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U.S. SUPREME COURT DECIDES ADDITIONAL ISSUES IN ARKANSAS RIVER DISPUTE

(William A. Paddock and Mary M. Hammond, Colorado Reporters)

In October 2003, Special Master Arthur L. Littleworth entered his Fourth Report in this case, resolving many, but not all, of the issues in dispute between Kansas and Colorado over Colorado's past violations of, and future compliance with, the Arkansas River Compact (Compact). Kansas filed exceptions to the Fourth Report of the Special Master; Colorado did not. The appeal was heard by the U.S. Supreme Court in October 2004, and the Court issued its decision on December 7, 2004. *Kansas v. Colorado*, 125 S. Ct. 526 (2004).

Kansas filed exceptions to: (1) the Special Master's refusal to recommend appointment of a River Master to decide technical disputes related to decree enforcement; (2) the manner in which the Special Master calculated prejudgment interest on the award of damages against Colorado; (3) the Special Master's recommendation that the "H-I model" be used with a 10-year moving measurement period for purposes of determining Colorado's Compact compliance; (4) the Special Master's recommendation that the final amount of replacement water credit to be applied toward Colorado's Compact obligations be determined by Colorado courts; (5) the Special Master's finding that Colorado complied with the Compact in 1997-1999; and (6) the Special Master's refusal to make recommendations on 15 disputed issues.

(1) *Kansas's Request for a River Master*. Kansas requested the Special Master to recommend the appointment of a River Master with the authority to decide various technical disputes related to decree enforcement. The Special Master recommended, instead, that the Court retain jurisdiction over the case for a limited time to permit the Special Master to resolve any lingering issues. The Court acknowledged that it had appointed River Masters on two prior occasions, each time on the recommendation of a Special Master, and only because the Court was convinced that such an appointment would significantly aid the resolution of further disputes. The Court was not persuaded that a River Master was appropriate here.

The Court stated that future disputes in this case could well involve discretionary, policy-oriented decision-making directly

CALIFORNIA COURT RULES AGAINST APPROPRIATION OF WATER FOR POTENTIAL FUTURE CUSTOMERS

(Ronald B. Robie, California Reporter)

In *Central Delta Water Agency v. State Water Resources Control Board*, 124 Cal. App. 4th 245 (Cal. Ct. App. 2004), the California Court of Appeal for the Third District set aside a water right permit for the Delta Wetlands storage project. This is the project by a private company to flood an island in the Sacramento-San Joaquin Delta and sell the stored water to water agencies around the state. (See this *Newsletter*, Vol. XXXVII, No. 3 (2004), at 6).

The court, in an unanimous opinion, held that since no water had been contracted for, "[a] general statement of potential beneficial use is insufficient and the [State Water Resources Control] Board may not satisfy its statutory and constitutional obligations by conditioning a permit on a particular use and in amounts to be specified at some later date." 124 Cal. App. 4th at 253. The Board had issued the permit, subject to reserved jurisdiction when the water was sold. The court held that "the Water Board must determine . . . that an actual, intended beneficial use, in estimated amounts, will be made of the impounded waters." *Id.*

Although Delta Wetlands Properties told the State Board that the state and federal projects are potential purchasers of its water it did not in fact have any buyers for the water.

The court also said that the Board's procedure followed in this permit ran afoul of the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21000-21177 (2005). "CEQA requires that the Water Board evaluate and condition the permits to mitigate the environmental consequences of the specific intended beneficial use of the impounded water before issuance of a permit." 124 Cal. App. 4th at 253.

The court's holding is a restatement of traditional western water law. Delta Wetlands Properties' applications were inadequate because they stated the "places of use will be the area of the SWP [State Water Project] and the CVP [Central Valley Project] south and west of the Delta, and the Delta, an area which encompasses a large portion of the State of California. The purposes of the use are stated as irrigation, domestic, municipal,

continued on page 3

ARKANSAS RIVER DISPUTE

(continued from page 1)

related to the underlying legal issues. Moreover, the Court found that administration of the decree in this case, unlike the decree in *Texas v. New Mexico*, 462 U.S. 554 (1983) (River Master appointed), would involve the highly complex H-I model. The resolution of modeling disputes could call for highly judgmental decision-making about matters that are related, in important ways, to the parties' basic legal claims. The Court also found that the need for a River Master was diminished by the parties' apparent willingness to resolve future technical disputes through arbitration. Also, the Court seemed to place special weight on the Special Master's recommendation against appointment of a River Master, and his observation that such an appointment would "simply" make it "easier to continue this litigation." 125 S. Ct. at 528 (quoting Fourth Report 136 at 532-33).

(2) *Prejudgment Interest*. In the Special Master's Third Report, he divided the award of damages against Colorado into the "Early Period," from 1950-1968; the "Middle Period," from 1969-1984; and the "Late Period," from 1985-1994. The Special Master adjusted the damages for each period to account for inflation, but he awarded prejudgment interest only from 1969 forward, i.e., the Middle and Late Periods. In *Kansas v. Colorado*, 533 U.S. 1 (2001) (*Kansas III*), the Court held that prejudgment interest should not begin to run until the filing of the complaint in 1985. In his Fourth Report, the Special Master calculated prejudgment interest on the Late Period damages beginning in 1985, excluding the Early and Middle Periods damages from that calculation. Kansas claimed that the Special Master should have calculated prejudgment interest starting in 1985 on all damages, not simply the Late Period damages.

To address Kansas's argument, the Court had to interpret the meaning and effect of its decision in *Kansas III*. The Court concluded that its decision in *Kansas III* implicitly accepted the Special Master's exclusion of the Early Period entirely from the calculation of prejudgment interest. And when, in *Kansas III*, the Court eliminated the Middle Period from the calculation of prejudgment interest, it also removed the damages from that period for purposes of calculating prejudgment interest beginning in 1985. This means that Kansas is entitled to prejudgment interest only on Late Period damages, and to damages adjusted for inflation only for the Early and Middle periods. The result is that the Special Master's award of damages to Kansas will be calculated as requested by Colorado.

Justice Stevens filed a separate dissenting opinion on the issue of prejudgment interest. He thought that the prejudgment interest should begin to run in 1985 on the Middle and Late Period damages. He argued that, beginning in 1969, Colorado knew or should have known that its post-Compact well depletions violated the Compact. He felt that result best respected the reasoning in *Kansas III*. Justice Thomas also filed an opinion dissenting from the award of prejudgment interest, arguing that Kansas was not entitled to any prejudgment interest.

(3) *Period for Determining Compact Compliance*. Colorado's future compliance with the Arkansas River Compact is to be determined by the use of the highly complex H-I computer model. Throughout the litigation that model's ability to accurately predict post-Compact depletions to usable state line flows has been disputed. The Special Master recommended the use of

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the H-I model over a 10-year running period to determine Colorado's Compact compliance. Kansas took exception to this recommendation, seeking instead a one-year compliance period.

Kansas argued that the use of a 10-year compliance period effectively allowed Colorado to accrue debits and/or credits in violation of Article V.E.(5) of the Compact by permitting under-deliveries in some years and over-deliveries in other years. Kansas also argued that Article IV.D prohibits Colorado from depleting the waters available for use in Kansas. Finally, Kansas pointed out that damages had been calculated based on one-year increments.

The Court rejected Kansas's argument that a 10-year measuring period violated the Compact's prohibition against credits and debits. The Court held that the Compact did not specify the length of time over which a "credit" is measured, and that any period of measurement, be it a week, a month, or a season, inevitably averages the interim period. The Court also found that practical considerations favored the Special Master's recommendation. The Special Master had found the H-I model results to be

highly inaccurate over measurement periods of less than 10 years. Thus, the Court adopted the 10-year measurement period to ensure accuracy. And, with respect to Kansas's argument that damages were computed on an annual basis, the Court pointed out that the states' agreement on that calculation was made before the Special Master had fully examined the model's accuracy, and that the agreement between the states did not govern this determination.

(4) *Determination of Replacement Credits.* Colorado's Compact compliance program is centered on the regulations that require post-Compact wells to replace their depletions to stream flow. Replacement of depletions is often accomplished by purchasing senior surface irrigation water rights, removing the historically irrigated land from irrigation, and delivering to the stream the water historically consumed by the senior water right. Rules adopted by the Colorado State Engineer require well owners to seek approval of changes of water rights from the Colorado Water Court for water rights used as a permanent source of augmentation water.

The Special Master recommended that Colorado's "water court" determine the final amount of any such replacement credits. Kansas took exception to this recommendation, arguing that a "state cannot be its own ultimate judge in a controversy with a sister state," *Kansas v. Colorado*, 125 S. Ct. 526, 538 (2004) (quoting Kansas's brief), and that the U.S. Supreme Court must decide every question essential to resolving the dispute. In addressing this argument the Court pointed out that the Special Master's recommendation also stated:

This is not to say, however, that the Colorado Water Courts are empowered to make a final determination on any matter essential to compact compliance at the State-line, or that Colorado's reliance on such Water Court actions will necessarily satisfy its compact obligations. . . . All replacement credits, no matter how determined, are subject to the right of Kansas to seek relief under the Court's original jurisdiction [as set forth in] Section VIII. Fourth Report 138-139, ¶ 9.

125 S. Ct. at 539. The Court held that the Special Master's recommendation adequately protected Kansas's right to contest any adverse Water Court decision.

(5) *Colorado's Compliance for the Period 1997 Through 1999.* Kansas took exception to the Special Master's recommendation that Colorado was in compliance with the Compact for the period 1997-1999 because the Special Master improperly relied upon a compliance period of more than one year. Because the Court found that a 10-year compliance period was appropriate, the Court overruled this exception.

(6) *Disputed Issues Not Decided by the Special Master.* Kansas took exception to the Special Master's failure to resolve 15 disputed issues concerning: (1) H-I model calibration; (2) 1997-1999 accounting issues; and (3) future compliance issues. Kansas argued that resolution of these issues was essential to deciding the controversy between the states and requested that the Court direct the Special Master to decide these issues.

The Special Master recommended that the remaining disputed issues not be decided immediately. The Court pointed out that the issues in category 2 were mostly moot due to the Court's finding that Colorado had complied with the Compact during the 1997-1999 period. As to the first and third categories, the Court thought that the passage of time would produce more accurate resolution of these disputes as the parties gained more knowledge about matters relevant to resolution of the disputes. The Court joined in the Special Master's hope and recommendation that the states resolve these and other future disputes by negotiation or binding arbitration. The Court agreed further to retain jurisdiction over the case for a limited time in order to permit the Special Master to decide any lingering disputes.

CALIFORNIA COURT RULES

(continued from page 1)

industrial, fish and wildlife preservation and enhancement, and the improvement of water quality." *Id.* at 254.

What the court did not say is that for many years the state and federal governments' water rights permits included such broad general service areas and uses. In essence, the court was holding that Delta Wetlands Properties could not piggyback on the state and federal projects because it was not entitled to the traditional latitude afforded governmental diverters, particularly municipal ones.

CALIFORNIA

(Ronald B. Robie, Reporter)

CONGRESS CONTINUES "CAL-FED" PROGRAM

In October 2004 Congress passed and the President signed into law continued authorization of the massive "Cal-Fed" water management and development program for California. Pub. L. No. 108-361, 118 Stat. 1681 (2004).

The law has a number of features: (1) \$90 million for pre-authorized levees and levee projects; (2) \$180 million for pre-authorized water quality improvement projects, including drinking water; and (3) \$90 million for fish and wildlife enhancements.

As for water storage projects, it resolves a major controversy. While it does not authorize any new projects it provides an unusual procedure for their consideration. Once a project feasibility study is completed, it must be authorized by Congress. If Congress does not do so, then the Secretary of the Interior must declare an "imbalance" in the Cal-Fed program and describe what must be done to achieve balance.

The Cal-Fed program was started in 1994 and the federal authorization expired in 2000. The joint federal-state program is making major studies of water supply and environmental issues, primarily in the Sacramento-San Joaquin Delta, from which both

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.

the federal Central Valley Project and the California State Water Project make major diversions.

The State Water Project currently has contracts for water delivery in excess of the Project's safe yield and both federal and state projects are caught in a bind as water needs for environmental purposes, such as the Endangered Species Act, adversely impact available supplies. A consistent sticking point has been disagreement between those believing that new storage projects are needed to meet future water needs and those believing that better management of existing supplies is sufficient. The compromise was a major bipartisan effort by California senators and representatives.

Interior Secretary Gale Norton termed Cal-Fed "a model of collaboration and conservation from which the rest of the West can learn . . ." *Western States Water*, No. 1586 (Oct. 8, 2004), at 1.

"TAKINGS" CASE SETTLED

In December 2003 the Federal Court of Claims held in *Tulare Lake Basin Water Storage District v. United States*, 59 Fed. Cl. 246 (2003), *modified on reconsideration*, 61 Fed. Cl. 624 (2004), that the failure to deliver water supplies to Central Valley Project customers due to limits imposed to protect Chinook salmon and delta smelt under the Endangered Species Act constituted a "taking" and must be compensated. The court found initial liability for about \$14 million (about \$26 million with interest and attorneys' fees) for the years 1992-1994.

In December 2004 the United States and the districts agreed to settle the litigation with the United States paying \$16.7 million. California officials had urged an appeal rather than settlement. The state, including the Water Resources Control Board, asserted that the settlement set a dangerous precedent. Interior Solicitor Sue Ellen Wooldridge said, "I think the ramifications are limited." She said that federal contracts have been interpreted as permitting the protection of species "without causing a taking." *Western States Water*, No. 1597 (Dec. 23, 2004), at 2.

STATE LEGISLATION ON MINIMUM STREAM FLOWS ENACTED

A state law has been enacted requiring the State Water Resources Control Board (Board) to adopt principles and guidelines in two years for maintaining instream flows in coastal streams north from San Francisco to the Oregon border. Cal. Water Code §§ 1259.2, 1259.4 (2004).

The principles and guidelines are to be used by the Board in establishing minimum flows in the consideration of nearly 300 water right applications pending on streams in the area. The minimum flows are primarily for fish-related needs.

The statute also grants the Board discretionary authority to adopt such principles and guidelines for other streams.

COLORADO

(William A. Paddock and Mary M. Hammond, Reporters)

COLORADO SUPREME COURT REJECTS RIGID APPLICATION OF "CAN AND WILL" STATUTE

The cities of Black Hawk and Central City are historic mining towns. In the 1990s the voters of Colorado saw fit to allow limited-stakes gambling in the two towns. While limited-stakes gambling has neither preserved the historic character of these towns nor protected local businesses, it has provided a new venue for the operation of casinos by large gaming corporations. The large casinos and hotels that have been built in both Black Hawk and Central City have placed significant new demands on the cities' water supplies. *City of Black Hawk v. City of Central*, 97 P.3d 951 (Colo. 2004) arose out of Black Hawk's efforts to provide additional water supplies by "over-filing" an application for a conditional water right on Central City's Chase Gulch Reservoir.

The existing Chase Gulch Reservoir has a capacity of 602 acre-feet; Central City owns a conditional water right to enlarge it to hold 1,117 acre-feet. Central City has also performed some geologic investigations of the dam site and has established the technical feasibility of enlarging the dam to hold 1,117 acre-feet. In 1992 Black Hawk filed its own application for a conditional water right to enlarge Chase Gulch Reservoir by 600 acre-feet. Nine days prior to the trial on Black Hawk's application, the City Council of Central City, at its water lawyer's request, passed a resolution stating that the City will not enter into agreements to allow third parties to use its real estate interests to construct water projects not filed for adjudication by Central City. On cross-examination at trial, however, Central City's mayor admitted that this resolution might not bind future city councils.

At the conclusion of trial, the water judge entered a decree granting Black Hawk a conditional water storage right for the Chase Gulch Reservoir enlargement. The water judge found that Black Hawk's application was not speculative and that Black Hawk had satisfied the requirements of Colorado's "can and will" statute, Colo. Rev. Stat. § 37-92-305(9)(b). The water judge also found that Black Hawk's proposed enlargement of the reservoir was technically feasible. Nine months after trial, Central City filed a motion asking the water judge to reconsider its order granting Black Hawk's application. The basis for the motion was the fact that the description of the reservoir in Black Hawk's application was 670 feet upstream from the existing dam. Central City claimed that a discrepancy existed between the location contained in Black Hawk's application and the intended downstream location of the enlarged dam. The water judge denied the motion on the grounds that Central City had failed to raise the issue at trial, refused to admit new evidence based on this allegation, and concluded that the discrepancy was "immaterial."

On appeal Central City argued that the water judge incorrectly found that Black Hawk had satisfied the "can and will" statute because Black Hawk did not prove that it had access to the property for construction of the enlarged dam, and because it did not introduce sufficient evidence to prove that the proposed enlargement was technically feasible. In reviewing these claims, the Colorado Supreme Court reiterated that its standard of review

required it to accept the water judge's factual findings unless they were so clearly erroneous as to find no support in the record.

The court began its analysis by pointing out that the "can and will" statute requires an applicant for a conditional water right to establish that there is a substantial probability that within a reasonable time the facilities necessary to complete the appropriation can and will be completed with diligence. The court went on to say that proof of such a substantial probability necessarily involves imperfect predictions of future events and conditions. Accordingly, the court held that the "can and will" requirement is not to be applied rigidly to prevent the beneficial use of water where an applicant otherwise satisfies the legal standard of establishing a nonspeculative intent to appropriate water for beneficial use.

The court rejected Central City's argument that Black Hawk could not prove that it could obtain the rights to use the real property needed for construction of the enlarged dam. It stated that whether an applicant may access property necessary for the conditional water storage right is but one factor that the court should consider in deciding whether the applicant meets the "can and will" test. A party's present and prospective ability to access the property, however, is not conclusive in determining whether the "can and will" test has been met. The court explained that, unlike other cases where conditional water rights had failed the "can and will" test for lack of access to property, here there was not a final and binding determination that prevented Black Hawk from obtaining access to the land necessary for constructing the reservoir. Accordingly, the court concluded that Black Hawk had presented sufficient evidence to satisfy the access-to-property requirement of the "can and will" statute.

Central City also argued that the water judge erred in finding that Black Hawk introduced sufficient evidence to show that enlargement of the reservoir was technically feasible. The court stated that technical feasibility was an appropriate factor for the water judge to consider when determining if an application for conditional water rights met the "can and will" requirement, but found that the record adequately supported the water judge's finding that Black Hawk had presented sufficient evidence of technical feasibility to satisfy this requirement.

Based upon the discrepancy between the location of the dam contained in Black Hawk's application and the actual proposed location of the enlarged dam, Central City argued that Black Hawk failed to satisfy the notice requirements for water rights applications. It also claimed that the parties could not try the issue of proposed enlargement at the downstream location by consent pursuant to Colo. R. of Civ. 15(b). Finally, Central City argued that the water judge erred by not requiring Black Hawk to republish its application to give notice of the actual location of the proposed dam.

In reviewing these challenges, the court pointed out that what constitutes reasonable notice to interested parties in water rights applications is based on an inquiry standard: in other words, whether the notice is sufficient to reveal to potentially interested parties the nature of the claim being made, so that the parties can determine whether to conduct further inquiry into the full extent of those claims and make a determination whether to participate in the proceedings. Here the court found that Black Hawk's application provided interested parties with notice of its claim for a conditional water storage right in Chase Gulch Reservoir. On the issue of whether the downstream location of the

dam site was tried by consent of the parties, the court held that the water judge was correct in not requiring Black Hawk to amend its application. The court pointed out that a party need not amend its pleadings to conform to the evidence presented at trial when issues not raised by the pleadings are tried by express or implied consent of the parties. Based on its holding that Black Hawk's application provided sufficient notice to interested parties, the court concluded that the parties could try by consent the issue of the reservoir enlargement at the downstream site.

WATER COURT PROPERLY STAYED RESERVED RIGHTS QUANTIFICATION TO ALLOW FEDERAL COURT RESOLUTION OF CHALLENGE TO FEDERAL SETTLEMENT AGREEMENT

The case of *In re Application for Water Rights of the United States*, 101 P.3d 1072 (Colo. 2004), involves federal reserved water rights for the Black Canyon of the Gunnison National Monument. In 1933 the Black Canyon was designated as a national monument and in 1999 it was converted into a national park. Under the reserved water rights doctrine, the United States is entitled to a reserved water right from the Gunnison River in the minimum amount of water necessary to satisfy the purposes for which the national monument was created. In March 1978, after several years of proceedings, the water court entered an interlocutory decree awarding the United States both absolute and conditional water rights for the Black Canyon. That decree recognized priority dates of 1933, 1938, and 1939 for the reserved water rights. While the water court deferred the quantification of the conditional water rights until they were made absolute, the 1978 decree explicitly recognized that the purposes of the national monument entitled the United States to an in-stream flow water right for a broad range of uses.

In January 2001, the United States filed an application to quantify its conditional water rights for the Black Canyon. It claimed year-round base flows of 300 cubic feet per second (c.f.s.) and higher peak flows and "shoulder flows" tied to the expected natural runoff each year. Depending on the quantity of water required to maintain spring peak flows, the United States reserved the right to claim up to 10,000 c.f.s. for part of each year. At the request of the United States, the water judge granted two consecutive six-month stays of the proceedings so that the United States could conduct settlement discussions with opposing parties. The environmental groups (Environmental Opposers) who were parties to the case were not allowed to participate in these negotiations.

In April 2003, the United States entered into an agreement with the State of Colorado relinquishing its reserved water right to peak flows and shoulder flows, and claiming a year-round base flow of the lesser of 300 c.f.s. or the natural stream flow. At the same time the United States filed a motion to amend its quantification and proposed an amended application to the water court. In July 2003, the United States and the State of Colorado entered into a Memorandum of Agreement concerning the reserved water rights for the Black Canyon. Under that agreement, the United States delegated the appropriation of peak and shoulder flows to the Colorado Water Conservation Board's instream flow program, and agreed to a 2003 priority date for those water rights. The United States retained no rights to enforce the in-stream water rights to be acquired by the State except through an action for specific performance of the agreement.

The Environmental Opposers objected to the United States' motion to amend its application and reduction of the claimed reserved water right and, in August of 2003, filed a complaint in the federal district court against the Department of the Interior and the National Park Service. The complaint alleged that the United States' decisions regarding the protection and management of the water-related natural resources of the Black Canyon violated various federal laws, including the National Park Service Act, the Black Canyon Act, the National Environmental Policy Act, and the Administrative Procedure Act. The complaint sought both declaratory and injunctive relief.

The Environmental Opposers sought to stay the water court quantification proceedings pending resolution of the federal litigation. Various petitioners opposed the stay, arguing that further delay would irreparably prejudice them and that the Environmental Opposers were improperly attempting to transfer jurisdiction over the quantification of the Black Canyon reserved water right to the federal court. The United States also opposed the stay, arguing that it was inappropriate because the federal litigation would not resolve all issues pending in the water court and because the Environmental Opposers could not show a pressing need for the stay.

In October 2003, the water court granted the stay, based upon its understanding of the application of *res judicata* in the context of federal reserved water rights litigation. The court reasoned that if it denied the stay and granted the United States' amended application, the Environmental Opposers would be without adequate recourse if they prevailed on their federal court claims because *res judicata* would prevent reopening of the quantification decree. Recognizing the need to avoid piecemeal litigation and weighing the hardship, delays, and prejudice to the petitioners, the water court limited the scope of its order and admonished that the order should not be construed as deferring to the federal court either the quantification of the water right or the question of whether to grant the motion to amend, but that it was merely a stay of the proceedings pending resolution of the federal questions raised in the Environmental Opposers' complaint. The petitioners challenged the water court's order and requested the Colorado Supreme Court to issue a show cause order why the stay should not be vacated. The Colorado Supreme Court first issued a show cause order and then, based on its finding that the water court properly exercised its discretion in granting the stay, discharged the order.

To determine whether the water court abused its discretion in granting the stay, the Colorado Supreme Court first reviewed the federal reserved water rights doctrine and the jurisdiction of state courts to quantify those water rights under the McCarran Amendment. The court then held that, although McCarran Amendment proceedings are intended to be all-inclusive, the waiver of sovereign immunity in the McCarran Amendment is limited to proceedings to determine or administer the water rights. The court concluded, therefore, that the McCarran Amendment does not assert or imply that a state court would have jurisdiction to review the decision-making processes of federal agencies, such as the Department of the Interior or the National Park Service, for compliance with federal law.

The court next addressed the standard of review for a water court's decision to grant or deny a stay. It observed that a water court generally has the discretion to grant or deny a stay, with the power to do so deriving from the inherent authority of every

court to control the disposition of cases on its docket with economy of time and effort for itself, counsel, and the litigants. The standard of review for the water court's stay order is the highly deferential "abuse of discretion" standard. Accordingly, absent a finding that the lower court's actions were manifestly arbitrary, unreasonable, or unfair, the decision would not be overturned. The court went on to conclude that when the harm to the non-moving party caused by the stay is greater than the prejudice caused to the moving party if the case were to proceed, a stay will be invalidated.

The petitioners contended that the stay would substantially and irreparably harm them because it causes delay and uncertainty and requires their participation in the federal litigation. They also claimed that decisions in the federal case will, in effect, determine the parameters of the United States' reserved water right with preclusive effect. The Environmental Opposers responded by arguing that the federal case presents distinct claims over which the federal court has exclusive jurisdiction, that resolution of those claims will not quantify the Black Canyon's reserved water right, and that their need for the stay outweighs any prejudice to the petitioners.

In balancing the interests of and prejudices to the parties, the court utilized the analytic framework found in *Adolph Coors Co. v. Davenport Machine & Foundry Co.*, 89 FRD 148 (D. Colo. 1981). The factors considered are: (1) the order in which jurisdiction was obtained, (2) the adequacy of relief available in state court, (3) comity, and (4) the need for comprehensive adjudication and the desire to avoid piecemeal litigation. As to the order of obtaining jurisdiction, the court held that the fact that the state water court obtained jurisdiction over the Black Canyon reserved water rights before the federal case was initiated did not mean that the water court abused its discretion in granting the stay, since the two cases, though they involve the Black Canyon reserved water right, will not resolve the same issue. Therefore, the order in which the courts acquired jurisdiction is not a compelling factor here.

The court held that the consideration of the relief available to the parties favored the granting of a stay in this case. The failure to grant the stay could result in a state court decree binding against the United States under the doctrine of *res judicata*, which would bar the United States from reopening the adjudication even if the federal court were to decide that the United States had violated federal law when it amended its application. The court also found that comity also favored the stay as a means to avoid potential conflict between state and federal courts. The court acknowledged that the stay will cause delay in the water court's quantification proceeding, but pointed out that the case has already been pending for nearly 30 years and the petitioners could show no great harm from the relatively short delay caused by the stay. Moreover, in evaluating the equities, the court pointed out that Colorado and the United States had recently sought and received a 12-month delay from the water court to carry out settlement negotiations, from which the Environmental Opposers had been excluded. The obvious implication of this observation is that had the Environmental Opposers been allowed to participate in the negotiations, the equities for the stay may have been different.

Finally, the court held that the need for comprehensive adjudication and the avoidance of piecemeal litigation did not warrant lifting the stay. Because the federal court has exclusive

jurisdiction over the claims in the federal suit, such dual proceedings are necessary, and the McCarran Amendment's policy to avoid piecemeal litigation is inapplicable to these circumstances.

The majority opinion was subject to a vigorous dissent by Justices Kourlis and Hobbs, who did not share the majority's view on the scope of the McCarran Amendment and the propriety of deferring to the federal court.

COLORADO SUPREME COURT RULES AGAINST SPORTSMEN'S RANCH WATER RIGHTS APPLICATION AND PLAN OF AUGMENTATION

In *City of Aurora v. State Engineer*, No. 01SA412, 2005 WL 100855 (Colo. Jan. 18, 2005), the applicant, Park County Sportsmen's Ranch, LLP (PCSR), owned land in South Park, Colorado, on which it sought to develop a groundwater and surface water conjunctive use project. Its application for water rights sought (1) a conditional water right to withdraw 140,000 acre-feet of groundwater annually through 26 proposed wells located on PCSR's property; (2) a conditional underground water storage right to store water in the "cone of depression" created by pumping water from the 26 proposed wells; and (3) absolute and conditional water rights for surface storage and recharge collection systems. PCSR also proposed a plan for augmentation to replace injurious stream depletions. PCSR envisioned that its water project would operate as follows: (1) groundwater pumping in excess of recharge would create a cone of depression (groundwater level drawdown) in the aquifer underlying its land, thereby creating underground storage capacity; (2) PCSR would deliver the withdrawn groundwater to the South Platte River and its tributaries for delivery downstream to the City of Aurora; (3) PCSR would store surface water diverted in priority during times of high runoff into recharge facilities overlying the aquifer; and (4) the water diverted and delivered to the recharge facilities would recharge the underlying aquifer, thereby reducing the "cone of depression" and the resultant injurious stream depletions.

Numerous parties opposed the application. To support its application and plan for augmentation, PCSR developed surface and groundwater computer models to simulate the hydrologic system and predict the effects of the project on the South Platte River and its tributaries. After an eight-week trial in which PCSR presented extensive expert testimony in support of its models, the Division I Water Court granted the opposers' motion for dismissal of the application pursuant to Colo. R. Civ. P. 41(b)(1). The water court concluded that PCSR's groundwater model did not produce sufficiently reliable results to permit a reasonably accurate determination of the timing, amount, and location of stream depletions, or to determine the rate of aquifer recharge resulting from PCSR's recharge facilities, and that PCSR's surface water model did not produce sufficiently reliable results to determine streamflow or legal availability of replacement water for the project. Accordingly, the water court concluded that PCSR failed to meet its burden of proof with respect to its augmentation plan by failing to quantify injurious depletions in time, place, and amount, and therefore dismissed PCSR's plan for augmentation and application for conditional water rights.

In post-trial motions, the opposers sought attorneys' fees and costs and the joinder of the City of Aurora as a party for purposes of collecting attorney's fees and costs. The water court concluded, among other things, that: (1) water cannot be stored in a

saturated aquifer that is tributary to an over-appropriated stream system; (2) the application became groundless prior to trial based on a memorandum from one of Applicant's experts (Eastman memo); (3) PCSR's claim for augmentation credits arising from precipitation, irrigation return flows, and decreases in evapotranspiration were frivolous from their inception; and (4) because Aurora was PCSR's principal with respect to the application, Aurora was liable for costs and attorneys' fees imposed against PCSR. Subsequently, the court concluded that Aurora could be liable for attorneys' fees, but not costs. The water court held an evidentiary hearing to quantify fees and costs and awarded certain of the opposers over \$2.5 million in costs and attorneys' fees. PCSR and Aurora appealed.

On appeal PCSR argued that the water court erred in requiring it to replace 100% of its groundwater withdrawals. The Colorado Supreme Court held that to the extent an applicant can prove that its depletions are non-injurious, or that its injurious depletions are less than its withdrawals, it is not required to replace 100% of its withdrawals. Since PCSR failed to prove either the timing of depletions resulting from its well pumping, or that the depletions would be less than its withdrawals by virtue of anticipated return flows, the supreme court concluded that the water court was required to order 100% replacement of withdrawals.

PCSR argued that 100% replacement of depletions was not required because some of its withdrawals would be offset by reductions in evapotranspiration from the project (salvaged water). Prior to trial, however, the water court granted partial summary judgment denying the claimed credit for salvaged water. PCSR argued that this was an error because underground storage facilities are analogous to both gravel pits and on-channel reservoirs, both of which are credited with reduced evapotranspiration for purposes of computing stream depletions. *See* Colo. Rev. Stat. §§ 37-84-117(5), 37-92-305(12). The supreme court disagreed, noting that water resulting from reduced consumption by native plants is commonly referred to as "salvage water" and that an applicant may not claim credit for salvaged water in a plan for augmentation. The court held that this rule applies to all native vegetation, whether or not it is classified as phreatophytic, and it declined to extend the narrowly drafted exemptions for on-stream reservoirs and gravel pits to the facts of this case.

In pretrial rulings, the water court excluded PCSR's proffered evidence of (1) sensitivity analysis performed on the groundwater model; (2) analysis of water availability for four years after the application was filed; (3) evidence regarding an analysis of well depletions; and (4) expert testimony in support of a new exhibit not timely disclosed by PCSR. Subject to these limitations PCSR went forward with its scientific evidence at trial. After hearing that evidence, including testimony regarding its groundwater and surface water models, the water court determined that PCSR's experts committed errors with respect to the groundwater model because they: (1) failed to conduct a sensitivity analysis on the model, (2) failed to calibrate the model properly, (3) failed to explain anomalous results and residual errors, (4) ignored another expert's report suggesting further evaluation, and, (5) failed to complete an independent peer review of the model. With respect to the surface water model, the water court concluded that PCSR's experts failed to adjust calculations for the change in the river call regime, failed to factor out irrigation run-off, failed to consider variables other than precipitation, and failed to determine the range of errors for its simulated stream flows.

The water court accordingly held that the groundwater model, as applied in this case, failed to produce sufficiently reliable results to permit a reasonably accurate determination of the timing, amount, and location of depletions, or the timing and amount of aquifer recharge. Similarly, the water court held that the surface water model, as operated in this case, failed to produce sufficiently reliable results to permit reasonably accurate determinations of either average stream flow or legal availability of augmentation water. On this basis the water court concluded that the evidence was not sufficiently reliable to be admissible under Colo. R. Evid. 702. The supreme court concluded that the water court's exercise of its discretion was not manifestly erroneous and, therefore, declined to second-guess the water court on appeal.

PCSR argued further that the water court improperly granted the Rule 41(b) motion to dismiss because PCSR was only required to present a prima facie case to survive such a motion. The supreme court analyzed the burden of proof in a water case stating that, before an augmentation plan is approved, the applicant bears the initial burden of producing sufficient evidence to establish a prima facie case that the proposed depletion will be noninjurious. Only if the applicant successfully meets its burden of proof does the burden of proving the existence of injury shift to the opposers. If the opposers provide evidence of injury, the applicant has the ultimate burden of showing absence of injurious effect by a preponderance of the evidence. The supreme court went on to point out that before an applicant can establish the absence of injury to meet its burden to present a prima facie case, it must first establish the timing and location of depletions, as well as the availability of replacement water to prevent injury from those depletions. Here the water court properly held that PCSR's groundwater and surface water models failed to produce sufficiently reliable results to permit a reasonably accurate determination of the time, amount, and location of stream depletions or the legal availability of replacement water. Accordingly, the supreme court upheld the water court's dismissal because PCSR had not established a prima facie case.

In the proceeding for costs and attorneys' fees, the water court held that PCSR's application was groundless after October 28, 1998, the date on which PCSR knew or should have known, based on the Eastman Memo, that the groundwater model was indefensible at trial. The water court also held that PCSR's claims for augmentation credits arising from precipitation, irrigation return flows, and decreased evapotranspiration were frivolous from their inception. The supreme court reversed the award of attorneys' fees on all issues except the claimed recharge from irrigation return flows and decreases in evapotranspiration losses.

The supreme court began its analysis with the proposition that the American rule precludes an award of attorneys' fees absent a specific contract or a statutory or procedural rule that provides otherwise. Colorado law authorizes recovery of attorneys' fees when a party or its attorney brings or defends an action that lacks substantial justification. *See* Colo. Rev. Stat. § 13-17-102(4). The court went on to note that an award of attorneys' fees will not be disturbed on appeal if they are supported by the evidence, unless the trial court abused its discretion in making the award. Here, the water court based its finding that the application was groundless on the so-called Eastman Memo. That memo, prepared by Dr. Harvey Eastman, one of PCSR's experts, was marked "Draft," the court noted. It contained proposed modeling and related tasks that would be useful to enhance the model and assist

in performing sensitivity analysis. The court found that nothing in the memorandum indicated the proposed tasks were necessary for the defense of the model. The court also noted that, in his pretrial deposition, Eastman testified that he participated in the decision to complete some of the proposed tasks but not others. He further testified that the necessary tasks had been completed and PCSR's model was valid. At trial, Eastman testified that the model was successful as a predictive tool to a reasonable degree of scientific certainty.

Based on the testimony of Eastman and other experts, the supreme court concluded that PCSR had no reason to know its model was unreliable until the water court dismissed its application at the end of its case in chief. The court pointed out that water courts must allow parties and their attorneys to reasonably rely on their experts without fear of punishment for errors in judgment made by those experts. It went on to point out that given the highly technical and complex nature of hydrology, as well as the groundwater expertise of PCSR's experts, PCSR's reliance on its experts was reasonable. Therefore, it reversed the water court's award of attorneys' fees for a "groundless" case.

That, however, did not end the inquiry. The water court had also found that PCSR's claims for storage of precipitation recharge, irrigation run-off, and salvage water were frivolous from their inception. In its order dismissing PCSR's application, the water court denied PCSR's claims for precipitation and irrigation return flows on the grounds that water stored underground must be placed into the aquifer by "other than natural means." *See* Colo. Rev. Stat. § 37-92-103(10.7). Under Colorado law a claim is substantially frivolous if the proponent can present no rational argument based on evidence or law to support the claim or defense, though meritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not frivolous.

The supreme court agreed that PCSR's claims to store precipitation and irrigation runoff that "naturally" percolated into the aquifer were frivolous. The irrigation runoff claimed by PCSR was not irrigation return flows from water rights owned or controlled by PCSR, but rather any irrigation runoff that happened to enter the cone of depression caused by its well pumping. In reliance on Colo. Rev. Stat. § 37-92-103(10.7), the court found that a claim for underground storage must be predicated on water placed in storage by other than natural means. Further, the court held that the applicant seeking an underground storage right must first capture, possess, and control the water prior to artificially recharging it into the aquifer for storage and subsequent use pursuant to a decreed right. The court pointed out that PCSR did not provide any evidence on how it intended to capture, possess, or control the precipitation and irrigation return flows naturally percolating into the aquifer; and, therefore, PCSR presented no rational argument based on the evidence or law in support of its claims for precipitation or irrigation runoff. This made the claims frivolous; the award of attorneys' fees for those claims was therefore affirmed.

The supreme court held, however, that PCSR's claim for credit for salvaged water was an effort to modify or extend existing law. It pointed out that applicants may not claim credit for salvaged water in plans for augmentation based on Colo. Rev. Stat. § 37-92-103(9). But it also noted the two statutory exceptions to this rule: for unlined gravel pits and on-stream reservoirs. Since PCSR's argument in this case was that its underground storage facility was analogous to the two excepted storage ves-

sels and the law should be extended to cover it, the supreme court concluded that PCSR's claim for salvaged water credit was a good faith attempt to extend existing law even though unsuccessful and therefore the claims were not frivolous. The attorneys' fees awarded on that basis were reversed.

In a pretrial ruling, the water court had concluded that PCSR was Aurora's agent-in-fact for purposes of prosecuting the application. At the conclusion of trial the opposers sought to join Aurora as a party for determination of liability for attorneys' fees and costs. The court granted the motion and Aurora challenged this decision on appeal. Aurora argued that attorneys' fees only attach to parties that litigate groundless claims, and since it was not the litigating party, it could not be liable for the attorneys' fees. Alternatively, Aurora argued that its joinder was procedurally improper. The supreme court applied the established rule of agency that a principal is vicariously liable for its agent's acts committed within the scope of its agency to conclude that Aurora was vicariously liable for the attorney fees. It found Aurora's argument that it was not liable because it did not litigate the case to be a "red herring," and held that Aurora could not be allowed to reap the benefits of its agency relationship without accepting the corresponding burdens. And because Aurora was vicariously liable for PCSR's litigation of a frivolous claim, the court held that Aurora was properly joined under Colo. R. Civ. P. 20 and 21.

Finally, PCSR asserted limited challenges to the water court's award of costs to certain opposers. It argued, first, that some opposers were not entitled to recover any costs for work done by a groundwater expert whose professional engineering license had lapsed for a period of time during the litigation, and second, that the Center of Colorado Water Conservancy District (CCWCD) was not entitled to any of the amounts claimed in its bill of costs, because it did not contain originals or duplicates of the underlying material supporting the bill of costs and did not comply with Colo. R. Evid. 1006 concerning summaries. The supreme court rejected the first argument because the work by the expert in question did not require a license, and the opposers were entitled to recover the costs for her work to the extent that they were reasonable. It rejected the second challenge to costs because the evidence submitted in support of CCWCD's bill of costs provided the water court with sufficient information and supporting documentation to allow it to make a reasoned decision on the cost items presented. Accordingly, it affirmed the costs award in its entirety. The case will now be returned to the water court for quantification of the amount of reasonable attorneys' fees incurred on the frivolous claims for precipitation and irrigation runoff.

NEVADA

(Douglas L. Grant, Reporter)

STATE LAW GOVERNS ENTRY OF STAY IN FEDERAL COURT AFFECTING INDIAN RESERVED RIGHTS

The Orr Ditch Decree is a Nevada federal district court decree adjudicating water rights in the Truckee River system. The decree specifies that the rights adjudicated may be changed in place, means, or purpose of use "in the manner provided by law." The quoted phrase means in the manner provided by

Nevada water law, and this includes procedural as well as substantive Nevada water law. *United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1307-08 (9th Cir. 1990). Under Nev. Rev. Stat. § 533.325, change applications must be filed with the state engineer. Under Nev. Rev. Stat. § 533.450(1), judicial review of the state engineer's rulings involving an adjudicated stream is by the court that entered the decree. Consequently, change applications for Truckee River rights must be filed with the state engineer, and judicial review is by the Nevada federal district court rather than a state district court.

In *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245 (D. Nev. 2004), reported in this *Newsletter*, Vol. XXXVII, No. 2 (2004), the state engineer partially approved applications by the Pyramid Lake Paiute Tribe of Indians to temporarily change two Orr Ditch Decree Indian reserved water rights from irrigation to instream use in order to preserve the Tribe's fishery in Pyramid Lake. Then the City of Fallon and the Truckee-Carson Irrigation District sought review of the state engineer's approvals in federal district court. The federal district court stayed the changes pending its review. It acted under Nev. Rev. Stat. § 533.450(5), which provides for automatic stay of a ruling by the state engineer upon timely request and the posting of a bond.

On appeal to the Ninth Circuit, the Tribe and the United States as trustee for the Tribe argued that entry of a stay should not be governed by the Nevada statute but by Rule 65(a) of the Federal Rules of Civil Procedure. Rule 65(a) would have made a stay discretionary rather than automatic and would have required a prior hearing. But the Ninth Circuit held in *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1078 (9th Cir. 2004), that the Nevada statutory provision was "an integral part of Nevada water law rather than a generally applicable rule of civil procedure," and thus it governed under the terms of the Orr Ditch Decree. The Ninth Circuit pointed out it previously held that two other subsections of the very same Nevada statute, which sets out procedures for judicial review of decisions by the state engineer, were integral parts of Nevada water law and applicable under the Orr Ditch Decree. In sum, even though the suit was in federal court and Indian reserved rights were involved, state law governed entry of a stay under the terms of the Orr Ditch Decree.

TEXAS

(Bruce Wasinger, Reporter)

TEXAS DAM OPERATOR HELD LIABLE FOR FLOODING DAMAGES

In *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004) the Texas Supreme Court affirmed the court of appeals judgment holding that (1) construction and operation of a reservoir resulted in the taking of ranch land by flooding about eight miles downstream from the dam; (2) evidence supported a finding of causation; (3) evidence supported a damage award of \$14 million (not including interest); (4) the data, methodology, and computer program relied on by hydrologists were sufficiently reliable; and (5) Tarrant Regional Water District was not entitled to separate trials on liability and damages. The court of appeals judgment is found at *Tarrant Regional Water District v. Gragg*,

43 S.W.3d 609 (Tex. App.—Waco 2001). On January 14, 2005, the Texas Supreme Court denied appellant Tarrant Regional Water District's motion for rehearing without issuing any further written opinion.

Background. In 1990, the Tarrant Regional Water District began releasing water for the first time from the Richland-Chambers Reservoir on the Trinity River about eight river miles upstream from the 12,516-acre Gragg Ranch. The Gragg family has owned the Ranch since 1949. The Gragg Ranch is one of the largest in East Texas, lying partly in Anderson County and partly in Freestone County. The Trinity River borders the Ranch in some places and bisects the property around the Ranch's midpoint. In all, the Ranch has 17 miles of river frontage. The Gragg property consists of 1,722 upland acres and 10,794 acres of bottomland within the Trinity River's flood plain where cattle normally graze.

In 1987, the District completed construction of the 1.2 million acre-foot Richland-Chambers Reservoir, which it built to supply water to Tarrant County and surrounding areas. The 44,000-acre reservoir impounds the waters of Richland and Chambers Creeks, two tributaries of the Trinity River. The creeks' watersheds comprise about 60% of an 80-mile stretch of the Trinity's watershed between the Trinidad Gauge, located near Trinidad Lake (between Corsicana and Athens), and the Oakwood Gauge (southwest of Palestine). The dam that holds the creeks' waters back is located about a mile from the Trinity River. A narrow, steeply banked, straight discharge channel connects the dam and the river and blocks a large portion of the Trinity's flood plain. The reservoir was not constructed to control floods but to supply water. Consistent with its intended function, the District keeps the reservoir as full as possible at a level only two feet below the overflow point.

In March 1990, extremely heavy rains caused extensive flooding throughout the Trinity Basin, and the District released water through the reservoir's floodgates for the first time. For the first time in its history, the Gragg Ranch suffered extensive flood damage. That flooding breached levee roads in several places, and gouged large sections of land out of the Ranch's bottomlands. O.L. Gragg and the Schwertner-Priest Partnership and its partners sued the District, alleging that its construction and operation of the reservoir had inversely condemned their property in violation of Article I, Section 17, of the Texas Constitution. The District denied liability, but asserted a counterclaim asking the trial court to award it fee simple title, or alternatively, a permanent and perpetual flowage easement over any property the court might find it had inversely condemned.

The case was tried in 1998, by which time the Ranch had experienced a large number of floods similar in severity to the one in 1990 that prompted this suit. After a 15-day trial, the court held that the District had inversely condemned a flood easement on the Ranch, and submitted the case to the jury to determine just compensation. The jury found the difference between the market value of Gragg's fee simple interest immediately before and immediately after condemnation to be \$10,214,122, and the before-and-after value of the Schwertner-Priest Partnership's leasehold estate to be \$4,268,547. The trial court rendered judgment on that verdict and also awarded the District a permanent and perpetual flowage easement over the property.

The Texas Supreme Court found that there was legally sufficient evidence that "the reservoir" caused recurrent des-

tructive changes in flooding characteristics that directly impacted the Gragg property such that it was no longer usable for its intended purpose and upheld the court of appeals judgment that an unconstitutional taking of the Gragg case had occurred.

The appellant Tarrant Regional Water District, the owner and operator of the dam, argued that as operated the dam would not have added more water downstream than would naturally have passed through the reservoir and thus its actions, while possibly negligent, did not constitute a taking. The Texas Supreme Court, however, stressed that the key point of its holding was not the operation of the reservoir but rather the reservoir's physical characteristics (mere construction as designed) which the court held "inevitably altered the characteristics of floods at the Ranch." 151 S.W.3d at 555. This case will certainly result in more litigation in the future against dam owners involving the conduct of flood operations.

Updates

City of San Marcos. This is an update to the case of *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004) which was reported in Vol. XXXVII, No. 1 (2004) of this *Newsletter*. On September 10, 2004, the Texas Supreme Court denied the appellant City of San Marcos's petition for review and on January 21, 2005, the same court denied the city's motion for rehearing.

Chocolate Bayou Water Co. This is an update to the case of *Chocolate Bayou Water Co. v. Texas Natural Resource Conservation Commission*, 124 S.W.3d 844 (Tex. App.—Austin 2003), as previously reported in Vol. XXXVII, Nos. 1 and 2 (2004) of this *Newsletter*. As last reported, the Texas Supreme Court had requested the parties to file briefs on the merits no later than July 9, 2004, but had not at that time decided whether to grant the petition for review filed by the appellant Chocolate Bayou Water Co. On September 10, 2004, the Texas Supreme Court denied the petition for review.

UTAH

(John H. Mabey, Jr., Reporter)

UNTIMELINESS OF OBJECTION FILED IN UTAH GENERAL ADJUDICATIONS MAY BE OVERCOME BY A SHOWING OF DUE CAUSE

The Utah Supreme Court recently ruled that untimely objections filed by water claimants against the State Engineer's proposed determination of water rights may be considered by the district court if the water claimant can show due cause. The case arose in a Price River general adjudication of water rights proceeding entitled *In re General Determination of Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Price River and of the Drainage Area of the Green River from the Confluence of the Price and Green Rivers to the Confluence of the Green and Colorado Rivers Excluding the Drainage Area of the San Rafael River in Utah*, 2004 UT 106.

Utah's general adjudication statutes require the State Engineer to prepare and recommend to the district courts a pro-

posed determination of water rights. Utah Code Ann. § 73-4-11 states that the proposed determination books “shall be mailed by regular mail to each claimant.” Water claimants then have 90 days to file any objections to the proposed determination. Utah Code Ann. § 73-4-10 allows the district court to extend the 90-day objection period. If no objection has been filed to a proposed determination, or if all objections have been resolved, the district court must enter judgment rendering the proposed determination the final adjudication of water rights for the given area. *Id.* § 73-4-12; see also *Plain City Irrigation Co. v. Hooper Irrigation Co.*, 51 P.2d 1069, 1073 (Utah 1935) (noting that judgment should not be entered until all protests “have been disposed of and determined”) (*quoted in* 2004 UT 106 ¶ 7).

In this case the State Engineer served the Green River Canal Company in December 1972 by personal service rather than by mailing. The canal company then filed its objection more than 180 days after service. In November 2000, the State Engineer filed a motion to dismiss the objection for being untimely.

Understandably, if the State Engineer waited 28 years to file a motion to dismiss, the water claimant thought its objection filed a mere 90 days late should be considered by the district court. The district court agreed and denied the motion to dismiss, concluding that it had “legal latitude” to grant an equitable remedy when service of the proposed determination was performed by personal service rather than by regular mail as required by the statute. *Id.* ¶ 13.

The Utah Supreme Court did not find the lower court’s legal logic persuasive. Instead, the court properly analyzed the statutes at hand and analogized the filing of an objection to that of filing an appeal to the appellate courts under Rule 4 of the Utah Rules of Appellate Procedure (URAP).

The court ruled that personal service of a proposed determination is not precluded by Utah Code Ann. § 73-4-11. Furthermore, the court declared that section 73-4-10 allows the district court to not only extend the filing of objections during the

90-day objection period, but to retroactively extend the period after the 90 days has expired. Therein lays the water claimant’s remedy. Similar to the reasoning of Rule 4(e) of URAP, if the water claimant can show due cause why the objection was filed beyond the 90-day time period, the district court may extend the objection period on a case-by-case basis.

To show due cause, the water claimant must show excusable neglect or a good cause that excuses the late filing. In its due cause analysis, the district court must confine its review to evidence explaining why the claimant failed to file an objection within the 90-day period. Evidence of events beyond the 90-day period is irrelevant. *Id.* ¶ 43.

In fashioning the above remedy, the court recognized and balanced the interests of certainty and justice. A desired goal in water right adjudications is that of certainty in order to reassure water claimants that their water rights are final and immune from attacks of other claimants. At the same time, Utah Code Ann. § 73-4-10 is meant to provide a mechanism, where justice warrants it, for the district court to allow retroactive extensions of the 90-day objection time period, but on a strict and limited basis.

The State of Utah is currently conducting general adjudications of water rights in 13 of its major drainages. Some of these general adjudications were filed nearly 50 years ago. The Utah Lake/Jordan River adjudication is over 70 years old. Some objections filed against the State Engineer’s proposed determinations of water rights are also decades old. As these objections are adjudicated, the Utah Supreme Court has attempted to strike a balance of providing certainty to water rights that were not timely objected to, while at the same time giving the district courts the discretion to dispense justice when, for excusable neglect or good cause shown during the 90-day objection period, the objection was filed after the 90-day period. The question remains whether in a given situation there is sufficient and credible evidence for events that occurred sometimes decades ago.