

1-1-2010

## The Secure Water Act: First Year Programs and Implementation

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### Custom Citation

Matt Brodahl, Conference Report, The Secure Water Act: First Year Programs and Implementation, 13 U. Denv. Water L. Rev. 500 (2010).

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## The Secure Water Act: First Year Programs and Implementation

regulatory void of both the Dormant Commerce Clause and the affirmative Commerce Clause. In support, Professor Klein cited both *Gonzales v. Raich*, 545 U.S. 1 (2005), in which the Court upheld a federal regulation on marijuana, and *GDF v. Norton*, 362 F.3d 286 (2005), in which the Court upheld federal regulations protecting cave insects. In addition, Professor Klein detected signs of increasing tolerance for state water export regulations. In support of this notion, Professor Klein cited *United Haulers v. Oneider-Herkimer Solid Waste*, 550 U.S. 330 (2007). *United Haulers* dealt with the state of New York requiring all waste to go through one facility. The Court upheld the state regulation despite the holding being in direct contrast to *Sporhase*. The majority of the justices supported the decision and distinguished *United Haulers* from *Sporhase* on the facts. Justice Thomas, in his concurrence, discussed the Lockner freedom of contract era, how the Court then adjusted precedent, and finally dismissed the idea. Justice Thomas suggested that the Court might follow the reasoning of *United Haulers* and eventually reject the Dormant Commerce Clause.

Professor Klein concluded that expansion of regulations shows an increased tolerance for the state regulation of water resources. As climate change becomes a greater concern, however, the Court may again strike down state regulations on water export.

*Serena Hendon*

#### THE SECURE WATER ACT: FIRST YEAR PROGRAMS AND IMPLEMENTATION

Melinda Kassen, Esq., Managing Director of the Western Water Project at Trout Unlimited, discussed the SECURE Water Act ("SECURE"), its new formulation as the WaterSMART Program, and the effects the legislation will have on the practices of the Bureau of Reclamation (Reclamation) in relation to climate change and potential long-term drought.

Senator Jeff Bingaman of New Mexico introduced SECURE, and Congress approved the legislation as part of the Omnibus Public Land Management Act in March of 2009. The Department of the Interior announced a departmental reorganization in February 2010 and placed many of the important elements of the SECURE legislation under the new WaterSMART program. Kassen noted, however, that the reorganization has not affected the important legislative goals established in SECURE. Most importantly, the department is now required to give credence to the importance of looking at the environmental impact in areas where Reclamation is active, in addition to the traditional concerns of the department such as the rights of water users and addressing potential water shortages.

According to Kassen, SECURE, now WaterSMART, provides Reclamation with additional authority and requires the agency to face the potential impacts of climate change on eight different river basins.

Reclamation facilities are present in the eight basins: the Colorado, the Columbia, the Klamath, the Missouri, the Rio Grande, the Sacramento, the San Joaquin, and the Truckee Rivers.

The legislation provides a multi-step process for Reclamation to use in addressing potential climate change impacts in the identified basins. These steps include analyzing climate change impacts in the basins, developing strategies to mitigate the identified impacts, conducting feasibility studies on the proposed strategies, and finally, making grants to implement strategies that will help to prevent water crises related to climate change. These grants are limited in their application, and the basins will utilize them to conserve water for municipal, industrial, recreational, and ecological resilience purposes.

Reclamation is currently conducting a study of the Colorado, Yakima, and St. Marys-Milk Rivers because of new legislation and goals Reclamation put into place prior to Congress passing the legislation. Reclamation made the decisions based on a competitive process, and \$3 million have been designated for the basin studies to date. In March 2010, Reclamation announced that it was accepting proposals for another round of studies to continue the work outlined in WaterSMART.

Kassen first discussed the Yakima basin study and explained that the work group participating in the study consists of government entities, water users, and a conservation NGO working to reach an agreement on the allocation of the available resources in the basin. The challenge, she conceded, will be to reconcile the needs of the senior water rights holders who are farming traditional crops, with the needs of junior rights holders who have established high-value orchard crops. In addition, the group must take into consideration the needs of the NGO, as outlined in the WaterSMART program.

Next, Kassen discussed the study underway in the Colorado River basin. Kassen approved of the study, but noted her concern that Reclamation has not invited the conservation NGOs and water user groups to the discussion. Instead, Reclamation is dealing strictly with the seven basin states, and the plan for the study indicates that it will include a public comment period. The study's discussion surrounding the Colorado basin includes dealing with decreasing flows in the river due to climate change and the inevitable increase of population throughout the southwest United States. Kassen analogized that all of the parties interested in water rights within the basin see those rights as currency, however, each party views its currency as something completely different from the other parties at the table; therefore, there is little room for exchange between parties because there is no common currency. However, Kassen noted that the state's willingness to sit down with Reclamation is an important first step in what is sure to be a long process.

Kassen concluded saying that Reclamation's demonstrated willingness to "grapple" with the effects of climate change is

encouraging. With further implementation of the SECURE Act, encompassed in the WaterSMART program, positive steps in this area are likely.

*Matt Brodahl*

#### WATER LAW AND ETHICS

Amy Beatie, Director of the Colorado Water Trust, presented on current ethical issues concerning water law practitioners' appellate practice. Specifically, Beatie discussed ethical issues arising when practitioners decide whether to appeal, issues when prosecuting an appeal, and issues regarding conflicts of interest.

First, Beatie addressed the ethical issues in a practitioner's decision to appeal. Initially, she explained that because attorneys draft their fee agreements, clients enjoy judicial deference for unclear or ambiguous fee language. Accordingly, attorneys should ensure fee agreements include clear language authorizing them to appeal on behalf of the client and describe any fee adjustments for appeals. Colorado Rules of Professional Conduct ("CRPC") 1.2(a) and 1.4(a)(2) instruct attorneys to consult with the client about potential legal strategies, including the decision to appeal.

Next, Beatie discussed the requirement that sufficient grounds for an appeal must exist. An attorney's signature certifies that a pleading has legal and factual merit. Colorado Rule of Professional Conduct 3.1 precludes filing an appeal that has no merit or asserting a frivolous claim. Filing an appeal merely because an insistent client desires one does not excuse CRPC 3.1 if no legal or factual basis supports the appeal. All Colorado lawyers or lawyers practicing in Colorado are subject to the jurisdiction of the CRPC. Consequences of filing a frivolous appeal include court sanctions or even civil prosecution for unauthorized practice of law.

Additionally, when a practitioner decides to appeal, he or she must be competent. Colorado Rule of Professional Conduct 1.1 requires Colorado attorneys to demonstrate competent skill, thoroughness, and preparation. If an attorney has no appellate experience but still chooses to appeal, the rule requires the attorney to commit to competent on-the-job training, turn the case over to a competent appellate attorney, or associate with a more experienced attorney. To ensure competent representation, Beatie advised attorneys maintain keen interest in an appeal even after adding an experienced associate to the appellate team.

If an attorney decides not to appeal, CRPC 1.16 requires notice to clients to allow time to seek new representation for an appeal. Beatie stressed that an untimely notice of appeal is an egregious mistake. Attorneys should file notice of appeal on behalf of their client then withdraw from representation. This way, the attorney communicates the withdrawal to the court while preserving the client's right to appeal