America’s Water Infrastructure Act Signed into Law

On October 23, 2018, President Trump signed America’s Water Infrastructure Act (“AWIA”), also known as the Water Resource Development Act, into law. This bipartisan bill, which previously passed the House of Representatives on September 13, 2018 and the Senate on October 10, 2018, aims to improve dams, levees, ports, and waterways throughout the United States. It also amends the Safe Water Drinking and allocates funds toward more efficient and sustainable water quality control and management, particularly in underserved communities.

As its name might suggest, one of AWIA’s main goals is to improve America’s water systems. Under AWIA, the U.S. Army Corps of Engineers will receive around $3.7 billion to plan, study, and develop water projects to alleviate strain on existing infrastructure. In the Northwest, the Port of Seattle is specifically slated to undergo construction to improve navigation channels, as are several other key ports around the United States. AWIA also has specific provisions that focus on flood protection measures on the Snake River and levee improvements in Clatsop County, Oregon, among others.

One of the most notable aspects of AWIA is how it addresses the ongoing water shortages in Northern California/Southern Oregon’s Klamath Basin. AWIA provides a much-needed $10 million annuity to the Bureau of Reclamation to address ongoing water issues in the Klamath Basin, and provides avenues for farmers to make use of Klamath Project canals to deliver water to their farms. AWIA also focuses on increasing efficiency and sustainability of hydropower and delivery of affordable electricity to those same farmers.

Stay tuned to Schroeder Law Offices’ blog for more updates on AWIA’s progress and impacts on water in the Northwest and the United States!
Conditions in the Klamath Basin Worsen in 2018

Water use conditions in the Klamath Basin continue to worsen in 2018. On March 8, 2018, a water “call” was made in the Klamath Basin, and the Oregon Water Resources Department (“OWRD”) began the validation process for shutting off junior water users. Within the week, on March 13th, Governor Kate Brown declared a drought in Klamath County, Oregon, the first drought declaration since 2015, coming much sooner than hoped or predicted.

In April, OWRD began regulating off water users in the Klamath Basin. On April 13, the Oregon Water Resources Commission approved temporary emergency rules granting a preference to water rights for human consumption and stock watering in Klamath County. The rules allow certain water users with water rights for human consumption and stock watering to continue using surface water for such uses despite OWRD’s regulation off of water use rights. Exempt uses of groundwater, including domestic and stock uses, may also continue despite OWRD’s regulation. The Commission passed similar temporary rules granting the same preferences during the last drought period.

Also in April, Klamath Project water users found themselves unable to begin irrigating due to a federal court injunction. The Hoopa Valley and Yurok Tribes in northern California previously brought suit against the Bureau of Reclamation and National Marine Fisheries Service in federal court, alleging mismanagement of the Klamath River below the four major dams lead to an outbreak of C. shasta, a parasite that infects juvenile Coho salmon. The court entered an injunction requiring 50,000 acre feet of water stored in Upper Klamath Lake to flush and dilute the parasite until most of the salmon have migrated to the ocean, usually occurring after the beginning of June. Irrigators and irrigation districts petitioned the court to lift the injunction, but the court declined to do so in 2018. For more information, see May 1 article from the Capital Press, Judge upholds Klamath River Injunction.

In May, the Klamath Irrigation District brought suit against OWRD, seeking to compel the agency to take exclusive charge of Upper Klamath Lake to distribute water according to the district’s water use rights determined by the agency in the Klamath Basin Adjudication. The district alleges that it disagrees with the Bureau of Reclamation and PacifiCorps as to the proper distribution of water, and those entities are releasing without valid water use rights, causing injury to the district and its patrons.

Also in May, the Klamath Tribes filed suit in federal court in northern California against the Bureau of Reclamation, US Fish & Wildlife Service, and National Marine Fisheries Service, alleging violations of the Endangered Species Act and National Environmental Protection Act by failing to maintain appropriate elevations in Upper Klamath Lake. The Tribes seek declaration of the alleged violations, an injunction against further jeopardy and habitat modification, and for the agencies to
reinitiate consultation resulting in a new biological opinion. Finally, on April 27, 2018, the Klamath County Circuit Court issued a Case Management Order in the Klamath Adjudication, outlining a schedule for hearing the first substantive exceptions filed with the court since the judicial phase of the adjudication began in 2013. First the court will decide exceptions made against federally reserved water claims, excluding Tribal claims. Next, the court will decide exceptions against Walton and Klamath Termination Act claims. Third, the court will decide exceptions to Tribal claims. Numerous exceptions have been filed with the court, alleging OWRD awarded too much water to these claims, ignoring the pertinent legal standards for deciding these claims, to the detriment of other Klamath Basin water users. A decision on the first group of exceptions is not anticipated until 2019.

The Upper Klamath Basin Comprehensive Agreement was terminated on December 28, 2017. The agreement called for retirement of irrigation rights to increase stream flows into Upper Klamath Lake by 30,000 acre feet per year. This “retirement” (or cancellation) of water use rights, which was negotiated largely in the absence of upper basin irrigators, was viewed unfavorably by many of the affected irrigators, and was ultimately not funded by Congress. Discussions about alternative agreements continue to this date.

Overall, the return of drought conditions, coupled with fish disease and five years of merely procedural rulings in the Klamath Basin Adjudication, have left water users in the Klamath Basin in serious trouble.

Stay tuned to Schroeder Law Offices’ Water Law Blog for more water news!
Other key points in the Reclamation Roundtable with all the regional directors included a water forecast for 2018, discussion of what current storage will secure or not secure, and how to deal with long term planning by:

- a) creating additional storage through raising dams;
- b) investigating new storage locations (new dams); and
- c) aquifer storage and recovery projects (underground storage) undergoing feasibility studies, working on creative ways to deal with ESA issue, and collaborating with stakeholders.

Alfalfa Farmers Win Jury Trial for Irrigation District’s Failure to Deliver Allocated Water

A jury recently decided in Malheur County Circuit Court Case #16CV32005 that local farmers, Delos & Barbara Lee, were entitled to the lost profits they incurred when Owyhee Irrigation District (“OID”) failed in 2014 to deliver the Lees their entire allocation of water and delivered their 2015 allocation in late July. The jury decided OID was negligent based on a computer error that caused the Lees to receive the improper allocations of water.

The Lees grow alfalfa and have farmed in the Oregon Slope area their entire lives. The Lees discovered OID’s computer error in late 2015 after complaining to OID beginning in 2014 that even though they had timely paid their yearly assessments for water delivery, they were not receiving their full water allocation. While there was a drought in 2014 and 2015 that reduced water allocations throughout OID, the failure to deliver even the reduced allocation to the Lees’ 39 acre field caused their hay stand and hay production to suffer more than would otherwise have occurred if the Lees had received the reduced allocation of water.

In late July 2015, OID admitted that it failed to deliver any of the water allocated to the Lees’ 39 acre field in 2014 and had yet to deliver the 2015 water allocation. After its admission, OID then delivered water to the Lees, but it was too late for the Lees’ hay stand to produce as it would have otherwise. At trial, the jury found OID’s failure to deliver and failure to timely deliver water made OID negligent and awarded judgment in favor of the Lees for the entire amount of Lees’ lost profits.

Unfortunately, the judgment will not “make the Lees whole” due to the expense of the case going to trial rather than settling. Additionally, OID has now decided to appeal the decision to the Oregon Court of Appeals. OID argued at trial, and may take up a similar argument on
appeal, that a U.S. Bureau of Reclamation (“BOR”) Repayment Contract from 1951 between the BOR and OID, along with other irrigation districts, makes OID wholly immune from liability even when OID failed to deliver water to the Lees when the water was allocated and available for delivery. The BOR repayment contract is a contract for the irrigation districts to repay the BOR for the construction obligations incurred to build the Owyhee Project. Schroeder Law Offices was privileged to have the opportunity to work with the Lees to hold OID accountable for its failure to deliver water that was available, paid for, and allocated to the Lees.

Schroeder Law Offices Plays Serious Water Games

Schroeder Law Offices plays some serious water games, and so should you! Serious gaming is an emerging tool in negotiation, mediation, and water conflict. Serious water gaming acts is a way to share knowledge, interact in an engaging way, and build capacity to solve the real problems in water resources. The games allow for role-playing for social learning in a less-threatening environment. Parties that might otherwise be unable to cooperate build capacity,
relationships, and deescalate tensions, at least momentary. Careful reflection after the game concludes provides lessons that can be applied to the real-life problems. When we aren’t helping you with your real-life water issues, we are honing our water gaming skills.

The United States Army Corp of Engineers has started playing too! They have built a dam-based game resembling the way the agency balances water needs for agriculture, flood control, habitat, water quality, and hydropower. The “River Basin Balancer Game” is available for free at:


The United Nations plays “Aqua Republica.” This game simulates the demands placed on water managers, balancing food, energy, and wildlife. The game includes social revolts, population increases, and economic impacts. There are multiple versions available representing different regions. Choices of crops, environmental policies, and irrigation technology all influence the player’s success. To begin playing for free, follow this link to the registration menu:

http://capnet.aquarepublica.com/register

For those that enjoy board games, the California Water Crisis Game pits the three regions of California against each other in a competition for water, but also reputation! Different stages of water law are represented, including the Gold Rush era and today’s Sustainable Groundwater Management Act. (See our blog post on the Act here:

https://www.water-law.com/california-will-have-regulations-on-groundwater-pumping/)

More information is available here: http://www.californiarailmap.com/cawater

Schroeder Law Offices will be developing its own game to show the kinds of legal problems you could encounter with your water issues! For more information and games, see Dr. Todd Jarvis’s blog at http://rainbowwatercoalition.blogspot.com/2016/04/serious-gaming-in-water.html and the upcoming paper titled “Serious Water Gaming” by Shelby Hockaday, Todd Jarvis, and Fatima Taha.

Make sure to stay tuned to Schroeder Law Offices’ Water Blog for more news that may affect you!

This article was drafted with the assistance of Law Clerk Jakob Wiley, a concurrent student at Oregon State University’s Water Resources Policy and Management graduate program and a law student at the University of Oregon School of Law.

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Snake River Dam Removal Public Meetings
The U.S. Army Corps of Engineers, Bonneville Power Administration, and the Bureau of Reclamation ("federal agencies") are engaged in a five year process to analyze the effects of the Federal Columbia River Power System on salmonid species. In May 2016, District Court Judge Michael Simon found the federal agencies had violated the Endangered Species Act and the National Environmental Policy Act. Specifically, Judge Simon said the federal agencies erred in failing to manage the Federal Columbia River Power System with strategies beyond the hydro-mitigation efforts that failed in the past. Therefore, the Judge ordered the federal agencies to develop a new biological opinion to address: 1) mitigation measures to avoid jeopardy to salmonid species; 2) development of a Biological Opinion that complies with the Endangered Species Act; and 3) development of an Environmental Impact Statement that complies with the National Environmental Policy Act and addresses the impact of the Snake River dams on salmonid species. In his opinion, Judge Simon suggested a proper analysis should include considering breaching, bypassing, or removing the Lower Snake River dams.

The federal agencies will hold public scoping meetings around Washington, Idaho, and Oregon in the next weeks, in addition to two webinars. Written comments will also be accepted until January 17, 2017. The meetings will be held from 4-7 PM as follows:

- November 29th, Boise, Idaho
- December 1st, Seattle, Washington
- December 6th, The Dalles, Oregon
- December 7th, Portland, Oregon
- December 8th, Astoria, Oregon

The scoping meetings are an important way for stakeholders to help the federal agencies narrow the issues and focus on key concerns. After the time period for the scoping meetings, the federal agencies will prepare a draft environmental impact statement that will be available for public comment. The federal agencies must respond to all substantive comments on the draft environmental impact statement.

It is recommended that parties interested in the outcome of the federal agencies’ decision attend a scoping meeting and make comments. If an interested party later wants to challenge the federal agencies’ decision that a certain alternative should have been analyzed in the NEPA document, the court may not hear the concern.

Written comments may be made in person at one of the scoping meetings, submitted via mail,
via email, or through the federal agencies’ online portal. Information about how to submit such comments is available at [www.crso.info](http://www.crso.info).


[2] [www.crso.info](http://www.crso.info)

[3] 40 C.F.R § 1502.9

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### Update: Klamath Basin Agreements in 2016

On April 6, 2016, amendments to the Klamath Hydroelectric Settlement Agreement (KHSA) and the new Klamath Power and Facilities Agreement (KPFA) were signed at a ceremony at the mouth of the Klamath River on the Yurok Indian Reservation. These changes come in the wake of the Congress’s decision not to pass legislation for the Klamath Basin Restoration Agreement (KBRA). Negotiations between the signatories of the new agreements in the Klamath Basin were kept secret, the results of their discussions can be seen in these new agreements, available at: [https://www.oregon.gov/owrd/Pages/adj/index.aspx](https://www.oregon.gov/owrd/Pages/adj/index.aspx).

The amended KHSA’s purpose is to establish a process for removal of Iron Gate, Copco 1, Copco 2 and J.C. Boyle dams under the Federal Energy Regulatory Commissions relicensing procedures. The decision to remove the dams was made based on a cost-benefit analysis that was not released to the public. The amended agreement will also shield PacificCorp and its customers from liability for damages associated with dam removal. The amended agreement transfers the ownership of the dams to the Klamath River Renewal Corporation. The new corporation will conduct the dam removal, while PacificCorp will operate the dams until their decommissioning. The dams are expected to be removed in 2020. The U.S. Department of the Interior, the U.S. Department of Commerce, California and Oregon States, and PacificCorp were parties to the agreement.

The KPFA is an agreement designed to mitigate economic and regulatory issues facing users of water and land in the Klamath Basin. Oregon and California States, the Klamath Water Users Association, public interest groups (including American Rivers, Trout Unlimited, and Sustainable Northwest), the U.S. Department of the Interior, and the National Marine Fisheries Service were parties to the agreement. The KPFA stipulates that the signing parties must meet and confer when there is an unforeseen circumstance related to the fishery restoration and regulatory impacts on the local economy. It also obligates the U.S. Bureau of Reclamation (“BOR”), upon transfer of the operation of Link River and Keno Dams, to operate the dams without adding any associated costs to water users for the maintenance of infrastructure. The BOR will operate...
those dams consistent with existing contracts for irrigation and flood control, and attempt to prevent salmon from entering irrigation canals and ditches. Funding for projects preventing salmon entry into irrigation infrastructure will come from a variety of sources, including irrigation districts, federal, state, and private parties. The agreement also requires the signing parties to support and defend the KHSA, refrain from making statements in opposition to the KHSA, and support the KHSA in administrative and judicial forums. Notably, representatives of the local landowners that will be affected were not included in negotiations, and are not signatories to the agreement.

In short, after many years of receiving a clear message from Congress that it was not going to fund the KBRA’s dam removal plan, the proponents are moving forward without Congress’s approval, or the approval of the local residents that will be most affected. Rather than retrofit the dams to allow fish passage and other updates, the negotiating parties are removing the dams. Along with the dams, the negotiating parties are doing away with inexpensive power, jobs, and water storage for increased reliability within the basin, in a proverbial “flushing the baby with the bathwater” situation. It remains to be seen how severe the impacts from dam removal will be on top of the other stresses that the Klamath Basin has suffered since the administrative phase of the Klamath Basin Adjudication was completed, and since the region has suffered from severe drought for several years.

Make sure to stay tuned to Schroeder Law Offices’ Water Blog for more news that may affect you!

This article was drafted with the assistance of Law Clerk Jakob Wiley, a concurrent student at Oregon State University’s Water Resources Policy and Management graduate program and a law student at the University of Oregon School of Law.

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**Pershing County Water Conservation District Celebrates Title Transfer**

On March 11, 2016, Schroeder Law Offices sponsored and participated in the celebration of the finalization of the title transfer process of the Rye Patch Dam and Reservoir from the United State Bureau of Reclamation (BOR) to Pershing County Water Conservation District (PCWCD). This title transfer process has taken 20+ years to substantially complete. The Pershing County Community Center provided the celebration venue on the evening of Friday, March 11, 2016. Those in attendance included the PCWCD Board of Directors, District constituents, community members, individuals involved in the process from the Bureau of Reclamation and Bureau of Land Management as well as Congressmen, Senators, and Assemblymen from the
State of Nevada. The award ceremony included a brief history of the process and speeches from individuals involved in the title transfer process with plaques given to those who have been directly involved and influential in the process. The ceremony was followed by a BBQ tri-tip dinner sponsored by PCWCD, Schroeder Law Offices, Bullen Law, LLC, and Stix Livestock. For more information and specifics on the title transfer please see the news release published by Schroeder Law Offices, P.C. on February 5, 2016 announcing the completion of the transfer. The Irrigation Leader magazine has also published an article on the Humboldt Project title transfer. The article “Seeing a Strong Conviction Through: The Humboldt Project Title Transfer” is based on an interview with Distract Manger Hodges.
Bureau of Reclamation: Water Contracting

The following announcement was issued by the Bureau of Reclamation on January 4, 2012: The Bureau of Reclamation has reissued for public comment four draft Reclamation Manual releases regarding water-related contracting activities. These draft releases provide definitions of key terms and revise existing definitions for water-related contracts, restructure and clarify Reclamation’s water transfer and conversion policy and consolidate and set-out basic pricing requirements for water-related contracts. Comments are due to Reclamation by April 3.

The four draft releases are:
- Draft RM Policy Water-Related Contract and Repayment General Principles and Requirements (PEC P05).
- Draft RM D&S Water Rates and Pricing (PEC 05-01).
- Draft RM Policy Transfers and Conversions of Project Water (PEC 09).
- Draft RM D&S Conversions of Project Water from Irrigation Use to Municipal and Industrial Use (PEC 09-01)

These releases have been updated to reflect comments received during the first comment period from September 29 to November 30. The changes are highlighted with redline-strikeout throughout the documents.

The Reclamation Manual establishes Reclamation requirements, assigns program responsibility and establishes and documents Reclamation methods of doing business.

These draft updates are available for detailed review at: [www.usbr.gov/recman](http://www.usbr.gov/recman). A summary of the draft updates can be found at: [http://on.doi.gov/rMciUA](http://on.doi.gov/rMciUA). Comments or questions may be directed to Owen Walker at owalker@usbr.gov.

Water Districts Successfully Appeal Takings Case Against BOR

Today- September 30, 2009, the Federal Circuit Court of Appeals issued a major decision in favor of Stockton East Water District and the Central San Joaquin Water Conservation District determining that the US Bureau of Reclamation and the Districts have binding contracts for specified quantities of water to which Reclamation is obligated to provide. The underlying trial court, the Court of Claims found, Reclamation failed to provide those specified quantities from 1990 to 2004. Accordingly the Court remanded the case to determine the amount of damages owed by the US Bureau of Reclamation to the Stockton and Central San Joaquin districts.
Remebering John Keyes

Retired Reclamation Commissioner John Keyes passing is sad news. I first “engaged” Reclamation with John at the helm in the Boise Regional office in 1992 when working for the Teel Irrigation District. We were dealing with issues surrounding “water spreading” then making headlines in the Umatilla Project by Water Watch of Oregon. Over the years, we kept in close touch on various Reclamation issues. Most recently, John assisted me in obtaining a position with the USAID working in Armenia. He was a southern gentleman in the best way. Kind and considerate always interested in a balance between what was best for the individual as well as the public. He told me that retirement to him meant a chance to spend more time flying.

Rio Grande Project Agreement Reached

An historic agreement has been reached in a dispute over water in the Rio Grande Project. It has taken 29 years in a process stagnated by several lawsuits to prepare an operating agreement negotiated between the Bureau of Reclamation, Elephant Butte Irrigation District (EBID), and the El Paso County Water Improvement District No. 1. No previous operating agreement has been signed by either of these districts. Rather, they have been complying with the Bureau’s requests and procedures on a yearly basis. In working to negotiate the new operating agreement, EBID used the “Managing for Excellence” report prepared by the Bureau of Reclamation to guide settlement discussions.

The Managing for Excellence Plan was created in response to a comprehensive report regarding the Bureau’s construction and infrastructure, prepared by the National Research Council and the National Academy of Sciences. Ultimately, the principles outlined in the Managing for Excellence report helped to develop an agreement which aims to increase transparency, cost effectiveness, and efficiency while allowing irrigation districts some independence in their operation. The agreement will also allow regional issues to be addressed and will allow for carryover of conserved water to be stored in project reservoirs on a yearly basis, promoting recreation and allowing upstream storage of water. The agreement is notable not only for resolving this long standing dispute, but also for establishing an interstate agreement between New Mexico and Texas, which could be used as a model for other states.

To read the full operating agreement visit [http://ebid-nm.org/static/pdf/opag/opag.pdf](http://ebid-nm.org/static/pdf/opag/opag.pdf).

To learn more about other water issues like this visit the Family Farm Alliance at [http://www.familyfarmalliance.org/](http://www.familyfarmalliance.org/) and click on the Water Review Link.