

1-1-2010

## Changing Paradigms and National Agendas

Ryan McLane

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Ryan McLane, Conference Report, Changing Paradigms and National Agendas, 13 U. Denv. Water L. Rev. 477 (2010).

This Conference Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## Changing Paradigms and National Agendas

Further, during much of the twentieth century, the Court allowed states to discriminate in favor of their own citizens in regard to natural resources, and the Court extended the Dormant Commerce Clause to natural resources.

Finally, Abrams notes that beginning in 1978 with the decision in *California v. United States*, the federal reclamation program has had to adhere closely to state law requirements regarding water regulation and allocation, curtailing some federal power under interstate commerce power. Following *Sporhase v Nebraska* in 1982, states could rely on the Dormant Commerce Clause and could no longer implement anti-water export statutes because water is an article of commerce that brings it within the purview of the federal government. Since *Sporhase*, the only water hoarding that will survive Dormant Commerce Clause scrutiny are facially even-handed enactments. Abrams also discussed interstate allocations of shared basins that occur through congressional apportionments, interstate compacts, or equitable apportionment.

Holly Doremus, professor at Boalt Hall School of Law, University of California, spoke next. Dovetailing with Abrams' presentation, Doremus noted that the main exception to the primacy of state power is federal reserved water rights. These rights are essentially a wild card in the state law system that lie dormant until they are needed. Two types of reserved rights exist: tribal and non-tribal.

Focusing first on tribal rights, Doremus discussed the Winters doctrine, noting that that priority date of appropriation is the date of creation of the reservation. She then explained that the measure of the right is not use, but rather what is necessary to support tribal needs. Doremus then moved to non-tribal rights, stating that the Winters doctrine applies to areas such as national forests and national recreation areas. Discussing *U.S. v. Cappaert*, Doremus explained that when land is reserved for a specific public purpose, water is impliedly reserved also; the scope of the reservation is only what is needed to support the purpose, and no more. However, *U.S. v. New Mexico* narrowed *Cappaert* noting that federally reserved water can serve only the core purpose of federal reserved lands. Doremus concluded her presentation with a discussion of reclamation federalism, observing that it is a major source of tension between state and federal governments.

*Danielle Sexton.*

#### CHANGING PARADIGMS AND NATIONAL AGENDAS

Thomas Sansonetti, of Holland & Hart L.L.P. and moderator of the panel, opened the discussion noting that changes in the presidential administrations often lead to changes in paradigms for federal agencies. Mr. Sansonetti noted that while some policies result from lobbying by interest groups, many policies however stem directly from the administrations themselves. He pointed out that the Obama administration has been no different in these regards. To that end, the

panel proceeded to identify the hallmarks of the Obama administration's water policies.

Professor Barton Thompson of Stanford Law School then outlined the basic themes he believes the administration is enacting through the federal agencies. (1) Principal of Partnership - the Obama administration seeks to revitalize state and federal partnerships. Mr. Thompson noted that it remains to be seen whether the agencies will merely participate in these partnerships, or whether the agencies will attempt to influence decisionmaking policies at the state and local levels. (2) Co-Equal Objectives - a term the Obama administration has been using to refer to its attempts to promote environmental and economic interests. The administration's policy promotes projects that stress the importance of both interests, particularly where the interests are not inconsistent with each other. (3) Ecosystem Services - the Obama administration is also attempting to incorporate ecosystem services, the concept that the environment provides services useful and marketable in our economy, into federal planning and agency considerations. (4) A Need to Address Climate Change - likely the most pervasively stated policy, the Obama administration intends for federal agencies to plan for climate change. Mr. Thompson noted that, to date, the administration has espoused "no regret" policies, like increased water storage and reduced consumption, which face little opposition. However, the degree to which the administration will push more unpopular, but perhaps necessary for mitigation and adaptation, strategies is unclear. (5) Watershed Planning and Ecosystem Management - The administration is pushing a holistic, basin-wide approach to managing our water resources. (6) Water Marketing - Finally, the last hallmark of the Obama administration's water policy has been the administration's emphasis on the need for active water markets.

Lynn Scarlett, Former Deputy Secretary of the Department of the Interior, next spoke and focused mainly on the challenges which the Obama administration faces. She emphasized several new complications: (1) climate change; (2) federal agency's fragmented management authority and jurisdiction; (3) non-point source pollution; (4) aging infrastructure of federal water delivery systems; and (5) the lack of relevant data. Ms. Scarlett noted that the Obama administration has actively engaged in trying to solve many of those problems. Ms. Scarlett then recommended, considering these new complications, that the administration should focus on several strategies. Chief among those strategies would be flexible river and reservoir management with a focus on ecosystem services. As an example, Ms. Scarlett spoke about floodplain restoration which would reduce the reservoir storage required for flood management, subsequently increasing the storage available for water use. Another strategy she emphasized was urban infrastructure greening, which would both reduce runoff management infrastructure and also increase groundwater storage in urban environments. Ms. Scarlett also agreed that water marketing needed to

be a more prominent strategy in the administrative policy.

Cynthia Koehler, a Senior Consulting Attorney with the Environmental Defense Fund, then spoke regarding her work on the California Bay Delta issue. She synthesized four major points from her experiences working with the federal agencies, which she believed were indicative of how the Obama administration was influencing federal agency work. First, Ms. Koehler stressed a renewed effort in the administration to coordinate federal agencies. Second, the Obama administration is stressing the importance of partnerships and collaboration between federal agencies, stakeholders, and the states. This emphasis on partnership often manifests where federal agencies can provide either financial assistance or technical assistance. Third, the Obama administration is directing agencies to focus on concrete actions, which have broad support. In other words, the administration is directing the agencies to move forward on projects in which the interested parties generally agree upon the outcome. Finally, Ms. Koehler noted that the Obama administration has been avoiding conflict as a tool for resolving water disputes. Ms. Koehler identified this policy as a way of pulling the federal agencies out of the "cycle of conflict." As an example, she noted that in the California Bay Delta dispute, the invasive species issue is much less controversial than other problems. Therefore the federal agencies focus on a resolution on issues that the parties agree upon, instead of only focusing on issues which the parties cannot yet agree upon. As a final point, Ms. Koehler noted that in terms of water policy, the Obama administration has been actively grappling with the water issues; but from a practical perspective, many of the difficult or attenuated decisions within the Obama water policy have yet to be addressed.

*Ryan McLane*

#### WATER SETTLEMENTS: CAN THEY EVER BE FINAL?

Settlement is the preferred method to resolve disputes, especially disputes over water, as it is a shared resource. This panel explored the potential legal and practical challenges that face negotiators in settlement agreements and the issues that settlement implementers encounter, and asked the question: can water settlements ever be final?

Settlement negotiations often begin among water right holders because their adjudication has staggered and the parties want finality or they realize that a settlement agreement will better address their needs of water. Typically, in these cases, after years of settlement negotiations, the final settlement is made public, where it requires legislative action by an Indian Tribe, the State, or the United States Congress. At this point, non-parties often become involved.

Sarah Bond, Assistant Attorney General, began her presentation discussing the necessity of settlements for states who are seeking to participate in federally funded projects, and for states and tribes who