



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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NEW WATER MANAGEMENT MODEL

THE UMATILLA BASIN WATER COMMISSION
COUNTIES, IRRIGATION DISTRICT & CONFEDERATED TRIBES FORM ADMINISTRATIVE BODY

by Martha Pagel, Schwabe, Williamson & Wyatt (Salem, OR)

INTRODUCTION

For a brief window of time, from April 1 to April 14 of this year, water flowed from the Columbia River to recharge groundwater in the Umatilla River Basin in North Central Oregon — a significant first step toward implementation of the Umatilla Basin Aquifer Restoration Project (Project). The Project, in turn, is the realization of a long-held vision among local stakeholders to restore severely depleted groundwater and enhance instream flows in the Umatilla River. In addition to providing much-needed water supply for the region, the Project has been a catalyst for bringing together a wide range of local interests to form a new administrative framework for water management.

The Umatilla Basin Water Commission (Commission) was created in late 2009 by an intergovernmental agreement authorized under provisions of Oregon law that encourage intergovernmental cooperation. Oregon Revised Statutes (ORS) 190.003 – 190.110. Parties to the intergovernmental agreement include two counties, an irrigation district, and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). Participation by CTUIR is authorized under specific statutory provisions allowing local governments and state agencies in Oregon to enter into agreements with American Indian Tribes. This unique agreement appears to be the first instance in which the Oregon statutes have been used to form a new public entity by local and tribal governments for the development of a joint water project. Assuming full implementation of the Project, CTUIR and local governments, working together as the Commission, will jointly own Project assets and operate the Project. In the future, the Commission may also provide the regional management structure for other water projects to address water supply and management needs within the basin.

This article focuses on the formation of the new Commission under Oregon's provisions for intergovernmental cooperation as a possible model for addressing shared water management interests within a basin or sub-basin. For additional technical background relating to the Umatilla Basin Aquifer Restoration Project see "Aquifer Recharge and Recovery, Assessing Potential in the Umatilla Basin," *The Water Report* #60, February 15, 2009.

OREGON'S PROVISIONS FOR INTERGOVERNMENTAL COOPERATION

Intergovernmental Agreements Between and Among Units of Local Government

Oregon law includes statutory authority for a "unit of local government" to enter into written agreements with other units of local government for the performance of any or all functions and activities that the respective parties may have authority to perform. ORS 190.010. A "unit of local government" includes a county, city, district or other public corporation, commission, authority, or entity organized and existing under statute or city or county charter. ORS 190.003.

Umatilla Basin Water Management

Functions

Governance

Entity Powers

Tribal Agreements

Under ORS 190.010, an intergovernmental agreement may provide for the accomplishment of designated functions or activities by:

- (1) A consolidated department;
- (2) Jointly providing for administrative officers;
- (3) Use of equipment or facilities that are jointly constructed owned, leased or operated;
- (4) Delegation of authority from one or more parties to another party;
- (5) Formation of a new intergovernmental entity created by the agreement; or
- (6) Any combination of the above options.

ORS 190.010 (1)-(6).

If the agreement creates a new intergovernmental entity as authorized under ORS 190.010(5), the entity must be governed by a board or commission “appointed by, responsible to and acting on behalf of the units of local government that are parties to the agreement.”

The statutes include further direction and authority regarding the contents of an intergovernmental agreement, and the effect of the agreement, fees, and tax coordination between and among the parties. See ORS 190.020, 190.050 and ORS 190.070.

The specific powers and limitations of a new intergovernmental entity created under ORS 190.010 are described in ORS 190.080.

Under ORS 190.080(1), the agreement may authorize a new entity to:

- (a) Issue revenue bonds;
- (b) Enter into agreements for purchase or lease of real or personal property; and
- (c) Adopt rules necessary to carry out its powers and duties under the agreement.

Intergovernmental entities may not levy taxes or issue general obligation bonds. ORS 190.080(2). Debts, liability and obligations of the new entity are addressed in ORS 190.080(3) – (5). Under ORS 190.080(6), the entity may be terminated at any time by unanimous vote of all parties, or as otherwise provided in the terms of the intergovernmental agreement.

Procedures for entering into an agreement, including the requirement for a ratifying ordinance to be adopted by the governing bodies of each participating unit of local government, are specified in ORS 190.085.

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Authority of Units of Local Government and State Agencies To Enter into Cooperative Agreements with American Indian Tribes

The statutes for Intergovernmental Cooperation include additional express authority for units of local government, the state and state agencies to enter into agreements with American Indian tribes. ORS 190.110.

A unit of local government or state agency may “cooperate for any lawful purpose, by agreement or otherwise” with an American Indian tribe or an agency of an American Indian tribe. ORS 190.110(1). Subsection (2) of the statute describes the role of the Governor in ensuring that “the state, a state agency or unit of local government does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe or members of a tribe held or granted under any federal treaty, executive order, agreement, statute, policy or other authority.” ORS 190.110(2). However, the statute provides no further direction or limitation regarding the nature, content or scope of potential agreements.

THE UMATILLA AQUIFER RESTORATION PROJECT

INTERGOVERNMENTAL COOPERATION

Overview

For many years, a broad-based group of local interests have worked together as the “Umatilla Basin Water Coalition” (Coalition) to address water supply and management concerns in the Umatilla Basin. Participants in the Coalition include Morrow and Umatilla Counties, irrigation districts, other special districts involved in water supply, individual farmers and water users, CTUIR, port districts in both counties, and other local businesses. Based in part on the success of a small-scale aquifer recharge project operated by the County Line Water Improvement District, the Coalition formed a vision of developing a large-scale project using available winter flows from the Columbia and Umatilla rivers for groundwater storage.

Umatilla Basin Water Management

Aquifer Restoration

Project Plan

An initial feasibility assessment of options for aquifer storage and recovery and/or artificial groundwater recharge in the basin was conducted in 2008-2009 under the supervision of the Oregon Water Resources Department. Following a determination that the concept of large-scale aquifer restoration and storage was promising, the Coalition decided to pursue project implementation. As a first step, the Coalition identified the need to establish a more formal management structure to oversee project implementation. After extensive consultation and negotiations among its stakeholders, the Coalition agreed on a conceptual framework for a new governmental entity to be formed under an intergovernmental agreement.

The resulting intergovernmental agreement (IGA) for the Umatilla Basin Water Commission, adopted December 22, 2009, is based on findings that Oregon law encourages intergovernmental cooperation among units of local governments and American Indian tribes, and that the parties have a shared interest in protecting and enhancing ground and surface waters and in developing methods for improving water supplies within the basin. See IGA Recitals A and D. Generally, the IGA provides for the next level of feasibility analysis, and for preliminary project development and testing to be accomplished over a two-year period with grant funding available from the State of Oregon. This “Stage 1” process culminates with adoption of a “Project Management Plan” that provides a detailed game plan for long-term project operations, including recommendations for any changes that may be needed in the structure or authority of the Umatilla Basin Water Commission (Commission) for on-going operations.

Under the IGA, the Commission provides direct oversight and management of the Project but also continues to work closely with the broader array of interests represented in the Coalition to help identify and address local water needs and priorities.

A bold plan for a thirsty region | With water restrictions in place, farmers in the Umatilla Basin of Eastern Oregon are proposing to draw water from the Columbia River and refill the aquifers they tap for irrigation. Here's how it would work:

1. Water taken from river

Up to 100,000 acre-feet of water, more than 32 billion gallons, is taken from the Columbia River during the winter, using existing irrigation pumping infrastructure.

2. Water treated

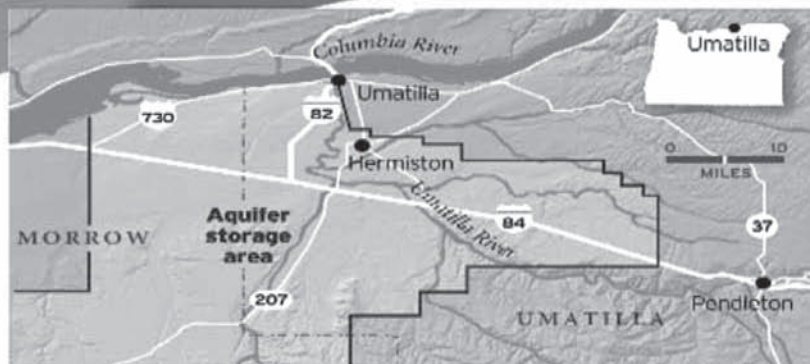
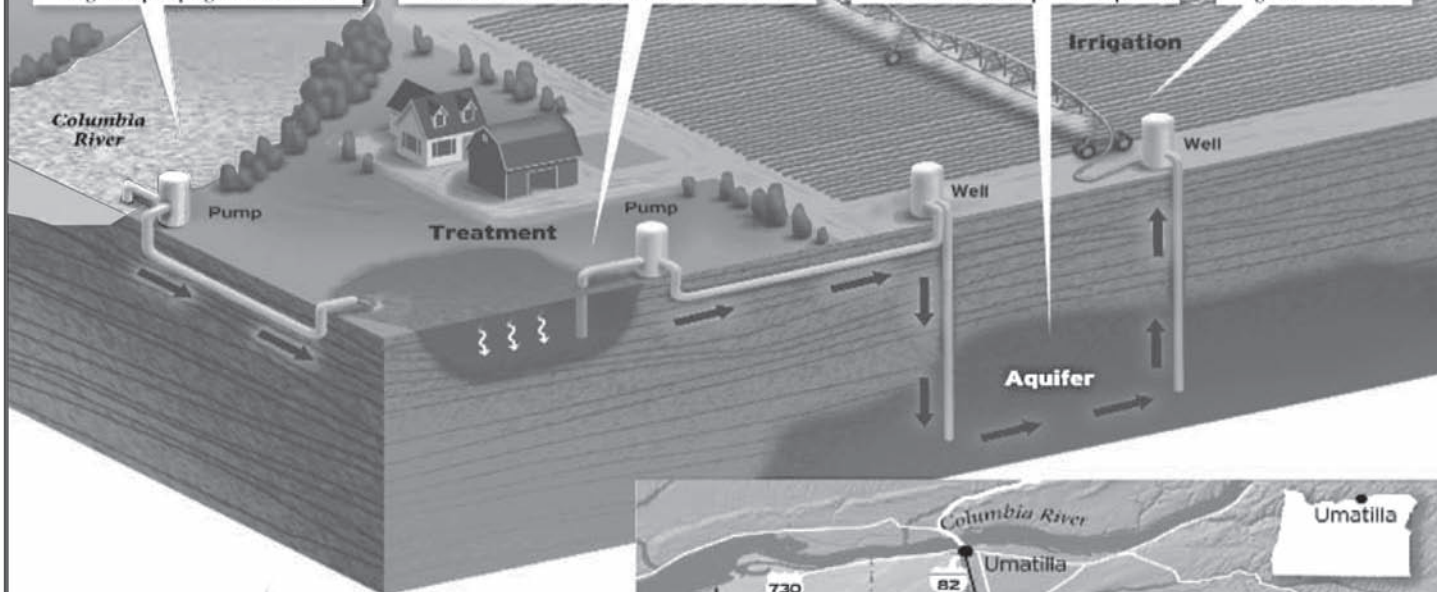
The water percolates through a shallow alluvial aquifer, which cleans the water in the process. Some of the water will leak to the Umatilla River, emerging in the summer months to increase its flow and cool the river.

3. Water stored in aquifer

Water is then pumped out of the shallow water aquifer and injected into existing wells throughout Umatilla and Morrow counties. The water fills deep basalt aquifers.

4. Water used for irrigation

As summer arrives, water is pumped back out for agricultural use.



Source: IRZ Consulting

Umatilla Basin Water Management

Commission Purposes

Groundwater Supply

Return Flows

“Stage 1” Implementation

Water Contracts

Management Plan

Key Provisions of the IGA

Initial parties to the IGA and members of the new Commission were Morrow County, Umatilla County, the County Line Water Improvement District, Westland Irrigation District, and CTUIR. (The County Line Water Improvement District later withdrew from the IGA and participation in the Commission by an Amendment to the IGA dated May 10, 2010, but the District continues to be actively involved as a member of the Coalition.)

SPECIFIC PURPOSES OF THE COMMISSION INCLUDE:

- Implementing “Stage 1” of the Project
 - Further developing the Project as well as to pursue other water-related projects in the basin
 - Taking such other actions as the Commission determines to be necessary
- See IGA, Section 3.2.

THE TERM “PROJECT” IS DEFINED AS:

The Umatilla Basin Aquifer Restoration Project, which includes but is not limited to: (i) the design, engineering, construction, operation, maintenance, and ownership of a supply, storage, recovery and distribution system, or systems; (ii) with the goal of helping to restore groundwater supply and return flows in the Umatilla Basin; and (iii) the goal of making water available for irrigation purposes through aquifer storage and recovery, as more fully described in the Feasibility Study.

IGA, Section 1.1.7

“STAGE 1” IS DEFINED AS:

The first stage of implementation of the Project to be carried out by the Commission, including but not limited to: (i) applying for and obtaining grant funds available from the State of Oregon pursuant to Oregon House Bill (HB) 3369 (2009 Oregon Laws, Ch 907) and Oregon Senate Bill (SB) 5535 (2009 Oregon Laws, Ch 906); (ii) contracting for design and engineering plans for initial Project work including construction of monitoring wells and pilot systems to test the supply, storage, recovery and distribution concepts; (iii) completing a preliminary due diligence legal assessment for the Project; (iv) applying for initial water use authorizations, including but not limited to a “limited license” for preliminary testing and implementation of the Project; (v) contracting for construction of monitoring wells or other facilities in connection with preliminary testing for the Project under a limited license or other water use authorization; (vi) refining and clarifying the scope of the Project for long term implementation; (vii) evaluating long-term funding, ownership, construction, operation, maintenance, and management needs for the Project, including recommendations for any changes that may be needed in the structure or authority of the Commission; (viii) preparing and adopting a Project Management Plan incorporating the conclusions and recommendations of the evaluation; and (ix) other activities associated with initial implementation and Project refinement as identified by the Board of Directors.

IGA, Section 1.1.9

The “Project Management Plan” to be developed during the Stage 1 process will provide a refined description of the scope and future stages of the Project, along with recommendations, strategies, and timelines for addressing key issues such as Project ownership, construction, operation, maintenance, funding, and long-term management. IGA, Section 1.1.8. The Project Management Plan will also specifically address “procedures and mechanisms” for determining how water stored under the Project will be made available under contracts for irrigation and other uses, including estimates of the cost of water and contract requirements. IGA, Section 4.2. The IGA expressly limits contracts for the use of Project water to “other governmental entities or Tribes” and prohibits contracts with “private individuals, business entities or non-governmental organizations.” *Id.*

Completion of Stage 1 is evidenced by the adoption of the Project Management Plan. See e.g., Section 1.1.9 (definition of Stage 1); and Section 3.5 (limitation of powers during Stage 1). The Project Management Plan, in turn, will determine whether and how the Project will continue with implementation of subsequent phases. Accordingly, it is possible the Commission may determine that further stages of implementation are not feasible — for example, if the project does not prove to be economically feasible based on available funding sources and potential contracts for the sale of stored water.

If the Project Management Plan does call for on-going implementation (as expected), the IGA will be amended to address long-term operational needs. If the Project Management Plan calls for the Project to be abandoned, the IGA includes provisions for termination of the agreement and dissolution of the Commission. IGA, Section 6.1. However, the Commission would also have the option to continue operations under the IGA to pursue other water-related projects as may be identified. IGA, Section 3.2.

Although the IGA grants broad authority to the Commission to carry out the purposes of the agreement, during the Stage 1 period the Commission’s powers and duties are expressly limited to “the

Umatilla Basin Water Management

State Agency Grant

Scope of Work

Environmental Benefits

Procedural Requirements

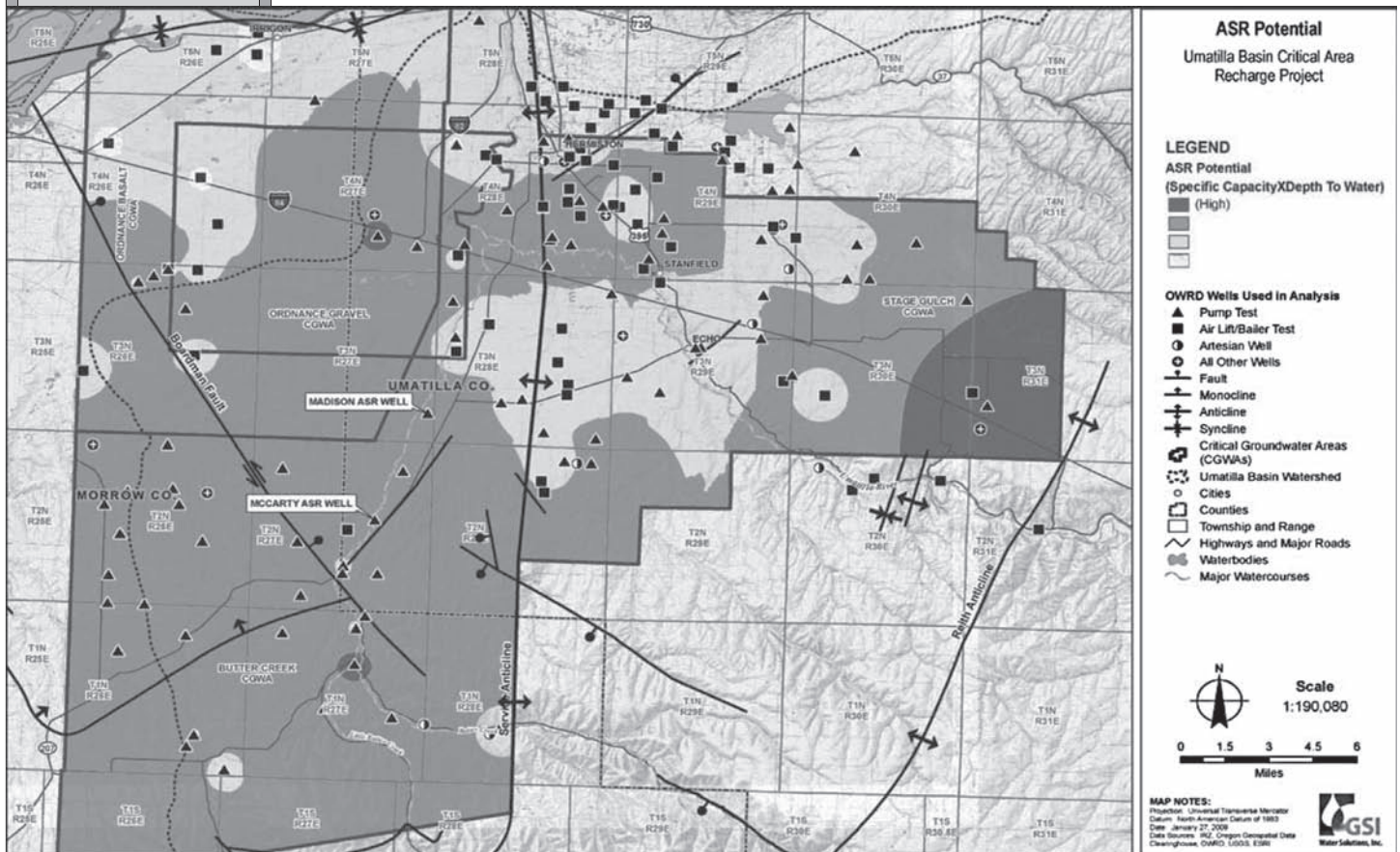
extent necessary to complete Stage 1.” IGA, Section 3.5. Specific activities contemplated during Stage 1 included securing a \$2.5 million grant from the Oregon Water Resources Department (OWRD) to fund the Stage 1 operations. The grant program was authorized under legislation enacted in 2009 to generally facilitate water supply projects throughout the state, and to provide specific authority and funding for a project in the Umatilla Basin. HB 3369 (2009 Or Laws, Ch 907) and SB 5535 (2009 Or Laws, Ch 906).

THE SCOPE OF WORK FOR THE OWRD GRANT INCLUDES:

- Completing additional feasibility work needed to develop the Project Management Plan
- Securing preliminary state authorization (a “limited license”) for diversions from the Columbia and Umatilla Rivers
- Acquiring real property or obtaining necessary easements or use agreements to begin Project development
- Applying for state water rights to authorize long-term use of water (the IGA provides express authority for the Commission to apply for and hold any required water use authorizations. IGA, Section. 4.1)

Under the terms of the grant and HB 3369, the Project must be designed to provide at least 25% of the stored water for “net environmental benefits.” If additional state grant or loan funds are used to construct the Project and the percentage of state funding exceeds 25% of the total Project costs, the percentage of net environmental benefit must equal or exceed the percentage of state funding. Under HB 3369, “net environmental benefits” is defined as an “improvement in ecological conditions” as compared with a pre-project baseline. HB 3369, Section 18(2). The required improvement in “ecological conditions” is tied to factors such as: stream flow conditions (water quantity, velocity, or temperature); fish habitat; return flows from groundwater recharge to surface waters; protection of peak flows and ecological flows; improved groundwater quality or quantity; or improved aquatic or riparian habitat. *Id.*

The IGA includes administrative and operational provisions requiring compliance with other Oregon laws pertaining to open public meetings, access to public records, and compliance with state public contracting procedures. See IGA, Sections 3.8.1, 3.9, and 3.11. As a sovereign tribal government, CTUIR generally would not be subject to such procedural requirements imposed by Oregon law on state agencies and units of local government. However, as a party to the IGA, and member of the Commission, CTUIR voluntarily agrees to compliance with the applicable state law in connection with Commission activities.



Work To Date

The Commission has made substantial progress since its formation in late 2009.

THUS FAR THE COMMISSION HAS:

- Secured the state grant funding from OWRD
- Entered into contracts for engineering and other technical services to implement the Project
- Filed applications for limited licenses to authorize initial use of water for recharge
- Negotiated agreements for use of private lands and infrastructure to deliver water to the recharge site
- Initiated actual Columbia River diversions and recharge for the 2011 season ending April 14
- Begun work on its long-term Project Management Plan, including further evaluation of the potential “net environmental benefits” to be derived from the Project

Operating under Limited License (LL) 1332 (issued by OWRD on March 1, 2011), the Commission officially began project operations on April 1 by diverting water through existing irrigation pumps and pipes owned by the Boardman Tree Farm and made available to Commission under a use agreement. The 14-day effort resulted in approximately 200 acre-feet of Columbia River water being delivered to the recharge site. Working cooperatively with the County Line Water Improvement District, the Commission is also gathering data and monitoring diversions from the Umatilla River to the existing County Line recharge project — as a preliminary step to obtaining its own limited license or water use permit.

The Commission will resume recharge operations under the Columbia River limited license when the season of use re-opens in October, 2011. The five-year limited license authorizes a diversion rate of up to 24.06 cubic feet per second (cfs), and maximum annual volume of 10,000 acre-feet, during a season of use from October 1 through April 14 each year.

Under a condition of the limited license, diversions during the month of November and from April 1 through April 14 of each year may be further limited under a plan that must be submitted by the Commission, and approved by OWRD to ensure protection for Columbia River salmon listed under the federal Endangered Species Act. The license is also subject to water quality monitoring and testing under a plan to be submitted prior to each recharge cycle. Data collected under the limited license will inform the process of applying for and obtaining permanent water right permits for the project.

CONCLUSION

The Umatilla Basin Water Commission appears to be the first example of a new public entity formed for water management purposes under Oregon statutes encouraging intergovernmental cooperation between and among units of local government and a tribal government. Assuming full implementation of the Project, CTUIR and local governments — working together as the Commission — will jointly own and operate the Project. The IGA also authorizes the Commission to undertake other water projects that are consistent with the underlying objectives of protecting and enhancing groundwater and surface waters within the basin and developing methods for improving water supplies through planning, aquifer restoration, storage, recovery, and distribution within the region. In addition to providing the vehicle for implementation of a much-needed groundwater restoration project in the basin, the formation and long-term work of the Commission may provide a model for integrated water management in other regions of the state and an administrative framework for using water more effectively to meet local needs.

FOR ADDITIONAL INFORMATION:

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The above article is based on materials prepared for presentation at a recent Continuing Legal Education Program, “Tribal Waters in the Pacific Northwest: Case Study of the Umatilla Basin Aquifer Restoration Project” — held April 11-12, 2011 in Seattle, Washington, by Law Seminars International.

Umatilla Basin Water Management

Progress

Recharge Activity

Season of Use

ESA Protection

Integrated Management

Editor’s Note: Martha Pagel will be moderating a panel of top water agency administrators and policy makers for Washington, Oregon, Montana, and Idaho at the “Water Solutions” conference being held **June 16 in Vancouver, WA** (see next page).

Martha Pagel is a shareholder in the regional law firm of Schwabe, Williamson & Wyatt, where she focuses her practice on water law and natural resources. She was legal counsel to the Umatilla Basin Water Coalition in drafting the Intergovernmental Agreement to form the Umatilla Basin Water Commission, and she currently serves as legal counsel to the Commission. Before entering private law practice in 2000, she served as Director of the Oregon Water Resources Department and as Director of the Oregon Department of State Lands. She is a recognized leader in Western water law and policy and recently served as arbitrator for the states of Colorado, Kansas and Nebraska in a dispute involving use of hydraulically connected ground water under an Interstate Compact for the Republican River.