

ARIZONA

Margaret Gallogly, Reporter

Arizona Court Rejects Public Trust Challenge

In a decision issued in response to several petitions for special action, the Arizona Court of Appeals recently ordered that a lawsuit challenging Arizona's management of groundwater pumping be dismissed. *Home Builders Ass'n v. Katz*, No. CA-SA 02-0168 (Ariz. Ct. App. 2002) (order). In the underlying case, The Center for Biological Diversity and several individuals (collectively, the Center) had sued the State of Arizona and others challenging the administration of the state's water laws as violating the public trust doctrine. *Center for Biological Diversity v. Smith*, No. CV 2002-000171 (Sup. Ct. Maricopa County, Ariz. filed Jan. 2002). The trial court had refused to dismiss the Center's complaint. The court of appeals noted that acceptance of jurisdiction based on denial of a motion to dismiss is rare, and that the "potential impact of such a suit on communities, citizens and businesses in our state is immense." The court of appeals' decision means that the Center will now be forced to establish the existence of a navigable watercourse before the administrative body established by the Arizona legislature to make such determinations before seeking to enforce the public trust doctrine.

Lawsuit filed by The Center for Biological Diversity. The underlying lawsuit was filed by the Center in January 2002, against the Arizona Department of Water Resources, its Director, Joseph Smith, and the State of Arizona. The complaint asserted that the public trust doctrine requires the state to manage and regulate Arizona's water resources and underlying lands for the protection of public uses and that the defendants were violating the public trust doctrine "by allowing the withdrawal of groundwater in a manner that has caused and is causing the substantial impairment, decline, degradation and loss to the State's watercourses." The plaintiffs requested a declaration that the asserted failure to protect Arizona's watercourses from excessive groundwater pumping constitutes a violation of the public trust doctrine. The plaintiffs also requested an order from the court directing the state to manage its water resources to protect the state's watercourses from excessive groundwater pumping. The Center's suit essentially challenged the state's statutory and regulatory scheme for managing groundwater withdrawals and use.

In recent decisions, Arizona courts have determined that, under the public trust doctrine, the state holds title to lands beneath navigable watercourses in trust on behalf of the public, and the state must manage public trust land consistently with trust purposes. *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (Ariz. Ct. App. 1991); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (Ariz. Ct. App. 2001). The Center's complaint sought to expand this concept to the water flowing in Arizona's watercourses and to groundwater that is tributary to a watercourse.

The state defendants moved to dismiss the Center's complaint on several theories. The trial court denied the motion to dismiss, finding that the plaintiffs have standing to bring the action, that there is a justiciable issue, and that the Center has stated a claim upon which relief may be granted. In its order denying dismissal, the trial court stated:

[i]t appears to this Court that the Center is citing the Doctrine claiming that the State is substantially interfering with the interest of the public in the navigable waters, not through the State's improper use or disposal of the land, but through the State's pumping of the groundwater. Although this view is clearly stretching the applicability of the Doctrine, this Court believes there is sufficient evidence before it to at least explore the Doctrine's extension.

Center, No. CV 2002-000171 (order denying motion to dismiss, at 3-4). The trial court ordered the plaintiffs to identify the groundwater and navigable watercourses affected by the defendants' alleged mismanagement.

Petitions for Special Action. Three separate petitions for special action were filed with the Arizona Court of Appeals requesting review of the trial court's decision on the motion to dismiss. The petitioners were the state parties in the underlying action, the Home Builders Association of Central Arizona (Home Builders), and the Salt River Project Agricultural Improvement and Power District together with the Salt River Valley Water Users' Association (together, SRP). The court of appeals granted a motion consolidating the three cases. In their petitions, the Home Builders and SRP contended that the trial court would be acting outside the scope of its jurisdiction if it proceeded with the claim asserted by the Center. The state also raised this jurisdictional argument, but focused its petition primarily on the argument that Arizona has not extended the public trust doctrine to water within navigable waterways, limiting the doctrine to the land underlying navigable waterways. As to the jurisdictional question, the petitioners argued that the public trust doctrine only applies to lands located beneath waterways that were navigable at the time of Arizona's admission to statehood. Thus, a necessary predicate to the Center's claim is a determination of what waterways were navigable on February 14, 1912, the date that Arizona was admitted to the Union. No court or administrative agency has determined that an Arizona waterway (other than the Colorado River) was navigable at statehood. The Arizona legislature had reserved the initial determination of navigability to the Arizona Navigable Stream Adjudication Commission (ANSAC). Ariz. Rev. Stat. §37-1123(G) (1993 & Supp. 2002) states that:

[n]o judicial action seeking a determination of navigability of a watercourse, to establish or obtain ownership of land within the bed and banks of a watercourse or to determine any public trust values associated with a watercourse may be commenced, continued or completed unless the commission has made a final determination with respect to the watercourse pursuant to §37-1128.

Based on this statute, the petitioners argued that the trial court lacked jurisdiction to make a finding of navigability or of the public trust values associated with a watercourse. By ignoring this express statutory limitation on its jurisdiction, the petitioners asserted that the trial court was proceeding or threatening to proceed without or in excess of its jurisdiction. The petitioners requested an order prohibiting the trial court from proceeding with the underlying action and requiring the dismissal of the underlying lawsuit.

In its responses to the petitions for special action, the Center argued that the relief sought by the plaintiffs did not require a determination of navigability of a particular waterway. The Center characterized its action as a challenge to the entire statutory scheme under which water use is governed in Arizona. The Center's argument apparently assumed that some watercourses will be found to have been navigable at statehood. Because its claim did not depend on a determination

of navigability, the Center argued, the ANSAC jurisdictional limitation stated in Ariz. Rev. Stat. §37-1123(G) did not apply to its action. The Center also argued that, if the court found that Ariz. Rev. Stat. §37-1123(G) could be interpreted to preclude the Center's claim, then the statute was unconstitutional as a violation of the separation of powers doctrine.

Court of Appeals Decision. The court of appeals ruled that the trial court erred as a matter of law in not dismissing the Center's lawsuit, and remanded the matter to the trial court for dismissal of the complaint without prejudice. The lawsuit should have been dismissed because the Center failed to comply with the legislative scheme established to determine the navigability of watercourses at the time of statehood. The court rejected the argument, on the record presented to it, that the ANSAC process for determining navigability is an unconstitutional violation of the separation of powers doctrine. The court noted that ANSAC's determinations are subject to judicial review and that the ANSAC legislation provides a means for the expedited review of the navigability of a particular watercourse. The court also rejected the argument that the lawsuit does not require a determination of navigability.

The difficulty with this argument is that without a determination of navigability at statehood this court is placed in the position of ruling on an abstract legal question. Neither the Uniform Declaratory Judgments Act, ..., nor the cases interpreting it, authorize the court to undertake such a contingent and hypothetical analysis. For the public trust doctrine to apply, and that is the sole basis for the Center's complaint, there must be a determination that a specific watercourse that was *navigable at statehood* has been adversely affected. That determination has neither been made nor alleged.

Home Builders Ass'n v. Katz, No. CA-SA 02-0168 (Ariz. Ct. App. 2002) (order at 6-7). Because its resolution of the jurisdictional issue was dispositive, the court refused to take up any of the other issues raised on appeal by the parties.

MONTANA

Holly Jo Franz, Reporter

Montana Supreme Court Recognizes Instream Water Rights

Overruling its earlier decision in *Matter of the Dearborn Drainage Area*, 234 Mont. 331, 766 P.2d 228 (1988) (*Bean Lake I*), the Montana Supreme Court held, in *Matter of the Missouri River Drainage*, 2002 MT 216, 55 P.3d 396 (2002) (*Bean Lake III*), that non-diversionary water right claims for fish, wildlife, and recreation purposes are valid and existed prior to 1973.

Bean Lake III arose out of the statewide water rights adjudication. All pre-July 1, 1973, water right claims are subject to adjudication by the Montana Water Court. The deadline for filing claims has expired. Each claim is examined by the Department of Natural Resources and Conservation and issue remarks are added to highlight potential problems with the claim.

Since the *Bean Lake I* decision, the Water Court has uniformly attached the following remark to all pre-July 1, 1973, water rights claiming a fish, wildlife, or recreation purpose:

There is a question as to the validity of this claimed right. In the *Matter of the Dearborn Drainage Area*, 234 Mont. 343 (1988) (the *Bean Lake* case) the Montana Supreme Court stated: "It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute."

In *Bean Lake I*, the Department of Fish, Wildlife and Parks (DFWP) claimed a pre-1973 water right for fish, wildlife, and recreation in Bean Lake, a natural pothole lake. While much of the parties' argument focused on the absence of a diversion, the court looked to Montana's 1972 Constitution which provides that "all existing rights of the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." Mont. Const. art. IX, sec. 3(1). Interpreting this provision to require both an existing right to use water *and* a beneficial use, the court held Montana law did not recognize such an appropriation right prior to 1973. While recognizing fish, wildlife, and recreation as a beneficial use of water, the court ruled, regardless of whether a diversion was involved, "DFWP and the public could not have intended an appropriation where none was recognized by law." *Bean Lake I*, 766 P.2d at 236.

In 1989, the Montana Supreme Court decided *Matter of the Dearborn Drainage Area*, 240 Mont. 39, 782 P.2d 898 (1989) (*Bean Lake II*), which primarily addresses attorneys' fees. Unfortunately, in *Bean Lake II* the court confused the issue by stating, in dicta, that its earlier decision was based upon the failure to prove the elements of diversion, intent, and notice.

Bean Lake III involves five DFWP claims for fish, wildlife, and recreation water rights, all with a diversion. DFWP objected to its own claims in an effort to remove the Bean Lake remark. On appeal, the court found *Bean Lake I* to be inconsistent with earlier Montana case law and relied on two prior decisions, *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936) and *Paradise Rainbows v. Fish & Game Commission*, 148 Mont. 412, 421 P.2d 717 (1966), as authority for the recognition of appropriations for fish, wildlife, and recreation purposes prior to 1973.

When discussing the public's right to recreational use of a stream, the court cited to *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), which granted public stream access based upon the public trust doctrine. The *Bean Lake III* court found the public has an instream, non-diversionary right to the recreational use of the state's navigable surface waters under the constitution and the public trust doctrine. The court's decision is based, however, on the prior appropriation doctrine rather than the public trust doctrine.

While not directly at issue, the court also considered whether non-diversionary water rights for fish, wildlife, and recreation are recognized in Montana. Referring to the flexibility of the appropriation doctrine, the court ruled a diversion is not a required element of an appropriation when no diversion is necessary to put the water to beneficial use. In such cases, the claim is valid if the facts and circumstances indicate notice of the appropriator's intent.

The court instructed the Water Court to identify, review, and hold hearings on all pre-1973 recreation, fish, and wildlife claims, both diversionary and non-diversionary, to determine their validity. According to the Water Court, 1,666 claims in 38 basins include the Bean Lake remark. The court's instructions suggest that the Water Court must review all such claims, including the original Bean Lake claims, even if proceedings on the claims have been completed.

The decision generated a vigorous dissent in which the majority is accused of not only remaking law, but rewriting Montana history. The impact of the decision may be limited since it only applies to claims already filed in the ongoing adjudication. While the full impact of the decision may not be clear for some time, there is little doubt that the court's reference to the public trust doctrine will continue to fuel debate.

CALIFORNIA

Ronald B. Robie, Reporter

Ninth Circuit Upholds Application of TMDLs to Non-Point Sources

The Ninth Circuit Court of Appeals has held in *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) that the U.S. Environmental Protection Agency (EPA) can establish the "Total Maximum Daily Load" (TMDL) of pollutants for streams where there are no point source discharges but water quality standards are not met.

Section 303(d) of the Clean Water Act (CWA) requires the states to identify waters for which point source effluent limitations are not stringent enough to implement applicable water quality standards. Plaintiffs, landowners applying for a timber harvesting permit from the State of California, claimed that on streams without point source discharges for which effluent limitations are established, the law did not permit establishment of TMDLs. On such streams the principal non-point sources of pollutants are from land developments, road construction, and activities such as logging. To comply with the applicable TMDL, the state limited plaintiffs' logging activities and required control of road-related sediment runoff.

The court upheld EPA regulations requiring TMDLs on all streams. If the state does not adopt TMDLs, the EPA is authorized to establish them for the state as was the case on the stream affected by plaintiffs.

Plaintiffs also argued, based on *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), that the exercise of EPA authority over TMDLs would intrude into the states' traditional control of land use. *Pronsolino*, 291 F.3d at 1140. The court, in rejecting the argument, pointed out that the enforcement and monitoring of pollution controls on non-point sources is with the state, not EPA.

COLORADO

William A. Paddock & Mary Mead Hammond, Reporters

Notice Required before Judicial Cancellation of Conditional Water Right

In Colorado, one may obtain a "conditional water right," which is defined as the right to perfect a water right with a certain priority upon completion with *reasonable diligence* of the appropriation that the water right is based upon. Colo. Rev. Stat. §37-92-103(6) (1990 & Supp. 2002). Reasonable diligence, in turn, is defined as the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances. Colo. Rev. Stat. §37-92-301(4). And, in every sixth year after the year in which a water right is conditionally decreed, or in which a finding of diligence is entered, if the owner or user of the conditional water right desires to maintain the same, an application for reasonable diligence must be filed or the conditional water right *shall be considered abandoned*. Colo. Rev. Stat. §37-92-301(4)(a)(I).

In *Double RL Co. v. Telluray Ranch Properties*, 54 P.3d 908 (Colo. 2002), the Colorado Supreme Court held that a conditional water right may not be canceled unless the owner has received the statutory notice required by Colo. Rev. Stat. §37-92-305(7). That statute provides in part:

Prior to the *cancellation or expiration* of a conditional water right ... the court ... shall give notice, within not less than sixty days nor more than ninety days, by certified or registered mail to all persons to whom such conditional right was granted....

This provision was enacted in 1975 to ameliorate the harsh consequence of the failure to timely file an application for reasonable diligence, namely cancellation of the conditional water right. *Town of DeBeque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980). In this case, Double RL obtained a conditional water right for 0.033 c.f.s. for domestic use in 1994 and was required by that decree to file a diligence application in February 2000. Double RL discovered in 2001 that it had failed to file the required diligence application. No notice from the court pursuant to Colo. Rev. Stat. §37-92-305(7) was found in the records of Double RL's attorney, who had died between 1994 and 2000. Likewise, there was no evidence in the water clerk's records that the required notice had been sent by the court to Double RL. These facts notwithstanding, the trial court, in reliance on Colo. Rev. Stat. §37-92-301(4)(a)(I), denied Double RL's request to vacate the order canceling the conditional water right and to permit the late filing of a diligence application.

On appeal, the Colorado Supreme Court reversed, holding that Colo. Rev. Stat. §37-92-305(7) is a prerequisite to abandonment of a conditional water right under Colo. Rev. Stat. §37-92-301(4)(a)(I). Absent the required notice, a conditional water right may not be canceled, and the claimant of the conditional water right is entitled to file a late diligence application if the water clerk has failed to mail the required notice.

Applicant's Burden of Proof in a Change of Water Rights

In *State Engineer v. Bradley*, 53 P.3d 1165 (Colo. 2002), the Colorado Supreme Court addressed the applicant's burden to establish historical use of a water right in the context of a change of water rights. Here, Bradley sought to change the point of diversion for a well to the center of his field to run a center pivot sprinkler to irrigate 128 acres. Historically, that land had been irrigated with surface water, and groundwater from the well was used only as a supplemental supply. The state and division engineers opposed the change of water right on the grounds that it would cause an enlargement of use of the groundwater right and thereby cause injury. The trial court found the applicant had met its burden of proof and directed the state engineer to issue the requested well permit and to include in it terms that would prevent injury. On appeal, the supreme court reversed on the grounds that the applicant had failed to prove its change of water rights would not cause an increased use of groundwater.

In its opinion, the court reviewed the well-established law governing changes of water rights. In so doing, the court noted that Bradley was confused about the relationship between a decreed water right and its historical use. The court explained that "an absolute decree, whether expressed in terms of a flow rate or a volumetric measurement, is itself not an adjudication of actual historical use but implicitly is further limited to actual historic use." 53 P.3d at 1170.

Then, the court went on to state:

It is well established that the applicant for a change of water right bears the burden of proving by a preponderance of the evidence that the requested change will not injure other users. *Farmers Res. & Irr. Co.*, 44 P.3d at 246. Although less expressly articulated, an obligation to demonstrate that the requested change remains within the scope of the original right and does not require a new and independent appropriation is necessarily included within this burden. While the enlargement of a water right, as measured by historic use, may be injurious to other rights, *it also simply does not constitute a*

permissible "change" of an existing right. The applicant therefore bears the risk of nonpersuasion with regard to historic use as well as absence of injury to other rights.

Id. (emphasis added).

From this statement, it is apparent that historical use is the measure of a water right, that no change may be granted for more than the historical use, and that the applicant must prove both the historical use and that the proposed change in use does not cause injury. While this is not a new rule of law, it is perhaps the court's clearest articulation to date of the applicant's dual burden of proof in a change of water rights case.

Colorado Water Conservation Board Makes Recommendations on Two Recreational In-Channel Diversion Water Rights

In the last issue of this *Newsletter*, Vol. XXXV, No. 2 (2002) these reporters described Colorado's new law authorizing so-called recreational in-channel diversion water rights (RICD). As you may recall, upon the filing of such an application, the Colorado Water Conservation Board (CWCB) must make findings and recommendations to the water judge on the proposed applications. And, you may also recall that a RICD is defined as the *minimum stream flow* needed for a reasonable recreational experience in and on water. Colo. Rev. Stat. §37-92-103(10.3) (1990 & Supp. 2002).

The CWCB held a hearing in July 2002 on the City of Pueblo's RICD application and in September on the Upper Gunnison Water Conservancy District's (Upper Gunnison District) RICD application. The City of Pueblo sought a year-round RICD in the amount of 100 c.f.s. from November 16 to March 14 and 500 c.f.s. from March 15 through November 14. Its claimed uses are boating (kayaking, rafting, and canoeing), fish and wildlife habitat, piscatorial, and general recreational uses. The city's RICD is proposed to be located within part of the concrete, canalized, Arkansas River flood control channel where it passes through the city.

In contrast, the Upper Gunnison District's RICD is located in the Gunnison River within the Town of Gunnison. The Gunnison River has avoided the canalization visited upon the Arkansas River. The Upper Gunnison District only seeks an RICD from May 15 to September 30 of each year. The requested flows begin at 570 c.f.s., and then increase every two weeks to a high of 1,500 c.f.s. between June 16 and 30. The requested flows then quickly decline in two-week increments down to 270 c.f.s. between September 16 and 30. In this respect, the requested RICD flows mimic the snowmelt run-off hydrograph of many Colorado mountain streams. The claimed uses are limited to boating (kayaking, rafting, and canoeing) and general recreational uses.

While the two cases are factually dissimilar, the CWCB's findings and recommendations on the City of Pueblo's application and its draft findings and recommendations on the Upper Gunnison District's application appear to establish consistent principles for the CWCB's evaluation of RICD applications generally.

A fundamental problem confronting both a RICD applicant and the CWCB is how to define the minimum flow. When an applicant claims different flow rates through the intended period of use, it raises the obvious question of whether the lowest flow requested isn't the minimum flow needed for a reasonable recreational experience in and on water. The City of Pueblo and the Upper Gunnison District requested different flow rates at different times. The CWCB has likewise recommended different flow rates at different times, apparently on the rationale that different flows provide a reasonable recreational experience for different water craft and different levels of expertise of the boater. Thus, the CWCB has recommended that the City of

Pueblo receive 500 c.f.s. in June and July; 250 c.f.s. in April, May, and August; and 100 c.f.s. for the remainder of the year. And, on the Upper Gunnison District's application, the CWCB recommends 250 c.f.s. in May, August, and September and 500 c.f.s. in June and July. Thus, it appears that the CWCB views 500 c.f.s. as an upper limit on a reasonable RICD.

In both cases, the CWCB has recommended that:

- the RICD water rights not be in effect in dry periods, defined as any month in which the water supply outlook report for the first day of the month "most probable forecast (50% chance of exceedance) for the applicable stream flow, is less than 70% of average;
- the administrative call for the RICD water be presumed futile (e.g., unenforceable) during times when the call for water will not result in the recommended monthly flow rate. In the case of the Upper Gunnison District, a call that produces less than 500 c.f.s. but more than 250 c.f.s. defaults to 250 c.f.s. In the case of the City of Pueblo, a call that fails to produce the recommended flow is not enforceable for any lesser rate of flow;
- to prevent waste, the RICD call will only be honored when a substantial number of people are reasonably expected to use the boating course;
- the RICD uses be limited to recreational boating only;
- the RICD water rights not be in effect or exercised after 10 p.m. and before 6 a.m. any day; and
- the RICD may not call for releases from upstream reservoirs during downstream flood control operations or when other good and sufficient emergency reasons dictate that water not be released.

For the City of Pueblo's RICD, the CWCB also recommended that it be administered so as not to impede the use, reuse, or successive use to extinction of transmountain diversions by exchange or otherwise. This recommendation is of considerable significance because of the number of upstream exchanges of transmountain and other water through the claimed RICD reach. And for the Upper Gunnison District's RICD, the CWCB recommended that if the RICD structures cause icing conditions such as flooding upstream of the RICD, then the applicant should be required to remedy the problem, including removing the structures as necessary.

Once the CWCB has made its findings and recommendations on an RICD application, the applicant is free to seek a different result in the Water Court. In that proceeding, the applicant has the burden of refuting the correctness of the CWCB's findings and recommendations. Neither the City of Pueblo nor the Upper Gunnison District has yet scheduled further proceedings in the Water Court. The CWCB's findings and recommendations on these two applications may be viewed at cwcb.state.co.us/isf/rules/FINALfinalPuebloRecommendationFindings.pdf; cwcb.state.co.us/isf/rules/gunnisonfinalfindingsandrecommendation.pdf. General information on all pending RICD applications can be found at cwcb.state.co.us/isf/rules/RICDapp.htm.

IDAHO

Jeffrey C. Fereday & John M. Marshall, Reporters

IDWR Decisions Based on Public Interest and Conservation Considerations

In Idaho, the Idaho Department of Water Resources (IDWR) must review applications for new water right permits and applications to transfer elements of existing water rights to determine, among other issues such as sufficiency of the water supply, whether the applications are in the "local public interest" and consistent with the "conservation of water resources within the state of Idaho." Idaho Code §42-203A (Supp. 2002). Several recent water decisions have turned on these considerations. Copies of IDWR's decisions are available on its website: www.idwr.state.id.us/info/pio/orders.htm.

In one recent decision, IDWR denied an application for a new water right permit to be used as part of a proposed electricity generating plant in part for failure to satisfy the public interest standard. *In re Application for Permit No. 63-31207 in the Name of IW Land Co.*, Feb. 19, 2002. In addition to finding the applicant had not demonstrated a sufficient water supply for the proposed use or non-injury to other water rights, the decision also concluded the application was not in the public interest because the proposed mitigation plan was not sufficient to protect existing water rights and because of the effects from water that would be diverted in the future pursuant to pending applications for water rights that would have senior priorities. The decision also concluded that the application was not in the public interest because the City of Middleton, a nearby community, could serve the water demands of the electricity plant. The applicant appealed the decision of the hearing officer to the director of IDWR. As of this writing, the director has not taken any action.

In *Wybenga v. Idaho Department of Water Resources*, No. CV 01-00577 (Idaho Apr. 11, 2002), an Idaho district court judge agreed IDWR had properly applied the local public interest criterion in denying an application for a new water right for an expanded dairy operation. The application had been protested on local public interest grounds alleging the dairy had serious odor and fly problems. On appeal from IDWR's decision, the district court found the focus of the local public interest test was not limited to water quantity and quality issues and IDWR was not obligated to craft conditions on the transfer to address the odor and fly issues but, rather, was entitled to deny the transfer application outright. Finally, the court rejected the argument that odor issues are the concern of another agency. This decision was appealed to the Idaho Supreme Court, but was settled while the appeal was pending.

In *In re Application for Transfer No. 5639 in the Name of K & W Dairy*, in a June 20, 2002, preliminary order, IDWR denied an application for transfer of water rights for a new dairy operation on grounds that the proposed dairy was not in the local public interest. The decision followed remand proceedings after a district court required IDWR to consider the appropriate level of odor from dairy operations and measure the proposed dairy against this standard. After taking additional evidence on remand, IDWR found that the proposed dairy likely would contribute to undesirable odors in the area and would further degrade aesthetic and recreational activities in the vicinity of the dairy.

In July 2002, IDWR denied two applications for water right permits to cool proposed electricity generating plants on grounds that the proposed water uses were not consistent with the conservation of water resources in Idaho. *In re Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*; *In re Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*. The applications requested diversion rates of 10.87 and 15.6 c.f.s respectively. IDWR concluded the applicants had not adequately addressed the conservation criterion because

the proposed projects employed water-based cooling technologies where other, less water intensive technologies were available to cool the plants.

On September 16, 2002, IDWR issued a recommended decision and order approving an application for municipal water for a proposed new four-season resort in Valley County, Idaho. *In re Application for Permit No. 65-22357 in the Name of WestRock Associates, LLC*. A citizens group opposing the resort protested the application alleging, among other things, that the proposed project was not in the local public interest. IDWR found the local public interest requirement did not require the equivalent of an environmental impact statement nor did it make IDWR the state's chief land planner. IDWR noted that Valley County, Idaho, and the State Land Board had considered and approved the proposed resort after consultation with other state and federal agencies, essentially satisfying the public interest criterion. The decision currently is a recommended decision, which can be appealed to the Director of IDWR.

MONTANA

Holly J. Franz, Reporter

Shared Well Agreement Found Enforceable

In *Williams v. Schwager*, 2002 MT 455, 47 P.3d 839 (2002), the Montana Supreme Court enforced a shared water well agreement even though the subdivision plat approval for the property required each tract owner to install an individual water well. The property was divided into four tracts in 1979. The following year, Tract 3 was sold with the provision that water would be provided from a well located in Tract 4. The owners of the two tracts entered into an agreement giving the owner of Tract 3 the right to use the well and guaranteeing an easement across Tract 4 for domestic water lines. In return, the Tract 3 owner was required to pay, to the owners of Tract 4, a \$10.00 monthly water fee that could be increased depending on electricity costs.

Eventually, Williams acquired Tract 3, and Schwager acquired Tract 4. The warranty deed to Schwager specifically provided that it was subject to the shared water well agreement. For a number of years there were no disputes between the parties until the Schwagers sought an increase in the monthly water fee. The parties could not agree on the amount of the increase and the fee was eventually set by the Justice Court at \$13.00 per month.

The following year the Schwagers began to complain about noise from the prime tank, which was located under the Schwagers' home. When water was turned on in either house, the tank would turn off if the prime was not enough to move the water through the lines. Occasionally, the Schwagers would manually shut off the electricity to the prime tank which prevented water from being used at either home.

The Williamses filed suit to enjoin the Schwagers from interfering with the shared well agreement. In response, the Schwagers alleged the shared well agreement was invalid and unenforceable since it violated the subdivision approval requirement of individual wells.

The court concluded the agreement was not illegal per se since the parties could still apply for and receive a deviation from the subdivision certificate. The court also found the agreement was not unlawful or void *ab initio* since compliance with subdivision certificates is handled through coordination of septic system applications, and Williams' predecessor referred to the shared well when obtaining septic system approval. Finally, the court noted that Schwager accepted the benefits of the agreement by collecting water fees from Williams and cannot now attempt to benefit by repudiating the agreement.

NEW MEXICO

Timothy de Young, Reporter

Tenth Circuit Affirms Importance of Critical Habitat Designation

In a sharply worded opinion, the Tenth Circuit Court of Appeals affirmed a New Mexico district court's refusal to grant the U.S. Fish and Wildlife Service (FWS) an extension of time to complete National Environmental Policy Act (NEPA) compliance in connection with the designation of critical habitat for the Rio Grande Silvery Minnow. *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002). In addition, the court rejected FWS' argument that because it had redesignated the minnow's critical habitat, it should be given a second opportunity to conduct an environmental assessment to determine whether an environmental impact statement (EIS) would be required. In the words of the court:

This case demonstrates that the abdication of an agency's responsibilities under NEPA can frustrate the goals of the Endangered Species Act. FWS' delays and inadequate decisionmaking have resulted in the absence of a critical habitat designation eight years after the Silvery Minnow's listing. The protections of a designation are particularly needed by the Silvery Minnow, a species placed on the brink of extinction by habitat loss. Adherence to the policy objective of the ESA to halt the extinction of the minnow no matter the cost requires that NEPA compliance be completed as expeditiously, yet comprehensively, as possible.

Id. at 1230-31. The court's evident frustration with FWS is understandable in light of both applicable authority and the facts of this case.

The Endangered Species Act requires the designation of critical habitat based on the view that it is "essential to the conservation of the species." 16 U.S.C.A. §1532(5)(A) (2000). The designation of critical habitat is to be made concurrently with the determination a species is endangered but the designating agency, usually FWS, can give itself an extension of time. *Id.* §1533(b)(6)(C). FWS has been allowed to delay NEPA compliance for critical habitat designations due to budget cuts and related factors. *See generally Forest Guardians v. Babbitt*, 174 F.3d 1178, 1183-84 (10th Cir. 1999). Some contend that FWS is reluctant to prepare a critical habitat EIS because quantifying the costs of endangered species protection often results in further controversy and litigation. Regardless of the reasons, this case helps define the point at which delays, if not avoidance, of NEPA responsibilities become arbitrary and capricious.

In July 1999, four years after listing the Silvery Minnow as endangered, FWS designated 167 miles of the main stem Rio Grande River as critical habitat. FWS thereafter completed an environmental assessment (EA) concluding the designation would have no significant impacts on the human environment. The State of New Mexico, the Middle Rio Grande Conservancy District, and the City of Socorro appealed arguing that the EA failed to consider all possible impacts, ignored data, and did not consider alternative designations. In November 2000, the district court ruled that FWS' decision was contrary to Tenth Circuit case law holding that except in rare cases an EIS is required for critical habitat designation. *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000); *see Catron County Board of Commissioners v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996). FWS was required to complete an EIS and propose a new designation within 120 days.

Two days before the 120-day deadline, FWS, citing budget restraints, moved for an extension of time until September 28, 2002. *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220, 1231 (10th Cir. 2002). Finding that the agency's difficulties were "of its own making," the district court denied the motion. On appeal, the Tenth Circuit ruled the district court did not abuse its discretion given the delays on the part of FWS and the urgent need for a new critical habitat designation. *Id.* The court also rejected FWS' argument that because it was ordered to designate a new critical habitat, it should be given another opportunity to determine whether an EIS was needed. *Id.* at 1229-30. Noting that the agency's new designation was even broader than its previous designation, the court held that in light of the "massive delays, the precarious position of the Silvery Minnow, and the overwhelming evidence of significant environmental impacts regardless of the size, shape, and location of the [critical habitat] designation, the district court's order to conduct an EIS was not an abuse of discretion." *Id.* at 1231. Ironically, the Tenth Circuit's June 21, 2002, decision was issued over a year after the district court's April 25, 2001 order. As this article goes to press, FWS has yet to complete the EIS.

Rio Grande Silvery Minnow Update

As reported in Vol. XXXV, No. 2 (2002), of this *Newsletter*, on April 19, 2002, New Mexico Federal District Judge James A. Parker ruled that federal water management agencies had discretion to consider, and should have considered, the use of imported project water from the San Juan Chama Project (SJP) in order to guarantee adequate flows for the silvery minnow. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RLP ACE (D.N.M Apr. 19, 2002). In relevant part, the court ruled that the Bureau of Reclamation (Reclamation) could use boilerplate shortage provisions in the SJP water delivery contracts in conjunction with the mandates of the Endangered Species Act (ESA) to limit water deliveries to the contracting parties. The ruling triggered appeals by the involved federal agencies and several intervenor-defendants including the State of New Mexico, the Middle Rio Grande Conservancy District, and the City of Albuquerque. The intervenors also moved for a stay pending appeal which was denied by the district court. The conservation groups aligned as plaintiffs-appellees subsequently moved to dismiss all of the appeals for lack of jurisdiction.

On September 11, 2002, the Tenth Circuit Court of Appeals dismissed the appeals. The court found that the district court's order was not a final decision but instead was an "interim solution" subject to a "dynamic, ever-evolving process." *Rio Grande Silvery Minnow v. Keys*, No. 02-2130, 2002 WL 31027874 (10th Cir. Sept. 11, 2002) (unpublished report). The court accordingly rejected the federal agency defendants' argument that the district court's order was an injunction appealable under 28 U.S.C.A. §1292(a)(1) (2002). 2002 WL 31027874 at *4. The court also held the intervenors lacked standing for failure to demonstrate actual or imminent injury in fact. *Id.* at *3. Although the district court's ruling requires the federal defendants to consider use of the intervenors' SJP water in future consultations, the court concluded that consultation *per se* causes no concrete injury. Therefore, the intervenors would not have standing unless and until consultation actually results in a decision to use their water.

Meanwhile, New Mexico's drought has continued with indications that 2001 and 2002 will become the two driest years in recorded history. Following Judge Parker's April 2002 order, Reclamation continued its practice of making all contracted deliveries of water under both the San Juan Chama and Middle Rio Grande Projects. Reclamation then leased back project water, primarily from the City of Albuquerque, in order to comply with the flow requirements of a 1991

biological opinion and accompanying reasonable and prudent alternative (RPA) flow regime. At some point, Reclamation realized that water supplies set aside for the minnow would be insufficient to keep the river wet for the rest of the year. On August 2, 2002, Reclamation requested reinitiation of consultation with FWS and proposed to direct flows so that certain reaches would receive water whereas other reaches would be allowed to dry.

Minimum flows would be maintained in the San Acacia Reach, which has the largest concentration of wild minnows, and in the Albuquerque Reach where reintroduction efforts have focused. Flows would be bypassed in the Isleta Reach which would cause the loss of some minnows. As necessary, water would be released from the Heron Reservoir, where Reclamation stores a "firm yield" needed to meet future deliveries of SJP water. The FWS began evaluating Reclamation's August 2, 2002 proposal but had not completed its review by August 30, 2002, when Reclamation withdrew its proposal and instead proposed to allow the drying of both the San Acacia and Isleta Reaches causing approximately 70% of the silvery minnow critical habitat to go dry. Reclamation's August 30 proposal would not allow any releases from Heron Reservoir based on the view that it would be needed in 2003 for both SJP contractors and spring spawning of the minnow in the event that the drought continues.

On September 4, 2002, the plaintiffs filed a motion for emergency injunctive relief seeking an order requiring the release of the water stored in Heron Reservoir in quantities sufficient to maintain the minimum flows required by the 2001 biological opinion. On September 9, 2002, several days of hearings began on plaintiffs' motion for emergency injunctive relief. As noted above, on September 11, 2002, the Tenth Circuit dismissed the pending appeals of the district court's prior order. The next day, FWS issued a new biological opinion finding that Reclamation's August 30, 2002, proposal to dry portions of the river would be likely to jeopardize the continued existence of the silvery minnow. Nevertheless, FWS agreed with Reclamation's opposition to releasing stored water in Heron based on its view that the water would be needed to induce spawning in Spring 2003. Even though the immediate drying of most of the critical habitat would result in jeopardy, FWS found that there was no other reasonable and prudent alternative available.

On September 18, 2002, Judge James A. Parker ordered Reclamation and FWS to implement Reclamation's August 2, 2002, proposal. In a subsequent and lengthy Memorandum Opinion and Findings of Fact and Conclusions of Law issued on September 23, 2002, the judge criticized Reclamation for its failure to act sooner. According to the court, Reclamation knew or should have known in early 2002 that because of the continued severe drought conditions, it would be unable to meet the flow requirements of the 2001 biological opinion. Despite its authority to reduce releases of project water, the judge was troubled by the fact that Reclamation had made all contracted deliveries in 2002 pursuant to a policy not to prorate water deliveries absent a court order. The court concludes:

The actions and inactions of the BOR resulted in a crisis that was then thrust upon this Court a few days ago. This Court had to make very difficult choices with limited ESA options on an emergency basis. The Court believes this crisis situation could have been avoided if the Federal Defendants, especially the BOR, had properly performed their statutory duties.

Slip op. at 4. The opinion specifically finds that Reclamation had made matters worse by withdrawing its August 2, 2002, proposal, which could have avoided jeopardy, in favor of the

August 30, 2002, proposal, which would result in jeopardy to the continued existence of the minnow. The opinion accordingly rejects the new biological opinion as arbitrary and capricious and orders implementation of the August 2, 2002, proposal.

The Rio Grande Silvery Minnow controversy is intriguing in several ways. The line between natural and human environments has blurred. As a result of artificial diversions and habitat modification, the silvery minnow has become endangered. During the current drought, however, the remaining minnows would have been lost but for the importation of water from another watershed. Whether this "project" water must be made available for species preservation is a question to be answered in further litigation. In the final analysis, the future of the species may depend more on the weather and the continued success of captive breeding programs than the preservation of natural habitat or the importation of water.

The recent controversy also may reflect a change in policy or approach by the current administration to the protection of endangered species. The federal water management agencies perhaps have learned a lesson from the controversial Klamath case where the federal agencies took most of the heat from water users for their efforts to protect endangered species. In New Mexico, the federal agencies have steadfastly refused to invoke shortage provisions in project water contracts absent a court order. As a result, there is no bucket brigade protesting Reclamation's actions. Instead, Judge James A. Parker is being blamed, or praised, for making the tough decisions which may or may not save this tiny fish.

On October 16, 2002, the Tenth Circuit Court of Appeals granted a stay of Judge Parker's order requiring Reclamation to release San Juan Chama Project water and granted the State of New Mexico and the City of Albuquerque's request for expedited briefing. The decision is described at www.kobtv.com/archive/2002/october/17/minnow_stay.htm.

Timely Appeals of Adverse State Engineer Decisions

Like most western states, New Mexico provides an administrative hearing process for the resolution of protested water rights applications. Unlike most states, New Mexico constitutionally provides for a *de novo* appeal of adverse decisions to state district court. New Mexico Constitution art. XVI, §5. However, a district court does not acquire jurisdiction over such appeals unless all parties to the administrative hearing are served within 30 days. N.M. Stat. Ann. §72-7-1 (Michie 1978 & Supp. 1997) Appellants may serve notice by summons or by publication in a local newspaper, "once a week for four consecutive weeks." *Id.* §72-7-1(C). A recent final decision of the New Mexico Court of Appeals confirms that appellants who choose to serve by publication must not only initiate, but must complete, the publication process within 30 days. *Anthony Water & Sanitation District v. Turney*, 54 P.3d 87 (N.M. 2002).

After receiving an adverse decision from the New Mexico Office of the State Engineer (State Engineer), the Anthony Water and Sanitation District (AWSD) served a notice of appeal by initiating, but not completing, publication within 30 days. Upon a motion from one of the parties, the district court dismissed the AWSD appeal finding that it lacked jurisdiction. On appeal, AWSD first argued that a court rule that otherwise governs appeals to district court from administrative agencies, Rule 1-074 NMRA 2002, should control, rather than the statutory provisions. The court rejected this argument both because it was not raised below and because it was without merit.

The court found that AWSD's "more compelling" argument was that the statute only requires initiation, rather than completion, of publication within 30 days. AWSD argued that otherwise, the publication requirement would be nearly impossible to meet because an appellant would

immediately need to start publication in order to complete the process within 30 days. Admitting that AWSA's argument had some appeal, the court nonetheless rejected it based on both the plain meaning of the statute and prior precedent which requires strict compliance with the service requirements of N.M. Stat. Ann. §72-7-1(B). The decision thus firmly establishes the rule that to appeal an adverse decision of the State Engineer, service of actual or constructive notice must be completed within 30 days.

OREGON

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

Trial Court Rules on Navigability and Public Use of River

In *Northwest Steelheaders Ass'n, Inc. v. Simantel*, No. 99C-12309 (Marion County Cir. Ct. filed June 7, 1999), the plaintiffs sought a declaration:

- (1) that the John Day River, as it passes through the individual defendant property owners' lands, is a "river navigable in fact," and that the plaintiffs, as members of the public, engaging in recreational fishing in the beds and along the banks of the John Day River, have a right of recreational use of this navigable river pursuant to the public trust doctrine, regardless of the ownership of the soil in the John Day River and other navigable rivers within the state; that title to such lands and water of navigable waterways in Oregon is impressed in trust for the preservation of the public right of fishing and recreational use and other public rights which all citizens enjoy; and
- (2) that pursuant to the English common law doctrine of custom as recognized by the Supreme Court of Oregon in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), the public enjoys customary rights to use the banks and beds of the John Day River for recreational purposes.

Prior to trial, some of the defendant property owners settled with the plaintiffs. The State of Oregon, as a defendant in this case, was also a party to the settlement agreement.

Thereafter, the case proceeded to trial before a jury sitting in an advisory capacity on the factual issues raised by the plaintiffs as to the navigability of certain portions of the John Day River. Interestingly, the State of Oregon participated in the trial. The jury found that the John Day River is navigable along the property owned by the property owner defendants.

The court, having considered the advisory verdict, issued an opinion and order dated March 13, 2002, and a later judgment dated June 14, 2002, in which the trial court held that: (1) the John Day River was navigable in fact at the time Oregon was admitted to the Union; (2) even in its current condition, the John Day River is susceptible to commercial navigation during most months of the year; (3) it is in fact actually navigated by hundreds of recreational tourists and commercial outfitters throughout much of each year; (4) the river was historically navigated commercially both by the indigenous Native American peoples and by immigrant settlers; and (5) had the river been permitted to remain in its natural state, without withdrawals for mining, irrigation, and livestock watering and grazing, it is also likely that more commercial navigation would have taken place years ago.

The court also agreed with the jury's verdict on the navigability issue, that title to all lands lying below the ordinary high water mark of the John Day River is vested in the State of Oregon in trust for the citizens of the State of Oregon.

The parties had agreed that there is a floatage easement on the John Day River but they disagreed as to its scope. The court specifically found:

The floatage easement is a creature of legal and practical necessity. Through that legal document, the boating public has traditionally enjoyed priority over the riparian land owners to the extent, but only to the extent, that the boaters' incidental activities on those riparian lands are reasonably necessary to the convenient use of the waterway for travel. Basically those customary uses of [the] boating public which are reasonably necessary to the convenient use of the public as a waterway are permitted. But those uses that are not necessary to the convenient travel on the River are not permitted

The plaintiffs had also asked the court to find that the State Land Board had not acted on a navigability study request from the plaintiff on the *entire* John Day River; and that the Board should act on that request without delay. The court agreed with plaintiffs and specifically found that the State Land Board had unreasonably delayed taking any action on the plaintiffs' request for a navigability study. Accordingly, the court ordered the State Land Board to act on the request and exercise its discretion, one way or the other.

One of the intervenors in this case has filed a notice of appeal from the trial court's judgment. That matter is now pending before the Oregon Court of Appeals.

TEXAS

Frank F. Skillern, Reporter

Texas Water Development Board Issues Texas State Water Plan

The Texas Water Development Board (TWDB or Board) presented to the Texas legislature the latest state water plan, *Water for Texas--2002*, in January 2002, and it became available to the public in May. The 2002 plan is the culmination of the comprehensive statewide water planning process mandated by the legislature in S.B. 1 in 1997. The current plan differs from earlier efforts in which the TWDB, along with other state agencies, conducted technical studies on surface water and groundwater availability, gathered information about water demand and use throughout the state, and projected future needs, supply, and demand for water. Those earlier plans then included suggestions for meeting the growing demand for water, ranging from moving surface water from East to West Texas in the 1968 plan to more recent suggestions for conservation measures for existing and new users. Neither the Texas Natural Resources Conservation Commission (TNRCC) nor other state agencies were bound to follow prior state water plans in water permitting or water development projects. S.B. 1 requires that various actions by groundwater conservation districts, water districts, and the TNRCC have to be consistent with approved regional plans and that the state water plan should be a guide to state water policy.

S.B.1 changed the planning process by requiring greater public participation in local and regional planning. The state was divided into 16 regions and regional planning groups were set up with members representing affected stakeholders, including municipalities, local governments, water districts, electric power authorities, small businesses, public interests,

environmental interests, agriculture, and industry. Each planning group was charged with determining how the region's needs over a 50-year period would be met and providing for drought contingency planning. The planning groups typically conducted baseline studies of existing uses of both surface water and groundwater, examined management strategies for meeting demand, and identified how long-term water needs would be met (or not). The regional plans were adopted only after presentation at public hearings in the region.

The adopted regional plans then were submitted to the TWDB for approval and inclusion in the state water plan. The agency coordinated the plans and resolved any conflicts between regional plans. The 2002 plan contains several recommendations for legislative action drawn in part from the regional plans. In Volume I, the only print volume of the plan, the TWDB presents information on statewide water resources, includes results of the regional plans, and presents the Board's policy recommendations. That volume also identifies rivers and stream segments of unique ecological value as required by S.B. 1. The other volumes of the plan are on compact discs that are attached to Volume I. Volume II is intended to be a reference document to identify the specific water supply strategies by user groups that were included in approved regional plans to meet existing and future water needs for cities and other users throughout the state. Volume III contains electronic copies of each of the 16 approved regional water plans.

Chapter 1 of the first volume of the plan is titled "Highlights and Major Policy Recommendations of the 2002 State Water Plan." One policy recommendation addresses the success of the local, "grass roots" approach and urges that the regional planning groups be continued. Other policy recommendations deal with specific topics, including Agricultural and Rural Issues, Ground Water, Surface Water, Conservation, Innovative Strategies, Environmental, and Providing and Funding for Water and Wastewater Service. The policy recommendations were reviewed in their draft form in Vol. XXXV, No. 1 (2002) of this *Newsletter*, and since most remained unchanged, that review will not be repeated. Some changes were made. The Board urges quantifying the impacts of surface water or groundwater transfers on rural areas and requiring those impacts to be made public to the appropriate permitting body. Another recommendation proposes a goal of sustainability for groundwater management, while recognizing that a management goal must be determined locally as sustainability may not always be appropriate for every aquifer. Additionally, the recommendation proposes that the Board, working with groundwater conservation districts and regional planning groups, should evaluate "hydrologic, environmental, social, and economic impacts" of groundwater withdrawal from major and minor aquifers at different levels under identified management strategies. *Water for Texas--2002*, vol. I, at 5. The Board also recommends a comprehensive study of surface water administration that would include consideration of, *inter alia*: (1) allocation and administration of wastewater discharge flows; (2) relocation of supplies by interbasin transfers; (3) implementation of watermaster programs for each river basin; and (4) linking groundwater and surface water availability models in areas where those waters interact. *Id.*

The Environmental Section notes the serious problem of adequate freshwater flows for streams and bays and estuaries. The issue is what is adequate environmental flow in terms of duration, frequency, and location. "Because of the complexities of defining an environmental flow as such, which species to protect and how to balance protection with the effects on the public welfare, additional policy directives are needed [from the legislature]." *Id.* at 9. One recommendation is to establish consensus recommendations for criteria to measure a "sound ecological environment" and identify ways to protect environmental flows, and then to provide necessary funding to attain it.

The new Texas state water plan is available on the TWDB's website: www.twdb.state.tx.us/publications/reports/State_Water_Plan/2002/FinalWaterPlan2002.htm.

Name Change for the TNRCC: Texas Commission on Environmental Quality

After September 1, 2002, the Texas Natural Resources Conservation Commission (TNRCC) will be known as the Texas Commission on Environmental Quality or TCEQ, which will have all the powers and duties of the TNRCC. This name change was a product of the sunset review of the TNRCC in 2001 and is not intended to alter any of the organization or functions of the agency. TCEQ will continue administration of the water rights and water quality programs, as well as the air pollution, NPDES permit, hazardous waste, and state superfund programs, among others. All of the personnel, commission members, facilities, documents, and equipment of the old agency are transferred to the new one. The agency's sunset act extends the commission for 12 years, when it will again be subject to review and renewal consideration. TNRCC Sunset Act, 77th Leg. Sess., ch. 965, art. 18, 2001 Tex. Sess. Law Serv. 1825, 1874 (Vernon).

City of Marshall Amendment Application

In 1997 in S.B.1, the 75th Legislative Session significantly amended §11.122 of the Texas Water Code regarding amend-ments. What is becoming known as the "Four Corners" provision was added to the amendment section:

- (b) Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment...[other than one increasing the amount diverted or the rate of diversion] shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

Tex. Water Code Ann. §11.122(b) (Vernon 2000). In a decision on June 14, 2002, the TNRCC set the stage for what may become the most important litigation to date involving S.B. 1, specifically, water marketing, hearings requirements on amendments, interbasin transfers, and water policy over reallocation of water rights. Certificate of Adjudication No. 04-4614, *In re Application of City of Marshall for Amendment*, before the TNRCC, decided June 14, 2002 (City of Marshall Amendment Application). The facts and arguments summarized below were taken from briefs filed by the Movants (defined below), the Texas Parks and Wildlife Department (TPWD), and the TNRCC's Office of Public Interest Counsel (OPIC).

The City of Marshall (City) filed two applications with the TNRCC to amend its certificate of adjudication which allowed a diversion for municipal uses of up to 16,000 acre-feet (AF) from Cypress Creek above Caddo Lake. The City has never used more than 8,000 AF, but sought the full amount of its adjudicated right, as well as an additional 3,000 AF for industrial purposes. It also sought to "correct" the certificate to allow return of surplus water into the Sabine River Basin, rather than the Cypress Basin. No notice of the application was given, but in December a public meeting was held in Marshall. On January 2, 2002, the application was declared "administratively complete," after a conservation plan was submitted by the City. The Executive Director (ED) of the TNRCC granted the City's application on March 9, 2002, without a hearing.

He approved the change in point of diversion, the change in place of return flow, the requested 3,000 AF for industrial (power plant cooling water), and the interbasin transfer for the return flow. The Caddo Lake Institute, a municipality, local chambers of commerce, and individual water users (Movants), immediately filed a motion with the TNRCC to overturn the ED's decision. The Movants were supported by responsive briefs from the TNRCC's OPIC and TPWD.

The allegations of the Movants focus on the potential harm to Caddo Lake, as well as the legal basis of the ED's decision. Caddo Lake is the only natural lake in Texas and is shared with Louisiana. It has been listed under the Ramsar Convention as an international wetland with exceptional wetland values for wildlife and habitat. As such, it is designated for preservation and protection. An increase in actual diversion from 8,000 AF historically to the full amount of the certificate, 16,000 AF, could adversely affect the lake. Allowing an additional 3,000 AF for industrial uses--a right that was claimed, but denied, in the 1986 adjudication for lack of need--similarly could hurt the lake. The harm would be worse if the requested change in point of return flow is allowed from the Cypress Basin and Caddo Lake to the Sabine River Basin.

Some of the legal arguments were: (1) the failure of the ED to provide notice and an opportunity for hearing on a "Four Corners" amendment, contrary to the water code; (2) not requiring an adequate conservation plan before making the "administratively complete" determination; and (3) acting contrary to TNRCC rules for amendments which call for a hearing to consider factors other than impact on existing rights and the environment, i.e., public welfare, conservation, and avoidance of waste. An important issue was whether the Four Corners provision could be used when the applicant had not previously been complying with the terms of the original water right. In addition, downstream users claimed that the reallocation of water worked a taking of their vested appropriative rights in the return flow.

The TPWD argued that by improperly deciding not to give notice and an opportunity for a hearing on the requested amendment, the ED prevented the department from presenting the public interest concerns. Also, the commission did not consult with the TPWD as required by the water code. The TPWD was concerned that by not holding a public hearing, the use of state waters held in trust for the public was turned over to the City with no consideration of the public interest or environmental issues. The OPIC argued that the water code required notice and an opportunity for contested case hearing in order to assure the reallocation was "not detrimental to the public welfare" under Tex. Water Code Ann. §11.134(b). OPIC also objected to the ED's use of an exception to Tex. Water Code Ann. §11.085 requirements for interbasin transfers. The exception, Tex. Water Code Ann. §11.085(v)(4), allows approval of transfers by municipalities whose service areas overlie two basins, without the extensive interbasin transfer review under Tex. Water Code Ann. §11.085. OPIC argued that the exception was not intended to apply to sales of raw water like the City was proposing.

On June 14, 2002, after a public hearing, the commissioners of the TNRCC upheld the ED's March 9 ruling in its entirety. Earlier in June, before the TNRCC's June 14 decision, some of the Movants in the administrative appeal had filed suit in state district court in Austin challenging the ED's decision. They seek an order for a contested case hearing under the state administrative procedure act and also claim a "taking" of property under the Private Property Act. In all likelihood, these parties will also appeal to state district court the TNRCC's final action upholding the ED's decision. Because Caddo Lake is an international wetland, federal lawsuits may be brought to protect it and to prevent harm to threatened species or their habitat.

Mesa Water Proposal to Market Groundwater from Ogallala Aquifer

A major development concerning groundwater management is the proposal by Mesa Water, Inc., a business venture of oilman T. Boone Pickens, to sell groundwater from the Ogallala Aquifer to water-thirsty cities in other parts of the state. The Ogallala is a mined aquifer, with no perceptible natural recharge. Mesa Water has purchased or leased 150,000 acres of land in rural Roberts County, in the northern Panhandle region of Texas. Recently the firm applied for a high-impact well permit from the Panhandle Groundwater Conservation District (PGCD). The application sought permission for wells to withdraw water to be conveyed to as yet unidentified cities for municipal uses. The PGCD had adopted a management plan in 1998, which included a so-called 50/50 rule--withdrawals would be allowed to deplete the aquifer up to 50% of its saturated thickness over the next 50-year period. At the time of the Mesa Water application, the Canadian River Municipal Water Authority (CRMWA) had permits to take groundwater to dilute the highly saline Canadian River water that is delivered to several cities in the southern Panhandle region. The City of Amarillo has permits for municipal use and, with CRMWA, filed protests and sought a contested case hearing on the Mesa Water application. Among other arguments, the protesters objected to the application for not stating a beneficial use since it did not name the end users and because the proposed wells would interfere with the protesters' vested rights. After the protesters sued to enjoin the district from issuing the permit, Mesa Water sued CRMWA in a separate action alleging that the Authority violated the Texas Private Property Act by its pumping of water under Mesa's land and preventing Mesa from exercising its rights to withdraw groundwater. The litigation was settled and both suits withdrawn in March 2002. The PGCD then determined that the Mesa Water application complied with the district's water management plan, including the 50/50 rule, and on May 16, 2002, granted a permit for 124 wells allowing withdrawal of 1 AF/acre/year. The permit was conditioned on Mesa Water identifying the cities where the water would be sold within five years. CRMWA reportedly is seeking more stringent conditions regulating pumping by Mesa Water to protect existing pumpers.

Court Construes Rules of Edwards Aquifer Authority

Recently, the Texas Supreme Court considered the validity of the regulatory and permitting rules issued by the Edwards Aquifer Authority (EAA or Authority). On February 14, 2002, the court issued an unpublished opinion upholding the Authority's rules against challenges based on the Private Real Property Rights Preservation Act (Private Property Act), Tex. Gov't Code Ann. §§2007.001 *et seq.* (Vernon 2000). In *Bragg v. Edwards Aquifer Authority*, 45 Tex. Sup. Ct. J. 375, 71 S.W.3d 729 (2002), the plaintiffs, as required by the Edwards Aquifer Act, applied for permits for two wells pumping from the Edwards Aquifer. That Act established the Authority as a regional agency to administer the statutory permit system for withdrawals from the Edwards Aquifer. Under the Act, a statutory cap was set at 450,000 acre-feet per year (AFY) through 2007 and 400,000 AFY thereafter. To achieve the limitations on annual withdrawals from the Aquifer, the Authority was directed to implement a permit system. A statutory preference for permits was given to existing users equal to the maximum amount of water beneficially used without waste during any one calendar year during the historical period. If the aggregate historical use exceeds the statutory cap, the Authority may proportionately reduce withdrawals under permits to keep withdrawals within the cap. The Act, however, provides that existing irrigation users would receive not less than 2 AF for each acre of land actually irrigated during the historical period. The EAA adopted rules to implement the permit system required by the Act, but it did not prepare a "takings impact assessment" (TIA) under the Private Property Act before adopting the rules. The Braggs sued the Authority to enjoin it from applying the rules to their applications for failing to prepare a TIA as required by the Private Property Act.

The Braggs were farmers who operated two commercial pecan orchards that were irrigated by wells pumping from the Edwards Aquifer. They had operated a well at one orchard since 1979, and they applied for the historical use amount withdrawn annually for commercial production of pecans. A well on the second orchard was started in 1994 and completed in 1995, after the historical use period (June 1, 1972-May 31, 1993). The application for that well sought the amount of water withdrawn in 1995 and 1996. The Executive Director of the EAA reviewed the applications and recommended to its board that the first application for an initial use permit be granted, but that it be limited to the statutory minimum amount of 2 AF/acre. The Braggs claimed that the minimum amount is insufficient for a commercial pecan orchard. The Director recommended that the application for the second orchard be denied since no water was withdrawn during the historical use period, i.e., it was a new well. Before the board could act on those recommendations, the Braggs sued to invalidate the proposed actions on the permit applications and also the EAA's rules for the well permitting process. 31 Tex. Admin. Code chs. 703, 705, 707 (West 1999). The Braggs asserted that the EAA failed to prepare a "takings impact assessment" required by the Private Property Act before issuing the rules and acting on the applications. Tex. Gov't Code Ann. §2007.044(a) (Vernon 2000).

The supreme court held that the EAA's adoption of well permitting rules is "governmental action" within the meaning of the Private Property Act, but that those rules fall within an enumerated exception in that Act. The court concluded that the rules fall within the exception for actions by the EAA taken under "statutory authority to prevent waste or protect rights of owners of interest in groundwater." *Id.* §2007.003(b)(11)(C). The EAA's rules were adopted to conserve and manage the aquifer by preventing waste. This action was taken under the legislative mandate in the Authority's organic Act. Hence, the adoption of well permitting rules is exempt from the TIA requirement of the Private Property Act. Similarly, the court rejected the declaratory relief sought by the Braggs that a TIA must be prepared before acting on individual permit

applications. The court concluded that the EAA's enforcement of its rules through permitting is not within the proposed governmental actions listed in the Private Property Act which require a TIA.

The case is important for clarifying the TIA requirement on agency rulemaking actions. The supreme court did not adopt the court of appeals' reasoning which had found the EAA's rules exempt under the exception for political subdivisions fulfilling obligations mandated by state law. On appeal, the court adopted the agency's argument that the Private Property Act's exception for required actions by agencies to prevent waste of groundwater did apply. Also the court rejected the Braggs' argument that the waste exception only applied to situations that specifically involved allegations of waste, and not to their application where no issue of waste was raised.

Adjudication of Rivers

The last general adjudication of Texas rivers is moving forward again. The adjudication of the Upper Rio Grande was originally initiated by the TNRCC on April 21, 1994. The United States filed its claim to 27,000 AFY based on its rights for the Rio Grande Reclamation Project (Project), which is located below the Elephant Butte Reservoir in New Mexico and extends into districts located in Western Texas. In 1997 the administrative law judge (ALJ) abated the adjudication after the United States filed a quiet title action in federal district court in New Mexico over ownership of Project water. *United States v. Elephant Butte Irrigation District*, CIV 97-0803 JP-RLP (D. N.M. 1997). The district court dismissed the quiet title suit and all counterclaims, and that decision was appealed to the Tenth Circuit Court of Appeals.

While the federal appeal was pending, on September 5, 2001, the Executive Director (ED) of the TNRCC asked the ALJ to solicit opinions of the other parties regarding ending the abatement and proceeding with the case. After receiving input both supporting and opposing resumption of the adjudication, on May 9, 2002, the ALJ decided to proceed with the adjudication and asked the ED to submit a written proposal for a schedule and procedures for the proceedings. The proposal will be submitted to all parties for response.

The Upper Rio Grande is the last river segment requiring adjudication in Texas. In addition to numerous claimants under state law, the federal government is asserting claims to Project water under both federal and state law. The Tigua Indians also have filed claims in the adjudication. It will be interesting to see if this adjudication proceeds as quickly as the earlier ones.

UTAH

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

U.S. District Court Strikes down Anti-Nuclear Waste Legislation, but Leaves Water Rights Adjudication Provision Intact

In *Skull Valley Band of the Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002), the U.S. District Court for Utah held that numerous sections of Utah statutes intended to block the storage of high-level nuclear waste in Utah are unconstitutional. The court, however, upheld a provision of the law that allows the executive director of the Department of Environmental Quality to require the state engineer to commence a general adjudication of water rights in areas in which a high-level nuclear waste storage facility is proposed.

In the main, the case does not relate to water or water rights. It stems from the plans by Private Fuel Storage, L.L.C. (PFS), to store high-level spent nuclear fuel on the reservation of the Skull Valley Band of the Goshute Indian Tribe (Skull Valley Band). In an effort to block the storage facility, the 2001 Utah legislature passed the legislation at issue in the case. PFS and the Skull Valley Band brought the lawsuit, seeking injunctive and declaratory relief from the Utah laws.

Judge Campbell of the Utah U.S. District Court held that many provisions of the Utah legislation are unconstitutional. Provisions that the court struck down would have established a separate state licensing process, revoked limitations on liability for officers and directors of companies operating high-level nuclear waste storage facilities, designated and restricted certain roads to give the state control over transportation to the planned facility site, and imposed requirements for certain municipal and county services. The court held that these provisions were preempted by the 1982 Nuclear Waste Policy Act.

The court also addressed an amendment to the Utah statutes governing the general adjudication of water rights. The court upheld the amendment because its effect on interstate commerce would be slight, and therefore it did not violate the Commerce Clause.

The amendment has two provisions. The first allows the executive director of the Department of Environmental Quality, with the concurrence of the governor, to require the state engineer to file an action to adjudicate the water rights in any area where a company or individual is "actively pursuing or processing a license application" for a high-level nuclear waste storage facility. Utah Code Ann. §73-4-1(2)(b) (Supp. 2002). The amendment authorizes the executive director to "request" the state engineer to commence the general adjudication, but if the executive director makes such a "request," the state engineer must commence the action.

The statute also provides that if the planned or proposed facility is in an area where an adjudication order is already in place, the executive director can require the state engineer to join the United States as a party. In certain river drainage areas in Utah, by mutual agreement, the United States has not yet been joined as a party in the respective general adjudication. This arrangement is intended to give the state and the United States flexibility to negotiate federal reserved water rights, particularly water rights related to Native American tribal reservations. For example, the United States has not been joined in the general adjudication in which Skull Valley is located, to allow time for negotiation of federal reserved water issues related to the Skull Valley Band Reservation, Goshute Indian Reservation, Dugway Proving Ground, Tooele Army Depot, Fish Springs National Wildlife Refuge, and Utah Test and Training Range.

Joining the United States in the general adjudication that covers the proposed facility in Skull Valley is unlikely to aid the state in preventing the storage of spent nuclear fuel at the PFS site. The proposed facility is simply not dependent on the general adjudication, and would likely benefit from an expedited adjudication the same as other water users. If the state decides to pursue the general adjudication as part of the fight against the PFS facility, the most one could reasonably hope for is that the Skull Valley area would be adjudicated earlier rather than later.

Court Denies Timpanogos Tribe Motion to Intervene

On its face, the case of *Ute Distribution Corp. v. Norton*, No. 01-4020, 2002 WL 1722061 (10th Cir. 2002) (unpublished opinion) is a question of federal civil procedure. It is, however, a surface manifestation of a much deeper dispute, in which the Timpanogos Tribe, Snake Band of the Shoshone Indians, claims an aboriginal right to land and water rights on the Ute Indian

Reservation in the Uinta Basin. The Timpanogos Tribe is not recognized by the United States as an Indian tribe.

In 1954, Congress passed the Ute Partition and Termination Act (UPA), 25 U.S.C.A. §§677-677aa (2001). The UPA, part of a federal government policy to divest itself of supervisory responsibility over Indian tribes, divided the Ute Tribe into two groups for purposes of distributing the assets of the Tribe. The groups were, in the language of the statute, the "full-blood" members and the "mixed-blood" members. The UPA directed that tribal assets that could be divided equitably should be distributed to the two groups, and federal supervision over the assets of the "mixed-blood" group would end. Other assets, including gas, oil, and mineral rights, were not included in the distribution because it is difficult to divide and distribute those assets equitably.

The Ute Distribution Corporation (UDC) represents "mixed-blood" Utes in management of the indivisible assets. The UDC brought suit in 1995 against the Secretary of the Interior and the Ute Indian Tribe seeking a declaration that the water rights for the Uintah Valley Reserve were included among the indivisible assets. As that case progressed, the Timpanogos Tribe filed a motion to intervene based on its claims to the land and water rights in the Uintah Valley. The federal district court denied the motion, and the Timpanogos Tribe appealed.

(As a side note, the spelling of "Uintah" and "Uinta" depends on the particular entity in question. Thus, the Uintah and Ouray Indian Reservation is in the Uinta Basin, as are the Uinta River, the Uinta Mountains, parts of Uintah County, Utah, but not Uinta County, Wyoming. In this article, we are using the court's spelling for "Uintah Valley," under the assumption that the court got it right.)

The Tenth Circuit affirmed the trial court, holding that the motion to intervene was untimely and that the Timpanogos Tribe did not have an interest that justified the motion to intervene. The Timpanogos Tribe's claim to the water "does not implicate, and is not affected by, the question of whether the water rights were divided and distributed to the full-blood and mixed-blood members of the Ute Tribe pursuant to the UPA." 2002 WL 1722061 at *5. It appears that the Timpanogos Tribe attempted to argue the merits of its underlying claims to land and water rights, but those arguments were not related to the narrow issue before the court.

The real dispute in this case, which is far from resolved, is the Timpanogos Tribe's claim to land and water rights in the Ute Indian Reservation in the Uintah Valley. The Timpanogos Tribe has already attempted to enjoin state regulation of its hunting and fishing rights in the Uinta Basin, see *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002), and has sought to intervene as a party in other cases brought on behalf of the Ute Indian Tribe, see *Ute Indian Tribe v. Utah*, No. 75-CV-408J (D. Utah 1975).

Amended Opinion in Shareholder vs. Irrigation Company Case

In Vol. XXXV, No. 2 (2002), of this *Newsletter*, we reported on the case of *Utah v. Huntington-Cleveland Irrigation Co.*, in which the Utah Supreme Court reversed a trial court ruling that the applicable statutes of limitation had run on contractual and statutory claims by the Utah Division of Wildlife Resources (DWR) against the Huntington-Cleveland Irrigation Company (HCIC). In response to a motion for reconsideration, the court made minor amendments to the original opinion and reissued it on July 30, 2002. *Utah v. Huntington-Cleveland Irrigation Co.*, 52 P.3d 1257 (Utah 2002).

Briefly, the dispute in the case arose when HCIC reclassified shares of stock owned by DWR from irrigation uses to municipal and industrial uses. In so doing, HCIC raised the assessments

charged against the shares and denied voting rights for the reclassified shares. DWR filed suit claiming that the HCIC actions were a breach of implied contract and in violation of statutes. The trial court dismissed the actions on grounds that the statute of limitations had run. DWR appealed, and the Utah Supreme Court reversed. The original opinion held that a new cause of action arose each time the assessments were charged against the shares, not merely when HCIC amended its bylaws or reclassified DWR's shares. The original opinion, however, did not fully explain when the statute of limitations begins to run on claims related to voting rights.

In the amended opinion, the court essentially added a paragraph explaining how the statute of limitations operates for causes of action that claim the denial of voting rights was a breach of implied contract. The court held that for causes of action based on contract, the statute of limitations began to run on voting rights claims "when HCIC specifically reclassified those shares, thus effectively denying voting rights on those particular shares." *Huntington-Cleveland*, 52 P.3d at 1263. However, the court stated that if HCIC did not specify exactly which shares were reclassified when it initially informed DWR about the reclassification in February 1995, then the statute of limitations began to run in October 1995 when HCIC sent DWR the first assessment incorporating the reclassification. Because the suit was filed in June 1999 and the statute of limitations is four years, the date of reclassification determines if that cause of action is barred. The case was remanded to the trial court for a determination of whether the shares were identified as reclassified shares in February 1995 or October 1995.

The Utah Supreme Court answered the question of when the statute of limitations begins to run on assessments based on shares of stock in an irrigation company. The resolution of the voting rights issue is less clear, however, in part because the court did not modify the opinion to address the denial of voting rights as a violation of statute. The amended opinion, while providing some guidance to the trial court, still leaves some questions in dispute.

WYOMING

David F. Palmerlee, Reporter

Court Rules on "Walton" Claims in Big Horn Adjudication

The Wyoming Supreme Court opinion in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 48 P.3d 1040 (Wyo. 2002), may be the last gasp of some 25 years of litigation over the Big Horn River System in Wyoming. The following quotations clearly explain the succinct opinion of Justice Kite:

This appeal arises out of the continuing, comprehensive adjudication of the water rights in the Big Horn River System initiated in 1977 The purpose of the adjudication was to resolve the issue of what water rights the federal government reserved for the Wind River Indian Reservation's benefit This immense task resulted in more than 20,000 water rights claims being winnowed down to the seventeen disputed claims now before this court.

43 P.3d at 1043.

The appellants own lands within the Big Horn River System and claim federal reserved water rights as a result of their acquiring properties from Indian allottees. These claims are known as "Walton" claims based on the federal court cases which first

identified them. To qualify, Walton claimants must demonstrate their lands were irrigated by their Indian allottee predecessors or the first non-Indian successors irrigated the lands within a reasonable time after they were conveyed. The district court denied these appellants' claims (unsuccessful claimants) finding they failed to show beneficial use of water within a "reasonable time" because they relied upon the construction of the Wind River Irrigation Project to make the water available to their lands and the project was not completed until approximately ten to thirty years after transfer of the allotments.

....
The special master acknowledged in her report that, absent the United States' assistance in constructing the Wind River Irrigation Project, irrigation would not have been possible on any of the Walton claimants' lands.

....
[T]he federal law of reserved rights relies upon the reasonable diligence standard established in state prior appropriation law to determine the validity of *Walton* right claims, and reliance upon the irrigation project met that standard.

....
As a matter of law, development of the project can be considered as having been done on behalf of the allottees and their successors Wyoming law is clear that irrigation projects such as this are favored, and the courts have allowed significant time for such projects to be completed while protecting the water rights upon which they rely.

....
A fundamental difference between a reserved right held by an Indian and one transferred to a non-Indian was that the Indian did not lose the right by nonuse.

Id. at 1042-47.

We find no authority for concluding the reasonable diligence required for a *Walton* right and that required to maintain a state water right are different in kind or quality

....
... We hold, under the circumstances of this case and presuming irrigation was not possible absent the project, in order to establish beneficial use of the reserved water within a reasonable time to retain the federal reserved right, the unsuccessful claimants must demonstrate their efforts to put the lands under irrigation within a reasonable time and with due diligence, as defined by state law, *after the federal project facilities became available to the properties.*

Id. at 1054-55.