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## COLORADO WATER COMMITTEE REPORT TO THE CHIEF JUSTICE

(William A. Paddock, Colorado Reporter)

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### PERMANENT WATER COMMITTEE ESTABLISHED, RECOMMENDATIONS TO SIGNIFICANTLY ALTER APPROACH TO USE OF EXPERT TESTIMONY

In December 2007 the chief justice of the Colorado Supreme Court established a Water Court Committee. The committee was charged with reviewing the water court process, identifying ways through rules and/or statutory changes to achieve efficiency in water court cases, while protecting the quality of outcomes and ensuring a high level of competence in water court case participants. Justice Gregory Hobbs served as the chairman of the committee.

The committee was subdivided into five subcommittees: one focusing on the role of the water referees, one focusing on the role of expert witnesses, one focusing on the needs of small water users, one focusing on education, and one focusing on case management. The subcommittees met on numerous occasions and the entire committee met on several occasions to discuss subcommittee reports, to give direction to the subcommittees, and to formulate recommendations to the chief justice. On August 1, 2008, Justice Hobbs completed the committee's report entitled *Timely, Fair, and Effective Water Courts*. That report and the minutes of the committee meetings are available at the Colorado courts' website, <http://www.courts.state.co.us>, under Water Court.

The principal recommendations in the August 1, 2008 report are:

- (1) The White River and its drainages should be placed within the jurisdiction of water division number six instead of water division number five.
- (2) The Colorado Supreme Court should consider amendments to Colo. R. Civ. P. (CRCP) 90 and Uniform Water Court Rules (UWCR) 2, 3, 6, and 11.
- (3) The Colorado Supreme Court should consider adopting a declaration to be signed by all expert witnesses in the water court proceedings.
- (4) The Colorado Supreme Court, the Colorado Bar Association through the Water Law section, and Continuing Legal Education, Inc., of the Colorado Bar Association, should work together to establish a comprehensive on-going educational program for water attorneys, water judges, and other professionals participating in the water court proceedings.

*continued on page 2*

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## STATE DISTRICT COURT DECLARES NEW MEXICO'S DOMESTIC WELL STATUTE UNCONSTITUTIONAL

Tim De Young, New Mexico Reporter)

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Horace and Jo Bounds (Bounds) owned adjudicated surface water rights with a priority date of 1869 for their irrigated lands along the Upper Mimbres River near Silver City, New Mexico. Surface water supplies had dwindled, and Bounds attributed the problem to approximately 45 domestic wells that had been drilled in the area in recent years. The Mimbres Basin had been closed to new appropriations since 1972 but, for decades, the New Mexico Office of the State Engineer (the State Engineer) has granted domestic well permits pursuant to N.M. Stat. § 72-12-1.1 and its predecessor statute. The statute limits the amount, purpose, and use of water pumped from domestic and livestock wells but also provides that any application for a permit shall be granted. Bounds' complaints to the State Engineer fell on deaf ears because the State Engineer felt obliged to grant domestic and livestock well permit applications despite their possible impact on water rights owners. The State Engineer had attempted to obtain statutory amendments over the years but, except for a few minor modifications, it had remained the case that under that statute, domestic well permits were required to be granted.

In 2006, Bounds filed a declaratory judgment action against the State Engineer seeking to have the domestic well statute declared unconstitutional. New Mexico District Court Judge J.C. Robinson agreed with Bounds, finding that § 72-12-1.1 is unconstitutional on two grounds. *Bounds v. New Mexico*, No. CV-2006-166, slip op. (6th Dist., Grant County, N.M., July 10, 2008) (unreported). First, the statute creates an impermissible exception to the priority administration system created by the New Mexico Constitution, art. XVI, § 2. Second, the statute provides no due process protections to water rights owners. The State Engineer has appealed the ruling, but if it stands the decision will have significant impacts on both water rights administration and future land and water use patterns, especially in rural areas of the state.

The court's decision notes that the New Mexico Constitution art. XVI, § 2, adopts the prior appropriation system and provides in relevant part that "[p]riority appropriation shall give the better right." Further, the right to appropriate is considered an interest in real property "of high order." *Bounds*, No. CV-2006-166, slip op. at 2, citing *Walker v. United States*, 142 N.M. 45, 162 P.3d 882 (N.M. 2007). The court found no justification for the exemption from the prior appropriation system created for domestic wells by the predecessor statute to § 72-12-1.1, which was adopted in 1953.

*continued on page 3*

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## COLORADO WATER COMMITTEE

(continued from page 1)

(5) The State Court Administrator's Office and the Water Court Committee should jointly prepare a set of "user friendly" materials to assist the public and individuals without attorneys to better understand and participate in water court proceedings.

(6) The water judges, working with the Water Court Committee, should review all current standard forms used in water court proceedings and make appropriate revisions and additions to the forms.

(7) The Colorado Supreme Court should establish a standing Water Court Committee.

The committee report also contains general recommendations for support of adequate funding for the operation of the water courts and for ongoing funding to continue work on publicly available River Basin Decision Support Systems. See <http://cdss.state.co.us/DNN>.

A good deal of the work by the committee as a whole, and by the subcommittees, focused on how to make the water court adjudication process more efficient by implementing differential case management practices in proceedings before the water referee, by changes to the authority of the water referee to improve the efficiency of the water court process, by encouraging expert witnesses to cooperatively resolve technical issues in advance of trial, and by requiring expert witnesses to sign a declaration with respect to the scope and content of their expert opinions. The committee reached consensus on most issues, including those dealing with expert evidence. The committee did not reach consensus with respect to the specifics of the differential case management standards before the water referee, authority of the water referee, and other technical issues dealing with processing of water court applications. Thus, the committee's August 1, 2008, report is not the final word on the subject. Rather, the chief justice adopted the committee's recommendation that the supreme court establish a permanent Water Court Committee. The permanent committee has now been established, its members have been appointed, and it is continuing the work of the original committee in an effort to resolve the remaining issues and complete a set of recommended amendments to CRCP 90, the UWCR, and the Colorado Revised Statutes.

The most interesting recommendations of the committee are those pertaining to expert evidence. UWCR 11 currently requires the applicant to disclose its expert evidence 240 days prior to trial, requires that opposers disclose their expert evidence at least 120 days before trial, and requires that any expert rebuttal evidence be submitted at least 90 days before trial. The proposed revisions to UWCR 11(b)(5) modify this procedure by requiring that, within 45 days after the applicant's initial expert disclosures, the experts for the applicant and the opposers meet and discuss the issues that are the subject of the applicant's expert disclosures, seek to identify undisputed matters, attempt to resolve disputed matters, and identify issues remaining in dispute. Thereafter, the applicant may make a supplemental expert disclosure at least 180 days prior to trial. The purpose of this supplemental disclosure is to allow the applicant to address issues raised in the initial meeting of the experts.

Next, 25 days after the opposers' expert disclosures are made, the expert witnesses for the applicant and the opposers must meet again to discuss the issues that are the subject of expert disclo-

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sure, identify undisputed matters, attempt to resolve disputed matters, and identify the issues that remain in dispute. Within five days after that second mandatory meeting, the experts must submit to the parties a written statement setting forth the disputed issues arising from the experts' disclosures that remain for trial. Thereafter, and no later than 60 days before trial, the parties must jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial.

The content of the meetings of the experts and the written statement concerning the disputed and undisputed issues are to be considered as conduct or statement made in compromise negotiations within the ambit of Colo. R. Evid. 408. The meetings of the experts may not include the attorneys for the parties or the parties themselves. The premise of these proposed changes to the rule is that the experts, acting in good faith, will be able to minimize the number of technical issues that need to be resolved by the water judge and thereby help to reduce costs and increase efficiency in the processing of water court applications.

The proposal for an expert declaration arises principally out of recommendations contained in the report entitled "Access to Justice Report," by Lord L.H. Woolf, and prepared for the British Court System in 1996. See <http://www.dca.gov.uk/civil/final/contents.htm>. The concerns expressed in the report about the role of experts in litigation in the British Courts are similar to concerns

expressed about the role of experts in American courts. Those concerns include, among others, that expert evidence greatly increases costs; that experts sometimes take on the role of partisan advocates (*see In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 634-637 (S.D. Tex. 2005)); that the present system has the effect of exaggerating the adversarial role of experts, helping neither the court nor the parties; that expert witnesses often cancel out each others' testimony (*see* Adam Liptak, "In U.S., Expert Witnesses are Partisan," *New York Times*, Aug. 12, 2008; *see also* Jack B. Weinstein, "Improving Expert Testimony," 20 *U. Rich. L. Rev.* 473, 482 (1986)); and that parties with greater resources can use experts to obtain unfair tactical and litigation advantages over less well funded litigants.

The declaration of experts recommended by the committee is intended to help ameliorate some of these concerns. The declaration requires the expert to affirm that his or her role as an expert, both in preparing the expert report and in giving evidence, is to assist the court to understand the evidence or to determine a fact in issue. It requires the expert to affirm that the opinions in the report are the expert's own professional opinions. It also requires the expert to affirm that in preparing the report and disclosures the expert has endeavored to be complete and has addressed all matters that the expert regards as being material to the opinions expressed, including the assumptions made by the expert, the bases for the opinions, and the methods employed to reach those opinions. It also requires the expert to (1) disclose whether, and to what extent, the content of the written report was drafted or changed by any person other than the expert; (2) immediately notify in writing the attorney for the party for whom the expert is giving evidence if, for any reason, the expert considers that his or her report requires correction or qualification; and (3) affirm that the expert has made the inquiries that the expert believes to be appropriate, and to the best of the expert's knowledge no matter of significance that the expert deems to be relevant has been withheld from the court. Finally, the expert must affirm that he or she has disclosed any financial or pecuniary interest that the expert has in the results of the lawsuit or any property or rights that are the subject of a lawsuit for which the expert disclosures are being submitted.

This declaration was widely reviewed in the Colorado water resources engineering community prior to its adoption by the committee, and a number of changes to the draft declaration were made at the request of the engineering community. The committee believed that the use of the declaration would help reduce the temptation for experts to take on the role of partisans for their clients and would provide the experts with a shield against lawyers or clients who sought to dictate the specific opinions that the expert should provide.

It appears that the standing Water Court Committee will review all of the proposed revisions to the Rules of Civil Procedure and Uniform Water Court Rules and then formulate a final set of recommendations for the Colorado Supreme Court. If the Colorado Supreme Court decides to act on the committee's recommendations, then it will publish notice of proposed revisions to the rules, hold public hearings on the proposed revisions, and issue amendments to the rules.

Your reporter wishes to point out that these recommendations are not the result of the perception that experts and attorneys practicing in Colorado's water courts are any better or any worse than experts and attorneys practicing in any other segment of the Colorado Bar. Rather, due to some particularly vexing and controversial problems in several Colorado water divisions, Colorado's executive branch and private organizations have been examining water rights administration and the water courts to help find solutions to these problems. The Colorado Supreme Court undertook a similar review through this committee to see what it might do to help make the water court process work better for all litigants.

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## NEW MEXICO'S DOMESTIC WELL STATUTE UNCONSTITUTIONAL

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Even though the State Engineer has granted domestic well permits for decades, the court found that it is "not logical, let alone consistent with constitutional protections, to require the [State Engineer] to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water." *Bounds*, No. CV-2006-166, slip op. at 4.

Unlike applications for permits to appropriate or transfer water rights, domestic well permits are granted without prior public notice or opportunity for protest. The court found the statute unconstitutional for lack of any due process to protect senior water rights owners from impairment caused by junior priority domestic wells. *Id.* In response to arguments that *Bounds* must first be impaired, the court responds:

*Bounds* does not have to suffer actual impairment to attack the constitutionality of the statute. It will do little good for *Bounds*, and others similarly situated, to sit idly and wait for actual impairment. When the water is gone it will be too late. Any litigation then will result in claims of laches, waiver, statutes of limitation, estoppel and the like.

*Id.* at 3. To correct the lack of due process, the State Engineer is required to administer domestic well applications the same as all other applications to appropriate water. Accordingly, domestic well applicants will be required to provide public notice and an opportunity for protest, while the State Engineer must determine whether unappropriated water is available to satisfy the application and whether granting the application would impair existing water rights, be contrary to water conservation, or detrimental to the public welfare of the state. *Cf.* N.M. Stat. § 72-12-3 (specifying requirement for permits to appropriate groundwater).

As noted, the State Engineer has appealed and, under applicable authority, the appeal stays the decision. While reversal is possible, the decision appears to be firmly supported by both the state constitution and the Water Code's express adoption of the prior appropriation system for all waters of the state and by the lack of due process protections for owners of private property water rights who may be impaired by growing numbers of domestic wells. In any event, efforts already are underway to craft an

**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.

appropriate response. The State Engineer already has adopted groundwater regulations that include the right to control diversions from domestic wells in critical areas but these provisions have been challenged in a pending court action.

The consequences of the court's decision, if not reversed by New Mexico appellate courts or ameliorated by subsequent legislation, are mind boggling. Significantly, most of the state's groundwater supplies have been declared fully appropriated by the State Engineer. In addition to providing public notice and dealing with potential protests, domestic well applicants may need to locate and acquire existing water rights as a costly prerequisite to pumping. Because developers of residential subdivisions often use domestic wells to provide water in areas where no water services are available, land use patterns also are likely to be affected with further development being concentrated in areas with available water service. Hydrologic impacts of future appropriations also may be affected to the extent that water is supplied by fewer large volume water utility wells, as opposed to the smaller cone of depression footprint created by a multitude of low volume domestic wells.

For several years, the inability of the State Engineer to regulate or limit domestic wells has been a cause of concern. Despite several efforts, neither the State Engineer nor the legislature has effectively addressed the proliferation of domestic wells throughout the state. Now that the domestic well statute has been declared unconstitutional in a persuasive opinion, there may be sufficient impetus to develop a meaningful response.

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## ALASKA

(Amy K. Kelley, Editor)

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### NINTH CIRCUIT HOLDS THAT CORPS OF ENGINEERS' WETLANDS DETERMINATION IS NOT "FINAL AGENCY ACTION" UNDER ADMINISTRATIVE PROCEDURE ACT

In a case that addresses a matter so commonplace that it is almost amazing there are no prior reported federal appellate decisions, the Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), held that "an approved jurisdictional determination" by the Corps that lands contained wetlands was not "final agency action" under the Administrative Procedure Act (APA) § 704 and, therefore, the plaintiff could not obtain judicial review of the determination as such. *Fairbanks*, 543 F.3d at 591. (There is a prior unreported case, *Greater Gulfport Properties, LLC v. U.S. Army Corps of Engineers*, 194 F.Appx 250 (5th Cir. 2006)). The Ninth Circuit found that an "approved jurisdictional determination" *did* constitute "the consummation of the agency's decisionmaking process," the first requirement for final agency action under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (emphasis added). The Corps had "asserted its ultimate administrative position regarding the presence of wetlands," *Fairbanks*, 543 F.3d at 591, and it was clear that this was the Corps' last word, its "considered, definite and firm position." *Id.* at 593.

The court, however, also determined that an "approved jurisdictional determination" was *not* an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,'" the second requirement for final agency action under the *Bennett v. Spear* test. The court admitted that one might face serious consequences if one were to unilaterally pro-

ceed with development activity on the land after such a determination, but the consequences would flow from the activity, not the determination: one would "face liability only for noncompliance with the CWA's [Clean Water Act] underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." The determination "does not alter [the] physical reality or the legal standards. . . ." *Fairbanks*, 543 F.3d at 594. In short, to obtain the necessary "status" of final agency action, and obtain judicial review, one must either actually go through the CWA permitting processes, or proceed to develop in potential violation of the law (only potential because, of course, ultimately a court might hold that the Corps was wrong in its determination that wetlands were present), and face an enforcement action. "Whatever *Fairbanks* now chooses to do, it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination." *Id.* at 596.

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## ARIZONA

(Margaret R. Gallogly, Reporter)

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### ARIZONA COURT OF APPEALS UPHOLDS RESERVATION OF RIGHT TO USE GROUNDWATER

In a matter of potential significance, the Arizona Court of Appeals recently ruled that Arizona law permits a seller of land to reserve to the seller whatever commercial groundwater rights the land may have. *Davis v. Agua Sierra Resources, L.L.C.*, 217 Ariz. 386, 174 P.3d 298 (Ariz. Ct. App. 2008), *reconsideration denied* (May 7, 2008). The court of appeals vacated a contrary conclusion reached by the Yavapai County Superior Court on a motion for summary judgment, and remanded the case for further action.

This matter centers around the CF Ranch located in Yavapai County, Arizona, within the Big Chino groundwater subbasin. Under Arizona law, the Big Chino groundwater subbasin is one of the few areas of the state from which it is legal to withdraw groundwater and transport it out of the subbasin for use at another location. Groundwater from the Big Chino may be transported into the Prescott Active Management Area, upon compliance with statutory requirements. Thus, the Big Chino subbasin is considered an important potential source of water by cities and towns located in the Prescott Active Management Area, including the City of Prescott, the Town of Prescott Valley, and the Town of Chino Valley.

Like most of Arizona, the Big Chino groundwater subbasin is located outside an active management area. As such, groundwater withdrawal and use is subject to the beneficial use doctrine. The Arizona legislature codified that doctrine at Ariz. Rev. Stat. § 45-453(1), which states that "[i]n areas outside of active management areas, a person may: . . . [w]ithdraw and use groundwater for reasonable and beneficial use. . . ."

The reservation at issue arose out of the sale of a portion of the CF Ranch that occurred in 1981. The deed used in the 1981 sale excluded "all mineral rights and oil rights and all commercial water rights" from the conveyed property. *Davis*, 174 P.3d at 301 n.1. A subsequent deed for the property, executed in 1984, conveyed the CF Ranch,

excluding therefrom and reserving to [the seller] all gas, oil and mineral rights and all commercial water rights and waters incident and appurtenant to and within the real property . . . together with the rights to develop such

minerals and waters and market and transport the same from the premises hereby conveyed; . . .

*Id.* at 301. (The seller under the 1981 deed and the seller under the 1984 deed subsequently merged, so that the exclusion and reservation of rights under both deeds were held by a single entity.) The 1984 deed allowed the buyer of the CF Ranch to use groundwater at the ranch for domestic, ranching, and agricultural purposes. The 1981 deed and the 1984 deed are referred to herein as the Deeds.

At the time the Deeds were signed, there were no statutory prohibitions on the transportation of water away from a subbasin located outside an active management area to a subbasin located inside an active management area, although such transportation could subject the transporter to damages. In 1991, however, the Arizona legislature became concerned with the acquisition of rural “water farms” and the possibility that groundwater would be moved wholesale from more rural counties into larger Arizona cities, thereby leaving the rural areas with an insufficient water supply. In response, the legislature enacted a statute that generally prohibits transportation of groundwater from rural subbasins into an active management area, except in specific limited circumstances. One statutory exception allows the transportation of groundwater from the Big Chino subbasin into the Prescott Active Management Area, when certain conditions are met.

A subsequent owner of the CF Ranch, Merwyn C. Davis (Davis), acting as trustee under a trust, attempted on a couple of occasions to sell the CF Ranch to the City of Prescott for use as a source of water to be imported to the city. Those sales did not close, however, apparently in part because of the reservation language in the Deeds. In 2004, Davis filed an action in the Yavapai County Superior Court seeking to have the commercial water rights reservation contained in the Deeds invalidated. The then-claimant to the reservation, Agua Sierra, filed a counterclaim requesting a declaration that the commercial water rights reservation is valid and an order quieting title to all commercial water rights associated with the CF Ranch. The superior court granted summary judgment to Davis, finding the reservation invalid. *Id.* at 302. The superior court concluded, “as a matter of law . . . Arizona does not recognize the reservation of commercial water rights or the right to develop commercial water rights [as described in the Deeds].” *Id.* (Subsequently, Davis sold the CF Ranch to Chino Grande, L.L.C., and that entity was joined to the litigation. The term “Davis” in the rest of this article refers to both Davis and Chino Grande, unless otherwise noted.)

In addressing the issues concerning commercial water rights, the court of appeals first set out certain general principles of Arizona water law recognizing: that Arizona has a bifurcated system of water law; that water considered to be surface water, including subflow, is subject to prior appropriation; and that water that is considered groundwater is not subject to prior appropriation, but may be pumped by the overlying landowner, subject to the requirement that the water be used for a reasonable and beneficial purpose. In addition, within the active management areas of the state, the 1980 Groundwater Code imposes additional regulations on the withdrawal and use of groundwater.

The court of appeals pointed out that the language of the Deeds refers to “commercial water rights,” without specifying whether the term meant surface water or groundwater, or both. The court of appeals noted that the market value of the property lies in its groundwater and the right to pump that water for transport. In addition, all parties to the appeal argued the matter as if the only water at issue was groundwater, and Agua Sierra

confirmed at oral argument that it was not making any claim to appropriable surface water. Accordingly, the court of appeals assumed that the reservation of all “commercial water rights” applied only to groundwater and not to surface water. The opinion does not otherwise define the terms.

Early in its analysis, in a section entitled “Severing Water Rights from the Land,” the court noted that a reservation of a water right:

cannot reserve an ownership interest in a source of water; instead, one may own, and reserve, only a right to use water. Thus, the owner of land overlying percolating groundwater has a right to the usufruct of the water. This right (to use water associated with real property) is a property right. Because the right is a hereditament, it must be conveyed by deed.

*Davis*, 174 P.3d at 304 (citations omitted). The court then reasoned that this right to use water is an interest in real property and might be reserved by the seller of property, much as an interest in oil, gas, and other minerals might be reserved. After discussing the arguments of the parties, the court found the commercial water rights reservation in the Deeds to be valid, concluding that a grantor “may reserve rights to the commercial use of percolating groundwater beneath the land the grantor no longer owns.” *Id.* at 308 (emphasis added). Thus, the court recognizes the division of the real property estate, with the landowner of the land holding title to all interest in the land except the right to the use of the groundwater pumped from the land for commercial purposes.

The court does not fully explain the extent of this “right to use water.” One possibility is that the owner of a reservation may enforce the reservation by coming on to a sold parcel, installing a well, and withdrawing groundwater from the common supply for a commercial use on or off the sold parcel for a reasonable and beneficial purpose (subject to all statutory restrictions). Those actions would be consistent with the idea that the reservation holder has no ownership interest in the underlying groundwater itself, but only a right to use the groundwater that may be withdrawn from the land for commercial purposes. These actions would also not disturb a neighbor’s right to withdraw groundwater from the common supply. The reservation would then be analogous to the granting of an easement or a lease for the purpose of installing and operating a well. Another possibility is that the owner of the property’s surface would be prohibited from withdrawing groundwater from wells on the surface without permission from, and presumably payment to, the owner of the reservation. This possibility would also be consistent with the idea that the reservation holder owns the right to use groundwater for a commercial purpose, but not the groundwater itself. A third possibility is that the court means that the holder of the reservation now owns a “water right” allowing that owner the right to hold an interest in and use the groundwater under the sold parcel to the exclusion of the rights of neighbors to pump from the common supply. This result would be contrary to other Arizona decisions.

Another somewhat confusing aspect of the decision is that the court repeatedly uses the shorthand “groundwater rights” to refer to this right to use water. Outside the active management areas, there is no such thing as a “groundwater right” under Arizona law. Instead, the owners of interests in land have the right to withdraw groundwater from the common supply that underlies the land for reasonable use. The use of the term “groundwater right” implies an ownership of the groundwater itself. As noted above, this does not appear to be the intention of the court.

Finally, the court brushes off the argument that this division of land ownership from the right to use the groundwater impedes the use of groundwater. When viewed in light of the requirements of the Arizona statutes governing the transportation of groundwater, this division does have the potential to prevent the use of groundwater or at least make it more complicated. One provision of the transportation statutes states that a city or town *that owns land* in the Big Chino subbasin, considered to be historically irrigated lands, or a city or town that has the permission of the *landowner* of historically irrigated lands within the Big Chino, may pump groundwater from that land and transport it into the Prescott Active Management Area. Ariz. Rev. Stat. § 45-555(A). To take advantage of this statute, the city or town must own the land or have the permission of the landowner. Based on *Davis*, the city or town now must also have the permission of the holder of any reservation of commercial water rights split off from the land in order to undertake the transportation of groundwater from the historically irrigated acres, or must purchase the reservation from its owner.

*Davis* and Chino Grande, L.L.C., each filed a petition for review by the Arizona Supreme Court. As of the date of this writing, the Arizona Supreme Court has not acted on that petition. A number of other interested parties, including the towns of Prescott Valley and Chino Valley, and the Salt River Project, have filed amicus briefs urging the court to accept the petitions for review. The Arizona Department of Water Resources also filed an amicus brief asking the supreme court to clarify the opinion, to make clear that any right to withdraw water reserved in a deed does not create a new type of water right. The state's position is that there are no groundwater rights outside the active management areas of the state, and that all a landowner owns is an usufructary right—that is, a right to pump groundwater for a reasonable and beneficial purpose to the extent that groundwater is physically available and subject to all legal requirements.

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## CALIFORNIA

(Ronald B. Robie, Reporter)

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### CALIFORNIA SUPREME COURT ADDRESSES CALFED EIS

In 1994, 18 federal and state agencies formed a consortium, CALFED, to design and implement a long-term comprehensive plan to restore California's Sacramento-San Joaquin Delta environment and better utilize it for continued transfer of water to Central and Southern California. The U.S. Bureau of Reclamation's Central Valley Project and the California State Water Project are the major exporters from the Delta. CALFED's creation came during continued controversy over water supply and water quality in the Delta and severe limitations on water exports due to declining quality of the Delta ecosystem.

CALFED's final Programmatic Environmental Impact Statement/Report (EIS/EIR) was issued in 2000. Prepared pursuant to both state and federal law, the report was challenged in a lawsuit that was finally resolved this spring when the California Supreme Court decided *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 184 P.3d 709 (Cal. 2008) (*In re CALFED*). The court upheld the EIS/EIR against several challenges under the California Environmental Quality Act (CEQA). Cal. Pub. Res. Code §§ 21000 *et seq.* The trial court had also upheld the EIS/EIR, but had been reversed by the court of appeal.

The many plaintiffs in the two coordinated actions included environmental groups and various local governments and individuals in Northern California and the Delta as well as the California Farm Bureau Federation.

The CALFED program had four primary objectives: (1) improving the ecosystem of the Delta; (2) using the Delta for a reliable water supply; (3) providing good water quality; and (4) reducing the risk of catastrophic failure of Delta levees. Key criticisms of the EIS/EIR were that it did not: (1) examine in detail a program alternative requiring reduced water exports from the Delta; (2) identify with adequate specificity the potential sources of new water supply or analyze in sufficient detail the environmental impact of taking water from these new sources; or (3) provide sufficient detail about a CALFED project, the Environmental Water Account. The California Supreme Court held that the EIS/EIR was not legally deficient under any of these theories.

Fundamental to the supreme court's decision was the fact that this was not a project-specific EIS/EIR but rather a "programmatic" one. If any specific future water supply projects were to be undertaken, they would require additional environmental review before they could proceed.

The most controversial issue about the EIS/EIR was the omission of a reduced exports alternative. CALFED concluded that this alternative was not feasible and did not include it in the final EIS/EIR. The court of appeal had concluded that inclusion of this alternative was necessary because fewer exports from the Delta might lead to reduced population growth in the areas served by the exports and that this alternative was environmentally superior. The court of appeal's October 2005 decision resulted in considerable public debate over the concept of managing growth by limiting water supply. The supreme court held that this concept was inconsistent with the objective of the CALFED program. As Justice Joyce Kennard explained for a unanimous court,

The CALFED Program is premised on the theory, as yet unproven, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports. . . . If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may have to be capped or reduced. At this relatively early stage of program design, however, we conclude that CALFED properly applied the rule of reason when it decided to consider . . . only alternatives that have the potential to both achieve ecosystem restoration goals and meet current and projected water export demands. . . . Failure to include a reduced exports alternative thus was not an abuse of discretion.

*In re CALFED*, 184 P.3d at 726.

The EIS/EIR only listed "potential" sources of water, thus deferring detailed and specific environmental analysis until later. The court of appeal had held that "[w]ater is too important to receive such cursory treatment." *Id.* The court of appeal also had held that even if specific sources were not identified, there must be an analysis of supplying such water from whatever source.

The supreme court disagreed with both points. Because this was a first-tier program EIR, "CEQA does not mandate that a first-tier program EIR identify with certainty particular sources of water for second-tier projects that will be further analyzed before implementation during later stages of the program." *Id.* The court concluded that first-tier program EIRs can analyze these matters in general terms without the level of detail appropriate for second-tier, site-specific review.

Finally, detailed analysis of the Environmental Water Account was not required either because it too was held to be a second-tier program.

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## COLORADO

(William A. Paddock, Reporter)

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### SIGNIFICANT DEVELOPMENTS RELATING TO DETERMINATIONS OF HISTORIC USE

After a 16-day trial to the court, on September 5, 2008, Water Judge Roger A. Klein entered his 154-page findings of fact, conclusions of law, and order in *In re Water Rights of: Farmers Reservoir & Irrigation Co.*, No. 02 CW 403, District Court, Water Division No. 1, Colorado, available at <http://www.courts.state.co.us>. A full explication of the complexities of this case is beyond the scope of this *Newsletter* and beyond the endurance of most mortals. Accordingly, a general description of the application must suffice. The Farmers Reservoir and Irrigation Company (FRICO) operates a massive irrigation system extending from Denver to Kersey, Colorado. The component of the FRICO system involved here is known as the Barr Lake Division and includes the lands served by the Burlington Ditch, Reservoir and Land Company. Both the Burlington Ditch and FRICO's Barr Lake Division are supplied with water diverted from the South Platte River at the southern edge of Denver. The purpose of the application was to change certain of the water rights of the Burlington Ditch and FRICO Barr Lake Division, and to adjudicate certain other water rights and exchanges, as part of an effort to provide water to replace depletions resulting from the pumping of tributary wells to be used to provide a renewable water supply to the East Cherry Creek Valley Water and Sanitation District (ECCV).

The ECCV provides water and sanitation services to some 50,000 customers in southeast Denver. It currently derives the majority of its water supply from so-called Denver Basin non-tributary groundwater. The use of nontributary groundwater as a municipal water supply fueled much of the rampant growth in Denver's eastern and southern suburban communities beginning in about 1980. Reliance upon non-tributary groundwater as a municipal water supply is somewhat akin to owning a portfolio of subprime mortgages in today's financial markets. The non-tributary water supply will run out in the not too distant future, it will become ever more expensive to produce until it is exhausted, and replacement water is expensive and hard to find. Thus, most municipal entities that rely heavily upon nontributary groundwater are working very hard, and paying a lot of money, to acquire renewable water supplies to help meet their water needs. ECCV plans to obtain its renewable supplies from the water rights being changed by FRICO et al. To deliver this water it was necessary for ECCV to construct a 31-mile long pipeline and two major pumping stations, at a cost of some \$75 million.

The other principal actor in this drama is United Water and Sanitation District, which was formed to provide for the design, acquisition, construction, maintenance, and financing of public improvements. The district is comprised of approximately one acre of land in Elbert County. It currently owns facilities, water rights, or other property rights in Adams, Douglas, El Paso, Morgan, Summit, and Weld Counties. United, FRICO, and ECCV entered into a water supply agreement pursuant to which United provided a substantial amount of the financing needed by ECCV.

FRICO and United entered into mutual water carriage and storage agreements for the use of their respective facilities, all done in furtherance of the ECCV water supply project.

The FRICO application was opposed by 45 parties, and the principal opponents at trial included the cities of Englewood and Aurora, the Central Colorado Water Conservancy District, the State and Division Engineers, and Public Service Company of Colorado.

One of the applicants' principal claims was to adjudicate alternate points of diversion for the FRICO and Burlington water rights to the so-called "Metro Pumps." The history of the Metro Pumps began in 1966 when the new metropolitan wastewater treatment plant (Metro Plant) went into operation at a location approximately 1.5 miles downstream from the Burlington Ditch headgate on the South Platte River. Prior to that time, the wastewater effluent from the City of Denver was discharged to the South Platte River upstream of the Burlington Ditch and was a significant part of the water supply for the Burlington Ditch. When the Metro Plant went into operation, FRICO and Burlington sued the Metropolitan Sewage District No. 1 to enjoin the relocation of the point of return of Denver's effluent to any point below the Burlington Ditch headgate. The companies were successful in the trial court, but lost on appeal. *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co.*, 179 Colo. 36, 499 P.2d 1190 (Colo. 1972). While the appeal was pending, the companies and Denver entered into an agreement that called for Denver to pump water from the Metro Plant's outfall into the Burlington Canal. The Metro Pumps have been used for this purpose since 1968, and, during the period 1969 to 2007, delivered an average of 9,600 acre-feet per year to the Burlington Ditch. The Metro Pumps, however, were never previously adjudicated as alternate points of diversion for the water rights decreed to Burlington Ditch.

A significant issue at trial was whether the Metro Pumps could be considered as a lawful alternate point of diversion for the Burlington Ditch for the period beginning in 1968. The significance of this issue is that if the Metro Pumps were not considered as a lawful alternate point of diversion during that period, the Burlington Ditch would not be able to rely upon the water delivered by the Metro Pumps in determining the transferable historical use of its water rights. The water judge ruled that the Metro Pumps were not a lawful alternate point of diversion and that the amount of water delivered into the Burlington Ditch from the Metro Pumps could not be considered in determining the historical use of the Burlington Ditch water rights. The court further determined that all future diversions at the requested alternate points of diversion for the Burlington Ditch could not exceed the amount of water legally and physically available in priority at the Burlington Ditch headgate on the South Platte River. This ruling resulted in loss of any historical use credit for the water that had been delivered to the Burlington Ditch from the Metro Pumps, some 9,600 acre-feet annually. And unless the Metro Plant's discharge is pumped back to the South Platte above the Burlington Ditch headgate, the Burlington Ditch's 1885 water rights will now place a call on upstream junior water rights to a greater extent than has occurred in the past. Moreover, the treated wastewater that was historically delivered to the Burlington Ditch by the Metro Pumps will now be discharged to the South Platte for use downstream. The combination of these two things will result in significant changes in the flow and water rights administration regime of the South Platte River.

Another one of the applicants' principal claims was to change the water rights represented by shares in the Burlington Ditch Company and the FRICO Barr Lake Division. This engendered a fractious dispute among the parties over what lands could be properly served with the Burlington Ditch Company's water rights. FRICO contended that the Burlington 1885 direct flow and storage water rights could be used to serve FRICO lands downstream from Barr Lake in the FRICO Barr Lake Division. The opposers contended that the Burlington 1885 water rights were not intended to serve those lands and that FRICO had substantially enlarged the use of that and other Burlington Ditch Company water rights after 1909 when FRICO entered into the first of a series of agreements with the Burlington Ditch Company.

After a painstaking review of the historical evidence, much of which dates from the period 1885 to 1920, the water judge concluded that the Burlington Ditch direct flow and storage water rights were not appropriated for use below Barr Lake. Based on this conclusion the water judge held that the applicants must limit the quantification of the historical consumptive use for the 1885 Burlington direct flow water rights to the amount consistent with the use of those rights during the period of 1885 to 1908. The judge also ruled that the Burlington Ditch direct flow water right for 350 c.f.s. must be limited to 200 c.f.s. for use above Barr Lake. Finally the water judge ruled that the Burlington storage water right was limited to an annual release of 5,456 acre-feet to lands under the Hudson and Burlington Extension Laterals as they exited in 1909. The cumulative effect of all of these limitations has yet to be quantified, but will be a substantial reduction in the use of these water rights. Further, the quantification of the historical use of water under these rights will now be made based upon the court-ordered study periods of 1885 to 1909 for the Burlington direct flow water right, 1927 to 2004 for the 1885 Burlington storage right, and 1927-1983 for the FRICO 1908 and 1909 water rights. These new limitations on the lawful use of these water rights also will have a significant effect on the regime of the South Platte River. *Farmer's Reservoir*, No. 02 CW 403, ¶¶ 363-387.

The other highly significant ruling by the water judge was his application of historical use limits to water storage water rights. The applicants did not limit the water storage rights based on an analysis of the historical use of the water rights but rather on the traditional rule of one annual filling of the reservoir. The applicants asserted that this is the proper standard under *City of Westminster v. Church*, 445 P. 2d 52 (Colo. 1968) and *Southeastern Colorado Water Conservation District v. Fort Lyon Canal Co.*, 720 P.2d 133 (Colo. 1986). The opposers asserted that in order to prevent expanded use and injury to vested water rights, the court must impose annual volumetric limits on water storage rights based upon their historical use. The opposers' legal argument relied upon the Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. §§ 37-92-101 *et. seq.* (1969 Act) and §§ 37-92-103(5) and -305(3) thereof. The water judge agreed with the opposers.

In reaching his conclusion, the water judge reasoned that the guiding principle in change of water rights cases is that the changes may not result in injury to vested water rights. The water judge stated that changes in the use of water rights cannot result in an enlargement of the use of the water rights and, therefore, under the applicable Colorado statutes and case law, an applicant seeking to change the use of a water storage right must quantify the historical consumptive use of the water right to be changed to prevent injury to other water rights. The water judge distinguished *City of Westminster v. Church* on the grounds that it was decided

before the adoption of the 1969 Act. The judge reasoned that the provisions of the 1969 Act concerning changes of water rights, including changes of water storage rights, were controlling, and that the holding in *Southeastern Colorado Water Conservation District v. Fort Lyon Canal Co.* made clear that the holding of *City of Westminster v. Church* did not survive the enactment of the 1969 Act. *Farmer's Reservoir*, No. 02 CW 403, ¶¶ 562-571.

The decision to apply a historical consumptive use standard to changes of reservoir water rights is highly controversial. Those that argue against it assert that maintenance of historical return flows is all that is required to prevent injury from a change of a water storage right. They also argue that the imposition of a historical consumptive use limitation on reservoir storage defeats the utility of reservoirs by creating an incentive to fill and empty them annually, rather than using them as a means to store water for times of drought. Thus, they argue that the trial court's ruling creates, in effect, a disincentive to the use of reservoirs as a source of drought protection. It seems likely that this decision will be appealed, and that the Colorado Supreme Court will have the opportunity to resolve this and the other questions addressed by the trial court. Thus, stay tuned for further developments.

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## MONTANA

(Holly Franz, Reporter)

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### SUPREME COURT UPHOLDS CASE-BY-CASE INTERPRETATION OF MUNICIPAL USE

The Montana Supreme Court defined municipal use for purposes of the Water Use Act in *Lohmeier v. Department of Natural Resources and Conservation (DNRC)*, 2008 MT 307, 192 P.3d 1137 (Mont. 2008). This dispute arose in the Gallatin drainage which is subject to the Upper Missouri River basin closure. The basin closure generally prohibits DNRC from accepting and processing new water use applications with certain exceptions, including an exception for municipal use. Mont. Code Ann. § 85-2-343(2)(c)(iii).

Municipal use is not defined in the Water Use Act. Between 1973 when the Water Use Act was enacted and 1993 when the basin closure was enacted, DNRC processed municipal use applications on a case-by-case basis depending upon the nature of the use. If the water was for a public water supply, even if operated by a private entity or water and sewer district, it was considered a municipal use. DNRC continued this practice until it was directed by the legislature in 2003 to adopt regulations for its water use permitting process. In response, DNRC adopted a regulation defining municipal use as "water appropriated by and provided for those in and around a municipality or an unincorporated town." Mont. Admin. R. § 36.12.101(39) (2005). Eighteen months later, DNRC repealed the administrative rule and returned to its case-by-case interpretation of municipal use.

Lohmeier filed a declaratory judgment seeking to invalidate DNRC's repeal of the administrative definition of municipal use. Lohmeier, an objector to a number of water use permit applications filed by Utility Solutions, a private water supply company serving customers in an unincorporated area of the county, argued that DNRC's repeal of the rule potentially harmed his senior appropriated water right by expanding the number of water use permit applications that may be applied for and potentially granted in the Upper Missouri River closed basin.

The Montana Supreme Court, focusing on the statutory requirements for challenging a regulation, rejected Lohmeier's argument. By statute, an agency rule may be declared invalid if its threatened application interferes with or impairs the legal rights of the plaintiff, or if the rule was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute. Mont. Code Ann. § 2-4-506(1) & (2). Granting deference to the agency, the court determined that Lohmeier failed to demonstrate any injury from DNRC's case-by-case interpretation of municipal use which was the unchallenged method of operation since the passage of the Water Use Act with the exception of an 18-month period before the new rule was repealed.

The court further concluded that since DNRC's case-by-case interpretation was in effect when the legislature enacted the Upper Missouri River basin closure, the legislature was aware of the agency's prior interpretations and chose not to redefine municipal use. In addition, the court pointed to Mont. Code Ann. § 85-2-227(4), dealing with the criteria for presumption of municipal non-abandonment, which describes municipal use as "use by a city, town, or other public or private entity that operates a public water supply system. . . ." The court presumed that the legislature knew the contents of the code and agreed with the character of the use, rather than the character of the applicant, as being the defining factor for municipal use. The court also determined that 18 months was not enough time for DNRC to have instilled reliance in the public on the definition of municipal use.

Lastly, the court determined that it was DNRC's prerogative to enact rules that aid the permitting process and to repeal rules that do not. Ironically, in 2007 the legislature amended the Upper Missouri River basin closure statute to limit the exception to the use of surface water "by or for a municipality." Mont. Code Ann. § 85-2-343(1)(c)(iii). A municipality is defined as "an incorporated city or town." *Id.* § 85-2-102(16). Because this amendment is not retroactive, the court's ruling in *Lohmeier* allowed DNRC to proceed with the processing of Utility Solutions' water use permit applications.

#### **SUPREME COURT UPHOLDS DISTRICT COURT JURISDICTION TO INTERPRET WATER ALLOCATION CONTRACTS**

In *Kruer v. Three Creeks Ranch*, 2008 MT 315, 194 P.3d 634 (Mont. 2008), the Montana Supreme Court further clarified the district court's jurisdiction regarding water rights. Business partners Kruer and Three Creeks Ranch entered into a purchase agreement for Kruer to purchase 54 acres, consisting of Lots 20V and 21V, of a 67-acre tract. Portions of the 67 acres were irrigated by previously adjudicated water rights 917 and 918. The purchase agreement specified that Kruer received 80% of water rights 917 and 918.

The relationship between the parties soured and disputes arose regarding water right ownership and use. The parties entered into a 2005 settlement agreement by which Three Creeks Ranch released all claims to Lots 20V and 21V as well as 80% of water rights 917 and 918. In addition, Three Creeks Ranch agreed to transfer another portion of the original 67-acre tract, Lot 11V-2 consisting of 10.7 irrigated acres, to Kruer. This left Three Creeks Ranch with the remaining 7.58 acres, referred to as the Common Area, of the original 67-acre tract. The transfer included all "[w]ater rights appurtenant to Lot [11V-2] only and not affecting any other [Three Creeks Ranch] irrigation or water rights." 194 P.3d 636.

The parties subsequently disagreed on the water rights appurtenant to Lot 11V-2, and Kruer sought relief in the district court. The district court interpreted the purchase agreement and

settlement agreement and granted Kruer 80% of water rights 917 and 918. In addition, the district determined that water right 917 was 100% appurtenant to Lot 11V-2. Finally, the district determined that the remaining 20% of water right 918 should be divided proportionately between the parties based upon the irrigated acreage of Kruer's Lot 11V-2 and Three Creeks Ranch's retained Common Area. Three Creeks Ranch appealed.

Three Creeks Ranch asserted that the district court exceeded its subject matter jurisdiction by allocating the disputed water rights. The Montana Supreme Court acknowledged that the water court has exclusive jurisdiction to interpret and determine existing water rights, but pointed to the district court's general jurisdiction to hear all civil matters in law or equity and to supervise the distribution of water. The supreme court ruled that while a district court may not have jurisdiction to reallocate disputed water rights absent a contract, the district court does have jurisdiction to interpret a contract that purports to allocate water rights.

The supreme court also upheld the district court's jurisdiction to determine appurtenance of water rights based on historic use. Since the agreements required the determination of appurtenancy, the district court properly relied on evidence that water right 917 was used solely on the Kruer properties since 1999 when allocating 100% of the right to Kruer.

As a side note, this dispute has generated at least two related Montana Supreme Court decisions. In *White v. Montana*, 344 Mont. 555, 186 P.3d 877 (Table) (2008) (unreported), a Three Creeks Ranch employee claimed malicious prosecution as a result of trespass and criminal mischief charges that were filed after he cut the lock off the Kruer's irrigation pump panel box. The employee also sought attorneys' fees based upon alleged ditch interference by Kruer and others. The court held that since White is only an employee and not a holder of a ditch easement, he could not seek attorneys' fees and costs under the ditch interference statute, Mont. Code Ann. § 70-17-112(5). The court also upheld the dismissal of the entire case based upon prosecutorial immunity. Likewise, in *Rosenthal v. County of Madison*, 339 Mont. 419, 170 P.3d 493 (Mont. 2007), the managing member and agent of Three Creeks Ranch filed a malicious prosecution claim based upon a criminal charge filed against him for stalking Kruer. The dismissal of this claim based on prosecutorial immunity was also upheld.

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## **NEVADA**

**(Douglas L. Grant, Reporter)**

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#### **COURT OF FEDERAL CLAIMS FINDS FOREST SERVICE TAKING OF HAGE RANCH'S WATER RIGHTS**

*Estate of Hage v. United States*, 82 Fed. Cl. 202 (2008) (*Hage*), is the fifth opinion by the Court of Federal Claims in litigation initiated in 1991 by the late E. Wayne Hage, of Sagebrush Rebellion fame, and his wife, the late Jean N. Hage. The Hages owned approximately 7,000 acres of patented land in Nevada used primarily for grazing cattle and also held Taylor Grazing Act permits for grazing cattle on 752,000 acres of nearby federal land, including land within what became part of the Toiyabe National Forest. The Nevada Department of Wildlife's introduction of elk into an area of the national forest led to continuing conflict between the Forest Service and the Hages that precipitated the litigation. The Hages asserted various claims,

most of which were unrelated to water rights and were unsuccessful. Their claim of potential interest to water lawyers was that the Forest Service had taken some of their water rights and thus owed them just compensation under the Fifth Amendment.

The fourth *Hage* opinion, *Hage v. United States*, 51 Fed. Cl. 570 (2002), held that under Nevada law the Hages had obtained vested water rights that fell into three categories: those for stockwatering on their federal grazing allotments, those for use on their patented land that were supplied by flows coming from upstream federal land, and those for use on their patented land that entailed transporting water across federal land through ditches for which they held rights-of-way acquired under 1866 federal legislation, 43 U.S.C. § 661.

The fifth *Hage* opinion examined, among other issues, whether particular Forest Service actions had taken any of those water rights. The court's analysis proceeded under the U.S. Supreme Court's takings framework that distinguishes between a physical taking and a regulatory taking. A physical taking is a taking per se, while a regulatory taking depends on balancing multiple factors. Under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the principal balancing factors are (1) the extent to which the regulation has interfered with the owner's distinct investment-backed expectations, (2) the character of the governmental action, and (3) the economic impact of the regulation on the owner. *Penn Central* noted that the Court had not found takings in cases where regulation caused large decreases in property values when the character of the governmental action was that it promoted the general welfare. *Penn Central*, 438 U.S. at 147-48. The court applied the takings framework to each of the three categories of water rights.

*Water rights for stockwatering on grazing allotments.* The Forest Service ultimately canceled and suspended some of the Hages' grazing permits. Several years before that, however, the Forest Service constructed fences around streams in which the Hages had stockwatering rights that prevented their cattle from accessing the water. The court held that ouster of the cattle by the fencing was a per se physical taking for the time the cattle were still permitted to graze on the federal land.

*Water rights for patented land supplied by flows from upstream federal land.* Some of the water supply for the Hages' patented land came from streams on federal land, and this supply decreased over time due to the construction of beaver dams and the growth of trees and other vegetation in and near streams on the federal land. Under *Ennor v. Raine*, 74 P. 1 (Nev. 1903), an appropriator has the right to enter land upstream belonging to another to remove obstructions in the stream channel that interfere with his water supply. The Court of Federal Claims concluded that *Ennor* applied not only to unnatural obstacles placed in the channel by an upstream owner but also to beaver dams and natural vegetation. The court found that the Forest Service allowed vegetation to grow upstream on federal land and threatened to prosecute the Hages for trespass if they entered the land to remove obstructions without first obtaining a special use permit. The court held that these federal policies constituted a regulatory taking under the *Penn Central* factors because (1) the Hages had investment-backed expectations in the water rights because they purchased them along with the patented ranch land in 1978, (2) the threats of prosecution for trespass were malicious in character (apparently the court was implying that the threats did not do much to promote the general welfare), and (3) the diminished water supply for irrigation made the ranch economically unviable.

*Water rights for patented land supplied by transporting water across federal land through ditches for which the Hages held rights-of-way.* The Hages' water ditches crossed thousands of acres of federal land. The Forest Service informed the Hages that only hand tools could be used for ditch maintenance and threatened to prosecute them if they entered federal land to do anything beyond minor trimming and clearing of vegetation without first obtaining a special use permit. The Hages never applied for a special use permit. The court said that given the history of bad relations between the parties, an application by the Hages to maintain their ditches with appropriate equipment, such as caterpillars and back hoes, clearly would have been futile, and therefore the special use permit requirement effectively prohibited necessary maintenance. The court held that the governmental action was a regulatory taking of water rights under *Penn Central* because (1) the Hages had significant investment-backed expectations in the ditches as they were the primary means of getting irrigation water to the patented land and were purchased by the Hages along with the patented land, (2) the hand tools requirement was based solely on hostility to the Hages (again, apparently the court was implying that the requirement did not do much to promote the general welfare), and (3) the economic impact of the regulation was considerable because it would have been economically impractical to hire enough men to do necessary maintenance work with hand tools.

The court found that the amount of water taken by the government was 17,568.1 acre-feet. It also found that the value of the water for agricultural use in 1991, when the Hages filed the suit, was \$162.50 per acre-foot, bringing the total value of the water rights taken to \$2,854,816. *Hage V*, 82 Fed. Cl. at 214. A final judgment has not been entered as of this writing. The Hages' attorneys have sought reconsideration of the valuation issue, and the issue of prejudgment interest remains to be resolved. Once a final judgment is entered, the United States will have to decide whether to appeal.

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## OREGON

(Jennie L. Bricker, Reporter)

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### FINAL WORD FROM OREGON SUPREME COURT ON WATER RIGHTS OWNERSHIP FOR TRANSFER APPLICATION PURPOSES

On July 10, 2008, the Oregon Supreme Court issued its opinion in *Fort Vannoy Irrigation District v. Water Resources Commission*, 345 Or. 56, 188 P.3d 277 (Or. 2008), upholding last year's decision by the Oregon Court of Appeals. That decision was reported in Vol. XL, No. 3 (2007) of this *Newsletter*.

The case concerns the issue of who is the "holder" of a water right for purposes of a transfer application under Or. Rev. Stat. § 540.510. The supreme court interpreted the statutory term "holder of [a] water use subject to transfer" as the person or entity holding an ownership interest in a water right. *Fort Vannoy*, 188 P.3d at 299. In the case of two water right certificates included in a transfer application by the landowner, Ken-Wal Farms, the certificates were issued in the name of Fort Vannoy Irrigation District. The Oregon Water Resources Commission posited that the holder of a water right was the owner of irrigated land to which the right was appurtenant. Rejecting the Commission's argument, the court held that the irrigation district, not the landowner, was the holder of those rights.

Irrigation districts are authorized to acquire property, including water rights, pursuant to Or. Rev. Stat. § 545.239. The court further held that a district's ownership interest amounts to legal title to water rights as trustee, for the benefit of the district's patrons, which hold equitable title as beneficiaries. Its role as trustee gives the district responsibility for managing the trust property, and that includes the right to apply for a water rights transfer.

#### ROGUE RIVER DECLARED NAVIGABLE

On June 10, 2008, the Oregon State Land Board considered evidence in a report from the Department of State Lands pursuant to Or. Rev. Stat. §§ 274.400 to 274.412 concerning ownership of the Rogue River from river mile 68.5 to 157.5. This report is available at [http://www.oregon.gov/DSL/NAV/Final\\_Study\\_May\\_2008.pdf](http://www.oregon.gov/DSL/NAV/Final_Study_May_2008.pdf). The Land Board declared public ownership of this segment of the river, based on its conclusion that when Oregon became a state in 1859, the 89-mile segment met the test for title navigability developed by federal courts. The federal test for navigability is whether the waterway was used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel over water. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). On August 14, 2008, a group of riparian landowners along the Rogue River filed a petition for judicial review in Jackson County Circuit Court, requesting review of the declaration.

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## TEXAS

(Emily Willms Rogers, Reporter)

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#### TEXAS SUPREME COURT REVERSES COURT OF APPEALS DECISION ON GROUNDWATER DISTRICT RULES

On May 30, 2008, in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1*, 263 S.W.3d 910 (Tex. 2008), the Texas Supreme Court reversed in part the Eighth Court of Appeals, El Paso, in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1*, 209 S.W.3d 146 (Tex. App.—El Paso 2006). The Texas Supreme Court concluded that both the amount of groundwater used and its beneficial purpose are components of “historic or existing use” as used in Texas Water Code § 36.116(b) and that the Hudspeth County Underground Water Conservation District No. 1 (Hudspeth District) exceeded its rulemaking authority in grandfathering existing wells without regard to both.

The Hudspeth District, in developing its groundwater production rules, divided groundwater production into three classes of uses: (1) the statutorily exempt users, (2) the existing and historic users, and (3) the new users. The existing and historic users were issued validation permits, which quantified the amount of water that the user could withdraw. The new users were issued operating permits, which conditioned the production of water upon the elevation of the Bone Springs-Victorio Peak Aquifer. As a result, those with validation permits have a guaranteed right to production, and those with operating permits have no right to groundwater until the aquifer reaches a certain defined level.

Under the district rules, transfer permits technically are available to both holders of validation permits and operating permits and the transfer of the water to another entity could be made

without regard to the use. In other words, the transfer rules would permit in-district irrigators to convert their existing use to an entirely new use and transfer it out of the district for municipal or industrial purposes. The holders of validation permits, thus, in actuality would receive substantially greater transfer rights because they receive a greater guaranteed allocation of groundwater than other landowners.

Guitar Holding Company, L.P. (Guitar) is one of the largest landowners in the county; however, it only irrigated a small portion of its land during the historic period and, thus, had only a limited ability to convert and transfer guaranteed amounts of water out of the district. In contrast, several other irrigators in the district with validation permits were permitted to produce a significantly greater amount of water than Guitar, even though they owned less land, and were able to transfer greater amounts of water out of the district as well.

In four separate administrative appeals, Guitar challenged the facial validity of the Hudspeth District's rules. The district court upheld the validity of the rules and the court of appeals affirmed. Guitar appealed the decision, complaining that the Hudspeth District misapplied its limited authority to preserve existing or historic groundwater use.

Two issues were addressed by the supreme court: (1) whether the definition of “use” includes both the amount of groundwater and its purpose, and (2) whether transfer permits issued by the Hudspeth District constituted new permit applications. In addressing the first issue, Guitar argued that the Water Code only authorized a district to preserve historic or existing uses of the same type or purpose. When a groundwater permit holder transfers water out of the district for a new use, it is not allowed under Texas law to preserve or “grandfather” the amount of water used without also requiring the purpose of the use to remain the same. The supreme court agreed. After analyzing the terms “historic or existing use” and “use” as used in Chapter 36 of the Texas Water Code, the supreme court held that “the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved.” 263 S.W.3d at 915. Thus, “[o]nce the groundwater allocated for existing irrigation use is transferred outside the district . . . the protected existing use ends, as does the justification for protecting that use.” *Id.* at 918.

With respect to the second issue, Guitar argued that transferring groundwater out of the district was a new use for which a new application must be made, and that must comply with the requirements of Texas Water Code § 36.113(e). By linking transfer permits to existing permits, the Hudspeth District avoided applying the same limitations to all of the new transfer permit applications, and effectively gave a preferential right to convert existing irrigation wells to an entirely new use without satisfying the more restrictive conditions applied to other landowners. The supreme court again agreed with Guitar and held that transfer permit applications were new permit applications within the meaning of Texas Water Code § 36.113(3).

Accordingly, the supreme court reversed the court of appeals and rendered a judgment declaring the rules relating to transfer permits invalid as well as any transfer permits issued pursuant to those rules.

#### COURT HOLDS LANDOWNER'S GROUNDWATER RIGHTS RESERVATION VALID

On February 27, 2008, the San Antonio Court of Appeals, in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 04-06-00782-CV, 2008 WL 508682 (Tex. App.—San Antonio Feb. 27,

2008, no pet.), upheld the lower court's judgment that a warranty deed's reservation of "all water rights" prevents the City of Del Rio (City) from drilling and pumping groundwater from beneath the 15-acre tract it purchased from the Clayton Sam Colt Hamilton Trust (Trust).

In 1997, the Trust sold 15 acres of ranch land to the City. The warranty deed conveying the property reserved to the seller "all oil, gas, and other mineral rights," relinquished all of the seller's rights to ingress and egress in and on the property, provided that "no portion of the property being conveyed under the terms of [the] contract shall be used for any operations either of drilling, exploration, or producing of the minerals reserved by the Seller," and reserved to the seller "all water rights associated with said tract," but prohibited the seller from using any portion of the surface for exploring, drilling, or producing any such water. *Del Rio*, 2008 WL 508682 at \*1.

Three years after the purchase, the City realized it needed additional water and decided to drill a water well on the 15-acre tract. The City completed the well in the summer of 2002 at a cost of \$850,000. On one of the trustee's infrequent visits to the Trust's remaining ranch property, the trustee noticed drilling on the 15-acre tract. The Trust, in response to the drilling, demanded the City neither produce nor capture the groundwater and gave formal notice of a \$500,000 claim against the City. After the City rejected the Trust's claims, the Trust sought a declaratory judgment that (1) it owned the groundwater beneath the 15-acre tract, and (2) the City's claim of ownership to those rights should be rejected. The district court agreed with the Trust, and the City appealed.

The court of appeals, in upholding the lower court's decision, considered two questions: (1) Can one reserve water rights unless one has reduced the water to possession? (2) Can one sever the groundwater estate from the surface estate when all rights of access to the surface estate are relinquished?

*Can one reserve water rights unless one has reduced the water to possession?* The City argued that, under the rule of capture, the corpus of the groundwater cannot be "owned" until it has been reduced to possession. Because the Trust never drilled or pumped on the 15-acre tract, the groundwater was never reduced to possession. The City further argued that the "absolute ownership theory" provides that ownership is limited to the surface estate owner's right to acquire possession of the water and not the corpus of the water itself. *Id.* at \*3. The Trust and court disagreed. The Trust claimed that the City confused the interplay between the separate and distinct concepts of the rule of capture and the absolute ownership theory. Under the City's analysis,

[a] landowner could not create a *present* transfer of groundwater interest in place even if the parties contemplated pumping the water to the surface the next day. Each time one wished to convey groundwater, the landowner would first have to raise the water to the surface, and then deliver it to the transferee.

*Id.* (emphasis added). Such a system would "bring to a standstill any attempt to transfer groundwater in this State."

The court of appeals, in citing several Texas Supreme Court cases, agreed with the Trust. The court noted that the Texas Supreme Court has stated that percolating water is a "part of, and not different from, the soil" and the landowner is the "absolute" owner of it. *See Houston & T.C. Railway Co. v. East*, 90 Tex. 146, 81 S.W. 279, 281 (Tex. 1904). And, the groundwater is the "exclusive property" of the owner of the surface and "subject to bar-

ter and sale as any other species of property." *See Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (Tex. 1927). Under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City. Contrary to the City assertions, the court held that the rule of capture does not change the ownership of the water in place. The rule of capture simply denies a landowner whose property is being drained any judicial remedy. The owner can "neither enjoin production from the draining well, nor obtain an accounting, nor obtain other equitable relief." *Del Rio*, 2008 WL 508682 at \*4. The rule of capture is a doctrine of "nonliability for drainage," not a rule of property. *Id.* Thus, the court of appeals held that the warranty deed conveyed the surface estate but reserved "all water rights," and the City never obtained ownership of the groundwater beneath the 15-acre tract it purchased from the Trust.

*Can one sever the groundwater estate from the surface estate when all rights of access to the surface estate are relinquished?*

The City argued that because the Trust relinquished the right to access the 15-acre tract of land, the groundwater estate could not be severed from the surface estate, and therefore, the City had a right to drill and pump the groundwater from the tract. The City argued that allowing the groundwater estate to be severed from the surface estate with no reserved right of access would "run afoul of the Texas Constitution's prohibition against the establishment of perpetuities." *Id.* at \*5 (citations omitted). The court disagreed with the City noting that the Trust did not need access to the 15-acre tract to pump groundwater from beneath it. The Trust can access the groundwater from its adjacent property and, thus, the water rights reservation did not violate the prohibition against perpetuities.

#### ANOTHER GROUNDWATER OWNERSHIP CASE TO WATCH

On August 29, 2008, the same San Antonio Court of Appeals that upheld the validity of the water rights reservation and ownership of the groundwater in place in the *Del Rio* case overturned a lower court decision in *Edwards Aquifer Authority v. Day*, No. 04-07-00103-CV, 2008 WL 4056321 (Tex. App.—San Antonio Aug. 29, 2008, no pet.), granting the Authority's summary judgment motion because the groundwater permit applicants did not have a constitutionally protected vested interest in groundwater. The court of appeals, in citing the *Del Rio* case, stated that the groundwater permit applicants have a vested right in some groundwater rights. *Edwards*, 2008 WL 4056321 at \*9. In reversing the lower court, the court of appeals remanded the applicant's constitutional taking claim for further proceedings.

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## UTAH

(L. Ward Wagstaff, Reporter)

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#### UTAH SUPREME COURT RECOGNIZES BROAD PUBLIC RIGHTS INCIDENT TO LAWFUL WATER RECREATION ACTIVITIES

In *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897 (Utah 2008), the Utah Supreme Court held that the public easement in the beds of natural waters allows the public to touch the privately owned stream or lake bed incidental to recreational pursuits that utilize the water.

In June 2000, Jody, Kevin, and Lacey Conatser, together with Nicole Mann, launched an inflatable raft on the Weber River from

a public access area. As they floated down the river, they crossed private property owned by the Johnsons. As they floated through the Johnsons' property, they touched the river bottom with their paddles, the bottom of the raft, and on foot while fishing and moving fencing. The Johnsons confronted them and ordered them to leave the river and carry their raft out along an adjacent railway. The Conatsers refused and, when they left the river at another public access point, a Morgan County deputy sheriff cited them for criminal trespass. The Morgan County Justice Court found them guilty and the Conatsers appealed. The state then dismissed the criminal charges. While the criminal charges were pending, however, the Conatsers filed a civil suit against the Johnsons seeking a judicial determination that they had a right to touch the river bed on the Johnsons' property.

In the civil suit, the parties filed cross-motions for summary judgment. The district court denied the Conatsers' motion in part, relying on the Wyoming case *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), and holding that the public easement is limited to activities conducted "upon the water." See *Conatser*, 194 P.3d at 898. It thus held that the public could only touch the water bed incidental to floating. The court held that other activities, such as "[w]ading or walking along the river, where such conduct is not incidental to the right of floatation upon natural waters, would constitute a trespass of private property rights." *Id.* at 899 (quoting the district court decision.) The Conatsers appealed the part of the decision that limited the public right to touch the stream bed incidental only to the act of floating.

In reviewing the case, the Utah Supreme Court first noted that Utah statutes provide that all waters in the state are the "property of the public." See Utah Code Ann. § 73-1-1. The court relied on the case *J.J.N.P. Co. v. State*, 655 P.2d 1183 (Utah 1982), holding that the public has an "easement over the water regardless of who owns the water bed beneath." *Conatser*, 194 P.3d at 899 (quoting *J.J.N.P.*, 655 P.2d at 1136).

The court then addressed the critical issue, the scope of the easement. Whereas the district court had relied on *Day*, the Utah Supreme Court looked to *J.J.N.P.* for a more expansive range of recreational activities. The court acknowledged that in *J.J.N.P.*, it had referenced *Day*, but stated that it "did not adopt the language that limits the easement's scope to activities that can be performed upon the water. Instead, we established our own rule that the public 'has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.'" *Conatser*, 194 P.3d at 901 (quoting *J.J.N.P.*, 655 P.2d at 1137).

Having determined that the public easement in state waters allows a broader range of activities than the district court had recognized, the court turned to the question of touching the stream bed, an issue the court had expressly not addressed in *J.J.N.P.* The court held that "the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement." *Id.* at 901-02. Such touching, the court held, is reasonably necessary for the public use of the easement: "The practical reality is that the public cannot effectively enjoy its right to 'utilize' the water to engage in recreational activities without touching the water's bed." *Id.* at 902. The court held further that such touching of the water bed does not cause unnecessary injury to the landowners. "Touching a water's bed . . . is merely part of the existing burden—it is not an additional burden and thus is not more injurious to landowners." *Id.*

The public easement has limits. The landowner's interests are protected because (1) "the public may engage only in lawful recreational activities," (2) "those activities must utilize the wa-

ter," (3) "the public must act reasonably in touching the water's bed," and (4) "the public may not cause unnecessary injury to the landowner." *Id.* at 903.

The *Conatser* decision has generated interest among recreation groups, particularly the fishing community, and concern among landowners, particularly the agricultural community. The next chapter in this story may be written in the legislature, as both sides seek a reasonable and workable accommodation of the interests affected by the decision.

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## WASHINGTON

(Amy K. Kelley, Editor)

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### WHEN ONLY MUNICIPALITIES ARE MUNICIPALITIES

The difference in Washington between "true" municipalities and the rest of the water-using universe was made abundantly clear in 1998 in the case of *State Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (Wash. 1998), in which the Washington Supreme Court held that a developer's final certificate for water would be limited to the amount of water actually applied to beneficial use, and not to the amount of "system capacity," a/k/a "pumps and pipes." This amount was a lot less than ultimately planned for the development of the completed real estate project. The legislative "fix" for the developers arrived in 2003 in the form of a "municipal" water law, S.S.H.B. No. 1338, 1st Spec. Sess. ch. 5, which expansively defined "municipal water supply purposes" to include "a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections. . . ." Wash. Rev. Code § 90.03.015. The 2003 law also purported to protect former certificated rights that had been granted but would not meet the *Theodoratus* rule.

In June 2008, a King County trial court struck down these parts of the 2003 statute in *Lummi Indian Nation v. Washington and Burlingame v. Washington*, largely on separation of powers principles. Nos. 06-2-40103-4SEA, 06-2-28667-7-SEA, slip.op. (King County Superior Ct., June 11, 2008). An appeal has been lodged, and the rulings on appeal are very anxiously awaited. In the meantime, in July, a lawsuit was commenced against Washington State University, challenging its plans to consolidate various "paper" water rights and use the water to irrigate a luxurious golf course from the Grande Ronde Aquifer, which is being "mined," and is declining at a rate of about a foot and a half a year. Various Pullman (where WSU is located) residents and Eastern Washington conservation groups have been fighting the university over the golf course for several years, and this latest court challenge is based largely on the same premises as the ruling in the King County case. Both of these cases are being closely watched and should provide the basis for lengthy discussions in future reports for this *Newsletter*.

### FINDING WATER IN THE DESERT

Prior *Newsletters* have addressed the State of Washington's plans and efforts to somehow increase the ability to use water from the Columbia River system. See Vol. XXXIX, No. 2 at 15 (2006) (addressing the passage of legislation authorizing inventories, forecasts, and studies) and Vol. XLI No. 1 at 11 (2008) (addressing agreements with several tribes whereby Washington State would make large annual payments in return for the tribes refraining from objections to large annual drawdowns of Lake

Roosevelt). On September 25, 2008, the state authorized the additional releases and also approved \$46 million for water storage and conservation projects in Eastern Washington. Although many irrigators, counties, municipalities, the tribes, and several environmental groups are "on board," at least some conservation organizations remain highly critical. Whether the

criticism will take the form of formal legal challenges as this "plan" is put into operation remains to be seen. Further details can be found in "State OKs Drawdown of Lake Roosevelt," *Spokesman Review*, Sept. 26, 2008, at B3.

### **NEW WATER RIGHTS HANDBOOK AVAILABLE**

**A new book has just been published that may be of interest to our readers. It is entitled *Water Rights Handbook for Colorado Conservation Professionals*. It was written by Peter D. Nichols, Esq., Michael F. Browning, Esq., Kenneth R. Wright, P.E., Patricia Flood, P.E., and Mark S. Weston. The book may be purchased from Bradford Publishing Company, 1743 Wazee Street, Denver, CO 80202, 800-446-2831, [www.bradfordpublishing.com](http://www.bradfordpublishing.com).**

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