

# Environmental Law, Insurance & Soil



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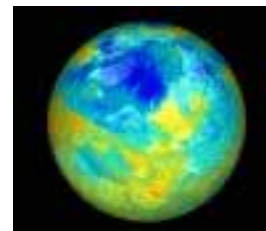
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# International Environmental Law



# Environmental Insurance

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# The Insurance World

- ❖ Investigation & “Due Diligence”
- ❖ Underwriting Coverages
- ❖ Encountering the Unexpected
- ❖ Long-term Monitoring
- ❖ Avoiding Catastrophic Losses

# Investigation & Research

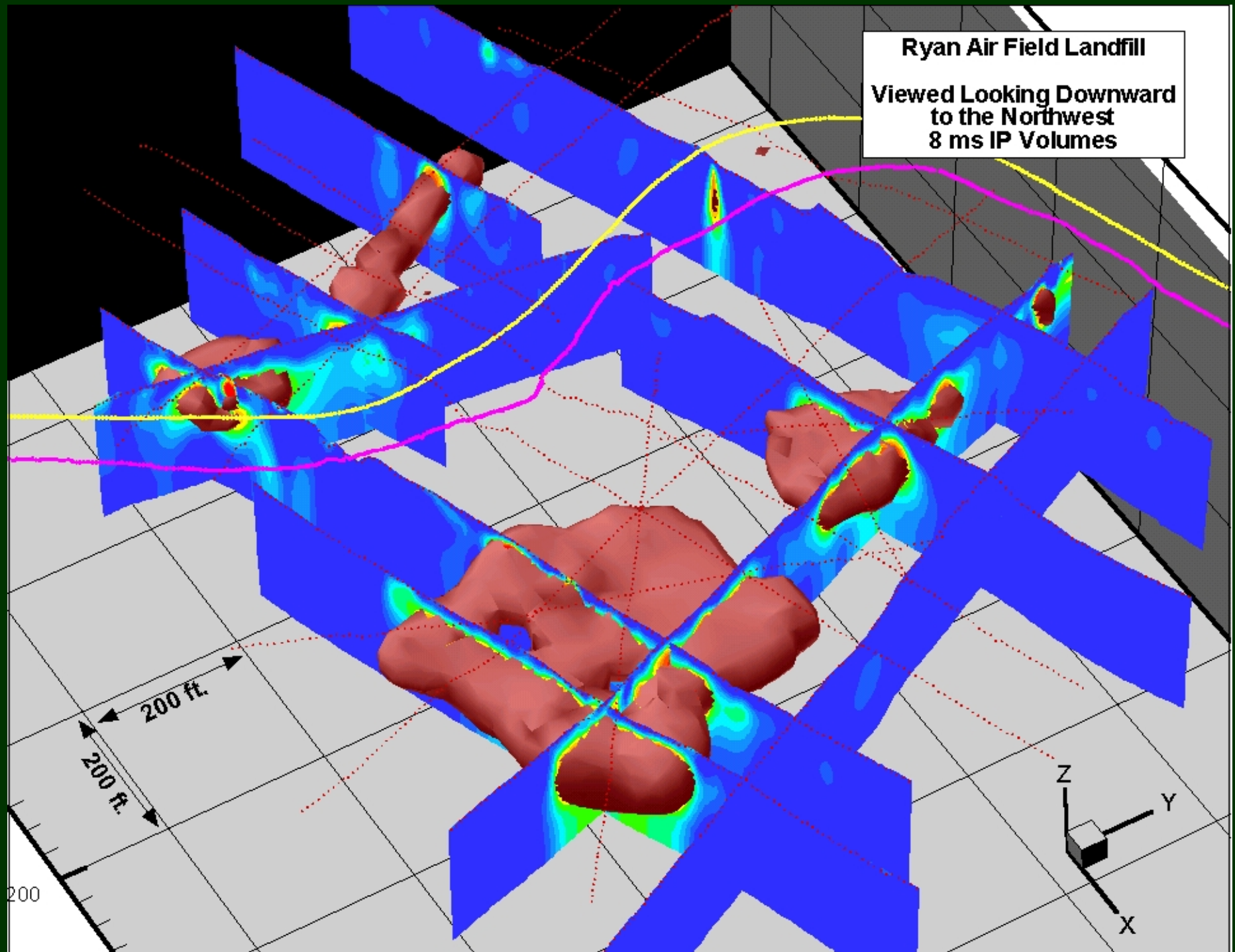


U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
**National Institutes of Health**



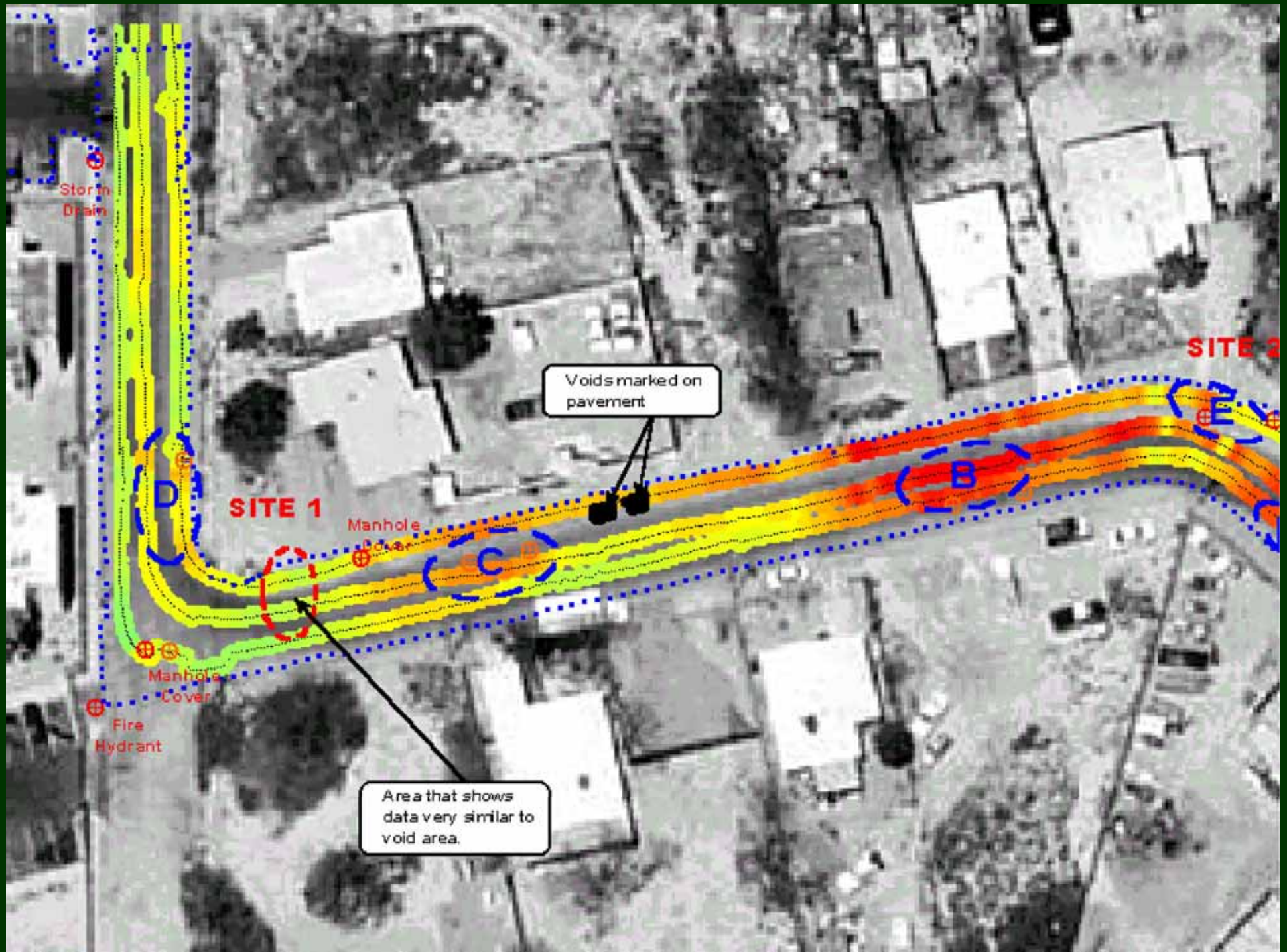


# SIP: Mapping Hydrocarbon Pollution





# TDEM: Mapping Leaking Sewers



# Soil - a “Pollutant?”

The Clean Water Act and The Colorado Water Quality Control Act define dirt, rock, soil and fill material as pollutants in certain circumstances.

❖ 33 U.S.C. §1251, *et seq.* (CWA)(2006)

❖ C.R.S. §25-8-101, *et seq.* (CWQCA)(2009)

❖ CDPHE, Hazardous Materials and Waste Division, *Proposed Soil Remediation Objectives Policy Document* (December 31, 1997)



# Soil - a "Pollutant?"

A "soil" is defined by the Soil Sciences Society of America (1987) as the mineral matter on the surface of the earth serving as a medium for the growth of plants, and influenced by genetic and environmental factors of parent material, climate, macro- and micro-organisms and topography. Soil differs from the material from which it was derived in many physical, chemical, biological and morphological properties and characteristics.

EPA, Groundwater Issue, *Fundamentals of Soil Science as Applicable to Management of Hazardous Waste*, Office of Solid Waste and Emergency Response, EPA/540/S-98/500, April, 1999

# Soil - a “Pollutant?”

- ❖ The EPA classifies soils under one of two standards: The Unifying Soil Classifications System (USCS), and the U.S. Department of Agriculture (USDA) System
- ❖ The USCS describes engineering properties of soils and classifies soil into 15 categories based on responses to physical manipulation at various water contents. The USDA system, developed for agricultural and other land management uses, is based on both chemical and physical properties of the soil.

# Soil - a "Pollutant?"

The EPA also distinguishes between, "soil impacted by waste," and "soil consisting of three phases: soil gases; soil water; organic and inorganic solids." To determine whether soil is *contaminated* at a suspected site, the EPA uses the following data sources:

- ❖ government investigative reports;
- ❖ engineering data from public and private agencies;
- ❖ water well pouring logs;
- ❖ geotechnical and soil reports from nearby facilities;
- ❖ soil surveys

# Soil - a “Pollutant?”

EPA assesses this data to design subsequent data collation activities. Soil scientists, geotechnical engineers, geologists, and other persons trained in appropriate disciplines are consulted to generate the required information. Indeed, the question of whether soil is contaminated, i.e. a pollutant, requires a meticulous, scientific, technical analysis based upon thorough investigation.

EPA, Groundwater Issue, *Fundamentals of Soil Science as Applicable to Management of Hazardous Waste*, Office of Solid Waste and Emergency Response, EPA/540/S-98/500, April, 1999



# U.S. Insurance Law

Words used in an insurance policy ***should be given their plain and ordinary meaning unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended.***

A court may not look beyond the plain words of an insurance contract unless there is an ambiguity in the policy.

# U.S. Insurance Law

The total pollution exclusion (TPE) contained within a standard form CGL policy excludes coverage for any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "*pollutants*;" or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "*pollutants*."

# U.S. Insurance Law

The policy defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes material to be recycled, reconditioned or reclaimed."

Assuming that the TPE is ambiguous with respect to whether dirt, rock, soil and fill material constitute pollutants, the TPE must be "construed favorably to the insured."

# U.S. Insurance Case Law

The question of soil as a pollutant for purposes of insurance is one of first impression in the United States. *The New Salida Ditch Company v. United Fire & Casualty Company* case, recently decided by the U.S. 10<sup>th</sup> Circuit Court of Appeals, is the first U.S. federal appellate decision addressing the question of whether soil is a pollutant under the TPE.



# Arkansas River Near Salida, Colorado



# U.S. Insurance Case Law

**Case law not supporting insurance coverage:**

*New Salida Ditch Company v. United Fire & Casualty Insurance Company*, 2010 WL 4250004, C.A.10 (Colo.), October 28, 2010 (No. 10-1010). For more than 125 years, New Salida Ditch Company has operated an irrigation ditch that runs along the Arkansas River, and United Fire issued it a CGL policy. The ditch provides water to farmers, ranchers and agri-businesses.

# Ditch Adjacent to River



# U.S. Insurance Case Law

**Case law not supporting insurance coverage:** *New Salida (con't)*

New Salida initiated maintenance activity adjacent to its ditch and disturbed existing native dirt, rock, soil and fill material adjacent to the Arkansas River. New Salida's contractor removed the material from one bank of the ditch to the bank adjacent to the river, allegedly causing some of the removed material to come in contact with the river and the river bank.



# Maintenance of Ditch



# U.S. Insurance Case Law

**Case law not supporting insurance coverage:** *New Salida (con't)*

In response to this disturbance, various U.S. federal and Colorado government agencies sent New Salida orders requiring it to engage in corrective action to remediate the alleged damage. New Salida submitted a claim to United Fire and United Fire denied that claim on the basis that its TPE barred coverage.

# Soil, Dirt & Rock Entering River



# U.S. Insurance Case Law

**Case law not supporting insurance coverage:** *New Salida (con't)*

Specifically, United Fire took the position that dirt, rock, soil and fill material constituted "pollutants" under the TPE. The District Court held that the rock, soil, dirt and fill material used to stabilize the ditch banks constituted a pollutant for purposes of the TPE, and denied coverage. The U.S. 10th Circuit Court of Appeals affirmed the Trial Court's opinion.

# U.S. Insurance Case Law

## **Case law and the *New Salida Ditch* case:**

The District Court (Trial Court) relied upon an unpublished order in *Mtn States Mutual Cas. Co. v. Kirkpatrick* decision (2007WL 2506640 (D.Colo. 2007, unpublished)) as the only Colorado authority, *at that time*, determining that soil and fill material might constitute pollutants under the TPE when introduced into a river.

# U.S. Insurance Case Law

## **Case law and the *New Salida Ditch* case (con't):**

After the Trial Court opinion was issued, but *before* the 10<sup>th</sup> Circuit U.S. Court of Appeals issued its affirmation, the Colorado Court of Appeals issued a ruling in the same case, *Roinestad v. Kirkpatrick*, 09-CA-2179 (Ct. App. Colo. 2010). The Court held that cooking oil and grease were *not* pollutants when introduced into a sewer system, since they were already present. In other words, the introduction of substances into a water course where the same substances were already present, did not constitute an event of pollution.



# U.S. Insurance Case Law

**Case law and the *New Salida Ditch* case (con't):**

Consequently, under Colorado law as set forth in the *Roinestad* case, the TPE did not apply, and *insurance coverage was available*. The 10<sup>th</sup> Circuit U.S. Court of Appeals did not consider the Colorado Court of Appeals decision in *Roinestad*. However, it was obligated to apply the Colorado Court of Appeals decision under the *Erie Doctrine*, a rule of law requiring state law to be applied when Federal Courts consider disputes between citizens of different states. *Erie v. Tompkins*. 304 U.S. 64 (1938).

# U.S. Insurance Case Law

## **Case law supporting insurance coverage:**

Currently there is one key appellate decision, from the Alabama Supreme Court, interpreting the pre-TPE pollution exclusion: *Molton, Allen and Williams, Inc. v. St. Paul Fire and Marine Ins. Co.*, 347 So.2d 95, 98 (Al. 1977). The Court held that a pollution exclusion barring coverage for "pollutants" did not bar coverage for the unintentional washing of sand from rainfall into the Plaintiffs' lakes. The Court accepted the insured's argument that the exclusion was intended to cover only industrial pollution.

# U.S. Insurance Case Law

## **Case law supporting insurance coverage:**

*Tsakopoulos v. Am. Mfr. Mut. Ins. Co.*, 2003 WL 22595248 (E.D. Cal. 2000). The insurance company claimed that the policyholder violated the Clean Water Act by causing *dredged* fill material to be discharged into waters of the United States. The Court found coverage, holding that the TPE was ambiguous in the context of sand and fill material, which did not constitute "pollutants" under the policy.

# U.S. Insurance Case Law

**Case law not supporting insurance coverage:**

*Pennsylvania National Mutual Casualty Ins. Co. v. Triangle Paving, Inc.*, 973 F.Supp. 560 (E.D. N.C. 1996). The Court determined that a reasonable person in the position of the defendant would understand the pollution exclusion to encompass sedimentation contamination as a solid contaminant, and denied coverage.

# U.S. Insurance Case Law

**Case law not supporting insurance coverage:**

*Essex Ins. Co. v. H&H Land Dev. Corp*, 525 F.Supp.2d 1344 (M.D. Ga. 2007) and *Owners Ins. Co. v. Chadd's Lake Homeowners Assoc., Inc.*, 2006 WL 1553888 (N.D. Ga. 2006). Courts in Georgia held that silt, sediment, and storm water runoff constituted irritants or contaminants and were therefore subject to the pollution exclusion. These cases did not analyze what was in the storm water runoff.

# U.S. Insurance Case Law

**Case law not supporting insurance coverage:**

*Clarendon Am. Ins. Co. v. Bay Inc.*, 10 F.Supp.2d 736, 743 (S.D. TX 1998). The Court held that sand, gravel, cement and silica are pollutants within the TPE. Given the confusion created by the 10<sup>th</sup> Circuit U.S. Court of Appeals in the *New Salida* decision, policyholders are left with conflicting authority. In federal courts in the 10<sup>th</sup> Circuit, coverage probably will not be available. In state courts, it may be.



# An Ideal World

- ❖ Insurance world mirrors the technical / scientific world
- ❖ Environmental Audits: Field reconnaissance “due diligence” / investigation / survey of exposure pathways
- ❖ Geosciences = Geology + Geophysics + Drilling + Investigation + Lab Work / Analysis
- ❖ Selection of final pathway design
- ❖ Risk Assessment: Risks / Exposures defined
- ❖ Bidding of Project
- ❖ Risk Management: Exposures underwritten by Insurance

# Environmental Impairment and Specialized Environmental Liability Insurance

- ❖ Pollution Legal Liability / Third-Party Indemnity (PLL)
- ❖ Cleanup Cost Cap / Stop Loss (CCC)
- ❖ Property Transfer: Owner / Seller Indemnity
- ❖ Pooling Insurance Resources

# Litigation Support

- ☞ Expert Witnesses: Engineers, Hazardous Waste, CERCLA, RCRA, Insurance Coverage



- ☞ Environmental Laws, Regulations and Policy at the National, State, Tribal, & Local levels



Washington, D.C. Federal  
Lobbying, Government Relations  
& Business Consulting



## Grimshaw & Harring



- ☞ Imaging and Graphics for Trial/Mediation Support



Rocky Flats – Former  
Nuclear Weapons Facility,  
Golden, Colorado, US





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