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The Nineteenth Annual Water Law Conference Watershed Management: A New Governance Trend

CONFERENCE REPORT

THE NINETEENTH ANNUAL WATER LAW CONFERENCE WATERSHED MANAGEMENT: A NEW GOVERNANCE TREND

San Diego, California February 15-16, 2001

The Nineteenth Annual Water Law Conference provided two days of informative discussions on various watershed management issues. The conference opened with a keynote address by Professor Joseph L. Sax, followed by two morning sessions attended by all. In the afternoon, attendees selected from four breakout sessions focusing on tribal water issues, ethics, and various practice skills. The second day provided three additional sessions, including a comprehensive panel discussion addressing the pros and cons of watershed management, as well as those components that make a watershed management program successful. This report provides a summary of the comments presented in each session.

DAY ONE

KEYNOTE ADDRESS—PROFESSOR JOSEPH L. SAX

Professor Joseph L. Sax opened the conference with his keynote address identifying current issues in the watershed management movement. Professor Sax explained that the roots of the watershed concept are found in the common law, but emphasized that the modern era presents new and unique difficulties. First, Professor Sax stated watershed management is much broader than water management, as a watershed includes any land uses affecting water. Professor Sax noted that successful watershed management might require centralized administration, which conflicts with the current trend toward localized management. Second, Professor Sax identified the difficulty of how to measure success of watershed management when a watershed constitutes the medium for working towards the goal of biological restoration. Professor Sax's keynote address concluded with perhaps the central questions pertaining to watershed management: (1) what institutional structure is best fitted for large-scale managerial efforts?; and (2) how comprehensively can a managerial system function without collapsing under its own bulk and complexity?

SESSION ONE—THE EVOLVING ROLE OF ENDANGERED SPECIES ACT CONSULTATION IN WATERSHED MANAGEMENT

Melanie Rowland of the National Oceanic & Atmospheric Administration moderated Session One. Rowland's introduction focused primarily on the Endangered Species Act's ("ESA") section 7 jeopardy prohibition. Specifically, Rowland addressed how, with limited knowledge and resources, we can identify which activities in a watershed will or will not jeopardize an endangered species. Rowland stated that the panelists would address the advantages of fish and wildlife agencies' early involvement in projects that may require ESA consultation.

The first panelist, Tom Lindley of Perkins Coie LLP, outlined "successful" consultation. Lindley used the 93,000-acre Three-Mile Canyon Farm on the Columbia River as an example. The listing or potential listing of several species under the ESA has caused considerable controversy regarding the large operations of this farm. Therefore, the farm has attempted to create a win-win settlement with the Army Corps of Engineers ("Corps") that takes into account endangered/threatened species and economic impacts. Although definite advantages exist to working with the Corps and the National Marine Fisheries Service, the parties must address other problems. Lindley was hopeful this new consultation approach would result in a more effective way to address problems concerning watershed management.

The second panelist, Richard Opper, the Executive Director of the Missouri River Basin Association ("MRBA"), addressed ESA consultation in the context of the Missouri River Basin. Opper stated that the Missouri River Basin was one of the most unpredictable basins in terms of flooding and drought until Congress passed the Pick-Sloan Program, a part of the Flood Control Act of 1944 and the Bank Stabilization and Navigation Project. Both of these Acts significantly affect the ecological make-up of an area along the Missouri River that is larger than the state of Rhode Island. Opper asserted that in addition to ecological effects, the Acts failed to control flooding completely. The Missouri River flooded in 1993, 1995, 1996, and 1997. The Missouri Basin Governors formed the MRBA in 1981, and in 1995, the Corps asked MRBA to create a plan to address new issues. MRBA designed the plan to include input from many different organizations that incorporated issues concerning overall basin health, drought flow management, and recovery of threatened and endangered species within the basin. Opper noted that the resulting planning document is a valuable resource both for solving current issues and for drafting the necessary biological opinion for the United States Fish and Wildlife Service ("USFWS"). Currently, the Corps and the MRBA are developing a plan to incorporate the biological opinion.

The third panelist was Wayne White, Field Supervisor for the USFWS. White's presentation addressed the ESA's role in watershed management beyond the section 7 consultation process. White stated

that habitat loss is the main factor leading to species listing. Because watershed management is essentially ecosystem management at the watershed level, it fits well with the ESA's goals of species/ecosystem recovery, subject to many challenges. In order to address these challenges, watershed managers should prepare plans with the USFWS to make sure they are consistent with the ESA. White used the CALFED Bay-Delta Program to illustrate how section 7 relates to watershed planning and the complexities that arise in section 7 and watershed management plans. White concluded that use of this "programmatic opinion" accelerates the consultation process because planners have already analyzed the program's effects.

Opper added to White's presentation in stating that watershed plans should include land uses within the watershed. One way to accomplish this is to integrate Habitat Conservation Plans ("HCP"). Opper used the Natomas Basin HCP as an example, since it included urban development, farming, and habitat protection. Opper also noted that watershed management plans should consider non-listed species in the event the USFWS lists one in the future.

SESSION TWO—CREATIVE PROGRAMS AND PROJECTS TO INCREASE WATER SUPPLY

Douglas W. MacDougal of Schwabe, Williamson & Wyatt, P.C. moderated Session Two. MacDougal presented an overview of creative programs and projects to increase water supply. He stated that the purpose of Session Two was to discuss various ways to "hold back and redistribute" available water to meet two identified needs: (1) population growth, and (2) sufficient instream flows for wildlife. The panelists presented three different approaches for meeting water demands: watershed conservation, management, and storage.

The first panelist, Alf W. Brandt of the Regional Solicitor's Office, United States Department of the Interior, spoke on the use of environmental water accounts ("EWAs") and used the CALFED EWA as an example. The CALFED EWA was a solution to several problems the Sacramento-San Joaquin River Delta area faced. Brandt identified some of the problems, which included the listing of species under the ESA, the Central Valley Project Improvement Act, and the rejection of state water quality standards in the area. EWAs establish a water budget, which is more flexible than placing restrictions on water operations in order to meet environmental needs. Brandt noted that some water users objected to the CALFED EWA because they believed it would provide water for fishery needs and reduce their water supply. However, an EWA is designed to identify environmental water needs early on to reduce the need for substantial reductions at a later time. Brandt then addressed the fact that agencies operating EWAs have faced several managerial challenges. These challenges include: (1) accounting for water use; (2) controlling water assets/project operations; (3) judging risk; (4) integrating other environmental

supplies; (5) preparing a finance plan; (6) providing for increased deliveries; (7) acquiring water; and (8) establishing long-term environmental water development. In addition, Brandt identified legal issues the agencies have faced, including: (1) federal-state coordination/supremacy; (2) ESA commitments; (3) water rights versus contract rights; (4) dependence on water transfers; and (5) operational flexibility under water rights.

The second panelist, Martha O. Pagel of Schwabe Williamson & Wyatt, addressed mitigation and mitigation banking strategies in Oregon's Deschutes Basin, an area experiencing rapid population growth. One piece of legislation affecting water use in the area is the Oregon Scenic Waterway Act, which requires a certain amount of instream flow in a designated waterway. Pagel explained that the Oregon Water Resources Department created an advisory group and steering committee to develop a mitigation strategy that considers instream flows. The mitigation strategy's main goal was to "directly replace the projected impact of a groundwater use by adding protected flow to the river." An applicant must include a mitigation plan when applying for a new groundwater right. In addition, the advisory group created a "mitigation credits and banking" program. Pagel concluded by addressing the three main issues that arise in mitigation programs: (1) qualitative versus quantitative mitigation; (2) canal lining and piping; and (3) enforcement.

The third panelist, Jeanne Zolezzi of Herum Crabtree Brown, addressed aquifer storage and recovery ("ASR") in California. Three main types of aquifer storage and recovery exist: in-lieu surface water use, direct recharge, and groundwater banking. Zolezzi defined each in turn. In-lieu surface water use involves using surface water, rather than groundwater, in areas where groundwater is a primary source. Direct recharge moves surface water directly into a groundwater basin. Groundwater banking recharges water from imported supplies and recovers water for export. Zolezzi noted that governmental agencies, environmental groups, and private corporations all support ASR. However, despite the support for ASR, local agricultural interests and overlying users often oppose the projects out of concern that ASR is really a plan to reallocate their groundwater rights to other users. Zolezzi concluded that adjudications and groundwater storage agreements are the most promising possible solutions to the conflict.

BREAK-OUT SESSION ONE—TRIBAL WATER ISSUES IN WATERSHED MANAGEMENT

The first Break-Out Session concerned tribal water issues within watershed management. The moderator, Lorna Babby of the Native American Rights Fund, addressed tribal regulatory authority over water resources as a major consideration in watershed management and planning. Babby pointed out that since tribes possess the power to regulate conduct that directly or indirectly affects them, tribal

sovereignty guarantees that the tribes have a say in the continuing discussion regarding water use and protection.

After Lorna Babby introduced the topic, Michael Connolly, the President and Chief Executive Officer of Laguna Resource Services, Inc., discussed basin planning with regard to tribal participation. Connolly provided a tribal perspective and contended that treating tribes as states, where water quality regulation under the Clean Water Act is concerned, was beneficial to all parties involved. Connolly expressed that “reciprocity in interest” exists, whereby all parties would reap benefits from tribal involvement.

Next, Tim Vollmann, the former Associate Solicitor for Indian Affairs, United States Department of Interior, provided a federal perspective and focused upon tribal water rights as related to the ESA. Specifically, Vollmann discussed tribes having to undergo section 7 consultation in accordance with the ESA to obtain water project approval. Vollmann noted that often tribes that possess unused senior water rights do not, in fact, have senior rights. Vollmann explained that under the USFWS’s or the National Marine Fisheries Service’s (collectively, “Service”) regulations, the party who completes section 7 consultation first gets seniority to the water. Additionally, Vollmann stated that the Service has refused to consider the “future exercise of senior water rights” in dealing with the section 7 consultation issue. As a possible solution, Vollmann suggested pursuing settlements regarding tribal water rights, as opposed to decades of uncertain adjudication. He remarked that such settlements could provide solutions in the form of federal funding, watershed improvements, and a water supply for tribal use that is also accessible to non-tribal communities.

Finally, Jeff Fassett, the President of Fassett Consulting LLC, gave a non-tribal perspective and discussed the realities of water administration in an intricate, multi-jurisdictional river basin. Fassett drew upon his experience as the State Engineer for the State of Wyoming where he dealt with the Wind River Basin, which contains both tribal and non-tribal communities. Fassett emphasized the importance of state coordination of efforts with tribal officials concerning water issues in order to produce continuing dialogue, education, and information exchange. Fassett stressed the importance of establishing communication between key participants within the affected tribal and non-tribal communities, even though such communication may consume considerable time, include a variety of partakers with differing interests, and result in an adversarial situation.

BREAK-OUT SESSION TWO—ETHICS: CONFIDENTIALITY ISSUES IN WATERSHED PROCESSES

The second Break-Out Session concerned ethical issues likely to arise in relation to water allocation matters, discharges, and other water-related environmental topics. The moderator, Irma S. Russell of

the University of Memphis School of Law, stated that this discussion focused on ethical issues that arise in connection with consultants and public entities. Specifically, the session addressed issues related to the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), including the Model Rule 4.2 contract prohibition, the Model Rule 1.6 prohibition against disclosure, and the issues presented in Model Rules 1.7 through 1.11.

The first speaker, Bradley F. Tellam of Barran Liebman LLP, addressed the legal and ethical standards that govern attorney interactions with experts. Tellam first discussed basic issues surrounding attorney contact with experts including expert fees, whether a lawyer may direct an expert to destroy notes or other documents the expert takes during retention, and the problem of false expert testimony. Tellam then addressed confidentiality of expert information, which he argued generally depends upon the expert's status. Tellam's final discussion concerned contact and conflict with experts. Tellam explained that set procedures often govern contact with opposing parties' expert witnesses, and, thus, Tellam advised attorneys to carefully follow these rules. In addition, Tellam cautioned attorneys to pay close attention to the Model Rules when dealing with experts who have "switched sides," or experts who will not testify.

The second speaker, Cynthia F. Covell of Alperstein, & Covell P.C., discussed confidentiality, disclosure, and communication when dealing with government agencies and employees. Covell noted that while client identification helps determine the extent of confidentiality, Covell warned that determining the proper level of confidentiality becomes complicated when trying to discern the identity of a government attorney's client. If the public is the client, the lawyer needs to consider whether a "higher duty" exists, and what that duty might be. Covell also identified that some confusion exists with regard to communications with government attorneys. For example, in some states, such as Colorado, the Model Rules essentially treat private and government lawyers the same. However, in other places, such as Washington, D.C., a government lawyer must act to further the public interest.

BREAK-OUT SESSION THREE—PRACTICE SKILLS: NEGOTIATION AND EVIDENTIARY ISSUES CONCERNING SCIENTIFIC MODELING

The third Break-Out Session pertained to negotiation and evidentiary issues concerning scientific modeling. The moderator, Gary Weatherford of Weatherford & Taaffe, LLP, began the session by emphasizing that scientists increasingly use mathematical models in the search for scientific facts on which to base and influence water resource decisions. Weatherford stated that attorneys utilize computer models for a variety of illustrative purposes, including reconstruction of past runoff in a watershed or basin, and reproduction of events. Weatherford contended that models could be used for prediction

purposes, data organization, process explanation, and problem solving. Weatherford cautioned, however, that predictive models could not meet an impossible standard of accuracy, since the future is unpredictable.

The first speaker, Steven Larson of S.S. Papadopoulos & Associates, Inc., discussed models in engineering, science, and litigation. Larson asserted that individuals could use models for varying purposes, such as forecasting, historical analysis, alternative historical analysis, design, and performance assessment. Moreover, Larson explained that two types of models exist: (1) an empirical model, which conveys relationships among variables; and (2) a deterministic model, which conveys mathematical descriptions of a certain physical process—such as momentum or continuity. Larson stated that the modeling process includes both constructing and validating the models.

The second speaker, Stuart Somach of Somach, Simmons & Dunn, discussed the use of computer models in the courtroom. Somach stressed the overall importance of using computer models in the practice of environmental law. Somach asserted that the use of models in the courtroom is generally similar to using other types of demonstrative evidence. Somach contended that when an attorney seeks to admit models, an attorney should initially consider: (1) the admission of the model's input for the truth of its contents; and (2) the admission of the model's assumptions/formulae and operations as scientific evidence. Somach also stated that models have utility both inside and outside of a courtroom. If such were not the case, then, in his view, models' ultimate value and reliability would be questionable. Furthermore, Somach advocated that attorneys use models as an effective way to transform computer output into a "picture" of what such output depicts. Somach also recognized that computer models are useful in the legal field regarding water quality.

BREAK-OUT SESSION FOUR—PRACTICE SKILLS: TRANSACTIONAL DUE DILIGENCE

Break-Out Session Four addressed: (1) state water rights basics; (2) water right identification; (3) water right ownership and title examination; (4) validity of a water right, including nonuse, abandonment, and forfeiture; (5) security of priority; (6) water quality impact on water availability; (7) change of use and transfer issues; and (8) whether the water is wet. Each panelist addressed the issues for one of six states, Arizona, California, Colorado, Nevada, New Mexico, and Oregon. The panelists included Elizabeth Newlin Taylor of Ryley, Carlock & Applewhite, for Arizona and New Mexico; Scott Shapiro, of Downey, Brand, Seymour & Rohwer, LLP, for California; Michael F. Browning of Porzak, Browning, & Bushong, LLP, for Colorado; Sylvia Harrison of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, for Nevada; and Laura A. Schroeder of Schroeder Law Offices, P.C., for Oregon. While each state approaches the eight

topics differently, similarities do exist.

DAY TWO

SESSION THREE—BEYOND ALLOCATION: EQUITABLE APPORTIONMENT AND INTERSTATE WATERSHED PROTECTION AND MANAGEMENT

Jerome Muys of Muys & Associates, P.C. opened day two of the conference with a presentation pertaining to equitable apportionment and interstate watershed protection and management. Muys focused on United States Supreme Court decisions that produced equitable apportionments of interstate rivers and interstate compacts. Muys stated that, traditionally, the Supreme Court focused on quantitative allocation, rather than management of either the allocations or the watershed that produces the water to satisfy the quantitative allocations. Muys recognized that in *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922), the Supreme Court added “reasonable use” as a criterion to an equitable apportionment analysis. Further, in *Colorado v. New Mexico*, 459 U.S. 176 (1982), 476 U.S. 310 (1984), he stated that the Supreme Court expanded on the “wasteful uses” concept. Muys noted the Supreme Court in *Nebraska v. Wyoming*, 515 U.S. 1, 11–13 (1995), pronounced that, with regard to equitable apportionment, consideration of evidence of an upstream state’s proposed actions impacts on downstream wildlife and wildlife habitat is appropriate. He further discussed that the Clean Water Act (“CWA”) has superseded some earlier Supreme Court decisions dealing with water quality issues. Muys argued that international law is ahead of the United States in the area of equitable apportionment because international law explicitly imposes watershed protection and management duties upon nations sharing international watercourses. To negate the Supreme Court’s lack of watershed management and protection consideration within equitable apportionment cases, Muys suggested that the United States government get more involved in such disputes—especially for the purpose of the administration and oversight of comprehensive regulatory programs that largely impact water rights, such as the CWA and the ESA. As an additional solution, Muys suggested Congress could repeal subsection (c) of the McCarran Amendment, 43 U.S.C. § 666, which provides that the Amendment’s inclusive sovereign immunity waiver for river system water adjudications is not applicable to any United States’ controversy in the Supreme Court concerning states’ rights to use the water of any interstate stream.

SESSION FOUR—INTERJURISDICTIONAL WATERSHED MANAGEMENT

The first panel on day two addressed interjurisdictional watershed management. The moderator, Jennifer Gimbel, an Assistant Attorney General within the Colorado Attorney General’s Office, discussed

section 7(a) of the ESA. Gimbel stated that section 7(a) does not mandate the consideration of Upper Basin operational effects on Lower Basin species. Specifically, Gimbel referenced the situation in which the Defenders of Wildlife and other environmental organizations filed a lawsuit against the Bureau of Reclamation for the Bureau's alleged failure to abide by the ESA in analyzing its lower Colorado River operations.

The first panelist, Charles DuMars, a professor at the University of New Mexico School of Law, discussed interjurisdictional compacts as tools for watershed management. DuMars stated that current water laws are often contradictory due to the varying interests that prompt each law. DuMars argued that new agreements for the common use of transboundary streams might be the solution to contradictory water laws. DuMars delineated steps parties to new agreements must follow in order to settle water-related disputes successfully. First, these new agreements need common data compilations. Second, at least one party to the agreement should build and calibrate a hydrologic model of the appropriate water system. Third, the parties must construct at least one model that depicts current conditions and future scenarios to illustrate both water supply and water quality effects that parties either want to achieve or avoid. Fourth, the parties should engage in discussions and negotiations. Finally, when the parties have mutually agreed upon negotiation results, the parties should integrate their agreement into a memorandum of agreement. DuMars noted that impartiality of the parties is crucial for the success of such new agreements. Furthermore, DuMars asserted that compacts are useful between individual states and between states and Indian tribes.

The second panelist, Kara Gillon of the Defenders of Wildlife, discussed the Lower Colorado River and the Middle Rio Grande. Gillon presented the Colorado River and the Rio Grande as informative case studies of the relationship between political boundaries and watersheds/river basins in resource management. Gillon highlighted the perceived tension between a state and federal governmental agencies that implement environmental laws. Gillon stated that watershed protection attempts face the problem of surmounting fragmented, incomplete, and shared regulatory schemes existing from and within the three levels of government.

The third panelist, James Lochhead of Brownstein, Hyatt & Farber, P.C., differentiated the experiences in bi-national watershed management of the Great Lakes from the experiences of the Colorado River. Specifically, Lochhead distinguished between state law, federal law, international law, dual country agreements, and recent events associated with the Great Lakes and Colorado River. Lochhead concluded that severing an allocation formula creates "irreconcilable" problems. Additionally, once parties establish frameworks, they must move forward from that point to implement them. Further, Lochhead advocated solving issues at their source and not solving problems on other states' backs. Lastly, he believed that watershed management could be achieved, via cooperation, without breaking up

laws/compacts that already exist.

SESSION FIVE—WHAT MAKES WATERSHED PROCESSES WORK?

The last session of the conference involved a discussion regarding what makes watershed processes work. Reed Benson of WaterWatch of Oregon, discussed concerns about watershed processes. Benson pointed out that, generally, conservationists are skeptical about watershed processes. Benson defined watershed groups as a collection of stakeholders and decision-makers who congregate to take actions that could affect the health, management, or use of natural resources in a specific watershed. Benson identified several negative aspects of watershed groups. First, Benson stated that watershed groups often lack a “mission” because they focus on reducing controversy over “hot” issues, instead of focusing on protection and/or restoration of environmental health. Second, Benson contended that watershed groups suffer from a lack of diverse “membership” involvement. Further, some watershed groups lack environmentally focused members. Third, Benson stated that watershed groups present a “management” problem in that they are closed to the public and are not really accountable to anyone. Additionally, Benson mentioned that few watershed groups function under clearly established standards or processes, and no way exists to dispute their actions. Fourth, Benson stated that “motivation” could be problematic when key players show up to the table advocating specific things from the watershed group process. In contrast, Benson emphasized that some positive aspects of watershed groups exist. First, watershed groups provide a mechanism to bring stakeholders to the table to talk. Second, watershed groups allow for the identification and implementation of projects. Third, watershed groups instigate stewardship. Fourth, watershed groups provide a mechanism to inform the public.

Second, Mark Smith, the Director of Water Policy in the Massachusetts Executive Office of Environmental Affairs, discussed the results of the Massachusetts watershed initiative. Smith introduced the Massachusetts’ watershed program, which identifies statewide policy needs and establishes watershed teams to test new approaches to address new environmental issues. Smith stressed the essential feature to Massachusetts’ watershed initiative was the creation of multi-discipline watershed teams in each of the major watersheds and the assignment of full-time team leaders to coordinate the teams’ activities. Another essential aspect of the watershed initiative is the fact that “no prioritization between the watersheds” exists. Smith attributed the watershed initiative’s success to the teams’ empowerment, funding given to public interest groups, and to the existence of continuous dialogue.

Finally, William Stelle, Jr. of Preston Gates & Ellis, LLP, spoke on the ingredients necessary for watershed management initiatives. Stelle

believed that watershed management initiatives are still in an experimental period. Thus, Stelle advocated allowing the experimental period to “run its course” before watershed management initiatives are widely implemented. Stelle argued that the two key ingredients of watershed management is the recognition of (1) the increasing adverse affects on landscapes due to population growth; and (2) better science, to provide an improved understanding of management inadequacies. Stelle presented the essential ingredients for watershed management programs to proceed successfully. First, “failure” must exist, because without “failure” watershed growth is difficult to perceive. Second, “consequences” must stem from the “failure(s).” Third, “local leadership” is needed to build watershed management programs. Fourth, “capacity” is necessary to understand the institutional and technical needs that will empower people to know more on different scales. Last, people need to foster “inventiveness” to develop new solutions.

Sara Franklin and Rebekah King