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TREATY TRIBES & HATCHERIES

by Alan C. Stay, Tribal Attorney (Muckleshoot Indian Tribe), Auburn, WA

INTRODUCTION

Hatcheries play an important role in the conservation and enhancement of fishery resources in the American Northwest. This is a true, but unfortunate, fact: it is true because the careless treatment of the salmon habitat over time has drastically reduced the number of salmon present; it is unfortunate because the preferred course would be to fix the habitat so that fish populations could rebound and reproduce in numbers sufficient to meet treaty and other needs of the Northwest. That goal, however, seems elusive.

Pacific Northwest Indian Tribes rely on hatchery-produced salmon to both: 1) assist in the restoration and perpetuation of runs that were decimated largely as result of non-Indian indifference to the salmon habitat; and 2) to provide harvestable salmon. In some cases, because the habitat cannot be restored to provide a sufficient number of salmon, hatcheries have become a permanent fixture. In other cases, hatcheries are used as a "bridge" — providing salmon for harvest while the habitat heals. Hatcheries have also proven indispensable to "jump start" the recovery of some salmon runs that were virtually extinct. How long a "hatchery bridge" will be needed depends in large measure on the willingness of the greater non-Indian community to take the necessary steps to restore habitat sufficient to support viable, harvestable, numbers of salmon.

The key concern from the view of Tribes is the restoration of "harvestable runs" sufficient to meet their needs and comply with contracts made between Tribes and the United States over 150 years ago. In those contracts — treaties — the United States guaranteed that Tribes would continue to have the right to fish at their usual and accustomed grounds and stations and to take sufficient fish to meet their "needs" — i.e., sufficient to make a moderate living in modern day parlance. If this promise cannot be met by assuring adequate habitat for salmon, the use of hatchery fish will be required to fill the gap. As a result, when considering the propriety of hatchery development, the duties that fall on the non-Indian regulators and governments as a result of the treaties cannot be ignored. To fail to consider and comply with these treaty obligations will not only violate the treaties, but just as seriously, violate the moral and ethical duties of the United States to Tribes. "Great nations, like great men, should keep their word." *Federal Power Commission v. Tuscarora*, 362 U.S. 99 (1960) (Black dissent). This is all Tribes have ever asked.

One fact should be made clear before moving on: as regards the choice between hatcheries and natural habitat to produce and rear salmon, Tribes choose habitat. For decades, both individually and in cooperation with others, Tribes have fought for the salmon and salmon habitat. The Elwah River dams on Washington State's Olympic Peninsula are coming down largely, if not exclusively, as a result of the decades-long efforts of the Lower Elwah Tribe. Similarly, there is no Northern Tier Gas Pipe line, no

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Insufficient Habitat

History & Hatcheries

The views expressed in this article are the author's alone, and do not necessarily reflect the views of the Muckleshoot Indian Tribe.

The Water Report
(ISSN 1946-116X)
is published monthly by
Envirotech Publications, Inc.
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Eugene, OR 97402

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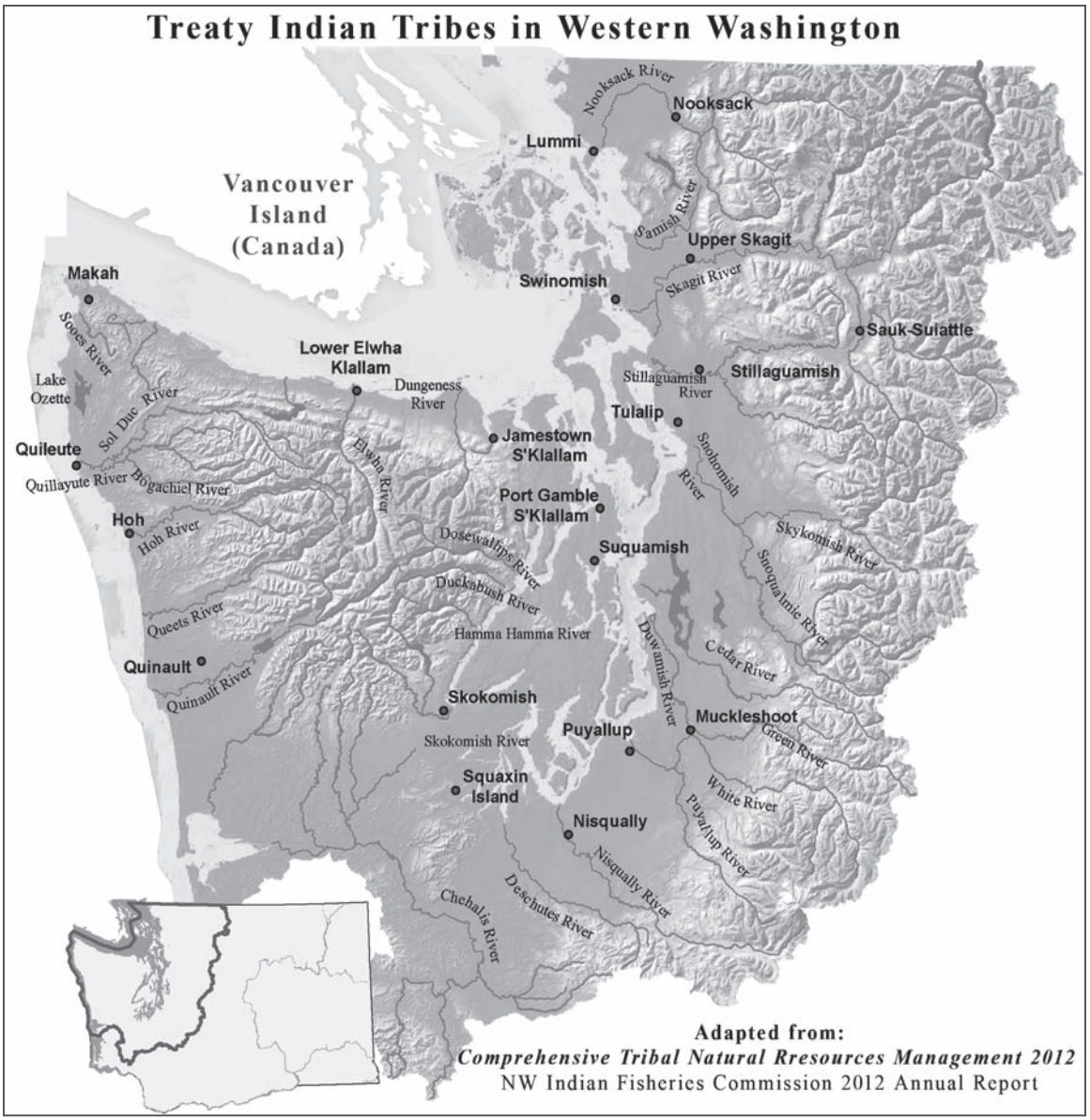
Subscription Rates:
$249 per year
Multiple subscription rates available.

Postmaster: Please send address corrections to
The Water Report,
260 North Polk Street,
Eugene, OR 97402

High Ross Dam, no Skagit nuclear facility — and in each case Tribal objections played a crucial role. Tribal commitment to the salmon habitat cannot be denied. At the same time, however, fishing is integral to who the Tribes are. It is part of their religion and spirit. It is why they labored to reserve this right in the treaties. Without meaning to be too melodramatic, to take fish is the essence of Tribes. Therefore, if the greater non-Indian community does not have the will or the ability to rehabilitate sufficient habitat to support sufficient salmon to carry out treaty promises — a goal Tribes embrace — then hatchery fish will be needed to meet those obligations to Tribes. It will not be sufficient to fix just enough habitat to support a few returning fish for viewing ("museum fish," if you will). Sufficient fish to meet treaty obligations are required.

Tribes see the primary culprit in the decline in fish populations to be insufficient quality habitat. Nevertheless, Tribes have shown the seriousness of their commitment to recovery by substantially reducing their harvest in an effort to assist in salmon runs (*see* "*We Must Win the Salmon Recovery Battle*," Billy Frank, Jr., Chair, Northwest Indian Fish Commission in *NWIFC News* (Spring 2012) at: http://files.nwifc.org/magazine/2012_1_spring_nwifc_magazine.pdf). Their wish is that the State of Washington shows a similar level of commitment.

This article will not attempt to answer the questions of when hatcheries are required and how long they are needed. Rather, the history of the Indian treaty rights and the law that must inform hatchery decisions is explored. The hope is that, in this imperfect world, decisions on when and how to use hatcheries will consider treaty rights and that those decisions will not result in the breach of treaty rights and the destruction of tribal society and culture.



Treaties & Hatchery Fish

US Title & Tribal Rights

Tribes & Fish

Treaty Purposes

Washington State Treaties

THE TREATY RIGHT TO TAKE FISH

In the 1850's, non-Indian settlers began to surge into the Pacific Northwest. Seeking a better life, they paid little heed to the fact the lands they sought were already occupied — occupied by a people who had been there from time immemorial — Indian Tribes. This appetite for another's property posed a problem: how could they obtain the right to use that property when it was occupied by others. This appeared to be a pure trespass.

The United States Supreme Court provided the answer. The Court held in *Johnson v. McIntosh*, 21 U.S. 543 (1823) that, in fact, the US had title but the Indians had the exclusive right to use and occupy their lands (Indian or aboriginal title). The US had the power (indeed the exclusive power) to negotiate for the Indian title. Until those use rights were resolved by the United States, the waiting settlers could not obtain secure use of the land.

While the non-Indian settlers wanted the land, Tribes sought to secure and protect their way of life and culture. For Tribes, protecting their way of life entailed protecting their right to take fish — then and for the future. The taking of fish, especially salmon, was an integral part of the Tribes' life; deeply infused into their religion and society; as well as being an essential part of their sustenance. In short, Tribes could not lose to the on-rushing settlers the right to take fish. The Supreme Court, in examining the history of Pacific Northwest Indian Tribes' reliance on salmon and its importance to Tribes, observed: "[The right to fish] [was] not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 37, 381 (1905).

These competing interests — settlement and preservation of preexisting Indian treaty fishing rights — were resolved by the United States through the negotiation of treaties by the US with Pacific Northwest Tribes in 1854 and 1855. These treaties became the instruments that would allow settlers to move west into the Pacific Northwest. Treaties were also the instruments in which the Tribes preserved their historic and all-important right to take fish. *See*, generally, *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash.1974); aff'd 520 F.2d 676 (9th Cir. 1975); substantially affirmed, *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055 (1979).

In Washington State, six treaties were negotiated with Tribes on both sides of the Cascade Range. Virtually all of the land in the Puget Sound region and a large portion of Eastern Washington are covered by one treaty or another (The Treaty with the Quinaeilt, 12 Stat. 971; Treaty of Point Elliot, 12 Stat. 927; Treaty with the Makah, 12 Stat. 939; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point No Point, 12 Stat. 933; and, Treaty with the Yakimas, 12 Stat. 951). In these treaties, Tribes reserved the right of taking fish at all usual and accustomed grounds and stations as well as the right to hunt and gather off their reservations on open and unclaimed lands. The treaty right of "taking" fish has been interpreted to mean the right to harvest a share of the fish that would return to each Tribe's usual and accustomed fishing grounds and stations. The treaties immunize treaty fishers from the enforcement of State fishing regulation except in very limited circumstances. State regulation of treaty fishing is limited to those regulations that are both reasonable and necessary for the conservation of the resource: that is to say, reasonable and necessary for the perpetuation of the salmon resource. *United States v. Washington*, 384 F. Supp. 312, 342 (W.D. Wash. 1974). (This article concentrates on the treaty reserved fishing right. The reserved right to hunt and gather were also central to the Tribes' way of life at the time that the treaties were signed and remain important aspects of tribal life today.)

The primacy of treaties over State law flows from the United States Constitution, which provides that treaties are the supreme law of the land and preempt conflicting State laws. Article 6, Clause 2, United States Constitution; *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (limiting the application of state tax laws to on-reservation logging operations). Notwithstanding this Constitutional mandate and the limitations placed on State authority over treaty fishing, as recently as 2009 the Court had to remind the State that tribal fishing consistent with treaties was not subject to State law and State arrest. *See State v. Guidry*, 153 Wn.App. 774 (Div.II 2009).

Treaties & Hatchery Fish

Treaties' Primacy

While the primacy of the treaties flows directly from the US Constitution, on another level treaties are contracts between the party Tribes and the United States with continuing force and effect. *Passenger Fishing Vessel*, 443 U.S. at 675; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). As such, the US is constrained by the trust duty it owes to Tribes to assure that it does not take actions that are inconsistent with treaty rights. *Parravano v. Babbitt*, 70 F.3d 546 (9th Cir. 1995). For example, in *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-1511 (W.D. Wash. 1988), the court enjoined the issuance of a US Army Corps of Engineers (Corps) permit that would have allowed the construction of a marina on a usual and accustomed fishing station. In *Northwest Sea Farms v. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) there was an unsuccessful challenge to a Corps' decision to refuse to issue a permit where the project would adversely affect treaty fishing rights. Meeting this trust duty has in part formed the basis of the United States' support of Tribes in the fishing litigation of the latter part of the 19th century.

While much of the litigation surrounding Indian treaty fishing rights has centered on the treaties and Tribes in the Pacific Northwest, the Supreme Court has affirmed the preemptive effect of treaties reserving natural resource use rights in other situations as well. *See*, *Minnesota v. Mile Lacs Band of Chippewa Indians*, 119 S.Ct. 1187 (1999); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). *See* also, *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 843 F. Supp. 1284 (W.D. Wis. 1994) that involved a civil rights claim against non-Indian protestors of Indian treaty fishing, where the court found that the actions of the protestors were racially motivated.

State Regs Limited

Tribal Take Allocated

The Court in *United States v. Washington*, *supra*, did more than set out the limits of State regulation of treaty fishing. It allocated the resource between tribal and non-tribal fishers. The Court had to interpret the meaning of the treaty provision that Tribes would fish in common with non-Indians. To resolve that issue the District Court found that non-Indian and Indian fishers had a right to each take 50% of the harvestable fish that would pass through Tribes' usual and accustomed fishing grounds and stations. 384 F. Supp. at 343. When the Supreme Court finally addressed this issue it affirmed this allocation but added a nuance: Tribes could take a maximum of 50% of the harvestable fish, unless their moderate living needs could be met by a lesser amount. 443 U.S. 686-687.

By 1975 and the Supreme Court's decision in *Passenger Fishing Vessel* the parameters of the treaty fishing right would seem to be set. The State was limited in its ability to regulate Tribal fishers; Tribes for the first time had a meaningful allocation of the resource that would appear to promise that their right would have meaning for the future. The treaty purposes of securing the Tribes' way of life would be met and Tribes were recognized as co-managers of the resource. Often, because of their close relationship to the rivers, the tribal co-managers possessed the best information on salmon and their habitat needs. Of course, all of this depended on there being fish to harvest and places to fish.

"Reserved Right"

In considering the rights contained in Treaties, it is important to remember that the right to take fish at all usual and accustomed grounds and stations is a "reserved right" — i.e, part of the larger pre-treaty Tribal right that included the right to use all of the land. This right to take fish was, therefore, not granted to the Tribes by the United States when the Treaties were signed; rather it was reserved by the Tribes while other interests in the land were being conveyed to the US in the Treaties. *See Winans v. United States, supra*.

THE TREATIES AND THE PROTECTION OF SALMON

State Recalcitrance

When the Tribes joined *United States v. Washington* in the early 1970's they were concerned with State regulation of tribal fisheries and the need for an allocation. In the first Court of Appeals review of *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), the nature and extent of State efforts to limit treaty fishing was commented on by concurring Judge Burns: "...it has been the recalcitrance of Washington State officials (and their vocal non-Indian commercial and sport fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten." 520 F.2d 676, 693.

Harvest Needs

Tribes were also concerned that a limitation on State interference with treaty fishing, should that come to pass, would mean nothing unless there were fish to harvest. The Supreme Court recognized this essential prerequisite to the meaningful exercise of the treaty fishing right when it noted that the treaty fishing right is much more than "merely a chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters" in the hope of catching fish. *Passenger Vessel*, 443 U.S. 658, 679. The Court placed special emphasis on the treaty language that "secured" the "right of ***taking*** fish." *Id.* Simply put, to allow fish to be taken through destruction of fish habitat — thus depriving treaty Tribes of an opportunity to harvest those fish — is no different than allowing a prior non-Indian harvest: in both cases treaty Tribes are deprived of their treaty opportunity and, in both, takes are prohibited by the treaty.

Treaties & Hatchery Fish

Habitat Protection

Without adequate and good quality habitat, the prospect of a treaty fishery sufficient to meet the needs of Tribes would be fleeting. The State understood this as all parties to *United States v. Washington* agreed that productive fisheries depended on "an adequate supply of good-quality water." 384 F.Supp. 312, 383. As a consequence of the tribal concern that fish remain sufficiently abundant, the Tribes' complaint asserted that the State had a duty under the treaty to protect fish habitat to assure that Tribes could harvest fish necessary to meet their moderate living needs.

The Tribes first sought a ruling to establish the fact that the treaties formed a legal basis to protect fish habitat (in what became the environmental phase of *United States v. Washington*) in 1985. Tribes asserted that the State may not directly or through the permitting of others degrade the fishery habitat to an extent that would deprive the Tribes of their moderate living needs. *United States v. Washington* (Phase II), 506 F.Supp. 187 (W.D. Wash. 1980), vacated in part, aff'd. in part, 759 F.2d 1353 (9th Cir. 1985) (en banc). The decision in Phase II was vacated, but the Court in doing so did not deny the principles that were articulated by the district court below. The Circuit Court opined that, "The State of Washington is bound by the Treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty…it will be subject to immediate…remedial action. In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute." *Id*. at 1357. Rather, the Ninth Circuit held that a ruling on the status and breath of the treaty right to habitat protection must await a more concrete set of facts.

Streamflow Decisions

The principles articulated in Phase II were followed in subsequent cases. *See*, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985), that required the release of water in a stream from an irrigation facility in order to protect salmon redds; *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), which affirmed the right to sufficient water to protect fishing. The principles are also reflected in the holding that predates Phase II, *United States v. Alexander*, 440 F.Supp. 553 (D.Or. 1977), where the United States was enjoined from constructing a dam that would destroy a traditional Indian fishing site.

"Culvert Case"

The Tribes again sought a determination in 2001 that the State had a duty to preserve the fish habitat to assure Tribes had sufficient fish to meet their moderate living needs. This time the Tribes' claims were limited to addressing the failure of Washington State to maintain its culverts to allow fish passage. In what became known as the "Culvert Case," the court determined that the treaties do impose a duty on the State "to refrain from building or maintaining culverts" that block fish passage. *United States v. Washington*, 2007 WL 2437166 (W.D. 2007)(SJ Order at 12). The Court based this holding on a reading of what the parties intended when the treaties were signed. The United States had promised that it would protect the Tribes' food supply. SJ Order at 9. The court rested its decision in part on the words of the United States Treaty negotiator, Governor Stevens, who said, "I want that you shall not have simple food and drink now but that you may have them forever." SJ Order at 11.

Treaty Promises

Treaty Interpretation Rules

The Court applied special rules developed by courts to be used when interpreting and construing Indian treaties. These rules are not the same as rules of statutory construction that normally apply to the interpretation of a federal statute: Indian treaties must be construed liberally in favor of Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943); ambiguous expressions must be resolved in favor of Indians, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973); and treaties must be construed as Indians would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

The Culvert Case is a subproceeding in the on-going federal court fishing case. The Court declared the right in 2007 and held a subsequent proceeding to address the remedy. The remedy phase has been fully briefed and argued to the court and the parties are waiting a decision.

THE VANISHING SALMON

Misuse of Habitat

The enormity of the impact of non-Indian development and misuse of the salmon habitat is made clear from Washington State's own reports and statements. The court in *Hoh v. Baldridge*, 898 F.Supp. 1477, 1479 (W.D. Wash. 1995), when considering the implementation of the treaties, observed that many of the salmon runs of both Canada and the United States were diminishing at an alarming rate. In 1997, Washington State stated that the failure to fix culverts blocking salmon passage accounted for an annual loss of 200,000 salmon. This admission by the State was an important factual underpinning of the court's decision in the Culvert Case. "While there may be other contributing causes for this [diminished fish runs], the conclusion is inescapable that if culverts block fish passage so that they cannot swim upstream to spawn or downstream to reach the ocean, those blocked culverts are responsible for some portion of the diminishment." SJ Order at 5. As if to cement this fact, in 2001 the State noted that it could take up to 100 years to fix the offending culverts.

Culvert Impacts

Treaties & Hatchery Fish

Habitat Loss Factors

These observations related to culverts mirror the broader problems with salmon habitat and the resulting failure to produce sufficient fish to meet the duties under the Treaties.

Some relevant facts relating to salmon and habitat loss include:

- After the federal Endangered Species Act (ESA) listing of Chinook salmon from 2001 to 2006, about 10,700 acres of forest and 4,300 acres of agriculture land were converted to impervious surfaces ("*NMFS Puget Sound Chinook Recovery Plan - 2011 Implementation Status Assessment Final Report 2011*" at 15).
- Washington has lost an estimated 70 percent of its estuarine wetlands and 90 percent of its old growth forest. *Id*. at 6.
- Since ESA listing of Puget Sound Chinook salmon in 1999 there has been a continued loss of shoreline habitat at the rate of 1.5 miles per year ("*US Geological Survey Scientific Investigations Report 2010*" at 40-54).
- About half of critical low-gradient riparian forest habitat has insufficient forest cover to support salmon (Washington Department of Fish and Wildlife and the Western Washington Treaty Indian Tribes co-managed Salmon and Steelhead Habitat Inventory and Assessment Program's (SSHIAP's) analysis of data sources: NOAA-CCAP 2006; NWIFC 2010; WADNR 2010).
- 83 percent of waters sampled to compile the State's 305(b) and 303(d) Clean Water Act lists violate state water quality standards and are polluted ("*SSHIAP analysis of Washington's 2008 Water Quality Assessment Data*").

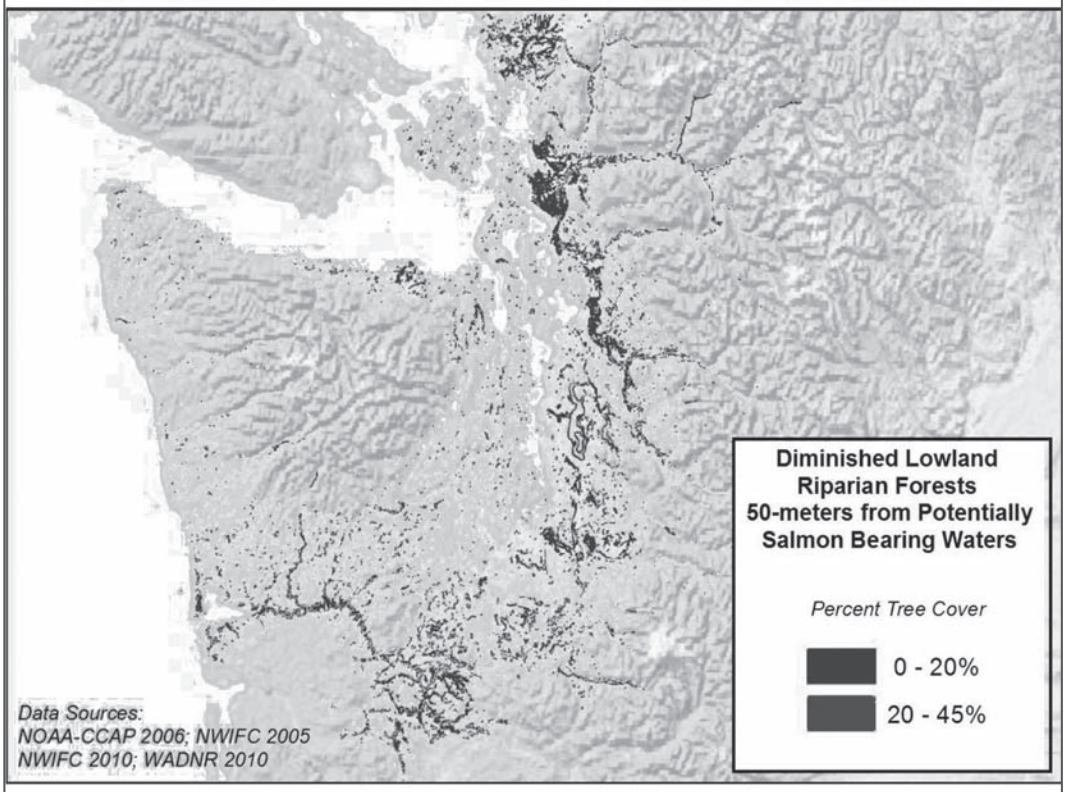
And the list goes on and on.

Hatchery Uses

TRIBAL RIGHT TO TAKE HATCHERY FISH

The role of hatcheries and the Tribes' right to harvest hatchery fish are two more factors crucial to understanding these issues. Hatcheries have been a tool used to replace fish lost to the onslaught of development. In keeping with their treaty rights, the quantity of fish available to Tribes must rise to a level that would meet their needs.

Diminished riparian forests in the lowlands of Western Washington continue to impair habitats critical to the recovery of the region's anadromous salmon.



Adapted from: ***Treaty Rights at Risk — Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change***, Treaty Indians of Western Washington Report, July 14, 2011 Northwest Indian Fisheries Commission website; http://nwifc.org/downloads/whitepaper628finalpdf.pdf

As is quite apparent from facts touched on above, fish habitat is not in good shape. Widespread improvement — if it is to come — appears to be a long way off. Moreover, there are places where fish habitat simply cannot be improved. These include many immovable metropolitan areas sitting on top of fish habitat. For example, Seattle will not likely voluntarily remove the fill at the mouth of the Duwamish River — thereby eliminating the highly industrialized Harbor Island and the plethora of athletic stadiums now occupying that land.

One would think that — due to the fact that development was causing drastic reductions in fish population and hatcheries were in part replacing those lost fish — the State would have no problem with Tribal fishers harvesting hatchery fish. This was not to be the case. The State essentially determined that the treaty right began and ended as of 1855 and since hatchery

Treaties & Hatchery Fish

Tribal Right to Hatchery Fish

fish were not present in 1855 Tribes could not harvest them. This presented a novel approach to limit or eliminate treaty fishing: simply allow development to diminish the natural salmon population to levels insufficient to meet tribal and treaty needs; replace those fish with hatchery fish; and then refuse to allow treaty fishers to harvest those replacement fish.

Between 1980 and 1985, however, three federal courts disagreed with this obvious contrivance. First, in *United States v. Washington*, 506 F.Supp. 187 (W.D. Wash. 1980), the district court made its initial attempt to address this issue and found that, "all hatchery fish must be included in the computation of the tribes' share in order to effectuate the parties' intent and purposes of the fishing clause." The Court went on to note the long standing view that, "treaties were designed to guarantee the tribes an adequate supply of fish goes far toward resolving the hatchery issue." 506 F.Supp. at 197. The district court's decision was appealed by the State to the 9th Circuit Court of Appeals. The Court of Appeals affirmed the district court twice, first in *United States v. Washington*, 694 F.2d 1374 (9th Cir. 1983), and then again in a subsequent State appeal where the Court of Appeals heard the case sitting en banc, *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985; en banc).

Adequacy Issue

The district court rested its ruling in part on the obvious proposition: "The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish — the right for which they traded millions of acres of valuable land and resources — would be placed in jeopardy." 506 F.Supp. at 199.

The en banc appeals court (9th Circuit Court of Appeals) later held: "However, the district court properly concluded that *Fishing Vessel*'s holding that the tribes are entitled under the treaty to an 'adequate supply of fish' supports the inclusion of hatchery fish in the allocation." 759 F.2d at 1358.

"Environmental Right"

It should be noted that the 9th Circuit's 1985 en banc decision also vacated the Tribes' assertion of an "environmental right" — i.e, the assertion by the Tribes that — as part of the treaty right to take fish — there is the concomitant right to have fish present to take, and, thus a right to be free from State actions (or actions authorized by the State) which adversely affect fish habitat and reduce fish populations. As noted above, in the Culvert Case decided in 2007 this issue was again ruled on and the district court found that the environmental right was enforceable and the State had violated that right due to how it maintained its culverts. The court found that the State had a duty to, "refrain from building or operating culverts under state-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." *United States v. Washington*, 2007 WL 2437166 (W.D. 2007)(SJ Order at 12).

The court's ruling that Tribes had the treaty right to harvest hatchery fish and that they were in part replacement fish for lost fish due to habitat loss raises two interesting questions: 1) is there a duty to provide hatchery fish until the habitat is repaired?; and 2) once provided, can the State remove those hatchery fish without violating the treaty? I leave these questions for the region to ponder.

CONCLUSION

Treaties' Importance

What lessons can be drawn from this discussion? Treaties are in fact critically important and do affect what the State and its citizens can do. They guarantee to Tribes, who are a party to the treaties, the right to take fish. That right "to take" presupposes there are fish to take. It is unlawful for the State to take or authorize others to take fish otherwise allocated to Tribes. The most obvious State take would be to authorize non-Indian fishers to take more fish then their share. On a more subtle level, though, it is just as much a take to authorize development that destroys habitat which deprives salmon the ability to reproduce or to rear. All the State has done in that case is to move the point of harvest up the river from the open water to the spawning ground. That harvest should count when the results are just as devastating.

State Duties & Benefits

When the State acts to correct problems with salmon habitat destroyed or diminished in productive value it will incidentally recover salmon and increase their number. This is in keeping with the duties of the State to Tribes under the treaties. Significantly, these improvements will inure to benefit of all of its citizens. The Tribes applaud these efforts even if they often seem a bit anemic in relation to the magnitude of the problem.

Habitat Impacts

It is unlikely, however, that habitat improvements will come fast enough everywhere they are needed or will be a viable option in all the places where habitat has been harmed. Where habitat has been harmed such that fish populations were reduced, the treaty right has likely been impacted (assuming fish are needed to meet tribal needs). Unfortunately, the non-Indian community has chosen to prefer its goals and objectives over the protection of the fish habitat and by so doing failed to comply with the Treaties.

Treaties & Hatchery Fish

Alan Stay has served as a member of the Office of the Tribal Attorney of the Muckleshoot Indian Tribe since 1998. Alan was one of the Tribal co-lead attorneys on the Culvert Case. He works primarily on hunting and fishing, natural resources, housing and education matters. He has served as a member of the Office of the Reservation Attorney for the Confederated Tribes of the Colville Reservation, as Reservation Attorney for the Suquamish Tribe, and also represented various Tribes as a legal services attorney from 1974 through 1983.

Hatcheries are important tools not only in meeting treaty obligations, but in succeeding in conserving, restoring and preserving the salmon populations in an imperfect world. Hatcheries are part of an overall solution to the decline of the salmon populations. In many cases, without hatcheries there will be no meaningful salmon runs to either fish or simply observe. They have provided for conservation and rebuilding of already decimated runs. Hatcheries mitigate for lost habitat — habitat that cannot be restored. They provide a vehicle to move salmon back to a river or stream where past practices have extirpated the wild run, thus helping to restore salmon and build a new wild run. Hatcheries are part of the solution. They cannot be swept aside. A properly developed hatchery program may well best assure salmon recovery in a region or river system now and viable populations into the future.

Treaties do have a habitat protection component — thus far applied to State-owned fish blocking culverts. Tribes will likely join with others to develop ways and strategies to improve the fish habitat. This is a good thing. Given the enormity of the harm and the many places where the ability to correct generations of neglect may be futile, these efforts will likely fall short. Hatcheries can and should fill this gap. Thus, where there is just not enough habitat to correct (even after improving all available habitat), or where fish might need a "jump start" to move toward recovery as a result of very low populations, or where time to recovery is long, hatchery programs — properly managed — will be required. Not to be overlooked are hatcheries' ability to help build harvestable runs and carry out duties required under the treaties.

The bottom line is that Tribes have a treaty right to fish, the impact on the habitat has affected that right, and we, the impacting parties, have a duty to take all steps to restore those fish we have removed from the system through improper habitat management. That duty includes the use of hatcheries. One thing is clear: it would be both improper and perhaps unlawful to devise a recovery strategy that would result in Tribes having insufficient fish to meet their needs and their treaty rights.

The Tribes made their deals with the United States in good faith 150 years ago. It is for us to honor those treaties. We certainly should have the ability and strength of character to devise solutions that allow the promises made by our forebears to Indian people and Tribes — to which we are the current beneficiaries — to be kept.

For Additional Information:

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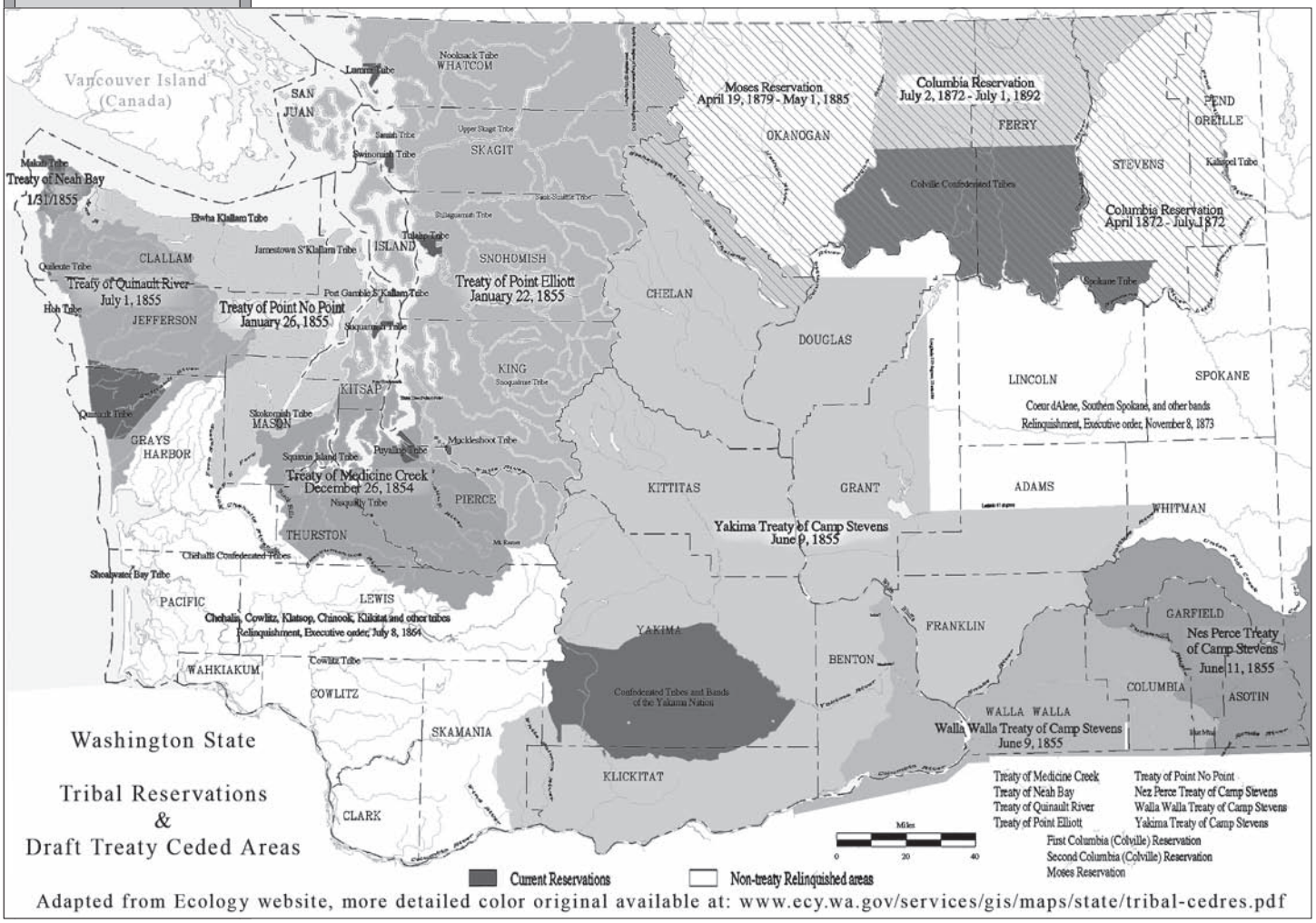
Website: Culvert Case available at: www.scribd.com/doc/259364/Culvert-Case-Summary-Judgment



Adapted from Ecology website, more detailed color original available at: www.ecy.wa.gov/services/gis/maps/state/tribal-cedres.pdf

Appendix

UNDERSTANDING TREATY RIGHTS

Set out below are various principles that are important to understanding treaty rights and the Tribes' involvement with the fishery resource and fish habitat.

Treaty Rights: In treaties negotiated between Tribes in the Pacific Northwest and the United States in 1854 and 1855, Tribes reserved the right of taking fish at all usual and accustomed grounds and stations; hunt off their reservations; and gather on open and unclaimed lands. *See*, e.g., Treaty of Point Elliott, 12 Stat.927 (1855); Treaty of Medicine Creek, 10 Stat. 1132 (1854).

Treaty Legal Status: The treaty making period began in the mid 1830's and ended in 1871 with the passage of 25 U.S.C. 71. While ending the treaty making period, that Act expressly affirmed the legal status of previously ratified treaties. Thereafter, the US exercised its government to government relation with Indian Tribes through Congressional acts and Executive Orders. *See*, Article III, Section 8, Clause 2, United States Constitution. Executive Orders have the same force of law as do treaties. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995). During the treaty making period more than 800,000,000 acres of land were ceded by Tribes to the United States.

Treaties are the supreme law of the land and preempt conflicting State laws. Article 6, Clause 2, United States Constitution; *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)(limiting the application of state tax laws to on-reservation logging operations).

Special Rules have been developed by courts to be used when interpreting and construing Indian treaties. These rules are not the same as rules of statutory construction that normally apply to the interpretation of a federal statute. Indian treaties must be construed liberally in favor of Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943); ambiguous expressions must be resolved in favor of Indians, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973); and treaties must be construed as Indians would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

The Scope of the Pacific Northwest Tribes' Treaty Right to fish was affirmed and defined in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975); *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055 (1979). In these cases, the court held that the Tribes reserved the right to take a share of each run that passes through their usual and accustomed fishing grounds and stations sufficient to earn a moderate living from fishing up to 50% of a run. Court decisions affirmed the Tribes' role as co-managers of the salmon resource. *United States v. Washington*, *supra* at 340-341. As part of the treaty right, Tribes are guaranteed access to their usual and accustomed grounds and stations for fishing. *United States v. Winans*, 198 U.S. 371 (1905). *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998)(affirming the right of Tribes to take shellfish from private tidelands and pass over uplands when necessary to reach the tidelands). *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-1511 (W.D. Wash. 1989).

Treaty Indian Fishing is Immune from all regulations save those that are reasonable and necessary for conservation. *Passenger Fishing Vessel*, 443 U.S. at 682; *Antoine v. Washington*, 420 U.S. 194, 207-208; *United States v. Washington*, *supra* at 342. Thus, while a state may regulate non-Indian interests for a wide variety of reasons and to meet a wide array of purposes, any possible regulation of treaty fishing is strictly circumscribed.

Conservation in the context of Indian treaty fishing rights is used as a term of art and is specifically defined in the Indian fishing cases. As a result, definitions of conservation in other contexts or in other statutes that are inconsistent with the definition embedded in the treaties does not apply. In the context of treaty fishing rights, "conservation...is limited to those measures that are reasonable and necessary to the perpetuation of a particular run of species of fish." *United States v. Washington*, 384 F.Supp. at 342. The terms "reasonable" and "necessary" were explicitly defined by the court. "[R]easonable means a specifically identified conservation measure is appropriate to its purpose; and necessary means that such purpose in addition to being reasonable is essential to conservation." *Id*. This definition was explained in *United States v. Oregon*, 718 F.2d 299 (9th Cir. 1983). There the court noted that the conservation standard embedded in the treaty, "embraces procedures and practices designed to forestall the imminence of extinction. Preserving a 'reasonable margin of safety' between an existing level of stocks and the imminence of extinction is the heart and sole of conservation." 718 F.2d at 305. A state regulation may not be applied to limit treaty fishing unless the government shows that it is both reasonable and necessary for conservation; that its application to the Indians is necessary in the interest of conservation; and the application to treaty fishing will not discriminate against Indians. *Antoine v. Washington*, 420 U.S. at 207. Moreover, before treaty fishing can be limited, a state must first show that there are no alternative means available to accomplish the conservation need, including the prior limitation of non-treaty activities. *United States v. Washington*, 520 F.2d at 686; *United States v. Washington,* 384 F.Supp. at 342; *Lac Courte Oreilles Band of Indians v. Wisconsin*, 668 F.Supp. 1233, 1236 (W.D. Wis. 1987).

Treaties are Contracts between the party Tribes and the US with continuing force and effect. *Passenger Fishing Vessel*, 443 U.S. at 675; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). As such, the United States is constrained by the trust duty it owes to Tribes to assure that it does not take actions that are inconsistent with treaty rights. *Parravano v. Babbitt*, 70 F.3d 546 (9th Cir. 1995); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1510-1511 (W.D. Wash. 1988) (enjoining the issuance of a Corps of Engineers Permit that would have allowed the construction of a marina on a usual and accustomed fishing station); *Northwest Sea Farms v. Army Corps of Engineers*, 931 F.Supp. 1515 (W.D. Wash. (1996)(an unsuccessful challenge to a Corps of Engineers' decision to refuse to issue a permit where the project would adversely affect treaty fishing rights).

Fishery Habitat: As part of the treaty right to take fish, governments may not directly or through the permitting of others degrade the fishery habitat to an extent that would deprive the Tribes of their moderate living needs. *United States v. Washington* (Phase II), 506 F.Supp. 187 (W.D. Wash. 1980), vacated in part, aff'd. in part, 759 F.2d. 1353 (9th Cir. 1985) (en banc). The decision in Phase II was vacated, but the Court in doing so did not deny the principles that were articulated in the court below. Rather, the Ninth Circuit held that a ruling on the status and breath of the treaty right to habitat protection must await a more concrete set of facts. The principles articulated in Phase II were followed in subsequent cases: *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985)(requiring the release of water in a stream from an irrigation facility in order to protect salmon redds); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983)(affirming the right to sufficient water to protect fishing); and are reflected in a holding that predates Phase II, *United States v. Alexander*, 440 F. Supp. 553 (D.Or. 1977)(enjoining the United States from constructing a dam that would destroy a traditional Indian fishing site). Recently, in a subsequent ruling in the continuing litigation in *Adair*, the Court of Appeals rejected as not ripe an attempt to clarify earlier rulings. Rather, the Court returned the case to the state court for initial quantification of the actual water rights. Any failure to properly follow the federal court's ruling would need to await the state court decisions. *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003).

US Trust Duties: The United States owes a trust duty to Tribes. As a result, it is presumed that actions taken by Congress that might affect Tribes are taken in furtherance of this duty. *Delaware Tribal Business Council v. United States*, 430 U.S. 73 (1977). Moreover, when acting, the United States (as trustee) must be judged by the most exacting fiduciary standards when dealing with Indians and Indian property. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

State Water Plans

WESTERN STATES' WATER PLANNING

THE BEST LAID PLANS: WATER PLANNING IN UNCERTAIN TIMES

by Janet Neuman, Tonkon Torp (Portland, OR)

What good is planning?

The value of planning can be expressed in a few succinct words:

"If you don't know where you're going, how can you expect to get there?" Basil S. Walsh

"Most people don't have a plan. That's why it's easy to beat most folks." Bear Bryant

But the critiques are equally pithy:

"Prediction is difficult, especially about the future." Yogi Berra

"Everybody has a plan, until they get punched in the face." Mike Tyson

INTRODUCTION

STATE WATER PLANNING IN THE WEST

Plans Vary

Among the western states, all but two (Oregon and Alaska) claim to have some sort of state water plan. Oregon is in the process of developing a plan, so Alaska will soon stand alone in the no-plan category — not surprising since it has more water than any other state. It might seem, then, that the rest of these states ascribe to the Walsh/Bryant view of planning rather than the Berra/Tyson view. However, saying that eighteen states have water plans overstates the case, because the content, scope, processes, and funding vary widely among the states, as do the plans' implementation and effectiveness.

Effective Planning

Perhaps a better question than "what good is planning" is "what is good planning;" or better yet, "what makes a good plan?" Simply stated, a good plan takes you where you want to go. To achieve that goal, a water plan needs to be comprehensive, balancing all aspects of water management with vision and pragmatism. Furthermore, a good plan must be flexible to cope with future uncertainties and the metaphorical punch in the face.

In terms of future water management, uncertainties abound, with climate change, domestic economic turmoil, and the shifting political and financial developments around the globe at the top of the list. An effective plan also needs to enjoy reasonably widespread support to avoid being put on the shelf or challenged at every turn; building such support usually requires an extensive public involvement and review process. Finally, the plan must be funded and implemented. This article takes a critical look at the western states' water plans to evaluate which states appear to be best positioned to cope with the tumultuous decades ahead.

First, a disclaimer — this evaluation is at a fairly high level of generality. I have only skimmed the surface of the eighteen states' processes and plans, and I'm sure I've missed many details and nuances. Furthermore, comparing these very different plans (and the states themselves) goes well beyond comparing apples and oranges to include rummaging through the rest of the fruit bowl. Information about funding is particularly difficult to find, understand, and compare, so the budget information should be considered more anecdotal than arithmetical. That being said, I invite the readers of *The Water Report* to correct any egregious mistakes.

PLANNING ON THE PLAINS

Water Development

First, a quick flyover of western water plans, starting with those states that straddle the 100th meridian. Bracketing the northern and southern Great Plains, North Dakota, South Dakota, and Texas all have what can be characterized as water development plans — meaning that they emphasize planning for storage facilities and other water supply or water treatment infrastructure projects rather than holistic water resource management.

North Dakota

North Dakota's plan explicitly states that "one of the most important components of this plan is identifying where water may be available for new development and use." The plan itself consists largely of descriptions of proposed water projects, and the projects address traditional water supply and flood control needs. The climate is discussed in terms of historical background for project planning, but not as a future planning challenge. However, the state has been regularly updating its plans since 1937, so dealing with climate change will eventually be unavoidable. North Dakota's project plans seem to be reasonably well-funded, with more than $192 million committed for the 2011-13 biennium (though this compares to a stated need of more than $600 million), thus enabling steady implementation of the planned projects. The funding is not just state money, but comes from a variety of sources coordinated by the state.

South Dakota

South Dakota's plan consists of two parts — the State Water Facilities Plan and the State Water Resources Management System. Both contain listings of desired potential water projects, with the difference between them being that the latter document includes the particularly large and expensive

State Water Plans

projects that will require state and/or federal funding. It is worth noting, however, that the listed projects go beyond traditional water storage — proposals also address: water conservation; watershed management and restoration; pollution prevention or remediation; wastewater facilities; storm sewers; and groundwater contamination. It appears that approximately $46 million worth of projects have already been funded in 2012. As in North Dakota, this funding comes from a combination of sources.

Texas

Texas is the largest of the lower 48 states in geographical area (more than 260 million square miles) and second in population only to California, with over 25 million people in 2010. The Texas Water Development Board just adopted its most recent state water plan in January of 2012 (*see* Water Briefs, *TWR* #96). The plan is well-documented and extensive, but it is narrowly focused on meeting demands for consumptive uses of water. The state estimates a water shortage of 8.3 million acre-feet annually by the year 2060 unless new supplies are developed. Hundreds of different projects around the state are discussed, with a projected price tag exceeding $50 billion dollars. These projects are not just traditional dams and water storage projects; many are creative proposals for conservation, rainwater harvesting, water reuse, desalinization, and other innovative suggestions.

Creative Proposals

The fact remains, however, that the plan does not address non-consumptive uses of water or broad issues of water quality, except in terms of "impacts" from the proposed water development. Nor does the Texas plan address climate change to any significant degree; the document primarily notes that specific future predictions are difficult to make. (However, the plan also reports that additional studies have been commissioned to attempt to "downscale" climate change models for use in Texas, and to determine a risk assessment methodology to build into specific project plans.) Although tens of millions of dollars have been funneled into Texas water projects in recent years, primarily through bonding, according to observers the 2012 plan remains significantly underfunded overall.

Nebraska

In the middle of the 100th meridian states are Nebraska, Kansas, and Oklahoma. Nebraska's statewide water planning effort dates from 1978. However, recently the state shifted its planning framework to a river basin approach; several regional river basin commissions oversee and coordinate integrated resource management plans that are prepared by sub-basin natural resource management districts. The river basin plans differ according to the different major issues in the basins. Thus, the Platte and Missouri River Basin plans are closely aligned with federal and interstate endangered species recovery planning efforts, while other basin plans emphasize coordinating groundwater and surface water management or curtailing groundwater overdraft. The state agency focuses on several statewide issues, such as data collection — including: stream gauging; floodplain mapping; digitizing water rights; estimating water supply and demand; and determining groundwater/surface water interaction — and funding assistance for planning and for water development projects. Climate seems to be addressed primarily in terms of historical patterns, rather than future uncertainties.

River Basin Approach

Issues Focus

Nebraska's planning efforts, both statewide and locally, seem to be regularly supported with minimal state funds (a few million dollars annually), and in 2010, nearly $80 million in project funds were awarded to natural resource projects around the state, many of which were water projects. However, future needs are noted as in the billions, and a recent citizens' report stated that Nebraska has a "water funding crisis."

Robust Plans

Oklahoma and Kansas seem to have the most comprehensive and robust state plans of the 100th meridian states. Oklahoma's first state plan was adopted in 1980; the state is currently at the end of a five-year update process mandated by the 2006 legislature. The Oklahoma Water Resources Board adopted the updated plan in late 2011. The new plan was developed with the extensive participation of several work groups who addressed a wide range of issues including: climate change; instream flow needs; tribal water rights; water transfers; water quality; conjunctive management; and aquifer recharge — as well as the more traditional areas of water demand forecasts and water supply and infrastructure needs. Although the Oklahoma plan contains extensive discussion about implementation and funding, the discussion is in the nature of what should happen as opposed to how it will happen.

Kansas

Kansas is often mentioned as a model for thorough state water planning. Although the state has a modest population — just approaching three million in 2010 — it has a long history of planning. Water planning began in the 1950s in response to both disastrous floods and severe droughts. The early plans understandably emphasized construction of water projects for flood control and water supply. Over the years, though, the scope of the state's water plans has expanded. The current plan, adopted in 2009, addresses: water quality as well as quantity; groundwater and surface water; and preservation and conservation of the resource as well as development. The Kansas process is specifically mandated by its legislature to incorporate continuous, adaptive planning. Although the plan doesn't address climate change in detail, the state uses ten-year rolling averages of climate/weather information, so the coming alterations will become part of the ongoing data used in future planning. The Kansas plan includes a fair amount of detail on measurable objectives, and in 1989, the legislature established a dedicated fund for implementing the plan. The fund is supported by several designated revenue streams, including: a number of different water use fees; fees on pesticide and fertilizer use; and even sand royalties. The budget for 2012 totaled over $14 million.

Adaptive Planning

Revenue Streams

State Water Plans

Montana Politics

Idaho

Comprehensive Approach

Nevada

Broad Scope

Wyoming

Basin Planning

New Mexico

Priority Areas

INTERMOUNTAIN STATES

Leaving the half-arid Plains states and moving west brings us to the higher and drier intermountain states. A few of these states have adopted fairly comprehensive state water plans. For example, Montana's 2003 plan strove to integrate water quantity and quality management, covered surface water and groundwater, and addressed both water supply/storage and instream flow protection needs. However, the Montana plan was light on data and heavier on policy statements, and it did not address climate change. Most importantly, the plan was not self-implementing, and it depends on local watershed groups to voluntarily carry forward specific plans and projects under the state plan's policy direction. Indeed, the plan appeared to be a "one-off" document. In 2009, the legislature amended the planning statute to mandate an ongoing process of data collection, water resources inventory, and evaluation of coming challenges. This new process is now underway and appears to have been funded with approximately $600,000 in 2010. Local groups overseen by basin councils still play the primary role in the actual planning.

Idaho, too, has broadened its focus beyond water supply project planning to address groundwater, water quality, and instream needs for fish, wildlife, and recreation. Idaho adopted its first state water plan in 1976 and the most recent version of the plan was adopted in 1996. In 2008, the state legislature broadened the planning mandate, and the Idaho Water Resource Board is currently reviewing and revising a draft issued in 2010. The 2010 draft carries forward a comprehensive approach, covering such diverse issues as: conjunctive management; aquifer recharge; water banking; endangered species; and stream channel rehabilitation. The plan also addresses the need for enhanced flexibility in future water management to cope with climate change — although the discussion is brief, it is quite specific. Idaho's plan also explicitly discusses implementation strategies and funding needs, but these portions of the plan appear more aspirational than concrete.

The Nevada legislature adopted a state water planning requirement in 1995. The state's current plan begins with this sentence: "Nevada is the driest state in the nation and one of the fastest growing." Nonetheless, in spite of this stark reality, the plan explicitly adopts a "growth-neutral" position. It "is designed to be a policy and planning guide, not a water supply plan" — with the assumption that most of the actual water supply planning will occur at the local level. That being said, the policy net was cast fairly broadly to consider: water quality as well as quantity; environmental uses for water as well as consumptive uses; and the relationship between groundwater and surface water. However, the plan doesn't appear to confront climate change directly. The plan sets forth a long series of recommendations in fourteen different broad issue areas. Ultimately, it is up to a number of different actors (the governor, the legislature, state agencies, local governments, etc.) to implement most of those recommendations on a voluntary basis, and most of them would require future funding.

Wyoming has the smallest population of any state — not only in the west, but in the entire country — with just over 564,000 residents in 2010. Wyoming's current plan (adopted in 2007) was developed in a bottom-up process. Plans were first developed at the basin level for the state's seven river basins, and the state then compiled those documents into a statewide framework plan, also adding statewide information and observations. The state plan contains extensive description about Wyoming's water resources, including: current uses and future demands; surface water and groundwater considerations; and consumptive and non-consumptive uses. The need to address the possible impacts of climate change is acknowledged, but the plan itself doesn't provide that analysis. Although both the state plan and the basin plans contain a range of detailed recommendations, none of them address actual implementation or funding for those suggestions — or for the "water use opportunities" (development projects) identified in the basin plans.

In New Mexico, the State Engineer's Office was directed by the State Legislature, in 2003, to prepare a state water plan and to update it every five years. Although a proposed review and revision document was issued in 2009, the update process has not been completed. The 2009 document noted some areas that received insufficient attention in the 2003 plan, including the relationship between groundwater and surface water, and the relationship between water availability and land use planning. The 2009 proposal also set priority areas to be addressed by the revised plan, which include, among other things: addressing the impacts of climate change and the energy/water nexus; giving more attention to water quality; and tending to critical infrastructure needs. Significantly, the proposal also noted that the update should include a more detailed implementation schedule than the original 2003 plan. The planning process seems to be operating on a shoestring budget of approximately $350,000, and at least one state official described it as an "unfunded mandate."

Among the inter-mountain west states, Colorado and Utah have more traditional water development plans. For example, Colorado does not have a comprehensive plan for water management, even though it ranks fairly high among the western states in terms of population (5.03 million in 2010; fifth largest of the

State Water Plans

Colorado Conflict

Supply Initiative

Utah

Regional Plans

Arizona

Groundwater Areas

California's Scope & Scale

Non-State Groundwater Approach

Continuous Planning

Funding

lower 48 western states, following California, Texas, Washington, and Arizona). As recently as January of 2012, the Colorado Water Congress Convention hosted a panel of speakers addressing the issue of state water planning. One of the speakers noted that such planning has been difficult historically because of "mistrust between the Colorado River basin, where most of the water is, and the Front Range." [The "Front Range" refers, colloquially, to the area east of the Front Range of Rocky Mountains in Colorado, mostly in the valley of the South Platte and Arkansas Rivers, where most of the state's population resides.] Panelists also noted that the documents which are in place at the state level "essentially boil down to finding out how much Colorado River water is left to develop." Chief among these documents is the Statewide Water Supply Initiative, which inventories water demands and proposed water supply development projects. Within its narrow focus, the Initiative is fairly explicit about implementation. Furthermore, the document addresses climate change in some detail. A variety of state water development funds are available, and the Colorado Water Conservation Board also provides information about additional funding sources.

Utah's plan is somewhat dated, as it was adopted in 2001. Although the major thrust of the plan was to identify how to meet future water demand, the plan went beyond discussion of physical infrastructure and broadly considered conservation, water transfers, and conjunctive management as ways to meet those water supply needs. Utah's plan does discuss water quality and other environmental issues, but primarily in the context of project impacts that water planners and managers "need to be aware of" and "fully consider" in their water development decisions. The regional plans prepared as part of the state plan are of more recent vintage and give somewhat more detailed treatment to environmental issues. Climate is discussed primarily in historical terms. Funding and implementation are noted as challenges that need to be met, but the plan doesn't really confront either of these challenges directly.

Arizona is somewhat unique in that its state planning process only covers groundwater in five "active management areas" of the state, albeit the most populous areas (containing 80% of the population and 75% of the water use — though only 13% of the state's land area). Within those constraints, however, the plans are very extensive and thorough, addressing details of allowable and prohibited water use and conservation with the goal of curtailing significant groundwater overdraft. The plans are updated every five years. Most of the specific requirements come directly from statute — the Arizona Groundwater Management Act was adopted in 1980 to address groundwater overdraft as well as limitations in pre-existing Arizona law that significantly limited the movement of water from historical agricultural and mining uses to the state's booming municipalities. The extensive and comprehensive statute contained implementation details and set groundwater use fees and other revenues to support the management program and projects conducted thereunder. In the rest of the Arizona, the state provides funding and technical assistance for local planning.

WEST COAST STATES

Our tour now brings us to the west coast — and beyond. Perhaps not surprisingly, California leads the west in terms of the scope and scale of state water planning. Situated mostly in the dry south, with a 2010 population of over thirty-seven million people and a multi-billion dollar agricultural industry, the state is highly motivated to plan ahead to meet its water supply needs. California's first water plan was prepared in 1957 and the plan is updated every five years. (*See* Water Briefs, *TWR* #24 and #48.) Both the processes and the resulting plans are the most comprehensive of the western states. The current plan (2009) is an extensive five-volume document addressing everything from traditional water supply issues to more innovative subjects such as ecosystem restoration, forest management, and land use planning. One area of omission that detracts from the plan's otherwise comprehensive approach is groundwater. Since California does not manage groundwater at the state level, the plan's discussion of the groundwater resource lacks authority and impact.

Because of the five-year updates and the broad scope of its planning effort, California's planning process is essentially continuous. For instance, only a few months after the issuance of the 2009 plan, the California Department of Water Resources (CDWR) began the process of scoping and identifying deliverables for the 2014 update. CDWR conducts extensive outreach to facilitate public involvement (including in Spanish), and uses several standing advisory committees and "topic-based caucuses" to provide information and recommendations and to communicate with various constituencies. The advisory committees include a Tribal Advisory Committee, a Public Advisory Committee, and the Federal Agency Network. The caucuses cover: Environmental Justice; Groundwater; Finance; Flooding; Land Use; Water Quality; and Water Technology. The caucuses are governed by extensive charters that outline caucus procedure and member responsibilities; they are assisted by staff from CDWR.

The California efforts have been very well-funded, though the state's ongoing budget crisis may change that. For 2011-12, the budget for continuing plan development was over $30 million, and the proposed budget for 2012-13 was close to $120 million. Over three hundred "personnel years" are represented in each of those annual budgets. These generous budgets support extensive technical and

State Water Plans

research support for the plans and enable broad public involvement. On top of the planning funds, billions of dollars of project funding are available from bonding and other sources. The level of detail in the plan and the ability of CDWR to directly carry out many of its elements insure a fair level of implementation. Nonetheless, the 2013 update is planned to enhance the coverage of funding and implementation with updated strategic implementation plan and finance plan components.

Hawaii

Comprehensive Process

Hawaii, more than 2000 miles west, may be comparatively tiny, but it also has a comprehensive state water plan, covering: water quantity and quality; preservation and use; groundwater and surface water; and land use and water use. Responsibilities are specified for the various state agencies, and Hawaii's five counties also play a significant role in the planning. Broad public involvement is required, and the planning process is ongoing, with various components being updated currently. While the plan does address the anticipated impacts from climate change, it does not do so in much detail — instead noting the need for additional research.

Washington

Washington's water planning effort consists of several components, including: a bare-bones state-level program plan; local watershed plans; and a comprehensive Columbia River planning process. The Washington Department of Ecology's (Ecology's) program plan includes biennial goals and performance measures for water resources. For example, recent goals included setting six instream flows around the state and providing technical assistance to forty-two local watershed councils. Local watershed planning is the primary planning approach; the state is divided into 62 "Water Resources Information Areas" (WRIAs) that prepare plans according to state statutory requirements. However, those requirements are not comprehensive. The plans need only address water quantity — water quality and habitat are optional elements. As to quantity, though, the plans must address both consumptive uses and instream flow needs.

Local Watershed Planning

Climate Impacts Researched

The University of Washington's Climate Impacts Group carries out extensive climate change research — while this effort is separate from the state's planning process, local governments and water utilities can use this resource voluntarily.

Most of the state has completed or has in-process plans except for some areas that are not participating for a variety of reasons, including everything from a lack of development pressure to sufficient alternative planning processes. State funding is available for the planning process and for projects identified in adopted plans. For the 2009-2010 biennium, the total budget for the program exceeded $7.4 million.

Columbia River Basin

The most intensive water planning in Washington has been done in the Columbia River Basin, which includes the bulk of the state's land area. Ecology's Office of Columbia River (OCR) was developed in response to 2006 legislation directing Ecology to identify and develop additional Columbia River water supply. As with the local watershed planning statute, the law requires consideration of supply for both consumptive uses and instream flows, but there are no comprehensive requirements beyond that.

Development & Mitigation

The emphasis is on water development projects (with appropriate mitigation), although conservation, cooperative agreements, and other supply innovations are also encouraged. The Washington legislature initially budgeted $216 million for the OCR and Columbia Basin projects ($200 million of this was in the form of authority to issue general obligation bonds).

Oregon

Initial Planning Efforts

Just across the Columbia River, Oregon's recent foray into state water planning is a pauper's project by comparison. The ongoing planning effort was mandated by 2009 legislation that directed the Oregon Department of Water Resources — in conjunction with the state's Departments of Environmental Quality and Fish and Wildlife — to develop a state "integrated water resources strategy." The planning mandate was funded with only $570,000 (including two limited duration FTE personnel positions) stretched over two biennial budget periods. No project funding was included. Understandably, the strategy is very much a preliminary document. It compiles a good deal of information about the state's water resources and the coming challenges and outlines an overarching framework for addressing the issues. *See* Water Briefs, *TWR* #84 and #90.

Broad Strategy

Nonetheless, Oregon's strategy is very broad and comprehensive. The draft document considers: both instream and out-of-stream water needs; water quantity and quality; the relationship of groundwater and surface water; land use and water use interactions; and the climate change/energy/water nexus. Many ambitious recommendations are included to improve everything from water resources data collection to education and outreach. However, the document does not address specific projects or implementation measures, nor does it propose how the recommendations will be funded. The strategy also recommends that specific future planning should occur at the basin and sub-basin level across the state, following the statewide framework. The Oregon draft strategy is currently out for review, with a target date of August of 2012 for adoption by Oregon's Water Resources Commission. The 2009 legislation requires the strategy to be updated every five years, but the five year reviews, concrete implementation of any of the strategy's recommendations, and further basin-level planning will all require considerable funding — and in some cases, additional legislative action — to become a reality.

Funding Needs

State Water Plans

Matrix Criteria

Comprehensive?

Involvement & Support

Flexibility

Funding & Implementation

Narrow Focus Plans

Challenges

COMPARISONS & ANALYSIS

At the beginning of this article, I suggested several criteria for evaluating a state water plan as to its effectiveness at getting you where you want to go: (1) comprehensiveness; (2) flexibility to deal with future uncertainties, particularly climate change; (3) public involvement and widespread support; (4) funding; and (5) implementation. In the matrix below, I've tried to summarize the previous discussion about each of the states in order to capture in a more concrete, comparable way how the western water plans shake out using these criteria. The states are evaluated against the criteria using a simple a plus (+) or minus (-). If I could not gather enough information to determine whether a plus or minus was warranted for any of the criteria, I inserted a question mark.

I gave a state a "plus" rating on comprehensiveness if its plan goes beyond water project planning to consider water resources more broadly — including consideration of water quantity and quality, groundwater and surface water, instream and out-of-stream uses, and/or the nexus between land use and water use and between energy and water. I gave "minuses" to states whose plans only address water supply for consumptive water use. This is obviously a coarse rating system, since it doesn't really distinguish among the plans as to varying degrees of comprehensiveness, but it at least indicates those states moving toward a more holistic approach to water management. Any state with a "water-supply-only" plan also got a minus in the involvement/support category on the assumption that if the plan isn't comprehensive, then by definition it is unlikely to have broad involvement and support from the non-water-user community.

The flexibility criterion is represented by the second column labeled "Rev/CC" for review and climate change. Each state got two ratings. The first simply indicates whether the planning process incorporates regular reviews, revisions, and updates of some sort as opposed to being a one-time document. The second reflects whether the state's plan explicitly addresses the impacts of climate change in some fashion. In this sense, consideration of climate change represents a proxy for how flexible and adaptable the plan is likely to be, though it is far from a sophisticated measure of overall flexibility.

In the funding column, a state received a plus if it appears that the planning process itself, and projects or recommendations growing out of the plan, are funded at some reasonable level. The implementation column, though closely related to funding, captures slightly different information. A plus indicates that there is some mechanism to carry the plan's recommendations forward. In many cases, that mechanism will be project funding, but it might also be an explicit implementation plan or some other sort of commitment or requirement by the planning agency or others to carry out the plan's components. With this very rough set of metrics, it's possible to make a few observations about how useful the various state plans are likely to be in the next few decades.

State Plan Criteria »	Comprehensive	Rev/CC	Involvement/Support	Funding	Implementation
Arizona	-	+/-	+	+	+
California	+	+/+	+	+	+
Colorado	-	-/-	-	+	+
Hawaii	+	+/+	+	?	+
Idaho	+	+/+	+	-	-
Kansas	+	+/-	+	+	+
Montana	+	-/-	+	?	?
Nebraska	+	?/-	+	+	+
Nevada	+	-/-	+	-	-
New Mexico	+	+/+	+	-	+
North Dakota	-	?/-	-	+	+
Oklahoma	+	+/+	+	-	-
Oregon	+	+/+	+	-	-
South Dakota	-	+/-	-	+	+
Texas	-	-/-	-	+	+
Utah	-	-/-	-	-	-
Washington	-	?/-	-	+	+
Wyoming	+	-/-	+	-	-

I would submit that the states with narrowly-focused water development plans — including Colorado, North and South Dakota, Texas, Utah, Washington, and Wyoming — are going to be less successful in meeting future water challenges than the states with comprehensive water management plans. (Arizona's plan is classified as non-comprehensive, but that is because its sole focus is groundwater, and it only covers part of the state, so it is different from these other states.) By focusing on water supply projects, these states leave out significant issues and constituencies interested in non-consumptive uses of water. This omission may defer or delay making decisions about water use tradeoffs, but eventually the states will need to confront those hard choices, and carefully planned and hoped-for water projects may suffer the consequences. The same is true for failing to integrate quantity and quality, groundwater and surface water, land use and water use, and energy and water. Water resources are integrated and holistic by nature, and eventually the inadequacies of compartmentalized planning will catch up to the planners.

State Water Plans

Climate Change Limitations

Janet Neuman is Senior Counsel with Tonkon Torp's Water Law Practice Group. She also works with the Environmental & Natural Resources Practice Group. Considered one of the foremost water law specialists in Oregon, Jan is a former professor, Associate Dean of Faculty, and co-director of the Natural Resources Law Institute at Lewis & Clark Law School. Prior to joining the Lewis & Clark faculty, Jan was Director of the Oregon Department of State Lands, where she oversaw the state's management of common school fund lands and natural resources. She previously had been the agency's assistant director for resource management. Before working in state government, Jan practiced litigation at Tonkon Torp. She is a frequent speaker and writer on water law and policy. Jan is also a past president of the Oregon Water Trust (now part of The Freshwater Trust) and has served on their Board for many years. Jan also served on the Western Water Policy Review Advisory Commission, appointed by President Clinton, which in 1998 released recommendations on the future role of the federal government in western water management. In 2011, Jan published *Oregon Water Law: A Comprehensive Treatise on the Law of Water and Water Rights in Oregon*.

That said, however, narrowly focused development plans can produce actual projects more readily in the short term, assuming that funding is available. For instance, Washington has been able to move forward with many on-the-ground water development projects as a result of its well-funded Columbia Basin water planning effort, while Oregon can only watch from the other side of the river. Oregon's plan is very comprehensive and ambitious, but also brand new and seriously underfunded — leaving the state years behind its neighbor in terms of implementation.

Fewer than half the states have directly incorporated climate change into their planning efforts. Yet the most detailed and well-funded plans may be for naught under future climate scenarios. Even those states who regularly review and revise their water plans may find themselves "up the paddle without a creek" if they continue to base their plans on historical water regimes rather than on the coming changes. In this regard, California, Hawaii, Idaho, New Mexico, and Oregon are headed in the right direction.

At the end of the day, however, the best-laid plans need to be funded and implemented to be worth more than the paper they're written on. Action and money can't necessarily make a mediocre plan better — silk purses and sows' ears come to mind — but without implementation and funding, a good plan is just a pipe dream. Several states have been generous with both planning and project funding, giving their plans considerable traction. The money for the planning process itself usually comes from appropriations, which are not necessarily reliable long-term. But in significant amounts at the right time, these monies can help produce very impressive planning documents — such as in California, Hawaii, and Texas.

Capital funds come from a variety of sources throughout the states. Kansas, Nebraska, and Arizona have all taken the politically difficult but worthwhile step of creating dedicated streams of revenue for water management. Other states have successfully used bonding revenue to create the necessary capital. Still others, such as North Dakota and South Dakota, have served a valuable clearinghouse and coordinating role to bring substantial federal funds to their states. Meanwhile, a few states have achieved much less traction on funding and implementation, including Idaho, Nevada, New Mexico, Oklahoma, Oregon, Utah, and Wyoming.

CONCLUSION

Putting all of these results together, which states seem to have the "best-laid" plans — meaning the most comprehensive, broadly-supported, adaptive, well-funded, and implemented? The states that appear to hit most of these marks include California, Hawaii, Kansas, Nebraska, and New Mexico, as well as Arizona, within more limited parameters. Of course, this prediction could be easily proven wrong — some amendments here, some tweaking there, and some well-placed dollars thrown into the mix — and any or all of the western states could be far more prepared to get where they want to go in their water future.

For Additional Information:

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State Water Plans Information

ADDITIONAL ONLINE RESOURCES

Arizona: www.azwater.gov/AzDWR/WaterManagement/AMAs/FourthManagementPlan.htm
California: www.waterplan.water.ca.gov/
Colorado: http://cwcb.state.co.us/water-management/water-supply-planning/Pages/SWSI2010.aspx
Hawaii: http://hawaii.gov/dlnr/cwrm/planning_hiwaterplan.htm
Idaho: www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State_Planning.htm
Kansas: www.kwo.org/Kansas_Water_Plan/Kansas_Water_Plan.htm
Montana: dnrc.mt.gov/wrd/water_mgmt/montana_state_waterplan/default.asp
Nebraska: www.dnr.ne.gov/docs/compplan.html
Nevada: http://water.nv.gov/programs/planning/stateplan/
New Mexico: www.ose.state.nm.us/publications_state_water_plans.html
North Dakota:
www.swc.state.nd.us/4dlink9/4dcgi/GetSubCategoryRecord/Reports%20and%20Publications/Water%20Management%20Plans
Oklahoma: http://environ.okstate.edu/owrri/waterplan/
Oregon: www.oregon.gov/OWRD/LAW/Integrated_Water_Supply_Strategy.shtml
South Dakota: http://denr.sd.gov/dfta/wwf/statewaterplan/statewaterplan.aspx
Texas: www.twdb.state.tx.us/wrpi/swp/swp.asp
Utah: www.water.utah.gov/waterplan/
Washington: www.ecy.wa.gov/programs/wr/cwp/crwmp.html and http://www.ecy.wa.gov/watershed/index.html
Wyoming: http://waterplan.state.wy.us/

Stormwater Assistance

NPDES Updates

Puget Sound Pollution

LID Research

Local Watershed Focus

THE WASHINGTON STORMWATER CENTER

by John D. Stark, Ph.D. and Tanyalee Erwin

INTRODUCTION

The issues of stormwater impacts and applicable solutions are complex, with many management entities working across watershed boundaries. Businesses and jurisdictions within the State of Washington have to meet increasingly rigorous criteria to satisfy the requirements of their National Pollutant Discharge Elimination System (NPDES) permits, which have been recently updated to reflect the growing focus on restoring water quality in the Puget Sound region as well as the rest of Washington's waters.

To provide needed assistance to stormwater permit holders, the Association of Washington Businesses worked with other collaborators and the Washington Department of Ecology (Ecology) and sponsored a bill to the Washington State Legislature. The bill (House Bill 2222, later codified in RCW 90.48.545) primarily addressed issues pertaining to industrial stormwater, with a call for the creation of a stormwater technical resource center. The Washington Stormwater Center, established in December 2010, provides assistance to all stormwater permit holders in the State, conducts research on known and emerging technologies, and offers training through web resources, site visits, and outreach programs.

THE WASHINGTON STORMWATER CENTER

Mission: To protect Washington's waters through improvements in stormwater management, serving as the central resource in Washington for integrated NPDES education, permit technical assistance, stormwater management and new technology research, development, and evaluation.

Stormwater runoff is the major source of water pollution for the Puget Sound region in Washington State. Improving stormwater management to reduce levels of pollutants entering the Sound is one of six key objectives the Puget Sound Partnership has identified to protect water quality, habitat, and aquatic resources, thus reversing the Sound's decline and restoring it to health by 2020. Because of the importance of cleaning up Puget Sound, increasing attention, resources, and best available science are aligning to improve stormwater management practices in Puget Sound and throughout Washington State.

The Low Impact Development (LID) Research Program on the Washington State University's (WSU's) Puyallup campus is home to one of the nation's largest full-scale-size replicated research areas, allowing for ongoing monitoring and analysis of a variety of LID stormwater management technologies. This "state of the art" facility was originally funded by Ecology in 2008 as an applied LID stormwater retrofit. The retrofit project served as the foundation for creating an on-the-ground program that could provide further research and education in stormwater management.

In 2009, the Washington State Legislature passed House Bill 2222 to develop a Stormwater Center for the State that would work with NPDES permit holders to improve stormwater quality through education, information sharing, and research. A grant request for proposals was issued to develop this center and Drs. John Stark, Washington State University, Puyallup and Joel Baker, University of Washington, Tacoma, Center for Urban Waters were awarded the grant. Along with Tanyalee Erwin, WSU-Puyallup, they assembled an advisory board consisting of representatives from industry, municipalities, Ecology, and **n**on-**g**overnmental **o**rganizations (NGOs). Together with the board, the Washington Stormwater Center (WSC) was developed and was officially established on December 9, 2010. Drs. John Stark and Joel Baker are the Co-Directors of WSC and Tanyalee Erwin is the Manager.

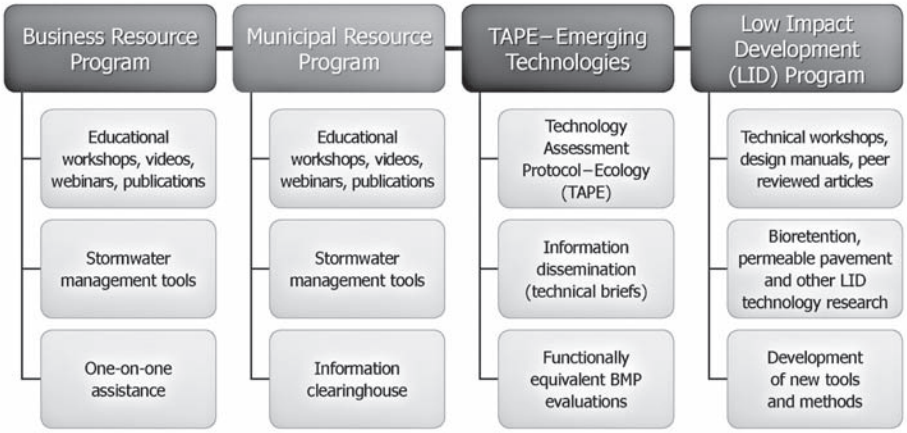
The complexity and regulatory environment of stormwater management is increasingly taxing budgets and stifling innovation for stormwater permit holders. Municipalities and businesses have strict requirements that must be enacted in order to help clean Washington's waters. The programs and resources at WSC, as well as the results of ongoing research and the partnership among municipalities, businesses, and industry will provide a framework for reducing, treating, and managing stormwater. Special attention is being given to the unique attributes and criteria of local watersheds. Through its management of the Technology Assessment Protocol-Ecology process ("TAPE" — an assessment process based on sound science overseen by a national review board), WSC will help manufacturers of viable stormwater management products obtain certification for the use of their products by Washington's stormwater permit holders.

Stormwater Assistance

John Stark is the Director of the Washington State University, Puyallup Research and Extension Center. John is also the Co-Director of the Washington Stormwater Center and a member of the Puget Sound Partnership Science Panel. Additionally, John is a Professor and runs the Ecotoxicology Program at WSU. John's research deals with protection of endangered species and ecological risk assessment of pollutants with particular emphasis on the effects of pesticides and pesticide mixtures on salmon and their food. Recent projects involve determination of the effects of polluted stormwater runoff on salmon and invertebrate health. John has published over 100 peer-reviewed papers in scientific journals, numerous book chapters, and a book on ecological risk assessment entitled "*Demographic Toxicity: Methods in Ecological Risk Assessment*."

Tanyalee Erwin is Manager of the Washington Stormwater Center and a Research Associate at Washington State University Puyallup Research and Extension Center. She holds dual roles as a faculty member working on fecal coliform pollution in salmon-bearing streams and as the manager and developer of the Washington Stormwater Center, which she helped create in collaboration with the City of Puyallup, University of Washington – Tacoma and a team of businesses, local governments, and environmental organizations.

FOUR AREAS OF STORMWATER MANAGEMENT PROGRAMS AND ASSISTANCE



The client base for WSC consists of businesses in 50+ industries within the State of Washington that require coverage under an industrial or construction stormwater general permit, as well as Phase I and II municipalities with or without coverage under a municipal stormwater permit, and landowners interested in non-point source stormwater management techniques.

Stormwater permit holders that will benefit from the Center are:

- Estimated 3600+ businesses currently requiring permits (roughly 88% fall in the small business category)
- Estimated 100+ municipalities and special purpose districts requiring permits
- Estimated 3,000+ businesses that should be, but are not currently covered, by a general permit

WSC consists of four branches:

- The Municipal Resource Program
- The Business Resource Program headed up by Lisa Rozmyn
- The Low Impact Development (LID) program led Curtis Hinman
- The Technology Assessment Protocol Ecology (TAPE) led by Kurt Marx. The TAPE program reviews and evaluates stormwater quality treatment emerging technologies designed to treat specific stormwater pollutants.

An Eastern Washington branch of WSC is also being developed, reflecting the fact that stormwater issues differ between eastern and western Washington and are regulated by two separate municipal permits (the industrial permit is uniform throughout the State).

WSC provides many services for industrial, construction, and municipal permit holders including acting as a clearinghouse for information for rural nonpoint source stormwater management. WSC also serves a coordinating role to provide a platform for stormwater events and other interests related to stormwater issues.

CONCLUSION

WSC has recently been funded by Ecology for the present biennium. WSC has hired a business resource program specialist, Lisa Rozmyn (formerly of the Port of Tacoma), with a grant from the Boeing Foundation and is in the process of a job search for a municipal stormwater permit specialist. We have hired many of our core group with state funds and generous grants from the Boeing Foundation and the Bullitt Foundation. The Russell Family Foundation has provided necessary support to complete initial LID research programs that will look at the effectiveness of LID-treated water on juvenile salmon.

As a partner in the newly formed Tacoma Urban Clean Water Technology Zone, WSC also will contribute to a statewide economic development plan. The Urban Clean Water Innovative Partnership Zone will leverage relationships amongst closely located research institutions, training facilities, and business complexes to address product and resource development and growth in clean water and stormwater technologies and services.

For Additional Information:

John Stark, Washington Stormwater Center, 253/ 445-4568 or starkj@wsu.edu
Washington Stormwater Center website: www.wastormwatercenter.org
WSC Report to the Washington State Legislature: www.ecy.wa.gov/biblio/1110009.html

Texas Groundwater

TEXAS GROUNDWATER RULING

EAA v. Day

TEXAS SUPREME COURT CONFIRMS LANDOWNER'S OWNERSHIP OF GROUNDWATER IN PLACE

by Edmond R. McCarthy, Jr., Jackson, Sjoberg, McCarthy & Townsend LLP (Austin, TX)

INTRODUCTION

Groundwater Ownership

In 1904 the Texas Supreme Court adopted as part of Texas Common Law the so-called English Rule of "Absolute Ownership" of groundwater in Texas. *Houston & Texas Central Railroad Co. v. East*, 81 S.W. 279, 280-81 (Tex. 1904)("East case" or "East"). On February 24, 2012 — more than a century later — the Supreme Court announced for the first time that under Texas law the ownership of the groundwater in place belonged to the owner of the property. *Edwards Aquifer Authority v. Day*, __ SW3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012)("Day case" or "Day" and cited as "*EAA v Day*, *supra*, at *__").

Anticipated as a landmark decision in Texas jurisprudence, the Court's decision was as significant for what it did not decide as what it did. The narrow scope of the Court's decision was a function of the procedural nature of the way the case came up to the Supreme Court. *Id.*

Rule of Capture

Since 1904 — when the Texas Supreme Court adopted the so-called rule of "Absolute Ownership" from the English case of *Acton v. Blundell*, 12 Mees & W (1843), and concluded that the owner of the surface had the right to dig and to capture the water percolating from beneath his property even if doing so affected his neighbor (*East*, *supra*, 81 S.W. at 280; *see City of Sherman v. PUC*, 643 S.W. 2d 681, 685 (Tex. 1983)) — Texas has followed the "Rule of Capture." From the *East* holding, Texas' "Rule of Capture" has evolved. *See* Drummond, Sherman & McCarthy, *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 Tex. Tech L. Rev. 1, 42-57 (2005), which discusses the development of the Rule of Capture and groundwater ownership in Texas.

Liability Decision

The Rule of Capture announced in *East* was a theory of "Tort Law" that allowed the Railroad to escape liability for the harm it may have produced on East's neighboring land irrespective of whether East had owned the water when it was in the ground. *EAA v. Day*, *supra*, at *29-30. The reason, according to the Supreme Court's *Day* decision, was that in *East* the Court concluded that "a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another." *Id.* at *30. Writing for a unanimous Court in *Day*, Justice Hecht noted: "The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did. *Id.* at *29 (citing *East*, *supra*, 81 S.W. at 280-281, quoting *Pixley v. Clark*, 35 N.Y. 520 (1866)).

Ownership in Place

The Rule of Capture is often confused with the more fundamental property right of the ownership of the groundwater in place. The Court's ruling in *Day*, according to Justice Hecht, was the first time that the Texas Supreme Court had decided the question of ownership of groundwater in place. *Id.* at *30-35 (distinguishing the Court's earlier decisions in *East, Pleasanton, City of Sherman, Friendswood, and Sipriano*); see *East*, *supra*; *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955); *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681 (Tex. 1983); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc*., 576 S.W.2d 21 (Tex. 1978); *Sipriano v. Great Spring Waters of Am., Inc*., 1 S.W.3d 75, 76, 79 (Tex. 1999).

FACTUAL BACKGROUND

Edwards Aquifer Permit

The *Day* case arose from an appeal from an administrative determination by the Edwards Aquifer Authority (EAA) on an application for an "**i**nitial **r**egular **p**ermit" (IRP) to produce groundwater from the Edwards Aquifer. *Id.*; *see* Edwards Aquifer Act (EAA Act cited as "EAA Act §__"). [The EEA Act, as amended, is not codified. The EAA website contains an unofficial user friendly compilation of the EAA Act as amended available online at: www.edwardsaquifer.org/files/EAAact.pdf.]

The focus of this article is the specific issue of the ownership of the groundwater in place. This issue was raised and adjudicated in the trial court by way of cross motions for summary judgment filed by Day and the EAA on the question of whether the landowner had a constitutionally protected interested in the groundwater in place. *EAA v. Day*, 274 S.W.3d 742, 750 (Tex. App. – San Antonio 2008), aff'd, __ S.W.3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012).

The EAA is a "special purpose district" created by the Texas Legislature in 1993 pursuant to the so-called "Conservation Amendment" of the Texas Constitution. (Act of May 30, 1993, 73d Leg., R.S., ch.

Texas Groundwater

EAA Creation

EPA Protection

626, 1993 Tex. Gen. Laws 2350 (original EAA Act); *see* Tex. Const. Art. XVI, §59). A detailed history of the events leading up to the creation of the EAA is beyond the scope of this article. [For a good summary of the history of the events leading up to the creation of the EAA, see Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict Over the Texas Edwards Aquifer*, 15 Tul. Envtl. L.J. 257 (2002); Todd H. Votteler, *The Little Fish that Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 Envtl. L. 845 (1998).] In a nutshell, however, the creation of the EAA was driven by the threat of the "blunt axes of federal intervention" to enforce the Endangered Species Act in a case styled *Sierra Club v. Babbitt*. The litigation was originally styled as *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353, 6 (W.D. Tex. Feb. 1, 1993). During the course of the litigation, however, the case was restyled and is now commonly known as *Sierra Club v. Babbitt*, due to a change in the Secretary of the Interior. In the case, Judge Lucius Bunton threatened to bring down the "blunt axes" of federal intervention upon the State of Texas if it did not act to pass legislation to address the spring flows emanating from the Edwards Aquifer at Comal and San Marcos Springs (flows needed to protect the identified endangered species). *See Id*. at *29; *see* generally Vottler, *Raiders of the Lost Aquifer*, supra, at 276.

Following its creation in 1993, the seating of the EAA Board and implementation of the EAA Act were delayed until 1996 for various reasons that are also beyond the scope of this Article. *EAA v Day*, *supra*, at *12; *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996); *see* generally Votteler, *Raiders of the Lost Aquifer*, *supra*; Votteler, *The Little Fish that Roared, supra*.

Agricultural Use

The year after the EAA was created, R. Burrell Day, together with Joel McDaniel (referred to here as "Day") purchased 381.40 acres of land within EAA's jurisdiction for agricultural purposes, e.g, raising oats and peanuts and grazing cattle. *See EAA v. Day*, *supra*, at *4. Pursuant to EAA Act requirements to file applications for beneficial use of water from the Edwards Aquifer to support their anticipated agricultural activities (*Id*. at *5-9; see EAA Act §§ 1.15(b), 1.33. 1.35(a)), Day filed an application for a permit to produce 700 acre-feet of water per annum. *Id*. at 13. In support of the application Day included an affidavit of historic use in 1983-1984 from the prior owners of the property claiming the irrigation of 300 acres of Coastal Bermuda grass. The 700 acre-foot production request was based upon the statutorily prescribed minimum production for irrigation purposes of two acre-feet for each acre of irrigated crop land during the historic use period (*Id*., *see* EAA Act §116(e); *see* generally *Barshop*, 925 S.W.2d at 624 n.2; see EAA RULES § 711.172(b)(2)), plus recreational use in a 50-acre lake on the property. *See EAA v. Day*, *supra*, at *13.

Historic Withdrawals

The EAA's management initially declared the Day application "administratively complete" and recommended issuance of a permit for 600 acre-feet of annual production based upon evidence of "average annual beneficial use of 600 acre-feet of water during the historical period." However, Day was "invited" by EAA to provide additional supporting evidence of the historic use. *Id*. Day did not respond, but in December 1999, the EAA approved an amendment to Day's application to move its point of diversion of water from the Aquifer. The EAA's confirmation of the proposed new replacement well location cautioned Day that it had not yet acted to approve the application. Day, however, proceeded to drill a new replacement well at a cost of $95,000.00. *Id*.

Beneficial Use

In November 2000, the EAA notified Day that — "based on information available" — the application would be denied for lack of evidence of "beneficial use" of the historic withdrawals. *Id*. at *13-14. Day protested the decision and the matter was transferred to an **a**dministrative **l**aw **j**udge (ALJ) engaged by the EAA to handle "contested case" hearings on permit applications. *Id*. at *14.

DAY'S COURT APPEALS

In the Trial Court

"Taking" Alleged

At the conclusion of the contested case, the ALJ recommended that Day receive an **i**nitial **r**egular **p**ermit or IRP authorizing Day's production of 14 acre-feet per year from the Edwards Aquifer. *Id*. Day appealed the decision to State District Court claiming not only error in the decision, but alleging that it constituted a "taking" of his property in violation of Article I, Section 17(a) of the Texas Constitution, as well as other constitutional violations. *Id*. at *15. Defendant EAA brought the State of Texas into the case as a third-party defendant seeking indemnification from and contribution by the State in response to Day's takings claim. *Id*. The Court noted that the issue of the State's potential liability to the EAA on the theory that the EAA's actions were mandated by the State "was not fully developed below and has not been fully briefed." As a result, like many other potential issues in the case, the Court declined to address it. *Id*. at *15-16 & n.24. The EAA looked to the State in light of the fact that the EAA believed its liability flowed solely from the EAA's performance of its statutorily prescribed mission and duties. *Id*.

State Liability

In its motion for summary judgment, the EAA contended that Day had no constitutionally protected vested ownership right in the groundwater in place. *EAA v. Day*, 274 S.W.3d 742, 756 (Tex. App. – San Antonio 2008), aff'd, __ S.W.3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012). The trial court granted

Texas Groundwater

Trial Court Limitations

the EAA's motion. As a result, the underlying facts related to Day's groundwater i.e., its value, the volume of water that could be produced, its potential uses, and the economic value and or damages associated with the loss of the use of that water — was not made part of the record. Similarly, no evidence was offered or derived in the case specific to whether and how the EAA's denial of the requested permit was based upon the EAA's regulatory authority (from enabling legislation) or the rules it had promulgated related to permitting. No evidence was offered or produced related to the underlying governmental rationale or public purpose for which the denial of the permit was ordered, or whether that action reached the level of "taking" or an "injury" under Article I, Section 17(a) of the Texas Constitution. Finally, because the trial court granted the EAA's motion for summary judgment based on the conclusion that Day did not own the groundwater in place, there was no evidence made a part of the record on the issues of: 1) the extent of Day's loss of use of the groundwater in light of the denial of the permit for agricultural use, and whether that denial constituted a total or partial use of the water; and/or 2) the damages, if any, to Day resulting from such loss. *See* generally, *EAA v. Day*, 274 S.W.3d 742, 750, 756 (Tex. App. – San Antonio 2008), aff'd, __ SW3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012).

Vested Right in Groundwater

The Court of Appeals Finds "Some Ownership" of Groundwater In Place

Day appealed the adverse ruling on the constitutionally protected vested property right in the groundwater in place. *Id.* at 742; *EAA v. Day*, *supra*, at *16. Relying upon its own recent decision that landowners have "some ownership interest" in the groundwater beneath their property (*City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex.App.-San Antonio 2008, pet.denied), the Court of Appeals concluded that Day had a "vested right" in the groundwater in place. *EAA v. Day*, 274 S.W.3d 742, 756 (Tex. App. – San Antonio 2008), aff'd, __ S.W.3d __, 2012 Tex. LEXIS 161 (Tex. Feb. 24, 2012). As a result, the Court of Appeals opined:

> "Because the Authority moved for summary judgment only on the ground Applicants have no vested property right, we must remand Applicants' constitutional taking claim for further proceedings." *Id.*

Supreme Court Issues

Supreme Court Declares Groundwater to Be A Constitutionally Protected Vested Right

On appeal to the Texas Supreme Court, two issues related to the ownership of the groundwater in place were presented: 1) did the landowner own it; and 2) was it a constitutionally protected vested property right? The Supreme Court answered both questions succinctly: "We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution. We hold that it does." *EAA v. Day*, *supra*, at *4. The Court affirmed the Court of Appeals decision, and ordered that the case be remanded to the district court for further proceedings. *Id.*

No Taking Determined

However, as noted above the case was not fully developed in the trial court and reviewable issues related to a number of questions were not presented to the Court in *Day*. As a result, the Court did not hold, nor find, that the EAA's denial of Day's requested permit amount constituted a taking of Day's property, nor that it damaged or destroyed the property, to constitute a "taking" within the meaning of Article I, §17(a), Tex. Const. As no taking was determined in this case, questions remain. Assuming there was a taking, there is still no holding or finding as to whether the underlying statutory scheme and adopted rules that purportedly guided the actions of the EAA resulting in that assumed taking: 1) were a reasonable or rationally based governmental action; 2) were for a public purpose; and/or 3) whether the "taking" was "compensable." *See* generally *EAA v. Day, supra*.

Regulatory Invasion of Rights

After concluding that a landowner does have a "constitutionally compensable interest in groundwater," the Court "teased" that it had "come at last to the issue not presented in *Barshop*: whether the implementation of the EAA Act's regulatory scheme has resulted in a taking of that interest." *Id.* at *62-63. In the 1996 *Barshop* decision, the Court postponed addressing the issue as follows:

> While our prior decisions recognize both the property ownership rights of landowners in underground water and the need for legislative regulation of water, we have not previously considered the point at which water regulation unconstitutionally invades the property rights of landowners. The issue of when a particular regulation becomes an invasion of property rights in underground water is complex and multi-faceted. The problem is further complicated in this case because Plaintiffs have brought this challenge to the Act before the Authority has even had an opportunity to begin regulating the aquifer. … Because Plaintiffs have not established that the Act is unconstitutional on its face, it is not necessary to the disposition of this case to definitively resolve the clash between property rights in water and regulation of water.

Barshop, supra, 925 S.W.2d at 626.

Limited Decision

The Court's opinion discusses how the EAA's regulatory permitting process had and had not affected Day's access to and use of the groundwater beneath the property. *EAA v Day, supra*, at *63-71. In *Day,* however, the Court does not answer the question of whether the regulatory process resulted in a taking. *Id.* at *63-79.

Texas Groundwater

Overview of Regulatory Impacts

Absence of Facts

Physical Invasions

Total Deprivation

Penn Central Factors

Severity of Burden

Regulatory Impacts

Supreme Court Offers Its Perspective on the "Takings" Issue

In *Day*, the Court's "answer" to the issue it intentionally left unresolved in *Barshop (supra*, at 626) falls short of being comprehensive. The decision might better be characterized as a generic overview of how the EAA's treatment of Day — based upon the limited record — may, or may not, have deprived Day of the use and benefit of the groundwater. *EAA v. Day*, *supra*, at *63-71. The Court's perspective might be seen as a "devil's advocate's" view of the EAA's regulatory scheme. The Court: 1) discusses how the EAA Act does not entirely deprive landowners of access to their groundwater since they can drill a well capable of producing 25,000 gallons per day without a permit for exempt uses (*Id*. at *67); and 2) upheld Day's right to a permit for at least 14 acre-feet of production annually from the Aquifer. *Id.*

There was an absence of specific facts upon which to base a review of whether the EAA's regulatory scheme (authorized by the EAA Act) constituted a compensable taking of Day's vested property by restricting the use of his groundwater rights and what the level of compensation should be for that taking. The Court instead provided a survey of decisions in which it construed Article I, Section 17, as well as the US Supreme Court's analysis in cases involving the construction of the protections afforded by the 5th and 14th amendments to the US Constitution. *Id*. at *63-71. The Court's analysis focuses on its decision in *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 669 (Tex. 2004) and "regulatory takings jurisprudence" which Texas Justice Hecht indicated had been summarized in the US Supreme Court's *Lingle v Chevron U.S.A., Inc*. 544 U.S. 528, 538-539, 125 S.Ct. 2074, 161 L.Ed. 2d 876 (2005). Quoting from the US Supreme Court's opinion in *Lingle*, Justice Hecht described the following two "per se" categories of regulatory takings:

1. Physical Invasions: Any governmental regulatory action which requires a property owner to suffer a permanent physical invasion — irrespective of how "minor" — must be compensated (*EAA v. Day*, *supra*, at *64-65, citing *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982)); and
2. Total Deprivation: Any governmental regulatory action which completely deprives an owner of "all economically beneficial us[e]" of property must be compensated. *EAA v. Day*, *supra*, at *65 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992)).

Justice Hecht went on to quote from the *Lingle* Court's analysis of the "factors" to be considered in evaluating regulatory takings articulated in the US Supreme Court's decision in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978); *see EAA v. Day, supra*, at *65-66 & n.144 (quoting *Lingle*, *supra*):

1. [t]he economic impact of the regulation on the claimant and,
2. particularly, the extent to which the regulation has interfered with distinct investment-backed expectations; and
3. finally, the character of the government action.

EAA v. Day, *supra*, at *65-66.

In conclusion, Justice Hecht noted that the *Lingle* Court pointed out that the factors derived from the earlier decisions in *Loretto*, *Lucas* and *Penn Central* all focused on the "severity of the burden that government imposes upon private property rights." *Id*. at *66 & n. 145 (quoting *Lingle, supra*). The Texas Supreme Court indicated that the "common touchstone" of each of the earlier decisions was the determination that the regulatory taking was "functionally equivalent" to the "classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.*

According to Justice Hecht, the Texas Supreme Court relied upon this foundation in *Sheffield*, (*Id*. at *67) but tempered the same with the realization that "[while] all of the surrounding circumstances must be considered in applying 'a fact-sensitive test of reasonableness,'…in the end, whether the facts are sufficient to constitute a taking is a question of law." *Id*. at *67 & n. 147 (citing *Sheffield*, *supra*, at 140 S.W.3d at 673 (quoting *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex.1998)). Applying the factors to the facts in *Day*, Justice Hecht concluded that as a result of the EAA's regulatory action denying Day's permit application:

1. That Day had not suffered a "physical invasion of property" (*EAA v. Day*, *supra*, at *67);
2. With respect to the deprivation of "all" economically beneficial use of the groundwater, the impact certainly appears to have had a significant, negative economic impact, but it is doubtful that Day was denied all economically beneficial use of his property (*Id*. at *67-68); and
3. It was not certain whether Day's economic based expectations under the limited available facts were "reasonable," however, a governmental entity such as the EAA cannot immunize itself from liability for adequately compensating a property owner for property taken through a regulatory scheme solely on the basis that the scheme was only "discouraging investment." (*Id*. at *68-69).

Without reaching the ultimate conclusion — whether the EAA's implementation of the EAA Act had

Texas Groundwater

Regulation Benefits

Lawful Regulation

Property Protection

Nonuse Issue

Vested Right

Failed EAA Argument

Limited Public Resource

Compensation Impact

Burden: No Excuse

Just Compensation

taken Day's property — Justice Hecht returned to the devil's advocate role and addressed the legitimacy of governmental regulation of property. *Id.*at *77-78. Water, of necessity, due to its finite nature and fickle characteristics and availability during times of Texas' frequent droughts highlighted the legitimacy of State regulation of the resource. *Id.* at *69-70. The benefits of such government regulation include conservation and preservation of the limited resource, providing access to a greater multitude, and prevention of waste. *Id.* at *70-72; *see* generally EAA Act; Texas Water Code Ch. 36.

After noting that the Legislature agreed with the Texas Supreme Court's conclusion that landowners had a vested property right in their groundwater, Justice Hecht qualified the extent of that right by reiterating the Legislature's position that the right was subject to lawful regulation and that groundwater districts remain the State's "preferred" management tool. *Id.* at *55 & n. 119, 77 (citing Texas Water Code §36.0015). The opinion also quotes Justice Hecht's concurring opinion in *Sipriano v. Great Spring Waters of Am., Inc*., 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring), as follows: "Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available." *EAA v. Day*, supra, at *55 & n. 119. Justice Hecht was clear, however, that the Court did not believe that the Legislature's authorization of either the EAA (under the EAA Act) or groundwater districts (under Chapter 36, Texas Water Code) to regulate groundwater did not mean that they could prohibit all groundwater use except for domestic and livestock purposes. *EAA v. Day*, supra, at *75-77. According to Justice Hecht, such a conclusion in the Court's opinion would render the protections afforded to landowners pursuant to Section 36.002(c) "extremely limited" unless by "deprive" and "divest" the Legislature meant that such governmental action could not occur without the payment of adequate compensation as guaranteed by the Texas Constitution. *Id.* at *76. The Court also noted that the government cannot justify nor rationalize the taking of the vested property right without the payment of just compensation on the basis of "nonuse" —

> [A] landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited. *Id.*at *77.

Money is No Object

Economic loss, property valuation, and the question of damages were not within the scope of the *Day* decision. This was again a reflection of the narrow scope of the issues presented to the Court in the case. However, the Court clearly stated that Texas landowners possess a constitutionally vested property right in their groundwater, a property right that is capable of being taken as a result of government regulation. The economic consequences of the Court's decision is potentially very great. While providing no guidance on how to calculate the value of property taken, the Court was vehement in their finding on groundwater rights:

> Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.

Id. at *48.

Moreover, EAA argued that if the Court held that a landowner had a constitutionally protected vested property right that could not be lawfully taken through governmental regulation without the payment of just compensation, such a decision would be "especially burdensome" and "disrupt the robust market that has developed in its permits and that buyers will be wary of paying for permits that may later be reduced." *Id.* at *78. EAA's position was debunked by the Court. The Court noted that — after being in operation for fifteen years — the EAA had only identified three filed takings claims. *Id.* at *78-79.

According to Justice Hecht:

1. The Legislature can discharge its responsibility under the Conservation Amendment without triggering the *Takings Clause*. But the *Takings Clause* ensures that the problems of a limited public resource — the water supply — are shared by the public, not foisted onto a few. *Id.* at *79.
2. The requirement of compensation may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals for groundwater production. *Id.* at *76-77.
3. We cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the *Takings Clause* on government is no reason to excuse its applicability. *Id.* at *79.

With respect to the application of the *Takings Clause* to the EAA and its application of the EAA Act, *Day* at *76 quotes the unambiguous legislative intent of Act as follows:

> The legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution.

Ed McCarthy, a partner in the Law Firm of Jackson, Sjoberg, McCarthy & Townsend, LLP, practices primarily in water and water-related areas. Ed has significant experience in representing landowners, industries, and public entities, including municipalities, water supply corporations, and water districts operating pursuant to Article XVI, Section 59, of the Texas Constitution. His representation has involved permitting, and sales and leases, including transfers of both groundwater and surface water rights, and participation in contested case hearings and rulemaking proceedings before the Texas Commission on Environmental Quality and multiple local groundwater districts across Texas. Ed has counseled clients in connection with the planning, permitting, and implementation of regional water supply projects, as well as the development of water rights and district legislation, and related agency rules and regulations. His practice focuses on the perspective of the landowner or regulated entity, rather than that of the regulating authority.

CONCLUSION

The *Day* decision puts to rest the question of whether or not a landowner has a constitutionally protected vested property right in the groundwater in place beneath the surface of his property. For now, it is clear that the *Day* decision left multiple questions unanswered:

1. When, whether and/or how may that right be taken, damaged, or destroyed within the meaning of the "*Takings Clause*" of the Texas Constitution (Tex. Const. Art.I, §17(a) as the result of government regulation?
2. If taken, how will the damages for such a taking be valued?

As the Court noted, whether the *Day* decision will result in a flood of new takings litigation is somewhat dubious. The resulting economic burden of whatever takings cases are successfully prosecuted is for now unknown. What remains certain is the fact the water will continue to be at the forefront of issues confronting Texas.

Future Court decisions will doubtless provide further clarification concerning the answers to the remaining questions. However, the Legislature also has a role. Justice Calvert, writing for the Court in *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d at 803 — after Texas had adopted of the so-called "Conservation Amendment" (Tex. Const. Art.XVI, §59) — described the separation of powers between the State's legislative and judicial branches with respect to our State's natural resources in the following way: "[b]y the very terms of the Amendment the duty was enjoined upon the Legislature to implement the public policy found therein…and the Legislature shall pass all such laws as may be appropriate thereto." Justice Calvert went on to note: "No such duty was or could have been delegated to the courts. It belongs exclusively to the legislative branch of the government." *City of Corpus Christi,* 276 S.W.2d at 803. Accordingly, the ball may back in the Legislature's Court.

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The *EAA v. Day* decision is available at: www.supreme.courts.state.tx.us/historical/2012/feb/080964.pdf

Water Rights Abandonment

Regulation "Call"

Abandonment

Nonuse

Statutory Forfeiture

ABANDONMENT & NONUSE CASE IN NEBRASKA

REGULATION OF WATER RIGHTS LEADS TO DECISION ON COMMON LAW ISSUES

by David Moon, Editor

In a decision filed on April 13, the Nebraska Supreme Court (Supreme Court) remanded a case back to the Nebraska Department of Natural Resources (DNR) for a determination concerning the validity of water rights based on the issues of nonuse and abandonment. The case, *In re 2007 Appropriations of Niobrara River Waters*, Case No. S-11-006, 283 Neb. 629 (April 13, 2012), arose from a "call" for regulation to DNR by the Nebraska Public Power District (NPPD) to exercise its senior hydropower water rights — thus curtailing junior water rights to the extent necessary for NPPD to receive its full water amount. Junior irrigation appropriators who had been ordered to shut off their pumps in 2007 challenged the regulation by DNR and asserted that NPPD had lost its water rights due to nonuse and abandonment. The Supreme Court concluded, "the Department erred in refusing to determine the junior appropriators' challenge to the validity of NPPD's appropriations. On remand, the Department is directed to determine whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part." *Slip Op*. at 658.

Don Blankenau of Blankenau & Wilmoth (Lincoln, NE), one of the attorneys for the appellant irrigators, told *The Water Report, "*The takeaway point from the case is, if you fail to use your water right, even without any formal forfeiture proceeding, the water rights are not valid and can be challenged later. Under Nebraska water law, ten years of nonuse results in the water right being lost without any formal action by the State."

In addition to the question of the validity of NPPD's water rights, the case dealt with Nebraska's administrative process for the regulation of water rights. These issues included the proper way to raise (plead) the issues of forfeiture and abandonment, and who ultimately has the burden of proof on the subject of nonuse and abandonment. The crux of the case dealt with the ways one may lose a water right in Nebraska — addressing whether the "statutory forfeiture" law, or the type of proceeding involved, limits the ways in which one user can challenge another water user's rights: "Additionally, in Nebraska, water rights may be lost by nonuse, abandonment, or statutory forfeiture. The question presented in this appeal is whether, under the governing statutory scheme, a junior appropriator may allege abandonment and statutory forfeiture to challenge the validity of a senior appropriator's rights before the Department." *Id.* at 633-634.

Water Rights Abandonment

Availability

Common Law Cancellation

Relevant Regulation Issue

Burden of Proof

Preference

Aggressive Cancellations

Cancellation Policy

Issues on Remand

Regulation Issue

Blankenau provided the historical context behind the situation. "The case has an interesting history, with emotions running high. There was a strong reaction to DNR's action when it required the irrigators to shut off their diversions. That is because NPPD held water rights since the early 1940's and never made a 'call' for regulation to receive all of its senior rights, even though there were approximately 400 new appropriations of water rights issued by DNR junior to the NPPD rights. NPPD never objected to the new appropriations or requested regulation until 2007. It's also important to note that for years DNR said there was plenty of unappropriated water but when they got the regulation call from NPPD, the Department reversed course and decided suddenly that there was no water available," Blankenau said.

The Supreme Court held that the "common law methods of cancellation" — abandonment and nonuse — are valid means of challenging the validity of a senior appropriator's water rights before DNR. "While the [forfeiture] statutes do provide the Department with a cancellation procedure, the statutes do not abrogate the common-law methods of cancellation." *Id.* at 651. The Court also ruled that "the validity of NPPD's appropriations in regard to the allegations of abandonment and forfeiture" could be raised in the administrative proceeding pursuant to NPPD's call for regulation, despite the fact that the proceeding was not a statutory forfeiture case under the statutes that govern such proceedings. "Furthermore, the statutory process for cancellation is not the sole method by which appropriations may be challenged." *Id.*

The Supreme Court discussed the ability to raise the abandonment/nonuse issues in an administrative proceeding before DNR (for regulation of water rights) that was *not* a forfeiture or cancellation proceeding. "We see no reason why the Department should require appropriators to jump through additional hoops when seeking a determination of the status of this significant property interest. When relevant to a hearing before the Department, the issue of abandonment or forfeiture should be heard and decided. The manner in which the proceeding was initiated does not limit the Department's authority to do so." *Id.* at 656.

On the burden of proof issue, the Supreme Court held: "It should be noted that in a proceeding canceling water appropriations for statutory nonuse [i.e. forfeiture], the Department bears the burden to establish nonuse for the statutory period. However, the proceeding below was not a proceeding canceling appropriations. The junior appropriators invoked the Department's authority to challenge the validity of NPPD's appropriations on the theories of abandonment and statutory forfeiture. The junior appropriators therefore bear the burden of proof to establish the allegations contained in their petition." *Id.* at 658.

As background to the case, it is of interest to note that junior irrigation users have been exercising their "preference" under Nebraska water law — i.e., a preference of irrigation over power production — to obtain the right to use water ahead of NPPD. However, utilizing this preference has required the irrigators to pay NPPD $47,000 as fair compensation for the water over a 20 year period. If NPPD's water rights were not valid (due to abandonment/nonuse) the need to pay NPPD for the water would be eliminated.

Unlike many western states, Nebraska has a strong history of canceling water rights for nonuse. Don Blankenau stressed this point to TWR: "Nebraska has been fairly aggressive about canceling water rights for nonuse in the past. Approximately 1.5 million acres of irrigation were cancelled under the forfeiture statutes since the early 1970s. Nebraska has reduced the number of such actions in the last 10 to 15 years."

The Supreme Court's decision in this case is important in that the court clarified that abandonment and nonuse clearly do still exist as ways one may lose a water right in Nebraska — in addition to statutory forfeiture. Blankenau stated, "We argued in the case that the policy supporting cancellation was very important, especially if the State for any reason — such as budget limitations — should effectively stop bringing forfeiture proceedings. It makes sense to us that the common law practices of abandonment and nonuse should still exist as valid challenges to water rights, in addition to forfeiture, as part of the workings of the Prior Appropriation Doctrine."

On remand to DNR, the agency's decision concerning the nonuse and abandonment issues will determine what, if any, water rights of NPPD are still valid. DNR may also address: (1) the impact of subordination agreements where junior users paid NPPD to be able to use their junior rights in time of shortage; and (2) NPPD's assertion that if it passed water through its turbines at least once, the fact that it never called for regulation is irrelevant and NPPD is entitled to retain its full water rights.

Although DNR has been ordered to determine whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part, the case may yet see another decision by the Supreme Court to clarify the fine distinctions of water rights. Last week a motion for rehearing before the Supreme Court was filed by NPPD. "NPPD has run more water through their turbines [at times] than their water rights allow," Blankenau said. "Our client's position in the case is that the call for administration or regulation when there is a shortage of water is what determines whether the water right is in use. If you are not receiving your allocation and you fail to call for administration, you shouldn't be permitted to resurrect the appropriation and undermine the investments made by others. Moreover, if there is no history of water administration, no investor has notice that a new appropriation might be subject to a shutdown of operations."

For Additional Information:

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Decision available at: www.supremecourt.ne.gov/opinions/2012/april/apr13/s11-006.pdf

WATER BRIEFS

GREEN STORMWATER INFRASTRUCTURE / IMPLEMENTATION NEEDS

CLEAN WATER AMERICA ALLIANCE'S NATIONAL SURVEY RESULTS

The Clean Water America Alliance (Alliance), a nonprofit educational organization promoting sustainable, integrated, holistic, watershed-based water management (Ben Grumbles, President) has published a report summarizing the findings of their nationwide survey of utilities, cities, government agencies, nonprofit organizations, and the private sector on the implementation of green infrastructure and related policies. The 38-page "*Barriers and Gateways to Green Infrastructure*" (Report) presents the results of a survey focusing on four barrier categories: technical/physical; legal/regulatory; financial; and community/institutional barriers — as well as identifying green infrastructure opportunities. From across the US, a diverse sampling of more than 200 entities participated in the study.

Green infrastructure systems and practices use or mimic natural processes to infiltrate, evapotranspire, or reuse stormwater and runoff on the site where it is generated. These approaches keep rainwater out of the sewer system which can lead to sewer overflows and also reduce the amount of untreated runoff discharged to surface waters by allowing stormwater to be absorbed and cleansed by soil and vegetation before flowing into groundwater or surface water resources. Green infrastructure has been proven to provide economic, social, and environmental benefits to communities. But it is still relatively new and poorly understood. Despite all these benefits, there is uncertainty and a lack of implementation.

COMMON IDENTIFIED BARRIERS INCLUDE:

Technical and Physical Barriers

- Lack of understanding and knowledge of what green infrastructure is and the benefits it provides
- Deficiency of data demonstrating benefits, costs, & performance
- Insufficient technical knowledge and experience
- Lack of design standards, best management practices, codes and ordinances that facilitate the design, acceptance, and implementation of green infrastructure

Legal and Regulatory Barriers

- Local rules can be lacking, conflicting, or restrictive
- State water and land-use policies and property rights can be complicating factors
- Federal rules can be conflicting, overly prescriptive, without needed flexibility, or silent in key aspects

Financial Barriers

- Not enough data about upfront and ongoing maintenance costs and economic benefits
- Perceived high cost over short and long term
- Lack of funding at all levels coupled with poor coordination or integration of programs and funds
- Too much risk — not enough incentives

Community and Institutional Barriers

- Insufficient and inaccessible information about green infrastructure and its benefits for political leaders, administrators, agency staff, developers, builders, landscapers, and others, including the public
- Community and institutional values that under-appreciate green infrastructure aesthetics and characteristics
- Lack of inter-agency and community cooperation

OPPORTUNITIES

Local leadership and knowledge of the regulatory roadmap, as well as the "triple bottom-line benefits" of green infrastructure, need to grow. Community forums on green infrastructure and designated green infrastructure "ombudsmen" to steer projects through the process can help, as well as identify the need for changes to current building codes, street/transportation/ parking ordinances, conflicting agency policies, and other uniquely local constraints.

State leadership is needed to clarify green infrastructure definitions and water rights implications, integrate and reconcile multiple local and state agency policies that impact green infrastructure and Low Impact Development (LID) practices. Federal leadership can take many forms, without creating a one-size-fits-all approach that stifles state or local flexibility. Flexible performance standards can help, as would greater promotion of green infrastructure in permits, Total Maximum Daily Loads (TMDLs), and consent decrees. Standard-setting, permitting and enforcement offices need to recognize green infrastructure approaches often need more time and different performance milestones than more costly, traditional methods. More robust policies and practices are needed to give appropriate credit for green infrastructure, including benefits under other water and air programs and based on triple bottom line / total project cost analysis.

RECOMMENDATIONS

The recommendations made in the Report stem from the responses received by survey participants and the Alliance's experience with green infrastructure policy. The purpose of the Report is to inform EPA policy choices on upcoming stormwater regulations and broader green infrastructure strategies involving other key federal agencies. It also provides guidance for green infrastructure pioneers at the local and state levels of government and in the private sector to promote and implement green infrastructure efforts.

Key recommendations include urging EPA to use new stormwater regulations and permits to help drive green infrastructure, fully measure and account for economic and environmental benefits, embrace regional flexibility and results-oriented approaches, and focus increased federal funding for green infrastructure initiatives. Coordination among other federal agencies is critical, especially the US Departments of Agriculture, Interior, and Transportation. This can also be true at all levels of government. Only through greater coordination, education, and funding can green infrastructure be advanced meaningfully and sustainably.

For info: The Alliance's full Report is available online at:
www.cleanwateramericaalliance.org/news-media/alliance-publications/

WATER BRIEFS

SPECULATION DENIED NM GROUNDWATER APP REJECTED

On April 2, the New Mexico State Engineer announced that he accepted the order of the hearing examiner (issued March 30) and denied an application to use 37 wells to pump 54,000 acre-feet of groundwater per year from the San Augustin Plains in southwestern New Mexico for all purposes of use, including municipalities and delivery to the Rio Grande to ensure interstate compact water deliveries to Texas. The State Engineer's Office (SEO) stated that the "application was denied because it was vague, over broad, lacked specificity, and the effects of granting it cannot reasonably be evaluated; problems which are contrary to public policy." The order to deny the application was based on a Motion to Dismiss; no hearing was held on the merits of the proposal due to the findings that the Application "on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is ontrary to sound public policy." *In the Matter of the Application by Augustin Plains Ranch, LLC*, OSE File No. RG-89943 (March 30, 2012) at 4.

The application, filed in 2007, was amended in 2008, changing the maximum depth of the wells from 2,000 feet to 3,500 feet. The application originally had over 900 protestants, including the New Mexico Interstate Stream Commission, the Middle Rio Grande Conservancy District, US Bureau of Reclamation, NM Dept of Game and Fish, Gila and Cibola National Forests, Catron County, Socorro County, Luna Irrigation Ditch, Monticello Irrigation District, several adjoining ranches, over 100 individuals and the Pueblos of: Santa Ana, Zuni, San Felipe, Isleta, Sandia, Acoma, Kewa, and the Navajo Nation.

Individuals who protested the application argued that the drawdown of water could impact their wells and would have an adverse impact on their rural, agricultural lifestyle. Groups that protested, ranging from the Middle Rio Grande Conservancy District to the Navajo Nation to the Monticello Community Ditch Association, challenged the feasibility and reasonableness of transporting groundwater from a remote rural region of the state to the Rio Grande when no end user for the water has been identified.

State Engineer Scott Verhines discussed the reasoning behind the decision, saying, "I've approached this appropriation with a thorough eye for the overall impacts this would have on New Mexicans. As our society becomes increasingly dense in urban areas, we remain encouraging to innovations in water movement around the state. However, reasonable applications are those that identify a clear purpose for the use of the water, include reasonable design plans, and include specifics as to the end user of the water. All applications demand intense scrutiny with all decisions made based on sound science, reason and caution, as it is our obligation to New Mexico to effectively and transparently manage, allocate and protect its water resources. Along with the proof of clear demand for the water in one area, and an absence of harm to those in the basin area from which the water is taken, a commitment to proper backing and contractual arrangements must also be in place."

Bruce Frederick of the New Mexico Environmental Law Center filed one of the motions to dismiss the application on behalf of about 80 parties in the case. "The State Engineer's decision confirmed what most objective water lawyers already knew — you can't take the public's water," says Frederick, "unless you have a concrete beneficial use in mind. In this case, the applicant just wanted to hoard the water until its value increased enough to justify selling the water or the entire project on the open market. This is commonly how ore deposits like gold, copper and silver come to market, but under our Constitution, water belongs to the public and cannot be hoarded or exploited like a mineral resource."

The applicant, Augustin Plains Ranch LLC, appealed the decision to deny its water rights application to the state district court on April 9.

For info: Julie Maas, SEO, 505/383-4095 or www.ose.state.nm.us/index.html; Order available at: http://nmenvirolaw.org/images/pdf/120330_OSE_Order_Denying_Application.pdf

SPECULATION RULING OR AGENCY DECISION OVERTURNED

A contested case hearing — from a decision by the Oregon Water Resources Department (WRD) to allow an application for 34 cubic feet per second of water from the famed McKenzie River — has resulted in a proposed order to overturn the agency's decision and deny the application on the basis of speculation. The Administrative Law Judge (ALJ) ruled that, "The preponderance of the evidence established that the Application proposes a speculative use for more water than the Company could establish it could put to actual beneficial use within the time allowed under ORS 537.230(1). [five years]. Therefore, the granting of the permit would impair or be detrimental to the public interest under ORS 537.153(2)(b), because the Application did not propose a beneficial use under ORS 537.170(8)(a)." *In the Matter of Water Right Application S-87330 in the name of Willamette Water Co*., OAH No. WR-10-003 (April 27, 2012), Proposed Order at 49.

The applicant, Willamette Water Company (WWC), is a private "quasi-municipal" entity as opposed to a municipal applicant. This distinction was crucial: "Nevertheless, the anti-speculation doctrine embodied in the concept of beneficial use without waste prevents the Department from extending to private entities the preferences and exemptions from the doctrine that municipalities enjoy. The legislature and the Department's rules have not extended such preferences and exemptions to quasi-municipal entities." *Id.* at 48.

The Proposed Order at 41 discussed speculation and beneficial use under Oregon water law: "The beneficial use doctrine and its corollaries, waste and forfeiture, have three purposes: 1) to prevent speculation in and monopoly of scarce and valuable water; 2) to maximize the use of that scarce resource to support many uses and thereby promote economic development; and 3) to provide flexibility to the water user, allowing the user (rather than courts, legislatures, or agencies) to determine appropriate improvements in water use practices. *Neuman*, 28 Envtl L at 962-963. Speculation 'refers to acquiring a resource or good for later use or resale rather than for immediate, actual use.' *Id.*"

Some of the critical factual findings relating to speculation came on page 40 of the Proposed Order. "The preponderance of the evidence established that there is an inchoate or potential demand for backup water supplies to meet municipal water use needs in and around the PSA [Proposed Service Area], and the demand is likely to increase and become more particular

WATER BRIEFS

in the coming decades. Nevertheless, the Company currently has no contracts to sell water and has not established that it will obtain such contracts in the future. Except for the Raven Group, LLC, the Company identified no commercial or industrial user that is likely to be its customer."

The ALJ cited the application requirements to specify details of the "proposed ditch, canal or other work" and "establish the location of the proposed point of diversion and the proposed place of use" under ORS 537.140(1)(a)(D), (E) and (4). "But the Company has not yet determined what, if any, water conveyance facilities it will need, where they will be located, where the places of use will be, or whether it will supply treated or untreated water or both." *Id*. The application included as its Proposed Service Area a 75 square-mile area in southern Lane County.

The ALJ found that "evidence of the Company's inability to make actual beneficial use of the requested amount of water within the statutory period [of five years] is relevant to the issue of whether the Application proposed actual beneficial use. At the hearing, the evidence established that although the Company may be able to begin construction within five years, decades would be needed before the full need for 34 cfs would materialize and before the Company could complete construction. Because the Company is not a municipality, it is not exempt from the five-year limitation under ORS 537.2300(1) and the cancellation provisions of ORS 537.410(1) for failure to complete construction within the statutory period." *Id*. at 46.

The Proposed Order will go before the Oregon Water Resources Commission (Commission) for the final order, following the filing of any exceptions and possibly written or oral arguments. The Commission, which is a body appointed by the Governor to oversee water policy in Oregon, may issue a final order that differs from the proposed order or it may adopt the proposed order as the final order. See Moon, *TWR* #94 for additional details.
For info: Lisa Brown, WaterWatch (Protestant), 503/295-4039 x4; Proposed Order at: http://s3.documentcloud.org/documents/351672/willamette-water-co-proposed-order.pdf; WRD website: http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=163509

WATER CONSERVATION US

STATE SCORECARD REPORT

On April 26, the Alliance for Water Efficiency and the Environmental Law Institute released a draft report entitled, *The Water Efficiency and Conservation State Scorecard: An Assessment of Laws and Policies*. This research effort identified state level water efficiency and conservation policies and laws throughout the 50 states via a 20-question survey. Water efficiency and conservation laws and policies encompassed in the survey included plumbing fixture standards, water conservation requirements related to water rights, water loss control rules, conservation planning and program implementation, volumetric billing for water, funding sources for water efficiency and conservation programs, and technical assistance and other informational resources.

In addition to collecting data on individual state level water efficiency and conservation policies, the project team graded the states based on its findings. Overall, the 50 states as a group average a "C" grade. A full breakdown of the scores is included in the report. The highlighted policy examples in the report can serve as a model for new initiatives.

Due to the abundance of information that was gathered for this project and the difficulty in finding legal citations to support survey answers, the project team wished to release the report for public comment and review to determine if any errors need correcting. The public comment period is open until June 15, 2012. Directions for comment submittal are in the report.
For info: www.allianceforwaterefficiency.org/

INSTREAM WATER RIGHTS AZ

STREAMFLOW DATA & RAINWATER HARVEST

The bar to obtain instream water rights in Arizona just got higher with the passage of SB 1236, signed by Gov. Jan Brewer on April 17th, and two rainwater harvest projects *may* have been set in motion. The bill requires the Arizona Department of Water Resources to develop at least two pilot projects to demonstrate water harvesting techniques, practices, and technology, yet doesn't appear to appropriate any funds to do so.

The bill also makes it difficult for any new instream flow applications to be filed by increasing the streamflow data required to be filed with an instream application to include five years of continuous streamflow management data to support the proposed beneficial use, in addition to other data requirements. Submitted streamflow data must be gauged on-site measurements of available water flow from the area in which the proposed beneficial instream use occurs.
For info: SB 1236 at: www.azleg.gov/; see also Montgomery & Associates website for discussion prior to passage: www.elmontgomery.com

WATER MARKETS OR

WHITE PAPER

The Institute for Water and Watersheds and The Institute for Natural Resources released a white paper in April that introduces water markets as a tool to combat water scarcity and shifting demand, entitled "*Oregon's Water Markets*." Over the last decade Oregon has made remarkable progress using the environmental market approach to managing the quality and quantity of water. The paper briefly explains environmental markets, how they work, and how Oregon is using this approach to protect its fresh water. The paper also summarizes Oregon water markets that are currently active.
For info: Paper available at: http://water.oregonstate.edu/sites/default/files/oregon_water_markets_v3_0.pdf

STORMWATER CRIME WA

FELONY VIOLATIONS OF CWA

The US Attorney's Office announced on April 12 that a prominent Sumner, Washington developer and his construction company have pleaded guilty in US District Court in Tacoma to felony violations of the federal Clean Water Act (CWA). The charges filed against Bryan Stowe and Stowe Construction, Inc. are the first stormwater pollution criminal charges brought in Western Washington. Under the terms of the plea agreements, Stowe and Stowe Construction will pay $650,000 in criminal fines and will make a $100,000 payment to the National Fish and Wildlife Foundation for environmental projects targeting resources impacted by the illegal discharges. Stowe could be sentenced to up to three years in prison. Both Stowe and the company will be subject to a court imposed stormwater compliance plan for all current and future development sites.

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In their plea agreements, the company and Stowe, as president and co-owner of the company, admit they knowingly violated the Construction General Storm Water Permit for the project known as the Rainier Park of Industry, located in Sumner. Permit violations contributed to two major landslides at the project site in the winter of 2011. Both slides forced closure of the West Valley Highway. Tyler Amon, acting Director of EPA's Criminal Investigation Division (Washington DC) stated, "For more than three years, Mr. Stowe and his construction company ignored the law, devastated salmon habitat and created nightmarish conditions for area drivers. This plea serves as notice to our regional developers...these are serious environmental crimes that will be vigorously pursued."

Stowe admits in the plea agreement to failing to install adequate improvements and practices between 2007 and 2011, as required under the Construction Storm Water General Permit. 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 West Valley Highway site issued several administrative compliance orders in an unsuccessful effort to bring Stowe and the company into compliance.
For info: US Atty. Office's website: www.justice.gov/usao/waw/press/2012/April/stowe.html

MULTI-YEAR FLEX KS

GROUNDWATER USE PROGRAM

The Kansas Department of Agriculture's Division of Water Resources is accepting applications for the revised program that allows groundwater water right holders to manage their water right over a five-year period. The Multi-Year Flex Account (MYFA) program is part of a series of water law changes by the Kansas Legislature designed to conserve the state's water supply and extend the life of the Ogallala Aquifer.

MYFA allows water right holders to obtain a five-year term permit that temporarily replaces their water right. This term permit allows the holder to exceed their annual authorized quantity in any year but restricts total pumping over the five-year period to a maximum of five times the larger of the water rights average water use, or the water rights maximum reported acres, times the county's net irrigation requirement for corn. The program is voluntary and does not permanently change the water right. At the end of five-years, if not extended by filing a new application, the operation of the water right returns back to its original conditions.
For info: www.ksda.gov/appropriation/?cid=297

SALMON SAFE CERT WA

GOLF COURSE ASSESSMENT

Squaxin Island Tribe's new Salish Cliffs Golf Club has become the first "Salmon-Safe" certified golf course after passing an exhaustive assessment verifying the Tribe's commitment to protecting native habitat, managing water runoff, reducing pesticides, and advancing environmental practices. The Salmon-Safe Golf Course Certification is an offshoot of the Northwest eco-label program for agricultural and vineyard practices, administered in Washington by the Seattle-based non-profit Stewardship Partners. The program looks at practices to protect water quality, fish and wildlife habitat, and overall watershed health based on a detailed set of peer-reviewed guidelines. The independent review of the golf course was conducted by experts in stream ecology, stormwater management, golf course design, and landscape management.

The water treatment system that generates Class A reuse water from Little Creek Casino Resort is exemplary of the detail and effort that Squaxin Island Tribe (Tribe) employed to earn Salmon-Safe certification at Salish Cliffs. The treated water is stored for its intended use irrigating the course during summer. The Tribe is acting on assessment team recommendations to enhance its management program. In an effort to minimize stormwater pollution from its clubhouse parking lot, the Tribe will join with Stewardship Partners to install a rain garden and implement other innovative methods to minimize runoff. The Tribe has proactively reduced and/or eliminated pesticides used at Salish Cliffs that could be harmful to salmon and continues to enhance wildlife habitat across the site.
For info: www.salmonsafe.org/

NOAA ENFORCEMENT US

PRIORITIES DOCUMENT

NOAA's Office of Law Enforcement released its Enforcement Priorities Document 2012 on April 4, following input from interested parties. Priority setting, including opportunities for public input, will be annual. The document contains sections on National, Regional, and Division Priorities.
For info: www.nmfs.noaa.gov/ole/docs/2012/ole_priorities_2012.pdf

WATERSHED EFFORTS KS

NONPOINT SOURCE RESTORATION

EPA's Clean Water Act (CWA) Section 319 Program provides funding for restoration of nonpoint source-impaired water bodies. EPA recently highlighted a program in Kansas. Grazing land or grassland is the predominant land use in the Fall River watershed. Low levels of oxygen and fecal coliform bacteria affected water quality in the upper watershed, prompting the Kansas Department of Health and Environment (KDHE) to add the river to the state's 1998 list of impaired waters for low levels of dissolved oxygen.

In October 2002, KDHE provided CWA section 319 funds to Kansas State University (KSU) to conduct a monitoring study to assess potential sources of FC bacteria and other nonpoint source pollutants. KSU identified several manure stockpiles in close proximity to waterways at a racetrack. Local agencies worked with the racetrack owner to move the manure stockpiles to an off-site composting site. Since 2003, government agencies have worked with landowners to implement agricultural BMPs throughout the watershed, many of which have been aimed at managing livestock, a nonpoint source contributor to Fall River's DO and FC bacteria impairments. The BMPs included implementing 2,122 acres of prescribed grazing and 1,174 acres of pest management; repairing/restoring 14 agricultural ponds (alternative water for livestock); and installing 13,537 linear feet of livestock fencing, seven water supply units and 5,681 linear feet of pipeline to facilitate alternative livestock watering.

As a result, river monitoring data collected between 2000 and 2011 showed that water bodies in the upper Fall River watershed now meet the state's water quality standards, and the department has removed nearly

WATER BRIEFS

144 miles of streams in the upper Fall River watershed from the 2010 list of impaired waters for dissolved oxygen impairment.
For info: Ann D'Alfonso, Kansas Bureau of Water, 785/ 296-3015 or AD'Alfonso@kdheks.gov; EPA's CWA Section 319 Program at: http://water.epa.gov/polwaste/nps/success319/

CROW TRIBE COMPACT MT
WATER RIGHTS SETTLEMENT

The Crow Tribe Apsáalooke Nation, Montana, and the US executed the Crow-Montana Water Rights Compact on April 27 at a signing ceremony held at the Department of Interior office. Execution of the Compact, along with its appendices, marks an important step towards implementing the Crow Tribe Water Rights Settlement Act that was passed into law on December 8, 2010. The signing ceremony was attended by Crow Tribal Chairman Cedric Black Eagle and tribal representatives, Secretary of the Interior Ken Salazar and his staff, Governor Schweitzer, and staff from the offices of Senator Baucus and Senator Tester.

The event signified the resolution of more than three decades of litigation and negotiations, clearing the way to address pressing needs on the Crow Reservation for safe drinking water and rehabilitation of a dilapidated irrigation project. Together, the Settlement Act and the Compact quantify the Tribe's water rights and authorize funding of $131.8 million for the rehabilitation and improvement irrigation and $246.4 million for the design and construction of a water system to serve numerous reservation communities, as well as funding totaling more than $81 million for tribal water administration and for a portion of costs for the irrigation and municipal water systems. The Settlement also provides funding to boost energy development projects such as hydropower generation, clean coal conversion, and other renewable energy projects. (*See* Public Law 111-291, the Claims Resolution Act of 2010; Title IV of the Act is the Crow Tribe Water Rights Settlement).

Cedric Black Eagle stated, "This Compact ensures that Crow people will have water and the necessary infrastructure for generations to come. Now the hard work continues to implement the Compact and Settlement legislation to ensure that Crow people realize these benefits from the settlement." Secretary Salazar echoed the United States' support of negotiated settlements, "Signing the Compact today demonstrates the Administration's continued leadership in resolving Indian water rights and providing settlements that truly benefit Indian tribes. The Compact not only ensures delivery of a safe and sanitary supply of water for tribal members, but also will bolster the Tribe's economic security."

The Crow Reservation is the largest reservation in Montana, encompassing about 2.3 million acres, and is home to approximately 8,000 of the 11,900 enrolled Crow tribal members.
For info: Adam Fetcher, DOI, 202/ 208-6416

WATER QUALITY DATA US
EPA/USGS WEB ACCESS

The US Geological Survey (USGS) and the US Environmental Protection Agency (EPA) have teamed up to launch an online portal for water quality information. Developed in cooperation with the National Water Quality Monitoring Council, the new Water Quality Portal brings together chemical, physical and microbiological data from USGS's National Water Information System and EPA's Storage and Retrieval Data Warehouse. The portal provides a single, user-friendly web interface showing where water quality information is available from federal, state, tribal and other water partners. It allows data users to more easily search, compile, and format water monitoring data for analysis, and provides scientists, policy-makers, and the public with a single web interface to query data stored in STORET and NWIS.
For info: Portal website — www.waterqualitydata.us/

DW CONTAMINANTS LIST US
EPA WORKING WITH WATER SYSTEMS TO MONITOR UNREGULATED CONTAMINANTS

EPA has published a list of 28 chemicals and two viruses that approximately 6,000 public water systems will monitor from 2013 to 2015 as part of the agency's unregulated contaminant monitoring program. This program collects data for contaminants suspected to be present in drinking water, but that do not have health-based standards set under the federal Safe Drinking Water Act.

EPA will spend more than $20 million to support the monitoring, the majority of which will be devoted to assist small drinking water systems with conducting the monitoring. The data collected under the Unregulated Contaminant Monitoring Rule 3 (UCMR 3) will inform EPA about the frequency and levels at which these contaminants are found in drinking water systems across the US and help determine whether additional protections are needed to ensure safe drinking water for Americans. State participation in the monitoring is voluntary. EPA will fund small drinking water system costs for laboratory analyses, shipping, and quality control.

The list of contaminants to be studied includes total chromium and hexavalent chromium, also known as chromium-6. EPA issued guidance to all water systems on how to assess the prevalence of hexavalent chromium and in a March 2011 proposal for UCMR 3. EPA has standards for 91 contaminants in drinking water, and the Safe Drinking Water Act requires that EPA identify up to 30 additional unregulated contaminants for monitoring every five years.
For info: http://water.epa.gov/lawsregs/rulesregs/sdwa/ucmr/ucmr3/index.cfm

PESTICIDES& WATER US
EPA BENCHMARKS TABLE UPDATE

EPA has published a table of human health benchmarks for approximately 350 pesticides to enable states, water systems and the public to better determine whether the detection of a pesticide in drinking water or source waters for drinking water may indicate a potential health risk. Advanced testing methods now allow pesticides to be detected in water at very low levels. These small amounts of pesticides detected in drinking water or source water for drinking water do not necessarily indicate a health risk.

Concentrations of pesticides in drinking water that have the potential for cancer risk are not currently included in the human health benchmarks for pesticides table. EPA intends to include these concentrations later. The table includes pesticide active ingredients for which health advisories or enforceable National Primary Drinking Water Regulations have not been developed.

EPA intends to update its online table of human health benchmarks for pesticides annually to ensure that the best available science is accessible to the public.
For info: www.epa.gov/pesticides/hhbp

CALENDAR

May 15 OR
Oregon's Integrated Water Resources Strategy Lecture: Dr. Brenda O. Bateman, Corvallis. OSU - Wilkinson Hall 231. For info: http://calendar.oregonstate.edu/event/67471//

May 15-16 ID
Water Ways and Means - Mountain West Water Institute Conference, Idaho Falls. Hilton Garden Inn. For info: https://secure.inl.gov/MWWI/

May 15-17 MT
Effective Water Quality Monitoring Workshop, Helena. Feathered Pipe Ranch. Sponsored by Montana Watershed Coordination Council. For info: www.mtwatersheds.org/Services/TrainingWorkshops.html

May 15-17 NM
Infrastructure Operation, Maintenance & Management Training for Tribal Water & Wastewater Operators & Leaders, Albuquerque. Sponsored by EPA. For info: Leon Latino, 202/ 564-1997 or latino.leon@epa.gov

May 15-18 NV
Environmental Awareness Bootcamp, Las Vegas. Residence Inn Las Vegas Hughes Ctr. For info: EPA Alliance Training Group, 713/ 703-7016 or www.epaalliance.com

May 16 NM
Little Rio Grande Adjudication Overview (Luncheon), Albuquerque. O'Neil's Pub on Central, 11:30am-12:30pm. Sponsored by AWRA State Section. For info: http://state.awra.org/new_mexico/index.html

May 16 CA
Overview of Water Law & Policy in California Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or www.extension.ucdavis.edu/landuse

May 16 AK
Water in Alaska: Changing Environment of Permitting & Enforcement, Anchorage. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

May 17 WA
Tribal Water in the Northwest Seminar, Seattle. WA State Convention Ctr. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

May 17 WEB
Innovative Energy Conservation Measures at Wastewater Treatment Facilities Webinar, WEB. For info: Jim Horne, EPA, 202/ 564-0571, horne.james@epa.gov or www3.gotomeeting.com/register/679203742

May 18 CA
Water: Get in the Game! - 5th Annual OC Water Summit, Anaheim. Grand Californian Hotel at Disneyland Resort. For info: www.OCWaterSummit.com

May 18 OR
Water Research Symposium, Corvallis. OSU Memorial Union. Sponsored by Water Resources Graduate Program & the Hydrophiles. For info: http://groups.oregonstate.edu/hydro/2012-osu-water-research-symposium

May 20-24 OR
2012 Land Grant & Sea Grant National Water Conference, Portland. Mariott Waterfront. For info: www.usawaterquality.org/conferences/2012/default.html

May 22 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Rickreall. Polk Co. Fairgrounds, 6-9pm. Hosted by Water for Life & Elizabeth Howard, Dunn Carney. For info: www.waterforlife.net

May 22-23 WA
Low Impact Development Workshop: Site Planning, TESC, Plan Review & Inspection, Puyallup. WSU LID Research Facility. For info: http://cm.wsu.edu/ehome/index.php?eventid=34097&

May 22-24 NV
2012 Tahoe Science Conference - Environmental Restoration in a Changing Climate, Incline Village. Sierra Nevada College. For info: http://tahoescience.org/events/conferences/

May 22-25 MA
Water Education: Developing 21st Century Solutions Conference, Bridgewater. Bridgewater State University. For info: http://www.bridgew.edu/wal/

May 23 CA
Addressing Nitrate in California's Drinking Water: SWRCB Public Hearing on SBX21, Sacramento. CalEPA Bldg. For info: http://groundwaternitrate.ucdavis.edu/Calendar/?calitem=158539&g=48492

May 23 WA
Permitting Residential, Commercial & Industrial Projects Seminar, Seattle. WA State Convention Ctr. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

May 23 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Reedsport. City Hall, 9am-12pm. Hosted by Water for Life & Elizabeth Howard, Dunn Carney. For info: www.waterforlife.net

May 23 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Klamath Falls. Klamath Co. Extension Office 6-9pm. Hosted by Water for Life & Elizabeth Howard, Dunn Carney. For info: www.waterforlife.net

May 24 OR
Willamette Water 2100 Project: Anticipating Water Scarcity & Informing Integrative Water System Response in the Pacific NW, Salem. Public Library. Sponsored by Friends of Straub Environmental Learning Ctr. For info: www.fselc.org/programs.html#LectureSeries

May 24 ID
Priorities, Initiatives & Vision for the Future of the Idaho Dept. of Environmental Quality (Luncheon with Director Fransen), Boise. Holland & Hart, 101 South Capitol Blvd. (2nd Fl.). Sponsored by Northwest Environmental Business Council. For info: Tyler Cluverius, 206/ 389-8660 or tyler@nebc.org

May 25 WA
Fisheries & Hatcheries Legal Frameworks Seminar, Seattle. Crowne Plaza, 1113 Sixth Ave. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

May 29 MT
Society of Wetland Scientists Speaker Series, Lewistown. Calvert Hotel. Sponsored by Montana Rocky Mountain Chapter. For info: www.sws.org/regional/rockymountain/index.html

May 30 WA
Getting Out of Hot Water: Recent Developments in Water Transfers & Water Marketing Conference, Seattle. 2100 Building, 2100 24th Ave. South. Sponsored by Washington Water Trust & Center for Environmental Law & Policy. For info: Lea Whitehill, WWT, 206/ 675-1585 x102, lea@washingtonwatertrust.org or http://washingtonwatertrust.org

May 30 MT
Montana Wetland Council Meeting, Lewistown. For info: Lynda Saul, MDEQ Wetland, 406/ 444-6652 or http://deq.mt.gov/wqinfo/wetlands/wetlandscouncil.mcpx

June 3-6 MO
Collection Systems 2012 Conference & Exhibition: Show Me the Green - Confluence of Planning, Implementation & Regulations, St. Louis. St. Louis Convention Ctr. For info: Water Environment Federation, 800/ 666-0206 or www.wef.org/CollectionSystems

June 3-8 FL
Joint 9th INTECOL International Wetlands Conference, Orlando. Sponsored by Society of Wetland Scientists and the Greater Everglades Ecosystem Restoration. For info: www.conference.ifas.ufl.edu/intecol/

June 4 OR
Oregon Water Quality Conference: Toxics, Standards, TMDLs & Permits, Portland. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, hduncan@elecenter.com or www.elecenter.com

June 4-5 CA
16th Annual Water Reuse & Desalination Research Conference, San Diego. Hyatt Regency Mission Bay. Sponsored by WaterReuse Ass'n. For info: Courtney Tharpe, 866/ 276-7907, cbalangawan@watereuse.org or www.watereuse.org/foundation/research-conference-16

June 5 CO
RiverBank Gala & Fundraiser, Denver. Sponsored by Colorado Water Trust. For info: Christine, CWT, 720/ 570-2897 or chartman@coloradowatertrust.org

June 5-7 MA
Fish Passage Conference, Amherst. For info: http://fishpassage.ecs.umass.edu/Conference2012/

June 6 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Ontario. Malheur Co. Extension Office, 6-9 pm. Hosted by Water for Life & Andrew Martin, Yturri Rose. For info: www.waterforlife.net

June 6 OR
Water Supply Well Standards for Developing Countries Lecture, Corvallis. OSU - ALS 4000, 4-5pm. Sponsored by Institute for Water & Watersheds. For info: http://water.oregonstate.edu/sponsored-events

June 6-8 CO
Low-Carbon Energy Blueprint for the American West: Martz Annual Summer Conference, Boulder. University of Colorado. Sponsored by Natural Resources Law Center. For info: www.colorado.edu/law/centers/nrlc/events/index.html

June 7 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Burns. Harney Co. Community Ctr., 9am-12pm. Hosted by Water for Life and Elizabeth Howard, Dunn Carney. For info: www.waterforlife.net

The Water Report
Water Rights, Water Quality & Water Solutions in the West
260 N. Polk Street • Eugene, OR 97402

CALENDAR

(continued from previous page)

June 7 OR
Oregon's New Water Rules & Future of Irrigated Agriculture, Bend. Central Oregon Community Ctr., 6-9pm. Hosted by Water for Life & Elizabeth Howard, Dunn Carney. For info: www.waterforlife.net

June 7-8 TX
Hydraulic Fracturing Conference, Houston. St. Regis Hotel. For info: CLE International, 800/ 873-7130 or www.cle.com/

June 8 CO
Hydraulic Fracturing Conference, Denver. Grand Hyatt Hotel. For info: CLE International, 800/ 873-7130 or www.cle.com/

June 9-12 WA
Western Governor's Ass'n Annual Meeting, Cle Elum. Lodge at Suncadia. For info: www.westgov.org/

June 10-14 TX
ACE 12 Annual Conference & Exposition, Dallas. Dallas Convention Ctr. American Water Works Ass'n Conference. For info: www.awwa.org/ACE12/index.cfm?ItemNumber=56774&navItemNumber=56623

June 12 CA
Infrastructure Funding Fair, Alhambra. LA County Dept. of Public Works, 900 South Fremont Avenue. For info: CleanWaterSRF@waterboards.ca.gov

June 13 WA
Modern Tribal Natural Resource Management in Indian Country CLE & Party, Seattle. Ivar's Salmon House, 4-5pm (Celebration following from 5:30-7:30pm). Sponsored by Center for Environmental Law & Policy. For info: CELP, 509/ 209-2899 or contact@celp.org

June 13-14 OR
Oregon Brownfields Conference, Portland. DoubleTree Hotel. Presented by Northwest Environmental Business Council. For info: Sue Moir, NEBC, 503/ 227-6361, sue@nebc.org or www.nebc.org

June 14-15 OR
14th Annual Oregon Wetlands & Aquatic Resources Seminar, Portland. World Trade Ctr. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

June 18-19 ID
IWUA Summer Water Law Seminar & Workshop, Sun Valley. Sponsored by Idaho Water Users Ass'n. For info: www.iwua.org

June 18-20 CA
WESTCAS 2012 Annual Conference, San Diego. Catamaran Resort Hotel. For info: WESTCAS, 770/424-8111 or www.westcas.org

June 21-22 NV
Tribal Water Law: National Perspective Conference, Las Vegas. Planet Hollywood. For info: CLE International, 800/ 873-7130 or www.cle.com/

June 21-22 WA
Washington Brownfields & Land Revitalization Conference & Trade Show, Spokane. The Davenport Hotel. Sponsored by Northwest Environmental Business Council. For info: Sue Moir, NEBC, 503/ 227-6361, sue@nebc.org or www.nebc.org

June 25-27 CO
Contaminants of Emerging Concern in Water Resources II: Research, Engineering & Community Action Conference, Denver. Sheraton Downtown. For info: American Water Resources Ass'n, www.awra.org/meetings/

June 25-29 CO
2012 AWRA Summer Specialty Conference, Denver. Sheraton Denver Downtown. Sponsored by American Water Resources Ass'n. For info: www.awra.org

June 26-27 OH
Midwestern Groundwater Issues Conference, Columbus. Crowne Plaza. For info: NGWA: www.ngwa.org/Events-Education/conferences/5085/Pages/5085jun12.aspx

June 26-29 AZ
Navajo Nation Biennial Drinking Water Conference, Scottsdale/ Fountain Hills. Wassaja Conference Ctr. For info: www.navajopublicwater.org/Conference2.html

June 27-29 CO
Riparian Ecosystems IV: Advancing Science, Economics & Policy Conference, Denver. Sheraton Downtown. For info: American Water Resources Ass'n, www.awra.org/meetings/

June 29 WA
Toxics in Washington Conference, Seattle. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, hduncan@elecenter.com or www.elecenter.com