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SB-28, also sponsored by Senator Brophy, appears to allow for the draining of Bonny Reservoir, eliminating evaporation and seepage losses allocated to Colorado as consumptive use under the Republican River Compact. Fox and Sims described the bill as too complex. The bill passed out of the Senate Committee on Agriculture on February 14 and had a second reading on February 22, 2008. The Water Congress is monitoring this bill.

SB-53, proposed by Senator Brophy, amends the statutory definition of designated groundwater to include 100-year wells. The Senate Committee on Agriculture postponed the controversial bill indefinitely on February 14, 2008. The Water Congress opposes this bill.

Allison Graboski

**UNIVERSITY OF DENVER
WATER LAW REVIEW
SYMPOSIUM**

**CUTTING EDGE ALTERNATIVES:
CREATING, LEASING, REUSING**

Denver, Colorado

March 5, 2008

INTRODUCTION

Decreasing fresh water supplies is a growing problem throughout the world, not only in the United States. This day-long symposium discussed alternative methods of water creation and allocation. Participants had an opportunity to hear cutting-edge ideas and how they may fit into current riparian or prior appropriation systems.

The University of Denver *Water Law Review* hosted the Symposium. The *Water Law Review* is an internationally circulated, semi-annual publication that serves as a high-quality forum for the exchange of ideas, information, and legal and policy analyses concerning water law. In publication since 1997, and the only journal of its kind in the nation, the *Water Law Review* seeks to foster water law discussions, both nationally and worldwide, and find possible solutions to the water problems that affect us all.

COALBED METHANE PRODUCED WATER

Steve E. Marlin, Esq., of Davis, Graham, & Stubbs LLP, Denver, Colorado, and Kate M. Fox of Davis & Cannon, Cheyenne, Wyoming, examined Colorado and Wyoming's coalbed methane ("CBM") produced water issues.

Mr. Marlin started with an explanation of CBM-produced water. In water-saturated coal seams, water pressure keeps methane in the coal. Extraction of the CBM involves pumping the groundwater from the

seam in order to reduce the water pressure that holds methane gas in the seam. The pumped water's quantity and quality determines whether it a user can put it to a beneficial use and how to dispose of it. Typically, the amount of pumped water is large at first and then reduces over the life of the well, which averages twenty years.

Mr. Marlin then focused on Colorado's CBM development. The Colorado Oil and Gas Conservation Commission ("COGCC") governs the use or disposal of CBM water, which can be, among other options, deposited into pits, reused, or discharged into surface waters. The Colorado Division of Water Resources ("CDWR") and the Office of the State Engineer ("SEO") permit and regulate water wells. The SEO has no jurisdiction unless the user puts the water to a beneficial use; the withdrawal of groundwater in itself is not a beneficial use. As such, CBM wells do not have to obtain permitting from the SEO for the produced water. However, Wyoming considers the withdrawal of CBM-produced water beneficial and requires permitting.

Mr. Marlin continued with an explanation of three distinct CBM basins in Colorado: San Juan, Raton, and Piceance Basins. He focused particularly on the San Juan Basin, where there is pending litigation questioning COGCC's exclusive authority to regulate CBM wells. The complaint asserts that the production of CBM water in itself is a beneficial use and deserves SEO permitting.

Next, Ms. Fox presented information about CBM water as waste in Wyoming. There, the diversion of water for production of CBM is a beneficial use and thus is subject to regulation by the SEO. However, in practice, there is little difference between Colorado and Wyoming because the SEO presumes a beneficial use and does not verify gas production or water quantity.

Ms. Fox focused particularly on the Powder River Basin where CBM produces 75,000 acre-feet of water per year. For perspective, the city of Cheyenne uses 15,000 acre-feet per year. The Basin discharges most of the water to the surface, and many landowners do not want the extra water on their land. Ranchers have grown accustomed to the ephemeral system, where periodic flooding acts to leach salts and to irrigate. Initially, landowners thought that CBM-produced water would be a boon, but now they have constant streams, and the soil is not suited for constant saturation. Likewise, the CBM water is high in salinity, and it destroys the soil. Although downstream users face the same issues, the SEO will not intervene even though the State holds easements for all existing channels. Instead, the SEO requires that individuals file civil suits.

Ms. Fox suggested that the SEO could resolve some of these problems. Because the State requires SEO to prevent groundwater waste, the SEO should presume beneficial use for a period of time, and then either verify beneficial use, or cut off the well. She believes that CBM-produced water should have limits just like other water rights. Cur-

rently, the SEO does not require adjudication of CBM-produced water. Adjudication before the Wyoming Board of Control would provide the public with notice and an opportunity to participate in a hearing.

Because CBM-produced water continues to be a pertinent issue in the West, states will have to continue grappling with the determination of beneficial and non-beneficial use. Likewise, states must also continue to examine the relationship between the SEO and the CBM-water producers.

Danielle Sexton

INDIAN WATER RIGHTS: AN INTRODUCTION TO INDIAN WATER RIGHTS, NEGOTIATING OR LITIGATING, AND INDIAN WATER LEASING

Jeanne S. Whiteing, Esq., of Whiteing & Smith, Boulder, Colorado, and David L. Gover, Esq., of the Native American Rights Fund, Boulder, Colorado, gave a joint presentation on the unique characteristics of Indian water rights, specifically their inception and history, the process of litigation and negotiation, and water marketing. Mr. Gover began the discussion with an existential look at the question "what is water?" from an Indian perspective, drawing on the distinction that many native peoples have a spiritual relationship with water as it relates to their way of life. As such, water rights issues for Indian tribes are not merely about water as an economic resource, even though economics plays a large role in water decisions today.

After establishing the appropriate perspective with which to view Indian water rights, Mr. Gover then reviewed the legal history of Indian water law. While most water law issues are under the purview of state law, Indian water law generally falls outside of the state system under the Reserved Right Doctrine established by the seminal 1908 case of *Winters v. United States*. Mr. Gover asserted that in *Winters*, the federal government had entered into a treaty with Montana tribes to create Reservation lands for the people, but the treaty did not expressly grant any water rights to the tribe and a lawsuit resulted. Ultimately, the Supreme Court recognized that it must resolve treaty ambiguities in favor of the Indian people, and found that the parties must have intended to reserve water rights for the Reservation in order to fulfill the purpose of its inception. Mr. Gover pointed out that one of the important outgrowths of the *Winters* Doctrine is the recognition that Indian tribes cannot lose or forfeit their water rights due to nonuse. Furthermore, the courts have also recognized that tribes have the reserved right of in-stream and other non-consumptive uses for water, such as those related to hunting, fishing, and gathering.

Mr. Gover then discussed the evolution of Indian water law through attempts to reconcile the management of Indian water rights with state water law. In 1963, for the first time the government attempted to quantify an Indian water right, using what practitioners now refer to as the "practically irrigable acreage" ("PIA") standard. In