Update on Water Law

by
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"Men of small means who under the theory of the bill are to receive its benefits will need a few years in which to construct the necessary waterways and bring their lands under cultivation. On the other hand, they should not be permitted to acquire rights to water without using the same." John Wesley Powell, 1879 Report on the Lands of the Arid Region of the United States 40 (1983 ed.).

I. INTRODUCTION.

As we examine the events and issues in western water law in the last year of the twentieth century and the first years of the twenty-first, to understand where we are requires us to look back from whence we have come, as well as to look forward and plan for the future. The venerable doctrine of prior appropriation and the requirement of beneficial use remain the engine driving what we know as western water law. These doctrines are being tested and applied in ways not contemplated by their authors or originally intended beneficiaries. Nonetheless, western water law moves forward and, sometimes painfully, but certainly steadfastly, accommodates and endures. These past two years show continued developments in the area of federal and state relationships vis-a-vis management of the water resource, recognition of tribal interests, protection of endangered species and the environment, all the while stretching the water resource to accommodate growing municipal needs and continued commercial and industrial development.

II. FEDERAL AND INTERSTATE ISSUES.

The historic tension between federal versus state regulation or control of the water resource continued to occupy the limelight in many arenas across the West in the past two years. State power over the water resource stems from constitutional principles reserving power to the states, and federal law recognizing state law as the source of water rights. *See, e.g., California v. United States*, 438 U.S. 645, 657-58 (1978). This venerable state authority often conflicts with the contrasting federal power to regulate commerce amongst states, which provides the basis for federal authority over the water resource, and the federal power to regulate and control federal property, which provides the basis for the reserved rights doctrine. These competing principles played out in a myriad of contexts these past two years including ownership disputes, battles under the Endangered Species Act, and claims of federal reserved rights.

A. Federal Ownership and Jurisdiction.

1. *United States v. Elephant Butte Irrigation District, No. CIV 97-803 JP/RLP (D.N.M. Aug. 22, 2000).*

Chief Judge James A. Parker dismissed a quiet title action brought by the Bureau of Reclamation, on the basis of Colorado River abstention and the court's discretion under the Declaratory Judgment Act. The Bureau's complaint was an effort to quiet title to waters in the Rio Grande Project, involving two irrigation districts, one in New Mexico and one in Texas. The court held dismissal was appropriate because of the pendency of an ongoing adjudication in the lower Rio Grande. The case is on appeal to the Tenth Circuit, Case Nos. 00-2451, 00-2459, and 00-2473 consolidated. Briefing will be complete at the end of June and oral argument is expected sometime thereafter. The District Court's decision dismissing the action is available at *www.nmcourt.fed.us/dcdocs*.

2. *United States v. Alpine Land and Reservoir Co., 174 F.3d 1007 (9th Cir. 1999).*

The Ninth Circuit determined that there was exclusive jurisdiction in the federal courts to hear appeals from the Nevada State Engineer involving either the Carson or Truckee Rivers based on Alpine or Orr Ditch decrees.

3. *State Engineer v. South Fork Band of Te-Moak Tribe, 66 F. Supp. 2d 1163 (D. Nev. 1999), vacated, 114 F. Supp. 2d 1046 (2000).*

The United States and Tribe removed an enforcement action brought by the Nevada State Engineer seeking to maintain access to the Te-Moak Tribe's reservation lands for purposes of monitoring and implementing the Humboldt Decree. Judge Reed denied the State Engineer's motion to remand on the basis that the action was in personam, not in rem. The Sixth Judicial District Court subsequently sought to enjoin the federal court from any further proceedings and the federal court responded in kind with its own injunction against the state court. The Ninth Circuit upheld the injunction of the federal district court. *In re Determination of Relative Rights of Claimants and Appropriators of Waters of Humboldt River Stream and Tributaries,* 225 F.3d 662 (Table), 2000 WL 714642, No. 00-15159 (9th Cir. June 2, 2000). On August 30, 2000, Judge Reed reversed himself, dismissing the case on *Colorado River* abstention grounds.

4. *United States v. New Mexico, CIV No. 01-00072 BDB (D.N.M.).*

On January 19, 2001, the United States filed a complaint naming several thousand defendants in the unadjudicated Zuni River Basin, seeking to quiet title to the waters of the basin on behalf of the Zuni Tribe and other Indian interests. The action has been stayed pending discussions between the New Mexico State Engineer and the United States regarding completing a hydrographic survey for the basin.

B. Endangered Species Act.

The effect of the Endangered Species Act ("ESA") through listing and critical habitat designations under section 4, section 7 consultation requirements, and section 9 take prohibitions, continues to have a significant impact on water resource allocation issues throughout the West.

1. ***Rio Grande Silvery Minnow v. McDonald, No. CIV 99-1320 JP/RLP (D.N.M.).***

The protection of the Rio Grande Silvery Minnow in the middle Rio Grande in New Mexico is illustrative of the competing interests of environmental protection, municipal and economic development needs, irrigated agriculture and the proper role of the federal government, all brought to the fore in a system where the water resource is already fully, if not over, allocated.

In 1999, environmentalists filed suit against the U.S. Army Corps of Engineers and the Bureau of Reclamation, claiming violations of sections 7 and 9 of the ESA, based on alleged Corps and Bureau action or inaction vis-a-vis the silvery minnow. Plaintiffs allege that the Bureau and Corps must manage federal project water and upstream reservoirs (including 40,000 acre-feet of City of Albuquerque San Juan-Chama water) for the minnow. The State of New Mexico, Middle Rio Grande Conservancy District and others intervened. After almost of year of unsuccessful mediation and band-aid fixes to hobble through last year's irrigation season, the case is set to be briefed on the "administrative record" by the end of June. The Middle Rio Grande Conservancy District has now filed its own notice of intent to sue under the Endangered Species Act in apparent anticipation of curtailed agricultural diversions.

2. ***Middle Rio Grande Conservancy District v. Babbitt, CIV No. 99-870, 99-1445, consolidated M/RLP (D.N.M. 2000).***

In November, 2000, Judge Mechem ruled the United States Fish and Wildlife Service ("USFWS") acted unlawfully in designating 163 miles in the middle Rio Grande as critical habitat for the silvery minnow without first preparing an environmental impact statement. The plaintiffs, Middle Rio Grande Conservancy District and State of New Mexico argued that the rule, supported by an environmental assessment and FONSI, failed to adequately consider economic impacts, failed to identify the biological needs of the fish, and failed to consider compact consequences. Environmentalists plaintiffs argued the designation was insufficiently broad. In a relatively strong opinion, the court ordered preparation of an environmental impact statement within 120 days. The government has appealed, Case No. 01-2145. The briefing on the appeal will be completed sometime in July. Judge Mechem's decision can be found at *www.nmcourt.fed.us/dcdocs*.

The USFWS has initiated the scoping process for the EIS and its Notice of Intent for the process proposes to consider inclusion of the entire Rio Grande in New Mexico and Texas, as well as the Pecos River in New Mexico and Texas, in the new critical habitat designation. 66 Fed. Reg. 18107 (2001).

3. ***Tulare Lake Basin Water Storage District v. United States, ____ Fed. Cl. ___, 2001 WL 474295, No. 98-101L (April 30, 2001).***

The Federal Court of Claims ruled that, while the government may use water from federal projects to protect endangered species, it must pay federal contractors for that water.

4. ***Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 2000), cert. denied sub. nom. Klamath Drainage District v. Patterson, 121 S.Ct. 44 (U.S. 2000)***.

The Ninth Circuit found that the Bureau of Reclamation was not liable to irrigators as third party beneficiaries for water allocation decisions fulfilling ESA and Tribal trust responsibilities.

5. ***Kandra v. Norton, CIV No. 01-6124-AA (D. Or. April 30, 2001).***

Plaintiffs moved to enjoin the Bureau of Reclamation from implementing 2001 operations plan for the Klamath Project which proposes to maintain flows and lake elevations to support endangered fish. Due to inadequate water supplies, no irrigation water will be made to a variety of irrigated land in the project. Judge Aiken denied the request for injunctive relief, citing to *Patterson, 204 F.3d 1206,* and finding that the Bureau is obligated under federal law to operate the project to protect endangered fish despite the harm that may cause irrigators.

6. ***Pacific Coast Federation of Fisherman's Ass'n v. U.S. Bureau of Reclamation, ___ F. Supp. 2d ___, 2001 WL 360146, No. C00-01955 SBA (N.D. Cal. April 3, 2001).***

Environmentalists successfully obtained an injunction requiring certain flows to protect endangered fish based on the failure of the Bureau of Reclamation to consult under section 7.

7. ***Forest Guardians v. Bureau of Reclamation, CIV No. 00-0746 JP/RLP (D.N.M.).***

The Court approved an April 30, 2000 settlement agreement among the parties to protect the bluntnose shiner on the Pecos River in New Mexico. Under the agreement, the Bureau of Reclamation will operate Pecos River dams and reservoirs consistent with a 2001 operations plan. To implement the agreement, the Bureau will lease water rights or enter into forbearance agreements with Pecos River irrigators. The Bureau will attempt to offset any net depletions to the Carlsbad Project so as not to interfere with compact obligations. The agreement covers only the 2001 season. A section 7 consultation is in progress to address future years and the court has retained jurisdiction over the settlement.

C. Federal Reserved Rights.

Under the property clause, the federal government is authorized to reserve lands from the public domain for federal purposes and may reserve sufficient water to accomplish the primary purposes of the reservation - both explicitly and implicitly. *Cappaert v. United*

States, 426 U.S. 128, 138-139 (1976); *United States v. New Mexico*, 438 U.S. 696 (1976). Because these federal reserved rights often carry relatively senior priority dates, and to a large degree, remain unquantified throughout the West, the potential for conflict and the need for resolution remain keen.

1. ***Potlatch Corp. v. United States (In re SRBA Case No. 39576, Re: Wilderness Reserved Claims), 12 P.3d 1260 (Idaho 2000).***

In one of three reserved water rights cases from the Snake River Adjudication all decided on the same day, the Idaho Supreme Court held that Congress did not intend to create federal reserved water rights in the Wilderness Act of 1964, but did so in connection with the Hell's Canyon National Recreation Area Act. However, the Court remanded for proper quantification of the water rights in the amount necessary to fulfill the purposes of the Hell's Canyon legislation.

2. ***Potlatch Corp. v. United States (In re SRBA Case No. 39576, Re: Wild and Scenic Rivers Claims), 12 P.3d 1256 (Idaho 2000).***

The Court determined that the Wild and Scenic Rivers Act creates an express reservation of water rights in an amount necessary to fulfill the purposes of the Act.

3. ***Idaho v. United States (In re SRBA Case No. 39576, Re: Sawtooth National Recreation Area Claims), 12 P.3d 1284 (Idaho 2000).***

The Court found that Congress did not provide a basis in the Sawtooth National Recreation Area Act for federal reserved water rights.

4. ***United States v. Idaho (In re SRBA Case No. 39576, Re: Fish and Wildlife Service), __ P.3d __, 2001 WL 170644, No. 25546 (Idaho Feb. 22, 2001), as amended (May 1, 2001).***

The Court determined that there was no basis in the authorizing legislation to provide federal reserved rights for the Deer Flat National Wildlife Refuge.

5. ***Idaho v. United States (In Re SRBA Case No. 39576, Re: Minidoka National Wildlife Refuge), 996 P.2d 806 (Idaho 2000).***

The Court rejected a claim by the United States that it had perfected an instream flow right for refuge use. The basis for the rejection of the claim was that absent a federal reserved right, the United States only may acquire a water right under state law by diverting the water for beneficial use.

6. ***In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739 (Ariz. 1999), cert. denied sub. nom. Phelps Dodge Corp. v. U.S., 530 U.S. 1250 (2000).***

The Arizona Supreme Court found that federal reserved rights extend to groundwater that is not subject to prior appropriation under Arizona law, and federal reserved rights holders are subject to greater protection from groundwater pumping than those who hold only state law rights.

7. *United States v. City of Challis, 988 P.2d 1199 (Idaho 1999).*

The Court found that the Multiple Use Sustained Yield Act did not provide a basis for a claim of federal reserved rights.

D. Federal Projects.

1. *Animas-La Plata Project.*

After many years of negotiations, several environmental impact statements and section 7 consultations later, President Clinton signed a scaled back version of the Animas-La Plata Project into law on December 21, 2000. Pub. L. No. 106-554, 114 Stat. 2763 (2000). The project will pump water during high flows from the Animas River near Durango, Colorado, into an offstream reservoir for later release back into the Animas. Depletions are capped at 57,100 acre-feet per annum, about one third of the depletions originally authorized. The Southern Utes and the Ute Mountain Utes, two Colorado Tribes, will receive approximately two-thirds of the depletions as part of the settlement of reserved water rights claims. The remaining depletions are for non-Indian water users in New Mexico, Colorado and 2,340 acre-feet per annum to the Navajo Nation.

E. Other Federal Issues.

1. *Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999)*.

The Tenth Circuit affirmed the District Court's finding that a vested water right under state law in connection with livestock grazing, did not impliedly create a federal grazing right absent a federal grazing permit.

2. *Department of Interior v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060 (U.S. 2001).*

In a unanimous decision, the U.S. Supreme Court affirmed the Ninth Circuit in holding that the Freedom of Information Act does not protect correspondence between Tribes and the Department of Interior in the context of administrative and adjudicatory proceedings, and that a third party water user association was entitled to such correspondence and related documents as public records. The Department of Interior had maintained that the documents were protected based on the trustee-beneficiary relationship between Interior and Tribes.

F. Interstate Issues.

1. *Colorado River Interim Surplus Criteria*.

Under *Arizona v. California*, 376 U.S. 340 (1960), California is entitled to excess Colorado River water to the extent other states were not fully utilizing their entitlements. Over the years, California has become increasingly reliant on the surplus from unutilized Arizona and Nevada water. However, both these states are now nearing full utilization of their allocations. To address this issue, the seven Colorado Basin states, the Colorado Basin Tribes and the Department of Interior, worked over a two year period to formulate the Colorado Interim Surplus Criteria. Secretary Babbitt signed a Record of Decision ("ROD") on January 16, 2001, implementing the criteria for declaring surpluses on the Colorado through 2015. The interim criteria will ensure California receives a reliable Colorado River water supply while reducing its reliance on the excess and finding alternative sources of supply. The ROD and criteria can be found at *www.lc.usbr.gov*. Notice of Availability of the ROD for Adoption of Colorado Interim Guidelines can be found at 66 Fed. Reg. 7772 (2001).

2. *Kansas v. Colorado*.

This infamous compact dispute has entered the damage phase of the litigation. The Special Master's Report to the Supreme Court recommends that: (1) monetary damages are an appropriate remedy and should be based upon the loss to Kansas, not the gain to Colorado; (2) the Eleventh Amendment does not preclude damages awarded to Kansas that are based, in part upon losses incurred by its water users; (3) the unliquidated nature of Kansas' claim does not bar pre-judgment interest; and (4) the remedy should be money damages, not repayment of past water shortages by means of increased future water deliveries.

3. *Nebraska v. Wyoming*.

This compact dispute stemming from Nebraska's 1986 filing, was scheduled to go to trial on May 10, 2000. On that date, all parties, with the exception of Basin Electric, announced a settlement had been reached. As of December, 2000 the parties continued to work on the proposed settlement.

III. TRIBAL DEVELOPMENTS.

A. Settlements.

Attempts to finally settle Native American water rights claims continue to move with somewhat glacial speed across the West. Settlement of such claims is essential in most states to allow greater certainty to water users in fully appropriated systems and provide water to Tribes for both existing uses and to allow needed economic development. This update highlights key settlements reached in the past two years.

1. *Jicarilla Apache Tribe Water Right Settlement Act, 102 Pub. L. No. 441, 106 Stat. 2237 (Oct. 23, 1992)*.

This settlement was congressionally approved in 1992, but only entered as part of the final decree in the San Juan Basin in New Mexico in 1999 after some modifications based on objections filed by third party water users. The Tribe is using some of its federal allocation (16,200 acre-feet per annum) to supply water by contract to the San Juan Generating Station, a coal-fired generating station supplying the Four Corners area.

2. ***Colorado Ute Settlement Act Amendments, Pub L. No. 100-585, 102 Stat. 2973 (Nov. 3, 1988).***

The amendments to this settlement are based on the long awaited approval of the Animas-La Plata Project. Under the amendments the Tribes receive 16,525 acre-feet per annum, monetary payments and facilities construction.

3. ***Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub L. No. 106-263, 114 Stat. 737 (Aug. 18, 2000).***

The Act provides the Tribe with 4,000 acre-feet per annum which it can use or lease, as well as appropriations for various water projects.

4. ***Arizona Water Settlements Act of 2000, S. 3231, 106th Cong. (introduced Oct. 24, 2000); H.R. 5529, 106th Cong. (introduced Oct. 24, 2000).***

This recently introduced legislation proposes a comprehensive settlement of the claims of numerous Indian reservations near Phoenix and Tucson.

5. ***Chippewa Cree Tribe of the Rocky Boy's Reservation, Pub. L. No. 106-163, 113 Stat. 1778 (Dec. 9, 1999).***

The settlement allocates on-reservation water between tribal and non-tribal users, allocates the Tribe 10,000 acre-feet of federal storage water, and $47 million in federal funding.

B. Judicial Developments.

1. ***Confederated Salish and Kootenai Tribes v. Clinch, 992 P.2d 244 (Mont. 1999)***.

The Montana Supreme Court ordered the Montana Department of Natural Resources and Conservation not to issue further water use permits on the Flathead Reservation until reserved rights had been quantified by compact or adjudication.

2. ***Arizona v. California, 530 U.S. 392 (2000), supplemented by 531 U.S. 1.***

The Court held that claims of the United States for additional Colorado River water rights appurtenant to disputed boundary lands for the Fort Yuma Reservation, were not precluded by the Court's earlier decision, *Arizona v. California*, 373 U.S. 576 (1963), or by a previous consent judgment in the Court of Claims.

3. *United States, ex. rel. Lummi Nation v. Washington, Civ. No. 01-47 (W.D. Wash. filed Jan. 10, 2001).*

The United States filed this complaint against State of Washington and water users in its own right and on behalf of the Lummi Nation, requesting a declaration for a reserved right to groundwater under the Lummi Peninsula. The complaint alleges that groundwater pumpers are affecting the reserved rights of the Lummi Nation and affecting the water quality available to the Tribe. The complaint requests an injunction against the State of Washington from asserting an ownership interest in, and from regulating the waters underlying the Lummi Peninsula.

C. Administrative.

1. *Final Report and Recommendations of the Working Group on the Endangered Species Act and Indian Water Rights, 65 Fed. Reg. 41709 (2000).*

The Report addresses the issue of the implementation of the Endangered Species Act in relation to the exercise of Indian Water Rights, and evaluates the process and criteria for the development of environmental baselines pursuant to Section 7 of the ESA.

IV. STATE LAW DEVELOPMENTS.

Over the past two years across the West, States continued to struggle with the nature and extent of beneficial use, transfers between uses, conjunctive management, protection of existing uses, and protection of the "public interest."

A. Abandonment and Forfeiture - exercising reasonable diligence and the nature of beneficial use.

Litigation pertaining to forfeiture and abandonment and the meaning of diligent development of water rights appears to be increasing. The litigation arises in part from continued reallocations of water from irrigation to municipal and industrial or commercial projects. Additionally, State water agencies are under increasing pressure to address problems related to over appropriated systems and to free up water for new development, Endangered Species Act requirements, and Native American water rights settlements. These cases raise the very basic question of what is meant by "beneficial use" and what standard of proof should be applied in determining loss of use. However, the enforcement of forfeiture and abandonment also provides an interesting tension with the notion that the "use it or lose it" principle should not be applied so as to force use that is contrary to conservation.

1. *R.D. Merrill Co. v. Washington, 969 P.2d 458 (Wash. 1999).*

The Supreme Court of Washington confirmed rule that an unperfected water right cannot be transferred, but rejected the argument that the measure of beneficial use is at the time application for transfer is made. The Court remanded the case for a determination of

whether legal proceedings had properly served as an excuse for nonuse and whether applicant had a sufficient development plan so as to prevent loss of the rights based on nonuse.

2. *Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999).*

The Wyoming Supreme Court found that while there need not be intent to abandon a right, the failure to use water must be voluntary. The Court determined that the blocking and destroying of ditches by an upstream user could not result in the downstream user's loss of the right because it represented circumstances beyond the control of the user.

3. *Municipal Subdistrict, Northern Colorado Water Conservancy District v. Chevron Shale Oil Co., 986 P.2d 918 (Colo. 1999); Municipal Subdistrict, Northern Colorado Water Conservancy District v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999); and Municipal Subdistrict, Northern Colorado Water Conservancy District v. Getty Oil Exploration Co., 997 P. 2d 557 (Colo. 2000).*

In three separate cases, the Colorado Supreme Court found companies exercised reasonable diligence in development of water rights for oil shale development. In the *Chevron* case, the court upheld the finding of reasonable diligence based on project planning and research even though the rights would not be used in the near future based on the economics of the industry. In *OXY USA*, the Court upheld a finding of reasonable diligence based on similar facts. *OXY USA* had drilled exploratory wells, commissioned feasibility studies, and undertaken various other planning and research.

The *Getty Oil Company* case, was decided on similar facts. Getty met reasonable diligence required under Colorado law because the evidence established the project was technically feasible given current technology and that Getty would proceed with the project when the economics of the industry permitted. A theme in all three cases, the court reemphasized that the Colorado diligence statutes do not preclude consideration of economic considerations in diligent development cases.

4. *Staats v. Newman, 988 P.2d 439 (Or. Ct. App. 1999).*

The Court found that beneficial use must involve some "artificial" application of water and water can be lost for non-use based only on a preponderance of the evidence standard.

5. *Santa Fe Trail Ranches Property Owners Ass'n. v. Simpson, 990 P.2d 46 (Colo. 1999).*

The Colorado Supreme Court held that historical diversions for undecreed uses could not serve as a basis for proof of historic beneficial use for purposes of supporting a transfer of water rights.

6. *Haystack Ranch, LLC v. Fazzio, 997 P.2d 548 (Colo. 2000).*

The Colorado Supreme Court affirmed a decree of abandonment based on a long period of nonuse (22 years) by user's predecessor in interest.

7. *McCray v. Rosenkrance, 20 P.3d 693 (Idaho 2001).*

The Court affirmed that in Idaho clear and convincing evidence must be presented before a water right will be deemed forfeited.

B. Administration of the Water Resource.

1. Protection of Existing Rights.

a. *City of Barstow v. Mojave Water Agency, 5 P.3d 853 (Cal. 2000).*

In rejecting a court approved settlement challenged by some water rights holders, the California Supreme Court held that courts may not disregard senior water rights when adopting a "physical solution" in an adjudication of water rights in an overdrafted groundwater basin, nor may courts rely on the doctrine of equitable apportionment in disregard of senior water rights.

b. *Salt Lake City v. Silver Fork Pipeline Corp. 5 P.3d 1206 (Utah 2000).*

The Court determined that waters percolating from a mine which would otherwise have reached a tributary creek, fully appropriated by Salt Lake City, were in fact owned by the City and could not be appropriated by defendant pipeline corporation.

2. Management of Groundwater.

a. *Sipriano v. Great Spring Waters of America, Inc., 1 SW.3d 75 (Tex. 1999).*

The Texas Supreme Court reaffirmed the common-law rule of capture for groundwater.

3. Conjunctive Management.

a. *In re the General Adjudication of All Rights to Use Water in Gila River System and Source, 9 P.3d 1069 (Ariz. 2000), petition for cert. filed, 69 U.S.L.W. 3646 (U.S. Mar. 19, 2001)(No. 00-1464).*

The Arizona Supreme Court affirmed, in its entirety, the decision of the trial court regarding what groundwater constitutes subflow of a surface stream, and is therefore appropriable and subject to the adjudication, as opposed to the rule of reasonable use applicable to groundwater. After voluminous expert testimony the trial court had determined that subflow is those waters constituting the saturated floodplain Holocene alluvium.

b. *Postema v. Pollution Control Hearings Board, 11 P.3d 726 (Wash. 2000).*

Reversing the Pollution Control Hearings Board ("PCHB"), the Washington Supreme Court held that hydraulic continuity between groundwater and surface water with unmet minimum flows, or which is closed to further appropriation, is not in and of itself, a basis on which to deny an application to withdraw groundwater.

C. Protecting the Public Interest.

1. *R.D. Merrill Co. v. Washington, 969 P.2d 458 (Wash. 1999).*

The Court found that the public trust doctrine can not serve as an independent source of authority for the department to use in making decisions on water rights applications apart from the provisions in the water code and the authority granted to the Department thereunder.

2. *United States v. Nevada, 123 F. Supp. 2d 1209 (D. Nev. 2000).*

This case resulted from the Nevada State Engineer's denial of a water rights application by the United States Department of Energy ("DOE") for its Yucca Mountain Nuclear Waste Repository. The denial was premised on a finding that the application was contrary to the public interest based on a Nevada statute prohibiting storage of high-level radioactive waste in the State. The DOE filed a complaint in federal court which the court dismissed on abstention grounds. The DOE has appealed the dismissal to the Ninth Circuit, Case No. 00-17330, and oral argument was held on May 14, 2001.

D. Miscellaneous State Issues.

1. *California v. Superior Court of Riverside County, 93 Cal. Rptr. 2d 276 (Cal. Ct. App. 2000).*

In the context of interpreting an "owned property exclusion" clause, the California Fourth Circuit Court of Appeal provides an interesting discourse on the meaning of public ownership of water, finding that the State does not actually own the waters, but merely regulates and supervises the allocation and use of the waters.

2. *Metropolitan Water District v. Imperial Irrigation District, 96 Cal. Rptr. 2d 314 (Cal. Ct. App. 2000), modified and reh'g denied, 2000 Cal. App. LEXIS 477 (June 15, 2000); San Luis Coastal Unified School District v. City of Morro Bay, 97 Cal. Rptr. 2d 323 (Cal. Ct. App. 2000).*

In these two cases the Second Judicial District Court of Appeal interpreted several provisions of California's wheeling statutes which govern the use of public water conveyance systems by non-owners of those facilities. The court found that the wheeling statutes, the use of which are critical to successful water transfers in California, do not prohibit a conveyance system owner from including system-wide costs in its rate calculation and do not prohibit establishing a fixed rate for Wheeling transactions.

3. ***Okanogan Highlands Alliance v. Washington, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019, 2000 WL 46743 (Wash. Pollution Control Hearings Board Jan. 19, 2000)*****.***

The PCHB reversed the Department of Ecology's issuance of ten new and transferred water rights, two reservoir permits, and a state water quality certification under Section 401 of the Clean Water Act for the proposed Crown Jewel Mine located in Northeastern Washington. The applicant proposed a stream flow mitigation plan to compensate for depletions resulting from mining operations. The PCHB found the mitigation plan failed to address all adverse impacts and did not provide sufficient certainty that it would protect existing rights and stream flows from harm.

4. ***San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999)***.

The Supreme Court struck down over twenty separate statutory provisions to the 1995 amendments to Arizona's surface water laws. The Court found that many of the revisions were unconstitutional violations of due process because they retroactively affected vested water rights.

V. SELECTED STATE ADMINISTRATIVE AND LEGISLATIVE DEVELOPMENTS.

A. Aquifer Storage and Recovery.

1. New Mexico.

In 1999 the New Mexico legislature enacted the New Mexico Ground Water Storage and Recovery Act, NMSA 1978, §§ 72-5A-1 to 72-5A-17 (1999). The Act authorizes governmental entities, including Tribes, to construct and operate programs for the storage of surface and groundwater in aquifers in declared basins, through injection wells, pursuant to permits issued by the State Engineer. The State Engineer recently issued regulations implementing the legislation. N.M Admin. Code tit. 19 §§ 25.8.1 to 25.8.49 (2001).

2. Arizona.

In 1999, the Arizona legislature amended its existing water banking statutes to enable the Arizona Water Banking Authority to enter into service agreements under which it can loan long-term storage credits to a person or Indian community within the State. Ariz. Rev. Stat. Ann. § 45-2458 (West 2000).

3. Washington.

In 2000, the legislature authorized the Department of Ecology to issue reservoir permits for qualifying underground geologic formations that store water for later use. 2000 Wash.

Laws 98, *codified at* Wash. Rev. Code Ann. §§ 90.03.370, 90.44.035, 90.44.460 (West 2001).

B. Other

1. California.

In 2000, the trend continued in California counties to restrict groundwater transfers out of county through enactment of groundwater management ordinances. *See, e.g.,* Fresno, Cal., County Ordinance Code tit. 14, Ch. 3 (2000). There are now approximately 14 counties in California that have adopted groundwater management ordinances.

2. Oregon.

In an effort to address environmental and Endangered Species Act needs in 1999, the Oregon legislature passed a measure allowing conversion of a water right no longer used for a hydroelectric project to be converted to instream uses, and enacted legislation addressing Endangered Species Act concerns in water rights transfers. Or. Rev. Stat. §§ 543A.005 to 543A.415, 537.211 (2000).

VI. WATER QUALITY DEVELOPMENTS AFFECTING USE OR DEVELOPMENT OF THE WATER RESOURCE.

A. *Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000).*

The court held that total maximum daily loads could be used to control solely non-point sources such as timber harvesting and agricultural runoff.

B. *Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001)*.

Irrigation canals are waters of the United States and thus subject to NPDES permitting requirements prior to applying aquatic herbicide in canals.

C. *In re Application 41T-104524 by CT Kendall Corp. (1999) (reported in RMMLF Water Law Newsletter, Vol. XXXII No. 1, 1999)*.

The Montana Department of Natural Resources and Conservation ruled that disposal of contaminated water is not a beneficial use entitled to protection as a water right. Accordingly, downstream users could not complain that use of a pump-back system impaired their water rights.

D. *Kinross Copper Corp. v. Oregon, 981 P.2d 833 (Or. Ct. App. 1999), aff'd on reh'g, 988 P.2d 400, review denied, 994 P.2d 133 (Or. 2000), cert. denied, 121 S.Ct. 387 (U.S.).*

The Oregon Court of Appeals held that denial of a permit to discharge wastewater based on a rule of no new discharges was not a basis for compensation for the value of unpatented mining claims rendered worthless by the denial.

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