



Water Resources Committee Newsletter

A joint newsletter of the Water Resources Committee
and the Water Quality and Wetlands Committee

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MESSAGE FROM THE CHAIRS

**Pamela Bush, Water Resources Committee
Larry Liebesman and Jeremy Jungreis,
Water Quality and Wetlands Committee**

The Section of Environment, Energy, and Resources' (SEER) Water Resources and Water Quality and Wetlands committees have joined forces to produce this Summer 2012 newsletter in recognition of the strong nexus between water supply and water quality. Indeed, as the interdependence of water uses is recognized increasingly by all economic sectors—agriculture, mining, fisheries, tourism, energy, and water and wastewater utilities among them—the law is inevitably—if gradually—doing so as well. Through our committee newsletters and other cooperative projects in the future, we intend to explore that evolution.

The centerpiece of this issue is the winner of the best paper prize at ABA's 31st Annual Water Law Conference in February—Ellen Hanak's excellent paper examining current challenges and possible solutions for funding the "public goods" aspects of water management, including planning, science, and ecosystem management. To provide stable funding for the administration water rights, planning, and water quality programs in her home state of California, Hanak recommends a volume-based state and/or regional public goods charge ("PGC") on water, similar to the per-gallon fee on fuel imposed by the federal government to support roads, mass transit, and transportation-related environmental projects. A PGC,

Hanak maintains, would in effect require water users to pay a rate that better reflects the cost of their water use to society, including management and environmental protection and mitigation. It would also create incentives for cost-saving local and regional cooperation in water system operations, planning, and infrastructure development. Although new fees to support the water sector are unlikely to be popular among California voters, Hanak concedes, over the past decade, water supply and quality issues together have ranked second after air quality as the State of California's top environmental concern in polls conducted by the Public Policy Institute of California, where Hanak is a senior policy fellow. Hanak believes that better public information about water system conditions could foster a vital discussion about how to reform the inadequate funding mechanisms currently available for water management in California and elsewhere.

Also in this issue, Blaine Early and Kathryn Taylor explore how regulators, water users, legislators, and the courts are responding to severe droughts in west Texas and the Southeastern United States by allocating water among competing users, incentivizing conservation, or, in an example of the law of unintended consequences, triggering greater depletion of limited groundwater reserves. The authors consider the economic and environmental consequences of drought in the two regions and posit that Georgia legislators should consider a system such as that adopted by Texas, allowing counties and cities to provide financial incentives for rainwater harvesting.

**Water Resources Committee
Newsletter
Vol. 14, No. 3, August 2012
Jeff B. Kray, Editor**

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Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

Susan Ryan relates how two ballot initiatives that would radically alter Colorado water law survived legal challenges before the Colorado Supreme Court, over the lone dissenting voice of Justice Hobbs. The decisions allowed the initiatives' sponsors to proceed in gathering the signatures required to place them before Colorado voters this fall. Whether the initiatives gain the required numbers of signatures or the votes necessary for their adoption, the debate they have triggered will surely elevate the public's awareness and understanding of the difficult choices Coloradans face in managing water resources in an era of growing scarcity.

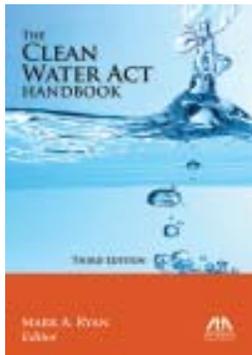
Elizabeth Thomas, Kenneth Gish, and Kari Vander Stoep review the Supreme Court's February 2012 decision in *PPL Montana, LLC v. State of Montana* and present an enlightening summary of the distinction between federal navigability tests for the purposes of (1) establishing title to the beds of water bodies, (2) determining the extent of federal regulatory jurisdiction under the Commerce Clause, and (3) determining the extent of admiralty jurisdiction. To the confusion of many courts and practitioners, the test for navigability is applied differently in each of these distinct types of cases.

Finally, Larry Liebesman reviews the recent precedent-setting decision of the U.S. District Court for the District of Washington in *United States v. City of Renton*, holding that the federal government must pay municipal assessments issued prior to the passage of S. 3481 to recover the costs of mitigating stormwater discharges from federal facilities. Senate Bill 3481, sponsored by Sen. Ben Cardin of Maryland, clarified that the Clean Water Act's waiver of sovereign immunity for "reasonable service charges" included the obligation to pay fees assessed under municipal stormwater ordinances. The ruling supports the efforts of many local governments to be compensated for the tremendous costs of cleaning up stormwater caused by runoff from federal facilities.

We hope this issue inspires you to propose an article or program of your own examining an aspect of the integrated nature of water supply and water quality management, law, or policy. Please contact any or all

of us to discuss your idea. Better yet, join us in Austin, Texas, for the 20th Section Fall Meeting October 10–13 and we’ll discuss it in person. Panels co-sponsored by our committees and others will consider the central role of water in energy facility siting, development, and operation; how climate change, wind power projects, and water transfers will affect and be affected by implementation of the Endangered Species Act; and what the next generation of environmental compliance may look like. We hope to see you there!

The Clean Water Act Handbook, Third Edition
Mark A. Ryan, Editor



Most parts of the economy—manufacturing, mining, construction, municipalities—generate and discharge process wastewater and/or stormwater. Those discharges are

extensively regulated under the Clean Water Act through a collaborative federal and state program of facility permits and regulatory standards. This updated guide is a definitive practical resource to the provisions and complexities of the federal Clean Water Act (CWA) and how it continues to evolve. Written by 21 of the country’s most knowledgeable experts on the CWA, **The Clean Water Act Handbook** is a compilation of their experience in understanding this complex statute and its implementing regulations and guidelines.

2011, 352 pages, 7 x 10, paper.
Product Code: 5350207
Price: Section of Environment, Energy, and Resources members \$99.95; Regular \$129.95

**Winner—Best Paper—
2012 ABA Water Law Conference**

**ADEQUATE AND APPROPRIATE FUNDING
FOR A MODERN WATER SECTOR:
INSIGHTS FROM CALIFORNIA**

Ellen Hanak

Presentation for the panel “Where’s the Money? Water Infrastructure Financing in a Whole New World” (1:30–3:00 PM February 23, 2012), American Bar Association 30th Annual Water Law Conference, San Diego, CA, February 22–24, 2012

Abstract: California’s water system presents a mixed picture of fiscal health. Water and wastewater utilities are in a relatively robust position because they rely primarily on ratepayer contributions. Although initiative-driven constitutional reforms from the mid-1990s have raised the possibility of voter rejection of rate increases, these constraints are less problematic than in other parts of the water system that face unreliable and inadequate funding streams: flood management, ecosystems, and other aspects of state oversight and management. Sustainable flood management will require increases in local and regional assessments, which are subject to majority and supermajority voter approval. To fund the public goods aspects of water management, including planning, science, and ecosystem management, California should introduce a public goods charge on water use—a small volumetric fee—rather than continuing to rely on unreliable general obligation bond funding. Specific fees for environmental mitigation, including dam removal and control of contaminants, are also appropriate. Water quality permit fees, which now fund regulatory administration, also should be augmented to support ecosystem management. Models for such funding reforms exist in other sectors. However, since recent constitutional reforms, most such fees will likely require supermajority legislative approval or majority approval through new voter initiatives.

Introduction

This paper reviews the legal context for funding California water infrastructure, which is heavily influenced

by a series of recent voter initiatives. The paper then reviews infrastructure funding needs and compares them with funding levels and sources for water supply, wastewater, flood management, and environmental management. It provides recommendations for more reliable and sustainable funding of the water system, drawing on models from other sectors.

California Voters Set the Context for Water System Funding

Relative to other states, California has an active initiative process, whereby interest groups can put both policy and spending measures on the ballot (National Conference of State Legislatures 2010). In addition, the California legislature must place general obligation (GO) bonds up for public vote, and it has the option to seek voter approval for policy measures. Policy and fiscal initiatives are also common at the local level.

In recent decades, voters have been solicited numerous times to approve GO bonds to support water-related activities. Between 1970 and 2006, voters approved more than 20 water bonds—covering water supply, water quality, and flood control—authorizing a total of over \$32 billion (2008 \$) in spending. The size of these bonds has increased dramatically over the past decade, and GO bonds have become a major mechanism for funding state water-related activity. The largest water bond to date (\$11.1 billion), part of the 2009 legislative package, was initially scheduled to go before voters in November 2010 and has now been rescheduled for November 2012 over concerns that the economic recession and state budget woes would dissuade voters from approving it.

In parallel to their largesse on state general obligation bonds for water, California voters have directly restricted the financial options of state and local governments, including local water agencies. Proposition 13, passed in 1978, limited property assessments and mandated supermajority voter approval for the passage of local special taxes. California is also one of only eight states with supermajority requirements on the passage of local GO bonds. (State GO bonds require only a simple majority to pass.) For water-related activities, two measures are particularly impor-

tant: Proposition 218, a constitutional amendment passed in 1996, mandated majority or supermajority votes for local general taxes, assessments, and “property-related” fees. Proposition 26, a constitutional amendment enacted in November 2010, raises voting requirements for most state and local regulatory fees—including fees designed to mitigate or remediate environmental harm—from a simple majority to a two-thirds majority.

Proposition 218 has substantially complicated funding for flood control and stormwater programs, which now require direct voter approval to raise funds: a simple majority of property owners or at least two-thirds of the general public. For assessments, the requirement is a weighted majority of property owners. For property-related fees (such as payments for local stormwater control), an alternative to a majority of property owners is a two-thirds majority of the general electorate (Legislative Analyst’s Office 1996). Water and wastewater utilities can still raise rates through a vote of their governing boards, although ratepayers can overturn them if a majority protest the increases. However, court interpretations of Proposition 218 are restricting the flexibility of water and wastewater utilities to raise funds to support new development, which can complicate capital project funding (Hanak 2009). And the courts are also calling into question the ability of groundwater management districts to charge pumping fees without a majority vote of the affected property owners or a two-thirds vote of the electorate (*Pajaro Valley Water Management Agency v. Amrhein* 2007; *Great Oaks Water Company v. Santa Clara Valley Water District* 2010). These decisions are problematic, as groundwater pumping charges are an important tool for managing overdraft.

Proposition 26 affects regulatory fees, which are a natural way to fund environmental mitigation associated with the use of water resources or other activities that impair water bodies. Regulatory fees are typically surcharges on the activity in question; for instance, a surcharge on a chemical that causes harm to the environment or public health. Regulatory fees are already used in California to fund programs related to the disposal of hazardous materials and the recycling of oil, among others. See “Official Title and Summary” in

the California Voter Guide for the November 2010 election: www.voterguide.sos.ca.gov/pdf/english/26-title-sum-analysis.pdf. Under Proposition 26, state regulatory fees now require a two-thirds vote of the state legislature (up from a simple majority). Local governing bodies, which could approve these fees without a vote of the general public, would also be required to seek a two-thirds vote of the general public for such fees. Although the text of the new amendment is uncertain in some respects and will certainly be tested in litigation, Proposition 26 is likely to substantially restrict California's ability to address the current gaps in resources for broad public purposes, including environmental stewardship and water resources planning.

Is There Enough Money to Pay for California's Water System?

Restrictions on state and local funding, along with the budget woes of federal and state governments, naturally raise the question of whether California can maintain, let alone enhance, its current water operations and infrastructure. Water managers in all sectors tend to answer with a resounding "no." But the answer is more nuanced than is commonly believed, reflecting the roles and responsibilities of different levels of government in water system management and differences in funding rules.

Water and wastewater utilities

Urban water and wastewater utilities, which are responsible for the vast majority of spending on water supply and wastewater infrastructure and operations, appear to be in relatively good financial shape. Every four years, these utilities are required to submit estimates of their long-term capital needs to the U.S. Environmental Protection Agency (EPA), which tracks investment needs nationwide. The most recent assessments, from 2007 for water and from 2008 for wastewater, indicate that California's 20-year spending needs for publicly owned utilities are on the order of \$40.7 billion and \$24.4 billion (2008 \$), respectively, or roughly \$2 billion and \$1.2 billion per year. U.S. Environmental Protection Agency (2008, 2009). Estimates of both needs and capital outlays reported in the text exclude interest payments. An additional

estimated \$3.9 billion over 20 years (\$194 million per year) is needed for managing stormwater and nonpoint source pollution, some of which is also handled by wastewater utilities.

In 2007, capital spending by these utilities was substantially higher. According to estimates from the State Controller's Office, publicly owned water utilities invested roughly \$3.6 billion and wastewater utilities roughly \$2.2 billion (2008 \$). (U.S. Census of Governments estimates put total capital outlays for water in California even higher, at \$5 billion.) For water, these levels of spending reflect increases in real per capita spending since the early 1980s, and for wastewater, a relatively stable rate of spending since the mid-1970s.

Although utilities have benefited from state bond funding as well as some property tax receipts, utility revenue comes predominately from ratepayers. In 2007, grants and equity contributions from federal and state sources accounted for less than 2 percent of revenues and contributed capital for all publicly owned local and regional urban and agricultural water agencies and wastewater utilities. Property taxes accounted for 5 percent of urban and agricultural water district revenues and 8 percent of wastewater district revenues; and voter-approved assessments accounted for 6 percent and 2 percent of revenues, respectively (comparable information on the share of tax revenues is not available for city-owned utilities) (Hanak et al. 2011). Compared with their own estimates of needs, water and wastewater utilities generally appear to have sufficient flexibility to raise rates to fund capital improvements in their systems, although they now face greater procedural requirements arising from Propositions 218. Moreover, water and wastewater rates in California generally fall well within the range considered "affordable" by federal guidelines (less than 4 percent of household income). See Hanak and Barbour (2005) for a discussion of affordability guidelines. Although raising rates is never easy politically, the ability to raise rates, while maintaining affordability, positions these utilities relatively well for the challenges of upgrading aging infrastructure, a perennial challenge for utilities.

Flood management

Flood management faces greater financial difficulties. This sector traditionally has relied on federal cost-sharing (typically 65 percent, sometimes higher), and local entities are now subject to public votes for raising local assessments under Proposition 218. Although no comparable exercise exists to estimate statewide flood control spending needs, the Department of Water Resources estimates that the minimum cost of restoring the Sacramento–San Joaquin Flood Control Projects is more than \$17 billion. See Central Valley Flood Management Planning Program (2011). For comparison purposes, the *New York Times* reports the cost of levee system reconstruction in New Orleans at \$15 billion (Schwartz 2010). The California estimate does not include flood-related investment needs in other parts of California, many of which are also vulnerable.

In recent decades, federal investments in California flood protection have been modest, leaving Californians to shoulder most of this financial burden. State flood protection funds have come from general obligation bonds (\$5 billion from two bonds passed in late 2006) and other general fund resources (such as emergency levee repair legislation). State bond funding has put California well ahead of the U.S. Army Corps of Engineers. Over the longer term, the bigger problem will be raising new sources when the bonds are exhausted, given the vast unfunded capital needs. New forms of regional or statewide risk-based assessments or fees will be needed.

Environmental management

The management of polluted stormwater and other types of runoff faces similar challenges because of Propositions 218 and 26. City and county governments are required by law to meet Clean Water Act standards regarding these nonpoint sources of pollutants, yet they are required to go to voters to raise the necessary funding—a difficult task when the problems caused by pollution occur downstream rather than close to home (Hanak and Barbour 2005).

Another area of systematic mismatch between funding mechanisms and funding needs is environmental management. California water users pay only for the infrastructure-related costs of water delivery, not the

environmental costs of diversions. Although, in principle, new water supply and flood control projects are required to mitigate environmental harm, the cumulative effects of decades of water system development have contributed to the widespread degradation of aquatic ecosystems described in the Introduction. Recent bonds have provided some support to scientific research and habitat investments, but bonds are an unreliable source of funds for these purposes. This is where the new constraints imposed by Proposition 26 will be felt the most. Surcharges on water use and other water-related activities, such as flood infrastructure investments and the discharge of contaminants, are an appropriate way to fund environmental mitigation and the related science needed to redress the decline of California’s aquatic ecosystems.

State analysis and oversight

Finally, state budget problems over the past decade have reduced funding for the basic state operations of monitoring, analysis, and enforcement of water policy. GO bond funds have provided stopgap funding for a wide range of operating expenses once supported by the general fund, from science to conservation, to environmental mitigation. Since the onset of chronic state budget problems in 2001, bonds have funded at least one-quarter—and sometimes more than half—of the Department of Water Resource’s operational expenses in every year except 2005 (Hanak et al. 2011). In a tight state budget without new tax revenues, repayment of GO bonds takes priority over other major state expenditures, making it likely that education and other sectors relying on state general funds will oppose continued reliance on GO bonds to fund water projects. For instance, the California Teachers’ Association opposed the \$11.1 billion GO bond that was part of the 2009 legislative water package, on the grounds that it would encumber general fund resources available for schools (Buchanan 2010).

Limited long-term prospects for state and federal funding

Economic recovery is likely to eventually improve the state’s revenue picture, but long-term liabilities, including undercapitalized pension funds, rapidly escalating costs for the state’s contributions to Medicaid, and

underfunded retiree health benefits, will maintain pressure on state resources.

In contrast to states, the federal government can use deficit finance during economic slowdowns when tax receipts are low. But similar cost uncertainties loom large at the federal level, and there is widespread concern about the long-term economic effects of sustaining such large deficits. Large-scale increases in taxes—the alternative to reduced spending—are unpopular at both state and federal levels. These trends imply long-term reductions in state and federal support for California water investments, as well as other investments.

These financial woes at the state and federal levels imply that local governments and water users will have no choice but to take more direct financial responsibility for California's water system. This shift also implies less ability for state and federal government to provide financial incentives to induce behavioral shifts by local and regional entities. The "carrot" approach has been a focus of much of the recent state bond funding, to encourage cooperation among local groundwater users and among regional water entities. In short, California needs more reliable, user-fee-based funding to support publicly related water expenses, including the basic science, monitoring, and planning functions of government as well as investments to improve aquatic habitat.

Water Fees to Support a Modern Water Sector

Components of this more reliable funding system include a "public goods charge" on water uses and specific environmental mitigation fees. Other sectors provide models for both types of fees. In the current funding climate, it will be challenging to gain legislative approval for such fees; the water sector itself will likely need to support this shift to gain the necessary political momentum.

"Public goods charge" on water use

A statewide "public goods" charge (PGC)—a volumetric charge on all surface and groundwater used in the state—is a promising solution to the chronic underfunding of the state's water-related agencies and

ecosystem programs. It also would provide a more efficient and equitable way to support local and regional water infrastructure. A PGC could support (1) operations of state agencies directly related to overseeing water allocation and extraction, (2) scientific and technical activities to improve water management, (3) environmental protection and restoration needed because of water extraction, and (4) local and regional water infrastructure improvements.

A similar PGC for energy, passed by the legislature as part of its 1996 deregulation of the energy sector, has collected roughly \$800 million per year from a roughly 0.5 cent per kilowatt hour charge on electricity and a similar charge on natural gas. This amounts to a relatively small share of customer energy costs (e.g., 4 percent in the San Diego area—see Kuduk and Anders 2006). The surcharge on electricity was introduced as part of legislation restructuring electric utilities in 1996 (AB 1890) and renewed with specific legislation in 2000 (AB 995). In 2000, a consumption surcharge on natural gas also was introduced (AB 1002). This funding has gone to support energy use by low-income households (47 percent), increasing energy efficiency (28 percent), renewable energy sources (17 percent), and research (8 percent) (Kuduk and Anders 2006). These funds have assured steady funding for state-of-the-art infrastructure, social goods, and research and development and have received high marks for supporting energy efficiency and the development of renewable sources (Griffin, Leventis, and McDonald 2010). Nationally, the federal highway trust fund, financed by a per gallon charge on fuel, supports roads, mass transit, and environmental cleanup associated with transportation projects. The ability of this fund to serve its various purposes is now challenged by several factors, including Congress's failure to index the per gallon gas tax to inflation—it has remained at \$0.18 per gallon since 1993 (National Surface Transportation Infrastructure Financing Commission 2009). California levies a similar fee on fuels to support transportation investments and maintenance and has faced similar challenges in recent decades.

By providing stable funding for the administration of statewide and regional water rights, planning, and

quality programs, a PGC would reduce much of the disruption, delay, and inefficiencies resulting from irregular, bond-dependent, and increasingly stressed general revenue funds. Funding for research and development would benefit in similar ways.

PGC funds for ecosystem reconciliation would support habitat development for native species, long-term purchases of water for environmental uses, invasive species enforcement, reconciliation-oriented research, and other environmental management activities. This funding would partially compensate for damage to native ecosystems and species from water infrastructure and operations and, by improving conditions, it would also reduce environmental pressures on water deliveries. The administration of such funding would need to ensure sound mechanisms for allocation and oversight in support of effective ecosystem reconciliation.

PGC funding for water reliability would support water infrastructure, conservation, reuse, and other activities that materially improve the reliability of water deliveries throughout the state. These funds would provide incentives for local and regional water agencies to cooperate in developing integrated water management activities, along the lines of current bond funding. These funds would also support state water rights administration to improve the institutional reliability and security of water rights and contracts.

Regional fees for water system management might be levied in parallel to the statewide public goods charge. For instance, Metropolitan Water District of Southern California instituted a stewardship fee on its wholesale water sales in the early 1990s to support a range of water supply reliability programs, including water use efficiency, recycled wastewater, and desalination projects.

A PGC also would help ensure that water users are paying a rate that better reflects the cost of their water use to society, including management and environmental protection and mitigation. Because water users are not currently paying a price that reflects these costs, they do not take these costs into account in making economic decisions, such as the appropriate level of water conservation.

Much as the federal highway trust fund taxes all highway fuel use to support federal highways built and maintained by state and regional transportation agencies, this approach to supporting statewide and regional water reliability would create financial incentives for local and regional cooperation in operations, planning, and infrastructure development. A major by-product of the federal highway fund is that it has provided incentives for states to agree on national data-collection and design and maintenance standards for roadways. The public goods charges in the energy sector have also fostered cooperation between utilities and local and regional governments in the use of energy efficiency grants (Hanak et al. 2008). These demand management programs and research and development activities funded through the program help to lower energy prices for all users.

Since the passage of Proposition 26 in late 2010, the creation of a PGC would likely require a two-thirds vote of the legislature. Although the State Water Resources Control Board (SWRCB) has authority to impose fees to fund the board's issuance, administration, review, monitoring, and enforcement of water rights permits and licenses (see Cal. Water Code §§ 1525–1560), this authority applies only to surface water users within the board's direct permit and license jurisdiction. In contrast, the PGC proposed here would apply to all surface- and groundwater use. Creation of a PGC therefore would require new legislation, most likely with a two-thirds majority vote under Proposition 26 (enacted by the electorate in November 2010 (Cal. Const. art. XIII A, § 3(a))). The PGC would likely not fall within the exemption set forth in Proposition 26 for charges “imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof” (Cal. Const. art. XIII A, § 3(a)(3)). This will be a difficult hurdle in the current funding climate. The surcharge on electricity expired on January 1, 2012, because of the legislature's failure to get a two-thirds majority for its renewal. The earlier bills all passed with high majorities: AB 1890 passed by unanimous vote of both houses; AB 995 (electricity) and AB 1002 (natural gas) passed with 95 percent of all assembly votes, and 86 percent and 75 percent of senate votes, respectively

(www.leginfo.ca.gov). The surcharge on natural gas was passed without an expiration date. Water utilities will likely need to support the creation of such a fee, something they may be more likely to do if continued GO bond funding is not available.

Specific fees for specific problems

In addition to a general public goods charge, some specific fees should be levied to address specific problems:

- A surcharge on chemical contaminants could help fund containment of source pollutants. Such a fee could be modeled after California’s electronic waste fee, introduced by the legislature in 2003, and the fee levied on paint manufacturers to mitigate lead paint poisoning, introduced in the mid-1990s; and
- A fee on beneficiaries of dams to help fund dam retirement actions (similar in spirit to the requirement under California’s Surface Mining and Reclamation Act that mine operators provide a bond sufficient for restoring the mine site) and to fund programs to improve the condition of fish whose habitat is compromised by dams.

Other sources of state revenue also could help support work critical to the health of California’s waterways. Recognizing the major effect of roads on aquatic ecosystems, for example, a small percentage of transportation mitigation funds might appropriately support the work of the Department of Fish and Game. As a precedent, 0.1 cent per gallon of the federal gas tax funds a Leaking Underground Storage Tank Trust Fund. Until recently, these types of specific mitigation fees could be approved with a simple

majority vote of the state legislature. However, with the passage of Proposition 26 in November 2010, they are also likely subject to a two-thirds vote by the legislature. See Cal. Const. art. XIII A, § 3(a). Before passage of Proposition 26, regulatory fees to fund “remedial measures to mitigate the past, present, or future adverse impact of the fee payer’s operations” could be enacted by majority vote of the legislature (*Sinclair Paint Co. v. State Board of Equalization* 1997). At the local level, such fees previously could be adopted by simple majority vote of the local agency’s governing board. After Proposition 26, these fees are now subject to a supermajority vote of the general public within the local agency (Cal. Const. art. XIIC, § 1).

Conclusion

For the foreseeable future, state general funds are unreliable and unsuitable for managing the public aspects of water management. To fund the public goods aspects of water management, including planning, science, and ecosystem management, California should introduce a public goods charge on water use. This charge—a small volumetric fee—would also be a more appropriate funding source for regional water projects than general obligation bonds that have been used recently. Specific fees for environmental mitigation, including dam removal and control of contaminants, are also appropriate. Water quality permit fees, which now fund regulatory administration, also should be augmented to support ecosystem management. Fees covering broader purposes than regulatory administration will likely require legislative approval. Local contributions to flood works will also be needed, ideally on a regional scale (Table 1).

<p>Public goods charge Ecosystem management Water system administration Regional water supply reliability and infrastructure Research and development</p>	<p>Special mitigation fees Dam removal and mitigation of effects on fish Chemical contaminants surcharge</p>
	<p>Water quality permit fees Environmental mitigation Administration</p>
	<p>Regional & local flood management fees</p>

Table 1. Fee-based funding for modern water management.

Whether the public can be convinced to shift to more fee-based funding of such public functions is an important question. Voter support for numerous water bonds suggests a willingness to support these activities with taxpayer dollars, but it is not clear that voters recognize the costs of state general obligation bonds in terms of new taxes or reduced spending in other areas. (Indeed, state general obligation bonds are often promoted by their sponsors as *not* requiring new taxes; in contrast, local bonds are generally proposed along with a revenue source to cover the obligation [Hanak 2009]).

In contrast to such issues as the economy, education, and crime, water is generally not the foremost policy issue on the minds of the state's residents. However, public opinion surveys suggest that the public is concerned with water conditions in the state. Over the past decade, water issues (supply and quality) have generally ranked second after air quality as the state's top environmental issue. See Hanak et al. 2011 for a summary of the results of public opinion polls conducted during the 2000s by the Public Policy Institute of California presented in this paragraph. (Water surpassed air quality in 2009, when many residents faced voluntary or mandatory rationing because of drought conditions and cutbacks in Delta pumping.) In recent surveys, more than two-thirds of respondents said that water supply is at least somewhat of a problem in their region. Looking ahead, most said that they are very or somewhat concerned about the potential for more severe floods (55–60 percent) and droughts (78–85 percent) as a result of climate change. Although raising new fees to support the water sector is not likely to be popular with California voters, better public information about water system conditions might help foster public discussion for reform of the inadequate funding mechanisms currently available.

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YOU DON'T MISS IT UNTIL IT'S GONE: DROUGHT HIGHLIGHTS THE IMPORTANCE OF WATER MANAGEMENT

W. Blaine Early, III and Kathryn A. Taylor

Drought conditions in Texas throughout 2011 adversely impacted Texas's economy and environment. Georgia is facing drought conditions again this year, following the shortages of 2008. As the economic and environmental impacts of water shortage continue, these regions share the results, but local responses differ.

Central and Western Texas

Rainfall in early 2012 helped Texas recover from water deficits in 2011, but not enough. For example, average yearly rainfall in Odessa, northwest of San Antonio, is about 14.22 inches. Lyxan Toledanes, *City Adjusts Water Use for New Restrictions* (Feb. 26, 2012), <http://www.oaoa.com/news/water-82687-restrictions-city.html>. In 2011 the area only received 5.47 inches of rainfall and by mid-April 2012 had only received 1.35 inches of rain, well below the 2.21-inch normal level. *Drought Information Statement*, NOAA (Apr. 17, 2012), <http://www.srh.noaa.gov/productview.php?pil=DGTMAF>.

El Paso, which relies on the Rio Grande to supply about 50 percent of its utilities, is usually allotted 60,000 acre-feet of water each year. But because of the 2012 drought, El Paso will only receive 20,000 to 25,000 acre-feet of water according to a spokesperson for El Paso's water utility. *Drought in El Paso County*, EL PASO TIMES (Apr. 6, 2012). Similar reductions face the Highland Lakes along the Colorado River that supply water to most of Austin. The Lower Colorado River Authority (LCRA) reports that last year the water supply in the Highland Lakes (lakes Travis and Buchanan) fell to their third lowest storage level in history and are about 48 percent full, containing about 960,000 acre-feet of water. LCRA, <http://www.lcra.org/water/drought/index.html>. Due to low reservoir levels, the LCRA will not provide water from those lakes to many downstream farmers this

year. *Id.* The effects of low rainfall and below-average snowpack combined with increased municipal and farming demand have impacted the distribution of water throughout western Texas.

The drought has also caused tensions between Texas and Mexico. According to a 1906 convention, the United States “shall deliver to Mexico a total of 60,000 acre-feet of water annually in the bed of the Rio Grande” at a location near El Paso, Texas, and Juarez, Mexico. Convention Between the United States and Mexico, Equitable Distribution of the Waters of the Rio Grande, art. I (May 21, 1906), http://www.ibwc.state.gov/Treaties_Minutes/treaties.html. But this allocation may be reduced in the event of “extraordinary drought,” in which case the amount delivered to Mexico may be reduced in proportion to the reduction of water supplied to irrigation systems in the United States. *Id.* at art. II. Because of the drought’s impact and resulting pro-rata reduction, Mexico received only about 12,275 acre-feet this year—about one-fifth of the allocation—from the Rio Grande this year. Minutes of the Rio Grande Citizens Forum, Int’l Boundary & Water Comm’n (Apr. 19, 2012).

Georgia and the Southeast

Georgia and other parts of the Southeast are also experiencing debilitating drought in 2012. *See, e.g., Drought Taking Toll on Parts of Georgia*, ASSOCIATED PRESS, Apr. 17, 2012. Outside of Atlanta, Thurmond Lake’s average pool in April was 5.6 feet lower than at the same time in 2011. *Id.* Inflows into Lake Lanier, which provides more than a third of Atlanta’s water, were 57 percent of normal inflows. *ACF Drought Update*, U.S. ARMY CORPS OF ENG’RS (May 22, 2012), <http://water.sam.usace.army.mil/ACFDroughtUpdate.pdf>.

Drought conditions in Georgia are beginning to have adverse economic and environmental effects as competition among water users increases. Conflicting interests for municipal, agricultural, and environmental use on the water supply from the Flint, Apalachicola, and Chattahoochee rivers exist throughout the Southeast. *Our Opinion: No More Water Wars*, TALLAHASSEE DEMOCRAT, May 11, 2012. Georgia

wants to use the water from Lake Lanier to supply the millions of Atlanta residents and businesses. *Id.* Downstream, farmers in southern Georgia and Alabama need water for crop production. *Id.* The U.S. Army Corps of Engineers has restricted flow into the Apalachicola River to protect threatened and endangered species from the devastating effects of a severe drought. *See, e.g., Ellen Reinhardt, Drought Hurting Georgia Fish Hatcheries*, GPB NEWS (Apr. 16, 2012), <http://www.gpb.org/news/2012/04/16/drought-hurting-georgia-fish-hatcheries>.

In sum, the droughts in both Texas and Georgia are severe and continue to impact local economies and environments. In particular, the lasting drought has affected Texas, where some ranchers have been forced to sell their cattle herds because they no longer have grass or water to sustain their population. LCRA, <http://www.lcra.org/water/drought/index.html>. Other ranchers are now moving their cattle to surrounding states to prevent selling their source of income. *Id.*

Approaches to the Problem

Responses to water shortage have been varied and tentative. A typical response is to restrict water use and so reserve it for other, specific needs. More forward-looking responses, however, involve water conservation and better water harvesting.

Texas cities remain under tight water restrictions, trying to stave off some of the negative effects of the drought. Typical of some of these restrictions, the Stage 2 restrictions imposed by Austin (1) limit “watering with an irrigation system, hose-end sprinkler, or soaker hose” to one day per week based on address; (2) limit automatic irrigation system use to before 10 a.m. on the resident’s assigned day; (3) limit washing cars and using hose-end sprinklers and soaker hoses to before 10 a.m. and after 7 p.m. on the assigned day; (4) prohibit “ornamental fountains” and automatic fill valves on swimming pools and ponds; (5) prohibit water being served at restaurants unless requested; (6) prohibit washing sidewalks, driveways, and parking areas; and (7) prohibit charity carwashes. *Stage 2 Watering Restrictions Still in Effect*, AUSTIN WATER, <http://www.austintexas.gov/department/stage-2-watering-restrictions> (last visited August 7, 2012).

Austin's Stage 2 restrictions had been in effect since September 6, 2011, but due to slight improvements in conditions, the city eased those restrictions on July 16, 2012. *Id.* In May 2012, Austin city officials proposed new water restriction rules in order to conserve water over time. Marty Toohey, *Austin Utility Proposes New Rules for Watering*, AUSTIN-AM. STATESMAN, May 12, 2012. The new rules allow use of drip irrigation, which is more efficient and wastes less water than traditional sprinkler systems.

Some of Georgia's restrictions intend to conserve water and to reduce the impacts of municipal and industrial use on those downstream. *See* Ga. Dep't of Natural Res., *Outdoor Water Use Schedules and Restrictions*, EPD, http://www.gaepd.org/Documents/water_use_schedules.html (last visited August 7, 2012). Currently, the nondrought schedule allows for outdoor water use three days per week. On the assigned days, landscape watering may not take place between 10 a.m. and 4 p.m.

Water users, including farmers and ranchers, routinely rely on both surface and groundwater to supply their needs. A decrease in one source almost requires a switch to the other. In Texas, LCRA has been withholding water from the Colorado River via the Highland Lakes from farmers downstream in order to preserve the water for municipal and residential use in the Austin area. This solution may put pressure on another rapidly depleting resource, the Edwards Aquifer. Shortages in groundwater supply have resulted in the formation of a series of groundwater management districts and local conservation districts cropping up to monitor and, in some cases, regulate the use of groundwater for that area. However, a recent Texas Supreme Court decision compared the ownership of groundwater to the ownership of oil and gas in place and recognized the landowner's right to that absolute ownership. *Edwards Aquifer Auth. v. McDaniel*, No. 08-0964, 2012 Tex. LEXIS 161, at *45, *77-78 (Tex. Feb. 24, 2012) (finding that the landowner had a compensable interest in groundwater and remanding to trial court to decide if restricting groundwater use amounts to a regulatory taking). This decision may make it difficult to regulate the use and withdrawal of groundwater from the aquifers. Thus,

while withholding surface water may temper the problem upstream, depending on the outcome of the trial court decision, the downstream farmers may rely primarily on groundwater, further exacerbating the pressing problem of diminished groundwater.

Atlanta's Clean Water Atlanta Program, adopted in response to sewer overflows, uses higher water/sewer rates as incentives for water conservation. *See Water and Sewer Rate Information*, ATLANTA WATERSHED DEP'T, http://www.atlantawatershed.org/custsrv/water_and_sewer_rates.htm (last visited August 7, 2012). These measures, coupled with rebates for citizens and businesses that use rainwater harvesting technology like those available in Austin, could aid Atlanta's recovery from the devastating drought.

An efficient and positive solution to reduce the harm of future droughts is to improve efforts to harvest and store the limited rainfall. Texas provides statewide tax incentives to encourage citizens to adopt rainwater harvesting technology, and San Antonio and Austin provide additional incentives and rebates to their citizens. Other cities would benefit from doing the same. TEX. TAX CODE ANN. § 151.355 (West 2011); TEX. WATER DEV. BD., TEXAS MANUAL ON RAINWATER HARVESTING 3, 54 (2005). An Austin program encourages citizens and businesses to adopt rainwater harvesting technology. *See, e.g., Rainwater Rebates*, AUSTIN WATER, <http://www.austintexas.gov/department/rainwater-harvesting-rebates> (last visited August 7, 2012).

Programs that limit stormwater runoff have the added benefit of slowing the discharge of surface water, thus allowing the recharge of groundwater. When precipitation is not directed across and through impervious surfaces into traditional storm drains but, instead, is allowed to slowly infiltrate into the soil, the water may eventually find its way into the groundwater aquifer. *See, e.g., LOS ANGELES AND SAN GABRIEL RIVERS WATERSHED COUNCIL, WATER AUGMENTATION STUDY* (2010), <http://www.usbr.gov/lc/socal/reports/LASGwtraugmentation/report.pdf>.

Some cities encourage the implementation of stormwater controls by taxing residents and businesses

based on the amount of impervious surfaces. For example, to promote water conservation and to mitigate stormwater runoff, San Antonio implemented stormwater fees: \$3.22 per month charged to residents that have up to 4,999 square feet of impervious surface area while residents with 5,000 square feet or more are charged \$4.25 per month. *Rate Structure: Storm Water Fee*, SAN ANTONIO WATER SYS., http://www.saws.org/service/rates/stormwater_fee.shtml (last visited June 15, 2012). The Atlanta area has also introduced fees to encourage its citizens to mitigate stormwater runoff. A single-dwelling lot is charged approximately \$4 per month. *See, e.g., Stormwater Utility*, DEKALB CNTY., http://www.co.dekalb.ga.us/publicwrks/stormwater_mangmt/index.html (last visited August 7, 2012). These fees both encourage reduction of impervious surface and may provide funds for large-scale infrastructure projects aimed at water conservation. The result may be improved water quality as well as a much needed recharge of local groundwater resources.

In conclusion, drought conditions of 2008, 2011, and 2012 in Georgia and Texas show that North America should pay attention to freshwater as a limited resource. Regulatory responses that foster water management and infrastructure responses to promote harvesting and conservation of existing resources may help mitigate the impact of water shortages.

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COLORADO WATER LAW BALLOT INITIATIVES MOVE FORWARD

Susan M. Ryan

As the result of two recent Colorado Supreme Court decisions, Colorado voters may have the opportunity to vote on two changes to the Colorado Constitution that would radically alter Colorado water law and change the way water has been allocated in the state for the past 150 years. Article XVI of the Colorado Constitution provides that the waters of the natural streams of the state belong to the people of the state, subject to appropriation for use, and that the right to divert unappropriated water for beneficial use shall never be denied. Water rights are administered based on their priority appropriation. The Colorado Constitution forms the basis of the settled tenet of Colorado water law that a water right is the private property right of the appropriator, and first in time is first in right.

Introduced by Richard Hamilton and Phil Doe, the proposed ballot initiatives, which are referred to as Ballot Initiatives No. 3 and No. 45, would amend the Colorado Constitution in order to create a public trust doctrine for allocating, regulating, and accessing water resources throughout the state. Mr. Hamilton, a well-known environmental lobbyist, proposed the initiatives to protect the public's interest in the waters of Colorado and to force accountability on large municipal and industrial water users. Peter Marcus, *Proposed Ballot Initiatives on Water Rights Are Swirling in Controversy*, 113(22) COLO. STATESMAN 1 (Jan. 4, 2012). The ballot initiatives would establish, among other things, that the public's ownership of the waters of natural streams supersedes property and contract law; that the right of appropriation is servient to the public's dominant water estate, which includes the protection of the public's enjoyment of the use of water; and that no water right has priority over the natural stream. If passed, these constitutional amendments will call into question the reliability of long-established decreed appropriative water rights by subordinating those rights in favor of the public's dominant water estate. Existing water rights could be reduced by stopping any use of water that harms the public's dominant water estate, including the public's enjoyment of water.

In two related cases, the Colorado Supreme Court decided that the ballot initiatives each contained a single subject, thereby allowing the proponents to move forward with collecting the requisite number of signatures. The Colorado Supreme Court's decisions were narrow in scope, addressing only whether each initiative contained a single subject; they did not reach the substance or application of the initiatives. Although the court addressed a narrow legal issue related to Colorado election laws, the decisions allow the initiatives to move forward, elevating among Coloradans vital questions about the value placed (or to be placed) on nonconsumptive uses of water, Colorado's current water allocation system, water ownership, and how to best allocate water to account for the public's use.

As a result of the court's decisions, the Colorado secretary of state provided the final forms for Mr. Doe and Mr. Hamilton to begin collecting signatures on May 14, 2012. Signatures collected prior to that date do not count toward the total needed to place the initiatives on the ballot. Each initiative must have 86,105 valid signatures by August 6 in order to qualify. If the initiatives qualify for the ballot and if they then are adopted by voters, the initiatives will be added to the Colorado Constitution as amendments.

Colorado Supreme Court's Ballot Initiative Decisions

Colorado uses a ballot referendum and initiative process to enact legislation and to amend the constitution. The process allows proponents of a measure to circulate petitions for signatures in order to place the measure on the ballot. Each proposed measure must address a single subject that is closely linked to the measure's ballot title. COLO. CONST. art. V, § 1(5.5); COLO. REV. STAT. § 1-40-106.5 (2012). The purpose of the single subject rule is to avoid voter confusion and the inadvertent passage of complex initiatives with unintended consequences. *In re Title, Ballot Title, Submission Clause, and Summary for Public Rights in Waters II*, 898 P.2d 1076, 1078-79 (Colo. 1995). If the initiative proposes one general purpose, it constitutes a single subject. *Id.* at 1079.

In both ballot initiative cases, the court was asked to review whether the titles, ballot titles, and submission clauses each contained a single subject. In this narrow review, the court could not address the merits of the proposed ballot initiatives or how the initiatives may be applied if enacted by the voters. As noted above, the purpose of the single-subject rule is to prevent the enactment of measures that might fail on their own merits if not tied to additional issues and to avoid voter surprise by the inadvertent passage of a provision in a complex initiative. The majority in both cases concluded that each initiative contained a single subject. Justice Hobbs dissented in both cases on grounds that each initiative contained complex and unstated issues, in violation of the single-subject rule.

Ballot Initiative No. 3—Adoption of the Public Trust Doctrine

In its first decision, the court addressed whether Ballot Initiative No. 3 violated the single-subject rule. *In re Title, Ballot Title, and Submission Clause for 2011–2012 #3*, 274 P.3d 562 (Colo. 2012). The initiative proposes the adoption of the public trust doctrine by creating a public estate in water that “has a legal authority superior to the terms of contracts or property law.” The initiative also proposes an amendment to the Colorado Constitution that would create a “usufruct right” servient to the public’s dominant water estate. In addition, the initiative extends the public’s water right to the “naturally-wetted high water mark of the stream.” In upholding the initiative as containing a single subject in compliance with Colorado law, the court concluded that all subsections of the initiative related to the public trust doctrine and had the distinct purpose of “describing a new legal regime—the Colorado public trust doctrine—that would govern the public’s rights in waters of natural streams.” *Id.* at 567 (internal quotations omitted).

Justice Hobbs began his dissent by noting that the court has a duty to determine whether an initiative “contains cleverly concealed multiple purposes under a seductively-stated broad title.” *Id.* at 571. While Justice Hobbs stated that the title of the initiative was consistent with Colorado’s water law doctrine, which provides that water resources are always owned by

the public, he took issue with what he identified as three separate and distinct subjects within the initiative that are not dependent on each other. The combination of all three subjects, in the view of Justice Hobbs, would result in creating new water rights for Colorado’s public at the expense of current water users, including members of the public, cities, farms, and families throughout the state. *Id.* at 572.

According to Justice Hobbs, the first discrete subject in the initiative is the subordination of all existing water rights created over the past 150 years to a newly created dominant public water estate. Justice Hobbs was concerned that this would result in a “super water right” designed to protect the natural environment and to protect the public’s enjoyment and use of water. The second distinct subject is creation of a navigation servitude for commerce and public use that extends to the lands of the banks of streams within Colorado. This provision would vest in the public possessory rights to stream beds and stream banks currently owned by public entities and private landowners, without regard for navigability. In Justice Hobbs’s opinion, creating a public trust in all water rights in the state as well as all natural stream beds regardless of navigability “would be a novelty among jurisdictions in the United States” and in violation of the U.S. Supreme Court’s recent decision in *PPL v. Montana*. *Id.* at 572, 574.

The third discrete subject in the initiative in Justice Hobbs’s view is the creation of a new property right of access by the public to any natural stream in Colorado. This provision would allow an easement in the public across all private property in Colorado on “which even a trickle of water runs.” *Id.* at 572. Justice Hobbs noted that this type of easement would “abrogate the right of private property owners . . . to prohibit trespass onto and across their land.” *Id.* Justice Hobbs was concerned that the combination of these three unrelated and discrete subjects into one initiative could confuse voters as to what a yes or no vote would mean, in violation of the single-subject rule. Thus, Justice Hobbs opined that the initiative should not be allowed to proceed.

Ballot Initiative No. 45—Public Control of Water and Limits on Diversion

In its second decision, the court addressed whether Ballot Initiative No. 45 violated the single-subject rule and whether the title was sufficiently clear. *In re Title, Ballot Title, and Submission Clause for 2011–2012 #45*, 274 P.3d 576 (Colo. 2012). The initiative seeks to implement the public trust doctrine, as described in Ballot Initiative No. 3, by limiting and/or curtailing beneficial water uses “to protect natural elements of the public’s dominant water estate by holding unlawful any usufruct use of water causing irreparable harm to the public’s estate.” The initiative also requires water users to “return water unimpaired to the public, after use, so as to protect the natural environment and the public’s use and enjoyment of waters.”

The majority of the court concluded that the initiative contained a single subject because the subsections all relate to the public control of waters. The court found that the provisions are “dependent upon and connected to each other because they define the purpose of the measure, describe the broadened scope of the public’s control over Colorado’s water resources, and outline how to implement and enforce the dominant public water estate.” *Id.* at 581.

Justice Hobbs dissented based on his conclusion that the initiative contained two separate and distinct subjects. He noted that the initiative would delete a fundamental provision of the Colorado Constitution regarding the appropriation of waters from the natural stream. The deletion of this key provision would make all water in the state, rather than just water in the natural stream, subject to an appropriation system. Currently, nontributary groundwater is excluded from the appropriation system and the right to use nontributary groundwater is vested in the overlying landowner.

Moreover, the initiative contains a provision that would require water to be returned unimpaired to the stream, which, in Justice Hobbs’s opinion, “would radically transform Colorado into a riparian water law state.” *Id.* at 585. Under a riparian system, landowners adjacent to the rivers and streams have the right to use water as

long as they only have a minimal impact on quality and quantity of water in the stream. Justice Hobbs noted that if Colorado adopted the riparian system, “the full flow of our streams would drain not to the sea but to the reservoirs, fields, and cities of our neighboring states.” *Id.* at 586. This would effectively overturn the equitable apportionment of benefits between two states resulting from the flow of a river and “would deprive Colorado of its interstate allocation of waters of the Platte, Arkansas, Rio Grande, and Colorado Rivers by imposing a predominantly non-consumptive water regimen upon the State and its water users, resulting in the free flow of waters across our boundaries for the use of others, devastating Colorado’s economy and way of life.” *Id.*

Due to the complexity of the initiative, the distinct nature of the subjects treated, and the potential for voter surprise and confusion, Justice Hobbs found Ballot Initiative No. 45 to be misleading and in violation of the single subject rule. Justice Hobbs also found the title of the initiative confusing because, he observed, Colorado already exercises a “high degree of public control of water through the prior appropriation system itself,” a fact the language of the initiative does not adequately reflect. *Id.* at 587. Accordingly, he concluded that the title and the subject were confusing, were misleading, and violated the single-subject rule.

Potential Impact of the Ballot Initiatives

Given the extreme drought conditions in Colorado and the rest of the western United States, the debate over public control of water resources and a new water law regime based on the public trust doctrine promises to be intense and to raise important policy decisions regarding the value placed on water use throughout the West. Proponents argue that the initiatives are environmental protections designed to prevent de-watering of rivers during droughts and to allow the public free access to rivers and streams throughout the state. Proponents also argue that the initiatives protect public use of water, value nonconsumptive water uses, and prevent overuse of water. Opponents of the initiatives argue with equal conviction that the initiatives are too broad and will result in taking valuable private property rights from water users and landowners throughout the

state. In addition, opponents fear that the initiatives will upset 150 years of established water resource allocation and expectations based on that allocation system, creating widespread uncertainty with potentially far-reaching economic consequences.

If passed, the initiatives will require Colorado to reallocate its water resources and to change its treatment of water as a private property right, separate from land. While the initiatives are limited to Colorado, passage of the initiatives may spark the reconsideration of the prior appropriation doctrine in other states. Further, interstate compacts and the equitable apportionment of water between states also will need to be reconsidered in light of the initiative's requirement to return all water unimpaired back to the stream. Ownership of stream beds as well as access to stream beds, regardless of navigability, also will be an issue if the initiatives pass. While it is still too early to tell if the initiatives will gain enough support to make it to the ballot in November, it is certain that the passage of the initiatives would radically change Colorado water law and could trigger changes in other states.

POSTSCRIPT

On July 23, 2012, the proponents of the ballot initiatives notified the Colorado secretary of state that they were withdrawing the initiatives from the November ballot. The proponents decided that it "would be a near impossibility" to get the required number of signatures by August 6, 2012. However, the proponents promised that the initiatives would return in 2014. Even though the initiatives have been withdrawn, the debate regarding nonconsumptive water uses, river access, and the nature and scope of the public's interest in water resources continues and will intensify over the next several years, especially in light of the proponents' promise to return with a more organized effort.

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SUPREME COURT CLARIFIES TEST TO DETERMINE NAVIGABILITY FOR TITLE TO RIVERBEDS

Elizabeth Thomas, Kenneth Gish, and Kari Vander Stoep

In a case that turned on whether the Missouri, Madison, and Clark Fork rivers in the State of Montana could be navigated for commercial purposes at the time of statehood, the U.S. Supreme Court clarified the federal navigability-for-title test to resolve whether Montana owns the riverbeds occupied by ten PPL Montana hydropower facilities. *PPL Montana, LLC v. State of Montana*, 565 U.S. ____ (Feb. 22, 2012). At stake is more than \$50 million in back rent claimed by the State, and many millions more in annual rent payments going forward.

The Court’s unanimous decision in *PPL Montana*’s favor highlights for water users, and the users of riverbeds and shorelands, the important distinctions between the federal tests for navigability for title, navigability for federal regulatory jurisdiction, and navigability for admiralty jurisdiction.

Background

The dispute between Montana and PPL Montana arose in 2003, when two parents of Montana school children sued PPL Montana and two other hydropower owners in federal district court. The parents claimed that the riverbeds occupied by the hydropower projects are owned by Montana and are school trust lands for which the hydropower owners must pay the State back and future rent. After the State joined the litigation, the federal district court dismissed for lack of diversity jurisdiction. PPL Montana and the other owners subsequently filed a declaratory judgment action against Montana in state court to resolve whether they owed the State rent. Nine of PPL Montana’s dams were built before 1931 and the tenth was built in the 1950s.

Notwithstanding a “mountain” of expert and documentary evidence in support of PPL Montana’s position that the relevant river segments were not navigable at statehood, the state trial court awarded summary

judgment to the State and held that Montana owned all of the riverbeds under the Missouri, Madison, and Clark Fork rivers. Under the Equal Footing Doctrine, new states take ownership of the beds of rivers that are navigable at the time they join the Union. Under the federal navigability-for-title test,

[u]pon statehood, the State gains title within its borders to the beds of waters then navigable . . . “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

Id., slip op. at 12–13 (emphasis added) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). The Montana Supreme Court affirmed the trial court’s determination that Montana owned all of the riverbeds within Montana on the theory that the Missouri, Madison, and Clark Fork were navigable at statehood under what the Supreme Court referred to as the lower courts’ “infirm legal understanding” of the federal navigability-for-title test. *Id.* at 26.

U.S. Supreme Court’s Holding

PPL Montana petitioned the U.S. Supreme Court for a writ of certiorari, contending that the Montana state courts had misinterpreted and misapplied the federal navigability-for-title test. The U.S. Supreme Court granted the writ of certiorari, heard arguments in December 2011, and issued a unanimous decision in PPL Montana’s favor on February 22, 2012. The Supreme Court concluded, as a matter of law, that the Great Falls reach of the Missouri River was nonnavigable at statehood. *Id.* at 20. Based on this determination, Montana does not own the riverbeds underlying at least five of PPL Montana’s dams and cannot charge PPL Montana rent for those dams. With respect to PPL Montana’s five other dams (two located upstream from Great Falls on the Missouri, two located on the Madison, and one located on the Clark Fork), the Supreme Court clarified the federal navigability-for-title test and stated that “based on evidence in the record,”

there is “a significant likelihood” that the disputed portions of the other rivers were not navigable for title purposes at statehood. *Id.*

Supreme Court Precedent Requires a Segment-by-Segment Analysis of Navigability for Title

Despite evidence demonstrating that the Lewis and Clark Expedition took “at least 11 days and probably more” (*id.* at 18) to portage around the Great Falls segment of the Missouri River where five of PPL Montana’s dams are located, the Montana state courts held that the Missouri River as a whole was navigable at the time of statehood. The state courts concluded that as long as the river—viewed as a whole—could be said to be generally navigable, any nonnavigable portions or segments would not defeat navigability for title purposes.

PPL Montana contended that the state courts misapplied *United States v. Utah*, 283 U.S. 64 (1931), which requires that navigability for title purposes be assessed on a segment-by-segment basis. The Supreme Court agreed, concluding that the “primary flaw” in the Montana courts’ reasoning was their failure to consider navigability “on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.” *PPL Montana*, slip op. at 14. The Court further concluded that portages around Great Falls demonstrated the Great Falls segment of the Missouri was nonnavigable at statehood. The Court expressly rejected the Montana courts’ “short interruptions” approach and concluded that portages, in “most cases,” are conclusive evidence that the portaged segment was nonnavigable for title purposes. *Id.* at 18–19 (“the Montana Supreme Court was wrong to state, with respect to the Great Falls reach and other stretches of the rivers in question, that portages ‘are not sufficient to defeat a finding of navigability.’”).

Present-Day Evidence of Navigability Is of Limited Value in Determining Navigability at Statehood

The Montana state courts relied on evidence of present-day fishing and recreation on the Madison

River, where two of PPL Montana’s dams are located, to conclude that the Madison River was navigable at statehood.

PPL Montana contended that the state courts ignored the fundamental tenets of the navigability-for-title test by relying on present-day usage to assume navigability at the time of statehood. Furthermore, the Montana state courts improperly ignored PPL Montana’s evidence that the Madison River has changed significantly since statehood.

The Supreme Court concluded that present-day evidence of fishing and recreation on a river is only relevant to determining navigability at statehood if, “at a minimum” (*id.* at 22), the party seeking to rely on present-day usage can show “(1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river’s post statehood condition is not materially different from its physical condition at statehood.” *Id.* at 23. As the Court explained, “[i]f modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.” *Id.*

Findings of Navigability for Federal Regulatory Purposes Are Not Relevant to Navigability for Title at Statehood

The Montana state courts relied on decisions by federal agencies and courts establishing navigability for federal regulatory purposes to conclude that the Missouri, Madison, and Clark Fork rivers were navigable for title purposes.

Because conditions at the time of statehood have no bearing on the test of navigability for regulatory purposes, and because regulatory navigability can be created by improvements to a river, PPL Montana argued that the state courts erred in their reliance on regulatory navigability cases to conclude that the Missouri, Madison, and Clark Fork rivers were navigable for title at statehood.

The Supreme Court agreed. In a key passage, it criticized the Montana Supreme Court for relying on the navigability analysis conducted in *The Montello*, 20 Wall. 430 (1874). *The Montello* disregarded a portage in the context of determining navigability of a river for federal regulatory jurisdiction. *PPL Montana*, slip op. at 19–20. The Court emphasized that navigability assessments to determine regulatory jurisdiction rely on a “doctrinally distinct” inquiry and should not be applied to cases requiring the assessment of navigability for title purposes. *Id.* Accordingly, the Montana courts erred in ignoring the evidence of portages and other navigation interruptions on the Missouri, Madison, and Clark Fork rivers. *Id.* at 13–14, 19–20.

Distinguishing Title Navigability from Regulatory Navigability

To the confusion of many courts and practitioners, navigability tests are used for at least three different federal purposes: (1) determining title to the beds of waterbodies, (2) determining the extent of federal regulatory jurisdiction under the Commerce Clause, and (3) determining the extent of admiralty jurisdiction. However, as Justice Kennedy noted in *PPL Montana*, “the test for navigability is not applied in the same way in these distinct types of cases.” *Id.* at 13.

The navigability-for-title test, the test at issue in the *PPL Montana* case, is used to determine whether title to the land beneath a segment of a waterbody passed to the state at statehood. Under the Equal Footing Doctrine, title to the beds of rivers within a new state passes to that state upon admittance to the Union, provided that the river segments at issue were navigable for title purposes at the time of the state’s admittance. *United States v. Utah*, 283 U.S. 64, 75 (1931). Further, as the Court in *PPL Montana* confirmed, the navigability for title test is not applied to the entire watercourse; rather it is to be applied to segments with particular characteristics of navigability or non-navigability. *Id.* at 77.

Unlike the navigability-for-title test, the Commerce Clause navigability test establishes the boundaries of federal regulatory jurisdiction over the nation’s water-

ways. It is for a different purpose and is a different test, as the *PPL Montana* Court confirmed. Congress has the power to regulate activities upon the “Waters of the United States” under the Commerce Clause of the Constitution. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). It is through this Commerce Clause power that the United States exercises regulatory authority under the Federal Power Act, the River and Harbors Act, and the Clean Water Act.

In *PPL Montana*, the Court clarified the three major differences between the application of the test for title purposes and for determining if federal regulatory jurisdiction exists under the Commerce Clause (slip op. at 13–14):

1. Unlike navigability for title purposes, navigability for regulatory purposes may be determined by analyzing whether the river was navigable in fact at any time.
2. Unlike navigability for title purposes, navigability for regulatory purposes may be premised on the suitability of the watercourse for navigation as a result of reasonable improvements.
3. Unlike navigability for title purposes, for navigability for regulatory purposes, the watercourse may require a nexus to interstate or foreign commerce.

Finally, a third area where a federal navigability determination is made is to decide whether federal admiralty jurisdiction is proper. Federal district courts have original jurisdiction over any civil case within admiralty jurisdiction. 28 U.S.C. § 1333(1). Admiralty jurisdiction requires that the alleged wrong occur on the navigable waters of the United States and bear a significant relationship to traditional maritime activities. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Navigable waters of the United States for admiralty jurisdictional purposes are those where the relevant portion of the watercourse is presently serving as an interstate artery of commerce. *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

All three federal navigability tests have certain shared historic roots. However, as the Court made clear in *PPL Montana*, the application of the test depends on the purposes for which navigability is being determined.

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K&L Gates, LLP was one of the firms that represented *PPL Montana* in state court and the U.S. Supreme Court.



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COURT HOLDS FEDERAL AGENCIES RESPONSIBLE FOR PAYMENT OF PAST-DUE STORMWATER SERVICE CHARGES

Lawrence R. Liebesman

Municipal stormwater management agencies achieved a major victory on May 25, 2012, when a federal judge in Washington State ruled for the cities of Renton and Vancouver, Washington, holding the federal government must pay those cities for the costs of cleaning up stormwater from federal facilities for assessments made prior to the passage of clarifying legislation that took effect in January 2011. Pub. L. No. 111-378, 124 Stat. 4128 (signed into law Jan. 4, 2011). This ruling supports local governments nationally in their efforts to collect past-due stormwater service charges from federal facilities discharging into municipal storm sewer systems that have previously refused to meet these obligations.

Sovereign Immunity and the District Court's Decision

The case of *United States v. City of Renton, et al.* revolves around the issue of whether federal facilities owned by the Bonneville Power Agency (BPA) were legally obligated to pay fees imposed by the cities of Renton and Vancouver in order to fund the stormwater mitigation efforts required under state law and the Clean Water Act (CWA). *See U.S. v. City of Renton et al.*, No. C11-1156JLR (W.D. Wash. May 25, 2012) (order granting in part and denying in part motion for partial summary judgment). The legal principle of sovereign immunity at issue in the case states that the federal government cannot be held liable for fees assessed by state and local governments, absent a clear congressional waiver. While Congress broadly waived the federal government's sovereign immunity in 1977 under section 313(a) of the CWA for the payment of "reasonable service charges," federal agencies in recent years have refused to pay the assessments for expensive stormwater cleanup throughout the United States, claiming that Congress did not expressly include such fees in enacting the 1977 waiver and that such assessments were a tax—

rather than a service charge—and are therefore outside of the waiver of sovereign immunity.

In this particular case, both cities had received prompt and uncontested payment of these fees from the BPA until late 2010 and early 2011, when the agency abruptly determined that it was not legally obligated to do so and ceased payment. In response to a raft of similar decisions throughout the country, municipal advocacy groups, including the National Association of Clean Water Agencies (NACWA), successfully pushed for the passage of S. 3481 in early 2011. This legislation, sponsored by Sen. Ben Cardin (D-Md.), included clarifying language at section 313(c) stating that the federal government’s waiver of sovereign immunity for “reasonable service charges” included stormwater fees. *See* Brief for the Nat’l Ass’n of Clean Water Agencies et al. as Amici Curiae in Support of Defendant’s Motion for Partial Summary Judgment at 6, *U.S. v. City of Renton et al.*, No. C11-1156JLR (W.D. Wash. Feb. 9, 2012).

Despite widespread expectations that this clarification would result in federal agencies paying past and future stormwater fees without objection, in Renton and Vancouver the BPA claimed that S. 3481 was not retroactive. *See id.* The United States then sued the cities arguing that the federal government was under no obligation to pay the cities stormwater fees until S. 3481 was signed into law on January 4, 2011, and sought the return of all amounts paid in the years prior to that date. In rejecting these claims, Judge James Robart of the Western District of Washington ruled that the federal government’s 1977 waiver of sovereign immunity “unambiguously includes any fee, charge or assessment, even if denominated as a tax.” In citing extensively from the legislative history of S. 3481, Judge Robart held that Congress waived sovereign immunity for reasonable service charges under the CWA since at least 1977 and that S. 3481 was a clarification of Congress’s original intent for the term “reasonable service charge”—rather than a change in substantive law. As a result, the government was retroactively obligated for any fees assessed prior to January 2011, so long as they fell within the Act’s criteria requiring that the assessment is “nondiscriminatory,” the assessment is based on “some

fair approximation of the proportionate contribution of the property of the facility to stormwater pollution,” and the fee is “used to pay or reimburse the costs associated with any stormwater management program.” *See id.*, slip op. at 11–24.

Notably, Judge Robart did not resolve the issue of whether the BPA was responsible for the specific unpaid charges imposed by the cities, concluding that they had not unequivocally demonstrated that those fees were reasonable charges within the framework established by S. 3481. *See id.* at 24. However, in doing so, he provided clarifying guidance on whether the cities’ fee programs complied with S. 3481, noting that the reasonableness of a charge should be considered in comparison to those assessed on nongovernmental entities, that the use of differing methods of approximating a facility’s burden did not mean that the fee program was “discriminatory,” and that the revenue from these fees may be used for the “full range of costs associated with the program.” *See id.* at 24–26.

Implication of the Decision

The *Renton* decision has wide-ranging implications for stormwater management agencies across the country because it establishes a clear avenue for municipal agencies to collect fees for federal facilities’ contributions to the expensive costs of stormwater being imposed on municipalities under the Clean Water Act. The importance of this avenue becomes clear when the plight of cities such as Richmond, Virginia, and Seattle, Washington, are considered as each is owed hundreds of thousands of dollars in stormwater fees by numerous federal agencies. *See* Brief for the National Association of Clean Water Agencies et al. at 13. This issue has only become more pressing over the last year as state and local governments are making tough fiscal decisions in light of a sluggish recovery from the recent recession. *See* Elizabeth McNichol, Phil Oliff & Nicholas Johnson, *States Continue to Feel Recession’s Impact*, CENTER FOR BUDGET AND POLICY PRIORITIES, March 2012, available at <http://www.cbpp.org/files/2-8-08sfp.pdf> (noting that 46 states have reduced services while at least 30 have been forced to raise taxes to maintain revenue). It also

is particularly important for municipalities in the Chesapeake Bay region that have extensive federal properties and are facing huge costs in meeting the Chesapeake Bay cleanup targets. Reducing stormwater impacts will help meet the Chesapeake Bay total maximum daily load (TMDL) limits established by EPA in December 2010. The Bay TMDL (1) sets the maximum amount of pollution the Bay can receive and still attain water quality standards and (2) identifies specific pollution reduction requirements for nitrogen, phosphorus, and sediment that must be met by 2025, with at least 60 percent reduction met by 2017. The costs will be very high. For example, Maryland estimates that costs of meeting the 2025 goals will be \$14.7 billion, of which \$7.7 billion will be devoted to stormwater remediation.

Although securing stormwater fee revenue from federal facilities will not solve local governments' funding woes, it will limit potential inequities by ensuring that local governments are not forced to pass on the burden of these costs to residents and other private facility owners. In addition, securing stormwater revenue from

federal facilities under the *Renton* precedent also may have significant benefit for communities that have struggled to fund long-term stormwater mitigation efforts that were predicated on revenue from those facilities.

Conclusion

Although still subject to appeal to the Ninth Circuit, the court's decision in *Renton* has the potential to significantly alter the balance of judicial precedent in favor of municipal and county governments seeking to secure past-due stormwater service fees from recalcitrant federal agencies. The ruling supports the efforts of many local governments around the country in their efforts to be compensated for the tremendous costs of cleaning up stormwater pollution caused by runoff from federal facilities into municipal storm sewer systems.

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