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The Federal Impact on State Water Rights
(Summer Conference, June 11-13)

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AGENDA: The Federal Impact on State Water Rights

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Agenda

June 11, 1984

- 8:00 a.m. Registration
- 8:45 a.m. **Introductory Remarks and Welcome**
Dean Betsy Levin and Co-Chairmen James N. Corbridge, Jr., and Lawrence J. MacDonnell
- A 9:00 a.m. **Introduction to Reserved Water Rights**
Ralph W. Johnson, Professor of Law, University of Washington, Seattle, Washington
The speaker will explain the development of the doctrine of reserved water rights, identify the major types of reserved rights and discuss the major issues arising under this doctrine. K
- 10:30 a.m. Refreshment break
- B 10:45 a.m. **Quantification of Indian Rights—Current Developments**
Louis F. Claiborne, Deputy Solicitor General, U.S. Dept. of Justice Washington, D.C.
The focus of quantification efforts has shifted in recent years from water for federal purposes to the claims of Indian nations. The scope of Indian claims and recent judicial developments will be addressed.
- 12:00 noon **Luncheon Program: Developments in Federal Water Policies and Programs**
Harold W. Furman, II, Deputy Assistant Secretary for Water and Science, Dept. of Interior, Washington, D.C.
- C 1:30 p.m. **Quantification of Indian Rights: Problems of Proof**
Harry R. Sachse, Sonosky, Chambers, Sachse & Guido, Washington, D.C.
D
Indian reserved rights raise special problems associated with verification of the claims. The speaker, an attorney experienced in litigating Indian water claims, will discuss methods of establishing the scope of these rights including the use of expert witnesses as well as some of the problems in this area.
- 2:45 p.m. Refreshment break
- E 3:00 p.m. **The Role of the State Courts in Adjudicating Indian Water Rights**
Jon L. Kyl, Jennings, Strouss & Salmon, Phoenix, Arizona
A continuing cause of controversy is the role of state as opposed to federal courts in determining the scope and priority of Indian water rights. The current legal status of this debate will be explained and analyzed.
- F 4:00 p.m. **Negotiation as a Means of Quantifying Indian Water Rights**
Joseph R. Membrino, Office of the Solicitor, Department of the Interior, Washington, D.C.
Negotiation between Indian nations and competing water users has received increasing attention as a means of avoiding costly and time-consuming litigation. Several examples of attempted negotiations in this field, both successful and unsuccessful, will be discussed.
- 5:30 p.m. Reception at the University Memorial Center
- 6:30 p.m. Dinner for all participants

June 12, 1984

- G 9:00 a.m. **Legislative Approaches to Quantification of Indian Water Rights**
James M. Bush, Evans, Kitchel & Jenckes, Phoenix, Arizona
Some Indian water claims have been settled by legislation passed by Congress. The effectiveness of these solutions will be discussed as will be the prospects for future legislation as a means of settling Indian water claims.
- 10:00 a.m. Refreshment break
- H 10:15 a.m. **The Transfer and Use of Reserved Water Rights Within the Framework of Indian Allotments**
Professor Richard B. Collins, University of Colorado School of Law, Boulder, Colorado
The transfer of land held by both Indians and non-Indians under the Allotment Act has particularly awkward implications for the status of

Indian reserved rights. This presentation will probe the problems created and discuss recent court decisions which have an impact on water and Indian allotments.

11:30 a.m. Lunch (on your own)

1:15 p.m. **Panel Discussion: The Future of Indian Water Rights Claims**
Charles B. Roe, Jr., Office of the Attorney General, Olympia, Washington

The speaker will summarize the discussion of Indian water rights and then moderate a panel discussion on future issues. The panel will be comprised of previous speakers.

3:00 p.m. Refreshment break

3:15 p.m. **Instream Flows as Reserved Rights on Federal Reservations after U.S. v. New Mexico**
Hank Meshorer, Department of Justice, Washington, D.C.

The 1978 case of *U.S. v. New Mexico* marked a significant turning point for the United States in establishing instream flows on federal land through the doctrine of reserved rights. The approach of the U.S. to such rights in the period since that landmark decision will be discussed.

4:15 p.m. **Effects of the Clean Water Act on Water Availability and Development**

Paula C. Phillips, Assistant Attorney General, Denver, Colorado

The interaction between water quality controls under the Clean Water Act and water allocation under the prior appropriations system will be analyzed in this presentation.

5:15 p.m. Reception on the lawn

June 13, 1984

9:00 a.m. **Wetlands Preservation and the Protection of Endangered Species as Limits on Water Development**

A. Dan Tarlock, Professor of Law, Chicago/Kent Law School, Illinois Institute of Technology, Chicago, Illinois

Section 404 dredge and fill permits affect water development. Section 7 of the Endangered Species Act requires that federal agencies not undertake actions which would jeopardize endangered species. These mandates, along with general efforts at wetlands preservation, have a potentially disruptive effect on water supplies for other uses. The speaker will discuss the implementation of these two programs as well as recent significant litigation.

10:30 a.m. Refreshment break

10:45 a.m. **Panel Discussion: Section 404 of the Clean Water Act and Section 7 of the Endangered Species Act—Potential Impacts on Water Supplies**

Robert J. Golten, Moderator, National Wildlife Federation, Boulder, Colorado

Gregory J. Hobbs, Davis, Graham & Stubbs, Denver, Colorado

Wendy C. Weiss, State Attorney General's Office, Denver, Colorado

Margot Zallen, Regional Solicitor's Office, Denver, Colorado

12:15 p.m. **Luncheon Program: David H. Getches**, Executive Director, Colorado Department of Natural Resources

1:45 p.m. **Groundwater Control Programs Affecting Water Development**
Arthur L. Littleworth, Best, Best, & Krieger, Riverside, California

The speaker will discuss groundwater control programs under RCRA and the UIC programs under the Safe Water Drinking Act as well as the implications for groundwater development resulting from the EPA decision to allow the states to retain primary responsibility in this area.

3:00 p.m. Refreshment break

3:15 p.m. **FERC, PURPA, and the Federal Power Act**

Lawrence J. Wolfe, Assistant Attorney General, Cheyenne, Wyoming

The licensing of small hydropower projects and the sale of the power, along with jurisdictional disputes which have arisen over the control of this process, will be considered.

4:30 p.m. Adjournment

NATURAL RESOURCES LAW SHORT COURSES

CONFERENCE ORGANIZERS



JAMES N. CORBRIDGE (A.B. English, Brown University '55, LL.B. Yale Law School, '63) is Professor of Law at the University of Colorado School of Law, specializing in water law and mining. He was Vice Chancellor for Academic Affairs at the University of Colorado, '74-'77, and Visiting Fellow at the Institute for Advanced Legal Studies at the University of London, '78-'79. His publications include "Legal Structures for International Control of Weather Modification Techniques," International Conference on Water for Peace (with Moses), "Weather Modification--Law and Administration" (with Moses). He is a past member of the U.S. Delegation to the

International Conference on Water for Peace and BUILD Conference on Water Resources Engineering.

DAVID H. GETCHES (A.B. '64, Occidental College; J.D. '67, University of Southern California Law School) was appointed Director of the Colorado Dept. of Natural Resources in August 1983. He is on leave as an Associate Professor of Law at the University of Colorado School of Law. Previously he had a law practice in Boulder, Getches & Greene, and was Directing Attorney for the Native American Rights Fund. He has taught at the University of Denver School of Law, the University of Alaska Center for Northern Education Research, and the University of California at San Diego. His publications include Cases and Materials on Federal Indian Law (with Rosenfelt and Wilkinson); Water Law in a Nutshell for West Publishing; and "Water Rights on Indian Allotments." He is on the Editorial Board of Cohen's Handbook of Federal Indian Law.



CONFERENCE ORGANIZERS (Con't)

LAWRENCE J. MacDONNELL (B.A. Political Science, University of Michigan, 1966; J.D. Natural Resources Law, University of Denver College of Law, 1972; and Ph.D. Mineral Economics, Colorado School of Mines, 1974) became Director of the Natural Resources Law Center in November 1983. Prior to that he was a research economist at the Denver Research Institute and Adjunct Professor at the Graduate School of Business and Public Management at the University of Denver, 1980-83. He has served as a consultant to the Colorado Office of Energy Conservation, as an instructor and course director for the Colorado Outward Bound School, as Assistant Professor in the Dept. of Mineral Economics at the Colorado School of Mines, and as a Special Consultant to the U.S. House Committee on Interior and Insular Affairs. He is a member of the Colorado Bar Association and the Association of Environmental and Resource Economists.



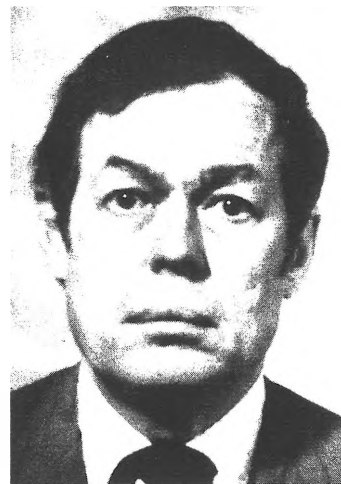
FACULTY: FEDERAL IMPACT ON STATE WATER RIGHTS, JUNE 11-13, 1984



JAMES M. BUSH is a partner and chairman of the Executive Committee of Evans, Kitchel & Jenckes in Tucson, with a practice in water, natural resource and tax law as related to the mining industry. His B.A. and J.D. are from the University of Arizona (1948 and 1950). He served in the U.S. Air Force in World War II and the Korean War. His memberships include the National Conference of Commissioners on Uniform State Laws, the American Law Institute, the Indian Reserved Water Rights Committee of the Western Regional Council, the Board of Directors of the Central Arizona Project Association, chairman of the Government Affairs

Committee of the Arizona Mining Association, and a member of the Legislative Committee of the State Bar of Arizona.

LOUIS FENNER CLAIBORNE (J.D. Tulane Law School, 1953) has had a varied legal career, encompassing serving as law clerk to a federal judge, private practice in Louisiana, Assistant District Attorney in the State system, teaching law, practicing as an English barrister, and serving as Assistant, then Deputy Solicitor General of the United States. In the last role, he has orally argued some 70 cases. Among these were a substantial number of Indian cases, from Menominee Tribe v. United States, 391 U.S. 404, twice argued in 1968, to Three Affiliated Tribes v. Wold Engineering, No. 82-629, argued last November and not yet decided. During most of his time as Deputy Solicitor General -- spanning some dozen years, with a long break between -- Claiborne has been in charge of all government litigation in the Supreme Court involving land or water or Indians. This, of course, includes the three recent cases dealing with Indian water rights (Arizona v. California, Nevada v. United States, and Arizona v. San Carlos Apache Tribe), the first and last of which he orally argued.



RICHARD B. COLLINS is Associate Professor of Law at the University of Colorado School of Law, specializing in courses in property, constitutional law, and trial practice. His B.A. is from Yale, and LL.B. from Harvard University Law School. He served as Legal Services Attorney (1967-75); as Staff Attorney for the Native American Rights Fund (1975-82), and is on the Editorial Board of Cohen's Handbook of Federal Indian Law. He is the author of "Implied Limitations on the Jurisdiction of Indian Tribes."



HAROLD W. FURMAN, II was named Deputy Assistant Secretary for Water and Science by Secretary of the Interior William Clark in December 1983 to oversee the operations of the Bureau of Reclamation, Bureau of Mines, and the U.S. Geological Survey. Previously Furman served as Deputy Assistant Secretary for Land and Water Resources, and as Special Assistant to the Commissioner of Reclamation, involved with the implementation of the Reclamation Reform Act of 1982. Before joining the Bureau of Reclamation, Furman was a member of the staff of U.S. Senator Paul Laxalt of Nevada, serving as legislative assistant and counsel on

natural resources issues. He was previously associated with the firm of Woodburn, Wedge, Blakey, and Jeppsen in Reno. His B.A. in political science is from the University of Southern California, and J.D. from the USC Law Center.

ROBERT GOLTEN has been Senior Counsel and Director of the National Wildlife Federation's Rocky Mountain Resource Center at the University of Colorado School of Law since 1978, involving natural resources law, environmental litigation, and clinical teaching. Previously he has served as Counsel for the NWF in Washington, D.C. 1974-78; as criminal trial attorney and chief of the Mental Health Division of the Public Defender's Office in Washington, 1970-74; as Assistant General Counsel, Office of Economic Opportunity (General Counsel, Job Corp), Washington, 1965-69; as Staff Attorney for the Dept. of Justice Tax Division 1962-65; and as a private attorney associated with Jenner & Block in Chicago, 1959-61. He has been an Adjunct Professor at the American University Law School, the George Washington University, and the University of Colorado Law School. He was recently honored in Who's Who in American Law (3rd edition, 1983).



GREGORY J. HOBBS, JR. is a partner with Davis, Graham & Stubbs in Denver, with clients including the Northern Colorado Water Conservancy District, the Mission Viejo Water and Sanitation District, and the Colorado Water Congress. He was Assistant Attorney General and First Assistant Attorney General for Natural Resources in Colorado from 1975-78, and Enforcement Attorney for the U.S. EPA, Region VIII, Denver, 1973-75. He is a member of the Colorado Air Quality Control Commission, Governor Lamm's Metropolitan Water Roundtable, and the Industrial Waste Committee of the Colorado Association of Commerce and Industry. His B.A. is from Notre Dame, and he did graduate work in Latin American Studies at Columbia University before entering the Peace Corps. His J.D. is from the University of California in Berkeley.



RALPH W. JOHNSON is a Professor of Law at the University of Washington School of Law. His B.S. is from the University of Oregon, and J.D. from the University of Oregon School of Law. He has a Diploma from the Hague Academy of International Law, Center for Studies and Research, and is author of numerous publications, including Weather Modification in the Public Interest (with Fleagle, Crutchfield and Abdo); Cleaning Up Europe's Waters: Economics, Management, and Policies (with Brown); and Coastal Zone Law and Policy (with Goldsmith). In 1981-82 he was Visiting Professor at the Harvard Law School.



JON L. KYL, a partner with Jennings, Strouss & Salmon in Phoenix, Arizona, has a B.A. with honors and an LL.B. from the University of Arizona. He has been a member of the Board of Litigation for the Mountain States Legal Foundation, a member of the Drafting Committee of the 1980 Arizona Groundwater Management Act, and the ABA's Natural Resources Section. He has been a lecturer for the Arizona Bar Association's seminar on Arizona Groundwater Law and for the University of Colorado's Natural Resources Law Center's short course on Interbasin Transfers in 1982. He is Chairman-elect of the

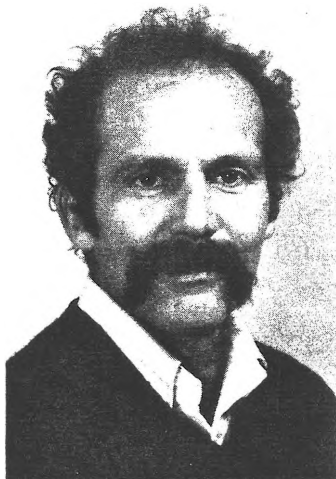
Phoenix Metropolitan Chamber of Commerce, is on the Board of Directors of the Arizona Academy, the Arizona Tax Research Association, the Arcadia Water Company, and the Victim/Witness Foundation. He is Counsel for the Salt River Project and the Arizona Petitioners in State of Arizona v. San Carlos Apache Tribe.

ARTHUR L. LITTLEWORTH, Senior Partner of the law firm of Best, Best & Krieger, graduated from Yale University, holds a M.A. degree from Stanford, and is a graduate of Yale Law School. He is a specialist in water rights law and was one of two practicing lawyers appointed to the Governor's Commission to Review California Water Rights Law. He acts as general counsel for a number of water districts and cities, including Pasadena, Ventura and Long Beach. He is presently in trial representing the large East Bay Municipal Utility District defending its federal contract to take water from the American River.

He has extensive experience in groundwater basin and stream system adjudications, groundwater quality lawsuits, environmental lawsuits, and is involved in the Mono Lake litigation. He also represents several State Water Contractors in the Delta water rights litigation, arising out of Decision 1485 of the State Water Resources Control Board. He is also deeply involved with current California legislative efforts to develop additional water supplies while still protecting the environmental and area of origin needs.



JOSEPH R. MEMBRINO has been Assistant Solicitor for Water and Power in the Division of Indian Affairs at the Department of the Interior since November 1982, dealing with negotiation of Indian water rights claims and the supervision of litigation preparation regarding Indian reserved water rights. His A.B. in English is from Georgetown University (1968) and J.D. from Boston College School of Law (1971). He worked for Federal Legal Services in Waterbury, Connecticut from 1971-72 and at the Native American Rights Fund in Boulder, Colorado, 1972-74. From 1974-76 he traveled extensively around the world before joining the Department of Interior in 1976 as an Attorney Advisor. He is a member of the Connecticut and District of Columbia Bar Associations.



HANK MESHORER is Chief of the Indian Resources Section of the U.S. Dept. of Justice. His B.A. is from Clark University (1963) and J.D. from Southern Methodist University (1966), where he was a contributing writer to the Journal of Science, Technology and Law. After graduation he served in the Marine Corps in Southeast Asia. From 1970-80 he served as Senior Trial Attorney in the Land and Natural Resources Division of the U.S. Dept. of Justice in both Washington, D.C. and Denver, representing the U.S., its agencies, and Indian tribes in both state and federal courts in some of the most significant water and environmental issues of the decade. In 1974 he received an LL.M. in Natural Resources and Environmental Law from George Washington University, and he expects to receive an M.S. in Law and Society from Denver University this year.



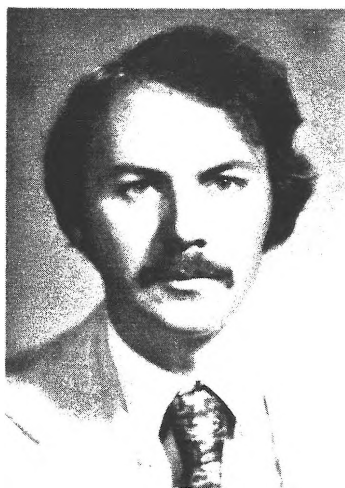
PAULA PHILLIPS is an Assistant Attorney General in the Natural Resources Section of the Colorado Attorney General's office. She has had a private practice in natural resources litigation, including hardrock mining law; federal water quality, public land, wilderness and environmental policy laws; and state administrative, mined land reclamation, radiation control and water quality laws. From 1977-80 she was regional counsel for the Denver office of the Environmental Defense Fund. In 1975-76 she was a law clerk for Judge Walter P. Gewin of the Fifth Circuit Court of Appeals in Tuscaloosa, Alabama. Her J.D. with

honors is from the University of Texas School of Law (1975) and A.B. from Hollins College in Virginia (1969). Between college and law school she taught English in Korea for the Peace Corps.

CHARLES B. ROE, JR. is Senior Assistant Attorney General of the State of Washington. His A.B. is from the University of Puget Sound and LL.B. from the University of Washington. He was formerly Adjunct Professor, Gonzaga University School of Law; Assistant Director of the Department of Water Resources; Chairman of the Water Rights Committee of the ABA's Natural Resources Section; Washington State Representative to the Western States Water Council; and Chief Counsel, Washington State Department of Ecology in Olympia.



HARRY R. SACHSE is a partner in the Washington law firm of Sonosky, Chambers, Sachse & Guido. From 1971 to 1976 he served as an Assistant to the Solicitor General of the United States, where he briefed or argued more than a dozen cases in the Supreme Court, including McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (state taxation of reservation income); Washington Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Indian fishing rights); Mattz v. Arnett, 412 U.S. 544 (1975) (reservation boundaries); and Morton v. Mancari, 417 U.S. 535 (1974) (preference in the hiring of Native Americans). He previously practiced privately in Baton Rouge, Louisiana, and taught commercial and comparative law at the law schools of Tulane, Stanford, and California - Davis. In recent years he has also taught Native American law at the University of Virginia and at Harvard University. He also served as Assistant General Counsel of the Agency for International Development. Since joining Sonosky, Chambers, Sachse & Guido, Mr. Sachse has conducted litigation for Indian clients on matters including tribal zoning, jurisdiction, management of trust assets, and water rights. He is also currently engaged in a transnational environmental pollution case on behalf of a Canadian tribe. He received his J.D. in 1957 from Louisiana State University where he was Editor-in-Chief of the Louisiana Law Review, and holds a diploma in comparative law from the University of Paris.

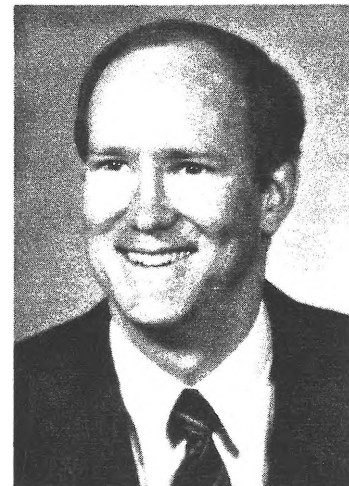


A. DAN TARLOCK is Professor of Law at the Chicago-Kent College of Law of the Illinois Institute of Technology. He is a member of the Advisory Board of the Natural Resources Law Center of the University of Colorado School of Law, having spoken at the Water Resources Allocation short course in 1981 and having presented a symposium in Denver on the impacts of the U.S. Supreme Court decision in Sporhase v. Nebraska in January 1983. His A.B. and LL.B. are from Stanford University. He is co-author of Environmental Law and Policy (with Eva and John Hanks), and Water Resource Management (with Meyers); author of "Western Water Law and Coal Development," and several law review articles on instream flow maintenance. He has served as consultant to private law firms, industry, local, state and federal governmental agencies, and has been Visiting Professor of Law at the University of Michigan.



WENDY C. WEISS is an Assistant Attorney General for Natural Resources for the State of Colorado, working in the Water Unit, 1980 to the present. Her J.D. cum laude is from Boston University School of Law (1975), and her B.A. in philosophy is from Tufts University (1969). Previously she has worked for the U.S. Environmental Protection Agency as Attorney in the Enforcement Division (1977-80) and as Law Clerk-Bailiff for Denver District Court Judge Zita L. Weinshienk (1976-77). She enjoys both cross-country and downhill skiing and mountaineering.

LAWRENCE J. WOLFE is a Senior Assistant Attorney General for the Wyoming Attorney General's Office, Cheyenne, Wyoming, where he is the head of the Natural Resources Division. Mr. Wolfe graduated from the University of California at Davis (A.B. 1974), and the University of Wyoming College of Law (J.D. 1980), where he was Managing Editor of the Land and Water Law Review. He has worked extensively in the area of water rights, water development and environmental law. He is the author of "Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts," 29 Rocky Mountain Mineral Law Institute 851 (1984).



MARGOT ZALLEN has been an attorney in the Office of the Regional Solicitor of the U.S. Dept. of Interior in Denver since 1980. She handles all cases in the Rocky Mountain region relating to Section 404 and to water and other resource development's effect on endangered species and other wildlife. Her current responsibilities also include riparian boundary and reserved water rights cases. Her J.D. is from the University of Denver (1977) and B.S. from Syracuse University, magna cum laude (1958). She was an attorney for the U.S. Fish & Wildlife Service in Denver from 1978-79.

