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Water Rights, Water Quality & Water Solutions in the West

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WATER, PROPERTY & AUTHORITY IN NEW MEXICO

BALANCING TRIBAL AND STATE SOVEREIGN INTERESTS

by Stephen H. Greetham, Esq.

INTRODUCTION

Battles over water, legal and otherwise, long preceded the United States' assertion of sovereignty over New Mexico. Among individuals, those battles typically turn on respective property rights (i.e., who can use how much water in a given stream system). Among sovereigns—the United States, Indian tribes, and States—those battles involve not only the property rights but also competing jurisdictional interests (i.e., which sovereign has the authority to regulate the exercise of those property rights). As a package, those proprietary and sovereign interests give rise to a great number of potential future complications in New Mexico's effort to comply with its Rio Grande Compact and Endangered Species Act obligations.

The bulk of the case law addressing tribal water rights concerns only the nature and extent of a tribe's proprietary interest, that is, the quantification of the right. For better or worse, the law addressing the complex interplay of sovereign interests with respect to the control of those rights is "relatively fragmented and uncertain." Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (Spring 1994). Instead of offering pat predictions as to how this law will play out for the Rio Grande and the communities that depend on it, this article outlines the legal parameters that will guide litigation and negotiation efforts to resolve tribal-state water disputes that affect New Mexico's largest stream system. Given the unavoidable interrelationship of the resource and human settlement patterns throughout the state, both the tribal and non-tribal communities stand to benefit from the sustainable resolution of these inter-sovereign conflicts, and such resolution will require difficult and creative problem solving in the years to come.

THE QUANTIFICATION OF TRIBAL WATER RIGHTS

Finality — A Critical Priority

Resolution of outstanding tribal water rights claims is a critical priority throughout the West. Without a final quantification of senior tribal water rights, efforts to manage water use in this arid region are profoundly hampered. That reality has induced New Mexico to declare the resolution of tribal claims as a critical statewide priority (see generally New Mexico State Water Plan at 11, 64-65 (Dec. 23, 2003); available on-line at www.seo.state.nm.us/water-info/NMWaterPlanning/2003StateWaterPlan.pdf; cf. id. at § E). Echoing the State's planning priority, the United States Senate Committee on Energy and Natural Resources convened a conference on April 5, 2005, to address — among a handful of other critical western water issues— how the federal government could better facilitate the resolution of those tribal claims (see generally http://energy.senate.gov/conference/waterconference.cfm). The unfortunate fact is that the longer it takes to obtain finality, the longer the West will be burdened by conflict, regulatory uncertainty, and the related adverse effects on local economic health. See Western Water Policy Review Comm'n, *Water in the West: Challenge for the Next Century* (June 1998).

Sovereignty in New Mexico

McCarran Amendment

Ten tribal water rights adjudications are now pending in New Mexico. Those cases relate to the tributary claims of seventeen of the twenty-two sovereign Indian tribes. Of those adjudications, five are in federal court, and five are in state court. The McCarran Amendment, 43 U.S.C. § 666, paved the way for the exercise of state court jurisdiction over tribal water rights by providing, in substantive part, that:

> "Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary part to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances . . . ." (end quote)

Federal Law

Regardless of McCarran's establishing concurrent federal-state jurisdiction over the adjudication of tribal water rights, the law that controls the nature and extent of those rights remains the exclusive province of federal law. See generally *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983); Strickland, Rennard, et al., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 579 n.6 and accompanying text (1982). See also *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979); *New Mexico, ex rel., State Engineer v. Aamodt*, *et al*., 537 F.2d 1102 (10th Cir. 1976).

Negotiation Guidelines

Of the current adjudications in New Mexico, several are also the subjects of active settlement negotiations. Indian water rights settlement negotiations are conducted in accordance with guidelines promulgated fifteen years ago by the US Department of the Interior, 55 FED. REG. 9223 (Mar. 12, 1990). Of the current negotiation efforts in New Mexico, the *Aamodt* talks have recently attracted the most substantial—and controversial—public attention. See, e.g., "*Aamodt, Schmaamodt: Who Really Gets the Water?*," Santa Fe New Mexican (Nov. 21, 2004). Those efforts, while inescapably complex and costly—and too often inaccurately perceived as a mixed bag for those not at the table — can bring tremendous benefit to both tribal and non-tribal communities. That seems especially so when one considers the social, economic, and legal disruptions that may result from exclusive reliance on litigation.

The Nature and Extent of Tribal Water Rights

Pueblo Tribes

Regardless of whether tribal claims are resolved through litigation or negotiation, the law will necessarily—and for better or worse—shape any resolution. Courts, scholars, and practitioners have developed a substantial body of work discussing the theories by which tribal water rights may be quantified. In New Mexico, however, the particularized case law has not been adequately developed so as to provide definitive guidelines. Also, given the unique historic and legal status of the Pueblo tribes, substantial questions remain as to how general federal standards—which have been typically developed through litigation by and on behalf of "reservation" Indian tribes—apply to the quantification of their rights. The unsettled nature of the law suggests the long row New Mexico practitioners still have to hoe. That said, let us proceed to describing the basics.

Winters Rights

***Winters* Rights**

In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court announced that the United States' establishment of an Indian reservation vests the benefited tribe with an implied water right that has a priority of the date on which the United States created the reservation. See generally COHEN'S 578-604. The Court later held that such reserved rights extend to that amount of water necessary to satisfy the tribe's current and future needs, *Arizona v. California*, 373 U.S. 546 (1963), but that those "needs" are limited by the federal purpose for which the reservation was created, *Cappaert v. United States*, 426 U.S. 128 (1976). While some courts have applied different means for quantifying reserved water rights, they have uniformly recognized *Winters* as the basis for large and senior tribal water rights throughout the West. Compare *Arizona*, supra, with *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.2d 68 (2001); see also Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J. 835 (Fall 2002)

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Sovereignty in New Mexico

Unique Status

***Winters* Limits**

Pueblo Standard

Mechem Doctrine

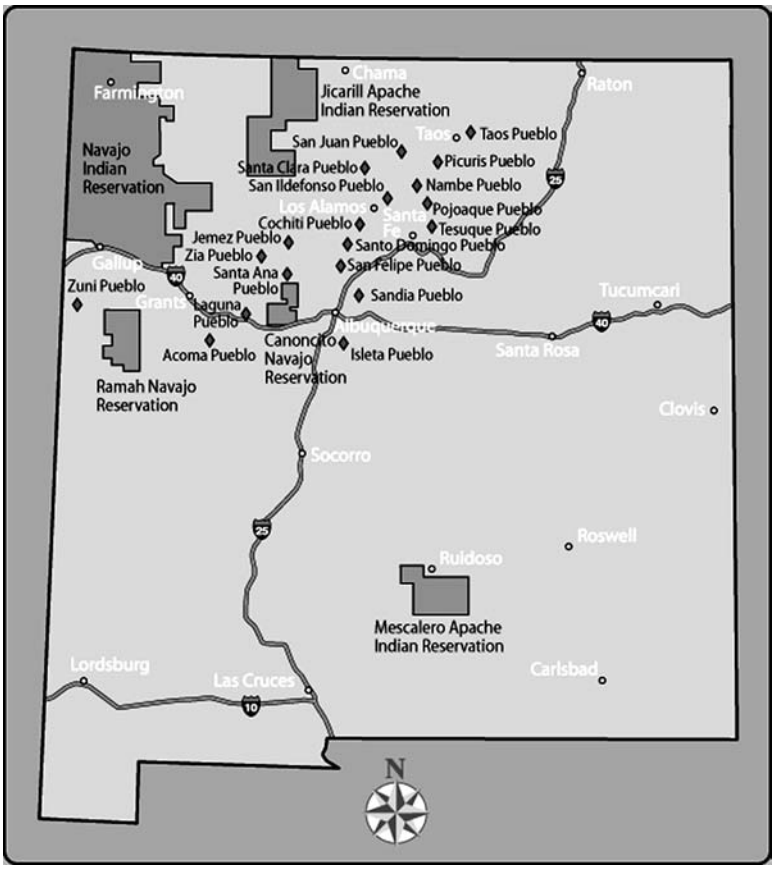
Pueblo Rights

Citing the unique status of the Pueblo tribes, however, several courts have stated that *Winters* does not apply to Pueblo grant lands (i.e. lands included in Spanish or Mexican land grants). Pueblo grant lands, as opposed to formal and informal reservation lands, were recognized by the colonizing sovereign as vested to the tribal governments prior to US sovereignty over the area. See *New Mexico, ex rel., State Engineer v. Abousleman, et al.,* No. CV 83-1041 (Oct. 4, 2004) (memorandum opinion); *New Mexico, ex rel., State Engineer v. Aamodt, et al.,* 618 F. Supp. 993 (D.N.M. 1985); *New Mexico, ex rel., State Engineer v. Kerr-McGee, et al.*, 120 N.M. 118 (Ct. App. 1995). While those rulings do not apply to formal and informal Pueblo "reservation" lands, they do apply to those lands included in formal Spanish or Mexican land grants, which comprise the bulk of most Pueblos' land holdings. *Winters*, accordingly, appears to be dramatically limited in New Mexico.

Notably, however, the Pueblo *Winters* rulings have not adequately addressed the long history of Spanish and Mexican relocation and concentration of Pueblo populations, a history that has many parallels to those devastating United States' policies that created Indian "reservations" and which form a cornerstone of the *Winters* doctrine. It is therefore possible that a future court will disregard the currently limited rulings and conclude that the *Winters* doctrine does apply to the Pueblo land grants. Until such a ruling appears, though, the current law takes the Pueblo land grants out of the mainstream of federal Indian water law. See generally Bradley S. Bridgewater, Esq., *"The Nature and Quantification of Pueblo Water Rights,"* LAW OF THE RIO GRANDE—CLE INT'L (2001); DuMars, Charles T., Marilyn O'Leary, and Albert E. Utton, PUEBLO INDIAN WATER RIGHTS (1984).

If *Winters* does not apply, what does? The federal court in New Mexico has invented a wholly unique standard for the quantification of Pueblo water rights. *Aamodt*, supra. That standard, often referred to as the Mechem Doctrine, focuses on the amount of water that a Pueblo used within its grant lands between 1846 (the date of the Treaty of Guadalupe Hidalgo) and 1924 (the date of the Pueblo Lands Act). Under this doctrine, such quantity of use is entitled to an aboriginal—or "first in time"—priority date that is senior to all colonial era water rights. While often the basis for substantial historic era irrigation claims, given the extensive agricultural works of most Pueblos, the doctrine does not appear to recognize future-use water rights (not yet developed), as does *Winters*.

PUEBLOS IN NEW MEXICO



Pueblos

The Pueblos are those agrarian Indian tribes that the conquistadors found living in settled "towns" throughout New Mexico. Because the Pueblo tribes had those settled "towns," with the adobe structures which have become archetypical symbols of the American Southwest, the Spanish identified them as "pueblos," distinguishing them from the nomadic tribes that also lived in the area (e.g. the Apache and Utes). After a problematic stutter step early in the US historic period, the Supreme Court recognized the Pueblos as "Indian tribes," thus protected by the full scope of federal law against local intrusions.

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Sovereignty in New Mexico

For years, practitioners in New Mexico have relied on the Mechem Doctrine, albeit often criticizing it at the same time. Recently, the federal court has questioned whether that doctrine exclusively controls the relevant question. See *Abousleman*, supra. In light of *Abousleman*, the absence of a concrete standard is all the more obvious and highlights, further, the substantial related questions that have never been conclusively resolved. When one considers any map of New Mexico, particularly focusing on the location of the nineteen Pueblos and their relation to the Rio Grande, that lack of certainty is no small cause for potential concern.

Hunting/Fishing

***Winans* Rights**

Finally, not all tribal water rights need to have a consumptive element. In *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court recognized a tribal treaty right to use off-reservation areas for hunting and fishing. *Winans* rights have been construed as securing to tribes those rights specifically or impliedly enumerated in treaties executed by the United States. By their nature, the substance of any *Winans* right depends on the content of the relevant treaty and the particularities of the protected activity.

Minimum Flows?

Relying on *Winans*, a Pueblo's aboriginal cultural or ceremonial use of springs or streams may be protected by the Treaty of Guadalupe Hidalgo. See generally *Abousleman*, supra. While such right presumably would not vest the tribe with a right to divert or deplete water from a stream system, it may establish minimum water feature characteristics that must be maintained for the protection of the aboriginal use right. Such protections might require the maintenance of instream flows or serve to prevent interfering or inconsistent uses of the affected source (e.g., excessive groundwater production or manipulation of natural springs). Whatever their particular characteristics, *Winans* rights will undoubtedly be part of the Rio Grande regulatory universe.

POST-DECREE ADMINISTRATION OF TRIBAL WATER RIGHTS

Regulatory Authority

Once water rights have been quantified, the potential for bare-knuckle fighting is far from over. A right to use a quantity of water, of course, is not the same as a license to use that water in any manner, place, or for any purpose desired. Instead, given the literally fluid nature of the resource, an administrative structure that can provide stability and predictability among all users must be preferred. Given persistent questions and periodic shifts in the course of federal jurisprudence on the interplay of tribal and state jurisdictional authority, however, the establishment of an appropriate administrative scheme may be more elusive than the need for it would suggest in those basins that contain tribal water rights.

The following discussion outlines the law implicated in tribal-state disputes of regulatory authority regarding water. It also briefly notes the great equalizer, that is, the prior exclusive jurisdiction doctrine. In the end, it is fair to say that this murky corner of the law is too ill-defined to provide universally applicable guidance. Nonetheless, the rules that will configure any resolution can be outlined, and in the coming years and generations, those rules will be further developed through necessary litigation and creative negotiation.

"Sovereignty" v. Federal Authority

Competing Sovereign Interests and Control

"Sovereignty"—no matter whether it is applied to foreign, federal, state, or tribal sovereigns—is more often used as a vague and romantic concept than as a discrete legal norm. Like "liberty" and "freedom," it is too often invoked more for what it connotes than what it denotes. At bottom, a people's or governing unit's "sovereignty" encapsulates its power to determine its own future—to make its own rules and to live by them. However, while both Indian tribes and American States possess sovereign powers, those powers are subject to superintending federal authority, and it is on that complex field, refereed by the federal sovereign, where tribal-state intergovernmental disputes will be played out and resolved.

Inherent Tribal Sovereignty

Federal law has long recognized that American Indian tribes possess an inherent sovereign authority over both their citizens and their territories. As a starting point, it is important to recognize that those powers are inherent, not vested by any external authority. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). While Congress may delegate certain powers to a tribe, such delegations are—by definition—not inherent to tribal sovereignty. Inherent tribal sovereignty, instead, encompasses those powers that exist solely because of a tribe's status as a pre-constitutional, separate, and self-determining collective. Accordingly, analyses of any tribal claim to a sovereign power must begin with the

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acknowledgment that a tribe possesses all of the powers that inhere to any sovereign with respect to its relationship to its citizens and its territory.

European arrival in North America, however, forcibly changed that relationship. See generally, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In the abstract, tribes continue to possess a full and inherent sovereignty; however, federal conquest and colonization—as continued through the vehicle of modern federal law—limits the exercisable scope of that power. Accordingly, when questions of tribal authority are presented, the question is not whether a tribe possesses a specific power. Instead, it is whether the United States will recognize as proper the tribe's exercise of that power. In other words, the analysis turns on how the United States' subjugation of American Indians has restrained the lawful potency of inherent tribal sovereignty. See generally Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

Sovereignty Limits

UNDER CURRENT FEDERAL LAW, TRIBES MAY EXERCISE ANY INHERENT POWER THAT:

1) is not inconsistent with its status as a so-called "domestic dependent nation" (e.g., the power to wage war or to treat with foreign nations are not considered to be exercisable);
2) has not been ceded by treaty (e.g., the relinquishment of authority over aboriginal lands); or
3) has not been abrogated by statute (e.g., the right to hunt certain wildlife without federal restraint).

Given that there is a specific text to construe, it is relatively straightforward to determine treaty cessions and statutory abrogations. However, figuring out whether a specific sovereign act would be inconsistent with a tribe's "domestic dependent nation" status opens the door wide for judicial judgment calls, policy making, and other general mischief. Not surprisingly, those cases comprise the bulk of published rulings in this area.

Inherent Powers

With respect to water resources, courts have recognized sovereign tribal interests and authority. For example, in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1997) (emphasis added), the Tenth Circuit upheld the US Environmental Protection Agency's enforcement of Isleta Pueblo's water quality standards against the City of Albuquerque, concluding that:

"The EPA's construction of the 1987 amendment to the Clean Water Act—that tribes may establish water quality standards that are more stringent than those imposed by the federal government—is permissible because *it is in accord with powers inherent in Indian tribal sovereignty."* (end quote)

Water Regulation

Accord *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998); compare also U.S. Interior Solicitor, Entitlement to Water Under the Southern Arizona Water Rights Settlement Act (Op. No. M-36982, Mar. 30, 1995). In other words, tribal regulation of water quality is a potent and exercisable feature of inherent tribal sovereignty. Compare *Arizona Public Service Co. v. United States EPA*, 211 F.3d 1280 (D.C. Cir. 2000) that noted in dicta, that it was "not implausibl[e]" to argue that tribal regulation of air quality is defendable as a component of inherent tribal sovereignty. While the specifically recognized potency of that power has not yet been detailed through subsequent litigation, Indian tribes in New Mexico—the Navajo and Jicarilla Apache Nations, for example—have enacted and are enforcing comprehensive regulatory schemes for the management of water within their territories.

State Authority

Federal Deference

The New Mexico constitution expressly reserves to the State the authority to regulate waters within its territory, and the federal government has often deferred to such general state interest. Through its enactment of the Mining Act of 1866 (43 U.S.C. § 661), the Desert Land Act of 1877 (43 U.S.C. § 321), and the Reclamation Act of 1902 (43 U.S.C. §§ 372, 383), for example, Congress has expressed a general deference to State authority in controlling water law, and the Supreme Court has duly noted those legislative signals, see, e.g., *California v. United States*, 438 U.S. 645 (1978); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Willson v. The Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245 (1829).

State/Tribal Adjudication

Also, as noted previously, the McCarran Amendment—a statutory passage to which many state's rights advocates seem to attribute an almost religious sanctity—paved the way for the exercise of state court jurisdiction over tribal water rights. More broadly, in fact, some parts of the statute seems to reinforce the argument for federal deference to state primacy in water matters, including tribal and other federal law water rights. Compare generally Senate Report No. 755, 82d Congress, 1st Session; and Berry, Catherine Anne, *The McCarran Water Rights Amendment of 1952: Policy Development, Interpretation, and Impact on Cross-Cultural Water Conflicts* (1993) (unpub'd masters thesis in UNM collection). However, the Amendment did not displace federal and tribal sovereign interests in water. Rather, it redressed the inability of state courts to conduct general stream adjudications when federal or tribal water rights were involved. See *Colorado River Water Conservation District v. United States*, 424

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Location of Use

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Negotiated Settlements

Adjudicating Court

U.S. 800 (1976). Nothing in McCarran cedes federal or tribal jurisdiction, authority, or control over tribal water rights, see, e.g., *Arizona*, supra. Also, as the Supreme Court has explored with respect to a different—yet equally controversial—statute, Congress's authorizing state courts to hear tribal subject matter does not vest the state with the full range of relevant regulatory authority. See *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Balancing of the Sovereign Interests

Both tribal and state sovereigns have arguments as to their respective authority to administer decreed water rights, but a legitimate sovereign claim does not dictate which claim prevails. With respect to competing tribal and state claims to regulatory authority, disputes most often concern the regulation of activities within tribal territory. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), remains one of the clearest statements of the power to exclude competing sovereign interests within that territory.

Writing for the Court in *White Mountain Apache*, Justice Blackmun acknowledged that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." Id. at 143. Nonetheless, after canvassing its earlier opinions, the Court explained that:

> "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise, where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (end quote) Id. at 145.

McClanahan v. Arizona State Tax Comm'n, 462 U.S. 324 (1983) was in accord with the above quote from *White Mountain Apache*. Given the literally fluid nature of the subject matter, evaluations of competing sovereign interests in the regulation of water are extremely complex. Nonetheless, it can be assumed that judicial resolution will turn largely on the off-reservation effect of the on-reservation water use at issue. Compare *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir 1981) (rejecting state authority over tribal on-reservation activities), with *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (affirming state authority with respect to non-Indian on-reservation activities). But note the Wyoming Supreme Court's holding in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wy. 1992) where the court imposed state law as a limitation to on-reservation use of reserved tribal water rights. In New Mexico, that will almost certainly implicate the state's Rio Grande and Endangered Species Act obligations, notwithstanding the facts that the tribes do not share that burden with the State.

One other assumption is safe: little hope can be justified that ad hoc judicial resolution of tribal-state regulatory disputes over water will produce a stable means for balancing complex and interrelated policy interests. For this reason, some Indian water rights settlement acts have attempted to address post-decree administration, at least as a threshold matter. See, e.g., Pub. L. No. 106-263, 114 Stat. 737 (2000) (Shivwitz Band settlement act restricting application of state law to off-reservation tribal water uses); Pub. L. No. 102-441, 106 Stat. 2237 (1992) (Jicarilla Nation settlement act relying on Reclamation law to control tribal water uses); Pub. L. No. 97-293, 96 Stat. 1274 (1982) (Tohono O'odham Nation settlement act requiring formulation of federal management plan for tribal water uses). Those efforts have produced some models for future settlements; however, no uniform template has yet emerged. The uncertainty promised by an exclusive reliance on litigation will no doubt keep negotiators on task toward developing more detailed models.

Prior Exclusive Jurisdiction Doctrine

Finally, one cannot discuss post-decree administration disputes without remembering the adjudicating court. Equitable principles provide that the first court to seize a res (property right) — such as a water right—shall retain exclusive jurisdiction over its disposition. While the prior exclusive jurisdiction doctrine does not, by itself, resolve tribal-state regulatory disputes, it is a critical part of the discussion if for no other reason than it will control which court—either state or federal—will hear and decide the post-decree regulatory disputes.

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Retained Jurisdiction

So far, the doctrine has been consistently applied. In *United States v. Alpine Land & Reservoir Co.,* 174 F.3d 1007 (9th Cir. 1999), for example, the federal court's jurisdiction was affirmed. In that case, Churchill County (Nevada) challenged the federal court's exercise of post-decree jurisdiction over a state engineer decision that affected a federal agency's water right. While the relevant decree did not state that the court retained such authority, the court nonetheless affirmed its power to do so, reasoning that "[s]o long as the dispute in this case is related to the district court's earlier Decrees, the district court retains jurisdiction to adjudicate the dispute." The court further affirmed the exclusivity of its power on the grounds, inter alia, that the "disposition of [water rights] are best conducted in unified proceedings... ." Given that the relevant decrees "were complex and comprehensive water adjudications," the court reasoned, "conflicting federal and state constructions would be entirely unworkable."

In *Nevada v. South Fork Band of the Te-Moak Tribe*, 339 F.3d 804 (9th Cir. 2003), the Ninth Circuit clarified and reaffirmed its *Alpine* ruling. There, however, it was the state court's authority to superintend post-decree administration actions that was at issue. Ruling against federal and tribal arguments, the *Te-Moak* court noted that the only difference between "this case and *Alpine* is that the shoe is now on the other foot." In other words, the state court entered the decree (rather than a federal court) and thus retained the exclusive and inherent right to administer that decree.

Uncertainty

In practice, the judicial power to administer decrees is often exercised as the power to superintend another authority's administrative decisions. Currently, for example, "[s]everal quantified Indian water reserved rights . . . are being administered by federal courts *occasionally relying on state administrative expertise*." McGovern, supra (emphasis added); see also *United States v. Walker River Irr. Dist*., 15 ILR 3083 (D. Nev. 1988). In such instances, a legitimate question is presented as to whose power the superintended authority is exercising. For example, if a state engineer is administering a federal court decree, is he or she doing so pursuant to inherent state authority or delegated federal court authority? Is such supervision bound by state statute, and more fundamentally, is such supervision injurious to state sovereign interests? Conversely, would state court supervision of post-decree tribal administration be injurious to tribal sovereign interests? What are the sovereign consequences of an "activist" decree court's presuming itself more capable than the existing administrator or administrative scheme? These questions suggest the complex uncertainties that could control efforts to administer the Rio Grande after the completion of all water rights adjudications, and those uncertainties are no small cause for furrowed brows when one considers that half of those adjudications are presently in state court and the other half are in federal court.

Decree Court Retains Power

What does the prior exclusive jurisdiction doctrine mean for purposes of resolving intersovereign post-decree administration disputes along the Rio Grande in New Mexico? In a nutshell, whichever court enters the decree—state or federal—that court will retain the power to administer the water rights therein decreed. In other words, if the sovereigns cannot reach a mutually acceptable resolution through negotiation, the decree court will resolve and balance the competing tribal-state interests. Given the difficult questions posed by such a judicial role, the sovereigns would likely be best served by seeking to resolve their disputes through negotiation, not case-by-case litigation.

CONCLUSION

Cooperation v. Imposition

Adequate and workable resolution of competing rights in the stream systems that traverse New Mexico will involve more than the quantification of respective rights. Sustainable future water management will also require the establishment of appropriate and predictable rules for the administration of all water rights, both tribal and non-Indian. In the absence of proactive intersovereign cooperation toward that goal, the adjudicating courts — both federal and state — will have the power to impose rules from the bench, which may be a greater cession of authority than any sovereign would prefer.

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Drinking Water

Federal Activities

Budget v. Mandates

Public Water Systems

MCLs

Primacy

1996 Amendments

Prevention

DRINKING WATER RULES UPDATE

NEW RULES IN EFFECT SOON
NON-REGULATORY INNOVATION AN OPTION

by Scott Shine, Lane Council of Governments (Eugene, Oregon)

It is a difficult task to fit such a complex subject as drinking water and the related laws, programs, and policies into a six hour conference. On March 4, 2005, the Environmental Law Education Center convened a stellar group of drinking water specialists at the World Trade Center in downtown Portland, Oregon to do just that. The speakers presented an excellent synopsis of current activities and projections for the future. At the end of the day, conference attendees better understood how drinking water issues are being addressed at the federal, state, and municipal levels and recognized how innovative approaches are being used to overcome the challenges associated with protecting this valuable resource.

Early in the day, Marie Jennings, Manager of the US Environmental Protection Agency's (EPA's) Region 10 Drinking Water Unit, gave a summary of current federal activities. She explained public spending trends, budget proposals, performance assessments, and then spoke more specifically on how these proceedings are impacting drinking water programs. The proposed federal budget will dramatically scale back existing programs and extensive reviews are putting pressure on agencies to demonstrate results. The Office of Management and Budget is presently coordinating a detailed assessment of all federal programs in order to evaluate effectiveness and provide a basis for budget restructuring. The combined effect of limited resource availability and increased attention to quantifiable results has resounding impacts on federal, state, and local drinking water programs.

While it may seem paradoxical to be introducing new rules and programs during a time of limited finances and increased scrutiny, that is exactly what is in the works. EPA's Office of Water has been developing three new rules that are expected to be released in the upcoming months. To understand these proposed rules it is important to understand the legislative history that has led up to this point.

BACKGROUND

Drinking water systems that serve a population of at least 25 people or have at least 15 service connections for more than 60 days a year are considered **public water systems**. These systems must adhere to federal regulations. Public water systems include **Community water systems**, such as a small city or manufactured home parks, **Non-Transient/Non-Community water systems**, such as schools or large businesses, and **Transient water systems**, such as gas stations or rest areas (for additional information, see website: www.epa.gov/safewater/pws/pwss.html). Systems that distribute water to less than 25 people or have fewer than 15 connections are not the focus of federal regulatory efforts, but states have the option of regulating this subset. There are approximately 160,000 federally regulated public water systems currently operating in the United States.

Beginning in 1974, with the passage of the federal Safe Drinking Water Act (SDWA) [42 USC § 300 et seq.], EPA was established as the lead regulatory agency as regards drinking water. At that time, EPA began the formulation of Maximum Contaminant Levels (MCLs) for identified drinking water contaminants. Over the years, the number of regulated contaminants has risen from around 20 in 1976 to 91 in 2004.

The SDWA also instituted the agreement between states and EPA known as primacy. If states meet and maintain certain standards of operation and enforcement, EPA can delegate primary enforcement authority of public water systems to the state. This is an important arrangement and successful implementation of regulations developed at the federal level depends heavily on the quality and effectiveness of state programs (see website: www.epa.gov/safewater/pws/primacy.htm). Since its conception, the SDWA has undergone significant revisions. The most recent and notable structural changes to the SDWA occurred in 1996.

The focal point of the 1996 Amendments to the SDWA is the integration of new drinking water protection efforts with traditional measures. Whereas the original 1974 Act and the 1986 Amendments focused mostly on treatment and infrastructure, the 1996 Amendments take a more systematic approach and attempt to shift the focus of the SDWA from cure to prevention.

THE FOUR MAJOR OBJECTIVES OF THE 1996 SDWA AMENDMENTS ARE TO:

- Increase consumer access to information
- Create new funding sources for public water systems
- Expand and re-focus regulatory approaches
- Establish prevention programs

(For additional information, see website: www.epa.gov/safewater/sdwa/laws_statutes.html#1996)

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Drinking Water

The 1996 Amendments lay out a tentative schedule for the development and implementation of regulatory measures for: arsenic; radon; sulfates; **d**isinfection **byp**roducts (DBPs); and *Cryptosporidium*. They also require EPA to investigate the public health benefits of disinfection in groundwater-dependent public water systems. Currently, proposed rules focusing on the interconnected issues of DBPs and *Cryptosporidium* along with a rule to more stringently oversee groundwater system operations are the top priorities within EPA's Office of Water.

PROPOSED NEW RULES

Disinfection Byproducts

Two of the three proposed rules are the second stages of a regulatory framework know as the Microbial and Disinfection Byproduct (M-DBP) Rule Cluster. Beginning with the Total Coliform Rule and the Surface Water Treatment Rule in 1989 [40 CFR 141.21 and 40 CFR 141 subpart H, respectively], EPA has crafted the M-DBP rules to address both the threat of microbial pathogens as well as the health risk from byproducts that form when disinfectants are added to purify water supplies. The next stages in the M-DBP rule anthology, Proposed Stage 2 Disinfectants and Disinfection Byproducts Rule (DBPR), and Proposed Long Term 2 Enhanced Surface Water Treatment Rule (LT2ESWTR), are on track to be finalized and promulgated by July 2005.

Long Term Two Enhanced Surface Water Rule

Cryptospo-ridium

The LT2ESWTR builds off a series of rules that began with the Surface Water Treatment Rule (SWTR) in 1989. The SWTR, requiring treatment in systems dependent on surface water or groundwater under the direct influence of surface water to protect from microbial pathogens, began a process of rule development that includes the Interim Enhanced Surface Water Treatment Rule (IESWTR), the Long Term 1 Enhanced Surface Water Treatment Rule (LT1ESWTR), and, most recently, the LT2ESWTR. These rules began with the regulation of large surface water systems that serve populations of 10,000 or more. They subsequently scaled-down sequentially to include smaller systems. Through the different stages of this rule development process, *Cryptosporidium* monitoring requirements were established and sanitary surveys for surface water systems have been instituted. The newest rule, LT2ESWTR, is an effort to identify systems that are especially susceptible to *Cryptosporidium* outbreaks. The *Cryptosporidium* microorganism is of special concern because it is highly resistant to conventional disinfectants. Although existing standards for *Cryptosporidium* require 99% treatment effectiveness, systems that have higher concentrations of *Cryptosporidium* in their source water may be required to treat influent with an even greater effectiveness.

System Categories

The proposed rule requires source water monitoring for *Cryptosporidium*, *E. Coli*, and turbidity in surface water and groundwater under the direct influence of surface water systems. Those systems serving 10,000 or more will monitor for two years after the rule is issued and systems serving less than 10,000 begin monitoring once larger systems have finished their monitoring cycle. After the results are analyzed, EPA will determine on a system-by-system basis if additional treatment is necessary.

As part of the LT2ESWTR, systems must maintain an up-to-date profile of their disinfection practices. Once EPA finalizes the Stage 2 Disinfection Byproducts Rule (DBPR), standards for disinfection byproducts will be more rigorous and EPA wants to avoid a compromise in microbial protection for the sake of reducing byproducts

Stage Two Disinfectants and Disinfection Byproducts Rule

Chemical Interactions

Some disinfectants (e.g., chlorine) interact with other agents in the water supply and may thereby form dangerous offshoots. According to EPA, substantial evidence exists that links DBPs with increased levels of cancer as well as reproductive and developmental disorders. For these reasons, EPA is augmenting their current efforts to minimize exposure to harmful byproducts. The Stage Two DBPR will affect: 1) all Community water systems that currently disinfect by any means other than ultraviolet (UV) treatment; and 2) Non-Transient/Non-Community water systems with a service population above 10,000 that add a disinfectant other than UV treatment.

Monitoring Evaluation

The first step in the implementation of the DBPR will be the completion of an Initial Distribution System Evaluation (IDSE). IDSEs are designed to determine the most representative places to monitor for the prevalent disinfection byproducts, haloacetic acids (HAA5) and trihalomethanes (TTHMs). The new rule also changes the structure by which systems measure compliance. Instead of using the average of all monitoring sites combined, each monitoring site's annual average must demonstrate compliance.

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Drinking Water

Groundwater Disinfection

Sanitary Surveys

Hydrogeologic Sensitivity

Source Monitoring

May Implementation

Source Assessments

This is known as the Locational Running Annual Average (LRAA). Once the monitoring points are determined by the IDSE, the proposed rule lays out a tiered schedule by which systems must come into compliance with newly developed MCLs. Small systems are granted a longer period of time to attain compliance.

Even though groundwater has traditionally been perceived as safe from external contamination and viral incidents, many Community and Non-transient/Non-Community systems that rely on groundwater add a disinfectant to minimize the slight, but still possible, risk of an outbreak. Groundwater systems that currently disinfect will be affected by the Stage Two Disinfection Byproducts Rule as well as the proposed Groundwater Rule.

The Groundwater Rule

The last of the three proposed rules awaiting finalization is the generically titled "Groundwater Rule." This rule also arises from the 1996 Amendments to the SDWA, which enables EPA to enact laws requiring groundwater disinfection as deemed necessary to protect public health.

The proposed Groundwater Rule aims to get a snapshot of system operation by initiating sanitary surveys for all public groundwater systems. State agencies given primacy by EPA are to perform these surveys every three years for Community water systems and every 5 years for Non-Transient/Non-Community water systems. If problems are identified during this analysis, states are required to notify systems within 30 days and systems must then take corrective actions to alleviate the deficiencies within 90 days. If the corrective actions require more than 90 days, the systems can submit a plan for state-approval and a deadline extension. These corrective actions could include the installation of new treatment facilities.

Hydrogeologic sensitivity assessments are another component of the proposed Groundwater Rule that EPA is calling on the states to perform. This is a one-time assessment that determines future monitoring and disinfection requirements for groundwater systems. Systems that already treat their groundwater to an effectiveness of 99.99% inactivation (i.e., oxidization or interference with cellular activity that renders the contaminant non-functional), or that remove 99.99% of potential viral contaminants through filtration are not required to have sensitivity assessments performed and they may be eligible for source water monitoring waivers.

The source water monitoring component of the new rule requires all systems that are identified as hydrogeologically sensitive or that do not currently disinfect to take monthly samples of their influent and test for fecal indicators. Systems that do treat their source water before distribution and serve a population of 3,300 or more must continuously monitor these procedures for effectiveness in removing or inactivating microbes. Systems serving less than 3,300 people are able to take monitoring samples once a day instead of continuously. All of the requirements of the new Groundwater Rule apply to systems that mix surface water and groundwater, which includes many large municipalities that use groundwater to supplement low surface water flows.

The proposed Groundwater Rule has far-reaching effects due to the fact that most small public water systems depend on groundwater as their primary source of drinking water. Systems such as rural schools, manufactured home parks, industry, and small towns that are typically dependent on groundwater usually lack the resources that large systems have to implement new orders and perform scrupulous monitoring. This will be a significant challenge as EPA and state agencies begin the implementation and enforcement of this new rule, which is expected to be issued in May.

As federal agencies pass down new regulations and on-the-ground implementation begins, the challenges that arise can either spoil the intended purpose of the rule or become a catalyst that motivates innovative partnerships, creates efficient systems, and enlivens interdisciplinary approaches to water resource issues. One example of the way challenges can create progress is the how the State of Oregon designed and is operating its Source Water Assessment Program.

AN INNOVATIVE MODEL OF IMPLEMENTATION

As noted above, a number of rules originated with the 1996 Amendments to the SDWA. However, many non-regulatory mechanisms were initiated as well. The most significant of these is the Source Water Assessment Program.

The 1996 Amendments established the requirement that all states under a primacy agreement with EPA must develop and submit for approval a comprehensive plan to assess all the public water systems in the state. These analyses are called Source Water Assessments.

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Drinking Water

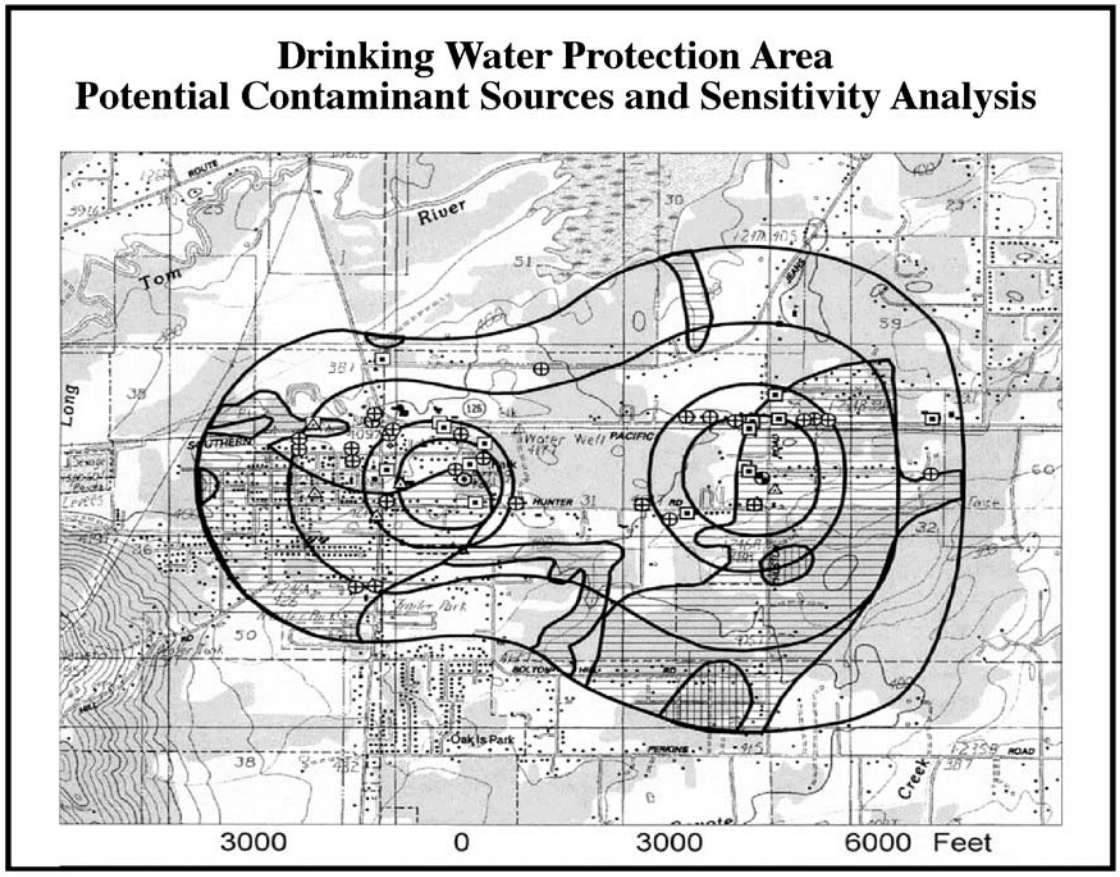
State Options

SOURCE WATER ASSESSMENTS MUST INCLUDE:

- A delineation of the area from which the drinking water is sourced
- An inventory of potential contaminant sources in the source water delineation
- An indication of a water system's susceptibility to contamination
- Methods to release this information to the public

The nature of the Source Water Assessment Program allows flexibility in how different states develop their programs. This leads to variability in language and processes, but the fundamental elements are the same in all states. The graphic below is an example of what source water delineation may look like for a groundwater system. This example is a municipal water system in western Oregon.

Well Protection Delineation



Time-of-Travel Zones

The solid black rings correspond to Time-of-Travel Zones around the city's two wells. The smallest is a one year Time-of-Travel Zone. According to the models used, a drop of water that enters the aquifer in this area will be assimilated into the drinking water supply within one year. Moving outwards, the larger land areas are the two year, five year, and ten year zones. The striped overlays signify areas of high sensitivity to contamination and the symbols represent potential contaminant sources. The symbols correspond to an attached table in the assessment that identifies the potential sources and specifically describes the associated risks.

Agencies Coordinate

In Oregon, the Source Water Assessment work is being completed through a joint effort by the Oregon Department of Human Services (ODHS) and the Oregon Department of Environmental Quality (ODEQ). Although the Department of Human Services is the primary regulator of all public water systems in the state, in the mid-1980's ODEQ was designated as the lead agency in a statewide effort to protect groundwater resources. Throughout the next decade, ODEQ and ODHS worked closely on developing measures to protect groundwater. This began a venture that has blossomed into an effective partnership dedicated to protecting Oregon's public health and water resources.

In response to the 1996 Amendments and the Source Water Assessment requirements, an advisory committee gathered to develop a statewide Source Water Assessment Plan. The Plan describes the procedures by which 2,656 system-specific Source Water Assessments will be completed (to view the

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State-Wide Plan

Additional Applications

DWPAs

Voluntary Local Involvement

Certification Elements

Local Approach

entire Plan, see website: www.DEQ.state.or.us/wq/dwp/SWAPCover.htm). As the Plan took shape, it was clear that the unique partnership between these two agencies could be utilized to efficiently and successfully meet the obligations of the Source Water Assessment Program.

The statewide Source Water Assessment Plan divides the workload according to agency expertise and interest. ODHS is completing all of the delineations for groundwater systems while ODEQ focuses on the delineation of surface water systems. In addition, ODEQ conducts all the inventories of potential contaminant sources within the source areas. Their shared responsibility approach has allowed the two agencies to meet their mandates, gather useful information, and pool their resources to more effectively serve the citizens of Oregon.

Source Water Assessments are already proving to be very valuable for a number of other applications related to drinking water protection and water resource planning. In anticipation of new federal rules and through the foresight of the program's administrators, the delineations and sensitivity analyses completed for the Source Water Assessments were designed to meet the hydrogeologic sensitivity assessment requirements of the forthcoming Groundwater Rule, eliminating duplicate efforts. ODEQ is using the Source Water Assessment data to prioritize the clean up and removal of hazardous Underground Storage Tanks. These are just two examples of the many ways this valuable information is being used now, and can be used in the future, to coordinate projects and increase efficiency.

Once the two agencies perform the necessary fieldwork and assemble a complete Source Water Assessment, they mail the report to the local water system operators along with a variety of informational materials. The delineated land areas included in the Source Water Assessments are referred to as Drinking Water Protection Areas (DWPAs) and they are the foundation for developing a community-based plan for the sustained protection of quality drinking water. Although the initial Source Water Assessment work was financed through funds allocated by the SDWA, funding is limited for actual implementation of management strategies to reduce identified contamination risks. For this reason, and to achieve broad-based community support for drinking water protection, Oregon's program is using incentives and educational efforts that encourage communities to apply the Source Water Assessment information in efforts to protect drinking water.

ODEQ and ODHS anticipate all of the systems originally designated to receive assessments will have them by the end of June. As a consequence, the agencies are shifting their focus from gathering data to helping the communities utilize the information they receive. ODEQ lacks the statutory authority to require specific protection efforts and the amount of technical assistance the agencies will be able to provide is limited — so the development of a local Drinking Water Protection Plan is completely voluntary. Systems are encouraged to take whatever steps they can to protect their drinking water and it is not necessary to complete an entire plan. However, if a system chooses to develop a Drinking Water Protection Plan that will be eligible for state certification, six key elements must be included.

STATE CERTIFIED DRINKING WATER PROTECTION PLANS MUST INCLUDE:

- PUBLIC PARTICIPATION: To begin, a local Drinking Water Protection Committee must be convened to write the plan and carry out educational events. The plan includes an explanation of how the protection efforts will involve the entire community and allow all interests to be represented.
- DELINEATION OF THE DRINKING WATER PROTECTION AREA: This element of the plan is included in the Source Water Assessment done by the state, but systems can choose to do their own.
- POTENTIAL CONTAMINANT SOURCE INVENTORY: This component is also included in the Source Water Assessment, but can be supplemented by local review and input.
- MANAGEMENT STRATEGIES: This section includes a listing of strategies that the system and its customers are willing and able to undertake in order to protect their drinking water. There are a wide range of potential strategies and it is important to get local input to ensure successful implementation.
- CONTINGENCY PLANNING: This section identifies potential scenarios that could incapacitate water systems and lays out the procedures for dealing with emergencies.
- NEW SOURCE ANALYSIS (if applicable): If the system plans on expanding capacity by adding a new well or surface water intake, this section includes the criteria by which they will locate the new source and ensure that the new source is as safe as possible.

The defining aspects of a Drinking Water Protection Plan are the heavy emphasis on local citizen involvement and non-regulatory approaches. This allows water systems and the populations they serve to take ownership of the information gathered through the Source Water Assessment Program, mold it to their unique situation, and use it for the protection and betterment of their drinking water. In Oregon, ODEQ and ODHS have come up with creative ways to encourage drinking water protection planning at the local level.

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Drinking Water

Multiple Benefits

Prevention Pays

Creativity

Successful Models

First and foremost, the two agencies remind the system operators, and all the people involved with the distribution of drinking water, that they provide a vital service and it is imperative that they take the steps necessary to protect the health of their customers. Local public officials, private businesses, and the general public must understand that the quality and security of drinking water supplies affects property values and the long-term potential for development. More tangibly, if a system has a certified plan, they are eligible for monitoring waivers from ODHS which allows less frequent sampling for contaminants because of the system's proactive planning efforts. The cost of monitoring is reduced and systems have more resources to use for protection efforts. Also, when systems apply for grants or loan funds, those with protection plans are looked at more favorably by both public and private funding institutions.

Despite these incentives and the obvious benefits of protection planning, it is often difficult to motivate water systems to take additional action. There are numerous examples of water systems that have had to close down a well or install expensive treatment facilities due to contamination. The costs of prevention have proven time and time again to be far less than the cost of the cure once the damage is done. The crux of the problem is getting systems to proactively plan when they are barely able to keep up with the flow of new regulations.

As drinking water protection planning moves forward, it is crucial to employ inventive means of addressing the challenges that arise. The partnerships demonstrated among ODEQ and ODHS to complete the Source Water Assessment work can continue and expand. Encouraging partnerships among small water systems to garner support for and implement strategies designed to protect drinking water will have resounding impacts on the quality of the resource, increase the level of awareness, and help overcome the limitations of small drinking water providers.

Budget restrictions, performance reviews, program cutbacks, security concerns, and instability are all vying for the attention of public employees and it is more difficult to take risks in this increasingly common scenario. As the newest rules are passed down from Washington, D.C., it is clear that creative approaches are necessary to generate the desired outcomes. Many successful models exist, including Oregon's Source Water Assessment Program, which program managers can look to for inspiration.

CONCLUSION

The Drinking Water 2005 Conference highlighted a number of different viewpoints and presented a lot of information. Representatives from a wide variety of organizations attended to learn more about drinking water and related programs. It was encouraging to see such a diverse group able to center their attention on this shared issue. There is a lot of debate on how programs, especially those seen as environmental in origin, can be successful in the current political, cultural, and economic climate. Being a highly valued and essential resource, drinking water is in a unique position to bridge the gap between environmental best practices, community safety, and public health concerns for the benefit of all those involved.

For Additional Information:
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Article Sources/ Additional Information:
- Safe Drinking Water Act - www.epa.gov/safewater/sdwa/basicinformation.html
- Proposed Rule Fact Sheets - www.epa.gov/safewater/standards.html
- Oregon ODEQ Drinking Water - www.DEQ.state.or.us/wq/dwp/dwphome.htm
- Oregon ODHS Drinking Water - www.DHS.state.or.us/publichealth/dwp/index.cfm

The **Environmental Law Education Center (ELEC)** produces top quality educational programs for environmental professionals in the Northwest. This conference on drinking water included highly respected professionals in the drinking water field and covered a broad spectrum of issues. Conference materials can be ordered by contacting the ELEC through their website [www.elecenter.com] or by phone: 503/ 282-5220.

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CRITICAL HABITAT, BULL TROUT AND POLITICS

by Arlene Montgomery, Program Director, Friends of the Wild Swan

Bull Trout Habitat

The importance of designating critical habitat for the recovery of species listed under the federal Endangered Species Act is currently undergoing public debate. All the major points at issue are involved in the ongoing process for designating critical habitat for the recovery of threatened bull trout. This article provides a brief history of this process and an update on current developments.

Critical Habitat — An Overview

ESA-Defined

Critical habitat designation is a major component of the Endangered Species Act's (ESA) basic premise to recover imperiled species to the point where the ESA's protections are not needed. The ESA defines critical habitat as: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. §1532(5)(A).

Habitat Importance

The US Fish and Wildlife Service (USFWS or "Service") and Department of Interior are currently downplaying the role of critical habitat by using boilerplate language in press releases and final critical habitat proposals that claim "designating critical habitat provides little additional protection to most listed species." The agencies, however, appear to have literally no factual basis for the statement. When the Center for Biological Diversity requested documents supporting this contention USFWS's reply was that there were "no responsive documents." This unsupported agency position is the underpinning for drastic reductions in critical habitat designations.

Courts' View

Courts have recognized the importance of critical habitat in a manner which is in direct contradiction to the Service's contention that critical habitat is meaningless and provides no benefit to species. For example: "It is clear that to fulfill the ESA's goal of halting and reversing the Silvery Minnow's decline, no matter the cost, FWS should designate critical habitat as soon as possible." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1227 (10th Cir. 2002).

Intended to be used as a companion to recovery plans, the designation of critical habitat delineates where important habitats necessary to recover the species are located. Recovery Plans outline the actions that need to be taken to either maintain or restore these habitats. Critical habitat is the "Where" corresponding to the recovery plans' "How." Together, based on good science, they should direct agencies towards recovering imperiled species.

"Survival" v. "Recovery"

As noted, critical habitat designation must include the geographic areas occupied by the species, which contain features essential to the conservation of the species. 50 C.F.R. §424.02(d)(1). Critical habitat also protects specific areas outside the geographical region occupied by the listed species if necessary for conservation. Id. See also 50 C.F.R. 424.12(a). There is a significant difference between "survival" and "recovery" of species. While survival might not require designation outside of presently occupied areas, recovery may very well require designation of areas outside of presently occupied areas. *Sierra Club v. United States Fish & Wildlife Serv*., 245 F.3d 434 (5th Cir. 2001). Simply meeting the "no jeopardy" standard in the ESA's Section 7 does not suffice for the overall requirement that species be recovered. Critical habitat is the key link to transition from jeopardy situations to recovery.

Habitat Needs

Enough critical habitat must be designated to ensure the survival and recovery of the listed species. The failure to designate adequate critical habitat has been identified in agency discussion papers. Craig Johnson, a biologist with the National Marine Fisheries Service (NMFS or NOAA Fisheries), reported in a study of critical habitat designations (NFMS 2000:3) that:

"To fulfill their statutory purpose, our critical habitat designations would have to be consistent with Carrying Capacity 2a: they would have to encompass enough resource space to sustain a population large enough and sufficiently healthy to be removed from the endangered species list."

"The population size and distribution of species when they are listed have serious implications for our critical habitat designations: in most cases, critical habitat designations that are based on a species' distribution and abundance at the time the species is listed will not protect enough resource space for threatened or endangered species to recover. The results of this study strongly suggest that our critical habitat designations are based on Carrying Capacity 2d, which would never allow most listed species to recover."

"Because of limitations in time and resources critical habitat designations are almost never revised, so we must emphasize doing them right the first time."

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Bull Trout Habitat

Requirements

Listing History

1994: Initial Lawsuit

"Warranted but Precluded"

Ranking

9th Circuit Ruling

"Mootness" Exception

Additionally, a significant amount of currently unoccupied habitat must also be designated to effect survival and recovery. Johnson found a key deficiency in critical habitat designations is that "they do not protect enough unoccupied habitat."

Bull Trout Critical Habitat

Bull trout have more specific habitat requirements than other salmonids. They need clean, cold waters with little fine sediment in order to successfully spawn. Complex cover, woody debris and pools are essential habitat features. They are also a migratory freshwater fish traveling as many as 150 miles from their spawning streams to lakes or rivers where they mature. They reach sexual maturity at age four to seven when they make the journey back to their natal streams to spawn. Unlike salmon, they survive spawning and may make the trip in alternate years several times during their lives.

To provide a context for the current, still contentious, bull trout critical habitat process a brief summary of the listing's history is necessary. Nearly 20 years ago, in September 1985, the US Forest Service listed bull trout as a sensitive species — elevating it to a category 2 species eligible for protection under the ESA. Logging, grazing and roads were increasing water temperature and sediment, damaging stream banks and removing woody material needed for pool formation. Migration routes were blocked by dams and irrigation diversions. Non-native fish were competing with or preying on bull trout. After researching declines in bull trout populations as a result of these threats the Alliance for the Wild Rockies (AWR), Friends of the Wild Swan (FOWS) and Swan View Coalition in 1992 petitioned USFWS requesting ESA protection for the species. The petition sought emergency listing of the most threatened populations and concurrent designation of critical habitat. The bull trout's strict habitat requirements make it an excellent indicator species. The petitioners believed that declining bull trout numbers were an indication that overall water quality was also declining due to human activities, since the strongest bull trout populations are correlated with areas containing few or no roads.

In June 1994, after petitioners had filed a lawsuit because USFWS failed to meet their mandatory deadline (a list of pertinent cases appears below), the agency published a "warranted but precluded" finding on the petition assigning it a Priority #9. A finding of "warranted but precluded" means that even though a species warrants ESA protection, the agency will not propose it for listing (based on the priority number) because other species are facing more imminent threats. FOWS and AWR challenged the "warranted but precluded" finding in November 1994. USFWS Regional Director Michael Spear changed the priority ranking to a #3 in January 1995. When USFWS issued another "warranted but precluded" finding in June 1995 it changed the priority ranking back to a #9. At that time USFWS was only addressing species with a priority ranking of one through six.

The agency scientists on the status review team had assigned the bull trout a priority #2 ranking. A #2 ranking indicates a high and imminent threat of extinction.

One member of the review team wrote that no bull trout populations had:

> "shown a long term steady rate of increase due to the elimination of threat factors. It is clear to me that we know how to 'protect' bull trout habitat, but we don't know how to 'fix' it once it has degraded. The management of the watersheds has been geared towards threshold limits, and we have now reached the point where secure habitat across the entire range of this species has been pushed to the threshold. Without any viable tools to fix the problems, I find the future of this species to be at great risk."

The status review team recommended that the bull trout be listed rangewide because "the cumulative and synergistic effects of multiple threats facing isolated bull trout populations are serious and support this determination." Their recommendation was ignored.

The District Court dismissed the listing lawsuit because the new finding had been issued. FOWS and AWR immediately appealed that decision to the Ninth Circuit. The Ninth Circuit agreed that the District Court's interpretation of the issuance of a new finding would mean that certain decisions could never be challenged. The Ninth Circuit found that the conservation organizations' challenge fell "within the exception to the mootness doctrine for claims that are capable of repetition but evading review." The case was sent back to the District Court where USFWS was found to be "arbitrary and capricious" by not listing bull trout in its 1994 and 1995 findings. They were ordered to reconsider.

In June 1997 USFWS proposed to list the Klamath Basin bull trout as endangered and the Columbia River Basin bull trout as threatened. Bull trout in the Puget Sound area of Washington, Jarbidge drainage in Nevada and St. Mary drainage in north-central Montana were not proposed for listing. FOWS and AWR again filed suit challenging the decision not to list the Coastal-Puget Sound, Jarbidge River and St. Mary drainage bull trout. The District Court again found USFWS was "arbitrary and capricious" for not proposing ESA protection for all bull trout within the coterminous United States.

Finally in June 1998 bull trout in the Columbia and Klamath River Basins were listed as threatened and the Coastal-Puget Sound, Jarbidge and St. Mary populations of bull trout were proposed for listing.

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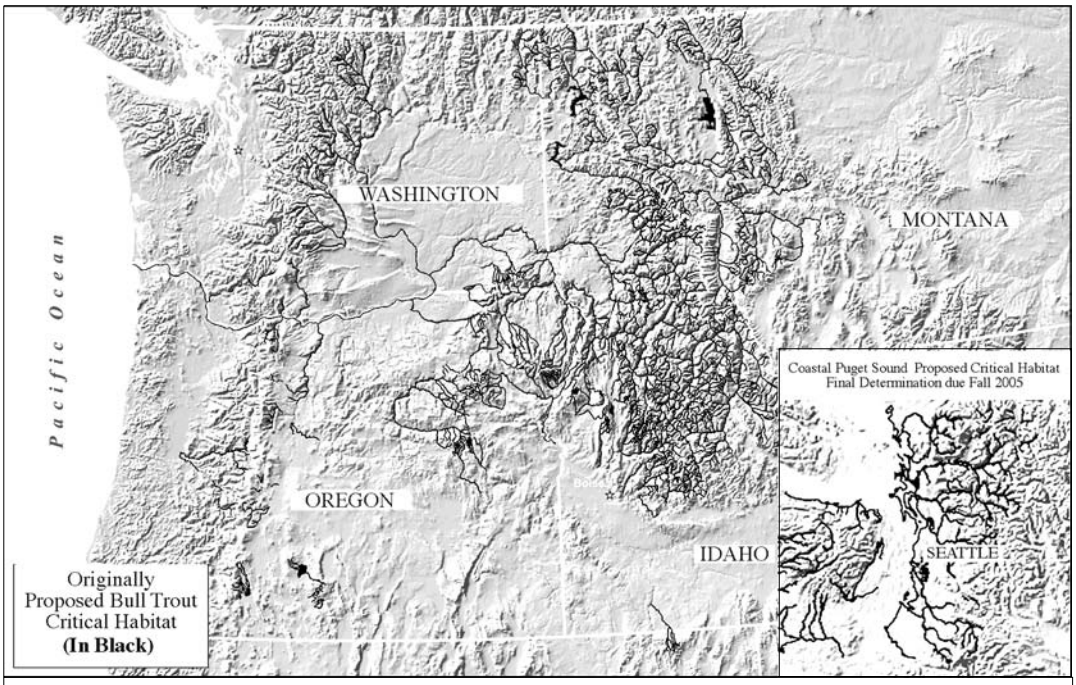
Bull Trout Habitat



Proposed Bull Trout Habitat

Illegal re-construction of a US Forest Service road along the Jarbidge River by Elko County prompted USFWS to emergency-list the bull trout in that system as "endangered" in August 1998. In April 1999, the Jarbidge bull trout were formally listed as "threatened" and in November 1999 the Coastal-Puget Sound and St. Mary River bull trout were listed as "threatened."

"Not Determinable"

No critical habitat was designated concurrent with listing because USFWS issued a "not determinable" finding. That finding allowed USFWS up to two years (one year plus an additional one year extension) to research the biological needs of bull trout to identify habitat necessary to support viable subpopulations in each distinct population segment. The ESA requires "not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat." 16 U.S.C. §1533(b)(6)(C). When no critical habitat was proposed by January 2001 FOWS and AWR again filed suit. A settlement agreement between AWR, FOWS and USFWS set a timeline for critical habitat designation.

Schedule Requirements

In November 2002, USFWS proposed critical habitat for 18,450 miles of streams and 532,700 acres of lakes/reservoirs in the Klamath and Columbia River basins in four states.

2002 Proposal

The Proposed Critical Habitat included:

- 8,958 miles of streams and 205,639 acres of lakes/reservoirs in Idaho
- 3,319 miles of streams and 217,577 acres of lakes/reservoirs in Montana;
- 3,687 miles of streams and 78,609 acres of lakes/reservoirs in Oregon
- 2,507 miles of streams and 30,986 acres of lakes/reservoirs in Washington

The draft critical habitat rule considered the needs of the species based on the primary constituent habitat elements. This rule was not as inclusive as it could have been. Riparian areas were not included. However, the draft did contain occupied habitats, migratory corridors, and some unoccupied habitat considered necessary to recover the species. USFWS stopped work on bull trout critical habitat in May 2003 citing a funding shortfall. A new timeline for the final rule had to be negotiated.

Economic Considerations

Skewed Economic Analysis

The critical habitat process is the only part of the ESA that requires consideration of factors other than science.

The ESA states: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. §1533(b)(2).

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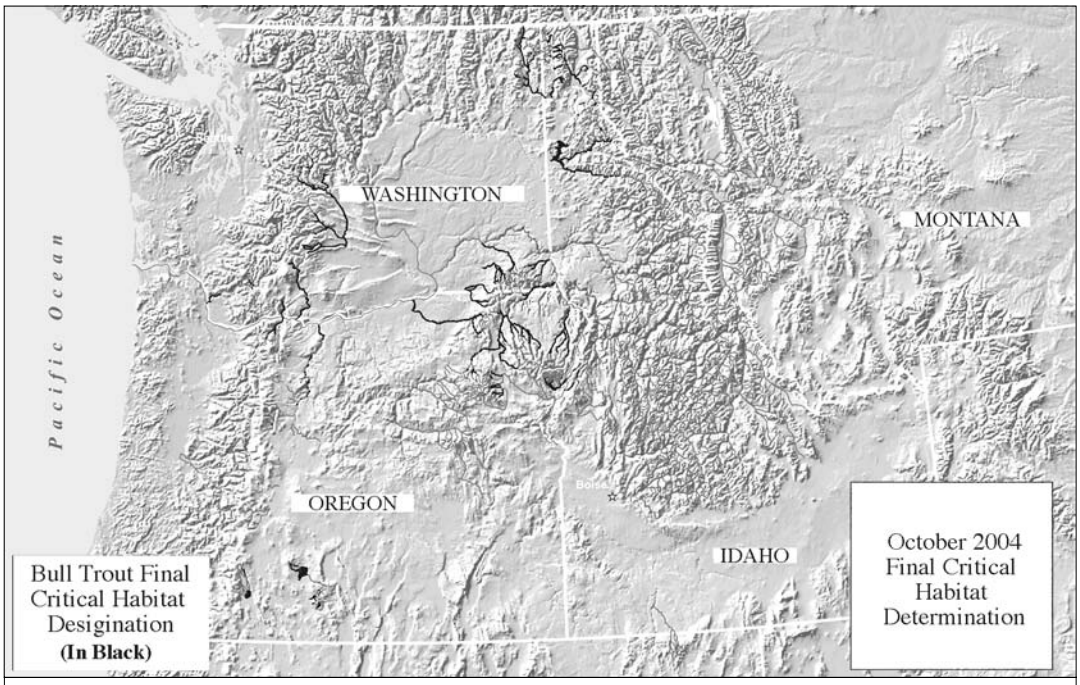
Bull Trout Habitat



Final Bull Trout Habitat Designation

Benefits Down-Played

Information Not Used

In April 2004, USFWS released for public review a draft analysis of potential economic impacts of the critical habitat proposal. One short paragraph in the over 200 page report was devoted to the economic benefits of the proposed critical habitat designation. This contrasts with the 50 plus pages of economic benefits that were originally provided to USFWS by the consultant who prepared the report.

That initial draft report cited numerous direct and indirect benefits throughout the Northwest. It documented the economic benefits of recreational bull trout fishing as well as how projects modified for bull trout would benefit salmon, steelhead and other salmonids. Improved water quality would reduce costs of future drinking water treatments for cities and towns in the region. Improved instream flows would benefit many aquatic species' habitat as well as provide recreational opportunities. All of this was removed from the draft that the public was given to review even though agency personnel and peer reviewers believed the benefits should have been included.

In addition to removing the benefits from the economic study, USFWS also increased the costs by including Section 7 consultation costs along with the costs of designating critical habitat. Internal Service documents reveal that agency personnel and peer reviewers questioned why these listing costs were not considered in the baseline instead of using them as critical habitat costs.

Final Critical Habitat Designation

90% Reduction

In October 2004, USFWS published the final bull trout critical habitat rule for the Columbia and Klamath River Basins. Only 1,748 miles of streams and 61,235 acres of lakes were designated, a 90% reduction from what was proposed (see above Map).

FINAL CRITICAL HABITAT INCLUDED:

- In Montana, no critical habitat was designated
- In Oregon, 706 miles of streams and 33,939 acres of lakes and marshes (all of the lakes and marshes are in the Klamath River Basin)
- In Washington, 737 miles of streams in the Columbia River Basin
- In Idaho, 306 miles of streams and 27,296 acres of lakes were designated

Excluded Areas

USFWS cited social and economic costs as a factor for excluding many areas as critical habitat.

ELIMINATED FROM THE FINAL RULE WERE:

- lands in the Federal Columbia River Power System
- federal lands covered by the Northwest Forest Plan, PACFISH and INFISH
- lands included in Washington's Forest Practices Rules and Regulations
- lands covered by the Snake River Basin Adjudication
- lands covered by draft and approved Habitat Conservation Plans
- the Willamette and Malheur River Basins
- all waters impounded behind dams and all stream segments less than one-half mile in length that are on private lands

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Bull Trout Habitat

Legality Contested

More Exclusions?

Politics

Listing Status Review

All of Montana's critical habitat was eliminated based, in part, on the Montana Bull Trout Restoration Plan. The purpose of this Plan was to "guide state restoration efforts and complement federal conservation and recovery processes" and "be consistent with the overall federal recovery plan for bull trout." Instead, USFWS used it as a substitute for federal conservation and recovery processes. The final rule also excluded Montana school trust lands based on a Habitat Conservation Plan that hasn't been developed yet.

Critical Habitat: Legal Precedents

According to established case law, areas cannot be excluded from critical habitat designation simply because they are already under what the Service might consider "adequate management." For instance, this matter was ruled on in *Center for Biological Diversity v. Norton*, U.S. District Court of Arizona, CV 01-409 TUC DCB (January 13, 2003). This case concerned a challenge to a Service regulation defining "critical habitat" so that "if existing management of an area is adequate, it is not critical habitat." Id. at 11. The Court there held that such an exclusion of land was arbitrary because the determinative factor is whether the habitat is "essential to the conservation of the species," not what kind of management practices are in place. Id. at 14. The Court further reiterated that some alternative protection, such as in that case a state program, "cannot be viewed as a functional substitute for critical habitat designation." Id. at 16 (citing *Natural Resources Defense Council v. Department of Interior*, 113 F.3d 1121 (9th Cir. 1997)). It is clear that the Service cannot exclude areas from critical habitat simply because some other layer of management protection may be in place. That is exactly what they did, however, in the case of bull trout.

AWR and FOWS are challenging the Columbia and Klamath bull trout critical habitat final rule.

Further Bull Trout Critical Habitat Developments

Meanwhile, in June 2004, USFWS proposed critical habitat for the Coastal-Puget Sound, Jarbidge and St. Mary-Belly River distinct population segments. Will the final designation for these areas be greatly reduced too? The implications of the methods used to exclude critical habitat for the Klamath and Columbia bull trout are wide-ranging. There is concern that this same scenario could play out with critical habitat for other species in the Northwest.

A recent survey of USFWS scientists was conducted by the Union of Concerned Scientists and Public Employees for Environmental Responsibility. More than 200 agency scientists said they were directed to alter official findings to reduce protections for plants and animals. More than half of the respondents said they knew of cases where commercial interests applied political pressure to reverse scientific conclusions. Many agency scientists fear retaliation and do not feel they can do their jobs as scientists.

Once again political pressure is being applied to the bull trout. During the critical habitat process the Service initiated a five-year status review at the behest of Idaho Governor Kempthorne and the Idaho Congressional delegation. In March 2004, USFWS suspended work on finalizing the bull trout Recovery Plan chapters for the Columbia, Klamath and St. Mary/Belly River distinct population segments while it reviewed whether bull trout still warrant listing under the ESA. The Service had already solicited public comments on these draft Recovery Plans in November 2002. A decision on the status review is due this year.

Conclusion

"We console ourselves with the comfortable fallacy that a single museum-piece will do, ignoring the clear dictum of history that a species must be saved *in many places* if it is to be saved at all."
Aldo Leopold

The struggle to protect bull trout and clean water in the Northwest has been unfolding for over twelve years. What if USFWS had put as much energy and resources into seriously addressing the threats to bull trout and its habitat instead of trying to circumvent the law? Would this native fish be well on its way to recovery? We'll never know for sure, but we do know that bull trout, as well as other species, have not received the protection they deserve without significant public oversight.

Securing federal Endangered Species Act protection for bull trout and the habitat critical for its survival has been like swimming upstream during spring snow melt. The political currents are strong with the decisions clouded by factors other than science and the law. Nevertheless, bull trout's migratory life history and strict habitat requirements illustrate the necessity, and difficulty, of saving a species *in many places*.

For Additional Information:
Arlene Montgomery, Program Director, Friends of the Wild Swan, 406/ 886-2011 or email: arlene@wildswan.org

The author wishes to thank Jack Tuholske and Mike Bader for their invaluable help with this article.

For a more thorough review of the bull trout listing process, see: *Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species* by Timothy Bechtold, Public Land and Resources Law Review, Volume 20, 1999.

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Bull Trout ESA Cases

1. *Alliance for the Wild Rockies v. Babbitt*, No. 94-0246-JLG (D.D.C. 1994), February 8, 1994. Lawsuit to force FWS to make the required 90 Day Finding under the ESA. Settled when FWS agreed to make the 90 Day and 12-Month Findings by June, 1995.
2. *Friends of the Wild Swan, Inc. v. USFWS*, No. CV-94-01318-REJ (D. Or 1995), November 1, 1995. Challenge to 1994 warranted but precluded finding, dismissed as moot by District Court after FWS issued a 1995 revised 12-Month Finding.
3. *Friends of the Wild Swan, Inc. v. USFWS*, 81F. 3d 168, 1996 WL 155143, No. 95-36916 (9th Cir. 1996) Appeal of District Court's dismissal to the 9th Circuit Court of Appeals. Court overturned dismissal of suit, holding that Court must review 1994 12-Month Finding because it fell within the exception to mootness doctrine. Case remanded to District Court.
4. *Friends of the Wild Swan, Inc. v. USFWS*, 945 F. Supp 1388 (D. Or 1996). Continuation of case #2 after remand from 9th Circuit. Summary Judgment granted to Plaintiffs. Court remanded 12 month finding as arbitrary and capricious because the Service's basis for failing to list under the ESA was contrary to the evidence by the agency's own scientists. FWS then published proposed and final rules listing Columbia and Klamath populations as threatened under the ESA.
5. *Friends of the Wild Swan v. USFWS*, 12 F. Supp. 2d 1121, 1124 (D. Or 1997). Challenge to USFWS' failure to list all five distinct population segments (DPS). Court again granted Summary Judgment to Plaintiffs, finding that FWS's attempt to break bull trout in to DPS and not list them all was arbitrary. FWS then published proposed and final rules listing Jarbidge, Eastern Montana and Puget Sound populations as threatened under the ESA.
6. *Alliance for the Wild Rockies, et al. v. Badgley et al.*, Civ. No. 01-127 (D. Or). Challenge to USFWS' failure to designate critical habitat. Case challenging FWS"s failure to designate critical habitat within time frames required by Section 4 of the ESA. Settled with Consent Decree requiring publication of rule for critical habitat.
7. *Alliance for the Wild Rockies, et al. v. Allen et al.*, Civ. No. 04-1813-RE (D. Or.). Challenges Klamath & Columbia Critical Habitat final rule. Case pending.

Colorado Diversions

Remand to CWCB

Issues

Flow Requests

Statutory Construction

CWCB Role

COLORADO RECREATIONAL IN-CHANNEL DIVERSIONS

COLORADO SUPREME COURT RULES

by David C. Moon, Editor

A close reading of *Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy District*, Case No. 04SA44 (Advance Sheets, March 14, 2005) issued by Justice Rice of the Colorado Supreme Court (Court) shows that while it answers many questions concerning recreational in-channel water rights (**"r**ecreational **i**n-**c**hannel **d**iversion" or RCID), it did not go nearly as far as some people believe. Steamboat Springs' city attorney, Tony Lettunich, was quoted in the Rocky Mountain News as saying that "the decision says that water interests contrary to recreation can't force us to have a bunny slope when we want a black diamond." In fact, the Court remanded the application all the way back down to the Colorado Water Conservation Board (CWCB) for a fact-finding review, after which the application will proceed to the water court for adjudication. The extent of the water right finally granted is unclear and whether it will be a "bunny slope" (low flow) or a "black diamond" (full amounts requested) remains to be seen.

The decision clearly defined the respective roles of the CWCB and the Water Court, as well as clarifying the standard that will ultimately govern precisely how much flow will be granted. The case was the first opportunity for the Court to address Colorado's recreational in-channel diversion (RICD) water rights. The Court found that both the CWCB and the water court erred in their respective decisions and remanded the case back down to the CWCB.

The applicant, the Upper Gunnison River Water Conservancy District, applied for water to supply a whitewater boating course along the Gunnison River. It requested flows ranging from 270 to 1500 cubic feet per second (cfs), designed with diversion structures incorporating both low flow and high flow channels to maximize use of the whitewater course by all skill levels throughout the season requested (May-September) .

The case focused on the two-part process for establishing a RICD and the respective roles of the CWCB and the Water Court. The decision turned on, first, principles of statutory construction as they apply to the two-part process involved and, secondly, the legislative intent regarding the statutory definition of a RICD ("minimum stream flow" necessary "for a reasonable recreation experience"). The case presents water lawyers with an excellent blueprint for application of the rules of statutory construction.

The Court referred to CWCB's initial, limited fact-finding function and said that "SB 216 requires the CWCB to 'consider' five enumerated areas of inquiry 'and make written findings thereon'." Advance Sheets at 12. See § 37-92-102(6)(b)(I)-(V), C.R.S. (2004). The Court held that CWCB's role is to "analyze the application purely as submitted by the applicant [under the five areas of inquiry], rather than to objectively determine what recreation experience would be reasonable, and what minimum stream flow would meet that recreational need. As such, we hold that the General Assembly intended for the CWCB to function as a narrowly constrained fact-finding and advisory body when it reviews RICD applications, rather than in an unrestricted adjudicatory role." Id. at 14.

(continued)

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Colorado Diversions

CWCB's Flaws

Water Court Role

Evidence Standards

Flow Rate Standard

"Beneficial Use" Limit

"Minimum" Stream Flow

User Fears

Site Specific Decision

Statutory Factors

Further explaining its decision, the Court said, "the CWCB is limited to review of an application on its face; nothing in either statutory provision allows the CWCB to look beyond the stream flow claimed or the recreation experience intended by the applicant..." Id. at 16. Highlighting the problems with CWCB's approach, the Court noted that the "findings and recommendations made by the CWCB literally ignored the application before it in favor of opining generally on its perception of the appropriate stream flow and more reasonable recreation experience" because CWCB's evaluation of the five statutory factors was based on the 250 cfs flow that CWCB determined was an appropriate minimum flow. As to specific flow rates, the Court made it abundantly clear that the CWCB has no "authority to dictate a flow rate or recreation experience for RICD water rights." Id. at 20.

The Court then turned to how the water court's adjudication should utilize CWCB's recommendations. The Court found that the statutes imparted "presumptive effect only upon the CWCB's findings of fact" while the "Board's recommendation does not have a presumptive effect before the water court...the recommendation is just that — a recommendation; functionally it cannot be rebutted as can factual findings." Id. at 24-25. Concerning the presumptive effect of the findings of fact, the Court held "should any party [including the applicant] present evidence on the statutory factors, the presumptive effect of the CWCB's findings have been rebutted, and the water court must then weigh the evidence before it." The Court clarified that when the water court weighs the evidence, the proper "burden of proof" standard is a "preponderance of the evidence." Id. at 26. If no party presents evidence rebutting CWCB's findings, those findings are binding on the water court.

The ultimate standards that govern the flow rate of an RICD were also addressed. Again, the decision turned in large part on statutory construction. Section 37-92-305, C.R.S (2004) establishes the standards for the water courts' adjudication of all conditional water rights, including RICDs. The Court pointed out that paragraph (9)(a) of that statute contains the requirement that water be put to a "beneficial use" and went on to note that "beneficial use" was redefined in SB 216 to specifically include diversions of water "for recreational in-channel diversion purposes." Id. at 29-30. The definition of a RICD, however, contains a limitation for RICDs — they encompass "only those uses which are limited to the 'minimum stream flow' 'for a reasonable recreation experience in and on the water.'" Id. at 30. "If an in-channel recreational appropriator seeks more than the minimum stream flow for a reasonable recreation experience in and on the water, then by definition, that would-be appropriator's intended use is not a beneficial use." Id. at 30-31

The Court turned its attention to the "more difficult issue" of "determining exactly what the General Assembly meant by its RICD definition and in particular, the phrases 'minimum stream flow' 'for a reasonable recreation experience in and on the water.'" The Court's decision, first, emphasized the common usage of the word "minimum" in holding that "as used in the RICD definition, minimum stream flow means the least necessary stream flow to accomplish a given reasonable recreation experience in and on the water." Id. at 32.

The Court then turned to legislative history since it found there was no common usage for the phrase "reasonable recreation experience in and on the water." In perhaps the most telling statement in the decision, the Court said: "The legislative history establishes that SB 216 was enacted, at least in part, in response to fears that under *Fort Collins*, 830 P.2d 915, appropriators could obtain high recreational in-channel flows, severely hindering Colorado's future development by either exporting or just tying up large amounts of water." Id. at 34-35.

Following extensive citations to legislative history, the Court laid out in detail how the phrases should be interpreted: "...the water court first must determine whether the appropriation sought by the applicant, viewed objectively, is for a reasonable recreation experience in and on the water — more specifically, are the requested flow amounts reasonable on the particular stream? This determination necessarily will vary from application to application, depending on the stream involved and the availability of water within the basin...then it must determine the minimum amount of stream flow necessary to accomplish that intended recreation experience. Hence, the water court may be required to weigh conflicting expert testimony given by course designers or other interested parties, and make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience." Id. at 43.

The Court, in an attempt to guide the process below, went further in explaining how the water court should proceed. "An applicant is not entitled to a decreed RICD merely upon a showing of water availability. The water court only may decree a RICD that is appropriate under the five statutory factors — compact impairment, stream reach appropriateness, access availability, instream flow rights injury, and maximum utilization." In a footnote, the Court added that all the other usual findings required by the statutes must also be made, including "whether the RICD would accomplish its purpose without

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Colorado Diversions

Undecided Flows

waste...and whether the diversion and beneficial use can and will be accomplished within a reasonable time..." Id. at 44.

Given the obvious gap between the CWCB's initial recommendations and the water court's grant of the significantly higher requested flow rates, plus the fact that the Court's remand essentially starts the process anew (albeit with much more guidance), this author expects to see an "Upper Gunnison II" decision from the Court before this water right is finalized.

For Additional Information: The Colorado Supreme Court's opinion is available at www.courts.state.co.us/supct/supctcaseannctsindex.htm

14th Annual Washington Water Law Conference

Seattle, WA — May 19-20

"What's Next in Washington State Water Law?"

The legal, policy and environmental landscape for Washington State water law is changing rapidly. These changes are the touchstone of this year's Washington Water Law conference. The new administration in Olympia, new programs addressing competing interests on the Columbia River, new information on global climate change and its effects on water resources are all having their impacts. In addition, the state's largest and longest water rights adjudication is drawing to a close, while a suite of regional water supply plans is in development, and policies on municipal water issues and conservation are being completed. This conference will provide an important update for water law practitioners, water resources managers and water users.

The Agenda Includes: What's Next in Washington Water Law? After Acquavella Adjudication; Case Law Update; Practice Tips Before the Boards; Legislative Update; Regional Water Supply Planning; Climate Change; ESA / Takings; Columbia River; Water Conservation Planning.

Program Co-Chairs

Sarah Mack, Esq., Mentor Law Group, PLLC & Matthew D. Wells, Esq., Preston Gates & Ellis, LLP

For info: Law Seminars International, 800/ 854-8009

website: www.lawseminars.com

Colorado River Conference

Natural Resources Law Center 26th Annual Water Conference

Boulder, CO — June 8-10

"Hard Times on the Colorado River: Drought, Growth and the Future of the Compact"

The 26th Annual Water Conference of the University of Colorado's Natural Resources Law Center is scheduled for June 8-10 in Boulder, Colorado. The Conference's title —"*Hard Times on the Colorado River: Drought, Growth and the Future of the Compact*" — reflects the event's focus on current and upcoming challenges. The loss of water from Lake Powell is particularly alarming (more than half its storage in the past four years). Declining water levels not only mean an end to surplus deliveries relied upon by downstream users, but threaten environmental resources and the ability to generate hydropower. It also could prevent the upper basin states from honoring the downstream delivery obligations spelled out in the Colorado River Compact, perhaps triggering a Compact "call."

"A Compact call could have devastating impacts on many water users in Colorado and the other upper basin states," warns conference organizer Doug Kenney. "The good news is that we can probably avoid this outcome by creative management, interstate diplomacy and by a little help from Mother Nature. The bad news is that every year of population growth in the basin makes the region more susceptible to future droughts."

For info: Doug Kenney, University of Colorado, 303/ 492-1296 or email: Douglas.kenney@colorado.edu

website: www.colorado.edu/law/summerconference

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WATER BRIEFS

GW CONTAMINATION AZ/CA

AZ STUDY OF PG&E PLUME

The Arizona Department of Environmental Quality (ADEQ) announced on March 9 that ADEQ will conduct a study to determine if groundwater in Arizona has been contaminated by a plume of hexavalent chromium coming from the Pacific Gas & Electric (PG&E) Natural Gas Compressor Station near Needles, California. ADEQ Director Steve Owens said that PG&E will pay for the study under an agreement signed by the company with ADEQ. The study, which is expected to cost more than $350,000, will examine the groundwater flow on the Arizona side of the Colorado River to determine whether the hexavalent chromium plume has migrated under the riverbed and contaminated water supplies in Arizona. Recent results from a new monitoring well in California show that the hexavalent chromium plume from the PG&E station has moved to within 60 feet (or less) of the Colorado River and have already extended beneath the river.

Director Owens sent a letter to the California Regional Water Quality Control Board (CRWQCB) in September of 2004 expressing concern that the plume could not only contaminate the Colorado River, but could also contaminate groundwater in Arizona. Owens' letter also requested that CRWQCB take additional steps to deal with the contamination issues. Director Owens pointed out in the letter that Arizona wells had been sampled by PG&E without ADEQ's knowledge and insisted that ADEQ be informed and involved with all activities occurring in Arizona. Director Owens' letter also requested that NPDES discharge limitations include selenium since Arizona's draft 2004 CWA 303(d) List of water quality impaired waters includes the Colorado River from Hoover Dam to Lake Mohave as impaired by selenium.

For info: ADEQ, 800/ 234-5677 or website: http://www.azdeq.gov/function/news/2005/march.html#0309

ESA PERMITS US

NOAA ONLINE GUIDE

NOAA Fisheries Service has launched a website to help prospective applicants determine what authorizations they may need under the Endangered Species Act and Marine Mammal Protection Act. After a handful of yes/no questions, the website provides the list of required permits/authorizations, contact information, and links to more information, including forms. This is the first phase of an online system for Authorizations and Permits for Protected Species issued by NOAA Fisheries Service. The next phase, anticipated in a year, will allow applicants to apply online for these authorizations.
For info: NOAA website: http://apps.nmfs.noaa.gov

WA DROUGHT WA

EMERGENCY DECLARED

Washington Governor Christine Gregoire authorized the Department of Ecology to declare a statewide drought emergency, based on extremely low snow pack in the mountains and record-low flows that are being seen in many rivers across the state. Ecology Director Jay Manning declared that a statewide drought emergency is now in effect. The emergency declaration immediately activates several tools Ecology can use to ease the effects of drought: emergency water permits; temporary transfers of water rights; and funding from the state's Water Emergency Account.
For info: Ecology Drought hotline, 800/468-0261 or website: www.ecy.wa.gov/programs/wr/drought2005/drthm.html

ECOLOGY LEASING WATER WA

YAKIMA BASIN DROUGHT RESPONSE

Washington's Department of Ecology (Ecology) is offering to lease irrigation water from senior water right holders in the Yakima Basin so that junior water right holders facing cutoff this year will still have water for their uses. Water may also be leased to improve flows for fish and to offset some of the effects of transferring water diversions to new locations during the drought emergency.

Ecology has set up a mechanism for qualified senior water right holders to make a bid to lease their water to the state for the 2005 irrigation season. Qualifying water rights must: have a May 10, 1905, priority date or earlier and must have been awarded a final water right from the Yakima River Adjudication court ("conditional final order"); have a "purpose of use" that includes irrigation; the point where the water is diverted must be upstream from the Sunnyside Canal diversion near Parker; and a minimum offer of 10 acres of irrigated land will be considered (cease irrigation through the end of the irrigation season). Interested parties may contact the Department of Ecology by phone at: 509/ 575-2597 or in person at 15 W. Yakima Ave., Suite 200, Yakima.
For info: Ecology website: www.ecy.wa.gov/programs/wr/drought/2005/drthm.html

TRIBAL FUND NM

WATER RIGHT FUND CREATED

New Mexico Governor Bill Richardson signed legislation creating an Indian Water Rights Settlement Fund on April 5. The legislation calls for a special fund to pay the state's share of costs for projects for the non-Indian portion of water rights settlements with Indian Tribes and Pueblos. However, no money was appropriated for the fund next year. Karin Stangl, Public Information Officer for the NM State Engineer's Office, told The Water Report that establishing the fund was very important so that future legislatures can appropriate money for the fund.

"The time to begin planning ahead for these settlements is now," said Interstate Stream Commission Director Estevan López. "This legislation is important because it allows us to get feedback from the legislature about funding decisions for important settlements and to set aside the money for future appropriations when it will be necessary to implement these critical initiatives."
For info: Karin Stangl, New Mexico Office of the State Engineer, 505/827-6139 or website: www.seo.state.nm.us/hot-topics/press.html

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WATER BRIEFS

GW AMA REJECTED AZ

UPPER SAN PEDRO BASIN AMA

The Director of the Arizona Department of Water Resources (ADWR), Herb Guenther, has determined that the Upper San Pedro Basin will not be declared an Active Management Area (AMA). The Basin is located in southeastern Arizona approximately 50 miles southeast of Tucson; the San Pedro River flows from Mexico north into Arizona. The director based his determination on findings that there are sufficient groundwater supplies in the Basin to meet future municipal, agricultural, and industrial needs. In addition, there is no evidence of land subsidence or fissuring, or that groundwater use is resulting in water quality degradation in the Basin, according to a press release from ADWR.

Under Arizona law, the director may propose to designate an AMA if any of the following criteria are met:

1) active management practices are necessary to preserve the existing supply of groundwater for future needs
2) land subsidence or fissuring is endangering property or potential groundwater storage capacity
3) use of groundwater is resulting in actual or threatened water quality degradation

Arizona currently has five active AMAs: Phoenix, Prescott, Tucson, Pinal and Santa Cruz. The full ADWR report is available on the agency's website (see below).

Environmental groups, who have been pushing for AMA protection for several years, maintain that more protection is needed for the fragile river's flows and its aquifer and were disappointed by the Director's announcement. ADWR began its study of the Upper San Pedro Basin in 2001 to review changes in the area since 1988, when an earlier review was completed and AMA status rejected.

For info: ADWR website: www.water.az.gov/adwr/Content/Publications/default.htm

NEZ PERCE SETTLEMENT ID

TRIBE & LEGISLATURE SIGN-OFF

Facing a March 31st deadline to accept a settlement agreement, the Nez Perce Tribe became the final party to approve a historic water rights settlement in Idaho, following a six-to-two vote by the Nez Perce Tribe Executive Committee. The Nez Perce Settlement had been accepted earlier by the Idaho Legislature and by the federal government, despite opposition by some water users to the terms of the agreement. With the settlement in hand, Idaho's long-running Snake River Basin Adjudication (SRBA) is back on track to be completed by the end of 2005.

The Nez Perce Tribe had filed a number of claims for instream flows to protect the Tribe's treaty-reserved fisheries with a time immemorial priority date. In addition, claims were filed for consumptive water needs and for springs in the area ceded by the Tribe in 1863. The settlement was designed to: resolve all the issues relating to the Tribe's water right claims; set out understandings and criteria to provide long-term ESA compliance for water use in the Snake River Basin in Idaho and for timber land management activities on public and private land; and to protect existing water uses.

Some of the specific provisions of the settlement include: 50,000 acre-feet (AF) of water primarily from the Clearwater River sources for multiple uses on the Tribe's North Idaho reservation (subordinated to all existing water uses); BLM lands valued at $7 million will be transferred to the Tribe; the US will establish a $50 million water and fisheries trust fund for use by the Tribe in acquiring land and water rights, restoring fishery habitat and other related activities; the US, Tribe and Idaho will enter into an agreement regarding use of 200,000 AF of water stored in Dworshak Reservoir (low flow augmentation for fishery); the US will provide $23 million for sewer and water systems for local Nez Perce tribal communities; in-lieu of contracting for 45,000 AF of Payette River storage space for a 30-year rental term, the US will pay the Tribe $10.1 million rental value for the storage space; and the Tribe's "springs or fountains" water right claims on federal land within the 1863 ceded area will be decreed (similar claims on nonfederal land will be waived).

As part of the Snake River Flow Component, the agreement allows the Bureau of Reclamation (BOR) to seek a 30-year Biological Opinion from NOAA Fisheries and the US Fish & Wildlife Service under the ESA on continued operations of the BOR's projects in the upper Snake River basin. Provisions of that component include: minimum flows defined by the "Swan Falls Agreement" will be decreed by the SRBA Court to the Idaho Water Resources Board; Idaho will extend provisions of state water law for the 30-year term of the agreement to allow BOR to lease up to 427,000 AF of water from Idaho water banks for flow augmentation; and BOR will be allowed to rent or acquire up to 60,000 AF of consumptive natural flow water rights from the Snake River for flow augmentation purposes.

For info: Mark Snider (Governor's Office), 208/ 334-2100, IDWR website: www.idwr.idaho.gov/nezperce/index.htm

CONAN THE RIPARIAN CA

TRIBES RALLY FOR SALMON

On March 14, members of the Karuk, Yurok, Hoopa and Klamath Tribes rallied at California's state capital to urge Governor Schwarzenegger to serve as "Conan the Riparian" and increase his efforts to restore Klamath River salmon. The Tribes, along with allies in the commercial fishing, human rights, and conservation communities attempted to focus the governor's attention on the Klamath River Dams, currently going through relicensed proceedings before the Federal Energy Regulatory Commission (FERC). The six dam complex is owned by PacifiCorp, a subsidiary of the multinational energy giant, Scottish Power, based in Glasgow, Scotland.

Although several factors are blamed for the salmon's decline, the Tribes are currently focused on the dams, which, according to tribal

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WATER BRIEFS

leaders, could be removed as part of the FERC relicensing process. According to Jeff Mitchell of the Klamath River Inter-tribal Fish and Water Commission, "We know that dam removal won't solve all of our problems, but re-opening the 350 miles of habit upstream of the dams is a prerequisite to any other restoration programs." Dams create problems for salmon by blocking access to spawning grounds and degrading water quality. The current dam license expires in March 2006. Hydroelectric licenses typically last 50 years, so river advocates view relicensing as a once-in-a-lifetime opportunity to restore rivers. See Water Briefs, TWR #4 and #9, regarding the FERC process and a $1 billion lawsuit brought by the Klamath Tribe against PacifiCorp.
For info: Bill Olson (Yurok Tribe), 503/ 880-0680; Taylor David (Klamath Tribes), 541/ 783-2219 x147 or website: www.friendsoftheriver.org

MEXICO WATER DEBT TX
US-MEXICO AGREEMENT

Mexico has agreed to transfer a sum of water to settle Mexico's water debt to the US under the Treaty of 1944. Mexico ended the prior two water accounting cycles (five-year cycles: 1992-2002) with a cumulative deficit of over 1.3 million acre-feet (AF). As of October 1, 2004, the deficit had been reduced to 716,670 AF. The US reached agreement in principle with Mexico on a plan whereby Mexico will provide sufficient water to cover the outstanding deficit no later than the end of September, 2005. This water is in addition to the minimum annual average of 350,000 AF required under the treaty. Because of the prior years' water deficits, Texas irrigators recently filed a "takings" lawsuit against Mexico under the North American Free Trade Act (NAFTA) seeking $500 million in damages (see Moon, TWR #13).

Mexico has met the minimum average volume required under the Treaty in the first two years of the current water accounting cycle (2002-2007), and as of February 26 had delivered 125,840 AF to be applied to the treaty requirement for year three of the current cycle. The US Department of State said that it anticipates that Mexico will deliver an additional 224,160 AF of water from the measured Treaty tributaries before the third year closes at the end of September.

According to a press release from Texas Governor Rick Perry, the agreement calls for Mexico to transfer water from the Amistad and Falcon Reservoirs to Texas, raising US reserves from 95% of storage to 103%. In addition, Mexico has obligated itself to deliver at least the average minimum of 350,000 AF per year for the remaining three years of the five-year cycle and end the cycle without a deficit. The new agreement also calls for Mexico and the United States to meet annually to review basin conditions, develop firm water delivery plans for the next cycle year, and work cooperatively on drought management strategies that can benefit both countries.

Mexico is already taking significant action to meet the terms of the agreement. The Texas Commission on Environmental Quality announced on March 22 that Mexico had transferred more than 210,000 AF to the US at the Amistad International Reservoir and 56,000 at the Falcon Reservoir, plus conveyance and evaporative loss credits (required under the 1944 Treaty). The 717,000 AF of water owed to Texas from Mexico as of October 2004, has been reduced by more than 422,000 AF, leaving a debt of approximately 295,000 AF.
For info: Andy Saenz, TCEQ, 512/ 239-5000, TCEQ website: www.tceq.state.tx.us/comm_exec/communication/media/03-05mexicotransfershalf.html; Texas Governor's website: www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-03-10.0041; US Dept of State's website: www.state.gov/r/pa/prs/ps/2005/43220.htm

RECLAIMED WATER USE AZ
SNOWMAKING APPROVED

The Coconino National Forest on March 8 released its Final Environmental Impact Statement for the Arizona Snowbowl Improvement project in which it approved an expansion of the ski area in addition to Snowbowl's plan to use reclaimed wastewater for snowmaking facilities on the mountain. The reclaimed wastewater, from the City of Flagstaff, will be allowed despite the opposition from environmental groups and vehement opposition of several Indian tribes who consider the San Francisco Peaks sacred. Apparently, Snowbowl will be the first area to exclusively use reclaimed water for snowmaking (as opposed to a mix of reclaimed and natural water). Representatives of the Hopi Tribe were quoted as saying they will make every administrative appeal possible. There will be a 45-day appeal period that begins after a legal notice appears in the Arizona Daily Sun. Any appeals will be filed with the Regional Forester of the Southwestern Region in Albuquerque, NM.

"After giving this proposal considerable thought, I have decided that it best serves the broad spectrum of the American public and the mission of the US Forest Service to provide recreational opportunities for the public," said Forest Supervisor Nora Rasure. "There is no question that the Arizona Snowbowl provides an opportunity for the general public to access and enjoy our public lands while still maintaining the vast majority of the Peaks in an undeveloped character, thus accommodating the needs and desires of those who come to the Peaks for physical, mental and inspirational rejuvenation." The Forest Service's press release pointed out that Arizona Snowbowl encompasses 777 acres of national forest lands (approximately one percent of the San Francisco Peaks), and operates under a Special Use Permit issued by the Coconino National Forest.
For info: The FEIS, Response to Comments, Record of Decision and other information about this project can be obtained on the Internet at www.fs.fed.us/r3/coconino/nepa/2005/feis-snowbowl/index.shtml

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WATER BRIEFS

US-MEXICO WATER SW

NEW REPORT ASSESSES RESOURCES

Those deciding the fate of the US-Mexico border region's scarce water resources must seize every opportunity to act strategically, according to the Good Neighbor Environmental Board in its latest report: *Water Resources Management on the US-Mexico Border*. The Board, an advisory committee managed by EPA, advises the US President and Congress about environmental conditions on the border.

The Report reveals that limited supplies, pockets of poverty, a combination of jurisdictional gaps and overlaps, and many other challenges all conspire to make water resources management in this region difficult.

THE REPORT RECOMMENDS:

INSTITUTIONS - Clarify current responsibilities held by US-Mexico border-region institutions responsible for managing water resources. Identify jurisdictional gaps and overlaps, interpret missions to reflect changing circumstances, and leverage opportunities for stronger cross-institutional collaboration.

DATA - Develop and sign formal US-Mexico border-region water resources data agreements. Such agreements should support the collection, analysis and sharing of compatible data across a wide range of uses so that border-region water resources can be more effectively managed.

STRATEGIC PLANNING - Implement a 5-year US-Mexico border-region integrated water resources planning process. Using a stakeholder-driven watershed approach, address immediate concerns in critical areas while pursuing collaborative longer-term strategies.

Good Neighbor Environmental Board members include representatives from US border states consisting of senior officials in business and industry, state and local government, federal agencies, ranching and grazing, non-profit groups, tribes, and the academic community. Each year, they meet several times in different communities along the US side of the border.

To obtain a copy of the new report, call 800-490-9198 and request the document by number, EPA 130-R-05-001. To view an electronic copy of the report or to obtain more information about the Board, visit EPA website: www.epa.gov/ocem/gneb

For info: Dave Ryan, EPA, 202/ 564-7827 or email: ryan.dave@epa.gov

CWA VIOLATION ID

EPA ENFORCEMENT

Lynn Plasma Inc., of Garden City, Idaho, was charged in US District Court for the District of Idaho in Boise with violating the federal Clean Water Act. Lynn Plasma is in the business of applying plasma coatings to a variety of materials. During the summer of 2002, and again in November of 2002, it is alleged that the defendant discharged industrial wastewater onto its parking lot. In November it is further alleged that the wastewater contained silicone. The wastewater allegedly ran into a storm drain that empties directly into the Boise River which is 200 yards from the drain. Lynn Plasma did not have a permit to discharge industrial wastewater into the storm drain and was warned by regulators in the summer of 2002 that such a permit was necessary.

Discharging industrial wastewater into storm drains that connect to rivers can harm fish and wildlife and can make surface waters unusable for drinking water and recreational purposes. The case was investigated by the Boise Office of EPA's Criminal Investigation Division and the FBI. Assistance was provided by the Idaho State Police, the Idaho Department of Environmental Quality, and the Garden City Public Works Department. The case is being prosecuted by the US attorney's office in Boise.

For info: Stacie Findon, EPA, 202/ 564-7338 or email: findon.stacie@epa.gov

LEAD IN DRINKING WATER US

EPA STRENGTHENS PROTECTION

EPA is initiating the Drinking Water Lead Reduction Plan to strengthen, update and clarify existing requirements for water utilities and states to test for and reduce lead in drinking water. This action will tighten monitoring, treatment, lead service line management and expand customer awareness. The plan also addresses lead in tap water in schools and child care facilities to further protect vulnerable populations.

From 1995-2004, states have concluded 1,753 enforcement actions to ensure compliance with the Lead and Copper Rule (LCR), and EPA has concluded 570. Under the Safe Drinking Water Act, state agencies take a lead role in enforcing the LCR.

Lead is a highly toxic metal that was used for many years in products found in and around homes. Even at low levels, lead may cause a range of health effects including behavioral problems and learning disabilities. Children six years old and under are most at risk because this is when the brain is developing. The primary source of lead exposure for most children is lead-based paint in older homes. Lead in drinking water adds to that exposure.

Lead is picked up as water passes through pipes and household plumbing fittings and fixtures that contain lead. Since 1991, the LCR has required water utilities to reduce lead contamination by controlling the corrosiveness of water and, as needed, replace lead service lines used to carry water from the street to the home.

Under the LCR, if 10 percent of required sampling show lead levels above a 15 **p**arts **p**er **b**illion (ppb) action level, the utility must 1) take a number of actions to control corrosion and 2) carry out public education to inform consumers of actions they can take to reduce their exposure to lead. If lead levels continue to be elevated after anti-corrosion treatment is installed, the utility must replace lead service lines.

Because virtually all lead enters water after it leaves the main system to enter individual homes and buildings, the LCR is the only drinking water regulation that requires utilities to test water at the tap. EPA plans to propose regulatory changes to the LCR by early 2006 which: tighten monitoring

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WATER BRIEFS

and sampling criteria; increase notification and tracking of water treatment system changes; and increase consumer awareness policies. A revised lead service line management system will ensure that service lines that test below the action level are re-evaluated after any major changes to treatment which could affect corrosion control. There will also be increased attention given to lead in school drinking water systems.

More information on National Review of LCR Implementation and Drinking Water Lead Reduction Plan is available online at: www.epa.gov/safewater/lcrmr/lead_review.html.

Information about lead in drinking water is available online at: www.epa.gov/safewater/lead or by calling the Safe Drinking Water Hotline at 800-426-4791.

For info: John Millett, EPA, 202/ 564-7842 or email: millett.john@epa.gov

CWA VIOLATION AK

EPA ENFORCEMENT

EPA has signed a Consent Agreement and Final Order (CAFO) with North Pacific Processors, Inc. (NPPI) for violations of the federal Clean Water Act. Specifically, the Order includes a penalty of $25,000 for discharge violations at the company's (Sitka Sound Seafoods) processing facility in Sitka, Alaska. NPPI has a National Pollution Discharge Elimination System permit that allows them to grind and discharge solid seafood processing wastes up to one-half inch in any dimension or smaller.

During several inspections in 2003, inspectors discovered multiple violations.

VIOLATIONS INCLUDED:

- Discharge particle size (larger than 1⁄2 inch)
- Items other than seafood waste that had been discharged
- Boundary violations of the permit's designated Zone of Discharge (ZOD)

The agreement took effect immediately and does not alter the existing permits or exempt NPPI from future enforcement action at these or other facilities.

For info: Mark MacIntyre, EPA, 206/ 553-7302 or email: macintryre.mark@epamail.epa.gov

PUMP & TREAT US

NEW EPA GUIDANCE

EPA recently released several fact sheets dealing with the effective use of pump and treat systems for remediating polluted ground water and otherwise contaminated sites.

Cost Effective Design of Pump and Treat Systems (EPA 542-R- 05-008) This fact sheet, published by EPA, summarizes key aspects of designing cost-effective pump and treat systems. Topics include: considering remedy goals and associated performance monitoring requirements; establishing design parameters; selecting ground water extraction methods; selecting technologies for treatment of contaminated water; determining options for discharge of treated water; and incorporating system controls and automation (April 2005, 38 pages). View or download at http://clu-in.org/techpubs.htm

Effective Contracting Approaches for Operating Pump and Treat Systems (EPA 542-R-05-009). This fact sheet, published by EPA, summarizes key aspects to consider for contracting to operate pump and treat systems. Topics include: essential contract components; options for contract type; considerations specific to contracts for operating P&T systems; and incorporation of optimization (April 2005, 22 pages). View or download at http://clu-in.org/techpubs.htm

O&M Report Template for Ground Water Remedies (with Emphasis on Pump and Treat Systems) (EPA 542-R-05-010). This EPA fact sheet provides a report template that can be used to present information on the operation and maintenance of a ground water remedy, particularly those including pump-and-treat. The template includes: various report sections; suggested items to be included in those sections; and example tables and figures (April 2005, 58 pages). View or download at http://clu-in.org/techpubs.htm

$70M IN ESA GRANTS US

USFWS SEEKING PROPOSALS

The US Fish and Wildlife Service (USFWS) is currently seeking proposals from states and US territories interested in acquiring land or conducting conservation planning for endangered species. Through the fiscal year 2005 appropriation from Congress, more than $70.5 million is available to fund planning activities and land acquisition for federally protected species.

The grants will be awarded in fiscal year 2005 from the Cooperative Endangered Species Conservation Fund, as authorized under the Endangered Species Act. This fund provides grants to states and territories to support their participation in a wide array of voluntary conservation projects for listed species, as well as for species that are either proposed or candidates for listing.

Grantees will contribute 25 percent of the estimated program costs of approved projects, or 10 percent when two or more states or territories undertake a joint project. The grants are expected to be awarded by next summer.

USFWS SEEKS PROPOSALS FOR THE FOLLOWING CATEGORIES:

- Recovery Land Acquisition Grants: These grants provide funds to states and territories for acquisition of habitat for endangered and threatened species in support of approved recovery plans.
- Habitat Conservation Planning Assistance Grants: These grants provide funds to states and territories to support the development of Habitat Conservation Plans (HCPs).
- HCP Land Acquisition Grants: These grants provide funds to states and territories to acquire land associated with approved HCPs.

For info: USFWS, 703/ 358-2106

USFWS website: http://endangered.fws.gov/grants/

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CALENDAR

April 17-20 TX

2005 Ground Water Summit, San Antonio, Hyatt Regency San Antonio, Sponsored by the National Ground Water Association, RE: Developing Countries Appropriate Technology, Sustainability & Self-Sufficiency, Bioremediation of DNAPLs, GW Tracers, Recycling Remediation Technologies, Geophysics, Water Supply and GW Resource Management, Technical and Economic Aspects of Treatment Trains, Strategies in Arid Environments, Detection, Transport and Health Impact of Pathogens, Ground Water Law, Policy and the Tragedy of the Commons, Microbiology, Arsenic Removal, Mass Flux Determination and Use, Emerging Contaminants & More. For info: NGWA, 800 551-7379, website: www.ngwa.org

April 17-20 CO

2005 Information Management & Technology Conference and Exposition, Denver, Hyatt Regency. RE: Information Technology for Water & Wastewater Utilities. Sponsored by the American Water Works Association and Water Environment Federation. For info: AWWA, 303/ 347-0804 or website: www.awwa.org/conferences/imtech/

April 17-21 MT

Mine Design, Operations & Closure Conference (13th Annual), Polson, KwaTaqNuk Resort. For info: Susie Anderson (Montana Tech), 406/ 496-4311 or website: http://multimedia.mtech.edu/mineop/

April 17-22 AK

EPA Region 10 Tribal Leaders' Summit, Sitka. For info: Sitka Tribe, 888-270-8687 or website: http://sitkatribe.org/summit/

April 20-22 ID

Western States Water Council Meeting, Boise, The Grove Hotel, 245 South Capital Blvd. For info: WSWC, 801/ 561.5300, website www.westgov.org/wswc/meetings.html

April 21-22 OR

Oregon Environmental Quality Commission Meeting, Boardman, Port of Morrow, 6 Marine Drive, Riverfront Conference Room. 4/21: 1pm-5pm; 4/22: 9am-Noon. For info: Day Marshall, DEQ Director's Office, 503/ 229-5990; website: www.deq.state.or.us/

April 22 CA

California EPA – State Water Resources Control Board Meeting, Sacramento, Cal/EPA Building, 1001 I Street, 10am. For info: Debbie Irvin, Clerk to the Board, 916/ 341-5600; email: dirvin@waterboards.ca.gov; website: www.swrcb.ca.gov/wksmtgs/schedule.html

April 22 KS

Clean Water Act Permitting and Compliance, Kansas City, RE: Overview of the Clean Water Act (CWA) and the National Pollutant Discharge Elimination System (NPDES). Developing Permitting Strategies. For info: Trinity Consultants, 800-613-4473 or website: www.trinityconsultants.com

April 22-24 OR

2005 Northwest Sustainability Conference, Seattle, Northwest Environmental Education Council Presentation (2nd Annual Conference). For info: Rachel Smith 206/ 762-1976 or email: rsmith@nweec.org

April 25-26 CA

EPA Arsenic Training Workshop, Sacramento. RE: Compliance Deadline (1/23/06), Arsenic Case Studies, Treatments, Technologies, Design Criteria. For info: EPA website: www.epa.gov/safewater/arsenic.html

April 25-27 CA

International Salinity Forum - Managing Saline Soils and Water: Science, Technology, and Social Issues, Riverside, Riverside Convention Center. Sponsored by the U of California Center for Water Resources (UCCWR). For info: Dennis Neffendorf, 817/ 509-3225 or email: dennis.neffendorf@ftw.nrcs.usda.gov; UCCWR website: www.waterresources.ucr.edu/index.php?content=news_events/intlsf_meeting/SF05pageDW.htm

April 27-29 CA

Natural Attenuation for Remediation of Contaminated Sites, San Francisco. RE: Remediation Alternative for Petroleum Hydrocarbons, Chlorinated Solvents, Other Contaminants in Ground Water. For info: National Ground Water Association, 800/ 551-7379, website: www.ngwa.org

April 28-29 NE

Nebraska Water Law: Facing Dramatic Changes in Our State, Lincoln, Embassy Suites Hotel. RE: Hydrology, Platte River Cooperative Agreement, COHYST Model, Republican River Settlement I, II and III, Spear T Ranch Case, Stream Challenges, Water Policy Task Force, Water Leasing and Marketing, Drought and Water Conservation, LB962. For info: CLE Int'l, 800/ 873-7130, website: www.cle.com

April 29-30 UT

Utah Board of Water Resources Meeting, Salt Lake City, Location TBA. RE: Tour MWD Salt Lake City and Sandy. For info: Molly Waters, 801/ 538-7230, email: mollywaters@utah.gov, website: www.water.utah.gov/board/2004SCHED.asp

May 2-4 TX

TCEQ Environmental Trade Fair and Conference, Austin, RE: Impact Reduction, Regulatory Relief and Incentives, Performance Based EMSs. For info: TCEQ Event Coordination, 512/ 239-3150, email: etfc@tceq.state.tx.us, website: http://www.tnrcc.state.tx.us/exec/sbea/etf/etf.html

May 2-5 Mexico

Symposium of Fishery Sciences in Mexico, La Paz, Baja California Sur, Los Arcos at La Paz. RE: Assessment and Dynamics of Fishing Resources, Fishing Efficiency, Potential Resources, Oceanography and Climate Change, Fisheries Management, Fisheries Conservation, and Organization of Mexican Fishery Scientists. For info: Dr. Mauricio Ramírez-Rodríguez, +(52) 612-1234658, email: sympesq@ipn.rnx, or website: www.wdafs.org/meet/2005/LaPaz_symposium.htm

May 3 WY

Wyoming State Water Forum Meeting, Cheyenne, State Engineer's Conference Room, Herschler Building 4E, 10am, Invited Guest: Rik Gay (Natrona Co. Conservation District, Discussion Item: Kendrick Selenium Watershed Project. For info: State Engineer's Office, website: http://seo.state.wy.us/forum.aspx

May 3 CA

"Groundwater Management in California-A Continuing Challenge in a Changing Environment," San Jose, Marriott Hotel and McEnery Convention Center, 8:30am-4:30pm. For info: Ellie Meek (ACWA), 888/ 666-2292 or website: www.acwanet.com/events/SC05/SC05_precon.asp

May 3-5 NM

NPDES Inspector Training (EPA Region 6), Albuquerque, Mariott. RE: NPDES Permits & Regulations, Field Inspection Capabilities, Wastewater Processes, Environmental Management Systems. For info: Juan Ibarra (EPA), 214/ 665-8493, email: ibarra.juan@epa.gov or website: www.netionline.com/catalog/CourseDetails.asp?CourseNumber=CWA209&New

May 3-6 CA

ACWA 2005 Spring Conference & Exhibition, "California's Water Blueprint: Charting Our Course," San Jose, Marriott Hotel and McEnery Convention Center. RE: Keynote Speakers: California State Controller Steve Westly, Senator Mike Machado, Assembly Member Lois Wolk, Political Columnist Daniel Weintraub (Sacramento Bee) and Roger Marzulla, of Marzulla & Marzulla. For info: Ellie Meek (ACWA), 888/ 666-2292 or website: www.acwanet.com/events/SC05/SC05_conference.asp

May 4-6 AZ

Arizona Water and Pollution Control Association 78th Annual Conference. For info: Deborah Muse (AWPCA), 928/ 717-9905 or AWPCA's website: http://awpca.org//calendar/conference/index.aspx

May 6 OR

SEDIMENTS 2005, Conference, Portland, World Trade Center Two, Auditorium. RE: Cleaning Up Contaminated Sediment Sites; Assessment & Evaluation; Allocation of Liability; Alternative Dispute Resolution; Early Action Processes; Disposal of Contaminated Sediments; Willamette & Duwamish Rivers. For info: Environmental Law Education Center, 503/282-5220 or email: hduncan@elecenter.com or website: www.elecenter.com

May 9-13 DC

Water Quality Standards Academy Sessions, Washington, DC. RE: US EPA Introductory Course on Water Quality Standards (Comprehensive), Regulation, Policies, Program Guidance, Water Quality Criteria Development. For info: www.glec-online.com/Announ-Session8.htm

May 10 OK

Oklahoma Water Resources Board Meeting, Oklahoma City, 3800 N. Classen Blvd., 9:30 am. For info: OWRB, 405/ 530-8800, website: www.owrb.state.ok.us/news/meetings/board/board-mtgs.php

May 10-11 OR

Accelerated In Situ Bioremediation of Chlorinated Solvents, Training, Portland, Portland State University, Smith Memorial Student Union Rooms 327 - 329, 1825 SW Broadway, International Experts Present the Latest Developments in Accelerated Bioremediation of Chlorinated Solvents Site Characterization, Modeling, Design, Monitoring, and Regulatory Interaction. Sponsored by the Oregon Department of Environmental Quality, the Portland State University Geology Department, and the Environmental Health and Safety Program of Mt. Hood Community College For Info: Registration and Information online:www.itrcweb.org (go to "Classroom Training" then "Accelerated In Situ Bioremediation") or call Bill Herrington, WPI, 540/ 557-6079

May 10-12 UT

Interagency River Management Workshop, Salt Lake City. Sponsors: Bureau of Land Management and River Management Society, RE: Networking, Problem-Solving and Training. For info: River Management Society, website: www.river-management.org/saltlake.htm

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(continued from previous page)

May 10-14 UT
Principles of Stream Restoration, Logan, Utah State University. RE: Two-Part Course (Part II, See May 16-19), Fluvial Geomorphology & Applications to River Management and Restoration. For info: USU Conference Services, 800/ 538-2663 or website: www.cnr.usu.edu/departments/awer/pages/Shortcourse/shortcourse2005.htm; or website: www.esice.org/geomorph.htm

May 11-12 WA
Introduction to Ordinary High Water Mark and Ordinary High Water Line Delineations on Rivers and Streams, Seattle, Mountaineers Conference Center, 300 Third Avenue West. Instructors from Washington DFW and Ecology. For info: Micah Bonkowski, Northwest Environmental Training Center, 206/ 762-1976 or website: www.nwetc.org

May 12-13 OR
Oregon Fish & Wildlife Commission, Prineville, 8 am. For info: Cristy Mosset, ODFW, 503/ 947-6044, www.dfw.state.or.us/Comm/schedule.htm

May 15-19 AK
World Water & Environmental Resources Congress, Anchorage. For info: Don Phelps, P.E. General Chair, 509/ 687-9065 or email: donphelps@aol.com or website: www.asce.org/conferences/ewri05/index.cfm

May 16-17 CA
Endangered Species Act (6th Annual), Costa Mesa, Hilton Hotel. RE: Regulatory and Judicial Developments, Prospects for ESA Reform. For info: CLE Int'l, 800/ 873-7130, website: www.cle.com

May 16-17 CA
Energy Strategies for Cities and Counties, Santa Monica, Huntley Hotel Santa Monica Beach. RE: Significant Revenue and Cost Saving Opportunity for Cities and Government Agencies. Changes in Laws and Regulations Provide New Options for Energy Planning. For info: Law Seminars International, 800-854-8009

May 16-19 UT
Geomorphology and Sediment Transport in Channel Design, Logan, Utah State University. RE: Two-Part Course (Part I, See May 10-14), Fluvial Geomorphology & Applications to River Management and Restoration. For info: USU Conference Services, 800/ 538-2663 or website: www.cnr.usu.edu/departments/awer/pages/Shortcourse/shortcourse2005.htm; or website: www.esice.org/geomorph.htm

May 18-20 Germany
2nd European Conference on Natural Attenuation, Soil and Groundwater Risk Management, Frankfurt. For info: http://events.dechema.de/natatt.html

May 19-20 WA
Water Law Conference, Seattle. RE: Water Case Law Update, After Acquavella, Practice Before the Boards & Courts, Legislative Update, Regional Water Supply Planning, Climate Change, ESA Takings, Columbia River, Water Conservation. For info: Law Seminars International, 800/ 854-8009, website: www.lawseminars.com

May 19-20 NV
Law of the Colorado River (7th Annual), Las Vegas, The Venetian Resort Hotel Casino. RE: Drought and Shortage Management. For info: CLE Int'l, 800/ 873-7130, website: www.cle.com

May 19-20 TX
Coastal Law, Houston. For info: CLE Int'l, 800/ 873-7130, website: www.cle.com

May 19-20 CO
Urban Flood Channel Design and Culvert Hydraulics (Storm Water Hydrology Certification Program), Denver, University of Colorado at Denver (Health Sciences Center), 8:30am–4:30pm. For info: CU Denver Engineering, 303/ 556-4907, website: www.cudenver.edu/engineer (click on Continuing Education, then Course Information)

May 20 UT
Utah Water Quality Board Meeting, Salt Lake City, Cannon Health Bldg., Rm125, 9:30am. For info: Utah DEQ, 801/ 538-6146, website: www.deq.utah.gov

May 20 CA
California EPA – State Water Resources Control Board Meeting, Sacramento, Cal/EPA Building, 1001 I Street, 10am. For info: Debbie Irvin, Clerk to the Board, 916/ 341-5600; email: dirvin@waterboards.ca.gov; website: www.swrcb.ca.gov/wksmtgs/schedule.html

May 20 WA
Brownfields Redevelopment: Market Opportunities, Seattle, WA State Conv. & Trade Center. RE: Market Trends, Financial Tools, Government as Stakeholder, Legal & Regulatory Development. For info: The Seminar Group, 800/ 574-4852 or website: www.TheSeminarGroup.net

May 20-24 CO
National River Rally 2005 (American Rivers), Keystone, Keystone Resort. RE: Restoration and Protection, Emerging Policy, Fundraising, Technical Issues, Watershed Science, Watershed Protection Skills & More. For info: American Rivers, 208/ 853-1920, email: riverrally@rivernetwork.org, website: www.rivernetwork.org/rally

May 22-25 SD
9th Annual Missouri River Natural Resources Conference, Pierre, Ramkota Hotel. RE: Forum for Stakeholders to Share Perspectives, Solve Problems, Exchange Information. For info: Jim Riis, 605/ 223-7701, email: jirn.riis@state.sd.us, website: http://infolink.cr.usgs.gov/events/05.htm

May 26-27 CA
MTBE and Perchlorate: Assessment, Remediation and Public Policy, San Francisco. RE: Remediation Technology Costs, Public Policy & Legal Issues, Drinking Water Treatment Technologies, Toxicology & Health Risks. For info: National Ground Water Association, 800/ 551-7379, website: www.ngwa.org

June 2 OR
Law of Easements in Oregon: Legal Issues and Practical Considerations, Portland, Fifth Avenue Suites Hotel, 506 Southwest Washington Street. RE: Easement Basics, Enforcement and Water Easements. For info: Lorman Education Services, 888/ 678-5565 or website: www.lorman.com

June 2-5 NM
Natural Resources Law Teachers Institute, Santa Fe. Sponsor: Rocky Mt. Mineral Law Foundation. For info: RMMLF, website: www.rmmlf.org

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