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Aaron O'Quinn

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## DAY 3: FRIDAY, JANUARY 29, 2010

FEDERAL LEGISLATION OF INTEREST TO THE COLORADO WATER  
COMMUNITY

## SPECIAL PRESENTATION ON THE CLEAN WATER RESTORATION Act

Mark Pifher, Director of Utilities for Aurora Water, opened the third general session with a discussion of the implications that the current iteration of the Clean Water Restoration Act (CWRA) may have on water users. Pifher followed with a discussion of the on-going dialog between western water diverters and federal regulators regarding a proposed rule change that may require diverters to acquire NPDES permits for water transfers.

Pifher explained that Congress proposed CWRA to clarify recent, ambiguous court rulings and interpretive agency findings by defining which waters are under the jurisdiction of the federal government. Pifher framed his discussion with the ramifications that the current version of the CWRA may have on water users and then addressed recent congressional hearings that may shrink the original expansive version of the bill. Of concern to Pifher is the uncertainty that the current version of the bill brings. The bill strikes from the Clean Water Act the words "navigable waters" and replaces them with a much more expansive and exhaustive enumeration of potential water bodies, including intrastate waters and "activities affecting" said waters. Additionally, the bill states that Congress derives its power not only from the Commerce Clause of the United States Constitution, but the fullest extent granted by the Constitution.

Pifher described many of the uncertainties that water users would face should the bill pass in its current version. The expansive language of the bill makes the line between federal and state jurisdiction unclear. This may pose a potential barrier for new infrastructure construction and modifications to historically irrigated agriculture. Additionally, it would likely create a huge demand for new NPDES permits, overwhelming the current administrative mechanisms. Pifher also addressed the congressional findings enumerated in the bill. In particular, the congressional findings seem to suggest that the new law would assert federal jurisdiction over the entirety of aquatic systems, including groundwater, ephemeral streams, wetlands draining, source water, and even bird watching and photography. Pifher mused, "I can watch a bird in a bird bath, does that federalize my bird bath?" Pifher's greatest concern is that striking "navigable waters" from the Clean Water Act will overturn pertinent CWA jurisprudence and assert federal jurisdiction over areas that state and local laws previously governed. Pifher ended his discussion of the CWRA positively. He noted that testimony from himself and other western water users at committee

hearings have led to a number of legislative compromises. Congress clarified the ambiguous United States Supreme Court Cases and "waters of the United States" is defined to the liking of western water interests. Amendments as a result of this compromise included striking "activities affecting the waters of the United States" and adopting the current EPA definition of waters of the United States.

Despite these compromises at the committee hearings, Pifher recently learned that Congress is currently drafting a new version of the bill, titled differently and not yet released to the public. This new bill will maintain a number of the CWA's exemptions, including existing irrigated cropland and wastewater treatment. It also removes the controversial phrase "activities affecting." The bill still broadens the federal jurisdiction, however, by making any newly constructed facilities subject to federal jurisdiction. Ultimately, Congress is not likely to vote on the controversial CWRA or variations thereof during such a busy and important mid-term election year.

The federal government is considering a second potential change that could affect western water interests. In the final days of the administration of George H. W. Bush, the Environmental Protection Agency (EPA) promulgated and adopted a rule exempting water transfers and trans-basin diversions from the NPDES permit programs, so long as the water user did not put to an intervening industrial or municipal use. However, with the recent change in administrations, the Executive branch has pushed to reexamine this question. A change requiring NPDES permits and treatment of trans-basin diversions would cripple Colorado because of the enormous amount of water transferred from the Western Slope to the Front Range. The new rule would require that transferors treat and permit the water, which is practically and economically untenable. A delegation, including Pifher, from Colorado met with a task force of high-level officials from the Department of the Interior, Department of Agriculture, and the EPA. According to Pifher, Colorado and western water interests seem well represented in this task force. There are a number of Coloradoans currently serving in these agencies and a genuine interest among the agencies in coming to a logical resolution of the issue. The delegation made many suggestions, but most importantly requested that the task force exclude trans-basin diversions and water transfers from point source regulation. At this time, a change to the rule does not seem imminent, but interested parties, particularly municipal users, should monitor the process closely because of the large consequences a change to this rule may have.

#### A PERSPECTIVE ON WORKING WITH THE BUREAU OF RECLAMATION

Robert Johnson, Senior Consultant for Water Consult and HDR Engineering, and former Commissioner for U. S. Bureau of Reclamation ("Reclamation"), shared his expertise with the Colorado Water Congress on how to develop a healthy working relationship with

Reclamation and explained the best strategies for obtaining Reclamation funding for local water projects. Johnson opined that the best way to establish a good and trusting relationship with Reclamation is to develop relationships with the local staff and management. Additionally, Reclamation staffers and managers have recently implemented a Managing for Excellence program (M4E), designed to build relationships with customers. M4E puts procedures in place to ensure that the customer is part of scheduling, funding, and other activities. It establishes formal partnership agreements that guide the process of developing a project and encourages partnerships with customers. Johnson cautioned that Reclamation must still maintain its control over the projects, but emphasized that the formal agreements provide for a means to appeal local decisions with which the customer is unhappy.

Finally, Johnson addressed strategies for acquiring funding from Reclamation for local water projects. Because Reclamation has a bottom-up budgeting procedure, a stakeholder has the best chance of acquiring funding by applying directly to the area offices during the summer. This ensures the project is a part of the budget when it goes before Congress for approval the following spring. Beyond this local point, the budgeting process evolves into a macro process and is very difficult to alter. Secondly, once the budget leaves the Executive branch for Congressional approval, there may be an additional opportunity to acquire funding by petitioning legislators for changes. Finally, moving projects to a "shovel-ready" point can be a very effective way of having a project funded when additional money becomes available, as was the case with the most recent government stimulus funding or other end of year budget surplus monies. Johnson also stressed that Reclamation has not fixed or codified rules for project standards. This can be somewhat frustrating for water managers, but ultimately this flexibility ensures that Reclamation considers each project on its own merits.

#### PLAIN TALK ON FEDERAL WATER QUALITY REGULATION

John Hall of Hall and Associates, addressed upcoming water quality regulations and policies being promulgated under the Clean Water Act (CWA). Hall began by noting that as the science behind water quality regulation becomes more and more complex, crafting simple solutions in the form of regulations becomes more and more difficult. As a result, the administrative process has eroded, resulting in policy declarations promulgated outside of the normal comment and hearing parameters. These complex, scientific policies pose a great financial burden to states and water users who have to employ an increasingly sophisticated and expensive army of staff in order to comply. As a solution, Hall suggests that stakeholders proffer as much input into these policy findings as possible to help mitigate possible future costs associated with compliance. Recent CWA regulations have regulated

boats, constructions sites, ballast water, and perhaps most consequentially, pesticide and herbicide application. Because agricultural users and application of pesticides and herbicides are so prolific, Hall hypothesizes that forcing states to issue permits for application will over-burden the application process. In addition to these regulations initiated by EPA, environmental groups have used the administrative process to file rule-making petitions. There are currently over 150 petitions being considered just involving Endangered Species Act rules. Water users must provide input at these proceedings to represent their interests. Perhaps the greatest burden already occurring are the impairment standards being imposed on streams. Once EPA determines that impairment to a stream exists, the EPA will not approve new operations that discharge into the waters unless the source is under a compliance schedule. However, this may be nearly impossible to achieve if most of the pollution in an impaired stream is the result of non-point sources because regulations do not require non-point sources to have compliance schedules making it nearly impossible to add additional discharges (i.e. grow housing or industry).

Typically, the EPA reaches conclusions about nation-wide impairment standards by using flawed statistical methods. Recently, plaintiffs in Pennsylvania won an administrative victory against an unfair standard by complaining to the Office of Management and Budget (OMB) that the nationwide standard would cost upwards of \$500 billion. The OMB sided with the plaintiffs and required that the EPA standards be subject to peer review. The peer review found that the impairment standards were inappropriate. Hall commented that petitioning for peer review can be an effective tool at battling burdensome regulatory restraints. Notably, the agency has yet to overturn the contested regulation in Pennsylvania. One final means to combat these burdensome standards can be petitioning for a variance from the standards. Often regulatory bodies grant these variances on extended schedules (sometimes even up to thirty years) if the municipality or user can show that it is maximizing benefits while minimizing economic burdens.

#### PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM WATER PLAN UPDATE AND LOOK AHEAD

Jerry Kenny and Beorn Courtney from Platte River Recovery Implementation Program Executive Director's Office, discussed the progress being made by the Platte River Recovery Implementation Program. The purpose of the program is to effectuate an agreement reached by the three basin states of the Platte River and the Secretary of the Department of the Interior to maintain stream flows and acquire lands in an effort to benefit targeted endangered species that inhabit the basin. Jerry Kenny spoke on the issue of land acquisitions, and Beorn Courtney addressed the water delivery aspects and progress of the program. The targeted species of the program are the Whooping

Crane, the Pallid Sturgeon, and the Piping Plover. The agreement calls for the acquisition of 10,000 acres of lands for the purposes of habitat rehabilitation. At this point, the program has acquired nearly 6,000 of the agreed acres. The office runs the program under an adaptive management program that allows the program to move forward in a scientific manner, gathering information to better use the land and water for better rehabilitation of the endangered species.

In addition to the on-going land acquisitions, the program must acquire an additional 130-150,000 acre-feet of water to supplement the current in-stream flows. This quantity increases water flow, aiding the habitat rehabilitation, and compensating for consumptive water uses that existed prior to the agreement. In addition to this overall flow increase, the managers have an immediate duty to ensure that certain short duration high flows or "pulse flows" travel through the basin resulting bank full stage for periods of three to five days at various times of the year. Because the plan requires managers to implement the pulse flows on an "as soon as possible" basis, the program has focused on engineering infrastructure to ensure their implementation. Economic and hydrologic studies have indicated that the program can use existing hydro-electric conveyance infrastructure combined with a new reservoir to stage water in order to send the pulse flows into the area when necessary at various times of the year. The studies also indicate that this new reservoir may also help maintain 30,000 acre feet of the long-term target flows thus accomplishing both goals of pulse flows and the long-term target flows all implemented on a schedule that allows the program to stay within its original budget. The program is researching additional ways to acquire the remaining flow needed to achieve the target flows mandated by the agreement, including efficiency incentives for water owners and the possibility of purchasing rights.

#### AT YOUR SERVICE: THE WATER RESOURCES ARCHIVE

Patty Retig from Water Resources Archive ("Archive") at Colorado State University, discussed the mission of the Archive: to document all aspects of water in the western United States. The Archive contains numerous types of documents, including ditch company meeting minutes, diaries, correspondence, photographs and maps dating back as far as the 1870s. In addition to documents, there are materials that catalog various historical water data points, such as groundwater data from the Eastern Plains of Colorado. Retig emphasized that the Archive is continually adding to its collection. For instance, the Archive recently acquired the files from the United States Supreme Court case *Kansas v. Colorado*. Currently, the Archive is in the process of digitizing its records and is welcoming input from the water community.

### §1031 EXCHANGE OF WATER RIGHTS

Kennen Cohen, Division Manager of Asset Preservation, Inc., opened by introducing the concept of "§ 1031 exchanges." Internal Revenue Code § 1031 provides, in part, that the IRS recognizes no gain or loss in the exchange of property for other property of a "like kind." Cohen explained that generally an exchange is not a two party swap. In fact, most exchanges take place through an intermediary exchange company. Furthermore, "like kind" property does not have to be property of exactly the same type. The IRS merely requires, in the water rights context, that "like kind" property be an interest in real property, though personal property is also exchangeable. For example, one could exchange a piece of farmland for a leasehold interest that is at least thirty years in duration.

In the water rights context, Colorado and most other states consider perpetual water rights to be an interest in real property, allowing owners to exchange them for other real properties. Cohen emphasized that the water rights must be perpetual or else they will not qualify as like kind property. Cohen then went on to address whether ditch company stock is a real property interest. Generally, the IRS does not consider stock to be real property. However, recent legislation has removed ditch company stock from the definition of stock, and, at least in Colorado, owners may exchange ditch company stock under § 1031. Cohen explained that the typical process involved in a §1031 exchange is: the seller deeds the property to the buyer, the seller then escrows the proceeds with an exchange company who then distributes the funds to the seller of the new piece of property. Cohen illustrated the benefits that §1031 exchanges can have for water rights holders. Recently, several water rights holders in southern Colorado sold their rights to a municipality. The sellers escrowed the funds with an exchange company and then, within the 180-day statutory period, acquired a number of pieces of property ranging from farmland to apartment complexes. This resulted in a complete avoidance of capital gains taxes on the proceeds of these long-held water rights, preserving a great deal of the sellers' capital and keeping a large amount of funds cycling through the local community instead of to the federal government.

*Aaron O'Quinn*