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CONFERENCE REPORT

THE 20TH ANNUAL WATER LAW CONFERENCE GROWTH AND SCARCITY: MANAGING WATER TO AVOID CONFLICT

San Diego, California February 21-22, 2002

The 20th Annual Water Law Conference provided two days of discussion focused on the rising tensions, especially in the West, between the ever increasing growth of water demand and the equally increasing scarcity of water to meet that demand. Among the highlights of the conference was a celebration of twenty years of water law conferences, an in-depth look at the Klamath Basin crisis, an examination of the issues surrounding federal Indian reserved rights to groundwater and a look at the water resource issues in New York City before and after the World Trade Center tragedy.

DAY ONE

SESSION ONE—FIVE PERSPECTIVES ON THE ALLOCATION OF SCARCE WATER RESOURCES

This discussion, moderated by Douglas MacDougal of Schwabe, Williamson & Wyatt based in Portland, Oregon, included five speakers who each addressed the allocation of water resources for varying needs. The *Water Law Review's* own advisory board member Hamlet "Chips" Barry, Manager for Denver Water, provided insight on the allocation of water resources for cities. Mr. Barry addressed the issue of water supply versus demand in metropolitan Denver and throughout the urban West. Mr. Barry also discussed various allocation methods and theories as well as the flaws, both real and perceived, of all allocation systems.

Tom Birmingham the General Manager of the Westlands Water District, Fresno, California, provided a perspective on water allocation for agriculture. Specifically, Mr. Birmingham discussed the policy issues arising from a proposal to retire up to 200,000 acres of land in the Westlands District from irrigated agriculture as a means of balancing demand with supply. Mr. Birmingham noted that land retirement is a means of dealing with the scarcity of water resources that was once considered taboo. However, the Westlands District views land retirement of a substantial area it controls as "an innovative means of dealing with two significant issues, drainage and water supply."

The third speaker on Thursday morning was Steven T. Miano of Wolf, Block, Schorr & Solis-Cohen, LLP from Philadelphia. Mr. Miano looked at the allocation of water resources to maintain water quality. Among the topics addressed were a historical perspective on water quality, the Clean Water Act's regulatory approach, and what states must do to maintain water quality.

Mason D. Morisset, of Morisset, Schlosser, Ayer & Jozwiak, Seattle, Washington, provided a perspective on water resources for Native American tribes. Mr. Morisset gave an overview on the *Winters* Doctrine and the scope of tribal reservation water rights. Also discussed was the trust responsibility of federal agencies to Native American tribes and federal compliance with NEPA and tribal rights.

Before a short break, we heard from Rachel Paschal Osborne who discussed various efforts to restore and protect instream flows for the benefit of fish in Washington State. In particular, Ms. Osborne provided insight on trends in instream flow protection, different restoration mechanisms, water transfers and water markets, and the future of river and stream restoration in Washington.

SESSION TWO—THE KLAMATH RIVER BASIN: THE CHALLENGE OF RECONCILING MIXED MISSIONS

Session Two addressed the Klamath River Basin crisis where drought, Endangered Species Act issues, and the over-allocation of limited water supplies created serious impacts on agriculture and wildlife interests. Years of litigation and mediation efforts have done little to resolve the issues surrounding the Basin. This session, moderated by Martha O. Pagel, Schwabe, Williamson & Wyatt, looked at whether the mixed missions and goals of agencies, tribes and users in the Basin have to be better understood before a solution is possible.

The first speaker was Meg Reeves, the Deputy Director of the Oregon Water Resources Department. Ms. Reeves described the Oregon adjudication process generally, the specifics of the current Klamath Basin Adjudication and other related mediation proceedings. Ms. Reeves also discussed the activities of the Oregon Water Resources Department in the Basin.

Paul S. Simmons, Somach, Simmons & Dunn, Sacramento, California, spoke about the Klamath Irrigation Project and the various legal and regulatory issues surrounding the water shortages and drought of 2001. Mr. Simmons also looked at the issues likely to influence the availability of water in future years. Among these issues are pending litigation, future administrative and/or legislative action, and the potential success or failure of dispute resolution processes.

Carl Ullman provided insight on the water rights of the Klamath tribes. Mr. Ullman looked at the crisis outside of the common "fish vs. farmers" clash in which the crisis is often portrayed, and discussed the many tribal and non-Indian communities that are involved and affected by the issues surrounding the Klamath Basin.

Finally, Sue Ellen Woolridge, Deputy Chief of Staff, Department of Interior, described the Basin's ecological diversity and gave an overview on the various species of wildlife found in the area. Ms. Woolridge also discussed the Klamath Project crisis from the perspective of the Department of Interior. Remarking on the lack of effective collaboration between the Department and tribal interests in regard to Indian water rights in the Basin, Woolridge mentioned that, "tribes are so hardened by pain and anger that they are unwilling to work for creative solutions." Woolridge mentioned that environmental groups active in the area must also accept a degree of blame for the present impasse because "they are bent on serving their interests regardless of the human costs."

LUNCHEON WITH KEYNOTE SPEAKER: RODERICK E. WALSTON, DEPUTY SOLICITOR, DEPARTMENT OF THE INTERIOR

This year's keynote speaker was Roderick E. Walston, the newly appointed Deputy Solicitor of the Department of Interior. Mr. Walston began his speech by giving a brief overview of the Office of the Solicitor including a look at the history of the office and his role as Deputy Solicitor. Mr. Walston then addressed two major issues affecting his office: the Endangered Species Act ("ESA"), and Tribal water rights.

Mr. Walston initially remarked that species not even heard of when the Water Law Conference first began twenty years ago are now crucial factors behind many water allocations. The Deputy Solicitor then noted the contrast between critical determinations made under state clean water acts, which often balance competing factors, and the ESA, which makes its determination that a species is endangered or threatened solely on the basis of the best available scientific evidence. Mr. Walston observed that a natural outgrowth of this is that many issues currently in litigation regarding the ESA go to the validity of the science used to determine critical habitat.

Mr. Walston observed that environmental groups were winning court battles over the ESA regarding "timing issues." For example, courts are rejecting the Fish and Wildlife Service's policy of delaying determinations regarding habitat designations and instead creating deadlines for the Fish and Wildlife Service. On the other hand, Mr. Walston did believe that developers and other similar interests were gaining ground by making various state and federal agencies consider economic factors when making their decisions.

Mr. Walston then turned to the issue of Indian water rights. After a brief review of the history behind the *Winters* doctrine and Indian reserved water rights, Mr. Walston outlined the policy under which his office operates in regard to Indian water rights. The Office of the Solicitor favors negotiated settlements as opposed to "time consuming" adjudications. Furthermore, Gale Norton's four "Cs," consultation, cooperation and communication in the service of conservation, drive the office's handling of all negotiations.

Mr. Walston concluded his speech with optimism as to the Department of Interior's future involvement regarding both ESA issues and Indian water rights. Mr. Walston also concluded with the belief that national interests should prevail, but that state and local governments need to be heard and that there is room for both interests.

BREAK-OUT SESSION ONE—PRACTICE SKILLS: DISCLOSURE, DISCOVERY AND SETTLEMENT IN COMPLEX WATER LITIGATION

In this first break-out session, the panelists discussed three aspects of water law litigation that are seldom addressed, yet essential to effective practice in the field.

From her prospective as a practitioner in Idaho, Josephine P. Beeman led off the session with an overview of disclosure requirements in water litigation. Beeman noted that although Federal Rule of Civil Procedure 26(a)(1) demands mandatory disclosure of non-requested information, many federal district courts have chosen to opt out of the initial disclosures requirement. Beeman also noted that in a review of the procedural rules in the western states, only Arizona, Colorado, and Utah follow the mandatory disclosure requirements of Federal Rule 26. To demonstrate how water practitioners have faced disclosure challenges in states without mandatory disclosure, Beeman detailed Idaho's Eastern Snake Plain Aquifer dispute between surface- and groundwater users.

John B. Draper continued the session with a lecture on discovery in water litigation. Referring to recent technological advances in the field, Draper's discourse focused on the unique challenges litigants now face in water litigation, and how to confront them. In particular, Draper addressed the growing use of data bases, FTP servers, and special software in order to satisfy water litigation discovery requirements. Draper acknowledged that while these new mediums allow for more efficient discovery on one hand, they nevertheless present problems such as inflated expenditures and technology sharing obstacles.

The session closed with a lecture on settlement in water litigation given by Hank Meshorer of the United States Department of Justice. Mr. Meshorer noted the natural propensity of water litigation to lead to a polarization of the parties involved. In order to foster settlement and avoid extended litigation in water cases, it is advisable for the central parties to restrict the involvement of peripheral interests in the settlement discussions. Environmental groups, in particular he said, often make settlement difficult. When settlement is achieved, Mr. Meshorer concluded, the agreement should be fair to all the parties, legally sufficient to the degree that the agreement would not spur litigation, and final, inasmuch as it will require no further judicial action.

BREAK-OUT SESSION TWO—ETHICS AND THE UNITARY GOVERNMENT: THE FEDERAL LAWYER AND HER CLIENT, AND CONSIDERATIONS OF THE PUBLIC GOOD

The Session Two panel reviewed some ethical issues that tend to arise among federal attorneys. Specifically, the panel spoke about: (1) the not-uncommon situation where multiple agencies' authorities are in conflict; (2) attorney representation of Indian tribes following federal employment; and (3) the conflicts between the public duty and client loyalty.

Jeffrey P. Minear of the Solicitor General's Office led off the session. He addressed "the legal and ethical issues that are implicated in litigation and water negotiations when one federal agency has regulatory or quasi-judicial authority over another."

The second speaker was V. Heather Sibbison. Sibbison is a former federal attorney who now represents Indian tribes. She addressed the unique problems that normally arise when federal litigators choose to discontinue their government employment. While federal statutes create many post-employment prohibitions, Sibbison noted that federal Indian Law practitioners are generally exempt from these prohibitions under the Indian Self Determination Act and Education Assistance Act of 1975.

Clive Strong's lecture on the federal theory of the unitary executive concluded the session. This theory posits that a dispute between two agencies of the Executive branch does not amount to a "case or controversy" within the Constitution's Article III jurisdiction for federal courts. Strong discussed the variety of approaches the states have taken to role conflicts where this theory is applicable.

BREAK-OUT SESSION FOUR—FEDERAL INDIAN RESERVED RIGHTS TO GROUNDWATER

Professor Robert Anderson from the University of Washington School of Law began the session by giving a legal overview of Indian Water Rights. Anderson revisited the creation of the *Winters* doctrine, in *Winters v. United States*, 207 U.S. 564 (1908). He noted the doctrine's consequence in establishing Indian reserved water rights. Anderson then discussed the significance of the 1952 McCarran Amendment, which allows the United States to be a defendant in a suit aimed at the adjudication of a water right. Finally, Professor Anderson reviewed Indian water rights settlement issues as presented in 55 Fed. Reg. 9223 (Mar. 12, 1990).

Harley R. Harris next offered a state and private perspective on federal Indian reserved rights to surface and groundwater. In regard to surface water, Harris pointed out that the state's legal regime is generally paramount; a state's adoption of the riparian, prior appropriation, dual, or permit system will usually control the

adjudication of a surface water right. Rights to groundwater, however, are often scrutinized within the confines of common law principles such as that of reasonable use. Turning to federal reserved rights, Harris noted that numerous federal and state courts have decided the extent of such rights under varying circumstances. This, he concluded, has led to the vague and open-ended nature of the doctrine of Indian reserved water rights.

Scott B. McElroy, of Boulder Colorado concluded the session with an examination of the present enforcement approach to reserved tribal water rights to groundwater. McElroy focused on two recent cases that came before the Arizona Supreme Court; *Gila III* and *Gila IV*. He noted that the *Gila IV* decision confirmed the notion the United States Supreme Court originally expressed in *Arizona v. California* that reserved rights must "satisfy the future as well as the present needs of the Indian Reservations." *Gila III*, he went on to say affirmed that groundwater may be set aside under the reserved rights system. The court was clear that whether the water source involved is underground or above ground is not a determinative factor.

DAY TWO

SESSION ONE—100 YEARS OF U.S. RECLAMATION: DEALING WITH SCARCITY AND GROWTH – PERSPECTIVES OF THE CURRENT AND FORMER COMMISSIONERS OF RECLAMATION

For the opening panel discussion on Friday morning, the current Commissioner of Reclamation and three former commissioners came together to discuss the successes and failures of reclamation over the years, and to discuss the future of the agency. Joining the panel was R. Keith Higgenson, appointed in 1977, Dennis B. Underwood, appointed in 1989, and the current commissioner, John W. Keys III.

President Bush, the elder, appointed Mr. Underwood as commissioner in 1989. According to Mr. Underwood, this was a period of confrontation between the new Republican President and Democratic controlled Congress, the beginning of a multi-year drought affecting the West, a period of growing conflict between environmental and economical interests, and a time of uncertainty for the Bureau of Reclamation and its employees. Mr. Underwood responded to the issues facing his agency by preparing a comprehensive strategic plan for the Bureau, enhancing human resources development, and establishing a corporate sense and business practices.

The next speaker was Mr. Higgenson who shared his recollections, as well as a splendid video show on the Bureau's "most significant failure:" the breakdown of the Teton Dam in Idaho on June 5, 1976. Mr. Higgenson showed the audience video footage that chronicled the leaks leading up to the Teton Dam's eventual failure. The Dam's failure resulted in the emptying the reservoir of about 250,000 acre-feet of water in five hours, cost eleven people their lives and resulted in

the payment of more than \$322 million in damages.

Finally, Mr. Keyes provided perspective and insight on his lifetime career in the Bureau. Mr. Keyes had spent time working for all the previous speakers on the panel, retired and then returned to reclamation to serve as commissioner. Mr. Keyes focused on the need to build consensus rather than conflict for the Bureau to succeed in the future.

SESSION TWO—LOOKING INTO THE FUTURE OF WATER MANAGEMENT: SELECTED BASIN ISSUES

The conference's final session provided examples of approaches to future water management in two vastly different regions: southern Nevada and New York City.

Kay Brothers of the Southern Nevada Water Authority began with a presentation on southern Nevada's growing water needs. Her presentation focused on the tremendous population growth in the Las Vegas area throughout the twentieth century. This unanticipated growth, Brothers observed, has forced the state to tap into unanticipated water resources. The most significant of these resources has been the Colorado River, which was not originally slated as a water source for the region. Brothers gave a brief overview of the Law of the Colorado River, touching on every legal device governing the river from the 1922 Colorado River Compact, to the 1974 Colorado River Basin Salinity Control Act. While Nevada's apportionment of the Colorado is still far less than that of other dependent states, the Southern region's population continues to grow at an inordinate rate, creating a concurrent growth in reliance on Colorado River water.

Mark D. Hoffer, general counsel for the New York Department of Environmental Protection, concluded the conference with his perspective on the New York City Watershed Memorandum of Agreement ("MOA") of 1997. He first detailed the history of the three supplies serving the city and the city's distribution system. Next, Mr. Hoffer discussed the challenges new federal drinking water regulations presented to updating these systems. While the City began to fashion a watershed protection program in 1990, it met with opposition from the watershed communities. The state became involved in 1995, and ultimately produced the MOA, which summarizes a consensus between the City and the watershed communities. The final MOA has five basic elements aimed at fulfilling federal law: (1) watershed land acquisition by the City; (2) new, updated City watershed rules and regulations; (3) City funding of watershed protection and partnership programs; (4) creation of watershed protection and partnership council; and (5) new filtration avoidance determination.

