



# The Water Report

*Water Rights, Water Quality & Water Solutions in the West*

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## WATER REUSE

LESSONS FROM THE CALIFORNIA EXPERIENCE

by Craig Lichty, Principal, Kennedy/Jenks Consultants (Sacramento, CA)

With several parts of the western United States currently experiencing drought conditions, the West is seeing increasing competition for limited water supplies. Urban, agricultural, and industrial entities compete with each other and with sensitive environmental interests—in particular endangered species such as salmon and steelhead.

Wastewater reclamation and beneficial reuse is a relatively mature industry in the arid southwestern states of California, Nevada and Arizona, where water scarcity is a constant challenge and both the demand and competition for water is increasing.

Water recycling in conjunction with water conservation is currently gaining momentum in the Pacific Northwest as a means for solving both water supply and wastewater management challenges. There is a tremendous opportunity for Northwest agencies and regulators to benefit from the experience of others.

### California & Recycled Water

In California, recycled water has supported a variety of beneficial uses for over 30 years.

ESTABLISHED BENEFITS INCLUDE:

- IRRIGATION of golf courses, cemeteries, parks & playgrounds, school yards, residential landscaping, orchards, vineyards—and even many types of edible food crops
- IMPOUNDMENTS such as decorative fountains and ponds, and in larger bodies of water where the public has unrestricted access
- INDUSTRIAL AND COMMERCIAL APPLICATIONS such as cooling towers, commercial laundries, car washes, boiler feed, fire fighting, dust control and soil compaction, concrete batching, wash down, snowmaking, and toilet flushing
- POTABLE CONSUMPTION: with advanced treatment, indirect potable consumption via surface water augmentation to reservoir supplies and via groundwater replenishment by either direct injection wells or through surface spreading and percolation

California is using recycled water as a new source of drought-proof supply that improves both total water supply and overall reliability of a water supply portfolio. Many agencies are taking an integrated water supply management approach that includes aggressive demand management (conservation) programs and water recycling to address current and near-term needs, while investigating other alternative water supplies such as brackish water and/or seawater desalination for the future. Agencies usually try to maximize water conservation as a first step. Conservation provides the most return for the investment (acre-feet per year (AF/yr) per dollars invested), and generally encounters less public resistance than water recycling. However, water conservation almost never generates enough water to solve current or projected water supply needs. Water recycling has become a standard and important part of many agency water supply portfolios.

At the direction of the Governor, The State of California's Department of Water Resources convened a Recycled Water Task Force in 2002 to evaluate the current framework of State and local rules, regulations, ordinances and permits to identify opportunities and obstacles to implementing recycled water projects. The Task Force prepared a report in 2003 entitled, *Water Recycling 2030: Recommendations of California's Recycled Water*

## Water Reuse

### Behavior Change

### Public Sensitivity

### Political Leadership

### Varying Attitudes

*Task Force.* The Task Force estimates that California has the potential to recycle up to 1.5 million AF/yr by the year 2030—if certain impediments are dealt with. The Report covers many detailed issues that were investigated and includes a number of prioritized recommendations in the areas of funding, public outreach, plumbing code provisions, regulations and permitting, economic evaluation techniques, and areas that need additional research.

[The Report is available online at: <http://www.owue.water.ca.gov/recycle/>.]

### THE CALIFORNIA EXPERIENCE: LESSONS TO BE LEARNED

Planning and implementing a recycled water project differs materially from a water supply or wastewater treatment project. It can only be accomplished with a change in human behavior. Change is not an easy process for government agencies or the public. People are used to consuming water in a certain way and at a known cost. They have set expectations for water as consumers and in most cases are not banging on an agency's door demanding to receive recycled water in lieu of their existing supply.

Agency managers and staff must approach recycled water projects with a heightened awareness of public sensitivity and a willingness to work collaboratively. The level of interaction between a sponsoring agency, elected officials, customers, the public, environmental groups, institutional partners and regulators is significant. The time required to successfully plan and implement a recycled water project can be much greater than that required by a comparable public works project of similar cost. It is extremely important for a sponsoring agency to: carefully craft a programmatic approach to a project before planning begins; allocate sufficient staff resources and funds; and then be patient. Everyone needs to be involved, informed and brought through the decision making process together.

#### Information and Outreach

#### Elected Officials: Help Them be Strong Leaders

Many recycled water projects in California have been derailed, temporarily or permanently, because they did not have strong political leadership and support. Elected officials have to address a wide range of community issues. Most elected officials, even those in single purpose water and wastewater agencies, are not water experts. You can be assured that at some point in the process there will be public debate over regulated and unregulated water quality parameters and the potential for public or environmental health risk. There will be one expert saying it is safe and reasonable and another expert saying it is not. This can place your officials in a very awkward position if they are not prepared for it in advance.

Prepare your officials for the nature of the debate. Make certain they clearly understand and are convinced of the needs underlying the project. Educate them on all sides of the issues before they appear in a public forum, so they can help lead the process. Consider taking them with you to conferences on the subject, such as those held by the WaterReuse Association and Foundation, so they can talk with representatives from other agencies about their experiences. Consider the timing of project decisions relative to election cycles, as some officials may be sensitive to making certain decisions in an election year. Make sure that your elected officials are kept informed of the continued development and challenges of your program, so they do not lose continuity with the participants or issues under discussion.

#### Know Your Community and Gain Their Trust

There is no "general public" when it comes to recycled water. Experience in California has shown there are extreme variations in attitudes towards water recycling. Some agencies in southern California have established favorable reputations with the public and have significant programs that are largely uncontested, even for advanced uses like indirect potable reuse. Other agencies have experienced significant public opposition to projects that simply propose to use recycled water to irrigate grass.

It is important to recognize that the perceptions of risk and benefits will be unique to each community. The topic of recycled water can polarize individuals and groups into support or contention. The debate will often become emotionally charged and hotly contested. Some may feel it is "the right thing to do" from an environmental sustainability perspective. Others may feel that the cost or perceived health risk of a project may far exceed the benefits.

It is very important to gauge the level of understanding of water issues and perception of water recycling in your community before you do any planning or alternatives analysis. The best way to do this

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## Water Reuse

### Meetings & Surveys

is to simply ask all the various stakeholders what they think about recycled water, using a variety of public outreach survey techniques and channels. Large public meetings tend to be less productive than one-on-one or smaller group situations where the communication can be more personal. Contact special interest groups or hold smaller community forums where people can quickly interact. Try to avoid big lengthy meetings where a few individuals may dominate. Web-based surveys or exit surveys at supermarkets can provide good information from people who may not have the time to attend a meeting. It is important that an agency be able to demonstrate that they have made a significant effort to interact with the public and have the documentation to back it up.

### Avoiding Jargon

#### **Communicating with the Public: Appropriate Language**

Most people do not understand the technical jargon of the water professional, so it is important to convey very technical information in a way that is understood. For instance, most people cannot relate to the concept of water quality parameters that are measured as one part per million, billion or trillion. However, they can understand how a grain of sand relates to an Olympic-sized swimming pool. Don't rely on your technical experts and consultants to communicate with the public. For public health issues, engage someone from the medical community. For environmental issues, draw upon academia or respected activist groups that often understand the issues and support recycling projects.

### Credibility & Trust

Information gathering can be done at the same time that you are working with elected officials and completing a recycled water market assessment. The information collected is highly valuable. It will help you: define issues to be addressed; identify additional information that needs to be collected or disseminated; and determine how the public wants to be included in the next steps. If you perform this communication exercise early, often, and consistently throughout the process—and value and respect the input given, responding to specific concerns or interests—you will build credibility and trust.

Credibility and trust are the two most important aspects of a good public information program.

When gathering information, it may at some point appear as if there are so many contentious concerns that a potential project may simply be impossible to accomplish. Just the opposite is true. It is precisely when you have developed a real understanding of the magnitude and breadth of the issues involved that real solutions can be crafted. You can now start to look for partnership opportunities that can be incorporated into alternatives that are responsive to the public. When you can show that you have listened and tried to address all concerns, you will have built credibility and trust. As Ed Everett, the City Manager for Redwood City, California recently related after working through this process for over a year in his City, "It's not about the engineering and science, it's about building a community."

### Dialog

Before alternatives are created and analyzed, it is critical to engage the community in a dialog during the market assessment phase of a project to gain an understanding of their issues and how they might be dealt with. After the alternatives are created with community input, it is important to get additional input on cost and benefits so the community will accept the economic evaluation of the project alternatives. Keep an open, honest and continuous dialog going with interested members of the community. It is difficult to meet the expectations of all parties, but we have found that most people will not contest a project if they understand how and why it was developed, and had the opportunity to participate in the dialog prior to final decision making. Even in communities where recycled water projects were initially strongly opposed, public opinion often changes when recycled water pilot projects, demonstration projects, and other information become available. This level of acceptance tends to increase over time.

#### **Identifying/Communicating with Potential Stakeholders and Partners**

### Getting Help

After you have engaged your elected officials and community and understand something about the likely project issues and constraints, it is time for you to get some help. Institutional partnerships and the support of your regulatory agencies and other stakeholder groups is another key element to creating a successful project. Recycled water projects tend to be capital intensive, particularly for the distribution system components. At first glance, the projects may appear much more expensive on an AF/yr basis than other water supply options. Finding partners that can receive real benefits from your project in exchange for funding assistance and political support is important and worth a thorough investigation.

#### **INSTITUTIONAL PARTNERSHIPS**

### Agencies

In California, most successful recycled water projects include a wastewater agency and a water agency in some sort of a wholesaler-retailer relationship. The wastewater agency typically knows the most about wastewater treatment and permit compliance and has an established reputation with water quality permitting agencies—such as the Regional Water Quality Control Board in California or the Department of Environmental Quality in Oregon. The water agency knows about water quality and public health issues, how to manage water distribution systems, and how to price water and bill their existing customers. If this two-way partnership can be linked with a direct environmental benefit and an environmental partner, the potential of completing a successful project is significantly improved.



<b>Water Reuse</b>	<p>It is possible for a wastewater agency to do a project on its own (there are several large programs like this in California). Frequently, however, such an approach can be particularly challenging. Project critics may view it as a “wastewater disposal” project and feel that the wastewater agency is doing whatever it can to solve its wastewater problem at the lowest possible cost and in a way that is less than totally protective of public health. This public perception and the project’s potential to create competition with the local water retailer for water revenues may derail support for your project.</p>
<b>Taking Time</b>	<p>Establishing interagency cooperation and eventual agreement takes time, and like public outreach, rarely occurs on a pre-ordained schedule. When investigating opportunities, it’s wise to look at local, regional, state and federal levels. Often regional projects can capture political attention and create good funding opportunities through the state and federal matching programs.</p>
<b>Model Program</b>	<p><b>THE GREAT EXAMPLE: EXCHANGING RECYCLED WATER FOR GROUNDWATER RIGHTS</b></p> <p>A good example of interagency cooperation is a recent California project created by the City of Oxnard called the <b>Groundwater Enhancement and Treatment (GREAT) Program</b>. The project participants include: the City of Oxnard’s Water and Wastewater Divisions; the Port Hueneme Water Agency; the United Water Conservation District; the Calleguas Municipal Water District; and the Fox Canyon Groundwater Management Agency. The GREAT Program solves a number of regional water issues and leverages existing infrastructure to reduce overall costs to the Program’s participants.</p>
<b>Exchanging Rights</b>	<p>The Oxnard Plain has long produced a range of high value agricultural crops. Over time, the urban development in this area has grown significantly and become reliant on imported water supplies that have become increasingly expensive and unreliable. Growers in the area have also found that their groundwater is becoming saltier due to seawater intrusion.</p> <p>The GREAT Program proposes to supply agricultural growers in the Oxnard Plain with recycled water in exchange for their groundwater rights. The groundwater rights would be exercised at extraction wells that do not contribute to overdrafting or subsequent seawater intrusion into the groundwater basin. Extracted groundwater will be desalted to match existing potable water quality and used for potable purposes, thereby reducing dependency on more costly imported water and improving supply reliability. Treated water can be banked in the groundwater basin to help during future droughts and the brine generated by the brackish water desalting process will be used to help restore and enhance local tidal wetlands (a goal of the California Coastal Conservancy). This win-win program enjoys widespread local and regional support and was able to attract a number of funding sources at federal, state, and local levels.</p> <p><b>REGULATORY PARTNERSHIPS</b></p>
<b>Agencies</b>	<p>Most state governments foster a supportive attitude towards increased recycled water use because they understand the long-term sustainability benefits to water and wastewater management which these projects can provide. It is important to recruit the support of the regulators and include them in the planning steps. In addition, it is important to closely observe and comment on the regulations developing in your area. Incorporating certain technology pilot or demonstration projects into the early phases of your program may offer a good opportunity to collaborate with your regulators.</p>
<b>Academia</b>	<p><b>OTHER STAKEHOLDER PARTNERSHIPS: UNIVERSITIES &amp; PUBLIC INTEREST GROUPS</b></p> <p>It is often beneficial to involve your local university in certain aspects of your project, particularly if they have research facilities and a good reputation in the community. Universities are usually seen as being “independent” and can add credibility to your overall image.</p>
<b>Public Interest Groups</b>	<p>In California, water recycling has enjoyed the support of major environmental organizations—including the Sierra Club, the Audubon Society, and the California Coastal Conservancy—because aspects of recycling projects are seen to provide direct benefits to the environment. The Sierra Club has an interest in sustainability and reducing the diversion of surface waters from streams. The National Audubon Society has an interest in developing wetland environments where migratory birds can rest and feed on their seasonal migrations across the continent. The California Coastal Conservancy wants to see wetland and marsh areas restored and preserved. Recycled water projects, if properly planned, can offer much more than just a water supply or wastewater management solution.</p>
<b>First Impressions</b>	<p><b>RECYCLED WATER CUSTOMERS: MARKET ASSESSMENT &amp; VERIFICATION</b></p> <p>A recycled water market assessment collects information from potential customers about water quality, quantity and level-of-service issues. Well-conceived project alternatives are dependent on the quality of this information. The initial market assessment is also where potential customers often get their “first impression” of the sponsoring agency and the proposed project—so a cautious, well thought out approach is very important. This first contact needs to exhibit an understanding of core customer interests and be sensitive to their concerns.</p> <p>Potential customers often represent an array of varied interests. Consider the different types of conversations that might take place when talking about recycled water with:</p>

## Water Reuse

### Approach Examples

- A GOLF COURSE SUPERINTENDENT about salt stress on their new USGA greens that are cut very short and receive significant play. The quality of play on a golf course is highly dependent on the grass quality, especially on the greens. When greens are mowed short each day and receive heavy play, the can become stressed, particularly during the hot summer months. Recycled water typically contains higher TDS (salt) concentrations than surface or well water, and this can exacerbate stress on the greens and cause parts of the green to become brown. This can be easily managed using a number of methods, and it is important to let your golf course customer know you understand how important their greens are and that they can use recycled water and manage it, while maintaining the quality of play.
- A FARMER about the public's perception and marketability of his edible food crops or water price impact on profitability. Agriculture is highly competitive and profitability is dependent on the marketability of their crop and the cost to produce crops. It is important that you be able to demonstrate where recycled water is currently being used for irrigating edible food crops, provide information on the many studies that have been done on plant and public health issues, and get a farmer into a one-on-one discussion with another farmer that is actually doing it. Farmers are not interested in the opinions of an engineer or public works staff, they know agriculture and trust people that are in agriculture the most.
- A SCHOOL PRINCIPAL about perceived health risks to children playing on grass. Recycled water has been used in schools throughout the US without any problems for well over a decade. Regardless, a principal, teachers and parents will ask questions regarding the protection of a child's health, and it is important you have accurate information to provide them. Have a local pediatrician review the water quality of the recycled water and put it in terms of other common health risks to children. A pediatrician in California recently explained that recycled water has less health risk than other substances often found on children's hands or in the dirt and grass on which children regularly play.
- AN ENVIRONMENTALIST about the potential impacts of minute quantities of endocrine disrupting compounds on spawning salmon and steelhead. This is a difficult topic to discuss, because research on this topic is ongoing and there is more work needed to provide a scientific basis for assessing potential impacts. It is important to take an open position and listen to a number of potentially different opinions on the subject. Don't rely on a statement such as "there is no proof that endocrine disrupting compounds are causing harm in the ecosystem." Try to partner with environmental groups to better understand the risk and work together to remove or reduce the risk over time.
- A FACILITIES MANAGER about the capital and operational costs and maintenance requirements of using recycled water in cooling towers in comparison to other water sources. Industry is very conscious about return on investment (ROI) in capital facilities and consistency of water quality. The ROI period needs to be short and assured. Be able to show how and where costs can be reduced or avoided to show a return in three-to-five years. If you can't demonstrate this, there will not be much interest in using recycled water. Make sure the customer understands how consistent the water quality will be, and the added benefit to them of having a drought proof supply, particularly if their manufacturing process is water dependent and linked to a surface water source.

### Concerns & Needs

Market assessment must be focused on the customers and their concerns and needs. Identify concerns and issues early and provide a meaningful and prompt response. Be prepared to have people on your market assessment team that speak the language of the customer and can anticipate potential topics of discussion. There is no substitute for one-on-one communications with potential customers. Be prepared to extract all of the information you can in one or two meetings, so you do not burden them with too many contacts. Make sure you provide them with a summary of the market assessment so they can see and understand how they might fit into an overall project and who else might be served. It is important that environmental justice issues be avoided and that all potential users be investigated to the same level. Some projects in California have been criticized because it appeared that the recycled water was being served only to low income areas or another disadvantaged group within the community.

### Environmental Justice

### GIS

It is said that "seeing is believing." This is why using a Geographical Information System (GIS) in conjunction with a database is a good platform for performing market assessment activities and visually communicating the results to your elected officials, stakeholders and the public. The types of use, relative size of demands and other features can be demonstrated using high quality mapping and then be subsequently used to support: hydraulic analyses; alternatives screening and cost evaluations; capital improvement planning and programming; and the regulatory permitting phases of recycled water projects. The GIS system and database is frequently linked with other software products to create a tool that not only reduces the overall effort required to do the work, but improves work quality and appearance as well. This type of information management can also be used to quickly evaluate permutations of alternatives or make last minute changes to planning deliverables. If your work has a high quality appearance, people are more inclined to believe the project is also of high quality.

## Water Reuse

### Identifying Benefits

### Life-Cycle Economic Evaluation

### Common Benefits

#### ECONOMIC EVALUATION OF WATER RECYCLING PROJECTS

Water recycling projects tend to be capital intensive and appear expensive compared to other alternatives at first glance. Water recycling can offer many types of benefits, but the full-range of benefits is not well recognized. This is because: some benefits cross political or agency jurisdictional boundaries; some beneficiaries may not be fully engaged in the project deliberations; and other benefits may not be realized until many years in the future.

It is important to develop a technically sound, objective basis for identifying, quantifying and determining a dollar amount for the life-cycle costs and benefits of various project alternatives.

Key components of successful evaluations include: adhering to accepted principals of economics for professional integrity and rigor; identifying where and how to assess benefits that cannot be readily quantified or valued; and embracing and integrating stakeholder perceptions and value systems. Each project and local setting is unique, and evaluation should reflect that uniqueness.

Economic evaluation can help identify institutional synergies and self-interests, particularly with the water agency partners so crucial to making a recycled water project successful.

#### KEY BENEFITS TO CONSIDER INCLUDE:

- Avoided or postponed costs of developing or expanding existing potable water supplies
- Water rights acquisition, conveyance and treatment facilities costs
- Improved water quality of potable source waters
- Higher instream flows and related downstream benefits
- Groundwater quality and quantity benefits
- Increased water supply reliability for all water users
- Recycled water is drought proof
- Increased availability of surface waters for highest and best use
- Improved water quality in wastewater-receiving waterways
- Avoided wastewater conveyance and treatment costs if a satellite system is included
- Benefits to environmentally concerned customers, such as endangered species habitat which may be created by a new or enhanced wetland or marsh.

#### Summary

If you want to start a recycled water program, allow enough time.

#### SET ASIDE AT LEAST 18 MONTHS TO:

- Perform your Public Information and Outreach Program and help get your elected officials to lead the process and become engaged in community discussions
- Identify your institutional partnerships and the principles and benefits that might be derived from a properly planned project
- Find other stakeholder partners that may derive environmental or other benefits from the project, and monetize those values
- Complete a thorough market assessment that identifies the water quality, quantity, level of service and water pricing that a project would need to provide to meet with the satisfaction of the customers
- Develop an economic framework within which project alternatives can be compared and evaluated on a life-cycle basis, including not only capital and operating costs, but avoided costs and the costs associated with other monetized benefits

Having achieved these elements, you now get to the engineering and science part of the project. Project alternatives can be evaluated, a Master Plan created, and a capital improvement program identified. This process can require between two and three years of planning for conventional uses, and more time for advanced uses such as indirect potable reuse. Trying to get a water recycling program underway in much less time will likely result in spending even more time and money undoing procedural mistakes.

#### FOR ADDITIONAL INFORMATION, CONTACT:

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RE: GROUNDWATER ENHANCEMENT AND TREATMENT (GREAT) PROGRAM  
 KEN ORTEGA (Water Superintendent, City of Oxnard) 805/ 385-8139,  
 JOHN MORENO (Water Production Supervisor, City of Oxnard) 805/ 385-8191  
 website: [www.oxnardwater.org/projects/great/desalter.asp](http://www.oxnardwater.org/projects/great/desalter.asp)

RE: WATER REUSE ASSOCIATION  
 WADE MILLER, Executive Director, 703/ 684-2409  
 website: [www.watereuse.org](http://www.watereuse.org)

## Missouri River

### ESA Impacts

### Litigation

### FCA

### Master Manual

### Species At Issue

### FWS BiOps

### RPAs

### Flow Mitigation

### NAS Report

## RIVER MANAGEMENT & THE ESA

AMERICAN RIVERS' MISSOURI RIVER LITIGATION

by David J. Hayes, Janice M. Schneider and Cassandra Sturkie of Latham & Watkins LLP

The federal Endangered Species Act (ESA) is having a significant impact on the management of many river systems in the United States, particularly on large river systems managed by federal agencies such as the United States Army Corps of Engineers (Corps) and the Bureau of Reclamation (BOR). ESA-based flow requirements have had significant impacts on the operation of the Rio Grande, the Colorado, and the Columbia rivers—the west's three most important river systems. Likewise, ESA issues have triggered major water management changes in California's Bay Delta and Florida's Everglades.

One major river system, however, is bucking the trend. Despite strong evidence that flow management changes are needed on the Missouri River in order to protect three ESA-listed endangered or threatened species, the Corps is fighting to keep a status quo that serves navigation first and foremost, with species-related issues relegated to a subordinate role. The result is a remarkable litigation battle that is a throw-back to a time when federal agencies and other interests routinely resisted implementing more modern flow management regimes that helped species, while also typically helping other important interests along the way. The outcome of the battle may set the tone for how future ESA implementation controversies will be resolved, and whether agency recalcitrance at compliance with the ESA will or will not be tolerated by the courts.

### Missouri River Operations & Threatened/Endangered Species

The Missouri River flows 2,340 miles from its head-waters near Three Forks, Montana, to its confluence with the Mississippi River north of St. Louis, Missouri. The River no longer flows naturally. It is regulated by the largest dam and reservoir system in North America—the Missouri River Main Stem System of Dams and Reservoirs (Main Stem System)—which is operated by the Corps. The system of six dams and reservoirs has a storage capacity of 74 million-acre feet and a surface area exceeding one million acres. Under the Flood Control Act of 1944 (FCA), the river is operated for flood control, navigation, water supply, power generation, irrigation, recreation, and fish and wildlife. Additionally, under the authority of the Missouri River Bank Stabilization and Navigation Project, the lower one third of the river (close to 800 miles) was channelized for navigation below Gavins Point dam from Sioux City, Iowa, to near St. Louis, Missouri. The fast-moving channel is approximately nine feet deep and significantly narrower than the natural River.

The Corps' Missouri River operations are governed by a Master Manual that, until quite recently, the Corps had not amended for nearly 25 years. Under this manual, the Corps had issued annual operating plans (AOPs) each year that kept the water levels artificially high in the summer to promote barge navigation on the River.

The Missouri River is also home to three threatened and endangered species of wildlife—the endangered least tern, the endangered pallid sturgeon, and the threatened piping plover—that are imperiled by the Corps' river operations (and at issue in the litigation).

The US Fish and Wildlife Service (FWS) issued a series of Biological Opinions (BiOps) in late 1990, in 1994 (as a draft) and then again in 2000. The BiOps stated that the Corps' River operations result in take of the endangered least tern and threatened piping plover (through flooding of nests, eggs and chicks), the take of pallid sturgeon (by eliminating shallow water habitat), and were likely to jeopardize the continued existence of these protected species.

Under these BiOps, the Corps was obligated to schedule the River flows to avoid flooding the nests of the ESA-protected least terns and piping plovers and to schedule flows that mimic as much as possible the natural flows of the River in order to avoid jeopardizing the three ESA-protected species. In the 2000 BiOp, the FWS specifically identified Reasonable and Prudent Alternatives (RPAs) that, among other things, required flow mitigation measures "no later than 2003" at Gavins Point and Fort Peck Dams to achieve "higher spring and declining or lower summer flows than now exist" for the purpose of "restor[ing] and maintain[ing] sandbars and shallow water areas that serve as nesting and foraging habitat for least terns and piping plover, as well as nursery habitat for pallid sturgeon and other native fishes." While the 2000 BiOp provides that the spring flow enhancement from Gavins Point Dam should, on average, occur only once every three years absent drought conditions, it makes clear that summer flows must be decreased annually to 21,000 kcfs (thousand cubic feet per second) from July 15 to August 15, beginning in water year 2003.

The FWS's conclusions were confirmed in a January 2002 report by the National Academy of Sciences (NAS) entitled "*The Missouri River Ecosystem: Exploring the Prospects for Recovery*." The report found that "the loss of natural flood pulses [and] the loss of natural low flows," is "jeopardiz[ing]



<b>Missouri River</b>	<p>... [the Missouri River's] fundamental natural processes." In discussing environmental consequences of the Corps' navigation-driven flow management regime, NAS concluded: "Degradation of the Missouri River ecosystem will continue unless some portion of the hydrologic and geomorphic processes that sustained the pre-regulation Missouri River and floodplain ecosystem are restored — including flow pulses that emulate the natural hydrograph . . . . <i>The ecosystem . . . faces the prospect of irreversible extinction of species</i>" (emphasis added). NAS also found that the changes in flow and habitat restoration it recommended may be justified on economic grounds alone. [To obtain the NAS report, see website: <a href="http://books.nap.edu/catalog/10277.html">http://books.nap.edu/catalog/10277.html</a>.] The Corps also released a new draft Environmental Impact Statement (EIS) for the Master Manual in August 2001. This draft EIS described (among other alternatives) the mitigation measures—including the flow changes—required to comply with the 2000 BiOp.</p>
<b>Flow Pulses</b>	
<b>Drought</b>	
<b>States Act</b>	
<b>High-Flow Decision</b>	<p><b>Flow Controversy</b></p> <p>As the 2003 low flow requirement ticked ever closer, drought gripped the Missouri River basin. In 2002, as upper basin reservoirs dipped lower and lower, upper basin states—driven in large part by the desire for drought conservation measures and to protect recreational reservoir fisheries—took action. In mid-May 2002, South Dakota, North Dakota and Montana sought relief from the federal District Courts in their states and were granted injunctions requiring the Corps to maintain reservoir levels in those respective states. Nebraska then obtained an injunction from the Nebraska District Court requiring the Corps to maintain navigation flow levels and to release water from the reservoirs. Ultimately, however, downstream flows were reduced due to lack of water in the system, and the navigation season was shortened during the summer resulting in what is known as a "split season" on the River. These injunctions went up on appeal to the United States Court of Appeals for the Eighth Circuit (see below).</p> <p>In September 2002, the Corps announced that it was delaying the release of the final EIS for the Master Manual indefinitely and that a final Record of Decision conforming the Corps' operational guidelines with ESA requirements would not be completed before the 2003 water year. The Corps also announced its intention to operate the River at a high level to support navigation from April 1 through the end of November, despite the 2000 BiOp's explicit requirement for stepped-down summer flows to avoid jeopardy to and unauthorized take of endangered and threatened species. The Corps then issued both its 2003 Annual Operating Plan outlining release scenarios to meet navigation flows, and Biological Assessments to support implementation of its plan of action.</p>
<b>FWS Support</b>	<p>In support of the Corps' decision, FWS issued a Supplemental Biological Opinion on April 21, 2003, covering River operations from May 1 through August 15, 2003. The 2003 Supplemental BiOp did not alter the 2000 BiOp finding that Missouri River operations still jeopardize the continued existence of these imperiled species, nor did it permanently amend the 2000 BiOp flow requirements. Rather, it purported to "allow" yet another deviation from the flow requirements of the underlying 2000 BiOp for only the low flow summer period in 2003 on the basis that the impacts to designated critical habitat and threatened and endangered species would be "short-term" and of "limited duration."</p>
<b>ESA-Suit</b>	<p><b>2003 ESA Litigation</b></p>
<b>Economic Benefits</b>	<p>Once the Corps announced its intent to disregard the requirements of the 2000 BiOp, environmental plaintiffs American Rivers, Environmental Defense, the Izaak Walton League, the National Wildlife Federation (NWF), and certain basin state affiliates of NWF filed suit in federal district court in Washington D.C. (DC) in February 2003. The suit sought a court order to require the Corps to reduce summer flows in the Missouri River to address the habitat needs of the endangered species on the river in compliance with the 2000 BiOp. The reduced flows would also produce tens of millions of dollars of economic benefits (primarily recreational benefits) for the Basin based on the Corps own economic analysis in their draft EIS. Despite the broad consensus that has developed around modest flow changes for the Missouri River, including significant scientific support by the NAS, the Corps opposed making these changes. Once the suit was filed, the various States and other interests intervened. American Rivers filed its motion for preliminary injunction in late May 2003 after the supplemental BiOp was issued.</p>
<b>8th Circuit</b>	<p>Shortly thereafter, on June 4, 2003, the Eighth Circuit ruled on the 2002 water year injunctions holding that Corps decisions made under the Flood Control Act were judicially reviewable and that the Master Manual was a binding rule on the Corps of Engineers. The Eighth Circuit also held that the South Dakota and North Dakota injunctions were improperly issued because the Flood Control Act does not require equal treatment of conflicting interests on the River, and upheld the Nebraska injunction favoring navigation. <i>South Dakota v. Ubbelohde</i>, 330 F.3d 1014 (8th Cir. 2003).</p>
<b>Six Courts in 30 Days</b>	<p>The parties to the ESA litigation then battled it out in six different courts over 30 days. The Corps and the States of Nebraska and Missouri argued that <i>Ubbelohde</i> required compliance with navigation flows set forth in the Master Manual and, as a result, removed the Corps' discretion to implement the ESA. On July 12, recognizing that the <i>Ubbelohde</i> decision did not address ESA issues, DC District Court</p>



## Missouri River

### Contempt Finding

### Case Consolidation

### Lowered Flows

### Round 2?

### FWS BiOp Amendment

Judge Gladys Kessler granted American Rivers' request for a preliminary injunction. Judge Kessler found that: 1) both the FCA and the Master Manual afforded the Corps sufficient discretion in its management of the Missouri River to comply with the ESA; and 2) that the Supplemental BiOp was unjustified. The Court required the Corps to implement low summer flows, beginning on July 15. See *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D. D.C. 2003) (enjoining the Corps "from taking any action that would be inconsistent with the provisions relating to summer water flow contained in the 2000 Biological Opinion."). The Corps, however, announced in a press release that it would not comply with Judge Kessler's injunction because it believed that it was subject to a conflicting injunction issued by the District Court of Nebraska in 2002. While the Corps filed an emergency request for a stay before the DC Circuit Court of Appeals, American Rivers opposed this DC Circuit Court action and filed a request before Judge Kessler to hold the Corps in contempt for not implementing the Court's injunction. Days later the DC Circuit Court ruled in favor of American Rivers, denying the Corps' request for a stay of the injunction, and opening the door for a contempt hearing before Judge Kessler.

Seeking to improve its position, the day before the DC District Court contempt hearing the Corps petitioned the District Court of Nebraska to amend the 2002 injunction to conform with the DC District Court's injunction (even though there was no conflict between the injunctions). The Corps' attempt did not succeed, and on July 22, Judge Kessler found the Corps in conditional contempt for disobeying her injunction. She ruled that if the Corps did not begin lowering Missouri River water levels by July 25, she would fine the Corps \$500,000 per day. See *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62 (D.D.C. 2003). That same day the District Court in Nebraska refused to alter its injunction and invited an expedited appeal to the Eighth Circuit, which American Rivers filed on July 23.

Due to the large number of cases pending in various federal district courts on Missouri River operations, the State of Nebraska had previously sought to have the cases consolidated by the Multi-District Litigation (MDL) Panel, preferably in Nebraska. The MDL panel heard oral argument on July 24 and, recognizing the pendency of the contempt proceeding, transferred all of the Missouri River cases on the same day to the District Court of Minnesota (Senior Judge Paul Magnuson). Later that day, the Minnesota District Court stayed all proceedings for 14 days to allow it to come up to speed on the case, and the very next day, on July 25, the Eighth Circuit agreed with American Rivers, finding that the Nebraska District Court injunction is not in effect because the Court's mandate in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) had not yet issued.

American Rivers then petitioned the Minnesota District Court to lift its stay of the DC District Court injunction because of the time-critical nature of the requested relief, and the Eighth Circuit's confirmation that there is no competing injunction in effect. The Corps filed a cross-claim, requesting the Minnesota District Court to modify the DC District Court injunction. On August 4, the Minnesota District Court ruled in favor of American Rivers, denying the Corps' attempt to overturn the DC District Court injunction. The Corps was required to reduce flows on the Missouri River, but again refused to do so until August 12, and only then for a three day period. American Rivers sought contempt once again against the Corps from the Minnesota District Court for its continued delayed compliance with the injunction. The Minnesota District Court denied the motion without prejudice, but warned the Corps that the low flow injunction is the law of the case.

At the 11th hour, the Corps finally lowered the flows on the Missouri. The low flow preliminary injunction, which is not limited in duration, currently remains in place.

#### 2004 ESA Litigation

Undeterred from last year's experience, the Corps continues to push its preferred "business as usual" approach and it is likely that we will see a repeat of last year's litigation. Less than two months after being ordered to comply with the governing preliminary injunction on the Missouri River, the Corps announced its intent not to comply with the 2000 BiOp for the 2004 water year. Despite Judge Kessler's conclusion that the FWS and the Corps could not establish a legally defensible basis for departing from the flow modifications included in the 2000 BiOp, the Corps issued a biological assessment in November 2003 that ignored her findings, concluding that there would be no jeopardy to the species even if flows remained unaltered, based upon a hoped-for infusion of \$42 million in federal funding for Missouri River ecosystem restoration (which has yet to materialize).

The FWS responded to the Corps' biological assessment by replacing the scientific team that had previously handled Missouri River issues and by issuing yet another amendment to the 2000 BiOp in December 2003. The December 2003 Amendment reaffirmed the findings in the 2000 BiOp that Corps dam operations jeopardize the listed species and that restoring the River's hydrograph is needed to avoid jeopardy. Despite reaffirming the extensive scientific support for the 2000 BiOp, however, the December 2003 Amendment adopted a new RPA that contains major changes. First, the new RPA postpones any

<div data-bbox="152 184 306 264"><b>Missouri River</b></div> <div data-bbox="162 306 297 411"><b>Habitat Mitigation Option</b></div> <div data-bbox="131 552 331 585"><b>NAS Rejection</b></div> <div data-bbox="134 1008 324 1108"><b>Water Control Shortcomings (PA)</b></div> <div data-bbox="134 1497 324 1560"><b>Minor Modifications</b></div> <div data-bbox="142 1602 316 1665"><b>New Manual Language</b></div> <div data-bbox="164 1774 295 1808"><b>2004 AOP</b></div>	<p>implementation of a spring rise for three years. Second, it foregoes any low flow requirement for the listed birds based on population numbers resulting from high spring flood flows in 1997 (treated as “new information”). Third, with respect to the pallid sturgeon, it requires a summer low flow of 25,000 kcfs, rather than 21,000 kcfs.</p> <p>Of particular significance—and contrary to the reasoning that physical habitat restoration measures and flow changes are <i>both</i> necessary—the December 2003 Amendment allows the Corps to avoid (in FWS’s parlance, “modify”) the summer low flow altogether for the pallid sturgeon if the Corps mechanically constructs 1,200 acres of shallow water habitat for the pallid sturgeon in the river reach between Sioux City, Iowa, and Omaha, Nebraska (after further consultation with the FWS). Since the December 2003 Amendment was published, the two agencies have scrambled to identify and/or develop 1,200 acres of shallow water habitat by July 1, 2004, so that the Corps can argue that summer flows can remain high throughout the period when the piping plover and least tern are attempting to rear their young. This approach had been previously expressly rejected by the National Academy of Sciences. [See NAS, “<i>The Missouri River Ecosystem</i>,” at 115 (“[s]imply constructing man-made habitat to satisfy the life-requirements of complex organisms, without changes in fundamental physical processes, is not likely to yield substantial ecological improvements.”).]</p> <p>On January 30, 2004, a month before the date that the Corps had committed to issuing the revised Master Manual and corresponding final 2004 AOP per court order, the Corps moved to amend the Court’s scheduling order to obtain an indefinite delay in issuing the revised Master Manual. On February 26, 2004, Judge Magnuson denied the Corps’ request and made clear that he would not entertain the Corps’ “illusory assurances to revise the Master Manual,” which the Corps had already made to various parties and courts over the last 15 years. Because the Corps already “has defied its governmental obligations by delaying the issuance of the Master Manual,” the Court compelled the Corps to issue the revised Master Manual and corresponding final 2004 AOP by March 19, 2004.</p> <p>The Corps issued the Final Environmental Impact Statement (FEIS) on the revised Master Manual last March (see Water Briefs, TWR #1); the 2004 Annual Operating Plan and Master Manual EIS are available at: <a href="http://www.nwd-mr.usace.army.mil/rcc/reports/MManual/MManual.html">www.nwd-mr.usace.army.mil/rcc/reports/MManual/MManual.html</a>.</p> <p>The preferred alternative (PA) water control plan adopted in the FEIS, however, does not incorporate any of the flow modifications required by the FWS in the 2000 BiOp or even in the new FWS December 2003 Amendment. It will, as a consequence, continue to jeopardize the existence of the pallid sturgeon, least tern, and piping plover. The PA instead adopts the plan of habitat creation through artificial means that it asserts will protect the ESA-protected species in the absence of any flow modifications. The benefits to pallid sturgeon and other species of the Corps’ proposed habitat work are unproven, however, and—by the Corps’ own admission—extremely expensive and speculative. The FEIS contains no new scientific evidence to justify implementation of the PA without flow modifications. In fact, the FEIS shows that certain modeled alternatives that incorporate the FWS’s flow change requirements and restore more of the River’s natural hydrograph perform better than the PA both environmentally and economically (e.g. alternative GP2021).</p> <p>Interior Department comments on the FEIS and PA filed with the Corps on March 16, 2004, raised concerns with the Corps’ documents recognizing that “the current PA in the FEIS is not consistent with the 2000 [BiOp] and the [December 2003 Amendment], does not include the flow provisions of the RPA elements, and does not achieve the desired goal of avoiding jeopardy to listed species.”</p> <p>Nonetheless, Brigadier General Grisoli of the Corps signed a Record of Decision (ROD) on March 19, 2004, that approved the PA with only minor modifications. The PA was also incorporated in the revised Master Manual and final 2004 AOP, both of which were issued on March 19, 2004, in accordance with this Court’s order. None of these Missouri River management documents contain any mandatory short- or long-term flow modification requirements, even though the revised Master Manual explicitly states that the Corps must comply with the ESA and no longer incorporates mandatory-type language regarding the Corps’ decision-making on the Missouri River (which should put to rest the State of Nebraska’s contention that the Corps has no discretion but to follow the dictates of the Master Manual, even if they are in conflict with the ESA).</p> <p>In anticipation of the upcoming consultation on the newly developed shallow water habitat, the Corps 2004 AOP actually provides for higher flows than the plan for the 2003 AOP previously rejected by Judge Kessler. It includes no requirement for a spring pulse flow. The five-year plan for Missouri River operations set forth in the 2004 AOP—modeled by the Corps “as guides for longer range planning”—predicts a static, navigation-based hydrograph for the River flows that is the opposite of the more natural hydrograph required by the 2000 BiOp and endorsed by the National Academy of Sciences. The Corps at the same time concludes that navigation would continue to exist and that project purposes would</p>
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## Missouri River

### Current Status

### Multiple Issues

not be frustrated even if a split season were imposed. See Federal Defendants' *Memorandum in Support of its Motion for Summary Judgment on Flood Control Act and NEPA* issues at 17 (citing EIS 7-191).

#### UPCOMING DECISIONS

The Minnesota District Court heard oral argument on Missouri River issues on May 21, 2004. Currently pending before the court are 16 dispositive motions and 12 non-dispositive motions, including American Rivers' ESA challenge and a host of other issues (including FCA, NEPA, water quality claims, and Tribal issues). The Corps represented to the Court that it has completed identification and/or development of 600 of the 1,200 acres necessary to purportedly avoid low summer flows, and that it expects to complete the remaining 600 acres by July 1. The Corps expected to outline how it will do this by June 7 in an anticipated request for consultation with the FWS allowing the Corps to avoid low flows altogether. The results of this consultation are expected by June 17 and notwithstanding the Minnesota District Court's attempt to avoid emergency motions during the low flow period through scheduling orders, the record of the consultation will be provided to the parties for another potential round of injunction requests on or about June 18.

#### CONCLUSION

The Endangered Species Act can be powerful tool to shape federal agency decision making. On the Missouri, however, the Corps appears intent on maintaining the status quo. The Corps has defied a federal district court order, and persuaded the FWS for two years running to try to provide it with accommodating science and legal cover. Corps actions are frustrating orderly resolution of this issue in 2004 in order to prevent operational changes on the Missouri River.

The diverse issues and array of interests on the Missouri are extraordinarily complex. Pressure on the Corps is no doubt great. However, the Corps' apparent inability to acknowledge the compelling scientific, economic and legal arguments for making flow modifications on the River is disturbing.

The ESA—like all legal requirements—depends upon a shared respect for the law, and for the courts. The Corps is not demonstrating that respect. That is why they are in court again, and that is why there is a good chance that the courts will once again need to step in to correct agency behavior.

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**David J. Hayes** is a partner and Global Chair of the Environment, Land and Resources Department of the law firm of Latham & Watkins LLP. He previously held the position of Deputy Secretary of the Interior during the Clinton Administration. **Janice M. Schneider** is a senior associate with the firm and she previously worked for the federal government in the Solicitor's Office of the US Department of the Interior and in the US Department of Justice. **Cassandra Sturkie** is an associate with the firm.

Mr. Hayes, Ms. Schneider and Ms. Sturkie represent American Rivers, et al. in the litigation on the Missouri River, along with co-counsel on that effort.

## PESTICIDE INJUNCTION

DISPUTES CONTINUE OVER PESTICIDE USE  
by Laurie Beale, Stoel Rives LLP (Seattle)

On January 22, 2004, a Seattle federal judge issued a landmark order restricting the use of 38 pesticide active ingredients in Washington, Oregon, and California. The remarkably broad injunction imposes buffer zones along salmon-bearing streams and other restrictions that agricultural and industry groups say will cause severe economic hardship. The restrictions are to remain in place until the US Environmental Protection Agency (EPA) completes consultations with the National Marine Fisheries Service over the chemicals' effects on threatened and endangered salmon species. The court's order, effective as of February 5, 2004, culminated years of litigation among environmental groups, EPA, and industry representatives. However, disputes over implementation of the order continue. EPA and the industry groups have appealed, and the industry groups recently sought an emergency stay from the Ninth Circuit Court of Appeals. A ruling from the Ninth Circuit on the emergency motion is likely this summer, and a decision on the merits of the injunction will likely follow sometime this fall. (continued)

### Stream Buffer Zones



**Pesticides****ESA Violation****Analysis  
Required****Information  
Website****"No-Spray"  
Zones****Urban Uses****Background**

The litigation began as a citizen suit filed in 2001 by environmental and fishing groups concerned that pesticide runoff was harming salmon species protected under the federal Endangered Species Act (ESA). The plaintiffs argued that EPA, which regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), was required to consult with the National Marine Fisheries Service (NMFS or NOAA Fisheries) prior to authorizing pesticide uses, notwithstanding FIFRA separately requires EPA to consider environmental impacts. Seattle federal district court judge John C. Coughenour agreed with the plaintiffs and ordered EPA to consult over the potential effects of 54 pesticide active ingredients on 26 salmon and steelhead runs. See *Washington Toxics Coalition v. EPA* (W.D. Wash., No. C01-0132C, Order dated July 2, 2002).

Although the judge's ruling was based on EPA's "procedural" violation of the ESA rather than a finding of actual harm to salmon, the judge determined that interim restrictions were necessary to ensure that fish are not adversely affected pending completion of the consultations. Last July, the judge heard argument from the parties as to the appropriate scope and form of an injunction. The judge issued his decision on January 22, 2004, defining the extent of the new restrictions, which became effective February 5, 2004. The restrictions are chemical-specific and are automatically lifted when EPA completes the consultation process for a particular chemical.

**The Consultation Process**

Pursuant to the court's orders, EPA, with NMFS' assistance, is required to analyze the effects of the 54 pesticides on 26 separate "Evolutionarily Significant Units" (ESUs) of salmon and steelhead. EPA has already completed a number of these consultations, which entail a multi-step process. EPA must first determine whether a particular pesticide use is likely to affect an ESU. If EPA concludes that the use will have "no effect," it is not required to consult with NMFS, and the use is automatically excluded from the injunction. If EPA determines that a pesticide ingredient may affect, but is "not likely to adversely affect" an ESU, that use is also excluded from the injunction. However, EPA must seek NMFS's concurrence in its "not likely to adversely affect," or NLAA, determinations. If NMFS disagrees with an NLAA decision, that pesticide becomes again subject to the injunction until NMFS completes a formal consultation over the pesticide's impacts. Formal consultations with NMFS are also required for any chemicals that EPA determines may adversely affect an ESU. During a formal consultation, NMFS conducts a biological analysis of the chemical's effects and considers whether restrictions are necessary to protect salmon. Depending on the results of this analysis, a consultation could result in permanent use restrictions, such as buffers, for a particular product.

EPA began its evaluations in 2002 and has made several hundred "no effect" and "NLAA" determinations for various ingredients and ESUs to date. Presently, approximately 36 chemicals are subject to restriction, although the number changes as consultations proceed. To assist users, registrants, and others, EPA has created an informational website [<http://epa.gov/espp>]. The website provides detail regarding the terms of the court's order and the progress of the consultations. It also provides an interactive map which allows users to obtain up-to-date information regarding restrictions in effect for particular products at particular locations.

**Buffer Zones**

The primary restriction imposed by the injunction is a ban on pesticide use near all "salmon supporting waters" in Washington, Oregon, and California. These "buffers," or "no-spray" zones are generally 20 yards for ground applications and 100 yards for aerial applications, measured from the "normal high water mark." Smaller or larger buffers apply to some chemicals on a case-by-case basis. Certain general exemptions apply, for example, for some public health uses, indoor, household, and pet uses (e.g., flea and tick collars), spot treatments, noxious weed control programs, and the like. Users should refer to EPA's website for a listing of specific exceptions and exemptions.

**Point of Sale Notifications**

In addition to buffers, the court imposed a notification requirement aimed at informing urban consumers that some home and garden products may pose a risk to salmon. Such products may reach salmon-bearing waters through urban runoff. In compliance with this requirement, EPA has developed a point-of-sale notification, being distributed to sales outlets. It advises customers that certain products may present a "Salmon Hazard." Retailers are being requested to display the notice where household and garden products containing seven pesticides subject to the injunction are sold.

**Points of Contention**

While implementation of the injunction order seems well underway, the legal skirmishes continue. On March 19, 2004, EPA filed a Notice with the district court detailing the steps it has taken to comply with the court's order. Simultaneously, EPA lodged an appeal with the Ninth Circuit Court of Appeals.

**Pesticides****Harm**

The intervenor-defendant industry groups likewise filed appeals. The industry groups further requested a stay—that is, an order suspending the effectiveness of the injunction—from both the district court and the Ninth Circuit. They asserted that the injunction will irreparably harm small farmers and farmworkers through the loss of crops, jobs, and livelihoods and will in turn harm local and state governments through lost tax revenues. They claim such losses may total hundreds of millions of dollars annually.

On May 4, 2004, the Ninth Circuit denied the motion for a stay without prejudice, declining to rule prior to Judge Coughenour's consideration of the request. Judge Coughenour subsequently denied the motion (May 18, 2004), reaffirming his "firm conviction" in the need for the buffers and other restrictions. In the meantime, the plaintiff groups filed a Notice with the district court expressing their dissatisfaction with EPA's compliance efforts. The plaintiffs particularly criticized the substance and format of EPA's point-of-sale, "Salmon Hazard" notification, which they describe as "confusing" and biased toward industry. They have requested a status conference with the court to discuss their complaints, which EPA and the industry groups vigorously dispute. The court had not yet ruled on the request for further review of EPA's implementation efforts as of the date of this article.

**Emergency Request**

In light of the district court's refusal to stay the injunction pending appeal, the industry groups recently renewed their request for a stay to the Ninth Circuit (May 27, 2004), seeking an emergency ruling. While it is not possible to predict when the court may act on this request, given that the court has already agreed to expedite its review of the merits of the appeal, a ruling in the next few months seems likely. Briefing on the merits of the appeal is scheduled to be concluded by mid-July, with a ruling from the Ninth Circuit likely sometime this fall. In the meantime, EPA's consultations are on-going, and the pesticide restrictions remain in effect.

**Conclusion****FIFRA Limit**

Many have long assumed that other statutes such as FIFRA "occupied the field" for purposes of governing the use of pesticides. The court's approach runs directly counter to such an assumption and openly embraces the view that pesticide use may be subject to multiple federal statutory schemes at the same time. The ESA, like the federal Clean Water Act, is quickly becoming an effective tool to impose additional restrictions on pesticide use than what otherwise may be required by the more traditional approaches to pesticide regulation.

**Enforceable Buffers**

Perhaps even more significant, the court's decision to impose sweeping enforceable buffer requirements comes at a time when so many other attempts to accomplish the same end result have failed. Buffers have long been proposed and contemplated in various local land use forums and as part of water quality planning efforts. However, such requirements were often viewed as voluntary, unenforceable, and unworkable. Now, end product users who do not adhere to the buffer restrictions could be subject to penalty.

**Further Impacts**

The injunction, although temporary, will likely have a lasting effect on pesticide use in the Northwest and elsewhere. The injunction expires by its own terms when EPA and NMFS conclude their consultations for specific pesticide uses. However, for those uses found to affect an ESU, additional restrictions will likely be developed by NMFS and implemented by EPA. This could mean permanent buffers or other limitations for chemicals found to adversely impact salmon.

Also, while this lawsuit concerned only a limited number of pesticide ingredients, it will likely lead to evaluation by EPA of many, if not all, of its past and future pesticide approvals under threat of more litigation. The plaintiffs to the lawsuit originally sought to compel EPA to review over 900 pesticide ingredients, but narrowed their challenge when the court required them to submit scientific evidence demonstrating a link between EPA's approvals and adverse effects on salmon for each chemical. Additional lawsuits are likely to follow if EPA fails to proceed on a schedule satisfactory to the plaintiffs.

Finally, the plaintiffs to this case have already demonstrated their intent to continue to pressure EPA to increase salmon protections. The Washington Toxics Coalition, for example, has threatened to challenge EPA's "no effect" determinations for some pesticides in an effort to compel formal consultations with NMFS and obtain increased ingredient-specific use restrictions.

This landmark lawsuit may prove to be only the beginning of protracted struggle to further alter the balance between industry and consumer needs and appropriate protections for listed salmon.

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## WASHINGTON WATER LAW UPDATE

REPORT FROM THE 13TH ANNUAL WASHINGTON WATER LAW CONFERENCE

by David Moon, Editor

The Thirteenth Annual Washington Water Law Conference, presented by Law Seminars International in Seattle on May 6<sup>th</sup> and 7<sup>th</sup>, focused on balancing instream and out-of-stream water needs as Washington state prepares for future economic and population growth. The conference provided a thorough discussion of new laws, on-going battles and potential tools for addressing key issues.

### Municipal Water Rights and Efficiency Legislation (SSHB 1338)

In 2003, the Washington Legislature passed the "Municipal Water Bill" (SSHB 1338). This bill resulted in "the most significant change in 20 years" for municipal water rights, according to Thomas Mortimer, a Seattle attorney who presented the water utility perspective on the new law. The driving force behind the legislation was the Washington Supreme Court decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), which held that water right certificates that were issued based on the capacity of a municipal system, rather than actual beneficial use, were invalid. Following the *Theodoratus* decision, the Washington State Department of Ecology (Ecology) challenged the legal validity of municipal water right certificates (referred to as "pumps/pipes" or "p/p" certificates) and the right of municipalities to make use of inchoate water (unperfected/unused water) to meet future demands—particularly where water had not been put to beneficial use more than 20 years after a certificate's issuance.

Mortimer noted that Ecology asserted it had the authority to either rescind inchoate water quantities contained within the "pumps/pipes certificates" or bifurcate the water rights into two certificates. With bifurcation, one certificate would be for the actual beneficial use; a second would be for the inchoate quantity with potentially new conditions (such as being subordinated to minimum instream flows) that would otherwise be junior priority water rights. Ecology's interpretation of *Theodoratus* created tremendous uncertainties for municipal water suppliers regarding their ability to meet future demands. It also might expose them to substantial "liabilities given the fact inchoate p/p water rights served as the foundation of many plat approvals, subdivision approvals, Growth Management Act (GMA) comprehensive planning assumptions, and bond revenue streams," Mortimer commented.

Washington's legislation essentially incorporates the "Growing Communities Doctrine" into Washington water law, according to Alan M. Reichman, Assistant Attorney General (Water Rights Section, Ecology). The legislature recognized the "need for flexibility for municipal water providers," Reichman said.

With the adoption of the Municipal Water Bill (SSHB 1338), Reichman referred to four major reforms now in place:

- Municipal rights are not subject to statutory relinquishment, although the common law doctrine of abandonment is still applicable
- The maximum number of connections is not limited, so long as a valid municipal right is involved and a "water system plan" is in place
- Maximum population figures are also irrelevant under the new law
- The place of use (POU), or service area, has the potential for expansion without an "impairment analysis" being required. Before the new law, the argument was advanced that the municipal right was limited to use within the city's boundaries at the time of the initial application

The definition of "municipal water rights" and who is entitled to hold them under the new law has led to thousands of new "municipal water rights" by operation of law, according to Reichman. Any system with 15 or more connections providing water for residential purposes is now defined to hold a "municipal water right" regardless of public or private status. Reichman alluded to the "incentives to move to 15 connections" and therefore "become a municipal water right"—especially the ability to avoid statutory relinquishment. He also noted the subsequent requirements of conservation planning that come along with the status. Rights used for "municipal water supply purposes" are extended the protection from relinquishment afforded by Revised Codes of Washington (RCW) 90.14.140.

Reichman made several "observations of challenges down the road." He noted that while proponents of the law believe it "provides flexibility to meet growth management planning needs. Opponents feel that the new law gives municipalities free rein to expand rights and...will exacerbate low-flow stream problems. I think there is balance in the law. Per capita demand has decreased due to conservation. Balance will come from the conservation requirements of plans."

Pumping  
Capacity

Inchoate  
Rights

Returns

"Municipal"  
Definition

Flow Concerns



## Washington Water Law

### "Good Standing"

### Abandonment

### Validity Determination

### Volume Not 24/7

### "Point of Withdrawal"

### DOH Role

### MOA Update

Mortimer pointed out in his written materials that "virtually the entire environmental community and tribal community of the state appeared unanimous in their opposition and denunciation of the bill." While the bill provided certainty and flexibility for municipalities, the concern is that use of previously unused water (inchoate quantities) will impact water otherwise left instream.

The uncertainty for existing municipal rights was addressed by Section 6 of the new legislation. That section puts in "good standing" existing water rights represented by water right certificates for "municipal water supply purposes" as defined by RCW 90.03.015. According to Mortimer, this "key feature" was included to "make clear that municipal purpose water rights issued to municipal systems under the p/p policy are in good standing and cannot be unilaterally rescinded by Ecology, as well as those rights later acquired that qualify for municipal supply purposes under the statute...This benefit, however, does not protect municipal right holders from claims of potential abandonment by Ecology if the period of non-use of their rights extends beyond 25-30 years." (emphasis added)

The question of unperfected or inchoate amounts may come into play if a purpose of use change is filed to change the purpose of use to a "municipal water supply purpose" (see RCW 90.03.380 or 90.44.100), even if a water right is in "good standing" based on Section 6. Under Section 3 of the bill, a right does not automatically qualify for municipal status simply because it is acquired by an entity that already holds municipal rights. If it does not qualify as a right for "municipal water supply purposes" under Section 1(4), then an application to change the purpose of use must be filed. Reichman pointed out that the Attorney General's position is that Ecology still must undertake a determination of the validity of the water right being changed. Thus, the "extent and validity of the water right" will be determined by Ecology as part of the change process, including a review of the historical non-use (relinquishment) issue, to determine the quantity available for change. See *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn2d 118, 130-131, 969 P.2d 458 (1999). Reichman commented that one "may still have an inchoate quantity that can or can't be transferred."

Reichman also noted that when water rights don't have an annual quantity (volume) spelled out in the existing certificate and a change occurs, Ecology is taking the position that the annual quantity is not based on the "instantaneous quantity" (peaking rate) applied on a 24 hours/7 days a week basis, but that a review to determine historical use will be necessary.

Another process that opens the door for Ecology to do a validity review occurs when a municipal system needs to secure changes in the "point of withdrawal" (sometimes called "point of diversion" in other states). Thomas Mortimer called this a "major risk area for utilities" since Ecology retains the authority "to investigate the historic use or non-use" of both existing rights and acquired rights, and many rights either held or acquired by municipal systems require such changes. There was no provision in the new law that prevents Ecology from engaging in a determination of validity under the common law doctrine of abandonment. Thus, "Ecology may well find that a right proposed for change has been abandoned if not used for greater than 25 years. In this situation, the burden will be on the utility to prove through prior plans, studies, investments, or credible declarations, that there was no intent to abandon the right." Mortimer's general admonition for municipalities was "Don't expose yourself to Ecology review unless it's required."

The other sweeping aspect of the new law is the broad role and tremendous responsibilities imposed on the Washington State Department of Health (DOH). Under Section 4 of the bill, water rights that qualify as being for municipal water supply purposes are governed primarily by "water system plans." DOH is provided with authority and responsibility to determine the maximum number of connections, or population limit, that can be served by a water right that qualifies as municipal. Although DOH can accept input from Ecology in these determination, DOH is authorized to make the decisions. This process is governed by a Memorandum of Agreement (MOA) between Ecology and DOH that can be amended. Jim Rioux, Special Assistant to the DOH Director, mentioned in his talk that the MOA should be updated before the end of the year: "The current MOA is not entirely understood by either agency." He mentioned that the next event for DOH is the development of a document that would specify how the department will work on day-to-day activities under the MOA.

Rioux noted some of the immediate changes brought about by the new law and its impact on the state's Office of Drinking Water's planning program. As of September 2003, water system plans and small water system management programs must be in compliance with law prior to approval. The Office of Drinking Water has published a guidance document to explain the interim requirements purveyors must meet to gain approval for a water system plan. These requirements will remain in effect until DOH establishes long-term processes over the next three years. [The guidance document can be accessed by going to the "interim planning guidance" contained on the DOH website at: [www.doh.wa.gov/ehp/dw/Publications/interim\\_guidelines.htm](http://www.doh.wa.gov/ehp/dw/Publications/interim_guidelines.htm)]

## Washington Water Law

### Conservation

#### SEPA Challenges

### Adjudication Impacts

### Negotiations

### Tools

### "Exempt Wells"

### Water Bank

Water use efficiency is naturally a critical part of the DOH's role in the process. Rioux is "excited about this part of the bill" because "we are moving the state-of-the-art for water conservation forward in Washington." New water use efficiency rules are being developed and are expected to be put in place by December 2005. Among other topics, Rioux highlighted a growing need for utilities to pay more attention to the potential of "reclaimed water." [See website: [www.doh.wa.gov/ehp/dw/municipal\\_water/water\\_use\\_efficiency\\_rule.htm](http://www.doh.wa.gov/ehp/dw/municipal_water/water_use_efficiency_rule.htm)]

The water system planning process will require utilities to engage in non-project programmatic State Environmental Policy Act (SEPA) procedures relating to their water system plan updates and the potential environmental effects. Mortimer expects this process to be "perhaps the most inviting target" for Tribes and environmental groups to raise legal challenges regarding "fish and flow effects relating to the use of inchoate rights over both existing and expanded service areas." Specific projects are subject to SEPA requirements and in the past this has been the point where challenges have occurred. The new legislation, however, doesn't require a place of use change application if the use is within the "service area" of the utility. Mortimer is anticipating appeals of the SEPA process itself when water system planning occurs, rather than opponents waiting for individual project reviews. His advice to utilities is to improve the quality and detail of their plans with regard to fish and flow issues and generally "punch up the discussion of how they exercise their water rights." By documenting an environmentally appropriate approach that shows how they will plan to protect species and aquatic habitat, for example, utilities may be able to avoid successful challenges.

Mortimer's final caution concerned the adjudication of water rights. The new bill "does not insulate municipal systems from being subject to quantification, and limitation, in general stream adjudications." He pointed out that the "new law equals certainty with a small 'c'— not a capital 'C.'" The protection afforded by the new municipal water right law for utilities' perfected or inchoate pump/pipe-based water rights may be compromised by an adjudication or by "more powerful tribal claims," especially if the adjudication finds that a stream has already been fully appropriated, Mortimer concluded.

#### PROTECTING INSTREAM FLOWS WHILE ACCOMMODATING GROWTH

A distinguished panel of speakers addressed efforts to resolve tensions between growth and protection of instream flows. They used the negotiation process that is on-going in Washington's Skagit River basin as the backdrop. The Skagit Valley Instream Flow Rule was adopted in 2001 (priority date of April 12, 2001), but was appealed by Skagit County in April of 2003. The County agreed to a stay to negotiate with various parties, with the hope that a Memorandum of Agreement can be reached that could be used as a model throughout Washington. Harry Chesnin, an attorney who represents the Upper Skagit Indian Tribe (intervenor in litigation), compared the length of water litigation in the Yakima River Basin adjudication which began in 1977 and is still on-going (*State v. Acquavella*, Yakima County Superior Court, Cause No. 77-2-01484-5) versus the hope for the settlement option in the Skagit River Basin in the near future. With a trial date looming in October 2004, the parties are working feverishly towards settlement.

The panel's discussion focused on available and potential tools. "Exempt wells" are a significant problem in the Skagit River Basin with approximately 50,000 gallons per day already being diverted, according to Ecology's Daniel Swenson. Joe Mentor, Jr. (Mentor Law Group PLLC, Seattle) pointed out that "exempt wells are water rights, they are just 'exempt' from permitting requirements." Queried about useful, less-known tools by the panel's moderator, Joe Mentor, Jr. referred to the possibility of a mandatory hookup requirement for exempt well users where a public water system is available. Mentor thought that this tool would be extremely useful statewide to address the growing problem of "exempt wells" and all of the panel participants embraced this concept.

While "exempt wells" are essentially a rural area issue, water pumped from such wells are "definitely impacting tributary flows" (surface water), according to Chesnin. This groundwater exemption allows individuals to use up to 5,000 gallons per day for single or group domestic uses, stockwater or industrial purposes, or up to one-half acre for irrigation of a lawn or non-commercial garden (RCW 90.44.050). Chesnin said that water hookup requirements are very important to the Tribes and that importing water in to users so that they can de-commission "exempt wells" makes sense.

Mentor also mentioned water banking, noting a pilot program that is underway in the Yakima River Basin. [See websites: [www.roundtableassociates.com/ywe/](http://www.roundtableassociates.com/ywe/) and [www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank](http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank)]

Water banking is viewed as an option that would mitigate for future out-of-stream needs.

The parties are also discussing establishment of a "water budget" for each tributary basin, as well as the "Skagit River Protection Fund" for acquisitions of water.

## Washington Water Law

### Tribes

### "Pump & Dump" GW

### GW Recharge

### "Early Winters"

### Ditch Easements

### Types

Larry Wasserman, a Tribal representative from the Skagit River System Cooperative of La Conner, discussed some of the tools being proposed from a Tribal perspective. In regard to "inchoate rights" of municipal water suppliers, he said that Tribes are willing to accept use of "inchoate rights" to meet the need to replace "exempt well" use. Wasserman mentioned conservation and efficiency improvements and also noted that the Tribes are willing to support purchase of water rights, but they are worried about the "biggest checkbook" dominating water use. They do support "Trust" purchases by the state that provide water for instream flows. [See the Washington Water Right Acquisition Program at Ecology's website: [www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank](http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank).]

Several panelists mentioned the use of deep wells, which are used to "pump and dump" groundwater into surface water streams to offset consumptive use impacts. Washington law already includes provisions that allow applicants for water right permit to include mitigation plans as part of their proposals to offset any potential adverse effects of their proposed water use (see RCW 90.03.255; RCW 90.44.055). A "Stream Flow Action Plan" (Working Document 1/23/04) by Ecology and the Washington Department of Fish & Wildlife states that mitigation plans can be included in watershed plans and may be adopted by Ecology by rule in conjunction with setting "regulatory flows." The document also notes that mitigation is voluntary and that most mitigation strategies are "in-kind," i.e. designed to replace exactly what is used: "water-for-water"—i.e., same time, same place, same amount.

Chesnin commented on groundwater recharge as a mitigation option. Much of the discussion to date has dealt with practical issues for recharge, such as how to define it and how to properly credit for the recharge.

Joseph Brogan (Foster Pepper & Shefelman PLLC, Seattle), representing the City of Anacortes and the Skagit Public Utility District (water purveyors), pointed out that "It's not only the substance, but how you work through it" that can make for a successful negotiation concerning water.

#### Brogan's SUGGESTIONS FOR SUCCESS INCLUDED:

- Using a neutral facilitator early on
- Include all the parties
- Transparency and credibility are paramount
- Be persistent and patient
- Put all moves on the table early
- Allow parties to communicate opinions openly
- Focus on solutions agendas that demand progress

### Endangered Species & Water Rights

John B. Arum (Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle) led off the discussion about the federal Endangered Species Act's (ESA's) recent trumping of water rights in what is sometimes called the "Early Winters case," *Okanogan County v. NMFS*, 347 F.3d 1081 (9<sup>th</sup> Cir. 2003). Arum, representing a number of local, state, and national environmental groups, intervened in the case to support the Forest Service's position. The petition for certiorari to the Supreme Court was denied the week before the conference, so the lower court holding supporting the US Forest Service's (USFS's) authority—to restrict the use of irrigation rights of way to protect fish—stands.

Arum provided a quick overview of endangered species consultation requirements under Section 7 of the ESA. If a federal agency's required biological assessment determines that a species will be jeopardized by a federal action, the agency must implement "reasonable and prudent alternatives" to avoid violating the ESA. In *Okanogan*, the USFS's "reasonable and prudent alternatives" included restricting the use of irrigation rights of way.

The type of right of way involved is key to determining how a right of way will stand in relation to the ESA, according to Arum. The first possibility is a right of way under the 1866 Mining Act, i.e. the water right was obtained under state law and the water user simply went out and dug the ditch. This type of right of way is the strongest, providing the owner with a permanent easement, so long as it was established before any federal reservation occurred. Arum said such a right of way is still subject to "reasonable regulation" that doesn't extinguish the right.

The second possibility is a right of way under the "1901 Act." That Act applied to all federal lands and it authorized issuance of right of way permits. These permits may be conditioned to protect the public interest or potentially denied in the public interest. One must apply to a federal land management agency to receive the permit and such permits have been held to be revocable. Thus, these rights of way are far different from the "1866 right of way."

The Federal Land Management Policy Act (FLMPA) of 1976 repealed the prior right of way



## Washington Water Law

### 1901 Act

### ESA-Water Use?

### 9th Cir (H)

### State Water Law

### "Takings" Issue

### 1866 Easements

### Test Case

### Water Users' Position

### ESA v. Water Law

statutes, while preserving any right of way vested under the earlier statutes. FLMPA authorizes the granting and renewal of rights of way across federal lands. FLMPA contains a provision, however, that the right of way must include terms and conditions to protect fish and wildlife, meet water quality standards and otherwise protect the environment (see 43 U.S.C. §1765).

In the *Okanogan* case, two private ditch companies each had rights of way for their irrigation ditches that were established after the federal reserve was created. Thus, the 1866 Mining act didn't apply, and they had USFS special use permits under the 1901 Act. The ditches cross Okanogan National Forest land, located east of the Cascades Mountains in the Methow River Basin of Washington. The permits were expressly revocable at the discretion of the Forest Service. The permits had been renewed several times and were up for renewal again in 1996. The National Marine Fisheries Service (NMFS) issued a biological opinion concerning the two ditches in 2000. That led to restrictions on the use of the ditches to maintain stream flow levels for the protection of fish under the ESA.

The ditch owners alleged that the USFS didn't have discretionary authority to restrict the use of water and that the duty to consult under Section 7 of the ESA did not apply to water use. They further argued that such restrictions effectively denied them their vested water rights under state law.

The 9<sup>th</sup> Circuit held that USFS has the authority under FLMPA to restrict the use of irrigation rights of way to protect endangered fish. Minimum flow conditions did not affect any vested rights because the rights of way were granted under the 1901 Act and were subject to termination at the discretion of USFS.

Arum referred to the 9<sup>th</sup> Circuit's rationale that the case was not a controversy over water rights, but rather was a case about rights of way through federal land. He noted that the court also found that the holding in *United States v. New Mexico*, 438 U.S. 696, 701 (1978) (relating to the "implied-reservation-of-water doctrine") did not limit USFS's authority to restrict the use of revocable ditch permits. The 9<sup>th</sup> Circuit held: "...FLMPA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law." *Okanogan*, Id. at 1086.

In Arum's words, a "water user could still use the water right, but with a different ditch" (one not running through federal land). Thus, as far as a "takings issue" is concerned, Arum felt there was no taking of the water rights in the *Okanogan* case: "The water right holder was free to change the point of diversion." Arum did say, however, that a different decision regarding "takings" may arise from another case involving an 1866 Mining Act easement—referring to *Hage v. U.S.*, 51 Fed.Cl. 570, 583 (2002). He believes that the outcome will depend on the extent of the regulation imposed and the effect on the use of the easement. Arum also remarked that the now well-known *Tulare* takings case was bound to go up on appeal (*Tulare Lake Basin Water Storage District vs. United States*, 49 Fed. Cl. 313 (2001)).

There is a pending test case involving 1866 Mining Act easements, *Western Watersheds Project v. Matejko*, No. CIV 01-0259-E-BLW (D. Idaho), that may answer the remaining question of just how far the discretion of federal agencies goes in restricting water rights use, Arum explained. Plaintiffs in the *Matejko* case challenged USFS and Bureau of Land Management (BLM) failure to consult on over 1000 irrigation and stockwater diversions on the Salmon Challis National Forests. The BLM had a policy not to attach new conditions to right of way permits unless there was a material change in location or authorized use. On March 23<sup>rd</sup>, the Idaho federal court held, however, that BLM has the authority and the "mandatory duty" under the ESA to determine whether easements covered by the 1866 Mining Act that originate on or cross BLM managed lands affect listed fish species. The court found that the BLM policy *not* to impose conditions is an agency action subject to Section 7 consultation, and that such action "may affect" listed species. Arum said it will remain unclear how far that discretion goes in restricting water use involving 1866 Mining Act easements until BLM makes its determinations and proposes actions. [The court's ruling can be viewed at [www.westernwatersheds.org/legal/salmon\\_blm\\_divert/SJorder.pdf](http://www.westernwatersheds.org/legal/salmon_blm_divert/SJorder.pdf)]

Russell Brooks (attorney, Pacific Legal Foundation) represented water users in *Okanogan*. Water users argued that the case was about water rights, not land. "You're either regulating the ditch or the water; if you're regulating the ditch" one still must ask "to what extent is the water right lost?" Brooks stated. They also questioned how much burden should be borne by property owners for ESA regulation. The main thrust of their position was that the result of regulation was an extinguishment of state water rights, for which there was no authority under the Organic Act of 1897. Brooks said that the District Court relied on the Multiple Use Sustained Yield Act of 1960 (MUYSA), 16 U.S.C. § 528, so before the 9<sup>th</sup> Circuit the Pacific Legal Foundation argued that MUYSA did not expand the authority of FLMPA. In other words, the special use permit issued under FLMPA authority was for the purpose of protecting federal land, but was issued subject to existing state water rights that should not be interfered with.

In their petition for writ of certiorari to the Supreme Court, the appellants argued that the ESA doesn't provide authority to control water use governed by state water law, and that while the federal

## Washington Water Law

### Physical Taking

agency has discretion to regulate the ditches, they can't regulate use of water. Brooks said the case was tremendously important due to the scope of its impact, with approximately 80% of the land in the western United States essentially being subjected to federal control of water rights due to federal ownership of headwater land. Regarding denial of certiorari, Brooks suggested that other appeals were coming: "Oftentimes you have to bring similar cases up to the Supreme Court several times before they will agree to hear one."

A critical distinction in "takings" cases when water rights are concerned, Brooks explained, is that the regulation effectively results in a "physical taking of the water." Where the federal agency has the authority to interfere with the water right, the question becomes "will they take action, if they have to pay." In *Tulare* the National Marine Fisheries Service, acting under authority of the ESA, required water that would otherwise have been delivered to water users by the water storage districts be used instead for the benefit of the Sacramento winter run of chinook salmon. The federal government argued that any "takings" decision had to come under the normal "*Penn Central* test," which includes a review of the character of the government action, the investment-backed expectations (regulation effect on the owner's interest), and what percentage of the property has been "taken" by the regulation (see *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978)). The plaintiffs in *Tulare* argued that there was a physical taking of the water, thereby avoiding the *Penn Central* test. Where a physical taking is involved with water, Brooks commented, "if you take even a portion, then that portion is gone and can't be used." Arum agreed that the most important issue in *Tulare* was the issue of the "physical taking" of water.

#### Editor's Note:

The 9<sup>th</sup> Circuit's specific language in the *Okanogan* case seems to provide a harbinger of what their holding might have been if an 1866 Mining Act easement was involved. Three times in the opinion the court highlighted the limitations of the appellants' rights of way. If a permanent, non-revocable easement that vested under the 1866 Mining Act is at issue, a different outcome may result.

"The ditch rights-of-way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent." *Okanogan* at 1084. "The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way." *Id* at 1085. "Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLMPA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right-of-way permits did not grant vested property rights. The 1901 Act stated that the Secretary of the Interior could grant rights-of-way through forest reservations for ditches, but that "any permission given...may be revoked by him...in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." *Id.* at 1085-1086.

**For the full case:** see <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=9th&no=0235512p+>

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Ecology's website for "Washington Water Right Acquisition Program" at : [www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank](http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html#waterbank)

#### RE: ESA/WATER RIGHTS CONFLICTS:

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## MONTANA-WYOMING WATER FIGHT BREWING?

MT, WY

"CALL" FOR WATER MADE BY MONTANA

The state of Montana is calling on Wyoming to shut off junior water rights in the Tongue, Powder and Little Powder Rivers to provide drought relief to more senior water rights holders in Montana. Montana has also requested that Wyoming release water stored in reservoirs in Wyoming to satisfy senior rights in Montana that are short of water. The Montana Department of Natural Resources and Conservation (DNRC) hopes it can reach an amicable settlement with Wyoming, but is prepared to take action to protect water rights under the 1950 Yellowstone River Compact signed by Montana and Wyoming to address management of water rights in both states. "Failing the cooperative approach, Montana is prepared to undertake whatever action we believe is in the best interests of our citizens to protect our rights that are secured in the compact," Jack Stults, administrator of the agency's water resources division, said in a letter to Wyoming officials dated May 18th.

Wyoming's State Engineer, Patrick T. Tyrrell, sent Montana a letter responding to the request on May 24th which stated that Wyoming felt they were meeting their obligations under the Compact. The two states are in discussion over the issues, with a meeting planned in the near future, according to Kevin Smith of DNRC. Smith told The Water Report that although there are guidelines in the Compact they will be working with, the Compact doesn't contain explicit water enforcement provisions regarding pre-1950 water rights, so the parties need to work through how to handle the situation.

The Powder and Tongue Rivers originate in north-central Wyoming and flow north into Montana, eventually dumping into the Yellowstone River. Rich Moy, chief of Montana's water management bureau, said only two 1886 water rights in the Tongue River in Montana are being partially met, with all other junior rights going without any water. Moy said this is the first time under the Yellowstone River Compact that Montana has asked Wyoming to regulate junior water rights holders to satisfy senior rights in Montana. "One of our concerns is that Wyoming is taking and using water for uses established after 1950 to the detriment of our uses that were established prior to 1950," Moy said. "The economic implications for us are very significant." Most of the water rights involved are irrigation rights, though some are municipal water rights (including Miles City).

The Compact, signed in 1950, treats pre-1950 water rights differently than water rights acquired after the Compact. The Compact states that water unappropriated as of the compact date would be apportioned ratably between the two states, while pre-1950 rights were to be enjoyed under the respective laws of both states in accordance with the prior appropriation doctrine. The Compact did not, however, spell out how pre-1950 water rights would be divided between the two states if a conflict developed. Moy told The Water Report that it is clear that Montana and Wyoming, at this point, have different interpretations of how pre-1950 water rights should be governed. "Wyoming's interpretation is that all their pre-1950 water rights should be satisfied before any water flows into Montana. We [Montana] think that the water should be divided based on the priority system. Eventually, there needs to be an adjudication, followed by an interstate commission that would divide water under the priority system as one river," Moy said.

In its May 18th letter, Montana made a "call" on 9,369 acre-feet of post-1950 water stored in the Tongue River Basin and 214,722 acre-feet of post-1950 water stored in the Powder River Basin: "We hereby request that all these stored waters be immediately released and delivered to the Montana border to begin to satisfy our valid and protected pre-1950 water rights on the Tongue and the Powder Rivers."

Wyoming's response letter disputed the stored water figures and said "there may be a misunderstanding of the Wyoming Reservoirs Capacity Report we gave you at the April 2004 technical meeting [of the Yellowstone River Compact]." In Wyoming's letter, State Engineer Tyrrell commented that the Compact was "far more complicated than simply releasing water when one party claimed a shortage." Due to the "uncharted territory" they find themselves in, Tyrrell said that "it is not at all clear what Wyoming's obligations are" when "the Compact makes no provision for any state to make a call on a river." Tyrrell went on to say that "the Compact does not apportion direct flow at the state line, nor does it establish or direct the establishment of an interstate priority schedule."

**For info:** Rich Moy (DNRC), 406/ 444-6633, email: [rmoy@state.mt.us](mailto:rmoy@state.mt.us)

## STATEWIDE AQUATIC HERBICIDE PERMIT APPROVED CA

DEVELOPED IN RESPONSE TO TALENT CASE

The California State Water Resources Control Board on May 20 approved the "Statewide General National Pollutant Discharge Elimination System Permit for the Discharge of Aquatic Pesticides for Aquatic Weed Control in Waters of the United States." The Aquatic Weed Permit covers use of aquatic herbicides to control algae and other aquatic weeds in canals or reservoirs. In March 2001, the 9th Circuit ruled in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) that the district's application of an herbicide in its canals constituted a "discharge" of a pollutant into "waters of the United States" thereby requiring an NPDES permit.

For info: <http://acwanet.com>, links to "Issues and Outreach">>"Issues">>"Aquatic Herbicides"



**BYPASS FLOW UPHeld CO**

On April 30th, a Wyoming federal court ruled in favor of Trout Unlimited's lawsuit against the US Forest Service (USFS) over the agency's failure to provide for the protection of downstream fish and aquatic habitat in re-issuing a permit for operation of Long Draw Reservoir on La Poudre Pass Creek. The court found that USFS does have the authority to prohibit historic diversions of water by non-federal parties in order to make water available for downstream fish and wildlife habitat protection. Under the original operating permit, flows out of Long Draw Reservoir were typically cut off entirely from November through March or April of the following year — effectively drying up the creek during the winter. In re-issuing the operating permit, the Forest Service rejected its own "Environmentally Preferred" planning alternative, which would have issued the permit with a bypass flow requirement that would approximate La Poudre Creek's natural flows. TU's argument that the Forest Service violated its statutory obligations under the Federal Land Management & Policy Act and the ESA ultimately led to the Court's reversal of the agency's decision to grant the permit. The *Okanogan* case was cited as a precedent (see Washington Water Law article in this issue). The decision by a federal court in Wyoming ruled that the USFS has not only the authority — but also the duty — to minimize harm to fish and wildlife when issuing or re-issuing a permit for dams and diversions on federal lands. Based on a review of the information before the Forest Supervisor at the time, the judge ruled that the failure to impose a "bypass flow" was arbitrary and capricious. Trout Unlimited expects either the federal government, the State of Colorado, or some water rights holders to appeal. See *Trout Unlimited, et al v. U.S. Dept. of Agriculture, et al*, Civil No 96-WY-2686-WD (2004)

**For info:** Full decision is available on Trout Unlimited's website: [www.cotrout.org](http://www.cotrout.org)

**TRIBES SUE PACIFICORP OR**

The Klamath Tribes are suing Portland-based PacifiCorp for more than \$1 billion for compensatory and punitive damages for the destruction of federal treaty rights to fish for salmon in the headwaters of the Klamath River. PacifiCorp owns and operates a series of hydroelectric dams on the Klamath River. The lawsuit alleges that the existence of the dams blocking salmon passage, beginning in 1911, combined with the failure to establish fish passage at the dams has ruined the Tribes' traditional reliance on salmon for subsistence and commerce.

The lawsuit states that at the time of the construction of the dams, California and Oregon law required fish passage. The complaint goes on to allege that PacifiCorp's predecessor represented to the Indians and others that fish passage for salmon would be maintained, but then intentionally and deliberately avoided their pledge and duty to provide fish passage. The complaint notes that PacifiCorp has gained millions of dollars in revenues from the sale of hydropower generated at the Klamath project, and that "But for the inactions of PacifiCorp...salmon runs would have continued past 1911 ..." *Klamath Tribes of Oregon, et al v. PacifiCorps*, Civil No. 3:04-CV-00644-MO (May 11, 2004).

PacifiCorp is also in the midst of its FERC relicensing process for the Klamath Project facilities. The Klamath Tribes on April 23rd filed study requests in that process asking for information relating to power revenues generated by the Project in the future from additional flows of 100,000 acre-feet expected from implementation of a water bank by the Bureau of Reclamation. The Tribes also requested that PacifiCorp provide whatever historic research is available to explain why the commitment to provide fish passage facilities was never implemented. In their "Supplemental Study Requests," the Tribes stated that in the FERC proceeding "the Tribes' focus is to take a leadership role...in developing a road map for native fish restoration in the Upper Klamath Lake and the Sprague and Williamson drainages."

**For info:** Dan Israel (Attorney for the Klamath Tribes), 303/ 543-0384.

**STORMWATER PENALTY UT  
\$3.1 MILLION FROM WAL-MART**

The Department of Justice and the US Environmental Protection Agency, along with the US Attorney's Office for the District of Delaware and the states of Utah and Tennessee, today announced a Clean Water Act settlement for storm water violations at Wal-Mart store construction sites across the country. Under the terms of the agreement, Wal-Mart has agreed to pay a \$3.1 million civil penalty and reduce storm water runoff at its sites by instituting better control measures, thereby setting an industry standard for developers and contractors.

According to EPA officials, storm water runoff is one of the most significant sources of water pollution in the nation, comparable to contamination from industrial and sewage sources. This settlement sets a very high bar for regulation of this pervasive problem. "Runoff from construction sites is a primary contributor to the impairment of water quality in the nation. EPA is vigorously enforcing federal regulations to help reduce this problem," said Thomas V. Skinner, Acting Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance.

The complaint filed against Wal-Mart cited violations at 24 sites in nine states and included allegations of failure to obtain a permit before starting construction, failure to develop a plan to control polluted runoff from the construction site, failure to adequately install sediment and erosion controls on the sites and failure to self-inspect sites and prevent discharges of sediments to sensitive ecosystems. Reducing sediment-laden runoff from construction sites can be achieved with relatively simple measures, but requires both developers and contractors to be vigilant about compliance throughout the construction process.

Today's settlement requires Wal-Mart to comply with storm water permitting requirements and ensures rigorous oversight of its 150 contractors at its construction sites across the country through an aggressive compli-

ance program. Wal-Mart will be required to use qualified personnel to oversee construction, conduct training and frequent inspections, report to EPA and take quick corrective actions. In addition to paying a \$3.1 million civil penalty to the United States, Tennessee and Utah, Wal-Mart has agreed to spend \$250,000 on an environmental project that will help protect sensitive wetlands or waterways in one of the affected states, which are California, Colorado, Delaware, Michigan, New Jersey, South Dakota, Tennessee, Texas and Utah. The settlement is available online at: <http://www.epa.gov/compliance/resources/cases/civil/cwa/walmart2.html>

**For info:** Cynthia Bergman, 202/-564-9828 or email: [bergman.cynthia@epa.gov](mailto:bergman.cynthia@epa.gov)

## NEW HATCHERY POLICY

NOAA / WEST COAST

NOAA's Proposed Policy on the Consideration of Hatchery Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead was announced by NOAA Administrator VADM Conrad Lautenbacher on May 28th in Seattle. A proposed rule was also announced that includes listing determinations for 27 evolutionarily significant units (ESUs). The listing of the stocks would be reinstated under the proposal with the following changes: Sacramento Winter-run chinook would change from endangered to threatened, Upper Columbia River steelhead (population includes resident rainbow trout) would change from endangered to threatened, and Central California Coast Coho would change from threatened to endangered. In addition, the Lower Columbia coho group that was a candidate for consideration just before the 2001 court decision is proposed for threatened status.

These proposals will be published in the Federal Register and public comments will be accepted for 90 days. A number of public meetings will be held in California, Oregon, Washington, and Idaho to seek input from constituents. The meetings will

undoubtedly draw plenty of attention since news reports and press releases from environmental groups and water users following NOAA's release of the policy included comments that ranged from cautious optimism to lawsuit threats.

One of the goals of this policy is to promote future scientific research to evaluate and monitor the role of hatcheries' effects, both positive and negative, upon wild populations. It also will help guide needed reforms where hatchery practices currently pose risks to the recovery of naturally spawning salmon. NOAA Fisheries' proposed hatchery policy follows a court's finding that the agency should better account for hatchery fish in its ESA listings. See *Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154 (Dist.Or. 2001). According to NOAA, the new policy's central focus is unchanged from prior policy: the conservation of naturally spawning salmon and the ecosystems upon which they depend. The policy would consider hatchery fish that are closely related to naturally spawning salmon in all of the current ESA-listed salmon groups. NOAA would also take into account the fact that some well managed hatcheries are contributing to the recovery of species, some hatcheries are having little or no effect, and some hatcheries are potentially hindering recovery. Better management practices in the Northwest's hatchery system are encouraging and should continue to help speed the recovery of salmon, NOAA officials said.

**For info:** The proposed policy and the listing reviews may be found at website: [www.nwr.noaa.gov/AlseaResponse/20040528/index.html](http://www.nwr.noaa.gov/AlseaResponse/20040528/index.html)

## FERC/FOREST SERVICE SUED OR HYDROPOWER LICENSE DISPUTE

Seven conservation groups sued the federal government on May 24th for issuing a hydropower license for a hydroelectric project on the North Umpqua River in Oregon. According to the lawsuit filed by Earthjustice, the Forest Service ignored the advice of its own scientists when it agreed to the issuance of a new operating license for the project without requiring adequate

measures to protect wildlife and their habitat.

The North Umpqua Project is comprised of eight dams, three reservoirs, over 30 miles of flumes and canals, six miles of penstocks and tunnels, and approximately 100 miles of project-related roads, all located on federal public land along the North Umpqua River and two of its tributaries. Until last November, the 185.5-megawatt project, operated by the multinational corporation Scottish Power, was governed by a license issued in the early 1950s.

Because the project operates on national forest land, the government is tasked with ensuring that the project complies with federal laws and regional forest plans that require protecting salmon habitat. Both Forest Service and US Fish and Wildlife Service biologists recommended removing or breaching Soda Springs dam, the lowermost of the eight project dams, because it inundates important mainstem spawning areas and harms salmon habitat. When Scottish Power refused to consider removing Soda Springs, the agencies backed away from these recommendations, according to Earthjustice.

Five anadromous fish species—chinook salmon, steelhead, coastal cutthroat trout, coho salmon, and Pacific lamprey—live in the North Umpqua, also known for its steelhead fly fishing. Most of the North Umpqua River below the hydroelectric project is designated a Wild and Scenic River, for its outstanding water quality and quantity, recreational opportunities, and fisheries.

Representing seven conservation groups—Umpqua Valley Audubon Society, Umpqua Watersheds, The North Umpqua Foundation, Steamboaters, Oregon Natural Resources Council, Pacific Rivers Council, and American Rivers—Earthjustice filed a petition for review of the decisions of both FERC and the Forest Service with the Ninth Circuit Court of Appeals on May 24, 2004.

**For info:** Kristen Boyles, Earthjustice, 206/ 343-7340 x33 or email: [eajus@earthjustice.org](mailto:eajus@earthjustice.org)

**June 13-18 CA**  
**Pacific Fisheries Management Council Meeting, Foster City,** Crowne Plaza Mid-Peninsula, 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 Rule of Capture in Texas, Changes to Groundwater Law Since 1904 Ruling, Changes in the Future, Perspectives on the Rule of Capture, Groundwater Conservation Districts, Groundwater Marketing, Sustainability. 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 Laws, Indian Groundwater Issues, Modeling and 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/nrcl/waterconference/index.htm

**June 16-18 CA**  
**Bay-Delta Tour, Water Education Foundation,** RE: Tour Through the Delta and San Francisco Bay Region, Houseboat Ride on Delta Waterways, Harvey O. Banks Pumping Plant, Skinner Fish Collecting Facility, Bay-Delta Model in Sausalito, Los Vaqueros Reservoir and Suisun Marsh. The Tour Begins and Ends at Sacramento International Airport, Dinner at the Alta Mira Hotel in Sausalito. For info: http://www.water-ed.org/tours.asp

**June 17-18 WA**  
**Tribal Energy Northwest Conference, Seattle,** Renaissance Seattle Hotel, 515 Madison St. RE: Structuring Energy Resources For Tribal Facilities And Commercial Enterprises, Tribal Energy Development; FERC And The Western Area Power Administration; Transmission, Relicensing, Financing And Access To Technical Assistance And Grant Opportunities; Federal Legislative Proposals. Co-Chairs: Karen Atkinson, Tribal Strategies Inc; Eric Eberhard, Dorsey & Whitney, LLP. For info: Law Seminars International, 800/ 854-8009 or website: www.lawseminars.com

**June 21-22 ID**  
**Summer Water Law and Resource Issues Seminar/ Workshop on Water Supply and Management, Idaho Water Users Association Seminar, Sun Valley,** RE: Clean Water Act Diversion, Idaho Water Legislation, Upper Snake River Basin ESA Lawsuit, Nex Perce Tribe Water Rights Settlement, Takings of Water Rights Under the ESA, Corps of Engineers Legislative Perspectives, "Waters of the U.S.," Potential Salmon Delistings, ESA Consultations on Canal Rts-of-Way, Water Supply and Management, Aquifer Systems and More. Sponsored by Idaho Water Users Association and Water Law Section (Idaho State Bar) For info: IWUA, 208/ 344-6690; email: iwua@iwua.org, website: www.iwua.org

**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, Sponsored by West Water Research. For info: Neal Stelting, 307/ 742 3232, email: neal.stelting@hotmail.com

**June 21-22 CA**  
**Endangered Species Act 5th Annual Conference, Santa Barbara,** Fess Park Doubletree Hotel, Sponsored by CLE International. For info: CLE Int'l, 303/ 377-6600, or toll-free 800/ 873-7130, email: registrar@cle.com, website: www.cle.com

**June 23-26 CO**  
**Environmental Litigation, American Law Institute-American Bar Association, Boulder,** School of Law, RE: Substantive and Trial Skills, Jurisdiction. Standing, Ripeness, Preemption, Litigation Administrative Case, Discovery In Environmental Litigation, Experts, Federal And State Hazardous Substance Litigation, National Resource Damage Litigation, Enforcement Litigation, Citizen Suits And Defenses, NEPA And "Little NEPA," Ethics In Environmental Litigation. For info: 800/ 253-6397 or website: www.ali-aba.org

**June 25 CA**  
**Private Enforcement of Environmental Law: Prosecuting & Defending Citizen Suits, Oakland** Presented by Environmental Law Section of CA State Bar. For info: website: www.calbar.ca.gov/enviro

**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

**June 28-30 CA**  
**Riparian Ecosystems and Buffers Conference, American Water Resources Association, Olympic Valley,** The Resort at Squaw Creek, RE: Multi-scale Structure, Functions, And Management Of Riparian Ecosystems, Conservation Buffers, Water Quality, Aquatic Habitat, Terrestrial Habitat, New Buffer Technology, Urban Riparian Areas, 2002 Farm Bill, More. For info: Patricia A. Reid, AWR, 540/ 687-8390, email: pat@awra.org, website: www.awra.org/meetings/Olympic2004/index.html

**June 28-30 CA**  
**National Site Assessment Symposium, San Diego.** For info: EPA website: www.epa.gov/superfund/programs/sitesmt/symp04/index.htm

**June 29-30 OR**  
**Natural Resource Damage Assessment Workshop, Portland,** Ecotrust Conf Ctr, 721 NW 9th Ave, 8:30am-5pm ° Overview & Update Based on New Publication from the Environmental Law Institute: "Natural Resource Damage Assessment Deskbook: A Legal and Technical Analysis" For info: Northwest Environmental Training Center, 206/ 762-1976

**July 1 WA**  
**Regional Hydropower Relicensing Seminar, Seattle,** Convention & Trade Center, RE: Federal Power Act: FERC's Perspective, National Legislation & Litigation, Federal and State Issues Under Sections 4(e) and 18, Federal Power Act, Tribal Issues, ESA and FERC, Program Co-Chairs: James Lynch, Stoel Rives LLP, Mason Morisset, Morisset Schlosser Jozwiak & McGaw. For info: The Seminar Group, 800/ 574-4852, email: info@TheSeminarGroup.net, website: www.theseminalgrou.net/htmls/seminars/04hydwa/index.htm

**July 9 OR**  
**Oregon Fish & Wildlife Commission Meeting, Salem ,** ODF&W Offices, 3406 Cherry Ave, 8am. RE: Sturgeon Update; Salmon & Trout Enhancement Program Annual Report; Stock Status Review; Wildlife Habitat Conservation & Management Program; Budget Request Approval; More. For info: Director's Office at 503/ 872-5272

**July 12-13 CO**  
**Colorado Water Quality Control Commission Meeting, Denver,** CDPHE Sabin Room, 9am-5pm. For info: Paul Frohardt, 303/ 692-3468

**July 13-15 WA**  
**Western Brownfields Workshop, EPA-Sponsored Event, Seattle,** Red Lion Inn. RE: Success Stories, Best Practices and Lessons Learned. Free. For info: email: wbwregistration@sri.com



(continued from previous page)

**July 13-15 WA**  
**Northwest Power and Conservation Council Meeting, Spokane.**  
 For info: NPPC, 800/ 452-5161, email:info@nwcouncil.org, , website: www.nwppc.org/

**July 14 - July 16 OR**  
**Western States Water Council, Summer Meeting, 145th Council Meeting, Newport,** Hallmark Inns & Resorts, 744 SW Elizabeth, 7/14: Field Trip; 7/15-7/16 Meeting (Adjourn by Noon 7/16). For info: WSWC, 801/ 561.5300, website www.westgov.org/wwsc/meetings.html

**July 15-16 CA**  
**Water Law & Policy Briefing, Water Education Foundation, San Diego,** Hyatt Islandia Hotel on Mission Bay, RE: Latest Information on Water Law, Management and Planning Across the States, In-Depth Panel Discussions. For info: http://www.water-ed.org/briefings.asp#law&policy

**July 15-16 OR**  
**Oregon Environmental Quality Commission (EQC) Meeting, Portland,** DEQ Headquarters, 811 SW Sixth Avenue, Conf Rm 3A, Time/Agenda TBA. For info: Mikell O'Mealy, DEQ, Office of the Director, 503/ 229-5301

**July 15-16 NM**  
**Energy in the Southwest Conference, Santa Fe,** Eldorado Hotel, Includes FERC Comm Suedeen Kelly & Faculty of Energy Executives, Tribal and Commission Representatives, Attorneys and Consultants. Evolving Technologies, Policies and Practices. For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/04/04resnm.htm

**July 20-21 CO**  
**Colorado Water Conservation Board Meeting, Delta,** Location/ Time/Agenda TBA. For info: email:cwcbnews@state.co.us, website: http://cwcb.state.co.us/

**July 20-22 OR**  
**"Allocating Water: Economics and Environment", 2004 UCOWR Annual Conference, Portland,** Marriott Downtown, 1401 Naito Parkway, RE:Water Resources Management, Impacts, Risk and Prices of Irrigation, Economic and Environmental Demands, Climate Change, Cooperative Solutions, Water Rights Markets, Water Allocation Legal Issues & ESA, Groundwater Resources and Integrated Management, Columbia River Treaty, Conservation, Development Trends, Water Utility Supply and Demand Planning, Water Transaction Strategies, Tradeoffs in Quality & Quantity, Fed Intervention, Sustainability. Sponsored by Universities Council on Water

Resources and The National Institutes for Water Resources. For info: Renee Mantei, 703/ 684-2473 or email: rmantei@wef or website: www.ucowr.siu.edu

**July 22-24 CO**  
**50th Annual Rocky Mountain Mineral Law Institute, Vail,** Vail Marriot, Water and Environmental Section on 7/24, For info: Rocky Mountain Mineral Law Foundation, 303/ 321-8100, website: www.rmmlf.org

**July 28-30 CO**  
**29th Colorado Water Workshop, Gunnison,** Western State College, "Science, Technology & the Changing Politics of Water in the West" For info: WSC, 970/ 943-2055 or website: www.western.edu/water

**July 28-31 NM**  
**Western Water Seminar, Santa Ana Pueblo,** Hyatt Regency Tamaya, Sponsor: National Water Resources Association. For info: Kris Polly, 703/ 524-1544, email:kpolly@nwra.org, website: www.nwra.org

**August 10 NM**  
**2004 New Mexico Water Research Symposium, Socorro,** Macey Center, New Mexico Tech, 8 pm. For info: Cathy Ortega Klett, 505/ 646-1195 or email: coklett@wrri.nmsu.edu

**August 10-12 MT**  
**Northwest Power and Conservation Council Meeting, Location TBA.** For info: NPPC, 800/ 452-5161, email:info@nwcouncil.org, website:www.nwppc.org/

**August 12-13 AZ**  
**Arizona Water Law, Scottsdale,** Marriott Mountain Shadows Resort & Golf Club, Sponsored by CLE International. For info: CLE Int'l, 303/ 377-6600, or toll-free 800/ 873-7130, email:registrar@cle.com, website: www.cle.com

**August 16-17 NM**  
**New Mexico Water Law 12th Annual Conference, Santa Fe,** La Fonda on the Plaza, RE: Hydrology, Adjudications, Natural Resource Damage Claims, Economics of Water, CWA, Navajo Settlement, Transfers, Acequias, More. For info: CLE Int'l, 800/ 873-7130, email: registrar@cle.com, website:www.cle.com

**August 20 CO**  
**Colorado Ground Water Commission Meeting, Location TBD.** For info: Marta Ahrens, 303/ 866-3581 or email: marta.ahrens@state.co.us website: http://water.state.co.us/cgwc/

**August 26-27 CO**  
**Colorado Water Congress Summer Convention, Snowmass Village.** For info: Richard MacRavey, 303/ 837-0812, email: macravey@cowatercongress, website: www.cowatercongress.org/



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