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Water Marketing CLE International

1 four dissenters got it exactly right, that the Kennedy test is going to
2 cripple the Corps further by requiring all these case-by-case analyses.

3 Now Kennedy did say new regulations would help. Chief Justice
4 Roberts said maybe we would defer to new regulations, although it's
5 hard to understand how he could do that and also join Justice Scalia's
6 opinion. But maybe they'll listen to Jonathan and his view that it's a
7 *Chevron* Step 2, and maybe Scalia would change his opinion in re-
8 sponse to regulations.

9 Nothing the Oberstar bill does would change the Corps' regula-
10 tion. If they wanted to somehow greatly expand what they actually re-
11 quire a 404 permit to do, they would have to propose new regulations
12 and get those adopted. All the Oberstar bill is trying to do is to reverse
13 the *Rapanos* decision and the *SWANCC* decision and side with the dis-
14 senters in both cases. And that was absolutely clear from anyone who
15 attended the July 17 hearing and all the discussion.

16 PROFESSOR EAGLE: Any other questions?

17 (No response.)

18 PROFESSOR EAGLE: Well, if not, thank you all very much for at-
19 tending. I think the panel has done some excellent presentations, and
20 I'd like to thank them.

21 (Applause.)

22 (Panel concluded.)

WATER MARKETING CLE INTERNATIONAL

Denver, Colorado

December 10, 2007

Taylor E. C. Hawes, Associate Counsel for the Colorado River Water Conservation District, provided the first presentation of the day. She framed the discussions to follow by introducing the subject of water marketing. She stated that practitioners use the term "water marketing" broadly to describe both arrangements in which private parties purchase water rights and sell them to third parties and arrangements in which private or public entities lease or contract water to third parties but retain ownership of the rights. The anti-speculation doctrine limits water marketing in Colorado to only allow appropriation if the water is put to a beneficial use. Under Colorado statutory law, no appropriation of water may occur when the basis of the proposed appropriation is a speculative sale or transfer of the water rights to persons who are not parties to the appropriation. Therefore, in Colorado, private parties may only purchase water to market to third parties if they have firm contractual commitments with third parties lined up for the use of water once a project is completed. Ms. Hawes, then discussed

the ways in which municipalities, irrigation districts and water conservancy and conservation districts can engage in water marketing. Notably, the Colorado statutes create a limited exception to the anti-speculation doctrine allowing municipalities and government agencies to contract to provide water services outside of city limits through agreements such as distributor agreements, connector agreements, and non-potable water contracts. State law allows water conservation districts to develop water resources within the district boundaries and, depending upon the enabling act of the district, may be able to sell or lease the water. Within water conservancy districts, state law also allows the districts to develop and market water within the district boundaries. Irrigation districts may distribute contracted water to irrigators within their districts and market excess water outside the district as well as contract for additional water from federal Reclamation projects.

Next, Alexandra L. Davis, Assistant Director for Water at the Colorado Department of Natural Resources, discussed the State's perspective on water marketing. This involved an overview of water use in Colorado and a discussion of the different uses competing for the limited supply of water. Ms. Davis projected that, as agriculture remains the dominant water use in Colorado, future water markets will primarily involve transfers of water from the agricultural sector. Recognizing the pressure to transfer agricultural water to municipal and industrial uses, Ms. Davis outlined several alternatives to traditional "buy and dry" agricultural water transfers. These include interruptible supply agreements, rotational fallowing arrangements, water banks, alternative cropping and/ or irrigation practices, and use of stored or average/ wet year statewide supplies. Ms. Davis concluded that water markets can help reduce uncertainty related to future water supply availability and are an important resource for meeting the current and future water needs of Colorado.

The morning concluded with complimentary presentations on the seller's and buyer's perspectives on water marketing. Bob Lembke, President of United Water and Sanitation District in Greenwood Village, provided the seller's perspective. Mr. Lembke stressed that an important goal of water marketing transactions needs to be maintaining value in the property rights for farmers. Because of the common adverse socioeconomic impacts to farmers from traditional "buy and dry" transfers, farmer-oriented transfers are key to the transition from agricultural to municipal uses. Consequently, marketing needs to be more than just buying and selling; it requires addressing the needs of the parties by providing a reliable product to the needed place of use at a price profitable for both parties. Mr. Lembke offered a basic three part process for a successful sale. First, consider who the buyers are and what their needs are. Second, assess and model the carrying capacity of the individual water rights. Third, determine the method of

storage for the transaction, recognizing that underground storage is key in water portfolios.

Peter Binney, the Director of Utilities for the City of Aurora Water, provided the buyer's perspective. Mr. Binney explained that the challenge for buyers is to create cost-effective and schedule-sensitive portfolios. With complicating issues such as population growth, instream flow uses, the variability of hydrological cycle, and the limits of existing infrastructure capacity, water markets are becoming very important in accomplishing the challenge presented to buyers. Aurora plans to acquire their water needs through several measures, including demand reduction, incorporation of reclaimed water, recapture of reusable water and acquisition of agricultural waters. Mr. Binney concluded his presentation with a brief description of one of Aurora's innovative answers, the Prairie Waters project. According to Mr. Binney, the project is trying to move wet water to customers via a pipeline from Brighton to Aurora.

After the lunch break, Amelia Whiting of Trout Unlimited discussed "buying water for fish" through acquisition of instream flows. The presentation addressed the use of water markets as a mechanism to secure flows necessary for the health of streams. She first discussed non-market approaches to obtaining instream flows such as regulatory mandates prescribed by the Endangered Species Act and the acquisition of instream flow appropriations by the Colorado Water Conservation Board ("CWCB"). Acknowledging that in Colorado instream flow appropriations may only be held by the CWCB, Ms. Whiting addressed several methods of obtaining instream flow rights such as forbearance agreements, acquisition of storage rights or storage space for stream flow enhancement, and acquisition of senior rights by the CWCB. Ms. Whiting argued that the CWCB could strengthen their acquisition of water rights program by adding staff, providing incentives to senior water right holders to sell or lease their rights, changing statutory law to allow owners to lease water to the CWCB on a long term basis, and exploring the privatization of instream flow acquisition. At the end of the presentation, Ms. Whiting was joined by Linda Bassi, Chief of Stream and Lake Protection at the CWCB who briefly discussed the benefits of acquisition of existing rights rather than appropriation of new, very junior, rights.

Next, Cliff Wilson, Managing Principal at H2O Consultants provided a brief overview of his business' operations. H2O Consultants identifies wholesale water rights opportunities for water districts and municipalities and provides capital for transactions in order to secure funding for acquisition of water rights. They therefore often enter into transactions with the seller and the buyer of water resources and act as principals in the transactions. H2O Consultants also identifies water storage locations and mechanisms and develops strategies to maximize

water resources through conjunctive water supply plans involving surface and groundwater.

To conclude the discussion on water markets, Peter Nichols of Trout, Raley, Monta o, Witwer & Freeman, teamed up with Leo Eisel, Principal Engineer at Brown and Caldwell, to discuss practical ideas for creating sustainable alternatives for agricultural transfers. Mr. Nichols began by discussing the so-called "Super Ditch," or more formally, the Lower Arkansas Valley Rotating Land Fallowing-Water Leasing Program. At its core, the Super Ditch is simply a brokerage clearinghouse for water rights that enables the agricultural communities to retain ownership in the water rights and prevents land from being permanently "dried up." Echoing the recommendations of the previous speakers, Mr. Nichols suggested that the Super Ditch Company will need to provide a reliable source of water for municipalities and create an alternate source of profit for agriculture for it to be successful. Furthermore, some of the key remaining issues to address before the Super Ditch comes to fruition include: 1) variation in yield and water value among ditches, 2) delivery issues to irrigated land with less water in the ditch, 3) what land will not be irrigated and when, 4) farmer concern about diminished productivity after fallowing, 5) the actual organization and creation of a "Super Ditch" company, and 6) municipality interest in working with this type of an entity as opposed to the traditional "buy and dry" method.

Dr. Eisel broadened the discussion by assessing several of the current ideas for creating practical alternatives to "buy and dry," including the Arkansas River Basin Water Bank Program, the Arkansas Basin Roundtable Water Transfers Committee, the Super Ditch Company, paying Kansas in water for the decision in *Kansas v. Colorado*, and changing water for instream flow purposes. In evaluating these ideas, Dr. Eisel offered several thoughts and conclusions to consider when attempting to create any successful alternative: 1) are these alternatives seeking to limit inter-basin transfers or to market water, 2) is limiting the transfers to in-basin customers really helping the implementation of sustainable agriculture and rural communities, 3) certainty of a permanent sustainable supply is required by both water utility managers and those customers seeking to use this water for instream flow purposes, 4) alternatives to buy and dry need to be focused on areas that will remain agricultural and will not immediately become residential, and 5) the process needs to be simple and participants can reduce costs by collectively doing the necessary engineering.

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