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## What's on Our Plate for 2013?

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water use is what instigated the present litigation. Robbins concluded by stressing that, if the Court grants certiorari, Colorado will be ready to defend its water interests.

*Andy McFadden*

### WHAT'S ON OUR PLATE FOR 2013?

Moderator Chris Treese of the Colorado River Water Conservation District introduced this session by describing the importance of planning for the future and considering changes happening throughout Colorado over the next year. This session included discussion of four separate topics: (i) the Colorado River Basin Water Supply and Demand Study; (ii) drought; (iii) Good Samaritan legislation; and (iv) the CWC's Public Trust Special Project.

#### Colorado River Basin Study

Erin Wilson of the Wilson Water Group first discussed the key findings of the Colorado River Basin Water Supply and Demand Study ("Study"). The Study employed several different demand scenarios to obtain the best possible projection of future water use within the Colorado River Basin. The Study based its various demand scenarios on models such as Paleo-direct natural flow (tree-ring information) and projected climate models accounting for climate change.

Wilson further explained the Study does not institute any decisions itself, but provides the foundation for future decision-making on water infrastructure and supply projects. Wilson described the key indicators for identifying changes in Colorado's water supply in the Colorado River as flows at Lees Ferry and other critical locations, as well as demand signposts. Based on the results and data of the Study, Wilson recommended a number of steps for Colorado to take.

First, Colorado should adopt a signpost approach outside of the modeling industry to respond to indicators in weather and streamflow conditions. For example, water planners can respond to certain set streamflow conditions with carefully planned drought response measures. Next, Colorado must develop methods to accurately represent supply and demand models. Wilson explained the Surface Water Supply Index ("SWSI") is a good model for basin-wide analysis; however, additional models should include cross-basin impacts. Finally, Wilson advocated for Colorado to support continued efforts to conduct water bank programs and desalination projects in the lower Colorado River Basin.

Wilson's discussion set forth the fundamental concepts contained in the Study and presented several key ideas for water managers to consider as steps to address the projected issues facing the future of water supply and demand in Colorado.

#### Drought

The next panel on drought featured Stacey Chesney of Denver Water, Diane Johnson of the Eagle River Water and Sanitation District ("ERWSD"),

and Russ Sands of the City of Boulder. Each panelist discussed the impacts of drought on their respective municipal water providers, specifically focusing on the drought's impact on public relations and rate setting for water in 2013.

Chesney discussed three main takeaways from the drought of 2012. First, Chesney explained drought is a result of many different factors, and water planners should not become too focused on reservoir levels. In order to fully prepare for drought conditions, municipalities must always be on guard for signals of impending drought. Second, Chesney suggested that good customer relationships are key to responding to drought in a timely and meaningful way. Third, Chesney noted the most effective way to involve the public in combating drought is to offer tangible actions with achievable goals.

Next, Johnson spoke about her reactions to a very dry 2012 in the Vail Valley. Johnson explained that, because Vail Mountain is celebrating its fiftieth anniversary this year, it is a relatively young community with little experience with severe drought conditions. This inexperience presents difficulties for community members who are more likely to have reactionary behavior to drought conditions. However, Johnson and the ERWSD learned valuable lessons from the 2002 and 2012 droughts that will impact its planning for the future.

Finally, Russ Sands stated 2012 was the City of Boulder's first actual run-through of its new drought plan. After implementing the plan for the first time, the main question for those in his office was how to work successfully with customers.

The panel then responded to a number of questions. First, do voluntary restrictions work? Chesney responded that Denver Water's aggressive conservation plan after 2002 made it more reluctant to impose mandatory restrictions because of the success of the voluntary plan. She explained that, because so many customers were complying with voluntary restrictions, Denver Water did not want to impose additional mandatory restrictions. Sands disagreed, arguing voluntary restrictions do not work, especially when there is no robust notification and public knowledge plan in place. Johnson agreed with Sands, explaining that in the Vail Valley, ERWSD implemented mandatory restrictions, but also offered explanations to its customers as to why the restrictions were necessary. Johnson also shared that ERWSD labeled the mandatory restrictions "regulations" and reached out to the tourism industry to highlight that the regulations would not impact tourism in the Vail Valley.

Next, the panel responded to the question "what is in store for 2013?" Sands said indoor use continues to decline in Boulder and the City plans to continue and expand its partnership with the Center for Resource Conservation ("CRC"). The CRC provides indoor and outdoor water audits for Boulder residents and businesses. Boulder plans to empower the CRC to implement actual improvements and repairs in people's homes rather than simply providing recommendations. Chesney explained that Denver Water plans to continue using "normal" or "annual" summer water use regulations for its customers. Finally, Johnson stated that ERWSD will (i) continue to focus on outdoor and irrigation water uses; (ii) utilize a five-tiered rate system; and (iii) identify "excessive water users" within the district as targeted for water conservation measures.

The panel concluded with the following question: "how do you keep peoples' attention if drought is the new normal?" Chesney assured the crowd that if water use affects people directly in their daily lives, they will pay attention. The key is for water managers to effectively communicate to the public the behavior changes needed to face a drought. Sands ended the discussion with the idea that drought mitigation is a long-term prospect: changing peoples' perception of normal water use and then internalizing the changes takes time.

### Good Samaritan Legislation

Jimmy Hague, Legislative Assistant to Senator Mark Udall, next presented a legislative update from Washington, D.C. on recent administrative rule-makings that will impact Colorado in 2013. Senator Udall recently announced the US Environmental Protection Agency's ("EPA") "Good Samaritan" policy for cleanup of abandoned mine sites. Hague explained there is a great mining history in Colorado, and thus cleanup of abandoned sites is very important to the state. In the past, liability issues surrounding the cleanup of these sites were a problem for parties involved with the sites due to the liability schemes of the Clean Water Act ("CWA") and Comprehensive Environmental Response, Compensation and Liability Act ("CERLA"). Hague explained that in 2007, the EPA put out a set of administrative "tools" for addressing liability for no-fault parties wishing to reclaim abandoned mine sites. However, parties still had lingering fears of unlimited liability under CERCLA and the CWA when they wished to reclaim contaminated sites. For example, many questioned whether building and leaving behind a water treatment facility would subject the party to long-term liability for the site.

Because of opposition in Congress, Senator Udall began seeking administrative solutions to these fears. Eventually, in December of 2012, the EPA and Senator Udall unveiled new regulations that amplify existing tools. The EPA's memo requires the "Good Samaritan" to enter into an agreement with the EPA to clean up the contaminated site. Unlike the previous tools, the EPA memo allows these agreements to exist for an unlimited duration. Additionally, if the Good Samaritan meets a five-part test, the EPA will exempt it from obtaining a CWA permit for any changes to water quality. Without legislation from Congress, Hague noted, the EPA memo can only ease, but not erase, the potential for civil liability. Hague urged the Convention attendees to investigate the Good Samaritan rules in more detail and hoped the regulations would make a difference for water quality in Colorado.

### Public Trust Special Project

In the final panel of the session, "What's On Our Plate for 2013," Doug Kemper of the Colorado Water Congress and Steve Leonhardt of Burns, Figa & Will, P.C. discussed the CWC's new Public Trust Special Project ("Special Project"). Kemper set the tone by explaining that drought and water demand issues are very important to the water industry, but not as serious a threat as the Public Trust Doctrine. The CWC has worked for nearly two decades opposing ballot proposals that would impose the Public Trust Doctrine on Colo-

rado water rights and riparian landowners. Kemper noted that non-profit environmental organizations are not leading the Public Trust Doctrine movement in Colorado, as they have in other states. Instead, Kemper identified Richard Hamilton and Phil Doe as the two individuals who have been the proponents and sponsors of the ballot initiatives throughout the last two decades. Kemper highlighted Doe's statement that "we will stay with this until we win."

In 2012, Hamilton and Doe submitted another Public Trust Doctrine ballot initiative that eventually fell short of the minimum signature requirement. Although every attempt by these individuals has failed to get an initiative on the ballot, Kemper stressed that there needs to be a more sustained opposition to these initiatives. Hamilton and Doe's determination and persistence suggest there will be future initiative submissions. Therefore, the CWC Board created the Special Project to provide permanent opposition to the initiatives. The Special Project strives to create more public outreach and to provide information about the potential negative effects of these initiatives on water rights holders within the state. The Special Project also serves as a forum for parties across the state to discuss important water issues.

Steve Leonhardt spoke next, explaining in further detail the potential effect of the Public Trust Doctrine ballot initiatives. The Public Trust Doctrine essentially imposes a duty on the state to administer water rights without encroaching on the public's right to water. The extent of this public right varies based on each state's interpretation of the Doctrine. California's Public Trust Doctrine (currently the most expansive state doctrine) includes fishing, navigation, and even environmental needs as public uses of water. Leonhardt explained the proposed initiative from 2012 would be stronger than the California version, because it would apply to all waters in Colorado, not just "navigable" waters. The Special Project is still in its early stages, but more information is available at the newly revamped CWC webpage: [www.cowatercongress.org](http://www.cowatercongress.org).

*Joseph Norris*

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**ENERGY PRODUCTION & WATER USE: PREPARING FOR A DRIER FUTURE**

Alice Madden of the University of Colorado, Denver moderated a discussion on water consumption planning in a drought environment at the Annual Rocky Mountain Land Use Institute Conference. She described an increase in populations across the West and charged the panelists with explaining how states could engage in water resource planning.

John Stulp, Director of the Interbasin Compact Committee and Colorado Special Policy Advisor to the Governor for Water, opened the discussion by describing water availability in Colorado and the state's planning process. Stulp explained Colorado is experiencing a significant drought, with the state in an arid D4 drought condition, which is the most severe level of drought as identi-