

1-1-2006

Plenary Presentation #1: Who Owns the Water?

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Julie M. Schmidt, Conference Report, Plenary Presentation #1: Who Owns the Water? , 9 U. Denv. Water L. Rev. 685 (2006).

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19TH CENTURY RULES FOR THE 21ST CENTURY: ARE GROWTH AND DEVELOPMENT OUTPACING WATER LAW?

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
24th ANNUAL WATER LAW CONFERENCE

San Diego, California February 23-24, 2006

INTRODUCTION

Adam W. Gravley, a partner at Buck & Gordon, LLP and Chair of the American Bar Association Water Resources Committee opened the conference and welcomed the participants. The program's co-chairs were David R.E. Aladjem of Downey Brand LLP and Reagan L.B. Desmond of Ball Janik LLP.

DAY ONE: THURSDAY, FEBRUARY 23, 2006

PLENARY PRESENTATION #1: WHO OWNS THE WATER?

Alf W. Brandt from the Assembly Committee on Water, Parks & Wildlife moderated the opening plenary presentation. His introductory remarks reminded practitioners to recall what they learned in their first year of law school, namely, that water is part of property law's bundle of sticks. According to Mr. Brandt, the majority of issues surrounding water law focus on the "use" aspect of that bundle of sticks. Mr. Brandt then introduced the first panelist of the group, Nancie G. Marzulla, president of Marzulla & Marzulla.

Ms. Marzulla spoke of water law as a three-legged stool comprised of the United States Constitution, federal statutes, and state law. The Constitution's impact on water law was most recently addressed in the *Madison* case, which defined the Fifth Amendment's Takings Clause very broadly. State law issues often focus on background principles, as well as other state-specific issues when dealing with water law. The most important impact federal statutes have on water law is through the 1902 Reclamation Act. According to Ms. Marzulla, understanding the interplay and importance of the three legs of the stool are essential to understanding who owns the water in a particular dispute.

Steven L. Hernandez of Hubert & Hernandez, P.A., was the next panelist to speak. Mr. Hernandez spoke about his experience with recent reclamation projects in New Mexico. The Bureau of Reclama-

tion purchased the existing Pecos irrigation district and Mr. Hernandez compared the settlement agreement the parties reached to the bundle of sticks analogy Mr. Brandt had used. Mr. Hernandez also spoke about the Rio Grande River. He talked about the treaty between Mexico and the United States and the compact between Colorado and New Mexico.

Christopher Rich of the United States Department of the Interior's Office of the Field Solicitor, spoke as the third panelist. Mr. Rich challenged the title of the presentation by saying "who owns the water?" is the wrong question; the right question should be "who has rights and obligations?" Under the 1902 Reclamation Act, the federal policy of dam building and public works could be considered as the federal government acting as a proprietor of land. The underlying intention was for the projects to remain under federal control forever. There is no title transfer in facilities changes. Because the federal government has enumerated powers only, authorization matters. Users start with a conditional right, which is either a contract right or a water right.

Clifford Lee, of the California Department of Justice was the final panelist. Mr. Lee spoke about the recent Ivanhoe litigation before the California Supreme Court. The California court held the federal government holds legal title and the end user holds equitable title. The United States Supreme Court overturned the California decision and also held the federal reclamation statutory acreage limit trumped state law. On remand, the California Supreme Court admitted they were wrong about users holding equitable title. The court determined end users hold no federal title, and the creation of end user water rights should be avoided as a policy.

After all the panelists spoke, a series of hypothetical questions were presented and a question and answer period followed.

PLENARY PRESENTATION #2: WHAT IS AN ADEQUATE WATER SUPPLY?

Robert H. "Bo" Abrams, Professor of Law at Florida A&M, moderated this discussion. Mr. Abrams opened with three theses. His first thesis was that assured supply laws add value, but less than it might seem. His second thesis was that assured supply laws are worse than no such laws at all. His third thesis was that assured supply laws do more than he thought possible. Mr. Abrams concluded his third thesis was the correct one, on the basis that assured supply laws increased visibility, which lead to better decision making.

The first panelist was Melinda Kassen, Colorado Director of Trout Unlimited. Water supply contemplates a wider spectrum of uses today, such as kayaking and recreation, and supply for fish, in addition to traditional agricultural uses. For rivers, Trout Unlimited currently works under a "CPR" agenda – conserve, protect, restore. Ms. Kassen spoke about ten principles of smart water management, which she broke down into two main categories. The first category was proce-