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PUBLIC TRUST DOCTRINE & WATER RIGHTS

THE WALKER RIVER CASE

DOES THE PUBLIC TRUST DOCTRINE APPLY TO WATER RIGHTS ESTABLISHED IN JUDICIAL DECREES?

by Roderick E. Walston, Best Best & Krieger (Walnut Creek, CA)

INTRODUCTION

A case currently pending in the Ninth Circuit raises a significant and novel issue of western water law. The case addresses whether the public trust doctrine can authorize modification of a water rights decree and reallocation of water rights adjudicated in the decree. *Mineral County, et al. v. Walker River Irrigation Dist., et al*., No. 15-16342, U.S. Court of Appeals, Ninth Circuit (hereinafter "Walker River case").

No federal or state court has ever addressed or decided this significant issue of water law. The issue arises in the context of the Walker River Decree, a 1940 decree that adjudicated all water rights in the Walker River, which is an interstate river that flows from California into Nevada and terminates at Walker Lake in Nevada. Mineral County, a county in Nevada, has brought an action alleging that the public trust doctrine requires that the Walker River Decree be modified in order to provide additional flows of water into Walker Lake for the protection of public trust resources in the lake. Mineral County's action, if successful, would result in a reallocation of water rights adjudicated in the Walker River Decree.

Mineral County's action raises a conflict between two important principles of law: 1) the public trust principle that the state has continuing authority to regulate water rights in the public interest; and 2) the principle that water rights decrees are final and certain. This article will argue that — although public trust principles play an important role in the administration of water rights, and properly apply in formulating water rights decrees — they do not provide a basis for modifying existing decrees and reallocating decreed water rights. Otherwise water rights decrees would never be final and certain and the holders of the decreed rights would never be able to fully rely on their decreed rights. This article will also argue that if the public trust doctrine nonetheless applies as a basis for modifying water rights decrees and reallocating decreed rights, such application would result in an unconstitutional taking of the decreed water rights in violation of the Takings Clause of the US Constitution, thus requiring that the holders of the decreed rights be compensated for the reallocation of their rights.

BACKGROUND OF THE CASE

The Walker River is an interstate river that flows from California into Nevada. The river originates as two forks in California — the West Fork and the East Fork — and the two forks flow into Nevada and converge near the town of Yerington. The river flows southward through the Walker River Indian Tribe's reservation and eventually reaches Walker Lake, where the river terminates. Water from the river is diverted by ranchers, water districts, public agencies and others in California and Nevada for their varied irrigation, municipal, domestic, and other needs. Most of the precipitation that feeds the river occurs in California, but most of the consumptive use of the river takes place in Nevada.

Public Trust & Water Rights

Public Trust Claim

Standing Issue

"Vested" Water Rights

Mono Lake

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In 1936, a federal district court in Nevada adjudicated the water rights of Walker River water users in Nevada and California and issued a final decree. *United States v. Walker River Irr. Dist., et al.*, 14 F.Supp. 10 (1936). On appeal, the Ninth Circuit required that the decree be modified to reflect the fact that the United States had impliedly reserved water rights for the Walker River Indian Tribe by creating the Tribe's reservation in 1859. *United States v. Walker River Irr. Dist., et al*., 104 F.2d 334 (1939). On remand, the district court modified the decree as required by the Ninth Circuit, and issued the final decree in 1940. *United States v. Walker River Irr. Dist., et al*., No. C-125 (April 24, 1940).

Many decades later in 1994, Mineral County — which is the Nevada county where Walker Lake is located — filed an intervention action in the Walker River litigation, alleging that the Walker River Decree must be modified in order to provide additional flows of Walker River water into Walker Lake. The additional flows are necessary, Mineral County argues, in order to protect fish and other public trust resources in Walker Lake. Mineral County's action is based on the public trust doctrine, which Mineral County argues requires that the additional flows reach the lake in order to protect the public trust resources. The effect of Mineral County's action, if successful, would be to reallocate the water rights of Walker River water users in Nevada and California whose rights were adjudicated in the Walker River Decree.

The federal district court (district court) dismissed Mineral County's action. First, the district court held that Mineral County lacked "standing" to bring its action, because the County had no proprietary interests in Walker Lake that it was seeking to protect, and the County could not represent its citizens in a parens patriae capacity. Citing the Ninth Circuit's decision in *United States v. City of Pittsburg, California*, 661 F.2d 783, 786-787 (9th Cir. 1981), the district court ruled that only the federal government and the states, and not cities and counties, may represent their citizens in a parens patriae capacity. [Editor's Note: "parens patriae" means "parent of the nation" and represents the power of the state to act as guardian for those who are unable to care for themselves].

Second, notwithstanding that the district court held that the County lacked standing, the court nonetheless addressed the merits of Mineral County's public trust claim. The court rejected Mineral County's claim on the merits because, the court concluded, the public trust doctrine does not apply to "vested" water rights. The court also stated that the state has discretion to apply the public trust doctrine to vested rights, and that whether the state chooses to do so is a "political question" that is beyond judicial purview. The court also held that if the public trust doctrine were applied to vested water rights, the holders of the rights, at least in California, would be entitled to compensation under the Takings Clause of the US Constitution.

It is not certain that the Ninth Circuit will reach and decide the merits of Mineral County's public trust claim — apart from whether the County may lack standing to maintain its action — because the Ninth Circuit may decide to refer the public trust issue to the Nevada Supreme Court rather than decide the issue itself. As will be explained, the public trust issue involves the interpretation of Nevada's public trust doctrine, and the Nevada courts have never decided whether the public trust doctrine applies to regulation of water rights, much less whether it applies to decreed water rights that have been established in judicial decrees. In a similar public trust case in California many years ago, a federal district court referred to the California courts the issue of whether California's public trust doctrine applies to regulation of water, and the referral resulted in the California Supreme Court's landmark decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), which held that the public trust doctrine applies to the state's regulation of water rights. That case came to known as the "Mono Lake case." The Ninth Circuit might follow the same approach and refer the public trust issue to the Nevada Supreme Court, as some parties and amici are urging the court to do and other parties and amici are urging the court not to do.

This article will not address issues unrelated to the merits of Mineral County's action, namely whether Mineral County has standing and whether its action should be referred to the Nevada Supreme Court. Instead, this article will address the merits of Mineral County's action, specifically whether the public trust doctrine authorizes modification of the Walker River Decree and reallocation of the decreed water rights.

THE PUBLIC TRUST DOCTRINE AS APPLIED TO THE WALKER RIVER

The Public Trust Doctrine

At the time of the American Revolution, the original thirteen states acquired sovereign authority over their navigable waters and underlying lands that had formerly belonged to the English Crown, subject to the federal government's constitutional power to regulate navigable waters in furtherance of interstate commerce. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 589-590 (2012); *Shively v. Bowlby*, 152 U.S. 1, 13 (1894); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the federal equal footing doctrine, new states, upon their admission to statehood, acquire the same sovereign authority over navigable waters and underlying lands as the original thirteen states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively*, 152 U.S. at 49-50. Thus, when Nevada was admitted to statehood in 1864, Nevada acquired sovereign authority over all navigable waters and underlying lands within its borders.

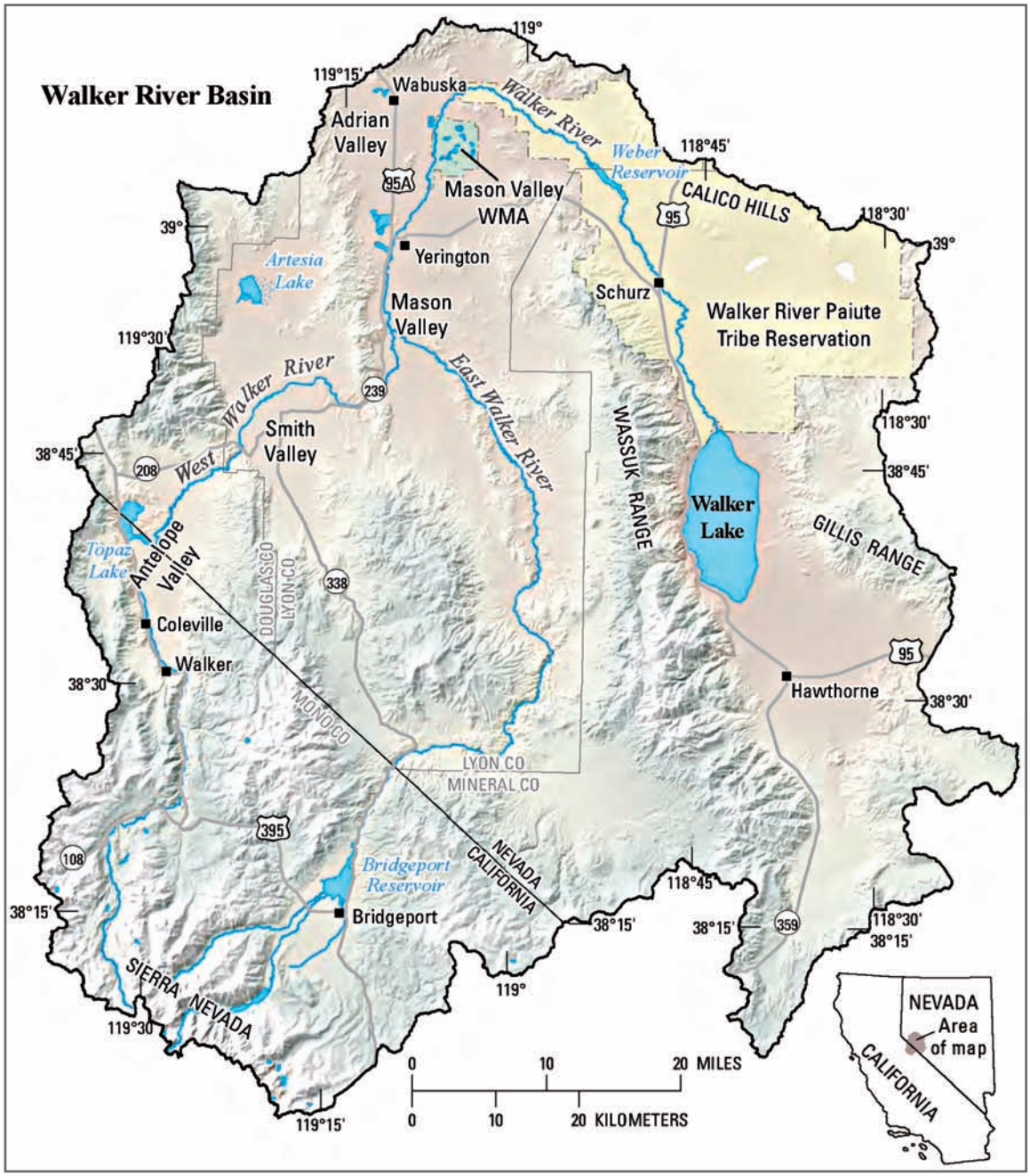
Public Trust & Water Rights

Public Trust Authority

Common Law v. Statutory

Under the public trust doctrine, as defined by the US Supreme Court in its seminal decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the state holds its navigable waters and underlying lands in trust for the public, for purposes of commerce, navigation, and fisheries. *Illinois Central, 146 U.S. at 452; National Audubon Society v. Superior Court*, 33 Cal.3d 419, 433-444 (1983); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 519 (1980). In *Illinois Central*, the US Supreme Court held that the Illinois Legislature was authorized under its public trust authority to revoke its grant of a fee interest to a private railroad company in the Chicago waterfront, which bordered the navigable waters of Lake Michigan, in order to provide for commercial development of the waterfront for the benefit of the public. The US Supreme Court stated that the state "can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them...than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central*, 146 U.S. at 453.

The public trust doctrine is a common law doctrine, because it has been fashioned by the courts, as in *Illinois Central*, rather than established by the legislatures. If a state legislature adopts public trust principles as part of the state's statutory system for regulating water rights, the public trust doctrine ceases to exist as a common law doctrine and becomes part of the state's statutory system for regulation of water rights. The reference to the "public trust doctrine" generally refers to the common law doctrine, not to statutory systems that may codify the common law doctrine.



Map adapted from USGS Scientific Investigations Report 2016-5133

Public Trust & Water Rights

State Law

Choice of Law

Resources Location

Nevada Decision

Guidelines

Water Rights System

Whose Public Trust Doctrine Applies: Nevada's or California's?

The US Supreme Court has held that the public trust doctrine is a state law doctrine, not a federal law doctrine. *PPL Montana*, 565 U.S. at 603; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). In *Coeur d'Alene*, for example, the US Supreme Court stated that its decision in *Illinois Central* was "necessarily a statement of Illinois law." 521 U.S. at 285. Thus, although the states acquire sovereign authority over navigable waters and underlying lands under the federal equal footing doctrine, each state is responsible for determining the nature and scope of its public trust authority over the waters and lands. The public trust doctrine is not a generic federal law doctrine that applies equally in all states, but instead is a state law doctrine that may vary from state to state, depending on how broadly or narrowly a state interprets its public trust authority.

Since the Walker River is an interstate river that flows from California into Nevada, the initial question posed in Mineral County's action is whether Nevada's public trust doctrine or California's doctrine applies in determining whether the doctrine authorizes modification of the Walker River Decree. No court has ever addressed or decided which state's public trust doctrine applies to an interstate body of water. Typically, disputes over water rights in interstate waters are resolved by the US Supreme Court under its original jurisdiction, in which the Court applies its own common law doctrine of "equitable apportionment." *Colorado v. New Mexico*, 467 U.S. 310, 323-324 (1984); *Nebraska v. Wyoming*, 325 U.S. 589, 617 (1945). The Nevada district court in the Walker River case, however, acquired jurisdiction over water rights in both Nevada and California in the original Walker River litigation, and thus the court, in addressing Mineral County's public trust claim, might face a choice of law issue that does not normally arise when the US Supreme Court resolves disputes concerning interstate waters under its original jurisdiction.

Logically, one might assume that a state's public trust doctrine applies to the portion of an interstate waterway located in the state, and thus that Nevada's doctrine applies to the portion of the Walker River located in Nevada and California's doctrine to the portion located in California. Because of the nature of the relief sought by Mineral County, however, it is reasonably clear that Nevada's public trust doctrine applies in the Walker River case, and that California's doctrine does not apply. Mineral County's action seeks to apply the public trust doctrine to protect public trust resources in Walker Lake, which is located wholly in Nevada. A state's public trust doctrine applies only for the purpose of protecting public trust uses within the state, and not for the purpose of protecting public trust resources in other states. In *Illinois Central*, for example, the US Supreme Court held that each state has authority to regulate navigable waters "within its limits," and that the waters are held in trust "for the people of the State." *Illinois Central*, 146 U.S. at 452. Since Mineral County's action seeks to protect public trust resources located wholly in Nevada, Nevada's public trust doctrine applies to the controversy, and California's public trust doctrine does not apply.

Nevada's Public Trust Doctrine as Applied to the Walker River Controversy

The Nevada courts have never decided whether Nevada's public trust doctrine applies to regulation of water rights, much less whether the doctrine authorizes modification of water rights decrees and reallocation of the decreed rights.

In *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011), the Nevada Supreme Court held that the public trust doctrine applies in Nevada, and that the doctrine restricts Nevada's authority to transfer lands underlying navigable waters. Nevada's authority to transfer the lands, the Nevada Supreme Court held, depends on several factors, such as whether the lands were navigable when Nevada was admitted to statehood and whether transfer of the lands contravenes public trust purposes. *Lawrence*, 254 P.3d at 607, 613-617. *Lawrence* did not, however, address whether the public trust doctrine applies to regulation of water or as a basis for modifying a water rights decree.

Nonetheless, *Lawrence* provided some guidelines for how the public trust issue raised in Mineral County's action might be resolved under Nevada law. The Nevada Supreme Court stated that Nevada's public trust doctrine is based on Nevada's Constitution and statutes and the principles established by the US Supreme Court in *Illinois Central*. *Lawrence*, 254 P.3d at 613. Thus, the viability of Mineral County's public trust claim would appear to depend on whether the claim is supported by Nevada's Constitution and statutes or the principles established in *Illinois Central*.

Nevada's Constitution and statutes, at least on their face, do not suggest that the public trust doctrine authorizes modification of a water rights decree and reallocation of the decreed rights. Although Nevada's Constitution contains no provision directly relating to water rights, the Nevada statutes provide for comprehensive regulation of water rights. Nevada Revised Statutes (NRS) §§ 533.005 et seq. Under the statutes, the Nevada State Engineer is responsible for administering the statutory water rights system,

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Adjudications

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Property Action

Right to Use v. Modification

Reallocation Potential

Decreed Rights

and for regulating water rights. *Id*. at §§ 533.325. The State Engineer is authorized to issue a permit to appropriate water if the proposed use is "beneficial," and a beneficial use of water is considered a "public use." *Id*. at §§ 533.050, 533.353, 533.050. The State Engineer cannot issue a permit if the proposed use is "detrimental to the public interest." *Id*. at §533.070(2). The Nevada statutes do not authorize the State Engineer to modify a water rights decree and reallocate the decreed water rights. On the contrary, the Nevada statutes establish a comprehensive system for court adjudications of water rights, *id*. at 533.090 et seq., and provide that the adjudicated rights are "final" and "conclusive." *Id*. at § 533.210. Thus, Nevada's Constitution and statutes do not appear to support Mineral County's public trust claim.

The principles established in *Illinois Central* also do not indicate that the public trust doctrine authorizes modification of a water rights decree and reallocation of the decreed rights. As mentioned above, *Illinois Central* held that the Illinois Legislature could revoke its grant of a fee interest in lands bordering the navigable waters of Lake Michigan in order to provide commercial development of the Chicago waterfront. No issue was raised in *Illinois Central* concerning whether the state could revoke or modify water rights that had been established in a judicial decree, at least without payment of compensation to the holders of the decreed rights. It is one thing for the Legislature to revoke its own grant of a fee interest, as in *Illinois Central* — i.e., to simply undo what the Legislature has done — and something entirely different for the state to revoke or modify a water right established through the judicial process. As we next explain, general principles of finality and repose apply to water rights decrees, and *Illinois Central* did not consider how these general principles apply to a state's authority to regulate water under the public trust doctrine, or whether these general principles might limit the state's regulatory authority.

General Principles of Finality and Repose Applicable to Water Rights Decrees

The US Supreme Court has stated that "general principles of finality and repose" apply to water rights decrees. *Arizona v. California*, 460 U.S. 605, 619 (1983). As the Court has stated, "[c]ertainty of water rights is particularly important with respect to water rights in the Western United States," because "[t]he development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the county." *Id*. at 620. Similarly, the US Supreme Court has stated that a water rights decree "enables a court of equity to acquire jurisdiction of all the rights involved... and thus settle and permanently adjudicate in a single proceeding all the rights...of all the claimants to the water taken from a common source of supply." *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983). Based on these principles, the US Supreme Court in *Arizona* and *Nevada* barred the United States from asserting additional water rights claims for Indian tribes and others that could have been, but were not, asserted in earlier water rights decrees.

An action to adjudicate all water rights in a stream system is generally considered an in rem action, because the action is intended to establish all rights in a particular res, namely a body of water. *Nevada*, 463 U.S. at 143-144; *United States v. Alpine Land & Reservoir Co*., 174 F.3d 1007, 1013-1014 (9th Cir. 1999). [Editor's Note: an "in rem" lawsuit or other legal action is directed toward property, rather than toward a particular person]. A water right adjudicated in an in rem action would appear to be the most secure, certain, and reliable form of water right under our system of laws, because the right has been adjudicated in relation to all other rights by a court of law, applying principles of law that apply to all such rights. Thus, the holder of a decreed water right has the most reasonable expectation of the right to use, and continue to use, the water that is the subject of the decree. Although public trust concerns are properly considered in the formulation of a water rights decree, such concerns are not appropriate as a basis for *modifying* a decree once the decree has been issued and the decreed water rights holders have begun exercising their rights. In the *Walker River* case, for example, the holders of the decreed water rights acquired their rights and have been exercising them for several decades prior to Mineral County's action. Thus, the general principles of finality and repose that apply to water rights decrees preclude the public trust doctrine from being construed as a basis for modifying a water rights decree and reallocating the decreed rights.

If the result were otherwise, a water right adjudicated in a decree would never be final and certain, because the right would always be subject to reallocation based on the changing values and perceptions of the public trust doctrine. The contours of the public trust doctrine have never been fully defined as the doctrine might apply in the water rights context. Indeed, one of the issues raised in the *Walker River* case is whether Nevada's public trust doctrine even applies in the water regulation context. Although the need to protect public trust resources may weigh heavily in a state's administration of its water rights system, the need for finality and certainty of water rights decrees weighs in favor of the conclusion that — once water rights have been adjudicated in a final court decree and the holders have begun exercising their decreed rights — their decreed rights are not subject to reallocation based on public trust principles.

Public Trust & Water Rights

California Precedent

The California Supreme Court's Decision in *National Audubon*

Mineral County's public trust claim substantially relies on the California Supreme Court's decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), which held that California's public trust doctrine applies to regulation of water rights. Since California's public trust doctrine does not apply in the *Walker River* case, *National Audubon* would apply, if at all, only as an analogy.

In *National Audubon*, the California Supreme Court held that the State Water Resources Control Board (Board), which administers California's statutory water rights system, was authorized under the public trust doctrine to reconsider its earlier decision granting an appropriative water right permit to the Los Angeles Department of Water and Power (DWP), in order to determine whether to impose conditions to protect public trust uses in Mono Lake. DWP argued that the Board was not authorized to reconsider its decision because DWP had a "vested right" as the result of the Board-issued permit. The California Supreme Court rejected DWP's argument. The California Supreme Court held that the state has "continuing supervisory authority" over water rights under the public trust doctrine; that the Board therefore had authority to reconsider its decision granting a permit to DWP in order to determine whether to impose conditions; and that DWP's claimed vested right does not bar the state from reconsidering its decision. *National Audubon*, 33 Cal.3d 445-457.

Permit v. Decree

National Audubon's conclusion that the Board had public trust authority to reconsider its decision notwithstanding DWP's claimed vested right might appear, on its face, to support Mineral County's claim that the courts have public trust authority to modify the Walker River Decree notwithstanding any claimed vested rights by Walker River water users. The vested rights claims in *National Audubon* and the *Walker River* case, however, are entirely different. The claimed vested right in *National Audubon* was based on a permit issued by the Board, not, as in the *Walker River* case, on a decree issued by the judicial branch as the result of an adjudication of all water rights in a stream system. Thus, the "general principles of finality and repose" that apply to water rights decrees (*Arizona*, 460 U.S. at 619), did not come into play in the *National Audubon* case. In light of these general principles, it is not clear that the *National Audubon* Court itself would have interpreted the public trust doctrine as a basis for reallocating decreed water rights. In any event, since California's public trust doctrine does not apply to the Walker River controversy, it is immaterial whether *National Audubon* might otherwise support Mineral County's claim.

CONSTITUTIONAL TAKINGS ISSUES

The Takings Clause

Burden

The Takings Clause prevents the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 354 U.S. 40, 49 (1960). *See generally* R. Walston, "Takings and Water Rights," *The Water Report*, p. 1 (*TWR* #93) (Nov. 15, 2011).

Private Property Protection

If the public trust doctrine were construed as authorizing reallocation of water rights adjudicated in judicial decrees, this would raise questions concerning whether the doctrine as so construed results in an unconstitutional taking of property in violation of the Takings Clause of the US Constitution. The Takings Clause prohibits the taking of private property for public use without payment of compensation. U.S. Const., amends. V, XIV; *Kelo v. City of New London*, 545 U.S. 469, 472 (2005). Thus, if the Ninth Circuit in the *Walker River* case concludes that Nevada's public trust doctrine authorizes reallocation of water rights adjudicated in the Walker River Decree, the Ninth Circuit would face the question whether the doctrine violates the Takings Clause and requires payment of compensation to the holders of the decreed rights.

Regulatory "Taking" Principles

The Takings Clause applies and requires compensation not only when the government physically seizes property for public use, such as for schools, hospitals and roads, but also when government regulates property, if the regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The US Supreme Court has applied a balancing test in determining whether a government regulation goes "too far"— this balancing test focuses on the "economic impact" of the regulation on the property owner, the extent to which the regulation interferes with his "distinct investment-backed expectations," and the "character of the government action." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-125 (1978); *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538-539 (2005). A regulation results in a categorical taking per se — and the balancing test does not apply — if the regulation results in a "physical taking" of the property (*Loretto v. Teleprompter CATV Corp*., 458 U.S. 419, 434-435 (1982)), or causes the property owner to lose "all economically beneficial uses" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). On the other hand, no taking occurs if the government regulation is supported by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029.

Public Trust & Water Rights

Use Rights

Supreme Court Factors

Judicial "Taking"

Property Use Restrictions

Water Reallocated

Photo from USGS website: https://nevada.usgs.gov/walker/downstreamtour.html

The US Supreme Court has held that a water right — even though usufructuary (use right) — is a form of "property" within the meaning of the Takings Clause. *United States v. Gerlach Live Stock Co*., 339 U.S. 725, 737, 752-754 (1950); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-408 (1931). The US Supreme Court has not, however, definitively decided whether the Takings Clause applies to and limits government regulation of water rights. If the Ninth Circuit concludes that Nevada's public trust doctrine authorizes reallocation of decreed water rights in the Walker River and that the Takings Clause does not apply, the US Supreme Court would have an opportunity to review important issues of water law and takings law that the US Supreme Court has never decided.

In *National Audubon*, the California Supreme Court held that takings claims do not arise when the government restricts vested water rights under the public trust doctrine, because the water right is held subject to the public trust and the holder of the right is not divested of "title" to his property. *National Audubon*, 33 Cal.3d at 440. The US Supreme Court has held, however, that whether a property right has been unconstitutionally taken does not depend on whether the property owner is divested of title or other incidents of ownership, but instead depends on the various factors that the US Supreme Court applies in its takings jurisprudence — such as the "economic impact" on the property owner, *Penn Central*, 438 U.S. at 124-125, whether the regulation results in a "physical taking" of the property, *Loretto*, 458 U.S. at 434-435, and whether the property owner has lost "all economically beneficial uses" of the property, *Lucas*, 505 U.S. at 1019. Thus, takings jurisprudence under US Supreme Court decisions focuses on various factors other than incidents of ownership, contrary to the California Supreme Court's *National Audubon* decision.

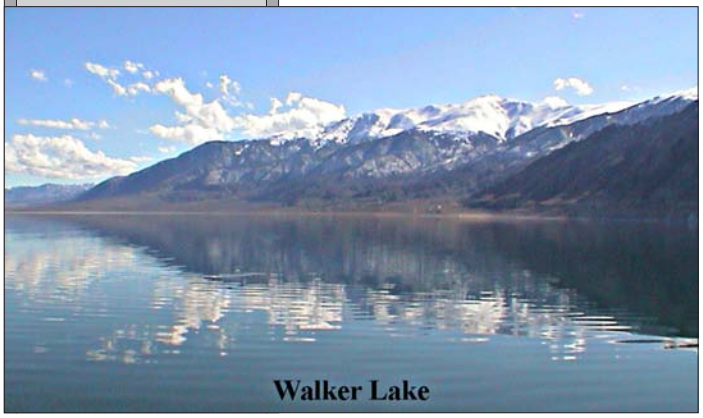
Judicial Takings?

If the public trust doctrine is applied to reallocate decreed water rights established in the Walker River Decree, any unconstitutional taking of the decreed rights would result from the judiciary's interpretation of the public trust doctrine, and not, as in the usual taking case, from legislative or executive action. This would raise the question whether there can be a "judicial taking" of property. Under the doctrine of judicial taking, an unconstitutional taking may occur if a court defines or redefines property in a way that causes the property owner to suffer the same loss of the right to use property, or diminution in the value of property, that would be caused by legislative or executive action restricting the right. *See* B. Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

A recent four-justice US Supreme Court plurality opinion, written by the late Justice Antonin Scalia, argued that a judicial taking of property may occur and require payment of compensation if a court significantly changes the definition of property by imposing restrictions on property use not previously recognized under state law. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Quality*, 560 U.S. 702, 713-728 (2010) (plurality opinion). As the plurality opinion stated, "the Takings Clause bars the State from taking property without paying for it, no matter which branch is the instrument of the takings." *Id*. at 715. Justice Scalia's plurality opinion did not command a majority of the US Supreme Court, however, and it remains to be seen whether a Court majority will adopt the judicial taking principle in a future case. Perhaps the *Walker River* case may provide the US Supreme Court with this opportunity.

Per Se Taking?

The Walker River water users who oppose Mineral County's public trust claim argue that — if their decreed water rights are reallocated under the public trust doctrine — the reallocation would constitute a categorical per se taking of their water rights, because the doctrine as so applied would result in a "physical taking" of their water rights, as in *Loretto*, and would cause them to lose "all economically beneficial uses" of their rights, as in *Lucas*. The water users argue that a per se taking would occur because — even though they may not lose all of their water rights — they would lose all rights to use the portion of the water that is reallocated under the public trust doctrine. Their argument may be supported by the US Supreme Court's recent decision in *Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (2015), which held that a government regulation requiring raisin producers to give a percentage of their raisin crop to the government free of charge resulted in a per se taking of the producers' raisins, because they lost all rights in the raisins that they were required to give to the government.



Walker Lake

Public Trust & Water Rights

Water Law Evolution: Regulations

"Background Principles" of State Law

Several law professors have submitted an amicus brief in the *Walker River* case arguing that government regulation of water rights based on the public trust doctrine does not give rise to takings claims, because western water law has "evolved" over time and such evolution could not have occurred if takings claims had been asserted and upheld at every step of the evolutionary process. Certainly western water law has evolved from the early days, when the early miners adopted the rule of prior appropriation as a local custom, to the modern age, in which the right to use water is based on principles of reasonable use. It is equally true that the Takings Clause does not and cannot apply at every step of the evolutionary process; otherwise, the development of western water law might not have taken place. For example, most western states have adopted the doctrine of reasonable use, which provides that water rights are limited by reasonable use, and the courts have applied the reasonable use doctrine to limit water rights without requiring payment of compensation to the holders of the rights. *See, e.g.*, *Joslin v. Marin Mun. Wat. Dist.*, 67 Cal.2d 132, 137-138 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 365-368 (1935). In the context of land use regulation, the US Supreme Court has held that the states may reasonably restrict the zoning of property in order to protect the public health, welfare and safety, without necessarily being required to pay compensation to property owners whose property is zoned. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). As Justice Holmes has commented, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Judicial Decree Certainty

Nonetheless, if the public trust doctrine is applied as a basis for reallocating water rights established in a judicial decree, the reallocation of the decreed rights would appear to give rise to legitimate takings claims, regardless of whether and how the public trust doctrine might apply in other contexts. As noted earlier, a water right adjudicated in a court decree may be the most secure, certain, and reliable form of water right under our system of laws, and the holder of the decreed right has the most reasonable expectation of the right to use, and continue to use, the right. Thus, the holder of a decreed water right does not have a reasonable expectation that his right may be reallocated on the basis of public trust principles that were not applied or deemed applicable when he acquired his decreed right — and that have never been applied to water rights in Nevada, or to water rights in California prior to the California Supreme Court's 1983 decision in *National Audubon*, or, more importantly, to water rights established in judicial decrees in Nevada, California, or any other state. Since the public trust doctrine has not been applied in this context, its application would not be supported by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029. Since the doctrine has never been applied or held to apply in this context, its application would cause a sudden, abrupt, and unpredictable change in the law, and would not be part of the gradual evolution of western water law in which takings principles have not been applied.

Background Principles Disrupted

CONCLUSION

Undecided Issues

The *Walker River* case raises significant issues concerning the relationship between public trust principles and the "general principles of finality and repose" that apply to water rights decrees. These issues are of national importance, and are particularly important in the western states, where water is chronically in short supply. Neither the US Supreme Court nor any other courts has ever decided these nationally-important issues. If the Ninth Circuit decides these issues on the merits, the US Supreme Court will have an opportunity to directly review the Ninth Circuit decision and decide the issues for itself. If, instead, the Ninth Circuit refers the issues to the Nevada courts, the Nevada Supreme Court presumably will decide the issues and its decision would be subject to direct review by the US Supreme Court. Either way, the public trust issues raised in Mineral County's action may eventually reach the US Supreme Court, if Mineral County's action is not dismissed on standing grounds. Once the merits of Mineral County's action are decided, if they are decided, whether by the US Supreme Court, the Nevada Supreme Court, or the Ninth Circuit, the decision will establish a major precedent in the continuing development of western water law.

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Roderick Walston is an attorney with Best Best & Krieger, in the firm's Walnut Creek, California, office. He represented the State of California in the case of *National Audubon Society v. Superior Court* that is discussed in the article. He currently represents counties and water users in Nevada and California opposed to Mineral County's public trust claim in the Ninth Circuit. The views expressed in this article, however, are those of the author and not necessarily of the counties and water users whom he represents.

Federal Water Policy

Regulatory Reform

Infrastructure & Clean Water

Scarce Water Supplies

Investment Tax Credits (Private)

Innovative Financing

Regulatory Constraints

FEDERAL WATER POLICY

EMERGING WATER POLICIES AND THE TRUMP ADMINISTRATION

by Sean Taylor, Van Ness Feldman LLP (Washington DC)

INTRODUCTION

The New Year marked the swearing in of the 115th Congress on January 3rd and the Inauguration of President Donald Trump on January 20th. In the days and weeks that have followed, we have seen a dizzying amount of action on the legislative front, with both the House and Senate actively working to roll back a number of Obama Administration policies and regulations. Not to be outdone, President Trump has moved quickly with the signing of Executive Orders to reduce regulation and expedite environmental reviews and approvals for high priority infrastructure projects. Through the Congressional Review Act, the new Congress and President have repealed an Obama-era Stream Protection Rule.

As of late February, the flurry of activity continues. The President just signed an Executive Order directing all federal agencies to establish a Regulatory Reform Task Force to identify burdensome regulations for repeal or modification. He has signaled a clear intent to grow the economy and address the nation's failing infrastructure, which have been primary objectives since the campaign.

The word infrastructure often invokes images of roadways, bridges, rail lines and air and seaports — the structures that keep commerce and people moving. In fact, nearly all aspects of both the physical and non-physical properties of society are infrastructure-based. Hard infrastructure (i.e., the physical networks of a modern industrial nation) relies on soft infrastructure (financial and educational systems, the system of government, regulatory approval processes, governmental oversight, etc.) to function efficiently and productively. Whether hard, soft, physical or non-physical, every aspect of infrastructure relies on the availability and accessibility of clean water, and lots of it. While the policies and priorities of this new Administration and Congress are still emerging, it appears that there may be opportunities to address these issues in the coming years.

In particular, we as a nation face growing concerns over water supply. These concerns stem in part from unstable weather patterns that have wrought significant long-term drought and extreme weather events over the last decade. As populations continue to grow, states, municipalities, agricultural producers, industry, and other users are increasingly required to compete over scarce supplies, and state and local leaders find themselves increasingly looking to Washington DC for solutions.

INFRASTRUCTURE

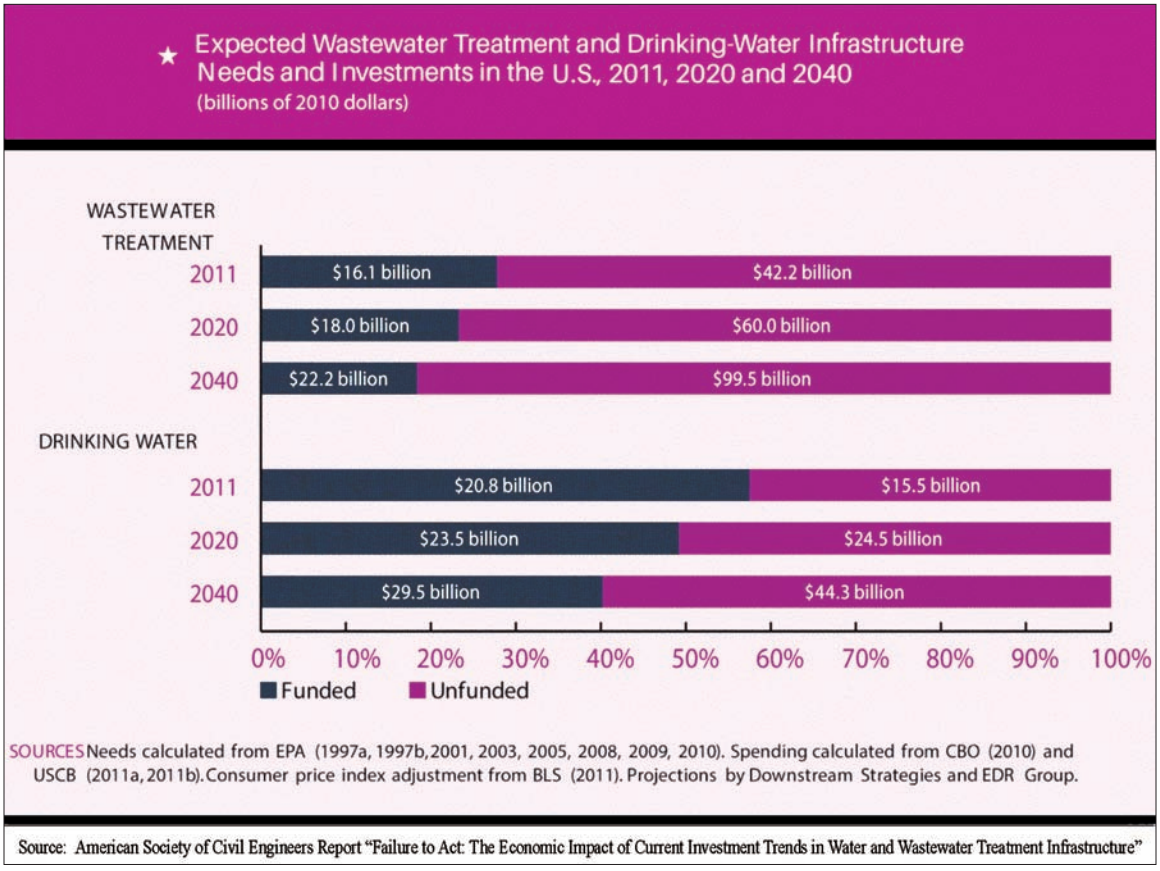
Throughout the recent Presidential campaign, a number of candidates expressed interest in broad infrastructure improvement initiatives to address the needs of the nation's aging infrastructure. President Trump has proposed a $1 trillion initiative to pursue an "America's Infrastructure First" policy to support investment in transportation, telecommunications, clean water, a modern and reliable electric grid, security infrastructure, and other pressing domestic needs. Although the details remain vague, the plan would revolve around public subsidies for projects of interest to private investors. The plan is the concept of venture capitalist Wilbur Ross, Trump's nominee for Secretary of Commerce, and Peter Navarro, business professor at the University of California at Irvine. It proposes an investment tax credit that would cost $137-$167 billion in order to stimulate roughly $1 trillion of private investment over a ten-year period. This financing option would serve as a critical supplement to existing financing programs, public-private partnerships, Build America Bonds, and other funding opportunities. This private-public approach was reiterated by the President in his February 28th address to Congress.

In December 2016, then President-Elect Trump announced plans to establish an Infrastructure Task Force to coordinate and carry out the ambitious program; as of the publication of this article, however, very little detail is known about the plan. Secretary of Transportation Elaine Chao provided insight into the incoming Administration's plans during her confirmation hearing on January 11th. Her remarks focused on three areas of importance for the new administration. First, she addressed the lack of federal financing resources (traditional program funding) to take on the failing infrastructure needs of the nation. Secretary Chao stressed the importance of capitalizing on innovative financing tools in order to take full advantage of the estimated trillions of dollars in capital that equity firms, pension funds, endowments and others can invest through an expanded market for public-private partnerships. Second, she indicated that the incoming Administration plans to work with Congress to address what it deems to be the unnecessary regulatory constraints that stymie project development, manufacturing, and economic growth across the nation's infrastructure spectrum. Lastly, Secretary Chao spoke of the "unique opportunity to address the exciting new technologies transforming travel and commerce" and how "the private sector is driving this innovation" to modernize American infrastructure.

Federal Water Policy

Clean Water Priority

The Trump Administration has stated that clean water is a high priority issue, and they plan to develop a long-term water infrastructure plan with city, state, and federal leaders to upgrade aging water systems throughout the nation.



Source: American Society of Civil Engineers Report "Failure to Act: The Economic Impact of Current Investment Trends in Water and Wastewater Treatment Infrastructure"

State Revolving Funds

The President has called for tripling the funding for the Clean Water and Drinking Water State Revolving Fund programs to help states and local governments upgrade critical drinking water and wastewater infrastructure. Private financing remains at the core of the President's infrastructure proposal; however, many believe that tax credits will not be enough to drive the investment needed for all sectors of our nation's many infrastructure demands — particularly those in rural states. Among Republicans, direct federal spending at stimulus-like levels is considered a nonstarter, given what they perceive as lackluster economic impact from the American Recovery and Reinvestment Act (ARRA), which was enacted in the early days of the Obama Administration at a price tag of $787 billion.

Private Financing

Direct Federal Spending

While it remains unclear how Congress would pay for this package of improvements, it is likely to be a combination of multiple financing tools. House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) met with the President on February 16th to discuss the proposal, and confirmed that the President promised money for infrastructure during the meeting. This is good news for those seeking bipartisan support for a package because Congressional Democrats are more likely to negotiate an overhaul of the tax code if Republicans are willing to include direct federal spending as part of an infrastructure package.

Blueprint to Rebuild America's Infrastructure

Democrats' Plan

On January 24th, Senate Democrats, led by Minority Leader Chuck Schumer (D-NY), unveiled a 10-year, $1 trillion infrastructure plan that reportedly would create 15 million jobs and would rely heavily on direct federal spending. Senator Schumer called on President Trump to work with Democrats on the plan and said the details of how to pay for the plan and specific funding allotments would be released at a later date. Senator Schumer was joined by Committee Ranking Members Bernie Sanders (D-VT, Budget), Tom Carper (D-DE, Environment and Public Works), Bill Nelson (D-FL, Commerce), Patrick Leahy (D-VT, Appropriations), Maria Cantwell (D-WA, Energy and Natural Resources), and Sherrod Brown (D-OH, Banking) — all of whom spoke about specific infrastructure needs within the jurisdiction of their Committees.

Federal Water Policy

Funding & Jobs (Democrat Plan)

Although the plan lacks specifics, preliminary breakdowns of the funding and projected job creation numbers are as follows:

$210 billion for roads and bridges = 2.7 million jobs
$110 billion for water and sewer = 2.5 million jobs
$180 billion for rail and bus systems = 2.5 million jobs
$200 billion for vital infrastructure programs to get major projects moving = 2.6 million jobs
$75 billion to rebuild America's schools = 975,000 jobs
$65 billion for ports, airports, water ways = 845,000 jobs
$100 billion for energy infrastructure = 1.3 million jobs
$20 billion to expand broadband = 260,000 jobs
$20 billion for backlogs on public and tribal lands = 260,000 jobs
$10 billion for VA hospitals and extended care = 130,000 jobs
$10 billion in new innovative financing tools = 1.3 million jobs

Trump Plan

In his address to a Joint Session of Congress on February 28, President Trump discussed his plan for addressing the nation's failing infrastructure. Aspects of the plan also are expected to be included in the President's fiscal year 2018 budget request, which could be released as early as mid-March. Although the President's speech shed some light on general aspects of his plan, there is no guarantee an associated legislative proposal will be introduced anytime soon.

Alternative Supply & Storage

As Congress and the Administration debate the infrastructure needs to address the nation's aging water supply systems, they are likely to do so within the framework of current federal programs. The President will be seeking to increase funding for the Clean Water and Drinking Water State Revolving Fund programs within the US Environmental Protection Agency (EPA), and members of Congress are likely to seek increased funding for federal programs focused on alternative water supply and storage, particularly members from arid states in the west.

Infrastructure Financing (Legislative Options)

Infrastructure Gap Proposals

In recent years, Congress has introduced legislation to address the growing financial burden on state and local governments in an effort to close the water infrastructure gap. There are five options that reflect recent legislative proposals, which are certain to be discussed in the coming months as Washington gears up for a national infrastructure debate:

1) Increasing funding for the State Revolving Fund (SRF) programs under the Clean Water Act and the Safe Drinking Water Act
2) Establishing a national infrastructure bank
3) Creating a federal water infrastructure trust fund
4) Reinstating authority for the issuance of Build America Bonds
5) Lifting restrictions on private activity bonds for water infrastructure projects

High Costs

A number of these options have been examined by Congressional committees in recent years. Interest in new financing options continues, largely due to long-standing concerns with the high costs associated with repairing aging and deteriorating infrastructure and in response to events in individual regions and cities, such as the recent lead exposure crisis in Flint, Michigan.

Consensus Lacking

Consensus exists among many state and local stakeholders, industry and labor groups, the environmental community, Congress, and the President on the need for more investment in water infrastructure. However, there is no consensus supporting a preferred option or policy to address the nation's growing needs and there is no single method that will close the financing gap completely. For example, large urban or multi-jurisdictional projects may benefit from private financing options, while low-income, small, and rural communities have limited ability to access private financing and would be a better fit for direct federal spending or assistance through loan and grant programs. Addressing the many areas of need and securing the appropriate funding mechanisms will take a collaborative effort by all parties. Policy makers should seek to balance their approach by pursuing sector and region-specific financing solutions that best fit the communities they seek to serve.

Urban v. Rural

Project Permitting

The uncertainty surrounding the project permitting process has discouraged many institutional investors from considering infrastructure projects as viable investments. Many would argue that financing opportunities have always been available, but the market has yet to present itself as an attractive option. Streamlining the permitting process for projects has already become a priority for the new Administration, and we can expect to see additional reforms from Congress and the Administration over the next few years.

Federal Water Policy

CONGRESSIONAL REVIEW ACT RESOLUTIONS

OVERTURNING FEDERAL REGULATIONS

Under the Congressional Review Act (CRA), Congress has the ability to consider and adopt joint resolutions of disapproval that nullify federal agency regulatory actions. From the date on which communication of a final regulation is received by Congress, either chamber may introduce the disapproval resolution within 60 legislative days. If a joint resolution of disapproval is adopted by Congress and signed by the President, the agency in question is prohibited from issuing a "substantially similar" rule in the future. These joint resolutions are also "filibuster-proof"— requiring only a simple majority to pass in the Senate.

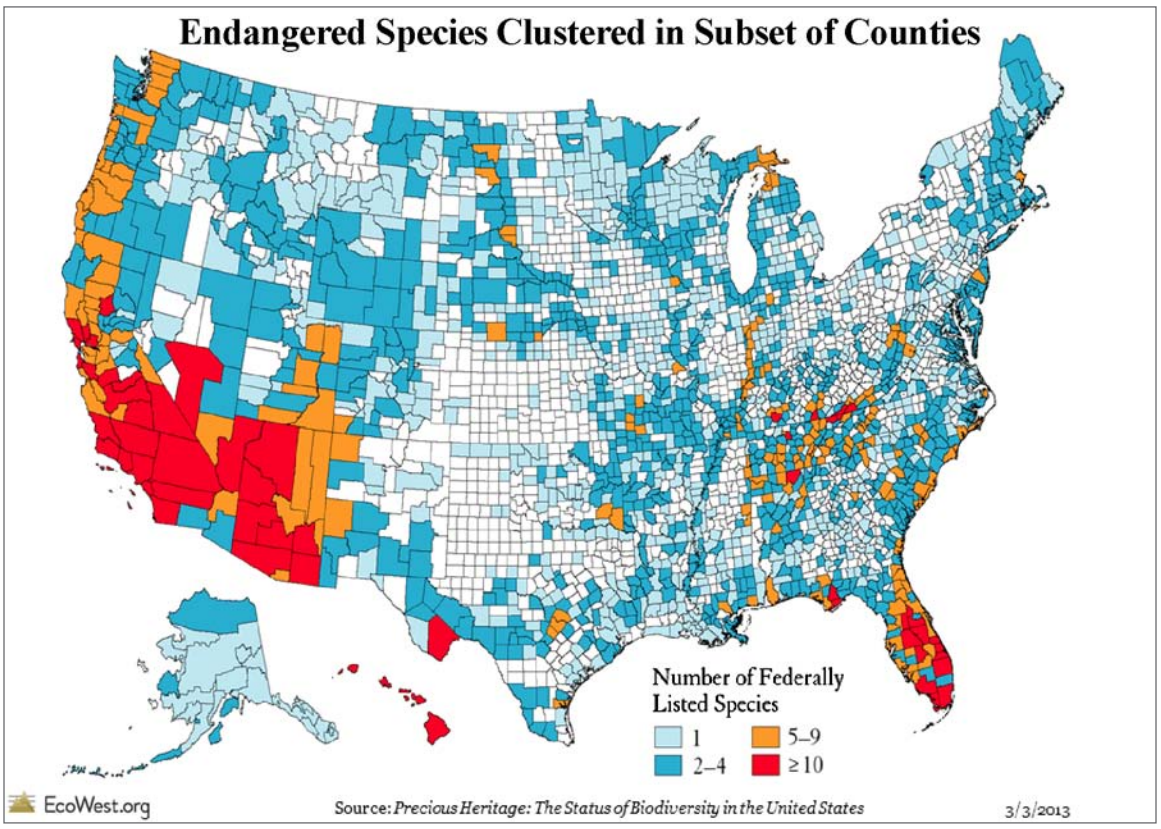
Stream Protection Rule (Mining)

On February 16, 2017, President Trump signed into law a Congressional Review Act (CRA) joint resolution (HJ Res 38) that nullifies a rule drafted and implemented by President Barack Obama's Interior Department to curb contamination of streams and waterways by open-pit coal mines. *See* WaterBriefs, *TWR* #155. President Trump's signature on the resolution is just the third time (second for President Trump) the CRA has been used successfully to overturn a federal regulation since its enactment in 1996. The resolution is part of the Republican-controlled House and Senate effort to reverse so-called "midnight regulations" issued during the final months and weeks of the Obama Administration. It is expected that Congress will overturn additional EPA and other federal resource management agency rules over the next few months.

The accompanying Tracking Table includes the status of CRA disapprovals relating to water and other federal natural resource management agency rules.

ENDANGERED SPECIES ACT

The Senate Environment and Public Works Committee held a hearing on February 15 entitled "Oversight: Modernization of the Endangered Species Act." Chairman John Barrasso (R-WY) has voiced his commitment to advancing legislation to update the federal Endangered Species Act (ESA). This updating could be introduced in the next several months. He has engaged stakeholders in conversations about opportunities to identify and implement what he considers to be long-overdue changes to the law. He has indicated this effort is a top priority for the Committee during this Congressional session. In the House, Natural Resources Committee Chairman Rob Bishop (R-UT) is awaiting key appointments of staff in the Administration with responsibility over ESA implementation before pursuing legislative efforts this year.



CONGRESSIONAL REVIEW ACT TRACKING TABLE
Proposed Actions to Nullify Certain Federal Agency Rules

US House of Representatives				
Bill Number	**Sponsor**	**Agency**	**Rule**	**Latest Action**
H.J. Res.22	Rep. Scott Perry (R-PA)	EPA	"Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources"	Introduced (1/6/17)
H.J. Res.36	Rep. Rob Bishop (R-UT)	Interior	BLM rule on "Waste Prevention, Production Subject to Royalties, and Resource Conservation"	Passed House by 221-191 vote (2/3/17)
H.J. Res.38	**Rep. Bill Johnson (R-OH)**	**Interior**	**"Stream Protection Rule "**	**Signed by the President (2/16/17)**
H.J. Res.44	Rep. Liz Cheney (R-WY)	Interior	BLM rule relating to "Resource Management Planning".	Passed House by 234-186 vote (2/7/17)
H.J. Res.45	Rep. Kevin Cramer (R-ND)	Interior	U.S. Fish and Wildlife Service rule relating to "Management of Non-Federal Oil and Gas Rights"	Introduced (1/30/17)
H.J. Res.46	Rep. Paul Goslar (R-AZ)	Interior	National Park Service rule relating to "General Provisions and Non-Federal Oil and Gas Rights"	Referred to House Committee on Natural Resources (1/30/17)
H.J. Res.47	Rep. Don Young (R-AK)	Interior	BSEE, BOEM rule "Oil and Gas and Sulfur Operations on the Outer Continental Shelf Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf "	Referred to House Committee on Natural Resources (1/30/17)
H.J. Res.49	Rep. Don Young (R-AK)	Interior	"Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska"	Referred to House Committee on Natural Resources (1/30/17)
H.J. Res.52	Rep. Dan Newhouse (R-WA)	Interior	U.S. Fish and Wildlife Service rule relating to "Mitigation Policy"	Referred to House Committee on Natural Resources (1/31/17)
H.J. Res.56	Rep. Steven Pearce (R-NM)	Interior	BLM rule relating to ""Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Site Security"	Referred to House Committee on Natural Resources (2/1/17)
H.J. Res.59	Rep. Mark Wayne Mullin (R-OK)	EPA	"Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act"	Referred to House Committee on Natural Resources (2/1/17)
H.J. Res.60	Rep. Dan Newhouse (R-WA)	Interior	U.S. Fish and Wildlife Service rule relating to "Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy"	Referred to House Committee on Natural Resources (2/2/17)
H.J. Res.68	Rep. Kevin Cramer (R-ND)	Interior	BLM rule relating to "Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Measurement of Gas"	Referred to House Committee on Natural Resources (2/7/17)
H.J. Res.69	Rep. Don Young (R-AK)	Interior	"Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska"	Passed House by 225-193 vote (2/15/17)
H.J. Res.77	Rep. Neal Dunn (R-FL)	Army Corps	"Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment"	Introduced (2/16/17)
H.J. Res.82	Rep. Bruce Westerman (R-AR)	Interior	BLM rule relating to "Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Measurement of Oil"	Introduced (2/16/17)
US Senate				
Bill Number	**Sponsor**	**Agency**	**Rule**	**Latest Action**
S.J. Res.10	Sen. Mitch McConnell (R-KY)	Interior	"Stream Protection Rule"	Referred to Senate Committee on Energy & Natural Resources (1/30/17)
S.J. Res.11	Sen. John Barrasso (R-WY)	Interior	BLM rule relating to "Waste Prevention, Production Subject to Royalties, and Resource Conservation"	Referred to Senate Committee on Energy & Natural Resources (1/30/17)
S.J. Res.15	Sen. Lisa Murkowski (R-AK)	Interior	BLM rule relating to "Resource Management Planning"	Referred to Senate Committee on Energy & Natural Resources (1/30/17)
S.J. Res.21	Sen. Pat Toomey (R-PA)	EPA	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS	Referred to Senate Committee on Environment & Public Works (2/1/17)

Federal Water Policy

Executive Actions

Regulations Freeze

"High Priority" Infrastructure

Regulations Reduction

Regulations Repeal

WOTUS Rule Repeal

Rulemaking

TRUMP ADMINISTRATION ACTIONS

As of February 27th, President Trump had signed 27 executive actions in an effort to rewrite or undo a number of policies relating to healthcare, federal hiring, immigration, oil exploration, trade, financial systems, and regulatory reform to name a few.

What follows is an overview of actions taken by the President relating to water supply.

Presidential Memorandum: Regulatory Freeze Pending Review (January 20, 2017)

Highlights:

- Prevents agencies from submitting regulations to the Office of Federal Register (OFR) until agency heads nominated or designated by the President are able to review and approve the regulation
- States that all regulations sent to the OFR but not published in the Federal Register (FR) will be withdrawn for review
- States that the effective date for all regulations published in the FR but not yet in effect will be postponed by 60 days

Executive Order: Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (January 24, 2017)

Highlights:

- Declares it the policy of the Executive Branch to "streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation"
- Directs the Chairman of the White House Council on Environmental Quality (CEQ) to decide whether an infrastructure project qualifies as a "high priority" project within 30 days of a request by the Governor of any state or head of any Federal agency, and expedited procedures and deadlines for completion of environmental reviews are then given to "high priority" projects

Executive Order: Reducing Regulation and Controlling Regulatory Costs (January 30, 2017)

Highlights:

- Declares that when a federal agency publicly proposes a new regulation, it must identify at least two existing regulations to be repealed
- For fiscal year 2017, all new regulations (including repealed regulations) must have a total incremental cost no greater than zero. If any new incremental costs are associated with a new regulation, they must be offset by the elimination of existing costs associated with at least two prior regulations
- Beginning in fiscal year 2018, directs agency heads to identify offsetting regulations for each existing regulation that increases incremental cost and provide the best approximation of total cost or savings associated with each new or repealed regulation
- Directs the Director of the Office of Management and Budget (OMB) to inform agencies of the total amount of incremental costs that will be allowed for each agency's new regulations for that year; no regulations exceeding that cost will be permitted unless otherwise approved by the OMB Director

Executive Order: Regulatory Reform Task Force (February 24, 2017)

Highlights:

- Each Regulatory Reform Task Force will evaluate existing regulations and identify candidates for repeal or modification
- Each agency's Task Force will focus on eliminating costly and unnecessary regulations
- To hold the Task Forces accountable, agencies will measure and report progress in achieving the President's directives

Executive Order: Reviewing the "Waters of the United States" Rule (February 28, 2017)

Highlights:

- Instructs EPA and the US Army Corps of Engineers to formally review and reconsider the "Waters of the United States" rule. The Order alone cannot rescind the rule, however this action could potentially lead to a full repeal or a significant rewrite of the rule. A full repeal can only be accomplished through a formal regulatory process

  Given that the rule has already been finalized, any change to the rule requires EPA to comply with the notice-and-comment requirements of the federal Administrative Procedure Act and to provide a "reasoned explanation" for changing course.

  While some language in the executive order suggests that the EPA could simply "rescind or revise" the WOTUS rule without first soliciting public comment, we expect the agency to follow formal notice and comment processes before making any change to the rule.

  EPA has announced that it "intends to immediately implement the Executive Order and submit a Notice of Proposed Rulemaking to withdraw and replace the rule." *See* www.epa.gov/cleanwaterrule

Federal Water Policy

WOTUS Scope

Objections

WOTUS Regulatory Process

Infrastructure Funding Debate Delayed

Agency Staffing

"WATERS OF THE UNITED STATES" (WOTUS) RULE

While the federal Clean Water Act (CWA) uses the phrase "**w**aters **o**f **t**he **U**nited **S**tates," (WOTUS) throughout the statute, the law does not include a statutory definition of the term. This has created long-standing disagreements over the meaning of the phrase. A basic disagreement concerns the degree to which the CWA should be interpreted as covering the widest amount of "waters" that could permissibly be federally regulated under the Constitution or whether that term should be interpreted in a more limited fashion. In recent years, EPA and the US Army Corps of Engineers worked to develop the rule in an attempt to clarify what constituted WOTUS, thereby deserving protection under the CWA. [*See* Water Briefs, *TWR* #136 & *TWR* #140; Moon, *TWR* #139; Glick & Antencio, *TWR* #149; and Dowell Lashmet, *TWR* #150].

Although the WOTUS rule was the definitive water policy achievement of the Obama Administration, the rule has been a target of Republicans since its proposal, and President Trump was an outspoken opponent of the rule throughout his campaign.

Shortly after President Trump was sworn into office, the new Administration posted a number of policy statements on the White House website, including the "America First Energy Plan," which states that the President is committed to eliminating harmful and unnecessary policies. This new policy includes the WOTUS rule.

Currently, the WOTUS rule has been in a holding pattern since 2015 when the Court of Appeals for the Sixth Circuit, in Cincinnati, Ohio, ordered a stop to the rule to allow for numerous lawsuits challenging the rule to make their way through the courts. As noted above, the President has issued an Executive Order to instruct the EPA and the US Army Corps of Engineers to formally reconsider the rule. This could potentially lead to a full repeal or a significant rewrite of the rule. The order alone cannot rescind the rule — that can only be accomplished through a formal regulatory process. However, the Executive Order will be viewed by some as the first step in eliminating the rule.

CONCLUSIONS & OUTLOOK

On March 9, the American Society of Civil Engineers is expected to release their latest Report Card for America's Infrastructure. Those findings ought to further encourage Congress and the White House to act on an infrastructure funding package. However, Congress is currently focused on repealing and replacing the Affordable Care Act (Obamacare), as well as addressing comprehensive tax reform. Speaker of the House Paul Ryan (R-WI) has stated that an infrastructure package will not come until Congress has addressed tax reform, which will have an infrastructure financing feature to it. These efforts will likely push the infrastructure debate into the summer or early fall.

In his first month in office, President Trump has excited the conservative base by working with Congressional Republicans to target and repeal a number of Obama-era regulations, as well as advancing portions of his own agenda. The Administration continues to operate at a dizzying pace despite numerous Cabinet-level vacancies still awaiting Senate confirmation. At the same time, advancing priorities at the agency level is lagging behind simply because they lack personnel at key policy positions needed to begin their work, and the ongoing need to nominate and confirm political appointees to fill these key positions will continue to be a primary focus of the Senate for some time.

As the Administration begins to fill the nearly 4,000 positions vacant throughout the federal agencies, we can expect an increase in policy reforms and a continued effort to roll back rules and regulations adopted during the Obama Presidency.

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Sean Taylor is Senior Director for Governmental Issues at Van Ness Feldman LLP in Washington DC. Sean has over a decade of experience representing municipalities and local governments on water infrastructure, federal regulations, public lands issues, and a variety of appropriations matters. He has developed comprehensive campaign plans that have resulted in the successful authorization of infrastructure project initiatives for communities throughout the country. Sean builds, maintains and strengthens bipartisan relationships with Members of Congress, Congressional staff, Administration officials, political and public policy organizations, trade associations, coalitions, and industry lobbyists on behalf of Van Ness Feldman clients. Sean began his career in the United States Senate working for Senator Connie Mack of Florida and Senator Judd Gregg of New Hampshire, before serving as a Natural Resources Policy Analyst to Governor Jeb Bush of Florida. As Governor Bush's lead staffer in Washington DC, Sean gained considerable experience developing regional and national coalitions to help mold national energy legislation, influence ocean policy, and expand aquatic ecosystem restoration, and land & water conservation programs for the states.

Water Transfers

Rule Reinstated

"Addition of Pollutants"

"Unitary Waters"

"Discharge"

NPDES Requirements

WATER TRANSFERS & THE CWA

OF SOUP LADLES AND MARBLES: FEDERAL COURT REINSTATES EPA'S WATER TRANSFERS RULE

by Sharon White and Charles Sensiba, Van Ness Feldman LLP (Washington, DC)

INTRODUCTION

On January 18, 2017, the United States Court of Appeals for the Second Circuit issued a decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, which reinstated the US Environmental Protection Agency's (EPA's) Water Transfers Rule. The Rule, adopted in 2008, codifies EPA's longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the federal Clean Water Act (CWA). The Second Circuit reversed a US District Court for the Southern District of New York decision that had vacated the Water Transfers Rule. The Second Circuit found that the Rule, which is based on the "unitary waters" reading of the statutory language, was a reasonable interpretation of the CWA and should be afforded deference under the US Supreme Court's two-part test for judicial review of an agency's formal interpretation of a statute in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (*Chevron*).

BACKGROUND

LEAD UP TO EPA'S FORMAL ADOPTION OF THE WATER TRANSFERTS RULE

The CWA prohibits the discharge of any pollutant by any person unless done in compliance with the requirements of the Act. It defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12)(A). "Navigable waters" is further defined as "the waters of the United States." *Id*. § 1362(7). "Addition" is not a defined term in the CWA. Section 402 of the CWA requires any person who discharges pollutants from a point source to waters of the United States to obtain an NPDES permit. *Id*. § 1342. NPDES permits must be obtained from either the EPA or the appropriate state permitting agency operating under an EPA-approved program. Permits under section 402 require that the discharger adhere to certain technology and water quality based requirements, and permits are issued for a term of five years.

EPA has maintained a longstanding interpretation that the CWA exempts water transfers from the NPDES permitting program. However, environmental groups in the early 2000s successfully challenged this longstanding interpretation, claiming that NPDES permits were required for certain water transfers. In 2001, the Second Circuit held that the City of New York violated the CWA by transferring turbid water from Schoharie Reservoir through the Shandaken Tunnel into Esopus Creek without an NPDES permit, because the transfer of turbid water into Esopus Creek was an "addition" of a pollutant. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*). In reaching this conclusion, the court famously explained that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id*. at 492. However, under the factual scenario in the case, the court found that the Reservoir and Esopus Creek were not the "same" water bodies (i.e., they were different pots of soup), and therefore, the passage of water from one water body to the other was an "addition" of a "pollutant" from a "point source" under the statute. EPA, relying on its longstanding interpretation, advanced a "singular entity theory of navigable waters" (*id*. at 492), under which all water bodies in the United States constitute a single, unitary entity, and even if a water transfer between navigable waters conveys water in which pollutants are present, it does not result in the addition of a pollutant to navigable waters. However, the court rejected this interpretation as inconsistent with the ordinary meaning of the word "addition" in the CWA. Importantly, the court held that because EPA's interpretation was never formalized by notice and comment rulemaking, it was not entitled to *Chevron* deference. Rather, the court held it is entitled to a lesser degree of deference under *Skidmore v. Swift & Co*., 323 U.S. 134, 40 (1944), which defers to an agency's statutory interpretation only to the extent the interpretation is persuasive. Because the court found that

Chevron Deference

"*Chevron* deference" refers to the deference that a reviewing court gives to an administrative agency's interpretation. The US Supreme Court in *Chevron* set out the two-part test as follows: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* at 842-843. If the intent of Congress is not unambiguous, the analysis moves to step two: "If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. (footnotes omitted).

Water Transfers

"Unitary Waters" Theory

Distinct Water Bodies?

Klee Memorandum (Congressional Intent)

Formal Rulemaking Issue

Water Transfers Rule

Pollutant "Addition"

EPA's position was inconsistent with the "addition" requirement in the CWA, EPA's interpretation was not persuasive. Notably, the court acknowledged that if EPA's interpretation had been adopted through a formal rulemaking, that *Chevron* deference may have applied and the outcome could have been different. *Catskill I,* 273 F.3d at 490.

This singular entity theory of navigable waters, later dubbed the "unitary waters theory," also was addressed before the US Supreme Court in 2004. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Miccosukee Tribe filed a citizen suit under the CWA, claiming that an NPDES permit was required for a pumping facility that transfers phosphorous-laden water from a canal to an undeveloped wetland a short distance away. The lower courts agreed with the Tribe, based on their determination that the canal and wetlands were two distinct water bodies. On appeal, the Supreme Court held that if the canal and the wetlands are not meaningfully distinct water bodies, no NPDES permit is required. Consistent with its argument in *Catskill I*, EPA argued that all "navigable waters" under the Act should be viewed unitarily for purposes of NPDES permitting. Under this theory, NPDES permits would not be required when water from one navigable water body is discharged into another navigable water body. The majority opinion declined to rule on this theory, finding that neither party raised it before the lower courts or in their briefs. The Court also noted that EPA had not articulated this unitary waters theory in any official administrative document. Instead, the Court vacated the lower court opinion on other grounds, and remanded the case for further factual development on whether the water bodies were "two pots of soup, not one" — but noted that the unitary waters theory would be open to the parties to argue on remand.

Following *Miccosukee*, EPA began to take steps to formalize the unitary waters theory as a means of exempting water transfers from NPDES permitting requirements. In an August 2005 memorandum written by then-EPA General Counsel Ann R. Klee (the "Klee Memorandum"), EPA asserted that Congress did not intend for water transfers to be subject to NPDES permits. Examining the legislative history of the Act and analyzing guiding precedent by the courts, the Klee Memorandum recognized that operators of water control facilities are frequently not responsible for the presence of pollutants in the waters they transport, and that they "should not be saddled with curing...regional water quality problems through the [CWA's] NPDES permitting regime." Klee Memorandum at 8. EPA's informal interpretation in the Klee Memorandum was based entirely on the statutory term "addition," which it interpreted using a "holistic view" of the statute, "[giving] meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500, 513 (S.D.N.Y. 2014).

Following EPA's issuance of the Klee Memorandum, the Second Circuit had the opportunity to reconsider its holding in *Catskill I* in an appeal from a district court order (issued on remand in *Catskill I*) assessing a civil penalty against New York City for failure to obtain an NPDES permit. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) (*Catskill II*). The court in *Catskill II* reaffirmed its holding that the discharge of water from the Reservoir to Esopus Creek required an NPDES permit. The court found that the Supreme Court's opinion in *Miccosukee* and the Klee Memorandum, each issued after the court's opinion in *Catskill I*, did not change its conclusion that passage of water from Schoharie Reservoir to Esopus Creek was an "addition" of a "pollutant" from a "point source" under the CWA. Once again, the court declined to extend *Chevron* deference to EPA's interpretation in the Klee Memorandum, as it was not adopted through a formal rulemaking process.

FORMAL ADOPTION OF THE WATER TRANSFERS RULE

In June 2008, EPA formalized its longstanding interpretation, based on the analysis contained in the Klee Memorandum, by promulgating the Water Transfers Rule. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. pt. 122). EPA exempted water transfers from the NPDES requirements of Section 402 of the CWA, and defined water transfers as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i).

In reaching this conclusion, EPA in the Water Transfers Rule found that "the language, structure, and legislative history of the statute all support the conclusion that Congress generally did not intend to subject water transfers to the NPDES program." 73 Fed. Reg. at 33,703. EPA interpreted the term "addition of pollutants" in the CWA to conclude that the transfer of water and any existing pollutants therein is not an "addition" of those pollutants "to navigable waters." This is consistent with EPA's longstanding position that an NPDES pollutant is "added" when it is introduced into a water from the "outside world" by a point source, i.e., from outside the waters being transferred. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d

Water Transfers Quantity Management

156, 174-75 (D.C. Cir. 1982). Under this interpretation, EPA found that Congress generally intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the NPDES permitting program, and that the CWA should not unnecessarily burden water quantity management activities with NPDES requirements.

CHALLENGES TO THE RULE

Shortly after EPA released the Rule, the US Court of Appeals for the Eleventh Circuit ruled on an ongoing case concerning a water transfer from the polluted canals of the Everglades Agricultural Area into Lake Okeechobee. The lower court ruled in 2006 that an NPDES permit was required for the transfer because the canal and lake are two distinct water bodies. On appeal, the Eleventh Circuit reversed, finding that, even though "all of the existing precedent" would have supported the district court's decision, the court must give *Chevron* deference to EPA's newly-issued Water Transfers Rule exempting water transfers from NPDES permitting requirements. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009). The court analogized the issue to the transfer of marbles between two buckets:

Chevron Deference

Marble Analogy

> Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets?"

Id. at 1228.

EPA's Interpretation Reasonable

The court found that the statutory language is ambiguous in that "any addition of any pollutant to navigable waters from any point source" could reasonably be read as "any addition…to [any] navigable waters" or "any addition…to navigable waters [as a whole]." *Id*. at 1227. Ultimately, the court concluded that, like the hypothetical marbles rule, the language of the CWA is ambiguous, and EPA's interpretation of CWA Section 402 in adopting the Water Transfers Rule is a reasonable interpretation of the statute.

Rule Vacated

Concurrent with the proceedings in the Eleventh Circuit, several environmental groups, states, and a Canadian province filed actions in the United States District Court for the Southern District of New York under the CWA and the Administrative Procedure Act directly challenging the Water Transfers Rule. On March 28, 2014, in an exhaustive 68-page ruling, the district court granted summary judgment in favor of the plaintiffs, vacating the Rule and remanding it to EPA for further consideration. Applying the US Supreme Court's two-part test under *Chevron* for judicial review of an agency's formal interpretation of a statute administered by the agency, the district court found under *Chevron* step one that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. In deciding whether the agency should be afforded deference in its interpretation of the statute, the court found under *Chevron* step two that the Rule was an unreasonable interpretation of the CWA because EPA failed, under the Supreme Court's standard for evaluating agency action under *Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (*State Farm*), to give a reasoned explanation for its interpretation exempting water transfers from the NPDES program. Under the *State Farm* standard:

Evaluating Agency Action

Stricter Standard

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Id. at 43.

The *State Farm* standard requires a much stricter and more exacting review of an agency's explanation and decision-making process than the *Chevron* step two standard.

Rule Impacts: Hydropower Agriculture Residential

EPA appealed the decision to the US Second Circuit. A number of groups on both sides filed amicus briefs explaining the impacts of the Rule. The hydropower industry raised concerns that reversal of the Water Transfers Rule could ultimately subject certain dams involving water transfers to NPDES permitting in the future, with significant regulatory and operational implications for these projects. The State of California argued that it uses the California State Water Project — a complex water delivery system based on water transfers to deliver water to millions of state residents and for agricultural needs in critical farming regions — and reversal of the Rule would put a significant financial and logistical strain on the Project. The Western Water Users Group explained that supplying water to those living in the arid West depends on thousands of water transfers every day, and meeting the water quality standards under NPDES permits for these water transfers would be cost prohibitive and technically impractical, threatening the continued supply of water resources to these regions. The American Farm Bureau Federation and Florida Farm Bureau Federation argued that water transfers are vital to manage water flows to and from crops, particularly in western states, and that invalidation of the Rule would impose massive new costs, including increased agricultural and property taxes on American farmers and ranchers, challenging their ability to remain competitive in world markets.

Water Transfers

Rule Reinstated

***Chevron* Deference Applies**

Dissent: Intent & Purpose

"Unitary Waters" Track Record

SECOND CIRCUIT UPHOLDS RULE

On January 18, 2017, a divided Second Circuit panel reversed the district court's decision and reinstated the Water Transfers Rule. While the court agreed with the district court that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers, the court found that the Water Transfers Rule "represents a reasonable policy choice" and should be afforded deference under the second prong of the *Chevron* test. The Second Circuit held that the more searching *State Farm* standard applied by the district court does not apply to judicial review of an agency's interpretative rule. Rather, an agency's initial interpretation of a statutory provision should be evaluated only under *Chevron*'s "reasonableness" standard under step two. Applying the more deferential *Chevron* step two test, the Second Circuit found that EPA offered a sufficient explanation for adopting the Rule, and that the Rule itself is a reasonable interpretation of the CWA. In upholding the Rule, the court noted that the CWA "does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 501 (2d Cir. 2017) (*Catskill III*).

In a dissenting opinion, Judge Denny Chin argued that the plain language of the CWA clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another without an NPDES permit. In criticizing the unitary waters theory, Judge Chin argued that the transfer of contaminated water from a polluted water body through a conveyance to a less-polluted water body is an "addition" of a pollutant to a navigable water from a point source. Judge Chin argued that the unitary waters theory runs counter to the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), holding that "navigable waters" as defined under the CWA refers to "individual bodies," not one collective body of water. Even if the CWA was ambiguous, Judge Chin argued that the Water Transfers Rule was an unreasonable interpretation of the CWA. He argued that an agency's interpretation of an ambiguous statute is not entitled to deference if it is at odds with the statute's manifest purpose — here, to address environmental harms caused by the discharge of pollutants into water bodies.

CONCLUSION

IMPLICATIONS OF THE DECISION

The Second Circuit's opinion in *Catskill III* reinstates the Water Transfers Rule and removes uncertainty by avoiding a split among the U.S. courts of appeal regarding the continuing applicability of the Rule — as the Eleventh Circuit upheld the Rule in its 2009 decision in *Friends of the Everglades*. It gives certainty to entities that rely on the exemption provided by the Rule that certain water transfers will avoid the costly and iterative requirement to obtain an NPDES permit every five years.

While the Second Circuit's decision resolves the Water Transfers Rule in a manner consistent with the Eleventh Circuit's decision, it is unclear whether this issue, which has enjoyed a long history of colorful decisions and creative analogies, is finally settled. The Eleventh Circuit itself acknowledged in 2009 that the unitary waters theory has "a low batting average" and had — at least before EPA finalized the theory through notice-and-comment rulemaking — "struck out in every court of appeals where it has come up to the plate." *Friends of the Everglades*, 570 F.3d at 1217. But now that EPA has adopted the theory through a formal rule, the two courts of appeals that have reviewed the Rule have upheld it as a reasonable interpretation of the numerous — and, at times, conflicting — purposes of the CWA. Still, it remains to be seen whether plaintiffs in that case will seek *en banc* review before the Second Circuit or file a petition for certiorari in the US Supreme Court.

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MT v. WY Interstate Compact

MONTANA v. WYOMING

REMEDIES & DAMAGES IN INTERSTATE COMPACT CASE

by David Moon, Editor

INTRODUCTION

Yellowstone River Compact

The long-running case of *State of Montana v. State of Wyoming*, No. 137, Original, dealing with the two states' water rights under the Yellowstone River Compact of 1950 appears to be coming to an end. On December 19, 2016, Special Master Barton "Buzz" Thompson, Jr. issued his *Opinion of Special Master on Remedies* (*Opinion*) in a case that began in January 2007. Montana brought the case to resolve disagreements with Wyoming over protections provided to pre-1950 appropriative rights in Montana under the Yellowstone River Compact, 65 Stat. 663 (1951) (Compact). The meaning of key provisions of the Compact had long been disputed by the two states. "Original jurisdiction" cases, such as this one involving a water compact between the states, are cases where one state sues another with the case brought directly before the US Supreme Court. Typically, the US Supreme Court then appoints a Special Master to try the case and make recommendations to them. For additional information on this case, s*ee* Falen*, TWR* #57, and Moon*, TWR* #65 and #132.

Montana: Prevailing Party

Special Master Thompson, appointed by the US Supreme Court, ruled in the *Opinion* that Montana is entitled to a specific declaration of its compact water rights; to recovery of damages in the form of water from Wyoming (1,356 acre-feet) or monetary damages totaling $35,877.06; and that Montana has the right to store water in the Tongue River Reservoir to the pre-1950 levels. The ruling also found that while Montana is not entitled to recover costs incurred since the Special Master issued his *First Interim Report* in February 2010: "As the prevailing party in the litigation, Montana therefore should be free to seek some or all of its costs incurred in [the] initial phase [i.e., prior to February 2010]." *Opinion* at 64.

States' View of Decision

The "decision is a big win for the State of Montana and its water users," said Montana Attorney General Tim Fox. "I am pleased that the Special Master recognized the State of Montana's right to assert its Compact rights, and has ruled that Montana is entitled to a specific judicial declaration of its rights." Meanwhile, Wyoming's Governor Matt Mead said that he was also pleased with the decision in the long-running dispute. "The Special Master has issued a solution with two practical options for the damages owed to Montana," said Governor Mead. "We look forward to working with our neighbors to quickly bring this case to a close."

Liability Limited

Replacement Water Mitigation

The "actual liability" against Wyoming was found to be limited to 1300 acre-feet in 2004 and 56 acre-feet in 2006, due to the finding that Montana did not "provide timely notice of the deficiency" in the other disputed years. *Opinion* at 1-2. Monetary damages were limited to $35,877.06 as "adequate compensation" based on the finding that "…Montana water users had a reasonable opportunity to mitigate any damages that they suffered by purchasing replacement water from the Northern Cheyenne Tribe, but failed to do so. As a result, Montana's damages should be limited to the cost of that water." *Opinion* at 11. The figure of nearly $36,000 includes interest added since 2004 and 2006.

The Special Master's *Opinion* is highly recommended for anyone interested in interstate disputes over water. Special Master Thompson broke his discussion into five sections: Remedies in an Original Jurisdiction Case; Damages; Declaratory Relief (including the storage issue); Injunctive Relief; and Costs. The *Opinion* is extremely well reasoned and written, and provides a thorough discussion of precedents from the US Supreme Court (Court) on various issues.

COMPACT CASE: INTERSTATE CONFLICTS

Remedies

Equitable Authority

The *Opinion* began with a discussion of remedies in an interstate Compact case, based on: (1) equitable discretion; (2) the facts of the particular case; and (3) detering future violations. "The Court's equitable authority, in short, should carefully balance the desire to protect and compensate downstream states with concerns for state sovereignty and the mutually agreed-upon terms of the underlying compact." *Opinion* at 5. After then noting that each case has its own particular facts that will affect the appropriate remedy ordered, the Special Master highlighted the nature of relief for a downstream state.

Relief: Deterrence

> Finally, the Court has frequently emphasized the importance of awarding relief that will not only make a downstream state whole for an upstream state's compact violations

MT v. WY **Interstate Compact**

Enforcement Authority

but also deter future violations. In its most recent opinion on interstate water disputes, the Court started by highlighting the inherent disadvantage of downstream states in enforcing its rights. *Kansas v. Nebraska, supra*, 135 S. Ct. at 1052. The Court then went on to emphasize that its "enforcement authority includes the ability to provide the remedy necessary to prevent abuse. We may invoke equitable principles, so long as consistent with the compact itself, to devise 'fair ... solution[s]' to the state-parties' disputes and provide effective relief for their violations." *Id*. at 1053, quoting *Texas v. New Mexico*, supra, 482 U.S. at 134. The Court's remedial authority, moreover, "gains still greater force" in compact cases since a compact, "having received Congress's blessing, counts as federal law." 135 S. Ct. at 1053. The Court, in short, enjoys "broad remedial authority to enforce [a compact's] terms and deter future violations." *Id*. at 1052 n.4 (emphasis added).

Opinion at 5.

Damages Award: Water or Monetary

Choice of Damages

The Special Master concluded that Montana could choose to receive as damages *either* an award of water (1,356 acre-feet) or monetary damages ($35,877.06: cost of replacement water plus interest). "A state's loss of water is difficult if not impossible to translate into a dollar value; particularly in the West, water is of incalculable value to those whose livelihoods depend on it. While I conclude below that monetary damages in this case can be measured by the cost it would have taken to mitigate Wyoming's breach, those damages will not seem adequate to many Montana water users. The determination of appropriate monetary damages, moreover, is almost inherently open to uncertainty." *Opinion* at 7. Special Master Thompson went on to explain why a water award might be preferable to Montana. "A water award is thus more equitable than monetary damages because they ensure that Wyoming does not benefit from its breach. A water award also helps ensure that an upstream state does not have an economic incentive to breach a compact where water is worth more economically to the upstream state than to the downstream state." *Opinion* at 8.

Incentive to Breach

Declaratory Relief

Decree for Storage Right

Addressing Montana's request for declaratory relief, the Special Master ruled that "…Montana holds an appropriative right, protected by Article V(A) of the Compact, to store up to the pre-1950 capacity of the Tongue River Reservoir…My conclusion is simply that the aggregate limit on storage is the pre-1950 capacity of the reservoir, not 32,000 acre-feet. " *Opinion* at 56. Wyoming had urged the Special Master to limit Montana's storage right to 32,000 acre-feet. Although the *Opinion* did not specify the amount of the "pre-1950 capacity of the reservoir" granted to Montana, the Special Master did note, "[W]henever a document listed the storage quantity for the Tongue River Reservoir, it consistently listed the presumed pre-1950 capacity of 69,400 acre feet." *Opinion* at 56. The specific amount of storage that will become part of the final decree in this case (see below) will be settled by the Special Master. Both Wyoming and Montana have proposed a specific amount for a storage right and how they propose it to be measured in the most recent filings to the Special Master in February, 2017.

Injunctive Relief and Disgorgement Damages

Recurrent Violation?

The issues surrounding injunctive relief provoked an interesting discussion in the *Opinion*, but the Special Master ultimately decided it was not appropriate to grant injunctive relief to Montana because "Montana has not shown a 'cognizable danger of recurrent violation' even utilizing a standard preponderance-of-the-evidence standard… ." *Opinion* at 62.

Compact Terms

Disgorgement Damages

The motivations behind Wyoming's refusal to comply with its Compact obligations were probed extensively during the liability trial. The resulting evidence does not suggest that Wyoming "knowingly" violated the Compact (although Wyoming may have had little incentive to carefully consider Montana's interpretation of the Compact or voluntarily agree to furnish more water to pre-1950 appropriators in Montana). Nor does the evidence suggest that Wyoming "recklessly" disregarded Montana's rights under the Compact. Instead, the dispute between Montana and Wyoming over Compact terms resulted from good-faith differences in interpretation.

Opinion at 20.

Before concluding that injunctive relief would not be granted, however, the Special Master alluded to the potential for "disgorgement damages" should Wyoming violate the Compact again in the future. "Disgorgement" is a damage remedy where the violating state is compelled to give up its unjust economic gains that resulted from taking water illegally.

Future Deterrent

> Finally, the Supreme Court's recognition of disgorgement damages in *Kansas v. Nebraska*, *supra*, reduces the need for an injunction in this case. While I have concluded earlier in this opinion that the Supreme Court should not order disgorgement for Wyoming's 2004 and 2006 violations, disgorgement damages remain an active deterrent going forward, particularly when paired with a clear and detailed declaratory decree. It is the threat that Wyoming could face disgorgement damages for future violations, rather than an award of disgorgement damages for past violations, that reduces the need for an injunction. Wyoming's "incentive to extend its recent record of strong compliance should be increased by its knowledge that, in the event of a relapse after this date, [Wyoming] will have a difficult time parrying a request for disgorgement even in the absence of a deliberate breach." *Id*.

Opinion at 60. *See* "Republican River Compact Decision - *Kansas v. Nebraska*: The Supreme Court's Equitable Powers" by David Moon (*TWR* #133: March 15, 2015).

Declaratory Relief — Detering Future Violations

Declaratory Decree

Although the Special Master granted the declaratory relief to Montana, he made one last attempt to have the parties themselves "agree on the provisions of a decree setting out the States' key rights and obligations…" giving Montana and Wyoming until February 10th to come up with specific language.

Downstream Disadvantage

Decree Specificity Important

> Third, specific declaratory relief will better enable Montana to defend its rights under the Compact in the future and deter prospective violations. As noted in Part I, the Court has often emphasized the importance of awarding relief that will help deter future violations. See page 6 *supra*. Downstream states are at an inherent disadvantage in interstate water disputes because their only effective remedy for a violation of their water rights is to sue the offending upstream state in the Supreme Court – an uncertain, time-consuming, and expensive process, as this case has shown. By issuing clear and specific declaratory relief, the Court can make it easier for a state to demonstrate liability in the future if an upstream state violates the decree. Violations also can trigger disgorgement damages or, if an injunction is issued, contempt penalties, enhancing prospective deterrence. Finally, a clear and specific decree can reduce any uncertainty that an upstream state has regarding its obligations, decreasing the chances that the upstream state will violate the compact again by mistake. For all of these reasons, specificity is important in protecting a downstream state like Montana from future violations of its sovereign rights.

Opinion at 30.

CONCLUSION

Montana has decided to take the monetary award, consisting of $20,340 (rather than seek a water award), together with prejudgment and postjudgement interest compounded at 7% per annum from the year of each violation (2004 and 2006) until paid. Costs for Montana have not yet been determined, but were limited by the Special Master as noted above.

Wyoming and Montana were unable to agree on specific rights and obligations to be incorporated into a decree. Thus, the Special Master's job is not quite finished since he will be preparing a decree to recommend to the US Supreme Court for adoption. That new decree will supplement the Yellowstone River Compact and ultimately control the allocation of water between Wyoming and Montana. Both states have filed a "Proposed Judgment and Decree" and a brief in support with the Special Master.

For Additional Information:
Wyoming Attorney General's website: http://ag.wyo.gov/current-issues ;
Special Master's website: http://web.stanford.edu/dept/law/mvn/

WATER BRIEFS

TEXAS V. NEW MEXICO TX/NM

RIO GRANDE LITIGATION

Special Master A. Gregory Grimsal issued the *First Interim Report of the Special Master* (*Report*) on February 9 in *State of Texas v. State of New Mexico and State of Colorado*, No. 141, Original (*Texas v. New Mexico*). Although a named party due to being a party to the Rio Grande Compact (Compact), Colorado is not actively involved in the case. This dispute over water rights presents a question of construction of the Compact, a 1938 agreement among the States of Colorado, New Mexico, and Texas (approved by Congress in 1939), whose purpose was to "effect[ ] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." The action will continue following the issuance of the voluminous *Report* because the Special Master has recommended that the US Supreme Court deny the Motion to Dismiss by New Mexico, as well as the Motions to Intervene by El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation District (IBID).

The State of Texas brought original jurisdiction litigation in the US Supreme Court, alleging that New Mexico's ever increasing water use and groundwater pumping *below* Elephant Butte Reservoir deprives Texas of water apportioned to it under the Compact. The crux of the case is that New Mexico contends that the Rio Grande Compact requires New Mexico to deliver its share of Rio Grande water into Elephant Butte Reservoir and not at the Texas/New Mexico state line — approximately 100 miles downstream. *See* Bond*, TWR* #130 and Stein*, TWR* #151 for additional details about the lawsuit.

The Compact apportions the waters of the Rio Grande among the signatory states of Colorado, New Mexico, and Texas. The Compact apportions all of the water that New Mexico delivers into Elephant Butte Reservoir to Texas, subject to US Treaty obligations to Mexico and the US project contract with EBID. Texas maintains that it is deprived of water apportioned to it in the Compact because New Mexico has authorized and permitted wells that have been developed near the Rio Grande in New Mexico. Texas alleges that the more than 3,000 wells pump tens of thousands of acre-feet of water that is hydrologically connected to the Rio Grande. Texas also asserts New Mexico has permitted wells which in the future will likely significantly increase pumping of Compact water that would otherwise flow to Texas. According to Texas, the pumping has both a direct and indirect effect on Texas' ability to obtain the water the Compact apportioned to it.

Texas issued a press release on February 9th praising the Special Master's recommendations and stating that Texas "appreciates the logical approach used in his report to derive his conclusions." The press release cites several portions of the Special Master's recommendation that Texas wished to emphasize:

> The Special Masters' report rejects several of New Mexico's claims involving their delivery obligation to Elephant Butte Reservoir and state law governing water below the reservoir. In rejecting New Mexico's claim, that New Mexico water appropriation law should trump the Compact over the water New Mexico diverts from reaching Texas, the Special Master unequivocally finds that, "The equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law." [*First Interim Report* at 211.]
>
> On this point, the Special Master went on to declare that "…New Mexico, through its agents or subdivisions, may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir...That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico." [*First Interim Report* at 213.]

The *First Interim Report* specifically recommends as follows:

> I recommend that this Court deny New Mexico's motion to dismiss Texas's Complaint, but grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent it fails to state a claim under the 1938 Compact; rather, to the extent that the United States has stated plausible claims against New Mexico under federal reclamation law, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) and resolve the claims alleged in the Complaint in Intervention for purposes of judicial economy and due to the interstate and international nature of the Rio Grande Project. Finally, I recommend that the Court deny the motions of the irrigation districts for leave to intervene.
>
> If the Court accepts my recommendations, the next step in this case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of this matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties. Also important is the resolution of the motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 requesting leave to intervene, as the resolution of those motions will assist the parties and the Special Master in establishing the scope and procedure of discovery.

First Interim Report at 3-4.

For info: *First Interim Report* available via weblink in Texas' Feb. 9th Press Release: www.tceq.texas.gov/news/releases/txvnmcaseatscotus020917

WATER BRIEFS

FLORIDA V. GEORGIA FL/GA

EQUITABLE APPORTIONMENT DENIAL

Special Master Ralph Lancaster Jr. issued his *Report of the Special Master, Florida v. Georgia*, No. 142, Original (*Report*) on February 14th recommending to the US Supreme Court that Florida's request for an equitable apportionment of the waters of the ACF Basin be denied. The ACF Basin is comprised of the Apalachicola River, Chattahoochee River and Flint River.

"In its Complaint, Florida alleges that it has suffered serious harm to its ecology and economy — particularly in Apalachicola Bay (the "Bay") — because of reduced flows in the Apalachicola River (the "River") resulting from Georgia's increasing consumption of water from the Basin. Florida therefore seeks an equitable apportionment of the waters of the Basin." *Report* at 1.

"According to Florida, Georgia's consumption of water has reduced the flows in the River to an extent that is destroying the ecology of both the River and the Bay, as well as the economy of the Apalachicola Region. Georgia, in turn, argues that Florida's asserted harms are imaginary, self-inflicted, or inflicted by the operations of the United States Army Corps of Engineers (the "Corps") or changes in precipitation patterns (or some combination thereof) but in any event cannot be traced to Georgia's water use. Georgia also maintains that, without an order binding the Corps, Florida will not be assured any relief — assuming it has suffered any injury at all — by a decree entered in this proceeding because the Corps has the ability to impound water in various reservoirs that it maintains in the Basin. Both States warn of dire consequences if the Court does not resolve this proceeding in their favor — Florida of an ecological and economic disaster in the Apalachicola Region; Georgia of a crippled city and arid farmland in Georgia. " *Report* at 2.

In the final analysis, Florida's request for relief was doomed by the nature of proceeding — an original proceeding before the US Supreme Court that is designed to facilitate litigation between states — rather than the facts or water rights issues that generally govern in an original proceeding.

> In sum, the Report recommends that the Court deny Florida's request for relief because the Corps is not a party to this original jurisdiction proceeding. Because the Corps is not a party, no decree entered by this Court can mandate any change in the Corps' operations in the Basin. Without the ability to bind the Corps, I am not persuaded that the Court can assure Florida the relief it seeks. I conclude that Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin.

Report at 3.

"We are incredibly pleased with the special master's recommendation to the Supreme Court of the US," said Georgia Governor Nathan Deal. "Georgia remains committed to the conservation efforts that make us amicable stewards of our water. We are encouraged by this outcome which puts us closer to finding a resolution to a decades-long dispute over the use and management of the waters of the basin." Deal Press Release, February 9, 2017.

An intriguing sidenote to the *Report* is that despite the limited rationale for the recommendation, the Special Master nevertheless felt compelled to "provide the Court a brief descriptive background regarding the harm suffered by Florida and the unreasonableness of Georgia's consumptive water use." As further explained by the Special Master, "[T]he facts presented at trial demonstrate the gravity of the dispute between Florida and Georgia. As the evidentiary hearing made clear, Florida points to real harm and, at the very least, likely misuse of resources by Georgia." *Report* at 31.

The Special Master succinctly wrapped up his recommendations to the Supreme Court in the Conclusion to the *Report*:

> In issuing the Order on Georgia's motion to dismiss, I observed that "Florida's claim will live or die based on whether Florida can show that a consumption cap is justified and will afford adequate relief." (Order on Georgia's Motion to Dismiss, at 13 (Dkt. No. 128) (citing Idaho, 444 U.S. at 392)). Florida has failed to show that a consumption cap will afford adequate relief. The testimony and evidence submitted at trial demonstrates that the Corps can likely offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods. The evidence also shows that the Corps retains extensive discretion in the operation of those federal reservoirs. As a result, the Corps can release (or not release) water largely as it sees fit, subject to certain minimum requirements under the RIOP. There is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time. Further, Florida has not shown that it would benefit from increased pass-through operations under normal conditions. Finally, without the Corps as a party, the Court cannot order the Corps to take any particular action. Accordingly, Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River resulting from a decree imposing a consumptive cap on Georgia's water use would be released from Jim Woodruff Dam into the River at a time that would provide a material benefit to Florida.

Report at 69-70.

For info: *Report of the Special Master* available at: www.pierceatwood.com/floridavgeorgia142original

WATER BRIEFS

WATER MARKETS **US**

POLITICAL ECONOMY ANALYSIS

"*The Political Economy of Water Markets*" was recently released (November 2016) by Ecosystem Economics LLC and AMP Insights and is available at the website shown below. The report identifies the conditions, policies and laws that lead water markets to function as a useful counterpart to other tools for sustainable water management. For anyone interested in these issues, the range of materials on this website are highly recommended.

The outputs of the project include a final report and eight case studies. Principal analysis includes: 1) *Healthy Water Markets: A Conceptual Framework* by Bruce Aylward, Davíd Pilz, Megan Dyson and Carl J. Bauer; 2) *Political Economy of Water Markets in the Western United States* by Bruce Aylward, Davíd Pilz and Leslie Sanchez; 3) *Comparative Analysis of Legal Regimes with Respect to Fostering Healthy Water Markets* by Davíd Pilz, Megan Dyson, Bruce Aylward, Carl J. Bauer and Amy Hardberger; and 4) *Water, Public Goods and Market Failure* by Bruce Aylward. **For info:** Bruce Aylward, Amp Insights, 541/ 480-5694 or bruce@ampinsights.com; Report & Case Studies available at: www.ampinsights.com/rock-report

CLIMATE CHANGE **WEST**

COLORADO RIVER IMPACTS

In mid-February, "*The 21st Century Colorado River Hot Drought and Implications for the Future*" (Report) went online in the American Geophysical Union journal *Water Resources Research*. The Report was written by Bradley Udall (Colorado Water Institute at Colorado State University and the Colorado River Research Group) and Jonathan Overpeck (Department of Geosciences, Department of Hydrology and Atmospheric Sciences and Institute for the Environment, University of Arizona; and the Colorado River Research Group). *See* weblink below to view the "Accepted Article" form of the Report. The Report stresses three Key Points:

1) Record Colorado River flow reductions between 2000 and 2014 averaged 19.3% per year below the 1906-1999 average. One-third or more of the decline, on average, was likely due to warming, with unprecedented temperatures confirming that continued warming will likely further reduce flows.
2) Unabated greenhouse gas emissions will lead to continued substantial warming, translating to 21st century flow reductions of 35% or more: "… continued business-as-usual warming will drive temperature-induced declines in river flow, conservatively -20% by mid-century and -35% by end–century, with support for losses exceeding -30% at mid-century and -55% at end-century."
3) More precipitation can reduce the flow loss, but to date no such increases are evident and there is no model agreement on future precipitation changes.

"These results, combined with the increasing likelihood of prolonged drought in the river basin, suggest that future climate change impacts on the Colorado River flows will be much more serious than currently assumed, especially if substantial reductions in greenhouse gas emissions do not occur." Report Abstract, page 2.

"Fifteen years into the 21st century, the emerging reality is that climate change is already depleting Colorado River water supplies at the upper end of the range suggested by previously published projections. Record setting temperatures are an important and underappreciated component of the flow reductions now being observed." *Introduction*, page 2.

With the Colorado River Basin including seven western states, northern Mexico, and 22 federally-recognized tribes, the 32-page Report highlights the importance of future flows of the Colorado River for the 40 million people who rely on this water supply. **For info:** Bradley Udall, Bradley.udall@Colostate.edu; Report available at: http://onlinelibrary.wiley.com/doi/10.1002/2016WR019638/pdf

OIL & GAS SPILLS **US**

RISKS, MITIGATION & REPORTING

A distinguished group of authors published a policy analysis on February 21st in the Environmental Science and Technology Journal entitled "*Unconventional Oil and Gas Spills: Risks, Mitigation Priorities, and State Reporting Requirements*" (*see* website below for analysis and authors' credentials). The lead author is Lauren Patterson of the Nicholas Institute for Environmental Policy Solutions, Duke University.

Rapid growth in **u**nconventional **o**il and **g**as (UOG) has produced jobs, revenue, and energy, but also concerns over spills and environmental risks. The analysis assessed spill data from 2005 to 2014 at 31,481 UOG wells in Colorado, New Mexico, North Dakota, and Pennsylvania. This analysis found 2–16% of wells reported a spill each year. Median spill volumes ranged from 0.5 m^3 in Pennsylvania to 4.9 m^3 in New Mexico; the largest spills exceeded 100 m^3. Seventy-five to 94% of spills occurred within the first three years of well life when wells were drilled, completed, and had their largest production volumes. Across all four states, 50% of spills were related to storage and moving fluids via flowlines. Reporting rates varied by state, affecting spill rates and requiring extensive time and effort getting data into a usable format. Enhanced and standardized regulatory requirements for reporting spills could improve the accuracy and speed of analyses to identify and prevent spill risks and mitigate potential environmental damage. Transparency for data sharing and analysis will be increasingly important as UOG development expands. This analysis includes an interactive spills data visualization tool (http://snappartnership.net/groups/hydraulic-fracturing/webapp/spills.html) that illustrates the value of having standardized, public data. **For info:** Lauren Patterson, 919/ 613-3653 or lauren.patterson@duke.edu; Analysis at: American Chemical Society Publications website: http://pubs.acs.org/doi/abs/10.1021/acs.est.6b05749

BASIN SUBSIDENCE **CA**

SAN JOAQUIN GROUNDWATER PUMPING

On February 8, the California Department of Water Resources (CDWR) issued a Press Release entitled "*NASA Report: San Joaquin Valley Land Continues to Sink*" (Report). The Report focuses on new NASA radar

WATER BRIEFS

satellite maps prepared for CDWR which show that land continues to sink rapidly in certain areas of the San Joaquin Valley, putting state and federal aqueducts and flood control structures at risk of damage. "The rates of San Joaquin Valley subsidence documented since 2014 by NASA are troubling and unsustainable," stated CDWR Director William Croyle. "Subsidence has long plagued certain regions of California. But the current rates jeopardize infrastructure serving millions of people. Groundwater pumping now puts at risk the very system that brings water to the San Joaquin Valley. The situation is untenable." There are thousands of groundwater wells near state infrastructure that could be contributing to the subsidence recorded by NASA.

A prior August 2015 NASA report prepared for CDWR documented record rates of subsidence in the San Joaquin Valley, particularly near Chowchilla and Corcoran, as farmers pumped groundwater in the midst of historic drought. The Report released February 8th shows that two main subsidence bowls covering hundreds of square miles grew wider and deeper between spring 2015 and fall 2016. Subsidence also intensified at a third area, near Tranquillity in Fresno County, where the land surface has settled up to 20 inches in an area that extends seven miles.

Additional aircraft-based NASA radar mapping was focused on the California Aqueduct, the main artery of the State Water Project (SWP), which supplies 25 million Californians and nearly one million acres of farmland. The Report shows that subsidence caused by groundwater pumping near Avenal in Kings County has caused the Aqueduct to drop more than two feet. As a result of the sinking, the Aqueduct at this stretch can carry a flow of only 6,650 **c**ubic **f**eet per **s**econd (cfs) — 20 & less than its design capacity of 8,350 cfs. To avoid overtopping the concrete banks of the Aqueduct in those sections that have sunk due to subsidence, water project operators must reduce flows.

The NASA analysis also found subsidence of up to 22 inches along the Delta-Mendota Canal, a major artery of the Central Valley Project (CVP), operated by the US Bureau of Reclamation. The CVP supplies water to approximately three million acres of farmland and more than two million Californians. Also of concern is the Eastside Bypass, a system designed to carry flood flow off the San Joaquin River in Fresno County. The Bypass runs through an area of subsidence where the land surface has fallen between 16 inches and 20 inches since May 2015 — on top of several feet of subsidence measured between 2008 and 2012. CDWR is working with local water districts to analyze whether surface deformation may interfere with flood-fighting efforts, particularly as a heavy Sierra snowpack melts this spring. A five-mile reach of the Eastside Bypass was raised in 2000 because of subsidence, and CDWR estimates that it may cost in the range of $250 million to acquire flowage easements and levee improvements to restore the design capacity of the subsided area.

State officials said they will investigate any legal options available to protect state infrastructure. CDWR also will investigate measures for reducing subsidence risk to infrastructure, including: groundwater pumping curtailment; creation of groundwater management zones near critical infrastructure; and county ordinance requirements.

In addition, CDWR will work with local water managers to identify specific actions to reduce long-term subsidence risk and consider whether to incorporate further emphasis on reduction of subsidence risk into the ongoing implementation of California's Sustainable Groundwater Management Act. The Act requires groundwater-dependent regions to halt overdraft and bring basins into sustainable levels of pumping and recharge by the early 2040s. Groundwater supplies between 30% and 60% of the water Californians use in any year. Bringing basins into balance will eliminate the worst effects of overpumping, including subsidence and the dewatering of streams.

Besides aqueducts, the increased subsidence rates have the potential to damage levees, bridges, and roads. Long-term subsidence already has destroyed thousands of public and private groundwater well casings in the San Joaquin Valley. Over time, subsidence can permanently reduce the aquifer's water storage capacity.

There has been no comprehensive estimation of damage costs associated with subsidence. Due to the gradual nature of the impacts, costs will often be covered as part of normal operations and maintenance. Subsidence-related repairs have cost the SWP and CVP an estimated $100 million since the 1960s.
For info: DWR Newsroom at: www.water.ca.gov/; Jeanine Jones, DWR, 916/ 653-8126 or Jeanine.Jones@water.ca.gov; Alan Buis, NASA, 818/ 354-0474 or Alan.Buis@jpl.nasa.gov

TRIBES & DAIRY FARMERS WA WATER QUALITY AGREEMENT

On January 5, the Lummi Nation and seven dairy farms announced an agreement to improve water quality in the Nooksack River Basin, in order to reopen shellfish beds that have been closed since fall 2014 because of bacteria contamination. The "Portage Bay Partnership Agreement" initiates a cooperative approach to developing supportive farming plans for dairies that join the partnership.
The agreement provides:

- payment by farmers to support compensation for shellfish harvesters harmed by the closures
- joint efforts to secure additional funding for shellfish bed restoration
- agreement to prevent litigation
- coordinated public outreach campaign
- Farm-specific Water Quality Improvement Plans
- Shared effort to engage local and state governments in protecting water

The agreement includes an initial $450,000 payment from farmers and the dairy industry for the impacts suffered by Lummi fishers for lost opportunities to harvest shellfish for commercial, ceremonial, and subsistence purposes. The Lummi Nation has agreed not to engage in adversarial litigation against the dairies that sign the agreement, provided that the parties continue to work in good faith.
For info: www.portagebaypartnership.org/; Sheena Kinley-Sanders, Lummi Indian Business Council, 360/ 305-8532; Gerald Baron, Whatcom Family Farmers, 360/ 303.9123 or info@whatcomfamilyfarmers.org

CALENDAR

March 15 CA
Water Gala '17, San Francisco. Mezzanine, 444 Jessie Street. Presented by Imagine H2O. For info: Nashelley Kaplan-Dailey, 415/ 828-6344, Nashelley@imagineh2o.org or www.imagineh20.org

March 15-16 CA
Water Innovation 2017 Conference, San Francisco. Sir Francis Drake Hotel. Presented by Water Environment Federation. For info: www.wef.org/WaterInnovation/

March 16-17 WY
Wyoming Water & Energy Law Conference, Cheyenne. Little America Hotel. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

March 17 OR
Columbia River Regional Forum, Hood River. Best Western Plus Hood River. Presented by American Planning Assoc. Oregon Chapter. For info: http://www.oregonapa.org/events/columbia-river-regional-forum/

March 19-21 CA
WateReuse California Annual Conference, San Diego. Westin San Diego. For info: https://watereuse.org/news-events/event-calendar

March 20 WA
Environmental Cleanup & Water Quality Conference, Seattle. Washington State Convention Ctr. For info: Environmental Law Education Center, 503/ 282-5220 or www.elecenter.com/

March 20-21 DC
Assoc. of Clean Water Administrators Mid-Year Meeting, Washington. Hilton Garden Inn. For info: www.acwa-us.org/#!meetings

March 20-22 CA
California Water & Environmental Modeling Forum 23rd Annual Meeting, Folsom. Lake Natoma Inn, 702 Gold Lake Drive. For info: www.cwemf.org/Activities/annualmtg.html

March 20-22 DC
Federal Water Issues Conference - National Water Resources Assoc., Washington. Embassy Suites. For info: NWRA, www.nwra.org/upcoming-conferences-workshops.html

March 20-23 CA
27th Annual International Conference on Soil, Water, Energy & Air, San Diego. Marriott Mission Valley. Presented by the Assoc. for Environmental Health & Sciences Foundation. For info: www.aehsfoundation.org/west-coast-conference.aspx

March 21 WA
5.0 Advanced Long-Term LID Operations: Bioretention Training, Bellingham. Alaska Ferry Terminal (Conference Room B). Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

March 21 NE
Republican River Basin-Wide Water Management Plan Meeting, Cambridge. Cambridge Community Center, 722 Patterson Ave. Hosted by Nebraska Dept. of Natural Resources. For info: http://dnr.nebraska.gov/RRBWP/project-and-meeting-schedule

March 21 CA
California's Climate Path - Discussion With UC Berkeley's Center for Law, Energy & the Environment, Sacramento. 555 Capitol Mall, Ste. 800, 5 pm. Hosted by Remy Moose Manley LLP. For info: RSVP to clee@law.berkeley.edu by March 14

March 21-22 DC
National Water Policy Fly-In & Expo, Washington. Washington Marriott Georgetown. Water Week 2017 Event: March 19-25. For info: https://watereuse.org/news-events/event-calendar

March 22 UT
Water, Community, and the Culture of Owning: Wallace Stegner Center Lecture, Salt Lake City. University of Utah, S.J. Quinney College of Law. 12:15 pm - 1:15 pm. For info: http://law.utah.edu/events/category/highlighted-events/

March 23 CA
2017 Executive Briefing: Wave of Change - Breaking the Status Quo, Sacramento. Hilton Sacramento Arden West. Presented by the Water Education Foundation. For info: www.watereducation.org/foundation-event/2017-executive-briefing

March 23 WA
5.0 Advanced Long-Term LID Operations: Bioretention Training, Vancouver. Water Resources Education Ctr., 4600 SE Columbia Way. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

March 23 WA & WEB
Environmental Law in the Trump Administration Seminar, Seattle. Hilton Garden Inn Downtown. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

March 23-24 UT
Water in the West - Exploring Untapped Solutions: 22nd Annual Wallace Stegner Center Symposium, Salt Lake City. University of Utah, S.J. Quinney College of Law. For info: http://law.utah.edu/events/category/highlighted-events/

March 28 AZ
Irrigated Agriculture in Arizona: A Fresh Perspective - WRRC Conference 2017, Tucson. University of Arizona Student Union, 8am-5pm. Presented by Water Resources Research Center. For info: http://wrrc.arizona.edu/events/conference/wrrc-conference-2017-irrigated-agriculture-arizona-fresh-perspective

March 28-29 CA
35th Annual ABA Water Law Conference, Los Angeles. Loews Hollywood Hotel. Presented by ABA in connection with SEER's Spring Conference March 29-31. For info: www.shop.americanbar.org/ebus/ABAEventsCalendar.aspx

March 28-30 CA
California Municipal Utilities Assoc. 85th Annual Meeting, Carlsbad. Sheraton Carlsbad Resort & Spa. For info: http://cmua.org/events/

March 29 CA
Environmental Summit of the Americas, Los Angeles. Loews Hollywood Hotel. Sponsored by the ABA Section of Environment, Energy & Resources. For info: http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=266631586

March 29-31 CA
46th Spring Conference of the Section of Environment, Energy & Resources, Los Angeles. Loews Hollywood Hotel. Presented by ABA SEER. For info: http://www.americanbar.org/groups/environment_energy_resources/events_cle.html

March 29-31 MN
Design-Build for Water/Wastewater Conference 2017, Minneapolis. Minneapolis Convention Center. Presented by Water Environment Federation. For info: http://www.wef.org/DBIA/

March 29-April 1 CA
35th Annual Salmonid Restoration Conference, Davis. Veteran's Memorial Center, 203 E. 14th Street. Presented by Salmonid Restoration Federation. For info: http://calsalmon.org/

March 30-31 MT
Buying and Selling Ranches Seminar, Helena. Best Western Premier Helena Great Northern Hotel. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

March 31 DC
Environmental Law & Policy Review Annual Conference 2017, Washington. Environmental Law Institute, 1730 M Streeet NW, Ste. 700. Presented by Environmental Law Institute & Vanderbilt University Law School. For info: www.eli.org/events/environmental-law-and-policy-review-annual-conference-2017

April 5 WA
5.1 Advanced Long-Term LID Operations: Permeable Pavement Training, Bellingham. Alaska Ferry Terminal (Conference Room B). Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

April 5-7 NV
Lower Colorado River Tour 2017, Las Vegas. Lower Colorado River. Presented by Water Education Foundation. For info: www.watereducation.org/topic-nevada

April 6-7 CA
California Water Policy Conference 26: Upstream, Downstream, We All Scream, San Diego. Courtyard by Marriott at Liberty Station. For info: http://cawaterpolicy.org/

April 6-7 NM
Law of the Rio Grande Conference, Santa Fe. La Fonda Hotel. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

April 6-7 CO
Long Term Capital & Financial Planning for Municipal/Public Water & Wasterwater Utilities Course, Denver. EUCI Offices, 4601 DTC Blvd., Ste. 800. Presented by EUCI (Electric Utility Consultants Inc.). For info: www.euci.com/events/

April 6-8 DC
The Environmental Council of States Spring Meeting, Washington. The Mayflower Hotel. For info: ECOS, www.ecos.org

April 7 DC
2017 NCR Water Resources Symposium, Washington. University of District Columbia. Presented by American Water Resources Assoc. - National Capital Region. For info: www.awrancrs.org/events/events2016-2017.html

April 8-11 WA
Residuals and Biosolids 2017 Conference, Seattle. Seattle Convention Center. Presented by Water Environment Federation. For info: www.wef.org/ResidualsBiosolids/

April 10-13 TX
Texas Water 2017 Conference, Austin. Austin Convention Ctr. For info: www.txwater.org/

April 11 WY
"Changes in Precipitation, Snowpack & Streamflow in Wyoming by the 21st Century" (Dr. Bart Geert) and "2017 Water Supply Outlook" (Reclamation): Wyoming Water Forum, Cheyenne. Herschler Bldg., Conference Room 1699. Presented by the State Engineer's Office. For info: https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum

April 11-12 CO
Natural Resources, Energy, and Public Lands: What Happens Next: 2017 Martz Spring Symposium, Boulder. Wolf Law Bldg., Wittemyer Courtroom. Presented by Getches-Wilkinson Center. For info: www.colorado.edu/law/research/gwc/events

April 12-14 NE
Western States Water Council Meeting - Spring 2017 (183rd), Nebraska City. Lied Lodge & Conference Center. For info: WSWC, www.westernstateswater.org

April 13 CA
ELQ-CLEE Annual Banquet, Berkeley. Chevron Auditorium, I-House. Presented by Center for Law Energy & the Environment and Ecology Law Quarterly, 6-9 pm. For info: www.law.berkeley.edu/research/clee/events/

April 14 OR
Oregon Source Control Conference, Portland. World Trade Center, 121 SW Salmon Street. For info: Environmental Law Education Center, www.elecenter.com/

April 18 WA
5.1 Advanced Long-Term LID Operations: Permeable Pavement Training, Olympia. Olympia Center, 222 Columbia Street NW. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

The Water Report
Water Rights, Water Quality & Water Solutions in the West
260 N. Polk Street • Eugene, OR 97402

CALENDAR

(continued from previous page)

April 18 **WA**
5.1 Advanced Long-Term LID Operations: Permeable Pavement Training, Vancouver. Water Resources Education Ctr., 4600 SE Columbia Way. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

April 20 **WA**
5.0 Advanced Long-Term LID Operations: Bioretention Training, Moses Lake. Moses Lake Fire Depart. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

April 27-28 **CA**
Headwaters Tour 2017, Sacramento. Sierra Nevadas. Presented by Water Education Foundation. For info: www.watereducation.org/tour/headwaters-tour-2017

April 30-May 5 **MO**
Assoc. of State Floodplain Managers (ASFPM) National Conference 2017, Kansas City. Kansas City Convention Ctr. For info: www.asfpmconference.org

May 3 **WA**
5.0 Advanced Long-Term LID Operations: Bioretention Training, Olympia. Olympia Center, 222 Columbia Street NW. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

May 3-4 **CA**
SGMA Conference - Groundwater Sustainability Plan Tools, Los Angeles. DoubleTree by Hilton Hotel Modesto. Presented by Groundwater Resources Assoc. of California. For info: www.grac.org/events/64/

May 4 **WA**
6.2 Advanced LID Design: Bioretention Media & Compost Amended Soils Training, Seattle. Center for Urban Horticulture, 3501 NE 41st Street. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

May 4-5 **CA**
P3 Water Summit: Forging Partnerships to Meet America's Water Challenges, San Diego. Grand Hyatt. For info: www.p3watersummit.com

May 8-9 **CA**
11th Annual NEPA Conference, San Francisco. Hotel Nikko. For info: CLE Int'l, 800/ 873-7130 or www.cle.com

May 8-11 **MI**
Annual National River Rally Conference, Grand Rapids. Amway Grand Plaza Hotel. Hosted by River Network. For info: www.rivernetwork.org/events-learning/river-rally/about/

May 9 **WA**
5.0 Advanced Long-Term LID Operations: Bioretention Training, Seattle. Center for Urban Horticulture, 3501 NE 41st Street. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510

May 9 **WY**
"MODIS & Snowcover Patterns: How Changes in Snow Affect Water Yield" by Stephanie Kampf, CSU: Wyoming Water Forum, Cheyenne. Herschler Bldg., Conference Room 1699. Presented by State Engineer's Office. For info: https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum

May 9-11 **WA**
Washington Hydrogeology Symposium 2017, Tacoma. Hotel Murano. For info: Mary Jane Shirkawa, 206/ 221-3936, mjshir@uw.edu or http://depts.washington.edu/uwconf/wordpress/wahgs/

May 9-12 **CA**
Assoc. of California Water Agencies 2017 Spring Conference & Exhibition, Monterey. Monterey Marriott & Portola Hotel & Spa. For info: http://www.acwa.com/events/acwa-2017-spring-conference-exhibition

May 12 **WA**
5.1 Advanced Long-Term LID Operations: Permeable Pavement Training, Seattle. Center for Urban Horticulture, 3501 NE 41st Street. Presented by Dept. of Ecology. For info: www.eventbrite.com/o/lid-training-team-8360043510