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TREATY RIGHTS & NATURAL RESOURCES

THE NEXT CHAPTER: *UNITED STATES V. WASHINGTON* - THE CULVERTS CASE

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"The Earth and myself are of one mind.
The measure of the land and the measure of our bodies are the same."
Nez Perce Chief, Hinmaton Yalatkit (Chief Joseph)

Introduction

Water is the lifeblood of our natural world. How we use, regulate, and protect our water and the habitat and fishery resources it sustains is a reflection of who we are as individuals, governments, and nations. Pacific Northwest Tribes (PNW Tribes) have served as guardians of our natural resources since time immemorial. The Tribes of Washington State that are parties to the Culverts Case proceeding include: Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community. (References to "PNW Tribes," means all Tribes listed here).

In more recent times, over the last 150 years, the PNW Tribes have been forced to fight with individuals, businesses, and the State of Washington to protect and maintain their treaty rights to harvest enough salmon to feed their families. While the PNW Tribes' treaty rights to fish, hunt, and gather has been long-established, the state and federal government's duty not to interfere with the PNW Tribes' exercise of those treaty protected rights is less well defined. However, on June 11, 2018, the State of Washington's duty not to interfere with the PNW Tribe's treaty fishing rights was dramatically defined by the United States Supreme Court decision in *Washington v. United States, et al*., 584 U.S. ____ (2018) (Culverts Case), which affirmed the 9th Circuit's decision in favor of Plaintiffs. This decision recognized Plaintiff PNW Tribes' enforceable right to protect fishery habitat as a component of their treaty fishing rights.

In Section I of this article we will briefly review the historical circumstances and case law leading up to the recent decision in *Washington v. United States* and then discuss the procedural history in the trial court that lead up to the 9th Circuit decision which was affirmed by the Supreme Court. In Section II, we analyze the decision by the 9th Circuit and in Section III, we explore how this most recent expansion of tribal treaty rights may be used by other treaty tribes to protect their treaty protected fishing, hunting, and gathering rights. In Section IV, we look into the future application of tribal treaty rights under the Superfund Statute, the Clean Water Act (CWA), and the National Environmental Policy Act (NEPA) and in Section V, we offer our view of the Culverts Case treaty claim model framework.

Culverts Case

Treaty-Based Rights

Implied Duty

Uphill Battle

Fishing Access

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Section I. History & Case Law

TREATY RIGHTS IGNORED FROM THE BEGINNING

The tribal fishing rights at issue in *Washington v. United States* were established in 1854 and 1855 by the Stevens Treaties. In a series of eight treaties, then Governor Stevens negotiated with the Tribes of the Pacific Northwest for the cession of the lands, surface waters, and marine areas they controlled in exchange for the small tracts of land which comprised their reservations, and their "right of taking fish, at all usual and accustomed grounds and stations… ." Treaty of Medicine Creek, 10 Stat. 1132; *see also* Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933. Ever since, the PNW Tribes have sought to clarify and exercise their treaty-based rights to fish. The *Washington v. United States* case sets new precedent in that it recognized the PNW Tribes' right to enforce an implied duty on the part of the state and federal governments to refrain from, and prevent damage to, natural habitats that support the PNW Tribes' treaty protected resources, including fish, water, and game. *See* Mason Morisset and Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation,* 1 Bellweather: The Seattle J. Envtl. L. Pol'y 29, 34 (2009).

Tribes have faced an uphill battle in exercising their treaty-based fishing rights despite the fact that the treaties explicitly provided the right. In the late 1880s, several members of the Yakima Tribe were forced to file suit to enforce their right to access off-reservation fishing sites because a private landowner had fenced off sections of the Yakima River, preventing access to the Tribe's traditional fishing grounds. The trial court initially ruled in favor of the landowner, but the Supreme Court of the Territory of Washington reversed that decision, finding that the treaty created an equitable servitude on the land that was not ended by the transfer of land from the government to a private individual. *U.S. v. Taylor*, 3 Wash. Terr. 88 (1887). A similar issue arose several years later when two brothers who owned land on opposite sides of the Columbia River obtained licenses from the State of Washington to operate several fish wheels that prevented passage of many of the salmon at Celilo Falls. There, the US Attorney filed suit to enforce tribal treaty rights and again the trial court upheld the landowners' right to exclude others from their property. In 1905, however, the US Supreme Court (Supreme Court) reversed that decision, holding that the applicable treaty reserved the tribal right to fish at traditional locations and therefore when the government transferred the land the new owners could not obtain greater property rights than those acquired by the government through the treaty. *U.S. v. Winans*, 198 U.S. 371 (1905). Fourteen years later, in another case involving landowners preventing access to fishing grounds near Celilo Falls, the Supreme Court affirmed an injunction issued by the US District Court in Oregon that prevented the landowners from excluding tribal members. *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). Significantly, this case also affirmed the tribal right to access fishing grounds *outside* of their ceded territory if it can be shown that the area was used for tribal resource gathering.

Not only did PNW Tribes face significant resistance from private landowners and State authorities to access their usual and accustomed fishing grounds, but the number of fish also steadily decreased. As the State developed and became more populated, pressure on the fisheries increased. In response, the State put in place fishing regulations and attempted to force the PNW Tribes to comply with those regulations.

The Fish Wars

Though the PNW Tribes' right to fish is protected by treaty, tribal members began being arrested when fishing off-reservation for their failure to obtain a fishing license. In 1945, Billy Frank Jr., a member of the Nisqually Tribe who later became a prominent activist for treaty rights and also the long-term Chairman of the Northwest Indian Fisheries Commission, was arrested by game wardens at the age of 14 for fishing with a net on off-reservation property owned by his family on the Nisqually River. Tensions continued to grow as the fish stocks declined due to increased harvests by unregulated commercial boats and new hydroelectric projects that impacted available habitat. By the 1960s Billy Frank Jr.'s property, known as "Frank's Landing," was the site of unlicensed "fish-ins" where tribal members repeatedly returned to exercise their treaty rights despite numerous arrests and convictions. The cause began to draw national attention, and in a show of support to the Puyallup Tribe Marlon Brando was arrested for unlicensed fishing during a protest in 1964.

In September 1970, a group of members of the Puyallup Tribe in boats challenged government authorities who approached their nets, wielding rifles and firing warning shots. A protester eventually threw a fire bomb onto a bridge to block the officials from approaching, but the authorities eventually raided the group's camp, breaking up the demonstration with clubs and tear gas. It was in this context that the federal government finally intervened on behalf of the PNW Tribes, suing the State of Washington for its failure to satisfy its obligations under the treaties.

Culverts Case

Fisheries Regulation

Right to Take Fish

"Fair Apportionment"

Tribes Co-Managers

Habitat Right

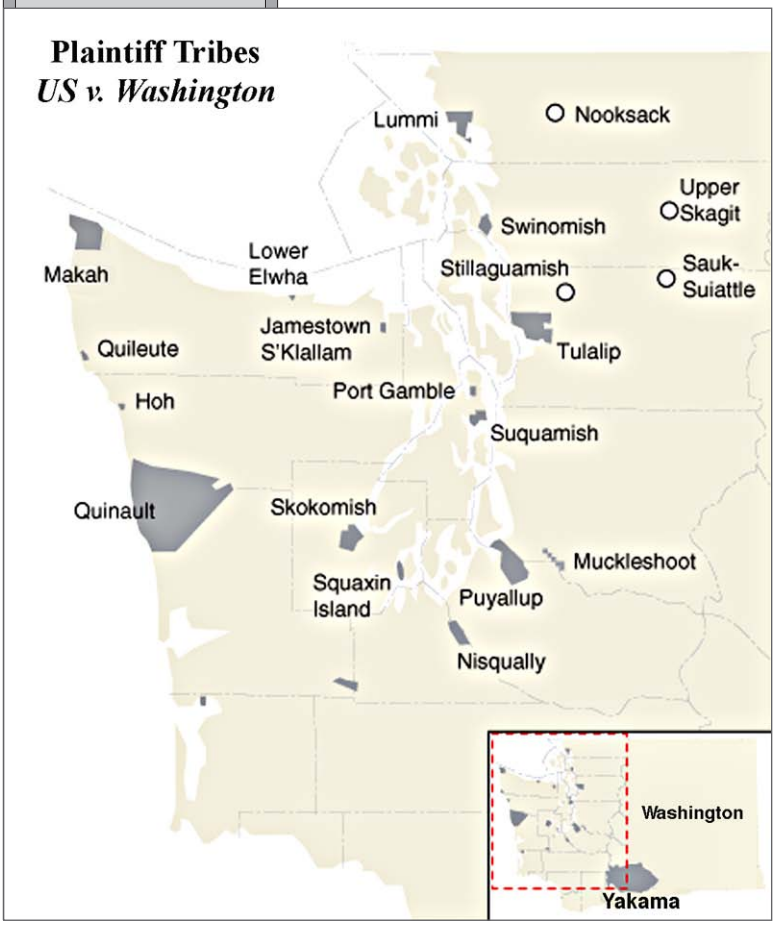
***Puyallup I and II* – Duty Not to Degrade Tribal Fishing Rights**

In what became known at *Puyallup I and II*, the Supreme Court found that state regulation of fisheries for the purpose of conservation could be upheld so long as appropriate standards were met — with "fair apportionment" of fish between Indians and non-Indians. *Puyallup I*, 391 U.S at 398 (1968), and *Puyallup II*, 414 U.S. at 4849 (1973). This ruling affirmed the PNW Tribes' interpretation of their treaty rights, and protected their "right to take fish" for both a living and for food. These decisions were significant because they implied a clear duty on the part of the State not to take actions that degrades the PNW Tribes' treaty-based fishing rights. Earlier Supreme Court decisions laid the foundation for the tribal rights. *U.S. v. Winans,* 198 U.S. 371 (1905), held that the right to take fish requires grantees of the state to allow tribe members access to the usual and accustomed fishing sites; *U.S. v. Winters,* 207 U.S. 564 (1908) held that the tribes had a treaty-based right to water for the purposes of the tribal reservation, including farming and fishing.

The "Boldt Decision" Clarifies Existence of Off-Reservation Treaty Rights

As fisheries declined, due at least in part to habitat loss, the PNW Tribes asked the court to determine to what extent they could enforce the implied duty of the State to not degrade fishing or hunting habitats used under their treaty rights. In 1974, in a case known as the "Boldt Decision," Federal District Court Judge Boldt clarified the meaning of "fair apportionment" and the "right to take fish." *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). He found that the PNW Tribes had bargained for the right to continue fishing where they always had, regardless of whether that location was on their reservation or not. *Id*. This decision acknowledged the role of the twenty treaty Indian tribes in western Washington as co-managers of the salmon resource with the State of Washington. The decision apportioned the fish between tribal and non-tribal fisherman, holding that PNW Tribes were entitled to 50% of the fish runs passing through the Tribes' usual and accustomed fishing grounds. *Id*.

The case brought against the State was bifurcated for trial, and in 1980, Phase II of the case proceeded to trial. The federal government and tribal governments alleged that an environmental right to have the fisheries resource protected from adverse State action also arose by implication from the reserved right to harvest fish. *Id*. Judge Orrick of the Northern Division of California held that there is an "implied environmental right" in the Treaties. *United States v. Washington* (*Phase II*), 506 F. Supp. 187 (W.D. Wash. 1980). The Judge analogized the habitat right tribes sought to the right of an implied reservation of water necessary for the protection of fish and farming recognized by the *Winters* Doctrine. *Id*. The *Winters* Doctrine held that an implied reservation of water reserved the amount of water necessary to fulfill the purpose of the reservation. *U.S. v. Winters*, 207 U.S. 564, 576 (1908). On appeal of Phase II, the 9th Circuit dismissed the proceeding for procedural reasons, but made it clear that the issue would be reconsidered if the plaintiffs came forward with a specific case demonstrating the State's obligations regarding habit protection.



Section II. *United States v. Washington*

THE CULVERTS CASE

As Washington grew and a network of roads was built, the State constructed and maintained culverts under State roads and highways to divert water away from the roadways. However, the culverts were often not designed or built to allow for fish to pass upstream to access their spawning grounds. These culverts, owned and operated by the State, directly contributed to the reduction of salmon runs by reducing available habitat essential to the reproductive cycle of anadromous fish. This situation provided the set of facts the 9th Circuit had noted in its 1993 decision would be required if the plaintiffs were to prove that the State violated its obligations regarding habitat protection. *United States v. Washington*, No. 13291 (W.D. Wash. June 22, 1993).

Culverts Case

Culvert Impacts

Treaty Obligation

"Moderate Living"

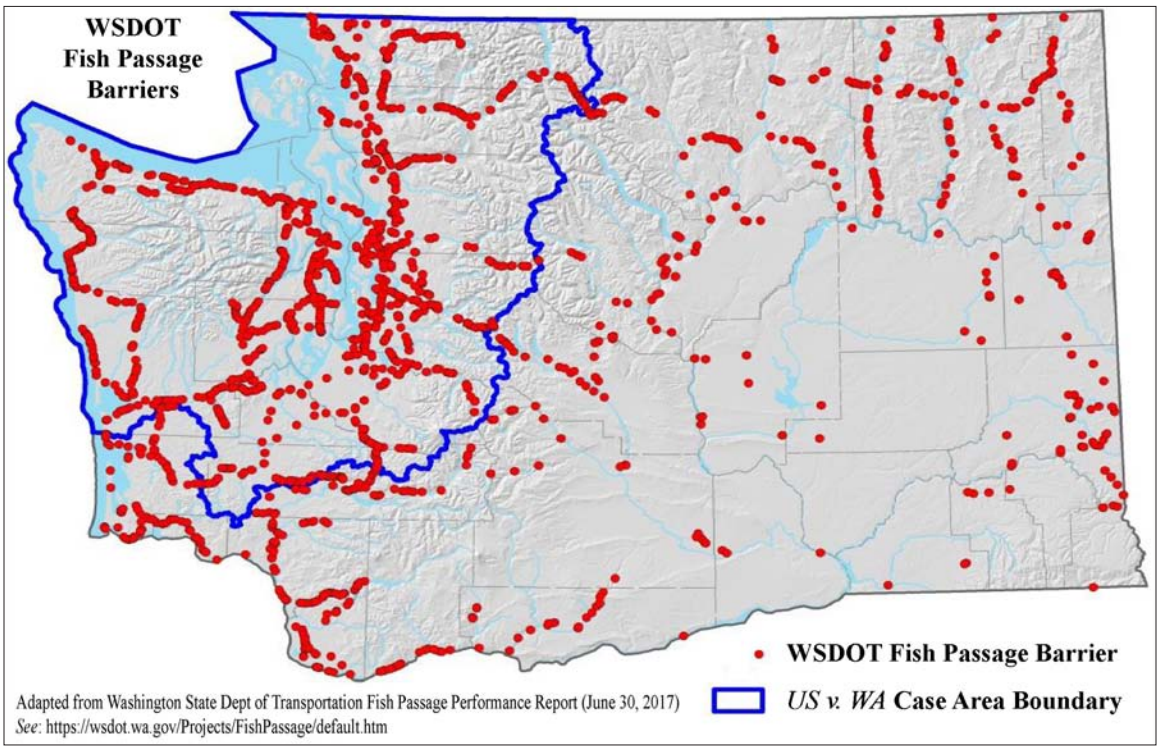
Diminishment of Salmon

2001 District Court: State's Obligation Under the Treaties

Based on the adverse impacts of culverts on the fisheries, in 2001 the PNW Tribes, joined by the United States, asked the US District Court to find that Washington State had a treaty-based duty to preserve fish runs and habitat at off-reservation fishing sites that were usual and accustomed places. The PNW Tribes sought to compel the State to repair or replace culverts that impede salmon migration. The PNW Tribes averred that a "significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival" (*United States v. State of Washington*, 2007 WL 2437166, at *2), and noted that the State's own estimate was that removal of obstacles presented by blocked culverts would result in an annual production increase of 200,000 fish. *Id*. ¶¶ 2.5, 2.6, 2.7.

District Court Judge Martinez found in favor of the PNW Tribes, holding that while culverts impeding fish migration were not the only factor diminishing their upstream habitat, the State's construction and maintenance of culverts that impede salmon migration had diminished the size of salmon runs and thereby violated the State's obligation under the treaties. *United States v. State of Washington*, 2007 WL 2437166, at *10. While not explicitly imputing an affirmative duty to take any and all steps possible to protect fish habitat, the decision did cite Judge Orrick's opinion for the basis that such a duty is implied and held that the State had to "refrain from building or operating culverts under state-maintained roads that hinder fish passage." *Id*. The decision incorporated the 9th Circuit's caveat that a remedy would only be granted on the basis of the specific facts and circumstances of a particular complaint. *Id.* at *5.

Judge Martinez found that the intent of the parties to the Stevens Treaties was to ensure the PNW Tribes would be able to take fish in sufficient amounts to meet their subsistence needs forever. *Id*. at *9. Thus, it is the State's burden to show that "any environmental degradation of the fish habitat proximately caused by the State's actions would not impair the Tribes' ability to satisfy their moderate living needs." *Id*. at 4, (citing *United States v. Washington*, 506 F. Supp. 187, 207 (1990)). The term "moderate living" was interpreted to mean a measure securing fish in an amount so much as, but not more than necessary, to provide the Tribes with a livelihood. *United States v. State of Washington*, 2007 WL 2437166, at *7. Based on that definition, Judge Martinez indicated that the PNW Tribes had provided sufficient evidence of a diminishment of salmon, and that the State's actions were a direct cause of the diminishment, such that the PNW Tribes' treaty rights had been damaged. Further, Judge Martinez ruled that the PNW Tribes did not have to "exactly quantify the numbers of missing fish" so long as there is evidence that the culverts are responsible for some portion of the proven decrease of fish runs. *United States v. State of Washington*, 2007 WL 2437166, at *3.



Adapted from Washington State Dept of Transportation Fish Passage Performance Report (June 30, 2017)
See: https://wsdot.wa.gov/Projects/FishPassage/default.htm

Culverts Case

Permanent Injunction (Habitat)

2013 District Court: Man-Made Degradation of Fish Habitat

In light of the specific factual showing of lost fishing opportunities due to culverts that blocked the upstream migration of fish, in 2013 the District Court issued a permanent injunction requiring the State to significantly increase its efforts to remove and replace the State-owned culverts that have the greatest adverse impact on the fish habitat by 2030. *U.S. v. Washington*, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013). The Court determined that the PNW Tribes' treaty right to take fish includes protection of fish habitat from man-made degradation. It found that culverts blocking the free passage of salmon upstream result in man-made degradation of the fish habitat. In coming to this conclusion, the District Court relied on the significant decrease in salmon stocks in Washington since 1985, specifically focusing on evidence demonstrating that barrier culverts block hundreds of thousands of salmon from traveling up freshwater rivers and streams to reach their spawning grounds.

Culvert Repair or Replacement

2017 9th Circuit Decision: "Moderate Living"

On appeal, the 9th Circuit upheld the District Court's injunction with a unanimous 3-0 decision, affirming the District Court's requirement that the State repair or replace State-owned culverts prohibiting free passage of fish to spawning grounds and other important habitats. In affirming the injunction, the court ruled that the State was obligated under the Stevens Treaties to ensure that there were enough fish available for the PNW Tribes to make a "moderate living." *Id*. The State petitioned the 9th Circuit for both a panel and en banc rehearing but was denied. The dissenting minority of the en banc review issued an opinion and argued that the majority's reasoning ignored the Supreme Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), that the opinion was overly broad, and if unchecked, could significantly affect natural resource management throughout the Northwest. The majority disagreed with each of those allegations, but because the court declined to articulate a standard for "moderate living," this standard may be the subject of future litigation.

Supreme Court Issues

2017 *Washington v. United States*

In response to the 9th Circuit decision, in 2017 the State filed a petition for review of the 9th Circuit decision by the United States Supreme Court. The Supreme Court accepted review and agreed to hear three issues:

(i) whether the treaties guarantee the tribes a "moderate living" from salmon harvests;
(ii) whether the federal government is barred from bringing the suit because the federal government approved the design and implementation of the culverts for decades; and
(iii) whether the district court's injunction violates principles of federalism because there was no judicial finding of a clear connection between culvert replacement and tribal fishing.

Habitat Degradation

The Justices who heard argument appeared particularly interested in identifying a clear test for determining treaty violations and in searching for some quantitative measure of habitat degradation that could serve as a standard for determining when state, local, or private activity would interfere with tribal fishing rights. Unfortunately, neither side would commit to an absolute percentage as a test of habitat degradation. Considerable time was also spent discussing the scope of the District Court injunction, with the State of Washington contesting its factual premises. Washington's Solicitor General proposed a standard based on "a large decline in a particular river." Attorneys for the US and the PNW Tribes argued that the test should be whether the culverts caused a "substantial decline" in the salmon population.

Section III. 2018 – Supreme Court Affirms the 9th Circuit

Split Decision

On June 22, 2018, the United States Supreme Court affirmed per curiam the 9th Circuit's decision in *Washington v. United States* in a 4-4 decision. *Washington v. United States*, 584 U.S. __ (2018). [Editor's Note: a "per curiam" decision is issued in the name of the court, rather than a specific judge]. The Justices were evenly split due to Justice Kennedy having recused himself from hearing the case because he had previously heard a portion of the case when he sat on the 9th Circuit. Justice Kennedy had traditionally been a skeptic of tribal rights and his recusal may have been instrumental in the Court's affirmation of the 9th Circuit decision.

Ruling's Applicability

When the Supreme Court ties, the lower-court ruling generally stands, but that does not mean the lower court's decision becomes the law of the land. In *United States v. Pink*, 315 U.S. 203, 216 (1941) the Supreme Court explained that an affirmance by equal division is binding on the parties to that litigation but no one else. *See also*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987): "Of course, an affirmance by an equally divided Court is not entitled to precedential weight." The Court's first tie decision was in 1792. The case, *Hayburn's Case*, required federal circuit courts to determine pensions for disabled revolutionary war veterans. The Supreme Court heard the case, but as it explained, "THE COURT

Culverts Case

Tie Vote Implications

being divided in opinion on that question, the motion was not allowed." The tie vote in *Hayburn's Case* didn't result in the affirmance of a lower court decision but rather denial of the Attorney General's motion. The principle embodied in the case, however, applies to situations where the Supreme Court reviews the decision of a lower court. Under the principle in *Hayburn's Case*, the Supreme Court views itself as being unable to take affirmative action — including reversing the decision of a lower court — in the absence of a majority vote of the Justices. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 253 (2016). Thus, a tie decision essentially binds only the parties to the case to obey what the lower court ruled. That said, if there is no existing authority on the law or the facts, a tie decision still carries persuasive authority in the form of the lower court's decision. For example, if another circuit heard a case with similar facts, it may look to the 9th Circuit's decision as persuasive authority. *Id. at* 245, 251 (2016); Pidot's survey showed that tie votes have been rare, averaging fewer than two occurrences per year. His survey also showed that issues of importance are very quickly presented to the Court again. *Id*. at 276.

Supreme Court Appointments

If a similar case were to be heard by the Supreme Court, however, the decision will likely be significantly influenced by recent changes to the makeup of the court, which may soon include President Trump's nominee to replace retiring Justice Kennedy, Brett Kavanaugh. Mr. Kavanaugh's views regarding Indian Law are relatively unknown. According to Mathew Fletcher, professor of law at Michigan State University, and citizen of Grand Traverse Band of Ottawa and Chippewa Indians, Kavanaugh has written less than ten relevant opinions addressing tribal issues, and of those, none "are overtly pro-Indian or anti-Indian"(*see* https://nativenewsonline.net/opinion/brett-kavanaugh-the-new-supreme-court-associate-justice-nominee-should-be-questioned-about-native-rights/).

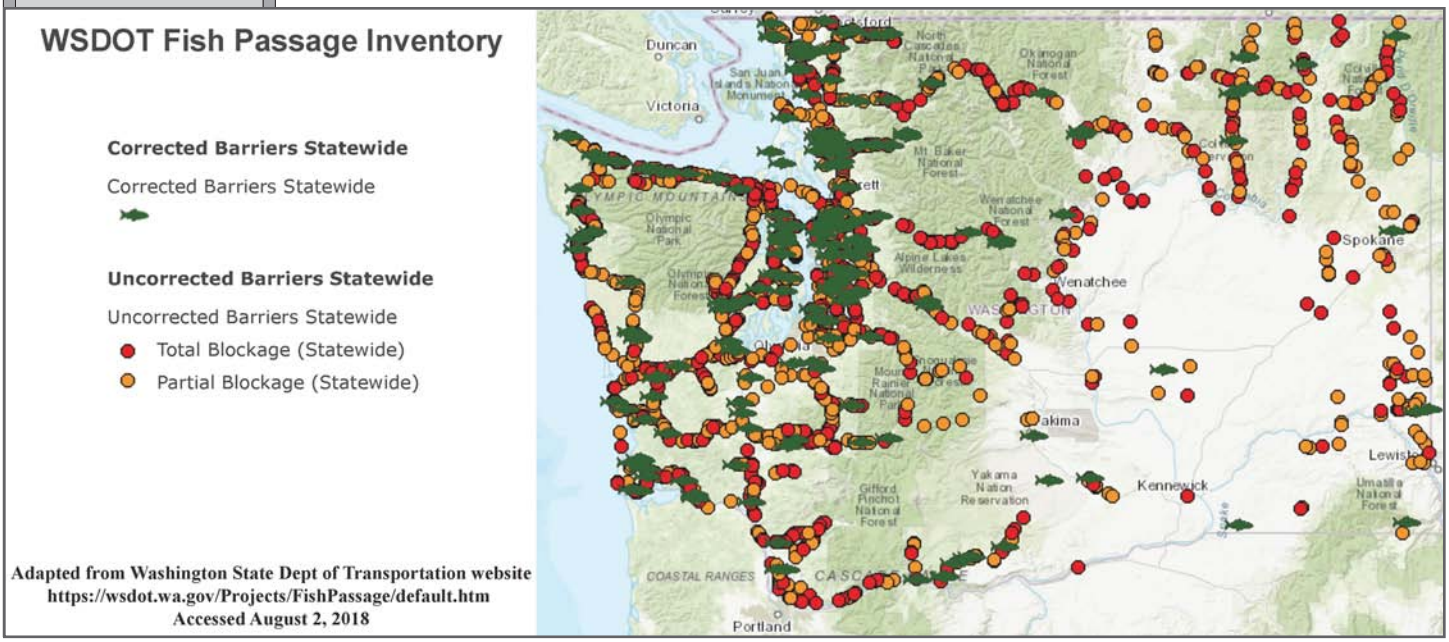
Treaty Language

In contrast, Justice Gorsuch's time on the Tenth Circuit provided significant opportunities to address tribal issues. While sitting on the Tenth Circuit, Justice Gorsuch wrote eighteen opinions related to federal Indian law or Indian interests and participated in an additional 42 such cases (*see* www.americanbar.org/groups/crsj/publications/crsj-human-rights-magazine/vol--43/vol--43--no--1/justice-gorsuch-and-federal-indian-law.html). Rather than defer to agency interpretation, Justice Gorsuch has turned to canons of statutory construction, suggesting that he may look closely at specific treaty language when making determinations regarding the rights reserved to Indian tribes. His previous experience with federal Indian law suggests he may be both attentive to the details and respectful of the fundamental principles of tribal sovereignty and the federal trust responsibility. *See Ute Indian Tribe v. State of Utah*, 790 F.3d 1255 (10th Cir. 2015) (addressing issues of sovereignty); see also *Ute Indian Tribe v. Myton*, 835 F.3d 1000 (10th Cir. 2016) (addressing issues of sovereignty); *see also Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013).

Precedential History: Implied Rights

Building upon Federal Common Law

The Supreme Court has previously recognized implied rights beyond those expressly reserved within the treaties. This precedential history offers context for the courts' determination that implied resource habitat protection rights logically follow from adherence to the canons of treaty construction. Mason Morisset and Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation,* 1 Bellweather: The Seattle J. Envtl. L. Pol'y 29, 7 (2009).



Culverts Case

Treaty Purpose

Winters Tribal Right to Water

Implied Promise of Water

Tribal Groundwater Case

Reserved Rights

Treaty Right to Fish

New Platform

The 2017 9th Circuit decision in *United States v. Washington* specifically looked to water rights case law when the court found an implied duty of the State to not degrade fish habitat. *United States v. Washington*, 853 F. 3d 946, 965 (2017). The water rights cases held that when interpreting the treaties, courts should infer a promise to "support the purpose of the Treaties." *Id*. As reflected in the water rights cases discussed below, this meant that even though an explicit promise to provide water or access to water was not written into the treaty, the Courts found the treaties carried an implied promise — otherwise the purpose of the treaty would have been meaningless.

The 1908 Supreme Court decision in *Winters* was the first case to recognize the implied right to water. In the Treaty that created the Fort Belknap Reservation, there was no explicit reservation of water use on the reserved lands, but the Supreme Court inferred a reservation of water "sufficient to support the tribe" because without the reservation of water, the lands reserved for the Tribe were arid and practically valueless. *Winters*, 207 U.S. 564, 576 (1908). "Between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it, the court chose the former." *Id*. at 577.

The *Winters* decision was later affirmed in *United States v. Adair*. In *Adair*, the Klamath Tribe's 1854 treaty promised that the Tribe would have the right to "hunt, fish, and gather on their reservation" but contained no explicit reservation of water rights. *U.S. v. Adair*, 723 F. 2d 1394, 1408 (9th Circ. 1983). The Klamath Marsh, on the reservation, provided the Tribe's primary hunting and fishing areas and relied on a flow of water from the Williamson River. Because game and fish in the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without the flow. In a decision foreshadowing the eventual decision regarding the impacts of culverts on fisheries in Washington, the court inferred a promise of water sufficient to ensure an adequate supply of game and fish. *Id*.

Cases involving treaty-reserved water rights have typically addressed surface waters. However, in a case that is still before the courts, the 9th Circuit recently affirmed a trial judge's determination that the Agua Caliente Band of Cahuilla Indians, located in California's Coachella Valley, have a reserved right applying to groundwater. *Agua Caliente Band of Indians v. Coachella Valley Water Dist.,* 849 F.3d 1262 (9th Cir. 2017); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, No. 17-42, 2017 U.S. LEXIS 7023, at *1 (Nov. 27, 2017) (Supreme Court denying certiorari). There, due to the arid environment, the groundwater of the Coachella Valley aquifer has been essential for tribal irrigation and drinking water, and is also a key part of the Band's ceremonial and spiritual traditions. The Tribe filed suit against the Coachella Valley Water District and Desert Water Agency in May 2013 for damage caused by the water agencies' ongoing overdraft of the Coachella Valley aquifer and its artificial recharge with untreated water imported from the Colorado River. The Band and the US argued that under federal law the Band has a reserved right to enough water to fulfill its present and future needs, regardless of whether that water is surface or groundwater. The trial judge recognized the Tribe's reserved water rights, ruling that under the doctrine of *U.S. v. Winters*, a tribal reserved right may be satisfied with groundwater. That decision was affirmed by the 9th Circuit in 2017 and the Supreme Court refused to hear an appeal from the water agencies. The parties agreed to approach the case in three phases, addressing in turn: (I) whether the Tribe has a reserved or aboriginal right to groundwater (now complete — affirming the reserved right); (II) whether the Tribe's reserved right to groundwater includes a water quality component, the standards for quantifying Tribe's water rights, and whether the Tribe owns the pore space in the aquifer below its reservation; and (III) actual quantification of the Tribe's groundwater and pore space rights within the aquifer, and potentially a determination of the water quality standard that must be met to fulfill the Tribe's water right. Phase II of the case is currently before the trial court. *See*: Munson & Reeves, *TWR* #161.

The treaty language at issue in *Washington v. United States* explicitly promises that the treaty secures the PNW Tribes' right to fish such that there would be food forever. Treaty of Medicine Creek, 10 Stat. 1132; *see also* Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933. Thus, no inference was needed there. However, the 9th Circuit's decision explicitly stated that even if the treaty had not contained the explicit promise of "food forever," the court would have inferred, as in *Winters* and *Adair*, a promise to support the purpose or intent of the treaties. *United States v. Washington*, 853 F. 3d at 965.

Section IV. Tribal Treaty Rights

WHERE DO WE GO FROM HERE?

Bringing Claims

Washington v. United States has the potential to create a new platform from which Tribes may assert their treaty rights. The case builds on strong precedent and outlines a clear strategy for bringing treaty-based claims. *Washington v. United States* could be used to support the ability of tribes to protect both their direct resources (the reserved right, i.e. to hunt, fish, gather, etc.) and indirect resources (protection of

Culverts Case

habitat that ensures continued access to the named right) guaranteed under the treaty. The decision could have broad implications for other government and private entities that own, manage, and/or control barriers (e.g., tide gates, floodgates, and dams) if it can be demonstrated that those barriers block or diminish a treaty guaranteed right to hunt, fish, or gather a natural resource. This decision creates a foundation from which to argue a de facto environmental servitude on the part of the State and federal government, once a tribe can establish that a State action causes significant decreases in the tribe's ability to hunt, fish, or gather their named resource under the treaty. This narrow focus may actually make the decision less vulnerable to reversal by future courts because there is a definitive standard that tribes must meet in order to bring a duty-based treaty resource claim.

De Facto Environmental Servitude

In order to bring a successful duty-based treaty resource claim, tribes will need to have a treaty-reserved right to fish, game, or other natural food source that then creates an inference of an implied duty by the State to protect the natural habitat that supports the specific resource protected under the treaty.

Chippewa Case

As an example of expanding the scope of this decision beyond just the PNW tribes in the Culverts Case, the Chippewa Tribes have a treaty reserved right similar to the PNW Tribes. The 1837 Treaty explicitly states that the Chippewa Tribes retain the privilege of hunting, fishing, and gathering the wild rice upon the lands, the rivers, and the lakes included in the territory ceded, but such privilege is at the pleasure of the President. Treaty with the Chippewa, July 29, 1837, 7 Sta., 536, Article 5. So long as the Chippewa can identify a diminishment of the wild rice, and can aver that a significant reason for the diminishment is the State's destruction and modification of the habitat where the wild rice grows, it is likely that a court will find an implied duty on the part of the State to ensure the amount of wild rice within the habitat is enough to provide for a moderate living.

Implied Duty

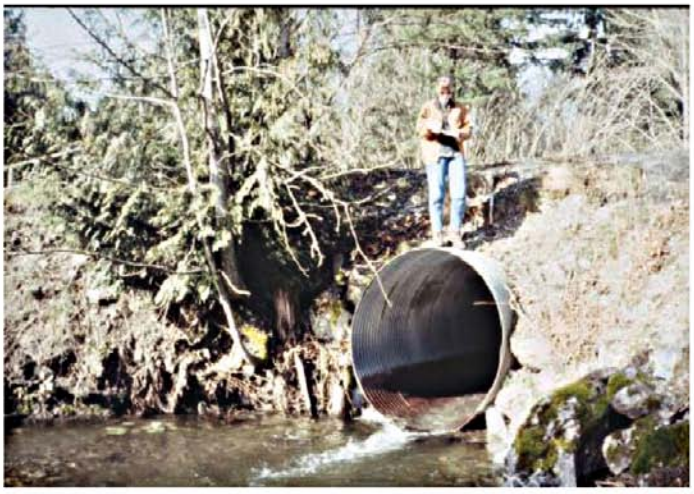
Cleanup Requirements

Application under the Superfund Program

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, for wastes left on-site, remedial actions must comply with Federal and State environmental laws that are legally applicable or are relevant and appropriate under the circumstances of the release. The standards which must be complied with are called "**a**pplicable or **r**elevant and **a**ppropriate **r**equirements" (ARARs). *See* CERCLA Section 121(d)(2). In addition, Superfund remedial actions must comply with State environmental or facility siting laws (ARARs), provided that the State requirements: (1) are promulgated; (2) are more stringent than Federal laws; and (3) are identified by the State in a timely manner.

Culvert Replacement on High Creek, Washington

Before Construction



The old crossing was a 6.2 ft (1.89 m) diameter corrugated steel pipe that was a barrier to fish passage due to excessive slope.

After Construction

The new crossing is a 27 ft (8.23 m) wide concrete box structure that provides access to 2.4 mi (3.9 km) of potential habitat for chum and coho salmon, steelhead, sea run cutthroat, resident and bull trout.

Adapted from Washington State Dept of Transportation Fish Passage Performance Report (June 30, 2017)
See: https://wsdot.wa.gov/Projects/FishPassage/default.htm

Culverts Case

Treaty-Related "ARARs"

The decision in *Washington v. United States* may be interpreted to establish treaty-related ARARs that prohibit the diminishment of treaty-reserved tribal resources. In the appropriate context, treaties should be found to establish ARARs because treaties to which the United States is a party are equivalent in status to Federal legislation, forming part of what the Constitution calls "the supreme Law of the Land." U.S. Const., Art. VI, Clause 2 (the "Supremacy Clause"). Where the implied obligation to protect indirect resources under a treaty is not met by existing federal or State laws, the treaty's requirements can be read to be a federal environmental law applicable as an ARAR if EPA is notified by the affected tribe of the obligation. This could help tribes ensure that the cleanup of contaminated sites, either on or off the reservation, is performed to a standard that is protective of their direct and indirect treaty-based resource rights.

Application under the Clean Water Act

Water Quality Standards

Under the Clean Water Act (CWA), the federal government has an obligation to establish **w**ater **q**uality **s**tandards (WQS), which provide the regulatory and scientific foundation for protecting water quality under the CWA. *See* 40 C.F.R. § 131. WQS not only set water quality goals for specific water bodies, but also serve as the regulatory basis for establishing water quality-based treatment controls and strategies. The authority to develop WQS can be delegated to states and tribes, but the EPA must approve all proposed standards before they are applicable under the CWA.

Indirect Resources

The decision in *Washington v. United States* may provide a tool to allow tribes to push for the establishment of more stringent WQS based on the federal and state obligation to protect the indirect resources supporting the treaty-reserved resources. Where a proposed WQS fails to protect those resources the approval of the WQS would result in a violation of the treaty-based obligations addressed in *Washington v. United States*.

Application Under the National Environmental Policy Act and Related State Acts

No Treaty Diminishment

The National Environmental Policy Act (NEPA) and the local State Environmental Policy Act (SEPA) both present opportunities to pro-actively apply the *Washington v. United States* decision. The decision holds that governmental agencies and third parties cannot take actions that diminish a Tribe's right to a reserved or implied treaty right. The most efficient way to ensure those rights are considered is to add a requirement into NEPA and SEPA environmental checklists requiring applicants to prove that their proposed development will not diminish a reserved or implied tribal right.

By placing the tribal rights review requirement into the permitting documents, concerns of whether a proposed development will affect tribal rights in the future is addressed preemptively. This creates a place for tribes to be at the negotiating table and provides an opportunity for cooperation that could preemptively avoid protracted, uncertain, and costly litigation.

Section V. The Culverts Case Model

POTENTIAL LIMITATIONS

Claims' Limitations

Despite the Culverts Case's ability to augment certain types of claims, there are three overarching potential limitations on the scope of the decision's ability to create a successful new pathway for tribal claims. The first limitation is the fact-specific inquiry that must be conducted. Judge Martinez specifically limited his decision to the particular facts of the case, so any future case must also go through a fact-specific inquiry. The second limitation is the lack of a definitive standard for what amounts to a "moderate living." This is concerning because "moderate living" standards can change depending on what resource must be protected, and it affects what duty the State and third-party actors must take to mitigate or remedy the degradation. Finally, the third limitation is determining what an appropriate remedy would be for any future cases. In *Washington v. United States* a clear remedy was available based on the allegations brought, but due to the complexity of environmental damages claims, determining remedies is never easy.

Causation

The PNW Tribes' and federal governments' arguments proved successful in part because the PNW Tribes established that State-owned road culverts were causing a substantial decrease in the number of salmon to which the PNW Tribes were entitled. There was a clear decrease in the protected resource — salmon. The State's duty was identified. The PNW Tribes presented sufficient evidence of causation with regard to State actions that caused the decrease in their protected resource.

Claims' Needs

Accordingly, successful application of the principals of the Culverts Case elsewhere will likely require:

1) a similar fact-specific inquiry in order to determine the baseline level of unimpaired resources, services, and evidence of the decline in a treaty protected resource;
2) a duty on the part of the State or third-party to protect or not degrade the resource; and
3) sufficient evidence to demonstrate the State or third-party's actions caused or contributed to the decline in the treaty-protected resource.

Culverts Case

Extent of Duty

Appropriate Remedies?

Treaty Protections

Furthermore, because neither the District Court nor the 9th Circuit defined the "moderate living" standard, the Supreme Court's tie decision leaves open the extent of the State's duty in any particular case. While the State tried to argue that a definition was needed in order to establish the extent of its duty, the Courts found that in this case a definition was not needed in order to find a duty on the part of the State. However, because this term was not defined, the extent of the State's duty will need to be determined on a case-by-case basis.

Finally, the question of what an appropriate remedy is remains in any future case. In *Washington v. United States*, the Court ordered the State to remove or fix all State-owned culverts that blocked access to salmon passage. This is a relatively straightforward remedy because there is a direct connection between physical structures and diminishment of the fisheries. For other claims of resource impairments, a determination of an appropriate remedy may prove more challenging due to the complexity of environmental claims and number of parties involved.

Conclusion

The 9th Circuit decision, affirmed by the Supreme Court, requires the State to meet its duty to not interfere with the PNW Tribes' treaty protected rights and to correct its own actions, as well as those of State-sanctioned private actors that either directly or indirectly limit those treaty rights. *United States v. State of Washington*, 2007 WL 2437166, *4, W.D.Wash., August 22, 2007.

This newly defined obligation creates an opportunity for tribes, States, private parties, and federal agencies to develop guidelines to improve their relationships and improve the quality of the environment for the benefit of all citizens. It is your co-authors hope that going forward we shall all be guided by the words of Chief Joseph and embrace our collective duty to protect the Earth.

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Prior *TWR* Culverts Case coverage: Moon, *TWR* #110; Water Briefs, *TWR* #112; Moon, *TWR* #120; Moon, *TWR* #149; Water Briefs, *TWR* #151; Water Briefs, *TWR* #160; Water Briefs, *TWR* #167; Water Briefs, *TWR* #173

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Klamath Adjudication

OREGON'S KLAMATH BASIN ADJUDICATION

THE FIRST FIVE YEARS OF THE CIRCUIT COURT PHASE

by Richard S. Deitchman, Somach Simmons & Dunn (Sacramento, CA)

INTRODUCTION

Judicial Phase

Although there were no champagne toasts or gifts exchanged (as far as we know), March 7, 2018 marked the five-year anniversary of the initiation of the judicial phase of the Klamath Basin Adjudication (KBA). The KBA involves the State of Oregon's determination of pre-code surface water rights in the Klamath Basin pursuant to Oregon Revised Statues (ORS) chapter 539. The KBA is the most complex general stream adjudication in Oregon's history, and the first in Oregon to involve the determination of federal reserved water rights claims. When the United States reserves public domain land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *See Winters v. United States*, 207 U.S. 564 (1908). The water rights associated with such reservations are referred to as federal reserved water rights. The Oregon Water Resources Department (OWRD) processed over 700 water right claims and over 5,000 contests to those claims during the 38-year administrative phase of the KBA.

Issues

The judicial phase has included proceedings to determine how to file exceptions to the order and then the filing of exceptions; briefing and hearings regarding how the court is to review the exceptions to the administrative order; regulation of water rights for the first time in the history of the Klamath Basin; and litigation in multiple courts challenging water rights regulation. The first five years of water regulation in the Klamath Basin has coincided with considerable drought, engendering substantial challenges for water users of all types. This article summarizes the judicial process to date, including the consequences of the court's procedural decisions and water regulation on water users, and provides an outlook for the next five (or more?) years. The beginning of the article provides background regarding the KBA, including the steps leading to the judicial phase. The second part summarizes the judicial proceedings to date, with an emphasis on the court's procedural rulings that will impact forthcoming litigation on parties' specific exceptions to the administrative order. Finally, there is an overview of litigation, including within the KBA itself, resulting from water regulation.

BACKGROUND

KLAMATH BASIN ADJUDICATION

Oregon's General Stream Adjudication Procedures

Permits (Post-1909)

Since 1909, Oregon law has required that all rights to water by appropriation be acquired through an application for a permit from the Oregon Water Resources Department (OWRD) or its predecessor agency. The permits (and certificates issued upon proof of beneficial use under the permits) specify all elements of the rights, including priority date, point of diversion, place of use, and other elements. Thus, all post-1909 water rights under state law are "determined." Rights initiated by pre-1909 appropriation (pre-code), and federal reserved water rights, are undetermined unless adjudicated through the state's statutory adjudication procedures. ORS Chapter 539 outlines the process for determining otherwise "undetermined" claims to surface water. Like other state adjudications, the process involves the filing of claims, contests, and litigation of the validity of the claims; in Oregon the process includes both an administrative and a judicial phase. At the completion of the administrative process, OWRD submits its order of determination and record to the Circuit Court (i.e., a State of Oregon trial court) of the county where the stream or some part of it is located. In the Circuit Court, claimants may file written exceptions to OWRD's **f**indings and **o**rder of **d**etermination (FOD). The Circuit Court processes any exceptions.

"Undetermined" Claims

Interim Regulation

Between the issuance of the order of determination by OWRD and the final decree by the Circuit Court — which may be a gap of many years — OWRD is required to regulate water use according to the FOD. A party may seek a stay to prevent the OWRD from regulating according to part or all of the order of determination, but to do so it must post bond in an amount set by the Circuit Court, and conditioned on the party paying all damages that may result from the order of determination *not* being enforced.

Final Decree

The ultimate outcome of the Circuit Court's process is a final decree that specifies all water rights. The decree becomes the basis for regulation of water in the basin, unless it is modified on appeal or on rehearing in the Circuit Court. Further appeals, including proceedings in federal courts, are possible. The courts may also send all or portions of the FOD back to OWRD for further investigation.

Klamath Adjudication

McCarran Amendment

The McCarran Amendment, passed by Congress in 1952, waived federal sovereign immunity for the joinder of the United States as a defendant in general stream adjudications. Prior to passage of the McCarran Amendment, federal water right could not be determined in state courts without the waiver of sovereign immunity.

The ORS Chapter 539 process is a "speak now or forever hold your peace" scheme; it ultimately culminates in a single, basin-wide water rights decree that is "conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." ORS 539.200. The effect of a decree is *res judicata* as to all parties who were in the adjudication and all water users claiming water rights through those original parties. *Id*. *Res judicata*, also known as "claim preclusion" is the principle that a cause of action may not be relitigated once it has been judged on the merits. In other words, a matter raised once cannot be raised again, either in the same court or in a different court.

Administrative Phase of the KBA

The KBA was initiated in 1975. OWRD specified in the 1975 notice that it would commence the investigation necessary to adjudicate the surface waters of the Klamath River Basin in Oregon, and requested that all persons claiming a right of use file a notice of intention to file claim. Following a period of investigation, OWRD issued a notice to file claims to all persons in the Klamath Basin in 1990. Subsequent to the notice to file claims, the United States filed a federal lawsuit alleging that Oregon's adjudication process did not meet the requirements of the McCarran Amendment (43 U.S.C. § 666) in order to waive the United States' sovereign immunity. *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), upheld the validity of Oregon's surface water adjudication statute and thereafter OWRD issued a second notice to those persons claiming a federal reserved right and to water users associated with the federal Klamath Reclamation Project. In total, over 730 claims were filed during the KBA's administrative phase.

In 1999 and 2000, there was an opportunity for "open inspection" of claims, a time during which parties could evaluate the claims of others and determine whether or not to file a contest. Thereafter, the parties filed contests to claims. Over 5,600 contests to claims were filed in the KBA. OWRD used Oregon's Office of Administrative Hearings (OAH) to conduct contested case proceedings in cases organized by individual water right claim or groups of associated claims. The OAH process included approximately twelve years of active contested case litigation. Following issuance of proposed orders by OAH, and the opportunity to file exceptions to the proposed orders, OWRD ultimately issued the Findings of Fact and Order of Determination (FFOD) for the Klamath Basin Adjudication on March 7, 2013.

Circuit Court Phase of the KBA

Case Management

On March 7, 2013, OWRD deposited the FFOD with the Klamath County Circuit Court (Court). In addition, OWRD provided the administrative record associated with the process, which included over two million pages of documents and required a truck to transport it from the capital in Salem, Oregon to the Klamath County Circuit Court in Klamath Falls, Oregon. The case was initially assigned to Judge Cameron Wogan and remains with Judge Wogan today. Judge Wogan manages the case via Case Management Orders. For example, Case Management Order 1 provided background on the service list and petitions for stay of the administrative order, among other housekeeping items. Case Management Order 3, issued in September 2013, established a Case Management Committee, consisting of attorneys for various parties, who were directed to provide proposed case management orders for consideration of the Court and the parties as to subsequent proceedings. The Case Management Committee has provided proposals since its creation and continues to exist today. The Klamath County Circuit Court's webpage includes a repository of KBA documents at: www.courts.oregon.gov/courts/klamath/resources/Pages/KlamathBasinAdjudication.aspx.

Following an opportunity for submission of non-disputed technical corrections, OWRD submitted the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) to the Circuit Court in February 2014. The ACFFOD is the operative order presently before the Circuit Court (Court) for review.

CIRCUIT COURT PROCEEDINGS: EXCEPTIONS AND PHASES

Exceptions and Orientation

Exemptions Filing

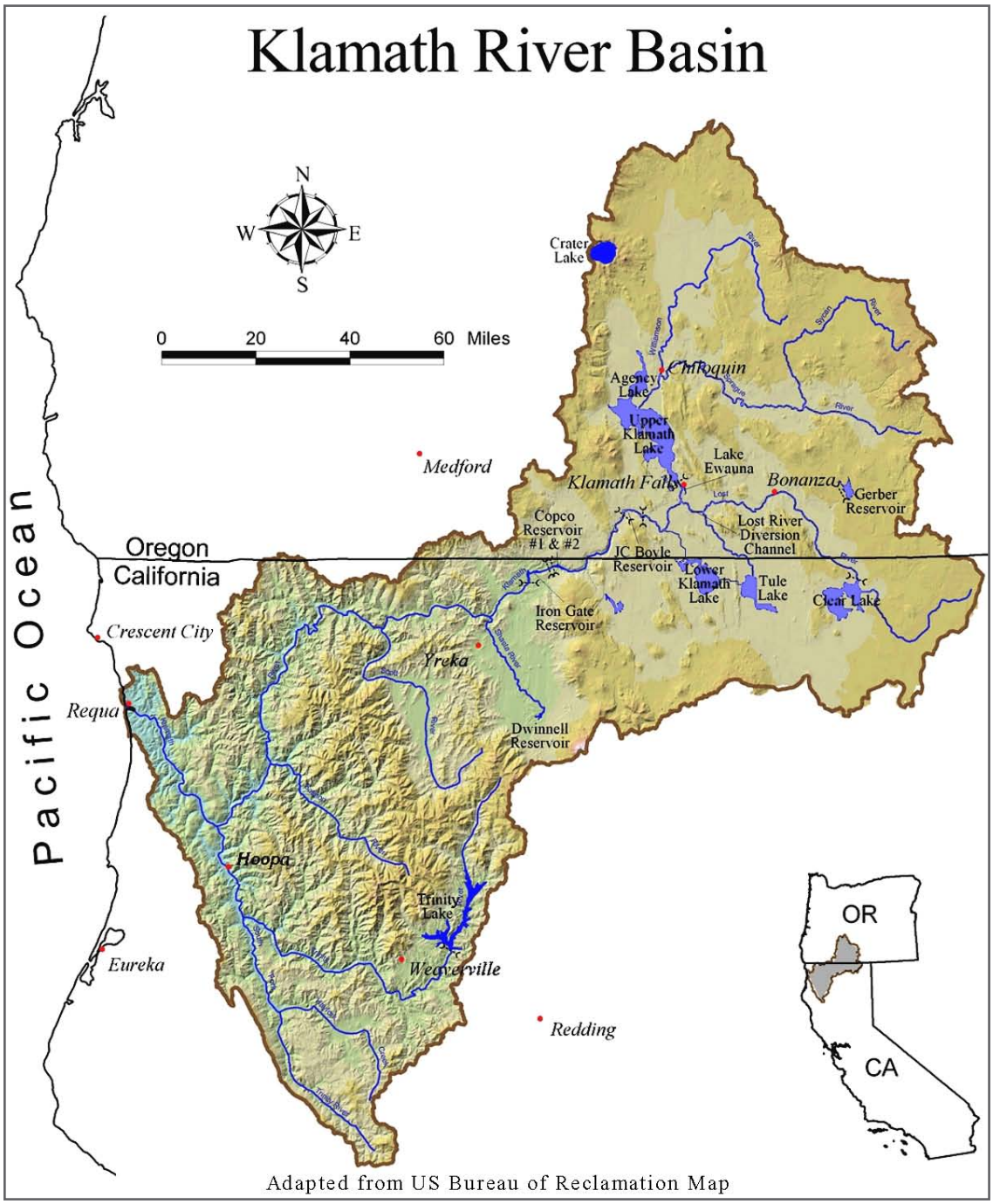
The first several years of the judicial phase might be considered an orientation period. The court and the parties had the enormous ACFFOD and a 1909 statute (ORS chapter 539) as the guideline for judicial review. The case initially included the requirement to serve documents on nearly 1,000 individuals. ORS chapter 539 requires the Court to set an "initial hearing," which serves as the deadline for filing exceptions to the administrative order. Due to the breadth of the ACFFOD, the record, and the vast number of parties involved, the time to prepare exceptions was necessarily lengthy. In addition, the general format, substantive requirements, and service requirements of exceptions are not clearly provided by statute. For example, ORS chapter 539 includes only the following regarding the content of exceptions: "any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to." ORS 539.150(1).

Klamath Adjudication

"Request to Be Heard"

The Case Management Committee prepared a proposal for exceptions, including an exceptions template with specified service instructions. The proposal was circulated for comment and, in Case Management Orders 7 and 8, Judge Wogan provided the standards for the exceptions and set the initial hearing and exceptions deadline for October 17, 2014. Over 200 individual statements of exception were filed, including thousands of individual exceptions to the ACFFOD.

The Case Management Committee also proposed, and the Court approved, a procedure called a "Request to Be Heard" (RTBH). The RTBH involved a court filing indicating that a party or group of parties collectively sought to be heard regarding another party's exception. In particular, the RTBH would allow a party to address an "alternative grounds" argument. For example, assume the ACFFOD denied a claim that Party A had contested in the administrative phase. Assume Party B, the claimant for the denied claim, filed an exception to the ACFFOD as to the denial of its claim. Party A would not have filed an exception to the denied claim, but would want the opportunity to be heard on Party B's exceptions, particularly in the event that the Circuit Court changed the administrative denial of claim. Thus, the RTBH process provides an important mechanism to ensure all parties have the opportunity to address exceptions of others. The deadline for RTBH was January 16, 2015.



Klamath Adjudication

The Court held a Case Management Conference to address proceedings on the exceptions and RTBH on March 18, 2015. Over a period of several months, the parties and Case Management Committee submitted comments, prepared proposals, and the Court circulated for comment a final proposal to structure proceedings on exceptions. On December 10, 2015 the Court issued Case Management Order 14, which declared that proceedings on exceptions would occur in phases. The goal of the phased process is to address threshold issues first, and gradually move from the more general to the more specific. As explained by Judge Wogan in Case Management Order #14, "[t]hreshold issues are issues raised by exceptions, or reasonably necessary to resolution of exceptions, and not inherently limited to a single claim or category of claims." Within each phase, exceptions are resolved via motion practice, subject to timelines set by the Court in accordance with the complexity and number of motions filed in each individual phase. In other words, issues are raised by the parties via requests for orders from the Court. The Court considers written and oral argument in response to the parties' motions.

Threshold Issues

Phase 1

Phase 1, now complete, proceeded in three distinct sub-phases: Phase 1A (jurisdiction and similar issues), Phase 1B (procedural issues), and Phase 1C (other threshold or cross-cutting issues). Broadly, the Circuit Court proceeding involves the review of exceptions to OWRD's determination of over 700 claims. Cross-cutting issues are those issues that potentially impact the determination of multiple individual claims. Phase 2 occurred simultaneously with Phase 1, and involved the Court's resolution of undisputed exceptions, limited to exceptions in the nature of typographical or minor corrections. To date, several unopposed Phase 2 motions have been approved by the Court, but otherwise Phase 2 was relatively unremarkable. Phase 1, and Phase 1B in particular, included several milestone rulings that have and will continue to control subsequent proceedings.

Cross-Cutting Issues

Phase 1A

Phase 1A addressed five jurisdictional and similar issues including:

(i) the Court's jurisdiction;
(ii) the validity, lawfulness, or effectiveness of the Amended and Corrected Findings of Fact and Order of Determination as a whole;
(iii) issues concerning the rights of the parties to pursue exceptions or requests to be heard;
(iv) the Court's authority to alter a partial order of determination to which no exceptions have been filed; and
(v) the Court's authority to issue a partial judgment (i.e., a judgment on one or some, but not all, water rights claims).

Jurisdiction & Authority

The parties filed seven motions directed at the Phase 1A issues or issue categories and various parties filed responses and replies. The Court held oral argument in October 2016 and issued rulings thereafter.

Several parties filed motions that addressed whether the court has the authority to issue a partial judgment on some, but not all, water right claims. The ultimate outcome of the KBA process is a decree that determines all the relative rights to the use of the surface water of the Klamath River and its tributaries. During the administrative phase, numerous water right claims and contests were resolved via stipulation of the claimant(s) and contestant(s). As a result, assuming the stipulation was approved by OWRD in the ACFFOD, no one filed an exception to the administratively-stipulated claims. Certain parties in that position sought, via Phase 1A, to request the opportunity to end their participation in the judicial phase via a partial judgment as to their water right claim. Several parties opposed that position, chiefly on the ground that the judicial phase might result in different conclusions than the ACFFOD about an adjudication-wide issue, or a claim-type issue, that might have the effect of altering the water rights determination even as to the stipulated claims. On review of the motions, Judge Wogan held that ORS chapter 539 provides for a single judgment, and the court does not have authority to issue partial judgments.

No Partial Judgements

One Phase 1A motion addressed various parties' exceptions to the ACFFOD on the grounds that OWRD failed to properly conduct its pre-claim filing deadline examination, including measurements, of the Klamath River and tributaries. The Court denied those exceptions and ruled that if OWRD improperly performed the pre-claim filing examination, that is only relevant as it may be reflected in the ACFFOD. In so ruling, the Court emphasized that its role is to review the ACFFOD. On another motion, the Court also denied exceptions relating to the organization of the ACFFOD and access to the record prior to the exceptions filing deadline. In both cases the Court found no deficiency with the ACFFOD or record.

Examination

Phase 1B

Phase 1B addressed threshold procedural issues and included several noteworthy rulings that will impact all remaining KBA proceedings. Many parties filed motions, responses, and replies relating to the Phase 1B issues or issue categories. Below is a summary and explanation of the implications of the court's rulings by issue.

Procedural Issues

Klamath Adjudication

De novo Review

Evidence Standard

Deference

Walton Rights

Factual Deference

Good Cause Standard

New Evidence Requirement

STANDARD OF REVIEW FOR THE ADJUDICATION PROCEEDING

The Court ruled that it will conduct *de novo* review (i.e., without the need for reference to any conclusion made by OWRD) regarding both questions of law and questions of fact contained in the ACFFOD. *De novo* review means that a court can take a fresh look at a lower court (or administrative) decision; the court need not defer to the lower court's decision. The parties generally agreed that the Court reviews questions of law *de novo*, thus the briefing focused on the standard of review that the Court should apply to questions of fact contained in the ACFFOD. A question of fact might include, for example, the date on which a party's predecessor in interest provided notice of their intent to develop a water right. Several parties proposed a substantial evidence standard of review for questions of fact, in line with the standard of review applied in Oregon Administrative Procedures Act (APA) cases. Other parties, largely relying on cases decided in the early 1900's prior to the addition of APA procedures to the adjudication process, argued for the *de novo* standard. In ruling that the *de novo* standard applies, the Court indicated that it has discretion to give greater weight to certain evidence, although it need not do so. For example, the Oregon Supreme Court has noted that "[i]t is seldom, if ever, that a court will interfere with discretionary action of the state engineer upon matters involving the administration of the water laws of the state and substitute its judgment for his. Judges are not super engineers." *Smyth v. Jenkins*, 208 Or. 92, 100 (1956). The Court's ruling indicates that it may afford some level of deference and/or weight to certain findings, but that such deference is discretionary.

The *de novo* ruling is important for all KBA parties. As to questions of law, the court may take a fresh look at OWRD's conclusions when it reviews exceptions to the ACFFOD. For example, the ACFFOD reached multiple legal conclusions regarding the elements of pre-1909 water rights, federal reserved water rights, and "*Walton"* right claims. The court may review those legal conclusions without deference to OWRD's conclusions. Certain exceptions go as far as to say that certain rights (such as *Walton* rights) should not even exist, thus the Phase 1B ruling keeps the door open for the Court to significantly alter the ACFFOD's legal conclusions and corresponding water right determinations, including as to the elements of a type of water right claim. *Walton* claims are federal reserved water right claims based on the primary purposes of the Klamath Treaty of 1864. A number of KBA claimants claimed water rights as non-Indian successors to Klamath Indian allottees. KBA_ACFFOD_00024. Provided a claimant was able to prove the elements of a *Walton* right, the ACFFOD assigned a priority date of 1864.

As it relates to questions of fact, the court's Phase 1B ruling indicates that it may do the same, but the court also retains discretion to defer or give weight to certain of OWRD's findings. For example, it appears likely that the court will defer, at least on some level, to findings of fact within the area of OWRD's expertise. Given OWRD's authority over water rights determination and administration, a level of deference to the ACFFOD's findings of fact can be expected.

INTRODUCTION OF NON-RECORD EVIDENCE IN THE ADJUDICATION PROCEEDING

A key point of contention among several of the parties concerned whether a party may present non-record evidence in the Circuit Court or whether the Circuit Court is limited to the evidentiary record created in the administrative phase of the adjudication. In other words, several parties considered the Circuit Court proceeding to be in the nature of a new trial, with the opportunity to present evidence and the application of the Oregon Rules of Civil Procedure. Other parties considered the Circuit Court proceedings to be a record review, with the introduction of new evidence *limited* to certain circumstances, and only allowed on remand to OWRD. The Court ruled that non-record evidence may only be taken for good cause shown, pursuant to the requirements of the Oregon APA. *See* ORS 183.482(5). The good cause standard requires that the evidence is material and that there were good and substantial reasons for the failure to seek to introduce the evidence during the administrative phase of the adjudication. The Court further ruled that if the good cause standard is met, new evidence will be taken on either remand to OWRD or by appointment of a referee pursuant to the procedural and evidentiary rules used during the administrative phase.

The Court's ruling on introduction of non-record evidence has enormous implications for the KBA and potentially for future Oregon adjudications. The ruling ensures that all evidence considered in the ACFFOD (and ultimately in the Court's decree) is addressed pursuant to the same evidentiary standards, whether the party offered the evidence during the administrative phase or if the party seeks to offer new evidence during the judicial phase. The ruling further heightens the importance of the 38-year long administrative phase of the adjudication, including the administrative contested cases. To present new evidence during the judicial phase, a party will have to overcome the good cause requirement, which requires more than just a demonstration that a party or its predecessor failed to present some piece of evidence.

Klamath Adjudication

Administrative Phase Importance

The ruling also acknowledges the record review nature of the judicial phase of the adjudication. The onus is on adjudication parties to appear and present their claims and contests during the administrative phase. The Circuit Court's review is limited to exceptions to the ACFFOD, and is not a brand new trial or do-over of the proceedings below. The ruling thus rewards those parties that put forth their best effort during the administrative process.

Provided the ruling holds up in the event of a future appeal, the non-record evidence ruling will be important to consider in any future Oregon adjudications; adjudication parties must gather and put forward all available evidence during the administrative phase in order to ensure its full consideration in the overall process. In the KBA, there are likely to be several motions filed seeking introduction of non-record evidence and the court is likely to further address the bounds of the good cause standard in subsequent phases.

Impact of Burdens

Burden of Production and Burden of Proof in the Adjudication Proceeding

Burden of production generally describes the obligation of a party to come forward with sufficient evidence to support a particular proposition of fact. Burden of proof generally describes the obligation of a party to prove an assertion. In Phase 1B, the court ruled that the burden of production is on the exceptor in the judicial phase and that the burden of proof is the preponderance of the evidence. Several parties argued that the burden is on the water right claimant to prove their claim during the judicial phase. The Court disagreed. Although the burden was on the claimant to appear and submit proof of their claim during the administrative phase, the burden is on the exceptor during the Circuit Court phase, when the Court's jurisdiction is to review exceptions to the ACFFOD. In general, this means that exceptors must affirmatively raise an exception with identification of proof to support the exception in order to result in any modification of the ACFFOD. Like other Phase 1B rulings, the setting of the burden with the exceptors heightens the benefit of a favorable ruling in the ACFFOD.

Evidentiary Rules

Availability and Timing of Discovery

Discovery generally describes the pre-trial procedures in which the parties may seek evidence from the other parties to the lawsuit, pursuant to a set of rules. Closely related to the non-record evidence issue, the Court ruled that discovery is only available if the Court determines that non-record evidence may be taken. In such a case, the discovery rules of the forum that will hear the evidence apply. For example, on remand to OWRD, the Oregon APA discovery rules would apply. This ruling ensures consistency in evidentiary rules between evidence submitted during the administrative phase and new evidence allowed to be submitted in subsequent proceedings.

Applicability of the Oregon Rules of Civil Procedure (ORCP) Generally or as to Specific Rules

During the 2013 stay proceedings (discussed below), the Court held that the ORCP apply except where a different procedure is specified by statute or rule. *See* ORCP 1A. In the Phase 1B ruling, the Court indicated that the ORCP discovery rules do not apply in the event that a matter is remanded to OWRD.

Record Review Approach

The net effect of the Phase 1B ruling is that the Circuit Court proceedings are not a trial *de novo*, as in normal bilateral civil lawsuits. The Court will review OWRD's ACFFOD *de novo*, but parties are limited by application of the good cause standard to the presentation of non-record evidence. Furthermore, the ORCP discovery rules do not apply and if the good cause standard is met, the Court will remand or appoint a referee to consider the new evidence. The ruling generally adopts a record review approach. The upshot is that parties will not be able to have the opportunity for a do-over of the administrative phase. Rather, the Circuit Court's purpose is to consider exceptions to the ACFFOD based on review of the existing record, except in limited circumstances where non-record evidence may be submitted upon good cause shown. Generally, the Phase 1B ruling should avoid lengthy and protracted trial court litigation, however, the number of exceptions and record associated with the ACFFOD is highly voluminous, so even a record review proceeding will be lengthy.

Phase 1C

After the completion of Phase 1B, Phase 1C addressed other threshold or cross-cutting issues. The purpose of Phase 1C was to provide the parties with the opportunity to file a motion on any exceptions addressing threshold issues not addressed in Phase 1A or Phase 1B. Below is a summary of the Phase 1C rulings by issue or issue category.

Agency Findings

OWRD's General Findings in the Corrected Findings of Fact and Order of Determination

The Court reviewed several motions directed at the general findings. The general findings include an overview of the physical characteristic of the Klamath Basin, the procedures followed in the administrative process, and general descriptions of the record associated with the ACFFOD, among other terms. The Court ruled that the final decree will affirm the general findings section of the ACFFOD.

Klamath Adjudication

Amendment "Up"

Conclusion of Law Concerning Amendment of Claims

The Court affirmed the general conclusions of law concerning amendment of claims. The ACFFOD includes a section describing the standards that apply relating to a claimant's attempt to amend aspects of a water right claim. The ACFFOD provides that a party may *not* amend their claim "up" after the applicable claim filing deadline. For example, a party may not seek to claim a superior water right after the deadline. Therefore, a party could not seek a more senior priority date, a greater volume of water, or other improved water right through a post-deadline amendment. The ACFFOD allows parties to amend their claims "down," meaning for a less superior water right. The rationale behind the rule is that the claim filing deadline set the stage for open inspection of other claims, followed by the contest deadline. The parties needed to be aware of all water right claims, and the aspects of those claims, prior to filing contests. A rule allowing parties to amend claims after the deadline would upend the process. The Court found that the "statutory scheme sets forth a sequential process where each step relies on the previous steps. If the parties were allowed to increase their claim by amendment after the deadline, many of the steps would need to be repeated." Court's Amended Order on Phase 1C, Category 2 Motions, Ex. A at p. 2.

Initial Claim Importance

The Court's ruling on amendment of claims resulted in the denial of the exceptions of several parties who sought to "amend up" after the claim filing deadline. This underscores the importance of the claim filing deadline and held that the outer scope of the final water right determination is dictated by the initial claim.

Late Claims

Exceptions Concerning the Denial of Late-Filed Claims

The Court denied late-filed claims, meaning claims filed or attempted to be filed after the applicable claim filing deadline. The rationale for the ruling is identical to the amendment of claims ruling. The denial of all late-filed claims was an important Phase 1C issue; it clarifies that no one can show up after-the-fact seeking to assert a claim. The ruling corresponds with the plain language of the Oregon adjudication statute: "…it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law." *See* ORS 539.210.

Substantive Exceptions

Phase 3

Phase 3 will address substantive exceptions to the ACFFOD, not previously addressed in Phase 1. Phase 3 is the third, and final phase of the Circuit Court phase. Conceptually, the objective of Phase 1 was to address threshold exceptions that potentially implicate the FFOD as a whole. Phase 3 is more narrowly focused, and includes resolution of all remaining exceptions. In order to accomplish the task of resolving all remaining exceptions, the Case Management Committee proposed and the Court adopted a multi-part procedure for Phase 3. Phase 3, part 1 will address exceptions that raise legal issues that may be capable of resolution with regard to disputed facts, and that have a broad application to exceptions within a specific group of claim determinations in the FFOD. Phase 3, part 1 includes three groups of "categories of claims": (1) state law pre-1909 water right claims and federal reserved water right claims, excluding tribal claims; (2) *Walton* right claims; and (3) tribal claims.

Categories of Claims

The Court will consider briefing on legal issues or issues that can be resolved without consideration of disputed facts for each category. Motions relating to the pre-1909 claims and federal reserved water right claims, excluding tribal claims, are due in August 2018. The motion practice on the Phase 3, part 1 issues should take 18 to 24 months. Following completion of Phase 3, part 1, the Court will consider specific exceptions to the ACFFOD's water right claim determinations.

WATER REGULATION and LITIGATION

"Calls" for Water

As noted above, 2013 was the first time water rights were subject to Basin-wide regulation in the Klamath Basin. Once the FFOD was deposited in the circuit court, OWRD's administrative determination of the water rights of the Klamath Basin was "of record" for regulation pursuant to Oregon's water rights administration statute. *See* ORS Chapter 540. Accordingly, 2013 was the first summer in which senior water right holders in the Klamath Basin had the opportunity to make a "call" to satisfy their rights. In Oregon, the senior user "calls" on the river system by notice to a watermaster, and the watermaster curtails the use of juniors, in reverse order of their priority, until the senior's entitlement is met. This had and continues to have enormous implications for all water right holders in the Klamath Basin. For the first time, regulation under Oregon's prior appropriation system is at work. This means that in times of shortage, junior right holders will be regulated to satisfy senior right calls. Accordingly, upstream juniors who never before have been subject to regulation, have since 2013 experienced the consequences of priority calls.

Stay Petitions

In 2013 and subsequent years, several parties filed petitions seeking to stay enforcement of the ACFFOD or to challenge specific regulation orders in both the Klamath County and Marion County Circuit Courts. Although several of the petitions are still pending in the Oregon courts, the Oregon courts have thus far upheld Klamath Basin water regulation.

Klamath Adjudication

Regulation Prevented

Stay Issues

Stay Holdings

2013 Stay Proceedings

In late spring and early summer 2013, four separate petitions were filed before Judge Wogan in the Klamath County Circuit Court by various irrigators or groups of off-Project irrigators (i.e., irrigators upstream of Upper Klamath Lake and not associated with the Klamath Reclamation Project). The petitions sought to stay regulation of water rights based on both the tribal instream water rights recognized in the ACFFOD and the rights of irrigation water users in the Klamath Reclamation Project. A stay, in this case, a stay of enforcement of the water right claims determined in OWRD's order, is an order of the court that would stop enforcement pending completion of the judicial proceeding. The off-Project irrigators' petitions were opposed by the United States, Klamath Tribes, and Klamath Project Water Users (various entities who receive water through the Klamath Reclamation Project via contract with the US Bureau of Reclamation), among others. Briefing on the stay petitions raised several issues of first impression in Oregon, particularly as the first modern adjudication to include both administrative contested case litigation pursuant to the Administrative Procedures Act (APA) and the determination of federal reserved water right claims. Specifically, the Court addressed the parties' arguments relating to four important questions:

(i) Does the Court have discretion to issue a stay or is a stay automatic upon the posting of a bond?;

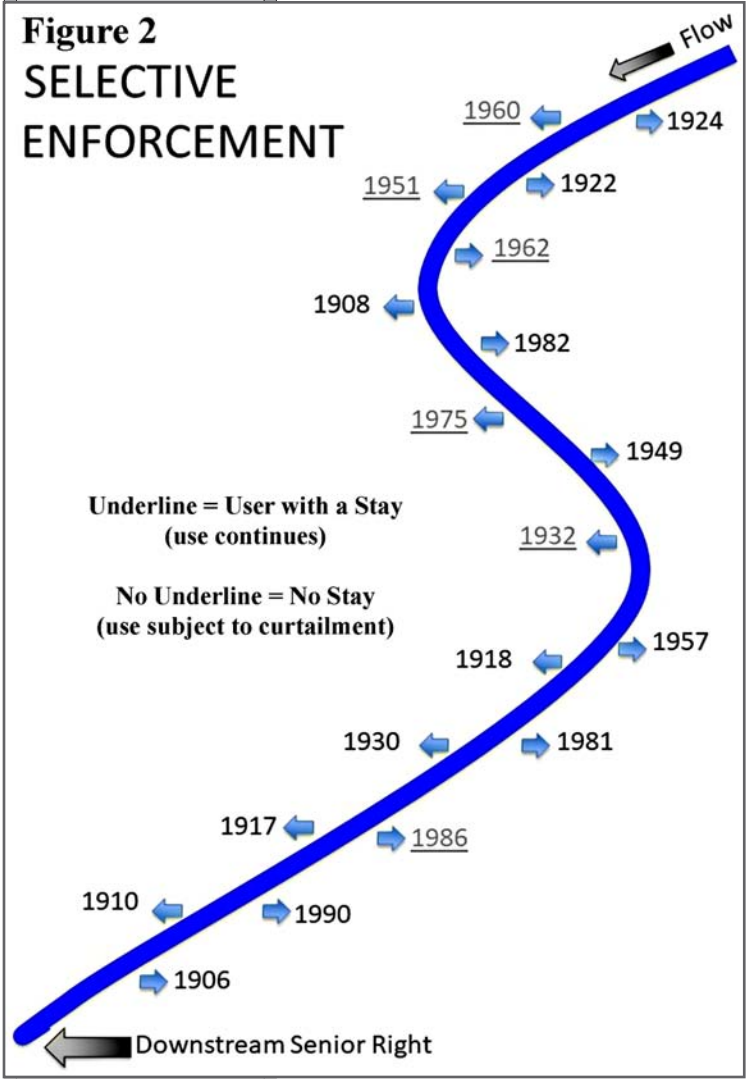
(ii) If the Court has discretion to issue a stay, what factors does the Court consider in making that determination?;

(iii) Is the potential liability of a party who obtains a stay capped by the bond or letter of credit they post in support of the stay?; and

(iv) Can the Court issue a stay as to regulation of certain individuals only (i.e., a selective call)?

Due to the enormous implications — regulation versus non-regulation of water use — briefing on the stay petitions was lengthy and complex. It culminated in a hearing before Judge Wogan attended by more than twenty lawyers in July 2013. In multiple orders issued on the various stay petitions between September and November 2013, Judge Wogan ruled that a stay of enforcement of the administrative order does not issue automatically. Rather, the Court has discretion on whether to issue a stay and will apply Oregon's provisional process rules in making a stay determination. In addition, and perhaps most detrimental to the 2013 stay petitions, Judge Wogan ruled that the potential liability to a party who obtains a stay is not capped by the bond or letter of credit set by the Court at the time the stay issues. Pursuant to ORS 539.180, Judge Wogan ruled that a party seeking a stay must agree to "pay all damages that may accrue by reason of the determination not being enforced" in addition to the bond.

Figure 2
SELECTIVE ENFORCEMENT



The Court further indicated that a stay could not be obtained as to an individual water user. In other words, several of the petitioners sought a stay as to enforcement against their own individual water right. As shown in Figure 2 on selective enforcement, if such a stay were granted, it would upend the priority system. The result would be that certain junior water right holders (underlined in Figure 2) could continue to use water while other more senior users who did not file a petition would be regulated off (i.e., have their use curtailed by enforcement). In effect, the stay as to certain individuals would create a "super priority" for certain water users who file a petition, which is not a concept that exists under Oregon water law.

Following this ruling, none of the parties associated with the 2013 petitions elected to pursue their petitions further and the Court did not need to exercise its discretion to determine whether a stay should issue in any of the cases. The petitioners likely did not wish to assume the liability for "all damages" that may accrue by reason of the FFOD not being enforced. For example, several entities associated with the Klamath Reclamation Project submitted expert declarations regarding the impact of non-enforcement of the Project's determined claims; the Project water users' experts valued water received via a Project call in the tens of millions of dollars.

Klamath Adjudication

Damages Deterrent

Time Immemorial Calls

Conjunctive Regulation

Judicial Review of Regulation

Stay Pending Resolution (Auto Stay)

Groundwater Regulation Standards

"Reasonable Person" Finding

It is safe to say that the Court's ruling, and the plain language of ORS 539.180 which requires that a petitioner "pay all damages" that may accrue, is a deterrent to seeking a stay of the ACFFOD. This underscores the importance of the ACFFOD; for the period between entry of the ACFFOD and completion of the Circuit Court proceeding, unless a petitioner is willing to assume all potential monetary liability, the FFOD provides the enforceable water rights for regulation in the basin.

No party has sought a stay since the four petitions filed in 2013. As a result, except as to certain circumstances associated with petitions for judicial review filed in the Marion County Circuit Court (*see below*), the ACFFOD has been in full force and effect in all five years since 2013. OWRD's Klamath County Watermaster regulates junior water uses in response to valid senior calls. The reality of prior appropriation, which can result in harsh consequences for junior users, is now active in the Klamath Basin pursuant to enforcement of the determined claims recognized in the ACFFOD.

Marion County Circuit Court Petitions: Jurisdiction for Regulation

As previously noted, due to both drought conditions and water right realities, OWRD has regulated off water users in each of the years since 2013, including in the present 2018 season. As a result of the priority system and enforcement of the ACFFOD, tribal time immemorial water right calls have resulted in complete shutoff of off-Project irrigation upstream of Upper Klamath Lake. In other years, calls have resulted in more limited shutoffs. The priority date associated with tribal water rights is generally "time immemorial." This is the most senior priority in the prior appropriation system. Furthermore, in 2015, OWRD began to regulate hydraulically connected groundwater use in response to downstream senior surface water right calls. Oregon is a conjunctive management state and the water regulation statute specifically contemplates regulation of groundwater in certain instances in response to senior surface water calls.

As discussed above, four petitioners or groups of petitioners unsuccessfully sought to stay portions of the FFOD in summer 2013. Oregon law also provides that a water right holder in receipt of a regulation order may challenge the regulation order either in the county where the water body sits (i.e., Klamath County for the Klamath River) or in Marion County, the location of OWRD's main office. In particular, a regulation order is considered an "order in an other than contested case," subject to judicial review pursuant to the Oregon APA.

Since 2015, several individuals have sought judicial review of regulation orders issued following senior surface water right calls in the Klamath Basin, pursuant to the calling parties' determined claim(s) under the adjudication. The cases include circumstances such as groundwater regulation and the unique circumstance of regulation arising despite a "no call agreement" among several parties. Oregon law specifically provides that application of an OWRD regulation order is stayed pending resolution of the petition for judicial review challenging the order. OWRD may lift the stay if it makes a determination that it is in the public interest to remove the stay. To date, OWRD has not lifted a stay pertaining to petitions challenging water rights regulation in the Klamath Basin. Thus, to date, by filing a petition for judicial review, the regulated parties continued to use water pursuant to their junior water rights until resolution of litigation on the particular petition.

Groundwater Cases: Conjunctive Regulation

Oregon law requires that OWRD regulate groundwater hydraulically connected to surface water *if* the groundwater use causes substantial interference with the surface water and that regulation of the groundwater use will provide timely and effective relief to the surface water user. In other words, the groundwater use must be shown to impact the surface use and regulation of the groundwater use must provide near-term relief to the surface water user. To date, several petitions or series of petitions have been filed by groundwater users in the Sprague River Valley pertaining to regulation of wells in response to downstream tribal and Klamath Project calls for water. Approximately five such petitions were filed between 2015 and 2017. As of July 2018, ten petitions relating to groundwater regulation in response to senior surface water right calls have been filed in the 2018 irrigation season in both Klamath County and Marion County.

Several of the 2015-2016 petitions were consolidated and have been tried in Marion County. The consolidated *Sees et al. v. Water Resources Department* case included a six-day trial in March 2017 in the Marion County Circuit Court. Trial in these matters, pursuant to the Oregon APA, weighs in favor of OWRD: the Court need only find that a "reasonable person could agree" that OWRD properly regulated a particular water use. *See* ORS Chapter 183. Following presentation of expert witnesses on behalf of the petitioners, OWRD, and intervening senior water districts, the Marion County Circuit Court found that OWRD acted reasonably in regulating petitioners' wells in response to the senior surface water right calls. The *Sees* petitioners have filed a notice of appeal, and briefing before the Oregon Court of Appeals is slated to be completed by fall 2018.

Klamath Adjudication

No other party has tried a groundwater regulation appeal, but several of the petitioners have benefitted from the stay of regulation pending resolution of the petition. Moreover, with the number of petitions filed in 2018, it remains to be seen whether public interest considerations will come into play with respect to automatic stays related to 2018 petitions (see above regarding automatic stays).

No-Call Agreement Case

"No-Call" Agreement

Another petition involved a challenge to water right regulation predicated on the existence of a "no-call" agreement entered into among several parties relating to water use on the Sycan River, a tributary to the Klamath River. In that case, an irrigator, The Klamath Tribes, the United States, and the State of Oregon entered into an agreement that included, among other provisions, an agreement that The Klamath Tribes would not call on the irrigators' right. Pursuant to a validated call by another water user who was not a party to the agreement, OWRD regulated all diversions on the Sycan River in 2015, including the diversion subject to the no-call agreement. In 2015, there were calls both by the Klamath Tribes and irrigators in the Klamath Project. The Klamath Tribes were a party to the agreement.

Selective Call

The irrigator filed a petition challenging the enforcement based on the existence of the no-call agreement. In late 2017, the Marion County Circuit Court ruled in favor of the irrigator and upheld the validity of the no-call agreement. The State of Oregon has appealed that ruling, and that appeal is pending. If the no-call agreement is upheld on appeal, it would validate what is, essentially, a selective call, by removing the no-call agreement party from the priority system. The case underscores tensions that may arise in the regulation of junior users in the Klamath Basin: with litigation in multiple forums there is the possibility of inconsistent rulings and tracking the status of Basin-wide regulation can be difficult. On the other hand, it is possible that the Oregon appellate courts will issue rulings to resolve any inconsistency. In any case, it is an early example of the challenges that arise in a newly-regulated basin.

NEXT STEPS

Ten Years?

The first five years of the judicial phase of the KBA has included: Klamath County Circuit Court (Court) resolution of novel questions of Oregon law; the first regulation of water rights in the history of the Klamath Basin; and separate litigation resulting from regulation in a previously unregulated basin. In the adjudication proceeding, among many other activities, the Court resolved: four petitions for stay of the application of the ACFFOD; created a procedure to review the enormous OWRD record; explained how to file an exception to the order and how to be heard on others exceptions; and resolved all threshold issues pertaining to the ACFFOD as a whole.

Summer 2018 will commence litigation of substantive water law issues pertaining to the various types of water right claims at issue in the adjudication. Based on the crucial Phase 1B ruling, which largely establishes that the judicial phase of the adjudication is a record review proceeding of exceptions to the ACFFOD, it appears possible that the Circuit Court phase will ultimately be ten years or less.

CONCLUSION

Water rights regulation in the Klamath Basin has included growing pains, introducing the harsh reality of prior appropriation which extends to groundwater use in Oregon. Petitions of regulation orders have resulted in litigation pertaining to Klamath regulation in both Marion and Klamath Counties. To date, several petitions have been filed in the 2018 seasons and petitioners enjoy the benefit of an automatic stay of regulation as a result of the petitions.

Ongoing Issues

The KBA, and related water regulation litigation, is but one factor impacting water use in the Basin in 2018 and beyond. In the meantime, in the background lie several complex proceedings: the re-initiation of consultation relating to operation of the Klamath Project, litigation by several parties arising under the Endangered Species Act, proceedings regarding the removal of four hydroelectric dams along the Klamath River, and informal conversations relating to re-initiating complex, basin-wide settlement discussions. Thus, in addition to the adjudication and related sideboard litigation, a lot is at play and substantial challenges lie ahead for the Klamath Basin.

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Stormwater

STORMWATER REGULATION

PERMIT FLEXIBILITY & LIMITATIONS

by Tammie Wilson, Terraphase Engineering Inc. (Portland, OR)

Introduction

Pollution Source

One of the biggest sources of pollution in the marine environment is strongly influenced by human activities on the landscape within a watershed. Our activities contribute pollution to the land on which we live, work, and play and that pollution is carried in stormwater runoff. *See*, e.g.: NOAA. *What is the Biggest Source of Pollution in the Ocean*? https://oceanservice.noaa.gov/facts/pollution.html.

Growing Scrutiny

Because of these impacts, stormwater has been a growing field of study, in conjunction with an increasingly stringent and complicated regulatory framework. Stormwater is regulated at construction sites and industrial facilities, as well as in local land use codes and municipal stormwater ordinances.

The costs of stormwater compliance have increased for industries, municipalities and the public with rising utility fees, program implementation as well as design, and construction, operation, and maintenance of a wide variety of engineered treatment systems.

Effectiveness?

With nearly thirty years of investment in stormwater regulation and treatment, can we confidently say that our actions have measurably improved surface water on the scale at which it has been implemented? What role does regulation play in measurable water protection and improving the effectiveness of so many evolving management techniques?

This article provides an overview of current stormwater regulation with a view to addressing those questions. The perspective is informed by your author's years of stormwater compliance work in California, Oregon, Washington, and Alaska.

Stormwater Regulation Overview

NPDES Regime

Stormwater regulation falls within the federal National Pollutant Discharge Elimination System (NPDES) program, which is administered under the Clean Water Act (CWA) section of the Code of Federal Regulations (CFR). The US Environmental Protection Agency (EPA) authorizes most states to administer the NPDES regulations. In 1990, regulation of stormwater as a point source started in 1990 at specified industrial facilities and for municipal "Phase I" communities (cities with populations greater than 100,000). NPDES programs oblige states to issue permits to cities that meet the federal population designations in accordance with the CFR (40 CFR 122.26).

MS4 Permits

Phase I communities are generally regulated under **m**unicipal **s**eparate **s**torm **s**ewer **s**ystem (MS4) permits. Among other responsibilities, MS4 entities must: manage their discharges of stormwater; implement street maintenance programs; and develop flow control and treatment standards for development to mitigate for impacts on surface water quality. "Phase II" communities were added in 1999 and are generally defined as *small* MS4s of various sizes, not already covered by a Phase I stormwater program. Phase II may include federally-owned MS4's such as military bases and urban areas meeting Phase II population requirements. *See*: EPA Phase II Resource Fact Sheet Series: www.epa.gov/npdes/stormwater-phase-ii-final-rule-fact-sheet-series.

MS4 permits generally require at least six minimum measures be implemented.

Municipal Measures

MINIMUM MS4 MEASURES INCLUDE:

Public Education & Outreach – Distribute educational materials and perform outreach to the public about the impacts of polluted stormwater runoff and the impact on water quality.

Public Participation/ Involvement – Provide opportunities to citizens to participate in program development and implementation, including publicizing public hearings and/or encouraging citizen representatives to participate on a stormwater management panel.

Detection & Elimination

Illicit Discharge Detection and Elimination – Develop and implement a plan to detect and eliminate illegal discharges to the stormwater system and improper disposal of waste. This requirement includes developing a detailed system map and informing the community about the hazards of illegal discharges and improper disposal of waste.

Construction Site Runoff Control – Develop, implement and enforce an erosion and sediment control (ESC) program for construction activities that disturb one or more acres of land. Some states and local communities may decrease the size of disturbance that requires ESC controls be implemented.

Post-Construction Runoff Control – Develop, implement and enforce a program to address stormwater discharges from new development and re-development areas. Applicable controls may include protecting sensitive areas such as wetlands or requiring the use of structural Best Management Practices (BMPs) such as vegetated swales or porous pavement.

Stormwater

Prevention

MS4s: "Maximum Extent Possible"

Industry: Pollutant Benchmarks

Pollutant Removal

Variable Performance

Bioretention

Mimicking Nature

Infiltration

Pollution Prevention/ Good Housekeeping – Develop and implement a program with the goal of preventing or reducing pollutant runoff from municipal operations. This program must include municipal training on pollution prevention measures and techniques such as regular street sweeping, catch basin cleaning, or reducing the use of pesticides or street salt.

In contrast to many industrial NPDES permits, MS4 permits typically do not include pollution benchmarks that require detailed corrective actions if the pollution standard is exceeded. An MS4 permittee is following their permit if they can show they are controlling stormwater pollution sources to the Maximum Extent Practicable (MEP). However, MEP is not clearly defined and is subjective to a variety of interpretations about what maximum extent practicable may mean. It may be intended to allow MS4s additional flexibility, however, that flexibility may sometimes come at a cost to our water resources.

Industrial stormwater permits are regulated slightly differently than MS4's and at a minimum must meet the requirements outlined in 40 CFR 122.26(b)(14)(i)-(xi). Most industrial facilities must monitor their stormwater regularly to ensure it meets pollutant benchmarks as defined by the state in which they operate. Applicability of the industrial stormwater permit is usually triggered by the Standard Industrial Code (SIC) activities conducted by the facility. There are additional sector-specific requirements at some facilities. EPA offers a fact sheet series of the minimum requirements for each sector. *See*: www.epa.gov/npdes/industrial-stormwater-fact-sheet-series.

Regulatory Effectiveness

When reflecting on the effectiveness of stormwater regulations in the Pacific Northwest (WA, OR, CA and AK), what first came to mind was how much guessing is, at times, involved — by both the regulated and the regulators. Since most of the tools that we have developed to manage stormwater send it away so that it "disappears" (down the drain, into the soil, off the property), it is nearly impossible to identify the exact mechanism of pollutant removal. It is also difficult to quantify the water quality benefits of stormwater compliance programs. The fate and transport of a pollutant carried in stormwater is not always visible and may be impacted by a complex set of sources, and chemical and biological processes, on the pathway to an outfall.

There are a wide variety of treatment designs and configurations. Some are highly effective at some locations but perform poorly at others — which can make it difficult to develop a cohesive industry standard. It can be challenging to justify the investment in a management technique or treatment system that significantly increases operating costs when the performance results can vary so much. The profession of stormwater management is full of changing viewpoints from what we used to think worked, which we understand differently now. There are instances where two ways of thinking can be both right and wrong at the same time.

One example is our understanding about the removal process for pollutants like copper and zinc through bioretention. There are conflicting studies about what mechanism is responsible for metal removal, and it is widely thought that metals are removed through plant uptake processes. *See*: Cataldo, D., Wildung, R. 1978. *Soil and Plant Factors Influencing the Accumulation of Heavy Metals by Plants.* Environmental Health Perspectives, Vol. 27, pg. 149-159; Sumiahadi, A., Acar, R. 2018. *A Review of Phytoremediation Technology: Heavy Metals Uptake by Plants.* IOP Conference Series: Earth and Environmental Science. 142 012023.

However, it has also been found that while plant life is crucial for nitrogen removal, TSS, phosphorous, and metals removal may not occur. In addition, native plants may help biodiversity, but not necessarily hydrologic or treatment performances. *See*: Dagenais, D., Brisson, J., Fletcher, T. 2018. *The Role of Plants in Bioretention Systems; Does the Science Underpin Current Guidance.* Ecological Engineering, Volume 120, September 2018, pg. 532-545.

Stormwater management techniques in the last 15 years have largely focused on the benefit of designs that mimic nature and encourage infiltration of the water. In the early 2000's, in Alaska, examples of stormwater designs which mimic nature were limited due to the geological features in the area, and the freeze-thaw cycles of a cold climate. At the time, some agencies limited infiltration facilities to what were lower risk sites such as new housing developments, sidewalks, and parking lots. It seems infiltration is increasingly encouraged, even for use on industrial sites where it was previously thought that industry has a higher potential to contaminate soils or groundwater resources. There are places where this impact is being considered, but how those impacts are considered largely depends on your location and the local regulations. Many of these local regulations are requirements of the municipal NPDES permit program, including developing design standards for stormwater facilities.

Stormwater

Design Standards

NPDES Categories

Industry, construction sites, new developments, re-developments, and commercial locations within a regulated community all must comply with local municipal or state design standards when designing stormwater treatment measures. The NPDES program has three general categories — construction, industrial, and MS4 — with very different requirements for each category. MS4s may implement a variety of approaches for stormwater treatment design requirements, largely dependent on whether the project is a regulated project, a small project, an existing system retrofit, or a voluntary action by a property owner. Additionally, local governments in some states may be able to get creative with how they comply with the design standard requirements in their permits. As a result, the performance and effectiveness of the results will vary. This can create a regulatory environment where the stormwater conditions may be similar, but the requirements for managing it vary quite a bit. Comparing effectiveness across such programs can be problematic.

Effectiveness Metric Lacking

Mimicking nature can be an effective stormwater solution and while mitigating for our activities, a design standard is an important aspect of water protection. However, it is very difficult to compare the effectiveness of design standards when there is no metric to compare the effectiveness across the variety of approaches the state or MS4 may implement. Sometimes the same permit can be interpreted or enforced differently in the same area, and the inconsistency itself may have an impact.

Varying Compliance Interpretations

One example of this may be that one inspector on an industrial site may interpret compliance with housekeeping requirements more stringently than another. The permit language regarding housekeeping requirements are written to be flexible for the needs of a site, however, this flexibility can lead to multiple interpretations of what constitutes compliance with that standard.

It is a huge challenge to develop a consistent standard that works in all kinds of communities, in a way that a similar water protection level is achieved. Another challenge is figuring out if that standard has had a measurable impact when it is not always possible to assure the quality and use of data across multiple programs.

Location Differences

Quite a bit of time and money has been invested by communities and industry to comply with stormwater regulations, with the added burden of having to develop and test these programs simultaneously. When an effective solution is found for a pollutant and its sources at one site, it is not always possible to repeat those results in another location. The reason may not always be readily observable. Is it the soil? Is it the plants? Is it the rocks? Does it have to do with maintenance occurring elsewhere? Depending on the situation, it could be all of these reasons, none of them, or only one of them.

Quantification Challenging

Widespread effectiveness of stormwater management and the measurable impact on surface water quality is very challenging to quantify. Over years of study it seems we have multiple conflicting data sets to decipher. There is certainly data that show regulating stormwater improves water quality (e.g., Center for Effective Government. 2012. *Celebrating a Public Protections Milestone: The 40th Anniversary of the Clean Water Act.* www.foreffectivegov.org/clean-water-act-40th-anniversary). However, conflicting data, and a variety of tracking methodologies makes it difficult to cross-compare programs and develop better, more effective, strategies and regulations. It also contributes to compliance continuing to be a moving target.

Data Variability

Monitoring Data

Overlapping programs and different tactics have created a jigsaw puzzle where many of the pieces don't seem to fit together quite right, and many can't agree on what the final picture is meant to look like.

When we are analyzing stormwater monitoring data — whether that is to determine appropriate regulation or what types of programs and treatment to invest in — it is very important to consider the variability of stormwater pollutant monitoring data.

Variability Factors

How variable stormwater data is depends on:

- adherence to quality controls;
- where measurements are being taken;
- the nature of storm events analyzed; and
- how many uncontrolled variables may be involved.

Variability can even occur on a single industrial site depending on where you take a sample, how you take the sample, and your ability to isolate sources. *See*: Golding, S. 2006. *A Survey of Zinc Concentrations in Industrial Stormwater Runoff.* Washington State Department of Ecology, Olympia, WA. Publication No. 06-03-009.

Stormwater

Regional Baseline

Stormwater data collected by Phase I municipalities in Washington State between 2007 and 2013 were analyzed by the Washington State Department of Ecology (Ecology) with the goal of providing the state with a regional baseline of stormwater quality. Hobbs, W., and Lubliner, B., N. Kale and E. Newell.2015. *Western Washington NPDES Phase I Stormwater Permit: Final Data Characterization 2009-2013.* Washington State Department of Ecology, Olympia, WA. Publication No. 15-03-001. (https://fortress.wa.gov/ecy/publications/SummaryPages/1503001.html).

Protocol

Ecology required permittees to collect what the agency referred to as "highly representative" storm-event samples under a prescribed monitoring program. This protocol allowed Ecology to provide more robust comparisons across various land uses and seasons. The study concluded that concentrations of metals from commercial and industrial land uses have remained high when compared to studies from the 1980's and 1990's. High concentrations of **p**olycyclic **a**romatic **h**ydrocarbons (PAHs) were observed during storm events, with no seasonal variations, in the study.

Analysis Requirements

The ability to perform this kind of analysis is dependent on the state having the resources to obtain reliable, high-quality data from permittees. The Ecology study: considered multiple years of sampling; was executed in real-world conditions; and involved a team of participants. The rigor and prescriptive nature of the monitoring program has a huge impact on whether reliable conclusions can be drawn. Stormwater is seasonal, and storms change year to year such that it may be difficult to identify reliable and repeatable trends in only a one-year study.

Another portion of Ecology's study implicated commercial and industrial sources as the main culprit for metals in stormwater. A similar study of sources of copper carried into San Francisco Bay implicated vehicle brake pads, architectural copper, and copper pesticides from landscaping and pools as the primary sources (with a moderate to high level of uncertainty). *See*: Moran, K., Clean Estuary Partnership, TDC Environmental. 2004. *Copper Sources in Urban Runoff and Shoreline Activities*. While we cannot compare results of these two studies directly, a general comparison can highlight problems that may arise when interpreting studies to manage common sources of pollution in stormwater, such as heavy metals.

Adaptive Management

Sometimes the regulation is moving faster than we can answer all the relevant questions. When a permittee is attempting to understand why a treatment system is not working, there is often limited guidance on how to implement effective adaptive management strategies. Improved adaptive management approaches in the form of guidance can be quite helpful to permittees.

Consistent Matrix Lacking

One of the things that may be impacting our understanding of overall water quality conditions is that each state independently defines how water quality will be assessed and compiled, so that a consistent matrix of how to assess water quality state to state does not really exist. The EPA does compile all this data periodically, but not regularly. Agency resources can impact how often data can be compiled and analyzed.

The types of analyses that were possible in Washington State with Phase I communities may be the result of adequate funding to properly administer the cooperative partnerships required. Likely, the level of trust between the regulator and regulated made it possible to trust the data obtained under a permit. To eliminate conflict, the partnerships had to stay focused on the common goal of water protection.

Trust Impact

Trust between the regulator and the regulated often seems to depend on whether both entities share a common goal of water protection. Some states may focus more on industry as opposed to urban sources, which may inhibit the building of trust. The requirements for industry versus municipalities are quite different, so it can be a challenging prospect. For instance, if a treatment system is not working at an industrial facility, that is much more likely to have a measurable impact at the point of discharge than one of hundreds of bioretention ponds malfunctioning. However, an installed treatment system that may be bypassing in some storm events within a large permitted municipal system may not be as readily noticed.

Industrial v. Municipal

On an industrial site, regular inspections, maintenance, and monitoring is required, and facilities face enforcement for stormwater compliance regularly. For cities, however, the regulation works quite differently. There are not permit benchmarks like there are at industrial sites, and requirements to implement treatment are quite a bit more flexible.

What's Working for Water: Analysis Mixed

Improvement?

Since the Clean Water Act (CWA) was first enacted in 1975, an analysis performed on water quality data between 1975 and 2011 indicated that water quality in freshwater lakes has not significantly improved since 1975. *See*: NBER Working Paper Series, *Has Surface Water Improved Since the Clean Water Act? Smith, K.V., and Wolloh, C. V.,* Working Paper 18192, June 2012. This assessment presents the aggregated data based on the fishability and swimmability of lakes and shows that water quality has not significantly improved regardless of increasingly stringent regulation under the CWA.

Stormwater

Fishable & Swimmable

Economy's Impact

Studies Ongoing

Hydrology Aspects

New Zealand Improvements

Stormwater Use

Low Impacts & Reuse

However, there are other similar assessments that do not agree with that conclusion. The 2012 assessment from the Center for Effective Government (referenced above) found that, overall, more than 60% of the nation's waters meet the CWA's fishable and swimmable goal; while in 1972 only about 1/3 were considered fit for these activities. Publicly owned treatment works were the dominant source of many contaminants, but also accounted for the greatest reductions in pollutant discharge since 1971. While overall the country's water quality has improved significantly in 40 years, many waters still fail to meet water quality standards.

Previous assessments of water quality and unemployment rates theorized that environmental quality improves with the average level of household income. *See*: Carson, Richard T., 2010, *"The Environmental Kuznets Curve: Seeking Empirical Regularity and Theoretical Structure,"* Review of Environmental Economics and Policy, Vol. 4 (Winter): 3-23.

However, the assessment of lakes used in the NBER Working Paper suggests the opposite: that as unemployment rates rise, the indexes for water quality appear to improve. So, despite the regulatory approach that increasingly stringent technology standards improve water quality, this data analysis points to economic growth or decline as having the greater impact on overall surface water quality.

Both industry and municipalities have been identifying what works and doesn't work under their permits and may have identified similar challenges. Some treatment and housekeeping problems may largely be the same, and in some cases the concentrations of pollutants may also be very similar, such that similar approaches may work. Each permitted entity, public or private, though, must be able to illustrate that their management techniques work.

Nearly every public and private entity with a stormwater permit has likely performed or contracted a study to help them understand what is and is not effective. Permitted entities have identified shortcomings or gray areas in the regulatory language, opportunities for improvements in the regulation, and practices for streamlining stormwater management. Many changes in procedure that have impacted results (both temporarily and long-term), have identified conditions which short-circuit treatment, found that tight soils are preventing infiltration, or that too much plant growth is prohibiting infiltration.

None of this means anyone has found the smoking gun, or all the missing pieces. However, we are doing this in nature and trying to mimic nature. Nature and mimicking nature perhaps should be chaotic and mysterious; however, some aspects of flow control and treatment can be quantified based on hydrology. For example, an MS4 permittee in Alaska has been comparing pre-project and post-project flow duration control curves to quantify hydromodification from flow control facilities. *See*: Municipality of Anchorage. January 2015. *MOA and ADOT&PF 2014 Low Impact Development Project Performance Monitoring Report.* http://anchoragestormwater.com/Archive2014APDES.html. In California, hydromodification management is done by comparing pre-project and post-project flow duration curves using continuous simulation with a long-term precipitation data set to better mimic pre-development conditions in post-development flows.

What's Working for Water: Some Success

New Zealand recently presented a success story related to surface water quality improvements. In April 2018, a report on National Water Quality Trends was released by New Zealand's Land, Air and Water Aotearoa (LAWA) which revealed that over a 10-year period, water quality at more water monitoring sites was improving than deteriorating in the country. This doesn't necessarily mean that New Zealand has found the solution, but it indicates that overall, they may be on the right track. *See*: www.lawa.org.nz/get-involved/news-and-stories/national-news/2018/april/new-zealand-river-water-quality-trends-show-cause-for-optimism/.

In California, urban stormwater management has recently been touted as an opportunity to solve water shortage problems as dwindling water supplies are increasingly a concern because of climate change. *See*: Shimabaku, M., Diringer, S., Cooley, H. 2018. *Stormwater Capture in California: Innovative Policies and Funding Opportunities.* Pacific Institute. ISBN: 978-1-893790-82-7.

While there are obstacles to utilizing stormwater to mitigate for water shortages, communities which have embraced low impact development features or incorporated direct reuse of stormwater have accomplished concrete actions to help protect California's water resources. Innovative competitive grant programs have been established in Washington and California which encourage the development of green infrastructure and help fund programs. While continued research is encouraged in nearly all these studies (mainly due to a need for more data), the need to study and understand improved stormwater management is commonly acknowledged.

Stormwater

Fees ‡ Incentives

Litigation & Legislation

Effective Strategies

Innovation Inhibition

Data Integration

Performance Metrics

Stormwater management fees can help fund better programs and fee reductions can be offered as an incentive for reducing and cleaning up stormwater. While stormwater fees have faced legal challenges, EPA has described Philadelphia Water Department's (PWD's) stormwater fee as "brilliant." PWD imposes a substantial fee based on impervious surface of a site, and the overall parcel size, but will reduce those fees by up to 80% (but not more than $100,000/year) when a property owner installs agreed-upon improvements. They also offer grant money for exceptional projects. This rebate is large enough to justify some stormwater improvements, which is a cost-benefit plus even if it is not always enough for what may be needed at many urban or industrial sites.

The Natural Resource Defense Council (NRDC) advocates for a shift in how cities approach water management. Sometimes more sustainable stormwater management has occurred because of an NRDC lawsuit. In 2013, a federal appeals court found Los Angeles County liable for untreated stormwater that was polluting the Los Angeles and San Gabriel rivers and threatening the health of local beaches. NRDC has also helped push sustainable stormwater management legislation through the New York City Council to encourage green design and reductions in sewage overflows. *See*: NRDC. *Encourage Green Infrastructure.* www.nrdc.org/issues/encourage-green-infrastructure. Since traditional public funding for stormwater controls and infrastructure can be limited, organizations like NRDC can work with city leaders to develop innovative programs that may increase the extent of beneficial stormwater programs.

Conclusion

Stormwater regulation is not going away. In fact, it seems it could still become increasingly complicated in some places. However, if we truly want to find a solution that adequately protects water we should continue to identify solutions that improve how we manage stormwater, even if we are unsure of the best way. Enhancing our understanding of more effective strategies with measurable water quality benefits is increasingly important. At some point, the jigsaw puzzle pieces must fit together.

While prescriptive requirements may make it more possible to analyze and compare data across multiple programs, it may also have the unintended consequence of inhibiting innovation. This can occur through a regulatory environment that limits experimentation, or engineering standards that are so prescriptive that it becomes difficult to adapt to advancements in research.

Evaluations of the effectiveness of stormwater regulation at improving regional water quality are lacking, primarily because integration of monitoring data from multiple dischargers to assess cumulative effects is not required. We have an opportunity to assess effectiveness by integrating data from all major sources of contaminants through smarter regulation. As point source treatment has improved, the relative contribution of non-point sources, such as stormwater runoff has increased. Despite the increased importance of stormwater discharges, regional monitoring and data compilation of this source is lacking, making it difficult to accurately assess trends in non-point source discharge.

One part of the solution may be to build more specific performance metrics into permits to promote the generation of higher quality data, making it increasingly possible to compare and analyze the data we are collecting across programs. Forming interdisciplinary work groups to tackle the most effective approach to the management of stormwater can help build smarter programs that adequately incorporate the concerns of both the regulator and the regulated. It is progressively essential to integrate new requirements that are based on evidence rather than hypotheses for improved stormwater regulation to continue to improve water quality.

For Additional Information:
Tammie Wilson, Terraphase Engineering, 503/ 889-0367 x117 or tammie.wilson@terraphase.com

Tammie Wilson is a Senior Stormwater Engineer at Terraphase Engineering Inc. and brings 15 years of multi-disciplinary project management experience including municipal, industrial, and construction stormwater compliance; water quality source tracing investigations; utility and infrastructure planning and design; Low Impact Development design, operation, maintenance, and treatment effectiveness monitoring; and stream restoration and revegetation projects. Tammie has a problem-solving approach with a variety of treatment operations and maintenance experience.

WATER BRIEFS

PAST ENVIRO HARM US

HYDRO LICENSING

On July 6, the D.C. Circuit (Court) vehemently vacated a Federal Energy Regulatory Commission (FERC) licensing decision, which had granted a hydroelectric license to Alabama Power Company in 2013, and remanded for further proceedings in accordance with its ruling. The Court, in a strongly worded opinion, found that FERC and the US Fish and Wildlife Service (USFWS) "declined to factor in the decades of environmental damage already wrought by exploitation of the waterway for power generation and that damage's continuing ecological effects." *American Rivers v. FERC*, Nos. 16-1195, 16-2336, ---- F.3d ----, 2018 WL 3320870 at *1 (D.C. Cir. July 6, 2018) (Slip Op. at 2).

At the beginning of its opinion, the Court pointed out that "a review of the licensed project's impact on the environment and endangered species documented that the project would cause a 100% take of multiple endangered mussels, a large loss of indigenous fish, and perilously low dissolved oxygen levels for substantial periods of time. Nevertheless, the Commission [FERC] concluded that licensing the generation project would have no substantial impact on either the River's ecological condition or endangered species." *Id*. The Court finished a summary of its rationale for vacating the license, stating "[B]ecause the Commission's environmental review and a biological opinion it relied on were unreasoned and unsupported by substantial evidence, the Commission's issuance of the license was arbitrary and capricious." *Id*. at 2-3.

The Court found fault with USFWS' actions regarding the Biological Opinion. "By discarding the methodology set forth in its own regulatory definitions, *see* 50 C.F.R. § 402.02, the Fish and Wildlife Service acted arbitrarily in establishing the environmental baseline without considering the degradation to the environment caused by the Coosa River Project's operation and its continuing impacts." *Id*. at 22. Addressing "baseline conditions" further, the Court noted that "[As] the Ninth Circuit has explained, 'even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.'" *Id*. at 23. The Court expanded on its examination of the "jeopardy analysis," rejecting the Department of the Interior's defense of the analysis where it argued that there were "degraded baseline conditions since at least 1964, and this licensing action proposes to *improve* those conditions by, among other things, imposing a minimum-flow regime…for the first time." The Court, however, pointed out that "attributing ongoing project impacts to the 'baseline' and excluding those impacts from the jeopardy analysis does not provide an adequate jeopardy analysis. The Opinion's jeopardy analysis is arbitrary in failing to account for the impact of continued operations of the existing dams." *Id*. at 24.

The Court goes on to relentlessly chastise FERC's analysis in the section of the opinion regarding the NEPA challenge, using phases such as "rife with flaws," "breezy dismissal" or "cheery assurance" when discussing the Commission's actions. Clearly, the Court was not pleased with the analysis of FERC in almost every instance. Discussing fish passage and estimates of fish deaths asserted by Alabama Power — the Court found them to be "entirely unmoored from any empirical, scientific, or otherwise verifiable study or source… ." The Court then showed its disdain for FERC's action: "The Commission's acceptance, hook, line, and sinker, of Alabama Power's outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy. And it is certainly unreasoned." *Id*. at 29.

The case provides interesting reading and is essentially a primer on how not to conduct a hydroelectric license renewal review. The Court details all the ways that FERC and USFWS failed while attempting to address the "three intersecting statutory schemes, all of which are designed to force federal agencies to carefully assess and address the environmental impacts of large-scale development projects." *Id*. at 3. The three statutory schemes discussed by the Court are the Federal Power Act, the National Environmental Policy Act, and the Endangered Species Act. *See id*. at 3-5.

For info: Decision available at: www.cadc.uscourts.gov/internet/home.nsf >> "Opinion Locator"

DAM REMOVAL OR/CA

KLAMATH RIVER PLAN FILED

On June 28, the Klamath River Renewal Corporation (KRRC) submitted the "*Definite Plan for the Lower Klamath Project*" with the Federal Regulatory Energy Commission (FERC) for the proposed removal of J.C. Boyle, Copco 1, Copco 2, and Iron Gate dams. The Definite Plan is part of KRRC's application to FERC for the transfer of the FERC license to operate the dams; it is an approximately 2,300 page document that provides comprehensive analysis and detail on dam removal, project design, deconstruction, reservoir restoration, and other post-deconstruction activites. FERC will review the Definite Plan to confirm KRRC has the technical, legal, and fiscal capacities to become the licensee. The dam removal and river restoration project would be the largest dam removal project in US history.

KRRC is an independent nonprofit organization formed in 2016 as part of the amended Klamath Hydroelectric Settlement Agreement (KHSA). KRRC is part of a cooperative effort to re-establish the natural vitality of the Klamath River so it can support all communities in the basin. Signatories of the amended KHSA, including the States of California and Oregon, local governments, Tribal Nations, dam owner PacifiCorp, irrigators, and several conservation and fishing groups, appointed KRRC to take ownership of four PacifiCorp dams — J.C. Boyle, Copco, No. 1 & 2, and Iron Gate — and then remove these dams, restore formerly inundated lands, and implement required mitigation measures in compliance with all applicable federal, state, and local regulations. KRRC's technical representative, AECOM Technical Services Inc., was the primary author of the plan under the direction of KRRC's Executive Director and Board.

WATER BRIEFS

During the coming months, FERC and an Independent Board of Consultants will review and provide guidance on the Definite Plan. For KRRC to implement the dam removal project, FERC must approve both the license transfer and the license surrender applications. If KRRC receives all approvals to begin work, it expects to begin site preparations in mid-2020, with dam removal and restoration activities commencing in 2021.
For info: Copy of the Definite Plan, plus a Fact Sheet and Q&A material, is available at KRRC's website at: www.klamathrenewal.org/definite-plan/

DAMS PREVENTED CO

AGREEMENT REACHED

On July 3, American Rivers and Colorado Trout Unlimited announced that they had signed an agreement with the City of Aspen to stop the development of two new dams deemed unnecessary. Those groups hailed the agreement as a major victory for free-flowing rivers and Aspen's iconic Maroon Bells.

Since 2016, Aspen had been advancing a proposal to develop a 155-foot dam on Maroon Creek and a 170-foot dam on Castle Creek in the shadow of the Maroon Bells for its water supply. The dams would have flooded private property as well as federally protected land in the Maroon Bells-Snowmass Wilderness Area, one of the most visited and photographed valleys in Colorado.

In December 2016, American Rivers and Colorado Trout Unlimited filed statements of opposition with the Colorado Water Court regarding Aspen's application to continue conditional water rights to pursue construction of the dams. Aspen's own 2016 water availability report clearly stated that the city did not need the two dams for municipal water supply or climate resiliency.

In the new agreement, Aspen commits to moving the water storage rights out of the Castle and Maroon Creek valleys forever, to alternate locations that won't damage river health.
For info: Matt Rice, American Rivers, 803-422-5244 or mrice@americanrivers.org

WATER SPECULATION NM

APPLICATION DENIED

On July 31, the New Mexico Office of State Engineer Hearings Unit issued the "*Report and Recommendations Granting Motions for Summary Judgment*" (*Report*) that denied an application for 54,000 acre-feet of groundwater in the Rio Grande Basin by Augustin Plains Ranch LLC (APR). The denial was based on the "anti-speculation doctrine" of western water law, which basically requires an appropriator of new water rights not to engage in speculation by obtaining water rights and holding them for later sale. "Administrative proceedings before the State Engineer are neither the time nor the place for Applicants to develop their intentions. Those intentions should be well-developed based on reasonable projections of future demand and clearly and specifically articulated in the application." *Report* at 8.

The *Report* cited the Colorado Supreme Court's articulation of the anti-speculation doctrine (*Vidler*, 594 P.2d 566, 568), as follows: "[o]ur constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains."

The *Report* goes on to set out some of the deficiencies in APR's application. "APR has shown neither: (1) a contractual agreement or an agency relationship with the municipalities identified in the Corrected Application, nor (2) a specific plan for the purchase and delivery of a specific amount of water for specific beneficial uses to meet the reasonably anticipated needs of those municipalities…An application for a new appropriation of water of this size and nature for municipal purposes should, with specificity, identify for each municipality: reasonable, substantiated projections of future demand, and the respective quantities, purposes and places of use for each identified user." *Id*. at 11-12.

The Hearing Examiner went on to discuss APR's problems that establish the application is speculative. "APR has invested significant time and resources into the conceptual development of a project and pipeline for the delivery of water for municipal and commercial purposes, but that must be considered in light of the need to demonstrate a specific plan, the probability of implementation, the requirement that water be applied to a beneficial use within a reasonable time, and the reasonably anticipated needs of any municipal entities involved. 78) All APR has established is that it wants to appropriate and convey water to uncommitted municipalities or entities in unknown quantities. 79) Here, there is a striking absence of information, namely agreements with specific end-users for specific quantities and purposes that APR could rely upon to defeat a claim of speculation and show a substantial probability that it will complete the proposed appropriation with diligence by placing water to beneficial use within a reasonable period of time." *Report* at 12.
For info: *Report* available at NMOSE website: www.ose.state.nm.us/HU/AugustinPlains.php

STATE WATER PLAN NM

DRAFT - COMMENTS DUE

The New Mexico Office of the State Engineer (NMOSE) recently released the Draft State Water Plan 2018. Comments to the New Mexico Interstate Stream Commission on the draft plan are due August 25, 2018; the comment period was open for 45 days. The Draft New Mexico State Water Plan 2018 is available for viewing at the NMOSE website listed below.
For info: www.ose.state.nm.us/ >> 2018 Draft State Water Plan Released

WATER BRIEFS

COAL ASH DISPOSAL OK

STATE OVERSIGHT

Prior to his resignation, EPA Administator Scott Pruitt signed a decision that allows Oklahoma to oversee and enforce regulations on disposal of coal ash. Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is approving the Oklahoma Department of Environmental Quality's Coal Combustion Residuals (CCR) State permit program, which will operate in lieu of the Federal CCR program. EPA has determined that Oklahoma's program meets the standard for approval under RCRA. Facilities operating under the state program requirements and resulting permit provisions will also be subject to EPA's inspection and enforcement authorities under RCRA.

CCR are generated from the combustion of coal, including solid fuels classified as anthracite, bituminous, subbituminous, and lignite, for the purpose of generating steam for powering a generator to produce electricity or electricity and other thermal energy by electric utilities and independent power producers. CCR include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. CCR can be sent off-site for disposal or beneficial use or may be disposed in on-site landfills or surface impoundments.

The new rule is only applicable to non-Indian country in Oklahoma. EPA retains the sole authority to regulate and permit CCR units in Indian country, which includes reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. Final authorization is effective on July 30, 2018. See the June 28th Federal Register for additional information: www.federalregister.gov/documents/2018/06/28/2018-13461/oklahoma-approval-of-state-coal-combustion-residuals-permit-program.

For info: Mary Jackson, Office of Resource Conservation and Recovery, EPA, 703/ 308-8453 or jackson.mary@epa.gov

STORMWATER MANUAL WA

DRAFT MANUALS

The Washington Department of Ecology (Ecology) recently released the Draft 2019 Stormwater Management Manual for Western Washington (SWMMWW) for public comment. In August 2018, the Draft 2019 Municipal Stormwater Permits are also scheduled to be released for public comment.

Ecology is looking for feedback on the drafts. The comment period (for both the Draft 2019 SWMMWW and the Draft 2019 Municipal Stormwater Permits) will end on November 14, 2018. The front page of the manual has information for how to submit comments on the manual.

For info: Amanda Heye, Ecology, Amanda.Heye@ecy.wa.gov or SWMMWW website: https://ecology.wa.gov/ >> Stormwater permittee guidance & resources

EMERGENCY GRAZING KS

CONSERVATION RESERVE

On July 18, USDA announced the additional authorization of Conservation Reserve Program (CRP) practice CP25 acres for emergency grazing only, for the remainder of fiscal year 2018 through September 30. This action covers the same 44 counties previously authorized for emergency haying and grazing on other CRP practices. A map of currently authorized counties can be found on the Kansas FSA webpage, www.fsa.usda.gov/ks.

Local FSA county committees in counties designated as D2 (severe drought) level on the US Drought Monitor (http://droughtmonitor.unl.edu) have been approved by the Kansas FSA State Committee for emergency grazing beginning July 16. The emergency grazing period for CP25 in these counties ends September 30. Emergency haying is NOT authorized for practice CP25. Counties that reach D2 status in the future may request authorization through their local FSA county committee.

All eligible producers who are interested in any type of emergency haying and grazing of CRP must first request approval through their local FSA before haying or grazing eligible acreage, and obtain a modified conservation plan from the NRCS that includes haying or grazing provisions. Certain restrictions apply to CP25 emergency grazing per county and contract. Interested producers should visit with county offices as soon as possible to determine eligibility and receive approval.

There will be no CRP annual rental payment reduction for 2018 emergency haying and grazing authorizations. To take advantage of the CP25 emergency grazing provisions, authorized producers can use the CRP acreage for their own livestock or may grant another livestock producer use of the CRP acreage. The eligible CRP acreage is limited to acres located within the approved county.

For info: Contact local county FSA office: contact info at: www.farmers.gov

FISH & WILDLIFE REPORT NW

BPA COSTS

The Northwest Power & Conservation Council's 17th Annual Report on fish and wildlife costs of the Bonneville Power Administration (BPA), including funding of the Council's Columbia River Basin Fish and Wildlife Program, was recently released. In Fiscal Year 2017, BPA reported fish and wildlife mitigation costs of $450.4 million, according to data compiled in the report to the Governors of the four Northwest states by the Northwest Power and Conservation Council (Council). The report is posted on the Council's website.

2018 is the 17th year the Council has reported to the Governors on BPA's fish and wildlife expenditures. Under the Northwest Power Act of 1980, the Council is required to prepare a program to protect, mitigate, and enhance fish and wildlife, and related spawning grounds and habitat, that have been affected by the construction and operation of hydropower dams in the Columbia River Basin. BPA is required to pay for the program under the law. Breakdown of BPA expenditures for Fiscal Year 2017:

- $254.7 million in direct (expense) costs for the direct-funded program (projects such as habitat improvements, research, and some fish hatchery costs)

WATER BRIEFS

- $85.2 million in reimbursements to the federal Treasury for expenditures of appropriated funds by the Corps of Engineers, Bureau of Reclamation, and US Fish and Wildlife Service for investments in fish passage and fish production, including direct funding of operations and maintenance expenses of federal fish hatcheries
- $121.4 million for debt service (interest, amortization, and depreciation) of capital investments for facilities such as hatcheries, fish passage facilities at dams, and some land purchases for fish and wildlife habitat
- $9.6 million in forgone hydropower sales revenue that results from dam operations that benefit fish but reduce hydropower generation, such as spill at Snake and Columbia river dams in the spring and early summer when juvenile salmon and steelhead are migrating to the ocean
- Negative $20.5 million in power purchases. The negative figure is an anomaly. BPA buys power in the wholesale market during periods when dam operations to protect migrating fish reduce hydropower generation below firm loads, such as by spilling water over dams in the spring or storing it behind dams in winter months in anticipation of flow augmentation. The 2017 Fiscal Year exhibited an unusual and unintuitive result for both replacement power purchases and forgone revenues. According to BPA, one of the reasons these "cost of fish operations" were lower in 2017 can be attributed to the modeled reservoir operations in the previous year as well as an unusual runoff. BPA's calculations show that operations for fish pushed some generation into months with higher power prices, and the value of that generation more than offset the fact that BPA lost approximately 210 average megawatts of generation due to operations for fish in 2017.

For info: John Harrison, NWPPC, 503/222-5161 or www.nwcouncil.org

EPA GRANT NV

WATER QUALITY MANAGEMENT

On July 18, EPA announced that it has awarded a total of $330,000 to the Nevada Division of Public and Behavioral Health (NDPBH) and to the Nevada Division of Environmental Protection (NDEP) to strengthen their capacity to protect human health and the environment. Funds will support radon exposure prevention and improvements in water quality management.

NDEP will receive a $100,000 Clean Water Act (CWA) grant to continue Nevada's water quality management and planning program to improve impaired waters and protect unimpaired waters across the state. One focus area for the program is development of appropriate and consistent temperature and dissolved oxygen criteria to protect the various coldwater and warmwater fish found in Nevada waters. NDEP will also sub-grant $40,000 of the funds to the Clark County Board of Commissioners, the designated CWA planning agency for Clark County, to promote efficient and comprehensive programs for controlling water pollution. NDPBH will receive a $230,000 State Indoor Radon Grant to support radon exposure prevention and outreach.

For info: EPA's Pacific Southwest Region website at: www.epa.gov/pacific-southwest-media-center

CREEK RESTORATION WA

FAILED DAM - RESTORATION ORDERED

The owner of an unpermitted, private dam that failed last year at the headwaters of Rattlesnake Creek in Asotin County has agreed to a multi-million-dollar restoration plan. When the dam broke on the Bonasa Breaks Ranch it released approximately 9.4 million gallons of water. The rush of water caused significant damage to the environment and also public and private property. Summer steelhead use Rattlesnake Creek for spawning, rearing and migration. Restoration of the creek is essential to provide refuge for the endangered fish.

Bonasa Breaks Ranch, LLC, also agreed to pay $15,000 for failing to secure the required permits to increase the dam's size, and $100,000 for violating the state's water quality laws. Rattlesnake Creek is an important tributary to the Grand Ronde River and both provide habitat for fish protected by the Endangered Species Act.

The Washington Department of Ecology (Ecology) worked with a technical team that consists of federal, state, local, and private environmental experts to develop a plan to restore more than six miles of the creek. Restoration is estimated to cost $2.5 million over the next 10 years. If Bonasa Breaks fails to complete the work outlined in the plan, additional penalties will apply.

"The failure of this private dam severely damaged miles of habitat used by endangered summer steelhead," said Ecology Water Quality Program Manager Heather Bartlett. "The dam break caused erosion, loss of thousands of mature trees that provided shade to cool water temperature, and sent boulders downstream and blocked migrating fish. Restoring Rattlesnake Creek is essential."

Bonasa Breaks hired Rio Applied Science and Engineering to begin removing fish barriers, adding structures to provide refuge for juvenile fish, removing invasive plants, and planting native trees and shrubs. Last fall, Bonasa Breaks also worked cooperatively with Ecology and other agencies to reduce the dam to its historic size and stabilize it to prevent another catastrophic release of water.

"It's vital that dam owners work with us to ensure the safety of people and property located downstream," said Joe Witczak, Dam Safety manager. "Our dam safety engineers and staff could have helped the owner make the necessary changes to avoid this failure."

In Washington, a dam owner is legally responsible to design, construct, and operate their dam in a safe and proper manner.

"We appreciate that Bonasa Breaks has already begun work to manage invasive weeds and secure permission from downstream landowners to plan and implement restoration work," Bartlett said.

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

CALENDAR

August 12-15 CO
StormCon Denver (2018): The Surface Water Quality Conference & Expo, Denver. Hyatt Regency Denver at Colorado Convention Center. For info: https://www.stormcon.com/

August 12-15 TN
International Low Impact Development Conference, Nashville. JW Marriott Hotel. Presented by American Society of Civil Engineers. For info: www.lidconference.org

August 16-17 WA & WEB
Water Law in Central Washington Seminar & Live Webcast, Ellensburg. Red Lion Hotel & Conference Center. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

August 16-17 WA & WEB
Clean Water & Stormwater Seminar, Seattle. Courtyard by Marriott Seattle Downtown/Pioneer Square. For info: Law Seminars Int'l, 206/ 567-4490 or www.lawseminars.com

August 20-23 OR
Oregon Association of Water Utilities Summer Conference, Seaside. Seaside Convention Center. For info: https://oawu.net/

August 22-24 CA
Urban Water Institute Annual Water Conference, San Diego. Hilton San Diego Resort & Spa. For info: www.urbanwater.com/conferences/

August 23 OR
ABA Section of Environment, Energy, and Resources SEER Social - Portland Happy Hour, Portland. Perkins Coie, 1120 NW Couch Street, 10th Floor. For info: RSVP to Kevin. Gordon@americanbar.org

August 28-29 DC
Water Finance Conference, Washington. The Washington Court Hotel. Presented by the National Association of Clean Water Agencies. For info: http://waterfinanceconference.com/

September 4-6 Mexico
Aquatech Mexico 2018, Mexico City. Mexico Room, WTC Mexico City, Montecita 38, Napoles. For info: www.aquatechtrade.com/en/mexico/

September 9-12 TX
33rd Annual WateReuse Symposium: "What's Working, What's New, and What's Next in Water Reuse", Austin. JW Marriott Hotel. Presented by WateReuse. For info: https://watereuse.org/news-events/conferences/

September 10 CA
Managing Drought in a Changing Climate Conference, San Francisco. Bechtel Conference Center at PPIC. Presented by Public Policy Institute of California. For info: http://www.ppic.org/news-and-events/events/

September 11-12 MO
Water and Planning Connect Conference, Kansas City. Kansas City Marriott Downtown. Presented by the American Planning Assoc. For info: www.planning.org/conference/water/

September 12 OR
EPA's Second Portland Harbor Public Forum, Portland. TBD. 6pm-8:30pm. For info: Laura Knudsen, 206/ 553-1838, knudsen.laura@epa.gov or https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=1002155

September 12-13 Canada
Canadian Shale Water Management 2018 Exhibition & Conference: Reducing the Cost of Water Recycling & Reuse, Alberta. Calgary Stampede, 1410 Olympic Way SE. For info: www.canada.shale-water-management.com/?join=VR

September 12-13 IL
US Power Plant Water Treatment Conference, Chicago. Hilton Chicago - Magnificent Mile Suites. For info: www.lmnpower.com/power-water-treatment-conference

September 12-14 CA
Global Climate Action Summit: Take Ambition to the Next Level, San Francisco. Moscone Center South. For info: http://globalclimateactionsummit.org/

September 13-14 TX
Texas Desal Conference, Austin. Sheraton Austin at the Capitol. For info: www.texasdesal.com/events/2018-conference

September 17-19 TX
WaterPro Conference, Fort Worth. Fort Worth Convention Center. Annual Conference of the National Rural Water Assoc. on Water & Wastewater Utility Systems. For info: www.waterproconference.org

September 20 WA
Northwest Remediation Conference: Integrated Approaches to Financing LUST Cleanup, Tacoma. Greater Tacoma Convention Center. Presented by Northwest Environmental Business Council; Remediating Brownfields, Sediments & More. For info: Diane Thornton, NEBC, 503/ 227-6361 x4, diane@nebc.org or www.nwremediation.com

September 20-21 NM
New Mexico Water Law 26th Annual Conference: The Latest Updates from All Points of View, Santa Fe. Eldorado Hotel & Spa. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

September 24 WA
CERCLA + MTCA: Sediments Conference, Seattle. Washington State Convention Center. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, info@elecenter.com or www.elecenter.com

September 24-25 FL
Managing Florida's Aquifers: Annual Conference, Orlando. Florida Hotel & Conference Center, 1500 Sand Lake Road. Presented by American Ground Water Trust. For info: https://agwt.org/events

September 25-27 CA
First Annual Western Groundwater Congress - Technical Conference on Western Groundwater Quality & Groundwater Resources, Sacramento. DoubleTree by Hilton. Presented by Groundwater Resources Assoc. of California. For info: www.grac.org/events/151/

September 26-29 FL
Association of Water Technologies (AWT) Annual Convention & Exposition, Orlando. Omni Orlando Resort. For info: www.awt.org/annualconvention18/

September 27-28 CA
San Diego Industrial Environmental Association: Environmental Training Symposium & Conference - "Strategies for Success on California's Environmental Frontier", San Diego. San Diego Convention Center. For info: http://ieaca.org/conference/

September 29-Oct. 3 LA
WEFTEC 2018: The Water Quality Event & Exhibition, New Orleans. Morial Convention Ctr. Presented by Water Education Foundation. For info: www.weftec.org/future-weftec-schedule/

October 3-5 NV
11th Annual Water Smart Innovations Conference & Expo, Las Vegas. South Point Hotel and Conference Center. For info: WaterSmartInnovations.com

October 9-11 OK
Interstate Council on Water Policy Annual Meeting, Oklahoma City. Sheraton Downtown. Field Trip to Simpson/Arbuckle Aquifer on Oct. 9; Panel Sessions Oct. 10-11. For info: Sue Lowry, ICWP, 307/ 630-5804, Sue.ICWP@gmail.com or www.icwp.org

October 10-12 MT
2018 Watershed Symposium: Advancing Conservation Through Effective Communication, Whitefish. The Lodge at Whitefish Lake. Presented by the Montana Watershed Coordination Council. For info: Kierra Davis: kierra@mtwatershed.org or www.mtwatersheds.org

October 11-12 MT & WEB
Montana Water Law Conference - 18th Annual, Helena. Great Northern Hotel. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

October 11-12 AZ
Tribal Water Law Conference, Scottsdale. WE-Ko-Pa Resort & Conference Center. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

October 14-17 CA
Association of Metropolitan Water Agencies Executive Management Conference, San Francisco. The Hotel InterContinental Mark Hopkins. Sharing Ideas and Building Relationships Among Top Drinking Water Utility Executives. For info: www.amwa.net/event/2018-executive-management-conference

October 15-17 CA
Connecting the Drops From Summit to Sea: CASQA 2018 14th Annual Conference, Riverside. Riverside Convention Center. Presented by California Stormwater Quality Ass'n. For info: www.casqa.org/events/annual-conference

October 16 WA
"*Hirst*, *Foster*, Boldt, and Beyond: A New Era of Water Management?" - 2018 AWRA Washington State Conference, Seattle. Moutaineers Seattle Program Center, 7700 Sand Point Way NE. Presented by American Water Resources Association - Washington Chapter. For info: www.waawra.org/event-2837056

October 16 CA
2018 Association of California Water Agencies (ACWA) Regulatory Summit, Sacramento. Hilton Sacramento Arden West. For info: www.acwa.com/events

October 22-23 TX
9th Annual Texas Water Law Conference: Innovations in Water Conservation & Management, San Antonio. La Cantera. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

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CALENDAR

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October 23 DC
ELI 2018 Environmental Achievement Award Dinner, Washington. Omni Shoreham Hotel. Award to Lisa Jackson Presented by the Environmental Law Institute. For info: www.eli.org/award-dinner

October 23-26 ID
2018 Western States Water Council Fall (188th) Council Meeting, Coeur d'Alene. The Coeur d'Alene Resort. For info: www.westernstateswater.org/upcoming-meetings

October 24 OR
Oregon Floodplain Development Conference, Portland. The Mark Spencer Hotel. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

October 24-26 NM
23rd Annual New Mexico Infrastructure Finance Conference, Albuquerque. Isleta Resort & Casino. Presented by New Mexico Environment Department. For info: www.nmifc.com

October 24-26 PA
The American Water Summit 2018, Philadelphia. Loews Philadelphia. For info: www.americanwatersummit.com

October 25-26 AZ
Tribal Water Summit, Phoenix. Wild Horse Pass Casino & Events Center. Presented by WestWater Research; Hosted by Gila River Indian Community. RE: Tribal water management and federal policy concerning Tribal water. For info: Julie Mai, WestWater Research, 208/ 433-0255 or mai@waterexchange.com or 208/ 433-0255 or www.tribalwatersummit.com

October 28-31 GA
Water Infrastructure Conference & Exposition, Atlanta. Hotel Regency Atlanta. Presented by American Water Works Assoc.. For info: www.awwa.org/conferences-education/conferences.aspx

November 1-2 WA
11th Annual Water Rights Transfers Seminar, Seattle. Washington Athletic Club. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

November 4-8 MD
Annual Water Resources Conference, Baltimore. Baltimore Marriott Inner Harbor at Camden Yards Hotel. Presented by American Water Resources Association. For info: www.awra.org/meetings/Baltimore2018/index.html

November 7-9 CA
NWRA Annual Conference, Coronado. Hotel Del Coronado. Presented by National Water Resources Assoc. For info: www.nwra.org/upcoming-conferences-workshops.html