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Changing Values, Changing Conflicts American Bar Association Section of Environment, Energy, and Resources 25th Annual Water Law Conference

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CONFERENCE REPORTS

CHANGING VALUES, CHANGING CONFLICTS
AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
25TH ANNUAL WATER LAW CONFERENCE

San Diego, California **February 22-23, 2007**

DAY ONE: THURSDAY, FEBRUARY 22, 2007

FUNDAMENTALS OF WATER LAW

Professor Robert "Bo" Abrams, Florida A&M University, College Of Law, Orlando Florida, gave the first presentation of the Conference by moderating a panel on the Fundamentals of water law. The panel included R. Timothy Weston, K & L Gates, Harrisburg, Pennsylvania; Stephen Bartel, U.S. Department of Justice, Environment and Natural resources Division, Washington, D.C.; and Jennifer Gimbel, U.S. Department of the Interior, Denver, Colorado.

Mr. Abrams opened the discussion by stating the purpose of the presentation was to provide an overview of water law for inexperienced practitioners and newcomers to the field of water law. After offering several legal anecdotes about water law including "whiskey is for drinking, water is for billable hours," Mr. Abrams opened the floor to Mr. Weston.

Mr. Weston examined the development of water law in the United States. The starting point of the lecture was water rights. Mr. Weston explained that a water right does not convey ownership of the water; water rights are mere rights of use. Thus, there are two ways to look at a water right: what can I do with the water and what can someone else do to me? Mr. Weston then discussed the historical basis for riparian water rights and groundwater rights. Three theories of ground water rights were presented: absolute dominion, reasonable use, and the correlative rights doctrine. Then, turning his attention to the eastern states, Mr. Weston discussed regulated riparianism.

Mr. Bartel followed Mr. Weston and spoke about the prior appropriation doctrine in the western states and basin adjudications. After discussing water law terminology, including c.f.s., storage rights, groundwater rights, and instream flow water rights, Mr. Bartel listed three factors necessary for a valid appropriation of a water right. In

general, one must attempt to validly appropriate, actually divert water from a source, and put the water to beneficial use.

Mr. Bartel also discussed water permits and the relationship between senior water rights holders and junior water rights holders. He noted that the limits on a water right define what the right allows. Mr. Bartel concluded his lecture by discussing three groundwater use doctrines: reasonable use, rule of the big pump, and reserve water rights.

Ms. Gimbel lectured on the topic of federal reserve water rights which is also known as the Winters Doctrine. She stated in basic terms that when the federal government withdraws land, the federal government also receives the water rights associated with that land. Ms. Gimbel stated the doctrine started with Indian tribes but now applies to all federal lands.

The lecture concluded with a discussion of interstate water compacts. The discussion included the different types of compacts, how states negotiate compacts, and enforcement of compacts. To conclude the session, Mr. Abrams opened the panel to questions.

PLENARY PRESENTATION #1: THE 25-YEAR PERSPECTIVE ON WATER LAW

Janet Newman, Professor of Law at Lewis & Clark Law School, Portland, Oregon, moderated this panel presentation. She asked each panelist to address five topics in turn: conflicts between water law and environmental law, economic pressures and market forces, Indian water rights, water as a property right, and water and decision-making.

Justice Ronald B. Robie from the California State Court of Appeal, District 3, was the first to address the conflicts between water law and environmental law. He discussed the Clean Water Act, public interest review, and the Mono Lake case. He also mentioned the Endangered Species Act and its impacts on the San Joaquin Delta. Finally, Justice Robie discussed the Central California Project Improvement Act and the fact that environmental protection is included in the authorization act for that Project. The next panelist to address this topic was David H. Getches, Dean of the University of Colorado Law School. He began by pointing out that most water projects on the Colorado River were completed over 25 years ago and that NEPA has had a large impact on the operation of those projects. Dean Getches then discussed the Adaptive Management Workgroup. He pointed out that in the 1980's salinity was the big issue on the Colorado River, but that the attention has now turned to the Colorado River Delta. In conclusion, Dean Getches stated that the potential impacts are just becoming clear and that the Endangered Species Act has been overly expensive and misses the point of an ecosystem method of addressing issues. The next panelist was Roger J. Marzulla, Marzulla & Marzulla, Washington, D.C. Mr. Marzulla began by stating that environmental law has been the most important development in water allocation in the last 25 years. He discussed that the Endangered Species Act was not designed for habitat

preservation, and using it for that purpose is difficult—"you can drive a screw with a hammer, but a screwdriver is easier." He pointed to expanded definitions of "taking" and "species" as the largest developments in history of the ESA. Mr. Marzulla then turned to the Clean Water Act, noting that while it was originally designed for point source pollution, it has since expanded significantly into the arena of non-point sources. However, like the ESA, the CWA is not tailored to non-point sources and isn't the best way to address them.

Dean Getches was the first panelist to discuss the next topic: economic pressures and market forces. He began by stating that the promise of water marketing has not been fully realized in Colorado. He discussed the marketing efforts in California, including the Imperial Valley to Metro Water Department transfers, water banking, and California's "Conceptual Approach" which would allow California to purchase water from the other six Colorado River Basin States. He added that he did not consider California's internal reallocations to be marketing. Mr. Marzulla predicted that over the next 25 years water marketing would become the most powerful force in putting water to its highest and best use. Finally, Justice Robie addressed the issue, stating that California was the only state that has the plumbing to move water around in a way that is necessary for an efficient market. He mentioned that during the 1970's and 1980's many people bought more water then they needed, and that water is slowly being reallocated through markets. He concluded by agreeing with Mr. Marzulla that water transfers would become important because new source development is unlikely.

Dean Getches addressed the third topic: Indian water rights. He suggested that Indian water rights represented enormous claims on water that has been ignored. He mentioned the potential for off-reservation marketing of Indian water rights, but opined that this would not be possible until the tribes are included in the decision making process on the Colorado River. Mr. Marzulla stated that Indian water rights represented a challenge because they are outside of state systems, in essence that they are "springing rights" that have not been factored into management. He then focused on the Klamath River Basin, where competing interests include farmers, Endangered Species Act, and tribal water rights, which, in his opinion have not been sufficiently accounted for by Bureau of Reclamation authority. Justice Robie disagreed with David Getches' statement that Indian tribes were not being included in decision-making.

Mr. Marzulla was the first to comment on the fourth topic: property rights claims and takings. He said that if water is in fact a commodity, it may not be taken without compensation, citing the *Tulare Lake* case, the *Stockton East* case, and the *Casitas* case. Dean Getches pointed out that there are issues with environmental enforcement when considering water as a property right. Justice Robie said that use

of the public trust doctrine, as administered in California, has not resulted in excessive litigation, but that if the board becomes more aggressive in using public trust review there will be more litigation in the future.

Dean Getches opened discussion of the fifth theme: who are the decision makers: is it still the water buffalos and the iron triangle? He said that the decision-making shifted as environmentalism came to the forefront, and that there is now a more inclusive attitude about decision making by environmental enforcement and federal policy. He closed his remarks by proposing a Basin wide decision-making forum to bring all interests together, perhaps charged with advising the Secretary of the Interior. Justice Robie stated that presence of a younger, more diverse, management has opened up decision making in California and made it more adaptive to the public needs. Mr. Marzulla discussed the *Bayview* NAFTA case, and whether water as property would constitute an investment under NAFTA. He predicted that there will be more litigation if it is an investment, pointing out that the water community has become a concern of the world community. Janet Newman closed the panel saying that she hoped that basin-wide and international decision-making is the future.

PLENARY PRESENTATION #2: AGENCY DEFERENCE: WHERE ARE THE COURTS GOING?

Kim Diana Connolly, Associate Professor of Law at the University of South Carolina School of Law, Columbia, SC, moderated this presentation. The panelists for this presentation were Matt Kenna, Western Environmental Law Center, Durango, CO and Roderick E. Walston, Best Best & Krieger LLP, Walnut Creek, CA. This panel focused whether the *Rapanos* decision is an indication that courts will grant greater deference to a federal agency's interpretation of their statutory authority.

Ms. Connolly began the presentation by providing a brief summary of the issues and outcome of the *Rapanos* decision. Specifically, Ms. Connolly stated that the underlying issues in *Rapanos* were 1) what does "navigable waters" mean and 2) how much deference should be given to an agency's interpretation of that term under the Clean Water Act. Ms. Connolly explained that the plurality decision held that the United States Army Corps of Engineers and the United States Environmental Protection Agency's interpretation of the term was not based on a reasonable interpretation of a statutory provision. The dissent determined that it was based on a reasonable interpretation of a statutory provision. The bottom line, according to Ms. Connolly, is that the immediate future regarding agency decision making is muddy.

Mr. Kenna began his part of the presentation by providing an introduction to deference as "Deference 101." First, if a statute is clear and unambiguous, then agencies should rely on the statute. If, how-

ever, a statute is not clear and unambiguous, then an agency's interpretation must be reasonable. Mr. Kenna noted that deference is often misunderstood to mean that when deference applies, the agency automatically wins. That is not the correct rule. Instead, if deference applies, then the court must still determine whether the agency interpretation is reasonable. Mr. Kenna concluded by suggesting that the *Rapanos* decision does not signal a new direction in the law, and instead practitioners are left with the same muddied definition we've had since the *Chevron* case.

Mr. Watson began his presentation by pointing out several arguments against giving government agencies greater deference. Mr. Watson said that deference could be used as a tool to decide cases without a hearing the merits. He also said that deference is not good when an agency interprets a statute to determine its own jurisdiction. This, he said, results in reducing other bodies of governments' jurisdiction over matters. Mr. Watson suggested that courts, instead of agencies, should draw the jurisdictional boundaries. Finally, Mr. Watson opined that after *Rapanos*, courts should grant deference to agency interpretations of ambiguous statutes in circumstances involving highly technical, scientific judgments, but should not grant such deference where the agency interpretation results in an expansion the agency's own jurisdiction.

KEYNOTE SPEAKER: THE HONORABLE GREGORY J. HOBBS JR.

The Honorable Gregory J. Hobbs, Jr., Colorado Supreme Court, Denver, CO, delivered the keynote conference address titled "One Body, One Spirit, and Many Futures." Justice Hobbs touched on many themes, all centering around the idea that, as our most universal resource, water transcends people, time, and places.

First, Justice Hobbs argued that water law transcends people by adapting to the changing values of people through the doctrine of community. He noted that no one has a monopoly on the public interest, as evidenced by the changing demand for instream flows. As public interest demands for water change, so will the law.

Second, Justice Hobbs stated that water's ubiquitous nature is seen in the law as well. The creation of new environmental laws over the years has responded to, and affected, water law. Justice Hobbs discussed how water law transcends time and that beneficial use dates back beyond traditional conceptions of water engineering. Ancient peoples had made reservoirs and protected the water. Today we have codified what has always been done through the doctrine of prior-appropriation.

Finally, Justice Hobbs touched on possible water issues in the future. He identified the trend of water use moving from the private sector for irrigation purposes to the public sector for environmental and recreation purposes. Moreover, Justice Hobbs called for the need

to consult and communicate as part of this grand interrelation of all things through water. He said that the winning combination of public interest, beneficial use, and conservation will allows us to overcome the divide and always has let us overcome the divide.

BREAKOUT SESSION #1: INSTREAM USE AND CHANGING VALUES (ESA, URBAN STREAMS, RECREATION)

Micheal J. Pearce, from Maguire & Pearce PLLC, Phoenix, Arizona moderated this panel discussion. He began the presentation by asking each of the panelists to discuss instream flow issues in their respective states. The first panelist to respond to this was Steve Macaulay, Executive Director, California Urban Water Agencies, Sacramento, California. He discussed California's Environmental Water Account and its role in preserving the health of the San Francisco Bay/Sacrament-San Joaquin River Delta. He then discussed market based water transfers and successes in renting water through intergovernmental cooperation. He concluded his remarks saying that a lot of underlying science is unclear and that efforts should be made to better understand the river systems.

Martha Pagel, of Schwabe, Williamson & Wyatt, Salem, Oregon, was the next panelist to discuss instream flow issues. She framed the issues as being between those that have the senior water rights and those that want the instream flows. She discussed the ways that Oregon law has been structured to allow "voluntary" transactions to occur that preserve instream flows. She then mentioned some specific issues in the Deschutes Basin, and concluded by cautioning that where there is a market driven need for water, mitigation will be important.

Finally, Norman Semanko, of Idaho Water Users Association, Inc., Boise, Idaho, covered instream flow issues in his state. He discussed the minimum stream flow program, which provides for instream flow rights held by the Idaho Water Resource Board, that the state enacted 29 years ago. He mentioned that the Endangered Species Act has been a motivator for the program and that the efforts were in cooperation with the federal government. He then turned to the State's water bank, which has been used to supply water when a 2001 instream flow right was out of priority. In conclusion, he said that minimum stream flows should be accomplished under state law, because that is where state water rights administration is best understood.

Mr. Pearce then asked the panel whether the instream programs would still be in place if it had not been for the Endangered Species Act, since many of those programs were a reaction to that Act. All of the panelists responded that they believed that those programs would be in place. Mr. Macaulay stated that the public trust doctrine would have been pushed harder, but that the Endangered Species Act was an effective hammer to spur the movement. The next question that Mr. Pearce put to the panel was whether private industry has pushed or

funded instream programs, and what would drive that movement. The panelists discussed the various ways that their states had gotten funding for instream flow programs. Finally, Mr. Pearce asked the panel why, in their opinion, a wide open market for creation of instream flows would not work. The panel discussed fears of water rights being purchased and changed to instream flows without mitigation efforts. Ms. Pagel touched on the use of mitigation credits in Oregon, and the panelists agreed that the determination of how much water is needed is critical.

BREAKOUT SESSION #2: CONFLICTING SOVEREIGNS, CONFLICTING RIGHTS

Jennifer Gimbel, U.S. Department of the Interior, Denver, Colorado moderated a panel which included Major Jeremy N. Jungreis, Special Counsel, Environmental Law, U.S. Marine Corps, Western Area Counsel Office, Camp Pendleton, California; Scott B. McElroy, Greene Meyer & McElroy PC, Boulder, Colorado; and Tim Vollmann, Attorney at Law, Albuquerque, New Mexico.

Major Jungreis spoke first and suggested an answer to the question: Why do federal water rights matter? His answer began by discussing three threshold considerations: 1) What is a federal water right and is it an issue for your water project; 2) advantages of federal water rights; and 3) whether the existence of a federal water right is contingent upon state law or the method of federal enclave creation. Major Jungreis then focused on determining the scope of a federal water right. In this portion of the lecture he discussed the differences between Indian water rights under the Winters Doctrine, regulatory water rights, and hybrid water rights created by interstate compacts.

Using his water rights framework, Major Jungreis posed a second question: "Can a federal agency or tribe obtain a water right on acquired lands?" Two answers to this question were posed. The first answer discussed was the Western Theory. This theory holds that the United States only receives what they purchase. Thus, if they do not purchase a water right when they buy land, they do not have a water right in that land. The second answer discussed, the Olson Theory, where federal water rights are possible provided the purpose of the land would be frustrated without the water right. Overall, Major Jungreis feels the question of federal water rights on acquired lands is wide open. He advises that, if possible, the best strategy is preserving the state water rights associated with the acquired land. Major Jungreis concluded his presentation by analyzing hybrid water rights settlements.

Mr. McElroy spoke after Major Jungreis and lectured on the development of the reserve rights doctrine and the impact of Arizona v. California on Indian tribes. Mr. McElroy suggests that Indian water rights are reserved by implication. He reaches this conclusion by ana-

lyzing three theories: 1) the supremacy of federal law, 2) the United States obligation to uphold treaties, and 3) when Indians relinquished rights, they explicitly retained all rights not given up.

After establishing the existence of Indian water rights, Mr. McElroy discussed the problem of determining how much water should be associated with an Indian water right. Here a brief discussion of the problems of measuring practicable irrigable acreage and determining beneficial uses took place. Mr. McElroy then discussed Indian ground water rights and the litigation surrounding the quantification of Indian ground water rights. He suggested a broad template for determining the quantity of water associated with the right should be based on a broad template that should include a tribe's population, historical use, and current use.

The lecture then turned to a discussion of the necessity of water for economic growth. Mr. McElroy noted that the need for water in a successful economy is "particularly true on Indian reservation."

Mr. McElroy concluded his presentation by looking to the future of the reserve water rights doctrine and stating that there is a strong legal framework to do what was promised and make reservations livable. However, he had reservation about the practicality of this future. Overall, he felt that there may be a lack of resources to adjudicate water rights and that the adjudications would not take place in a timely manner.

Mr. Vollmann anchored the panel and spoke about tribal water marketing and whether the Indian Nonintercourse Act is a bar to water marketing. To begin, Mr. Vollmann discussed international law principles to provide a foundation for discussion of Indian law. In moving to the focus of his lecture, Mr. Vollmann discussed water marketing. He suggested that market forces do not control whether tribes can market their water. In reaching this conclusion, he discussed the Indian Nonintercourse Act and the fact that Indian land is inalienable without an act of congress. Yet, Mr. Vollman notes that short term water marketing contracts may be enforceable under the Indian Tribal Economic Development and Contract Encouragement Act of 2000 without running afoul of the Indian Nonintercourse Act. Mr. Vollmann notes that there is no case law on point and concludes with the question: Why not create legislation authorizing Indian water marketing? The panel then accepted audience questions.

BREAKOUT SESSION #3: PROMOTING CONSERVATION BY LAW

Mary Ann Dickinson, Executive Director, California Urban Water Conservation Council, Sacramento, CA, moderated this presentation. The panelists for this presentation were Stephen Arakawa, Group Manager, Resource Management, Metropolitan Water District of Southern California, Los Angeles, CA; Craig Bell, Executive Director, Western States Water Council, Midvale, UT; and David E. Filippi, Stoel

Rives, LLP, Portland, OR. This panel focused on whether the demand for water conservation can be met within the bounds of existing water laws, or whether existing laws, such as prior appropriation, undermines the goal of conservation.

Ms. Dickinson gave a brief introduction to the panel, and noted that conservation is no longer a tool used solely in drought periods. Conservation is now a widely used water supply planning tool.

Mr. Arakawa began his presentation by using Southern California as an example of how conservation needs to be used to meet future demands. He talked about historical droughts, and the various temporary solutions people used during these periods. Mr. Arakawa then talked about Integrated Resource Planning which utilizes water storage, recycling, and conservation. He then discussed how the Metropolitan Water District of Southern California has implemented an Urban Conservation plan which he described as a core element of their long-term water management strategy. The Water District is beginning to focus more on outdoor landscaping and the commercial aspects in its Urban Conservation plan. Mr. Arakawa concluded by saying that conservation is a necessary and important part of California's water supply planning.

Mr. Filippi's presentation focused on the conflict between existing water law, much of which is embodied in the doctrine of prior appropriation, and conservation efforts to meet emerging demands for water. The "use it or lose it" principle of prior appropriation, whereby a water user must exercise his water right or risk forfeiture, obviously creates a great deal of tension with conservation efforts. If a water user uses less water to accomplish the same beneficial use, then the water right can be subject to forfeiture and loss. Mr. Filippi made reference to Oregon laws which have attempted to integrate prior appropriation and conservation. Mr. Filippi noted that Oregon has a number of statutes designed to encourage water right holders to conserve. For example, Oregon has redefined beneficial use to include instream uses.

As the final panelist, Mr. Bell discussed various strategies that have been used to integrate the prior appropriation system with conservation. Mr. Bell mentioned various state legislative efforts which have sought to mitigate the disincentives of conservation which are inherent to the prior appropriation doctrine. Mr. Bell also suggested that water policymakers must preemptively prepare for future obstacles such as climate change. Mr. Bell mentioned a recent Colorado River Basin Water Management Report which states that water conservation alone is not sufficient to meet future water demands, but it is a very essential step. Finally, Mr. Bell posed the question of what happens to water when it is conserved—should it stay at its point of origin? In other words, who owns conserved water? This, Mr. Bell suggested, is a question that will have to be answered in the near future.

BREAKOUT SESSION #4: EMERGING ISSUE – INTERNATIONAL CONFLICTS (ALL-AMERICAN CANAL)

James S. Lochhead of Brownstein, Hyatt, Farber & Schreck PC, Glenwood Springs, Colorado moderated a panel which included Professor John Leshy, University of California, Hastings College of the Law, San Francisco, California; Robert Snow, U.S. Department of the Interior, Office of the Solicitor, Washington, DC; and Jay Stein, Stein & Brockmann, P.A., Santa Fe New Mexico.

Mr. Lochhead briefly introduced the conflict regarding the lining of the All-American Canal that has resulted in the litigation *CDEM v. United States.* He also introduced the panelists' role in the litigation. John Leshy was formerly Solicitor General at the Department of the Interior, Robert Snow is counsel for the defense, and Jay Stein is counsel for the plaintiffs.

Mr. Leshy spoke first and introduced the All-American Canal Lining Project in more detail. The All-American Canal takes 3.12 million acre-feet of water through the Imperial Valley. The lining of the canal blocks the seepage water of the canal from entering into Mexico and recharging the underlying aquifer. This raises legal issues on water law and environmental law fronts.

Mr. Stein spoke next and discussed some of the water law issues involved in the case and presented the arguments for the plaintiffs. Mr. Stein identified four water rights counts: 1) Unconstitutional Deprivation of Water Rights, 2) Constitutional Tort, 3) Equitable Apportionment, and 4) Estoppel. In regard to the fourth claim, Mr. Stein argued that third parties can acquire water rights by seepage and the canal had been operated for seventy years with seepage into the aquifer, thus constituting estoppel. Mr. Stein also challenged the district court's ruling plaintiff lacked standing, stating that this is not a diplomatic issue and that it is in fact a private claim.

Mr. Snow spoke last and discussed the environmental law claims. He identified four statutory violation counts: 1) NEPA, 2) Endangered Species Act, 3) Migratory Bird Act, and 4) San Luis Rey Act Wetland Mitigation Measures. In regard to NEPA, Mr. Snow argued that the statute is silent on looking at the impacts across the border. Moreover, he argued that the Endangered Species Act is also silent on taking action for effects on listed endangered species existing abroad. Mr. Snow said that this conflict was largely a consequence of parties talking past each other. He said that a simple difference between the plaintiff and defense's perspective on the case is that plaintiff believes this is a case about ground water and the defense believes it is a case about surface water. Mr. Snow summed up the defendant's argument stating that "borders matter."

DAY TWO: FRIDAY, FEBRUARY 23, 2007

PLENARY PRESENTATION #3: CLEAN WATER ACT PERMITS FOR WATER TRANSFERS

Ann R. Klee of Crowell & Moring, former General Counsel, U.S. Environmental Protection Agency, moderated a panel which included Roger R. Martella, Jr., Office of the General Counsel, U.S. Environmental Protection Agency, Washington, DC; Karen Smith, Deputy Director, Arizona Department of Water Reources, Phoenix, AZ; and James M. Tierney, Assistant Attorney General and Watershed Inspector General, New York State Office of Attorney General, Environmental Protection Bureau, Albany, NY.

Ms. Klee began by introducing the topic of whether the Clean Water Act requires discharge permits for water deliveries between watersheds. She said the main issue in this dispute is whether movement or transfer of water constitutes an addition, thus requiring a permit. Ms. Klee argued that transfers provide a benefit and that it is burdensome for water suppliers to get CWA permits. Finally, Ms. Klee added that courts are split on this issue.

Mr. Martella spoke next and addressed four topics: 1) water transfers across the nation, 2) EPA approach to water transfers, 3) comments on EPA position, and 4) recent case law. In regard to transfers, Mr. Martella defined transfers as when one water of the United States is added to another water of the United States with nothing in the middle. He said transfers occur for three main purposes: commercial drinking water, environmental reasons such as wetlands restoration, and irrigation. Next, Mr. Martella said the EPA has had a long-standing position that water transfers do not require a § 402 permit. Based on the Klee/Grumbles Memo, "addition" is intentionally left undefined in the Clean Water Act and Congress intended water transfers to be subjected to oversight by state water resource management agencies. Mr. Martella commented that there is a proposed rule to exclude water transfers from permitting to settle this issue. Next, Mr. Martella said that in response to the proposed rule the comments EPA received were split geographically between the East and West. He said the West supported the rule while the East opposed. Finally, in regard to recent case law, Mr. Martella said that the issues in the *Catskill Mountains* and *Friends of the Everglades* cases were distinguishable from the present issue.

Ms. Smith spoke next and argued that EPA has it right on this issue. She said that this is different than industrial discharges and that "water quality is not impaired by these types of transfers." She added that there is no such thing as a benign permit and the best solution is to leave this type of permitting up to the states.

Finally, Mr. Tierney spoke, arguing for EPA permit requirements for transfers. He said that if you take polluted water from one distinct

body and put it into another body of water, this must be an addition. To support his argument he referenced the *Catskill Mountains* and *Friends of the Everglades* cases and argued that under *Chevron* if the statute is clear based on the standard statutory construction, the issue is over. In this case, "any" is used to qualify "addition" and therefore a permit should be required. Mr. Tierney then gave examples of the consequences of additions currently not requiring an EPA permit, such as adding saltwater to freshwater or warm water into cold water, and that EPA did not consider these real examples. Moreover, this would allow downstream states to be damaged by upstream states who do regulate transfers themselves. In conclusion, Mr. Tierney said that a EPA permit system is completely feasible.

Both Ms. Klee and Mr. Martella responded to Mr. Tierney, each arguing that it is outside the bounds of the Clean Water Act for EPA to regulate. Finally, Ms. Klee concluded that there are better ways to cure environmental ills than EPA permitting.

PLENARY PRESENTATION #4: THE CHANGING INTERFACE BETWEEN LAW AND SCIENCE

Professor Barbara Cosens, University of Idaho, College of Law, Moscow, Idaho, moderated this panel which included Michael Bogert, Counselor to the Secretary, U.S. Department of the Interior, Washington, D.C.; Dr. Stephen L. Katz, National Oceanic and Atmospheric Administration, Northwest Fisheries Science Center, Seattle, Washington; Chairman Rebecca Miles, Nez Perce Tribe, Lapwai, Idaho; and Dr. William Woessner, University of Montana, Department of Geosciences, Missoula, Montana. The panel met to discuss the interface between law and science during a typical water withdrawal project. Specifically, the presented hypothetical looked at a state permit for a proposed groundwater well for a water bottling plant. Mr. Woessner discussed the potential hydrological impacts of the hypothetical. Mr. Katz discussed the hypothetical project's impact on various fish species in the effected basin. Chairman Miles discussed potential tribal issues. Mr. Bogert discussed the possibility of a settlement between all of the stakeholders. Ms. Cosens then open the panel to questions from the audience.

PLENARY PRESENTATION #5: FORUM FOR CHANGING VALUES: DE WE STILL NEED ADJUDICATIONS?

Peter W. Sly, Colby College, Brooklin, ME, moderated the final plenary presentation. The panelists for this presentation were Dr. Bonnie G. Colby, The University of Arizona, Tucson, AZ; Charles "Chuck" T. DuMars, Law & Resource Planning Associates, PC, Albuquerque, NM; Ramsey L. Kropf, Patrick, Miller & Kropf, P.C., Aspen, CO. This pres-

entation focused on whether adjudication is the most fair and efficient way to resolve water disputes.

To start this presentation, all of the panelists joined Mr. Sly in singing an introductory parody, "Come on Baby, Do the Litigation." Afterwards, each panelist gave a brief introduction of themselves to explain their personal connections and qualifications with water adjudications. As moderator, Mr. Sly compiled a list of questions for the panelists to consider.

Mr. Dumars addressed the question of why does it take so long to litigate water cases? Mr. Dumars noted that most people do not benefit from adjudication. More specifically, adjudication does not benefit those who can't afford to use less water; it does not benefit junior users; and it does not benefit water users that have no desire to change their use regardless of the monetary value.

When asked what they would advise a state that is contemplating a new adjudication or major revision to an existing statute, the panelists had the following comments:

Mr. Dumars suggested that the standing requirement needs to be more strict. Only parties that are directly affected should be able to bring suits. Furthermore, Mr. Dumars suggested that a penalty should be imposed on unnecessary and annoying interveners.

Ms. Kropf noted that it is very important for states to be involved in water litigation. States have many important interests in almost any water litigation, and should therefore be considered a necessary party. Ms. Kropf also pointed out that water litigation issues are cyclical, and that practitioners today are dealing with many of the same issues that were being addressed 30 years ago.

Doctor Colby, an economist whose work and research focuses on complex water transfers, discussed the economical costs of water adjudications. Doctor Colby pointed out that the most obvious costs of water adjudications are the public costs which are paid by federal, state, and local taxpayers and by tribal governments. Doctor Colby also suggested that rules need to be developed to make water transfers more straight forward.

HOT TOPICS: CLIMATE CHANGE

Fabian Nunez, Speaker of the California State Assembly, delivered the Hot Topics Luncheon presentation on climate change. During his spirited speech, he discussed his background in California, his work as a legislator, and the efforts that California is making to get global climate change in hand. The goal that California has set is to reduce emissions levels to 1990 levels by the year 2020, a 25% reduction. He expressed his concern over future generations, stating that he wants the economy for our children and our children's children to be a clean economy, and for the neighborhoods they live in to be clean

neighborhoods. He concluded his presentation by encouraging other states to follow suit in a national effort to combat global warming.
Mark Terzaghi Howe, Thomas Jantunen, Andrew Ellis & Jeff McGaughran

COLORADO WATER LAW CLE INTERNATIONAL

Denver, Colorado **March 8-9, 2007**

The Colorado Water Law conference, sponsored by Denver based CLE International, was a two day conference covering an assortment of current water related issues facing Colorado including climate change, conjunctive management, "ag to urban" transfers, water re-use and conservation, as well as recreational uses of water. The conference had something of interest to individuals from many water related fields including attorneys, engineers, water managers, and city planners and was heavily attended by individuals from those fields. James Lockhead of Brownstein Hyatt & Farber, P.C., Glenwood Springs, and Raymond Petros of Petros & White, L.L.C, Denver, co-chaired this event. Each day began with a brief introduction to what the day's presentations had in store. In addition to the sessions described in more detail below, the conference featured a presentation entitled "New Challenges (or Realities) for Water Development in Colorado: Water Managers Discuss New Definitions of Drought, Climate Change, Groundwater Depletion, and Alternatives for Development of New Supplies" presented by a panel consisting of James Broderick, the Executive Director of the Southeastern Colorado Water Conservancy District, Eric Kuhn, the General Manager of the Colorado River Water Conservation District, and Dale Rademacher, P.C, the Director of the Longmont Public Works and Water Utilities. As part of the section of the conference covering "Conflicts in Groundwater Administration and Development," a panel consisting of Mike Shimmin, Esq., of Vranesh and Raisch, Boulder, and Kim R. Lawrence, Esq., of Lind, Lawrence & Ottenhoff, Windsor, discussed the issues on the South Platt. Cynthia F. Covell, Esq., of Alperstien & Covell, Denver, concluded the first day of the conference with a presentation on the new ethics rules being considered by the Supreme Court.

CONFLICTS IN GROUND WATER ADMINISTRATION AND DEVELOPMENT

DESIGNATED GROUND WATER BASINS: UNDESIGNATING AND OTHER CHALLENGES

Anne Castle, Esq., of Holland & Hart, Denver, and Steven J. Bushing, Esq., of Porzack, Browning & Bushong, Boulder, represented opposing parties in litigation concerning water users in the Republican