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SOUTHWEST WATER DECISIONS

ARIZONA WATER SETTLEMENTS ACT, INDIAN RESERVED RIGHTS, ADJUDICATIONS

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INTRODUCTION

The struggle over water resources in Arizona always has been an important and contentious subject. Litigation over water rights began in Arizona decades before statehood. The Territorial Supreme Court, for example, rejected the common law doctrine of riparian water rights and adopted the rule of prior appropriation ("first in time, first in right") in 1888, stating:

> We deem no doctrine more clearly and thoroughly settled on this coast than this doctrine of water-rights. It is par excellence the doctrine of the Pacific coast. Among the earliest apprehensions of the people was the paramount importance of water. Among the miners the custom early grew of according to him the best right who was first in time. The privileges of irrigation soon became gauged by the same rule; so that now this doctrine is thoroughly interwoven into the jurisprudence of the coast, and may not be questioned.

Hill v. Lenormand, 2 Ariz. 354, 356-57, 16 P. 266, 268 (1888).

Ten years later, the same court noted that, under prior appropriation the holder of senior (i.e., earlier) rights was entitled to divert and use its entire quantity of water before any junior (subsequent) users received any water. *Huning v. Porter,* 6 Ariz. 171, 179, 54 P. 584, 587 (Terr. Supreme Ct. 1898) ("When the relative priority in which the rights exist is determined, it is immaterial whether or not the stream furnishes a sufficiency for all.").

The Prior Appropriation Doctrine, seemingly harsh on its face, has been the law of Arizona for more than 100 years. The fact that the doctrine entitles the senior user to divert and use water with no consideration for the rights or needs of any junior users has, along with other considerations, resulted in contested litigation over who is "first in time" and just how much water they get. Other factors also have increased the importance of these issues. The overlay of the doctrine of federal reserved water rights, which provides that certain federal reservations have rights to water based upon the date the reservation was established, notwithstanding the Prior Appropriation Doctrine, has caused additional uncertainty for holders of appropriative rights. Arizona is also relatively unique in the West in that its system of water law is bifurcated between appropriable surface water (which is governed by prior appropriation) and "percolating" groundwater (which is controlled by a Groundwater Code and a reasonable use rule). This bifurcation has caused a continuing dispute over what constitutes appropriable water, including the underground "subflow" of a surface stream, and what constitutes "percolating" groundwater.

Conflicts over water rights in Arizona are no less pervasive in 2005 than they were in 1888, and perhaps more so. Although the state and its residents have had more than 100 years to resolve these conflicts, more new disputes have arisen than have been resolved. For good or for bad, water rights litigation is alive and well in 21st century Arizona.

SW Water

This article will focus on current issues in Arizona relating to the general stream adjudications, including the pending disputes regarding the pumping of underground water, and the multitude of issues associated with the ongoing negotiations to finally and permanently resolve the water rights claims of the Gila River Indian Community (GRIC), and the United States on its behalf, for the Gila River Indian Reservation south of Phoenix.

THE LAW OF FEDERAL RESERVED WATER RIGHTS

Indian water rights have for decades been an important and contentious issue in the West. Resolving these issues remains a critical task. As off-reservation development continues and competition for scarce water increases, the recognition and quantification of federal reserved water rights for Indian reservations becomes ever more important. While this article focuses principally on Arizona, many of these issues also effect the rights of tribes and others throughout the West.

Implied Rights

Although most treaties, executive orders, congressional enactments, and other documents establishing Indian reservations did not explicitly provide water for the land upon which the reservation was created, the federal reserved rights doctrine generally recognizes that the Federal Government impliedly reserved, along with the land, an amount of water to accomplish the purposes of a federal reservation at the time the reservation was established. The origins of the federal reserved rights doctrine can be traced to the landmark United States Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the United States brought suit on behalf of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation to halt upstream diversions by non-Indians who had been using water since 1900. The Fort Belknap Reservation was established under the terms of an 1888 treaty, which generally described the purpose of the Reservation as to provide a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits. The treaty did not mention water rights, however. The non-Indian diverters contended that their diversions, which were prior in time to those by the Indians, gave them a right superior to that of the Indians. That argument was rejected by the Supreme Court, which stated:

Winters

> The case, as we view it turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation. . . . The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habit and want of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change in conditions. The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government . . . The power of the Government to reserve the water and exempt them from appropriation under state laws is not denied, and could not be.

Federal Reservation

Id. at 575-76 (citing, among other cases, *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 702 (1899)).

Later courts have held that the principle of impliedly reserving water rights applies to all reservations, regardless of whether such reservations were created by treaty, statute, or executive order. *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939); see also *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

Priority Date

The United States Supreme Court also has held that the priority date for a reserved right is based on the date the reservation was created. *Arizona*, 373 U.S. at 546. One state court has held that the priority date is based on the date the United States first promised to create the reservation. *New Mexico v. Lewis*, 861 P.2d 235, 244 (N.M. App. 1993).

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SW Water

Special Features

Extension to Federal Lands

Appurtenant Water

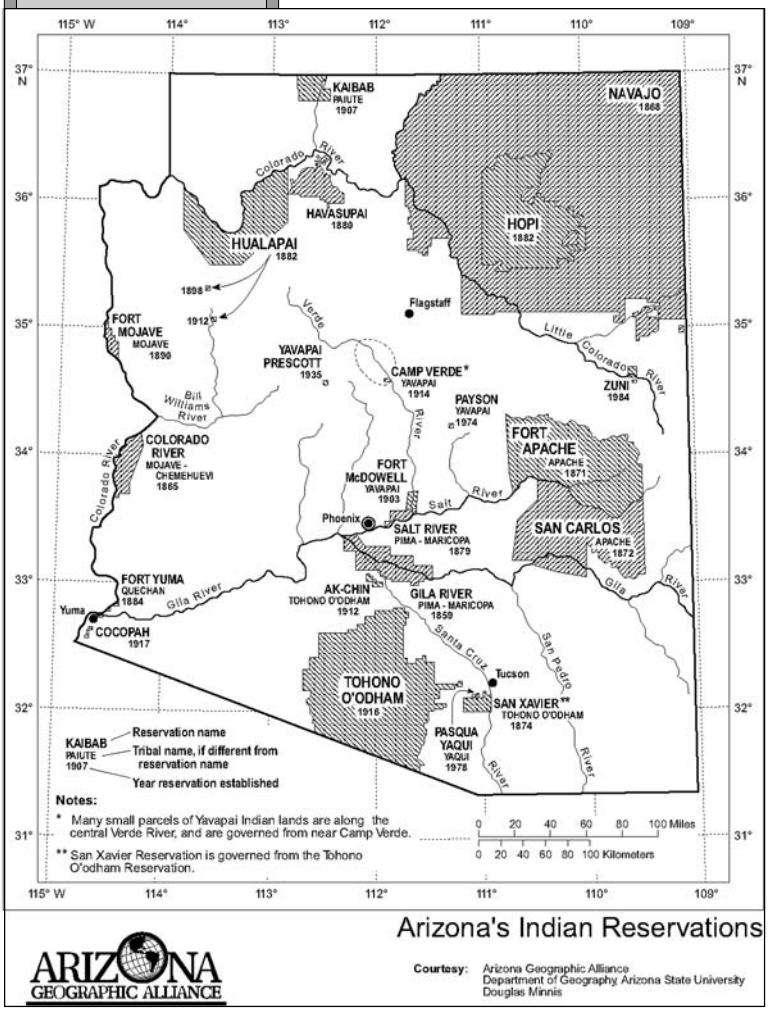
Nature of the Right

The reserved water rights flowing to a reservation exist regardless of whether water has been beneficially used by a tribe. Unlike prior appropriation rights, which are based upon a "first in time, first in right" principle and require that the water have been beneficially used to create (or "perfect") the legal right, the existence of federal reserved rights is not dependent on beneficial use. Similarly, reserved rights are generally considered to not be lost through non-use or the state law doctrines of abandonment or forfeiture. *Winters*, 207 U.S. at 564; *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1248 (D. Nevada 2004); see also Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, at 5780 (1982 ed.).

The reserved rights doctrine also has been extended to other federal establishments as well as Indian reservations. *Arizona*, 373 U.S. at 601. In *Cappaert v. United States*, the United States Supreme Court succinctly described the doctrine and the authority for the principle:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved right in unappropriated water which vests on the date of their reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

426 U.S. 128, 138 (1976) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976); *United States v. District Court in and for Eagle County*, 401 U.S. 520, 522-23 (1971); *Arizona*, 373 U.S. at 601; *FPC v. Oregon,* 349 U.S. 435 (1955); *United States v. Powers*, 305 U.S. 527 (1939); *Winters*, 207 U.S. at 564).



Measure of the Right

Despite its broad application, the reserved rights doctrine has its limits. The US Supreme Court has cautioned on two occasions that the doctrine, at least as applied to non-Indian federal establishments, has a narrower application. In *Cappaert*, the Court stated: "The implied-reservation-of-water-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purposes of the reservation, no more." 426 U.S. at 141 (citing *Arizona*, 373 U.S. at 600-01). Likewise, in *United States v. New Mexico*, the Court clarified the application of the doctrine to national forest lands stating that, under the Organic Administration Act of 1897, water was reserved "only where necessary to preserve the timber or secure favorable water flows for private and public uses under state law." 438 U.S. 696, 718 (1978). The extent to which those cautions apply to Indian reserved rights, in practice, remains a hotly debated issue.

In *Arizona*, for example, the Special Master appointed to resolve certain preliminary questions settled on the notion of quantifying reserved water rights based upon **p**racticably **i**rrigable **a**creage (PIA). Under this test, a tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation. This is the most commonly recognized quantification standard. Nonetheless, California urged that rights should be granted only for existing uses, and Arizona advocated a standard of "reasonably foreseeable needs." The Special Master was not convinced with either contention, however, and instead accepted the PIA standard advanced by the United States. The Supreme Court agreed with the Special Master. *Arizona*, 373 U.S. at 600-01.

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Water Need

Specifically, Justice Black concluded that water rights were reserved for the reservation upon their creation. *Id.* at 546. Justice Black forcefully stated the need for water:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indian were out on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservation they were unaware that most of the lands were of the desert kind hot, scorching sands, and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

Id. at 598-99.

Future Needs

"Permanent Homeland"

The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation." *Id*. at 600. In other words, the water was reserved "to make the Reservation livable." *Id*. at 599, cited with approval in *Montana v. United States*, 450 U.S. 544, 566 n.15 (1981). Several tribes have contended that this "permanent homeland" concept has been recognized in other cases, citing *New Mexico v. Lewis*, Nos. 20294 and 22600, Final Judgment (July 11, 1989), aff'd on other grounds, 861 P.2d 235 (N.M. App. 1993); *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983), cert. denied sub nom*., Oregon v. United States*, 426 U.S. 1252 (1984); *In Re Rights to Use Water in Big Horn River*, 753 P.2d 76 (Wyo. 1988), aff'd sub nom., *Wyoming v. United States*, 492 U.S. 406 (1989). The Arizona Supreme Court appears to have adopted this concept in a recent decision concerning this issue. See *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001) (*Gila V*).

Gila V: Tribal Homeland

PIA

In *Gila V*, the Arizona Supreme Court was presented with the question of defining the standard for quantifying the amount of water for federal reserved rights. Initially, and keeping with the standard established in *Arizona*, Judge Goodfarb of the Maricopa County Superior Court held that all federal reserved rights for Indian reservations were to be measured based upon the PIA standard. That standard provided that the tribes should get enough water to irrigate all land on the reservation that is: 1) arable; 2) physically irrigable; and 3) economically irrigable.

Evolution

Inequity

Addressing this issue on interlocutory review, the Arizona Supreme Court first stated that the "essential purpose" of Indian reservations "is to provide Native American people with a 'permanent home and abiding place,' that is, a 'livable' environment." 201 Ariz. at 315, 35 P.3d at 76. The Arizona court then rejected PIA as the sole standard for satisfying the "essential purpose" of Indian reservations. Instead, the court held that the general purpose of providing a home for Indians is a broad one that courts must broadly construe to ensure tribes the ability to achieve self-determination and economic self-sufficiency. *Id*. at 315, 35 P.2d at 76. The court went on to say that limiting tribes to a PIA standard denies them the opportunity to evolve, which, in turn, limits them to an agrarian standard in a largely non-agrarian modern world. The standard also can result in inequitable treatment for certain tribes who, due to their geographic location, have little practicably irrigable land. The court also found that PIA forces tribes to develop large agricultural projects in order to maximize water resources at a time when such projects are economically risky. *Id*. at 317, 35 P.2d at 78. According to the Arizona Supreme Court, the focus on agricultural uses "deters consideration of actual water needs based on realistic economic choices." *Id.* In short, the Court held that PIA can frustrate the requirement that federal reserved water rights be tailored to meet a reservation's minimal needs by focusing on the total number of irrigable acres rather than on what is necessary to fulfill a reservation's overall purpose and design. See *id.*

Primary Purpose

Broad Interpretation

In addition, the Arizona Supreme Court in *Gila V* addressed whether the "primary-secondary purposes" test applied to Indian reservations. See *New Mexico*, 438 U.S. at 696. Under that test, a federal reserved right is entitled to only enough water to carry out the "primary" purposes of the reservation; water for any "secondary" reservation purposes must be established pursuant to state law (e.g., prior appropriation). Indian reservations, the Arizona court noted, are unlike other federal reservations, such as national forests, national parks, and military bases. According to the court, the purposes of other federal reservations should be strictly construed, but the purposes of Indian reservations should be entitled to broader interpretation. Thus, the *Gila V* court found that the "primary-secondary purposes" test does not apply to Indian reservations. 201 Ariz. at 315-16, 35 P.3d at 76-77.

SW Water

Purposes

The *Gila V* court ultimately decided that the best approach for satisfying the purposes of Indian reservations as a permanent homeland was one that balanced a "myriad of factors," such as agricultural production, commercial development, industrial use, residential use, recreational use, and wilderness uses. *Id*. at 318, 35 P.3d at 79. The court noted that successful Indian water rights settlements have employed master land use plans for reservations that specify the quantity of water necessary for the different purposes of the reservation. *Id.* at 318, 35 P.3d at 79. For the court, the "important thing is that the lower court should have before it actual and proposed uses, accompanied by the parties' recommendations regarding feasibility and the amount of water necessary to accomplish the homeland purpose." *Id.*

Factors

The Arizona court enumerated several factors that should be considered in quantifying the water necessary to satisfy the homeland purpose of Indian reservations, including: 1) historical uses; 2) cultural uses of water and their importance to tribal cultures; 3) the geography, topography, and natural resources of the reservation, including the availability of groundwater; 4) the tribe's current economic base and its economic development plans and needs; and 5) the tribe's current and projected future population. *Id.* at 318-19, 35 P.3d at 79-80. This list is not exclusive, and other courts are free to consider other evidence in determining tribal water rights. What the *Gila V* court required, however, is that the proposed uses be "reasonably feasible." *Id.* at 319, 35 P.3d at 80. To determine if a use is reasonably feasible involves a two-step analysis: 1) projects must be achievable from a practical standpoint, and 2) projects must be economically sound. *Id.* at 320, 35 P.3d at 81.

Feasibility

"Minimal Need"

The *Gila V* court further found that Indian reserved water rights are limited by the concept of "minimal need," such that the federal reserved rights doctrine reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* The "minimal needs" quantification for an Indian reservation, however, must take into account both the present and future needs of the reservation.

Despite these pronouncements, a uniform standard by which the reserved rights may be measured by all states has not been articulated. Indeed, the United States Supreme Court has yet to squarely recognize the concepts outlined in *Gila V*. Ordinarily, that difficult task is left to the trial judge or special master. See generally *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 685-86 (1979).

Lummi Nation Decision

The *Gila V* court acknowledged that, in rejecting the PIA standard as the exclusive means to quantify federal reserved rights for Indian reservations, it was "enter[ing] essentially uncharted territory." 201 Ariz. at 318, 35 P.3d at 79. The court's analysis on the application (or lack thereof) of the PIA standard was strongly criticized by a recent order from a federal district court in Washington. See *United States and Lummi Indian Nation v. Washington*, 375 F.Supp.2d 1050 (W.D. Wash. June 23, 2005) ("*Washington*"— available online at: WESTLAW 1561518 or www.narf.org/ (follow>>National Indian Law Library>>Indian Law Bulletins>>US District Courts>>2005>>June>>scroll down). See also Markham, TWR #17). The United States and tribe in that case, seeking to quantify a federal reserved right for an Indian reservation, argued that the reservation in question was intended to provide a "homeland" for the tribe. *See id.* at *6. Relying heavily upon *Gila V,* those parties argued that because the purpose of the treaty creating the reservation was to provide a "homeland," "the Court should find sufficient water was reserved to provide for all domestic, agricultural, community, commercial, and industrial purposes." *Id.*

Gila V Rejected

The *Washington* court rejected the *Gila V* analysis. *Id.* at * 9. Finding that "no federal court has ever found an impliedly reserved water right by first looking to the modern day activities of an Indian reservation," the *Washington* court found that "the 'homeland purpose' theory adopted in [*Gila V*] is contrary to the 'primary purpose' doctrine under federal law." *Id.* That court further found that the "homeland purpose" theory "conflicts with clear Ninth Circuit precedent." *Id.* (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981)). "The Court cannot find a 'homeland' primary purpose and end[s] its inquiry." *Id.*

Non-Agricultural Uses

Fish Runs

Other concerns arise when determining the extent to which water has been reserved for the benefit of tribes for non-agricultural uses. The Ninth Circuit, for instance, has recognized reserved rights in connection with maintenance of flows necessary for fish runs in streams running through or bordering an Indian reservation. *Adair*, 723 F.2d at 1394. However, see also *In Re Big Horn River*, 753 P.2d at 76, *aff'd*, 492 U.S. at 406 (refusing to find that water had been reserved to maintain the fisheries or for mineral development).

SW Water

Gila IV

Reservation Priority

Groundwater Extension

Reservation Purpose

Groundwater Limit

Federal Protection

Gila IV Rejected

Implementation

Federal Reserved Rights to Groundwater

Federal reserved rights are most often considered with respect to surface water sources. As is clear from the recent disputes in Arizona, the applicability of the reserved rights doctrine to groundwater is the subject of great debate. The Arizona Supreme Court in 1999 considered the issue of whether the holder of a federal reserved water right, such as the United States or an Indian tribe, has a right extending to "percolating" groundwater despite Arizona's bifurcated system of water law. *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999), *cert. denied*, 120 S. Ct. 2705 (2000) (*Gila IV*). Because federal reserved rights set aside an amount of water to accomplish the purposes of a federal reservation at the time the reservation was established, they are not subject to many of the requirements of the Prior Appropriation Doctrine, and their "priority date" (i.e., the date that determines whether they are senior or junior to other rights, including prior appropriation rights) is the date the reservation was created, not the date that water was first used.

In *Gila IV*, the Arizona Supreme Court, on interlocutory review, had to determine if federal reserved rights extend to groundwater that was not subject to prior appropriation under Arizona law (i.e., "percolating" groundwater). Moreover, the court addressed whether federal reserved right holders are entitled to greater protection from groundwater pumping than are surface water users holding state law prior appropriation rights.

In dealing with the first issue, the *Gila IV* court first noted that most prior appropriation states had abandoned Arizona's bifurcated approach to distinguish between surface water and groundwater. The court refused to follow those other states, however, reaffirming its prior decisions that it was too late to modify Arizona groundwater law because the state legislature and water rights holders had relied for so long on the existing system. 195 Ariz. at 416, 989 P.2d at 744.

However, the court found that, unlike holders of prior appropriation rights, federal reserved right holders were not limited by Arizona's bifurcated treatment of groundwater. *Id.* at 419-20, 989 P.2d at 747-78. Federal reserved rights stem from federal, not state, substantive law. The Arizona court noted that the issue of federal reserved rights to groundwater had not been directly addressed by the United States Supreme Court and rejected the opinion of other state courts (including the Wyoming Supreme Court) that had refused to find a reserved right to groundwater simply because no prior case had done so. See *In Re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988). Rather, the *Gila IV* court held that the question was not whether water runs above or below the ground, but whether a reservation of water was necessary to accomplish the purpose of the reservation of land. 195 Ariz. at 417, 989 P.2d at 745. That being the issue, the Arizona Supreme Court concluded that the federal reserved rights doctrine applies to groundwater, regardless of whether it is the "subflow" of a surface stream or "percolating" groundwater. The court noted, however, that a reserved right to groundwater exists only where other available waters are inadequate to accomplish the purpose of the reservation. *Id.* at 420, 989 P.2d at 748.

Answering the second issue, the *Gila IV* court held that once a federal reserved right to groundwater is established, a reservation may invoke federal law to protect its groundwater to the extent such protection is necessary to fulfill the reserved right. *Id.* at 421-22, 989 P.2d at 749-50. Whether a particular reservation would need to rely on more than existing state law to protect its reserved right is an issue of fact to be decided on a case-by-case basis. The court noted that, although federal reserved rights holders enjoy greater protection from groundwater pumping than do state rights holders under the court's decision, a "zero-impact standard" of protection for federal reserved rights is not required. Rather, any devices employed to protect a federal reserved right to groundwater, such as an injunction, should be tailored to meet the minimal need that will satisfy the purposes of the reservation. *Id.*

The recent *Washington* case in federal district court also criticized the Arizona Supreme Court's holding in *Gila IV*, as it did the *Gila V* holding. See 2005 WESTLAW 1561518, at *12. Specifically, the court at least impliedly questioned the Arizona Supreme Court's authority to stray from federal precedent on issues of federal law. Noting that the *Gila IV* court held that "[a] federal reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation," the *Washington* court stated: "The Court is unaware, however of any federal precedent that would require adherence to [Gila IV], permitting federal reserved rights only where surface waters are inadequate to provide for the needs of the reservation." *Id.* (quoting *Gila IV*, 201 Ariz. at 420, 989 P.2d at 748).

Lawyers and commentators are still assessing the impact of the recent Arizona Supreme Court decisions on the federal reserved rights doctrine in Arizona. Many individuals think that whether the tribes or the non-Indians are benefited might depend primarily on how the decisions are implemented by the trial court. It could be several years before the superior court in the Gila River General Stream Adjudication has occasion to put these issues into practice.

SW Water

AWSA

CAP Involvement

Settlement Incentives

Complexities

CAP SYSTEM

THE ARIZONA WATER SETTLEMENTS ACT OF 2004

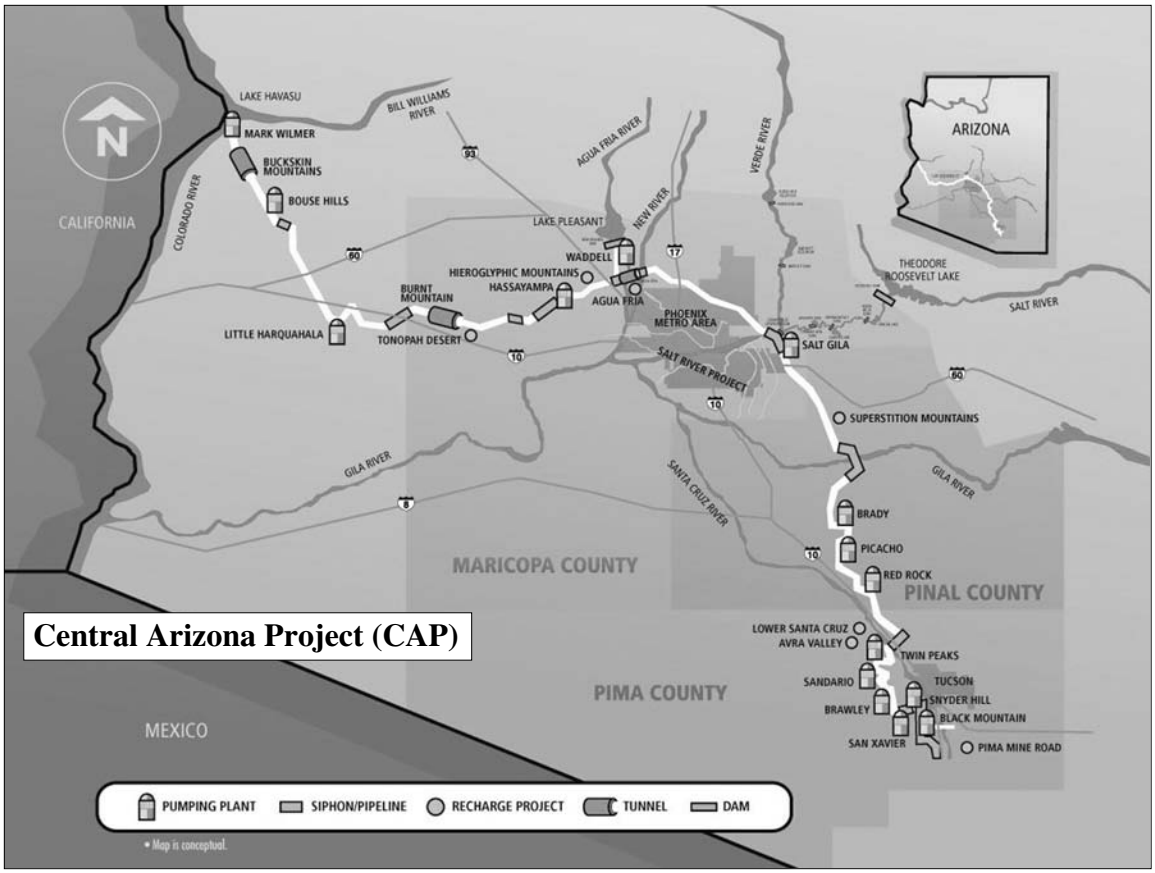
The most significant events regarding tribal water rights in Arizona since 2001 have occurred not in the courts, but in the United States Congress and in negotiations between trial and non-Indian water users. The Arizona Water Settlements Act of 2004 (AWSA) represents the culmination of more than fifteen years of negotiations between representatives of the United States, the States of Arizona and New Mexico, the Gila River Indian Community (GRIC), the Tohono O'odham Nation and approximately thirty-five different non-Indian organizations including cities, counties, irrigation districts, utilities, and mining companies from central, southern, and eastern Arizona and eastern New Mexico. See Pub. L. No. 108-451, 118 Stat. 3478 (2004).

The history of AWSA involves, to a large extent, the Central Arizona Project (CAP), a federally-developed water project authorized in 1968 to deliver approximately 1.5 million acre-feet of Colorado River water annually to central and southern Arizona. Resolution of the CAP-related issues also directly facilitates two Indian water rights settlements, the largest consisting of the Gila River Indian Reservation, which comprises approximately 372,000 acres south of Phoenix (see Map). That reservation was originally established in 1859, with several subsequent additions occurring up through the early 1900s.

The magnitude of the rights claimed for the reservation, along with other factors, has given the Arizona State Government and non-Indian water users substantial incentive to negotiate an agreed settlement of the claims made by and for GRIC. GRIC and the United States (on GRIC's behalf) also have certain incentives to settle because, among other things, all litigation is risky, and the outcome is never certain. In addition, a negotiated settlement can provide other benefits to the Indian community, such as financial contributions to construct a water delivery system and for other purposes that are not normally available through litigation.

For these reasons and others, various parties have been engaged in settlement negotiations with GRIC and the United States since the mid-1980s. Those negotiations broke down for a period in the late 1980s and commenced again in earnest in the mid-1990s. Those negotiations gained substantial momentum over the last few years, with the parties meeting on a regular basis to discuss the details of a possible settlement.

The GRIC negotiations have been slow for a variety of reasons. First, the magnitude of the claims has made the negotiations contentious and difficult to manage. Second, the legal, financial, and technical issues associated with any GRIC settlement are extraordinarily complex and have required substantial



Central Arizona Project (CAP)

SW Water

Global Settlement

Rights Clarified

CAP Allocations

Repayment Obligations

GRIC Rights

635,500 AF

$200 Million Infrastructure

Legal Framework

Conditions

SAWRSA

Groundwater Pumping

time and effort by the parties. Third, the negotiations have trended toward a global settlement of a variety of claims and issues in addition to GRIC's water rights, so the sheer number of parties involved has become, at times, almost unmanageable. For instance, the United States has ongoing disagreements with the Central Arizona Water Conservation District (CAWCD) regarding the repayment of certain costs associated with construction of the CAP, and those issues have become part of the overall GRIC settlement discussions. In addition, other largely unrelated disputes between the United States, GRIC, and others have become part of the negotiations. The water rights claims for the San Carlos Apache Reservation also were involved in parts of these negotiations, although a comprehensive settlement of those rights has not reached fruition as part of the settlement negotiations to date.

Despite these obstacles, the parties finally reached an agreement on the US/CAWCD issue and on the settlement of GRIC claims. In December 2004, President Bush signed AWSA into law. Overall, AWSA settles long-standing disputes between the United States, Arizona, and various Indian tribes, and is a major advance in clarifying the priority and quantity of water rights in the state. The Act contains three key titles.

Title I settles a long-standing dispute between the United States and the State of Arizona regarding the allocation of CAP water. Certain non-Indian agricultural irrigation districts with long-term CAP contracts are expected to relinquish their existing long-term contracts in return for federal debt relief and an exemption from acreage limitations and full-cost pricing provisions under the Reclamation Reform Act and other federal laws. This CAP water would then be reallocated among Indian and non-Indian uses. AWSA also permanently designates forty-seven percent of CAP water supply for Indian uses and fifty-three percent for non-Indian agricultural, municipal, and industrial uses.

Title I also amends Section 403(f) of the Colorado River Basin Project Act of 1968 by permitting additional uses of the funds deposited into the Lower Colorado River Basin Development Fund. Previously, these funds were credited each year against CAWCD's repayment obligations for CAP, with the remainder returned to the United States Treasury's general fund to repay the costs of constructing CAP. Under AWSA, funds left over after repayment of CAWCD's repayment obligations may be used to pay the costs of delivering CAP water to Indian tribes and to fund Indian water rights settlements, including costs authorized under Titles II and III of AWSA.

Title II of AWSA implements the Gila River Indian Community Water Rights Settlement Agreement between: GRIC; the United States; the State of Arizona; and numerous Arizona municipalities, irrigation districts, and private water users. Under the Agreement, GRIC is entitled to an average of 653,500 acre-feet of water annually. This entitlement includes: GRIC's existing water rights under two Arizona court decrees; water contributed to the settlement by the Salt River Project and Roosevelt Water Conservation District; 328,500 acre-feet of CAP water; reclaimed water from the Cities of Mesa and Chandler; and underground water. Title II provides over $200 million to GRIC for rehabilitation and construction of water facilities, defraying operation and maintenance costs associated with the delivery of CAP water, rehabilitation of subsidence damages, and implementation of a water quality monitoring program.

Title II also provides a legal framework for settlement of water rights disputes between GRIC and upstream water users in the Gila and San Pedro River watersheds. This includes settlement of disputes regarding rights under the 1935 *Globe Equity* Decree. To help settle disputes regarding the pumping of water in these watersheds and limit groundwater pumping, Title II provides for state legislation that will establish the Upper Gila Watershed Maintenance Program. GRIC, its members and allottees, and the United States on GRIC's behalf will waive and release claims for water rights, injuries to water rights, and injuries to water quality, in exchange for the benefits provided under the settlement. Other parties to the settlement will execute reciprocal waivers and releases to GRIC, the members, allottees, and the United States. The settlement includes numerous conditions that must be met before it is enforceable. If the settlement is not fully enforceable by December 31, 2007, Title I and Title II are automatically repealed, and any actions taken before that date are voided.

Title III of AWSA addresses outstanding issues related to the Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA). In 1975, the United States, Tohono O'odham Nation, and a class of Indian allottees sued the City of Tucson and other water users in the Upper Santa Cruz Basin for damages and an injunction to stop groundwater pumping. SAWRSA implemented a settlement between the parties, providing water and money to the tribe and allottees. The allottees objected to some aspects of SAWRSA, however, and opposed dismissal of the 1975 litigation. In 1993, certain allottees filed a class action lawsuit, again seeking damages and injunctive relief against other water users in the basin, as well as a lawsuit against the United States for breach of trust and other equitable relief. Title III amends and modifies the 1982 SAWRSA to address these outstanding disputes and issues relating to the act between the United States, the Nation, a class of Indian allottees, and the City of Tucson.

SW Water

SAWRSA Terms

AWSA Overview

San Carlos Apache Tribe

More Requirements

Ending Uncertainty

CAP Resolution

General Adjudications

1974 Start

After years of negotiations, the parties to these lawsuits agreed on amendments to SAWRSA that would permit the original settlement to be fully implemented while clarifying the benefits to the various parties. Title III incorporates these changes. The Nation is permitted greater flexibility in the use of its water resources, the rights of allottees are clarified, and the obligations of the United States under SAWRSA are clarified. The pending litigation will be dismissed, and the Nation and allottees will release claims for future injuries to water rights where water use complies with state law and the terms of the settlement. Title III also bars claims of any allottees who opt out of the class settlement.

In short, Title I concerns the allocation of CAP water among several water users in central Arizona (including State, Federal, and Indian parties) and confirms the settlement between the United States and CAWCD regarding repayment of CAP construction costs. It also permits the use of certain funds deposited into the Lower Colorado River Basin Development Fund to pay for the costs of delivering CAP water to Indian tribes and to fund Indian water rights settlements, including costs authorized under the other two titles of AWSA. Title II settles the GRIC water rights claims by implementing the settlement agreement between GRIC, the United States, the State of Arizona, and numerous Arizona cities and towns, irrigation districts, and private water users. It also provides funds for irrigation and other water infrastructure on the Gila River Indian Reservation and provides a legal framework for the settlement of certain water rights disputes pending between other parties in the Gila River watershed. Title III amends and modifies SAWRSA to address outstanding disputes and issues relating to that act between the United States, Tohono O'odham Nation, a class of Indian allottees, and the City of Tucson.

AWSA also contains a Title IV, which pertains to the San Carlos Apache Tribe (SCAT). In particular, Title IV does not settle or resolve SCAT's water rights claims in the Gila River General Stream Adjudication. Rather, it simply makes clear that Titles I through III do not limit the ability of SCAT, or the United States as its trustee, from pursuing any future water rights claims. Title IV also requires the Secretary of the Interior to assess the progress toward completing a settlement with SCAT annually for three years.

The passage of AWSA does not end the story, however. The Arizona State Legislature, for instance, must pass certain legislation to make AWSA effective, including the appropriation of substantial funds. Although progress has been made towards this goal, additional work is still needed. In addition, AWSA will need to be approved by the state courts in the Gila River General Stream Adjudication and likely also by the federal district court in the continuing *Globe Equity* decree enforcement proceedings.

AWSA is a major advance in clarifying the priority and quantity of water rights in central and southern Arizona. It settles GRIC's rights, thus removing a significant source of uncertainty and future litigation for the tribes, the United States, and many non-Indian entities in Arizona and western New Mexico. Moreover, AWSA provides GRIC with the means to develop the infrastructure necessary to put its water resources to beneficial use. Similarly, the rights of the Tohono O'odham Nation and its allottees are settled, providing more certainty to water users in Tucson and southern Arizona. Additional water is made available to Arizona cities and towns for future growth through exchanges and leases with the tribes. Finally, the resolution of disputes regarding CAP frees up water for future Indian settlements, provides certainty regarding CAP's future, and creates a source of funding for other water right settlements in Arizona.

THE GILA AND LITTLE COLORADO RIVER ADJUDICATIONS

Arizona currently has two general stream adjudications pending: The Gila River General Stream Adjudication, and the Little Colorado River General Stream Adjudication.

The Little Colorado Adjudication is pending in Apache County Superior Court in St. Johns, Arizona. That proceeding covers the entire Little Colorado River and all of its tributaries in northeastern Arizona. More than 11,000 claims for water rights have been filed in that proceeding, by 3,100 parties.

The Gila Adjudication is pending in Maricopa County Superior Court. That proceeding covers the Gila River and its tributaries, including the Salt River, Verde River, San Pedro River, Santa Cruz River, and others. In the Gila Adjudication, 66,000 water right claims have been filed by 24,000 parties.

Judge Eddward Ballinger of the Maricopa County Superior Court is the trial judge in both adjudications. Mr. George Schade has been appointed as the Special Master in both proceedings.

These adjudications, which have been pending since the Salt River Project filed a petition to adjudicate the waters of the Upper Salt River in 1974, have been slowed down by a series of jurisdictional disputes and because many broad legal issues relating to water rights were unresolved in the first sixty years after statehood. Most of the recent litigation activity has taken place in the Gila Adjudication.

SW Water

GW / Surface Water Relationship

Interlocutory Review

Notice

Issues

Surface "Subflow"

"Percolating" Groundwater

Substantial Considerations

1931 Case

ARIZONA SUPREME COURT'S RULINGS ON INTERLOCUTORY APPEAL FROM THE GILA ADJUDICATION

In October 1987, Judge Stanley Goodfarb (Maricopa County Superior Court, who was then presiding over the Gila Adjudication) conducted extensive evidentiary hearings regarding the hydrological relationship between groundwater and surface water in Arizona. See Superior Court's Order, Case No. W1, Docket No. 1202, at 1 (September 9, 1988) ("1988 Groundwater Order"). At the conclusion of those hearings, a group of cities filed a motion requesting the court to exclude from the Adjudication all wells pumping "percolating groundwater." See Motion to Exclude Wells from the General Adjudication, Superior Court, Case No. W1, Docket No. 1003 (November 17, 1987). In response to that motion, Judge Goodfarb selected eight issues "related to the groundwater relationship issues of this case" for briefing and decision. See Superior Court's Order, Case No. W1, Docket No. 1062 (January 19, 1988).

On September 9, 1988, Judge Goodfarb entered an order deciding the eight issues he had identified for consideration, among others. See 1988 Groundwater Order, supra. Several parties filed petitions for interlocutory review of his order with the Arizona Supreme Court. Interlocutory review allows for a party to seek the Supreme Court's ruling on an issue currently pending in the superior court, even though the superior court litigation has not yet been fully completed. The Supreme Court decides whether to take issues on interlocutory review by considering, among other things, whether making its ruling at that time would help expedite the litigation and save the courts and the parties the time and expense of litigating a case to completion only to later have it reversed by the Supreme Court, requiring the litigation to, in effect, start over again. In response to those petitions, the Arizona Supreme Court accepted six legal issues for review, denominated as Interlocutory Issues 1 through 6.

The Supreme Court took more than thirteen years to hear and rule on these six issues. The Court ruled on Issue 1, which involved whether the procedures that the Arizona Department of Water Resources had used for publishing and mailing notice of the Adjudication to potential claims were constitutionally sufficient, in 1992. See *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 171 Ariz. 230, 830 P.2d 442 (1992) (the procedures were found to be valid). The Supreme Court decided that Issue 6, relating to the superior court's procedures for addressing conflicting rights, does not need to be addressed at this stage of the litigation. Issues 2, 3, 4, and 5, however, were decided by the Arizona Supreme Court over the last six years. Issues 4 and 5 dealt with whether the holder of a federal reserved water right, such as the United States or an Indian tribe, has a right extending to "percolating" groundwater despite Arizona's bifurcated system of water law (see *Gila V1* and federal reserved rights discussion above). Issue 3 dealt with defining the standard for quantifying the amount of water for federal reserved rights (see *Gila V* and discussion above).

Issue 2 (2000) — "Subflow"

Issue 2 involved the long-standing question of specifically what water constitutes appropriable "subflow" of a surface stream and what constitutes "percolating" groundwater—i.e., the artificial line in the sand that Arizona law has drawn with respect to water for more than seventy years. *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. Adv. Rep. 330, 9 P.3d 1069 (2000), cert. denied, 121 S. Ct. 2576. This distinction is highly important because, among other things, thousands of individuals and entities have, over the years, installed wells in the vicinity of Arizona surface streams, arguably on the assumption that they were withdrawing "percolating" groundwater that was not subject to the prior claims of holders of senior prior appropriation rights. If those wells are found to be withdrawing appropriable "subflow," the pumping from those wells becomes subject to the Gila Adjudication proceedings and, perhaps more important, subject to being shut down or curtailed based upon the resulting impact on the senior appropriative rights. Because many of these wells were drilled years after the senior surface water rights were perfected by others (most often downstream), the well owners are subject to substantial impacts if their rights are governed under the same legal doctrine (prior appropriation) as the rights of the senior appropriators.

This general issue had been before the Arizona Supreme Court on two prior occasions. The first, in 1931, arose from the building of "Old" Waddell Dam, which forms Lake Pleasant on the Agua Fria River. *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931). ("Old" Waddell Dam was replaced by "New" Waddell Dam in the same general location in the early 1990s, as part of CAP.) In the 1931 case, Southwest Cotton (a subsidiary of Goodyear Tire & Rubber) was pumping water from a number of wells bordering the Agua Fria, some of which were in or immediately adjacent to the riverbed, others of which were more removed from the river. MWD was building Old Waddell Dam upstream. Southwest Cotton sued to enjoin the use of water behind the dam, alleging that its prior appropriation of water in its wells was threatened or impaired.

SW Water

"Appreciable and Direct"

The meaning of the Supreme Court's *Southwest Cotton* decision has been the subject of much debate among lawyers for the more than seventy years since it was issued. In general, however, the court stated that a well was withdrawing appropriable "subflow" if its pumping caused an "appreciable and direct" diminishment on the surface stream. Because the case was remanded to the trial court for further evidentiary proceedings and subsequently settled prior to again reaching the Supreme Court, no further direction was provided on that issue.

The precise definition of appropriable "subflow" again came to the Supreme Court in 1993 on appeal of Judge Goodfarb's 1988 Groundwater Order. *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source,* 175 Ariz. 382, 857 P.2d 1236 (1993). In his 1988 order, Judge Goodfarb had developed the "50%/90-day" test. Under that test, a well would have been deemed to be pumping appropriable "subflow" if it was determined that, the well having been operated for a period of ninety days, fifty percent or more of the water withdrawn came from the surface stream.

"Subflow" Test

When it first addressed Issue 2 in 1993, the Arizona Supreme Court struck down Judge Goodfarb's "50%/90-day" test. Although the court in that opinion presented an extensive discussion on how appropriable water should be distinguished from "percolating" groundwater, it did not establish a precise test. Rather, the court remanded the issues to Judge Goodfarb for further fact-finding and consideration. On remand, Judge Goodfarb decided that the "saturated floodplain Holocene alluvium" was the geologic unit that best defined the subflow zone of a stream under Arizona law. Wells located within this subflow zone are presumed to be pumping subflow, and wells located outside are presumed not to be pumping subflow. In addition, a well located outside of the subflow zone may be found to be pumping subflow if its cone of depression reaches the subflow zone and the pumping affects the volume of surface water and subflow in an amount capable of being measured.

Judge Goodfarb's second decision was appealed by groundwater users, who argued that this definition of subflow was overly broad and conflicted with the *Southwest Cotton* opinion. The Supreme Court in 2000 affirmed Judge Goodfarb's opinion in its entirety, finding that the "entire saturated floodplain Holocene alluvium . . . will define the subflow zone in any given area."

OTHER CURRENT ISSUES

After waiting more than a decade, the parties in Arizona water rights litigation finally have at least some additional direction from the Supreme Court about certain basic legal issues relating to water and water rights. The court's decisions on Issues 2, 3, 4, and 5 have shed additional light on several issues that had been unclear for decades. In addition, these decisions have spawned further litigation, on the one hand, and perhaps facilitated negotiations to settle pending litigation, on the other.

Implementation of Issue 2 Decision in the Gila Adjudication

Agency Task

For purposes of the Gila and Little Colorado Adjudications, the Arizona Department of Water Resources (ADWR) will have the initial task of determining which wells are pumping subflow and are therefore subject to the law of prior appropriation, using the test set forth in the Arizona Supreme Court's Issue 2 decision. The common thinking is that ADWR will perform this function by drawing a two-dimensional line along the rivers, thereby designating the lateral extent of the saturated floodplain Holocene alluvium. A well owner can overcome ADWR's determination only by showing, by a preponderance of the evidence, that its particular well is not pumping subflow.

Judge Ballinger has asked ADWR to develop a process and timeline for preparing their recommendation on the lateral extent of the subflow zone based upon the Issue 2 decision. ADWR submitted a report to the court on December 18, 2001, but the judge on January 8, 2002 ruled that the report was inadequate and required ADWR to submit a revised and more thorough report.

Subflow Report

ADWR submitted a revised report to Judge Ballinger on March 29, 2002. Shortly thereafter, several parties submitted responses to ADWR's revised report, most of which opposed some portion of ADWR's analysis. Consistent with Judge Ballinger's January 8 order, the parties' responses included affidavits from their expert witnesses. Judge Ballinger referred the proceedings to the Special Master, who then scheduled a hearing to resolve various issues presented by ADWR's revised subflow report; namely, the hearing was to assist in resolving the location of the subflow zone and how the cone of depression test would be implemented by ADWR.

Special Master Rulings

Prior to the hearing, the Special Master made several initial rulings on associated legal issues in conjunction with the issues to be presented at the hearing. Specifically, the Special Master held that: 1) ADWR should base its analysis on pre-development conditions; 2) the Supreme Court incorporated the criteria specified in its 2000 decision to identify the saturated flood plain Holocene alluvium unless

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ADWR cannot identify or delineate a subflow zone in a particular stream segment; 3) a well's drawdown at the subflow zone would be analyzed individually for each well; and 4) ADWR must prepare a map to delineate the subflow zone for the entire San Pedro River watershed. Although the initial rulings were subject to hearing testimony from expert witnesses on various technical issues, the Special Master nevertheless recommended a similar procedure be followed for all the watersheds in the Gila Adjudication.

Soil Survey Maps

After several attempts at determining the lateral extent of the saturated Holocene alluvium, ADWR eventually proposed using the Natural Resources Conservation Service (NRCS) soil survey maps as a boundary line. In particular, ADWR contended the use of the NRCS maps would be helpful in determining the subflow zone. Several parties objected to this proposal, however. Although the Special Master did not allow cross-examination of the proposed use of the maps, he did acknowledge that there may be no single or exclusive indicator that delineates the subflow zone as defined by the Supreme Court. Oral argument on the proposed use of the NRCS maps was heard in May 2004. Shortly thereafter, the Special Master filed his report and findings on the subflow implementation issues and asked the Gila Adjudication court to approve his recommendations.

Revised Findings

Specifically, the Special Master found, among other things, that: 1) the analysis should be performed using "predevelopment" conditions; 2) the Supreme Court's 2000 decision determined that the saturated floodplain Holocene alluvium is the subflow zone and no additional consideration of "criteria" is necessary except in limited circumstances; 3) the court should not adopt ADWR's recommendation that the entire floodplain Holocene alluvium be considered saturated; and 4) the edge of a well's cone of depression for purpose of the subflow analysis is the point where the well's drawdown is modeled to be 0.1 foot. More than a dozen parties, however, filed objections to the report. Judge Ballinger heard objections to the Special Master's Report on July 13, 2005. On September 28, 2005, he issued an order essentially adopting the majority of the Special Master's recommendations. A copy of the order is available on the adjudication website: www.supreme.state.az.us/wm/Gila.htm.

Proceedings in Contested Case No. W1-203

GRIC Water Rights

Much of the litigation in the Gila Adjudication over the past several years has taken place in Contested Case No. W1-203, which is to determine the water rights by and for the Gila River Indian Community (GRIC). In 1997, Superior Court Judge Susan Bolton (who was then presiding over the Gila Adjudication) set a deadline for filing summary judgment motions relating to the preclusive effect of prior decrees and agreements on the water right claims by and for GRIC ("GRIC claims"). See Superior Court's Order of December 8, 1997. Various parties thereafter filed motions, contending that the GRIC claims were precluded by certain prior decrees and agreements. Each of these motions was briefed and argued before the Special Master, who issued two reports to the trial court. The parties filed objections to the Special Master's reports, those objections were briefed, and Judge Ballinger heard argument and entered his decision on February 20, 2002 and amended it *nunc pro tunc* ("now for then"—designating a delayed action which takes effect as if done at the proper time) on March 7, 2002.

Preclusion

Former Decrees

Globe Equity

Alloted Lands

The issues before Judge Ballinger involved the preclusive effect of various decrees and agreements. The most broad-ranging of these issues related to a motion for partial summary judgment filed by several non-Indian parties seeking a declaration that GRIC's rights to the Gila River were limited to those decreed in the 1935 *Globe Equity* Decree. See *United States v. Gila Valley Irrigation Dist.,* Globe Equity No. 59 (D. Ariz. June 29, 1935). The *Globe Equity* Decree involved the adjudication of the Gila River from a point ten miles east of the Arizona-New Mexico line to a point just upstream from the confluence of the Gila and Salt Rivers. The decree awarded water rights for approximately 50,000 acres of allotted lands on the Gila River Indian Reservation, for a total of approximately 300,000 acre-feet of water per year. In the Gila Adjudication, by comparison, GRIC and the United States (on GRIC's behalf) have made claims to approximately 1.5 million acre-feet of water per year for the Reservation.

Res Judicata

Judge Ballinger, basing his decision largely on the United States Supreme Court's opinion in *Nevada v. United States*, 463 U.S. 110 (1983), held that the *Globe Equity* Decree has *res judicata* (i.e., previously decided) effect on GRIC's water rights, such that neither the United States nor GRIC may assert additional claims to the mainstream of the Gila River against parties to the decree or their privities. Judge Ballinger also held that the ability to assert the preclusive effects of the 1935 decree runs not only to those entities who were parties to the decree but also to subsequent appropriators who were not parties.

The other four motions addressed by Judge Ballinger included: 1) a motion regarding the preclusive effect of the decision of the United States Claims Court in a proceeding between GRIC and the United States known as "Docket No. 228" ("Docket No. 228 Motion"); 2) a motion regarding the preclusive effect of the 1903 *Haggard* Decree, the 1936 "Maricopa Contract," and Claims Court Docket No. 236-D

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("*Haggard* Motion"); 3) a motion regarding the preclusive effect of the 1907 "Sacaton Agreement" between the United States and the Salt River Valley Water Users' Association ("Sacaton Motion"); and 4) a motion regarding the preclusive effect of two 1945 agreements ("Buckeye-Arlington Agreements") on GRIC's rights, including its rights to groundwater ("Buckeye Motion"). Judge Ballinger 1) denied the Docket No. 228 Motion; 2) granted, in part, the Haggard Motion; 3) granted the Sacaton Motion; and 4) denied the Buckeye Motion.

Damage Claims

The basis for the Docket No. 228 Motion was that GRIC's claims are precluded by its arguments in the Docket No. 228 proceedings and by its receipt of payment resulting from those proceedings. Congress established an Indian Claims Commission (ICC) in 1946 for purposes of creating a forum for Indian tribes to bring money damage claims against the United States, for the failure to protect Indian resources. See 2 U.S.C. § 70a. The ICC's jurisdiction was later transferred to the United States Court of Claims. Docket No. 228 dealt with one set of claims filed by GRIC against the United States. Specifically, Docket No. 228 involved GRIC's damage claims for the alleged taking of this aboriginal land of the Pima and Maricopa Indians outside the Gila River Indian Reservation. In Contested Case No. W1-203, the moving parties argued that, in order to maximize the amount that it would receive in damages in that proceeding, GRIC had contended that much of land within the aboriginal territory outside the Reservation was "agricultural." To show the "agricultural" value of the land, GRIC had argued that virtually all of the water supply in central Arizona was available to this off-Reservation land when it was taken from the Indians in 1883. Ultimately, GRIC received over six million dollars for 375,000 acres of "agricultural" land, "inclusive of water rights." The moving parties argued that GRIC should be precluded from now contesting the water rights for 375,000 acres of off-Reservation land.

1883 Taking

Motion Denied

Judge Ballinger denied the Docket No. 228 Motion because, on summary judgment, he could not determine that the issues in Docket No. 228 and the Gila Adjudication water right claims were the same.

Haggard Motion (Salt River)

The *Haggard* Motion related to GRIC's federal reserved right claims to the Salt River. The moving parties argued that GRIC's claims to the Salt River were precluded by: 1) the 1903 *Haggard* Decree; 2) the 1935 Maricopa Contract; and 3) the Claims Court's ruling in Docket No. 236-D. Docket No. 236-D was another ICC proceeding, in which GRIC sued the United States for money damages, claiming that the United States had failed to adequately protect GRIC's rights to the Salt River. In largely denying GRIC's requested relief, the Claims Court had found that GRIC had no rights to the Salt River, except for (at most) 1,490 acres in the northwest portion of the Reservation. Thus, GRIC had no claim for damages against the United States for the alleged failure to protect any other purported water rights from the Salt River. In the Contested Case No. W1-203 proceedings in the Gila Adjudication, the moving parties argued that GRIC should be precluded from claiming rights to any water for more than 1,490 acres from the Salt River.

Appeal Granted

Judge Ballinger granted the *Haggard* Motion with respect to Docket No. 236-D. If upheld on appeal, this ruling will preclude GRIC from claiming rights to the Salt River for any more than 1,490 acres on the Reservation.

Sacaton Motion

The 1907 Sacaton Contract related to the ability of a limited number of Pima and Maricopa Indians to become members of Salt River Valley Water Users' Association and to obtain electrical power from the Salt River Federal Reclamation Project. The agreement also specifically provided that it did not give the Indians any right to water, even if they became members. Judge Ballinger found that neither GRIC nor its members had any ownership interest in or right to use the SRP water storage or distribution facilities.

Buckeye Motion

The last motion related to the 1945 agreements between the United States and the Buckeye Irrigation Company and Arlington Canal Company. The moving parties argued that the agreements, and the positions taken by the United States and GRIC in Claims Court Docket No. 236-F regarding those agreements, preclude GRIC from irrigating any lands or pumping any underground water on the Reservation except on certain specific lands. Judge Ballinger held that the agreements were valid and binding on GRIC, but he found that an issue of fact exists as to what the contracts mean and that, thus, a trial could assist the court in determining the meaning of these agreements.

AZ Supreme Court Review

GRIC, the United States, and other parties filed petitions for interlocutory review with the Arizona Supreme Court, asking the Court to review various portions of Judge Ballinger's February 20, 2002 order. Nothing happened to these petitions for more than two years. Nevertheless, a joint status report from the parties was filed on January 14, 2005, followed shortly thereafter by a telephonic presubmittal conference. On February 23, the Supreme Court issued an order setting forth the schedule for briefing and oral arguments.

On February 16, 2005, GRIC also filed a motion requesting that the Supreme Court consider a portion of its pending petition be reviewed concurrently with the petition filed by the San Carlos Apache

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San Carlos Apache Tribe

Appeal

Salt River Project

State Trust Lands

Implied Sufficiency

No Precedent

Transbasin Diversion

Hydrographic Survey

Tribe (SCAT) with respect to similar rulings in Contested Case No. W1-206. The United States filed a similar motion requesting the Court to consider its earlier petition concurrently with that of GRIC and the San Carlos Apache Tribe. On April 20, 2005, however, the Supreme Court denied the requests for concurrent review.

Proceedings in Contested Case No. W1-206

Similar to the proceedings and issues in W1-203, Contested Case No. W1-206 deals with the water right claims made by and for SCAT. In 2002, Judge Ballinger heard oral argument on various summary judgment motions in that case, in which the moving parties argued that SCAT was precluded from claiming any more water from the Gila River other than the 6,000 acre-feet it was decreed in the *Globe Equity* Decree. On May 17, 2002, Judge Ballinger entered summary judgment against SCAT. Subsequently, SCAT filed a petition for interlocutory review with the Arizona Supreme Court, which the Court granted in 2004. A briefing schedule was entered with respect to the Court's review of the SCAT petition. Briefs are being filed in a six-step process during the summer of 2005. The Supreme Court has set oral argument on the W1-206 issues for October 28, 2005.

Verde Valley Order to Show Cause Proceedings

The most recent litigation in the Gila Adjudication involves several efforts by the Salt River Project (SRP) to obtain interim injunctive relief against certain non-Indian landowners along the Verde River. On April 26, 2004, SRP filed five separate Applications for Order to Show Cause (OSC) directed at violations by various Verde Valley water users. Specifically, SRP contends that several claimants along the Verde River are taking SRP's senior water rights via direct surface water diversions and by pumping subflow. After various motions and a status conference, the superior court entered an order deferring certain of those matters until after the subflow issues have been resolved. Other OSC matters not related to the subflow issue are now engaged in discovery and motion practice.

State of Arizona's Claims for Federal Reserved Rights for State Trust Lands

On June 21, 2004, the State of Arizona filed a motion for partial summary judgment in the Gila Adjudication, asking that the court enter an order establishing the existence of federal reserved water rights for state trust lands. The State asserts that it owns approximately 9.3 million acres of land, of which approximately 8.8 million acres were granted to Arizona by the United States Congress for the financial benefit of the State's common schools, universities, and certain other public institutions. According to the State's motion, the Federal Government also impliedly reserved sufficient water for these lands at the time is granted the lands to Arizona. This issue also pertains to State lands in the Little Colorado Adjudication.

Acceptance of such rights, normally applied only to Indian reservations and other federal conclaves, would constitute an unprecedented development in western water law. Several of the grants were made at a relatively early date. Granting the State federal reserved rights as of the dates of the grants for the large amounts of acreages included in those grants would have a dramatic impact on the availability of water supplies for other users.

Judge Ballinger referred the issues regarding the State's summary judgment motion to the Special Master on January 20, 2005. Discovery has commenced, and the parties have briefed various procedural issues. No briefing schedule or argument on the substantive issues has yet been set, and it could be a substantial time before these issues are resolved.

Show Low Lake Proceedings in the Little Colorado Adjudication

In 2003, the Phelps Dodge Corporation initiated a special contested case concerning its claims to Show Low Lake and the Hopi Lands **h**ydrographic **s**urvey **r**eport (HSR). In particular, the dispute surrounding Show Low Lake involves a transbasin diversion of water by Phelps Dodge, which in the past diverted water from the Lake in the White Mountains and transported it down to Morenci for use at its mining operations through a series of conveyances and exchanges.

On July 2, 2004, ADWR issued a draft HSR. On January 31, 2005, ADWR filed a two-volume final supplemental HSR that contains the results of ADWR's investigation of the water rights claimed by Phelps Dodge for diversion and storage rights to Show Low Lake. In particular, Volume I contains background information, an analysis of Phelps Dodge's amended statement of claimant, a description of agreements and water rights associated with Phelps Dodge's use of water at the Morenci mine, and ADWR's proposed water right attributes for Phelps Dodge's claims to Show Low Lake. Likewise, Volume II contains copies of agreements and other documents related to Phelps Dodge's use of water at

SW Water

Abandonment

Disputes Continue

the Morenci mine. ADWR also filed instructions about whether and how to file an objection to Phelps Dodge's water rights claim to Show Low Lake. Claimants can file objections to the information presented in the HSR. The last day to file an objection was scheduled for August 1, 2005.

On June 29, 2005, Phelps Dodge filed a notice of abandonment of its water rights in Show Low Lake and a motion to dismiss the proceedings relating to the Show Low Lake HSR. The City of Show Low and various other entities joined in this motion.

SUMMARY & CONCLUSIONS

Execution and effectiveness of AWSA is a major advance in clarifying the priority and quantity of water rights in Central and Southern Arizona. Even if AWSA is ultimately implemented, however, the Gila and Little Colorado River Adjudications likely will continue for many more years to come, as the courts struggle with disputes between non-Indian parties and with those remaining tribes who have not entered into comprehensive settlement agreements.

Despite the best efforts and intentions of all involved, the simple fact remains that the supply of water in most areas of Arizona is less than the needs and wants of all potential users. As long as that remains true, litigation over water rights almost certainly will continue. For this reason, anyone interested in constraints on water use and the resulting impacts on property values would be well served to keep informed on the developments in the Arizona general stream adjudications.

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Website

Digital Resource

Contributing Libraries

Intended Scope

WESTERN WATER INFORMATION

THE WESTERN WATER DIGITIZATION PROGRAM

by Constance Lundberg, Jones Waldo Holbrook & McDonough (Salt Lake City, UT)

The internet-based Western Waters Digital Library (WWDL) has accomplished the project's initial steps towards becoming a comprehensive digital resource for easy access to relevant legal, scientific, historic and contemporary water-related information concerning the American West. The ultimate aim of WWDL is to provide the resources necessary to promote more informed decisions about our region's most precious natural resource.

WWDL was launched in 2003 under the leadership of the Greater Western Library Alliance (GWLA) with a National Leadership Grant from the Institute of Museum and Library Services. The grant funded the development of digital collections at twelve academic research libraries in eight western states. These initial collections focused on four principal river basins: the Columbia, Colorado, Platte, and Rio Grande.

The WWDL process created an aggregated metadata index from the individual library collections. The resulting data compilation is being harvested to a multi-site server at the Marriott Library to enable virtual, seamless searching of all the collections from the central WWDL website: westernwaters.org.

Current content contributors include: Brigham Young University; Arizona State University; University of Arizona; Colorado State University; University of Nebraska at Lincoln; University of Nevada at Las Vegas; University of New Mexico; Oregon State University; University of Oregon; University of Utah, Washington State University; and University of Washington.

Now nearing the end of the initial grant period, the WWDL has achieved its three original goals. WWDL ACHIEVEMENTS INCLUDE:

1) developing a viable and sustainable technical infrastructure
2) laying the foundation for the continued development of a comprehensive digital library about water in the west
3) establishing a model for institutional cooperation and collaboration among GWLA and other institutions across the West

To date over 80,000 pages of digital materials have been created for the WWDL and are now available for searching on the web site.

WWDL intends to expand geographic coverage and institutional participation incrementally. To achieve this vision, WWDL will develop the collection in planned phases, eventually providing information on all the major rivers and tributaries in the West. Information will include historical, legal, economic, scientific, and spatial data. The underlying aim and intended long-term outcome is to support more informed decision-making about water distribution and usage in the West.

WWDL is seeking feedback on the effectiveness of the website and the content of the collection created thus far. If the furtherance of informed water-related decisions in the West is of interest to you, please visit WWDL website and let us know what you think. If you have any comments or suggestions for additional materials, please use the following contact information.

FOR ADDITIONAL INFORMATION (OR TO PROVIDE FEEDBACK) CONTACT:

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Water Speculation

Anti-Speculation Doctrine

Vague Tranfers

Private Investor

ISG

New Right v. Transfers

Doctrine Upheld

Transfer Issues

Priciples

SPECULATION IN WATER RIGHTS

TRANSFER DECISIONS BY THE COLORADO SUPREME COURT / SPECIAL STATUS FOR MUNICIPALITIES

by David C. Moon, Editor

COLORADO TRANSFERS DECISION

In two decisions announced September 12, 2005, the Colorado Supreme Court clarified how it views Colorado's "anti-speculation doctrine" when a water right transfer is proposed. Justice Greg Hobbs wrote both majority opinions, which affirmed the Colorado Water Court's decisions rejecting certain applications. The Water Court had dismissed a change of water right application because the applicants did not identify the particular location where the appropriation would be put to beneficial use under the transfer or identify the actual users or type of use proposed. The transfer application sought to change water rights historically used for irrigation purposes to "all beneficial uses" in any of twenty-eight Colorado counties. The Supreme Court decisions do, however, allow High Plains A & M, LLC and Wollert Enterprises, Inc. (collectively, High Plains) and the **i**ndependent **s**hareholders **g**roup (ISG) to re-file their change applications, without prejudice, when actual places of beneficial use can be identified. *High Plains A & M, LLC v. Southeastern Colorado Water Conservancy District*, Nos. 04SA266 & 04SA267 (Colo. Sept. 12, 2005); and *ISG, LLC v. Arkansas Valley Ditch Association,* No. 04SA268 (Colo. Sept. 12, 2005).

High Plains is a private water investment company which had purchased approximately 115 farms served by the Fort Lyon Canal Company (FLCC) system, along with 20,000 FLCC shares. FLCC is a "mutual ditch company," operating since 1897, that utilizes an extensive system of canals and reservoirs with decreed Arkansas River direct flow and storage water rights for the benefit of its shareholders. High Plains also owns options to purchase over 8,000 additional shares, for a total ownership and control of almost 29,000 shares, or approximately thirty percent of all the outstanding FLCC shares. On March 28, 2003, High Plains filed two essentially identical change applications for different blocks of shares. ISG filed a third, virtually identical, application. ISG consists of forty-five ranchers and farmers who own 8,287.05 FLCC shares, or 8.8% of the total outstanding shares.

High Plains filed a motion with the Water Court seeking a legal ruling "that the anti-speculation doctrine, *see* section 37-92-103(3), C.R.S. (2005) and *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.,* 197 Colo. 413, 417, 594 P.2d 566, 568 (1979), and the 'can and will' requirements of section 37-92-305(9)(b), C.R.S. (2005), apply only to new appropriations in proceedings for absolute or conditional water rights and not to change application proceedings." *High Plains*, Advance Sheets, pages 12-13. Various objectors filed a motion for summary judgment, arguing the applications violated the anti-speculation doctrine and presented no specific plan that could be assessed for "injury" to other water users ("injury" is one standard for approval used in change applications).

The Colorado Supreme Court upheld the "anti-speculation doctrine" and found that it does apply to water right transfers.

> "Reviewing our cases and the applicable statutes, we determine that the anti-speculation doctrine is rooted in the requirement that an appropriation of the public's water resource must be for an actual beneficial use. To implement this requirement, adjudication of water right and change of water right applications includes identification of the structures through which the appropriated water will be diverted and delivered for identified beneficial uses at identified locations."

High Plains, Advance Sheets, page 14. See section 37-92-103(5) and section 37-92-103(3)(a)(I) and (II), C.R.S. (2005).

The opinion also provided a general discussion regarding the range of issues involved in transfer proceedings.

> "In a change proceeding, the water court has a duty to ensure that the true right — that which has ripened by beneficial use over time — is the one that continues in its changed form under the new decree. Santa Fe Trail Ranches, 990 P.2d at 55. Limitations made applicable to the change of water right by the court's decree [Water Court] advance fundamental principles of Colorado and western water law favoring optimum use, efficient water management, priority administration, and disfavoring speculation and waste. *Id.* at 54."

High Plains, Advance Sheets, pages 21-22.

Water Speculation

Private Entity

"Governmental Agency" Exception

Beneficial Use

Investment Risk

"Reasonable Expectations"

Doctrine Extension

Historic Consumptive Use

The decision did, however, differentiate between a "governmental agency" and a private entity where a change application is concerned. "Accordingly, the change applicant must show a legally vested interest in the land to be served by the change of use and a specific plan and intent to use the water for specific purposes. This statutory requirement can be satisfied by a showing that the appropriator of record for purposes of the change decree is a *governmental agency*, or a person who will use the changed water right for his or her own lands or business or has an agreement to provide water to a public entity and/or private lands or businesses to be served by the changed water right. § 37-92-103(3)(a)(I), C.R.S. (2005)." *High Plains*, Advance Sheets, page 25 (emphasis added). The court did not provide any explanation as to what, if anything, would constitute "speculation" by a municipality.

Despite the exception carved out for a "governmental agency" (which allows such an agency to forego providing the specifics that are required for a private entity's transfer), Justice Hobbs' opinion went on to point out that the court does not disapprove of private investment for water development.

> "Our cases concerning the anti-speculation doctrine do not disapprove of water development or private investment in water projects; rather, they re-emphasize our traditional requirement that appropriated water is applied to actual beneficial use. See, e.g., *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 78-80 (Colo. 2003) (requiring evidence of identifiable place and manner of use in applications for withdrawal of designated groundwater); *Lionelle v. Southeastern Colo. Water Conservancy Dist.*, 676 P.2d 1162, 1169 (Colo. 1984)(finding insufficient evidence of future needs and uses of the water to show intent to appropriate in application for conditional enlargement of storage right); *Vidler Tunnel,* 594 P.2d at 568 (stating that "the right to appropriate is for use, not merely for profit")(emphasis in original)."

High Plains, Advance Sheets, pages 25-26.

High Plains advanced an equity argument that its investment was put at risk by the rejection of its change application. Relying on the "well-established methodology" for transfers and its view of the actual rights that High Plains had purchased from FLCC, the court rejected that position.

> "High Plains argues that it is prejudiced by dismissal of its applications because of risk to its investment and because it cannot enter into contracts with end users until it has court approval to change the water rights. This argument reverses the well-established methodology for change of type and place of use proceedings. As an initial matter, High Plains's investment so far has been primarily for the purposes of acquiring FLCC shares that are decreed for irrigation use on lands under the FLCC system. Purchase of shares in a mutual ditch company guarantee only a proportionate interest in the water rights held by the mutual company and continued delivery of the water to their historic place of use, upon payment of the assessments imposed. See *Brown*, 56 Colo. at 222, 138 P. at 46-47."

High Plains, Advance Sheets, page 31.

> "Our decision in this regard does not prejudice the ability of investors such as High Plains to realize *reasonable expectations* on their investments. First, High Plains can use the shares it acquired on lands under the FLCC system, to the benefit of the local economy and to consumers of agricultural products."

High Plains, Advance Sheets, page 32 (emphasis added).

Colorado water attorney Larry MacDonnell told The Water Report that the decision significantly extends the Colorado anti-speculation doctrine by applying it to an established property right rather than a new appropriation of water. "The decision reflects widespread concern in Colorado about the transfer of water out of agriculture, but it imposes conditions on the transferability of mutual ditch shares that represent a significant change in the law," MacDonnell said. A law review article by MacDonnell and Teresa Rice was cited by the Colorado Supreme Court in *High Plains* when the opinion noted that Colorado's "future well-being likely depends on continued transfers of appropriated agricultural water to other uses at other places." *High Plains*, Advance Sheets, page 29.

The Colorado Supreme Court also discussed the amount of the water right that may be transferred and the protection afforded to remaining water users in the ditch company. "Second, we have held that a sufficient historic consumptive use analysis in a change of water right case can be utilized in another change case for allocation of the pro-rata share of water to which each mutual company shareholder is entitled. *Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001).

Water Speculation

"Nebulous and Expansive" Application

ISG Case

"Historic Consumptive Use"

Injury Standard

Temporary Changes

No Abandonment

This assures that all shareholders will be fairly and equitably treated and prevents expensive re-litigation of historic consumptive use in transfer after transfer involving the same ditch or reservoir system." *High Plains*, Advance Sheets, page 32.

Justice Hobbs succinctly stated the court's rationale for rejecting the "premature" application:

> "It is possible that High Plains harbored unrealistic expectations when it purchased such a large interest in FLCC. The water court's concern about the 'nebulous and expansive' nature and scope of the High Plains application undoubtedly stems from ambiguity about whom the requested change decree is going to serve, when, how, and in what capacity — ranging from simple resale of some or all of the shares over time to providing raw or retail water service to others. In any event, High Plains's applications for a change in the type and place of use are premature in the absence of identified places of actual beneficial use for operation of the change decree. As we said in *Combs*, a stockholder in an irrigating company 'can only transfer his priority to some one who will continue to use the water.' 17 Colo. at 152, 28 P. at 968."

High Plains, Advance Sheets, pages 36-37.

In the *ISG* case, the Colorado Supreme Court applied its decision in *High Plains* to make essentially the same holding. Since ISG also did not identify the locations at which the new use would be placed to actual beneficial use, the court found that the water court correctly dismissed the application.

The decision in *ISG* did address some additional arguments made by the applicants that were not made in the *High Plains* case. ISG maintained that the water court's decision would cause problems with "historic consumptive use" determinations if they attempted to take advantage of temporary changes of their water rights allowed under Colorado law. Justice Hobbs first explained the general principles involved in permanent transfers of water rights, and then specifically held that ISG users would not suffer any ill effects if they took advantage of temporary change possibilities.

> "The primary purposes for the historic consumptive use requirement in a permanent transfer adjudication is to prevent enlargement of the water right and to define and include decree conditions necessary to protect against injury to other water rights. See *Farmers Reservoir & Irrigation Co. v. City of Golden,* 44 P.3d 241, 246-47 (Colo. 2002)(extensively explaining the traditional proscriptions against enlargement of decreed water rights and the protections provided by the historic consumptive use limitation on changes). The situs of the decreed water right is the place at which the historic consumptive use calculation is made. See *Santa Fe Trail Ranches*, 990 P.2d at 54 ("the right to change a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use").
>
> ISG asserts that its members might want to take advantage of temporary changes that would optimize either the value or the beneficial use of their water rights in particular years and under particular conditions. Nothing in our decisions in High Plains or this case prevents ISG shareholders from proceeding under statutes that provide for a variety of means by which changes can be made on a temporary basis with approval by the state or division engineer. See, e.g., §§ 37-80.5-104 to -106, 37-83-104, 37-83-105, 37-92-309, C.R.S. (2005)."

ISG, Advance Sheets, pages 21-22.

> "Unlike the applicant for a permanent change of water rights in *Santa Fe Trail Ranches,* any authorized temporary changes to type or place of use made by ISG will not serve to reduce its historic consumptive use allocation as measured by operation of the FLCC decreed water rights. Nor will those changes give rise to a presumption of discontinuance or abandonment. The legislature clearly intended to promote flexibility in the administration of water rights, especially in the circumstances of temporarily transferring water from agricultural use to municipal use on a contract basis. It did not intend to penalize owners of decreed appropriations for properly taking advantage of these statutes according to their terms."

ISG, Advance Sheets, page 25.

Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Court's homepage at www.courts.state.co.us/supct/supctcaseannctsindex.htm and are posted on the Colorado Bar Association homepage at www.cobar.org.

Water Speculation

"Great and Growing Cities" Doctrine

"M & I" Uses

Any Limit?

***Sheriff* Case**

Population Needs

Colorado Rulings

Oregon Case

SPECULATION AND MUNICIPALITIES IN THE WEST

The *High Plains* decision noted the distinction Colorado recognizes between a "governmental agency" and a private entity where a change application is concerned (see Advance Sheets, page 25). Presumably because it was unnecessary to the decision, Justice Hobbs' did not provide any further discussion about what circumstances, if any, would constitute "speculation" on the part of a "government agency."

The court's distinction continues to recognize the special position granted to municipalities under a 1939 decision. The city of Denver was allowed to appropriate far more water than it could demonstrate a use for at that time, under the theory that has been called the "great and growing cities doctrine." The rationale is that cities will grow and so will eventually their need for water; thus they are given an exception to the anti-speculation doctrine. *City and County of Denver v. Sheriff,* 96 P.2d 836 (1939). Government agencies have essentially been given a pass regarding the anti-speculation doctrine in Colorado based on the *Sheriff* case, by utilizing "conditional water rights." With a conditional water right, a priority date can be established for a diversion and a use of water that does not have to be completely implemented until some unknown time in the future. "While this practice is occasionally challenged as a form of water speculation, the courts have upheld the practice as prudent water planning." *Water and Growth in Colorado: A Review of Legal and Policy Issues*, page 29, Peter D. Nichols, Megan K. Murphy, and Douglas S. Kenney (Natural Resources Law Center, University of Colorado School of Law, 2001).

Do municipalities have any restrictions on this exception to the anti-speculation doctrine, or are they free to reserve any amount of water without limitation as "prudent water planning?" This issue has not been fully addressed in Colorado or in many states in the West. The question is important since "municipal" use has been generally acknowledged as including "municipal and industrial" uses by state water agencies and water courts throughout the West. "M & I" is an accepted term of art among water right professionals, meaning that a water right for a municipality is composed of not only what most people think of as the normal uses for a city, but also the immense amounts of water which *may* be necessary to supply large industrial users. The vast quantities of water *potentially* involved has only expanded in scope with the advent of computer companies that need huge amounts of clean water for chip plants and the like.

What exactly does the "great and growing cities doctrine" include? Should it be viewed as encompassing any water use that a municipality can eventually find a user for? Should it allow a city — no matter how small — to speculate on water rights, in order to convince a gigantic industrial user to locate in their city? Or, should the doctrine logically be limited to providing water for the population growth of a city?

Interestingly enough, the seminal case of *City and County of Denver v. Sheriff,* 96 P.2d 836 (1939) itself indicates the doctrine might not be as expansive as cities would like. Nichols, Murphy and Kenney alluded to the constraint of the *Sheriff* case in a footnote to their 2001 article on *Water and Growth in Colorado*: "*Sheriff* does not, however, alter the general rule against speculation outlined in *Ft. Lyon Canal Co. v. Chew*, 81 P. 37 (Colo. 1905). Rather, *Sheriff* says that 'it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the *needs resulting from a normal increase in population* within a reasonable period of time.' The *Sheriff* ruling allowed Denver to appropriate and bring water across the divide through the Moffat Tunnel for anticipated future demand stemming from population growth." (Id. at 29-30, emphasis added).

In that same article, the authors also pointed out some Colorado cases that they maintained are in contrast to the *Sheriff* ruling. "In contrast see *Colorado River Water Conservation District v. Vidler Tunnel Water*, which held that evidence of future needs and uses of water by certain municipalities, without firm contractual commitments from any municipality to use any of the water, was insufficient to show the intent to take the water and put it to a beneficial use requisite to obtaining a conditional water decree. 592 P.2d 566, at 568 (Colo. 1979). Also in contrast to *Sheriff*, see *Rocky Mountain Power Co. v. Colorado River Water Conservation District*, 646 P.2d 383 (Colo. 1982). The Rocky Mountain Power ruling prompted the legislature to respond with Colo. Rev. Stat. § 37-92-305(9)(b) (2000) which states that conditional rights will not be granted unless it is demonstrated that water can and will be diverted, stored, otherwise captured, possessed, or controlled. Finally, in contrast to *Sheriff*, see *Thornton v. Bijou*, which held that projected population increases are not probative of anticipated future demand. 926 P.2d 1 (Colo. 1996)." Id. at 29-30.

The anti-speculation issue may be coming to a head in Oregon soon. On September 9, 2005, the Oregon Supreme Court remanded the case of *WaterWatch v. Water Resources Comn.,* 193 Or App 87, 88

Water Speculation

Legislative Relief

Potential Industrial Use

Speculation

Future Needs Statute

Water Right as Bait?

P3d 327 (2004), back to Oregon's Court of Appeals "for further consideration." The Supreme Court footnoted their remand order with the notation that "there are other issues in the case that the Court of Appeals did not address." See *WaterWatch v. Water Resources Comn.*, 339 Or. 275, 119 P.3d 221 (2005); footnote 2. Those issues include the question of speculation by the municipal applicant for a new water right, the Coos Bay North Bend Water Board (CBNB). Although Oregon's Legislature may have foreclosed judicial review of the Court of Appeals decision by passing HB 3068 in its 2005 session, the remand opens the door to address the "other issues" that the Court of Appeals did not address the first time around.

The facts in *WaterWatch* lend itself to a review of the speculation issue:

> "The commission found CBNB's third water demand forecast, which used a base demand derived from past experience plus a projected additional industrial demand, to be 'reasonable.' WaterWatch asserted that that forecast showed that CBNB would not need water beyond its present resources and planned capacity until approximately 2050. The commission, however, accepted the contrary position that, by 2050, the need will be 3 million gallons of water per day. A diversion of 4.6 cubic feet per second would supply that need, but the commission allowed an additional 18.6 cubic feet per second in order to accommodate a potential industrial user who might require as much as 12 million gallons of water per day. The commission issued its final order granting the permit and allowing CBNB to withdraw water at a maximum rate of 23.2 cubic feet per second."

WaterWatch, Id. at 88 P3d 329.

WaterWatch and the other protestant in the contested case (City of Lakeside) asserted that "under Oregon's permitting system, permits may be granted only to those planning to make beneficial use of the water and that the ability to use the water must be more than speculative. See ORS 537.130; ORS 537.160; ORS 537.190." Id. at 336-337. The Court of Appeals decision also noted that the Respondents (CBNB, Water Resources Commission and Water Resources Department) asserted that "future needs must be considered when a municipality makes a water right application. They rely on ORS 540.610(4), which provides: 'The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.'" Id. at 340.

Unlike the applicant, the protestants argued that the language of ORS 540.610(4) clearly limited municipal water rights for future purposes to those necessary "by reason of growth of population" or for "cases of emergency." The Oregon Water Resources Commission granted 4.6 cubic feet per second to supply the municipalities' needs in 2050, *plus* an additional 18.6 cubic feet per second "to accommodate a potential industrial user…" Id. at 329.

Population growth forecasts had nothing to do with the industrial user that CBNB hoped to land in the future. The Oregon water agency, however, decided that it was also reasonable to grant a very large water right specifically for the purpose of attracting a big industrial user to the area. In fact, officials from CBNB themselves referred to such a potential industrial user as the "big fish." Clearly such a decision allows for a municipality to speculate on water. Should municipalities be granted huge water rights as bait for the "big fish" they wish to attract, simply because they are a municipality and not a private investor? It appears this contentious issue will be with us for awhile.

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David Moon, Moon Firm, previously represented one of the protestants in the *WaterWatch* case (City of Lakeside). Lakeside is not party to the appeal discussed in the article. He is a sole practicioner of water law in Eugene, Oregon. He previously practiced in Bozeman, Montana with Moore, Refling, O'Connell & Moon. He is co-editor of The Water Report. Mr. Moon received his undergraduate degree at Colorado College and his JD at the University of Idaho Law School. He is a member of the Oregon, Idaho and Montana Bars.

WATER BRIEFS

PESTICIDES DECISION MT
NINTH CIRCUIT
"NOT A POLLUTANT"

In a decision issued on September 8, in *Fairhurst v. Hagener*, the Ninth Circuit Court of Appeals held that a pesticide applied directly to Cherry Creek, Montana, for the purpose of killing non-native fish species, was not a pollutant under the federal Clean Water Act (CWA), and thus no NPDES permit was required for the application. The Court concluded that "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollutants' regulated by the CWA."

The Montana Dept. of Fish, Wildlife, and Parks (MDFWP) applied the pesticide (antimycin) to Cherry Creek as part of an effort to reintroduce the westslope cutthroat trout (a threatened species). The trout was threatened in part by competition with non-native trout species, and the pesticide was intended to eliminate the non-native species prior to reintroducing the westslope cutthroat. A citizen sued MDFWP, alleging that the application violated section 301(a) of the CWA and required an NPDES permit. The parties agreed that the pesticide was applied in accordance with the product's FIFRA label.

In concluding that the antimycin was not a "chemical waste," the Court first considered the dictionary definition of "waste," and concluded that the plain meaning of the term suggests that a pesticide intentionally applied to the water that leaves no excess after performing its intended function is not a "chemical waste." The Court further said that this analysis is consistent with EPA's July 2003 Interim Statement, which is entitled to some deference and is a reasonable interpretation of "chemical waste." The Court noted that the Interim Statement did not conflict with the earlier *Headwaters v. Talent* decision because the material at issue in Talent was the residual herbicide, not a pesticide applied intentionally to the water for a beneficial purpose. In the *Fairhurst* case, the plaintiff conceded that the pesticide "dissipated rapidly" and left no residue. Thus, the Court was clear that the *Talent* decision still stands.

The court declined to reach MDFWP's alternative defense—that even if the pesticide was a pollutant, no permit was required because the application was consistent with the FIFRA label. However, the Court did note that such an argument is foreclosed by *Talent*, which held that FIFRA label compliance does not preclude the need for an NPDES permit because each instrument serves a different purpose.

The entire case, *Fairhurst v. Hagener*, No. 04-35366 (September 8, 2005), is available by going to www.findlaw.com and following the links for the 9th Circuit, September 2005 decisions.

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WATER SHORTAGE WEST
POWELL & MEAD MANAGEMENT

The US Bureau of Reclamation (Bureau) is seeking public input on water shortage management strategies for Lakes Powell and Mead. As required by the National Environmental Policy Act, the Bureau on September 30th issued a Federal Register Notice announcing the next in a series of upcoming scoping meetings for soliciting public comment on the development of Lower Basin (Colorado River) shortage guidelines and coordinated management strategies for the operation of Lakes Powell and Mead under low reservoir conditions.

As part of the process, the Bureau proposes to prepare an Environmental Impact Statement that identifies guidelines and strategies under which the Department of the Interior would reduce annual water deliveries from Lake Mead to Lower Basin States below the 7.5 million acre-foot Lower Basin apportionment and the manner in which those deliveries would be reduced. Guidelines and strategies developed through the NEPA process will likely identify those circumstances under which the Department of the Interior would reduce annual Colorado River water deliveries to users in Nevada, Arizona and California, and the manner in which annual operations of these two Colorado River water bodies would be modified under low reservoir conditions.

To solicit comments on the scope of specific shortage guidelines, public meetings will be held in Salt Lake City, Utah; Denver, Colo.; Phoenix, Ariz.; and Henderson, Nev., between November 1 and November 8, 2005 (see TWR Calendar). Both oral and written comments will be accepted at the meetings. Entities or individuals who are unable to attend but wish to submit written comments can do so by close of business on November 30, 2005.

For info: Federal Register Notice on Bureau's website: www.usbr.gov/lc/riverops.html

CRITICAL HABITAT NW
BULL TROUT

The US Fish and Wildlife Service (FWS) has issued its final rule designating 3,828 miles of streams, 143,218 acres of lakes and 985 miles of shoreline paralleling marine habitat in Washington as critical habitat for the Klamath River, Columbia River, Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River populations of bull trout. The reduction in critical habitat designations from what was initially announced by FWS produced significant controversy (see Montgomery, TWR #14).

For info: The final rule, economic analyses, and maps are also available via the Internet at the FWS website: http://pacific.fws.gov/bulltrout/.

PRETREATMENT RULE US
WASTEWATER DISCHARGERS

EPA finalized the Pretreatment Streamlining Rule which revises how industrial and commercial facilities manage their wastewater discharges before sending it on to publicly owned treatment works (POTW) for final treatment. The pretreatment program requires manufacturing dischargers to use treatment techniques and management practices to reduce or eliminate the discharge of harmful pollutants that could compromise

municipal treatment plant processes or contaminate waterways. The new rule maintains that protection, but removes process requirements for industrial operations including sampling their discharges for pollutants that are not present at their facilities. This change will substantially reduce the costs to facilities, while still holding those facilities to the same federal discharge limits currently in place under Clean Water Act regulations.

"This rule helps reduce paperwork and increase incentives for water conservation, while maintaining important water quality protections," said Assistant Administrator for Water Benjamin H. Grumbles.

POTWs will be granted greater flexibility to issue "general permits" for effluent to multiple industrial users within the same treatment district that have similar operations, discharges and requirements. EPA estimates the rule will save 240,000 employee hours or $10.1 million annually currently expended on pretreatment requirements.

The pretreatment streamlining rule updates the National Pretreatment Program, which has been in place for more than 30 years.

For info: Eryn Witcher, EPA, 202/564-4355, email: witcher.eryn@epa.gov, or website: www.epa.gov/npdes/pretreatment

NEBRASKA CAFOS NE

CWA PENALTY

EPA Region 7 cited two operators of Concentrated Animal Feeding Operations (CAFOs) in eastern Nebraska on August 31 for violating the Clean Water Act, stemming from their illegal discharge of wastewater and runoff from livestock facilities into nearby streams or rivers. EPA ordered both CAFO operators to promptly construct proper livestock waste control facilities to stop pollutants from the feedlots from causing further harm to the environment. Both facilities will also pay a civil penalty. These enforcement cases were finalized earlier in August following a 40-day public notice and comment period.

EPA brought these actions largely due to the failure of both feedlot operators to comply with the requirements of the Nebraska Department of Environmental Quality (NDEQ) in a timely way. EPA cited DB Feedyards, Inc., near Tekamah (40 miles north of Omaha), for the unauthorized discharge of pollutants into a tributary of Bell Creek, which flows into the Elkhorn River. DB Feedyards had been operating its facility without proper waste controls for more than 15 years in violation of the Clean Water Act. It had not fully complied with previous orders from NDEQ to come into compliance. DB Feedyards must pay a penalty of $135,000.

EPA also cited J&S Feedlots, Inc., near Dodge (50 miles northwest of Omaha), for the unauthorized discharge of pollutants into a tributary of Pebble Creek, which flows into the Elkhorn River. J&S Feedlots has operated its facility since 1993, and failed to comply with an order from NDEQ in 2002 to install additional waste controls. J&S Feedlots must pay a penalty of $47,000.

The CAFOs both discharged into tributaries of the Elkhorn River. Parts of the Elkhorn River have been listed by NDEQ as "impaired" for fecal coliform, which means that the water is unfit for human contact due to high levels of bacteria. Wastewater discharges and runoff from livestock operations are partly responsible for this impairment. The Clean Water Act requires feedlots to prevent the discharge of all feedlot runoff because of the high pollutant levels it contains.

For info: Martin Kessler, EPA, 913/551-7236 or email: kessler.martin@epa.gov

COLUMBIA BIOPS NW

UPPER SNAKE BIOPS

On September 30, Judge James Redden ordered federal agencies to come up with a new plan (Biological Opinion) within one year to protect threatened and endangered species in the Columbia River hydropower system as part of the ongoing litigation in *National Wildlife Federation v. NMFS*. Redden sided with the plaintiffs (Earthjustice on behalf of environmental groups, Indian tribes and fishermen) in the lawsuit by deciding that one year was sufficient for NOAA Fisheries, US Corps of Engineers and Bonneville Power Administration to submit the Biological Opinion (BiOp). The 2004 BiOp will remain in place during the remand. Of particular interest will be the conclusions that federal agencies come to regarding operation of the federal hydroelectric dams and their impact on fish passage in the lower Snake River and Columbia River. See Moon, TWR #16.

In another case before Judge Redden, fishing industry and conservation groups on September 29 requested that he invalidate a federal BiOp for 12 federal reservoirs in the upper Snake River basin used for irrigation and flood control. Those plaintiffs are seeking an order from Judge Redden that would combine the federal Columbia River hydropower system BiOp (see above) and the upper Snake River BiOp into one comprehensive federal salmon plan. The plaintiffs — American Rivers, Idaho Rivers United, National Wildlife Federation, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources — allege that a 2005 BiOp for the upper Snake River projects is illegal for many of the same reasons that Redden found the 2004 BiOp for the FCRPS BiOp illegal in a May ruling.

The federal BiOps address the US Bureau of Reclamation's (Bureau) future operations and routine maintenance actions for 12 federal projects located in Wyoming, Idaho, and Oregon. Those projects include Minidoka, Palisades, Ririe, Michaud Flats, Little Wood River, Boise, Lucky Peak, Mann Creek, Owyhee, Vale, Burnt River, and Baker, collectively referred to as the upper Snake River projects. The BiOps released in March led the Bureau to say that planned operations and maintenance of 12 federal reservoirs in the Upper Snake River basin for irrigation and flood control will not jeopardize the survival of federally protected fish and wildlife species. The Bureau said the biological opinions were consistent with the terms of the Nez Perce Settlement Agreement (under the Snake River

Basin Adjudication) to address the agency's continued operation of Upper Snake projects through the year 2035, including the continued provision of water to augment flows in the lower Snake River to benefit salmon. See Rigby, TWR #18.
For info: Copies of the BiOps at the Bureau's website: www.usbr.gov/pn; Federal Caucus website: www.salmonrecovery.gov/; Earthjustice website: www.earthjustice.org/news/display.html?ID=1055

GROUNDWATER BASINS NM
STATEWIDE JURISDICTION

On September 23, New Mexico State Engineer John D'Antonio signed six special orders declaring administration over six new underground water basins and extending the boundaries of nine existing underground water basins. The State Engineer declared the Clayton, Causey Lingo, Mount Riley, Hatchita, Yaqui, and Cloverdale Underground Water Basins, and extended the Canadian River, Curry County, Fort Sumner, Lea County, Tularosa, Animas, Lordsburg, Nutt-Hockett, and Playas Underground Water Basins.

The areas being declared and extended encompass approximately 11,500 square miles, about 9.5 percent of the State of New Mexico, giving the State Engineer jurisdiction over the appropriation and use of all of the underground waters in New Mexico. The State Engineer has had jurisdiction over the appropriation and use of the surface waters in the state since 1907.

"The declaration and extension of each basin will not affect the validity of any water right in existence at the time the basin was declared or extended," said State Engineer D'Antonio. "The purpose of the declarations and extension of the basins is to provide for the statewide administration of underground water to accurately account for and administer the resources and to prevent impairment to valid existing rights."

In addition to statewide administration, the State Engineer said the action was taken to: apply the Rules and Regulations for the Administration of Underground Water statewide; apply all state laws pertaining to the administration of groundwater statewide; promote and support Active Water Resources Management; protect fresh water supplies within regional aquifers; provide for the orderly development of groundwater resources in the basins; provide for a more complete and accurate public record of the water rights; provide for the orderly completion of regional water planning; prevent actions that would be contrary to the conservation of water; and prevent actions that would be detrimental to the public welfare.

A hearing on the declarations and extensions will be held in Santa Fe on December 9, 2005. Information and maps on the basin declarations can be obtained on the Office of the State Engineer's website at www.ose.state.nm.us.
For info: Paul Wells, OSE, 505/ 827-6120, email: paul.wells@state.nm.us, or website: www.ose.state.nm.us/doing-business/NewBasins/index.html.

WATER SUPPLY STUDY WA
DECLINING AQUIFER

Governor Christine Gregoire recently earmarked $600,000 from the state's current capital budget to find ways to provide water to 170,000-acres of prime agricultural land in the central Columbia Basin of Eastern Washington. The area is at risk of losing a water supply as a result of the sharp decline of the Odessa Aquifer. The Governor was quoted as saying that the project will keep land irrigated "while we work toward the long-term solution of water storage."

Farmers began tapping into the Odessa aquifer in the 1970s, providing deep-well irrigation to potato, alfalfa and corn crops in the central Columbia River Basin. In the 1970s, the state issued groundwater permits to farmers allowing them to draw water from the aquifer based on the premise that they would eventually be served by surface water from the US Bureau of Reclamation's Columbia Basin Project. The Odessa ground water management sub-area was created by rule to allow groundwater use in anticipation of the continued development of the project.

Recently the Odessa Aquifer has been dropping about 10 feet per year. Mining of the aquifer is occurring at a rate that outpaces its ability to recharge and, as a result, the cost of lifting water to irrigate fields is rapidly becoming economically infeasible.

Department of Ecology (Ecology) Director Jay Manning will be working with the US Bureau of Reclamation, Columbia Basin Project Irrigation Districts and the Columbia Basin Development League to find ways to continue providing an affordable supply of water to farmers while improving the health of the aquifer. The $600,000 grant is the first installment by the state in a cost-sharing effort with the federal government to find water-delivery solutions in the basin. The funds will be taken from a $6 million appropriation authorized this spring by the Legislature in support of feasibility studies related to storage and operational improvements focused on the Columbia Basin Project and the Columbia River.

The combined potential economic loss to the region would total approximately $630 million per year, including 3,600 jobs, were the affected acreage in the area devoted to potato production returned to dry land agricultural practices, according to a Washington State University study commissioned by the Washington State Potato Commission.
For info: Joye Redfield-Wilder, Ecology Public Information Manager, 509/ 575-2610; Alice Parker, Columbia Basin Development League, 509/ 346-9442

KLAMATH FERC CA/OR
DAM REMOVAL

Dwight Russell, a California Department of Water Resources (CDWR) regional manager raised the issue of dam removal recently during the Klamath River Compact Commission's annual meeting. Russell said that CDWR thinks that the Federal Energy and Regulatory Commission should mandate a study

of Klamath River dam removal and alternatives to the project's hydroelectric generation of power (151 megawatts). Russell is California's representative on the interstate compact commission that was formed under a 1957 law (69 Stat. 613; 71 Stat. 497). The Klamath Tribes has also advocated such a position in the past, and the Pacific Coast Federation of Fisheries Association believes dam removal is essential for both fish passage and water quality.

PacifiCorp is in the process of relicensing its hydro facilities on the Klamath River. The licenses expire March 31, 2006. Issues that have been raised in the FERC process include fish passage, water quality impacts and power rates for irrigators. Fish passage has been blocked on the Klamath River due to the project since approximately 1913, cutting off habitat in hundreds of miles of stream primarily in Oregon.

PacifiCorp's predecessor granted favorable power rates to irrigators in the area fifty years ago (set to expire April 16, 2006). The electrical rates for irrigation pumping have been a half-cent per kilowatt-hour inside the Klamath Basin Project (KBJ: US Bureau of Reclamation Project), and 0.75 cents per Kwh outside the KBJ. PacifiCorp sent shock waves through the irrigation community in the Klamath Basin when they announced that they would raise the irrigators' rates some 1200 percent. PacifiCorp's planned action led to the recent passage of SB 81 (Rate Mitigation) by the Oregon Legislature in 2005, which prevents PacifiCorp from raising its rates more than 50 percent per year for the next seven years.

Irrigators meanwhile are maintaining their position in the FERC proceeding that they are entitled to a continuance of the lowest reasonable power rate from PacifiCorp. This position is based in part on the terms of the Klamath River Compact: Article IV calls for "lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells." Settlement talks are ongoing between the parties over the power rates. Oregon's Public Utility Council (PUC) is in the process of deciding whether rates for Klamath irrigators should go up as much as tenfold, and whether PacifiCorp can raise rates 12 percent statewide.

For info: California DWR website**:** www.dwr.water.ca.gov/ - search on "Klamath" for Klamath River Compact information;
Power Rates website: www.klamathbasincrisis.org/Poweranddamstoc/poweranddamstoc.htm

INTERSTATE WQ OK/AR

OKLAHOMA V. POULTRY

On June 13, Oklahoma Attorney General Drew Edmondson sued several out-of-state poultry companies for polluting the waters of Oklahoma. The complaint alleges violations of the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), state and federal nuisance laws, trespass and Oklahoma Environmental Quality and Agriculture Codes.

Named in the complaint are Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Aviagen, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. These companies include some of the country's largest providers of chicken, turkey and eggs to consumers in the United States.

The lawsuit was filed in the US District Court for the Northern District of Oklahoma. The suit addresses pollution in the Illinois River watershed, which consists of more than one million acres of land in Arkansas and Oklahoma.

The lawsuit alleges runoff from the improper dumping and storage of poultry waste has caused and is causing the pollution of Oklahoma streams and lakes. In the Illinois River watershed alone, the phosphorus from poultry waste is equivalent to the waste that would be generated by 10.7 million people, a population greater than the states of Arkansas, Kansas and Oklahoma combined, according to Edmondson's press release.

The attorney general said the Illinois River watershed serves as the source of drinking water for 22 public water supplies in eastern Oklahoma. "We're not only talking about phosphorus," Edmondson said. "This waste contains arsenic, zinc, hormones and microbial pathogens like e. coli and fecal coliform - not exactly things you want in your drinking water." Edmondson, who has spent the last three years seeking a negotiated water quality agreement with the poultry companies, said his attempts to reach an agreement outside the courtroom have not yet been successful. "One company alone, Tyson, announced it was spending $75 million over 12 months in an ad campaign. If they can afford that, they can afford to clean up their waste," Edmondson said.

On October 4th, the poultry industry named 161 Oklahoma citizens, cities and businesses as third-party defendants in the lawsuit, accusing them of a shared stake in the pollution in eastern Oklahoma. The industry's reply also maintained no pollution has actually occurred. This action drew the ire of Edmondson, who called the action "strictly a stunt to apply political pressure to my office. If the industry was really serious about naming third party defendants, why are all their 'defendants' located in Oklahoma. Half the watershed is in Arkansas, but according to the poultry companies, only the Oklahoma side is responsible for the pollution. The poultry industry has declared war on eastern Oklahoma, and they've just taken hostages."

The Associated Press reported on September 30 that six of the poultry companies named in the lawsuit have offered to donate $1.1 million to the Oklahoma Scenic Rivers Commission. The commission has been asking for donations for several purposes, including erosion control. The offer to donate asks the commission to adopt a resolution saying one of the greatest threats to the Illinois River and Lake Tenkiller is erosion. The requested

WATER BRIEFS

resolution would also say improper clearing along streams and banks allows cattle direct access to streams.
For info: Oklahoma AG's website: www.oag.state.ok.us/

SEDIMENT EVALUATION NW
REGIONAL FRAMEWORK

For several years now, the Regional Sediment Evaluation Team (RSET) has worked to consolidate and revise the previous Dredged Material Evaluation Frameworks (DMEF), creating a new Sediment Evaluation Framework (SEF) for use throughout the Pacific Northwest. A draft SEF was presented for public comment at a meeting in Portland, Oregon on September 14.

The draft SEF provides a framework for the assessment and characterization of freshwater and marine sediments in Idaho, Oregon, and Washington. The SEF is relevant to maintenance dredging and contaminated sediment cleanup related activities. It provides an evaluation regimen for sampling, sediment testing, and test interpretation. For dredging projects, it provides the basis for evaluating the suitability for unconfined open water or other disposal options. For sediment cleanup projects, it supports the evaluation of the potential risk of in-place sediments and tools to evaluate the sediments based on potential cleanup options

RSET involved representatives from federal and state agencies; Port Authorities; and private firms; including: US Army Corps (Seattle District, Portland District, Walla Walla District, and Northwestern Division), EPA Region 10, Washington Department of Ecology, Oregon Department of Environmental Quality, Idaho Department of Environmental Quality**,** National Marine Fisheries Service, US Fish and Wildlife Service, The Ports of Portland, Vancouver, and Coos Bay, and several engineering firms (Tetra Tech EC, Kennedy/Jenks Consultants, Anchor Environmental, Avocet, Battelle Pacific Northwest Laboratories, Columbia Analytical Services, Hart Crowser, MEC Analytical Services, and Northwestern Aquatic Sciences

Copies of the SEF are available from the Army Corps Seattle District website: www.nws.usace.army.mil
For info: Stephanie Stirling, US Army Corps Seattle District, 206/ 764-6945 or email: stephanie.k.stirling@usace.army.mil

RECLAIMED WATER AZ
BUREAU FONSI

On September 29, the US Bureau of Reclamation (Bureau) has completed a Finding of No Significant Impact (FONSI) for the proposed construction and operation of a 16-mile reclaimed water pipeline in the municipalities of Mesa and Gilbert. The pipeline will link the Greenfield and Southeast Water Reclamation Plants to the Highland Canal on the Gila River Indian Community. Reclaimed water will be mixed with water from the Roosevelt Water Conservation District Canal and groundwater in the Highland Canal and applied to farmland in the Santan Ranches area of the Community.

The proposed project is being carried out by the City of Mesa in order to execute the terms of a Reclaimed Water Delivery Agreement, which will allow the Gila River Indian Community to exchange a portion of its Central Arizona Project (CAP) water allocation in return for the reclaimed water provided by Mesa. The Bureau has determined that construction and operation of the pipeline will not significantly impact the environment, and a FONSI is appropriate. A copy of the FONSI and EA are available on the Phoenix Area Office website at http://www.usbr.gov/lc/phoenix/.
For info: John McGlothlen, Bureau's Environmental Resource Management Division, 602/ 216-3866.

SALMON FISHING CASE NW/CA
APPEAL TO 9TH CIRCUIT

The Pacific Legal Foundation (PLF) has filed an appeal with the US Ninth Circuit Court of Appeals following an unfavorable decision from the district court. On September 8th, US Magistrate Coffin in Eugene, Oregon, ruled against the plaintiffs and completely denied the relief requested.

In *Oregon Trollers Association v. National Marine Fisheries Service*, PLF is alleging that the National Marine Fisheries Service's (NMFS) regulation of commercial trollers' chinook salmon management measures illegally threatens to decimate fishing communities from Portland to San Francisco. The Secretary of Commerce is also a defendant in the suit due to Commerce's oversight of the Pacific Fishery Management Council, which sets the management measures.

Attempting to build off its success in *Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154 (Dist.Or. 2001), PLF maintains that federal law does not allow NMFS to treat hatchery fish and wild salmon differently or to issue harvest regulations based solely on naturally spawned salmon numbers. PLF also charged NMFS with failing to consider economic impacts of its regulation on fishermen and small businesses dependent on the commercial chinook salmon fishery, as required by federal law.
For info: Dawn Collier, PLF, 916/ 419-7111, or website: www.pacificlegal.org/

USGW REPORT US
GROUNDWATER DEPENDENCE

The US Geological Survey (USGS) recently issued a report on the nation´s dependence on ground water. The report, entitled "Estimated Withdrawals from Principal Aquifers in the United States, 2000," provides details of groundwater withdrawals and use from principal aquifers in each state. USGS found that more than 90 percent of groundwater withdrawals are used for irrigation, public supply (deliveries to homes, businesses, and industry), and self-supplied industrial uses. On a daily basis, 76.5 billion gallons are used for these three purposes with irrigation accounting for nearly three-quarters of this amount.
For info: USGS report is available online at: http://pubs.water.usgs.gov/circ1279

CALENDAR

Please Note: An extended Calendar containing ongoing updates now appears on The Water Report's website: www.thewaterreport.com. Subscribers are encouraged to submit calendar entries, email: thewaterreport@hotmail.com

October 17 **WA**

Water Resources Advisory Committee (WRAC) Meeting, Lacey, Ecology Hdqrters, 300 Desmond Drive. RE: Water Resource Management and Strategies (Agenda Varies). For info: Curt Hart, Ecology, 360/ 407-7139, email: char461@ecy.wa.gov, or website: www.ecy.wa.gov/programs/wr/wrac/wrachome.html

October 17 **OR**

DEQ Draft 303(d) Impaired Waters Report, Public Hearing, Bend, Central Oregon Board of Realtors, 2112 NE Fourth St, 3pm (information meeting), 4pm (formal public hearing). For info: Karla Urbanowicz, DEQ/WQ, 503/ 229-6099 or email: urbanowicz.karla@deq.state.or.us

October 17-19 **TX**

Western States Adjudication Conference, San Antonio, Drury Inn & Suites, 201 N. St. Marys. RE: Adjudication and Water Rights Issues; Sponsored by TCEQ. For info: Sue Phillips, TCEQ, 512/ 239-6327, or email: sphillip@tceq.state.tx.us

October 18 **OR**

Drinking Water Advisory Committee Meeting, Salem, Public Utility Commission Office, For info: Diane Weis, DHS, 503/ 731-4010 or email: diane.weis@state.or.us

October 18 **CA**

Water Quality Monitoring Conference, Nevada City, Miners Foundry, 325 Spring Street. Sponsored by the State Water Resources Control Board. For info: Kayle Martin, 530/ 265-5961 x201, email: kayle@syrcl.org, or website: www.yubariver.org

October 18-19 **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.

October 18-19 **NM**

Identifying "Water of the U.S." After SWANCC, Albuquerque, Marriott Pyramid North. RE: Wetland & Riparian Area Legal Workshop. For info: Laura Burchill, 207/ 892-3399, email: laura@aswm.org, or website: www.aswm.org/calendar/legal/legaloct.htm#66

October 19-20 **NM**

50th Annual New Mexico Water Conference, Las Cruces. For info: New Mexico Water Resources Research Institute, website: http://wrri.nmsu.edu/conf/confsymp.html

October 19-20 **WA**

Northwest Environmental Summit, Tacoma, Greater Tacoma Convention & Trade Center. Presented by Association of Washington Business and Northwest Environmental Business Council, RE: Current & Emerging Environmental Issues (Tracks: Policy Roundtable; Advanced Management/Technical; Compliance Basics). For info: Association of Washington Business, 800/ 521-9325 or website www.ecwashington.org

October 19-21 **NV**

"Innovative Management Technologies for the Arid West" WESTCAS' Fall Conference, Sparks, John Ascuaga's Nugget Hotel. RE: For info: WESTCAS, Gary Martin, 202/ 429-4344, or website: www.westcas.com/events/index.html

October 19-21 **TX**

Western States Water Council Meeting, San Antonio, The Historic Menger Hotel. For info: WSWC, 801/ 561.5300, website www.westgov.org/wswc/meetings.html

October 20-21 **OR**

Oregon Environmental Quality Commission Meeting, Portland, DEQ Rm 3A, 811 SW 6th Ave. For info: Day Marshall, Office of DEQ Director, 503/ 229-5990, website: www.deq.state.or.us/news/events/asp

October 20-21 **NV**

Nevada Water Law, Reno, Hilton Hotel, 2500 East Second Street. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

October 20-21 **DC**

US EPA Workshop on Nanotechnology for Site Remediation, Washington, D.C. RE: Nanotechnology for Hazardous Waste Site Remediation, Research Needs, Barriers & Incentives. For info: www.scgcorp.com/nanositeremed/index.asp

October 21 **OR**

Oregon Environmental Quality Commission Meeting, Portland, DEQ Headquarters. RE: Oregon Solutions, Sewage Disposal Contested Cases, Umatilla Chemical Agent Disposal Facility & More. For info: DEQ website: www.deq.state.or.us/about/eqc/agendas/2005/2005.10.21.EQCAgenda.htm

October 21 **OR**

Willamette River Basin 4th Annual Conference: Challenges for Oregon's Future, Portland, World Trade Center. RE: Legal, Technical, Practical Solutions & Alternative Strategies for Environmental Compliance; Clean Water Act, ESA, Safe Drinking Water Act, Superfund & Other Regulatory Programs. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com, or website: www.elecenter.com

October 21 **UT**

Utah Water Quality Board Meeting, Salt Lake City, Cannon Health Bldg., Rm125, 9:30am. For info: Utah DEQ, 801/ 538-6146, website: http://waterquality.utah.gov/wq_board/wq_board.htm

October 21-22 **OR**

Northwest Tribal Water Law Conference (2nd Annual), Eugene, University of Oregon School of Law. For info: Center for Tribal Water Advocacy, 544/ 276-1624, or website: www.tribaladvocacy.org

October 22-23 **OR**

18th Annual Oregon Coast Conference, Newport, 10/22: Newport Performing Arts Center, 10am-4:30pm and 10/23: Hatfield Marine Science Center,10am-3:30pm. Oregon Shores Conservation Coalition Event. RE: Preventing Ocean Pollution and Coastal Sprawl, Tools for Activists. For info: Sylvia Shaw, Oregon Shores' Executive Director, email: sylvia@oregonshores.org

October 24-25 **WA**

Wetlands Conference, Seattle. RE: Wetland/Resource Regulation, Corps of Engineers Policy Initiatives, Wetland Identification and Valuation, Mitigation Strategies, ESA, Contested Cases, Enforcement, HGM Assessments & More. For info: Law Seminars International, 800/ 854-8009, website: www.lawseminars.com

October 24-26 **CO**

Western Wetlands Conference, Denver, Marriot West. RE: Wetland Protection Challenges, Conservation, Gathering & Using Information, Water Availability & Mitigation. For info: Janet Bender-Keigley, email: jkeigley@montana.edu, or website: http://mtwatercourse.org/wwc/index.htm

October 25 **OR**

Draft "2005 Portland Watershed Management Plan" Open House & Public Review, Portland, Hinson Memorial Baptist Church, 1137 SE 20th Avenue, 6pm-9pm. For info: Mike Rosen, Portland BES, 503/ 823-5708 or email: mikero@bes.ci.portland.or.us

October 25-26 **CA**

25th Biennial Groundwater Conference and 14th Annual Groundwater Resources Association Meeting & Conference: "Past Lessons & Future Prospects," Sacramento, Sacramento Convention Center. RE: Climate Change, Septic System Discharge, Salinity Issues, Modeling, GW Law & Policy, Tracers & Age Dating, GW Management Plans, Unregulated Contaminants, Renaturalization, Quality & Recycled Wastes, Emerging Issues. For info: GRA, website: www.grac.org/am05.pdf or Conference website: http://www.waterresources.ucr.edu/index.php?content=news_events/gw_meetings/gw25thpage.htm

October 26 **CO**

Water Lawyer: Trial & Appellate Advocacy, Denver (CLECI Large Classroom) plus Colorado Springs, Cortez, Grand Junction, and Pueblo. For info: Colorado Bar, 303-860-0608, or website: www.cobar.org/cle/programs.cfm

October 26 **WA**

Columbia Basin Water Initiative, Moses Lake, Big Bend Community College ATEC. For info: Columbia Basin Development League, website: www.cbdleague.com/water/october_meeting.htm

October 26-29 **WA**

Irrigation District Modernization: SCADA & Related Technologies, Vancouver. RE: Modernization Projects, Implementation Strategies, Management Techniques, Water Delivery. For info: www.uscid.org/05scada.html

October 26-28 **CA**

Region 9 Tribal EPA Conference (13th Annual), Coarsegold, Chukshansi Gold Resort & Casino. RE: Region 9's Tribal Environmental Programs, Environmental Issues, Networking Opportunities. For info: Sam Elizondo, 559/ 683-6633, or Chukshansi website: www.chukchansigold.net/

October 27 **WA**

Climate Change Conference 2005 - The Future Ain't What It Used To Be: Planning for Climate Disruption, Seattle, Qwest Field Conference Center. For info: Deborah Brockway, 206/ 296-1927, or website: http://dnr.metroke.gov/dnrp/climate-change/conference-2005.htm

October 27-28 **TX**

Pollution Prevention Workshop - TCEQ, Houston, The U of Houston Small Business Development Center, 2302 Fannin, Suite 200. RE: Improved Efficiency Decreasing Pollution, Environmental Management Systems,, Enviro Regulations. For info: Dana Macomb, TCEQ, 512/ 239-4745, email: dmacomb@tceq.state.tx.us, or website: www.tceq.state.tx.us/assets/public/admin/events/10-05p2workshop.pdf

October 27-28 **UT**

Utah Water Law 13th Annual, Salt Lake City, Downtown Marriott Hotel. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

October 27-28 **OR**

Oregon Water Resources Commission Meeting, Klamath Falls. For info: Cindy Smith (OWRD), 503/ 986-0876, website: www.wrd.state.or.us/commission/index.shtml

October 27-28 **MT**

"Surface Water/Ground Water: One Resource," Montana Section Annual Meeting (American Water Resources Association), Bozeman. For info: Montana Section, 406/994-1772 or website: http://awra.org/state/montana/events/conference.htm

October 27-28 **WA**

Agricultural Lands in Transition, Stevenson. For info: Law Seminars International, 800/854-8009, website: www.lawseminars.com

October 29-November 2 **DC**

The Water Quality Event, Washington D.C. RE: Technology Solutions, Technical Sessions, Workshops, Facility Tours & Exhibitions. For info: WEFTEC website: www.weftec.org

October 30-November 3 **NM**

New Mexico Environmental Health Conference (10th Annual), Albuquerque, Sheraton Old Town. For info: Lorie Stoller, Conference Chair, 505/ 768-2718, or email: nmehc@swep.com

October 30 - November 4 **CA**

Pacific Fishery Management Council Meeting, San Diego, Hyatt Regency Islandia, 1441 Quivira Road. For info: PFMC, 866/ 806-7204, website: www.pccouncil.org

November 1 **UT**

Water Shortage Management Strategies: Lakes Powell and Mead, Salt Lake City, Hilton Salt Lake City Center, Topaz Room, 255 South West Temple, 6pm-8pm. RE: Public Comment on Development of Lower Basin Shortage Guidelines and Strategies for Operation of Lakes Powell and Mead. For info: www.usbr.gov/lc/riverops.html

November 2 **WA**

State of the Hanford Site Meeting, Seattle, University Tower Hotel Grand Ballroom, 6:30pm. RE: Hanford Decision Makers, Nuclear Waste Cleanup Decisions. For info: Tanya R. Williams, Ecology, 509/ 372-7883, or email: tawi461@ecy.wa.gov; Hanford Hotline, 800/ 321-2008

November 2 **CO**

Water Shortage Management Strategies: Lakes Powell and Mead, Denver, Adam's Mark Hotel, Tower Court D, 1550 Court Place, 6pm-8pm. RE: Public Comment on Development of Lower Basin Shortage Guidelines and Strategies for Operation of Lakes Powell and Mead. For info: www.usbr.gov/lc/riverops.html

(continued from previous page)

November 2-4 **WY**

"Wyoming's Water: Transitions Ahead," Wyoming Water Association Annual Meeting and Seminar, Casper, Ramkota Hotel. RE: Water Development & Project Permitting, Wyoming Water Planning, Coalbed Methane, Weather Modification & Economic Value of Water Supply. For info: John Shields, WWA, 307/ 631-0898, email: wwa@wyoming.com, or website: www.wyomingwater.org

November 2-4 **CO**

Brownfields 2005 EPA, Denver. Co-Sponsors EPA and ICMA Seeking Suggestions for Presentations, Sessions, Marketplace Roundtables & Best Practice Case Studies. Submission Deadline is April 29, 2005. For info: 202/ 962-3563, website: www.brownfields2005.org/en/Ideas.aspx, or email: Brownfields2005@icma.org

November 2-4 **TX**

"Precious, Worthless, or Immeasurable: The Value and Ethic of Water" Symposium, Lubbock, Texas Tech University School of Law. For info: Professor Gabriel Eckstein, email: gabriel.eckstein@ttu.edu, or website: www.watersymposium.net

November 2-4 **WY**

Wyoming Water Association Seminar and Annual Conference, Casper, Radisson Hotel. For info: WWA, 307/ 631-0898, or email: wwa@wyoming.com, or website: www.wyomingwater.org

November 3 **AZ**

Water Shortage Management Strategies: Lakes Powell and Mead, Phoenix, Arizona Department of Water Resources, Third Floor, Conference Rooms A&B, 500 North Third Street, 6pm-8pm. RE: Public Comment on Development of Lower Basin Shortage Guidelines and Strategies for Operation of Lakes Powell and Mead. For info: www.usbr.gov/lc/riverops.html

November 3-4 **OR**

Oregon Water Law, Portland. RE: Legislation; Klamath Basin Update; Deschutes Consensus; Municipal Developments; ESA Update; More. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

November 3-4 **CA**

California Water Law 4th Annual, San Diego, Marriot Hotel and Marina, 333 West Harbor Drive. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

November 3-4 **OR**

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

November 3-5 **NV**

57th Annual California Groundwater Association Convention & Trade Show, Sparks, Nuggett Casino Resort. For info: CGA, 707/ 578-4408, email: wellguy@groundh20.org, or website: www.groundh2o.org/

November 5 **UT**

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

November 5-7 **Palau**

US Coral Reef Task Force 14th Annual Meeting, Koror. RE: Coordinated Planning, Coral Reef Science and Management Strategies. For info: NOAA, (301) 713-9501, email Editor.Fishnews@noaa.gov, or website: www.nmfs.noaa.gov

November 7-9 **CA**

California 2005 Nonpoint Source Conference, Sacramento. RE: Project Design for Measurable Water Quality Improvements, Techniques for Monitoring Results. For info: Kim Wittorff, 916/ 327-9117, email: kwittorff, or website: www waterboards.ca.gov/nps/fall2005

November 7-10 **WA**

American Water Resources Association (AWRA) 2005 Annual Conference, Seattle, Red Lion. RE: Technical, Social & Legal Topics, Infrastructure & Asset Management, Water, Dam Removal, Sustainable Development, Large-Scale Water Projects, Search for Water. For info: AWRA, 540/ 687-8390 or website: www.awra.org/meetings/Seattle2005/index.html

November 8 **CO**

Legal Ethics in Water & Environmental Law, Denver. Sponsored by Colorado Water Congress. For info: CWC, 303/ 837-0812, email: macravey@cowatercongress.org, or website: www.cowatercongress.org

November 8 **NV**

Water Shortage Management Strategies: Lakes Powell and Mead, Henderson, Henderson Convention Center, Grand Ballroom, 200 South Water Street, 6pm-8pm. RE: Public Comment on Development of Lower Basin Shortage Guidelines and Strategies for Operation of Lakes Powell and Mead. For info: www.usbr.gov/lc/riverops.html

November 8 **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

November 9-11 **HI**

National Water Resources Association Annual Conference, Honolulu, Sheraton Waikiki. Sponsored by National Water Resources Association. For info: NWRA, 703/ 524-1544, email: nwra@nwra.org, website: www.nwra.org/meetings.cfm For info: www.nwra.org

November 10-11 **NM**

Natural Resources Development in Indian Country, Albuquerque, Marriott Hotel. RE: Interplay Between Fed, State & Tribal Laws and Regulations, Federal Agency Perspective, Overview of Laws, Agreements & Procedures, Federal Approval Role, Financing Options, New Fed Energy Bill & More. For info: RMMLF, 303/ 321-8100, email: info@rmmlf.org, or website: www.rmmlf.org

November 10-12 **OR**

League of Oregon Cities Annual Conference, Eugene, Hilton Eugene & Conference Center, 66 East 6th Avenue. For info: LOC website: www.orcities.org/Conference/tabid/806/Default.aspx

November 14-15 **WA**

The Mighty Columbia, Seattle, Renaissance Madison Hotel. RE: Preserving the Columbia River, Energy & Fish and Wildlife Strategies, Implementation. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

November 14-15 **WA**

14th Annual Conference on the Promises and Challenges of Growth Management, Seattle. RE: Growth Management Act, Sensitive Areas, Land Use Initiatives, Urban Density. For info: Karen Fox, Law Seminars Int'l, 206/ 567-4490 or 800/ 854-8009, or website: www.lawseminars.com/seminars

November 17-18 **OR**

Oregon Wetlands, Portland, 5th Avenue Suites Hotel. RE: Implications of State & Federal Regulations. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

November 17-18 **AZ**

Endangered Species Act, Tucson. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

November 17-18 **ID**

IWUA Water Law & Resource Issues Seminar, Boise, DoubleTree Riverside. Sponsored by Idaho Water Users Association. For info: IWUA, 208/ 344-6690, website: www.iwua.org

November 17-18 **TX**

Pollution Prevention Workshop - TCEQ, Austin, The University of Texas Thompson Conference Center. RE: Strategies to Improve Efficiency Decreasing/Eliminating Pollution, Environmental Management Systems (EMS), Environmental Regulations, & P2 Strategies. For info: Dana Macomb, TCEQ, 512/ 239-4745, email: dmacomb@tceq.state.tx.us, or website: www.tceq.state.tx.us/assets/public/admin/events/10-05p2workshop.pdf

November 18 **ID**

Idaho Water Resources Board, TBA. For info: IWRB, 208/ 287-4800, or website: www.idwr.idaho.gov/waterboard/minutes.htm

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