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Water Rights, Water Quality & Water Solutions in the West

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OKLAHOMA STATE-TRIBAL SETTLEMENT

PERSISTENCE & SHARED PRINCIPLES RESULT IN HISTORIC WATER AGREEMENT

by Duane A. Smith, with Brian R. Vance, Duane Smith & Associates (Oklahoma City, OK)

Introduction

For decades, legal uncertainty surrounding Tribal water rights claims has, at least to some degree, weakened economic activity in Oklahoma. Specifically, these questions have contributed to long-running conflicts over southeast Oklahoma's Sardis Lake and the Kiamichi Basin, which have resulted in multiple court actions. Yet the challenge of complex issues and specter of costly, protracted litigation have kept each side from approaching the other — even though both realized that an amicable resolution recognizing both State and Tribal sovereignty would be beneficial to all Oklahoma citizens.

Then, in August 2016, the Choctaw and Chickasaw Nations, who share a familial brotherhood since cohabitating their ancestral homeland in the southeastern United States, and the State of Oklahoma ended years of conflict with an historic water agreement. As Executive Director of the state's water management agency for 13 years (Oklahoma Water Resources Board) and, today, a water planning consultant for the two Nations, I was in the unique position to personally witness resolution of the dispute from both sides as well as observe the evolution of unifying principles that reflect the interests of all Oklahomans.

Key to success of the State/Tribal Water Settlement was a focus on common ground and a shared desire to work in concert for Oklahoma's water future. With an age-old obstacle now removed, and embracing shared principles governing the use of water, both the State and Tribes can wield their considerable resources through a cooperative framework to manage and protect the state's abundant water supplies and resources.

Background

Pursuant to the 1830 Treaty of Dancing Rabbit Creek, the Choctaw and Chickasaw Nations reluctantly agreed to move from their aboriginal homelands in the Mississippi uplands to the west. Resigned to their fate but making the most of this opportunity that secured forever exclusive ownership and jurisdiction of lands that today comprise south central and southeast Oklahoma, the Nations established independent, self-governed republics in their new Territory homeland (see Figure 1, page 2). They drafted constitutions, established tripartite governments and built infrastructure for communities, economies, and tribal continuance.

For centuries, natural resources — especially clean and abundant water — have been intrinsically important to Native American people. As a result, they have embraced both a moral and legal obligation to ensure sustainable water use and protection. For the Choctaw and Chickasaw Nations in Oklahoma — which through the Treaty of Dancing Rabbit Creek obtained explicit authority over water in their 22-county jurisdictions — this particular resource has been a foundation of the economically diverse and self-sufficient society they have built for their citizens.

Oklahoma Settlement

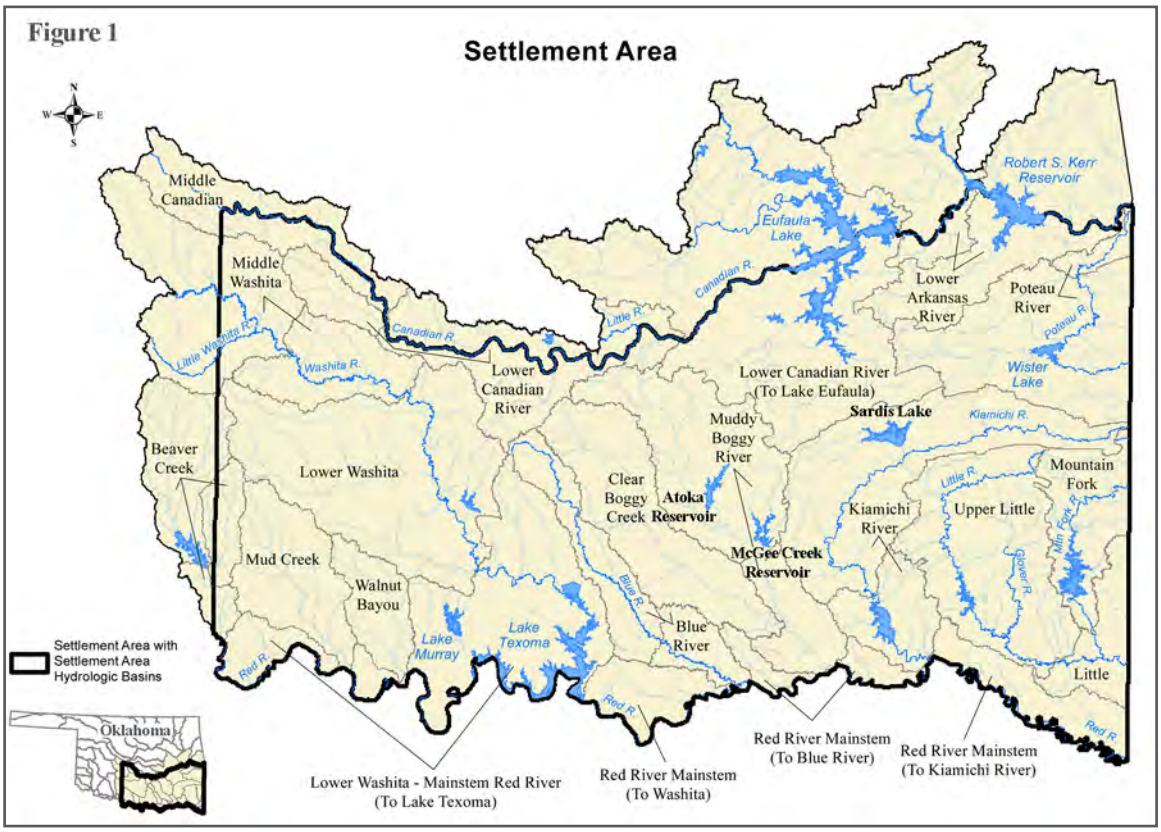

Figure 1: Choctaw and Chickasaw Nations in Oklahoma, 2016 Settlement Area

Water Supply Storage

Utilizing this authority, the Nations built successful businesses that relied on the water and other natural resources of their treaty homeland. They moved goods up and down the Red, Kiamichi and other river systems; operated ferries and toll bridges that enabled overland movement of commodities; constructed and operated mills that harnessed the power of moving water to grind grain; and even established summer resorts to attract visitors. In these and other ways, Chickasaw and Choctaw citizens honored and adapted to the homeland-for-homeland exchange, working vigorously to rebuild their ancient systems in this new land despite challenges to their authority, notwithstanding Oklahoma statehood in 1907.

Over the years, substantial state and federal water development occurred in the Treaty Territories, including establishment of vital water supply storage for Oklahoma City through construction of Atoka Lake in 1964 and a 90-mile pipeline to bring water northwest to the metropolitan area. Later, the City extended its reach into southeast Oklahoma by augmenting this supply with McGee Creek Reservoir, constructed by the US Bureau of Reclamation in 1987.

Oklahoma City lobbied for yet another source of long-term water in the region through the proposed Sardis Reservoir project in the Kiamichi River Basin. The State, through the now-defunct Oklahoma Water Conservation Storage Commission, lent its support as well by underwriting construction costs of the lake, completed by the US Army Corps of Engineers in 1982. Regular annual payments were made to the federal government, but those payments soon became sporadic in nature.

As water development continued in the region, an uneasy truce between the State and Tribes festered. In addition, as no entity stepped forward to utilize Sardis Lake water and assume the construction debt (notwithstanding an informal interstate water sale proposal by North Texas Municipal Water District in 1992). The State Legislature elected to defer its required annual repayments, previously made through the Oklahoma Water Resources Board (OWRB). The federal government soon became impatient with the lack of payments, increasing pressure on the State and initiating legal action (eventually settled in 2009) to recoup that debt.

Joint State/Tribal Water Compact (2001)

In the early 1990s, North Texas communities — concerned about rapidly growing water demands and well aware of abundant water resources north of the state border — approached Oklahoma with a water sale proposal. Emboldened by this potential opportunity to resolve its outstanding Sardis obligation to the federal government yet cognizant of both long-standing Tribal claims and intense public interest concerning a potential water sale, the State Legislature instituted measures to explore relevant technical, legal, political, and financial issues.

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Oklahoma Settlement

Principles

Together, the Nations and the State initially developed baseline "cornerstone principles" to ensure protection of waters in southeast Oklahoma. Final principles instituted measures to preserve the ecological integrity of the Kiamichi River, establish a lake level management plan to protect the recreation and fish and wildlife resources in Sardis Lake, and allocate water storage in Sardis Lake for future local demands. As water purchase proposals from North Texas requesting Kiamichi River Basin water were evaluated, the issue drew considerable local opposition from Oklahoma citizens. Discussions were subsequently suspended, but the State and Choctaw and Chickasaw Nations began to lay the framework for a sound set of water resources management principles on which they would build.

Legal Battles

New Applications

While the all-important State/Tribal water issues remained unsettled, Texas entities and Oklahoma City continued to aggressively pursue supplies within the Nations' territories, spawning a flurry of reactions. In 2007, Oklahoma City filed a permit application for 136,000 **a**cre-**f**eet per **y**ear (AFY) of Sardis Lake storage. That same year, Tarrant County Regional Water District (Tarrant) submitted an application seeking to divert more than 460,000 AFY from tributaries to the Red River in southern Oklahoma and Upper Trinity Regional Water District (another member of the original Texas alliance) filed a similar request for 115,000 AFY from the watershed. *See* Water Briefs, *TWR* #58 and #64.

Interstate Lawsuits

Simultaneously, Tarrant also filed federal suit against the State of Oklahoma to force the interstate transfer (such actions are prohibited without consent of the State Legislature). *See* Sledge & Hill, *TWR* #76. And in a separate case, the City of Hugo filed suit against the State to grant the sale of 200,000 AFY from Hugo Lake to the City of Irving, Texas. The City of Hugo and Hugo Lake, in which the City owns some 1,700 AFY of water supply storage rights, are located about a dozen miles from the Texas state line at the lower end of the Kiamichi River Basin.

Oklahoma City Transfer

While the State was wrestling with out-of-state legal challenges, its uneasy truce with the Choctaw and Chickasaw Nations came to a head in June 2010 when, despite the Nations' pleas to reconsider or at least delay the decision, the nine-member Water Board approved an agreement transferring Sardis storage rights to Oklahoma City. In return, the City pledged to assume the State's federal debt owed for Sardis construction as well as agree to two elements included in the failed draft compact in 2001 — the 20,000 AFY storage set-aside for future needs and a lake level management plan to mitigate fluctuations. *See* Moon, *TWR* #79; Greetham, *TWR* #82.

Compact Decision

Oklahoma — and, indirectly, the Nations — won favorable decisions in both the Tarrant and Hugo cases at the District Court level. In September 2011, the US Tenth Circuit Court upheld the lower court's ruling that the case should be dismissed since the water being sought by Tarrant is already apportioned by the Red River Compact between Oklahoma, Texas, Arkansas, and Louisiana. In its Hugo decision, the federal court ruled that the plaintiffs lacked standing to file a lawsuit against an agency of the State of Oklahoma. Hugo's appeal to the US Supreme Court was denied in March 2012.

Tribal Lawsuit

Expressing disappointment in the State's refusal to consult with them prior to the Sardis Lake decision and maintaining that the OWRB lacked authority over the use of water from Tribal lands, in August 2011 the Nations filed suit in US District Court for the Western District of Oklahoma requesting an injunction against the OWRB's action. *See* Moon, TWR #91.

Adjudication Pursued

Oklahoma, like the other 17 western states, has laws allowing for general stream adjudications. Wielding this authority, Oklahoma countersued in early 2012 and petitioned the State Supreme Court to comprehensively adjudicate and confirm the validity of individual surface water rights within three river basins in that jurisdiction — the Clear Boggy, Muddy Boggy and Kiamichi (groundwater rights are considered public property in Oklahoma). The state's lawsuit was eventually transferred to federal court. *See* Water Briefs, TWR #95, #97 and #98.

Tribal Water Planning

Water Plan

While each side positioned itself for lengthy legal battles, the Choctaw and Chickasaw Nations resolved to pursue a path of self-determination concerning the long-term management and protection of their homeland's water resources. Asserting that science-based assessment of water resources is the essential ingredient to effectively balancing Tribal-based water needs with social, environmental, and economic priorities, the Tribes launched development of a regional water plan in 2011. They asked me to assist them.

Sustainability

Consulting with the Nations has provided me with an entirely new perspective on water use and management. For as long as Oklahoma has been a state, its water laws and programs have been centered on the utilization of Oklahoma's water resources. While the Tribes also recognize that water provides an almost limitless economic benefit to the state, the Tribes focus is on sustainability. This is reflected in seven elemental principles — or protection goals — which, from the start, were considered by Tribal leaders to be essential to water management and planning in the Nations' territories.

Oklahoma Settlement

Goals

Tribal Elemental Principles & Protection Goals:

- At the foundation are **Unity and Sustainability**, which reflect the unique cultural and environmental spirit of the Choctaw and Chickasaw Nations.
- Protection of **Urban and Town and Rural** water needs is crucial to maintain communities and increase economic development in the homeland.
- The region's variable and unpredictable climate threatens every water use sector without strong **Drought Defense** plans and strategies to reduce this vulnerability.
- Water for **Agriculture**, also vital to the region, will not only be protected but expanded through optimal use of previously untapped land, water and human resources.
- Water for **Tourism** is the cornerstone of economies in the region and must be duly acknowledged in relation to other water needs and priorities.

Using these principles as a guide, we assembled an experienced Planning Team to establish a permanent planning program for the region that provides Tribal leaders with the information they require to make crucial decisions concerning the use, protection, and development of the Nations' waters.

Federal Partnership

In my 32-year career with the OWRB, I had the opportunity to participate in and/or direct three statewide planning efforts — the 1980, 1995, and 2012 Oklahoma Comprehensive Water Plans. With each plan's implementation, the State's partnership with the federal government — especially the considerable programs and resources available through the US Army Corps of Engineers and US Bureau of Reclamation — grew stronger and stronger. Because tribal governments occupy a position similar to state governments, they too can leverage this federal partnership. This has become a foundational element of the Choctaw-Chickasaw Regional Water Plan (CCRWP).

Working closely with federal, as well as state and local partners, the CCRWP Planning Team has revealed numerous opportunities to develop and augment water supplies as well as new approaches to more sustainable water management.

Identified Opportunities

Identified Sustainable Water Management Opportunities include:

- **Water Quality Assessment:** A comprehensive assessment of water quality in the region has helped identify where remedial practices and plans — especially those aimed at mitigating disinfection by-products in treated water — will have the most benefit.
- **Streamflow Assessment:** New procedures have provided realistic estimates of streamflows required to satisfy both the consumptive water needs of municipalities and industry and the non-consumptive water needs of vital tourism and recreational interests, which constitute a large portion of the Tribal area economy.
- **Brackish Water Sources:** Potential sources of brackish water identified by the Planning Team will lessen the strain on the region's fresh water supplies, especially for non-potable uses.
- **Aquifer Modeling:** Complex aquifer models and other new tools provide insight into the long-term supply potential of local and regional water sources under a variety of scenarios.
- **Water Supply Systems Assessment:** A continuing assessment of more than 50 water supply systems in the region is identifying infrastructure improvements to strengthen the ability of each provider to deliver reliable supply and withstand future drought episodes, as well as reduce costs through improved management and consolidation of supply, treatment, and distribution.
- **Water Conservation Evaluation:** A regional evaluation has determined that prospective water conservation strategies and programs could significantly reduce the future demand on area water providers. As a result, we are looking at programs to encourage and incentivize conservation practices. Plus, an ongoing evaluation of water reuse and reclamation is demonstrating the technology's promise in both increasing water supply and improving water quality.
- **Climate Change & Drought Contingencies:** An investigation of climate change — as well as cooperative federal/state/local drought contingency plans focused on specific Tribal resources and areas — has pinpointed strategies that will strengthen the region's ability to withstand and respond to future drought and related water supply uncertainties.
- **Sustainable Agriculture:** The Nations are partnering with state, federal, and university experts to explore opportunities to sustainably expand the region's agricultural industry. A similar investigation of recreational facility expansion is in development.
- **Community Infrastructure & Watershed Issues:** The Planning Team and other Nation officials are providing technical and financial support to resolve community infrastructure problems and address various watershed issues.

Oklahoma Settlement

Negotiations

Agreement

Major Points

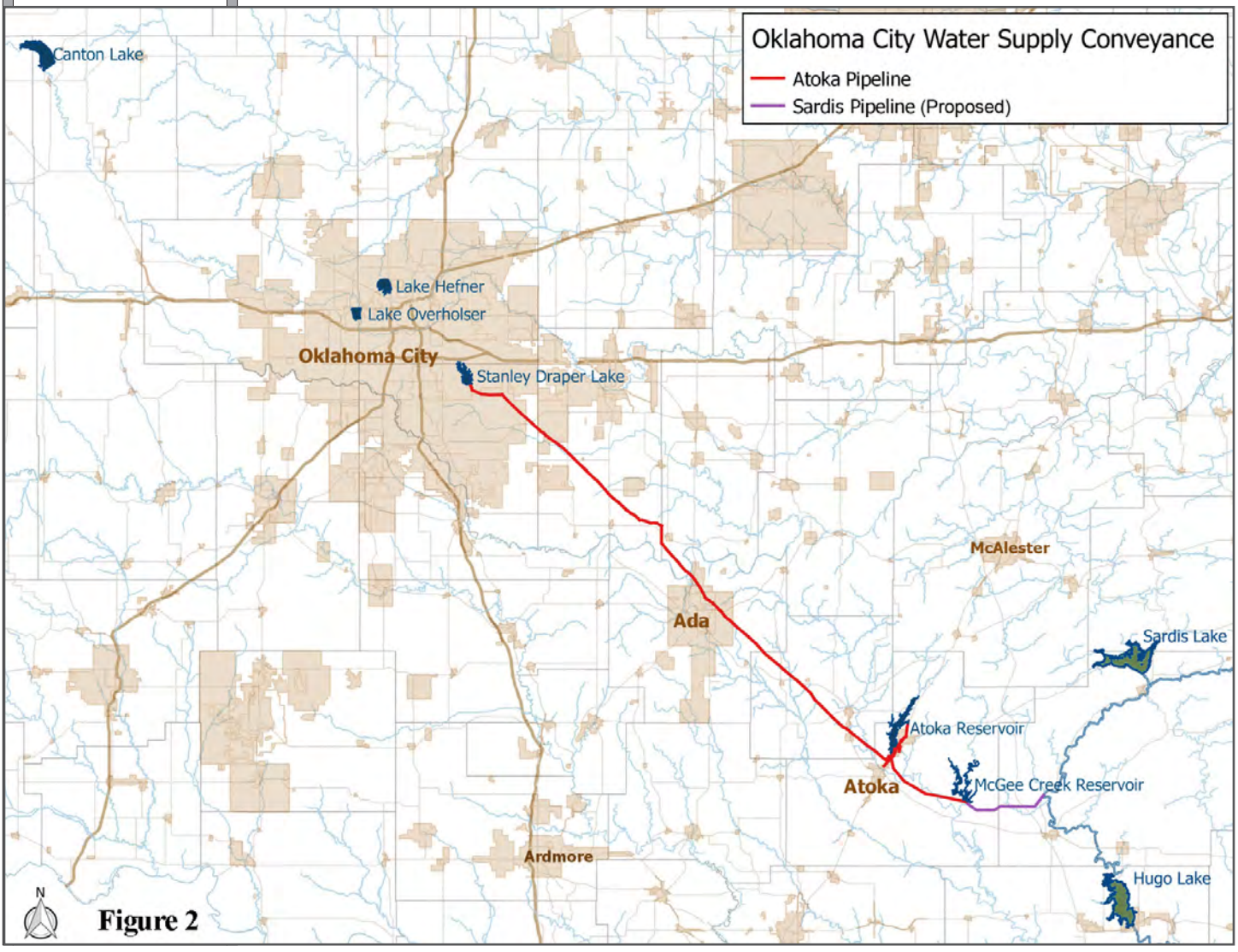
Joint State/Tribal Water Agreement (2016)

In addition to my work on the CCRWP, I provided technical and policy support to the Choctaw and Chickasaw Nations in mediation to resolve the pending federal lawsuit against the State. Formal negotiations began in July 2012. The parties spent years discussing and, at times, contentiously debating: growth projections; water demands; current and potential allocation methodologies; scientific water use models; applicable case law; and a litany of related matters. At times, we made impressive progress. Other times, it appeared talks would break down. But each side persisted, sticking to their principles while making important concessions.

On August 11, 2016, the two sides reached a landmark agreement through which both can claim victory. It was accomplished in record time, especially considering that resolution of a similar water rights dispute in New Mexico involving four Native American pueblos in northern Santa Fe County required more than four decades to achieve. *See* Water Briefs, *TWR* #151.

From a global economic development perspective, the new 88-page State/Tribal Water Agreement, still pending Congressional approval, establishes certainty and security regarding water rights and usage in Oklahoma. Tribal leaders got exactly what they have long desired: formal state acknowledgement of tribal sovereignty and a seat at the table when the two governments collaboratively consider future issues impacting water in the southeastern quadrant of Oklahoma. At the same time, the agreement recognizes the State's authority to manage and assess usage of Oklahoma's surface and groundwater resources. For Oklahoma City, it provides Sardis Lake water supply to enable long-term growth in the expanding metropolitan area (Figure 2). No existing water rights or rights to surface or groundwater are affected by the agreement, a principle embraced early on by all parties to the negotiations.

Figure 2: Oklahoma City Current & Future Water Supply Reservoirs



Oklahoma Settlement

Protection & Conservation

Minimum Streamflow

Shortage Requirements

Basins' Classification

Out-of-Basin Applications

Threshold

Oklahoma Attorney General Scott Pruitt best described the dual victory of the settlement, stating: "Absent this agreement, existing water rights for urban, agricultural, industrial, and development for future uses and needs would remain uncertain. When finalized, the agreement will protect existing rights and provide certainty for the development of future uses both in and outside southeastern Oklahoma."

Perhaps above all, the agreement reflects the Nations' substantial concerns with water protection and conservation. At Sardis Lake, a lake level management plan, similar to that developed during the failed compact in 2001, will ensure that a minimum of 20,000 AFY will be reserved in the lake to maintain fish/wildlife benefits, tourism, and future needs for the public water supply.

In the Kiamichi River, downstream of Sardis, a regime will be followed that will mimic, as much as climate conditions will allow, natural flows to protect species listed under the federal Endangered Species Act (including two species of mussels) and recreation. Water releases to Oklahoma City — from a point near Moyers, Oklahoma, where water will be diverted to McGee Creek Reservoir and the Atoka pipeline — will be subject to a new "bypass flow" requirement mandating a minimum Kiamichi streamflow of 50 **c**ubic **f**eet per **s**econd (cfs) at the diversion point during periods of water transfer to the west.

As a result, during dry times, Oklahoma City officials will be forced to utilize the City's other water supplies and implement and enforce municipal conservation strategies *prior* to withdrawing water from southeast water sources. Tribal leaders were adamant about limiting Oklahoma City's ability to severely draw down Sardis Lake levels — as occurred when the City drained Canton Lake, their northwest Oklahoma water supply, during the 2010-15 statewide drought — or diminish Kiamichi River flows during drought conditions. In addition, the agreement establishes a $10 million fund to enhance recreational use, fish and wildlife habitat. and environmental protections at both Sardis and Atoka Lakes.

One of the most significant components of the agreement is creation of a new system that requires enhanced review of applications to appropriate water throughout the settlement area. The agreement establishes three unique classes of surface water basins with the highest level of protection afforded to Class B watersheds containing streams of "significant cultural, ecological or recreational value" to the Nations. Class A and C basins are afforded similar, though less strict, protection (Figure 3).

Figure 3: Surface Water Basin Classes, Choctaw-Chickasaw Settlement Area

Future water use applications to use water from Class A, B or C watersheds outside of the source basin are now subject to rigorous technical evaluation ensuring accordance with relative values for each. For Class B basins — including the Kiamichi, Upper Little, Mountain Fork, Clear Boggy, Blue and Lower Washita Rivers — any proposed out-of-basin usage amount that is more than either 20,000 AFY or three percent of the source river's mean available flow meets a new "conferral threshold" that triggers evaluation. Agreement language also addresses and precludes attempts to piece together separate applications in an attempt to circumvent the threshold.

Oklahoma Settlement

Technical Committee Evaluation

Conducting the evaluation will be done by a new two-member technical committee, including one representative from the Nations and one from the State. The Committee establishes and maintains appropriate scientific models necessary to determine a proposed permit's accordance with the Water Agreement, which has incorporated existing requirements of Oklahoma law governing surface water appropriations.

Interstate Sales

The agreement does not authorize out-of-state water use absent approval by the Oklahoma State Legislature. But should such proposals be made, it includes a framework to fairly evaluate interstate sales or transfers of water from the 22-county Tribal territory through a permanent five-person commission consisting of members appointed by both State and Tribal governments. Similar to the 2001 draft compact, potential revenues earned through the sale of water out-of-state are earmarked for much-needed upgrade and expansion of water and wastewater infrastructure in Oklahoma with prioritization for projects in the Nations' historic treaty area.

Conclusion

Obstacles Removed

The new State/Tribal Water Agreement, developed through five years of litigation and intense mediation, was actually forged over a longer period through the evolution of shared foundational principles and goals that defined virtually every aspect of the final accord. At last, significant obstacles to economic development in southeastern Oklahoma, as well as central Oklahoma and the entire state, have been removed. The implications will resonate for decades, perhaps even hundreds of years.

Sustainable Planning

The agreement and events surrounding its development have also positioned the Choctaw and Chickasaw Nations as state and national leaders in sustainable water planning. Through new partnerships at both the state and federal level, they are implementing sensible, science-based programs to guide the use, protection, and development of the Nations' shared waters in a manner that ensures a robust future economy. Yet, in an era of increasing competition, advanced technology, and more onerous regulations, the Nations remain true to their historical and cultural ethic — perennial stewardship and a duty to protect and sustain their land and water resources for future generations.

[Editor's Note: The vehicle for the US Congress to approve the Settlement is the Water Resources Development Act of 2016 (WRDA). WRDA was approved by the Senate on September 15th. In a December 5 Press Release, House Transportation and Infrastructure Chairman Bill Shuster (R-PA), Senate Environment and Public Works Committee Chairman Jim Inhofe (R-OK), House Energy and Commerce Chairman Fred Upton (R-MI), and House Natural Resources Chairman Rob Bishop (R-UT) announced an agreement on comprehensive water resources infrastructure legislation. The legislation, the "Water Infrastructure Improvements Act for the Nation (WIIN) Act," includes the Water Resources Development Act (WRDA), which authorizes port, waterway, and flood protection improvements for the country. The WIIN Act also includes the Water and Waste Act of 2016 to help communities meet the requirements of the Safe Drinking Water Act and authorize state regulation of coal ash. In addition, the legislation addresses significant tribal and natural resources issues. WIIN and WRDA await final Congressional approval and the President's signature, as *TWR* went to press].

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Duane Smith, considered one of the Oklahoma's foremost water advisors, specializes in regional and tribal water planning and works to empower the decision-making authority of local water use stakeholders in ensuring the attainment of economic development goals. Serving as Executive Director of the Oklahoma Water Resources Board for 13 years, he possesses unique experience in the administration of Oklahoma water law and implementation of state and federal water management, planning and financing programs. As lead consultant for Duane Smith and Associates, Mr. Smith has provided direction and facilitated development of various regional and Tribal water planning efforts in Oklahoma. He oversees a diverse planning team that provides uniquely varied skills and experience in the areas of water supply planning, engineering, hydrology, monitoring, dispute resolution, water and wastewater treatment, water distribution, meteorology and climatology, environmental science, financing and funding programs, state and federal water policy and legislation, water law and rights administration, media and public relations, technical writing, and publications and graphics development.

Brian R. Vance, has a B.A. in Journalism and worked for 29 years for the Oklahoma Water Resources Board as both a water planner and the agency's Communications Director. Mr. Vance was the lead author of the Northwest Oklahoma Water Action Plan report and the recent update of the Southwest Oklahoma Water Action Plan. He is currently assisting in implementation of the Choctaw-Chickasaw Regional Water Plan. Throughout his career at the OWRB, he wrote, edited, developed, and organized numerous high-profile and award-winning technical and promotional publications — including the Oklahoma Water Atlas, Lakes of Oklahoma, and the 2012 Update of the Oklahoma Comprehensive Water Plan — as well as countless press releases, reports, water policy summaries, presentations and related materials. Specializing in making technical information accessible to the common citizen, Mr. Vance manages Write Stuff, a writing, messaging and publications development business.

Reserved Treaty Rights

INDIAN RESERVED RIGHTS IN THE 21ST CENTURY

RECENT DEVELOPMENTS IN THE PACIFIC NORTHWEST

by Duane Mecham, Acting Deputy Director, Secretary's Indian Water Rights Office
US Department of the Interior, Washington DC

INTRODUCTION

The Bonneville Power Administration (BPA) is the federal agency charged by Congress with marketing and transmitting hydropower generated at federal dams in the Columbia River basin. In 1947, when BPA was an agency located within the Department of the Interior, BPA published a newsletter — "*BPA Currents*" — which reported on the various happenings at the agency.

The July 25, 1947, edition included a report, excerpted below, on a topic that resonates today:

Dams v. Fish

DAMS VERSUS FISH

> The Columbia Basin Inter-agency Committee held a two day hearing on the subject of dams versus fish in the Columbia Basin area…to discuss the Department of Interior's proposal that upstream dams be constructed before additional structures were placed in the downstream areas in order to allow a ten-year program of study and analysis of the fishing interests… .
>
> The hearing was opened with a statement regarding the position of the Department of the Interior… . [T]he general conclusions of the Department could be summarized as follows:
>
> > "…The Department agrees that interests of the Columbia River fisheries should not be allowed indefinitely to retard full development of the other resources of the river… . [T]he overall benefits to the Pacific Northwest from a thorough going development of the Snake and the Columbia are such that the present salmon run must, if necessary, be sacrificed.
> >
> > "This means to the Department that the Government's efforts should be directed toward ameliorating the impact of an ultimate and inevitably full development of the river's [hydropower and irrigation] resources upon the immediately injured interests and not toward a vain attempt to hold still the hands of the clock."

Unregulated Harvests

In 1947, before the advent of full hydropower development, salmon runs in the Columbia River (once the largest salmon-producing river in the world), were already facing significant impacts from habitat destruction and unregulated commercial fishing. Commercial harvest interests in particular profoundly impacted and sought to suppress the exercise of Indian reserved fishing rights, as addressed, for example, in the *United States v. Winans* decision discussed below.

Salmon Protection

Fast forward to 2016. On the one hand, full hydropower development of the Columbia and lower Snake Rivers essentially has been achieved, and there is even a 1960s era treaty with Canada that allowed full hydropower development of the entire Columbia basin. On the other hand, the decision to unilaterally "sacrifice" salmon runs, and, by extension, Indian reserved rights to fish those runs, has been rejected by the courts in a series of decisions that have important implications for the future of the Columbia River basin.

Reserved Rights' Impact

In this article, I will make the case that: (a) the days of ignoring or sidestepping Indian reserved rights when discussing, licensing, allocating, adjudicating or otherwise addressing interests in water resources, natural resources and land use planning in the Columbia basin are waning if not gone; and (b) legal practitioners in these areas are well advised to have a basic understanding of and factor in the roles that Indian reserved rights play in any decision relating to Columbia basin natural resources. I first briefly describe the legal context of Indian reserved or treaty rights with an emphasis on how they apply in the Pacific Northwest. Second, I provide a survey of recent examples from and near the Columbia River basin that illustrate the reach and impact of Indian reserved rights today.

INDIAN RESERVED OR "TREATY" RIGHTS IN THE PACIFIC NORTHWEST

LEGAL FOUNDATIONS

The terms "Indian reserved rights" and "Indian treaty rights" are often used interchangeably and have significant overlap in meaning. For purposes of this article, the points made about Indian reserved rights also relate to Indian treaty rights.

The views expressed in this paper are the author's own and are not intended to represent or reflect the positions of the Office of the Solicitor or the Department of the Interior.

Reserved Treaty Rights

Stevens Treaties

Instream Flow Reserved

Reservation of Rights

Off Reservation Rights

Harvestable Allocation

Livelihood

Indian Reserved Rights to Fisheries

Treaty Negotiations and *United States v. Winans*

In the Pacific Northwest, a discussion of rights reserved by Indian tribes begins with the treaty negotiations carried out between the United States and tribes ranging from the Puget Sound to central Oregon to the upper reaches of the Columbia River basin in Montana. In 1854 and 1855, a series of similar Indian treaties were entered into between the United States, represented by Washington Territory Governor Isaac Stevens, and numerous tribes in the Pacific Northwest. A common attribute of these "Stevens treaties" is the express reservation of tribal aboriginal hunting, fishing, and gathering rights on-and off-reservations. In most of these treaties, tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to fish at usual and accustomed fishing sites off the Reservation "in common" with non-Indian settlers. These and similar terms found in Indian treaties, discussed further below, have been found by state and federal courts to support reserved instream flow water rights for tribal fisheries.

A major legal test of Indian reserved rights in the Northwest played out in the United States Supreme Court (Supreme Court) in the 1905 case of *United States v. Winans*, 198 U.S. 371 (1905). Members of the Yakama Nation had been blocked from a traditional fishing site on the Columbia River by landowners who had obtained a patent for the land from the United States. The Supreme Court, reversing the US Court of Appeals for the Ninth Circuit (Ninth Circuit), held that "the treaty was not a grant of rights to the Indians, but a grant of rights from them, *a reservation of those [rights] not granted*." (emphasis added). *Id.* at 381. Turning to the access issue, the Court found that the right "imposed a servitude upon every piece of land as if described therein." *Id.*

Adjudicating the Extent of Tribal Reserved Fishing Rights

Despite the *Winans* decision, states in the Northwest for decades refused to recognize this unique legal right of the Stevens treaty tribes to fish off their reservations. By the late 1960s, the United States and individual Indians had initiated litigation to confirm and adjudicate the extent of the reserved fishing rights of several Northwest tribes, which from time immemorial had harvested salmon. *United States v. Washington* adjudicated the reserved fishing rights of Stevens treaty tribes in the Puget Sound area, and *United States v. Oregon* adjudicated the rights of Columbia basin Stevens treaty tribes to the Columbia basin fishery.

In these cases, the courts found that the phrase "the right of taking fish...in common with all citizens" gives the Treaty tribes the right to take up to fifty percent of the harvestable fish in the area where fishing rights had been reserved. *See, e.g., United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). This allocation was upheld by the US Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979), often referred to as the *Fishing Vessel* decision. The Court determined that fifty percent was a ceiling rather than a floor, and that the fishing clause guaranteed "so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living." *Id.* at 686. These same allocation principles have been applied to the Columbia basin in *United States v. Oregon*.

US v. Oregon

NOAA Fisheries has this helpful summary of *US v. Oregon* on its website: *United States v. Oregon* (302 F. Supp. 899) is the on-going federal court proceeding that enforces and implements the Columbia River treaty tribes' reserved fishing rights. In his 1969 decision, Judge Robert C. Belloni ruled that state regulatory power over Indian fishing is limited because treaties between the United States and the Nez Perce, Umatilla, Warm Springs and Yakama tribes in 1855 reserved the tribes' exclusive rights to fish in waters running through their reservations and at "all usual and accustomed places, in common with the citizens of the United States [or citizens of the territory]." In this case, the court held that the state is limited in its power to regulate treaty Indian fisheries. Among other things, the court held that the state may only regulate when reasonable and necessary for conservation, provided: reasonable regulation of non-Indian activities is insufficient to meet the conservation purpose, the regulations are the least restrictive possible, the regulations do not discriminate against Indians, and voluntary tribal measures are not adequate.

In 1974, Judge George Boldt decided in a case referred to as *United States v. Washington* (384 F. Supp. 312) that Belloni's "in common with the citizens of the United States [or citizens of the territory]" was, in fact, 50 percent of all the harvestable fish destined for the tribes' traditional fishing places. The following year, Judge Belloni applied the 50/50 standard to *United States v. Oregon* and the Columbia River.

Fisheries in the Columbia River have subsequently been managed subject to provisions of *United States v. Oregon* under the continuing jurisdiction of the federal court. The Columbia River Fish Management Plan provided a framework for management from 1988 through 1998, although certain provisions were modified during that time to address concerns related to the increasing number of ESA-listed species. After 1998, fisheries were managed through a series of short term agreements among the parties, the duration of which ranged from several months to five years. The 2008-2017 *United States v. Oregon* Management Agreement provides the current framework for managing fisheries and hatchery programs in much of the Columbia River Basin.

See: www.westcoast.fisheries.noaa.gov/fisheries/salmon_steelhead/united_states_v_oregon.html

Tribal Reserved Rights to Water: *United States v. Winters*

Reserved Treaty Rights

Winters

Implied Reservation

Flow for Fisheries

Minimum Flow

Tribal Reserved Water Rights Doctrine

A few years after the *Winans* decision, the Supreme Court issued its seminal decision addressing tribal reserved water rights: *United States v. Winters* 207 U.S. 564 (1908). Writing for the Court, Justice Joseph McKenna (the same justice who authored the *Winans* decision) explained that, when a reservation of land for the Indians was established, adequate water to meet the purposes of the reservation was also impliedly reserved. As Professor Royster has explained:

> Tribal water rights arise by implication through interpretation of the treaties, statutes, agreements, and executive orders creating Indian country. Nothing in those federal documents speaks expressly to water, but the Supreme Court has held, ever since the foundational *Winters* decision in 1908, that water was nonetheless reserved for the tribes. In part, this reservation stems from the canons of construction, which in turn are an expression of the federal trust obligation. The Indians, the Court found, would not have agreed to settle on the reserved tract of land without the water to make it livable. And in part, the reservation of water rights stems from the federal government's power to reserve water from appropriation, a power that it impliedly exercised when it set land aside in trust for the tribes.

[Royster, Judith V., *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 Nat. Resources J. 375 (citations omitted).]

Adjudication of Tribal Water Rights in the Pacific Northwest

In the Pacific Northwest, the reach of these Indian reserved water rights can be extensive. A number of court decisions have focused, for example, on the underlying need for — and right to — water to support the on-and off-reservation fisheries reserved by the tribes. For instance, early in the adjudication of all water rights in the Yakima River basin the state trial court established that the United States generally holds in trust for the Yakama Nation an Indian reserved water right with a priority date of time immemorial for "the specific 'minimum instream flow' necessary to maintain anadromous fish life in the river, according to the annual prevailing conditions as they occur [in the Yakima river and its off-reservation tributaries]." *Amended Partial Summary Judgment Entered As Final Judgment Pursuant to Civil Rule 54(b)* at 7-8 (Nov. 29, 1990). This ruling was upheld on appeal to the Washington Supreme Court. *See Washington Dep't of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993).

In *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), the Ninth Circuit upheld a trial court's order requiring the US Bureau of Reclamation to release water stored in federal reservoirs for the protection of the Yakama Nation's Chinook salmon treaty fishery outside the boundaries of the Yakama Reservation. In another case brought in the 1980s, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) in Montana (the eastern-most Stevens treaty tribe with reserved fishing rights) challenged federal irrigation project operations that depleted streams on the Reservation. The federal courts confirmed that the CSKT treaty language reserving the "exclusive right of taking fish" on-reservation also reserved to the Tribes instream flow water rights in all of the streams running through or bordering the Flathead Reservation. *See, e.g., Joint Board of Control et al. v. United States et al.*, 832 F.2d 1127 (9th Cir. 1987). The courts denied local irrigation districts' arguments that the instream flow rights should be shared equitably with the irrigation diversion rights of the local federal irrigation project, and instead concluded that the priority date for the Tribes' reserved flow rights was "time immemorial" and must be fully satisfied before the junior irrigation water rights could be exercised.

Reserved Treaty Rights

INDIAN RESERVED RIGHTS IN ACTION

RECENT EXAMPLES

To illustrate the nature and reach of tribal reserved rights in the Northwest, what follows it is a sampling of recent developments where rights reserved by tribes in the Northwest have influenced water and other natural resource decisions and operations — sometimes far away from any Indian reservation. As seen by this inventory, the range of situations where Indian treaty rights are at play is broad. In sum, it seems safe to say that, contrary to the implication in the 1940s era BPA newsletter quoted above, these tribal reserved rights increasingly are being recognized and are not on the sacrificial block.

The "Culverts" Decision

Continuing Jurisdiction

In both *United States v. Oregon* and *United States v. Washington*, the federal district courts have retained continuing jurisdiction and have overseen various sub-proceedings over the years, including a sub-proceeding in *United States v. Washington* that made headlines this year. As discussed below, the rulings in the case have direct implications for the Columbia basin.

Culvert Replacement

In *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), a three judge panel of the Ninth Circuit ruled unanimously that the reserved fishing rights of the Stevens treaty tribes include the right to a healthy fishery. The panel further held that the federal district court correctly found that the State of Washington must restore habitat by replacing hundreds of culverts that block access to streams for salmon spawning and rearing. As David Moon, editor of *The Water Report*, stated "[t]he precedents set by the decision could have significant ramifications for the state and federal governments due to its recognition that [reserved] treaty rights for fishing necessarily include a right to a healthy fishery." *See* Moon, *TWR* #149.

Habitat Protection Vacated

The underpinnings of this case go back nearly four decades. In 1980, Judge William H. Orrick, Jr., who oversaw the *United States v. Washington* proceedings at that time, found that the Stevens' treaty language — "the right to take fish in usual and accustomed grounds" — implied a broader right to habitat protection for the fisheries subject to that right. *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980). Sitting en banc (i.e., with all judges of the court present), the Ninth Circuit vacated the trial court's decision on environmental habitat protections. The Ninth Circuit in the 1980 decision "held that the issue was too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes." 827 F.3d at 846.

"Particularized Dispute"

In 2001, the tribes, joined by the United States, alleged such a "particularized dispute" and asserted that "Washington State…had violated, and was continuing to violate, the Treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds, prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented very young salmon from moving freely to seek food and escape predators." 827 F.3d at 841. The litigation, which proceeded for 15 years, resulted in both the trial and appellate courts finding that:

Habitat Obligation

> [I]n building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties, and has not waived its own sovereign immunity by bringing suit on behalf of the tribes. The district court did not abuse its discretion in enjoining Washington to correct…barrier culverts… .

827 F.3d at 865.

This decision also set down a sobering marker for the federal government. As an affirmative defense, the State of Washington asserted that "if its barrier culverts violate the Treaties, so too do the United States' barrier culverts…" referencing the fact that federal land management and highway agencies also have culverts that block salmon habitat. 827 F.3d at 855. The Ninth Circuit rejected this argument based on sovereign immunity and standing grounds, *Id.*, but went on to opine:

US Obligation

> Washington seeks an injunction requiring the United States to correct its barrier culverts on the ground that the United States is bound by the Treaties in the same manner and to the same degree as the State. Washington is, of course, correct that the United States is bound by the Treaties. Indian treaty rights were "intended to be continuing against the United States…as well as against the state." *Winans*, 198 US at 381-82. Our holding that Washington has violated the Treaties in building and maintaining its barrier culverts necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts.

827 F.3d at 856.

Reserved Treaty Rights

Wharf Impact

Political v. Factual

Tribal Fishing Grounds

Fishing Sites Impacts

Fishery Management

Consultation with Tribes

Columbia River Treaty

The US Army Corps of Engineers' Decision to Reject Permit for Coal Terminal

Another potentially far-reaching natural resources decision directly linked to tribal reserved rights occurred earlier this year. The company SSA Marine sought a permit from the US Army Corps of Engineers (Corps) to build and operate a large coal shipping terminal near the City of Bellingham, Washington. On May 9, 2016, the Corps found that the proposed terminal would impact the treaty-protected fishing rights of the Lummi Nation based on the fact that the proposed trestle and associated wharf would take up 122 acres over water. The Bellingham Herald reported: "The Corps may not permit a project that abrogates treaty rights," said Col. John Buck, commander of the Corps' Seattle District. It is interesting to note the reaction of SSA Marine:

> "This is an inconceivable decision. Looking at the set of facts in the administrative summary it's quite obvious this is a political decision and not fact based," Bob Watters, PIT president, said in the release. "We are very disappointed that the GPT project has become a political target rather than being addressed on the facts. The terminal promises to deliver substantial benefits through economic development, the creation of family wage jobs, and the generation of significant taxes."

See www.bellinghamherald.com/news/local/article76545117.html#storylink=cpy.

The record of decision developed by the Corps, however, shows that the Lummi Nation provided extensive and detailed information about its fishing rights in the vicinity of the proposed terminal. For anyone who is or will be pursuing a permitting process in the Columbia basin that implicates tribal fishing grounds, it will be important to address the issues raised in this decision from the Corps. *See* Water Briefs, *TWR* #148.

This Corps decision not to grant a permit based on impacts to Indian reserved fishing sites is not an outlier. As early as 1973, a federal district court ordered the Corps and BPA to operate federal dams on the Columbia in a manner that would not "impair or destroy any fishing rights…secured by Treaty with the Indians." *Confederated Tribes of Umatilla Reservation v. Calloway,* Civ. No. 72-211 (D. Oregon Aug. 17 1973) (*Slip Op* at 7). This case is discussed in the article: *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, M. Blumm & B. Swift, 69 U. Colo. L. Rev. 407, 464, (1998). *See also, Confederated Tribes of Umatilla Reservation v. Alexander,* 440 F. Supp. 553 (D. Oregon 1977). In a recent article, the author explained that in this case, the court "issued a declaratory judgment stating that the constructing of a dam on Catherine Creek would 'impair access to… traditional [fishing] stations' by covering them in 200 feet of water, and 'prevent all wild fish from swimming upstream.' Importantly, the court concluded, "the treaty right to fish at all the usual and accustomed stations will be destroyed.'" *See "Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, W. Furlong 37 Pub. Land & Resources L. Rev. 113 (2016).

Tribes as Co-Managers of Columbia Basin Fisheries

The influence of Indian reserved rights goes beyond the specific court and administrative decisions addressing the scope and application of those rights. Many of the tribes in the Columbia basin have developed considerable expertise as fisheries managers who actively participate in all relevant forums at the technical, policy, and legal levels. For decades now, courts have recognized the importance of considering the views and information from tribal and other fisheries managers in the ongoing efforts to improve conditions in the Columbia for anadromous fish runs.

In *Natural Resources Information Center v. Northwest Power and Planning Council*, 35 F.3d 1371 (9th Cir. 1994), plaintiffs challenged the fish and wildlife plan issued by what is now known as the Northwest Power and Conservation Council (Council). The Ninth Circuit found that the Council, when formulating the plan, did not adequately consider the information and positions of state and tribal fishery co-managers and remanded the plan for further consideration of that information. Similarly, in one of the early cases challenging the adequacy of Columbia basin federal dam operators' compliance with the federal Endangered Species Act (ESA) with respect to ESA-protected salmon, Judge Marsh found that the National Marine Fisheries Service did not adequately consider the views and positions of state and tribal fisheries co-managers. *Idaho Dep't of Fish and Game v. National Marine Fisheries Service,* 850 F. Supp. 866 (D. Oregon 1994).

More recently, Columbia Basin tribes came together in force to participate collectively in a region-wide review and recommendation process for the Columbia River Treaty with Canada. This treaty, ratified in 1964, set out agreements between the two countries to coordinate hydropower development and generation and flood control. As the treaty can be renewed or rescinded beginning in 2024, BPA and the Corps sponsored a review of the treaty. Many tribes actively participated in this review and were instrumental in advocating that any renewal of the treaty include consideration of a properly functioning ecosystem for the basin in both countries. RE: Columbia River Treaty *see* Miller, *TWR* #101; Bankes & Cosens, *TWR* #105 & #129; US Entity, *TWR* #117; and Christensen, *TWR* #125.

Reserved Treaty Rights

Montana Agreement

Instream Flows

Montana Compact

Off-Reservation Flow Protections

PROPOSED SETTLEMENT OF WATER CLAIMS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Similar to tribal reserved fishing rights, the scope and nature of tribal reserved water rights for flows and other purposes are being actively addressed in the courts and also in negotiations. In one example, the State of Montana and the Confederated Salish and Kootenai Tribes recently reached agreements to settle all of CSKTs' water right claims, including extensive off-reservation instream flow claims. Figure 2 below shows the extensive range of the Indian reserved instream flow claims filed by both the United States and CSKT in the Montana general stream adjudication. These claims for flow protections reflect the claimants' assessment that the Tribes' use of river basins (green on the map) for fisheries historically extended throughout many basins in Montana on both the west and east side of the Continental Divide. Figure 3 highlights the basins where the State, CSKT and the federal government agreed to a more limited range of instream flow protections on the west side of the Divide. CSKT also agreed to certain restrictions on the exercise of these instream flow rights to protect existing uses of water.

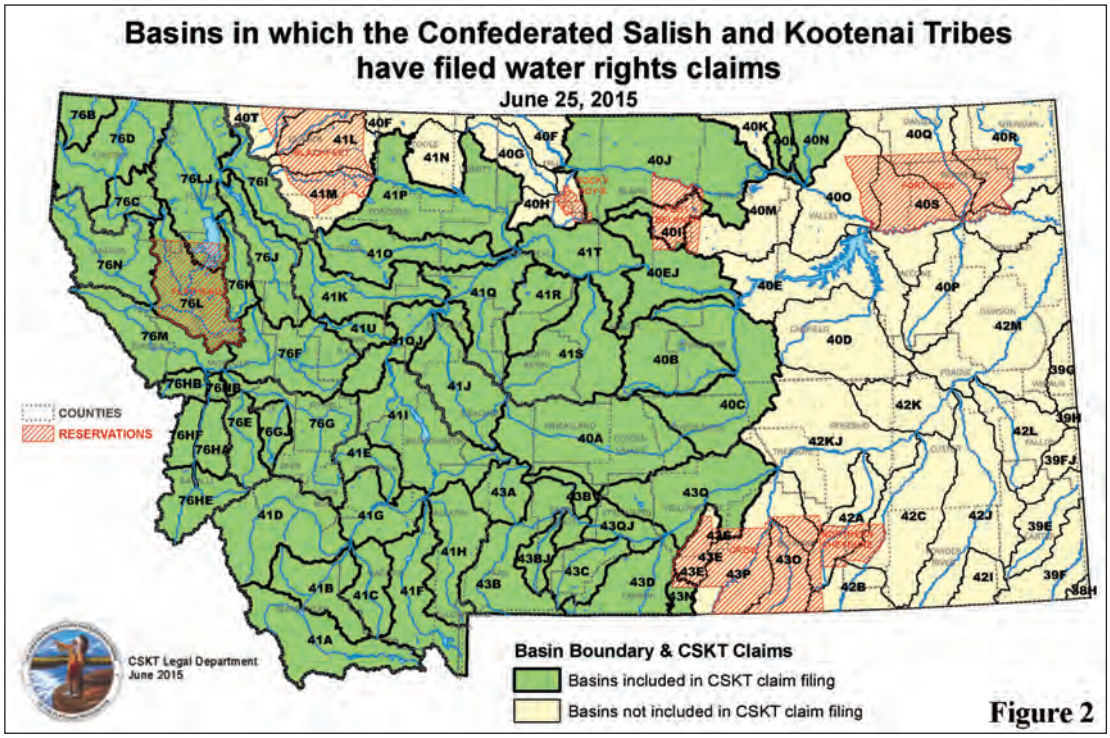

Figure 2

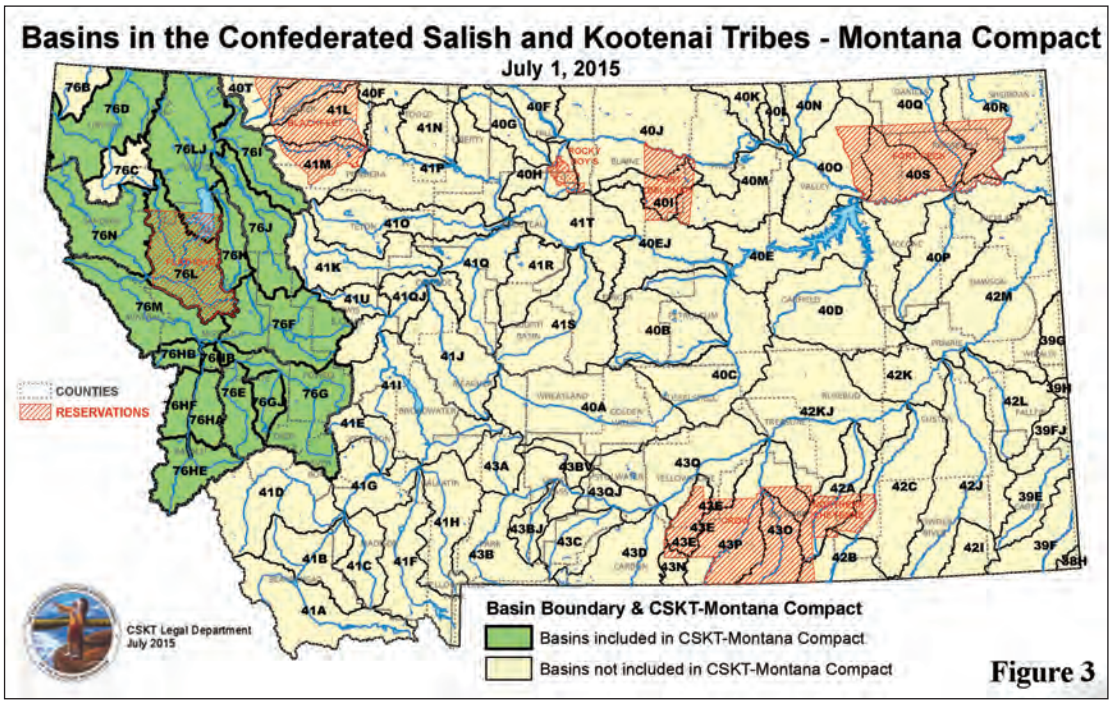

Figure 3

Reserved Treaty Rights

Off-Reservation Compromises

Thus, through the process of negotiating all of CSKTs' water right claims, the parties were able to resolve the significant legal cloud that the time-immemorial Indian reserved flow claims had created on the arguably junior non-Indian water right claims throughout more than one-half of Montana. It is interesting to note that the State of Montana agreed in the settlement that CSKT will hold Indian reserved instream flow water rights with a time-immemorial priority date on the Kootenai and Clarks Fork Rivers in western Montana. CSKT in turn concluded that it could compromise on some of the off-reservation reserved right water claims based on the benefits it would receive overall in the settlement. The federal government currently is evaluating this agreement. [The CSKT water rights compact and related materials are online at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/approved-compacts].

Other tribal water settlements in the Northwest have accomplished the objective of improving or protecting instream flows for streams that sustain tribal reserved fisheries, but have accomplished those protections under state water law, not federal reserved water law. *See, e.g.*, Mecham, *TWR* #83.

CONSIDERATION OF INDIAN TREATY RIGHTS IN EPA DECISION-MAKING

CURRENT EFFORTS BY THE US ENVIRONMENTAL PROTECTION AGENCY

Trust Responsibility

Over the past year, US Environmental Protection Agency (EPA) has made great strides in recognizing at the highest levels the federal government's trust responsibility and recognizing the importance of tribal waters, tribal sovereignty, and the need to better protect water resources that tribes rely upon.

Guidance v. Rules

- In February 2016, EPA developed guidance to enhance EPA's consultations with tribes where Indian treaty rights may be affected by a proposed EPA action. *See* Water Briefs, *TWR* #153.
- In May 2016, EPA issued an interpretive rule for Treatment of State for Clean Water Act programs that will enable streamlining of the application process, which will encourage an increased number of tribes coming under "Treatment as States" (TAS). On September 16, Administrator McCarthy signed the final EPA rule on TAS for tribes for Section 303(d) of the federal Clean Water Act, which will enable eligible tribes to obtain authority to identify impaired waters on their reservations and establish "Total Maximum Daily Loads" for impaired streams, a significant development for tribal governments. *See* Water Briefs, *TWR* #148.
- On September 19, Administrator McCarthy signed an Advance Notice of Proposed Rulemaking for Tribal Baseline water quality standards which will seek feedback from tribal governments and others on a potential future federal promulgation of water quality standards for tribal waters that do not currently have EPA-approved **w**ater **q**uality **s**tandards (WQS). Currently fewer than 50 of over 300 federally recognized tribes with Indian reservations have WQS effective under the CWA. EPA conducted a tribal consultation process over the summer and is hoping to continue to receive feedback from tribal governments on potential standards which could address the use of cultural and traditional uses as specific designated uses, the use of limited fish consumption rates and how antidegradation can protect significant tribal resources.

These and other initiatives have a direct focus on tribes and their water resource protections and management.

TRIBAL TREATY RIGHTS MEMORANDUM OF UNDERSTANDING

FEDERAL INTERAGENCY COORDINATION & COLLABORATION FOR PROTECTION OF TRIBAL RIGHTS

Protective MOU

Finally, in a very recent development, I note that several federal department and agency heads have signed or are in the process of signing a Memorandum of Understanding (MOU) setting out commitments "to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decision-making processes and enhanced interagency coordination and collaboration." This MOU can be found at:
MOU Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights: https://www.epa.gov/sites/production/files/2016-09/documents/13sep16_interagency_treaty_rights_mou_final.pdf.

CONCLUSION

Treaties' Scope

The brief survey in this paper provides ample illustration of the scope and application of Indian reserved rights in modern day decisions affecting water, land and natural resources. Also, and not coincidentally, the examples demonstrate that tribal governments are themselves at the forefront articulating, exercising, and defending their reserved rights. While it is possible that some decisions affirming tribal reserved rights may be modified or reversed on appeal, it is also true that the jurisprudence

Reserved Treaty Rights

on tribal treaty and reserved rights over the past few decades has generally reaffirmed and strengthened the original holdings in the *Winans* and *Winters* Supreme Court decisions. An understanding of how tribal reserved rights are exercised and are entitled to be protected is important for those involved in decisions that may affect those rights.

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This article was adapted from a paper originally presented at The Seminar Group's seminar "The Mighty Columbia" on October 28, 2016 in Seattle, Washington.

Duane Mecham currently is Acting Deputy Director for the Secretary's Indian Water Rights Office within the US Department of the Interior. This Office oversees the Department's Indian water rights settlement program and provides high level policy guidance to the Secretary and the bureaus and offices of the Department on matters concerning Indian water rights settlements. He will soon return to his position as senior attorney in the Department's Regional Solicitor's Office based in Portland, Oregon. He advises several Interior agencies on tribal and federal water rights matters and on Endangered Species Act compliance issues arising out of impacts of federal hydropower and irrigation projects on salmon in the Columbia and other river basins. He was the chair of the federal government's negotiation team for the Nez Perce water right claims in Idaho and has been appointed as chair of the Umatilla (Oregon) and Salish-Kootenai (Montana) federal negotiation teams. He would like to express his deep appreciation to Mary Lou Soscia, Columbia River Coordinator for the US Environmental Protection Agency, who provided extensive background on the EPA initiatives to acknowledge and integrate tribal rights into its decisions.

Stockwater Rights

STOCKWATER RIGHTS ON STATE & FEDERAL LAND

OWNERSHIP OF STATE-BASED STOCKWATER RIGHTS

by Rachel Meredith, Bloomquist Law Firm (Helena, MT)

INTRODUCTION

Private Appropriation on Public Lands

Private appropriation of water on state and federal land is heavily fact-dependent. This article is intended to act as a primer for those who find themselves defending or asserting private appropriations on those lands. While ownership of a private claim may ultimately vest in a state or federal agency, such a result is not a default.

BACKGROUND

Montana's Wise Use Act

In 1973, the Montana legislature passed the Water Use Act (WUA), creating significant changes in the way Montana administers water right appropriations. The WUA took effect July 1, 1973 and created: (1) a system for the adjudication of existing water rights (those water rights existing prior to July 1, 1973, that were perfected in accordance with state customs, laws, and judicial decrees); and (2) a system for changing existing water rights and appropriating new water rights after July 1, 1973. Mont. Code Ann. § 85-2-101, et seq.

Adjudication

Montana's first foray into adjudicating existing water rights occurred in the Powder River Basin in 1973. In 1979, after six years of intensive basin investigation that yielded few results, the Montana Legislature sought measures to increase efficiency in the process. To this end, the legislature passed Senate Bill 76, which established a deadline for Montanans to file water right claims with the Montana Department of Natural Resources and Conservation (DNRC), and established the Montana Water Court (Water Court) and the Montana Reserved Water Rights Compact Commission. Mont. Code Ann. §§ 85-2-221, 2-15-212.

Under the WUA, adjudication began with water users being required to file statement of claim forms for the use of water by April 30, 1982 — after which they were examined by DNRC. Mont. Code Ann. § 85-2-221. Once examined, these claims were released to the public for objection and eventual case consolidation before the Water Court. Mont. Code Ann. § 85-2-212, et seq.

At the beginning of the adjudication, many water users filed claims and appeared in the Water Court without the assistance of counsel or consultant. While knowledgeable about how each water right was

Stockwater Rights

historically used, this trend of self-representation left even water-savvy claimants vulnerable to state and federal agency interpretations of the law. Claimants who had historically utilized water on US Bureau of Land Management (BLM) and US Forest Service (USFS) allotments were told they had no ownership interest in the water used. Many claimants were talked out of their water right claims and, in some cases, prohibited from filing claims at all. Claimants who had utilized water on Montana state land leases were also subject to pressure, but not to the same degree or extent as those utilizing water on federal lands.

STATE-BASED VS. FEDERALLY RESERVED WATER RIGHTS

Before exploring the various water ownership scenarios on state and federal land, it is important to recognize the difference between state-based and federally reserved water rights.

State-Based: Beneficial Use

Fact-Intensive

State-based water rights are based on actual, beneficial, historical use (in Montana, pre-July 1, 1973) and they are governed by state law. *In re Adjudication of the Existing Rights to the Use of the Missouri River* (*Bean Lake III*), 2002 MT 216, ¶ 75, 311 Mont. 327, 55 P. 396 (quoting *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 90, 712 P.2d 754, 762 (1985) (*Greely*)); *see also*, *Confederated Salish & Kootenai Tribes v. Clinch*, 1999 MT 342, ¶¶ 21-23, 297 Mont. 448, 992 P.2d 344 (*Clinch*). The beneficial use of a state-based water right is the basis, the measure, and the limit of the water right, making adjudication of state-based water rights fact-intensive. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986).

Federal Reserved Rights

Federally reserved water rights, on the other hand, are creatures of federal legislation or tribal treaty. Federal water rights are held by federal agencies or tribes, and their adjudication gives no consideration to the actual, historical use of the water. *Bean Lake III*, 2002 MT 216, ¶ 75 (quoting *Greely*, 219 Mont. at 90, 712 P.2d at 762). Rather, the extent of a reserved water right is determined and quantified by considering the use intended by the governing legislation or treaty. *Id*.; *Clinch*, 1999 MT 342, ¶¶ 21-23. The quantity reserved is "only that amount of water necessary to fulfill the purpose of the reservation, no more." *U.S. v. N.M*., 438 U.S. 696, 699 (1978) (quoting *Cappaert v. U.S.*, 426 U.S. 128, 141 (1976)); *see also*, *Arizona v. California*, 373 U.S. 546, 600-601 (1963) (overruled on other grounds).

Montana Compact

Rather than filing statement of claim forms like state-based water users, tribes and federal agencies have had the option to enter into negotiations with the State of Montana. Since 1979, Montana has negotiated 18 compacts with various federal agencies and tribes. *See*: *Approved Compacts*, available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/approved-compacts.

GENERAL RULES OF APPROPRIATING WATER ON LAND YOU MAY OR MAY NOT OWN

Beneficial Use v. Land Ownership

One of the most frequently cited Montana cases exploring water right appropriation and ownership is *Smith v. Denniff*, 24 Mont. 20, 60 P. 398, 401 (1900), which held that an appropriator is not required to own an interest or an easement in the land upon where water is appropriated in order to maintain a valid water right. The Montana Supreme Court (Court) found that beneficial use — and not property ownership — determines ownership of the water right itself. *See generally*, *Smith*. In reaching this conclusion, the Court reviewed the following five scenarios:

Scenario 1: The private appropriator owns land next to the water source and appropriates water for use on his land.

Result 1: Title to the water right vests and attaches as an appurtenance to the private appropriator's land. The water right attaches as an appurtenance because there is unity of title (both to the water right and the private land) in the private appropriator. *Smith*, 60 P. at 399-400.

Scenario 2: The private appropriator owns land away from the water source, requiring conveyance over the public domain.

Result 2: The private appropriator has the privilege of appropriating water on the public domain and conveying it to his property. The water right and ditch become easement in, or servitudes on, the public domain and attach as an appurtenance to the private appropriator's property (due to unity of title). *Id*. at 400.

Scenario 3: The private appropriator owns land away from the water source, requiring conveyance over another private landowner's land.

Result 3: The private appropriator must acquire an easement from the landowner in order to convey an appropriation across that property. If the landowner grants the appropriator an easement, the water right and ditch become easements in, or servitudes on, the landowner's property. The water right becomes appurtenant to the private appropriator's land (due to unity of title). *Id*.

Scenario 4: The private appropriator has a possessory interest in (but does not own) the land next to water source and appropriates water for use on that land.

Result 4: The private appropriator has the privilege of appropriating water and using it on that land.

Stockwater Rights

However, title to the water right vests in the appropriator, akin to an easement in gross. The water right cannot attach to that land as an appurtenance until there is unity of title. *Id*. at 400-401. [Editor's Note: An easement in gross is an easement that benefits an individual and is not tied to the land. It is a personal right of its holder to a use of another's land and that is not dependent on ownership of a dominant estate. An easement in gross does not transfer with the property when it is sold.]

Scenario 5: The private appropriator has a possessory interest in land away from the water source, requiring conveyance over the public domain.

Result 5: The private appropriator has the privilege of appropriating water on the public domain and conveying it to the land in the private appropriator's possession. As in Scenario 4, title to the water right vests in the appropriator, akin to an easement in gross. Neither the water right or easement across the public domain attach as an appurtenance to the land occupied by the private appropriator until such time as there is unity of title. *Id*. at 401.

Use v. Land Ownership

The consistent conclusion in each *Smith* scenario is that water right ownership goes to the individual benefitting from the appropriation. Land ownership is irrelevant, for the water right appropriated does not always attach as an appurtenance to the land upon which it is used. Alternatively, water rights appropriated by individuals on other lands may vest in the appropriator themselves.

THE MONTANA SCHOOL TRUST LAND EXCEPTION

Montana Department of State Lands v. Pettibone

In 1985, the Montana Supreme Court was asked to determine whether ownership of water rights appropriated and used on Montana School Trust Lands (Trust Lands) by a lessee vest within the lessee/appropriator or the State of Montana?

Lessee Rights?

In 1983, the Montana Water Court issued the Powder River Final Decree, its first final decree in the state under the adjudication process. In its decree, the Water Court held that title to waters diverted and used on Trust Lands were owned by the lessee who appropriated the water, as opposed to the State. *Dept. of State Lands v. Pettibone*, 214 Mont. 361, 364, 702 P.2d 948, 950 (1985). The State appealed this portion of the Water Court's decree, asserting ownership vested within the State. *Id*.

The case centered on 23 water rights, including four groundwater wells, three developed springs, 15 onstream reservoirs, and one undeveloped spring. *Id*. at 365, 702 P.2d at 950. Other than one well (straddling and used on Trust Land and privately owned land), one reservoir (located on Trust Land and serving both state and private property), and an irrigation diversion (located on Trust Land, but used on private land), the water rights at issue were located on, and used entirely within, Trust Lands. *Id*. These water rights were all "use based" and perfected in accordance with state custom.

State's Fiduciary Duty

The Montana Supreme Court held that the State, and not the lessee, owned the water rights at issue. *Id*. at 368, 702 P.2d at 952. At the time of statehood, Montana was granted certain lands, typically Sections 16 and 36 in every township, for the benefit of common schools. *Id*. at 365, 702 P.2d at 950. In reaching this holding, the Montana Supreme Court focused heavily, if not entirely, on the State's fiduciary duty to manage Trust Lands for the benefit of common schools.

Beneficial User

> The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.

Id. at 368, 702 P.2d at 952.

Public Lands Distinction

The Montana Supreme Court examined both Montana and extra-jurisdictional case law regarding a state's duty to manage Trust Lands, finding that Trust Lands' interests could not be alienated unless the trust received compensation. *Id*. at 368-372, 702 P.2d at 952-955. Waters appurtenant to Trust Lands were interests subject to the trust principle, and allowing private appropriations reduced the value of Trust Lands. *Id*. at 371, 702 P.2d at 954. The Montana Supreme Court recognized this as a departure from how private water rights on other public lands are assessed. *Id*. at 373, 702 P.2d at 956 (quoting *U.S. v. Ervien*, 246 F. 277, 280 (8th Cir. 1917)) ("'Congress did not intend that the [school trust] lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people... .'").

Stockwater Rights

Acquired Land

In 2005, the Montana Water Court clarified the *Pettibone* principle, concluding that the case applied not only to those sections granted at statehood, but also lands purchased with proceeds from the common school permanent fund. *In re Huckaba Ranch, Inc.*, Mont. Water Ct. Case No. 41G-3, Op., 9-10, (Aug. 3, 2005). Montana had purchased land from several homesteaders with money from the permanent school fund and then leased the property to stockowners for grazing. *Id*. at 15-17. One of the lessees filed a stockwater claim that had been appropriated and used on the leased land. In 1985, the State sold some of these lands to Golden Sunlight Mine, which, as successor to the State, asserted ownership over the lessee's claim. *Id*. at 1-2.

Appurtenance

The Water Court found Golden Sunlight Mine to be the proper owner of the rights. The lessee had never owned the water rights to begin with, since under the *Pettibone* decision ownership vested in the State of Montana during its ownership. *Id*. at 13-18. When the State sold that property, ownership of the claims passed from the State to Golden Sunlight Mine as an appurtenance to the property. *Id*.

Exception to the *Pettibone* Exception

Time of Vesting

In 2000, the Water Court revisited the *Pettibone* principle in another case. In *Harper*, the appropriator diverted water from the Shields River for use on private lands. *Harper, et al.*, Mont. Water Ct. Case No. 43A-A, Findings of Fact, Conclusions of Law and Memo., 2-4 (June 29, 2000). Over time, the appropriator began using his water on Trust Lands he leased, in addition to his own private land. *Id*. at 4-6, 8-9. The State of Montana objected to his claim, asserting that ownership properly vested within the State, as per *Pettibone*. *Id*. at 10.

The Water Court disagreed. *Pettibone* had focused entirely on water rights diverted, developed, and perfected on Trust Lands as "use rights." *Id*. at 11. The claim in *Harper*, on the other hand, was an 1893 water right diverted off of Trust Lands for use on land owned by the appropriator. *Id*. at 13. In 1911, the water right was subject to a district court decree, which held it to be privately owned and appurtenant to private land. *Id*. As such, the Harper claim was a "positive, certain, and vested property right before it was ever used on school trust land." *Id*. As such, the private appropriator was the proper owner and *Pettibone* did not apply. *Id.* at 13, 19-23.

Timing Matters

In *Harper*, the Water Court suggested that the date Trust Lands vest within the State may also affect the applicability of *Pettibone*. *Id*. at 13, FN 3. In *U.S. v. Wyoming*, the US Supreme Court held that Wyoming's land interests do not vest until the later of two dates: (1) statehood; or (2) the official survey. *U.S. v. Wyoming*, 331 U.S. 440, 443-444 (1946); *U.S. v. Morrison*, 240 U.S. 192 (1916). Therefore, if a private appropriator perfected a water right on Trust Lands after Montana's date of statehood, but before an official land survey was conducted, ownership of the right would vest in the private appropriator and not Montana. Montana would take ownership of the land upon official survey, subject to the private appropriator's already vested water right.

PRIVATE APPROPRIATIONS ON FEDERAL LANDS

Historic Recognition of Private Appropriations on the Public Domain

Federal Land Policy

To understand water right appropriation on various federal lands, it is important to understand the evolution of early federal land management policy, beginning with the public domain. In the late 1800s, federal land policy on the public domain was one of disposal. Homesteading, patents, and private water appropriation were encouraged. This policy persisted for decades, and the federal government acquiesced to the use and disposition of waters on federal lands that were perfected in accordance with state custom, rule, and law. *U.S. v. City & Co. of Denver*, 656 P.2d 1, 7 (Colo. 1982) (*Denver*). As time went on, lands were withdrawn or reserved by various federal agencies for multiple purposes, signifying a management change for those lands no longer part of the public domain.

Mining Law

Courts begin the analysis of private water right appropriation on the public domain by starting with the Mining Law of 1866. *Id*. at 7-8; *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-156 (1935). The Mining Law of 1866, c. 262, 25 Stat. 253 (July 26, 1866), specifically opened surveyed and unsurveyed mineral lands of the public domain to exploration and occupation. The act simultaneously recognized, and established protection for, private water rights on the public domain.

Private Rights Recognized

> And be it further enacted, that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed... .

Id.

Stockwater Rights

Placer Mining Act (1870)

Desert Land Act (1877)

Prior Appropriation

Future Policy Confirmed

Public Use Reservation

Private Right Possible

Source Size

"[T]he Act was 'a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use.'" *Cal. v. U.S.,* 438 U.S. 645, 656 (1978) (quoting *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 705 (1899)).

The federal government continued to recognize and protect private water rights in the 1870 Placer Mining Act, which amended the Mining Law of 1866 and made patents subject to the appropriative rights recognized by the Mining Act of 1866. *Denver*, 656 P.2d at 7; *Cal. Or. Power*, 295 U.S. at 155-156; The Placer Act of 1870, c. 235, 16 Stat. 218 (July 9, 1870).

Finally, the Desert Land Act of 1877 again reaffirmed the rule that private water rights on the public domain were to be governed by the Prior Appropriation Doctrine. *Denver*, 656 P.2d at 7. The purpose of the Desert Land Act was to encourage development of arid and semiarid public domain in the western United States. *Cal.*, 438 U.S. at 657-658. While reclamation, irrigation, and cultivation of these lands were the primary aims, the Act effectively severed water from the land, allowing acquisition of one interest without the other. *Cal. Or. Power*, 295 U.S. at 158, 162 (with the passage of the Desert Land Act in 1877, interests in land and water were separated); *see also*, *Cal*., 438 U.S. at 657-658.

> [T]he right to the use of water [by a claimant] shall depend upon bona fide prior appropriation:...and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

The Desert Land Act of 1877, c. 107, 19 Stat. 377 (Mar. 3, 1877).

Multiple courts have examined these three acts, finding that they not only recognized previously vested water rights, but also "reach[ed] into the future" and "approve[d] and confirm[ed] the policy of appropriation for a beneficial use...as the test and measure of private rights in and to the non-navigable waters on public domain." *Cal. Or. Power*, 295 U.S. at 155; see also, *Walker v. U.S*., 69 Fed. Cl. 222, 227-228 (Fed. Cl. 2005). The Water Court has recognized these legislative authorities, holding in several instances that stockwater rights at issue were perfected on the public domain by private appropriators, and that said individuals are the proper owners of those claims.

Bureau of Land Management Lands

Two federal laws characterize early federal land management policies on the public domain: the Public Water Reservation (PWR) 107 of 1926 and the Taylor Grazing Act (TGA) of 1934.

PWR 107

Approved by President Calvin Coolidge via Executive Order in 1926, PWR 107 reserved, on surveyed public land, "every smallest [sic] legal subdivision…which is vacant, unappropriated, unreserved public land and contains a spring or water hole... ." 43 C.F.R. 292.1 (1938). On unsurveyed land, PWR 107 reserved all land within one quarter of a mile of said spring or water hole. *Id*. These lands were reserved for public use in accordance with the provisions of the Stockraising Homestead Act. *Id*. The purpose of the reservation was to prevent private monopolization of water and vast land areas by providing public drinking water for animal and human consumption. *Denver*, 656 P.2d at 31.

In *U.S. v. City & Co. of Denver* (*Denver*), the Colorado Supreme Court examined the extent of the federal government's reserved water rights, including PWR 107 potholes, and concluded that PWR 107 was only intended to reserve that amount necessary to prevent pothole monopolization. *Denver*, 656 P.2d at 32. PWR 107 did not necessarily entitle the federal government to the entire yield of a spring or pothole. *Id*. Based on the express wording of PWR 107, and the *Denver* court's holding, springs and waterholes subject to PWR 107 may contain both: (1) a private water right appropriated prior to the PWR 107 reservation; and (2) a private water right appropriated junior to PWR 107, assuming that unappropriated water remains in the source, post reservation.

The *Denver* court also recognized a Department of Interior rule that makes source size a determining factor in whether PWR 107 applies to a source. The rule states that PWR 107:

> Was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.

43 C.F.R. § 2311.0-3(a)(2)(1980).

Legally speaking, the rule ultimately renders the applicability of PWR 107 a question of fact.

Stockwater Rights

1934 Taylor Grazing Act (TGA)

Lands now managed by BLM generally remained part of the public domain until the passage of the TGA in 1934, which withdrew lands from the public domain for creation of grazing districts. 43 U.S.C. § 315(a)(2000). The legislation marked the federal government's attempt to organize and control open range grazing practices that damaged the range. The purpose of the TGA "was to stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; and to stabilize the livestock industry dependent upon the public range." *In re Lawrence Edwards, et al*., Mont. Water Ct. Case No. 40E-A, Op., 27 (June 29, 2005) (citing 43 U.S.C. § 315(a) (2000)); *Public Lands Council v. Babbitt*, 529 US 728, 733 (2000), *Fallini v. Hodel*, 963 F.2d 275, 279 (9th Cir 1992), and *Kidd v. U.S. Dept. of Interior, BLM*, 756 F.2d 1410, 1411 (9th Cir. 1985)).

Open Range Control

Existing Rights

While the TGA withdrew lands from patent for the purpose of creating and leasing allotments, it did so with: (1) the recognition that private water rights may exist on said lands; and (2) the promise that said rights would not be impaired in any way.

> Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

43 U.S.C.A. § 315 (1934).

The TGA not only recognized private water rights appropriated prior to withdrawal, but also opened the door for any future private appropriations on allotted lands.

BLM Lands & Private Appropriators

The Water Court thoroughly explored private appropriations on BLM land in *In re Lawrence Edwards, et al*. (*Edwards*). *Edwards* involved over 104 stockwater claims filed by 22 different private entities in the Missouri River Basin. *Edwards*, Opinion at 1. Lands associated with the claims had historically been part of the public domain where livestock owners grazed the open range. *Id*. at 5. Over time, these stockowners appropriated water from a variety of sources, including lakes, reservoirs, and potholes. *Id*. BLM (and the US Fish and Wildlife Service (FWS)) objected to the permittees' claims, arguing that because the US owned and permitted the property underlying the water source, private water right appropriations were precluded and ownership of said appropriations should vest with the US. *Id*. at 3-5. In rendering a decision in favor of the private claimants, the Water Court explored a variety of legal authorities, noting that:

- The Acts of 1866, 1870, and 1877 recognized those private appropriations on the public domain that were made in accordance with Montana custom, rules, and law. *Id*. at 16-20.
- That the TGA did not explicitly amend or repeal the Acts of 1866, 1870, and 1877 or change federal deference to state control over water right appropriations on public domain. *Id*. at 28 (internal citations omitted). While the TGA did not preclude or preempt private water rights, grazing use within the allotments was subject to federal regulation. *Id*. at 29. As such, federal grazing regulations, permits, and agreements in effect during the appropriation may define, restrict, or preclude the right to appropriate after the TGA. *Id*. at 30.

Appropriations Protected

In short, private stockwater appropriations perfected prior to the TGA were recognized and preserved by the act. The TGA also provided for future private appropriations on BLM land, subject to federal regulations.

Pending Case

In September of this year, the Montana Supreme Court heard oral argument in *United States, Bureau of Land Management v. Barthelmess Ranch Corp., et al*. The case centers on pre-1973 stockwater claims made by BLM for reservoirs and potholes on grazing allotments in Phillips County, Montana. A group of permittees, collectively referred to as the South Phillips Water Group, objected to BLM's ownership of the water right claims and assert that they — as successors-in-interest to the original appropriators — are the proper owners of the water rights at issue. A decision has not yet been issued in the case.

US Forest Service Lands

Reserved Land Distinction

Lands reserved and managed by USFS are treated slightly different than those under BLM management. The TGA withdrew lands from the public domain, but still allowed private appropriations of water to continue on those lands. USFS land, on the other hand, is reserved, making private appropriations much more difficult to obtain and maintain.

In 1891, Congress passed The Forest Reserve Act of 1891, which granted the President authority to set aside forest reserves from the public domain. The Forest Reserve Act of 1891, c. 561, 26 Stat. 1103 (Mar. 3, 1891). The 1897 Forest Service Organic Administration Act provided further context and procedure for

Stockwater Rights

this authority, specifying the purpose for establishing reserves as well as providing for the administration and protection of said reserves. The Forest Service Organic Act of 1897, c. 2, 30 Stat. 34 (June 4, 1897). It also set forth criteria by which new forest reserve designations could be made. *Id*. In addition to these federal authorities, each national forest is also the product of a specific act of reservation in its name.

Reservation Purpose

When Congress gave the President the power to reserve portions of the public domain for specific federal purposes, such as those set forth in the Forest Reserve Act and the Forest Service Organic Administration Act, Congress also implicitly authorized the President to reserve unappropriated water appurtenant to the reservation. *Cappaert*, 426 U.S. at 138. As stated previously, only that amount of water necessary to fulfill the purpose of the reservation could be reserved, no more. *Id*. at 141.

Forest Purpose

The US Supreme Court addressed the reserved quantity question, as it specifically pertained to the Gila National Forest and USFS, in *U.S. v. New Mexico*. In that case, USFS argued that it was entitled not only to those waters necessary for the preservation of the Gila forest, but also stockwater and a sufficient instream flow to maintain aesthetic, environmental, recreational, and fishery purposes. *U.S. v. N.M*., 438 U.S. at 704. The US Supreme Court did not accept USFS' argument, finding instead that national forests were narrowly reserved to maintain favorable forest conditions. *Id*. at 705. The Court found that the intent behind the original reservations were purely economic, driven by fears of timber shortage. *Id*. at 708. "Parks were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." *Id*.

Later Act Supplemental

The US Supreme Court also found that the 1960 Multiple-Use Sustained-Yield Act of 1960 (MUSYA) did not change the USFS' primary management objective. *Id*. at 713-714. While MUSYA stated that national forests would be managed for outdoor recreation, range, timber, and fish and wildlife, the legislation was supplemental to the primary purpose of national forests. *Id*. at 713. The management objectives set forth in MUSYA were secondary and the law of reserved water rights did not apply. *Id*. at 715. The Court held that if USFS wished to obtained water rights for additional management objectives, it would need to acquire state-based water rights in accordance with state appropriation laws. *Id*.

The Water Court explored private water right appropriations on USFS land in *In re Hamilton Ranches Partnership* (*Hamilton*). Like *Edwards*, *Hamilton* centered on stockwater rights perfected during open range days on the public domain. *In re Hamilton Ranches Partn*., Mont. Water Ct. Case No. 41G-190, Op., 6 (July 19, 2005). BLM and USFS objected to Hamilton's claims, arguing that because the water rights included public lands as a place of use, and because all grazing use of public land was subject to BLM and USFS permits, the Water Court should either: (1) exclude public lands from the right; or (2) add BLM and USFS, in whole or in part, as an owner of the right. *Id*. at 2.

Private Stockwater Use

The Water Court rejected BLM's and USFS' arguments, adopting the *Edwards* analysis and concluding that: (1) legal title to the land upon which water is appropriated or used does not affect an appropriator's title to the right; and (2) when stockwater was appropriated on federal land, the water is used for the benefit of the stockman's privately owned lands, becoming appurtenant thereto and vesting with said stockman. *Id*. at 14-16, 18-19 (internal cites omitted).

Use Before Reservation

As to USFS specifically, the Water Court held that Hamilton's water right preceded the USFS reservation, and that USFS reserved the forest subject to the Hamilton water right. The source in question, a spring, was deemed withdrawn from the public domain by President Theodore Roosevelt's proclamation creating the Helena Forest Reserve, which was later consolidated into the Deerlodge National Forest. *Id*. at 28; *see also*, Helena Forest Reserve, Mont. (April 12, 1906); Executive Order: Deer Lodge National Forest, Montana (July 1, 1908). By the time the spring had been reserved from the public domain, the private appropriator had already perfected a claim from the spring in accordance with Montana law. *Hamilton* at 28. Any right reserved by USFS was junior and subject to Hamilton's claim. *Id*.

After Reservation

Theoretically speaking, a private appropriator may still own a water right from a source containing a reserved water right so long as there are unappropriated waters above and beyond the reservation. *Cappaert*, 426 U.S. at 138. Under these circumstances, a private appropriator's claim is simply junior to the reserved claim. *Id*. Whether a private appropriator can, in reality, obtain a private appropriation after a property is reserved is dependent upon the facts and circumstances of the reservation and the water source. As the Water Court noted in relation to BLM land in *Edwards*, even if a private appropriation on federal land is technically possible, land use regulations, permits, and agreements in effect during the private appropriation may define, restrict, or preclude the right to appropriate in USFS land. *Edwards* at 30.

US Bureau of Reclamation Projects

Reclamation Ownership

In 1902, Congress passed the Reclamation Act (Act), which ultimately funded irrigation projects in the arid West to deliver water for irrigation purposes. Unlike other federal agencies, the US Bureau of Reclamation (Reclamation) does not typically hold the land beneath project infrastructure. Instead, Reclamation installs project structures by obtaining easements. Federal monies on reclamation water

development projects were repaid by the water users who benefitted from the project. The Act, like other legislation discussed herein, recognized pre-existing private appropriations.

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

The Reclamation Act, c. 1093, 32 Stat. 390 (June 17, 1903).

Stockwater Rights

Existing Rights Recognized

Beneficial Use

The Act also stated that any right to the use of water acquired under the act would "be appurtenant to the land irrigated," and beneficial use would be the "basis, the measure, and the limit of the right," raising question as to who owns the water delivered by the project. *Id*.

Ownership Issue

Several courts have examined the Act for the purpose of determining ownership of project water. In *Ickes v. Fox*, the US Supreme Court reviewed Reclamation's interest in stored and distributed water under the Reclamation Act. The Supreme Court found that although the government diverted, stored, and distributed the water at issue, the appropriation was not for the use or benefit of the federal government. *Ickes v. Fox*, 300 U.S. 82, 93-95 (1937). To the contrary, ownership of the project water went to the beneficial users and property owners. *Id*. The Supreme Court's recognition that diversion and impoundment construction alone are not enough to create ownership was crucial to this result. *Id*. at 94-96. Reclamation's property interest in the irrigation works was wholly distinct from the water right. *Id*. at 93-95.

Irrigation Rights v. Water Rights

The US Supreme Court upheld these principles again in *Nevada v. U.S.* when it addressed ownership of Truckee River water rights utilized by the Truckee-Carson Irrigation District. In that case, the US sought to shift previously decreed water rights from the Newlands Reclamation Project to the Pyramid Lake Paiute Tribe. *Nevada v. U.S*., 463 U.S. 110, 121 (1983) (*Nevada*). The Supreme Court found that the US lacked the authority to reallocate the water rights from the reclamation project to the reservation as it did not have "beneficial ownership" the reclamation water rights. *Id*. at 122-123, 126.

Separate Water Right

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches, or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.

Id. at 125 (quoting *Murphy v. Kerr*, 296 F. 536, 542, 544-545 (D. N.M. 1923)).

In *Nevada*, the federal government was simply a carrier and distributor of water. The only right held by the federal government was to the contracted sums of reimbursement money from water users for construction, and operation and maintenance. *Id*. at 123 (quoting *Ickes*, 300 U.S. at 94-96); *see generally*, *U.S. v. Pioneer Irrigation Dist*., 157 P.3d 600 (Idaho 2007).

Existing Water Rights

The 1902 Reclamation Act, on its face, recognizes pre-existing private water rights, and other courts have found private water users are the owners of water in the project. There are no Water Court cases specifically addressing the ownership of project waters. A cursory review of the DNRC water right database reveals that Reclamation has claimed a number of water rights utilized by reclamation projects. The author is not aware of any challenge to Reclamation's ownership to date.

US National Park Service Lands

National Monuments

The Antiquities Act of 1906 authorized the President to declare, as national monuments, any historic landmarks, historic and prehistoric structures, and other objects of history and scientific interest. The Antiquities Act, c. 3060, 34 Stat. 225 (June 8, 1906). In 1916, Congress passed the National Park Service Organic Act, which organized the National Park Service (NPS) and granted management authority of parks and monuments to the agency. The National Park Service Organic Act, c. 408, 39 Stat. 535 (Aug. 25, 1916). The NPS Organic Act also stated that monuments and parks would be managed for the purpose of conserving "the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id*.

Just as national forests are created subject to preexisting private appropriations, so also are some monuments and parks. In *Hunter v. U.S*., the Ninth Circuit Court of Appeals reviewed the grazing and water right claims of a livestock owner on the Death Valley National Monument. *Hunter*, 388 F.2d 148, 150 (9th Cir. 1967). Prior to creation of the monument, Hunter's predecessors had watered and grazed livestock in the area. *Id*. at 151. Hunter argued that this historic practice created a vested water right that the federal government was obligated to honor. *Id*. The Court agreed with Hunter insofar as his water right was

Stockwater Rights

Right of Way Protection

concerned. Hunter had appropriated water for an actual beneficial purpose, in accordance with California law and custom, and thus a private water right vested. *Id*. at 153. Furthermore, that right was entitled to protection, and the Ninth Circuit granted Hunter a right of way over monument lands to divert and utilize his water. *Id*. at 153-154.

It is clear from *Hunter* that private water rights preceding creation of monuments or parks are valid. The ability of a private water user to appropriate water on a park or monument after its creation, while highly improbable, is ultimately a product of each park or monument's reserving legislation and NPS management objectives and policies. The author is unaware, however, of any post-reservation private appropriations that are maintained on any Montana monument or park.

US Fish & Wildlife Service Refuges

Refuges

The modern day US Fish & Wildlife Service (FWS) and refuge system is the product of extensive organizational evolution. FWS stems from two early organizations, the Bureau of Biological Survey and the Bureau of Fisheries. As the agency evolved over time, it was given more and more management authority and oversight of refuges. In 1956, the Fish and Wildlife Act expanded the agency's authority to acquire and develop refuges. The Fish and Wildlife Act, c. 1036, 70 Stat. 1119 (Aug. 15, 1956). The 1966 National Wildlife Refuge System Administration Act further broadened FWS' scope of duties to include all areas of the refuge system, including wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas. The National Wildlife Refuge System Administration Act, 80 Stat. 927 (Oct. 15, 1966).

Private Stockwater Rights

The Water Court briefly addressed private stockwater rights appropriated on FWS refuges in *Edwards*. Specifically, the Court reviewed authorities withdrawing the Charles M. Russell National Wildlife Refuge and the UL Bend National Wildlife Refuge. *Edwards* at 30. In assessing the validity of private water rights on the refuge, the Water Court applied the same principles set forth in *New Mexico*, *Cappaert*, and *Arizona*.

> This Court simply reiterates the well-established rule that valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by any federal reservation and that state based water rights appropriated subsequent to the creation of a federal reserved water right in the same source, though not necessarily precluded, are subordinate and subject to the federal reserved right.

Id. at 31.

Private Appropriation Allowed

In short, validity of a private appropriation on a refuge depends upon: (1) whether the right was perfected prior to reservation of the refuge; and (2) whether refuge management allows perfection of private rights after refuge creation. If a refuge was created after perfection of a private water right on the land, FWS assumes management subject to the private water right. If a private water right is appropriated after creation of the refuge, acquisition and exercise of the right may be subject to federal policies, rules, and agreements governing the refuge.

CONCLUSION

Reserved Lands Policy

Private water right appropriations on the public domain were not only possible, but encouraged by the federal government in the late 1800s and early 1900s. As the federal government withdrew lands from the public domain for federal agency management, the attitude towards private appropriations shifted. While most, if not all, agency mandates recognized and protected the existence of private water rights perfected prior to land withdrawal, the validity of private water rights post-withdrawal was dependent on the land management objectives and agency mandates in place at the time of appropriation. Some mandates, such as the Taylor Grazing Act, specifically provided for future private appropriations. Other mandates, such as those for national parks and monuments, seem less forgiving of, if not prohibitory towards, private appropriations. In any case, the validity of any stockwater claim on federal land, either pre- reservation or post-reservation, is fact dependent and requires significant investigation.

Fact Dependent

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WATER BRIEFS

FLOW BOOST OR SPOTTED FROG ESA AGREEMENT

On October 28, the Center for Biological Diversity, WaterWatch of Oregon, the US Bureau of Reclamation (Reclamation) and several irrigation districts reached an interim agreement to temporarily boost flows in the Upper Deschutes River to reduce harm to the Oregon spotted frog, a threatened species protected by the federal Endangered Species Act (ESA). The deal also requires Reclamation and the water districts to consult with the US Fish and Wildlife Service to create a long-term plan on a set timeline that will further reduce harm to the frogs. The five central Oregon irrigation districts involved are the Arnold Irrigation District, Central Oregon Irrigation District, Lone Pine Irrigation District, North Unit Irrigation District, and Tumalo Irrigation District (Districts). The Confederated Tribes of the Warm Springs Reservation of Oregon and the State of Oregon were individually granted leave to participate as amici (friends of the court). *Ctr. for Biological Diversity, et al. v. Bureau of Reclamation, et al.*; Case No.: 6:15-cv-02358-JR (Oct. 28, 2016).

The Settlement Agreement stems from lawsuits brought by the two conservation groups (plaintiffs) arguing that management of Crane Prairie and Wickiup dams on the Upper Deschutes River was driving the struggling frogs toward extinction. The groups also argued that Reclamation had failed to follow the law and consult with the US Fish and Wildlife Service in a timely manner to reduce the harm from its river management operations.

The 2-inch- to 4-inch-long, black-spotted frog, now known to inhabit fewer than 100 sites, lives on the margins of both reservoirs and along the river below the dams. According to the Press Release of October 28th by WaterWatch of Oregon, large fluctuations in both the size of the reservoirs and the river's flows alternately flood and dry out the frog's habitat, in violation of the ESA.

The Settlement Agreement (Agreement) sets out detailed requirements and consultation efforts to improve Upper Deschutes River flow management by certain dates. The "Federal Defendant's Commitments Re: Completion of the Biological Assessment and the ESA Consultation," which also contains commitments by the Districts, is contained in the Agreement, pages 3-4. The Agreement also contains two sections dealing with the Districts' additional commitments regarding first, the Oregon Spotted Frog (OSF) technical team's meetings and discussions, and, secondly, the Districts' commitments regarding interim operations of Wickiup, Crane Prairie, and Crescent Lake dams and reservoirs.

The operational commitments include providing a minimum flow of 100 **c**ubic **f**eet per **s**econd (cfs) of water from September 16, 2016, to March 30, 2017, for winter flows in the Upper Deschutes River. This represents an increase compared to some years in which minimum instream flows during certain periods were closer to 20 cfs. The Agreement also provides for a minimum instream flow in Crescent Creek of 30 cfs from March 15 through November 30; with an instream flow (at the CREO gage) of 20 cfs from December 1 through March 14 (*see* Agreement, pages 5-7, for additional details). The Agreement contains an important section concerning minimum reservoir levels and operation of Crane Prairie Reservoir (page 6): "The water level in Crane Prairie Reservoir will not drop below 35,000 acre feet at any point during the term of the agreement unless inflow to the reservoir is less than the combined total of natural evaporation and seepage loss, and then will drop only to the extent dictated by those natural conditions. In addition, the reservoir may be lowered below 35,000 acre feet if: (1) the OSF Technical Team recommends a lower reservoir volume to maintain instream flows in the Deschutes River between Crane Prairie Dam and Wickiup Reservoir for the benefit of Oregon spotted frogs or fish using that stretch of the river; or (2) if necessary to undertake emergency repairs to Crane Prairie Dam, but to the minimum extent and for the minimum time needed to complete such repairs."

The plaintiffs are seeking to restore a natural flow regime in the Upper Deschutes. "Our goal has always been a science-based water management plan that benefits frogs as well as fish, other wildlife and the people of Central Oregon who cherish and rely on the Upper Deschutes," said John DeVoe, Executive Director of WaterWatch of Oregon. "The interim flow measures are a step in the right direction while parties work toward the main objective: establishing substantive flow improvements in the river. We will be holding parties to achievement of this goal under the timeline defined by the settlement."

In a Deschutes Basin Board of Control press release dated October 28th the Board noted, "[A]lthough the settlement agreement is a step in the right direction, the irrigation districts recognize that it does not permanently resolve potential concerns related to the reservoirs' impacts on the Oregon spotted frog or provide long-term liability protection to the districts. The irrigation districts and their partners remain committed to completing a multi-species **h**abitat **c**onservation **p**lan (HCP), which represents a proactive, collaborative approach to balance fish and wildlife conservation with water use in the Deschutes Basin through innovative, science-based solutions. The HCP, once approved, will result in long-term benefits to the Oregon spotted frog, bull trout, steelhead, and other fish and wildlife species, the region's water resources, and the social and economic health of communities. The HCP will also provide ESA-related liability protection to the districts."

For info: Agreement available upon request from *TWR*; DBBC website at: http://dbbcirrigation.com/news/; Jim McCarthy, WaterWatch of Oregon, 541/ 708-0731 or jim@waterwatch.org; Noah Greenwald, Center for Biological Diversity, 503/ 484-7495 or ngreenwald@biologicaldiversity.org

WATER BRIEFS

DAKOTA ACCESS PIPELINE ND

ARMY DENIES EASEMENT

In a significant victory for the Standing Rock Sioux Tribe (Tribe), on December 4 the US Department of the Army (Army) announced that it will not approve an easement that would allow the proposed Dakota Access Pipeline (DAPL) to cross under Lake Oahe in North Dakota. Jo-Ellen Darcy, the Army's Assistant Secretary for Civil Works, issued a Memorandum to the US Army Corps of Engineers (Corps), which stated that the "Army will not grant an easement to cross Lake Oahe at the proposed location based on the current record." Memorandum at 3. The Corps will instead be undertaking an environmental impact statement to look at possible alternative routes.

The Dakota Access Pipeline (DAPL) is an approximately 1,172 mile pipeline that would connect oil production areas in North Dakota to an existing crude oil terminal near Pakota, Illinois. The pipeline is 30 inches in diameter and is projected to transport approximately 470,000 barrels of oil per day, with a capacity as high as 570,000 barrels. Total North Dakota field production of crude oil, as of September 2016, was 962,000 barrels per day.

The current proposed pipeline route would cross Lake Oahe, a Corps project on the Missouri River. The Tribe notes that the current pipeline route is directly upstream from where they source their water. The Tribe's website notes: "Dakota Access Pipeline, LLC's initial draft environmental assessment of December 9, 2015 made no mention of the fact that the route they chose brings the pipeline near, and could jeopardize, the drinking water of the Tribe and its citizens. It actually omitted the very existence of the tribe on all maps and any analysis, in direct violation of the US environmental justice policies."

The Army's decision does not signal the end of the dispute regarding the DAPL's route. It does, however, show that the Corps will be undertaking a more detailed look at alternative routes and will consider issues raised by the Tribe. Assistant Secretary Darcy's Memorandum went on to state, "…I have concluded that a decision on whether to authorize the Dakota Access Pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments as contemplated in the CEQ's National Environmental Protection Act (NEPA) implementing regulations, 40 C.F.R. §1502.14 and §1503.1." Memorandum at 3.

The scope of the additional review and analysis was further spelled out in the Memorandum. "Consistent with 40 C.F.R. §1500.2(e) the Corps shall engage in the following additional review and analysis (at a minimum):

- A robust consideration and discussion of alternative locations for the pipeline crossing the Missouri River, including, but not limited to, more detailed information on the alternative crossing that was considered roughly ten miles north of Bismarck:
- Detailed discussion of potential risk of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe's water intakes, and the Tribe's water rights as well as treaty fishing and hunting rights; and
- Additional information on the extent and location of the Tribe's treaty rights in Lake Oahe." Memorandum at 3.

Darcy's rationale for requiring another look at the easement question was explained in the Memorandum at 4: "This policy decision is based on the totality of circumstances in this case, more specifically, the specific mandates of the Mineral Leasing Act (30 U.S.C. §185) the involvement of historic tribal homelands, the close proximity to reservation lands that extend into the potentially affected waters, and the potential impacts on treaty hunting and fishing rights." The Army press release of December 4th added that, "Darcy said that the consideration of alternative routes would be best accomplished through an Environmental Impact Statement with full public input and analysis."

For info: Memorandum available upon request from *TWR;* Moira Kelley, Army, 703/ 614-3992 or moira.l.Kelley.civ@mail.mil; Tribal website at: http://standingrock.org

FOREST SERVICE ROADS ID

BULL TROUT CRITICAL HABITAT

In response to a lawsuit filed by WildEarth Guardians, the US Forest Service (Forest Service) is reconsidering how it manages roads and motorized trails to better protect clean, cold water necessary for bull trout survival and recovery on the Fairfield Ranger District of the Sawtooth National Forest in central Idaho. The complaint, filed on September 30, 2016, challenged the Forest Service's and US Fish and Wildlife Service's (USFWS's) failure to analyze the impacts of roads, motorized trails, and climate change on bull trout critical habitat and ensure the protection of that habitat and the species itself as required by the federal Endangered Species Act (ESA).

ESA-listed as threatened in 1999, bull trout currently occupy less than half their historic range. The predator species requires cold, clean, complex, and connected waterways to survive. According to WildEarth Guardians, a major threat to bull trout's survival is the Forest Service's massive and decaying road system. Forest road stream crossings block fish passage and sediment in stormwater runoff from forest roads chokes native trout streams.

Under the ESA, habitat is deemed critical if it has features essential to the conservation of a listed species and needs special management or protection. After USFWS designated more than 15 streams and their tributaries as critical bull trout habitat on the Fairfield Ranger District in 2010, the Forest Service failed to consult with USFWS to ensure its motorized road and trail system does not hinder the fish's recovery.

On November 16, the plaintiff WildEarth Guardians, and the defendants Forest Service and USFWS filed a Joint Motion to Stay (Joint Motion) the lawsuit for 90 days. As noted in the Joint Motion at page 3, "[B]ecause Federal Defendants have already reinitiated ESA Section 7 consultation, the parties request a 90-day stay of the current litigation, until February 14, 2017, to allow Federal Defendants to devote their resources to completing the consultation process. The stay would conserve the parties' and the Court's limited resources

WATER BRIEFS

by avoiding potentially unnecessary litigation." The Joint Motion also provides for written status updates to the Court every 30 days to advise of the progress made during the consultation process.

The Joint Motion describes the consultation process anticipated and also includes a provision for an additional stay of 90 days.

"If, on February 14, 2017, both parties agree that Federal Defendants have met the first two benchmarks listed in Attachment C and the estimated date of consultation completion is still June 30, 2017, the parties intend to file a motion to extend the current stay by an additional 90 days." Joint Motion at 4.

The Joint Motion for a 90-day stay (and possible extension for an additional 90 days) will allow the federal defendants to complete the consultation process to assess impacts on bull trout critical habitat of the Fairfield Ranger District of the Sawtooth National Forest's motorized travel management decisions.

For info: Joint Motion available at: www.scribd.com/document/331335374/2016-11-16-Joint-Motion-to-Stay-PDF; Marla Fox, WildEarth Guardians, 651/ 434-7737 or mfox@wildearthguardians.org

FISH PASSAGE MT

ROD FOR LOWER YELLOWSTONE PROJECT

The US Army Corps of Engineers (Corps) and the US Bureau of Reclamation (Reclamation) have signed a Record of Decision (ROD) today for the Lower Yellowstone Intake Diversion Dam Fish Passage Project selecting the Bypass Channel Alternative and associated Adaptive Management and Monitoring Plan (AMP) for implementation. This Alternative involves constructing a 15,500-foot long bypass channel from the upper end of the existing side channel, to just downstream of the existing dam.

The Bypass Channel Alternative is expected to improve pallid sturgeon passage at Intake Diversion Dam and contribute to ecosystem restoration. At the same time, while an increase in operations and maintenance costs is expected, it is not anticipated to disrupt operation of the Lower Yellowstone Project.

Construction of the approximately $57 million Bypass Channel project will be funded and managed by the Corps and is expected to begin as early as the spring of 2017 and take approximately 28 months to complete. The Corps and Reclamation will implement the AMP beginning in 2017. The Lower Yellowstone Irrigation Project Board of Control will be responsible for the long term operation and maintenance of the project and for certain aspects of the AMP.

The Intake Diversion Dam is located 70-miles upstream from the confluence of the Yellowstone and Missouri Rivers near Glendive, Montana. It is a feature of the Lower Yellowstone Project which provides irrigation water to approximately 55,000 acres in eastern Montana and Western North Dakota.

For info: The ROD and other associated documents are available at: www.usbr.gov/gp/mtao/loweryellowstone/

DRINKING WATER PLAN US

SAFETY & RELIABILITY

On November 30, EPA released a plan that serves as a national call to action, urging all levels of government, utilities, community organizations, and other stakeholders to work together to increase the safety and reliability of drinking water. "Ensuring that all Americans have access to safe drinking water is an absolute top priority for EPA," said EPA Administrator Gina McCarthy. "We must work collectively to seize opportunities for progress, partnership, and innovation in order to continue to provide our citizens with the safest drinking water in the world."

The plan includes **six priority areas** and identifies proposed actions for each area:

- Building capacity for water **infrastructure financing** and management in disadvantaged, small, and environmental justice communities: Actions include launching a national initiative to promote regional partnerships, reinvigorating training programs for system operators, sharing best practices and establishing an online water funding portal.
- Advancing oversight of the **Safe Drinking Water Act**: Actions include electronic reporting for Safe Drinking Water Act compliance data, releasing triennial EPA reviews of state programs, and developing indicators to identify troubled systems.
- Strengthening **source water protection** and resilience of drinking water supplies: Actions include updating and acting on source water vulnerability assessments, building collaborative local partnerships for watershed protection, developing an initiative to enhance community resilience to climate and extreme weather events, launching source water monitoring pilot projects and promoting water efficiency and reuse.
- Addressing **unregulated contaminants**: Actions include strengthening the effectiveness of the health advisory program, prioritizing work on contaminants that pose the most significant risk, and promoting the development of low cost and innovative technologies that may remove a broad range of contaminants.
- Improving **transparency**, public education, and risk communication on drinking water safety: Actions include strengthening transparency and public education, developing indicators to enhance how data is presented on the internet and improving risk communication tools.
- Reducing **lead risks**: Actions include the consideration of critical options in revising the Lead and Copper Rule and continuing work to improve implementation of the current rule through enhanced oversight, identifying best practices on lead service line replacement, and revising guidance for schools. *See* Water Briefs, *TWR* #153.

In tandem with the development of the plan, the President's Council of Advisors on Science and Technology (PCAST) undertook a study on science and technology for drinking water safety. The PCAST's recommendations complement and support EPA's plan.

For info: Enesta Jones, EPA, 202/ 564-7873 or jones.enesta@epa.gov; Plan at: www.epa.gov/ground-water-and-drinking-water/drinking-water-action-plan; PCAST report: www.whitehouse.gov/administration/eop/ostp/pcast/docsreports

CALENDAR

December 15 TX
SWIFT Funding Workshop: Focus on Water Conservation, Richmond. Willliam B. Travis Bldg. Presented by Sierra Club & National Wildlife Federation. For info: www.SWIFTWorkshopRichmond.eventbrite.com

December 15 WEB
Emerging Legal Issues: A Lead & Legionella Trend, Webinar. Presented by American Water Works Ass'n. For info: http://www.awwa.org/store/productdetail_event.aspx?productId=62010639

December 16 WA
Tribal Natural Resource Damages Assessments Seminar, Seattle. Washington State Convention Ctr. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

January 4-6 China
9th International Perspective on Water Resources & the Environment, Wuhan. For info: http://9thasceewri.whu.edu.cn/

January 9-10 CA
SGMA, GSA Setup and GSA Preparation Conference, Los Angeles. DoubleTree by Hilton Los Angeles Downtown. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

January 10-11 NV
Leadership Forum - National Water Resources Ass'n, Las Vegas. Tropicana Las Vegas. For info: NWRA, www.nwra.org/upcoming-conferences-workshops.html

January 11 CA or WEB
Environmental Due Diligence in Real Estate Transactions Seminar, Los Angeles. DoubleTree by Hilton Downtown. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

January 13 WA or WEB
SEPA & NEPA Seminar, Seattle. Washington State Convention Ctr. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

January 18 WEB
Dealing With Potential Water Quality Issues from Source Water & Treatment Changes, Webinar. Presented by American Water Works Ass'n. For info: http://www.awwa.org/store/productdetail_event.aspx?productId=62586337

January 18-20 CO
Membership Summit - American Water Works Ass'n, Denver. AWWA, 6666 West Quincy Avenue. For info: http://www.awwa.org/store/productdetail_event.aspx?productId=62608117

January 20 OR
Conference on Environmental Protection: What's Next?, Portland. World Trade Center. For info: Environmental Law Education Center, www.elecenter.com/

January 23-25 TX
Water for Texas 2017: "Innovation at Work" Conference, Austin. AT&T Executive Education and Conference Center. Presented by Texas Water Development Board. For info: http://waterfortexas.twdb.texas.gov/

January 24-26 ID
Idaho Water Users Ass'n Annual Convention, Boise. The Riverside Hotel. For info: IWUA, 208/ 344-6690 or www.iwua.org/

January 24-26 DC
NCSE 2017 - National Conference and Global Forum on Science, Policy, and the Environment, Washington. Presented by National Council for Science & the Environment. For info: www.ncseonline.org/national-conference

January 25 TX
Dam Safety Workshop, Austin. J.J. Pickle Research Campus, University of Texas at Austin. Presented by TCEQ. For info: http://tceq.state.tx.us/p2/events/dam-safety.html

January 25-26 CA
California Climate Change Symposium, Sacramento. Sheraton Grand Sacramento Hotel. Convened by the California Natural Resources Agency, the California Environmental Protection Agency & the Governor's Office of Planning and Research. For info: www.californiascience.org/

January 25-27 CO
Colorado Water Congress 2017 Annual Convention, Denver. Hyatt Regency Tech Center. For info: http://www.cowatercongress.org/annual-convention.html

January 26-27 WA
24th Annual Endangered Species Act Conference, Seattle. Crowne Plaza Seattle. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

January 26-27 NM
Advanced Public Land Law - The Continuing Challenge of Managing for Multiple Use Institute, Santa Fe. Eldorado Hotel. Presented by the Rocky Mt. Mineral Law Foundation. For info: www.rmmlf.org

February 4-7 FL
Next Generation Compliance: Where Affordability + Innovation Intersect - 2017 NACWA Winter Conference, Tampa. Tampa Marriott Waterside. Presented by National Ass''n of Clean Water Agencies. For info: www.nacwa.org/

February 7-10 FL
The Utility Management 2017 Conference, Tampa. Tampa Marriott Waterside. Presented by the American Water Works Association and the Water Environment Federation. For info: www.wef.org/UtilityManagement2017/

February 9-10 AZ or WEB
Tribal Water in Arizona Seminar, Phoenix. Pointe Hilton Squaw Peak Resort. For info: Law Seminars Int'l, 800/ 854-8009, registrar@lawseminars.com or www.lawseminars.com

February 9-10 CA
Western Water Law Conference, San Diego. The Westin. For info: CLE Int'l, 800/ 873-7130 or www.cle.com/Western

February 13 WA
Source Control: Environmental Cleanup & Water Quality Conference, Seattle. TBA. For info: Environmental Law Education Center, www.elecenter.com/

February 13 NV
Water Rights in Nevada Class, Reno. Peppermill Resort. Presented by Nevada Water Resources Ass'n. For info: www.nvwra.org/2017-water-rights-seminar

February 13-17 CA
Membrane Technology Conference & Exposition, Long Beach. Long Beach Convention Ctr. Presented by American Water Works Ass'n & American Membrane Technology Ass'n. For info: www.awwa.org/conferences-education/conferences/membrane-technology.aspx

February 14-16 NV
2017 Nevada Water Resources Ass'n Annual Conference, Reno. Peppermill Resort. Presented by Nevada Water Resources Ass'n. For info: www.nvwra.org/2017-annual-conference-program

February 14 CA
California Agricultural Irrigation Ass'n 2017 World Ag Expo Meeting & Dinner, Tulare. Southern Edison Energy Education Center. For info: http://calirrigation.com/events.shtml

February 15 WEB
Foundations in Water Loss: New Developments in Non-revenue Water - Webinar, Webinar. Presented by American Water Works Ass'n, 11 am -12:30 pm. For info: www.awwa.org/store/productdetail_event.aspx?productId=62603976

February 16-17 WA
Agriculture Law Seminar, Wenatchee. Wenatchee Convention Center, 121 N. Wenatchee Avenue. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

February 21-23 TX
2017 Underground Injection Control (UIC) Conference, Austin. Radisson Hotel & Suites Downtown. For info: http://www.gwpc.org/events/2017-uic-conference-0

February 22 WEB
Approaches for Defining & Implementing Storm Water Billing Webinar, Webinar. Presented by American Water Works Ass'n, 11 am -12:30 pm. For info: http://www.awwa.org/store/productdetail_event.aspx?productId=62604313

February 22-24 NV
Family Farm Alliance Annual Meeting & Conference, Las Vegas. Monte Carlo Resort. For info: http://www.familyfarmalliance.org/

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

February 26-March 10 VA
Water & Wastewater Leadership Center, Leeburg. Lansdowne Resort. For info: http://waterleadership.org/

February 28-March 1 CA
Water-Energy Nexus Conference 2017, Los Angeles. Energy Resources Center. For info: www.environmental-expert.com/events/water-energy-nexus-conference-2017-20537

March 1-2 Canada
50th International Conference on Water Management Modeling, Toronto. Courtyard by Marriott Toronto Brampton Hotel. Pre-Conference Workshops on 2/27 & 2/28. For info: http://www.icwmm.org/

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CALENDAR

(continued from previous page)

March 2-3 **WA**
Permitting Strategies for Large, Controversial Projects in Washingon & the Northwest Seminar, Seattle. Crowne Plaza Downtown. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

March 7-9 **MI**
2017 Flint Water Infrasturcture Summit - A National Conversation, Flint. Riverfront Banquet Ctr. Presented by Michigan Dept. of Environmental Quality; Co-Sponsored by the City of Flint and State of Michigan. For info: www.michigan.gov/deq/0,4561,7-135-3308_3333-392619--,00.html

March 9 **OR**
Then. Now. Next. - The Freshwater Trust Event, Portland. Castaway Portland, 1900 NW 18th Avenue. For info: www.thefreshwatertrust.org/thennownext/

March 15 **CA**
Water Gala '17, San Francisco. Presented by Imagine H2O. For info: www.imagineh20.org

March 15-16 **CA**
Water Innovation 2017 Conference, San Francisco. Sir Francis Drake Hotel. Presented by Water Environment Federation. For info: www.wef.org/WaterInnovation/

March 20-21 **DC**
Ass'n of Clean Water Administrators Mid-Year Meeting, Washington. Hilton Garden Inn. For info: www.acwa-us.org/#!meetings

March 20-22 **DC**
Federal Water Issues Conference - National Water Resources Ass'n, Washington. Embassy Suites. For info: NWRA, www.nwra.org/upcoming-conferences-workshops.html

March 28 **AZ**
Irrigated Agriculture in Arizona: A Fresh Perspective - WRRC Conference 2017, Tucson. University of Arizona Student Union, 8am-5pm. Presented by Water Resources Research Center. For info: http://wrrc.arizona.edu/events/conference/wrrc-conference-2017-irrigated-agriculture-arizona-fresh-perspective

March 28-29 **CA**
35th Annual ABA Water Law Conference, Los Angeles. Loews Hollywood Hotel. Presented by Section of Environment, Energy & Resources in connection with SEER's Spring Conference March 29-31.

March 28-30 **CA**
California Municipal Utilities Ass'n 85th Annual Meeting, Carlsbad. Sheraton Carlsbad Resort & Spa. For info: http://cmua.org/events/

March 29-31 **CA**
46th Spring Conference of the Section of Environment, Energy & Resources, Los Angeles. Loews Hollywood Hotel. Presented by ABA SEER. For info: http://www.americanbar.org/groups/environment_energy_resources/events_cle.html