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Municipal Water Supplies: How Do We Secure the Future?

K&L Gates LLP in Newark, New Jersey, proceeded to discuss three case studies.

Mr. Clifford discussed the restoration project at Milltown, Montana, suggesting the key to success on that project was that a group of informal stakeholders worked together in a collaborative effort to create a new restoration at Milltown. Mr. Hyatt shared his experiences as common counsel for seventy-five companies involved in the cleanup of the Superfund Site on the Passaic River. The cleanup on the Passaic was one of the pilot programs under the Urban River Restoration Initiative. While a settlement has been reached with the EPA, Mr. Hyatt discussed some of the remaining questions going forward, including how to allocate costs from 200 years of contamination and how to effectively cleanup the water bodies. Mr. Brandes ended the panel with a discussion about the Anacostia Waterfront project in the Chesapeake Bay. Mr. Brandes explained how the river has slowly transitioned from a socio-economic barrier in the community to a mixed use redevelopment that is slowly unifying the community. According to Mr. Brandes, non-governmental organizations have accomplished this transition by working together and creating alliances.

Maria Hohn

MUNICIPAL WATER SUPPLIES: HOW DO WE SECURE THE FUTURE?

Charlotte Benson, City Attorney for Tempe, Arizona, moderated this session about municipal water supplies and if the “old rules” still apply. The session posed three issues: 1) how secure or reliable are municipal water supplies, 2) the tension between certainty and acquiring water for future use, and 3) potential solutions. Municipalities must attempt to balance growth with their water supply.

Steven E. Clyde, Director at Clyde Snow Sessions & Swenson, PC in Salt Lake City, Utah, led the discussion with a detailed look at Utah’s water supplies. Specifically, Mr. Clyde stated that municipalities hold too few water rights at the time of development and ask developers to bring in their own water supply. Utah surface water is fully allocated and the population is expected to double within the next 25 years. Mr. Clyde questions if municipalities are getting excessive rights in water, or more than would be reasonable, for the expected growth. Mr. Clyde discussed pending legislation that would eliminate the need for municipalities to file non-use applications so long as the water rights were held in the reasonable future needs of the community.

Tom McDonald, Partner at Cascadia Law Group in Olympia, Washington, compared these same issues with what is occurring in Washington. Mr. McDonald believes that municipalities hold too many future water rights. Washington has instream flow requirements on all rivers that tie into tribal claims for fisheries. However, Mr. McDonald queries if municipalities should be given preference and what that preference is subject to. For example, Washington state was issuing permits for

water rights certificates if the potential user built pipes and pumps, but never put a single drop of water to beneficial use. The Supreme Court stated that this exceeded state authority, but current legislation may allow these future water rights.

The session concluded with a question and answer session that highlighted the problems associated with allowing municipalities to hold future water rights: what must municipalities show to retain these future rights without actually putting the water to beneficial use and what constitutes forfeiture of these rights?

Amy Petri Beard

WATER AND THE MARKET ECONOMY

Because of the scarcity of water in the American West and increased demand, many have seen an opportunity for profit in the area of water resource development. This panel, moderated by Reagan L. B. Desmond, an associate with the firm of Ball Janik, LLP in Bend, Oregon, discussed commodization of water resources, the establishment of water markets, and anti-speculation laws. The panelists were Pat Donoho of the International Bottled Water Association in Alexandria, Virginia, Richard E. Howitt, professor and chair of the Department of Agricultural and Resources Economics at the University of California at Davis, and Sandra Zellmer, professor at the University of Nebraska College of Law. The discussion provided an overview of what water attorneys need to know about emerging later markets.

The major point of contention in the area of water and market economics is whether water should be treated as a commodity. Currently, many western states have laws that prohibit speculation in water and require any appropriator to have an existing beneficial use for the water. However, Professor Zellmer argued that anti-speculation laws and market development are not mutually exclusive because of statutory exceptions to anti-speculation laws as applied to municipalities, foreign and developed water resources and instream flows. Professor Howitt agreed with this analysis, stating that water is already treated as a commodity, although not a widely traded one. Water markets currently exist in the West; however, they are largely dominated by leases. Professor Howitt stated that these markets need to evolve to provide for greater risk sharing among market backers and beneficiaries, accommodate conjunctive use, and sell conveyance capacity as well as stored water.

Nora Pincus