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UPPER COLUMBIA RIVER CONTAMINATION

TRANSBOUNDARY APPLICATION OF CERCLA

Pakootas v. TCM Metals, Ltd.

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Introduction

On November 8, 2004, in a case of first impression, the US District Court for the Eastern District of Washington denied a Canadian corporation's motion to dismiss the citizen suit brought against it under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA — 42 U.S.C. § 9601 et seq.). The plaintiffs in the suit are two members of the Confederated Tribes of the Colville Reservation (the Tribes) who brought a CERCLA citizen suit against TCM Metals, Ltd. (TCM), a Canadian corporation operating in Trail, British Columbia. In its citizen suit claim, Plaintiffs sought to enforce an outstanding Unilateral Administrative Order (UAO) issued to TCM by the United States Environmental Protection Agency (EPA).

The District Court held that, based on the facts of this case, the CERCLA citizen suit should not be dismissed and the case may proceed to trial. TCM appealed the District Court's ruling to the Ninth Circuit Court of Appeals where briefing will take place this summer and oral argument is expected in late 2005 or early 2006. This article will present the environmental and historical backdrop behind the citizen suit and presents the legal claims and procedures associated with both the citizen suit and with TCM's motion to dismiss. Finally, the article concludes with a preview of the timeline and possible outcomes of TCM's appeal to the Ninth Circuit.

The Federal Columbia River Power System (FCRPS)

To comprehend the Confederated Tribes' unique interest in the Upper Columbia Basin environment, it is essential to appreciate the relatively recent and sweeping ecological changes to the Columbia River that irreversibly changed the nation's environment in which the Tribes had lived and prospered for thousands of years.

The Columbia River (the Columbia) runs 2,000 miles from its source in the Selkirk Mountains of southeastern British Columbia across the US/Canada border and through four states (Washington, Idaho, Montana, and Oregon) on its way west to the Pacific Ocean. The Columbia contains a series of hydroelectric and multi-purpose dams that are managed as the Federal Columbia River Power System (FCRPS). FCRPS projects provided cheap electricity to aid the World War II economy of the Pacific Northwest, powering aluminum plants, shipyards, and the development of nuclear weapons at southern Washington's Hanford Reservation. The hydroelectricity generated along the Columbia continues to sustain significant industrial growth within the region.

The largest dam in the FCRPS is the Grand Coulee Dam. Construction of the dam in the thirties and early forties brought jobs and electricity to northeastern Washington, and the dam's irrigation project opened thousands of acres of arid lands for farming. The dam barred the upstream migration of salmon to the Tribe's historical fishing areas and destroyed the once abundant fishery at Kettle Falls and elsewhere on the river. Lake

Roosevelt, the reservoir created upriver of the Grand Coulee Dam offered new opportunities and has become a haven for boating, fishing, swimming, camping, and canoeing. The construction of FCRPS projects, including Grand Coulee Dam, created many beneficiaries: farmers who receive subsidized irrigation; recreation-related commerce; and individual and industrial Bonneville Power Administration (BPA) ratepayers who enjoy low electric rates.

These many benefits, however, do not come without costs. The Grand Coulee Dam is an enormous concrete barrier that not only ended runs of wild salmon on the Upper Columbia River but also prevents contamination from mining and industrial operations from traveling downstream. Dioxins, furans, and heavy metals have accumulated in the sediments behind Grand Coulee Dam, creating a human health risk and harming the environment. One group in particular has had to bear a disproportionate share of the costs of the Grand Coulee Dam: the Native Americans, specifically, the Tribes that now reside on the Colville Indian Reservation.

The Law of the River

The Columbia River and the FCRPS are governed by a complex web of laws, treaties, and compacts. In 1961, the United States signed the Columbia River Treaty with Canada, which provided that the four major storage reservoirs in the US and Canada would be regulated primarily for hydropower generation and flood control. The additional reservoirs doubled the system's storage capacity and increased the need for coordinated dam operations along the river to maximize hydropower production. In 1964, the US Army Corps of Engineers (Corps), the US Bureau of Reclamation (Reclamation), BPA and the region's utilities negotiated a long-term agreement called the Pacific Northwest Coordination Agreement (Coordination Agreement) which established detailed operating criteria, power exchange principles, and the allocation of downstream benefits.

Columbia River Basin

Nonpower Purposes

The Coordination Agreement requires the Corps, the BPA, and Reclamation to prepare annual operating plans. The current System Operational Plan seeks to maximize power production after nonpower purposes, such as flood control, fisheries, irrigation, and recreation, have been met. These additional purposes are treated as operational "constraints" on power production. Thus, although the Coordination Agreement provides for detailed and coordinated operating plans for power production, it does not provide for the type of integrated operations that would meaningfully evaluate or incorporate nonpower uses.

Environmental Considerations on the Upper Columbia River

Conservation Program

In the 1970s, the adverse effects of the FCRPS dams on fish populations became evident. In the face of a potential listing of two Columbia Basin salmon species under the Endangered Species Act (ESA), Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (NPA). The NPA created the Northwest Power Planning Council (Council), an interstate agency comprised of representatives from the states of Idaho, Montana, Oregon, and Washington, to develop a 20-year electric power plan. Part of the Council's mission is to develop and oversee a program "to protect, mitigate, and enhance [Columbia Basin] fish and wildlife" and review its program at least every five years. The Council's current conservation program is the Columbia River Basin Fish and Wildlife Program, which was revised in 2000 and amended in 2003 (Conservation Program).

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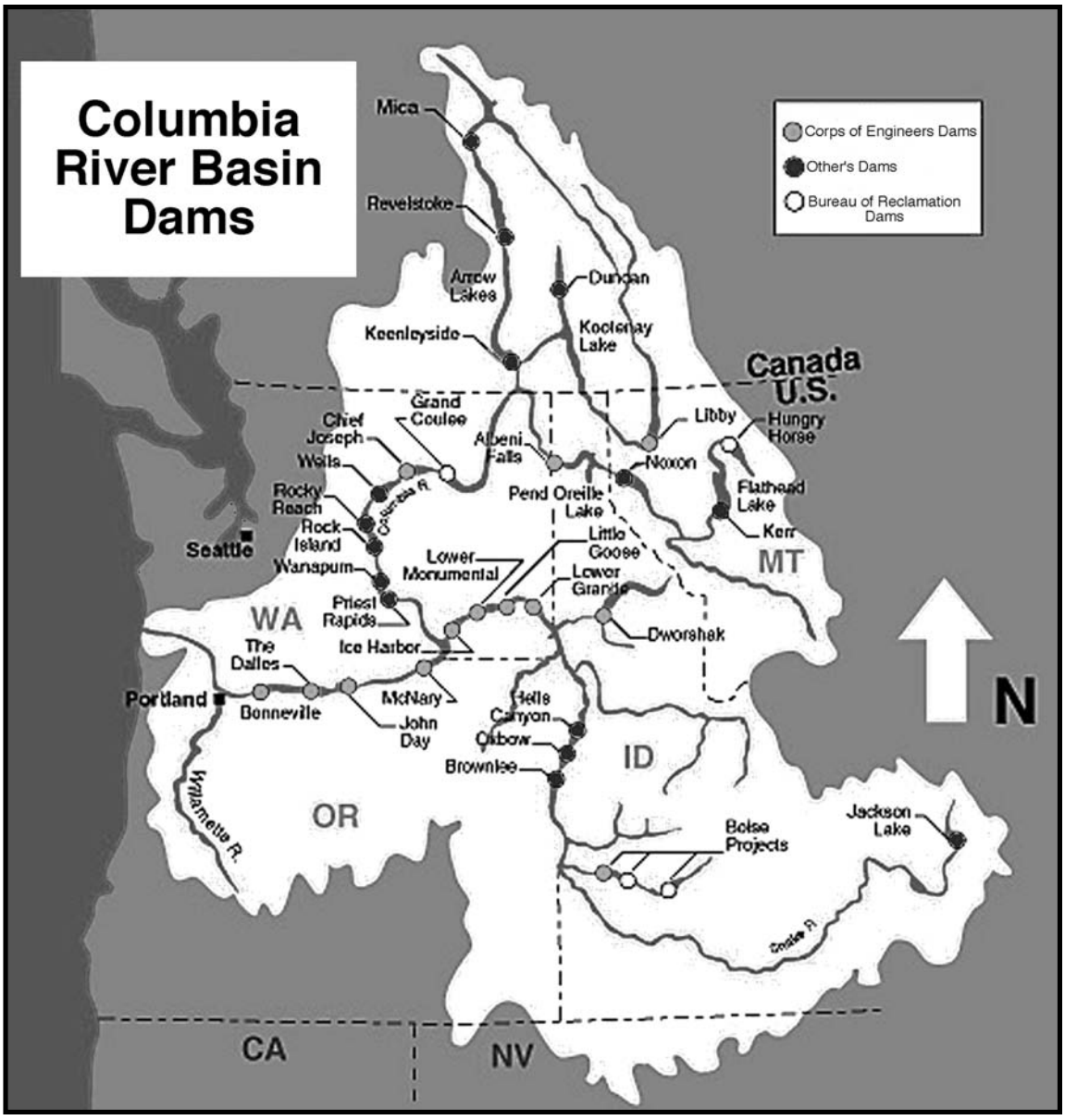
Columbia River Basin



Agency Conflicts

Under the NPA, the BPA must act in a manner consistent with the Conservation Program. In contrast, the federal hydropower agencies (Reclamation and the Corps) are only required to take the Conservation Program into account "to the fullest extent practicable" in exercising their hydroelectric responsibilities. In addition, several provisions of the NPA itself impose limits on the Council's fish restoration programs, such as the requirement that restoration measures may not jeopardize an "adequate, efficient, economical, and reliable power supply."

ESA Listings

The less-than-effective conservation provisions of the NPA failed to prevent the drastic declines in the Columbia's fish populations, compelling the National Marine Fisheries Service (NMFS) and the US Fish and Wildlife Service (FWS) to step in. During the 1990's, 12 species of Columbia Basin salmonids were listed as threatened or endangered under the ESA. In 1995, NMFS and the FWS each issued Biological Opinions (Bi-Ops) concerning the operations of the FCRPS dams and the effect of such operations on those species of salmon listed as endangered. Subsequently in 2000, NMFS and the FWS issued Bi-Ops which built upon the 1995 documents. The 2000 Bi-Ops require that additional water be released for moving salmon through the river system and that certain changes in dam operations be implemented to increase survival of fish moving through the FCRPS dam.

"Bi-Ops"

From a management standpoint, the operation of the FCRPS is directed not only by the US-Canada treaties and the interagency agreements among BPA, Reclamation and the Corps, but the agencies' administration of the FCRPS, including basic day-to-day decision-making, is also constrained by the requirements of the Bi-Ops. Thus, parties wishing to see changes in the management of the FCRPS

Columbia River Basin

FCRPS Framework

cannot expect such change to occur in a vacuum. When dealing with any part of the Columbia River, it is necessary to understand and navigate the law of the river and the environmental constraints under which the agencies operate.

Accordingly, when contamination was first discovered in the Upper Columbia and Lake Roosevelt, concerned parties, including the Tribes, had to analyze the legal and operational framework of the FCRPS to understand the effect of dam operations on the contamination and develop strategies to not only identify the source or sources of the contamination but also find resolutions.

Reservation Boundaries

The Confederated Tribes of the Colville Reservation

Since time immemorial, the Upper Columbia River basin has been of great importance to the Tribes. Predecessors of the Tribes and their members have always occupied and utilized the area from south of the confluence of the Columbia and Okanogan Rivers, north into what is now Canada. The fish, wildlife, plants, lands, and waters of the Upper Columbia basin have always been and still remain of central importance to the Tribes' subsistence, culture, and spiritual well-being.

An Executive Order of July 2, 1872, initially established the Colville Indian Reservation. At that time, the entire segment of the Columbia River, from the Okanogan confluence to the Canadian border – roughly 150 river miles – was included within the exterior boundaries of the Colville Indian Reservation. However, in 1891, the United States government took action to reduce the size of the Reservation and ceded the north half of the Reservation to the United States, including a portion of the Columbia River. Despite the territorial reduction, the Tribes expressly reserved hunting, fishing, and gathering rights and entitlements within the ceded portion of the reservation, including the Columbia River. In 1975, the US Supreme Court affirmed the Tribes' rights in *Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975). The current Colville Indian Reservation is bounded by the Columbia River on the east and the south.

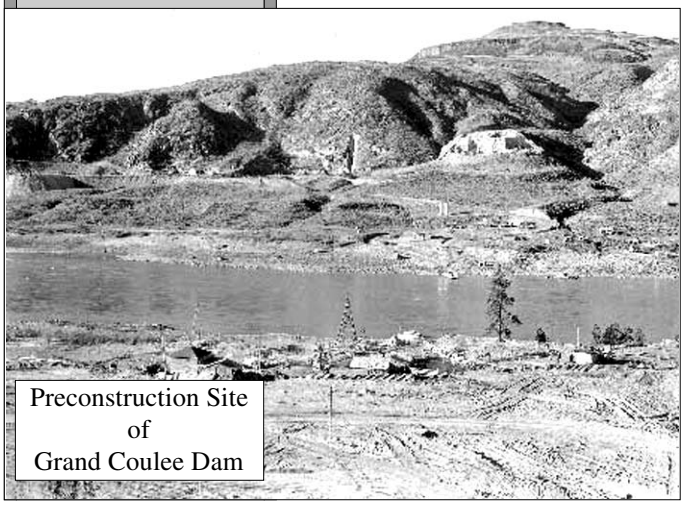
Dam Impacts

Effect of The Grand Coulee Dam on the Tribe

One of the events that greatly changed the Reservation land base and affected the members of the Tribes and the resources upon which the Tribes relied, was construction of the Grand Coulee Dam. Completed in 1940, the Grand Coulee Dam blocks the free flow of the Columbia River at the point where the Columbia forms the southern boundary of the Reservation. Behind the dam is the reservoir, Lake Roosevelt, which has total storage capacity of approximately nine million acre-feet of water and stretches north over 130 miles to the Canadian Border.

"Indian Zone"

Construction of the Grand Coulee Dam resulted in flooding and further diminishment of the Reservation land base when traditional Tribal lands were taken by the United States. In recognition of the Tribes' loss of territory, approximately one fourth of the Lake Roosevelt reservoir area above the dam was set aside for the paramount use of the Tribes and the Spokane Tribe for hunting, fishing and boating. Pursuant to a 1946 tri-party agreement among Reclamation, the US Department of the Interior National Park Services and the Office of Indian Affairs, Reclamation has the primary responsibility for overseeing the reservoir area. However, the agreement designated an "Indian zone" which comprises essentially all of the freeboard, draw-down and water area inside the original boundaries of the Reservation except for the area immediately around the dam. This "Indian zone" extends to a strip in the center of Lake Roosevelt which is preserved as a navigation lane.



Preconstruction Site of Grand Coulee Dam

In addition to diminishment of Reservations lands, the construction of the Grand Coulee Dam caused numerous other negative impacts to the Tribes' natural resources. The pre-1850 runs of salmon and steelhead on the Upper Columbia River have been estimated to have included from 500,000-to-1,300,000 fish. But those once great runs of salmon and steelhead on the Upper Columbia River were already in decline even before the construction of Grand Coulee Dam due to the development of commercial fisheries, over-harvesting, grazing, timber harvesting, mining, roads, highways, railroads, and the destruction of estuarine and freshwater wetlands. By 1938, shortly before the Grand Coulee Dam cut off the Upper Columbia River for migrating anadromous fish, the runs of salmon and steelhead in the Upper Columbia River were estimated to have dropped to 25,000. The construction of the Grand Coulee Dam, along with the downstream Chief Joseph Dam, sounded the final death knell.

Columbia River Basin

Water Quality Issues

Fishery Conflicts

Smelter Discharge

Sediment Study

Remnant Contamination

Despite the drastic decline of the anadromous fishery, the Tribes continue to fish the Okanogan River today, and they rely heavily on the kokanee (land-locked sockeye salmon) fishery that exists between Chief Joseph Dam and the Reservation boundary five miles downstream. In addition, the Tribes have come to rely increasingly on the resident (as opposed to anadromous) fishery. A number of problems, however, hamper improved fishery production. Water quality in and below Lake Roosevelt is poor, particularly for temperature, dissolved oxygen and nitrogen, which directly affect salmon survival. To thrive, salmon need abundant cold water. Small increases in water temperatures (e.g. 2°-3° C) above the optimal range impair juvenile migrants' smoltification (adaptation to salt water), delay adults' migration to spawning areas, and increase stress and mortality in both juveniles and adults. In addition, high concentrations of total dissolved gas can be fatal to anadromous fish. The spills at the Grand Coulee Dam that occur as part of the FCRPS operations increase total dissolved gas below the dam.

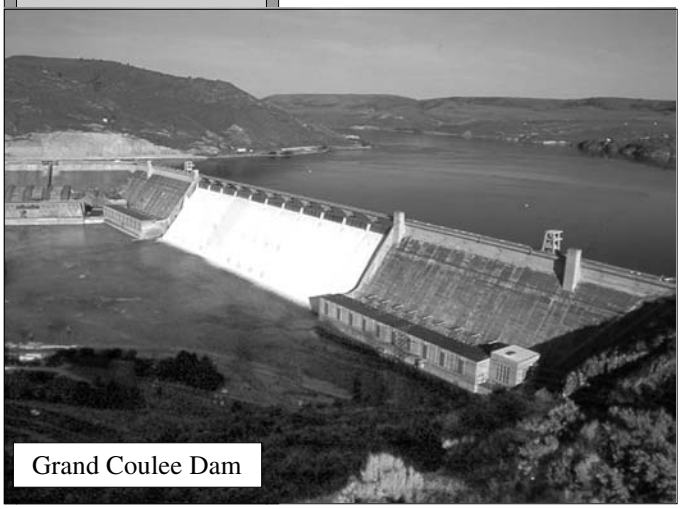
As part of the operation of the FCRPS, Reclamation draws down Lake Roosevelt in early summer and fall. The reduced volume and surface area limit food supply and increase water temperatures during periods that are often critical for the resident fish. Thus, conflicts arise between the anadromous smolts, which need flows for outmigration, and resident fish in Lake Roosevelt, which become threatened by the reduced volumes. In addition, recent evidence from a United States Geological Survey (USGS) report published in 2005 shows that the draw downs may also contribute to release of contaminants from sediment into the water column (Scientific Investigations Report 2004-5090).

Water Quality in the Upper Columbia River

In the early 1980s, concerns about water quality in Lake Roosevelt and the Upper Columbia River were first noted in a US Fish and Wildlife study that reported the presence of elevated concentrations of arsenic, cadmium, lead, and zinc in fish from Lake Roosevelt. Follow-up studies indicated that the primary source of this contamination was a virtually unregulated lead-zinc smelter located on the banks of Columbia River in Trail, British Columbia, 16 kilometers upstream from the international boundary (i.e., TCM Metals, the smelter named in the suit). From the 1950s until the mid-1990s, the smelter regularly discharged several hundred tons of blast furnace slag and effluent per day directly into the Columbia River.

In 1992, at the request of the US Environmental Protection Agency (EPA) and Lake Roosevelt Water Quality Council (LRWQC), the USGS initiated a large-scale sediment quality study of Lake Roosevelt. The USGS reported that the riverbed sediments were contaminated by elevated concentrations of metals (arsenic, cadmium, copper, lead, mercury, and zinc). The USGS report also concluded that the presence of these contaminants had altered benthic invertebrate communities (the bottom-dwelling organisms on which salmon and steelhead feed).

Owing in part to the studies in Canada and Washington State, and the constant pressure of the Confederated Tribes and the LRWQC, the TCM smelter has apparently stopped discharging slag and has reduced its effluent discharge. While this is a significant improvement in the loadings of additional metals to the system, large quantities of previously discharged contaminated sediments remain in and about Lake Roosevelt. Due to the presence of the Grand Coulee Dam, which severely retards the downstream migration of contaminants, a significant volume of hazardous contaminants has accumulated on the upland beaches and throughout the sediments beneath Lake Roosevelt.



Grand Coulee Dam

From about January to April each year, Reclamation draws down the level of Lake Roosevelt for primarily flood control purposes. The lake level is lowered by as much as 82 feet, exposing hundreds of miles of Reclamation-owned shoreline area. Consequently, the contaminated sediment in the shoreline area is exposed to the air. When dry, the sediments are easily distributed by wind as fugitive air emissions. The raising and lowering of the reservoir also prevents the establishment of plants that would normally grow around a lake and stabilize its banks, subjecting the banks of Lake Roosevelt to erosion. Further, as the contaminated sediment materials are scoured and transported downstream, they become dissolved in the water column. Other factors, including the hydrodynamics of water flow, keep the contaminants moving in and around Lake Roosevelt. Therefore, long after being discharged by the upstream pollution source, these contaminants continue to move around and adversely impact the surface and groundwater, sediments, and biological resources of Lake Roosevelt.

Columbia River Basin

Human Health Concerns

Impacts on Human Health

The presence and operation of the Grand Coulee Dam has had a number of adverse impacts on human health. The construction of the dam and the resulting decline in the anadromous fisheries has caused salmon, once a major food source for Tribal members, to be replaced with foods that are high in fat, sugar and salt. As a result, there have been significant increases in the rates of heart disease, diabetes, and other diet-related illnesses on the reservation. The increase in incidents of disease is exacerbated by limited availability of health care on the reservation.

Contaminant Concentrations

Other human health issues of concern to the Tribes are associated with impacts to the food chain caused by the bioaccumulation of the contaminants, including mercury, lead, arsenic, dioxins, furans and PCBs, in the resident and anadromous fish. In 1990, the Washington State Department of Health (DOH) issued a fish consumption advisory for dioxins in Lake Roosevelt fish (Dioxin Advisory). Then in 1994, a USGS study identified high levels of mercury in sportfish, triggering a Washington DOH fish consumption advisory that still remains in effect (Mercury Advisory). Another recent study of sportfish from Lake Roosevelt indicated that the concentrations of PCBs did not change from 1994 to 1998. Although this most recent report was encouraging in that it indicated that concentrations of furans in rainbow trout had decreased, the report also stated that there was no change in concentration levels of dioxins and furans in sportfish and whitefish, and concentrations of PCBs in rainbow trout remained elevated and do not appear to be decreasing. The presence of contaminants in the resident and anadromous fish in Lake Roosevelt and the Upper Columbia disproportionately affects the Tribes. Per capita, tribal members typically consume 10 times the quantity of fish than non-Native Americans.

Superfund Listing

The Application of CERCLA

In addition to the direct release of hazardous substances into the Columbia River by industrial sources, the redistribution of contaminated sediment and dust storms caused by the draw-downs of the Lake Roosevelt may constitute the release of hazardous substances under CERCLA, commonly known as "Superfund."

CERCLA is a strict liability statute which provides that those that own the land on which a release occurs, or operate in a manner to cause or contribute to such a release, are responsible for the release of hazardous substances (regardless of the quantity) and are jointly and severally liable for the total costs of the "removal or remedial action . . . [and] damages for injury to, destruction of, or loss of natural resources." CERCLA also establishes a National Priority List (NPL) to identify and remedy the country's worst sites, for which the federal Superfund may be accessed to pay clean up costs. Finally, any person that is or could be affected by a release of hazardous substances may petition the EPA to conduct a preliminary assessment of a site or sites that are affected by a release or threatened release of hazardous substances.

Preliminary Assessment

As a direct result of its concern for Tribal members, as well as other people living and recreating within the Lake Roosevelt environment, on August 2, 1999, the Tribes petitioned Region 10 of the EPA to conduct a preliminary assessment to investigate the human health and environmental risks associated with the presence of hazardous substances in the Upper Columbia River Basin from the Canadian border, southward through Lake Roosevelt, to the Grand Coulee Dam, (encompassing the water, river- and lake-beds, and banks).

National Priority List

In early 2000, EPA granted the Tribes' petition and commenced multiple preliminary assessments within the area of concern in and around Lake Roosevelt (the Lake Roosevelt Site). The EPA's investigation indicated that additional information was needed. In 2001, EPA began its Expanded Site Inspection and based on this data, issued its draft report in October 2002. Based on data obtained by the assessment process, EPA determined that the Lake Roosevelt Site qualifies for placement on the National Priority List (NPL). EPA had the option of proceeding with the NPL listing process or entering into an administrative order with the **p**otentially **r**esponsible **p**arties (PRPs) at the Lake Roosevelt Site in accordance with EPA's Alternative NPL Site Guidance, OSWER 92-08.0-17 (June 24, 2002).

Negotiations

Accordingly, in about April 2003, EPA initiated informal settlement discussions with TCM Metals, Ltd. (TCM), owner and operator of the smelter in Trail, British Columbia, Canada. EPA intended to enter into an Agreed Administrative Order on Consent (AOC) with TCM whereby TCM American (of Spokane, Washington) one of TCM's United States subsidiaries, would conduct a Remedial Investigation/ Feasibility Study of the Lake Roosevelt Site (the RI/FS). Towards that end, on October 10, 2003, the EPA sent a Special Notice letter to TCM, triggering an automatic 60-day period of formal negotiations with EPA. The negotiations between EPA and TCM broke down in November 2003.

Enforcement

As a result, on December 11, 2003, EPA issued a Unilateral Administrative Enforcement Order (UAO) to TCM directing that TCM perform the studies necessary for the RI/FS investigation under

Columbia River Basin

Jurisdiction Question

Citizen Suit

US v. Canada Jurisdiction

"Effects Doctrine"

"Long Arm" Statute

Court Ruling

CERCLA. On January 12, 2004, TCM sent a letter to EPA advising the agency that it did not believe that EPA had jurisdiction over TCM under US law and that TCM would not comply with the UAO. To date, EPA has not taken action to enforce the UAO. TCM, however, has sought relief from the Canadian government and as a result, Canada has filed a diplomatic note with the US Department of State advising the Department that Canada does not believe that the EPA has jurisdiction over TCM under CERCLA.

In February 2004, two members of the Confederated Tribes of the Colville Reservation, Joseph Pakootas and Donald R. Michel, provided TCM with notice of their intent to sue TCM under the citizen suit provision of CERCLA. Under the provision, any person may bring a civil action against any person who is alleged to be in violation of any standard, regulation, condition, requirement or order. In short, the letter indicated that Pakootas and Michel intended to enforce the UAO against TCM.

The Citizen Suit Against TCM

The Pakootas and Michel (Plaintiffs) filed suit on July 16, 2004. *Pakootas v. TCM Metals, Ltd.*, E.D. Wash., No. CV-04-256, 2004 U.S. Dist. LEXIS 23041, (Nov. 8, 2004). The two plaintiffs are Joe Pakootas (Chair of the Tribal Business Council) and D.R. Michel (Council member and Chair of the Business Council's Natural Resources Committee). Their citizen suit, asked the court to enforce EPA's UAO against TCM and compel TCM to study the contamination it had released into the United States. TCM resisted the claim against it and in August, 2004, filed a motion to dismiss the suit. In its motion to dismiss, TCM asserted that the court did not have jurisdiction over TCM or its operations in Canada for the purpose of enforcing the UAO. Specifically, TCM argued that the court lacked both subject matter and personal jurisdiction and that the plaintiffs had not stated a claim for which relief could be granted. TCM further argued that CERCLA was not intended to allow EPA or US courts to regulate Canadian corporations operating in Canada. Rather, TCM asserted, its waste disposal activities fell under properly issued Canadian permits.

With its motion to dismiss, TCM presented the court with a new question not yet addressed. Specifically, can a CERCLA citizen suit apply CERCLA extraterritorially? In its suggestion to the contrary, TCM argued that Congress intends for US law to be applied domestically, unless there is a clear expression of Congressional intention that the law should apply extraterritorially. TCM went on to argue that CERCLA lacks such clear expression of Congressional intent and, therefore, the company should not be subject to CERCLA enforcement for its conduct outside of the Untied States. Finally, TCM claimed that the US District Court lacked jurisdiction to compel TCM to perform the RI/FS.

Plaintiffs' Arguments in Response to TCM's Motion to Dismiss

At the hearing on TCM's motion to dismiss, Plaintiffs argued that CERCLA applied to TCM's disposal actions under the "effects doctrine." The "effects doctrine" holds that US law applies when a party's actions occur outside of the United States but cause significant impacts within the United States. In this case, TCM's willful release of hazardous substances for almost 100 years caused substantial adverse effects in the Upper Columbia River basin and in Lake Roosevelt. These adverse effects, Plaintiffs asserted, bring TCE within CERCLA's scope for the purpose of conducting RI/FS studies and implementing necessary cleanup in the United States. According to Plaintiffs, the effects doctrine establishes "subject matter jurisdiction" which gives United States courts the authority to hear and decide the claim.

Additionally, Plaintiffs argued that TCM's actions subjected the company to the personal jurisdiction of the US District Court under the "long arm" statute. The long arm statute requirements are met because TCM's disposal likely impacted the natural resources owned and managed by the Tribes and the State of Washington. [Washington State's "long arm" statute applies, RCW 4.28.185. The statute provides that jurisdiction over a nonresident individual or a foreign corporation may be asserted to the extent permitted by the Due Process Clause of the United States Constitution, except as limited by the terms of the statute.]

District Court Decision

The District Court heard oral argument in November 2004. Four days later, the court issued a 27-page opinion denying TCM's motion to dismiss. The opinion thoroughly analyzed the issues and concluded that the court had both subject matter and personal jurisdiction over the matter and that the citizen suit complaint stated a cognizable claim for relief. Furthermore, the court held that CERCLA was intended to address domestic pollution, even when the source of the domestic pollution originated in Canada under Canadian permits. The court noted that Congress clearly intended that CERCLA be used to clean up hazardous substances within the United States and ruled that the presumption against the

Columbia River Basin

Appeal & Stay

Transboundary Contamination

extraterritorial application of CERCLA could result in adverse effects within the United States. Significantly, the court held that the extraterritorial application of CERCLA is not, as TCM had claimed, an attempt to regulate discharges within Canada but rather an attempt to address TCM's past discharges into the United States that resulted in current violations of US law (CERCLA).

Appeal to Ninth Circuit Court of Appeals

In light of the unique nature of this case, the District Court opinion provided leave for TCM to file an immediate appeal to the Ninth Circuit Court of Appeals. TCM pursued the appeal, and in February 2005, the Ninth Circuit agreed to hear TCM's appeal. In response to the acceptance of the appeal, the District Court agreed to stay the trial court proceedings pending a decision by the Ninth Circuit. During the stay the court assured EPA would continue funding the ongoing RI/FS being performed at the site, or Plaintiffs could return to court and request that the stay will be lifted.

The parties' briefs will be filed with the 9th Circuit this summer and several interest groups are likely to participate in the proceedings, by filing amicus curiae briefs in support of either Plaintiffs or TCM. The Washington Public Interest Research Group, Citizens for a Clean Columbia, and the Washington Environmental Counsel filed an amicus curiae brief with the district court. It is likely that similar groups would file amicus curiae briefs with the 9th Circuit.

Conclusion

The Ninth Circuit is poised to hear and decide an historic case. For the first time in the 25 years since CERCLA was instated, a circuit court will address the question of whether a party liable for transboundary contamination can be sued under CERCLA's citizen suit provision. The Ninth Circuit's opinion will strongly impact the Tribes and touch issues of public health, protection of the Reservation's natural resources, culture, and sovereignty. However, the question of the transboundary application of CERCLA's citizen suit provision has even broader application. The Ninth Circuit has the opportunity to decide whether or not CERCLA permits foreign polluters to be held liable for their releases of hazardous substances into the United States, that create legacy sites resulting in threats to the health of US citizens and harm to the property and natural resources of the United States.

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Michelle Ulick Rosenthal is an attorney with Short Cressman & Burgess PLLC. She practices primarily in the areas of environmental and natural resources law, federal Indian law, and land use/municipal government. Before becoming an attorney, Ms. Rosenthal received her Masters in Public Policy and spent eight years working with the US Department of Energy on the Yucca Mountain Site Characterization Project in Las Vegas, and with the Nevada Test Site's Environmental Management Program.

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Please Note: Portions of this article have been reprinted from an article entitled "*The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-up the Boundary Waters to the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*" appearing in its entirety in the Penn State Environmental Law Review, 12 Penn St. Envtl. L. Rev. 335 (2004). We thank the Penn State Environmental Law Review for this courtesy.

El Paso Water

Regional Planner

High Usage

Water Sources

EL PASO WATER RESOURCE MANAGEMENT

CONSERVATION, RECLAIMED WATER AND DESALINIZATION

by Edmund G. Archuleta & Karol Parker, El Paso Water Utilities

Introduction

Water conservation has become a way of life in El Paso, Texas. This southwestern city is located on the northern extreme of the Chihuahuan Desert and residents receive more than 300 days of sunshine each year. With 50 percent or more of the municipal supply coming from aquifers that receive limited recharge, the City's water conservation program plays an important role in stretching its water resources.

El Paso Water Utilities

El Paso Water Utilities (EPWU) has served the residents of the City since 1910. It took its present form in 1952 when the Public Service Board (PSB) was created. This five-member board of trustees was given complete management and control of the City's water and wastewater system.

In 1989, the PSB adopted a policy of serving areas of El Paso County that needed services, such as the *colonias* — i.e., the unincorporated communities found along the United States/Mexico border that often lack basic services. Six years later, Texas Governor George Bush signed Senate Bill 450 designating the PSB as regional water and wastewater planner for the county. El Paso Water Utilities now serves almost 97 percent of approximately 700,000 City and county residents through various retail and wholesale contracts.

El Paso has not always been frugal in its use of water. Per capita water use was nearly 230 gallons per day in 1977. However, a report issued in 1979 triggered a number of initiatives that have significantly reduced that number.

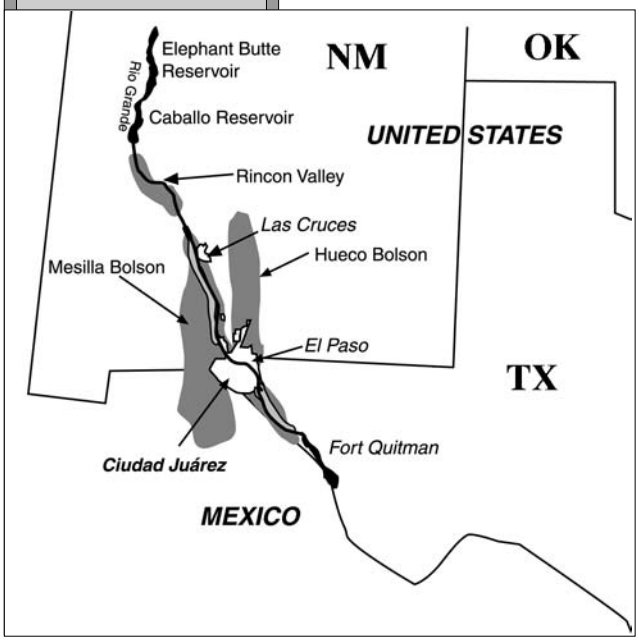
Sources of Supply

For many years, El Paso has taken water from three sources — groundwater from two transboundary aquifers and surface water from the Rio Grande. The Rio Grande was the only source of water for El Paso's earliest settlements, but the City began using groundwater from the Hueco Bolson in 1904. See EPWU Supply Chart (next page).

For most of the first half of the 20th century, El Paso relied totally on the Hueco Bolson for its municipal supply. This vast aquifer covers about 2,500 square miles in New Mexico, Texas and Chihuahua. In Texas, it covers portions of El Paso and Hudspeth Counties.

El Paso realized many years ago that the Hueco Bolson was essentially finite and the City was mining its principal water resource. When additional water was needed to accommodate the expansion of Fort Bliss in 1941, the PSB contracted with the US Bureau of Reclamation and El Paso County Water Improvement No. 1, the local irrigation district, to obtain surface water from the Rio Grande Project.

El Paso began to use groundwater and surface water conjunctively when El Paso's first water treatment plant began operating in 1943. The plant was expanded in 1949, which increased the treatment capacity to 20 **m**illion **g**allons **p**er day (MGD). The City used all of the surface water available under its Rio Grande Project contracts, but groundwater use continued to increase as demand grew from the expanding population. The Hueco Bolson provided 59 percent of the municipal supply by 1950.



In 1952, the City began pumping water from the Mesilla Bolson, an aquifer that extends from New Mexico to far west Texas and northwest Juárez (see map of aquifers, this page). Fifteen years later, a second water treatment plant was added, increasing the total surface water capacity to 40 MGD. Still, by the late 1970s, groundwater provided 90 percent of the total supply.

In 1979, the Texas Department of Water Resources, a predecessor agency of the Texas Water Development Board, assessed groundwater availability in the major groundwater areas of Texas. The assessment concluded that the fresh groundwater in El Paso's portion of the Hueco Bolson would be depleted by 2030 if it continued to be used as the City's primary source of supply. As a result of historic pumping, groundwater levels declined and brackish groundwater began to intrude into some of the City's wells in the 1980's. It was clear that El Paso would need to develop alternative resources.

El Paso Water

50-Year Plan

Reuse & Conservation

Conservation Benefits

Acquisition of Supplies

Plan Update

Water Resource Management Plan

The PSB and the Irrigation District subsequently entered into a Memorandum of Understanding that included a decision to develop a 50-year Water Resource Management Plan. The overall objective of the plan was to provide long-term, reliable and cost-effective water supplies to meet the region's agricultural and municipal needs.

The management plan contains a 50-year action plan for reducing the City's potable water demand and managing its water resources. It was developed in three phrases. Phase I evaluated basic data and projection demands and estimated future water demand. Phase II evaluated sources of surface water, groundwater and alternative sources of supply. It also proposed alternatives for managing water resources.

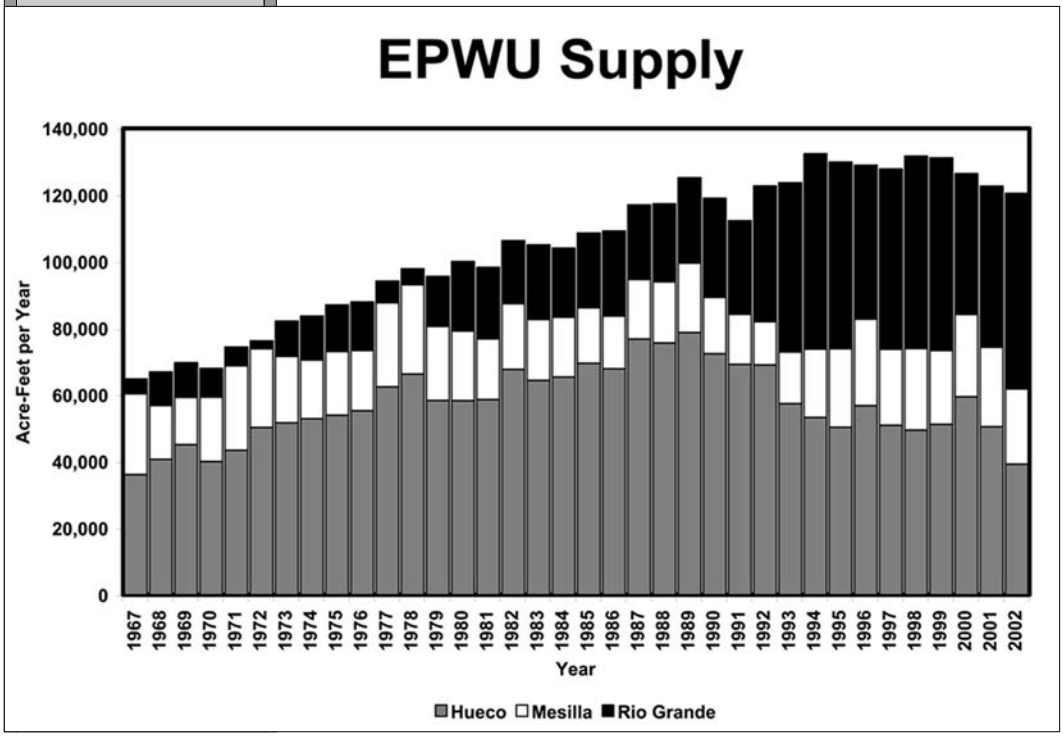
The alternatives were ranked in the Phase III completion report, which estimated the quantities and costs of the water supplies and facilities projected to be required over a 50-year period and proposed a schedule for implementation. In the alternative adopted by the PSB, reuse and water conservation were identified as the means for reducing demand.

The management plan recommended increasing the use of treated wastewater for commercial and industrial processes and for irrigating large turf areas. It also recommended developing an aggressive conservation program that would reduce consumption by 20 percent over a ten-year period to achieve and maintain usage of 160 gallons per person per day (gpcd).

According to the completion report, water conservation offered benefits beyond demand reduction. It would reduce peak demand by regulating the outdoor water use associated with lawn irrigation. As a result of indoor conservation, sewage flows would be reduced and El Paso Water Utilities would realize economies in the sizing of facilities as well as being able to postpone water and wastewater system expansions.

While the water conservation program and wastewater reuse programs are intended to reduce potable water demand, the management plan contains a third component, the acquisition of additional raw water supplies. The plan also cautions that the amount of water available from the Rio Grande would be reduced periodically due to drought, and urged the preparation of a drought contingency plan.

El Paso's water resource management plan was updated in 2000 and submitted to the Texas Water Development Board in 2001 as a part of the Far West Texas Regional Plan. The Far West Texas Plan is one of 16 regional plans submitted to the Texas Water Development Board and incorporated into the state water plan. Texas law requires regional water plans to be updated every five years to address changes in the environment, demographics and socioeconomic conditions. The plans are currently being updated to reflect current water availability data, revised water management strategies, new projects and water policy.



Wastewater Reuse

Most El Pasoans are familiar with the purple pipe system that carries treated wastewater, known as reclaimed water, throughout the City. Golf courses were the first to use reclaimed water for irrigation. The Ascarate Golf Course has been irrigated with reclaimed water since 1963, and the Painted Dunes Golf Course has been served since 1990. The first industrial customer was El Paso Electric Company, which began using reclaimed water for cooling and boiler make up water in 1992.

El Paso recognizes that reclaimed water is a valuable resource, rather than a byproduct that requires disposal. Every gallon of reclaimed water used

El Paso Water

Reclaimed Water

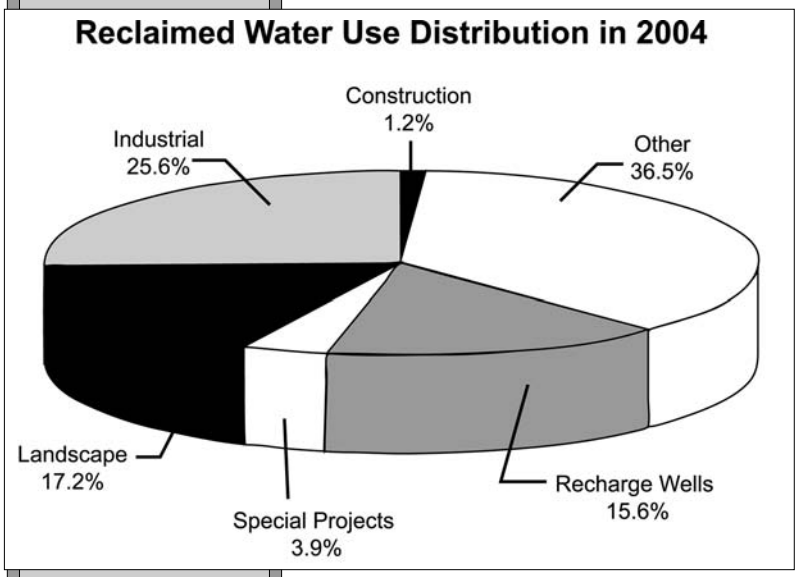
Reclaimed Uses

for irrigation, manufacturing or construction saves a gallon of potable water. El Paso provides reclaimed water from each of its four wastewater treatment plants and serves customers in all areas of the City.

El Paso Water Utilities has attained international recognition for its innovative reclaimed water program. It operates one of the most extensive and advanced systems in Texas. The City is home to one of two plants in the nation that treats wastewater to meet drinking water standards. Its other plants treat wastewater to advanced secondary standards and received the highest quality rating given by the Texas Commission on Environmental Quality. El Paso's wastewater plants supply the City with 3.4 billion gallons per year of reclaimed water.

Reclaimed water irrigates 12 parks, 11 schools, three golf courses, two townhome complexes and an apartment complex. Service has also been extended to a cemetery, a tree nursery, a ranch and the El Paso Zoo. Contractors obtain reclaimed water for dust control from standpipes throughout the City. Water from the standpipes is also available for street sweeping and fire protection. More than 25 percent of the reclaimed water produced in El Paso is used for industrial processes. See Reclaimed Water Use pie chart (this page).

The Water Resource Management Plan does not advocate extending reclaimed water to residential customers because of the measures required to prevent cross connection with the potable water system. The system does, however,currently serve four residential customers.



The reclaimed water system is being expanded in all areas of the City. Several sites will be added in 2005, including two schools, street medians, additional townhome complexes, one industrial site, four parks and a cemetery. One current project under construction is the NW Wastewater Reclamation Facilities Project. This multi-phase project provides over 300 million gallons of reclaimed water per year through 22 miles of pipeline to various locations in Northwest El Paso. The project value is $23 million paid for by grants from the US Bureau of Reclamation, the Texas Water Development Board and through City of El Paso Water and Sewer revenue bonds. EPWU reclaims an estimated 11 percent of the wastewater generated, with a goal of reclaiming 17 percent by 2010.

Water Conservation

El Paso's comprehensive water conservation program is the mainstay of the Water Resource Management Plan.

Conservation Elements

WATER CONSERVATION PROGRAM ELEMENTS INCLUDE:

- A revised rate structure to encourage conservation
- An amended plumbing code requiring ultra-low-flow plumbing fixtures in new and remodeled construction and a rebate program to encourage the replacement of existing toilets
- A comprehensive conservation ordinance
- A rebate program for customers who replace water-intensive vegetation with low-water-use landscaping
- Expanded leak detection/repair and meter calibration/replacement programs

Education

Equally important, the management plan recommended hiring a full-time water conservation manager and expanding the public information and education component of the conservation program. EPWU was also urged to increase the availability of its water conservation kits, which contain toilet tank displacement bags, shower head restrictors and faucet aerators.

EPWU moved quickly to implement the recommendations. With the exception of the water audit/ leak detection program and the landscaping ordinance and rebate, all components were in place by the end of 1992.

Restrictions

The water conservation program began in 1990 when the City Council adopted the conservation ordinance. Among other things, the ordinance: (1) limits landscape irrigation to three days per week; (2) prohibits landscape irrigation between 10am and 6pm from April 1 to September 30; (3) bans the use of hoses for washing driveways and other nonporous surfaces except to eliminate dangerous conditions; and (4) establishes fines for violations.

El Paso Water

Rebates

CD-ROM

Enforcement

Tiered Rates

Per Capita Use

Reduction Factors

City Council updated the ordinance in 2001 to strengthen the enforcement language and prohibit the use of sprinklers to irrigate parkways, the area between the property line and the street. The following year, an update to the ordinance limited the planting of turf to one-half the total landscapable area for new homes and one-third for new commercial sites.

EPWU offers a number of rebate programs to encourage customers to incorporate water-efficient practices. Cash incentives are available for the installation of water-efficient washing machines, low-flow toilets and refrigerated air conditioning systems. A turf replacement rebate program offers $1.00 per square foot for replacing established grass with low-water-use landscaping.

The conservation program also includes a public education component. The staff makes presentations to schools and civic groups and sets up exhibits at regional events. These efforts are supplemented by advertising campaigns that encourage the wise and efficient use of water. Educational tools include *Desert Blooms,* a CD-ROM that provides landscaping tips and information on more than 400 plants, trees and shrubs. The conservation staff also offers free indoor and outdoor water use audits and has given away more than 200,000 low-flow shower heads.

EPWU has increased its enforcement staff. Following the recommendation of the City Council and the endorsement of a citizens advisory committee that makes recommendations on programs and initiatives, the utility now adds temporary workers each spring to assist with enforcement during times of peak water usage.

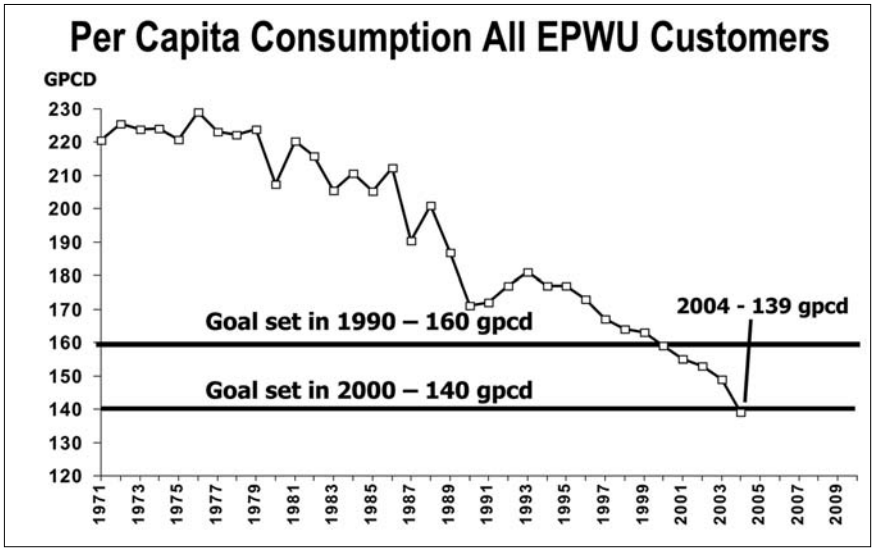
Although incentives, education and enforcement play an important role in changing habits and attitudes, price also plays a part. As recommended in the management plan, the PSB has adopted a tiered rate structure that encourages conservation.

Each year, the December, January and February usage is averaged for each account to calculate average winter consumption, a figure used to determine the threshold for each tier. Usage generally climbs during the spring and summer months when water is used for landscape irrigation and evaporative coolers. The rates are structured so the first 400 cubic feet (2,992 gallons) of water are included in the minimum charge. Customers are charged the first tier rate for water used in excess of 400 cubic feet (Ccf), currently $1.17 per Ccf (748 gallons). Usage that exceeds 150 percent of the winter average is billed at the higher second tier rate, $3.27 per Ccf. When usage exceeds 250 percent of the winter average, the rate climbs to $4.68 per Ccf.

New Goal

El Paso reduced water use to 159 gpcd by the end of 2000, surpassing the goal set in the Water Resource Management Plan. In 2001, the PSB set a new goal. It challenged El Paso to reduce water use to 140 gpcd by 2010. By the end of 2004, water use had fallen to 139 gpcd, one of the lowest among arid cities in the Southwest (see Per Capita Consumption chart, below).

Several factors account for the reduction. Many miles of pipeline and several customers were added to the reclaimed water system, and new water conservation incentives were introduced. Rebates were offered to apartment complexes and laundromats that installed water-efficient commercial clothes washers, and rebates for installing refrigerated air systems, once available only to homeowners, were offered to builders. EPWU also began a new program that offers rebates to homeowners who install hot-water-on-demand-systems.



El Paso Water

Xeriscaping

Line Replacement

Leak Detection

Surface Water Purchases

Leases

Future Supply

Groundwater Use

Infrastructure

El Pasoans saw that established native and adaptive plants flourish with very little water, but less suitable plant materials did not fare as well. Xeriscaped landscapes remained attractive and colorful while traditional landscapes suffered from the lack of water when the temperature began to rise. Customers in record numbers used the turf rebate to retrofit their yards with low-water-use plants, trees, shrubs and ground cover.

Additional water is saved through EPWU's aggressive and sophisticated line replacement program. According to an American Water Works Association survey, the national average for line breaks is one break per year for every 3.3 miles of pipeline. El Paso averages one line break for every 19.3 miles of pipeline.

Lines are replaced based on a number of factors, including the age and composition of the pipe and the number of leaks and breaks. Lines are also replaced when other improvements are needed or when there are conflicts with grade, such as when a storm sewer being installed conflicts with the pipelines.

El Paso also has an innovative leak detection program. While many well-run utilities report losses of 15 to 20 percent, industry experts consider losses of 10 percent or less to be excellent. EPWU reduced unbilled water from 14 percent in 1996 to less than 8 percent in 2004 by replacing cast iron pipes, increasing reservoir inspection and rehabilitation, and improving the cathodic protection of pipelines and reservoirs. Plans are to reduce unbilled water to 5 percent through state-of-the-art programs such as the Permalog® leak detection system.

El Paso is one of the first cities in the country to install Permalog® transmitters, which use radio signals to locate underground leaks. The 5,000 "loggers" installed in 2004 identified more than 100 leaks, ranging in size from one to 36 gallons per minute. Repairing these leaks saved more than 200 million gallons of water per year.

The PSB has approved the installation of 5,000 additional Permalog® units in 2005, which gives EPWU the ability to monitor 85 percent of the distribution system.

Additional Water Supplies

The Water Resource Management Plan devotes an entire chapter to the acquisition of additional water supplies from both surface water and groundwater sources. Most of the surface water being used by El Paso is derived from ownership of Rio Grande Project water rights land and the assignment of water rights of Project lands that are no longer irrigated. This is a viable source of additional water. Surface water diversions are likely to increase somewhat during times of full allocation as additional water rights are acquired.

Under a contract with the Irrigation District (El Paso County Water Improvement No. 1), EPWU provides a one-time cash payment to lease surface water rights from property owners who own parcels two acres or less in size inside the City limits. The leases are for 75 years, and the surface water rights revert to the owner of record at the end of the lease.

Additional contracts with the Irrigation District give El Paso surface water credit for effluent discharged from a wastewater plant that provides water for agricultural irrigation and two short-term contracts that increase the quantity of surface water available to El Paso during drought years.

El Paso also increased its surface water treatment capacity in 2002 by expanding its Lower Valley water treatment plant. The plant began operating in 1993 with a treatment capacity of 40 MGD. It now treats up to 60 MGD, bringing El Paso's total treatment capacity to 100 MGD during the seven-month irrigation season when surface water is available.

WATER SUPPLIES IN THE FUTURE WILL CONSIST OF THE FOLLOWING:

- Groundwater from the Hueco Bolson
- Groundwater from the Mesilla Bolson
- Surface water from the Rio Grande
- Reclaimed water
- Desalinated water from the brackish portion of the Hueco Bolson
- Imported water from other parts of west Texas

The Hueco Bolson Report

After years of speculation, an EPWU report released in March 2004 established that the fresh water portion of the Hueco Bolson will continue to supply El Paso for more than 70 years with proper management. By following the 50-year Water Resource Management Plan, the City has decreased the use of ground water.

El Paso Water

Aquifer Levels

El Paso was pumping 60,000 acre-feet per year in 1979 when the Texas Department of Water Resources concluded that the fresh water in the Texas portion of the Hueco Bolson would be depleted by 2030. Pumping peaked at about 80,000 acre-feet per year in 1989, but was less than 40,000 acre-feet per year in 2002 for the first time since 1967. Furthermore, total demand has flattened and has been declining since the late 1990s.

EPWU is using monitoring data from wells and a groundwater flow model to interpret the aquifer's flow conditions and patterns. The monitoring data confirm that groundwater levels have stabilized in many areas. Fresh groundwater in storage in 1974 was estimated to be 10.6 million **a**cre-**f**eet (AF). Based on estimates from the most recent US Geological Survey model, the total fresh groundwater storage depletion between 1974 and 2002 was about 1.2 million AF, leaving an estimated 9.4 million AF in storage.

Groundwater Storage

The model results suggest that, if El Paso pumps 40,000 AF per year in normal years and 75,000 AF per year in drought years, more than 70 percent of the fresh groundwater in storage will remain after 100 years. An independent panel of engineers and scientists confirmed these findings in 2004. The panel also confirmed that, as a result of the decreased pumping, the Hueco Bolson has a nearly sustainable supply of fresh water. But sustainability depends on an integrated strategy that includes continued conservation, importation from PSB properties located east of El Paso, and the implementation of the Fort Bliss/El Paso desalination facilities project.

Land Purchases

EPWU continues to evaluate available water supply sources in other parts of west Texas. The Public Service Board (PSB) previously acquired two ranches (Antelope Valley Ranch near Valentine and Wild Horse Valley Ranch near Van Horn) that lie over West Texas aquifers. Groundwater pumped at the ranches can be imported to El Paso, but plans call for "banking" the water for a decade or more (i.e. leaving groundwater unused). Most recently, PSB has purchased Diablo Farms that straddles the Hudspeth and Culberson County line. These properties are being held to assure El Paso's future water supply, and planning to transport the water to El Paso when needed is ongoing.

Desalinization

The $83 million Fort Bliss/El Paso Desalination Facilities Project is designed to treat brackish well water from Hueco Bolson wells. The project is scheduled to begin operating in 2007. When it is operational, the desalinization plant will produce 27.5 million gallons per day of potable water, making it the nation's largest inland desalinization plant. The Desalinization Facilities Project is a "public/public" partnership between the City of El Paso and the US Army: the City will build, own and operate the facilities on land leased from the Army.

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EPWU website: www.epwu.org

Edmund G. Archuleta is general manager of the El Paso Water Utilities Public Service Board. He is responsible for all aspects of water and wastewater service to the greater El Paso metropolitan area. A registered Professional Engineer in Texas, New Mexico and Iowa, Archuleta earned BS and MS degrees in civil engineering from New Mexico State University and a Master of Management degree from the University of New Mexico. He is trustee of the Association of Metropolitan Water Agencies and on the Board of Directors of Water for People.

Karol Parker is the El Paso Water Utilities public affairs manager. She is responsible for the utility's internal and external communications programs. Parker graduated from the University of Alabama, where she received a bachelor's degree in English and journalism, and from Boston University, where she received a master's degree in public relations. She is enrolled in the doctoral program at the University of Texas at El Paso, working toward a Ph.D. in English rhetoric and composition.

IDAHO CONJUNCTIVE USE BATTLE

ORDER ISSUED IN RESPONSE TO PRIORITY "CALL"

by David C. Moon, Editor

Idaho Conjunctive Use

"Delivery Call"

Surface v. Groundwater

1979 Cutoff

Replacement Water

Cumulative Relief

Adjudicated Rights

Orderly Distribution

Junior Rights

On April 19th, Director Karl Dreher of the Idaho Department of Water Resources (IDWR) issued a comprehensive order that impacts use of ground water for irrigation of 80,810 acres of land in two water districts situated above the Eastern Snake Plain Aquifer (Water District's 120 and 130; see map on the next page). The Order was made in response to a "delivery call" for water made in January by the Surface Water Coalition, made up of seven Magic Valley canal companies and irrigation districts which hold surface water rights senior in priority to most ground water rights from the Eastern Snake Plain Aquifer (ESPA). The surface water right owners asserted that pumping of groundwater in the ESPA depleted springs that contribute to surface water flows. The Order affects ground water users for agricultural, commercial, industrial and municipal uses. IDWR pointed out that the Order does not resolve the Surface Coalition's petition for administration of junior priority ground water rights in areas outside the two Water Districts. For additional background on issues involved see Rassier, TWR #10.

Material Injury & Curtailment

The Order concluded that the "reasonably likely material injury predicted for 2005" for members of the Coalition is 133,400 acre-feet of water in 2005. Order of April 19, Conclusion of Law 50, page 43. Under the Order, holders of consumptive use ground water rights with a priority date of February 27, 1979 and later are to be curtailed, unless replacement water is provided in amounts equal to depletions to the Snake River flows between Near Blackfoot Gage and Minidoka Gage as determined by IDWR's latest ground water model. Approximately 1300 ground water users are subject to curtailment under the Order. IDWR said that the ground water right holders in District's 120 and 130 (with a priority date of February 27, 1979 and later) must provide a minimum of 27, 700 acre-feet (AF) of replacement water during the 2005 irrigation season to avoid curtailment. That is the minimum amount of reasonably likely shortages predicted to occur in 2005 under natural flow water rights and storage contracts held by members of the Surface Water Coalition. In the Order, Dreher also determined that — in lieu of curtailment — the affected ground water users in the two water districts are responsible for supplying a total of 101,000 AF of the necessary replacement water over time. Groundwater users outside those two water districts must supply the remaining 32,400 AF of replacement water.

An IDWR press release dated April 21st (Release 2005-39) noted that the obligation may be addressed with replacement water from other water right owners, curtailment of the ground water use, or a combination of the two. The Order "allows the ground water users to supply that replacement water over time in amounts equal to accruals that would occur from curtailment. But it is important to note that if the drought continues, the balance of water owed this year will be added to whatever additional mitigation may be necessary next year, if material injury occurs."

An important issue discussed in the Order was whether a "delivery call" by the surface water users against the groundwater users can be enforced by the state when there has not been an adjudication of water rights that included all the parties (see Moon, *Rio Grande Sweeping Changes* in this issue of TWR regarding similar issues of state agency regulation of unadjudicated water rights). Dreher in the Order stated that "the Director remains troubled by the conflicting court decisions and recognizes that the issue is not free from doubt." Nonetheless, the Order goes on to say "The Director is persuaded, however, that under the circumstances of the present case it is appropriate to recognize the right of the [Surface Water] Coalition members to pursue their delivery call against the holders of junior priority ground water rights within established districts who were not parties to nor bound by the prior decrees that adjudicated the surface water rights of the Coalition members." Order of April 19, 2005, Conclusion of Law 9, page 31.

Dreher reached that conclusion based on the Idaho Supreme Court's holding in *Nettleton v. Higginson*, 98 Idaho 87, 94, 558 P.2d 1048, 1055 (1977) and added that "the Department may rely upon a decree for the orderly distribution of water rights among the right holders within adjoining water districts on connected sources [surface/ground water] until such time as a court action is brought to challenge the rights established in the decree." Order of April 19, 2005, Conclusion of Law 10, page 31.

Director Dreher also stated that his conclusion was "based upon the fact that a junior water right is established subject to all existing water rights. If a junior water right holder has concerns regarding the validity of the senior water right making the delivery call, the junior right holder has the opportunity and right to challenge the senior water right in an adjudication proceeding. Thus, there is an avenue for addressing any due process concerns." Order of April 19, 2005, Conclusion of Law 11, page 32.

Idaho Conjunctive Use

Replacement Plans

Additional Orders

Complex Approach

Optimal Use

Conjunctive Management

Extent of Injury

Prior Injury

Mitigation Debits/Credits

Finally, addressing the issue of conjunctive use of surface water and ground water, the Order stated that "a contrary holding would de-stabilize the priority system and frustrate the conjunctive administrative of water rights diverting from a common water supply. The Director must be cognizant of the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary of interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607." Order of April 19, 2005, Conclusion of Law 12, page 32.

Ground water districts and others had until the close of business on April 29, 2005, to file plans with IDWR to provide replacement water. Director Dreher was scheduled to approve or disallow the plans by May 6, 2005. Two such filed mitigation plans appeared IDWR's website by this TWR's press-deadline: one by the Idaho Ground Water Users, Inc. (composed of seven ground water district members) and one by the J.R. Simplot Company.

The press release referring to the Order on April 20th stated that Dreher and his staff will finish work on orders in response to other pending delivery calls in the Thousand Springs area. Director Dreher will re-issue an order in response to the delivery call made by Rangen Inc. in 2003, and issue orders in response to delivery calls from Billingsley Creek Ranch and Blue Lakes Trout filed in March. These orders were expected to be issued approximately two or three weeks after the April 20th press release.

Dreher described his Order and the prospects for a legal appeal with The Water Report on April 23rd. "This is a very complex situation. Sometimes judges like to simplify cases. But when we wrote the Order, we tried to emphasize just how complex the situation is and the fact that the issues can't be dealt with in a simplistic way. It is a complex situation that demands a complex approach."

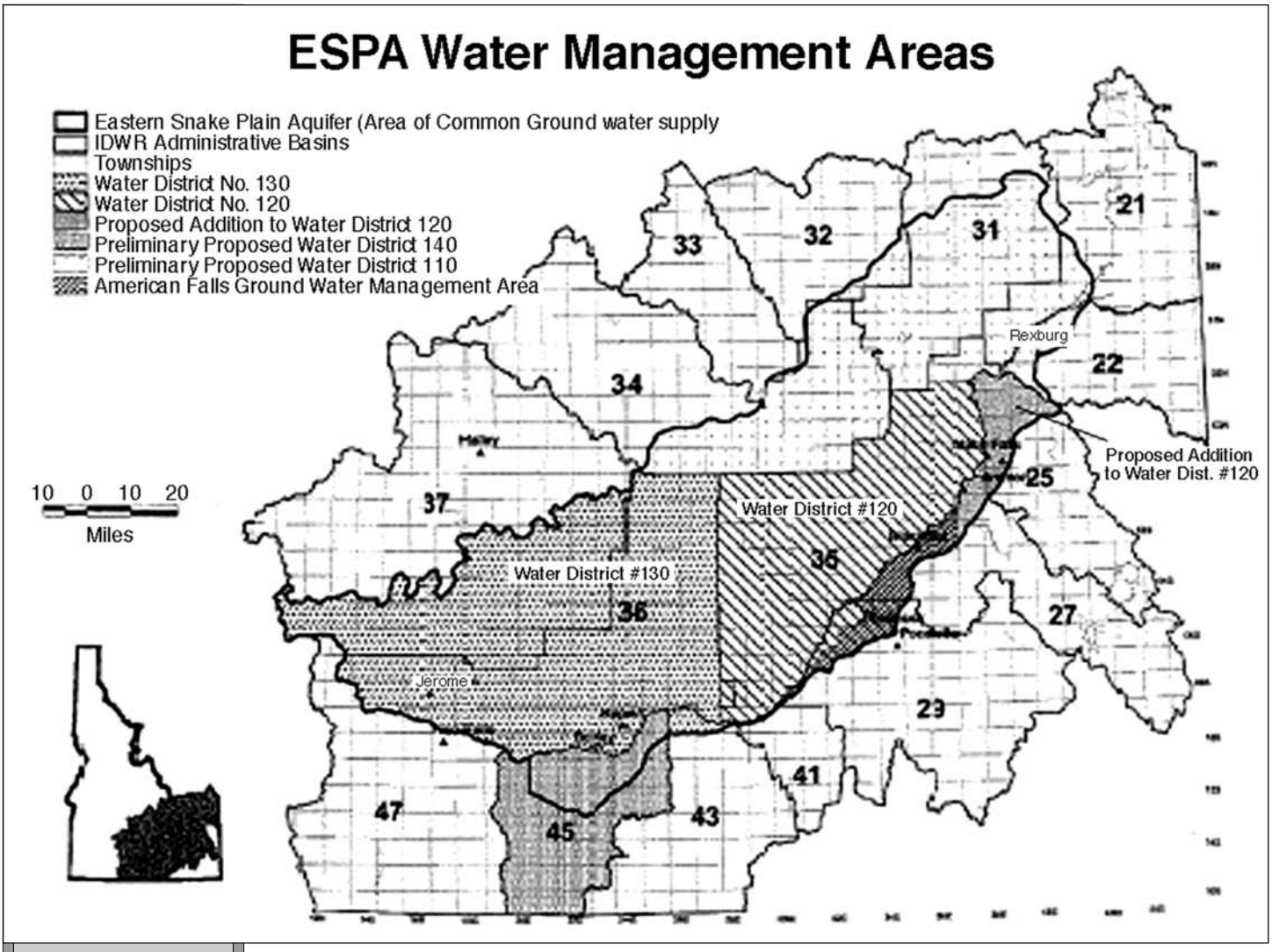
Water Law Principles

Dreher's Order provides fascinating insight into Idaho's attempt to resolve the conjunctive administration issue (surface water and groundwater use) with the "application of two well established principles of the prior appropriation doctrine: (1) the principle of 'first in time is first in right' and (2) the principle of optimum use of Idaho's water. Both of these principles are subject to the requirement of reasonable use." Order of April 19, 2005, Conclusion of Law 20, page 34. Dreher goes on to explain the interrelationship of these various principles of water law: "It is the policy of this state to integrate the appropriation, use, and administration of ground water tributary to a stream with the use of surface water from the stream in such a way as to optimize the beneficial use of all of the water of this state. 'An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water...' IDAPA 37.03.11.020.03; *Schodde v. Twin Falls Land & Water Co.,* 224 U.S. 107, 119 (1912)." Order of April 19, 2005, Conclusion of Law 23, page 34. See also Conclusion 46, page 42, regarding how the principle of "optimum use" applies as a practical matter to satisfy the natural flow rights and storage rights of the Surface Water Coalition.

Idaho already has extensive "Conjunctive Management Rules" to govern the conjunctive management of surface and ground water (IDAPA 37.03.11; effective October 7, 1994). Dreher's Order quotes extensively from those rules to justify the actions taken, in addition to providing a primer on water rights regulation under Idaho law.

Although Dreher's decision acknowledged that the pumping of ground water has "injured" surface water users, he refused to accept the Surface Water Coalition's assertion that "the extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water is the result of groundwater depletions." Order of April 19, 2005, Conclusion of Law 46, page 42. After citing the above quotation, the Order states: "Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. The Surface Water Coalition has no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by the Coalition to have occurred in prior years." Order of April 19, 2005, Conclusion of Law 45, page 42. A further discussion regarding "injury" is contained in the next Conclusion of Law 46, on page 42, wherein Dreher discusses the complexities of natural flow rights used in combination with storage rights by the surface water users.

The Order also establishes a system of mitigation credits and debits which result from the success or failure of ground water users to supply required replacement water. The debits or credits will continue to accrue and carry forward to the next season "until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR [US Bureau of Reclamation] fills. At that time, any remaining debits and credits will cancel." Order of April 19, 2005, Order 13, pages 45-46.



Data Needs

In remarks to the Western States Water Council (WSWC) on April 23rd, Dreher also provided some perspective on the amounts of water at stake, with an aquifer "approaching 1 billion acre-feet" and the flow of the Snake River providing 37 million AF annually to the Columbia River." The Director said that the ESPA is "not like other alluvial aquifers where the impact is felt either immediately or at least within one year." The impact might not be felt for years or decades later. But, as Dreher explained, while the ESPA may present a situation that would normally be considered a "futile call" (where water not diverted would not reach the senior user), there is still injury that must be addressed. Hence, the need to "devise a means of predicting injury...the 'reasonably likely injury for 2005' contained in the Order." Dreher recognized that his actions are "precedent setting for Idaho and should probably be reviewed by a judge."

Dreher said in his presentation to the WSWC that the recent development of Idaho's groundwater model was critical to providing the factual determinations necessary to implement the Order. "Five years ago we only had 1980 data (calibration plotting) for the groundwater. That is like knowing only one point on a linear progression. So I got the legislature to appropriate $3 million to build a ground water model and put together a vertically integrated technical team composed of experts from the state, the federal government and ground water users to construct it. That was a painful process, but every technical decision was made by this group. Now we have 22 years of stream and spring discharge data, in other words a 22-year calibration, with over 1,000 monitoring wells." See Order of April 19, 2005, Findings of Fact 28-33, pages 6-7, describing the ground water modeling.

A thorough reading of the Order is highly recommended for any water user or water professional facing similar issues regarding regulation of ground water and surface water. The complete Order is available on the IDWR's website at www.idwr.state.id.us/Calls/Water_call_info/Order%2004-19-05.pdf. **For Additional Information:** David Moon, 541/ 517-5608 or email: thewaterreport@hotmail.com; Michael Keckler (IDWR), 208/ 287-4828

New Mexico Water Rules

New Rules (AWRM)

Supply Improves

Adjudication Status

AWRM

Marketing & Leasing

Alternative Administration

Water Banking

THE RIO GRANDE AND NEW MEXICO RULES

"SWEEPING CHANGES IN WATER REGULATION"

by David C. Moon, Editor

"Active Water Resource Management"

New Mexico's State Engineer, John D'Antonio, led off a lively discussion of the State's new "Active Water Resource Management" (AWRM) rules at the Law of the Rio Grande Conference held on January 27-28, 2005 in Albuquerque (see Moon, TWR #13). D'Antonio began his speech by noting that New Mexico was operating under Article VII of the Rio Grande Compact that governs low flow requirements for the three states involved (Texas, Colorado and New Mexico).

Fortunately for water users in New Mexico, the water situation has improved dramatically according to a press release from the Bureau of Reclamation (Reclamation) on April 25, 2005. Prospects are very good for an above normal spring runoff into Elephant Butte Reservoir in 2005. The April 1st runoff forecast for San Marcial (just upstream of Elephant Butte Reservoir) is 930,000 acre-feet or 162% of the average March-July flow. There has not been a runoff of that magnitude since 1995. In 2004, the spring runoff at San Marcial was 240,000 acre-feet or 42% of the average flow. Currently, Rio Grande Project water users (Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1, and Mexico) have been allotted 31.2 percent of a full irrigation water supply based on storage levels in Elephant Butte and Caballo Reservoirs. Due to the large, forecasted spring runoff volume, Reclamation anticipates that a full supply for irrigation may be allotted by this summer. For the last two years (2004, 2003), Rio Grande Project water users were allocated only 38% and 34% of a full supply respectively. Reclamation revises the allocation on a monthly basis as snow pack runoff reaches the reservoirs.

D'Antonio stated that adjudication of water rights in New Mexico has been slower than in most of the West. He noted that 40% of the State is engaged in active adjudications and only 20% of the State has completed water rights adjudications (see Status of New Mexico Adjudications, page 24). The continuing drought, combined with slow adjudications, produced an "urgent need for water management" in New Mexico. Meeting that need led his office to prepare the "Active Water Resource Management" (AWRM) rules and regulations. The AWRM rules were finalized by the State Engineer's Office on December 3, 2004.

D'Antonio's conference materials define AWRM as "a broad range of activities, which emphasize permitting transfers, monitoring and metering diversions, and limiting diversion of water to the amount authorized by existing water rights all within the prior appropriation system." The State Engineer's Office has the authority to create special water districts and hire Water Masters as the State Engineer determines is necessary for the administration of water rights.

State Engineer D'Antonio highlighted two particular components of AWRM in his presentation. First, the rules promote expedited marketing and leasing of water rights in the affected areas. The statewide rules and regulations provide that, when necessary, junior water rights that would otherwise be curtailed will be able to temporarily acquire senior water rights from owners participating in the water rights marketplace. Second, AWRM provides the possibility for an "alternative administration" (for example, a water users group) to implement "replacement plans" with voluntary options such as: shortage sharing agreements; rotation agreements; or water banking (expedited temporary reallocation). These "replacement plans" would allow short-term use of water by junior users who would otherwise be curtailed by "priority administration" (i.e. regulation by seniority date). Pilot projects are planned to test the water banking concept with transfers of agriculture-to-agriculture water use. If the pilot projects are effective, the water banking concept could be expanded to municipal, industrial, recreational and drinking water uses, or to provide water for endangered species' needs or compact delivery requirements.

There are four types of "Administration" outlined in the AWRM rules: 1) direct flow administration (aka "natural flow"); 2) storage water administration; 3) depletion limit administration (conjunctive use: surface water and groundwater); and 4) alternative administration.

AWRM RULES ALLOW:

- Establishment of an AWRM district
- Appointment of "Water Masters" for regulation of water rights, with counties assessing water users to pay for the Water Master
- Providing training for Water Masters and creating Water Master guidelines (by the Office of the State Engineer)
- Water rights abstracting by the Water Masters (determination of elements of a water right based on "best available evidence")

New Mexico Water Rules

- Implementation of measurement, metering and reporting requirements
- Expediting the application transfer process
- Setting feasible short-term and long-term guidelines
- Developing basin-specific rules and regulations for each area of critical concern

Critical Basins

The State Engineer designated seven areas of critical concern where Water Master districts will be created and AWRM implemented, in order of priority: 1) the Lower Pecos; 2) the Lower Rio Grande; 3) San Juan River Basin; 4) Nambe-Pojoaque-Tesuque Stream System Basin; 5) Rio Chama; 6) Rio Mimbres; and 7) Rio Gallinas. A new Water Master subdistrict was created for the Rio Hondo in early December. In coming months, a declaration of a new Water Master subdistrict for the Rio Peñasco, Ft. Sumner, and Carlsbad Basin regions is expected. During the public review of the general regulations, the State Engineer pledged that his office would hold extensive discussions with water users and provide many opportunities for public review and comment as district-specific regulations are developed for each of the highest priority geographic areas.

Lower Rio Grande

Basin-specific regulations are already being developed for the Lower Rio Grande. The State Engineer's objectives for the Lower Rio Grande regulations and an outline of the public process, as well as the schedule that his office will use to develop them, were posted on February 2nd on the Office of the State Engineer's website at www.ose.state.nm.us/ActiveWater. The website as of TWR's presstime, however, stated that the previously posted schedule has been delayed and a new schedule will be released soon. Basin-specific regulations for the Lower Rio Grande AWRM are slated for implementation by the end of 2005.

Lower Pecos

On February 2nd, State Engineer D'Antonio also announced his objectives and a schedule for the administration of supplemental wells in the Carlsbad Irrigation District (CID) as well as the creation of AWRM district-specific rules and regulations for the Lower Pecos Region. That schedule and objectives are posted for public inspection on the Office of the State Engineer website at: www.ose.state.nm.us/ActiveWater. "Our first priority for the Pecos River district-specific rules and regulations is implementation of the Pecos River Settlement, which was signed in 2003. It can proceed now that a Partial Final Decree on the Carlsbad Irrigation District adjudication has been entered by the District Court. However, I also intend that the district-specific regulations will provide the details of water administration consistent with the settlement or for priority administration if the settlement can't be implemented."

Groundwater Pumping in CID

The State Engineer's schedule for development of AWRM district-specific regulations in the Lower Pecos River Basin will conclude in January 2006. Implementation of regulations to prevent over-diversions from supplemental wells within CID is planned to occur by the end of May 2005. Implementation of AWRM in the Lower Pecos River Basin will address groundwater pumping but will not include oversight of the CID's distribution of surface water for irrigation to its constituents. D'Antonio stated that distribution of surface water by CID is CID's responsibility and that he has "no intention of duplicating that responsibility." A public hearing for the proposed rules and regulations for groundwater pumping within CID is scheduled for June 3, 2005 (see website mentioned above).

Concerns and Opposition to AWRM Actions

Two other speakers at the conference, Steven L. Hernandez of Hubert & Hernandez (Las Cruces) and Charles T. DuMars of Law & Resource Planning Associates (Albuquerque), were less enthusiastic about implementation of AWRM. Hernandez, who represents Elephant Butte Irrigation District (EBID) and Carlsbad Irrigation District (CID), referred to the "sweeping changes" and reported that "the proposed regulations really brought out the water community."

Administrative Control

Mr. Hernandez pointed out that the water rights of the Lower Rio Grande Basin are currently being adjudicated and "there remain unanswered many legal issues regarding the ownership and administrative control of the New Mexico portion of the surface waters of the Rio Grande Project." EBID filed for the stream adjudication in the Lower Rio Grande to bring attention to the problem of unregulated groundwater pumping. The adjudication of water rights in the Lower Rio Grande stream system and "Underground Water Basin" has begun, but has not been completed. Administrative authority is complicated by the fact that water use under the Rio Grande Project is subject to the Rio Grande Compact of 1938 (see Moon, TWR #13).

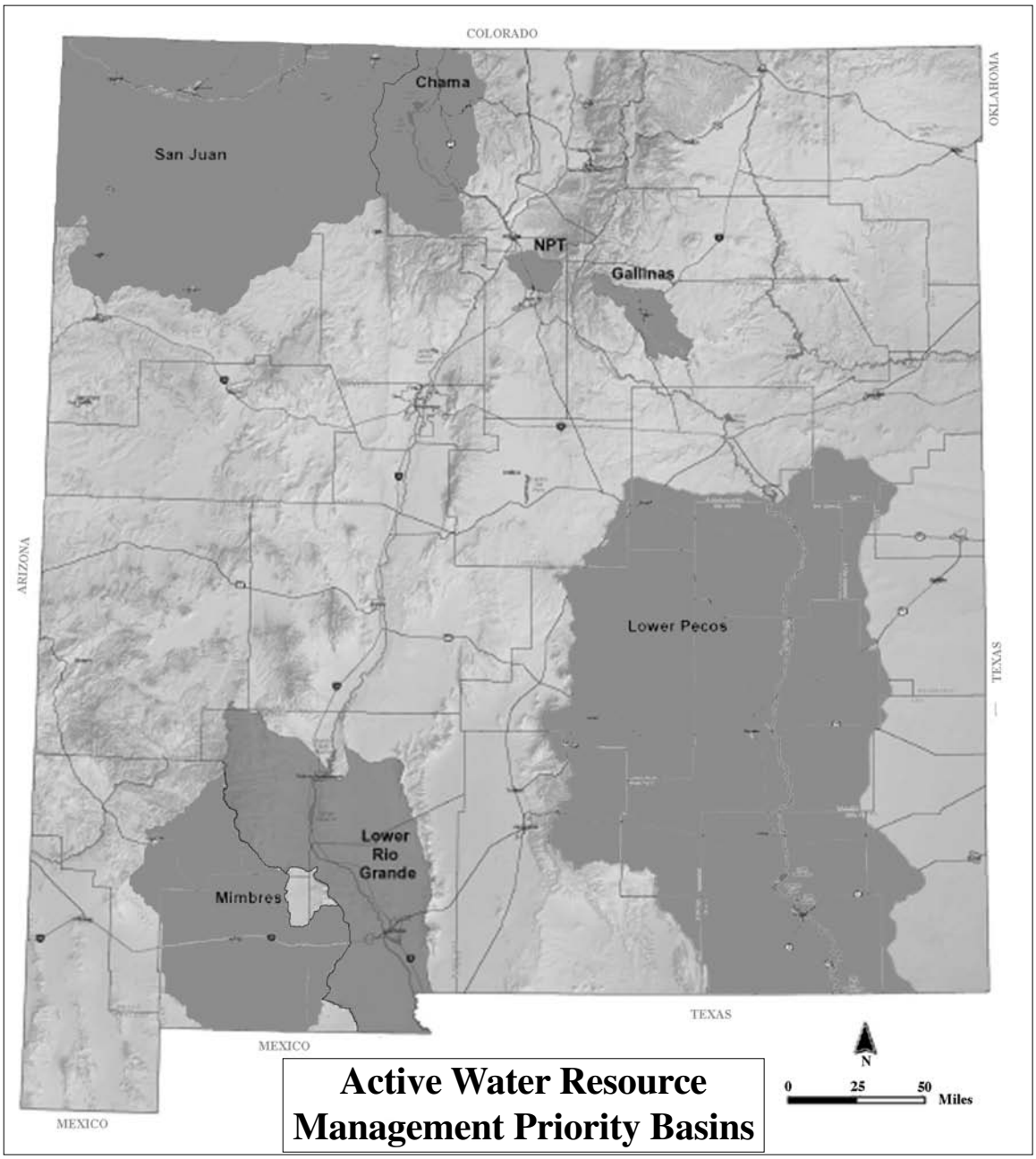
Transfers

Distribution

Hernandez expressed EBID's concern that AWRM provisions —giving the Water Master unlimited discretion in the supervision of waters in the Lower Rio Grande Basin (Section 72-3-1 NMSA 1978 et.seq.) — not conflict with the district's existing authority over transfers and distribution of water within the districts. "We're hoping that it is just the diversion of water into the ditch that the Water Master will be concerned with" since it is an internal matter of the districts to control distribution *within* their

New Mexico Water Rules

Seven Critical Basins



District Control

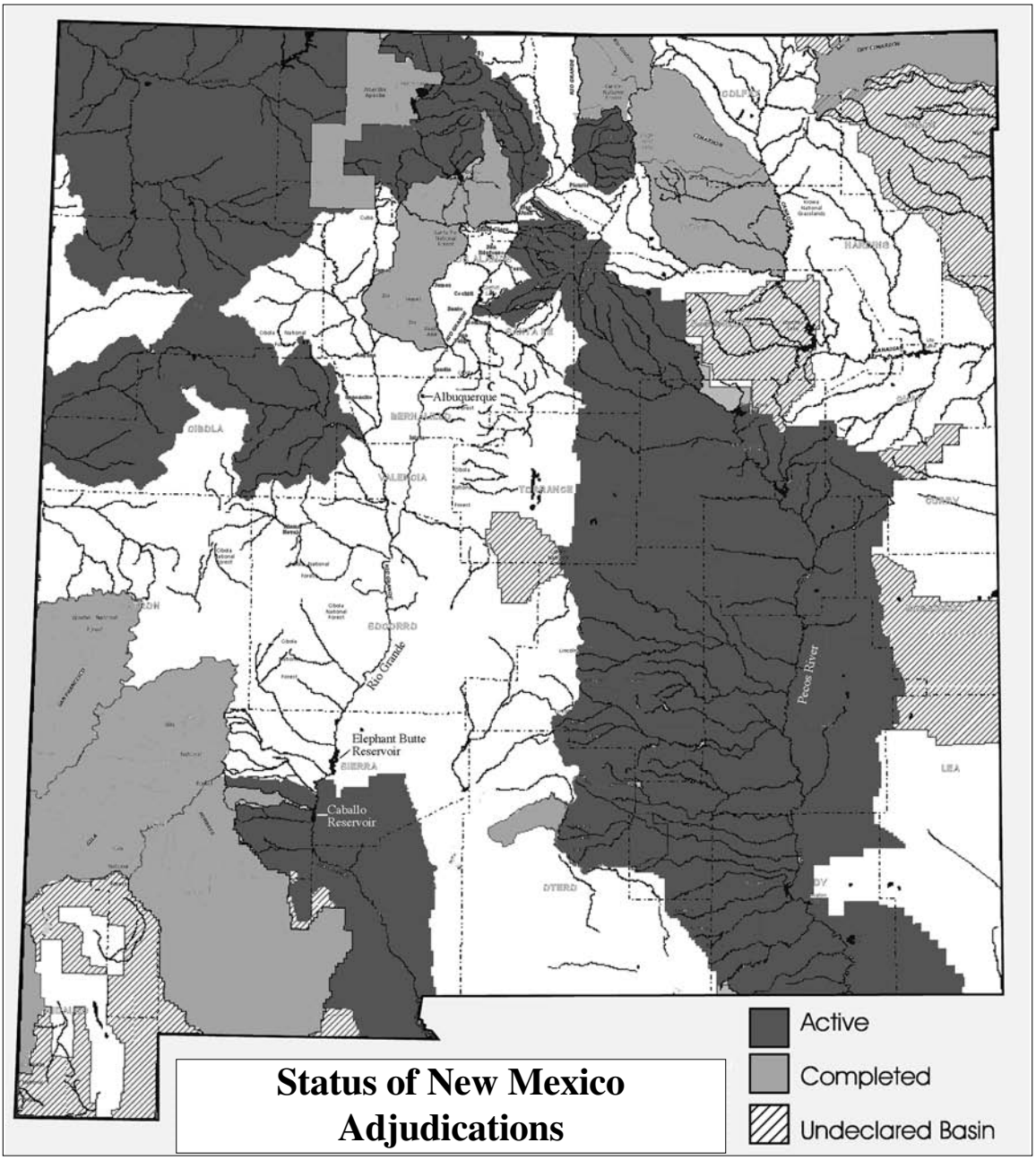
Water Master Costs

County Charges

systems. He also noted that agriculture-to-agriculture transfers are already frequently done within districts without any requirement for State oversight, in accordance with the Special Water User Association (SWUA) Legislation (see Section 73-10-48 NMSA 1978 et. seq.), which provided for expedited transfer procedures as well as requiring that the irrigation district board approve any transfers.

The fact that the costs for Water Masters is to be borne by water users is also troubling to Mr. Hernandez' clients. "We have a hard time swallowing that. Districts can only charge for water they actually sell. Our farmers are already being taxed by the district. They probably don't want to be taxed again for the Water Master to protect senior rights. An additional tax on farmers for a Water Master is grossly unfair." (See Section 72-3-4 NMSA 1978, regarding Water Master's compensation). "Another major concern is that nowhere in the rules are there provisions for coordination by the Water Master with...the irrigation districts," Hernandez said. With no mechanism in the AWRM rules for water users to oversee the budget of a Water Master, the concern is that the Water Master could duplicate functions of the irrigation districts and charge the water users for unneeded actions. "There is no way to limit the costs or services that can be passed on to the water users," according to Hernandez' conference materials. He was also concerned that the counties are simply not equipped to determine how much to charge each water user; Section 72-3-4 MNSA requires the county to charge each water user or ditch owner for the quantity of water received based on a percentage of the whole amount received by all water users.

New Mexico Water Rules



Status of New Mexico Adjudications

Water Master Authority

The underlying authority of Water Masters was also questioned. According Hernandez, the statutes are premised on the justification that the Water Master has authority to prevent the "waste of water" (Section 72-3-2 NMSA 1978). He maintained that, given the current drought in the Lower Rio Grande Basin, "the issue is whether junior users are taking water and putting it to beneficial use while impairing senior users. This is not a waste issue." AWRM rules, however, lay out a broader purpose: "The objective of these rules is to establish the framework for the state engineer to carry out his responsibility to supervise the physical distribution of water to protect senior water rights owners, to assure compliance with interstate stream compacts and to prevent waste by administration of water rights." (Section 19.26.13.6 NMAC; to view the AWRM rules go to www.ose.state.nm.us/doing-business/ActiveWaterMgt/awrm-menu.html >>> "Active Water Resource Management Rules and Regulations").

Meters

As part of the AWRM process for the new "Lower Rio Grande Water Master District," the State Engineer issued an order requiring the installation of totalizing flow meters for all groundwater diversions. The exceptions to the Order were wells that serve domestic uses of a single household, the irrigation of one acre of noncommercial trees, lawn or garden, or wells that are used for the sole purpose of livestock watering. The order was based on a finding that "the groundwaters of the...District are in hydrologic connection with the surface water system of the Lower Rio Grande" and, further, that "measuring and reporting of groundwater diversions...will promote expedited leasing and marketing of

Hydrologic Connection

New Mexico Water Rules

Over-Diversions

Alternative Plans

Agency Adjudication?

Judicial Adjudication

Priority Conflicts

Rules Challenged

water by ensuring a high degree of accuracy in the determination of actual water use..." (Order, December 3, 2004).

The mandatory metering Order requires all users to either comply with the Order's stipulations by March 1, 2006, or cease their water use. Quarterly reports are required. The Order also addresses the effect of over-use: "All over-diversions of water made in one accounting year shall be made up during the accounting year following the year in which the over-diversions occurred." For additional details, download the Order from the Office of the State Engineer website at: www.ose.state.nm.us.

Some of Hernandez' and his clients' concerns received mention by the Office of the State Engineer in its press release issued on February 2, 2005. The release stated that implementation of AWRM in the Lower Rio Grande will address groundwater pumping but will not include oversight of the Elephant Butte Irrigation District's (EBID) distribution of surface water for irrigation to its constituents. Echoing his statement regarding CID, D'Antonio reiterated, "That is EBID's responsibility, by law, and I have no intention of duplicating that responsibility." The State Engineer's press release also referred to the "alternative administration" option in the rules. "I will implement priority administration only if area water right owners don't agree on a plan that I can accept for managing limited water supplies. Priority enforcement by my office is my last resort," said D'Antonio. "I am very pleased that the Lower Rio Grande Water Users Organization has told me they will develop such a plan for alternative administration."

Charles T. DuMars of Law & Resource Planning Associates (Albuquerque) focused his conference presentation on the legitimacy of AWRM provisions that grant the Water Master the power to make determinations regarding the elements of a water right. In order to carry out "priority administration" (i.e. regulation to protect senior water right owners), the Water Master has the authority to "define each administrable water right by its elements," including making "determinations of priority based on best available evidence." (See Section 19.25.13.27 NMAC regarding "Administrable Water Rights").

DuMars vehemently argued against the powers he views as being granted to Water Masters in the AWRM rules. "All users — when they acquire a water right — acquire a property right, a Constitutional right that can only be denied by a judicial hearing. But current rules allow Water Masters to deny rights." DuMars believes that the "laborious process to appeal to district court" from a Water Master's determination does not cure the defect. "It is essential that a judicial officer determine the elements of a water right under the adjudication process, not a Water Master." DuMars asserted that any argument contrary to his position involves accepting the premise that water rights are not actually "rights" but, rather, only simple privileges administered by the state.

While acknowledging that a drought emergency existed in New Mexico, DuMars insisted that "if you need to determine the priority from one user versus another user, you should go to a judicial officer to decide" rather than base the decision on the "best available information" that a Water Master has gathered. DuMars noted that in New Mexico, "local authority has thrived. The problem is, what happens when a state agency decides what is best and it conflicts with the locals' [assessment]?"

DuMars laid out "his view" of water management. "Actively administer, meter and measure and if use is inconsistent with the license of the state engineer, stop it. But where a question exists between one user and another user, you need a neutral decision-maker, [i.e.] a judge." The noted water attorney mentioned there were essentially three questions presented in this situation. First, are water rights property rights or mere privileges? Second, even if water rights are only privileges, shouldn't there be a hearing by a judicial officer before rights are regulated? And finally, where should the local authority lie — with the State's Water Master or with elected officials (i.e. irrigation district officials)?

A legal challenge was filed on January 3, 2005 to contest the new general AWRM rules in district court in Socorro. The challenge claims that State Engineer John D'Antonio exceeded his authority by adopting the AWRM rules. The Middle Rio Grande Conservancy District, Tri-State Generation and Transmission Association Inc. and the New Mexico Mining Association filed the lawsuit, asserting that the new rules illegally give the State Engineer the power to determine who has water rights and what the priority date is, resulting in potential "takings" of Constitutionally protected water rights without compensation. The District also maintains in the suit that the rules illegally override its power to distribute irrigation water within the district. A similar issue — state agency regulation of water rights where no general adjudication of all the water rights involved has occurred — has come to a head in Idaho between surface water users and ground water users (see Moon, *Idaho Conjunction Use Battle* this issue).

For Additional Information: David Moon, The Water Report, 541/ 485-5350 or email: thewaterreport@hotmail.com; Karin Stangl, New Mexico Office of the State Engineer, Public Information Officer (505) 827-6139

WATER BRIEFS

GROUNDWATER RULE US
SDWA RULE DELAYED
EPA REGULATORY ANALYSIS

The US Environmental Protection Agency (EPA) has withdrawn the proposed Groundwater Rule from the Office of Management and Budget (OMB) review process. Although the public comment period closed in August 2000 and the final rule was expected in March 2003 (see Shine, TWR #14), EPA has not yet been able to get this rule through the regulatory analysis procedures.

EPA released a *Desk Statement* on the status of the Groundwater Rule on March 30, 2005. It states that, "a number of issues concerning the underlying regulatory analysis could not be fully addressed within the 90-day review time." EPA submitted the rule for review on December 29, 2004 and the 90-day review process expired March 29, 2005. Further details about the nature of the regulatory impacts are not specified, but the *Desk Statement* makes clear the extensive impacts the rule will have once it is finally promulgated; the Groundwater Rule is expected to impact "147,000 public water systems that collectively serve 114 million people."

EPA is working to ensure that the next regulatory impact analysis goes smoothly and that the promulgation of the final rule is feasible and effective. EPA has established "a goal of promulgating the final rule as soon as possible, but no later than the end of 2005."

For info:
EPA SDWA WEBSITE: www.epa.gov/safewater/standards.html

CAFO RULING US 2ND CIR
REHEARING REQUEST
2ND CIRCUIT DECISION

On April 14, 2005 the Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and the Mid-Atlantic Environmental Law Center filed a request for hearing with the 2nd Circuit Court of Appeals regarding the Courts February 28, 2005 decision in *Waterkeeper Alliance, Inc., et al, v. EPA* (see Brief, TWR #13). The Court's decision is automatically stayed upon a timely, proper request for rehearing unless the Court should order otherwise.

If the rehearing is granted, the 2nd Circuit Court has several options available, including: a final disposition of the case without reargument; restoring the case to the calendar for reargument and/or resubmission; or issuing any other order it deems appropriate.

The Petitioners are requesting rehearing on the "duty to apply" issue because "the Court overlooked or misapprehended arguments and its opinion created unintended consequences."

THEIR PETITION ALSO STATES:

> "EPA has authority to require all Large Concentrated Animal Feeding Operations (CAFOs) to apply for a permit or demonstrate no potential to discharge by virtue of its authority to: 1) prevent, reduce, or eliminate water pollution; 2) implement zero discharge effluent limitations; and 3) based on a presumption that CAFOs actually discharge that is supported by the Administrative Record.
>
> In the alternative, Environmental Petitioners ask the Court to clarify its opinion to remedy an unintended consequence of its decision on 'duty to apply.' EPA believes this holding creates a self-regulatory scheme in which CAFOs can make their own determination of whether they need a permit by setting their land application rates without agency review, and thereby determining on their own whether they qualify for the agricultural stormwater exemption to NPDES permit requirements. In this case, we ask the Court to clarify its opinion that Large CAFOs that land apply waste must do so at rates established in a nutrient management plan incorporated into a NPDES permit, and that nothing in the Court's holding on the 'duty to apply' relieves them of that requirement."

For info: Jeffrey Odefey, Waterkeeper Alliance, 914/ 674-0622; Eric Huber, Sierra Club, 303/ 449-5595; Melanie Shepherdson or Nancy Stoner, Natural Resources Defense Council, 202/ 289-6868

CLEAN WATER DECISION CA
COSTS OF COMPLIANCE

The California Supreme Court on April 4th held that the cost of compliance for treating sewage cannot be used in deciding whether specific discharge requirements should be imposed, if the pollution limitations are less stringent than federal standards. The case involves pollution restrictions imposed by the Los Angeles Regional Board on National Pollution Discharge Elimination System (NPDES) permits for the cities of Los Angeles and Burbank's wastewater treatment plants. "The Court rejected the argument that Clean Water Act requirements are subject to a permit-by-permit negotiation," said David Beckman, a senior attorney at the Natural Resources Defense Council (NRDC), who argued the case before the Supreme Court along with the California Attorney General's Office.

The case examined whether the cost of water pollution and its remedies, as well as other factors, must be assessed when water quality standards are established or revised, or instead, whether they must be continually reassessed whenever a regional water board issues a discharge permit. Discharge permits set maximum pollution levels for municipal and industrial dischargers.

The Supreme Court held that state NPDES permits for discharging wastewater "may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." The court held that the regional board *could* "take into account economic factors, including the wastewater discharger's cost of compliance" when the board is "considering whether or not to make the pollutant restrictions *more stringent* than federal law requires." [Emphasis in original]. *Burbank v. State Water Resources Control Board* (No. S119248), 35 Cal.4th 613, 614 (2005). The court based its decision on the finding both California law and federal law require the California agency to comply with federal clean

water standards, and the supremacy clause of the US Constitution requires that state law yield to federal law. The case was remanded back to the lower court to determine whether the pollutant limitations at issue meet or exceed federal standards, since the court found that was an issue of fact that was unclear from the record. "Under the Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not 'less stringent' than those set out in the Clean Water Act (33 U.S.C. § 1370)." *Burbank* at 617.

Beckman told The Water Report that the controversy over the NPDES permits deals with the general "rules of the game." Los Angeles and Burbank argued that permit requirements would result in excessive costs to comply. Beckman said, however, that "the numeric pollution limits set in the permits" are "a scientific question not an economic question. When you're determining what level is necessary to meet Clean Water Act standards, there is no room in the equation for economics." Beckman also noted that two petitions for rehearing are pending before the court that should be decided by July 1st, so the case is not final.

For info: David Beckman, NRDC, email: dbeckman@nrdc.org; Court Opinion can be viewed at www.courtinfo.ca.gov/opinions/documents/S119248.PDF

MONTANA ADJUDICATION MT

FEE BILL PASSES

Montana's Legislature passed HB 22 recently to accelerate the statewide general adjudication of water rights. The bill establishes a fee on all water users in Montana to provide funding for the on-going adjudication process that began in 1979. Montana's adjudication involves all water rights with priority dates before 1973 — approximately 240,000 rights held by some 85,000 claimants.

The Water Report spoke with Jack Stults, Division Administrator for the Water Resources Division of the Department of Natural Resources & Conservation (DNRC), about the bill.

The "Environmental Quality Council," a standing interim committee of the legislature, decided that the most important water issue was the need to finalize the adjudication. The question was how to pay for speeding up the process. Until now the adjudication has been dependent on "general funds," a fragile source of funding that has suffered of late.

Stults outlined the major components of the new program. It consists of a flat fee of $10 per year for every water right in the state, including new permits for water rights, with a maximum of $200 per year for most water users. There are a total of six categories of water use, with some differences in the fee, for example, for municipalities, power generation and instream uses. Those types of uses pay step-up fees based on the total volume of the water right. Fees are collected every two years, in even-numbered years, and are due on December 31st. The fees are required for 10 years, sunseting in 2004 (effective as of July 1, 2005). The program has an earmarked "Water adjudication account," designed to collect a maximum of $31 million in fees over its life, with a reduction in fees collected if additional monies are collected from other sources. For example, the Governor appropriated $2 million during the legislative session for the program. The bill also required that the historic base appropriation of $2 million per year for the adjudication program be continued by future legislatures, in order for the fees to be continued to be collected from water users.

The Department of Revenue (DOR) is charged with billing fees, utilizing DNRC's database of water rights. DOR is responsible for collecting fees for any delinquencies. Penalties assessed for delinquencies can result in a lien being placed on the water users' property.

Stults told The Water Report that the bill also sets "benchmarks" the DNRC must meet. DNRC examines all the claims for accuracy and potential issues of validity, resulting in "Remarks" that water users utilize when they review other water users' claims. The benchmarks require that of the 57,000 water rights claims remaining to be examined, 8,000 must be examined by the end of 2006, 19,000 by the end of 2008, 31,000 by the end of 2010, 44,000 by the end of 2012, and the total of 57,000 finished by June 30, 2015. If the DNRC fails to meet its benchmarks, the fees may not be collected from water users for the next cycle. The DNRC is required by the bill to finish its "claims examination" in 10 years, with an additional five years allowed for the Water Court to finish the adjudication. The bill granted the Water Court the power to prioritize basins for the purpose of the DNRC claims examination.

Additional options are provided in the bill for approximately 98,000 "verified claims" that were evaluated using an earlier verification process" rather than the "examination process" utilized by DNRC (in accordance with Montant Supreme Court examination rules). Both DNRC and the Water Court are required to provide reports to the Environmental Quality Council at each meeting during the legislative interim on the progress of the adjudication and total revenue generated by the fees.

Hiring is underway for positions with DNRC, the Water Court and the DOR. The Water Court will be hiring five new Watermasters (who make adjudication determinations under the auspices of a Chief Water Judge) plus two clerical positions. DOR will hire two people to run the billing program. DNRC will hire a total of 39 FTE for claims' examination and processing, plus two FTEs for GIS work. Stults said the plan is to be underway with new personnel by July 5th. Despite fears of potential opposition from water users, the legislation received overwhelming support due in large part to substantial outreach to the water user community in the months before the legislative session. The vote in the House was 98 to 1, while the vote in the Senate was 44 to 6. "It's thrilling to have that kind of a vote of confidence," Stults said. The first bills for payment will be sent in December 2005, with payment due in January of 2006.

WATER BRIEFS

To view the bill for additional details, go to the website below, under "Features" click on "2005 Legislature Session Information" then click on "Look Up Bill Information" and type in HB 22.
For info: Jack Stults, DNRC, 406/ 444-6605, email: jstults@mt.gov

STORMWATER HOLDING CA
MUNICIPAL PERMITS

The California Supreme Court rejected a request by builders to review a lower court decision that required cities to ensure that runoff, including that from new construction, meets water quality standards. The case sets a precedent for municipal stormwater permits in the state. Both the Superior Court and the Court of Appeal in San Diego had upheld the stormwater permit issued by the San Diego Regional Water Board..

The building industry claimed that the stormwater permit went too far by requiring compliance with water quality standards. Instead, they argued, the agencies could only require cleanup "to the maximum extent practicable." Citing "numerous harmful pollutants" discharged in runoff to the San Diego Bay and other water bodies without receiving any treatment, the Court of Appeal issued a lengthy opinion concluding that the permit's requirements to protect water quality are proper.
For info: Betsy Jennings, Senior Counsel (SWRCB), 941/ 341-5175 or email: info@waterboards.ca.gov

NAVAJO SETTLEMENT NM
SAN JUAN RIVER BASIN

The water rights settlement that could resolve Navajo claims for the use of waters of the San Juan River Basin in northwestern New Mexico was approved by the Navajo Nation and New Mexico on April 19. The settlement includes an agreement and four appendix documents: 1) Partial Final Decree in the San Juan River Adjudication setting forth the rights of the Navajo Nation to use and administer waters; 2) Supplemental Partial Final Decree quantifying certain reserved rights of the Navajo Nation for historic and existing uses within the Basin in New Mexico from tributaries to the San Juan River and ground water, and rights of the Navajo Nation to the use of water in the Basin acquired pursuant to state law; 3) Settlement Act for the US Congress to approve the Settlement Agreement, authorize the construction and operation of the Navajo-Gallup Water Supply Project, fund construction and rehabilitation of Navajo water projects in the San Juan River Basin in New Mexico, and approve other authorizations to secure to the Navajo Nation a water supply to meet the needs of the Nation and its members; and 4) Settlement Contract to provide for deliveries to the Navajo Nation under Bureau of Reclamation projects, namely the Navajo Indian Irrigation Project, the Navajo-Gallup Water Supply Project, and the Animas-La Plata Project. The Settlement Agreement must be approved by Congress before it is effective.
For info: Office of the State Engineer's website: www.ose.state.nm.us (click on "Hot Topics")

INSTITUTIONAL CONTROLS US
EPA CITIZEN'S GUIDE

On April 7, EPA issued "*Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups.*" The document is intended to complement existing EPA program guidance and provide communities with a plain language guide to institutional controls (ICs). ICs are legal or administrative tools (e.g., permits, deed notices, and easements) put in place at sites to ensure protection of human health. The guide defines different types of ICs and explains their uses; identifies who may be involved in implementing, monitoring, and enforcing ICs; addresses questions about potential reuse and redevelopment; and encourages citizens to help select appropriate ICs and ensure their successful implementation. The final document is available on the Institutional Controls Guidance website: http://www.epa.gov/superfund/action/ic/guide/index.htm.
For info: Marisa Guarinello, Office of Superfund Remediation and Technology Innovation, guarinello.marisa@epa.gov.

CRIMINAL SENTENCE ID
HAZARDOUS WASTE

On March 10, the US District Court for the District of Idaho sentenced Robert Patrick Mominee to five months in prison plus five months in-home detention and a $1,000 fine for illegally transporting hazardous waste, a violation of the Resource Conservation and Recovery Act. Mominee was an employee of Ponderosa Paint. Together with his father-in-law, Paul Woods, Mominee planned to illegally dispose of 4,500 gallons of waste paint materials. The two men were caught after they transported the waste to Wood's home in Wilder, Idaho and burned some of it in a pit. Burning waste paint materials in this manner may pollute groundwater and emit toxic chemicals into the air. The owner of Ponderosa Paint, Dennis Ellis, offered to pay Mominee and Woods $1 for every gallon of waste paint removed from his business in order to save nearly $150,000 in disposal fees. Several State and Federal entities investigated the case including EPA's Criminal Investigation Division in Boise, the FBI, and the Idaho Department of Environmental Quality.
For info: Peter Rosenberg, rosenberg.peter@epa.gov.

GREEN STURGEON CA
ESA PROPOSED LISTING

NOAA Fisheries Service has published a proposed rule to list North American green sturgeon south of the Eel River, CA, (southern **d**istinct **p**opulation **s**egment (DPS)) as threatened under the Endangered Species Act (ESA). Green sturgeon is an anadromous species requiring habitat similar to salmon. Green sturgeon north of and including the Eel River (northern DPS) did not receive ESA listing. Due to concerns over availability of data, the northern DPS will be placed on NOAA Fisheries' Species of Concern List and its status

WATER BRIEFS

may be re-assessed in five years. Public comments on this proposed listing will be accepted through July 5, 2005. [See: Federal e-Rulemaking Portal: www.regulations.gov].

In January 2003, NOAA Fisheries determined that neither the northern nor the southern DPS of green sturgeon warranted listing under the ESA. However, that determination was legally challenged, and in March 2004 the U.S. District Court for the Northern District of California set aside the decision and remanded the case for further evaluation by NOAA Fisheries. NOAA's Biological Review Team used previous studies of salmon in the central valley to examine the likelihood that spawning habitat has been lost within the range of the southern green sturgeon DPS. It was determined that dams built in the upper Sacramento and Feather Rivers likely blocked migration of green sturgeon which led to a significant reduction of the southern DPS's historical habitat. The proposed rule to be filed by NOAA Fisheries is a result of that re-evaluation.

For info: Jim Milbury, NOAA, 562/ 980-4006 or NOAA website: http:// swr.nmfs.noaa.gov > click on "Latest News"; Proposed Rule website: www.regulations.gov/fredpdfs/05-06611.pdf

WASHINGTON DRAFT PLAN

SALMON RECOVERY

NOAA Fisheries Service has endorsed the State of Washington's draft Interim Salmon Recovery Plan for the Lower Columbia River Subbasin. The plan was developed by the Lower Columbia Fish Recovery Board, a team including members of the state legislature, city and county governments, the Cowlitz Tribe, private property owners, hydroelectric project operators, environmental interests, and other concerned citizens. The draft plan includes specific measures to recover all salmon and steelhead species that exist in approximately 1,700 river and stream miles on the Washington side of the lower Columbia River sub-basins from the Chinook River near the Pacific Ocean to the Little White Salmon River in the Columbia River Gorge area.

The Plan addresses the Washington portion of the Lower Columbia chinook, Columbia River chum, and Lower Columbia steelhead ESUs. It includes recovery goals, a comprehensive assessment of threats and limiting factors, and specific actions needed for recovery. Although the plan is "interim," NOAA Fisheries intends to finalize a complete ESA recovery plan for the entire Willamette/Lower Columbia domain after working with Oregon to complete plan elements for the Oregon portion of the domain.

The Lower Columbia Plan is part of a larger commitment made in 2002 by NOAA Fisheries Service to develop regional salmon recovery plans. Elements of over 60 subbasin and watershed plans from all across the Northwest are in the process of being incorporated into larger regional recovery plans for salmon and steelhead in the Interior Columbia Basin, the Snake River Basin, the Oregon Coast, and Puget Sound areas. NOAA will receive draft plans from various recovery teams later this year and expects to finalize them in 2006.

For info: Patty Dornbusch, Recovery Coodinator (NOAA Fisheries), 503/ 230-5430, or email: patty.dornbusch@noaa.gov, or website: www.nwr.noaa.gov/1srd/Recovery/ domains/willow/WMU_Plan/index.html

RIPARIAN FUNDING AZ

The Arizona Water Protection Fund has approximately $1.5 million available for grant awards for the FY 2006 grant cycle. Funds are earmarked to support projects that enhance riparian areas. The application deadline for this cycle's grants is June 15, at 3:00 pm. All applicants will be required to demonstrate the direct benefit(s) to rivers, streams and/or riparian habitats in their proposals.

For info: Rodney Held, AWPF, 602/ 417-2400 x7012, or website: www.awpf.state.az.us/pubs/FY2006/ FY_2006_Schedule.htm

WATER 2025 GRANTS WEST

NEW STATE PROGRAM

Bureau of Reclamation Commissioner John Keys on April 26th announced a new Water 2025 Challenge Grant Program that seeks proposals for cooperative projects between Western state governments and the Bureau of Reclamation (BOR) to make more efficient use of existing water supplies in the region.

The program is focused on achieving goals identified in the Water 2025 initiative to avoid crises and conflict in the West, particularly the development and use of water markets, and structural modifications that will conserve water and improve water management. Among these measures are the use of analytical tools that will help states better administer or more efficiently manage water rights, comply with interstate compacts, or otherwise stretch scarce water supplies.

The Challenge Grant Program for Western States is similar to the Water 2025 Challenge Grant Program. In the new program, eligible applicants are limited to state government water management agencies and authorities in the western United States, as identified in the Reclamation Act of June 17, 1902. The regular Water 2025 Challenge Grant Program (open to local government, municipal and private irrigation districts and water associations as well as tribal water authorities) will continue as established.

Priority will be given to projects with practical applications that will reduce the likelihood of conflict over water and can be completed within 24 months from the date of award. The deadline for submitting proposals for the new program is June 10, 2005. Selections are scheduled to be announced by August.

For info: Avra Morgan (BOR), 303/ 445-2906, website: www.doi.gov/ water2025; Request for Proposals available online at www.grants.gov (keyword: Water 2025)

CALENDAR

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
6th Annual Endangered Species Act Conference, 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: Revenue and Cost Saving for Cities and Government Agencies. Changes in Laws and Regulations. For info: Law Seminars International, 800-854-8009, website: www.lawseminars.com

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 17-18 WA
Monitored Natural Attenuation of TPH, Fuel Oxygenates, and Chlorinated Hydrocarbons in Groundwater, Training, Seattle, Mountaineers Conference Center, 300 Third Avenue, 8:30am-5pm. For info: Erick McWayne, Northwest Environmental Training Center, 206/ 762-1976 Office or email: emcwayne@nwetc.org

May 18 NM
2005 Annual Operating Plan For The Rio Grande Project, Including Elephant Butte And Caballo Reservoirs, Reclamation Public Meeting, Truth or Consequences, PM Civic Center Auditorium, 425 W. Fourth Ave, 6pm. For info: Filiberto Cortez, Reclamation, 915/ 534-6301

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 CO
Colorado Groundwater Commission Meeting, Parker. For info: Marta Ahrens, 303/ 866-3581.

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 23-24 TX
Arsenic Treatment Technology Training (EPA), Austin. RE: Case Studies, Design Criteria & Approval Issues. For info: Jennifer Moller (EPA), 202/ 564-3891 or website: www.epa.gov/safewater/arsenic.html

May 24 WA
Connecting for Energy Solutions, Conference, Bellevue. For info: Website: www.electricleague.net

May 24-25 OR
Risk-Based Corrective Action (RBCA) Applied at Petroleum Release Sites, ASTM Class, Portland, Heathman Hotel, 1001 SW Broadway, 8am-5pm. For info: Scott Murphy, ASTM Education Services, 610/ 832-9685 or email: smurphy@astm.org to register.

May 24-25 CO
Colorado Water Conservation Board Meeting, Cañon City. For info: Catherine Gonzalez, 303/ 866-3441

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

May 31 BC
Eco-Mapping Workshop, Victoria, BC, Delta Victoria Ocean Pointe Resort and Spa, 1pm-5pm. Associated With P2 Conference for Canada and the Northwest (see June 1-2). For info: website: www.pprc.org/networking/rrt.cfm

June 1-2 BC
2005 Northwest Pollution Prevention Roundtable, Victoria, BC, Delta Victoria Ocean Pointe Resort and Spa. P2 Conference for Canada and the Northwest. For info: Website: www.pprc.org/networking/rrt.cfm

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

June 7 OR
"Hazardous Waste Basics" and "Managing Common Wastes"— DEQ Trainings, Roseburg, Umpqua Community College. Two Separate Classes. Morning & Afternoon. For info: Pam Engle, Umpqua Community College, 541/ 672-2535 or email: pam.engle@umpqua.edu

June 8-10 CO
Water Supply Crisis – Colorado River, Natural Resources Law Center Annual Water Conference, Boulder, RE: Colorado River System, Extreme Drought, Regional Water Demands, Over-Allocation. For info: NRLC, 303/ 492-1296, website: www.colorado.edu/law/summerconference

June 10 OR
10th Stormwater 2005 Conference, Portland, World Trade Center Two. RE: Legal & Litigation Update, Stormwater Permitting, Stormwater & Sediment Contamination, Source Control, Portland Harbor Superfund Site, Stormwater & Fish, Restoring Watershed Health, TMDLs & Stormwater Permitting, Technical Challenges & Solutions. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com, or website: www.elecenter.com

June 10 OR
Oregon Fish & Wildlife Commission, Salem, 8 am. For info: Cristy Mosset, ODFW, 503/ 947-6044, www.dfw.state.or.us/Comm/schedule.htm

June 12-16 CA
AWWA Annual Conference & Exposition: "The World's Water Event," San Francisco, Moscone Center. For info: American Water Works Association, 303/ 347-0804, website: www.awwa.org/ace2005

June 12-17 CA
Pacific Fishery Management Council Meeting, Foster City, Crowne Plaza Mid Peninsula, 1221 Chess Drive. For info: PFMC, *866/ 806-7204, website: www.pccouncil.org*

June 14 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

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June 14 **OR**

"Hazardous Waste Basics" and "Managing Common Wastes"— DEQ Trainings, Medford, Southern Oregon University Small Business Development Center. Two Separate Classes. Morning & Afternoon. For info: Mary Lee Hurd, SOUSBD, Center, 541/ 772-3418 or email: hurd@sou.edu

July 14-15 **NM**

Energy in the Southwest Conference, Santa Fe, Eldorado Hotel. Leading Energy Professionals Discuss Rnewables, Nuclear Power; Gas Supplies and Coal; Reliability Requirements, Cyber Security Standard 1300; New Transmission Connections; Resource Adequacy, Tribal Interests, Recent Litigation & More. For info: Law Seminars International, 800-854-8009 or website: www.clenews.com/LSI/05/05bsenm.htm

June 14-15 **UT**

NPDES Permits Program Overview, Salt Lake City. RE: New & Emerging Issues, Purpose of NPDES, Mechanics for Developing, Issuing & Implementing. Co-Sponsors: USEPA, Water Environment Federation & Water Environment Association of Utah. For info: EPA website: http://cfpub.epa.gov/npdes/courses.cfm?program_id=0&outreach_id=197&o_type=1

June 14-16 **OR**

Northwest Power & Conservation Council Meeting, Portland. For info: NWPCC, 503/ 222-5161 or website: info@nwcouncil.org.

June 14-17 **Canada**

Reflections On Our Future: A New Century of Water Stewardship, Banff. RE: Water Management, Development & Adaptation in Canada, Current Transitional Challenges & Future Direction. Sponsor: Canadian Water Resources Association. For info: www.reflectionsonourfuture.ca/

June 15 **OK**

EPA Stormwater Training, Oklahoma City. RE: Workshop for Stormwater Program Managers (Phase II). For info: EPA website: www.epa.gov/npdes/stormwater, click on "Training"

June 16-17 **WA**

"Tribal Energy in the Northwest" Third Annual Conference, Seattle, Renaissance Seattle Hotel. RE: Developing Energy Projects on Tribal Lands, Easements, Transmission, Business Structures, Renewables, Environmental Regulation, BPA's Role & Financing. For info: Law Seminars International, 800/ 854-8009 or website: www.lawseminars.com

June 17 **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

June 17 **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

June 20-21 **ID**

Summer Water Law Seminar & Workshop, Sun Valley. Sponsored by Idaho Water Users Association. For info: IWUA, 208/ 344-6690, website: www.iwua.org

June 23-24 **OR**

Oregon Environmental Quality Commission Meeting, Portland, DEQ Rm 3A, 811 SW 6th Ave. For info: Mikell O'Mealy, Office of DEQ Director, 503/ 229-5301, website: www.deq.state.or.us/

June 24 **CA**

Water Supply and Reliability, San Francisco, Crowne Plaza Union Square. RE: Interstate and Intrastate Water Marketing, Desalinization, Environmental Considerations, Urban Water Management Plans, Integrity & Operation of Dams, Changes in California Water Law, Groundwater Recharge. For info: The Seminar Group, 800/ 574-4852, website: www.theseminargroup.net

June 24-25 **UT**

Utah Board of Water Resources Meeting, Price, Location TBA. RE: Tour Carbon and Emery Counties. For info: Molly Waters, 801/ 538-7230, email: mollywaters@utah.gov, website: www.water.utah.gov/board/2004SCHED.asp

June 27-28 **CA**

Indicators of Hydrologic Alteration (IHA): Software for Understanding the Ecological Consequences of Hydrologic Change, Petaluma, Walker Creek Ranch Conference Center. Sponsored by: The Nature Conservancy, RE: IHA Software Program For Ecological Implications of Flow Patterns & Water Management (Two-Day Training). For info: TNC website: www.freshwaters.org

June 27-29 **HI**

American Water Resources Association (AWRA) 2005 Summer Specialty Conference, Honolulu, Hyatt Regency Waikiki. RE: Traditional Asia-Pacific Practices & Sustainable Use of Watersheds. For info: www.awra.org/meetings/Hawaii2005/index.html

June 29 **WA**

Regional Hydropower Relicensing, Seattle, Washington State Conv. & Trade Center. RE: Federal Power Act Overview: FERC's Perspective, National Legislation & Litigation Update, 401 Certifications: Updates & New Developments, Tribal Role in Relicensing, Settlement Agreements/Implementation. For info: The Seminar Group, 800/ 574-4852, website: www.theseminargroup.net

July 8 **OR**

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

July 12 **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

July 12-14 **ME**

River and Lake Restoration: Changing Landscapes, Portland, 2005 Annual Conference: Universities Council on Water Resources, Holiday Inn by the Bay. For info: Rosie Gard, UCOWR, gardr@siu.edu or website: www.ucowr.siu.edu

The Water Report
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