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

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# WEST COAST ESA CHALLENGES

### THE VIEW FROM NOAA FISHERIES

### A REPORT ON NOAA FISHERIES REGIONAL ADMINISTRATOR WILLIAM STELLE'S PRESENTATION AT THE 22ND ANNUAL ENDANGERED SPECIES ACT CONFERENCE

by David Light, Editor

### INTRODUCTION

The following article contains edited excerpts from a presentation by William Stelle, West Coast Region Administrator for National Oceanic and Atmospheric Administration (NOAA) Fisheries, at the 22nd Annual Endangered Species Act Conference, held on January 22-23, in Seattle, Washington.

Mr. Stelle's presentation — *Current Challenges in ESA Implementation on the West Coast: A NOAA Perspective* — included very informative discussions of California water issues, salmon harvest management, and hatchery issues which are not included in this article. Moreover, the Conference included a comprehensive range of expert perspectives on current and impending national and regional Endangered Species Act (ESA) issues that are also beyond the scope of this article. Conference materials, including a video of the entire proceedings, are available for purchase from the Conference organizers: The Seminar Group (*see* www.theseminargroup.net).

"NOAA Fisheries" and "National Marine Fisheries Service" (or "NMFS") refer to the same federal agency and are used interchangeably throughout this article.

### TRIBAL RIGHTS AT RISK

#### NW TREATY FISHING RIGHTS DEFENDED

**Editor's Introduction**

In July 2011, the Northwest Indian Fisheries Commission issued the white paper *Treaty Rights at Risk — see* http://nwifc.org/ (select "Treaty Rights at Risk"). Often referred to as the "Stevens Treaties," the treaties in question were negotiated under the direction of then Washington State Governor Isaac Stevens with Northwest Tribes in the 1850s. In these treaties, the Tribes reserved the right of taking fish at all their "usual and accustomed" places. These rights were forcefully upheld in *United States v. Washington*, 384 F. Supp. 312, 342 (W.D. Wash. 1974) (also referred to as the "Boldt Decision" after ruling Judge George Hugo Boldt). The Boldt decision was largely affirmed by the US Supreme Court in *Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979).

> "Through the treaties we reserved that which is most important to us as a people: The right to harvest salmon in our traditional fishing areas. But today the salmon is disappearing because the federal government is failing to protect salmon habitat. Without the salmon there is no treaty right. We kept our word when we ceded all of western Washington to the United States, and we expect the United States to keep its word."
>
> Billy Frank, Jr., Chairman of the Northwest Indian Fisheries Commission
> (From *Treaty Rights at Risk* (July, 2011))

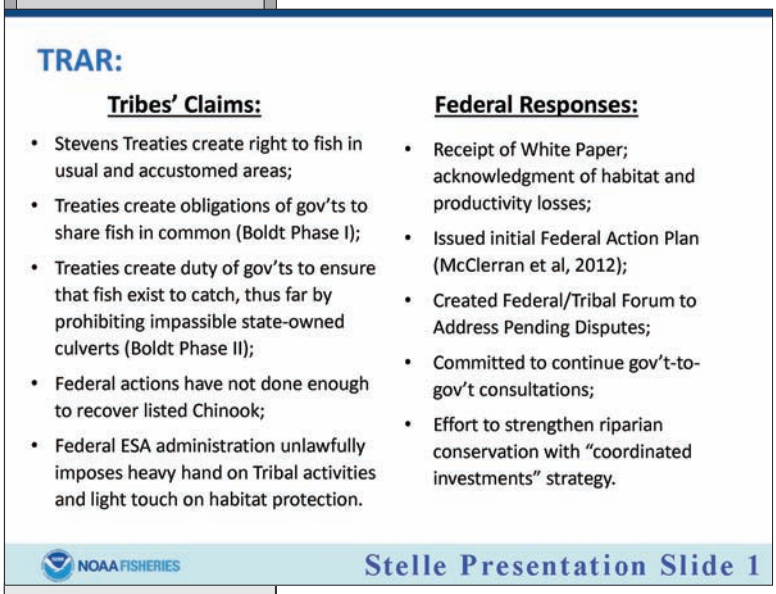
## ESA Challenges

### Treaty Rights At Risk

Mr. Stelle also refers to the "Culvert Case" (*U.S v. Washington,* C70-9213 (March 29, 2013), in which US District Court Judge Ricardo Martinez ordered that the State of Washington must accelerate work to replace and repair approximately 1,000 fish run-blocking culverts, within 17 years, to help restore treaty-protected salmon runs. *See* Moon, *TWR* #110.

**From William Stelle's Presentation:**

[My] thesis is that this Treaty Rights at Risk (TRAR) initiative in the Pacific Northwest will dominate the Pacific Northwest federal aquatics agenda, leading to significant long-term legal and biological risks and challenges. [TRAR] was initiated by member tribes of the Northwest Indian Fisheries Commission through the issuance of a TRAR White Paper in July 2011 — called "*Treaty Rights at Risk*" — which was presented to the United States government as their principal federal trustees. It encompasses the case area of *U.S. v. Washington* and addresses the habitat underpinnings of Treaty-based fishing rights. It is based on factual foundations of continued habitat loss that are vital for the long-term viability of the salmon runs that are part of the Tribes' treaty rights established under the Stevens Treaties on behalf of these Tribes. [The TRAR initiative] has significant implications for Indian Law, Endangered Species Act administration, and the Northwest salmon agenda and it's a very big deal.




The "Culverts case" is one example of what could be in store.

[Stelle Presentation Slide 1] summarizes some of the Tribal claims included in the TRAR and the federal responses thus far.

Basically, the core of the Tribal claims is that: "we have a treaty right to fish, gather, and hunt that the United States government, under those treaties, promised us in perpetuity — and 'in perpetuity' means forever. If you look at population trends and habitat trends in the Pacific Northwest, in [the Tribes' Treaty] areas [current practices] are destroying those fish runs because they are destroying the habitat on which [the fish runs] are based. If we don't change these trends our treaty rights will be rendered null and void, in fact. Therefore you — federal trustees, and you — the United States, have an affirmative obligation under these treaties to do something about it. And if you don't, we will not hold back."

That's the basic thesis — what we call "habitat servitude" under the Stevens Treaties. These are some of the implications of this engagement:

- What is the character of the duty to conserve habitat?
- To whom does the duty run? Is it just a federal issue, or is it more?
- How do we work out how we are going to work through these issues — are we going to work them out administratively, judiciously, legislatively?

This is very loaded stuff…

I just want to note, on May 24th of 2014, when I and the other federal trustees were on our way to meet with members of the Northwest Indian Fisheries Commission in Lakewood, Washington…we learned that the Chairman of the Commission — a legendary figure, Billy Frank, Jr. — had died that morning. Billy Frank, if you don't know of him, is the Rosa Parks and Martin Luther King of the Indian civil rights movement and fishing rights movement in the United States and an incredible man…It was he who understood, looking out over seven generations: "What does the [Tribes'] treaty right mean, given what we see."

…Two weeks ago [early January, 2015], the federal trustees, led by myself and the [regional] head of EPA [the US Environmental Protection Agency], met with the Northwest Indian Fisheries Commission member Tribes at Suquamish [Washington] in our first Trustee/Tribal Leadership meeting after Billy's passing. At that meeting, all 20 [Treaty] tribes [in western Washington] were represented. Of those twenty Tribes, at least 15 were represented by at least their Chair. It was the most muscular meeting of Pacific Northwest tribal leadership that I had ever seen in my thirty years of doing this business. What it represented was, basically, a very visible commitment by this leadership to continue this effort. They understand that this is Billy's legacy and they will continue to place a very top priority on it. So, pay attention to this — because it's got traction.

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**ESA Challenges**

**Jeopardy Considerations**

**Jeopardy Opinion**

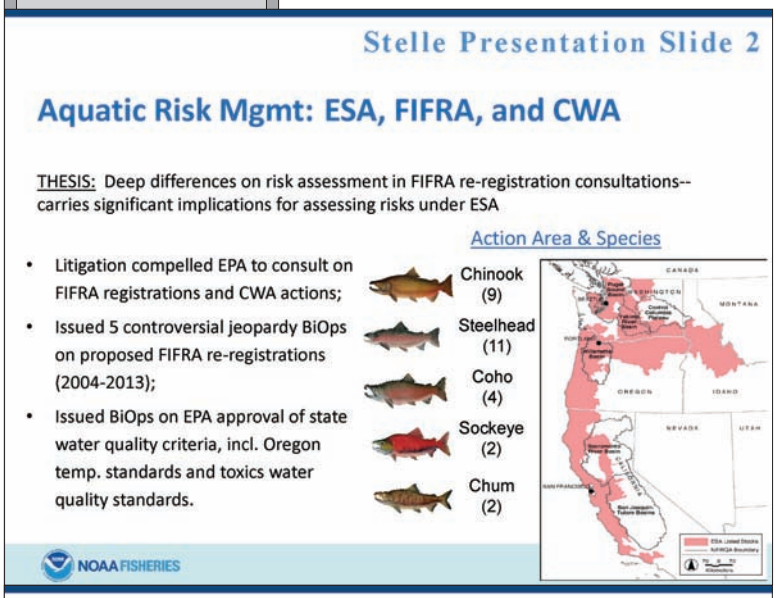
## FIFRA RISK ASSESSMENT

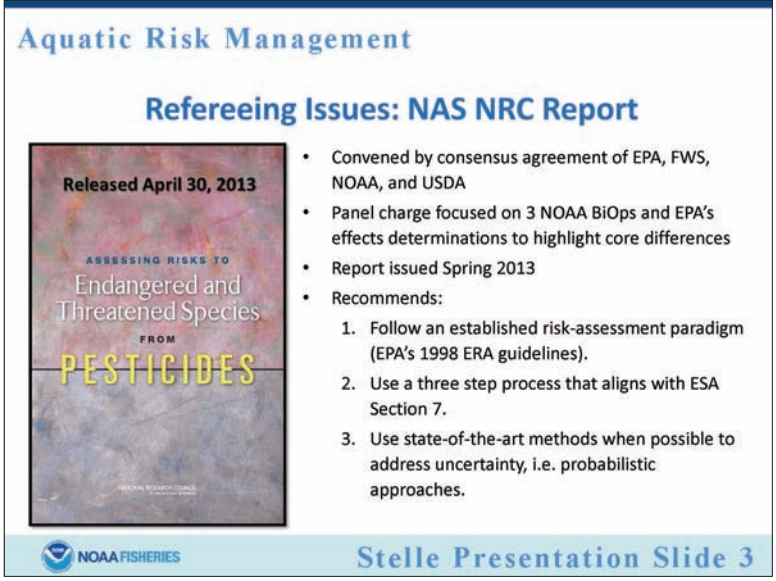
### "A GENERATIONAL CHANGE ON HOW WE ANALYZE AQUATIC RISK"

**Editor's Introduction**

ESA Section 7 (16 U.S.C. § 1536) requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of the ESA-listed species or to destroy or adversely modify those species' critical habitat. ESA Section 7(a)(2) establishes a consultation process to guide federal agencies in discharging these obligations. Federal agencies must consult with NOAA Fisheries or the US Fish and Wildlife Service to ensure that their actions will not jeopardize the survival and recovery of listed species or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2). NOAA Fisheries conducts consultations on federal agency actions impacting anadromous (ocean-going) fish, such as salmon and steelhead. These consultations are conducted to ensure that an agency action "is not likely to jeopardize the continued existence of any" ESA-listed species (16 U.S.C. § 1536(a)(2)) and require such consultations whenever an action "may affect" a listed species (50 C.F.R. § 402.14). The consultations result in NOAA Fisheries or the US Fish and Wildlife Service issuing a "Biological Opinion" (BiOp) addressing whether-or-not there is a risk posed to ESA-listed species by the actions under consideration — in terms of both direct threats and "adverse modification" of critical habitat. A BiOp determining that jeopardy is likely to occur is referred to as a Jeopardy Opinion and may include **r**easonable and **p**rudent **a**lternatives (RPAs) to the initially proposed action(s).

The 2002 ruling in *Washington Toxics Coalition v. EPA* (W.D. Wash., No. C01-0132C, Order dated July 2, 2002) found EPA was required to consult with NOAA Fisheries on possible impacts to ESA-listed salmon and steelhead runs prior to authorizing or reauthorizing the use of certain pesticides. *See* Beale, *TWR* #4.



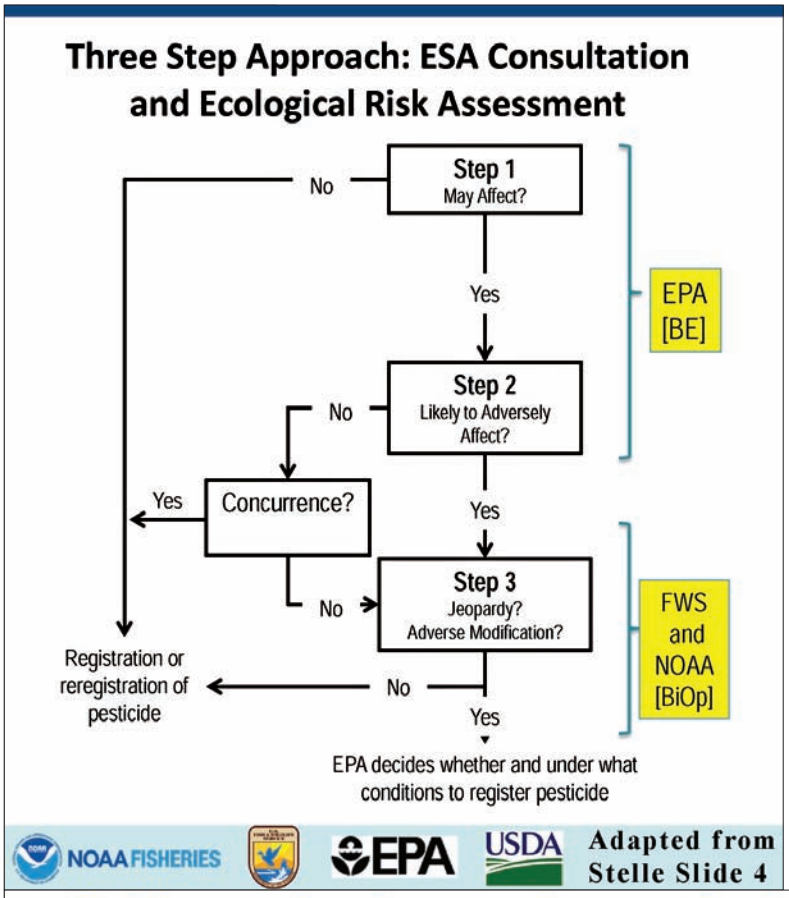




**From William Stelle's Presentation:**

Evolving scientific and technical protocols for assessing aquatic risks relating to pesticides (insecticides, herbicides, fungicides, etc.) represents another fascinating area of development which deserves mention this morning, and lest we at NOAA Fisheries seek to claim credit (or accept blame) for intrepid leadership, let me set the record straight; no such thing. No, we were forced into it via third party litigation. We (EPA and us) got sued on the thesis that EPA's registrations of insecticides, herbicides, and fungicides under the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 [FIFRA] effect fish [and] salmon habitat in the western United States and constitute federal actions which trigger ESA section 7 responsibilities. We ended up with a settlement which…[directed] EPA's Office of Pesticides and Toxic Substances [to] consult with NOAA Fisheries on the effects of re-registration of 37 pesticides [on certain ESA-listed species] used in that landscape. So we had to figure out: how do you analyze the effects of that variety of compounds, in those varieties of habitat, on those differing riverine, estuarine, and near shore ocean systems upon which populations and species depend. There were powerful differences of opinion on how to answer these questions between ourselves and EPA, with the industry and with the NGO community. How to analyze indirect and aggregate effects? What to do about complex formulation, tank, and environmental mixtures [used in laboratory analyses]? Which data reflect credible science, and which data do not?

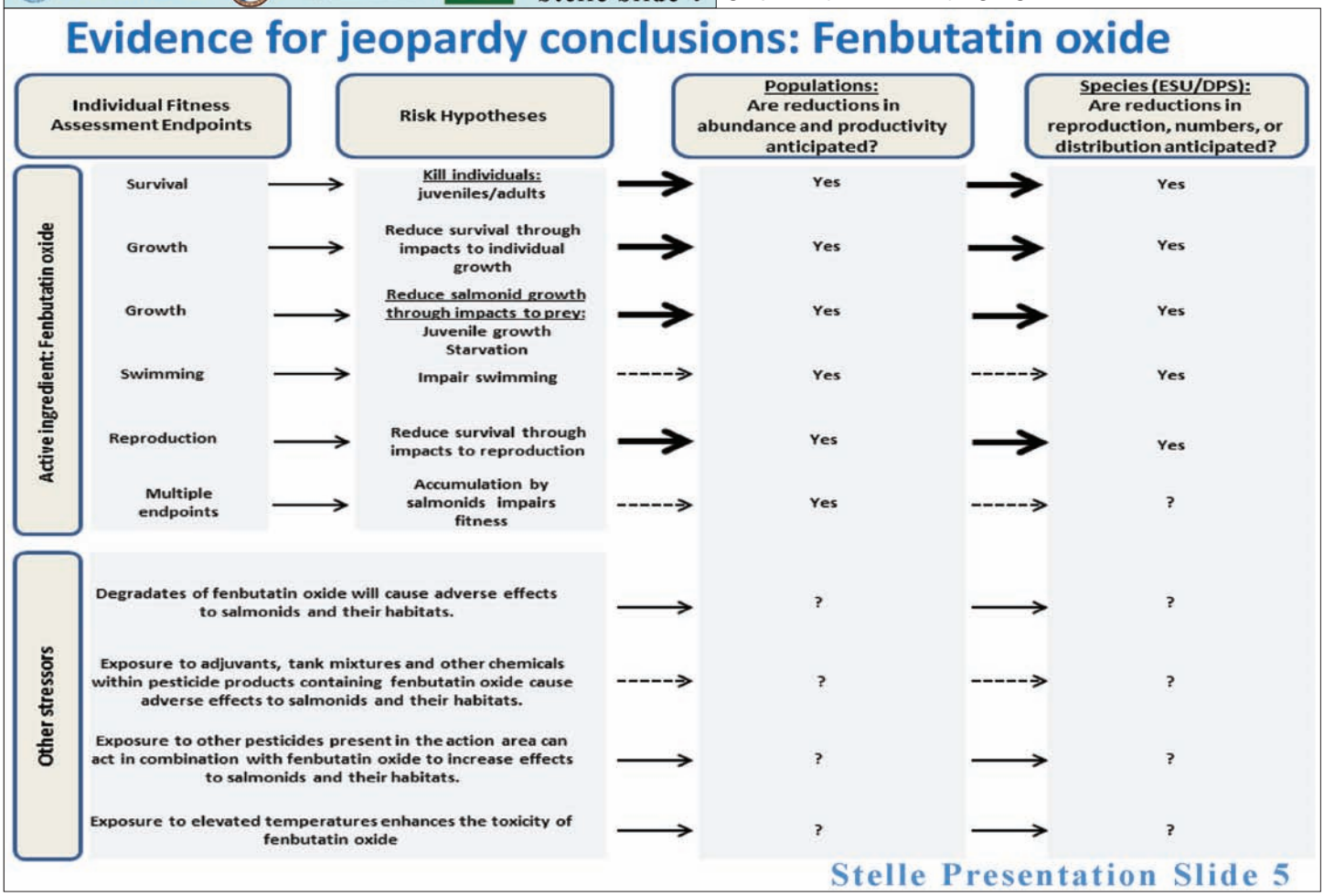
The outcomes of this engagement over the last six years has been a successful story of learning how to better analyze risk across biological and landscape scales and scopes. We — the federal agencies of EPA, NOAA Fisheries, the US Department of Agriculture, and the US Fish and Wildlife Service — requested the National Academy of Sciences to convene a panel to examine our technical and scientific differences, and in




April of 2013, this panel issued a major report which laid out a whole series of recommendations which [the federal agencies] are evaluating to better analyze risks across these spatial and temporal scales and which will be used for pesticide risk assessments on all ESA-listed species.

We are now in the process of implementing these new risk assessment paradigms. EPA's Office of Pesticides and Toxic Substances, NOAA Fisheries, and the [US] Fish & Wildlife Service have embraced these revised paradigms for assessing risk and are now building them into our joint ESA consultation processes. We expect future consultations around biological opinions [Biological Opinions issued by NOAA fisheries concerning EPA registration and re-registration of certain insecticides, herbicides, and fungicides] which will be occurring in the middle of 2015 and beyond — will reflect this new, joint protocol on assessing risk and will help resolve the deep differences on the technical underpinnings of these complex ESA consultations. This is a big deal, and represents in my view a generational change on how we analyze aquatic risk under FIFRA. Moreover, these paradigms are not necessarily limited to FIFRA-related dynamics. They constitute the "best available science" we can muster, and they will flow into other water quality related consultations involving toxic materials and chemicals including risk assessments conducted under the federal Clean Water Act. I commend to you the final slide of this portion of the presentation as it depicts graphically the underlying logic of the evaluation.



**ESA Challenges**

**Reducing Risk**

**FEMA Consultation**

**Jeopardy Finding**

**Floodplain Habitats**

## FEMA NATIONAL FLOOD INSURANCE PROGRAM ISSUES

### CONTROVERSIAL JEOPARDY OPINIONS FOR WASHINGTON, OREGON, AND CALIFORNIA

**Editor's Introduction**

One of the duties of the Federal Emergency Management Agency [FEMA] is administration of the National Flood Insurance Program [NFIP].

> The NFIP is a Federal program enabling property owners in participating communities to purchase insurance as a protection against flood losses in exchange for State and community floodplain management regulations that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the Federal Government. If a community adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains, the Federal Government will make flood insurance available within the community as a financial protection against flood losses. This insurance is designed to provide an insurance alternative to disaster assistance to reduce the escalating costs of repairing damage to buildings and their contents caused by floods.

From: *National Flood Insurance Program Description,* FEMA, 2002, *see*: www.fema.gov/library/viewRecord.do?id=1480.

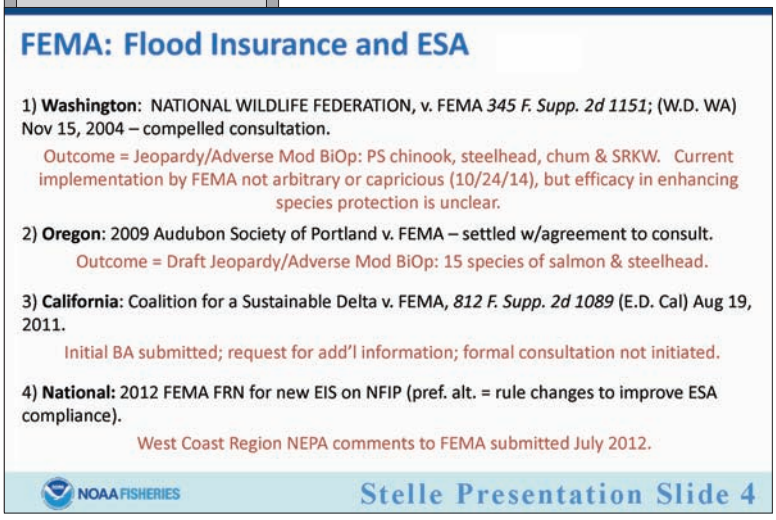
In 2003, the citizens group National Wildlife Federation (NWF) sued FEMA for failure to consult under the ESA in regards to its administration of the NFIP. *National Wildlife Federation v. FEMA*, 345 F. Supp. 1151, 1154-55 (W.D. Wash. 2004). In a November 17, 2004 opinion, the judge agreed with the plaintiffs and required FEMA to consult with NOAA Fisheries on NFIP impacts to salmon. *See* Eberlein, *TWR* #92.

In September 2008, NOAA Fisheries issued a Jeopardy Opinion which concluded that the NFIP, as then implemented, did cause "jeopardy" to salmon and "adversely modified" their "critical habitat." Regarding "jeopardy" and "adverse modification" of critical habitat see: 16 U.S.C. §1536 (b)(3)(A). NOAA Fisheries Jeopardy Opinion included a number of RPAs.

In a subsequent case, NWF again sued FEMA asserting that the RPAs were not being adequately implemented. In this case, the judge affirmed FEMA's discretion to implement the RPAs in a manner FEMA found adequate and that FEMA's implementation had not been proven to be arbitrary and capricious. *National Wildlife Federation v. FEMA, et al*., No. C11-2044-RSM, Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant FEMA's Motion for Summary Judgment (W.D. Wash. Oct. 24, 2014), 2014 WL 5449859. *See* Lawrence, *TWR* #131.

**From William Stelle's Presentation:**

The Federal Emergency Management Agency [FEMA] is important because it administers the National Flood Insurance Program [NFIP]. Why is the National Flood Insurance Program important to the National Marine Fisheries Service? Two reasons: one is because we got sued on it and we have to make it important and another is because it authorizes development and redevelopment in floodplains and [this activity] destroys floodplain habitats that are really important for our species… The National Flood Insurance Program is a major driver of development and redevelopment in our floodplains and we are now involved in a decadal-long set of consultations with FEMA on what kind of changes are necessary to avoid jeopardizing Chinook and coho and steelhead and the habitats upon which they depend.




So, Washington, Oregon, and California are the three points of engagement here on the West Coast. We issued a jeopardy opinion to the western Washington [State] administration of the National Flood Insurance Program in, I think, 2008. We have had one round of litigation on whether or not the implementation of the RPAs [**r**easonable and **p**rudent **a**lternatives] is adequate or not. The district court ruled last year that FEMA has not been arbitrary and capricious [see cite above] — but it remains quite contentious…Whether or not the RPAs are effective at changing patterns of development and redevelopment is an active, open, question on which we, NOAA Fisheries, are doing some hard field work investigation. The record is, at best, mixed and we are not overly impressed…I say this not to criticize FEMA at all, but merely to say that I don't think the way in which we structured those RPAs is doing what we expected it to do.

## ESA Challenges

### National Consultation

### High-Risk Areas

### Flood Insurance

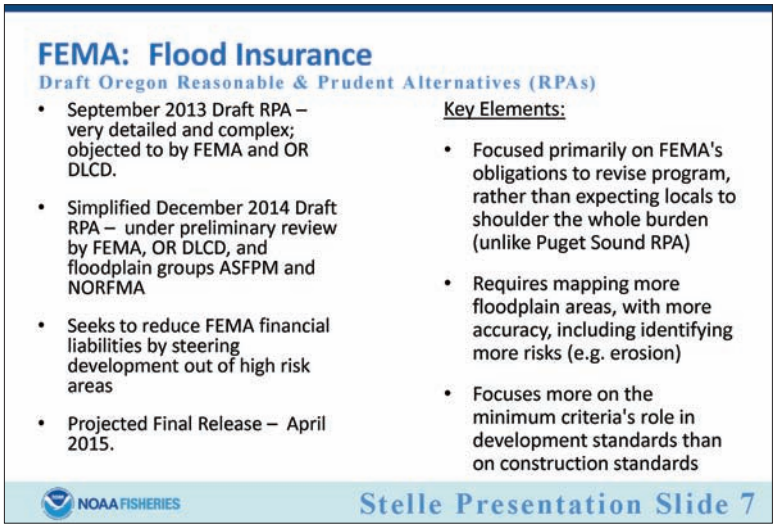
We are consulting with FEMA on a series of recommendations to modify their program to protect salmon and steelhead. The State of Oregon and [its] local governments are also engaged as they are very interested in our recommendations. We're hoping to release a biological opinion in 2015.

California is the next in line…We expect we will be engaged in more active consultation in later 2015 and 2016, depending on how things shake out in Oregon.

There is also a major consultation at the national level, on how to restructure the NFIP…under the Endangered Species Act for multiple species.

There is a confluence…between protecting habitat and minimizing financial risk. The reason why the NFIP is completely bankrupt, and one of the largest civilian liabilities of the United States, is because we keep building in high-risk flood areas. And then they get flooded-out and then FEMA has to pay for it — do the numbers. So, there is a major effort to reform the program purely from a fiscal perspective. …There is a big confluence between those efforts and protecting habitat. Effectuating that change is a very difficult thing to do because local governments like building and development in inexpensive areas — and flat plains are pretty inexpensive. So, changing local building codes is a difficult thing to do.

…That's [what's happening with] FEMA, it's a big deal and it will be very controversial.




### Columbia River Operations

### New Considerations

**COLUMBIA RIVER BASIN TREATY ESA CONSULTATION**

**From William Stelle's Presentation:**

**ANSWER TO QUESTION CONCERNING WHETHER THERE WILL BE ESA CONSULTATION:**

We, the United States, are involved in early preparatory work to sit down with the Canadians to figure how to renew the bi-lateral agreement — called the Columbia River Basin Treaty — between the United States and Canada, governing how we jointly operate the Columbia River. Canada has some huge storage projects upstream from us, and we in turn also have some large storage projects downstream. The governments take these flood control risks very seriously, and they also entail major electrical power generating implications, irrigation capabilities, and fishery and ecological responsibilities for the Columbia basin as a whole. We're in the early stages of figuring out how we are going to renew it when it expires in 2024, and we are currently shaping our ideas on what ought to be our priorities when we commence discussions with our Canadian brothers and sisters. We certainly need to modernize this bi-lateral agreement and, in doing so, bring in larger scale climate change considerations, larger scale ecological considerations, and fisheries considerations to rebuild the productivity of the Basin as a whole. While technically we do not consult on treaties with foreign governments under the ESA, we would consult with the US federal action agencies (Army Corps, Bureau of Reclamation, Bonneville Power Administration) regarding any changes to river operations as a result of new treaty provisions.

## ESA Challenges

### Lonesome Larry

### Record Runs

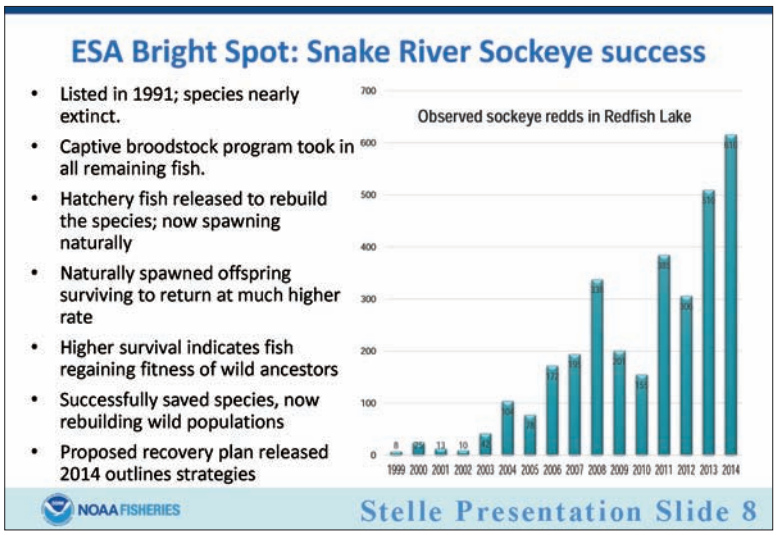
**SNAKE RIVER SOCKEYE**
**"STUNNING, RECORD RUNS"**

**From William Stelle's Presentation:**

Let me now present something of an ESA bright spot: Snake River Sockeye. Some of you are old enough to remember that, way back in the nineties, we had "Lonesome Larry." In Redfish Lake [in the Sawtooth Valley, Idaho], we were down to six or eight adult sockeyes. They were basically, functionally, extinct — and we called the male Lonesome Larry.

We made a fairly drastic (but simple) decision that we were going to scoop up the remaining adults and put them in a hatchery in order to try to preserve the gene pool of that population and try to rebuild the numbers in a conservation hatchery setting. So, we did so and this year we have absolutely stunning, record runs. Over 600,000 sockeye returned to Bonneville Dam this year, many of which were headed to the Upper Columbia River. [Moreover], of these fish, we are now up to about 1,650 returning sockeye to the Sawtooth Valley in Idaho this year, of which 30% were natural origin spawners. This is a phenomenal result — four times greater than the previous ten year average for Snake River sockeye. That is a huge deal [considering] we were down to six or eight only fifteen years ago. At the mouth of the Columbia [to which the Snake River and Redfish Lake are tributary] the returning sockeye run was about 650,000…We have made huge progress in the Columbia Basin generally in improving fish survival throughout the system.

So, success is possible if you stick to the science, keep with it, and get lucky along the way.

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**NOAA Fisheries West Coast Region website**: www.westcoast.fisheries.noaa.gov

**William Stelle** is the Regional Administrator of NOAA Fisheries' West Coast Region. Prior to the establishment of the new region, Will was appointed as the Regional Administrator for NOAA Fisheries Northwest Region in June, 2010, and was designated as the Acting Southwest Regional Administrator in April, 2013, pending the creation of the new West Coast Region. Before joining the Obama Administration, he was a partner at the law firm of K&L Gates. His practice concentrated on projects involving complex Federal and State environmental regulatory challenges, specializing in freshwater and marine habitat issues and endangered species, CERCLA, CWA and NEPA issues. He served as NOAA Fisheries Northwest Regional Administrator from 1994 until 2000, where he managed the listings of salmon and steelhead populations under the Endangered Species Act in Washington, Oregon, Idaho, and California. He has extensive experience in State, Tribal and Congressional relations. Before settling in the Northwest, Will held a variety of policy positions dealing with a range of environmental and natural resource programs in Washington, D.C. Within the Federal Executive Branch, he served as the Associate Director for Natural Resources with the White House Office on Environmental Policy overseeing Federal lands, endangered species and natural resource policies. Before that he was Special Assistant to the Secretary of the Interior where he helped promulgate and implement the Northwest Forest Plan, governing federal Forest Service and BLM lands in California, Oregon, Washington and Idaho. Prior to entering the Executive Branch, Will served as Chief Counsel for the House Committee on Merchant Marine and Fisheries, as General Counsel for the House Fish and Wildlife Subcommittee, and as staff counsel to the Senate Select Committee on Indian Affairs. Mr. Stelle received the Department of Commerce Gold Medal Award in 1997, and the NOAA Administrator's Award in 2000. His education includes: LL.M., Marine Resource Law, University of Washington School of Law, 1981; J.D., Coastal and Marine Law, University of Maine Law School, 1978; and a B.A. from Boston University, 1974 (magna cum laude). He also studied international marine resource law at Dalhousie University Law School in Halifax, Nova Scotia.

 

# MUNICIPAL WATER RIGHTS

RECENT RULINGS IN WASHINGTON & OREGON

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

Municipal Water Rights
Forfeiture Risk
Growing Communities Doctrine
States' Statutes
Fish Persistence
Retroactive Application
Conditions' Adequacy
Undeveloped Water

## INTRODUCTION

Three recent decisions out of Oregon and Washington courts address the special circumstances confronting municipal water providers. The law of prior appropriation, which governs water use in all the Western states, generally requires prompt application of water to beneficial use upon issuance of a permit. At that point, a certificate is issued evidencing the vested water right. The water right holder is then expected to make continual use of the water — at least once during a five-year period — or risk forfeiture for non-use (known as "relinquishment" in Washington state). Different rules apply to municipalities; municipalities in this context refers both to cities and special districts.

The processes for acquiring, developing, and maintaining municipal water rights reflect public water providers' special needs. Under what commentators call the Growing Communities Doctrine, legislatures and courts have recognized that local water authorities must plan for future population growth. That means that water providers apply for more water than they presently need so as to ensure an adequate supply at such time as the sufficient numbers of ratepayers emerge to justify and pay for the construction work.

In Oregon, the most recent manifestation of the Growing Communities Doctrine is a 2005 law that created a whole new process for local water providers needing an extension of time to develop their water systems. HB 3038 (2005), codified as ORS 537.230. In Washington State, a 2003 law rewrote the rules applying to municipal water right holders to protect public investment in water supplies. Municipal Water Law, HB 1338 (2003), codified as RCW 90.03.015 et seq. Two recent Oregon cases cast a shadow over the legislature's nod to Growing Communities, whereas the Washington Supreme Court has parted the clouds for public water rights in that state.

## OREGON CASES

Oregon law provides that the Oregon Water Resources Department (Department) must consider the persistence of fish species prior to issuing a permit extension. The relevant statute states the Department may "order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit" if the Department finds that "the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law." ORS 537.230(2).

Two recent opinions issued by the Oregon Court of Appeals address the Department's interpretation and application of fish persistence requirements. The first of these cases, involving the City of Cottage Grove, retroactively applied the fish persistence conditions back to the previous extension in 1999, despite the fact that the municipality had completed development of its water system. This outcome exposes the city to potential curtailment of its water rights and unbudgeted additional public expense, raising concerns for local water providers across the state. Further, the court took the extraordinary action of vacating the certificate issued to the city.

The second case, involving a group of municipal water providers on the Clackamas River, addresses the adequacy of fish persistence conditions, and may be less impactful to the broader water using community. The issue was whether the Department adequately explained how the conditions it imposed are protective of fish over the long-term.

### Cottage Grove Fish Persistence

In December 2013, the Oregon Court of Appeals issued an opinion in *WaterWatch of Oregon v. Water Resources Dept*., holding that the Department was required to consider whether conditions were necessary to maintain fish populations based on the quantity of undeveloped water that existed at the time the last valid permit extension expired, regardless of whether a municipality had diverted its full water right in the interim. 259 Or App 717, 313 P.3d 330 (2013) (review improvidently granted in 355 Or 317, 327 P.3d 1167 (2014), decision aff'd). The Department and the applicant had argued that fish persistence requirements applied to the "undeveloped portion" as of the new extension.

## Municipal Water Rights

**Extension Application**

**Certification of Right**

**Extension Conditions**

**Implications**

**Retroactive Conditions**

**Fish Persistence**

**Long-Term Viability**

**Agency Reasoning**

The case involved a challenge to a 2010 "Certificate of Water Rights" issued to the City of Cottage Grove ("City"). The City's original permit was issued in 1974 and required complete diversion of 6.2 **c**ubic **f**eet per **s**econd (cfs) of water by October 1980. The City applied for and received extensions until October 1999 to complete its water treatment plant. The City continued development of its water system, and by 2007 the City completed its water treatment plant; in July 2008 the City successfully diverted all 6.2 cfs allocated under its permit. In 2009, the City reopened its 2007 application for extension of time, a prerequisite to certificating the water right. The Department approved the extension application, and immediately after, approved the City's certificate.

Petitioners appealed the approval of the extension. One of the City's arguments was that the issuance of the certificate rendered the extension challenge moot, as the certificate is "conclusive proof" of the water right. *See* ORS 537.250 and 537.270. The court rejected this argument, reasoning that "if the city had not been granted an extension of time, it would not have been able to perfect its water right under the permit, and, consequently, the department could not lawfully have issued a water-right certificate to the city." 259 Or App at 728, 313 P3d at 337.

Turning to the validity of the extension, the court determined that the Department had failed to consider whether, as of the date of the last properly issued extension in 1999, the undeveloped portion of the permit was conditioned to maintain the persistence of fish species. The City argued that because it had already developed and used its full water right at the time the Department granted the extension, there was no "undeveloped water" to consider that would be subject to fish persistence requirements. The court disagreed and instead remanded the case to the Department to assess whether the permit was conditioned to ensure the City's use of its undeveloped water, as quantified in 1999, would maintain fish species populations.

As noted above, this case has significant implications for municipal water providers beyond Cottage Grove. Prior to enactment of the 2005 municipal extension law, the Department went through a long period of policy development, during which it asked municipal permittees to refrain from filing extension applications. Most water providers, however, continued development of their water systems to ensure their ability to meet demand. Consequently, these water systems were developed without benefit of official extensions.

Retroactive application of fish persistence requirements may mean that these water providers do not hold the full amount water rights they assumed they have, as conditions on extension now reach back to the last granted extension. This could result in curtailment of the water right and additional unbudgeted expenses to address such retroactive fish persistence conditions. This outcome is contrary to the Department's reading of the statute, the expectations of municipal water providers and, we submit, to legislative intent.

**Clackamas River Water Providers: Long-Term Viability**

The following year, in December 2014, the Oregon Court of Appeals issued an opinion in *WaterWatch of Oregon v. Department of Water Resources*, 268 Or. App 717 (Dec 31, 2014). Here, the court found that the Department had not adequately explained why conditions included in three municipal water permits would ensure fish persistence on the lower 3.1 miles of the Clackamas River.

In this case, the Department's final orders provided for the following conditions: the orders identified stream flows necessary to maintain fish persistence; the orders required an annual meeting to determine whether stream flows should be augmented with water releases from an upstream lake; and the orders required curtailment of the diversion of undeveloped water between September and June in proportion to the amount by which the recommended flows were not met.

The court first agreed the Department had correctly interpreted the fish persistence provision as requiring the Department to condition the use of undeveloped water to ensure the long-term viability of fish populations, and not short-term effects to individual fish. The court did not agree, however, that the Department's conclusions, as articulated in the final orders, regarding fish persistence requirements were supported by the record. The court found that the Department had failed to "connect the dots" on why short-term water flow shortfalls would not adversely impact long-term fish persistence. In other words, the Department's orders did not define how long the "short-term" would last; nor did the Department explain how long-term flow objectives would be met.

The court took further issue with fact that the conditions did not relate to the use of the undeveloped water but rather contemplated any flow shortfalls would be augmented with the release of stored water from an upstream lake. Ultimately, the court reversed all three final orders and returned the case to the Department for further review.

 

## Municipal Water Rights

**Agency Explanation**

**Municipal Rights Confirmed**

**Municipal Immunity**

**Municipal Purposes**

**Change Application**

**Purpose Issue**

**MWL Constitutional**

**Definition of Purposes**

**Actual Water Use**

It may be that the Clackamas holding does not have broad implications for other municipal water right holders. The court seemed to invite the Department to look again at the record and better explain what it means by "short-term" and what the Department expects to happen to ensure long-term fish persistence flows. An extensive record was developed in the contested case hearings over the Clackamas extensions, and it may be that record evidence is available to fully support and better elucidate the original Department decisions.

### WASHINGTON CASE

***Cornelius v. WSU***

In contrast to the Oregon cases, the Washington Supreme Court's recent opinion in *Cornelius v. Washington State University*, broadly affirmed the rights of municipal water rights holders. *Slip Opinion*, No 8817-3, 2015 WL 594309 (Wash, Feb. 12, 2015). In *Cornelius*, the Washington Supreme Court (Supreme Court) considered whether Washington State University's (WSU's) water rights were protected from relinquishment despite WSU's non-use of those rights. [Editor's Note: many western states use the word "forfeiture" in non-use situations, whereas Washington uses "relinquishment"]. To understand the decision, it is important to note that in Washington, "…since 1967, our statutory scheme has treated water rights claimed for municipal water supply purposes as immune from statutory relinquishment, while nonmunicipal water rights may be relinquished through nonuse. LAWS OF 1967, ch. 233, § 18 (codified as RCW 90.14.180); cf LAWS OF 1967, ch. 233, § 14 (codified as RCW 90.14.140(2)(d))." 2015 WL 594309 at *9. In a twenty-seven page opinion (with a twenty-seven page dissent), the Supreme Court reaffirmed the constitutionality of the 2003 Municipal Water Law (MWL), which recognized as in good standing, municipal water rights certificates issued prior to September 9, 2003. RCW 90.03.330(3).

The statutes further protected permit holders by defining "municipal water supply purposes" to ensure that the practical reality of the water purpose was recognized above the purpose that had been identified in the original certificate or permit. RCW 90.03.015(4). "When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes." RCW 90.03.560.

*Cornelius* involved a challenge to changes in WSU's water certificate. WSU had sought to amend its water certificate so that the certificate conformed to WSU's actual water use as municipal water rights. WSU held seven separate groundwater rights for use on its Pullman Campus. Documents representing WSU's water rights had assigned the water rights to particular wells, and, at various times, WSU has drawn water from eight wells. In recent years, WSU had consolidated its water system, "shifting almost all of its groundwater pumping from older wells to two newer wells drawing from the same aquifer" but had not applied for a change in its water rights certificate. 2015 WL 594309 at *3. WSU's certificates and permits primarily identified the purposes as "municipal," but two permits issued by the Washington Department of Ecology (Ecology) identified the purpose as "domestic." After consideration of the status of WSU's certificates, Ecology approved all but one of WSU's requested amendments.

A junior water user in the same groundwater system appealed Ecology's approval of WSU's change application. On review, the Supreme Court considered ten questions certified from the Court of Appeals. The Supreme Court's opinion affirmed its prior holding in *Lummi Indian Nation v. State*, 170 Wash. 2d 247, 241 P3d 1220 (2010), in which the Supreme Court found the MWL constitutional. With the passage of the MWL, the Washington Legislature had sought to clarify the status of municipal water rights in Washington. It did so by confirming that municipal water certificates issued prior to September 9, 2003, were in good standing and not relinquished, and by providing a definition of "municipal water supply purposes" that would control the classification of the water right.

The junior water user asserted several bases for appeal but most were predicated on the argument that WSU's certificates identified the purpose of the water rights as for domestic use. Therefore, the junior user argued, the water rights were not municipal and were subject to relinquishment for non-use. The Court rejected this argument and instead reaffirmed that whether a water use is classified as municipal is not dependent on the purpose identified in the certificate, but rather, on whether the actual water use meets the definition of municipal purpose in the MWL. As the Court recognized, "[I]t makes no sense to say that in 1962 and 1963, Ecology issued WSU the right to pump over 971 million gallons of water per year but never intended WSU to use that water for municipal purposes." 2015 WL 594309 at *7. Uses that meet the MWL definition of municipal purposes are therefore protected from relinquishment by non-use.

**Municipal Water Rights**

**Good Standing**

**Water Supply Planning**

**Flexibility Needed**

The Court also reaffirmed the constitutionality of the MWL's provision recognizing that municipal rights issued prior to September 9, 2003, are in good standing. In so holding, the Court affirmed Ecology's use of a streamlined process that did not require the applicant to show year-to-year actual use of water prior to approving an extension application. The Court recognized that because the permit is not subject to relinquishment, a showing of actual use is immaterial to the validity of the permit. The Court went on to reject the remainder of the junior user's claims and affirmed Ecology's approval of WSU's application.

## CONCLUSION

The Growing Communities Doctrine deserves full expression by our legislatures and courts. Important differences exist between municipal and other water users, in that municipalities are almost never in a position to complete full build-out of their water systems when they apply for a permit, as they lack the immediate need and ratepayer support. Still, the core mission for every municipal provider is to secure a safe, adequate, and reliable water supply to meet current and future demand. By its nature, then, municipal water supply planning dictates identification and locking up of water supplies to meet projected needs years or decades into the future.

This most fundamental of public services, then, calls for flexibility by our policy makers in approaching municipal water rights. In Washington State, the Legislature helpfully defined municipal water supply purposes, irrespective of the type of entity or the use shown in the original certificate, which was affirmed by the Supreme Court in *Cornelius*. In Oregon, however, better clarity evidently is needed to ensure that those communities that developed their water supply systems in good faith — pending revisions to state extensions policy — can realize the benefit of their public investment.

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Cottage grove case at: www.publications.ojd.state.or.us/docs/A147071.pdf
Clackamas river water providers case at: www.publications.ojd.state.or.us/docs/A148870.pdf
*Cornelius* case at: www.ecy.wa.gov/programs/wr/caselaw/images/pdf/88317-3%20Opinion.pdf

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# REPUBLICAN RIVER COMPACT DECISION

***KANSAS V. NEBRASKA*: THE SUPREME COURT'S EQUITABLE POWERS**

by David Moon, Editor

**Republican River Compact**

**Damages Awarded**

**"Disgorgement"**

**Water Consumption Calculation**

**Special Master**

## INTRODUCTION

The US Supreme Court (Court), in an opinion written by Justice Elena Kagan, has ordered Nebraska to pay $5.5 million to Kansas based on a long-running battle over Republican River water use administered under the Republican River Compact (Compact). "…Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled." *Slip Op*. at 14. The 6-3 decision awarding damages was handed down on February 24th, with both states finding parts of the decision to celebrate.

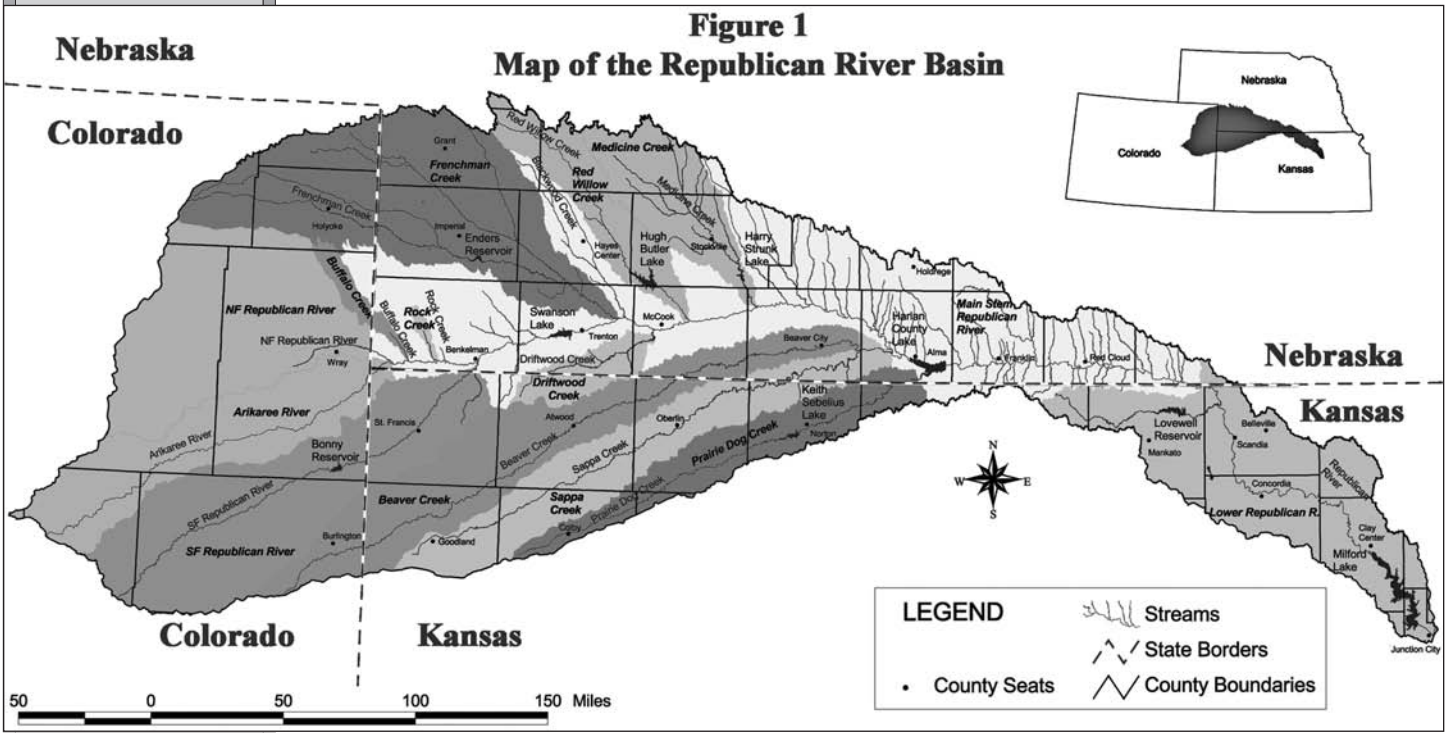
"The Republican River originates in Colorado; crosses the northwestern corner of Kansas into Nebraska; flows through much of southwestern Nebraska; and finally cuts back into northern Kansas. Along with its many tributaries, the river drains a 24,900-square-mile watershed, called the Republican River Basin." *Kansas v. Nebraska, et al*., 574 U. S. ___ (2015), *Slip Op*. at 1. *See* Figure 1, Republican River Basin.

The $5.5 million dollar verdict is comprised of $3.7 million to compensate for Kansas's actual economic losses during 2005-2006 and $1.8 million for "disgorgement" of Nebraska's unjust enrichment. Most importantly, the Court ruled for the first time in an interstate Compact dispute that Nebraska must "disgorge" a portion of the economic gain that Nebraska received from higher yields obtained by irrigating crops with water that should have been sent downstream to Kansas.

The Court sided with Nebraska in the other significant part of the case, supporting reformation of the Accounting Procedure used by the states to calculate water consumption when determining the amount of water to be divided amongst them (5-4 decision). In accordance with the Republican River Compact of 1943 (Compact), 49 percent of the river's water is allocated to Nebraska, with 40 percent to Kansas, and 11 percent to Colorado. Nebraska pushed for the change in the Accounting Procedures, which they maintained "improperly charged Nebraska with consumption of Platte River imported water...water to which Kansas is not entitled." Attorney General Doug Peterson, Press Release (2/24/15).

Justice Kagan's opinion notes that the case had been referred to Special Master William J. Kayatta, who issued a 188-page recommendation in November 2013. "We…now accept his recommendations as to appropriate equitable remedies: for Kansas, partial disgorgement but no injunction; and for Nebraska, reform of the appendix." *Slip Op*. at 1. There was no recalculation of damages by the Court.

**Figure 1**
**Map of the Republican River Basin**



**Republican River Compact**

**Reckless Overuse**

**Actual Loss**

**Disgorgement**

**Groundbreaking Precedent**

**Tool of Equity**

**Groundwater Pumping**

**Conduct Impact**

**Disgorgement Factors**

For additional background regarding the Special Master's Report (Report), see *Republican River Special Master's Report Issued: Kansas v. Nebraska and Colorado* (Water Briefs, *TWR* #118). The Special Master's Report provides an excellent background for the litigation and contains appendices with additional information (*see* weblink below). Detailed information regarding the issues, history, and the Republican River Compact can also be found in the article *Republican River Compact: Federalism, the Compact, and the Serial Crises of State Water Law* (Griggs, *TWR* #100).

## DAMAGES AWARDED TO KANSAS

### "DISGORGEMENT" REMEDY

Commenting on the Court's decision, Kansas Attorney General (AG) Derek Schmidt issued a press release entitled "*Supreme Court Finds Nebraska Liable for 'Reckless' Water Use*." Kansas was very happy to prevail on the finding of liability and receive some compensation for Nebraska's upstream water use, in addition to damages for its own economic losses. "The U.S. Supreme Court today found Nebraska 'recklessly' overused Republican River water in 2005 and 2006, and the court took the unprecedented step of ordering Nebraska to give up a portion of its unjust economic gains from keeping and using Kansas water," the AG noted, pointing out that the Court "unanimously agreed that Nebraska 'knowingly' violated the Republican River Compact and took water that belonged to Kansas." Kansas AG Press Release, 2/24/15.

Kansas AG Schmidt's press release discussed the remedy ordered by the Court (6-3 vote) and laid out how that money will be used. "The Supreme Court ordered Nebraska to repay Kansas $3.7 million to compensate for Kansas's actual economic losses during 2005-06 and another $1.8 million as partial disgorgement of Nebraska's unjust gains from illegally using Kansas water. That $5.5 million recovery will be used to fully reimburse the attorney general's office for its roughly $4.5 million costs in bringing the lawsuit and defending Kansas water rights, making the State of Kansas whole for its cost of litigation. The remainder will be available to the legislature to designate for other purposes as provided by law." Obviously, the cost of bringing a Compact case before the Supreme Court is not something to be taken lightly.

Schmidt emphasized that the Supreme Court had never before ordered "disgorgement" of an upstream state's unjust gains as a remedy in an interstate water dispute. "Legally, this is a groundbreaking case that vindicates Kansas's rights as a downstream state," Schmidt stated. "We brought this lawsuit to encourage our neighbors to live up to their obligations in future dry periods. I'm hopeful this strong and clear Supreme Court order will have that effect."

Justice Kagan's opinion laid out the Court's rationale regarding "disgorgement" as a tool of equity, as well as discussing the physical realities of the situation that water users sometime refer to as "highority" — i.e., the ability of an upstream user to divert water and ignore downstream users' needs. "Assessed in this light, a disgorgement order constitutes a 'fair and equitable' remedy for Nebraska's breach. *Texas v. New Mexico*, 482 U.S., at 134. 'Possessing the privilege of being upstream,' Nebraska can (physically, though not legally) drain all the water it wants from the Republican River. Report 130. And the higher value of water on Nebraska's farmland than on Kansas's means that Nebraska can take water that under the Compact should go to Kansas, pay Kansas actual damages, and still come out ahead. That is nearly a recipe for breach [of the Compact] — for an upstream State to refuse to deliver to its downstream neighbor the water to which the latter is entitled. And through 2006, Nebraska took full advantage of its favorable position, eschewing steps that would effectively control groundwater pumping and thus exceeding its allotment. In such circumstances, a disgorgement award appropriately reminds Nebraska of its legal obligations, deters future violations, and promotes the Compact's successful administration." *Slip Op*. at 16-17.

The amount of the "disgorgement" award — $1.8 million — was a point of contention, with Kansas arguing that "the Special Master's recommended disgorgement award…is too low to ensure Nebraska's future compliance." *Id*. at 17. Kansas suggested three different possibilities for that amount, but the Court decided to simply adopt the Special Master's finding, in part due to Nebraska's recent conduct: "…we agree with the Master's judgment that a relatively small disgorgement award suffices here. That is because, as the Master detailed, Nebraska altered its conduct after the 2006 breach, and has complied with the Compact ever since. *See* Report 112–118, 180." *Id*. at 18-19.

Notable candor on the subject of damages by Justice Kagan provided a revealing look at the factors weighed by the Court. "Truth be told, we cannot be sure why the Master selected the exact number he did — why, that is, he arrived at $1.8 million, rather than a little more or a little less. The Master's Report, in this single respect, contains less explanation than we might like. But then again, any hard number reflecting a balance of equities can seem random in a certain light — as Kansas's own briefs, with their

**Republican River Compact**

**Guestimate**

ever-fluctuating ideas for a disgorgement award, amply attest. What matters is that the Master took into account the appropriate considerations — weighing Nebraska's incentives, past behavior, and more recent compliance efforts — in determining the kind of signal necessary to prevent another breach. We are thus confident that in approving the Master's recommendation for about half again Kansas's actual damages, we award a fair and equitable remedy suited to the circumstances." *Id*. at 19-20. In his Report, the Special Master concluded that "additional precision is not necessary" and then added a footnote that explained the basis of his calculation: "To be sure, the fact that I arrive only at a rough, order of magnitude estimate of Nebraska's gain does not mean that that estimate is unreliable as a matter of common sense or math. *See* Lawrence Weinstein & John A. Adam, *Guesstimation: Solving the World's Problems on the Back of a Cocktail Napkin* (2008)." Report, Footnote 64, p. 179 (11/15/13).

**Nebraska's View**

When the case began, Kansas asserted that it was entitled to approximately $80 million from Nebraska for use of water beyond the amount granted to Nebraska by the Compact. This amount was based primarily on Kansas' argument that Nebraska needed to be punished — via "disgorgement" of Nebraska's unjust enrichment. Don Blankenau of Blankenau Wilmoth Jarecke, who provided legal counsel for Nebraska before the Court along with his partner Tom Wilmoth, pointed out to *The Water Report* (*TWR*) that in viewing the outcome of the case, it is important to keep in mind what Kansas sought at the beginning of the litigation. "Kansas asked for $80 million, with approximately $60 million for disgorgement plus a penalty, the retirement of some 300,000 acres of irrigated land in Nebraska, and the appointment of a River Master for the Republican River to oversee and enforce the decision against Nebraska." With all that in mind, "Nebraska should be pretty thrilled" with the decision, according to Blankenau.

Nebraska Attorney General Doug Peterson released a statement on the day of the decision that sets forth his view of the final decision. "We are pleased with the overall outcome of the U.S. Supreme Court's decision. The United States Supreme Court's decision adopts the Special Master's Report. The court's adoption of the Special Master's award of $3.7 million in actual damages and $1.8 million in disgorgement ($5.5 million in total) to Kansas is significantly less than the more than $80 million that Kansas originally sought." Nebraska AG Press Release (2/24/15).

**Deliberate Conduct**

Nebraska argued against any award for "disgorgement" based on its position that contract law governing disgorgement requires willful or deliberate actions that clearly show intent, whereas the finding here was that Nebraska simply acted recklessly. "There was no evidence to support Kansas' position that Nebraska was willfully or deliberately damaging Kansas by its actions," Blankenau noted.

**Contract Law (Dissent)**

Justice Clarence Thomas in his dissent stated that "Kansas, Nebraska, and Colorado have presented us with what is, in essence, a contract dispute." *Dissent* at 1. Justice Thomas then argued strenuously that the Court should adhere strictly to contract law principles and not utilize equitable powers: "…to the extent that we have departed from contract law principles when adjudicating disputes over water compacts, it has been to reject loose equitable powers of the sort the majority now invokes." *Id*. at 3. "Although our precedents have not foreclosed disgorgement of profits as a remedy for breach of a water compact, they have suggested that disgorgement would be available, if at all, only for the most culpable breaches: those that are 'deliberate.'" *Id*. at 6. "Although it is uncontested that Nebraska breached the Compact and that Kansas lost $3.7 million as a result, …the Master expressly found that there is no evidence that Nebraska deliberately breached the Compact." *Id*. at 7. Blankenau summed up the outcome for *TWR*, "[T]he case shows that the Supreme Court's equitable reach was extended somewhat by this Court's decision on disgorgement."

**Leverage Against Upstream States**

Professor Stephen McAllister of the University of Kansas School of Law, who argued the case before the Court for Kansas, also spoke with *TWR* about the damages award. "Awarding disgorgement for the first time in an original action case, above and beyond the proof of actual damages, was the most significant aspect of the decision. Disgorgement is a very significant tool for downstream states to use as leverage against upstream states in order to ensure compliance. The issue also got Colorado's attention as it was the main issue they addressed in their briefs."

## ACCOUNTING PRINCIPLES REFORMATION

### "IMPORTED WATER" CONSIDERATIONS

As noted above, the Court also decided in favor of reforming the Compact accounting procedures which were established in 2002 under a settlement of a previous Compact dispute.

**Groundwater Pumping**

The Compact was ratified by the States and Congress approved it in 1943. As the Court noted: "All was smooth sailing for decades, until Kansas complained to this Court [in 1997] about Nebraska's increased pumping of groundwater, resulting from that State's construction of 'thousands of wells hydraulically connected to the Republican River and its tributaries.' …Kansas contended that such activity was subject to the Compact: To the extent groundwater pumping depleted stream flow in the Basin, it counted against the pumping State's annual allotment of water." *Slip Op*. at 3. The Supreme Court at that time ended up agreeing with the Kansas position on groundwater pumping — based on a recommendation of the Special Master appointed then. "The States then entered into negotiations, aimed primarily at

## Republican River Compact

### Imported Water

### Platte River Water

### Reformation Dissent

### Settlement Language

### Compact Allotment

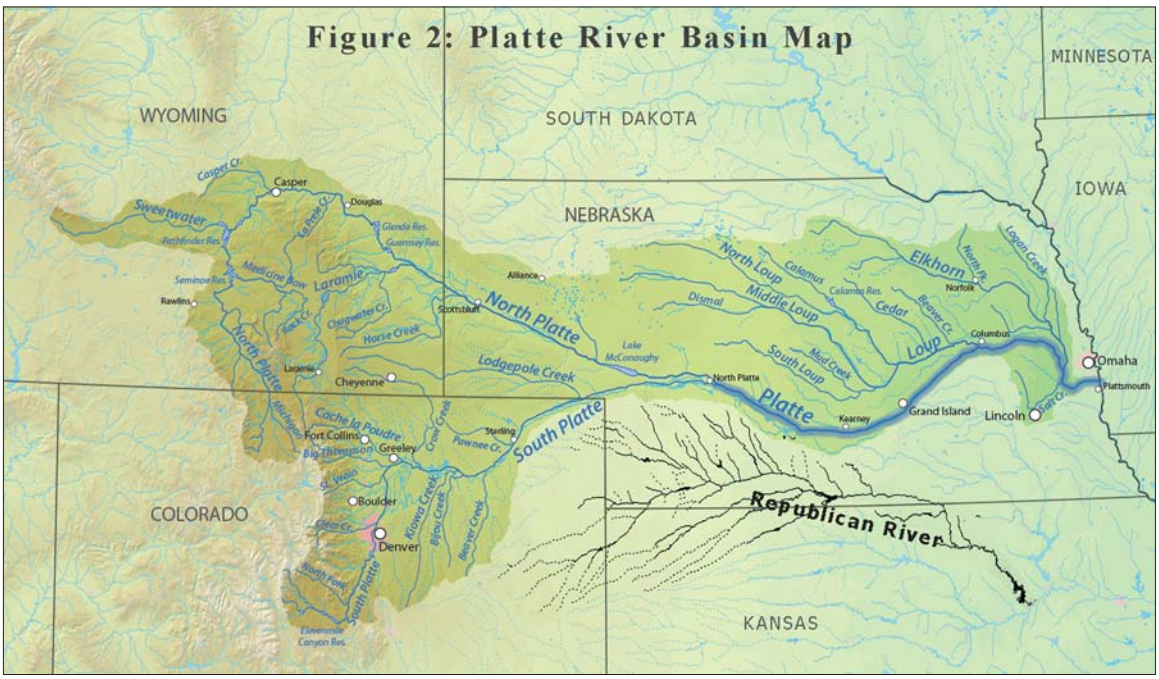
determining how best to measure, and reflect in Compact accounting, the depletion of the Basin's stream flow due to groundwater pumping." *Id*. Eventually, the three states to the Compact signed the Final Settlement Stipulation (Settlement) in 2002, addressing a range of issues affecting Compact administration. The 2002 Settlement included Accounting Principles designed to accurately measure the supply and use of the Republican Basin's water and "established detailed mechanisms to promote compliance with the Compact's terms." *Id*. "To smooth out year-to-year fluctuations and otherwise facilitate compliance, the Settlement based all Compact accounting on 5-year running averages, reduced to 2-year averages in 'water-short' periods. *Id*., §§IV(D), V(B)." *Id*.

Justice Kagan succinctly set out the facts underlying the accounting issue: "The Compact, recall, apportions the virgin water supply of the Republican River and its tributaries — nothing less, but also nothing more. See Compact Art. III; *supra*, at 2. One complexity of that project arises from water's ...well, fluid quality. Nebraska imports water from the Platte River, outside the Republican River Basin and thus outside the Compact's scope, to irrigate farmland. And that imported water simply will not stay still: Some of it seeps through the ground and raises stream flow in the Republican River and its tributaries." *Slip Op*, at 21.

Nebraska's counterclaim in the present case requested amendment of a technical appendix (Accounting Principles) to the 2002 Settlement, arguing that this action was necessary to ensure that the allocation of water would faithfully reflect the parties' intent as expressed in both the 2002 Settlement and the Compact itself. "…Nebraska contended that the Settlement's Accounting Procedures inadvertently charge the State for using 'imported water' — specifically, water from the Platte River — in conflict with the parties' intent in both the Compact and the Settlement. …The Master agreed, and recommended modifying the Procedures by adopting an approach that the parties call the '5-run formula,' to ensure that Nebraska's consumption of Platte River water will not count toward its Compact allotment." *Slip Op*. at 20. See Figure 2, Platte River Basin map.

The decision to order reformation of the accounting procedure as recommended by the Special Master was by a 5-4 vote. Justice Roberts declined to join the majority in this part of the decision, stating "I do not believe our equitable power, though sufficient to order a remedy of partial disgorgement, permits us to alter the Accounting Procedures to which the States agreed." *Roberts Opinion* at 1. Don Blankenau told *TWR* that "the dissent viewed this as modifying a settlement that was previously approved by the Court. They believed that you can't modify the procedure just because you didn't get it right the first time."

In deciding to allow reformation of the Settlement, the Court relied heavily on the language from the Settlement. "Reflecting the Compact's own scope, §IV(F) of the Settlement states, in no uncertain terms, that 'Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use' of Republican River Basin water. Which means, without all that distracting capitalization, that when Nebraska consumes imported water that has found its way into the Basin's streams, that use shall not count toward its Compact allotment." *Id*.



**Republican River Compact**

**Deal is a Deal**

**Intent & Equity**

**Imported Water Charge**

**Equitable Powers**

**Broad View of Equitable Powers**

The dissent's view, limiting accounting modification, was based on Kansas' position on this point: "…Kansas argues (along with the dissent) that a deal is a deal is a deal — and this deal did not include the 5-run formula the Master now proposes. (citation omitted)…On that view, the parties' clear intent to exclude imported water does not matter; nor does their failure to appreciate that the Procedures, in opposition to that goal, would count such water in material amounts. According to Kansas, so long as the parties bargained (as they did) for the Procedures they got, that is the end of the matter: No one should now be heard to say that there is a better mode of accounting." *Id*. at 23.

The Court, however, found that the argument "does not pass muster. …in this Compact case, two special (and linked) considerations warrant reforming the Accounting Procedures as the Master has proposed — or better phrased, warrant conforming those Procedures to the parties' underlying agreements. First, that remedy is necessary to prevent serious inaccuracies from distorting the States' intended apportionment of interstate waters, as reflected in both the Compact and the Settlement. And second, it is required to avert an outright breach of the Compact — and so a violation of federal law." *Id*. at 23-24. The Court goes on to explain its reasoning in detail, including an important statement supporting the Court's equitable powers when interstate conflicts are concerned: "…this Court's authority to devise 'fair and equitable solutions' to interstate water disputes encompasses modifying a technical agreement to correct material errors in the way it operates and thus align it with the compacting States' intended apportionment." *Id*. at 25.

According to the Nebraska AG, "The most important issue in this case from Nebraska's perspective has always been correcting the Accounting Procedures, which improperly charged Nebraska with consumption of Platte River imported water. The Court's agreement with Nebraska's correction of the Accounting Procedures will ensure that Nebraskans receive their full Compact entitlement, and that Nebraska is no longer improperly charged for using water to which Kansas is not entitled." Nebraska AG Press Release (2/24/15).

Don Blankenau discussed Nebraska's position with *TWR*. "Nebraska determined that the accounting procedures adopted in the Settlement agreement mistakenly charged Nebraska for consuming Platte River water as if it were Republican River water. There are canals on the south side of the Platte River, carrying water diverted from the Platte, which leaked water and caused a rise in the water table. That groundwater eventually flows over to the Republican River. The Compact is specifically limited to the division of Republican River waters, not water imported from the Platte River."

Professor McAllister also commented on this part of the decision, noting: "Reworking the accounting procedures was rather odd and essentially oriented to the particular facts in this case. It involved a rewording of a settlement agreement and not the Compact itself. It does show again a broad view of the Court's equitable powers, although this aspect of the case divided the Court 5-4."

## CONCLUSION

### EXTENT OF THE COURT'S ROLE

States involved in compact disputes and other interstate battles would be well-advised to review this Supreme Court decision in detail to understand the Court's current view of its equitable powers in water compact cases.

In the last paragraph of the opinion, Justice Kagan provides general guidance for those water professionals 'reading the tea leaves' to ascertain how the Court will approach interstate disputes in the future: "Nebraska argues here for a cramped view of our authority to order disgorgement. Kansas argues for a similarly restrictive idea of our power to modify a technical document. We think each has too narrow an understanding of this Court's role in disputes arising from compacts apportioning interstate streams. The Court has broad remedial authority in such cases to enforce the compact's terms. Here, compelling Nebraska to disgorge profits deters it from taking advantage of its upstream position to appropriate more water than the Compact allows. And amending the Accounting Procedures ensures that the Compact's provisions will govern the division of the Republican River Basin's (and only that Basin's) water supply. Both remedies safeguard the Compact; both insist that States live within its law. Accordingly, we adopt all of the Special Master's recommendations." *Slip Op*. at 28.

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Supreme court's decision at: www.supremecourt.gov/opinions/14pdf/126orig_olq2.pdf
Special master's report at: http://media.ca1.uscourts.gov/special_master/files/2013-11-15_511.pdf

California Rulemaking & Public Notice

Underground Regulations

Administrative Practice

Fish Stocking

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# FISH & WILDLIFE AGENCY ACTION

**"UNDERGROUND REGULATION" — AGENCY RULEMAKING & THE CALIFORNIA ADMINISTRATIVE PROCEDURES ACT**

***California Association for Recreational Fishing v. Department of Fish & Wildlife***

by Damien Schiff, Alston & Bird LLP (Sacramento, CA)

## INTRODUCTION

Last month, the California Third District Court of Appeal (Court) issued a groundbreaking published decision interpreting the California Administrative Procedure Act (APA), Cal. Gov't Code §§ 11340-11361. In *California Association for Recreational Fishing v. Department of Fish and Wildlife*, 2015 WL 543704 (Cal. Ct. App. Feb. 10, 2015)("CARF"), the Court held illegal several Department of Fish and Wildlife (Department) mitigation measures governing fish stocking in California waters. Specifically, the court held that the measures — crafted as part of an environmental impact report governing the Department's fish stocking and related permitting activities — violated the APA's prohibition on underground regulations.

Although the case arises within the context of fish stocking regulation, its interpretation of the APA will affect administrative practice throughout a state when broadly applicable policies and procedures are imposed on the regulated public with no notice or opportunity for comment. The decision also may prove influential in how other jurisdictions seek to reconcile the notice-and-comment requirements of administrative rulemaking with the duty to identify and reduce environmental impacts.

## BACKGROUND ON CALIFORNIA FISH STOCKING

The California Fish and Game Code authorizes the Department to issue permits for the stocking of fish in private and public waters throughout the state. *See* Cal. Fish & Game Code § 6400. Under the Department's regulations, no fish may be stocked unless in accordance with the following general terms and conditions: the fish stock was legally reared by a registered aquaculturalist; the fish stock is not parasitized, diseased, or of an unauthorized species; the stocking is consistent with a private stocking permit; and the stocking is consistent with the Department's fisheries management programs. Cal. Code Regs. tit. 14, § 238.5(a), (d)(1).

Since 1993, the Department has operated the "Fishing in the City" program. Under that program, the Department contracts with private aquaculture firms to stock public lakes and ponds in urban areas in the Sacramento, San Francisco, and Los Angeles greater metropolitan areas. The program has been successful at affording city residents, especially inner-city youth, with angling opportunities.

In addition to the above-mentioned stocking activities, the Department operates two dozen hatcheries throughout the state. These hatcheries provide fish to satisfy the Department's statutory stocking obligations. Fish & Game Code § 1120 (requiring the Department to maintain and operate fish hatcheries that have been established by the Fish and Game Commission); *Id*. §§ 1725-30 (Trout and Steelhead Conservation and Management Planning Act of 1979) (requiring the Department to designate certain waters as wild trout waters and requiring the Department to develop management plans for those waters); *Id*. § 13007 (imposing state hatchery production goals). These hatcheries also provide mitigation for fisheries impacts from other projects.

## LEGAL BACKGROUND

### The California Environmental Quality Act

Enacted in 1970, the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21100-21189.3, directs public agencies not to approve projects that may have a substantial negative effect on the physical environment, where feasible alternatives or feasible mitigation may be adopted to avoid or lessen those impacts. *Id*. § 21002. To that end, the statute requires the analysis of the environmental impact of any discretionary project that will cause a direct physical change to the environment, or a reasonably foreseeable indirect physical change to the environment. *Id*. §§ 21065(a), 21080(a); Cal. Code Regs. tit. 14, §§ 15378(a)(1), 15357, 15358. Where the project may have a significant impact on the environment, the lead public agency must prepare an environmental impact report. Cal. Pub. Res. Code § 21080(d). An environmental impact report must "identify the significant effects on the environment of a project,…identify alternatives to the project, and…indicate the manner in which those significant effects can be mitigated or avoided." *Id*. § 21002.1(a). *See Id*. § 21061. The report also must include a "detailed statement" discussing the project's significant effects, any unavoidable significant effect, any irreversible significant effect, mitigation measures, alternatives to the project, and the reasons various effects on the environment have been determined to be insignificant. *Id*. § 21100. The report's analysis must be based on the environmental setting, which "constitute[s] the baseline physical conditions by which a lead agency determines whether an impact is significant." Cal. Code Regs. tit. 14, § 15125(a).

 

**California Rulemaking & Public Notice**

**"No Project" Alternative**

**Public Comment**

**Significant Effect**

**Rulemaking Framework**

**APA Compliance**

**Notice of Action**

**Statement of Reasons**

**One-Year Timeline**

In addition to identifying and discussing all of the project's significant environmental effects, an environmental impact report must "describe a range of reasonable alternatives to the project…which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." *Id*. § 15126.6(a). The report must also consider a "no project" alternative. *Id*. § 15126.6(e). Once the "no project" alternative is identified, the lead agency must analyze its impacts by projecting what would reasonably be expected to occur in the foreseeable future if the project were not approved. *Id*. § 15126.6(e)(3)(C). The purpose of the "no project" alternative is to allow decision-makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. *Id*. § 15126.6(e)(1). Following the preparation of the draft environmental impact report, the lead agency must make the report available for public comment. Pub. Res. Code §§ 21091, 21092; Cal. Code Regs. tit. 14, §§ 15087, 15105(a). A lead agency must "consider" and "evaluate" every comment submitted on a draft environmental impact report and prepare a written response describing the disposition of each significant environmental issue raised therein. Cal. Pub. Res. Code § 21091(d)(1)-(2); Cal. Code Regs. tit. 14, § 15088(c).

In contrast to its federal counterpart — i.e., the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h — CEQA imposes substantive protections for the environment. *Quail Botanical Gardens Found. v. City of Encinitas*, 29 Cal. App. 4th 1597, 1601 (1994) found that "[I]n addition to the intent to require governmental decision makers to consider the environmental implications of their decisions, the Legislature in enacting CEQA also intended to provide certain substantive measures for protection of the environment." Under CEQA, a public agency may not approve or carry out a project that will have a significant effect on the environment unless: (1) the effect is mitigated to insignificance; (2) the effect is avoided through adoption of an alternative; or (3) the agency determines that mitigation is infeasible and the project's overriding benefits outweigh the significant effect. *See* Cal. Pub. Res. Code § 21081; Cal. Code Regs. tit. 14, §§ 15002(h), 15091(a), 15092(b), 15093(c).

**The California Administrative Procedure Act**

The California Administrative Procedure Act (APA) provides the basic framework for administrative rulemaking. The Legislature enacted the APA out of a concern founded on the "unprecedented growth in the number of administrative regulations." Cal. Gov't Code § 11340(a). That, coupled with the "complexity and lack of clarity in many regulations," "has placed an unnecessary burden on California citizens and discouraged innovation, research, and development of improved means of achieving desirable social goals," as well as put "small businesses…at a distinct disadvantage." *Id*. § 11340(d), (g). The Legislature sought to remedy these ills through the APA's various procedural and substantive limitations on agency rulemaking. *Armistead v. State Personnel Bd*., 22 Cal. 3d 198, 204 (1978), noted that, "[A] major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules." Consequently, an agency generally cannot enforce a rule or standard without prior compliance with the APA. *Id*. § 11340.5(a).

To initiate rulemaking, the APA requires an agency to publish a notice of proposed action, which sets forth the text of the proposed regulation and the agency's alleged authority for enacting it. The agency also must provide an initial statement of reasons, which sets forth, among other things, the alleged purpose of and reason for the regulation, as well as reasonable alternatives to the regulation and, for "major regulations" (estimated to have an impact exceeding $50 million, *id*. § 11342.548), an analysis of the economic impacts of the proposed regulation on California businesses. *Id*. §§ 11346.2, 11346.3. The notice must be provided at least 45 days prior to the close of public comment and hearing on the proposed regulation. *Id*. § 11346.4. If the agency proposes to make any substantial change to its initial proposal, it must give the public 15 days' notice prior to the hearing.*Id*. § 11346.8(c). If the agency adopts the regulation, it must submit the regulation to the Office for its review, accompanied by a final statement of reasons. *Id*. § 11346.9(a).

**The final statement of reasons must contain:**

- an update of the information contained within the initial statement of reasons;
- a determination as to whether the proposed action would impose a mandate on local agencies or school districts;
- a summary of each objection or recommendation made, along with the agency's response thereto;
- a determination with supporting evidence that no alternative considered by the agency would be more effective in achieving the agency's regulatory goals, or would be as effective and less burdensome to affected private persons, or would be more cost effective to affected private persons and equally effective in achieving the agency's regulatory goals; and
- an explanation for the rejection of any proposed alternative that would lessen the economic impact on small businesses.

*Id.* § 11346.9(a)(1)-(5).

The entire process, between notice of proposed action and submission of adopted action to the Office, must occur within one year; otherwise, an agency must begin the process anew with another notice of proposed action. *Id.* § 11346.4(b).

California Rulemaking & Public Notice

Proposal Review

The Office has 30 days to review the agency's adopted proposal. *Id*. § 11349.3(a). The Office's review is limited to whether the agency complied with the APA's aforementioned procedural requirements, and whether the adopted proposal meets the standards for:

- "necessity" (whether the proposal is needed to effectuate the purpose of the relevant provision of law)
- "authority" (whether it is authorized by law)
- "clarity" (whether those directly affected by the proposed regulation can easily understand its terms)
- "consistency" (whether the proposed regulation is consistent with existing law)
- "reference" (the provision of law that authorizes the proposed regulation)
- "nonduplication" (whether the proposed regulation serves the same purpose as an existing provision of law)

*Id*. §§ 11349.3(b), 11349.1.

Identified Errors

If the Office disapproves the proposal, the submitting agency has 120 days in which to fix the identified errors without needing to reinitiate the entire rulemaking process. *Id*. § 11349.4(a). Alternatively, the agency can appeal the Office's decision to the Governor's Legal Affairs Secretary. *Id*. § 11349.5(a). Following the Office's response to the appeal, the Governor has fifteen days in which to affirm or disapprove the Office's decision. *Id*. § 11349.5(c).

**The Fish Hatchery Environmental Impact Report**

Exemption Lawsuit

Shortly following the 1970 passage of CEQA, the California Secretary of Natural Resources certified that the Department's hatchery and fish stocking activities were categorically exempt from CEQA. Nevertheless, in 2006 environmentalists sued the Department, contending that the agency's fish stocking was not exempt from CEQA. The lawsuit also contended that an environmental impact report was required, owing to the negative impacts to amphibians and other species caused by the Department's stocking. In 2007, the trial court ruled in favor of the environmentalists. The court ordered the Department to prepare an environmental impact report, but allowed hatchery and fish stocking to continue in the interim. The Department did not appeal.

Report Scope Expanded

In 2008, the Department requested and was granted more time to complete the environmental impact report. Importantly, in that request, the Department for the first time sought to expand the scope of the environmental impact report that the court previously had ordered. The 2006 lawsuit had focused exclusively on the Department's own hatchery and stocking activities; it did not concern the Fishing in the City program or the private permit program generally. Nevertheless, the trial court, in granting the Department's request for more time to complete the environmental impact report, also arguably authorized the Department to expand the report's scope to include the Fishing in the City and the private stocking permit programs.

The Department issued the final environmental impact report in January 2010. The report determined that the Fishing in the City and private permitting programs would, as proposed, have significant environmental impacts. To mitigate these impacts, the Department proposed several measures, among them three that formed the basis of the *CARF* lawsuit.

Mitigation Measures

For the Fishing in the City and private permitting programs, the Department proposed Mitigation Measures BIO-226 and BIO-233b. These measures would require that all requests for the stocking of fish be reviewed by a Department biologist using a special protocol termed Appendix K. According to this protocol, a Department biologist would have to determine whether the proposed fish stocking would have a significant adverse effect on any Decision Species, i.e., 85 species chosen by the Department (without public input), about half of which receive no special protection under either the federal or the California Endangered Species Act. If the biologist were to determine that such a significant effect would result, then the protocol required that the stocking request be denied. Additionally, for the Fishing in the City program, the Department proposed Mitigation Measure BIO-229. Under that measure, participating fish stocking companies would be required to monitor and report the existence of invasive species at their facilities, and to report the results of such monitoring to the Department on a quarterly basis.

**UNDERGROUND REGULATION LAWSUIT IN THE TRIAL COURT**

Underground Regulations

In 2011, CARF — a non-profit organization representing the interests of fish vendors, private fish stockers, and recreational fishermen — filed suit challenging the abovementioned mitigation measures. The lawsuit argued that the measures were underground regulations, i.e., broadly applicable rules that were not adopted pursuant to the rigorous notice-and-comment procedures of the California APA. *Cf*. Gov't Code 11340.5(a) (forbidding the enforcement of such un-vetted rules).

Three-Step Analysis

Under the California APA, an underground regulation claim requires a court to proceed with a three-step analysis. First, the court must determine whether the policy or practice in question qualifies as a "regulation" as defined in the APA, i.e., a rule or standard of general application intended to "implement, interpret, or make specific the law enforced by it, or to govern its procedure." Gov't Code § 11342.600. The California Supreme Court has interpreted the APA's definition to exclude the type of "rulemaking" that results from day-to-day agency adjudication and enforcement. *Cf. Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996).

 

**California Rulemaking & Public Notice**

Second, the court must determine whether the generally applicable rule or standard implements, makes specific, or interprets the law in a way that makes clear that the rule or standard will guide the agency's decision-making in future case. *Id*. at 571, 574-77. Third, the court must determine whether the rule or standard that otherwise qualifies as a "regulation" is nevertheless exempt from the APA under one of the statute's nine express exemptions. *Cf*. Cal. Gov't Code § 11340.9.

**Exemptions**

**The statute's exemptions are:**

- a rule from an agency within the legislative or judicial branch;
- a legal ruling issued by the Franchise Tax Board or the State Board of Equalization;
- the use of a form prescribed by a state agency;
- a rule that pertains solely to an agency's internal management;
- certain types of rules pertaining to agency enforcement;
- a rule that embodies the only legally tenable interpretation of a provision of law;
- a rate fixing rule;
- a public works rule pertaining to signage or traffic control; and
- a rule directed at a single person or entity and not intended to apply generally throughout the state.

*Id*. § 11340.9(a)-(i).

**_CARF_ Exemptions & Arguments**

At issue in *CARF* were the exemptions for rules that embody the only legally tenable interpretation of law, and that relate solely to the internal management of an agency. *Id*. 11340.9(d), (f).

In the trial court, CARF argued that the aforementioned mitigation measures qualified as "regulations" under the APA: they were intended to apply generally to the Department's fish stocking programs, and they represented the Department's interpretation and application of its permitting and other authority under the Fish and Game Code. Further, the mitigation measures were intended to apply to all future Fishing in the City contracts and applications for private fish stocking permits. For its part, the Department argued that the challenged mitigation measures were not underground regulations because they fell within the APA exemptions for the only legally tenable interpretation and for internal management rules. In reply, CARF contended that the only legally tenable interpretation exemption did not apply because none of the mitigation measures was compelled by existing law. In other words, although the Department might have the authority to impose the measures, no provision of law required that the mitigation measures take the precise form in which the Department had proposed them. Similarly, the internal management exemption was inappropriate because all of the mitigation measures would have direct and immediate impacts on the general public, in particular participants in the Fishing in the City program.

**Trial Court Decision**

The trial court, however, disagreed. Specifically, the court concluded that the Appendix K protocol, as applied to the Fishing in the City program, was exempt as an internal management rule. The court reasoned that the measure had no direct effect on the regulated public, but instead only affected how a Department official would make the purely internal decision of whom to contract with to stock urban ponds. Moreover, the court noted that the protocol is merely an evaluative tool to assist the Department in applying existing law, and thus arguably does not even qualify, prima facie, as an APA "regulation."

With respect to invasive species monitoring and reporting, the trial court concluded that the pertinent mitigation measure was exempt because "the Department has a clear statutory basis" for imposing it, namely Cal. Fish & Game Code § 2301 (generally prohibiting the possession, transportation, and planting of dreissenid mussels); Cal. Code Regs. tit. 14, § 671(c)(9)(A), (c)(10) (prohibiting the New Zealand mudsnail, zebra mussel, and quagga mussel). The court also suggested, citing Fish and Game Code section 1123.5 (generally requiring the Department to purchase fish from in-state registered aquaculturalists consistent with the Public Contract Code), that the monitoring and reporting requirement could be proper simply as a term incorporated into the Fishing in the City program contracts.

Finally, the court concluded that Appendix K's application to the private fish stocking program was exempt because Appendix K merely assisted the Department to apply existing law without interpreting it. The court was not troubled that Appendix K applied to many species that receive no special protection under any endangered species regulation. The court reasoned that other laws authorize the Department to protect such non-endangered species. *See* Cal. Fish & Game Code § 1700 (noting the public policy of the state to conserve and protect the state's aquatic resources); *Id*. § 711.7 (noting that the Department is trustee of the public trust in the state's fish and wildlife resources); *Id*. § 1802 (noting that the Department has jurisdiction over the state's wildlife and aquatic resources).

### _CARF_ ON APPEAL

**"Internal Management"**

CARF appealed the trial court's decision to the California Court of Appeal, Third District. In that court, CARF renewed its objections to the mitigation measures, and the Department again defended on the grounds that the measures were exempt from the APA. Specifically, the Department argued that Appendix K as applied to the Fishing in the City program was exempt because it relates wholly to the Department's "internal management." The Department argued that the mitigation and monitoring measures, as well as Appendix K's application to the private fish stocking permit program, were exempt because both comprised

## California Rulemaking

**Damien Schiff** of Alston & Bird LLP represents the successful appellant/petitioner in the *CARF* decision along with attorneys from Pacific Legal Foundation. Damien Schiff has over nine years of experience litigating cases concerning a variety of federal and state environmental and land use issues. In 2012, he argued and won *Sackett v. US Environmental Protection Agency*, a groundbreaking decision in which the US Supreme Court upheld the right of project applicants to challenge Clean Water Act compliance orders issued by the Environmental Protection Agency. For that victory, California Lawyer Magazine recognized Damien as an Attorney of the Year in Appellate Law. In addition to the Clean Water Act, Damien's practice focuses on enforcement and permitting issues arising under the Endangered Species Act and the California Coastal Act. He has litigated or filed friend-of-the-court briefs in cases concerning the federal Clean Air Act, California Endangered Species Act, California Environmental Quality Act, Z'berg-Nejedly Forest Practice Act, and Mello-Roos Community Facilities Act. Before joining the firm, Damien was a principal attorney at Pacific Legal Foundation, a public interest organization committed to litigating pro bono for property rights.

the only legally tenable interpretation of existing wildlife and fisheries law. The Court of Appeal, however, rejected each of these arguments.

The Court determined that BIO-226 was not exempt as an internal management rule because the mitigation measure would effectively determine which public lakes and ponds would be stocked. For that reason, the measure would "significantly affect[] numerous citizens, both those who run established fish stocking businesses and those, especially children, who enjoy participating in the Fishing in the City program." In reaching that conclusion, the Court avoided having to address whether its earlier decision in *Californians for Pesticide Reform v. Cal. Dep't of Pesticide Regulation*, 184 Cal. App. 4th 887 (2010), should be overruled. That case arguably holds that agency rules that do not *directly* regulate outside parties are exempt as internal management measures. *See Id.* at 909 (holding that the APA's internal management exception applies to a rule that "does not require the individuals or entities affected to do anything they are not already required to do"). The *CARF* Court explained that it need not address the vitality or scope of the rule in *Californians for Pesticide Reform* because BIO-226, as noted above, "requires the Department to perform a new duty," as well as "substantively affect[s] a public program the Department administers," thereby "significantly affect[ing] numerous citizens, both those who run established fish stocking businesses and those, especially children, who enjoy participating in the Fishing in the City program." *CARF*, 2015 WL 543704, at *27.

The Court of Appeal also rejected the Department's "only legally tenable interpretation" defense. That defense failed with respect to BIO-229 because no provision of law "patently compel[s]" the particular monitoring and reporting regime that BIO-229 mandated. *Id*. at *28 (quoting *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 337 (2006)). As the Court explained, under existing law monitoring may be required, but not the particular quarterly monitoring regime that the mitigation measure demanded. Similarly, the Department's defense failed with respect to BIO-233b because nothing in the Department's existing permitting regulations mandates the particular enforcement protocol that BIO-233b established. "Another possible interpretation the Department could reach would be to require the permit applicant to submit a report from a qualified biologist certifying the nonexistence of any decision species or that stocking would not have a significant adverse effect on decision species." 2015 WL 543704, at *28.

### IMPACTS OF *CARF* DECISION

The Court of Appeal's decision in *CARF* will have important impacts not just on the recreational fishing industry, but also on all citizens who may be subject to the regulatory jurisdiction of administrative agencies. The decision establishes the critical proposition that an agency cannot escape the APA's stringent rulemaking standards through an expansive understanding of what constitutes "internal management," or through a narrow understanding of what existing law may authorize.

The decision does leave open, however, one aspect of the internal management exemption. As noted above, the *CARF* Court acknowledged a tension in the case law over whether a seemingly "internal" agency rule that has a substantial practical impact on outside parties may nevertheless be exempt from the APA — so long as the rule imposes no *new* duty on the agency or on the regulated public. Recall that the *CARF* Court avoided the question because it determined that the application of Appendix K to the Fishing in the City program did impose new obligations on Department personnel. Nevertheless, the *CARF* decision evinces a judicial skepticism of a broad interpretation of such an exemption, one that will likely be relevant in the many western states with similar exemptions. *Cf*. Ariz. Rev. Stat. § 41-1001(19) (generally exempting intra-agency memoranda); Wyo. Stat. Ann. § 16-3-101(ix)(C) (same); Alaska Stat. § 44.62.640(a)(3) (exempting rules that relate "only to the internal management of a state agency"); Hawaii Rev. Stat. § 91-1(4) (generally exempting rules concerning the internal management of an agency and not affecting private rights of the public); Idaho Code § 67-5201(19)(b)(i) (same); Mont. Code § 2-4-102(11)(b)(i) (same); Nev. Rev. Stat. 84-901(2)(a) (same); Nev. Rev. Stat. 233B.038(2)(a) (same); N.M. Stat. § 12-8-2(G)(2) (same); N.D. Cent. Code Ann. § 28-32-01(11)(a) (same); Ok. Stat. Ann. Tit. 75, § 250.3(17)(c) (same); Or. Rev. Stat. § 183.310(9)(a) (same); S.D. Codified Laws § 1-26-1(8)(a) (same); Tex. Stat. & Code Ann. § 2001.003(6)(C) (same); Utah Code Ann. § 63G-3-102(16)(c)(ii) (same); and Wash. Rev. Code Ann. § 34.05.010(16)(i) (same).

The decision also stands for the proposition that an agency cannot use the environmental impact assessment process as a substitute for the vigorous notice-and-comment rulemaking procedures of the APA. Thus, the decision also may affect the practice of administrative agencies in western states that, like California, have administrative procedure acts and environmental impact assessment statutes. *Cf*. Hawaii Rev. Stat. §§ 341-1 to 343-8; Mont. Stat. §§ 75-1-101 to 75-1-324; S.D. Cod. Laws §§ 34a-9-1 to 34a-9-13; Wash. Rev. Stat. §§ 43.21c.010-43.21c.914.

Regardless of its future impacts in other jurisdictions, the *CARF* decision will serve as an important procedural limitation on California agencies' regulatory authority.

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## WATER BRIEFS

### WATER RIGHT NONUSE DECISION CO

#### HISTORICAL BENEFICIAL USE

On February 9, the Colorado Supreme Court (Court) handed down its decision in *Wolfe v. Sedalia*, Case No. 14SA12 (Feb. 9, 2015), ruling that "issue preclusion" applies to a change of water right and augmentation plan decree and, thus, the Colorado State and Division Engineers (Engineers) may not re-litigate an historical beneficial consumptive use quantification that was made in a 1986 decree. The Court further held, however, that "issue preclusion" does not prevent the Colorado water court (water court) from inquiring into the 24 years of post-1986 nonuse that the Engineers allege. The opinion was written by Justice Gregory Hobbs

The Engineers argued on appeal that the Court should adopt a comprehensive rule that every change of water right case triggers requantification of the water right, i.e., a review of the historical beneficial consumptive use to determine the proper amount of the water right remaining. "Sedalia asks us to adopt the polar opposite rule — that once determined in a previous change case, the amount of historical beneficial consumptive use allocated to the original appropriation carries through every subsequent change case and cannot be relitigated." *Slip Op*. at 7. Both of these positions were rejected by the Court.

The Court remanded the case to the water court and ordered that in "finalizing Sedalia's decree, the water court should take any evidence and legal argument offered by the parties on the issue of the alleged post-1986 nonuse. If the water court finds there has been prolonged unjustified nonuse of the water right between entry of the prior change decree and the pending decree application, it may conclude that this constitutes a changed circumstance calling for the selection of a revised representative period of time for calculating the average annual consumptive use amount available for Sedalia's change of water right and augmentation decree." *Id*. at 7.

Colorado, like all the western states, generally allows water right owners to "change" their water rights, so long as there is no injury to other water users from the change. Colorado and some western states, however, conduct an historical inquiry when a change occurs to insure that the water right is not expanded from the historical use, which would injure other water users. "Where a court has never adjudicated the historical beneficial consumptive use under the original appropriation's decree, that determination must be made in the pending change case by examining the representative period of use." (citations omitted) *Id*. at 15.

The historical inquiry that occurs as part of a change proceeding is based on fundamental principles of water law, as discussed in the opinion. "Thus, the actual beneficial use of the appropriation becomes the basis, measure, and limit of the water right. *Santa Fe Trail Ranches*, 990 P.2d at 53. Over an extended period of time, the pattern of historical diversions and use matures, becoming the true measure of the water right. *Williams v. Midway Ranches Prop. Owners' Ass'n*, 938 P.2d 515, 521 (Colo. 1997). In a change proceeding, the water court has a duty to ensure that the true right — that which has ripened by beneficial use over time — is the right that continues in its changed form under the new decree. *Santa Fe Trail Ranches*, 990 P.2d at 1655. The actual historical diversion for beneficial use could be less than the optimum utilization in any particular case, either because the well or other facility involved cannot physically produce at the decreed rate on a continuing basis, or because that amount has simply not been historically needed or applied for the decreed purpose. *State Eng'r v. Bradley*, 53 P.3d 1165, 1169 (Colo. 2002)." *Id*. at 16-17.

Justice Hobbs explained the Court's rationale regarding "changed circumstances" that allow for inquiry into the alleged nonuse. "Although the preclusion doctrines apply to water adjudications, their application is not without reservation. The original priority date of an appropriation continues into the future under each change decree. But a changed circumstance, such as an extended period of unjustified nonuse, calls for an inquiry into whether the representative period of time used for calculating the amount of consumptive use water available under the prior decree should remain the same for subsequent change applications." *Id*. at 24.

The change in circumstances justifies a new look that could result in requantification of the historical beneficial consumptive use and, potentially, a reduction in the amount allowed for Sedalia's augmentation plan. "Prolonged unjustified nonuse calls into question the appropriate representative period of time for calculating the annual average consumptive use amount and therefore, the amount legally available for the subsequent change decree. The water court erred by invoking issue preclusion against inquiry into the alleged nonuse of the water right after entry of the 1986 change decree and by allowing only an abandonment claim." *Id*. at 26.

Justice Hobbs' opinion provides an excellent discussion regarding issue preclusion, change application requirements, augmentation plans, historical consumptive use analysis, nonuse, and the application of various water law doctrines where these issues are involved. Water lawyers, particularly with cases that involve an examination of historical beneficial use, will find a comprehensive discussion of Colorado precedents on these issues in the opinion.

**For info:** Decision available at: http://cases.justia.com/colorado/supreme-court/2015-14sa12.pdf?ts=1423501225

## WATER BRIEFS

### FLOODPLAIN PROJECTS US

**FEDERAL FLOOD RISK MANAGEMENT**

The Federal Flood Risk Management Standard creates a national minimum flood risk management standard to ensure that Federal Actions that are located in or near the floodplain when there are no other practical alternatives last as long as intended by considering risks, changes in climate, and vulnerability.

Federally funded projects in floodplains will have to meet a new standard for flood risk that take into account projections of future climate changes, according to Executive Order 13690 — signed by President Obama on January 30, 2015.

New federally funded facilities have three options for meeting the standard:

1) Use the latest climate models to forecast future flood probabilities.
2) Site the facility two feet above the current 100-year flood level for non-critical buildings, and three feet for critical buildings such as hospitals.
3) Site the facility according to the 500-year, or 0.2%-annual-chance, flood elevation.

Flooding accounts for 85 percent of federal disaster declarations, according to the Federal Emergency Management Agency (FEMA).

Prior to implementation of the Federal Flood Risk Management Standard, additional input from stakeholders will be solicited and considered. To carry out this process, FEMA published *Draft Guidelines for Implementing Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*, for public comment in the Federal Register on February 5, 2015. FEMA will also be hosting public meetings to further solicit and consider stakeholder input. At the conclusion of the public comment period on April 6, 2015, the Mitigation Framework Leadership Group shall revise the draft Implementing Guidelines, based on input received, and provide recommendations to the Water Resources Council.

**For info:** www.whitehouse.gov/briefing-room/presidential-actions/executive-orders (see January 30, 2015); www.fema.gov/federal-flood-risk-management-standard-ffrms

### GREEN INFRASTRUCTURE US

**NEW EPA PRESENTATION**
**NEW UC BERKELEY REPORT**

A new EPA presentation — *Green Infrastructure Opportunities that Arise During Municipal Operations* — provides approaches that small to midsize communities can use to incorporate green infrastructure components into work they are doing in public spaces. The document presents examples and case studies of how integrating green infrastructure methods can enhance retrofits and maintenance projects and provide other multiple community benefits.

In addition, a new report from the UC Berkeley School of Law - Center for Law, Energy & the Environment identifies actions water quality authorities can take to drive data collection and information sharing. *Accelerating Cost-Effective Green Stormwater Infrastructure: Learning from Local Implementation* recommends enhancing learning from local implementation efforts to address knowledge gaps and speed cost-effective deployment.

**For info:**
EPA Presentation: http://epa.gov/owow/ocpd/green_infrastructure_roadshow.pdf
UC Berkeley Report: www.law.berkeley.edu/cost-effective-GSI.htm.

### WATER STRATEGY WY

**STATE WATER PLANNING**

On January 15, Wyoming Governor Matt Mead released Wyoming's Water Strategy. The Water Strategy was developed with the input of Wyoming people who were part of nine meetings held across the state. The Strategy contains ten initiatives put forward by local elected leaders, tribal representatives, interested groups, and individual citizens. More than seven thousand individuals commented on the Water Strategy. The Water Strategy is the start of development, planning, and implementation for the final ten initiatives and mirrors the approach used in Governor Mead's 2013 Energy Strategy.

The Water Strategy's ten initiatives cover the following areas: Credible Climate, Weather, and Streamflow Data; Uniform Hydrographers Operations Manual; Groundwater Analysis and Control Area Management Framework; Fontenelle Dam and Outworks Infrastructure Completion Project; Glendo Reservoir Full Utilization Project; Ten in Ten Project (water storage); Collaborative Planning and Authorization Processes; Water Quality Data Integrity Initiative; River Restoration; and Collaborative Fish Passage Restoration. The initiatives build on existing programs, efforts, and infrastructure. Over the next year Wyoming intends to develop detailed plans to achieve these initiatives. According to the Governor's press release, these plans will be specific, measurable, and attainable — with milestones and deliverables.

"We will continue to seek critical input to help complete the tasks at hand from groups and individuals across Wyoming," said Mead. "Water is tied to everything we do in Wyoming. It is tied to everything we have done, and it is tied to everything we will do. The time for action is now. This strategy moves us forward."

**For info:** Wyoming's Water Strategy is available at water.wyo.gov

### WATER CONSERVATION CA

**STEEP DECLINE IN CONSERVATION**

As California enters a fourth year of drought amidst worsening water supply conditions, the California State Water Resources Control Board (State Water Board) announced a steep decline in water conservation during the month of January 2015, considered the driest January since meteorological records have been kept. Remarkably, per capita water use inched up in January as compared to December 2014. In the most recent statewide survey of nearly 400 urban water retailers, the amount of water conserved by the state's large water agency customers declined from 22 percent in December 2014 to approximately 8.8 percent in January in year-over-year comparisons. Broken down by hydrologic region, the results show that some parts of the state saved much less water in January than in any month since reporting requirements began. January followed a very wet December 2014, which reduced the need for outdoor water use and likely contributed to the high conservation rate in December.

On March 17, the State Water Board will discuss renewing an

## WATER BRIEFS

emergency regulation supporting water conservation originally adopted in July 2014, which restricts outdoor water use and authorizes penalties for water waste. The emergency regulation is in effect until April 25. Water board members directed staff to offer additional measures intended to increase conservation statewide.

The decline in water conservation by two of the most populated regions in the state did impact the statewide average for January. The South Coast hydrologic region decline, with 9.2 percent savings for January compared to 23.3 percent for December, had an impact on the state average because 56 percent of all the residential water customers statewide are in the South Coast hydrologic region. Representing approximately 20 percent of all residential water customers statewide, the San Francisco Bay Area hydrologic region decline — 3.7 percent savings for January compared to 21.6 percent for December — also impacted the statewide average. The report found that in January, 95 percent of water agencies reporting had instituted outdoor water use restrictions. Such restrictions are a key requirement for urban water suppliers under the Emergency Water Conservation Regulation. Outdoor watering accounts for as much as 80 percent of urban water use in some areas.

The State Water Board also reported residential gallons per-capita per day (R-GPCD) for January. The report estimates daily water use by residential customers for nearly 400 urban water agencies statewide. The statewide R-GPCD average for January was 72.6 gallons per person, a slight increase from December 2014 when the statewide average was 67.2 gallons per person, per day. State Water Board staff continues to study this trend in an effort to understand what is driving the reduction in water use in some hydrologic regions, but not in others.

According to the R-GPCD data, water use varies widely by hydrologic region and showed consistent declines in water use during this fourth month of reporting. At the low end, the San Francisco Bay hydrologic region averaged 56.3 gallons per person, per day. On the high end, the Colorado River hydrologic region averaged 147.2 gallons per person, per day.

The Emergency Water Conservation Regulation will be in effect until April 25, 2015, and will likely be extended if drought persists. The State Water Board will closely monitor the implementation of the regulations and the weather over the coming months to determine if further restrictions are needed.
**For info:** California Drought website at: http://ca.gov/drought/; Conservation Report at: www.waterboards.ca.gov/waterrights/water_issues/programs/drought/conservation_reporting_info.shtml

### ONGOING DROUGHT SW

**CLIMATE CHANGE MEGADROUGHT**

"In the Southwest and Central Plains of Western North America, climate change is expected to increase drought severity in the coming decades. These regions nevertheless experienced extended Medieval-era droughts that were more persistent than any historical event, providing crucial targets in the paleoclimate record for benchmarking the severity of future drought risks. … Notably, future drought risk will likely exceed even the driest centuries of the Medieval Climate Anomaly (1100–1300 CE) in both moderate…and high… future emissions scenarios, leading to unprecedented drought conditions during the last millennium."

The Abstract quoted above is from a study published in *Science Advances* on February 12 by Benjamin Cook of NASA Goddard Institute for Space Studies, Toby Ault of Ocean and Climate Physics, Lamont-Doherty Earth Observatory of Columbia University, and Jason Smerdon of Earth and Atmospheric Sciences, Cornell University, entitled "*Unprecedented 21st Century Drought Risk in the American Southwest and Central Plains*."

The Study' Discussion section concludes with the following: "Our results point to a remarkably drier future that falls far outside the contemporary experience of natural and human systems in Western North America, conditions that may present a substantial challenge to adaptation. Human populations in this region, and their associated water resources demands, have been increasing rapidly in recent decades, and these trends are expected to continue for years to come. Future droughts will occur in a significantly warmer world with higher temperatures than recent historical events, conditions that are likely to be a major added stress on both natural ecosystems and agriculture. And, perhaps most importantly for adaptation, recent years have witnessed the widespread depletion of nonrenewable groundwater reservoirs, resources that have allowed people to mitigate the impacts of naturally occurring droughts. In some cases, these losses have even exceeded the capacity of Lake Mead and Lake Powell, the two major surface reservoirs in the region. Combined with the likelihood of a much drier future and increased demand, the loss of groundwater and higher temperatures will likely exacerbate the impacts of future droughts, presenting a major adaptation challenge for managing ecological and anthropogenic water needs in the region."
**For info:** Study available at: http://advances.sciencemag.org/content/1/1/e1400082

### UTILITIES INCIDENTS US

**EMERGENCY CHECKLISTS**

EPA recently developed a series of Incident Action Checklists that outline critical measures that drinking water and wastewater utility personnel can take immediately before, during and after an emergency to protect their systems. Ten incident types are highlighted, including drought, earthquake, extreme cold and winter storms, extreme heat, flooding, hurricane, tornado, tsunami, volcanic activity and wildfire. The "rip & run" style checklists were developed collaboratively with water utility managers and state agency/water association representatives as an on-the-go reference.

The Incident Action Checklists complement two other EPA efforts that support response during actual emergencies. The first effort provides up-to-date response partner contact information by state and region. The second effort provides access to a number of useful weather forecasting tools through the PDF document "*Weather & Hydrologic Forecasting for Water Utility Incident Preparedness and Response*."
**For info:** Resources available at EPA's Emergency/Incident Information webpage: http://water.epa.gov/drink/emerprep/index.cfm

## WATER BRIEFS

**FLOWS ACHIEVEMENT WA**
**WATERSHED PLANNING GRANTS**

The Washington State Department of Ecology (Ecology) is granting applications for the Watershed Planning Implementation and Flow Achievement (PIFA) 2015-17 Grant Funding Cycle. Applications are being accepted through April 30, 2015.

Funding under this program requires flow achievement, through either: Increased flows below the project site; Improving instream and riparian zone conditions (such as enhancing fish passage or habitat); Reorganizing or concentrating existing points of diversion; Establishing water banks, water exchanges or pursing trust water opportunities; Improving public water supply or irrigation district infrastructure that leads to water savings; or Purchasing and installing meters, stream gages or groundwater monitoring equipments when water savings and or efficiencies can be expected short or long term.

**For info:** Rose Bennett, Ecology, 360/407-6027, rose.bennett@ecy.wa.gov or Ecology website: www.ecy.wa.gov/programs/wr/funding/fo-wspifa.html

**NUTRIENT REDUCTION GULF**
**STATES DEVELOP STRATEGIES**

The 12 states of the Hypoxia Task Force (Task Force) have devised new strategies to speed up reduction of nutrient levels in waterways in the Mississippi/Atchafalaya River Basin. High nutrients levels are a key contributor each summer to the large area of low oxygen in the Gulf of Mexico known as a dead zone. Each state has outlined specific actions it will take to reduce nitrogen and phosphorus in the Mississippi/Atchafalaya River Basin from wastewater plants, industries, agriculture, and stormwater runoff.

The Task Force has decided to extend the target date for shrinking the dead zone from its current average size of almost 6,000 square miles to about 2,000 square miles from 2015 to 2035. Progress has been made in certain watersheds within the region, but science shows a 45% reduction is needed in the nitrogen and phosphorus entering the Gulf of Mexico. In order to track progress and spur action, the Task Force is also aiming at a 20% reduction in nutrient loads by 2025.

"The Hypoxia Task Force has been supporting the states as they develop voluntary, science-based strategies that work to achieve the shared goals of our states," said Bill Northey, Iowa Secretary of Agriculture and state co-chair of the Task Force. Members of the Hypoxia Task Force are the Army Corps of Engineers; US Department of Agriculture; Department of the Interior; US Environmental Protection Agency; National Oceanic and Atmospheric Administration; and the states of Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin. Tribes are represented by the National Tribal Water Council.

For examples of actions in state nutrient reduction strategies, and details about federal programs, funding and partnerships visit the EPA website listed below.

**For info:** http://water.epa.gov/type/watersheds/named/msbasin/index.cfm

**WATER RESOURCES US**
**ISSUES BEFORE CONGRESS**

On January 23, the Congressional Research Service (CRS) released its published report on Water Resource Issues in the 114th Congress. Featuring prominently are issues relating to both the Columbia and Klamath River basins. The report's authors are Betsy Cody, Charles Stern, Nicole Carter and Pervaze Sheikh, all of CRS.

The 114th Congress faces many water resource development, management, and protection issues. Congressional actions shape reinvestment in aging federal infrastructure (e.g., dams, locks, and levees) and federal and nonfederal investment in new infrastructure, such as water supply augmentation, hydropower projects, navigation improvements, and efforts to restore aquatic ecosystems. These issues often arise at the regional or local levels, but often have a federal connection. Ongoing issues include competition over water, drought and flood responses and policies, competitiveness and efficiency of US harbors and waterways, and innovative and alternative financing approaches.

The 114th Congress also may continue oversight of operations of federal infrastructure during drought and low-flow conditions, past large-scale flooding issues (e.g., Hurricane Sandy, Hurricane Katrina, Missouri and Mississippi River floods), and balancing hydropower generation, recreational use, and protection of threatened and endangered species. In addition to oversight, each Congress also provides appropriations for major federal water resource agencies, such as the US Army Corps of Engineers (Corps) and the Bureau of Reclamation (Reclamation).

The issues before the 114th Congress are in part shaped by what earlier Congresses chose to enact and consider. Measures considered but not enacted by the 113th Congress include California drought legislation, various drought policy and water efficiency and conservation measures, regional restoration legislation (e.g., Klamath Basin, Great Lakes, Chesapeake Bay), actions to expedite water storage projects and permits, settlement of Indian water rights claims, and a lifting of restrictions on firearms at Corps projects.

Because of recent water conditions, disasters, or legal or agency developments, certain river basin issues are particularly likely to receive congressional attention during the 114th Congress. The Columbia River, Missouri River, and Sacramento and San Joaquin River (Central Valley Project) basins fall into this category. Other potential topics of congressional interest include emergency drought or flood legislation, private and public hydropower, water research and science investment and coordination, aging infrastructure, and environmental policy.

This report discusses recent congressional activity and possible topics for the 114th Congress. It provides an overview of the federal role in water resources development, management, and protection, with a focus on projects of the two major federal water resources agencies — Reclamation and the Corps — and related legislation. It also discusses overarching policy issues, such as drought and flood management and response, project funding and authorization priorities, and aquatic ecosystem restoration.

**For info:** Full Report at: http://crsreports.blogspot.com/2015/02/water-resource-issues-in-114th-congress.html

## WATER BRIEFS

**EPA ENFORCEMENT US**

**2014 ENFORCEMENT REPORT**

On December 18, 2014, EPA released it annual enforcement and compliance results, which EPA says reflects a focus on large cases driving industry compliance that have a high impact on protecting public health and the environment. "By taking on large, high impact enforcement cases, EPA is helping to level the playing field for companies that play by the rules, while maximizing our ability to protect the communities we serve across the country," said Cynthia Giles, Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance. "Despite challenges posed by budget cuts and a government shutdown, we secured major settlements in key industry sectors and brought criminal violators to justice. This work resulted in critical investments in advanced technologies and innovative approaches to reduce pollution and improve compliance."

In fiscal year 2014, EPA enforcement actions required companies to invest more than $9.7 billion in actions and equipment to control pollution and clean up contaminated sites. EPA's cases resulted in $163 million in combined federal administrative, civil judicial penalties, and criminal fines. Other results include: Reductions of an estimated 141 million pounds of air pollutants, including 6.7 million pounds of air toxics; Reductions of approximately 337 million pounds of water pollutants; and Clean up of an estimated 856 million cubic yards of contaminated water/aquifers.

EPA cited two high impact cases it pursued that drive compliance across industries: Lowe's Home Centers agreed to a corporate-wide compliance program ensuring contractors nation-wide follow laws to protect children from dangerous lead paint exposure; and the nation's second largest natural gas producer, Chesapeake Appalachia, agreed to restore streams and wetlands damaged from its operations and implement a comprehensive plan to comply with water protection laws.

EPA also highlighted its actions to hold criminal violators accountable that threaten the health and safety of Americans, while directing funds to affected communities: EPA's criminal program generated $63 million in fines and restitution, secured $16 million in court-ordered environmental projects and sentenced defendants to a combined 155 years of incarceration; and Tonawanda Coke was found guilty and required to pay a $12.5 million criminal penalty and fund $12.2 million in community service in New York, for releasing benzene from its facility into neighboring communities.

Polluted sites across the country are being cleaned up while EPA conserves and recovers federal funds. This year, settlements will result in more than $453.7 million in commitments from responsible parties to clean up Superfund sites, and return $57.7 million to the Superfund trust.

EPA's press release also cited major cases developed in 2014, but not included in fiscal year 2014 statistics to demonstrate EPA's commitment to tough enforcement

- A settlement with Hyundai-Kia netted a $100 million fine, forfeiture of emissions credits, and more than $50 million invested in compliance measures to help level the playing field for car companies that follow the law, and reduce greenhouse gas emissions;
- The largest cleanup settlement in American history, with Anadarko and Kerr McGee, will put more than $4.4 billion into toxic pollution cleanup, improving water quality, and removing dangerous materials in tribal and overburdened communities; and
- A settlement with Alpha Natural Resources, one of the country's largest coal companies, requires it to protect water quality in communities near their coal mining operations in five states.

**For info:** EPA's 2014 Enforcement Results at: www2.epa.gov/enforcement/enforcement-annual-results-fiscal-year-fy-2014

**FRACKING BAN? CA**

**CALIFORNIA GOVERNOR PETITIONED**

Following disclosures by California officials concerning oil industry injections of wastewater into protected aquifers via disposal wells, more than 150 environmental and community groups filed a legal petition on February 26 urging California Governor Jerry Brown to use his emergency powers to place a moratorium on fracking and other well stimulation techniques. The groups point to tests showing dangerously high levels of cancer-causing benzene in fracking flowback fluid, which is often dumped into California injection wells.

The legal petition was submitted under the California Administrative Procedure Act, which requires the governor to respond within 30 days.

Petition supporting organizations include Breast Cancer Action; the Center on Race, Poverty and the Environment; Greenpeace; 350.org; Physicians for Social Responsibility-San Francisco; California Environmental Justice Alliance; Earthworks; CREDO; Public Citizen; Alliance of Nurses for a Healthy Environment; and the Center for Environmental Health.

California state officials have reported that hundreds of disposal wells are illegally injecting oil industry wastewater into scores of protected aquifers, including some with water clean enough for drinking and irrigation. The oil industry is also operating hundreds of illegal wastewater disposal pits that pose water- and air-pollution risks, according to petitioners.

Fracking flowback fluid is a key part of the oil industry wastewater stream. Recent oil industry tests of this fracking flowback, conducted as a result of new state reporting rules, have found dangerously high levels of cancer-causing benzene and hexavalent chromium, in addition to other harmful chemicals. Average benzene levels were about 700 times the federal limit for drinking water.

The State of New York recently banned fracking after an exhaustive review by the state health department found that the method poses unacceptable risks to the environment and human health.

**For info:** Patrick Sullivan, Center for Biological Diversity, 415/ 517-9364 or psullivan@biologicaldiversity.org Center for Biological Diversity news release at: www.biologicaldiversity.org/news/press_releases/2015/fracking-02-26-2015.html

# CALENDAR

**March 16-18 TX**
**National Groundwater Ass'n 2015 Groundwater Summit, San Antonio.** Grand Hyatt. For info: http://groundwatersummit.org/

**March 16-18 CA**
**CleanTech Forum San Francisco, San Francisco.** Palace Hotel. For info: http://events.cleantech.com/sf-forum-15/

**March 17-19 WA**
**Western Boot Camp on Environmental Law, Seattle.** Perkins Coie, 1201 Third Avenue. Presented by Environmental Law Institute. For info: www.eli.org/events/eleventh-annual-eli-western-boot-camp-environmental-law

**March 18 CA**
**Water Gala '15: Imagine H2O's 6th Annual Celebration, San Francisco.** The Palace Hotel. Celebrating the Winners of Imagine H2O's Water Infrastructure Challenge. For info: www.imagineh2o.org/watergala15

**March 19 Greece**
**Frontiers in Environmental & Water Management Int'l Conference, Kavala.** For info: http://fewm.eu/

**March 19-20 TX**
**Estimating Rates of Groundwater Recharge Course, San Antonio.** Grand Hyatt. Presented by Nat'l Groundwater Ass'n. For info: www.ngwa.org/Events-Education/shortcourses/Pages/125mar15.aspx

**March 19-20 TX**
**Fundamentals of Groundwater Geochemistry Course, San Antonio.** Grand Hyatt. Presented by Nat'l Groundwater Ass'n. For info: www.ngwa.org/Events-Education/shortcourses/Pages/235mar15.aspx

**March 19-20 CA**
**California Water Policy Conference 24, Claremont.** The Roberts Environmental Center at Claremont McKenna College. For info: www.cawaterpolicy.org/

**March 19-20 CA**
**Planning & Environmental Law Course, Sacramento.** Galleria, 2901 K Street. For info: UC Davis Extension, 530/ 757-8777 or https://extension.ucdavis.edu/

**March 22-25 DC**
**Ass'n of Metropolitan Water Agencies 2015 Water Policy Conference, Washington.** The Liason Hotel. For info: www.amwa.net/event/2015-water-policy-conference

**March 25 CA**
**Water Education Foundation 32nd Annual Executive Briefing: The Value of Water: Building Momentum in 2015, Sacramento.** Red Lion Inn. For info: www.watereducation.org/foundation-event/2015-executive-briefing

**March 26 WEB**
**The 2015 Water Market Outlook: Performance, Growth & Investments in the Water Rights Sector - Webinar, WEB.** 1:00 PM. For info: WestWater Research, 208/ 433-0255 or www.waterexchange.com

**March 26 TX**
**Texas Water Day at the Capitol, Austin.** Capitol Auditorium, 1-4 p.m. Presented by the Texas Water Foundation. For info: cbaker@texaswater.org

**March 26 AZ**
**A New Paradigm: Electric Utilities Investing in Water Conservation (Brown Bag Seminar - Lecture by Lon House), Tucson.** WRRC Sol Resnick Conference Ctr., 350 N. Campbell Avenue, 12-1:30 pm. Presented by Water Resources Research Center. For info: https://wrrc.arizona.edu/events/all

**March 26-27 CA**
**Endangered Species Act Conference, San Diego.** The Westin. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

**March 26-27 OK**
**2015 Student Water Conference, Stillwater.** Oklahoma State University. Hosted by OSU. For info: Dr. Garey Fox, garey.fox@okstate.edu or http://studentwater.okstate.edu/content/swc

**March 26-28 CA**
**44th Spring Conference: ABA Superconference on Environmental Law, San Francisco.** Palace Hotel. For info: http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=131644078

**March 27-29 AZ**
**Balance - Unbalance International Conference: Water, Climate, Place: Reimagining Environments Conference, Tempe.** ASU Campus. Presented by Global Institute of Sustainability at ASU. For info: https://sustainability.asu.edu/events/rsvp/balance-unbalance

**March 27 OR**
**Floodplain Development: Regulation Under FEMA & ESA Seminar, Portland.** Hilton Executive Tower. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

**March 30-April 1 CA**
**2015 AWRA Spring Specialty Conference on Water for Urban Areas, Los Angeles.** Airport Hilton. For info: AWRA, www.awra.org/meetings

**March 31-April 1 UT**
**2015 Utah State University Spring Runoff Conference: Water Body Connectivity & the Clean Water Act + Environmental Flows in a Time of Drought, Logan.** Eccles Conference Center. For info: www.usu.edu/ust/index.cfm?article=54528

**April 2 WA**
**Reauthorization of the Columbia River Treaty in an Era of Climate Change, Water Scarcity & International Tensions Forum, Seattle.** Seattle First Baptist Church. Presented by League of Women Voters of Seattle-King County. For info: http://seattlelwv.org/node/2127

**April 6-7 CA**
**Water Scarcity in the West: Past, Present, Future Conference, Davis.** UC Davis Conference Ctr. Presented by Climate Change, Water, and Society IGERT. For info: http://ccwas.ucdavis.edu/State_of_the_Science_and_Policy_Workshop/2015/

**April 7-8 WA**
**Clean Water & Stormwater Seminar, Seattle.** Renaissance Seattle Hotel. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

**April 8 CO**
**Aspinall Lecture by F. Ross Peterson - Proving Powell's Prognostications Erroneous: The Colorado River Basin & the Manipulation of Water, Grand Junction.** Colorado Mesa University. For info: www.coloradomesa.edu/aspinall/lectureship.html

**April 8-9 OK**
**2015 Oklahoma Clean Lakes & Watersheds Ass'n Conference: From Watersheds to Wetlands, Stillwater.** Wes Watkins Conference Ctr. For info: http://water.okstate.edu/news-events/conferences/2015-oklahoma-clean-lakes-and-watersheds-association-conference

**April 9-10 HI**
**Endangered Species Act Conference, Honolulu.** YMCA. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

**April 9-10 TX**
**Texas Water Law Conference, San Antonio.** La Cantera Hill Country Resort. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

**April 12-17 Rep. Of Korea**
**7th World Water Forum 2015, Daegu-Gyeongbuk.** For info: http://eng.worldwaterforum7.org/main/

**April 13-15 DC**
**NWRA Federal Water Issues Conference, Washington.** Washington Court Hotel. Presented by the National Water Resources Ass'n For info: www.nwra.org/upcoming-conferences-workshops.html

**April 13-15 DC**
**Federal Water Issues Conference, Washington.** Washington Court Hotel. Presented by National Water Resources Ass'n. For info: www.nwra.org/upcoming-conferences-workshops.html

**April 13-15 DC**
**Water & Wastewater Equipment Manufacturers Ass'n Washington Forum, Washington.** The Fairfax at Embassy Row. For info: www.wwema.org/washingtonforum.php

**April 13-17 HI**
**National Ass'n of Environmental Professionals Annual Conference, Honolulu.** Waikiki Marriott Hotel. For info: www.naep.org/2015-conference

**April 13-17 KY**
**2015 Unted States Society on Dams: Annual Meeting & Conference, Louisville.** For info: www.ussdams.org/2015conf.html

**April 14-16 WA**
**10th Washington Hydrogeology Symposium, Tacoma.** Hotel Murano. For info: http://depts.washington.edu/uwconf/wordpress/wahgs/

**April 14-17 TX**
**TEXAS WATER 2015, Corpus Christi.** The Largest Regional Water Conference in the US. For info: www.texas-water.com/home.html

**April 16-17 CA**
**California Wetlands Conference, San Francisco.** Hotel Nikko. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

 

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



## CALENDAR

(continued from previous page)

**April 17 OR**
**2015 Northwest Environmental Health Conference (7th Annual), Portland.** DoubleTree Hotel. Presented by Oregon Environmental Council. For info: http://oeconline.org/7th-annual-northwest-environmental-health-conference/

**April 20-24 OH**
**International Water Ass'n Conference: Water Efficiency & Performance Improvement: Smart Strategies for the 21st Century, Cincinatti.** Hilton Cincinnati Netherland Plaza Hotel. For info: www.iwaefficient.com/2015/

**April 21 WA**
**Lake Roosevelt Forum 2015 Conference: Defining Stewardship & Recreation for a New Generation, Spokane.** The Davenport Hotel. For info: http://www.lrf.org/conference

**April 21-24 NV**
**Water Quality Ass'n Annual Convention & Trade Show, Las Vegas.** Las Vegas Convention Ctr. For info: www.wqa.org/aquatech

**April 22 DC**
**Water 2.0 Conference, Washington.** GE Offices, H1291299 Pennsylvania Avenue. Presented by Water Innovations Allicance Foundation. For info: www.waterinnovations.org/conferences_home.php

**April 22-24 CA**
**Central Valley Tour 2015, Central Valley.** Presented by Water Education Foundation. For info: www.watereducation.org/tour/central-valley-tour-2015

**April 23 CA**
**CEQA & Climate Change: An In-Depth Update (Course), Sacramento.** Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 530/ 757-8777 or https://extension.ucdavis.edu/section/ceqa-and-climate-change-depth-update

**April 23-24 OK**
**Oklahoma Water Law Conference, Oklahoma City.** The Skirvin Hilton. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

**April 26-28 OR**
**2015 Hydrophiles Water Research Symposium - 5th Annual, Corvallis.** CH2M Hill Alumni Center. For info: http://hydrophilesresearchsymposium.org/

**April 27-19 DC**
**National Hydropower Ass'n Annual Conference, Washington.** Capitol Hilton. For info: www.nationalhydroconference.com

**April 28-30 OR**
**Flow 2015: Protecting Rivers & Lakes in the Face of Uncertainty - 3rd International Workshop on Instream Flows, Portland.** Red Lion on the River, Jantzen Beach. Presented by Instream Flow Council. For info: www.instreamflowcouncil.org/flow-2015/

**April 29-30 Netherlands**
**Environmental Technology for Impact 2015 Conference, Wageningen.** Wageningen University. For info: www.etei2015.org

**April 29-30 England**
**Smart Water Systems 4th Annual Conference, London.** Marriott Hotel Regents Park. For info: www.smi-online.co.uk/utility/uk/smart-water-systems

**April 30 AK**
**Regulation of Water in Alaska Seminar, Anchorage.** Denai'ina Convention Ctr. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

**April 30-May 1 NV**
**Law of the Colorado River Conference, Las Vegas.** Planet Hollywood. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

**May 1 NM**
**River Law Conference, Santa Ana Pueblo.** Hyatt Regency Tamaya Resort. For info: CLE Int'l, 800/ 873-7130 or www.cle.com