

COLORADO

William A. Paddock & Mary Mead Hammond, Reporters

Colorado Supreme Court Resolves Jurisdictional Issues in Quantity/Quality Dispute

City of Thornton v. Denver, 44 P.3d 1019 (Colo. 2002), is part of a larger struggle between the City of Thornton and the neighboring upstream municipalities over water quality in the South Platte River. Thornton obtains some of its water from the South Platte downstream from the discharge points of several large metropolitan wastewater treatment plants. Denver and other upstream municipalities have water rights from Colorado's western slope and other water sources that they are allowed to recapture and reuse. *See* Colo. Rev. Stat. §37-82-106. The common method to recapture and reuse this water is by exchange where treated effluent from wastewater treatment plants is discharged to the stream and the reusable component of the effluent is diverted upstream by exchange. The consequence of this practice is that municipal effluent, which is the substitute water supply in the ex-change, comprises a greater percentage of the stream flow available to downstream water users. And it is the resulting change in water quality that concerns the City of Thornton.

This particular case involved Thornton's petition to invoke the retained jurisdiction in Denver's Overland Park augmentation plan. That augmentation plan involves the delivery of effluent to the South Platte several miles upstream from Thornton's diversion points as the substitute water supply in an augmentation plan exchange. As required by Colo. Rev. Stat. §37-92-304(6), the water court retained jurisdiction over the decree to reconsider the question of injury to the vested water rights of others. Thornton petitioned to invoke the retained jurisdiction alleging, among other things, that its water rights were being injured by water quality effects that included increasing concentrations of phosphorous, nitrate, and nitrite, and other harmful types of dissolved organic carbon and microbiological contaminates. Thornton also alleged that the nature and extent of its injury was not fully known when it consented to the entry of the decree. Thus, Thornton requested that the water court either (1) hold a hearing on the necessity to modify the augmentation plan to prevent injury to its water rights, or (2) extend the period of retained jurisdiction until after the same court ruled on common factual questions then pending in other litigation between Thornton and Denver.

The water court, without a hearing, denied Thornton's petition on the grounds that (1) it would frustrate the finality of water court judgments; (2) it would upset the justifiable reliance of the parties on the finality of prior proceedings; and (3) a new understanding of harmful effects of effluent may only be addressed in subsequent applications that implicate such injury. On appeal, the Colorado Supreme Court reversed and remanded the case for a hearing on Thornton's petition.

The core issue in this case is the role of the water court in making water quality determinations. Colorado law has traditionally delegated nearly all authority over water quality matters to the Water Quality Control Commission in the Department of Public Health and the Environment. The Colorado Water Quality Control Act expressly provides, however, that it is not to be interpreted to supersede, abrogate, or impair rights to divert water or to apply water to beneficial use, statutes governing allocation and administration of water rights, or court decrees

concerning the determination and administration of water rights. Colo. Rev. Stat. §25-8-104. Rather, all authority over water quantity, *i.e.*, water rights, has traditionally been delegated to the State Engineer in the Department of Natural Resources. One of the consequences of this divided authority is that a person holding a valid National Pollutant Discharge Elimination System (NPDES) permit is not "injured" by the reduction of stream flows caused by the upstream diversion of water, even though the discharger's cost for wastewater treatment will increase. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 66 (Colo. 1996).

While the Water Quality Control Commission has no authority over water quantity, the State Engineer and Colorado's water courts do have limited authority over water quality. In both plans for augmentation involving exchanges and in independent exchanges, the State Engineer and the water court must ensure that the substitute supply of water provided to downstream senior appropriators is of a quality and continuity to meet the requirements for which the senior appropriator's water has normally been used. Colo. Rev. Stat. §§37-80-120(3), 37-92-305(5).

On appeal, Denver argued that it was the Water Quality Control Commission, not the water court, that determined the adequacy of water quality for Thornton's use. Hence, since Denver's effluent was being discharged pursuant to a valid NPDES permit issued by the Commission, it argued that the water quality was sufficient for Thornton's use. The court did not agree. First, it pointed out that under Colorado's prior appropriations doctrine there is a common law right that prohibits the discharge of contaminants into a stream when doing so makes the water unsuitable for a downstream appropriator's normal use of the water. Second, the Water Quality Control Act's prohibition against the Commission's interference with the water court's role in adjudicating water rights means that the Commission cannot interfere with the water court's duty to determine the suitability of the substitute water supply under Colo. Rev. Stat. §§37-80-120(3) and 37-92-305(5). Third, the Water Quality Control Act expressly reserved to the water court questions of injury to water rights and the remedies for such injury. Thus, the court concluded that since injury occurs to a water right from a substitute water supply of a quality that is no longer suitable for a senior appropriator's normal use, the General Assembly intended that the water court, not the Commission, had authority over the quality of substitute water supplies.

In turning to the water court's denial of Thornton's petition, the court pointed out that once Denver's augmentation plan became operational, the question of operational injury remained open for reconsideration under the retained jurisdiction. The court stated that the augmentation plan decree's determination of non-injury was based upon a prediction made at the time the decree was entered. That prediction did not, however, preclude the court from reconsidering the question of injury once the plan became operational. *See Farmer's Reservoir & Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799 (Colo. 2001). The court also pointed out that it was the unsuitability of the substitute water supply, not Thornton's knowledge of the possible health consequences of its use, that triggered the retained jurisdiction. Since Thornton's petition contained sufficient allegations that the substitute water supply was unsuitable for its use, the water court was required to hold a hearing on the petition with Thornton bearing the burden of going forward to establish its claim of injury, or to extend the period of retained jurisdiction until the common questions of fact were resolved in the other litigation between the parties.

NEW MEXICO

Timothy De Young, Reporter

Endangered Species Threaten Water Deliveries in New Mexico

In the throes of an extreme drought, the managers of the fabled Rio Grande have started a new chapter in their continuing struggle to protect endangered species and meet increasing demand for the beneficial consumptive use of water. On April 19, 2002, Federal District Judge James A. Parker gave the Bureau of Reclamation (Reclamation) discretion that it did not want to save the Rio Grande Silvery Minnow and the Southwestern Willow Fly Catcher from extinction. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RLP ACE (D.N.M Apr. 19, 2002). The memorandum opinion and order affirm a final biological opinion (BO) issued by the U.S. Fish and Wildlife Service (FWS) after consultation with the Bureau of Reclamation and the U.S. Army Corps of Engineers (the Corps), but also rule that the federal agencies should have considered the possible use of Rio Grande Project water and water imported via the San Juan Chama Project. The latter part of the decision has triggered an immediate request for stay pending appeal filed jointly by the State of New Mexico, the Middle Rio Grande Conservancy District (MRGCD), and the City of Albuquerque. An appeal by one or more of the involved federal agencies also is possible. This controversial decision has been front page news especially after an announcement by Reclamation that it might have to drain Cochiti Lake, the nearest recreational lake to Albuquerque, in order to release adequate flows for the silvery minnow. Moreover, the MRGCD predicts it will use its available supplies by the end of June and will need to curtail irrigation deliveries unless additional water is found.

Although the silvery minnow was listed as endangered in 1994, this case was not filed until 1999 when a consortium of environmental and conservation non-profit organizations, led by in-house counsel for the Land and Water Fund of the Rockies, challenged the alleged failure of Reclamation and the Corps to consult fully with FWS on a broad range of discretionary water alternatives to protect the minnow and the riparian habitat of the flycatcher. Intervention by several parties, including the State of New Mexico, the MRGCD, the City of Albuquerque, and other parties was allowed. Extended efforts to reach a mediated settlement failed to resolve the case but led to a Conservation Water Agreement between the United States and New Mexico to release additional waters to benefit the minnow and provide incidental take coverage to all New Mexico water users in the Middle Rio Grande. Reclamation also entered into a separate agreement with MRGCD (the MRGCD Agreement) whereby the district promised to return 50% of the water delivered by Reclamation to the river and assist the federal agencies in the development of fish passages and related measures. Shortly before a scheduled hearing on the merits in June 2001, FWS issued the final BO which essentially incorporated the terms of the Conservation Water Agreement and the MRGCD Agreement into a reasonable and prudent alternative (RPA). Plaintiffs were granted leave to file a second amended complaint to attack the final BO under the standard applicable to final agency action while continuing to challenge the scope of consultation. A hearing on the merits was held in November 2001.

To understand the order, a brief background is required. In 1994, the FWS found that the silvery minnow, a small and previously abundant fish throughout the Rio Grande, now is confined to a 170-mile stretch from Cochiti Dam downstream to the headwaters of Elephant Butte Lake. This portion of the river is divided into three sections by bank-to-bank diversion structures operated by the MRGCD. Initially, Reclamation had proposed taking no discretionary actions with respect to the three diversion dams on the grounds that it did not hold title to them.

During the litigation, Reclamation changed its position and claimed ownership prompting a quiet title action cross-claim by the MRGCD that has not been resolved.

The final BO finds that the water operations of Reclamation and the Corps are likely to jeopardize the continued existence of the silvery minnow but that a single RPA will avoid jeopardy. Plaintiffs first challenged the RPA on the grounds that it was contrary to the best available scientific evidence. Substantively, Plaintiffs alleged the RPA was based on pragmatic, rather than scientific, factors because Reclamation and the Corps determined they had no discretion to order the release of more water than was made available by the State via the Conservation Water Agreement, even though this amount would result in massive river drying in dry years. The court denied this challenge by ruling that legally, FWS is only required to use the best scientific data, but is not required to choose the best or most effective RPA to avoid jeopardy. The court observed that the consultation is a dynamic, ever-evolving process which will be reinitiated in a drought year such as 2002.

The most controversial part of the decision concerns the scope of federal agency discretion. Plaintiffs alleged that Reclamation and the Corps, in their consultations with FWS, should have considered limiting water deliveries to the MRGCD under the Middle Rio Grande Project, altering water deliveries and operations to federal contractors under an interbasin diversion project, the San Juan Chama Project, and deviating from normal operations on several of the Corps reservoirs. After first ruling that this issue was not rendered moot by issuance of the final BO, the court rejected MRGCD's claim that the court could not decide the consultation claim until after the question of title to project facilities was decided, based on its reading of the federal Quiet Title Act which vests "possession or control" with the United States until 60 days after final resolution of title claims. 28 U.S.C. §2409a(b). The court then rejected Reclamation's contention that under applicable contracts it did not have discretion to limit water deliveries to the MRGCD. The court based its decision on a number of Ninth Circuit cases--New Mexico is in the Tenth Circuit--especially, *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998). That court found that a boilerplate shortage provision in the applicable contract and Reclamation's statutory duty to limit MRGCD's diversions to amounts reasonably needed for beneficial use provided discretion to limit deliveries. The court held that Reclamation erroneously and improperly omitted its discretion to limit deliveries during the consideration of possible solutions.

The court also found Reclamation has discretion to limit deliveries of San Juan Chama water. The San Juan Chama Project allows the importation of up to 110,000 acre-feet per year from the San Juan River basin for "beneficial consumptive use" in the Rio Grande basin. About one half of that amount is contracted for delivery to the City of Albuquerque. Although Albuquerque historically has relied upon groundwater, it is in the process of building a multimillion dollar project to divert surface waters from the Rio Grande. The second largest recipient of San Juan Chama water is the MRGCD, which is entitled to 20,900 acre-feet per year for supplemental irrigation. Plaintiffs cited two "shortage" or "scarcity" provisions and one provision that reduced contractors' costs to reflect a higher proportion of water used for fish and wildlife and recreation needs as providing sufficient discretion to Reclamation. The court agreed. Pursuant to these provisions, Reclamation has the discretion to consider reallocating water from the San Juan Chama contractors to address the needs of endangered species. The court also rejected arguments that using San Juan Chama water would violate interstate compacts that require the San Juan Chama water to be applied to "beneficial consumptive use."

Although Reclamation has discretion to use MRGCD or San Juan Chama water to protect the silvery minnow, the court stressed that this is not to say that Reclamation must use the water.

The court acknowledged that it is certainly advisable for Reclamation to seek water elsewhere in order to avoid economic damage to the State of New Mexico. In addition, the court suggested that the federal government may consider compensating the contractors for delivering them less water. Interestingly, the court ruled that the statutory provisions governing the Corps water storage facilities, unlike the Reclamation contracts, do not give the Corps sufficient discretion to alter operations under the consultation requirements of the Endangered Species Act.

As this article goes to press, the deadline for filing appeals has not yet occurred. However, the City of Albuquerque already has filed a notice of appeal and appeals from the State and the MRGCD are expected particularly on the issue of the scope of federal agency discretion. If the drought continues, the Rio Grande is likely to be confronted with a situation not unlike the recent conflict in Oregon's Klamath River Valley. Interestingly, Judge Parker cites *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir.), *cert. denied*, 531 U.S. 812 (2000) as support for his conclusion that Reclamation has discretion to limit water deliveries to contractors for the protection of endangered species.

Note: The reporter represents two *amici* in the reported case--the Albuquerque Economic Forum and the New Mexico Chapter of the National Association of Industrial and Office Property. These parties jointly filed an *amicus* brief primarily in support of the City of Albuquerque. The views expressed in this article are those of the author only.

ARIZONA

James W. Johnson & Margaret Gallogly, Reporters

Gila River Adjudication Court Precludes Assertion of Certain Water Rights Claims

The Maricopa County Superior Court Judge assigned to the Gila River General Stream Adjudication recently determined that certain water rights claims of the Gila River Indian Community (Community) and of the United States acting on the Community's behalf are limited or precluded due to prior decrees and judicial decisions. *In re The General Stream Adjudication of All Rights to Use Water in the Gila River System and Source*, Contested Case No. W-1-203 (Amended Order issued Mar. 7, 2002, *nunc pro tunc*). Among the conclusions reached by the court are that the Community and the United States (acting on the Community's behalf): (1) may not claim water rights in the mainstem of the Gila River, including flows from the San Carlos River, except to the extent granted in a 1935 federal district court decree entered in *United States v. Gila Valley Irrigation District*, Globe Equity No. 59 (D. Ariz. 1935); and (2) may not claim water rights in the Salt River system, except to the extent such claims are consistent with a decision by the U.S. Court of Claims (*Gila 236*), affirmed in part by the U.S. Court of Appeals in *Gila River Pima-Maricopa Indian Community v. United States*, 695 F. 2d 559 (Fed. Cir. 1982). This report describes the court's decisions regarding the preclusive effect of *Globe Equity* and *Gila 236*.

Background--Globe Equity. Congress established the Gila River Indian Reservation (Reservation) in 1859. It encompasses a large area of land located immediately south of and adjacent to Phoenix. Due to water diversions by settlers upstream from the Reservation, the federal government attempted to secure water for the Community by acquiring land and by authorizing and constructing the San Carlos Irrigation Project. The United States eventually initiated litigation in 1925 to adjudicate the waters of the Gila River. The litigation concluded in a consent decree entered in 1935 by the federal district court (Globe Equity Decree). Among

other things, the Globe Equity Decree awarded the United States a right to divert 210,000 acre-feet annually from the Gila River on behalf of the Pima and other Indians with a time immemorial priority for the irrigation of approximately 50,000 acres of land within the Reservation anticipated to pass to Indian allottees. These lands were selected because of their arability. At the time, the Reservation consisted of approximately 375,000 acres. The federal government assumed that approximately 325,000 acres of the Reservation would be transferred as surplus lands to non-Indians. Those lands did not pass into non-Indian hands, however, and remain a part of the Reservation today.

In 1974, water rights claimants initiated a general stream adjudication for the Gila River system and source. In the Gila River Adjudication, the court is addressing water rights claims to water within the Gila River and its various tributaries including the Salt, Verde, Agua Fria, Upper Santa Cruz, and San Pedro Rivers. Both the United States and the Community filed claims in the Gila River Adjudication. The federal claim, as trustee, asserts a right to over 1.7 million acre-feet annually and an unquantified storage right from the Gila River and tributaries not adjudicated in the Globe Equity Decree. The Community filed claims asserting water rights of almost 1.6 million acre-feet annually for irrigation and other uses, 205,000 acre-feet annually for hydro-power production, 267,000 acre-feet annually for storage, as well as groundwater uses. These claims represent the largest and most senior claims in the Gila River Adjudication.

Motions for Summary Judgment based on Globe Equity. Several claimants in the Gila River Adjudication filed two motions for partial summary judgment against the Community and the United States. The moving parties argued that the doctrine of *res judicata* requires that the court recognize the Globe Equity Decree as resolving all of the claims of the Community and the United States, acting on the Community's behalf, to water in the Gila River for use on the Reservation. Under federal law, the doctrine of *res judicata* provides that, when a final judgment has been entered addressing the merits of a case, the judgment is final as to the claim in controversy and conclusive for the parties to the case and those in privity with the parties to the case. The Community and the United States countered that the Globe Equity Decree, as a consent decree and not a final decision rendered by a court after an evidentiary hearing, cannot serve as a *res judicata* bar. They also argued that the moving parties had not established the elements of a *res judicata* defense and that there were material facts in dispute that precluded summary judgment. These motions were heard by the Special Master for the Gila River Adjudication, who filed his Special Reports on June 30, 2000, and December 28, 2000, recommending decisions on this issue and others raised by the moving parties.

Decision as to Res Judicata Effect of Globe Equity Decree. After first determining that the court had jurisdiction to consider the validity and preclusive effect of the federal judgment entered in the Globe Equity Decree, the court then considered whether the doctrine of *res judicata* applies so as to bar the additional water rights claims to the Gila River asserted by the Community and the United States. The court concluded that *res judicata* applied and neither the Community nor the United States, acting on behalf of the Community, "shall be entitled to claim water rights relating to the mainstem of the Gila River, including flow from the San Carlos River, except to the extent such rights were granted to them by the Globe Equity Decree." Amended Order, Mar. 7, 2002, at 25.

Application to Consent Decrees. In reaching its conclusion, the court first addressed the argument raised by the Community and the federal government that the doctrine of *res judicata* is not applicable to a consent decree such as the Globe Equity Decree. The Special Master had concluded that a consent decree could have preclusive effect, if the other requirements of *res*

judicata are met. The Adjudication Court agreed with the Special Master and rejected the argument that issue and claim preclusion require that the matters in dispute be resolved through a decision rendered after an evidentiary hearing. Instead, the court determined, based on the applicable case law, that "decrees entered by stipulation are to be treated as any other judgments." Amended Order, Mar. 7, 2002, at 11. In reaching this decision, the court relied on two Supreme Court decisions in water adjudication matters--*Nevada v. United States*, 463 U.S. 110 (1983) and *Arizona v. California*, 530 U.S. 392 (2000). In both of these cases, the Supreme Court distinguished between claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). The Supreme Court recognized that a water rights decree may have a claim-preclusive effect, but not an issue-preclusive effect, unless the parties clearly so intend.

Same Cause of Action. The court next considered whether the moving parties had established the elements of *res judicata*--namely, whether the "cause of action" in the present case and the prior case are the same; whether the parties to the current action are the same as the parties in the prior action; or in privity with them.

To determine whether the causes of action are the same, the court was guided by the factors applied by the U.S. Supreme Court in the *Nevada* case. The Supreme Court in that case considered primarily three factors in determining whether causes of action are the same in the *res judicata* context: the relief sought in the original action, the language of the decree resulting from the original action, and the relief sought in the second action. The Adjudication Court concluded that the United States in *Globe Equity* intended a broad assertion of the Community's water rights, and the Globe Equity Decree was intended to resolve the parties' relative water rights in the Gila River. The Adjudication Court decided that the Community's water rights claims in the Gila River Adjudication, as they pertain to the segment of the Gila River that was the subject of *Globe Equity*, constitute the same cause of action that was resolved in the Globe Equity Decree. Therefore, the first requirement for *res judicata* was satisfied. On this issue, the Adjudication Court agreed with the conclusions of the Special Master.

In reaching its conclusion on the same cause of action question, the court addressed two arguments raised by the Community. The first argument was that *Globe Equity* was not comprehensive enough to support *res judicata*. The court opined that the amended complaint filed by the United States in *Globe Equity* "sought to determine the rights to all those known to have water claims to the portion of the Gila River at issue." Amended Order, Mar. 7, 2002, at 16. The scope of the undertaking in *Globe Equity* was sufficiently broad to support *res judicata*. The second argument by the Community was that the court limit the *res judicata* preclusion to the 50,000 acres of allotted lands for which water rights were granted in the Globe Equity Decree. If the court were to so limit the *res judicata* preclusion, the Community would be able to pursue water rights claims as to the approximately 325,000 acres of surplus lands that were not granted water rights in the Globe Equity Decree. In effect, the Community argued that the United States never made a water rights claim as to the surplus lands, and such a claim was not part of the "cause of action" in *Globe Equity*. Although it expressed sympathy for the Community's position, the Adjudication Court did not accept this argument. The court again expressed the view that, in *Globe Equity*, the United States placed at issue the entire water right claim of the Community to the mainstem of the Gila River. Citing the constraints placed on it by the U.S. Supreme Court's decision in the *Nevada* case, the Adjudication Court concluded that *res judicata* prevented relitigation of the water rights of the surplus lands to the mainstem of the Gila River.

Same Parties. The court next addressed the mutuality requirement of the *res judicata* doctrine. For *res judicata* to apply, the law generally requires that the parties be identical in both

actions, or that there be privity with parties to the original action. In this case, only a few of the claimants in the Gila River Adjudication were represented in *Globe Equity*, or in privity with parties to that case, and thereby entitled to assert preclusion based on *res judicata*. The question was whether the non-parties could also rely on *res judicata* to preclude additional water rights claims by the Community.

The Special Master concluded that the non-parties could not rely on the principle of *res judicata* to preclude the claims made by the Community and the United States. However, the Special Master asserted that, as to the 50,000 acres of allotted lands only, non-parties could rely on the doctrine of collateral estoppel to preclude water rights claims in addition to those granted in the *Globe Equity* Decree.

The Adjudication Court respectfully disagreed with the Special Master on the extent to which subsequent water rights claimants may rely on *res judicata* to preclude the additional claims of the Community, even though they were not parties to *Globe Equity* and not in privity with parties to *Globe Equity*. The court noted that the U.S. Supreme Court in the *Nevada* case created an exception to the mutuality requirement of *res judicata* where there is a comprehensive determination of water rights, and subsequent appropriators had relied on the determination such that it would be manifestly unjust not to apply *res judicata*. In applying these standards, the court determined, first, that there was no genuine dispute from the facts on record that *Globe Equity* was a comprehensive water rights determination. The court next took judicial notice that subsequent appropriators have relied on the *Globe Equity* Decree sufficient to satisfy the mutuality exception created in the *Nevada* case. Subsequent water rights claimants, who were not parties in *Globe Equity*, or successors to or in privity with a party in *Globe Equity*, could assert *res judicata* against the Community and the United States.

Background--Salt River System. In 1951, the Community filed a petition before the Indian Claims Commission, asserting among other things monetary claims against the United States concerning the Salt River. The Salt River is a tributary of the Gila River. Its historic course cuts through the center of the Phoenix metropolitan area. In its petition, the Community claimed that it was entitled to compensation from the United States for Salt River water that should have been used on the Reservation, but was instead used for other purposes. In particular, the Community claimed that 113,498 acres of the Reservation were irrigable from the Salt River, and sought compensation from the United States for approximately 550,000 acre-feet of water. The Indian Claims Commission held a trial in December 1974, for the purpose of establishing what water rights the Community had in the Salt River for the irrigation of Reservation lands. The Indian Claims Commission expired by statute in 1978, before it issued a decision regarding the Community's rights to the Salt River, and the Commission's incomplete work was transferred to the U.S. Court of Claims. In 1981, the U.S. Court of Claims issued its decision that the Community had failed to establish any entitlement to Salt River water that would entitle it to monetary compensation from the United States. *Gila River Pima-Maricopa Indian Community v. United States*, No. 236-D (Ct. Cl. Sept. 28, 1981). The U.S. Court of Appeals affirmed this decision for the most part, except that it noted that the trial court recognized that 1,490 acres of Reservation land located in the far northwest of the Reservation (Maricopa Colony) had a water right entitlement to the Salt River based on a prior decree. The court of appeals remanded the matter for consideration of damages due to the deprivation of water rights appurtenant to the Maricopa Colony. The matter then lay dormant for a number of years. Finally, in April 1999, the federal government and the Community reached a \$7 million settlement, and a judgment in that amount was entered by the Court of Claims.

Motion for Summary Judgment based on *Gila 236*. The City of Tempe and the Salt River Project filed a motion for summary judgment arguing that the issue of whether the Community and the United States have a claim in the Salt River System was determined by the Court of Claims in *Gila 236* and affirmed by the court of appeals. Based on collateral, judicial, and statutory estoppel, the moving parties argued that the Community and the United States are precluded from asserting a right to water in the Salt River, except with respect to the Maricopa Colony, as such a claim would be inconsistent with the decision rendered in *Gila 236*. The Community and the federal government objected to the motion on the grounds that decisions such as *Gila 236* are not to be given preclusive effect, and the moving parties did not satisfy the requirements for precluding the water rights claims based on the asserted grounds.

Decision as to Preclusive Effect of *Gila 236*. Based on the doctrine of collateral estoppel, the Adjudication Court concluded that the Community may not assert any claim in the Gila River Adjudication that is inconsistent with the judgment of the Court of Claims in *Gila 236*. Although it determined that the United States was not subject to collateral estoppel, the Adjudication Court likewise concluded that the United States could not assert a claim to water in the Salt River inconsistent with the *Gila 236* decision based on the principle of judicial estoppel.

Identical Issue Actually Decided. In considering whether collateral estoppel was appropriate, the Adjudication Court examined the issue decided in *Gila 236* and concluded that the issue decided in that case is the same as the issue presented by the water rights claims made to the Salt River by the Community in the Gila River Adjudication. "The *Gila 236* decision directly addressed and unambiguously declared the land for which [the Community] may claim Salt River water rights." Amended Order, Mar. 7, 2002, at 28-29. The Adjudication Court rejected the argument that collateral estoppel does not apply to consent judgments such as the judgment the parties stipulated to in *Gila 236*. The court pointed out that the parties actually litigated the issue as to the extent of the Community's Salt River water rights. That the parties later stipulated to the amount of damages was irrelevant. The court thus agreed with the Special Master's recommendation that collateral estoppel precluded the Community from asserting a water rights claim inconsistent with the decision in *Gila 236*.

United States Not Collaterally Estopped. The court next considered the argument of whether the United States may be collaterally estopped from asserting a water rights claim inconsistent with the decision in *Gila 236*. The United States asserted that, based on the U.S. Supreme Court decision in *United States v. Mendoza*, 464 U.S. 154 (1984), collateral estoppel against the United States requires mutuality. Therefore, the United States argued, the use of the collateral estoppel argument by the City of Tempe or the Salt River Project, which were not parties to *Gila 236*, was improper. In considering this question, the Special Master concluded that an exception should be made to the general rule stated in *Mendoza* due to the nature of the action and the reliance by a large number of parties on the *Gila 236* decision. The Adjudication Court disagreed with the Special Master and concluded that it was bound by the *Mendoza* decision. Thus, the doctrine of collateral estoppel could not be used by the moving parties to preclude the United States from asserting water rights in the Salt River on behalf of the Community.

Judicial Estoppel. The Adjudication Court next considered whether judicial estoppel applied so as to preclude the United States from asserting a claim to the Salt River inconsistent with its position in *Gila 236*. Under Arizona law as expressed by the Arizona Supreme Court in *State v. Towery*, 186 Ariz. 480, 920 P.2d 290 (1996), the use of judicial estoppel requires the satisfaction of three elements--the parties to the current action must be the same as in the prior action; the question involved in the current action must be the same as in the prior action; and the party

asserting the inconsistent position must have prevailed in the prior action. The Adjudication Court had no difficulty in finding that the second two elements were satisfied. The court determined that the issue under consideration in the Gila River Adjudication is the Community's entitlement to water in the Salt River, which was the same issue presented in *Gila 236*. It further determined that the United States was the prevailing party in *Gila 236*, having successfully presented its position that water from the Salt River was not generally reserved to the Reservation. In the Gila River Adjudication, however, the United States was asserting a contrary position that water in the Salt River was reserved to the Reservation. The court concluded that the mutuality element (the first element noted above) was the only component of judicial estoppel that might bar preclusion of the claim.

The moving parties argued that the mutuality requirement stated in *Towery* was dictum that should not prevent the application of judicial estoppel in this case. After considering the history of Arizona's judicial estoppel doctrine, the Adjudication Court agreed that the Arizona Supreme Court has not substantively examined whether mutuality was a necessity in a finding of judicial estoppel. The Adjudication Court then relied on an Arizona Court of Appeals decision that did decide that parties could assert judicial estoppel, even when the asserting party was not involved in the original litigation. The Adjudication Court also looked to the Arizona Supreme Court's formulation of the fundamental purposes of judicial estoppel--to protect the judicial process and to prevent a party from using the courts to gain an unfair advantage. The Adjudication Court determined that it "cannot comprehend how mutuality aids in preventing the wrong judicial estoppel is designed to prevent. To the contrary, such a requirement could aid a party in obtaining an unfair advantage in litigation or blemishing the integrity that is so important to maintaining public confidence in our judicial process." Amended Order, Mar. 7, 2002 at 35. The court concluded that the United States was barred from asserting claims to the Salt River on behalf of the Community that were inconsistent with the decision rendered in *Gila 236*.

The court's Amended Order, the June 30, 2000, Report of the Special Master, and the December 28, 2000, Second Report of the Special Master may be accessed on the website for the Gila River Adjudication at www.supreme.state.az.us/wm/Gila.htm.

CALIFORNIA

Ronald B. Robie, Reporter

Water Transfer Stalled by Defective Environmental Impact Report

The State Department of Water Resources' attempt to transfer up to 130,000 acre-feet of water from agricultural users to urban users of water from the State Water Project received another setback in *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 95 Cal. App. 4th 1373 (Ct. App. 2002).

In 1999 the Castaic Lake Water Agency purchased 41,000 acre-feet of state water from the Kern County Water Agency. Before completing the purchase, an environmental impact report (EIR) was required under the California Environmental Quality Act (CEQA). Cal. Pub. Res. Code §21000-21178.1. Such transfers had been authorized by the so-called "Monterey Agreement," a series of State Water Project Contract amendments executed in 1995.

Under Cal. Pub. Res. Code §21094, this Castaic Lake EIR was a tiered one. Under the tiering concept, the EIR on the 1995 Monterey Agreement dealt only with "general matters" and did not deal with the details of site-specific proposed transfers. These were left to subsequent EIRs on specific transfer contracts, which would then incorporate the first EIR by reference.

In this case challenging the transfer, the Court of Appeal for the Second Appellate District held that the Castaic Lake transfer was based upon the 1995 contract authorizing such agreements. The problem, however, was that while this litigation was pending, the EIR prepared on the 1995 Monterey Agreement was ruled inadequate and decertified by the Court of Appeal for the Third Appellate District in *Planning & Conservation League v. Department of Water Resources*, 83 Cal. App. 4th 892 (Ct. App. 2002). See this *Newsletter*, Vol. XXXIII, No. 3 (2000) at 6. Thus, said the court in the *Castaic Lake* case, its EIR was de-fective and its certification had to be vacated.

Joinder Rules do not Bar Challenge to Environmental Impact Report

The Court of Appeal for the Third Appellate District issued another important decision involving CEQA and water contracts in *Deltakeeper v. Oakdale Irrigation District*, 94 Cal. App. 4th 1092 (Ct. App. 2002). In this case the Oakdale and South San Joaquin Irrigation Districts contracted to sell water from the Stanislaus River to the Stockton East Water District. The City of Stockton, the California Water Service Company, and two small maintenance districts were also parties to the agreement and were the ultimate users of the water. In a separate agreement they de-designated Stockton East to carry out their obligations under the agreement with Oakdale and South San Joaquin, including the control of litigation involving the agreement.

In this lawsuit several environmental groups opposed to the purchase agreement brought a writ mandate challenging the EIR. They named Oakdale and South San Joaquin as respondents and Stockton East as real party in interest. The City and the two maintenance districts were not named as parties. The trial court dismissed the writ pursuant to Cal. Civ. Proc. Code § 389 on the ground plaintiffs failed to join indispensable parties--the City and the maintenance districts. At the time the short (30-day) statute of limitations period had expired and they could not be joined. It is a common practice to challenge such writs on the basis of joinder of parties. The law was unclear whether joinder in CEQA challenges was different than general application of joinder principles.

The court of appeal reversed the trial court, basing its holding largely on the fact that CEQA, the "heart" of which is the EIR, should be interpreted in a manner "as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." 94 Cal. App. 4th at 1094. The court referred to the agreement between Stockton East, the City, and the maintenance districts granting Stockton East control of litigation and concluded the interests of the nonjoined parties "were adequately protected by the parties to the action." *Id.* at 1107.

Holding that no single factor is determinative of whether a dismissal for failure to join parties is an abuse of discretion, the court set out four factors to consider: (1) Is the judgment prejudicial to parties or non-parties? (2) Are there measures by which prejudice can be lessened or avoided? (3) Will the judgment rendered be adequate? (4) Will the plaintiff have an adequate remedy if the action is dismissed?

After weighing these factors, the court concluded that Cal. Civ. Proc. Code § 389 should not be converted from a rule of fairness "into an arbitrary and burdensome requirement which may thwart rather than accomplish justice[,] . . . [and] we cannot say in equity and good conscience that this action should be dismissed." 94 Cal. App. 4th at 1105 & 1109.

COLORADO

William A. Paddock & Mary Mead Hammond, Reporters

Instream Water Rights

The spring of 2002 finds Colorado, and indeed much of the Southwest, in the grip of the worst drought in more than one hundred years. Snow melt run-off is the primary source of Colorado's stream flows. What looked in late March to be a dry year, with below-average snow pack, became unprecedented drought when the snow pack literally evaporated in April. Colorado's last severe drought, and the previous dry year of record for much of the state, was in 1977, and the records for low flow set in that year are being rapidly eclipsed in 2002. Between 1977 and the present, an entire generation of Coloradans has grown up, and countless thousands of people have moved to Colorado, without experiencing a real drought. So, it is no little irony that 2002 finds Colorado water users mired in controversy over instream flow water rights.

Traditionally, the acquisition of instream flow water rights to preserve the natural environment to a reasonable degree was the exclusive province of the Colorado Water Conservation Board (CWCB). The first breach in this monopoly came in *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992). There, the Colorado Supreme Court approved an in-channel recreational water right claimed by the City of Fort Collins. The court found that by means of a "Nature Dam" that diverted water into an old channel of the Cache la Poudre River, the City had controlled the water in its natural course by a structure or device and applied it to a beneficial use.

It was not long before other municipalities began filing applications for kayak courses on the streams flowing through their towns. One such application resulted in an in-channel water right for 1,000 cubic feet per second (c.f.s.) on Clear Creek to enable kayakers to "boot and splat" their way through the City of Golden. That case is now on appeal to the Colorado Supreme Court and the decision should provide some guidance on the permissible extent of such rights.

Sensing the potential for chaos, in 2001 the Colorado General Assembly moved tentatively to place some sideboards on such applications. In Senate Bill 216, 2001 Colo. Sess. Laws 1187, the General Assembly sanctioned the adjudication of recreational in-channel diversion (RICD) water rights, but limited the class of appropriators to counties, municipalities, water districts, water conservancy districts, and water conservation districts. The law defines a "recreational in-channel diversion" as a minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures to provide a "reasonable recreation experience in and on the water." Colo. Rev. Stat. §37-92-103(10.3).

Once such an application is filed, the applicant must submit a copy to the CWCB for its review and recommendations. Colo. Rev. Stat. §37-92-305(16). The CWCB is then required to make findings and recommendations as to whether the application should be granted. In so doing, it must consider *inter alia* (1) whether the RICD would impair Colorado's ability to fully develop its interstate compact entitlements; (2) whether the RICD would promote maximum beneficial use of water; (3) access to the stream for recreational use; and (4) other factors contained in the CWCB's RICD rules and regulations. Colo. Rev. Stat. §37-92-102(5). In the water court, the CWCB's findings of fact are presumptive as to such facts, subject to rebuttal by any party. Colo. Rev. Stat. §37-92-305(13).

In December of 2001, both the City of Longmont and the City of Pueblo filed RICD applications. The City of Pueblo's application will be heard by the CWCB this summer. Once the CWCB issues its findings of facts and recommendations, the application will presumably proceed to trial in the Water Division No. 2 Water Court. Meanwhile, a decision in the appeal of the City of Golden's kayak course case should be made late this year or early in 2003. Both these cases should begin to "flesh out" the contours of these recreational water rights.

In the meantime, the push for instream flow water rights continues unabated. In 2002, Senate Bill 156 was introduced to permit private entities to acquire instream flow water rights and convert existing water rights to instream flow use. When the annual legislative session finally ground to a halt in early May, Senate Bill 156 had shed many of its most ambitious goals and instead authorized the CWCB to accept donations of water rights and to convert those water rights to instream flow water rights. Colo. Rev. Stat. §37-92-103(3). The bill also relaxed the former requirement of the law that instream flows be limited to the mini-mum amount required to preserve the natural environment to a reasonable degree. Now, the CWCB may obtain instream flow water in an amount to preserve or improve the natural environment to a reasonable degree. *Id.*

New Law Grants State Engineer Limited Authority to Approve Substitute Water Supply Plans

In *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2002), the Colorado Supreme Court held that the State Engineer did not have the authority to approve out-of-priority depletions of water pursuant to the temporary substitute supply plan statute. Colo. Rev. Stat. §37-80-120. A number of water-user organizations had become dependent upon the annual approval of temporary substitute supply plans in lieu of a court-decreed plan for augmentation to replace out-of-priority depletions. Accordingly, in the wake of the *Empire Lodge* decision, the General Assembly was persuaded to enact H.B. 1414. That bill grants to the State Engineer limited authority to approve substitute supply plans, including replacement of out-of-priority depletions, while incorporating a notice provision so that other water users can both learn of the request for substitute supply plans and be advised of the State Engineer's decisions on those plans.

For existing substitute supply plans, approved by the State Engineer prior to January 1, 2002, H.B. 1414 grants the State Engineer authority to approve one renewal of such plans on substantially the same terms as those contained in the previous plan. Any such renewals may not extend past December 31, 2002, and thereafter, any such plans must comply with the remaining provisions of H.B. 1414.

New substitute supply plan applications filed on or after January 1, 2002, may only be approved by the State Engineer if the applicant has also filed an application for approval of a plan of augmentation with the water court and the water court has not issued a decree. In that circumstance, the State Engineer may approve a temporary substitute supply plan after the applicant has provided written notice of request of the substitute supply plan to all parties who filed a statement of opposition to the application in the water court, and after the State Engineer has given the opposers in the water court case an opportunity to file comments on the substitute water supply plan application. The State Engineer may approve an application subject to terms and conditions that prevent injury to other vested water rights. In making his determination, the State Engineer is not required to conduct formal hearings, but may do so if he finds it to be helpful.

Substitute supply plans approved under this procedure are valid for only one year. If an applicant requests successive renewals of a plan that would result in extending it past three years from the initial date of approval, the applicant must demonstrate to the State Engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue to operate under the substitute supply plan will cause undue hardship. If an applicant seeks successive renewals of a plan that would result in extending it past five years from the date of

initial approval, the applicant must demonstrate to the water judge that the delay in obtaining a decree has been justifiable, and that not being able to continue to operate under the substitute supply plan until a decree is entered will cause undue hardship.

When the State Engineer approves or denies a substitute supply plan, he must provide notice of his decision to all parties to the pending water court case. The State Engineer's approval or denial of the application does not create any presumptions, shift any burdens of proof, or provide a defense in the water court case or any other legal action initiated concerning the substitute supply water plan. Any appeal of the State Engineer's decision on a substitute supply plan must be filed with the water judge within 30 days, and is to be consolidated with the application for approval of the plan for augmentation.

House Bill 1414 also permits the State Engineer to approve substitute supply plans of limited duration where no application for a plan for augmentation has been filed with the water court. This authority is limited to situations where the proposed water use will be for a limited duration, not to exceed five years. To implement this program, the State Engineer is required to establish a publication procedure for limited duration plans. Interested persons may subscribe to the publication, and thereby receive notice of applications for short-term substitute supply plans. Although these plans are for a limited duration, they may not be approved for any more than one year at a time. Once again, the State Engineer must consider the comments filed by any opposer, and impose terms and conditions on the substitute supply plan that ensure no injury to other vested water rights. The State Engineer is not required to conduct formal hearings, but may conduct them if he wishes. Neither the approval nor the denial of the State Engineer creates any presumption or shifts any burden of proof nor serves as a defense in any legal action initiated concerning the substitute supply plan. Any appeal of the State Engineer's decision, however, must be made to the water judge in the applicable water division within 30 days after the decision is rendered. The water judge is then to hear the appeal on an expedited basis.

Finally, H.B. 1414 permits the State Engineer to approve a temporary substitute water supply plan if he determines that the plan is needed to address an emergency situation and the plan will not cause injury to other vested water rights. Such emergency plans cannot operate for more than 90 days, and emergencies are limited to situations involving public health or safety where a substitute water supply plan needs to be implemented more quickly than the other procedures in H.B. 1414 would allow.

The chief benefit of this statute is that it provides, for the first time, notice of temporary substitute plans being approved by the State Engineer, establishes standards for their approval, and limits their duration so that water users cannot circumvent indefinitely public scrutiny of their substitute water supply plan practices in the water court.

Supreme Court Permits Reopening of Water Rights Decrees to Correct Substantive Errors

SL Group, LLC v. Go West Industries, Inc., 42 P.3d 637 (Colo. 2002), addresses what constitutes mistake, inadvertence, or excusable neglect for purposes of reopening a final water rights decree to correct substantive errors. Colorado's water right adjudication procedures rely upon published notice to confer jurisdiction over any person potentially affected by the application. And, "it is an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality that all interested parties be given notice reasonably calculated, under all circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 640. To this end, Colo. Rev. Stat. §37-92-302(3) requires that notice of water rights applications be mailed to everyone the water referee

has reason to believe would be affected. And, to aid in this process, the application must include the name and address of the owner or reputed owner of the land upon which any structure involved in the application is or will be located, upon which the water is or will be stored, and upon which it will be used.

In this case, both parties' predecessor in title had used the Meadow Ditch and its two extensions to irrigate land currently owned by the SL Group, LLC (SL). The water rights for the ditch had been conveyed to SL, but they were decreed abandoned in 1989. *See* Colo. Rev. Stat. §37-92-401. SL, apparently unaware of the abandonment decree, continued to use the ditch to irrigate its land.

In 1998, Go West Industries, Inc. (Go West) applied for a new water right decree for irrigation and stockwatering. The application claimed a 1938 appropriation date, apparently based upon the original construction of the Meadow Ditch and its historical use on SL's land. Go West's application identified the U.S. Forest Service as the owner of the land on which the headgate was located, and identified itself as the owner of the land on which the stock pond was located. The application made no reference to SL, and in 1999, a decree was entered granting the requested water right.

Some time after the decree was entered, SL presumably learned that it no longer had use of the water and filed a motion to correct substantive errors in the decree. Its petition alleged, *inter alia*, that it was entitled to receive notice of the application, that it was not otherwise aware of the application, that it owned the historically-irrigated land, that it had used water from the ditch from long before the abandonment decree to the present, that the stock pond was located on its property, and that it was injured by the decree. The water judge, without hearing, dismissed SL's petition because publication had been proper and SL had failed to show inadvertence, mistake, or excusable neglect. SL appealed, and the Colorado Supreme Court reversed, concluding that under the facts alleged, SL's failure to oppose the application was the result of inadvertence, mistake, or excusable neglect. The decision turns primarily upon the fact that SL, a long-time user of the ditch, and an owner of the land on which the ditch was located, was not identified in the application. What the opinion does not make clear, and what will be troubling to practitioners, is the question of whether each landowner on whose property an existing ditch (or other structure) is located, must be listed in any application involving water rights carried in that structure. Given the vast size of many ditch systems, simply identifying the landowners involved could impose an enormous burden on the water right owner, while providing a welcome boon to local title companies.

Court Construes "Can and Will" Requirement for Conditional Water Rights

In *Mount Emmons Mining Co. v. Crystal Creek Homeowners' Ass'n*, 40 P.3d 1255 (Colo. 2002), the water rights for the massive Aspinall Unit, built as part of the Colorado River Storage Project Act, effectively command the available supply of water in the Gunnison River Basin. In *Board of County Commissioners v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325 (Colo. 2000) (*Arapahoe II*), local water users in the Gunnison River Basin successfully argued that the U.S. Bureau of Reclamation had agreed to subordinate the water rights for the Aspinall Unit to 60,000 acre-feet of new depletions by junior water rights in the basin. The local water users also successfully established that the 60,000 acre-feet subordination would not benefit out-of-basin diversions, such as those proposed by Arapahoe County. In that case, the trial court had also ruled that a contract with the Bureau of Reclamation was required to use any part of the 60,000 acre-feet subordination.

Flushed with this victory, the local water users sought to use this "required contract" provision to stop an unpopular in-basin mining project near Crested Butte, Colorado. The opponents argued that Mount Emmons Mining Company (Mount Emmons), like Arapahoe County, was required to have a water supply contract with the Bureau of Reclamation before it could obtain a conditional water right. The local water users have now learned to their sorrow that "the sword of justice has no scabbard." Joseph de Maistre.

At issue in this case was whether the "can and will" requirement for conditional water rights found in Colo. Rev. Stat. §37-92-305(9)(b) required Mount Emmons to have a contract for a portion of the 60,000 acre-feet subordination. The new water judge, relying upon the former water judge's ruling in *Crystal Creek Homeowners' Ass'n* held that a contract was required before a conditional water right decree could be granted. The supreme court reversed, holding that Mount Emmons need only show that a portion of the 60,000 acre-feet subordination remains unused by in-basin absolute water rights. In so ruling, the court held that its decision in *Arapahoe II* established, as a matter of law, that the 60,000 acre-feet subordination was available for use by in-basin users such as Mount Emmons. Since the water was legally available, the only remaining water availability question under the "can and will" requirement was whether any portion of the 60,000 acre-feet remained unused by absolute water rights. If so, Mount Emmons would have satisfied the water availability requirement for purposes of obtaining a conditional decree.

Expanded Use of Senior Water Rights Prohibited

In *Farmers Reservoir & Irrigation Co. v. City of Golden*, 44 P.3d 241 (Colo. 2002), the second appeal of this case, the Colorado Supreme Court ruled that the City of Golden has impermissibly expanded the use of a very senior surface water right, Priority 12 on Clear Creek, and directed the water court to enter an injunction prohibiting Golden from irrigating more than 225 acres of lawn with the water right, or applying more than 900 acre-feet annually of Priority 12 water for irrigation. The litigation began in 1995 when a coalition of municipal and agricultural water users filed suit against Golden in the water court, seeking a declaratory judgment and injunction restraining Golden from enlarging its use of Clear Creek Priority 12. Golden acquired portions of the right, which was originally decreed for direct flow irrigation use, and changed it to municipal use in two cases in the early 1960s. These decrees required Golden to abandon part of the decreed flow rate, allowed diversion of up to 4.66 c.f.s., and included no express volumetric limitations on diversions or consumptive use.

In 1993, Golden participated as an objector in another change case, this time involving interests in Priority 12 owned by another municipal user. There, Golden characterized its prior Priority 12 changes as "consumptive use" transfers, and indicated that the historical consumptive use of the rights it had changed had been quantified and was about 278 acre-feet per year. In the 1995 lawsuit, the plaintiffs claimed that Golden had enlarged its use. They asserted that volumetric consumptive use limitations were implied in the decrees as a matter of law, and that Golden was estopped to deny them because it had stated what the historical consumptive use volume was in the 1993 change case.

At trial in 1997, the plaintiffs presented evidence of three claims of enlarged use: violation of implied volumetric consumptive use limitations; change of pattern of municipal use of the water, from supplying peak flow demands to meeting base flow needs; and enlargement of lawn acreage irrigated with the changed water rights. The water court dismissed the case, and most of the original plaintiffs appealed to the Colorado Supreme Court. In its 1999 opinion on the first

appeal, *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189 (Colo. 1999), the supreme court held that claim preclusion prohibited the imposition of volumetric limits on the prior Golden change decrees and upheld the dismissal of the plaintiffs' first claim. The supreme court also upheld the water court's factual conclusion that no change in pattern of municipal use had been shown, and its dismissal of the second claim of enlarged use. As to the third claim of enlarged use, the court concluded that the plaintiffs' claims of increased lawn irrigation constituted an allegation of changed circumstances sufficient to defeat Golden's assertion of claim preclusion. Since the water court had made no findings or rulings on the third claim, the court remanded to the water court for further consideration of this claim.

On remand, the water court held that Golden had not impermissibly expanded the use of its Priority 12 water because it had not applied a greater amount of Priority 12 water to lawn irrigation than was anticipated in the 1960s change proceedings. The water court made no ruling, however, with regard to the number of acres of lawn actually irrigated with Priority 12 water, holding instead that whether Golden has increased the acreage of lawn irrigated by Priority 12 "does not address the basic questions regarding Golden's entitlement under the present decree, or the extent to which Golden has exercised its entitlement."

In this second appeal, the Colorado Supreme Court began with a general review of the principles of law governing changes of water rights and prohibiting enlargement of use of water. It reemphasized that the right to change the use of a water right is an important part of the "bundle of sticks" making up a water right, but that it is not absolute. Because the holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time of their appropriations, a change of water right cannot be approved if the change will injuriously affect the vested rights of others. To ensure that this fundamental condition on the right to change a water right is met, a change of use must be (1) accomplished by proper court decree; (2) only for the extent of use contemplated at the time of appropriation; and (3) strictly limited to the extent of former actual usage. Implicit in these precepts is the principle that the change in the use of a water right cannot effect an enlargement in the use of the right. To safeguard junior appropriators' rights to immutable stream conditions in the face of a change from agricultural to municipal use requires that there be "parity in the consumptive use of the right before and after the change--and that this parity endures." 44 P.3d at 246. Accordingly, an enlargement in use subsequent to a change proceeding is a change in circumstance such that claim preclusion based on the change decree does not bar relief.

In addressing whether Golden has impermissibly expanded its use of Priority 12, the court referred to the "striking similarities" between the current case and the "seminal" *John's Flood Ditch* cases from the 1950s. 44 P.2d at 247. In the first *John's Flood* case, water users sued to enjoin enlarged irrigation use of a water right, alleging it was being used to irrigate additional lands. The trial court made no findings on the claim, and the supreme court remanded for such findings. On remand, the trial court found the defendants had not diverted more water, in quantity or time, than historically, and concluded there had been no enlargement of use. On the second appeal, the supreme court reversed and held that continuing to irrigate lands historically irrigated, while also irrigating additional lands under the decrees, effectuated an enlargement of use, and instructed the trial court to enjoin the irrigation of additional lands.

In Golden's case, the court concluded that the testimony and calculations of W.W. "Pete" Wheeler, who performed the engineering for the cases on behalf of Golden, formed the basis for Golden's Priority 12 change decrees, and govern their interpretation. Wheeler's calculations attempted to balance the consumptive use of water by the previous users of the water right with

the amount of water that would be consumed by Golden's municipal use. Therefore, "if Golden is consuming more water today than Wheeler anticipated it would consume, the balance he struck in crafting the flow rate limitations in the '60s decrees has been disrupted, and there has been an enlargement of use that must be enjoined." 44 P.3d at 248. The court accordingly reviewed the 1960s change proceeding to define the limits of Golden's permissible use of Priority 12 water. Based on his testimony, it held that Wheeler's determination that Golden could divert 4.66 c.f.s. was based on calculations and data on how many acres would be irrigated with the changed water, and how much of the changed water would be applied for irrigation. It held that these calculations and data serve "as a limit demarcating permissible from enlarged use." 44 P.3d at 251.

It therefore reversed the water court's conclusion that the number of acres of lawn irrigated with Priority 12 water does not address Golden's entitlement under the decrees. The supreme court determined that a maximum of 225 acres was intended to be irrigated with the changed Priority 12 water, and that Golden has exceeded that acreage and impermissibly enlarged its use of Priority 12 water.

The court also examined whether Golden has enlarged the amount of Priority 12 water applied to irrigation beyond what Wheeler calculated. It disagreed with the water court's conclusion that 36% of allowable May through October diversions, or a maximum of 611 acre-feet, can be applied to irrigation. Instead, it determined that Wheeler anticipated that up to 53% of allowable May through October diversions, or 900 acre-feet, may be so used. The supreme court adopted the water court's conclusion that the percentage of Priority 12 diversions applied to irrigation use is the same, on an annual basis, as the percentage of Golden's total water supply applied to such use, since Wheeler assumed that Priority 12 water would be used in the same way as all other Golden water supply, and it concluded that Golden's irrigation use of Priority 12 has not exceeded 900 acre-feet.

The court held that "Golden may irrigate up to 225 acres of lawn with up to 53% or 900 acre-feet of its Priority 12 entitlement." 44 P.3d at 255. It went on, however:

In holding as we do, we are mindful of the rule that "diversions are limited to an amount sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion." [citation omitted]; "A right to use of water for irrigation is limited in time and volume by the needs of the land and the law reads this limitation into a decree declaring that right." [citation omitted]. "Read into every decree, regardless of its language, is the unquestioned law of this state that an owner of a water priority may use the quantity awarded only when good irrigation usage justifies it, and when the needs of the land are satisfied, the water must no longer be used by him, but must be permitted to flow uninterrupted in the channel of the stream." [citations omitted].

44 P.3d at 255. Since the court found that Golden's recent lawn application rate has averaged 1.78 acre-feet per acre, this language indicates that diversions of 900 acre-feet per year to irrigate 225 acres of lawn (i.e., 4 acre-feet per acre) could be excessive, and may therefore be impermissible.

Landowners' Consent to Groundwater Recharge and Underground Storage Project Not Required

South Park is a broad, wind-swept, and sparsely populated intermountain valley at the headwaters of the South Platte River. After its settlement by the white man, and a brief flirtation with gold mining, it became cattle country comprised of large ranches with vast tracts of irrigated grass lands. During the latter half of the Twentieth Century, the water-hungry Denver metropolitan area began buying up the ranch land, drying up the irrigated pastures, and moving the water rights downstream for municipal use. And to facilitate this water use, a number of large surface reservoirs were built in South Park. More recently, Park County Sportsmen's Ranch (PCSR) and the City of Aurora proposed a groundwater recharge/underground storage project utilizing the aquifer system in a portion of South Park. Essentially, the plan called for the pumping of groundwater to the South Platte for use by Aurora, and the replacement of that groundwater by aquifer recharge during wet years. PCSR did not own all of the land beneath which ground water was to be recharged. This type of conjunctive use project, including lack of ownership of the land beneath which recharge occurs, is not particularly uncommon in Colorado. Nonetheless, PCSR's plan was not at all well received by the citizens of South Park.

The landowners filed a complaint in the district court seeking a declaratory judgment that the placing of water in storage either above or beneath their lands, absent their consent, would constitute a trespass. The case was transferred to the water court where PCSR's water rights application was pending. At the hearing, the water judge found that the landowners had failed to allege that the use, benefit, or enjoyment of their properties would be invaded or compromised by PCSR's underground storage proposal. The water court held that PCSR's project did not require the landowners' consent or condemnation and payment of just compensation because (1) the landowners' property rights do not include ownership of waters tributary to a natural stream; (2) natural streams crossing a person's property may be used, without consent, for the transportation of water by a lawful appropriator; (3) natural streams include the underlying aquifers; (4) water is treated differently from a property owner's traditional rights in land; (5) Colorado's eminent domain law applies only when the water right holder constructs facilities on or in a non-consenting landowner's property; (6) Colorado law encourages the efficient use of the state's scarce water resources; (7) the General Assembly intended to authorize artificial recharge in natural subsurface formations and the conjunctive use of groundwater so recharged, as part of its policy to maximize beneficial use of water; and, (8) the movement of artificially-recharged groundwater into, from, or through land underlying another's property does not constitute a trespass. On appeal the Colorado Supreme Court upheld the decision of the trial court. *Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002).

The landowners' primary argument on appeal was that common-law principles entitled them to control the storage space in aquifers underneath the surface of their lands and grants them a remedy in trespass against migration of PCSR's water laterally into their property. 45 P.3d at 701. The basis for this argument was two very old Colorado decisions stating, in effect, that at common law a grant of land carries with it all that lies beneath the surface down to the center of the earth. Yet, this proposition itself illustrates one of the central difficulties of the landowners' position. Most modern jurisprudence in the United States has moved beyond the strict application of ancient common law rules of property because they are predicated upon a limited understanding of the physical systems involved, and because they do not fit the reality of the world we now live in. This was the position adopted by the court in this case. Relying upon cases from other jurisdictions, the history of development of Colorado water law, and the current understanding of the relationship between surface water and groundwater, the court held that landowners have no property right to require their consent for artificial recharge and the storage

of water in aquifers that extend through their land. *Id.* at 710. In a footnote the court pointed out, however, that an applicant for an underground water storage right could be required to prove that the underground storage would not tortiously interfere with the overlying landowner's use and enjoyment of his property.

The landowners' legal position was made even more difficult because they conceded that the movement beneath their land of water artificially recharged to an aquifer as part of a plan for augmentation did not violate their property rights. Thus, the landowners had to create a meaningful distinction between underground storage and groundwater recharged as part of an augmentation plan. To do so, they argued that Colo. Rev. Stat. §37-92-103(10.5) required that the PCSR construct some type of underground structure to capture, possess, and control the groundwater it recharged into the aquifer system. That statute states:

"Storage" or "store" means the impoundment, possession, and control of water by means of a dam. Waters in underground aquifers are not in storage or stored *except to the extent waters in such aquifers are placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right.* (emphasis added).

The court rejected the landowners' interpretation of this statute, and held instead that the statute's first sentence "describes the typical reservoir, which is a constructed impoundment. The second definition contemplates the artificial recharge of water into the aquifer for 'storage' and describes the circumstances under which a decree may be issued for aquifer storage. Thus, the legislature contemplated a two-step process: that a person will capture, possess, and control water and then artificially recharge it into the aquifer for storage and subsequent use, pursuant to a decreed water right." 45 P.3d at 704. The court also found that the landowners' "distinction ignores both nature's course and the law's course in Colorado." *Id.* at 715.

Water Court Jurisdiction

City of Sterling v. Sterling Irrigation Co., 42 P.3d 72 (Colo. App. 2002) involved the transfer of shares in an irrigation company to a city and the subject matter jurisdiction of the water court to decide related issues.

As Colorado's cities continue to grow, they frequently acquire agricultural water rights to meet their increased water demands. In response, agricultural mutual ditch and reservoir companies have adopted bylaws or changed their articles of incorporation to prevent or control the conversion of their agricultural water rights to other uses. *See, e.g., Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982). For example, here the Sterling Irrigation Company's (Company) bylaws apparently provided that water represented by shares in the Company could not be transferred to lands not previously irrigated absent approval of its board of directors. And, when the City of Sterling (City) purchased Company shares from an irrigator, the Company refused to transfer the shares until the City provided assurances that it was bound by and would comply with the Company's bylaws. The City acknowledged it was bound by the bylaws, but refused to make any assurances about its future use as a condition for transfer of the shares.

The City sued the Company seeking transfer of the shares. The Company counterclaimed for a declaratory judgment that (1) the City was bound by the Company's bylaws; (2) the City could only use the water to irrigate historically-irrigated lands; (3) any transfer of water to other users

required prior approval by the Company's board of directors; and (4) the only permissible use of the Company's water rights are its decreed uses, and the City, as a shareholder, is bound by that decree. Upon motions for summary judgment, the trial court granted the relief requested by each party. The City then filed a motion for relief from judgment asserting the trial court lacked subject matter jurisdiction over the Company's counterclaim. That motion was denied and the City appealed. On appeal the City argued that the Company's counterclaim involved "water matters" within the exclusive subject matter jurisdiction of the water court. *See* Colo. Rev. Stat. §37-92-203(1). The court of appeals agreed with the City and ordered the trial court to dismiss the Company's counterclaims.

The basis for the court's ruling was its conclusion that the Company's counterclaims were, in effect, a request to define limitations on the City's use of its water rights. The court of appeals reasoned that the relief requested by the Company would preclude future judicial review of any denial by the Company of a request by the City to change the place or type of the water rights represented by its shares in the Company. On this basis, the court concluded that the Company's claims involved the City's right to use its water, and thus were water matters within the exclusive jurisdiction of the water court.

NEVADA

Ross E. de Lipkau, Reporter

Ninth Circuit Decides Abandonment and Forfeiture Issues in Long-Running *Alpine* Case

United States v. Alpine Land & Reservoir Co., 279 F.3d 1189 (9th Cir. 2002), is another decision in the seemingly endless *Alpine* actions involving the waters of the Carson River. This decision will probably be known as *Alpine V*. The court commenced its opinion by setting forth a comprehensive review of the several prior district court and Ninth Circuit decisions known as *Alpine I - IV*. In particular, the court reaffirmed those provisions upon which it relied in this decision.

In *Alpine IV*, *United States v. Alpine*, 27 F. Supp. 2d 1230 (D. Nev. 1998), the subject of this appeal, the district court:

- (1) Affirmed the State Engineer's conclusion that a re-buttable presumption does not arise under Nevada law based upon a showing of prolonged non-use;
- (2) Held that the payment of taxes and assessments is a circumstance that should be taken into account regarding intent to abandon;
- (3) Reversed a State Engineer's finding "that the landowners could not have formed a requisite intent to abandon water rights given that they did not know they owned the water rights until after 1983";
- (4) Held that a prolonged period of non-use on a particular parcel of real property, together with an improvement that precludes irrigation, demonstrates abandonment; and
- (5) Held that the State Engineer did not err in concluding, as a matter of equity, that water rights subject to interfarm transfers within the Newlands Reclamation Project will not be deemed to have been forfeited or abandoned.

The Ninth Circuit decided the following issues:

- (1) Regarding the standard of review, the court affirmed prior rulings, saying: "A reviewing court will uphold the engineer's factual findings if supported by substantial evidence and his legal conclusions so long as they are not contrary to law." 279 F.3d at 1198.
- (2) Regarding forfeiture and abandonment, the Ninth Circuit again ruled: "[A]lthough a prolonged period of non-use may raise an inference of intent to abandon, it does not create a rebuttable presumption [A]bandonment is to be determined 'from all the surrounding circumstances,' ... includ[ing] the payment of assessments and taxes." *Id.* at 1189.
- (3) Regarding priority, the Ninth Circuit again asserted that priority occurs when the landowner took the first affirmative steps to appropriate water. This is so even in light of the fact that the United States commenced the Newlands Reclamation Project in 1902, reserving water with that priority for the subsequent patentees. This position was affirmed in *United States v. Orr Water Ditch Co.* (commonly known as the *Fernley* case), 256 F.3d 935 (9th Cir. 2001), even though the Orr Ditch Decree, *United States v. Orr Ditch*, Equity No. A-3 (D. Nev. 1944), specifically set forth a 1902 priority for the United States, the water to be used within the Newlands Reclamation Project.
- (4) Regarding the issue of equitable relief from forfeiture and/or abandonment of rights subject to interfarm transfers, the court reversed the district court's holding of a blanket exemption. An interfarm transfer occurs, for example, if a farmer received a patent to 160 acres, but received a contract for 80 acres of water rights. The place of use of the original 80 water right acres was set forth in the contract. Over the years, with knowledge of the United States and Truckee-Carson Irrigation District (TCID), the various farmers moved their water right acres around, but within their patented lands, to irrigate their best lands. The Pyramid Lake Tribe called for forfeiture and/or abandonment of such rights if the place of use differed from the original. Under Nevada law, water rights with a priority after 1913 may be lost by forfeiture; while those rights initiated prior to 1913 may be lost only by abandonment. Abandonment requires intent, a much harder burden to prove than a continuous five-year period of non-use. On this point, the court said:

On remand, the district court is instructed to make factual findings, or to remand to the Engineer to do so, in order to determine whether each individual landowner had the requisite intent to abandon in light of the factors noted in the district court's opinion. At a minimum, proof of continuous use of the water right should be required to support a finding of lack of intent to abandon. In addition, each landowner should be required to present evidence that he or she attempted unsuccessfully to file for a change in place of use, or at least inquired about the possibility of a transfer and was told by the government or TCID that such transfer was not permitted.

Although the court refused to recognize a blanket exemption where interfarm transfers have occurred, it concluded that "equity may be appropriate on a case-by-case basis in the forfeiture context if a landowner can show that steps were taken to transfer water rights during the period of non-use, but that those steps were thwarted by the government or TCID." *Id.* at 1204.

It appears that the Ninth Circuit is slowly tightening the noose, the result being more irrigated farmlands taken out of production by either abandonment or forfeiture, with the benefit of such forfeiture or abandonment apparently flowing to Pyramid Lake.

NEW MEXICO

Timothy de Young, Reporter

Tenth Circuit Remands United States' Quiet Title Action on Lower Rio Grande

On May 7, 2002, the Tenth Circuit Court of Appeals in a lengthy opinion vacated and remanded an order of New Mexico federal district court dismissing the United States' suit to quiet title to water rights in the Rio Grande Project, which serves the portion of the Rio Grande between Elephant Butte Reservoir and Fort Quitman, Texas. *United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002). Although remanded, the decision allows the district court to dismiss or stay the action. The decision therefore represents the fourth denial of the United States' attempt to dismiss an ongoing New Mexico stream adjudication in that portion of the Rio Grande between Elephant Butte Reservoir and the Texas state line. The district court had dismissed the action under the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and, in the alternative, under the abstention doctrine of *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942). The Tenth Circuit held that although the case did not present the exceptional circumstances required by *Colorado River*, the district court did not abuse its discretion when it refused to exercise jurisdiction pursuant to *Brillhart*. Because the district court did not articulate the basis for dismissal, the case was remanded with instructions to consider the propriety of a stay in lieu of dismissal.

Sixteen years ago, during a protracted struggle involving the City of El Paso's attempts to export groundwater from New Mexico, the Elephant Butte Irrigation District (EBID) filed a complaint in New Mexico state court against the New Mexico State Engineer, the United States, the City of El Paso, and all known and unknown claimants to surface and groundwater rights within New Mexico's Lower Rio Grande Underground Water Basin. The suit was unusual because pursuant to statute, the State Engineer arguably is the only party that can initiate and prosecute a stream adjudication. The State Engineer initially sought to dismiss the stream adjudication and succeeded, on venue grounds, at the district court level. However, the New Mexico Court of Appeals reversed, ordering the adjudication to proceed where filed in Doña Ana County. *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 849 P.2d 372, 381 (N.M. Ct. App. 1993). The State Engineer again tried to dismiss the suit, primarily on the ground that the state court did not have personal jurisdiction over project water users in Texas who were indispensable parties. At about this time, the El Paso County Water Improvement District No. 1 requested initiation of a water rights adjudication by the Texas Natural Resources Conservation Commission. The request was granted and the Texas adjudication began in 1994. In 1997, the New Mexico State Engineer's second motion to dismiss was denied and the State Engineer was realigned as plaintiff. The State Engineer no longer contests the adjudication and in fact, the adjudication has proceeded relatively quickly.

Meanwhile, the United States filed three motions to dismiss the New Mexico adjudication asserting it had not waived sovereign immunity under the McCarran Amendment because the portion of the Rio Grande subject to the adjudication did not constitute a "river system." The United States also supported the City of El Paso's unsuccessful attempt to remove the case to federal district court in New Mexico. Shortly after its third attempt to dismiss the case failed, the United States filed this action seeking to quiet its title to Project water against several named plaintiffs in New Mexico and Texas. The New Mexico parties are the EBID, the State of New Mexico, New Mexico State University, and Stahmann Farms, Inc. The Texas parties are the El Paso County Water Improvement District No. 1, the City of El Paso, and the Hudspeth County Conservation and Reclamation District No. 1. The district court was concerned that the United States had engaged in "procedural fencing" because it had moved to dismiss the New Mexico adjudication several times. The court of appeals agreed that the procedural fencing factor weighs against the exercise of federal jurisdiction.

The substantive basis for dismissal by the federal district court was that because the water rights were being adjudicated in both New Mexico and Texas by state entities, the federal court should abstain in deference to the "parallel" proceedings. On appeal, the United States and the Texas parties unsuccessfully argued that the proceedings were not parallel in that different parties and issues were involved. In addition, the United States contended that its complaint was properly filed in federal court because it implicates three sources of federal law: Section 8 of the Reclamation Act pertaining to interstate streams, the interstate and international obligations reflected by the Rio Grande Compact and a 1906 Treaty with Mexico, and reclamation contracts between the United States and the New Mexico and Texas water districts. The court of appeals rejected each contention finding that Section 8 requires compliance with state law to the extent not inconsistent with federal obligations. Second, the court held that the Rio Grande Compact and the 1906 Treaty were not directly involved. Third, the court found that the United States' contract claims were fatally weakened by lack of citation to the record. More generally, the court found the complaint was neither a quiet title action, since only declaratory relief was sought, nor could it be considered an equitable apportionment case.

Probably the most perplexing part of the decision concerns whether water in storage at Elephant Butte Reservoir will be included in the adjudication which in turn raises significant questions about proper parties and the ability of the state court to resolve essentially federal questions. Water is stored for both New Mexico and Texas users in the Reservoir, and New Mexico meets its compact obligations by delivering water to the Reservoir, not to the state line. The appellants accordingly argued that the New Mexico adjudication will not settle the "federal controversy" over rights to store in, and divert water from, the Reservoir. Noting that the State Engineer had notified all parties of its intent to include Reservoir storage in the New Mexico adjudication, the court ruled that the district court did not abuse its discretion by concluding that the notice of intent signaled the likely inclusion of the Reservoir. Interestingly, the water in storage has not yet been made part of the adjudication. If water in storage is included, then the Texas parties' rights to Project water may be affected. Recognizing this possibility, the court reasoned that the Texas parties may be entitled to intervention as of right. A prior attempt by the El Paso County Water Improvement District to intervene was opposed on the grounds that it neither diverted nor applied water to beneficial use in New Mexico. Inclusion of Project water in storage would appear to provide an adequate basis for intervention but it is questionable whether a state court could or would adjudicate the water rights of Texas parties.

The New Mexico adjudication therefore may evolve into an unusual combination of an adjudication of diversionary rights in New Mexico and a determination of the rights to store and distribute water in both New Mexico and Texas. Perhaps the uncertainty over what will and what will not be decided is why the case was remanded with specific instructions to consider whether the case should be stayed, rather than dismissed. Reading between the lines, the court of appeals appears to favor the entry of a stay by its citation of authority that prescribes a stay to allow for the resolution of federal claims in the event the state court proceedings do not address these issues in a timely fashion.

Note: The reporter is one of the attorneys representing the El Paso County Water Improvement District No. 1 in *United States v. City of Las Cruces* and in other matters. However, the views expressed are those of the reporter only, and do not represent the opinions or positions of such client.

State Legislature Funds Acquisition of Water Rights on the Pecos

New Mexico continues to develop and implement strategies to comply with its Pecos River water delivery requirements to Texas under the Pecos River Compact. On March 5, 2002, New Mexico Governor Gary Johnson signed into law a bill that allocates a total of \$30 million in three separate increments of \$10 million to the New Mexico Interstate Stream Commission. The act authorizes the purchase of land with valid appurtenant water rights in the Pecos River basin. The land would be fallowed and the water rights retired in order to decrease depletions to the river. The bill implements the recommendations of a stakeholder task force, adopted by the Interstate Stream Commission, which favored the purchase of valid water rights from willing sellers, as opposed to regulatory alternatives or a priority call in the ongoing stream adjudication. The priority call is generally disfavored due to the probable impacts on local economies if junior groundwater appropriators' rights are curtailed. A priority call also faced certain legal challenges based on the futile call doctrine, if not other theories.

OREGON

Robert E. O'Rourke & Stephen M. Bloom, Reporters

Settlement Reached in Lawsuit over Chemical Use in Irrigation District Canals

Headwaters, Inc. v. Talent Irrigation District, U.S. District Court for the District of Oregon, Civ. Action No. 96-6004-AA, is a case dealing with the discharge of herbicides and the Clean Water Act, 33 U.S.C. §1365. The lawsuit sought penalties and injunctive relief for Talent Irrigation District's use of a chemical in its irrigation canals without a Clean Water Act permit. The chemical use is intended to control aquatic weed growth.

The district court initially ruled in February 1999 that the Talent Irrigation District did not need a permit to apply chemicals to control aquatic weed growth in the canals as long as the district followed the instructions contained on the chemical's label. *Headwaters* and the Oregon Natural Resources Counsel Action Committee (ONRC) appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. In March 2001, the court of appeals reversed the district court's judgment and concluded in a precedent-setting ruling for the circuit that the district needed a permit to apply the chemicals to the irrigation canals. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

After a settlement session with the United States Magistrate Judge in Eugene, Oregon, Talent Irrigation District and the plaintiffs, Headwaters, Inc. and the ONRC, have reached a settlement of the lawsuit.

Reserved Indian Water Rights Clarified

In *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*), the U.S. District Court for the District of Oregon declared the existence, nature, scope, and priority of the reserved Indian water rights of the Klamath Tribes, but left the quantification of those rights to the State of Oregon's Klamath Basin Adjudication. The court entered a declaratory judgment on April 21, 1980, which was affirmed in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (*Adair II*). The district court retained continuing jurisdiction in the case.

Pursuant to paragraph 15 of the district court's declaratory judgment, motions were filed concerning a dispute that has arisen among the parties in the Klamath Basin Adjudication over the proper interpretation of the court's declaratory judgment and how to effectuate the rulings in the federal court case to quantify the Tribes' water rights in the state proceeding. In *Klamath Indian Tribes v. Adair*, 187 F. Supp. 2d 1273 (D. Or. 2002), the district court held that it was exercising its continuing jurisdiction to determine two narrow issues: (1) whether the Klamath Tribes have a water right to support reserved gathering rights (rights to gather edible plants); and (2) whether and to what extent the "moderate living" standard applies in quantifying the Tribes' water rights. *Id.* at 1275.

The court held in 1980 that the Klamath Tribes have reserved gathering rights, along with supporting water rights. In the declaratory judgment the court held that by treaty the Tribes were granted an implied right to as much water on the reservation as was necessary to fulfill the purposes of "hunting, fishing, trapping and gathering rights and to encourage agriculture." *See Id.* at 1275. The court also held in its declaratory judgment that the priority date of the Tribes' water rights necessary to preserve those purposes is "time immemorial." *Id.*

The parties in this case were now disputing how to apply the legal standard for quantifying the Tribes' water rights. The parties disputed not only what standard should be applied, but how it should be applied, and which party has the burden of proof.

At the outset, the court held that it was worth noting that "any argument that would have the practical effect of quantifying the Tribes' reserved right at a level that would not support productive habitat is rejected." *Id.* The court also noted that the Ninth Circuit Court of Appeals had recently confirmed that "only Congress can abrogate Indian Treaty Rights ... and it has not done so here." *Klamath Water Users Protective Ass'n v Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000). The court further noted that in *Adair II* the Ninth Circuit "could not have been more clear that it intended to 'prevent other appropriators from depleting the streams and waters below a protected level in any area where the non-consumptive [water] right applies.'" *Adair II*, 723 F.2d at 1411." 187 F. Supp. 2d at 1276.

The court held that in the Klamath Basin Adjudication the adjudicator is called upon to first quantify the Tribes' water rights to establish an allocation of water to fulfill the purpose of the reservation. Only after that quantification can the "moderate living" doctrine be considered to possibly adjust the quantification.

The court also noted that the quantification standard does not involve an analysis of any actual beneficial use of the water, or any actual harvest of treaty protected resources on a fixed day or time in history. Instead, "the focus must be on fulfilling the purpose of the reservation." *Id.*

The court held:

In order to provide the Tribe an opportunity to continue hunting and fishing on the reservation lands, it is axio-matic that there be sufficient water to support productive habitat so there may be game to hunt, and fish to fish, as well as edible plants to gather.

Id. at 1276.

The court also put to rest the defendants' assertion that the Tribes are entitled only to "some minimum amount" of water. The court noted that the Tribes are entitled to "whatever water is necessary to achieve" the result of supporting productive habitat. *Adair I*, 478 F. Supp. at 346." 187 F. Supp. 2d at 1277.

As to the "moderate living standard," the court held that reducing the water level below a level that would support productive habitat would have the result of abrogating the reserved rights. Because only Congress can abrogate treaty rights, and Congress has not so acted, the "moderate living standard" cannot be applied to have the effect of reducing water levels below a level that would support productive habitat.

The court noted that the parties also dispute the meaning of the "as currently exercised" language in *Adair II* where the court of appeals "confirm[ed] to the Tribe the amount of water necessary to support its hunting and fishing rights *as currently exercised* to maintain the livelihood of the Tribe members, not as these rights once were exercised." *Adair II*, 723 F.2d at 1414-15 (emphasis added)." Under the defendants' interpretation, the amount of water associated with the Tribes' rights is to be fixed at a specific date in 1979 under the first *Adair* decision. But the court disagreed holding that the defendants' interpretations conflict with the meaning of *Adair II*, and are inconsistent with the cases relied upon therein.

In the court's view, the defendants' interpretations would have the effect of assigning a 1979 priority date to the Tribes' water right. That result could not be reconciled with this court's holding, which was affirmed by the Ninth Circuit Court of Appeals, "that the Tribes' priority date is time immemorial." 187 F. Supp. 2d at 1278.

The court held that the "as currently exercised" phase in *Adair* refers only to the moderate living standard which recognizes that changing circumstances can affect the measure of the reserved right. According to the court, the "as currently exercised" language does not set a water right to a level in 1979 or 1984, because that would be contrary to the intent of *Adair II*.

The court concluded:

(1) the Klamath Tribes' water rights include a right to support resources the Tribes gather, in addition to the resources they hunt, fish, and trap; (2) *Adair I* announced the standard for quantifying the tribal water right; and (3) the "moderate living" standard has limited application in this case, but could be used to adjust the initial quantification of the tribal water right upon a proper showing by non-tribal opponents.

187 F. Supp. 2d at 1279. Notwithstanding the conclusions, the court held: "In no event shall the adjudicator quantify or reduce the Tribal water right to a level below that which is necessary to support productive habitat." *Id.*

What is interesting in this case is that the court held that the quantification standard for quantifying the water right does *not* involve an analysis of any actual beneficial use of water or any actual harvest of treaty protected resources on any fixed day or time in history. Instead,

according to the court, the focus must be on fulfilling the "purpose of the reservation." The court noted:

Adair II held that there were two primary purposes of the reservation and accompanying implied water rights. One was to support Klamath agriculture, and the other, which is at issue here, was 'for the purpose of maintaining the Tribes' treaty right to hunt and fish on re-servation lands.' *Adair II*, 723 F.2d at 1409. ... Quantifying the reserved water right so that productive habitat can be supported is the only meaningful way to measure the water requirements to meet the goal of fulfilling the purpose of the reservation.

187 F. Supp. 2d at 1276.

SOUTH DAKOTA

Diane Best, Reporter

Missouri River Spawns Multiple Lawsuits

The States of South Dakota, North Dakota, Montana, and Nebraska all filed suit this spring against the U.S. Army Corps of Engineers over management of the flows of the Missouri River.

By way of background, the five mainstem dams and reservoirs on the Missouri River in Montana, North Dakota, and South Dakota were constructed for multiple purposes including flood control, recreation, irrigation, navigation, and power. *See* John P. Guhin, "The Law of the Missouri," 30 *S.D.L. Rev.* 346 (1985). In the early 1990s South Dakota, North Dakota, and Montana filed suit against the Army Corps of Engineers, asserting that the Corps had favored the declining downstream navigation interests (barge traffic) to the detriment of the natural resources (including endangered species) and the recreational uses in the upstream states. The Corps ultimately agreed that the river is to be managed for all authorized purposes, not just the barge traffic. In court papers it stated that it would be revising the Master Water Control Manual for the Missouri River and would give "equal consideration" to all uses "while the master manual revision proceeded." *South Dakota v. Bornhoft*, No. 91-26-BLG, Memorandum & Order (D. Mont. Feb. 3, 1993).

The Montana District Court relied on the Corps' admission and ruled that there was no reason to continue the lawsuit since the Corps had agreed (1) to "interim relief" by giving equal consideration to all uses while the Master Manual was being revised and (2) to give equal consideration to all uses in the final revision itself. *Id.* Since that time, the Corps has continued to hold meetings and develop drafts for a new Master Manual. The old Master Manual, written in 1979, is still in effect.

The South Dakota litigation was filed this spring in response to the Corps' release of large quantities of water from reservoirs in the state in support of the barge traffic between Sioux City and Kansas City. *South Dakota v. Ubbelohde*, No. 02-3011, Preliminary Injunction at 2 (D.S.D. May 13, 2002). The releases continued during the spawn season for rainbow smelt (the primary food source for walleye) and walleye. *Id.* at 1. Concerned with the South Dakota \$51 million recreational fishing industry, the state sought and received a preliminary injunction restraining the releases until the smelt season is completed on May 25. *Id.*

District Court Judge Kornmann held the Corps "has continued to completely subordinate the upper basin interest in recreation, fish, and wildlife for the betterment of downstream navigation" despite the previous Montana litigation where it was understood "that all water uses were to

thereafter receive equal consideration, making the case moot." *Id.* at 7. He further stated that "the Corps, in times of low water flows (as a result of drought or little snow melt or both), always chooses to seriously impact upstream States to continue navigation, 'come Hell or low water.' The more dire the water conditions upstream, the more water that is released for downstream purposes." *Id.* at 7. The downstream deficiencies usually correspond to upstream water shortages. The file documents in this case are available for a small fee from the court's public access system at www.sdd.uscourts.gov/cases.htm.

The Corps complied with the South Dakota court order, but immediately began releasing water upstream from Lake Sakakawea in North Dakota in support of downstream barge traffic. *North Dakota v. Ubbelohde*, No. 02-59, Memorandum & Order at 1 (D.N.D. May 20, 2002). The State of North Dakota filed suit due to the effect of the releases on the spawn season in that state. A preliminary injunction was issued on May 20, 2002, and required that the river be maintained at its then current elevation until May 25. *Id.*

Montana filed suit to protect water in the farthest reservoir upstream at Fort Peck. It sought and received a temporary restraining order on May 13. *Montana v. Ubbelohde*, No. 02-70-Blg-RFG, Temporary Restraining Order (D. Mont. May 13, 2002). A preliminary injunction hearing was scheduled for May 22.

On May 13, 2002, Nebraska filed suit and hearing was held on its preliminary injunction request. It sought to continue downstream flows so that its power plants would have enough water so as not to be in violation of their surface water discharge permits under the Clean Water Act. *Nebraska v. Ubbelohde*, No. 8:02CV217, Memorandum & Order on Motion for Preliminary Injunction (D. Neb. May 13, 2002). Further, Nebraska was concerned about stranded barges and reduced waters for spawning and wildlife. The district court judge required the Corps to adhere to minimum navigation flows in the 1979 Master Manual and Annual Operating Plan (gauged at Sioux City).

Appeals from the Nebraska, South Dakota, and North Dakota decisions were filed with the Eighth Circuit Court of Appeals. The Eighth Circuit issued a stay of the Nebraska, South Dakota, and North Dakota district court orders on May 22. The appeals are pending.

UTAH

John H. Mabey, Jr. & L. Ward Wagstaff, Reporters

Utah Supreme Court Clarifies Statutes of Limitation in Actions by Shareholder Against Mutual Irrigation Company

In *Utah v. Huntington Cleveland Irrigation Co.*, No. 20000413, 2002 WL 655236 (Utah Apr. 23, 2002), the Utah Supreme Court clarified when statutes of limitation begin to run on claims for unjust assessments and denial of voting rights for shares of stock in a mutual irrigation company. The court held that a cause of action accrues each time an assessment is levied or voting rights are denied, rather than at the time of the original decision upon which the share classification is based.

The Utah Division of Wildlife Resources (DWR) purchased shares in Huntington-Cleveland Irrigation Company (HCIC) to use for enhancement of wildlife habitat. DWR uses most of the water to irrigate crops, but leaves the crops in place for wildlife rather than harvesting them for sale.

HCIC is a mutual nonprofit irrigation company. It delivers water to its shareholders and charges an assessment based on the amount of water delivered. In 1977, HCIC amended its articles of incorporation to allow unequal assessments based on type of use. In 1987, HCIC again amended its articles of incorporation to limit the voting rights of shares used for municipal and industrial purposes (M & I), and it directed the board of directors to levy an additional assessment on M & I shares. In January 1995, the HCIC directors adopted bylaws to implement the 1987 amendments. The 1995 bylaws defined "irrigation use" as "water applied to land for crop or livestock-feed production purposes for pecuniary gain." All uses not classified as "irrigation use" are classified as M & I uses. In February 1995, HCIC first informed DWR that the modified corporate documents could impact its shares. At that time, HCIC reclassified a portion of DWR's shares as M & I, and informed DWR that it could not vote the M & I portion. DWR objected to the reclassification.

On October 11, 1995, HCIC sent DWR the first assessment under the reclassification. HCIC reclassified some DWR shares as M & I use and therefore subject to higher assessments and reduced voting rights, and classified the remainder of DWR's shares as irrigation use. In 1996, HCIC reduced the number of DWR's shares that were classified as M & I. In 1999, HCIC reclassified all DWR's shares as M & I. On June 14, 1999, DWR filed a complaint seeking a determination that none of its shares were M & I shares. DWR amended its complaint on August 16, 1999.

DWR's requests for relief fell into two basic categories. First, DWR asserted that HCIC had violated an implied contract when it reclassified the DWR shares. Second, DWR asserted that HCIC had violated Utah Code Ann. §§16-4-4 & 16-4-7, which deal with assessments on shares of stock of corporations, and §16-4-24, which deals with assessments by irrigation companies.

On April 20, 2000, the trial court dismissed DWR's amended complaint on grounds that the applicable statutes of limitation had run. The trial court ruled that the statute of limitations for implied contracts (four years) and for violations of statute (three years) had begun to run in February 1995 when HCIC first informed DWR that a portion of its shares had been reclassified as M & I and could not be voted. DWR appealed.

The Utah Supreme Court reversed the trial court decision. The court first examined the wording of the statute of limitations applicable to implied contracts. The statute, Utah Code Ann. §78-12-25(1), lists several situations of implied contracts to which the statute applies, and ends with the clause, "provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received." The court reasoned that the plain language of the statute and the rules of grammar and punctuation made the final clause applicable to all of the situations listed in the statute, not merely the immediately preceding phrase; therefore, the statute of limitations did not begin to run on the implied contract claims until each assessment was made by HCIC. The court stated, "Here, whenever HCIC makes a new assessment under the purportedly unlawful mechanism, a new cause of action accrues on that individual assessment, permitting the statute of limitations on the newly arisen cause of action to run from the date of the new assessment." 2002 WL 655236, at *4. DWR could not pursue claims for assessments or voting violations that were more than four years in the past, but it could pursue claims that arose during the four years prior to June 1999.

With regard to the statutory claims, the court again held that the statute of limitations did not begin to run until the assessments were made or voting rights reduced. Otherwise, DWR would be forced to file the lawsuit before it had actually suffered damages. The court held that the action accrued when the assessments were made or voting rights reduced, not when HCIC made

the decisions upon which the assessments were based. The statutory claims were subject to a three-year limitation; therefore, DWR could not go back more than three years to make a claim, but could renew the claim each time a new assessment was made or the voting was precluded.

The full significance of this case, particularly with respect to a mutual irrigation company's obligation to treat shareholders reasonably, may be more apparent when the trial on the merits determines whether a mutual irrigation company can make the kind of questionable distinctions that triggered the DWR's lawsuit. The ruling as to applicability of the statute of limitations is nonetheless significant.

HCIC's amendments to the articles of incorporation did not give notice that irrigation for wildlife use would be classified as M & I use, and even the requirement of "pecuniary gain" for irrigation use could be subject to a broad range of interpretations. When DWR acquired its shares of stock, it had no reason to believe that it would be treated differently from other irrigators, particularly when most of the water it receives under its shares is used to irrigate crops just as other shareholders do. If the statute of limitations begins to run when an irrigation company amends its articles of incorporation, it could easily shield itself from liability or accountability by waiting four years or more before implementing the changes made by the amendments, an obviously unjust result.

Instead, the irrigation company is liable each time it makes an assessment on the shares or each time it denies voting rights. The court recognized that the damage is not the initial amendment of corporate documents, which may lack definition, but rather it is the implementation of those changes as they are applied to specific shares. The shareholder only realizes the full extent of the damage when the shares are actually assessed and when the shareholder is actually denied the ability to vote. Although the statute of limitations problem may not arise very often, the court avoided a clearly unjust result by holding that the statute of limitations does not begin to run until each assessment is made or the right to vote is denied.

Utah Supreme Court Enforces "Oral Contracts" for Water Right Conveyances

At first blush, it would seem improbable that an oral contract for the conveyance of water rights could overcome all the legal doctrines in place to protect the first-year property law doctrine that the conveyance of real property must be in writing. Nevertheless, the plaintiffs in the case were successful in overcoming the merger doctrine, the parol evidence rule, and the statute of frauds, in addition to other issues raised related to agency, statute of limitations, and privity.

In *Spears v. Warr*, 44 P.3d 742 (Utah 2002), the plaintiffs purchased residential "ranchette" lots from the defendants. During negotiations each buyer understood, based on the sellers' representations, that irrigation water rights were included as part of the purchase. However, there were no water rights appurtenant to the purchased land, and the warranty deeds for the land were silent as to any irrigation water rights. At issue was whether the sellers had agreed to convey water rights with each ranchette lot, or whether the buyers agreed to pay additional consideration for the water rights.

With regard to the merger doctrine, the supreme court concluded that the "collateral rights exception" applied to the facts of the case. The court concluded, after reviewing the trial court's findings, that the irrigation water was not part of the subject matter of the land title transaction and held that "the merger doctrine did not extinguish the agreement for irrigation water rights." 44 P.3d at 749.

The court also analyzed the facts of the case under the parol evidence rule, the statute of frauds, agency, statute of limitations, and privity and ruled in favor of the plaintiffs. This case contains broad discussions and analysis of real property conveyance law that is applicable to both the conveyance of water rights and real property in general. This is definitely a case a land and water transaction attorney should carefully review.