

# WATER STRATEGIST

QUARTERLY ANALYSIS OF WATER MARKETING, FINANCE, LEGISLATION AND LITIGATION

Editors: Rodney T. Smith and Roger Vaughan

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## Texas Regulates the Edwards Aquifer

After forty years of increasingly bitter controversy, the Texas Legislature has taken what it hopes will be a major step toward resolving the problems posed by overdraft pumping of the Edwards Aquifer. It passed SB 1477, creating the Edwards Aquifer Authority. The Authority has the power to set up a permitting system for everyone pumping aquifer water, cutting withdrawals to maintain springflows fed by the aquifer. The measure is intended to meet the requirements imposed by a Federal District Court judge to protect endangered and threatened species dependent on springflows.

The story of how this groundwater regulation was adopted in Texas illustrates two important lessons for the rest of the West. First, farmers and municipalities can no longer regard the non-management of important groundwater aquifers as a viable long-term option. Aquifer overdraft not only raises the costs for all pumpers, but may also threaten flora and fauna. If wildlife is threatened, pumpers may find themselves unwitting participants in expensive lawsuits and, perhaps, the subjects of a hastily-devised management solution imposed by the courts. Better to take the time to develop a carefully considered and cooperative approach to the problem. Users of Edwards water were fortunate that the Texas Water Commission could offer a locally-crafted set of recommendations to meet the short time lines imposed by the court. If the Legislature had not been able to design legislation around an already existing strategy, it may have failed to meet the May 31 deadline, and water users would have been subject to the much blunter instrument wielded by the District Court.

The second lesson is that there is little to gain by fighting. The new Authority will impose essentially the same regulations the Texas Water Commission has been advocating for several years. But pumpers, federal agencies, and local water agencies decided to fight rather than negotiate an agreement. Good for lawyers; bad for water users. One reason for fighting, defendants claimed, was the fear that meeting pumping standards required under the federal Endangered Species Act would shut down the City of San Antonio, wipe out a large part of the regional economy, and put an end to farming. Yet the manner in which the Act has been implemented in this case so far suggests that few of these dire consequences need come to pass.

### A BRIEF HISTORY OF THE DISPUTE

To hydrologists, the Edwards Aquifer is "an arcuate belt of porous, water-bearing, predominantly carbonate rocks in the Balcones Fault Zone." To legislators, it is "a unique and complex hydrological system . . . a unique aquifer, and not an underground stream." To 1.5 million Texans in a six-county area, including the residents of San Antonio, it is the only source of water. The aquifer supports a diverse economy providing 700,000 to 800,000 jobs generating annual incomes of \$13 to \$15 billion. It is the City of San Antonio's only water source and feeds six downstream river basins including the Guadalupe

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"Texas Regulates the Edwards Aquifer" examines legislation passed to control overdraft of the Edwards Aquifer. The new authority will manage groundwater to meet growing water demands, while avoiding draconian actions many feared were necessary under the federal Endangered Species Act.

"The 1992 Annual Litigation Review" reports on the 52 federal and state court decisions tracked by *WS* concerning federal issues, fees & assessments, liability, local powers, and state water rights. Indian water rights and the environment topped the judicial agenda.

"Finance Update" reviews the results from the 191 bonds that raised a record \$3.39 billion in the second quarter of 1993.

"Legislative Update" describes the fate of the 200 bills tracked by *WS* on water transfers, conservation, water rights, water quality, groundwater, public trust, and planning/policy.

"Litigation Update" reviews a Washington Supreme Court decision on the reserved water rights of the Yakima Indian Nation. It was based on the treaty establishing the Nation, subsequent Congressional actions and a court settlement, rather than judicial interpretation of the reserved rights doctrine.

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## THE EDWARDS AQUIFER AUTHORITY

Under SB 1477, the State of Texas establishes the *Edwards Aquifer Authority* with jurisdiction over all or part of Atacosa, Bexar, Caldwell, Comal, Guadalupe, Hays, Medina, and Uvalde counties. No vote of residents is required to establish the Authority. The area includes several existing groundwater management districts. These may continue their operations only if they do not conflict with or duplicate the responsibilities of the new Authority.

**The Board.** The Authority will be governed by an appointed board of nine members. One is appointed by the South Central Texas Water Advisory Committee (a body created by the act to advise the board on downstream water rights and issues), three appointed from Bexar County (two appointed by the City of San Antonio and one by the county commissioners' court), one from Comal County appointed by the county commissioners' court, one from Hays County appointed by the City of San Marcos, one from Medina County appointed by the Medina Underground Water Conservation District, one from Uvalde County appointed by the Uvalde Underground Water Conservation District, and one appointed in rotation from Atacosa, Medina, or Uvalde County.

**Powers.** The Authority will have the power to require pumpers to apply for permits and to ensure compliance with permitting, metering, and reporting requirements. It can issue revenue bonds (subject to the approval of the attorney general and the Texas Water Commission), administer grants and loans for water conservation and water reuse projects, receive loans from the Texas Water Development Board under the agricultural water conservation bond program, and enjoy other powers typical of public authorities including that of eminent domain. The Authority must finance all its activities from fees, charges, and assessments on permit holders, and may not impose a property tax.

The Authority has the power to contract with any subdivision of the state to provide for the artificial recharge of the Edwards Aquifer through injection wells or with surface water, allowing ultimate retrieval by the political subdivision. It may also build or operate recharge dams in the recharge area of the aquifer provided that the projects do not impair senior water rights or vested riparian rights. The Authority would have the power to prevent any person from constructing or owning facilities for transporting groundwater out of Uvalde or Medina Counties.

By September 1, 1995, the Authority is required to develop and implement a comprehensive, 20-year, water management plan providing for alternative supplies of water to the region, with 5-year goals and objectives. The plan will be reviewed by the appropriate state agencies and the Edwards Aquifer Oversight Committee in the legislature.

**Pumping Rights.** The Authority will issue interim permits, while determining the quantity and design of regular permits. Everyone pumping water from the aquifer, with the exception of those using water exclusively for domestic use or watering livestock, will be required to apply for permits. Existing users may apply for permits by filing a declaration of historical use of underground water during the period June 1, 1972 to May 31, 1993 (irrigators shall receive permits for not less than two acre-feet a year). The permit will specify the maximum rate and total volume of water that the holder may withdraw in a calendar year (taking into account water reuse).

The Authority will permit withdrawals of only 450,000 af/year for the period ending December 31, 2007 (about 100,000 af/year below current pumping levels). After that date, withdrawals will be limited to 400,000 af/year and will be achieved either through the repurchase of some outstanding permits by the Authority or by reducing authorized withdrawals under each regular permit by an equal percentage. No permits will be issued for withdrawals from wells drilled after June 1, 1993, unless studies show that additional supplies are available beyond present levels. Permit holders will be required to meter their withdrawals and to submit to the Authority an annual report of their pumping activity.

The Authority may also issue interruptible term permits for periods of up to 10 years. These permits would be conditioned on the level of the aquifer above sea level — if the level fell below 649 feet above mean sea level, for example, pumping from certain areas under interruptible permits would be terminated. The Authority may also issue Emergency Permits, for 30 days, but only to prevent the loss of life or to prevent severe, imminent threats to the public health or safety.

**Transfer of Rights.** Water withdrawn from the aquifer must be used within the boundaries of the Authority. The Authority, by rule, may allow people who install water conservation equipment to sell the conserved water. Permit holders may lease their permitted withdrawals to other users within the area, but irrigators may only lease 50 percent of their permitted rights.

The Authority may acquire and hold permits that it has issued for several reasons: 1) to hold on trust for sale or transfer to persons within the Authority's jurisdiction who may use the water from the aquifer; 2) hold those rights on trust as a means of managing overall demand; 3) hold those rights for resale or as a means of complying with pumping requirements; 4) as a way to retire permitted rights. The Authority must pay full compensation if any of its actions causes a taking of private property or the impairment of a contract in contravention of the Texas or United States constitution.

**Financing.** The cost of reducing withdrawals to 450,000 af/year must be born solely by users of the aquifer water. The cost of reducing withdrawals from 450,000 af/year to 400,000 af/year must be shared equally between aquifer water users and downstream water rights holders. User fees must be equitable but may differ among different classes of users. Irrigation fees per af may not exceed 20 percent of the fee per af paid by municipalities.

The Authority may impose several types of fees and charges: 1) A user fee, per acre foot withdrawn, to pay for operations (each water district within the Authority's boundaries may pay through taxes in lieu of user fees equal to what would have been paid through fees); 2) special fees on both aquifer water users and downstream water users to finance the retirement of rights necessary to meet the pumping goals; 3) permit application fees not to exceed \$25; and 4) registration application fees not to exceed \$10.

**Conservation and Reuse Plans.** The Authority may require holders of regular permits and holders of term permits to submit water conservation plans and, if appropriate, reuse plans for review and approval by the Authority, which can, by rule, mandate their implementation.

**Drought Emergencies.** During drought years, withdrawals will have to be further reduced, to 350,000 af/year. By September 1, 1995, the Authority must prepare and coordinate the implementation of a plan for critical period management. The mechanism must distinguish between discretionary use and nondiscretionary use; require reductions in discretionary uses to the maximum extent feasible, and require utility pricing to discourage discretionary water use, and require reductions in nondiscretionary use within a system of priorities under which municipal, domestic, and livestock uses would be the last cut, industrial and crop irrigation would have the second priority, residential landscape the third priority, and recreational and pleasure uses the lowest priority.

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River and the 80,000 jobs in that river's basin all the way to the Gulf Coast.

But the aquifer also feeds two crucial systems of springs — the Comal and San Marcos Springs — home of animal and plant species that were listed as endangered or threatened. Feeding these spring systems has traditionally taken over one half of the annual average recharge of 637,000 af/year, or 350,000 af/year.

Unfortunately, Edwards cannot meet all demands in dry years. It supported rapid economic development through rapid increases in pumping — from an average of 30,000 af/year at the turn of the century to an average of 500,000 af/year during the 1980s, reaching 540,000 af/year during recent years. Pumping is split evenly between municipal users and irrigators. The problem is the result of its porosity: the aquifer does not hold water for long. When it rains, it recharges quickly. But when it does not rain, its level drops quickly. Annual recharge from rainfall and surface flows varies more than for most aquifers — from 46,000 af/year in dry years to over two million af/year in wet years. Each decade, increasing withdrawals from the aquifer have led to greater peak-to-trough fluctuations in the aquifer level during the year, from an average of barely three feet during the 1950s to 30 feet in recent years. Since 1934, flows at the crucial Comal and San Marcos Springs as a percent of recharge have fallen by an average of one percent each year — from about 50 percent to barely 20 percent.

The overdraft problem first became apparent during the severe drought during the 1950s — an event of such severity that it is likely to occur only once every 200 to 300 years. Aquifer levels declined significantly and spring flows were seriously reduced. There was no organization with jurisdiction over pumping from the aquifer. Farmers jealously defended their right of "free capture" of underground water. By the 1980s, the Texas Water Commission (TWC) — a body with jurisdiction over water quality issues, not withdrawals — attempted several times to solve the growing problem by calling for the formation by resolution of a South Central Texas Water Planning Council. This Council was intended to develop a long-term management plan for the region, coordinating the efforts of many local and regional agencies. The Commission testified many times that it had no interest in managing groundwater itself. But the proposal raised strong opposition especially among farmers. One administrator characterized the position of irrigators as: "You can regulate pumping when you pry my dead fingers from my pump handle." Although legislators routinely introduced bills to regulate pumping, none received more than cursory consideration.

Between 1988 and 1990, water use exceeded aquifer recharge 47 percent of the time. In July 1990, the draft of the Texas Water Development Board Plan argued that wise management of the aquifer was necessary, predicting that, without limitations on pumping, water use from the Edwards could

grow to more than 700,000 af/year by the year 2030. The plan called for limits on pumping, conservation, reuse, and conjunctive use projects, but noted that these measures may not provide adequate protection for the springs during dry years. Therefore it called for the development of alternative supplies, focusing on Lake Medina water, and the construction of reservoirs in Applewhite, Cuero, Lindenau, and Goliad. The Board later announced a \$2-million "Trans-Texas Water Program" study to examine ways of transferring water among basins to meet the growing demands on Edwards water, including the possibility of 675,000 af/year from the Toledo Bend Reservoir on the Texas-Louisiana border.

Environmental groups entered the debate. The TWC attempted to mediate among the Sierra Club, the U.S. Fish and Wildlife Service, farmers, cities, and local water organizations. But by the spring of 1992, the Commission reported that "various parties cannot or will not agree." The City of San Antonio doubted if Congress would "allow the nation's ninth largest city to be brought to its knees by the fountain darter," but pushed ahead for measures to cut pumping — promising to reduce its own withdrawals if farmers did the same. The Commission accurately pointed out that failure to agree on a policy would create "the risk of direct intervention by the federal government in a matter that can and should be resolved by Texans."

In April 1992, frustrated by their inability to forge consensus and aware of the growing threat of litigation or direct federal intervention, TWC declared the southern Edwards Aquifer an underground stream (see *WIM October 1990 and May 1992*). The step had been requested by the Guadalupe-Blanco River Authority, an understandably concerned downstream user of Edwards water. One of the events that focused public attention on the issue was the opening of a huge catfish farm that would reportedly pump 68,000 af/year — despite the growing overdraft. The Commission was powerless to deny the new business a permit on the grounds of the quantity of water it would withdraw.

By declaring the aquifer an underground stream, TWC placed its water under the regulatory control of the State. All users would have to have applied to TWC for permits. TWC began the process of promulgating and implementing an interim management plan to help minimize the probability that springflows would dry up during prolonged droughts by reducing direct pumping to 400,000 af in ten years, declaring a moratorium on new wells, requiring users to engage in water conservation projects, as well as adopting other management strategies. (Many of these steps form the basis of the powers of the new Edwards Aquifer Authority.)

The Commission voted to approve the proposed regulations on September 9, 1992. But two days later, a judge in Travis County District Court ruled against TWC's underground river designation and granted the injunction against the imposition of regulations that had been requested by the Farm

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**Table 3**  
Second Quarter Comparisons: Western State

	2nd Quarter 1993	2nd Quarter 1992
Number of Issues	191	107
Gross Volume (\$ billions)	3.39	1.82
% Revenue	82	95
% Competitive	35	33
Average Net Interest Cost (%)	5.52	6.36
Bond Buyer		
G.O. Index (%)	5.69	6.00
Average Spread (\$)	16.78	14.56

Source: From Securities Data Co. Listings, supplemented by Stratecon, Inc. Water bonds include those sold for water, sewer and flood control.

money borrowed, for 43 out of 191 issues, and for 6 of the twenty largest issues — including CA DWR, Los Angeles DWP, and Metropolitan (WA). They paid an average NIC of 5.47 percent, below the 5.58 percent paid on negotiated issues. But they paid higher spreads, \$18.06 compared with \$16.59 on negotiated issues.

### Underwriting

Merrill Lynch topped the *WS Underwriter Top Ten* based on underwriting 8 issues (see Table 4). Morgan Stanley came in second with four issues, including the quarter's largest, raising a total of \$576.5 million. And Paine Webber was third, also with four issues raising \$394.4 million. Rauscher Pierce Refsnes worked the hardest, underwriting 15 issues for a total of \$121.7 million, earning sixth position.

### FINANCE LEGISLATION (15 BILLS 1P:1F)

Only one of the finance bills described in the last issue has passed. Arizona passed (*SB 1091*), permitting the State Land Commission to require those acquiring permits or leasing land to post bond. California is still considering six bills to place bond issues before the voters. New Mexico rejected (*SB 131*), which would have allowed the State Board of Finance to issue up to \$2.5 million in severance tax bonds and appropriated the proceeds to the Wastewater Facility Construction Loan Fund.

**Table 4**  
Market Share of Top 10 Lead Underwriters  
Second Quarter 1993 (Percent)

Merrill Lynch Capital Markets	21.4
Morgan Stanley	19.9
Paine Webber-Subsidiary	11.6
Lehman	6.1
Stone&Youngberg	5.2
Rauscher Pierce Refsnes	3.6
Smith Barney Harris	2.5
Masterson Moreland	2.3
First Boston	2.0
Goldman, Sachs	2.0

Source: Compiled by Stratecon, Inc. from Securities Data Co. Listings.

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Bureau. Further attempts to reach consensus on means to regulate pumping failed despite the involvement of the TWC. Manuel Lujan, then Secretary of the Interior, several city officials, and the Guadalupe-Blanco River Authority. The battlefield in what the press were calling the Texas Water War shifted from Austin to the town of Midland where a suit was being heard in federal district court where the Interior Secretary was the defendant.

### ENTER THE FOUNTAIN DARTER

The Sierra Club had first filed suit in the summer of 1989, charging that the U.S. Fish and Wildlife Service (FWS), by allowing excessive pumping from the Edwards Aquifer, had violated subsections 4 and 9 of the federal Endangered Species Act. Specifically, low springflows from the Comal and San Marcos Springs threatened the habitat of two species of fish, a species of lizard, and Texas Wild Rice.

The initial response of the defendants was to challenge the right of the Sierra Club to bring suit, arguing that individuals within the Club should have to show specific interest in the future of the listed species. The defendants also lobbied Congress to rewrite the Endangered Species Act. Finally, they asked the judge to delay hearing the case until the 1993 legislature had the opportunity to enact a groundwater management strategy. FWS was joined as defendant by the City of San Antonio, the Texas Department of Agriculture, as well as by several businesses. None of these actions affected the course of the trial. The Sierra Club retained its standing, joined as plaintiff by downstream users including the cities of San Marcos and New Braunfels (both dependent on tourism generated by their springs) and the Guadalupe-Blanco River Authority.

In court testimony during November 1992, defendants did not dispute that pumping from the aquifer would lead to "takings" of the listed species by reducing springflows below critical levels during droughts. Instead, they argued that the pumping limitations needed to protect springflows — as low as 165,000 af/year according to some hydrological studies — would impose enormous costs. The City of San Antonio claimed it would have to spend \$1.5 billion to develop alternative water supplies and their residents would have to cut water use by two-thirds. A Baylor University economist testified that personal income in Bexar County could fall by as much as \$3.25 billion (including \$2.6 billion in lost wages and salaries) and 136,700 jobs could be lost (a 17 percent decline from present levels).

These arguments failed to persuade Judge Bunton. On January 30, 1993 he issued his decision. He strongly criticized federal and state agencies for not settling the problem of over

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pumping among themselves. He admitted the ruling may have far reaching consequences and that there was no official determination as to the level at which withdrawals from the Edwards would endanger the threatened species. Judge Bunton found that the "firm yield" of the aquifer was only about 225,000 af/year and that any withdrawals in excess of this during a repeat of the severe drought of the early 1950s would dry up springflows. He set interim springflow rates (greater than 100 cfs for both systems) and gave FWS 45 days to determine levels that would permanently protect the listed species. FWS was required to inform other federal agencies involved in the case as well as all pumpers of these minimum springflows so that those agencies could enforce the Endangered Species Act "if the State of Texas fails or refuses to regulate withdrawals from the Edwards Aquifer."

In his ruling, Judge Bunton cited a U.S. Supreme Court statement that "the plain intent of Congress in enacting this statute (the Endangered Species Act) was to halt and reverse the trend towards species extinction, whatever the cost" (emphasis added). But the Endangered Species Act allows exemptions if compliance would impose extreme burdens. Recognizing it will take time to develop alternative water sources and that limiting pumping to safe yields during a major drought could cause severe economic harm, the judge recommended pursuing exemptions to those requirements. The judge gave the Commission until March 1 to make recommendations and the legislature until May 31 to enact a satisfactory management plan of its own or be subject to strict pumping limits under a management plan he would impose.

On March 1, 1993, as ordered by Judge Bunton, TWC released recommendations for the management of the Edwards Aquifer (see WIM May 1993). The Commission made three basic recommendations. 1) In the short term: create a management entity with the power to issue permits that would quickly reduce pumping to 450,000 af/year; apply for a permit from the Fish and Wildlife Service allowing "takings" of the listed species during extreme conditions; and develop a drought emergency strategy that would cut pumping to 350,000 af/year when aquifer levels fell below 649 feet above mean sea level. 2) In the intermediate term: reduce pumping to 400,000 af/year by December 31, 2008 by retiring aquifer pumping rights, augmenting springflows, developing alternative water supplies, and increasing recharge. And 3) In the long term: cut pumping to "safe-yield", eliminating the need for an "incidental take" permit by developing additional sources including the development of the reservoirs described in the State Water Plan.

On April 19, 1993, Secretary of the Interior Bruce Babbitt endorsed TWC's management plan (see WIM May 1993). He wrote to the governor and to the leaders of the state legislature, arguing that, "As a former governor, I believe that management

of groundwater resources is first and foremost a State responsibility." and urging "as the current session of the Texas Legislature nears adjournment, it is vitally important that the State of Texas pass legislation." He stated the Commission's approach "could provide the basis for the U.S. Fish and Wildlife Service's issuance of a permit pursuant to Section 10(a) of the Endangered Species Act which would authorize the incidental take of some endangered species during periods of drought."

### LEGISLATURE ACTS

The legislature considered a flurry of bills, eventually passing SB 1477 which embodies many of the Commission's earlier recommendations. The newly-created Edwards Aquifer Authority will assume full management authority for limiting pumping, effectively replacing several existing, but less powerful, organizations (see insert page). It will use its permitting powers to reach the short-term goal of 450,000 af/year and the intermediate goal of 400,000 af/year — retiring permits, mandating conservation measures, or reducing allowable pumping under outstanding permits. It will finance its operations with permitting fees and special assessments on permit holders. And it will report biennially to the legislature.

These pumping limits are provisional targets only. The legislation states: "If through studies and implementation of water management strategies, including conservation, springflow augmentation, diversions downstream of the springflows, reuse, supplemental recharge, conjunctive management of surface and subsurface water, and drought management plans, the Authority determines that additional supplies are available from the aquifer, the Authority, in consultation with appropriate state and federal agencies, may review and may increase the maximum amount of withdrawals." The Authority may also issue interruptible permits that allow pumping only when the aquifer exceeds specified minimum levels above mean sea level. Permits are transferable — holders may lease all (in the case of municipal and industrial users) or up to one-half (in the case of irrigators) of their permitted withdrawals. But the leased water must be used on the land overlying the aquifer.

Whether these measures — far less draconian than those feared by water users — will protect the endangered fishes, lizards, and rice without creating the economic and fiscal disasters foretold by the defendants remains to be seen. A study, released by the Texas Water Resources Institute at Texas A & M University in March 1993 predicted relatively small economic damages from limits on pumping — between \$6.26 and \$19.58 for each acre foot that pumpage is reduced (and the Authority will initially cut pumping by only by about 100,000 af). In the year 2000, this would mean total net economic losses of between \$2.78 million and \$6.60 million annually. But these overall losses mask a considerable decline in the level of agricultural activity: the researchers predict that irrigated acreage could decline by 32 percent to 84 percent by the year

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2000. Farmers would, of course, receive the income from leasing unused irrigation water to municipal users. Unlike earlier estimates, these are based on a model that allocates pumped water to its most valuable economic use — an allocation that will be possible if the Authority were to adopt procedures to let permit holders lease water.

### AFTERWORD

Users of Edwards Aquifer water resisted all attempts to create a permitting system. Voluntary efforts and jaw-boning by the Edwards Underground Water District (which goes out of business with the formation of the Authority) collapsed before the inexorable pressure of growth in the region. But aquifers that are both overdrafted and unregulated are a threatened if not an endangered species.

By invoking the Endangered Species Act, the Sierra Club has brought about a court decision that achieved what the TWC and others had been unable to do: persuade a majority of the legislature that it was better to create a Texas Authority to limit pumping than to surrender control over the aquifer to the federal government.

After the passage of the Act, Judge Bunton stated that he was pleased with the proposed Authority. He suspended indefinitely hearings he had scheduled for June to determine whether the State had been responsive to his rulings. The approach he adopted shows that federal law — even one as feared as the Endangered Species Act — need not preclude local initiative. But the possibility of retaining local power should not be taken for granted: Texas could act quickly, as Judge Bunton required them to, because a management strategy was already available. Pumpers over other aquifers who do not prepare management plans may find themselves subject to court-directed federal regulations.

And the catfish farm? After harvesting one large crop of fish, it was closed in late 1992 by the Texas Water Commission because it lacked appropriate water quality permits for its downstream discharges. A hearing on its permit application has been scheduled later this year!

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## Annual Litigation Review

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to impose user fees, but rejected requests by regulated private water utilities for further increases in water rates.

In *Carlsbad Mun. Water Dist. v. QLC Corp.*, a California appellate court held that “a major facilities charge” was a permissible user fee. The District levies the challenged fee for the extension of water service to new construction. A developer argued that the fee constitutes a “special tax” under the Jarvis-Gann initiative Proposition 13, which requires voter approval of a special tax by a two-thirds vote. The court rejected the argument. The fee does not exceed the reasonable cost of providing water service to new construction. It bears a fair and reasonable relationship to the developer’s benefit from the services financed by the fee. And the fee is not levied for general revenue purposes.

Private water utilities were unsuccessful in challenging rate decisions by state regulators. In *Application of Timberon Water Co.*, the New Mexico Supreme Court held that “Contributions in Aid of Construction” were properly excluded from the company’s rate base, because the contributions represented “cost-free” capital for the utility. In *Mountain Water v. Public Service*, the Montana Supreme Court refused to allow the company to recover back expenses required by a 1987 law transferring the financial responsibility for maintaining water service pipelines from property owners to private water service providers. The company did not include these costs in their rates during their two-year, unsuccessful legal challenge of the law. The Court, however, affirmed that the company’s water rates may reflect the current and future costs mandated by the law.

### LIABILITY

In *U.S. v. Imperial Irrigation District*, a federal district court held the Imperial Irrigation District and the Coachella Valley Water District severally liable for trespass because agricultural runoff from 1924 through 1992 flooded tribal lands of the Torres-Martinez Band of Mission Indians. The reservation was created in 1876. Many tribal acres were flooded between 1905 and 1907 when the Colorado River overflowed its banks and subsequently drained into the Salton Sea. For 400 years prior to the flood, the Sea was dry except for occasional runoff from large storms.

The Sea would have receded to its pre-flood level by 1923 but for irrigation in the Imperial Valley and the Coachella Valley. As a result, the level of the Sea fluctuated around 227.5 feet below sea level since 1924. On behalf of the tribe, the U.S. sued Imperial and Coachella for present and future damages of \$69.6 million and sought an injunctive relief against further flooding.

Based on a theory of trespass, the Court found the districts liable for damages. It rejected the defendant’s argument that,



## LEGISLATIVE UPDATE

*Each quarter WS examines proposed or enacted legislation in the 17 western states to provide a revealing picture of the evolution of water policy.*

This year *WS* is tracking 141 major bills introduced in 14 legislatures. The number of bills considered for inclusion in this Legislative Update exceeded 300 — richer even than last year's record harvest. As usual, for lack of space, *WS* has selected those bills that propose significant policy changes and has omitted several bills that, in previous years, might have been included. Water rights and policy and planning generated the most bills — 28 and 43, respectively. But water transfers (14 bills), public trust (19 bills), and groundwater (15 bills) generated the most heat. Conservation accounted for 12 bills and water quality only 10 bills this year.

California, as usual, is the busiest state, with 41 bills. It should retain this position while legislators worry about flood control as well as the aftermath of the drought and keep struggling to create a sound framework for water transfers. Oregon is experiencing a bumper session, with 25 bills — many of them far-reaching reforms of the state's water rights regime. Arizona is also busy, considering 21 major water bills — including attempts to tighten the Groundwater Transportation Act and to repeal the Water Augmentation Act. Washington lawmakers are considering 18 important policy bills. Montana has 9 major bills under consideration, Nebraska and Idaho 8, and Wyoming 4. Uncharacteristically quiet were Colorado (5), Texas (2), and Utah (no major bills). Quiet as usual were New Mexico (4), Nevada (2), Oklahoma (2), and South Dakota (1).

### WATER TRANSFERS (14 Bills)

Water transfers have re-emerged as a major legislative concern in many states. Legislatures in Arizona, California, Colorado, Idaho, Kansas, Oregon, and Washington are debating measures that would change the way interbasin transfers are conducted.

Arizona is reopening the debate over the export of groundwater. (*SB 1086: Arzberger et al*) would prohibit the transportation of groundwater from any basin. Previously, with the exception of basins explicitly closed in the 1991 Groundwater Transportation Act, groundwater could be exported if damages were paid or mitigation strategies employed.

In California, Assemblyman Katz is again trying to make water transfers easier and within the control of the water user rather than the water supplier. (*AB 52*) would permit water users within water agency service areas "to sell, lease, exchange or otherwise transfer (1) water that is surplus to the water users of the agency for use outside the agency or (2) water, the use of which is foregone during the period of the transfer by a water user of the agency, for use inside or outside the agency." For temporary and long term transfers, the State Water Re-

sources Control Board (SWRCB) must consider the recommendations of the Department of Fish and Game that the change would not unreasonably affect the environment (under existing law, the Department makes recommendations only about the impact on fish and wildlife) and would have to give written reasons for not following the Department's recommendations. These provisions would not, however, apply to water from Inyo and Mono County or to water from the Colorado River basin. The Board must also determine that the transfer will not "unreasonably affect the overall economy of the county or the local community from which the water is being transferred." Those transferring water would be required either to make available 10 percent of the amount of water approved for transfer to the Department of Fish and Game or deposit 10 percent of the cost paid for the water in the Aquatic Habitat Mitigation Account. The transferee would also have to provide the Department a reasonable opportunity to purchase up to 10 percent of the amount of water to be transferred.

Less dramatic changes would be permitted under (*AB 97: Cortese*). The bill would allow water agencies (but not their water users, as Katz's bill proposes) to transfer water voluntarily foregone by their users (not simply "surplus" water as under current law). Water suppliers would be authorized to set up programs to enable their users to transfer all or part of their water allocations for use outside the suppliers' service areas. But users would be able to request suppliers that have not adopted transfer programs to transfer their allocation, and suppliers would be obliged to approve or deny the request. (*AB 1387: Polanco*) takes a mandatory approach. It would require every water supplier, public and private, to adopt, by January 1995, a program to allow water users to cut water use and transfer the unused water with preference given to opportunities within the supplier's service area. The net proceeds from transfers would be distributed based on water users' allocations. DWR would report to the Legislature in 1998 on the success of the bill, and would identify any unnecessary barriers to water transfers. (*AB 1593: Costa*) would explicitly include state and local government water agencies as allowable contractors for transferred water. (*SCA 11: Ayala*) would amend the constitution to require a 2/3 majority to change portions of the water code protecting areas of origin and the Bay Delta.

(*AB 2242: Collins*) would remove "consumptive use" limitations on water transfers under SWRCB authority and rely instead on the restriction that such transfers do not unreasonably harm fish, wildlife, or other instream beneficial uses. (*AB 1316: Richter*) would authorize the Yuba County Water Agency to enter into long term contracts for the sale of water for use outside its service area after determining that such water is surplus and hold public hearings.

The Colorado legislature is engaged in its perennial and heated interbasin debate. (*SB 180: Ament*) would require transfer applicants to notify the Board of County Commissioners of the export county, the school board, the officers of any

water conservancy and water conservation districts, and the secretary of any ditch company. The water court could require mitigation payments by the applicant, equal to the difference between the taxes payable on the property with and without the irrigation water as well as any bonded indebtedness payment equal to the reduction in the ad valorem taxes attributable to the removal of water. The proceeds would have to be distributed among taxing entities in the exporting county. By contrast, (SB 112: *Cassidy and Pastore*) would require from applicants "a detailed study and analysis of all reasonable alternatives to the proposed water transport, including consideration of the cost, yield, reliability, and any other beneficial or adverse consequences of: (a) Water-saving measures and techniques . . . ; (b) coordination with other water providers for the supply, storage, treatment, and distribution of water; (c) water delivery system efficiency improvements; (d) the use of groundwater, including conjunctive use and drought supply; (e) in-basin agricultural transfers; and (f) new storage or other facilities, or new arrangements for the utilization of existing storage or other facilities, located in the same basin as that of the applicant. The applicant must also prepare an integrated water supply and demand plan, with a bewildering number of requirements that exceed, in specificity, the most careful of state water plans.

In response to Idaho's drought, (H 111: *Resources and Conservation Committee*) would continue the authority granted under H 4 during the last session, allowing the director of DWR to permit emergency transfers of water.

In Kansas, (HB 2070: *Committee on Energy and Natural Resources*) has been introduced at the request of the Kansas Water Authority, arguing that procedures introduced in 1983 have led to only one transfer application. The bill defines a water transfer as the diversion of transportation of 4,000 af/year or more for a distance of less than 50 miles or 2,000 af/year for more than 50 miles. A water transfer hearing panel would be established consisting of the chief engineer of the Division of Water Resources (who would chair the panel), the director of the Kansas Water Office, and the secretary of the Department of Health and Environment. For each application, the panel would select an independent, knowledgeable hearing officer to preside. No transfer would be approved unless it offers net benefits to the state, the chief engineer recommends, and the panel concurs (or the governor declares), that an emergency exists affecting the public health, safety, or welfare. The hearing officer must also determine that the applicant has had conservation plans and practices in effect for at least 12 months, and, if the transfer is for a public water supply system, that the system imposes increasing block rate prices. The hearing officer may assess "costs to the applicant before the hearing and may order reimbursement of the applicant by other parties for the parties' fair and equitable portion of the costs."

Oregon is debating (HB 3355), which would encourage the "reallocation of water through market driven forces." Rights holders could apply to the Water Resources Commission

for approval of a one-year lease agreement that could, with Commission's approval, be extended and embody a renewal option. Individuals who fear damage to existing water rights may file comments with the Commission. Permission would be denied if the lease injured an existing right or impaired the public interest. Washington takes the opposite approach. (SHB 1787: *Linville et al*) would eliminate the state's pilot programs, permitted last year, to test market mechanisms for water transfer and conservation.

## CONSERVATION (12 Bills)

Plentiful rain in the Southwest has tempered legislators' interest in conservation — although enthusiasm remains unabated in the Northwest. Fewer states are considering new measures this year, some are trying to introduce market incentives for conservation, and some are trying to roll back measures passed last year. In Arizona, for example, reaction against mandatory plumbing laws is reflected in (HB 2026: *Aldridge*). The bill would repeal the 1992 act requiring the use of low-flow plumbing fixtures. Perhaps supporters recognize the growing retail value of effluent and treated water.

In California, (AB 1712: *Lee*) would authorize public water suppliers to include rate structures as a water conservation technique. Assemblyman Cortese has introduced a bill similar to one that failed last year, to prevent water conserv and transferred under present law from reverting to the state through non-use (AB 2014). Colorado's (HB 1158: *Foster et al*) would declare that saved water is not evidence of the abandonment or nonbeneficial use.

California's water suppliers could "acquire, store, provide, sell and deliver reclaimed water for any beneficial use" consistent with statewide reclamation regulations under (SB 7: *Kelley*). (SB 365: *Kelley*) would make the use of potable water for landscape irrigation, floor trap priming, cooling towers, or for air-conditioning devices an unreasonable use if reasonably-priced reclaimed water is available — a similar measure failed last year. (SB 129: *Kelley*) would create separate PUC rule- and rate-making procedures for reclaimed water. (SB 50: *Thompson*) would exempt from property taxation drip or sprinkler irrigation systems, soil moisture measuring devices, and other conservation devices — but only if (SCA 4) passes.

In Oregon, (SB 92: *Water Resources Department*) would establish preference during emergency water shortages for human consumption and stock watering, permit the Water Resources Commission to require local water curtailment plans, and allow potable water suppliers to receive permits for drought options for water. (HB 2341: *Norris*) would permit industrial reclaimed water to be used for the same purposes that municipal reclaimed water may now be used. (HB 2342: *Norris*) would give irrigation districts the power to require users to install lockable, controllable headgates and point-of-delivery measuring devices.

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### WATER RIGHTS (28 Bills)

A striking feature of this year's legislative agenda is the number of bills aimed at establishing new types of water rights or at clarifying existing water rights regimes. Arizona, for example, would create permits for underground effluent storage and recovery projects under (*SB 1380: Day*). The DWR director would issue the permit to a city, town, private water company, or irrigation district if the applicant has the technical and financial capability to construct and operate the project, the applicant has a right to use the effluent, and the project is hydrologically feasible and will not cause unreasonable harm.

In California, (*SB 235: Ayala*) would repeal the sunset provisions on SWRCB's program to register small domestic users. In Idaho, (*SB 1054: Resources and Environment Committee*) would authorize the director of DWR to approve short term uses of water for minor projects without creating a permanent water right. Nebraska's (*LB 789: Beutler*) would also allow permits for temporary appropriations of water.

Montana is considering its biennial instream-rights bill (*SB 346: Yellowtail*). Current law allows only the Department of Fish, Wildlife, and Parks to lease, not purchase, existing rights for augmenting instream flows. The bill would place instream flows on an equal footing with traditional beneficial uses. Dissatisfied with the denial of reservations for minimum stream flows by the Board of Natural Resources and Conservation in six river basins — usually because of inadequate water supplies — legislators have introduced (*HB 420*) to amend the water code. The section dealing with water reservations would state: "The preclusion of permit applications for any class of uses for any period of time on any source of water supply does not affect a reservation to maintain a minimum flow, level, or quality of water that was made prior to the preclusion." The provision would apply retroactively.

Inundated with new permit and change applications, Montana is also considering closing four river basins temporarily to further appropriations under (*SB 363: Bianchi*), saving \$84,000 in staff costs for the Department of Natural Resources and Conservation. (*HB 395: Grosfield*) would temporarily close the Upper Missouri basin to further appropriations. (*SB 282: Swysgood, Tash*) would close the Jefferson River basin and Madison River basins to further consumptive appropriations.

Nebraska is considering legislation (*LB 302*) to give irrigators in the panhandle three years to transfer water rights onto their irrigated land. Rights had been granted to tracts of land before the territory had been settled. Landowners were unaware of the need to transfer rights appurtenant to tracts on which they had built to tracts under irrigation — and many had, unwittingly, allowed their rights to revert to the state. Last year the legislature passed (*LB 948*) to ensure that they would

continue to receive water. This year, the bill would give irrigators three years to complete the necessary paperwork.

The legislature has also introduced (*LB 301: Beutler*), similar to bills that failed last year, that would allow municipalities with wells recharged from surface water sources to appropriate surface water to protect the quantity and quality of their recharge supplies. It would be the first time Nebraska law explicitly recognized the connection between surface and groundwater supplies. Conjunctive use is also the focus of (*LB 751: Beutler*). The bill would give notice to water users that permits for surface diversions and groundwater wells issued after the effective date of the act may be subject to laws, rules, and regulations integrating the management of groundwater and surface water. This would be the first regulation of groundwater withdrawals in the state, necessary, says its sponsor, because water is declining in 25 of the state's 93 counties.

Oregon has the fullest water rights agenda. (*SB 440: Hannon*) would replace water quantity measures with instream flow rates as the basis for instream water rights, and would allow only a temporary instream right while a pollution abatement plan is developed. (*HB 2505*) would condition instream rights to allow de minimis human and livestock use. (*HB 2928*) would require the Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation to pay fees for application for instream flow certificates. And (*HB 3009*) would mandate the Water Resources Commission to hold hearings on applications for instream rights when it determined these rights would affect the public interest.

Many Oregon bills are intended to exempt certain water uses from the burden of obtaining a water rights permit or to introduce a simplified form of permitting. (*SB 441: Hannon*) would exempt from permitting surface water used for emergency fire fighting, stockwatering, fish passage structures, or ponds of less than 10 af used for forest or rangeland management; (*HB 2399: Shiprack*) would exempt from permitting water used to fill fire ponds; (*HB 2970*) would exempt water used for small ponds built before May 1991; and (*HB 3273*) would exempt water used to fill ponds holding less than 10 af and from a seasonal water source, and water used for fire fighting. (*HB 2153*) offers a slightly different list of activities: it includes road construction and maintenance, for example, requires only a limited license, exempts some activities from permitting, and allows other users to register a water use. Registration would not establish a priority date, nor offer any of the protections of a water right, and would not be transferrable. The Commission could require registrants to apply for a formal permit if they had reason to believe that the registered water use was causing harm to other users, the watershed, or instream rights. (*HB 2344: Norris*) would also establish limited license for de minimis human or livestock uses. (*HB 2107: Water Resources Department*) would allow registration of water use in lieu of permit if water use is for wetland or stream restoration.

Other bills are intended to limit the discretion of regulatory

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agencies in issuing permits. (HB 2772) would prohibit the Water Resources Commission from limiting the exercise of a water right to a particular time period. Under (SB 91: *Water Resources Department*), water users who failed to file use reports would forfeit their rights. (HB 2834: *Walters*) would exempt from the 5-year period of non-use leading to forfeiture, periods when water rights were not used because of crop rotation, growing grains not needing irrigation water, or when the land was offered for sale.

Finally, two bills deal with Indian water rights. In Arizona, (HCM 2003: *Aldridge et al*) would memorialize the U.S. Congress to reject the proposed Navajo-Hopi settlement agreement on the grounds that judicial rulings have already caused the greatest forced relocation of U.S. citizens in history, that the agreement was carried out in secret, and that the affected parties were given only minimal opportunity to comment. In Oregon, (HB 2109) would authorize the Water Resources Department to negotiate with any federally-recognized Indian tribe that may have a federal reserved water right claim.

### WATER QUALITY (10 Bills)

Water quality issues have shrunk in importance while public trust issues have grown. In California, (AB 1182: *Sher*) would require the Secretary of the Environmental Protection Agency to establish a standardized format and data base for all environmental data required by state and local agencies. In Colorado, (HB 1130: *Chlouber*) would exempt from ad valorem taxes property owned by charitable organizations and used to control or reduce pollution damage, and used pursuant to an agreement with federal, state, or local government.

In Idaho, (H 153: *Environmental Affairs Committee*) would create the Big Payette Water Quality Council. It would be funded through grants, gifts, and donations. In Montana, (SB 388: *Swysgood et al*) would clarify water nondegradation policy. Degradation would mean lowering water quality to more than a de minimis extent by discharging pollutants; it would not mean changes in water quality resulting from non-point source pollutants or temporary changes in water quality resulting from short-term construction or rehabilitation. The Board of Health and Environmental Sciences would delegate to the Department of Health and Environmental Sciences the task of developing the necessary rules to allow mixing zones — areas where water quality standards may be exceeded. A competing bill, (SB 401: *McClernan*), offers a broader definition of degradation — “a change in water quality that lowers the quality of high-quality waters for a parameter” — and would transfer power to authorize degradation from the Board to the Department of Health and Environmental Sciences. The Department would be able to collect fees to offset the costs of water

quality programs under (HB 388: *Raney*).

Nebraska's Department of Health would administer a Drinking Water Source Quality Act under (LB 736: *Beutler*). The Department would test sources for contaminants, financed by 50 percent of the proceeds of annual fees on pesticides distributed in the state. The remaining proceeds would be used by the Natural Resources Commission for grants for sustainable agriculture, horticulture, and lawn care research. Under (LB 656: *Robak, Bohlke*), the Department would be empowered to inspect point-of-entry treatment devices for private water supply systems and charge a fee of between \$60 and \$100.

In Oregon, (SB 417 *Cease*) would allow citizens or municipalities to bring action to enforce rules related to the prevention of contamination of drinking water. (HB 2149: *Department of Environmental Quality*) would establish a program for the delineation and protection of groundwater sources of public drinking water administered by the Department of Environmental Quality, the Water Resources Commission, and the Health Division.

### GROUNDWATER (15 Bills)

In Arizona, the legislature is still wrestling with the implications of the landmark replenishment district act passed two years ago. Representative Keegan has introduced (HB 2103) to allow the creation of separate replenishment district for the eastern and western portions of the Phoenix Active Management Area. This reflects fears that the rapidly growing western suburbs of Phoenix, still heavily dependent on groundwater, will be forced to buy water at higher and higher prices from the slower growing city — fears that motivated the 29 no-votes cast against the enabling legislation in 1991. A more dramatic approach would be pursued under (HB 2100: *Keegan*), which would repeal the Groundwater Replenishment District Act. A committee amendment passed in February, however, moderated the bill; it would now merely sunset the power to create any groundwater replenishment district not created by July 1, 1996. (HB 2304: *Overton et al*) would redefine the replenishment obligations of members of replenishment districts by excluding incidental replenishment. Member obligations would therefore be based on adjusted rather than net groundwater.

(SB 1425: *Salmon et al*) would require the Central Arizona Water Conservation District to create a groundwater replenishment authority (composed of the CAWCD board and serving CAWCD's multi-county area) to replenish groundwater with Central Arizona Project water. “County water augmentation authorities” would be allowed under (SB 1260: *Arzberger et al*) in AMA counties with populations of less than 150,000.

Arizona would also broaden the definition of groundwater recharge projects. (HB 2073: *Killian et al*) would define “recharge project” as any facility “that is capable of being used to provide for the seepage or injection of water or treatment

effluent or both into an aquifer." The requirement that an applicant for a recharge project should be technically and financially able to "construct and operate" would be changed to "construct or operate." Under (*HB 2116: Keegan*), the state would make some recharge projects more attractive by allowing people to apply for permits to transport recharge water to projects through natural stream beds and receive credits for any natural recharge occurring in the stream.

Finally, (*SB 1336: Arzberger et al*) would enable DWR to designate the Santa Cruz International Active Management Area, including parts of Santa Cruz county split off from the Tucson AMA as well as parts of Mexico. The director would have to determine that: 1) groundwater withdrawals exceed, or may exceed, recharge; 2) recharge has been impaired; 3) affected aquifers are an important source of drinking water; 4) affected aquifers have become or may become contaminated; 5) recurring drought conditions require management of water supplies; and 6) a portion of the river basin is located within Mexico. Mexico must consent pursuant to the water treaty between the U.S. and Mexico signed in 1944. The U.S. and Mexico would adopt their own management plan and goals for their respective portion of the IAMA and each would remain sovereign in its right to regulate water supplies within its own territories. The same sponsors also introduced (*SCM 1004*), requesting Congress and the President to negotiate with Mexico for the cooperative management of the Santa Cruz basin.

In California, (*AB 144: Richter*) would prohibit the substitution of leased groundwater for surface water unless the use of the groundwater is consistent with a groundwater management plan or is approved by the local water supplier. (*AB 1152: Costa*) would let flood control districts, groundwater management agencies, and groundwater replenishment agencies implement groundwater management plans only if a local water service agency formally declines.

In Montana, (*SB 280: Grosfield*) would implement part of the 1992 State Water Plan by adding water quality criterion for consideration by the Department of Natural Resources and Conservation when issuing permits and change authorizations, and for petitions to DNRC for basin closures and for controlled groundwater areas. The Department of Health and Environmental Services could petition for a controlled groundwater area. In Nevada, even domestic well drillers would be required to obtain a permit under (*SB 138: Committee on Natural Resources*). In Washington, (*HB 1131: Kremen et al*) would exempt from permitting agricultural as well as industrial withdrawals of groundwater of amounts less than 5,000 gpd.

Texas lawmakers are debating ways to deal with the highly controversial issue of regulating pumping from the state's aquifers. On February 1, a federal judge issued a court order to limit pumping from the huge Edwards Aquifer to protect endangered species (see *WIM February 1993*). (*SB 1334: Bivins, Carriker*) would limit the Texas Water Commission's powers to regulating the quality of underground water, removing all mention of conservation and quantity.

## PUBLIC TRUST (19 Bills)

The protection of fish and wildlife and the promotion of water based recreation occupy a growing share of legislative time — bills are under consideration in 8 states — and have led to some of the most intense debates. Concern over endangered species drives many bills. In California, for example, (*AB 249: Allen*) would exclude from the definition of "taking" in the Fish and Game Code any loss of plants or wildlife resulting from modification of habitat. The bill would also modify the findings and declarations of the California Endangered Species Act to declare that the Act does not authorize agencies to regulate agricultural activity, habitat modification, or other land use changes. (*AB 399: Campbell*) and (*AB 426: Cortese*) would extend until January 1999 and January 1998, respectively, existing requirements under the California Endangered Species Act for lead agencies to consult with the Department of Fish and Game. (*SB 661: Deddeh*) would require the Department to analyze the economic impacts of proposing to list a species as a candidate, threatened, or endangered species, or before accepting a petition to list a species. In New Mexico, (*SB 517*) would create its own endangered species list through hearings and economic impact analyses conducted by the director of the Department of Game and Fish. In Washington, (*SB 5198: Sutherland et al*) would require the Department of Fisheries to ban harvesting of wild salmon species on the federal endangered species list. And in Wyoming, (*HJR 6: Betts*) would request Congress to set up an Endangered Species Citizen Advisory Board representing the interests of those affected by the administration of the Act.

California is also considering bills to clarify and extend its public trust programs. (*AB 183: Allen*) would require the Department of Fish and Game to issue permits for the use of suction dredge equipment. The Department would have to adopt regulations designating areas open and closed to dredging. (*AB 1129: Lee*) would create the Upland Dredge Disposal Coordinating Authority to review permits and plans. (*AB 182: Allen*) would, for the purposes of streambed alteration, define natural flow or bed as the area adjacent to water and below the 10-year average high water mark. Rivers (and creeks) would be defined as "bodies of water flowing on the surface, at least periodically, through channels with banks, supporting aquatic life." (*AB 230: Farr*) would require the Governor's *Environmental Goals and Policy Report* to include a comprehensive plan showing consistency among policies on agricultural land, timber land, forest land, range land, areas where endangered species are threatened, wetlands, and state buildings. (*SB 936: McCorquodale*) would require the Department of Fish and Game to set the regulations for qualifying a site as a wetlands bank in the Sacramento-San Joaquin Valley. Decision 1630 has prompted several bills (see *WIM April 1993*). (*AB 2110: Cortese*) would set up a Bay Delta Fish and Wildlife Advisory

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Committee (co-chaired by Fish and Game and DWR) to advise SWRCB on the use of fees resulting from the decision. (*SR 14: McCorquodale*) and (*HR 8: Costa et al*) would urge the SWRCB to prepare an environmental impact report on Decision 1630 prior to its adoption.

In Idaho, the legislature must approve applications by the Idaho Resource Board for permits to appropriate water to establish minimum stream flows. If passed, (*SCR 105: Resources and Environment Committee*) would approve the Board's application for a minimum flow of 59 cfs in Crystal Springs, Gooding County. In Kansas, (*HB 2356: Plummer*) would establish a task force on bio-diversity to develop a state plan and make recommendations for the maintenance and restoration of bio-diversity. In Nebraska, (*LB 624: Beutler*) would create a gubernatorially-appointed Task Force on River Assessment, funded by grants, to identify resource values of streams and rivers for preserving wildlife, for recreation, and for aesthetic, cultural, and historical uses. The task force would report by September 30, 1995. The state would issue \$3 million in severance tax bonds to purchase water rights within the Pecos River basin by the Interstate Stream Commission under (*HB 197*). In Oklahoma, (*HB 1344*) would declare it wasteful to use fresh groundwater from any nonrechargeable aquifer for Department of Wildlife Conservation wildlife programs.

In Oregon, (*SB 192: Committee on Agriculture and Natural Resources*) would direct the Department of Fish and Wildlife to study impacts of aggregate removal on anadromous fish habitat, financed through increased permit fees. (*SJR 1: Committee on Agriculture and Natural Resources*) would amend the constitution to guarantee all citizens the right to live and work in an environment protected from harmful pollutants and "to the sustainable benefit of Oregon's natural resources, free from significant impairment or irreversible harm."

Washington legislators are considering (*HB 1487: Sheahan et al*) to require local governments to list and map all wetlands within their jurisdiction. (*SHB 1762: Committee on Natural Resources*) would appropriate \$100,000 to the Parks and Recreation Commission to study ways to improve public access to river recreation. (*SHB 1785: Locke et al*) would set up an interagency coordinating council to promote job creation by restoring the state's environment and forests. (*HJR 4003*) and (*SJR 8006*) would memorialize the Congress and the President to limit drawdowns on the Columbia and Snake River systems because of the damage to salmon and to navigation on the streams (see *WIM April 1993*). (*SSJM 8012: Hargrove*) would request Congress and the President to require FERC to make all hydropower licensees supply electricity at no cost to anadromous fish. (*SB 5031: Haugen*) would impose user fees on sport and commercial fishers to fund research and development of a fish enhancement program. (*SHB 1309: King et al*) would create a committee of several departments and Indian

tribes to develop, in consultation with the federal government and other states, a strategy to reduce the impact of fishing on salmon stocks. Under (*SB 5667: Talmadge et al*) the Parks and Recreation Commission would set up and manage a water trails program to develop overnight facilities along shores.

Finally, Wyoming has declared *Phrynosoma douglassi brevirostre*, otherwise known as the horned toad, the official state reptile. The governor signed (*HB 213*) in February.

### PLANNING AND POLICY (43 Bills)

The rapid shifts in water policy on water rights, transfers, and public trust is necessitating related shifts in planning, agency organization, and policy coordination. Many states recognize the importance of creating new types of organizations — from watershed councils to single purpose local authorities — as instruments in achieving water policy objectives. California, for example, is considering (*AB 639: Peace*), which would create the California-Mexico Border Environmental Authority (but only if the Clean Water Bond Law of 1994 is approved by the voters). Participating local governments would appoint board members and prepare local management plans. In Colorado, (*SB 130: Norton*) would give to water districts and local governments the power to create "water project enterprises" that would manage water facilities or businesses that supply or treat water, secure interstate compact water, or that recharge or reclaim water. The governing body of the enterprise would be the same as that of the district and could develop and maintain projects, enter into contracts, employ agents and employees, condemn property, incur liabilities, and issue revenue bonds. Idaho's (*SB 1101: Resources and Environment Committee*) would give irrigation districts the power to establish improvement districts within their boundaries for the purpose of financing urban water distribution systems. Oregon's (*HB 2215*) would encourage the creation of voluntary partnerships among local, state, and federal interests for watershed management through cooperative interagency and intergovernmental agreements. Washington's (*SB 5215: Talmadge et al*) would empower counties to set up watershed protection programs. And in Wyoming, (*HB 364: Johnson et al*) would grant cities, counties, towns, or joint powers boards the authority to create storm water utilities to design, plan, construct, and maintain storm water systems if approved by voters; and (*HB 362: Paseneaux et al*) would grant local governments the power to create rural community water import districts to plan and build facilities and acquire water to meet local needs.

States, too, recognize that utility regulation is a powerful tool to encourage conservation and other policy goals. In Arizona, for example, (*HB 2334: Aldridge*) would require cities that supply water or wastewater treatment to charge each user (or class of users) based on the cost of providing services. (*HB 2254: Grosco*) would require the Corporations Commission to let water utilities recover operating costs through a

surcharge on sales. (*TIB 2309: King et al*) would require cities and towns to assess development fees based on "independently verifiable data that analyzes the burden imposed on different types of public services by different types of development." (*TIB 2015: Overton et al*) would prohibit any public service corporation providing water and/or sewer connections to more than 1,000 customers from selling or leasing any part of its system to an entity other than another public service corporation without the consent of the city or town.

California legislators are also weighing the merits of restructuring rate-making powers of local authorities. (*AB 2210: Polanco*), for example, would declare it inappropriate for water districts to use revenues collected from existing customers to pay for projects designed to serve new or future customers. (*AB 837: Moore*) would require MWD to set rates for service for its member districts equal to the costs of service to those districts, repealing the provision of its act that requires MWD, so far as is practical, to fix uniform rates. (*AB 2272: Martinez*) would require DWR to submit to the legislature for approval any SWP contract that affects project rates. In Oregon, (*HB 2192*) would remove from Public Utility Commission regulation water utilities that deliver water to the inhabitants of any locality where there is no municipal or public utility plant to furnish the same or that serve fewer than 300 customers.

States are also raising permit fees to recover costs of examining applications. In New Mexico, for example, (*SB 516*) and (*TIB 671*) would let the state engineer impose fees for filing objections or protests to an application for change in location or use not exceeding \$50 for an individual, \$150 for acequia, and \$300 for all others. South Dakota is considering (*SB 84*) which would increase filing and examination fees to \$150 for the first 120 af/year, \$75 for the second 120 af/year, and \$25 for each subsequent 120 af/year. And Washington's (*H 1236: Committee on Natural Resources and SB 5529*) would raise fees for the water rights program (they have been changed little since 1917) with the aim of covering about one-third of the cost of administering the program (fees now cover less than 2 percent). For example, for 1993-95, filing fees would be \$100, permit application examination fees would be between \$140 for 0-1 cfs and \$60,000 for over 100 cfs (to examine a permanent change application, the fee would be one fourth these amounts). The bill would also create a water rights fees task force.

Arizona is also considering bills to streamline or amend its regulatory framework. (*HB 2253: Grosco*), for example, would redefine "a small municipal provider" from one supplying fewer than 500 customers to one supplying less than 10,000 af/year. Small providers enjoy freedom from some regulations. (*HB 2255: Grosco*) would introduce four classes of water utilities, based on annual sales. The Corporations Commission would have to issue rate and charges decisions within 170 days for the largest class of utilities (those with annual sales of over \$10 million) and within 90 days for the smallest class (those with annual revenues of less than \$100,000). (*SB 1359: Day et*

*al*) would require the at-large member of the board of directors of an AMA to be elected rather than appointed by the board of supervisors. (*SB 1053: Buster, Keegan*), a bill developed by the state Department of Water Resources, would make several amendments to the water code — including a delay (until January 1995) in calculating farmers' intermediate water duty, requiring well-drillers to have contractors' licenses, allowing the conveyance of storage and recovery permits to irrigation districts as well as to cities, towns, and water companies, and allowing the initial board of groundwater management districts to put a tax levy on the ballot.

California is considering requiring the Attorney General to adopt guidelines by January 1, 1995, to identify state actions that would be considered takings of private property subject to constitutionally-required compensation by the state (*AB 145: Richter*). Guidelines would be updated annually, and an assistant attorney general appointed to ensure compliance. (*AB 892: Frazee*) would require all urban water suppliers to present annual water use and management plans to DWR using a standardized format DWR would promulgate. (*AB 1199: Seastrand*) would exclude from the definition of a "project" under CEQA the "extension, renewal reissuance, or transfer by a public agency of a lease, permit, license, certificate, or other entitlement of use." (*AB 385: Hannigan*) would prevent SWRCB from imposing fees on discharges from lands managed as wildfowl habitats. (*AB 1364: Polanco*) would require every city with a population in excess of 3 million to prepare a program environmental impact report, on top of the already mandated project EIR, for any water quality project that requires modifications to existing reservoirs. (*SB 967: McCorquodale*) would authorize DWR to negotiate with the federal government regarding transfer ownership of the CVP to the State. (*SCA 4: Thompson*) proposes, for property tax purposes, a constitutional amendment to exclude water conservation devices from the definition of full cash value.

In Idaho, both (*H 81*) and (*H 260: Resources and Conservation Committee*) would allow corporations managing irrigation projects greater flexibility in assessments. Previously, they could make assessments either equally against all shares or on water use. These bills would allow them a combination of (1) an equal assessment per share, (2) an additional assessment based on the amount of water per share (regardless of use), and (3) a charge for extra water to meet farmers' pre-season estimates. (*H 81*) would also allow boards of directors the option of not assessing Conservation Resource Program acres while (*H 260*) would give them the option of not assessing federal crop land, set-aside acres, or parcels of less than five shares that cannot get water. (*SB 1119: Resources and Environment Committee*) would allow DWR to require all well pumpers to provide withdrawal information, not just those in critical groundwater areas.

Nebraska is wrestling with one of the fiscal aspects of water transfers. (*LR 19CA: Bromm*) would submit to the state's

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## Legislative Update

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electors an amendment to the constitution requiring utilities to make annual payments in lieu of taxes on any property located in other counties. In Nevada, (*SB 125: Committee on Natural Resources*) would change the boundaries of the Carson Water Subconservancy District to include Storey County and exclude Douglas County. (*SB 125: Committee on Natural Resources*) would raise the bonding limit of the Colorado River Commission for certain purposes and repeal it for others. Oklahoma would change the procedure for dissolving a rural water district. Instead of distributing any funds left among members of the district on a pro rata basis, (*HB 1240*) would apportion property and proceeds to an adjoining rural water district or any other political subdivision of the state. No money could be distributed to private interests. Texas, under (*HB 682*), would force the Lower Colorado River Authority to sell, as soon as possible, all the electric power and energy generating facilities it owns, its interests in any jointly owned electric power facilities, all water distributing facilities, all jointly owned water distributing facilities, all vehicles and other personal property it owns, all real property it owns, and use the proceeds to retire its bonds (with any surplus to be deposited in the permanent school fund).

In Washington, (*SHB 1442: Johnson et al*) would create a water resources policy commission to make recommendations by November 1994 for the improvement and implementation of management decisions. The commission grows out of the perception that the proliferating number of water programs and planning requirements at all levels of government is causing inconsistent and conflicting management strategies. (*HB 1573: Pruitt et al*) expresses similar concerns, but would place the burden of coordinating water resource policy on counties. (*SHB 1309: King et al*) and (*SSB 5210: Haugen, Rasmussen*) would impose a tax on the sale of real property of 0.5 percent of the sale price and dedicate the proceeds to the purchase and maintenance of conservation areas.

WS will track these bills and any others introduced during the coming weeks. In our next issue we will describe what passed, what failed, and what has been changed in the process. WIM will provide monthly updates on bills of particular significance for western water policy. □

## Forgotten Economics

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to commit the \$500,000 to \$1,000,000 needed to fund upfront costs, bear the risk of failure, and incur the cost of delay for the scale of water transactions discussed above. For growers with pre-existing large debt, they lack any further borrowing capacity. For growers with unused borrowing capacity, they may not wish "to bet the farm" by funding the upfront costs of water transactions.

Water districts may also not have the ability or the willingness to fund transactions. Unless *all* growers want to participate in transactions, the district will find itself torn between the growers who support and the growers who do not support the funding of trading efforts. Especially for failed ventures, the increase of water rates and assessments may prove to be politically divisive.

From an economics perspective, there is a role for equity capital in which investors fund the development and implementation of water transactions in return for a share of the financial proceeds generated by successful transactions. The raising of equity capital requires the creation of a separate trading entity with the exclusive rights to market water. Without exclusive marketing rights, growers will forego the two benefits from joint action — bargaining leverage and savings in upfront costs. In addition, they would increase the share of the financial proceeds private investors would demand because the lack of the exclusive right increases the risk of failure for the trading organization.

## CONCLUSION

For a decade, advocates of water trading have searched for and removed suspected impediments to water trades. Recently, the role of growers versus districts in water transactions has been at the top of the legislative agendas, in both Congress (see "Aftermath of Congressional Water War," *WS January 1993*) and state legislatures (see "Katz Introduces Water Transfer Bill," *WIM January 1993*).

For sellers, effective water trades require joint action backed with equity capital provided by private investors. Proponents of legislation that promote or at least do not undermine these principles will be successful at providing the framework for water trades. Proponents of legislative reforms that do not may find their efforts unsuccessful. □

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