



Water Resources Committee Newsletter

Vol. 13, No. 1

September 2010

MESSAGE FROM THE CHAIR

Wendy Bowden Crowther

September brings us to a new ABA year. I am happy to report that many of our vice chairs will continue to serve into 2011. We do, however, have a few new vice chairs that I would like to introduce to you. Pam Bush has joined Jeremy Jungreis as a Programs vice chair. Pam and Jeremy have already done a great job in preparing panel proposals for the 40th Annual Conference on Environmental Law that will be held in March 17-20 2011, and they are working on several ideas for Quick Teleconferences. If you have ideas for programs that you would like to see as quick teleconferences or as panels at the larger Section meetings, please contact Pam and Jeremy. Bidtah Becker has taken over as Technology vice chair and Elizabeth Ewens has agreed to serve as our *Year in Review* vice chair. I thank all of our vice chairs for their willingness to serve our Committee.

The Eastern Water Resources Conference took place in May and was a great success. The Orlando location was wonderful and the public service project at the Nature Conservancy's Disney Wilderness Preserve was outstanding. Of course, the program content itself was of the highest standard. Included in this Newsletter is the article "Heading South: Equitable Apportionment Comes to the Carolinas," which was awarded "Best Paper" at the conference. Congratulations to author J. Blanding Holman IV for his outstanding work.

Planning is well under way for the 29th Annual Water Law Conference, which will again be held in San Diego in February 2011. I have been able to participate in many of the planning meetings and I am confident that the conference will once again live up to its reputation as the premier water law conference in the nation.

Finally, I want to encourage you to attend the 18th Section Fall Meeting that will be held September 29 through October 2, 2010, in New Orleans. Fall Meeting is an incredible opportunity to expand your knowledge and to network with other environment and resource attorneys. I am proud to note that the Water Resources Committee will be well represented at two substantive panels during the Fall Meeting. On Thursday afternoon there will be a panel addressing emerging constituents and their effect on both water quality and quantity. On Friday morning there will be a lively discussion about the changing face of the water supply across the nation. Of course, there will also be opportunities for members of the Water Resources Committee to socialize (as we do so well) during lunch and dinner on Friday. I hope to see you there.

I am looking forward to another exciting and successful year for the Water Resources Committee and I want to encourage all of our members to get involved this year.

**Water Resources Committee
Newsletter
Vol. 13, No. 1, September 2010
Jeff B. Kray, Editor**

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Sept. 29 - Oct. 2, 2010
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New Orleans

Oct. 12, 2010
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Primary Sponsor The Center for American
and International Law
Houston

Feb. 23-25, 2011
29th Annual Water Law Conference
San Diego

March 17-20, 2011
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Salt Lake City

August 4-9, 2011
ABA Annual Meeting
Toronto

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HEADED SOUTH: EQUITABLE APPORTIONMENT COMES TO THE CAROLINAS

J. Blanding Holman IV

The Section recognizes Blan Holman as recipient of the “Best Paper” recognition for his paper prepared for the ABA’s 2010 Eastern Water Resources Conference held on May 20–21 in Orlando, Florida.

Introduction

In 2007, South Carolina initiated an original action in the U.S. Supreme Court, seeking equitable apportionment with North Carolina of the Catawba-Wateree River. The Court referred the matter to a Special Master, together with the motions of three nonstate entities—the Catawba River Water Supply Project (CRWSP), Duke Energy Carolinas, LLC (Duke Energy), and the city of Charlotte, N. C.—seeking to intervene as parties. Charlotte withdraws water from the Catawba in North Carolina upstream of South Carolina. Duke operates hydropower dams along the river in both states. The CRWSP withdraws water in South Carolina, but distributes it in both states. Over South Carolina’s objections, the Special Master recommended that all three entities be allowed intervention. Reviewing South Carolina’s exceptions, the Supreme Court clarified the standard governing intervention, holding that a party that shows a compelling, distinct interest in his own right not properly represented by the state can intervene. Applying that standard, it affirmed intervention by Duke and the CRWSP but denied intervention by Charlotte.

The majority’s opinion stands as a landmark development in equitable apportionment jurisprudence and will greatly impact the progress of this particular case. The action now returns to the Special Master for expanded discovery and an eventual hearing on the merits. Meanwhile, Federal Energy Regulatory Commission (FERC) relicensing of Duke’s impoundments along the Catawba proceeds in parallel, with the South Carolina Attorney General participating

in state administrative proceedings concerning a South Carolina water quality certification that was issued by staff of the S.C. Department of Health and Environmental Control (DHEC) but then rescinded by the DHEC Board.

I. Origin and Development of the Catawba-Wateree Equitable Apportionment Case

A. Origin of the Case and Initial Proceedings

On June 7, 2007, South Carolina Attorney General Henry McMaster filed a motion for leave to file a complaint on behalf of South Carolina against the State of North Carolina, seeking equitable apportionment of the Catawba-Wateree, a river that arises in the mountains of North Carolina and flows down into South Carolina. *See Mot. Leave File Compl.* at 3. The Catawba River becomes the Wateree River in South Carolina, which then joins the Congaree River to form the Santee River, which travels to the Atlantic Ocean. For purposes of this paper, the subject river is referred to as simply the “Catawba.” In addition to equitable apportionment of the river, South Carolina’s proposed complaint sought a declaration that North Carolina’s interbasin transfer statute cannot be used to determine each state’s share of the river, as well as an injunction preventing North Carolina from allowing transfers of water from the Catawba River basins to other river basins in a manner inconsistent with the requested apportionment. *Compl.; Prayer for Relief*, ¶¶ 1–2. North Carolina opposed the motion on grounds that the Catawba’s flow was being addressed in a FERC relicensing proceeding, wherein Duke Energy was seeking an operating license for a system of 11 impoundments along the river in both states. While its petition for leave to file a complaint was pending, South Carolina moved for a preliminary injunction to prevent North Carolina from authorizing transfers of water from the Catawba River beyond those previously authorized, which North Carolina also opposed. On October 1, 2007, the Court granted South Carolina’s motion for leave to file the complaint, directed that North Carolina file an answer, and denied South Carolina’s motion for a preliminary injunction. *South Carolina v. North Carolina*, 552 U.S. 804, 128 S. Ct. 349 (2007).

South Carolina contends North Carolina has authorized upstream transfers of water from the Catawba River basin that exceed North Carolina's equitable share of the river and has done so pursuant to a North Carolina statute that requires any person seeking to transfer more than 2 million gallons of water per day (mgd) from the Catawba River basin to obtain a permit from the North Carolina Environmental Management Commission. *See* N.C. GEN. STAT. ANN. §§ 143-215.22L(a)(1), 143-215.22G(1)(h) (2007). The complaint alleges that North Carolina has issued permits to Charlotte for the transfer of up to 33 mgd; to the North Carolina cities of Concord and Kannapolis for the transfer of 10 mgd; has authorized Union County (through the CRWSP) to transfer at least five mgd; and has implicitly authorized an unknown number of transfers below the 2 mgd permitting threshold. Compl. ¶ 18, 21–22. South Carolina claims that the net effect of these upstream transfers is to deprive South Carolina of its equitable share of the Catawba River's water, particularly during periods of drought or low river flow. While South Carolina seeks a decree that equitably apportions the Catawba River between the two states and enjoins North Carolina from authorizing transfers in excess of that state's equitable share, it does not specify a minimum flow of water that would satisfy South Carolina's equitable needs.

North Carolina agrees that severe drought conditions have affected the flow of the Catawba and other rivers in the states, but denies that its own actions have caused harm to South Carolina. Answer ¶¶ 2, 17–18. North Carolina specifically denies that actions it took pursuant to its interbasin permitting statute—including transfers approved for Charlotte-Mecklenburg and Union County—exceed North Carolina's equitable share of the Catawba River. *Id.* ¶¶ 3, 20(a), 21. Rather, according to North Carolina, the Catawba River's flows have fluctuated as a result of various factors including requirements “imposed pursuant to a license issued by [FERC] and the operation of hydroelectric generation facilities located on the River.” *Id.* ¶ 2. North Carolina has also interposed a series of affirmative defenses, including laches and a claim that the complaint should be dismissed because South Carolina's position amounts to “nothing more than a difference of opinion with the manner in which a

FERC-regulated hydroelectric project stores and releases flows” such that the complained-about low flows could be avoided through “revisions to the operational parameters of the several hydroelectric dams that populate the Catawba River.” *Id.* ¶ 32(a). North Carolina also contends that FERC's involvement and other federal interests within the Catawba-Wateree-Santee River basin are such that the United States is an indispensable party to the litigation. *Id.* ¶ 36.

B. Proceedings before the Special Master

As is standard with original actions, the Court, having granted South Carolina's motion for leave to file, appointed a special master to help it decide the case. “The special master acts somewhat like a district court judge or magistrate, hearing motions and overseeing any trial in the matter,” albeit with “much more discretion that district court judges about how to conduct the proceedings before them.” J. Bleich et al., *Very Special Master—Handling the Supreme Court's Original Jurisdiction Cases*, SAN FRANCISCO ATT'Y, Winter 2009, at 45, 47. While the Court has never revealed how it selects special masters, in the past it often chose senior federal judges and justices, but more recently has selected former Supreme Court law clerks, including, in this case, Kristen Linsley Myles, a former clerk to Justice Antonin Scalia and the first female special master ever appointed. *Id.* at 48. Selection of less senior special masters has at least one major benefit: they may actually survive an equitable apportionment case. *Arizona v. California* lasted decades, and “required five different special masters, some of whom had to be replaced because they died before the case was resolved.” *Id.* (citing Ann-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 647, 655 (2002)). The case involved a two-year-long trial, the testimony of 340 witnesses, 25,000 pages of transcript, and resulted in a master's recommendation that stretched 433 pages long. Bleich et al., *supr.* at 48. The Supreme Court itself heard nearly twenty-four total hours of argument. *Id.* at 48.

Following assignment of the case to the Special Master, Duke Energy and the CRWSP filed motions for leave to intervene as defendants in November

2007, which were followed, in February 2008, by a third motion to intervene as a defendant by the city of Charlotte, North Carolina. South Carolina opposed all three motions, and North Carolina took no position. First Interim Rept. of the Special Master, O.T. 2008, No. 138, Orig. at 8. North Carolina later supported intervention. The Court referred all three motions to the Special Master, 552 U.S. 1160, 128 S. Ct 117 (2008), who held a hearing on the motions on March 28, 2008, in Richmond, Virginia, and issued an order granting the motions on May 27, 2008. First Interim Rept., at 8. On June 27, 2008, South Carolina filed a motion for clarification or, in the alternative, for reconsideration of the order. After a telephonic conference at which the Special Master indicated that the motion would be denied, South Carolina requested that the Special Master issue an interim report to the Court so that South Carolina could present exceptions to these rulings, which the Special Master granted. *Id.*

Meanwhile, discovery commenced, including discovery between the parties and the intervenors as guided by an order from the Special Master governing discovery pending Court resolution of the intervention issue. *Id.* A separate dispute then arose concerning the scope of the pleadings and of the issues open for discovery, with North Carolina contending that South Carolina's complaint was limited (and discovery was limited) to the propriety of North Carolina's authorization of interbasin transfers (IBTs) and the harms from those IBTs during droughts, and South Carolina contending that its complaint was not so limited and that restrictions on discovery at this stage would not be appropriate. In a September 24, 2008, order the Special Master ruled that, while interbasin transfers were the central focus of the complaint, and while the harms alleged focused primarily upon drought conditions and the upstream portion of the river as it flowed through South Carolina, the general prayer for an equitable apportionment of the Catawba permitted consideration of other factors so that a blanket limitation on discovery at the initial stage was not warranted. *Id.*

Back in the Supreme Court, the parties briefed the intervention issue in 2009, with oral argument heard October 13, 2009. The full Court issued its opinion on January 10, 2010.

II. The Court's Decision on Intervention in Equitable Apportionment Actions

The justices splintered in a surprising 5-4 fashion in resolving intervention. The majority opinion, favoring intervention by Duke and the CRWSP but not Charlotte, was authored by Justice Alito, joined by Justices Stevens, Scalia, Kennedy, and Breyer. The dissent, opposing all three interventions, was penned by Chief Justice Roberts, joined by Justices Thomas, Ginsburg, and Sotomayor. The majority's opinion stands as a landmark development in equitable apportionment jurisprudence and could greatly impact the progress of this particular case.

A. Justice Alito's Majority Opinion

The majority begins with the precept that “[p]articipation by nonstate parties in actions arising under our original jurisdiction is not a new development,” citing Article III, Section 2, of the Constitution as contemplating suits “between a State and Citizens of another State” within the Court's original jurisdiction. *North Carolina v. South Carolina*, 130 S. Ct. 854, 861 (2010). The majority notes that “for more than two centuries, the Court has exercised that jurisdiction over nonstate parties in suits between two or more States,” and observes that “[n]onstate entities have even participated as parties in disputes between States, such as the one before us now, where the States were seeking equitable apportionment of water resources.” *Id.* Moreover, the majority points out that the Court has granted leave for nonstate entities to intervene as parties in original actions between states for nearly 90 years. *Id.* (citing *Maryland v. Louisiana*, 451 U.S. 725, 745, n.21, 101 S. Ct. 2114 (1981) (private corporation intervention into original action challenging a state's imposition of a tax that burdened interstate commerce); *Oklahoma v. Texas*, 254 U.S. 609, 41 S. Ct. 12 (1920) (individual and corporate citizen intervention to protect rights in contested land in boundary dispute); *Texas v. Louisiana*, 426 U.S. 465, 466, 96 S. Ct. 2155 (1976) (*per curiam*) (municipality intervention in boundary dispute)). However, rather than adopt the Special Master's synthesis of that history—essentially, as allowing nonstate involvement intervention for “compelling” reasons—the majority clarified the proper standard for intervention by nonstate entities, as earlier

set forth in *New Jersey v. New York*, 345 U.S. 369, 73 S. Ct. 689 (1953) (*per curiam*).

In *New Jersey*, the state of New Jersey sued the state of New York and the city of New York in 1929 for their diversion of the Delaware River’s headwaters. 345 U.S. at 370. After granting the Commonwealth of Pennsylvania leave to intervene, the Court in 1931 entered a decree enjoining certain diversions of water by the state of New York and the city of New York. *Id.* at 371. In 1952, New York City moved to modify the decree, and New Jersey and Pennsylvania filed oppositions. Philadelphia then sought to intervene, on the basis of its use of the Delaware River’s water. The Court kept Philadelphia out. Because Pennsylvania had intervened “to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River,” *id.* at 374, and was acting *parens patriae*, it was “deemed to represent all [of] its citizens.” *Id.* at 372–73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173–74 (1930)). Accordingly, to ensure due respect to “sovereign dignity” and to provide “a working rule for good judicial administration,” *id.* at 373, the Court denied intervention using the following standard:

An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. *Id.*

Applying this standard to the Carolinas’ dispute, the majority Court concludes that the CRWSP—a joint venture established with the encouragement of regulatory authorities in both states and designed to serve the increasing water needs of Union County, North Carolina, as well as Lancaster County, South Carolina—should be allowed to intervene. The majority notes that the CRWSP’s advisory board consists of representatives from both counties, draws its revenues from sales in both states, and operates infrastructure and assets that are owned by both counties as tenants-in-common, with roughly half of the CRWSP’s total withdrawals of water from the Catawba River going to South Carolina consumers. *North Carolina v. South Carolina*, 130 S. Ct. 854,

864 (2010). Indeed, the Court found that the CRWSP had been given a certificate by South Carolina in 1989 authorizing up to 20 mgd to be transferred out of the Catawba River basin, with Lancaster County (S.C.) currently using 2 mgd of this amount, Union County (N.C.) using 5 mgd, and the remaining 13 mgd not yet used. *Id.* at 864–65. Moreover, because the CRWSP pumps water to Union County across state lines pursuant to a parallel certificate issued by North Carolina, the CRWSP’s activities depend upon authority conferred by both states and thus, the majority concluded, “neither State can properly represent the interests of the CRWSP in this litigation.” *Id.* at 865. Indeed North Carolina, at oral argument, stated that it could not represent the CRWSP’s interests, which the majority attributes to that state’s having to take the position that “downstream users”—including CRWSP partner Lancaster County, S.C.— “should receive less water.” *Id.* Conversely, because Lancaster County is obligated to provide water to Mecklenburg County, *North Carolina*, South Carolina “may not be interested in protecting all uses of Lancaster County’s share of the CRWSP’s water.” *Id.* at 865, n.6.

The majority cites similar reasons in support of Duke Energy’s intervention. As an initial matter, the opinion deems it significant that any equitable apportionment of the river would need to take into account Duke Energy’s 11 dams, which ultimately control how much water enters South Carolina, as well as “the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region. . . .” *Id.* at 866. The majority also discerns that Duke has a “unique and compelling interest” in protecting the terms of its existing FERC license and the Comprehensive Relicensing Agreement (CRA) it forged with many stakeholders as part of its FERC license renewal application, which the majority says it will “likely [] consider in reaching the ultimate disposition of this case.” *Id.* at 866–67. Since “[n]either state has signed the CRA or expressed an intention to defend its terms,” neither was seen to sufficiently represent Duke’s interests, thus justifying intervention. *Id.* at 867.

When it came to Charlotte, the majority opinion goes the other way. Because Charlotte “is a municipality of

North Carolina, and for purposes of this litigation, its transfers of water from the Catawba River basin constitute part of North Carolina's equitable share," the sheer magnitude of its withdrawals and the likely impact of the relief sought by South Carolina on it were deemed insufficient to "distinguish it in kind from other members of the class"—as Philadelphia's interest failed to distinguish it in *New Jersey v. New York*. transfer, thereby reducing the chances of inadequate representation *Id.* Furthermore, the majority notes that the state of North Carolina, while nominally supporting Charlotte's intervention, represented to the Court that it would be defending Charlotte's right to its interbasin. *Id.* at 868.

B. Chief Justice Roberts' Dissent

The dissent penned by Chief Justice Roberts is notable for its forceful objection to the expansion of intervention in original actions and its prediction that the decision will greatly alter future equitable apportionment cases and make them akin to class actions:

The result is literally unprecedented: Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never. That is because the apportionment of an interstate waterway is a sovereign dispute, and the key to intervention in such an action is just that—sovereignty. The Court's decision to permit nonsovereigns to intervene in this case has the potential to alter in a fundamental way the nature of our original jurisdiction, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests. *Id.* at 869.

The dissent arrives at these conclusions from its view that original jurisdiction cases in general, and equitable apportionment cases in particular, are an extremely rare species of dispute, and are defined by two central attributes. First, the Court's original jurisdiction encompasses only grave concerns between the states that, absent a forum for their peaceful resolution "would amount to *casus belli* if the States were fully sovereign." *Id.* (quoting *Texas v. New Mexico*, 462

U.S. 554, 571, n.18, 103 S. Ct. 2558, (1983)). Second, as a forum for resolving those issues, the Supreme Court faces serious practical limitations because it is "not well suited to assume the role of a trial judge." *Id.* These considerations, in turn, lead to dissent to argue for a much more rigid application of the standard announced in *New Jersey v. New York*, with particular focus put on precluding "a State from being 'judicially impeached on matters of policy by its own subjects,'" and to prevent "the use of the Court's original jurisdiction to air 'intramural dispute[s]' that should be settled in a different forum—namely, within the States." *Id.* at 870 (quoting *New Jersey*, 345 U.S. at 373).

Because Charlotte, Duke Energy, and the CRWSP all stake claims to water, the dissent concludes that they all merely seek to vindicate rights derivative of the respective states' rights to the Catawba River as shared with other citizens of those states. *Id.* at 873. Thus the dissent agrees that Charlotte has no basis for intervention, but goes further to contend that Duke Energy and the CRWSP lack any basis as well. As for Duke, the dissent suggests that the information and evidence said to justify its involvement in resolution of the case could be gleaned through amicus participation, while Duke's needs for water for electricity generation "are simply interests in a particular use of water or its flow" that "are no different in kind from the interests of any other entity that relies on water for its commercial operation." *Id.* The dissent discounts the FERC proceedings as well, observing that the federal government, which filed an amicus brief and presented oral argument in opposition to intervention, "is doubtless familiar with the pending FERC proceedings, and it sees no corresponding need for us to grant Duke Energy's motion to intervene." *Id.* at 874. Turning to the CRWSP, the dissent finds it similar to "any bi-state entity, or indeed any corporation or individual conducting business in both states" that should "seek to vindicate [its] interests within each State." *Id.* Nor is the dissent concerned by the specter that the respective states will not properly represent that entity's interests, since each state must be deemed to represent all its citizens and may not be "judicially impeached on matters of policy by its own subjects." *Id.* (internal quotations and citations omitted).

Considering the practical impact of the majority's view on future cases, the dissent predicts that lowering of the velvet rope to allow more intervention will, in addition to diluting the dignity of original jurisdiction cases, prompt more parties to seek intervention into them. "To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well—and we will be hard put to refuse them." *Id.* at 875. Equitable apportionment cases will "take on the characteristics of an interpleader case," with common parties "jostling for their share like animals at a water hole" and prolonging already epochal cases with "more issues to decide, more discovery requests, more exceptions to the recommendations of the Special Master," and (perhaps most significant for Court personnel) "mak[ing] settling a case more difficult." *Id.*

III. What Happens Next

Just how fundamentally the majority's opinion will change this case, and equitable apportionment cases in general, remains to be seen. To be sure, the entry of legally well-provisioned litigants into a dispute does not typically simplify matters or reduce costs for the other parties. On the other hand, in an era of limited governmental budgets, the entry of new participants on a particular state's side will assist that side in the prosecution of these extremely resource-intensive and time-consuming cases. For this reason alone, the majority's opinion will likely prompt more nonstate parties to seek intervention in original jurisdiction cases, citing a standard that seems not unlike that governing permissive intervention under Federal Rule of Civil Procedure 24. Unless the factual scenario dealt with by the Court in this case is subsequently viewed as unique, the majority decision is sure to lead to many more applications for intervention in original jurisdiction cases, and presumably many more orders granting intervention. Letting in the whole "herd" will make cases more cumbersome and expensive, and perhaps less grave and delicate. It could, moreover, lead to those entities with means having an inordinate gravitational pull on litigation that historically revolved around semi-sovereign states.

The intervention of Duke Energy and the CRWSP in the inter-Carolina dispute could have a number of

effects. Whether it makes settlement more or less possible seems like an open question. Certainly things would seem to be more difficult as a mathematical matter: to the extent there are now four parties to the dispute rather than two, agreement may have gotten twice as difficult to achieve (or exponentially so). Furthermore, Duke and the South Carolina Attorney General are now facing off in state administrative proceedings concerning South Carolina's water quality certification for Duke's hydropower relicensing application. *Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control*, Docket No. 09-ALJ-07-0377-CC (S.C. ALC 2010). The author is representing other parties in that water quality certification matter. Crosscurrents between these cases could edge the parties toward settlement, or they could fuel an ongoing litigation spiral.

Another key factor in the impact of intervention will be the Special Master, and how she chooses to manage the case. As both the majority and dissent acknowledge, information about Duke's hydropower system—which effectively controls how much of the Catawba River enters into South Carolina—is relevant to resolution of the equitable apportionment case. The Special Master has already made efforts to manage how that information comes into the record. If properly managed, intervention and the resultant discovery production could dovetail with efforts initiated before the Court resolved the intervention issue. The magnitude of the case and magnitude of the parties involved would suggest that discovery could be onerous and lengthy. It is probably a good thing that the Court, along with adopting a more relaxed intervention standard, also appears to have adopted a practice of appointing younger special masters.

J. Blanding Holman IV is a senior attorney at the Southern Environmental Law Center. The views expressed in this paper are those of the author alone and do not necessarily reflect the views of the author's employer or its clients.

MRRIC BRINGS COLLABORATION TO MISSOURI RIVER ISSUES

John E. Thorson

The Missouri River is synonymous with western history. From its mouth near Saint Louis to its headwaters west of Bozeman, Montana, America's longest river evokes the legends of Lewis and Clark, Sacagawea, steamboats, epic floods, and monumental dams. Congressional passage of the 1944 Pick-Sloan Plan initiated decades of dam construction, flood control, and navigation improvements on the river. The Missouri has also been the venue for waves of litigation and conflict—somewhat ironic given the generally plentiful river. For example, the U.S. Army Corps of Engineers' (USACE's) revision of the Master Water Control Manual for operating main-stem reservoirs on the river, commenced in 1989, took 15 years to complete in the face of controversy over how the many users of the river would be affected.

In the aftermath of this conflict, a committee oddly known as the MRRIC, is pioneering new approaches for resolving conflicts involving large river systems. The Missouri River Recovery Implementation Committee—MRRIC—is a 70-member assembly of sovereign and stakeholder representatives who are working collaboratively on pressing river issues.

River of Controversy

For all its force and bounty, the Missouri faces a suite of problems challenging decision makers. The pallid sturgeon, a fish tracing its origins to the late Cretaceous period 70 million years ago, is listed as endangered under the federal Endangered Species Act (ESA). Two bird species foraging and nesting near the river are also listed, the interior least tern as endangered and the piping plover as threatened. While the main-stem dams have reduced the risk of catastrophic flooding, tributary inflows and unusual weather can still result in flooding. The USACE is increasingly challenged in managing six main-stem dams, constructed in the 1930s and following decades, in our contemporary era of environmental consciousness and changed economics. Water levels can rapidly fluctuate both in

the upper basin reservoirs and the lower river, complicating water intakes and other commercial uses as well as bird nesting patterns. Scientists and others are concerned about how dams and navigation channels have changed the sedimentation patterns in the river. The list goes on and on.

During the master manual revision, all sides criticized the USACE. The requirements of Biological Opinions issued in 2000 and 2003 by the U.S. Fish and Wildlife Service (FWS) to protect the listed species limited the USACE's range of options, and the agency was challenged to find the right mix of flows and storage to satisfy all interests. During summer 2003, the USACE was defendant in six lawsuits filed in different federal courts. When the agency was able to issue its master manual in 2004, it committed to a different approach to future decision making. In signing the record of decision, Brigadier General William T. Grisoli pledged that river restoration actions “will be identified, reviewed, modified, and implemented through coordination with a Missouri River Recovery Implementation Committee, which will include stakeholder representation. . . .”

Advent of the MRRIC

To advance the MRRIC concept, the U.S. Institute for Environmental Cooperation (an impartial federal entity located in Tucson, Ariz., providing conflict resolution services) worked with the USACE and other federal agencies (which continue to work together as a federal working group) and stakeholders to commission a situation assessment performed by CDR Associates of Boulder, Colo. In its 2006 report, CDR provided a detailed concept of how the MRRIC might be created and what it might accomplish.

The USACE and other federal agencies active in the Missouri River basin asked the institute to convene a planning group of sovereign and stakeholder representatives to draft a proposed charter for the MRRIC. The planning group consisted of a drafting team that met ten times during 2007–2008 to develop charter language, and a review team that critiqued the drafts. During this period, Congress passed the Water Resources Development Act of 2007 (WRDA);

section 5018 of the legislation authorized the establishment of the MRRIC. On July 1, 2008, the drafting team presented John P. Woodley Jr., Assistant Secretary of the Army (Civil Works) with a proposed charter, which he approved that day.

The MRRIC does not make management decisions for the Missouri River. The charter specifies that the MRRIC's purposes are primarily to provide *guidance and recommendations* to the USACE and other federal agencies on (a) the ongoing Missouri River mitigation and recovery plan (with annual expenditures of between \$50 and \$85 million), and (b) the long-term (50-year) Missouri River Ecosystem Restoration Plan (MRERP). MRRIC members are encouraged to articulate their perspectives and flag when policies might negatively impact their interests.

The MRRIC charter establishes a committee with state, tribal, federal, and stakeholder representation. The eight main-stem states may appoint members and all have done so. All 28 basin tribes are authorized to appoint representatives and 18 have done so. The USACE and FWS are standing lead federal agencies and other federal agencies are represented as participating federal agencies. Federal agencies are not counted for quorums or consensus determinations.

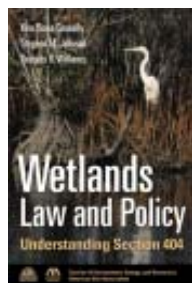
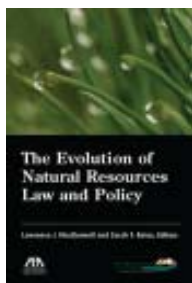
Sixteen stakeholder categories (e.g., navigation, irrigation, environmental/conservation) are identified in the charter and a total of 28 MRRIC members are selected from these categories. State, tribal, and federal agencies appoint their own representatives and alternates. Stakeholder representatives are appointed by the commander, USACE Northwestern Division, based on applications and demonstrated support from stakeholder organizations. The MRRIC selects its chair and vice-chair. A talented team from RESOLVE, a

nonprofit firm dedicated to the use of consensus building in public decision making, facilitates meetings and conference calls. The U.S. Institute for Environmental Cooperation continues to provide overall assistance.

The MRRIC's most distinctive feature is the consensus requirement. For a substantive recommendation to be adopted, state, tribal, and stakeholder representatives must support or "be able to live with" the recommendation.

While MRRIC decision making can be tedious, the committee was able to reach consensus on many important subjects in its first 18 months. They include:

- adopting internal operating procedures and ground rules and establishing a series of specialized work groups allowing the MRRIC to work efficiently;
- selecting an interim chair, the initial chair, and vice-chair, and a facilitation team;
- developing multifaceted ways to engage with federal agencies on a wide range of concerns including a partnered independent science program, the ongoing recovery program, and the USACE's long-term restoration plan (MRERP);
- developing a comprehensive set of social, economic, cultural, and tribal values associated with the river, articulated by individual members, that should be considered by the USACE in its long-term planning; and
- approving recommendations to federal agencies addressing the endangered pallid sturgeon and the purpose and need for the MRERP study.



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Recent Work and Challenges

MRRIC met six times during 2009, its first full year of operations. Four meetings are being held in 2010: Saint Louis (Feb. 2–4), Bismarck (April 27–29), Sheridan (July 20–22), and Iowa (Oct. 19–21)—plus a video linking nine sites on March 24. A typical MRRIC meeting is preceded with optional field trips or other educational activities. Before the February Saint Louis meeting, MRRIC members visited Columbia Bottoms at the confluence of the Missouri with the Mississippi, the National Great Rivers Research and Education Center in Godfrey, Ill., and the Melvin Price Locks and Dam complex on the Mississippi. Brigadier General John R. McMahon, commander of the USACE’s Northwestern Division, accompanied MRRIC members on the trip. At its April meeting, the MRRIC’s agenda emphasized tribal issues and members heard from Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy.

Official MRRIC meetings usually run from Tuesday morning to Thursday noon and the agenda consists of information sessions, business sessions, and work group meetings. Work groups, whose members also participate in two or three conference calls between each MRRIC meeting, conduct much of the committee’s work. Work groups have been formed on the ongoing recovery program, MRERP, integrated science, communications, nominations, and agenda development. A special committee on tribal participation has been established to explore ways to increase tribal involvement in the MRRIC.

Despite its initial successes, the MRRIC faces daunting challenges in its second full year of operations. They include:

Reaching consensus on substantive recommendations—The MRRIC’s charter requires that members in attendance reach consensus at two consecutive meetings on substantive recommendations to the USACE and other federal agencies. The consensus requirement provides opportunities for members to vet pending recommendations with constituents, prevents a tyranny of the majority, and ensures broad support for

approved measures. As MRRIC turns to the difficult issues of Missouri River recovery, finding consensus may be tedious. If recent meetings are predictive, MRRIC members are increasingly proficient in communicating their interests, listening, brainstorming alternatives, and agreeing on practical solutions.

Time and expense of participating—The federal legislation establishing MRRIC (WRDA 2007) bars any compensation for nonfederal members’ service—or even reimbursement of their travel expenses. This legislation, particularly the travel reimbursement ban, makes MRRIC participation costly for all members and is particularly burdensome during the recession.

A recent survey estimates that nonfederal members collectively spent more than 10,000 hours on committee activities during the first year of operations—an average of more than 255 hours per person. At the average national hourly rate (\$20 per hour), this volunteer service is conservatively estimated at \$253,000. Members or their organizations likely incurred more than \$180,000 in travel expenses to meetings—a total of \$433,000 for nonfederal members’ time and expenses.

MRRIC members participate to protect or advance their personal or organizational interests, but they also provide a valuable public service in improving decision making concerning the river. Some MRRIC members are actively working on legislation to overturn the travel reimbursement ban, and their efforts may be crucial in assuring members’ long-term commitment and involvement.

“Missouri River Fatigue”—The increasing attention to Missouri River issues means that MRRIC members and federal agency staff find it increasingly difficult to participate in the long list of meetings and events: public meetings on the USACE’s annual operating plan, MRERP scoping meetings, scientific conferences, constituent briefings—all in addition to the MRRIC’s own many meetings and conference calls. The USACE has also been mandated by Congress to study the congressionally authorized purposes for federal involvement in the river (MRAPS, the Missouri River Authorized Purposes Study), and this work is adding

to the many meetings and creating uncertainties for many MRRIC members about whether the MRRIC and MRAPS are complementary or competitive undertakings.

The relatively few number of people knowledgeable about the Missouri River, in a basin of millions of residents, compounds the fatigue factor. MRRIC members have discussed how they can recruit and educate a new generation of leaders on these issues.

Corps of Recovery

In conclusion, basin residents may envision a future of improved policies and institutions for the Missouri River. However, such wishful thinking does not account for the uncertainties of actually identifying those improved policies and institutions and the difficult, tedious work of negotiating the necessary agreements. The MRRIC's crucial challenges are ahead—especially the needs of the pallid sturgeon, least tern, and piping plover; but I'm encouraged by the shared learning that is under way for MRRIC members, their improved abilities to mend a conflict or solve a problem, and the growing goodwill for one another and our shared task.

As our able vice-chair, Randy Asbury, has noted, we are a "Corps of Recovery," restoring both our personal relationships with one another and our relationship to the river. Once again, the Missouri River challenges our pioneering spirit.

The MRRIC's Web site is www.mrric.org and the committee's charter and annual report may be found under the "MRRIC Documents" tab. More information on the MRERP may be found at www.mrerp.org.

John Thorson, a retired judge and former chair of the ABA Section of Environment, Energy, and Resources Water Resources Committee, is Chair of the MRRIC. The opinions expressed in this article are his and do not represent the view of the MRRIC or necessarily of any member. © 2010. Permission granted by John E. Thorson.

CHANGING DECREES—THE ORR DITCH DECREE AND THE TRUCKEE RIVER

John R. Zimmerman

The Truckee River is a perennial stream that begins at Lake Tahoe and ends at Pyramid Lake—the largest remnant of ancient Lake Lahonton and home to the Pyramid Lake Paiute Tribe of Indians. The Orr Ditch Decree was entered in 1944 by the U.S. district court in Nevada and controls water rights to the Truckee. The decree also incorporated the Truckee River Agreement, which was entered into by the principal defendants in the Orr Ditch adjudication. Since 1944 the Decree has been subject to much litigation and political interest. In 1990, the U.S. Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990. The Act authorized and directed the Secretary of the Interior to negotiate a new operating agreement with Nevada and California for operation of the Truckee with the intention of improving the efficiency of the existing method of river regulation by modifying it to meet the current circumstances on the river, accounting for in-stream uses, and improving reservoir operations. After many years of negotiation, the various stakeholders finally entered into a new operating agreement. The result was the signing of the Truckee River Operating Agreement (TROA) in September 2008. TROA was signed by numerous major stakeholders including the United States, California, and Nevada, along with many local governments and agencies. Because TROA affected how the river was managed, however, the parties were required to seek approval from the decree court—the U.S. District Court, District of Nevada.

Accordingly, in November 2008 the major stakeholders filed a motion to "modify or amend" the Decree to implement TROA. The motion was filed under Fed. R. Civ. P. 60(b)(5), which provides that a court may grant relief "if it is no longer equitable that the judgment should have prospective application." Under the case law, federal courts have broad authority to ensure that their continuing injunctions remain consistent with existing circumstances and the public interest. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378–80 (1990). And "[a] court

charged with administering a decree by it or its predecessor has broad authority to alter or modify the decree in light of changed circumstances, and consistent with principles of equity.” *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989). In the motion, the stakeholders make clear that they are not requesting the court to reopen the Decree regarding adjudicated water rights, but simply are requesting the court to modify several operational aspects of the Truckee River Operating Agreement that relate to the storage of water in upstream reservoirs. Under the Decree, the river needed to maintain a certain flow of water (the so-called Floriston rates) to satisfy a hydroelectric plant and pulp mill downstream. The Floriston rates dictated how much water needed to be released from the upstream reservoirs. To implement TROA, the requirement to maintain the Floriston rates must be modified to allow for increased water storage upstream.

In response to the motion, over 900 parties have filed notices that they intend to participate in the case. And several of those parties disagree with the proponents’ statement that the proposed modifications will not affect existing water rights to the Truckee. Accordingly, the court will be required to decide whether and how to modify or amend the Decree to account for changed circumstances and TROA and existing water rights holders. At present the court has not entered any substantive decisions in the case and is dealing with case management issues.

The standard set forth by the movants in the Orr Ditch case turns on whether “a significant change in facts or law warrants revision of the decree” and whether any modification can be “suitably tailored to the changed circumstance.” *Rufo*, 502 U.S. at 393. In the Orr Ditch case, the movants assert that changes in the use of water, the population growth of the surrounding areas, and environmental issues warrant modifying the Decree. First, the movants note that much of the land irrigated by the decreed water rights has been converted to urban uses and that the population of the surrounding area has increased considerably since 1944. Second, the movants highlight that the small hydroelectric plants that existed at the time of the Decree no longer provide a significant portion of electricity to the area, and therefore, there is less need to maintain a certain flow of water in the river. Third,

there have been several new reservoirs constructed since the Decree was entered, which provide more storage flexibility, but need more operational flexibility in the Decree to maximize their efficiency. Fourth, the movants state that new demands have been placed on reservoir operations because of two legally protected species of fish under the Endangered Species Act (ESA).

The significant legal changes cited by the movants are the act itself and the ESA. In addition to changed factual and legal circumstances, the movants assert that the public interest weighs in favor of modifying the Decree because it will improve drought water supplies and water quality, enhance fish spawning, and provide for the allocation of water between Nevada and California.

Opponents of the motion have argued that the Decree cannot be changed by a motion and that the movants must petition the court to reform it. Accordingly, opponents contend that the court should conduct a trial on the merits to determine whether or not the relief sought in the motion should be granted. In response, the movants dispute that rule 60(b)(5) cannot be used to modify or amend the Decree, but do not dispute that the court must conduct an evidentiary hearing and provide all water rights owners with notice and an opportunity to be heard. Accordingly, although both sides dispute which is the proper manner to bring the issue before the court, they do not dispute that the movants will be required to present sufficient evidence to satisfy the standard set forth above.

Modifying decrees may become more prevalent as municipalities expand in agricultural areas and as severe droughts place more demand on surface water sources. The result of this most recent action in the Orr Ditch case may have significant impacts on northern Nevada, but will also influence the manner in which decrees may be modified in Nevada and other western states.

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NEW ATTENTION FOR URBAN WATER MANAGEMENT PLANS: URBAN WATER PLANNING IN CALIFORNIA AFTER THE WATER CONSERVATION ACT OF 2009

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The California legislature and Governor Arnold Schwarzenegger agree that local water suppliers should prepare for urban water shortages through mandatory conservation measures. The California Water Conservation Act of 2009, enacted at the governor's behest, requires the state to reduce per capita urban water use by 10 percent by the year 2015, and by a total of 20 percent by the year 2020. The primary mechanism for implementing this mandate is the Urban Water Management Plan already prepared by each water supplier. Urban Water Management Plans are foundational documents that support subsequent planning and environmental review for new urban development. They must be updated every five years to reflect any changes in water availability and water demand projected for the following 20 years.

Environmental organizations and others arguing in favor of limited growth have focused on water supply issues in opposing specific urban development projects, but challenges to Urban Water Management Plans have been relatively rare. The new conservation mandate, combined with the pending round of plan updates due in mid-2011, may bring unprecedented levels of attention and scrutiny to Urban Water Management Plans in coming years. This article presents an overview of the Urban Water Management Planning Act and the Water Conservation Act of 2009, and discusses the challenges faced by water suppliers in complying with both.

Background

As population growth and concerns over ecological impacts have challenged water suppliers and taxed available supplies, California has paid increasing attention to water supply issues in land use planning

decisions. Most land use development projects require review under the California Environmental Quality Act (CEQA), the California parallel of the National Environmental Policy Act. Most large development projects undergoing CEQA review require a "water supply assessment" pursuant to California Water Code sections 10910–10915 (these sections are commonly referred to as "SB 610," after the 2001 legislation enacting them). The water supply assessment must explain whether the system's supplies available during normal, single-dry, and multiple-dry water years will be adequate to serve the system's total projected water demand, including the proposed project and existing and planned future development in the service area, over a 20-year projection. Cal. Water Code § 10910.

California Government Code section 66473.7, commonly referred to as "SB 221," after its 2001 implementing legislation, requires written verification from the water supplier of adequate supplies for large residential subdivisions before recording a final subdivision map. The written verification must demonstrate that sufficient water will be available to serve the subdivision and existing and planned future development during normal, single-dry, and multiple-dry water years, over a 20-year projection. Cal. Gov. Code § 66473.7(b)(1). The local land use permitting agency may approve the final subdivision map even if the written verification does not show sufficient water supplies, but only if the agency can find, based on substantial evidence, that additional water supplies are or will become available. Cal. Gov. Code § 66473.7(b)(3).

CEQA requires the analysis of a project's water supply impacts, independent of the SB 610 requirements, and water supply issues have long been a target in CEQA-based litigation by project opponents. In a landmark 2007 decision, the California Supreme Court clarified that a CEQA water supply analysis must be supported by substantial evidence in the record showing a reasonable likelihood that an identified water source will be available to serve a proposed project, and the analysis must also address the environmental impacts of supplying water to the project. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal. 4th 412, 430–34, 437 (2007).

Urban Water Management Plans form the foundation for all of these documents. The information required in SB 610 water supply assessments may come from Urban Water Management Plans, if the projected water demand for a project was accounted for in the most recent plan. Cal. Water Code § 10910(c)(2). The information required in SB 221 water supply verifications may come from the relevant Urban Water Management Plan. Cal. Gov. Code § 66473.7(c)(1). The information required in CEQA water supply analyses may also come from Urban Water Management Plans, provided the project demand was accounted for in the plan. *Vineyard Area Citizens for Responsible Growth, supra* at 434–35.

Urban Water Management Planning Act

The Urban Water Management Planning Act is codified in division 6, part 2.6, of the California Water Code, commencing with section 10610. The Act was first adopted in 1983, although most of the significant elements described here were incorporated by amendment in 1995. The Act provides that although urban water conservation is a matter of statewide concern, “the planning for that use and the implementation of those plans can best be accomplished at a local level.” Cal. Water Code § 10610.2(a)(2). The Act further provides that the “management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions,” and places local water suppliers squarely at the forefront of water conservation and planning efforts. Cal. Water Code § 10610.4(a)-(c).

Plan Requirements

The Act requires water suppliers to quantify and describe water demand and water supplies over a 20-year planning horizon, and to describe how the supplier will address any shortfalls. “Urban water suppliers” must prepare and adopt Urban Water Management Plans, and update those plans every five years, on or before December 31 in years ending in five and zero. Cal. Water Code § 10621(a). Urban water suppliers are all public or privately owned water suppliers serving more than 3000 customers or providing more than 3000 acre-feet of water each year. Cal. Water Code § 10617. Over 400 urban water suppliers

submitted Urban Water Management Plans to the California Department of Water Resources as part of the 2005 update cycle. *Department of Water Resources List of 2005 Submitted Urban Water Management Plans, available at <http://www.water.ca.gov/urbanwatermanagement/docs/UWMPSummary.pdf>* (last visited July 15, 2010).

Urban Water Management Plans must describe the supplier’s service area and population, identify the existing and planned water sources available to the supplier over a 20-year planning horizon, describe the reliability of the water supplies during average, single-dry and multiple-dry water year scenarios, provide water use history and future demand projections, describe the supplier’s demand management measures, describe potential water supply projects and programs, provide a water contingency analysis, provide information on the use or potential use of recycled water, and describe the supplier’s water service reliability. Cal. Water Code §§ 10631–10635. Water suppliers must coordinate the preparation of their plans with other appropriate agencies in the area, and must hold a noticed public hearing on plan amendments. Cal. Water Code §§ 10620(d), 10621(b).

The Act places particular emphasis on planning for the reliability of water supplies:

As part of its long-range planning activities, every urban water supplier should make every effort to ensure the appropriate level of reliability in its water service sufficient to meet the needs of its various categories of customers during normal, dry, and multiple dry years.

Cal. Water Code § 10610.2(a)(4). To that end, Urban Water Management Plans must describe the reliability of water supplies under those year types, and

[f]or any water source that may not be available at a consistent level of use, given specific legal, environmental, water quality, or climatic factors, describe plans to replace that source with alternative sources or water demand management measures, to the extent practicable.

Cal. Water Code § 10631(c).

The Act provides some incentives for suppliers to conserve water but does not set specific conservation goals. Suppliers that fail to submit or update plans are ineligible for drought assistance and other state water management funding. Cal. Water Code § 10631.5. As of January 1, 2009, eligibility for water management grants and loans is further conditioned on the implementation of locally cost-effective water demand management measures, such as plumbing retrofits, conservation pricing, education programs, and the like. Cal. Water Code § 10631.5(a). As described below, the Water Conservation Act of 2009 does set specific conservation requirements and ties funding eligibility to those requirements.

Challenges

The Act provides for challenges to plans or actions taken under them. Parties may challenge a supplier's failure to adopt a plan at any time within 18 months after the plan should have been adopted. Cal. Water Code § 10650. Parties may challenge an adopted plan for noncompliance with the Act's requirements within 90 days after the filing of the plan with the Department of Water Resources. *Id.* The Act also provides for challenges to actions taken in accordance with adopted plans, up to 90 days after the taking of the allegedly noncompliant action. *Id.* The court's inquiry under any of these challenges is limited to determining whether there was a prejudicial abuse of discretion, either by the supplier not proceeding as required by law, or if the action is not supported by substantial evidence. *Id.* This standard is essentially identical to that applied in CEQA challenges. *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 123 Cal. App. 4th 1, 8–9 (2004). Under this standard, courts must defer to agency determinations and reasoning as long as the record contains substantial evidence in support. *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 571 (1995).

The author is aware of only two challenges to Urban Water Management Plans that have reached the appellate courts, and, as of this writing, only one of those has reached a decision. Both focus on the reliability requirements set forth in California Water Code sections 10610.2(a)(4) and 10634(c). In one,

the Fifth District Court of Appeals rejected a plan for failing to adequately address the reliability of water supply obtained from a groundwater aquifer contaminated with perchlorate, holding that the plan should have provided more details regarding the remediation activities. *Friends of the Santa Clara River, supra* at 14. In the other, the Sonoma County Superior Court rejected a plan for failing to address the reliability of supplies obtained from a variety of sources in light of pending legal and regulatory processes and not adequately describing plans to replace those supplies should they prove unavailable. *Sonoma County Water Coalition, et al. v. Sonoma County Water Agency, et al.*, Sonoma County Superior Court No. SCV 240367, Decision Re: Writ of Mandate, filed October 28, 2008. The *Sonoma County Water Coalition* case has been appealed to the First District Court of Appeals (No. A124556), where a decision is expected in late 2010. In the interest of full disclosure, the author participated in the preparation of an amicus curiae brief by the Association of California Water Agencies, the League of California Cities, and the California State Association of Counties, filed with the court of appeals in support of the appellant water agency.

Water Conservation Act of 2009

The California legislature adopted the Water Conservation Act on November 4, 2009, as part of a special session dedicated to water issues. The Water Conservation Act is commonly referred to by its bill number from that session, Senate Bill (SB) 7x-7 (the "7x" denotes that the bill was adopted during the legislature's seventh extraordinary session of that term). SB 7x-7 establishes a statewide goal of reducing urban per capita water use by 20 percent by the year 2020, along with a 10 percent reduction by the year 2015. Cal. Water Code § 10608.16. The 20 percent reduction goal originated in a February 28, 2008, letter from Governor Schwarzenegger to legislative leaders outlining his plan to address Sacramento-San Joaquin River Delta issues. http://www.swrcb.ca.gov/water_issues/hot_topics/20x2020/docs/govltr_to_legislature022808.pdf (last visited July 14, 2010). That letter led a number of state agencies to develop the April 2009 draft *20x2020 Water*

Conservation Plan, portions of which were referenced in SB 7x-7.

SB 7x-7 requires water suppliers to increase water efficiency, and to measure the increased efficiency of urban water use on a per capita basis. Cal. Water Code § 10608.4. Specifically, urban water suppliers must develop “urban water use targets” to contribute to the statewide 20 percent urban per capita water conservation goal, and to incorporate those targets into their Urban Water Management Plans. Cal. Water Code § 10608.20(a). Suppliers must meet their interim urban water use target by December 31, 2015, and their urban water use target by December 31, 2020. Cal. Water Code § 10608.24(a)-(b). Suppliers do not lose their rights to any conserved water, and may use that water in other ways, e.g., to serve existing or new development or for transfers. Cal. Water Code § 10608.8(a)(1). Notably, although SB 7x-7 cites the California Constitution’s prohibition against waste and unreasonable use of water as justification for the conservation requirements, it does not go so far as to explicitly find that any particular level of urban per capita water use violates that prohibition. Cal. Water Code § 10608(a), (d).

The baseline against which each supplier’s reductions are measured is calculated from the supplier’s average gross water use, in gallons per capita per day, over a continuous 10- or 15-year period ending between December 31, 2004, and December 31, 2010. Cal. Water Code § 10608.12. Each supplier may choose its own end date. The longer baseline period is allowed for those suppliers that met at least 10 percent of their 2008 retail water demand through recycled water. *Id.* Gross water use is the total volume of water entering the distribution system of an urban supplier, excluding recycled water, water placed into long-term storage, water conveyed for use by another urban supplier, and water delivered for agricultural use. Cal. Water Code § 10608.12(g).

Water Use Target Methods

Water suppliers must derive their urban water use targets from one of four methods: (1) 80 percent of the baseline per capita daily water use (i.e., a straight 20 percent cut); (2) per capita daily water use estimated

from applying an assumption of no more than 55 gallons per capita per day of indoor water use, the implementation of a model landscape ordinance, and a ten percent reduction in commercial, industrial, and institutional water use by 2020; (3) a ninety-five percent reduction of the applicable state hydrologic region target set forth in the state’s draft *20x2020 Water Conservation Plan*; or (4) a method currently being developed by the California Department of Water Resources, due by December 31, 2010, that accounts for various climatic and population differences within the state and that must “avoid placing an undue hardship on communities that have implemented conservations measures or taken actions to keep per capita water use low.” Cal. Water Code § 10608.20(b). SB 7x-7 does not require any particular conservation method for any supplier.

Of the four urban water use target methods, the first and fourth appear most likely to be chosen by water suppliers. The second method is complicated, at best, and the assumptions (e.g., no more than 55 gallons per capita per day of indoor use) may prove to be unreasonable under most circumstances. At first blush, the third method seems to require only a five percent reduction, except that the *20x2020 Water Conservation Plan* hydrologic region targets already incorporate a 20 percent reduction over the 1995–2005 baseline water use for each region. *See 20x2020 Water Conservation Plan*, at chapter 2 (describing the hydrologic region targets) *available at* http://www.swrcb.ca.gov/water_issues/hot_topics/20x2020/docs/20x2020plan.pdf (last visited July 15, 2010). The hydrologic region approach was developed in an attempt to equitably distribute the conservation mandate, as existing per capita use tends to be lowest along the coast, and highest in the inland valley and desert regions (largely due to different outdoor landscape irrigation demands). *Id.* However, under that approach, water suppliers at or above the average baseline water use for their regions would be required to achieve a greater than 20 percent reduction. These suppliers would be better served by simply adopting the straight 20 percent reduction under the first method. Suppliers with lower than average baseline use for their hydrologic region would likely be better served by adopting the as-yet-undeveloped fourth

method, which will presumably provide some credit for existing conservation measures and keep the overall reduction at less than 20 percent.

It is important to note that SB 7x-7 does not require water suppliers to reduce per capita water use by more than 20 percent, and it is quite possible that many, perhaps most, will be able to set their water use targets much lower. Urban water suppliers must reduce per capita daily water use by at least five percent of recent levels, although the few suppliers, if any, with a base daily per capita water use at or below 100 gallons need not reduce per capita daily water use at all. Cal. Water Code § 10608.22. Because at least some urban water suppliers will set their water use targets at less than a 20 percent reduction, and none are required to set their targets above a 20 percent reduction, some question whether the statewide goal of a 20 percent reduction in urban per capita water use is unachievable.

SB 7x-7 Modifications to Urban Water Management Plans

The vehicle for implementing the SB 7x-7 conservation requirements is the Urban Water Management Plan. Starting with the 2010 round of plan updates, suppliers must include the baseline daily per capita water use, the urban water use target, and the interim water use target to be met by 2015, the “compliance daily per capita water use” (the gross per capita water use during the final year of the reporting period), along with the bases and supporting data for determining each of these estimates. Cal. Water Code § 10608.20(e). Suppliers must conduct at least one public hearing to allow community input regarding the conservation measures, to consider the economic impacts of implementing the conservation requirements, and to adopt a method for determining the water use target. Cal. Water Code § 10608.26(e). SB 7x-7 extends the current Urban Water Management Plan update deadline to July 1, 2011, in order to allow the suppliers to incorporate the new requirements and the technical methodologies currently being developed by the Department of Water Resources. Cal. Water Code § 10608.20(j).

Penalties and Challenges

SB 7x-7 largely defers penalties for failing to meet the water use targets. Failure to comply with the interim water use targets by July 1, 2016, can render a supplier ineligible for state water management grants and loans. Cal. Water Code § 10608.56. The law expressly provides that a supplier’s failure to meet the water use targets cannot establish a violation of law for any administrative or judicial proceeding before January 1, 2021. Cal. Water Code § 10608.8(a)(2). After that date, suppliers failing to meet their targets may be subject to a variety of claims, including failure to comply with SB 7x-7 and perhaps claims of waste or unreasonable use of water. It is not clear whether the state itself may be subject to actions if statewide urban per capita water use is not reduced by 20 percent. SB 7x-7 does not stay the procedural or substantive challenges provided under the Urban Water Management Planning Act. Thus, plans adopted in 2011 may be subject to challenge for failing to adequately incorporate or implement the SB 7x-7 requirements. Even if the failure to achieve SB7x-7’s water conservation objective is not enforceable until 2021, it seems reasonable to expect early litigation challenging Urban Water Management Plan updates for failure to impose conservation requirements that are reasonably likely to achieve conservation targets by 2021.

Conclusion

Urban Water Management Plans have largely gone unchallenged, at least so far. It is unclear why. Perhaps growth opponents have tended to focus their legal resources on specific projects. Perhaps suppliers have tended to adopt plans only to shelve them until the next update round. Whatever the reason, conditions seem ripe for a change. Concerns over endangered species, climate change, groundwater overdraft, aging infrastructure, and a growing population mean that water managers and planners cannot avoid growing uncertainty over the reliability of water supplies. Urban Water Management Plans must address that uncertainty while carrying out SB7x-7’s broad new water conservation mandates. Key features of the SB 7x-7 process (e.g., the fourth water use target method)

will not be fully developed until relatively close to the 2011 Urban Water Management Plan update deadline. Finally, growth opponents may seek to influence projects by focusing on the 2011 round of plan updates. Those updates will form the foundation for numerous SB 610 water supply assessments, SB 221 water supply verifications, and CEQA analyses over the next five years. Challenges to Urban Water Management Plans would increase uncertainty in water availability analyses for future land use planning decisions.

Water managers faced with updating their Urban Water Management Plans should not consider successful challenges to be a foregone conclusion. Under the abuse of discretion standard applied under the Urban Water Management Planning Act, courts will overturn plans only if the water supplier fails to proceed as required by the law, or if the supplier's determinations are not supported by substantial evidence in the record. The first basis is negated by adopting plan updates according to the process set forth under the Act and now SB 7x-7. The second basis is negated if the water supplier explains the rationale for its decision and provides substantial evidence in support. With respect to the reliability of current or planned future water supplies, which is likely to continue to be a favored area of attack, this means suppliers should describe their assumptions regarding the supply projections, describe the factors that can be expected to influence whether those assumptions will be realized, and—most importantly—provide evidence supporting a reasonable basis for those assumptions. Urban Water Management Plans necessarily involve complex technical issues, and courts should defer to the supplier's determinations and reasoning as long as there is evidence in support.

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18th Section Fall Meeting

Sept. 29 –
Oct. 2, 2010
New Orleans



The Big Easy, renowned for its food, music, and culture, provides the perfect setting for the 18th Section Fall Meeting, perhaps even more so with the nation's attention focused on the Gulf Coast. Other CLE sessions will address the Clean Air and Water Acts, green jobs and buildings, renewable energy, waste, disaster preparedness, permitting tips, climate change, water rights, enforcement priorities, the Endangered Species Act, vapor intrusion, and more. Along with the outstanding sessions, meeting highlights include:

- Environmental Litigation Workshop
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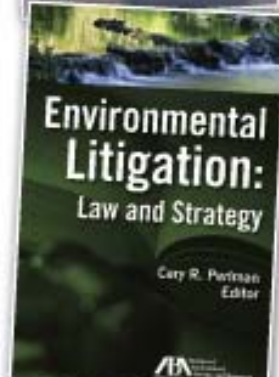
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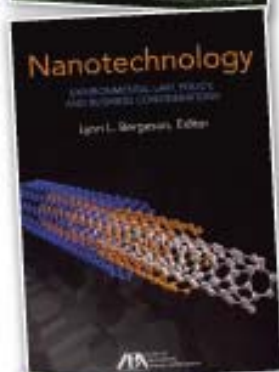


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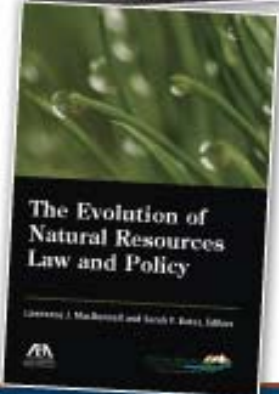
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