The Water Report™

Water Rights, Water Quality & Water Solutions in the West

In This Issue:

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Western Water Transport Projects

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SCOTT VERHINES, NM STATE ENGINEER

INTERVIEW OF SCOTT A. VERHINES, NEW MEXICO STATE ENGINEER

Interviewed by Michelle Henrie, Attorney at Law (Albuquerque and Santa Fe, NM)

INTRODUCTION

Scott A. Verhines, appointed as New Mexico's State Engineer in 2011, is a registered professional engineer in New Mexico with over 34 years experience focusing on water resources, transportation, and drainage/flood control projects.

Mr. Verhines earned a Bachelor of Science degree from Texas Tech University in 1979 emphasizing hydraulics and hydrology, a Master of Science degree from the University of New Mexico in 1991 focusing specifically on water resources, and his Master of Business Administration from Anderson School of Management, University of New Mexico, in 2002. Mr. Verhines served as program manager for the Eastern New Mexico Rural Water Authority from 2005 to 2011.

Mr. Verhines' predecessor, John D' Antonio, Jr., resigned in 2011 to accept a position with the Albuquerque District Office of the US Army Corp of Engineers.

For ***The Water Report,*** Michelle Henrie — a project development attorney with offices in Albuquerque and Santa Fe, New Mexico (Michelle Henrie LLC) — spoke with Mr. Verhines on October 1st, 2012.

Michelle Henrie: Let me start by asking you about your background. You are a New Mexico native, right?

Scott Verhines: I'm a New Mexico kid. My parents moved to Albuquerque after my dad got out of the Army. He went back to school at UNM on the G.I. Bill to get an engineering degree. I was born in Albuquerque when he was in school, and then I grew up partially here in Santa Fe and partially down in Artesia. I started high school here in Santa Fe. We moved mid-Semester my sophomore year to Artesia, so I graduated from Artesia High School.

Both of my parents are southeastern New Mexico natives. My dad is a Roswell native and my mom grew up on a cotton and alfalfa farm outside southeast of Artesia. I grew up working on the farm. We still have the farm in the family.

My dad was the President of Scanlon & Associates, a long standing New Mexico engineering firm that is not around anymore. He was there for about 30 years, so I sort of grew up in the engineering business. I did not know any better than being an Engineer.

After high school, I went to Texas Tech. I received a Civil Engineering degree in Hydraulics and Hydrology. I then moved to east Texas (Longview) and worked for a consulting

New Mexico State Engineer

Engineering Background

Ute Pipeline Project

Rio & Pecos Compacts

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firm, Kendall Stone & Associates for a little over a year. After that I moved back to New Mexico to go to work for Scanlon, my dad's company, in Farmington. I lived in Farmington for a little more than a year. My son was born there.

From there, I moved back to Santa Fe and I worked in Scanlon's office in Santa Fe for a long time. Then I went back to Artesia to run Scanlon's office in Artesia. Then back to Albuquerque with Scanlon's Albuquerque office. Along the way I got a Master's degree in Civil Engineering, Water Resources Engineering at UNM.

Eventually we sold Scanlon. So in 1993, I went to work for Smith Engineering Company and moved back to Roswell for the next ten years. I then moved to Albuquerque and started my own company in 2002 or 2003. I also went back to UNM and got an MBA through the Anderson School. So I had my own little engineering company, Occam Consulting Engineers, until I was appointed to this job. Occam is still up and running. I had to put the company into a blind trust when I was appointed to this job — so I hope they're doing well. It's a great gang.

Henrie: It sounds to me like a lot of your career has been about water.

Verhines: Yes, a lot of it has been water, but not all of it. In the consulting engineering business, you get to wear lots of hats. That's one of the fun things about the job. We did a little bit of everything involved in public works from landfills to water projects to flood control to the Ute pipeline project. Along the way, I got to do some things that had never happened in New Mexico before. Like the Water Trust Board, which was created in part because of lessons learned on Ute project.

Henrie: I want to hear about those lessons learned in just a minute. First, can you tell us more about the Ute pipeline project?

Verhines: The Ute project is on the Canadian River, which is subject to an interstate compact like New Mexico's other interstate rivers. However, the Canadian River Compact is a very different type of compact. The Rio Grande and the Pecos Rivers are subject to delivery compacts. By contrast, the Canadian River Compact is a storage compact. It says that New Mexico can store basically up to 200,000 acre feet between Conchas Reservoir and the State line. The dam that created the Ute reservoir was built to store New Mexico's share of water under the compact. Dam construction started in 1959 using Severance Tax Bonds.

Even in late 1950's and early 1960's, they knew that the Ogallala Aquifer had a depleting lifespan. The intent of the Ute project was to provide a surface water storage reservoir knowing that communities along the eastern side of New Mexico were going to need the water. A lot of people forget this. The reservoir has developed significant recreational use over the years, which is a big focus for the people who live near the reservoir right now. But the reservoir's purpose was storage for water supply.

In 1963, a feasibility study was started to look at how to take surface water and deliver it to member entities for use along the eastern side of New Mexico. At that time, the project was intended to go all the way to Jal in the very far southeastern corner of the State and there were 17 member entities. Based on precipitation records at the time, they estimated that there would be about 44,000 acre feet a year firm yield available for delivery to those 17 entities. Since then, the ISC [Interstate Stream Commission] has revised the estimate down to about 24,000 acre feet a year.

As I understand it, the original project was intended to be privately financed, primarily by oil and gas folks down in Lea County. They said, we'll front the money and we'll be compensated through water rates over time. But eventually folks in Lea County dropped out.

In 1998, the Eastern Plains Council of Governments in Clovis realized that the problem wasn't going away and the solution hadn't made any progress, so they resurrected the effort. This group was given a fiscal agent role, and they issued a Request for Proposals. I was with Smith Engineering Company at the time. We submitted a proposal, and were selected to develop a conceptual design of how this project might be revived.

Of course, the first thing we needed to do was to try to get everybody who hadn't worked together for many years back to working together. It took a couple of years of pretty intense effort to update the feasibility study, redo the conceptual design, and, most importantly, get folks to talk about it.

Today the Ute project looks a little different than it did in 1963. In those days, it was intended to be delivered as raw water and then each member entity would treat what it received. Over the years the concept has gone the other direction and today the project plans to centrally treat water and then deliver potable water. So it's really a wholesale delivery project now.

Also, the entities that are part of the project and their relationship to each other have changed. In the past, there was a Joint Powers Agreement. In the 2010 Legislative session, the Eastern New Mexico Rural Water Authority was created statutorily with seven member entities. The "Authority" is officially a subdivision of the State, not unlike a city, although it exists for a very limited scope.

New Mexico State Engineer

The first phase of the project is designed. It has gone to bid. Bids have been opened. Everyone was ready to go build when Ute Lake's neighbor, the Village of Logan, filed a lawsuit to stop the project under the premise that the Environmental Assessment was not done appropriately. In my opinion, the Environmental Assessment was very robust and comprehensive. It was three years' worth of effort and a lot of work. But that's the basis for the lawsuit is that the Environmental Assessment was not complete. As I understand it, the Village has requested an injunction and there is a hearing tomorrow. [Editor's note: no decision has been issued by the court at the time this article is going to print].

Henrie: Good luck with the litigation. This is an important project for communities in eastern New Mexico, it's been planned forever, and I would like to see it happen.

Aquifer Drop

Verhines: You know the aquifer is dropping about two and a half feet per year over there right now, and there's a study by New Mexico State University that says it only recharges about a half an inch a year. So even an old engineer can figure out it can't happen like that forever. And there are places where there is probably ten years or less worth of water left. That's the urgency. We need to get the project in place so that the affected communities don't run up against very severe draconian conservation measures just to survive till the pipeline gets there. It's really an important project, I agree.

Henrie: You started to tell me about lessons learned on the Ute pipeline project and how this fits into the New Mexico Water Trust Board.

Ute Project Funding

Verhines: We started working on the Ute project in 1999. In 2000 we took a whole bunch of folks around the country to look at big regional/rural efforts. We went to Arkansas, South Dakota, Wyoming, and Texas to learn about what was successful. The South Dakota model looked more like what we wanted to do in New Mexico. They had come up with a way to develop local funds and State funds so they could leverage federal dollars. They had created something similar to a Water Trust Board, and a Water Trust Fund with dedicated monies, so that they could go to Congress and say "Our money is sitting in the bank. We are ready." What we needed in New Mexico was that same kind of ability to leverage.

We brought that concept back and spent most of the next two years educating the Legislature and the Governor and figuring out how it might work in New Mexico. It took two years to get it done. Senator Pat Lyons and Representative Joe Stell were the champions through all of the Legislative and State hearing processes. They provided bipartisan support in both chambers. They recognized that this idea made sense for New Mexico, and they ran with it and got it passed. It was really a cool story.

Henrie: It sounds like the model worked for us?

Verhines: Yeah, I think it worked, but because nothing like this existed, we all had to learn as we went about what worked and what didn't work. That was the fun part of being on the front end of that.

Henrie: You had planned to give a presentation at the New Mexico Water Law Conference but unfortunately were not able to do so. Is there anything from your presentation that you would like to share with *The Water Report* readers?

Learning Curve

Verhines: Unfortunately my father passed away just before the Water Law Conference and the funeral was that week so I wasn't able to come. But the honest answer is: I'm almost exactly nine months on the job and you can probably surmise that the learning curve in this job is really incredible. So a lot of what I'm doing right now is trying to understand how we do business. What's on our plates? Why have we done it that way in the past? Does it make sense to continue to do it that way in the future?

Continuous Improvement

I am a continuous improvement guy. I'm not a person who says "if it ain't broke, don't break it." I think if it ain't broke, let's look at whether we can improve it. Let's go ahead and break it. I want to make sure that we are really looking at things critically in the way that we do business.

Agency Decision Making

The first thing we are thinking about is how we make decisions within the agency. On the one hand, I am spending a lot of time meeting with and hearing from stakeholders. What's working for them? What's not working for them? On the other hand, I am asking within the agency: "What are the factors that we include/exclude when making decisions?"

Experienced Staff

We have a lot of really smart people within the agency — engineers, hydrologists, geologists, geohydrologists, and attorneys — and most of these folks have a lot of history with the agency. As a side note, I have to say how pleasantly surprised I was at the professionalism that everybody brings. It really is rewarding. I really appreciate the thoughtfulness and work ethic that goes into the agency's work. For example, I get emails from my team at 2:00 in the morning saying "You know I've been thinking about this issue and…"

So having said that, we've got all this experience, we've got all this history, but when you actually look at how we're making decisions, there's nothing formal.

New Mexico State Engineer

Decision Factors

Regional Goals

Water Trust Board

State & Regional Plans

Implementation Steps

Decision-Making

Mayors' Conference

There is also an interesting checks and balances within the agency's professionals. It's one of the things I probably would have talked about at the Law Conference. In very general terms, law likes to keep things the way they are. Law says: "This is the way we settled this one before. This is similar. We should settle it the same way." By contrast, I think a lot of our scientists and engineers look at something and say, "Why don't we try something else? What if we did this differently?" So we have a tension all the time between the legal side of the house and the scientific side of the house which is a good thing. I think it's a good balance. It means that people really test decisions in an incredibly thorough way before they go out the door here.

But what factors do we think about when we're thinking about our decisions? The obvious ones are legal and regulatory and technical. The things that I've been thinking about are also things like economic. They are what I would call, for a lack of a better term, "consequential." What are the consequences of this decision down the road that we haven't thought about today? I do have to give the gang a lot of credit for thinking critically about the consequences. What are the unintended consequences? Long term consequences? And so my challenge is to ask: are there additional factors, such as economic consequences, that need to be considered as well?

The second issue that I've been trying to pull into the mix is regional goals. We have all these Regional Water Plans. Each of the Plans has its own direction. They are all different. We are thinking about whether we should restart Regional Water Plans. Should we devise a mechanism for rethinking Regional Water Plans?

For example, consider the connection with the Water Trust Board. If you go back and look at statute and policy, the Water Trust Board is supposed to implement the goals of the State Water Plan. It is very clear. In the Water Trust Board process, we are supposed to give priority to projects that have been identified in Regional Water Plans. Well, on the Water Trust Board, we give a couple of extra points if a project was part of the Regional Water Plan but not really giving priority to designated projects. If we rethink how we're doing business, if we really try to give those regionally-identified projects priority, what happens when somebody in southeastern New Mexico or northeastern New Mexico says "We weren't part of that original Regional Water Plan. Does that mean we'll never have an opportunity for our project to be supported by the Water Trust Board?"

Another reason we are thinking about these plans is because plans should never be a destination. This is true whether we are talking about the State Water Plan or the Regional Water Plans or a comprehensive plan for a city. Plans should have a mechanism for being revisited over time. Things are going to change. How do we provide that mechanism for things to change? So we're talking right now within the Water Trust Board Policy Committee and also within the Interstate Stream Commission about what we want to see in the State Water Plan. How do we want to incorporate the wishes of the regions? Should we have a mechanism for those regions to redevelop their plans? Should we have the regions reconstituted in a different fashion, for example reflecting watersheds instead of political boundary lines?

The original Regional Water Plans were driven by whoever showed up. They were not necessarily representative of the water interests in the area at that time. For example, I worked on several Regional Water Plans. In one of these plans, agriculture didn't really show up. They really weren't at the table. So a lot of the recommendations that came out of that planning process were that agriculture ought to do this and agriculture ought to do that. And agriculture really was not a part of it. Should we structure the process differently? We don't know. I don't know what the answer is yet, but generally folks say "yes."

Plus — those Regional Water plans don't really have any teeth in them. They didn't really put in place any implementation steps. They got to that point of making recommendations. Implementation is the hard stuff.

So those are some of the things we're working on. How do we make decisions, and how do we include all the right stuff in the decision-making? And should we be rethinking how the regions operate and how that plays into the State Water Plan? All of that is under discussion right now. We hope to start rolling out draft sections of the State Water Plan between now and the end of the year for people to look at and tell us what they think.

Henrie: Can you share some of the interesting things you have learned in your first nine months on the job?

Verhines: One thing that I know right now is that I certainly don't have all the answers yet. I don't know if you ever have all the answers in this job. I don't know that you want to. You really need to be able to appreciate that the issues are unique.

I recently had a chance to speak to a Mayors' conference for all of the Mayors in southeastern New Mexico as part of the Southeastern New Mexico Economic Development District, the Council of Governments or "COG" down there. I was really surprised how different the water issues were from one

New Mexico State Engineer

Texas 50/50 Plans

NM Choices

Regional Preferences

"AWRMs"

side of that COG district to another. The district includes everything from Ruidoso to Lea County. So you have oil and gas issues. You have all the groundwater issues. And then you have everything that sits on top of the mountain competing over that pot of water. Even within Lea County — just one area within the district — I was approached by two different groups wanting completely opposite things from me in terms of the State's water policy. That was really fascinating.

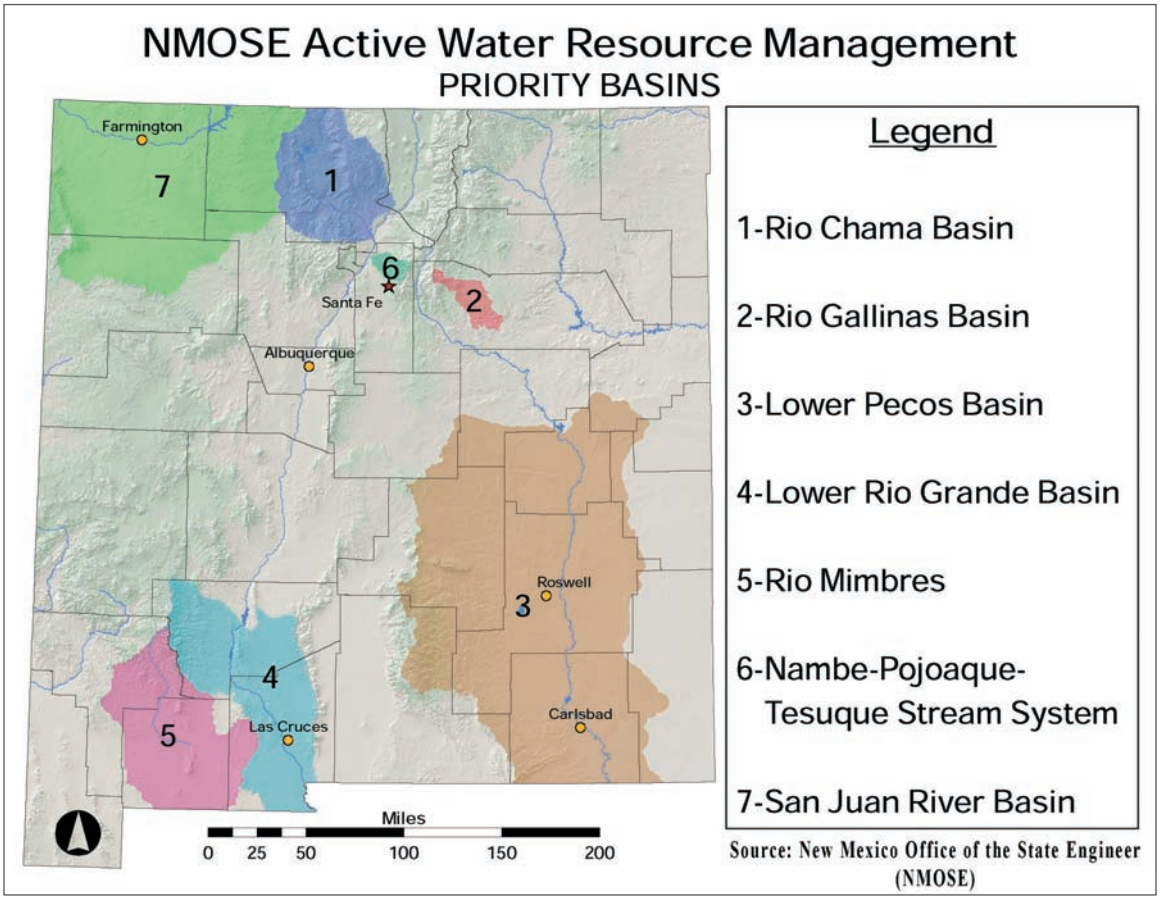
I also recently had a chance to speak in Lubbock to the Texas Tech University Civil Engineering Academy. I'm a member. There were students, professors, some non-University folks, as well as the Manager of the High Plains Underground Water District, which includes all that area. We talked about how in Texas, some of the Texas districts have adopted the 50/50 plan: [saying] we want 50% of our water left in 50 years. Is this not basically planning to be out of water in 100 years?

Coming back to New Mexico, do we have some regions that are on that same path? Whether they've developed it as policy or not, what do we do if a region is on the path of the 50/50 plan? As a State, do we stay out of their business and let them do their thing? Or do we try to facilitate some sort of more sustainable plan? And how do we do that in a prior appropriation State? Very interesting questions, and there's not good answers. [Editors' note: "Prior Appropriation" refers to the central tenet "Western Water Law" — prevalent throughout the American West — which gives prioritized access to water based on how early a user's "water right" was established.]

One of the reasons I want to include regional goals in our decision-making is that I want to at least be able to consider what the regions want. So we need to know what the regions want. And we need to know what the regions want in a representative sort of a way.

Henrie: You just mentioned prior appropriation, and before I turned on the tape recorder we talked about drought. It might be interesting just to let people know where we are with regard to the agency's regulations allowing priority administration in unadjudicated areas of the State, Active Water Resource Management or "AWRM." I always saw AWRM as a solution to avoiding priority calls in times of drought, but then it got tied up into the courts. What's the status?

Verhines: It's in the New Mexico Supreme Court awaiting a decision. I think everybody is very interested in the outcome because it does what you just described. It provides tools, administrative options for both our agency and for those who are involved. [Editors' note: the New Mexico Supreme Court issued a decision on November 1st — *see* article, page 11, this *TWR*.]



New Mexico State Engineer

Acequia Water Rights: Pilot Project

This is one of the things that has been interesting to me. We actually have many areas around the State where we're administering right now strictly on priority, such as Costilla Creek. Those are mostly areas of the State where essentially all of the water is in agriculture in one form or another. That seems to simplify things somewhat. Whenever you add municipal or industrial interests, you have different values for the use of that water. Then there seems to be more interest by the stakeholders in looking at alternatives to priority administration.

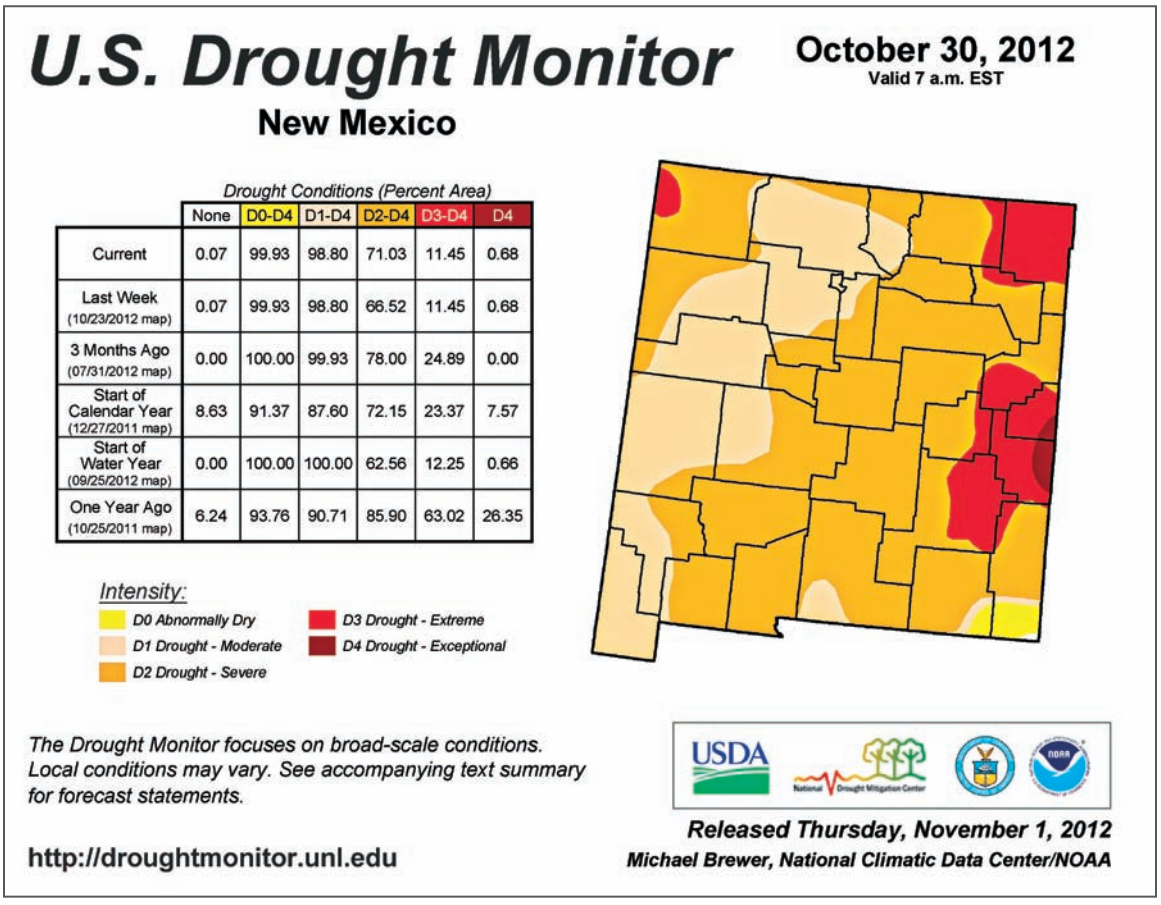
The Rio Chama Acequia Association is an example of a different approach than priority administration. The Association came in about roughly a month ago and said "We're the most senior water rights in New Mexico" — which I think is true, next to the Native Americans, these are 1700's rights in the acequia — "And people above us are taking water, we're not getting any. So what are we going to do?" They came in pushing for priority administration. But then we helped facilitate discussion among water users north of the acequia and the Rio Chama Acequia Association. We established a pilot project to get the northern users to curtail some use to see if it would generate water downstream that the Association can use. This pilot project is ongoing as we speak. We don't have resolution on it yet, but after they got together with their neighbors, they wanted to try something different than strict priority administration.

Continuing Drought

Henrie: Let's talk about drought. How bad is it?

Verhines: The New Mexico Drought Task Force met a week ago Wednesday and we heard presentations by the National Weather Service, by the State climatologists down at New Mexico State [University], and by John Longworth with our Water Use and Conservation Bureau. The National Weather Service talked primarily about current conditions. The State climatologist talked about what we saw during the monsoon season this year — or "non-soon" as the paper called it. John Longworth talked about the condition of all the reservoirs in the State, which is terribly depressing. The Pecos River reservoirs are the worst. They are in really bad shape. And the Lower Rio Grande reservoirs are bad too. The Northern reservoirs are in a little better shape but everybody got hit really hard. The last 24 months ending August were the driest two years on record in New Mexico.

It's a really poor situation. I remember about 18 months ago, maybe a little longer, John D'Antonio and I were having breakfast. John said that as bad as the drought was then, what he was really worried about was the next year. Because based on projections show, New Mexico might be a little bit better than it was that current year. But the Reservoirs will not be able to recover. There's not enough moisture for them to recover. And that's exactly what happened. They continue to decline.



New Mexico State Engineer

Drought Assessment

We had a lot of discussion about that in the Drought Task Force meeting. What should we be doing to inform people about next year? It does look like we're coming out of La Nina, the dry cycle. All the projections are showing an El Nino cycle, but nobody can predict whether it's going to be strong or weak or average. So most of the statistics are saying right now that 2013 will an average year. Even if we had an average year, the ability of the reservoirs to recover is very limited.

Back in May, Governor Susana Martinez issued a State-wide drought declaration. In the declaration, the Governor asked us to do certain things. One of them is assess the impact of drought on the various sectors of the economy. We are working on that assessment.

Informing Decisions

We discussed a second step at the Drought Task Force meeting. Let's not just be studying stuff, let's come up with something that we can do now to inform people about what we know. So what we're working on currently is a monitoring and outreach program where we can inform people about where we are and what we see. So folks can be making decisions about what their next year is going to look like. Do we add to our cattle herd, or do we cut our herd back? What kind of decision-making tools can we help provide for New Mexicans?

So that's what we're working on as we speak: helping people make informed decisions. If we blow it and we have an above-average year with all kinds of snow in the mountains, that's OK. I'd rather beg forgiveness than not have informed people as best we can about what we know so that people can be make economic choices.

We will be working on this project through John Longworth and Lela Hunt, our Public Information Officer. We met on Friday and started putting the pieces of a plan together. We even considered using Twitter. You know, we're going to take an old engineer into the 21st century here. That will be interesting!

Proactive Planning

So the drought is serious and what that means to everybody is serious as well. We're going to be working between now and the end of the year on planning ahead. If we're faced with this same situation next year, and we know early enough going in that we're going to have a similar situation, what kind of things do we want to have in place so that we're not running up against them and having to put something in place overnight? The Rio Chama Acequia Association is a good example. If we're faced with going through that issue again next year, we'd rather have everybody at the table and have agreed to it before we get there.

Henrie: I like it. I like hearing about proactively plan ahead.

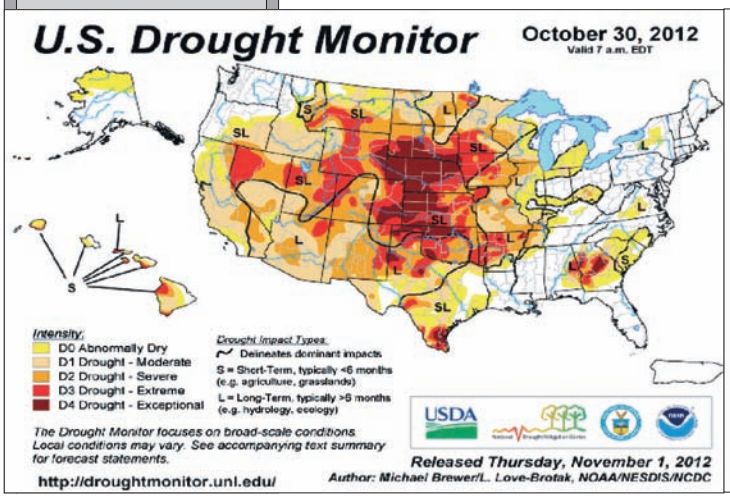
Verhines: It's certainly encouraging to take the proactive approach instead of the reactive approach. I'd rather be out in front of it if we can.

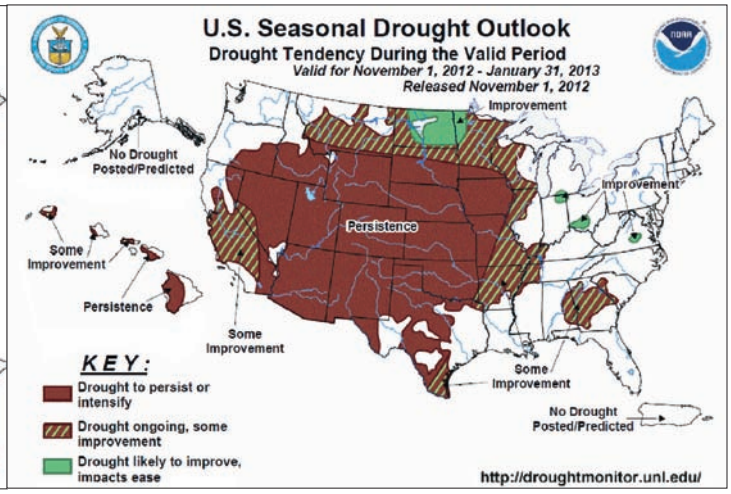
Henrie: What are some of the other issues facing New Mexico right now?

Infrastructure Report Card

Verhines: Certainly infrastructure. The American Society of Civil Engineers recently rolled out their report card on New Mexico's infrastructure. The report covers roads, bridges, highways, water, wastewater, and all those things. I think New Mexico fared slightly better than National for drinking water, like a C- compared to the National D-.

This report card points to the importance of investing in infrastructure. I think there are very a few things that are better economic drivers than investing in infrastructure. The Federal Highway Administration used to say every billion dollars of infrastructure investment generated around 45,000 jobs. For example, the Bureau of Business & Economic Research did a job-creating model for us at the Eastern New Mexico Rural Water Authority. They said that the Ute project alone could generate up to 7,000 jobs over its life in direct, indirect and induced jobs. I think there are few things that can compare to that in terms of job-creation.





New Mexico State Engineer

Infrastructure Funding Practices

Speaking of infrastructure, there's a lot of really good discussion going on among agencies heads on capital outlay reform. Is there a better way to spend the State's money? Should we be more thoughtful about how we do that? Should we be more efficient about how we do that?

One of the big problems we have in New Mexico, and I know this firsthand having been an old civil engineer working for different cities where I have seen really good practices and really bad practices. The problem, particularly with the small communities, is that communities come to the Legislature to fund infrastructure projects. They get funded, or partially funded in most cases. Then they go build that infrastructure or the phase of that infrastructure. But because they don't have the technical or managerial expertise, or they don't have a good plan in place for how to adequately operate and maintain that asset for the next 40 years, after a few years it falls apart. And then they are back in front of Legislature again, basically to do what they did a few years ago. This means our funding pot gets smaller.

It's a huge culture shift in New Mexico to think about doing capital outlay differently. But there seems to be a lot of like-mindedness right now among the agencies and even, based on what we're hearing, from the Governor's office and the Legislators about rethinking capital outlay and how we spend the State's money. There's a lot of good thought going in to capital outlay reform right now.

Henrie: There is one question that I have looked forward to asking. When you decided to take this job — and everyone knows it's the hardest job in the State — what motivated you to take the job and what did you want to accomplish?

Verhines: That's a great question. I've thought about it a lot. I don't know if it's the hardest job in the State, but it's a challenging one I must say.

Governor's Appointment Process

I need to go back to the beginning. The former State Engineer, John D'Antonio, is a longtime friend and colleague. I think the world of John, and I'm really happy he's doing what he's doing now. As John knows, and I want others to know, I did not lobby for this job. When John decided to resign, then the door opened. After that, I guess you might say I was willingly recruited to put my name in the hat.

I understand there were four of us that ended up getting interviewed. What I'll share is my interview with the Governor because I had no idea what to expect. I thought it might be me on one side of the table and a bunch of folks on the other side wanting to work me over. It ended up being Governor Susana Martinez and her Deputy Chief of Staff and myself basically sitting around her coffee table visiting for about an hour. I appreciate the way it was done and I appreciate the way the dialogue went because it made it really comfortable and easy to talk about some very hard subjects like how all this should be done.

The thing I loved about the Governor's comments is she said, "I'll tell you right up front Scott, I do not like this water business. It's really challenging. It's really contentious." She said, "I understand how important it is, don't get me wrong. It's incredibly important to all of these other sectors of the economy and the way the State runs. It's just hard. And I tell you I don't like it. I appreciate there are those who are willing to step into it."

After making the cut and being appointed, I jokingly tell everybody that the eventuality of me getting fired is 100%. I just don't know when it's going to happen. Maybe next year. Maybe ten years from now. So I want to do as good a job as I can while I can. This may be by rethinking some of the things that we've done in the past. It may be by being a little more formalized about how we make decisions and what we include in our decision-making for down the road.

Water Context

This is the most challenging thing I've ever done, hands down. It's probably the most fascinating as well. When we're in Cabinet meetings — and that's an incredible honor to get to sit on the Governor's cabinet — while I'm listening to everybody else talking about what they have going in within their agencies, the thing that I'm thinking about is how water is a part of every one of those agencies. Economic development. Agriculture. Energy Minerals and Natural Resources. Tourism. The Environment Department. Nearly every one of them has a water context. But they're not thinking about it. I think part of my job is to keep reminding folks and keep interjecting the importance of the water business and what the water community does in order to keep New Mexico in operating position.

Planning & Opportunity

You asked me about what I want to accomplish. I think we need to collectively try to help the regions of the State figure out what their next 100 years is going to look like. It's really fascinating to be the State Engineer at the end of our first 100 years, as we get ready to kick-off our next 100 years. What do we want our next 100 years to look like? What will we look like as an outcome of what we're working on today? It's a fascinating opportunity.

It's a real honor, and it's not lost on me that there's both the opportunity here and also the power that goes along with this role. You can affect a lot of people and their lives and their businesses through decisions that you make. It's not lost on me. It's not lost on any of us. That why I think about that consequential factor. What are the consequences of making these kinds of decisions?

New Mexico State Engineer

Water Transport Proposals

We have talked about the Ute project which can be described as taking water from where it exists to where it's needed. We have other big issues like that on our plate these days. One example was the Berrendo Pipeline decision. That project proposed to transport water from the Pecos River near Ft. Sumner to the Santa Fe River. The application was denied by John D'Antonio. A second example is the Augustin Plains Ranch pipeline which would send water from the Socorro area to Albuquerque. I spent about a month working on that decision and what to do with that application. John left the door open for Berrendo to submit a new application at some future point, should it be brought to the State in a different form with a real plan in place. We did the same thing with Augustine Plains Ranch. They appealed our decision and its being heard by the courts right now. I don't know this to be the case, but I suspect that we may get another application from them down the road.

I don't want to say we're not going to hear those things. They are all a little unique. Each is really different. There are some basic underpinnings that are similar in the way they are being considered, but there's a lot of uniqueness to them. These kinds of decisions are why I think we need to work on a more robust decision-making process. Can we consider all these other factors that need to be thought about in making a decision like this? Do we take water from where it exists to where it's needed? I think we need to leave the door open to doing that. I think it's got to be done right because it has long-term consequences: long-term consequences from the region where that water is coming from, and long-term consequences for the region it's going to. Ideally, the region where the water is coming from gains from the project as well. I think it's incumbent upon those who are making the proposals to come up with a way to make sure that the move-from regions benefit from the proposal in some fashion or another. Not necessarily just monetarily. There's got to be other ways to do it.

Henrie: Do you have thoughts or comments about what you have learned from former State Engineers?

Verhines: I was recently down in Las Cruces at the annual New Mexico Water Resources Research Institute conference, and they had four former State Engineers on a panel: John D'Antonio; Eluid Martinez; Tom Turney; and John Hernandez. It was really informative to me to listen to their comments, particularly in the context of this conference.

WRRI Conference

WRRI had a series of panels all day long, each with a different topic, and there were folks on both ends of the scale on that topic. What you heard during the course of the day was about every value of water that you can imagine. Everything from a very strong environmental focus, "There should be more water in the river and, by the way Scott, you could use your power to control population growth in New Mexico" — not probably something I'm all that interested in. I'm not sure that's the job of the State Engineer to determine who's going to win and who's going to lose in the population fight. That's a decision above my head. From that side of the coin all the way to a pure market-based opinion "Water ought to be able to flow to wherever the market says it can go." And everything in between. The cultural values of water to acequias. The cultural values to the Native Americans. Water for biofuels. Every value of water was represented.

Water Values

Management Perspectives

With that setting the stage for what we heard from the State Engineers, they all had a little different spin. There were those who were very much in favor of going back to a strict prior appropriation means of dealing with our situation. To those who felt that we need to think more about the regional context. What are the regional goals? If a county in eastern New Mexico says we want the 50/50 plan, should we help them get there? I am not sure. I am not sure that that should be our job to help them plan for running out of water over time.

Their perspectives were really valuable. I took pages of notes. There was general consensus, I think, about the need to balance all of these different perspectives. To me a big part of the job is balancing. It's about recognizing the uniqueness, depending upon the issue, and where the issue is, and who is a party to it.

New Mexico's Unique Aspects

Eluid Martinez did a really nice job of talking about why New Mexico's water situation is unique to other western states. I learned a lot from hearing that. Other western states don't have Pueblo water rights. Most western states don't have acequias. And why is the way we deal with water in New Mexico unique compared to other western states.

Federal Jurisdiction Issues

There was consensus, I think, in opposition to what we're seeing right now with the assertion of federal jurisdiction by attempting to federalize groundwater in the western United States. This is not just in New Mexico, although New Mexico has been on the front lines of that battle this year. This is something we've had to go to fight against almost from the day I got here, in several different venues. So far we are winning those battles, but it continues to come at us from a lot of different directions.

Tribal Rights

Another issue that came up in the discussion with the State Engineers was the issue of very senior water rights held by Native Americans. We have an issue right now with the Mescalero Apaches that

New Mexico State Engineer

Regional Collaboration Discussions

is very delicate. They have asked Congress to give them ability to lease water off Reservation. That's happened with other tribal entities. That's a decision Congress makes, and we get to deal with the aftermath. If they are allowed to lease these very senior priority rights, and if one entity ends up with that lease, if affects everybody else in the Ruidoso area. Some of those folks have already indicated to us that they will challenge that at every front because that means they go to the back of the bus.

I am a big fan of regional collaboration, if it makes sense. And of course every region and every situation is a little unique. For the Ruidoso area, I have been encouraging them to consider a regional approach to their long term water supply needs. They're all drawing from the same sources. They're all trying to put themselves into the best position that they can. You can't blame them for any of those things. But if they were to regionalize and cooperate, as opposed to competing all the time, I think it makes for a really positive long term outcome. Their bonding capacity goes up. They have the ability to assist if one system goes down while they get that system back up. This issue with Mescalaro leasing of water rights, if that was leased to regional authority as opposed to one member it sort of washes out their competition for that water.

I've been talking with folks from the Ruidoso area a lot over the past couple of years. They invited us from the Eastern New Mexico Rural Water Authority to come over and talk to them about how regional collaboration might work. To their credit they came up earlier in the year, a whole group — Ruidoso, Ruidoso Downs, Mescalaro, Alto, everybody was represented — and they came and said, "It's making more sense to us to regionalize so how do we get started?" I give them a lot of credit for having come to that conclusion. These are difficult things to do. The first thing you've got to do is admit that you have a problem. I think they have all come to that place where they know that if they continue to compete against one another somebody loses and contention is always on the table. If they can find a way to go through that contention once and get a new entity in place and be off and running, that's better for everyone. We're encouraging them to work towards those ends.

I think you'll see a lot more opportunity for regional collaboration around New Mexico through the drought and through the need to work with your neighbors instead of compete with your neighbors. It's like that population control thing. Instead of somebody wins and somebody loses, if everybody can cooperate a little better then everybody wins. You might have to give something up, but you get a lot more than what you give up.

It's encouraging to see these kind of discussions taking place. It was the intent of setting up the Water Trust Board and Water Trust Fund to create a mechanism for projects that involved regional collaboration and to help kind these efforts.

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New Mexico Water Regulation

"Priority Adiministration"

Authority Constutional

Adjudication Delays

Adjudication Authority

Prior Appropriation

"Best Available Evidence"

Management Tools

Priority Basins

NEW MEXICO PRIORITY ADMINISTRATION

NEW MEXICO SUPREME COURT DECISION ON STATE ENGINEER'S AUTHORITY

by David Moon, Editor

On November 1, 2012, the New Mexico Supreme Court (Court) issued a ruling in the *Tri-State* case involving constitutional challenges to the State Engineer Active Water Resource Management (AWMR) rules for "priority administration" during water supply shortages. "Priority administration" refers to the temporary curtailment of junior water rights in times of shortage, so that more senior water rights can be served by the available water supply. The Court essentially ruled that the State Engineer has the authority to regulate water use and allocate scarce water supplies among water users, even if the source of water has not been adjudicated by the courts. Office of the State Engineer Chief Counsel DL Sanders noted that the decision gives the State Engineer the necessary legal tools to "bring order to chaos."

The Court upheld the State Engineer's authority, reversing both the District Court and Court of Appeals and concluding that AWRM rules are constitutional: "We reverse both the Court of Appeals and the district court by holding that AWRM does not violate constitutional separation of powers limitations. On an issue not reached by the Court of Appeals, we reverse the District Court by holding that AWRM does not violate due process. Finally, addressing an issue not reached by either court below, we hold that AWRM is not unconstitutionally vague." *Tri-State Generation and Transmission Ass'n v. D'Antonio*, No. 32,704, slip op. (N.M. Sup. Ct., November 1, 2012), page 18.

The problem identified by the Legislature was that the "adjudication process is slow" for water rights in New Mexico and "the need for water administration is urgent… ." NMSA 1978, Section 72-2-9.1 (2003). "Under AWRM rules, the State Engineer identifies water districts in need of management and appoints a water master to manage these districts…The water master evaluates the available water supply in the district and then manages that supply according to users' priority dates, which necessarily involves denying water to junior users in favor of senior users when the supply is insufficient." *Id*. at 3. AWRM rules allow this interim priority management while waiting for the adjudication process to finally determine the specifics of the water rights.

The Court also held that "the State Engineer lacks the authority to adjudicate water rights" citing *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 772, 508 P.2d, 577, 581 (1973) for the proposition that only the courts have the power and authority to adjudicate water rights. "But whether the State Engineer may adjudicate water rights is not the issue before us; rather, we are addressing the State Engineer's statutory authority to administer water outside of the adjudication process." *Id*. at 9-10. Further important discussions by the Court on the parameters of water rights and the State Engineer's authority to regulate such rights are contained under the opinion's discussion of property rights and due process at pages 11-15. "A junior water rights holder cannot complain of deprivation when its water is curtailed to serve others more senior in the system, regardless of whether the junior's rights have been formally adjudicated. Such are the demands of our state's system of prior appropriation." *Id*. at 13.

The relevant statute also stated that the State Engineer was to use the "best available evidence" to determine the priorities to be used on an interim basis for management; Tri-State argued that the standard was unconstitutionally vague. After a fairly lengthy discussion regarding a statute's vagueness, the Court rejected Tri-State's argument. "While we recognize that certain fact-sensitive inquiries may arise, AWRM provides persons of reasonable intelligence with constitutionally adequate notice of what 'best available evidence' the State Engineer will consider. As *N.M. Mining Ass'n* stated, we will not require the State Engineer to draft these regulations for the benefit of a deliberately unsympathetic audience. Rather, like the discretion this Court afforded judges in *Segotta*, some independent reasoned judgment on the part of the State Engineer is properly permitted in making priority determinations on the basis of information considered reliable." *Id*. at 17.

"Today's ruling upholds the water management tools which are exactly what New Mexico needs to navigate the difficult drought conditions burdening our state," said State Engineer Scott Verhines. "The last twenty-four months have been the hottest and driest in recorded state history. Active Water Resource Management gives New Mexico the ability to respond to our variable water supply."

The lawsuit was originally filed in 2005 by Tri-State, New Mexico Mining Association, and the Middle Rio Grande Conservancy District against the New Mexico Office of the State Engineer as a reaction to the 2003 legislation directing the State Engineer to create Priority Administration rules. Those rules were created in 2004 and the subsequent lawsuit has bound this issue in a legal battle until now. "Our Active Water Resource Management rules as written in 2004 are now in effect," said Office of the State Engineer Chief Counsel DL Sanders. "Our staff will proceed to implement those rules in our seven priority basins." (Lower Pecos, Lower Rio Grande, San Juan River Basin, Nambe-Pojoaque-Tesuque, Mimbres, Rio Chama Basin, and Rio Gallinas — *see* map, page 5, this *TWR*).

For Additional Information: Case available at: www.nmcompcomm.us/nmcases/NMSCSlip.aspx; AWMR rules on NM State Engineer's website: www.ose.state.nm.us/water_info_awrm.html

Columbia Treaty

Treaty Termination Option

Treaty Analysis

Broader Consideration

White Paper Analysis

Examining Flexibility

Default Options

Flood Control Provisions

1964 Treaty

THE FUTURE OF THE COLUMBIA RIVER TREATY

by Nigel Bankes, University of Calgary & Barbara Cosens, University of Idaho College of Law

Editors' Introduction: As reported in earlier issues of ***The Water Report***, the Columbia River Treaty — which has provided the framework for cooperation between the United States and Canada as regards the Columbia River Basin's power generation and flood control facilities since September, 1964 — is undergoing review. This is due to the approaching date which, under the Treaty, is the earliest either party may give ten-year notice of the intent to terminate the Treaty (i.e., after the Treaty has been in effect for 50 years — September 2014, for Treaty termination in September 2024). *See* Stan Miller, *Columbia River, Basin, and Treaty,* ***TWR*** #101 & F. Lorraine Bodi, *Northwest Hydropower and Fish,* ***TWR*** #104.

The US Army Corps of Engineers and the Bonneville Power Administration are conducting public outreach, analysis, and examination of Treaty issues and options. This process is referred to as the "2014/2024 Columbia River Treaty Review" and is scheduled to be complete, with recommendations, by September, 2013 (*see*: www.crt2014-2024review.gov/).

As might be imagined, Treaty review and discussion now includes a much broader range of considerations than was the case fifty years ago. The original negotiations occurred prior to significant environmental legislation, including the federal Endangered Species Act and Clean Water Act. They also lacked any meaningful consideration of, or representation from, the Columbia River Basin's many indigenous tribes.

The following article has been adapted using excerpts from *The Future of the Columbia River Treaty*, a white paper published by the Program on Water Issues of the Munk School of Global Affairs at the University of Toronto (see below). The paper examines the flexibility available under domestic and international law to fashion a modified Treaty or another new agreement — perhaps more suited to current interests and concerns. The paper itself runs 116 pages and provides much more depth and detail than we are able to provide here. The paper is available for free download from the Program On Water Uses website: www.powi.ca/ (*see* "New Publication").

The excerpts used in this article have been minimally edited to better match *TWR* format.

INTRODUCTION

This paper examines the future of the Columbia River Treaty [hereafter "CRT" or "Treaty"]. In particular it assesses the degree of flexibility available under international law and the domestic laws of the United States and Canada for the relevant parties to negotiate and implement possible future legal arrangements for the Columbia River Basin (Basin). We do not argue for the adoption of any particular vision of those future arrangements, but take as a starting point the possibility that the future may hold something different from the two options that are allowed in the current text of the Columbia River Treaty. The two default options that the Treaty provides for are continuation and unilateral termination. We leave it to the relevant parties, including Basin stakeholders, to consider the additional specific scenarios they would like to explore. Our focus is to assess the degree of flexibility available under international and domestic law to adopt and implement any such alternative arrangements.

The CRT between Canada and the United States, concluded in 1961 and entering into force in 1964, addresses the cooperative management of the Columbia River but only for flood control and power purposes. The Parties share the resulting benefits. The Treaty has no fixed term but either Party may unilaterally terminate the Treaty in 2024 or later provided that it gives at least ten years notice. Unilateral termination will principally affect the sharing of power benefits. This is because the flood control provisions change automatically in 2024. Those changed flood control provisions survive Treaty termination as does the right of the US to operate Libby Dam. In addition to these rules the governing regime will revert to the Boundary Waters Treaty of 1909 and any relevant norms of customary international law. In addition to unilateral termination, the two States [US and Canada] may terminate the entire Treaty at any time by mutual agreement.

The 1964 CRT was ratified by the President of the United States on the advice and consent of a two-thirds majority of the Senate, and ratified by the federal Crown for Canada following parliamentary approval and agreement with the province of British Columbia. Implementation has proceeded at the federal level in the US through the appointment of the Administrator of the Bonneville Power Administration and Division Engineer of the Northwestern Division US Army Corps of Engineers as the "US Entity" and in Canada through the appointment of British Columbia Hydro as the "Canadian Entity."

Columbia Treaty

Power & Flood Control

Ecosystem Values

Treaty Alternatives

Ecosystem Functions

Public & Tribal Input

The Treaty addressed flood control and power values but it did not directly accommodate other values including fish and related ecological values. The Treaty focused on power and flood control because the Parties believed that these were the issues where the greatest benefits could be secured through cooperative action. States in the US portion of the Basin were involved in negotiations through their representatives in the Senate. The Province of British Columbia was also heavily involved in the negotiation of the Treaty on the Canadian side. Indigenous peoples were not involved in the development of the CRT on either side of the international boundary; neither in any significant way were other Basin residents.

The Entities have reached mutually acceptable annual supplementary agreements to meet some of the non-power and non-flood concerns but many believe that these arrangements do not go nearly far enough in accommodating ecosystem values and function. The supplementary agreements do not provide an avenue for re-consideration of the formula for sharing the costs and the benefits of providing enhanced power and flood control. The dynamic created by possible Treaty termination in 2024 (by notice given in 2014 or earlier) as well as the automatic changes to the flood control operations that will occur in 2024 will create both the opportunity, and perhaps the need, to take a broader look at the Treaty.

The Entities have begun their own assessments of alternatives futures for the CRT and have undertaken joint studies to inform some options.

The Phase I report of the Entities considered three alternatives:

(1) Option A - Treaty Continues: The Treaty continues post-2024 with its current provisions including expiration of certain flood control provisions.

(2) Option B - Treaty Terminated: The Treaty terminates in 2024, leaving only continuation of certain flood control provisions as in Option A.

(3) Option C - Continuation of Pre-2024 Conditions: The Treaty continues post-2024 with the existing pre-2024 flood control and other provisions. Option C would require new arrangements for implementation.

This paper starts with the premise that the two alternatives that the treaty text offers, unilateral termination (albeit with continuing but changed flood control provisions), and continuation (power provisions continue, flood control provisions change just as in unilateral termination) cannot be exhaustive of the possible futures. Changes in values since the early 1960s have led to important legislative developments in both countries including environmental assessment laws and endangered species legislation that requires that much greater attention be accorded to environmental and ecological concerns. Many Basin interests would like to see ecosystem function (variously defined as keeping reservoir levels higher or re-introducing salmon to the upper Basin, and operating in a manner consistent with the natural hydrograph in the lower Basin) elevated to a third purpose of international management. In addition, there is a much higher expectation of public participation in government decision making and resource management now than there was in 1964 and the legal status of indigenous peoples has been considerably enhanced since then. Finally, changing approaches to flood control and changes in energy markets since 1964 may lead some to seek to alter the arrangements for sharing the costs and the benefits of providing enhanced power and flood control.

Columbia Treaty

US Process

Canadian Process

US Negotiation Participants

ADDRESSING INTERNATIONAL AGREEMENTS

As noted above, this paper leaves to others the actual development of additional alternative scenarios. But to the extent that the relevant parties seek an alternative that is not articulated as a default position in the CRT, it will be necessary for them to consider that alternative in the context of the flexibility provided by international law, and the domestic law and practice of the two countries in relation to treaties.

In the US, the Constitution provides for Presidential ratification of international agreements following the advice and consent of a two-thirds majority of the Senate. However, actual practice indicates greater flexibility and some room for unilateral Executive action. Just how flexible and what process is to be followed in the alternative is left to the Executive and Congress to determine as a political matter. No bright line can be drawn. In general, the Executive in entering into international agreements will seek to rely on an existing treaty, or a general indication of acceptance or delegation of authority from Congress before taking unilateral action. Consultation by the Executive with Congressional representatives from the states in the Basin and members of the Senate Committee on Foreign Relations throughout will reduce the risks of not pursuing the advice and consent route to ratification.

In Canada, the path forward is clearer since the conclusion of international agreements is the responsibility of the executive. However, since the subject matter of the CRT engages the rights and interests of the province, British Columbia will take a leadership role in concluding any arrangements. Both governments will need to consult with First Nations [i.e., indigenous peoples] if their interests may be affected by the negotiations.

ADDRESSING ALTERNATIVES

NEGOTIATION, RATIFICATION, AND IMPLEMENTATION

It is useful to break the analysis leading to the conclusions above into three steps: (1) the negotiation of any new arrangement; (2) the ratification of any new arrangement; and (3) implementation — because the degree of flexibility varies with each step. Consideration of these three steps within the context of international law and the domestic laws of the two parties is the subject of chapters 3, 4, and 5 of the paper and is briefly summarized here then related to the overarching question of flexibility to alter international management of the Columbia River.

Negotiation:

The legal answer to the question of who can participate in the negotiation of any new international agreement is straightforward but warrants addressing due to the interest of Basin stakeholders in this issue. International law imposes no constraints on the inclusion of different regional interests within the negotiating team of a state. Under US law the Executive has the sole authority to negotiate an agreement, but may appoint a negotiating team that includes representatives of various departments, and may include as advisors members of Congress and other interested parties. Although nothing requires the inclusion of representatives of States [of America], Native American tribes, and other interested parties in the Basin, nothing prevents the Executive from appointing a team of representatives from the Basin to act in an advisory capacity during negotiations, provided the Executive either maintains final authority to accept the agreement or expressly delegates that authority to the negotiation team. It is also important to note that while the Executive may compose a negotiating team in any manner it sees fit, should the CRT be terminated in its entirety and management proceed under operating agreements among agencies, the US agencies are substantially more constrained in their authority to include Basin interests, with public comment being the primary avenue for input.

Columbia Treaty

Canadian Negotiation Participants

The position is similar under Canadian law: the conclusion (or amendment) of a treaty is an executive act of the federal government. As a practical matter the federal government will work collaboratively with a province to the extent that the subject matter of a treaty engages the property, resource, and legislative interests of the province. The Columbia River Treaty is such a treaty. The Province was heavily involved in the negotiation of the Treaty and will be similarly involved in any discussions as to its future. This is confirmed by the terms of the 1963 Agreement between Canada and British Columbia. Developments in constitutional and aboriginal law in Canada require both governments to consult an aboriginal people if the outcome of a proposed negotiation may affect (prospectively) the aboriginal or treaty rights of that particular people. Other residents of the Basin have no similar constitutional entitlement to be engaged in any such negotiations but the provincial government has made a political and ethical commitment to engage all residents of the Basin.

Ratification:

US Ratification Process

International law leaves all decisions as to the appropriate process for ratification of a treaty to the domestic law of the [national] states concerned. Under US domestic law, international agreements that have the force of a treaty in international law may be ratified by the Executive: (1) with the advice and consent of the Senate; (2) with prior or post-authorization of Congress or both; or (3) by the Executive alone. In the period since 1964 it has become increasingly common to use options (2) and (3) rather than seeking the advice and consent of the Senate prior to ratification. A 1984 Study indicated that 94% of international agreements reached between 1946 and 1972 were ratified without the advice and consent of the Senate. However, it is important to note that no clear line exists for when the advice and consent of the Senate is required. If implementation of an agreement requires additional action by Congress, such as the appropriation of funds, then unilateral Executive action is insufficient and at the very least post-Congressional action is required. In areas specifically under the purview of Congress such as commerce (and through commerce, water), the Executive may be on stronger ground when acting under an existing treaty or Congressional action addressing the matter. Nevertheless, practice is not entirely consistent with this statement. The US Supreme Court has been unwilling to weigh in on the balance between the Executive and Congress in entering into international agreements. Consultation by the Executive branch with key members of Congress (those from the Basin states and those on the Senate Committee on Foreign Relations) is an important step in determining the appropriate process and we strongly recommend that it begin early in the consideration of alternatives.

Unilateral Executive Action

If the question were the degree of flexibility available under US law to enter into an international agreement with Canada on the Columbia River without formalizing the treaty through the advice and consent of Congress and with participation by Basin residents, the response would be that there is some flexibility as noted above, providing that key members of Congress concur. That is not, however, the question. A treaty on the subject of the Columbia River already exists. With the backdrop of U.S. domestic law in general, the actual practice between the United States and Canada for similar purposes and under the CRT is informative. In fact, the US Department of State articulates a series of factors for determining when an international agreement requires the advice and consent of the Senate. Of particular importance in the context of the CRT are the preference of Congress and past US practice, particularly in its relations with Canada. In the area of water and other natural resources, the US has increasingly entered into agreements through unilateral Executive action with and without the umbrella of an existing treaty. The discussion of implementation [below] further informs this analysis.

The written constitution of Canada does not prescribe a particular form for the ratification (or termination) of an international treaty or a treaty amendment. In recent years the federal government of Canada has adopted a policy of tabling new arrangements in Parliament. It is less clear that such a policy will be applied to amendments to existing treaties or their termination. Recent practice suggests that the federal government does not consider that the policy applies to termination but the policy should extend to significant amendments to a treaty.

Implementation:

Although the flexibility to implement a new arrangement is related to the flexibility to negotiate a new arrangement, it also raises a question as to the degree of flexibility offered by the CRT as it stands. Thus, we treat implementation as a separate issue. International law has nothing to say about the manner in which [national] states implement treaties in domestic law other than that they must do so in good faith and that a state cannot rely upon its own constitution or laws as an excuse for failing to implement the terms of a treaty.

Columbia Treaty

Supplemental Agreements

Deviation & the Senate

Libby Coordination Agreement

Treaty Interpretation

Provincial Authority

Executive Act Implications

US IMPLEMENTATION ISSUES

Testimony by the Executive in the 1961 advice and consent proceedings in the Senate focused narrowly on the treaty purposes of flood control and hydropower and the limitation of discretionary decisions by implementing entities to technical decisions on reservoir operation based on water supply. This seemingly narrow view of flexibility under the CRT is tempered by the fact that actual implementation of the CRT has been quite flexible, including the 1964 Exchange of Notes that filled gaps in the implementation of the flood control provisions and in doing so made more specific agreements than were spelled out in the CRT. Similarly, the operating entities have used supplemental agreements to achieve benefits to both parties — including those related to fisheries. This flexibility parallels the increasing use of unilateral Executive action in general and suggests a relatively high degree of flexibility in dealings between the US and Canada to alter implementation under the existing treaty. A cautionary note is warranted — the further the Basin stakeholders seek to deviate from the CRT and its subsequent implementation, the more likely it is that a new agreement is needed and the more likely that it will require the advice and consent of the Senate prior to ratification.

Efforts to reconcile implementation under the CRT with a later-enacted domestic law (i.e. the [US] Endangered Species Act), provides an additional avenue for flexibility for the US to alter implementation under the existing CRT. US courts will uphold a later-enacted domestic law over a treaty in the event of conflict. Because the result of this interpretation would place the US in breach of the international agreement, courts will go to great lengths to interpret the domestic law in a manner that avoids a finding of conflict. Arguably the Executive is well advised to implement the domestic law in a manner that also avoids conflict. Thus, the basis for modifications to implementation to reconcile the CRT with the Endangered Species Act (e.g., through the Libby Coordination Agreement) lies in the need to avoid conflict and need not rest solely on the authority for unilateral Executive action. [Editors' Note: The February 2000 Libby Coordination Agreement resolved dispute on Canada's request for compensation for their Kootenay project power generation losses caused by changes to Libby Dam's operation to aid endangered sturgeon and salmon, and the related dispute on failure to agree to Assured Operating Plans.]

The issue of the scope of authority and degree of flexibility afforded the US Executive branch under a treaty is further informed by the questions of who has the authority to interpret a treaty and who has standing to challenge that interpretation? The US Supreme Court considers interpretation of an international agreement to be a matter for the political branches and has been unwilling to consider challenges to interpretation by either private parties or members of Congress. Thus, the ultimate decision on interpretation is left to a political battle of wills between the Executive and Congress. While this suggests the possibility of considerable flexibility, based on the analysis below, consultation between the two branches is strongly advised before the Executive embarks on a new interpretation of a treaty, and the greater the deviation from past practices, the more likely that consultation will lead to a push for seeking the advice and consent of the Senate.

CANADIAN IMPLEMENTATION ISSUES

The conclusion and ratification of a treaty does not change the division of legislative authority in Canada for the subject matter of that treaty. Accordingly, where the subject matter of a treaty like the CRT or any amendment of that treaty deals largely with provincial property and provincial legislative powers, it is the provincial government that obtains the benefits of the treaty and which has the authority to implement the treaty. The federal government remains responsible in international law for the fulfillment of the terms of the treaty. The federal and provincial governments dealt with this mismatch between authority and responsibility when the CRT was negotiated by entering into the 1963 Canada-British Columbia Agreement. This Agreement confirms the allocation of benefits to British Columbia and requires the province to fulfill the terms of the Treaty. The agreement further requires the province to indemnify Canada against any losses that Canada may suffer in the event that British Columbia fails to implement the obligations arising under the terms of the Treaty.

Given the executive status of a treaty in Canadian law, the most important preliminary task of the responsible level of government is to assess whether or not the treaty needs to be implemented by legislation or whether it can be implemented simply by executive action. In the case of the CRT, the two governments (and principally the provincial government) concluded that executive action alone would suffice. Thus, there is no federal or provincial "Columbia River Treaty Implementation Act." Instead, the CRT has been implemented by executive act and principally by executive acts of the provincial government and its agent BC Hydro (the designated Entity for Canada under the Treaty). This has proven to be efficient although the executive character of the implementation makes it difficult to provide appropriate avenues for public participation.

Columbia Treaty

Aboriginal & Treaty Rights

Past Practice

Senate Advice & Consent

The responsible government(s) will need to scrutinize any future arrangements for the Columbia River in light of the same question. If the Treaty expands to cover a broader range of values than just power generation and flood control it may be necessary to amend provincial or federal laws to accommodate any new responsibilities. It is not possible to make that judgment in the abstract; the assessment can only be made on a case-by-case basis. To the extent that any CRT amendment or future implementation may affect existing aboriginal or treaty rights it will be necessary for the responsible government(s) to consult and accommodate the affected First Nations.

US - CANADIAN TREATY PRACTICES IN GENERAL

Treaty practice in the international relations of Canada and the United States — examined in Chapters 6 and 7 [of the white paper] — informs the degree of flexibility that has been accepted in treaty implementation in dealings between the two countries. In Chapter 6 of the paper, we examine practice in relation to treaties other than the CRT. Most of the treaties examined are boundary or transboundary water agreements but we also look at the Migratory Birds Convention and the Pacific Salmon Treaty. Two questions inform the inclusion of this part of the paper: first, what do these practices tell us about the circumstances under which the amendment of such a treaty might require the advice and consent of the Senate; and second, what do these practices tell us about how the two [federal] states have involved regional interests in the negotiation and implementation of such arrangements?

As to the first question, the analysis shows that the practice is very mixed. Some amendments to treaties have received the advice and consent of Senate (e.g., a recent important amendment to the Migratory Birds Convention) while in other cases the US has found it possible to accommodate significant changes and additions to existing instruments without needing the approval of the Senate. Furthermore, recent (post-1950) bilateral water agreements have been ratified without securing Senate consent (although with the important caveat that the implementation of any obligation is subject to domestic approval of any necessary financial appropriations).

Columbia Basin Tribes

Joint Statement of Common Views on the Future of the Columbia River Treaty

The present Columbia River power and flood control system operations are negatively affecting tribal rights and cultural interests throughout the Columbia Basin. The Columbia River Treaty is foundational to these operations.

The Columbia River Treaty —

- Was negotiated and continues to be implemented without regard to the tribes' unique legal and political relationship with the federal government.
- Is narrowly designed for the benefit of power and flood control.
- Does not include ecological considerations for critical tribal natural resources.
- Does not include considerations of critical tribal cultural resources.
- Created a power and flood control system that degraded rivers, First Foods, natural resources, and tribal customs and identities.
- Significantly affects tribal economies.
- Excludes tribal participation in its governance and implementation.
- Limits what can be accomplished with non-Treaty agreements to meet tribal resource priorities.

The Columbia River Treaty is under review by the US and Canadian governments for reconsideration in 2014. Reconsideration of the Treaty provides an opportunity for the tribes to seek benefits not realized in 50 years of Treaty implementation.

The Columbia Basin tribes' interests must be represented in the implementation and reconsideration of the Columbia River Treaty.

The Columbia River must be managed for multiple purposes, including —

- Respect for the sovereignty of each tribal government - each tribe has a voice in governance and implementation of the Columbia River Treaty.
- Tribal cultural and natural resources must be included in river management to protect and promote ecological processes – healthy and useable fish, wildlife, and plant communities.
- Integrate the tribes' expertise of cultural and natural resources in river management.
- Equitable benefits to each Tribe in priority to other sovereign parties in Columbia River management.
- Respecting and preserving the benefits of settlement agreements with tribes.
- Recognize tribal flood control benefits.
- Protecting tribal reserved rights to current and future beneficial uses, in a manner consistent with ecosystem-based management.

In order to realize these principles, the tribes' collective voices must be included in the implementation and reconsideration of the Columbia River Treaty.

Thanks to Paul Lumley, Executive Director of the Columbia River Inter-Tribal Fish Commission, for forwarding this Statement

Columbia Treaty

Indigenous & Regional Interests

As to the second question, practice in relation to the Migratory Birds Convention (MBC) and Pacific Salmon Treaty (PST) shows how indigenous and regional interests may be taken into account in international negotiations. Aboriginal interests were a very significant driver of the 1985 Protocol to the MBC. In particular, it was important to ensure that the arrangement reflected Canada's constitutional obligations. Indigenous people were consulted closely on the language of those amendments. The amendments also recognize the importance of indigenous knowledge. The PST is more guarded, although the Yukon River amendments to the Annex to the PST do, for example, expressly recognize the priority attaching to aboriginal and subsistence harvesters. The PST also provides useful examples of how regional interests may be taken into account in implementing a treaty. However, such regional representation is not without its problems and may make it very difficult to achieve consensus. Indeed, the particular history of the PST suggests that US interests may be much more enthusiastic about using the PST as a model for accommodating regional interests than their Canadian counterparts.

COLUMBIA RIVER TREATY PRACTICES

Historical Practices

Chapter 7 of the paper examines the practice under the CRT. In this section we examine the extent to which the parties (the US and Canada) and the Entities have felt able to add to, elaborate upon, change or finesse the treaty in response to new developments, unexpected circumstances and changing values. The practice includes early agreements in relation to the Treaty (including the Protocol), as well as later agreements dealing with the return of the Canadian entitlement, the annual supplementary operating agreements, and the agreement in relation to the changed operation of the Libby dam. So far as we are aware, in only one case has the Executive in the US felt it necessary to return to the Senate for its advice and consent. That instance related to what seems, in retrospect, to be a fairly trivial matter — an additional flood control payment to Canada as a result of the advanced in-service date for the Duncan and Arrow storage facilities. In all other cases, the Entities have proceeded on their own (as in the case of the annual supplementary operating agreements and the Non-Treaty Storage Agreements) with the approbation of the Permanent Engineering Board and often accompanied by declarations that the arrangements have no adverse effect on Treaty obligations, or if the two [national] States are involved, then by way of an Exchange of Notes.

Columbia River Treaty

Tribal Nations in the United States

1 - Cowlitz Indian Tribe
2 - Confederated Tribes of the Warm Springs Reservation of Oregon
3 - Confederated Tribes and Bands of the Yakama Nation
4 - Confederated Tribes of the Colville Reservation
5 - Burns Paiute Tribe
6 - Confederated Tribes of the Umatilla Indian Reservation
7 - Spokane Tribe of Indians
8 - Fort McDermitt Paiute Shoshone Tribes
9 - Kalispel Tribe of Indians
10 - Coeur d' Alene Tribe
11 - Nez Perce Tribe
12 - Kootenai Tribe of Idaho
13 - Shoshone Paiute Tribe of the Duck Valley Indian Reservation
14 - Confederated Salish and Kootenai Tribes of the Flathead Nation
15 - Shoshone-Bannock Tribes of the Fort Hall Reservation

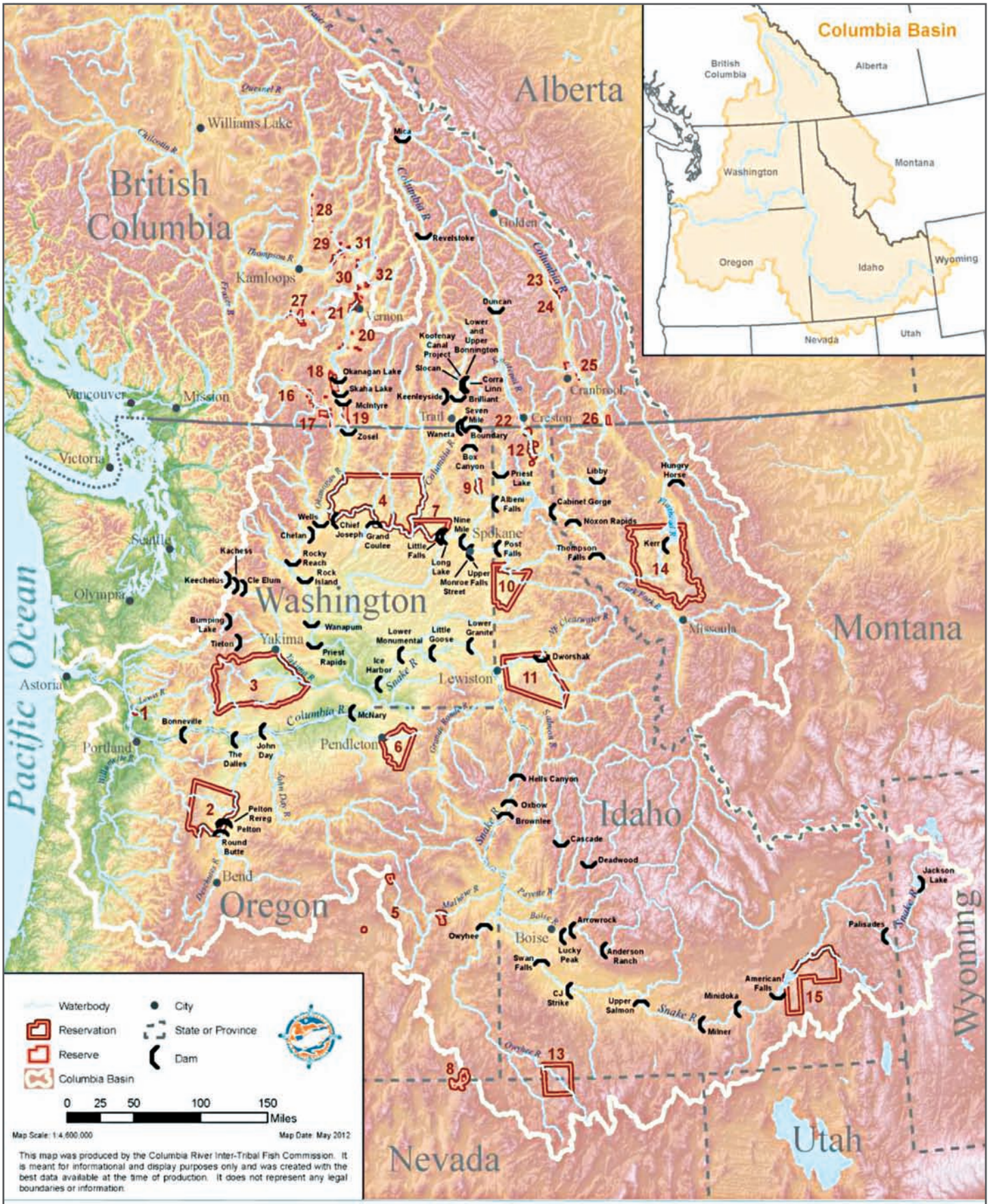
First Nations in Canada

Inside the Columbia Basin

16 - Upper Similkameen Indian Band (Okanagan Nation)
17 - Lower Similkameen Indian Band (Okanagan Nation)
18 - Penticton Indian Band (Okanagan Nation)
19 - Osoyoos Indian Band (Okanagan Nation)
20 - Westbank First Nation (Okanagan Nation)
21 - Suknaqinx/Okanagan Indian Band (Okanagan Nation)
22 - Lower Kootenay Indian Band (Ktunaxa Nation)
23 - Shuswap Band (Secwepemc Nation)
24 - ?a'kisqnuk First Nation (Ktunaxa Nation)
25 - ?aq'am (Ktunaxa Nation)
26 - Tobacco Plains Indian Band (Ktunaxa Nation)

Outside the Columbia Basin with Asserted Interests

27 - Upper Nicola Indian Band (Okanagan Nation)
28 - Simpcw First Nation (Secwepemc Nation)
29 - Adams Lake Indian Band (Secwepemc Nation)
30 - Neskonlith Indian Band (Secwepemc Nation)
31 - Little Shuswap Indian Band (Secwepemc Nation)
32 - Splatsin First Nation (Secwepemc Nation)



Columbia River Treaty: Tribal & First Nation Stakeholders
Adapted from *The Future of the Columbia River Treaty* Appendix A

Columbia Treaty

Key Points

The Program on Water Issues

The Program On Water Issues (POWI) creates opportunities for members of the private, public, academic, and not-for-profit sectors to join in collaborative research, dialogue, and education. POWI is dedicated to giving voice to those who would bring transparency and breadth of knowledge to the understanding and protection of Canada's valuable water resources. Since 2001, POWI has provided the public with analysis, information, and opinion on a range of important and emerging water issues. Its location within the Munk School of Global Affairs at the University of Toronto provides access to rich analytic resources, state-of-the-art information technology, and international expertise.
POWI website: www.powi.ca
POWI Director: Adèle Hurley, 416/ 946-8919
or adele@adelehurley.com

CONCLUSIONS

FLEXIBILITY & CONSTRAINTS

The paper focuses on two questions: How much flexibility do Basin interests have to craft a future which differs from either of the futures offered by the terms of the Treaty without encountering a significant risk of legal or constitutional challenge? And second, do the rules and practices of treaty-making constrain the involvement of Basin interests in the negotiation and implementation of any such different future? The short answers to these questions are:

- Other than the need for formal endorsement by the parties to effect a valid Treaty amendment, international law imposes no constraints on the process to amend the CRT.
- Under US constitutional law the Executive has a degree of flexibility in developing a new arrangement without obtaining the advice and consent of the Senate for the ratification of that arrangement. This flexibility arises from both the changing practices in the US in the area of foreign agreements and the need to reconcile treaty compliance with post-1964 domestic legislation (including the Endangered Species Act). Key to achieving this is to involve congressional delegations from the Columbia River Basin and members of the Senate Committee on Foreign Relations in any negotiations, as well as tribal interests.
- US constitutional law places the authority to negotiate with the Executive, however nothing limits the power of the President to appoint a negotiating team that includes local representation.
- Canadian constitutional law will be able to accommodate any of the visions of a different future for the CRT. Although the conclusion or amendment of a treaty is an executive act of the federal government, because the core subject matters of the CRT fall within provincial heads of power and property rights, the province of British Columbia will play a central role in the negotiation of any amendments.
- The governments of Canada and British Columbia have a constitutional duty to consult and accommodate First Nations whose interests may be affected by a Treaty amendment.
- International law calls for greater participation by indigenous people whose interests are affected by decision making than was the case in 1964.
- Analysis of the practice under the 1964 CRT demonstrates that a number of mechanisms have been effectively used to respond to changed circumstances, achieve mutual non-Treaty benefits, resolve disputes and avoid or resolve conflicts.

In sum, our analysis of the three steps involved in developing a new arrangement that goes beyond the options articulated under the CRT suggests the following:

First, international law will not constrain the parties in adopting a new arrangement.

Second, the different ways in which the US may ratify an international agreement means that it will be important for there to be clear communication between the Executive and key members of Congress in the US if it seems desirable to avoid the advice and consent procedure in Congress.

Third, in Canada, the Province [of British Columbia] will assume a leading role in any articulation and negotiation of a new arrangement for the Columbia Basin. In taking that role the Province has assumed a moral responsibility to consult with the residents of the Basin.

In addition, both the Province and [Canada's] federal government have a legal responsibility to consult and accommodate First Nations whose rights and interests may be affected by any such new arrangement.

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Nigel Bankes is a professor of law at The University of Calgary where he holds the chair in natural resources law and an adjunct professor of law at the University of Tromsø. Bankes works in various aspects of natural resources law including water law, energy law, oil and gas law, aboriginal law, and international environmental law. In 1999-2000 he was professor in residence in the legal bureau of Canada's Department of Foreign Affairs and International Trade. He is a member of the water advisory panel of the Columbia Basin Trust.

Barbara Cosens is a professor of law at the University of Idaho College of Law and the Waters of the West Program. Cosens works on the integration of law and science in water resource management and dispute resolution, water management and resilience. She has led an interdisciplinary team of faculty in the development of a course on approaches to the integration of law and science. She has served as both a negotiator and mediator in the settlement of Native American water rights. She is a member of the Universities Consortium on Columbia River Governance.

WaterSMART

Progress Report

Water Conservation

Energy Savings

Grants

Irrigation Improvements

Water Reuse

Efficiency & Optimization

Availability Assessments

Basin Studies

Water Quality

WATERSMART UPDATE

Edited/condensed from US Bureau of Reclamation / Department of the Interior materials

Editors' Introduction: The following article is composed of excerpts from *WaterSMART: A Three-Year Progress Report*, which was released in October by the US Department of the Interior, and additional information on the *WaterSMART* program accompanying the Report's release.

The Report's chapters include: Water Reuse: Developing and Supplementing Limited Supplies; Water Conservation and Efficiency: Stretching Existing Supplies; The Priority Goal for Water Conservation: 730,000 Acre-Feet by the End of 2013; A Comprehensive Landscape-Level Planning Strategy; The Energy-Water Nexus (extensive excerpt below); National Water Availability and Use Assessment; and Securing a Sustainable Water Future.

WaterSMART: A Three-Year Progress Report is available at: www.usbr.gov/WaterSMART

WaterSMART Progress — An Overview

The US Department of the Interior's WaterSMART program is saving water, finding better ways to stretch existing supplies, and helping partners plan to meet future water demands, according to a three-year progress report on the program released October 11th. The program was launched by Secretary of the Interior Ken Salazar in 2010 (*see* Morgan *TWR* #92; Thalacker *TWR* #101; and Briefs, *TWRs* #73, #75, #90, #98). Combining new initiatives with existing programs as part of a comprehensive strategy for sustainable management of water supplies in the US, WaterSMART projects, along with other conservation activities, are expected to save an estimated 587,839 acre-feet (AF) of water a year — enough water for more than 2.3 million people. These water conservation results put Interior well on the way toward achieving its high priority goal of saving 730,000 AF/year by the end of 2013.

The water savings and other accomplishments are detailed in the report, *WaterSMART: A Three-Year Progress Report*. "SMART" stands for "Sustain and Manage America's Resources for Tomorrow." In addition to saving water, the WaterSMART Program has conserved 40 million kilowatt-hours of electricity annually — enough power for 3,400 households. The water/energy nexus, which is receiving increasing attention throughout the country, was highlighted by Reclamation Commissioner Michael L. Conner: "Water and energy are linked. Water is necessary to generate power, while energy is required to store, move and treat water. Water saved is energy earned, and energy saved is water earned."

Many accomplishments were identified in the WaterSMART progress report, including the following:

- Since 2009, about $94 million in federal funding was awarded through Reclamation's WaterSMART Grants for 158 projects, leveraging more than $280 million in water management improvements across the West.
- Reclamation and the US Department of Agriculture's Natural Resources Conservation Service began a new partnership in 2011 to leverage funding for water delivery agencies and agricultural producers in California. Reclamation made $4.1 million in competitive WaterSMART Grants available to five irrigation districts for water management improvements within the delivery systems used by farmers. NRCS committed $7 million to farmers who receive water from those districts so on-farm conservation improvements can be made.
- About $231 million in federal funding was provided for Title XVI Water Reclamation and Reuse Projects since 2009. Eight projects have finished construction since that time, and eight others are expected to be completed in 2013. Project sponsors delivered about 262,000 AF of recycled water in 2011, providing a drought-resistant supply and new flexibility for water managers.
- Reclamation provided cost-shared funding for 129 smaller-scale efficiency projects through the Water Conservation Field Services Program, 69 of which are now completed.
- Reclamation has also provided more than $2.6 million in funding for 18 System Optimization Reviews since 2009, assisting project sponsors in their assessments of the potential for water management improvements in the future.
- As part of the National Water Census, the USGS has begun Geographic Focus Areas Studies — comprehensive technical assessments of water availability and use — in the Colorado, Delaware, and Apalachicola-Chattahoochee-Flint River basins.
- Interior agencies are also taking steps to conserve water at more than 2,400 of their own facilities.
- Reclamation contributed more than $12 million toward 17 Basin Studies in states across the West, assisting partners in planning for the long-term challenges of water scarcity, supply and demand imbalances, and the impacts of climate change.
- Launched in 2012, the Cooperative Watershed Management Program provided eight entities $333,500 in grants the first year. Its purpose is to improve water quality and ecological resilience and to reduce conflicts over water through collaborative conservation efforts in local watersheds.

WaterSMART

Nexus

Reclamation Hydropower

Funding Evaluations

Renewable Energy

WaterSMART & the Water/Energy Nexus

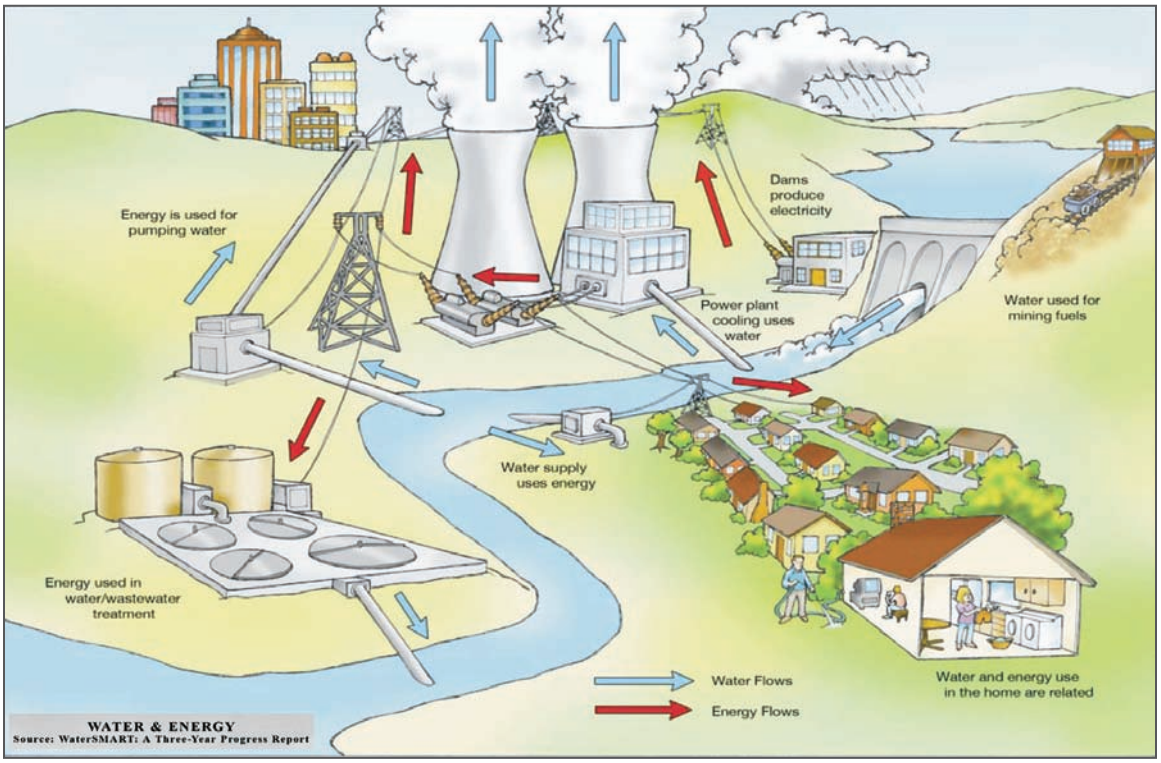
Water and energy are inextricably linked. Water is necessary to generate power, whether it is the kinetic source to turn a hydroelectric turbine; the thermal workhorse for a coal-fired power plant, cooling, and emissions control; or the water needed for mining, transportation, and decommissioning for other electricity-generating sources. Likewise, energy is a necessary component of water. Energy is required to store, move, and treat water on the supply side as well as the waste side. According to the California Energy Commission's 2005 Integrated Energy Policy Report, the State of California's annual water-related energy accounts for about 20% of the State's total electricity consumption, about a third of non-power plant natural gas consumption, and about 88 million gallons of diesel fuel consumption. The Oregon Water Resources Department estimates that about 21,000 pumps were used in 2008 to pump irrigation water in Oregon, resulting in electricity costs of about $49 million that year. In this sense, water saved is energy earned, and energy saved is water earned.

While Reclamation's earliest vision was to help reclaim the arid west, primarily through irrigation to make land agriculturally productive, Interior and Reclamation have long recognized the value of developing hydroelectric power as they strive to extract the most out of each drop of water. Today, Reclamation is the Nation's second largest generator of hydroelectric power, operating 53 hydroelectric power plants with a capacity of about 15,000 megawatts of electricity per year. Reclamation generates an average of 40 billion kilowatt-hours each year — enough to power almost 3.5 million homes. Power from Reclamation facilities is transmitted on the interconnected transmission grid and sold on the wholesale power market. Bonneville Power Administration and Western Area Power Administration, which are part of the Department of Energy, market Reclamation's power to customers. Reclamation, along with Bonneville and Western, serve customers in 17 western and central States.

In 2010, as Reclamation expanded existing programs and incorporated them into WaterSMART, several steps were taken to emphasize the link between energy and water — each in consideration of the other. Projects that implement renewable energy are now eligible for WaterSMART Grant funding. In its evaluation of funding proposals, Reclamation also prioritizes those proposals that describe the estimated energy savings from planned water efficiency improvements. These projects have included everything from installing new hydroelectric turbine generators on canals and conduits; to building storm water recharge systems — taking advantage of local water, thus minimizing the need to pump water from distant sources; to building wind power generation — replacing supplied power for pumping; to installing automated systems on facilities — avoiding driving and fuel consumption; to increasing availability of water for downstream hydroelectric facilities.

Water Delivery Projects

Since 2010, Reclamation has awarded six WaterSMART Grants for projects that incorporate renewable energy improvements into existing water delivery facilities. Together, those projects are expected to result in over 3500 kilowatts of new renewable energy capacity.



WaterSMART

Irrigation Hydropower

Pipeline Project

Stormwater Reuse

Efficient Landscaping

Closed-Pipe Systems

Remote Control

Funding Criteria

Recycled Water

Hydropower Needs

Through an FY 2011 WaterSMART Grant, the Boise Project Board of Control, near Homedale, Idaho west of Boise, is developing an 839 kilowatt power plant at the "Fargo Drop," a change in elevation in the existing irrigation canal system. The project will generate hydroelectric power that will be sold to Idaho Power Company, and revenues are expected to offset as much as 30 to 40 percent of the operational costs of the irrigation system. The project will also include installation of a Supervisory Control and Data Acquisition system to improve regulation flows in the Deer Flat Low Line Canal below the Fargo Drop diversion. The new power plant is expected to be operational in the spring of 2013.

This year, another project in Idaho that incorporates renewable energy improvements into the delivery system has been selected for WaterSMART Funding. The Consolidated Irrigation Company in the Bear River basin in southern Idaho will convert an unlined earthen canal to high-pressure pipe and install advanced measuring devices. These improvements are expected to result in water savings of over 9,400 acre-feet (AF) each year once the project has been completed. To take advantage of an elevation change as the new pipeline drops into Glendale Reservoir, the project also includes the installation of a 500-kilowatt hydropower facility to generate energy. The project is expected to begin construction in 2013.

Since 2010, Reclamation has provided funding for more than 60 water efficiency projects whose sponsors provided energy savings estimates. Those projects together are expected by their sponsors to save over 40 million kilowatt-hours annually, the amount of energy necessary for about 3,400 households. Sponsors have used a number of different methods and assumptions to estimate energy savings.

Water delivery facility projects include:

- The City of Torrance, California, was selected to receive a WaterSMART Grant in 2012. The City will make improvements so that stormwater can be filtered and used to recharge groundwater rather than flowing untreated to the ocean. The City estimates that by using this source of water over the twenty-year life of the improvement, about 1,500,000 kilowatt-hours of energy necessary to deliver an equivalent amount of water from outside the region will be avoided. For the estimate, the City drew on existing estimates that 3,000 kilowatt-hours of energy are required to move each acre-foot of water through the State Water Project to southern California.
- The Southern Nevada Water Authority, with a 2011 WaterSMART Grant, took a slightly different approach to formulate an energy savings estimate. The project is expected to generate 790 AF of water savings per year through rebates to residential property owners for replacement of turf grass with water efficient landscaping. To estimate energy savings, the Authority considered the energy necessary to treat and deliver water to the average customer: each AF of water saved is expected to yield an estimated 2,118 kilowatt-hours in energy savings. The Authority expects to save about 1,600,000 kilowatt-hours annually.

Some applicants have quantified energy savings that will result from a reduction in pumping associated with water savings. The South Board of Control in Owyhee, Idaho (2011 WaterSMART Grant) is converting open lateral canals to closed-pipe systems that will supply gravity-flow irrigation water to farm units, conserving an estimated 3,300 AF of water annually. Currently, nine pumps supply water to three canals to meet supplemental needs, consuming 18 to 20 million kilowatt-hours of energy annually. The Board of Control worked with the Bonneville Power Administration to calculate that avoided pumping of 3,300 AF of water each year will result in savings of 573,911 kilowatt-hours of energy annually.

Other applicants have quantified reductions in vehicle miles driven and reductions in carbon emissions expected to result from water efficiency improvements. The Shasta Community Services District near Redding, California, is implementing a project to allow remote monitoring and control of its water distribution system. The District estimates that it will avoid about 2,080 vehicle miles annually, or about 149 gallons of fuel, by reducing on-site visits. Additionally, some project sponsors have incorporated more energy-efficient equipment into their water delivery systems. The Whitestone Reclamation District in Washington is installing a new high-efficiency booster pump at its pumping plant. Installation of the high-efficiency pump is expected to save 12,343 kilowatt-hours of energy per year.

Reclamation has also restructured its WaterSMART System Optimization Review funding criteria to prioritize proposals that assess increasing the use of renewable energy and improve energy efficiency. As part of a System Optimization Review, the Southwest Kansas Groundwater Management District No. 3 is examining ways to increase both water and energy efficiency in its use of Arkansas River water supplies, including the potential for installing low-head hydroelectric facilities, wind powered headgates, and solar powered headgates.

Similarly, as part of new funding criteria incorporated into the Title XVI program in 2010, Reclamation prioritizes proposals based on the extent to which each project incorporates renewable energy or addresses the energy required for treatment and delivery of recycled water.

Hydropower Projects

Secretarial Order 3297, which guides the WaterSMART Program, is broad in its charge to integrate water and energy policies to support sustainable use of all natural resources. In addition to the water and energy components of WaterSMART specified above, Reclamation leverages its sustainable water and power influence through other programs. In March 2010, the Departments of the Interior, Energy, and Army entered into a memorandum of understanding to help meet the Nation's hydropower needs and to align ongoing and future renewable energy efforts.

WaterSMART

Potential Sites

Reclamation Facilities

Power Upgrades

Hydropower Optimization

Upcoming Grant Opportunity

Grant Purposes

Water Supply Sustainability

Eligible Entities

In April 2012 these agencies reported on progress, including the following accomplishments: Reclamation has identified 373 existing canals and conduits and 191 existing dam and reservoir sites with the total combined potential of generating an additional 1.565 million megawatt-hours annually. Additional details are available at: www.usbr.gov/power/CanalReport/ and www.usbr.gov/power/ AssessmentReport/ USBRHydroAssessmentFinalReportMarch2011.pdf

To assist hydroelectric developers in responding to these resources, Reclamation is drafting Reclamation Manual Directives and Standards for Lease of Power Privilege Processes, Responsibilities, Timelines, and Charges, which will guide applicants through a streamlined process for installation of power generation on existing facilities.

Reclamation is actively involved in the Basin Scale Opportunity Assessment to develop an approach to hydropower and environmental assessment, emphasizing sustainable energy systems and environmental protection and restoration. *See* http://basin.pnnl.gov.

Overall, since 2009, Reclamation has worked with its partners to install 77.5 megawatts of new hydropower generating capacity through power plant upgrades. In addition, 35.9 megawatts of capacity have been developed through the Lease of Power Privilege and Federal Energy Regulatory Commission licensing processes, with significant amounts of additional capacity under active consideration.

Reclamation is installing hydropower optimization systems for plant operators to identify and gain efficiencies. At most Reclamation facilities, a fixed water release dictates the available power capacity at any given point in time. By optimizing the plant to maximize the power capacity based on plant conditions such as efficiency curves, rough zones, outages, ancillary service demand, and the scheduled water release, the energy per acre-foot of water will also be maximized. This is tantamount to increasing plant efficiency through conventional methods, such as generator rewinds and turbine uprates. It can also offset the need to build new renewable power facilities such as new hydropower plants, wind farms, or solar arrays, all of which have significant environmental and budget impacts. Optimization adds extra generation capacity to the power system without expending any fuel or water. Reclamation estimates that this system can give operators the real-time information to improve operations by one percent across Reclamation, producing 16.2 megawatts of additional power at all times.

WaterSMART Funding

WATER SUPPLY SUSTAINABILITY PROJECTS

Reclamation is seeking proposals for its WaterSMART Water and Energy Efficiency Grant funding opportunity. Projects that are eligible must conserve water or result in other improvements that address water supply sustainability in the West. Proposals must be submitted as indicated on www.grants.gov by next January 17th. It is anticipated that awards will be made next spring.

Projects submitted for funding should seek to conserve and use water more efficiently, increase the use of renewable energy and improve energy efficiency, protect endangered and threatened species, facilitate water markets, or carry out other activities to address climate-related impacts on water or prevent any water-related crisis or conflict.

Applications may be submitted to one of two funding groups. Funding Group I: Up to $300,000 will be available for smaller projects that may take up to two years to complete. It is expected that a majority of awards will be made in this funding group. Funding Group II: Up to $1,500,000 will be available for larger, phased projects that will take up to three years to complete. Applicants may not request more than $750,000 in federal funds within a given year to complete each phase. This will provide an opportunity for larger, multiple-year projects to receive some funding in the first year without having to compete for funding in the second and third years. The second and third year of funding is dependent upon future appropriations.

This funding opportunity is also available for water management improvements that complement other ongoing efforts to address water supply sustainability. Through the WaterSMART Basin Study Program, for example, Reclamation is working with State and local partners, as well as other stakeholders, to comprehensively evaluate the ability to meet future water demands within a river basin. Partners who have completed a basin study may apply for cost-shared funding to implement adaptation strategies that meet the eligibility and other requirements of this funding opportunity. In addition, funding is available for water delivery system improvements that will enable farmers to make additional on-farm improvements in the future, including improvements that may be eligible for Natural Resources Conservation Service funding.

Entities that are eligible for funding include states, Indian tribes, irrigation districts, water districts, or other organizations with water or power delivery authority in the 17 western states, American Samoa, Guam, the Northern Mariana Islands and the Virgin Islands. Combined with the non-federal cost-share, the projects selected will complete $32.4 million in improvements.

For Additional Information:
Peter Soeth, Reclamation, 303/ 445-3615 or psoeth@usbr.gov
Request for Proposals announcement at: www.grants.gov (funding #R13SF80003)
WaterSMART website: www.usbr.gov/WaterSMART

LAWSUIT CHALLENGES ALL WATER QUALITY TRADING

Comments by Tom Lindley, Perkins Coie (Portland, OR)

Editors' Introduction: Readers will recall that Tom Lindley, along with Bobby Cochran and Nicole Robinson Maness, authored Water Quality Trading — the lead article in our September issue, ***The Water Report*** #103.

WQ Trading Lawsuit

Promissing Tool vs. "Right to Pollute"

TMDL Provisions

Agency Authority

CONSIDER THREE STATEMENTS:

(1) "If we ever build another chiller in Oregon at the expense of ecosystems, we've failed." (Dick Pedersen, Director, Oregon Department of Environmental Quality).

(2) "I think [water quality trading] is the future." (Ben Grumbles, former US EPA Assistant Administrator for Water).

(3) "The notion that polluters should be allowed to profit by selling the right to pollute the Bay to other polluters not only violates the letter of the Clean Water Act, but offends the very spirit of the law." (Food & Water Watch (FWW) attorney Michele Merkel).

For many of us who have been part of the success of water quality trading in the Pacific Northwest, from its great ecosystems benefits through its economic benefits, the October 3rd statement announcing a federal lawsuit filed by FWW and Friends of the Earth (FoE) illustrates the concerns that arise due to ignorance of standards outside their locale, and to misunderstanding of the Clean Water Act (CWA) and how it is implemented in ways that lead to the greatest environmental protection and enhancements.

The new lawsuit (*Food and Water Watch and Friends of the Earth v. United States Environmental Protection Agency and Lisa Jackson*, US District Court for District of Columbia, 12-cv-01639-RC) seeks to overturn provisions in EPA's **t**otal **m**aximum **d**aily **l**oad (TMDL) for the Chesapeake Bay. That TMDL specifically allows states to establish water quality trading regimes between point and nonpoint sources of pollution in order to meet pollution reduction goals. This new 'trading" litigation is the second challenge to that TMDL; certain industry groups previously sued to vacate the entire cleanup plan, arguing that it oversteps agency authority (*American Farm Bureau Federation, et al. v. United States Environmental Protection Agency*, US District Court for the middle District of Pennsylvania, Case No 11-cv-00067-SHR). That case however challenges the specifics of the TMDL development and imposition, and not the trading programs within it.

The Chesapeake Bay TMDL's proposed trading programs would allow point sources to exceed permit limits if they buy "credits" for pollution reductions made elsewhere — often at farms and other nonpoint sources of pollution, where nutrient runoff can be reduced at a cost substantially less than a wastewater treatment plant or other point source would face. According to the US EPA's 2003 guidance on water quality trading, EPA says such programs can be aligned with CWA requirements "by including provisions for trading in water quality management plans, the continuing planning process, watershed plans, water quality standards, including antidegradation policy and . . . incorporating provisions for trading into TMDLs and [National Pollutant Discharge Elimination System] permits." This is the same sort of trading that has been successfully implemented by Clean Water Services in Oregon (*see* Cordon, *TWR* #24; Horton and Gaddis, *TWR* #94), and by The Freshwater Trust and The Willamette Partnership over the past decade. (*See*, e.g., Cochran, Lindley & Maness, "*Water Quality Trading*," *TWR* #103, 9/15/2012: "Water Quality Trading") Water quality trading has become so accepted in the Northwest for its broad benefits by federal, State, and local agencies that it is now the subject of numerous governmental and private training programs.

Nevertheless, according to the new complaint, "pollution trading" is allowed under the CWA neither between point-and-point nor between point and non-point sources (paras. 67, 68). Also according to the complaint (para. 71), "Point source permitting provisions of the CWA, with its source-by-source reduction mandate, do not allow for such sources to avoid any permit limitations — including technology-based, water quality-based or wasteload limitations — through a pollution trading program." Members of FWW and FoE reportedly stated in an October 3rd conference call that pollution trading programs will be vulnerable to nonpoint source owners selling credits based on "fictitious pollution reductions." If so, this should be recognized as a short-coming of the specific measures taken to implement the trading programs, and not the CWA itself. EPA has encouraged Chesapeake States to use "transparent" and "verifiable" methods of confirming nonpoint reductions when engaged in such water quality trading.

FOR ADDITIONAL INFORMATION:
TOM LINDLEY, Perkins Coie LLP, 503/ 727-2032 or TLindley@perkinscoie.com

Tom Lindley leads the national Environment, Energy & Resources Practice at the law firm Perkins Coie LLP. For over 25 years, Tom has represented wastewater and stormwater dischargers on every aspect of permitting and compliance. Tom helped to conceive and create the nation's first watershed-based multiple source NPDES permit, is actively engaged in efforts to expand water quality trading, and is on the Advisory Board for the Smithsonian's Environmental Research Center.

WATER BRIEFS

PRISON SENTENCE WA
CWA VIOLATIONS

The Water Report #99 (May 15, 2012) contained a Water Brief about a guilty plea for felony violations of the federal Clean Water Act (CWA) from Bryan Stowe and Stowe Construction. On October 10, the US Attorney's Office for the Western District of Washington announced that Bryan Stowe, a prominent Sumner, Washington developer, was sentenced to prison in US District Court in Tacoma for a felony violation of the CWA. Bryan Stowe, 65, was sentenced to six months in prison, one year of supervised release, and a $300,000 fine for knowingly violating a National Pollutant Discharge Elimination System (NPDES) permit. In addition, Stowe will make a $100,000 payment to the National Fish and Wildlife Foundation for environmental projects targeting resources impacted by the illegal discharges. Stowe, as president and co-owner of Stowe Construction, Inc., admitted knowingly violating the Construction General Storm Water Permit for the Rainier Park of Industry project in Sumner. Permit violations contributed to two major landslides at the site in 2010 and 2011, both of which forced closures of the West Valley Highway.

This case is one of the first stormwater pollution criminal cases brought in the United States. At sentencing US District Judge Ronald B. Leighton referenced the Clean Water Act saying, "These regulations serve a broad and useful purpose. You violated them persistently. You were wrong." US Attorney Jenny Durkan said, "This defendant chose profit over environmental stewardship, repeatedly scoffing at those who tried to get him to literally 'clean-up his act.' This prison sentence shows we will not allow violators to think they can simply pay money later for a crime they commit today. Today they understand that the price also includes their liberty."

Last month Stowe Construction, Inc. was sentenced to a $350,000 criminal fine. Both Stowe and the company will be subject to a court imposed stormwater compliance plan for all current and future development sites. Tyler Amon, Special Agent in Charge for EPA's Criminal Investigation Division in the Northwest stated: "…Defendant Bryan Stowe and his company chose profit over protection, resulting in a landslide, water pollution and road closures. The EPA and Washington Department of Ecology want this criminal case to send a message to developers: Serious environmental crimes will be vigorously pursued."

According to records filed in the case, Bryan Stowe, acting on behalf of Stowe Construction, obtained coverage under the NPDES Construction Storm Water General Permit for the West Valley Highway site in October 2006. The permit required Stowe Construction to prepare and implement a plan to prevent the discharge of pollutants through use site improvements and practices designed to minimize and eliminate the migration of pollutants from the site to nearby waters. Stowe admits in the plea agreement to failing to install adequate improvements and practices between 2007 and 2011. These failures led to significant discharges of pollutants from the site to adjacent wetlands and streams. In addition, the plea agreements acknowledge that weekly site inspection reports and discharge sampling reports intended to assist regulators in assessing the adequacy of site improvement and practices were falsified. State and federal regulators monitoring the site issued several administrative compliance orders in an unsuccessful effort to bring Stowe and the company into compliance.

In their request for a prison sentence, prosecutors wrote to the court that the crimes did significant environmental damage. "Here, the permit violations are symptoms of the defendant's disregard for all regulatory oversight that might hurt his bottom line. He was not swayed by violation letters, administrative orders, or civil penalties. His actions exhibit a total lack of respect for the law — a law he was well aware of — as well as for the environment. Mr. Stowe's non-compliance caused increased sedimentation in the White River and a neighboring wetlands restoration project, as well as a number of landslides," prosecutors wrote in their sentencing memo.

For info: US Attorney's Office website: www.justice.gov/usao/waw/press/2012/October/stowe.html

VEGAS WATER REQUEST UT/NV
UTAH INDEPENDENT REPORT

On October 29, Governor Gary Herbert of Utah released a report (Report) by an independent panel of Utah water lawyers, which concluded that the Snake Valley Water Agreement with Nevada would be preferable to a protracted lawsuit between the two states and that the two related agreements "are in the best interest of Utah's citizens." The Report concluded at page 11: "We believe these agreements offer the States a reasonable and frankly a preferable alternative to equitable apportionment litigation between Utah and Nevada." Equitable apportionment litigation would be decided by the US Supreme Court only upon permission ("leave") from the Supreme Court to hear such litigation.

The three attorneys, Steven Clyde, Dallin Jensen and Warren Peterson, were appointed by Governor Herbert to review the agreement. Back in 2009, the two states appeared to have reached an agreement after years of negotiation on how to divide groundwater in the Great Basin along the Utah-Nevada line but Governor Herbert refused to sign the agreement following pressure from Utah water users and conservationists. The Southern Nevada Water Authority's applications for groundwater are pending before the State Engineer's office of Nevada (*see* Briefs, *TWRs* #98 and #103).

The Report summarized the probable outcome if Utah refused to sign the agreements: "In the absence of these agreements, Nevada, because of its more pressing need for water, may simply appropriate the remaining available water in the Snake Valley Groundwater System to the exclusion of Utah's needs for future water supplies. The Snake Valley Water Agreement ensures that Utah will have an equal share of this limited but shared groundwater resource, regardless of the relative pace of development in both states, while providing a process to

WATER BRIEFS

identify and mitigate potential harms both to water users, as well as to the environment." The Report noted that "without the agreements, it would simply be a race to development" and that "Nevada's current needs for water will all but guarantee that it beats Utah to the water supply." Report at 4.

How Utah ultimately handles the issue remains to be seen as opposition still exists despite the expert's report. Ally Isom, Governor Herbert's Deputy Chief of Staff, issued the following statement regarding the Report: "The Governor is determined to protect every drop of Utah's water and has asked Rep. Patrick Painter to include the report on Water Development Commission's November agenda. Bottom line: This is about doing what is in the best long-term interests for the State of Utah." The Water Development Commission meeting was scheduled for November 13th.

The main points regarding equitable apportionment of groundwater cited in the Report include the statement that the "Agreement allocates this shared ground water resource on an equal 50/50 basis…[and] protects existing Utah appropriated water rights for uses including irrigation, stock water, and domestic use and for habitat protection at Fish Springs." Report at 2. The specific numbers regarding groundwater allocation are noted in the "Key Points of Agreement" part of the Report as follows: 55,000 acre-feet year (afy) to Utah and 12,000 afy to Nevada of presently allocated water; 6,000 afy to Utah and 35,000 afy to Nevada of unallocated water; and 5,000 afy to Utah and 19,000 afy to Nevada of "reserved water." These allocation numbers "show that Utah receives most of the water presently allocated, but Nevada most of the water yet to be allocated. This will allow Nevada to 'catch up,' eventually resulting in an equal 50-50 division, but only if sufficient groundwater is available without groundwater 'mining.'" Key Points, at page 1.

For info: Nate McDonald, Gov. Herbert's office, 801/ 538-1509 or nmcdonald@utah.gov; Report and Key Points available from *TWR* — TheWaterReport@yahoo.com

INSTREAM WATER RIGHTS CA

TRIBES CRITICIZE USFS' ESA INACTION

On October 10, the Karuk Tribe and the Yurok Tribe issued a joint press release entitled "*Forest Service Ignores Responsibility to Protect Endangered Salmon.*" The Tribes asserted that the US Forest Service (USFS) had taken no action since August 3rd while its water right on the Scott River — a vital stream for Endangered Species Act (ESA) listed salmon — is not met. The Scott River is a tributary to the Klamath River in northern California and is of vital importance to Chinook salmon, Pacific lamprey, steelhead trout, and ESA-listed coho salmon. Scott River water was allocated to USFS by a water rights adjudication that awarded flows designed to protect fish.

As of October 10, hundreds of adult salmon were circling at the mouth of the Scott waiting for enough water to migrate up the Valley and spawn, according to Yurok Fisheries Program Manager Dave Hillemeier, and "these kinds of conditions can lead to disease outbreaks and fish kills." Karuk Tribal Chairman Buster Attebery noted his frustration, "During meetings between the USFS and the Karuk Tribe, the Tribe has asked that attention be brought to the failure of meeting water needs... the Klamath National Forest has yet to take any action regarding the reported shortage in water and the obvious failure to protect the fishery."

The USFS water right for the month of August is 30 cubic feet per second (cfs), with a right of 40 cfs in October to accommodate adult migration. On October 10, the river was running at 18 cfs, not enough water for migrating salmon to make it up river to reproduce according to the press release.

Despite the fact that the number of days per year that the USFS water right is not met has increased steadily since the 1980 adjudication, the agency has never lodged a complaint with California Water Resources Control Board to protect its water rights. The Tribes urged USFS to formally notify the California Water Board of the situation and make a call on any junior water rights holders.

Local water users have a different view of the situation. According to one website that includes a byline of "Scott Valley Protect Our Water" (http://pienpolitics.com/?m=20121025) as of October 25th there was 32 cfs flow in the Scott River ("plenty of water flow") and the diversions from the Scott River are based on legal water rights for stockwatering purposes.

For info: Craig Tucker, Karuk Tribe, 916/ 207-8294; Matt Mais, Yurok Tribe, 707/ 954-0976; USFS website: www.fs.usda.gov/main/klamath/home

CONTAMINATION GUIDE US

WATER UTILITIES RESPONSE

EPA has released the *Containment and Disposal of Large Amounts of Contaminated Water: A Support Guide for Water Utilities*. The guide serves as a reference document for the preparation and response to a contamination event when rapid decision-making is needed. It provides recommendations primarily to drinking water, wastewater and stormwater utilities following an all-hazard **c**hemical, **b**iological, and **r**adiological (CBR) contamination event. Secondary users of the guide are decision makers involved with planning and disposal at the federal, state, local, and tribal levels.

For info: http://water.epa.gov/infrastructure/watersecurity/emerplan/upload/epa817b12002.pdf

OIL & GAS LEASE BUYOUT WY

LEASES TO BE RETIRED

The Hoback River in western Wyoming had climbed to fifth on American Rivers' list of "America's Most Endangered Rivers" due to the threat of industrial-scale gas drilling in its headwaters. At an October 5th news conference, the Trust for Public Land (TPL) announced that it has entered into an agreement with Plains Exploration & Production Company (PXP) to purchase oil and gas leases on 58,000 acres of environmentally sensitive land located at the headwaters of the Hoback River. Once the transaction is completed, the leases will be retired, protecting the land from fracking and other forms of oil and gas drilling.

This marks the second major lease buyout on a Wild and Scenic river in the Northern Rockies this fall. In September, The Nature Conservancy

WATER BRIEFS

and the Nature Conservancy of Canada announced they had raised $10 million to buy out mining and energy leases at the headwaters of the North Fork of the Flathead River near Glacier National Park in northwest Montana. The North Fork appeared in America's Most Endangered Rivers report in 2009.

"This is an outstanding outcome for the people of Wyoming — a true 'win-win' resolution. It respects both the wishes of local residents and the legal rights of leaseholders," said Wyoming Governor Matt Mead. TPL is currently working to raise the $8.75 million needed to complete the transaction by December 31. As of October 5, the organization has received donations and pledges of $4.5 million from a combination of individuals and foundations. Under a law passed by Congress in 2009, no federal funds can be used to purchase oil and gas leases in the Wyoming Range, where the Hoback headwaters are located. "PXP is pleased to have worked with the Trust for Public Land on this agreement. From the first day the Wyoming Range Legacy Act was passed, PXP has repeatedly stated our willingness to consider a buyout of our lease position if a valid offer were tendered. This agreement represents a win-win for all parties," said Steve Rusch, Vice President of EH&S and Government Affairs at PXP.

The Hoback is known for its rich hunting and fishing grounds and astounding natural beauty. Part of the Greater Yellowstone area, the lands and waters affected by the oil and gas leases are home to thriving populations of native cutthroat trout, elk, mule deer, antelope, and scores of other species. In recognition of its pristine water quality and stunning array of wildlife, Congress designated the Hoback as a Wild and Scenic river in 2009, which protected a total of 13 rivers and 400 river miles surrounding Jackson Hole.

For info: Tim Ahern, TPL, 415-495-4014 or www.tpl.org/

FRACKING LAWSUIT CA

ENFORCEMENT ISSUE

On October 16, the non-profit environmental law firm Earthjustice filed a lawsuit on behalf of the Center for Biological Diversity, Earthworks, Environmental Working Group, and Sierra Club to require California state regulators to enforce existing law regulating the oil and gas industry to protect public health and the environment. The lawsuit, filed in Alameda County Superior Court, charges that the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) has failed to consider or evaluate the risks of fracking, as required by the California Environmental Quality Act (CEQA). Although DOGGR is the state agency charged with regulating all oil and gas well activity in California, according to Earthjustice the agency admits it has not permitted or monitored its impacts and has never formally evaluated the potential environmental and health effects of the practice, even as it continues to approve new permits for oil and gas wells.

"Right now, the people of California don't know where or when the drillers are fracking, what chemicals they are using, what pollutants they're releasing into the air and water, and what other risks they are taking. That's because the state hasn't required them to disclose any information on fracking activities," said Earthjustice attorney George Torgun. "Public outcry has finally forced the Department to take a look at fracking. They've held workshops and say they're considering regulations. But the problem needs attention now before too much damage is done."

Earthjustice asserts that under current DOGGR policy, the agency has been rubberstamping oil and gas drilling activity, declaring it exempt from environmental review or issuing "negative declarations" that such activity will have "no significant effect" on the environment, without any study or mention of the potential impacts from fracking. Enticed by claims that more than 14 billion barrels of oil are trapped in the Monterey and Santos shale formations, oil and gas companies have commenced an exploratory drilling and fracking campaign beneath central and southern California. These shale formations span 1,700 square miles across the San Joaquin Valley to the Pacific Ocean, including the Los Angeles basin, a region crisscrossed with active earthquake faults, according to Earthjustice's press release.

For info: Kathleen Sutcliffe, Earthjustice, 202/ 797-5235 or http://earthjustice.org/

PUGET SOUND REPORT WA

PARTNERSHIP'S NEW BIENNIAL REPORT

The Puget Sound Partnership is required to produce a *State of the Sound* report every two years concerning Puget Sound in Washington. Puget Sound, the second largest estuary in the US with 2800 square miles of inland waters, is fed by 10,000 rivers and streams. The statutory reporting requirements are to document the current status of the ecosystem, as well as status of implementation and funding. This information can be used to inform decisions about changes to funding, programs, or policies that might accelerate the regional progress towards ecosystem recovery, including more efficient use of resources.

The Partnership recently released the *2012 State of the Sound, A Biennial Report on the Recovery of Puget Sound* (Report). This is the second report to the Legislature on the status of restoration efforts. "The *State of the Sound* also reports on our accomplishments in the use of state and other funding and recommendations on what other measures are necessary to sustain the effort, including realignment in the use of funds. The purpose of the analysis undertaken to prepare the *2012 State of the Sound* is to sharpen our focus on the pathway ahead. Along with the 2012 Action Agenda — which identified Strategic Initiatives that include what our partners believe represent the highest priorities — this report describes the measures we need to move forward." Report at 9.

The Report is organized around ecosystem indicators and targets adopted by the Leadership Council in 2010-2011 as the primary focus of reporting on ecosystem recovery. The Report contains five major elements: 1) information on the status of the ecosystem; 2) status of the implementation effort; 3) role of adaptive management in regional decision-making; 4) allocation and

WATER BRIEFS

effectiveness of funding for recovery; and 5) alignment of programs with priorities.
For info: www.psp.wa.gov/sos.php

WATER WASTE SUIT CA
CHINATOWN REVISITED?

The Los Angeles Department of Water and Power (LADWP) filed a federal lawsuit on October 12 to force the Great Basin Unified Air Pollution Control District (Great Basin) to halt what LADWP called "its systematic and unlawful issuance of water-wasting orders to L.A.'s customers." LADWP alleged that Los Angeles water consumers have already spent $1.2 billion over the past decade to control Owens Lake dust, in compliance with regulations, but recent orders by Great Basin would require LADWP to spend another $400 million for mitigation of dust that it did not cause. These orders, according to the lawsuit, are in violation of the California State Constitution and federal and state laws and will, unless they are halted, result in the continued waste of billions of gallons of scarce California drinking water. In addition to Great Basin, LADWP named the California State Lands Commission, US EPA and BLM, and the California Air Resources Board as defendants. *City of Los Angeles v. Great Basin, et al*., Case No. ____, (Oct. 12, 2012).

The 40 page Complaint, filed in the US District Court for the Eastern District of California, alleges, among other causes of action, that Great Basin and its Air Pollution Control Officer, Theodore P. Schade, have: ignored statutory limitations on their authority; acted in an arbitrary and capricious manner; issued orders that originate from an unenforceable legal source; acted to treat Los Angeles water customers differently than any other similarly situated consumers anywhere else in California or the United States; issued orders based on flawed science in an attempt to force Los Angeles consumers to mitigate dust emissions that were not caused by LADWP; and compelled LADWP to engage in an unconstitutional waste of water, to the detriment of both California's overall water supply and water consumers in the City of Los Angeles.

LADWP General Manager Ron Nichols concluded: "Great Basin's top official, Mr. Schade, has said publicly that he does not need to pursue other responsible parties or explore innovative solutions because he already has Los Angeles water customers right where he wants them, as 'fish on a hook.' Today, the people of Los Angeles served notice that while we intend to continue to honor our obligations at Owens Lake, our water consumers will no longer be victimized by an unaccountable local regulator." Schade was not named as a defendant in the lawsuit but it does accuse him of "bias, prejudice or interest in the proceedings" and requests the court to bar him from presiding over future decisions that affect the City. *Id*. at 38.

Some of the allegations regarding the waste of water are contained in the Complaint at page 3: "The District and APCO's [Air Pollution Control Officer's] orders also compel the City to use water to control dust thereby causing the City to engage in the unconstitutional waste of water. Forcing the City through regulatory fiat to undertake water intensive projects for dust mitigation (when other reasonable feasible means of dust mitigation exist) also violates the City's legal and fiduciary responsibility to its water customers. Specifically, the mitigation measures ordered by the District, through the APCO, require and thereby deprive the City of 95,000 acre-feet of water that is wasted to control dust on the Owens Lake bed. 95,000 acre-feet of water is more water than is consumed by the City of San Francisco in one year." Additional allegations regarding the use of water required for dust control are found on pages 13-14 of the Complaint, including the assertion that the "…vast majority of dust controls ordered by the District, and constructed by the City on Owens Lake, involve placing high quality water on the saline lakebed to control dust. In this era of dwindling water supplies, the District's orders necessitate the City to replace up to 95,000 acre-feet of water from other sources."
For info: Complaint and other relevant materials at: www.ladwp.com/OwensLake

PIPELINE & THE ESA WEST
9TH CIRCUIT HOLDING

On October 22, the 9th Circuit Court of Appeals (Court) ruled that the US Bureau of Land Management (BLM) and US Fish and Wildlife Service (USFWS) violated federal law — both the Endangered Species Act and the National Environmental Policy Act — in approving the 700-mile Ruby pipeline from natural gas fields in Wyoming to southern Oregon. The decision requires USFWS to prepare a new "biological opinion" requiring additional mitigation for nine endangered fish species; it requires the BLM to prepare a new analysis of the pipeline's cumulative effects on sensitive sagebrush. *Center for Biological Diversity v. BLM, et al*., Case No. 10-72356, 9th Circuit (Oct. 22, 2012).

The appeal addressed issues raised by the Center for Biological Diversity, Defenders of Wildlife et al., and the Summit Lake Paiute Tribe under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. The Court held found in favor of the Petitioners: "Specifically, we resolve petitioners' claims that the Biological Opinion and its accompanying Incidental Take Statement were arbitrary and capricious because: (1) the Biological Opinion's 'no jeopardy' and 'no adverse modification' determinations relied on protective measures set forth in a conservation plan not enforceable under the ESA; (2) the Biological Opinion did not take into account the potential impacts of withdrawing 337.8 million gallons of groundwater from sixty-four wells along the pipeline; (3) the Incidental Take Statement miscalculated the number of fish to be killed, by using a 'dry-ditch construction method' for water crossings; and (4) the Incidental Take Statement placed no limit on the number of 'eggs and fry' of threatened Lahontan cutthroat trout to be taken during construction." *Slip Op.* at 12714-12715.

Constructed in 2010, the 700-mile Ruby pipeline cuts across hundreds of streams in Wyoming, Utah, Nevada and Oregon, directly affecting five endangered fish: the Lahontan cutthroat trout, Warner sucker, Lost River sucker,

WATER BRIEFS

shortnose sucker, and Modoc sucker. The natural gas pipeline extends from Wyoming to Oregon, over 678 miles and the right-of-way encompasses approximately 2,291 acres of federal lands and crosses 209 rivers and streams that support federally endangered and threatened fish species. By pumping more than 300 million gallons of water for use in dust abatement and "hydrostatic testing," the pipeline also affected four endangered Colorado River fish: the Colorado pikeminnow; humpback chub; razorback sucker; and bonytail chub.

Although the pipeline builder promised voluntary mitigations to address impacts to fish, the mitigations were not required by the current biological opinion and were not fully funded. The court concluded that relying on voluntary measures that may or may not occur is a clear violation of the law. It also concluded that Ruby and USFWS had failed to consider or mitigate the impacts of withdrawing millions of gallons of groundwater, as noted above.

For info: Case available at: www.ca9.uscourts.gov/datastore/opinions/2012/10/22/10-72356.pdf; Amy Atwood, Center for Biological Diversity, 503/ 504-5660

HEALTH OF WATERWAYS US

EPA WEB TOOL

On October 18, EPA launched a new app and website to help people find information on the condition of thousands of lakes, rivers and streams across the US from their smart phone, tablet, or desktop computer. The *How's My Waterway* app and website uses GPS technology or a user-entered zip code or city name to provide information about the quality of local water bodies.

"This new app provides easy, user-friendly access to the health of a waterway, whether it is safe for swimming and fishing, and what is being done about any reported problems," said Nancy Stoner, acting assistant administrator for EPA's Office of Water. The app works by first going to www.epa.gov/mywaterway and allowing GPS technology to identify the nearest streams, rivers, or lakes or by entering a zip code or city name. A user will instantly receive a list of waterways within five miles of the search location, with each waterway identified as unpolluted, polluted, or unassessed. A map option offers the user a view of the search area with the results color-coded by assessment status. Once a specific lake, river, or stream is selected, the *How's My Waterway* app and website provides information on the type of pollution reported for that waterway and what has been done by EPA and the states to reduce it. Additional reports and technical information is available for many waterways. The site also provides simple descriptions of each type of water pollutant, including pollutant type, likely sources, and potential health risks. A related links page connects users to popular water information on beaches, drinking water, and fish and wildlife habitat based on a user's search criteria.

For info: App available at: www.epa.gov/mywaterway

LAS VEGAS WATER SALE NV

WATER MARKET

The Walters Group (Walters), a Las Vegas based multifaceted group of businesses in that includes residential and commercial developments, is offering to sell 150 acre-feet (AF) of fully transferable Las Vegas, Nevada groundwater rights at the rate of $25,500 per acre-foot. Walters maintains that this price represents the "current market value." Investors may elect to purchase these water rights in full, as a single transaction of all 150 AF or in blocks of as few as two AF. Walters claims that the groundwater rights can be pumped from almost anywhere in the Las Vegas Valley and that the water rights were issued to private parties in the early 1950s.

Walters' press release noted that all appropriate documentation of the water rights will be provided by the seller, noting that for immediate reference purposes one can check "application number 24909, certificate number 8017 and permit numbers 23088, 23089 & 24904."

For info: Mike Luce, Walters, 702/ 450-8001 or mluce@waltersgolf.com

WATER/ENERGY NEXUS CA

WHITE PAPER RELEASED

California's Water-Energy Nexus: Pathways to Implementation is a white paper written by GEI Consultants, Inc. on behalf of the California Water-Energy Team of the Governor's Climate Action Team (WET-CAT) and released on September 12, 2012. The paper was prepared to facilitate the on-going dialogue among policymakers and regulators as to actions that can be taken by California's water sector to help achieve the State's aggressive resource efficiency, economic, and environmental goals. Some actions are achievable now, under existing policies, rules and regulations; others will require modification.

"Through this seminal white paper, GEI outlines the potential strategic role that water and wastewater agencies could play in helping to reduce the energy consumption embedded in the water services we deliver, increasing renewable generation and reducing greenhouse gas emissions. GEI summarizes key findings and recommendations from recent studies that suggest that water and wastewater agencies have unique characteristics that could be leveraged through appropriate partnerships to provide significant benefits to the State's electric system." Preface at 3.

For info: www.geiconsultants.com/water-energy

WATER REUSE US

NEW EPA GUIDELINES

EPA has released its 2012 guidelines for water reuse, which update and build on the agency's previous reuse guidelines issued in 2004. The document summarizes existing US regulations, details water reuse practices outside the US, and includes case studies and information on planning for future water reuse systems. Indirect potable reuse and industrial reuse, as well as disinfectant and treatment technologies also are discussed in the document.

EPA's *Guidelines for Water Reuse* debuted in 1980 and was updated in 1992 and 2004.

For info: *Guidelines* available at: www.waterreuseguidelines.org/

CALENDAR

November 18 Bali
Regional Colloquium on Environmental Law, Nusa Dua. Westin Hotel. Sponsored by Law Council of Australia. For info: www.lawcouncil.asn.au/sections/legal-practice/events/

November 20 AZ
2012 Summer Extern Update: County Sustainability Projects that Improve the Lives of Arizonans (Brownbag), Tucson. WRRC, 350 N. Campbell Ave., 12-1:30pm. For info: Jane Cripps, WRRC, 520/ 621-2526, jcripps@cals.arizona.edu or http://ag.arizona.edu/azwater/

November 26-29 Mexico
Disinfection of Water, Wastewater & Biosolids Conference, Mexico City. Sponsored by Intn'l Water Assoc. For info: http://eventos.iingen.unam.mx/DisinfConfMex2012/Default.htm

November 29 AZ
Searching for Water Solutions: Experiences from My Sabbatical & Other Travels - Sharon Megdal, Director of WRRC (Brownbag), Tucson. WRRC, 350 N. Campbell Ave., 12-1:30pm. For info: Jane Cripps, WRRC, 520/ 621-2526, jcripps@cals.arizona.edu or http://ag.arizona.edu/azwater/

November 29-30 ID
IWUA Winter Water Law Seminar, Boise. DoubleTree Riverside Hotel. Sponsored by Idaho Water Users Ass'n. For info: www.iwua.org

November 30 TX
Hydraulic Fracturing Conference, Austin. Omni Southpark. For info: CLE International, 800/ 873-7130 or www.cle.com/

December 1-2 AZ
Western Governors' Ass'n 2012 Winter Meeting, Phoenix. Montelucia Resort. For info: www.westgov.org

December 4 DC
Importance of Water to the U.S. Economy Symposium, Washington. American University. Sponsored by EPA. For info: John Powers, EPA, 202/ 564-5776, powers.john@epa.gov or http://water.epa.gov/action/importanceofwater/registration.cfm

December 4-5 OR
Northwest Environmental Conference & Tradeshow, Portland. Red Lion Jantzen Beach. Presented by Northwest Environmental Business Council, Associated Oregon Industries, Oregon Dept. of Environmental Quality & Washington Dept. of Ecology. For info: Catherine Van Zyl, NEBC, 503/ 227-6361, Catherine@nebc.org or www.nebc.org

December 4-7 CA
ACWA 2012 Fall Conference & Exhibition: California Water - The Next Generation, San Diego. Manchester Grand Hyatt. For info: Ass'n of California Water Agencies, www.acwa.com/events/2012-fall-conference-exhibition

December 6 AZ
Tucson Conserve to Enhance Workshop for Funding Local Enhancement Projects (Brownbag), Tucson. WRRC, 350 N. Campbell Ave., 5pm. For info: Jane Cripps, WRRC, 520/ 621-2526, jcripps@cals.arizona.edu or http://ag.arizona.edu/azwater/

December 6 WA
Washington Water Law & the Public Trust - 2nd Annual CLE, Seattle. 2100 Building. Sponsored by Center for Environmental Law & Policy. For info: CELP, 509/ 209-2899 or contact@celp.org

December 7 OR
Annual Meeting - OSB Environmental & Natural Resources Section, Portland. Pazzo Ristorante. For info: www.osbar.org/

December 10 CO
Water-Energy Nexus Workshop, Glenwood Springs. Sponsors Recharge Colorado & Great Western Institute with funding from the Colorado Water Conservation Board. For info: http://www.crwcd.org/

December 10 CA
Clean Water & Stormwater in California Seminar, Los Angeles. Millennium Biltmore Hotel. Board. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

December 10-14 FL
ACES & Ecosystem Markets 2012 Conference, Ft. Lauderdale. Marriott Harbor Beach. Pre-Conference Workshops on 12/10; Post-Conference Tour on 12/14. For info: www.conference.ifas.ufl.edu/aces/glance.html

December 11 AZ
Linking Knowledge & Action for Water Sustainability & Urban Climate Adaptation: Research Update from ASU, Tucson. WRRC, 350 N. Campbell Ave., 12-1:30pm. For info: Jane Cripps, WRRC, 520/ 621-2526, jcripps@cals.arizona.edu or http://ag.arizona.edu/azwater/

December 11-12 MT
Montana Agriculture Seminar, Billings. Crowne Plaza Hotel. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

December 11-13 HI
Membranes in Paradise Technology Transfer Workshop, Wailea-Maui. Makena Beach & Golf Resort. For info: www.amtaorg.com

December 12 CO
Water-Energy Nexus Workshop, Berthoud. Sponsors Recharge Colorado & Great Western Institute with funding from the Colorado Water Conservation Board. For info: http://www.crwcd.org/

December 12-13 WA
Industrial Stormwater Management Workshop, Puyallup. WSU Extension. For info: John Loyd, 206/ 767-0432, john@ecoss.org or www.ecoss.org

December 13 CO
Water-Energy Nexus Workshop, Colorado Springs. Sponsors Recharge Colorado & Great Western Institute with funding from the Colorado Water Conservation Board. For info: http://www.crwcd.org/

December 13-14 OR
16th Annual Oregon Land Use Law Seminar, Portland. World Trade Ctr. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

December 13-14 CA
CEQA Conference, San Francisco. Hotel Nikko. For info: CLE International, 800/ 873-7130 or www.cle.com/

December 14-16 NV
Colorado River Water Users Ass'n Conference, Las Vegas. Caesar's Palace. For info: http://www.crwua.org/AboutUs/2011AnnualConference.aspx

December 18 CA
GIS for Watershed Analysis: Intermediate Course, Davis. UC Davis, 1137 Lab, Plant & Enviromental Sciences. Sponsored by UC Davis Extension. For info: http://extension.ucdavis.edu

January 7 OR
Oregon Water Quality Conference, Portland. For info: Environmental Law Education Center: www.elecenter.com/

January 9 OR
Oregon Water Utilities Council Legislative Symposium: "Meeting Oregon's Water Needs", Salem. Salem Convention Ctr., 200 Commercial Street, 8-5pm. For info: http://events.r20.constantcontact.com/register/event?oeidk=a07e6igb1we180325e7&llr=fdcbrhjab

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CALENDAR

(continued from previous page)

January 22-24 FL
Underground Injection Control Conference 2013, Sarasota. Lido Hotel. Sponsored by Ground Water Protection Council. For info: www.gwpc.org/events

January 23 CA
Beyond the Water Wars: Cooperative Management Solutions for a Shared Resource (Symposium), Davis. UC Davis. Sponsored by California Water Law Symposium. For info: www.waterlawsymposium.com/

January 24-25 WA
19th Annual Endangered Species Act Seminar, Seattle. Red Lion Hotel on 5th. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

February 4-8 WA
12th Annual RRNW Stream Restoration Symposium, Stevenson. Skamania Lodge. Sponsored by River Restoration Northwest. For info: www.rrnw.org/

February 5 CA
Investing in California's Water Seminar, Santa Monica. Sheraton Delfina. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

December 5-6 AZ
Western Governors' Wildlife Council Meeting, Scottsdale. Hotel Valley Ho. For info: Madeleine West, 303/ 623-9378 or www.westgov.org

February 6 CA
Ecological & Environmental Mitigation Banking Seminar, Santa Monica. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

February 5-7 WA
River Restoration Northwest Symposium, Stevenson. Skamania Lodge. For info: www.rrnw.org/

February 8 CA
Hydraulic Fracking Seminar, Santa Barbara. Bacara Resort & Spa. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

February 14-15 DC
Natural Resources Damages Seminar, Washington. TENTATIVE. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

February 20-23 NV
2013 Family Farm Alliance Annual Meeting & Conference, Las Vegas. Monte Carlo Resort. For info: www.familyfarmalliance.org

February 22 OR
The Freshwater Trust Annual Gala & Auction, Portland. For info: www.freshwatertrust.org

February 27-28 GA
12th Annual Wetlands & Water Law Update, Atlanta. Hyatt Regency. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

February 28-March 3 OR
Earth: Too Big to Fail: PIELC Environmental Law Conference 2013, Eugene. University of Oregon. For info: www.pielc.org

March 1 IN
Great Lakes Natural Resource Goverance Symposium, Indianapolis. Indiana University School of Law. Call for Papers in October. For info: http://indylaw.indiana.edu/programs/ENR/symposium.htm

March 5 AZ
Water Security From the Ground Up: 2013 Annual Conference, Tucson. Student Union Memorial Ctr. Sponsored by Water Resources Research Ctr. For info: Jane Cripps, WRRC, 520/ 621-2526, jcripps@cals.arizona.edu or http://ag.arizona.