



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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LAKE POWELL WATER

SHEPHERDING APPROPRIATED WATER WITHIN COLORADO AND TO LAKE POWELL
FOR COLORADO RIVER COMPACT SECURITY

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Introduction

Colorado and the other states in the Upper Basin of the Colorado River — New Mexico, Utah, and Wyoming — are facing difficult water challenges. A prolonged drought beginning in 2000 has increased the risk of future curtailment of water uses in these states to meet obligations under the 1922 Colorado River Compact (Compact). A recent study attributes the significant measurable declines in water flows that the basin has already experienced to warming temperatures. Conservatively, it is estimated that there will be 20% to 35% less water available during the remainder of the 21st century. All of the Colorado River Basin states and the US Bureau of Reclamation (Reclamation) have been conducting “Drought Contingency Planning” to explore appropriate responses to these growing challenges.

A major concern for the Upper Basin states is the uncertainty respecting future water levels in Lake Powell. Natural flows reaching Lake Powell during many of the recent years of drought have not been sufficient to replace annual releases currently made to the Lower Basin plus water lost through lake evaporation. Continued declines could threaten the generation of hydroelectricity at Glen Canyon Dam. At storage levels below that necessary to generate hydropower, Glen Canyon Dam’s ability to release water is more limited, also threatening the ability of the Upper Basin states to meet downstream Compact obligations.

The Compact provides that the Upper Basin states will not cause flows at Lee Ferry (just downstream of Lake Powell) to be depleted below 75 million acre-feet in any consecutive ten-year period. This provision appears to give the Upper Basin states an affirmative obligation to protect against the risk that Lake Powell will reach levels that would make it difficult or impossible to avoid depleting the flow below the amount specified in the Compact. Consequently, the Upper Basin states have been exploring mechanisms to: temporarily reduce some existing consumptive uses of water; temporarily change the associated water rights if and when necessary; and move the conserved consumptive use water to Lake Powell to benefit the overall Upper Basin System and diminish the threat of curtailment of existing uses of water. Proactively placing additional water in Lake Powell is intended to avoid reaching lake elevations that would diminish or eliminate hydropower production and jeopardize the Upper Basin’s ability to comply with the Compact, potentially requiring curtailment of existing post-Compact water rights. We refer here to all such water as Compact security water. For additional information regarding Lake Powell storage options (*see* MacDonnell, *The “Fill Mead First” Proposal: Potential Legal Issues Under the Law of the River* — TWR #112).

Lake Powell Water

Shepherding

Transfer Methods

Storage Levels

Technical Appendix

To achieve the intended benefit to the Colorado River System, the Upper Basin, and the State of Colorado in particular, the Compact security water must actually make its way to Lake Powell. That is, the water must be moved from its existing place of use or storage and reach Lake Powell when necessary without being diminished by other water users. Absent relatively specialized circumstances, most conserved consumptive use water will require some form of administrative “shepherding” to reach the state line and Lake Powell. Water shepherding here refers to the delivery of a specified volume of conserved consumptive use water from its original place of storage or use to a downstream location without diminishment by other users.

A recent report on Alternative Transfer Methods (ATMs) addresses the issue of Colorado River Compact security and concludes that the ability to shepherd conserved or changed water to Lake Powell is essential (*see* Sources list, below). The report reflects the consensus opinion of many knowledgeable water users in Colorado. But existing water law in the Upper Basin states, including in Colorado, presents challenges for protecting Compact security water from diversion and use by others.

This article explains the basis for the concern about storage levels in Lake Powell. Focusing on Colorado, we discuss some of the legal and policy issues involved with moving Compact security water to the reservoir. We offer recommendations for revisions to Colorado law. Interstate issues and the management of Compact security water once it reaches Lake Powell are considered. A Technical Appendix is also available, providing a more comprehensive discussion of the legal and policy issues (available at: www.colorado.edu/law/research/gwc).



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Lake Powell Water

Hydropower Level

Powell Power

Compact Obligations

Demand Management

Lake Powell Storage Levels

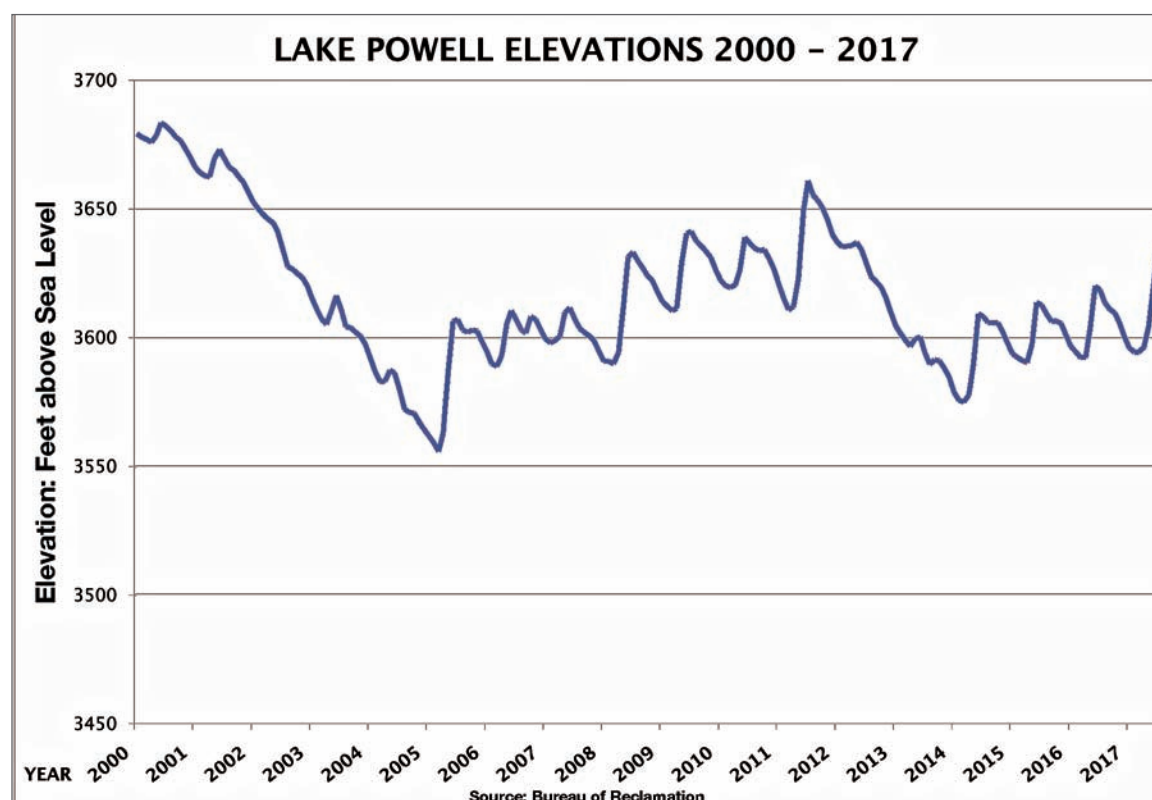
The chart below shows the actual water elevations in Lake Powell since 2000. The rapid drop in elevation between 2000 and 2005 demonstrates how quickly storage in this reservoir can disappear. Even with better flows in several of the following years, storage remains well below capacity.

Preliminary modeling suggests that the type of hydrology experienced in the Basin during some recent very dry periods (such as 2001 – 2006), could quickly plunge Lake Powell below the elevation of the hydropower turbines (3490 feet).

In addition to the natural hydrology and downstream obligations, pressure on Lake Powell is created by increasing consumptive uses in the Upper Basin and by decreases in water levels at Lake Mead, which has experienced even steeper and deeper drops in elevation. Pursuant to the coordinated operating criteria and guidelines governing these two reservoirs, water levels are “balanced” and “equalized” under certain specified conditions. Persistent declines at Lake Powell would threaten operation of the hydroelectric power facilities at Glen Canyon Dam, which generate five billion kilowatt-hours of hydroelectric power annually for users in Colorado, Wyoming, Utah, New Mexico, Arizona, Nevada, and Nebraska and earn over \$150 million in annual revenues. These revenues: fund Reclamation project operations in the Upper Basin; repay the federal treasury for project investments; and support critical environmental programs — all of which are essential to continued use of water rights in Colorado and other Colorado River Basin states. Moreover, sustained reductions in storage in Lake Powell would jeopardize the ability of the Upper Basin states to meet their Compact obligations respecting Lee Ferry flows and treaty obligations to Mexico. Substantial curtailment of existing uses in the Upper Basin states, and especially in Colorado, would likely be required.

Drought Contingency Planning and the System Conservation Pilot Program

The seven Colorado River Basin States and the US Bureau of Reclamation (Reclamation) have been engaged in Drought Contingency Planning to help bring the Basin’s water budget into better balance. In the Upper Basin, the states of Colorado, New Mexico, Utah, and Wyoming have been exploring, among other strategies, demand management arrangements in which interested water users are paid to temporarily reduce consumptive use of water. Increasing demand in the Upper Basin from population growth and related new water development puts additional pressure on the system and underscores the need for this demand management.



Lake Powell Water

Conserved Water

Preventing “Calls”

Curtailment Risk

Use Practices

Legal Structure Needed

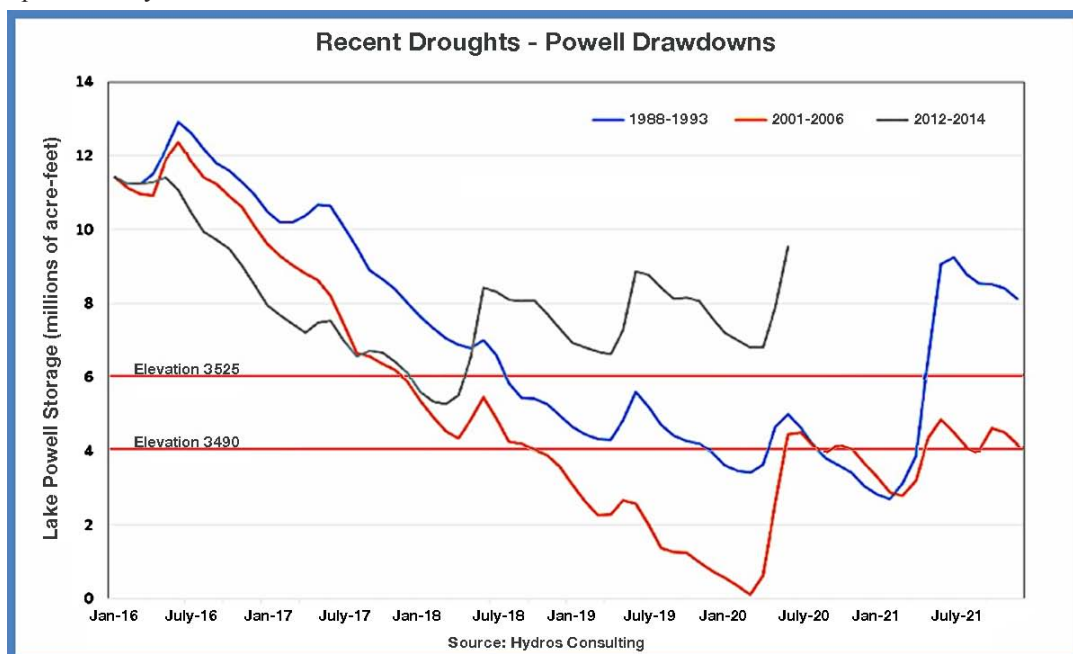
The System Conservation Pilot Program (SCPP), based on a 2014 funding agreement among Reclamation and four major municipal water suppliers in the Basin, was designed to determine whether voluntary, compensated conservation measures could create “system water” that would benefit the Colorado River Basin in general. The Upper Basin component of the SCPP has now been operating for three years, and is generally believed to have been successful in demonstrating that water users in Colorado, New Mexico, Utah, and Wyoming are willing to participate in a conserved water program.

The pilot projects funded in Colorado involve changes in traditional irrigation practices to temporarily make formerly consumptively used water available to the River. The focus of the pilot projects to date has been to: gauge potential interest in such demand management; evaluate the effectiveness of different approaches for producing conserved water; and understand the consequences to the irrigator and other water users of making the changes required. In one example, the conserved consumptive use water was routed through a hydropower plant under its water right to prevent the conserved water from being “called” and diverted by upstream water users with senior rights. In other cases, the water was likely to reach Lake Powell given the proximity to the state line, current hydrology, and lack of intervening demands. Thus far, however, the delivery of the savings to Lake Powell has not been ensured. Broader authorities and mechanisms must be considered, therefore, in order to ensure that the conserved water serves its intended purpose. In addition, the Upper Basin states will need to address the management of this water once it reaches Lake Powell.

Compact Security Water

The pressing challenge is how to make some amount of already appropriated water in the Upper Basin states available as needed to bolster storage levels in Lake Powell and thus reduce the risk of future Compact curtailment. Colorado’s Water Plan calls for strategies to maximize use of Colorado River Compact water while actively avoiding a Compact deficit. To minimize effects on agriculture and communities, interest has focused on implementing water use practices that minimally disrupt existing operations, such as: rotational fallowing; crop switching; deficit irrigation; and split season irrigation. Willing water users have volunteered to participate in such efforts in return for compensation. For this type of demand management to have the intended result of supporting Compact security, the water made available through conservation must be administered in a manner that actually moves it to Lake Powell. It must be able to move across state lines and pass downstream to the reservoir without diminishment by diverters located along the way. Once it reaches Lake Powell, it must be managed in a manner that ensures it serves its Compact security purpose.

The legal structures and their ability to provide the type of protection needed are somewhat different in each Upper Basin state. We have examined issues raised under Colorado law and the existing statutes and mechanisms that could be used to address this problem. We offer suggestions for helpful clarifications that might be made in the law. We discuss the need for coordination of Colorado’s shepherding and Compact security efforts with the other Upper Basin states. Finally, we address the need for procedures to manage Compact security water while it resides in Lake Powell so that the intended benefits are realized.



Legal Issues Under Colorado Law

COMPACT SECURITY AS A BENEFICIAL USE

Conserved consumptive use water is water that has historically been diverted or stored and consumed in a beneficial use under a water right but which the diverter has ceased consumptively using. Normally, this unused water becomes available for use by other appropriators, both upstream and downstream, unless it has a legally protected status. To make conserved consumptive use water available for Compact security purposes, the legal status of the conserved water must ensure that the conserved water can be directed to the state line without being diminished by others and that it be allowed to pass without diminishment, except for transit losses, through downstream states so it can reach Lake Powell.

Temporarily dedicating conserved or stored water to Compact security will generally require some type of state approval. If a change of use or change of place of use is involved, state approval occurs through a change of water right proceeding in water court or, under limited defined circumstances, an administrative review. [Editor's Note: These "change" proceedings are also known as "transfer" proceedings in some states.] The primary purpose of either type of review is to ensure that the change in use does not harm other appropriators. The new use retains the same priority date and historical consumptive use as the original use, but other aspects of the right, such as the point of diversion, the purpose and place of use, and the divertible quantity of water, are adjusted to reflect changes associated with the new use.

In addition to the ordinary challenges associated with obtaining approval for a change of water right, allowing conserved or changed water to be dedicated to Compact security purposes raises special issues, namely, assuring that this use of water is regarded as "beneficial" under state law. Because most beneficial uses of water in Colorado involve some type of diversion of the water from the stream, the lack of diversion in the case of Compact security water may pose a problem. Compact compliance or reducing the risk of curtailment for Compact purposes (both included in the term "Compact security") provide a clear benefit to the State of Colorado and its water users, and thus may be recognized as a beneficial use. But the traditional understanding of the kind of beneficial use sanctioned by Colorado water law has been one that generates economic benefits for the user or, in certain circumstances, improves or preserves the natural environment. Legislative language would be desirable to confirm that Compact security is an acceptable and beneficial use for a Colorado water right and that a diversion is not required under appropriately limited circumstances. A water right that allows use for Compact security can rightfully demand administration and protection of the water past would-be diverters to the state line, that is, shepherding.

OUT-OF-STATE EXPORT STATUTE

A second concern is that the water conserved for Compact security purposes would be stored in Lake Powell, located in Utah and Arizona. Colorado law governs out-of-state transport of Colorado water rights under special rules that require detailed findings, including that such water will be credited as a delivery to the downstream state for use under its Compact apportionment. In addition, a fee of \$50 per acre-foot is assessed against such exports.

Compact security water generated in Colorado would be clearly intended for the benefit of the State of Colorado and its water users and thus, may not trigger the export statute. Recent decisions in the Republican River Basin support this view, but the precise question of Colorado River Compact deliveries has not been addressed. Because, however, the ultimate destination for Compact security water is out-of-state in Lake Powell, it could be governed by the out-of-state export statute.

It may also be argued that the provisions of the Upper Colorado River Compact addressing Colorado River Compact compliance override the out-of-state export statute and, therefore, the provisions of the export statute would not apply to Compact security water. While we see merit in this view, we are concerned about potential uncertainties of interpretation and the delay in implementation that could be caused by litigation over conflicting views. Because of the statewide benefit from Compact security water, it would be appropriate in our view to treat such exports differently than other types of out-of-state deliveries. Legislative clarification on this point would be prudent, narrowly drawn to avoid unintended consequences.

CONTROL AND ADMINISTRATION OF COMPACT SECURITY WATER

A third consideration is the control and administration of a water right used for Compact security purposes. Given the public purpose for which the water is to be used, public entities with missions related to safeguarding Colorado's Compact entitlements — including the Colorado Water Conservation Board (CWCB), the Colorado River Water Conservation District (CRWCD), and the Southwestern Water Conservation District (SWCD) — probably should take an active role. Several options could be considered, including involvement by the CWCB, CRWCD, or SWCD in Compact security water transactions by taking a lease or contract interest in such water. Alternatively, the CWCB — in consultation with the State Engineer — could establish criteria that each Compact security transaction would meet. These options are explored in more detail in the Technical Appendix.

Lake Powell
Water

Beneficial Use

Change of Use

No Injury Rule

Diversion
Requirement

"Shepherding"

Out-of-State
DestinationLegislative
ClarificationTransaction
Options

**Lake Powell
Water****Commission
Finding****Pass Through
States****Interstate
Agreement****Beneficial Use
Legislation****Banking Option****Powell
Fluctuations**

While we believe legislative authorization for Compact security water would be desirable, there is a possible pathway that may not require such legislation. Upon request by the four Upper Division states, the Upper Colorado River Commission could make a finding that additional water is needed in Lake Powell to avoid future curtailment. Such a finding could provide the basis for the State Engineer to use the Compact rule power to establish procedures for shepherding Compact security water to the state line. This option also is more fully discussed in the Appendix.

Legal Considerations Outside of Colorado

Water conserved or changed in Colorado and intended for storage in Lake Powell must pass through Utah. Depending on the location of the existing water use within Colorado, the Compact security water may also need to pass first through New Mexico or Wyoming. Just as in Colorado, the water must be legally protectable in the other states to ensure that it is not consumed by their appropriators. The State of Colorado, as well as the other upstream states, will want to be certain that any additional water transported downstream for Compact security purposes receives recognition and protection in the other states. Moreover, the State will want to ensure that Compact security water stored in Lake Powell accomplishes the objectives for which it was intended. The Upper Colorado River Commission has helpful authorities for this purpose that could greatly facilitate the management of Compact security water if the Upper Basin states agree to the use of these authorities. Alternatively or in addition, an interstate agreement among all the Upper Basin states could be developed to facilitate the management of Compact security water, the quantity of water required, and the share attributable to each state. Special rules governing the use and storage of this water in Lake Powell will be needed to allow the Compact security water to remain in the reservoir until needed. These rules will require the consent and support of all seven Basin states and Reclamation.

Recommendations for Colorado

In our view the preferable and more prudent approach is to enact legislation specifically confirming the use of appropriated water for Colorado River Compact security purposes as beneficial. We further suggest that such uses be exempted from the Colorado water export statute if necessary and that the CWCB and the State Engineer be directed to establish criteria governing the use of Compact security water and rules for its shepherding to the state line. If such use of water for Compact security involves a temporary change of use, we suggest it should go through an administrative review, preferably an expanded water bank. Logical candidates to administer such a bank would be the CRWCD and the SWCD. Determination of the need for, and transport of, Compact security water in the various states and storage in Lake Powell should be coordinated through the Upper Colorado River Commission under interstate agreement.

Conclusion

As the Colorado River Basin states adjust to changing hydrology in the Colorado River Basin, adaptations of existing water uses as well as of related laws and procedures will be necessary. The Upper Basin states are now responding to foreseeable challenges as storage levels in Lake Powell fluctuate and decline. Colorado is examining options for making additional water available to maintain safe water levels in Lake Powell, including demand management within the state. We offer here our recommendations for a legal structure that will help to facilitate the purpose of demand management transactions and operations, and urge their prompt consideration.

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TECHNICAL APPENDIX available at: www.colorado.edu/law/research/gwc

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The opinions and recommendations in this paper are solely those of the authors.

Lake Powell Water

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Anne Castle is a Senior Fellow at the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment at the University of Colorado, focusing on western water issues. From 2009 to 2014, she was Assistant Secretary for Water and Science at the US Department of the Interior where she oversaw water and science policy for the Department and had responsibility for the US Bureau of Reclamation and the US Geological Survey. While at Interior, Castle spearheaded the Department's WaterSMART program, which although not an entirely original name despite best intentions and multiple trademark searches, provides federal leadership on the path toward sustainable water supplies. She was the driving force behind the 2010 federal Memorandum of Understanding (MOU) addressing sustainable hydropower, the largest, least respected, and most vilified form of renewable energy in the country. Castle also provided hands-on leadership on Colorado River issues and was the Chair of the Glen Canyon Dam Adaptive Management Work Group and a champion of Minute 319 between the US and Mexico. Castle is a recovering lawyer, having practiced water law for 28 years with the Rocky Mountain law firm of Holland & Hart.

Public
Interest

PUBLIC INTEREST & WATER LAW

AN EXAMINATION OF PUBLIC INTEREST IN WASHINGTON STATE WATER LAW

by Rachael Paschal Osborn

Balancing Tool

INTRODUCTION

The public interest doctrine is a tool used to balance the resource-exploitive dominance of the prior appropriation system of water allocation. Consideration of the public interest has been in the law from inception, but was infrequently used in the early days of Washington's Water Code. Its importance emerged commensurate with the "environmental revolution" of the 1960s and 70s. The doctrine continues to evolve today. Future use of the public interest doctrine will continue to expand as the need to preserve water resources becomes more intense due to historic over-appropriation and future unfolding climate change. Professor Joseph Sax described the public interest phenomenon:

Public Resource

Water, as a necessary and common medium for community development at every stage of society, has been held subject to perceived societal necessities of the time and circumstances. In that sense water's capacity for full privatization has always been limited. The very terminology of water law reveals that limitation: terms such as beneficial, non-wasteful, navigation servitude, and public trust all impart an irreducible public claim on water as a public resource, and not merely a private commodity.

Professor Joseph Sax, quoted in Bates, Sarah F., D.H. Getches, L.J. MacDonnell, and C.F. Wilkinson, *Searching Out the Headwaters, Change and Rediscovery in Western Water Policy* at p.148 (Island Press 1993).

Allocation
System

It is natural to ask, just what is the "public interest"? As a starting point, subject to pre-existing Native American tribal rights, water is a publicly owned resource. Rainfall, flowing waters, groundwater, saltwater and springs — all water in Washington State — is publicly owned, held by the state in trust for the citizens of the state.

Access to the use of Washington's waters is through the entry-gate known as the water right allocation system, based on the law of prior appropriation (with some early riparian rights grandfathered in). This system allows for privatization and commodification of public waters, and has led to overuse of water in many areas.

Public Uses

Public uses of water resources occur in various ways, often centered on the concept of "the commons." Aquatic uses of water are of ecological importance, and benefit animal and plant species ranging from mud-dwelling benthic invertebrates to the wild Pacific salmon. Not surprisingly, public interests enumerated in Washington's water policy statute include "wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a). Maintenance of high water quality is also a public interest. RCW 90.54.020(3)(b).

Stewardship

The public interest in water resources is also expressed through concepts such as stewardship and environmental justice. Stewardship entails a duty to protect public uses which cannot be reduced to private ownership. One aspect of stewardship called out directly in water law is the prohibition on waste of water (and corollary emphasis on water use efficiency). Environmental justice includes honoring the treaties and executive orders between Native American Tribes and the United States that permit non-Indians today to occupy the lands of Washington State and utilize its resources.

Instream Flows

Protecting waters in situ for public use and enjoyment has both intrinsic and economic value. Generally, such protections stand in opposition to the extractive goals of the water allocation system, although prior appropriation has been adapted to provide for some basic protection of instream flows.

This article begins by identifying where in Washington State's constitution and statutes references to the public interest may be found. I then examine the Washington State Department of Ecology's (Ecology's) water right procedures and provide examples of how the public interest has been implemented in water right decision-making — including Washington appellate decisions, and Pollution Control Hearings Board decisions that have discussed the public interest. The last section discusses the future of the public interest doctrine, including its relevance to the looming problem of climate change.

EVOLUTION OF THE PUBLIC INTEREST IN WASHINGTON LAWS

Public Interest**The Washington State Constitution**

The public interest in water is broadly established in Washington's laws. The Washington State Constitution, Article XVII, § 1, sets forth the declaration of public ownership of tidelands and bedlands:

Public Ownership

[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high tide within the banks of all navigable rivers and lakes...

Equal Footing

State ownership of navigable waters originates in the Equal Footing Doctrine, under which the United States' Constitution provides that new states enter the Union on the same footing as the original thirteen states. The original states assumed their sovereign attributes, including water ownership, based on the powers of the King of England. Hence all states, including Washington, own all waters not previously reserved by the US and Native American Tribes, or otherwise granted to third parties at the time of statehood. *See PPL Montana v. Montana*, 132 S.Ct. 1215 (2012).

Constitution

Article XXI of the Washington Constitution provides that "[u]se of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use." This provision has been applied primarily in condemnation proceedings. Many other purposes are deemed acceptable and legal uses of water. *See Utter, Robert F. and Hugh D. Spitzer, The Washington State Constitution, A Reference Guide* at 224-25 (Greenwood Press 2002).

The Public Trust Doctrine**Generally**

Flowing from the State Constitution is the constitutional and common law-based Public Trust Doctrine (PTD), which attached to Washington's navigable waterways no later than 1889, when Washington became a state. Contours of the PTD were first explicitly described by the Washington Supreme Court in *Caminiti v. Boyle*, a case challenging legislation that de-regulated the use of private docks:

Navigable Waterways

The public trust doctrine is an ancient common law doctrine that recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities...This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery....[S]overeignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public.

Held in Trust

107 Wn.2d 662, 669 (1987).

The PTD is "partially encapsulated" in Article 17 of the Washington state constitution. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232 (1993). Because of the doctrine's constitutional underpinnings, any legislation that impairs the public trust remains subject to judicial review. The legislature may dispose of the public right to use navigable waters only to promote the interests protected by the PTD or to further some other interest if doing so does not substantially impair the public trust resource. *Caminiti, supra*; *see also Utter, supra* at 216-17.

Washi

In addition to protecting traditional public uses of navigable waters such as navigation, commerce, and fishing, in Washington the PTD has been expanded to protect public uses such as "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes" *Orion Corp. v. State*, 109 Wn.2d 621, 641 (1987). The *Orion* Court also found that public trust principles are reflected in the policies of Washington's Shoreline Management Act, Ch. 90.58 RCW, which contemplates "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life." *Id.*

The Public Trust Doctrine and the Washington Water Code

The Public Trust Doctrine has been employed by Courts to inform and decide permit decisions relating to Washington's Shoreline Management Act, Ch. 90.58 RCW, and the regulation of aquatic resources (for example, geoducks). *E.g., Orion Corp., supra*; *Esplanade Properties v. Seattle*, 307 F.3d 978 (2002); *Nelson Alaska Seafoods v. Washington*, 143 Wn.App. 455 (2008).

Public Interest Delegated Authority Instream Flow Issue Water Code Groundwater Code Four Part Test Power & Watersheds Groundwater Changes & Transfers Other Code References	The Washington Supreme Court, however, has rejected use of the Public Trust Doctrine by Ecology's Water Resource Program as an independent source of authority in making water right enforcement and permitting decisions. <i>Rettkowski v. Dept. of Ecology</i>, 122 Wn.2d 219, 232 (1993); <i>R.D. Merrill v. Pollution Control Hrgs. Bd.</i>, 137 Wn.2d 118, 133-34 (1999); <i>Postema v. Pollution Control Hrgs. Bd.</i>, 142 Wn.2d 68, 98-99 (2000). The statements in these cases are based on <i>Rettkowski's</i> questionable analysis that, because the Legislature has not specifically delegated authority to "assume the state's public trust duties" to Ecology's Water Resources Program, therefore such authority does not exist. <i>Rettkowski</i>, 122 Wn.2d at 232. As a constitutional and common law doctrine controlled by the judiciary, one would not expect to find express legislative delegation of the Public Trust Doctrine in an agency's enabling statutes. The more important question, however, may be whether the Public Trust Doctrine constrains Ecology's decision-making in any way. This, as well as how the Doctrine informs the development and adoption of Washington's instream flow regulations (particularly for navigable rivers), has yet to be addressed by the courts. Water Code Statutes and the Public Interest PUBLIC OWNERSHIP Public ownership of and interests in waters of the state are established in the initial sections of Washington's 1917 Surface Water Code. "Subject to existing rights all waters within the state belong to the public..." RCW 90.03.010. Further, RCW 90.03.005 provides: [i]t is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights. Likewise, Washington's 1945 Groundwater Code establishes public ownership of groundwater resources: "Subject to existing rights, all natural groundwaters of the state [and] all artificial groundwaters that have been abandoned or forfeited, are hereby declared to be public groundwaters and belong to the public..." RCW 90.44.040. References to the public nature and ownership of groundwater are replete throughout the Groundwater Code. <i>E.g.</i>, RCW 90.44.050, .060, .070, .080, .090, .100, .105, .110, .130, .180, and .250. PUBLIC INTEREST REGULATION As the Washington State Supreme Court has observed: "[w]ithout question, the state water codes contain numerous provisions intended to protect public interests." <i>R.D. Merrill</i>, 137 Wn.2d at 134. The most widely used public interest proviso resides in the water right permitting section of Washington's Surface Water Code, which establishes the "four part test" for issuance of a new water right. Applicants for a new water right must show that: (1) water is physically available; (2) the proposed use will not impair existing water right holders; (3) the use is beneficial; and of particular interest here, (4) the appropriation "as proposed in the application will not...be detrimental to the public welfare..." RCW 90.03.290(3). Also, use of water resources for power production is called out as a particular use subject to public interest review. RCW 90.03.290(1). Watershed planning also evokes public interest considerations: "[T]he department shall rely upon the [watershed] plan as a primary consideration in determining the public interest related to such decisions." RCW 90.82.130(4). The Groundwater Code requires evaluation of the public interest when groundwater permits are processed, by explicitly referencing the water right permit provisions in the Surface Water Code. RCW 90.44.060. Groundwater changes or transfers also require public interest review, based on reference to the Surface Water Code procedures for new permits. RCW 90.44.100. Under the Water Resources Act of 1971, RCW 90.54.010(10), "[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions." This statute ostensibly requires public interest review for all water right decisions. However the Supreme Court disregarded this statute when it ruled that Ecology may not consider the public interest when processing changes or transfers of surface water rights. <i>See discussion of PUD No. 1 of Pend Oreille County v. Ecology</i>, below. The water code statutes contain numerous other references to the public interest or public welfare: • RCW 90.03.110 and 90.44.220: Ecology to consider public interest in filing a general stream or groundwater adjudication. • RCW 90.03.255 and 90.44.255: Legislative finding that it is in the public interest to impound excess water to be used for mitigation for new water rights and to offset impacts to instream resources. • RCW 90.03.320: The public interest must be considered when a water right holder seeks an extension of time to put water to use. • RCW 90.03.383: The public interest supports the grandfathering of interties existing and in use as of
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Public Interest

Family Farm Act

Instream Flow Protection

Base Flows

Enforceable Water Rights

January 1, 1991, and it is in the public interest to develop a coordinated process to review proposals for interties commencing after that date.

- RCW 90.03.655: The department considers the public interest when deciding whether to expedite applications within a water source.
- RCW 90.42.040: Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired.
- RCW 90.66.030: It is in the public interest to conserve and wisely use public waters to benefit the greatest possible number of Washington's citizens. Pursuant to the Family Farm Act, this is accomplished by limiting use of agricultural water to family farms no larger than 6,000 acres.
- RCW 90.80.030: The department must consider the public interest when deciding whether to create a local water conservancy board.

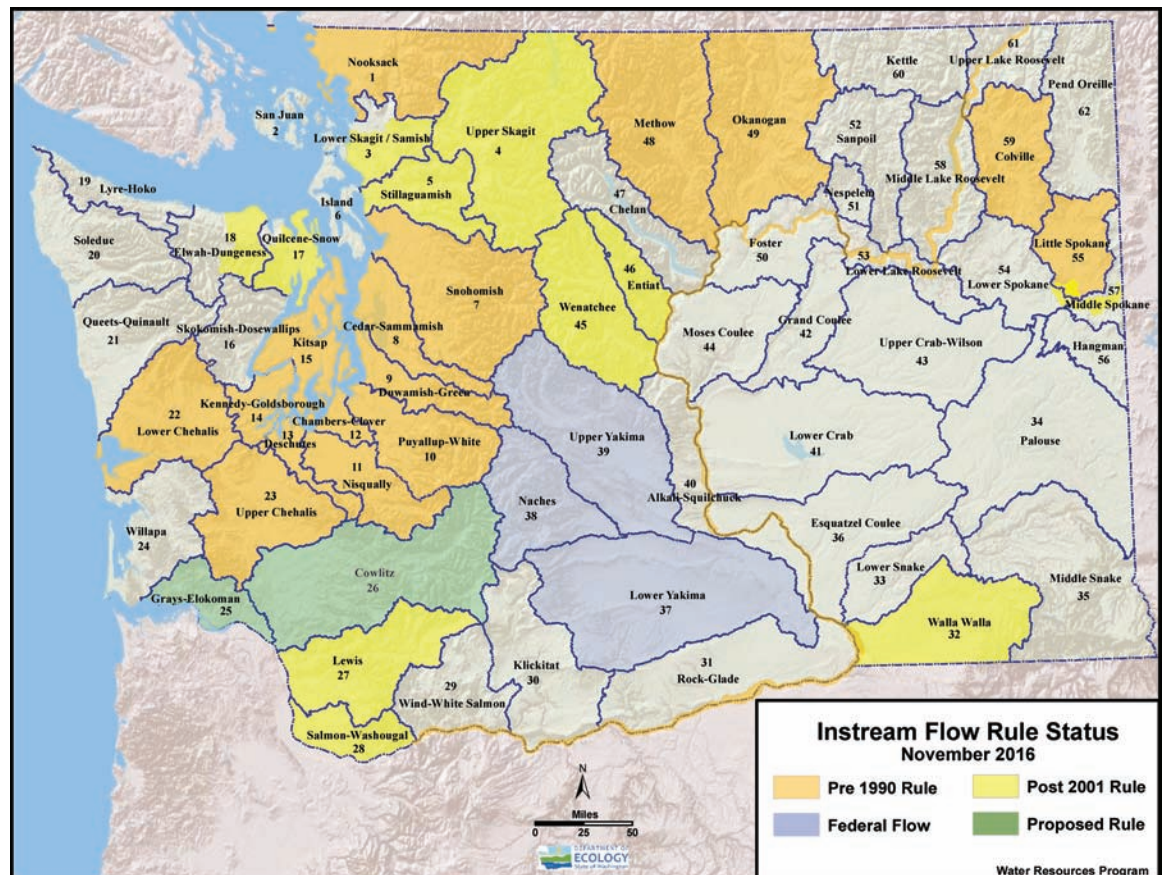
INSTREAM FLOW STATUTES

Protecting water instream — referred to as: in situ; instream; or environmental flows — is one of the strongest mechanisms for protecting the public interest in the water resource commons.

Under Washington's 1969 Minimum Water Flows and Levels Act, "[t]he department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be *in the public interest* to establish the same..." RCW 90.22.010 (emphasis added).

Washington's Water Resources Act of 1971 mandates protection of public interests: "The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a).

Pursuant to these two statutes, Ecology adopts instream flow regulations that are defined as enforceable water rights. RCW 90.03.247, 90.03.345. These instream flow regulations are codified at Chs. 173-500 through 173-564 WAC. The state is divided into 62 administrative watersheds (Water Resource Inventory Areas), but Ecology has adopted instream flow regulations for only about half the state.



Public Interest "OCPI" Fisheries Impacts (Objections) Conversion to Instream Flow Relinquishment Protection Anti-Speculation Beneficial Use "Waste" Reasonable Efficiency Public Supply	Actions that would harm or deplete instream flows and high quality waters may be taken only if "overriding considerations of the public interest" (OCPI) are found to supersede the instream flow mandate. RCW 90.54.020(3)(a), (b). Significant litigation has placed a narrow construction on this exception, illuminating what the public interest is <i>not</i>. For example, new water supply for private development is not in the public interest, nor is providing water for public supply, at least insofar as these uses conflict with instream flows. <i>See</i> discussion of <i>Swinomish Indian Tribal Community v. State</i> and <i>Foster v. Yelm</i>, below. The State Fisheries Code, RCW 77.57.020 (formerly 77.55.050, first adopted in 1949), provides: "It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state." The statute requires Ecology to notify the Washington Department of Fish & Wildlife (WDFW) of all water right applications, and authorizes WDFW to object to any proposed permit based on impacts to fisheries. Ecology has discretion to deny a water right based on WDFW's objection pursuant to the "detriment to public welfare" criterion for water right permitting. RCW 90.03.290(3); <i>see also</i> PCHB decisions below. WDFW's several hundred recommendations are collected in Ecology's Surface Water Source Limitation (SWSL) list, and continue to serve as low flow limitations for proposed water rights. <i>See</i> WAC 173-500-050(8) and 173-500-060(4). TRUST WATER RIGHTS Out-of-stream water rights may be "retired" and converted into enforceable instream flows via Washington's Trust Water Right program. Chs. 90.38 RCW (Yakima Basin) and 90.42 RCW (trust water rights program generally). Under this program, the state may purchase or acquire water rights by donation, and convert them to instream flows or create water banks that are used to mitigate new water rights. The state is often assisted in this process by non-profit organizations such as Washington Water Trust, which act as brokers between private parties and the state. Trust water rights have been utilized to increase flows in over-appropriated streams, usually to the benefit of fisheries restoration. However, the program is also frequently employed to "park" unused privately-held water rights and protect them from relinquishment, diminishing the value of the program to provide public benefits. BENEFICIAL USE OF WATER RESOURCES Early prior appropriation law was founded on the concept of anti-speculation — it required that water rights be used in fact ("use it or lose it") and with reasonable efficiency. A water right is a "usufruct" — meaning it is a right of use, not physical ownership, and the way in which the water is used informs the scope of the water right. Water hoarding and waste have long been prohibited. The goal has been to extend scarce supplies to as many users as possible, thereby promoting economic development. These rules are encompassed within the doctrine of "beneficial use" — an all-purpose legal concept which requires that water use be actual, for a beneficial purpose, reasonably efficient, and accomplished without waste. While the origin of these rules was to promote private exploitation of water resources, the beneficial use doctrine now serves important public interests, including stewardship of water resources for the public good. Washington's Water Resources Act of 1971 explicitly denominated beneficial purposes of water to include instream uses that depend on water as a public commons, including navigation, water quality, recreation, fish and wildlife habitat, and scenic beauty. RCW 90.54.020(1). The surface water and groundwater codes prohibit waste of water. RCW 90.03.005; 90.44.110; <i>see also</i> RCW 90.03.400 (waste of water a criminal misdemeanor). Combined with the history of the development of prior appropriation law, these statutes informed the Washington Supreme Court's important ruling that water resources must be used with reasonable efficiency. <i>Dept. of Ecology v. Grimes</i>, 121 Wn.2d 459 (1993). The <i>Grimes</i> decision provides a detailed framework by which the efficiency of agricultural water use should be evaluated. A lesser known administrative case documented the procedures and law for finding waste of water by an irrigation district (harming both junior water users and instream flows), holding that "the prohibition on waste is a long-standing precept of water law enunciated in both common law and statute." <i>Methow Valley Irr. Dist. and Okanogan Wilderness League v. Dept. of Ecology</i>, PCHB No. 02-071, -074, <i>Findings of Fact, Conclusions of Law and Final Order</i> at 25 (2003). Principles of reasonable efficiency and water conservation create a strong foundation for reducing wasteful extraction of water from the source, preserving it as a public commons or making it available for appropriation. However, despite strong laws and precedent, Ecology's Water Resource Program has virtually no process or framework to require efficient water use by existing water rights. PUBLIC WATER SUPPLY AND THE PUBLIC INTEREST A public interest exists in the provision of public water supply. However, public supply water rights are limited by requirements of diligence and efficiency. RCW 90.03.460; RCW 70.119A.180. Washington's Municipal Water Law of 2003 — which grandfathered large, unused water rights held by various types of water purveyors — has undermined the ability of the state to protect water resources for the public good. <i>See</i> RCW 90.03.330(3) (finding inchoate water right certificates to be "in good standing");
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Public Interest Water Availability Inchoate Municipal Rights “Safe Sustaining Yield” “Mining” SEPA Exemptions Growth Management Act Sustainability Treaty Rights	<i>Cornelius v. Ecology</i>, 182 Wn.2d 574, 601-02 (despite 40-plus years of non-use, a municipal water right has nonetheless been used with reasonable diligence). Further, the extractive nature of public water supply puts it in competition with instream flows and sustainable groundwater systems that benefit the public. Washington courts recently declined to elevate public water use over public interests in instream flows. In <i>Foster v. City of Yelm</i> the Washington Supreme Court observed that “municipal water needs, far from extraordinary, are common and likely to occur frequently as strains on limited water resources increase throughout the state.” 184 Wn.2d 465, 476 (2015). The Court also addressed the issue in <i>Swinomish Indian Tribal Community v. State</i>, 178 Wn.2d 571, 587: There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under [Ecology’s invalid] balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971...explicitly contemplates the value of instream resources for future populations: Adequate water supplies are essential to meet the needs of the state’s growing population and economy. At the same time <i>instream resources and values must be preserved and protected so that future generations can continue to enjoy them</i>. RCW 90.54.010(1)(a). (Emphasis in original) Public interests in preservation of water resources as a commons directly conflicts with the provision of water for a public water supply. However, as long as pre-existing unused municipal rights enjoy priority, the degradation of instream flows and aquatic habitat will increase, and public use and enjoyment of them will continue to decline. OTHER EXPRESSIONS OF THE PUBLIC INTEREST RELEVANT TO WATER RESOURCE ALLOCATION The “safe sustaining yield” proviso of the Groundwater Code authorizes Ecology “to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body.” RCW 90.44.130. “Safe yield” and the more conservative term “sustainable yield” generally are defined to mean maintaining groundwater withdrawals to prevent groundwater “mining” (i.e., withdrawing more groundwater than is replenished naturally). However, pursuant to the Washington Supreme Court, this statute applies only to new water users and (perhaps) senior appropriators seeking to limit junior users. See <i>Cornelius v. Washington State University</i>, below. Eastern Washington basalt aquifers are in substantial overdraft (“mined”) condition, and unfortunately RCW 90.44.130’s “safe, sustaining yield” mandate has done nothing to address the problem. [The physical status of these aquifer systems are described in US Geological Survey, Columbia Plateau Groundwater Availability Study at https://wa.water.usgs.gov/projects/cpgw/index.html.] The Washington State Environmental Policy Act (SEPA), Ch. 43.21C RCW, is designed to protect public interests in Washington’s environment. However, the Legislature and Ecology have categorically exempted water diversions of less than 50 cubic feet per second (cfs) for irrigation projects, or 1 cfs or 2,500 gallons per minute (gpm) for any use, from SEPA’s environmental impact evaluation requirements and commensurate mitigation potential. RCW 43.21C.035 and WAC 197-11-800(4). The Growth Management Act (GMA), Ch. 36.70A RCW, includes several provisions requiring local government to protect water resources as part of comprehensive plans and development regulations. The GMA goal to protect the environment, expressed in RCW 36.70A.020(10), includes: “water quality...and the availability of water”), 36.70A.030(15)(d) and (g) (“Rural character” refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan... (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat; and... (g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas), 36.70A.070(1) (land use elements “shall provide for protection of the quality and quantity of groundwater used for public water supplies”), 36.70A.070(5)(c)(iv) (rural elements to include measures “[p]rotecting ...surface water and groundwater resources.” Local governments must also consider water sustainability when issuing building permits and subdivision approvals. RCW 19.27.097, 58.17.110. These statutes were litigated in the <i>Kittitas County</i> and <i>Whatcom County</i> (aka <i>Hirst</i>) decisions, discussed below. The Washington Water Code and Tribal Treaty Water Rights In Washington, a largely unfulfilled public interest resides in recognition of Native American Tribal water rights, particularly the rights reserved by the Tribes to protect treaty fisheries. The treaties enabled settlement of Washington by non-Indians and created essentially contractual obligations of the state and federal governments. Respect for, and conduct upholding, treaty provisions promotes environmental justice and the public interest.
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**Public
Interest****“Stevens
Treaties”****Off-Reservation
Fisheries****Tribal
Priority Dates****Tribal Rights
Protection****New
Water Rights****Report of
Examination****Fully
Appropriated****Mitigation Plans**

In the mid-nineteenth century, various Native American Tribes of the Pacific Northwest entered into a series of treaties with the United States — now known as the “Stevens Treaties” — that reserved to the Tribes their ancestral fishing rights. *See, e.g., Treaty of Point Elliott*, Art. V, Jan. 22, 1855, 12 Stat. 927, 928; *Treaty with the Yakama*, Art. III, ¶ 2, June 9, 1855, 12 Stat. 951, 953. In addition to reserving rights to take fish on and off reservation, the Tribes retained the right to co-manage fisheries with state agencies, and to maintain healthy aquatic habitat that produces the fisheries. *U.S. v. Washington*, 827 F.3d 836 (9th Cir. 2016), *modified* 853 F.3d 946 (2017), *cert. pending*.

Tribal water rights to support off-reservation fisheries are recognized by the Washington Supreme Court. In 1993, the Court held that, pursuant to the US-Yakama treaty, the Yakama Nation holds an aboriginal water right to maintain off-reservation instream flows sufficient to support treaty fishery habitat. *State v. Yakima Reservation Irrigation District*, 121 Wn.2d 257, 262 (1993). Many Tribes located in Washington hold similar rights, largely unquantified and less limited, based on treaties reserving their rights to fisheries and other natural resources.

Native American fisheries-based water rights have a priority date of “time immemorial.” *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1983). Pre-dating the state water code statutes and pre-1917 water claims, all Washington state water rights are subordinate to Tribal fisheries-based water rights. Tribes also own “*Winters*” water rights for on-reservation water use that supports both off-stream and instream uses. The *Winters* or reserved rights doctrine recognizes Tribal rights to a quantity of water sufficient to fulfill the purposes of Native American reservations. The priority date of such rights is usually the date of treaty or executive order establishing the reservations, or time immemorial for fishing and hunting rights.

The mechanism for protection of Tribal interests in the water rights process is less than optimal. Ecology notifies Tribes of water right applications pending in areas where they exercise fishing rights. The 1989 Centennial Accord contemplates substantive consultation between the State and Tribes for this type of resource allocation. *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington* and implementing documents, available at Governor’s Office of Indian Affairs, <http://goia.wa.gov>. However, Ecology routinely issues water rights that jeopardize Tribal interests, casually noting in some but not all new water permits that “[t]his authorization to make use of public waters of the state is subject to existing rights, including any tribal water rights held by the United States for the benefit of tribes, to the extent they may exist.” Ecology will engage in notification to Tribes per Water Resource Program Policies PRO-1043A (Dispute Resolution, State and Tribal Comments on Water Right Applications) (rev. 1990) and PRO-1105A (Notification of Indian Tribes of Water Right Applications) (rev. 1990). Experience has shown that Tribal vigilance is required to ensure protection of instream flows.

APPLICATION OF PUBLIC INTEREST IN AGENCY ACTIONS AND COURT DECISIONS**Agency Interpretations****Water Right Process**

When a proposed water user applies for a new water right, Ecology must first investigate to determine whether the proposed use will meet the statutory requirements. As noted, the four-part test for a water right requires that: 1) water be available; 2) that the new use not impair existing uses; 3) that the use be beneficial (i.e., a proper purpose and quantity for that purpose); and 4) that it not cause harm to the public welfare, also called the public interest. RCW 90.03.290(3).

At one time, the water right investigation to address these elements was pro forma. Findings from Ecology’s water right investigation are set forth in document called a Report of Examination (ROE) which, until the 1990s, might be written up on two pages. Since that time, however, the investigation and findings have become much more elaborate.

This increased analysis arises for primarily three reasons:

First, Washington’s waters are for the most part fully or over-appropriated. To issue or deny a water right takes a lot more evaluation than in previous years to ensure that senior water users are not impaired and to generally protect the public interest in a sustainable water supply. Present-day ROEs typically include sections discussing: SEPA; hydrologic impacts including hydrogeological analysis for groundwater rights; notification to Native American tribes; notification to other affected agencies; water system plans (if public water supply is involved); and many other factors. *See* Dept. of Ecology, Water Resource Program Policy, Water Rights Processing Procedures, PRO-1000, pp. 8-10 (rev. 3-30-15).

Second, the advent of environmental laws, including consideration of the real-world impacts of water use, has made the evaluation much more complicated.

Finally, arriving quite recently, applications for new water rights often include a mitigation plan to offset the adverse impacts arising from over-appropriation and environmental repercussions.

Public Interest Allocation Problems Guidance Lacking Permitting Factor Public Interest Findings Economic Element Rejected Private Economic Activity Interpretations Mixed	All of these factors require explanation and analysis in the ROE. The resulting detailed analysis provides much greater consideration and protection of public interests in water resources than has previously occurred in the 100-year history of the Washington Water Code. That said, the proverbial horses have long-departed the barn. Washington has allocated too much water from Washington's rivers and aquifers, as is evident in the health of aquatic ecosystems throughout the state, measured by metrics such as: endangered species listings; impaired water quality listings; and declining groundwater levels (especially in eastern Washington basalt aquifer systems). Explicit Application of the Public Interest Test in Water Right Processing Agency Guidance Ecology guidance on use of the public interest in water right decisions is minimal. Although the agency has promulgated numerous policies governing various water right topics, it has not done so for the public interest test. Ecology's Water Right Investigator's Manual (May 2013) contains two pages of discussion about use of the public interest, recommending that permit writers research the Water Resources Act, SEPA, consistency with natural resource, land use and water supply plans, water conservation, and protection of aquifer zones. Water Right Decisions As noted above, Ecology is required to consider detriment to the public interest in water right decisions. RCW 90.03.290. Consideration of the public interest is often limited to determining whether a third party protested, or WDFW commented on, a subject application. If not, no detriment is found. Examples of public interest findings in recent Ecology decisions include the following: • Washington Dept. of Fish and Wildlife, Water Right No. S3-29491 (McGilvra Springs) (2015). Application for stockwater/wildlife diversion denied because it is redundant to an existing water right claim, and therefore speculative and not in the public interest. • Kitsap Public Utility District, Water Right No. G1-23071 (Pioneer Hill) (2014). Application to add new point of diversion to municipal water right approved. It is in the public interest to bring an illegal well serving a rural subdivision under the umbrella of the local public utility district's water rights. • Wilson Creek-Coulee City area Reports of Examination, e.g., Isaac Land, Mark Gregson (draft denials 2014). Permits denied because "[t]he area is experiencing significant groundwater level declines. New water rights would worsen aquifer mining. It would impair existing water rights and would not be beneficial to the long term economic stability of the area, which relies heavily on agriculture and ranching. Therefore issuance of this application is not in the public's interest." • Sherman Polinder, Report of Examination, Water Right No. S1-28777 (2015). Controversial permit "correcting" unauthorized water use is in the public interest because user will be required to curtail during low flow periods, will meter and report water use, and will be able to continue agricultural operations. This water right raises an interesting public interest problem, because the instream flow regulations that trigger curtailment of the right, WAC 173-501-030, are obsolete. Specifically, they are inadequate to provide habitat for Endangered Species Act-listed salmonids. This fact was not identified or considered in the ROE, nor did the WDFW object to the proposed water use. Washington courts have rejected the use of private economic activity as a public interest factor. The profit element of a given transaction is not a proper consideration for evaluating a proposed water right. <i>Schuh v. Dept. of Ecology</i>, 100 Wn.2d 180, 186, n.2 (1983). More recently, the Court ruled that the reservation of domestic water for residential development is a private, not public, use, and cannot serve as an "overriding public interest" to the detriment of instream flows. <i>Swinomish Indian Tribal Community v. State</i>, 178 Wn.2d 571, 587 (2013). Nonetheless, the Office of the Columbia River (OCR), which issues water rights for the Columbia River mainstem, equates the public interest with private economic activity. OCR-issued water rights typically contain assertions that the public interest is served through issuance of the water right because the project will generate new jobs, revenue, and other economic benefits to individuals and communities in the Columbia Basin. For example, a recent OCR-issued water right states that "[t]he proposed use of water would support a business currently employing many people in and around Paterson, Washington. The continued viability of this business provides jobs and economic stability to a region of the state largely dependent on agricultural commodities. Favorable processing of this application would not be detrimental to the public interest." <i>OCR Report of Examination, St. Michelle Wine Estates Ltd.</i>, Water Right No. G4-33121 (2-24-15). In sum, Ecology's interpretations of the public interest prong are mixed. Protection of instream flows clearly merits proactive public interest findings, but there remains a strong emphasis on authorizing illegal water uses and promoting economic activities. When challenged, these latter uses often do not prevail in the courts.
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Courts Decisions on the Public Interest in Water Law

The following chronological list identifies most of the cases discussing public interest or public welfare concerns in the context of a water resources dispute, including cases in which the term was not explicitly used, but public interest concerns were at issue in the case. Some are water right appeals, and a few involve challenges that implicate the water resource statutes. (Disclosure: the author represented a party or amicus in some of the decisions discussed below.)

- *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973). The newly enacted SEPA and Water Resources Act function as an overlay on the water code to require consideration of environmental, public interest values.
- *Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993), *affirmed*, *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900 (1994). RCW 90.54.020(3)(a) (requiring protection of instream values) is an “appropriate requirement of state law,” which serves as “congressional authorization to the states to consider [instream flow quantity issues] when imposing conditions on section 401 certificates.” “Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and base flows...Ecology’s base flow limitation in the 401 certificate was an appropriate measure to assure compliance with RCW 90.54.020(3)(a) as well as the water quality standards.”
- *Hubbard v. Ecology*, 86 Wn.App. 119, 936 P.2d 27 (1997). New groundwater withdrawals that deplete protected instream flows are a detriment to the public interest. Also, RCW 90.03.005’s balancing of economic uses with protection of instream flows expresses the public interest.
- *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000). When Ecology issues a water right decision, it must consider the relationship between ground and surface waters. In assessing hydraulic connectivity, Ecology may and should use new scientific methods to determine impairment. If a proposed new groundwater withdrawal will deplete instream flows when a river is not meeting its regulatory minimum flows, the new withdrawal must be denied. Minimum flows set by rule are appropriations with a priority of the date of rule adoption, and entitled to protection from impairment similar to diversion-based water rights. Likewise, withdrawals that would deplete streams or rivers that are closed by rule must also be denied.
- *PUD No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002). Because the surface water transfer statute, RCW 90.03.380, does not explicitly mention the public interest, therefore Ecology may not consider the public interest when processing change applications. Although the Court rejected use of RCW 90.54.020(10) (“[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions”), the decision does not discuss why it does not apply. This is a glaring inconsistency given the emphasis that Court decisions have placed on mandatory language in other sections of the same statute, e.g., *Swinomish Indian Tribal Community*, *Foster v. Yelm*, *Hirst*, *infra*.
- *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011). The Growth Management Act, Ch. 36.70A RCW, contains numerous provisions requiring local land use authorities (e.g., counties) to protect water resources. See RCW 36.70A.020(10) (GMA goal to protect the environment, including “water quality...and the availability of water”), .070(1) (requiring that land use elements “shall provide for protection of the quality and quantity of groundwater used for public water supplies”), (5)(c)(iv) (requiring that rural elements include measures “[p]rotecting...surface water and groundwater resources”), and RCW 19.27.097 and 58.17.110, requiring counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.
- *Swinomish Indian Tribal Community vs. State*, 78 Wn.2d 571, 311 P.3d 6 (2013). Challenge to the creation of out-of-stream water reserves in an instream flow rule to serve new development. The Court rejected Ecology’s finding that private use of water (e.g., permit exempt wells for residential supply) supports a finding of overriding public interest. That a proposed water use is beneficial alone does not mean it serves the public interest.
- *Cornelius v. Dept. of Ecology and Washington State Univ.*, 182 Wn.2d 574, 344 P.3d 199 (2015). Junior users cannot employ the “safe, sustaining yield” requirement of RCW 90.44.130 to prevent a senior municipal user from over-drafting an aquifer. Also, 40-year history of failure to develop a water right does not offend requirement of reasonable diligence.
- *Foster v. Yelm*, 184 Wn.2d 465, 362 P.3d 969 (2015). (1) Instream flow rights may not be impaired; and (2) the use of out-of-kind mitigation projects to mitigate for impacts that cause impairment to instream flow rights is not permissible. “[W]e reject the argument that ecological improvements can ‘mitigate’ the injury when a junior water right holder impairs a senior water right.” Water resource mitigation must be in-kind, in-place, and in-time. See also *Okanogan Wilderness League and CELP v. Dept. of Ecology and Kennewick Gen. Hosp.*, Thurston County Sup’r Ct. No. 15-2-00998-0, Order [on Vacatur] (June 17, 2016) (vacating PCHB ruling that out-of-kind mitigation may be used to offset instream flow impairment).
- *Whatcom County v. Western Wash. Growth Mgt. Hrgs. Bd.*, 186 Wn.2d 648, 381 P.3d 1 (2016)

Public Interest**Case Review****Base Flow Protection****Groundwater Withdrawals****Hydraulic Connectivity****Closures****Change Applications****Growth Management Act****Reserves & “OCPI”****Municipal Rights****Mitigation Requirements**

Public Interest Water Right Appeals Fisheries Groundwater Impact Diligence Cumulative Impact Groundwater Use & Impairment Information Lack Evolving Law Social Values & Depletion "Beneficial Use" Expansion	(aka <i>Hirst</i>). The Growth Management Act requires local land use authorities to protect water resources and supply when adopting comprehensive plans and associated regulations. Counties must determine both physical and legal water availability when issuing building permits and may not simply rely on the Department of Ecology's assessment (or lack of a specific Ecology rule). Whatcom County's comprehensive land use plan fails to protect water availability. Pollution Control Hearings Board decisions Washington's administrative trial court for water right appeals, the Pollution Control Hearings Board (PCHB), regularly interprets the public interest prongs of the water code to decide cases. The following provides a non-exhaustive sampling of PCHB decisions involving the public interest factor. • <i>Stinnette v. Dept. of Ecology</i>, PCHB No. 15-007, Findings of Fact, Conclusions of Law and Order (2015). WDFW's recommendation, that water is not available for appropriation in a creek supporting fisheries, serves as basis for Ecology to deny water right application as detrimental to the public interest. • <i>Squaxin Island Tribe v. Dept. of Ecology and Miller Land & Timber LLC</i>, PCHB No. 05-137, Modified Findings of Fact, Conclusions of Law, and Order (2006). Proposed withdrawal of groundwater in continuity with salmon-bearing stream will reduce numbers of fish available to tribal members and therefore is not in the public interest. • <i>Oroville-Tonasket Irrigation Dist. v. Dept. of Ecology, et al.</i>, PCHB No. 91-170 et seq., Findings of Fact, Conclusions of Law, and Order (1996). Extension of time to allow development of reservoir permit not in the public interest, where district failed to diligently pursue development of the permit, and detriment to downstream lake users will ensue. • <i>Fleming v. Dept. of Ecology, et al.</i>, PCHB No. 93-320, et seq., Findings of Fact, Conclusions of Law and Order (1994). The public interest includes an examination of net benefits as between diversionary uses and retention of water instream. Therefore consideration should be given to the cumulative impact of similar water permit requests that might be made in the future. Proposal to divert one-third of small stream for golf course denied. • <i>Jones, et al. v. Dept. of Ecology</i>, PCHB No. 94-63, Final Findings of Fact, Conclusions of Law, and Order (1995). A new appropriation of hydraulically connected groundwater would constitute an impairment of existing rights and a detriment to the public welfare where surface water is over-appropriated and closed to further appropriation. • <i>Black Star Ranch v. Dept. of Ecology</i>, PCHB No. 87-19 (1988). Lacking information regarding impairment of existing rights and water availability, Ecology's "appropriate response is to deny the permit, and hold that in these circumstances the proposed use 'threatens to prove detrimental to the public interest.'" New Directions for Water Right Processing. Washington water law has evolved to the point where issuance of a new water right virtually always requires water-for-water mitigation, unless the new right is non-consumptive. A review of water right reports of examination during the autumn of 2017 reveals that almost all new water rights are issued for affirmative public interest purposes (i.e., not just because they were not detrimental to the public welfare). Water rights were issued, for example, for a fishery acclimation pond, a tribal hatchery, and a geothermal heating system for a community college. Changes to existing water rights often serve private interests, but often serve the public interest too. For example, a trust water right resulting from retirement of a power plant diversion dedicated a substantial 360 cubic feet per second to instream flows in the Naches River for salmon restoration in the Yakima Basin. Several water rights were also granted for private development purposes, but all were mitigated using water-for-water mitigation. Increasingly, and as discussed below, water law is evolving to serve greater public needs and interests. THE PUBLIC INTEREST AND THE FUTURE OF WATER LAW The Evolving Water Code Water law is an evolving doctrine, and allocation policies and procedures have changed commensurate with changes in both social values and technology and increasingly depleted surface and ground waters. For example, when the Water Code was originally developed, keeping water instream was considered "waste." Washington's landmark Water Resources Act of 1971 changed this historic policy by explicitly recognizing that instream values and uses such as water quality, fish and wildlife, recreation, scenic beauty and so forth are beneficial use purposes under the Water Code. In 1993, in <i>Ecology v. Grimes</i>, the Washington Supreme Court recognized that standards for water conservation should improve over time, and could impact the quantities of water needed to be available to existing water rights. In 2000, <i>Postema</i> recognized that Ecology must use best science to determine impairment, and that may lead to changes in policy and practices governing water right decisions. See also <i>Whatcom County</i>, 186 Wn.2d at 666: Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on
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Public Interest

Climate Change & Decision Making

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surface waters. When Ecology adopted the minimum instream flow rules, such as those contained within the Nooksack Rule, it 'did not believe that withdrawals from deep confined aquifers would have any impact on stream flows.' However, we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing permits for groundwater appropriation. (citations omitted).

The Public Interest and Climate Change

Humans are now confronted with the greatest environmental challenge ever: climate change, also increasingly a phenomenon of climate destruction. Evidence continues to grow on global, continental, and local scales, and includes massive wildfires, sea level rise, ocean acidification, and extreme weather events. Irrevocable changes are occurring, such as disappearing polar ice and glaciers, coral bleaching, and species extinctions. Locally, Washington's rivers and aquifers are already affected by climate change, and impacts will worsen. Warming temperatures diminish mountain snowpack and glaciers, reducing summertime runoff to streams and rivers and recharge to groundwater. This in turn depletes instream flows, harming aquatic habitat and reducing water available to existing water users.

Despite the impacts climate change is working on Washington's hydrology, Ecology does not reference or consider climate change impacts in water right decision-making. This must change, as the four essential elements of water rights — water availability, impairment, beneficial use, and the public interest — are all affected.

Protection of the public commons will become a foremost factor in Washington's water allocation system in the future. Humans can and do adapt to changing hydrology, occupying almost every hydrologic niche on the planet. As the regimes of precipitation, snowpack and available water change over time, human society will adapt. But if the people of Washington (and other western states) wish to preserve public uses of water resources — particularly keystone aquatic species such as salmon — historic water allocation must be reconsidered, and soon. The flexibility and importance of the public interest in Washington's water resources provides the vehicle for assessing climate impacts for new and existing water rights.

CONCLUSION

The public interest provisos of Washington's water codes properly focus on protection of instream flows and associated public uses, although agencies and courts have protected other activities under the public welfare umbrella. Water resource scarcity, exacerbated by climate change, makes the law of the public interest an increasingly critical tool to manage and allocate water for the future.

FOR ADDITIONAL INFORMATION:

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References

- Methow Valley Irrigation District Cases:** The MVID enforcement case settled on the eve of appellate argument. The unpublished court orders include: *Methow Valley Irr. Dist. & Okanogan Wilderness League v. Ecology*, PCHB No. 02-071 & 02-074, Order on Partial Summary Judgment (2-27-03), Findings of Fact, Conclusions of Law and Order (8-20-03), affirmed, Okanogan County Superior Court No. 03-2-00235-8, Final Order; *Methow Valley Irrigation District v. Ecology and Okanogan Wilderness League*, PCHB No. 04-005, Order on Collateral Estoppel (11-16-04) and Final Findings of Fact, Conclusions of Law & Order (5-9-05), affirmed, Okanogan County Superior Court No. 05-2-00283-4 (MVID 2) Decision on Appeal (7-13-07); and *Ecology v. Methow Valley Irrigation District*, PCHB No. 04-165, (penalty case), Findings of Fact, Conclusions of Law and Order (7-14-10).
- Tribal Water Rights to maintain off-reservation instream flows sufficient to support treaty fishery habitat:** *State v. Yakima Reservation Irrigation District*, 121 Wn.2d 257, 262 (1993). This decision affirmed *State v. Acquavella*, Yakima Cty. Sup. Ct. No. 77-2-01484-5, Memorandum Opinion re: Motions for Partial Summary Judgment (Oct. 22, 1990); see also *State v. Acquavella*, Yakima Cty. Sup. Ct. No. 77-2-01484-5, Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Mar. 1, 1995); *State v. Acquavella*, Yakima Cty. Sup. Ct. No. 77-2-01484-5, Memorandum Opinion re: "Flushing Flows" (Dec. 22, 1994).
- Climate Change:** See *World Scientists' Warning to Humanity*, BioScience (Nov. 13, 2017), in which 15,364 scientists from across the planet co-signed a letter warning of the disastrous impacts associated with the changing climate at: http://scientists.forestry.oregonstate.edu/sites/sw/files/Ripple_et_al_warning_2017.pdf.
- Climate Change and Water Availability Impact:** See University of Washington, Climate Impacts Group, *Climate Change Impacts and Adaptation in Washington State* (esp. Section 6: How Will Climate Change Affect Water in Washington?) (2013); Mote, P., et al., *Climate Change Impacts in the United States: The Third National Climate Assessment, Chapter 21: Northwest*, J. M. Melillo, et al., Eds., U.S. Global Change Research Program (2014).

Municipal Water

NEPA Arena

Water Supply Infrastructure

Federal Lands

Special Use Permit

Opposition Basis

No ESA Violation

MUNICIPAL WATER SUPPLY

THE SUCCESSFUL STRUGGLE TO SECURE THE CITY OF BEND'S NEW WATER SUPPLY PROJECT

by Douglas MacDougal, Marten Law LLP (Portland, Oregon)

Introduction

Fresh from intense litigation over the spotted frog, Central Oregon has again been the arena of another fierce fight, this time involving the future of the City of Bend's water supply improvement project. The legal trajectory of this court challenge was determined not by the federal Endangered Species Act (ESA) but rather by the National Environmental Policy Act (NEPA) related theories. The case is of interest for how such challenges may be framed in the future, as municipal and other consumptive needs continue to compete for water with those seeking additional resources for aquatic habitats.

Last summer, a terse memorandum decision was issued by the Ninth Circuit Court of Appeals (Ninth Circuit) affirming Judge Ann Aiken's opinion in *Central Oregon Landwatch v. Connaughton*, 2017 WL 3616386 (August 23, 2017) (*Landwatch Appeal*). That opinion allowed the City of Bend (City), Oregon to improve its water supply infrastructure with an upgraded creek diversion facility and a 10-mile long replacement pipe through US Forest Service (Forest Service) land. The brevity of the opinion, however, belied the duration and intensity of the underlying fight. The opinion followed years of litigation where several public interest groups threw everything they had at the City to prevent the project from going forward. It is an example, in our current era, of what cities and other water-using entities have to plan for whenever they contemplate a project involving federal lands, even in the absence of a threatened or endangered species. Appellants were Central Oregon Landwatch and WaterWatch of Oregon. Appellees were Kent Connaughton in his official capacity as Regional Forester of Region 6, John Allen, in his official capacity as Forest Supervisor of the Deschutes National Forest, and the US Forest Service. The City of Bend was an Intervenor-Defendant-Appellee.

In this case, the City sought a new Forest Service special use permit (SUP) for its project. In response, plaintiffs, Central Oregon Landwatch and WaterWatch of Oregon, alleged that the project and process violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361; the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq.; the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761 et seq.; and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 et seq. Violations of the latter two acts were alleged to occur by virtue of the proposed project's incompatibility with the Forest Service's Inland Native Fish Strategy (INFISH) guidelines, and with the Deschutes National Forest Plan (DNFP). Plaintiffs asserted that temperature-based Riparian Management Objectives (RMOs) established by INFISH would not be met. These allegations were first made at the administrative level, then in the United States District Court, which ruled in the City's favor on all allegations. *Central Oregon Landwatch v. Connaughton*, 2014 WL 6893695 (Dec. 5, 2014) (*Landwatch*).

It is noteworthy what was not alleged. The creek from which water is diverted does not have threatened or endangered species. There was no allegation of violation of the Endangered Species Act (ESA). The citizen suit provision of the ESA is the more traditional litigation angle for environmental

lawsuits involving water-related projects in this region. *Landwatch* at 8. Note that Plaintiffs did contend that redband trout are a sensitive species on some lists, that bull trout historically used Tumalo Creek, and that the Forest Service has "proposed consideration of the reintroduction of bull trout" to the creek. *Landwatch Complaint*, pars. 227-232. Plaintiffs also asserted that the project would decrease or foreclose the chance of successful bull trout reintroduction. *Id.* at 232.

Among the plethora of allegations in the 283-paragraph complaint, two were particularly noteworthy assertions: first, that the Forest Service should have considered no withdrawal of water at all as part of its "no action" alternative under NEPA. In other words, the "no action" alternative, in plaintiffs' view, meant the restoration of Creek to its original state and presumably cessation of all water deliveries to the City of Bend from Tumalo Creek. Second, that the Forest Service was under a legal obligation to impose minimum instream flow requirements in its authorization of the SUP, in order to protect fish and aquatic habitats. Plaintiffs were suggesting here that the Forest Service employ federal authority to impose flows that conflict with state water rights.



Municipal Water

Historical Diversion

Original Project Enjoined

Forest Service Land

NEPA Finding (FONSI)

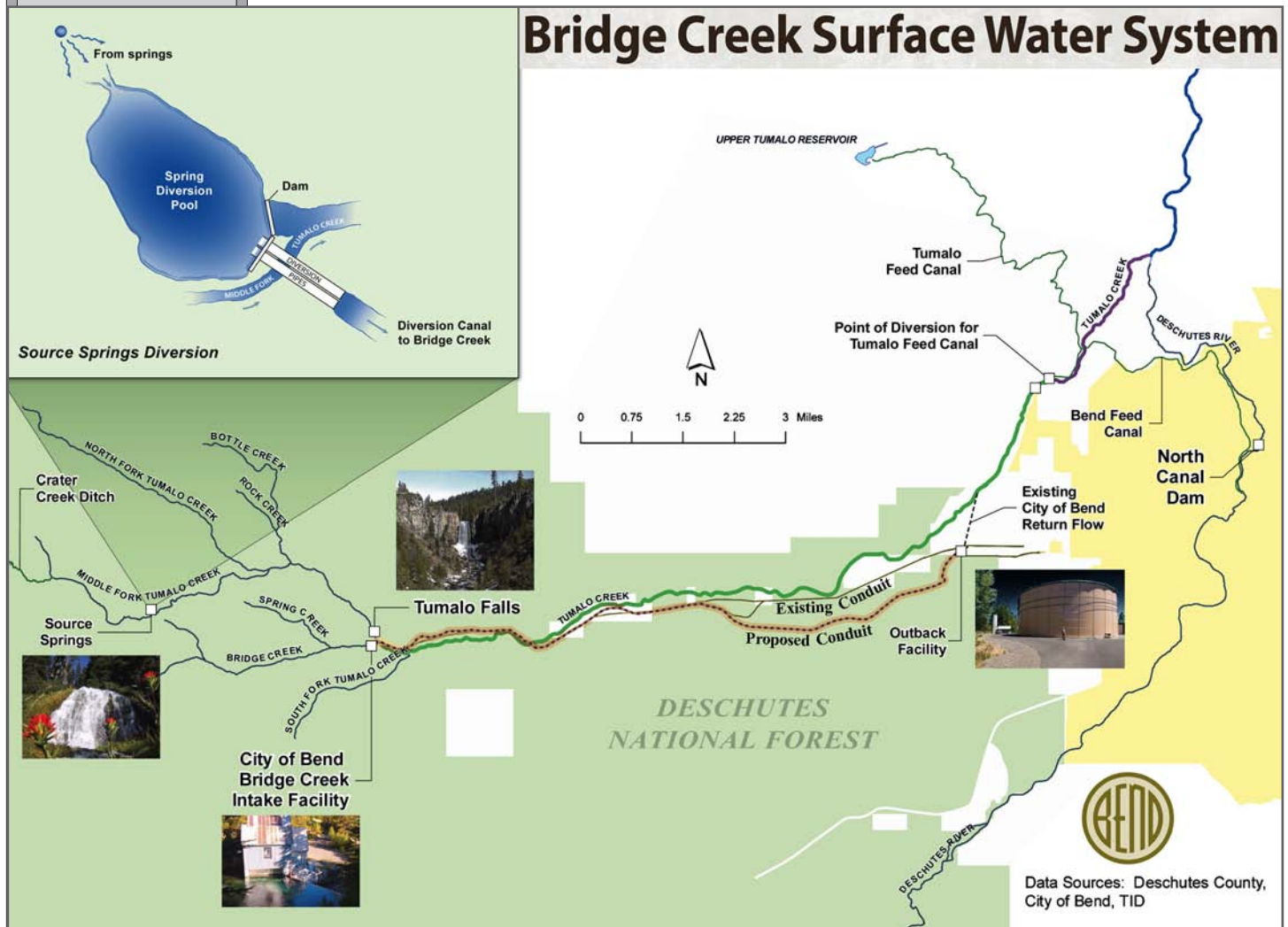
The case represents another effort to push the boundaries of NEPA and other laws outward in creative ways to encompass virtually any activity that could affect the use of water, even if the project in question entails what, in another day, might have been regarded as a routine infrastructure upgrade.

Brief Background

The City of Bend has diverted water from Tumalo Creek, a tributary of the Deschutes River since 1926. This water is conveyed to Bridge Creek. A structure on Bridge Creek then diverts the water from Bridge Creek through pipelines to the City. The existing conveyance system to the City consists of two deteriorating pipelines at risk of failure. Under the City's plans, the diversion structure would be upgraded with a new pipeline to replace the two old pipes, and diversions would be limited to 18.2 cubic feet per second (cfs).

The original project proposal was not so limited. In September 2012, the Forest Service approved issuance of an SUP for a greater rate of water withdrawal. Plaintiffs challenged the Environmental Assessment (EA) for that project, and successfully enjoined it. *Central Oregon Landwatch v. Connaughton*, 905 F.Supp. 2d 1192 (D. Or. 2012). The revised project proposal limited water withdrawals to 18.2 cfs.

NEPA was implicated in the present project because the diversion facility and replacement pipe would be on federal land, and would require a Forest Service SUP. NEPA requires agencies to prepare an Environmental Impact Statement (EIS) for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). But an EIS is not required in all cases — the agency first must prepare an Environmental Assessment (EA) to see whether an action will be significant. In this case, the Forest Service issued a finding of no significant impact (FONSI), hence no EIS was required. After losing their administrative appeal to the Forest Service of its FONSI decision, plaintiffs went to court to enjoin the project, but had no better success at either the district or appellate level.



Municipal Water

Proposed Alternative

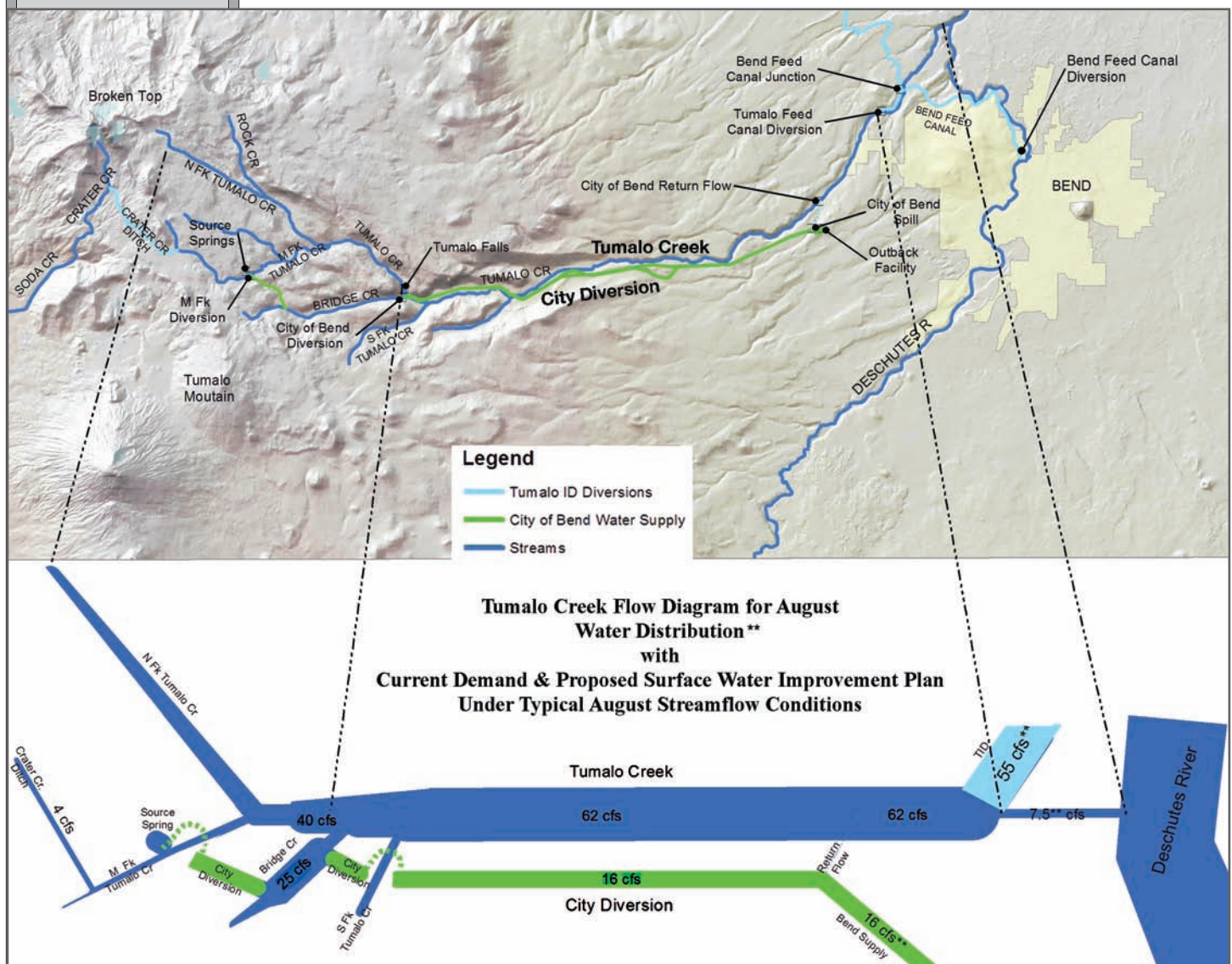
Potential Expansion Issue

Essentially, plaintiffs contended that the Forest Service didn't take a hard enough look at the environmental consequences of the proposed alternatives before accepting the EA in lieu of an EIS. As the District Court pointed out, though, the EA needed to only be a "reasonably thorough discussion" of significant impacts of the probable environmental consequences. *Landwatch* at 3. The three-judge panel of the Ninth Circuit agreed that this EA fit that bill. *Landwatch Appeal* at 2. The District Court granted summary judgment to the Forest Service, finding that the Service's actions were not arbitrary and capricious, and the Ninth Circuit affirmed. *Landwatch* at 9; *Landwatch Appeal* at 2.

Imposition of Mandatory Instream Flows

The key components of plaintiffs' flow concerns were that: 1) limiting City withdrawals to 18.2 cfs was insufficient to protect fish habitat; and 2) the City might someday divert more than 18.2 cfs of water. Plaintiffs asserted that such an excess diversion might occur was a reasonably foreseeable impact that should have been analyzed. *See generally, Landwatch Complaint*, Sixth Claim for Relief. The court, on the other hand, thought that the fear of future increased diversions was "speculative." If the City were to divert more than 18.2 cfs, it would have to come back to the Forest Service to modify the SUP and that action would be once again subject to challenge. *Landwatch* at 3.

Plaintiffs' concern that the City's future withdrawals would exceed 18.2 cfs may have been motivated in part by the project's infrastructure capacity, the City's cumulative water rights, and the City's public representations: "The project's 30-inch pipeline has the physical capacity to deliver 36 cfs to 47 cfs from the Bridge Creek intake facility to the City of Bend's distribution facilities known as the Outback Site," and that "the project's lifespan is 75-100 years." *Landwatch Complaint*, paragraphs 25 & 26. Plaintiffs also



Municipal Water Alleged Flow Obligation Water Need Reapportioning Issue Agency Water Rights Analysis No ESA Jeopardy No Fishery Benefit No Flow-Setting Requirement Impacts Issues	contended: “The City of Bend claims water rights under Oregon state law to divert up to 36 cfs of water from Tumalo Creek, subject to applicable laws.” “The City’s Water Management and Conservation Plan (WMCP) states that “[b]ased on projected water demand growth, the City anticipates fully exercising all of its existing surface water and ground water rights during the next 20-year planning period.” <i>Landwatch Complaint</i>, paragraphs 32 & 33. These concerns were coupled with the far weightier allegation — that the Forest Service had an <i>obligation</i> to impose minimum flows as a condition to issuing its SUP for the project, in effect “reprioritizing” and subordinating existing water rights: The Forest Service must identify and legally establish minimum flows necessary to preserve fish habitat on Tumalo Creek and demonstrate that the approval is based on having given a preference to riparian area dependent resources, including fish, over the proposed special use. <i>Landwatch Complaint</i>, par. 176. Interestingly, the Oregon Water Resources Department (OWRD), the agency which manages water resources in the State of Oregon, filed a forceful amicus brief in the Ninth Circuit stating that the evidence showed that the creek did not need more water for fish. More importantly, OWRD argued that, for the Forest Service to do as the plaintiffs requested would upend traditional prior appropriation water rights — effectively “reapportioning” water rights among the City, Tumalo Irrigation District (TID; a large downstream user), and instream water rights. According to the OWRD brief: [S]uch a condition on the SUP would not only impact the City’s water rights, it would effectively reapportion water rights as between the City, TID, and the instream rights in contravention of Oregon’s system of prior appropriation. That is so because TID would be able to use water allocated to the City. When there is insufficient flow to meet demand, Oregon law requires water to be distributed according to priority date. Ore. Rev. Stat. § 540.045. Ordinarily, the watermaster would make sure that water is apportioned to the City, TID, and the in-stream water rights according to the relative priority dates of those rights. If the City is required to bypass water to which it is entitled under state law, TID — whose diversion is not controlled by the Forest Service — would be able to divert the water allocated to the city. <i>OWRD Brief</i> at 8. OWRD also incorporated the District Court’s analysis of the conditions under which the Forest Service could or should impose flows to protect species: [A]lthough there is Ninth Circuit precedent that supports the Forest Service’s authority to restrict the use of rights-of-way to maintain minimum stream flows, it is not clear that such authority extends to the present situation. In <i>County of Okanogan v. National Marine Fisheries Service</i>, 347 F.3d 1081 (2003), this court held that the Forest Service could restrict the use of rights-of-way to protect endangered fish despite the permit applicant being entitled to take more water from the stream under state law. ...But in that case, the National Marine Fisheries Service had concluded that the permit applicant’s diversion was likely to jeopardize the continued existence of endangered steelhead and spring chinook salmon. ...Here, there are no endangered species in Tumalo Creek and the record shows that there will be no demonstrable benefit to fish from restricting the City’s diversion to less than 18.2 cfs. <i>OWRD Brief</i> at 8-9. The Ninth Circuit agreed that the Forest Service was not required to impose minimum instream flow requirements in authorizing the SUP. Indeed, the court held that the project would have a positive impact on stream flows. <i>Landwatch Appeal</i> at 1. Forest Service Regulatory Standards and Guidelines: Legal Effect Many of plaintiff’s claims concerned the project’s alleged violation of standards, guidelines, and goals under the authorities noted above. Plaintiffs asserted that project impacts on such goals and guidelines should have been thoroughly analyzed in the EA. For example, plaintiffs cited the “standards, guidelines and objectives” set forth in the Deschutes National Forest Plan (DNFP), which pertain to aquatic ecosystems and water quality. <i>Landwatch Complaint</i>, pars. 45 & 46. The goal to “restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them on public
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**Municipal
Water****Forest Service
Standards****Evaluation
Limits****Flow
Protection
Discretion**

lands” is contained in Northwest Forest Plan’s Aquatic Conservation Strategy. *Id.* The Deschutes Land and Resource Management Plan (DLRMP) established “standards and guidelines” for Forest Service actions and authorizations, including issuance of SUPs. *Landwatch Complaint*, par. 92. INFISH’s standards and guidelines urge the Forest Service to “avoid effects that would retard or prevent attainment of the Riparian Management Objectives and avoid adverse effects on inland native fish.” *Landwatch Complaint*, par. 47. They also establish temperature and water quality objectives. *Landwatch Complaint*, pars. 98-100. According to plaintiffs, the EA was deficient in failing to disclose project impacts on these and other “planning standards, guidelines and objectives.” *Landwatch Complaint*, par. 48. Plaintiffs alleged that these were binding commitments on the Forest Service, *requiring it to impose* minimum instream flow requirements on the creek prior to issuing the City’s SUP. *Landwatch* at 7.

Yet, for all this, the range of actual specific actions that the Forest Service was required to take in evaluating environmental impacts of the project was a much smaller set than plaintiffs had alleged. Indeed, the District Court found “only 5 of the 15 planning directives plaintiffs cite are site-specific provisions subject to judicial review.” *Id.* None of these mandated that the Forest Service set minimum instream flow requirements. To take one example, the District Court said:

[T]he Deschutes LRMP RP-9 regulation requires the Forest Service to “[p]rotect instream flow on National Forest System Lands.” Plaintiffs, however, interpret this provision to mean the agency had a duty to establish minimum streamflow levels before issuing the SUP. While the Forest Service had a duty to protect the Creek’s instream flows, it was not required to adopt plaintiffs’ specific recommendations on how to do so. ...Accordingly, plaintiffs’ argument that the Forest Service had a duty to establish minimum instream flow requirements is without merit.

Landwatch at 7.

The District Court cited *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) in support of this position, noting that environmental regulation may be “mandatory as to the object to be achieved,” but it allows agency discretion in deciding how to achieve it. Hence, the Forest Service is entitled to substantial deference in the interpretation of its own forest plan. *Landwatch* at 7, citing *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012).

On appeal, the Ninth Circuit agreed, according substantial deference to the Forest Service’s own interpretation of these regulations as non-binding guidelines. *Landwatch Appeal* at 1.

The “No Action” Alternative: Baseline Scenarios**Baseline Issue**

Plaintiffs also alleged that the “no action” alternative in the EA was misplaced. The plaintiffs essentially argued for a “without project” baseline scenario as if this were an ESA consultation case. Plaintiffs alleged that the “no action” alternative under NEPA should be the “expiration of the current Special Use Permit and the restoration of natural (or native) flows in Tumalo Creek benefiting the watershed and fisheries.” *Landwatch Complaint*, par. 238. They also contended that the EA failed to consider an action alternative that would “limit diversion to what would be necessary to maintain minimum flows” in the creek, or to fully analyze other project options. *Id.* at pars 239-241.

The District Court confirmed that an agency is not required to consider alternatives that are not feasible in light of a proposed action’s purpose or need. *Landwatch* at 4. And “no action” equates to status quo, not pre-project conditions:

Plaintiffs allege that the Forest Service incorrectly presumed the no action baseline was the City’s continued diversion of 18.2 cfs because the City’s current SUP will expire in less than five years. They assert that the appropriate no action alternative was the discontinuation of the current water system. However, the Forest Service explained that “the no action alternative is best represented by current conditions, including the City’s current system that has been in place now for decades, not the environmental conditions that may have been in existence prior to the beginning of diversions in the 1920s.” [Citation omitted]. Further, there is no reason to presume that when the City’s current SUP expires, the Forest Service would not renew it as it has in years past.

Id. at 4.

The appellate court (Ninth Circuit) held that Forest Service did not act arbitrarily and capriciously by defining its “no action” alternative as a continuation of the existing SUP, as doing so is permitted by its own regulations and existing precedent. *Landwatch Appeal* at 2.

**Status Quo
v.
Pre-Project****“No Action”
Defined**

Municipal Water

No Climate Analysis Required

Water Supply Goals

Aquatic Benefits v. Pre-Project Conditions

Adequacy of Qualitative Climate Change Analysis

Plaintiffs contended that the Forest Service streamflow data was incomplete and its climate change assessment was purely qualitative. *See generally Landwatch Complaint*, pars. 50-55. They alleged that the Service ignored “readily available quantitative assessment tools and methods to analyze the issue.” *Landwatch Complaint*, par. 54.

Both the District Court and the Ninth Circuit held that the Forest Service was not required to conduct a quantitative climate analysis. Because the impacts of climate change would be about the same on stream flows under either NEPA alternative, only a brief discussion of climate change’s impact on the project area was necessary. *Landwatch Appeal* at 3. Agencies may describe environmental impacts in qualitative terms “when they explain their reasons for doing so and ‘why objective data cannot be provided.’” *Id.*, citing *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1076 (9th Cir. 2012). Both courts accepted the Forest Service’s explanation why it did not dig any deeper than it did on this issue.

Conclusion

The US District Court in Oregon and the Ninth Circuit judges may have been scratching their heads as to exactly why this case was brought. Under one component of its forest plan the Forest Service sets aside approximately 4,136 acres as managed watershed specifically for the City of Bend’s municipal water supply. *Appellate Brief for the Federal Appellees*, at 32. One of the Forest Service’s primary goals in issuing an SUP is “(1) to provide water at a level of quantity and quality that will, with adequate treatment, result in a satisfactory and safe domestic water supply and (2) to balance the present and future resource use with domestic water supply needs.” *Id.*

Given the principle of substantial deference to an agency’s interpretation of its own rules, perhaps the outcome was quite predictable. However, even apart from that deference, if one focuses just on one key, undisputed fact, one may see how plaintiffs’ case may have been fatally undercut. The old existing pipelines from the creek had no flow control so that even when municipal demand almost always fell well short of needing 18.2 cfs of water, the full amount would still be withdrawn from the creek 24/7, year-round. This diversion lasts for about 10 miles until the excess water was returned to the creek. *See Appellate Brief for the Federal Appellees* at 9 and 12. The new project’s controls would avoid this needless depletion of creek water, to the clear benefit of aquatic resources in the upper reach of the stream. The proposal was in fact expected to increase the abundance of fish populations there, and to have a neutral or beneficial effect for redband trout habitat. *Id.* at 36-37. Both courts stressed these water quality benefits of the project. On top of this, there appeared to be little or no supporting legal precedent for plaintiffs’ other main arguments, such as, for example, the idea that “no action” under NEPA meant a return to a pristine, pre-project condition.

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Doug MacDougal has over 30 years of experience in water rights, natural resources, and real estate law. His water-related experience includes representing clients in water rights, permitting and regulatory matters, and natural resource policy issues. Doug has been lead counsel on a number of complex water negotiations in Oregon water basins, involving federal, tribal, environmental, and private party interests. He has substantial experience in contested water cases involving water right transfers, stream and groundwater hydrology, and native rights, and has been involved in the ongoing Klamath Adjudication. He frequently consults on individual, basin, and watershed issues involving water rights, the Clean Water Act, endangered species, dams, and hydropower operations. He also has been heavily engaged in various ESA Section 7 consultations, and has undertaken a variety of due diligence assignments involving water, natural resource, and real estate issues in large multi-party transactions. His work emphasizes representation of ports, irrigation water users, ranches, and municipalities.

WATER BRIEFS

TRIBAL GROUNDWATER US
QUANTITY ISSUES REMAIN

On November 27, 2017, the US Supreme Court denied certiorari in a case involving a reserved right to groundwater for the Agua Caliente Band of Cahuilla Indians (Tribe), thereby denying the petition for review of the case by the Coachella Valley Water District (CVWD) and Desert Water Agency (DWA). CVWD and DWA appealed the March 2017 decision by the Ninth Circuit Court of Appeals (Ninth Circuit) which held that the *Winters* doctrine applies, and that the Tribe “has a reserved right to groundwater underlying its reservation as a result of the purpose for which the reservation was established.” *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017). For a detailed discussion of the case, see Munson & Reeves, *TWR* #161. Munson and Reeves served as lead counsel for the Tribes. See also Moon, *TWR* #158 for additional information.

The case is far from completed. As noted by Native American Rights Fund (NARF) attorneys Steven Moore and Heather Whiteman Runs Him, the Tribe’s reserved right to groundwater is “firmly shielded” by the decision. However, “...the Tribe, the United States, and the water agencies are addressing what are called the ‘phase two’ legal issues. Phase two will deal with the correct method for quantifying the Tribe’s share, whether there is a right to water of a certain quality, and whether the Tribe owns the groundwater storage space under its reservation. A decision on these three legal issues will be issued by the court in the first quarter of 2018, and that decision will guide the ‘phase three’ legal issues of the case which include quantification.” NARF webpage.

In the case, which began in 2013, the Tribe sought unprecedented rights to groundwater, effectively superseding all other water users. The decision from the Ninth Circuit and the Supreme Court’s decision not to review the Ninth Circuit’s holding results in the grant of “reserved rights” to groundwater to the Tribe that are superior to the rights of the two water districts. Among other assertions, the water districts had argued that the *Winters* doctrine — governing federal

reserved rights to water — only applies to surface water and does not apply to groundwater.

The water districts issued a press release expressing disappointment in the decision and noted that they expect a groundwater adjudication process as the next likely step: “Following this decision, the water agencies expect a lengthy and expensive legal process for all water users in the Coachella Valley. The federal District Court will likely need to engage in a full groundwater adjudication, dividing the water resources between the Agua Caliente Tribe and the residents, businesses, agricultural and golf communities and other tribes. Rates will likely increase as water availability becomes more limited.”

For info: NARF webpage: www.narf.org/cases/agua-caliente-v-coachella/; DWA webpage: www.dwa.org/lawsuits; CVWD webpage: www.cvwd.org/lawsuit

GROUNDWATER QUALITY SW
USGS GROUNDWATER STUDY

A regional assessment of untreated groundwater in the Rio Grande aquifer system, which includes parts of Colorado, New Mexico and Texas, is now available from the US Geological Survey (USGS). See *Groundwater Quality in the Rio Grande Aquifer System, Southwestern United States* — USGS Fact Sheet 2017-3047.

The Rio Grande aquifer system ranks 18th in the nation as a source of groundwater for public supply, providing 240 million gallons per day for this use. Urban areas within the boundaries of the aquifer include Albuquerque, New Mexico, and El Paso, Texas.

USGS scientists tested for hundreds of water-quality constituents and characteristics in samples of untreated groundwater from 60 public-supply wells throughout the aquifer. Results were compared to human-health benchmarks. In 30 percent of the study area, at least one constituent was measured at a high concentration, meaning it exceeded its human-health benchmark.

The trace element arsenic was the inorganic constituent most frequently detected in groundwater at high concentrations, and exceeded the human-health benchmark in 18 percent of the

study area. Trace elements fluoride, strontium and uranium were measured in groundwater at high levels in 3 percent of the study area. Radioactive constituents, including gross-alpha activity and radon, were present at high levels in groundwater in about five percent of the study area. Most of the radioactivity in groundwater comes from the decay of isotopes of uranium and thorium that are present in minerals found in aquifers.

Many inorganic constituents, including trace elements and radioactive constituents, occur naturally in groundwater, although concentrations can be affected by human activities. The nutrient nitrate, which has natural and human-related sources, was detected at high concentrations in about two percent of the study area.

“Nuisance” constituents — those that can affect water’s taste, color or odor — were present at high levels, meaning they exceeded the US Environmental Protection Agency’s non-mandatory benchmarks, in about 10 percent of the study area. Total dissolved solids, a measure of the salinity of groundwater, was also measured at high concentrations in groundwater in 35 percent of the study area.

Groundwater provides nearly 50 percent of the nation’s drinking water. To help protect this vital resource, the USGS National Water-Quality Assessment, or NAWQA, Project of the National Water Quality Program assesses groundwater quality in aquifers that are important sources of drinking water.

Over the last two decades, USGS scientists have assessed water quality in untreated water from 6,600 wells in extensive regional aquifers that supply most of the groundwater pumped for the nation’s drinking water, irrigation, and other uses. This comprehensive sampling, along with detailed information on geology, hydrology, geochemistry, and chemical and water use, can be used to explain how and why aquifer vulnerability to contamination varies across the nation.

For info: Bruce Lindsey, USGS National Water Quality Program, 717/ 730-6964 or blindsey@usgs.gov; USGS Fact Sheet at: <https://pubs.er.usgs.gov/publication/fs20173047>.

WATER BRIEFS

WATER TREATMENT**TX****INNOVATIVE TREATMENTS TESTING**

Thanks to advances in such technologies as reverse osmosis, membranes, electrodialysis reversal, atmospheric water generators, ultraviolet light, ozone, and others, even with difficult circumstances, better water quality than ever before is possible. However, when Texas' rules and regulations do not have established criteria for an innovative technology to follow, the Texas Commission on Environmental Quality (TCEQ) requires a pilot project.

A pilot project involves a scaled-down version of the water treatment facility that runs continuously for a period of anywhere from 30 days to as long as a year. Treated water is tested repeatedly as the pilot project is subjected to all of the variances the source water may experience. The project will not clear testing until it demonstrates that the treated water protects public health. During this time, the water treatment process is adjusted and optimized, and additional steps may be required, depending on the results. The pilot project gives the water plant operator time to learn the finer points of the technology.

Some technologies are evolving quickly enough that trying to put design criteria in rule would be problematic. That's the case with low-pressure membranes, which numerous water systems in Texas now use. The materials used to make the membranes, which filter the water through microscopic pores, have been evolving. Improvements in the technology have improved durability and cost. Union Water Supply Corp. in Starr County is testing a membrane made out of ceramic, which should make it more resistant to tearing and, thus, improve the lifespan of the filters.

The TCEQ also has a robust process in place to ensure that potential corrosivity is evaluated when any new source or treatment is approved. Also, under the Lead and Copper Rule, water systems must conduct regular compliance monitoring to evaluate corrosivity.

In Bridge City, the water system was dealing with rusty or dark-colored water because of the secondary contaminants, iron and manganese. To fix that issue, the city turned to a company with a special filtration system, which oxidizes iron and manganese, allowing them to be removed by the filters. A recent pilot project is being reviewed by the TCEQ to make sure it is functioning well.

In some cases, a single emerging technology can address multiple contaminants cheaper than a system that would otherwise have to use multiple conventional processes to do the same. In the case of Wolfforth, that city had to deal with dissolved salts, including sulfates and chlorides, alpha emitting radionuclides, fluoride, and arsenic. All of these contaminants are dissolved ionized particles, which is what the innovative technology called electrodialysis reversal is capable of handling. It does so by using a current of electricity to remove ionized particles from the water stream. Data from Wolfforth's pilot project not only affirmed electrodialysis reversal was the right technology for Wolfforth, but the pilot project data was also used by another community to get its electrodialysis reversal project approved by the TCEQ.

In the case of the desalination process, a big concern is what to do with the leftover waste. In El Paso, where water is scarce, each drop is precious. They have had a reverse osmosis treatment plant to treat brackish water for years; however, they wanted to recover even more water, instead of returning it back to nature. El Paso recently completed a pilot project of a proprietary treatment system to extract more salt-free water.

For info: David Williams, TCEQ, 512/239-0945 or david.a.williams@tceq.texas.gov

UNAUTHORIZED USE**CA****NESTLÉ REPORT ISSUED**

On December 20, 2017, the California State Water Resources Control Board (State Water Board) approved an investigation report involving Nestlé Waters North

America's (Nestlé) diversion and use of water from water sources located in the San Bernardino National Forest (SBNF). *See* State Water Board Report of Investigation, INV 8217 (12/20/17) (Report). The detailed 37-page Report concluded that Nestlé in 1998 was diverting a total of 508 acre-feet per annum (AFA), of which 356 AFA was unauthorized. Report at 33.

The Report's conclusions addressed the 152 AFA of diversions by Nestlé: "The amount Nestlé could have diverted in 1998 under a pre-1914 claim [26 AFA] and as groundwater from the Spring 7 wells and Lower Springs Complex totals up to an approximate maximum of 152 AFA, but this amount could be much less if groundwater not within the permitting authority of the State Water Board was overestimated. Detailed hydrological studies showing how diversions impact streamflow are needed to determine the actual amount of developed water that would or would not surface elsewhere in the watershed." *Id.*

The State Water Board's investigation was spurred by the fact that it "received several water rights complaints against Nestlé Waters North America (Nestlé or NWN) starting on April 20, 2015. The complaints contain many allegations, including diversion of water without a valid basis of right, unreasonable use of water, injury to public trust resources, and incorrect or missing reporting. ... Additionally, Jody Noiron, Forest Supervisor for the United States Forest Service (Forest Service), San Bernardino National Forest, requested assistance with clarifying Nestlé's basis of right by letter dated May 20, 2016 (San Bernardino National Forest Supervisor's Office, 2016)." Report at 5. The State Water Board, Division of Water Rights (Division) began an extensive water rights complaints investigation, which included a detailed evaluation of the geology of the spring water sources in the SBNF and Nestlé's historical water rights claims.

The Center for Biological Diversity (CBD) and allies, The Story of Stuff Project and the California-based Courage Campaign Institute, sued the

WATER BRIEFS

US Forest Service in 2015 for allowing Nestlé to continue bottling water from the San Bernardino National Forest under a permit that expired nearly three decades ago. That lawsuit continues to make its way through the courts — it specifically challenged Nestlé's four-mile pipeline that siphons water from San Bernardino National Forest's Strawberry Creek to bottling operations in Ontario, California. The lawsuit calls on the court to shut down the pipeline and order the Forest Service to conduct a full permitting process that includes environmental reviews. According to CBD, in 2014 alone an estimated 28 million gallons were piped away from the forest to be bottled and sold under Nestlé's Arrowhead Mountain Spring Water brand of bottled water. The permit expired in 1988, but the piping system remains in active use, siphoning about 68,000 gallons of water a day out of the forest.

The State Water Board Report states that "Division staff recommends that Nestlé immediately cease any unauthorized diversions." The Report goes on to provide a detailed list of "Recommendations" or actions that the Division staff recommends that Nestlé take in order to bring its diversions into compliance with state water law. Report at 34. A full reading of the Report is recommended for those interested in the issues involved in the century plus water use by Nestlé and its predecessors.

The situation is clearly far from resolved, as is evidenced by the final recommendation of the State Water Board: "Take no further action on the allegations of unreasonable use and injury to public trust resources at this time. If future hydrologic and riparian studies indicate that Nestlé's diversion of water injures public trust resources in a way that cannot be mitigated by implementation of the adaptive management plan in development as part of the US Forest Service Special Use Permit process, the Division should revisit this issue." Report at 34-35. For info: Investigation Report at: www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/nestle.html

FOREST ACCESS NM/US WATER RIGHTS & "TAKINGS"

On November 3, 2017, the US Court of Federal Claims (Court) issued a Memorandum Opinion and Order determining that the Federal Government violated plaintiffs' rights under New Mexico law to beneficial use of stock water in the Lincoln National Forest. The plaintiffs are the Sacramento Grazing Ass'n, Inc., et al. (SGA). The decision is important due to the precedent it sets regarding water rights under state water law to stockwater on federal lands and the right of private landowners to maintain access to water sources on the federal lands, plus the affirmation of claims under the 5th Amendment based on those rights. Thousands of Forest Service permit holders across the West could be impacted by the decision.

"Today, the court reaffirms a prior ruling that SGA's Fifth Amendment Takings Clause claims are not barred by the statute of limitations. In addition, the court has determined that SGA established, at trial, a property interest, recognized by New Mexico law, to make beneficial use of stock water sources in the Sacramento Allotment of the Lincoln National Forest. The court also has determined that SGA established the right to make beneficial use of stock water sources in the Sacramento Allotment that was abrogated by actions undertaken by the United States Forest Service ("USFS"), in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. ... The United States Forest Service ("USFS") has responsibility to manage national forests including the habitat of endangered species. But a small, family-owned cattle ranch should not be forced to 'bear' the entire financial burden of the USFS's management choices, where they interfere with property rights, recognized by state law." Memorandum Opinion and Order (Opinion) at page 2.

As part of its ruling on the applicable law governing stockwater rights held by the plaintiffs, the Court addressed the question of whether or not a "diversion" from a water source was necessary to establish a stockwater right

under New Mexico water law. "For these reasons, the court has determined that neither state statutes nor case law require a physical diversion to establish the right of beneficial use of stock water. *See Walker*, 162 P.3d at 886 n.3 (N.M. 2007) (citing *First State Bank v. McNew*, 269 P. 56, 62 (N.M. 1928) (overruled on other grounds) (stock-raising 'is a beneficial use for which water may be appropriated'))." *Opinion*. at 45.

The Court laid out its rationale concerning the "Takings" claims at the beginning of its Opinion: "As Justice Holmes observed ninety-five years ago, 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922); see also *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting, joined by Thomas & Alito, JJ.). ('Our decisions have, time and time again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such established property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large.') (emphasis omitted); see also *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 354 (2002) (Rehnquist, C.J., dissenting, joined by Thomas & Scalia, JJ.). ('[A]s is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not a few targeted citizens.')." *Opinion*. at 2.

In the Conclusion, Chief Judge Susan Braden set out the Court's basic holding and ordered the parties to attempt to come up with suitable alternative sources of water. "For these reasons, the court has determined that SGA established that the USFS's May 5, 1998 AOP [Annual Operating Plan] Amendment effected a taking under the Fifth Amendment to the United States Constitution of SGA's right to beneficial use of stock water sources under New

Mexico law that are located within exclosures in the Sacramento Allotment of the Lincoln National Forest. Before the court determines the amount of ‘just compensation’ due, both parties should undertake a renewed effort to ascertain whether alternative water sources can be made available to SGA to allow this family enterprise to continue in the cattle business on a viable basis. To facilitate this effort, the court will convene a telephone conference with the parties on or before November 30, 2017.” *Opinion*, at 51.

For info: Opinion available at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2004cv0786-204-0

“CULVERT CASE” APPEAL WA SUPREME COURT PETITION

On August 17, the Washington Attorney General’s (AG’s) office filed a petition for a Writ of Certiorari (petition) asking the US Supreme Court (Supreme Court) to review a decision by the Ninth Circuit Court of Appeals in the “culverts case,” officially referred to as *United States of America et al. v. State of Washington*. That date was the deadline for filing the petition for Supreme Court review. The petition asks the high court to review the case and resolve some of the especially challenging effects of the lower court ruling, which reach beyond culverts.

The culverts case involves the meaning of 1850’s treaties between the federal government and western Washington Indian tribes that promised the tribes “[t]he right of taking fish, at all usual and accustomed grounds and stations...in common with all citizens.” The case began in 2001 when the federal government and 21 tribes sued the state, claiming that culverts under state roads violate this treaty provision if they restrict salmon passage and reduce the number of salmon available for the tribes.

In 2013, the District Court for the Western District of Washington ruled for the federal government and the tribes, ordering Washington to replace hundreds of culverts under state highways by 2030, at a cost of billions of dollars. The state appealed. In 2016,

the Ninth Circuit upheld the district court’s order. For details about the case, see *TWR*’s extensive coverage: Moon, *TWRs* #110, #120 and #149; Water Briefs, *TWRs* #112 and #160.

The AG’s press release noted that the petition does not prevent the state legislature from appropriating money to replace old culverts, and it does not halt or delay state agencies’ efforts to replace old culverts to improve fish passage. The petition also does not prevent the AG’s Office from engaging Washington tribes in ongoing discussions to potentially resolve challenges with the Ninth Circuit ruling outside of court. The AG’s Office retained Special Assistant Attorney General Rob Costello, who served as tribal liaison for three state Attorneys General, to manage and coordinate the state’s efforts to reach such a resolution.

“Tribal treaty rights are vitally important,” AG Bob Ferguson said. “I appreciate and share the goal of restoring salmon habitat, but the State has strong legal arguments that the Ninth Circuit decision is overbroad. We are working with tribes to resolve this matter, but we needed to file this appeal today to preserve our ability to challenge aspects of the Ninth Circuit’s opinion.” The AG also pointed out that the impacts of the Ninth Circuit decision extend beyond culverts. As nine dissenting judges of the Ninth Circuit pointed out, “Legal commentators have noted that plaintiffs could use the panel’s decision to demand the removal of dams and attack a host of other practices” that affect fish habitat, from farming to logging to construction. AG Press Release, August 17, 2017.

In the August 2017 press release, the AG stated the following reasons Washington is asking for Supreme Court review. The Ninth Circuit’s decision forces the state to expend resources on projects that will not benefit salmon. The decision requires the state to replace culverts even when other barriers, such as dams or federal culverts, block salmon from ever reaching the state’s culverts. Money squandered on such projects could and should instead be used for more effective salmon restoration efforts. The lower court

decision forces state taxpayers to pay for problems largely created by the federal government. For decades, the federal government specified the design for the state’s highway culverts. The state then invented and began using a new design that is better for salmon. Then, the federal government sued Washington over the old culverts designed to federal standards. The petition asks that the federal government be blocked from bringing its claim, or at least be required to contribute to the cost of fixing the federally designed culverts.

According to AG Ferguson, the Ninth Circuit adopted a sweeping treaty interpretation that contradicts the Supreme Court’s previous interpretation of the state’s obligation under the treaty. The Ninth Circuit held that the treaty language guaranteed “that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes.” While Washington is committed to protecting salmon — spending hundreds of millions toward this goal in recent years — many factors beyond the state’s control affect whether there are enough salmon “to provide a ‘moderate living’ to the Tribes,” including global climate change and ocean acidification. Therefore, the state may be unable to comply with the court’s order if factors outside the state’s control negatively affect the salmon population, regardless of how many culverts it restores.

For info: Brionna Aho, AG’s Office, 360/ 753-2727 or brionna.aho@atg.wa.gov

WATER STORAGE OR DRAFT REALLOCATION REPORT

The comment period for the draft Willamette Basin Review Feasibility Study by the US Army Corps of Engineers (Corps) regarding the reallocation of storage from the Willamette Valley project reservoirs closed on January 5, 2018. Comments were sought on the draft Integrated Feasibility Report and Environmental Assessment (EA) and draft Finding of No Significant Impacts (FONSI) for the Willamette Basin Review feasibility study.

The Willamette Basin is Oregon's largest river basin, encompassing 11,200 square miles. The basin contains nearly 70% of Oregon's population, its most highly productive agricultural land, and significant habitat for anadromous fish populations. The Corps' system includes 13 dams and reservoirs in the Willamette River Basin, with a combined conservation storage capacity of approximately 1,590,000 acre-feet.

The system's primary purpose is flood risk management. However, Oregon residents benefit from reservoir water in a variety of other ways, including hydropower generation and recreation. The Corps is in the process of determining if a reallocation of water storage could grant municipal and industrial water supply, irrigation, and fish and wildlife better access to the stored water. "The dams store and release water for other Congressionally authorized purposes, including hydropower generation, irrigation, water quality, supporting fish and wildlife and recreation. There is not a specific amount of reservoir space allocated for a particular use. This joint-use allocation is unique to the Corps' Willamette Valley dams." Corps Website.

The Corps is studying this issue because demands on the Valley's water supplies have changed due to increasing populations, development, irrigation, and the listing of threatened or endangered fish species. The Corps' Portland District and the Oregon Water Resources Department are sponsoring a feasibility study to determine if and how to best reallocate reservoir space during the spring and summer months. The Corps' website noted that "[I]t is a goal of the study to determine if current and future demands can be met in a cost-effective manner while considering those aspects of current operations that people value today."

The Willamette Basin Review Feasibility Study (Nov. 2017), in its Executive Summary at page i, sets forth the basic issues being studied: "The feasibility study was re-initiated in 2015 with the goal of reallocating WVP [Willamette Valley Project] conservation storage for the benefit of ESA-listed fish (F&W), agricultural irrigation (AI),

and municipal and industrial (M&I) water supply, while continuing to fulfill other project purposes. The study documented in this integrated Feasibility Report and Environmental Assessment analyzes current water uses in the basin for F&W, M&I, and AI, provides projections of water needs for these three project purposes, and develops a combined conservation storage reallocation and water management plan that would provide the most public benefit within the policies and regulations of the Corps and the state of Oregon."

The Corps and the water resources department sought comments on a draft integrated feasibility study report / environmental assessment, which includes a finding of no significant impact for the study. The Corps has prepared these documents for this proposal in accordance with the National Environmental Policy Act. The documents include a brief discussion of the need for the reallocation, as well as environmental considerations resulting from the reallocation. To review the draft assessment, visit www.nwp.usace.army.mil/notice/Article/1364275/.

For info: Corps website: www.nwp.usace.army.mil/willamette/basin-review/

MINING BAN UPHELD AZ BAN NEAR GRAND CANYON

On December 12, the Ninth Circuit Court of Appeals (Ninth Circuit or Court) affirmed a federal district court's decision, which rejected challenges to the Department of the Interior's decision to withdraw from new uranium mining claims, over one million acres of land near Grand Canyon National Park for up to 20 years. The ban was instituted, after an extended study period, by then-US Secretary of the Interior Ken Salazar when he issued a Record of Decision (ROD) in January 2012 announcing the withdrawal of 1,006,545 acres. *See* Federal Land Policy and Management Act of 1976 (FLPMA) § 204(c), 43 U.S.C. § 1714 (authorizing the Secretary to make, revoke, or modify such withdrawals subject to certain conditions).

The Havasupai Tribe, Grand Canyon Trust, Sierra Club, Center for Biological Diversity (CBD) and National Parks Conservation Association intervened in the case in 2013. The groups and the US Department of Justice prevailed in a 2014 decision by the US District Court in Arizona, which upheld Interior's 2012 uranium mining withdrawal. Mining companies appealed the decision to the 9th Circuit.

The fundamental issue was highlighted in the Ninth Circuit opinion by Judge Marsha Berzon, *Nat'l Mining Ass'n v. Zinke, et al.*, Consolidated Case No. 14-17350 (Ninth Cir. 12/12/2017). "Determining the appropriate balance between safeguarding an iconic American natural wonder and permitting extraction of a critically important mineral is at the heart of the present dispute." *Slip Op.* at 10. The decision turned on the authority of the Department of the Interior under FLPMA to withdraw the land from mining activities.

On the merits of the FLPMA claims, the Ninth Circuit rejected appellants' challenges to each of the Secretary's rationales for the land withdrawal. First, the Ninth Circuit held that the Secretary's decision to withdraw the large tract of land to protect water resources in the Grand Canyon watershed and the Colorado River from possible water contamination was not arbitrary, capricious, or not in accordance with the law. Second, it was held that FLPMA and case law did not prevent the Secretary from withdrawing large tracts of land in the interest of preserving cultural and tribal resources. Third, the Ninth Circuit held that the record supported the conclusion that there would be a significant impact on visual resources and a risk of significant harm to wildlife absent the withdrawal. Finally, the Court held that the agency's findings regarding the quantity of uranium in the withdrawn area were not arbitrary or capricious, as the agency relied on peer reviewed data and reasonably explained why it did not adopt appellants' alternative version.

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The Ninth Circuit also held that the Secretary did not act arbitrarily or capriciously in setting the boundaries of the withdrawn area. The Court found that the Secretary did not contravene the principle that land management under FLPMA “be on the basis of multiple use and sustained yield.” 43 U.S.C § 1701(a)(7). The Court held that in accordance with the multiuse principle, the Secretary engaged in a careful and reasoned balancing of the potential economic benefits of additional mining against the possible risks of environmental and cultural resources. Finally, the Ninth Circuit held that the final environmental impact statement took existing legal regimes into account but reasonably concluded that they were inadequate to meet the purposes of the withdrawal. *See Synopsis, Slip Op.* at 6-7. The court did, however, reject a challenge to the Canyon Mine, a uranium mine located on the Kaibab National Forest six miles south of Grand Canyon National Park; the court’s decision allows Energy Fuels Inc. to mine without initiating or completing formal tribal consultations and without updating a federal environmental review dating to 1986.

The Ninth Circuit’s Conclusion in the Opinion summed up the court’s rationale. “At its core, the merits question in this case is whether the Secretary was allowed to adopt a cautious approach in the face of some risk, difficult to quantify based on current knowledge, to what he called ‘America’s greatest national wonder.’ Appellants raise a myriad of challenges but in the end identify no legal principle invalidating the Secretary’s risk-averse approach. As Interior concluded, withdrawal of the area from new mining claims for a limited period will permit more careful, longer-term study of the uncertain effects of uranium mining in the area and better-informed decision making in the future. For the foregoing reasons, we AFFIRM the judgment of the district court.” *Slip Op.* at 62.

For info: Opinion available at CBD Webpage: www.biologicaldiversity.org/news/press_releases/2017/grand-canyon-uranium-mining-victory-12-12-2017.php

ILLEGAL GW PUMPING WA LANDOWNERS FINED

Landowners near Moses Lake, Washington have been fined for illegally pumping more than 500 million gallons of groundwater from the declining Odessa aquifer. In June of 2017, the Washington Department of Ecology (Ecology) issued cease and desist orders requiring the landowners and their lessee to stop pumping groundwater. Despite the warnings and orders from Ecology, the landowners continued to illegally irrigate through the 2017 growing season. The estimated value of crops grown on the illegally irrigated lands is more than \$1 million.

The Odessa aquifer has been rapidly declining since 1980. Groundwater has dropped more than 200 feet, forcing local farmers and homeowners to drill wells deeper to reach the diminishing water supply. The Washington Legislature passed a law in 2004 that prohibited using water from the dwindling Odessa aquifer for irrigation when water from the Columbia River is available through the irrigation district (2004 law report available at: <https://ecology.wa.gov/About-us/Get-to-know-us/News/2017/Dec-19-Landowners-fined-for-illegally-pumping-500>).

Ecology issued the following fines: Landowners Michael Schmidt, et al. and lessee Ron Fode were fined \$103,000 for illegally irrigating 65 acres of alfalfa; Landowner Ron Fode was fined \$206,000 for illegally irrigating 130 acres of timothy hay; Landowners Randy and Michele Kiesz, as well as lessee Ron Fode, were fined \$309,000 for illegally irrigating 335 acres of alfalfa and potatoes. “These landowners willfully ignored the law and tapped into a vulnerable aquifer without a legal right to do so,” said Mary Verner, Ecology’s Water Resources program manager. “This isn’t fair to other irrigators who follow the law or to local communities and rural landowners who depend on this groundwater for their drinking water.”

Ecology’s press release pointed out that more than \$200 million has been invested by local landowners and public agencies in recent years to ease

the pressure on the declining aquifer by developing sustainable surface water supplies.

For info: Brook Beeler, Ecology, 509/329-3478 or brook.beeler@ecy.wa.gov

PCBS LAWSUIT OR OREGON SUES MONSANTO

On January 4, Oregon Attorney General Ellen Rosenblum filed a lawsuit against Monsanto for the harm that chemicals it manufactured have caused over decades to Oregon’s land, waters, fish, and wildlife. The lawsuit seeks over \$100 million for the damages and clean-up costs associated with polychlorinated biphenyls (PCBs).

The lawsuit alleges that Monsanto knew as early as 1937 that PCBs were toxic to fish, wildlife and other living species. PCBs were used in many compounds because they are highly durable and do not naturally break down. PCBs were eventually banned in the US in 1977, but today they continue to pollute public lands and waterways.

PCB exposure can cause serious liver damage, depressed immune system function, skin conditions such as acne and rashes, significant irritation of and harm to the nose and lungs, gastrointestinal discomfort, changes in the blood and liver, depression, fatigue, and learning capacity impairment.

PCBs are hard to remove from the environment, and they bioaccumulate in fish and wildlife, meaning that species higher up the food chain retain and accumulate PCBs from feeding on smaller species. They are not found naturally in the environment, so all PCB contamination is the result of the manufacturer — Monsanto.

As highlighted on page 3 and 29 of the complaint, in the face of its own internal research showing how harmful and persistent PCBs were, Monsanto’s internal talking point was that it could not “afford to lose one dollar of business,” and it continued to manufacture, market, and sell more and more PCBs.

For info: Kristina Edmunson, ODOJ, 503/ 378-6002, Kristina.Edmunson@doj.state.or.us; Complaint at: www.doj.state.or.us/wp-content/uploads/2018/01/Monsanto_Complaint.pdf

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January 16-18 ID

Idaho Water Users Assoc. Annual Convention, Boise. The Riverside Hotel. For info: IWUA, 208/ 344-6690 or www.iwua.org/

January 17 DC

Water Infrastructure Finance & Innovation Act (WIFIA) Information Session, Washington. EPA Headquarters, William Jefferson Clinton East Bldg., 1301 Constitution Avenue, NW. For info: <https://events.r20.constantcontact.com/register/eventReg?oeidk=a07eeq8d6abafcc5e55&osq=&c=&ch=>

January 18-19 KS

Kansas Ground Water Association Convention 2018, Mulvane. Kansas Star Event Center. For info: <https://kgwa.org/events/>

January 19 CA

17th Annual Land Use, Environmental & Real Estate Law Update, Redding. Hilton Garden Inn Redding, 5050 Bechelli Lane, 12:30 pm-4:00 pm. Presented by Abbott Kindermann. For info: <https://blog.aklandlaw.com/>

January 20 CA

What's Coming Down the Pipeline? The Future of California's Water Infrastructure - 14th Annual California Water Law Symposium, Berkeley. Chevron Auditorium, International House, UC Berkeley. Collaborative, Student-Led Event Involving UC Berkeley School of Law; UC Davis School of Law; UC Hastings College of the Law; University of San Francisco School of Law; Golden Gate University School of Law & the University of the Pacific, McGeorge School. For info: waterlawsymposium2018.com

January 24-26 CO

Colorado Water Congress 2018 Annual Convention, Denver. Hyatt Regency Denver Tech Center. For info: <http://www.cowatercongress.org/annual-convention.html>

January 24-26 TX

Texas Ground Water Association Annual Convention, San Marcos. Embassy Suites in San Marcos. For info: www.tgwa.org/

January 24-26 WY

Wyoming Water Well Association Annual Convention, Casper. Ramkota Hotel & Conference Center. For info: www.wywaterwell.org/convention

January 25-26 WA

25th Annual Endangered Species Act Conference, Seattle. Crowne Plaza Downtown. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

January 25-27 BC

2018 Environmental & Energy, Mass Torts & Products Liability Committees' Joint CLE Seminar, Whistler. Westin Resort & Spa. Presented by ABA Sections. For info: <https://shop.americanbar.org/ebus/ABAEventsCalendar/>

January 26 CA

17th Annual Land Use, Environmental & Real Estate Law Update, Sacramento. Sacramento Hilton Arden West, 2200 Harvard Street, 8:30 am-Noon. Presented by Abbott Kindermann. For info: <https://blog.aklandlaw.com/>

January 29-30 CA

2018 California Irrigation Institute 56th Annual Conference: Drought to Deluge - Scaling Solutions, Sacramento. Hilton Arden West. For info: www.caii.org/

January 30-Feb. 1 ID

Idaho Ground Water Association Annual Convention & Trade Show, Boise. JUMP, 1000 W. Myrtle. For info: <http://www.igwa.info/events.html>

February 1 TX

Central Texas Water Conservation 8th Annual Symposium: Future-Focused Water Conservation (Past to Present: What's Next on the Horizon), Austin. Canyon View Event Center, 4800 Spicewood Springs Road. For info: <http://www.texaswater.org/>

February 2 CA

17th Annual Land Use, Environmental & Real Estate Law Update, Modesto. DoubleTree Hotel Modesto, 1150 Ninth Street, 12:30 pm-4:00 pm. Presented by Abbott Kindermann. For info: <https://blog.aklandlaw.com/>

February 6-8 WA

16th Annual Stream Restoration Symposium, Stevenson. Skamaia Lodge. Presented by River Restoration Northwest. For info: <http://www.rnwn.org/>

February 7 CA

17th Annual Land Use, Environmental & Real Estate Law Update, Napa. Embassy Suites, 1075 California Blvd., 12:30 pm - 4:00 pm. Presented by Abbott Kindermann. For info: <https://blog.aklandlaw.com/>

February 7-9 MT

Montana Water Well Drillers Association 2018 Convention, Great Falls. Heritage Inn. For info: www.mwwda.org/convention

February 8-9 DC

Environmental Law Conference, Washington. Washington Plaza. Presented by American Law Institute. For info: www.ali-cle.org/index.cfm?fuseaction=courses.course&course_code=CZ014

February 8-9 NV

Western Water Law 23rd Annual Conference: Federal, Tribal, State & Local Considerations, Las Vegas. Caesars Palace. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

February 8-9 NV

Mountain States Ground Water Expo, Laughlin. The Aquarius Resort Casino. For info: <http://mountainstatesgroundwater.com/>

February 9 OR

Oregon Superfund Conference: Environmental Contamination Plus Cleanup, Portland. World Trade Center Two. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, info@elecenter.com or www.elecenter.com

February 12-13 LA

Endangered Species Act, Wetlands, Stormwater & Floodplain Regulatory Compliance for Energy & Utilities Conference, New Orleans. Hyatt Regency New Orleans. For info: www.euci.com/event

February 13 WY

Wyoming Water Forum: Paige Wolken, U.S. Army Corps of Engineers. "Compensatory Mitigation", Cheyenne. Wyoming Water Development Commission at 6920 Yellowtail Rd. Presented by Wyoming State Engineer's Office. For info: <http://seo.wyo.gov/interstate-streams/water-forum>

February 13-15 NE

2018 Nebraska Water Industries Convention & Trade Show, Lincoln. For info: <http://www.nebraskawelldrillers.org/>

February 15-16 AK

Alaska Water Well Association 2018 Conference, Anchorage. Lakefront Hotel. For info: www.alaskawellwater.org/convention

February 21-22 TX

North American Shale Water Management 2018: Reducing the Cost of Water Recycling & Reuse, Houston. For info: www.shale-water-management.com

February 22-23 WY

Oklahoma Water Law Conference, Oklahoma City. Sheraton Downtown. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

February 22-23 NV

Family Farm Alliance Conference: One Year In - What's Changed & Where Are We Going in Western Water, Reno. Eldorado Resort Casino. For info: www.familyfarmalliance.org

March 1-2 AZ

Law of the Colorado River Superconference: Learning from Our History & Planning for the Future, Tucson. Hilton El Conquistador Resort. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

March 1-4 OR

Public Interest Environmental Law Conference 2018: Local Character, Global Vision, Eugene. University of Oregon. Presented by Land Air Water & Friends of Land Air Water. For info: <http://pielc.org/pielc-2018/>



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March 5-6 TX

Texas Wetlands Conference, Austin. Omni Hotel at Southpark. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

March 5-7 CA

16th Biennial Symposium on Managed Aquifer Recharge, San Diego. The Dana on Mission Bay, 1710 W. Mission Bay Drive. Presented by Groundwater Resources Assoc. of California and the Arizona Hydrological Society. For info: www.grac.org/events/99/

March 8 OR

Faces of Freshwater Event, Portland. Castaway Portland, 5:30 - 9:00 pm. Presented by The Freshwater Trust. For info: www.thefreshwatertrust.org/get-involved/events/

March 13 WY

Wyoming Water Forum: "Updates on Governor's Water Strategy Fish Passage Initiative", Cheyenne. Wyoming Water Development Commission at 6920 Yellowtail Rd. Presented by Wyoming State Engineer's Office. For info: <http://seo.wyo.gov/interstate-streams/water-forum>

March 16-17 OR

2018 Pacific Northwest Ground Water Exposition, Portland. Red Lion Hotel on the River - Jantzen Beach. For info: <http://www.pnwgwa.org/>

March 18 CA

Water Gala '18, San Francisco. Mezzanine. Presented by Alliance for Water Efficiency. For info: Nashelley Kaplan-Dailey, 415) 828-6344 or nashelley@imagineh2o.org

March 20 OR

Water Quality Conference: NPDES Permitting, Stormwater Management & Source Control, Portland. World Trade Center Two. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, info@elecenter.com or www.elecenter.com



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