



# Rocky Mountain Mineral Law Foundation



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## COLORADO SUPREME COURT CLARIFIES PROTECTION FOR INSTREAM FLOW WATER RIGHTS

(William A. Paddock, Colorado Reporter)

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*Colorado Water Conservation Board v. City of Central*, 125 P.3d 424 (Colo. 2005), pitted the increasing water demands of the City of Central (Central City), a mining town turned gambling resort, against downstream instream flow water rights, in a dispute over the legal protection to be afforded to instream flow water rights under a plan for augmentation. Pursuant to Colo. Rev. Stat. § 37-92-102(3), the Colorado Water Conservation Board (the Board) is vested with the exclusive authority, on behalf of the people of the State of Colorado, to appropriate such waters of natural streams and lakes as the Board determines may be required for minimum stream flows (or for natural surface water levels or volumes for natural lakes) to preserve the natural environment to a reasonable degree. Since 1973, the Board has been diligent in the appropriation and adjudication of instream flow water rights on stream systems throughout the State of Colorado. In 1987, it appropriated an instream flow water right for 1.5 c.f.s. on North Clear Creek, from its confluence with Pine Gulch as the upstream terminus to its confluence with Chase Gulch as the downstream terminus.

A number of years later Central City filed four water rights applications, one of which included an application for change in use of downstream senior water rights in the Farmer's High Line Canal and Wanamaker Ditch, approval of a plan for augmentation, and adjudication of appropriate rights of substitution and exchange on North Clear Creek and its tributaries. Some of the water rights Central City sought to divert out of priority pursuant to the plan for augmentation are senior in priority to the Board's downstream instream flow water right, but junior to many water rights located further downstream. The net effect of the augmentation plan would be to permit Central City to increase its upstream diversions, reducing the amount of water available to the Board's instream flow water right. Accordingly, the Board filed a statement of opposition to protect its instream flow water right on North Clear Creek.

At trial, Central City claimed that when a downstream call senior to both Central City's rights and the instream flow water right was in effect, the City would augment its out-of-priority diversions downstream from the instream flow water right, and upstream of the calling downstream senior. In essence, the City's argument was that it only had to protect the downstream senior water right, not the intervening out-of-priority instream flow water right.

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## COURT OF FEDERAL CLAIMS HOLDS THAT TERMINATION OF WATER DELIVERIES DOES NOT RESULT IN A "TAKING"

(George A. Gould, Editor)

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*Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005), *interlocutory appeal denied*, 69 Fed. Cl. 160 (2005), represents yet another judicial effort to define the circumstances in which government regulation of water rights does or does not constitute a "taking" of property under the Fifth Amendment of the U.S. Constitution. The case was brought by various private parties and irrigation districts in the Klamath River Basin in Oregon and California that receive water from the Klamath Project, operated by the U.S. Bureau of Reclamation. The case resulted from the temporary termination of water deliveries to the plaintiffs in 2001 to ensure that project operations did not jeopardize the continued existence of listed species under the Endangered Species Act (ESA). After an aborted attempt to obtain injunctive relief in U.S. District Court, the plaintiffs filed suit in the Court of Federal Claims, seeking compensation for water rights allegedly "taken" by the termination of deliveries. A claim for damages for breach of contract was added later. The current decision resulted from a motion for summary judgment on the takings claim.

The court began its analysis by observing that to prevail on the takings claim the plaintiffs must establish property interests in the waters of the Klamath Basin. The court then addressed the assertion that the plaintiffs had such property interests under section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383. The plaintiffs argued that because they own irrigated lands to which reclamation water is made "appurtenant" by section 8, that section confers on them a property interest in water. The court rejected this interpretation, concluding that state law, not the Reclamation Act, determines property interests in water. The court said that to rule in the plaintiffs' favor on the issue, it would have to "defenstrate" (throw out the window) 70 years of decisions in the Supreme Court and elsewhere consistently construing the Reclamation Act as deferring to state law in determining who has interests in reclamation water, "contraindications" in the *Ickes* line of cases (*Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 463 U.S. 110 (1983)) heavily relied on by the plaintiffs, and a wealth of legislative history, and be prepared "to flip the statute onto its head." 67 Fed. Cl. at 522.

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## INSTREAM FLOW WATER RIGHTS

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The City's legal argument was based on the second sentence of Colo. Rev. Stat. § 37-92-305(8), which provides:

A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a *valid senior call* for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent of the *senior* would be deprived of his or her lawful entitlement by the applicant's diversion (emphasis added).

Thus, the City claimed that to be lawful, its plan for augmentation was only required to provide replacement water necessary to meet the lawful requirements of a downstream *senior* diverter. Since the Board's instream flow water right was not a downstream senior, the City argued that it did not need to replace depletions that reduced the flow of water available to the Board's instream flow water right.

The Board, on the other hand, argued that the City's plan for augmentation must include terms and conditions to protect the Board's instream flow water right against injuries caused by all out-of-priority diversions that diminished the flow available to satisfy the instream flow water right, including diversions made on water rights senior to the instream flow right, but junior to the downstream call. The Board argued that the out-of-priority diversions by water rights senior to the instream flow are still out-of-priority diversions and have no decreed priority. The Board contended that those diversions had to be augmented so as to prevent injury to any vested water rights, including its instream flow water right. In addition, the Board contended that Central City is not entitled to change stream conditions to the detriment of junior appropriators by means of water rights that, absent the plan for augmentation, would be curtailed. The water judge agreed with Central City and entered a decree approving the plan for augmentation without terms or conditions to protect the Board's instream flow water right at times when Central City was making out-of-priority diversions under its upstream senior water rights and replacing those depletions below the instream flow reach. The Board appealed.

The supreme court's opinion first provided a detailed background on Central City's water rights applications, the proceedings before the trial court, and the factual claims concerning injury or the absence thereof made by the Board and Central City. After this review, the court described the crux of the issue as the meaning of the injury standard for augmentation plans set forth in Colo. Rev. Stat. § 37-92-305. In order to resolve the legal question of whether the Board's instream flow water right was entitled to protection, the court first discussed basic principles of Colorado water law and the Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. §§ 37-92-101 to -602.

Central to the court's analysis was its view of the role and significance of the adjudication of a water right. It stated that adjudication is essential to protecting a water right, and that a decreed junior water right is entitled to maintenance of stream conditions existing at the time of its appropriation. The court also acknowledged the corresponding right to change an existing water right to new uses and the important role that a plan for augmen-

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tation may play in that process. The court was careful, however, to point out that plans for augmentation operate outside of the priority system and therefore operate "out-of-priority." The court then turned its attention to the injury standard of Colo. Rev. Stat. § 37-92-305.

The court pointed out that section 305 contains a number of subsections addressing the injury standard for both changes of water rights and plans for augmentation, including the following:

(3) A change of water right or *plan for augmentation, including water exchange project*, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a *vested water right* or a decreed conditional water right. . . .

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(a) A limitation on the use of the water which is subject to the change, taking into consideration the *historic use* and the flexibility required by annual climatic differences;

(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;

....

(d) Such other conditions as may be necessary to protect the vested rights of others.

Colo. Rev. Stat. § 37-92-305(3) & (4) (emphasis added).

The court also pointed out that section 305(8) contains provisions, in addition to those relied upon by Central City, that require the water judge to consider injury to “any owner of . . . a vested water right” and require the state engineer to curtail out-of-priority diversions that deplete stream flows and are not replaced so as to prevent injury to vested rights. The court concluded that the language in section 37-92-305(8) regarding augmentation plans required the protection of both junior and senior vested water rights.

The court also found it necessary to discuss the nature of an instream flow water right and the purpose of Colorado’s instream flow program. One of the tenets of that program was to correlate the activities of mankind with some reasonable preservation of the natural environment. The court said that the General Assembly had chosen to accomplish this by empowering the Board to appropriate instream flow and minimal minimum lake levels with priority dates that are subject to the priority system. It pointed out that an adjudicated instream flow or lake level recognizes a property right vested in the Board on behalf of the people of the State of Colorado. Recognizing the fact that most instream flow water rights have relatively junior priorities, the court pointed out that the value of an instream flow water right’s priority does not, however, derive primarily from its place in the hierarchy (priority) of users who have rights to water from the same source. Rather, the court held that the General Assembly envisioned that the instream flow program would attain, in a reasonable measure, its goal of preserving the natural environment by ensuring that certain stream reaches would not be further depleted without conditions to protect against such injury. The court went on to conclude that the General Assembly envisioned that the primary value of instream flow rights would derive from a basic tenet of Colorado water law, namely the right to preserve the stream conditions existing at the time of the appropriation. To effectuate the General Assembly’s purpose of preserving the environment through minimum stream flows, the court held that the Board is entitled to necessary protective terms and conditions in a decree approving a plan for augmentation to prevent injury to junior instream flow water rights.

Based on its analysis, the court held that the junior instream flow water right may resist all proposed changes in time, place, or use of water that in any way materially injure or adversely affect the decreed minimum flow.

Because the water court’s determination was based on its interpretation of Colo. Rev. Stat. § 37-92-305(8) and there had

been no factual determination whether Central City’s augmentation plan would in fact cause injury to the Board’s instream flow water right, the supreme court remanded the case to the water court for further determinations on the question of actual injury and terms or conditions necessary to prevent any such injury.

The court’s opinion gives substantial protection to instream water rights. It acknowledges, in effect, that such water rights are in priority so long as there is a physical water supply in the stream reach of the right. Thus, the fact that the instream flow water right may be out-of-priority as against downstream senior water rights, does not mean it is also out-of-priority in the sense that diminutions in stream flow will not result in legal injury to it. Instead, the nature of the right appears to be such that it can, in effect, ride on top of the downstream senior water rights to obtain a supply of water despite its junior priority, and it may prevent any new upstream depletion that would reduce the stream flow below the minimum instream quantity decreed, whether such changes result from changes of water rights, augmentation plans, exchanges, or other new water supply arrangements. While some observers predict that this decision will hinder the ability to maximize the use of water, since the Board’s minimum stream flows are typically for fairly modest quantities of water, it seem possible that it may only bite hard in areas where, like Central City, there is very little water to begin with.

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## TERMINATION OF WATER DELIVERIES

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Having concluded that the Reclamation Act confers no property interest in the plaintiffs, the court turned its attention to state law. The court concluded that pursuant to Oregon legislation, the United States in 1905 obtained rights to the unappropriated water of the Klamath Basin. The court observed that individual plaintiffs might hold rights to water appropriated before 1905 or water rights obtained from the United States after 1905. The United States asserted that it had acquired all pre-1905 rights and integrated them into the project. The plaintiffs did not seriously contest this claim, but some of them argued that they had exchanged their pre-1905 rights for perpetual rights to Klamath Project water, resulting in beneficial interests in the water. The court said that these exchanges appeared to have taken the form of a series of post-1905 contracts and any property interests still existing were derived from the commitments made by the United States in the contracts.

After an extensive review of post-1905 transactions, the court placed the plaintiffs’ interests in Klamath Project water into five categories. The first three categories all involved claims based on contracts with the United States. Although the court acknowledged that rights against the United States arising out of a contract are protected by the Fifth Amendment, the court noted that takings claims derived from alleged interference with contract rights are usually rejected. Two rationales have been advanced for this result. Under one rationale, because the government acts in its “commercial or proprietary capacity” rather than its “sovereign capacity” in entering contracts, remedies arise from the contracts themselves, rather than from the protection of private property

**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.

rights. *See Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060 (Fed. Cir. 2001). Under the other rationale, the availability of contract remedies is sufficient to vitiate a takings claim, even if it is ultimately determined that no breach of contract occurred. *See United States v. Winstar Corp.*, 518 U.S. 839 (1996) and *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002). Finding that the United States acted in its proprietary capacity in entering into the Klamath contracts and that the plaintiffs retained the full range of remedies with which to vindicate their contract rights, the court rejected the takings remedy. As to the individual irrigators, the court held that they are third-party beneficiaries of the contracts between the United States and the various irrigation districts, and thus their claims sound in contract, not in takings.

Because briefing on breach of contract claims had been stayed, the court held that the issue must await another day. Nevertheless, the court offered several observations. First, it noted that most of the plaintiffs' interests in Klamath Project water are not absolute, but are limited by language relieving the government of liability for water shortages resulting from drought or other causes. The court said that the plain language of these provisions absolves the government from liability for all types of water shortages, not just those resulting from hydrologic causes. The court observed that other cases have construed similar clauses as protecting the United States from damages based on enforcement of the ESA, citing, among others, *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) and *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).

Second, the court noted that the "sovereign acts doctrine" might also protect the United States. According to the court, this doctrine shields the government from contract liability based on its public and general acts as a sovereign. The court said that an act of government will be considered sovereign so long as its impact on a contract is merely incidental to the accomplishment of a broader governmental objective. The court noted several courts have concluded that enforcement of the ESA should be viewed as sovereign acts which override the Bureau of Reclamation's obligations to provide water under various contracts, but concluded that the application of the doctrine to the contracts at issue has not been adequately briefed. In a footnote, the court observed that other cases have applied the "unmistakability doctrine" to Bureau contracts. 67 Fed. Cl. at 537 n.57. That doctrine holds that sovereign power is an enduring presence that governs all contracts and remains intact unless surrendered in unmistakable terms.

Finally, with regard to the contracts issues, the court discussed its decision in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001). In that case, the court ruled that restrictions on water use required by the ESA resulted in a "physical taking" of contractual water rights. The *Klamath* court said "with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events." 67 Fed. Cl. at 538. Specifically, the court faulted *Tulare* because it treated the contract rights as absolute and failed to consider possible limitations for water shortages based on prior contracts, prior appropriations, or other state law principles. The court noted that *Tulare* failed to examine agreements between the United States and the State of California creating a coordinated pumping system to see if they limited the plaintiffs' rights. Also the court faulted *Tulare*'s refusal to consider whether the plaintiff's claimed uses of water violated accepted state doctrines. As a result, the court said *Tulare* awarded compensation for interests that may well not exist under state law. Also, the court noted that

*Tulare* did not consider a breach of contract analysis because it did not view the parties as third-party beneficiaries of contracts with the United States, and thus, never considered application of the sovereign acts and unmistakability doctrines.

Turning to the non-contract based claims, the court concluded that such claims were dependent on water rights, if any, that are junior to the rights of the United States. As such, the court concluded that they give rise to no interest that could have been taken or infringed by the failure of the Bureau to deliver water in 2001.

The decision is somewhat surprising. In tone, analysis, and result, it presents a marked contrast to the *Tulare* decision by the same court only four years earlier. At the very least, the present decision suggests that irrigators and others who find water deliveries curtailed because of the application of federal environmental statutes may find it more difficult to obtain compensation from the United States than once thought.

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## ALASKA

(Thomas E. Meacham, Reporter)

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### SUPREME COURT DECIDES SUBMERGED LAND TITLE ISSUE IN ALASKAN NATIONAL PARK

In June 2005, the U.S. Supreme Court handed down its decision in *Alaska v. United States*, 125 S. Ct. 2137 (2005). This litigation determined that the United States owns the tide and submerged lands within Glacier Bay National Park under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315; the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607 (Apr. 29, 1958); and the Alaska Statehood Act (48 U.S.C. note prec. § 21).

A majority of the Court, in an opinion written by Justice Kennedy, held that the United States had effectively preserved federal title to the submerged lands in question, notwithstanding the enactment of the Alaska Statehood Act in 1958, because the lands and waters of Glacier Bay lay within an existing national monument at the time of statehood. Further, the state had failed to prove that the Bay and its related archipelago were either "inland waters" or a "juridical bay" through a continuous exercise of state sovereign authority, which might otherwise have permitted recognition of a claim of state title. Dissenting was Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas.

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## ARIZONA

(Margaret R. Gallogly, Reporter)

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### REASONABLE USE DOCTRINE PROTECTS LANDOWNER FROM NEGLIGENCE AND NUISANCE CLAIMS UNDER ARIZONA COMMON LAW

The Ninth Circuit Court of Appeals recently held that, under Arizona common law, a landowner pumping groundwater for a beneficial purpose is not subject to liability to a neighbor based on negligence or nuisance claims. *Brady v. Abbott Laboratories*, 433 F.3d 679 (9th Cir. 2005). In doing so, the court of appeals reversed a district court decision which held that Abbott Laboratories (Abbott) was liable for \$618,766 in compensatory damages

for injury caused to neighboring farmers (the Bradys), plus \$618,766 in punitive damages.

This matter arose out of Abbott's desire to expand its facilities in Casa Grande, Arizona. In order to install a basement at the facilities, Abbott needed to lower the groundwater table from approximately 16 feet below land surface to approximately 32 feet below land surface. Abbott obtained a dewatering permit from the Arizona Department of Water Resources (ADWR) for that purpose. It successfully pumped enough groundwater to lower the water table to a depth of 32 feet below land surface. However, Abbott pumped more water than was allowed under the ADWR dewatering permit, and its pumping exceeded the temporal limits of the permit. The volume of pumped water was such that it exceeded the holding capacity of retaining ponds Abbott constructed at its property. Abbott diverted some portion of the pumped water into a ditch, and the groundwater subsequently flowed off the Abbott property.

The Bradys owned land adjacent to the Abbott property. Several hundred pecan trees were cultivated on the Brady property. The trees relied on the shallow groundwater at the site for water. Subsequent to the dewatering activities on the Abbott property, the pecan trees died. The Bradys filed an action for compensatory and punitive damages against Abbott, alleging negligence and nuisance in its dewatering activities. The Bradys expressly disclaimed any reliance on any statutory claim under the Arizona Groundwater Code. 433 F.3d at 681 n.1. They did not assert, for example, that pumping groundwater in excess of the volume allowed under the dewatering permit was *per se* negligent.

The court of appeals analyzed this case under the common law doctrine of reasonable use. That doctrine permits a landowner to "capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply." *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 195 Ariz. 411, 415 n.3, 989 P.2d 739, 743 n.3 (1999), *cert. denied*, 530 U.S. 1250 (2000) (citations omitted). The court found that Abbott withdrew the groundwater for the purpose of expanding its facilities on its property and that such a use was a permitted beneficial use under Arizona law. Therefore, Abbott's activities were protected by the reasonable use doctrine, and Abbott was not liable for the death of the Bradys' pecan trees.

In its decision, the court of appeals focused on the common law and considered important whether the beneficial use of the groundwater occurred on or off the Abbott property. The court analyzed Arizona Supreme Court decisions in *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (Ariz. 1953) and *Farmers Investment Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (Ariz. 1976) (FICO). The court concluded that the purpose of the groundwater withdrawals was to allow Abbott to expand its facilities on its property. Thus, it was not significant whether or not the groundwater withdrawn by Abbott was retained on the Abbott property or was allowed to flow off that property, because the water was not withdrawn to benefit land other than the Abbott property.

The court's decision leaves the impression that the transportation of groundwater for a beneficial use at off-site land may subject the transporting party to liability under *Bristor* and *FICO*. The court did not mention in its opinion Arizona statutes that permit the transportation of groundwater in certain circumstances without the payment of damages. These statutes greatly limit the effect and application of the *FICO* case, in particular. For example, Ariz. Rev. Stat. § 45-541(A) applies to locations within the Active Management Areas (AMAs) of Arizona. From the dis-

ussion in the opinion, it is apparent that the Abbott and Brady properties are located within an AMA. The statute states:

Groundwater which is withdrawn pursuant to a grandfathered right or a groundwater withdrawal permit or from an exempt well may be transported without payment of damages within a sub-basin of an active management area, subject to limitations on the locations of use in [certain statutory sections that are not applicable.]

Outside of AMAs, the pertinent statute is Ariz. Rev. Stat. § 45-544(A)(1). That statute allows the transportation of groundwater within a subbasin without the payment of damages, and allows the transportation of groundwater between subbasins, subject to the payment of damages.

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## CALIFORNIA

(Ronald B. Robie, Reporter)

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### CALFED EIS RULED INADEQUATE

In *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 34 Cal. Rptr. 3d 696, 133 Cal. App. 4th 154 (Cal. Ct. App. 2005), the Court of Appeal, Third Appellate District, found inadequate the joint state-federal programmatic environmental impact statement (PEIS/R) for the CALFED Program for long-term management of water resources in the San Francisco Bay and Delta.

In a 125-page opinion, Justice Harry Hull, Jr., writing for an unanimous court, thoroughly reviewed the history of water exports in California, water quality and environmental problems in the Sacramento-San Joaquin Delta, and the CALFED program.

The CALFED program was created in June 1994 by the state and federal governments. It had three objectives: (1) to coordinate activities in operating the federal Central Valley Project (CVP) and the State Water Project (SWP) to meet environmental mandates; (2) to coordinate activities in establishing water-quality standards; and (3) to develop a long-term strategy for managing the Delta.

The principal problem with the PEIS/R, according to the opinion, was CALFED's failure to discuss a program alternative that required reduced exports of water from the Delta. The SWP and the CVP export several million acre feet of water from the Delta to agricultural and urban users in Central and Southern California. Supporters of CALFED argued that a reduced water exports alternative was rejected as infeasible "in light of projected population growth. . . ." 34 Cal. Rptr. 3d at 770. Although the CALFED program includes significant water conservation and increased water use efficiency, the PEIS/R found that these efforts would not be enough to meet the needs of a state population expected to increase from 30 to 49 million by 2020. The court held that CALFED's rejection of a reduced water exports alternative on the basis that it would not meet all of the program's goals was a false assumption. The court held that "the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, *even if these alternatives would impede to some degree the attainment of project objectives, or would be more costly.*" *Id.* at 772.

The court said it was a "glaring defect" for the PEIS/R to be based on the argument that people should follow the water, not

vice versa. The court said that assuming certain population growth “and then finding ways to provide water to that population overlooked an alternative that would provide less water for population growth leaving more for other beneficial uses.” *Id.* at 774. The court observed: “CALFED apparently assumed that the California population would grow as projected regardless of the availability of water and did not consider whether, if less water was supplied, population growth would be affected accordingly, leading to less demand.” *Id.*

The court commented that “An alternative with reduced exports of water may well be environmentally superior to one that requires redirection of water from existing streams or construction or expansion of water storage facilities.” *Id.* at 775.

In the PEIS/R CALFED merely listed potential future sources of water and stated that the ultimate source determination would be made later, deferring environmental analysis of the need to provide water to the program. The court held that the PEIS/R was inadequate in this respect. “Water is too important to receive such cursory treatment.” *Id.* at 757 (quoting *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 131 Cal. Rptr. 2d 186, 192, 106 Cal. App. 4th 715, 723 (Cal. Ct. App. 2003)). While the court said that individual sources of water need not be discussed, the PEIS/R must address the impact of supplying water for the project.

Finally, the court found inadequate the PEIS/R’s consideration of the Environmental Water Account (EWA). The EWA is proposed as part of a water transfer program to bank excess water when supplies are available. The court found the PEIS/R did not have a complete description of the EWA and, accordingly, the EWA was adopted without “any meaningful environmental review.” 34 Cal. Rptr. 3d at 790.

The court rejected numerous other objections to the PEIS/R, including many brought by agricultural interests, as well as many procedural challenges. A number of parties have petitioned the California Supreme Court for review of this decision. The petitions are pending.

**Editor’s Note: On January 25, 2006, the California Supreme Court granted review and superseded the opinion on which the foregoing report was based. The case may not be cited. See Cal. Ct. Rs. 976, 977, 979.**

#### LAKE ARROWHEAD DIVERSIONS RESTRICTED

On January 13, 2006, the State Water Resources Control Board ordered the Lake Arrowhead Community Services District to stop taking water in excess of its 1905 appropriative rights and imposed an administrative penalty of \$112,000 for unauthorized diversions. The penalty covered only one year but the excess diversions began in 1981. The Board acted pursuant to Cal. Water Code §§ 1052 & 1831.

Lake Arrowhead, located in the San Bernardino Mountains in Southern California, is formed by a dam constructed in 1912 to provide water for cabins around the lake and for recreation. The District has a firm right to 1,566 acre feet of consumptive use withdrawals a year. It had attempted to convert some of its recreational non-consumptive rights into domestic consumptive rights but could not do so since the Mojave River Basin is fully appropriated. Cal. Water Code § 1706. The unauthorized diversions adversely impacted recreation at the lake and water right holders in the basin.

Among the holdings of the Board was its rejection of the argument that the Board waited too long to take enforcement

action. Since a new appropriation can only be pursued by complying with the statutory procedure and since one may not obtain a prescriptive right against the state, the Board rejected the claim.

In addition to a cease and desist order and the civil penalty, the Board ordered the District to develop a plan to initially reduce and subsequently cease the unauthorized diversion and consumptive use of stored water from Lake Arrowhead above the allowable diversion and use amount of 1,566 acre feet per calendar year.

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## NEVADA

(Douglas L. Grant, Reporter)

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### ORR DITCH DECREE INTERPRETED TO IMPOSE UNUSUAL LIMITATION ON TRANSFER OF INDIAN RESERVED RIGHTS

In *United States v. Truckee-Carson Irrigation District*, 429 F.3d 902 (9th Cir. 2005), the Ninth Circuit considered the Nevada State Engineer’s partial approval of a request by the Pyramid Lake Paiute Tribe of Indians to temporarily transfer reserved water rights. The State Engineer allowed the Tribe to change the place and manner of use of specified quantities of water from the irrigation of tribal lands to the preservation of tribal fishery by allowing the water to remain undiverted in the Truckee River so that it would flow into Pyramid Lake.

As previously reported in Vol. XXXVII, No. 2 (2004), of this *Newsletter*, the federal district court for Nevada largely affirmed the State Engineer’s transfer ruling. *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245 (D. Nev. 2004). Although the period of the temporary transfer expired before the Ninth Circuit heard the appeal, the Ninth Circuit did not regard the matter as moot because the Tribe intended to file virtually identical temporary transfer applications in future years. The issue that occupied the Ninth Circuit was the amount of water the Tribe could transfer from irrigation to fishery habitat use.

The Orr Ditch Decree awarded the Tribe two reserved rights: Claim No. 1 for diversion of up to 14,742 acre-feet (a.f.) per year to irrigate 3,130 acres of tribal bottom lands and Claim No. 2 for diversion of up to 15,344.55 a.f. per year to irrigate 2,745 acres of tribal bench lands. The decree stated that transportation loss for these rights was estimated to be 15%, and further stated that under Claim No. 1 the Tribe could *divert* a maximum of 4.71 a.f. per acre per year (4.71 a.f. x 3,130 acres = 14,742 a.f.) and could *apply to the land* a maximum of 4.0 a.f. per acre per year. Similarly, the decree stated that under Claim No. 2 the Tribe could *divert* a maximum of 5.59 a.f. per acre per year (5.59 a.f. x 2,745 acres = 15,344.55 a.f.) and could *apply to the land* a maximum of 4.1 a.f. per acre per year. With both reserved rights, the difference between the amount for diversion and for application to the land was attributable to the estimated loss in transporting water from the point of diversion to the place of use.

The “general provisions” section of the Orr Ditch Decree acknowledged that actual transportation losses might differ at times from the estimated 15%. To deal with that possibility, the “general provisions” section declared that the amounts allowed for application to the land should control the amounts allowed for diversion, and it added:

Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the

quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and the quantity needed for irrigation thereof.

429 F.3d at 906.

The Tribe applied to the State Engineer for permission to transfer 9,941 a.f. of Claim No. 1 and all 15,344.55 a.f. of Claim No. 2. The State Engineer approved transfer of 8,420 a.f. of Claim No. 1 and 11,254.5 of Claim No. 2. In both instances, he allowed the Tribe to transfer only the water allocated by the decree for application to the tribal lands and denied transfer of the transportation-loss component. Applying the conventional no-injury limitation on transfers in western water law, which was incorporated into the Orr Ditch Decree, the State Engineer found that transfer of the transportation-loss component would potentially reduce upstream storage by junior appropriators and thereby injure them.

The federal district court found no proof of injury to other appropriators, but it affirmed the State Engineer's result on a different ground. The district court ruled that the Orr Ditch Decree allowed transfer only of the water it allocated for application to the land for irrigation plus the actual transportation loss for the new in-stream use. (The latter was expected to be zero since the Tribe would be putting the water to the new use beginning at the old point of diversion.) The district court disallowed transfer of transportation loss associated with the original irrigation use.

The Ninth Circuit agreed with the district court, giving two reasons—one pragmatic and the other conceptual. The pragmatic reason was that

if we were to agree with the Tribe that it is entitled to transfer to in-stream use the water allocated to transportation loss for irrigation, we would have to direct the State Engineer to make a year-by-year assessment of how much water, under current weather and soil conditions, would actually be lost if the Tribe used its water right to irrigate its lands rather than to support its fishery. Such a rule would be difficult to administer and would create considerable uncertainty.

*Id.* at 907-08. The conceptual reason was that

because such a rule would require the State Engineer to apply beneficial use principles in estimating the amount of water that would reasonably be lost from year to year, it would also be in tension with our general approach to the Tribe's [reserved] water rights under the Decree, under which we do not subject the Tribe's rights to any beneficial use requirement.

*Id.* at 908. For these reasons, the Ninth Circuit concluded that it was unlikely such a rule was contemplated by the Orr Ditch Decree. The court held that no water allocated to transportation loss for the original irrigation use could be transferred to the new in-stream use if the new use in fact would have no transportation loss. *Id.* at 909.

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## SOUTH DAKOTA

(John H. Davidson, Reporter)

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### EIGHTH CIRCUIT ADDRESSES MISSOURI RIVER ISSUES

Earlier reports described an intense period of litigation over the Missouri River, which resulted in 10 to 15 judicial decisions, depending on how one is counting. See Vol. XXXVII, No. 3 (2004), Vol. XXXVI, No. 3 (2003), and Vol. XXXV, No. 2 (2002) of this *Newsletter*. The legal and policy issues described there continue into 2006, with most of the focus involving interpretation of the Flood Control Act of 1944 (FCA), the Endangered Species Act (ESA), and the Clean Water Act (CWA), all of which have now been addressed by the Eighth Circuit Court of Appeals.

The CWA issue was pressed by the State of North Dakota, which continues to assert that management of the Missouri River by the Corps of Engineers must be in accord with water quality standards (WQS) established by the state under requirements in the CWA. 33 U.S.C. § 1313. North Dakota's WQS established the waters of Lake Sakakawea, a huge mainstem dam operated by the Corps pursuant to the FCA, as cold water fish habitat requiring that minimum reservoir levels be maintained at certain times of the year. The Corps had refused to modify its operating plan for 2003 to comply with North Dakota's demands. At issue are potentially conflicting provisions of the CWA. On the one hand, the statute provides that all federal agencies that are "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, . . . respecting the control and abatement of water pollution in the same manner . . ." as any other person. 33 U.S.C. § 1323(a)(2). On the other hand, the CWA also states that it "shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." 33 U.S.C. § 1371(a).

The federal district court held that sovereign immunity applies because enforcement of the state WQS "might affect or impair the authority of the Corps to maintain navigation." *In re Operation of Missouri River System Litigation*, 320 F. Supp. 2d 873, 877 (D. Minn. 2004). The Eighth Circuit affirmed, concluding that section 1371(a) of the CWA "[o]n its face . . . exempts the Corps." *In re Operation of Missouri River System Litigation*, 418 F.3d 915, 918 (8th Cir. 2005). In addition, the court concluded that the Corps's position supported a theory of implied preemption in that state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 919 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). North Dakota has filed a petition for writ of certiorari on this question with the Supreme Court of the United States. 74 U.S.L.W. 3309 (Nov. 22, 2005) (05-611).

On the second major interpretive issue, the degree of management discretion available to the Corps under the FCA, the Eighth Circuit also ruled in favor of the Corps. An earlier decision of the Eighth Circuit, *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), held that the Corps enjoyed discretion to balance competing water use interests on the River. Describing the "balance of interests" required under the FCA, the *Ubbelohde* decision concluded that "[t]he dominant functions of the [FCA] were to avoid flooding and to maintain downstream navigation," while taking into consideration "secondary uses of the River, including irri-

gation, recreation, fish, and wildlife.” *Id.* at 1019-20. The underlying relevant decision is *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). In the subsequent case, downstream states asserted that because the Corps’s newly proposed management plan recognized a possibility for cancellation of a navigation season under severe drought conditions, it violated a FCA duty to maintain downstream navigation. The Eighth Circuit ruled that the FCA “does not set forth what level of river flow or length of navigation season is required to make navigation ‘dominant’ over a ‘secondary’ interest,” *In re Operation of Missouri River System Litigation*, 421 F.3d 618, 629 (8th Cir. 2005), and concluded that a reviewing court need only satisfy itself that the Corps took each of the competing interests into account. Thus, while the FCA is sufficiently specific to support judicial review, “[a]rguments based on the wisdom of the priorities established by the FCA must be addressed by Congress.” *Id.* at 630. This issue is also the subject of a petition for writ of certiorari. 74 U.S.L.W. 3308 (Nov. 22, 2005) (05-628).

The ESA issues emerged from a nearly 15-year effort by the Corps to revise its management of the six mainstem dams on the upper Missouri River. The U.S. Fish and Wildlife Service (FWS), through three formal biological opinions (BiOps) under the ESA, took the position that restoring some part of the River’s natural hydrograph was necessary to avoid jeopardy to three listed species. When the Corps declined to implement flow changes for 2003, environmental groups obtained a thorough and lengthy

preliminary injunction opinion in the D.C. District Court requiring the Corps to implement the flow changes outlined in the 2000 BiOp. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D.D.C. 2003). The Corps refused to comply with the injunction but escaped sanction when the panel on multi-district litigation transferred the case to the District of Minnesota.

In November 2003, the Corps again initiated consultation with the FWS and sought permission to avoid any changes in the hydrograph. In response, FWS replaced the science team that had worked on the River for over a decade with a new team, headed by a lawyer and a FWS regional director from the southwest. The resulting amended BiOp reversed the long-standing position requiring flow changes, while sustaining the finding of the 2001 BiOp that some restoration of the natural hydrology was necessary to avoid jeopardy. The plaintiffs in the D.C. District Court action renewed their ESA claim in the Minnesota district court, which ruled that there was a “rational connection between the facts and the choice made” and upheld the final determination. *In re Operation of Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1160 (D. Minn. 2004). On appeal, the Eighth Circuit affirmed, concluding that “evidence in the record adequately explains the decision made by the FWS.” *In re Operation of Missouri River System Litigation*, 421 F.3d 618, 634 (8th Cir. 2005). This matter is also the subject of a petition for writ of certiorari. 74 U.S.L.W. 3324 (Nov. 29, 2005) (05-631).