



Water Resources Committee Newsletter

Vol. 12, No. 1

November 2009

MESSAGE FROM THE CHAIR

Wendy Bowden Crowther

Welcome to the new ABA year. As the new chair of the Water Resources Committee, I want to begin thanking my predecessor, David Aladjem, for his service. David did an incredible job as chair of the committee over the last two years. Under David's guidance, the committee put on three great water law conferences, increased its participation in the Section of Environment, Energy, and Resources' Fall Meeting and the Annual Conference on Environmental Law, and boasts one of the best newsletters in the Section. I also want to thank David personally for the guidance he has given me as I take over this position and warn him that his job is far from done.

Next, I want to introduce you to your new vice chairs. Many are familiar faces but we also have some enthusiastic new additions to the committee leadership. Jeff Kray will continue to helm the Water Resources Committee newsletter, Tom Hicks and John Chaffin are in charge of membership, and Jeremy Jungreis and Elizabeth Taylor will continue with their excellent work as Programs vice chair and *Year in Review* vice chair. Two new faces this year are Jon Schutz who will serve as our Public Service vice chair and Craig Wilson who is our Technology vice chair. David Aladjem and Elizabeth Ewens have agreed to continue their service to the committee, and specifically to the success of our conferences, by serving as Sponsorship vice chairs.

Planning is currently under way for both the 28th Annual Water Law Conference to be held in San Diego on Feb. 17–19, 2010 and the Eastern Water Resources Conference which will take place in Orlando, Florida on May 20–21, 2010. Peter Sly and Jill Willis serve as the co-chairs of the 28th Annual Water Law Conference. Lewis Jones and Pamela Bush are the co-chairs of the Eastern Water Law Conference. I have been privileged to be involved in the planning calls for both conferences and I guarantee that we can look forward to two great conferences. Our co-chairs have drafted articles previewing the conferences which are included in this newsletter. I encourage you to read their articles and mark the conference dates on your calendar.

John Cruden, the new chair of the Section of Environment, Energy, and Resources, has defined "Outreach" as the theme for his tenure. John's theme also reflects my goals for the Water Resource Committee. Over the last few years, our committee has been successful in increasing the involvement of tribal attorneys, environmental attorneys, and attorneys working with NGOs. One of my priorities is to continue this trend and the active involvement of these members. We need to focus attention on these groups, together with young lawyers, if we are to continue to grow as a committee and to maintain our role the premier water resource group in the country. Specifically, we need to encourage these lawyers to participate in conference planning and to contribute to the newsletter. This year I also hope to increase the interaction between the Water Resource Committee

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Vol. 12, No. 1, November 2009
Jeff B. Kray, Marten Law Group PLLC,
Editor**

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and the Water Quality and Wetlands Committee. The reality is that we are two sides of the same coin and I believe the membership of both groups will benefit from our working together. As a first step, the two committees joined for the Dining Together event at 17th Section Fall Meeting in Baltimore.

I am looking forward to an exciting and successful year for the Water Resource Committee and I want to invite all of our members to get involved. Attend a conference, work on a public service project, or write an article for the newsletter. Finally, I want to invite all of you who have thoughts about the committee or ideas that you want to share to contact me or any of our vice chairs. I am looking forward to working with you.

**28TH ANNUAL WATER LAW CONFERENCE
WHOSE SPIGOT IS IT?
LEGAL CONTROL OF THE WATER**

**Peter Sly
Jill Willis**

We are excited to announce that the 28th Annual Water Law Conference will take place from Feb. 17-19, 2010 at the U.S. Grant Hotel in San Diego, California. The 2010 Conference will focus on control of water resources: **Whose Spigot Is It? Legal Control of the Water**. We are developing several provocative panels addressing major issues facing the water community. Some questions to be discussed include:

- What is the impact of changing social paradigms on legal regimes affecting water resources?
- Are there lessons from the prolonged drought in Australia that may apply in the United States.?
- How may potential changes in Constitutional bedrock doctrines such as the Takings Clause and the Commerce Clause affect control of water resources?
- How do we respond to scientific uncertainties regarding water supplies? How do we

- respond to emerging constituent “chemicals of concern” and related issues?
- Can municipal water suppliers expect priority status in times of drought?
- What legal challenges face long-term water rights settlements? Are these settlements ever “final”?
- Is Low Impact Development the next frontier in water supply planning and water quality regulation? How do issues associated with “Low Impact Development” affect water rights?

In addition, the conference will cover “Hot Topics” in water law, ethical considerations facing water law practitioners, and “Water Law 103,” with an emphasis on Federalism, Reclamation Law, and Reserved Rights.

We hope you can join us for this exciting conference. Additional information about the 28th Annual Water Law Conference can be found on the Section’s Web site at www.abanet.org/enviro/ or by calling the Section office at (312) 988-5724.

Peter Sly teaches courses on federal Indian law, water policy, and conservation easements at Colby College. A specialist in water, Indian, energy, and ethics law, his practice has included Indian water settlements, federal water rights, the Colorado River, FERC relicensing, the Endangered Species Act, and water matters related to the PG&E bankruptcy. **Jill Willis** is a partner in the Natural Resources Practice Group of the law firm of Best Best & Krieger LLP, in Los Angeles, California. Ms. Willis specializes in water rights and related issues. She represents numerous public and private clients in actions involving surface and groundwater rights throughout Southern California.

**2010 EASTERN WATER
RESOURCES CONFERENCE
SURPLUS AND SCARCITY: ADAPTING TO
HYDROLOGIC DISRUPTION IN THE EAST**

**Pamela Bush
Lewis Jones**

The ABA Water Resources Committee hosts its 2010 Eastern Water Resources Conference, *Surplus and Scarcity: Adapting to Hydrologic Disruption in the East*, on May 20-21, 2010 at the Swan and Dolphin Hotel in Orlando, Florida. The Orlando conference will focus on the evolution of eastern water law and policy in response to an increasingly complex water management environment and the ways in which these developments are guiding crucial decisions about energy, infrastructure, and development east of the Mississippi. Panels will focus on water economics in the face of surplus and scarcity, the water-energy nexus, including the advent of renewable portfolio standard requirements, state water planning initiatives and implementation, uses and abuses of data in resolving disputes among competing users, and the quality-quantity connection as a driver in interstate conflicts and regulatory initiatives. Developments in litigation related to reservoir operations, water allocations and aquifer storage and recovery are among the topics to be addressed. Conference planning is benefiting from the input of volunteers from a number of potential non-financial co-sponsors, including the American Water Works Association, the Chesapeake Bay Foundation, the Southern Environmental Law Center, and the National Wildlife Federation.

The Planning Committee has arranged for a tour and ABA public service project in connection with the conference on Thursday morning, May 20, 2010 at the Disney Wilderness Preserve, owned and operated by The Nature Conservancy. This 12,000-acre preserve borders Lake Russell, one of the last remaining undeveloped lakes in central Florida, and is among the largest off-site wetlands mitigation projects ever undertaken in the United States. A “Water Law 101” program is planned for Thursday afternoon to provide those new to the practice area with the context they

need for the Friday program. The conference is being shaped by an energetic, diverse, and extremely dedicated planning committee, led by Pamela Bush and Lewis Jones.

We hope you can join us for this exciting conference. Additional information about the 2010 Eastern Water Resources Conference can be found on the Section's Web site at www.abanet.org/enviro/ or by calling the Section office at (312) 988-5724.




Pamela Bush is assistant general counsel with the Delaware River Basin Commission, based in West Trenton, New Jersey. She has engaged in diverse aspects of integrated water resource management on behalf of this interstate and federal compact agency since 1999. **Lewis Jones** is counsel with King and Spalding in Atlanta, Georgia. As a member of the firm's Tort & Environmental Litigation Practice Group he concentrates on water law and water resources as well as general environmental litigation. Both co-chairs view this decade as a particularly challenging and fascinating time to be focused on water law in the east.

SHOULD WE BUILD AN ARK TO COMPLY WITH THE ESA?—APPLYING THE ENDANGERED SPECIES ACT'S CAUSATION ELEMENT TO CLIMATE CHANGE

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The Earth's past includes several mass extinctions and scientists believe climate change is ushering in another. Many water projects operate in regions where threatened or endangered species will be affected by climate change. The power of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, to regulate and modify such water projects makes it a convenient and attractive legal vehicle for those seeking to address or mitigate the effects of climate change. Using the ESA to regulate activities that actually may be contributing to climate change has at least two major difficulties: (1) a substantial proportion of the activities suspected of contributing to climate change are outside the United States and beyond jurisdiction, and (2) a specific project's "greenhouse gas" emissions and its individual effect on climate is often negligible or extremely difficult to accurately determine. This issue, however, is distinct from the question of whether it is appropriate to use the ESA to force projects to address climate change even if there is no "causal" link between those projects and the effects of climate change. As discussed below, if the ESA's causation element is properly applied, the answer to this question is no.

As climate change and its effects expand, circumstances for some species will become more dire. This will likely create increased pressure to use the ESA to hold projects responsible for alleviating or mitigating the effects of climate change, even in the absence of the requisite causal nexus. Thus, the effects of a regulated activity and those of climate change must be properly distinguished to prevent the ESA from being expansively used as a means to solve all the biological problems created by climate change. In many circumstances, lack of adequate data, scientific uncertainty, and the emotional rhetoric the prospect of



**Water Resources
Committee Newsletter**

LIKE TO WRITE?

The Water Resources Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact Jeff B. Kray at jkray@martenlaw.com.

extinction evokes, promise to make attempts at applying the proper causal limits of the ESA difficult and contentious. As discussed below, this “causation” issue has already arrived in the federal courts with regard to ESA litigation and water projects.

Section 7 and Section 9 of the ESA

The ESA’s federal consultation provision (Section 7) includes a substantive mandate that federal agencies avoid jeopardizing listed species or destroying or adversely modifying their critical habitat. 16 U.S.C. § 1536(a)(2). This article uses the term “jeopardize” to encompass Section 7’s mandates. These mandates apply to direct federal actions and those requiring federal permitting, funding, or other involvement. Thus, countless federal, state, and private flood control projects, reservoirs, hydropower stations, water diversions, water discharges, marinas, ports, harbors, and other associated activities (collectively “water projects”) are subject to Section 7.

The ESA’s “take” prohibition (Section 9) forbids “any person” from engaging in unauthorized “take” of a listed species. 16 U.S.C. § 1538(a); *see also* 16 U.S.C. § 1532(19) & 16 U.S.C. § 1532(13) (broadly defining person and take, respectively). Because many water projects have the potential to cause “take” of listed species, either through habitat modification or direct injury or killing of individuals, Section 9 usually applies.

Many water projects receive authorization to take listed species by obtaining an incidental take statement pursuant to a Section 7 consultation between the federal “action agency” and the federal “consulting agency,” either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (collectively “Services”). After consultation, the Services provide their biological opinion on whether the effects of the water project will jeopardize the listed species. If the Services determine the action may jeopardize the species, they “suggest those reasonable and prudent alternatives” that would avoid jeopardizing the species, “and can be taken by the Federal agency or applicant in implementing the agency action.” 16 U.S.C. § 1536(3)(A). If the Services do

not find that the action jeopardizes the species, no such alternatives are suggested or adopted.

The statutory term “suggest” is a misnomer, however, because water project proponents are essentially required to adopt the Services’ reasonable and prudent alternatives in order to receive an incidental take statement. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 169-170 (1997) (recognizing powerful coercive effect of biological opinion). Thus, the need for take authorization to comply with Section 9 essentially grants the Services a veto power over any action that might take a listed species, notwithstanding legitimate disputes about whether the action would jeopardize the species. After finding that the action will not jeopardize listed species, or upon adoption of the reasonable and prudent alternatives, the Services will issue an incidental take statement allowing the water project to proceed despite the incidental take of some individuals of the listed species.

Effects of Climate Change on Water Resources and Aquatic Ecosystems

The scientific and common literature is overflowing with reports documenting and predicting the effects of climate change. The Obama administration recently issued a comprehensive and well documented report predicting the current and future impacts of climate change in the United States (“White House Report”). “Global Climate Change Impacts in the United States,” Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson (eds.) Cambridge University Press, 2009; *available at* www.globalchange.gov.

Members of the water bar are likely familiar with the White House Report’s key messages regarding water resources and aquatic ecosystems. Changes in the frequency and magnitude of precipitation events will increase and intensify floods and droughts. In many areas, snowpack runoff will shift to earlier in the spring. Many streams will have lower flows in the late summer. The already significant effects of fires, disease pathogens, and invasive species will likely increase. The habitats of some mountain species and coldwater fish, such as salmon and trout, will contract or disappear. Coastal and near-shore ecosystems will

face stresses from sea level rise and changes in inflow and circulation patterns that will affect salinity distribution, water temperatures, and water quality.

Assuming its accuracy, the White House Report portends hydrological and ecosystem changes that will increase the frequency of regulatory clashes involving ESA-listed species, as well as adding multiple pressures on water projects to maintain their water supply, hydropower, water quality, flood control, and other human benefits.

Causation and the ESA

The legal principle of causation is not foreign to the ESA. In fact, in her concurring opinion in the ESA case *Babbitt v. Sweet Home* Justice O’Conner stated:

Even if . . . [the ESA] does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one’s conduct. . . I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well entrenched principle. *Babbitt v. Sweet Home*, 515 U.S. 687 (1995) Concurring Op. J. O’Conner.

More recently, the Ninth Circuit confirmed that: “To ‘jeopardize’—the action the ESA prohibits—means to ‘expose to loss or injury’ or to ‘imperil.’ Either of these implies causation, and thus some new risk of harm.” *National Wildlife Federation v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008).

In the context of climate change, how causation is analyzed in Section 7 and Section 9 when applied to water projects is a matter of great social and economic import. For example, how should rising sea levels or changes in streamflows be considered in a Section 7 consultation on flood control or reservoir facilities? The implications of this determination can be huge. For instance, an analysis that expands the causal scope of water project effects to also include the effects of

climate change could significantly reduce the water supply, hydropower, or flood control benefits of those projects in an attempt to mitigate for the effects of climate change— effects that the water project did not cause. If implemented, such an application of the ESA threatens to radically alter the operations of many water projects in an effort to sustain and protect ESA-listed species against the rising tide of climate change.

Regardless of whether attempts to insulate species from climate change have merit, there is no indication the ESA was ever intended for this task and it is ill-suited to do so. At least three significant factors argue against using the ESA to make the complex choices regarding species conservation that climate change will likely force on society: (1) the ESA was enacted prior to Congressional awareness of climate change, (2) the Services routinely apply the ESA in a manner that affords the benefit of any doubt or uncertainty to the species, and (3) the Services have interpreted the ESA as precluding consideration of other environmental or social impacts, essentially elevating the needs of the single species that is the subject of Section 7 consultation above all other considerations.

Case Examples

Two federal district courts have already confronted the causation issue in relation to water projects and effects on ESA-listed species. These cases offer some insight into the potential application of the ESA’s causation element in future situations involving water projects and climate change.

Alabama v. United States Army Corps of Engineers

In *Alabama v. United States Army Corps of Engineers*, 441 F. Supp. 2d 1123 (N.D. Ala. 2006) (*Alabama*), Florida sought to modify operations of a U.S. Army Corps of Engineers (Corps) facility on the Apalachicola River. At issue was how much water the Corps had to release from Woodruff Dam to protect four ESA-listed species: Gulf sturgeon, fat threeridge mussel, purple bankclimber mussel, and Chipola slabshell mussel (the “ACF Species”). *Alabama*, 441 F. Supp. 2d at 1125. Several of these species were highly dependant on water levels in the river:

The mussels in the Apalachicola River . . . generally cannot escape the adverse conditions they currently are experiencing in side channels and sloughs along the river. Particularly dramatic flow reductions, as have been previously experienced in the Apalachicola River, quickly sever the connection between the main river channel and occupied mussel habitats outside the main channel before mussels can relocate, resulting in stranding and death due to heat, predation, and desiccation. As a result, hundreds, if not thousands of dead and dying mussels were observed in the Apalachicola River. *Id.*

These deaths occurred at a time when the Corps was still engaged in Section 7 consultation with FWS, thus the Corps had not yet received an incidental take statement. *Id.* at 1127. Instead, the Corps was operating Woodruff Dam pursuant to an Interim Operating Plan it had agreed to with FWS, calling for releases of 5,000 cubic-feet-per-second (cfs). Florida contended that the Corps was violating Section 7 and Section 9 of the ESA, and sought to force the Corps to increase its releases from Woodruff Dam from 5,000 cfs to 6,300 cfs. *Id.* Florida argued that “the Corps retains water in upstream reservoirs and fails to satisfy the interim flow needs of the ACF species during periods of low flow conditions, such as those currently experienced.” *Alabama*, 441 F. Supp. 2d at 1125.

The court noted “[n]o one disputes that protected mussels are dying by the hundreds, that more will die at 5,000 cfs, and that their habitat is being modified by the decreased flows so that they are facing death, harm and harassment.” *Id.* at 1132. However, the court explained that “[c]urrently, the ACF Basin is experiencing a severe drought, with basin inflows recently measured below 2,500 cfs.” *Id.* at 1128. Then, in a prescient passage eerily similar to predictions in the White House Report, the court explained:

The court is not convinced that the predicament faced by these protected mussels rests at the feet of the Corps. Instead, the weight of evidence points to other causes for the exposure of the

mussels and harm to their habitat. . . . Evidence from FWS indicates that drought conditions have become more severe than droughts were in the years prior to constructing of dams on these affected rivers. . . . Because of decreased rainfall and increased evaporation, the amount of water available in the ACF basin has fallen sharply. The court cannot hold the Corps responsible for the absence of rain. *Id.* at 1134.

The court continued:

Florida argues, however, that the Corps should do more to protect these mussels than the protection that nature provides. The court can find no controlling authority that requires the Corps to do more than what it is currently doing. *Id.* at 1135.

Accordingly, the court denied Florida’s motion, concluding:

The Corps cannot control the weather, nor can it be held responsible for the effects of the weather on the mussels’ habitat. The Corps, in consultation with FWS, faces the unenviable task of balancing the competing demands for the dwindling amounts of water in the reservoirs it manages. Providing more water for the mussels than nature has herself demonstrates that the Corps takes seriously its responsibility to ensure that its actions do not jeopardize the continued existence of these mussels. *Id.* at 1137.

As the effects of climate change progress, other ESA-listed species throughout the United States are likely to be affected by factors such as low flows, high water temperatures, or poor water quality, much like the drought affected the mussels in *Alabama*. Thus, other water projects will likely face the unenviable task of balancing limited water supplies with competing needs. The *Alabama* case shows that when these issues arise, a focus on causation will be important to properly delineate the requirements of the ESA.

Pacific Shores Subdivision California Water District v. United States Army Corps of Engineers

In another case, *Pacific Shores Subdivision California Water District v. U.S. Army Corps of Engineers*, 538 F. Supp. 2d 242 (D.C. D.C. 2008) (*Pacific Shores*), plaintiffs challenged the Corps' issuance of a permit to Del Norte County (Del Norte) and the California Department of Fish and Game (DFG) to breach a sand bar separating two coastal lakes from the Pacific Ocean (the "Lakes"). The Lakes formed a coastal lagoon area that was home to several ESA-listed species: the tidewater goby, the Oregon silverspot butterfly, the western snowy plover, the Southern Oregon/Northern California Coast coho salmon, and the California Brown pelican.

The Corps issued a permit allowing Del Norte and DFG to artificially breach a sand bar so that the Lakes would drain when they reached 8-10 feet above mean sea level (msl). Among other issues, plaintiffs sought a lower breach elevation so that less butterfly habitat would be inundated prior to breaching:

Plaintiffs argue that take would result from flooding of the butterfly's habitat and the drowning of butterfly eggs and larvae will occur if the Lakes are artificially breached at 8-10 msl. However, defendants contend that because flooding of the habitat is a natural event, and would occur even in the absence of federal action, no incidental take statement is required. *Pacific Shores*, 538 F. Supp. 2d at 260.

The court found for the Corps:

Plaintiffs fail to establish that the proposed agency action is the cause of the take. The natural filling of the lagoons and the accompanying flooding of the adjacent region occurs as a result of natural conditions and not as a result of the artificial breaching. The FWS is not obligated to issue an incidental take statement for the effects of flooding of the butterfly's habitat when that flooding is completely unconnected to the proposed breaching action. *Id.* at 261.

Accordingly, the court concluded:

Here, rainfall and other precipitation cause the natural filling of the Lakes. As the Lakes fill, the surrounding areas flood. This flooding can cause take of listed species and their habitats. However, this is not an illegal take under § 9 of the ESA because this flooding is the result of the natural filling of the Lakes and not the result of the artificial breaching. *Id.* at 262.

With regard to the Corps' Section 7 obligations, the court stated:

Plaintiffs' attempts to challenge this permit on the grounds that a lower breaching level would result in less take are misguided. The ESA does not hold the Corps accountable for an inaction, i.e., the failure to breach at 4-6 msl. . . . The Corps is charged only with evaluating and ensuring that the proposed action—artificial breaching at 8-10 msl—complies with the ESA. *Id.* at 261-262.

The flooding impact that plaintiffs complained of in *Pacific Shores* is essentially the same as those the White House Report predicts will occur from climate change through rising sea levels, or changes in precipitation and runoff patterns. Thus, *Pacific Shores* again displays an analysis of causation under the ESA that confirms that water projects should not be held accountable for the effects of climate change. The case's holding that alternative breaching elevations that might have flooded less habitat and killed fewer individuals were not the proper focus of the Section 7 consultation further emphasizes that the effects of the action must be the focus of Section 7 consultation, not alternative actions that might offset the negative impacts of other effects such as flooding, which are causally distinct from the effects of the project.

Conclusion

While not intended and ill-suited to cope with climate change, the ESA is one existing legal method that regulatory agencies or environmental advocates may employ to offset the effects of climate change on

species. If implemented in this manner, water projects could be forced to address the effects of climate change in addition to their own individual effects. As exemplified in the *Alabama* and *Pacific Shores* cases, these efforts should be limited by the ESA's existing causation requirements. However, the *Alabama* and *Pacific Shores* cases present relatively simple fact patterns. Unfortunately, more complex issues of causation are certain to arise in future cases. Thus, while there is already some case law addressing the ESA's causation element, more statutory or regulatory clarification would help ensure consistent application of the ESA in the face of climate change.

Interestingly, on Dec. 16, 2008, the Bush administration promulgated regulations that attempted to clarify the application of Section 7 with respect to both causation and climate change. 73 Fed. Reg. 76,272. However, Congress included a provision in the 2009 Omnibus Appropriations Act (Pub. L. 111-8) granting the Services the unusual power to rescind them without complying with the federal Administrative Procedure Act. On May 4, 2009, the Services rescinded the new regulations and reinstated the former, 23 year-old, ESA regulations. 74 Fed. Reg. 20,421. At the same time, however, the Services appeared to acknowledge that the ESA regulations require updating and they indicated they would endeavor to do so. Thus, the Services are currently soliciting comments on, among other things, "the appropriate standard of causation" and "consideration of effects related to global climate change." 74 Fed. Reg. 20,422. Disappointingly for ESA practitioners, however, the Services provided no timeline for receipt of comments or issuance of new ESA regulations addressing these issues.

In sum, regulators, lawyers, and courts are now left with applying the existing statutory and regulatory terms, and existing cases, to determine and draw the proper causal line between effects of the action and those of climate change in Section 7 or Section 9 cases. In this regard, the Supreme Court offered the following, somewhat unhelpful, advice 14 years ago:

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with

the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case by case resolution and adjudication. *Babbitt v. Sweet Home*, 515 U.S. 687 (1995).

The sudden rescission of the 2008 ESA regulations, and the fact that the Court's 14-year-old statement in *Babbitt v. Sweet Home* still applies today, confirm that the ESA remains one of the dreaded "third-rails" of politics, and that ESA practitioners should not hold their breath for any insightful reforms. Until that time, practitioners and the judicial branch have the task of ensuring and further clarifying the proper application of the ESA's causation element in the context of climate change.

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A PREFERENCE FOR DOMESTIC WATER USE IN UTAH: A RELIC OF THE PAST?

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Since 1880, 16 years prior to statehood, Utah law has given preference, in times of scarcity, to "domestic use"—historically defined as indoor household use—over all other uses of water. 1880, Laws of Utah, Chapter XX, Section 14. This policy derives from the truism that the absence of drinking water renders any other potential use completely pointless, since there would be no one to benefit from it. Utah law has thus maintained the primacy of household water use, for drinking, kitchen, and sanitary purposes among all of the many beneficial uses of water for well over a century. Utah's 2009 legislature caught many a bit off guard, therefore, when H.B. 241 repealed Utah Code Annotated § 73-3-21, the statute that gives priority to domestic use of water. It was only at the last minute that the effective date of the repeal was delayed until

May 12, 2010, to provide an opportunity for closer scrutiny.

Utah, like many other western states, generally follows the time-honored Doctrine of Prior Appropriation, generally summarized as “first in time is first in right.” Prior appropriation gives an earlier, or prior appropriator of water (called the senior appropriator), the right to take and use its entire water right before a later, or subsequent appropriator (called the junior appropriator), may take any water pursuant to its right. *See* UCA § 73-3-1. The just-repealed exception to strict application of the Prior Appropriation Doctrine has always been a statutory safety valve, allowing for domestic water use otherwise unavailable during times of scarcity:

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

See UCA § 73-3-21.

The statutory preference for domestic use has had several incarnations since 1880, but it had remained unchanged since 1917 when it was prospectively repealed in 2009; and, while few could recall when it had last been formally invoked, the move to repeal the preference for domestic use was led by Utah’s agricultural community and its principal lobby, the Utah Farm Bureau. Ironically, the repealed law gave agricultural water use second priority to domestic use in times of scarcity. This priority will be lost under the repeal. Not surprisingly, at least one large mining interest also supported the repeal.

Proponents of the repeal successfully characterized the preference as both vague as well as contrary to the Prior Appropriation Doctrine. Those who opposed the repeal, of course, urged caution in changing a law which had existed for 131 years without any major complaint or problem. They noted that, as Utah’s population continued to grow, the state’s limited supply of water must, of necessity, eventually be subject to the application of the preference during times of scarcity so as to ensure that public water suppliers could continue uninterrupted culinary water service. The fact that Utah, next only to Nevada, is the driest state in the nation makes this point all the more critical, especially in that, in Utah, water rights for culinary use, which necessarily includes domestic use, are often junior to agricultural water rights drawn from the same source or aquifer.

The preference has been a useful tool for public water suppliers even despite its rare formal application. One municipal public water supplier, for example, had a well which, when pumped, directly diminished flows from a nearby spring. The spring provided water for agricultural use under a water right senior to that of the municipality who owned the well. Due to this recognized interference, the municipality used the well only as an emergency backup. However, several times, when other sources were not available—typically during the late summer months—the well was pumped, and the public water supplier negotiated a voluntary damage payment to the senior water right holder for crop loss. Without the now perhaps-defunct preference, the senior water right holder could have successfully refused to accept damages and instead enforced his senior water right and required the public water supplier to suspend pumping the well, taking culinary water from thirsty people to irrigate crops.

Obviously, leaving occupied homes without domestic water is an unacceptable outcome. Equally obviously, were it ever to occur, there would be an immediate and intense public outcry demanding the legislature reinstate a domestic-over-other-use preference. Even faced with this thirsty specter, the proponents of the repeal pressed forward, many doubting that any such scenario could ever really occur.

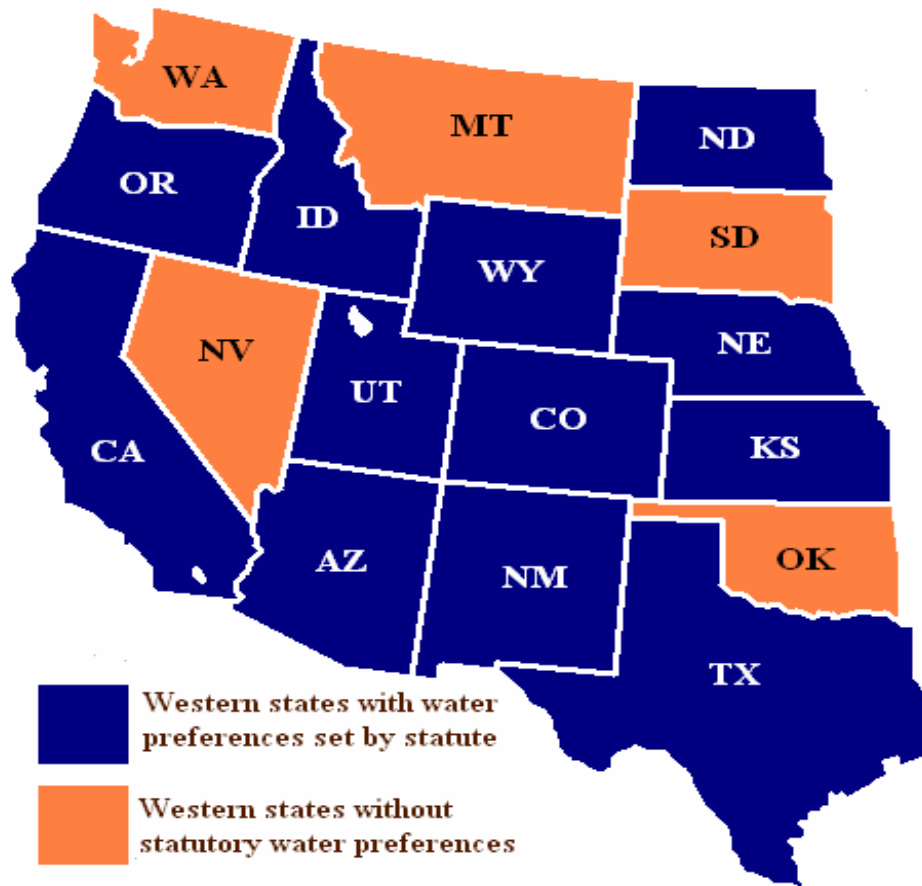


Figure 1

One point both sides did agree upon was that the language of the law was outdated and did not address modern multiple uses of water by public water suppliers typically bundled under the heading “municipal use.” This is unsurprising since public suppliers with “municipal” water rights can legally use water for numerous purposes (and typically do), from snow making in the ski resort of Park City to watering golf courses, year round, in St. George, in addition to the regular domestic use of local residents. Attempting to parse “municipal” water usage so as to separate domestic water use from all other uses is problematic, to say the least, for most public water suppliers. They could and have, however, adopted policies and ordinances limiting outside watering during periods of low supply.

Both sides also noted that, until 1903, the law provided for just compensation to senior water-right holders whose priority was lost through legal process, the original 1880 statute providing that

Whenever the waters of any natural source of supply are not sufficient for the service of all those having primary rights to the use of the same, such water shall be distributed to each owner of such right in proportion to its extent, but those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for irrigating lands shall have preference over those using the same for any other purpose, except domestic purposes. Provided, Such preference shall not be exercised to the injury of any vested right, without just compensation for such injury.”

1880, Laws of Utah, Chapter XX, Section 14. Many, both for and against the repeal, felt that just compensation should also apply if domestic-preference trumps the usual operation of the Prior Appropriation Doctrine to provide water for domestic use. In the example above, the payment of compensation for crop

loss allowed the parties to negotiate an amicable resolution outside of court. If the preference is resurrected in the 2010 legislative session it will almost assuredly include a provision for payment of just compensation to the senior water right holder. The hierarchy of beneficial water use is not unique to Utah; prior appropriation statutes generally include some form of preference that can preempt a prior or senior use of water. These preferences range from the curiously blurry—Washington’s remarkably vague declaration that water allocation “among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state,” RCW § 90.54.020—to the strictly regimented—Texas law’s specific, categorical list of appropriation preferences, Texas Water Code Annotated § 11.024. The particulars are set out below:

Arizona
Rev. Stat. Ann. § 45-157

Specifies the “Relative value of uses” when “the capacity of the [water] supply is not sufficient for all applications” as follows:

1. Domestic and municipal uses. Domestic uses shall include gardens not exceeding one-half acre to each family.
2. Irrigation and stock watering.
3. Power and mining uses.
4. Recreation and wildlife, including fish.
5. Nonrecoverable water storage pursuant to section 45-833.01.

California
Calif. Water Code § 1460

California law does not provide a list of preferences, but does provide for the supremacy of municipal permits delivering water for domestic uses:

The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time.

The law also allows for temporary permits for water in excess of a municipality’s needs; however, should the municipality desire to use the additional water,

it may do so upon making just compensation [to the temporary user] for the facilities for taking, conveying, and storing the additional water [Disputed] compensation ... may be determined [as if it were] property [to be] taken by eminent domain proceedings.

Colorado
Constitution, Art. XVI § 6

In Colorado, the preferences in times of drought or other scarcity—domestic trumps all other uses, and agricultural use trumps manufacturing—is explicitly spelled out in the state’s Constitution:

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Idaho
Constitution, Art. XV §§ 3 & 5

In Idaho, as in Colorado (and in much the same language), preferences in times of drought or other scarcity—domestic use first, mining uses second (if in an organized mining district), agricultural use third, and manufacturing fourth—are explicitly spelled out in the state’s Constitution:

SECTION 3. [w]hen the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject

to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

SECTION 5. Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Kansas
KSA § 82a-707(b) & (c)

Kansas operates under the Prior Appropriation Doctrine. Kansas law does include a preference list (Subsection (b)), but that list (rather strangely) applies only to conflicting *usage* of water; not to the purpose of its use:

Where uses of water for different purposes conflict, such uses shall conform to the following order of preference: [a] Domestic, [b] municipal, [c] irrigation, [d] industrial, [e]

recreational and water power uses. However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.

Because the drafters of this provision did not include a serial comma, it is not clear whether “recreational” use trumps “water power” use or not. Because lists in prior and subsequent statutory provisions do include serial commas, we have opted to assume that the two uses occupy the same level of preference.

Kansas law (Subsection (c)) includes a provision recognizing the primacy of domestic use, but it is remarkably weak, and appears to apply only at application, not later:

The priority of the appropriation right to use water for any beneficial purpose except domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer. The priority of the appropriation right to use water for domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer or from the time the user makes actual use of water for domestic purposes, whichever is earlier.

Montana
(No preference provisions)

Montana law gives no order of preference as to water use: there is no provision in the Montana Code listing or even implying the primacy or superiority of any particular water use. Montana does not even make any allowance for domestic use. Part Five of Chapter 85-2 of the Montana Code places significant importance on underground water, but all water use is

subject to Montana’s application of the Prior Appropriation Doctrine, under- as well as above-ground. **Time** of beneficial use of water—and to some extent, its source—controls; **purpose** of use is virtually irrelevant.

Nebraska State Constitution, Art. XV § 6

Nebraska’s preference hierarchy appears in its Constitution, which lists them as follows:

Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

Nevada (No preference provisions—excepting one for irrigation using underground water)

Oddly perhaps, for the driest state in the U.S., Nevada law contains a rather rudimentary set of preference provisions for underground water in the context of irrigation, but none for any other use or source. (On the other hand, because it is so dry, Nevada has very little above-ground water requiring regulation):

When two or more applications are made to appropriate underground water for irrigation purposes from what appears to the State Engineer to be the same basin he shall observe the following order of priority in acting upon them, according to the status of the applicant and the intended place of use:

1. *An owner of land for use on that land.*
2. *An owner of land for use on adjacent land for which he intends to file an application under the Carey Act or the Desert Land Entry Act, 43 U.S.C. §§ 321 et seq.*
3. *Any other person whose application is preparatory to proceeding under the Carey Act or the Desert Land Entry Act.*

New Mexico NM Stat. Ann. § 73-14-47(I)

In New Mexico, beneficial use is considered the equivalent of a formal application, and preference is given according to purpose of use:

*[An] application shall state the purposes and character of [the planned] use, the period and degree of continuity of [the] use, the amount of water desired and the place of use. **In case any party makes greater, better or more convenient use of the waters of the district without formal application, the fact of such use shall serve all purposes of an application, and the board may proceed to determine a reasonable rate of compensation the same as though formal application has been made.** Where it is not possible or reasonable to grant all applications, **preference shall be given to the greatest need and to the most reasonable use, as may be determined by the board, subject to the approval of the court. Preference shall be given, FIRST, to domestic and municipal water supply, and no charge shall be made for the use of water taken by private persons for home and farmyard use, or for watering farm stock; SECOND, to supplying water used in irrigation, processes of manufacture, for the production of steam, for refrigerating, cooling and condensing and for maintaining sanitary conditions of stream flow; THIRD, for power development, recreation, fisheries and for other uses.***

(Emphasis added.)

North Dakota
ND Century Code § 61-04-06.1

Applies to “competing applications for water from the same source” when “the source is insufficient to supply all applicants.” Preference priority runs as follows:

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other outdoor recreational uses.

Oklahoma
(No preference provisions—although the language implies the primacy of domestic use)

Oklahoma water law has an interesting, if rather convoluted, history. Oklahoma is essentially a 45-million-acre plain sloping from high, semi-arid prairie in the west to a comparatively lush humid subtropical land in the east where the Canadian, Arkansas, and Red Rivers enter the state of Arkansas on their way to the Gulf of Mexico. This split climatic personality led, awkwardly, to Oklahoma’s employing at times both the Prior Appropriation and Riparian Ownership Doctrines.

In 1993, however, the Oklahoma legislature passed SB 54 (Oklahoma Laws chapter 310 § 1), codified at OSC § 82-1-105.1A, the purpose of which was

to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights ... with an appropriation system ... requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future

claims to use water, except for domestic use, based only on ownership of riparian lands.

Oregon
ORS § 536.310

Oregon’s lawmakers have crafted an admirable water-use–priority hierarchy, emphasizing the establishment, protection, and preservation of both water duties and relative priorities (Subsection (1)):

When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to [a] human consumption purposes over all other uses and [b] for livestock consumption, over any other use, and thereafter [c] other beneficial purposes in such order as may be in the public interest ... under the existing circumstances

(Subsection 12). The Oregon provision reiterates the priority of domestic water use in Subsection 3 of the same provision: “[A]dequate and safe [water] supplies [shall] be preserved and protected for human consumption, while conserving maximum supplies for other beneficial use.” Oregon, moreover, discourages “[c]ompetitive exploitation of water resources ... for single-purpose uses ... when other feasible uses are in the general public interest” (Subsection 5).

Having made provision for its citizens’ health and industry, Oregon law goes on to specify order of preference in other areas:

- Multiple-purpose impoundment structures are to be preferred over single-purpose structures;
- Upstream impoundments are to be preferred over downstream impoundments;
- Planning and construction of impoundment and other artificial obstructions must give due regard to the protection of Oregon’s fishing industry.

(See Subsection 4.) Finally, Oregon law addresses environmental considerations:

The maintenance of minimum perennial streamflows sufficient to support aquatic life, to minimize pollution and to maintain recreation values shall be fostered and encouraged if existing rights and priorities under existing laws will permit

(Subsection 7.)

South Dakota
SD Codified Law § 46-1-5

Specifies that domestic water use is “the highest use of water and takes precedence over all appropriative rights,” so long as it is “exercised in a manner consistent with [the] public interest.” South Dakota law, however, provides no list of preferences such as exist in other state codes.

Texas
Texas Water Code Ann. § 11.02

Operates “to conserve and properly utilize state water,” by declaring the state’s “constructive public policy regarding the preferences between these [beneficial] uses”: “[I]t is therefore declared to be [Texas] public policy ... that in appropriating state water preference shall be given to the following uses in the order named:”

- (1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals ... shall be and remain superior to the rights of the state to appropriate the same for all other purposes;
- (2) agricultural uses and industrial uses;
- (3) mining and recovery of minerals;
- (4) hydroelectric power;
- (5) navigation;
- (6) recreation and pleasure; and
- (7) other beneficial uses.

[Note: *oddly, the Texas Code does not cite this hierarchy in its provisions about water shortages (Texas Water Code § 11.039), stating instead that water must be shared pro rata “so that preference is given to no one and everyone suffers alike.”*]

Utah
UCA § 73-3-21
[Repeal effective May 12, 2010]

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

Washington
Wash. Rev. Code Ann. § 90.54.020(1) & (2)

Declares “beneficial” water use for “domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, ... thermal power production purposes, ... preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state ...” But mentions no priorities, instead providing only that

Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

Wyoming
Wyo. Stat. Ann. § 43-3-102(b)
41-3-102. Preferred uses; defined; order of preference.

- (b) Preferred water uses shall have preference rights in the following order:
 - (i) Water for drinking purposes for both man and beast;

- (ii) Water for municipal purposes;
- (iii) Water for the use of steam engines and for general railway use, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), for steam and hot water heating plants, and steam power plants; and
- (iv) Industrial purposes.

[**Note:** § 41-3-102(a) allows for the condemnation of “preferred water uses,” but curiously also declares that *[t]he use of water for irrigation shall be superior and preferred to any use where water turbines or impulse water wheels are installed for power purposes; provided, however, that the preferred use of steam power plants and industrial purposes herein granted shall not be construed to give the right of condemnation.*]

The reasons for Utah’s repeal of its preference for domestic water use are likely a reaction by the agricultural community to urbanization caused by Utah’s rapid population growth which has both shifted water from agriculture to municipal use and dramatically increased water right values. Between 1980 and 2007, Utah growth has experienced a double-digit increase, averaging an annual 22 percent increase over the 27-year period. *See* Table 13, Population: Estimates and Projections—States, Metropolitan Areas, Cities, The 2009 Statistical Abstract, The National Data Book, available on the U.S. Census Web site, www.census.gov. The spark was likely legislation in 2008 that was viewed by the agricultural community as largely favorable to public water suppliers and urban areas. A key provision of the 2008 legislation was to allow public water suppliers to hold water rights for the “reasonable future requirements of the public” without forfeiture for nonuse. However, if the history of water development in the west teaches us anything, it is that water will always continue to flow, both literally and economically, to the demands of domestic and other urban uses.

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

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UNIFICATION OF STANDARDS FOR DRINKING WATER FROM DIFFERENT SOURCES IN ISRAEL— THE UNITED STATES AS A MODEL

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According to the existing legal status in Israel, only drinking water which is mineral water or spring water, and tap water, are regulated while water that is neither mineral nor spring water but supplied in bottles is not. The Israeli standard for the quality of drinking water which is not mineral or spring water supplied in bottles and containers is not mandatory. Thus, the public does not have any certainty about the quality of this kind of bottled water. In addition, the maximum contamination levels for tap water on the one hand, and mineral and spring water on the other, in Israel differ. We, therefore, recommend overhauling Israeli water quality laws and harmonizing the standards of drinking water regardless of the method of supply where that is appropriate, or at least adopting the existing Israeli standard as mandatory for drinking water supplied in bottles. Water quality standards for drinking water in the United States can serve as a model for harmonizing the Israeli drinking water standards and including bottled water that is not mineral or spring water.

1. Introduction

Most drinking water in Israel is supplied by water suppliers through pipes to households. The Israeli Ministry of Health established regulations setting maximum contaminant levels (MCL) for tap water in the People's Health Regulations (Sanitary Quality for Drinking Water), 1974 (hereinafter "Sanitary Quality of Drinking Water Regulations"). The same ministry set binding standards also for mineral water or spring water in its People's Health Regulations (Mineral Water and Spring Water), 1986 (hereinafter "Mineral Water and Spring Water Regulations"). Neither of these regulations, however, regulates bottled water that is not mineral water or spring water (see below 3.). This is especially striking since mineral/spring water

and non-mineral/spring bottled water have the same characteristics that may influence the quality of the water (such as the type of the bottle material, or types and conditions of storage).

The Israeli Standard for the Quality of Drinking Water in Bottles and Containers No. 1501, 1994 relates to drinking water supplied in bottles which is neither mineral nor spring water. Water suppliers supplying water according to the standard can mark the bottles with the standard mark approved by the Israeli Standards Institute. However, this standard is not official and, therefore, not legally binding according to the Israeli Standards Law, 1953.

In the United States, bottled water and tap water are regulated by two different agencies; the Food and Drug Administration (FDA) regulates bottled water (including mineral and non-mineral water) as food, and the U.S. Environmental Protection Agency (EPA) regulates tap water (also referred to as municipal water or public drinking water). The latter established the National Primary Drinking Water Regulations while the former regulated bottled water in Title 21 of the Code of Federal Regulations (21 C.F.R.).

2. Definitions of Drinking Water

Pursuant to the Israeli Public Health Ordinance 1940, drinking water is water for drinking or for cooking, and in the food industry water that will or may be in contact with food or with other materials that will be in contact with food.

A definition of drinking water can also be inferred from the following definition of non-potable water contained in the Sanitary Quality of Drinking Water Regulations: water that is disqualified from being drinking water based on microbial tests of *E. coli*, chemical tests of various parameters listed in the annexes, high concentration of fluoride, negative findings of sanitary survey, radioactive tests, toxic substances tests, or any other reasonable concern that the water may endanger public health.

In the Mineral Water and Spring Water Regulations the term "drinking water" is defined as: water that is drinking water according to the Sanitary Quality of

Drinking Water Regulations, with certain exemptions for substances being listed in the annexes to the Sanitary Quality of Drinking Water Regulations. In short: The Israeli Ministry of Health defines drinking water as drinking water which lacks legal precision.

A definition of drinking water in the United States can be found in the National Primary Drinking Water Regulations where a public water system is defined as “a system for the provision to the public of water for human consumption through pipes or, (...), other constructed conveyances.” Also the Code of Federal Regulations describes it as “water that is intended for human consumption and that is sealed in bottles or other containers with no added ingredients except that it may optionally contain safe and suitable antimicrobial agents.”

3. Bottled Water from Wells

So why does bottled water that was pumped from wells not fall within the scope of the Israeli Mineral Water and Spring Water Regulations? Pursuant to these regulations, mineral water and spring water can be used as drinking water under the following cumulative conditions:

1. It was taken from an underground source or spring approved by the competent authority;
2. The connection between the underground source or the spring and the filling of the bottles should be direct, without stops or any intermediate system;
3. The results of the microbial tests do not exceed the values in Annex I;
4. The results of the chemical tests do not exceed the allowed values;
5. The water was not treated.

Treatment is defined in these regulations as: every treatment, “*except processes of filtration and precipitation.*” This definition is problematic. First, the term is defined by a repetition of the same term (“treatment is treatment”). Second, on the one hand mineral and spring water is considered as drinking water only if it was not treated, on the other hand, the definition of treatment allows filtration and precipitation, which are general terms for most of the

common methods for water treatment. Moreover, if filtration and precipitation are allowed, obviously some installation will be located between the source of the water and the filling point of the bottles, which is in contradiction to requirement no. 2 above.

As regard to water that is supplied in bottles and containers but pumped from wells: since this water is treated (and not only by filtration or precipitation) before being filled up in bottles, it cannot be defined as mineral water or spring water (see above requirements 2 and 5). It follows from this that bottled water pumped from wells, although increasingly popular, is not regulated in Israel.

4. Contaminant Values

A comparison of the two Israeli regulations and the Israeli standard for drinking water shows an inconsistency among them. In some cases certain contaminants that are mentioned in one regulation or the standard are not mentioned in the other and also the MCLs for the same substance differ. For example, while in mineral water a concentration of 0.01 mg/L cyanide and 45 mg/L nitrate is accepted, in drinking water supplied through pipes the accepted concentrations are 0.05 mg/L cyanide and 70 mg/L nitrate.

Table 1 compares the MCL provided by Sanitary Quality of Drinking Water Regulations, Mineral Water and Spring Water Regulations and the Israeli Standard 1501, 1994, only regarding the contaminants where an inconsistency was found.

As mentioned above, in the United States, bottled water, be it mineral or spring water, be it not, is included in the scope of the FDA's 21 C.F.R. The standard of quality (21 C.F.R. 165.110) includes allowable levels for more than seventy different chemical contaminants. There are also hardly any inconsistencies between the regulations on bottled water (21 C.F.R.) and National Primary Drinking Water Regulations regulating tap water. Section 410 of the Federal Food, Drug, and Cosmetic Act provides FDA with specific instructions on establishing quality standard regulations for bottled water in response to developments at EPA. Under section 410, when EPA

Table 1 – Summary of different contaminant levels for drinking water in Israel.

	Contaminant	Upper concentration limits determined by People's Health Regulations (Sanitary Quality of Drinking Water), 1974 (mg/L)	Upper concentration limits determined by People's Health Regulations (Mineral Water and Spring Water), 1986 (mg/L)	Upper concentration limits determined by Israeli Standard 1501, 1994 (not official) (mg/L)
1	Nickel	0.05	0.05	No value
	Silver	0.01 (0.08 in treated water)	0.01 (0.08 in treated water)	No value
	Taste & odor	not repellent	No limitation	No value
	TSS	1,500	No limitation	No value
2	Nitrites	No value	0.005	0.005
	Sulfides	No value	0.05	0.05
	Mineral oil	No value	0	Not detected
	Borates	No value	50	50
	Trihalomethanes	No value	0	Not detected
	Pseudomonas aeruginosa bacteria	No value	**0	**0
	Sulfate reducing bacteria	No value	**0	**0
	Streptococcus bacteria	No value	***0	***0
3	Total β beam activity	*****1	*****1.1	*****1.1
	Cadmium	0.005	0.01	0.01
	Lead	0.01	0.05	0.05
4	Nitrate	70	45	45
	Cyanide	0.05	0.01	0.01
	Color	****15	****5	****5
	Fecal coliform	1*	**0	**0
	<i>Escherichia col</i>	3*	**0	**0
	Sulfate	437.5 (minus the concentration of magnesium multiplied by 1.25)	200	No value
	Chloride	600	200	No value
	Surfactants	1	0	Not detected
	Copper	1.4	1	1
	Magnesium	150	50	No value
	Phenol	0.002	0	Not detected
	Chlorine	< 0.5chlorine 0.1 <	0	0

	Organic substances	<u>VOC</u> Benzene - 0.01 Benzo(a)pyrene – 0.007 1,2-Dichlorobenzene – 1 1,4-Dichlorobenzene – 0.3 1,2-Dichloroethane – 0.05 1,1-Dichloroethylene—0.03 1,2-Dichloroethylene—0.1 1,1,1-Trichloroethylene - 0.2 Trichloroethylene - 0.05 Tetrachloroethylene 0.04 – Chloroform - 0.1 Carbon Tetrachloride - 0.005 Monochlorobenzene – 0.3 Formaldehyde-0.9 Toluene – 0.7 Xylenes - 1 Styrene - 0.05	3
		<i>Pesticides</i> Ethylene dibromide -0.00005 Lindane – 0.002 Alachlor – 0.02 Heptachlor– 0.004 Chlordane – 0.002 Methoxy chloride – 0.02 Aldrin – 0.002 Atrazin – 0.002 Dibromo(1,2,3) chloropropane – 0.001	

- 1 – Contaminants referred to in the Sanitary Quality of Drinking Water Regulations, but with no reference in the Mineral Water and Spring Water Regulations.
- 2 – Contaminants referred to in the Mineral Water and Spring Water Regulations, but with no reference in the Sanitary Quality of Drinking Water Regulations.
- 3 – Contaminants with stricter MCL in the Sanitary Quality of Drinking Water Regulations than in the Mineral Water and Spring Water Regulations.
- 4 – Contaminants with stricter MCL in the Mineral Water and Spring Water Regulations than in the Sanitary Quality of Drinking Water Regulations.
- * Number of microbes in 100 ml of water
- ** Number of microbes in 250 ml of water
- *** Number of microbes in 50 ml of water
- **** Platinum cobalt units

establishes new MCLs in public drinking water as part of a National Primary Drinking Water Regulations, FDA is required to establish a standard of quality regulation for the same contaminants in bottled water, or to provide a reasoning why such a regulation is not necessary to protect the public health because the contaminant is not present in water used for bottled drinking water. If FDA adopts an allowable level under the quality standard regulations, the level in bottled water must be no less stringent than EPA's MCL for drinking water; FDA's regulation must have the same effective date as EPA's regulation and must publish its regulation no later than 180 days before the effective date. L. Posnick & H. Kim, "February/March 2002 Ask the Regulators—Bottled Water Regulation and the FDA," reprinted on FDA's Web site from Food and Safety Magazine August/September 2002 issue.

FDA has generally adopted EPA's MCLs for contaminants in public drinking water as allowable levels for the same contaminants in the quality standard regulations for bottled water. In some cases, however, FDA standards for bottled water are different than EPA standards for public drinking water. Lead is an example. In 1991, EPA adopted a requirement that public water systems treat their water to reduce lead when lead levels consistently exceed 15 parts per billion (ppb). The 15 ppb level took into account the fact that lead appears in public drinking water from corrosion of public water distribution systems and residential plumbing. However, leaching of lead from distribution systems is not a factor for bottled water and, based on its survey data, FDA concluded that bottlers can readily produce bottled water products with lead levels below 5 ppb. In 1994, FDA adopted an allowable level for lead at 5 ppb as a bottled water quality standard regulation (59 Fed. Reg. 26,933). This action was consistent with FDA's goal of reducing consumers' exposure to lead in drinking water to the extent practicable. *Id.* In addition to the FDA, state and local governments also regulate bottled water. Some states have regulations that differ from FDA's in content and coverage.

5. Discussion and Conclusions

Central to this article were two issues:

1. The missing reference in Israeli legislation to bottled water that is neither mineral nor spring water;
2. The inconsistency of MCLs in the two regulations and the standard referring to drinking water in Israel.

Drinking water is one of the most existential needs of all human beings. In order to safeguard the public's health it is crucial to determine allowed contamination levels for drinking water independently of the way it is supplied. In order to create legal certainty these levels should be consistent for all types of drinking water, except for single justified cases. For example, the inconsistency of cyanide levels in the Israeli regulations and the standard is not justified. The different lead levels in the U.S. regulations, however, are based on practical and legitimate reasons: while lead can leach from the pipe system into public drinking water and the exchange of the whole system would be the only solution to avoid such leakage there is no reason why the higher level of lead in public water should also be applied to bottled water.

Also with respect to the inclusion of bottled water that is neither mineral nor spring water the U.S. federal regulatory can and should serve as a model for the Israeli regulator. It is impossible to explain to a consumer why this increasingly popular type of bottled water is not yet regulated and how he could possibly know about this lack of regulation.

We conclude that the Israeli drinking water regulations should be overhauled and harmonized and should include all types of drinking water independently of the way it is supplied. As a minimum, the Israeli Standard for the Quality of Drinking Water in Bottles and Containers No. 1501, 1994 should become mandatory.

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RAIN, RAIN, STORE AWAY, USE AGAIN ANOTHER DAY

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Rainwater harvesting seems like a common sense way to both stretch existing water supplies and reduce stormwater runoff. But state water laws, as well as practical problems associated with water storage and reuse, have made the practice more difficult to implement than one might expect.

In Washington, as an example, rainwater (and other precipitation) is considered a water of the state and a public resource, and therefore its use requires a water right permit. RCW 43.27A.020. However, the Washington water codes apply specifically to beneficial use of groundwater or surface water, and rainwater has not yet been defined as either one. The Washington State Department of Ecology (Ecology), which has regulatory authority over water rights and appropriations has not required a water right permit for “de minimis” use of rainwater. *See* RCW 43.21A.064. Ecology has taken the position that a rain barrel or small ornamental pond with capacity of a few hundred gallons is exempt from water right permitting but the term “de minimis” is not defined in the regulations or rules. Ecology Publication Number 07-11-018 *Focus on Rainwater Collection and Water Right Permitting*, June 2007.

Bills have been introduced in every session of the Washington State legislature since 2001 to try to address rainwater as a potential water supply. Proposals have ranged from allowing up to 300 gallons of capacity from rooftop collection for use only on the same property to essentially allowing all such collection of precipitation from hard surfaces provided it complies with area-specific rules to be developed by Ecology. *House Bill 1423: An act relating to small rainwater collection facilities*, 60th Leg. (referred to Committee on Agriculture and Natural Resources, Jan. 18, 2007); *House Bill 2097: An act relating to*

rainwater collection facilities, 61st Leg. (referred to Committee on Agriculture and Natural Resources, Feb. 10, 2009). Every one of these bills has died in committee.

Debate over what volume of water constitutes a “de minimis” use continues unresolved because the cumulative effect of many rainwater collection systems could impact both surface water and groundwater that is recharged by infiltration of stormwater, and Washington water right law follows the doctrine of “first in time is first in right.” *See* RCW 90.03.010. This means that a more recently developed rainwater collection system could be required to cease operation if a party with a previously existing water right can demonstrate that the rainwater system’s use impairs that senior water right.

Given the difficult task of administering this portion of the waters of the state without any regulatory tools to do so, Ecology has come up with some ad hoc solutions.

Seattle Regional Water Right Permit

Ecology has granted Seattle Public Utilities a water right permit that allows collection and non-potable use of rainwater from rooftops of certain properties within its service area. Permit to Appropriate Public Waters of the State of Washington. Certificate Number S1-28477P; issued Dec. 27, 2007. Only properties served by sewer systems that combine stormwater with sanitary flows are eligible; those served by separate stormwater and sanitary systems do not qualify. Ecology Report of Examination (ROE), File Number S1-28477, dated Jan. 30, 2007, pages 1, 2, 5, and 10. Justification for this appropriation was two-fold: it was intended to augment the city’s water supply as well as to relieve pressure on regional wastewater treatment plants by removing stormwater flow from the system.

Seattle is located in a watershed that has been closed to new surface water appropriations yet for the purposes of this permit, rainwater has been classified as a surface water source. WACs 173-508 and 173-509. The combined sewer system created a special

circumstance that has allowed the city and Ecology to work around that complication. If not diverted by rooftop catchment systems, water collected under this permit would otherwise be conveyed by the combined storm/sanitary sewer system to a regional wastewater treatment plant and released to a deep marine outfall; thus it would never reach local fresh water bodies. Diverting this water for beneficial use creates no impacts to existing surface water rights or instream flows. Ecology has, therefore, considered this a “new” water source separate from the surface water bodies closed to appropriation.

In order to address potential health concerns arising from use of this untreated water source, all such systems must:

- Be restricted to non-potable use.
- Fully conform to the Uniform Plumbing Code.
- Comply with the policies and procedures outlined in the Seattle-King County Department of Public Health’s *Rainwater Harvesting and Connection to Plumbing Fixtures*. S1-28477P page 2.

Among the requirements imposed by these restrictions are a separate piping system for rainwater, labeling of the rainwater system to avoid confusion with the potable water system, supplementation from a potable water source in the event the rainwater system fails, and cross-connection protections to prevent rainwater from entering the potable water supply.

The Northgate Civic Center is one of several projects developed under this new rainwater harvesting permit. This project redeveloped an asphalt parking lot to include a 10,000 square-foot library, a 20,000 square-foot community center, and a green space park area. The onsite rainwater collection system includes a 267,000-gallon concrete vault located under the lawn, which is adequate to collect runoff from roofs and paved surfaces from a 100-year, 23-hour storm event. A portion of this water is used for irrigating the landscaped areas of the project, and the remainder is released gradually to Thornton Creek to help restore a more natural hydrology pattern. http://www.seattle.gov/dpd/static/NorthgateCivic%20web_LatestReleased_DPDP-16-95.pdf.

King County’s King Street Center, which houses office space for more than 1,400 county employees, also uses a rainwater harvesting system under a rainwater harvesting permit. The King Street Center system replaces over one million gallons of potable water a year with collected rainwater. This water supplies more than 50 percent of the building’s needs for flushing toilets. A virtual tour of King Street Center, including a simplified representation of the rainwater collection and distribution system, will soon be available online at <http://your.kingcounty.gov/solidwaste/greenbuilding/commercial/king-street-tour.asp>.

San Juan County Island-Wide Permits

Ecology is also granting rainwater harvesting water rights in San Juan County. The county is comprised of numerous small islands located in the northern part of Puget Sound. The geology of these islands is not conducive to groundwater recharge and, therefore, precipitation is the primary water resource in the county. Golder Associates, *Technical memorandum regarding Analysis Impacts on Water Resources of Rainwater Harvesting on San Juan Islands from Chris V. Pitre and Elizabeth Shea to Roma Call, Washington State Department of Ecology* (July 9, 2007), available at http://www.ecy.wa.gov/programs/wr/nwro/images/pdfs/SanJuanTechMemo_071307.pdf. The combination of island geology and local weather patterns means that streams often dry up in summer, and wells can go dry or experience saltwater incursion, making them unusable. The local watershed planning unit requested that rainwater harvesting permits be allowed as part of a regional watershed management plan. Ecology has chosen to issue permits for each island independently, again based on the premise that the majority of precipitation runs off to Puget Sound, and would therefore not impact existing surface water rights if impounded for beneficial use. <http://www.ecy.wa.gov/programs/wr/nwro/sjc-rwc.html>. The first of these permits, for Shaw Island and Lopez Island, are anticipated to be issued late 2009.

While review drafts have not yet been released to the public, Ecology information indicates that the following provisions are likely to be included (<http://www.ecy.wa.gov/programs/wr/nwro/sjc-rwc.html>):

- Rooftop collection will be allowed only for domestic water use with minor outdoor gardening. Irrigation uses will still require a separate water right.
- Domestic rooftop collection from properties on a septic system and outside a public water system service area will be allowed with no limit on tank size.
- Domestic rooftop collection from properties within a public water system service area will be allowed only with permission from the water purveyor.
- San Juan County will track rainwater collection systems through building code requirements, and report to Ecology annually.

The major difference between the island permits under development for San Juan County and the Seattle Public Utilities permit is that the island permits allow rainwater as a potable water source, and in some cases, the sole source of water supply. San Juan County water systems are anticipated to be subject to more stringent treatment requirements.

Possible Regional Permit for Jefferson County

Water supply in Jefferson County presents a unique set of challenges. Located in the northeast portion of Washington, it lies in a temperate rain forest, with geology much like the San Juan Islands, and limited municipal infrastructure. This combination means that most of the local water supply comes from surface water sources recharged by precipitation. An additional complication is that Jefferson County's political delineation does not match area geography. The county is comprised of portions of five separate drainage basins, known as Water Resource Inventory Areas (WRIAs), each of which is treated as a separate entity for the state's required RCW 90.82, watershed planning process. <http://www.ecy.wa.gov/watershed/pdf/rcw9082-0209.pdf>. Rainwater collection has been a topic of discussion during this planning process for most of these areas, usually as part of an instream flow rule designed to protect water quantity for salmon-bearing streams. Certainly, a county-wide water right permit specifying conditions under which rainwater collection would be allowed in this area would simplify

planning and permitting for development projects. We understand that Ecology is considering such a permit, but no further information is available at this time.

Other Key Issues and Options

There is another approach to rainwater collection gaining popularity with developers of small commercial and industrial projects throughout Washington. It involves keeping storage capacity of the system under 5,000 gallons. The argument for this approach necessitates drawing a parallel between an exempt groundwater well with an allowable withdrawal of up to 5,000 gallons per day (RCW 90.44.050) and a rainwater collection system with a capacity that makes it impossible to capture more than 5,000 gallons per day. Thus the onsite rainwater collection system would have no greater impact to existing water rights than would an onsite well drilled under the exemption provision and should therefore be allowed without requirement for a water right permit. Many of the developers of these projects are applying for a water right anyway, citing an "unnamed source" of water, to protect themselves against potential civil penalties assessed for non-permitted appropriation of public water. Ecology Guidance Document #GUID-2005, Water Resources Program Guidance—Levying Civil Penalties (effective May 13, 2009). If, however, rainwater is to be classified as surface water as in the Seattle permit, and such a system is to be located in a closed basin, no new appropriation would be allowed, and operation of a rainwater collection system would be prohibited.

A variation on this theme involves the very lack of classification of rainwater. This argument revolves around the fact that in Washington rainwater is not defined as either surface water or groundwater, and the rules and regulations as they currently exist are specific to one or the other. Thus, if rainwater is neither, there is no regulatory basis for requiring a water right permit for its use. This approach is untested in the courts, but it is unlikely to be successful based on the definition of water resources as "all waters *above*, upon, or beneath the earth, located within the state and over which the state has sole or concurrent jurisdiction." RCW 43.27A.020 (emphasis added).

Conclusions

Washington and some other states have started to manage precipitation and stormwater runoff as a beneficial resource, rather than treating it as a waste stream. There are many ramifications to be considered in utilizing precipitation as a water source, including impacts to groundwater, impacts to surface water to which such runoff may be tributary, health concerns associated with a private water source, and regulatory compliance. Additional guidance from the Washington State legislature and/or Ecology is needed to address the complications inherent in the current rule and regulations. At this time, rainwater collection in Washington makes sense for:

- Projects in waterfront or island locations where diverted stormwater flows would not impact existing surface water rights.
- Projects in areas where stormwater conveyance systems are combined with sanitary sewer systems in such a way that precipitation water diverted from the system would not otherwise impact nearby surface water flows.
- Projects where current water sources are insufficient due to local weather patterns, geological conditions, and infrastructure restrictions, and where it can be demonstrated that rainwater harvest will not impact existing water rights.
- Small, independent systems where the quantity of water used can arguably be considered negligible.

Authors' note: On Oct. 9, 2009 the Washington Department of Ecology issued a policy that allows rainwater collection from rooftops for beneficial use without a water right. Although Washington law has not changed, Ecology policy is now to interpret the law to allow unrestricted rooftop rainwater harvesting. The policy, POL 1017 is available at <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1017.pdf>. The policy is not binding on future administrations and could change following the recent departure of Ecology's director, Jay Manning, who became chief of staff for Washington Governor Christine Gregoire on Oct. 19, 2009.

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ARE BANS ON OFF-SITE TRANSPORT OF GROUNDWATER “REASONABLE” BUT UNCONSTITUTIONAL?

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As with politics, in Maine, the fight over the control of groundwater has become a local issue. Largely in response to high volume extraction by bottled water companies and concerns about the sufficiency of the state’s resources to adequately regulate groundwater extraction, towns in Maine are enacting local water extraction ordinances and, in some instances, prohibiting the export of water outside town boundaries.

The latest chapter in Maine’s water wars is playing out in the town of Shapleigh, Maine, over a recently enacted “water rights and local self-government” water extraction ordinance (the “Ordinance”). A copy of the Shapleigh Ordinance can be found at <http://www.soh2o.org/pdfs/ShapleighOrdinance.pdf>. The central provision in the Ordinance is a total ban on the off-site transport of groundwater by corporations, a prohibition that could, if enacted more broadly, shut down the bottled water industry in Maine. A legal challenge is inevitable, and such a fight will likely include arguments regarding common law ownership rules and the dormant Commerce Clause.

Local Ordinance Restricts Off-Site Transport

This “rights-based” ordinance was developed by a Pennsylvania based non-profit, the Community Environmental Legal Defense Fund (CELDF). According to its Web site (celdf.org) CELDF provides:

... free and affordable legal services to community based groups and local governments working to protect their quality of life and the natural environment through building sustainable communities. Increasingly, that means teaming up with people and their municipal representatives to mount campaigns that challenge the legal clout of

corporations to overrule decisions made by citizens for their communities.

The Ordinance, which is similar to others enacted in Newfield, Maine and Barnstead and Nottingham, New Hampshire, declares that “the human right to drinking water is fundamental to life and health.” These rights are held, not only by people, but “natural communities and ecosystems” also “possess unalienable and fundamental rights to exist, flourish, and naturally evolve” within these towns. Moreover, these rights are allegedly derived, not only from the Maine and United States Constitutions, but from the United Nations Covenant on Economic, Social, and Cultural Rights, which states that “sufficient and safe drinking water is a precondition to the realization of human rights.” Ordinance §§ 3, 5.1.

Corporations, however, do not fair as well. The Ordinance finds that “placing the control of water in the hands of a corporate few, rather than the community—would constitute tyranny and usurpation.” In order to prevent this, the Ordinance states that “no corporation shall engage in water withdrawals” within the towns. This includes not only a ban on pumping, but a ban on corporate purchases of water pumped by others. *Id.* §§ 2,4.

In an attempt to prevent corporations from objecting on the grounds that such a prohibition is unlawful under any statutory or constitutional theory, the Ordinance states that no corporation,

... shall be recognized as a “person” under the United States or Maine Constitutions, or laws of the United States or Maine, nor shall the corporation be afforded the protections of the Contracts Clause or Commerce Clause of the United States Constitution, or similar provisions found within the Maine Constitution, within the Town of Shapleigh. *Id.* § 5.

After prohibiting corporate water withdrawals and purporting to remove the corporations’ constitutional rights, the Ordinance does provide one relevant exception. Corporations may extract groundwater so long as the water is used “solely for on-site residential,

household, agricultural or commercial use” within the municipal boundaries. The effect of the Ordinance, therefore, is to prohibit corporations from extracting groundwater for use or sale outside of the Town of Shapleigh. *Id.* § 6(4).

The Ordinance has been enacted during a time of concern about the impacts of increasing commercial groundwater extraction for bottled water production. The Town of Fryeburg, in the Western mountains of Maine, is in danger of having its pristine sand and gravel aquifers “tapped out,” with Fryeburg considering a cap on the amount of water that may be extracted for bottling. It’s been raining a lot in Maine recently, but memories of recent drought periods remain fresh in residents’ collective memory, and the increasing number of water tanker trucks prowling Maine’s roads is a constant reminder that Maine’s groundwater is being removed and shipped elsewhere.

As a result, these “rights-based” ordinances are being enacted, it seems, in response to several factors. Although protecting the environment and the sufficiency of clean groundwater is normally the stated purpose (and is often a valid basis), ownership and control of the resource appears to be the primary goal. For the bottled water companies (and given Maine’s archaic insistence on retaining the “Absolute Dominion” groundwater liability rule) they claim they “own” whatever they can bring to the surface. The public does not seem satisfied with this assessment, and is now fighting back, intent on resting ownership and control of groundwater from these corporations. It is less an issue of protecting a scarce resource than of asserting or confirming a collective right of ownership over a commodity that the public feels is being taken by corporations, without just compensation.

As discussed below, although bans on off-site transport are not new, they may not be constitutional. Further, from a resource management perspective, what should we be concerned about when we regulate groundwater withdrawals—protecting the environment or establishing who owns or controls the resource, regardless of its impacts?

Are These Rights-Based Ordinances “Reasonable”?

Notwithstanding some of the more suspect provisions cited above (and there are others, such as imposing personal liability on state agency officials that issue permits for corporate groundwater extraction, and a requirement to hold a special public meeting if there is any “attempt to use county, state, or federal levels of government” to “intimidate” the residents of the municipality), a prohibition on off-site transport of groundwater is not a novel or outrageous proposition. Under the common law “Reasonable Use” groundwater rule, a landowner may withdraw large quantities of water, even when such an extraction causes harm to an abutter, so long as the use of the water, in conjunction with the use of the surface property, is “reasonable.” See *Finley v. Teeter Stone, Inc.*, 248 A.2d 106 (Md. 1968) (use of water in mining operation that depleted abutter’s water supply was reasonable); *Drummond v. Fuel Co.*, 140 S.E 57 (W. Va. 1927) (same).

Although what is “reasonable” is usually determined on a case-by-case basis, many jurisdictions have held that off-site transport of water is, as a matter of law, unreasonable. As an example, in *Martin v. City of Linden*, the Alabama Supreme Court held that a municipality’s pumping of 500,000 gallons per day for delivery 15 miles away by pipeline was not “reasonable.” See 667 So. 2d 732 (Ala. 1995). Had the city pumped the water for a use “incidental” to the beneficial use of the overlying land, the analysis would have been different. Similarly, in *Higday v. Nickolas*, a Missouri appellate court stated that “[u]nder the rule of reasonable use, the overlying landowner may use the subjacent groundwater freely, and without liability to an adjoining owner, but only if his use is for purposes incident to the beneficial enjoyment of the land from which the water was taken.” 469 S.W. 2d 859 (Mo. App. 1971). The Ninth Circuit Court of Appeals, as recently as four years ago, relied on the Reasonable Use doctrine when it held that a company was not liable for the destruction of its neighbor’s pecan orchard, caused by the company’s dewatering of the aquifer, given that the company had not transported the water for the benefit of other property, and its use was,

therefore, “reasonable.” See *Brady v. Abbott Laboratories*, 433 F.3d 679, 683 (9th Cir. 2005).

Sporhase, Pike, and the Regulation of Groundwater

So restrictions on off-site transportation of groundwater are not new. If that is the case is the Town of Shapleigh prohibited from imposing limitations that my neighbor could impose in a Reasonable Use jurisdiction?

At least one company in Maine has recently raised the threat of the dormant Commerce Clause in opposition to a statutory restriction on off-site transportation of groundwater. Until recently amended, a Maine state law required a corporation extracting large amounts of groundwater for transport elsewhere to show that it would suffer “substantial hardship” if the permit were not issued. See 22 M.R.S.A. § 2660-A(3)(C) (repealed Chapter 399, Laws of 2007). In litigation over the scope of this provision, a bottled water company alleged in briefs filed in the Maine Supreme Court that if the state were to deny a permit for off-site transport on the basis that the applicant had not met this “hardship” requirement (as opposed, for example, due to a “permissible” concern about environmental impact) the application of such a statute would constitute an impermissible burden on interstate commerce under the doctrine set forth in the 1982 U.S. Supreme Court decision *Sporhase v. Nebraska ex rel. Douglas*. 458 U.S. 941 (1982).

In *Sporhase*, the Supreme Court confirmed that groundwater was an “article of commerce” and, therefore, a resource subject to analysis under the Commerce Clause. See 458 U.S. at 954. Determining the validity of a state or local law affecting this article of commerce requires a two-tiered review. First, if the groundwater law facially discriminates against out-of-state entities or forbids interstate transfers, then such a provision would be subject to “*Hughes* scrutiny,” a version of strict scrutiny in which the government must demonstrate that a legitimate purpose could not be served by any less discriminatory regulation. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Second, if the ordinance regulates “evenhandedly” but, nevertheless, imposes an incidental burden on interstate commerce, the test is whether “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Edgar v. Mite Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Under this test, referred to as “*Pike* balancing,” the state or local law will be upheld unless the burden imposed on commerce is “clearly excessive in relation to the putative local benefit.” *Sporhase*, 458 U.S. at 954 (citing *Pike*, 397 U.S. at 142). In addition, the courts will permit higher burdens on commerce when the nature of the local interest at stake is of particular importance. See *Pike*, 397 U.S. at 142. With regard to natural resources, a state or local law may explicitly discriminate against interstate commerce, so long as the state or municipality does “not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation.” See *Maine v. Taylor*, 477 U.S. 131, 137-38, 151 (1986); see also *Cities Service Gas Co. v. Peerless Oil and Gas*, 340 U.S. 179, 187 (1950) (“[a] state is justifiably concerned with preventing a rapid and uneconomic dissipation of one of its chief natural resources”).

In *Sporhase*, the Supreme Court discussed the “putative local benefits” of regulating groundwater. Acknowledging that “water is indeed essential for human survival,” the Court held that:

... a State’s power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. 458 U.S. at 953, 956.

Not only did the Court find that preserving diminishing sources of groundwater is a “legitimate and highly important” goal, it was also convinced of the “desirability of state and local management of ground water.” *Id.* at 952, 954. The Court noted that states have, in the context of interstate compacts and other agreements, lawfully restricted interstate transfers of water and a state’s claim to ownership of groundwater, while not sufficient to deny federal regulation, “may support a limited preference for its own citizens in the

utilization of the resource.” *Id.* at 956. Furthermore, the Court has “recognized the relevance of state boundaries in the allocation of scarce water resources” and is reluctant to hold state action unreasonable when such action is taken to conserve vital water resources for its own citizens. *See id.* at 956. Finally, when a state imposes restrictions and other conservation measures to preserve the availability of groundwater, the existence of sufficient groundwater supplies “is not simply happenstance,” and a state may “favor its own citizens in times of shortage.” *Id.* at 957. Indeed, in a case where a state’s water resources are in jeopardy, that state “conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.” *Id.* at 958. Accordingly, the mere fact that a state may restrict groundwater use outside its borders—“for the purposes of protecting the health of its citizens”—is not, necessarily, an unreasonable burden on commerce.

Does the U.S. Constitution Prohibit “Reasonable” Groundwater Restrictions?

The Shapleigh Ordinance is rife with findings regarding the critical link between human health, environmental health, and a sufficient supply of groundwater. Although findings regarding municipal scarcities or shortages are somewhat lacking, we know from *Sporhase* that the courts are likely to recognize the critical importance of protecting groundwater supplies and that local and state protection may be preferable to federal regulation. What of the ban on out-of-town transfers?

If challenged, Shapleigh will allege that its Ordinance does not expressly discriminate on the basis of state boundaries or in-state versus out-of-state corporations. Maine companies, as well as out-of-state companies, are prohibited from exporting Shapleigh’s water for sale elsewhere. However, in prohibiting the shipment of groundwater beyond the Town’s boundaries the Ordinance, necessarily, prohibits the shipment of groundwater for sale to other states. This is a total ban, and there are no exceptions. Is this ban the type of “simple economic protectionism” that triggers *Hughes* scrutiny? *Id.* at 338. If not, would the ban survive the *Pike* balancing test?

If this Ordinance would not survive scrutiny under the dormant Commerce Clause, where does that leave the Reasonable Use doctrine? Although common law property rules cannot run afoul of the Commerce Clause, from a groundwater management perspective, the purpose and effect of the common law rule is not significantly different than the Shapleigh Ordinance. Both the common law rule and the Shapleigh Ordinance prohibit interstate transfers of groundwater. Moreover, these bans are not imposed due to a concern about environmental protection, scarcity, or any of the other factors identified in *Sporhase* as justifying the use of the police power.

Although the Ordinance does state that “ecological systems,” depend on a sufficient source of clean water for survival, the primary intent of the Ordinances is not to protect the environment. Indeed, there are no restrictions on the amount of pumping by residents for on-site use, even pumping that would result, conceivably, in environmental harm. Instead, the “water rights” Ordinance is, first and foremost, about controlling groundwater and preventing corporations from taking a resource which, in the minds of the drafters, does not “belong” to the companies or the marketplace.

Similarly, Reasonable Use is predicated on the assumption that groundwater exists for the benefit of the overlying landowner, but only when used “in connection with a beneficial enjoyment for the land from which it is taken.” *Brady*, 433 F.3d at 682. Accordingly, the Reasonable Use doctrine presumes that groundwater has no “reasonable” value independent of the value the water may provide to the overlying land. Both the rule and the Ordinance presume that groundwater is not a commodity—not an article of commerce—and that the water is best utilized by leaving it in the ground unless it is used to enhance the value of the overlying land.

The Reasonable Use rule and the Shapleigh Ordinance also make a similar statement about ownership of groundwater. The voters in the Town of Shapleigh have expressly stated their position: groundwater belongs to the people, “held in the public trust as a common resource. . . .” Ordinance § 2. Under the Reasonable Use rule, ownership of the groundwater is shared, and

your neighbor can restrict what you do with “your” groundwater under certain circumstances. Although the Ordinance goes farther, declaring groundwater a public resource, both the Ordinance and the rule grant rights to others, at the expense of the overlying landowner.

These presumptions about ownership and value appear in conflict with the Commerce Clause analysis. In *Sporhase* the Supreme Court discussed both these issues, finding first that the state (*i.e.*, the public) does not own the groundwater. Second, the Court concluded that groundwater is an article of commerce with independent value in the marketplace, distinct from the value it provides to the overlying land. As a practical matter, there can be no dispute that groundwater, placed in a plastic bottle and shipped to your local Quick-E-Mart, has significant commercial value.

Should We Care About Reasonable Use Anymore?

If the Shapleigh Ordinance is unconstitutional, then given the shared presumptions with the Reasonable Use rule regarding ownership and value, both the rule and the Ordinance appear out of step with the courts’ current view of appropriate groundwater regulation.

However, the commonalities between the old common law rule and the new “rights-based” Ordinance suggest that there has been, and continues to be, a strongly held view that groundwater should not be a commodity, and that it should be protected as a shared resource for the benefit of the overlying communities. Although what is “reasonable” might not be constitutional, legal arguments regarding the demands of the Commerce Clause are not likely to satisfy the residents of the Town of Shapleigh.

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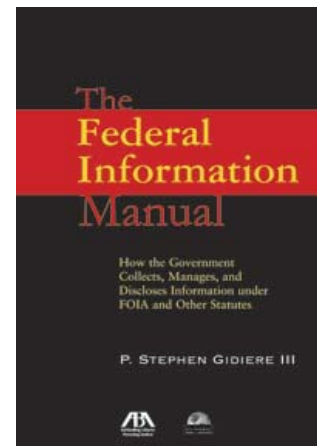
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