The Water Report

Water Rights, Water Quality & Water Solutions in the West

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LITTLE CLARIFICATION IN SUPREME COURT DECISION

by Richard M. Glick and Margarita Molina, Davis Wright Tremaine LLP

In a case with major implications for dam operators, *South Florida Water Management District v. Miccosukee Tribe of Indians et al*, No. 02-626 (March 23, 2004), the Supreme Court deferred to a later day the question of whether the engineered movement of water from one navigable waterway to another requires compliance with the federal Clean Water Act (CWA). Instead, the Court confirmed the obvious — that conveyances can be point sources and remanded back to the trial court to determine whether the two water bodies at issue are in fact distinct. The final resolution of this case could have a dramatic impact on dams across the country, public and private. If it turns out that transfers of already polluted inflow from one side of the dam to the other entails regulation, then thousands of new National Pollution Discharge Elimination System (NPDES) permits under CWA § 402 will need to be issued, and a similar number of CWA § 401 certifications will need to be revisited.

Dams collect the waters of flowing streams, store them for a time in a reservoir and then divert the water out of stream, run it through penstocks to create hydroelectric power, or spill it over the top. Generally speaking, the dam operator accepts the incoming water of whatever quality it happens to be into the reservoir and discharges it below. Sometimes the inflow contains contaminants, such as waste chemicals from upstream farms or industry, which are simply passed through. Since dam operations do not "add" these chemicals, courts have held that dams are not point sources subject to regulation under the Clean Water Act. The Miccosukee case may ultimately determine whether the mere pass-through of upstream contaminants constitutes a discharge subject to CWA § 402. This article will review the pertinent provisions of the CWA, cases leading up to *Miccosukee* and the Supreme Court's decision.

THE STATUTE

Section 502 of the CWA states that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. §1362(16). "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. §1362(12). A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(6). A "point source" is any discernible, confined and discrete conveyance … from which pollutants are or may be discharged." *Id.* These definitions are critical to determining the scope of section 402 of the CWA, which requires a permit for the discharge of a pollutant into waters of the United States.

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CWA § 401 Certification

These definitions also are relevant to the scope of CWA section 401, which provides for state certification of compliance with state water quality standards.

Section 401 of the CWA provides:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

The need for certification is thus determined by whether the activity to be authorized by federal license "may result in a discharge" into navigable waters. If there is a "discharge" in connection with the authorized activity, then *PUD No. 1 of Jefferson County v. DOE*, 511 U.S. 700 (1994) holds that the certifying State is authorized to impose additional conditions on the "activity as a whole" to comply with State water quality standards.

THE CASES

"Water Conditions"

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (1982), the D.C. Circuit upheld the US Environmental Protection Agency's (EPA's) position that dams are to be treated as nonpoint sources of pollution and thus dam induced water quality changes are not considered a discharge of pollutants subject to the NPDES permit system established in section 402 of the CWA. The court deferred to EPA's interpretation that water quality parameters associated with dam operations, including dissolved oxygen, temperature and total dissolved gas, constitute "water conditions," not substances added to water. It is important to note, however, that much of the court's analysis focused on whether EPA's interpretation is entitled to "great deference," and having concluded that it is, found enough ambiguity in the CWA as to the treatment of dams as point sources that EPA's view was reasonable. The court did not address the regulatory implications of passed-through pollutants from upstream sources.

No Addition

The Sixth Circuit later held that the operation of a licensed pumped storage project on Lake Michigan did not involve a discharge of a pollutant. In *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (1988), NWF brought suit claiming that Consumers was operating a project in violation of the CWA because the project's tailrace water contained entrained pulverized fish not authorized by the NPDES permits for that facility. A federal district court found for NWF, requiring Consumers to apply for a section 402 permit. The Sixth Circuit reversed, citing *Gorsuch*. The Project's outflow did not "add" a "pollutant" to Lake Michigan, so there was no discharge requiring a section 402 permit.

THE COURT REASONED:

> Just as in *Gorsuch* the release of storage dam water low in dissolved oxygen, and containing heat, dissolved minerals and nutrients, and sediment did not constitute an addition of a pollutant to navigable waters, so in the instant case the release of turbine generating water containing entrained fish does not constitute the addition of any pollutant to navigable waters. … The Ludington facility, in the process of generating electricity, transforms water containing live fish into water containing live and dead fish. The fish originate in Lake Michigan, and any resulting pollution in the form of entrained fish is, as in *Gorsuch*, an inherent result of dam operation. Any water quality change resulting from the release of entrained fish at the Ludington facility is simply not, giving proper deference to the EPA definition, from the physical introduction of a pollutant from the outside world.
> *Consumers* at 585-586. [An example of a dam adding a pollutant from the outside world to water could be the discharge of grease into water as the water passes through outlet works. *Gorsuch* at 195, n.22.]

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Watershed-to-Watershed

"Discharge"

Remand

Distinct Water Bodies?

Draining

The Sixth Circuit also noted that "EPA has consistently maintained that dam-induced water quality changes are not generally the result of the discharge of any pollutant." *Id*. at 587. "[D]ams generally do not require NPDES permits," since "the release of water from dams including hydro-electric facilities is not a point source discharge." *Id*. at 587-588. The court also relied on its holding in *United States ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F.2d 992 (1983), that releases from a dam are not a point source discharge, and that EPA has consistently treated dams as "nonpoint sources of pollution," which are to be dealt with through the device of area wide waste management treatment by the states.

The Second Circuit declined to follow *Gorsuch* and *Consumers* in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 2001 WL 1267391 (Oct. 23, 2001). The court held that a point source discharge of a pollutant can exist when water containing suspended solids and heat is artificially diverted from its natural course and travels several miles from a reservoir through a tunnel to a creek that is unrelated to the reservoir and its watershed. The court reasoned that the tunnel is a point source and that the tunnel itself need not have created the pollution. It is enough that it conveys the pollutants from their original source to the destination body of water. In this context the court was unwilling to accept the understanding of "addition" in *Gorsuch* and *Consumers*, at least in so far as it implies acceptance of the theory that an addition to one water body is an addition to all of the waters of the United States. However, the court acknowledged that both decisions comport with the plain meaning of "addition" assuming "that the water from which the discharges came is the same as that to which they go."

The Ninth Circuit has held that section 401 certification is not required for nonpoint sources, and that the term "discharge" as used under section 401 consistently refers to the release of effluent from a point source. Hence, certification is not required for issuance of grazing permits, which it characterized as a nonpoint source. *Oregon Natural Desert Ass'n v. Forest Service*, 172 F.3d 1092 (9th Cir. 1998).

A similar result was reached in *Idaho Conservation League v. Caswell*, Case No. CV 95-394-S-MHW, 1996 U.S. Dist. LEXIS 21980 (D. Id. 1996), where a federal district court held that the construction of two roads within a national forest near a creek did not require section 401 certification, in part because construction of the roads would be a nonpoint source activity not subject to certification under section 401. After reviewing CWA definitions of "discharge" and "point source," the court concluded that section 401 encompasses only those projects that result in a "point source discharge." The court also found that the CWA and Idaho's water quality statute and regulations implementing the CWA clearly intended that activities such as the construction of forest roads constituted nonpoint source activities.

Thus, the courts have resisted the argument that dams are point sources and concluded that water quality changes resulting from nonpoint sources entail CWA regulation. The cases do not, however, represent a clear, consistent understanding among the Circuits as to regulatory implications of passing pollutants added by third parties through the reservoir to receiving waters below a dam. The Supreme Court had the opportunity in *Miccosukee* to add clarity to this subject, but punted instead.

THE *MICCOSUKEE* CASE

In *Miccosukee*, the Supreme Court declined to answer whether the engineered movement of water from one navigable waterway to another requires compliance with the Clean Water Act, declaring the case premature. Instead, the Court remanded a six year legal battle involving the Florida Everglades between the South Florida Water Management District (District) and the Miccosukee Tribe of Indians (Tribe) back to the lower court for further proceedings. At issue in the case was whether pumping water from a canal to a natural wetland storage facility separated by levees requires the District to obtain a NPDES permit. Both the trial court and the Eleventh Circuit held a permit is required. The Supreme Court vacated and remanded to the lower court to determine whether the canal and wetlands are in fact two distinct water bodies.

Background

Starting in the 1900s, the Federal Government began constructing a series of canals and levees to drain wetlands. This network protects the populated areas of Broward County from inundation. Groundwater and surface runoff from urban, agricultural, and residential areas collect in the canal. That runoff contains contaminants, including high levels of phosphorous. When water in the canal reaches a certain volume, the pumping station is activated and pumps the water into a large, undeveloped wetland area, which is naturally low in phosphorous. This transfer of water stimulates the growth of algae and plants that were foreign to the wetlands ecosystem. A number of initiatives had been underway for some time to restore the ecological integrity of the Everglades. The Tribe, impatient with the pace of progress, brought a suit under the Clean Water Act to enjoin operation of the pump, arguing that the District is required to obtain a NPDES permit because the pump station transferred pollutants from the canal to the wetlands.

Miccosukee

Government Arguments

"Unitary Waters"

Burdens

Conveyance

Issue-of-Fact

Legal Arguments

The District, joined by the federal government who filed an *amicus* brief, advanced three arguments: (1) because the pollutants originated elsewhere and merely passed through the pump, the pump was not a point source and did not require a permit; (2) all "waters of the United States" should be viewed unitarily for purposes of NPDES permitting requirements and no permit is required when water from one navigable water body is discharged, unaltered, into another (the "unitary waters" test); and (3) if a NPDES permit is required here, it would also be required at the hundreds of dams scattered throughout the West, thus adding considerable cost to public water supply systems.

Under the unitary waters test, the Government argued that all navigable waters should be viewed as one under the Clean Water Act for purposes of NPDES permitting. That is, once a pollutant is in the navigable waters of the US, a permit is not required to "move" the pollutant from one water body to another. NPDES permits are only required when the pollutant is initially added to navigable waters, not when water from one navigable water body is discharged, unaltered, into another. Distinct from this argument, the District argued that science and law supported viewing the Everglades as a single water body rather than as two distinct water bodies. The District relied on evidence that established the hydrological connection of the canal and wetlands, arguing the "undisputed unitary nature of these waters is well established by the consistent understanding of the scientific community and the consistent treatment of the waters as part of a single system by State and federal regulators and legislatures." *District's Brief* at 47.

Forty parties submitted or joined in *amicus* briefs, including various environmental groups, governmental bodies, former EPA administrators, and other public and private associations (see below). Several western states joined the District in asking the Court to overturn the decision of the lower court, arguing that requiring NPDES permits for situations like the one in this case would result in an enormous and expensive burden on government entities. Affirmation of the lower court decision would require those entities to deal with pollutants that they had no part in creating. The *amicus* briefs in support of the Tribes argued that requiring permits would not create any undue burden.

The Ruling

Under the first argument, the Court held "that a point source need not be the original source of the pollutant" and need only convey the pollutant to navigable waters. Since this was the question upon which the Court granted *certiorari*, the decision could have ended there. Instead, the Court spent several pages discussing the Government's unitary waters theory. Indeed, while the Court invited this theory to be explored on remand, it hinted broadly that the unitary waters test is not likely to survive scrutiny. First, the Court observed that the approach of the Clean Water Act was to protect individual water bodies as well as the waters of the US as a whole. Second, the Court somewhat archly noted that the Government had failed to identify any documents indicating that the EPA had adopted the unitary water theory before this case, and in fact the unitary waters approach could conflict with current NPDES regulations. Former EPA administrators, as *amici*, advised the Court that EPA had in fact rejected this theory years ago. The Court appeared ambivalent about the practical implications of requiring permits for situations like the one in this case, noting that such permitting authority may be necessary to protect water quality and regulatory costs could be controlled by issuing general permits.

The Court appeared critical of both the unitary waters test and the potential practical implications of requiring NPDES permits in situations that previously did not require one. While the Court did touch on the merits of each argument, it ultimately concluded that because there was a genuine issue of fact as to whether the canal and the reservoir were indeed two separate and distinct water bodies, the case must be remanded for further proceedings. Because neither party had raised the unitary waters theory in the court below, both parties are free to argue the unitary waters test on remand.

Interestingly, the Tribe did not dispute that if the canal and the wetlands were simply two parts of the same water body, that pumping water from one into the other could not constitute an addition of pollutants. The Tribe only took issue with the accuracy of the factual premise and argued that there were, indeed, two distinct water bodies. The lower court had applied a test that neither party defended, namely that the canal and wetlands were distinct because the transfer of water from the canal into the Everglades would not occur naturally. The Court noted that, after reviewing the full record on remand, it is possible that the District Court would conclude that there were not two meaningfully distinct water bodies and, therefore, the pump station would not require a NPDES permit.

Justice O'Connor wrote the opinion for the nearly unanimous Court. Justice Scalia concurred in part and dissented in part, noting that he would affirm the Court of Appeal's disposition of the question presented (whether a point source need be the original source of the pollutant) without reaching the other

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issues and leaving the unitary waters test to be considered in another case. In any event, the Court failed to take the opportunity to clarify what constitutes a point source subject to the NPDES permitting system. In *dicta*, it expressed disdain for the unitary waters test, but suggested it was open to persuasion. A pending appeal in the Second Circuit, *Catskill Mountains Chapter of Trout Unlimited v. New York City*, could very well address the unitary waters theory and may reach the US Supreme Court before the Everglades case is resolved.

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Miccosukee Amicus Briefs

The following parties supported the District: US Solicitor General, National Water Resources Association et al, Lake Worth Drainage District and the Florida Association of Special Districts, Florida Fruit and Vegetable Association et al, City of New York et al, Nationwide Public Projects Coalition et al, States of Colorado and New Mexico, Idaho Governor Dirk Kempthorne, National Hydropower Association, National Association of Home Builders, Utility Water Act Group, National League of Cities et al, and the City of Weston, Florida.
The Tribe received support from: National Tribal Environmental Council and the National Congress of American Indians, States of New York et al, National Wildlife Federation et al, Florida Wildlife Federation et al, Tongue & Yellowstone River Irrigation District et al, Former EPA Administrator Carol Browner et al, Commonwealth of Pennsylvania, Association of State Wetland Managers and the Tropical Audubon Society, Coalitions of Greater Minnesota Cities and the City of Saint Cloud, Minnesota, Trout Unlimited Inc. et al. The federal government originally argued that the Court should not accept the case. After the Court agreed to hear the case, the Solicitor General argued to overturn the lower court decision.

WATER RIGHTS ADJUDICATION IN MONTANA

an interview with montana's chief water judge c. bruce loble
Interviewed by David Moon, Editor

Pre-1973 Rights

Chief Water Judge C. Bruce Loble presides over the gargantuan task of adjudicating all of Montana's pre-July 1st, 1973 water rights. Like many western states, Montana is in the midst of adjudicating historic water rights. The Montana process began statewide in 1979 with the filing of water right claims by water users. Montana, however, did not adopt a permit system for obtaining water rights until 1973 — so Judge Loble's efforts necessarily encompass nearly 220,000 claims. This figure includes 13,415 claims for fish, wildlife and recreation purposes. The expected completion date is somewhat vague. "I wish I could tell you; I don't really know," Judge Loble mused. "We can't adjudicate any faster than claims are reviewed by the DNRC [i.e., Montana's Department of Natural Resources and Conservation] and they have had a reduction of staff." Judge Loble then noted that one official at DNRC, Montana's water rights agency, predicted that DNRC's claims examination effort might be finished in 20-to-25 years.

Lengthy Process

THE MONTANA WATER COURT

Court Structure

Judge Loble described the structure of Montana's "Water Court"— a separate entity created by Montana Senate Bill 76 to adjudicate pre-1973 (pre-permit) water rights. The Water Court oversees four water divisions in Montana. The divisions are based on the major drainage basins in the state, which include: (1) Clark Fork (west of the Continental Divide); (2) Upper Missouri River; (3) Lower Missouri River; and (4) Yellowstone. Each division is presided over by a "Water Judge" — three are sitting District Court Judges and one judge is a retired District Court judge. Judge Loble noted that the "Judges are extraordinarily busy and the Water Court doesn't utilize them unless it is absolutely necessary." Cases are referred to the appropriate judge if Chief Judge Loble has conflicts of interest arising out of his previous career practicing water law in Montana. The Water Judges are also utilized in other circumstances, such as when the case involves both water rights and an easement issue. When a case like that comes up, Loble stated it "gets farmed out to one of the Water Judges to hear both in their capacity as a Water Judge and as a district judge, in order to handle the entire case in one setting."

Montana Adjudication

"Substantial Evidence" Rule

Appeals

Non-Use

Mining Claim

Non-Use & Intent

Approach Shifted

Representation

ADJUDICATION HEARINGS & SETTLEMENTS

The first level of adjudication usually takes place before the "Water Masters." Currently there are five Water Masters (four lawyers and one former DNRC employee), with the Water Court looking to hire a sixth. The Water Masters do the judicial work at the first level of hearings, producing a "Master's Report" that is sent out to the concerned parties. A water user can appeal the "Master's Report" to the Chief Water Judge for review. According to Judge Loble, many claimants simply brief the issue for his decision rather than requesting a hearing — as is their right. The "substantial evidence" rule applies in the Water Court, so the Chief Water Judge will not overturn the Water Master's factual findings unless there is no "substantial evidence" to support the findings. The Chief Water Judge has the power to either amend, adopt, reject or remand the Water Master's findings.

The Water Court has not had all that many hearings, according to Judge Loble. Settlements of objections are the norm. Although "we don't keep track of the exact figures, I think 90-95% of the objections are resolved." Judge Loble thought a similar percentage was also true of most civil lawsuits, and that it is "typical that people don't litigate as much as they did 50 years ago."

Appeals from the Water Court go straight to the Montana Supreme Court since there is no intermediate court of appeals in Montana. "There have only been thirteen cases that have been appealed from the Water Court to the Montana Supreme Court," Judge Loble proudly said, "and, since I started as Chief Water Judge in 1990, only two of my decisions have been appealed." Asked to explain such an exemplary record, he chuckled "We do wonderful work here."

ABANDONMENT CASES & PRO SE LITIGANTS

In Montana, as in all western states, water rights can be lost due to non-use. Montana's law on abandonment, which until recently had more stringent requirements for "abandonment" than is to be found in most other states, is evolving. Abandonment issues have been brought up in several objections filed with the Water Court and there have been a number of cases where abandonment was found. According to Judge Loble, the Montana Supreme Court affirmed the Water Court's holdings in all cases in which the issue was appealed.

One case involved the City of Deer Lodge, which had switched to groundwater wells for its municipal use and had not put their surface water rights to beneficial use for over 23 years. Even though the water rights had originally been decreed in an earlier court case, Montana's Supreme Court upheld the Water Court's decision that the City's surface water rights had been abandoned. [*Adjudication of Water Rights of Clark Fork River*, 254 MT 11, 833 P.2d 1120 (1992). See also Section 85-2-227(4), MCA for statutory provisions regarding the adjudication of certain municipal water rights.]

Another case dealt with a mining claim where there had been an undisputed 50 years of non-use. [*Adjudication of Clark Fork*, 274 Mont. 340, 908 P.2d 1353 (1995).] The claimant asserted that since mining is a cyclical industry by its very nature, periods of non-use are to be expected, and the court should allow a mining claim to be reopened when the price of the commodity rose, with no loss of the water right by abandonment. The Supreme Court affirmed the holding that mining rights should not be treated any differently than other water uses. Thus, the long period of non-use raised a rebuttable presumption of an intent to abandon the right and without evidence being presented to excuse such non-use — other than mere expressions of hope or desire reflecting a gleam-in-the-eye philosophy regarding future use of water — the court found the rights to have been abandoned.

Judge Loble provided a primer in Montana's water law regarding abandonment. In the first 100 years of Montana's abandonment case law, the Supreme Court required a two prong approach: (1) a period of non-use; and (2) intent to abandon the water right. There was also a line of cases that held that a long period of non-use was not in and of itself evidence of an intent to abandon one's water right. "As you might expect," Loble observed, "the court always had a problem finding intent."

The Supreme Court in *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983), signaled the change in Montana's approach to abandonment. The court held that if there was a sufficient period of non-use, the burden of proof shifted to the water user to adequately explain the non-use. Recent Montana statutes have now gone even further by setting out that when there is a 10 year period of non-use, there is a prima facie presumption of abandonment. Section 85-2-404, Montana Code Annotated (MCA). This statute is not applicable to water rights until they have been finally adjudicated. [See 85-2-404(5), MCA.]

In an interesting sidebar to the abandonment issues, Judge Loble noted that in many of the abandonment cases the claimants appear 'pro se' (i.e., without the benefit of legal counsel). This has created problems, according to Judge Loble, since the claimants often don't understand the recent case law governing abandonment. The claimants vehemently fight the objections, but don't realize they need to present evidence to excuse long periods of non-use. The situation is problematic not only due to the lack

Montana Adjudication

of knowledge, but as the presiding judge "you cannot advise litigants of the obvious legal holes in their argument or tell them that they are pursuing theories the Supreme Court has recently rejected multiple times." Loble lamented, "All you can do is watch unskilled litigants dig themselves into deeper holes." In a number of Adjudication cases, both the objector and the claimant have appeared pro se.

Retaining legal representation tends to favor the represented. "The Federal government is a big player in the Adjudication, as is Avista Corporation, formerly Washington Water Power, which owns a dam located on the border between Montana and Idaho. Their attorneys face many pro se claimants and have the opportunity and skills to completely befuddle and overwhelm pro se water users, but they rarely do so, and, to their credit, they are usually very patient with unrepresented parties," Loble commented.

DNRC EXAMINATION OF CLAIMS & THE WATER COURT

Staffing

Loble pointed out that one of the major problems slowing down the process is dwindling DNRC staffing. DNRC is charged with examining the water right claims prior to the issuance of decrees. "Since 1987, the DNRC adjudication staff has been in a downward spiral...with only 9.9 FTEs in the entire state. But really, only 3.6 FTEs do the examinations because they are constantly being pulled away to do something else."

Process

DNRC's examination process is based on a "four inch thick examination manual" that guides agency personnel as they review claim specifics. DNRC examines historic decrees, where they exist — and does a historic use review based on Montana's "Water Resource Surveys" and associated aerial photographs. DNRC also reviews 1979-1980 aerial photograph to help identify the pertinent irrigated land.

Judge Loble went on to highlight a part of DNRC's examination process that has worked well. Following its initial review, the agency contacts claimants to explain any discrepancies — and oftentimes any problems are eliminated at that stage. If there is no viable explanation for the problems identified by the DNRC's review, DNRC places "issue remarks" on the claim that are then noted in the decrees issued by the Water Court. According to Judge Loble, these issue remarks "usually trigger objections from major institutional users, such as the federal government or big industry." If no one objects to a claim, "we still list the claim on our objection list due to the 'issue remark' and people could later file a motion to appear, or the Water Court could review the claim on its own motion," Judge Loble said.

"Issue Remarks"

Court Review

Judge Loble provided the caveat, however, that there are only "slight amounts of review" from the Water Court's own motion. A significant controversy has erupted lately over the extent of the Water Court's review of claims on its own motion, with some parties believing that no such review should occur while other parties think that the Water Court is not doing enough.

A bill was introduced in the 1999 legislative session dealing with this issue by Representative Cindy Youngkin, a practicing water law attorney. The legislation required opposition to a claim from another water user for the Water Court to undertake a review. That bill was eventually tabled, with the legislative committee's expectation that the Water Court would create rules to decide when the Court should review claims on its own motion. Judge Loble said that the Water Court is in the process of "trying to write down guidelines for when the court would review a claim on its own motion."

PRIMA FACIE EVIDENCE STANDARD

Burden-of-Proof

The above mentioned review controversy may stem from Montana's law that a water right claim constitutes prima facie proof of its content. This critical provision essentially shifts the burden of proof from a claimant to the objector of the claim (see Section 85-2-227, MCA). If no objection is filed, even if an "issue remark" was placed on a claim due to DNRC's examination, a claim could potentially be approved regardless of DNRC's concerns. With at least the possibility of claims being granted that may not be valid or accurate, some groups are pushing for increased Water Court involvement. A fairly specific proposal to alter the process, prepared by a subcommittee group of the "Water Court Adjudication Advisory Committee," is currently circulating for discussion. [**Editor's Note:** For additional discussion on this topic and other information regarding Montana's adjudication process, see the *White Paper on the Montana Water Rights Adjudication* —recently put out by a local watershed group, the Upper Clark Fork River Basin Steering Committee and available via the internet at: http://water.montana.edu.]

Judge Loble commented on the varying attitudes toward this standard in the adjudication. "Everybody grumbles about it...depending on where you are. Some water users like it; others think it is awful. Most water users recognize the benefit of the Water Court catching the errors and other problems that objectors miss, but almost everyone is concerned about the practice being applied to their own claims. The Attorney General's office recently said, at one of our advisory committee meetings, that either by legislation or through the rulemaking process we should do something different about it."

Montana Adjudication

Old Claims

"The Attorney General views the 'on motion' practice as the last opportunity to catch bogus or inaccurate claims," Loble noted. Additionally, the Attorney General's office is "seeking some kind of conceptual change that will place the burden on the water user to contest changes made by the DNRC after it completes the claims examination process."

Judge Loble discussed some of the problems associated with pleading and amendment issues in an adjudication process, where some claims are over 100 years old and proof can be scarce. "In Montana the whole system is designed to support the water user. When the adjudication statutes were enacted in 1979, the water users were the ones who were pushing it through the Legislature. Historically in Montana water right litigation, the burden was on the water user to prove all the elements of a historical water right. Without a filed notice of appropriation or a district court decree, the early evidence of a hundred year old water right might not exist. When they created the Water Court, the Legislature basically shifted the burden of proof to an objector by making the claim prima facie proof of its content," Judge Loble noted.

AMENDMENT OF CLAIMS & OBJECTIONS

1997 Law

Judge Loble discussed how Montana treats the amendment of claims and the alteration of claims as part of the adjudication process. He stated that before 1997, if no one objected to a claim and it contained flaws, the water user was simply out of luck and could not amend the claim on his own. The Montana Legislature addressed the issue in 1997 and passed Section 85-2-233, MCA . Under the new law, a water user can amend his/her claim or amend an objection after the close of the Objection Period.

Notice & Review

Motions to amend a claim or objection are governed by Section 85-2-233(6), MCA, which instituted a notice procedure requiring publication of a notice in the basin where the claim or objection was filed. The Water Court reviews the motions and decides if other water users could be affected by the amendment; if so, the publication of notice is required, with the cost borne by the moving party. The Water Court provides the text of the notice that is to appear, and also provides a service list of all water users who must receive individual notice of the proposed amendment to the party requesting the amendment (the "movant"). A 45 day Objection Period follows publication of the notice. If no other water user objects to the proposed amendment, the Water Court reviews the merits of the amendment and may require further evidence to substantiate the amendment. If other water users do object, the Water Court hears the objections as part of the review process for the claim.

Hearing Process

Judge Loble also pointed out that "as long as an element of the claim has received an objection" the claimant "can amend that element through the hearing process." Thus, if an objector has raised the issue, the element is contested in the hearing with the outcome depending on the evidence produced. "Where an element of a claim has not received an objection, a claimant could still go through the statutory publication process to amend that part of the claim," he clarified.

[**Editor's Note:** Amendment of claims has become an issue in the Klamath Basin Adjudication in Oregon. An administrative law judge recently upheld the Oregon Water Resources Department's assertion that no amendment of a claim that would expand or increase the water right is allowed after the beginning of the "Inspection Period," based on Oregon Administrative Rule 690-30-0085 and Oregon Revised Statutes 539.210. *Cameron A. Curtis v. WaterWatch, Inc., et al*, Claim No. 133, HOP Case No. 112, October 15, 2003. Under this holding, a claimant cannot amend the claim or otherwise amend their pleadings at any point during the contested case process, even if new evidence is discovered and presented during the contested case hearing.]

***BEAN LAKE III* — FISH, WILDLIFE & RECREATION CLAIMS**

1988 Decision

On September 24, 2002, the Montana Supreme Court overruled language from its 1988 decisions relating to fish, wildlife and recreational appropriations of water. The Court attempted to decide once and for all whether or not Montana law recognized such claims prior to 1973 and whether or not such claims required a diversion of water. The Court's ruling *In the Matter of Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002) [AKA "*Bean Lake III*"] revisited the Court's 1988 *Bean Lake* cases (versions I and II).

Judge Loble was required by the Montana Supreme Court to appear on behalf of the Water Court in the case, which had been precipitated by the Water Court's placement of "issue remarks" on fish, wildlife and recreational claims questioning their validity, due to the 1988 *Bean Lake* decision. Ultimately, the Court ruled that fish, wildlife and recreation uses were recognized beneficial uses and that valid instream and inlake appropriations of water existed in Montana prior to 1973. Judge Loble then requested "clear instructions" on how the Water Court should proceed with regard to these claims. The Supreme Court replied by instructing the Water Court "to identify, review and hold hearings in a manner similar to *Adjudication of Water Rights of Yellowstone River*, 253 Mont 167, 832 P.2d 1210 (1992) on all pre-1973

Montana Adjudication

Challenges

recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein." [See, *In re Adjudication of Existing Water Rights*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396, paragraph 41.]

The Water Court is facing over 13,000 such claims. Judge Loble commented on how the simple language of the Supreme Court's requirements has resulted in complicated challenges: "We have very little experience in quantifying recreation, fish and wildlife claims. With other types of claims, we have standard guidelines in our rules to facilitate a review of those claims. For example, the guideline for irrigation claims is 17 GPM [gallons per minute] per acre. If an irrigation water user claims a water right of 100 GPM per acre, then another water user might question such a claim and file an objection. But how does one quantify a recreation right? What standards should the DNRC claims examiners apply when they review recreation, fish and wildlife claims prior to the issuance of Water Court decrees? After the decrees are issued, how will other water users know whether such claims are too little or too much? That determination may depend on the hydraulic and topographic characteristics of an individual source."

Case-by-Case

"Many of these claims are 'pothole lake' claims — over 3,000 claims. I'll probably start with those relatively easy ones and, through a case-by-case effort, we will develop some guidelines for the others."

There will be hearings held on many claims even though there may not have been an objection filed. "We'll figure it out. I'm blessed with having people on the Water Court who are really smart and who are good problem solvers. Mostly we have procedural stuff to sort out, such as what do we do to make it go faster? What do we do in order to finish this adjudication and eventually close the doors?"

As to specific issues, Loble cautioned that "I view the Water Masters as being the fact finders so I have to be careful that I don't telegraph what I think the outcome should be."

Instream Rights

Concerning instream water right claims, the Water Court is considering how they should be granted, whether as a reach of a stream or at a particular point. "We're trying to figure out how to decree it, as a reach of the river or at a point on the river. If it's a Fish, Wildlife & Parks claim, maybe we go as the whole stretch of river. We don't know yet, that's why we'll have the hearings. The vast majority of the fish and wildlife claims have late priority dates, relatively junior rights from the 1920's and 1930's, and probably will not receive very many objections. As a practical matter, the Water Court will probably have to do much of the necessary research on its own," Loble commented.

TRIBAL CLAIMS & THE COMPACT COMMISSION

Success

Tribal reserved right claims are part of Montana's Adjudication, but the various Tribes are going through the Reserved Water Rights Compact Commission at this point, as opposed to litigating their claims. "The Compact Commission and its success is one of the shining stars" of the Adjudication process according to Judge Loble.

The Attorney General appoints one representative to the nine-member Reserved Water Rights Compact Commission. The commission settles reserved water right claims within the state by negotiating intergovernmental agreements with tribal and federal governments. The commission also includes four members appointed by the governor, two appointed by the president of the Montana Senate and two appointed by the speaker of the Montana House of Representatives.

Process

Following extensive negotiations, a Compact document is introduced into the Montana Legislature for approval, after which the Governor signs the Compact. The relevant Tribal Council then signs off on the Compact (in some circumstances the Tribe involved has conducted a referendum on the proposed settlement). Judge Loble explained that when money is involved the agreement goes to Congress to be approved, then to the President to be signed, before being incorporated into the Adjudication process. "Eventually, the Water Court must approve the Compact, although we're limited to approving or rejecting Compacts." Loble pointed out that this process ends up with the "odd potential of this Chief Water Judge having the capability to approve or reject the Compact after everyone else has approved it."

To date, Compacts have been approved by the state for five of the seven reservations in Montana: Fort Peck, Northern Cheyenne, Crow, Fort Belknap, and the Rocky Boy's Reservations. Only three of the five compacts have been submitted to the Water Court and all three have been approved. Negotiations are on-going to obtain Compacts for the Blackfeet and Flathead reservations. [See Title 85, Chapter 20, MCA. For detailed info on the Compacts: see http://data.opi.state.mt.us/bills/mca_toc/85_20.htm]

For Additional Information:

Montana Water Court, 800/ 624-3270 (in Montana) or 406/ 586-4364
website: www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1789
DNRC website: www.dnrc.state.mt.us/wrd/home.htm

FLOW RESTORATION IN THE PACIFIC NORTHWEST

COLUMBIA BASIN WATER TRANSACTIONS PROGRAM

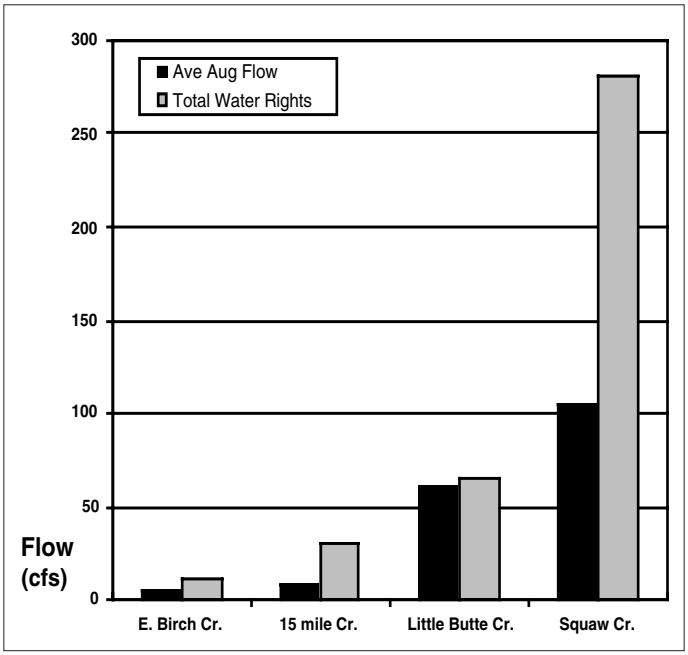
by Christopher H. Furey, Policy Analyst, Bonneville Power Administration
and Andrew T. Purkey, Associate Director, National Fish and Wildlife Foundation

When Lewis and Clark made their way down the Columbia River to the Pacific Ocean in 1805, the Columbia Basin was home to Indian nations and a small number of European trappers and traders. Up to 16,000,000 salmon returned to its streams and tributaries, supporting one of the largest concentrations of aboriginal people in North America. Today, nearly half of the habitat once open to salmon and steelhead has been lost. Much of the rest needs improvement if we want it to support fish and wildlife.

People sometimes refer to the Columbia Basin's "open spaces." But most of this country is being used — these are working landscapes. Agriculture is one of the region's biggest economic engines and it's also a part of the culture that sets this place apart. The Columbia Basin wasn't always a "breadbasket." Generations of families and communities dedicated themselves to make this happen. They tapped the region's water and sent it to thirsty lands.

Water Law Doctrine

The American people also saw the Basin as a good investment and helped build the dams and irrigation systems that divert and use the water for power and agriculture. Water is allocated to producers through a system of legal rights first established in the late nineteenth century when it seemed there was no end to land or water. Currently, however, water rights have been parceled out. Under the "doctrine of prior appropriation" — the concept underlying the water law of the four Basin states — more rights have been assigned than there is water to meet them. (See graph.) During a typical growing season, stretches of many streams and rivers in the Columbia Basin run low — and sometimes dry — particularly in late summer and early fall. In years with below average snow and rain, shortages are even more severe.



PRIOR APPROPRIATION CHALLENGES

The concept of "first in time, first in right" is the key premise of the "doctrine of prior appropriation." When flows in a river are inadequate to satisfy all existing water rights, the oldest water rights (the first ones historically used) have priority to divert water before newer rights, regardless of the location of the diversion on the waterway. This often results in later, junior rights being "shut off" from diverting any water so that the senior right holders are able to divert their entitlement. This "over-appropriation," while perfectly legal, is a major factor limiting aquatic habitat throughout the Basin. Over time, as more streams have become affected by water shortages, values have come into conflict, not just in the Columbia Basin, but across the West.

Voluntary v. Regulation

There are two major ways of responding to such challenges. The ideal approach works from the ground up, rather than from the top down. It involves local people managing their own destinies through voluntary efforts that balance community values. For while Northwesterners value the production of food and fiber, they also have other values that are affected by the allocation of water such as fish habitat, recreation, navigation, and power production. Voluntary efforts to restore streamflows can help achieve outcomes that satisfy these values and reduce or eliminate the need for regulations.

Acquisition of "senior rights"

One effective method of restoring streamflows and improving habitat is to acquire existing water rights and convert them to "instream water rights" under state law. This approach is akin to purchasing land as a method for protecting terrestrial habitat. Given the concept of "first in time, first in right," water right acquisition strategies are focused on purchasing the oldest, "most senior," rights. Acquiring rights that are typically met throughout the dry season allows for an established rate of flow to be left in the stream for the benefit of fish, protected against diversion by junior priority date right holders.

Instream Flow

Agencies' Viewpoint

The importance of supporting innovative and voluntary transactional strategies to increase stream flows did not go unnoticed. NOAA Fisheries is the federal agency with primary responsibility over ocean-going fish species. The Northwest Power and Conservation Council (NPCC) is a regional agency, with one of their charges being to develop programs to protect and rebuild fish and wildlife populations affected by the hydropower development. The Bonneville Power Administrative (BPA) is the federal agency that controls hydropower generation from the federal dams on the Columbia River. Both NOAA Fisheries and NPCC encouraged BPA to establish a separate pilot project to fund instream water transactions. However, the intent of the two agency recommendations was different. NOAA Fisheries called for BPA to experiment with innovative ways to increase tributary flow, given the perceived uncertainties about whether and how solutions can be implemented through existing laws and administrative processes. The Council, on the other hand, recommended a mechanism that would enable BPA funding to flow flexibly and quickly to transactions to protect or enhance fish and wildlife habitat as assessed through a specific set of criteria. After a series of insightful public meetings to discuss an integrated approach, BPA issued a Solicitation in December of 2001 to form an initiative that would satisfy multiple goals.

WATER INITIATIVE PRIMARY GOALS INCLUDED:

- To implement Action 151 of the NOAA Fisheries 2000 Biological Opinion on the Operation of the Federal Columbia River Power System.
- To implement Provision A.8 of the Council's 2000 Columbia River Basin Fish and Wildlife Program related to securing water for instream flows.
- To integrate the Northwest Power and Conservation Council's Program and Watershed Assessment process with the NOAA Fisheries 2000 Biological Opinion.
- To ensure actions taken under the program would be effective, fiscally efficient, and biologically beneficial to fish and wildlife in the region.

"CPWTP" Program

Several entities responded to the solicitation, and in the spring of 2002, BPA set up the funding agreement and scope of work to establish this initiative. The project is now known as the Columbia Basin Water Transactions Program (CBWTP). BPA selected the National Fish and Wildlife Foundation (NFWF) to serve as the regional entity to manage CBWTP in partnership with the agency. NFWF is a non-profit organization established in 1984. It is authorized to accept federal funds and leverage them with non-federal partners to invest in innovative strategies for increasing stream flows. NFWF established its Pacific Northwest Regional (PNW) Office in September 2000 in order to develop innovative partnerships with both federal and nonfederal entities.

Goals

As the Water Transaction Program works to meet Biological Opinion and Northwest Power Act goals, it maintains a basic philosophy.

KEY WATER TRANSACTION PROGRAM GOALS INCLUDE:

- Improve fish and wildlife habitat
- Respect private property rights
- Respect the values of irrigated agriculture
- Work locally using market-based strategies
- Take a balanced approach

This philosophy is supported by many agricultural producers, including John Wilson of Wilson Cattle Company in Baker County, Oregon. "When it comes to water challenges in the Columbia Basin, one thing most folks can agree on is that we'd like to solve them ourselves," said Wilson. "I think one of the best ways to make sure water gets where it needs to go, is to use the free enterprise system to give property owners some choices."

Eligible "QLEs"

QUALIFIED LOCAL ENTITIES

CBWTP is working on dozens of voluntary water transactions with Program Partners – called "Qualified Local Entities" or "QLEs" – in the Basin states of Idaho, Montana, Oregon and Washington. QLEs link with irrigation districts, landowners and producers in their communities to help put water in streams. Qualified Local Entities currently eligible to submit water transaction funding proposals for consideration by CBWTP include: Oregon Water Trust, Deschutes Resources Conservancy, Oregon Water Resources Department, Washington Water Trust, Idaho Department of Water Resources, Montana Water Trust, Trout Unlimited, Bonneville Environmental Foundation, Walla Walla Watershed Alliance, and Washington Department of Ecology.

Instream Flow

STRATEGIES & TECHNIQUES

There are many ways to keep streams flowing. The QLEs have developed a number of different water management techniques.

Strategies

THE QLEs' STRATEGIES INCLUDE:

WATER ACQUISITIONS

- Short and long-term leases
- Permanent purchase
- Split Season – A portion of a water right is used for irrigation in the spring and the remainder is left instream in late summer/fall
- Dry Year Option – An opportunity to lease a water right during a particularly dry year

BOOSTING EFFICIENCY

- Switching from a flood to sprinkler irrigation system
- Modernizing headgates
- Improving ditch efficiency

CONSERVING HABITAT

- Protecting/restoring stream habitat and changing a portion of the associated water right

RETHINKING THE SOURCE

- Changing the point of diversion from tributary to mainstream in order to improve stream flows
- Switching from surface to a ground water source

POOLS

- Rotational Pool – A group of irrigators take turns leaving a portion of their water rights in stream

WATER "BANKS"

- Producers in an irrigation district "bank" water they may not need so it can be available for sale for other uses

Transaction Proposals

In 2003, CBWTP began to receive, evaluate, and rank innovative water proposals submitted by the QLEs for funding from BPA, NFWF and other sources. Using a set of evaluation criteria, CBWTP made funding recommendations to BPA on proposed water transactions. QLEs submitted 46 transaction proposals. Of those 46 transactions, 33 were funded in 2003, seven were put in escrow pending final agency approval of the changed use, two were withdrawn by the QLE, three did not receive agency approval in time for 2003 funding, and one was deferred pending additional information.

Benefits

FUNDING DURING THE 2003 FUNDING CYCLE RESULTED IN THESE BENEFITS TO STREAMFLOWS:

Benefit Year	2003	2004	Longer (2013)
Protected Flow Rate	98.62 cfs	58.26 cfs	18.70 cfs
Protected Distance	207.20 miles	95.30 miles	2.75 miles
Acre-Feet (AF)	22,641.28 AF	33,388.97 AF	24,351.55 AF

INNOVATIVE TRANSACTIONS

Several transactions completed this year by the QLEs were particularly interesting and innovative.

Non-Generation Agreement

OREGON WATER TRUST (OWT) entered a non-generation agreement with a small hydro facility on the Calapooia River in the Willamette Basin. Thompson's Mill was built in 1858 to mill grain. The non-consumptive water right used to operate the hydro-mechanical gristmill is one of the oldest in the state. The mill also has a large water right to operate a small hydropower facility incorporated into the Mill. Use of the water rights through a millrace significantly impacted flow on stretches of the Calapooia River and an alternate channel. OWT's non-generation agreement resulted in a minimum of 12 to 15 cubic feet per second (cfs) instream for adult spring Chinook migration and summer rearing habitat for other aquatic species. The Oregon State Parks Commission voted last November to purchase the historic property, opening the door to a permanent conversion of water rights instream. [OWT, Fritz Paulus, 503/ 226-9055 or email: fritz@owt.org or website: www.owt.org].

Multiple Leases

THE WASHINGTON WATER TRUST (WWT) worked with multiple landowners on a single ditch. Through multiple annual and short-term lease agreements, WWT was able to restore approximately 5 cfs of flow to the Teanaway River in the Yakima Basin. The Teanaway River is a critical system for both Chinook and steelhead and includes the Jack Creek Acclimation Facility, a facility of particular importance to the Yakima Nation's restoration efforts on the Teanaway River. These transactions set the stage for the future negotiation of longer-term and permanent deals on the Teanaway by WWT. [WWT, Lisa Pelly, 206/ 675-1585 or email: lisa@thewatertrust.org or website: www.thewatertrust.org].

Instream Flow

Connectivity

IDAHO DEPARTMENT OF WATER RESOURCES (IDWR) reached a diversion reduction agreement this year with the lowest water right holder on Fourth Of July Creek in the Upper Salmon River Basin — "lowest" right because of its location as the last diversion on the creek prior to flow into the Salmon River. The landowner agreed to reduce his diversion by 3 cfs during the critical low flow period of late summer and early fall. Although there was not an actual instream lease executed, his water right was senior enough to be satisfied all year. Thus, the increased flow was available instream during the critical period of need. The deal prompted the landowner to say "we stand to risk dewatering Fourth of July Creek so there's no connectivity between the Creek and the Salmon River… if people cut back during rough times we can keep a minimum flow going." [IDWR, Bill Graham, 208/ 327-7966 or email: bgraham@idwr.state.id.us or website: www.idwr.state.id.us].

Reverse Bid

THE DESCHUTES RESOURCES CONSERVANCY (DRC) established a reverse bid auction with the Ochoco Irrigation District (OID). The auction resulted in a number of annual leases from landowners in a District where the DRC had not previously entered leases. As part of the reverse bid auction, the DRC established a confidential reserve price and then invited annual lease bids from OID patrons. At a pre-determined time and place, the DRC's reserve price was revealed and the patron's bids were opened. All bids at or below the reserve price of $75 an acre were accepted and all above were declined. The water rights associated with the accepted bids were then leased instream for one year. [DRC, Bruce Aylward, 541/ 382-5186 or email: bruceaylward@deschuteswe.org or website: www.deschutesrc.org].

Inefficient Ditch

A MONTANA LANDOWNER historically diverted his irrigation water from Poorman Creek down a long, inefficient ditch, which lost upwards of 15 cfs before reaching his place of use. This project involved a multi-party agreement with the irrigator, Montana Fish Wildlife and Parks, US Fish and Wildlife Service, the Natural Resource Conservation Service (NRCS) and the Big Blackfoot Chapter of Trout Unlimited. The project installed significant irrigation improvements and is part of a larger habitat restoration project on lower Poorman Creek. In June 2003, the state approved a change in point of diversion and a conversion of up to 15.11 cfs to instream flows for a period of 15 years, while reserving 3.1 cfs to the landowner. The water savings result from replacing the leaky, open ditch with a gravity-feed pipe system and converting part of the irrigation from flood to sprinkler irrigation with a center pivot. Water savings on this project are significant because a hydrologic study showed that the "return flows" from the leaky ditch and flood irrigation were returning downstream to the mainstem of the Blackfoot River, rather than the critical dewatered reach of Poorman Creek.

Trust Trend

CONCLUSION

The establishment of CBWTP represents a milestone for instream water transactions. Just a decade ago in 1994, the Oregon Water Trust was charting a course through unknown territory, literally inventing the mechanics of water right transactions as a flow restoration tool. Over the past ten years, others have built upon and expanded on the strategies to increase streamflows. Now, there is a growing community committed to implementing this approach and to improving the efficacy and utility of water transactions. This community extends across the four states of the Columbia Basin, and includes the nonprofit and public sectors. It consists of a wide range of individuals committed to working at the grassroots level to restore streamflows in a productive manner, respectful of agriculture and private property rights and the diverse interests of the region. It is a model that can replicated throughout the American West.

FOR ADDITIONAL INFORMATION:

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COLUMBIA BASIN WATER TRANSACTIONS PROGRAM: www.cbwtp.org
NORTHWEST POWER AND CONSERVATION COUNCIL: www.nwcouncil.org
OREGON WATER TRUST: www.cbwtp.org/partners/OWT.htm
DESCHUTES RESOURCES CONSERVANCY: www.cbwtp.org/partners/DRC.htm
OREGON WATER RESOURCES DEPARTMENT: www.cbwtp.org/partners/OWRD
WASHINGTON WATER TRUST: www.cbwtp.org/partners/WWT.htm
IDAHO DEPARTMENT OF WATER RESOURCES: www.cbwtp.org/partners/IDWR
MONTANA WATER TRUST: www.cbwtp.org/partners/MWT.htm
TROUT UNLIMITED: www.cbwtp.org/partners/TU.htm
BONNEVILLE ENVIRONMENTAL FOUNDATION: www.cbwtp.org/partners/BEF.htm
WALLA WALLA WATERSHED ALLIANCE: www.cbwtp.org/partners/WWWA.htm
WASHINGTON DEPARTMENT OF ECOLOGY: www.cbwtp.org/partners/WDOE.htm

EPA APPROVES OREGON WATER STANDARDS

WQ STANDARDS TOUTED AS NATIONAL MODEL

by Mary Lou Soscia, Columbia River Coordinator, US Environmental Protection Agency

On March 2, 2004, the US Environmental Protection Agency (EPA) approved new and revised water quality standards for the state of Oregon for Temperature, Inter-Gravel Dissolved Oxygen, and Antidegradation. These water quality standards were developed to reflect life stage needs for the fish that live in rivers throughout the state of Oregon (see Table below). The bases for these standards are available on a series of easily accessible computer maps (some information is found in tables) with detailed migration, spawning and rearing information for salmon, bull trout, Lahontan Cutthroat Trout, and Redband Trout. EPA has lauded these standards and the accompanying maps as a national model for the restoration and protection of fish. [These maps can be found at: www.deq.state.or.us/wq/standards/WQStdsFinalFishUseMaps.htm]

REGULATORY BACKGROUND

CWA Goal

EPA's water quality standards regulations require states to designate uses for all water bodies within their jurisdiction. Designated uses determine what water quality criteria apply to specific water bodies. The federal Clean Water Act (CWA) sets an interim national goal for attaining "...water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water ..." wherever attainable. EPA regulations further this goal by requiring that water quality standards provide for "fishable/ swimmable" uses unless a use attainability analysis (UAA) shows such uses are unattainable. In addition, when EPA disapproves a state or tribal water quality standard, and the state or tribe does not make appropriate changes, EPA's Administrator must propose and promulgate revised standards.

Critical Life Stages

In July 1996, the State of Oregon submitted revisions to its water quality standards to EPA for review and approval or disapproval, pursuant to CWA section 303(c)(2)(A). Included in these revisions were specific numeric temperature criteria to protect critical life stages of fish in the family Salmonidae, commonly known as "salmonids." The Salmonidae family includes the genus Oncorhynchus, which consists of Pacific salmon and trout. There are seven species of Pacific salmon within the genus Oncorhynchus, five of which are found in North America: pink (O. gorbuscha); chum (O. keta); sockeye (O. nerka); coho (O. kisutch); and chinook (O. tshawytscha). Pacific trout within the genus Oncorhynchus include the anadromous steelhead (O. mkiss), and coastal cutthroat (O. clarki); and the non-anadromous rainbow trout (O. mkiss). Also in the family Salmonidae is the genus Salvelinus, which includes the bull trout species, confluentus.

EPA Temperature Guidance

In July 1999, EPA approved all but one of the standards submitted by Oregon, including the new and revised temperature, pH, dissolved oxygen, and bacteria standards. EPA disapproved the 20 degrees Celsius / 68 degrees Fahrenheit (20°C/68°F) numeric criterion for salmonid rearing in the lower Willamette River because the State's submission did not justify how 20°C/68°F alone would protect salmonid rearing in view of scientific information to the contrary. As a result of EPA's Endangered Species Act (ESA) consultation with the US Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) on EPA's action, EPA, its federal partners, and the State of Oregon agreed to develop temperature criteria recommendations protective of all life stages of salmonids in the Pacific Northwest. This effort culminated in April 2003 with the publication of the EPA Region 10 Temperature Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards [AVAILABLE AT: http://yosemite.epa.gov/R10/WATER.NSF/].

Legal Challenge

In 2001, the citizens' group Northwest Environmental Advocates filed suit in the US District Court for Oregon against EPA and NOAA Fisheries in *Northwest Environmental Advocates vs U.S. EPA, et al.*, 268 F.Supp.2d 1255 (D. OR., March 31, 2003). The suit challenged EPA's 1999 approval of certain water quality standards adopted by Oregon. The suit also charged that NOAA Fisheries' determination that the revised water quality standards would not jeopardize ESA-listed species was arbitrary and capricious.

On March 31, 2003, the US District Court in Oregon ruled that EPA had violated the CWA and the ESA when it approved (in 1999) certain water quality standards for the protection of salmonids that were contained in Oregon's 1996 submission. Although the court deferred to EPA's scientific judgment regarding the protectiveness of the specific numeric temperature criteria, the court found that the temperature standards that EPA approved violated EPA's regulations and EPA's duty under section 7 of the ESA

Oregon WQ Standards

Court Orders

because Oregon had failed to designate "where and when" these criteria would apply. The court directed EPA to rescind its approval of the criteria because the absence of "time and place" use designations failed to protect the use categories created by Oregon — in this case salmonid rearing, bull trout rearing and bull trout spawning. The court directed EPA to propose and promulgate new temperature water quality standards, or approve new State standards, to address this deficiency.

The court also directed EPA to rescind its approval of a water quality criterion for intergravel dissolved oxygen for the protection of salmonid spawning. The court found that EPA's approval of the six milligrams per liter (6.0 mg/L) criterion adopted by Oregon was arbitrary and capricious based on record information showing that 6.0 mg/L would not adequately protect salmonid spawning and because Oregon had not made "time and place" use designations where the criterion would apply. Thus, the court ordered EPA to promulgate a new water quality criterion for this pollutant parameter or approve a new State criterion. The court also ordered EPA to promulgate an antidegradation implementation plan for Oregon waters or approve such a plan promulgated by Oregon. At the same time, the court vacated NOAA Fisheries' biological opinion, stating that EPA had violated the ESA by relying on NOAA Fisheries' arbitrary "no-jeopardy" biological opinion when EPA approved Oregon's revised water quality standards.

On August 13, 2003, the US District Court for the District of Oregon directed EPA either to promulgate a federal rule or to approve final state regulations by March 2, 2004. On August 15, 2003, the Oregon Department of Environmental Quality (ODEQ) published proposed revisions to its water quality standards. In December 2003, the ODEQ submitted new and revised standard to EPA for approval. EPA determined that this submittal fulfilled the requirements of the US District Court, so EPA approved the state standards.

THE NEW STANDARDS

Temperature

Temperature Guidance

The basis for Oregon's temperature criteria for salmonid uses is the EPA Region 10 Temperature Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards (Temperature Guidance) intended to assist States and authorized Tribes in adopting scientifically-defensible temperature water quality standards. The Temperature Guidance recommends an approach for adopting temperature water quality standards to protect cold-water salmonids. It specifically addresses the following cold-water salmonid species in the Pacific Northwest: chinook, coho, sockeye, chum, and pink salmon; steelhead and coastal cutthroat trout; and bull trout. The Temperature Guidance provides recommendations to States and *authorized* Tribes on how they can designate uses and establish numeric temperature criteria for waterbodies that help meet the interim goal of the CWA to, where attainable, provide for water quality that "provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water." [CWA section 101(a)(2)]. In addition, temperature water quality standards are viewed by many as an important tool for the protection and recovery of threatened and endangered salmonid species in the Pacific Northwest. Attaining criteria and protecting existing cold temperatures for waters used by these salmonids will help maintain and improve their habitat and aid in their protection and recovery.

Summer Standards

Four of the five designated salmonid uses in Oregon's standards are based on the salmonid uses that occur during the period of summer maximum temperatures, which is generally during July and August. These uses were designated because: (1) human activities that increase summer water temperatures are a significant concern for salmonids in the Pacific Northwest; and (2) ensuring water temperatures are protective of salmonid uses during the summer will generally result in protective water temperatures for salmonids other times of the year due to the climate-controlled annual thermal pattern (i.e., waters will naturally be cooler during other months of the year). However, for some waters, attaining the criteria to protect for a summer salmonid use may not result in protecting salmonid spawning and fry emergence that occurs in the spring to early summer or late summer to fall. Thus, in addition to the four summer salmonid designated uses, Oregon's standards includes a use designation specifically for salmon and steelhead spawning through fry emergence, which typically occurs beginning in the fall and continuing through the spring, but can also occur in early July for steelhead and late August for chinook. Designating this use and associated water quality criteria provides an added degree of protection where meeting only the summer maximum temperature may be inadequate to ensure protection of this use during the other times of the year when spawning occurs.

Use Designation

Oregon's standards also include a 20°C salmon and steelhead migration criterion in conjunction with a narrative criterion that requires the presence of sufficient cold water refugia to protect salmon and

Oregon WQ Standards

steelhead migration. These criteria are intended to protect designated beneficial uses and minimize the adverse effects to migratory salmon and steelhead, while taking into account the natural conditions that salmon and steelhead likely experienced historically.

This 20°C salmon and steelhead migration criterion designation applies to:

- Lower Willamette River (from the mouth to river mile 50)
- Lower John Day River (from the mouth to the confluence with the North Fork John Day River)
- Columbia River mainstem from the mouth to the Washington-Oregon border,
- Snake River from the Washington-Oregon border to Hells Canyon Dam
- Three small reaches of the lower Coos River

Natural Conditions

Temperature Natural Conditions Criteria

EPA also approved a provision for a Temperature Natural Condition criterion to supplement numeric temperature criteria. This provision is consistent with the EPA Temperature Guidance and stipulates that where the natural temperature conditions (i.e., the natural thermal potential) of a waterbody are warmer than the numeric criteria, the natural thermal potential conditions become the applicable criteria for the water body. Water temperatures in rivers and streams vary naturally, and the technical workgroup of the EPA Temperature Guidance concluded that prior to human disturbance, water temperatures were likely warmer than optimal for some rivers, some of the time. Thus, warmer than optimal temperatures (even temperatures that may adversely affect salmonids over a short period of time) likely occurred in some river locations some of the time as a natural part of the Pacific Northwest ecosystem — i.e., an ecosystem which nonetheless supported the uses the State seeks to protect with the temperature criteria.

The numeric and narrative temperature criteria are designed to protect various salmonid life stages, and in turn, healthy salmonid populations. The temperature criteria based on natural conditions were viewed by EPA to be fully protective of salmonid uses, even if the natural conditions are warmer than the applicable numeric temperature criteria in some waterbodies, because river temperatures prior to human impacts clearly supported healthy salmonid populations. Even if the natural conditions criteria would result in temperatures that cause adverse effects to salmonids in some river segments during certain time periods, those adverse effects would be viewed as naturally occurring adverse effects that do not threaten the designated salmonid uses overall.

Additional Standards

Other provisions

Oregon's new and revised standards also include:

- Cold Water Protection — protecting existing waters which are colder than the "optimal thermal range" established in guidance
- Human Use Allowances — allowing water temperature in a waterbody to be insignificantly higher than the otherwise applicable criteria.
- Air Temperature Exclusion — modifying the temperature criteria under certain unusually hot weather conditions for the purpose of 303(d) listing.
- Site Specific Criteria — allowing states the opportunity to adopt water quality criteria consistent with CWA Section 303(c) and 40 CFR Part 131. This is subject to EPA approval and where appropriate ESA consultation.
- Mixing Zones / Thermal Plume Limitations — protecting salmonids near the vicinity of point source discharges.
- Water Quality Variances — subject to EPA approval and where appropriate ESA consultation.

ODFW Database

Designated Uses

Oregon's designated uses for the specified water bodies were developed by an interagency team which included ODEQ, EPA, NOAA Fisheries and the USFWS. This interagency team primarily relied on a database developed by Oregon Department of Fish and Wildlife (ODFW). [ODFW database is available at: http://osu.orst.edu/dept/nrimp/information/fishdistdata.htm]

The ODFW methodology for developing their database is described in the *1:24K Fish Habitat Distribution Development Project Procedures Manual* (ODFW, February 26, 2002). The database is the product of a multi-year effort by ODFW to develop consistent and comprehensive fish distribution data for a number of salmonid species. This database included all basins or sub-basins in Oregon that have anadromous fish. The distribution data represent known fish use based on documented observations, as well as the best professional judgment of local field biologists as to where use is likely to occur based on suitable habitat (i.e., waters near areas of documented life stage presence on the same water body that

Oregon WQ Standards

have similar habitat features, such as flow volume, gradient, gravel size, and pool frequency, and no known obstructions or reasons why the use would not also be present in these waters). ODFW compiled and reviewed fish distribution information from a variety of sources, including state and federal fisheries agencies, federal land management agencies, tribal entities, watershed councils and other interested public or private organizations. The ODFW fish distribution data reflect areas of fish use based on information collected over the past five life cycles for a particular species, which ranges from 15-to-35 years.

In addition to spatial fish distribution data that describe where a life stage use is known or likely to occur, the ODFW database also includes information describing when a life stage use is known or likely to occur.

ADDITIONAL SOURCES

In addition to the ODFW information, ODEQ also relied upon the following sources of information to identify the proposed salmonid designated uses, respond to public comment and revise the proposed rules:

- *Bull Trout Habitat Designation Report: Technical Work Group Recommendations* (ODEQ 2003)
- USFWS proposed critical habitat for bull trout spawning and juvenile rearing (67 FR 71236, November 29, 2002)
- *Salmon Anchor Habitat Strategy for the Tillamook and Clatsop State Forests* (Dewberry 2003);
- *Ecotrust Salmon Anchor Habitat in the Siuslaw River sub-basin* (Ecotrust 2000)
- Temperature data (ODEQ database - Laboratory Analytical Storage and Retrieval Database List of WQ Monitoring Stations for Temperature at http://www.deq.state.or.us/wq/lasar/StationListParam.asp?ParameterKey-2224)

Dissolved Oxygen

Intergravel Dissolved Oxygen - 8.0 mg/l

The purpose of the intergravel dissolved oxygen standards is to protect salmonid spawning and egg incubation to fry emergence from low dissolved oxygen concentrations. The state determined when and where salmonid and trout spawning occur throughout the state. These determinations are displayed on the Basin maps.

Cost Benefits Analysis

Antidegradation

Prior to this approval, Oregon had already adopted an antidegradation policy. EPA's approval action approved Oregon's methods for implementing that policy. EPA approved Oregon's antidegradation water quality standards that are applicable to all standards, not just temperature. Highlights of Oregon's policy include: 1) a requirement that prior to authorizing a new or increased discharge, dischargers to Tier 1 and Tier 2 waters consider costs and benefits of the discharge; and 2) a Threatened and Endangered species provision for Tier I waters.

ESA § 7

ESA CONSULTATION

Section 7 of the ESA requires Federal agencies, in consultation with the USFWS and NOAA Fisheries, to ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which have been designated as critical. Consultation is designed to assist Federal agencies in complying with the requirements of section 7 by supplying a process within which USFWS and NOAA Fisheries provide such agencies with advice and guidance on whether an action complies with the substantive requirements of the ESA. Approval of State or Tribal water quality standards is considered a Federal action, and hence EPA was required to comply with the requirements of ESA section 7 prior to taking final action approving Oregon's submitted standards.

Fish Species

USFWS and NOAA Fisheries lists of threatened and endangered species included:

- Snake River Sockeye Salmon
- Upper Columbia River spring chinook salmon
- Upper Columbia River steelhead
- Snake River spring/summer, Snake River fall, Upper Willamette River, Lower Columbia River, and Southern Oregon/California Coastal chinook salmon
- Oregon Coast and Southern Oregon/Northern California coho salmon
- Snake River Basin, Middle and Lower Columbia, Upper Willamette, Oregon Coast, and Klamath Mountains Province steelhead trout

Oregon WQ Standards

Biological Opinions

- Columbia River Chum Salmon;
- Umpqua River coastal cutthroat trout
- Southwestern Washington/Columbia River coastal cutthroat trout
- Columbia River Basin and Klamath River Basin Bull Trout

As a result of EPA's responsibilities and duties under section 7 of the ESA, EPA initiated informal consultation with USFWS and NOAA Fisheries on the EPA's approval of the state standards. In December 2003, EPA provided a biological assessment to USFWS and NOAA Fisheries which provided an analysis of EPA's approval action. USFWS and NOAA Fisheries provided Final Biological Opinions to EPA in February 2004. In addition, under the authorities of Section 305(b)(2) of the Magnuson-Stevens Fishery Management and Conservation Act (MSFM), in January 2004, EPA provided to NOAA Fisheries an Essential Fish Habitat Assessment of EPA's proposed approval of Oregon's standards. After receiving NOAA Fisheries' conservation recommendations under the MSFM Act, EPA responded to NOAA Fisheries under the MSFM Act on February 24, 2004, indicating EPA's intent to implement those recommendations.

OREGON'S PUBLIC PROCESS

Prior to the ODEQ proposed rulemaking, from 2001 - 2003, ODEQ worked extensively with various policy and technical advisory committees to discuss rule development and to develop drafts of these rules. These discussions included detailed descriptions of how the beneficial use maps and tables were compiled. Prior to initiating rulemaking, ODEQ sponsored informal "listening sessions" throughout the State to discuss the reasons for revising Oregon's water quality standards, the existing rule, the EPA Temperature Guidance and rulemaking options available to the State. ODEQ provided iterative versions of their proposed Division 41 Rule beginning on June 20, 2003. On August 14, 2003, the State of Oregon began a public comment period and held ten public hearings in September 2003 where they presented the Basin maps and tables. The Oregon Environmental Quality Commission (ODEQ's oversight board) approved the final proposed standards on December 4 and on December 10, 2003, the State of Oregon, Department of Justice, submitted to EPA a letter which provided State Attorney General Certification that the proposed rules were duly adopted pursuant to state law.

Oregon River Basins Included in the New and Revised Standards

- Mainstem Columbia River
- Mainstem Snake River
- Deschutes Basin
- Goose and Summer Lake Basins
- Grande Ronde Basin
- Hood Basin
- John Day Basin
- Klamath Basin
- Malheur Lake Basin
- Mid Coast Basin
- North Coast Basin
- Owyhee Basin
- Powder/Burnt Basins
- Rogue Basin
- Sandy Basin
- South Coast Basin
- Umatilla Basin
- Umpqua Basin
- Walla Walla Basin
- Willamette Basin

For Additional Information:

Mary Lou Soscia, Columbia River Coordinator, US Environmental Protection Agency, Region 10, 503/ 326-5873 or email: soscia.marylou@epa.gov

Debra Sturdevant, Water Quality Standards Coordinator, Oregon Department of Environmental Quality, 503/ 229-6691 or email: sturdevant.debra@deq.state.or.us.

WATER BRIEFS

AMICUS BRIEF MT
MISSOURI RIVER
MONTANA AG SEEKS
SUPREME COURT REVIEW

Attorney General Mike McGrath wants the US Supreme Court to help settle the ongoing dispute over managing the Missouri River. McGrath filed a "friend of the court" brief on March 10th, asking the Supreme Court to hear an appeal of a lawsuit brought by North Dakota and South Dakota. The lawsuit contends the US Army Corps of Engineers' management of the river illegally favors downstream states.

By giving higher priority to barge traffic on stretches of the river in such states as Nebraska and Missouri, the Corps is releasing too much water from upstream reservoirs in Montana and the Dakotas and harming fish, wildlife and recreation, McGrath said. "The Corps of Engineers has played favorites with the downstream interests at our expense," he said. "The Flood Control Act...gives them authority to manage the river. But it does not give them the authority to play favorites."

McGrath's filing came on the same day the Corps signaled it will allow barge shipping on the Missouri River this summer, a move that prompted conservation groups to promise another round of lawsuits. That development was the latest in the long-running battle over whether to boost spring releases and reduce summer flows to mimic nature and help endangered and threatened fish and birds. US Fish and Wildlife Service biologists had ordered the more seasonal flow three years ago. But they backed off in December, telling the Corps that summer water levels can be kept high enough for barge shipping if the Corps also builds 1,200 acres of new habitat for the endangered pallid sturgeon. The Corps said it has identified 1,200 acres along about 620 miles of the river's lower reaches where it can create slow-moving, shallow-water channels for the sturgeon by July 1.

North Dakota and South Dakota sued the Corps and the states of Nebraska and Missouri in 2002. A federal district court ruling favored the Dakotas, but the 8th US Circuit Court of Appeals in St. Louis overturned that decision last summer in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). McGrath argues in his brief that federal law does not allow the Corps to give priority to certain river uses, but rather requires it to treat upstream and downstream uses equally.

For info: Judy Beck, Montana AG's Office, 406/ 444-0582 or website: www.doj.state.mt.us/

ENDANGERED SPECIES ACT
CONSULTATION PROCESS QUESTIONED
GAO REPORT ON ESA CONSULTATION

The General Accounting Office (GAO) released a report on the review of the government consultation process required under the Endangered Species Act (ESA). The report came at the request of Senators Crapo (R-Idaho) and Baucus (D-Montana). The report shows the length of the government consultation process could be weakening species recovering efforts.

The GAO report, "*More Management Attention is Needed to Improve the Consultation Process*" examines the way that federal agencies work together under the ESA. Nearly 40% of official consultations exceeded deadlines, and were most often late on projects posing the least risk to species.

For info: GAO website: www.gao.gov/cgi-bin/getrpt?GAO-04-93

DAM REMOVAL CA
TASK FORCE RECOMMENDS REMOVAL

A task force of federal, state and local officials recommended that Matilija Dam on Southern California's Ventura River be removed "to revive the dwindling population of endangered southern steelhead trout." The recommendations follow those developed by the Institute for Fisheries Resources (IFR) pursuant to a contract with the California Coastal Conservancy. The remnant steelhead population is the southernmost remaining salmonid population on the west coast, and was once thought to be extinct. The Matilija Dam has no fish passage, no longer serves any function, is completely silted up, and will have to eventually be removed anyway to prevent major dam failure. Removing the dam and the 6 million cubic yards of silt behind it are expected to cost around $130 million, according to US Army Corps estimates, but would restore breeding grounds in the upper reaches of the river and rebuild 50% of the river's steelhead population.

For info: Matilija Coalition, 415/ 561-3474, website: http://pages.sbcglobal.net/pjenkin/matilija.

WASTEWATER FINES WA
SURFACE & GROUNDWATER CONNECTION

A frozen-vegetable processing plant has been fined for over-applying waste water to fields near Ellensburg. The Washington Department of Ecology (Ecology) has issued a penalty of $12,000 to Twin City Foods Inc. for violating its wastewater discharge permit and state groundwater standards. The company was cited for applying wastewater in quantities that caused the water to accumulate on the ground, as well as for producing objectionable odors. "Pooling wastewater creates an opportunity for both the river and groundwater to be contaminated," explained Bob Raforth, a hydrogeologist with Ecology's water quality program. "In this case, the aquifer is about seven feet from the surface and is inter-connected with the Yakima River." Samples from area monitoring wells show levels of iron, manganese, total-dissolved solids and chloride are violating state groundwater standards.

In September 2003, inspectors observed water pooling on the company's spray fields. In October 2003, Ecology issued a "notice of violation" requiring the company to outline what steps it was taking to manage its wastewater within permit limits and to comply with state water-quality standards. Ecology issued the penalty after determining the company had not taken sufficient measures to prevent pollution and bring the facility into compliance. Twin City Foods has 30 days to file an appeal to the Pollution Control Hearings Board.

For info: Joye Redfield-Wilder, Ecology, 509/ 575-2610

WATER BRIEFS

MORE POWER / FEWER SPILLS

BPA PROPOSAL REDUCES SPILLS FOR FISH

Hoping to earn up to $45 million more in electricity sales, the Bonneville Power Administration (BPA) has proposed reducing the amount of water it spills over Columbia Basin hydroelectric dams to help threatened salmon migrate to the ocean. BPA Administrator Steve Wright said that the agency was counting on other measures to offset the losses of Snake river fall chinook and other Columbia Basin salmon, while allowing BPA to earn money to reduce an expected rate increase.

Robert Lohn, northwest administrator of NOAA Fisheries, which must approve the proposal, said the agency was willing to consider steps to reduce BPA's costs if they cause no harm to threatened Snake River fall chinook. The governors of Idaho, Washington, Montana and Oregon weighed in on the proposal with comments in a letter sent on March 29th to BPA and the US Army Corps which included: "Ultimately, the responsible federal agencies must decide whether any alternative spill regime avoids adversely affecting salmon and steelhead listed under the Endangered Species Act. In light of the considerations outlined in this letter, we will support a spill reduction proposal that mitigates for the impacts to nonlisted salmon and steelhead, and that NOAA Fisheries determines is adequate to avoid adversely affecting listed salmon and steelhead." The four governors noted they "strongly believe that the evaluation of spill reduction alternatives should be implemented in a manner consistent with the 2000 FCRPS Biological Opinion, our continued commitment to pursue a proactive fish and wildlife recovery strategy pursuant to the Four Governors' Recommendations, and the 2003 mainstem amendments to the Fish and Wildlife Program of the Northwest Power and Conservation Council."

For info: Mary Ellen Glynn, OR Gov's Office, 503/ 378-6496 or website: www.oregon.gov/Gov/press_032904.shtml ("Four Governors' Letter")

COASTAL RESTORATION

NOAA RESTORATION MONITORING MANUAL

NOAA Fisheries has recently compiled key restoration monitoring information applicable to coastal habitats nationwide and is making that information available in manual form. "*Science-Based Restoration Monitoring of Coastal Habitats, Volume One: A Framework for Monitoring Plans Under the Estuaries and Clean Waters Act of 2000 (Public Law 160-457)*" offers technical assistance, and provides tools for developing and carrying out monitoring of coastal restoration efforts. A companion volume, "*Science-Based Restoration Monitoring of Coastal Habitats, Volume Two: Tools for Monitoring Coastal Habitats*" is due for release later this year. Volume one of the manual can be downloaded as a PDF file at: http://coastalscience.noaa.gov/ecosystems/estuaries/restoration_monitoring.html

For info: Teresa McTigue; National Centers for Coastal Ocean Science, 301/ 713-3020 x 186; email: restoration.monitoring@noaa.gov

INSTREAM FLOWS WA

ECOLOGY SETS MINIMUM FLOWS

Washington State's Department of Ecology (Ecology) has launched an effort to set requirements for minimum stream flows in 10 watersheds for the first time. Ecology also will consider amending existing flow requirements in four watersheds and enhancing flow requirements in three more watersheds by the end of June 2005.

Since 1976, Ecology has adopted minimum flow rules in only 19 of the state's 62 watersheds. In 2004, the department will adopt minimum stream flows for the first time in the Elwha-Dungeness, Entiat and Lower Skagit-Samish sub-basins, and the Stillaguamish and Walla Walla watersheds.

In 2005, instream flows will be set for the first time for the Cowlitz, Grays-Elochoman, Lewis, Quilcene-Snow and Salmon-Washougal watersheds. Water rights already issued in a watershed before minimum flows are set will remain unaffected by new flow rules.

For info: Ecology website: www.ecy.wa.gov/programs/wr/instream-flows/isfhm.html

CWA ON NAVAJO LAND UT

EPA ENFORCEMENT ACTION

The US Environmental Protection Agency (EPA) is ordering Mountain States Petroleum Corp to comply with the Clean Water Act requirements of its wastewater discharge permit on the Navajo Nation. The New Mexico-based company, which operates an oil field on the Navajo Nation in Utah, failed to monitor and sample wastewater from its operations and submit quarterly reports to the EPA. The company last reported its discharge monitoring reports December 2001. The company discharges wastewater to a tributary to the Chinle Wash, which is a tributary to the San Juan River. "Ranchers use this water for their livestock and Mountain States must do its part to sample and monitor the discharge to ensure that the water is not polluted," said Alexis Strauss, director of the EPA's Water Division for the Pacific Southwest region. "Diligent oversight of the permit requirements minimizes the potential of harmful pollutants being discharged into nearby water bodies."

Under the EPA order, the company must sample and monitor for pollutants, which may be present in the water that is separated from the crude oil, such as oil, grease and solids, and submit quarterly reports to the EPA. Failure to comply with the order may result in a penalty of $32,500 per day per violation.

For info: Wendy Chavez, 415/ 947-4248

STORMWATER PENALTY CA

EPA ENFORCEMENT ACTION

EPA recently ordered Wayne J. Sand and Gravel to comply with the federal Clean Water Act over stormwater discharge violations at its industrial sand and gravel mine operation near Moorpark, California. Federal and state regulations require that sand and gravel operations have pollution control devices (such as settling basins) in place to prevent water contamination. During inspections conducted over the past two years at the gravel mine, EPA and state inspectors found evidence of

discharges of oil, fuel and sediment to a nearby drainage.

During the past two years, state regulators have issued numerous CWA citations to Wayne J. Sand and Gravel for inadequately contained fuel storage facilities, discharge of truck wash water into a nearby drainage, uncontrolled runoff from mine and automotive parts storage areas, and an inadequate plan to control pollution from other areas of the site. The EPA order requires Wayne J. Sand and Gravel to comply with the CWA, and take needed actions at the site. In addition, the mine must develop a work plan to prevent future problems at the site. Failure to comply with this order could make the company liable for civil penalties by the EPA of $32,500 per day.

For info: Francisco Arcaute, EPA, 213/ 452-3378; EPA stormwater regulations for industrial sites: www.epa.gov/ebtpages/watestormindustrialstormwater.html

DREDGING LAWSUIT WA-OR

COLUMBIA RIVER DEEPENING OPPOSED

On behalf of Northwest Environmental Advocates (NWEA), Earthjustice filed suit on March 30th to challenge a plan to deepen the Columbia River. Critics of the costly plan say the federal government acted illegally in approving dredging that will further degrade and destroy threatened and endangered salmon habitat. The U.S. Army Corps of Engineers intends to deepen a 100-mile navigation channel to allow larger container ships to reach the Port of Portland. NOAA Fisheries gave its approval for the plan.

"This project is wrong for salmon and other species, it's wrong for Washington and Oregon, and it's wrong for the American taxpayers," said Nina Bell, executive director of NWEA, which successfully challenged the agency's previous endorsement of the project in 2000. "It's shocking that the federal agency in charge of saving salmon can approve further degrading the estuary that is so critical to salmon survival." Todd True of Earthjustice added, "NOAA Fisheries disregarded its own scientific findings when it approved this project. All the science shows that dredging and dams on the Columbia have taken an enormous toll on salmon and it's outright illegal to approve more." NWEA and Earthjustice assert that NOAA Fisheries failed to study the causes of the estuary's decline and the potential for restoration if dredging were limited or modified. The lawsuit challenges agency approval of routine dredging and the channel-deepening plan for failure to protect twelve stocks of Columbia River salmon.

For info: Nina Bell (NWEA), 503/ 295-0490, Todd True (Earthjustice), 206/ 343-7340, ext 30

NAVAJO WATER RIGHTS NM

SETTLEMENT PROPOSED

New Mexico's Interstate Stream Commission directed staff members to continue to work toward completing negotiations on the proposed water rights settlement with the Navajo Nation. The nine-member Interstate Stream Commission is charged with separate duties, including protecting New Mexico's right to water under eight interstate stream compacts and ensuring the state complies with each of those compacts. "Commissioners directed staff to brief San Juan Basin legislators and other interested legislators as soon as possible" and " to continue negotiations with the Navajo Nation to arrive at final draft settlement documents for the Interstate Stream Commission to consider, while continuing to address issues that were raised by the public regarding the San Juan River Basin proposed settlement agreement," said Interstate Stream Commission Director Estevan López.

The proposed agreement could potentially resolve the claims of the Navajo Nation for the use of waters of the San Juan River Basin. The proposed settlement agreement is intended to adjudicate the Navajo Nation's water rights and provide associated water development projects for the benefit of the Navajo Nation in exchange for a release of claims to water that could potentially displace existing non-Navajo water users in the basin. **For info:** Karin Stangl, NM State Engineer's Office, 505/ 827-6139

WATER POLLUTION: CWA MT

TRIBES SUE GOLD MINE AND AGENCIES

On January 29, 2004, the Gros Ventre and Assiniboine Tribes filed a complaint against the US Bureau of Land Management (BLM), the Montana Department of Environmental Quality (DEQ) and Luke Ployhar in federal district court in Montana for past and ongoing violations of the Clean Water Act (CWA) caused by mining operations in the Island Mountains ("Little Rocky Mountains"). The area has been traditionally used by the Tribes for spiritual purposes. Beginning in 1979, Zortman Mining Co, a subsidiary of Pegasus Gold, Inc, used cyanide heap leach mining practices to extract gold at the Zortman and Landusky mine sites, which are adjacent to the southern boundary of the Fort Belknap Indian Reservation. The mining created acidic, cyanide and metal-laden wastewater. The lawsuit seeks CWA compliance and effective clean up.

"The water pollution is just not getting cleaned up and we have to bring this lawsuit to protect our people and water," said Benjamin Speakthunder, President of the Fort Belknap Indian Community Council, the governmental body of the Tribes. "The area is still so contaminated that even the water treatment plants are discharging polluted water." The Tribes allege that each day the mines discharge pollutants into the Island Mountain watershed, the BLM, DEQ and Mr. Ployhar are individually and collectively violating the CWA. The CWA prohibits all persons from discharging pollutants into waters of the US unless the discharges are authorized by a National Pollution Discharge Elimination System (NPDES) permit. No such permits have been issued for the discharges that are occurring at these mines. The complaint further alleges that discharged toxic metals and cyanide exceeded State water quality standards.

For info: Benjamin Speakthunder, 406/ 353-8450, Charlie Tebbutt, Western Environmental Law Center, 541/ 485-2471

WATER BRIEFS

WATER TEMPERATURES WA
ECOLOGY STUDY RELEASED

Parts of the Stillaguamish River and many of its tributary creeks have summer water temperatures that are too warm to support healthy fish populations, according to research by the Washington Department of Ecology (Ecology). The research, entitled "Stillaguamish River Watershed Temperature Total Maximum Daily Load Study," is available at www.ecy.wa.gov/biblio/040310.html. High temperatures affect the river's mainstem, its north and south forks, and Deer Creek, Higgins Creek, Little Deer Creek and Pilchuck Creek. Ecology found temperatures above the state standard of 64.4 degrees Fahrenheit at 43 locations. Temperatures at seven of those locations rose above 73.4 degrees, the lethal level for salmon, during the summer of 2001. Shading by planting trees along the streams would help, but would not by itself keep the water temperature within state standards, according to Greg Pelletier, who conducted the study.

The loss of cover is one of many factors that affect water temperature," Pelletier said. "The watershed will need a variety of steps to reverse the trend toward higher temperatures over the past hundred or so years."

Shade is just one factor affecting stream temperatures. Water withdrawals lower stream levels. Streams become wider and shallower as banks erode, and erosion from logged and cleared land washes silt into channels. Ecology found that water temperatures could be reduced below lethal levels by planting more plants along stream banks, narrowing channel widths, reducing the flow of sediments into the streams, and improving groundwater recharge and stream flows.

Ecology will use the information to develop restoration plans for the streams in the watershed in cooperation with local governments, farmers, other property owners, tribes and interested citizens. A draft plan to lower water temperatures, expected later this year, will be made available for public review and comment before it is submitted to EPA for approval. Several efforts already are under way to protect stream temperatures in the watershed, including native tree planting and investigation of wetlands to filter stormwater pollution.

For info: Larry Altose, Ecology, 425/649-7009

EPA FINE: OCEAN DUMPING CA
$100,000 SETTLEMENT FOR VIOLATIONS

EPA announced that it has reached a $100,000 settlement with a dredging company for ocean dumping violations that occurred during a harbor deepening project at the Port of Richmond. EPA cited Manson Construction Company of Seattle, Wash. for Marine Protection, Research and Sanctuaries Act violations that took place in 1998. Barges used by the company spilled more than 20,000 cubic yards of dredged material – much of it within the Gulf of the Farallon National Marine Sanctuary – on their way to an EPA-approved ocean disposal site 50 miles west of San Francisco and 9,000 feet deep. Last fall the EPA reached a $20,000 settlement with another dredger, Great Lakes Dredge and Dock Company of Oakbrook, Ill, for similar violations on the same Port of Richmond project. The US Army Corps awarded a contract to Great Lakes and Manson, who operated jointly, to dredge approximately 2.5 million cubic yards of non-toxic sediment from the Port of Richmond navigation channel and to dispose of the mud at the EPA-designated site. The Ocean Dumping Act regulations guard against spilling or leaking material during transit through protected areas such as the Farallon sanctuary. These include having specialized tracking and leak-detection sensors installed on disposal barges.

For info: Mark Merchant, EPA, 415/947-4297

COLUMBIA WITHDRAWALS WA
NATIONAL ACADEMY OF SCIENCE STUDY

Additional permits to divert water from the Columbia River should be issued by the state of Washington only if those withdrawals can be stopped when low water flows imperil threatened salmon, according to the National Academy of Science (NAS) study released March 31st. The $488,000 study, commissioned by the Washington Department of Ecology as part of a plan to establish new rules for water rights, could make it hard for irrigators to obtain new water rights.

Ernest Smerdon, chairman of the committee that wrote the report, said "Whether or not to issue additional permits is a decision to be made by the public and policy-makers. But if the withdrawals are allowed, there should be enough flexibility to halt them if river conditions become too severe for the salmon." Ecology Director Linda Hoffman said the department would review the study in the coming weeks. The state had asked the committee of 13 experts to evaluate the effects of additional water withdrawals of between 250,000 acre-feet and 1.3 million acre-feet per year, which is approximately the volume of water sought in pending applications.

The panel recommended against a proposal to allow existing water rights to give up a certain volume of water in exchange for an uninterruptible, guaranteed minimum level of water every year. Such an approach would reduce flexibility in times of low flows or high water temperatures when salmon are most at risk. The committee suggested that the state and other Columbia River basin stakeholders continue to explore water rights transfers and other market-based programs.

For info: www.ecy.wa.gov/programs/wr/cri/crinsr.html; NAS website: http://books.nap.edu/catalog/10962.html

WATER USE TRENDS US
USGS STUDY DETAILS NATIONAL USE

A recent USGS report shows that the nation used on average 408 billion gallons of water per day in 2000. Heavy industrial water use declined by nearly 11% from 1995 to 2000 while ground water withdrawals increased by 16%. Agricultural water usage still accounts for the largest proportion of water used (65% of the total).

For info: Report available at USGS website: http://water.usgs.gov/pubs/circ/2004/circl268/

CALENDAR

April 16 CA

Desalination Conference, Santa Barbara, RE: Statewide Water Supply, Desalination Methods and Technology; More. For info: Chris Terp, The Seminar Group, 800-574-4852 or website: www.theseminargroup.net/htmls/seminars/04dslca/index.htm

April 16 OR

Oregon Fish & Wildlife Commission Meeting, Beaverton, Best Western Greenwood Inn & Suites, 10700 SW Allen Blvd, 8am. RE: Director's Rpt; Lower Columbia River Coho Recovery Plan; Pacific Lamprey Rule Amendment; More. For info: ODF&W Director's Office, 503/ 947-6044

April 19-22 MD

"One Environment – One Conference" EPA National Compliance Assistance Providers Forum and the National Pollution Prevention Roundtable, Baltimore, Wyndham Baltimore Inner Harbor Hotel. For info: www.p2.org/summit2004/

April 22 WA

Buckhorn Mountain Gold Mine Proposal, Department of Ecology and U.S. Forest Service, Republic, Elem School, 30306 E. Hwy 20, 5pm-7:30pm, RE: Proposal by Crown Resources Corp to develop an underground gold mine on Buckhorn Mountain; Ecology and USFS will answer questions about NEPA, SEPA and take comments on the scope of the supplemental EIS. For info: Mark Schuppe, 509/ 575-2384, email: msch461@ecy.wa.gov

April 22 CA

California Water Plan, Advisory Committee Meeting, Sacramento, Sterling Hotel, 1300 H Street, 8:30am-4:30pm, Note: 3/17/04 meeting was postponed-moved to 4/22/04, Administrative Draft of Update 2003 to be released on April 7, For info: 916/448-1300, website: www.waterplan.water.ca.gov/b160/committee/calendar.htm

April 22-23 NV

Tribal Energy Conference, Las Vegas, Westin Casuarina, Program Co-chairs: Karen J. Atkinson, Esq. of Tribal Strategies, Inc., and Maurice Richard of Marin Power Ventures LLC. For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/04/04tribnv.htm

April 25-28 OR

Building Bridges in a Changing World, Portland, Hilton Hotel, RE: NEPA symposium, Public participation, Land & watershed management, Sustainable development, Water rights and water quality, ESA, Environmental management. For info: Donna Carter, 863/ 679-3852, or email: conference@naep.org

April 29-30 UT

Utah Board of Water Resources, Board Meeting, Salt Lake City. For info: 801/ 538-7230 or email: mollywaters@utah.gov; website: www.water.utah.gov/board/2004sched.asp

April 30 CO

Interstate Compacts and Treaties: Then and Now, Colorado Section of the American Water Resources Association and the Colorado Foundation for Water Education, Arvada, The Arvada Center, 6901 Wadsworth Boulevard, 8am,Compact Influence on Water Resources in Colorado. For info: website: www.awra.org/state/colorado/symposium.htm

April 25-28 OR

12th Annual Portland BEST Business Awards Presentation, Portland, Oregon Convention Center Ballroom, 7:30am-9:30am. "Green" Businesses Awarded. For info: Stephanie Swanson, Portland Office of Sustainable Development, 503/ 823-7109

April 30 CA

An Overview of Water Law and Policy in California (UC/Davis), Sacramento,. Sutter Square Galleria, 2901 K St, 9am-4:30 pm, RE: allocation of California's water resources, comprehensive study of the regulatory framework for surface water and groundwater rights, as well as the environmental laws that regulate water use, current controversies associated with California water, overview of California water law, Instructor: David Sandino J.D., staff counsel for the California Department of Water Resources

April 30 OR

9th Clean Water Conference, Portland, World Trade Center Auditorium. Consistently Excellent Expert Presentations. (see Brief, this ***Insider***) For info: Holly Duncan, ELEC, 503/ 282-5220 or email: hduncan@elecenter.com or website: www.elecenter.com

May 4 WY

"Field Evaluation of the Fate of Wastewater Components from Septic Systems" Water Forum, State of Wyoming, Laramie, Speaker: Marge Bedessem, University of Wyoming, State Engineer's Conference Room, Herschler Building 4E at 10am

May 4 CA

"Water Quality: Source to Tap" Workshop, Association of California Water Agencies, Monterey, Monterey Conf. Center and surrounding hotels, Co-sponsor: CA-NV Section of the American Water Works Assn. For info: Dawn Hummel, 888/ 666/2292, email: dawnh@acwanet.com

May 5-7 CA

"California Water: Thinking Outside the Box", 2004 Spring Conference, Association of California Water Agencies, Monterey, Monterey Conf. Center and surrounding hotels, RE: Priorities and Nuance of the Schwarzenegger Admin.; State Water Resources Control Board-Fees, Groundwater Management; Bay-Delta: Tidal or River System; Clean Water Act; more. For info: Dawn Hummel, 888/ 666/2292, email: dawnh@acwanet.com

May 6-7 WA

Washington Water Law Conference, Seattle, For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/04/04tribnv.htm

May 11-13 WA

Northwest Power and Conservation Council Meeting, Walla Walla. For info: NPCC, 800/ 452-5161, website: www.nwcouncil.org

May 11 OR

Hydropower Relicensing Workshop, Portland, 5th Ave. Suites, 506 SW Washington, 9am-4:30pm, RE: FERC Relicensing, New Rules, Collaborative Options, 401 Certificate, Effective Participation in Relicensing. For info: The Seminar Group, 800/574-4852, website: www.TheSeminarGroup.net

May 12-14 CA

Central Valley Tour, Water Education Foundation, RE: Issues of growth, water supply, groundwater banking, wetlands, salmon restoration, and salinity and agricultural drainage will be discussed on this tour that begins and ends at the Sacramento International Airport. Stops include San Luis Reservoir, Panoche Irrigation District, the San Joaquin River Parkway, Kern County Water Bank and local farms. For info: http://www.water-ed.org/tours.asp

May 19-21 DC

Wetlands Law and Regulation, American Law Institute-American Bar Association, Washington DC, Hilton Embassy Row, RE: Federal Wetlands Law, Post-SWANCC cases, Section 404 Jurisdiction, Developments in Regulatory Takings, Mitigation Science, Policy and Practice, Nonwetland Waters, Litigation and Enforce-

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ment Update. For info: 800-253-6397, www.ali-aba.org/aliaba/emailfrm.htm

May 20-21 OR

Oregon Environmental Quality Commission (EQC) Meeting, Hermiston, Location/Time/Agenda TBA. For info: Mikell O'Mealy, DEQ, Office of the Director, 503/ 229-5301

May 24-27 CO

Colorado Water Conservation Board Meeting, Steamboat Springs, Location TBA. For info:email:cwcbnews@state.co.us, website: http://cwcb.state.co.us/

June 10 OR

Northwest Water Trading and Marketing, The Seminar Group, Portland, World Trade Center, 121 SW Salmon, 8:30am-4:30pm, RE: Tools for Water Marketing, Transfer Process, Washington's Hot Topics, Case Study: Deschutes Basin, Economics of Trading, Water Trading for the Environment, 3rd Party Impacts. For info: The Seminar Group, 800/ 574,4852, website: www.TheSeminarGroup.net

June 11 WA

Natural Resources Damage Litigation Conference, Seattle, For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/04/04tribnv.htm

June 13-18 CA

Pacific Fisheries Management Council Meeting, Foster City, Crowne Plaza Mid-Penisula, For info: Kerry Aden, 866/ 806-7204; email: Kerry.Aden@noaa.gov, website: www.pcouncil.org

June 15 TX

100 Years of Rule of Capture: From East to Groundwater Management, Texas Water Development Board, Austin, Capitol Extension Auditorium, 9am-5pm, RE: Commemorate the 100th anniversary of the rule of capture in Texas, focus on the rule of capture, changes to groundwater law since the 1904 ruling, and possible changes in the future. The symposium will feature different perspectives on the rule of capture, groundwater conservation districts, groundwater marketing, and sustainability from a number of recognized experts and speakers. For info: Cindy Ridgeway, 512/ 936-2386, email: cindy,ridgeway@twdb.state.tx.us .

June 16-18 CO

Groundwater in the West: 25th Summer Conference, Natural Resources Law Center, Boulder, Fleming Law Building, University of Colorado School of Law, RE: Science and Law Basics, Groundwater Management, Indian Groundwater, Modeling, Expert Witnesses, Coalbed Methane, Transboundary Issues, Regional Groundwater Panels, Conjunctive Use. For info: Kathryn Mutz, Natural Resources Law Center, 303/ 492-1286 or email: nrcl@colorado.edu, Website: www.colorado.edu/law/centers/nrlc/waterconference/index.htm

June 18-19 WA

Northwest Tribal Energy Conference, Seattle, Renaissance Seattle Hotel. Co-Chairs: Karen Atkinson, Tribal Strategies Inc; Eric Eberhard, Dorsey & Whitney, LLP. For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/04/04tribnv.htm

June 21-22 TX

Water Resources Symposium, Houston, The Houstonian, RE: Water Resource Development, featuring oil baron T. Boone Pickens; Water Law, Financing, Risk Management. For info: Neal Stelting, 307/ 742 3232, email: neal stelting@hotmail.com

June 23-26 CO

Environmental Litigation, American Law Institute-American Bar Association, Boulder, CO, For info: 800-253-6397, www.ali-aba.org/aliaba/emailfrm.htm

June 27-July 1 UT

World Water & Environmental Resources Congress 2004, Environmental Water & Resources Institute of the American Society of Civil Engineers, Salt Lake City, Grand America Hotel, RE: Integration of Knowledge and Scientific, Engineering, and Management Efforts Across Hydrologic Media (atmospheric, surface water, and ground water); Among Various Disciplines (engineering, hydrology, policy, law, socioeconomic, and ecology); plus Symposium on Native American/Indigenous Peoples/First Nations' Natural Resources Needs. For info: Leonore Jordan, 800/ 548-2723, email: conferences@asce.org,

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