



# Rocky Mountain Mineral Law Foundation

# Water Law Newsletter

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## UTAH SUPREME COURT RULES THAT IRRIGATION OF NATURAL VEGETATION IS A BENEFICIAL USE OF WATER IN SOME SITUATIONS

(John H. Mabey, Jr., Utah Reporter)

The Utah Supreme Court reluctantly upheld a trial court's determination that irrigation of a tree farm that ultimately failed nevertheless constituted a beneficial use of water because of the benefits produced by the enhanced indigenous vegetation. *In re General Determination of the Rights to Use All of the Water*, 2004 UT 67, 98 P.3d 1 (Utah 2004). The landowner testified at trial that the diversion of water for irrigation allowed him to cultivate various plants indigenous to the area. As a result, he was able to harvest berries and trees, and the enhanced foliage provided feed and cover for animal life. The trial court found that the irrigation produced the benefits of, "among other uses," "satisfy[ing] aesthetic desires," "reduc[ing] the fire hazard," and "creat[ing] property line buffers." 98 P.3d at 13.

As would be expected, however, the supreme court's ruling is amply qualified:

We are particularly skeptical of ends that appear to be merely incidental to water use and that are declared as beneficial only in hindsight. However, because the trial court is entitled to significant discretion in applying principles of beneficial use, we affirm the trial court's finding that the water available . . . was put to beneficial use. . . . We caution, however, that our holding should not be interpreted to imply that irrigation of natural vegetation generally constitutes beneficial use. . . .

While watering indigenous vegetation generally is not a beneficial use and may, in fact, be wasteful, a determination of beneficial use relies on the individual facts and circumstances of a given situation.

*Id.*

After finding that the water was placed to a beneficial use, the court concluded that the water right was not forfeited for failure to use the water for a consecutive five-year period. The competing water user also alleged that the water right was partially forfeited on the grounds that more water was diverted than was reasonably necessary for the irrigation of natural vegetation.

## FEDERAL DISTRICT COURT RULES THAT BUREAU OF RECLAMATION MUST COMPLY WITH STATE FISH FLOW LAW

(Ronald B. Robie, California Reporter)

In a case involving stream flows below a dam, Senior U.S. District Judge Lawrence Karlton in Sacramento held in *Natural Resources Defense Council v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004), that state law required fisheries releases below the U.S. Bureau of Reclamation's (USBR) Friant Dam on the San Joaquin River. Among others, California's Water Resources Control Board filed an amicus brief in support of the plaintiff's motion for summary adjudication on liability, which was granted.

Beginning in the late 1940s, flows were reduced below the dam as water stored was delivered by the Friant-Kern and Madera Canals to water users in the Eastern San Joaquin Valley. Before the construction of the Friant Dam, the spring Chinook Salmon run numbered into the hundreds of thousands and the historical fall run was estimated to be 50,000 to 100,000 fish. Both runs disappeared after 1949 and for the last 50 years USBR has diverted nearly all the river's flows. Other native fish also suffered declines.

The issue before the court was whether Cal. Fish and Game Code § 5937 applied to the dam. This statute provides that: "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

The trial court explained that under *California v. United States*, 438 U.S. 645 (1978), "the 'cooperative federalism' mandated by § 8 [of the Reclamation Act (43 U.S.C. § 383)] required the United States to comply with state water laws unless that law was directly inconsistent with clear congressional directives regarding the project." 333 F. Supp. 2d at 914.

Two previous times claims that section 5937 was preempted by the Central Valley Project Improvement Act, 106 Stat. 4706 (CVPIA), or did not apply to the Friant Dam were heard and rejected by Judge Karlton. In *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit held that section 5937 was not facially preempted but remanded the case for an as-applied analysis. The current decision dealt with

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## IRRIGATION OF NATURAL VEGETATION

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No evidence was presented at trial, however, to support the claim of partial forfeiture.

In an interesting footnote the court clarified that it was not reaching “the question of whether a finding of partial forfeiture may be grounded in the estimated water consumption of the specific types of plants cultivated by a water user granted water rights for irrigation.” *Id.* at 14 n.8. The court left the door open for a future court to decide, as a matter of law, whether in Utah partial forfeiture can result from changing the crops from a high-consumptive crop such as alfalfa to a lower water-consuming crop.

The Utah state engineer has historically viewed irrigation as a beneficial use without distinguishing between the types of crops irrigated. When evaluating the amount of water consumed by irrigation in a given drainage, the state engineer has always used formulas based on alfalfa, which is considered to be the highest consumptive crop in Utah. If the supreme court were to allow partial forfeiture to be based on changes in crop type, Utah’s whole approach to irrigation use would need to be modified. Conceivably, if an irrigation water right can be partially forfeited because the irrigator decides to irrigate a less water-intensive crop, then an irrigator would be precluded from going to a more water-intensive crop on the grounds that such a change in crop type would result in an enlargement of the water right. Such a result is not likely in Utah not only because of the administrative burden it would create for the state engineer, but also because in Utah irrigation and agriculture remain important elements of both its economy and culture.

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## STATE FISH FLOW LAW

(continued from page 1)

that issue. The decision concluded that “the Bureau of Reclamation has violated § 5937 of the California Fish and Game Code as applied to it by virtue of § 8 of the Reclamation Act of 1902.” 333 F. Supp. 2d at 18. The court, however, also stated that its holding

hardly begins to address the problem of remedies. In this regard, the court notes not only the issue of whether the reasonableness component of the CVPIA constitutes an overlay on the Bureau’s duties, but as the non-federal defendants noted in oral argument, farmers throughout the valley have dedicated their lives and fortunes to making the desert bloom. They did so in reliance on the availability of CVP water. That reality most likely should be taken into account when the court comes to address a remedy.

*Id.*

The bottom line is that this already lengthy litigation still has a long way to go.

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## WATER LAW NEWSLETTER

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## ALASKA

(Thomas E. Meacham, Reporter)

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### ALASKA SUPREME COURT FINDS DUE PROCESS VIOLATIONS IN TEMPORARY WATER PERMIT

The Alaska Supreme Court has held that certain procedures that the Alaska Department of Natural Resources (DNR) followed to accommodate the oil and gas industry in its seasonal construction of ice roads on the North Slope of Alaska violated procedural due process rights. In *Alaska Department of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056 (Alaska 2004), the court held that DNR violated Greenpeace’s rights as an appellant by providing it with only one day’s notice before lifting a stay regarding issuance of a temporary water use permit (TWUP) for the seasonal withdrawal by BP Exploration Alaska, Inc. (BP) of water for winter ice road construction. However, the court held

that Greenpeace's participation in subsequent administrative proceedings regarding the environmental effects of the TWUP had effectively cured the earlier due-process violations.

BP had applied to DNR in August of 1999 for the issuance of a TWUP allowing it to withdraw 70 million gallons of water from a gravel pit adjacent to the Kuparuk River for the winter construction of ice roads to facilitate its oil and gas operations. The permit quantity was reduced to 56 million gallons by the Alaska Department of Fish and Game, which otherwise consented to DNR's issuance of the permit. Greenpeace appealed DNR's decision to issue the permit, asserting that fish habitat in the Kuparuk River would be adversely affected during periods of low winter flows. Under regulations existing at the time, Alaska Admin. Code tit. 11, § 02.060(a), such an appeal triggered an automatic stay of the permit issuance decision. Seven days later, BP requested that the commissioner of DNR lift the stay under expedited consideration, asserting that delays would jeopardize its winter oil and gas projects.

The commissioner of DNR gave notice to Greenpeace by a telephone message that it had one day to oppose his lifting of the stay on public-interest grounds. Greenpeace did not timely respond, and the stay was lifted. The court held that this abbreviated procedure violated the rights of Greenpeace to timely notice and an opportunity to present its position before the stay was lifted. However, the court also held that Greenpeace's later participation in proceedings concerning the merits of the dispute (i.e., whether the water withdrawal would have an adverse effect on fish habitat in the Kuparuk River) had effectively cured the initial denial of procedural due process.

The court also noted that legislation enacted in July of 2001, Alaska Stat. § 46.15.155(e), had amended the substantive bases for issuance of TWUPs, eliminating the requirement for a best-interest finding by DNR and that a change in regulations in September of 2001 had abolished the procedural requirement that the appeal of a permit's issuance trigger an automatic stay of the permit, Alaska Admin. Code tit. 11, § 02.060. Nevertheless, the court held that the "public interest" exception to the mootness doctrine required that it decide the due-process claims that Greenpeace had raised.

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## ARIZONA

(Margaret Gallogly, Reporter)

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### ARIZONA SUPREME COURT VALIDATES STATE-IMPOSED MUNICIPAL WATER CONSERVATION PROGRAM

The Arizona Supreme Court recently resolved a long-running dispute regarding the authority of the Arizona Department of Water Resources (ADWR) to regulate municipal water providers. *Arizona Water Co. v. Arizona Department of Water Resources*, 208 AZ 147, 91 P.3d 990 (Ariz. 2004). The court unanimously concluded that ADWR (1) has the statutory authority to impose water conservation regulations directly on municipal water providers; (2) may impose water conservation requirements on end users, but is not required to do so; and (3) may take into account a water provider's use of Central Arizona Project (CAP) water in determining compliance with per capita water use. The

supreme court's decision allows ADWR to begin enforcing its primary water conservation program for municipal water providers—the total gallons per capita per day (GPCD) program—once again. During the duration of the lawsuit, ADWR had essentially stopped enforcing this program due to questions about its validity.

This decision vacated, in part, an opinion of the Arizona Court of Appeals which had held that ADWR's municipal water conservation plan was invalid because it failed to address water utilization by the end users of water. *Arizona Water Co. v. Arizona Department of Water Resources*, 205 AZ 532, 73 P.3d 1267 (Ariz. Ct. App. 2003).

**Background.** As part of the comprehensive Groundwater Code adopted in 1980, the Arizona legislature required ADWR to develop groundwater management plans for each Active Management Area (AMA) of the state. The legislature established AMAs in those areas of the state where groundwater has been heavily pumped, including the Phoenix and Tucson metropolitan areas. The legislature required the development of five management plans for each AMA—one for each successive decade from 1980 through 2020, and a fifth management plan for the five-year period from 2020 to 2025.

As required by statute, in late 1989, ADWR promulgated the Second Management Plan for the Phoenix AMA applicable from 1990 to 2000. (Both the Arizona Supreme Court and the Court of Appeals determined that this lawsuit was not moot, because the Third Management Plan for the Phoenix AMA covering the years from 2000 to 2010 contained essentially the same municipal water conservation requirements as the Second Management Plan.) The Second Management Plan contained several programs imposing water conservation requirements on agriculture, municipal water providers, and certain industries pumping groundwater for their own use, such as golf courses, industrial plants, dairy farms, and cattle feeding operations. For large municipal water providers, the primary water conservation program was the GPCD program.

Under the GPCD program contained in both the Second Management Plan and the subsequent Third Management Plan now in effect, ADWR regulates the amount of water each large municipal water provider may deliver in a year, based on a set daily delivery rate per person within the provider's service area. All sources of water are counted, except certain surface water releases and except for effluent under limited circumstances. To implement this program, ADWR established a GPCD rate for each large municipal water provider in the AMA. ADWR limits the total amount of water that a water provider may withdraw, divert, or receive during a year by multiplying the provider's GPCD rate by the population of the municipal water provider's service area and multiplying that product by 365. Except for narrow categories of water users, ADWR did not directly regulate the customers of municipal water providers. Thus, in general, if customers used more water in a year than the GPCD rate of its water provider allows, only the water provider would be in violation of the management plan requirement, not the customers. As the supreme court recognized "[t]his approach places the principal burden of achieving reductions in groundwater use on water providers," rather than on end users of water. 91 P.3d at 992.

This case began in 1990, when Arizona Water Company filed a complaint in the Maricopa County Superior Court against ADWR requesting judicial review of the Second Management Plan on a number of grounds and for several of the water company's community systems. The parties agreed to continue this matter on the inactive calendar while administrative review proceeded. Over time, the water company and ADWR were able to resolve all issues except for those involving the water company's Apache Junction system. Apache Junction is a small community located on the eastern edge of the Phoenix metropolitan area. Arizona Water Company's Apache Junction system includes part of the Town of Apache Junction and adjacent unincorporated areas. The Apache Junction area experienced a great deal of growth in the 1980s and 1990s. Moreover, the nature of water service changed from being primarily residential water service to a mixture of residential and non-residential water service, including large commercial customers such as golf courses. Water served to non-residential uses such as golf courses can greatly impact a water provider's GPCD compliance, because those uses result in an increase in water deliveries without necessarily increasing the water provider's residential population base, which is used to compute compliance with the GPCD program.

Eventually, the Director of ADWR issued a 1999 decision substantially affirming the water conservation requirements contained in the Second Management Plan for the water company's Apache Junction system. Arizona Water Company requested judicial review of that decision, and the 1990 and 1999 complaints were consolidated into one action. In its complaints, Arizona Water Company contended that ADWR imposed the water conservation burden only on municipal water providers and a limited group of other users, not on all persons who withdraw, distribute, or receive groundwater, as required by the Code. The company also argued that the water conservation requirements of the Second Management Plan would require the company to restrict or refuse service to its customers in violation of its obligations as a public utility. In addition, Arizona Water Company asserted that ADWR should not include the company's CAP water use in determining compliance with the GPCD program, because the Groundwater Code authorizes ADWR to regulate groundwater, not all sources of water.

*Prior Decisions.* The essence of the dispute is whether ADWR is required by statute to impose water conservation requirements directly on end users of water. The Maricopa County superior court agreed with the water company's statutory interpretation and found that ADWR's Second Management Plan was unenforceable because it did not address water utilization by end users. By a 2-1 decision, the Arizona Court of Appeals affirmed the superior court on this issue. The court of appeals determined that the central issue of the appeal was "whether the legislature intended that . . . the Department should include in its management plans conservation measures to be employed by end users of groundwater." 73 P.3d at 1271. After reviewing several provisions of the Groundwater Code, the court of appeals concluded that the legislature did intend that ADWR impose conservation requirements on end users. While acknowledging that the legislature did not expressly order inclusion of end-user water conservation measures in ADWR's management plans, the court interpreted the legislature's intent as requiring such conservation measures. The court of appeals directed that ADWR devise appropriate conservation measures in its management plans that included the end users of water.

The court of appeals did not address the question of whether ADWR has the statutory authority to impose water conservation requirements directly on municipal providers, or if the agency's authority is limited solely to regulating the customers of municipal water providers. The court stated that Arizona Water Company had not squarely presented the question on appeal. The dissenting judge analyzed this issue and reached the conclusion that the legislature clearly intended that municipal water providers are to be directly regulated in ADWR's management plans. Without ruling on the issue, the majority of the court of appeals indicated that, if the question had been properly before the court, they would have reached the same conclusion as the dissenting judge.

*Supreme Court Decision.* The Arizona Supreme Court first addressed the question of whether ADWR has the statutory authority to impose per capita use limitations directly on municipal water providers. As an initial matter, the court agreed that Arizona Water Company had properly raised this question on appeal. Arizona Water Company argued that the statute requiring reductions in per capita use of water only applied to users of water, not to those entities providing water service. The supreme court rejected this argument. Referring to other statutory provisions in the Groundwater Code, the court found that "[t]his language conclusively demonstrates that the legislature contemplated that GPCD requirements could be imposed directly on municipal providers." 91 P.3d at 995. The court held that ADWR does have the statutory authority to impose gallons-per-capita water conservation requirements directly on municipal water providers.

The second issue resolved by the court was whether ADWR must directly regulate end users of water before ADWR may impose conservation requirements on municipal water providers. It was on this point that the supreme court disagreed with the court of appeals and the superior court. The supreme court noted, as did the court of appeals, that there is no statute definitively ordering ADWR to regulate water use by end users. The court then analyzed the express language of the pertinent statutes and found that those statutes did not support the conclusion that the management plans must include water conservation requirements imposed directly on end users. The court stated that, when the legislature has not spoken definitively to an issue, statutory interpretation by the administrative agency should be given great weight. In light of the expertise required of the Director of ADWR and given that the statutory language is not dispositive, "the Director's expert interpretation deserves considerable deference by the judiciary, and should not be overturned simply because judges find a greater 'sensitivity quotient,' . . . in an alternative interpretation of the statute." *Id.* at 998 (quoting the court of appeals opinion). The court held that the Code authorizes ADWR to regulate end users directly, but does not require ADWR to do so. Further, the Code does not require ADWR to impose water conservation requirements on all end users before it may impose GPCD requirements on municipal water providers.

The third issue decided by the supreme court was whether ADWR may include the amount of CAP water delivered by a water provider in determining whether that provider is in compliance with its GPCD requirement. ADWR includes all sources of water in calculating GPCD compliance, except surface water and effluent under limited circumstances. Using a process called "stacking," ADWR accounts for groundwater deliveries last. Re-

lying on a prior decision involving effluent deliveries and on statutory interpretation, the supreme court held that CAP water may be included in determining compliance with the per capita use requirements. On this issue, the supreme court upheld the decision of the court of appeals.

This decision does not entirely conclude the matter. The supreme court remanded the case to the Maricopa County Superior Court for further proceedings on the question of whether the GPCD rate set by ADWR for the Arizona Water Company Apache Junction system was reasonable, given the particular circumstances of that water system. The lower courts did not reach the issue of reasonableness, having found that the management plan was not valid.

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## CALIFORNIA

(Ronald B. Robie, Reporter)

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### NINTH CIRCUIT WEIGHS IN ON TRINITY RIVER RESTORATION DISPUTE

The Ninth Circuit Court of Appeals has weighed in on the continuing controversy over the flows of California's Trinity River and a tug-of-war between fishery interests and Native Americans and water users in the vast Central Valley. The case is *Westlands Water District v. U.S. Department of the Interior*, 376 F.3d 853 (9th Cir. 2004).

U.S. District Judge Oliver Wenger in Fresno enjoined parts of the Trinity River Restoration Program (TRRP). This program is designed to increase flows in the Trinity River, which will reduce exports into the Sacramento River Basin in California's Central Valley. The district court also required a supplemental environmental impact report under the National Environmental Policy Act (NEPA). The Ninth Circuit reversed the injunction but affirmed the invalidation of some features of the program.

The Trinity River on California's North Coast normally flows to the sea. In 1964 a federal dam—Trinity Dam—was in place on the river and a pipeline began exporting water from the Trinity River to the Sacramento River for water supply and power purposes as part of the vast Central Valley Project.

Over the years, the remaining reduced flows in the Trinity River "radically altered the Trinity River environment, destroying or degrading river habitats that supported once-abundant fish populations." *Id.* at 862. In response, beginning in 1980 Congress passed a number of acts to restore the river. These included the Trinity River Basin Fish and Wildlife Management Act, 98 Stat. 2721 (1984) and the Central Valley Project Improvement Act, 106 Stat. 4741 (1992). Congress established a minimum flow release from Trinity Dam of 344,000 acre-feet.

An environmental impact statement (EIS) on restoration plans was prepared with the U.S. Fish and Wildlife Service (FWS) as the lead agency. The Hoopa Valley Tribe, Trinity County, and the Bureau of Reclamation served as co-leads. Interior Secretary Bruce Babbitt approved the EIS and ordered implementation of its recommended alternative in December 2000.

This suit is a challenge to the EIS and certain "Reasonable and Prudent Measures" (RPM) put forth by the FWS. As to alternatives, the EIS included six. All included non-flow measures

such as habitat rehabilitation and fishery management. They varied in the amount of flow remaining in the Trinity River. The Ninth Circuit rejected the district court's conclusion that the alternatives, which the district court described as "two extreme end-points and one mid-range alternative," 376 F.3d at 871, were insufficient. The Ninth Circuit held that the range of alternatives considered was reasonable.

The district court had ordered preparation of a supplemental EIS because the measures suggested to mitigate the environmental impact of the preferred alternative "did not receive the public vetting demanded by NEPA." *Id.* at 872. Specifically, it directed that two RPMs and the analysis of the impact on California's power system be the subject of the supplemental EIS (SEIS).

The Ninth Circuit found the power analysis sufficient but agreed that the RPMs (which were part of Biological Opinions under the Endangered Species Act (ESA)) were not proper. The first RPM required a plan to mitigate the project effect on water quality in the Sacramento-San Joaquin Delta. To do this would require significant outflow in many years. The Ninth Circuit agreed that this was not a minor change to the adopted alternative.

Secondly, a RPM required that "[t]he USFWS and Reclamation shall [i]mplement the flow regimes included in the proposed action . . . as soon as possible." *Id.* at 876. The Ninth Circuit held that requiring immediate implementation altered the "timing of the action" in violation of the ESA regulations. The district court's action on these two points was the subject of a cross-appeal by the tribes.

The Ninth Circuit concluded that "nothing remains to prevent the full implementation of the . . . flow plan for the Trinity River" and remanded the matter to the trial court. *Id.* at 878.

### RIPARIANS LOSE WATER QUALITY DISPUTE WITH BUREAU OF RECLAMATION

Farmers and water districts with riparian rights in the Sacramento-San Joaquin Delta have failed in an effort to force the U.S. Bureau of Reclamation (Bureau) to operate the New Melones Unit of the Central Valley Project to protect water quality at the plaintiffs' points of diversion. U.S. District Judge Oliver Wanger in Fresno granted summary judgment to the United States, in *Central Valley Water Agency v. United States*, 327 F. Supp. 2d 1180 (E.D. Cal. 2004).

Plaintiffs objected to the operating plan for the New Melones Project on the Stanislaus River, a tributary of the San Joaquin River upstream from the Delta. Plaintiffs relied primarily on the Central Valley Project Improvement Act, a 1992 congressional directive that the Bureau "implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991." *Id.* at 1185.

Plaintiffs specifically alleged that the Bureau was violating a water quality standard adopted under state and federal law at a point near the confluence of the Sacramento and San Joaquin Rivers. Importantly, Judge Wanger held that plaintiffs had produced no evidence that the Bureau had failed to meet the stand-

ard since 1995 or was even threatening to violate it. He also held that there was no evidence any plaintiff had suffered any injury.

With regard to water rights, the judge held that plaintiffs' alleged riparian rights did not carry any right to stream flows stored and released in a different season (as with the operation of New Melones). He relied on State Water Resources Control Board (Board) Decision 1641 (1999) that held such riparians are only entitled to natural flow. The court said that the plaintiffs' riparian rights have been asserted before the Board and rejected.

This case had previously been considered by the Ninth Circuit Court of Appeals, which held in 2002 that plaintiffs had shown a sufficient basis for standing. *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002). See Vol. XXXVI, No. 1, at 5 (2003) of this *Newsletter*.

#### RESERVOIR PROJECT IS SUBJECT TO COUNTY ZONING ORDINANCE

In *Delta Wetlands Properties v. County of San Joaquin*, 121 Cal. App. 4th 128 (2004), the California Third District Court of Appeal, in an opinion by Justice Coleman Blease, held that California counties could apply zoning ordinances to the construction of reservoirs built by private parties provided their dams are smaller than those regulated by the State Department of Water Resources.

At issue is a novel project in which an island in the Sacramento-San Joaquin Delta would be flooded with fresh water in high water conditions. The water would then be released during summer low water months to be delivered to purchasers. The levees around the island would now contain water and, in effect, be a dam and an island, a reservoir.

Plaintiff, the private company that is sponsoring the project, sued to invalidate the county's ordinance.

Plaintiff first argued that Cal. Government Code § 53091(e), which provides that county or city zoning ordinances shall not apply to facilities for the storage of water, preempted this ordinance. The court held that this section only applied to other local public agencies and did not preempt projects constructed by private parties.

The court also rejected the argument that when plaintiff received a water right permit from the State Water Resources Control Board, this constituted implied preemption of local government authority regarding the location of reservoirs. The court pointed out that in exercising its authority to condition permits in the public interest all permits include the provision that "no construction shall be commenced and no water shall be diverted . . . until all necessary federal, state and local approvals have been obtained." 121 Cal. App. 4th at 145.

The court also held that although the State Department of Water Resources dam safety program regulates the construction of dams, its jurisdiction is limited to dams that impound 50 acre-feet or more of water and are a certain height and elevation. Dams not subject to the jurisdiction of the dam safety program can be regulated by the county.

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## COLORADO

(William A. Paddock and Amy N. Huff, Reporters)

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#### CHANGE IN POINT OF DIVERSION REQUIRES COMPLIANCE WITH STATUTORY PROCEDURES

In Colorado it has long been the law that one may not change a water right except in compliance with the statutory procedures. See *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501, 506 (Colo. 1982). In a change of water rights proceeding the measure of a water right is its historical consumptive use. And, while the original decree quantifies the water right so long as it remains unchanged, once a change of water rights proceeding is instituted, the owner risks the re-quantification of the water right based upon its historical use. See *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 959 (Colo. 1986).

Colorado law also permits the use of natural streams as a means to carry water available to a water right from its place of diversion or storage to its place of use. See, e.g., Colo. Rev. Stat. § 37-82-106 (right to recapture and reuse imported or foreign water); Colo. Rev. Stat. § 37-83-101 (transfer of water from one stream to another); and Colo. Rev. Stat. § 37-84-113 (measurement of water when transferred between streams, reservoirs, or ditches). Thus, it was only a matter of time before someone asked whether the statutes allowing the transfer of water between structures by use of the natural stream allowed a change in point of diversion of water without having to invoke the statutory procedure for obtaining judicial approval of a change of water rights. If permitted, this would constitute a simple means to change the point of diversion of a water right without running the risk of re-quantification based upon the historical use of the water right.

In *Trail's End Ranch, L.L.C., v. Colorado Division of Water Resources*, 91 P.3d 1058 (Colo. 2004), the Ranch owned three senior direct flow water rights on Spruce Creek that were decreed for irrigation use. Over the years the operators of the Ranch had apparently begun diverting part of their water rights at undecreed points of diversion several thousand feet downstream from the decreed points of diversion. The Ranch owned the land where all of the points of diversion were located, and there were no other water rights located on Spruce Creek between the decreed and undecreed points of diversion being used by the Ranch.

The Division Engineer ordered the Ranch to cease diversions at the undecreed points of diversion. The Ranch complied with the order but proposed that it be allowed to divert the water rights at their decreed points of diversion, measure a portion of that water back into the creek, use the creek to carry the water to the undecreed downstream points of diversion, and redirect the water at those locations for irrigation on the Ranch. The Division Engineer did not accept this proposal and the Ranch brought suit. The Ranch sought declaratory and injunctive relief claiming that once water had been diverted at its decreed points of diversion and returned directly to the creek, then it was entitled to recapture that water further downstream (subject to transit losses) without first obtaining judicial approval of a change of water rights.

The Colorado Supreme Court disagreed with the Ranch, and held that the statutes allowing water users to use the natural stream to transport water from one place to another had no applicability to the Ranch's proposal. It held that Colo. Rev. Stat. § 37-84-113, while implicitly acknowledging the use of a natural stream as a conduit to carry water from one source to another, merely mandates measurement of water so transferred. The court found that the statute implied nothing about relief from the legal obligation to adjudicate a change of water right in accordance with the statutorily prescribed procedures. The court also held that the diversion of the water at undecreed points of diversion under the decree priorities of the water rights constituted a change of water rights and the only way that such a change can be accomplished is in accordance with the statutorily prescribed procedures for a change of water rights.

#### **PROPOSAL TO CHANGE LOCATION OF EFFLUENT DISCHARGE CAUSES DISPUTE**

In 1964, 14 municipalities in the greater Denver metropolitan area joined together and executed a service agreement that formed the Metro Wastewater District (Metro), an entity that would treat and dispose of their sewage. In 1966, the City of Thornton (Thornton) and Metro agreed upon terms for Thornton's inclusion into Metro. Metro agreed that it would treat Thornton's sewage, and Thornton agreed to pay the costs for the improvements necessary to carry Thornton's sewage to Metro's central treatment plant (CTP). Since Thornton's inclusion into Metro, the amount of sewage being conveyed to Metro has increased, and the structures that were originally built to carry Thornton's sewage to Metro are nearing capacity. Rather than enlarge the CTP and continue to pay the costs associated with pumping Thornton's sewage uphill to the CTP, Metro is planning the construction of a Lower South Platte treatment plant (LSPTP) that can receive Thornton's sewage by gravity flow. Metro, therefore, would prefer to treat and discharge Thornton's sewage at the LSPTP, located some 20 miles downstream from the CTP. This relocation is problematic for Thornton because Thornton is using and seeks to use its reusable effluent discharged from the CTP as a source of substitute supply for exchanges and a plan for augmentation. If the point of discharge of Thornton's reusable effluent is moved downstream 20 miles, it will bypass the senior rights that need to be satisfied for Thornton to operate either an exchange or plan for augmentation. Thus, the issue in dispute is whether Metro has the authority to move the point at which it discharges Thornton's reusable effluent.

To resolve this controversy, Metro initially filed a petition for a judicial determination in Denver District Court seeking a determination that it has the power and authority to move the location of the treatment and disposal of sewage derived from the current location to a proposed new downstream regional treatment plant, without incurring liability. The Denver District Court, however, dismissed Metro's petition finding it to be a water matter within the exclusive jurisdiction of the water court.

Thornton subsequently filed two nearly identical motions for determination of a question of law seeking a determination that Metro cannot move the point at which it discharges Thornton's reusable effluent without limitation. The motions were filed in the district court for Water Division No. 1 in Thornton's water rights applications pending in Cases No. 96CW1116 and No. 02CW180. Case No. 96CW1116 is Thornton's application for an

exchange, including storage, in which Thornton seeks a decree allowing it to use its reusable effluent from the Metro CTP as a source of substitute supply. Case No. 02CW180 is Thornton's application for approval of a plan for augmentation, in which the majority of Thornton's replacement water is reusable effluent discharged from Metro's CTP. Metro filed a statement of opposition in both of these cases asserting that it has the right to move the location at which it discharges some or all of the wastewater treated at its plants.

On August 18, 2004, the water judge for Water Division No. 1 issued an order, in *In re Water Rights of the City of Thornton*, Cases No. 96CW1116 and No. 02CW180, ruling on Thornton's motions and, like Solomon, he split the baby. Although the parties argued the laws of contract, agency, and water law in support of their respective positions, the water court approached the issue as a matter of contract law. After reviewing Metro's enabling act, the service contract, and the resolutions by which Thornton joined Metro, the water court found that at the time Thornton joined Metro, both parties intended that all treatment and discharge of Thornton's sewage would occur at the CTP. Thus, the court held that "Metro cannot relocate the point at which it discharges Thornton's effluent without limitation and without incurring liability." The court further stated that although Metro has an obligation to treat and dispose Thornton's sewage at the CTP, it is only obligated to do so in the amount contemplated by the parties at the time they entered into an agreement. The court therefore held that Metro is "only obligated to treat and discharge Thornton's sewage that can be carried to the CTP in the present facilities."

Metro recently filed a notice of appeal in the Denver District Court seeking review of the dismissal of its petition on the grounds that it was a water matter. The water court cases are not yet final, but Metro has requested certification under Rule 54(b) so that it can appeal.

#### **CHANGE IN USE APPLICATIONS REJECTED AS SPECULATIVE**

The Fort Lyon Canal, owned and operated by the Fort Lyon Canal Company, is among the oldest and is certainly the largest irrigation enterprise in the Arkansas River basin in Colorado. From its river headgate near La Junta, its canal extends over 100 miles downstream supplying irrigation water to thousands of acres of farm land. In recent years investors have been purchasing shares in the Fort Lyon Canal Company. In 2002 and 2003 three applications were filed to change the water rights decreed to the Fort Lyon Canal. The applications were filed by Wollert Enterprises, *et al.*, in Case No. 02CW183, High Plains A&M, LLC, *et al.*, in Case No. 03CW28, and by ISG, LLC, *et al.* (Independent Shareholder Group), in Case No. 03CW68. In general, the applications sought to change the water rights to allow them to be applied to nearly every conceivable beneficial use both in the Arkansas River basin and throughout much of the South Platte River basin. Although each application sought essentially the same relief, the ISG shareholder group is, on its face, somewhat different than the other two applicants. The ISG members are farmers served by the Fort Lyon Canal, some of whom testified that they simply sought the change of water rights to increase the flexibility of their water rights and enhance their value in the event they subsequently decide to sell them. The remaining two applicants had purchased shares in the Fort Lyon Canal Company for the purpose of changing their use and re-

selling the water, hopefully on advantageous terms, to new users. While hoping to make such sales, High Plains A&M and Wollert Enterprises lacked a contract with anyone to buy the water rights sought to be changed.

The applicants filed motions in district court for Water Division No. 2 seeking a determination that Colo. Rev. Stat. §§ 37-92-103(a) and 37-92-305(9)(b) did not apply to changes of water rights. These sections are generally viewed as codifying the so-called Vidler Doctrine against speculation in water rights. The Southeastern Colorado Water Conservancy District (District) and others moved for summary judgment seeking dismissal of the applications in Cases No. 02CW183 and No. 03CW28 on the grounds that the cited sections and general principles of Colorado water law prohibited "speculation." The District argued that in absence of a contract to sell the water, the applications were speculative and therefore barred by Colorado law. On July 2, 2004, the district court for Water Division No. 2 dismissed all three applications. *In re Change of Water Rights of Wollert Enterprises, Inc., High Plains, L.L.C., and ISG, L.L.C.*, order (Nos. 02CW183, 03CW28, & 03CW68.) The water judge agreed with the District's argument and dismissed the applications in all *three* cases on the grounds that they were barred by the anti-speculation doctrine. The applicants in all three cases have appealed the dismissals to the Colorado Supreme Court. The water judge's decision may be viewed at <http://www.courts.state.co.us/supct/watercourts/wat-div2/Order.pdf>.

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## IDAHO

(Jeffrey C. Fereday and John M. Marshall, Reporters)

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### AGREEMENT SEEKS TO QUANTIFY FLOWS FOR IDAHO'S WILD AND SCENIC RIVERS

The federal government, the State of Idaho, several private water user entities, individuals representing conservation interests, and numerous Idaho cities have signed and submitted to the Snake River Basin Adjudication court a stipulation and proposed order that, if accepted, will quantify the federal reserved water rights in each of the six Wild and Scenic Rivers in Idaho. This would settle litigation that has been ongoing for several years.

In 2000, the Idaho Supreme Court ruled that in enacting the Wild and Scenic Rivers Act (WSRA) in 1968—and also in adding Idaho rivers to the system in subsequent years—Congress intended to establish federal reserved water rights in these streams. *Pollatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (Idaho 2000). See Vol. XXXIV, No. 1 (2001) of this *Newsletter*. The Idaho court was not asked to decide how much water Congress intended to reserve, and therefore remanded the quantification issue to the Snake River Basin Adjudication (SRBA) Court. The SRBA Court directed the parties to mediate, and the stipulation is the result of that nearly four-year effort.

The proposed settlement quantifies the amount of each river's WSRA reserved water right as an instream flow amount measured in cubic feet per second at specific locations in each river. The amount involved varies according to month. The stipulation and proposed order seek a final SRBA Court decree of these amounts to the United States, subject to specific conditions.

Probably the most important conditions are those that subordinate each of these federal water rights to all existing water rights and, depending on the river involved, to certain types and amounts of consumptive water rights that might be developed in the future. As a practical matter, most of the WSRA river reaches are upstream of development dependent upon existing or likely future diversions. Some reaches, however, such as the famous Salmon River and its principal tributary, the Middle Fork, are downstream of such development. Consequently, the conditions on these rivers are more complex than those on the others.

Other conditions deal with out-of-basin transfers, establishment of water districts, administration of both federal and non-federal water rights, inventories of diversions, monitoring of use under certain water rights, remedies and enforcement, the maintenance of a database of water rights enjoying the subordination condition, and other matters.

The SRBA Court has set a hearing on the stipulation and proposed order for mid-October, 2004.

**Note: Jeffery C. Fereday, one of the Idaho reporters, was one of the negotiators in the WSRA litigation at both the Idaho Supreme Court and SRBA Court and represented certain industrial and mining interests in the mediation.**

### SNAKE RIVER BASIN ADJUDICATION COURT RULES ON OWNERSHIP OF WATER RIGHTS IN FEDERAL RECLAMATION PROJECT

On September 1, 2004, Idaho's Snake River Basin Adjudication (SRBA) District Court issued a decision holding that the United States holds only a "nominal interest," or legal title, to the water rights for the Bureau of Reclamation's Boise Project, which includes three large reservoirs on the Boise River upstream from Boise, Idaho. These reservoirs supply water to Boise and its surrounding communities and farms. The court held that the landowners within the project boundaries hold the "beneficial interest" in the water rights at issue, and the United States merely holds the rights in name for use by the landowners. The court intends to add a remark to the water rights decrees for the Boise Project clarifying that the United States holds legal title subject to the beneficial ownership of the landowners. The court has directed the parties to propose language for the remark.

The case arose on objections filed by irrigation districts to recommended decrees listing the United States as the sole owner of the storage water rights in the Boise Project. The irrigation districts argued that since they were contracting entities for the water stored in the Boise Project, the water rights should either be decreed in their name or, in the alternative, their beneficial ownership in the water rights should be recognized.

Although the water rights for the three reservoirs at issue all were either licensed by the State of Idaho or decreed in an earlier adjudication in the name of the United States, the SRBA Court found that clarifying the United States's legal interest in the water rights is not a collateral attack on the licenses or decrees. The court explained that it simply is adding a clarifying remark to the new decrees that does nothing more than restate existing law established by the U.S. Supreme Court, but which is necessary to eliminate future controversy over ownership that otherwise would be likely based on the United States's position in the case. The United States has yet to decide whether to appeal the decision to the Idaho Supreme Court. A copy of the court's

decision is available on the SRBA website at <http://www.srba.state.id.us/srba7.htm>.

#### INTERIM LEGISLATIVE COMMITTEE STUDIES CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE WATER

In the spring of 2004 the Idaho legislature directed the Natural Resources Interim Committee to serve as a forum for developing a long-term solution to address water supply and administration problems between groundwater and surface water users in Idaho. The committee was formed following a March 15, 2004, settlement agreement between the State of Idaho and groundwater and surface water users in southern Idaho to stay delivery calls against groundwater users made by the surface water users. The surface water users, primarily users of spring water discharged from the Eastern Snake Plain Aquifer (ESPA), had made a series of delivery calls during 2003 requesting curtailment of groundwater pumpers diverting from the ESPA.

The agreement, called the Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004, avoided an order by the Director of Idaho Department of Water Resources (IDWR), commonly referred to as the "Rangen Order," that would have required curtailment of over 100,000 acres irrigated with groundwater. The curtailment, which would have gone into effect on April 1, 2004, would have affected 750 water users with 1,300 wells.

Litigation loomed as the groundwater users threatened legal challenges to the Rangen Order, alleging, among other things, that the Director ordered curtailment of their water rights without first providing a constitutionally required hearing and that Rangen's call was futile. Meanwhile, spring users had filed suit alleging the Director had not done enough to protect their rights and threatened additional curtailment of ESPA groundwater users.

Facing the possibility of extended litigation and serious disruption to southern Idaho's economy, the affected water users on both sides of the dispute and several representatives from the State of Idaho, including Governor Dirk Kempthorne and members of the Idaho legislature, met at the negotiating table. The parties and the State of Idaho reached a deal to set aside the curtailment for one year in exchange for several short-term mitigation measures and a commitment by the legislature to develop long-term solutions.

In exchange for a one-year hold on delivery calls by the spring users, the agreement required the affected groundwater users to deliver 10,000 acre-feet of replacement water to spring users through a previously constructed pipeline and convert 7,700 acres of irrigated ground to a surface water supply in lieu of groundwater pumping. Additionally, the groundwater users agreed to provide \$1 million to a fund for distribution to the affected spring users.

For its part, the State of Idaho agreed to spend nearly \$2 million to create a state commission to promote the aquaculture industry (most of the affected spring users are fish-rearing facilities), rent 40,000 acre-feet of storage water for recharge projects in 2004, provide grants and loans for the development of new recharge projects, provide loans to the groundwater districts for the purpose of meeting their mitigation requirements, and develop a long-term aquifer management plan. The State also agreed to task and fund the Natural Resources Interim Committee to serve as a forum for developing recommendations for long-

term solutions. Subsequently, the legislature decided to expand the scope of the committee to investigate and address other aquifers of concern and to change the name of the committee to the Expanded Natural Resources Interim Committee on Water Supply and Management Issues. Up-to-date information on the work of the interim committee is available at <http://www.idwr.state.id.us/Committee/default.htm>.

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## MONTANA

(Holly J. Franz, Reporter)

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#### MONTANA SUPREME COURT ADDRESSES JURISDICTIONAL AUTHORITY OF WATER COURTS AND DISTRICT COURTS

In 1979 the Montana water court was created and, pursuant to Mont. Code Ann. § 3-7-501 (2003), was granted exclusive jurisdiction to adjudicate all pre-1973 water rights. The water court is a court of limited jurisdiction, however, and the district courts retain jurisdiction over disputes concerning the distribution of water.

In *Hidden Hollow Ranch v. Fields* [sic], 2004 MT 153, 92 P.3d 1185 (Mont. 2004), a dispute arose over water rights that had not been adjudicated in the statewide water court adjudication, but that were subject to a pre-1973 district court decree. The district court decree granted Hidden Hollow's predecessor an 1867 and an 1869 right to water from Clear Creek. The district court decree also granted Field's predecessor the entire flow of Willow Creek and declared this right to be prior to the rights of any other party to the action. In approximately 1905, Field's predecessor diverted the water from Willow Creek and conveyed it to a tributary of Clear Creek and then diverted the water from the tributary through a lower ditch.

In 1999, Field experienced a shortage of water and discovered that Hidden Hollow, based on its claim of a prior right to water tributary to Clear Creek, had blocked his lower ditch. For the rest of the 1999 irrigation season and into the 2000 season, Field repeatedly repaired his diversion structure as Hidden Hollow continued to alter it. To prevent further alterations to his diversion, Field installed a concrete diversion structure that diverted most of the water down his lower ditch and installed a bypass tube to allow approximately 13.2 miner's inches of water to flow down the tributary. The bypass was installed to account for the flow of a natural spring that entered the tributary upstream of Field's upper ditch. Believing it was entitled to more than 13.2 miner's inches, Hidden Hollow sued Field for an injunction to enforce Hidden Hollow's water rights.

The district court determined that Field's water was "developed water" imported from Willow Creek and ruled that Field was entitled to use the water before all other water appropriators. The district court also ruled that Field only had to bypass 0.83 miner's inches of water past his lower ditch since this was the seasonal flow of the natural spring. The district court also denied Hidden Hollow's petition to certify the matter to the chief water judge. Hidden Hollow's petition was based upon Mont. Code Ann. § 85-2-406(2)(b), which allows a district court, in a distribution controversy, to certify the adjudication of the underlying

water rights to the chief water judge if the rights are not subject to a final water court decree.

On appeal, Hidden Hollow alleged the district court should have certified the matter to the chief water judge and exceeded its jurisdiction in determining the amount of water flowing in the tributary spring. The Montana Supreme Court recognized the water court's exclusive jurisdiction to adjudicate water rights, but pointed out that the right to supervise the distribution of water subject to a pre-1973 decree remains with the district court. The supreme court concluded that the district court was merely enforcing the distribution of water according to the pre-1973 decree and did not exceed its jurisdiction in determining the source and flow of water coming from the tributary spring.

Hidden Hollow also attempted to make an issue of the district court reference to the imported water as "developed water," arguing that the determination of whether a water right constitutes developed water rests exclusively with the water court. The supreme court agreed with Hidden Hollow and ruled that if the original character of the water has been lost or the water is no longer under the possession or control of the original owner, the source of the water right should be adjudicated before the water court. In this case, however, the supreme court found that Field maintained control over his Willow Creek water and was simply using the tributary to Clear Creek as a natural carrier, which is allowed under Montana law. Because the court found the water to be imported rather than developed, the supreme court upheld the district court's jurisdiction.

Finally, Hidden Hollow argued that the district court improperly shifted the burden of proof onto the natural flow user by requiring Hidden Hollow to prove the amount of water flowing from the tributary spring. In response, the court confirmed that the person asserting an entitlement to use waters from a natural carrier based upon importing water from another water source bears the burden of proving a lack of interference with natural flow water rights. The court found, however, that Field met this burden and it upheld the district court ruling.

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## NEW MEXICO

(Tim De Young, Reporter)

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### TRANSFER OF INCHOATE WATER RIGHTS PROHIBITED

On July 8, 2004, the New Mexico Court of Appeals held that the holder of a water right permit may not change the permitted use of the water unless water first has been applied to beneficial use. *Hanson v. Turney*, 136 N.M. 1, 94 P.3d 1 (N.M. Ct. App. 2004). The court held that a water right permit is an inchoate right that does not become a "water right" until it is perfected by application of water to beneficial use. Because there were no New Mexico cases directly on point, the court relied on general New Mexico authority recognizing that beneficial use is the *sine qua non* of a water right and a Wyoming case, *Green River Development Co. v. FMC Corp.*, 660 P.2d 339 (Wyo. 1983), in which the Wyoming Supreme Court held that application of water to beneficial use is a prerequisite to changing the permitted use. The decision should reduce confusion about the transferability of water rights in New Mexico because the courts had

not clearly addressed this issue and the State Engineer had not promulgated any policy or rules.

By way of background, Hanson had been granted two permits to appropriate water for irrigation purposes. After drilling wells but prior to using any water for irrigation, she sought permits to change the use to residential subdivision purposes. The State Engineer had granted her a similar permit and Hanson introduced evidence that the State Engineer had granted other change permits in the area even though water had not first been applied to beneficial use. The court rejected Hanson's argument that the State Engineer was estopped from denying her application, reasoning that "less than perfect consistency" may be caused by mistakes by employees or supervisors, by changes in policy, or by changes in the agency's interpretation of its governing statutes. Moreover, the court noted that Hanson had not asserted that the State Engineer made any affirmative misrepresentations upon which she relied to her detriment.

New Mexico's water laws expressly allow for, if not encourage, water rights transfers or reallocations. N.M. Stat. Ann. § 72-12-7(A), the statute at issue in *Hanson*, provides "[T]he owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer." As with applications for new appropriations, the statute requires the State Engineer to determine whether granting the change permit would impair existing rights, be contrary to water conservation, or be detrimental to the public welfare. *Compare* N.M. Stat. Ann. § 72-12-7 with N.M. Stat. Ann. § 72-12-3 (new appropriations of groundwater permits.) In *Hanson*, the State Engineer's refusal to grant the change permits was not based on the express statutory criteria of impairment, conservation, or public welfare. Instead, the State Engineer refusal to grant the permit was based on his assertion that "the owner of a water right" phrase referred to the owner of vested water rights, that is, water rights perfected by application of water to beneficial use. The court affirmed this interpretation finding that the term "water right" as used in the statute was ambiguous. Based on its reading of prior authority, the court concluded that the legislature's intent was to prohibit a water rights permit holder from changing the purpose or place of use of a water right until water is first applied to beneficial use pursuant to the terms of the initial permit.

The decision is soundly based on the principle that beneficial use is the measure, the right, and the limit of a water right and the decision provides a bright line rule regarding water rights changes. The decision may be inimical to efficient water use, however. In Hanson's case, the practical effect of the decision is to require her to establish her water rights through highly consumptive irrigation before she can obtain a permit to use less water for the residential subdivision. Less water will be diverted after any changes not only because domestic uses consume less water than irrigation but also because the State Engineer's policy is to limit changes to the amount of water consumed by the prior use, rather than the amount of water diverted. The decision therefore gives water rights permit holders a clear incentive to use and consume as much water as possible prior to reallocation of the water to other uses or places of use. Perhaps this is not the best message to send to water users in a desert.

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## SOUTH DAKOTA

(Diane Best and John H. Davidson, Reporters)

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### FEDERAL DISTRICT COURT RULES IN MISSOURI RIVER LAWSUIT

A series of lawsuits involving the Missouri River has previously been described in detail in Vol. XXXV, No. 2, at 16 (2002) and Vol. XXXVI, No. 3, at 14 (2003) of this *Newsletter*. The lawsuits involve the management of the Missouri River by the U.S. Army Corps of Engineers for multiple uses including flood control, navigation, irrigation, recreational use, and power production.

In 2003, the U.S. Judicial Panel on Multi-District Litigation accepted jurisdiction and assigned the series of suits to Judge Magnuson of the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (MDL 2003).

Judge Magnuson ordered the Corps to complete its revision of the Missouri River Main Stem Reservoir System Master Water Control Manual, a guidance document for Corps operation of the six reservoirs on the Missouri River. *In re Operation of the Missouri River System Litigation*, 305 F. Supp. 2d 1096 (D. Minn. 2004). Before this ruling, the revision had been the subject of repeated delays over a 15-year period. *Id.* at 1096-97. The Master Manual was completed in March 2004, as ordered by Judge Magnuson.

Judge Magnuson next addressed a North Dakota claim that management of the Missouri River must be in accord with water quality standards developed by the state under the Clean Water Act, 33 U.S.C. § 1251. *In re Operation of the Missouri River System Litigation*, 320 F. Supp. 2d 873 (D. Minn. 2004). The court held that sovereign immunity applies because enforcement of the state water quality standards "might affect or impair the authority of the Corps to maintain navigation." *Id.* at 877. Thus, because barge traffic downstream would be affected, the navigational servitude was invoked to defeat the Clean Water Act claim. In so holding, the district court relied on language in the Clean Water Act stating that the Act "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." *Id.*, quoting 33 U.S.C. § 1371.

Judge Magnuson issued his ruling on the remaining claims in June 2004. *In re Operation of the Missouri River System Litigation*, No. 03-MD-1555 (PAM), 2004 WL 1402563 (D. Minn. June 21, 2004). Among the various claims, the district court

considered a claim involving the Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944). The O'Mahoney-Milliken Amendment to the Flood Control Act, now codified at 33 U.S.C. § 701-1(b) was at issue. The district court held that under the O'Mahoney-Milliken Amendment, "when a conflict between upstream consumptive uses and downstream navigation exists, upstream consumptive uses receive preference." 2004 WL 1402563 at \*5. The district court further held that the O'Mahoney-Milliken Amendment is designed to protect the legal rights of upstream consumptive water users over downstream navigation, but that it provides no security for such consumptive water users to rely on particular water levels to meet their delivery needs. *Id.* This issue arose because water systems in the Dakotas have been required to extend intake structures when reservoirs are lowered to serve downstream barge traffic. *Id.* The court held that because the Corps has not taken away legal rights of irrigators and drinking water systems, the Corps acted within its discretion in releasing water for downstream navigation flows even in periods of drought. *Id.*

The case also involved the important issue of whether the Corps properly complied with the Endangered Species Act in developing the new Master Manual. *Id.* at \*6-\*13. In 2000, the Fish and Wildlife Service issued a biological opinion indicating that the Corps proposals for the Master Manual were inadequate to protect the endangered pallid sturgeon, interior least tern, and the piping plover. *Id.* at \*7. The biological opinion provided that flow changes and habitat construction were necessary in order to protect the three species. *Id.*

Ultimately, the newly issued Master Manual provides for flow changes of lesser magnitude than originally required by the Fish and Wildlife Service as well as different construction measures. *Id.* at \*10. In the end, the Fish and Wildlife Service amended its 2000 biological opinion and found that the Corps proposal would not constitute jeopardy to the three endangered species. The district court held that the Fish and Wildlife Service determination provided a "rational connection between the facts and the choice made" and upheld the amended biological determination. *Id.* at \*11. The court also held that the Corps's proposed action does not constitute a "take" under the ESA, as claimed. *Id.*

The district court also ruled on a series of National Environmental Policy Act claims regarding the Master Manual. The court found that the Corps properly acted within its discretion in regard to NEPA issues. *Id.* at \*14.

The entire matter is on appeal before the Eighth Circuit Court of Appeals.

**EDITOR'S NOTE ON UNPUBLISHED OPINIONS:** This *Newsletter* sometimes contains reports on unpublished court opinions that we think may be of interest to our readers. Readers are cautioned that many jurisdictions prohibit the citation of unpublished opinions. Readers are advised to consult the rules of all pertinent jurisdictions regarding this matter.