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U.S. SUPREME COURT STRENGTHENS AUTHORITY OF STATES TO IMPOSE FLOW REQUIREMENTS IN FEDERAL LICENSING PROCESSES

(George A. Gould, Editor)

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, No. 04-1527, 2006 WL 1310684 (Me. May 15, 2006), the U.S. Supreme Court, in an almost unanimous opinion, reaffirmed the authority of the states to require instream flows as a condition of federal hydropower licensing. The decision cannot properly be called a "states rights" victory because it is dependent on a provision of the federal Clean Water Act (CWA), 33 U.S.C. §§ 1251-1376. Nevertheless, it is a significant victory for state protection of instream values.

The case arose from relicensing under the Federal Power Act (FPA), 16 U.S.C. §§ 791a-828c, by the Federal Energy Regulatory Commission (FERC) of hydroelectic dams on the Presumpscot River in Maine. The dams owned by the petitioner, S.D. Warren Co. (Warren), pass impounded water through a power canal and a turbine, returning the water to the riverbed some distance below the dams, thereby bypassing a section of the riverbed below. Notably, however, the hydropower operations do not result in the addition of any pollutant as defined by the CWA.

Although the Federal Power Act seems to give the states a substantial role with regard to the water rights of a licensee (*see* § 9(b), 16 U.S.C. § 802(b), and § 27, 16 U.S.C. § 821), in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), the Supreme Court emasculated these provisions, holding that Congress had preempted the authority of the states except for the determination of "proprietary"water rights; i.e., the water rights of other parties under state law must be respected, but if there is water that is lawfully available for the project ("unappropriated water" in western states), state law can impose no conditions or limitations on the use of such water. This interpretation of the Federal Power Act was reaffirmed in *California v. F.E.R.C.*, 495 U.S. 490 (1990). The preemption of state law has particularly frustrated state efforts to impose environmental conditions on licensees, including conditions to preserve instream flows. However, some of the authority of states to impose environmental conditions on FPA licensees was restored in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), pursuant to section 401 of the CWA, 33 U.S.C. § 1341.

Section 401 provides that any applicant for a federal permit or license that could result in the discharge into waters of the

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ARIZONA SUPREME COURT CONFIRMS PRECLUSIVE EFFECT OF GLOBE EQUITY DECREE ON GILA RIVER WATER RIGHTS CLAIMS OF SAN CARLOS APACHE TRIBE AND UNITED STATES

(Margaret R. Gallogly, Arizona Reporter)

The Arizona Supreme Court recently considered whether the San Carlos Apache Tribe (Tribe) and the United States, acting on the Tribe's behalf, are precluded from claiming additional rights to water from the Gila River mainstem due to a prior consent decree entered by the U.S. District Court for the District of Arizona. *In re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 127 P.3d 882 (Ariz. 2006), *recon. denied*, *In re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d 375 (Ariz. 2006). The consent decree in question was entered by the federal district court in 1935 in *United States v. Gila Valley Irrigation District*, and is commonly referred to as the Globe Equity Decree. In sum, the court held that the Tribe and the United States are precluded from asserting any claims to additional water from the mainstem of the Gila River beyond those claims adjudicated in the Globe Equity Decree; held that the Globe Equity Decree does not preclude claims to additional water from the tributaries to the Gila River; refused to address the Tribe's argument that it is not bound by the preclusive effect of the Globe Equity Decree because of the absence of privity between the Tribe and the United States; and held that non-parties to the Globe Equity Decree may rely on the preclusive effect of that decree as to claims to waters of the Gila River mainstem.

Globe Equity Decree. In 1925, the United States initiated litigation in the federal district court to adjudicate the waters of the Gila River. It filed the litigation on behalf of itself, the Tribe, the Gila River Indian Community, and two reclamation projects located on the river, alleging that the tribes and the reclamation projects were entitled to certain quantities of water from the river. The initial complaint filed by the United States sought an adjudication of the rights of the parties to the waters of the Gila River and its tributaries. An amended complaint later filed by the United States, however, referred to the adjudication of the parties' rights to the waters of the Gila River, without specifically referring to its tributaries. In 1935, the parties stipulated to the entry of the Globe Equity Decree, defining the rights of the various parties, including the Tribe, to the waters of the Gila River. Since that time, the federal district court has retained jurisdiction to enforce and interpret the Globe Equity Decree.

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FLOW REQUIREMENTS

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United States must obtain a certification for the state where the discharge occurs that the discharge will not result in a violation of specified provisions of the CWA and "any other appropriate requirement of State law." Certification may include limitations and requirements to assure compliance with such provisions, and such limitations and requirements, if appropriate, become a condition of the federal permit or license. The licensee in *PUD No. 1*, did not dispute the requirement of state certification, but took the position that minimum streamflow requirements were not appropriate under section 401, a position rejected by the Supreme Court.

In the present case, Warren applied to the Maine Department of Environmental Protection for the water quality certification, albeit under protest. Unlike the petitioner in *PUD No. 1*, Warren claimed that the dams do not result in a "discharge into" the river, the event triggering the certification requirement. As a condition of certification, the Maine Department of Environmental Protection required Warren to maintain minimum streamflows in the bypassed sections of the river and to allow for passage of migrating fish and eels. FERC subsequently included the conditions in the licenses.

The U.S. Supreme Court granted certiorari after Warren's claim that section 401 certification is not required because the dams do not result in a discharge was rejected at all stages of administrative and judicial review in Maine. The Court affirmed the Maine decisions in an opinion written by Justice Souter and joined in by all members of the Court, except Justice Scalia, who did not join in a part of the opinion that deals with arguments based on the legislative history of the CWA.

The dispute centered on the meaning of the word "discharge." Discharge is not defined in the CWA, although "discharge of a pollutant" and "discharge of pollutants" are defined. Because the term is undefined and is not a term of art, the Court said it would be construed according to its ordinary or natural meaning, which the Court said means a "flowing or issuing out." The Court said that this has consistently been the meaning intended when the court has used the term in prior water cases. It noted that no one, not even the petitioner or the dissent, questioned that the hydroelectic dam in *PUD No. 1* resulted in a discharge within the meaning of section 401. The Court also said that both the EPA and FERC have regularly given "discharge" its ordinary meaning and have applied it to releases from hydroelectric dams.

Warren advanced three arguments in support of its assertion that "discharge," when used to trigger section 401, required the addition of something foreign into the water into which the discharge is made. The first argument applied the interpretive canon *noscitur a sociis*—a word is known by the company it keeps. Because the CWA provided that "discharge" when used without qualification includes "discharge of a pollutant," and its plural variant "discharge of pollutants," which are defined to require the "addition" of pollutants, Warren argued that "discharge" standing alone also requires the addition of something foreign.

The Court, however, found the canon inapposite. It noted that the canon is usually applied when a term is part of a list of several other terms having a common feature. Here, the Court said, Warren was trying to extrapolate a common feature from a single term, "discharge of a pollutant," and its plural variant. Absent a gathering of several terms with a common feature, the Court concluded that the pairing of "discharge" with "pollutant" cannot be used to narrow the broad meaning of "discharge." The Court also cautioned against uncritical use of interpretive rules in making sense of a complex statute like the CWA.

Warren's second argument relied on *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004). In that case, the Court seemingly accepted the premise that an NPDES permit is not required for a discharge that results from the transportation of water from one part to another part of the same body of water. Because Warren's facilities merely discharge water back into the same body from which it is taken, Warren argued that *Micccosukee* indicated that section 401 was not triggered.

The Court rejected the argument, noting that *Miccosukee* dealt with section 402, not section 401. The Court said that the two sections are not interchangeable as they serve different purposes and use different language. Notably, the Court pointed out that the triggering language for section 402 is "discharge of any pollutant," not "discharge" alone, as is the case under section 401. The Court concluded the discussion of this argument by saying: "[T]he understanding that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401." *S.D. Warren Co.*, 2006 WL 1310684, at *6.

WATER LAW NEWSLETTER

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Warren's third argument relied on the legislative history of the CWA, notably a complicated analysis of attempts to amend the act with regard to "thermal discharges." Calling this a "lawyer's argument" the court rejected it as "implausible speculation."

Finally, the Court said that Warren's arguments "miss the forest for the trees." The Court observed that the CWA seeks to " 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' " and to achieve " 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.' " *Id.* at *8 (quoting 33 U.S.C. § 1251(a),(a)(2)). Thus, the Court concluded, the act does not stop at controlling the addition of pollution, but deals with " 'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.' " *Id.* (quoting 33 U.S.C. § 1362(19).) The Court noted that dams and turbines can cause a variety of problems the CWA seeks to eliminate and that it provides for a system which recognizes and protects the primary responsibility and rights of the states to address the broad range of pollution. These, the Court said, are the very reasons Congress gave the states the power to enforce " 'any other appropriate requirement of State law,' " through the section 401 certification process. The Court concluded: "Reading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended." *Id.*

GLOBE EQUITY DECREE

(continued from page 1)

Gila River General Adjudication. Decades after the entry of the Globe Equity Decree, water rights claimants initiated a general stream adjudication for the Gila River system and source. In the Gila River Adjudication, the Adjudication Court is addressing water rights claims to water within the Gila River and its various tributaries. Both the Tribe and the United States filed claims in the Gila River Adjudication claiming additional rights to the waters of the Gila River and its tributaries beyond those recognized in the Globe Equity Decree.

Certain parties to the Gila River Adjudication, some of which were parties to the Globe Equity Decree and some of which were not, filed motions for summary judgment asserting that the Globe Equity Decree precludes the Tribe and the United States from asserting any claims to additional water from the Gila River and its tributaries. Those moving parties argued that the defense of claim preclusion—formerly known as *res judicata*—required the Adjudication Court to recognize the Globe Equity Decree as resolving all of the claims of the Tribe and the United States, acting on the Tribe's behalf, to the waters in the Gila River for use on the Tribe's reservation. Under federal law, claim preclusion provides that, when a final judgment has been entered addressing the merits of a case, the judgment is final as to the claim in controversy and conclusive for the parties to the case and those in privity with the parties to the case. The non-parties to the Globe Equity Decree also contended that they could assert the preclusive effect of the decree, even though they were not parties to the decree, relying on an exception to the privity requirement. As may be expected, the Tribe filed its own motion for summary judgment arguing that the Globe Equity Decree does not preclude its claims to additional water from the Gila River or its tributaries.

The Adjudication Court determined that neither the Tribe nor the United States were entitled to claim water rights in the Gila River, except to the extent granted in the Globe Equity Decree. Consistent with that order, the Adjudication Court granted partial summary judgment to the non-Tribal moving parties, but held that the Globe Equity Decree was limited to the mainstem of the Gila River and not its tributaries. The Adjudication Court also held that non-parties may assert the preclusive effect of the Globe Equity Decree. The Tribe appealed the decision of the Adjudication Court.

The Arizona Supreme Court granted interlocutory review of the Adjudication Court decision to consider several issues raised by the Tribe and others. One issue was whether the Adjudication Court correctly determined that the Tribe's claims to additional water from the Gila River are precluded due to the Globe Equity Decree. Another was whether the Adjudication Court erred in not allowing the Tribe to present evidence that the representation of the United States in the *Globe Equity* litigation was inadequate and, therefore, privity between the United States and the Tribe was removed. The Arizona Supreme Court also agreed to review the decision of the Adjudication Court that the preclusive effect of the Globe Equity Decree applied only to the mainstem of the Gila River and did not affect water rights claims to the tributaries of the Gila River.

Supreme Court Decision. The Arizona Supreme Court first considered whether the Tribe and the United States were precluded by the Globe Equity Decree from claiming rights to additional water from the Gila River and its tributaries. The court analyzed whether the moving parties had established the elements of claim preclusion—namely, whether the "cause of action" in the present case and the prior case are the same; whether a final judgment had been entered in the prior litigation; and whether the parties to the current action are the same as the parties in the prior action, or in privity with them. The second element—whether the Globe Equity Decree was a final judgment—was not in dispute. Therefore, the court focused only upon the other two elements of claim preclusion.

Same Cause of Action or Claim Element. The court examined what claims had actually been adjudicated by the *Globe Equity* litigation, and the intent of the parties to the Globe Equity Decree regarding its preclusive effect. First, the court considered whether the decree adjudicated claims to the tributaries of the Gila River or only to the mainstem. The court reviewed the language of the Amended Complaint filed in the *Globe Equity* litigation as compared to the language of the initial Complaint and concluded that the Amended Complaint was directed only to the rights of the parties to waters of the Gila River mainstem. The court also took into account the fact that parties with claims solely to the tributaries of the Gila River were dismissed from the litigation. "Given that the Decree made plain that it was not resolving the claims of the dismissed defendants to water of the tributaries, it naturally follows that the Decree also did not adjudicate the Tribe's claims to the tributaries, as the dismissed defendants would have been necessary parties to any such adjudication." 127 P.3d at 892.

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 court concluded that the parties intended only to adjudicate rights to mainstem waters.

Next, the court considered what claims to the Gila River mainstem had been adjudicated in the Globe Equity Decree. The Tribe took the position that the Globe Equity Decree only adjudicated its prior appropriative rights. If that were correct, then the Tribe could assert its aboriginal or *Winters* reserved rights in the Gila River Adjudication. The other parties asserted that all tribal claims were adjudicated in the Globe Equity Decree. Again, the court closely examined the language of the Amended Complaint and found that the United States had claimed rights to water based on a number of claims, including prior appropriation and "occupancy and possession" of the land. The language of the Globe Equity Decree also made clear the parties' intent to resolve all of the parties' claims to the Gila River mainstem. The court concluded that "all of the Tribe's water rights, under all theories, to the Gila River mainstem were placed at issue and resolved in the Globe Equity litigation. The Decree precludes all further claims to the mainstem of the Gila River by the parties to the Decree." 127 P.3d at 895.

Same Parties or in Privity Element. The court next addressed the mutuality requirement of the defense of claim preclusion. For claim preclusion to apply, the law generally requires that the parties be identical in both actions, or that there be privity with parties to the original action. The court considered two separate questions on this point. First, the court acknowledged that the Tribe was not a party to the Globe Equity Decree. The United States was a party to that decree, acting on the Tribe's behalf as its trustee. Because of this situation, the court had to determine whether the United States and the Tribe were in privity, such that the Tribe was bound by the preclusive effect of the Globe Equity Decree. Second, certain parties to the Gila River Adjudication wished to assert the preclusive effect of the Globe Equity Decree, even though those parties were not parties to the *Globe Equity* litigation and were not in privity to parties to the *Globe Equity* litigation. The court had to determine whether those non-parties could rely on the preclusive effect of the Globe Equity Decree, based on an exception to the mutuality requirement.

Tribe Bound by Preclusive Effect of Globe Equity Decree. The court recognized the general principle that a tribe is ordinarily bound by a judgment or decree where the tribe is represented by the United States, acting as trustee. The Tribe attempted to counter this general principle through several arguments. First, it argued that the United States lacked the authority to represent the Tribe in the *Globe Equity* litigation. The court rejected this argument, concluding that the United States proceeded pursuant to congressional authority. Second, the Tribe argued that the United States had no right to extinguish the Tribe's water rights. Again, the court disagreed, concluding that the Globe Equity Decree did not extinguish the Tribe's water rights, but rather determined the scope of the Tribe's water rights. Finally, the Tribe asserted that the representation by the United States in the *Globe Equity* litigation was so inadequate that privity between the Tribe and the United States was removed. The court refused to address this issue, stating that "the doctrine of comity compels us to refrain from addressing the Tribe's arguments." 127 P.3d at 898. The doctrine of comity provides that a court should not hear a claim seeking relief from a judgment entered by another court; rather the party requesting relief should do so in the court rendering the original decision. Thus, the court concluded that privity between the United States and the Tribe exists, and the Tribe is bound by the preclusive effect of the Globe Equity Decree.

The court noted several points that made comity to the federal courts particularly appropriate in this case. The court noted that the U.S. District Court for the District of Arizona expressly retained jurisdiction over the interpretation and enforcement of the Globe Equity Decree. The Tribe is now a party to the *Globe Equity* litigation, having been granted permission to intervene in 1990. Thus, the Tribe could assert the claim of inadequate representation before the federal district court. The court stated that, in the court's view, the Tribe had "consciously declined to adjudicate its 'inadequate representation' claim in the forum responsible for issuing, interpreting, and enforcing the Decree. Notions of comity would be seriously undermined if we were to permit the Tribe to assert the very arguments in this Court that it has explicitly pretermitted in the federal court." 127 P.3d at 900. The court noted that the federal district court, in similar circumstances, had refused to allow the Gila River Indian Community to attack the Globe Equity Decree because of the untimeliness of that attack. Thus, it was likely that the federal district court, if faced with the issue, would also refuse to allow the Tribe to attack the Globe Equity Decree based on the inadequacy of representation by the United States in 1935. In effect, the court refused to act as a more favorable forum to the Tribe than the federal district court that issued the Globe Equity Decree in the first place.

The Tribe filed a motion for reconsideration of the court's decision on this issue of comity. The Tribe argued in its motion that the federal district court lacks jurisdiction to consider a challenge to the Globe Equity Decree based on the inadequacy of representation by the United States. The court denied the motion, concluding that neither the McCarran Amendment nor caselaw cited by the Tribe deprived the federal district court of jurisdiction to consider attacks upon the validity of the Globe Equity Decree. The result is that, if the Tribe wishes to present an argument that it was inadequately represented in 1935 and, therefore, should not be bound by the preclusive effect of the Globe Equity Decree, the Tribe will have to make that argument to the federal district court.

Non-Parties to Globe Equity Decree Allowed to Rely on Preclusive Effect. The court next considered whether subsequent water rights claimants may rely on the preclusive effect of the Globe Equity Decree, even though they were not parties to the *Globe Equity* litigation and not in privity with parties to that litigation. The court noted that the U.S. Supreme Court, in *Nevada v. United States*, 463 U.S. 110 (1983), created an exception to the mutuality requirement where there is a comprehensive determination of water rights, and subsequent appropriators have relied on the determination such that it would be manifestly unjust not to apply claim preclusion. In applying these standards, the court determined that the Globe Equity Decree was comprehensive as to water rights claims to the mainstem of the Gila River. The court next determined that, "given the long history of the Decree, it is clear that those not party to the Decree have in fact relied upon it in the same manner as the later appropriators in *Nevada*." 127 P.3d at 902. The court concluded that non-parties to the Globe Equity Decree are entitled to assert its preclusive effect against others.

ALASKA

(Thomas E. Meacham, Reporter)

STATE OF ALASKA FILES FOR TITLE TO ADDITIONAL WATER BODIES ON FEDERAL LAND

Between December 22, 2005, and March 10, 2006, the State of Alaska filed applications with the U.S. Department of the Interior for the issuance of "recordable disclaimers of federal interest" regarding 22 lakes, rivers, and creeks lying entirely or partially on federally-owned land. The water bodies involved in this latest round of applications asserting state title lie in the Tanana River and Kuskokwim River basins of Alaska.

Alaska's "disclaimer of interest" applications are being filed under authority of section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745. The state's title to these water bodies, claimed by Alaska as being "navigable waters" at the date of statehood in 1959, is being asserted under section 3 of the Submerged Lands Act of 1953, 43 U.S.C. § 1311.

Under procedures adopted by the Bureau of Land Management, public comment on issuance of the proposed disclaimers of federal interest will be accepted and reviewed before the disclaimer applications are adjudicated. Additional information on the pending applications is available at www.dnr.state.ak.us/mlw/nav/rdi.

To date, the State of Alaska has filed applications for the issuance of disclaimers of federal interest in 66 lakes, rivers, and creeks within the state. Nine of these applications have resulted in the issuance of federal disclaimers of interest.

CALIFORNIA

(George A. Gould, Editor)

CALIFORNIA COURT OF APPEAL DECIDES IMPORTANT WATER RIGHTS/WATER QUALITY CASE

State Water Resources Control Board Cases, 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 (Cal. Ct. App. 2006), is a continuation of long-standing efforts to resolve water quality problems in the San Francisco/Sacramento-San Joaquin Delta Estuary (Bay-Delta). The opinion, written by Justice Ronald Robie, the California reporter for this *Newsletter*, results from the coordination of eight cases challenging actions taken by the California Water Resources Control Board to implement "flow-dependent," Bay-Delta water quality standards and to resolve related issues. The length of the opinion is indicative of the complexity of the issues addressed and the importance of the case; it covers 138 pages of the California Reporter, including headnotes and maps.

The Sacramento-San Joaquin Delta results from the confluence of the Sacramento and San Joaquin Rivers east of San Francisco Bay. The Sacramento River and its tributaries drain the northern reach of California's great Central Valley and the San Joaquin River and its tributaries drain its southern reach. Water from the Delta is discharged into Suisun Bay and then into San Francisco Bay. The Bay-Delta region is a rich environmental resource in its own right, and it serves as a highway for migrating fish species. Many of the islands in the Delta are farmed using Delta waters, and various municipalities and industries divert Delta waters. The Delta also plays an important role in the operation of California's two major water projects, the Central Valley Project (CVP), operated by the federal Bureau of Reclamation (Bureau) and the State Water Project (SWP), operated by the California Department of Water Resources (Department). Both projects store water in northern California and release it down the Sacramento River into the Delta. Water is then pumped from the southern part of the Delta into canals and is transported south and west to agricultural and municipal users, supplying water to two-thirds of California's people and irrigating 4.5 million acres.

Salinity is the major water quality problem affecting the Delta. Much of the salinity problem is the result of saltwater intrusion from San Francisco Bay during times of high tides and low river levels, but agricultural runoff entering the Delta, particularly from the San Joaquin River, also contributes to the problem. The solution to the salinity problem and other Delta water quality problems requires the flow of fresh water into the Delta, which can be accomplished by restricting upstream diversions or by requiring the release of stored water into the Delta.

Efforts to resolve the Delta's water quality problems go back more than 40 years. One of the major events in this history was Decision 1485 (D 1485) of the California Water Resources Control Board (Board) in 1978. Using its combined authority over water rights and water quality for the first time, the Board established water quality objectives for the Delta and required the Bureau and the Department to release water into the Delta to meet the objectives. That decision was challenged by a number of parties and resulted in a decision by the California Court of Appeal, *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986), which made a number of important holdings, including the holding that the Board had the authority to modify water rights to provide flows necessary to meet water quality standards. That decision, often referred to as the *Racanelli* decision because of its author, Justice Racanelli, found the standards established in D 1485 inadequate, but did not invalidate D 1485 because the Board had already announced its intention to set new standards.

In 1991, the Board set new standards for the Delta, but the U.S. Environmental Protection Agency (EPA) rejected the standards relating to the protection of fish and wildlife and promulgated its own water quality standards. In 1995, the Board adopted a new water quality plan for the Delta (1995 Plan), and this plan received EPA approval. The Board subsequently commenced water rights proceedings to allocate responsibility for meeting the "flow-dependent objectives" of the 1995 Plan through the amendment of water rights in the Bay-Delta watershed. That process resulted in Decision 1641 (D 1641) in 2000, the subject of the current decision.

The water rights proceedings also addressed two related issues, a joint petition by the Bureau and the Department to use each other's points of diversion in the southern Delta, and a petition by the Bureau to change the purpose of use of its water rights by adding fish and wildlife enhancement as an authorized use and to change the place of use of some of its rights by adding additional lands. With regard to the joint petition, the Board conditionally authorized the Bureau and the Department to use each other's pumping plants. With regard to the addition of lands by the Bureau, the Board authorized the addition of lands already being served, called "encroachment lands," but rejected the addition of lands within the service area of various CVP contractors not presently receiving water, called "expansion lands." The Board

determined that expansion lands could be added later on a case-by-case basis.

A number of cases challenging D 1641 were filed. These were all considered in a coordinated proceeding. The trial judge upheld D 1641, with two exceptions, one involving the failure of the Board to allocate responsibility for meeting all of the flow objectives of the 1995 Plan and the other involving the refusal of the Board to amend the Bureau's permits to include certain encroachment lands in the Westlands Water District. The court of appeal stated that it agreed with the trial court in most regards but disagreed in a few instances. Most significantly, it said, it agreed with the trial court regarding its first exception, but disagreed with regard to the second.

As noted, the decision is lengthy and complex, addressing numerous water law issues and issues regarding the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21000-21177. Some of the issues are highly fact-specific and have little significance beyond these proceedings. Thus, a detailed analysis of all the issues is beyond the scope of this report, and the report will focus on selected issues.

The Vernalis Flow Objectives and San Joaquin River Agreement. The 1995 Plan set minimum monthly flow rates on the San Joaquin River at Vernalis (Vernalis flow objectives). The flow objectives included a "pulse" flow during April and May each year to coincide with fish migrations. D 1641 adopted the San Joaquin River Agreement, a proposed settlement by some of the parties having potential responsibility for the Vernalis flow objectives. However, the San Joaquin River Agreement did not provide sufficient flows to meet all of the Vernalis flow objectives. The parties to the agreement justified it as a means for conducting an experiment, known as the Vernalis Adaptive Management Plan, to gather better scientific information on the effect of flows on fisheries. In approving the agreement, the Board said that it was authorizing a staged implementation of the Vernalis pulse flow objectives.

The California Court of Appeal began its analysis of this issue by observing that, in its view, the San Joaquin River Agreement was not a "staged" implementation of the pulse flow objectives, but a "delayed" one. However characterized, the court of appeal found nothing in the 1995 Plan that authorized delayed implementation of the pulse flow objectives or authorized the Board to implement a flow regime different from that provided in the Plan, even on a temporary basis. While the court agreed that sequential implementation of a water quality objective could be compatible with California's water quality laws, it said that the 1995 Plan did not provide for sequential implementation of the pulse flows. The court noted that the 1995 Plan could have been amended to provide for the alternative flow regime of the San Joaquin River Agreement through a properly noticed and conducted regulatory proceeding. In the absence of an amendment, the court held that the water rights proceeding must fully implement the flow objectives of the 1995 Plan.

The court of appeal also rejected a number of arguments by the Board that it was only obligated to "consider" the flow-dependent objectives of the Plan in the water rights phase, not actually implement them. The court noted that the regulation of water rights is the principal mechanism for enforcing flow-dependent objectives, and it said it would be strange if the Board could conclude in a water quality control plan that a water rights proceeding is necessary to implement the plan and then in the water right proceeding decided not to do so, thereby refusing to implement its own plan. Thus, the court concluded, the Board could not make a "de facto" amendment of water quality objectives by refusing to take the necessary actions to implement the objectives. The court of appeal also disagreed with the Board that the *Racanelli* decision affirmed its authority to deviate from water quality objectives in order to prevent waste and unreasonable use of water, and noted that, in any case, the deviation at issue here was not undertaken to prevent waste or unreasonable use.

The Southern Delta Salinity Objectives. The 1995 Plan adopted various salinity objectives at Vernalis and several other locations in the southern Delta. In D 1641 the Board found that the Bureau's CVP was the primary cause of salinity concentrations at Vernalis and required the Bureau to meet the Vernalis objective. However, it specified that the Bureau could meet the objectives " 'through flows or other measures.' " With regard to the other locations, the Board determined that the Bureau and the Department were partially responsible and required them to meet these objectives. However, the Board delayed the implementation of these objectives until April 1, 2005.

With regard to the salinity objectives, the court of appeal rejected claims that the Board erred in not specifying exactly how the Bureau and the Board were to meet them, saying it was enough that D 1641 directed the two agencies to meet them in the absence of a showing that they could not do so. However, the court found that the Board erred in delaying the implementation of the 1995 plan objectives and held that the Board had effectively amended the Plan without complying with required procedures. Since the April 1, 2005, date had passed, the court found the issue moot, but did not find moot another provision in D 1641 replacing the 1995 Plan objective with a lower objective in some cases. The court held that the Board must either fully implement the 1995 Plan or amend it.

Addition of Fish and Wildlife Enhancement as a Purpose of Use. The Board also added fish and wildlife enhancement as a purpose of use of various irrigation districts in order to allow them to provide water required under the San Joaquin River Agreement. Various parties downstream contested the change arguing that they would be injured by the change, contrary to the "no injury rule," codified in various provisions of the Water Code, which holds that a change in use cannot cause injury to others.

With regard to water stored in reservoirs, the central question was whether the no injury rule protects users of water from any injury or only from injury to their water rights. The Board adopted the latter interpretation and ruled that the contesting parties could not be injured by the release of such water because a downstream riparian or appropriator has no right to water stored by another in another season. After an extensive review of case law and statutory provisions regarding the no injury rule, the court of appeal agreed with the Board that the rule only protects against injury to water rights, and thus, having no rights to the stored water, the contesting parties are not protected by the rule.

In an effort to get around the problem, some riparian contestants argued that they could compel the release of water under the physical solution doctrine. The court of appeal dealt with this claim rather summarily, saying that no physical solution was being imposed here and, thus, the question of whether or not a release of stored water could be required under the doctrine was not a question that required an answer.

With regard to changes in direct diversions, the Board had ruled that downstream appropriators could be injured if the changes caused a reduction in return flows during the summer months. However, the Board concluded that it was unlikely that injury

will occur because the water provided for instream flows will be available for use after it passes Vernalis. Finding this conclusion supported by substantial evidence, the court of appeal upheld the Board. The court of appeal also agreed with the Board that the requested changes could not cause injury by degrading water quality in the Delta because the changes are conditioned on the requirement that the Bureau meet the 1995 Plan objectives at Vernalis.

San Joaquin County also argued that the proposed changes in use violate California Water Code §§ 12230 *et seq*., which prevent actions of the Board or other state agencies that degrade water quality in specified sections of the San Joaquin River. The problem with this argument is that § 12233 provides that these provisions cannot affect vested water rights or applications to appropriate water filed prior to June 17, 1961. All of the rights for which a change in use was sought predated that date. In an effort to circumvent the limitation, San Joaquin County argued that the rights lost the protection of the limitation when the change petition was filed because the changes were not "vested" prior to 1961. The court of appeal rejected the argument, noting that the limitation protects not only vested rights but also applications filed before the specified date. The court concluded that if the legislature had intended the result San Joaquin County sought, it could have said so.

Challenges to the Use of New Melones Water to Meet Delta Water Quality Objectives. D 1641 modified the Bureau's water rights for the New Melones Reservoir on the Stanislas River to allow the Bureau to use water stored there to meet its responsibilities for flow-dependent objectives in the Delta. Various parties from San Joaquin County challenged the modification, arguing that it violates California Water Code § 11460, the so-called "watershed protection act." Section 11460 provides that the construction and operation of the CVP cannot deprive "a watershed or area wherein water originates, or an area immediately adjacent thereto" of water needed within the watershed or area.

The court of appeal rejected the argument, agreeing with the trial court that the provision was a limitation only on the Bureau (or Department), not on the Board, although it did conclude that the Board could not require the Bureau to operate the dam in violation of § 11460. Here, however, the court said that while the change in the Bureau's right allowed it to use New Melones water, it did not require it. Even assuming that § 11460 could be triggered by the Board's action, the court concluded that the section was not violated. The court noted that § 11460 does not establish a preference for particular types of uses within an area of origin. Further, it noted that even if it were to assume that the Delta is not within the watershed of the Stanislas River, it is certainly an area "immediately adjacent thereto." Thus, the use of Stanislas River water to protect agriculture, fish, and wildlife in the Delta is not a violation of the section. The court also rejected the argument that, because the New Melones water is released to offset the effects of other water exported from the Delta, it is the functional equivalent of exporting Stanislas River water. The court acknowledged that the argument has surface appeal, but rejected it anyway, saying that § 11460 is not concerned with why water is needed for use within the area of origin. Although the court ruled against the claim, it did conclude that a CVP contractor that holds no appropriative water right can seek the protection of § 11460 if export outside the area of origin reduces the contractor's allotment.

Unreasonable Use of Water. Several parties argued that the use of water from New Melones to dilute salinity at Vernalis is an unreasonable use of water in contravention of Article X, section 2 of the California Constitution. The court of appeal said that the argument fails because what is a reasonable use of water is a question of fact. While the court acknowledged that the use of water to dilute salinity could be unreasonable in some cases, here the court said the challengers failed to demonstrate that the Board's determination that it is reasonable is in error. The court also concluded that the argument that continued and increased delivery of water to the west side of the San Joaquin River, an area of high salt loading, is unreasonable fails for the same reason; i.e., the challengers did not show it is unreasonable.

Delta Protection Act. Various parties argued that D 1641 violates California Water Code §§ 12200 *et seq*., known as the Delta Protection Act. In addressing this issue, the court of appeal noted that the act sets two goals: (1) maintaining and expanding agriculture, industry, urban, and recreational development in the Delta; and (2) providing fresh water for export (controlling salinity). The court of appeal noted that the adequacy of the 1995 Plan objectives is not at issue in this proceeding. It also noted that the balance to be struck between the two objectives of the Delta Protection Act was for the Board to decide in the first instance and would not be overturned unless unreasonable, which had not been shown here. The court also rejected the claim that the Delta Protection Act entitles Delta water users to water stored by others upstream.

Narrative Objective for the Protection of Salmon. The 1995 Plan included a narrative objective which required the doubling of chinook salmon. In rejecting claims that D 1641 would not achieve that objective, the court of appeal brushed aside an argument that D 1641 had to meet the water quality standards adopted by the EPA in 1991 as well as the standards of the 1995 Plan. The court agreed with the Board that the 1995 Plan approved by EPA supplants the early EPA standards as a matter of federal law. With regard to the substantive challenges regarding the salmon objective, the court said that the only responsibility of the Board in the water rights phase was to implement the flow objectives established in the 1995 Plan. If the 1995 Plan objectives are inadequate to achieve the narrative objective, the court said that the appropriate action is to change the flow objective in the next regulatory proceeding to review and revise the Delta water quality plan.

The court of appeal also rejected claims that the public trust doctrine obligates the Board to provide more water for the salmon narrative objective because it is "feasible" to do so, citing *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 189 Cal. Rptr. 346 (Cal. 1983). However, in applying the public trust doctrine, the court noted that the Board also has a duty to consider and protect all other beneficial uses of water and concluded that balancing the competing interests of fish and wildlife protection and the need for water for other beneficial uses is in the Board's discretion and judgment.

Joint Points of Diversion. In approving the petition of the Bureau and the Department to use each other's pumping plants in the Delta, the Board required the development of response and operation plans, to be approved by the Executive Director of the Board, to ensure that other water users would not be injured by lowering the water levels in the south Delta. In approving of this process, the court of appeal concluded that the Board had not improperly delegated to its staff its responsibility for determining that the change would not cause injury. Instead, the court said, the Board determined that there would be no injury as long as the Bureau and the Department ensure that the joint operations are conducted in a manner that does not result in an unacceptable lowering of water levels in the southern Delta, and requiring them to develop response and operations plans to be approved by the Executive Director is an appropriate way of providing this assurance.

Adding Fish and Wildlife Enhancement as Permitted Uses of CVP Water. As noted earlier, the Bureau petitioned to add fish and wildlife enhancement as an authorized use of water under a number of its permits. The Bureau sought this change to allow it to comply with the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, tit. XXXIV, 106 Stat. 4600, 4706 (1992), a federal statute designed to address environmental damage caused by the CVP. The Westlands Water District objected to the change, arguing that it injured the district and other CVP contractors because allowing the Bureau to use more CVP water for fish and wildlife enhancement would reduce the amount of water available for irrigation.

A cental issue in this dispute was the question of whether a CVP contractor is a "legal user of water," entitled to the protection of the no injury rule under California Water Code § 1702. The Board concluded that only one having a traditional water right comes within this term and, thus, a CVP contractor having only a contractual right to water is not protected. The court of appeal disagreed. After an extensive review of the statutory and case law associated with the no injury rule, the court held that the term includes anyone who has a right to use water, whatever the source of the right.

Nevertheless, the court of appeal concluded that Westlands could not show that the change in use would cause it injury even if the change resulted in it receiving less water. The court said that to show injury Westlands must show that it had a right under its CVP contract to the water that would be redirected to fish and wildlife. The court noted that Westlands' CVP contract expressly provides for reduced deliveries in situations in which the Bureau is required by law to make water available for other purposes. Citing *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995), a case in which the Ninth Circuit held that the Bureau is not obligated to deliver the full contractual amount of water to a contractor when the water cannot be delivered because of requirements of the Endangered Species Act, the court of appeal agreed that Westlands had no right to CVP water that was to be used for fish and wildlife pursuant to the CVPIA. Thus, the court concluded, having no contractual right to water redirected to fish and wildlife, Westlands could not show that changes in the Bureau's permits to allow redirection would cause it injury.

Encroachment and Expansion Lands. The discussion of the court of appeal regarding the addition of encroachment and expansion lands to the Bureau's CVP permits primarily involved the interpretation of language in a number of the permits and in very specific legislation and is of little consequence beyond the immediate dispute. However, one issue merits mention. In adding the encroachment lands to the Bureau's permits, the Board imposed a habitat mitigation requirement which was challenged by some of the CVP contractors. However, the court of appeal agreed with the Board that the contractors had no standing to challenge the requirement because it was imposed on the Bureau, not on them and, thus, they could not show the requisite injury. The contractors argued that uncertainty as to whether the Bureau would pass the costs of implementing the mitigation requirements on to them rendered the encroachment lands less valuable than other lands served by CVP water. The court rejected the argument saying it was based on speculation that the costs might be visited only on those owning encroachment lands, rather than being borne by the Bureau or passed on to all CVP users. Thus, the court concluded, the uncertainty was no greater for those holding encroachment lands than for any other CVP landowner; consequently, there was no evidence that the encroachment lands were less valuable than other lands and, thus, no showing of injury.

On May 17, 2006, the California Supreme Court denied the petitions for review in this case. Thus, it appears that the decision of the court of appeal represents another important milestone in the resolution of water quality problems in the Bay-Delta. Nevertheless, this will undoubtedly not be the last time a California court will be called on to address Bay-Delta issues.

CALIFORNIA COURT OF APPEAL REAFFIRMS RIGHT TO CHANGE PLACE OF USE OF PRE-1914 WATER RIGHTS

Although *Barnes v. Hussa*, 136 Cal. App. 4th 1358, 39 Cal. Rptr. 3d 659 (Cal. Ct. App. 2006), discusses several water law issues, it began as a dispute over an "irrevocable license" (an easement). The underlying grievance that led to the dispute is not apparent from the opinion, which was written by Justice Ronald Robie, the California reporter for this *Newsletter*.

The plaintiff (the Barneses), the defendant (the Hussas), and a third party shared a "first-priority" right to waters of Deep Creek in Modoc County pursuant to a 1934 court decree. The decree awarded a total of 5 cfs to the shared first-priority right, with Barnes having the right to 3.33 cfs. The decree also provided for a pro rata sharing of water under "low-flow conditions"; i.e., when there was insufficient water to satisfy the entire first-priority right. The right, known in California as a "pre-1914 right," predated the effective date of the California administrative permit system.

The Barneses' water right was acquired by a predecessor in interest for the irrigation of a tract of land called the Street property. Originally, water was conveyed to the Street property through two ditches, but later a pipeline was constructed to carry water to the property, although the pipeline only had a capacity of 2.2 to 2.3 cfs, less than the portion of the first-priority right awarded to the Street property. The pipeline crossed a parcel known as the Vawter property, owned by the Hussas. The Hussas gave permission for the pipeline to a predecessor in interest to the Barneses.

In the early 1990s, the Barneses extended the pipeline to another parcel they owned, the Tyeryar property, using a portion of their first-priority allotment on that parcel. The Hussas objected to the use of first-priority water on the Tyeryar parcel and eventually notified the Barneses that they were revoking permission for the pipeline. The Barneses then initiated the present litigation to protect their right to continue using the pipeline. The Hussas cross-complained, asserting that use of first-priority water on the Tyeryar property violated the 1934 decree and, in a closing brief, raised the issue of partial forfeiture because the pipeline did not have the capacity to carry the full allotment of the Barneses. The trial court held that the Barneses have an "irrevocable license" for the pipeline, a holding apparently not challenged on appeal, upheld the extension of the pipeline to the Tyeryar property, and found no forfeiture of rights.

The court of appeal affirmed all the holdings of the trial court. With regard to use of first-priority water on the Tyeryar property, the court began by noting that California Water Code § 1706 and prior case law which § 1706 codified allow a change in point of diversion and place and purpose of use of pre-1914 rights if others are not injured by the change. Although the 1934 decree identified the Street property as the place of use of the Barneses' water right and did not expressly authorize the use of water elsewhere, the court held that California law, as expressed in § 1706, gives the right to make a change in use provided others are not injured.

Addressing the burden of proof with regard to the issue of injury, the court rejected the Hussas' argument that the burden is on the person seeking the change. Instead, the court held that the issue is controlled by California Evidence Code § 500, which

places the burden on the party for whom the fact is essential. Finding that it was the Hussas who sought to enjoin the change, the court found the Hussas had the burden. The court noted that injury from a change in place of use usually results from the use of a greater amount of water or a reduction of return flows. Observing that the Hussas had produced no evidence of either, the court held that they had not shown injury.

Although not strictly a water law question, one of the more interesting aspects of the case is the court's treatment of the Hussas' claim that the extension of the pipeline to the Tyeryar property was an unlawful expansion of the irrevocable license. Citing prior California case law involving rights-of-way, the Hussas relied on a widely-applied rule that an easement appurtenant to one parcel cannot be extended to another parcel. The court refused to apply the rule. It first noted that the Hussas had not explained why the license was appurtenant to the Street property. Second, the court distinguished the California precedents on which the Hussas relied, noting that a road is different than a pipeline. In the absence of authority directly forbidding the holder of an easement for a pipeline to change the destination of the water conveyed by the pipeline and in the absence of any evidence that the change in destination adversely impacted the servient parcel, the court held that the Hussas had not established an impermissible expansion of the license.

Finally, the court of appeal held that the trial court did not commit error in refusing to find a partial forfeiture because the Barneses' right exceeded the capacity of the pipeline, despite testimony by a prior owner and a prior lessee of the Street property that only the pipeline had been used to irrigate the property from the late 1960s to the early 1980s, a period well in excess of the five years of non-use required for forfeiture under California Water Code § 1241. The court of appeal said that there was nothing in the record indicating that the trial court believed this testimony. More significantly, the court said even if the trial court believed the testimony, to establish forfeiture it was necessary to show that water in excess of the capacity of the pipeline was available for use during the forfeiture period. Finding no such evidence, the court held the trial court was correct in rejecting the forfeiture claim.

(Ronald B. Robie, Reporter)

County Groundwater Ordinance Can Limit Amount Pumped

The California Court of Appeal, Fourth District, Division One, has upheld a county groundwater ordinance that placed a limit on annual pumping against claims that it constituted a "taking." The case is *Allegretti & Co. v. Imperial County*, 138 Cal. App. 4th 1261, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

At issue is Imperial County's groundwater ordinance which requires a conditional use permit to install a well. In Allegretti's case the county imposed a condition that he extract no more than 12,000 acre-feet a year of water from the underlying aquifer. The court held that the restriction was neither a *physical* nor a *regulatory* taking of water rights and denied an inverse condemnation claim.

The court reviewed the general principles of law involving "takings." In discussing the physical takings issue, the court referred to a statement of the California Supreme Court in *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1237 n.7, 99 Cal. Rptr. 2d 294 (Cal. 2000) that "overlying water rights are usufructuary only, and while conferring the legal right to use the water that is superior to all other users, confer no right of private ownership in public waters."

Allegretti relied on the decision of the Federal Circuit Court of Claims in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001), in support of its physical takings argument. This case held that water users with contracts with the U.S. Bureau of Reclamation were entitled to compensation when their contract supplies were reduced due to government compliance with the Endangered Species Act. The court of appeal declined to rely on *Tulare Lake*'s reasoning to find a physical taking. It also distinguished it "by virtue of the existence of identifiable contractual rights between the plaintiffs and water rights holder, rights that are not present in this case." *Allegretti*, 42 Cal. Rptr. 3d at 131. The appellate court went on to cite with approval another court of claims case that "rejected the underpinnings" of the Tulare case: *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504, 538 (Fed. Cl. 2005).

In rejecting the regulatory taking argument, the court applied the factors in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The court noted that Allegretti did not demonstrate any economic impact from the pumping limitation. Although Allegretti claimed he could not farm all 2,400 acres he owned, the court held that his water right is limited to reasonable beneficial use under article X, section 2 of the California Constitution. "Allegretti's claim to an unlimited right to use as much water as it needs to irrigate flies in the face of that standard, and it has not pointed to any evidence in the record that its proposed irrigation . . . would be reasonable within the meaning of the constitutional restriction." *Allegretti*, 42 Cal. Rptr. 3d at 136.

The court noted that in *Baldwin v. Tehama County*, 31 Cal. App. 4th 166, 36 Cal. Rptr. 2d 886 (Cal. Ct. App. 1994), counties are permitted to adopt ordinances for the conservation of groundwater.

This opinion is not yet final as the time for filing a petition for review with the California Supreme Court has not yet run.

COLORADO

(William A. Paddock, Reporter)

Contractual Limitations on Changes of Water Rights

Public Service Co. of Colorado v. Meadow Island Ditch Co. No. 2, 132 P.3d 333 (Colo. 2006), involves a dispute over the terms of two ancient contracts limiting the exercise of irrigation water rights and how the terms of those contracts are applied in a rapidly urbanizing area with competing demands for limited water resources. The Meadow Island Ditch Company (Meadow Island) owns priority No. 12 for 57.83 c.f.s. with an appropriation date of May 3, 1866, and priority No. 41 for 8.33 c.f.s. with an appropriation date of April 10, 1876, both for irrigation use. The Meadow Island Ditch shares a headgate on the South Platte River with the Beeman Ditch and Milling Company. The Beeman Ditch owns 12 shares of stock out of 90 shares of stock in the Meadow Island Ditch Company, and it shares both the headgate and the first 125 feet of the Meadow Island Ditch.

In 1925 a dispute arose between the Meadow Island Ditch Company and the Consolidated Ditches Company of Water District No. 2 (Consolidated Ditches) over Meadow Island's delivery of water to the Beeman Ditch. The dispute was resolved by a May 1925 Agreement between Meadow Island and Consolidated Ditches. Under that Agreement, Meadow Island agreed to limit its diversions and not to "*claim or directly or indirectly divert*" more than 40 c.f.s. Meadow Island further agreed not to use the 40 c.f.s. "*upon the land except such as may be irrigated by water diverted at said head-gate under the ditches of this time constructed and used*" and that it would not "*draw, or cause to be drawn, water*" from the South Platte "*except at its present headgate on said river. . . .*" 132 P.3d at 336. The agreement went on to state that it was the intention of the parties to limit the draft on the river by Meadow Island's priorities No. 12 and 41 to 40 c.f.s.

In turn, in June 1925, Meadow Island entered into an agreement with the Beeman Ditch (the June 1925 Agreement). That agreement incorporated the terms of the May 1925 Agreement with Consolidated Ditches and provided that Meadow Island would deliver to the Beeman Ditch, in addition to its 12/90ths of the water diverted through their joint headgate, "*all the water not required for immediate use*" by Meadow Island (the Excess Water).

The Public Service Company of Colorado (PSCo) owns 18.5 of the 40 shares outstanding in the Beeman Ditch. PSCo filed an application to change the point of diversion of its interest in the Beeman Ditch's 12/90ths in the Meadow Island Ditch, and its pro rata interest in the Excess Water, to new downstream points of diversion, including several wells, and also to use the water to augment out-of-priority depletions. The water diverted at the alternate points of diversion and by virtue of PSCo's replacement of out-of-priority depletions was to be used for industrial purposes at a power plant located on lands historically irrigated by the Meadow Island water rights.

Meadow Island objected to PSCo's application and sought a pretrial ruling that PSCo could not change the type or place of use of the Excess Water because it only had a contractual right to use the water. Meadow Island also asserted that under the 1925 Agreements, PSCo could not change the point of diversion or place of use of its 12/90ths of the Meadow Island Ditch water rights. PSCo conceded it could not change the point of diversion, but asserted it was entitled to change the use of the water rights, including the Excess Water.

Prior to trial the water court ruled that PSCo did not own and did not have Meadow Island's consent to change the "Excess Water" and, without that consent, PSCo's use of the excess water was governed by the June 1925 Agreement. The case went to trial on the issues, *inter alia*, of whether PSCo could change the type of use of the water from irrigation to industrial use and whether PSCo's plan for augmentation constituted a change in point of diversion of the water rights. Based upon extrinsic evidence the water court found that the purpose of the May 1925 Agreement was to prevent the expansion of the Meadow Island's priority No. 12 to irrigate lands not then irrigated by the Meadow Island and Beeman Ditches. On this basis, the water court found no intent to limit future uses to irrigation. With respect to the change in point of diversion, the water court found that since PSCo would continue to divert its water through the jointly-owned headgate, the augmentation plan did not constitute a change in point of diversion.

PSCo appealed the water court's denial of its request to change the Excess Water and Meadow Island cross-appealed the water court's ruling that the augmentation plan was not a change in point of diversion. The Colorado Supreme Court unanimously upheld the water court's ruling on the Excess Water and upheld, by a vote of 5 to 2, the water court's ruling that the augmentation plan did not constitute a change in point of diversion.

On appeal PSCo argued that the water court erred when concluding that the June 1925 Agreement was unambiguous and did not grant PSCo the right to change the Excess Water. The court observed that because the June 1925 Agreement did not expressly grant the right to change the use of Excess Water, the question before it was whether the agreement implicitly grants a right to change the water's use. The court concluded that it did not.

The court began its analysis by distinguishing between water rights acquired by appropriation and rights to use water acquired by contract. The court pointed out that the owner of a water right has a statutory right to change the water right but that a change to water right used pursuant to a contract requires the consent of the water right's owner.

The court then turned to the specific terms of the June 1925 Agreement. It found that the June 1925 Agreement only added one term to the May 1925 Agreement, namely the delivery of Excess Water to the Beeman Ditch. The court also pointed out the limited nature of PSCo's contract right to Excess Water: that the amount of water available varied depending upon Meadow Island's needs and that no fixed amount of delivery was required by the agreement. The court found that the parties did not bargain for the right to change the Excess Water because the dispute resolved by the 1925 Agreements was the distribution of Meadow Island's water and it did not intend to grant the right to change the use of the Excess Water.

PSCo argued that Colorado's policy of maximizing the beneficial use of water should cause the court to construe the June 1925 Agreement in favor of allowing a change to the Excess Water. The court rejected this argument, reasoning that the scope of PSCo's right to use water was defined by contract and that, while general provisions of Colorado law may still apply, their application is subject to the terms of the contract.

On the cross-appeal, the court took an entirely different approach. The water rights involved were adjudicated water rights owned by the Beeman Ditch, not contract rights. The court stated that contractual restrictions on adjudicated water rights are to be construed narrowly to avoid depriving its owner of rights that it did not clearly, or by necessary implication, grant in the contract.

At issue was PSCo's argumentation plan under which it would run its water down the Beeman Ditch and PSCo's lateral, without use, and then return it to either the South Platte River or St. Vrain Creek. The water so returned would then be used to augment out-of-priority diversions by the water rights for PSCo's junior wells. In effect, the water diverted at the Meadow Island Ditch headgate would be returned to the river downstream as replacement water or substitute water to offset the junior wells' depletions and thereby maintain the supply available to downstream senior water rights. The majority held that under these circumstances the water was not "diverted" by PSCo at any location except the Meadow Island Ditch, and therefore, was not a violation of the 1925 Agreements.

To bolster its conclusion, the court pointed out that in 1925 augmentation plans were unknown and therefore the parties could not have contemplated whether augmentation of downstream diversions would be considered a change in point of diversion. The majority went on to point out that augmentation plans were part of Colorado's statutory mechanisms to promote the maximum

beneficial use of water. Under augmentation plans, the historical consumptive use of the water right used for augmentation may not be increased. The court stated that the 1925 Agreements were intended to limit Meadow Island's draft to 40 c.f.s., which the majority viewed as correlating to the purpose of preventing an enlargement of Meadow Island's historical consumptive use. On this basis, the majority said that approval of the plan for augmentation was consistent with the intent of the 1925 Agreements to limit the use of water diverted into the Meadow Island Ditch. The majority reiterated that contractual restrictions on adjudicated water rights are to be narrowly construed and therefore declined to restrict PSCo's adjudicated water rights by imposing limits not required to fulfill the 1925 Agreements' purposes and intent of preventing enlarged use.

The dissent did not take issue with the principle that contracts restricting the use of adjudicated water rights should be narrowly construed. The dissent, however, read the May 1925 Agreement as expressly limiting both the point at which the Meadow Island's water rights could be diverted and the use to which the water could be applied. The dissent relied upon the provision in the May 1925 Agreement that prohibits the Meadow Island's water rights from being

> used upon any land except such as may be irrigated by water diverted at said head-gate under the ditches of this time constructed and used, and it will not draw, *or cause to be drawn*, water from said river or its tributaries under its said decreed priorities, *except at its present head-gate* on said river. . . .

132 P.3d at 335 (emphasis added).

The dissent pointed out that the contract does not merely require diversions at the Meadow Island headgate, but it also prohibits diversions at any other point of diversion, either directly or indirectly. It then argued that the augmentation plan effectively allows rediversion of the Meadow Island water rights at the new points of diversion used in PSCo's augmentation plan, and permits the water to be used on lands other than those irrigated under the Meadow Island and Beeman ditches in 1925. Because it found both of these changes to be in violation of the plain language of the May 1925 Agreement, the dissent would have denied the change in water rights and plan for augmentation.

WELL OWNER'S LIABILITY FOR ILLEGAL DIVERSIONS

Vaughn v. People ex rel. Simpson, No. 04SA381, 2006 WL 1313173 (Colo. May 15, 2006) (not yet released), involves an action by the State Engineer pursuant to Colo. Rev. Stat. § 37-92-503(6)(a) to enforce a valid order of the Division Engineer issued pursuant to Colo. Rev. Stat. § 37-92-502 ordering the cessation of diversions by a well owned by the defendant, Michael Vaughn. The Division Engineer's order was mailed to Vaughn and a copy of the order was posted on the power meter supplying electricity to the well. The specific issue in this case was whether, under section 503(6)(a), the Division Engineer was required to issue the cease and desist order to the person who was actually operating the well in violation of the order as opposed to the owner of the well.

Section 37-92-503(6)(a) is one of a number of statutory amendments adopted in 1996 to assist the Division of Water Resources in the effective enforcement of orders to prevent out-of-priority diversions, and in particular out-of-priority diversions of groundwater. That section provides:

> Any person who diverts ground water contrary to a valid order of the state engineer or a division engineer issued pursuant to section 37-92-502, . . . or otherwise in violation of rules and regulations adopted by the state engineer to regulate or measure diversions of ground water shall forfeit and pay a sum not to exceed five hundred dollars for each day such violation continues.

Vaughn claimed that he was not properly the subject of the enforcement action because he was not the person who diverted groundwater contrary to the order of the Division Engineer. Vaughn denied having personal knowledge of the order, but did admit that he had delegated irrigation of the involved land to members of his family.

The court found that the well had been pumped in violation of the Division Engineer's order and, based upon circumstantial evidence, also found that Vaughn was actually aware of the order and that he could not have been unaware of pumping in violation of the order. The evidence also established that the illegal pumping amounted to approximately six million gallons (18.4 acre-feet) of water. Based on the evidence, the court found that Vaughn or his family members operated the well in violation of the order, and therefore Vaughn could properly be held liable for the illegal operation of the well.

In his appeal Vaughn raised no constitutional challenges to the statutory scheme. Rather, he simply argued that the statute imposes liability upon the person who actually turns on the well and that there had been a failure of proof that he personally operated the well, or even that members of his family did so.

Vaughn's defense required the court to interpret the phrase "any person who diverts" in section 503(6)(a). The court pointed out that both the term "person" and "divert" are defined terms in the Water Right Determination and Administration Act of 1969. Section 37-92-103(8) defines a "person" as an individual, a partnership, a corporation, a municipality, the State of Colorado, the United States, or any other legal entity public or private. And section 37-92-103(7) defines "divert" to include removing water from its natural course or location by means of a well. Based on these definitions the court concluded that the terms of section 503(6)(a) did not restrict liability to natural persons who physically turn on the well. The court found that the context in which the legislature had used these words made clear that they were to be given the same meaning as used elsewhere in the Act. The court concluded that the terms "person" and "divert" as used in section 503(6)(a) demanded an interpretation that makes the owner of the well liable for the acts of others who operate the well. The court reasoned that any other construction would undermine the purpose of the statutory scheme to ensure the enforcement of orders of the Division Engineer. In light of the water court's specific findings about Vaughn's knowledge of the order and the operation of the well, the court held that the statute imposes liability on the owner or user of the water rights to whom an order to discontinue was validly issued when the well continues to be used with that owner's authorization.

NEW LEGISLATION AFFECTING WATER RIGHTS ADOPTED BY 2006 COLORADO GENERAL ASSEMBLY

Recreational In-Channel Diversion Water Rights—Senate Bill 06-037. The nature and scope of recreational in-channel diversion water rights (RICDs) and the role of the Colorado Water Conservation Board (CWCB) in defining the scope of those water rights has been a very contentious issue ever since the 2002 adoption of legislation authorizing these types of instream water rights.

In 2006 the Colorado General Assembly adopted Senate Bill 06-037 amending the RICD legislation. The new legislation clarifies the respective roles of the CWCB and the water court, establishes limits on the time RICD water rights may be in effect, the amount of water claimed, the administration of such rights, and presumptions regarding the absence of injury from new uses that reduce the quantity of water available to an RICD water right.

With respect to the CWCB, it is no longer required to hold hearings on a proposed RICD, and instead, after public deliberations, is to make written recommendations to the water court as to whether (1) the proposed RICD will materially impair Colorado's ability to fully develop and beneficially use its interstate compact entitlements; (2) the exercise of the RICD would cause material injury to instream flow water rights; and (3) the adjudication and administration of the RICD would promote maximum utilization of the waters of the state. This change relieves the CWCB of the burden of long and contentious hearings on RICD water rights and limits the findings it is required to make. To the extent the CWCB has concerns about the RICD application it can fully participate in the water court adjudication.

The new legislation also added and amended statutory definitions applicable to RICDs with the intention of eliminating ambiguities in the prior law and more precisely defining the scope of an RICD. The legislation adds a definition of "control structure," which is the type of in-channel structure required for RICDs, and requires that such structures be designed by or under the direct supervision of a registered professional engineer.

Under the new law, the parties will no longer debate what is the minimum amount of water required for a reasonable recreational experience. The statute now defines reasonable recreational experience as the recreational use of an RICD for non-motorized boating. In turn, the definition of RICD limits the time an RICD can be in effect to April 1 through Labor Day, unless the applicant demonstrates there will be a demand for recreational boating on additional days. RICDs are now limited to one specified flow rate for each time period claimed by the applicant and the presumptive minimum duration of such a time period is 14 days. The legislation adds a presumption of no material injury to an RICD water right from new appropriations or changes of water rights that do not cause depletion of more than 0.1% of the lowest decreed RICD flow rate and that the cumulative effect of all such changes and new appropriations do not exceed 2% of the lowest decreed RICD flow rate.

The role of the water court was also changed by the legislation. The water court must still consider as presumptively correct the findings of the CWCB, subject to rebuttal by any party. In addition, the water court must make specific findings that the RICD will (1) not materially impair Colorado's ability to fully develop and beneficially use its compact entitlements; (2) promote maximum utilization of the waters of the state; (3) include only that reach of the stream that is appropriate for the intended use; (4) be accessible to the public for the uses proposed; and (5) not cause material injury to instream flow water rights.

In determining whether the intended recreational experience is reasonable and the claimed amount of water is the appropriate flow for any period, the water court must consider all factors that bear upon the reasonableness of the claim. If the court determines that the proposed RICD would materially impair Colorado's ability to fully develop and consumptively use its compact entitlements, the application must be denied. In determining the minimum amount of stream flow needed for the RICD, the court must also make findings in the decree as to the flow rate below which there is no longer any beneficial use of water at the control structures. The court must also make the determination of the total volume of water in acre-feet claimed by the RICD. Finally, if the court determines that the volume of water represented by the flow rates decreed for the RICD exceeds 50% of the average historical water volume for the stream segment where the RICD is located, on each day that a claim is made, the decree must (1) specify that the State Engineer shall not administer a call for the RICD unless the call would result in at least 85% of the decreed flow rate for the applicable time period; (2) limit the RICD to no more than three time periods; and (3) specify that each time period is limited to one flow rate.

Rotational Crop Management Contracts—House Bill 06-1124. In Colorado, water to meet growing municipal water needs is obtained, in large part, by purchasing senior irrigation water rights and changing them to municipal use. Such changes of water rights typically require that the historically irrigated lands be revegetated and permanently removed from irrigation. More recently some municipal water users have experimented with contracts with irrigation ditch companies or a large number of shareholders under a ditch for a rotational dry-up of irrigated lands to provide water to the municipalities, provide cash to the farmers for the use of their water, but not to remove specific lands from irrigation on a permanent basis. House Bill 06-1124 provides statutory guidelines for this type of change of water rights and, more importantly, a mechanism to fund the enforcement and administration of these programs.

H.B. 06-1124 defines a rotational crop management contract as a written agreement by which one or more irrigation water right owners implement a change of water rights requiring the dry-up of historically irrigated lands, but which allows the dry-up lands to change, and which requires water court approval of the rotation of the dry-up lands. The implementation of such contracts requires a water court-approved change of water rights or State Engineer-approved substitute water supply plan, both of which are subject to all normal requirements intended to prevent injury to other vested water rights from the proposed change of water rights. The law also protects the farmers against a diminution of their historical consumptive use if the contract user of the water fails to use it in the year when the farmer fallows his fields.

In the change of water rights proceeding, if the water court approves the contract, the judge must make affirmative findings that the implementation of the contract (1) is capable of administration; (2) will not cause injury by expansion of consumptive use or change of historical return flow patterns; and (3) will comply with applicable requirements to prevent soil erosion, manage weeds, and for revegetation. H.B. 06-1124 requires the applicant to pay the State Engineer an initial evaluation fee, an annual administrative fee until the plan is decreed, and a lower annual administration fee once the plan is decreed.

Underground Water Storage—Senate Bill 06-193. In 2004 the Colorado Water Conservation Board (CWCB) completed a statewide reconnaissance level study of the potential for underground water storage. Senate Bill 06-193 directs the CWCB to conduct a further study of the most economically and technically feasible and ecologically sound underground storage sites in the South Platte and Arkansas River Basins. The report is to be submitted to the General Assembly by March 1, 2007. The goal of this study is to identify locations where water can be stored without the construction of surface reservoirs.

OREGON

(Jennie L. Bricker, Reporter)

COURT OF APPEALS INVALIDATES DESCHUTES BASIN GROUNDWATER RULES

In *WaterWatch of Oregon, Inc. v. Water Resources Commission*, 199 Or. App. 598, 112 P.3d 443 (2005), the Oregon Court of Appeals invalidated two sets of rules governing the issuance of groundwater permits, holding that the Oregon Water Resources Commission (the Commission) exceeded its statutory authority in promulgating rules related to the mitigation of groundwater use impacts on scenic waterway flows in the Deschutes River Basin. In its 2002 rules, the Commission had amended the Deschutes Basin Program to allow the appropriation of groundwater and to establish mitigation requirements. On review, the court held that the rules violated Oregon statutes governing scenic waterways, groundwater rights, and instream rights.

One set of rules barred the appropriation of groundwater in the Deschutes Ground Water Study Area, with an exception for the cumulative total of 200 cubic feet per second. Or. Admin. R. 690-505-0500(1). In recognition of the impacts on stream flow from groundwater use, the rules required mitigation measures to be taken prior to approval of a groundwater permit. Such mitigation measures were required to "moderate" the impacts to surface water flows from a groundwater appropriation. Or. Admin. R. 690-505-0605(8). The second set of rules provided for mitigation banks and credits in the Basin.

The court began its examination of the rules by reviewing the underlying statute, which declares, in part, that: "the highest and best use of the waters within scenic waterways are recreation, fish and wildlife uses. The free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses." Or. Rev. Stat. § 390.835(1). That policy applies to portions of the Deschutes River that are designated scenic waterways and to certain applications for the use of groundwater if the Water Resources Director finds that the "use of ground water will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife." Or. Rev. Stat. § 390.835(9)(a).

The court's invalidation of the rules turned on the dictionary definition of "maintain," which the court contrasted with the rules' requirement that stream flow diminution be "moderated." The court concluded that *moderation* of groundwater impacts was inconsistent with the legal standard expressed in Or. Rev. Stat. § 390.835, which requires *maintenance* of stream flows. Moreover, the court concluded that the rules governing groundwater withdrawals and mitigation of those withdrawals, and the rules governing mitigation credits and banks, "constitute a unitary scheme based on the definition of 'mitigation,' " and because that definition departed from the statutory requirement in Or. Rev. Stat. § 390.835 to maintain flows, both sets of rules were invalid. Specifically, the court invalidated Or. Admin. R. 690-505-0400 to 690-505-0630 and Or. Admin. R. 690-521-0100 to 690-521-0600. Shortly after the decision, however, the Oregon legislature restored the rules (see discussion below).

OREGON 2005 LEGISLATIVE SESSION RESTORES DESCHUTES BASIN GROUNDWATER RULES, REVISES MUNICIPAL WATER PERMIT EXTENSION PROCESS, AND ADJUSTS WATER RIGHT TRANSFER REQUIREMENTS

In prompt response to the court's holding in *WaterWatch of Oregon, Inc. v. Water Resources Commission*, 199 Or. App. 598, 112 P.3d 443 (2005), the Oregon Legislature restored the Deschutes Basin groundwater rules and mitigation program. The 2005 Legislative Assembly passed House Bill 3494, effective July 29, 2005, which amended Or. Rev. Stat. §§ 537.505 and 537.795 to certify the groundwater mitigation rules adopted by the Commission in 2002 as satisfying the requirements relating to mitigation under the Scenic Waterway Act, the Instream Water Rights Act, and the Ground Water Act. However, the new legislation contains a sunset provision that repeals the rules in January 2014.

Additionally, it requires that the Commission report to the Legislature on the implementation and operation of the Deschutes groundwater mitigation and mitigation bank programs by January 2009. The report must specifically address (1) the cumulative rate of water appropriated under all groundwater permits approved in the Basin under the rules; (2) the volume of water provided through mitigation; and (3) the measured stream flow of the Deschutes River and its tributaries. The report is intended to monitor whether the mitigation program is, in fact, maintaining stream flows.

The 2005 Legislature also adopted House Bill 3038 (effective June 29, 2005), which extends the statutory timeline—from 5 to 20 years—for new municipal water permit holders to commence and complete construction under their permits. The legislation requires that all municipal permit extensions be conditioned to require a water management and conservation plan prior to diverting water beyond the maximum amount currently beneficially used by the municipality. For permits issued before November 2, 1998, an extension issued after June 25, 2005, must meet the additional requirement that the undeveloped portion of the permit will maintain the persistence of listed fish species. *See* Or. Rev. Stat. §§ 537.230, 537.250, 537.409 & 537.630.

Finally, the 2005 Legislative Assembly enacted House Bill 2123, which modifies Or. Rev. Stat. § 537.610 to require the Commission to adopt rules for defining the process and standards by which it will recognize changes in the place of use, type of use, or point of appropriation for pre-1955 claims to appropriate groundwater. The legislation also modifies Or. Rev. Stat. § 540.531 to allow transfers of a surface water diversion to a groundwater well. To allow this type of transfer, use of groundwater at the new point of appropriation must affect the surface water source "similarly" to the use of the originating surface water right, but H.B. 2123 eliminates the requirement that the groundwater come from an unconfined aquifer.

CHANGES IN OREGON ADMINISTRATIVE RULES

To implement the statutory changes in House Bill 3038 (see above), the Commission modified many of the rules in Or. Admin. R. ch. 690, div. 315. The new rules adjust the standards the Oregon Water Resources Department (the Department) uses to review applications for extensions of time filed by holders of municipal use permits. The rules also clarify that holders of municipal permits may not develop additional water under the permits until the Department approves a water management and conservation plan.

Oregon rules regarding the practice and procedure relative to contests in the adjudication of water rights have been amended. *See* Or. Admin. R. 690-030-0085. Once a claim was filed in an

adjudication, claimants were historically required to wait until the adjudication was complete in order to add or change points of diversion for water uses covered under the claim. The rules now allow claimants to make such changes to their water rights while the adjudication is still pending, so long as the new diversion points draw from the same source; do not increase the rate, duty, acreage benefited, or season of use; and are downstream of the original diversion point.

TEXAS

(Bruce Wasinger, Reporter)

Littoral or Riparian Rights Do Not Attach to Land Adjacent to Artificial Lake Impounding Floodwaters

In *Cummins v. Travis County Water Control & Improvement District No. 17*, Cause No. 05-0945, the Texas Supreme Court denied the Cumminses' petition for review on April 21, 2006. The Cumminses were seeking to overturn a court of appeals decision that they did not have littoral or riparian rights to use Lake Travis despite owning land along the shores of the lake.

The court of appeals, in *Cummins v. Travis County Water Control & Improvement District No. 17*, 175 S.W.3d 34 (Tex. App.—Austin 2005), held that the Cumminses did not have littoral rights for essentially two reasons. First, title to the Cumminses' property could not be traced back to a grant from a sovereign between 1823 and 1895 and, second, their land is not adjacent to a natural lake with a normal flow of water since the flows impounded by Lake Travis are flood flows.

The Cumminses had filed an application with the Travis County Water Control and Improvement District No. 17 (the District) for a license to construct a boat dock in Lake Travis. The proposed location of the boat dock violated certain District raw water setback rules and the application was denied by the District.

The Cumminses then filed a declaratory judgment action with the state district court, requesting the court to declare that the Cumminses had littoral rights to use their lakefront property for the purpose of constructing the boat dock and also challenging the District's raw water setback rules. The state district court found for the District. On appeal to the court of appeals, the scope of the case was expanded and changed from "a right to build a boat dock" to a case addressing the legal rights associated with littoral rights. In other words, the Cumminses argued that they could use their land as a lakefront property owner, which entitled them to construct a boat dock, among other things.

The court of appeals first addressed and defined the terms "riparian" and "littoral." In Texas jurisprudence, riparian and littoral rights are treated similarly and used interchangeably even though, as defined, riparian refers to the waters of rivers and streams and littoral refers to waters of lakes, seas, and oceans. Generally, in Texas, the courts use the term riparian as a blanket term to refer to a landowner's rights regarding any type of waterfront property.

Land granted from the Mexican or Spanish governments between 1823-1840 was vested with civil law riparian rights. In 1840, Texas adopted the English common law riparian system. Texas continued to recognize common law riparian rights in land granted from the sovereign until 1913, when Texas passed legislation that ceased to recognize riparian rights that were not already vested and prohibited their creation by state land patents issued after July 1, 1895. Unless a landowner can trace his chain of title to a grant from the Mexican or Spanish governments between 1823-1840, or to a grant from the State of Texas between 1840-1895, the landowner cannot establish that his land is vested with riparian or littoral rights. In 1967, in an effort to alleviate the complications resulting from the dual system of civil law and English common law, Texas passed the Water Rights Adjudication Act, Tex. Water Code §§ 11.301 - .341, which required Texas landowners to file claims for water rights and obtain a certificate of adjudication. Any person who failed to timely file a claim was deemed to have abandoned or waived his right to use the water, whether the nature of the claim was riparian or appropriation.

The court of appeals held that, assuming the landowner can establish a proper chain of title and/or obtain a certificate of adjudication, there are also physical attributes that must be present in order for land to be considered riparian or littoral. The land must be adjacent to the water. The adjacent water must be a natural, not an artificial, body. Texas courts have repeatedly held that riparian rights do not attach to artificial bodies of water and only attach to the normal flow of the waters, as opposed to floodwaters.

The court of appeals held that riparian rights did not attach to the Cumminses' land because their chain of title originated with a grant from the State of Texas in 1904, some nine years after Texas ceased recognizing common law riparian rights in grants of waterfront property. The Cumminses also did not obtain a certificate of adjudication. Additionally, the court of appeals held that Lake Travis is an artificial lake and the waters filling the lake are not considered its normal flow but instead are floodwaters.

UTAH

(L. Ward Wagstaff, Reporter)

Utah Supreme Court Addresses Burden of Proof for Change Applications

In Utah, almost all water basins are fully appropriated. Growth is accommodated by an active water market, in which existing water uses, especially irrigation, are retired and the water rights are moved to new points of diversion where they can be used for other purposes, often municipal or industrial. In the new diversion area, however, this process creates tension between the new uses and existing water rights. In *Searle v. Milburn Irrigation Co.*, 2006 UT 16, 133 P.3d 382 (Utah 2006), the Utah Supreme Court addressed some threshold questions raised by this trend, and attempted to clarify the burden of proof for applicants seeking to change the point of diversion of a water right.

The Searles planned to build a cabin on some mountain property in the scenic Wasatch Plateau east of the San Pitch River valley in central Utah. The area is closed to new water appropriations, so they purchased a water right in the valley and filed a change application to move the point of diversion to a well near the mountain property.

Milburn Irrigation Company is a small mutual irrigation company that has an early priority water right to divert water from the San Pitch River for irrigation of land in the valley. Late in the irrigation season, the flow of the San Pitch River is usually not sufficient to supply Milburn's full water right. The Searles' original point of diversion in the valley is downstream from Milburn's

diversion, but the well they sought to take water from under the change application is up-gradient from Milburn's source. Milburn therefore protested the Searles' change application.

The State Engineer denied the change application, and the Searles sought de novo review in the district court. The trial court heard conflicting expert testimony and ruled in favor of Milburn and the State Engineer, finding "by a preponderance of evidence, that the rights of [Milburn] will be impaired if the application is approved." *Searle*, 133 P.3d at 386. The Searles appealed to the Utah Supreme Court.

On appeal, the Utah Supreme Court addressed three issues: (1) whether the trial court employed the proper standard of proof for the initial showing of no impairment by a change applicant; (2) whether the trial court properly allocated the burden of proof between the applicant and the opposing party; and (3) whether the trial court correctly considered circumstantial evidence supporting impairment.

The court acknowledged that some of its earlier statements regarding the burden of proof for change applications were confusing, perhaps even misleading. In *Crafts v. Hansen*, 667 P.2d 1068 (Utah 1983), the court explained in dicta that after an applicant has made a showing that there is reason to believe the change will not impair existing rights, the protesting party bears the burden of proving by a preponderance of the evidence that impairment will actually occur. *See id.* at 1081. This statement, however, can be understood in several different ways. The Searles argued that the applicant's initial burden is to show, by a very low standard, that there is reason to believe no impairment will occur; if the applicant meets this burden, the burden of persuasion shifts to the opposing party to prove actual impairment by a higher standard, in effect by clear and convincing evidence.

The court rejected this argument. It explained that an applicant bears an initial burden of showing there is reason to believe the change can be made without impairing existing rights. The reason to believe standard is analogous to probable cause. If a party opposes the change on grounds of impairment, it must prove impairment by a preponderance of the evidence. In other words, if a change application is unopposed, it should be approved if the applicant provides "evidence to support a reasonable belief that the changes . . . can be perfected without impairing vested rights." *Searle*, 133 P.3d at 394. But if an opposing party offers evidence contradicting the applicant's evidence, the trial court will decide the question based on which party offers the more convincing evidence.

This means that the "reason to believe" initial standard has little practical utility in contested cases, because the effective standard will be the preponderance of the evidence. Presumably, if an applicant offered just barely enough evidence to show reason to believe there would be no impairment, the opposing party could defeat the change by offering just barely more evidence to the contrary.

The court also clarified that the applicant bears the burden of persuasion throughout the process, even though the burden of producing evidence shifts to the party opposing the change.

The court also held that the trial court can consider circumstantial evidence of impairment. In this case, a critical factor was that Milburn's source no longer provides adequate water in most years to fill Milburn's water right. Thus, evidence that the Searles' proposed point of diversion was hydrologically connected to Milburn's source was, in effect, evidence of impairment.

The initial opinion, issued in September 2005, referred to a procedure when proof is filed whereby the applicant must prove to the State Engineer by a preponderance of evidence that the water right does not impair prior rights. No such procedure or requirement is in the statutes, case law, or the State Engineer's administrative procedures. At that stage, an impaired party's recourse normally would be a private action to enforce the priority. On petitions for rehearing, the court wisely omitted that discussion, although it retained several references to a "final adjudication" regarding impairment. *See, e.g., id.* at 391-93.

The court concluded by remanding the case to the trial court, even though the trial court in its original opinion had already found the likelihood of impairment by a preponderance of the evidence.

The case clarifies the respective burdens for applicants and protestors of change applications, but leaves much room for argument. Given that almost all of Utah is now closed to new appropriations, more disputes will arise as water users seek to move water rights from areas of historical use into new areas, particularly as municipalities and industries grow and their need for water expands. This case will almost certainly be further refined and explained by the court as it struggles to balance the interests of prior water right users with the interests of those seeking to move water rights into areas of heavy use.

WASHINGTON

(Amy K. Kelley, Reporter)

A Once and Future Plan?

Despite the popular notion that Washington is the state where it rains all the time, water supply problems have been hugely problematic for well over a decade, especially in eastern Washington. In the spring of 2006, the state legislature passed "An Act Relating to water resource management in the Columbia river basin," in order to start tackling some of the problems, 2006 Wash. Legis. Serv. ch. 6, S.S.H.B. 2680. Given all the fanfare in the press; the gushing of high level folks like the governor, the director of the Department of Ecology (DOE), and the chair of the state senate Water, Energy and Environment Committee; and the cat calls of environmental organizations (several other environmental groups were supportive), one would think it was the biggest water deal since, well, the Grand Coulee Dam.

Someday that may be closer to the truth than it is now, but for the moment not a drop of "new" water has resulted from the bill, nor is it likely to for some time (and "new" doesn't mean imported). Even *if* all the ducks line up, several of the state's most protracted water issues are not even addressed: there are no new personnel for the DOE, so the thousands of backed up permit applications continue to pile up in a queue that might stretch to the top of Mt. Rainier; and the infamous "*Sinking Creek*" case, which limits the authority of the DOE and mandates litigation for too many disputes, is still waiting for a "fix," despite the shrinkage the case itself has seen in subsequent decisions.

The legislative process rarely results in *perfection*, however, and there is clearly some *good* in this Act. The unalloyed positive: by November 2006 the DOE is to complete the first annual "Columbia River water supply inventory" and the first "long-term water supply and demand forecast" (to be updated every five years).

This information will be supplemented by other data that must be gathered by the DOE, such as the "total aggregate quantity of water rights issued" and the "total aggregate of current water use." All of this is to be published on the DOE website and be periodically updated. This comprehensive and accessible data will be of great value to multiple constituencies, from irrigators to tribes, municipalities, and public interest organizations.

There would have been no great hoopla about an act concerning the accumulation of data; however, the nitty gritty of the law involves the encouragement (in a very preliminary way) of "new storage facilities" and "voluntary regional agreements" that are *hoped* to provide additional (or at least "firmed up") stored or conserved water for, in a 2/3 to 1/3 ratio, out-of-stream consumptive uses and instream flow augmentation. *Hope* is the operative word because although the act envisions an investment of $200 million, most of that will depend on future appropriations (or perhaps federal funding). Furthermore, any significant movement of water, in both a legal and literal sense, will depend on working out many, many details with federal agencies; the Army Corps of Engineers and the Bureau of Reclamation are omnipresent on the Columbia. And need I even utter the word "salmon"?

It is extremely premature to say what will happen. "Storage facilities" is a loose term and some fear dams in the offing. Even if that doesn't transpire, and there are simply lots of relatively small off-stream containment facilities, the amount of evaporation loss could be daunting (it already hit the high 90s in the Columbia Basin by mid-May). The Act requires that nothing "impair or diminish" existing water rights, and summer mainstream instream flows are to suffer "no negative impacts," but once water is out of the River it is hard to put it back (although not as hard as if the water is in the ocean), and as to the 1/3 of the water intended for instream flow augmentation, it has been noted that the fish may have little use for warm water.

In any event, environmental impacts are being studied, and a series of public meetings to discuss how to "implement" the Act were scheduled in eastern Washington for late May. A year or two should reveal whether this law delivers the goods.

Legislation Lite

Another law, 2006 Wash. Legis. Serv. ch. 168, S.S.B. 6151, that received less attention but has some immediate on-the-ground impact was enacted in 2006. The Odessa aquifer has been severely mined over the years (in anticipation of water deliveries from the Columbia Basin Project that have not materialized). There is no magic cure for water shortages in the new law, but there is some sensible relief in the (temporary?) abrogation of the "use or lose it" feature of prior appropriation law for some Odessa area water users. Those who do not use their full paper water right due to "conservation practices, irrigation or water use efficiencies [or] long or short term changes in the types or rotations of crops grown" are deemed to have "involuntary" nonuse, which excuses them from the forfeiture provisions of Wash. Rev. Code § 90.14.140(2)(b). Parties whose water is "unavailable" or "unsuitable" are also excused, but that would likely be true in any case. Parties seeking relief under this law are required to give notice to the DOE and to maintain their withdrawal and diversion facilities, and if the devotedly awaited-for Columbia Basin Project water ever does show up, the law is superseded.

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