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Water 101: The Fundamentals

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Water 101: The Fundamentals

CONFERENCE REPORTS

26TH ANNUAL WATER LAW CONFERENCE

TWENTY-FIRST CENTURY WATER SUPPLY, USE, AND DISTRIBUTION: DO THE OLD RULES STILL APPLY?

San Diego, California

February 21-22, 2008

INTRODUCTION

Lee A. DeHihns, III, Partner at Alston & Bird LLP in Atlanta, Georgia and Chair of the American Bar Association Water Resources Committee opened the conference and welcomed the participants. The program's co-chairs were Wendy Bowden Crowther of Clyde Snow Sessions & Swenson in Salt Lake City, Utah, and Jeff Kray of Marten Law Group PLLC in Seattle, Washington.

DAY ONE: THURSDAY FEBRUARY 21, 2008

WATER 101: THE FUNDAMENTALS

Robert Abrams, professor at Florida A&M University College of Law in Orlando, Florida, moderated the first session of the day and clarified that the discussion would only address the fundamentals of surface water, not the various methods of groundwater allocation. Each panelist discussed the basics of the three major water allocation schemes: riparianism, prior appropriation, and reclamation.

R. Timothy Weston, Partner at K&L Gates LLP in Harrisburg, Pennsylvania, began with a discussion of riparian basics. Mr. Weston encouraged participants to move East, where, according to Mr. Weston, they have water and systems in place to regulate the water. Mr. Weston gave an overview of where water rights come from, the common law, and discussed the hydrologic cycle. He distinguished between the two main theories encompassed within the riparian method of allocation - natural flow and reasonable use. To close, Mr. Weston touched upon the problems with groundwater allocation in the common law doctrine.

Stephen G. Bartell, from the United States Department of Justice in Washington, D.C., spoke about the prior appropriation doctrine. After an introduction to the doctrine, Mr. Bartell explained the factors required to appropriate water and the factors required to lose that appropriation. Mr. Bartell touched on the *Winters* doctrine and how it

applies to Indian reserved water rights. Mr. Bartell concluded by mentioning some current adjudications of water rights.

Christopher Rich, of the Office of the Solicitor, United States Department of the Interior in Salt Lake City, Utah, was the final panelist. Mr. Rich opened his presentation with a jaunty limerick and proceeded to explain how the Reclamation Act of 1902 affects water appropriation.

Professor Abrams synthesized these three methods of water allocation. The riparian theory allows any riparian to use a water source in a reasonable way with all uses have equal weight. Riparians use these water rights on their land and the right transfers with the sale of the land. Anyone can own water rights through prior appropriation so long as the water is unappropriated. First in time is first in right for prior appropriation with the amount of water right determined by how much the user diverts and puts to beneficial use. The water can be used anywhere, but the user may not use if it harms other users. Finally, the United States holds the rights to reclamation water but the contract holder holds the right to use the reclamation water. The United States must obtain rights in the water and reclamation project users share any shortages pro rata. Acreage served by the reclamation project drives the amount of water allocated to each user but water is transferable within the project. Reclamation water users may only use the water on lands within the contract boundaries.

Overall, this early session provided a perfect basic foundation of water law for any professional.

Amy Petri Beard

OUT DAMMED SPOT

The morning continued with a panel discussion titled "Out Dammed Spot," which addressed the myriad of issues related to dam removal. Thomas Berliner, a partner at the San Francisco office for the international law firm of Duane Morris, LLP, moderated the session. Mr. Berliner recognized from the start that making a decision to remove a dam is very controversial and complex, with many positive and negative aspects on both sides of the decision. Therefore, he explained that this panel would refrain from that debate and just discuss the necessary considerations once an entity has already made the decision to remove a dam.

Jock Conyngham, a Research Ecologist for the Army Corps of Engineers ("Corps") and a self-proclaimed "water-hugger and fish-kisser," began the panel. Mr. Conyngham suggests that there are really two options for dam removal: 1) a "blow and go" approach; and 2) an incremental approach. The "blow and go" method is common with small dam removals, while the Corps often uses the incremental approach with larger projects. The major consideration with incremental dam removal is sediment management, as well as other environmental