

ALASKA

Thomas E. Meacham, Reporter

Alaska Legislature Creates Navigable Waters Commission

The Alaska legislature enacted an uncodified statute at Chapter 71, Sess. Laws Alaska 2002, which creates the state component of a proposed "Navigable Waters Commission for Alaska" (Commission). The stated function of the state component of this commission would be to provide a carefully coordinated approach with the federal government to resolve submerged land ownership issues arising from the still-undetermined status of Alaska's numerous waterways (possibly more than 20,000) which might eventually be found "navigable" under provisions of the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301, 1311. With such determinations of navigability would come the passage of title, from the United States to the State of Alaska, to the submerged lands beneath the navigable waterways, *nunc pro tunc* as of January 2, 1959, the date of Alaska's statehood.

According to the legislation, the Commission would expedite the process of quieting title to Alaska's submerged lands; determine, to the extent possible, which water bodies are navigable; and provide recommendations to the state and federal governments on how to improve the process of making navigability determinations. To date, these determinations have followed the laborious and detailed path of individual suits, lake by lake and river by river, in federal district court. There is no power presently vested in the state component of the Commission to make navigability determinations on its own.

The state legislation contemplates the formation of a counterpart federal component which, together with the state component, would form the "Navigable Waters Commission for Alaska" to accomplish the tasks listed above. Proposed legislation which would have created such a federal counterpart was sponsored by Sen. Frank Murkowski (R.-Alaska), but it died without action at the close of the 2002 congressional session. Sen. Murkowski's election as Governor of Alaska in November 2002, and his resignation of his Senate seat in favor of his daughter Lisa Murkowski (whom he appointed to fill Alaska's vacancy in the U.S. Senate on December 20, 2002), together mean that legislation to establish the proposed federal component of the Commission will probably be introduced in the new congressional session.

The extent to which such a federal-state commission, if it is created, could potentially make binding navigability determinations that could determine and transfer title without litigation has been the subject of some debate. That debate has been fueled by an address given in Anchorage on November 22, 2002, by Deputy Secretary of the Interior Stephen Griles. Mr. Griles stated that, even without the creation of the federal component of the Commission, the Department of the Interior would use authority granted under section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 315, 43 U.S.C. § 1745, to record "disclaimers of interest" in those federal lands which the state's component of the Commission might recommend as navigable. He referred to the Department's final rulemaking concerning proposed regulations at 43 C.F.R. part 1860 to implement FLPMA's section 315. Notice of proposed rulemaking was published at 67 *Fed. Reg.* 8216-8219 (Feb. 22, 2002), and the final rule was published at 68 *Fed. Reg.* 494-503 (Jan. 6, 2003).

It is presently unknown the degree to which FLPMA's section 315 disclaimer authority may be extended to lands under the management jurisdiction of other Interior Department agencies besides the Bureau of Land Management, or to lands managed by the U.S. Forest Service, Department of Agriculture.

Alaska Legislature Enacts Recordkeeping Requirements, Repeals "Sunset" Clause

The Alaska legislature has enacted a provision at Chapter 66, Sess. Laws Alaska 2002, which amends the Alaska Water Use Act (Alaska Stat. § 46.15.020(b)(2)) to require the Department of Natural Resources (DNR) to implement a "standardized procedure" for the processing of water use applications, the issuance of permits, authorizations, and certificates, the indexing of water use records, and making them available to the public on the Internet.

The statutory authority, which had been enacted in 2001 to validate DNR's ad hoc temporary water permit program (Ch. 100, Sess. Laws Alaska 2001), contained a legislated "sunset" provision which would have repealed this authority on July 1, 2002. However, by legislation in 2002 (Ch. 65, Sess. Laws Alaska 2002), the sunset provision has itself been repealed, thereby leaving the "temporary water use" provisions of the Alaska Water Use

Act in place.

The new statute does place some limits on the validity of the "temporary water use applications" that had been statutorily recognized, ex post facto, in the 2001 session of the state legislature. Temporary water use authorizations are now declared valid only to the extent that they comply with applicable fish-protection requirements of Alaska Stat. § 16.05.870.

Alaska Department of Natural Resources Declines to Adopt Proposed Regulations

Regulatory changes to certain regulations (11 Alaska Admin. Code §§ 93.020-93.970) which implement Alaska's Water Use Act were proposed by DNR in late 2001, to accommodate the DNR's newfound temporary water permit authority (see article immediately above). However, DNR, with little public explanation, in 2002 decided not to adopt its proposed regulatory changes in any form. There are no pending proposals to amend existing regulations, which had been adopted long before DNR's new temporary water permit authority became formalized by the 2001 legislation at Chapter 100, § 6, Sess. Laws Alaska 2001.

Alaska Department Issues Uncommon Water Rights Forfeiture Decision

Through a seldom-used administrative proceeding, the Alaska Department of Natural Resources has declared a filed declaration of appropriation of water invalid, and thereby forfeited for non-use. *In the Matter of Revocation of ADL-40815, ADL-43821* (May 11, 2002) (*Dale E. Young II*). Such administrative determinations are uncommon in Alaska, and can be anticipated in those few areas where the public interest and a possible over-appropriation of available water combine to offer the necessary incentive to initiate administrative proceedings against a dilatory water appropriator.

The *Dale E. Young II* proceeding involved the revocation of certificates of appropriation for waters of the Baranof River and a natural hot spring, which both flow into the Pacific Ocean at the old federal townsite of Baranof Warm Springs, on Baranof Island near Sitka, Alaska. Claimant Dale E. Young, by his appropriations for ostensible domestic use, commercial development, and hydroelectric power generation had tied up the use of a significant quantity of water from the Baranof River and—more significantly from the public interest standpoint—had appropriated Baranof Warm Spring No. 8.

Warm Spring No. 8 is a hot spring, bathing pool, and warm-water course which local residents have used for domestic purposes at their homes and recreational cabins, and which has long provided the source of hot water for public bathing in a few large pools near the seashore. These bathing pools have historically provided respite for commercial fishermen and other sailors traveling up the Alaska Panhandle by water. There was a significant potential for an outbreak of violence over the loss of these opportunities by the claimant's recent closures of these pools, and by his reassertion of an intention to develop the waters for the purposes for which his certificates of appropriation had been issued in 1970 (Baranof River) and in 1982 (Warm Spring No. 8).

Concluding a proceeding which DNR had begun in 1997, the administrative decision determined that Young had failed to commence construction of his works of appropriation and had not in fact appropriated the water for a period of five years or more after issuance of his certificates; and therefore, under the Alaska Water Use Act, Alaska Stat. § 46.15.140(b), his failures were conclusive as to the forfeiture of his claimed water rights. The claimant has appealed DNR's administrative decision to the Alaska Superior Court, where the case is presently pending.

ARIZONA

Margaret Gallogly, Reporter

Final Interstate Banking Agreements Executed

On December 18, 2002, representatives of the States of Arizona and Nevada and of the United States signed the two remaining agreements necessary for the interstate banking of Colorado River Water in Arizona for the benefit of Nevada. These agreements are the Storage and Interstate Release Agreement among the U.S. Department of the Interior (United States), the Arizona Water Banking Authority (AWBA), the Southern Nevada Water Authority (SNWA), and the Colorado River Commission of Nevada (CRCN); and the Agreement for the Development of Intentionally Created Unused Apportionment between the AWBA and the Central Arizona Water Conservation District (CAWCD). These two agreements, along with the Agreement for Interstate Water Banking (Interstate Water Banking Agreement) dated July 3, 2001, among the AWBA, the SNWA, and the CRCN allow the AWBA to store up to 200,000 acre-feet of Colorado River water per year in underground storage projects in Arizona for Nevada's benefit. The total cumulative amount that may be stored for Nevada's benefit under the agreements is 1.2 million acre-feet. Arizona and Nevada have already begun to store Colorado River water through the interstate water

banking program. Recovery of the stored water is expected to begin around 2017. All three agreements expire in 2050. The interstate banking of Colorado River water is considered an important interim source of water for Nevada as it pursues permanent non-Colorado River sources of water. Interstate banking is also an important component of Arizona's strategy of fully utilizing its Colorado River allocation.

Background. The execution of the Storage and Interstate Release Agreement and the Agreement for the Development of Intentionally Created Unused Apportionment are the final steps in the complicated process of creating a legal framework for interstate water banking. The Arizona legislature authorized the AWBA to store Colorado River water in Arizona on behalf of Nevada and California in 1996. The Arizona legislature imposed two conditions before its authorization for interstate banking would be effective. It required that the federal government promulgate regulations allowing the distribution of an unused Colorado River water apportionment to other states. The federal government subsequently adopted such regulations regarding the development and release of intentionally created unused apportionment. 43 C.F.R. pt. 414 (2002). The second condition was that the Arizona Department of Water Resources (ADWR) determine that the federal regulations protect Arizona's rights to its Colorado River apportionment. This condition was met in 1999, when the Director of ADWR declared that the federal regulations adequately protect Arizona's rights to its Colorado River water supply.

Following the satisfaction of these conditions, the AWBA, the SNWA, and the CRCN negotiated the Interstate Water Banking Agreement that was signed in July 2001. Through the Interstate Water Banking Agreement, the AWBA, the SNWA, and the CRCN created a program for interstate banking of Colorado River water in Arizona for the benefit of the SNWA. The Interstate Water Banking Agreement sets out the obligations and rights of the AWBA, the SNWA, and the CRCN for the delivery, storage, and recovery of Colorado River water and the development of intentionally created unused apportionment. Under this interstate banking program, AWBA will acquire mainstream Colorado River water and store the water in Arizona aquifers. The water storage will result in the generation of long-term storage credits to be held for the benefit of the SNWA in an account established with ADWR. Later, the long-term storage credits will be used to develop intentionally created unused apportionment by exchanging the stored water for Colorado River water. The United States will then release a quantity of Colorado River water, equal to the intentionally created unused apportionment, for consumption in Nevada. All costs of water delivery, storage and recovery incurred in connection with interstate water banking are paid by SNWA. Details of the Interstate Water Banking Agreement were described in this *Newsletter*, Vol. XXXIV, No. 3, at 1 (2001).

The concept of intentionally created unused apportionment (ICUA) is critical to the recovery of water stored on behalf of the SNWA. The three agreements detail the process of developing ICUA consistent with the terms of Article II(B)(6) of the U.S. Supreme Court's decree (the Decree) entered in *Arizona v. California*, 376 U.S. 340 (1964). That section of the Decree generally provides that, if Colorado River water apportioned to a Lower Basin State is not consumed in that state during a particular year, nothing in the Decree prohibits the Secretary of the Interior from releasing the unused apportionment to another Lower Basin State for consumption in that state. For interstate water banking of Colorado River water to exist consistent with the Decree and the apportionment of Colorado River water established in the Decree, Arizona must intentionally not use a portion of its apportionment and the Secretary of the Interior must be willing to release that unused apportionment to Nevada for consumption in Nevada under Article II(B)(6) of the Decree.

The AWBA stored approximately 64,000 acre-feet of water on behalf of the SNWA in 2002. However, the Interstate Water Banking Agreement provides that the AWBA has no obligation to store water on behalf of the SNWA until the Storage and Interstate Release Agreement and the Agreement for the Development of Intentionally Created Unused Apportionment are signed and in effect. With the execution of the Storage and Interstate Release Agreement and the Agreement for the Development of Intentionally Created Unused Apportionment, the AWBA is now obligated to store Colorado River water on behalf of the SNWA as provided in and subject to the terms of the three agreements.

Summary of the Storage and Interstate Release Agreement. Under the Storage and Interstate Release Agreement, the United States agrees to release the quantity of ICUA developed by the AWBA for consumptive use in the State of Nevada, so long as the United States determines that certain certifications made by the AWBA meet the requirements of the Storage and Interstate Release Agreement. The Storage and Interstate Release Agreement establishes the timetable for Nevada's submission of requests for release of ICUA, the AWBA's submission of certificates, and the United States' determination that the certifications are proper. Once the United States determines that the ICUA will be released for consumption in Nevada, such ICUA is no longer available for release to Arizona or California. The maximum ICUA that may be developed by the AWBA in any year is 100,000 acre-feet, and the maximum amount of ICUA released by the United States for consumption in Nevada in any one year is 100,000 acre-feet. Over the term of the agreements, the cumulative total ICUA may not exceed 1,250,000 acre-feet, which

includes 1,200,000 acre-feet of long-term storage credits that may be accrued under the Interstate Water Banking Agreement, and an additional 50,000 acre-feet of long-term storage credits generated in Arizona to be separately assigned to the SNWA.

The agreement details the three certifications that the AWBA must make to the United States before the United States is obligated to release ICUA for consumptive use in Nevada. The three certifications cover (1) details about the development of the ICUA, including information on the long-term storage credits generated on Nevada's behalf through the storage of Colorado River water in Arizona, and including a request to release the ICUA for use in Nevada pursuant to Article II(B)(6) of the Decree and the Storage and Interstate Release Agreement; (2) the preparation of an Interstate Recovery Schedule by the AWBA and the CAWCD, setting forth the means by which the AWBA will develop the ICUA and the quantity of ICUA to be developed; and (3) information on the deliveries of water to CAWCD in the following year and how much water CAWCD will divert from the Colorado River. This last certification must state that Arizona's consumptive use of Colorado River water will be decreased by the quantity sufficient to develop the requested ICUA.

In the Storage and Interstate Release Agreement, the United States agrees to two methods of developing the ICUA. The first method is the "recovery and exchange" method, under which long-term storage credits developed through the storage of water in Arizona for Nevada's benefit are recovered in Arizona by CAWCD or another entity scheduled to receive water from CAWCD. In return for long-term storage credits, CAWCD exchanges Colorado River water that would otherwise have been delivered through the Central Arizona Project that year. The second approved method is the "credit exchange" method under which the long-term storage credits generated by the storage of Colorado River water in Arizona on Nevada's behalf are exchanged for Colorado River water that was to be delivered by CAWCD for underground storage. Instead of taking delivery of Central Arizona Project water and storing it, the entity that was scheduled to receive Central Arizona Project water for underground storage would instead receive long-term storage credits from the SNWA long-term storage account.

Under the Storage and Interstate Release Agreement, the AWBA is required to prepare an Interstate Recovery Schedule detailing the means by which the AWBA intends to create ICUA. The agreement obligates the AWBA to store water on behalf of the SNWA as provided in the Interstate Water Banking Agreement and to establish a long-term storage account for the SNWA with ADWR. The AWBA commits to provide monthly and annual estimates of the long-term storage credits to be developed for the benefit of SNWA, and an annual verified accounting of such credits. The AWBA also agrees to develop the ICUA as provided in the agreements and to deliver the three certifications necessary for the United States to release the ICUA to the SNWA.

As may be expected, the SNWA is the party responsible for requesting releases of ICUA for consumptive use by Nevada. Under the Interstate Water Banking Agreement, the SNWA is required to confer with the AWBA about developing ICUA three years prior to the SNWA's initial request for the development of ICUA. This three-year preliminary notice period is intended to give the AWBA and the CAWCD time to plan for developing ICUA through the recovery of long-term storage credits. The three-year preliminary notice period may be waived by the AWBA, with the consent of the CAWCD. Once SNWA decides to request the release of ICUA during a particular year, the Interstate Water Banking Agreement requires that the SNWA provide, by June 1 of the prior year, a written preliminary request to the AWBA to develop ICUA for the upcoming year. Under the Storage and Interstate Release Agreement, the SNWA must then make a written request to the United States, by September 15 of the prior year, for the release of ICUA for the following year. Such a request is considered proper and timely under the Storage and Interstate Release Agreement if the SNWA is in compliance with the Interstate Water Banking Agreement and has made the required preliminary request to the AWBA by the June 1st deadline. The request for a release of ICUA triggers the AWBA's obligation to provide to the United States the three certifications described above, and the United States' obligation to release ICUA for consumptive use by Nevada, subject to the terms of the Storage and Interstate Release Agreement.

Summary of Agreement for the Development of Intentionally Created Unused Apportionment. The Agreement for the Development of Intentionally Created Unused Apportionment is the final document needed to implement the interstate water banking program. That agreement facilitates the development of ICUA by using the Central Arizona Project system. In the Agreement for the Development of Intentionally Created Unused Apportionment, CAWCD agrees to accept long-term storage credits assigned to it by the AWBA in exchange for Colorado River water that CAWCD would have otherwise diverted into the Central Arizona Project. CAWCD agrees to reduce its consumptive use of Colorado River water by the amount of the long-term storage credits assigned to it, with the reduction not to exceed 100,000 acre-feet in a year. CAWCD agrees to account for the long-term storage credits as water diverted from the Colorado River.

In the Agreement for the Development of Intentionally Created Unused Apportionment, the parties agree to

cooperate in developing, finalizing, and implementing the Interstate Recovery Schedule. The Interstate Recovery Schedule will set forth the means by which CAWCD intends to develop the ICUA for a particular year, using either the recovery and exchange method or the credit exchange method approved by the United States in the Storage and Interstate Release Agreement. In developing the Interstate Recovery Schedule, the parties agree to take into account the location, manner, and cost of recovery of all water stored by the AWBA in Arizona, and such factors as Arizona's water management goals, Central Arizona Project operational requirements, water quality requirements, opportunities for shared or joint facilities, and opportunities for reducing recovery costs. After the United States determines that the requirements for developing ICUA have been satisfied and, therefore, the United States will release the ICUA for the benefit of Nevada, the AWBA, and CAWCD commit that they will implement the Interstate Recovery Schedule for the development of the ICUA for the year in question.

Copies of the Storage and Interstate Release Agreement and the Agreement for the Development of Intentionally Created Unused Apportionment are available on the AWBA website at www.awba.state.az.us.

CALIFORNIA

Ronald B. Robie, Reporter

401 Certification Not Required for FERC Annual License

Section 401 of the Clean Water Act requires an applicant for a federal license or permit that may result in a discharge into navigable waters to obtain a state certification that the project will comply with applicable provisions of the Clean Water Act. In *California Trout, Inc. v. Federal Energy Regulatory Commission*, 313 F.3d 1131 (9th Cir. 2002), the Ninth Circuit Court of Appeals held the provision does not apply to annual licenses issued by the Federal Energy Regulatory Commission (FERC).

This case involved a power project of the Southern California Edison Company (SCE) whose 50-year license for the Santa Ana River Hydroelectric Project expired in 1996. In 1994 SCE applied for a new FERC license and requested a section 401 certificate from the State of California. The state denied certification in 1995. In the absence of a new license, on May 7, 1996, FERC issued a "Notice of Authorization for Continued Project Operation" under annual licenses that contain the same terms and conditions as the existing license. These are automatically issued each year until a new license is issued.

The purpose of the annual license is to prevent a hiatus in operation of the project. In interpreting the two statutes, the court held that the Clean Water Act requirement did not apply since the licensee has a right to continue to operate under existing terms.

In a preliminary matter, FERC contended that since California Trout (Cal Trout) had not requested rehearing of the May 7, 1996, FERC notice, the court did not have jurisdiction to hear its challenge to the annual permits. Cal Trout did not begin its challenge of annual licenses until 2000. The court held that each annual license, although issued automatically, is still an action of FERC and is subject to review from year to year.

Bureau of Reclamation Can Be Sued for Potential Water Quality Degradation

In a major decision, the Ninth Circuit Court of Appeals has held, 2-1, that Sacramento-San Joaquin Delta water agencies and farmers have standing to sue the U.S. Bureau of Reclamation (Bureau) to challenge the operation of the Central Valley Project based on potential degradation of water quality due to the project.

In *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002), the court, with Judge Stephen Reinhardt writing for the majority, held as to the farmers that "[t]he threat of injury resulting from the Bureau's employing an operational plan that will likely lead to violations of the [water quality] standard is sufficient to confer standing . . ." 306 F.3d at 948. The farmers alleged excess salinity would damage their crops.

This case involved a 1999 operational plan for New Melones Reservoir on the Stanislaus River, a tributary to the Delta. The federal Central Valley Project Improvement Act requires specific quantities of Bureau water to be released to meet the water quality standards in the Delta adopted by the State Water Resources Control Board and included in the water right permits for the Central Valley Project. The particular standard in question was the level of salinity at Vernalis on the San Joaquin River. Releases of water from New Melones (along with those from other reservoirs) are used to repel the salinity coming in from the ocean through San Francisco Bay and the Delta.

In this case there was no actual injury since the Vernalis standard was not being violated. However, a Bureau computer model predicted that over a period of time violations will occur in 16% of the months when the farmers use the water. This "significant risk," said the court, was sufficient to constitute a threatened injury which satisfied the standing requirements under *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000). 306 F.3d at 948.

As to the water agencies, the court held that the fact that their powers included "ensuring that its constituent

users have water of acceptable salinity," and that the individual plaintiffs, farmers within the agencies, have standing, the agencies also have standing. 306 F.3d at 951. The court applied the test for public agency standing in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

In dissent, Judge Ferdinand F. Fernandez did not believe either the farmers or the agencies had standing. He argued that neither had any right to the water stored within the dam, but rather merely had a right to have sufficient water supplied to maintain water quality downstream. The judge noted the government indicated it will do whatever is required to keep the water at the proper level of quality. "The right has not been violated, and the government has no intention of violating it . . . [The agency's] speculation that under some conditions at some later time the government may breach its legal duty to supply water is entirely insufficient to show that 'invasion of a legally protected interest' is more than 'conjectural' or 'hypothetical.'" 306 F.3d at 954.

Rights Predating the Permit System Can Be Regulated to Protect Fish and Wildlife

People v. Murrison, 101 Cal. App. 4th 349, 124 Cal. Rptr. 2d 68 (2002) reaffirms the power of the state to subject water rights to reasonable police power regulation. The decision resulted from construction by Murrison of a sand and gravel diversion dam across Big Creek to divert water into a ditch for use on his ranch. Murrison constructed the dam without notifying the California Department of Fish and Game (DFG) as required by Fish and Game Code section 1603. As a result, state authorities sought civil penalties and injunctive relief pursuant to section 1603 and Business and Professional Code section 17203. The latter section authorizes remedial acts to prevent "unfair competition." Unfair competition has been construed broadly to include any business practice forbidden by law. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118 (1997). The alleged illegal practice in this case was the violation of Fish and Game Code section 1603. Thus, substantively the case turned on section 1603. The unfair competition claim was apparently asserted primarily because of the broad injunctive relief it authorizes.

Murrison's defense centered on the assertion that section 1603 was not applicable because he was diverting water pursuant to a "pre-1914 right." A pre-1914 right refers to an appropriation made prior to the effective date of the California Water Commission Act which established an administrative process (permit requirement) for the appropriation of water. For the most part, pre-1914 appropriations are not subject to the regulatory jurisdiction of the state water rights agency, the California Water Resources Control Board. The trial court rejected Murrison's defense, imposed substantial monetary penalties, and enjoined Murrison from working in Big Creek. The court of appeal upheld the trial court in all respects in an opinion written by Justice Robie, the California Reporter for this *Newsletter*.

Murrison made both constitutional and statutory claims that a pre-1914 right is not subject to Fish and Game Code section 1603. The constitutional claim was based on Article X, Section 2, of the California Constitution, which prohibits unreasonable uses of water. Citing a part of Article X, Section 2, which states that "nothing herein contained shall be construed as depriving any . . . appropriator of water to which the appropriator is lawfully entitled," Murrison argued that unreasonable use is the only permissible restriction on the exercise of his right. The court of appeal rejected the argument holding that all water rights are subject to reasonable regulation pursuant to the police power of the state.

The statutory argument relied on Water Code section 1201, originally enacted as part of the Water Commission Act. Section 1201 imposes an administrative process (permit requirement) on all appropriations made after 1913. Murrison argued that because the state water rights agency, the Water Resources Control Board, does not allocate or distribute pre-1914 water rights, Fish and Game Code section 1603 does not apply to such rights. Stating that the only substantive difference between pre- and post-1914 rights is the administrative process required of post-1914 rights, the court held section 1201 does not exempt pre-1914 rights from regulatory powers of the state.

The court of appeal also found that Murrison's claim that DFG cannot regulate his diversion was misplaced. Although related provisions of the Fish and Game Code section 1603 authorize the regulation of diversions to protect fish and wildlife, the only provision at issue in the present case was the requirement to give notice before diverting or obstructing the natural flow of a stream. The court noted that the mere imposition of a notice requirement does not impact Murrison's ability to exercise his claimed right, and it held that any challenge to DFG's ability to regulate his water rights must wait until notice is given and his rights are limited in some manner. Similarly, the court held that Murrison's "takings" claim was not ripe because DFG had not yet imposed any restrictions on his right to use water. Finally, the court of appeal held that both the monetary penalties and injunction imposed by the trial court were appropriate.

COLORADO

William A. Paddock & Mary Mead Hammond, Reporters

Water Court Strikes Down State Engineer's Amended Groundwater Regulations for the South Platte River

Colorado, like other Western states, has long been vexed by the problems of integrated management of surface water and hydraulically-connected groundwater under the doctrine of prior appropriation. For a number of reasons, many wells withdrawing groundwater hydraulically connected to surface streams were developed before there was a real appreciation of the effect of the wells on stream flows. When that effect became clear, Colorado was faced with the daunting task of regulating an established groundwater irrigation economy by requiring cessation of diversions or replacement of stream depletions. The results of this effort have been mixed. *See Kansas v. Colorado*, 514 U.S. 673 (1995).

In 1974, the state engineer's groundwater regulations for the South Platte River Basin were approved by the water court. Those rules required that by 1976 all tributary wells not decreed as an alternate point of diversion or changed points of diversion for a senior surface water right be curtailed unless the well had a decreed plan for augmentation or could demonstrate that its in-priority operation would not injure senior water rights. The results of these rules have been mixed, with many well users obtaining decreed augmentation plans and many others enrolling in well owners' associations on the South Platte and relying for many years on state engineer-approved temporary substitute supply plans. *See Colo. Rev. Stat. § 37-80-120*. In *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001), the Colorado Supreme Court ruled that the state engineer lacked the authority to approve out-of-priority depletions under a temporary substitute supply plan. Although some have argued that *Empire Lodge* is simply a standing case, the opinion cast great doubt on the state engineer's ability to continue to approve annual temporary substitute supply plans for the well users' associations on the South Platte. In 2002, the Colorado General Assembly responded by enacting H.B. 02-1414, codified at Colo. Rev. Stat. § 37-92-308. This bill granted the state engineer the authority to extend existing temporary substitute supply plans for one year. It also authorized the state engineer to approve temporary water supply plans in limited circumstances more fully described in this *Newsletter*, Vol. XXXV, No. 2, at 8 (2002).

In May 2002, the state engineer promulgated "Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the South Platte River Basin." Those rules continued to allow water users to go to water court to obtain a decreed augmentation plan for their wells. The rules also authorized the state engineer to approve "replacement plans" whereby out-of-priority depletions could be replaced under an administratively-approved plan subject to public notice and an opportunity for the public to comment on the adequacy of the plan. Numerous surface water users in the South Platte River Basin filed protests to the Amended Rules. Opponents of the Amended Rules moved for summary judgment on their claim that the state engineer lacked the statutory authority to approve out-of-priority depletions under replacement plans. On December 20, 2002, the water court ruled in their favor, holding that the state engineer lacked this authority and dismissing the Amended Rules. *In re* The Proposed Amended Rules and Regulations Governing the Diversion and use of Tributary Ground Water in the S. Platte River Basin, No. 02-CW-108 (D.C. Water Div. No. 1. Colo. Dec. 23, 2002) (Order re: Motions for Summary Judgment and Determination of Questions of Law).

The water court's decision relies upon the statutes that limit the circumstances when the state engineer may allow out-of-priority diversions, and the language and intent of Colo. Rev. Stat. § 37-92-308. The water court reasoned (first quoting part of the Amended Rules):

Prior to January 1, 2002, the general assembly gave the state engineer administrative authority to regulate wells upon promulgation of rules for a river basin or aquifer, subject to the review of the water judge as provided in section 37-92-501(3); and nothing in this section shall be construed to modify such authority.

Respondents [State Engineer et al.] argue that this language preserves the SEO's [State Engineer] enforcement discretion under § 37-92-501 and § 37-92-502 concerning the curtailment of junior diversions. This provision preserves previously granted statutory authority, but it does not provide any guidance as to the extent of that authority. Section 37-92-308(2) states:

In addition to the authority previously granted to the state engineer, listed in subsection (1) of this section, the state engineer is authorized to review and approve substitute water supply plans that allow out-of-priority diversions only under the circumstances and pursuant to the procedures set forth in this section.

Subsection (1)(b) sets forth statutory grants of authority for the state engineer to approve substitute water supply plans, and Subsection (1)(c) recognizes the state engineer's administrative authority to regulate wells pursuant to rules promulgated under § 37-92-501. Under the SEO's interpretation of 37-92-501 and 502, § 37-92-308(2) limits the SEO's authority to review and approve substitute water supply plans associated with out-of-priority diversions to those circumstances set forth in that section, unless the SEO is allowing the continuation of an out-of-priority diversion pursuant to exercise of his enforcement discretion under § 37-92-501, in which case, his authority to approve substitute water supply plans would not be limited by the provisions of § 37-92-308. Such a construction conflicts with the intent of § 37-92-308, which by its terms limits the SEO's authority to approve temporary substitute supply plans to four narrowly circumscribed situations....

In re Proposed Amended Rules, No. 02-CW-108, Order, at 9-10 (footnotes omitted).

The water court went on to conclude:

As written, the 2002 Proposed Amended Rules let the division engineer allow out-of-priority diversions pursuant to a replacement plan authorized by the division engineer subject to his analysis of depletions and sufficiency of replacement water in amount, timing, and location. Taken as a whole, the statutes, case law, legislative history, and current legislation require the conclusion that the SEO does not have the authority to generally approve out-of-priority diversions. The SEO appears to argue that there is a difference between "authorizing" out-of-priority diversions pursuant to a court decreed augmentation plan, and "allowing" out-of-priority diversions based on a finding of no-injury. Such a difference does exist, because allowing out-of-priority diversions based on no-injury findings permits such diversions to continue, in perpetuity, with the consent of the SEO with no requirement that the diverter apply for a court approved plan of augmentation. This difference does not support the Respondent's position.

Id. at 12.

The state engineer has appealed this ruling and the Colorado Supreme Court has agreed to an accelerated briefing schedule so that the appeal can be decided before the 2003 irrigation season. In addition, members of the Colorado General Assembly have gotten into the act by introducing legislation on the subject. The Attorney General has also sought to mediate the dispute, which is largely between senior surface water users and the well users' associations that lack decreed plans for augmentation. As of this writing, no compromise is in sight and the state engineer has notified South Platte well users that are members of the well users' associations that are without decreed plans for augmentation that they may not pump their wells this year. There are certain to be new developments, so stay tuned.

Denial of Forest Service Special Use Permit Results in Denial of Water Right

West Elk Ranch is a dude ranch operation located on about 160 acres contiguous to the national forest in western Colorado. West Elk (and its predecessors) sought a conditional water right for 45 gallons per minute for a spring located on the adjacent national forest lands. The Forest Service denied the special use permit required for West Elk to use the spring. Subsequently, in water court, the United States moved for summary judgment denying the conditional water right because West Elk could not meet the "can and will" requirements of Colo. Rev. Stat. § 37-92-305(9)(b). The water court granted the motion for summary judgment, dismissed the application, and West Elk appealed. The Colorado Supreme Court affirmed the water court decision in *West Elk Ranch, L.L.C. v. United States*, No. 02SA93, 2002 WL 31681910 (Colo. Dec. 2, 2002) (not released for publication).

West Elk's predecessors in interest filed an application for a special use permit to build a spring box and collection system on the national forest to collect and divert the claimed water. The Forest Service denied the special use permit because of environmental concerns about the impact of construction and its belief that the applicant could meet its water needs from sources on its own property. West Elk challenged the denial, and the forest supervisor upheld the denial. West Elk then apparently late filed an appeal of the decision of the forest supervisor. In water court, West Elk presented no evidence that the forest supervisor's decision was not final. On this record, the Colorado Supreme Court concluded that West Elk had failed to meet the "can and will" requirements of Colo. Rev. Stat. § 37-92-305(9)(b). It reasoned that the denial of the special use permit eliminated the only alternative available to West Elk to develop the water right. Without the special use permit, West Elk could not put the claimed water to

beneficial use. Since West Elk did not present sufficient evidence to the water court to demonstrate a substantial probability that it would eventually obtain a special use permit, dismissal of the application was proper.

NEVADA

Ross E. de Lipkau, Reporter

Nevada Supreme Court Rules on Contempt Order Against Indian Tribe

On December 26, 2002, the Nevada Supreme Court, sitting en banc, affirmed in part and reversed in part a district court decision involving the Te-Moak Tribe of Western Shoshone Indians of Nevada (Tribe) which required certain tribal actions. *In re the Determination of the Relative Rights of the Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, 59 P.3d 1226 (Nev. 2002). The water rights involved are decreed rights of the Humboldt River Decree. The rights were finalized in 1931 and modified in 1935. The United States, on behalf of the Tribe purchased five privately owned ranches between the years 1937 and 1942. The Tribe, therefore, acquired those water rights that were appurtenant to the property purchased by the United States. The Tribe operated the ranches without problem until 1998 when the Tribe stopped making payments to the state engineer's office for water master services. All decreed Humboldt River water right holders make annual payments to the state engineer. The Tribe further enacted a resolution which precluded the state engineer from entering tribal property for the purpose of regulating headgates. In September 1999, the supervising commissioner of the Humboldt River Decree, while on tribal property, was placed under arrest and escorted off the tribal property by the tribal police.

The state engineer promptly issued an order requiring the Tribe to allow state engineer employees access to tribal properties. This order was ignored. The state engineer thereupon filed a motion in the district court that issued the Humboldt River Decree and retains continuing jurisdiction over it. The Tribe responded and sought a writ of prohibition from the Nevada Supreme Court. In August 2000, the Nevada Supreme Court in *South Fork Band of Te-Moak Tribe v. District Court*, 116 Nev. 805, 7 P.3d 455 (2000), ruled that the Tribe had waived its sovereign immunity, and that the Sixth Judicial District Court had jurisdiction. The Supreme Court therefore denied the Tribe's motion for prohibition, allowing the state engineer access to tribal property.

On remand the district court entered an order requiring the Tribe to refrain from interfering with the water commissioner or from diverting water to which it was not entitled. The tribal chairman was sentenced to three days' imprisonment, that sentence being suspended. The district court further ordered the Tribe to enact a resolution "to provide a safe environment for the [water commissioner] and allow access to the tribal property by the [w]ater [c]ommissioners to carry out their duties under the Humboldt Decree." If that resolution was not enacted within 30 days, the court would order the local county sheriff's department to provide protection to the water commissioners while on the reservation. The court further ordered that if the Tribe did not abide by these requirements, it would be required to post a \$10,000 bond to cover the costs of security guards and/or locking mechanism to prevent the Tribe from violating the provisions of the Humboldt River Decree.

The Nevada Supreme Court ruled that the district court had authority to require the Tribe to post a bond, but that the suspended 3-day jail term was beyond the district court's contempt powers. Further, the supreme court held, the order requiring the tribal council to enact the resolution was beyond the authority of the district court. The balance of the order was affirmed.

OREGON

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

Beneficial Use Must Continue Until Final Proof to Perfect Water Right

In *Hale v. Water Resources Department*, 184 Or. App. 36, 55 P.3d 497 (2002), landowners sought review of a final order of the Water Resources Department (Department) denying their application to include their lands within a certificate for the use of irrigation water from the Umatilla River. The court of appeals affirmed the Department's final order.

In 1965 the Stanfield Irrigation District (District) applied to the Department for a permit to divert water from the Umatilla River to irrigate approximately 13,000 acres. The Department issued a permit which established a deadline of December 31, 1988, to put the water to beneficial use as irrigation water, which was to be followed by a final proof survey and the issuance of a water rights certificate.

The permit included two sections of land not within the boundary of the District. The owners of the land first applied water to the omitted lands under the permit in 1974. They continued to irrigate the lands through 1983. They

then advised the District of their intention to discontinue development of their water rights under the permit. The District replied to the landowners that it had no objection to the cancellation of their water rights under the permit.

The final proof survey was conducted in 1989. The survey concluded that the two sections of land had not been irrigated. In 1997 the Department issued a proposed certificate of water rights that did not include these two sections. The then owners of the land protested the proposed certificate, requesting that the two sections be included. The Department refused the request on the grounds that: "Satisfactory proof has not been made to allow the Department to determine that appropriation of water to beneficial use under the terms of the permit has been accomplished for these lands." 55 P.3d at 499.

The landowners requested a hearing on their protest and argued that by putting water to beneficial use in 1974, they, or their predecessors, had accomplished all that the law requires to perfect their water rights. The Department disagreed, concluding that the requirement of putting water to beneficial use includes a requirement of continuity, which in this case had been broken by the cessation of water use in the early 1980s.

On appeal to the Oregon Court of Appeals, the landowners argued that " 'perfection' is a term of art that refers not to an ongoing activity but to a single incident—however brief—of putting the water to a beneficial use." 55 P.3d at 498. The Department contended that, under Oregon law, the determination whether a water right has been "perfected" has been delegated to its discretion and that its decision to require continuity of use falls within the "reasonable exercise of that discretion." 55 P.3d at 498. The court of appeals agreed with the Department.

Under Oregon law, the court held, water right certificates may be granted only "[a]fter the Water Resources Department has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230(3) that shows to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act ORS 537.250(1)." 55 P.3d at 499.

Once the certificate is issued, the rights continue " 'so long as the water shall be applied to a beneficial use' in accordance with the terms of the certificate, subject to loss by nonuse or cancellation. ORS 537.520(3)." *Id.*

The dispute between the landowners and the Department was whether the Department correctly concluded that the landowners had not "perfected" their water rights within the meaning of Or. Rev. Stat. § 537.250(1). The court of appeals held that whether an appropriation has been "perfected" is expressly left to the "satisfaction of the department." 55 P.3d at 500. The court of appeals then reviewed the Department's decision to determine whether it was within the range of discretion allowed by the statute.

The court noted that the Oregon Supreme Court had previously held "beneficial use" inherently implies an element of continuity of use. 55 P.3d at 500 (citing *Withers v. Reed*, 194 Or. 541, 571, 243 P.2d 283, 298 (1952)). The court also noted that the final proof survey under Or. Rev. Stat. § 537.230(3) must be done "upon completion of beneficial use." In the court's view, that must necessarily imply that the "beneficial use continues at least to the time of the survey itself." 55 P.3d at 501. The court then held that the Water Rights Act "expressly contemplates that the beneficial use must continue to the time of submission of final proof." *Id.*

The court concluded that the Department's decision that the landowners failed to make use of water described in the permit for at least six years as of the time of the survey, and accordingly did not satisfactorily establish that they had perfected the water rights, falls well within the Department's discretion.

***Editor's Note:** This will be the last report of Robert E. O'Rourke and Stephen L. Bloom as Oregon Reporters. Mr. O'Rourke has served as a reporter since 1977 and Mr. Bloom since 1991. They have been unusually diligent reporters and the Foundation and I thank them for their lengthy service.

TEXAS

Diane Best, Reporter

Permit Not Required for Domestic and Livestock Use by Riparians

By the end of the 1980s, all of the river basins in the state, except for the Upper Rio Grande, were fully adjudicated pursuant to the 1967 Water Rights Adjudication Act (WRAA). An issue that remained unresolved, though, was whether a riparian right for domestic and livestock use continued after the adjudications. Whether the legislature intended to eliminate all riparian water rights by the adjudication process is unclear. The act requires all water rights claimants, including riparian users, to file their claim in an adjudication, and any claims not filed would be extinguished. Tex. Water Code Ann. § 11.303(a). However, the WRAA's filing requirement did not apply to "use of water for domestic or livestock purposes." *Id.* § 11.303(l). The section of the WRAA that declares what water rights will be recognized after a final adjudication decree provides exceptions for use "for domestic and livestock purposes or rights subsequently acquired by permit." *Id.* § 11.322(e). The confusion is that the first part of the

statutory exception could be referring to the riparian natural use for domestic and livestock purposes even though the exception is not called a "riparian" right. Or the exception could be viewed as restating the exemption from the permit requirements for small reservoirs used for domestic and livestock purposes that is contained in Tex. Water Code Ann. § 11.142. Under the latter view, the riparian right would have been eliminated although the domestic and livestock use is allowed to continue as an exempt one not requiring a permit, but without the early priority of a common law riparian right.

The Texas Natural Resources Conservation Commission (TNRCC) (now Texas Commission on Environmental Quality (TCEQ)) in 1999 administratively adopted the interpretation of the WRAA which recognizes a riparian water right for domestic and livestock use as an exception to the adjudication process. The administrative rule provides:

(a) In accordance with Texas Water Code (TWC), § 11.303(l), a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit. Manner of diversion may be by pumping and by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights.

30 Tex. Admin. Code § 297.21(a). As drought conditions continue in Texas, clashes between riparian claimants and appropriators will likely occur, and the issue may have to be resolved judicially.

Court Rules on Open Meetings Issues in Watermaster Proceedings

The statutory exemption from permit requirements for domestic and livestock purposes, Tex. Water Code Ann. § 11.142(a), was recently implicated in a mandamus suit. In an unpublished opinion, *City of San Angelo v. Texas Natural Resources Conservation Commission*, No. 03-02-00289-CV, 2002 WL 31718332 (Tex. App.—Austin Dec. 5, 2002), the city and a water and control district sued, challenging the Open Meetings Act notice filed by the Texas Natural Resources Conservation Commission (commission) regarding petitions filed for appointment of watermasters on the Concho and San Saba Rivers. Under Tex. Water Code Ann. § 11.451, the commission may appoint a watermaster either after receiving a petition by 25 water rights holders in a river basin or on the commission's own motion. Tex. Water Code Ann. § 11.451. After receiving a watermaster petition, the commission must hold an evidentiary hearing to determine if a serious enough threat exists to senior water rights in the basin so that appointment of a watermaster is necessary. This hearing may be held before the commission or before an administrative law judge by the commission's referral of the matter to the State Office of Administrative Hearings (SOAH).

The watermaster petition in this case was signed by both water rights holders and by persons using state water for domestic and livestock (d&ls) purposes without a permit in the basin. Rather than conducting a hearing or referring the petition to SOAH for an evidentiary hearing, the commission decided to address related legal issues in an open meeting. The executive director asked the commission to consider four legal issues. Those issues were whether d&ls users were "water rights holders in the basin" within the meaning of the statute who could (1) petition for a watermaster, (2) present evidence at the hearing, (3) not be named watermaster, and (4) have their use considered in determining a "threat" to senior rights holders. The commission gave notice of these issues to interested parties, including the appellants, by letter. The statutory published notice of the commission's open meeting agenda listed, in part, "Consideration of four legal issues" raised by the executive director relating to the watermaster petitions and noted that the issues concerned whether d&ls users are appropriate water rights holders in the respective river basins. After holding its meeting, the commission issued two interim orders. The orders found that each watermaster petition was signed by 25 or more water rights users, d&ls users were affected and could participate fully in an evidentiary hearing, and the water code did not allow charging d&ls users fees for the watermaster program. The order then referred the matter to SOAH for an evidentiary hearing.

The city and district sought injunctive and mandamus relief contending that the commission did not comply with the Open Meetings Act. First they objected that the notice stated that the agency would "consider" the legal issues, but did not indicate that any action would be taken. They also argued that the notice was inadequate to inform the public that the agency would refer the petition for hearing.

The Austin Court of Appeals affirmed the lower court's judgment denying relief. On the first issue, the court held that the phrase, "Consideration of four legal issues," regarding the petitions in the notice includes the possibility that the commission might take action on the petitions. It rejected the appellants' contention that "to consider" something

does not mean "acting" on it. On the second issue, the court held that the notice referred to the watermaster petitions sufficiently to inform the public that those petitions might be referred for hearing. The court rejected the argument that the notice was limited to considering the legal issues mentioned, but not the petitions generally. The notice did provide that legal issues "with regard to petitions for a watermaster" would be considered.

The case allows agencies to not have to identify specifically "action" items in the public notice of meetings. It also indicates the commission's position on important issues regarding watermaster petitions. Domestic and livestock users without a permit are allowed to be included as "water rights holders" for purposes of watermaster petitions and have party status for purposes of participating in the required evidentiary hearing.

Watermaster petitions may be filed on other river basins in the future if the serious drought conditions continue and enforcement problems arise. Presently, the Lower Rio Grande is the only Texas river on which a watermaster administers water rights. Historically the commission has been unwilling to assume the duties of a watermaster when asked by users to enforce water rights. That reticence, in part, precipitated the petitions for a watermaster on the Concho and San Saba Rivers.