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COURT CLARIFIES JURISDICTION OF GROUND WATER COMMISSION OVER SURFACE WATER IN DESIGNATED GROUNDWATER BASINS

(William A. Paddock, Colorado Reporter)

In Colorado, surface water and “tributary” groundwater are administered under the Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. §§ 37-92-101 through 602. Designated groundwater is governed by the Colorado Groundwater Management Act of 1965, Colo. Rev. Stat. §§ 37-90-101 through -143 (the 1965 Act). Designated groundwater is defined in section 37-90-103(6)(a) as:

[T]hat ground water which in its natural course *would not be available to and required for the fulfillment of decreed surface rights*, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin,

(emphasis added).

The Colorado Ground Water Commission (Commission) has exclusive jurisdiction over designated groundwater, but has no jurisdiction to regulate surface water or tributary groundwater. Jurisdiction over the administration of surface water and tributary groundwater is vested in the State Engineer and the water courts. *Gallegos v. Colorado Ground Water Commission*, 147 P.3d 20 (Colo. 2006), involves the jurisdiction issues that arise when senior surface water rights are claimed to have been injured by junior designated groundwater uses.

In 1987, the Commission established the Upper Crow Creek Designated Ground Water Basin in Weld County, Colorado (the Basin). The Basin was designated on findings that Upper Crow Creek is not a continuously flowing stream, and that groundwater withdrawals had constituted the principal water usage for at least 15 years before the first hearing on designation of the Basin. These findings brought the groundwater within the Upper Crow Creek Basin within the ambit of designated groundwater.

Gallegos owns surface water rights in the Basin that pre-date the designation of the Basin, and Gallegos’s predecessors were aware of and participated in the administrative hearing that led to the creation of the Basin. By 2003, Gallegos had begun complaining that groundwater diversions by wells in the Basin were reducing the surface water supply available to his senior surface

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CALIFORNIA RIVER RESTORATION PROJECTS PROCEED

(Ronald B. Robie, California Reporter)

SAN JOAQUIN RIVER RESTORATION COMPROMISE APPROVED

In October 2006, U.S. District Judge Lawrence K. Karlton approved a compromise agreement in *Natural Resources Defense Council v. Rodgers*, No. 88-1658 (E.D. Cal.). The agreement, if funded by the state and federal governments, will restore California’s second longest river—the San Joaquin—stretches of which have been dry most of the year since Friant Dam was completed more than 60 years ago. Prior to the construction of the dam and cessation of flows, the river supported a large spring run of Chinook salmon.

The dam was constructed by the Bureau of Reclamation (Bureau) of the U.S. Department of the Interior as part of the Central Valley Project. Water stored behind the dam is delivered through two canals—the Madera and Friant-Kern—to agricultural users in the San Joaquin Valley. After the dam was constructed, the destruction of fisheries in the river was approved by the State Water Rights Board in 1959 when it issued water rights (Decision 935) to the Bureau for the project.

Over the years, pressure built to restore the river and its fisheries. The passage of the National Environmental Policy Act (NEPA) (1969), the Clean Water Act (1972), the Endangered Species Act (ESA) (1973), and most importantly, the Central Valley Project Improvement Act (CVPIA) (1992) all contributed to the legal framework for the settlement of this lawsuit, which was filed in 1988. Also very significant were the U. S. Supreme Court ruling in *California v. United States*, 438 U.S. 645 (1978), holding that, under section 8 of the Reclamation Act of 1902, federal projects must comply with state water law unless there is a clear congressional directive to the contrary; and the California Supreme Court ruling in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (Cal. 1983), which held that the public trust doctrine applied to navigable waters in California.

Further, a few years ago the State Water Resources Control Board added fish and wildlife preservation and enhancement to the water rights of the Bureau for all its California projects. *See State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 (Cal. Ct. App. 2006).

Over the years, Judge Karlton made a number of rulings involving water service contracts for the project, the ESA, and NEPA. In *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit upheld his ruling that the Bureau violated the ESA in renewing contracts for the pro-

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GROUND WATER COMMISSION

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water rights. Gallegos demanded that either the State Engineer or the Commission administer junior wells in the Basin as necessary to protect Gallegos's senior surface water rights. The State Engineer, acting in his capacity as Executive Director of the Commission, declined to do so on the grounds that the extent of the impact on surface streams from use of designated groundwater was considered when the Basin was designated, and that the wells in the Basin were lawfully entitled to operate in conformity with their well permits.

This decision was administratively appealed to a Commission hearing officer who concluded that Gallegos's claim was barred by the doctrine of claim preclusion, reasoning that implicit in the designation of the Basin was a finding that the withdrawal of designated groundwater had only a *de minimus* effect on surface water, and that the designation of the Basin changed the law governing use of groundwater—subjecting it to the modified prior appropriation doctrine of the 1965 Act. The hearing officer also held that while the Commission had exclusive jurisdiction over designated groundwater in the Basin, it had no jurisdiction over surface water rights in the Basin, and therefore could not administer designated groundwater uses to protect surface water rights. The Commission affirmed the decision of the hearing officer.

Gallegos then appealed the Commission's decision to the district court and filed a motion seeking legal determinations (1) that the Commission was constitutionally required to administer junior wells in the Basin to ensure delivery to senior surface water rights in the Basin; (2) that the Commission, as the only agency with authority to administer wells in the Basin, was constitutionally required to do so to protect senior surface water rights; and (3) that the Commission lacked authority to allow junior well diversions that resulted in the curtailment of senior surface water rights.

The district court ruled that, while Gallegos was barred by claim preclusion from challenging the designation of the Basin, Gallegos's claim concerning administration of wells was not barred by claim or issue preclusion because the claim addressed the Commission's responsibility to administer water rights in the Basin. After so ruling, the district court denied Gallegos's motions because they involved issues of disputed facts. The court, however, on its own initiative, ruled that (1) the Commission had jurisdiction over surface water rights affected by designated groundwater pumping; (2) this jurisdiction extended to the administration of junior wells for the protection of senior surface water rights; and (3) the surface water diversion must not have an unreasonable means of diversion to the detriment of junior appropriations. Both Gallegos and the Commission appealed.

On appeal, the Colorado Supreme Court clarified and expanded upon its prior decisions in *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981), and *Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842 (Colo. 1983), concerning the jurisdiction of the Commission and the water court. The *Vickroy* case involved jurisdiction over the change of a surface water right to a well in a designated groundwater basin and established a rebuttable presumption that groundwater in a designated basin is designated groundwater, not "tributary" groundwater, and that the initial determination of whether the well is pumping designated groundwater lies with the Commission, not the water court. The *Pioneer* case involved efforts by surface water users to curtail

WATER LAW NEWSLETTER

Editor

George A. Gould
Professor, McGeorge School of Law
University of the Pacific

Reporter—State

Alaska — Thomas E. Meacham
 Attorney at Law
 9500 Prospect Drive
 Anchorage, AK 99516

Arizona — James W. Johnson
 Margaret R. Gallogly
 Fennemore Craig
 Two North Central Ave., #2200
 Phoenix, AZ 85004-2390

California — Ronald B. Robie
 Associate Justice, Court of Appeal
 914 Capitol Mall
 Sacramento, CA 95814

Colorado — William A. Paddock
 Carlson, Hammond & Paddock
 1700 Lincoln St., Ste. #3900
 Denver, CO 80203

Idaho — Jeffrey C. Fereday &
 John M. Marshall
 Givens Pursley LLP
 P.O. Box 2720
 Boise, ID 83701

Kansas — Leland E. Rolfs
 Division of Water Resources
 109 S.W. 9th St., #202
 Topeka, KS 66612-1283

John C. Peck
 University of Kansas
 School of Law
 Lawrence, KS 66045

Montana — Holly J. Franz
 Franz & Driscoll, PLLP
 P.O. Box 1155
 Helena, MT 59624-1155

Nebraska — Don Blankenau
 Fennemore Craig
 1221 N. Street, Ste. 801
 Lincoln, NE 68508-2028

Nevada — Douglas L. Grant
 William S. Boyd School of Law
 University of Nevada Las Vegas
 4505 Maryland Parkway, Box 451003
 Las Vegas, NV 89154-1003

New Mexico — Tim De Young
 Modrall, Sperling, Roehl,
 Harris & Sisk, P.A.
 P.O. Box 2168
 Albuquerque, NM 87103

North Dakota — Matthew A. Sagsveen
 Assistant Attorney General
 Attorney General's Office
 State Capitol, 600 East Blvd.
 Bismarck, ND 58505

Oklahoma — Dean A. Couch
 Oklahoma Water Resources Board
 3800 North Classen Boulevard
 Oklahoma City, OK 73118

Oregon — Jennie L. Bricker
 Stoel Rives LLP
 900 S.W. Fifth Ave., #2600
 Portland, OR 97204

South Dakota — Diane Best
 Office of the Attorney General
 State of South Dakota
 500 East Capitol Ave.
 Pierre, SD 57501-5070

John H. Davidson
 School of Law
 University of South Dakota
 414 East Clark Street
 Vermillion, SD 57069

Texas — Bruce Wasinger
 Bickerstaff Heath Pollan & Caroom LLP
 816 Congress Ave. # 1700
 Austin, TX 78701

Utah — John H. Mabey, Jr.
 Mabey & Wright, LLC
 265 East 100 South, Suite 300
 Salt Lake City, UT 84111

L. Ward Wagstaff
 Assistant Attorney General
 1594 West North Temple Street
 Suite 300, Box 140855
 Salt Lake City, UT 84116-0855

Washington — Amy K. Kelley
 Gonzaga Univ.
 School of Law
 P.O. Box 3528
 Spokane, WA 99220-3528

Wyoming — David Frank Palmerlee
 Palmerlee & Durant, P.C.
 11 North Main Street
 Buffalo, WY 82834

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groundwater diversions in a designated groundwater basin to protect their senior water rights. In that case the Colorado Supreme Court held that the primary question was whether the wells involved were pumping designated groundwater or tributary groundwater, a decision to be made by the Commission in the first instance, not the water court.

The jurisdictional controversy at the heart of the *Gallegos* case arises from the distinction between the "waters of the state" subject to Colorado's constitutional doctrine of prior appropriation, and designated groundwater. Designated groundwater may include groundwater not tributary to any stream, groundwater not available for the fulfillment of surface rights, *Vickroy*, 627 P.2d at 756, and groundwater not part of the natural stream, the use of which has a *de minimus* effect on any surface stream, *Upper Black Squirrel Creek Designated Ground Water Management District v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000). By definition, if designated groundwater is not available for the fulfillment of surface rights, then wells pumping designated groundwater should have no more than a *de minimus* impact on surface streams and surface water rights. Based upon this understanding of the meaning of designated groundwater, the supreme court rejected Gallegos's

claim that the Commission had a duty to administer designated groundwater for the benefit of senior surface water rights.

The supreme court then turned to the question of the proper scope of the Commission's jurisdiction in disputes between users of surface water rights and designated groundwater. The court found the answer in Colo. Rev. Stat. § 37-90-106(1)(a), which states, in part: "The commission shall, from time to time as adequate factual data becomes available, determine designated ground water basins . . . and, as future conditions require and factual data justify, shall alter the boundaries or description thereof." Based upon its reading of this statute, the Colorado Supreme Court held that the Commission has jurisdiction over surface water rights only to the extent that a surface water right owner seeks to change the boundaries of a designated groundwater basin. If the surface water right owner establishes that the pumping of designated groundwater has more than a *de minimus* effect on surface water rights, and is causing injury to such rights, then the Commission must redraw the boundaries of the designated groundwater basin (1) to exclude the surface water rights and (2) to exclude those wells, the withdrawal from which have more than a *de minimus* impact on surface water rights. Once the Commission has redrawn the boundaries of the designated groundwater basin, jurisdiction over the water rights within the excluded lands vests in the water court.

Since Gallegos had not had the opportunity to make this showing, the supreme court remanded the case to the Commission. In so doing, it stated that both claim preclusion and issue preclusion applied to administrative hearings and, if Gallegos were unable to present evidence on groundwater connectivity and injury, other than that which was before the Commission when the Basin was designated, then Gallegos's claim would be barred by the doctrines of claim preclusion or issue preclusion.

This decision resolves at least one of the nettlesome legal questions involved not only in the *Gallegos* case, but also in the pending litigation between surface water users and the Commission in the Northern High Plains Designated Ground Water Basin, *Laird Ditch v. Colorado Ground Water Commission*, Case No. 06-CV-31, District Court, Yuma County, Colorado. In that case surface water users seek, among other things, to have the boundaries of the designated groundwater basin changed to exclude well pumping that reduces surface water supplies available to senior surface water rights.

CALIFORNIA RIVER RESTORATION

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ject. See Vol. XXXI, No. 3 (1998), of this *Newsletter*. In addition, a 2004 decision by Judge Karlton holding that the Bureau violated section 5937 of the California Fish and Game Code in operating the project was most significant. *Natural Resources Defense Council v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004). This section of the code requires owners of dams to release enough water to keep downstream fish in good condition.

After Judge Karlton set a trial date in this case for early 2006 to determine how much water must be released to meet the re-

quirements of section 5937, new settlement negotiations began, spurred on by U.S. Senator Dianne Feinstein and U.S. Representative George Radanovich, who was Chair of the House Water and Power Subcommittee and who represented the Friant area.

The settlement provides that its water management objective will be to reduce or avoid adverse water supply impacts to all of the long term Friant contractors while providing flows to restore the fisheries. Water releases are estimated to average 170,000 acre-feet annually, about 15% of normal deliveries. However, to mitigate this impact on water users, a plan will be developed to recirculate, reuse, exchange, or recapture water released from the dam. This water could be purchased by contractors at a reduced rate.

The flows are specified in the agreement so that there will be no surprises when implementation begins. Water will be released in differing amounts depending on the type of water year. Some releases will begin in a few years and salmon will be reintroduced no later than 2012. Before releases begin, a number of channel improvements necessary to maximize the benefits of the flows will be undertaken. Year-round flows are expected to begin in 2014.

U.S. Secretary of the Interior Dirk Kempthorne hailed the agreement as "opening a new chapter of environmental restoration and water supply certainty for the farmers and their communities." *S.F. Daily Journal*, Oct. 24, 2006.

Congressional legislation will be required to provide authority to the Bureau to undertake some of the actions required by the settlement agreement and to fund the activities. The cost is estimated to range from \$250 million to \$800 million. State funds will also be used for the project.

Although the settlement agreement contemplated completion of legislative action by December 31, 2006, none was passed and action has been deferred to 2007.

OWENS RIVER FLOWS AGAIN IN ANOTHER RESTORATION PROJECT

Water began flowing in December 2006 in the 62-mile long Lower Owens River after years of being dry due to diversions from this Eastern Sierra stream to the City of Los Angeles.

The river dried up as a result of direct diversions and groundwater pumping by the City from the Owens Valley. The City purchased most of the land (and riparian rights) in the valley in the early 1900s. Diversions began in 1913 and gradually built up over the years, reaching 430 million gallons per day.

This restoration project resulted from a lawsuit filed in 2001 by the California Department of Fish and Game, the California State Lands Commission, the Sierra Club, and the Owens Valley Committee. Although the City agreed in 1991 to restore the stream, the suit was filed because implementation was delayed. The Inyo County Superior Court had issued an order preventing diversions from the City's second aqueduct unless the restoration took place. The order was upheld by the Fourth District Court of Appeal in an unpublished opinion (Sept. 27, 2006). Also, the City was subject to fines of \$5,000 per day for each day it missed deadlines set by the Inyo County court. By the time water flowed again, the fines had reached \$2,285,000.

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 restoration project will not actually cost the City much water. After it flows 62 miles at a depth of 2 to 6 feet, it will be pumped out and put back into the aqueduct to continue 250 miles to Los Angeles. The stream should support fisheries, waterfowl, and recreation such as kayaking.

This restoration, following the previous restoration of Mono Lake (also a victim of Los Angeles diversions) is quite an amazing accomplishment, after nearly a century-long dispute between the City and the small rural county. At the ceremony beginning the flows, Los Angeles Mayor Antonio Villaraigosa said: "This is a new chapter in our relationship with the Owens Valley. We can't take back what happened here 90 years ago, but we can make it better." Louis Sahagun, "In Owens Valley, Water Flows Again," *L.A. Times*, Dec. 7, 2006.

ARIZONA

(Margaret R. Gallogly, Reporter)

STATEWIDE WATER ADVISORY GROUP CONSIDERS CHANGES TO ADDRESS RURAL ARIZONA WATER ISSUES

The Arizona Statewide Water Advisory Group is in the process of recommending changes to state law that the Group believes will assist rural Arizona communities in addressing concerns about water management and supply. A lengthy, severe drought combined with the rapid growth of rural Arizona communities prompted the Arizona Department of Water Resources (ADWR) to form the Group in May 2006. ADWR recognized that water resources problems exist in rural Arizona that cannot be resolved under current statutory authorities. The Group is made up of dozens of stakeholders from state, county, local, and tribal governments; utilities; homebuilders; agriculture; and environmental interests. Based on the Group's discussions, ADWR issued a Rural Water Supply Development and Management Proposal in September 2006, and has held a series of meetings in small towns around the state to discuss that proposal. The Group is now in the process of drafting legislation to implement the Group's ideas and recommendations.

Under current Arizona law, surface water and groundwater are treated as separate systems and are regulated quite differently. Throughout the state, surface water is addressed under the doctrine of prior appropriation, using the principle of "first in time, first in right." Surface water for most river systems has already been fully appropriated. In contrast, groundwater in Arizona has historically been regulated under the doctrine of reasonable use, meaning that a landowner has the right to pump groundwater for reasonable and beneficial purposes at his or her property, even to the detriment of neighboring property owners. Over the years, the legislature has tightened its regulation of groundwater pumping in specific geographic areas of the state. The most severe regulations have been imposed in Active Management Areas (AMAs) located in those areas with historically heavy groundwater pumping. The Phoenix, Tucson, and Prescott metropolitan areas are located in AMAs, as is the rapidly growing corridor between Phoenix and Tucson. In two other areas of the state, the legislature has created Irrigation Non-Expansion Areas (INAs), in which no new lands may be opened to agriculture irrigated with groundwater. Regulation of groundwater use and pumping in the INAs is less strict than in the AMAs. Most of the state, however, is not within either an AMA or an INA. These areas tend to be more rural in nature, but they do include smaller Arizona cities such as Flagstaff, Yuma, and Kingman.

For the more rural areas of the state that are not within AMAs or INAs, there are only a couple of groundwater pumping and use restrictions. In particular, the legislature has severely limited the transportation of groundwater away from the basin or subbasin from which it was pumped, with some exceptions set out in statutes. In addition, developers of subdivisions in rural Arizona must submit a water adequacy study for approval by ADWR, indicating whether or not there is a 100-year adequate water supply for the proposed subdivision. Under Arizona law, subdivisions are created when a property is divided into six or more lots or parcels for the purpose of sale or lease. If the developer proves that there is a 100-year adequate water supply, ADWR will issue a water adequacy report for the subdivision. If the developer cannot prove that there is a 100-year adequate water supply for the subdivision, however, the developer may still plat the subdivision and obtain a public report from the Arizona Department of Real Estate. The sole statutory requirement is that the developer must disclose in the public report and other advertising that the developer could not prove the existence of a 100-year adequate water supply. Some cities and counties are requiring developers to prove an adequate water supply as a condition to final plat approval. However, it is questionable whether a city or county has the legal authority to impose this condition. Thus, neither the water adequacy program nor the groundwater transportation prohibitions are significant barriers to development in most of rural Arizona.

The rate of subdivision growth in rural Arizona over the last several years has been dramatic. ADWR estimates that developers did not prove the existence of a 100-year adequate water supply for approximately 22% of the lots proposed for subdivision in rural Arizona under the water adequacy program. There could be a number of reasons for a developer's failure to prove adequacy. For example, in some parts of the state, groundwater is available but at a depth too great to be "counted" by ADWR as part of an adequate supply. In those locations, no matter how much groundwater might be available, a developer cannot prove the adequacy of the water supply due to the depth of the water. Also, developers sometimes intentionally elect to proceed with platting without proof of a 100-year adequate water supply because the cost of proving an adequate water supply is too high. Such costs include hiring a hydrologist to perform hydrologic testing and to prepare a study for submission to ADWR. This has particularly been the case with small subdivisions. Also, in some locations, the amount of available groundwater simply is not enough to supply the proposed subdivision for the 100-year period.

As noted above, the Group is in the process of developing legislation, so its final proposals are not known at this time. Based on the work that has been performed through early January 2007, however, the Group's final recommendations are likely to include the following:

Strengthen Adequate Water Supply Program. Under the Group's most recent proposal, cities and counties located outside the AMAs would be given the authority to require developers to prove the existence of a 100-year adequate water supply before the city or county must approve a final plat for a new subdivision. In those cases where a city or town imposes this requirement, the State Department of Real Estate could not issue a public report for subdivisions within those cities or counties, unless the developer proves the existence of a 100-year adequate water supply. This proposal would exempt subdivisions where the subdivider has a vested right to subdivide under prior law and subdivisions to be served by long-term water supply projects that are under construction and will provide water to the subdivisions within a reasonable period of time. The proposed change in law would clarify the

legal authority of cities and counties to require a 100-year adequate water supply.

ADWR would revise its water adequacy program rules to specify the hydrologic criteria that a developer would have to satisfy to prove that a 100-year adequate water supply exists, and the rules may differ depending on the groundwater basin. For example, in some parts of the state groundwater supplies are available, but at a depth much greater than current ADWR rules allow. It is conceivable that, for those deep-water areas, ADWR would set the depth-to-groundwater levels deeper than is currently allowed.

Authorize the Establishment of Special Districts. The Group contemplates legislation to authorize the establishment of a new type of special district for use in addressing water issues in a few critical areas of the state. The most likely location of one such new district is the Upper San Pedro groundwater basin in the southeastern portion of the state, including the City of Sierra Vista and a major military installation, Fort Huachuca. Under the most current proposal considered by the Group, the purpose of the district would be to establish and implement a water management plan for the conservation, reuse, recharge, and augmentation of groundwater within the district. The proposed district would be controlled by a board of directors consisting of local officials and members elected from within the district. The district would have taxing and bonding authority to ensure adequate financial strength to implement the water management plan.

Authorize the Establishment of a Water Supply Development Revolving Fund. The Group currently proposes the creation of a Water Supply Development Revolving Fund for use primarily in making loans to water providers for community water supply projects. Such projects would include the acquisition of water rights or new water supplies and the development of infrastructure for water conveyance, storage, reclamation, reuse, or replenishment. All funds would be administered by a Committee that would include members from certain state agencies plus others appointed by the governor. Sources of financing for the Fund would include appropriations from the state and federal governments, proceeds from bond sales, proceeds from loan repayment, and investment income. This proposal contemplates that the Committee would establish a priority list, taking into account a number of enumerated items, including the financial need of the water provider, the urgency of the water project given water supplies and demands of the community, and the likely benefits of the water project. Some funds would be available in the form of grants for technical assistance and planning.

Impose Modest Additional Regulation on Wells Located Outside AMAs. At present, there is very little state regulation of wells located outside of AMAs, except that a Notice of Intent to Drill such a well must be filed with ADWR before drilling, the well must be registered with the state, and the well must be located not less than 100 feet from septic systems. In some parts of state, small private wells are a serious problem. The ability of a lot owner to install such a well tends to encourage lot splits and wildcat subdivisions, limits the ability of a local jurisdiction to control development, and makes it difficult to project water budgets and prepare hydrologic models.

The Group is currently considering two relatively modest proposals that would affect wells located outside AMAs. One would allow ADWR to withhold approval of the drilling of a new well located in or near an environmental remedial action site, if ADWR determines that the new well is likely to cause the migration of contaminated groundwater that would injure another well.

This authority is similar to the authority held by ADWR over wells located in AMAs. The second proposal is intended to improve information about hydrologic conditions outside the AMAs. Under that proposal, the legislature would impose water metering and reporting requirements on wells located outside the AMAs, and would require that ADWR gather hydrologic information for dissemination to persons interested in drilling new wells.

As noted above, each of these proposals is a work in process and the final legislative package will likely contain some variations from what is currently proposed. Also, all of these proposals require legislative action to implement. There is momentum behind these proposals due to the drought conditions that exist in the state and Arizona's rapid population growth. In particular, the proposal to strengthen the water adequacy program appears to have strong support in rural Arizona.

COLORADO

(William A. Paddock, Reporter)

COURT CONSTRUES STIPULATION TO RESTRICT GROUNDWATER EXPORTS FROM A DESIGNATED GROUND WATER BASIN

Cherokee Metropolitan District v. Simpson, 148 P.3d 142 (Colo. 2006), involves the use of groundwater in a designated groundwater basin under decreed conditional water rights appropriated prior to the creation of the Upper Black Squirrel Creek Designated Ground Water Basin (the UBSC Basin). It is also a lesson in the perils of drafting legal agreements. Cherokee Metropolitan District (Cherokee) owns rights to use designated groundwater in the UBSC Basin, including certain conditional groundwater rights adjudicated by the water court on applications pending at the time the UBSC Basin was created. *See Sweetwater Development Corp. v. Schubert Ranches, Inc.*, 188 Colo. 379, 535 P.2d 215 (Colo. 1975). Cherokee uses this water to supply homes and commercial users both within and outside the UBSC Basin. In 1999, in settlement of an application for a finding of reasonable diligence in the development of its conditional water rights, Cherokee stipulated that it would:

[U]se Cherokee Wells No. 1-8 only for supplying in-basin beneficial uses that discharge any unconsumed water back into the Upper Black Squirrel Creek Designated Basin and for *emergency and backup purposes*. Emergency and backup use shall include the inability to get sufficient supply from the Cherokee owned Sweetwater Wells.

148 P.3d at 145 (emphasis added).

In 1999, Cherokee's out-of-basin water demand was about 2,680 acre-feet annually. Cherokee then experienced substantial growth in its service area, and by 2005 its out-of-basin water demands had grown to approximately 5,000 acre-feet annually. Cherokee sought to use Cherokee Wells No. 1-8 to help meet this out-of-basin demand and was opposed by the State Engineer and the UBSC Basin Management District. The parties disagreed over the meaning of "emergency and backup purposes" and whether Cherokee's use of Wells No. 1-8 to meet increased out-of-basin demand that could not be supplied by its Sweetwater Wells was a "backup" purpose within the meaning of the 1999 Stipulation. To resolve the dispute Cherokee filed a motion with the water court seeking to enforce its construction of the 1999 Stipulation.

In this case geography is important. The Sweetwater Wells are located at the southern or “downstream” end of the UBSC Basin. Pumping those wells has limited effect on other wells in the UBSC Basin. The Cherokee Wells No. 1-8 are located further north in the UBSC Basin, and in an area of much greater demand on the aquifer. Therefore, increased use of Wells No. 1-8 is more likely to affect existing wells, particularly if the water pumped is exported out of the UBSC Basin so that return flows are no longer available to replenish the aquifer.

The water judge found the 1999 stipulation to be ambiguous and allowed the parties to present extrinsic evidence as to the intent of the parties. After hearing the extrinsic evidence, the water judge construed the stipulation to mean that Wells No. 1-8 could be used to supply water out of the basin only for emergency and backup purposes when the Sweetwater Wells were unable to produce sufficient water to meet Cherokee’s out-of-basin water commitments. The water judge also ruled that the ability of the Sweetwater Wells to supply Cherokee’s out-of-basin demands was to be measured by the levels of demand existing in 1999, not 2005. The judge went on to find that the Sweetwater Wells were capable of meeting the 1999 demand level. The effect of the ruling was that Cherokee did not have the right to invoke the “backup” provision of the 1999 Stipulation to use Wells No. 1-8 to supply increased out-of-basin demand. Cherokee appealed, and the Colorado Supreme Court affirmed in a 6-1 decision.

The majority found the purpose of the stipulation was to restrict the use of Wells No. 1-8 to in-basin use except for emergency or backup purposes. It reasoned that emergency or backup purposes was intended to address short-term conditions when the supply from Cherokee’s Sweetwater Wells was disrupted. It stated that in the water supply context this meant emergency outages, malfunctions, or planned maintenance events that prevented use of the Sweetwater Wells. The court reasoned that a construction of the 1999 Stipulation that allowed Wells No. 1-8 to become a permanent source of supply for out-of-basin uses would undermine the principal anti-export language and purpose of the 1999 Stipulation, and would deprive the UBSC Basin Management District of the benefit of its bargain.

The dissenting justice argued that the majority placed an overly restrictive reading of the term “backup” in the 1999 Stipulation. He believed that the stipulation reserved to Cherokee the right to use Wells No. 1-8 to meet its out-of-basin demands in the event the Sweetwater Wells did not have the ability to do so, and argued that Cherokee did not have any motivation to limit its out-of-basin use of Wells No. 1-8 when it entered into the 1999 Stipulation, and that there was no basis in the record to impose on Cherokee, rather than the Management District, the burden to define the terms of the agreement with greater precision. Therefore, the dissent would have reversed the decision of the water judge and permitted the use of Wells 1-8 to supply increased out-of-basin demand.

COURT CLARIFIES THE MEASURE OF IRRIGATION WATER RIGHTS IN CHANGE OF USE PROCEEDINGS

In re Water Rights of Central Colorado Water Conservancy District, 147 P.3d 9 (Colo. 2006), addresses the vexing question of the proper measure of a water right in a change of use proceeding. The water right involved is the Jones Ditch, with a decreed right to divert 15.5 c.f.s. from the Cache La Poudre River for irrigation and domestic purposes. The April 1882 decree for the Jones Ditch did not identify the land to be irrigated by the water right. That decree, however, was entered based upon the testi-

mony of William R. Jones, the claimant of the water right, who said in 1879 that he owned at least 300 acres that were under and could be irrigated by the ditch, and that he had irrigated all of his lands that needed irrigation. The evidence at trial established that in 1879 Jones owned about 560 acres in proximity to the Jones Ditch, of which 344 acres were down gradient from the ditch. The evidence at trial also disclosed that by 1920, Jones and his successors were irrigating about 700 acres with this relatively senior water right.

The Jones Ditch water right is now held by the Jones Ditch Company; the Ground Water Management Subdistrict of the Central Colorado Water Conservancy District (Central), owns 139 of the 200 shares in the ditch company, and in this case sought to change the water attributable to 77 shares from irrigation and domestic use to irrigation, augmentation, replacement, exchange, and recreational use.

To rule on Central’s change application, the water court was required to determine the extent of the lawful historical use of the Jones Ditch water right. Central argued that the Jones Ditch was lawfully entitled to irrigate approximately 700 acres. The opposers argued that Central’s interpretation of the 1882 decree allowed an unlawful enlargement of the water right, which they claimed was limited to the amount of water necessary to irrigate 344 acres.

In a pretrial order the water court determined that the Jones Ditch water right was only entitled to irrigate 344 acres under its decree, and that irrigation of additional land could not be considered to be part of the Jones Ditch’s lawful historical use. The court was next required to determine whether the historical consumptive use attributable to the 77 shares being changed in this case should be determined on a “parcel-by-parcel” basis or on a “ditch-wide” analysis. The parcel-specific analysis would result in historical consumptive use credit for the amount of water necessary to irrigate the 37 acres of the original 344 irrigated acres corresponding to the shares owned by Central. A ditch-wide analysis would award Central its pro rata share of the Jones Ditch water right based on the ditch-wide consumptive use and its pro rata ownership of stock in the Jones Ditch Company.

The analysis was complicated by the fact that in 1992 Central had obtained a change of water right decree awarding it 401.4 acre-feet of consumptive use credit based on its ownership of 62 shares of stock in the Jones Ditch Company. The evidence before the water court demonstrated that the historical consumptive use of the entire Jones Ditch water right from irrigation of up to 700 acres was approximately 520 acre-feet per year. Under a ditch-wide analysis, Central would only have been entitled to a total of 361 acre-feet per year for its 139 shares of stock in the ditch company. Thus, the 1992 decree had already awarded Central more historical consumptive use credit for 62 shares of stock than it would be entitled to receive under a ditch-wide analysis for 139 shares.

The water court held that claim preclusion prevented a ditch-wide analysis of the Jones Ditch water right, because that method of analysis would require the court to revisit the 1992 decree and revise the 401.4 acre-feet credit previously awarded to Central. The court therefore proceeded to analyze the application on a parcel-specific basis and granted Central an additional 66.65 acre-feet of consumptive use annually. Both Central and the opposers appealed the decision of the water court. The supreme court affirmed the water court’s order limiting the lawful historical use of the Jones Ditch water right to 344 acres and reversed the court’s decision to use a parcel-by-parcel analysis for the change of water rights.

On appeal Central made three arguments why the lawful historical use for the Jones Ditch water right should include the entire 700 acres irrigated by the ditch. Its first argument was that at the time the 1882 decree was entered Colorado law did not limit the lawful use to acreage irrigated when the decree was entered. Second, Central argued that the 1882 decree is silent as to acreage and that the water court was wrong to limit the decree to the originally-irrigated acreage. Finally, Central argued that laches barred the opposers from challenging the increased use that occurred after 1882.

With respect to its first argument, Central did not dispute the fact that current Colorado law reads into every water right decree the implied limitation that the water right is only for an amount of water sufficient to irrigate the acreage connected to the original appropriation. Central argued, however, that the law was different in 1882 and that at that time an appropriator was not limited to water used on specific acreage. The supreme court disagreed with Central's interpretation of the prior Colorado law. It held that the case law established that acreage under irrigation is, and has always been, the principal basis for measurement of the use of a water right in the adjudication of priorities and that the use of water for irrigation is measured by the needs of the land for which the water right was decreed. Under those principles of law, the supreme court held that the Jones Ditch water right was limited to the amount of water necessary to irrigate the approximately 344 acres originally irrigated by Jones, regardless of the number of acres that may have been irrigated subsequently. The supreme court also stated that the post-1882 increase in irrigated acreage under the Jones Ditch was unlawful, no matter how long it continued, and is not part of the lawful historical use of the water right for purposes of the change of water rights proceedings.

The supreme court also rejected Central's argument that the water court should have limited its inquiry to the terms of the 1882 decree, which does not contain a specific acreage to be irrigated. The supreme court pointed out that the 1882 decree is silent, not ambiguous, as to the specific acreage the Jones water right was intended to irrigate. It then reasoned that because Colorado law recognizes an implied limitation of the water right to the acreage for which the appropriation was made, the statements of claim and transcripts of testimony in adjudication proceedings are admissible to determine the lands intended to be irrigated by the water right. After reviewing that evidence, the supreme court concluded that Jones never suggested that he was seeking an additional appropriation for additional lands and that the water court was correct to base its determination of the lands intended to be irrigated on the testimony of Jones.

Finally, the supreme court rejected Central's laches argument because Central had failed to meet the requirements of laches. It pointed out that in water rights cases a laches defense must meet a high standard, and must include proof of some degree of turpitude in the conduct of a party to be estopped. This higher standard is applied in water rights cases because the effect of the estoppel can be a loss of a property right or the transfer of its enjoyment to another.

The supreme court then turned to the question of whether a parcel-by-parcel analysis or ditch-wide analysis was appropriate in this case. First, the court explained that neither claim preclusion nor issue preclusion prevented a ditch-wide analysis of the Jones Ditch water right. The court reasoned that claim preclusion was not implicated because the opposers were not requesting reduction or reconsideration of the 401.4 acre-feet of consumptive use awarded to Central in the 1992 change of water rights proceeding. It also

stated that there was no basis for applying the doctrine of issue preclusion to any contested question in this case, reasoning that issue preclusion was inapplicable because the 1992 decree was not the result of a ditch-wide analysis of the Jones Ditch water right and therefore it did not resolve questions as to lawful historical use on different lands. Instead, the court reasoned that the issue raised by the current application was whether Central was entitled to any additional consumptive use credit for its remaining shares that were not changed in 1992.

Based upon its holdings that the doctrines of claim preclusion and issue preclusion did not bar ditch-wide analysis of the consumptive use of the Jones Ditch water rights for the purposes of Central's application, the supreme court remanded the case to the water court for further consideration. On remand, the water court was directed to determine whether any additional factual findings were necessary to determine Central's share of the Jones Ditch water right. The supreme court stated that if the water court determined that Central's share of the lawful historical consumptive use of the Jones Ditch water right is less than the 401.4 acre-feet awarded in 1992, then Central would not be entitled to any additional consumptive use credit in the pending change of water rights proceeding.

NEVADA

(Douglas L. Grant, Reporter)

LIMITATION ON INTERBASIN GROUNDWATER TRANSFERS

Section 533.370(6)(a) of the Nevada Revised Statutes (Nev. Rev. Stat.) allows the State Engineer to approve an application for the interbasin transfer of groundwater only if "the applicant has justified the need to import the water from another basin." The Nevada Supreme Court interpreted this requirement for the first time in *Bacher v. State Engineer*, 146 P.3d 793 (Nev. 2006).

In *Bacher*, Vidler Water Company sought a permit to import groundwater from the Sandy Valley Basin to the Ivanpah Basin. Although Vidler applied for the permit in its name, it was acting as the agent of Primm South Real Estate Company. Primm South, the owner of three casinos, an outlet mall, a power plant, a welcome center, and employee housing in the Ivanpah Basin, desired to expand its operations there and needed additional water to do so. The State Engineer approved the application for 2 c.f.s. up to 415 acre-feet annually. The district court denied protestants' petition for judicial review.

On appeal, the Nevada Supreme Court made three points about the "need to import" statutory requirement. First, it said that the permit applicant can be a third party (as Vidler was) rather than the party needing to import water for beneficial use but, to prevent speculation, a third-party applicant must specify the beneficial uses intended and must have a contractual or agency relationship with the party needing to import the water (as Vidler did).

Second, the court said the "need to import" requirement means an applicant must prove by substantial evidence specifically how much imported water is needed to accomplish the intended beneficial uses. Primm South had plans to expand its mall, power plant, and employee housing and to build an industrial park or a theme park. But the court found the administrative record failed to specify how many acre-feet of imported water each project would require, and therefore the State Engineer abused his discretion in finding Vidler had shown the need to import water.

Although the court did not characterize the nature of the beneficial uses involved, the State Engineer had described Vidler's application as being for municipal purposes. Office of the State Engineer, Ruling No. 5132, at 1 (June 12, 2002). Nev. Rev. Stat. § 533.340 requires all permit applications for municipal supply—whether involving surface water or groundwater and intrabasin or interbasin use—to set out the approximate number of persons to be served and the approximate future water requirement. Given Vidler's experience developing water supplies in western states, it seems reasonable to assume that Vidler's application complied with this general statute and that Vidler presented substantial supporting evidence to the State Engineer. If this assumption is correct, *Bacher* indicates that the "need to import" requirement for interbasin groundwater transfers under Nev. Rev. Stat. § 533.370(6)(a) calls for greater specificity of proof than contemplated by the general statute.

Third, after disposing of the case as described above, the tentative status of some of Primm South's expansion plans prompted the court to observe that, although it did not have to reach whether "contingent projects" could count in evaluating the need to import water, "speculative evidence of development projects is not sufficient to survive a substantial evidence inquiry on review." 146 P.3d at 801.

NEW MEXICO

(Tim De Young, Reporter)

ATTEMPT TO ENFORCE ADJUDICATED WATER RIGHTS SUFFERS SETBACK

Although New Mexico follows the prior appropriation doctrine, many, if not most, water rights claims in the state have yet to be adjudicated by a court in a comprehensive stream system action, as required by the state's 1907 Water Code. N.M. Stat. Ann. §§ 72-4-1 through 72-4-20. Even in those stream systems where water rights have been adjudicated, enforcing senior water rights is problematic for a number of reasons. For better or worse, "first in time, first in right" is a principle that is seldom enforced. A recent decision, *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, 140 N.M. 168, 140 P.3d 1117 (N.M. Ct. App. 2006), illustrates the problems that can be encountered when senior water rights owners seek to enjoin water use by junior water rights owners.

In 1970, the New Mexico State Engineer filed a complaint to adjudicate all water rights having as their source of water the Mimbres River stream system in southwestern New Mexico. In 1993, a final decree was entered determining in part that the San Lorenzo Community Ditch Association (San Lorenzo) owned water rights senior to those of upstream individuals and entities including a number of other community ditch associations. The final decree provided that the adjudication court would retain jurisdiction and appoint a water master to administer the decreed water rights.

In 2003, San Lorenzo filed a petition for preliminary and permanent injunctions to enjoin upstream surface water users from diverting water from the Mimbres River when flows were insufficient to satisfy San Lorenzo's diversion requirements. Significantly, the petition acknowledged that whether San Lorenzo's shortages were due to the water master's failure to monitor upstream diversions, or because of drought conditions, could not be

determined. As will be seen, factual disputes concerning the reasons for lack of adequate supply eventually came back to haunt San Lorenzo in its efforts to curtail upstream diversions.

San Lorenzo also filed a motion for an order of reference to a water master, which the court granted, directing the water master to convene a meeting of San Lorenzo and private upstream ditch associations to attempt to have the affected parties reach an agreement apportioning the available supply. The motion was made pursuant to N.M. Stat. Ann. §§ 73-2-47 through -50, which provide for meetings of the commissioners of ditch associations supplied from the same source. Section 73-2-49 provides that the apportionment and distribution of water "shall be made in accordance with the rights of each ditch, and in proportion to the lands irrigated by each ditch." The order also provided that in the event no agreement could be reached, the water master was permitted to specify a rotation period for the allocation of water among the ditches. After the affected parties were unable to reach an agreement, the water master ordered a rotation system which San Lorenzo refused to follow. The water master then filed a motion requesting that San Lorenzo show cause why it should not be held in contempt.

The day before the show cause hearing, San Lorenzo filed a petition for peremptory writ of mandamus which was subsequently granted by the district court. The district court also ordered the water master to file a response to the petition. The State Engineer filed a response on behalf of the water master asserting that San Lorenzo was not entitled to the writ because it had an adequate remedy at law, namely the relief sought in the petition for preliminary and permanent injunction of upstream diversions. The district court then decided to quash the writ because the water master had raised disputed factual questions and a more detailed analysis of the entire water system was required. San Lorenzo appealed.

The court of appeals first noted that neither party had considered whether the district court's order quashing the petition was a final, appealable order. Concluding that it was not because further proceedings were contemplated, the court dismissed the appeal and remanded the case to the district court for further proceedings. The court also agreed with the district court that because the water master had raised questions of fact, a trial must first be held to resolve those factual issues before San Lorenzo, as petitioner, would be entitled to the extraordinary writ of mandamus.

Although San Lorenzo had established relatively senior water rights in the adjudication, its first in time position has not yet translated into an actual, dependable right to receive water or prevent upstream diversions. Part of the injunctive relief sought by San Lorenzo was the installation of measurement devices on the upstream ditches. Along the same lines, the district court found that "[e]ffective administration will require a more detailed analysis of the entire water system, including more comprehensive measurement or estimation of flows, demands, diversions and returns." 140 P.3d at 1120.

In response to this case and analogous problems throughout the state, the State Engineer has initiated an ambitious, statewide effort to more actively manage water resources. The Upper Mimbres was designated as a critical Active Water Resource Management basin, another water master has been appointed, and upstream ditches recently have been metered. As a final note, the State Engineer has asked the adjudication court to relinquish jurisdiction, but the court refused the request. An appeal is pending. One lesson to be learned here is that adjudication of water rights, while important, must be coupled with measurement, mod-

eling, and enforcement to ensure that water rights owners receive their entitlement to the available supply. While the State Engineer has initiated active water rights administration efforts, implementation faces a number of legal and other challenges.

OREGON

(Jennie L. Bricker, Reporter)

AMENDMENTS TO PROCEDURAL RULES

The Oregon Water Resources Commission (the Commission) has amended three sets of procedural rules, effective October 6, 2006. The amended rules are codified at Divisions 1, 2, and 3 of chapter 690 of the Oregon Administrative Rules (Or. Admin. R.). Division 1 contains rules of procedure for rulemaking; these rules have been updated to conform to a new version of the Oregon Attorney General's Uniform and Model Rules, and to change notice procedures—such as providing for notices of proposed rules to be distributed electronically. Similarly, Division 2, which includes procedural rules for contested case hearings, has been amended for consistency with the Attorney General's Model Rules of Procedure. In Division 3, the Commission promulgated new rules to establish procedures for making public records requests, under section 192.420 of the Oregon Revised Statutes (Or. Rev. Stat.), to the Oregon Department of Water Resources (the Department).

AMENDMENTS TO TRANSFER RULES

The Commission has also amended three sets of rules having to do with water rights transfers. Transfers are the process by which the Department allows water users to change the terms of their water rights, including (1) the *point of diversion* (the place from which surface water is diverted from its natural flow) or *point of appropriation* (the location of a well, in the case of a groundwater right); (2) the *type of use*; or (3) the *place of use*.

Or. Admin. R. ch. 690, Div. 380 has been modified in accordance with Or. Rev. Stat. § 540.531 (H.B. 2123 from the 2005 legislative session) to provide more flexibility for point of diversion transfers from surface water to groundwater. Specifically, Or. Admin. R. 690-380-2130 previously required that, for such a transfer to be approved, the groundwater had to come from an unconfined aquifer. That requirement is gone, leaving the basic requirement that the groundwater use must affect the surface water source “similarly” to the original surface water right. Division 380 changes took effect on October 6, 2006.

Also arising from H.B. 2123, Division 382 is a new set of rules that provide for a “certificate of registration modification.” Before the change, pre-1955, unadjudicated groundwater rights, though registered under Or. Rev. Stat. § 537.610, could not be transferred. Division 382 creates a process through which the Department recognizes changes to the place of use, type of use, or point of appropriation for a registered but unadjudicated groundwater right. October 6, 2006, was the effective date for the new rules.

Effective January 5, 2007, the Division 385 rules were amended to create a mechanism for irrigation districts to effect temporary transfers of points of diversion in response to an emergency—such as sudden, unforeseen damage to a diversion structure. Such transfers are effective for one irrigation season, and districts are

restricted to two successive transfer applications for the same emergency.

AMENDMENTS TO INSTREAM RULES

Instream water rights are a special type of water right, held by state agencies, that designate a volume of water to stay instream. Sometimes this is done by lease, so that, for example, a farmer may lease an irrigation water right to a state agency to keep the water instream for the term of the lease. Administrative rules governing instream water rights are found at Or. Admin. R. ch. 690, Div. 77.

Effective October 2, 2006, the Division 77 rules were amended in several respects. First, the rules were updated for consistency with the transfer rules in Division 380 and were changed to correct outdated statutory references and make other “housekeeping” changes. Second, the rules for leasing were clarified, and “split-season” leasing, an option that would have ended January 2, 2008, will continue and be treated like other leases. Split-season leases allow an irrigation water right to be used during the same season, alternately for irrigation and for instream use.

Third, the new rules incorporate a provision of a 2005 settlement agreement related to two specific instream water right applications. The state agencies authorized to hold instream rights—the Oregon Department of Fish and Wildlife, the Department of Environmental Quality, and the Parks and Recreation Department—are required as part of the application process to document their compliance with their own rules for instream water rights. Finally, the amended rules clarify rate limitations for instream water rights; specifically, the new rules identify circumstances in which the instream right may exceed the “estimated average natural flow” and still be classified as a beneficial use.

KLAMATH BASIN GENERAL STREAM ADJUDICATION UPDATE

Oregon's largest general stream adjudication is currently ongoing and has been since 1975, when the Department initiated the adjudication with notices to more than 30,000 landowners in Oregon's portion of the Klamath River Basin, which drains approximately 5,600 square miles. Ultimately, 730 claims and 5,660 contests were filed in the adjudication. As of the end of 2006, 88% of the claims and 94% of the contests had been preliminarily resolved and await a final determination by the Department's Adjudicator.

Most significantly, “Case 003,” a mammoth group of consolidated claims and contests involving Klamath Project water rights, has been resolved by a proposed final order issued on November 14, 2006. The Klamath Project, administered by the U.S. Bureau of Reclamation, dominates irrigation use in the upper basin.

TEXAS

(Bruce Wasinger, Reporter)

MORE HEARINGS LIKELY ON APPLICATIONS TO AMEND WATER RIGHTS PERMITS

After a wait of more than two years, the Texas Supreme Court finally issued its decision in *City of Marshall v. City of Uncertain*, 49 Tex. Sup. Ct. J. 695, 206 S.W.3d 97 (Tex. 2006), *reh'g denied*. The court affirmed in part and reversed in part the decision of the Third Court of Appeals. The Third Court of Appeals in *City of Marshall v. City of Uncertain*, 124 S.W. 3d

690 (Tex. App.—Austin 2003) had held that the City of Uncertain was entitled to a contested case hearing and that the Texas Commission on Environmental Quality (TCEQ) could not summarily issue a water right permit amendment to the City of Marshall. The Texas Supreme Court held that, while Tex. Water Code Ann. § 11.122(b) significantly restricts the amendment application issues that may be reviewed in a contested case hearing, it does not preclude a contested case hearing.

Background

The City of Marshall (Marshall), is located in Harrison County, Texas, which is partially located within the Cypress Creek Basin and partially within the Sabine River Basin. For more than 50 years, Marshall has held a water right to divert water from Cypress Creek and use that water for municipal purposes.

In 2001, Marshall applied to the TCEQ for an amendment of Marshall's water right permit. At that time Marshall had a right to divert up to 16,000 acre-feet of water per year but historically had used less than half that amount. In its application Marshall, among other amendments, requested the authorization to use water for non-potable industrial use; i.e., adding industrial use to its previously authorized municipal use. The TCEQ determined that Marshall's amendment request to add industrial use as an authorized beneficial use was not subject to the general notice and hearing procedures on the basis that the amendment request was covered by section 11.122(b).

Tex. Water Code Ann. § 11.122(b) basically provides that, except for an amendment that "increases the amount of water authorized to be diverted or the authorized rate of diversion," approval of amendments is mandated if the amendment "will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit . . . that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment."

According to the TCEQ's reading of section 11.122(b), the determination of whether an amendment will have adverse impacts on other water rights or the environment on the stream is to be made by the TCEQ, without notice or a hearing. TCEQ determined that Marshall's application to add industrial use as an additional authorized use would not harm other water right holders or the environment in a greater magnitude of adverse impacts than Marshall's historical municipal use.

TCEQ issued the permit amendment to Marshall without notice and hearing. The City of Uncertain, and others, appealed TCEQ's decision to state district court on several issues including the interpretation and implementation of section 11.122(b). The state district court reversed TCEQ's decision and ordered and remanded the case for a contested case hearing. Both Marshall and TCEQ appealed to the Third Court of Appeals. The Third Court of Appeals affirmed in part and reversed and rendered in part, holding that Marshall's application for an amendment to add industrial use as an authorized beneficial use was subject to notice and the contested case hearing requirement. The Texas Supreme Court basically agreed with the Third Court of Appeals and affirmed the Third Court of Appeals' judgment in part and rendered the case to TCEQ for further proceedings.

Discussion

Tex. Water Code Ann. § 11.122(b) provides:

Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that in-

creases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

Marshall and the TCEQ directed their focus on the full use assumption. In 1997, they contended, the Texas legislature sought to streamline the amendment process by removing TCEQ's discretion to deny an amendment that did not seek to appropriate additional water or increase the authorized diversion rate beyond the full use already permitted. According to Marshall and the TCEQ, section 11.122(b)'s predicate language subjecting an amendment's approval to "all other *applicable* requirements of this chapter for the approval of an application" referred merely to matters which they asserted are not tied to a new appropriation of water, such as a payment of a filing fee, administrative completeness, and provision of a conservation plan. Requiring TCEQ to apply other Texas Water Code criteria to permit amendments, they claimed, would thwart the legislature's intent to streamline the amendment process.

Uncertain's primary focus was section 11.122(b)'s predicate language—"subject to meeting *all* other applicable *requirements* of this chapter for the approval of an application." Uncertain argued that the term "application" included amendment applications and that "all" requirements for approval of a new appropriation applied equally to amendments like Marshall's that request a change in the purpose of use, including the substantive and procedural requirements contained in other Water Code sections relating to water rights permits. According to Uncertain, section 11.122(b)'s full use assumption only restricts the parameters of the TCEQ's review of those elements specified in that section, namely that the proposed amendment "will not cause adverse impact on other water right holders or the environment on the stream," and does not exempt the applicant from meeting all other Water Code requirements. Uncertain argued that even if the full use assumption did preclude the TCEQ's consideration of all other factors, assessing the proposed amendment's impact on other water rights holders and the on stream environment involves a factual determination upon which a contested case hearing must be afforded.

The supreme court found that the arguments of both sides found some support in the statutory language. However, the court found that neither side gave full effect to section 11.122(b)'s statutory language.

The supreme court said that Uncertain glossed over the term "[s]ubject to meeting all other *applicable* requirements of this chapter for the approval of an application." "Applicable" must mean something less than all requirements necessary for an original permit else section 11.122(b)'s purpose to streamline the amendment process would have no effect. On the other hand, Marshall's position that the subject-to clause refers only to administrative form and content requirements has no support in the text or the legislative history, not to mention the ease with which the legislature could have said "subject to meeting all *administrative* requirements for the approval of an application" had it so intended. Contrary to the parties' diametrically opposed interpretations, the supreme court believed that all of section 11.122(b)'s language can be given effect without undermining the statute's overall purpose to streamline the amendment application process.

The supreme court found that the legislature's intent in enacting Tex. Water Code Ann. § 11.122(b) and other portions of comprehensive water legislation in 1997 was to protect the public welfare by otherwise ensuring protection of water as a valuable resource.

Section 11.122(b) simplified the permit amendment process to facilitate water rights marketing by curtailing certain assessments under the full use assumption. However, other Water Code sections specifically require applicants for both new and amended water rights to submit water conservation plans and direct the TCEQ to assess an amendment application's consistency with that state water plan and any approved regional plan and also requires the TCEQ to assess an amendment application's effect on groundwater use, quality, or recharge.

The supreme court stated that Marshall and the TCEQ's contention that any application that does not increase the amount or rate of diversion must be approved irrespective of these effects would undermine the Water Code's public welfare purpose as reflected in section 11.122(b)'s "subject-to" clause.

The supreme court added that section 11.122(b)'s predicate clause requires that an amendment application meet "all other applicable requirements of this chapter for the approval of an application." All *other* requirements of the chapter can only mean those that do not concern section 11.122(b)'s specific criteria, i.e., assessment of "adverse impact on other water right holders or the environment on the stream."

The supreme court held that the "other applicable requirements" that do not implicate effects on other water rights holders or the on stream environment concern conformance with administrative requirements, beneficial use of the water right, protection of the public welfare, groundwater effects, consistency with the state and any applicable regional water plan, avoidance of waste, and achievement of water conservation.

On this basis, the supreme court interpreted section 11.122(b) to require the TCEQ to assess specified criteria other than impacts on other water rights holders and the on stream environment when considering a proposed water rights amendment. Marshall had a specifically defined right to fully use the amount of water identified in its permit, but it had no right to use that water other than as conditioned. The legislature has determined that the TCEQ must approve alterations in water rights like the change in purpose of use that Marshall sought in its amendment. If removal of the potability restriction from Marshall's permit would adversely impact the limited public interest criteria that the legislature carved

out of section 11.122(b), then holding a contested case hearing to determine those specific effects comports with the legislature's overall purpose to protect this valuable resource. On the other hand, if it is apparent from the application that those limited public interest criteria are not adversely impacted, then no hearing on the application would be required. The supreme court emphasized, however, that in evaluating an amendment application seeking a change in use, the TCEQ must focus on the impacts that are inherent in the type of use that is proposed, and not on the fact that the applicant may fully use its permitted water right.

In general, the TCEQ should be able to evaluate an amendment's effect on other water rights holders and the on stream environment without the need for a formal evidentiary hearing, although certainly nothing would prohibit the TCEQ from holding a hearing if there appeared to be disputed issues relevant to determining those effects. A hearing would be required, for example, if other water rights holders or the on stream environment were affected beyond or irrespective of the full use assumption. For instance, if the amendment moved the point of diversion upstream above a senior right holder, it could affect that right holder's diversion of water even if the applicant's amount and rate of diversion were unchanged. Or if the use changed from a nonconsumptive use to a consumptive one, the amount returned to the stream would decrease and could affect downstream right holders, again irrespective of the full use assumption or the rate of diversion. In situations like these, the TCEQ would be required to provide notice and hearing.

It may generally be possible for the TCEQ to determine from the face of a proposed amendment that the relevant criteria are met or are not implicated by a particular amendment application, in which event a hearing would not be necessary. But if an issue is raised as to these effects, a hearing should be afforded to assess them.

Under the full use assumption, an amendment's impact on other water rights and the on stream environment, including the issues of habitat mitigation, water quality effects, estuarine considerations, and in stream uses, can in most instances be determined from a facial review of the permit application without an evidentiary hearing. Moreover, application of the full use assumption may substantially limit the pool of potential parties to a contested case hearing. At the same time, any limited hearing that may be required gives effect to other provisions of the Water Code that the legislature considered necessary to protect the public interest and preserve water as a valuable resource.

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