The Water Report™
Water Rights, Water Quality & Water Solutions in the West

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TAKING & WATER RIGHTS

CONSTITUTIONAL & CONTRACTUAL REMEDIES FOR GOVERNMENT TAKINGS THE TULARE LAKE DECISION AND BEYOND

by Roger J. Marzulla, Marzulla & Marzulla (Washington, DC)

Litigating water rights cases in federal courts is often a complex and challenging undertaking. First, many judges defer to agency decision-making and rulemaking regarding hydrology and the imperatives of the federal Endangered Species Act ("the ESA obligates federal agencies to afford first priority to the declared national policy of saving endangered species," *PCFFA v. Bureau of Reclamation*, 2005 WL 2649448, *1 (9th Cir. 2005) (internal quotations omitted)). Judges also may defer to the Clean Water Act, and congressionally imposed limitations on jurisdiction (for example, *Orff v. United States*, 125 S. Ct. 2606 (2005) (holding the Reclamation Reform Act, 43 U.S.C. § 390uu, does not permit a claimant to sue the United States alone)). Accordingly, a federal district judge may be more inclined to rule for the federal agency (such as the Bureau of Reclamation, the Fish and Wildlife Service, or the National Marine Fisheries Service) and against the water user in an injunctive case. *See, e.g*., *Klamath Water Users Protective Ass'n v. Patterson*, 191 F.3d 1115 (9th Cir. 1999); and *Barcellos and Wolfsen, Inc. v. Westlands Water Dist*., 899 F.2d 814 (9th Cir. 1990). Fortunately, equitable relief in the district court is not the sole remedy available to irrigators and urban water users. Although they may not be able to compel deliveries, they may nevertheless recover damages — sometimes including attorney's fees and expert witness costs — in the US Court of Federal Claims located in Washington, DC.

The Court of Federal Claims has nationwide jurisdiction over monetary claims (other than in tort) founded on federal statutes, executive regulations, government contracts, and the Constitution. A number of water districts have availed themselves of this jurisdiction to assert monetary claims against the United States for failure to deliver water to which they were entitled under state law. This article explores several such cases: their legal theories, the government's defenses and (as of this writing) what the court has ruled. Although it is too early to declare victory in most of these cases, the holdings thus far provide reason for optimism that water users are not entirely without a judicial remedy when the government refuses to make available to them the water to which they are entitled under state law. As one judge has already ruled, "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001).

Likewise, when dealing with water rights claims against another government, certain treaties, such as the North American Free Trade Agreement (NAFTA), provide a basis upon which to seek monetary damages.

THE *TULARE LAKE BASIN* CASE

In January 2005, the United States paid $16.7 million to a group of California water districts for the taking of about 300,000 acre-feet of water they were entitled to from two water projects located in California (State Water Project water). The two water projects

Takings

Restrictions Challenged

5th Amendment

Contract Issue

Federal Arguments

— one operated by the federal government and the other by California's Department of Water Resources (DWR) — divert water from the Feather and Sacramento Rivers to pumping systems located at the southern edge of the Sacramento-San Joaquin Delta. The water is then distributed through a series of canals to end-users in southern California. The settlement followed several years of litigation in the Court of Federal Claims, resulting in three reported decisions: 61 Fed. Cl. 624 (2004); 59 Fed. Cl. 246 (2003); 49 Fed. Cl. 313 (2001). The lawsuit challenged the restrictions imposed by the National Marine Fisheries Service and the US Fish and Wildlife Service under the Endangered Species Act during water years 1992-1994 on the ground that the water loss was an unconstitutional taking of private property without just compensation. Plaintiffs were Tulare Lake Basin Water Storage District, Hansen Ranches, Kern County Water Agency, Lost Hills Water District, H.P. Anderson & Sons, Wheeler Ridge-Maricopa Water Storage District, and several individual water users. The case was filed as a class action on behalf of all water users in the districts. Both sides filed motions for summary judgment on liability.

In ruling for the plaintiffs on liability, the court held that plaintiffs possessed a property right to receive State Water Project (SWP) water, which is protected against uncompensated taking by the Fifth Amendment's Just Compensation Clause. The court rejected the government's argument that because plaintiffs' right to receive water was pursuant to contract, plaintiffs' right did not rise to the level of a protected property interest. The court stated:

> Plaintiffs can claim an identifiable interest in a stipulated volume of water. While under California law the title to water always remains with the state, the right to the water's use is transferred first by permit to DWR, and then by contract to end-users, such as the plaintiffs. Those contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of the permits...Thus, we see plaintiffs' contract rights in the water's use as superior to all competing interests.

Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 317-18 (2001).

In defense, the federal government argued that its actions taken to protect the salmon and the smelt were consistent with state law, and that the doctrines of reasonable use and public trust barred plaintiffs' right to divert water to the detriment of wildlife. The court rejected this argument, holding instead that only the State Water Resources Control Board (SWRCB) and the California courts, and not the federal government, have the right to determine "[w]hether a particular use or method of diversion is unreasonable or violative of the public trust..." *Id.* at 321. The court further stated, discussing the State Water Resources Control Board's decision (D-1485), that:

> Once an allocation has been made – as was done in D-1485 – that determination defines the scope of plaintiffs' property rights, pronouncements of other agencies notwithstanding. While we accept the principle that California water policy may be ever evolving, rights based on contracts with the state are not correspondingly self-adjusting. Rather, the promissory assurances they recite remain fixed until formally changed. In the absence of a reallocation by the State Water Resources Control Board, or a determination of illegality by the California courts, the allocation scheme imposed by D-1485 defines the scope of plaintiffs' contract rights.

Id. at 322.

Pointing "to a myriad of state and federal actions as evidence that either the SWRCB or the California courts would have deemed plaintiffs' proposed use unreasonable," the government urged the court to "step into the shoes" of the State and declare that plaintiffs' proposed use of the water would have been unreasonable. *Id.* at 322. The court, however, flatly rejected the government's invitation that it anticipate "how the Board or the California courts would apply the doctrine of reasonable use if the issue were before them..." *Id.* The court instead held that:

> [t]he public trust and reasonable use doctrines each require a complex balancing of interests – an exercise of discretion for which this court is not suited and with which it is not charged. To the extent that water allocation in California is a policy judgment – one specifically committed to the SWRCB and the California courts – a finding of unreasonableness by this court would be tantamount to our making California law rather than merely applying it. This is especially true where, as here, the Board charged with such determinations has responded, and continues to respond, to the concerns about fish and wildlife that the government was seeking to address through the implementation of the ESA.

Id. at 323-24.

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State Role

Finally, the court emphasized the role of the State in determining the allocation of use of SWP water:

> D-1485 is a comprehensive balancing of interests that recognized that while the "full protection" of fish was perhaps possible, it was not ultimately in the public interest. The SWRCB chose not to revisit that in-depth balancing of water needs and uses even as it reviewed the salinity standards it had set in response to NMFS's biological opinion. We need not attempt to discern the state's response to the threat, then, because the state has in fact spoken.

Id. at 324.

ESA Responsibility

The court recognized that the federal government's decisions to divert plaintiffs' SWP water was based on the government's concerns that the delta smelt and the winter-run Chinook salmon were in jeopardy of extinction. Under the Endangered Species Act, the US Fish and Wildlife Service and National Marine Fisheries Service are required to protect endangered fish and to "halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 315 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 154, 184 (1978)). The court did not purport to limit the government's ability to carry out its responsibilities under the Endangered Species Act: "At issue, then, is not whether the federal government has the authority to protect the winter-run Chinook salmon and delta smelt under the Endangered Species Act, but whether it may impose the costs of their protection solely on plaintiffs." *Id.* at 316. The court's answer to this question is clear: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." *Id.* at 324.

Payment Required

Damages Formula

Following a trial on damages at which both sides presented hydrologic and valuation testimony, the court established a formula for calculating damages: "[t]he first step in calculating plaintiffs' recovery is determining the quantity of water taken from each of the plaintiffs. That determination in turn depends on three factors: the overall amount of pumping foregone, the portion of that loss properly attributable to ESA restrictions, and the method by which that quantity would otherwise have been distributed." *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246, 250 (2003). Following a two-week trial, the court rejected the government's contention that the plaintiffs had actually lost no water as a result of federal actions, and found plaintiffs' total water loss to be 307,334 AF. Adopting Plaintiffs' valuation of approximately $68 per acre-foot for most of the water, the court awarded $14,599,164.78 as the value of the water taken.

Valuation

Interest Rate

Finally, rejecting the government's assertion that Treasury bills provided the appropriate interest rate to provide full compensation, the court adopted plaintiffs' contention that the interest rate should be based on the "prudent investor rule"—how "'a reasonably prudent person' would have invested the funds to 'produce a reasonable return while maintaining safety of principal.'" *Tulare Lake Basin Water Storage Dist. v. United States*, 61 Fed. Cl. 624, 627 (2004) (citations omitted). And because a reasonably prudent investor would have diversified, the court concluded "that the best measure of compensation...is the rate of return achieved on plaintiffs' state-sanctioned accounts—accounts whose mix of investment interests...provides a reasonable rate of return consistent with a high level of safety," (*Id.* at 628.). Nearly $10 million in interest was awarded to the plaintiffs.

Settlement

On December 21, 2004, the parties agreed to settle the case for a total payment of $16.7 million. [See Moon, TWR #11.] The settlement allowed the government to avoid having to appeal a $26 million judgment against the United States.

PENDING CASES

Federal Claims Cases

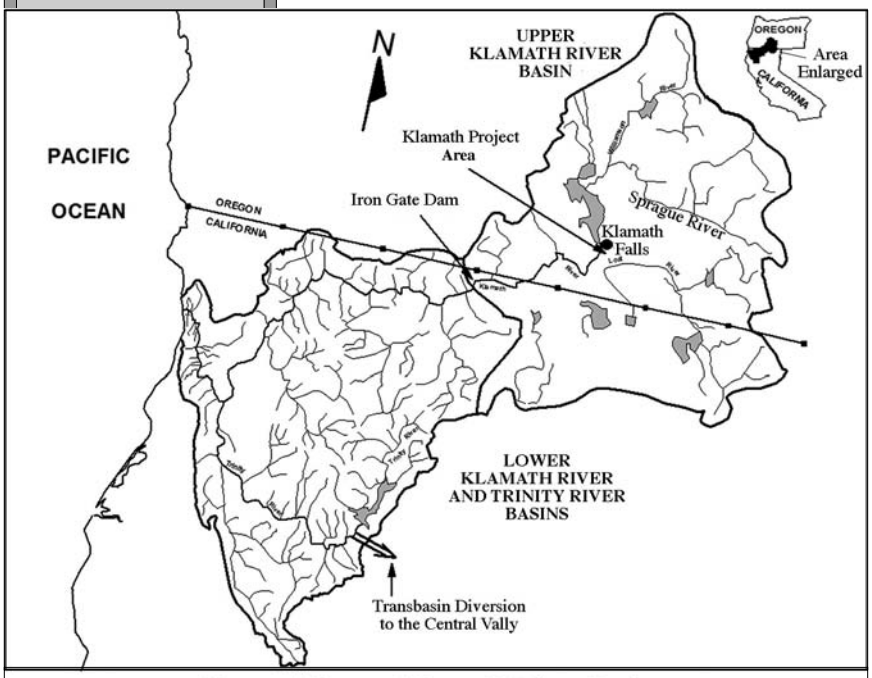
A number of other water rights compensation cases are currently pending in the Court of Federal Claims at various stages of development. In *Klamath Irrigation District v. United States*, case number 01-591L, a motion for certification for interlocutory appeal is pending before Judge Francis Allegra. In *Stockton East Water District v. United States*, case number 04-541L, the parties are currently briefing cross motions for summary judgment with oral argument set for December 19, 2005 before Judge Christine Miller. Initial discovery on liability closes December 31 of this year, in *Casitas Municipal Water District v. United States,* 05-168L, which is pending before Judge John Wiese, who decided *Tulare Lake.* Decisions in these cases, which should be forthcoming shortly, should shed significant light on issues of "takings" liability, damages and interest calculation. Below is a brief description of what is at issue in each case.

Takings

Klamath Issues

The *Klamath* Case

In *Klamath Irrigation District v. United States*, the plaintiffs are thirteen individually named agricultural landowners and fourteen water, drainage or irrigation districts in the Klamath River Basin area of Oregon that receive water (directly or indirectly) from irrigation works constructed or operated by the US Department of the Interior's Bureau of Reclamation (Reclamation). The fourteen districts, in turn, represent approximately 1,400 families that own farm and ranch land that is irrigated with water from the Klamath Project, including land that has been irrigated with water from the Klamath Project for a century. The Klamath Project area includes 240,000 acres of irrigable lands. At issue in *Klamath* is the water that was to be used to irrigate 176,000 privately owned acres of land in the western portion of the Klamath Project in 2001. Under the authority of the Endangered Species Act, Reclamation refused to deliver to irrigators approximately 350,000 AF of water, which it retained in Upper Klamath Lake for the benefit of two species of endangered fish.



Upper & Lower Klamath River Basins

The parties filed cross motions for summary judgment and, on August 31, 2005, Judge Allegra of the Court of Federal Claims, issued a decision holding that the plaintiffs did not have a constitutionally protected property interest in the water withheld by the government (*see* 67 Fed. Cl. 504 (2005)). The judge reasoned that the State of Oregon had permanently transferred to the United States all unappropriated waters of the Klamath Basin under a 1905 Oregon statute. That opinion is the first construction of the 1905 statute and, in plaintiffs' view, conflicts with the *Tulare Lake* decision discussed above. Consequently, the plaintiffs are seeking interlocutory appeal to the US Court of Appeals for the Federal Circuit. They retain a breach of contract claim that the court has not yet ruled upon, except to hold that the 1,400 Klamath water users are third-party beneficiaries of the repayment contracts between Reclamation and the irrigation districts. [See TWR #19, Water Briefs, for additional information on Judge Allegra's holding.]

Urban & Irrigation

Breach of Contract

Government Defense

The *Stockton East* Case

Two California water districts (Stockton East Water District and Central San Joaquin Water Conservation District), and the County of San Joaquin, City of Stockton, and California Water Service Company, have filed suit against the United States seeking $500 million in damages and just compensation for Reclamation's failure to deliver water to them from New Melones reservoir since 1993. The plaintiffs in this suit together serve over 300,000 urban water users and 130,000 acres of irrigated farmland in California's San Joaquin Valley.

Stockton East Water District (Stockton East) and Central San Joaquin Water Conservation District (Central) assert a breach of contract claim for Reclamation's failure to make available to them approximately 155,000 AF per year from the New Melones unit of the Central Valley Project. The 1983 contracts between the districts and Reclamation obligated the districts to construct a $70 million water conveyance system that, in most years, has been bone dry. The government defends on the ground that the subsequent congressional enactments, as well as restrictions created by the Endangered Species Act, prevent them from delivering the water. The parties are presently briefing cross motions for summary judgment, which are set for oral argument December 19, 2005, in Washington, DC.

Contract Claim

Fish Diversion

The *Casitas* Case

Casitas Municipal Water District provides part or all of the municipal water supply for approximately 65,000 residents within the District, and the entire agricultural water supply for 5,668 acres of farm and ranch land. Casitas operates the Ventura River Project under a 1958 contract with Reclamation, and Casitas holds the sole right to use the water of the Ventura River Project (subject only to prior existing rights). In the suit, Casitas asserts a claim for breach of contract by reason of Reclamation's order that Casitas, at its own expense, construct a $9.3 million fish diversion facility to

Takings

protect spawning steelhead trout (a species listed under the Endangered Species Act), and dedicate substantial bypass flows to the facility (for which Casitas claims a taking of its water rights). The case is currently in discovery, and is expected to go to trial next year.

CONSTITUTIONAL PROTECTION OF WATER RIGHTS

Precedents

All of these cases have a venerable pedigree, stretching back to Justice Holmes' opinion in *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931): "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use...The Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay."

Reimbursement

S*ee also United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 737 (1950): "[T]his Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed"); *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (citations omitted): "[T]he United States was empowered to acquire the water rights of respondents by physical seizure . . . such rights could be acquired by the payment of compensation 'either through condemnation or, if already taken, through action [for just compensation] of the owners in the courts."

Property Attributes

Because water rights are a somewhat unusual type of property, these cases have forced the court to reach deeply into the fundamental nature of property rights and to articulate explicitly the kinds of government actions that can constitute a taking (e.g., "reasonable and prudent alternatives" contained in a biological opinion). See for example, *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (2003); s*ee also Hage v. United States,* 35 Fed. Cl. 147, 172 (1996) (citations omitted): "[T]he right to appropriate water can be a property right. *Amici* provide no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection...This court holds that water rights are not 'lesser or diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution."

5th Amendment

The Fifth Amendment to the United States Constitution states, in part, that private property shall not be "taken for public use, without just compensation." This clause of the Fifth Amendment, referred to as the Just Compensation Clause, requires that society as a whole, rather than a particular property owner, bear the burden of the exercise of eminent domain power in the public interest. As the court has often stated, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Supreme Court has applied a similar principle to statutory provisions (e.g., the Endangered Species Act or Central Valley Project Improvement Act) which purport to abolish the contract rights of private parties. In *United States v. Winstar Corp*., the Supreme Court stated that just as the Court has recognized that the Constitution prohibits the government from

Public Burdens

Contractual Shift

> forcing some people alone to bear public burdens which...should be borne by the public as a whole, so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change.

518 U.S. 839, 883 (1996) (internal citations omitted).

INTERNATIONAL WATER RIGHTS: THE NAFTA CASE

Treaty Rights

An expropriation of water rights claim, not dissimilar to the cases discussed above, is currently pending in arbitration before the International Center for the Settlement of Investment Disputes in Washington, DC. The claim arises out of Mexico's withholding of approximately 1 million AF of water which, under a 1944 treaty, belongs to the United States (and, under the law of the United States, to those holding water permits from the State of Texas).

NAFTA Rights

The claim is brought by a group of water users — which include 17 Texas irrigation districts, 29 independent water rights holders, and the North Alamo Water Supply Corp. — in the Lower Rio Grande Valley (see map). The claim was filed under Chapter 11 of the North American Free Trade Agreement (NAFTA) in August 2004. NAFTA requires compensation for expropriated property and discriminatory treatment of foreign investors.

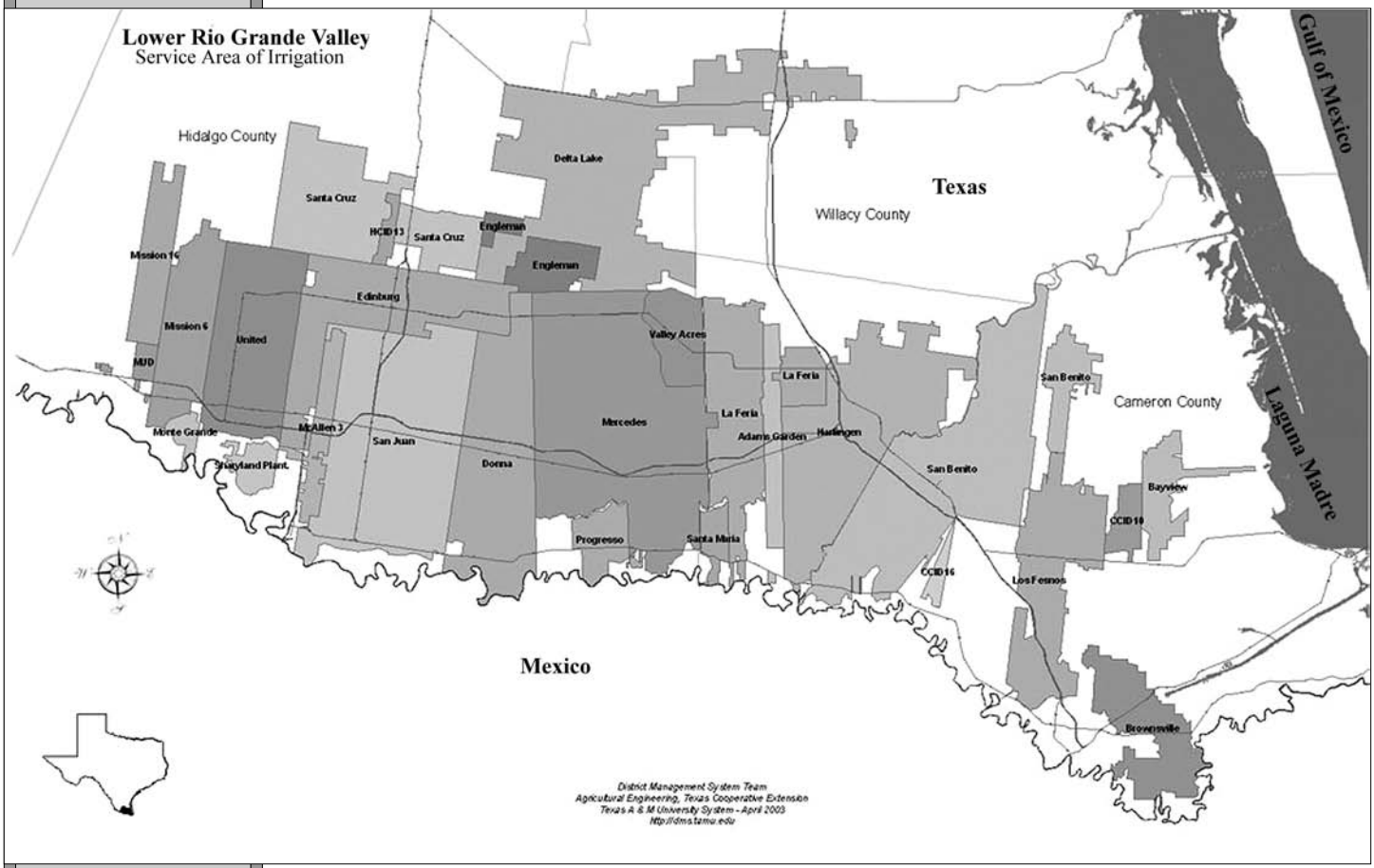
Takings

Claim Against Mexico

THE NOTICE OF ARBITRATION STATES:

"From 1992 to 2002, Mexico captured, seized, and diverted to the use of Mexican farmers, an investment (approximately 1,013,056 acre-feet of irrigation water) located in Mexico and owned by Claimants. By diverting Claimants' water to Mexican farmers, Mexico dramatically increased its irrigated agricultural production on the Mexican side of the Rio Grande, while the crops of United States farmers in the Rio Grande Valley shriveled. Mexico thus treated the investments of United States investors less favorably than it treated its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in violation of Article 1102 of NAFTA. Mexico also nationalized or expropriated Claimants' investment within Mexico, or took a measure tantamount to nationalization or expropriation of such an investment, unfairly and without compensation and due process in violation of Article 1110 of NAFTA."

The arbitration is expected to commence early in 2006.



CONCLUSION

Water allocation is increasingly a zero-sum game with winners and losers in the competition for this scarce resource. Although water districts and water users may not be able to stop governments (domestic or foreign) from appropriating their water, districts and water users may have damages remedies based on the US Constitution, contract, or (in one case) international treaties. This is a quickly developing field of law which water users should follow closely.

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Sediments

Interagency Team

Appropriate Assessment

Management Alternatives

Contamination Threats

Evaluation

Technical Scoping

NORTHWEST REGIONAL SEDIMENT EVALUATION

DEVELOPMENT PROJECT OVERVIEW & UPDATE

by Taku Fuji, PhD, Kennedy Jenks Consultants & Howard L. Cumberland, Tetra Tech EC (Portland, OR)

Introduction

This article presents an overview of the Regional Sediment Evaluation Team (RSET) activities over the past four years to develop the Sediment Evaluation Framework (SEF) for the Pacific Northwest and presents an overview of the Draft SEF. RSET is an interagency team, co-chaired by the US Environmental Protection Agency (EPA), Region 10 and the Northwestern Division of the US Army Corps of Engineers (Corps), consisting of federal and state agencies with regulatory responsibilities for managing sediments in Washington, Oregon and Idaho.

Since 2002, RSET members have worked to develop the SEF for the Pacific Northwest. The SEF provides a regional framework for the assessment, characterization, and management of sediments in the Northwest. The appropriate assessment of sediments is a critical component of all sediment management activities regardless of whether it is for dredging a navigational channel or investigation and/or remediation of a contaminated sediment site. It is the intention that the SEF, which consolidates the existing regional sediment testing guidance manuals, be technically applicable throughout the Pacific Northwest for both freshwater and marine sediment assessments. This SEF also includes a discussion of dredged material management alternatives, such as in-water and upland disposal options.

Background

The Pacific Northwest is unique because of its numerous water dependent economic uses and significant cultural and natural resources. The waters of the Pacific Northwest provide many benefits, but also receive many threats from contamination. For example, a significant portion of the economy comes from shipping and water-dependent uses, which need navigational dredging to maintain safe transport. Industrial, municipal, and non-point discharges (e.g., agricultural run-off) are typically the sources of contamination to water bodies that are used by salmon and other species protected by the federal Endangered Species Act (ESA). There is a strong need for consistent, comprehensive evaluation and regulatory processes for navigation dredging projects, waterway restoration programs, recreational and commercial fisheries management, water-quality protection, sediment-quality protection, and natural resource restoration.

To begin the process of developing the Draft SEF, RSET initially conducted a three-day technical scoping workshop on September 11 through 13, 2002, for RSET members and other interested parties from federal and state agencies, and regional Port authorities. The purpose of the meeting was to develop the scope for preparing an overall plan and process for updating the existing Columbia River Dredged Material Evaluation Framework (DMEF), which was developed in 1998 by an interagency group that was the precursor to RSET (EPA/Corps, 1998). The workshop also was used to gauge the level of agency support for revising the existing Columbia River DMEF and expanding it to encompass the evaluation of sediments throughout Washington, Oregon, and Idaho. Finally, the workshop asked attendees to identify technical and policy issues that would need to be addressed during the revision process.

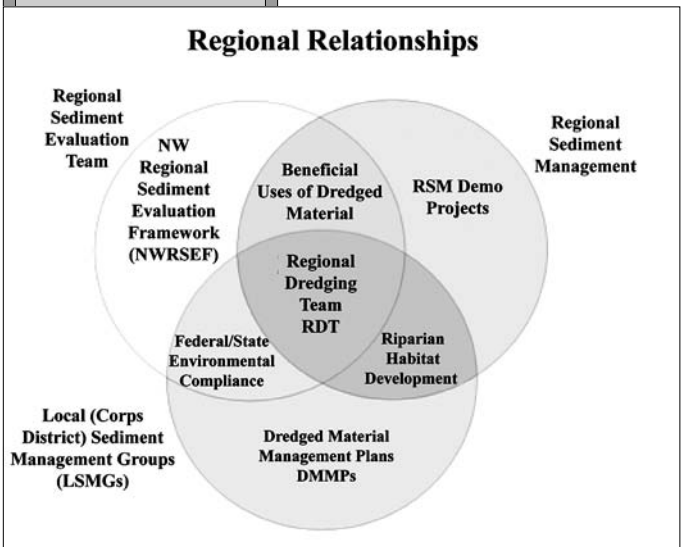


Figure 1. Local Corps District Sediment Management Groups

The workshop consisted of breakout sessions covering the topics of Process, Biology, and Chemistry. The purpose of these sessions was to allow participants an open opportunity to present the issues that they (and/or the agency they represent) saw as priorities that need to be addressed prior to the completion of a regional SEF. The breakout session participants were encouraged to identify and discuss their highest priority issues requiring further evaluation in the process of preparing a regional SEF. The meeting concluded that preparing a regional SEF for the Northwest was an extremely worthwhile process that would provide more consistency and certainty in the decision making process. The relationship among different sediment-related programs and objectives to be addressed by the SEF is shown on Figure 1. Subsequent to the meeting, RSET has met formally and informally many times to discuss technical and policy issues that were necessary to develop the Draft SEF.

Sediments

Objectives

Characterization Framework

Regulatory Framework

Uniform Evaluation

CWA Notification

Uniform Requirements

CERCLA & ARAR

Database Development

Disposal Options

Sediment Evaluation Framework Objectives

The Draft SEF was prepared to satisfy multiple objectives.

1) It establishes an appropriate marine and freshwater sediment characterization framework agreeable to the public, stakeholders, and resource agencies.

This regional SEF manual establishes a sediment sampling, testing, and interpretation framework acceptable to stakeholders, such as ports and private industries that maintain navigation access in the study area, and to resource agencies having an interest in, concern for, or some form of permit authority relative to sediment management. Such a framework will provide clarity, maximize consistency and, allow informed discussions to take place on the need for and extent of sediment characterization for dredging and sediment management projects.

2) It establishes a uniform framework under which the Corps will carry out Federal requirements in conducting the dredging and disposal program.

The laws and regulations under which the Corps operates require the Corps, to the maximum extent practicable, to predict dredged material types, contaminant levels, and biological effects, both in water and sediments, before dredging and disposal actions can be considered environmentally acceptable. This document provides the regulatory framework that will facilitate a consistent application of regional criteria and guidelines.

3) It establishes a uniform framework for evaluating sediment management activities on water quality. The Pacific Northwest includes the water bodies in the states of Washington, Oregon, and Idaho. Projects may involve actions in one state which may affect another state. Because sediment management impacts affect all states, regulation of these activities must be consistent between Washington, Oregon, and Idaho.

States have statutory control over water quality impacts resulting from a neighboring state. Section 401 (a)(2) of the federal Clean Water Act (CWA) requires that a neighboring state be notified of actions that may affect its water quality. In order to work efficiently under this regulation, water quality requirements in a bi-state waterway must be uniform. Without uniform requirements, the implementation of water quality programs in shared water bodies may not be consistent or predictable. Section 103 of the CWA encourages states to develop uniform laws for the prevention, reduction, and elimination of pollution, and to negotiate and enter into agreements or compacts not contrary to any laws or treaties of the United States.

Although the laws discussed in the SEF may well be **a**pplicable and **r**elevant and **a**ppropriate **r**equirements (ARAR) as defined by the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for a particular CERCLA site, this SEF is not itself an ARAR. It does not apply to CERCLA cleanups, except to the extent determined that it is **t**o **b**e **c**onsidered (TBC) in the CERCLA site decision document. However, the "tools" described in the Draft SEF and Future SEF may be useful to the CERCLA program.

4) It establishes appropriate databases to track the long-term trends in sediment quality of specific dredging projects/locations and the river in general.

Sediment management programs require the collection and maintenance of data about projects and their characteristics. This objective includes the establishment of appropriate databases which will track sediment quality trends over time at specific locations and for the region in general. Systematic database development will provide useful input into larger planning efforts. Implementation of the framework will generate regular reporting on sediment quality and thus raise the information level available for making decisions on sediment management.

5) It establishes procedures or references for other regional/national guidance to assist in the identification and evaluation of alternative sediment management options.

The SEF will address the five basic dredged material disposal options: unconfined aquatic, unconfined upland, confined aquatic, confined nearshore, and confined upland. It is acknowledged that different sampling and testing requirements may be required for evaluating alternative management options. Beneficial uses of dredged material, such as wetland creation and beach nourishment, will also be discussed.

Sediments

Evaluation Defined

Evaluation Procedures & Rationale

Evaluation procedures consist of the sampling requirements, tests and guidelines for test interpretation that are to be used in assessing the quality of sediment, including dredged material, and management options for contaminated sediment and dredged material. Evaluation procedures identify whether unacceptable adverse effects on biological resources or human health might result from in-place sediments or dredged material management. A regulatory decision on acceptability of material for remediation or disposal is determined from the test results. The SEF defines the minimum requirements for evaluation of contaminated sediments and dredged material for regulatory decision-making under National Environmental Policy Act (NEPA), ESA, CWA, Marine Protection Research and Sanctuaries Act (MPRSA), and various state cleanup regulations.

Risk-Based Assessment

One of the underlying principles in the preparation of this SEF is the use of a risk-based sediment assessment framework to guide assessments and management decisions by various regulatory authorities. The results of the 2002 Society of Environmental Toxicity and Chemistry (SETAC) Pellston Workshop on the "*Use of Sediment Quality Guidelines and Related Tools for the Assessment of Contaminated Sediments*" (Wenning and Ingersoll, 2002) were relied upon to generate the philosophical and technical underpinnings of the assessment framework that is presented in this manual. The Pellston Workshop was sponsored by the SETAC and held August 17-22, 2002, in Fairmont, Montana. This workshop brought together 55 experts in the field of sediment assessment and management from Australia, Canada, France, Germany, Great Britain, Italy, the Netherlands and the United States for six days of discussion on the use of Sediment Quality Guidelines and other sediment assessment tools.

Tiered Testing

One significant change from earlier guidance is the reduction in the number of testing tiers recommended in the guidance document. Previously, dredged material evaluations were conducted based on a four-tier testing framework as presented in historical Pacific Northwest regional manuals. For the SEF, the two level-testing framework, as presented in the Pellston Workshop Summary, is adopted for use (Wenning and Ingersoll, 2002). While the same amount of data will be collected under the new framework as under pre-existing Pacific Northwest regional manuals, the two-level system will be more consistent with national and international guidance.

The SEF distills the accumulated knowledge and experience with sediments and dredged material management in the Pacific Northwest over the last 30 years. It describes stepwise procedures for sediment assessment and is intended for use by the regulatory and regulated community. Full consideration was made of all pertinent state and Federal laws, regulations and guidance, including other regional sediment management programs, and the SEF is generally consistent with the guidelines of the national-level sediment assessment manuals.

Purpose

RSET's Focus

RSET's focus requires a high level of sophistication in laws and regulations that govern sediments and water quality, sediment chemistry, toxicology, engineering, and other related fields. At the same time, the science must inform a regulatory program involving numerous agencies and statutory frameworks. It was also determined early on in the RSET process that the SEF evaluation procedures comprise the complete process of sediment assessment and incorporate a range of scientific and administrative factors. Beyond the decision to base sediment and dredged material evaluations on avoiding unacceptable adverse biological effects, effective evaluation procedures should also have certain characteristics. RSET is designed to provide the highest-caliber scientific advice combined with practicable knowledge about the administrative use of that information to ensure science-based regulation. The structure and processes outlined below support RSET's functions: continuous improvement of methods for sediment sampling, testing, and analysis to support regulatory management decisions at a region-wide level, and maintenance of the sediment quality database. It is expected that RSET will provide a cooperative, interagency center of expertise on sediment assessment and management that can be accessed by different agencies and programs as the need arises.

RSET Functions

Issue Papers

RSET Technical Subcommittees

Much of RSET work has been performed by technical subcommittees. The technical subcommittees prepare recommendations in the form of issue papers (requesting policy guidance or other information). Issue papers underwent a peer review process to ensure the recommendations and supporting information was clear and that the necessary coordination had occurred with other subcommittees. The issue papers also provide a record of RSET's deliberations on technical issues. The current subcommittees that were used to develop the Draft SEF include: Policy; Sediment Quality Guidelines; Chemical Analyte; Biological Testing; and Bioaccumulation.

Sediments

Federal Authorities

State Authorities

Applicable Laws

Changes Proposed

Risk-Based Objectives

Incorporation of Applicable Laws and Regulations

Several state and federal entities have regulatory or proprietary authority governing the management of contaminated sediment and dredged material. For the assessment and management of contaminated sediment, Federal agencies that have regulatory authority over investigations and cleanups are EPA, US Fish and Wildlife Service, and National Marine Fisheries Service. States exercise their regulatory authority via their cleanup statutes.

At the federal level, the Corps and EPA share the responsibility for regulating the discharge of dredged material. In the state of Washington, Washington Department of Ecology, Department of Natural Resources, and Department of Fish and Wildlife share regulation. In Oregon, this regulation is carried out by Oregon Department of Environmental Quality, Division of State Lands, and Department of Land Conservation and Development. In Idaho, regulation is carried out by Idaho Department of Environmental Quality.

The following laws and regulations that were considered when developing the Draft SEF:

- Clean Water Act Section 404
- Rivers and Harbors Act Section 10
- Marine Protection, Research, and Sanctuaries Act of 1972
- Coastal Zone Management Act of 1972
- Endangered Species Act of 1973
- Marine Mammal Protection Act of 1972
- Magnuson-Stevens Fishery Conservation and Management Act of 1996
- National Environmental Policy Act of 1969
- State of Washington Regulations
- State of Oregon Regulations
- State of Idaho Regulations

Draft SEF: Significant Changes

While this SEF version remains a "work-in-progress" draft, several of the following significant changes and additions to current sediment evaluation guidance should be noted.

CHANGES INCLUDE:

- A consistent approach for characterizing in-place sediments as well as proposed dredged material
- Draft freshwater sediment screening levels
- Updated information on the chemical analyte lists that will need to be evaluated in different parts of the Pacific Northwest
- Updated information on the appropriate analysis of PCBs in sediment and tissue
- A framework for addressing bioaccumulation, including a process for deriving scientifically defensible **b**ioaccumulation **t**riggers (BTs) for tissues and sediments
- A two-tier (or level) process, as opposed to the historical four-tier assessment process, consistent with emerging National Guidance
- Additional editorial changes and clarifications

Risk-Based Framework

As previously discussed, the Draft SEF was developed based on a risk-based framework. A risked-based framework makes use of multiple lines of evidence to reach management decisions. This framework guides the assessment/management process by providing structure, organization and flow for the actions to be taken in assessing risks and making management decisions.

THE OBJECTIVES OF THE RISK-BASED FRAMEWORK ARE AS FOLLOWS:

- Ensure that assessments are comprehensive, clear, and consistent;
- Ensure that any evaluation that follows the steps of the framework is complete in its consideration and analysis of present and future exposures, effects, and human and ecological risks at the site of concern for cleanup projects or at the disposal site for dredging projects;
- Consider the likelihood for all possible routes of exposure and effects to ensure that required or important site-specific environmental factors are not omitted from the evaluation process;
- Provide a measure of clarity to sediment investigation and management to facilitate meaningful participation in the assessment and decision-making process by scientists, regulatory agencies, and representatives of affected communities;
- Involve active stakeholder involvement to ensure that the results of the assessment can be successfully applied within the decision making process; and
- Ensure consistent application of the assessment and management process (where possible) for projects whether they are for sediment assessment or dredge material characterization.

Sediments

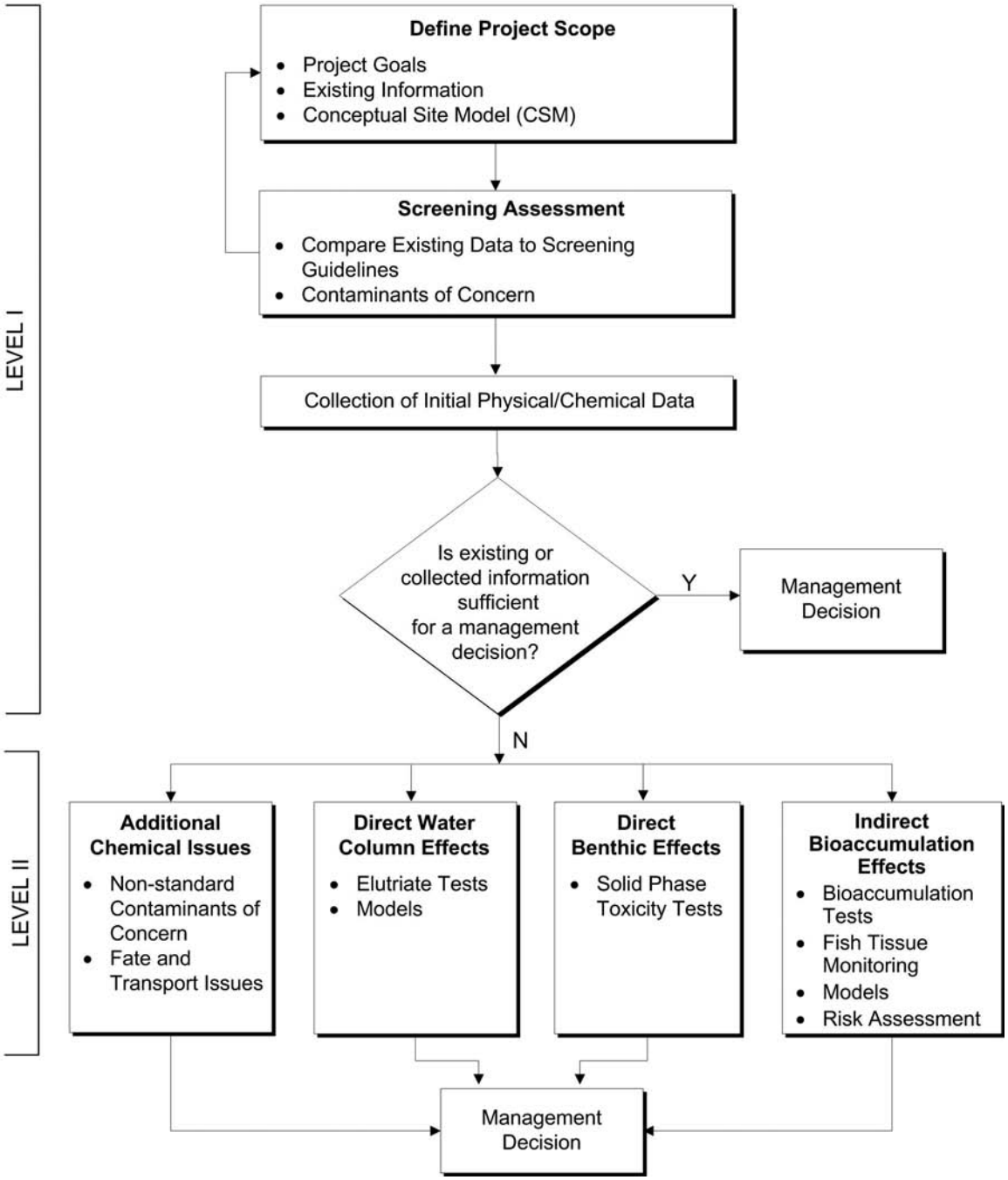
Phased Evaluation

The testing proposed under the SEF can be expensive. One of the goals of the SEF is to develop and refine procedures that reduce the cost of contaminated sediment investigations and dredged material testing while providing appropriate evaluation of the potential environmental impacts.

Multiple Lines & Levels of Evidence

The types and amount of information necessary to reach management decisions will vary from site to site or project to project. Most sediment assessments and dredged material characterizations will involve the use of a variety of physical, chemical, and biological information in order to reach decisions about the presence/absence of risk and how best to manage evident risk when determining appropriate disposal/remediation options. The basic framework proposed in the Draft SEF consists of a phased evaluation process that is consistent with available and upcoming national guidance. A generalized sediment evaluation framework is presented in Figure 2.

Figure 2. Generalized Sediment Evaluation Framework to Make Management Decisions



Sediments

Assessment Levels

Management Decisions

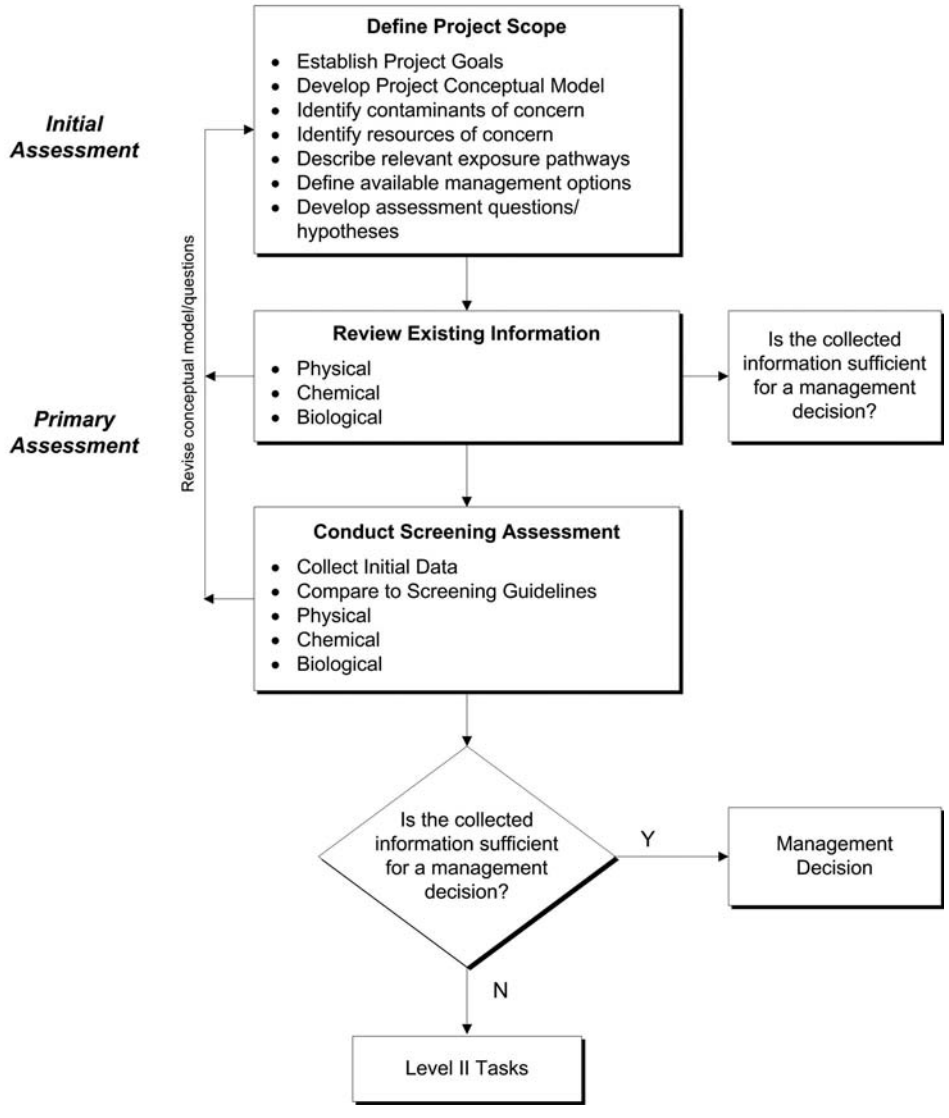
Adaptation

The Draft SEF has been designed with levels to encourage investigations that optimize the amount of effort expended in the assessment with respect to the complexity of both the project/site and assessment questions that must be answered to reach management decisions. A level in this sense is a stage in the assessment process that concludes with a decision to either: 1) exit the assessment process because sufficient information has been collected to answer questions about the need for management; or 2) continue the assessment because insufficient information exists to reach a management decision for the proposed action.

In many cases management decisions may be possible during the initial phase of an assessment when there is convincing evidence for or against the presence of risk or whether or not an appropriate disposal option exists for dredged materials. In more ambiguous circumstances, or where the complexity of the site requires it, more comprehensive assessments and data collection may be required in a subsequent level before credible management decisions can be made. The strength of a phased assessment framework is that the framework includes clear decision points where the need to continue the evaluation is addressed.

This risk-based framework is also structured to allow for iteration. As information is collected and analyzed during an evaluation, the assessment process must allow for making additions and refinements to the conceptual model and assessment questions that are formulated during the initial stages of assessment. Such iteration allows the assessment to become more focused as the evaluation proceeds.

Figure 3. Detail of Level I Tasks



Figures 2 and 3 present the assessment and management framework for sediments. Figure 3 provides additional details for what is included in a Level 1 evaluation. As shown on these figures, Level 1 includes pre-assessment and initial assessment tasks, while Level 2 can include sediment-dredged material/ site assessment, additional chemical and/ or biological testing, or modeling tasks.

The levels or categories of information/data needs described below are used in a sequential manner for evaluating the risk of in-place sediments and the suitability of dredged material for unconfined aquatic disposal. This sequential approach is called a tiered evaluation process. At each level a decision is made regarding the adequacy of the existing data to make a suitability determination. If the existing data are adequate for management decision making purposes, then there is no need to proceed to the next level. If not, data at the next level are required before a management decision can be made.

Transition to Subsequent Levels

The compilation and review/ screening of existing information and other locational factors comprise the initial tasks in Level 1. In some instances, the existing information may be sufficient to make a management decision. For example, for a navigational dredging project, if existing information adequately supports a decision for unconfined aquatic disposal, no additional data are needed. However, if there is no existing information or it is not adequate for

Sediments

Design Factors

Level 2 Triggers

Programmatic Goals

"CSM"

Appropriate Approach

purposes of the initial site/sediment characterization, the project proponent will be required to prepare and submit a sampling and analysis plan for additional data collection. This additional data collection may provide sufficient analytical data to make a management decision. For example, for a site investigation project, if the analytical data were all below appropriate sediment screening levels and there was no "reason to believe" that bioaccumulation issues are present at the site, the investigation may be concluded at this point with the decision of no unacceptable risk from sediment at this site.

The transition from Level 1 to Level 2 occurs when the screening of collected data indicates the need for additional tasks that are required to reach a management decision, whether it is assessment of direct toxicity, indirect bioaccumulation effects, or other tasks as shown on Figure 2. The transition from Level 1 to Level 2 can be triggered by exceedences of appropriate sediment screening levels or other analytical results that indicate a need for more detailed assessment of the sediment or water column.

Considering Program Objectives

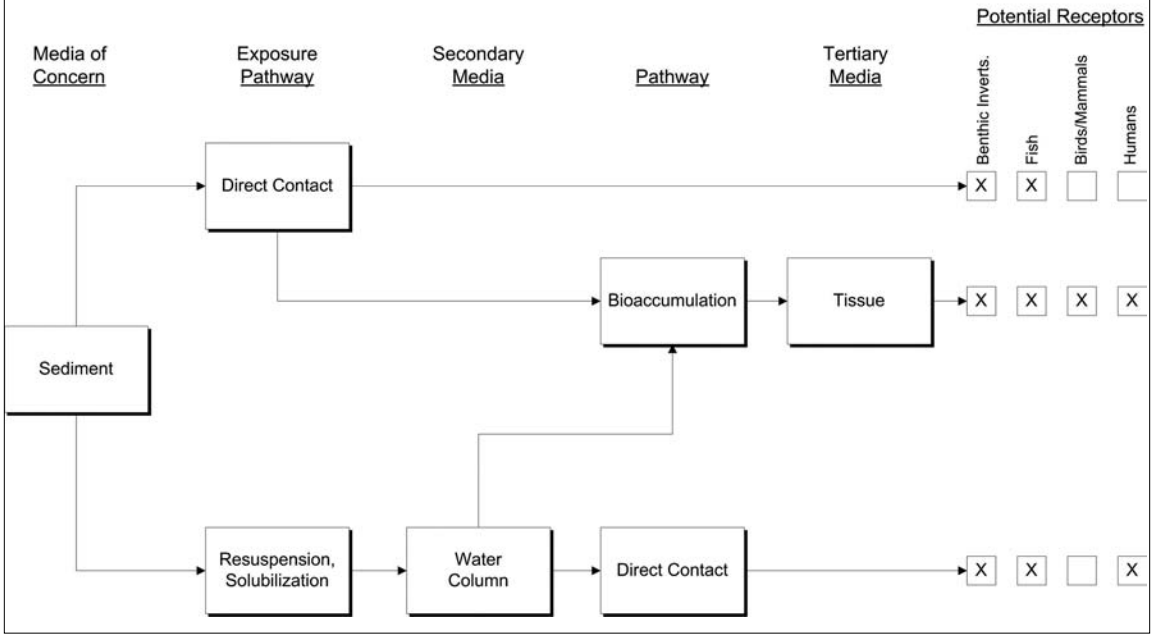
Within a risk-based framework, conceptual site models and project sampling and analysis plans are developed and used to address specific programmatic goals. Knowledge of these programmatic objectives must be factored into the assessment process to ensure that a complete set of information is collected and analyzed to aid decision-making. The degree of success achieved in using a specific sediment assessment framework within the context of a regulatory program will be determined in large part by the extent to which program-specific objectives are acknowledged and accounted for when designing and applying the assessment framework.

Conceptual Site Model

Following the initial data collection and analysis, a **c**onceptual **s**ite **m**odel (CSM) for the site is developed. A CSM identifies and describes contaminant sources, the processes linking those sources to the sediment in question, the physical, chemical, and biological processes occurring within the sediment that affect exposure, defines the receptors of concern, and how receptors of concern are exposed to the contaminants associated with the sediment. A CSM allows for a graphical representation of the relationships between receptors and resources in the environment and the stressors to which they may be exposed. The CSM also can provide an avenue for beginning to address uncertainties in the relationships and exposure pathways and presence/absence of important receptors at a particular project site or disposal location.

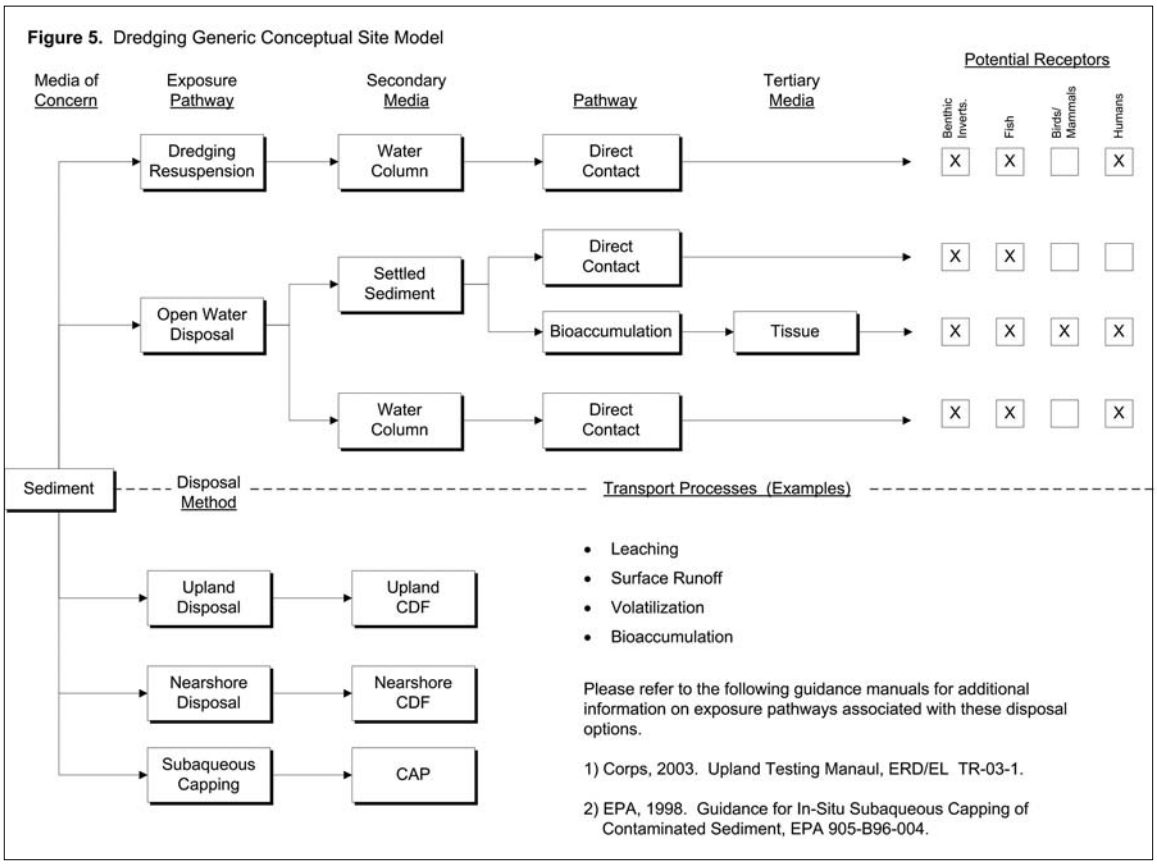
A CSM is invaluable in establishing the appropriate technical and managerial approach for addressing the specific issues associated with a project, whether it is a site assessment or a dredging project. A generic CSM for a contaminated site assessment is presented in Figure 4 and a generic CSM for a dredging project is presented in Figure 5 (next page).

Figure 4. Site Investigation Generic Conception Site Model



Sediments

Site Model



CSM Uses

The CSM provides a powerful tool for communicating ecological or human health (or other) issues among assessors, managers, and interested parties. The CSM identifies the complete and potentially complete exposure pathways and provides a template to conduct exposure pathway evaluations. It also provides a means to identify relevant receptors and potential response actions. The CSM is dynamic in the sense that, when available, additional data are used to refine and increase the accuracy of the CSM as necessary to reflect the current understanding of the project.

The following are summary program objectives to consider in completing either a contaminated sediment investigation or a dredged material characterization project.

Potential Effects

Contaminated Sediment Projects

The primary goal of assessing contaminated sediments is to determine the potential effects of the sediments in place. The site characterization process should allow for the accomplishment of the following goals:

- Identify and quantify the contamination present in sediments
- Understand the vertical and horizontal distribution of the contaminants in the sediments
- Understand the physical, chemical, and biological processes affecting the fate and bioavailability of sediment contaminants at the site
- Identify the complete human and ecological exposure pathways for the contamination
- Identify current and potential human and ecological risks posed by the contaminants

Dredging Evaluation

Dredging Projects

The primary purpose of a dredging project is to remove material in order to maintain or create water depths to allow for safe passage or berthing of vessels. The evaluation of dredged material is to determine whether there will be unacceptable impacts either during the dredging process or at the disposal site.

OF PRIMARY CONCERN ARE:

- Whether the dredging process will affect or degrade the dredging site
- Whether the disposal of dredged material will affect or degrade the disposal site, whether in-water or in some cases on land
- Additionally, an evaluation of the sediment that will be exposed subsequent to dredging will be necessary

Sediments

Draft Usable

Public Review

Summary & Conclusions

The current document is a "working" draft of the SEF. As such, there are sections that have yet to be written and there are "placeholders" in specific places in the framework where technical and regulatory issues will continue to be addressed as we move forward with the process to complete the framework. As a draft, the framework will be useful as a resource, as it compiles information from many documents in active use in the Pacific Northwest, and consolidates and updates specific portions of previous regional frameworks. It provides a conceptual framework for sediment assessment activities in the Pacific Northwest. It is consistent with regulation and, in most cases, the techniques described here should be useful as part of the "toolkit" of methods that can be used for sediment and dredge material characterizations. It is recognized that individual regulatory programs (e.g., CERCLA) may have specific additional requirements other than those specified in this framework.

Draft Sediment Evaluation Framework Availability & Comment Period

The Draft Sediment Evaluation Framework is available at the Seattle Corps RSET Website. This is a public review draft and we encourage public comment on the SEF. It is anticipated that the Draft SEF will be revised based on public comment and additional work being conducted by the technical subcommittees in the upcoming year. Updates will be posted on the RSET website and all interested parties are encouraged to visit the website over time to remain current with RSET activities.

To access Draft SEF and associated documentation, the website is located at:
www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=dmmo&pagename=RSET

Comments can be submitted directly to Ms. Stephanie Stirling at:
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Taku Fuji, PhD, Senior Toxicologist/Sediment Quality Specialist, Kennedy Jenks Consultants. Dr. Fuji has over twelve years of experience working on issues related to risk assessments and sediment contamination at hazardous waste sites. In addition, Dr. Fuji has considerable experience conducting dredged material characterization and evaluation of disposal options for this material. Dr. Fuji is responsible for developing and conducting human health and ecological risk assessments and designing, implementing and interpreting biological testing programs. Dr. Fuji has considerable experience leading field sampling programs in support of risk assessments and has successfully completed risk assessments using national and regional risk assessment guidance in Alaska, Washington, Oregon, and California. Dr. Fuji has extensive laboratory experience investigating the biotic and physio-chemical factors that influence the bioaccumulation of contaminants from sediments and in the biological testing methods used to assess the acute and chronic effects of sediment contaminants on benthic organisms. He is an expert in the development, interpretation, and use of sediment quality criteria and standards and has led sediment collection efforts under a variety of regulatory programs.

Howard L. Cumberland, National Program Lead, Ports Harbors and Waterways, Tetra Tech EC. Mr. Cumberland is a Marine Scientist specializing in evaluating the ecological impacts associated with dredging and contaminated sediments. The majority of Mr. Cumberland's 16 years of experience has centered on waterfront properties, where he performs strategic consulting services to identify, investigate, and remediate sediments and conduct ecological impact studies for waterfront properties under state or federal cleanup orders. Mr. Cumberland's regulatory knowledge has assisted clients with strategic planning in response to federal (Superfund) and state lead cleanup actions at waterfront properties and provides clients with cost-effective approaches to evaluate the nature and extent of contamination and negotiate the proper remedial response, as appropriate.

Nebraska

Groundwater Accountable

Pumpkin Creek Aquifer

NEBRASKA WATER LAW CHANGING

DRAMATIC DEVELOPMENTS - THE SPEAR T RANCH CASE

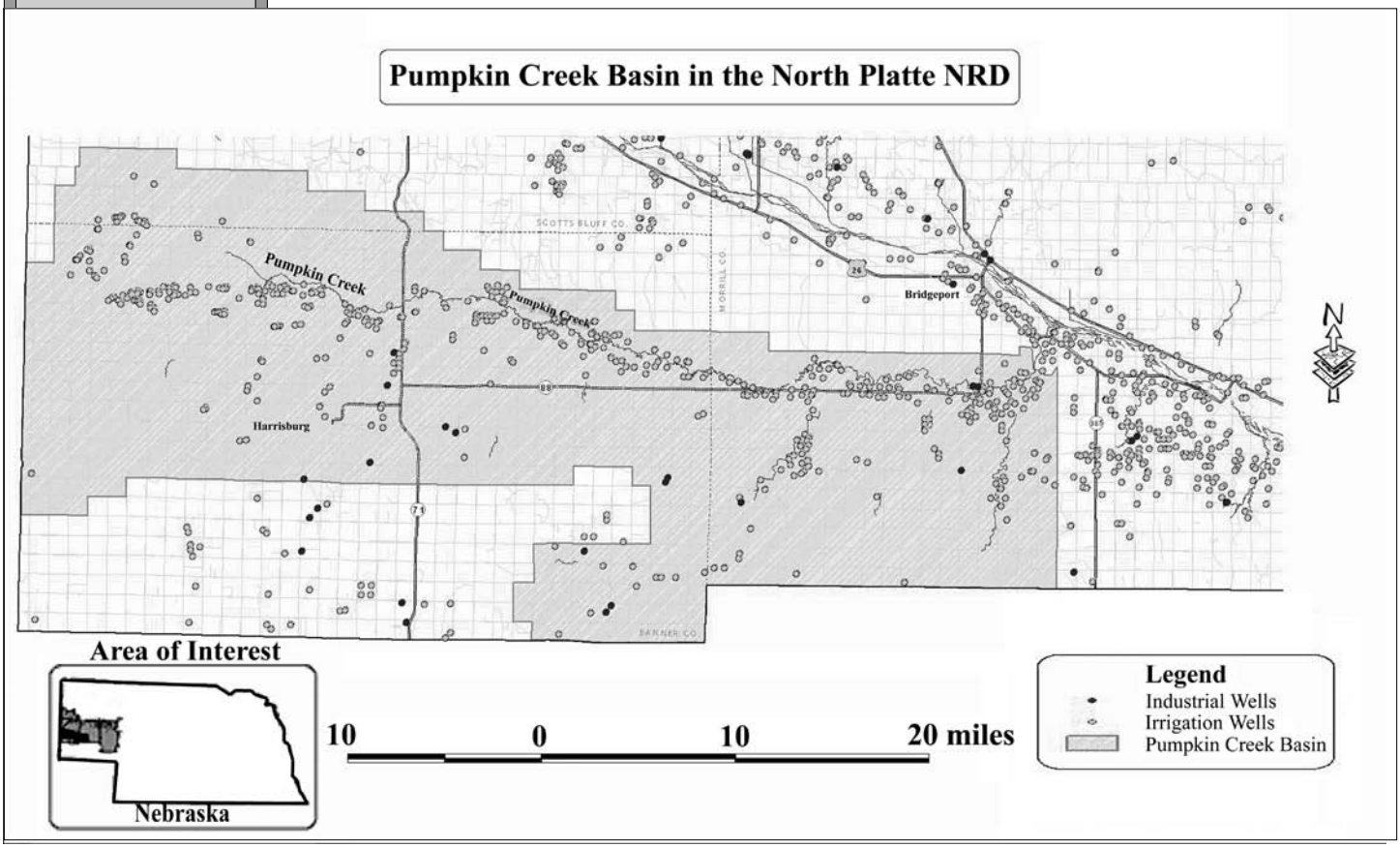
by LeRoy W. Sievers and Jocelyn Walsh Golden
Knudsen, Berkheimer, Richardson & Endacott, LLP (Lincoln, NE)

INTRODUCTION

Recently, the Nebraska Supreme Court issued its decision in the case of *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), which potentially is the most significant case decided by the Nebraska Supreme Court in decades. This case establishes the principle that uses supplied from groundwater, which result in direct and significant reduction in stream flows, can be held accountable for the resulting damages to surface water irrigators. This case for the first time in Nebraska gives legal recognition of the hydraulic reality of the inter-connectedness of certain surface water and groundwater and provides recourse for surface water users whose interests are not being otherwise protected. This article will provide a background of the physical and legal setting, briefly describe the history of the case as it made its way through the Nebraska Supreme Court, detail the positions of the various parties and amicus, describe the Court's decision, and, finally, discuss its potential implications. Other significant cases recently decided by the Nebraska Supreme Court will also be briefly described.

BACKGROUND

Pumpkin Creek begins near the Nebraska/Wyoming state line in the panhandle of Nebraska and flows generally east and north, entering the North Platte River near Bridgeport, Nebraska (see map). In the Pumpkin Creek Basin (Basin), precipitation averages between 15 and 17 inches per year. The Basin's aquifer is of a type unusual in Nebraska. The groundwater resources, other than a very thin alluvial aquifer below the stream itself, come from fractures in the parent material. From before the 1930s until the mid-1960s, Pumpkin Creek contributed between 20,000 and 30,000 acre-feet (AF) per year to the North Platte River. However, as the number of irrigation wells drilled in the Basin increased, the flows in the stream declined. As of 1998, the number of wells had increased to 543, the flows of Pumpkin Creek declined to less than 10,000 AF, and the number of zero flow days increased substantially. Additionally, groundwater levels declined in wells throughout the basin.



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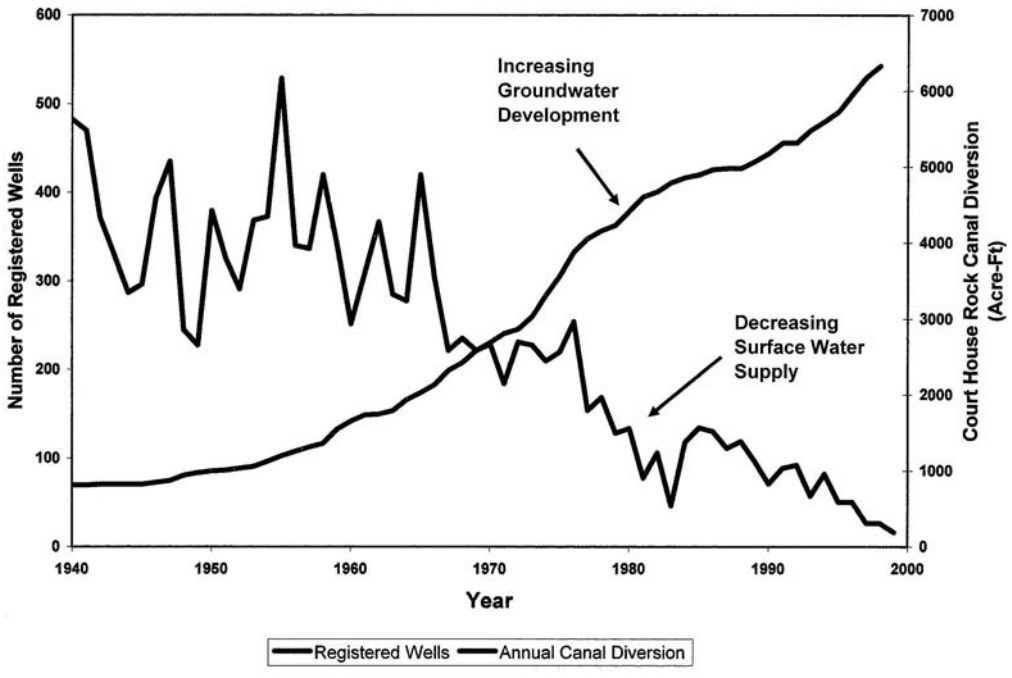


Suface Water Administration

In Nebraska, surface water rights are issued and administered by a state agency, the Department of Natural Resources (previously known as the Department of Water Resources). Spear T Ranch was issued two surface water permits or appropriations, one dated November 16, 1954 and one dated December 21, 1956. These permits were for surface water for irrigation of crops on Spear T Ranch property located in the lower Pumpkin Creek watershed not far from where Pumpkin Creek empties into the North Platte River. In its Complaint, the plaintiff, Spear T Ranch, alleged that for the four years preceding the filing of its Complaint in 2003, it had been unable to divert any water for its surface water rights and had been unable to provide water for its livestock.

"NRDs"

In 1972, the Nebraska Legislature grappled with a number of natural resources issues. Among other actions, the Legislature decided to merge the functions of numerous local entities into political subdivisions of the State of Nebraska, known as **n**atural **r**esources **d**istricts (NRDs). The state was divided roughly along surface watershed boundaries into 24 natural resources districts.

When Spear T Ranch filed its Complaint in 2003, the Department of Natural Resources, then known as the Department of Water Resources, had not issued any new surface water rights in the Pumpkin Creek Basin since 1979 and had not issued any in the North Platte River Basin since 1993. The area encompassed by the Pumpkin Creek Basin was included in a groundwater management sub-area created by the North Platte Natural Resources District effective March 21, 2001. As a part of the rules adopted by the NRD, a moratorium on the construction of new wells was implemented.

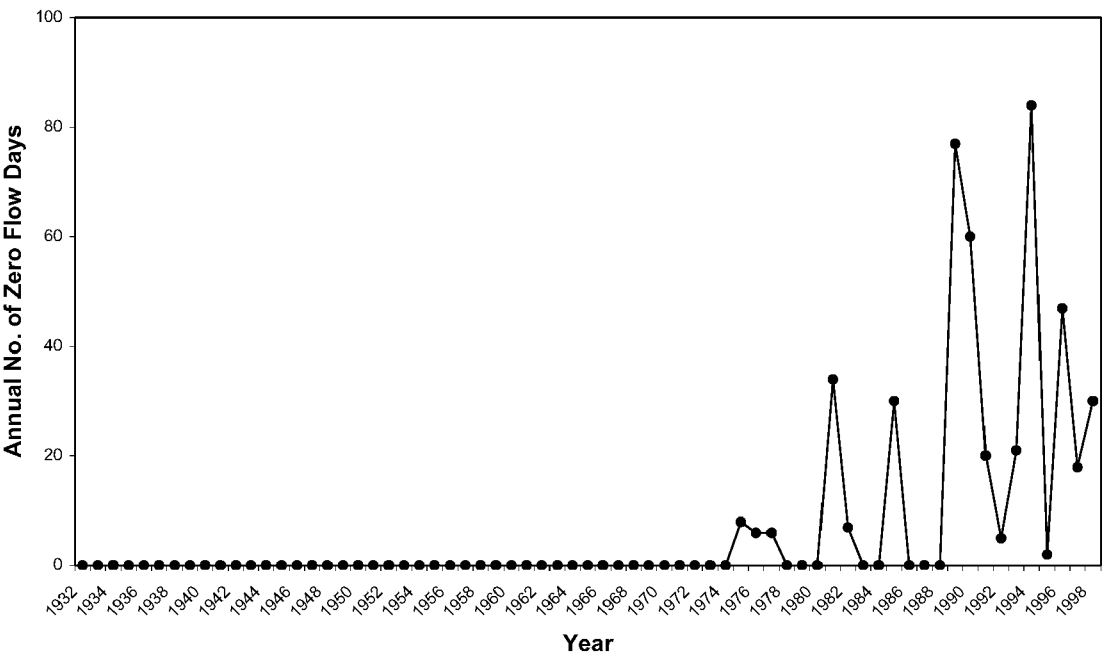
HISTORY OF THE CASE
District Court Proceedings

Complaint

On February 26, 2003, the plaintiff filed its Complaint in the District Court for Morrill County, Nebraska. In the Complaint, 23 defendants including individuals, farming corporations, and partnerships were identified. Essentially, the Complaint alleged that the groundwater wells on the land owned by the defendants had been pumped and intercepted or withdrew water that, but for the pumping, would have been in Pumpkin Creek and would have provided water for Spear T Ranch's irrigation pursuant to its surface water appropriations and for watering its livestock. The defendants filed motions to dismiss pursuant to Rule 12(b), alleging that the Complaint failed to state a claim upon which relief could be granted, that the Court lacked jurisdiction over the subject matter, and that the plaintiff failed to include

Nebraska

necessary and indispensable parties. On those bases, the District Court in an Order dated June 10, 2003, dismissed the Complaint based on its findings that there was no reasonable possibility that the plaintiff could amend the Complaint to cure the defects.



Nebraska Department of Natural Resources streamflow records database, 2001

Supreme Court Consideration

Contending Parties

The case, being one of first impression, bypassed the Court of Appeals and was directly considered by the Nebraska Supreme Court. Spear T Ranch, as the Appellant, filed its expanded Brief in September of 2003. The Appellees (defendants) filed a Joint Brief in November and the Appellant Spear T Ranch filed its Reply in December. In addition, numerous entities filed Amicus Briefs. Briefs generally supporting the positions argued by the Appellees came from the Nebraska Groundwater Management Coalition, the Nebraska Farm Bureau Federation, and the Nebraska Attorney General's office. Entities submitting Briefs generally supportive of the position of the Appellant included the Nebraska State Irrigation Association, Central Nebraska Public Power and Irrigation District, a joint Brief filed by the Farmers Irrigation District and other panhandle irrigators, and the Reban Corporation representing an irrigator downstream of Lake McConaughy.

Court Order

Oral argument was held on March 3, 2004 at the University of Nebraska College of Law before a large gathering of law students and interested persons. Subsequent to the oral argument, but before a decision was issued, the Appellees filed a Motion to permit further argument and additional briefing. The Motion was opposed by Spear T Ranch, but was granted by the Court in an Order dated April 21, 2004. In that Order, the Court asked for briefs and argument on four points.

THE COURT ASKED THE PARTIES TO ADDRESS THE FOLLOWING:

1) The doctrine of primary jurisdiction
2) Primary jurisdiction in light of the Groundwater Management and Protection Act and the recent adoption of LB962
3) Any effect of the adoption of LB962 on the appeal
4) Whether the Nebraska Groundwater Management and Protection Act or LB962 abrogated any common law remedies that the Appellant had or if they provided an adequate remedy at law

AG's Motion Denied

Additional briefs were provided by the Appellant and the Appellees as well as most of the Amici. Subsequent to the submittal of all of the briefs, the Nebraska Attorney General's office filed a Motion for Leave to Intervene as a defendant. This motion was opposed by some of the Appellees and the Appellant. The Court, on September 1, 2004, sustained the objections and denied the Attorney General's request for leave to intervene. The case was re-argued before the Court on September 8, 2004 and the Court issued its opinion dated January 21, 2005.

Nebraska

Damage Claim

Defense Arguments

Diversions Stopped

Interconnection Acknowledged

Court's Steps

Tort Law

Significant Position of the Parties: Spear T Ranch (Appellants)

In essence, Spear T Ranch argued that the groundwater users had damaged its right to use the water out of Pumpkin Creek and that it was entitled to compensation and an injunction. In particular, Spear T Ranch argued that the defendants had converted to their own use the water that it would otherwise receive. This argument was based upon the common law theory of conversion. Further, it was argued that if conversion did not exist then trespass would be the available common law remedy.

The Groundwater Users (Appellees)

The defendants, in their consolidated brief, presented several arguments. First, they argued that *surface water use* is administered pursuant to the prior appropriation doctrine and that *groundwater* is governed by the correlative use doctrine as established in Nebraska. Thus, the argument was that there were separate administrative mechanisms that regulated the use of surface water and groundwater. Secondly, it was argued that the Legislature had adopted groundwater management statutes regulating the use of groundwater and that the plaintiff's recourse was to bring its concerns before the local natural resources district. Further, it was argued that the local natural resources district had adopted a groundwater management plan and that each of the groundwater users had registered each of their wells and thus had not engaged in any illegal act. Finally, it was argued that Spear T Ranch could not successfully pursue a claim of conversion because it did not own the water but merely had a right of use.

Attached to Appellees' Brief were rules and regulations of the North Platte Natural Resources District establishing the Pumpkin Creek Management sub-area. Additionally, for the water year 2002-2003 (10/1/02 through 9/30/03), 56,450 AF of water was allocated for use by groundwater irrigators in the sub-area with no more than 24 acre inches allowed to be pumped in any year by any groundwater irrigator. Under the plan, no water was allocated for surface water use and apparently Spear T Ranch was unable to divert any surface water for its use during that water year.

LB 962 (Legislative Bill) was adopted by the Nebraska Legislature in 2004, after a 49-member water policy task force appointed by the governor in 2002 proposed the legislation. LB 962 was intended to integrate the management of surface and ground water. The extremely lengthy Bill was the most significant legislation in this area of the law in Nebraska at least since 1966.

Supreme Court Decision

Judge Connolly wrote the decision for a unanimous court. After reviewing the physical circumstances of the case, he noted that there are circumstances in which groundwater contributes to the flows of surface water streams and the flows of surface water streams contribute to the accumulation of water underground. The Court acknowledged the physical reality of the inter-connected nature of portions of the surface and groundwater systems.

The Court then reviewed the administrative systems established under Nebraska law for its water resources. It noted that the Department of Natural Resources and its predecessors have been given the legislative authority for regulation of surface water through the prior appropriation system. The court reviewed the adoption of statutes that authorize the 23 local natural resources districts to adopt rules and regulations regarding the use of groundwater.

In determining what steps it would take, the Court first determined what steps it would not take. First, it held that it would not apply the Prior Appropriation Doctrine to groundwater uses. Secondly, it determined that it would not apply the common law right of recovery for conversion or trespass. As the Court said, "Because Spear T does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass." *Id.* at 186. It should be noted that this quoted language seems at odds with prior decisions of the Supreme Court of Nebraska which have said that a surface water appropriation does constitute a property interest. *See Nine Mile Irr. Dist. v. State*, 118 Neb. 522, 225 N.W. 679 (1929) (the right to appropriate water is a vested property right); *Enterprise Irr. Dist. v. Willis*, 135 Neb. 827, 284 N.W. 326 (1939) (appropriator of public water has a vested property right); *Loup River Public Power Dist. v. North Loup River Public Power and Irr. Dist.*, 142 Neb. 141, 5 N.W.2d 240 (1942). The Court then reviewed the common law analysis used to resolve disputes among (groundwater) users. The Court looked at the English rule, the American Rule, Correlative Use Doctrine and the Restatement (Second) of Torts.

At the heart of its decision, the Court determined it would utilize the Restatement of Torts as the means of resolving disputes between surface water users and hydrologically connected groundwater users.

THE COURT STATED:

> Accordingly, we adopt the Restatement to govern conflicts between users of hydrologically connected surface water and groundwater. Specifically, we hold: A proprietor of land or his [or her] grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not

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> subject to liability for interference with the use of water of another, unless...the withdrawal of the groundwater has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water. Restatement (Second) of Torts Section 858 (1)(c) at 258 (1979). Whether a ground water user has unreasonably caused harm to a surface water user it is decided on a case-by-case basis. In making the reasonableness determination, the Restatement...provides a valuable guide, but we emphasis that the test is flexible and that a trial court should consider any factors it deems relevant.

Id. at 194.

Restatement Factors

Thus the factors set forth in the Restatement are to be considered in making the determination. THE FACTORS INCLUDE:

- Purpose of use
- Suitability of the use to the water course or lake
- Economic value of the use
- Social value of the use
- Extent and amount of harm it causes
- Practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other
- Practicality of adjusting the quantity of water used by each proprietor
- Protection of existing values of water uses, land, investments and enterprises
- Justice of requiring the water user causing harm to bear the loss.

Groundwater Act Reviewed

The Court reviewed the Groundwater Management and Protection Act and the recently adopted LB 962. The Court noted that these statutes contain general regulations but are not designed to resolve individual disputes and do not result in any type of administrative adjudication. The adoption of these laws allows the request to be made to a local natural resources district to make rules and adopt management plans. However, these plans are prospective in their operation and thus do not provide adequate remedy for harm that has already occurred. In addition, the concept of primary jurisdiction does not apply because a remedy is not assured through actions of the local natural resources district. The Court also determined that the District Court had improperly dismissed the claim on the basis that necessary parties were not included. The Court noted that the plaintiff could choose to sue any one of the alleged groundwater users that caused its damage and was not required to join all the groundwater users that allegedly caused the damage. The case was reversed and remanded to the District Court for additional proceedings.

IMPLICATIONS

Evolving Implications

This case carries with it significant, if evolving, implications. The most significant implication that exists is that surface water users who believe they can establish that groundwater users have unreasonably interfered with their use of surface water can file a complaint in the appropriate state District Court seeking redress for their harm. To help prove that the surface water user has been harmed, the Court has provided — through citation to the Restatement (Second) of Torts — guidance regarding the type of factors used to determine whether or not the surface water user is entitled to prevail in its claims. The case leaves in place the Groundwater and Protection Act as a means for local natural resources districts to manage interrelated resources and the Prior Appropriation system for the regulation of surface water rights. Whether the Spear T Ranch case provides a means for surface water users to obtain compensation for their losses and whether it provides additional incentive to develop comprehensive and effective groundwater management plans remains to be seen.

ADDITIONAL SIGNIFICANT AND RELATED CASES

Additional Tort Claim

Other cases have been decided by the Nebraska Supreme Court since the *Spear T Ranch* decision which discuss who has the power to regulate groundwater and surface water uses. In addition to the case discussed above, Spear T Ranch also brought a claim against the State of Nebraska. Its tort claim against the State for over $4 million was rejected by the State Tort Claims Board and a subsequent complaint against the State was dismissed by the State District Court of Morrill County on summary judgment. Spear T Ranch appealed the decision to the Nebraska Supreme Court, which affirmed the dismissal. *Spear T Ranch, Inc. v. Nebraska Dept. of Natural* Resources, 270 Neb. 130, 699 N.W.2d 379 (2005). The Nebraska Supreme Court held that the State of Nebraska could not be held liable for Spear T Ranch's alleged losses because there was no explicit authority for the Department of Natural Resources to directly regulate the use of groundwater or resolve conflicts between surface water appropriators and ground water users. The Court reasoned that without any legal duty, the Department of Natural Resources could not be liable for any loss sustained by Spear T Ranch.

No Liability

Nebraska

Authority Limitations

In the separate case of *In re Central Nebraska Public Power and Irr. Dist.*, 270 Neb. 108, 699 N.W.2d 372 (2005), the Central Nebraska Public Power and Irrigation District (Central) filed a request with Nebraska's Department of Natural Resources to regulate "unpermitted" diversions upstream from Lake McConaughy. As a part of its filing, Central alleged that hydrologically connected groundwater users amounted to unpermitted diversions that should be regulated. The Department rejected that petition and the case was appealed by Central to the Nebraska Supreme Court. The Supreme Court, in it decision, determined that the Department of Natural Resources was limited to regulating surface water uses and that the Natural Resources Districts were given authority to regulate groundwater uses.

THE COURT STATED THE FOLLOWING IN SUPPORT OF ITS DECISION:

> This conclusion is clearly supported by our decision in Spear T Ranch v. Knaub, supra, in which we declined to apply legislatively created surface water priorities to ground water use for the reason that no statutory authority or case law supported the rationale of applying the rules relating to surface water appropriations to ground water use. We recognized that the Legislature has not developed an appropriation system that addresses direct conflicts between users of surface water and ground water that is hydrologically connected. We noted that the lack of an integrated system was reinforced by the fact that different agencies regulate ground water and surface water.

Central, 270 Neb. at 117-18, 699 N.W.2d at 378-79.

Unintended Consequences?

The result of these decisions may be unintended consequences. For instance, the State of Kansas, having previously sued Nebraska regarding the Republican River Compact, may again seek redress against the State of Nebraska before the US Supreme Court. Under the settlement of the prior litigation, the parties agreed to a new methodology for accounting for and reporting uses in each state. Should Nebraska fail to be in compliance with the compact under the new accounting rules, how will the State assure compliance in the future? If use by groundwater wells significantly contributes to any established shortages and the Nebraska Department of Natural Resources does not have authority to ensure that compliance will be achieved if compliance requires regulation of groundwater uses, it would appear that despite the holding in *Hinderlider v. Laplata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803 (1938), Nebraska may be in a position to be unable to assure compliance. If that is the case, then will Nebraska be inviting outside governance of its groundwater uses?

Assurance Lacking

Also, as the Court noted in the *Central* case, the Nebraska Legislature has not adopted statutes that assure that surface water permit holders will have their rights protected. Conceptually, Nebraska has chosen to utilize a planning process that results in the adoption of Integrated Management Plans, but does not assure protection of historically permitted and used rights. Unlike states that have adopted statutes that require protection of existing uses from new uses, Nebraska laws do not provide such protection. Nebraska laws put the burden on existing users to sue new users if such uses result in impacts. Such a lawsuit would be permitted even if the new use were in compliance with an integrated management plan, so long as the existing user can meet the standards established in the *Spear T Ranch* case. Nevertheless, the Court in the *Spear T Ranch* case seems to be calling for the Nebraska Legislature to pass new laws to address the concerns of protecting the rights of both groundwater and surface water users from harm caused by new users.

New Laws?

For Additional Information:

LEROY W. SIEVERS, 402/ 475-7011 or email: LWS@knudsenlaw.com
JOCELYN WALSH GOLDEN, 402/ 475-7011 or email: jwalsh@knudsenlaw.com

LeRoy W. Sievers has been a member of the law firm of Knudsen, Berkheimer, Richardson & Endacott, LLP since 2000. His practice primarily focuses on natural resources litigation and water law. He graduated from Doane College with honors in 1970. He served three years in the US Army, spending two years at The White House. In 1975, he received a Masters Degree in management in Computer Science from The American University in Washington, DC. He graduated from the University of Nebraska College of Law in December 1977. From 1984 to 1991, he worked at the Nebraska Attorney General's Office and represented the State in water resources, banking and appellate litigation. In 1991, LeRoy moved to the Nebraska Department of Water Resources, where he worked on a variety of water related issues. One of his primary responsibilities was the *Nebraska v. Wyoming* litigation before the US Supreme Court concerning the North Platte River.

Jocelyn Walsh Golden is an associate of the law firm of Knudsen, Berkheimer, Richardson & Endacott, LLP having joined the firm in 2004. Her practice focuses on commercial litigation, bankruptcy, and natural resources litigation. She graduated with distinction from the University of Nebraska-Lincoln with degrees in Psychology and Political Science in 2001. She graduated magna cum laude from Creighton University School of Law with her JD in 2004.

WATER BRIEFS

CLEAN WATER ACT — US
SUPREME COURT

The US Supreme Court agreed on October 11 to accept two cases concerning federal jurisdiction over wetlands. The cases deal with the definition of federally protected wetlands and the scope of jurisdiction under the Clean Water Act (CWA). Jurisdiction questions have abounded since the "isolated wetlands" decision in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC* case).

The two cases both originated in the 6th Circuit Court of Appeals in Michigan: *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004), cert. granted (U.S. Oct 11, 2005) (No. 04-1034) and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), cert. granted (U.S. Oct 11, 2005) (No. 04-1384).

The Supreme Court will be grappling with issues of hydrological connection between a wetland and "navigable waters," the physical remoteness of wetlands to navigable waters, and the reach of jurisdiction under the Clean Water Act regarding actions that affect wetlands (fill and removal permits, etc.).

The Supreme Court also accepted a third CWA case that deals with a separate issue. In *S.D. Warren v. Maine Department of Environmental Protection* (No. 04-1527), the issue involves a "water quality certification" that is required before making "any discharge" of a "pollutant" into navigable waters. The issue arose in a Federal Energy Regulatory Commission license renewal proceeding for hydroelectric generating dams. This case may provide additional guidance regarding the law on waterway-to-waterway transference that was largely deferred by the Supreme Court in the *Miccosukee* case (*South Florida Water Management District v. Miccosukee Tribe of Indians et al*. (March 23, 2004). See Glick, TWR #2.

For info: Richard Glick, Davis Wright Tremaine, 503/778-5210 or email: rickglick@dwt.com

PESTICIDES INFO — WA/OR/CA
JUDICIAL ORDER

In an on-going case about the effect of pesticides on ESA listed fisheries, federal Judge John Coughenour ordered the Environmental Protection Agency on October 17th to take a greater role in informing the public about potential harm to salmon. The recent order followed the January 2004 ruling by Judge Coughenour that banned the use of some pesticides within protective buffers along salmon streams in California, Washington and Oregon (with certain exceptions). The ban remains in place while EPA determines if these chemicals harm threatened and endangered salmon. See Beale, TWR #4 and Goldman, TWR #12.

The EPA was ordered to send letters to pesticide retailers, distributors, and wholesalers in three states telling them they are responsible for notifying consumers about the dangers posed to salmon by the chemicals, which are widely available in garden and yard stores. Under the new order, EPA must send letters about the policy to retailers in urban areas with more than 50,000 people and provide stores with a list of the chemicals and the products that contain them.

The retailers must post notices warning them about the potential danger to salmon. The warnings apply to pesticides containing the following seven ingredients: 2,4-D, carbaryl, diazinon, diuron, malathion, triclopyr, and trifluralin. These pesticides have been frequently detected in waterways near urban areas and are in products such as weed & feed products, Sevin, Bug B Gon Granules, malathion insect sprays, and combination slug and insect baits. Diazinon is not longer sold in urban markets. EPA must also list the information on its website.

For info:
Erika Schreder, WA Toxics Coalition, 206/ 632-1545 x119; EPA website: www.epa.gov/oppfead1/endanger/wtc/index.html

HAWAI'I DOT FINED — HI
STORMWATER VIOLATIONS

Hawai'i DOT agreed to pay a fine of $1 million to resolve stormwater violations, as well as spending an estimated $50 million on compliance over the next five years. The US Department of Justice, the US Environmental Protection Agency, and the Hawai'i Department of Health reached the agreement with the Hawai'i Department of Transportation (HDOT) regarding Clean Water Act stormwater violations at highways and airports in Hawai'i.

The settlement requires HDOT to undertake a variety of actions to improve management of stormwater runoff from its highways and airports. These actions include requiring HDOT to: update its existing program for management of its storm sewer system for highways on Oahu (includes improving removal of sediment and debris from roadsides and storm drain catch basins, reducing roadside erosion, and controlling other sources of pollution into its storm drainage system); institute new procedures for controlling stormwater at highway construction projects (better processes for the planning and design of proposed projects and increasing inspections of contractors constructing projects on HDOT's behalf); improve management of stormwater at airports (enhanced program of inspections and enforcement against non-complying airport tenants). Violations of CWA's stormwater control requirements led the EPA to issue several orders against HDOT in 1999, 2000 and 2002. Inspectors from EPA and the Hawai'i Department of Health found that HDOT was significantly behind other state and local governments in meeting national and state stormwater requirements.

The agreement takes effect when signed by the District Court judge following the conclusion of a 30-day public comment period. A copy of the consent decree lodged October 6 is available on the US DOJ website at: www.usdoj.gov/enrd/open.html

For info: Ravi Sanga, EPA, 206/ 553-4092 or email: sanga.ravi@epa.gov

WATER BRIEFS

TRIBAL PROJECTS AZ/CA/NV
EPA GRANTS

The US Environmental Protection Agency (EPA) in late October awarded more than $40 million in grants for environmental protection projects to tribes in California, Arizona and Nevada. EPA's funding will be used to develop environmental programs, build water and sewage treatment systems, and implement air pollution control, solid waste management, watershed monitoring and restoration projects.

The money will be distributed to more than 140 tribes in the Pacific Southwest, including $19 million to California tribes, $13.5 million to Arizona tribes, and $7.7 million to Nevada tribes. Expenditures expected include $125,000 to the Torres Martinez Tribe and $125,000 to the Colorado River Indian Tribe to assess lead-based paint hazards affecting children, $180,000 to the Washoe Tribe to clean up and restore the Clear Creek watershed, and $100,000 to the Havasupai Tribe, located in the Grand Canyon.

The Havasupai Tribe faces unparalleled environmental challenges — the only access to the reservation is by helicopter, horseback, or an 8-mile walk.

More than 90% of the 146 federally recognized Tribes in the Pacific Southwest now have environmental programs, up from just a handful 10 years ago. EPA noted that this year, Tribes in the Pacific Southwest used grant funds to provide safe water to more than 1,200 tribal homes, recycle more than a million pounds of waste and clean up more than 150 illegal open dumps.

For more information on the EPA's tribal program for the Pacific Southwest region, see EPA's website: www.epa.gov/reigon09/indian/

For info:
Laura Gentile, EPA, 415/947-4227

KLAMATH COHO SALMON PLAN REJECTED: 9TH CIRCUIT CA/OR

On October 18, the 9th Circuit Court of Appeals held that the Klamath coho operation plan was illegal, finding it failed to provide adequate water flows for coho until eight years into the ten-year timeframe (see *PCFFA, et al v. Bureau of Reclamation, et al*, Civil No. 03-16718). The decision reversed the 2002-2012 Klamath Project Operations Biological Opinion prepared by NOAA Fisheries for the coho. The lawsuit concerns US Bureau of Reclamation's (Bureau's) operation of the Klamath Project in accordance with its responsibilities under the ESA to protect threatened Southern Oregon/Northern California Coast (SONCC) coho.

The National Marine Fisheries Service (NMFS) determined that the Bureau's proposed activities — the operation of a federal irrigation system — would cause jeopardy to the SONCC coho salmon. NMFS developed "reasonable and prudent alternatives" (RPA) concerning the quantity of water that the Bureau would be required to release from behind Iron Gate Dam to the Klamath River for the years 2002-2012 and how that water would be obtained. The first two phases of the RPA contained a phased-approach for the years 2002-2009; these co-called "short-term measures" during the first eight years were at issue before the 9th Circuit.

The court was concerned with the lack of actual analysis by NMFS regarding Phases I and II. "The BiOp contains no analysis that suggests that the agency determined that, during the eight-year period encompassed by Phases I and II, the coho would receive sufficient protection against jeopardy under the proposed plan of operations." Slip Op. at 14311. Without any factual basis, the court was unwilling to simply rely on NMFS' beliefs: "Although this language suggests, as the district court indicated, that the agency believed that the RPA would avoid jeopardy to the coho, this assertion alone is insufficient to sustain the BiOp and the RPA. The agency essentially asks that we take its word that the species will be protected if its plans are followed. If this were sufficient, the NMFS could simply assert that its decisions were protective and so withstand all scrutiny." Slip Op. at 14312

The 9th Circuit rejected NMFS' view of the Bureau's "57 percent responsibility" conclusion, which was based on the Project providing irrigation to 57 percent of the land in the upper Klamath Basin. "The flow level appears to be justified solely on the basis of the Klamath Project's share of responsibility for the water use. The proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts. See *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999); see also *Nat'l* Wildlife Fed'n v. Coleman, 529 F.2d 359, 373-74 (5th Cir. 1976). Nothing in this section shows that the agency considered the effect on the coho of providing only slightly more than half of the long-term flow needs for the first eight years of implementation." Slip Op. at 14313-14314.

The opinion said, "Five full generations of coho will complete their three-year life cycles — hatch, rear, and spawn — during those eight years. Or, if there is insufficient water to sustain the coho during this period, they will *not* complete their life cycle, with the consequence that there will be no coho at the end of the eight years. If that happens, all the water in the world in 2010 and 2011 will not protect the coho, for there will be none to protect." Slip Op. at 14315 (emphasis in original).

The court remanded the case back to the district court in Oakland for imposition of an appropriate injunction addressing flow in the river: "We emphasize that the interim injunctive relief should reflect the short life-cycle of the species. It is not enough to provide water for the coho to survive in five years, if in the meantime, the population has been weakened or destroyed by inadequate water flows." Slip Op. at 14317.

CASE WEBSITE: www.findlaw.com [select: 9th Circuit > Oct. 2005 cases > *Pacific Coast Federation of Fishermen's Associations v. US Bureau of Reclamation*]

For info: Kristen Boyles, Earthjustice, 206/ 343-7340 x33 or website: www.earthjustice.org/news/press.html; Greg Addington, KWUA Executive Director, 541/ 883-6100 or website: www.kwua.org

WATER BRIEFS

SUPERFUND ORDER WA
DUWAMISH SEDIMENTS

On October 17, the Port of Seattle agreed to perform extensive soil sampling in the 3-acre upland portion of the area known as Terminal 117, which is part of the Lower Duwamish Waterway Superfund site. The terminal is located in Seattle's South Park neighborhood.

Under the order, the Port agreed with EPA to conduct sampling across the entire property. This past fall, the Port completed soil sampling for PCBs (polychlorinated biphenyls) at the northern part of Terminal 117. The samples taken under the October 17th order will be analyzed for more chemicals than just PCBs, including petroleum byproducts and metals.

Results from recent Port sampling activity at Terminal 117 ranged from 500 to 1600 parts per million for PCBs. The new soil sampling is anticipated to start this winter. Based on the results, the Port will recommend ways to manage and clean up this soil in 2006, under EPA authority. Higher PCB contamination in the top of the riverbank is expected to be cleaned up this summer along with the soil. Cleanup of the contaminated mud and other areas will occur in 2007.
For info: Ravi Sanga, EPA, 206/ 553-4092 or email: sanga.ravi@epa.gov

HAZARDOUS WASTE CA
GLIDDEN SETTLES

The US Environmental Protection Agency (EPA) recently settled with paint manufacturer Glidden Company for $95,000 in cleanup costs at an abandoned drum site in Riverside County, outside of Los Angeles.
In June 2004, EPA investigated four abandoned 48-foot tractor trailers that contained resins, polymers, paint wastes, solvents and heavy metal sludge, located in Perris. The EPA determined that the trailers were holding hazardous substances, and subject to response under of the Comprehensive Environmental Response, Compensation and Liability Act or Superfund law. The trailers were owned by John Jones, a trucker who had previously operated a waste hauling business from 1960 to 1980. Three trailers were located on Jones' property and while another vehicle was parked on a parcel belonging to his brother, Robert Jones.

EPA removed approximately 1,000 containers, ranging in size from 5-gallon paint cans to 55-gallon drums. The containers were severely deteriorated and had to be carefully packaged for shipment and disposal. EPA's cleanup at the trailers cost approximately $206,396. Because it is believed that at least some of the paint cans were transported under the orders of a paint manufacturer since acquired by Glidden, Glidden Company will share in the clean up costs.
For info: Dean Higuchi, EPA, 808/ 541-2711 or email: higuchi.dean@epa.gov; EPA's Superfund website: www.epa.gov/superfund/action/law/cercla.htm

DAM BREACH WA
Sediment Impact

The Washington Department of Ecology (Ecology) recently released a supplemental environmental impact statement (EIS) that addresses the affects of removing Condit Dam on the White Salmon River. The document primarily addresses water quality concerns and is a supplement to environmental impact studies on the proposal by PacifiCorp to remove the hydroelectric project, submitted to the Federal Energy Regulatory Commission (FERC). Ecology is accepting public comments on the document until November 15.
The dam is proposed to be breached in October 2008. Demolition of the 125-foot high dam would open 33 miles of steelhead habitat and 14 miles of salmon habitat, which have been blocked since the dam was constructed in 1913.

Ecology is in the process of making a decision on whether the proposal to remove the dam will meet state water-quality and other environmental mandates. The state must approve water-quality certification and a state construction stormwater permit before the dam can be removed. Ecology hired URS Corporation, a Seattle consulting firm, to independently evaluate the FERC document to determine whether it met state environmental regulations. According to Ecology's document, the plume released when the dam is breached could kill fish and other aquatic species downstream.
Ecology's report said that the project might violate the Endangered Species Act due to the sediment problems. "While the FERC document covered most of the issues, more information was needed on both long-term and short-term water-quality concerns surrounding dam removal," explained Derek Sandison, central region director for Ecology. "Concerns included how backed-up sediments and debris would be managed, as well as what effects dam removal would have on wetlands, endangered fish and fish passage." The draft SEIS may be viewed at www.ecy.wa.gov/biblio/0506022.html; Call Ecology for a compact disk or hard copy, 509/ 575-2808.
For info: Joye Redfield-Wilder, Ecology, 509/ 575-2610

BROWNFIELDS RULE US
EPA ANNOUNCES

In a press release dated November 1, EPA noted that Stephen L. Johnson, administrator of the Environmental Protection Agency, is scheduled to announce the All Appropriate Inquiries rule November 2 at this year's Brownfields Conference in Denver, Colorado. The new rule establishes clear standards for environmental due diligence that will encourage more urban redevelopment, according to EPA.

"President Bush and EPA are committed to putting both property and people back to work through our successful brownfields program," said Johnson. "By making risk management less of a guessing game and more of a science, we are expanding the number of problem properties that will be transformed back into community assets."

The All Appropriate Inquiries rule is expected to increase private cleanups of brownfields while reducing urban sprawl, affecting more than

250,000 commercial real estate transactions nationwide annually. The rule's process of evaluating a property for potential environmental contamination and assessing potential liability for any contamination at the property increases certainty of Superfund liability protection, and improves information about environmental conditions of properties.

EPA noted that over the last decade EPA's brownfields program has attracted more than $7 billion in public and private investments for the cleanup and redevelopment of brownfield properties in cities and towns across the nation, creating more than 33,000 thousand jobs. During this time, more than 7,000 properties have been assessed for environmental contamination.

For info: Kerry Humphrey, EPA, 202/ 564-4355 or email: humphrey.kerry@epa.gov; EPA website: www.epa.gov/brownfields/

GW CLEANUP **CA**

DRINKING WATER

The Justice Department and EPA announced October 26 that sixteen firms will pay a combined $14.9 million for cleanup costs at the San Gabriel Valley Area 2 Superfund site. The 16 companies involved in today's settlements will pay $14.5 million to the U.S. and $346,000 to the State of California. EPA's cleanup calls for removing contaminants from approximately 30 million gallons per day of contaminated groundwater in and near Baldwin Park, California, benefiting the drinking water source for some 85,000 households.

Beginning in the 1940's, companies started using various chemicals at the site that have now contaminated the area's groundwater. Contaminants include trichloroethylene (TCE) and perchloroethylene (PCE), volatile organic compounds that can affect breathing and nervous systems, and perchlorate, a component of rocket fuel that may affect the thyroid.

The Baldwin Park area and three adjoining areas of groundwater contamination were declared Superfund sites in 1984. The Baldwin Park area cleanup addresses an area of groundwater contamination more than eight miles long and 1,000 feet deep. The settlements follow an earlier agreement between nine of the 16 companies and seven local water agencies that is helping guide the cleanup. More than $100 million has been spent in the last three years alone on the construction and operation of four large water treatment systems to clean the groundwater and provide a safe source of drinking water to area residents and businesses. The groundwater cleanup, one of the largest in the country, has been a cooperative effort involving the EPA, the State of California, and seven local water agencies.

The 16 companies are: Aerojet-General Corporation; Allegiance Healthcare Corporation; Azusa Land Reclamation Co. Inc.; Fairchild Holding Corp.; Hartwell Corporation; Huffy Corporation; Leach International Corporation; Lockheed Martin Corporation; Mobil Oil Corporation; Oil & Solvent Process Company; Phaostron Instrument and Electronic Company; Philip Morris USA Inc.; Reichhold Inc.; the Valspar Corporation; White & White Properties; and Winco Enterprises Inc. The settlements also cover several related entities.

EPA noted in its announcement that it will continue to oversee cleanup work at the site and the other San Gabriel Valley Superfund sites to protect and restore the San Gabriel Basin as a vital source of drinking water for Southern California.

The San Gabriel Valley Superfund site settlements are described in seven consent decrees lodged today with the US District Court in Los Angeles and one bankruptcy settlement lodged with the US Bankruptcy Court in Ohio on September 20, 2005. The settlements accomplish three goals: to reimburse state and federal government for their initial efforts to investigate and clean up the contamination; to obtain cash payments from seven of the companies that had not participated in the earlier agreement with the water agencies; and to provide commitments to pay future EPA costs of overseeing the cleanup.

Lockheed Martin Corporation, Mobil Oil Corporation, the Valspar Corporation, and Phaostron Instrument and Electronic Company will pay additional amounts for their failure to perform work required by a June 2000 EPA Order. The additional amounts make up $1.5 million of the $14.5 million to be paid to the federal government.

Copies of the consent decrees and bankruptcy settlement are available at DOJ's website: www.usdoj.gov/enrd/open.html. For more information on the EPA's Superfund program, please visit their website: www.epa.gov/superfund/index.htm.

For info:
Lisa Fasano, EPA, 415/ 947-4307

CWA FINE **AK**

INACCURATE REPORTING

EPA's Northwest regional office has announced that International Seafoods of Alaska, Inc. (ISA) has agreed to pay a $20,000 penalty for violations of the federal Clean Water Act. The company submitted numerous inaccurate wastewater discharge reports from its Kodiak, Alaska facility over a two year period.

EPA issued a National Pollutant Discharge Elimination System (NPDES) Permit to ISA in 1998 that allows for discharge of a limited amount of fish processing waste into St. Paul Harbor in Alaska. The permit also requires daily monitoring of the discharges and regular reporting to the EPA.

According to the Consent Agreement and Final Order, International Seafoods submitted ten reports between July 2000 and July 2002 showing that it exceeded its discharge limits for certain pollutants including oil and grease. Later, the company produced information indicating that all the reports were prepared based upon outdated waterflow estimates and were, therefore, inaccurate. ISA submitted corrected reports which showed only one exceedance of the monthly average for oil and grease in February 2002.

For info: Chae Park, EPA, 553-1441

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

November 16-17 MT

Montana Association of Conservation Districts 64th Annual Convention, Helena, Red Lion Colonial Inn. For info: MACD, 406/ 443-5711, email: mail@macknet.org

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 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 OR

Environmental Enforcement Workshop: Criminal Prosecution, Civil Enforcement and Citizen Suits, Portland, World Trade Center, 8am - Noon. RE: Clean Water Act, Clean Air Act, Hazardous and Solid Waste Laws, Endangered Species Act, and State Environmental Statutes. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220 or email hduncan@elecenter.com or website: www.elecenter.com

November 18 ID

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

November 18 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

November 28 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

November 29 CA

Association of California Water Agencies 2005 Fall Pre-Conference Workshop, San Diego, Town and Country Resort and Convention Center. For info: ACWA website: www.acwanet.com/events/ontap.asp

Nov 29-Dec 1 DC

Partners in Environmental Technology Technical Symposium & Workshop, Washington, DC. RE: Sustainable DoD Facilities and Communities; Environmental Impacts of Nanotechnologies; Environmentally Benign Corrosion Protection Technologies; Green Energetics; Managing Threatened and Endangered Species (TES) for DoD Sustainability; Marine Mammals and Military Operations; Management Options for Chlorinated Solvents; Metals Bioavailability and Risk Assessment; Perchlorate Remediation and Treatment and More. For info: Website: www.fedcenter.gov/Events/index.cfm?id=1836

Nov 29-Dec 2 CA

Water Resources Management and Growth: California At A Crossroads, Association of California Water Agencies - Fall Conference 2005, San Diego, Town and Country Resort & Convention Center. For info: ACWA, 916/ 441-4545, or website: www.acwanet.com/events/ontap.asp

Nov 30-Dec 2 OR

Navigating New Frontiers: 2005 OWRC Annual Conference, Hood River, Hood River Inn. RE: ESA Reform, Drought Resources, Klamath Takings Decisions, Columbia River BiOp Remand, Water Demand Planning, Defining Injury in Transactions, & More. Sponsored by Oregon Water Resources Congress. For info: OWRC, 503/ 363-0121 or website: www.owrc.org/

December 1 CA

Profit in The Water Industry: Tap the Reservoir of Wealth, Conference, San Francisco, RE: Opportunities in Latin America; Where the Venture Capital is Flowing; Impact of Regulation on Water-Related Investments; Overview of Regulatory Changes in California. For info: Naomi Barazani, The Water Strategist, 212-952-7400 x126 or email: naomi@twst.com

December 1-2 ID

22nd Annual Water Law & Resource Issues Seminar, Boise, DoubleTree Riverside. RE: Defending Private Property, Clean Water Act, Water Storage Assessments, Public Works Contracting, Water Supplies & Water Markets, Water Transactions in the Columbia Basin & Idaho, ESA Litigation, Water Policy Challenges, Conservation Security Program, Conjunctive Administration, and Practical Solutions. Sponsored by Idaho Water Users Association. For info: IWUA, 208/ 344-6690, website: www.iwua.org

CALENDAR

December 1-2 WA
Government "Takings" Conference, Seattle, Renaissance Hotel. RE: Kelo Decision & More. For info: Karen Fox, Law Seminars Int'l, 206/ 567-4490 or, 800/ 854-8009, or website: www.lawseminars.com/seminars

December 2 OR
Oregon Fish & Wildlife Commission, Salem, 8 am. For info: Cristy Mosset, ODFW, 503/ 947-6044, www.dfw.state.or.us/Comm/schedule.htm

December 6 OR
Northwest Section/AWWA: General Membership Meeting, Location TBA. For info: NW Section website: www.pnws-awwa.org/training.cfm

December 6 WY
Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: Wyoming Assoc. of Rural Water Systems. For info: Wyoming State Engineer's Office website: http://seo.state.wy.us/forum.aspx

December 8-9 OR
Northwest Environmental Conference and Tradeshow (17th Annual), Portland, Red Lion Hotel on the River - Jantzen Beach. RE: Compliance, Technical Sessions, Hazardous Materials Training & More. For info: Cara Bergeson, NEBC, 503/ 227-6361, email: cara@nebc.org, or NWEC website: www.nwec.org

December 8-9 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

December 9 WA
Water Intrusion, Seattle. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

December 10 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

December 12-13 CA
Endangered Species Act, San Francisco. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

December 13 OK
Oklahoma Water Resources Board Meeting, Oklahoma City, 3800 N. Classen Blvd., 9:30am. For info: OWRB, 405/ 530-8800, website: www.owrb.state.ok.us/news/meetings/board/board-mtgs.php

December 14 AZ
Arizona Water Banking Authority, Phoenix, 3550 North Central Ave.(2nd Floor), 10am-12pm. For info: Nan Flores, ADWR, nxflores@azwater.gov

December 14-16 NV
Colorado River Water Users Association Annual Meeting, Las Vegas, Caesar's Palace. For info: CRWUA, 760/ 398-2651, or website: www.crwua.org

December 16 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

December 19 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

December 19-21 CA
Aquatic Ecological Assessment Workshops (Part 2), Davis, UC Davis. RE: Conducting Bioassessements in California, Bioassessment Protocols by SWAMP. For info: David Crane, email: dcrane@OSPR.DFG.CA.GOV; Inge Werner, email: iwerner@ucdavis.edu

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January 3 WY
Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: Kirby Area Water Supply Project. For info: Wyoming State Engineer's Office website: http://seo.state.wy.us/forum.aspx

January 12-13 OR
Oregon Water Resources Commission Meeting, Corvallis. For info: Cindy Smith (OWRD), 503/ 986-0876, website: www.wrd.state.or.us/commission/index.shtml

January 13-15 CA
4th Annual Wild & Scenic Environmental Film Festival, Nevada City, Miners Foundry, 325 Spring Street. For info: Kathy Dotson, 530/ 265-5961 x202, email: Kathy@syrcl.org, or website: www.wildandscenicfilmfestival.org

January 24-25 NE
NARD Legislative Conference (Nebraska Association of Resources Districts), Location TBA. For info: NARD, 402/ 471-7670, email: nard@nrdnet.org, or website: www.nrdnet.org

January 24-27 LA
Third International Conference on Remediation of Contaminated Sediments, New Orleans, Sheraton New Orleans Hotel. For info: Gina Melaragno, 614/ 424-7866, email: sedimentscon@battelle.org, or website: www.battelle.org/environment/er/conferences/sedimentscon/default.stm

January 25 WA
The Latest Word on Compliance with SEPA/NEPA, Seattle, Renaissance Seattle Hotel. For info: Law Seminars International, 800/ 854-8009, website: www.lawseminars.com/seminars/06SEPAWA.php

January 25 OR
Salmon 2100 Project: Alternative Futures for Wild Pacific Salmon in Western North America, Conference, Portland, RE: 33 Salmon Scientists, Policy Analysts, & Salmon Advocates Discuss Outlook for Wild Salmon in California, Oregon, Washington, Idaho, and southern British Columbia.

(continued from previous page)

Keynote Speaker: William Ruckelshaus, Chairman of the Salmon Recovery Funding Board for the State of Washington. For info: Robert T. Lackey, EPA, 541/ 754-4607 or email: lackey.robert@epa.gov

January 26-27 CO
Colorado Water Congress 48th Annual Convention, Denver. For info: CWC, 303/ 837-0812, email: macravey@cowatercongress.org, or website: www.cowatercongress.org

February 2-3 CO
NEPA and Federal Land Development, Denver. Sponsored by Rocky Mountain Mineral Law Foundation. For info: RMMLF, 303/ 321-8100, email: info@rmmlf.org, or website: www.rmmlf.org

February 2-3 CA
Toxic Releases, Los Angeles. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

February 5-9 TX
National Water Conference USDA-CSREES, San Antonio, Marriott Rivercenter. RE: Ag Best Management Practices, Rural Environmental Protection, Conservation & Resource Management, Watershed Assessment & Restoration. For info: USDA-CSREES website: www.soil.ncsu.edu/swetc/waterconf/2006/main.htm

February 7 WY
Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: Instream Flow. For info: Wyoming State Engineer's Office website: http://seo.state.wy.us/forum.aspx

February 20-22 KS
Kansas Dam Safety Conference 2006, Wichita, Radisson Hotel. For info: Kansas Division of Water Resources, 785/ 296-3710, website: www.ksda.gov/Default.aspx?tabid=173

February 23-24 CA
24th Annual Water Law Conference (ABA), San Diego, Hotel Del Coronado. For info: ABA website, www.abanet.org/environ/committees/waterresources/home.html

March 2-3 AK
Brownfields Redevelopment, Anchorage. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

March 7 WY
Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: NHD and FEMA Map Mod Projects. For info: Wyoming State Engineer's Office website: http://seo.state.wy.us/forum.aspx

March 9-11 NM
11th Xeriscape Conference & Expo, Albuquerque, Convention Center. For info: www.xeriscapenm.com

March 9-12 CO
35th Conference on Environmental Law (ABA), Keystone, Keystone Resort & Convention Center. For info: ABA website, www.abanet.org/environ/programs/keystone/2006/

March 20-21 WA
Clean Water and Storm Water, Seattle. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

March 27-29 DC
Western States Water Council Meeting (150th Meeting and Water Policy Seminar), Washington DC, Holiday Inn Capitol. For info: Tony Willardson, WSWC Associate Director, 801/ 561-5300, email: twillards@wswc.state.ut.us, or website: www.westgov.org/wswc/meetings.html

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