



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

In This Issue:

**Yellowstone Compact
Dispute 1**

**Restoration Credits
& NRDA
Liability Relief 9**

**Water Rights
Auctions 14**

**EPA Clean Water Act
Regulation 17**

Takings Decision 19

Water Briefs 24

Calendar 30

Upcoming Stories:

CWA Citizen Suits

**Columbia River
Toxics Plan**

**ASR & Water Reuse
Issues**

& More!

MONTANA V. WYOMING

US SUPREME COURT TO HEAR YELLOWSTONE COMPACT CASE

by Karen Budd-Falen, Budd-Falen Law Offices (Cheyenne, WY)

Editor's Introduction

Water rights battles pitting upstream versus downstream users enjoy a long and colorful place in the history of Western Water Law. They are typically highly contentious affairs, with downstream users traditionally claiming that too much water is being diverted or stored in reservoirs upstream and, thus, that they are not receiving water that should flow to them.

Montana and Wyoming believed they had settled their differences regarding water use in the Yellowstone River by entering into a compact in 1950 (Yellowstone River Compact). Since that time, however, new reservoirs have been built, water use has increased, severe droughts have occurred, and climate change looms. Downstream water users in Montana, which include irrigation and municipal users, have asserted that they have not received water they are entitled to and the state of Montana has decided that long-running negotiations will not solve the controversy.

Montana and Wyoming have become the latest states to enter into an interstate litigation battle over the allocation of water rights. The controversy between Montana and Wyoming over water in the Tongue and Powder rivers has been brewing for some time. The Water Report first wrote about the situation back in June of 2004 (TWR #4). As noted in that article, only two 1886 water rights from the Tongue River in Montana were being satisfied early in the 2004 irrigation season, with all other junior water rights going without any water. Most of the water rights involved in Montana are irrigation rights, although some are municipal rights (including Miles City, Montana). On May 18, 2004, Montana attempted to make a "call" on water stored upstream in Wyoming reservoirs of 9,369 acre-feet of "post-1950" water stored in the Tongue River Basin and 214,722 acre-feet of "post-1950" water stored in the Powder River Basin (the Yellowstone River Compact differentiates between "pre-1950" and "post-1950" water rights, i.e. pre-Compact and post-Compact rights). In July 2004, TWR reported on the severity of the drought that year: the Tongue River on June 23 was flowing at an all-time low of 129 cubic feet per second (cfs) in contrast to the historical median flow of 495 cfs for that date.

The controversy erupted again during the severe drought year of 2006. On July 28, 2006, Montana again attempted to make a "call" to the State Engineer of Wyoming to release water to satisfy Montana water users downstream in accordance with the Yellowstone River Compact. Montana had been unable to fill the Tongue River Reservoir (storage capacity of 79,070 acre-feet) and was unable to fulfill all pre-1950 water rights use. The Reservoir is located 10 miles downstream from the Montana-Wyoming state line. Montana ended up purchasing water from the Northern Cheyenne Tribe that was stored in the reservoir to maintain base flow for aquatic life in the river through September (when precipitation augmented flows). Montana was also concerned about flow in the Powder River, which essentially went dry on July 25, 2006; the average historical flow for that date is 215 cfs. See Yellowstone River Compact Annual Report 2006.

Yellowstone Compact

Coalbed Methane

Tongue River Basin

Montana Complaint

Special Master

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Montana is also concerned about the use of water for coalbed methane production in Wyoming. During a meeting of the Compact Commission on April 13, 2006, Wyoming provided a table listing the coalbed methane disposal reservoirs in the Tongue, Powder, and Little Powder River drainages where applications had been received and where permits had been issued. Wyoming required all reservoirs to be permitted, even those being used for activities other than coalbed methane development. As noted in the Minutes of that meeting, there were 2,481 permits and the average volume stored in each of the permitted reservoirs was about 12.5 acre-feet. Wyoming also presented a graph showing the number of coalbed methane well applications by month. From January 1997 to March 2006, there were 36,543 coalbed methane well applications received throughout Wyoming. Wells had not been drilled for all those permits. Minutes of April 13, 2006 (Compact Commission); see Commission website: <http://yrcc.usgs.gov/support.docs/YRCCAnnualReport2006.pdf>.

The Tongue River valley of Wyoming and Montana has over 60,000 acres of irrigated land which have supported cattle ranching and farming operations for more than 100 years. The Tongue River basin is home to approximately 25,000 people, 88% of whom live in and around Sheridan, Wyoming. There are at least 60,000 irrigated acres in the basin, 73% of which are in Wyoming. Water rights filing information demonstrates that claims for water from the basin are far in excess of its historic delivery capability. Just over 6,000 private water wells are drilled in the basin, 64% of which are in Montana, and most of which are used for agricultural purposes. Through 2006, approximately 3,000 coal bed natural gas wells were installed in the basin, 73% of which are in Wyoming (*Tongue River Hydrology Report*, Hydrosolutions, Inc. (May 2007), Page 1).

BACKGROUND

The United States Supreme Court has agreed to hear Montana's complaint that Wyoming is violating the Yellowstone River Compact (Compact) by taking more water than they are due. Specifically, Montana claims that Wyoming has disregarded its obligations under Article V of the Compact to curtail water diversions in excess of Wyoming's pre-1950 consumption levels in the Tongue and Powder River Basins whenever the amount of water necessary to satisfy Montana's pre-1950 uses of water is not passing the Montana-Wyoming state line. Despite Wyoming's opposition — based on its claim that Wyoming is delivering its Compact-required water to Montana and that Montana has not been harmed — on October 20, 2008, the U.S. Supreme Court (Supreme Court) appointed Barton H. Thompson of Stanford, California, as the Special Master from to take testimony, oversee discovery and make factual findings.

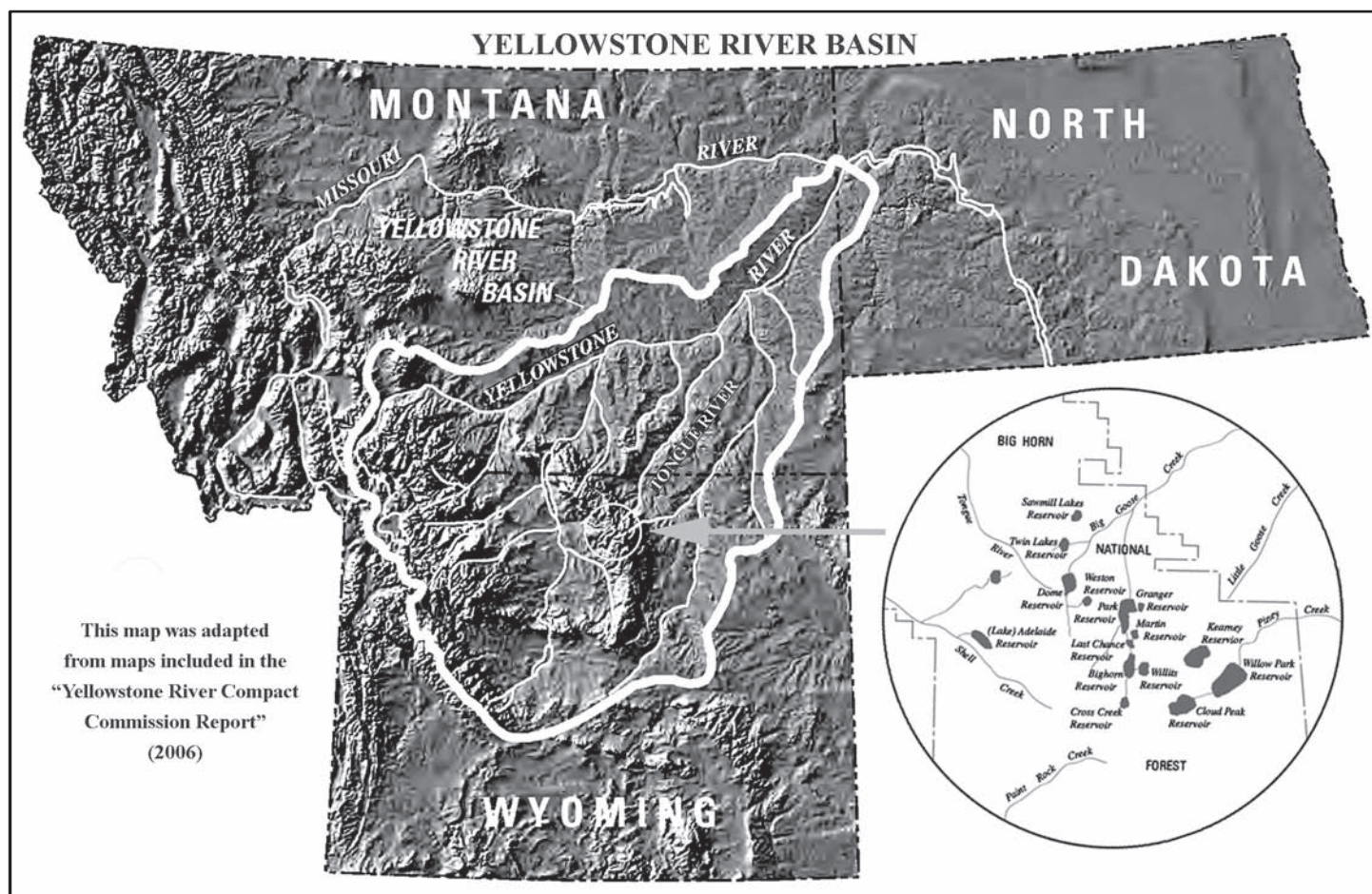
WATER COMPACTS GENERALLY

A compact is an agreement between persons, nations or states; a contract between parties which creates obligations and rights capable of being enforced. Blacks Law Dictionary, 6th Ed. at 255. Compacts between states regarding water allocation must be ratified by Congress pursuant to section 10 of the U.S. Constitution which states, "No state shall, without the consent of Congress...enter into any Agreement or Compact with another state..." U.S. Const. Art. 10, Cl. 3.

The Supreme Court has long recognized and encouraged states to enter into compacts regarding allocation of water use, rather than settling disputes through litigation that results in equitable apportionment by the Supreme Court. *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). Once a compact is ratified, the apportionment is binding upon the citizens of each state and all water claimants, even where the state had granted the water rights before it entered into the compact. *Poole v. Fleegee*, 11 Pet. 185, 209, 9 L.Ed. 680. Once Congress ratifies a compact, it operates as a treaty between sovereign nations. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725, 9 L.Ed. 1233.

MAJOR RIVER DRAINAGES IN WYOMING AND MONTANA

Montana has divided the state into six major drainage basins and fifteen sub-major drainage basins (see Montana Drainage Basin Map; available at http://dnrc.mt.gov/wrd/water_rts/default.asp). The three major drainages containing waters flowing from Wyoming to Montana are the Missouri, Yellowstone, and Little Missouri. The sub-major drainages containing waters flowing from Wyoming are the Upper Missouri (contains the Madison and Gallatin Rivers), Lower Yellowstone (contains the Little Powder River and the Powder River below Clear Creek), Little Missouri (contains the Little Missouri River), Upper Yellowstone (contains the Clarks Fork River), and Middle Yellowstone (contains the Little Bighorn River, the Tongue River, and the Shoshone River). The Gallatin/Madison River Basin in Wyoming appears to correspond with the Upper Missouri River Basin in Montana. The Bighorn/Wind River Basin in Wyoming corresponds with the Middle Yellowstone River Basin in Montana. The Tongue/Powder River Basin in Wyoming corresponds with the Lower Yellowstone and Middle Yellowstone River Basins in Montana. The Yellowstone/Clarks Fork River Basin corresponds with the Upper Yellowstone River Basin in Montana. Finally, the Little Missouri River is part of the Little Missouri River Basins in both states.



Yellowstone Compact

Categories of Rights

Allocation Percentages

YELLOWSTONE RIVER COMPACT

On December 8, 1950, the Wyoming State Engineer and the commissioners for Wyoming, Montana and North Dakota signed the Yellowstone River Compact. See Wyo. Stat. § 14-12-601. The United States Congress approved the Compact in October 1951. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663. The Compact addresses water allocation issues between Wyoming and Montana with regard to the interstate tributaries to the Yellowstone River, with the exception of waters within or contributing to the flow of streams within Yellowstone National Park. *Id.* at Art. V. (Compact attached to Montana's Complaint; available at: www.doj.mt.gov/lands/waterrights.asp).

The Compact discusses three categories of water rights: (1) pre-1950 appropriative water rights; (2) post-1950 appropriative water rights used to supplement pre-1950 water rights; and (3) the remaining unused and unappropriated waters in the interstate tributaries to the Yellowstone River. The Compact recognizes "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory state as of January 1, 1950," and provides that those rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." *Id.* at Art. V.A. It then allocates to each "signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described [above]" from the unused and unappropriated waters of the interstate tributaries of the Yellowstone River. *Id.* at Art. V.B. Such rights were to be acquired and used in accordance with the Prior Appropriation Doctrine. *Id.*

From the remainder of the unused and unappropriated water, the Compact allocates to "each state for storage or direct diversions for beneficial use on new lands or for other purposes as follows:" (1) from the Clarks Fork, Yellowstone River, 60% to Wyoming and 40% to Montana; (2) from the Bighorn River (exclusive of the Little Bighorn River), 80% to Wyoming and 20% to Montana; (3) from the Tongue River, 40% to Wyoming and 60% to Montana; (4) from the Powder River (including the Little Powder River), 42% to Wyoming and 58% to Montana. *Id.* The Compact outlines the point on the respective rivers at which the percentages are to be measured and the manner in which they are to be measured. *Id.* at Art. V.B, V.C.

Yellowstone Compact

Exclusions

The Compact specifically excludes existing and future domestic and stock water uses, although the storage capacity for any stock water reservoirs cannot exceed twenty acre-feet. It also excludes devices and facilities for the control and regulation of surface waters. *Id.* at Art. V.E. The Compact also does not cover the rights of Native Americans to the waters of the Yellowstone River or its tributaries. *Id.* at Art. VI. The Compact prohibits the diversion of water from the Yellowstone River basin to another basin without the unanimous consent of all of the signatory states. *Id.* at Art. X. If water is diverted into the Yellowstone River basin or transferred from one basin to another, the state having the right to the use of the water shall be given proper credit in determining its share of the water apportioned under the Compact. *Id.*

Interstate Permits

The Compact provides that a lower (downstream) signatory state can file an application for a permit to appropriate water with an upper (upstream) signatory state for waters not specifically apportioned to or appropriated by the upper state under Article V of the Compact. *Id.* at Art. VII.A. Lower signatory states also have the right to “construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper state for the purpose of conserving and regulating water that may be apportioned or appropriated by the lower state,” although the upper state retains the right to control, regulate and use the water apportioned to or appropriated by it. An upper state also has the right to elect to share in the use of facilities constructed by a “lower state to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance.” The same provisions allowing a lower state to acquire rights in an upper state applies equally to upper states acquiring rights in lower states. *Id.* Any facilities constructed in another state are subject to that state’s laws regarding construction, operation, repairs and replacements. *Id.* at Art. IX.

Eminent Domain

The Compact also allows a lower signatory state to acquire by purchase or the power of eminent domain, lands, easements, and rights-of-way in the upper states for the “construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state.” The same is true with regard to upper states acquiring lands in lower states. *Id.* at VIII.

Adjudication Provisions

Any claim for an appropriation of water in a signatory state for use in another signatory state after the date of the Compact must be filed in the “office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.” *Id.* at Art. VII.B. The water diverted is subject to adjudication in the state in which the water is diverted, and where the water is used to irrigate lands in another signatory state, it shall also be “confirmed in that state by the proper authority.” *Id.* at Art. VII.C. “Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.” *Id.* The use of water allocated to the respective states after the date of the Compact by the United States, its agencies and instrumentalities, is charged as a use by the state in which the use is made, except where the use of the water is incident to the diversion, impounding, or conveyance of water in one state for use in another state, in which case the use is charged to the latter state. *Id.* at Art. VII.D.

Compact Commission

The Compact created a commission to administer the Compact and divide the waters between the states of Wyoming and Montana. *Id.* at Art. III.A. The commission is composed of one representative from Wyoming and one representative from Montana, each selected by their respective governors, and a representative selected by the Director of the United States Geological Survey or its successor. *Id.* The US representative is to serve when requested by the states, and is to act as the commission’s chairman without vote, except as necessary to break a tie between Wyoming and Montana. *Id.*; see also Art. III. F. The commission has jurisdiction over the “collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this compact, and recommendation to such states upon matters connected with the administration of this compact.” It is required to compile an annual report for the governors of the signatory states. *Id.* at Art. III.C. The commission also has the authority to make rules and regulations, employ services and make expenditures within the limits of the money provided by the states as is reasonable and necessary, and has the power to sue and be sued. *Id.* at Art. III.C, III.E, III.G. The Secretary of the Army, the Secretary of the Interior, the Secretary of Agriculture, the Chairman of the Federal Power Commission, the Secretary of Commerce, and other comparable officers and their successors are directed to cooperate with the commission in “the collection, correlation, and publication of records and data necessary for the proper administration of the compact.” *Id.* at Art. III.D. Finally, the commission is responsible for the establishment, maintenance and operation of gauging and evaporation stations as are necessary to carry out the Compact. *Id.* at Art. IV.

Jurisdiction & Authority

YELLOWSTONE RIVER COMPACT LITIGATION

Yellowstone Compact

Parties

On January 31, 2007, the state of Montana filed a motion for leave to file a bill of complaint, a brief in support of the motion, and a complaint against the states of Wyoming and North Dakota in the United States Supreme Court (Supreme Court), seeking to invoke the Supreme Court's original and exclusive jurisdiction to determine and enforce Montana's rights in the Tongue and Powder Rivers in accordance with the Yellowstone River Compact. See Brief in Support of Motion for Leave to File Bill of Complaint 1 (Jan. 31, 2007). On February 19, 2008, the Supreme Court granted the Motion and allowed Wyoming to file a Motion to Dismiss. Amicus curiae (latin for "friends of the court") United States, Anadarko Petroleum Corporation, and the Northern Cheyenne Tribe also filed briefs.

The Complaint

Montana Claims

Montana claims that Wyoming has disregarded its obligations under Article V of the Compact to curtail water diversions in excess of Wyoming's pre-1950 consumption levels in the Tongue and Powder River Basins whenever the amount of water necessary to satisfy Montana's pre-1950 uses of water is not passing the Montana-Wyoming stateline (Bill of Complaint ¶ 8 (Jan. 31, 2007); Brief in Support of Motion for Leave to File Bill of Complaint at 2). Specifically, Montana claims that Wyoming has constructed or enlarged fifteen reservoirs in the Tongue and Powder River Basins since the Compact's adoption (Bill of Complaint at ¶ 9; Brief in Support of Motion for Leave to File Bill of Complaint at 14 — see map, page 3). It also claims that Wyoming has increased the amount of irrigated lands in the Tongue and Powder River Basins which, when Wyoming fails to curtail uses on these lands to protect Montana's rights under the Compact, violates the Compact (Bill of Complaint at ¶ 10; Brief in Support of Motion for Leave to File Bill of Complaint at 14).

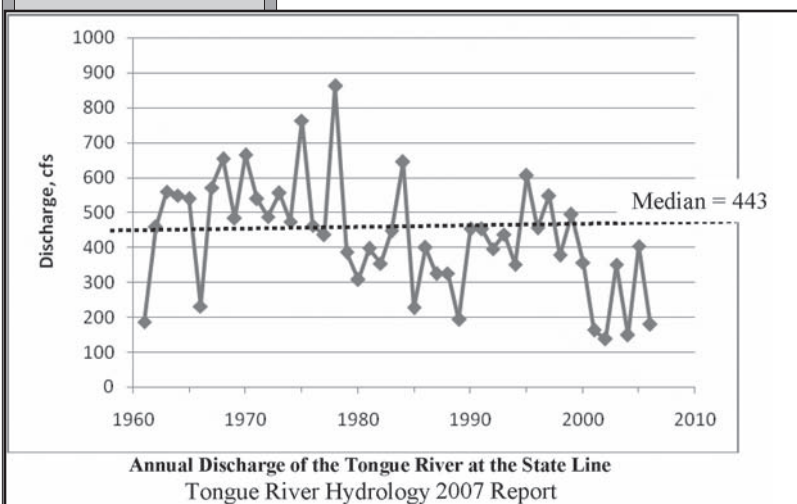
Groundwater Pumping

Montana also claims that Wyoming has increased the use of groundwater wells for irrigation, coalbed methane production, and other purposes since the Compact was adopted (Bill of Complaint at ¶ 11; Brief in Support of Motion for Leave to File Bill of Complaint at 15). This groundwater pumping has the potential to deplete the compacted waters of the Powder and Tongue Rivers, which would violate the Compact. *Id.* Furthermore, Wyoming has allowed significant increases in consumption of water by water users converting from flood irrigation to sprinkler irrigation, which reduces return flows to streams (Bill of Complaint at ¶ 12; Brief in Support of Motion for Leave to File Bill of Complaint at 15-16). "All of these developments since the adoption of the Compact have the potential, in some cases the strong potential, to increase the consumption of water in Wyoming. Wyoming refuses, however, to manage or curtail such activities for the purposes of protecting the rights of Montana under the Yellowstone River Compact." Brief in Support of Motion for Leave to File Bill of Complaint at 16.

Fundamental Dispute

Montana claims that the present controversy over water use "includes a fundamental dispute over the proper interpretation of the Compact." *Id.* According to Montana, Article V.A. apportions water to the states that were in actual use at the time of the Compact pursuant to the doctrine of prior appropriation, yet Wyoming claims that the Compact did not even address pre-1950 water rights. *Id.* Montana argues that, although it "cannot demand water at the stateline that is needed to supply the valid Wyoming upstream rights that were in use on January 1, 1950...neither can Wyoming deny Montana water that should be available for Montana's pre-1950 water uses by supplying supplemental water to pre-1950 Wyoming uses or by supplying water to new acreages or other post-January 1, 1950 uses in Wyoming. In disregarding these principles, Wyoming has failed to deliver water to which Montana is entitled." *Id.* at 19.

Damage Claim



Montana claims that only the Supreme Court can provide a remedy for the breach of the Compact and not the Yellowstone River Compact Commission. *Id.* at 24. Additionally, Montana's Brief notes that Montana and Wyoming have been deadlocked in their disputes since the United States representative has never exercised his right to vote. *Id.* at 27.

In addition to Montana's requests that the Supreme Court declare the rights of Montana to the waters of the Tongue and Powder Rivers pursuant to the Compact, Montana has also asked for an award for damages and other relief for the injury suffered by the state due to Wyoming's "past and continuing violations of the Yellowstone River Compact." Bill of Complaint at 5.

Yellowstone Compact

"Depletion" Compact

"Divertible Flow" Compact

No "Call" Allowed

Groundwater Excluded

Post-1950 Rights

Inclusive Apportionment

Wyoming's Motion to Dismiss

In Wyoming's Motion to Dismiss, it argues that Montana incorrectly asserts that the Compact is a "depletion" Compact, under which Wyoming cannot deplete the two rivers through its actions more than it depleted them as of January 1, 1950. Wyoming's Motion to Dismiss at 2-3, 26 (April 4, 2008). Wyoming maintains that Montana is wrong in assuming that the Compact is based on a "depletion" standard — i.e. that the Compact guarantees river flows at the state line as those flows existed as of January 1, 1950. As Wyoming stated in its Motion to Dismiss at 10, a "depletion compact restricts an upstream state from depleting a river below a certain quantity of flow at the state line, even in low flow periods."

Wyoming argues that the language of the Compact and the history of its drafting makes clear that the commissioners intended to create a "divertible flow" compact, whereby water diversions serving post-1950 water rights would be calculated on a cumulative annual basis, rather than a daily mean basis. *Id.* at 3; 36-37.

According to Wyoming, pre-1950 water rights, and water rights supplemental to pre-1950 water rights were excluded from coverage under the Compact and were to be regulated by each state under its water laws. *Id.* at 36. Since allocations were calculated on a cumulative annual basis, the drafters anticipated that Montana would store water earlier in the season to satisfy pre-1950 water rights later in the season. *Id.* at 46.

The drafters explicitly rejected an interstate system whereby Montana could make a "call" on water from Wyoming "to shut down the diversion of a Wyoming water user whose rights were junior to a Montana user's right." In other words, Wyoming is asserting that the drafters of the Compact rejected "Montana's proposal that pre-1950 rights be regulated based on a prior appropriation scheme that ignored state line." *Id.* at 36-37.

In arguing that Wyoming has used groundwater irrigation, irrigated new acreage, and switched to more consumptive irrigation methods, Montana again incorrectly assumes that the Compact is based on depletion rather than diversion principles. *Id.* at 36. Furthermore, the language of the Compact refers to surface waters and not to groundwater. *Id.* at 59-62. With regard to the claim that Wyoming is irrigating new acreage, this fact alone would not violate the Compact unless Wyoming had violated the allocation formula in the Compact. *Id.* at 54. Nor does the Compact discuss the method Wyoming irrigators can use to irrigate their crops (i.e., sprinkler irrigation versus flood irrigation). *Id.* at 55.

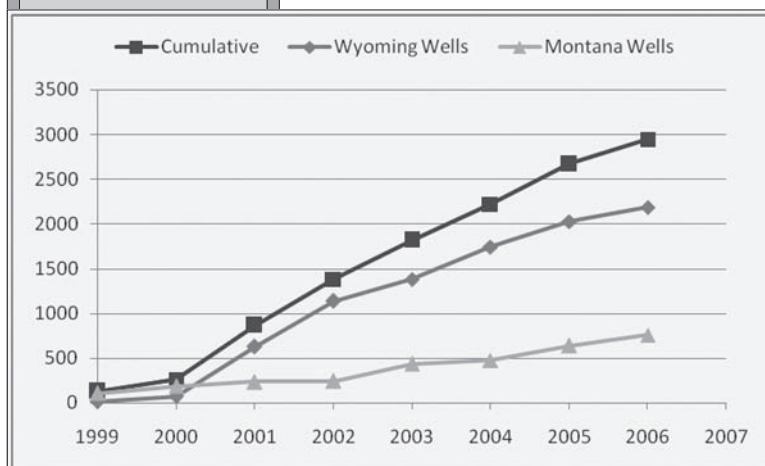
Montana's Response

Montana responded to Wyoming's Motion to Dismiss by arguing that, for purposes of the Motion to Dismiss, the Court must assume that Wyoming is depleting the Tongue and Powder Rivers and thereby causing Montana injury as specified above. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint 13 (May 9, 2008). The legal question is whether such actions violate Article V of the Compact. *Id.* Wyoming has admitted that, if its post-1950 cumulative water diversions and net gains in storage exceed its allocated amount, it has violated the Compact and Montana's complaint, read broadly, makes that allegation. *Id.* at 17-18.

Montana further argues that Wyoming's interpretation of the Compact is incorrect. *Id.* at 19. Wyoming's Motion to Dismiss improperly relies on documents and factual matters outside of the pleadings. *Id.* at 22-23. Next, Montana argues that the Yellowstone River Compact provides a cause of action for depletion of the waters apportioned to Montana. *Id.* at 23-24. The Compact is all-inclusive and apportions all waters not specifically excluded. *Id.* at 23-27. Wyoming's view that the Compact only allocates water

for new uses ignores the express purpose of the Compact, which is to effect a complete apportionment of the waters from the four tributaries and to remove all present and future sources of controversy. *Id.* at 25-26. Furthermore, the "Senate Report indicates Congress did intend a state line call to be the appropriate remedy for excessive depletions by an upstream State." *Id.* at 27.

Montana also argues that the Compact apportioned all waters in use at the time the Compact was adopted, thus allowing the unused water to be stored or put to other beneficial uses. *Id.* at 27-28. Article V.B. allocates those waters that were unused and unapportioned at the time of the Compact. *Id.* at 35. Under the Compact, pre-Compact rights in all three states take first priority. They are protected in whatever amount was then being put to beneficial use. Any water leftover after pre-1950 rights are satisfied may first be used for supplemental rights described in V.A. and



Combined History of CBNG Well Completions in the Tongue River Basin
Sources: MBOGC, 2006; WOGCC, 2007. Tongue River Hydrology 2007 Report

Yellowstone Compact

Pre-Compact Rights

Post-Compact Use

Groundwater Claim

Coalbed Methane & Groundwater Use

Tribal Rights

Baseline Issue

US Brief

the final remainder is divided by specific percentages for new uses. *Id.* at 36. Thus, by providing that pre-Compact rights “shall continue to be enjoyed” and by allocating only those waters that were unused and unapportioned at the time of the Compact, the States are prohibited from depleting another state’s apportioned pre-Compact water supply. *Id.* at 38-39. “If Wyoming’s post-Compact uses impair Montana’s pre-Compact water supply, Wyoming is exceeding its allocation in V.B and is thereby violating Article V.B.” *Id.* at 39.

“Wyoming may not deplete the waters necessary to supply Montana’s pre-Compact rights if that water was available to Montana under the state of development existing at the time of the Compact.” *Id.* at 40. The term “beneficial uses” refers to the water supply of a drainage basin that is depleted. *Id.* at 40. The divertible flow principle only applies to the unused and unapportioned water allocations, and not to pre-Compact water rights. *Id.* at 41-42. One of the reports to Congress noted that the allocations take into account return flow and uses of return flow. *Id.* at 43.

Montana further argues that any post-Compact use, including irrigating additional acres, or storing additional water, that consumes part of the water supply for Montana’s pre-Compact uses violates the Compact. *Id.* at 43-46. Additionally, Wyoming’s increased consumption on pre-Compact acreage (e.g., through more efficient irrigation methods) may violate the Compact because Article V.A. specifically incorporates “depletion” into the definition of “beneficial use” and Article V.B. incorporates return flows into the accounting. *Id.* at 48. If there is no restriction on increasing consumption of pre-Compact acreage, there would be no purpose for the clause allocating supplemental water rights to pre-Compact uses. *Id.* at 49.

Finally, Montana has stated a claim based on the increase in groundwater pumping in Wyoming. *Id.* at 49-54. Pumping can impact surface flows in the same basin. *Id.* at 50. The Supreme Court has interpreted other compacts to include groundwater, even though the compact did not mention groundwater. *Id.* at 53. Wyoming argues, in essence, that even if it pumped groundwater to the point of drying up the Tongue and the Powder Rivers, Montana would have no remedy under the Compact. *Id.* at 54. That interpretation defeats the purpose of having an interstate apportionment by compact. *Id.* In response to Anadarko’s argument (see below), Montana argues that the Supreme Court has interpreted “diversion” to include groundwater, and any factual dispute regarding whether the groundwater pumping is actually depleting the surface waters is a factual argument that cannot be resolved on a Motion to Dismiss. *Id.* at 55-56.

Amicus Curiae Briefs (Friends of the Court)

Several parties have filed amicus curiae briefs (amicus briefs) in this case. Anadarko Petroleum Corporation (Anadarko), a corporation engaged in coalbed methane production, filed an amicus brief in support of Wyoming’s Motion to Dismiss, arguing that the Compact does not cover groundwater generally or, even if it does cover groundwater generally, it does not cover groundwater pumping used for coalbed methane production. See Motion of Anadarko Petroleum Corp. for Leave to File Amicus Brief and Amicus Brief in Support of Respondent State of Wyoming (April 25, 2008). According to Anadarko, the purpose of the Compact was to allocate surface waters and facilitate construction projects. *Id.* at 3. Anadarko argues that the plain language of the Compact makes clear that it only covers surface water, because it only applies to the unused and unallocated tributaries of the Yellowstone River (and a tributary is defined in terms of surface water), none of the terms are defined to include groundwater, and it does not contain an anti-depletion clause. *Id.* However, even if the Compact does include some groundwater, it should not be read to include groundwater used for coalbed methane production because that water is in deep seams and typically does not reach the surface without pumping. *Id.* at 4.

The Northern Cheyenne Tribe (Tribe) filed an amicus brief in support of Montana, arguing that the Tribe’s water rights are protected by the Compact and urging the Court to deny Wyoming’s Motion to Dismiss. See Brief for Amicus Curiae Northern Cheyenne Tribe in Support of Plaintiff State of Montana (May 16, 2008). The Tribe argues that, under the structure of the Compact, Montana’s pre-Compact uses are protected from Wyoming’s expanded and new uses. *Id.* at 8. The pre-1950 uses create a baseline for the Compact, and unless the pre-Compact rights are fulfilled, there are no “unused and unallocated” waters subject to the percentage allocation. *Id.* at 9. Additionally, the Tribe argues that the baseline for the Compact is the amount of water actually being used as of January 1, 1950, and not the full amount that was permitted or appropriated. *Id.* Unless the Compact is tied to the pre-1950 water that was actually being used, the baseline would be a moving baseline and it would be impossible to determine the amount of unused and unallocated water for purposes of Article V.B. *Id.*

The United States filed an amicus brief, arguing that Montana is correct in its assertion that when pre-1950 Montana water rights holders are short of water, there is no “unused and unappropriated water” under the Compact, and “the ‘appropriated’ water must flow to the pre-1950 users who appropriated it.” Brief for

Yellowstone Compact

Pre-1950 Protection

Depletion Issue

Storage Timing

Interstate Regulation

Groundwater Exclusion

Special Master's Tasks

the United States as Amicus Curiae in Opposition to the Motion to Dismiss 8 (May 16, 2008). However, in order to obtain redress, Montana must show that its pre-1950 users are not receiving sufficient water and that Wyoming water users are diverting water to post-1950 purposes. *Id.* “Wyoming’s position — that pre-1950 rights received no protection at all under the Compact — cannot be squared with the text and history of Article V(A).” *Id.* Wyoming’s alleged post-1950 use of water for “storage, irrigation of new acreage, and groundwater pumping for irrigation or industrial use” could all violate the Compact. *Id.* However, because the Compact protects pre-1950 water rights, and Wyoming water law allows users to change to more efficient irrigation methods, Montana cannot state a claim based on decreasing return flows. *Id.* at 9.

The United States also argues that Montana’s claim does not depend on depletion principles, nor does it require Wyoming to deliver a certain quantity of water to Montana. *Id.* at 20. Rather, Wyoming has an obligation to curtail post-1950 water uses when needed for Montana’s pre-1950 water uses. *Id.* To survive the Motion to Dismiss, “Montana need[s] [only to] allege [] that, at a time when there is no ‘unused and unappropriated’ water, Wyoming is making diversions to post-1950 uses, in violation of Montana’s first-tier rights under the Compact,” which it has done. *Id.* at 23.

Wyoming’s Reply

Wyoming, in its reply brief, again argues that the Compact is not a “depletion” Compact and Montana water users with pre-1950 water rights do not have the right to make a demand on post-1950 diversions or storage in Wyoming. *Id.* at 2. The basic dispute is over the timing of the water flows, and if Wyoming remains within its allocated percentage, it is not responsible to resolve Montana’s timing issues. *Id.* at 3. The Compact’s solution to Montana’s timing problem is to build reservoirs. *Id.* at 55. The Compact does not guarantee a specific quantity of water at the state line, but rather allowed the states to continue to regulate pre-1950 water uses. *Id.* at 16.

However, if Montana properly moves water from its post-1950 diversions to serve pre-1950 rights that are in need, the Compact automatically forces Wyoming to reduce its post-1950 diversions when necessary to keep Wyoming within its percentage limit. All flows in Wyoming that would cause Wyoming to exceed its share if diverted to post-1950 rights must be passed to Montana. *Id.* The only claim Montana can make under the Compact is a claim that Wyoming exceeded its allocated percentage. *Id.* Wyoming argues that pre-compact rights (pre-1950 rights) are not protected outside of intra-state water law under the Compact and that Section A “created no basis for interstate regulation of supply to satisfy those appropriative rights.” *Id.* at 10-11.

Finally, in discussing whether the Compact regulates groundwater pumping, Montana and the United States improperly rely on compacts from other states that are not similar to the Yellowstone River Compact. *Id.* at 3-4. The Compact’s language is clearly limited to surface waters. *Id.* at 24. The Compact is not designed to address groundwater in its allocation scheme, and any attempts to do so would cause calculation problems. *Id.* at 28. Montana has several other options to obtain redress for any alleged harm caused by groundwater pumping, such as asking Wyoming to negotiate an amendment to the Yellowstone River Compact, asking Wyoming to negotiate an additional compact or bringing an equitable apportionment case to apportion the groundwater. *Id.* at 29.

US SUPREME COURT DECISION & NEXT STEPS

As stated above, on October 20, 2008, the U.S. Supreme Court determined that the case should be transferred to a Special Master to take testimony, govern discovery and make findings of fact. The Special Master will likely follow the Federal Rules of Civil Procedure as a guide, and thus the case may follow the same progression as other civil cases brought in federal court. See Sup. Ct. R. 17.2. At this point, no scheduling order has been issued. However, what is clear for both states is that the process will be long and time-consuming as the parties seek to protect their positions and use of the water in the Yellowstone River.

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NRDA Ecocredits

Earlier Results

Liability Relief

Seattle Properties

CERCLA Background

NRDA Liability

CERCLA-NRDA RESTORATION

ECOCREDITS/LIABILITY COVERAGE FOR DUWAMISH RIVER SITES

by Scott Lockert, Vice President, Bluefield Holdings, Inc. (Seattle, WA)

Editor's Introduction: Cleanup and remediation of contaminated sites listed under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") is a notoriously slow process. Habitat restoration to address the natural resource damages identified under CERCLA is typically even slower. In Seattle, Washington, a process is underway to enable habitat restoration to begin much sooner while at the same time providing CERCLA liability relief.

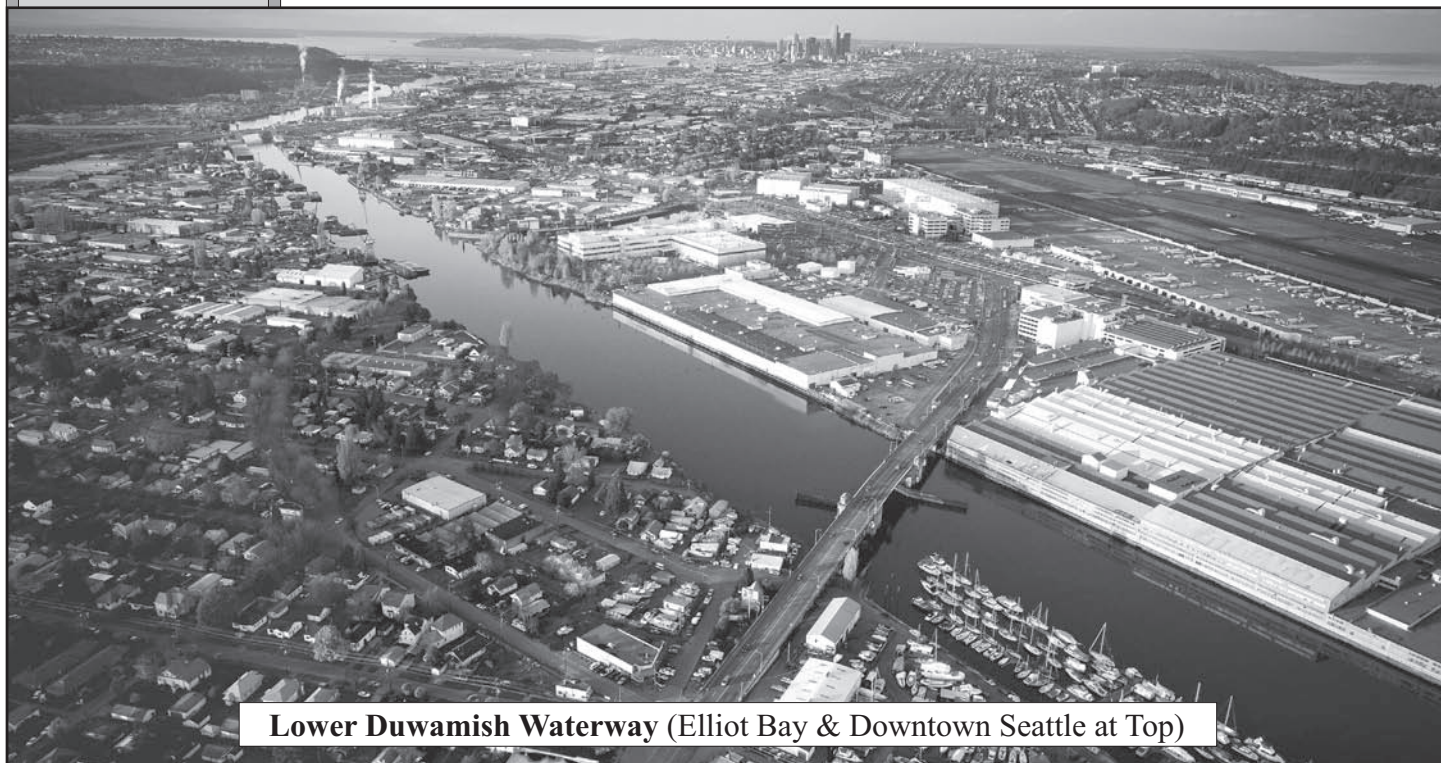
On June 30, 2008, the Seattle, Washington, City Council unanimously passed an ordinance authorizing a "Master Lease Agreement" with Bluefield Holdings, Incorporated, for the development and enhancement of habitat on selected City-owned properties along the Lower Duwamish River. These habitat restoration projects will result in the creation of "ecocredits" intended to be sold to a wide array of businesses who have been identified as having contributed to the devaluation of Lower Duwamish natural resources, thus settling these companies' outstanding liabilities.

Located just south of downtown Seattle, the Lower Duwamish Waterway Superfund site is a 5.5 mile portion of the Lower Duwamish River which flows into Elliott Bay. The waterway is flanked by industrial corridors and residential neighborhoods. Sediments (mud and sand on the river bottom) in and along the waterway contain a wide range of contaminants from years of industrial activity and from stormwater. The US Environmental Protection Agency (EPA) added the waterway to its list of Superfund cleanup sites in 2001. The contaminants in the waterway sediments include polychlorinated biphenyls (PCBs), polyaromatic hydrocarbons (PAHs), mercury and other metals, and phthalates. The Washington State Department of Ecology (Ecology) and EPA are working to clean up contaminated sediment and control sources of recontamination in the waterway.

Boat repair, marina operations, airplane parts manufacturing, metal fabrication, sewer overflows and more than 100 storm drains contributed to contamination of the Duwamish. However, it is far from being a dead river. More than 15,000 Chinook, chum, Coho, steelhead and other salmon migrate up the Duwamish to spawn in the river and at hatcheries every year.

As noted below, the Superfund process includes both a cleanup phase and a Natural Resource Damages Assessment (NRDA) which assesses the extent of resource injuries and restoration obligations. NRDA liability is generally settled by the creation of habitat within a Superfund site. On the Duwamish, there are City-owned properties, for example street right-of-ways, where habitat development can occur without interfering with the public purpose of the City holding. It is these properties that Bluefield Holdings is leasing and developing as habitat and thereby creating ecocredits.

The current financial crisis has US businesses scrambling to operate in an economy where very little is certain. Nowhere is this more evident than in the heavy bottom-line burdens placed on businesses from unsettled environmental liabilities.



Lower Duwamish Waterway (Elliot Bay & Downtown Seattle at Top)

Overview

NRDA
EcocreditsDual
PurposesCredits
Creation

CERCLA

Delays
TypicalPotential Habitat
on the
Duwamish
Waterway

Natural resource trading systems provide tremendous opportunities to settle liability early while clearly and substantially advancing ecosystem restoration. Cap-and-trade exchanges, wetland banks and mitigation banks are in place throughout the country.

In Seattle, Washington, a unique public-private partnership agreement is in place to help restore salmon habitat along the banks of the Duwamish River and, in the process, also meet the immediate liability settlement needs of CERCLA-identified responsible parties with outstanding natural resource damage liabilities.

The City of Seattle's Duwamish Habitat Restoration Program was launched in April 2008, under the leadership of Mayor Greg Nickels, to lease unused near-shore City properties to a third-party ecological habitat developer. The natural resource credits created from the developed habitat will be made available for purchase by responsible parties needing an alternative to costly litigation, self-construction of habitat or costly cash-outs to Natural Resource Trustees.

The program takes advantage of the best of public sector leadership for community involvement and the innovation of a private sector third-party for the benefit of business constituents. An overview of the City of Seattle program appears below.

Environmental Liability meets Financial Liability

Passed by Congress in 1980, CERCLA addresses both the cleanup of environmental contamination as well as the restoration of natural resources impacted by the contamination. The cleanup process is enforced and managed by EPA and the natural resources restoration process is enforced and managed by the public "trustees" of the resources — usually Tribal nations and federal fish and wildlife agencies. Habitat restoration under CERCLA's Natural Resource Damage Assessment (NRDA) provisions has generally been accomplished at a snail's pace.

Natural resource damages include injuries to land, fish, wildlife, biota, air, water, groundwater, drinking water and other such resources. Although CERCLA provisions addressed NRDA liability, the original Superfund (long since empty) was only available for site cleanup/remediation. Quantifying natural resource damages and completing restoration were not funded. The NRDA costs were documented and calculated as part of a second-tier response.

One major problem has always been the lag between the initial CERCLA response and NRDA. CERCLA site investigations were usually due to a specific spill incident or were precipitated by a pending property transfer. The NRDA portion operated on a different timeline, and with multiple stakeholders, typically delayed remediation efforts and liability settlement by five-to-ten years.

Meanwhile changes in financial accounting also evolved to challenge conventional thinking about environmental liability. In 2001, Financial Accounting Standards Board (FASB) Statement No. 143 stated: "An entity shall recognize the fair value of a liability for an asset retirement obligation in the period

in which it is incurred if a reasonable estimate of fair value can be made." The federal "Sarbanes-Oxley Act" (2002) and FASB's "Interpretation No. 47: Accounting for Conditional Asset Retirement Obligations" (2005) also contributed to the more robust disclosure of environmental liability. In simple terms, industry now needs to account for future cleanup costs associated with any known assets as an asset retirement obligation.

This convergence of FASB and NRDA might seem to create a nearly insurmountable problem due to the inability to fully account for future regulations that might affect site contamination — and this is exactly where and why alternative and non-adversarial approaches come in pretty handy.



NRDA Ecocredits

NRDA Process

Cooperative Opportunities

Compensatory Restoration

Potential Habitat on the Duwamish Waterway

Overcoming Inertia

GETTING TO REMEDIATION

The primary focus of CERCLA has always been on determining the damages, identifying an acceptable remediation plan, and establishing the dollar cost estimates. **Potentially responsible parties** (“PRPs” — i.e. those entities or individuals potentially responsible for paying cleanup costs) must be identified. Remediation would occur within CERCLA’s NRDA process as a second-tier response, even though the remediation planning and funding of the pre-NRDA phase frequently took 10-to-15 years.

Both CERCLA and the Oil Pollution Act (OPA) regulations provide rules that guide the NRDA process to the preassessment phase. Under CERCLA this includes: Preassessment (notification and detection, emergency restorations, data collection and preassessment screen); Assessment Plan; Notice of Intent; Injury Determination/Quantification; and a Determination Plan. Under OPA, the Preassessment process — including: determination of jurisdiction; determination to conduct restoration planning; data collection; and Notice of Intent — leads to Restoration Planning and then Restoration Implementation.

The specific NRDA process includes many additional steps and by definition must involve the natural resource Trustees and the PRPs. The dollar amount for damages, including restoration costs, is not presented until the end of the process. As noted, this process usually takes years. As a consequence, it is years before responsible parties can be free of their liability and years before actual habitat restoration can even begin. This is not a situation that benefits any party.

Fortunately, the objectives of NRDA lend themselves to a cooperative assessment model where the overall goal is not to have a punitive element but rather to “make the public whole” through restoration. NRDA includes both “primary” and “compensatory” restoration.

Primary restoration returns injured natural resources and services to baseline. Actions that are part of primary restoration include efforts to restore, replace, rehabilitate, or acquire the equivalent of injured natural resources or services.

Compensatory restoration addresses the interim losses from the date of the incident until natural resources are restored to baseline. Hence, compensatory restoration provides a compelling reason to move the process more quickly and thereby reduce the costs of services lost that continues to accrue during the interim period. The economics of NRDA include the costs of assessing the damages, the value of lost services, and determining the costs to restore the injured natural resources. In cases involving oil spills, the responsible party is offered a choice of implementing restoration themselves (with Trustee oversight) or simply paying the costs of restoration. This model is increasingly used for hazardous waste situations as well, once again illuminating the shift to restoration-based settlements.

Over the last 10 years, however, natural resource trustees (often led by the federal National Oceanic and Atmospheric Administration) have been working with other trustees and industry representatives to develop what is known as a Cooperative Assessment Program (CAP) in order to better integrate the overall interests of all parties affected by a site. The CAP process is helping to streamline coordination among potentially responsible parties and response agencies through: increased data sharing; a mutual framework for planning and decision-making; increased public input; and combined funding. The result is a quicker

route to an overall solution and one that benefits the habitat, the Trustees, the responsible parties and their insurers, and the public. With the increasing success of CAP has come the ability to be more proactive about potential asset liability through the concept of resource banking.

Natural Resource Banking

NRDA resource or restoration banking allows economic liability to be minimized and resource expectation to be maximized by placing greater emphasis on the ecological value of restoration rather than a cash-damages recovery. Restoration banking creates a winning situation for many parties. For the Trustees, restoration banking reduces the dollars that would otherwise be spent on litigation, it builds consensus and thereby



NRDA Ecocredits

Restoration Banking

"DSAYs"

breaks the bottleneck. Of greatest benefit for the Trustees, the habitat is restored more quickly and with greater likelihood of increasing the positive ecological impacts by increasing the restoration area beyond just the original contaminated area. The process offers benefits to industry by quantifying the liability and making it finite, which is also helpful to shareholders and insurers. Not only is restoration banking usually the most economic solution, it is usually the fastest. It can work well for both those sites with just one responsible party and more complex sites with many responsible parties.

The currency for NRDA credits are Discounted Service Acre-Years (DSAYs). DSAYs are determined from a Habitat Equivalency Analysis (HEA), which measures the loss of the resource and the required actions to regain that resource. DSAYs become the equivalent of a credit and have a specific value based on the total amount of funds required to restore the resource.

The benefits for attorneys are that liability issues can be settled more quickly, in turn benefiting the client. By working with clients to resolve liability issues quickly and offset future liability, assets remain available that would otherwise not be available. The client is able to manage the project directly with contractors and, in many cases, derive good public relations through the positive impact on the community from restoration projects.

As is true in any complex negotiation, resource banking is not without the potential for problems. For example, it is possible that the economics will not be feasible for the site if there is not sufficient ecological impact potential for credits. Also, changes in circumstances (including leadership or the habitat) could cause costs to escalate or render a restoration plan infeasible.

The Duwamish Habitat Restoration Program

The Lower Duwamish River in south Seattle has seen more than a century of industrial development. As a Superfund site, the Lower Duwamish is the subject of both an extensive cleanup overseen by EPA and a natural resource restoration program under the leadership of natural resource trustees. The trustees for the Duwamish are the National Oceanic and Atmospheric Administration, US Fish and Wildlife Service, Washington State's Department of Ecology and Department of Fish and Wildlife, the Suquamish Tribe of Indians and the Muckleshoot Tribe of Indians.

While Tribal governments still maintain active fisheries in the lower Duwamish, the amount of functional habitat for salmon and other species of fish and wildlife has substantially diminished over time. Some small habitat restoration projects have been developed but they are not enough to compensate for the injury to natural resources arising from contaminated sediments.

In advance of the listing of the site as a part of the Superfund program, the City of Seattle settled its NRDA liability with natural resource trustees in 1991. Rather than step back from the future settlement process, the City has taken bold steps to use its property to help create habitat that might also help others along the river settle their liability. It is with this vision for helping advance restoration while preserving the working waterfront that the City has created a public-private partnership with Bluefield Holdings, Inc. to create ecosystem credit-worthy habitat that benefits the environment and other responsible parties seeking resolution of their NRDA liability.

Bluefield Holdings, Inc. (Bluefield) uses market-driven innovation to develop ecological and cultural resource assets to help both business and environment. Bluefield restores, revalues and replenishes resources and offers financial products that help its customers retire environmental liabilities.

The City owns property along the Duwamish operated by Seattle City Light and the City Departments of Parks and Recreation and Transportation. Many of these parcels consist of uplands that could be revegetated and intertidal areas that could be reshaped for increased habitat value.

Through a lease/ordinance proposed by Mayor Greg Nickels and unanimously approved by the Seattle City Council, Bluefield will lease City properties and — after a process of investigation, confirmation and scoping — regrade slopes, restore mudflat and marsh habitat, and replant uplands to provide new habitat for migrating salmon.

With agreement on the value of the habitat, the natural resource trustees will allow Bluefield to sell the environmental credits generated from the City parcels to other property owners and businesses who need to settle their own liability.

For the City of Seattle, this proposal could provide millions of dollars of shoreline improvement at no cost to the taxpayers. Indeed, the City will receive a lease payment for its now-unused property. Bluefield also intends to create a community-based trust fund to pay for the long-term maintenance of the habitat. The news of the public-private partnership garnered enthusiastic responses:

"We want to get moving on restoring the Duwamish. By taking a collaborative approach, we can help salmon and shorebirds now instead of waiting years. The Duwamish River deserves our best creativity and energy." Mayor Greg Nickels

Trustees

City Properties

Lease Agreement

City Benefits

NRDA Ecocredits

Preliminary Designs

Ongoing Obligations

New Paradigm

Scott Lockert, Vice-President of Northwest Operations at Bluefield Holdings, Inc., directs project strategy to generate and market eco-credits for Bluefield Holdings' Northwest projects. He focuses on ecological financing, forecasting Natural Resource Damages liability nationally and tracking ecocredit banking trends.

"The partnership with Bluefield is a creative approach that could restore our river sooner rather than later. We support this assessment and hope it yields results that will benefit all parties."

BJ Cummings, Duwamish River Cleanup Coalition

"We hope to work with you on the outreach to businesses, property owners and others along the river who can benefit from opportunities to settle potential natural resource liability and/or benefit from market-rate sale or lease of properties they would normally not have an opportunity to develop."

Kevin Burrell, Environmental Coalition of South Seattle

Since the initial announcement, Bluefield has moved forward with preliminary designs and other due diligence work on eight City properties. Trustees have been enthusiastic about the program and are working with the City to ensure the projects carry the highest NRD value possible. In addition to the City of Seattle project, Bluefield is working with other property owners and local governments on real property leases or contracts for the right to enter, construct and maintain natural resource habitat projects.

Strategies for the Future

Environmental liability for US businesses won't be bailed out like the home mortgage crisis. As businesses sort through the immediate crisis of credit availability, settling environmental liability may be temporarily sidestepped. However, the rules of environmental law are not likely to change and the continued pressure from unsettled liability will continue to hurt future business growth and do little to help cleanup or restore the environment.

One of the major differences between the current financial hurricane blowing across America and those of the past is the emergence of the new "green economy" — which shifts the paradigm of the old investigation-cleanup-litigation-restoration model to ones that demand solutions that move at the speed of business and forge public-private partnerships between responsible parties and regulators.

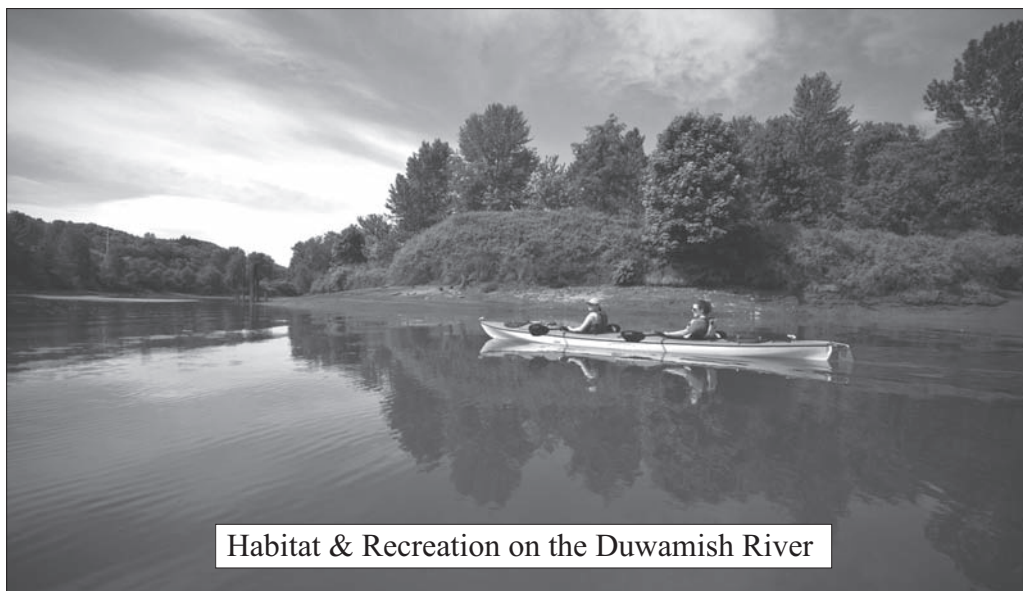
Every CERCLA responsible party continues to undergo strategic environmental planning. However, with the overwhelming uncertainty of the current financial crisis with as yet un-tallied losses, the conversation is much more strained. What are the options? What can we do now as opposed to later? What is the quickest way to settle and move forward?

Property owners are also at a loss to know how to keep their businesses open and yet allow environmental habitat adjacent to their operations. In the past, options for property owners to realize value from their under-utilized property were limited, unless they took it upon themselves to get into the habitat development business. Can we co-exist with habitat? Will it curtail operation or impede growth?

However, it should be reassuring that there is now a new option for settlement that takes a lot of the guess work out of liability. The new "green economy" may prove to be the best option yet for innovation, progress and true environmental restoration.

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Habitat & Recreation on the Duwamish River

Water Rights Auction

Pricing Issues

Groundwater Rights

Factual Information

SELLING WATER RIGHTS BY LIVE AUCTION

SOLVING THE PRICING DILEMMA

by Paul Thomas, Northwest Auctions (Seattle, WA)

Introduction

As is demonstrated almost daily by Christie's and Sotheby's, a live public auction is an extremely effective way to obtain true market value for an asset, particularly one which is hard to value and/or in high demand. Water rights are just such an asset and this article will explore the concept of selling water rights by auction. An upcoming water rights auction in Washington State will be examined to provide a specific and detailed example of the water rights auction process. As an illustration that auctions can be extremely successful, this article will also summarize a water rights auction in Prescott Valley, Arizona that generated \$67 million of revenue for the city.

The Pricing Dilemma

For a seller of water rights, perhaps the most challenging element of the sale process is establishing the offering price. A number of unique factors make pricing especially difficult.

PRICING DIFFICULTIES INCLUDE:

- Water rights are a non-uniform asset that are infrequently traded
- Price information for other recent sales (if any exists) can be difficult or impossible to find
- Buyers with very different needs are willing to pay very different prices

The value of water rights is governed by priority date *and* quantity *and* location. Therefore, even though other recent water rights sales might seem comparable on the surface, they may in fact have little in common with a seller's water rights.

Some sellers hire consultants to attempt to estimate a reasonable asking price based on whatever market data they can find, while other sellers simply guess at a price. Either way, the risks are the same — sell for too little and leave money on the table or endure a long sales cycle with repeated price reductions and greatly diminished interest from potential buyers.

There is an effective solution to this dilemma. A carefully designed, extensively marketed, and professionally managed auction will overcome the difficulties inherent in pre-sale pricing and will establish and obtain the true market value per acre-foot for a particular water right. After the price per acre-foot has been established at auction, the conventional water rights transfer process is used to determine the number of transferable acre-feet (as approved by the appropriate state agency) and thus the total sale price.

The Auction Process

To illustrate the auction process, the following is a detailed examination of an upcoming water rights auction.

A water rights holder near Seattle wants to sell five water rights certificates that represent several hundred acre-feet of groundwater. Prior to contacting Northwest Auctions, the seller had priced his rights based upon his own impressions of their value and attempted to sell them "By Owner" through word-of-mouth advertising. Unfortunately, the results were dismal. The few potential buyers he located and contacted expressed very widely ranging opinions of the value of the rights (650% difference between the lowest and highest estimates) and six months of effort did not yield a single offer.

The seller came to Northwest Auctions with a clear directive: establish and obtain true market value for his water rights by conducting a live auction. In response, we developed and are implementing an auction plan with four distinct stages:

- (1) Preparation
- (2) Marketing
- (3) Auction Day
- (4) Post-Auction

Stage I: Preparation

Obviously, for an auction to be successful bidders must know exactly what they are bidding on. The auction company's job during the preparation stage is to gather as much factual information as possible and make that information available to prospective bidders well in advance of auction day.

THE MATERIALS THAT WILL BE POSTED ON OUR WEBSITE INCLUDE (BUT ARE NOT LIMITED TO):

- Copies of the water right certificates
- Description of historical use with particular emphasis on the past five years [Editor's Note: Five years of nonuse may result in statutory forfeiture in Washington; see chapter 90.14 RCM]
- Electrical and flow meter records

Water Rights Auction

Terms & Conditions

- Irrigation equipment inventory
- Aerial photos
- Crop seed records and crop sale records
- Affidavits of use from the seller and neighboring property owners
- Comprehensive review of the validity of the rights by a respected local water rights attorney (a water rights consultant's review would be equally useful)
- Title Insurance policy to guarantee ownership (of any land involved)
- Other documentation of continuous beneficial use
- Hydrogeologist's preliminary estimate of the "downstream" area where the rights could be used

The Purchase and Sale Agreement and all related sale documents will also be provided so each prospective bidder can review the terms and conditions of the auction with their legal advisor(s). These documents discuss such transaction details as owner financing terms, down payment requirements, responsibilities for transaction costs such as any additional studies that may be required by the Washington Department of Ecology (Ecology), the "outs" for both buyer and seller, the required time line for submission of the transfer application and the steps which the seller will take to protect the rights from relinquishment due to nonuse during the transfer process.

Due Diligence

The goals of providing such extensive due diligence materials are two-fold: to demonstrate that the history of use of the water rights is legitimate and to help potential bidders assess the fit between their individual needs and the rights being sold. No attempt is made to estimate the dollar value of the rights — valuation will occur on auction day.

Stage II: Marketing

Once the due diligence materials have been posted on our web site, Northwest Auctions will conduct an eight-week intensive marketing campaign with the goal of attracting as many qualified bidders as possible. The marketing message is simple and cost-effective: announce the auction and direct potential bidders to our web site for information.

Marketing

COMPONENTS OF THE MARKETING CAMPAIGN INCLUDE:

- Direct mail
- Print advertisements
- Extensive online and email promotion
- Direct contact with a wide variety of potential bidders across a range of market segments including: cities; counties; state agencies; water districts; commercial and residential developers; individual and corporate water investors; Tribes; conservation groups; agricultural and industrial users; water rights consultants; and attorneys.

Reserve Price

Stage III: Auction Day

Prospective bidders will gather at a local conference facility or they may bid by phone. Generally, one establishes an unpublished reserve price for an auction such as this. The reserve price is the standard seller's "safety net" which is used in each auction to safeguard the seller in the highly unlikely event that only one bidder attends the auction. We won't go forward with an auction unless we're very comfortable that the seller's reserve price is both realistic and attainable. Obviously, there is absolutely nothing gained by conducting an auction that does not result in a sale. In the upcoming auction that is being used as an example, a reserve price has been set but we don't anticipate any problem whatsoever passing the reserve price on auction day.

"Bidder's Choice" Format

The auction will be conducted using the "Bidder's Choice" format whereby the first round of bidding will yield a winning price per acre-foot and then the winning bidder can choose which certificate(s) he or she wishes to purchase at that price. If the bidder does not commit to all of the available certificates, subsequent rounds will be conducted in the same way until all of the certificates have been sold.

Using this manner of auction, the marketplace will establish exactly what these particular rights are worth. The pricing dilemma is completely avoided and the seller is assured of receiving true market value.

Stage IV: Post Auction

Transfer Application

Each winning bidder is required to submit an Application for Transfer to the Washington State Department of Ecology (Ecology) within a prescribed time frame. The prescribed time frame is set forth in the Auction Terms and Conditions and the Purchase Agreement. This ninety-day period is designed to allow the winning bidder(s) to gather any additional information they may need for their application, and to assure the seller that an application will be submitted without undue delays.

From that point onward, the process is exactly the same as that of a private sale and the buyer must wait for a decision from Ecology as to the amount of the transferable quantity (volume in acre-feet). The auction company's role will be to monitor the application and to provide any additional information that may be needed by the buyer.

Water Rights Auction

Volume Determination

At the conclusion of the application process, Ecology will determine how many acre-feet in each certificate are transferable to the winning bidder. The total purchase price for each certificate can then be calculated and the transfer process finalized. Thus, the total purchase price is the winning bid price per acre-foot times the amount of acre-feet approved by Ecology in the transfer process.

Proceeding in this manner — with the actual volume of water (acre-feet) to be transferred determined by Ecology's transfer approval decision — eliminates any issues between the seller and buyer as to how much of the water right is legally valid and can eventually be used. If one simply "purchased" a water right without going through the transfer process before the sale was finalized, the buyer would run the risk that the "paper" right would be reduced or found totally invalid by Ecology during the transfer process.

Editor's Note: All transfers or changes of water rights must be submitted to Ecology for approval in Washington state. A similar process to transfer water rights is necessary in all the western states. Ecology's determination of the amount of acre-feet that may be legally transferred is based on the water right's validity, including the amount of water that has actually been put to beneficial use historically. Ecology will examine the certificate of water right to be sure it is valid and that the amount of water proposed for transfer was properly granted (as shown in the water right certificate). One must always remember that the existence of a "paper" right (i.e. the certificate) does not guarantee that the right actually exists or exists in the amount or location stated on the certificate document. Ecology's determination regarding a water right's validity will also include an examination of the "historical use" of the water right to insure that all or part of the right has not been "relinquished" or forfeited due to nonuse of the water right. Thus, during the transfer process one question that arises is — has the water been put to beneficial use with no breaks of five or more years? If not, it is subject to "relinquishment" (RCW 90.14.130). As noted on Ecology's website, "If you have concerns about the validity or scope of the right, consider consulting an attorney or professional in the field."

Sewage Effluent

Available Credits

**\$24,000
per
Acre-Foot**

Paul Thomas is a principal with Northwest Auctions in Seattle. Northwest Auctions conducts live auctions of commercial and residential real estate and related assets such as water rights throughout Washington.

The \$67,000,000 Question

So far, this discussion has not answered a very important question: do water rights auctions actually work? The short answer is a resounding yes! A recent example illustrates that outstanding results can be achieved by selling water rights at auction.

In 2005, the City of Prescott Valley (City), Arizona faced a dilemma. Their sewage treatment facility was generating large quantities of effluent that consisted of highly treated waste water which, though treated, could not be used for human consumption. The City could, however, add the effluent to local rivers where it would gradually percolate into the groundwater, being naturally filtered and purified in the process. Simultaneously, the City could sell credits whereby the buyer of one credit was entitled to remove one acre-foot of consumable water per year from the groundwater anywhere in the city of Prescott Valley, for the next 100 years.

The demand for consumable water in the Prescott Valley area is increasing rapidly, so the next challenge facing the City was establishing a reasonable price for each credit. The City hired a consulting firm to price the credits based on a market analysis, but the effort was unsuccessful due to a dearth of sales with comparable characteristics.

Ultimately, the city decided to conduct an auction for a total of 2,724 acre-feet of annual effluent water. Of that total, 1,103 acre-feet of credits were immediately available, plus the option to purchase an additional 1,621 acre-feet of credits as they became available over time. The remaining 1,621 acre-feet of credits was expected to be available in the future as the governing authority deemed that additional released effluent has percolated from the streams (where it is released) toward, or into, the water table. Apparently, the goal is to avoid over-taxing the groundwater before it has been "recharged" sufficiently by the (naturally filtered and purified) effluent making its way into the groundwater.

A team effort by City staff, private attorneys and consultants drafted documentation to govern the complex transaction. A consulting firm was then charged with marketing the auction nationwide. In October 2006, an auction was conducted but was not successful because bidders balked at the strongly seller-oriented terms. Those terms required the buyer to pay for all 2,724 acre-feet of credits up-front. After this unexpected result, the City revised the terms of the auction, allowing staged payments for the 1,103 acre-feet of immediately available credits and providing the buyer an exclusive option to purchase part or all of the remaining 1,621 acre-feet of credits as they became available. The City then re-marketed the auction and conducted a second auction in October 2007.

This auction was extraordinarily successful, netting a winning bid of \$24,650 per acre-foot — twelve times the price paid at a private sale in Phoenix. The winning bidder was Water Property Investors LLC, a New York-based water resource investment firm. That firm can re-sell or use the water to meet state water supply requirements for new subdivision properties. If the winning bidder chooses to exercise their option to purchase all of the available credits, the City will earn just over \$67 million. See Water Briefs, TWR #32 and #46 for more details on the Arizona auction.

Clearly, live auctions of water rights can, and do, work.

FOR ADDITIONAL INFORMATION: PAUL THOMAS, 888/ 222-1882 or email: paul@NWAuctions.com

EPA/CWA

EPA CLEAN WATER ACT REGULATIONS

NINTH CIRCUIT AFFIRMS DISTRICT COURT MANDATE THAT EPA ISSUE
CONSTRUCTION INDUSTRY GUIDELINES & STANDARDS

by John Iani and Athena Kennedy, Van Ness Feldman (Seattle)

Overview

On September 18, the US Court of Appeals for the Ninth Circuit upheld a decision by the US District Court for the Central District of California requiring the US Environmental Protection Agency (EPA) to promulgate effluent limitations guidelines (ELGs) and new source performance standards (NSPSs) for pollution discharges caused by the construction and development industry. *Natural Resources Defense Counsel v. US Environmental Protection Agency (NRDC v. EPA)* (9th Cir. Sept. 18, 2008). The States of Connecticut and New York, along with the New York State Department of Environmental Conservation, intervened on behalf of the plaintiffs, Natural Resources Defense Counsel (NRDC) and Waterkeeper Alliance, while the National Association of Home Builders and Associated General Contractors of America intervened on behalf of EPA. The appellate court's ruling upholds the district court's permanent injunction, requiring that EPA promulgate the guidelines by December 1, 2009.

Background

ELGs, NSPSs & EPA'S DECISION NOT TO PROMULGATE STANDARDS

The federal Clean Water Act (CWA) was designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, the CWA prohibits the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." CWA § 301(a); § 502(12). Despite the general prohibition on the discharge of pollutants, the CWA also established a permitting system that authorizes the discharge of some pollutants, called the National Pollution Discharge Elimination System (NPDES). See CWA § 402. Under the NPDES, EPA and approved states may issue permits for the discharge of pollutants that meet the requirements outlined in CWA Section 402. Those permits use "effluent limitations" that restrict the type and quantity of pollutants that may be released.

The specific effluent limitations in an NPDES permit are determined according to general ELGs and NSPSs, separately promulgated by EPA. CWA § 304(b); § 306(b). Both ELGs and NSPSs involve technology-based restrictions on water pollution to reduce pollution based on current technological capabilities. ELGs apply to existing sources of pollution, while NSPSs apply to new sources of pollution. CWA § 304(b); CWA § 306(a)(2). Specifically, CWA Section 304(m) requires that every two years EPA publish a plan that identifies categories of sources of pollutants for which ELGs and NSPSs have not yet been published, and then promulgate effluent guidelines for those categories no more than three years after the publication of the plan.

In March of 1999, EPA announced that it was undertaking rulemaking to address pollution from stormwater discharge associated with construction activities. The proposed regulation would regulate stormwater runoff during all stages of construction and would affect home builders and developers of commercial and industrial land. In 2000, EPA published its final notice of an effluent guideline plan which listed construction activities as a point-source category requiring guidelines under CWA Section 304(m). Those guidelines would then eventually have been implemented in NPDES permits, replacing the interim limitations imposed by the various NPDES administrators using their best professional judgment. In 2002, EPA issued a proposed rule to address stormwater discharge from construction sites. However, in April 2004, EPA withdrew its proposal to promulgate ELGs, reasoning that existing standards were sufficient and that additional standards would be too costly. Subsequently, EPA removed the construction industry point-source category from its plans and claimed that it had mistakenly identified the category under in its 2002 plan.

District and Appellate Court Decisions

NRDC and the state intervenors challenged EPA's decision to withdraw issuing ELGs and NSPSs for the construction industry. EPA and the industry intervenors unsuccessfully attempted to have the suit dismissed on jurisdictional and standing grounds. The district court granted the plaintiffs' motion for partial summary judgment on the basis that EPA failed to comply with the CWA by not performing a non-discretionary duty to promulgate ELGs and NSPSs for the construction industry.

Ninth District
Decision"ELG"
&
"NSPS"Effluent
LimitationsTechnology
BasedConstruction
RunoffProposal
WithdrawnWithdrawal
Challenged

EPA/CWA**Congressional
Intent**

The Ninth Circuit affirmed. The court agreed that the district court had jurisdiction over the lawsuit, and that the plaintiffs and the state intervenors each had Article III standing. Next, the Ninth Circuit also affirmed the district court's granting of summary judgment in favor of the plaintiffs and upheld the permanent injunction. The court examined the language of the CWA and concluded that the language is clear: the EPA must promulgate ELGs and NSPSs for point-source categories it lists in any plan published under Section 304(m). The statute states plainly that EPA "shall establish a schedule" under which the ELGs and NSPSs are promulgated "no later than . . . 3 years after the publication of the plan." CWA 304(m)(1). The Ninth Circuit found this language "unequivocal" in articulating Congress' intent to require that EPA promulgate guidelines. *NRDC v. EPA* (9th Cir. Sept. 18, 2008).

**Delisting
Impermissible**

Furthermore, the Ninth Circuit concluded that EPA's nondiscretionary duty to promulgate the ELGs and NSPSs exists notwithstanding the EPA's subsequent unilateral decision to remove the construction point-source category from its plans. Unlike the Clean Air Act, which expressly grants EPA the authority to delist source categories, the CWA does not explicitly grant the EPA the authority to do so. Moreover, CWA Section 304(m) provides that EPA must provide for public review and comment on a plan prior to final publication. Thus, Congress determined that by the time a point-source category is published, the category has already been reviewed by EPA which has made the determination whether to list the category. Accordingly, the Ninth Circuit held that EPA's reading of the statute to allow for its unilateral delisting of a point source category previously listed to be an impermissible interpretation of the CWA.

**Fundamental
CWA Purposes****Implications**

The Ninth Circuit's decision indicates that the construction industry point-source should still be considered a listed category under the CWA. The district court emphasized that once limitations have been established by EPA, the state permit programs will apply them in NPDES permits to achieve the statutory goal of uniform effluent limitations. *NRDC v. EPA* (C.D. Cal. June 27, 2006). The district court also criticized the ongoing practice of issuing permits based on "best professional judgment" and noted that unpromulgated ELGs do not reduce pollution discharges, which is the fundamental purpose of the CWA. *Id.* Assuming EPA chooses not to pursue review of this decision, it will be required to publish ELGs and NSPSs for construction and development point sources, and those guidelines will be uniform in NPDES permits issued across the country.

Impacts

Once implemented, the increased permitting and regulation may increase construction costs at sites and projects that involve clearing, grading, excavating or stockpiling of fill material on one or more acres of land. However, states have already been issuing construction NPDES permits for some time containing standards based on the "best professional judgment" of the administrators. The industry intervenors voiced concerns in their reply brief to the Ninth Circuit that EPA-mandated ELGs will eliminate flexibility in the guidelines made necessary by precipitation-related discharges and soil types that vary widely across the country and for which no single technology can apply. However, it is possible that EPA's ELGs and NSPSs will be very similar to the guidelines already contained in the permits.

**EPA Duty
Mandatory**

Finally, this decision highlights the continued trend of courts in holding EPA accountable for performing non-discretionary duties. The court's recognition of EPA's mandatory duty to promulgate ELGs for every identified point-source category may have a cooling effect on its identification of point-source categories in future bi-annual plans, and may also prompt EPA to issue ELGs for other identified point-source categories for which it has not done so.

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Athena Kennedy is an associate at Van Ness Feldman. Her practice focuses on environmental issues, particularly those related to water regulation and regulation of hazardous substances. Ms. Kennedy also has experience with all stages of environmental litigation, including cases involving equitable indemnification, breach of contract, constitutional, and property issues. Prior to joining Van Ness Feldman, Ms. Kennedy served as a legal intern at the US Department of Justice's Environmental Enforcement Section and as a summer extern for the Honorable Judge Edward F. Shea, US District Court for the Eastern District of Washington.

ENDANGERED SPECIES ACT & TAKINGS

FIFTH AMENDMENT DECISION

by David Moon, Editor

ESA Takings

ESA Requirements

On September 25, a federal appeals court held that the United States physically appropriated water when it required an irrigation district to divert water for the protection of steelhead under the federal Endangered Species Act (ESA). The US Court of Appeals for the Federal Circuit (Court) overturned the federal district court's grant of partial summary judgment in favor of the government with respect to a taking under the Fifth Amendment and remanded the case back to the Court of Federal Claims for proceedings consistent with its opinion. *Casitas Municipal Water District v. United States* (Case No. 2007-5153). The case involves a claim by Casitas Municipal Water District (Casitas) that the US Bureau of Reclamation's (Reclamation's) requirement — that the district construct a fish ladder and divert water to it to protect steelhead — was a taking under the Fifth Amendment and therefore compensable. The federal government argued that “it did not seize, appropriate, divert, or impound any water, but merely required water to be left in the stream” so there was no physical taking. *Slip Op.* at 20.

Takings Clause

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. The Takings Clause “is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 315 (1987) (emphasis in the original).

Property Rights

One critical point the Court noted is that the federal government conceded that Casitas has a valid property right in the water at question (*Slip Op.* at 16). This fact is pivotal since other “takings” cases have been decided based on whether the water users owned “cognizable property interests for the purposes of the Takings Clause...” (see *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504, 531-535, 539-540 (2005); and Water Briefs, TWR #39).

Physical Taking Analysis

The Court's decision dealt with the differences between a “physical taking” and a “regulatory taking.” This distinction is also crucial in takings cases due to the different standard which applies in each case. When a “physical taking” is involved, “the size and scope of a physical invasion is immaterial to the analysis; even if the government appropriates only a tiny slice of a person's holdings, a taking has occurred and the owner must be provided just compensation. *Tahoe v. Sierra*, 535 U.S. 232.” Regulatory takings analysis “outside the context of a physical or *per se* taking is ‘more complex.’” *Id.* at 322 n.17. Courts “typically consider whether the restriction has risen to the level of a compensable taking under the multi-factor balancing test articulated in *Penn Central*, 438 U.S. at 124.” The Court goes on to discuss a “trilogy of Supreme Court cases involving water rights [that] provides guidance on the demarcation between regulatory and physical takings analysis with respect to these rights.” *Slip Op.* at 17.

Pertinent Facts

The federal government admitted that it required Casitas to build a fish ladder facility and also admitted that the fish ladder required water to be physically diverted away from Casitas' canal and into the fish ladder. “These admissions make clear that the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal — after the water had left the Ventura River and was in the Robles-Casitas Canal — and towards the fish ladder, thus reducing Casitas' water supply.” *Id.* at 22. The Court went on to state that even though “Casitas' right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient.” See *Tahoe-Sierra*, 535 U.S. at 322. The Court then concluded that “the government physically appropriated water that Casitas held a usufructuary right in.” *Slip Op.* at 22-23.

Forced Diversion

The Court found the government's argument that it did not appropriate the water for its own use or the use of a third party to be unpersuasive. “The government, by passing the ESA, has recognized the importance of protecting endangered species. In fact, the purpose of the ESA is express in the statute itself. 16 U.S.C. § 1531(a)-(c)...When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water. The fact that the government did not itself divert the water is of no import.” *Slip Op.* at 23-24.

Physical Possession

The government also argued that the installation and operation of the fish ladder was merely a use restriction on a natural resource, and therefore governed by the regulatory taking jurisprudence. Rejecting the position, the Court said that the “United States actively caused water to be physically diverted away from Casitas after the water had left the Ventura River and was in the Robles-Casitas Canal. Like *Pewee Coal* [*United States v. Pewee Coal Co.*, 341 U.S. 114, 115-16 (1951)], the government, in this case, took physical possession of the water.” *Id.* at 26. The Court left no doubt about its rationale, expanding on its

ESA Takings

Permanent
Taking

decision as follows: “In this case, in contrast, the water that is diverted away from the Robles-Diversion Canal is permanently gone. Casitas will never, at the end of any period of time, be able to get that water back. The character of the government action was a physical diversion for a public use — the protection of an endangered species. The government-caused diversion to the fish ladder has permanently taken that water away from Casitas. This is not temporary, and it does not leave the right in the same state it was before the government action. The water, and Casitas’ right to use that water, is forever gone.” *Id.* at 30.

Following remand, the Court of Federal Claims will “determine the ultimate question of whether a taking occurred in this case. If the court determines that a taking occurred, it will be necessary for it to determine the amount of damages to which Casitas is entitled.” *Id.* at 31 n.17.

FOR ADDITIONAL INFORMATION:

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CASE AVAILABLE AT:

http://216.109.139.51/Files/20109_CASITAS%20MUNICIPAL%20WATER%20DISTRICT.pdf

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Wetlands Fine

Deterrence

Permit
Required

WATER BRIEFS

WETLANDS VIOLATION ND

DREDGE & FILL

EPA has reached an agreement with David J. Paulson and the Northeast Ridge Development Company (Northeast Ridge) in which the company will pay a \$15,000 fine for unauthorized discharges of dredged and fill material to wetlands adjacent to Lake Elsie, near Hankinson, North Dakota. In addition to the fine, Northeast Ridge is responsible for all costs necessary to restore the impacted wetlands.

EPA issued a complaint to Northeast Ridge for discharges of dredged and fill material to Lake Elsie and its adjacent wetlands without a permit, a violation of the federal Clean Water Act. The unauthorized discharges occurred on a 17-acre property where the company intended to develop a marina and residential subdivision on Lake Elsie’s north shore, two miles southwest of Hankinson.

Northeast Ridge’s unauthorized activities impaired or destroyed approximately 1.5 acres of wetlands.

“EPA is taking this action to deter future violations of laws that protect North Dakota’s water resources,” Michael Gaydosch, EPA’s Assistant Regional Administrator in Denver. “In addition to providing habitat for birds and wildlife, Lake Elsie’s wetlands play important roles in maintaining water quality and providing for water storage and flood attenuation.”

In 2005, EPA filed an administrative compliance order which required Northeast Ridge to correct the environmental damage and restore impacted wetlands to pre-impact conditions. EPA approved Northeast Ridge’s Restoration and Mitigation Plan in 2007 and the company is currently implementing the plan.

A permit from the US Army Corps of Engineers is required before performing any work that results in discharges of dredged or fill material into waters of the US, which include rivers, lakes, streams, and certain wetlands. The negative impacts of these alleged violations could have been avoided if Northeast Ridge had followed proper permit application procedures and guidance from the Corps and the North Dakota Department of Health.

Lake Elsie and its adjacent wetlands are important as habitat for wildlife, water storage and retention, and flood control. Placing dredged or fill material in creeks, streams, rivers, or wetlands can have adverse impacts on fish and wildlife habitat, and can adversely impact the plants and insects they rely on as food sources. Damaging or destroying wetlands can lead to increased flooding and a decline of water quality and habitat.

Property owners, contractors, or developers planning to do work in surface waters and wetlands should contact the US Army Corps’ North Dakota Regulatory Office (1513 South 12th Street, Bismarck, N.D. 58504; telephone, 701-225-0015) before they begin work to determine if they need a permit.

For info: Diane Sipe, EPA, 303/ 312-6391; Richard Mylott, EPA, 303/ 312-6654

WATER BRIEFS

CAFO REQUIREMENTS

US

EPA RULE FINALIZED

On October 31, the US Environmental Protection Agency (EPA) finalized a rule helping to protect the nation's water quality by requiring concentrated animal feeding operations (CAFOs) to safely manage manure. EPA estimates CAFO regulations will prevent 56 million pounds of phosphorus, 110 million pounds of nitrogen, and 2 billion pounds of sediment from entering streams, lakes, and other waters annually. "This clean water rule strengthens environmental safeguards by embracing a zero discharge standard and requiring site-specific management plans to prevent runoff of excess nutrients into our nation's waters," said Assistant Administrator for Water Benjamin Grumbles.

This is the first time EPA has required a nutrient management plan (NMP) for manure to be submitted as part of a CAFO Clean Water Act permit application. Manure contains the nutrients nitrogen and phosphorus, which, when not managed properly on agricultural land, can pollute nearby streams, lakes, and other waters. Previous rules required a CAFO operator to use an NMP for controlling manure, but the regulation builds on that by requiring the NMP to be submitted with the permit application. The plan will be reviewed by the permitting authority and conditions based on it will be incorporated as enforceable terms of the permit. The proposed NMP and permit will be available for public review and comment before going final.

The regulation also requires that an owner or operator of a CAFO that actually discharges to streams, lakes, and other waters must apply for a permit under the Clean Water Act. If a farmer designs, constructs, operates and maintains their facility such that a discharge will occur, a permit is needed. EPA is also providing an opportunity for CAFO operators who do not discharge or propose to discharge to show their commitment to pollution prevention by obtaining certification as zero dischargers. In addition, the final rule includes technical clarifications

regarding water quality-based effluent limitations and use of best management practices to meet zero discharge requirements, as well as affirming the 2003 rule requirement for reducing fecal coliform through the use of best conventional technology.

The rule deadline for newly defined facilities to apply for permits is February 27, 2009. EPA has been regulating CAFOs for more than 30 years. The final rule responds to a February 2005 federal court decision that upheld most of the agency's 2003 rule, but directed further action or clarification on some portions.

For info: Dave Ryan, EPA, 202/ 564-4355, email: ryan.dave@epa.gov or website: www.epa.gov/npdes/caforule

ENVIRO ENFORCEMENT

CA

NRDC REPORT ON OVERSIGHT

The Natural Resources Defense Council (NRDC) released a new report on October 7 entitled "*An Uneven Shield: The Record of Enforcement and Violations Under California's Environmental, Health, and Workplace Safety Laws*." The report assessed multi-year data on known violations and law enforcement responses within six California regulatory areas: water pollution, hazardous waste management, drinking water, air pollution, agricultural pesticide use, and workplace safety and health. The report found that decentralized authority, apparent violation "hotspots," major data gaps, and poor recordkeeping by some enforcement authorities made it difficult for either policymakers or the public to determine the rate at which violations were occurring or the extent of enforcement responses. During the period analyzed, reported violation rates and enforcement activity varied dramatically by program, region, and enforcement authority.

According to NRDC, under some programs known violators frequently got off without a penalty. In 2004, for example, there were 3,799 cases of facilities violating the state's water pollution laws, yet there was no enforcement reported for nearly a quarter of these facilities. In the same year, 2,165 inspections identified

violations of agricultural pesticide use laws, yet more than half of these violations were not penalized or subject to other formal enforcement action. The report also found enforcement to vary widely between geographic regions: in 2005, enforcement action was taken against nearly all wastewater violations in the Colorado River Basin Region, while only about 30 percent of wastewater violations in the Los Angeles Region were enforced.

NRDC concluded that broad reforms will be required to ensure the promise of our environmental, health and safety laws. Cal/EPA has already launched an enforcement reform effort, but the report noted that Cal/EPA's jurisdiction is limited and its power constrained by existing laws and resources. Among the recommendations are state citizen suit authority, higher penalty caps, delegation of enforcement authority to staff, and adequate funding of enforcement. NRDC also recommended that: enforcement authorities should be required to report complete, accurate and timely data on violations so that hotspots can be identified and corrected; penalty assessments should be increased to deter illegal conduct; and clear enforcement standards should be set and all enforcement authorities' results should be measured.

For info: Craig Noble, NRDC, 415/ 875-6100 or email: nrdinfo@nrdc.org; Full report available on NRDC's website: www.nrdc.org/legislation/shield/contents.asp

CWA ENFORCEMENT

MN

CRIMINAL SENTENCING

The Chief Executive Officer and President of Eco Finishing Co. of Fridley, Minnesota, Keith Rosenblum, was sentenced to 15 months in prison and two years supervised release on one count of felony conspiracy to defraud the US; two counts of felony violations of the Clean Water Act (CWA); and 10 counts of negligent violations of the Act. Rosenblum will also pay a \$250,000 fine and serve 200 hours of community service. Rosenblum was convicted by a federal jury in March. "This sentence should put companies,

WATER BRIEFS

their executives and managers on notice that environmental compliance is important,” said Randall Ashe, Acting Special Agent in Charge of the Environmental Protection Agency’s Criminal Investigative Division in Chicago. “Violators will be aggressively pursued.”

Eco Finishing is a metal finishing business that coats metal products. It was fined \$225,000 in February 2007 for violating the CWA by discharging untreated or inadequately treated hazardous wastewater. According to court documents, the company discharges industrial wastewater that enters the sewer system operated and overseen by Metropolitan Council Environmental Services (MCES). Prior to discharge, the company is to treat the wastewater to meet metal and cyanide discharge parameters set forth in the National Pollutant Discharge Elimination System permit issued to the company by MCES.

According to an Environmental Protection Agency (EPA) affidavit, MCES and EPA began investigating the company in January 2005. MCES was contacted by an environmental manager at Eco Finishing about concerns he had with the company’s wastewater treatment practices. The manager reported that CWA violations documented during internal wastewater monitoring were not reported to MCES and that the facility’s cyanide destruction system was not properly working. According to internal summaries, the company was discharging levels of metals and cyanide that were well above the permitted limits. The investigation also revealed that the company on several occasions altered its production and wastewater treatment practices when regulators were conducting on-site compliance testing. The alterations were designed to deceive the government by limiting the company’s discharge of pollutants when the company was being monitored.

Another defendant, Martin Meister, 39, of Brooklyn Park, was also convicted. Meister, the company’s plant manager, was convicted of eight counts of negligent violations of the

Clean Water Act. According to David Anderson of the US Department of Justice, informed TWR that Mr. Meister was sentenced on October 22 to two years probation and was required to pay restitution of \$2,501. The convictions of Rosenblum and Meister followed the successful prosecution of the company’s former lab chemist, Ted Gibbons, of White Bear Lake. In May 2006, Gibbons was sentenced to 18 months in prison for violating the Act, including tampering with MCES’ environmental testing equipment. Gibbons testified about company practices during the trial of Rosenblum and Meister.

For info: David Anderson, US DOJ, 612/ 664-5684

GW/SURFACE WATER NE DNR AUTHORITY UPHELD

The Nebraska Supreme Court upheld a district court determination that the Nebraska Ground Water Management and Protection Act (Act) provides the Nebraska Department of Natural Resources (NDNR) with the authority to consider a geographic area located in one river basin but hydrologically connected to a second basin, when determining that the second basin is fully appropriated. *Upper Big Blue NRD v. State*, 276 Neb. 612 (Sept. 26, 2008).

In December 2005, the NDNR had made a preliminary finding that the Upper Platte River Basin was fully appropriated. As part of that determination, NDNR included a small geographic area located in the Big Blue River Basin. In its Order of Final Determination, issued April 21, 2006, NDNR again made the same finding. The inclusion of the small area in Big Blue River Basin was based on an NDNR determination that the surface water from the Upper Platte River Basin was hydrologically connected to ground water located in the Big Blue River Basin.

The NDNR’s actions prompted the Upper Big Blue Natural Resources District to file a lawsuit against NDNR, arguing that the state did not have authority to include the area in the

Big Blue River Basin while making a “fully appropriated” determination for the Upper Platte River Basin and that the NDNR exceeded its authority in enacting rules related to the governing legislation. The effect of such a determination is that it imposes certain restrictions with respect to the use of surface water and ground water in the affected geographic area.

The Nebraska Supreme Court (Court) examined the relevant statutory provisions as well as the Legislative findings that had been codified to explain its intent (see Neb. Rev. Stat. §§ 46-701 and 46-754). “An examination of the findings of the Legislature with respect to the passage of the Act demonstrates that the Legislature was fully aware of the hydrological connection often existing between surface water and ground water and was interested in protecting those resources. The findings also indicate that the Legislature recognized these hydrological connections sometimes affect more than one natural resources district and that it was the expectation of the Legislature that all interested parties would cooperate in the management of the State’s hydrologically connected water resources.” *Slip Op.* at 619.

Addressing the fact that the Act did not contain any limitations on the NDNR’s ability to define hydrological connections between groundwater and surface water, the Court said that this “omission” was telling. The Court then stated that they agree with the NDNR that the District’s interpretation would “require the Department to completely ignore the realworld hydrologic interconnections between surface water and ground water, and said connections’ effect on a ‘basin.’ In addition, such a requirement would set an arbitrary standard for managing the State’s interconnected water resources, which simply goes against the intent of the Act...[T]he intent of the Act is... to integrate the management of surface water and ground water...” (Court quoting from Brief for Appellees). *Id.* at 620.

For info: Case available at: www.supremecourt.ne.gov/opinions/2008/september/sept26/s07-905.pdf

WATER BRIEFS

NPDES PERMITS

AK

EPA APPROVES AK PROGRAM

The US Environmental Protection Agency (EPA) approved the State of Alaska Department of Environmental Conservation's (ADEC) application to run the National Pollutant Discharge Elimination System (NPDES) permitting program in the state on October 31. The NPDES permit program, a key part of the federal Clean Water Act, controls water pollution by regulating sources that discharge pollutants to waters in the US. Alaska's environmental regulators join 45 other states by gaining the authority to both write wastewater discharge permits for local businesses and industry, and enforce those permits to insure compliance with permit conditions. EPA officials noted that while the official approval gives Alaska responsibility for water quality permitting, EPA will continue its government-to-government relationship with Tribes as it oversees the state's permitting program.

Alaska's authority to write permits will be phased-in over three years, while EPA will continue to write permits for those facilities that Alaska has yet to assume. Permits previously issued by EPA will remain in effect and become State APDES permits, administered and enforced by the ADEC. Alaska plans to phase-in the permit program as follows: Phase I (Upon delegation): Domestic Wastewater, Timber Harvesting, Seafood Processing; Phase II (One year after delegation): Federal Facilities, Stormwater, Pre-Treatment; Phase III (Two years after delegation): Mining; Phase IV (Three years after delegation): Oil and Gas, cooling water, all remaining facilities.

EPA plans to issue a notice in the Federal Register on or around November 10, 2008, informing the public that Alaska's application for authorization to run the program has been approved.

For info: Christine Psyk, EPA, 206/553-1906 or email: psyk.christine@epa.gov; Lynn Tomich Kent, ADEC, 907/269-6281 or email: lynn.kent@alaska.gov

RECLAMATION GRANTS WEST
WATER FOR AMERICA CHALLENGE

The US Bureau of Reclamation (Reclamation) is seeking proposals for cooperative projects that create water banks and markets or improve the water delivery efficiency of a system through conservation or operational improvements. Entities that may submit proposals are irrigation and/or water districts, water authorities of federally recognized Tribes, and other entities created under State or Territory law with water management authority. Applicants must also be located in the Western United States or United States Territories. Proposals must be submitted as indicated on www.grants.gov by January 14, 2009, at 4:00 p.m. MST. It is anticipated the awards will be made during the summer of 2009.

The Water for America initiative was developed under Secretary of the Interior Dirk Kempthorne to help state, tribal, and local governments better conserve, manage and develop their vital water resources to meet future challenges and demands. Projects will be selected for funding through a competitive process and should meet the goals of the initiative. Water Marketing and Efficiency grants were previously known as Challenge Grants under the Water 2025 Initiative. In previous years, this program funded 137 projects which represented a combined investment of more than \$127 million in water improvements, including a non-federal cost share of \$97.7 million.

For info: Water for America website: www.usbr.gov/wfa/

MUNI & INSTREAM RIGHT WA
WITHDRAWAL EXCHANGE

The Washington Department of Ecology (Ecology) issued four new water rights for the city of Camas (Camas) on October 29th that will spur economic growth for the southwest Washington community and help protect salmon runs and critical fish habitat. Camas currently draws its municipal water supply from two surface water diversions on Jones and Boulder Creeks, high in the watershed, and from nine groundwater wells along the Washougal River. The Jones and Boulder Creek

water diversions during summer months take water away during a critical time for fish. As a result of the new water rights, the Camas will eliminate its withdrawal from the headwaters of the two creeks during low-flow times and in exchange, draw groundwater from three new wells in a productive aquifer in the lower Washougal/Columbia River floodplain. Leaving more water to flow through Jones and Boulder Creeks into the Washougal River will enhance 18 miles of critical habitat for threatened steelhead, Chinook and chum runs and at-risk Coho salmon.

A broad coalition of representatives from local and state agencies, tribes, business interests, environmental groups and private citizens developed a watershed plan, which was adopted by Clark, Skamania and Cowlitz counties in 2006. This plan helped Camas and Ecology agree on a strategy to approve the new water rights. The watershed plan recommended shifting Camas' water supplies away from the Jones and Boulder Creeks to another source with less impact on fish and habitat. As a result of Ecology's decision, Camas has rights to receive 4.3 million gallons per day of new water to add to its current authorization of 5.6 million gallons per day. That combined total will meet the city's 2020 demand projection.

For info: Eric Levison, Ecology, 360/817-1563 x4251; Lewis, Salmon-Washougal watershed planning:: www.ecy.wa.gov/apps/watersheds/planning/27-28.html

CWA VIOLATIONS

AZ

SANTA CRUZ RIVER FILL

An Arizona land developer and a contractor have agreed to settle alleged violations of the Clean Water Act for bulldozing, filling, and diverting approximately five miles of the Santa Cruz River, a major waterway in Arizona, the US Justice Department and Environmental Protection Agency (EPA) announced on October 7. According to the settlement, Scottsdale-based developer George H. Johnson, his companies Johnson International, Inc. and General Hunt Properties, Inc., and land-clearing contractor, 3-F Contracting, Inc. will pay a combined

WATER BRIEFS

\$1.25 million civil penalty. The penalty is the largest obtained in the history of EPA's Pacific Southwest Region, and one of the largest in EPA's history under Section 404 of the Clean Water Act (CWA), which protects against the unauthorized filling of federally protected waterways through a permit program administered jointly by EPA and the U.S. Army Corps of Engineers.

The settlement resolves a CWA complaint filed in 2005 by the Justice Department and EPA against Johnson and his companies for clearing and filling an extensive stretch of the lower Santa Cruz River and a major tributary, the Los Robles Wash, without a permit from the Corps of Engineers. The alleged violations occurred in 2003 and early 2004, when defendants bulldozed 2000 acres of the historic King Ranch and La Osa Ranch in Pinal County. The bulldozed areas lie within the largest active floodplain of the lower Santa Cruz River, which meanders through the two ranches in natural braids, a rarity for this heavily channelized waterway.

Prior to defendants' land-clearing activities, this stretch of the Santa Cruz River supported a rich variety of vegetation, including one of the few extensive mesquite forests remaining in Arizona's Sonoran Desert region. These areas form a critical corridor for wildlife to move along the Santa Cruz River and from Picacho Peak State Park to the Ironwood Forest National Monument. The case was referred to EPA by the Corps of Engineers after concerned citizens, tribes, and local, state and federal agencies complained about the serious flooding dangers and ecological impacts in connection with defendants' land-clearing activities.

"The Santa Cruz River is a gem in Arizona's crown, as it flows from Arizona to Mexico [and] back into Arizona, sustaining life, habitat for animals and plants, and providing so many benefits for residents of southern Arizona," said Alexis Strauss, director of EPA's Water Division for the Pacific Southwest Region. "This settlement reflects both the strong emphasis EPA places on protecting this important watershed and the seriousness of the alleged violations."

The proposed consent decree, lodged in the US District Court in Phoenix, is subject to a 30-day comment period and final court approval; a copy is available on the Justice Department website: www.usdoj.gov/enrd/Consent_Decrees.html

For info: Margot Perez-Sullivan, EPA, 415/ 947.4149 or email: perezsullivan.margot@epa.gov

WATER LEGISLATION CA OPTIONS IDENTIFIED

The California Legislative Analyst's Office (LAO) released a report highlighting challenges facing the state's water system and identifying options the Legislature should consider as it grapples with water policy decisions. The report released October 20th, "*California's Water: An LAO Primer*," recommends that lawmakers consider changes to the state's water rights system to better reflect modern needs and re-evaluate how groundwater is regulated and managed. It also recommends that legislators come to terms with trade-offs that will need to be made to achieve economic and environmental objectives in the Delta.

California's water delivery system is facing a series of challenges due in part to a combination of increasingly variable weather conditions, legal requirements, and system operation and conveyance constraints. These challenges affect water availability, reliability, and delivery. Recent public and private efforts have sought ways to address these challenges. These measures include proposals to increase water through groundwater storage, surface storage, infrastructure changes, and system operation improvements, among others. This report provides, through a "quick reference" document relying heavily on charts to present information, a snapshot of water in California, including: (1) An Overview of California's Water Governance; (2) Water Supply, Source, and Delivery; (3) How Do We Finance Water Projects? (4) What Drives the Cost of Water?, and (5) Issues for Legislative Consideration.

For info: LAO website: www.lao.ca.gov/laoapp/main.aspx

WATERSENSE CHALLENGE AZ

On October 9, EPA recognized the Arizona Department of Water Resources as the winner of the WaterSense® State Challenge, a challenge among 20 states to encourage their local water providers to join EPA's WaterSense program and encourage water efficiency nationwide. Launched in 2006, WaterSense provides consumers with simple ways to use less water. Utilities, state and local governments, manufacturers, retailers, distributors, trade associations, and irrigation professionals that partner with WaterSense encourage their constituents to look for the WaterSense label on products such as toilets and faucets and water their landscapes more efficiently.

In 2007, WaterSense partners were responsible for labeling, selling and promoting more than 193,400 WaterSense labeled products, saving the United States more than 277 million gallons of water annually.

For info: Margot Perez-Sullivan, EPA, 415/ 947-4149, email: perezsullivan.margot@epa.gov or website: epa.gov/watersense

NOAA ARCTIC REPORT US GREATER WARMING

Temperature increases, a near-record loss of summer sea ice, and a melting of surface ice in Greenland are among some of the evidence of continued warming in the Arctic, according to an annual review of conditions in the Arctic issued October 16 by NOAA and its university, agency, and international partners. The Arctic Report Card, a product introduced by NOAA's Climate Program Office in 2006, establishes a baseline of conditions in that region in the 21st century and provides a way of monitoring the often quickly changing conditions. It is updated annually in October and tracks the Arctic atmosphere, sea ice, biology, ocean, land and Greenland.

"Changes in the Arctic show a domino effect from multiple causes more clearly than in other regions," said James Overland, an oceanographer at NOAA's Pacific Marine Environmental Laboratory in Seattle and a lead author

WATER BRIEFS

of the report. "It's a sensitive system and often reflects changes in relatively fast and dramatic ways." One example of these changes in arctic climate is the autumn air temperatures which are at a record 5 degrees C (9 degrees F) above normal, because of the major loss of sea ice in recent years. The loss of sea ice allows more solar heating of the ocean. That warming of the air and ocean affects land and marine life, and reduces the amount of winter sea ice that lasts into the following summer. The year 2007 was the warmest on record for the Arctic, continuing a general Arctic-wide warming trend that began in the mid-1960s.

In this year's report card, three of the six areas (atmosphere, sea ice, and Greenland) are coded red on the Report Card, indicating that the changes are strongly attributed to warming. The three remaining areas (biology, ocean, land) are coded yellow, indicating mixed signals. The report's other contributing lead authors are from the Woods Hole Oceanographic Institute in Woods Hole, Mass.; the Geophysical Institute, University of Alaska in Fairbanks, Fairbanks, Alaska; Byrd Polar Research Center, Columbus, Ohio; and Environment Canada, Whitehorse, Yukon.

For info: 2008 Arctic NOAA Report at: www.arctic.noaa.gov/reportcard/

CLIMATE CHANGE ACTION US EPA WATER STRATEGY

To assist in responding to potential effects of climate change, a new strategy focuses on 40 specific actions for the national water program to take to respond to climate change. EPA's "National Water Program Strategy: Response to Climate Change," released on October 2, describes steps for managers to adapt their clean water, drinking water, and ocean protection programs. The water strategy identifies specific response actions in five areas: mitigation of greenhouse gases; adaptation to climate change; research related to water and climate change; education on climate change; and water program management of climate change.

Potential impacts of climate change on water resources reviewed in the strategy include increases in certain water pollution problems, changes in availability of drinking water supplies, and collective impacts on coastal areas. The strategy reflects input provided during a public comment period earlier this year. EPA has been working with other federal agencies to coordinate work on climate change and water. Recently, EPA issued a joint memorandum with the US Departments of Agriculture, Commerce, Defense, and Interior to describe cooperative efforts on climate change and water issues.

For info: Roxanne Smith, EPA 202/564-4355, email: smith.roxanne@epa.gov or website: www.epa.gov/water/climatechange

CLIMATE CHANGE CA CDWR WHITE PAPER

The California Department of Water Resources (CDWR) recently released a new white paper that lays out 10 adaptation strategies for water managers to cope with the effects of climate change. The report, "*Managing an Uncertain Future: Climate Change Adaptation Strategies for California's Water*," says the changing climate already is affecting our water supplies and raising uncertainty for the future. "Warmer temperatures, altered patterns of precipitation and runoff, and rising sea levels are increasingly compromising the ability to effectively manage water supplies, floods and other natural resources," the report says. "Adapting California's water management systems in response to climate change presents one of the most significant challenges of this century."

For info: Report available at: www.water.ca.gov/climatechange/docs/ClimateChangeWhitePaper.pdf

PETROLEUM BROWNFIELDS US EPA REVITALIZATION PLAN

The abandoned corner gas station can look toward a new life with an

action plan that focuses on cleaning up brownfields sites contaminated with petroleum. EPA's plan, "*Petroleum Brownfields Action Plan: Promoting Revitalization and Sustainability*," describes specific actions, new tools, and opportunities for expanding partnerships to foster the reuse of sites. The petroleum brownfields program focuses on assessing, cleaning up, and reusing petroleum-contaminated brownfields sites.

EPA identifies four strategic initiatives:

- Bolster communication and outreach to petroleum brownfields stakeholders
- Provide targeted support to state, tribal, and local governments
- Explore and evaluate policies to facilitate increased petroleum brownfields site revitalization
- Forge partnerships to promote investment in and the sustainable reuse of petroleum brownfields

EPA will work with a broad array of external stakeholders to implement the action plan and ensure that each of the plan's strategic initiatives is designed and carried out effectively.

For info: Latisha Petteway, EPA, 202) 564-4355 or email: petteway.latisha@epa.gov

EPA WEBSITE: www.epa.gov/oust/rags/petrobfactionplan.pdf

GW RECHARGE FUNDING ID WATER BOARD AUTHORIZATION

The Idaho Water Resource Board (IWRB) approved a resolution on September 16th authorizing up to \$150,000 for costs associated with delivering water for fall recharge projects to benefit the Eastern Snake Plain Aquifer (ESPA). Water Board members unanimously authorized paying the lease and conveyance costs of up to \$3 per acre-foot for water offered by the Eastern Idaho Water Right Coalition for recharge of the aquifer. The Coalition is comprised of Upper Snake River storage contract holders who have offered to lease some of their carryover storage water for a fall recharge pilot project for several sites above American Falls Reservoir.

For info: Bob McLaughlin, IWRB Staff, 208/ 287-4828

November 16-19 CA**Potable Reuse for Water Supply Sustainability Conference, Long Beach.**

Sponsored by WaterReuse Assn & International Water Assn. For info: Courtney Tharpe, WaterReuse Assn, 703/ 548-0880 x101, email: ctharpe@waterreuse.org or website: waterreuse.org/

November 16-19 WA**2008 International Low Impact Development Conference, Seattle.**

Westin Seattle. Sponsored by American Society of Civil Engineers. For info: ASCE, 800/ 548-2723 or website: www.asce.org

November 17-18 CA**Conservation Easements Conference, San Francisco.**

For info: CLE International, 800/ 873-7130 or website: www.cle.com

November 17-18 FL**Florida Wetlands Conference, Jacksonville.**

For info: CLE International, 800/ 873-7130 or website: www.cle.com

November 17-18 CA**Conservation Easements Conference, San Francisco.**

For info: CLE International, 800/ 873-7130 or website: www.cle.com

November 17-19 UT**The West's Water Future: Water Information Needs & Strategies, Salt Lake City.**

Sheraton City Centre Hotel. Sponsored by Western States Water Council. For info: Cheryl Redding, WSWC, 801/ 561-5300, email: credding@wswc.state.ut.us or website: www.westgov.org/wswc/

November 17-20 LA**American Water Resources Assn 2008 Annual Meeting, New Orleans.**

Sheraton Hotel. For info: AWRA, 540/ 687-8390 or website: www.awra.org

November 18 OR**Advanced Sediment Conference, Portland.**

World Trade Center. RE: Evaluation, Remediation, Dredging & Disposal. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com

November 18-19 ID**Idaho Environmental Summit, Boise.**

For info: Idaho Summit website: www.idahosummit.org

November 18-20 KS**Alternative Covers for Landfills: Theory, Design & Practice, Kansas City.**

For info: Steve Rock, EPA, 513/ 569-7149, email: rock.steven@epa.gov or website: phytosociety.org

November 18-20 AZ**2008 Colorado River Basin Science & Resource Management Symposium, Scottsdale.**

DoubleTree Resort. For info: Water Education Foundation website: www.water-ed.org

November 18-20 CA**2008 Groundwater Foundation National Conference, Desert Hot Springs.**

Miracle Springs Resort. Specific topics include: LEED Building, EPA's Water Sense, gray water reuse, landscape technologies, stormwater management, pollution prevention, take-back programs, business/industry "green" models,

media challenges and solutions. For info: For info: TGF, 800/ 858-4844 or website: www.groundwater.org

November 19-20 CA**California Aquatic Bioassessment Workshop, Davis.**

UC Davis. Pre-register for free workshop. For info: Mary Tappel, SWRCB, 916/ 341-5491, email: mtappel@waterboards.ca.gov or Conference website: www.science.calwater.ca.gov/conferences/

November 19-20 CA**Emerging Contaminants 2008 Symposium, San Jose.**

For info: Conference website: www.grac.org/contaminants.asp

November 20-21 CA**California Water Law Seminar, Pasadena.**

Sheraton Hotel. For info: CLE International, 800/ 873-7130 or website: www.cle.com

November 20-21 WA**Measuring Environmental, Social & Economic Performance, Seattle.**

For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976 or website: www.nwetc.org

November 20-21 NJ**Natural Resources Damages Litigation Seminar, Newark.**

For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

November 24 Web**Groundwater & Well Microbiology Webinar, Web.**

Sponsored by National Ground Water Association. For info: NGWA, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

Nov 28-December 1 CA**National Water Resources Assn Annual Conference, San Diego.**

Hotel del Coronado. For info: NWRA, 703/ 524-1544, email: nwra@nwra.org, website: www.nwra.org

December 1-5 CA**International Conference on Water Scarcity, Global Changes, and Groundwater Management Responses, Irvine.**

Convened by UNESCO & University of California, Irvine. For info: Prof. Jean Fried, 714/ 679-6888, email: jfried@uci.edu or website: www.waterunifies.com

December 2 CA**Boalt Environmental Speaker Series: Jeffrey Kightlinger, Metropolitan Water Dist. of Southern California, Berkeley.**

Boalt Hall, School of Law, 12:45pm. For info: Boalt Hall Event, 510/ 643-8167 or website: www.law.berkeley.edu/1380.htm

December 2-3 WA**Ecology of Pacific Salmonids Workshop, Port Hadlock.**

For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976 or website: www.nwetc.org

December 2-3 CA

Corporate Water Footprinting 08 Conference, San Francisco. Hyatt Regency. RE: Water Management & Consumption. For info: Yahya Al Barishi, email: Yahya.b@greenpowerconferences.com or website: www.greenpowerconferences.com

December 2-5 CA

Assn of California Water Agencies Fall Conference, Long Beach. Long Beach Convention & Entertainment Center. For info: ACWA, 916/441-4545 or website: www.acwa.com

December 2-5 OR

Oregon Water Resources Congress Annual Conference, Hood River. Hood River Inn. For info: Anita Winkler, OWRC, 503/363-0121 or website: www.owrc.org

December 2-5 NV

2008 Ground Water Expo & Annual Meeting, Las Vegas. For info: NGWA, 800/551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

December 4 WA

The Puget Sound Action Agenda & Funding Plan, Seattle. For info: Jamie Wine, People for Puget Sound, 206-382-7007, email: jwine@pugetsound.org or website: www.pugetsound.org

December 4-5 TX

Texas Water Law Institute, Austin. Radisson Hotel on Town Lake. For info: University of Texas at Austin School of Law website: www.utcle.org

December 4-5 WA

Pacific Salmonid Spawning Habitat Restoration, Port Hadlock. For info: Renata Sobol, NW Environmental Training Center, 206/762-1976 or website: www.nwetc.org

December 5 OR

Willamette River: TMDLs, ESA, Superfund Seminar, Portland. For info: Holly Duncan, Environmental Law Education Center, 503/282-5220, email: hduncan@elecenter.com or website: www.elecenter.com

December 8-9 OR

Northwest Environmental Conference & Trade Show, Portland. Red Lion Hotel on the River. Presented by Northwest Environmental Business Council, Associate Oregon Industries, Oregon Dept. of Environmental Quality & Washington Dept. of Ecology. For info: Conference website: www.nwec.org

December 8-9 CA

On Thin Ice: Addressing the Scientific, Economic, Environmental, Cultural and Security Implications of Climate Change in the Arctic Region: An Interdisciplinary Conference, Monterey. Monterey Bay Aquarium. Sponsored by the Center for Stabilization & Reconstruction Studies. For info: CSRS website: www.csrs-nps.org/logistica/public/home.cfm

December 9-10 MT

Montana Agriculture 4th

Annual Conference, Billings.

For info: The Seminar Group, 800/574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

December 10 FL

Marine Shoreline Development & Permitting, Tampa. For info: Law Seminars Int'l, 800/854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

December 10-12 WA

The Carbon Series Training Course, Seattle. For info: Renata Sobol, NW Environmental Training Center, 206/762-1976 or website: www.nwetc.org

December 11-12 CA

Endangered Species Act Seminar, Sacramento. For info: CLE International, 800/873-7130 or website: www.cle.com

December 15-16 NV

Colorado River Water Users Association Annual Conference, Las Vegas. Caesar's Palace. For info: CRWUA website: crwua.org

December 15-16 WA

Growth Management Act Conference, Seattle. For info: Law Seminars Int'l, 800/854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

December 17 WA

Model Toxics Control Act (MTCA) 101 Workshop, Lacey. For info: Renata Sobol, NW Environmental Training Center, 206/762-1976 or website: www.nwetc.org

December 18-19 WA

Model Toxics Control Act (MTCA) Cleanup Levels Workshop, Lacey. For info: Renata Sobol, NW Environmental Training Center, 206/762-1976 or website: www.nwetc.org

January 5-7 Thailand

International Perspective on Environmental & Water Resources, Bangkok. For info: ASCE, 800/548-2723 or website: www.asce.org

January 12 OR

Bridging Law & Science in the Face of Climate Emergency Conversation, Eugene. Bowerman Center for Environmental Law, 5pm. For info: ENR, 541/346-1395, email: enr@uoregon.edu or website: www.law.uoregon.edu/org/enr

January 14 WA

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

January 15 AK

Permitting Strategies Conference, Anchorage. For info: The Seminar Group, 800/574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

January 15-16 HI

Hawai'i Land Use Law Conference, Honolulu. For info: The Seminar Group, 800/574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

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January 22-23 AZ

Adaptation to Climate Change in the Desert Southwest: Impacts & Opportunities, Tucson. Sponsored by Institute for the Study of Planet Earth, James E. Rogers College of Law, & Economics, Law & Environment Program. For info: Conference email: adaptationconference@law.arizona.edu or website: law.arizona.edu

January 26-28 TX

2009 UIC Conference, San Antonio. Sheraton Gunter. Sponsored by the Ground Water Protection Council. For info: GWPC website: www.gwpc.org

January 26-March 1 OR

Public Interest Environmental Law Conference, Eugene. University of Oregon, Knight Law Center. For info: Conference website: www.pielc.org

January 27-28 WA

Endangered Species Act 16th Annual Conference, Seattle. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

January 28-29 OR

Oregon Sustainable Building Expo & Conference, Portland. For info: Expo website: http://oregon.sustainableexpos.com/Home.aspx

January 28-29 CO

Colorado Water Congress 51st Annual Conference, Denver. Hyatt Regency Denver Tech Center. For info: CWC, 303/ 837-0812, email: cwc@cowatercongress.org or website: www.cowatercongress.org/

January 29 OR

Water for People & the Environment: Conflict, Compromise & New Directions Conversation, Eugene. Bowerman Center for Environmental Law, 5pm. For info: ENR , 541/ 346-1395, email: enr@uoregon.edu or website: www.law.uoregon.edu/org/enr

January 29-30 KS

Kansas Natural Resources Conference: Renewable Energy - Renewable Resources, Wichita. Hilton Airport. For info: Conference email: KNRC@kaws.org or website: www.kansasnrc.net/index.html

February 3-5 WA

Stream Restoration Design Symposium, Stevenson. Skamania Lodge. For info: Rob Sampson, 208/ 378-5727, email: Rob.sampson@id.usda.gov or website: http://rrnw.org

February 3-6 GA

2009 Winter Conference: National Association of Clean Water Agencies, Atlanta. Westin Buckhead. For info: NACWA website: www.nacwa.org

February 4 WA

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

February 5-6 FL

Water & Energy: Climate Change & Sustainability, Deerfield Beach. For info: CLE International, 800/ 873-7130 or website: www.cle.com

February 5-6 NV

Nevada Water Law Seminar, Reno. For info: CLE International, 800/ 873-7130 or website: www.cle.com

February 5-6 Canada

"Bringing the Future into Focus": The State of the Salmon's Second Annual International Conference, Vancouver, B.C.. Speakers from around the Pacific Rim will share knowledge and explore possible solutions to the crises that plague some salmon populations. For info: Conference website: www.stateofthesalmon.org/

February 5-6 FL

Growth and Water Supply Seminar, Deerfield Beach. For info: CLE International, 800/ 873-7130 or website: www.cle.com



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