



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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Erratum: Many thanks
to the many subscribers
who noticed we managed
to misspell "Santa Fe."

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& More!

UNTAPPING TRIBAL WATERS

TRIBAL WATER MARKETING EXPANDING

by Clay J. Landry and Christina Quinn
WestWater Research LLC (Vancouver, WA)

Introduction

Many American Indian nations in the West have valuable and largely untapped water resources. More than 26 tribes have secured water rights through state and federal settlement agreements. These tribal water rights represent more than 5.9 million acre-feet (AF) of water. Most settlement agreements explicitly allow tribes to market their water rights. Although few tribes have initiated marketing efforts, interest in tribal water marketing will grow as water prices continue to climb and water shortages persist throughout the West. This article discusses the development of tribal water rights, the current marketing of the water rights, and the obstacles tribes must overcome to lease water.

Indian Water Right Settlements

The first legal recognition of Indian water rights occurred in 1908 on the Fort Belknap Indian Reservation in Montana. The Gros Ventre and Assiniboine Tribes were developing an irrigation project along the Milk River with water set aside for the reservation. During dry years, non-Indian water users depleted the stream (Congressional Budget Office: "How Federal Policies Affect the Allocation of Water" August 2006). The US government sued the upstream water users on behalf of the Fort Belknap Indian Reservation in *Winters v. United States*, 207 U.S. 564 (1908). The US Supreme Court ruled in favor of the Indian reservation, concluding that the depletion of water infringed upon the tribes' ability to "fulfill the purpose for which the reservation was made." The doctrine provided reservations federally protected reserved water rights with two advantages to water rights governed by prior appropriation. First, the tribal water rights' priority date is the reservation establishment date; second, the rights cannot be forfeited for nonuse.

The doctrine, however, did not specify how to allot the reserved water to the tribes. This method was developed from the 1964 US Supreme Court Case *Arizona v. California*, 376 U.S. 340 (March 9, 1964). The Court decided that most reservations were meant to be farms and, therefore, the amount of water for each settlement should be quantified by irrigation needs. The Court ruled that reservations should have enough water to grow crops on "practicably irrigable land," whether or not the land was currently irrigated. The Wind River Reservation, for example, has 1.2 million acres, which is about 21 percent of Wyoming. Much of this land can be feasibly irrigated and therefore was a factor in calculating the reservation's 500,717 AF of water entitlements. Colby/Thorson/Britton, "Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West" 2005.

The Confrontation

Despite the federal protection of tribal water entitlements, states continued issuing water rights to farms, cities and industries without recognizing reservation water entitlements. Tribes responded with a series of lawsuits beginning in the 1970s with

Tribal Water Markets

McCarran Amendment

PIA Standard

Other Uses

Leases

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the Ak-Chin Indian Community. The Ak-Chin settled their lawsuit in what became the Ak-Chin Water Rights Settlement Act of 1978, which provided the tribe with 75,000 AF. *Id.* Following this, the federal government began using the settlement process in an effort to avoid further tribal lawsuits.

Legal conflict between tribes and state governments sparked again in 1988 when the McCarran Amendment was passed by Congress. Stein, “*The McCarran Amendment and the Administration of Tribal Reserved Water Rights*” Universities Council on Water Resources (1997). The Amendment waived federal sovereign immunity for the adjudication and administration of federal water rights, including tribal water rights. The US Supreme Court ruling in *Winters* established that tribal water rights were also subject to state adjudication. As a result, tribes seeking water rights were required to negotiate with state governments in addition to the federal government to quantify their entitlement.

Another point of contention that has delayed the settlement process centers on the appropriate quantification method. Many tribes have disputed the “practicably irrigable acreage” (PIA) standard because it ignores other water uses while many states have argued that it provides too much water to the tribes. Disputes between tribes and states over the method used to quantify and use reserved water rights have led to extensive litigation including the Big Horn Adjudication process that resulted in the Wind River Reservation’s water rights allocation. See *In re: The General Adjudication of all Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (1988) and 835 P.2d 273 (1992).

To avoid litigation, some states are now accepting other water uses such as fisheries, domestic use and mineral extraction as quantifiable water uses in their water rights adjudication process.

A New Era of Indian Water Marketing

Although Indian water rights differ in size, usage and transferability, most settlements allow off-reservation use of tribal water through water lease agreements. However, the agreements must be approved by the Secretary of the Interior and abide by state rules. Of the more than 26 western tribes that have established water rights, at least 13 of them have off-reservation lease agreements with municipalities, industries or irrigators. Currently, most of the leases are small, annual agreements with irrigators.

New Mexico’s Jicarilla Apache Nation, which has approximately 40,000 AF of water rights, has taken water marketing the furthest (*Colby*, *infra*). Through a 10-year agreement, the Jicarilla Nation leases 8,500 AF of water to electric generation companies (Lease Agreement Between the Jicarilla Apache Nation and the Arizona Public Service Company, Begins Jan 1, 2007). The companies have an option to purchase an additional 5,100 AF to buffer against extended droughts. The Nation also has smaller industrial leases with the San Juan Basin Waterhauleders and the San Juan Refining Company (Lease Agreement Between the Jicarilla Apache Nation and the San Juan Basin Waterhauleders. Jan. 1, 2006). The waterhauleders agreement is for 100 AF and the refining company agreement is for 340 AF. Both agreements provide options for the lessee to purchase more water.

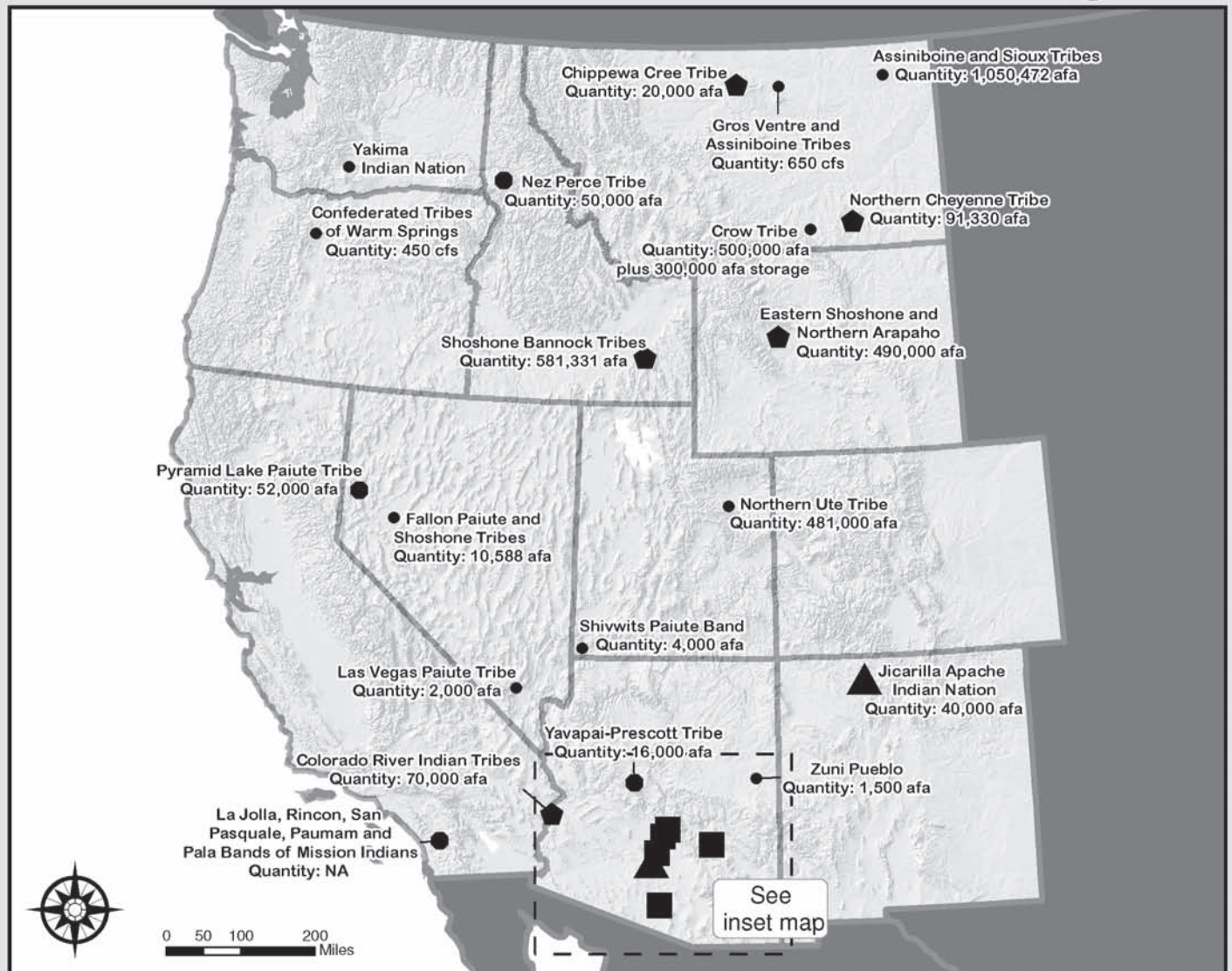
Montana’s Northern Cheyenne Tribe has developed a drought-year, water leasing program that provides water to irrigators along the Tongue River. Each year the Tribe allows irrigators to bid for water to use during the irrigation season. The leasing program provides as much as 10,000 AF annually to downstream irrigators. The quantity made available through the program does vary each year depending on snowpack and available storage associated with the Tribe’s water rights. The program is proving to be successful with approximately 15 to 25 farmers participating each year depending on the quantity of water available through the leasing program and downstream irrigation needs. The Tribe has also voluntarily released additional water through the leasing program to maintain stream flows to benefit native fish species.

The Northern Cheyenne Tribe has also initiated a marketing effort for water rights from Yellowtail Reservoir, which is located off the reservation. Because of the location of the reservoir, the water rights are unable to be used on the Cheyenne reservation without the construction of a pipeline of more than 50 miles long. However, the Tribe views the water rights as a valuable resource for generating off-reservation income through water leases.

Idaho’s Shoshone Bannock Tribes operate the only tribal water bank in the country. The tribal water bank was modeled after Idaho’s water banking and pool program that allows for annual leasing of surplus storage water. The purpose of the Shoshone-Bannock Tribal Water Bank is to provide the Tribes a means to lease water stored in American Falls Reservoir and Palisades Reservoir. Currently, the Tribes are providing water through the bank to the US Bureau of Reclamation for flow augmentation to benefit endangered salmon on the Snake River.

Other Nations that have long-term agreements primarily lease to cities and real estate developments. Arizona’s Ak-Chin Indian Community has a 100-year agreement to deliver 10,000 AF of water to the Del

Indian Reservations with Water Rights



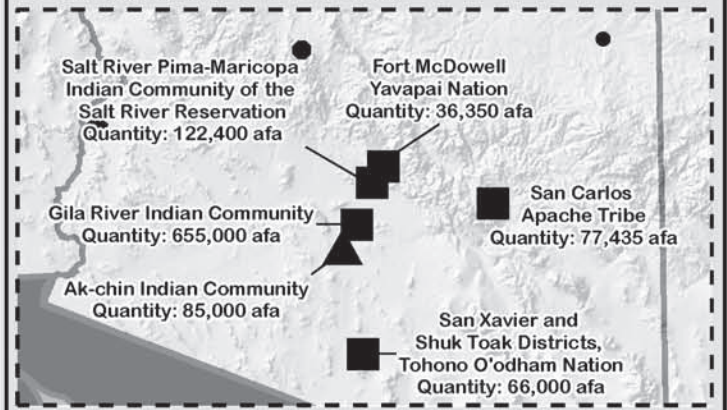
Key

Level of Water Marketing

- NA: Settlement not finalized or leasing activity not available
- None: no leasing activity
- ◆ Low: Annual lease or short-term lease agreements
- Moderate: Actively marketing water or limited long-term lease agreements
- ▲ High: Large long-term industrial or municipal lease agreements

"Quantity" refers to entitlement.
afa = "acre-feet annually"
cfs = "cubic feet per second"

Southern Arizona



Source: Leasing data from communications with tribes. Settlement data from Colby Bonnie G. et al. 2005. "Negotiating Tribal Water Rights Fulfilling Promises in the Arid West." Cartographic boundary file from the U.S. Census Bureau. Hillshade from the National Atlas of the United States, Reston, VA.

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Tribal Water Markets

Lease Examples

Web Corporation — a real estate development company (United States Department of the Interior, *Options and Lease Agreement among the Ak-Chin Indian Community, United States, and Del Webb Corporation*, 1994). Similarly, the San Carlos Apache Tribe, the Salt River Pima-Maricopa Indian Community, the Gila River Indian Community, and the Jicarilla Nation lease water to Arizona or New Mexico cities. See *Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement* (February 1998); *City of Phoenix and Fort McDowell Indian Community Water Agreement*; *Lease Agreement for CAP Water Among the City of Scottsdale, Gila River Indian Community, and the US, as Trustee for the Gila River Indian Community* (Final Execution Version, Oct. 21, 2005); *Lease Agreement Between the Jicarilla Apache Nation and the City of Santa Fe*, (Begins Jan. 1, 2007); and *Central Arizona Project Water Lease among the US, San Carlos Apache Tribe and City of Scottsdale, Arizona* (May 13, 1999). Lease rates among these contracts are some of the highest in the country. The municipal contracts in Arizona, however, are a required component of the water right settlement agreements with the state.

Prices Localized

Like most markets, prices for tribal water are highly localized and vary considerably depending on local water supply and demand conditions. For example, prices for tribal water range from \$9 an acre-foot per year for instream water leases to \$1,200 an acre-foot for longer-term lease agreements to support new housing developments. Tribal lease agreements with municipalities tend to be in the higher end of the market range, followed by industrial and commercial leases. Irrigation and instream water leases typically set the lower end of market prices.

Jicarilla Apache Lease

Even small leases can financially benefit tribes. Water leases can provide an important source of income for tribes with limited resources as well as provide opportunities to attract water-intensive industries and commercial operations to reservations. For example, the Jicarilla Apache Nation, which has 3,560 members, will receive its first annual payment from the City of Santa Fe in 2007 (*"Santa Fe Makes First Water Payment to Jicarillas"* U.S. Water News Online, December 2005). The Tribe's 50-year lease could amount to \$75 million for up to 3,000 AF per year.

Obstacles to Tribal Water Marketing

Rural v. Urban

Water marketing is a new and controversial concept among many Indian nations. For the most part, tribes near urban centers, such as the Gila River Indian Community, have marketing provisions that require a portion of their settlement water to be leased to municipalities and/or industrial or commercial entities. In contrast rural tribes, such as the Northern Cheyenne, have to be more assertive in establishing water marketing opportunities. For these tribes, settlement regulations and enforcement, public protests, and the complexities of water-lease agreements have discouraged water marketing. The following section further describes some of these challenges.

Restrictions

SETTLEMENT STIPULATIONS

Settlement stipulations have limited the ability of tribes to market water through temporary moratoriums or state review requirements. For example, several Montana tribal water right compacts require state approval for off-reservation leasing. Other tribes face similar restrictions. Many Arizona tribes can only lease water from the Central Arizona Project (CAP) and are restricted from leasing CAP water to out-of-state parties. Similar restrictions apply to other entitlement holders. The Jicarilla settlement explicitly prohibits any out-of-state water leasing and, in Idaho, the leases must occur through a state water bank (Jicarilla Lease Agreement, above).

Enforcement

MANDATED MARKETING

Some Indian nations have a hard time protecting the value of their water rights because the rights lack enforcement. The San Carlos Apache Tribe, for example, received part of its 1992 settlement water from Phelps Dodge. The tribe was then required through legislation to lease the water back to Phelps Dodge. The tribe has argued that the mining company was diverting water without paying. Without the enforcement to protect water rights, a tribe cannot capture the fair-market value for water.

POLITICAL PRESSURE

Political pressure is another hurdle to water marketing. The Colorado River Indian Tribes, for example, have tried to lease water to California but face opposition from Arizona political leaders concerned with keeping the water rights in state (Communications with Gary Hansen of the Colorado River Indian Tribes, 2006). Questions within tribes about the ethics of pricing and selling water have also limited marketing opportunities. Opponents of water marketing within the tribes argue that water cannot be priced and thus should not be sold.

Internal & External Pressures

Tribal Water Markets	<p>OFF-RESERVATION LEASES</p> <p>While most tribes have pushed for water marketing provisions in settlements, some tribes have trepidation to enter into off-reservation lease agreements. In general, most off-reservations leases are subject to state-level review and approval. Tribes are reluctant to subject their water rights to state jurisdiction. Furthermore, tribes have expressed concern about the ability to terminate long-term, off-reservation agreements with municipal users. As a practical matter, there is some justification for concern by tribes that entering into a long-term lease with a municipality presents some risk that it will be hard to wrestle the rights back when the lease term is up. Consequently, several tribes have elected to limit or restrict off-reservation water marketing activities. For example, the Fort Peck Tribes have elected not to lease water off-reservation.</p>
Off-Reservation Concerns	<p>Risks</p> <p>COMPLEXITIES OF THE LEASE AGREEMENTS</p> <p>Tribal water leases tend to be complex documents with risk that can discourage both the lessee and lessor from entering into an agreement.</p> <p>Some of the primary issues that arise are:</p>
Lease Rates	<p>Lease Rates: With few exceptions, most tribal water marketing activity is limited to leases. Establishing and verifying a fair-market lease rate has become an essential part of contract negotiations as result of litigation asserting mismanagement of tribal assets. See <i>Cobell v. Kempthorne</i>, Case No 05-5269, U.S. Court of Appeals (D.C. Cir.). To date, a limited number of lease agreements have developed appraisals for establishing and negotiating agreed-upon lease rates.</p>
Adjustment Options	<p>Periodic Lease Rate Adjustments: To account for inflation and the rising costs of water, long-term water supply contracts increasingly are including annual rate or periodic adjustments to keep pace with the rate of inflation and asset appreciation. The most common approach to making these adjustments is based on a mutually agreed upon rate index where annual changes are made to the contract base rate. In general, most contracts use some form of rate index adjustment based on published CPI data. Several contracts provided for a fixed annual rate adjustment during the initial period of the contract (five to ten years) and then made adjustments based on the CPI if the annual adjustment exceeded the initial fixed rate. Other contracts allowed for deflationary adjustments based on the CPI but established a minimum price regardless of potential deflation.</p>
Terms	<p>Lease Term: Length of time affects prices and risk distribution. Longer-term leases tend to protect a tribe if prices are adjusted over time to account for inflation and changes in market prices. Short-term leases allow tribes to maintain greater control and management of their water. However, short-term lease agreements are not attractive to capital-intensive industries where returns on investment require a longer time horizon.</p>
Cost Responsibility	<p>Operation and Delivery Cost Obligations: Operational and delivery costs, and methods also have to be considered in an agreement. Some leases place the responsibility of delivery upon the lessee. Moreover, the location where the water is physically diverted is important because the diversion method often must be approved by the state.</p>
Purposes	<p>Water Use: Water use is another aspect a tribe should consider in its general marketing strategy. Industrial and municipal water leases tend to generate greater prices. Also, a lease agreement can allow for other water uses through subleasing. The Ak-Chin lease agreement, for example, allows Del Webb (a development company) to sublease with the approval of the tribe and the Secretary of the Interior (United States Department of the Interior, Options and Lease Agreement among the Ak-Chin Indian Community, United States of America and Del Webb Corporation, 1994).</p>
Sovereignty	<p>Tribal Sovereignty and Dispute Resolution: Tribal sovereignty issues are not unique to water transactions and are often addressed in lease agreements. Non-Indian lessees generally want to know: how tribal sovereignty can affect the lease; how to evaluate contract enforceability in tribal water lease agreements; and whether disputes will be resolved by federal, state or tribal law. Increasingly, tribes are acknowledging both the benefits and challenges of tribal sovereignty in water-lease agreements. Tribal water leases commonly provide for some type of arbitration in the event of contract disputes or enforcement issues.</p>

The Future of Tribal Water Marketing

Tribal Water
MarketsArizona
OpportunitiesMontana
Leases

Wyoming

California

Missouri
River

Water marketing provides many cash-strapped reservations opportunities to generate revenue and manage their water resources. Moreover, it provides the West a needed source of water. For these reasons, tribal water rights will play a critical role in future water supplies.

The Gila River Indian Community is among the tribes with an opportunity to further market its water. The community finalized its settlement agreement in October 2005 for 653,500 AF per year. Within the agreement are requirements to lease 41,000 AF of water to cities including Peoria, Phoenix and Scottsdale (see *2004 Arizona Water Settlements Act* (AWSA) available at the Arizona Department of Water Resources website: www.azwater.gov/dwr/ >> "Arizona Water Settlement Act." >> Stipulation at Section 14.0). The Community also has the right to lease water to industries.

The Chippewa Cree Tribes on the Rocky Boy's Reservation are receiving 10,000 AF of water diverted from a northern dam (Communications with Tribal Attorney Dan Belcourt 2006). The Tribes will use their water rights on the reservation and are currently exploring the feasibility of leasing water to farmers in the dry area of North Central Montana. The Tribes are also considering leasing water to the North Central Water Authority in Montana at a lower price than what the authority currently pays. The North Central Water Authority is a wholesale water provider to towns and industries in the region.

The Wind River Reservation has 500,717 AF of water that could meet industrial, agricultural and municipal water needs in Nevada and California and serve water needs for coalbed methane development in Wyoming. The tribe has considered large-scale marketing but legal issues concerning its ability to market water remain a question (Big Horn Adjudication: 1991; 1995; 1996).

The Colorado River Indian Tribes continues to push to market water in California but faces strong political opposition within the state. The tribe has approximately 717,000 AF of water and California has a growing water shortage (Inter Tribal Council of Arizona Inc., Member Tribes: Colorado River Indian Tribes, October 2006).

These tribes and others are showing a growing interest in marketing water. The desire has united tribes along the Missouri River. The Mni Sose Intertribal Water Right Coalition is a coalition of tribes on the Missouri River Basin seeking legal, administrative and economic control over their water resources to achieve sustainable reservation economies and cultural well-being, according to the coalition. See Moccasin Richard Bad, "*The Missouri River Voyage of Recovery Conference*" St. Charles, Missouri, Nov. 9, 1999. These tribes include many nations that have yet to settle their water rights from as far north as the Blackfeet Indians in northwest Montana to as far south as the Prairie Band Potawatomi Nation in Kansas. As more of these tribes and tribes across the country acquire defined water rights, the likelihood of tribal water marketing will increase.

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NPDES PERMITS & WATER TRANSFERS

POST-MICCOSUKEE COURT IN FLORIDA FINDS NPDES PERMIT NECESSARY

by Richard M. Glick, Davis Wright Tremaine LLP (Portland, OR)

Water Transfers

NPDES Permits

In the first reconsideration of the cases giving rise to the US Supreme Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (541 US 95 (2004) (*Miccosukee*)), a federal judge in Florida held that "backpumping" of flood waters from drainage canals into Lake Okeechobee requires a National Pollutant Discharge Elimination System permit ("NPDES" permit, 33 USC § 1342) under the federal Clean Water Act (CWA). *Friends of the Everglades v. South Florida Water Management District* (Case No. 02-80309-CIV-ALTONAGA/Turnoff, Dec. 11, 2006. (*Friends*)). Because the practical benefit to the Everglades of requiring a permit was not immediately apparent, the court ordered further proceedings to better define the scope of injunctive relief. All parties agree that backpumping is necessary to avoid flooding populated and agricultural areas.

Immunity Issue

Interestingly, the court devotes 15 pages of this 107-page order to the question of whether SFWMD enjoys sovereign immunity under the 11th Amendment to the US Constitution. The court concludes in the affirmative, that SFWMD as an instrumentality of the State of Florida is immune from suit in the federal courts, and that SFWMD has not waived immunity, yet proceeds to issue a ruling on the merits.

History

In 2002, environmental organizations led by Friends of the Everglades (FOE) filed a citizen suit under the CWA to compel the South Florida Water Management District (SFWMD) to obtain a NPDES permit under section 402 of the CWA. The drainage canals in question carry polluted municipal and agricultural runoff, which are pumped upgradient into Lake Okeechobee to avoid flooding. The case was consolidated with another brought against the SFWMD by the Florida Wildlife Federation. The Miccosukee Tribe, which intervened in the FOE case, filed yet another case against SFWMD that involves different pump stations that transfer canal water to a designated conservation area. The cases were all stayed when the US Supreme Court accepted certiorari in the *Miccosukee* case. After *Miccosukee* was decided, the stays were lifted and the instant case (i.e. *Friends*) reopened.

CWA Scope

The case presents a unique test of the scope of CWA § 402. Most of southern Florida was developed on reclaimed lands that were formerly part of the vast Everglades. The lands were drained to accommodate both high value agriculture and municipal development. The land areas in question are immediately south of Lake Okeechobee, one of the largest fresh water lakes in the United States. The boundary between the lake and adjacent wetlands varied historically, depending on weather conditions. These lands are almost flat, but in a natural state drained slowly to the sea. They were drained through a labyrinth of canals and levees leading from the lake to the Gulf of Mexico. Working in conjunction with the US Army Corps of Engineers, SFWMD operates several large pump stations to prevent canal or levee overtopping. In most cases the most practical solution is to pump flood waters back "uphill" to Lake Okeechobee.

Legal Issues

It is undisputed that backpumping results in the transfer of polluted water from the canals into Lake Okeechobee. The legal issue is whether this transfer constitutes an "addition of pollutants" that requires a NPDES permit. The CWA prohibits "the discharge of any pollutant" except in compliance with the CWA. 33 USC § 1311. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12). Following the Supreme Court's ruling in *Miccosukee*, EPA proposed rules that would exclude water transfers from regulation under the NPDES program. *NPDES Water Transfers Proposed Rule*, 71 Fed. Reg. 32887 (June 7, 2006). However, the *Friends* court declined to defer to the US Environmental Protection Agency's (EPA's) interpretation of the CWA because "No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA." *Slip Op.* at 84.

EPA Proposed Rules

SFWMD argued that an "addition to navigable waters" does not occur from backpumping, but rather simply moves water between and among navigable waters. This argument derives from the *Miccosukee* case, which involved transfers from a SFWMD drainage canal into a designated conservation area. There the federal government advanced its "unitary waters" theory, i.e. that all navigable waters should be viewed as one for CWA purposes, and thus water transfers should be seen as non-point source activities that do not require NPDES permits. The Court did not resolve this issue, noting that it had not been adequately argued below, but could be raised on remand. Instead, the Court held that further proceedings are necessary to determine whether the two affected water bodies are "meaningfully distinct" from each other. If they are not, then no NPDES permit is required. 541 US at 112.

"Meaningfully Distinct"

After a lengthy description of the physical features of the Everglades, both naturally and as transformed, the District Court determined that in the instant case the subject drainage canals and Lake

Water Transfers

Standards

Factors

Okeechobee are in fact meaningfully distinct. Although the court declined to “articulate a precise test,” it nevertheless concluded:

But, at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are distinct from one another and would remain distinct if backpumping ceased. Suffice it to say that, based upon the evidence presented, the Lake is “meaningfully distinct” from the canals.

Slip Op. at 86.

In reaching that conclusion, the court cites ten factors, among these are physical barriers between the water bodies, chemical and biological differences, and that the water would not normally flow from the canal areas into the lake but for backpumping. The fact that there is some natural intermingling of water between the canals and lake is not relevant: “However, the Supreme Court has instructed that the proper question is whether the bodies of water are ‘*meaningfully distinct*,’ not ‘*completely distinct*.’” *Id.* at 87.

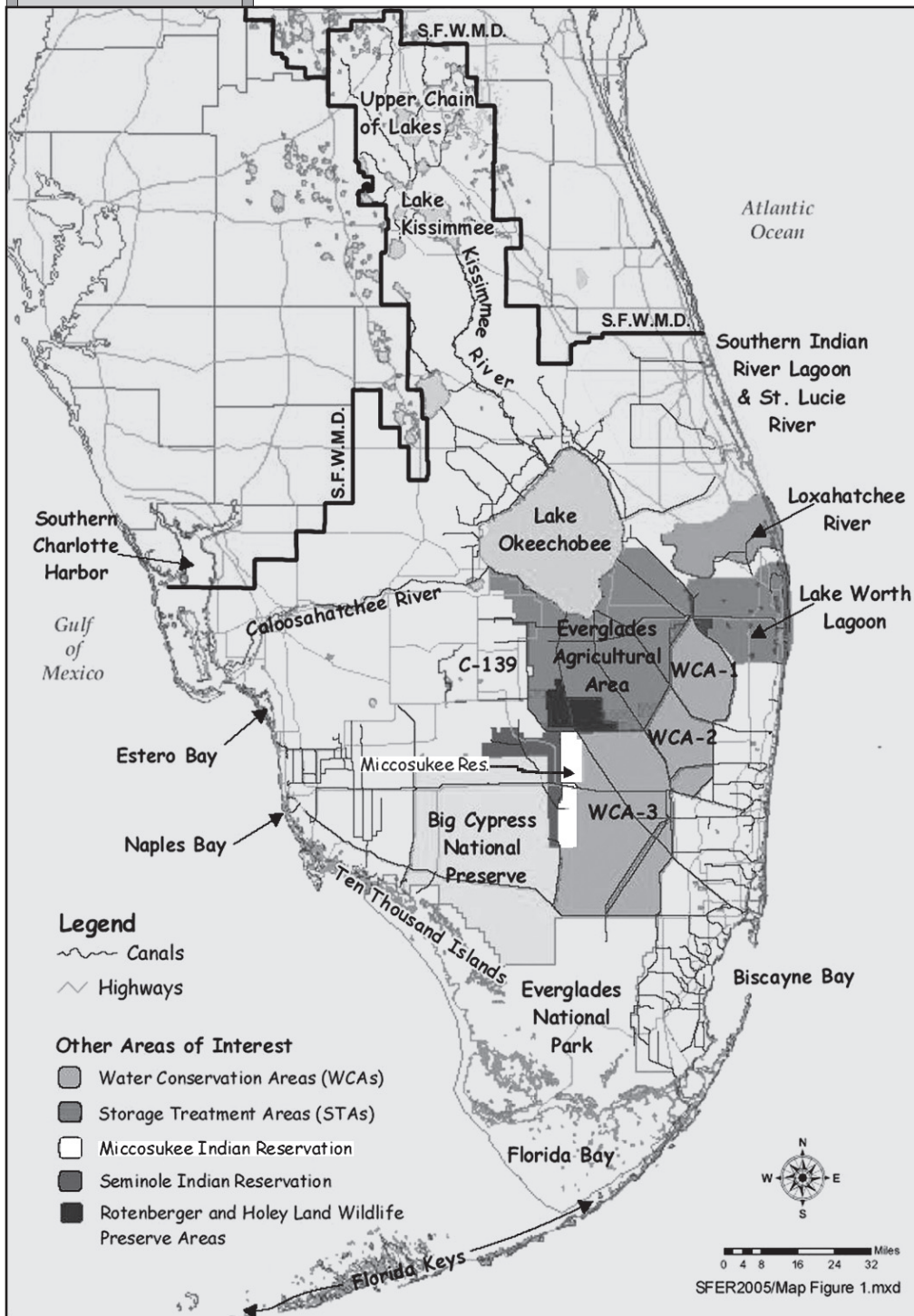
Conclusion

The *Miccosukee* case, and those like *Friends* arising from similar facts, raise important policy questions about water resource management in the West. Water transfers, often between basins, occur routinely and are not now subject to the CWA regulatory program. The Supreme Court in *Miccosukee* was unmoved by the argument that regulation would make such transfers prohibitively expensive, which would obviate the CWA’s proscription against interference with state authority to allocate water. The Court noted that expenses could be controlled through issuance of general permits. Thus, courts will apply the limited guidance supplied by the Supreme Court to the specific facts at hand to discern whether meaningful distinctions can be made. The broader implications of *Friends* and other cases on water transfers will be explored in detail in the February, 2007, issue of *The Water Report*.

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Tribal Water

Annual
ConferenceOff-Reservation
Rights

Instream Flows

Monitoring
LackSettlement
ConstraintsFlexibility
&
Scope

TRIBAL WATER RIGHTS

CONFERENCE COVERS SETTLEMENTS, COMMODIFICATION AND OTHER ISSUES

by Harold Shepherd, Center for Tribal Advocacy, Clifton, CO

The annual Northwest Tribal Water Rights Conference (sponsored by the Center for Water Advocacy, the University of Oregon and others) was held in Eugene, Oregon during October 2006. The Conference brought together Tribes, law school faculty and other authorities on water law issues affecting Indian Tribes. Speakers presented papers designed to create a dialogue between tribal, governmental and corporate entities regarding water right settlement negotiations in the United States, alternative dispute resolution and other water-related issues.

Negotiations: “Who is at the Table and What is on the Table?”

Several panels focused on the settlement of tribal water rights. The panel entitled “Who is at the Table and What is on the Table?” featured several prominent experts on current tribal water settlement activities.

Professor Robert Anderson (Indian Law, University of Washington Law School) discussed the origins of the federal reserved rights doctrine, tracing it back to the landmark US Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908). Anderson noted that “While there are many cases applying the Winters Doctrine, there is substantial uncertainty surrounding much of the Doctrine. This creates a climate that can be conducive to negotiated settlement of claims.” So far, he reported, Congress has approved 20 Indian water right settlements.

Professor Anderson described how tribal treaty rights — which often include a water right priority date of “time immemorial” — include both on and off the reservation access to tribal fishing locations and instream flows sufficient to support their fisheries. According to Anderson, a “solid legal framework underlies these claims” (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) and *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) as one example. Anderson noted that even the Bush Administration supported tribal rights to off-reservation instream flows when it filed a brief in the Idaho Supreme Court in a case involving Indian reserved rights for instream flows that originated in the Snake River Adjudication (later mooted by the Snake River Water Rights Settlement). *In Re: SRBA*, Case No. 39576, Subcase No. 10022, Brief of Appellant United States at 28 (Nov. 22, 2003).

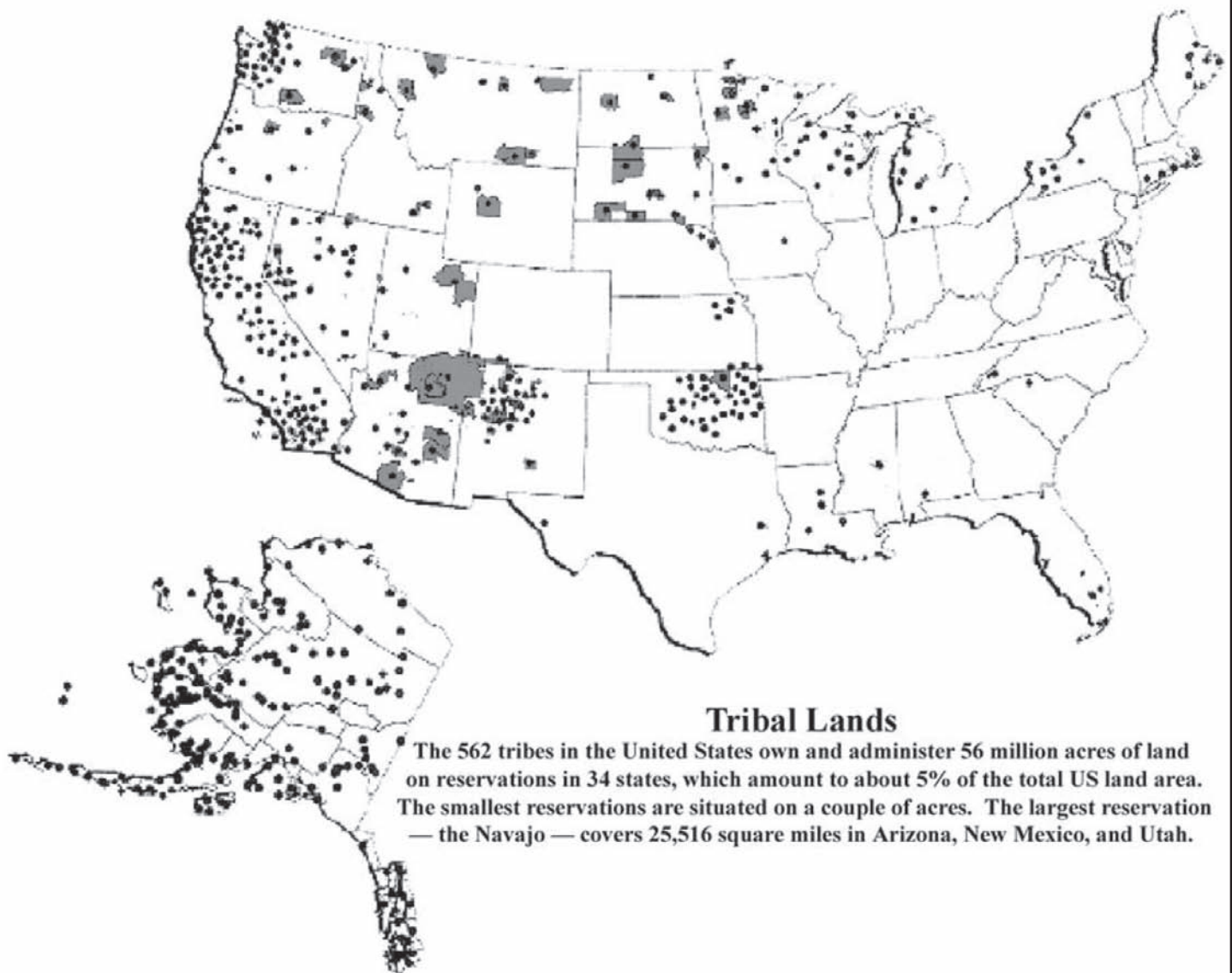
Impediments to settlement may arise from entrenched interests. For instance, the monitoring of water use by western water resource agencies generally continues to be non-existent or grossly insufficient. Anderson explained that this lack of monitoring has often worked to the advantage of many non-tribal water rights holders, with the result that these non-tribal interests are often opposed to water rights settlements because monitoring is frequently a key component of such settlements.

Professor Barbara Cosens (University of Idaho Law School) spoke about attempts to settle water use disputes in the Walker River Basin, located in eastern California near Mono Lake. In 1994, the United States filed suit in federal district court asserting water right claims for the federal and tribal entities in the basin. Local and regional officials tried to negotiate an interstate compact for the Walker River Basin to deal with the primary uses of recreation, pasture grazing, and irrigation. These negotiations were unsuccessful due to the failure to account for tribal water interests in California and Nevada.

Conditions in the Walker River Basin constrain negotiating flexibility. The Basin is a “closed” basin, with the Walker River drainage terminating in Walker Lake. Lahonton cutthroat trout in Walker Lake are now listed as a threatened species under the federal Endangered Species Act (ESA) and cannot survive if salinity in the Lake rises too high. As a result, the Nevada Division of Environmental Quality has set water quality standards for the Lake at 12,000 Total Dissolved Solids (TDS). Water right diversions and prolonged drought above the Lake, meanwhile, have reduced inflows. These conditions have resulted in lower water levels in the Lake. In 2006, such water-level decline contributed to the Lake’s salinity rising to over 15,000 TDS.

Professor Cosens pointed out that settlements are “iterative processes” which “sometime start with litigation.” The goal in settling a lawsuit is to bind all the parties to the settlement. However, narrowing the discussion to solely legal issues may obscure broader practical issues and devolve into political fallout. While a binding settlement may end the immediate litigation, it will ultimately prove useless unless it has garnered local support for implementation. In water settlements, “every single issue concerning water resources will eventually find its way on the table...generally expanding to basin-wide concerns” and inevitably become a “highly-politicized process,” according to Cosens. It is crucial to have the flexibility to involve competing interests and to realize that there is a “major incentive” to settle all water problems, rather than be hamstrung with the inevitable failure inherent in “piecemeal solutions.”

Tribal Water	<p>Professor Cosens stressed the need for settlement negotiations to be “reality-based”— a process that must take into account the culture of all the stakeholders, specific basin conditions, funding needs, etc. Cosens counseled involving all the necessary stakeholders, the public-at-large, and concerned legislators. She acknowledged, however, that off-setting such inclusiveness with the need to keep the process manageable is indeed “a tough balancing act.” “Even though it might not be workable to get all the interests to the table, you eventually have to have a way to get their buy-in.” It may be that “concentric circles” of stakeholders can channel their input into a single representative involved directly at the negotiation table so that all interests are heard.</p>
Inclusive Negotiations	<p>Pamela Williams (Department of Interior (DOI), Indian Water Rights Office) presented the “Federal View of Tribal Water Rights.” Williams provided background regarding negotiations and settlements by noting that tribal treaties must be interpreted based on an understanding of the Tribes at the time the treaties were signed. Adjudication of federal water rights is an “unsatisfactory solution” for most Tribes, Williams stated, because adjudication processes are generally very long and costly. Even when adjudication progresses quickly the results may not be helpful. Using the Wind River case in Wyoming as an example, Williams noted that while the Tribes successfully secured a large amount of water through adjudication, currently the Tribes do not have any use for it. [Editor’s Note: See <i>In Re Rights to Use Water in the Big Horn River System</i>, 835 P.2d 273 (Sup.Ct. Wyo. 1992); the Shoshone and Northern Arapaho Tribes received 500,717 acre-feet.].</p>
Federal Viewpoint	<p>Negotiation is a more suitable process according to Williams. Creative solutions are possible. Parties to the negotiation can address a range of issues — e.g. marketing of water and groundwater protection — that would not be part of an adjudication. Williams noted that DOI’s current negotiation guidelines are contained in “<i>Negotiations for the Settlement of Indian Water Rights Claims</i>” (55 FR 9223, March 12, 1990).</p>
Negotiation Guidelines	<p>Williams explained that under the federal process local teams representative of the various concerned federal agencies (e.g. Bureau of Indian Affairs (BIA) and the Bureau of Reclamation (Reclamation)) are assembled. Currently, nineteen such negotiating teams and four implementation teams are in place nationwide to help enact settlements. The negotiating team makes settlement recommendations to the “working group” and the working group then takes recommendations to the Secretary of Interior. “We have to come up with a federal position that can be supported by the administration. This can be a very slow process — bureaucratic really,” Williams said. Finally, Williams noted that settlement enforcement is a often problematic in Indian Country.</p>
Local Federal Teams	<p>DOI’s Vision</p>
Settlement Obstacles	
Funding Needs	<p>KEYNOTE SPEAKER: COUNSELOR TO SECRETARY OF THE INTERIOR</p> <p>Michael Bogert, Counselor to the new Secretary of the Interior Dirk Kempthorne, provided the keynote speech on “Sovereignty, Certainty and Opportunity: Secretary Kempthorne’s Vision for Tribal Water Rights Settlements in the West.”</p>
	<p>Bogert discussed the backlog of tribal water right settlement negotiations and the obstacles the new Secretary will face in moving these forward. Part of the problem rests in the attitude of today’s federal court system, according to Bogert, which has taken a fairly hostile attitude towards Indian Tribal Sovereignty. DOI has committed several hundred million dollars to water rights settlements over the past several decades and it supports local (not “top-down”) solutions. DOI also embraces a “holistic approach” designed to include all the players including the Tribes, local stakeholders, and state and federal agencies. Bogert noted that Secretary Kempthorne “supports on-the-ground improvements.”</p>
Options/Costs	<p>Bogert addressed funding issues. One example of Tribes facing funding roadblocks is illustrated in the <i>Aamodt</i> water rights settlement in New Mexico (<i>State of New Mexico ex rel. State Engineer v. Aamodt</i>, Case Action No. 66-6639; for information see the New Mexico State Engineer’s website: www.seo.state.nm.us/legal_ose_aamodt_info.html).</p>
	<p>Even after tribal water right settlements are reached they compete with other agreements for the funds available for implementation. In the case of the <i>Aamodt</i> settlement, for example, the Pueblos are competing for federal funds with the <i>Abeyta</i> adjudication in Taos and Navajo claims on the San Juan River (see the “<i>Taos Pueblo Draft Settlement Agreement</i>” and San Juan Adjudication information on the New Mexico State Engineer’s website: www.seo.state.nm.us/legal_ose_active_cases.html).</p> <p>Bogert supplied an overview of certain settlement agreement options and corresponding costs, including: land transfers; habitat management; and water facilities work. He pointed out that such proposals being considered in current settlement negotiations add up to billions of dollars. The size of such expenditures results in the concerned federal agencies having to coordinate any settlement with the federal Office of Management and Budget. Moreover, “Federal contributions should not exceed cost exposure and tribal obligations,” according to Bogert.</p>



SRBA Settlement

Bogert pointed to the 2004 Snake River Basin Adjudication (SRBA) settlement as one of the best examples of how such agreements may not only be applied to provide assurances to non-Indian agricultural interests, but can also protect streamflows needed for fisheries. The Nez Perce Tribe initiated the adjudication of the Snake River and its tributaries by filing a claim in the Idaho Water Court. The Tribe asserted that the Treaties of 1855 and 1863 granted the Tribe off-reservation instream flows that included most of the flow in the Snake River, with a priority date of “time immemorial” (SRBA commenced in 1993; see Rigby, TWR #18).

Ongoing litigation under the Wilderness Act, the Organic Act, the Multiple Use and Sustained Yield Act, the Wild and Scenic Act, and the Deer Flat Federal Refuge and the National Recreation Area Acts was eventually incorporated into the SRBA settlement. ESA issues were also involved.

In your author’s opinion, the turning point in the negotiations occurred when non-Indian water right holders realized that, even if they prevailed against the Tribe in the adjudication process, they would likely eventually have to leave undiverted the same water claimed by the Tribe, to fulfill a biological opinion requiring instream flow levels protective of ESA-listed species in the Snake River. The key to the success of the negotiations, therefore, was the amount of water which the federal agencies claimed was needed to comply with federal environmental law. Coincidentally, addressing these federal claims would result in impacts to State and individual water rights similar to the impacts of the Tribe’s claims.

ESA Flow Needs

Tribal Water

Umatilla
Requests

TRIBES MEET WITH BOGERT

Some Tribes used the opportunity provided by the Conference to speak with Mr. Bogert about their individual water right negotiations. The Confederated Tribes of the Umatilla brought several representatives to the Conference in order to meet with Bogert in an effort to gain DOI's support of the Tribe's water rights negotiation with the Westland Irrigation District (WID).

THE CONFEDERATED TRIBES' NEGOTIATION EFFORT INCLUDES:

- Requesting that Reclamation initiate and complete a technical study of a water exchange the Umatilla Tribes have been working on with WID (i.e. "*Phase III of the Umatilla Basin Project*" — see below)
- Completing an ongoing study by the Tribes of its water needs on-Reservation and instream in the Umatilla River for fish and watershed health
- Requesting that the US Secretary of Interior appoint a special "assessment team" to determine the nature of the Tribes' water rights and whether a negotiated settlement is possible.

Water
Exchanges

Umatilla Basin Project: Exchange of Water Rights

Another example of how tribal treaty rights and interests can be applied to benefit instream flows for both fishery needs and agricultural interests in the West involves the current water rights settlement negotiations between the Confederated Tribes of the Umatilla and Westland Irrigation District (WID) in Oregon. Incorporated into these negotiations is Phase III of the Reclamation-sponsored "Umatilla Basin Project."

This three-phase project began in the early 1990s. Phase I diverted water from the Columbia River near McNary Dam. This water is then exchanged for water covered by water rights held by the West Extension Irrigation District, which the District then leaves in the Umatilla River (Editor's Note: up to 140 cubic feet per second). In Phase II, facilities diverted Columbia River water upstream of McNary Dam to the Hermiston and Stanfield Irrigation Districts, so that these districts can leave needed flows in the Umatilla River by not diverting the water covered by their Umatilla River water rights.

While Phases I and II were significant steps in the right direction, there is still work to be done in the Umatilla. Currently the lower river continues to run dry from July through September due to irrigation withdrawals near the town of Echo and downstream. As a result, the Tribes and WID are seeking legislative approval of "Phase III." Consistent with the first two phases, Phase III would include a full exchange of WID's McKay Reservoir storage water for Columbia River water.

The Nez Perce, the Umatilla, and other Tribes are moving ahead with progressive plans to settle water rights claims in a fashion that will benefit not only those interests currently at the table — but also fishery resources and the wide range of additional environmental benefits resulting from increased instream flows. This all comes at a time when the federal administration and federal courts are not particularly receptive to the protection of the environment or tribal treaty rights. Given the current political and legal atmosphere, tribal water right settlements may be one of the best means of not only protecting tribal sovereignty, but also to serve the public interest by protecting water resources for all to enjoy.

Three Phases

Water Rights as Commodities

Competition for water has given rise to bitter divisions and legal challenges regarding who has the right to use this resource. In addition, the manner in which water resources are managed by federal and state water agencies may exacerbate these conflicts. These circumstances threaten tribal culture by jeopardizing the long-term sustainability of water resources and the fishery interests upon which the Tribes depend. In some circles the "commodification" of water — i.e. the establishment of a "free market" in water rights — is viewed as a panacea. However, markets are seldom "free" from undue influence and putting a price on this resource engenders environmental and social costs not always reflected in the marketplace. A panel discussion entitled "The Commodification of Water on an International Scale" addressed these issues.

Professor James Hopkins (Rogers College of Law, University of Arizona) discussed how the enforced selling of water rights is impacting Canada's aboriginal peoples. In Canada, when projects undertaken or sanctioned by provincial or national agencies will infringe upon aboriginal water rights, Canadian courts employ an "infringement test" to determine whether the infringement is justifiable. If such infringement is deemed "justifiable," water resources that otherwise would be wholly within the jurisdiction of aboriginal communities are simply compensated for in some fashion.

Bud Ullman (Attorney for the Klamath Tribes) presented a view of the Klamath Basin as seen through the lens of commodization of water rights. Ullman noted that, while the Klamath Tribe's water rights in the Basin have not yet been adjudicated, "Native people are suspicious of commodization of water. They

Market Impacts
Mixed

Tribal Water**Flow to Money?**

are fearful that dollars and cents means someone else who has the dollars will purchase the resource and trump any other competing values.” Commodization of water requires that a price be placed on the natural resource as a matter of course. Ullman pointed out that “the pendulum seems to have swung such that water banks and water markets are suddenly plausible.” He warned that the commodification of water rights may actually be “codifying the old adage that water flows to money.” According to Ullman, once the resource is priced, it is reasonable to assume that “all access to water [will go] to people who have the money.” This could eventually result in “transferring the resource away from native people.”

Privatization

Professor Amy Cohen (Moritz College of Law, Ohio State University) gave a presentation entitled: “Assessing the Decision-Making Framework for Dams and Development.” According to Professor Cohen, more dams are being financed by the private sector due to the high profits possible from privately owned facilities. Such global level privatization of water rights arises, in part, from the belief that liberal market economics will resolve international economic and environmental problems. Thus, governments and international institutions around the world are advocating putting water up for sale and letting the market determine its future. Cohen stated that the “effects of privatization are complex. In some cases, it has actually helped environmentalists” where the “economic exigencies of dams were reviewed more thoroughly by private entities.”

Decision Making

According to Professor Cohen, however, tribes are often left out of negotiations over water. As a consequence, human rights are “traded off” in the decision-making process and dams “often come with unacceptable costs to the environment and indigenous people.” As reported by the World Bank, which alone has put \$50 billion into dam development since the 1950’s, from 40-to-80 million people have been displaced by dams worldwide. Professor Cohen said that the movement to establish water-access as a basic human right for meeting the needs of indigenous communities is growing. National and international dialogues over water are increasing. Non-governmental organizations and anti-dam movements continue to work with indigenous peoples at the grassroots level as well as with elected tribal leadership. Cohen advocated an approach where final decisions are only made following good faith negotiations with all stakeholders. This “negotiated process” would utilize both “rights” and “risks” among the competing interests, with an emphasis on including an expanded view of the risks to all impacted stakeholders.

AUTHOR’S ADDENDUM**Aamodt Settlement****Changing Standards of Water Quantity and “Calls” for Water**

There are over 2,500 parties to the *Aamodt* water rights adjudication. In the spring of 2006, the Pueblos, the County and the State have agreed to a revised settlement first proposed in 2004. That agreement now awaits federal approval and funding.

When the State first filed the *Aamodt* case in 1966, no one knew which water law applied to the Pueblos. Thus *Aamodt* has set a number of water law precedents, especially regarding Pueblo water rights in New Mexico. Usually, a specific Tribe’s water rights are tied to the amount of “practicably irrigable acreage” (PIA) on its reservation (see *Arizona v. California*, 373 U.S. 546 (1963)). Under the PIA standard and the Winters Doctrine (see above), the Pueblos would have ended up with all the water in the basin. However, in an unpublished district court opinion in 1983, a federal district court ruled that Pueblo grants were not reservations since they are land grants that predate the United States. Therefore, Pueblo lands were not entitled to water rights measured according to the Winters Doctrine or the practicably irrigable acres standard (PIA).

Historically Irrigated Acreage

In 1985, federal Judge Edwin Mechem handed down the most important ruling in the *Aamodt* case: Pueblos are entitled to aboriginal water rights based on how many acres each had historically irrigated at any time between 1846 and 1924 (Historically Irrigated Acreage or HIA). The court also concluded that the Pueblos were entitled to satisfy their rights either from surface water or hydrologically connected groundwater (see *Aamodt II* at 618 F.Supp 993, D.N.M. (1985)). While this gives them less water than under the Winters Doctrine, it is more than would have been granted under New Mexico law. It also allows them first priority on most of the water in the basin. If the Pueblos were to “call” in their water rights during a drought, every acequia in the region could run dry. [Editor’s note: a “call” for water rights occurs when a senior water user requests that users with junior or newer water rights shut off their diversions so that water will flow to the senior user’s diversion point. An “acequia” is a community-based system of irrigation and water governance; “acequia” also refers to the community of farmers that cooperatively maintain the ditch and share water through custom and tradition. Acequias formed the basis for settlement of New Mexico’s Indo-Hispano communities between two and four hundred years ago.]

Acequia Impacts

Under the settlement that emerged in the spring of 2006, the four concerned Pueblos (Nambe, Pojoaque, Tesuque and San Ildefonso) collectively settled for less water than they are entitled to under

Tribal Water

Regulation of Tribal Rights

Extent of Tribal Rights

Hunting & Fishing

the Winters Doctrine and agreed to limit priority “calls” on the basin’s acequias. The federal government is required to acquire rights to 2,500 acre-feet of Rio Grande water for the use of the Pueblos, to build a pipeline to deliver it to the four Pueblos, and to deliver additional water for future non-Pueblo growth in the basin.

The plight of the ESA-listed silvery minnow raised the questions of whether, or to what extent, the federal government may regulate tribal water rights (*Rio Grande Silvery Minnow, et al. v. Keys*, 333 F.3d 1109 (10th Cir. 2003)). This increasingly pressing issue has only rarely been addressed in the courts. There is no question that the federal government (primarily under the commerce clause) has plenary power over Tribes in many cases. See e.g. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). On the other hand, the abrogation of Indian rights is not “lightly imputed” (*Menominee Tribe v. United States*, 391 U.S. 404 (1968), and typically requires express statutory authority to regulate such rights, including tribal rights to natural resources that may otherwise be regulated by federal agencies. See e.g. *Mason v. Sams*, 5 F.2d 255 (D. Wash. 1925), *Strom v. Commissioner*, 6 T.C. 621 (1946); and *United States v. Wilson*, 611 F. Supp. 813 (N.D. Cal 1985).

Many commentators believe that Indian treaty fishing and hunting rights can be interpreted as being functionally much more protective than the ESA — which some interpret as being limited to merely saving endangered species from extinction. Treaty fishing and hunting rights may confer the right to hunt and fish species robust enough to sustain these activities.

INDIAN LAW EXPERTS COGGINS AND MODRICIN STATED:

It is submitted that Indian treaty rights to hunt and fish are not fundamentally inconsistent with federal wildlife statutes, and that courts should seek harmonization of the interest. To achieve a rational balancing, it is necessary first to find that Indians are within the definition of ‘persons’ bound by the new laws. Courts should hold that federal wildlife statutes have dual effect: They override or modify treaty right to the extent necessary for conservation of the species; and they impose upon federal officials an affirmative duty, in the nature of a trustee’s responsibility, of implementing the statutes so that any benefits to be derived from the taking of protected species go first to treaty Indians.

Coggins and Modricin, 1979, *Native American Indians and Federal Wildlife Law*, 31 Stan. L. Rev. 375.

Whenever Tribes assert their water rights, however, legal complexities and controversy are almost never far behind. New Mexico is no exception to this rule. In one complex situation, downstream alfalfa farmers utilizing flood irrigation methods were granted water rights under State law but are likely in violation of federally protected tribal water rights. Exacerbating the situation, the Rio Grande area’s population is approaching one million and the rapid growth in places like Albuquerque conflicts with farmers’ claimed rights to dwindling water supplies.

Conclusion

Tribes are proactively pushing for reform in the water resources protection area. The hope expressed at the Conference is that this dialogue will spread. This dialogue could prove instrumental in assisting local and federal governments, and corporations in understanding indigenous political structures and relationships. With this increased understanding, threats to the environmental and cultural survival of indigenous communities can be effectively addressed.

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Pesticides

"Pollutant"
DefinedPermit
ExceptionsEPA
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Clarifications

Talent Case
Distinguished

NPDES REQUIREMENTS & PESTICIDES

EPA'S FINAL RULE EXEMPTS CERTAIN APPLICATIONS

by Beth S. Ginsberg (Stoel Rives LLP, Seattle, WA) and J. Mark Morford, (Stoel Rives LLP, Portland, OR)

In late November 2006, the US Environmental Protection Agency (EPA) issued a final rule interpreting the definition of the term "pollutant" under the federal Clean Water Act (CWA) to not include pesticides that are applied in compliance with relevant water quality requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 71 Fed. Reg. 68483 (Nov. 27, 2006). According to this interpretive rule, pesticide applicators do not need to obtain a National Pollutant Discharge Elimination System (NPDES) permit in two specific circumstances: (1) when the pesticide is applied directly to a waters of the United States to control pests present in the water; and (2) when the application of the pesticide is made to control pests that are over, including near, waters of the United States.

As a result of EPA's final rule, those who apply pesticides to control mosquito larvae, aquatic weeds or other pests that are present in waters regulated under the CWA, will now be exempt from NPDES permit requirements. Similarly, those who apply pesticides to control pests that are present over or near such waters, where some amount of pesticide will unavoidably be deposited to waters of the United States to effectively target the pests, and where the pesticide necessarily must enter the water in order for the application to achieve its intended purpose, will also be exempt from NPDES permit requirements. EPA provided examples of such situations, specifically including wide-area forest canopy insecticide applications resulting in pesticide deposition to waters which are either not visible to the applicator or not possible to avoid, mosquito adulticide applications, and pesticide applications to control non-native plants which grow at the water's edge, such as purple loosestrife.

To arrive at this interpretive rule, EPA interpreted the terms "chemical wastes" and "biological materials" (included in the CWA's definition of "pollutant"), to exclude pesticides applied consistently with EPA approved label restrictions. According to EPA, the term "waste" means that which is eliminated or discarded as no longer useful or required after the completion of a process. Pesticides applied consistent with the water quality related restrictions imposed under the FIFRA label approved by EPA are useful products — and therefore not "wastes" — because they are "products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose" (quoting *Fairhurst v. Hager*, 422 F.3d at 1150). EPA similarly interpreted the term "biological materials" to not include biological pesticides applied consistent with relevant FIFRA label requirements, emphasizing that these types of pesticides are generally "reduced-risk products" that have a narrower range of potential adverse environmental effects compared to chemical pesticides, and thus, present even less of a rationale for CWA permitting.

In exempting these two pesticide application scenarios from NPDES requirements, EPA emphasized that those who apply pesticides to terrestrial agricultural crops will remain subject to CWA requirements in the event such pesticides unintentionally reach waters covered under the CWA. EPA identified spray drift from aerial applications covered by the rule as exempt. Drift from terrestrial applications is not yet exempted, but will be addressed by an EPA work group. EPA also clarified that pesticides are wastes when contained in a waste stream, including stormwater or other industrial or municipal discharges regulated under CWA section 402(p). In addition, EPA clarified that residual materials resulting from pesticides that remain in the water after the application and its intended purpose have been completed will be regulated as "pollutants" subject to NPDES permit requirements, unless the application was performed consistent with all relevant FIFRA requirements.

EPA's interpretive rule comes on the heels of several high profile court decisions that have inconsistently addressed the question of whether the CWA requires NPDES permits for pesticide applications. The preamble to EPA's rule discusses the most important cases. The Ninth Circuit issued three opinions on this issue.

Perhaps the most problematic of the Ninth Circuit cases is *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In *Talent*, the Ninth Circuit held that application of herbicide Magnacide H to irrigation canals to control aquatic weeds and vegetation requires an NPDES permit because application left "residue" after pesticide performed its "intended effect." In the *Talent* case, the applicator violated the FIFRA label requirement to contain the herbicide-laden water in an irrigation canal for a specified number of days, leading to a large fish kill in a downstream creek. In the preamble to the new rule, EPA attempts to distance itself from arguably contradictory positions the government took in amicus briefs it filed in the *Talent* litigation. EPA now asserts that its brief was based on "evaluation of the

Pesticides**Aerial
Application**

law in the context of specific factual situations, and did not result from deliberative consideration through an administrative process.” 71 Fed Reg at 68485. In effect, EPA is attempting to distinguish its rule from the facts in *Talent*, by asserting that the *Talent* holding only applies to circumstances where the applicator has not complied with the FIFRA label or other relevant FIFRA requirements.

EPA’s preamble also discusses *League of Wilderness Defenders et al. v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). In *Forsgren*, the Ninth Circuit held that the aerial application of pesticide to control gypsy moth constituted a point source discharge subject to NPDES permitting. EPA points out, however, that the court in this case did not decide whether the pesticide was a pollutant because the Forest Service had conceded that point. In this regard, EPA’s new interpretive rule can be distinguished from *Forsgren* because it addresses the question of whether a pesticide properly applied is a pollutant and does not question the point source determination in *Forsgren*. The interpretive rule specifically exempts the application of pesticides that are “aerially applied to a forest canopy where waters of the United States may be present below the canopy.” 17 Fed Reg at 68492. EPA’s intent is clear, therefore, in attempting to undo the practical effects of the *Forsgren* case.

Proper Use

EPA’s new rule is in harmony with a third Ninth Circuit decision. See *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005)(pesticides intentionally applied directly to a lake to eliminate non-native fish species, where there are no residues or unintended effects, are not “pollutants” under the CWA because they are not chemical wastes). The rule is also responsive to the Second Circuit in *Altman v. Town of Amherst*, 47 Fed. Appx 62, 67 (2nd Cir. 2002) which remanded a lower court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the United States, admonishing EPA to resolve the question of whether properly used pesticides can become pollutants.

EPA asserts that its final interpretive rule is both consistent with, and is expressly intended to resolve, any uncertainty created by these decisions. Its critics, however, contend that EPA has yet to remedy the existing regulatory morass both by leaving important questions unresolved and by following a path which fosters inconsistent results among the various affected states.

**Rule
v.
Holding**

First, many would argue that the interpretive rule itself cannot overturn the Ninth Circuit’s *Talent* decision. *Talent* broadly held that the discharge of a pesticide from a point source constituted an activity requiring an NPDES permit because residues from the Magnacide H application constituted “pollutants” covered under the CWA (notwithstanding the pesticides’ registration under FIFRA). 243 F.3rd 526. As discussed above, however, EPA attempts to distinguish this case on the factual basis that the applicator violated the FIFRA label resulting in a fish kill.

**States’
Responses**

Delegated states in the Ninth Circuit, including Washington, Oregon, and California, currently regulate the discharge of FIFRA regulated pesticides into jurisdictional waters under their respective state-delegated permitting programs. It remains to be seen how each of these states will respond to EPA’s new interpretive rule. Conversations with state regulators reveal that the Oregon Department of Environmental Quality (ODEQ) will stay the course it set when it originally responded to the *Talent* decision by adopting EPA’s position on this issue. ODEQ continues to maintain that permits are not required for pesticides discharged in compliance with relevant FIFRA labeling requirements but has agreed to issue a number of individual permits to irrigation districts and others desirous of additional regulatory certainty. The Washington Department of Ecology is currently evaluating its options to either rescind the existing individual NPDES and general permits for pesticides, to re-issue them as state waste discharge permits, or rescind existing permits as unnecessary. In California, the State Water Resources Control Board is similarly considering all options available to it including permit rescindment. Interestingly, in Idaho where EPA administers the NPDES permitting program, EPA has refused to issue NPDES permits for pesticide applications.

Residues

Second, and equally importantly, EPA’s preamble to the interpretive rule describes pesticide residues as pollutants subject to CWA restrictions in certain circumstances, including when discharged into regulated discharges of industrial or municipal stormwater. The preamble describes a pesticide residue as “residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed.” 71 Fed Reg at 68487. This description could include aquatic herbicides at concentrations below efficacy levels or trace levels of forest pesticides that make their way into stormwater runoff. Fortunately, the preamble follows this confusing discussion with a straightforward statement that such residues are not subject to permitting requirements when associated with the two types of applications exempted by the rule. Also, a footnote in the interpretive clarifies that nothing in this rulemaking undoes EPA’s prior interpretive statement that pesticide application to irrigation return flows systems is a non-point source not subject to NPDES permitting requirements.

**Terrestrial
Applications**

Third, as mentioned above, EPA’s interpretive rule does not purport to cover pesticide “spray drift” in connection with terrestrial applications or the unintentional discharge of a pesticide that makes its way into waters covered under the CWA, as contrasted with drift from the aerial application of a pesticide to a forest

Pesticides**Uncertainty
Remains****Challenges
Filed**

canopy which EPA has expressly exempted from NPDES permit requirements when CWA covered waters exist below the canopy. Instead, EPA has committed to exploring how and whether to address spray drift through a workgroup formally established under the Federal Advisory Committee Act.

Unless and until the states roll back their permitting programs, applicators in the Ninth Circuit, particularly timberland managers, irrigation system managers, and others in the regulated community, are left to ponder whether or not to pursue NPDES permits for their activities. Even if the states take the position that NPDES permits are not required, the rule does not prevent environmentalists from filing Clean Water Act citizen suits in attempts to overturn the rule and compel NPDES permits.

Meanwhile, various interest groups rushed to the courts to challenge the rule. As of January 2, challenges were filed in various federal circuit courts of appeal across the country. These include a challenge in the Ninth Circuit by Baykeeper represented by Western Environmental Law Center (which was instrumental in the *Talent* case) and other California and Oregon environmental groups. We expect EPA to move to consolidate the cases into a single court, most likely the D.C. Circuit Court. Until this litigation is resolved or until Congress legislates a broad statutory fix, regulated entities and permitting agencies will continue to wrestle with these issues.

FOR ADDITIONAL INFORMATION:

BETH GINSBERG, Stoel Rives LLP (Seattle, WA) 206/ 624-0900 or email: bsginsberg@stoel.com

J. MARK MORFORD, Stoel Rives LLP (Portland, OR) 503/ 294-9259 or email: jmmorford@stoel.com;

Beth S. Ginsberg and J. Mark Morford are partners in Stoel Rives, LLP where they focus their practice on environmental law.

Beth Ginsberg has more than 20 years experience litigating and providing advice on environmental, natural resources, and wildlife matters under the CWA, ESA, NEPA, and other federal and state statutes for public and private entities. Ms. Ginsberg has been consistently voted a “Super Lawyer” and has recently been named one of the Fifty Top Women Lawyers in Washington by *Washington Law & Politics*, and is listed by *Chambers USA America’s Leading Lawyers for Business* and *The International Who’s Who of Business Lawyers*.

Mark Morford has in-depth experience with the full range of environmental issues that face industrial, energy, forest products and agricultural facilities, including water quality, air quality, waste management, radioactive materials management, endangered species issues and cleanups. Mark is listed in *The Best Lawyers in America*, *The International Who’s Who of Business Lawyers*, *Lawdragon 500 Leading Lawyers in America*, *Chambers USA America’s Leading Lawyers for Business* and *Oregon Super Lawyers*.

WATER BRIEFS**NEW RESERVOIR NV/CA/AZ**

On December 11, 2006, Congress passed a bill that includes language directing the Bureau of Reclamation (Reclamation) to construct a new reservoir in Southern California that would capture billions of gallons of Colorado River water requested by Arizona and California users but not used. The project, currently estimated to cost \$84 million, would be funded by Nevada in exchange for the right to withdraw a total of 280,000 acre-feet (AF) of water on an as-needed basis.

Under the rules governing use of the Colorado River, irrigators or municipalities request Reclamation to release water from Lake Mead for their use. However, it often takes several days for that water to reach its destination. If during that period the requestor no longer needs the water due to rainfall or other circumstances, they have the option of “canceling” the order. There is currently no way to capture and store that water for later use, and it is not counted against the requestor’s allotment.

Reclamation estimates that the proposed reservoir will conserve an average of 60,000 AF of water — nearly 20 billion gallons — per year. Over the structure’s projected 50-year lifespan, the total savings equates to 3 million AF. Southern Nevada Water Authority (SNWA) General Manager Patricia Mulroy praised the legislation, noting that the new reservoir “provides yet another tool to help us protect the reliability of this community’s water supply” and “allows us to optimize our use of the Colorado River.”

The so-called “Drop 2 Structure” would be located in the Imperial Valley in southern California near the All-American Canal and the California-Mexico border. US and Mexican environmental groups oppose the “Drop 2 Structure” on the basis that it would cut off critical flows that sustain the Colorado River delta in Mexico.

For info: Scott Huntley, SNWA, 702/ 258-7258, or website: www.snwa.com

WATER BRIEFS

GROUND WATER & SURFACE WATER CO

SEPERATE SYSTEMS

The Colorado Supreme Court recently issued a decision in *Gallegos v. Colo. Ground Water Commission* (No. 05SA253, Nov. 6, 2006) clarifying Colorado's separate regulation of surface water and ground water uses. The Court held that the Colorado Ground Water Commission (Commission) has jurisdiction over surface water rights *only* to the extent that a holder of those rights seeks changes to a designated ground water basin's boundaries, based on section 37-90-106(1)(a) of the Colorado Ground Water Management Act ("Management Act"). The Commission does not have jurisdiction to order curtailment of ground water use to protect senior surface water rights. The case also discusses the basic policy differences between ground water and surface water regulation and thus, the need to keep the two systems separate and distinct.

The Court stated, it "previously noted that designated ground water 'includes water *not tributary* to any stream, and other water *not available for the fulfillment of decreed surface rights*.' *Vickroy*, 627 P.2d at 756 (emphasis added). We have also observed that designated ground water falls into a category of ground water not part of the natural stream, and any use of this water has a 'de minimis [sic] effect on any surface stream.' *Goss*, 993 P.2d at 1182. These statements stand for the rule that designated ground water cannot, as a matter of law, impact surface flows by greater than a de minimis amount." (Slip Op. at 18-19).

Designation of a ground water basin, however, is not a static event in Colorado and designations can be updated to reflect new information. "Section 37-90-106(1)(a) of the Management Act states that the Commission 'shall, from time to time as adequate factual data becomes available, determine designated ground water basins and subdivisions thereof by geographic description and, *as future conditions require and factual data justify, shall alter the boundaries or description thereof*.' § 37-90-106(1)(a) (emphasis added). Notably, this provision was originally part of the Management Act. § 148-18-5, 9 C.R.S. (1963 & Perm. Cum. Supp. 1965). As this provision makes clear, the General Assembly anticipated that a designated ground water basin could include ground water that does not properly fall within the definition of designated ground water. When future conditions and factual data reveal this to be the case, the Management Act requires that the Commission redraw the boundaries of the designated basin. § 37-90-106(1)(a) ('*shall alter the boundaries or description thereof*') (emphasis added)." Slip Op. at 25-26.

The Court held that when a surface water user seeks to change the boundary of a designated ground water basin, they "must prove that the pumping of then-designated ground water has more than a de minimis impact on their surface water rights and is causing injury to those rights. Upon such a showing, the Management Act requires the Commission redraw the boundaries of the designated basin to exclude the surface water rights and those wells pumping designated ground water that has been proven to fall more properly within the definition of ground water subject to the 1969 Act. After the boundaries are redrawn, the State Engineer and the water courts regain jurisdiction and can administer the relative water rights under the 1969 Act." Slip Op. at 26-27. The "1969 Act" is the statutory scheme that governs surface water use and all underground water tributary to natural streams according to the Prior Appropriation Doctrine (Sections 3792101 to 602, C.R.S. (2006). Later in the opinion the court added the explanation that "a surface water right holder, such as the Gallegos Family, claiming injury caused by pumping within a designated ground water basin has the burden of proving that the ground water being pumped is hydrologically connected and causing injury to the surface water rights at issue." Slip Op. at 27-28.

The Court reiterated its distinction between Colorado's ground water and surface water systems. "The need to keep the Management Act and the 1969 Act separate and distinct stems from the basic policy differences underlying the two statutes. See, e.g., *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 215 (Colo. 1996). As we have previously stated: We recognize the dissimilarity in the basic policies underlying the laws of this State for surface water and for ground water in designated basins. Prior appropriation rules for surface water were primarily designed and developed to protect the relative rights of senior and junior appropriators, in order to maximize the beneficial use of the surface water in this State. . . . In contrast, Colorado's permit system for regulation of the appropriation of water in designated ground water basins under the Act permits the full development of ground water sources while protecting against depletion of the underground aquifer, which is not subject to the same ready recharge enjoyed by surface streams and tributary ground water. *Danielson v. Kerbs AG, Inc.*, 646 P.2d 363, 370 (Colo. 1982)." Slip Op. at 24-25.

For info: Full case is available on the Colorado Bar's website: www.courts.state.co.us/supct/opinions/2005/05SA253.pdf

WATER USE EFFICIENCY CA

RECLAMATION REPORT

The Bureau of Reclamation (Reclamation) released a 62-page report entitled "Coordinating Government Programs and Policies to Advance Water Use Efficiency in California" on December 12, 2006. The report identifies public and private financial assistance opportunities available within California for water use efficiency programs. It also presents information about policies that support or conflict with water use efficiency measures; examples of successful Federal, State, regional and local strategies where collaborative interagency and stakeholder efforts have resulted in exemplary programs; and recommendations to funding agencies and fund-seeking entities to improve collaboration and implementation of water-saving projects.

For info: Report available at Reclamation's website: www.usbr.gov/lc/socal

WATER BRIEFS

PERCHLORATE BILLS

US

LEGISLATION INTRODUCED

On January 4, 2007, US Senator Barbara Boxer (D-CA), incoming Chairman of the Senate Committee on Environment and Public Works, introduced two bills aimed at protecting the American public from drinking water contaminated by the chemical perchlorate (see Cox/Aziz/Borch, TWR #26). Senator Boxer was joined in introducing the bills by Senators Dianne Feinstein (D-CA) and Frank Lautenberg (D-NJ). Lautenberg is the incoming Chairman of the Water Quality Subcommittee.

Perchlorate has been found in the drinking water supplies of over 20 million Americans in at least 35 States. It poses particular threats to pregnant women, infants and children. It comes from rocket fuel and other sources. In California, perchlorate has impacted the water supplies in Rialto, Colton, Glen Avon, Redlands, San Bernardino and other communities, where water management agencies have had to remove the contamination or secure alternative sources for drinking water. California already requires water agencies to test for the presence of perchlorate and is expected to set safety standards in the near future.

EPA has not set a standard for safe perchlorate levels in drinking water. The first of the two bills introduced would direct EPA to promptly establish a health advisory, followed by a drinking water standard, for perchlorate. The standard would have to protect the health of the most vulnerable, i.e. pregnant women and children. The second bill would assure that tap water is tested for perchlorate and that the public be notified when drinking water is contaminated.

For info: Offices of Senator Barbara Boxer 202/ 224-3553 or website: <http://boxer.senate.gov/>

CWA SETTLEMENT

WA

WETLANDS AGREEMENT

The US Environmental Protection Agency (EPA) announced on January 4 that Dunes Estates Inc. (Dunes) has agreed to permanently preserve and enhance over 114 acres of wetlands as part of a settlement with the EPA for violations of the Clean Water Act (CWA). Dunes was charged with dredging and filling wetlands adjacent to the Pacific Ocean and Connor Creek without a permit. The wetlands are just north of Ocean Shores, Washington. Under the terms of the agreement, Dunes has agreed to: enhance 2.9 acres of wetlands impacted during the excavation of wetlands along Connor Creek; create approximately 3.4 acres of wetlands; permanently preserve over 114 acres of wetlands and wetland buffers; and pay \$8,000 in penalties.

EPA's press release noted that it has been working very closely with Dunes, the US Army Corps of Engineers, Washington Department of Fish and Wildlife and Grays Harbor County to assure that the corrective actions contained in the enforcement agreement will compensate for the loss of 1.7 acres of coastal dune wetlands and the excavation of 2.7 acres of wetlands adjacent to Connor Creek, a salmon bearing creek.

For info: Steve Roy, EPA, 206/ 553-6221, email: roy.steve@epa.gov

KLAMATH WATER

OR/CA

WATER MARKET & STUDY

The Bureau of Reclamation's (Reclamation) Klamath Basin Area Office announces implementation of the 2007 Klamath Basin Water Supply Enhancement Study (WSSES). The 2000 Klamath Basin Water Supply Enhancement Act authorizes Reclamation to study various aspects of water development and marketing in the Basin. Under this authority, Reclamation may acquire up to 100,000 acre-feet of water in 2007 above Keno Dam in Oregon to use

during the irrigation season. The water will be used as needed to supplement agricultural water demand while meeting court ordered flows in the Klamath River for ESA listed species. WSSES consists of several programs, including on- and off-Klamath Project storage, dryland operation, groundwater pumping, and groundwater substitution options. Reclamation is soliciting bids for the dryland operation and groundwater substitution options programs for WSSES.

Reclamation is accepting applications for dryland operations from individuals and groups willing to forego irrigation of their lands during the 2007 irrigation season in exchange for payment. For groundwater substitution options, Reclamation is accepting applications for water users to alternate between surface water irrigation and groundwater irrigation during the 2007 season at Reclamation's discretion (payment based on documented quantity of groundwater pumped). Oregon landowners must provide documentation of a Supplemental Water Right for the groundwater sources and fields in this program, as it is unknown whether drought permits will be issued in 2007.

Participation is open to all users of surface water above Keno Dam, including non-Project users, except lands above Harpold Dam, Federal lease lands, and lands under temporary surplus water contracts ("C lands"). Eligibility is limited to field units that have been irrigated in at least one of the past 3 years; only complete field units of at least 20 contiguous acres are eligible.

Applicants should contact Reclamation's Klamath Basin Area Office for details. Applicants may make an appointment to discuss their particular operational situation prior to submittal of their final bid. Completed and signed applications and all documentation must be submitted for consideration by 4 p.m. on Thursday, February 15. Program information, application forms, and a sample contract are available on the website listed below.

For info: Jennifer Birri, Reclamation, 541/ 883-6935, email: jbirri@mp.usbr.gov, or website: www.usbr.gov/mp/kbao

WATER BRIEFS

**DAIRY WATER QUALITY CA
MANAGEMENT & TECHNOLOGY**

A new University of California Davis publication (Guide) outlines key management practices, practical approaches and technologies that protect surface and groundwater quality for the dairy industry. The Guide is aimed at lending institutions, consulting engineers and crop management companies that work with dairy producers, as well as regulatory bodies like county environmental health departments and the regional water quality control boards.

Milk is California's No. 1 agricultural commodity with a farmgate value of more than \$5 billion annually. Dairy producers continue to face increasing scrutiny by environmental health and planning agencies. Stu Pettygrove, UC Cooperative Extension soils specialist at UC Davis and co-author of the publication, pointed out that each dairy is different, and production practices must be individually tailored. The Guide identifies three kinds of dairies: 1) those with irrigated cropland; 2) those with non-irrigated pasture and hay fields; and 3) those with limited cropland. The Guide outlines a variety of management measures for each. "We have compiled some of the specific measures taken by progressive dairy producers who have improved their nutrient management practices. There is a wide range of solutions to the challenges facing dairy farmers," Pettygrove said. A limited supply of free copies of the Guide free copies are available from the following contact person.

For info: Tiva Lasiter, UC Davis, 530/752-1130, or email: tlasiter@ucdavis.edu

**USGS DATA & MAPPING US
QUALITY & HYDROLOGY**

The National Water Quality Assessment (NAWQA) Program recently announced the availability of its new USGS Fact Sheet on data delivery and mapping. NAWQA's Data Warehouse integrates data on water quality (more than 11 million records), ecology, and hydrology across the Nation, providing one of the largest

nationally consistent on-line collections of water quality data and associated information. The Data Warehouse contains information and links, for example, on: Chemical concentrations in water, sediment, and aquatic-organism tissues and related quality-control data for 2,000 chemicals from the USGS National Water Information System (NWIS); Biological community data for about 16,000 algae, fish and invertebrate samples; 8,000 stream sites, 8,000 wells, and associated site and basin information; and Daily streamflow and temperature information from NWIS for selected sampling sites.

For info: Sandy Williamson, Project Chief, NAWQA, 253/ 552-1683, email: akwill@usgs.gov, or website: <http://water.usgs.gov/nawqa/data>

**PUGET SOUND INITIATIVE WA
PROPOSALS & CLEANUP**

Governor Gregoire has proposed the "Puget Sound Initiative" to Washington lawmakers that would provide \$220 million for Puget Sound cleanup and restoration in the 2007-09 state budgets. The plan would speed the cleanup of toxic chemicals, restore waterways and salmon habitat, help replace old septic systems and overflowing sewers, and reduce contaminated stormwater runoff that runs into the Sound after heavy rains. The Department of Ecology (Ecology) already is working to clean up more than 550 sites within a half-mile of Puget Sound. Another 115 potential sites have been identified for work.

On December 13, 2006, Governor Gregoire also received the final report from the Puget Sound Partnership, a 22-member panel of Washingtonians she tasked to study clean-up efforts across the country and make recommendations about further clean-up measures. Entitled "Sound Health, Sound Future — Protecting and Restoring Puget Sound," the report outlined a series of recommendations to reach a healthy Puget Sound by 2020. The Partnership recommended five top-priority areas for immediate work: clean up areas with immediate septic problems; protect Puget Sound habitat; restore damaged habitat; accelerate control and cleanup

of toxic pollution at in-water sites and within one-half mile of Puget Sound; and significantly reduce polluted stormwater runoff.

Governor Gregoire in 2006 accelerated the cleanup of pollution in the Sound from leaking septic systems and contaminated stormwater. She designated \$42 million to restore estuaries and salmon habitat and improve the wastewater systems at state parks. The Puget Sound Partnership estimated that it could cost \$18 billion to \$27 billion to achieve Gregoire's goal of completely restoring the Sound to health by 2020. Gregoire also plans to push related bills, including one that would create a board to plan and oversee cleanup of the Sound, and a bill that would ban a widely-used flame retardant used in fighting forest fires.

Meanwhile, cleanup work is under way in Port Gamble Bay to clean up water and habitat at a former sawmill site. Contractors for the \$770,000 project will dredge 17,000 cubic yards of wood debris and contaminated sediments from the water at a two acre site. The dredged materials will be rinsed with fresh water to remove salt. The materials then will be used as topsoil on forest lands. Ecology is leading the work and participants include the state Department of Natural Resources (DNR), the Port Gamble S'Klallam Tribe and other affected tribes, former mill-site owner Pope&Talbot, and current owner Pope Resources and its subsidiary, Olympic Property Group. Ecology received supplemental budget money this year to pay for this and other cleanups as part of Gov. Gregoire's Puget Sound Initiative. Tim Nord of Ecology's Toxics Cleanup Program said that the Port Gamble project shows how Ecology is partnering with tribes, government, and private industry to make sure the state's investments in cleaning up and restoring Puget Sound pay off.

Pope&Talbot is the responsible party for the cleanup. Pope&Talbot and Pope Resources also have cleaned up four landfills, a shoreline area and other sites in Port Gamble through Ecology's Voluntary Cleanup Program. That program enables property owners

WATER BRIEFS

to perform independent cleanups and obtain certification from Ecology when the work is complete, based on detailed technical reports.

For info: Governor's Office, 360/ 902-4111; Ecology's Puget Sound website: www.ecy.wa.gov/puget_sound/index.html; Puget Sound Partnership's website: www.pugetsoundpartnership.org/

DRINKING WATER US UNREGULATED CONTAMINANTS

Approximately 4,000 public water systems will monitor drinking water for up to 25 unregulated chemicals to inform EPA about the frequency and levels at which these contaminants are found in drinking water systems across the US. The information will help determine whether regulations are needed to protect public health. This is the second scheduled review under the Unregulated Contaminant Monitoring Rule (UCMR 2).

EPA currently has regulations for more than 90 contaminants. The Safe Drinking Water Act requires EPA to identify up to 30 contaminants for monitoring every five years. The first cycle, UCMR 1, was published in 1999 and covered 25 chemicals and one microorganism.

EPA selected the contaminants that will be monitored through a process that included a review of EPA's Contaminant Candidate List. The contaminants on the list are known or anticipated to occur in public water systems, however, they are unregulated by existing national drinking water regulations. The review also included additional contaminants of concern based on current research about occurrence and various health-risk factors.

Costs for the five-year UCMR 2 will total about \$44.3 million. EPA will conduct and pay for the monitoring for those water systems serving 10,000 people or fewer at a cost of \$9 million.

For info: Greg Carroll, EPA, 513/ 569-7948, email: carroll.gregory@epa.gov, or website: www.epa.gov/safewater/ucmr/ucmr2; Safe Drinking Water Hotline: 800/ 426-4791

WETLAND NUTRIENTS US DRAFT EPA WQ STANDARDS GUIDANCE

On December 14, 2006, EPA announced the availability of a draft *Nutrient Criteria Technical Guidance Manual for Wetlands*. This document provides State and Tribal water quality managers and others with information on how to develop numeric nutrient criteria for wetlands as State or tribal law regulation. EPA is soliciting information, data, and views on issues of science pertaining to the information EPA used to develop this document.

The draft guidance explains how to consider water, vegetation and soil conditions to develop regionally-based numeric nutrient criteria for wetland systems. While the manual does not provide specific recommendations for nutrient criteria, it does give EPA's recommendations on defensible technical approaches for developing regional nutrient criteria. This document provides elements considered important to criteria development including: Classification; Sampling; Design; and Criteria Development (setting a benchmark).

Nutrients (e.g. nitrogen and phosphorus) are found in nature. They are also found in water as a result of anthropogenic sources including: runoff from fertilized agriculture or residential grounds; municipal wastewater treatment plants; animal farming practices; and for nitrogen, from atmospheric deposition. Human activities can increase runoff from the land surface and increase the input of nutrients into surface waters, including wetlands.

When nutrients accumulate in excessive quantities, they can cause detrimental changes in water quality, in the aquatic life that depends on those waters, and in human uses of that water. This phenomenon is called eutrophication. Eutrophication due to excessive nutrients is one of the top five causes of waterbody impairment in the US, according to information provided by states on their CWA section 303(d) lists. Chronic symptoms of over-enrichment include low dissolved oxygen, fish kills, cloudy or murky water, and depletion of desirable flora and fauna.

The draft guidance presents three methods for use in developing nutrient criteria:

- 1) Identifying reference systems for each established wetland type and class based on either best professional judgment (BPJ) or percentile selections of data plotted as frequency distributions.
- 2) Refining classification systems, using models, and/or examining system biological attributes to assess the relationships among nutrients, vegetation or algae, soil, and other variables.
- 3) Using or modifying published nutrient and vegetation, algal, and soil relationships and values as criteria.

In 1998, EPA published a report entitled *National Strategy for the Development of Regional Nutrient Criteria*. This report outlined a framework for development of waterbody-specific technical guidance that can be used to assess nutrient status and develop region-specific numeric nutrient criteria. The current draft document presents wetland-specific technical guidance for developing numeric nutrient criteria. EPA has previously released the companion *Nutrient Criteria Technical Guidance Manuals* for: *Rivers and Streams* (2000), *Lakes and Reservoirs* (2000) and *Estuarine and Coastal Marine Waters* (2001).

Copies of the complete draft document entitled *Nutrient Criteria Technical Guidance Manual: Wetlands* (EPA-823-B-05-003) may be obtained from EPA's National Service Center for Environmental Publications (NSCEP) by phone at 513/ 489-8190 or 800-490-9198 or email: ncepiwo@one.net. You can also download the document from EPA's website: www.epa.gov/waterscience/nutrient.html

REFERENCE: Federal Register: December 14, 2006 (Volume 71, Number 240, pp 75247-75249)]

CLOSE OF COMMENT: Scientific views, data, and information should be submitted to EPA by February 12, 2007.

For info: Dr. Amy Parker, EPA Health and Ecological Criteria Division 202/ 566-1341 or email: parker.amy@epa.gov

WATER BRIEFS

BPA LAND ACQUISITION WA

TRIBAL OWNERSHIP

The Bonneville Power Administration (BPA) is proposing to fund the acquisition of a 420-acre parcel of wildlife mitigation land in the Calispell Creek watershed in Pend Oreille County, Washington. BPA funds the Albeni Falls Wildlife Mitigation Program, which is tasked with the acquisition and restoration of key habitats within the larger Pend Oreille Watershed. This mitigation program purchases private land to be owned and managed by program participants for the protection, mitigation, and enhancement of wildlife affected by the construction and operation of the federal hydroelectric facilities on the Columbia River.

BPA is currently working with the Kalispel Tribe to acquire and manage the parcel of land. The property proposed for acquisition supports diverse wildlife and wildlife habitats, including wetlands that will provide BPA with credits for partial mitigation of wildlife habitat losses due to the construction of Albeni Falls Dam. The 420-acre parcel will be owned and managed by the Kalispel Tribe for the purpose of wildlife mitigation.

Once these lands have been acquired, the Kalispel Tribe will develop a management plan to guide the protection and enhancement of resources on the property. The Kalispel Tribe will provide information about opportunities for the public to review and comment on the development of the management plan for this property in the future. Pending BPA approval of the management plan, no forest management, grazing or other land management activities will occur except maintenance and protection such as weed control or fence maintenance.

For info: Shannon Stewart, BPA, 503/ 230-5928 or email: scstewart@bpa.gov; Stacey Stovall, Kalispel Tribe, 509/ 445-1147 or email: sstovall@knrd.org

CALENDAR

January 17 WA

SEPA & NEPA, Seattle, Renaissance Hotel. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

January 17 OR

"Water Conflicts in the West," Eugene, University of Oregon, Many Nations Longhouse, 4:30 pm. RE: Faculty Series with Adell Amos. For info: Jill Forcier, Environmental & Natural Resources Law Program, 541/ 346-1395, or email: jillf@uoregon.edu

January 18 OR

DEQ PacifiCorp Energy Prospect No. 1, 2 and 4 Hydroelectric Project Proposed Clean Water Act §401 Certification, Request for Comments & Hearing, Medford, Santo Community Center Rm5. For info: Dennis Belsky, ODEQ Medford, 541/ 776-6010 x226

January 18-19 WA

Endangered Species Act Regional Conference (14th Annual), Seattle, Red Lion on 5th. RE: Case Law, Policy Developments, & Legislative Proposals ;& ESA Implementation. For info: The Seminar Group, 800/ 574-4852, email: info@TheSeminarGroup.net, or website: www.TheSeminarGroup.net

January 18-19 WA

Buying & Selling Electric Power in the West Conference, Seattle, Washington Athletic Club. RE: Bonneville's post-2011 Contracts, Climate Change & New Transmission Projects, Incentives for Renewables, Financing, FERC's Priorities & More. For info: Law Seminars Int'l, (800) 854-8009, or website: www.lawseminars.com

January 18-20 NM

Quivira Coalition's 6th Annual Conference, Albuquerque, Marriott Pyramid. RE: "Fresh Eyes on the Land: Innovation & the Next Generation" For info: Quivira website: www.quiviracoalition.org

January 22 OR

Urban Ecology and Conservation Symposium: Seeking Science for Solutions, Portland, Portland State University. RE: Restoration, Stream & Watershed Health, Fish & Wildlife Habitat, Ecological Health & Ecosystem Services. For info: Jennifer Thompson, USFWS, 503/ 231-6179, or website: www.esr.pdx.edu/uerc/

January 22-23 VA

Third National Water Resources Policy Dialogue, Arlington, Sheraton National Hotel. Sponsored by the American Water Resources Association. For info: AWRA website: www.awra.org

January 22-25 GA

Fourth International Conference on Remediation of Contaminated Sediments, Savannah, Marriott Riverfront Hotel. RE: Efficient Assessment, Effective Management & Successful Remediation. For info: The Conference Group, 800/ 783-6338, email: info@confgroupinc.com, or website: www.battelle.org/environment/er/conferences/sedimentscon/

January 23 WA

Yakima River Basin Water Storage Feasibility Meetings (Bureau of Reclamation & Dept. of Ecology), Yakima, Yakima Convention Center, 10 North 8th Street, Open Houses: 1-2pm and 6-7pm; Scoping Meetings: 2-4pm and 7-9pm. RE: Comment on Yakima River Basin Water Storage Feasibility Study. For info: Gerald Kelso, Reclamation, 509/ 575-5848 x202, or website: www.usbr.gov/pn/programs/storage_study/index.html

January 23 OR

State of the State: Oregon Legislature and the Environment, Portland. Sponsored by NEBC & AWMA (OR Chapter). RE: Issues Facing Environmental Businesses. For info: Cheryl, NEBC, 503/ 222-1963 x100, email: cheryl@oeonline.org, or website: www.nebc.org

January 24 CA

Endangered Species Regulation & Protection Seminar, Orange, UC Irvine Learning Center. Sponsored by UC Irvine Extension. For info: Judy Purewall, UC Irvine Extension, 949/ 824-6538, or website: www.extension.uci.edu

January 25 OR

Green Chemistry: Innovating for Public Health, Portland, Multnomah Athletic Club (1849 SW Salmon), 6-8pm. RE: Less Toxic Alternatives, Implications for Health Community, Public Policy. Sponsored by Oregon Environmental Council Healthy Environment Forum Series. For info: Cheryl, NEBC, 503/ 222-1963 x100, email: cheryl@oeonline.org, or website: www.nebc.org

January 25-26 CO

Colorado Water Congress 49th Annual Convention, Denver. For info: CWC, 303/ 837-0812, email: macravery@cowatercongress.org, or website: www.cowatercongress.org

January 26 OR

Clean Water Act and TMDLs Conference, Portland, World Trade Center. RE: Stormwater Management & Non-Point Sources of Contamination, Oregon and Washington TMDL Programs, Legal, Technical & Regulatory

Requirements. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com/

January 26 OR
Symposium on Klamath River Basin, Eugene, University of Oregon. Sponsored by the Journal of Environmental Law & Litigation. For info: Melissa Peterson, mpeter10@uoregon.edu, JELL website: www.law.uoregon.edu/org/jell/klamath.php

January 26 HI
Natural Resources Damages in Hawai'i, Honolulu, Ala Moana Hotel. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

January 29-30 NV
Nevada Water Law, Reno. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

January 29-31 OR
Hydrology, Ecology & Fishes in the Klamath River Basin, Klamath Falls, Shilo Inn Suites Hotel. RE: Public Session on 1/29/07. For info: Liza Hamilton, National Academy of Science, 202/ 334-1702, or email: lhamilton@nas.edu

January 30-February 2 FL
Winter Conference: National Association of Clean Water Agencies, St. Petersburg, Renaissance Vinoy Resort.. RE: Global Trends Impacting Public Utilities: The Rising Cost of Clean Water. For info: NACWA, 202/ 833.2672, email: info@nacwa.org, or website: www.nacwa.org/meetings/#07winter

February 1-2 NM
Law of the Rio Grande, Santa Fe, Eldorado Hotel & Spa. RE: Rio Grande Compact, Regional Planning & Conversion of Water, Active Water Resource Management & Adjudication, Municipalities' Demands, Indian Water Rights Settlements, Hydrology & Water Markets, Recreational & Environmental Uses & More. For info: CLE Int'l, 800/ 873-7130, email: registrar@cle.com, or website: www.cle.com

February 5-8 WA
Stream Restoration Design Symposium, Stevenson, Skamania Lodge. For info: River Restoration Northwest, 541/ 753-3350, email: registration@rrnw.org, website: <http://rrnw.org/>

February 6-7 MA
Environmental Isotopes in Ground Water Resources and Contaminant Hydrogeology, Boston. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

February 6-7 CO
2007 RiverWare User Group Meeting, Boulder, NCAR/UCAR Center Green Campus Auditorium. RE: Applications, New Tools Developed at CADSWES, Suggestions for Enhancements For info: Kaye Barrett, 303/ 492-4132, email: bkaye@colorado.edu, or website: <http://cadswes.colorado.edu/riverware/ugm/2007/index.html>

February 7 CA
Water Recycling, Monterey, Hyatt Regency Monterey. RE: Regulatory, Political, Technical, & Economic Hurdles, Accomplishments & Developments in Recycling, Design to Permitting, Engineering to Finance & More. For info: The Seminar Group, 800) 574-4852, email: info@theseminalgroup.net, or website: www.theseminalgroup.net/

February 8 OR
"Corporate Law & the Environment," Eugene, University of Oregon, Many Nations Longhouse, 4:30 pm. RE: Faculty Series with Judd Sneirson. For info: Jill Forcier, Environmental & Natural Resources Law Program, 541/ 346-1395, or email: jillf@uoregon.edu

February 9 OR
Easements & CCRs, Portland, 5th Avenue Suites Hotel. RE: Litigation, Drafting Instruments, Reciprocal Easements, Mixed Use Developments, Title Issues, Water Easements, Public/Private Partnerships, Conservation Easement Incentives, Legislation & More. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

February 9 OR
Oregon Fish & Wildlife Commission Meeting, Seaside, Exact Location TBA. RE: Sturgeon and Spring Chinook Regulations; Crab Pots, Sardines, Razor Clams; Upland Artwork Selection; Fish and Wildlife Steward Award Presentation; More. For info: Casaria Tuttle, ODFW Director's Office, 503/ 947-6044, or website: www.dfw.state.or.us/agency/commission/minutes/

February 9 OR
Water Quality, Portland. For info: For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com/

February 13-16 MT
Montana American Fisheries Society Annual Meeting, Missoula. For info: AFS website: www.fisheries.org/AFSmontana/

February 16 MT
Stream Access Law (Annual Real Estate CLE), Fairmount Hot Springs Resort. RE: Bitterroot River Protective Association Stream Access Case. For info: CLE Institute of State Bar of Montana, 406/ 447-2206

February 20-23 ID
2007 AFS Idaho Chapter Annual Meeting, Boise, Riverside DoubleTree Hotel. RE: Diversions, Dams and Fish: Understanding and Managing the Impact of Diversions and Dams on Fish in Idaho on 2/21-2/23; Workshop on 2/20: Current and Emerging Pathogens of Fishes in the Pacific Northwest. For info: AFS website: www.idahoafs.org/meeting2007.php

February 21 WA
Marine Shoreline Development, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

February 22-23 OR
Oregon Water Resources Commission Meeting, Salem. For info: Cindy Smith, OWRD, 503/ 986-0876, or website: www.wrd.state.or.us/OWRD/COMMIS/calendar.shtml

February 22-23 CA
25th Annual Water Law Conference (ABA), San Diego, Hotel Del Coronado. RE: Recent Changes in Water Law & What That Means for the Future, Agency Statutory Interpretation, Instream Use & Water Conservation, Federal Reserved Rights Doctrine, Transfers, Adjudications, Global Climate Change & More. Co-Sponsored in part by THE WATER REPORT. For info: ABA website: www.abanet.org/environ/committees/waterresources/home.html

February 22-23 OR
Oregon Environmental Quality Commission Meeting, Salem. For info: Helen Lottridge, ODEQ, 503/ 229-6725, or website: www.deq.state.or.us/about/eqc/EQCagendas.htm

February 22-23 NV
Family Farm Alliance Conference, Las Vegas, Monte Carlo Resort & Casino. RE: Development in the West, Agricultural Lands and Environmental Demands, Reclamation Roundtable, Climate Change, Ag Water Supplies & More. For info: FFA, 707/ 998-9487, or email: ffameeting@aol.com

February 22-23 CA
Annual Executive Briefing by the Water Education Foundation, Sacramento, RE: Current Water Issues - Speakers from the Urban, Business, Farming, Environmental & Public Interest. For info: WEF, 916/ 444-6240, email: feedback@watereducation.org, or website: www.water-ed.org/briefings.asp

February 26 WA
Natural Resources Damages Litigation, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

February 27-March 2 DC
Water Systems Council Spring 2007 Members Meeting, Washington, DC. For info: member_services@watersystemscouncil.org or website: www.watersystemscouncil.org/calendar/index.cfm

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March 1-2 OR
Public Interest Environmental Law Conference (25th Annual), Eugene, University of Oregon. For info: PIELC, 541/ 346-3828, email: askpielc@uoregon.edu, or website: www.pielc.org/

March 1-2 OR
2007 Brownfields Conference, Salem, Salem Conference Center. For info: Karen Homolac, Oregon Economic and Community Development Department, 503/ 986-0191, email: Karen.Homolac@state.or.us

March 1-2 NV
NEPA, Las Vegas. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

March 5-6 DC
2007 Ground Water Industry Legislative Conference/NGWA Fly-in, Washington, DC. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

March 6-7 DC
2007 Ground Water Industry Legislative Conference, Washington, DC. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

March 8-9 OR
NEPA Practice: 2007 Update, Portland, Oregon Convention Center, 777 NE Martin Luther King Jr., Blvd. RE: Preparing, Reviewing, Challenging & Defending Documents Prepared Under NEPA. For info: Oregon Law Institute of Lewis & Clark Law School, 503/ 768-6580, email: oli@lclark.edu, or website: www.lclark.edu/org/oli

March 8-9 CO
Colorado Water Law, Denver, Grand Hyatt. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

March 8-11 CO
36th Annual Conference on Environmental Law, Keystone, Keystone Resort & Convention Center. For info: ABA website, www.abanet.org/environ/programs/keystone/2006/

March 10-13 TX
4th Conference on Watershed Management to Meet Water Quality and TMDL Issues: Solutions and Impediments to Watershed Management and TMDLs, San Antonio, Crowne Plaza Riverwalk. Sponsored by the American Society of Agricultural and Biological Engineers. For info: Sharon McKnight, ASABE, 269/ 428-6333, email: jcknight@asabe.org, or website: www.asabe.org/meetings/tmdl2007/index.htm

March 12-13 ID
Water Law, Boise. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

March 13 VA
"Water Quality Committee Meeting," Western States Water Council, Arlington, Crowne Plaza Washington National Airport, 1480 Crystal Drive. For info: Cheryl Redding, WSWC, 801/ 561-5300, email: credding@wswc.state.ut.us or website: www.westgov.org/wswc/meetings.html

March 13-15 NV
Environmental Geochemistry of Metals, Las Vegas. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

March 16-17 CO
The Climate of Environmental Justice: Taking Stock, Boulder, University of Colorado Law School. RE: Environmental Justice and the Consequences of Climate Change. For info: Maxine Burkett, Natural Resources Law Center, 303/ 492-3720, or website: www.colorado.edu/law/centers/nrlc/Climate_Justice_Conference.pdf

March 19-20 WA
Clean Water & Stormwater, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

March 19-21 CA
Low-Cost Remediation Strategies for Contaminated Soil and Ground Water, San Francisco. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

March 20-23 WA
Fifth Climate Prediction Applications Science Workshop, Seattle. For info: Diana Perfect, NOAA-National Weather Service, 301/ 713-1970 x 132, email: diana.perfect@noaa.gov, or website: www.cses.washington.edu/cig/outreach/workshopfiles/cpasw07/

March 21-23 OH
Principles of Ground Water: Flow, Transportation, and Remediation, Dublin. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org



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