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Water Rights, Water Quality & Water Solutions in the West

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WASHINGTON STATE RURAL WATER STRATEGIES

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&
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INTRODUCTION

RURAL DOMESTIC WATER IN WASHINGTON STATE: THE BALANCING ACT

In Washington State, fairly apportioning rural domestic water between rural property owners, counties, instream flows, and tribes is a delicate balancing act.

Washington State adopted western water law prior appropriation in its code in 1891 (Laws of Washington, 1891). Subsequently, adoption of the codes governing the use of surface water and groundwater in 1917 (Title 90.03 Revised Code of Washington (RCW)) and 1945 (Title 90.44 RCW), respectively, solidified this doctrine. [Editors' Note: Under western water law's Prior Appropriation Doctrine (often referred to as "first in time, first in right") the water user with the oldest or "senior" right is entitled to receive all of their water right during times of shortage — which may require that "junior" users with later rights have their water use curtailed or completely denied.]

Currently, in many Washington basins, protecting existing appropriations precludes any new appropriations of water, even very small uses of groundwater for individual residences that are exempt from permitting (permit-exempt) under RCW 90.44.100. Herein lies the fundamental conflict: rural property owners who desire new rural water allocations are denied the ability to use groundwater for the construction of a new home. Not surprisingly, this results in legal disagreements and frustration.

The legal perspective on rural domestic water is changing. A series of Washington State Supreme Court (State Supreme Court) decisions have shifted the underlying paradigm from the belief that a permit-exempt groundwater right was paramount and undeniable, to a paradigm that other prior appropriations limit the legal availability of permit-exempt groundwater. This paradigm applies even for very small uses for which impairment can be measured only through mathematical modeling.

Washington State's Growth Management Act (GMA) (RCW 36.70A) also creates expectations that local governments address water resource availability — including legal water availability — in their land use and permitting decisions. The GMA requires proof of an adequate water supply prior to permit approval. Because of limits on water availability for new appropriation, local land use authorities have been thrust into the position of making water resource management decisions dependent upon legal water availability (*see Kittitas v. EWGMHB*, 2011, discussed below).

Rural property owners seeking to use domestic water for a home have generally not been aware of the ramifications of the prior appropriations water law. Local governments planning under the GMA are accustomed to assuring physical water availability, but the recent shift to local governments considering legal water availability arguably constitutes a

Rural Water

Permit-Exempt Uses

Instream Flows

Ecology Rules

Flow Levels Adopted

redistribution of water management in Washington State. The shift in the legal landscape regarding permit-exempt uses and unavailability of water for homes in Washington State is something new, just occurring over the last several years. An atmosphere of suspicion has arisen, amplified by: ongoing misunderstanding of rural property owners' existing rights; changes to local government's role in water management as a result of recent changes in the legal landscape; and expanded restrictions on rural property owners' use of permit-exempt groundwater.

LEGAL BACKGROUND

Beginning in 1945, the Washington State Legislature created the groundwater code, and, critical to this discussion, designated uses of groundwater that are exempt from permitting (RCW 90.44.050). Those groundwater exemptions are for: 1) stock-watering purposes; 2) for the watering of up to one-half acre lawn and noncommercial garden; 3) for single or group domestic uses not exceeding 5,000 gallons per day; or 4) for an industrial purpose not exceeding 5,000 gallons per day. The two relevant exemptions for this article are watering of up to one-half acre of lawn and noncommercial garden, and single or group domestic uses not exceeding 5,000 gallons per day.

Additionally, beginning in the mid-20th century as stream flows continued to decline, policy makers recognized the need to ensure adequate stream flow to protect fishery resources (RCW 90.22) through creating authority to administratively establish minimum instream flows. In subsequent years, out of stream water development continued to grow along with population, and agricultural and industrial demands continued as well. Concern over the need to maintain instream flows to protect fishery resources became increasingly relevant. The Water Resources Act of 1971 (RCW 90.54) called for the Washington State Department of Ecology (Ecology), the State's water management agency, to create a framework to balance the out-of-stream demands for agricultural and community needs with the instream needs to maintain productive fisheries. The Act provided a process whereby Ecology would set minimum instream flows rules in each watershed to ensure protection of instream resources.

To implement the Water Resources Act, Ecology adopted instream flow rules for many Water Resource Inventory Areas (WRIAs) through the 1970's and 1980's (Figure 1). The flow levels adopted into rule were flows determined to be fully protective of habitat to sustain wild fish populations and their respective life stages. However, in most years there are portions of the year where actual stream flows don't meet the levels aspired to in the rules.

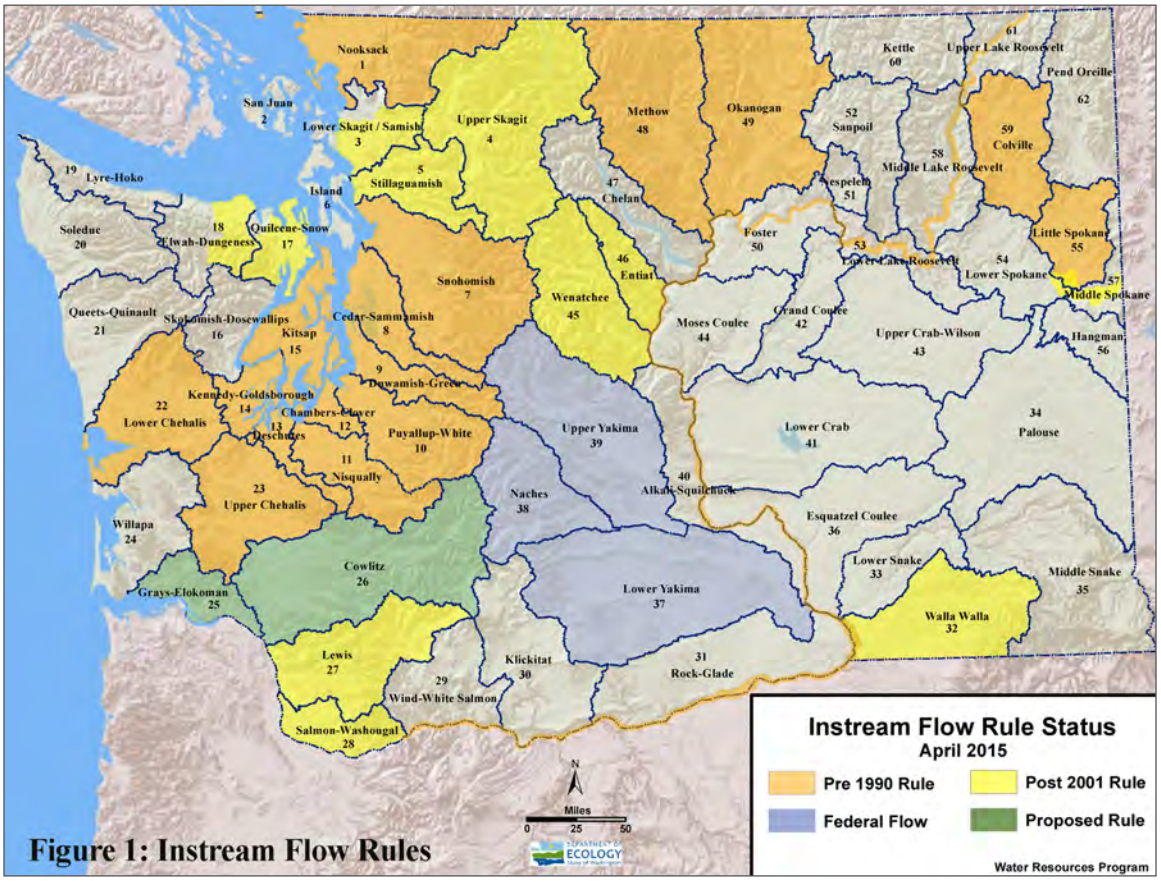

Figure 1: Instream Flow Rules

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Rural Water

Curtailment

After adoption of an instream flow rule, the instream flow becomes protected as a water right with the priority date being the date of adoption of the rule. Water rights issued junior to the instream flow rule (after the adoption date) are curtailed when flows are not achieved, based on the instream flow provisions in water rights permits. For irrigation rights, curtailment is a normal expectation associated with prior appropriations. However, domestic users require an uninterruptible supply of water, and new permits for municipal and domestic uses cannot be curtailed without significant public health and safety concerns. Therefore, Ecology denies applications for new domestic, industrial, or municipal uses which would impair adopted instream flows.

Connected Groundwater

As more instream flow rules were adopted, Ecology provided for new surface water rights for irrigation conditioned on the instream flow rule or denied applications for new appropriations of surface water. Later, Ecology extended these practices to groundwater hydraulically connected to surface water, where withdrawals would impair the adopted instream flows. Appeals of these denials began increasing throughout the 1990's.

De Minimus Impairment

One such appeal led to the *Postema v. PCHB* (*Postema*) decision in 2000, in which the State Supreme Court concluded that groundwater hydraulically connected to surface water was to be regulated to protect the adopted instream flows. The State Supreme Court found that the standard of protection applied to any impairment on flows, even de minimus, and that these impacts did not have to be shown through physical measurement. The Court found that mathematical models which demonstrate an impact (no matter how small) that would impair instream flow levels was sufficient evidence to deny an application for a new appropriation. The *Postema* decision represented the first paradigm shift towards the general principal that groundwater and surface water are connected and that uses of groundwater have the potential to impair instream flows.

Reservations (Future Use)

After the *Postema* decision, Ecology was challenged to meet two competing goals of the Water Resources Act: 1) setting instream flows at levels protective of instream fisheries resources; and 2) ensuring water availability for agricultural and community needs. To address this challenge, Ecology generally adopted instream flow rules that included reservations of water for future uses. The reservations, defined in each instream flow rule, allowed new permitted and permit-exempt junior surface and groundwater users to tap into a finite "bucket of water" still available for out-of-stream uses, despite impairment of instream flows, as authorized in law (RCW 90.54.050(1)). In some rules, Ecology waived impairment to instream flows through administrative action. Certain of these rules were contested in court.

Overriding Public Interest

In October 2013, the State Supreme Court issued the *Swinomish v. Ecology* (*Swinomish*) decision which invalidated the 2006 amendment to the Skagit Instream Flow Rule. Central to this decision was that the amendment of the Skagit Instream flow which created a reservation of water for future domestic uses impaired senior instream flows. Ecology had justified the impairment as being due to an "overriding consideration of the public interest." The Court concluded that Ecology did not follow statutory authority and voided the reservations when it invalidated the amendment. *See* Moon, *TWR* #116 (Oct. 15, 2013) and Water Briefs, TWR #117 (Nov. 15, 2013).

In-Kind Mitigation

In October 2015, the State Supreme Court issued the *Foster v. City of Yelm* (*Foster*) decision, which reaffirmed holdings from *Postema* and *Swinomish*, and further detailed interpretation of existing law to specify that all flow impairment to adopted instream flows from new uses must be mitigated in-kind through instream flow (and not through habitat enhancement). Importantly, the Court found that considering mitigation approaches beyond in-kind water for water mitigation would not address legal impairment of instream flows. *See* Moon, *TWR* #141 (Nov. 15, 2015).

LAND USE PLANNING & WATER RESOURCES

Rural Protections

Concerns about population growth during the 1980's, especially in the Puget Sound region, led to the adoption of Washington State's Growth Management Act (GMA) in 1990 (RCW 36.70A). Counties planning under the GMA are required to limit rural development to maintain the rural character of communities. Numerous other provisions include protecting and preserving agricultural and forest lands. The adoption of the GMA also affected water resource management by changing the requirements for subdivisions (RCW 58.17) and building permits (RCW 19.27.097) for applicants to ensure adequate water supply for new development.

Exempt Wells Reliance

With the difficulty in obtaining new surface and groundwater permits occurring statewide in the 1990's, developers steadily increased their reliance on permit-exempt groundwater withdrawals. As permitting of new groundwater rights came to a halt, reliance on the permit exemption expanded rapidly to meet the demand for new rural developments. In 2002, the State Supreme Court clarified in the *Campbell and Gwinn v. Ecology* (*Campbell and Gwinn*) decision that each project was limited to a single exemption, and a developer could not "daisy chain" a number of exemptions together to cumulatively use more than 5,000 gallons per day.

Rural Water

Single Exemption

Water Availability

Regulation of Exempt Uses

Instream Flow Rules

Reservations Risk

Mitigation Solutions

Reservoir Re-Timing

Supply Solutions

Subsequently, Kittitas County's development regulations were challenged on the basis that the County was not limiting subdivisions to a single permit exemption. In the *Kittitas County v. EWGMHB* (*Kittitas*) decision in 2011, the State Supreme Court ruled that counties were obligated under the GMA to ensure that water resources were both physically and, more importantly, legally available. Also in *Kittitas*, the Court identified statutory requirements for counties to address water resource management issues. The Court stated that counties must comply with water law provisions (such as those addressed in *Campbell and Gwinn*) and consider water resource availability — including in light of restrictions established in instream flow rules. These interpretations were significant and signaled a second paradigm change as counties had not previously considered legal water availability from both existing out-of-stream water rights *and* instream flow.

Currently, the State Supreme Court is deliberating in the *Whatcom County v. Hirst* (*Hirst*) case. This case is a specific challenge to the interpretation of instream flow rules and the obligations of counties to protect adopted instream flows. At the core, the question is whether counties have an obligation under the GMA to take actions beyond those in which Ecology's instream flow rules require. The Supreme Court is reviewing the 2015 appeals court ruling about Whatcom County's obligations to regulate permit-exempt uses even despite the fact that the existing instream flow rule for the Nooksack Basin (WRIA 1) does not apply to those uses. The appeals court ruled that the County's obligations were to align development regulations with the instream flow rule, and thus found that Whatcom County was in compliance with the GMA. Petitioners in the *Hirst* case argued in their appeal to the Supreme Court that the instream flow rule must apply to permit-exempt uses, and that compliance with the GMA requires the County to regulate permit-exempt uses even if the instream flow rule does not.

The *Hirst* case has the potential to further define how permit-exempt uses are to be regulated under state law. This pending decision could directly affect all Puget Sound counties with adopted instream flow rules written in the 1970's and 1980's, even though Ecology intended those rules to apply only to its permitting decisions.

CURRENT SOLUTIONS & TOOLS

Of the 62 watersheds in Washington State, identified as Water Resource Inventory Areas (WRIA) by Ecology (www.ecy.wa.gov/water/wria/), 29 watersheds plus the mainstem Columbia River have adopted Ecology instream flow rules. An additional three watersheds (Yakima Basin) are protected by Federal Flow targets resulting from Bureau of Reclamation's Yakima Project. Unsurprisingly, these 32 subject watersheds represent approximately 76 percent of Washington State's total population.

In light of the *Swinomish* and *Foster* decisions, adopting new instream flow rules with reservations includes significant legal risks. In the Skagit basin, because the reservations were challenged and found invalid in 2013, rural property owners who built homes under the invalidated reservations have legal uncertainty with respect to their water supply. This has affected property values, impacted ability to buy and sell, and created financing difficulties. Adopting new rules with reservations would impart significant uncertainty about how the Skagit basin ruling would apply to the new rules, if the rules contain provisions to allow for new permit-exempt uses. The State is additionally working on mitigation solutions in lieu of and/or in addition to instream flow rule revisions.

In watersheds with instream flow rules, new appropriations must address impairment on senior instream flows as well as impairment of existing senior users.

Options to accommodate new appropriations that have been successfully used in Washington include:

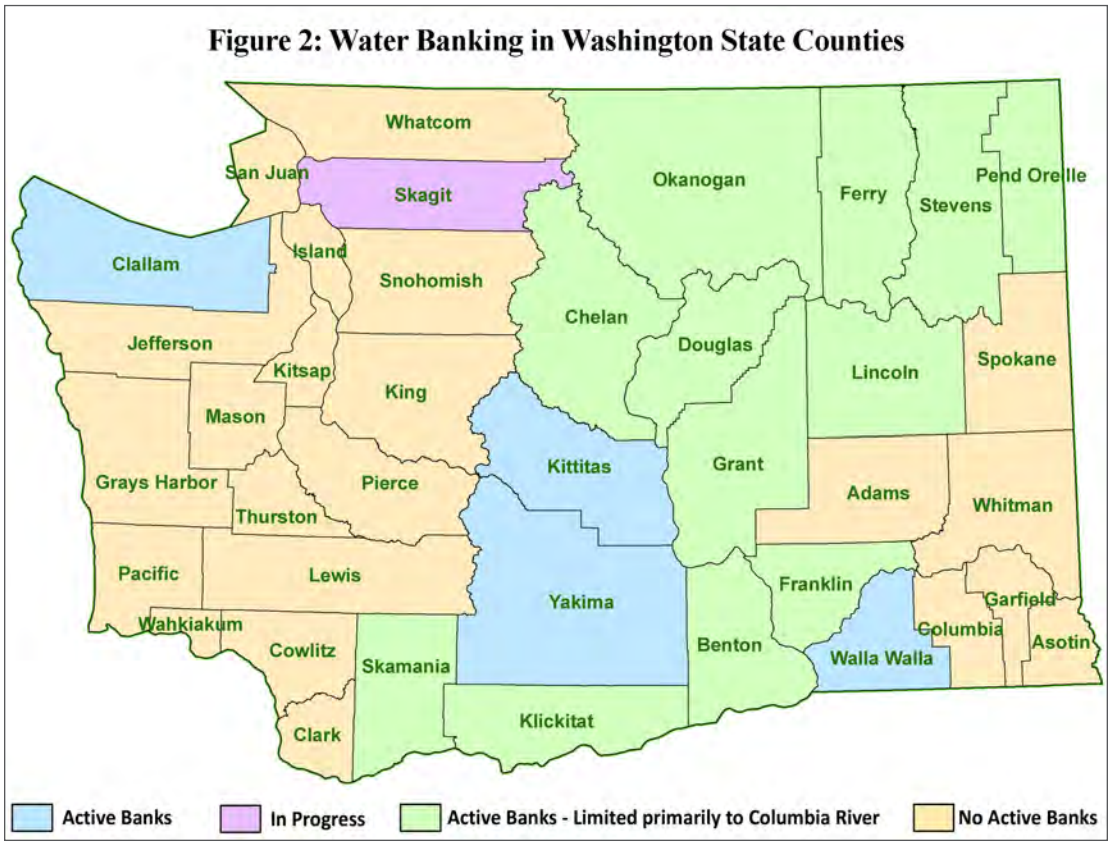
- Modifying water storage in reservoirs to address seasonal impairment of instream flows through water supply agreements.
- Creating mitigation banks to offset potential impairment of existing out-of-stream and instream uses.
- Where other options are unavailable, using other water supply options such as rainwater collection systems or trucked water from outside a basin where water is available or legal rights exist.

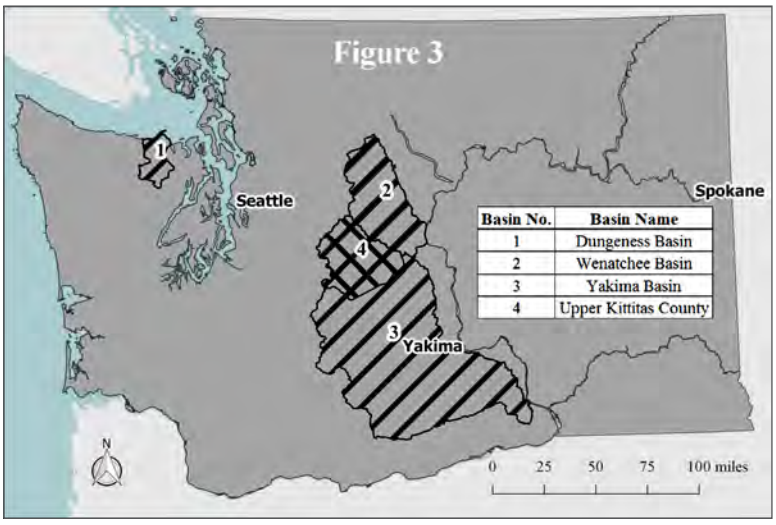
There are more than 400 reservoirs on the Columbia River and its tributaries. By modifying how water is stored and released, water managers re-time water availability for rural uses so that there is no legal impairment of senior water rights. For example, Ecology's Office of the Columbia River reached agreement with Federal and local water managers, and the State has been able to make nearly 400,000 acre-feet of water available to be split equally between instream, agricultural, and municipal needs. *See also* Haller & Tebb, *TWR* #150.

In several basins, permit-exempt water supply solutions have been crafted and implemented that produce legally available water, prevent impairment to existing uses and instream flows, and provide for both new permit-exempt and permitted uses of groundwater (Figure 2). These solutions have varied from market-based reallocation of senior water rights, groundwater storage and recharge, and the fortifying of mutually agreeable instream flow rules with reservations.

Rural Water

Water Banking Status





The following three examples will focus on water supply efforts in the Yakima Basin, Dungeness Basin, and the Wenatchee Basin, shown in Figure 3.

Mitigation Required

Water Banks Mitigation

Yakima Basin Water Exchange

In September 2007, Ecology received a petition to close Upper Kittitas County to new permit-exempt uses of groundwater due to impairment of existing senior water rights. After initial negotiations with Kittitas County did not go favorably, Ecology issued an emergency groundwater rule in July 2009 limiting new uses of groundwater under the permit exemption unless mitigated by an existing senior water right. By February 2010, Ecology had approved the first private sector water bank to mitigate new permit-exempt uses, forming the foundation of the Yakima Basin Water Exchange. Ecology chose the private sector mitigation model, in large part, because the Yakima Basin already supported an active water market, and there was a significant network of adjudicated privately-held senior water rights in the mainstem and tributaries to the Yakima River. To date, the Yakima River Basin supports 14 private and publicly-run water banks fully mitigating new junior water users in Upper Kittitas County and the greater Yakima Basin. By no means is the Yakima Basin Water Exchange complete, but it is serving new demand by providing mitigation for permit-exempt rural water users in most areas of the basin. *See* Cronin & Fowler, *TWR* #102.

Rural Water

Quasi-Government Water Bank

Other Strategies

Dungeness Basin Water Exchange

In the Dungeness River Basin, one water bank administered by a non-profit organization, Washington Water Trust, was established along with the Dungeness Instream Flow Protection Rule (Dungeness Rule) in December 2012. The Dungeness Water Exchange provides mitigation for new permit-exempt water users that would otherwise be precluded following adoption of the Dungeness Rule. In contrast to the Yakima Basin, Ecology opted to form a quasi-government water bank structure where the state, a non-profit, and a county collaboratively developed the water bank. This choice was made, in large part, due to the nexus with the Dungeness Rule and the Dungeness' geography of less widely-held private water rights. The Dungeness Water Exchange also utilizes strategies beyond mitigation with existing senior water rights, including groundwater modeling and aquifer recharge. In total, the Dungeness Water Exchange has allocated more than 130 mitigation certificates satisfying new permit-exempt water demand. *See* Cronin, *TWR* #139.

Wenatchee Basin Instream Flow Rule

In contrast to the Yakima and Dungeness Water Exchanges, the Wenatchee Basin Instream Flow Rule (Wenatchee Rule) provided reservations of both permitted and permit-exempt water for new uses. Following the *Swinomish* decision, concern was cast over the validity of the Wenatchee Rule's reservations due to the similarities to the Skagit Rule. Ecology suspended issuing water right permits for water from the reservation. In demonstrating the collaborative nature of the Wenatchee Rule development, Chelan County requested a legislative confirmation of the Wenatchee Rule reservation. In March of 2016, with the support of tribal governments, environmental groups, and state and local governments, the Washington State Legislature passed a bill declaring the Wenatchee Rule reservation valid. New permitted and permit-exempt uses in the Wenatchee Basin are relying on the instream flow reservation. While the Wenatchee Rule legislative exemption model is not sustainable or universally applicable across Washington State, it is an example of a solution in the suite of options where interested parties are in agreement.

Legislative Exemption

Successful Solutions

The common lineage between the Yakima and Dungeness Basin approaches is seeking solutions that provide certainty and reliability for new permit-exempt rural water users. Where the Wenatchee Basin differs is that it is a near-term solution crafted to uphold an existing mutually agreeable instream flow rule and associated reservation based on the waning instream flow rule with reservations model. The paradigm continues waxing toward understanding legal water availability, the current legal landscape, and regulation of permit-exempt uses. Successful solutions involve multiple interests finding agreement on how to achieve success in protecting instream resources while providing reliable water supply options for current and future rural water users' needs.

CHALLENGES

Population Growth

Washington State anticipates about a million additional residents calling our state home in the next 10 years. There is no Growth Management strategy that has been adopted by the state or local governments that attempts to reduce the projected population increase — only to manage where the population growth should occur. New residents will use water, and municipal water conservation will supply only a portion of the new demand.

Urban Development

Ecology's unpublished data estimates that roughly 85 percent of the population increase over the past 30 years has been in areas served by municipal water systems, which represents primarily urban development. Most of the water supply to support this population increase in urban areas is anticipated to come from conservation by existing users within existing municipal water systems. In addition, under the State's Municipal Water Law, municipal water systems have flexibility to use existing water rights throughout their service areas. This is why the largest municipal water system utilities are well positioned to serve anticipated growth.

Transfers Impacted

However, other municipalities, especially smaller cities, face significant challenges. The *Postema* decision's strict impairment standard for new appropriations created significant incentives for utilities to find creative mitigation strategies associated with their applications for new water rights. Now, under the *Foster* decision, mitigation must address legal impairment of even de minimus impacts from water rights changes and transfers. This standard will make it harder to reallocate existing rights to new uses. The *Foster* decision has the potential to create a chilling effect on budding water markets and water banking.

Closed Basins Options

The challenges are even greater in rural areas. In basins with adopted instream flows and closures for new water rights, the need to address legal impairment of unmet flows limits rural property owners' ability to develop in areas where existing rights are not available for mitigation. In some areas of the state with instream flow rules and closures, the only legal access to water is from a rainwater collection system or by obtaining trucked water deliveries. However, many are skeptical of those water sources from a reliability, safety, and cost standpoint. Rural property owners and local governments, especially, look to Ecology to find solutions which will enable them to access a safe and reliable source of water using a permit-exempt well to enable building a home in a rural area. Under the State Supreme Court decisions discussed above, Ecology is constrained to find adequate mitigation that fully addresses legal impairment to instream flows.

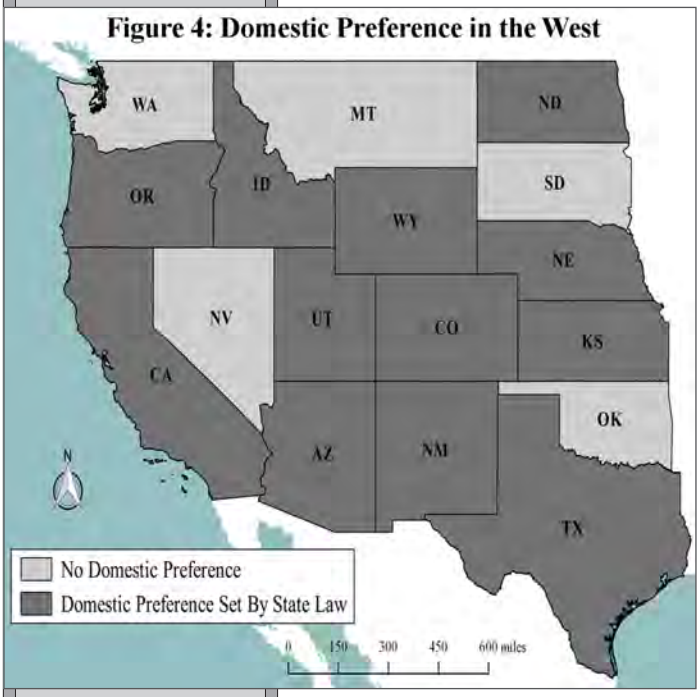
Scale of Impacts

Managing at the scale of individual domestic rural properties and individual residences creates a significant challenge. Even cumulatively, these impacts are generally small compared to other uses, except

Rural Water

in water-limited tributaries. In many rural areas, on a basin-wide generalized scale, the smallest total use of water is from the rural domestic users. Yet, the challenge to allow continued rural development played out in the Yakima Basin from July 2009 to February 2010 and is playing out today in the Skagit Basin. Both basins have either experienced or are experiencing complete moratoriums on new permit-exempt groundwater appropriations, with no mitigation structures in place. It should be noted that the discussion revolves around new permit-exempt uses of groundwater — to date, nowhere in the State have junior permit-exempt groundwater uses been curtailed through regulation for impairment to existing senior water users, either surface or ground.

Figure 4: Domestic Preference in the West



As a byproduct of rural development, new permit-exempt groundwater users are confronted with being the last users in the prior appropriation scheme and have the most junior right to use water. However, to many prospective permit-exempt groundwater users this seems unfair, and to many of them this situation represents bad public policy. Some portion of the public believes that water is a basic human right and should not be denied to someone to supply their home. To address these values, many states have a legislative priority for domestic use of water administered under the Prior Appropriation Doctrine. *See* Clyde, *TWR* #83. These states do not apply the prior appropriation framework to the individual residence, which could be an option for Washington State to consider (*see* Figure 4).

Additionally, one key issue that is critical to mention but will not be discussed in detail here is the State's obligation to meet tribal treaty rights. Figure 5 shows the Treaty Tribes in Washington State. A full discussion of treaty rights and water resources is worthy of an entire article, and is under dispute in federal court in the *United States v. Washington* (the "Culverts Case"). On June 27, 2016, a three-judge appeals panel of the Ninth Circuit Court of Appeals ruled that treaties between the United States and tribes, under which 24 tribes ceded 64 million acres of land to the US, include ongoing obligations for the state to protect habitat for fish to ensure protection of the rights of the tribes to fish. Given the broad implications of the case, the State has petitioned the 9th Circuit for an en banc review of the panel's judgment. Washington's petition has received amicus briefs from Idaho and Montana. Overall, instream flows associated with tribal treaty fisheries habitat have not been quantified for the vast portions of the State, which creates significant uncertainty and a further challenge to water resource management.

Culvert Case

Tribal Rights Uncertainty

Figure 6: Treaty Tribes in Washington State

Rural Water

Competing Positions

Water Allocation Issues

Dialogue

Local Government

Water Supply Assessment

Collaboration

In conclusion, a number of challenges confront future sustainable water management of rural permit-exempt groundwater uses in Washington State in the absence of a single universally applicable strategy. Strategies to provide for permit-exempt groundwater uses must weigh the rights of senior water right holders, instream flows for fisheries and Tribes, and public opinion while addressing water availability limitations from the state scale to the local scale in tributaries.

RISING ABOVE CONFLICT: FUTURE RURAL DOMESTIC WATER STRATEGIES

To solve the problem of water allocation in Washington State, the Water Resources Act of 1971 intended to ensure that water supplies would be available for current and future municipal, rural water uses (domestic), agricultural, and instream needs. However, existing appropriations, case law, and physical limits on water availability make that outcome very difficult. In particular, Ecology adopting new instream flow rules — that would not preclude all new uses of water in large areas of a watershed — is a difficult and in many cases impossible scenario.

Ecology undertook a two-year process involving rural property owner representatives, counties, tribes, fellow state agencies, and environmental groups with interests in water policy to have a dialogue about finding solutions for rural water supply needs. To date, there has been little success in achieving consensus to meet the multiple objectives of the Water Resources Act of 1971. Discussions should and will continue to involve rural property owner representatives, counties, tribes, fellow state agencies, and environmental groups with interests in water policy.

Pending the outcome of the *Hirst* case, Washington is faced with a challenge to harmonize the expectations on local governments to manage land use within the constraints of the Prior Appropriation Doctrine as well as the ability for rural property owners to obtain new legally available water supplies. Thus, there is a significant burden on local governments to not deny rights to use private property, and at the same time to not impair the rights of existing water right holders.

Truly integrating land use and water supply strategies means that land use planning should also include some level of up-front assessment of water supply. At the same time, rural property owners should have some assurance that they will not later have their plans upended by unforeseen governmental regulation or litigation affecting water availability. It has been demonstrated that collaborative and inclusive approaches, such as the Wenatchee Basin Instream Flow Rule, Dungeness Water Exchange, and the Yakima Water Exchange, have the ability to provide certainty and reliability for most rural property owners. Therefore, land use and water resource managers could integrate their approaches to create certainty and reliability for local governments and rural property owners while upholding commitments to instream flows.

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Jason McCormick, McCormick Water Strategies, 509/ 949-7297 or jason@mccormickwater.com

References

Washington state case law: Ecology actively maintains a comprehensive digest of case law in Washington State, including those cases referenced in this article. For full access to all case law referenced in this article, please refer to Ecology's website: www.ecy.wa.gov/programs/wr/caselaw/cl-home.html

Washington administrative code: http://app.leg.wa.gov/wac/

Revised code of washington: http://app.leg.wa.gov/rcw/

United States v. Washington (*Culvert Case*): http://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/27/13-

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Jason D. McCormick, CWRE, is the Founder and Principal of McCormick Water Strategies. Jason's work focuses on water banking, water transactions, and water rights administration.

American Water Resources Association Washington Section
2016 Annual State Conference
"Rural Domestic and Municipal Water Supply"
Seattle, WA — October 26th

Mountaineers Seattle Program Center, 7700 Sand Point Way NE
8:00 AM to 5:00 PM PDT (Reception - 5:00 PM to 7:00 PM)

Recent court rulings have significantly altered how Washington State must manage water, including rural domestic (permit-exempt) uses. Counties must now demonstrate legal water availability in addition to physical availability under the State's Growth Management Act. These changes embrace a larger shift in general perception that permit-exempt groundwater is no longer freely available for appropriation under Washington Water Law. Current legal and public policy perception shifts represent a paradigm change in the appropriation and management of Washington's increasingly limited water resources.

This year's AWRA-WA conference will involve in-depth discussions of recent legal cases and consequential water management challenges. Participants will summarize the status of rural domestic and municipal water programs and discuss current water resources strategies. The conference will explore future options and delve into potential policy choices and solutions in response to this changing legal environment. An evening reception will provide an opportunity to meet and mingle among water resource professionals and enjoy a variety of hors d'oeuvres and select beverages.

Agenda

Keynote Speaker: ***Maia Bellon, Esq., Director, Washington State Department of Ecology***

Session 1: Rural Domestic and Municipal Water Supply Law and Policy
Moderator: Adam Gravley, Esq., Partner, Van Ness Feldman, LLP
Speakers: Alan Reichman, Esq., Managing Assistant Attorney General, Washington State Attorney General's Office
Hon. Chuck Mosher, Board Member, Eastern Washington Growth Management Hearings Board
TBD, Lightning Talk

Session 2: Intersection of Growth Management Act and the Water Code
Moderator: Steve Hirschey, Comprehensive Planning, King County
Speakers: Tadas A. Kisielius, Esq., Partner Attorney, Van Ness Feldman, LLP
Jean Melious, Esq., Attorney, Nossaman, LLP
Tim Trohimovich, Director of Planning and Law, Futurewise
Honorable Paul Jewell, Commissioner, Kittitas County Board of Commissioners
TBD, Lightning Talk

Session 3: Current Rural Domestic and Municipal Water Supply Tools and Programs
Moderator: Jay Chennault, Associate Hydrogeologist/Engineer, Associated Earth Sciences, Inc.
Speakers: Joel Freudenthal, Senior Natural Resources Specialist, Yakima County
Amanda Cronin, Project Manager, Washington Water Trust
Melissa Downes, Hydrogeologist, Office of Columbia River, Dept. of Ecology
William Meyer, Biologist, Washington State Department of Fish and Wildlife
TBD, Lightning Talk

Session 4: Progressive Rural Domestic and Municipal Water Supply Strategies
Moderator: Dave Christensen, Program Dev. and Operations Support, Water Resources, Dept. of Ecology
Speakers: Philip Rigdon, Department of Natural Resources Deputy Director, Confederated Tribes and Bands of the Yakama Nation
Larry Wasserman, Environmental Policy Director, Swinomish Indian Tribal Community
Mike Hermanson, Water Resources Specialist, Spokane County
Bill Clarke, Attorney, Washington REALTORS
Steve Malloch, Principal, Western Water Futures, LLP

Register now at http://www.waawra.org/2016-State-Conference
Questions? Contact Conference Co-chairs:
Jason McCormick (jason@mccormickwater.com) or Rabia Ahmed (rahmed@ramboll.com)
The Water Report is a Media Sponsor for the Conference
Agenda subject to change. Please see the registration website for the latest information.

Diligence

PRIOR APPROPRIATIVE RIGHTS & DILIGENCE

A 21ST CENTURY PERSPECTIVE

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Editors' Introduction: The central tenet of western water law is often encapsulated as "first in time, first in right" — reflecting the Prior Appropriation Doctrine whereby those earliest in putting water to beneficial use are granted a prioritized right to continue using the water flow necessary to maintain the designated beneficial use. This doctrine promoted development by ensuring a water supply adequate to the developer's purpose in making often considerable investment in water diversion infrastructure. In consideration of the substantial time often involved in completing development, a water right's priority is in some cases based on the time of application for the water right, not the completion of the diversion project. However, to maintain that priority date, the developer must show "diligence" in pursuing project completion.

INTRODUCTION

Federal Authorization Changes

Diligence is the link between the aspirations of the appropriator and the reality of the time and effort required to establish a water project. However, the realities associated with large, federal water projects add complexity to the evaluation of an appropriator's continued diligence. Query the result when an appropriator can no longer support her initial plan and intent for the appropriations to support such a project because the congressional authorization has changed. This article examines one example of the results of such a change in plan and intent on appropriations made to support a major federal water project — the Animas-La Plata Project — in the context of Colorado diligence law.

Reasonable Diligence

Western water law has long recognized that an appropriation, especially a large one, may not be completed quickly. In 1884, the Colorado Supreme Court announced: "[w]e accept the rule adopted in California and Nevada….'[a]lthough the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it'." *Sieber v. Frink*, 2 P. 901, 903 (Colo. 1884) (quoting *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 544 (1869); *Kelly v. Natoma Water Co*., 6 Cal. 105, 109 (1856)). *See also* 2 Clesson S. Kinney, A Treatise on the Law of Irrigation and Water Rights, § 734 n.6 (2d ed. 1912) (exhaustive citation to pre-1912 state supreme court decisions endorsing or announcing a diligence standard for developing prior appropriative rights). *See generally id.* at §§ 733-41.

This article begins with background of the development of the diligence requirement generally, then discusses the current status of the diligence requirement under Colorado law, and concludes with an examination of the changes in the Animas-La Plata Project that caused these issues to be raised in Colorado water court and the ultimate settlement of that case.

HISTORICAL BACKGROUND: DILIGENCE REQUIREMENT

Adjudications

The nature and extent of the requirement to diligently develop an inchoate prior appropriative right has historically been, and remains today, a function of applicable water rights adjudication procedures. For example, the *Sieber* Court acknowledgement of the Nevada and California standards for diligence of inchoate appropriative rights was in the context of Colorado's general adjudication procedures. In 1879, the Colorado General Assembly spelled out in the State's statutory framework of procedures and requirements for general stream adjudications. The 1879 statutes did not include a particular standard for evaluating diligence in water rights development. However, the common law concept of diligent efforts to perfect an interest in a usufruct (use right) was undoubtedly familiar to the Colorado district courts. These courts had, during territorial days, dealt with challenges brought by later-in-time hard rock miners to the diligent development of older, and more choice mining claims. *See generally* David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 Ecology L.Q. 3 (2005), available at: http://scholarship.law.berkeley.edu/elq/vol32/iss1/1. In *Patterson v. Hitchcock*, 3 Colo. 533, 539 (1877), the Colorado Supreme Court stated that "[t]he discoverer of a lode...is permitted to retain possession of the property without interference [but] his work must progress with reasonable diligence."

Mining Claims Diligence

Lengthy Process & Challenges

Under the 1879 Statutes, water rights claims were to be filed at the time the adjudication commenced, or at any time prior to the close of the proceeding. The adjudication proceedings under the 1879 Act sometimes took decades to complete. A ruling from the district court judge (or in some cases, the district court assigned the general adjudication to a referee or special master) might occur years later. The lengthy nature of adjudication proceedings under Colorado's general adjudication statutes led to challenges

Diligence

Challenges

regarding the appropriation date. For example, water rights claim filed in 1889 might not have been perfected until 1905; further, the court's decree might not have issued until 1910. A water right holder nominally junior to the 1889 filing and adjudicated under the 1910 decree might see a way to better his position by challenging the 1889 appropriator's claim for the earlier priority date — based on the grounds that the 1889 claimant had not perfected the water right by putting it to beneficial use and thus was not entitled to the 1889 priority date.

Use v. Diligence

In the absence of a diligence standard, the only way to support an 1889 appropriation is if you have put the water right to beneficial use. If you have a diligence standard, the court can look and see whether the activities you've undertaken were "diligent" enough to support an appropriation in the absence of actual use of the water.

This was the source of the dispute in *Sieber* because the defendants constructed a ditch to serve a parcel of land using the waters of Cottonwood Creek, a tributary of Antelope Creek. The plaintiffs had acquired a prior right to a ditch to serve the same parcel of land diverting from Antelope Creek, but the diversion was above the confluence of the two streams. Defendants argued that the plaintiffs' interests had not been diligently pursued and that the plaintiffs' water rights should be cancelled because plaintiffs failed to use them between 1871 and 1875. The Court rejected this idea and found that the plaintiffs had been diligent in developing their water rights despite the delays. *Sieber*, 2 P. at 903-904.

Development Time

This court-developed diligence standard reflects a common sense recognition that developing water projects — especially if you are using mules or men to hand-dig a miles-long ditch or to construct a sizable reservoir — takes time. Appropriators ought to be able to reserve their "place in line" even if they have not completed the structures necessary to put the water rights to beneficial use. The Colorado Supreme Court (Supreme Court) has sustained numerous adjudications involving appropriations that were unperfected at the time of filing. *See, e.g., Broad Run Inv. Co. v. Deuel & Snyder Improvement Co.*, 108 P. 755, 756-58 (Colo. 1910), which involved the conditional appropriation of meadows.

Conditional Decree

The Supreme Court acknowledged the importance of diligence in water rights appropriations from the earliest days of the Colorado Territory. The first specific reference to diligent prosecution of conditional decrees in statute arises in the early twentieth century, when the Colorado General Assembly established procedures requiring conditional water right holders to come into the district court in which the conditional decree was adjudicated every two years until "all conditional decrees, so entered and included in said general adjudication, shall either have been cancelled, made final, or otherwise disposed of." Compiled Laws of Colorado Ann. tit. 8, § 1799 (1921). Failure to appear biennially resulted in potential cancellation of the conditional right: "[if] any appropriator granted a conditional decree shall fail to appear and offer proof as above provided, his conditional decree may be cancelled by the court upon failure to submit such proof within six months after notice...of an order...directing him to show cause why such conditional decree should not be cancelled ..."). *Id*.

Standard's Outcomes

Under the case law standards for diligence applied by courts in the mid-twentieth century and under this statutory standard, three outcomes were possible: 1) the appropriator was found to be diligent and her project could continue to be developed using the originally claimed priority date; 2) the appropriator was found to not be diligent, in which case the project was dead; or 3) the appropriator's diligence (in light of the priority date claimed) could not be sustained, and so the priority date was modified. As discussed below, the more detailed standards for diligence that have been adopted by the Colorado General Assembly and developed by the court under the 1969 Act include a fourth outcome: a portion of an appropriation may be reduced or abandoned.

Priority Date

The third outcome — modifying the priority date — was the fate met by the City and County of Denver's (Denver's) Blue River project. *City and County of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (Colo. 1954) (the "Blue River" case). The Supreme Court's decision in the Blue River Case is lengthy and reviews multiple challenges to the district court's decree in the general stream adjudication involving claimants on the Blue River and other tributaries to the Upper Colorado River. The Supreme Court also considered many different appeals to the district court's decree. However, for purposes of understanding the standards applied at that time to "diligence" in developing a large water project, the Blue River Court's standards applied against Denver are instructive.

Denver Appeal

Denver appealed the district court's award of a 1946 priority date to its Blue River project, which included as part of the project both a large reservoir (Lake Dillon) and a tunnel through the Continental Divide to deliver water to the South Platte basin. Denver had sought a much earlier date for its Blue River project, in the hopes of getting a priority that antedated some of the other large, transmountain water developments also claimed and decreed in the district court's general stream adjudication. However, the Supreme Court affirmed the district court, declining to impose the decision in *Taussig v. Moffatt Tunnel*, 106 P.2d 363 (Colo. 1940), which involved a private entity of limited means. By comparison, Denver was a governmental entity with extensive resources. Further, the Moffatt Tunnel Company's appropriation only sought a relation back of five years. By contrast, Denver sought to relate its priority back over 20 years on the strength of desultory activity that included such things as surveys but did not involve any construction.

Diligence

"Rolling" Adjudications

DILIGENCE STANDARDS ARISING UNDER THE 1969 ACT

In 1969, the General Assembly adopted a new approach to adjudications in Colorado. The 1969 Water Rights Determination and Administration Act (1969 Act) effectively did away with general stream adjudications in favor of "rolling" adjudications brought by appropriators in individual cases with basin-wide "resume" notice. The adjudication statutes in place at the time of the Blue River case involved a decades-long effort by the district court to juggle multiple claimants over the course of many years — a process punctuated by "term days" when the general adjudication evidence was heard. Meanwhile, the new Colorado Water Courts (also district courts designated in the 1969 Act by the "water judge" and selected for each basin by special designation of the Chief Justice) were designed to resolve water issues quickly. *See* Colorado Revised Statutes (C.R.S.) §§ 37-92-201, -203. Specifically, under the 1969 Act resume publication notifies (and binds) all interested persons regarding pending water rights claims. Thus, interested water users are free to object to (and participate in) any water court application that appears to impact their interests, but are not required to participate in *all* claims in a basin. The result has been more efficient resolution of water rights claims, including diligence claims which are a special category of a water court case required under the 1969 Act.

Deadlines and Standards for Diligence Under the 1969 Act

Codification

Development Encouraged

The General Assembly codified diligence concepts in the 1969 Act. C.R.S. § 37-92-103(6) defines a conditional water right as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is based." The policy behind conditional decrees is the same as it was when the territorial and early state courts were developing the concept through entry of interlocutory decrees: to encourage the development of water resources by allowing an antedated priority (the essential value of a water right) so that appropriate financing, engineering, and construction can be put in place. *E.g., Upper Gunnison River Water Conservancy Dist. v. Board of County Comm'rs of County of Arapahoe*, 841 P.2d 1061, 1065 (Colo. 1992).

Diligence Applications

In C.R.S. § 37-92-301(4), the General Assembly established procedural and substantive standards for maintaining conditional water rights. Currently, diligence applications must be filed with the water court every six years. This interval has changed over time. Immediately after the adoption of the 1969 Act, diligence filings were required every two years (Colo. Rev. Stat. § 148-21-17(4) (1969) then extended to every four years in 1973 (Colo. Rev. Stat. § 148-21-44 (1973). In 1990, the General Assembly extended the time to six years, and defined for the first time the term "reasonable diligence" — essentially codifying existing case law. S.B. 90-13, 57th Gen. Assemb., Reg. Sess. (Colo. 1990). A proposal was recently made to extend the term to ten years. Failure to file an application for a finding of diligence in a timely manner results in abandonment of the water right.

Applicable Definitions

Diligence (and Exceptions):

- Under Colorado law, the "measure of reasonable diligence" is "the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances." C.R.S. § 37-92-301(4)(b).
- Integrated system: "[w]hen a project or integrated system is comprised of several features, work on one feature of the project or system shall be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system." *Id*.
- Unfavorable economic conditions and lack of governmental permits: "subject to the provisions of paragraph (b) of this subsection (4), neither current economic conditions beyond the control of the applicant which adversely affect the feasibility of perfecting a conditional water right or the proposed use of water from a conditional water right ***nor*** the fact that one or more governmental permits or approvals have not been obtained shall be considered sufficient to deny a diligence application, so long as other facts and circumstances which show diligence are present." C.R.S. § 37-92-301(4)(c) (emphasis added).

"Can and Will"

- Conditional water rights cannot be maintained without a showing that the appropriation "can and will" be built and that it has not become speculative.

Anti-Speculation

> "No claim for a conditional water right may be recognized or a decree therefore granted except to the extent that it is established that the waters can be and will be...beneficially used and that the project can and will be completed with diligence and within a reasonable time." C.R.S. § 37-92-305(9)(b).

Applicant's Burden

Application of diligence standards and the "can and will" and anti-speculation standards has been extended to conditional water rights as well as original appropriations. *E.g., Dallas Creek Water Co. v. Huey*, 933 P.2d 27 (Colo. 1997). The order of the Division 7 Water Court in Case No. 13CW3011, the ALP diligence case, lays out the applicants' burden as far as legal and factual requirements in a diligence case. [Order available upon request from *TWR*.]

Diligence

"Can and Will" Standards

Modern-Day Application of the Diligence Statutory Standards by the Supreme Court

"CAN AND WILL" STANDARD

Almost all recent litigation involving large conditional water rights in Colorado has involved the "can and will" standard. Not surprisingly, as time goes on, litigants and water courts may develop some skepticism that an appropriator of an aging conditional water right truly "can and will" develop a project — especially one that has not even gotten off (or, in some cases, to) the drawing board. Conditional appropriators have, not surprisingly, attempted to take advantage of some of the more favorable diligence formulations of the Colorado Supreme Court. Sometimes this has worked; sometimes not.

Conditional Water Rights Maintained

OIL SHALE DEVELOPMENT CONTROVERSIAL — "CAN AND WILL" ANALYSIS

Oil Shale Exception

Conditional water rights held for oil shale development are among the most controversial conditional rights in Colorado. In the early 1990s, the General Assembly created an "exception" to the economic feasibility showing required for conditional water rights to protect oil shale appropriations. The nature and extent of this exception were put to the test in a trio of cases brought by the Northern Colorado Water Conservancy District (Northern), to challenge the oil companies' maintenance of oil shale appropriations. Northern's challenge was brought for the same purpose as its challenge in the Blue River case over 40 years previously: to protect, and possibly improve the position of Northern's irrigation and municipal water rights developed under the federal Colorado-Big Thompson Project. *N. Colo. Water Conservancy Dist. v. Chevron Shale Oil Co*., 986 P.2d 918 (Colo. 1999); *N. Colo. Water Conservancy Dist. v. OXY USA, Inc*., 990 P.2d 701 (Colo. 1999) [hereinafter, "*OXY*"]; *N. Colo. Water Conservancy Dist. v. Getty Oil Exploration Co.*, 997 P.2d 557 (Colo. 2000). For purposes of this discussion, we will focus on *OXY*.

Economic Conditions

In *OXY*, the Water Court took evidence regarding the economic conditions of the oil shale industry and, applying the statutory language directly, the Water Court found that OXY had been diligent primarily because the language of C.R.S. § 37-92-301(4)(c) (cited above) precludes cancellation of a conditional water right solely on the basis of the economic feasibility of the project.

The Colorado Supreme Court (Supreme Court) found it proper for the Water Court to examine the economic conditions of the oil shale industry. Further, while the Supreme Court allowed examination of the industry as a whole, it also required examination of the applicant's financial wherewithal to complete the oil shale project once economic conditions were ripe.

Standards Developed

Also in *OXY*, the Supreme Court developed the standards to be applied in a "can and will" analysis. The Supreme Court rejected the argument that the diligence inquiry is retrospective only, i.e., that the Court should only look to the past six years to see if there are facts to support diligence. "The very nature of a conditional right suggests that the 'can and will' test applies until the right matures into an absolute decree...the anti-speculation doctrine and the "can and will" requirement are closely related, although the 'can and will' test is more stringent." *OXY*, 990 P.2d at 708. In a footnote, the Supreme Court says "the 'can and will' requirement should not be applied rigidly to defeat beneficial uses when the applicant can demonstrate a nonspeculative intent" (the so-called "no rigid application" test). *Id*. at 708 n.3. Because "can and will" is forward looking, it requires an "imperfect prediction" of future events and conditions based on what we know now. *Id*. at 708.

Anti-Speculation Application

The *OXY* case also involved the first direct application of anti-speculation in the context of a diligence case. The Supreme Court stated that "because a conditional right, or some part of that right, may become speculative over time, we now hold that just as the 'can and will' test continues to apply in later diligence proceedings, so does the anti-speculation doctrine." *Id*. at 709 (overruling the dicta in *N. Colo. Water Conservancy Dist. v. Rifle*, 726 P.2d 635, 637 n.1 (Colo. 1986), in this respect).

Conditional Water Rights Cancelled

By contrast, in *City of Aurora v. ACJ*, 209 P.3d 1076 (Colo. 2009), the Water Court dismissed a portion of Aurora's application for three water storage rights because the sites sought by Aurora had already been leased in part to another water user. The Water Court concluded that the existence of the leases was a material impediment to Aurora developing its conditional storage rights.

Material Impediment

On appeal, Aurora resorted to the *OXY* Court's "no rigid application" rule to avoid its "can and will" problems. This reliance was rejected by the Colorado Supreme Court which held, instead, that in the context of facilities in question Aurora had to show a "substantial probability" that within a reasonable time the facilities necessary to effect the appropriation "can and will" be completed with diligence. *Id*. at 1088-89. Citing to *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265 (Colo. 2006), the Court noted that *final denial* of the ability to obtain facilities is fatal; but went on to say that the "mere absence of a final denial does not entail the conclusion that the can and will test has been satisfied." *Id*. at 1084-85.

Facilities

Inability to Access

In rejecting Aurora's reliance on the "no rigid application rule" the Court noted the rule was designed to avoid the use of "can and will" to improperly interfere with the maximum utilization of water on the basis of "technicalities" when speculation is not an issue. *Id*. at 1089. Here, Aurora's problems were "substantial" because of the inability to access the land underlying the claimed conditional storage right. *Id*.

Diligence
Maximum Utilization

Opposition Increase

New Appropriation

Permit Absence

Federal Limitations

Upper Colorado Storage

Project Modifications

Federal Changes

By the same token, there was no problem with maximum utilization, because Aurora had other reservoir sites which were decreed conditionally by the Water Court — thus, no interference with Aurora's efforts to develop this amount of water. *Id*.

CONDITIONAL WATER RIGHTS FOR LARGE WATER PROJECTS

Reflecting the further refinement of required diligence showings described by the cases above, appropriators filing diligence applications in recent years have come to expect a high level of opposition and significant scrutiny by the water courts. A generation ago, routine diligence applications were rarely opposed; today opposers see diligence cases as another tactic to cut back or cancel unsustainable conditional water rights.

The attack on conditional water rights has seen its apogee in recent years in diligence cases involving large federally-conceived water projects which have seen either no construction based on the original plans of the Bureau of Reclamation (Reclamation), or local governmental entities, or which have involved construction of a project that was vastly different from that originally proposed.

The Colorado Supreme Court considered the impact of federal law on "can and will" in the context of an appropriation (rather than diligence on an already decreed conditional water right) in *Bd. of Cnty Comm'rs of Cnty of Arapahoe v. Crystal Creek Homeowner's Ass'n*, 14 P.3d 325 (Colo. 2000) (*Arapahoe II*).

The history of *Arapahoe II* is lengthy — the first time the case went to the Supreme Court it was known as *In re Bd. of Cnty Comm'rs*, 891 P.2d 952 (Colo. 1995) and is referred to as *Arapahoe I*. However, in relevant part for this case, Arapahoe County sought to develop water rights in the Gunnison River Basin, on the western slope. Arapahoe needed a pumping plant to get their water rights over the Continental Divide and sought to use for that purpose Taylor Park Reservoir, a previously constructed federal water rights structure associated with the Gunnison Project. The decision turned on whether Arapahoe County could show "can and will" in the absence of a federal permit.

Taylor Park Reservoir was a reservoir constructed in the 1930s to provide a supplemental supply of water to the Uncompahgre Valley Water Users Association (UVWUA) as part of the Uncompahgre Valley Water Users Project (known locally as the "Gunnison Project"). The Gunnison Project was authorized by Congress in 1902 and was among the first reclamation projects constructed by Reclamation. *See* Reclamation Projects website: www.usbr.gov/projects/ (select "Uncompahgre" for general description and project history). The United States and UVWUA were co-owners of the project. Neither would grant Arapahoe permission to use the reservoir, although it was Reclamation's permission that Arapahoe legally required. Accordingly, the Supreme Court ultimately found Arapahoe did not provide evidence that it "can and will" gain access to the reservoir. *Arapahoe County II* at 344.

THE ANIMAS-LA PLATA PROJECT

The remainder of this article focuses on the diligence challenges recently faced by the appropriator of the Animas-La Plata Project (ALP Project or Project). The ALP Project diligence case presents a few similarities to the issues in dispute in *Arapahoe County II*, but in many ways the diligence disputes in the ALP case were unique. The case reflects the importance of evaluating substantive federal limitations on the development of conditional water rights.

ALP Project: Federal History

The proposed ALP Project was a federal water project promoted by Reclamation as a means to create storage on the Upper Colorado River system. The Project was originally conceived in the 1940s and 1950s, and the original project Feasibility Report was issued in 1962. Subsequently, the Project was modified in major ways on three occasions, in 1966, 1979, and 2000. The modifications dramatically changed the elements and purpose of the project, and the modifications required in 2000 by congressional action significantly downsized the project. While the Project was always envisioned as an interstate project that would serve tribal and non-tribal users, during the Project's evolution, it also became the vehicle for settlement of Indian water rights claims. All of these complications, along with the federal overlay of cost-benefit analyses, compliance with environmental laws, and changes in federal dynamics that have made Congress increasingly unwilling to loosen the federal purse-strings to build a large dam, make the fact of ultimate construction of the ALP Project almost incredible.

The history of the ALP should be the subject of a separate article, and a comprehensive history of the Project is beyond the scope of this one. However, for purposes of the diligence discussion here, the federal changes to the Project substantially changed the scope, extent, and purposes of the original Project — a problem under the "can and will" doctrine for showing diligence on the portions of the ALP Project water rights that were originally appropriated for jettisoned Project purposes. After reviewing in brief the evolution of the ALP Project scope and design, we examine the diligence challenges arising from maintenance of conditional water rights originally conceived as part of a federal project, but for which no federal funding or assistance is likely ever to be forthcoming.

Diligence

1962 Study

1966 Redesign

1979 Report

Smaller Project

CWA & ESA Review

Tribal Claims & Settlement

ESA Constraints

2000 Ute Amendments

"ALP Lite"

ALP Congressional Authorization History

ORIGINAL PROJECT DESIGN – 1962 FEASIBILITY STUDY

As originally contemplated in the 1962 Feasibility Study, the ALP Project would have provided full and supplemental irrigation water to 84,500 acres of irrigable land, including 17,200 acres of "Indian lands." The original Project design would have developed 225,300 acre-feet of water to be used in the original Project service area and 3,700 acre-feet for use in the Florida Project. The original ALP Project design would have also made available an average of 9,200 acre-feet of municipal and industrial water for the City of Durango. The ALP Project was to be a "gravity project," meaning the water would have been diverted high up in the San Juan Mountains in the vicinity of Silverton. Transbasin diversions for irrigation of the lands in the La Plata River Basin would have traveled from the diversion upstream on the Animas River many miles and through several tunnels to the La Plata River.

Project Redesign – 1966 Supplemental Report

The ALP Project went through a major redesign after the 1962 Feasibility Study was circulated to Project beneficiaries and stakeholders. It remained a gravity system with irrigation and municipal uses, but due to comments from Project beneficiaries, the Project redesign decreased the full service irrigated acreage to 46,520 acres, and increased municipal and industrial water supply from 9,200 acre-feet to 76,200 acre-feet annually. Storage capacity for the expanded municipal and industrial water supply was provided by a new Project feature: Three Buttes Dam and Reservoir. The Project design reflected in the 1966 Supplemental Report became the basis for the ALP's 1968 authorization by Congress. Pub.L. No. 90-537; 43 U.S.C. §§ 1501-1556.

1979 Definite Plan Report

After the 1966 Supplemental Report was published, the ALP went through yet another redesign. This redesign was reflected in the Animas-La Plata Definite Plan Report (hereinafter "Definite Plan Report") which presented the results of studies completed since the Project's authorization in 1968. The Project design reflected in the Definite Plan Report was smaller and contained fewer structures than were approved at the time of authorization; only two storage reservoirs were to be built, Ridges Basin Reservoir and Southern Ute Reservoir. Significantly, the 1979 Project involved offstream storage in Ridges Basin Reservoir, and required the construction of a pumping plant to pump water out of the Animas River and up several hundred feet to the reservoir site. Once in the Ridges Basin Reservoir, water could be transported through the "inlet" on the west side of the reservoir to uses in the La Plata River basin.

As contemplated in the Definite Plan Report, the Project would have annually provided 118,100 acre-feet of water for full and supplemental irrigation on 70,100 irrigable acres. Additionally, the Project design in the Definite Plan Report would have provided 80,100 acre-feet of municipal and industrial water for use in Durango as well as communities in San Juan County, New Mexico.

In the early 1980s, the ALP Project as defined by the 1979 Definite Plan Report became the subject of review under the federal Clean Water Act (CWA) and the federal Endangered Species Act (ESA). Around the same time, on a parallel track, in 1986 the Southern Ute Indian Tribe and the Ute Mountain Indian Tribe (the "Tribes") entered into a consent decree to resolve their *Winters* Doctrine claims to adjudicate tribal water rights, filed by the Tribes in 1976. [Editor's Note: The *Winters* Doctrine establishes that when the federal government created Indian reservations, water rights were impliedly reserved in sufficient quantities for the purposes for which the reservation was established. The Doctrine is based on *Winters v. United States*, 207 U.S. 564 (1908).] The tribal claims posed a significant threat to existing water users. As a result, the parties negotiated a tribal water rights settlement that relied on the waters stored and diverted under the 1979 ALP Project as the source of a permanent water supply from the Animas and La Plata rivers for the Tribes' municipal, industrial, and irrigation uses. Colorado Ute Indian Water Rights Final Settlement Act, Pub L. No. 100-585, 102 Stat. 2973. Of course the 1979 ALP Project was also intended to serve non-tribal beneficiaries with a water supply for the same purposes.

2000 Amendments

After the 1979 Definite Plan Report, Reclamation began evaluating potential project impacts under the ESA and CWA. In 1990, Reclamation published a draft Biological Opinion which determined the Project would likely jeopardize listed species. Project supporters, after studying the 1990 Biological Opinion, proposed a "reasonable prudent alternative" which allowed construction of a portion of the 1979 ALP Project, but which limited "depletions" to 57,100 acre-feet per year. This alternative was adopted, but almost immediately became the target of a lawsuit by environmental groups to prevent construction of any ALP facilities. In addition, the price of the project had skyrocketed due to the increased costs of construction and implementation of environmental compliance obligations.

The State of Colorado sponsored negotiations in the late 1990s, commonly known as the "Romer/Schoettler Process." The result of these negotiations, along with considerable assists from the local tribal and non-tribal water interests, finally resulted in the 2000 Ute Amendments. Pub. L. No. 106-554, §§ 301-03, 114 Stat. 2763, 2763A-258. The 2000 Ute Amendments modified the implementation of the 1986 Consent Decree, and authorized construction of a significantly downsized project (sometimes referred to locally as "ALP Lite").

Diligence

ALP Lite Prohibitions

Water Rights Appropriation

Diligence Decreases Sought

Diligence Standard?

2013 Application

Project Water Entitlements

Irrigation Rights

The ALP Project authorized under the 2000 Ute Amendments was not only vastly different from the 1979 ALP Project configuration — both in size, water sources, and purposes — but reflected congressional determinations that expressly excluded the possibility of the realization of the larger 1979 ALP Project configuration. Among other things, the 2000 Ute Amendments prohibited irrigation uses of Project water or use of Project structures for irrigation**,** and specifically adopted the 2000 Record of Decision under ESA section 7 consultation as a basis for the findings by Congress in the statute.

The ALP Project — Water Rights History

1966 Original Project Design

In the late 1950s, a local water conservation district, the Southwestern Water Conservation District (SWCD), appropriated the water rights to serve the ALP Project. Available records suggest that SWCD was formed for the primary purpose of holding the water rights associated with the ALP and that Reclamation and other water officials worked closely with SWCD early on to develop the scope of the Project. The water rights appropriated by SWCD under the then-applicable statutory procedures of the 1944 Adjudication Act reflected the original 1962 Project design, scope and purpose. The appropriations were modified to reflect the 1966 Project modifications in a hastily sought petition to the district court to "modify" the previously partially decreed appropriations, interestingly on the same day that the modified ALP Project was presented to Congress, March 21, 1966.

1979 Definite Plan Report

After the adoption of the 1969 Act, SWCD began to seek diligence decrees for the ALP water rights. Review of the diligence decrees obtained prior to 1980 reflects diligence cases in which there were few or no opponents and SWCD easily obtained findings of diligence. In 1980, following the announcement of the 1979 Definite Plan Report and Project redesign, SWCD sought a change of water rights decree from the Division 7 Water Court, to reflect the modifications to the ALP Project reflected in the 1979 Definite Plan Report. There was some opposition to the change decree on the basis that the Project modifications were so significant that SWCD had abandoned its water rights and the rights should be cancelled. The Water Court rejected these arguments, noting that SWCD had received a diligence decree for the conditional water rights appropriations only months before without any opposition. In rejecting the opposers' arguments, the Water Court noted a diligence standard arguably at odds with that expressed by the Supreme Court in the Blue River case:

> The Project Plan, as revised, is the same Project it has always been with some refinements. Large irrigation projects, as Rome, are not built in a day. The Animas-La Plata Project has been in active planning for almost fifty years. Its construction depends on Congressional appropriations hampered somewhat by administrations during the past several years which have not demonstrated much enthusiasm for Western irrigation projects...What is lack of due diligence in the case of an ordinary irrigation ditch costing a few hundred dollars may be due diligence in the case of a vast project involving thousands of acre feet of water and the expenditure of millions of dollars, usually federal money.

Decree at 3, Case No. 80CW237, Division 7 Water Court, Aug. 9, 1984.

SWCD's change decree was entered by the Water Court and maintained the Project's interstate nature and its stated intention to serve tribal as well as non-tribal water users. However, rather than seek a change that limited the appropriations to the new scope, purposes, and limits of the Project as set forth in the 1979 Definite Plan Report, the change of water rights for the most part simply added the new structures, amounts, and purposes proposed by the 1979 Project changes to the original decrees.

2000 Ute Amendments and 2013 diligence application (Case No. 13CW3011)

Unlike the 1979 Definite Plan Report, when the 2000 Ute Amendments were adopted, SWCD did not seek a change decree to ensure the appropriations reflected the federal project authorization. Even after the gates were closed on Ridges Basin Dam in 2011, SWCD maintained the position that all ALP appropriations (both the originally appropriated ALP water rights and structures *and* the changes made in their 1980 change decree *and* the irrigation uses for the appropriations) continued to properly reflect appropriations made for purposes of the Project. SWCD's position met with substantial controversy in response to its 2013 diligence filing.

Objectors to Case No. 13CW3011 were all governmental entities interested in protecting their entitlements to project water in the ALP Project as constructed. The objectors, however, were not completely aligned on the legal issues in the case, or the approach to protecting their interests. The Tribes and the New Mexico interests, the San Juan Water Commission (the municipal water suppliers in San Juan County, New Mexico) and the La Plata Conservancy District (N.M.) were aligned and actively litigated the disputed issues in the case, of which there were many.

One of the primary issues — specifically related to "can and will" — was SWCD's ability to maintain the appropriated irrigation rights. This issue arose from the 2000 Ute Amendments having specifically prohibited development of water rights for irrigation and the use of Project facilities (even for non-project water) for irrigation purposes. Similarly, the 2000 Ute Amendments limited the Project as constructed to

Diligence

Motion Practice

Evidence Required

Standard Decided

Settlement

Diligence Law

capping Project depletions at 57,100 acre-feet per year, suggesting that any volume above and beyond the statutory amount had to be cancelled.

Most people would find water court litigation about as exciting as watching paint dry; motions practice can be just as exciting. Rather than take any of these issues on directly, the parties engaged in somewhat less than direct motions practice. For example, less than a year after the initial pleadings were filed and before any discovery deadlines, SWCD moved the Water Court (Court) for an order to "narrow the issues" and exclude from discovery the Court's examination, among other things, of evidence related to "interpretations of federal statutes and contracts" related to the ALP Project as constructed. The Court rejected the motion as premature at best. Order Denying Motion to Narrow Issues, Case No. 13CW3011, Division 7 Water Court, Oct. 27, 2014.

Several days later, objectors filed a "Motion for Determination of Question of Law (Can and Will/Speculation)" asking the Court to articulate the nature of the diligence and "can and will" evidence that SWCD was obligated to show in order to obtain a diligence finding, and specifically that SWCD had to show legally and factually how it "could and would" develop the conditional irrigation rights. This motion arose from the fact that the 2000 Ute Amendments, authorizing (and limiting) the construction of the ALP Project also reflected, among other things, the virtual impossibility of obtaining federal: a) authorization to use the constructed Project to deliver non-project water for irrigation uses because of the congressional prohibition based on ESA consultation; and b) financial support to construct the original envisioned structures (those structures such as reservoirs that had been removed from the ALP Project plan over the years, but maintained by SWCD in their diligence decrees) to deliver irrigation water rights. The Court granted the motion, and laid out the diligence and "can and will" standards that SWCD would be required to satisfy, but remained circumspect about which evidence would be dispositive. Order Re: Motion for Determination of Question of Law (Can and Will/Speculation), Case No. 13CW3011, Division 7 Water Court, April 23, 2015. (Available upon request from TWR).

With the Court's April 23, 2015 Order, the parties continued to litigate their disputes through discovery and pre-trial practice. The parties also began negotiating a settlement in July of 2015. The settlement was signed on November 2, 2015, one week before the three-week trial that the Court had scheduled on SWCD's diligence claims. The settlement allowed the objectors to protect their interests in the Project water rights, but also allowed SWCD, subject to certain conditions, to maintain conditional water rights for irrigation in the La Plata Basin (the Settlement is available upon request from *TWR*).

CONCLUSION

The Colorado Supreme Court's announcements regarding diligence standards, whether under the common law or since the adoption of the 1969 Act, have always arisen under hard facts, and that is not likely to change. This article has attempted to summarize basics of diligence law in Colorado, with a special focus on the manner in which diligence challenges develop when the conditional water rights at issue are associated with an as-built federal project that differs significantly from the project as originally authorized by Congress. However, there are many more examples of conditional water rights associated with unbuilt federal projects, and the owners of such water rights are likely to experience significant challenges during their hexennial diligence applications in Water Court, but perhaps will have fewer options for resolving the dispute than were available to the Southwestern Water Conservation District.

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Sarah Klahn, Esq., works to protect the water rights of municipal, industrial, and ranching clients in Colorado, Idaho, Wyoming, and New Mexico. She represented the plaintiffs in *Vance v. Wolfe* and *William F. West Ranch, LLC v. Tyrell*, where her clients sought application of state water law principles to oil and gas produced ground water diversions. She also litigated the applicability of Colorado water law to tribal oil and gas ground water diversions in *Pawnee Well Users v. Wolfe*. Sarah has represented the City of Pocatello, Idaho for over 10 years on conjunctive management disputes (e.g., *A&B Irrigation District v. Idaho Department of Water Resources*, and *In re Distribution of Water to Various Water Rights Held By or For Benefit of A&B Irrigation District*) and other water rights-related matters (*Pocatello v. State*). She also represents the San Juan Water Commission and La Plata Conservancy District (New Mexico) on water matters related to their interests in the Colorado Animas-La Plata Project. In addition to her litigation practice, she testified on Colorado water law as an expert witness in 2012 in *Hall v. Moreno*, a case involving federal congressional redistricting. Sarah edits the Water Law chapter of West's Krendl's Colorado Methods of Practice, and is a member of the Board of Advisors for the National Judicial College's Dividing the Waters program for water judges. She has been a partner at White & Jankowski, LLP for over 15 years and she is included in The Best Lawyers in America© in the field of water law, has been recognized in Colorado Super Lawyers®, and has been named a Top Lawyer by 5280 Magazine in the field of water law for the last two years.

Rio Grande Compact

Compact Violations

Delivery Point

"Project Supply"

Compact Area

Delivery Obligations

Separate Systems

Project Appropriations

RIO GRANDE COMPACT SUIT UPDATE

TEXAS V. NEW MEXICO AND COLORADO

by Jay F. Stein, Stein & Brockmann, P.A. (Santa Fe, NM)

Introduction

On January 8, 2013, the State of Texas sought leave of the United States Supreme Court (Court) to file suit against the State of New Mexico, within the Court's original jurisdiction, for alleged violations of the Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785. Texas alleged that New Mexico had violated the Rio Grande Compact by authorizing pumping by New Mexico groundwater users in hydrologically connected reaches of the Rio Grande below Elephant Butte Reservoir, which depletes Texas' apportionment of water. The State of New Mexico opposed the Motion for Leave to File Complaint on a variety of grounds; principally, that a Compact violation was not stated because the Rio Grande Compact required New Mexico to deliver its share of Rio Grande water into Elephant Butte Reservoir, *not* at the New Mexico-Texas state line. The City of Las Cruces filed an *amicus curiae* brief arguing that the issues raised by Texas could best be addressed by New Mexico's administration of an adjudication decree once New Mexico's rights had been determined in the general stream system adjudication pending in state court in Las Cruces. Stein & Brockmann, P.A. is water counsel to the City of Las Cruces.

On February 27, 2014, the United States moved to intervene, essentially arguing that the groundwater in storage in the Lower Rio Grande was "Project Supply" for the Rio Grande Project regulated by the United States, for which contracts with the United States were required to be obtained by New Mexico's water users.

On January 27, 2014, the Court accepted Texas' Motion for Leave to File Complaint, subject to a motion to dismiss, which New Mexico filed on April 30, 2014. The City of Las Cruces filed an *amicus curiae* brief urging dismissal of the Complaint. The case was referred to A. Gregory Grimsal of New Orleans, as Special Master, to take evidence and make reports to the Court.

Following briefing and oral argument in August of 2015, Special Master Grimsal issued a draft report denying New Mexico's Motion to Dismiss pertaining to Texas' Complaint and recommending that the Court exercise its discretionary, non-exclusive jurisdiction to hear the United States' issues. He received comments from the parties and *amici* on August 1, 2016.

The case raises issues of compact compliance, federal reclamation law, and state court jurisdiction and administration.

Rio Grande

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. Through an inflow/outflow formula, the Rio Grande Compact limits stream depletions *upstream* of Elephant Butte Reservoir.

Colorado is obligated to deliver a percentage of the recorded inflow at the New Mexico-Colorado state line under Article III of the Rio Grande Compact. This delivery obligation is measured by a gauging station at Lobatos, Colorado.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir, which is located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and the obligation is determined as a percentage of the inflow recorded at a gauging station at Otowi, New Mexico. A resolution of the Rio Grande Compact Commission in 1948 changed New Mexico's delivery obligation from San Marcial into Elephant Butte Reservoir.

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande runs from the New Mexico-Colorado state line to Otowi Gage. The Middle Rio Grande is situated between the Otowi Gage and Elephant Butte Reservoir, and the Lower Rio Grande (LRG) stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line.

Rio Grande Project

Pursuant to the Reclamation Act, the United States initiated the acquisition of surface water rights for the Rio Grande Project by filing Notices of Intent to Appropriate with the New Mexico Territorial Engineer in 1906 and 1908. *See* Reclamation Act of 1902, §§ 2 and 8, 32 Stat. 388; *see also* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. The Notices of Intent sought to reserve then-unappropriated surface waters upstream of Elephant Butte Reservoir for storage in the reservoir for use in the Rio Grande Project. New Mexico's delivery obligation into Elephant Butte Reservoir is governed by the Rio Grande Compact.

Rio Grande Compact

Once released from Elephant Butte Reservoir, Project surface water is allocated between Elephant Butte Irrigation District (EBID), located in New Mexico, and El Paso County Water Improvement District No. 1 (EP No. 1), located in Texas. Administration of Rio Grande Project water released from Elephant Butte Reservoir was not addressed in the Rio Grande Compact, and therefore is governed by a combination of contracts and state and federal law.

Stream Adjudication

Lower Rio Grande Adjudication

A general stream system adjudication is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012). An adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The LRG Adjudication was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico.

Project Rights

Despite its opposition, the United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993). [Editor's Note: The McCarran Amendment waives the United States' sovereign immunity in suits concerning ownership or management of water rights; this allows general stream adjudications in state courts to determine water rights held by the United States as part of the adjudication.] A judicial determination of the United States' Rio Grande Project rights is nearly complete. The LRG Adjudication Court has held that groundwater is not part of Rio Grande Project water supply. It has also quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.

Texas v. New Mexico and Colorado

Failure to Protect

Texas's Complaint asserts violations of the Rio Grande Compact based upon New Mexico's alleged failure to protect Rio Grande Project surface water supply by allowing diversions of surface water and groundwater below Elephant Butte Reservoir beyond 1938 conditions. Texas contends New Mexico has a water delivery obligation at the New Mexico-Texas state line that has been violated. Texas alleged that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface water and groundwater between Elephant Butte Reservoir and the New Mexico-Texas state line beyond 1938 conditions. *See* Texas' Complaint at ¶4, ¶10, ¶11, ¶18, and ¶19. In ¶ 18, Texas alleged:

Compact Intent

> New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas. Despite the State of Texas' request that New Mexico take action to cease these diversions and extractions, these unlawful surface water diversions and extractions of water from beneath the ground have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually. These unlawful surface water diversions and extractions of water from beneath the ground intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico. The unlawful diversion of surface water and extraction of underground water also require more water to be released from Elephant Butte Reservoir depleting Rio Grande Project storage. These extractions also create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water. This requires additional releases of water from Elephant Butte Reservoir, which has a detrimental effect on the amount of water stored in Elephant Butte Reservoir for future use. Depleted reserves at Elephant Butte Reservoir have adverse impacts on future water supplies that should otherwise be available to the Rio Grande Project for delivery in southern New Mexico, Texas and Mexico. These extractions have a direct adverse impact on the amount of water delivered to Texas pursuant to the Rio Grande Project authorization

Excess Diversions

Water Intercepted

Extractions Impact

Rio Grande Compact

Language Interpretation

State Jurisdiction

Las Cruces' Groundwater Use

Adjudication Conflict

Modification v. Enforcement

Compact Terms Binding

Special Master Report

Delivery Point

and the Rio Grade Compact. These extractions were not occurring in 1938 when Colorado, New Mexico, and Texas entered into the Rio Grande Compact to equitably apportion these waters. Thus, New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.

Texas and the United States argue that it was "understood" that the Rio Grande Compact requires the delivery of a specific amount of water at the New Mexico-Texas state line, despite contrary language in the Compact. They argue that the Rio Grande Compact resulted in a tacit apportionment of the groundwater of the Lower Rio Grande, resulting in New Mexico being locked into 1938 conditions not applicable to Texas and the United States, then posit that all surface water and hydrologically connected groundwater below Elephant Butte Reservoir in New Mexico are Rio Grande Project water, which the United States contends cannot be diverted without obtaining a water supply contract from it. See United States' Complaint in Intervention at 4, ¶¶ 12 and 13. This position results in New Mexico being divested of state jurisdiction over all surface water and groundwater in the Lower Rio Grande, assuming that all groundwater is hydrologically connected, threatening the viability of Las Cruces' water supply.

Assuming all groundwater is hydrologically connected to surface water, the United States' attempt to "enforce" the Rio Grande Compact results in a federalization of the Lower Rio Grande, with all surface water and groundwater users in New Mexico being regulated by the United States, not New Mexico. Issues related to *California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978), which confirm that states have plenary control over the waters within their borders, are therefore raised. The United States' argument places Las Cruces' adjudicated groundwater rights obtained under state law at risk and would require the City to enter into a water supply contract with the United States to divert groundwater in the LRG for municipal use, despite the fact that the City's groundwater use was initiated more than 100 years ago, prior to the project.

Texas and the United States would have the Court wade into a quantification of the Rio Grande Project water supply, something that has already been largely accomplished in the LRG Adjudication. By effectively removing the United States' interests to the U.S. Supreme Court, the LRG Adjudication Court could not fashion a unified decree for administration of the interrelated water rights in the LRG.

New Mexico's position on the merits has been that New Mexico's delivery obligation under the Rio Grande Compact is at Elephant Butte Reservoir, not the New Mexico-Texas state line. *See* Rio Grande Compact at Art. IV, as amended. New Mexico cannot violate a compact provision that does not exist. Moreover, the relief Texas and the United States seek in other words — state line deliveries — would result in modification, not enforcement, of the Rio Grande Compact.

The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus curiae*, filing briefs and presenting oral arguments in that case.

New Mexico's principal position has been that once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. at 564; *see generally Arizona v. California*, 373 U.S. 546, 565-66 (1963); *New Jersey v. New York*, 523 U.S. 767, 811 (1998). In this case, Texas and the United States are seeking relief inconsistent with the express terms of the Rio Grande Compact. Because they have failed to plead allegations that even if accepted as true "plausibly give rise to an entitlement of relief" New Mexico argued that its motion to dismiss should be granted.

Motions to intervene were filed by Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, which contended that their interests were not adequately represented by their respective states.

Draft Report

On July 1, 2016, the Special Master issued his Draft Report denying New Mexico's Motion to Dismiss, and denying EBID and El Paso County Water Improvement District No. 1's motions to intervene. The draft report contained an introductory section containing an extensive background on the history and background of the Rio Grande and the Rio Grande Project. These facts had not been presented in the Texas Complaint or the United States' Complaint in Intervention. *See* Water Briefs, *TWR* #149 (Aug. 15, 2016) for additional detail about the Draft Report; copy available at: https://static.texastribune.org/media/documents/6-28-16-First-Rpt-SM-Motion-to-Dismiss-and.pdf.

New Mexico's Motion to Dismiss was decided pursuant to Fed.R.Civ.P. 12(b)(6) which requires that "all factual allegations contained in Texas' Complaint and the United States' Complaint in Intervention are assumed to be true." Draft Report at 164. To survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. At 164-165.

The Special Master addressed New Mexico's principal contention that the Rio Grande Compact did not require deliveries at the state line but instead into Elephant Butte Reservoir. The Special Master framed the issue as follows:

Rio Grande Compact

Requirements

Control & Dominion

Relinquish Control

Overall Purpose

> New Mexico moves to dismiss Texas's Complaint for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has "allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. To Dismiss, at 28 (quoting Compl. ¶ 4).

Draft Report at 162. The Special Master rejected New Mexico's contentions, finding that "Texas has stated a claim under the unambiguous text and structure of the 1938 Compact." He recommended:

> Thus, the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir. If, as Texas alleges, New Mexico intercepts or diverts water it delivers to the Rio Grande Project immediately upon release from Elephant Butte Reservoir, it disregards the text of Article IV and renders the common and straightforward meanings of the terms "obligation" and "deliver" in Article IV void, which offends the principles of federal statutory construction as well as those of contractual interpretation.

Draft Report at 169.

The Special Master's reasoning creates issues for New Mexico's internal administration of water rights in the Lower Rio Grande. He concluded "[t]hat the text of the 1938 Compact requires New Mexico to relinquish control of Project water permanently once it delivers water to the Elephant Butte Reservoir." Draft Report at 167. This may affect New Mexico's ability to administer hydrologically connected groundwater south of Elephant Butte Reservoir. The Special Master Found:

> The text and structure of the 1938 Compact do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir, as New Mexico asserts. Rather, the 1938 Compact is a comprehensive agreement, the text and structure of which equitably apportions water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share. New Mexico's obligations under the 1938 Compact do not end discretely at Article IV, but are woven throughout the 1938 Compact to effect the overall purpose of the Compact.

Draft Report at 172.

The Special Master found that the United States did not state a claim for compact violations, but recommended that the Court hear their issues anyway:

> I recommend that the Court grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent that the United States cannot state a plausible claim under the 1938 Compact; but to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Rio Grande Project, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. 1251(b)(2) to allow for the resolution by the Court of the United States' project claims to occur simultaneously with the resolution of Texas's compact claims against New Mexico.

Draft Report at 204-205.

The Special Master denied the motions to intervene of both Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1.

Conclusion

Upon the filing of a final Report by the Special Master, containing his recommendations on the Motion to Dismiss and the two Motions to Intervene, issues will be framed for exceptions to the full Court in Washington. If it chooses, the Court will have sufficient precedent to refrain from hearing this interstate case on the grounds that the Compact delivery obligation extends only as far as Elephant Butte Reservoir and cannot be "modified" in a compact enforcement action. Relief for Texas, if any is required, would nevertheless be available on the completion of New Mexico's general stream system adjudication and the administration of priority dates. Insofar as the United States' interests in the Rio Grande Project are concerned, this process is virtually complete in the state court adjudication with the adjudication of its Project rights.

If the case proceeds before the US Supreme Court, a determination on the Motions to Intervene will determine the parties, prior to the Special Master entering pretrial scheduling orders governing discovery and pretrial motions.

In either event, *Texas v. New Mexico and Colorado* will provide fresh law on compact enforcement, alternative forums to the Court's original jurisdiction, the intervention of instate parties in original actions, and federal Reclamation law in interstate projects.

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WATER BRIEFS

WATER RIGHTS SETTLEMENT OK

TRIBES, CITY & STATE

The Chickasaw and Choctaw Nations (Nations), the State of Oklahoma and the City of Oklahoma City announced August 11th that they have reached a water rights settlement, which will be presented to the US Congress for final approval. When finalized, the detailed 88-page settlement will resolve long-standing questions over water rights ownership and regulatory authority over the waters of the Choctaw and Chickasaw Nations' historic treaty territories, an area that spans approximately 22 counties in south-central and southeastern Oklahoma. The agreement provides a framework that fosters intergovernmental collaboration on significant water resource concerns within the Settlement Area, while at the same time protecting existing water rights and affirming the State's role in water rights permitting and administration. Additionally, the agreement will implement a robust system of lake level release restrictions to allow Oklahoma City's measured use of Sardis Lake for municipal supply purposes while continuing to support regionally critical recreation, fish and wildlife uses.

For decades there has been legal uncertainty in the Settlement Area regarding water rights and regulatory authority arising from unresolved questions of federal law and tribal rights. These uncertainties contributed to long-running conflicts over Sardis Lake and the Kiamichi Basin in southeastern Oklahoma, resulting in multiple court actions. Once finalized, the Settlement will end ongoing litigation including a federal lawsuit the Nations filed against the State of Oklahoma and the City of Oklahoma City with regard to Sardis Lake and other waters of the historic treaty territory and a second lawsuit the State filed to adjudicate water rights in the Kiamichi, the Muddy Boggy, and the Clear Boggy watersheds. By reaching this settlement, the parties avoid decades of litigation and associated expenses and uncertainty for the State, the Nations, Oklahoma City and property owners throughout the Settlement Area. *The Water Report* has covered the water dispute extensively over the years: *see* Moon, *TWR* #79; Greetham, *TWR* #82; Moon, *TWR* #91; and Water Briefs, *TWR* #95.

"The agreement approved by the Board today maintains the OWRB's role and responsibility in allocating and managing the state's water resources for the benefit of all Oklahomans, while also addressing the values and protections important to the Choctaw and Chickasaw Nations," said Oklahoma Water Resources Board (OWRB) Executive Director J. D. Strong. "Importantly, this agreement resolves the state's debt to the Federal government for construction of Sardis Lake, while at the same time making water available to meet the long term needs of Oklahoma City and surrounding metropolitan area." Strong went on to note, "Five years of concentrated research, analysis and modeling provide the underpinnings of this agreement. All parties were committed to basing decisions on fact and science, building upon the foundation of the Oklahoma Comprehensive Water Plan using the best information we had or could develop regarding potential impacts on lake levels and stream flows. The State, the Nations and Oklahoma City were committed to applying what we have learned through decades of study so that our water resources can be protected while supporting a strong and growing economy in the region and throughout the state."

Under the terms of the agreement, the Choctaw and Chickasaw Nations will participate in technical evaluations of significant future water right allocation proposals within the Settlement Area. The agreement also formalizes protections for the current and future water needs of communities throughout the region, ensuring adequate water for south-central and southeastern Oklahoma and enhancing stewardship of water resources both for future consumptive use within the region as well as protecting lake levels and stream flows on which the vibrant tourism industry relies.

The agreement also establishes the legal security of Oklahoma City's water supplies and gives the greater Oklahoma City metropolitan area access to water for its future needs. Oklahoma City's releases from Sardis Lake will be governed by a system of lake level release restrictions based on the Oklahoma Department of Wildlife Conservation's lake level management plan, which is designed to protect fishing and recreational resources. Oklahoma City will also gain access to the Kiamichi River, dependent upon lake level release and minimum stream flow restrictions intended to protect environmental and recreational uses.

Existing water rights or rights to surface or groundwater will not be affected by the agreement, and the agreement does not authorize out-of-state use or diversion of water, which remains unlawful absent State legislative approval. The settlement calls for a Settlement Commission to evaluate the impacts of future proposals for out-of-state water use or diversion, which would remain subject to State legislative authorization. Should the Oklahoma Legislature ever approve such a proposal, the agreement ensures that any proceeds would be devoted to meeting water and wastewater infrastructure needs, particularly in southeastern Oklahoma. The Settlement Commission shall be comprised of five (5) members, appointed as follows: (i) one by the Governor of the State; (ii) one by the Attorney General of the State; (iii) one by the Chief of the Choctaw Nation; (iv) one by the Governor of the Chickasaw Nation; and (v) one by agreement of the aforementioned four members (Agreement, p. 38). Other duties of the Commission are listed, beginning at page 39.

After the agreement is signed by all parties, it must be approved by federal legislation and executed by the Secretary of the United States Department of the Interior. The parties are now working with the Oklahoma congressional delegation to secure appropriate legislation. Additional information is available online at: www.WaterUnityOK.com.

The Water Report will feature a major article on the Settlement in an upcoming issue by Duane Smith, former Executive Director of the Oklahoma Water Resources Board (OWRB).

For info: Settlement Agreement available at: WaterUnityOK.com; OWRB website: www.owrb.ok.gov/

WATER BRIEFS

WATER QUALITY TRADING US
GROWING MARKETS SUPPORT

On August 1, Ann Mills, USDA Deputy Under Secretary for Natural Resources and Environment and Ellen Gilinsky, EPA Office of Water Senior Policy Advisor, announced actions to support growing water quality trading markets in the US. They referred specifically to a June 2016 Report that summarizes the primary obstacles to market expansion and recommendations on how to simplify development of trading markets.

In September of 2015, EPA and USDA sponsored a three-day national workshop at the Robert B. Daugherty Water for Food Institute in Lincoln, Nebraska that brought together more than 200 experts and leaders representing the agricultural community, utilities, environmental NGOs, private investors, states, cities, and tribes to discuss how to expand the country's small but growing water quality trading markets. A June 2016 Report summarizes the workshop's key discussions.

Over the last decade, states and others have discovered they can meet their water quality improvement goals with lower costs and greater flexibility by using a voluntary water quality trading program. Trading is based on the fact that sources in a watershed can face very different costs to control the same pollutant. Trading programs allow facilities facing higher pollution control costs (like a wastewater treatment plant or a municipality with a stormwater permit) to meet their regulatory obligations by purchasing lower cost environmentally equivalent (or superior) pollution reductions (or credits) from another source — including farms that use conservation practices to efficiently reduce the movement of nitrogen, phosphorus, and sediment from their fields into local waterways. For example, Virginia's nutrient trading program to offset stormwater phosphorous loads from new development has saved the state more than $1 million in meeting state water quality goals while providing economic incentives to local agricultural producers to reduce soil erosion and runoff. This proven approach creates new revenue streams for farmers and ranchers while delivering significant environmental results. While relatively few robust state and tribal water quality trading programs are in existence today, there is growing interest in markets as a tool for achieving water quality and ecosystem sustainability goals.

Workshop participants' recommendations to promote the use of water quality trading include: supporting a national dialogue series over the next three years, to advance collective understanding of water quality program design, implementation, and operation; increasing state awareness of water quality trading, through support of the Ass'n of Clean Water Administrators working directly with state agencies; highlighting successful trading programs that have attracted private capital, or are otherwise financially sustainable; compiling a list of voluntary conservation program design frameworks that use market-like approaches; pursuing efforts to develop a national registry for water quality trading programs; forming a stakeholder group to develop a list of tools that meet the minimum requirements of the federal and state agencies that must verify trades; increasing targeted stakeholder engagement; and, working with federal and state partners to actively engage in locations where increasing participation in market-based programs may result in more rapid nutrient decreases to address immediate problems such as harmful algal blooms.

These recommendations complement the USDA-EPA Water Quality Trading Roadmap (http://oem.usda.gov/welcome-usda-epa-water-quality-trading-roadmap) and EnviroAtlas (www.epa.gov/enviroatlas), products the two agencies jointly developed to simplify stakeholders' efforts to establish their own trading markets.

For info: June 2016 Report: www.oem.usda.gov/sites/default/files/CLEARED%20EPA%20USDA%20Workshop%20Report.pdf; USDA Environmental Markets website at: http://oem.usda.gov/ and EPA's Water Quality Trading website at:www.epa.gov/npdes/water-quality-trading

TRIBAL ATTORNEY FEES WA
TRANSBOUNDARY POLLUTION CASE

On August 12, Judge Lonny Suko of the US District Court for the District of Eastern Washington ruled that Teck Metals Ltd. (Teck) must pay nearly $8.3 million to the Confederated Tribes of the Colville Reservation (Tribes) for all "past response" costs related to the Tribes' ongoing legal battle to force the Canadian smelter company to clean up mine waste pollutants it released directly into the Columbia River. The ruling is the most recent victory by the Tribes who, along with the State of Washington, successfully sued Teck to force the company to comply with the US Superfund law. *See Pakootas, et al. v. Teck Cominco Metals, Ltd*., Case No. CV-04-0256-LRS (E.D. Wash. Aug 12, 2016), Phase II Findings of Fact and Conclusions of Law (Phase II).

The $8.3 million will cover environmental investigation and legal response costs (attorney's fees, expert witnesses, etc.) incurred since the legal fight began through 2013. Teck will also have to pay costs going forward. The award also includes prejudgment interest from June 1, 2008 (the date the Tribes filed its Second Amended Complaint) to the date of Judgment. The breakdown of the $8,253,676.65 was reflected in Phase II at page 27: "The amount of attorneys' fees and litigation costs sought - $4,859,482.22 - is proportionate to the amount of costs sought for 'removal' action - $3,394,194.43 - that being the fees and costs incurred by the Tribes in their investigation and evaluation of the UCR Site to determine whether Teck's slag and effluent were releasing or threatening to release hazardous substances into the Site."

The total costs of the cleanup and the restoration of damaged natural resources have not yet been determined, but the Tribes hope that the ruling will mean actual cleanup can proceed more quickly. For nearly a century, Teck's smelter released slag and liquid effluent, a toxic byproduct of metals refining, directly into the Columbia River, and pumped toxins into the air that polluted tribal and Washington state lands. More than 10 million tons of the granular slag created the "black

WATER BRIEFS

sand" beaches of the Upper Columbia, a 150-mile reach of the river between the Canadian border and Grand Coulee Dam. As noted by Judge Suko in Phase II at page 2: "In Phase I of this case, the Court determined that pursuant to the Comprehensive Environmental Response and Liability Act (CERCLA), 42 U.S.C. § 9607 (a)(4)(A), Teck Metals Ltd. …is liable to the Confederated Tribes of the Colville Reservation (the Tribes) and the State of Washington (the State) in any subsequent action or actions to recover past or future response costs. ECF No. 1955, p. 43."

Phase II provides a concise review of this complex and on-going litigation and also succinctly lays out the court's rationale for its decision regarding "past response" costs. For additional details, see Du Bey, TWR #18 and #85.

For info: Meghan Francis, Tribes, 509/ 634-2222 or meghan.francis.cbc @ colvilletribes.com; Decision available at: https://casetext.com/case/pakootas-v-teck-cominco-metals-ltd-9 or upon request from TWR

EARTHQUAKE SHUTDOWN OK

OIL & GAS DISPOSAL WELLS

On September 3, the Oklahoma Corporation Commission's Oil and Gas Division (OGCD) instituted the process of implementing a mandatory directive to shut down all Arbuckle disposal wells within a 725 square mile area, based on the location of the earthquake that occurred on September 3, 2016 near Pawnee, Oklahoma. OGCD stated in the shutdown letter to disposal operators that it was taking the action "to respond to an emergency situation having potentially critical environmental or public safety impact resulting from the operation of saltwater disposal wells." OGCD further stated in that letter that the "affected area highlighted on the attached map was previously designated as an area of interest based upon the dramatic increase in earthquakes within the immediate area. The OGCD has reviewed the report of earthquake activity of magnitude 5.6 MW… ."

OGCD's website noted that the "area includes 211 square miles of Osage County, which is outside of OGCD jurisdiction. OGCD is working with the [US] Environmental Protection Agency, which has sole jurisdiction over disposal wells in Osage County. The EPA has confirmed there are 17 Arbuckle disposal wells in the 211 square mile area under EPA jurisdiction, and that all the wells are being shut down."

OGCD ordered a two-part regulation: disposal wells from zero to five miles of the area of interest were to have a "managed shut-in" on or before September 10th, while disposal wells located from five to ten miles were required to have a "managed shut-in" on or before September 13th. The OGCD Director's letter also stated that, "[T]hese instructions are mandatory and to be implemented immediately."

For info: OGCD website: www.occ.state.ok.us/; Charles Lord, 405/ 522-2751 or c.lord@occemail.com

WATER PROTECTION CO

SOURCE WATER REPORT

A new report — "*Protecting Source Water in Colorado During Oil and Gas Development*" — is intended for water providers and community members interested in methods to protect source water quality in areas of oil and gas development. The report focuses on methods that water providers and local governments can engage with the oil and gas industry to protect source waters, such as commenting on the location of oil and gas wells, negotiating the use of best management practices to maintain water quality, and enacting watershed protection ordinances. "Source water" includes both surface waters (streams, rivers, and lakes) and groundwater (aquifers) that serve as sources of public drinking water.

The report is a collaborative effort of the Colorado Rural Water Association, Western Resource Advocates, University of Colorado Intermountain Oil and Gas Best Management Practices (through a CU Outreach grant to the Getches-Wilkinson Center), and AirWaterGas, a National Science Foundation funded research group of ten institutions including Colorado School of Mines, Colorado State University, and the University of Colorado.

For info: Report at: www.oilandgasbmps.org/docs/CO186_ProtectingSourceWaterAugust2016.pdf; Matt Samelson, Co-Author, 303/ 519-5769; Kathryn Mutz, CU, Intermountain Oil and Gas BMP project, 303/ 499-1092

GOLD KING MINE SPILL NM

TRIBAL SUIT/SUPERFUND LIST

On August 16, the Navajo Nation (Nation) sued EPA, alleging that EPA and other parties on August 5, 2015 "caused an unprecedented environmental disaster when they recklessly burrowed into an abandoned gold mine (Gold King Mine) and released more than three million gallons of toxic acid mine waste into the waters upstream of the Nation." *Complaint* at p. 2. Waste from the spill flowed through New Mexico, Colorado and Utah, reaching Lake Powell one week later. The Nation also complained that EPA for nearly two days did not call, notify or alert the Nation about the spill of at least 880,000 pounds of heavy metals into the Animas and San Juan rivers upstream of the Nation. *Id*. The additional defendants in the suit are two contractors (Environmental Restoration and Harrison Western); four mining companies called Gold King Mines Corporation, Sunnyside Gold Corporation, Kinross in Canada and Kinross USA; and 10 unnamed individuals.

The *Complaint* goes on to explain why the Nation is bringing the lawsuit: "Now, a year after one of the most significant environmental catastrophes in history, the Nation and the Navajo people have yet to have their waterways cleaned, their losses compensated, their health protected, or their way of life restored. Despite repeatedly conceding responsibility for the actions that caused millions of dollars of harm to the Nation and the Navajo people, the USEPA has yet to provide any meaningful recovery. Efforts to be made whole over the past year have been met with resistance, delays, and second-guessing. Unfortunately, this is consistent with a long history of neglect and disregard for the well-being of the Navajo people." *Id*.

The New Mexico Environment Department (NMED) also sued EPA and its contractors, the mine owners, and the State of Colorado for the Gold King Mine spill on May 23 of this year. That lawsuit seeks more than $130 million in damages.

Meanwhile, EPA announced on September 7 that it was placing the Gold King Mine site on the Superfund program's National Priorities List (Bonita Peak Mining District in San

WATER BRIEFS

Juan County, Colorado).
For info: NMED website: www.env.nm.gov/river-water-safety/; New Mexico's Complaint available at: www.env.nm.gov/wp-content/uploads/2015/12/complaint.pdf; Navajo Nation Complaint (Draft) at: https://assets.documentcloud.org/documents/3022143/2016-08-15-NN-Complaint-DRAFT.pdf; EPA Superfund website: www.epa.gov/superfund/current-npl-updates-new-proposed-npl-sites-and-new-npl-sites

TRIBAL FISHING RIGHTS NW
"CULVERT CASE" EXAMINED

Michael Blumm, a water law expert in the Northwest and professor at Lewis & Clark Law School, recently released a paper entitled "*Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration.*" In 1970, twenty-one tribes in the Pacific Northwest, along with their federal trustee, sued the state of Washington, claiming that numerous state actions violated their treaty rights, which assured them "the right of taking fish in common with" white settlers. The tribes and their federal trustee maintained that the treaties of the 1850s guaranteed the tribes: 1) a share of fish harvests for both cultural and commercial purposes; 2) inclusion of hatchery fish in that harvest share; and 3) protection of the habitat necessary to provide the fish that were the basis of the bargain which led to peaceful white settlement of the Pacific Northwest. By 1985, the tribes and the trustee convinced the courts of the merits of the first two propositions, but the Ninth Circuit deferred on the third, requiring a specific factual dispute.

In 2007, the tribes and the federal government convinced federal district Judge Ricardo Martinez that the state's construction and maintenance of road culverts blocking salmon access to their spawning grounds violated the 1850s treaties. In 2013, after settlement talks failed, the district court issued an injunction that required most of the offending barrier culverts to be remedied within seventeen years. Claiming exaggerated costs of compliance, the state appealed, and in 2016 a unanimous panel of the Ninth Circuit affirmed, rejecting wholesale the state's allegations. *See* Moon, *TWR* #149 (July 15, 2016). Blumm's paper discusses the reasoning of both the district court and the Ninth Circuit and makes some assessment of the road ahead, which may implicate road culverts owned by other governments and other habitat-damaging activities like dams, water diversions, and land management actions affecting water quality and quantity.
For info: Paper available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813894; Michael Blumm, 503/ 768-6824

MINING WASTEWATER PA/OH
MANAGEMENT & MONITORING

EPA and the State of Pennsylvania recently announced that Consol Energy Inc., CNX Coal Resources and Consol Pennsylvania Coal Co., LLC ("Consol") have agreed to implement extensive water management and monitoring activities to prevent contaminated discharges of mining wastewater from the Bailey Mine Complex (Complex) in Greene and Washington Counties, Pa., to the Ohio River and its tributaries.

In a consent decree filed in federal court on August 4, Consol also agreed to continue to prevent certain discharges from the Complex, conduct regular long-term-monitoring to ensure sufficient storage capacity to prevent future discharges, develop contingency plans should future discharges become likely, and implement an environmental management system to ensure compliance with the Clean Water Act (CWA) and other applicable environmental laws. Consol, the largest producer of coal from underground mines in the US, will pay a $3 million civil penalty for CWA violations.

The US government's complaint, filed concurrently with the settlement, alleges chronic exceedances of **o**smotic **p**ressure (OP) and other limits in Consol's CWA discharge permits. The discharges primarily enter into tributaries of the Ohio River. OP is the standard used in Pennsylvania to protect aquatic life from excess amounts of **t**otal **d**issolved **s**olids (TDS). Too much TDS going into a water body can increase the salinity and harm aquatic life and drinking water quality.

Consol has also agreed to: complete and maintain certain water management measures to prevent discharges from certain outfalls at Complex; monitor and report quarterly and annually, to ensure adequate storage capacity to prevent future discharges; submit and implement a plan to achieve long-term compliance through advanced treatment in the event of projected exhaustion of storage capacity; and develop and implement an environmental management system to ensure environmental compliance throughout the Complex. These measures will continue to reduce TDS in mining waters discharged to streams from the Complex. EPA estimates that implementation of the consent decree will eliminate more than 2.5 million pounds of pollutants in the form of TDS.
For info: Roy Seneca, EPA, 215/ 814-5567 or seneca.roy@epa.gov; Consent Decree available at: www.justice.gov/enrd/

SUPPLY STRESS TESTS CA
DROUGHT & CONSERVATION

On August 16, the California State Water Resources Control Board (SWRCB) posted "stress tests" submitted by water suppliers to demonstrate whether they have adequate supplies to withstand three additional dry years. Water suppliers that pass their "stress test" will not face a state-mandated conservation standard through January 2017, but are expected to keep conserving water to build long-term drought resilience.

SWRCB also issued nine Informational Orders to water suppliers whose "stress test" submissions were incomplete or inadequate. The nine suppliers that received Informational Orders have 30 days to provide additional documentation, and failure to comply could result in a return to a supplier's March 2016 conservation standard, monetary penalties, or both.

Of the 379 suppliers that submitted "stress tests," 36 indicated that they would face a supply shortage in 2019 and will be required to meet a conservation standard equal to the shortage amount. Thirty-two suppliers did not submit "stress tests" and will retain their March 2016 conservation standards through January 2017.

Going forward, SWRCB will investigate allegations that "stress test" submittals are inaccurate. SWRCB reserves the right to reject submissions found to be significantly erroneous or misleading and will also closely monitor conservation levels through the end of the year. A proposal to return

WATER BRIEFS

to state-mandated conservation levels in February 2017 will be prepared if drought conditions persist and statewide conservation levels falter significantly.

In addition to monitoring conservation levels, SWRCB is working closely with the California Department of Water Resources and other state agencies to develop long-term water use efficiency standards applicable across California, as directed by Executive Order B-37-16. These new standards will provide for improved water conservation and efficiency based on climate, population, and business types, rather than percentage reductions off a given baseline. The new standards will include permanent prohibitions on wasteful water use, improved drought planning, and enhanced leak detection and repair requirements.

The adopted regulation also keeps in place specific prohibitions against certain water uses, including watering down a sidewalk with a hose instead of a broom or a brush, or overwatering a landscape to where water is running off the lawn, over a sidewalk and into the gutter. Prohibitions directed to the hospitality industry also remain in place. Prohibitions against homeowners associations taking action against homeowners during a declared drought remain as well. SWRCB staff will be following up with urban water suppliers who have certified a three-year supply to ensure that local enforcement of the prohibitions is being reported in the monthly water data each urban water supplier sends showing how much water is delivered to customers every month.

In addition to many effective local programs, state-funded turf removal and toilet replacement rebates are also available. Information and rebate applications can be found at: www.saveourwaterrebates.com/

For info: Website at: Drought.CA.Gov; Conservation website: SaveOurWater.com

WASTEWATER CLEANUP WA

NPDES PERMIT INADEQUATE

On August 16, the Washington State Court of Appeals issued the third legal decision in favor of Spokane River advocates seeking to stop more PCBs from being added to the Spokane River from Spokane County's wastewater treatment facility. Three courts have now ruled that the Washington State Department of Ecology (Ecology) failed to do what the law requires: analyze whether the County's discharge of PCBs has potential to violate state water quality standards, and if so, impose appropriate limits to prevent such violations. The Appeals Court, in an unpublished opinion, left intact an earlier ruling that the Spokane River Toxics Task Force is not an adequate or legal substitute for pollution control limits. *Spokane County, et al. v. Sierra Club, et al*., Case No. 47158 (August 16, 2016).

Sierra Club and the Center for Environmental Law & Policy (CELP) filed the lawsuit against Ecology in 2011, and a companion lawsuit in federal court to compel Washington State and EPA to uphold water quality laws for the Spokane River. The Spokane Tribe intervened in support of the federal lawsuit. In that case, a Seattle federal judge ruled that EPA was wrong not to require Washington to prepare a clean-up plan for Spokane River PCBs.

In rejecting the appeal by Ecology and Spokane County, the Appeals Court supported earlier decisions that because the 2011 permit lacks any limit on PCB discharges, it violates the Clean Water Act, and that other terms of the permit are vague and unenforceable. The Pollution Control Hearings Board (PCHB) remanded the permit back to Ecology to do over. As noted by the Court of Appeals, the case "centers on whether Ecology took the proper steps under the National Pollution Discharge Elimination System (NPDES) permitting process to ensure the discharge from the Facility did not contain unsafe Polychlorinated Biphenyls (PCB) levels." *Slip Op*. at 1.

The Spokane River is among Washington's most contaminated river for PCBs. Exposure to PCBs through ingestion of fish represents a public health hazard. In 2008, the Washington State Department of Health issued fish consumption advisories, recommending limited or no consumption of fish from Lake Roosevelt and the Spokane River.

For info: Opinion available at: www.celp.org/pdf/PCBs_County_permit_Appeals_Court_8-16-2016.pdf; Rachael Paschal Osborn, Sierra Club, 509/ 954-5641 or rdpaschal@earthlink.net; Dan Von Seggern, CELP, 206/ 829-8299 or dvonseggern@celp.org

ESA LISTINGS US

NEW USFWS WORKPLAN

On September 7th, as part of its efforts to improve implementation of the federal Endangered Species Act (ESA), the US Fish and Wildlife Service (USFWS) released its National Listing Workplan for addressing ESA listing and critical habitat decisions over the next seven years.

This announcement comes as Service biologists wrap up work on a previous list of more than 250 species that had been identified as candidates for protection under the ESA.

The workplan identifies the USFWS' schedule for addressing all 30 species currently on the ESA Candidate List and conducting 320 status reviews for species that have been petitioned for federal ESA protections. Petitioned species are prioritized using a new methodology. Each status review is assigned to one of five priority categories, according to the urgency of threats, availability of relevant science and information, and ongoing conservation efforts by states and other stakeholders. The workplan also includes eleven additional species for which the Service plans to undertake discretionary status reviews, and one action impacted by court decisions.

USFWS hopes that sharing this workplan will spur proactive conservation of imperiled species so federal protections aren't needed. Recent successes by states, federal agencies, private landowners, non-profit organizations and industry collaborating on behalf of the greater sage-grouse, Columbia spotted frog, New England cottontail, mariposa lily, Page springsnail, Cumberland arrow darter, Goose Creek milkvetch, and Yadkin River goldenrod meant these species did not require listing under the ESA.

In the event that a petitioned species does require ESA protections, USFWS will seek to issue a listing proposal instead of adding the species to the candidate list, and will endeavor to simultaneously propose critical habitat designations.

For more information about the National Listing Workplan, visit: www.fws.gov/endangered/improving_esa/listing_workplan_actions.html

For info: Brian Hires, USFWS, 703/ 358-2191 or brian_hires@fws.gov

CALENDAR

September 19 WA
2016 Environmental Cleanup Conference: CERCLA & MTCA Advanced Sediments Conference, Seattle. WA State Convention Ctr. For info: Environmental Law Education Center, 503/ 282-5220 or www.elecenter.com

September 19-22 CA
VERGE: Where Technology Meets Sustainability (Convention), Santa Clara. Santa Clara Convention Ctr. For info: www.greenbiz.com/events/verge/santa-clara/2016

September 20-21 AZ
Navajo Nation Environmental Protection Agency 2016 Conference: Respect & Care for Mother Earth, Window Rock. Navajo Nation Museum & Library. For info: http://navajonationepa.org/main/index.php

September 22 WA
Washington Water Infrastructure & Fisheries Habitat Restoration Workshop, Yakima. Southeast Community Center. Presented by Department of Ecology. For info: Gretchen Greene at ggreene@ramboll.com or www.ecy.wa.gov/programs/wr/wrhome.html

September 22-23 CA
California Coastal Law Conference, Los Angeles. Intercontinental Century City. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

September 23 TX
Valley Environmental Summit, South Padre Island. South Padre Island Convention Centre, 7355 Padre Blvd. Presented by TCEQ. For info: Imeida Pena, 956/ 389-7427 or www.tceq.state.tx.us/assistance/summits/valley-environmental-summit

September 24 CA & WEB
The Fate of Our Public Lands Event, Berkeley. David Brower Center, Goldman Theater, 6:30-7:30 pm; Reception following. Presented by High Country News. For info: www.hcn.org/sf-events

September 24-28 LA
WEFTEC 2016: The Water Quality Event & Exhibition, New Orleans. Morial Convention Ctr. Presented by Water Education Foundation. For info: www.weftec.org/future-weftec-schedule/

September 27-30 BC
Living Waters Rally 2016, Vancouver. Simon Fraser University. Hosted by Freshwater Alliance; Complement with Watersheds 2016 - see 9/27/16 entry. For info: http://www.freshwateralliance.ca/lwr16

September 27-30 Alberta
Under Western Skies 2016 Conference: Water - Events, Trends, Analysis, Calgary. Mount Royal University, Roderick Mah Centre & Bella Conservatory. For info: http://skies.mtroyal.ca/

September 28-29 CA
Groundwater Resource Ass'n of California 25th Annual Meeting: 2016: Groundwater Supply, Quality, and Sustainability, Concord. Hilton Concord. For info: www.grac.org/events/6/

September 28-30 UT
Western States Water Council Fall (182nd) Council Meeting, St. George. Best Western Abbey Inn. For info: http://www.westernstateswater.org/upcoming-meetings/

September 29 WA
Washington Water Infrastructure & Fisheries Habitat Restoration Workshop, Lynnwood. Edmonds Community College. Presented by Department of Ecology. For info: Gretchen Greene at ggreene@ramboll.com or www.ecy.wa.gov/programs/wr/wrhome.html

September 29-30 NV
Tribal Water Law Conference, Las Vegas. Caesars Palace. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

September 29-30 TX
Texas Water Law Conference, San Antonio. La Cantera Hill Country Resort. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

September 30-Oct. 1 BC
Watersheds 2016 Conference: Building Capacity for Collaboration & Watershed Governance in British Columbia, Vancouver. SFU Wosk Centre for Dialogue & Simon Fraser University. Complement with Living Waters Rally 2016. For info: Rosie Simms, water@polisproject.org or https://watersheds2016forum.wordpress.com/

October 2-6 OK
18th Annual EPA Region 6 Stormwater Conference, Oklahoma City. Sheraton Downtown Hotel. Hosted by EPA Region 6, Texas A&M University in Kingsville, Oklahoma City MS4s, and States in Region 6. For info: Nelly Smith, EPA, 214/ 665-7109, smith.nelly@epa.gov or www.epa.gov/ok/18th-annual-epa-region-6-stormwater-conference

October 3-4 CA
Ass'n of California Water Agencies (ACWA 2016) Regulatory Summit, Sacramento. Hilton Sacramento Arden West. Registration Deadline 9/26. For info: www.acwa.com/events/acwa-2016-regulatory-summit

October 5 AZ
Colorado River Conference, Phoenix. Hilton Scottsdale. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

October 5-6 CA
Water & Long-Term Value 2 Conference, San Francisco. Levi Strauss & Co., 1155 Battery Street. Hosted by Skytop Strategies. For info: http://skytopstrategies.com/water-long-term-value-2/

October 5-7 NV
9th Annual WaterSmart Innovations Conference & Exposition, Las Vegas. South Poinrt Hotel & Conf. Ctr. For info: WaterSmartInnovations.com

October 5-7 MI
Great Lakes Adapatation Forum: "A Network of Networks", Ann Arbor. University of Michigan Palmer Commons. For info: http://graham.umich.edu/climate/forum-2016

October 9-13 Australia
World Water Congress & Exhibition 2016: Shaping Our Water Future, Brisbane. Brisbane Convention & Exhibition Centre. Organized by the International Water Ass'n. For info: www.iwa-network.org/event/world-water-congress-exhibition-2016

October 10-14 NC
Water and Health Conference: Where Science Meets Policy, Columbia. UNC William and Ida Friday Center for Continuing Education. Organizer: University of North Carolina - Chapel Hill. For info: http://waterinstitute.unc.edu/conferences/waterandhealth2016/

October 11-12 OK
Weathering Oklahoma's Extremes: 37th Annual Oklahoma Governor's Water Conference & Research Symposium, Norman. Norman Hotel & Conference Center. For info: www.owrb.ok.gov/gwc/index.php

October 11-13 CO
Sustaining Colorado Watersheds Conference, Avon. Westin Riverfront Resort. Presented by Colorado Watershed Assembly. For info: www.coloradowater.org/scw-conference-2016

October 12-13 TX
Water Quality / Stormwater Seminar, Austin. Palmer Events Center, 900 Barton Springs Road. Presented by TCEQ. For info: Natalie Myhra, 512/ 239-3143 or events@tceq.texas.gov

October 13 TX
Laredo Environmental Summit, Laredo. Texas A&M Int'l University, 5201 University Blvd. Presented by TCEQ. For info: Carmen Ramirez, 956/ 721-8457 or www.tceq.state.tx.us/assistance/summits/valley-environmental-summit

October 13-14 MT & WEB
16th Annual Montana Water Law, Helena. Great Northern Hotel. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

October 13-14 MT
2016 Montana AWRA Conference (33rd Annual): Water Quality & Quantity in a Changing Climate, Fairmount Hot Springs. Fairmount Hot Springs Resort. Pre-Conference Field Trip Oct. 12. For info: http://www.montanawatercenter.org/2016-awra-info

October 14 OR
Environmental Law: Year in Review CLE, Troutdale. Edgefield Manor. Presented by OSB Environmental & Natural Resources Section. For info: Dustin Till, dustin.till@pacificorp.com

October 15-16 Canada
International Conference on Climate Change Adaptation 2016, Toronto. Ryerson University. For info: www.globalclimate.info/

October 15-16 WA
Lake Roosevelt Forum Conference: Importance of Grand Coulee Dam & the Upper Columbia (Lake Roosevelt) to the Future of the Northwest, Spokane. Davenport Hotel. For info: Lake Roosevelt Forum, 509/ 535-7084, info@lrf.org or www.lrf.org

October 17-18 OK
Potable Reuse Summit, Oklahoma City. Skirvin Hilton. Organizer: WateReuse. For info: https://watereuse.org/news-events/conferences/potable-reuse-summit/program/

October 19-21 CA
Northern California Tour 2016, Sacramento. Water Projects Tour. For info: www.watereducation.org/general-tours

October 20-21 MT
River Restoration Course, Big Sky. Free Course. Presented by Montana Water Center, Gallatin River Task Force, Montana DEQ and the Montana Wetland Council. For info: Stephanie McGinnis, 406/ 994-6425, mcginnis@montana.edu or www.montanawatercenter.org/riverrestorationcourse

October 21 OR
Oregon Environmental Cleanup: Allocation, Liability & Insurance Conference, Portland. TBA. For info: Environmental Law Education Center, 503/ 282-5220 or www.elecenter.com

October 21 CO
40th Anniversity of the Federal Land Policy & Management Act Conference, Boulder. University of Colorado Wolf Law Bldg. For info: gwc@colorado.edu

October 24 UT
Utah Water Law Conference, Salt Lake City. Marriott Downtown at City Creek. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

October 24-25 CA
Endangered Species Act Conference: Highlights of New Rules & Regulations, San Francisco. BASF Conference Center. For info: CLE Int'l, 800/ 873-7130 or www.cle.com/BASF

October 24-26 MT
Montana Watershed Coordination Council (MWCC) Watershed Symposium, Billings. Crowne Plaza Billings. For info: www.mtwatersheds.org or erin@mtwatersheds.org

October 25-26 CA & WEB
California Water: Current Challenges & Future Solutions Seminar, Century City. Intercontental Century City. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

October 26 WA
Rural Domestic & Municipal Water Supply: AWRA-WA 2016 State Conference, Seattle. Seattle Mountaineers Event Center, 7700 Sand Point Way NE. For info: http://waawra.org/event-2205467

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

CALENDAR

(continued from previous page)

October 28 WA & WEB
The Mighty Columbia Seminar, Seattle. Hilton Garden Inn Downtown. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

October 30-Nov. 2 AZ
Water Infrastructure Conference & Exposition, Phoenix. Arizona Grand Resort & Spa. Organizer: American Water Works Association. For info: www.awwa.org/conferences-education/conferences/water-infrastructure.aspx

November 1-2 Scotland
Alliance for Water Stewardship - Global Water Stewardship Forum, Edinburgh. Forum Limited to 100 places. For info: http://www.awsforum2016.org/

November 1-4 DC
14th Annual Green Roof & Wall Conference: Cities Alive: Rising to the Stormwater Challenge, Washington. University of the District of Columbia. For info: Green Roofs for Healthy Cities, 416/ 971-4494 x228 or www.greenroofs.org

November 2-3 CA
San Joaquin Restoration Tour 2016, San Joaquin Valley. River Restoration Tour. For info: www.watereducation.org/general-tours

November 2-4 CA
California Water Association 2016 Annual Conference, Monterey. Monterey Plaza Hotel. For info: http://www.calwaterassn.com/upcoming-conferences/

November 3 CA
Southern California Edison Annual Water Conference: California Water Situation and Efforts to Advance Energy, Water and State Policy, Tulare. Energy Education Center. For info: http://scewaterconference.com/tulare/

November 4 OH
Safe Drinking Water: A Tale of Three Cities - 16th Annual Great Lakes Water Conference, Toledo. U of Toledo College of Law. For info: http://www.utoledo.edu/law/academics/ligl/conferences.html

November 5 OR
14th Annual Celebration of Oregon Rivers, Portland. Tiffany Center, 1410 SW Morrison Street. Presented by WaterWatch of Oregon. For info: www.waterwatch.org

November 6-10 TX
The International Water Conference, San Antonio. Marriott River Center. Presented by the Engineers' Society of Western Pennsylvania. For info: https://eswp.com/water/overview/

November 7 NM
Endangered Species Act in New Mexico Conference, Santa Fe. Inn & Spa at Loretto. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

November 9-10 WA & WEB
9th Annual Water Rights Transfers, Seattle. Hilton Garden Inn Downtown. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

November 6-12 Thailand
Water Management in a Changing World: Role of Irrigation for Sustainable Food Production - 2nd World Irrigation Forum, Chiang Mai. International Convention & Exhibition Center. For info: www.worldirrigationforum.net/

November 9-11 NM
2016 Quivera Conference, Albuquerque. Embassy Suites Hotel. For info: http://quiviracoalition.org/2016_Conference/index.html

November 13-17 FL
2016 American Water Resources Ass'n Annual Conference, Orlando. Florida Hotel & Conference Ctr. Presented by American Water Resources Ass'n. For info: www.awra.org/meetings/Orlando2016/

November 13-17 IN
Water Quality Technology Conference & Exposition, Indianapolis. Indiana Convention Center. Presented by American Water Works Ass'n. For info: www.awwa.org/conferences-education/conferences/water-quality-technology.aspx

November 14-15 CA
California Water Law Conference, San Francisco. Hotel Nikko. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

November 14-16 CA
National Water Resources Association (NWRA) Annual Conference, Coronado. Hotel Del Coronado. For info: www.nwra.org/upcoming-conferences-workshops.html