

ARIZONA

Margaret Gallogly, Reporter

Court Limits Section 7 Consultation on Colorado River Operations Affecting Mexican Species

The U.S. District Court for the District of Columbia recently granted summary judgment in favor of certain federal defendants, including the U.S. Bureau of Reclamation (Reclamation), the U.S. Fish & Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) in a lawsuit important to the operation of the Lower Colorado River. *Defenders of Wildlife v. Norton*, No. CIV.A. 00-1544 (JR.), 2003 WL 1737547 (D.D.C. Mar. 31, 2003) (unpublished). The court also denied a motion for summary judgment filed by the plaintiff environmental groups. One significant issue considered by the court was whether Reclamation's duty to consult under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 to 1544, with regard to its Lower Colorado River operations extends to nondiscretionary operations that may affect endangered or threatened species in Mexico. In granting defendants' motion for summary judgment, the court agreed with the defendants' position that the agencies' obligation to consult under Section 7 of the ESA is limited to discretionary actions, and does not extend to nondiscretionary actions.

Background. The lawsuit was filed in June 2000 by Defenders of Wildlife and seven other U.S. and Mexican environmental organizations against the Secretaries of Interior and Commerce, Reclamation, the FWS, and the NMFS. Plaintiffs alleged that, during the Section 7 consultation process regarding Reclamation's Lower Colorado River operations, and in the resulting biological opinion issued by FWS in 1997, the agencies did not consider possible impacts of Reclamation's operations on threatened or endangered species found in the Colorado River Delta or the Gulf of California in Mexico. The species involved are the Desert Pupfish, the Totoaba, and the Vaquita (a small porpoise), and two bird species—the Yuma Clapper Rail and the Southwestern Willow Flycatcher. The plaintiffs sought an order from the court requiring Reclamation, the FWS, and the NMFS to engage in Section 7 consultation on the impacts of Lower Colorado River operations on endangered and threatened species in Mexico.

Under various interstate compacts, international treaties, congressional acts, and Supreme Court decisions and decrees, collectively known as the "Law of the River," the seven Basin States of Arizona, California, Nevada (the Lower Basin States), Colorado, New Mexico, Utah, and Wyoming (the Upper Basin States) have each been allocated a share of the waters of the Colorado River. Individual water and power entities within the states have contracted with the Secretary of the Interior for water and power deliveries pursuant to individual project authorities. Reclamation operates the dams, reservoirs, and other facilities on the river used to store and distribute water allocated to the various contractors. Reclamation is also required to deliver between 1.5 million and 1.7 million acre-feet of water per year to the country of Mexico.

The lawsuit is of great interest to the Basin States and contractors for Colorado River water. The Lower Basin States filed motions to intervene in the matter, as did major municipal, agricultural, and power interests in Arizona and California. All motions were denied and subsequently appealed. All seven Basin States filed or joined in memoranda as amici curiae, as did municipal, agricultural, and power interests in Arizona and California. On its face, the plaintiffs' claim was procedural in nature. If the plaintiffs' requested relief were granted, however, Reclamation would have had to reconsult with the FWS and NMFS regarding the effects of its Lower Colorado River operations. Such a decision could have placed in doubt Reclamation's reliance on the 1997 biological opinion and related incidental take statement in performing Reclamation's discretionary activities associated with river operations. A reconsultation could possibly result in substantive changes in river operations, such as changes in the amount of water stored in reservoirs, the timing of releases from reservoirs, or the availability of surplus water, in an effort to deliver more fresh water to Mexico. Thus, although cast as a procedural matter by defendants, the requested relief raised substantive issues of great importance to the Basin States and the various contractors for Colorado River water.

Plaintiffs' Motion for Summary Judgment Regarding Section 7 Issue. Plaintiffs claimed that Reclamation, the FWS, and the NMFS violated Section 7(a)(2) of the ESA by failing to consider the impact of Lower Colorado River operations on certain threatened and endangered species in Mexico. Section 7(a)(2) of the ESA requires that an agency shall "in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or

threatened species or result in the destruction or adverse modification of habitat of such species" 16 U.S.C. § 1536(a)(2). Plaintiffs argued that this consultation requirement is not limited to species within the United States, especially where agency action occurs in the United States, but has impacts to endangered and threatened species outside the United States.

Plaintiffs disputed the adequacy of the federal agencies' consultation under Section 7(a)(2) for all five species. They asserted that the federal agencies improperly limited the action area for analysis to the United States, rather than taking into account the effects of Reclamation's Lower Colorado River operations on endangered and threatened species in Mexico. Also, although Reclamation had determined in its biological assessment that its operations may have an adverse impact on four species, including the Totoaba, Reclamation requested formal consultation for only the three species with populations in the United States—the Southwestern Willow Flycatcher, Bony Chub, and Razorback Sucker. Reclamation discussed possible impacts of its actions on the Totoaba, but did not request formal consultation with NMFS about that species. Instead, Reclamation took the position that consultation is not required under Section 7(a)(2) because the species is potentially affected only by Reclamation's *nondiscretionary* actions pertaining to the amount of water delivered to Mexico, and the consultation requirement applies only to discretionary actions. The NMFS concurred in this conclusion and no formal consultation under Section 7(a)(2) occurred with regard to the Totoaba.

Plaintiffs argued that the issue of a lack of discretion only becomes pertinent after consultation occurs. If after consultation, the FWS or the NMFS determines that the continued existence of the endangered or threatened species in Mexico is placed in jeopardy by Reclamation's Lower Colorado River operations, the FWS or the NMFS must propose reasonable and prudent alternatives (RPAs) to Reclamation's activities. The discretionary or nondiscretionary nature of Reclamation's actions would be relevant to the development of RPAs. Plaintiffs also posited that there may be RPAs other than the release of additional water to the Colorado River Delta that would address a jeopardy determination. Such RPAs could be developed only after consultation and a determination that jeopardy exists. Thus, plaintiffs argued that Reclamation and the NMFS improperly failed to consult about whether Reclamation's Lower Colorado River operations jeopardized the continued existence of the Totoaba.

Defendants' Motion for Summary Judgment Regarding Section 7 Issue. The defendants countered that they followed all Section 7 requirements in considering the effects of Reclamation's discretionary Lower Colorado River activities. Defendants stressed that the regulations implementing Section 7 do *not* require consultation for *nondiscretionary* actions. 50 C.F.R. § 402.03 states that Section 7 and its implementing regulations "apply to all actions in which there is discretionary Federal involvement or control." Without taking a position on whether Section 7(a)(2) requires consideration of effects to endangered and threatened species located outside the United States, defendants asserted that the agencies analyzed possible effects of Reclamation's nondiscretionary Lower Colorado River actions on both domestic and extraterritorial species. Defendants asserted that the agencies determined that Reclamation's discretionary activities (a) would not affect the species (Desert Pupfish), and, therefore, no consultation was required; or (b) were not likely to adversely affect the species (Vaquita, Yuma Clapper Rail), and, therefore, no consultation was required; or (c) may adversely affect the species (Totoaba), but no consultation was required because any possible adverse effects would arise only from nondiscretionary actions; or (d) may adversely affect the species (Southwestern Willow Flycatcher) and consultation was required. As to the Southwestern Willow Flycatcher, the FWS ultimately issued a jeopardy opinion and issued an RPA to Reclamation's actions to avoid jeopardy.

With regard to the Totoaba, Reclamation and the NMFS determined that none of Reclamation's *discretionary* activities would affect the species. The agencies concurred that the species was potentially affected only by Reclamation's *nondiscretionary* activities—the amount of Colorado River water delivered to Mexico. Under the Law of the River, Reclamation is required to deliver between 1.5 million and 1.7 million acre-feet of water to the United States-Mexico border. The defendants asserted that they have no discretion to increase the amount of water delivered to Mexico. Because the agency activity was nondiscretionary, Reclamation concluded that consultation under Section 7(a)(2) was not required, and the NMFS concurred with Reclamation's conclusion.

In addition to the constraints imposed on it by the Law of the River, Reclamation also asserted that it had no control over the use of river water once it entered Mexico. Under Mexican law, upon entry into that country, the water belongs to the sovereign state of Mexico, which has completely allocated it for municipal and agricultural purposes. Reclamation has no authority to influence how Mexico uses the water delivered to the international boundary. In typical years, water delivered by Reclamation to Mexico is fully diverted for agricultural or municipal purposes and none of the water reaches the Colorado River Delta. Even in years of flooding, defendants asserted that it is unusual for water from the river to reach the Colorado River Delta. Such floodwaters are diverted for agricultural or municipal purposes, or are absorbed into the riverbed or evaporate before reaching the delta.

District Court Decision. With regard to the consultation process, the district court concluded that the defendants did analyze the effects of Reclamation's Lower Colorado River activities on the Totoaba, the Vaquita, and Desert Pupfish (species found only in Mexico) and on the Yuma Clapper Rail (found in both the United States and Mexico). (Curiously, the court did not include the Southwestern Willow Flycatcher in its list of species analyzed by the agencies. However, there is no doubt that such an analysis occurred, because the FWS issued a jeopardy opinion and an RPA to avoid jeopardy to this species.) Although the court described the action area for the agencies' analysis as extending from Lake Mead to the southerly international border between the United States and Mexico, the court also stated that the agencies evaluated the effect of Reclamation's activities on endangered and threatened species within Mexico primarily in those areas of the country that received river flows subject to Reclamation's discretionary control. The court then restricted its further analysis to the question of whether Reclamation had a duty to consult regarding operations that may affect endangered or threatened species in other parts of Mexico where Reclamation has no discretionary control over river flows.

In this regard, the court considered 50 C.F.R. § 402.03, the regulation that limits the Section 7 consultation requirement to actions having discretionary federal involvement or control. The court described the regulation as facially valid, and one that plaintiffs are in no position to challenge. The court cited a number of judicial decisions limiting an agency's obligation to consult under Section 7 where the agency had no discretion of action, and implicitly concluded that the consultation requirements of Section 7 do not apply to nondiscretionary actions.

The court then considered the extent to which Reclamation has discretion over its Colorado River operations. In that regard, the court agreed with the defendants that the Law of the River strictly limits the authority of Reclamation to release additional waters to Mexico. The court concluded that Reclamation could not manipulate water deliveries in the United States thereby creating excess releases for the Colorado River Delta. The court rejected plaintiffs' examples of actions by Reclamation that purportedly indicated that Reclamation has some discretion in its river operations, stating that the water deliveries described by plaintiffs do not indicate whether Reclamation can release more water to Mexico. The court indicated that Reclamation's interpretation of its duties and the discretion with which it can carry out those duties is entitled to deference. The court then granted the federal defendants' motion for summary judgment and denied plaintiff environmental groups' motion for summary judgment.

ALASKA

Thomas E. Meacham, Reporter

Alaska and United States Act Swiftly on Navigable Waters Title "Disclaimers"

By a notice in the Federal Register on May 8, 2003 (68 Fed. Reg. 24,754), the U.S. Department of the Interior announced that it intended to use its new "disclaimer of interest" regulations and procedures, *see* 43 C.F.R. pt. 1864, to disclaim any federal ownership interest in several disputed water bottoms in Alaska. Included in this title disclaimer are significant portions of the Black River, Black River Slough, the Salmon Fork, the Grayling Fork, Bull Creek, and all interconnecting sloughs associated with these water bodies. The Department asserted that it was acting on a February 14, 2003, request by the State of Alaska that the United States issue a disclaimer of any federal title interest in the listed water bodies.

Unlike the controversial use of federal title disclaimers to recognize the validity of state-asserted R.S. 2477 rights-of-way, disclaimers of federal ownership in disputes with states over title to navigable water bottoms under the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, are not subject to assertions that such disclaimers are barred by an existing congressional moratorium on new R.S. 2477 validations by administrative action.

It is not clear whether this recent federal policy decision on navigable waters is subject to the self-imposed limitation announced by Interior Secretary Gale Norton on April 9, 2003, in conjunction with her proposed resolution of numerous R.S. 2477 claims in Utah—that disclaimers of federal interest would not be employed in circumstances where the federal lands involved were in protected status (i.e., national parks, wildlife refuges, national forests, or designated wilderness areas). Given the wide scope of navigable waters title disputes in Alaska, the vast network of rivers and lakes, and the equally vast acreage of federally-protected lands in Alaska, such a limitation would render any program of disclaiming federal ownership to navigable waters in Alaska fairly ineffectual—leading to the inevitable conclusion that no such limitation constrains the federal title disclaimer program regarding navigability in Alaska.

The Department established a 90-day public comment period regarding the water bodies listed in its May 8, 2003 Federal Register notice.

COLORADO

William A. Paddock, Reporter

Colorado Supreme Court Rejects State Engineer's Amended South Platte Groundwater Rules

In December 2002, the District Court for Water Division No. 1 rejected the State Engineer's Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the South Platte Basin (Amended Rules) because they were beyond the legal authority of the State Engineer. *See* Vol. XXXVI, No.1 (2003), of this *Newsletter*. In particular, the water judge ruled that the State Engineer lacked statutory authority to approve so-called "replacement plans" that did not require water court approval. The water judge also ruled that the South Platte River Compact was not deficient in establishing standards for administration of water rights in Colorado, so the Amended Rules could not be justified on that basis. Finally, the water judge ruled that the Amended Rules could only become effective when approved by the water judge.

The State Engineer and others sought and received an expedited appeal and on April 30, 2003, the Colorado Supreme Court affirmed the decision of the water judge in part and reversed it in part. In its opinion in *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003), the court affirmed the ruling that the State Engineer lacked statutory authority to approve replacement plans that did not also require a water court decreed plan for augmentation and the ruling that the Amended Rules could only be effective after approval by the water judge. The court reversed the water judge's conclusion that the South Platte River Compact was not deficient in establishing standards for water right administration in Colorado, but also held that any "compact rules" had to be adopted in conformity with Colo. Rev. Stat. § 37-92-501(2).

The dispute over the State Engineer's authority to authorize and approve the so-called "replacement plans" in the Amended Rules largely involves the interpretation of the following two statutes, the first enacted in 1969 and the second in 1977:

Colo. Rev Stat. § 37-92-501. Jurisdiction over water -- rules and regulations. (1) The state engineer and the division engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws, and written instructions and orders of the state engineer, in conformity with such constitution and laws It is the legislative intent that the operation of this section shall not be used to allow ground water withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal and that ground water diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties.

Colo. Rev. Stat. § 37-92-501.5. Special procedures with respect to plans for augmentation. Consistent with the decisions of the water judges establishing the basis for approval for plans for augmentation and for the administration of ground water, the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary exchanges of water and may make such rules and regulations and shall take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. In so doing, the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

The State Engineer and the Ground Water Appropriators of the South Platte (GASP) argued that these statutes distinguish between existing uses of groundwater (i.e., pre-1969 use) and new uses of groundwater. As to existing uses, they argued that the State Engineer had authority to approve replacement plans because when first enacted in 1969 the Water Right Determination and Administration Act, Colo. Rev. Stat. §§ 37-92-101 to 37-92-103, contained no requirement that existing groundwater uses obtain a plan for augmentation to continue operation. Instead, they asserted that the State Engineer's and the courts' interpretation of the 1969 Act permitted the operation of pre-1969 wells pursuant to State Engineer-approved replacement plans (instead of water court-approved augmentation plans) and that water court-approved augmentation plans were only required for new groundwater uses.

In 1974 the General Assembly authorized the State Engineer to approve temporary augmentation plans. *See* 1974 Colo. Sess. Laws 440, ch. 111, sec. 1, 148-21-23(2). In 1977, though, the General Assembly repealed that statute for the reasons explained in *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2002), and enacted Colo. Rev. Stat. § 37-92-501.5. GASP and the State Engineer argued that this section, in combination with Colo. Rev. Stat. § 37-92-501(1), authorize the State Engineer to make such rules and regulations as may be necessary in order to allow the continuation of existing uses, including, as the means for doing so, replacement plans approved by the State Engineer. GASP and the State Engineer argued that only this interpretation gives full effect to all of the statutory language.

The Colorado Supreme Court was not inclined to parse the statutes so finely or to rely upon past interpretation of the statutes as the guide for its decision. Rather, it looked to the legislative history of the 1969 Act, the enactment and repeal of the State Engineer's authority to approve temporary augmentation plans, the newly enacted limitations in Colo. Rev. Stat. § 37-92-308 on the State Engineer's authority to approve substitute water supply plans, and the court's decision in *Empire Lodge Homeowners' Ass'n v. Moyer*.

At the outset, the court observed that the term "replacement plan" is undefined both in statute and the proposed groundwater regulations. The court concluded that a replacement plan, like a substitute supply plan, is the functional equivalent of an augmentation plan. With respect to the 1969 Act, the court pointed out that approval of augmentation plans was expressly vested with the water court. The court also found it significant that a version of the 1969 Act that was not enacted would have granted the State Engineer authority to approve augmentation plans. The court pointed out that this proposal was not approved due to the large amount of power it would vest in the State Engineer. *Simpson*, 60 P.3d at 61.

The court went on to point out that when the State Engineer was given authority in 1974 to approve temporary augmentation plans, the statute required the filing of an application for approval of an augmentation plan with the water court as a precondition of temporary approval by the State Engineer. *Id.* Then, in response to concerns raised about the constitutionality of State Engineer approval of temporary augmentation plans, the General Assembly repealed the statute rather than correcting the perceived constitutional infirmities of the statute. The court found that this result was motivated, in part, by a concern about the resulting overlap in administrative and adjudicative functions. *Id.*

The court next pointed to the enactment of 1977 Colo. Sess. Laws 1702, 1704, ch. 483, sec. 5, § 37-92-501.5, and 1977 Colo. Sess. Laws 1702, 1703, ch. 483, sec. 4, § 37-92-305(8), both of which it concluded indicate the General Assembly's intent to vest the water court with authority to approve plans for augmentation.

The court next turned to the 1996 amendments to the State Engineer's rulemaking authority adopted in response to the decision in *Kansas v. Colorado*, 514 U.S. 673 (1995). It noted the provisions of Colo. Rev. Stat. § 37-92-503(6)(a) and (7) that, on their face, seem to support the claims of the State Engineer. The court did not directly deal with this statutory language; instead it apparently conceded that it lends some support to the State Engineer's position.

In fact, in 1996 Division No. 2 Water Court approved amended groundwater regulations that provide for State Engineer approval of replacement plans without requiring water court approval of a plan for augmentation. Both the State Engineer and GASP pointed to this as an administrative interpretation of the State Engineer's rulemaking authority. The court was not persuaded by this argument, but did not deal with it other than to say that those rules were not appealed so the issue was not addressed, and that rules applicable to one water basin are not applicable to others. This reporter observes that while the court's first rationale explains why the Arkansas rules are not a binding precedent, its second rationale is really beside the point: whether the factual situation in the Arkansas River Basin is different from that in the South Platte River Basin has nothing to do with the scope of the State Engineer's statutory rulemaking authority.

The court went on to say that nothing in its opinion should affect the Arkansas River Basin rules. It is difficult for this reporter to understand, however, how those rules could be amended without facing a substantial challenge based on the underlying statutory authority of the State Engineer. Fortunately, by reason of the April 30, 2003, enactment of Senate Bill 03-073 which legislatively ratifies the Arkansas River Basin rules, *see* Colo. Rev. Stat. § 37-92-308(1)(c)(I), as amended, this is an issue that neither the court nor the water users in the Arkansas River Basin will have to face in the future.

In any event, whatever persuasive effect the 1996 amendments might have had in convincing the court of the State Engineer's rulemaking authority appears to have been completely undone by the 2002 enactment of Colo. Rev. Stat. § 37-92-308 governing the State Engineer's approval of substitute water supply plans. The court observed that this statute provides that "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." Colo. Rev. Stat. § 37-92-308(2), *Simpson*, 69 P.3d at 62. The statute then sets out four limited circumstances under which the State Engineer may grant temporary approval of substitute supply plans, none of which authorize replacement plans approved by the State Engineer pursuant to his rulemaking authority.

Therefore, the court found that when taken in its totality, the legislative history eliminated any question about the intended scope of the State Engineer's authority, and "unambiguously provides that it is the province of the water courts to approve and decree augmentation plans . . ." *id.* at 63, except under the narrow circumstances allowed by Colo. Rev. Stat. § 37-92-308. The language in § 37-92-308 relied upon by the State Engineer and GASP was simply too general and unspecific to overcome the clear and specific limitations on the State Engineer's authority contained in the remainder of this statute.

The State Engineer's argument about the need for Amended Rules to implement the administration of the South Platte River Compact in Colorado, however, was accepted by the supreme court. State Engineer rules for compact administration are based upon Colo. Rev. Stat. § 37-80-104, which states:

The state engineer shall make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments. In those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments, so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible.

Article IV of the South Platte River Compact provides that between October 15 and April 1 of the next succeeding year, Colorado has the unimpeded use of all waters of the South Platte River flowing within the state. Colo. Rev. Stat. § 37-65-101, art. IV(1). Between April 1 and October 15, however, Colorado may not allow those water users in the lower section of the river (east of the boundary between Morgan and Washington counties) with appropriation dates junior to June 14, 1897, to divert water if those diversions will lower the flow of the river to less than a mean daily flow of 120 cubic feet per second (c.f.s.) where it flows through the Interstate Station at the Colorado-Nebraska border. Colo. Rev. Stat. § 37-65-101, art. IV(2). The supreme court agreed that changed conditions on the South Platte after the signing of the Compact, including the advent of wells and the difficulty of administration of wells in response to calls on the river, made the Compact deficient in establishing standards for administration of water rights within Colorado to meet the terms of the Compact. This in turn justified the State Engineer's promulgation of Amended Rules to ensure Compact compliance.

The court went on, however, to point out that Colo. Rev. Stat. § 37-80-104 contained no specific procedures for Compact rulemaking and that its decision in *Kuiper v. Gould*, 196 Colo. 197, 202, 583 P.2d 910, 193 (1978), required the State Engineer to follow the procedures of Colo. Rev. Stat. § 37-92-501(2) in adopting such rules and regulations. To the court, this meant that Compact rulemaking by the State Engineer is constrained by all of the statutory restrictions imposed on his authority, including the provisions of Colo. Rev. Stat. § 37-92-308. Thus, Compact rulemaking power did not provide the State Engineer authority to enact Amended Rules that permit the State Engineer to approve replacement plans.

Finally, the court held that rules promulgated by the State Engineer under either Colo. Rev. Stat. § 37-80-104 or § 37-92-501(2) cannot be effective until all protests to the rules have been ruled upon and the rules have been approved by the water judge.

On the same day that the court issued its opinion Governor Owens signed Senate Bill 03-073 (see discussion of the bill below) that addresses the State Engineer's authority to approve substitute water supply plans for groundwater users in the South Platte. That bill amends Colo. Rev. Stat. § 37-92-308 to authorize the State Engineer to issue for three more years annual approvals of substitute water supply plans for wells in the South Platte that have been included in such plans. After that three-year period no substitute supply plans can be approved unless an augmentation plan has been filed with the water court. On this basis the State Engineer filed a petition for rehearing that suggests, among other things, that the enactment of Senate Bill 03-073 renders the appeal moot and that the opinion should be withdrawn. GASP has also filed a petition for rehearing, arguing that the court has not correctly interpreted the controlling statutes. Since the State Engineer requested and received an expedited appeal and the court issued a unanimous decision, this reporter doubts the court will be likely to warm to the State Engineer's suggestion that it withdraw the opinion. The court may, however, make some of the clarifying changes suggested in the State Engineer's petition for rehearing.

2003 Colorado Water Legislation

With Colorado in the grip of an historic drought no member of the General Assembly worth his or her salt wanted to stand by when he or she could carry a water bill that would "do something about the drought." The result was a parade of half-baked ideas or worse, the majority of which were defeated. A number of proposals managed to survive the legislative process and a summary of some of the more significant water-related legislation for 2003 follows.

House Bill 03-1001—Increased Flexibility in the Use of Water Resources. Among the other notable accomplishments of this bill is its addition of a new section, Colo. Rev. Stat. § 37-95-109(1), to the law governing condemnation of rights-of-way for ditches and like structures. Colo. Rev. Stat. § 37-86-104(2) now directs state agencies to cooperate, to the maximum extent practicable, with users seeking such rights-of-way. Likewise, with respect to the storage of water, Colo. Rev. Stat. § 37-87-101(1)(b) now directs state agencies to cooperate, to the maximum extent practicable, with people to acquire real property for reservoirs. On a more productive note, the bill outlaws new restrictive covenants that prohibit or limit the installation or use of drought tolerant vegetation. And, perhaps most significantly, it amends Colo. Rev. Stat. § 37-92-308(4) and (5) to allow the State Engineer to grant temporary changes of water rights in the same manner that the State Engineer may now approve temporary substitute water supply plans.

Senate Bill 03-085—Temporary Loans of Water Rights. This bill amends Colo. Rev. Stat. § 37-83-105 concerning the loan of water rights. Under the prior law the owners of ditches and water rights taking water from the same stream could exchange with and loan to each other, for a limited time, the water to which each is entitled for the purpose of saving crops or using water in a more economical manner.

The amendment authorizes the loan of water rights for either agricultural purposes or, upon application by the Colorado Water Conservation Board, for instream flow purposes. The loans may not exceed 180 days per year and may only occur three years in ten. The loans must be approved in advance by the division engineer upon terms and conditions that prevent injury to other water rights. The applicant must provide notice of the proposed loan to other water users following the procedures in Colo. Rev. Stat. § 37-92-308(6). After considering any comments filed by interested parties, the division engineer may grant or deny the proposed loan and must provide notice of the decision. Thereafter the division engineer's decision may be appealed to the water court. In effect this bill authorizes undecreed changes of water right of limited duration and for limited purposes.

House Bill 03-1320—Administration of Temporary Instream Flow Water Rights. This bill adds standards applicable to the Colorado Water Conservation Board's (CWCB) use of loaned water rights for instream flow purposes, and partially amends Senate Bill 03-085. House Bill 03-1320 provides that water rights may be loaned for instream flow purposes only when a drought emergency *or any other* emergency has been declared in the county or river basin involved. Any such loan is limited to 120 days. The CWCB is required to submit to the State Engineer a description of the loan containing sufficient information for the State Engineer to determine that the loan will not injure vested water rights. The CWCB may only accept the loan if the State Engineer agrees and determines that the loan will not cause injury. The loaned water right may only be accepted by the CWCB in accordance with Colo. Rev. Stat. § 37-92-102(3) which limits the use of the water to preservation or improvement of the natural environment to a reasonable degree.

House Bill 03-1318—Creation of Water Banks. This bill amends the Arkansas River water bank pilot program by expanding it statewide. It adds Colo. Rev. Stat. § 37-80.5-104.5 authorizing the State Engineer, upon request of a water conservation district or water conservancy district, to promulgate rules and regulations for the operation of a water bank within the water division where the district is located. The standards for the rules and regulations are essentially the same as those now found in Colo. Rev. Stat. § 37-80.5-104 for the Arkansas River water bank pilot program. The State Engineer is required, however, to delegate the administration of the water bank to the district that submitted the request for the water bank. The district is entitled to charge a transaction fee to cover the bank's administrative costs. And, the district to which the water bank's administration has been delegated is granted full authority to administer the bank's operation, as necessary, outside of the district's geographic boundaries.

House Bill 03-1334—Interruptible Water Supply Agreements. This bill adds Colo. Rev. Stat. § 37-92-309 to authorize and administer interruptible water supply agreements. It defines an interruptible water supply agreement as an option agreement between two or more water rights owners. The loaning water right owner ceases use of a water right so that the borrowing party may use the water on terms approved by the State Engineer. These temporary and undecreed changes of water rights are only permitted during calendar years in which a drought *or other emergency* is declared by the Governor in the county of the water rights origin or use, and during the first calendar year following the year in which the declared emergency terminates.

The interruptible water supply agreements may only effect a temporary change of the historical consumptive use of the water right and must do so in a manner that does not cause injury to other water rights. The proponent of the

plan must submit a report acceptable to the State Engineer establishing the historical consumptive use and absence of injury. After publication of notice pursuant to Colo. Rev. Stat. § 37-92-308(6), and after consideration of comments by interested parties, the State Engineer may act on the request. In addition to imposing terms and conditions to prevent injury to water rights for irrigation use, the State Engineer may impose requirements to prevent soil erosion and ensure control of noxious weeds. Any appeal of the State Engineer's decision is to the water court.

Senate Bills 03-181 and 03-278—New Taxes on Water Users. In an effort to replace funds lost to tax cuts and declining revenues, the Republican-controlled Colorado General Assembly imposed new or increased taxes on water users to replace the general fund money that it took from the Colorado Division of Water Resources. Senate Bill 03-181 eliminates "the current general fund subsidy" associated with the cost of well permitting. It does so by increasing the cost of all new well permit applications from \$60 to \$440; increasing the cost for a permit to replace an existing well from \$20 to \$200; charging \$200 rather than \$60 to extend existing well permits; and charging \$200 rather than \$20 for household use well permits. The fee increase theoretically sunsets July 1, 2006.

Senate Bill 03-278 imposes an annual water rights administration fee beginning in 2003. Each direct flow water right of 1 c.f.s. or more used for agricultural irrigation, recharge, or stock watering purposes is assessed a fee of \$10, and all other direct flow water rights are assessed \$250 each. Water storage rights decreed for agricultural irrigation, recharge or stock watering are assessed a fee of \$25. All other decreed water storage rights are assessed \$100 each. By rulemaking the State Engineer is to establish the procedure for implementing the fee assessments and their collection. The water right owner must pay the fee within 30 days after the fee assessment is received. Those who fail to pay the fee are subject to interest at 1.5% per month, costs associated with collection, and reasonable attorney fees, unless it is determined that the fee was improperly assessed. The bill also requires the State Engineer, in consultation with interested parties, to re-examine this administrative tax and provide a report to the General Assembly by December 2004. The entire section sunsets July 1, 2005.

This bill was hastily prepared as Colorado's budget deficit continued to grow. As a consequence, the bill, which is intended to generate some \$1.8 million annually, promises to be very difficult to implement. Its implementation will require the State Engineer to know the owner and current address for the hundreds of thousands of water rights to be assessed. This in and of itself may be an insurmountable task because Colorado has no readily available and reliable records of title to water rights. Thus, except in the most obvious situations, many water rights will simply go untaxed because the State Engineer lacks the resources and manpower to determine ownership, a prerequisite to implementing the legislation.

Senate Bill 03-236—Water Project Financing. This is the "feel good" water bill for 2003. It authorizes a water referendum to allow the issuance of \$2 billion in revenue bonds to finance water infrastructure projects in the state. Water infrastructure projects are generally defined as projects involving the acquisition of water rights and the construction, development, or improvement of dams, reservoirs, or other water diversion, conveyance, or storage facilities that will enhance the ability of the state to exercise all of its compact entitlements fully while reducing the state's vulnerability to drought and water shortages. Domestic water treatment and distribution projects and wastewater collection and treatment projects are specifically excluded.

Assuming voter approval of the revenue bonds, then the question becomes whether this source of financing will make any difference. The answer to that, of course, depends upon whether there are any viable water infrastructure projects in Colorado that have not been built for lack of such financing. It is this reporter's view that meaningful water projects in Colorado have largely floundered on the shoals of local politics, environmental concerns, or economic insufficiency (i.e., the project revenues don't repay their costs), none of which will be changed by the revenue bonds authorized, which will still require sufficient project revenue to repay the project costs. Thus, while the General Assembly may *feel* good for passing this bill, it remains to be seen whether the bill will, in fact, *do* any good.

Senate Bill 03-073—South Platte Groundwater Administration. Senate Bill 03-073 is the "Big Kielbasa" of 2003 water legislation. Its purpose was to break the stalemate over well administration in the South Platte, arising from the dispute between groundwater users and the State Engineer, on the one hand, and senior surface water rights, on the other hand, over whether court-approved plans for augmentation would be required for wells that deplete the flows of the South Platte and its tributaries. As explained above, and in Vol. XXXVI, No. 1 (2003) of this *Newsletter*, the Division No. 1 Water Court rejected the State Engineer's proposed amended groundwater regulation that authorized him to approve so-called "replacement plans" for wells rather than requiring a court-approved plan for augmentation, and the Colorado Supreme Court affirmed that ruling. Senate Bill 03-073 resolves this controversy, at least temporarily, in the South Platte Basin.

The bill amends Colo. Rev. Stat. § 37-92-308 governing the State Engineer's approval of substitute water supply plans. See Vol. XXXV, No. 2 (2002) of this *Newsletter* for more background on § 37-92-308. The bill ratifies the

State Engineer's current groundwater regulations in the Arkansas River Basin that include State Engineer-approved replacement plans. It specifically denies the State Engineer authority in Water Division No. 1 to approve plans for or otherwise to allow the operation of wells that cause out-of-priority depletions without a plan for augmentation approved by the water judge. The bill, however, contains a three-year grace period for wells in Water Division No. 1 that have been operating under substitute water supply plans approved by the State Engineer. After December 31, 2005, a substitute water supply plan may only be approved if a plan for augmentation has been filed with the water court and is being diligently prosecuted.

During the three-year grace period the State Engineer's administrative discretion to approve such substitute water supply plans is greatly limited. The bill provides an extensive list of the engineering factors that must be considered by the State Engineer, the methodologies that must be applied and the maximum and minimum consumptive use that may be attributed to certain irrigation practices. It also requires the State Engineer to conduct hearings on such plans that include oral and written evidence and cross-examination of witnesses. The State Engineer, when approving such a plan, must provide an extensive written report explaining the factual basis for the plan and its approval and the terms and conditions imposed to prevent injury. And, for all plans approved in 2003 for wells operating after January 1, 1974, all stream depletions occurring after October 31, 2002 (i.e., last winter's depletions) must be replaced as part of the plan. Finally, the State Engineer is directed to consider, with other water users, whether additional legislation is needed to provide compensation to injured water users in the event that the substitute supply plans fail to prevent injury. The State Engineer must report his findings to the General Assembly by December 31, 2003.

Both the extraordinary level of detail in this bill, and the exceptional difficulty in reaching a compromise, reflect the substantial disagreements and general lack of trust between the respective parties. And while Denver's record snowfall in March and a moderately wet spring have eased the drought in northeastern Colorado, that moisture has done nothing to ease the wariness with which the parties to this controversy regard one another.

Instream Recreational Water Rights

The Colorado Supreme Court has acted on appeals of water court decrees from Water Division Nos. 1 and 5 granting instream water rights for recreational purposes to the City of Golden, the Town of Breckenridge, and the Eagle River Water and Sanitation District. See Vol. XXXV, No. 2 (2002) of this *Newsletter*. The trial court decisions granting these water rights had been appealed by the State Engineer, the Colorado Water Conservation Board, and various water users. On May 19, 2003, the decisions of the trial courts were affirmed by operation of law because the Colorado Supreme Court, with one justice not participating, was evenly split. See *State Engineer v. City of Golden*, No. 01SA252, 2003 WL 21136728 (D. Colo. May 19, 2003); *State Engineer v. Eagle River Water & Sanitation District*, Nos. 02SA224 & 02SA226, 2003 WL 21136730 (D. Colo. May 19, 2003). Chief Justice Mullarkey and Justices Bender and Martinez would have affirmed the trial court while Justices Kourlis, Rice, and Coats would have reversed the trial court.

Attorney Fees and Costs in Water Rights Cases

The former water judge for Water Division No. 1 had a greater propensity than other water judges to award attorney fees and costs in water court cases. He did so principally under Colo. R. Civ. P. 41(b) when the case was dismissed with prejudice and under Colorado's frivolous and groundless litigation statute, Colo. Rev. Stat. § 13-17-102. At least three appeals challenging the propriety of these awards are now pending before the Colorado Supreme Court. It therefore came as no surprise that after dismissing the hotly contested Application of Park County Sportsmen's Ranch, the court awarded substantial attorney fees and costs. (For background on this case, see *Board of County Commissioners v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002), in Vol. XXXV, No. 2 (2002) of this *Newsletter*. The trial court's order dismissing the Application may be viewed at <http://www.courts.state.co.us/supct/watercourts/wat-div1/parkcounty.htm>.)

On May 1, 2003, after discovery and an evidentiary hearing on reasonableness, the water court awarded 14 opposing parties approximately \$1.2 million in costs and \$1.2 million in attorney fees. *In re Water Rights of Park County Sportsmen's Ranch*, No. 96CW14 (Colo. Water Ct. Div. 1, 2003) (order awarding costs and attorney fees) (copy available from court and this reporter). The award for attorney fees was entered against Park County Sportsmen's Ranch and its attorney, and the City of Aurora. Costs were not awarded against Aurora. The basis for this award was the water court's conclusion that the Applicants' claims were frivolous from their inception. The basis for this conclusion was the Applicants' failure to heed the advice of one of their expert witnesses concerning groundwater modeling. That expert had stated that additional data, additional model calibration, and additional evaluation of the model target data was required before he could defend the applicants' groundwater model.

This is probably the second largest award of fees and costs in a Colorado water court case and is certainly the largest under the groundless and frivolous litigation statute. The question now becomes whether the Opposers will be able to sustain the award on appeal, so stay tuned for further developments.

IDAHO

Jeffrey C. Fereday & John M. Marshall, Reporters

Idaho Supreme Court Invalidates TMDL for Failure to Follow Formal Rulemaking Procedure; Legislature Responds That TMDLS Are Not Rules

On April 25, 2003, the Idaho Supreme Court ruled that the total daily maximum load (TMDL) developed by the Idaho Department of Environmental Quality (DEQ) for the Coeur d'Alene River Basin in northern Idaho was invalid for failure to comply with the rulemaking procedures of the Idaho Administrative Procedure Act (IDAPA). *Asarco Inc. v. Idaho*, No. 27914, Idaho Sup. Ct. Opinion No. 54 (Apr. 25, 2003). The decision is available on the court's website at <http://www2.state.id.us/judicial/sccivil.htm>. Although the decision addresses only the Coeur d'Alene TMDL (the TMDL), the decision's rationale arguably would invalidate all TMDLs in Idaho affecting some 900 stream segments, none of which have been promulgated as agency rules.

DEQ argued the TMDL is not a rule because it is akin to a planning document that does not implement or interpret existing law and the agency purposefully had exercised its discretion not to engage in rulemaking so that the TMDL would not be enforceable. The court ruled that even though DEQ did not intend to treat the TMDL as a rule, as a practical matter it operates as a rule because it is a new expression of agency policy that has broad, uniform applicability and prospective operation that is implemented through specific assignments of pollution loads and reduction obligations. The court specifically noted that the Environmental Protection Agency (EPA) had modified two of the three mining company respondents' National Pollutant Discharge Elimination System (NPDES) permits in accordance with the TMDL.

The court held the TMDL was void because it actually operates as a rule even though it was not promulgated as such under the procedures of the IDAPA. Within one week of the court's decision, the legislature responded by introducing H.R. 458, 2003 Leg., 1st Sess. (Idaho 2003) which limits the decision by clarifying that TMDLs in Idaho are not rules subject to the rulemaking requirements of the IDAPA. The governor signed H.R. 458 into law on May 7, 2003.

Resumption of Use Still Has Limited Role in Idaho

In *Sagewillow, Inc. v. Idaho Department of Water Resources*, No. 27534, Idaho Sup. Ct. Opinion No. 44 (Apr. 10, 2003), the Idaho Supreme Court overruled a district court decision affirming an order from the Idaho Department of Water Resources (Department) partially forfeiting water rights held by Sagewillow. The court remanded the case for further proceedings before the agency to consider Sagewillow's defense to forfeiture that it had resumed the use of the forfeited water rights. The decision is available on the court's website at <http://www2.state.id.us/judicial/sccivil.htm>.

In its order on the transfer and before the court, the Department argued the resumption of use defense can apply only if there are no junior appropriators on the same or an interconnected water source, and since there are juniors on the stream at issue, the resumption of use defense was not applicable. The court ruled, however, that the mere existence of a junior was insufficient to defeat the resumption defense. Instead, to defeat resumption, the Department must make a specific finding that a junior appropriator actually used water made available through the nonuse before the resumption occurs. As noted in the concurring opinion, such a finding is a near certainty in most cases because most, if not all, of Idaho's water is appropriated. Regardless, according to the court, if the defense of resumption is raised, the Department must make the specific finding that a junior has relied on the forfeited water.

In making its ruling, the court declined to adopt arguments that the resumption of use doctrine had been abrogated by the Idaho Legislature's passage of a statute requiring water users to seek Department approval of a request to extend time to avoid forfeiture. The court also ruled the doctrine is not limited to a resumption by the original appropriator.

Finally, the court held the Department was properly a party to the case and was not barred by res judicata or estoppel from voiding a prior transfer approval that did not forfeit the same rights at issue in the present case. Sagewillow argued that it had relied on the Department's prior approval in making considerable financial investments on the property. The court held that because forfeiture had not been raised in the prior proceeding, res

judicata did not apply. As for estoppel, the court found the Department's prior approval expressly stating that later review of the rights was not precluded and the absence of any evidence of false representation or concealment defeated the claim of estoppel against the Department.

SRBA Court Rules Recaptured Waste Water Cannot Be Used to Enlarge Water Right

In an April 25, 2003, decision, the Snake River Basin Adjudication (SRBA) District Court ruled that while an appropriator has the right to recapture and reuse waste water, the reuse cannot enlarge the beneficial use of the original right. *In re SRBA (A&B Irrigation District)*, No. 39576 (D. Idaho, Nov. 10, 1999) (order on challenge).

The case arose on a challenge by the A&B Irrigation District to a ruling by the Special Master that the approximately 2,000 irrigated acres developed by the District in excess of the acreage allowed in the District's water right license constituted an enlargement that had to be subordinated to April 12, 1994, the date the Idaho Legislature passed Idaho Code § 42-1426. This statute grants amnesty to otherwise illegal enlargements of water rights accomplished prior to the 1987 commencement date of the SRBA. The District argued this statute did not apply in its case because it had accomplished its approximately 2,000 acres of enlargements using recaptured waste water. Thus, according to the District, its enlargements should be decreed with the same 1948 priority date as the original right creating the waste and with a source of waste, drain, and return flows.

The SRBA court rejected the District's arguments and agreed with the Special Master, holding that the act of recapturing waste water did not give rise to the right to enlarge the beneficial use under a water right. The court recognized, as both a factual and legal matter, that the ultimate source of the District's enlargements was groundwater. Further, the court ruled that allowing an enlargement to the number of irrigated acres using waste water generated through diverting the original groundwater right would injure the water rights of other appropriators of the groundwater source.

A&B presented the novel argument that in its situation, juniors would not be injured by the reuse of waste water on enlarged acres because the water otherwise would pool up and evaporate. The SRBA court disagreed and recognized that even if this were true, the District's irrigation of enlargements in times of shortage still would impermissibly injure holders of rights junior to the District's 1948 priority right who would be curtailed while the District continued to irrigate its enlargements.

A copy of the SRBA court's decision can be found at <http://www.srba.state.id.us/srba7.htm>.

Idaho Legislature Limits the Scope of Public Interest Review in Water Right Proceedings

During the 2003 legislative session, the Idaho Legislature amended Idaho Stat. § 42-202B, and redefined "local public interest" to limit its scope in consideration of water right applications, transfer, and water supply bank transactions as follows: "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource. H.R. 284, 2003 Leg., 1st Sess. (Idaho 2003).

The effect of the new language is to refocus the Idaho Department of Water Resources' (Department) local public interest review on issues relating to the affected water resource. The legislature passed the bill in response to a growing number of protests to water transactions involving a broad range of social, economic, and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resource. For example, in recent applications involving dairies, the Department has weighed evidence and made decisions on such factors as the effects on communities from increased odors and insect populations. Also, in a proposed water right for a new ski area development, the Department considered evidence generally about whether the four-season resort would be a detriment or benefit to the local community apart from any effect on the water resource. The new bill, signed into law on April 15, 2003, is designed to limit the Department's consideration of the public interest only to water related issues, leaving the unrelated issues to be considered by other government agencies.

The bill also added a new provision for consideration by the Department in water transactions prohibiting inter-basin transfers that "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates." According to the bill's statement of purpose, this provision is designed to clarify that out-of-basin transfers do not deprive a local area of use of the available water supply.

Idaho Legislature Adds Conservation as a Defense to Forfeiture

In Senate Bill 1100, the Idaho Legislature amended section 42-223 of the Idaho Code to add the following statutory defense to forfeiture: "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as

defined in section 42-250, Idaho Code." The bill adds a new section to Idaho Code § 42-250 that defines conservation as "diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water right." The stated purpose of the legislation is to define, encourage, and support water conservation practices.

The legislation also adds a provision to Idaho Code § 42-223 to clarify that other, non-codified common law defenses to forfeiture may exist even though the legislature has created several statutory defenses to forfeiture. Senate Bill 1100 was signed into law on March 27, 2003.

KANSAS

John C. Peck & Leland E. Rolfs, Reporters

Kansas and Nebraska Settle Dispute over Republican River

The case of *Kansas v. Nebraska*, No. 126 Original, filed with the U.S. Supreme Court in May 1998 and involving a claim by Kansas that Nebraska is violating the Republican River Compact (Compact) has been settled. Special Master Vincent McKusick, the retired Chief Justice of the Maine Supreme Court, actively managed the case.

The North Fork of the Republican River starts in Colorado, and runs into Nebraska. The South Fork runs from Colorado into Kansas before it enters Nebraska and joins the North Fork to form the Republican, which then runs roughly parallel to the Kansas-Nebraska border before bending south and entering Kansas. Thus, Kansas is both upstream and downstream from Nebraska. On the mainstem in Nebraska about 65 miles from where the Republican River enters Kansas is Harlan County Lake with a conservation capacity of 314,111 acre-feet (a.f.) and additional flood control capacity. Downstream 50 miles from the lake is Guide Rock, Nebraska, the location of a principal diversion point for both the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District.

Negotiations creating the Compact took place in the early 1940s. Congress gave final approval in 1943. Kansas, Colorado, Nebraska, and the federal government are signatories. The Compact provides for "an equitable division" of the waters of the Republican River Basin. It does so through the concept of "virgin water supply" (water supply within the Basin undepleted by the activities of man) and "beneficial consumptive use" (use by which water supply is consumed through the activities of man). The Compact quantifies the virgin water supply for the entire Basin and each of the subbasins and allocates to each of the states the following annual amounts: Colorado, 54,100 a.f.; Nebraska, 234,500 a.f.; and Kansas, 190,300 a.f. plus the water supply originating downstream from the "lowest crossing" of the river at the state line. In 1959, pursuant to the Compact, the states formed the Republican River Compact Administration (RRCA) to administer the Compact.

A disagreement existed for years as to whether the Compact covered groundwater or just direct diversions from stream flow. Kansas' complaint alleged that Nebraska had allowed thousands of wells hydraulically connected to the Republican River to proliferate. In the First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), dated January 28, 2000, the Special Master recommended denial of Nebraska's motion to dismiss on the basis that the effects of well pumping on stream flows were not regulated by the Compact. The Court denied Nebraska's motion. The case then continued with further pleadings, discovery, hearings, and attempts at settlement.

In December 2002, the parties successfully conducted settlement discussions, and they have settled the case after about 45 days of negotiation with the full negotiation team, and numerous subcommittees doing substantial amounts of additional work on various areas. The parties prepared what is now a five-volume settlement (the Republican River Compact Settlement Document, December 15, 2002) and submitted it to the Special Master. He has approved it and submitted a one-volume report to the Supreme Court on April 15, 2003, along with the Final Settlement Stipulation. The Final Settlement Stipulation is *available at* www.nrc.state.ne.us/Republican/FinalSettlement3.pdf.

The Second Report of the Special Master (Subject: Final Settlement Stipulation) lays out the details of the settlement. The following summary comes *verbatim* from the Second Report:

III. The Final Settlement Stipulation

The Final Settlement Stipulation results from exactly the kind of cooperative effort and mutual concession by litigating States that the Court has long favored:

Time and again we have counselled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States which are vitally interested than by proceedings in any court however constituted."

Texas v. New Mexico, 462 U.S. at 575 (quoting *New York v. New Jersey*, 265 U.S. 296, 313 (1921)).

Plainly the result of "cooperative study" and of "mutual concession," the Final Settlement Stipulation has the following principal features:

- *Waiver of claims.* All three States agree that "all claims against each other relating to the use of the waters of the Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002, shall be waived, forever barred and dismissed with prejudice."
- *Treatment of groundwater pumping.*

Modeling – The First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), filed on January 28, 2000, recommended that the Court deny Nebraska's Motion to Dismiss because the Compact "restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin." The Court denied Nebraska's Motion to Dismiss. Implementing that denial and for the purpose of determining future Compact compliance, the Final Settlement Stipulation provides that the Groundwater Model is the means by which the States will account for consumption of groundwater to the extent the consumption depletes stream flow in the Basin.

Moratorium on the construction of new wells – The Final Settlement Stipulation imposes a moratorium on the construction of new groundwater wells in Nebraska upstream of Guide Rock, to match an existing *de facto* moratorium in Colorado and Kansas. The States have agreed to several reasonable and sensible exceptions to the moratorium.

- *Mechanisms for future Compact administration.* The Final Settlement Stipulation contains numerous clarifications and water accounting improvements that will help the RRCA in better administering the Compact. Many of these provisions resolve issues and ambiguities that hindered Compact administration and enforcement in the past. The clarifications and improvements include:
 - (a) New, more specific RRCA accounting procedures and formulas;
 - (b) Use of a five-year running average of water supply and consumptive use figures for determining Compact compliance, except in dry (or "water-short") years, in which either a two- or a three-year running average will be used;
 - (c) Flexibility for each State, within certain parameters, to use its annual allocation of the virgin water supply wherever it wishes within its boundaries without violating the Compact;
 - (d) Rules for the use and administration of water above Guide Rock, Nebraska, the point at which Kansas may divert all or part of its allocation from the main stem and otherwise unallocated upstream sources;
 - (e) Extensive information sharing requirements;
 - (f) Provisions for giving credit for water imported from outside the Basin for beneficial consumptive use within the Basin; and
 - (g) Commitments of each State to take various specific actions in water-short years.
- *Dispute resolution system.* The Compact is silent on matters of Compact enforcement and the settling of disputes other than by unanimous action of the RRCA. In accordance with the stated purposes of the Compact "to remove all causes present and future which might lead to controversies" and "to promote interstate comity," and in an effort to minimize the need for future litigation before the Court, the Final Settlement Stipulation establishes procedures encouraging

resolution of disputes between or among the compacting States where there is no unanimity in the RRCA. Of course, binding arbitration is possible only by agreement of the States affected.

- *Commitment to future joint efforts.* With the goals of using water in the Basin with maximum efficiency and of accounting for water use as accurately as possible, the three States have agreed in the Final Settlement Stipulation to undertake several efforts in the future. These efforts involve:
 - (a) The calculation of evaporation from small, non-federal reservoirs (typically farm ponds) in the Basin for purposes of Compact accounting;
 - (b) A study of the effect on virgin water supply of non-federal reservoirs and land terracing practices in the Basin; and
 - (c) A study of the feasibility of system improvements in the Basin, including measures to improve the ability to use the water supply in the Kansas and Nebraska Bostwick Irrigation Districts as well as the water supply on the main stem below Hardy, Nebraska.
- *Non-severability.* The agreement of each of the States to the terms of the Final Settlement Stipulation depends upon the inclusion of all its provisions, negotiated as a single whole on a give-and-take basis, and, therefore, the States have provided that the rights and obligations in the Final Settlement Stipulation are not severable. If the Court declines to approve the Final Settlement Stipulation in the form submitted, the States have agreed that the entire Final Settlement Stipulation will be null and void.

Second Report of the Special Master at 26-30 (footnotes omitted).

The Special Master concluded his report by "strongly" recommending approval of the settlement. On May 19, 2003, the U.S. Supreme Court issued a decree approving the final settlement stipulation. *Kansas v. Nebraska*, No. 126 Original, 123 S. Ct. 1898 (2003). The Court recommitted the matter to the Special Master for the sole purpose of deciding procedural questions arising in the completion by the state parties of the RRCA groundwater model pursuant to the binding procedures prescribed by the Final Settlement Stipulation.

The only issue outstanding is the completion of a joint groundwater computer model by experts of Kansas, Colorado, Nebraska, and the United States. If they cannot complete the model by July 1, 2003, binding arbitration will settle the issue.

Editor's Note: Leland E. Rolfs, one of the Kansas reporters for this *Newsletter*, is one of the attorneys representing the State of Kansas in the above-described litigation and in the settlement negotiations.

NEW MEXICO

Tim De Young, Reporter

Settlement Agreement Reached in Pecos River Adjudication

On March 25, 2003, the State of New Mexico, the Carlsbad Irrigation District, the Pecos Valley Artesian Conservancy District, and the United States executed a settlement agreement designed to insure New Mexico fulfills its obligations under the Pecos River Compact and the Decree of the U.S. Supreme Court in *Texas v. New Mexico*, 485 U.S. 388 (1988). Upon satisfaction of certain conditions, the settlement agreement will settle the surface water claims of the Carlsbad Irrigation District (CID) and the United States. Pursuant to the settlement agreement, the parties filed a Joint Motion for Entry of Partial Final Decree in *New Mexico v. Lewis*, Nos. 20294 and 22600 (consolidated) the longstanding stream adjudication of the Pecos River. Copies of the agreement and joint motion can be obtained from the New Mexico Office of the State Engineer website, <http://www.seo.state.nm.us/hot-topics/index.html>.

By way of background, in 1988 the U.S. Supreme Court ordered New Mexico to pay Texas damages of \$14 million for underdelivering an average of 10,000 acre-feet of water per year and to take steps to insure adequate future deliveries. New Mexico has since spent approximately \$30 million for measures to increase river flows. As owners of the oldest priority surface water rights on the river, the CID historically has urged the issuance of a

priority call whereby junior water rights owners upstream would be required to cease diverting surface waters or curtail groundwater pumping. Faced with the uncertainty of a priority call in a stream system that has not yet been fully adjudicated and the potential for further litigation, the State has promoted a consensual approach by forming the Lower Pecos River Basin Committee which consists of representatives of the major water user entities, industries, and political subdivisions within the lower Pecos River Basin below Sumner Reservoir. The work of this group resulted in key legislation passed in 2002, N.M. Stat. Ann. § 72-1-2.4, that requires the New Mexico Interstate Stream Commission (ISC) to determine the projects needed for compliance with the Pecos River Compact, including the purchase of land with appurtenant water rights or rights to the delivery of water. As a condition precedent to the expenditure of funds, however, the ISC was required to negotiate and enter into a settlement agreement with the major water users and to settle or adjudicate the surface water claims of the CID.

The March 25, 2003, settlement agreement along with a separate agreement between the ISC and the Fort Sumner Irrigation District, also executed on March 25, 2003, therefore should free up funding for the acquisition of a significant amount of irrigated farm land with appurtenant water rights. In fact, the settlement agreement authorizes the ISC to acquire at least 4,500 acres of land within the CID and at least 7,500 acres of irrigation water rights in the Roswell Artesian Basin. The ISC has already undertaken computer modeling of the anticipated effects of the retirement of irrigation water rights and such efforts will continue. In addition, the ISC is required to construct, lease, or purchase wells sufficient to undertake an augmentation pumping plan. On or before September 30, 2004, the parties to the settlement agreement are required to confer to determine whether the agreement's conditions precedent have been satisfied or will be waived.

The CID and the U.S. Bureau of Reclamation, pursuant to the partial final decree, will receive adjudicated water rights for the Carlsbad Irrigation Project. In a subsequent phase of the adjudication, the relative water rights of the members of the CID will be determined. In exchange, CID and the United States have agreed to refrain from placing a call for administration of priorities or otherwise seek to curtail water uses in the Roswell Artesian Basin and have further agreed to a limitation on their storage of water, except to the extent necessary to supply water to the CID.

The settlement agreement requires the entry of a partial final decree by the adjudication court containing the same terms as the form of partial final decree attached to the agreement. To facilitate satisfaction of this condition, the parties have agreed to seek the withdrawal of as many of the objections to the partial final decree as possible.

The settlement agreement also specifies steps to be taken if the River Master determines there is likely to be a shortfall in deliveries to Texas. A priority list of voluntary measures are specified in the agreement designed to increase the amount of water delivered at the New Mexico-Texas state line. Whether these measures will prevent under-deliveries to Texas remains to be seen but the settlement agreement, if nothing else, seems to reflect a shift from reliance on litigation to implementation of strategies developed by the stakeholders.

New Mexico's New Water Leaders Respond to Continued Drought on the Rio Grande

On January 1, 2003, New Mexico's new Governor, Bill Richardson, took office. One of Richardson's campaign promises was to make water policy reform a top priority starting with the replacement of former State Engineer Tom Turney. Following a fairly extensive search process, the new Governor appointed John D'Antonio, an employee of the Office of the State Engineer with prior experience with the U.S. Army Corps of Engineers. In addition to the normal problems associated with managing water in a semi-arid state, New Mexico's new State Engineer faced the additional challenge of a continuing, severe drought, especially in the Rio Grande Basin.

In six of the last seven years (1996 to 2002), the Rio Grande Basin has experienced below normal runoff with the 2002 runoff the eighth lowest on record in 107 years of flow data, dating back to 1895. The March 1, 2003, water in storage at New Mexico's largest reservoir, Elephant Butte, was 405,075 acre-feet (only 20% of full) and the lowest level since 1979. Moreover, the 2003 spring runoff into Elephant Butte Reservoir is predicted to be only 53% of normal. The U.S. Bureau of Reclamation anticipates that the Rio Grande Project, which serves irrigators in New Mexico, Texas, and Mexico, with water stored in Elephant Butte and Caballo Reservoirs, will not receive a full allocation for the first time in 25 years.

On April 3, 2003, the new State Engineer announced approval of an emergency drought water agreement by the New Mexico Interstate Stream Commission. The centerpiece of the agreement is the proposed relinquishment of up to 217,500 acre-feet of Rio Grande Compact "credit water" currently stored in Elephant Butte Reservoir. The Texas Commissioner for the Rio Grande Compact rejected the original proposal but on April 23, 2003, Governor Richardson announced a "win-win compromise" whereby Texas agreed that New Mexico can release 122,500 acre-feet of its credit water from Elephant Butte Reservoir over the next two years in exchange for giving New Mexico the right to store an equivalent amount in upstream reservoirs. New Mexico's water leaders contend that the relinquishment will insure that the city of Santa Fe as well as the Middle Rio Grande Conservancy District will

receive adequate supplies, while still having enough water to meet federal requirements for the protection of the Rio Grande Silvery Minnow. Meanwhile, New Mexico anxiously awaits a ruling by the Tenth Circuit Court of Appeals on whether the Bureau of Reclamation is authorized to use water imported via the San Juan Chama Project for protection of the endangered fish. Less obviously, the release of credit water will benefit Rio Grande Project irrigators within the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas.

To understand the relinquishment proposal, a quick review of the Rio Grande Compact of 1939 is instructive. Article I of the Compact defines "usable water" as all water, exclusive of credit water, in Rio Grande Project storage available for release to downstream users. Credit water occurs when actual deliveries by Colorado or New Mexico exceed their respective delivery obligations in any calendar year. Historically and until recently, both Colorado and New Mexico had been in a debit status in most years since the Compact became effective in 1939. See S.E. Reynolds & P.B. Mutz, "Water Delivery Under the Rio Grande Compact," 14 *Nat. Resources J.* 201 (Apr. 1974). Despite the extended drought, New Mexico has been earning substantial credits in the last few years, primarily as a result of the Bureau of Reclamation's surplus water program.

Under this program, Reclamation acquires San Juan Chama water from willing contractors and then allows the Middle Rio Grande Conservancy District the right to use the imported water for irrigation. In exchange, the Conservancy District releases or bypasses its "native water" to augment flows in the Rio Grande needed for preservation of the Silvery Minnow. This exchange is required because Article IX of the Rio Grande Compact provides that New Mexico is not allowed to receive credit for water imported via the San Juan Chama Project. To the extent that the "native water" reaches Elephant Butte Reservoir in excess of New Mexico's delivery requirements, New Mexico receives credit for over-deliveries.

But the accumulation of credits or debits is only half of the story. Article VII of the Compact prohibits storage of water upstream whenever there is less than 400,000 acre-feet of usable water in the Elephant Butte Reservoir. Because Elephant Butte Reservoir's water levels are so low this year and much of the water in storage is not "usable" because it is credit water, relatively little water would have been available for release. To address this problem and perhaps in light of potential litigation by Texas, New Mexico offered to relinquish its credit water in exchange for the right to store an equal amount in upstream reservoirs for use later this summer. Pursuant to Article VII, such relinquishment is allowed provided Texas accepts the relinquished water.

New Mexico's new water leaders characterized the relinquishment of New Mexico's credit water as a win-win compromise that brings relief to the cities and farmers along the river. However, the proposed relinquishment provoked strong opposition from Elephant Butte area residents, municipal leaders in nearby Truth or Consequences, and recreational boaters who understandably opposed draining the reservoir primarily for the benefit of farmers. In fact, an impromptu "boat brigade" was staged to stall traffic in Santa Fe's narrow streets and bring attention to the possible economic impacts of the proposal. Recognizing that the water relinquishment agreement resulted in an apparent conflict between recreation interests and farmers, the new Governor quickly sent aids to talk with leaders in the Elephant Butte area. After a conciliatory meeting with the local leaders, the Governor announced plans to stock the lake with more fish and build a sewer system at the state park. At about the same time, State Engineer D'Antonio announced that it was likely that downstream irrigators in southern New Mexico and Texas would not draw most of their water until August and September, which in turn would help maintain adequate water for boaters and recreational users for most of the summer, assuming that summer monsoon rains will help recharge water levels in the lake.

With the full support of the new Governor, the new State Engineer appears to be actively pursuing a number of proactive water strategies. On May 5, 2003, he issued a revised strategic plan that emphasizes the need for active water management in order to comply with interstate water compacts, improve water use efficiency, and complete the adjudication of all water rights. For a copy, see <http://www.seo.state.nm.us>. New Mexico's new water leaders have acted quickly and decisively. Only time will tell how successful their initiatives will be.

TEXAS

Frank F. Skillern, Reporter

Agencies Approve Letter of Intent to Develop Groundwater

Recently, the Guadalupe-Blanco River Authority, the San Antonio River Authority, and the San Antonio Water System approved a letter of intent to develop groundwater from the Gulf Coast Aquifer to supply water users in South Central Texas. The proposal is for a 40-year lease of at least 20,000 acre-feet of groundwater and would be subject to volume changes based on permits issued by the Refugio County Groundwater Conservation District.

Depending on the outcome of viability and sustainability studies, the parties anticipate a final agreement by August 2003. The groundwater would be applied to the Lower Guadalupe Water Supply Project which is a joint project among the parties pursuant to Senate Bill 1. The project is another example of using groundwater supplies to supplement the water supply for San Antonio that also would be used for users south of the City on the San Antonio and Guadalupe Rivers. It also will provide needed water for the bays and estuaries. *Water Strategist*, Jan. 2003.

Challenges to Amendment of Water Right Dismissed

In *Friends of Canyon Lake, Inc. (FCL) v. Guadalupe-Blanco River Authority (GBRA)*, 96 S.W. 3d 519 (Tex. App.—Austin 2002), the GBRA had applied to the Texas Natural Resources Conservation Commission (TNRCC) for an amendment to its certificate of adjudication allowing it to increase withdrawals from Canyon Reservoir and sell water outside its area. Notice of the application was published in local newspapers, and the application was approved by the TNRCC. Subsequently, FCL was formed, and the GBRA sought approval from the Attorney General's Office for revenue bonds authorized for the project. The approval of the bond issuance was held up because of legal challenges by FCL which had sued contesting the amendment by TNRCC. The GBRA then brought an expedited declaratory judgment action to resolve those issues. The cases were consolidated, and the trial court dismissed all of the challenges to the amendment and, after a trial, dismissed the FCL's Open Meetings Act claim.

The appeals court ruled that FCL did not exhaust its administrative remedies since it did not request a contested case hearing within the 30-day period after public notice of the application was published. The court rejected FCL's argument that the case was within an exception to the exhaustion doctrine because the agency acted without authority or in violation of law. It also rejected the argument that the Expedited Declaratory Judgment Act, Tex. Gov't Code Ann. § 1205.021 granted standing to FCL to "contest the validity of any of the actions taken by the [Authority]." 96 S.W. 3d at 528. The court held that this provision was not changing the requirement that the group must first seek judicial review in order to challenge an agency's final order. On the Open Meetings Act challenge the court concluded that TNRCC's notice was sufficient to inform the public about the action on the application as well as the commission's consideration of the water purchase contract that necessitated the revenue bonds.

Court Interprets Water Rights Transfers

Two other opinions not released for publication were decided earlier this year. *Herrmann v. Lindsey*, No. 04-02-00184-CV, 2003 WL 354464 (Tex. App.—San Antonio Feb. 19, 2003) involved a reservation of water rights in a deed for the sale of land within the Edwards Aquifer Authority's (EAA) jurisdiction. The original owner, Hendrix, had applied for and received an initial regular permit from the EAA. Hendrix later sold the land and permit water rights to the Herrmanns, who made two separate conveyances of one-half of the water rights to Columbia Realty Ltd. The EAA approved both transfers of the permit rights. About two months later, the Herrmanns sold the irrigated portion of the land which had the permit rights to the Lindseys. That deed contained a reservation for the grantor of water rights under the permit from the EAA. A year later, the Herrmanns and Columbia Realty brought this declaratory judgment action to have the water rights transfers declared valid under the EAA Act. The Lindseys filed a counterclaim seeking title to the water rights under the permit.

The Lindseys next sought approval of the transfer of the water rights from the Herrmanns to them under the contract for the purchase of the irrigated lands. The EAA determined that the first transfer to Columbia of 50% of the permit right (the unrestricted irrigation groundwater part of the permit application) was valid, but that the second transfer was void because of the sale of the irrigated lands to the Lindseys. Hence, the EAA concluded that the remaining 50% of the permit right was transferred to the Lindseys by the deed of the irrigated lands.

The Lindseys moved for summary judgment on the basis of the EAA rulings in the declaratory judgment action. The trial court ruled for them, holding that they acquired 50% of the permit right by the sale of the irrigated land by the Herrmanns.

On appeal, the court held that the contract principles of failure of consideration, rescission, mutual mistake, and failure of material condition do not apply since the sales contract was fully performed and nothing remained to be enforced. The court held that a grantor may not rescind a deed for failure of consideration or for mistake. If the reservation in the deed is an illegal provision, then it simply will not be enforced. Hence, the Lindseys acquired title to the water rights under the deed.

Court Rejects Damage Claims Resulting from Drainage Project

In another unreleased opinion, the Fort Worth Court of Appeals considered a claim of inverse condemnation based on a drainage system built by the city. In *Berry v. City of Reno*, No. 2-02-150-CV, 2003 WL 1948870 (Tex. App.—Fort Worth Apr. 24, 2003), the City constructed a drainage system on the low water area on a roadside that is

in front of the plaintiffs' property and Wenzels' land. Two 18-inch drainage pipes from Wenzels' land were put under the roadway to carry off flood waters. When the project was finished, the plaintiffs' house and pool were flooded in November and February. The City attempted corrective measures, but was unsuccessful. The plaintiffs sued the City in negligence and inverse condemnation.

Both claims were rejected by the court. The negligence claim was barred by the defense of sovereign immunity under the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code § 101.056(2) (Vernon 1997). That defense applies to the discretion exercised by a city in designing its roadways. 2003 WL 1948870, at *4. The City relied on the plaintiffs' testimony, affidavits, and depositions to show that the suit was based on negligent design and construction of the roadway, which are discretionary actions.

On the inverse condemnation claim, the court ruled that the plaintiffs made no showing that the property was taken for a public use. The City raised the issue of the public use as a requirement for a constitutional taking, but the plaintiffs failed to respond to the issue. The test is whether there is some right or use in the public or a "general benefit to the State" from the action. *Id.* at *6. The court concluded that the evidence here only showed that the plaintiffs did not know why the drain system was built. No evidence was presented showing the purpose of the City in undertaking the project. Hence, no public use was established and the inverse condemnation suit was properly dismissed.

Editor's Note: Frank Skillern has notified us that he is retiring from teaching and this will be his last report for the Newsletter. The Editor and Foundation would like to thank Mr. Skillern for his services. He has been a diligent, articulate, and insightful reporter on Texas water matters. We wish him good fortune in his retirement.

WASHINGTON

Amy K. Kelley, Reporter

"Ministerial" Defined

Recent Washington cases have involved very precise issues of statutory interpretation in contrast to many cases of the 1990s that centered on "mega issues" such as the overall enforcement authority of the Department of Ecology (DOE).

In *Willowbrook Farms, LLP v. Department of Ecology*, 66 P.3d 664 (Wash. Ct. App. 2003), the court addressed the meaning of the word "ministerial" in Wash. Rev. Code § 90.14.065(3), which allows water rights claims filed with the state to be amended if the "amendment is ministerial in nature." Concluding that the issue was one of law to be decided de novo by the court, and that DOE's interpretation (that ministerial errors were limited to typographical or clerical errors) was not entitled to deference since it did not require administrative expertise, the court held that an error in describing the place of use (leaving out an entire quarter section) was ministerial, and thus subject to amendment. Only an error of "*judgment*," where the claimant "*elected*" to claim less property than that actually irrigated would have been non-ministerial. *Willowbrook Farms*, 66 P.3d at 668.

"Industrial Purpose" Includes Agriculture

In *Kim v. Pollution Control Hearing Board (PCHB)*, 61 P.3d 1211 (Wash. Ct. App. 2003), the court interpreted an exception under Wash. Rev. Code § 90.44.050, which since 1945 has required permits for groundwater withdrawals and use, absent such an exception. The relevant exception in *Kim* was for "not more than five thousand gallons per day 'for an industrial purpose.'" 61 P.3d at 1212. Until the mid 1990s, DOE apparently recognized various agricultural endeavors to be covered by the word "industrial," but then altered its position so that "industry" excluded agriculture. Noting that "at least 24 Washington statutes, six Washington regulations, and ten Washington cases refer to the 'agricultural industry,'" *Kim*, 61 P.3d at 1213, the court disagreed, and ruled that the appellants (the Kims) were entitled to withdraw groundwater without a permit for their commercial nursery. The court did not "overlook" DOE's (and the PCHB's) concern that there were "changing conditions" (such as growing population, endangered salmon, better understanding of the hydrologic continuity between surface waters and groundwaters) that might make the extensive and very loose permit exceptions under the Water Code unwise, but found that: "When a statute is rendered obsolete by changing conditions, the remedy is for the legislature to amend it; neither an administrative agency nor the courts may read it in a way that the enacting legislature never intended." *Id.* at 1214.

Legislature

The 2003 Washington Legislature is, indeed, entertaining numerous major bills that would address many longstanding problems in Washington water law (although some of the bills could arguably make matters worse

rather than better). The legislative session, however, was totally bogged down in budget bills; and well into special sessions and the month of May, the water bills (and the budget) were still in legislative limbo. If substantial water legislation is passed it will be addressed in the next *Newsletter*.