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The Twenty-First Annual Water Law Conference into the Twenty-First Century: Water Rights, Water Supply, Water Quality

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CONFERENCE REPORT

THE TWENTY-FIRST ANNUAL WATER LAW CONFERENCE INTO THE TWENTY-FIRST CENTURY: WATER RIGHTS, WATER SUPPLY, WATER QUALITY

San Diego, California February 20-21, 2003

The Twenty-First Annual Water Law Conference provided two days of informative discussions on various water rights and associated issues. The conference opened with a keynote address from John D. Leshy, former U.S. Solicitor, followed by two morning sessions attended by all. Fortunately for attendees, U.S. Secretary of the Interior, Gale Norton addressed the conference during the luncheon. The afternoon provided four breakout sessions spanning from multi-jurisdictional issues to Indian water law regarding quantity and quality. The second day featured keynote speeches from Tom Sansonetti, Assistant Attorney General, and Christine Klein, Professor of Law. Two additional conference topics covered long-term implications of drought management and contemplating the Endangered Species Act balanced out the remainder of the conference. This report provides a summary of the comments presented in each issue.

DAY ONE

KEYNOTE ADDRESS—THE FEDERAL ROLE IN WATER MANAGEMENT IN THE WEST: TIME FOR NEW THINKING?

JOHN D. LESHY

John D. Leshy, former U.S. Solicitor and Professor of Law at the University of California, Hastings College of Law in San Francisco delivered the keynote address. Professor Leshy spoke about the role of federal law and federal government in water.

Professor Leshy declared there was a problem with imperfect state regulation systems. He used the *Colorado v. New Mexico* case as an example. The case revolved around the State of Colorado's contention that inefficient delivery systems, not over-consumption by Colorado, was the reason for New Mexico's perceived water shortage on the Vermiejo River. It also revealed inadequacies in New Mexico's system of accounting and record keeping and presented a complicated issue over what Professor Leshy called "slop."

Professor Leshy contended the issue of "slop" or inefficient systems with inadequate measurement and accounting tools present an impending, contentious, costly and complicated problem. He noted

many states live with the reality of "slop" and few have taken legislative steps toward stricter and more effective water rights administration. Great water battles, like the one on the Klamath in Oregon, or the battle over Colorado River water in California often involve a significant issue of poor water regulation by the states. Still unquantified rights make Imperial Valley farmers' claims difficult to evaluate, and the same issue complicates the plight of the silvery minnow on the Rio Grande in Albuquerque.

However, Leshy noted the political and economic costs of tighter water administration often prove too much for states to handle, and things remain at status quo. Therefore, he suggested federal money would be required to solve this problem given the states' financial conditions and budgetary restraints. To do this effectively, the professor suggested earmarking federal grants for state water administration and attaching strings to this federal money, requiring it be spent only on water uses, and attaching a pre-condition that measurement and policing systems be put in place. Other suggested pre-conditions included recognizing the connection between surface and groundwater and recognizing the validity and importance of stream flows.

Whatever money this would cost, the Professor contended, would be less than the cost of having to bail out drought stricken farmers with federal money.

SESSION ONE—TMDL'S: THE IMPACTS OF WATER QUALITY ON WATER QUANTITY

William Hillhouse of White & Jankowski in Denver, Colorado moderated the panel. The first panelist, Bruce Zander from the U.S. Environmental Protection Agency ("EPA") in Denver, Colorado, spoke about the practice of using minimum stream flows as a means of keeping Total Maximum Daily Loads ("TMDL") of pollutants regulated. Mr. Zander called attention to the problem of what constitutes a pollutant for the purposes of the CWA ("CWA"), requiring a listing on the 303(d) list of regulated pollutants with assigned TMDLs. Beyond the list of usual "suspects," Mr. Zander noted other elements could act as stressors on a stream. While waterbody impairments associated with low flow are not required to be addressed in the TMDL program, Mr. Zander emphasized the fact solutions can and have used flows to alleviate non-traditional, non-point source pollutant problems.

First, Mr. Zander showed the term pollutants as defined in the CWA covered a more narrow class of things than all those capable of causing pollution in a stream. In essence, a stream could be polluted without containing pollutants. Pollutants, in other words, are a subset of pollution. In 1978, Mr. Zander noted, the EPA published a final identification of pollutants covered by the Act that did not expand the definition of pollutant. However, in 1985 and 1992, EPA regulations blurred the distinction between pollution and pollutant. In a

preamble of the EPAs 1992 amendments to its TMDL regulation at 57 Federal Register 33040, July 24, 1992, the EPA seemed to embark on a new course where TMDLs applied not just to pollutants but to "anything causing impairment," of stream habitat.

However, in its 2000 amendment, the EPA clearly showed its interpretation of TMDLs did not apply to non-pollutants. Thus, Mr. Zander stated, "EPA does not believe effects cause by an anthropogenic alteration of a waterbody's flow regime is addressed in the definition of pollutant in the Act." However, this interpretation applies only to 303(d) and Mr. Zander stressed the fact that EPA makes a clear distinction between that section and section 101(a) stating the overall intent of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." As such, Mr. Zander contended the EPA might recognize modifications to the environment such as reduced flow may constitute pollution under the act, but 303(d) and TMDLs would not apply.

A recent Congressionally authorized study in 2001 conducted by the National Research Council recommended that the TMDL program should "encompass all stressors, both pollutant and pollution, that determine the condition of a waterbody." Mr. Zander notes that low flow may cause a pollutant problem, but finds other types of cases where it does not. Using for example Big Creek in Montana, low flows and not pollutants were determined to be the cause of problems and thus despite a commendable collaborative effort, the EPA rejected a plan for TMDLs because no pollutants were identified. Another example from Montana came from Deep Creek where a similar problem was approached as a siltation problem, and the agency approved the TMDL.

In conclusion, Mr. Zander stated the EPA does not recognize TMDLs for non-pollutants but does encourage "a broad approach in overall water quality management programs, designing solutions for both pollutant and non-pollutant problems." And noted flow management programs can assist in alleviating pollutant problems.

The second panelist, Arthur G. Baggett from the California Resources Control Board in Sacramento, spoke about the effect of National Pollutant Discharge Elimination System ("NPDES") and TMDL regulations on California water users who are trying to solve chloride problems in their water. One solution has been to pump well water and relinquish stream rights, but problems with the chemical composition of the water get in the way. This prompted Mr. Baggett ask whether NPDES regulations impair effort toward cooperative in-stream flow programs by way of giving up stream rights and pumping well water?

Mr. Baggett noted in order for California to meet current TMDL standards for chlorides, it would cost the State $4 million and produce briny discharge into the ocean requiring a permit. He also noted water softeners and other outside contributors like the State Water Project bring chloride into the system. In a question and answer section after his presentation, Mr. Baggett stressed, given the vexing,

multifaceted public issues involved in creating cooperative solutions to water quality problems planners, should be involved.

SESSION TWO—RUNNING A RIVER BY LITIGATION: A LOOK AT THE COLORADO RIVER, MISSOURI RIVER AND RIO GRANDE

Robert Snow, of the Office of the Solicitor in Washington D.C., moderated the second session. He began this session by noting issues about water appear in agencies, courts, and private boardrooms. This framed the debate about whether a resource of such broad significance and public importance as water is best administered through a system where private litigation can play a large role.

The first panelist, Roger Patterson of the Nebraska Department of Natural Resources in Lincoln, Nebraska, spoke about litigation involving the Missouri River. Mr. Patterson discussed the Missouri River Master Plan by the Missouri River Basin Association, its four recommendations, and how support for the plan crumbled because of controversial tailwater minimum flow proposals. Next, he discussed the events spawning litigation during a drought.

Mr. Patterson noted many issues were not before the Eighth Circuit in the consolidated appeal of cases from three District Courts, suggesting therefore, the best and most comprehensive answer might not come from litigation. However, he also talked about how litigation in other big cases has brought important issues to the table. "Litigation," he stated, "at least, can bring issues to light, or simply force them to be addressed."

The second panelist, Michael J. Pearce of Fennemore Craig in Phoenix, Arizona, spoke about the role of the courts and litigation in regulating our rivers. Mr. Pearce began by asking, "Are the courts going to run our rivers?" He says yes. Mr. Pearce concluded there was too much instantaneous gain and shortsighted self-interest to expect anything but for people to act in self interest and go to litigation.

Mr. Pearce noted the courts had long been involved in running our rivers, but in the past the states had played an active role in the litigation, often protecting the public interest. Now, he stressed, the states cannot afford to litigate and the public interest is often sidelined. Mr. Pearce concluded, "there needs to be more people at the table to make this system of running rivers by litigation work."

The role of federal actions, in Mr. Pearce's view, cannot be ignored. He suggested continuing enforcement of law so discretionary action not benefiting species is always actionable is important in keeping public interest in the game. To shut out interests and resolve issues through incremental litigation, Mr. Pearce argues, is problematic. He concluded while states' need for federal money is a major concern, injunctions preventing states from intervening in large decisions is more problematic, or is at least an antecedent issue.

The third panelist, Anne Klee from the U.S. Department of the Interior in Washington, D.C., spoke about Endangered Species Act

("ESA") suits. She noted ESA suits on rivers often seek increased flow, and such suits rarely satisfy the parties or bring certainty. The Department of Interior, she said, is reaching out seeking cooperative solutions and new ways while getting away from bureaucratic rut, and added, providing incentives to cooperate will be important, as will respect for state law.

Klee asked whether the Bureau of Land Management could use water for ESA purposes in violation of contractual obligations. She discussed a collaborative effort in New Mexico having similar issues to problems on the often-talked-about Klamath River. Klee noted battles over water in litigation could become a zero sum game and be very adversarial. However, she suggested cooperative collaboration could be an alternative.

Aspects of Klee's vision of cooperative collaboration include having parties come together to craft their own creative solutions to water use and endangered species problems; federal and state agencies working together, instead of against one another; a shift to better use of water rather than simply looking for more water; and shared responsibility among the parties.

In the question and answer segment that followed Klee noted litigation did not necessarily have to polarize sides and impede progress stating, "[j]ust because you are in litigation doesn't mean you can't reach settlement." She stressed, opposing sides could "find overlapping consensus," and "issues [they] can work on." She also warned a "trend in judicial decisions regarding risk to species makes ongoing negotiation important even during litigation."

Regarding chances for ESA reform, Klee responded general reform was unlikely because Congress is reluctant to act comprehensively. However, she noted regulations not crafted to deal with some specific section 7 situations may be reformed.

LUNCHEON WITH SPEAKER: GALE A. NORTON

Rod Walston, Deputy Solicitor of the Department of the Interior, introduced Gale Norton, U.S. Secretary of the Interior. She stated that water law exists to resolve conflicts in time of shortage. Water is short in the West and population gains in the Southwest and West contribute to challenge of addressing water needs when there is a drought.

Secretary Norton used the Colorado River basin to help the audience visualize the drought. Throughout the entire Colorado River system, storage levels are low; therefore the system relies upon spring runoff. She spoke of low water levels throughout the Colorado River system such as Lake Powell and Lake Mead. Additionally, she mentioned the stress the Rio Grande was under due to its extended drought.

Secretary Norton then turned to public perception during the drought, proposing to the attendees to stick to their guns and preserve

the doctrine of water law because the law provides certainty. The law directs future water planning, success of market based transfers and environmental protection. To address water supply conflicts, she applies two principles: (1) work with the states, tribes and local interests to determine the best outcome; and (2) recognize that in time of shortage, one and all must understand water allocation. Congress has always deferred to state law when contemplating water law, and Secretary Norton illustrates her local approach through communication, consultation, and cooperation to achieve conservation.

Secretary Norton reviewed the history of the reserved rights doctrine and reminded the audience that the United States does not limit itself to this doctrine to acquire water rights. It also purchases rights and obtains water rights within the rubric of state water law. She excepted adjudicating Indian reserved rights, because such rights are different in that the federal government must obtain rights in the best interest of the tribe. She also spoke of the McCarran Amendment and pledged her goal of living within the "letter and spirit" of this amendment and fully participate in general stream adjudications whenever possible.

Secretary Norton drew upon Ronald Coase's economic theory to demonstrate the dilemma of unquantified water rights. The Klamath River basin epitomizes unquantified water rights despite the efforts to quantify. If each water user knew his exact rights, then parties could negotiate to satisfy each user's needs, for example, by fallowing land or restricting fish harvesting. She again turned to the Colorado River basin discussing the basis for the Colorado River Compact and California's 4.4 million annual acre-feet limitation. When California failed to meet its December 31 deadline, the Law of the River required Norton, without discretion, to limit the state to its 4.4 million acre-feet allowance. She concluded that this failure was likely to lead to another ten-year session of "divisive litigation."

Secretary Norton proposed solutions to some of the West's water challenges. First, the Interior plans to develop a resource management plan. Second, it proposes to initiate twenty-first century water management systems such as canal lining. Third, the Bureau of Reclamation will further use water banking programs whenever possible. Fourth, the Interior will research further desalinization technologies.

Secretary Norton concluded with a call for ideas. She recognized that there are a numerous challenging issues involved with water management, particularly with ownership clarification. In searching for solutions to water management challenges, she invited everyone to contact her with solutions.

BREAK-OUT SESSION ONE—MULTI-JURISDICTIONAL PRACTICE: PROMISING OR PROBLEMATIC?

Kathleen Marion Carr, U.S. Department of Interior in Boise, Idaho, moderated this panel.

The first panelist, Kenneth J. Warren of Wolf, Block, Schorr & Solis-Cohen, of Philadelphia, spoke about the pros and cons of multi-jurisdictional practice, specifically *pro hac vice* admission and the proposed revisions to Model Rules 5.5 and 8.5. Mr. Warren explained *pro hac vice* stands as an exception to the usual rule a lawyer must be licensed and in good standing in the state where he practices. The reason for the usual rule, Warren explained, is the state's interest in protecting clients from incompetent or unscrupulous lawyers, to preserve integrity in the profession and protect local lawyers who contribute to the community. *Pro hac vice* exists to allow some flexibility and allow multi-jurisdictional issues to be handled effectively while attempting to safeguard local interests.

Mr. Warren noted the existing rules are unrealistic for environmental and natural resources lawyers. He cited four reasons for multi-jurisdictional practice in these areas: (1) cross-boundary interstate issues are common; (2) cross-boundary interstate and international activities by clients are common in this economy; (3) multi-jurisdictional practice give clients an opportunity to seek specialists or stick with familiar counsel without complication due to jurisdictional matters; and (4) in-house and government lawyers move around a lot.

In practice, Mr. Warren noted, transient provision of legal services is rarely penalized, and in-house practice of law without license is tolerated because employment with the in-state company usually suffices as an ethical check provided the lawyer is acting for his employer. However, prophylactic use of local counsel may not be enough protection and the law is unclear about what specific conduct violates ethical rules and who disciplines when lawyer retreats outside state boundaries. Mr. Warren noted defining unauthorized practice demands an examination of core values.

He discussed how the *Birbower* holding spawned an American Bar Association rule change, which has not yet been accepted as law in the states. Rule 5.5, he stated, does not take the "drivers license" or the narrow "safe harbor" approach, but one somewhere in between. It requires local counsel to be an active participant. Warren urged involvement by lawyers to get the new rules promulgated in their states.

The second panelist, the Honorable Ruth McGregor of the Arizona Supreme Court spoke about Rule 33(d), adopted by Arizona, concerning multi-jurisdictional practice. Justice McGregor stated the goals of the rule serve individual interests of client choice and sustained relationships between clients and lawyers, and state interests

of maintaining standards and having an effective disciplinary system. In 2001, the Arizona Bar stated enforcement of multi-jurisdictional practice rules was lacking, abuse was prevalent and detrimental, and a large non-resident lawyer problem existed. In response, the court adopted Rule 33(d).

Rule 33(d) is an onerous rule in many respects. For example, a lawyer must provide certificates of good standing from jurisdictions where they practice. Justice McGregor states this is not as onerous as some lawyers make it out to be. Some onerous provisions include time consuming procedures, payment of partial bar dues and separate fees for each matter, and listing of all members in the firm. However, the allowance for emergency applications probably keeps many of these requirements from presenting real and immediate obstacles to justice says Justice McGregor.

Later in her presentation, Justice McGregor also noted the standard *pro hac vice* rule needs definition in the part that says one may practice without license in a state if in a "complex area of law where the non-lawyer has specific expertise." Exactly what would constitute a "complex area" of law or "specific expertise" is somewhat of an open question, and those practicing water law might be stuck in a gray area. Thus, water practitioners ought to familiarize themselves with the rules of any state in which they are dealing without being admitted to the bar.

The final panelist, Peter R. Jarvis of Stoel Rives LLP, Portland, Oregon discussed issues presented by the proposed revisions to Model Rules 5.5 and 8.5. Jarvis said the problem of unlicensed practice by a lawyer is similar to riding in a cab with a driver who does not know the area. He noted a series of potential problems even with the new uniform rules, revolving around definitions such as: "active participation" "predominant effect" and "recognized expertise." Also, Mr. Jarvis noted retained local lawyers can be subject to liability exceeding their expertise, and outside lawyers can be liable for problems caused by local counsel. To avoid such problems, Mr. Jarvis recommended attorneys clearly define responsibilities in writing from the outset on any project where multi-jurisdictional practice is concerned.

Mr. Jarvis mentioned an alternative to creating in-state/out-of-state teams for multi-jurisdictional problem: the reciprocal admissions process. He asked, "How essential are state bar restrictions" now that national law is taught pervasively? Jarvis says no one doubts the ability of host state to discipline attorneys practicing within. Yet, with increasing interstate issues, Jarvis wondered, will it continue to be appropriate for state supreme courts to deal with discipline, or should this be the responsibility of an administrative agency.

BREAK-OUT SESSION TWO—MUNICIPAL STORM WATER REGULATIONS: CONTROLLING THE TOXIC BREW IN CALIFORNIA

John Minan, University of San Diego School of Law, moderated the second break-out session. In Mr. Minan's opening remarks, he explained that the "toxic brew" of storm water runoff was the leading cause of water quality impairment and typically included a mix of metals, pesticides, fertilizers, animal waste, trash, and numerous other toxic substances. Mr. Minan pointed out that unlike sanitary waste, urban runoff is "discharged to receiving water without the benefit of. . . treatment." As a brief overview, Mr. Minan discussed the structure of storm water regulations including the MS4 municipal permit and explained "storm water regulation is part of the NPDES permit program." In closing, Mr. Minan asserted that significant regulatory actions regarding storm water pollution were occurring in California and explained that the panelists would focus on a recent lawsuit filed by the Building Industry Association, et al. challenging the San Diego MS4 permit.

Shandra M. Stephenson, attorney from Latham & Walkins LLP (representing the Building Industry), raised concerns that the San Diego MS4 Permit requirements exceeded the "maximum extent practicable" substantive limit of Section 402(p) in the CWA. Notably, she claimed the permit would result in the unreasonable expenditure of millions of dollars with no discernible water quality benefit, required "strict compliance" with water quality standards, and set unqualified requirements for new and existing developments. Additionally, Ms. Stephenson argued that the water-quality based provisions of the permit violated the Porter-Cologne Act of the California Water Code, infringed on municipal land use authority, and violated California Environmental Quality Act ("CEQA") requirements.

The second panelist, David Beckman of the Natural Resources Defense Council, disagreed with the Building Industry's position and asserted that the San Diego MS4 Permit requirements were either not stringent enough or should be viewed as the "very minimum" allowable.

The last panelist, Craig M. Wilson of the California State Water Resources Control Board, supported the provisions of the San Diego MS4 Permit and opened by clarifying that the permit was originally issued by the San Diego Regional Water Quality Control Board in February 2001 and subsequently appealed to his office, the State Water Resources Control Board ("Board"). Notably, none of the municipal dischargers subject to the permit filed a petition. Mr. Wilson stressed that it is within the States' jurisdiction to establish appropriate requirements for the control of pollutants in their MS4 permits.

A recent Los Angeles case established precedent for the Board by concluding "numeric standards for the design of Best Management Practices to control runoff from new construction and redevelopment

constituted controls to the maximum extent practicable." Similarly, San Diego's Permit incorporates numeric design standards and was upheld by the Board. Lastly, Mr. Wilson refuted several Building Industry claims by stating that the CWA granted the permitting agency discretion to determine pollution controls, by rejecting the claim that separate wet weather water quality standards were required in the Permit, and by contending that CEQA does not apply to NPDES permits.

BREAK-OUT SESSION THREE—PRIVATE WATER RIGHTS OR PUBLIC RESOURCE? OVERVIEW OF CURRENT TAKINGS ISSUES IN WATER LAW

Martha Pagel, Schwabe Williamson & Wyatt of Salem, Oregon, moderated this panel. Art Littleworth, filling in for Nancy Marzulla, spoke about takings, using the *Tulare* case as an example. Mr. Littleworth noted takings issues often involve take or pay contracts. State water contracts, he said, do not implicitly include a right for government to disregard obligations to deliver the way federal contracts could. State law takes into account all necessary things, balances uses of water against one another, and not in a way that favors endangered species. In the *Tulare* example, federal action overrode a state agency, which it had a right to do, but then faced valid takings claim because of this.

The second panelist, Barton ("Buzz") Thompson, Professor of Law at Stanford University, stated that not much has changed in the takings arena over the years, but *Penn Central* defined things categorically and now the Supreme Court is moving back to a "muddy" balancing-test-approach to takings. Historically, "takings" have been a land issue, and controlling doctrines in that area are often unable satisfactorily to handle issues presented by water. Thompson predicts an increased number of takings claims in water, including challenges to water reform efforts such as well restrictions.

Thompson also noted ESA remedies, which often require "cessation of use," can be harder on water owners than on land owners due to the usufructuary nature of water rights. Furthermore, some ESA remedies relating to land end up putting restrictions or total bars on appurtenant water rights.

Thompson asked whether all forms of water entitlements deserve the same kind of constitutional protection, and who should be able to sue or enforce them? Thompson noted the difficulties presented when trying to classify a water right that come from a contract with a water district, and the concept of a "beneficial holder" of a water right. Next, Thompson inquired into what constitutes a "traditional expropriation" in a water context. Again, Thompson noted things that look like regulatory takings in land may be a traditional expropriation in the water context because a water right is usufructuary. Furthermore, Thompson pointed to ambiguity in the test for a regulatory taking, i.e. should physical occupation be used as a *per se* rule, or does governmental purpose matter more in the water context?

He went on to inquire whether, if physical occupation is the rule, it an unmanageable one?

Because use is the core of a water right, a restriction on use violates the core interest, which is what physical occupation of land violates in the land context. But, whether this should likewise trigger *per se* unconstitutionality is unclear. Background principles of water could be interpreted to benefit the government in this context, raising another issue. In all, Thompson highlighted numerous areas in need of some attention.

The next panelist, David Haddock of Pacific Legal Foundation, discussed how the *Lucas* case explored background principles of law in its analysis of takings issues. He noted the courts would have to ask: Were the proscribed uses by regulation part of the right originally? He also noted, of Mr. Thompson's hypothesis about core interests being usufructuary is correct, this question would not need to be asked. However, he then asked whether beneficial use and waste would become the standard.

Mr. Haddock compared background principles as a static notion of stability for the law and beneficial use and waste as dynamic concepts that are the background notions of water law. For example, he noted in water law, beneficial use and waste *are* background principles, yet they are dynamic ideas in the law.

The benefit to the public, and to private water rights holders may depend on an interpretation of the underlying values of a water right. Yet, as Mr. Haddock pointed out, the framework for interpretation is not as capable of dealing fairly and easily with water law issues.

The final panelist, Alf Brandt of the U.S. Department of the Interior in Sacramento, California, spoke about whether contract rights to water deliveries from a water project equal a property right, and if so, what the scope of that right is. He asserted that three factors should be considered in making this determination: (1) the Project authorization statute (which often has express language defining the right, though that is not also unambiguous or controlling); (2) how much deference to state water law should be given; and (3) an evaluation of how the project is or was managed.

Brandt noted in the case in question the limits on water rights were reasonable use, the public trust as put forth in *Mono Lake*, nuisance, the California Endangered Species Act, and area of origin (basin protection) laws. However, the contractual nature of water delivery agreements injected other concerns. Mr. Brandt discussed how state water project contracts involved issues of reasonable efforts to protect water rights, distinguished water supply commitments, and involved Board of Department of Water Resources' discretion.

In response to Mr. Littlefield, Mr. Brandt offered the idea that one can learn from the *Tulare* case. The *Tulare* lessons were, first, to look closely at the scope of the contract. One should ask whether property is defined by the contract. One should also ask what means are "available" in terms of commitment, when supply is low. Next, one

must examine the government action giving rise to the takings claim and whether it is within the scope of the property right. This involved determining whether the action is a federal or state action. If it is a state action, there can be no taking. However, if the state asks the federal government to ask, there may be a takings issue, but this remains an open question.

Mr. Brandt thought contract rights to deliveries are not property rights and that *Tulare* and *Lucas* were decided wrongly. The issues he sees are ambiguity, water versus water rights, location, parcel-as-a-whole issues, and the effect of taking a market approach to water rights.

BREAK-OUT SESSION FOUR—SURVEY OF INDIAN WATER LAW: THE INTERPLAY BETWEEN QUALITY AND QUANTITY

Ramsey L. Kropf, an attorney with Patrick, Miller & Kropf in Aspen, Colorado, moderated the fourth break out session. The first panelist, Robert Anderson, Professor of Law at University of Washington, opened with a general discussion of federal reserved water rights, Indian reserved water rights, and the application of the McCarran Amendment. Next, Mr. Anderson outlined major caselaw for Indian water rights quantification and the use of reserved water rights for instream flows and fisheries. Mr. Anderson also pointed out potential adverse effects of the Endangered Species Act on Indian reserved water rights, noting two cases, *United States v. Billie* and *United States v. Dion*, where the ESA abrogated treaty rights. However, Professor Anderson noted that in one recent case, *Klamath Water Users Protective Association v. Patterson*, the ESA and tribal rights were complimentary because the court held that the Bureau of Reclamation had to operate the dam consistent with the requirements of both the ESA and the tribal water rights. Lastly, Professor Anderson briefly discussed recent holdings requiring fish habitat protection in order to satisfy tribal fishing rights.

The second panelist, Patti Goldman of Earthjustice in Seattle, reviewed three ways tribes could use federal environmental laws to protect water quality and quantity. First, tribes can use the CWA to reduce point source pollution. For example, the Penobscot Indian Nation challenged an NPDES permit authorizing Lincoln Pulp and Paper Company to discharge dioxins into the Penobscot River, impairing water quality and resulting in high levels of dioxins in fish consumed by the Penobscot. The Penobscot appeal resulted in significant pollution controls placed on discharges. Secondly, the tribes can use the CWA to reduce non-point source pollution. Here, Ms. Goldman presented the example of the Lower Elwha Tribe bringing a suit against the Forest Service to compel maintenance of federal roads, thereby preventing stream-damaging landslides. Lastly, Ms. Goldman described the use of the Endangered Species Act for maintaining instream flows.

The third panelist, Rich McAllister with the Environmental Protection Agency Region 10, described a tribe's ability to establish

"treatment as a state" or "TAS" status under the CWA, a status that allows tribes to set water quality standards and issue water quality certifications for reservation waters. Notably, several EPA eligibility decisions for TAS have been challenged in court. Mr. McAllister stated that, of the fifty tribes that have applied for TAS status, only twenty-six have been approved and "seven of those approvals have been challenged." TAS status is contentious because tribal water quality programs can be more stringent than state standards, can be applied to non-Indian fee lands, and can be applied to "submerged lands claimed by the state."

DAY TWO

FEATURED SPEAKER—CURRENT ISSUES IN FEDERAL WATER LAW
THOMAS L. SANSONETTI

Thomas Sansonetti, Assistant Attorney General, Environmental and Natural Resources Division at the United State Department of Justice spoke about current issues in federal water Law.

FEATURED SPEAKER—EAST MEETS WEST: THE EMERGING WATER LAW OF THE GREAT LAKES BASIN
CHRISTINE A. KLEIN

Christine Klein, Professor of Law at Michigan State University, spoke about water law in the Great Lakes states. The Great Lakes provide twenty percent of fresh surface water in the world, and ninety-five percent of the fresh surface water in the United States. She quoted Mark Twain "Whisky is for Drinkin,' water is for fightin'" to characterize water law in the West. She quoted Joe Dellapenna "We'll keep in touch" to characterize water law in the Great Lakes Region.

She discussed Great Lakes diversion schemes on a scale from sublime to ridiculous. There are already existing diversions, such as the Akron Ohio diversion taking three million gallons of water for replacement water and the Chicago River reverse flow of approximately two billion gallons per year. She exposed some ridiculous ideas of diversion such as: (1) constructing a pipeline to replenish the Ogallala Aquifer; (2) constructing a pipeline for coal slurry in Montana; and (3) shipping about 160 million gallons annually to Asia.

The Law of the Lakes encompasses state law, international treaties and state compacts. The eight basin states are Illinois, Indiana, Michigan, Ohio, New York, Minnesota, Pennsylvania, and Wisconsin. The two basin provinces are Ontario and Quebec. Some of the states have laws regulating surface water and groundwater. There are four international documents in place: (1) Boundary Waters Treaty; (2) Great Lakes Basin Compact; (3) Great Lakes Charter; and (4) Great Lakes Charter Annex.

Professor Klein went on to explain some of the emerging law. The

basic premise of the newest law is "Don't Dip Your Straw in our Basin." For example, the Water Resources Development Act of 1986 proposed that water could not be diverted out of the basin. If a state wanted to do so, it would need permission from the other states. However, Michigan can divert with impunity because it is the only state that always drains within the basin. The Annex 2001 agreement proposed to prevent water loss, protect water quality and quantity, and improve ecosystems.

Professor Klein concluded by illustrating lessons the East can learn from the West. Data is incredibly important. Groundwater is not necessarily mysterious. Regulation is not inherently evil. She also demonstrated lessons that the West can learn from the East. Environmental protection is not synonymous with waste. Quality and Quantity are interrelated. It is important to reach beyond our grasp to improve ecosystems.

SESSION THREE—LONG-TERM IMPLICATIONS OF DROUGHT AND WATER MANAGEMENT

The first panelist, Reed Benson, Professor of Law at University of Wyoming (stepping in for Karen Allston, Center for Environmental Law & Policy) opened by pointing out that only a third of the water districts in Wyoming had implemented water conservation programs in response to the drought. Mr. Benson proposed several items for better water management during the drought including: pricing water higher, providing greater flexibility in water administration, better promotion of reduced use, improved planning for drought, and greater protection of recreational and ecological water rights (if all else fails, prayer).

The second panelist, Joseph Dellapenna from Villanova University School of Law, described three models of surface water allocation seen throughout the United States: the riparian system, the prior appropriation system, and the so-called "regulated riparianism" system. Dellapenna asserted that the traditional riparian system treats water as common property and, as in the Tragedy of the Commons, recurring water shortages have resulted in an increased number of water disputes. In order to avoid these conflicts, many eastern states have adopted a system called "regulated riparianism." This new system of law does not treat water as either common property or private property (as in the appropriation system), rather, it treats water as a "species of public property." Dellapenna asserted that half of the states east of Kansas have developed a regulated riparian system described as an "administrative permit system[ ] to replace traditional riparian rights." Dellapenna concluded by acknowledging the significant financial costs of the new system but claiming it was a "better suited" system for the eastern states.

Next, David Hayes, former Deputy Secretary of the Department of Interior and currently in private practice with Latham & Watkins, discussed the clash of federal and state water law. Mr. Hayes pointed

out that during times of drought demands intensify and, correspondingly, federal presence in western water management increases. The most common federal trigger is the ESA. Mr. Hayes reviewed four prominent and on-going cases involving federal/state conflict, including the silvery minnow conflict on the Rio Grande, the downstream flow and lake level requirements in the Klamath Basin, the water quality impacts on endangered fish in the California Bay-Delta, and lastly, the federal involvement in water shortage on the Colorado River. In closing, Mr. Hayes asserted the best solution to these conflicts was to include all stakeholders at the table.

Lastly, Colorado Supreme Court Justice Gregory J. Hobbs discussed the historical context of the prior appropriation doctrine and asserted that even in time of severe drought the reliability and predictability of the system must be enforced. Additionally, Colorado must live within its water constraints, namely rainfall, and the legal constraints of nine interstate water compacts, in order to maintain in-state and out-of-state uses. Justices Hobbs emphasized that "reservoir storage was the key to Colorado water use" during the drought and reported that Colorado used six million acre-feet in reservoir storage during 2002 to supplement streamflow.

SESSION FOUR—MIXING OIL AND WATER: THE ENDANGERED SPECIES ACT, STATE WATER LAW, AND "BEST SCIENCE"

Federico Cheever, Professor of Law at University of Denver, introduced the session by pointing out that the ESA must act as a balancing point between human endeavors and the continued existence of listed species. Professor Cheever stated that the requirement of the use of "the best scientific and commercial data available" is the means to that end. Despite the requirement of "best science" in a wide range of contexts and processes, Professor Cheever asserted that the ESA is vague in its definition of the requirement. Professor Cheever also noted that the relatively short time requirements of the ESA for activities such as listing determinations, designation of critical habitat, and issuance of Biological Opinions ("BO") make is almost impossible to do the rigorous studies needed to meet the best science requirement. Professor Cheever closed by pointing out that, paradoxically, the absence of sound science is seen by some to lead to over-application of the ESA and by others to lead to its under-application.

Alletta Belin, of Belin & Sugarman, provided a history of the operations of two federal water projects in New Mexico and their effects on the Rio Grande silvery minnow, a species listed as endangered under the ESA. Included in her history was a summary of suits filed by six environmental groups against the Bureau of Reclamation and the Army Corps of Engineers concerning water operations in the Middle Rio Grande, the lowest sixty miles of which provide habitat for most of the remaining minnows. Ms. Belin discussed several issues raised during litigation over the defendants'

consultation with the Fish and Wildlife Service and resultant BOs and issues associated with court rulings on reducing contract deliveries of water and private water rights.

Jennifer T. Buckman, with Best, Best & Krieger, provided a summary of ESA consultation and litigation associated with the endangered Lost River and shortnose suckers present in the Klamath Basin. In the Klamath case, the Fish and Wildlife Service's BO stated that operations of reservoirs would jeopardize the suckers and that the reasonable and prudent alternative would be to establish minimum water levels. This original BO was ruled "arbitrary and capricious." The Service again proposed minimum lake levels in a subsequent BO on a ten-year operation plan proposed by Bureau of Reclamation. The proposed minimum levels were higher than the levels proposed in the invalidated BO. Ms. Buckman outlined a position that as with the invalidated BO the Service's most recent BO is not based on "best science" and should be invalidated. Overall, she argued that lower lake levels did not harm the fish and biologists had selectively used data to support their position.

The final panelist J.B. Ruhl, Professor of Law at Florida State University proposed a methodological framework for use in decision making under the ESA. Professor Ruhl discussed a spectrum of decision-making methods that range from "sheer arrogance" to scientific method. Professor Ruhl's proposed framework includes using a mix of professional judgment (the workhorse), scientific peer review (to guard against arrogance or ambition), and the precautionary principal (for infrequent use when evidence is inconclusive, or even contra-indicative of protective measures, but not taking measures could reasonably lead to extinction). Professor Ruhl also provided commentary on provisions in a proposed act to codify the use of "sound science" in application of the ESA.

Holly Kirsner, Lisa Marie Thompson, and Daniel Wennogle