Environmental, Energy, and Resources Law

37TH WATER LAW CONFERENCE

MARCH 26-27, 2019
GRAND HYATT DENVER
DENVER, COLORADO
37th Water Law Conference

Denver, Colorado

March 26-27, 2019

Grand Hyatt Denver

2019 Keynote Speakers

Deborah E. Greenspan
Special Master, Blank Rome LLP

Kristin A. Linsley
Special Master, Gibson Dunn

Matthew Leopold
General Counsel of the United States Environmental Protection Agency
2018-2019 Section Chair
Amy L. Edwards, Holland & Knight LLP, Washington, DC

Programming Planning Chair
Roger Sims, Holland & Knight LLP, Orlando, FL

Planning Committee
Robert Abrams, Florida A&M University, Orlando, FL
Bennett L. Bearden, Geological Survey of Alabama and The University of Alabama, Tuscaloosa, AL
Nancye Bethurem, U.S. Army Corps of Engineers Southwestern Division, Dallas, TX
Pamela M. Bush, Commission Secretary and Assistant General Counsel, Delaware River Basin Commission, West Trenton, NJ
Alan E. Curtis, White & Jankowski LLP, Denver, CO
John B. Draper, Draper & Draper LLC, Santa Fe, NM
John Echohawk, Native American Rights Fund, Boulder, CO
Cynthia Harris, Environmental Law Institute, Washington, DC
Ilene Munk, Foley & Mansfield, Portland, OR
Kathy Robb, Sive, Paget & Riesel P.C., New York, NY
Ian Smith, Historical Research Associates, Inc., Missoula, MT
Mark L. Walters, Jackson Walker, Austin, TX

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**MON**

**March 25, 2019**

- **6:30pm—9:30pm** Taste of SEER (Dine Arounds)

**TUE**

**March 26, 2019**

- **7:00am—8:15am** Continental Breakfast
- **8:15am—9:30am** East, West, Colorado, and the Colorado River
- **9:30am—9:45am** Networking Break
- **9:45am—11:00am** Interstate Disputes/U.S. Supreme Court Case Update
- **11:00am—11:15am** Networking Break
- **11:15am—12:30pm** The Culverts Case: Interference with Tribal Fishing Rights by Government Stormwater Diversion and Treatment Systems
- **12:30pm—2:00pm** Luncheon and Keynote Presentation
- **2:00pm—3:15pm** Impacts to Freshwater Resources from Drought and Sea Level Rise
- **3:15pm—3:45pm** Networking Break
- **3:45pm—5:00pm** Walker River/Walker Lake Litigation: The Public Trust Doctrine in Nevada
- **5:00pm—7:00pm** Welcome Reception
March 27, 2019

7:00 AM – 8:00 AM
Continental Breakfast

8:00 AM – 9:15 AM
Litigating, Negotiating, and Implementing Tribal Water Rights in the United States

9:15 AM – 9:30 AM
Networking Break

9:30 AM – 10:45 AM
NPDES Permits for Discharges Carried by Groundwater: Is That a Thing?

10:45 AM – 11:00 AM
Networking Break

11:00 AM – 12:30 PM
ETHICS: The Attorney-Client Privilege in the Twitter Era

1:00 PM – 4:00 PM
Public Service Project

6:30 PM – 8:00 PM
Reception
Monday, March 25, 2019
6:30pm – 9:30pm

Taste of SEER (Dine Aroumds)
Dinner reservations have been made at several restaurants in Denver near the conference hotel. Each dinner will be organized by a Section leader and will have a conversation theme. This is a great opportunity to meet new people, eat great food, and have lively discussions. Information about how to sign-up for these Dutch-treat dinners (each person pays for his or her own meal) will be sent to conference registrants by email.

Tuesday, March 26, 2019
8:15am – 9:30am

East, West, Colorado, and the Colorado River
Don’t miss this discussion on the foundations of water law, with insights for both new and experienced practitioners. This session will summarize the basics as well as provide informative updates on topics with potentially broad applicability in the era of increasing water demand and less reliable water supplies. Panelists will consider the law governing the Colorado River and features of Colorado’s unique form of prior appropriation that provide a valuable model on several issues facing all prior appropriation states and states struggling with groundwater and stream water interactions.

Moderator
Bennett L. Bearden, Chief of Staff and Special Assistant to the State Geologist, Geological Survey of Alabama, and Adjunct Professor, The University of Alabama, Tuscaloosa, AL

Speakers
Robert Abrams, Professor of Law, Florida A&M University College of Law, Orlando, FL
Jennifer Crandell, Special Counsel, Attorney General of Nevada, Colorado River Commission of Nevada, Las Vegas, NV
Sarah Klahn, Somach, Simmons, and Dunn, Denver, CO

9:45am – 11:00am

Interstate Disputes/U.S. Supreme Court Case Update
Every water practitioner needs to understand the principles of interstate water apportionment, including equitable apportionment and enforcement by the U.S. Supreme Court, compacts, and apportionment by Congress. Over the past decade, the Supreme Court has accepted an increasing number of interstate lawsuits under the Court’s original and exclusive jurisdiction. While these cases pit one state against another, they take place within a wider context of state and federal regulation and litigation, including state administration and federal water-supply management. The panel will analyze that context in connection with three pending Supreme Court cases: Florida v. Georgia, an equitable apportionment case over surface water, Mississippi v. Tennessee, an equitable apportionment case over groundwater, and Texas v. New Mexico & Colorado, a case to enforce the Rio Grande Compact. Attendees will hear how these cases may result in regulation initiatives or further litigation.

Moderator
Greg Hobbs, Senior Water Judge, Colorado Courts, Denver, CO

Speakers
Heather Elliott, Professor of Law, University of Alabama School of Law, Tuscaloosa, AL
Sandra Zellmer, Professor of Law, University of Montana School of Law, Missoula, MT

11:15am - 12:30pm

The Culverts Case: Interference with Tribal Fishing Rights by Government Stormwater Diversion and Treatment Systems
The Stevens Treaties, signed by several Pacific Northwest tribes in the mid-1850s, reserved tribal rights to fish “at all usual and accustomed grounds” in common with settlers. Interpretation of this provision has been subjected to litigation for over a century, including the 1905 U.S. Supreme Court case, United States v. Winans, and the Court’s affirmation of 1974’s Boldt Decision (United States v. Washington), which guaranteed tribes up to 50 percent of the region’s fisheries. The “Culverts Case” is the most recent sub-proceeding of United States v. Washington to reach the Supreme Court, affirming a federal court injunction requiring the State of Washington to remove or retrofit hundreds of road culverts blocking critical fish runs. Panelists and attendees will explore how the Culverts Case applies federal Indian law concepts to water quality and habitat protection—and consider how tribes might leverage off-reservation fishing and other treaty rights for greater water quality protection.
MODERATOR
Ilene Munk, Foley & Mansfield, Portland, OR

SPEAKERS
Jay Geck, Deputy Solicitor General, Office of the Attorney General, Washington State, Olympia, WA
Cassie Phillips, Director, Private Environmental Governance Initiative, Environmental Law Institute, Washington, DC
Ann E. Tweedy, Attorney, Muckleshoot Indian Tribe Legal Department, Auburn, WA

Sea level rise and drought are becoming major concerns to those dependent on groundwater or other freshwater resources. This panel will review the scientific issues and discuss the legal implications of dealing with gradual encroachment of saline water into aquifers providing fresh water for potable, agricultural, and other uses vital to the public health, safety, and welfare. This novel and important session will address such issues as the scientific concerns surrounding salt water intrusion and the upwelling of deeper water with brackish characteristics. Legal issues will be explored and planning for alternatives to the traditional sources now at risk will be discussed. This panel will offer attendees a unique new tool for judges and litigants to make sense of groundwater science in litigation—the National Judicial College’s new Adjudicating Groundwater bench book. The Section’s collaboration with the National Judicial College and its Dividing the Waters program allows the Section to offer this resource to conference attendees.

MODERATOR
Robin K. Craig, James I. Farr Presidential Endowed Professor of Law, University of Utah S.J. Quinney College of Law, Salt Lake City, UT

SPEAKERS
Greg Bengtson, Clark, Mize & Linville, Chtd, Salina, KS
Michael Sklash, Senior Hydrogeologist, Dragun Corporation, Farmington Hills, MI

The U.S. Supreme Court’s November 2017 cert denial in Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians will have significant implications for both tribes and non-Indian stakeholders in groundwater-dependent basins throughout the United States. Outlining some of these potential impacts, an August 2018 article in Science estimated that more than 200 Indian tribes in the West have unresolved claims to groundwater, some of which involve lands in areas with significant concerns about groundwater quality. In addition to discussing the consequences of this landmark case, this panel will provide an update on ongoing efforts to establish

Wednesday, March 27, 2019

8:00AM – 9:15AM
LITIGATING, NEGOTIATING, AND IMPLEMENTING TRIBAL WATER RIGHTS IN THE UNITED STATES

The U.S. Supreme Court’s November 2017 cert denial in Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians will have significant implications for both tribes and non-Indian stakeholders in groundwater-dependent basins throughout the United States. Outlining some of these potential impacts, an August 2018 article in Science estimated that more than 200 Indian tribes in the West have unresolved claims to groundwater, some of which involve lands in areas with significant concerns about groundwater quality. In addition to discussing the consequences of this landmark case, this panel will provide an update on ongoing efforts to establish
and quantify tribal water rights through litigation and settlement efforts. Attendees will gain insight and understanding into issues of significance to tribes, as well as the challenges faced when implementing and enforcing both tribal water rights settlements and adjudicated tribal water rights.

**MODERATOR**
Jeanne Whiteing, Attorney, Whiteing Law, Boulder, CO

**SPEAKERS**
M. Alexander Pearl, Director of Center for Water Law and Policy, Professor, Texas Tech University School of Law, Lubbock, TX
Stanley Pollack, Contract Attorney, Water Rights Unit, Navajo Nation Department of Justice, Window Rock, AZ
Vanessa Ray-Hodge, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, Albuquerque, NM

**9:30AM – 10:45AM**

**NPDES PERMITS FOR DISCHARGES CARRIED BY GROUNDWATER: IS THAT A THING?**

The Clean Water Act (CWA) regulates “Waters of the United States” (WOTUS) which, by definition, does not include groundwater. In 2018, two federal appeals courts held that discharges through groundwater hydrologically connected to WOTUS are subject to regulation under the CWA. The Ninth Circuit concluded that treated wastewater injected into wells and carried by groundwater to the Pacific Ocean after 84 days was “fairly traceable” to WOTUS. The Fourth Circuit found that a gasoline spill that continued to migrate from a repaired underground pipe break resulted in a “discharge” through soil and groundwater into adjacent wetlands and creeks. Both courts held that CWA groundwater jurisdiction is not limited to discharges of pollutants “directly” from point sources to WOTUS. These cases leave regulation ambiguous and pose substantial technical and regulatory challenges. This panel, from diverse perspectives, will discuss the status of regulation and the challenges in implementing the case law while equipping attendees with practical knowledge to assist stakeholders.

**MODERATOR**
Marcia Greenblatt, Principal, Integral Consulting, Inc., Louisville, CO

**SPEAKERS**
John Fognani (invited), Hayes and Boone, LLP, Denver, CO
Frank Holleman, Southern Environmental Law Center, Chapel Hill, NC

**11:00AM – 12:30PM**

**ETHICS: THE ATTORNEY-CLIENT PRIVILEGE IN THE TWITTER ERA**

A panel of attorneys knowledgeable of the many ambiguities present in social media will tackle the difficult ethical challenges faced daily by attorneys. Whether working in private practice, as in-house counsel, in academia, government, or non-profit organizations, today’s attorneys face an expanding and myriad number of ways in which they can knowingly, and unknowingly, violate the ethical rules, simply by using social media. Panelists will reinforce safe practices and procedures to ensure ethical rules are not sacrificed during social media use.

**SPEAKERS**
Kevin Kinnear, Porzak Browning & Bushong LLP, Boulder, CO
Sylvia Quast, U.S. Environmental Protection Agency, Region 9, San Francisco, CA
Heather Welles, O’Melveny & Myers LLP, Los Angeles, CA

*Additional speakers to be confirmed, speakers subject to change.

**1:00PM – 4:00PM**

**PUBLIC SERVICE PROJECT**

This year’s public service project will be a joint effort between participants of the 37th Water Law Conference and the 48th Spring Conference. A boxed lunch will be provided for all participants from 12:00 p.m. – 1:00 p.m. Transportation will be provided, departing the hotel promptly at 1:00 p.m. To volunteer for the public service project, sign up while registering.

**6:00PM – 8:00PM**

**RECEPTION**

Join us to catch up with old friends, become acquainted with new ones. This unique networking opportunity will include attendees of the 48th Spring Conference.
Enjoy everything exciting that Denver has to offer
• Take a dip in the indoor pool
• Experience a unique Denver dining experience at the downtown restaurants and cafes

Treat yourself to an exceptional experience at Grand Hyatt Denver. The AAA Four Diamond hotel welcomes you with beautifully designed guestrooms and premium amenities that make your stay easy and comfortable.

A block of rooms has been reserved at the Grand Hyatt Denver, 1750 Welton St., Denver, CO 80202, at the discounted rate of $199 plus tax for single/double rooms. A limited number of government rate rooms are also available for $178 plus tax (or the current government rate). A valid government ID will be required upon check in.

The deadline for room reservations at the discounted rate is Monday, March 4, 2019 at 5:00 p.m. (CST). To book our contracted rate, call reservations at (800) 223–1234 or the hotel directly at (303) 295–1234 or reserve online at https://bit.ly/2THKZTV or at https://bit.ly/2Ceq7MI for government employees. Be sure to mention the ABA Section of Environment, Energy, and Resources 2019 Water Law Conference.
The registration fee includes tuition and online course materials developed especially for this conference. In addition, your fee covers Tuesday’s continental breakfast, breaks, lunch, and reception and Wednesday’s continental breakfast, breaks, public service project, and reception.

**MORE WAYS TO SAVE**

**GROUP DISCOUNT**

Organizations registering three or more attendees are eligible for a group discount of 20% off each attendee’s registration. Please email environ@americanbar.org for more information.

**HOW TO REGISTER**

We encourage you to register online at ambar.org/seerspring. If you want to register by mail visit ambar.org/seerspring to download a registration form. Please mail the form with your check (payable to the American Bar Association) or credit card information to: American Bar Association, Attn: Service Center—Meeting/Event Registrations Department, 321 N. Clark St., Fl. 19, Chicago, IL 60654 or fax to our secure fax number: (312) 988–5850. All attendees must be preregistered for this conference.

**ATTENTION ABA MEMBERS**

If you are an ABA member but not a member of the Section of Environment, Energy, and Resources, your conference registration fee now includes Section membership, a $75 value! You will be automatically enrolled in the Section. ABA membership is a prerequisite of Section membership. If you are not already an ABA member, please call (800) 285-2221. Free Section membership only applies to individuals who have not been a member of the Section during the past two years.
ACHIEVING CARBON NEUTRALITY
Calculated with great care, the Section estimates that the average 48th Spring Conference attendee’s participation will generate approximately one metric ton of carbon emissions. Help offset your carbon footprint by adding the cost of a one-ton carbon credit from a verified offset project that will reduce greenhouse gases. Contributions to The Fund for Justice and Education (FJE) are tax deductible to the full extent allowed by law. Purchase your carbon offset when you register.

CONFERENCE SPEAKER SUPPORT
The Section strives to provide programming representing a unique depth of perspectives on all issues. We consistently work to include speakers on panels that represent tribal interests, nongovernmental organizations, and academia. To assist these speakers with the expense of attending conferences the Section offers a limited number of travel reimbursements. To ensure that the Section can continue to offer travel assistance to such speakers please consider donating to our Program Support Fund. Donations are tax deductible to the full extent allowed by law. Make your donation of $25 (or more) when you register.

EARLY BIRD DEADLINE
The deadline to receive the early bird registration rate for the 37th Water Law Conference is Monday, February 11, 2019. The final cutoff date for advance registration is Monday, March 4, 2019. After this date, registrations must include an additional $25 for processing.

CANCELLATION POLICY
Registrants who are unable to attend the conference will receive a refund less a $50 administrative fee if written notice of cancellation is received by Monday, March 4, 2019. No refunds will be granted after this date. Cancellations may be e-mailed to environ@americanbar.org or faxed to (312) 988–5572, Attn.: Program Assistant. Registration fees are not transferable to other Section or ABA programs. Substitutions for the program are acceptable. The ABA reserves the right to cancel any program and assumes no responsibility for personal expense.

TUITION ASSISTANCE
A limited number of registration fee waivers are available for government employees, public interest lawyers employed with nonprofit organizations, and academics. For programs with tuition costs over $500, qualifying lawyers will receive at least a 50 percent reduction in the course fee(s). To apply, complete the online application by visiting bit.ly/37WaterLawTuitionAssistance by Monday, February 4, 2019.

LAW STUDENT SCHOLARSHIP OPPORTUNITY
A limited number of scholarships are available to law students interested in attending the entire conference and helping ensure our conference runs smoothly. To be considered, you must be a member of the ABA Section of Environment, Energy, and Resources. Your application and resume must be submitted by Monday, February 4, 2019 to be considered. This scholarship does not include lodging or transportation. To apply, complete the application by visiting bit.ly/37WaterLawStudentScholar.

Questions?
Contact environ@americanbar.org.
CONFERENCE COURSE MATERIALS
Course materials and related background information will be provided to attendees online prior to the conference. You may wish to bring a device to view the materials on-site; complimentary Wi-Fi access will be available.

CLE CREDIT
The ABA directly applies for and ordinarily receives CLE credit for ABA programs in AK, AL, AR, AZ, CA, CO, CT, DE, GA, GU, HI, IA, IL, IN, KS, KY, LA, ME, MN, MS, MO, MP, MT, NH, NJ, NM, NV, NY, NC, ND, OH, OK, OR, PA, SC, TN, TX, UT, VT, VA, VI, WA, WI, and WV. These states sometimes do not approve a program for credit before the program occurs. This transitional program is approved for both newly admitted and experienced attorneys in NY. Attorneys may be eligible to receive CLE credit through reciprocity or attorney self-submission in other states. For more information about CLE accreditation in your state, contact Yujin Maeng at yujin.maeng@americanbar.org.

DRESS
Section conferences are business casual. Suggested dress includes slacks, skirts, polotype shirts or blouses, sweaters, and comfortable shoes. The hotel will be cool, so please pack a jacket or sweater.

DIETARY RESTRICTIONS
If you have any dietary restrictions, please indicate so during registration or by email environ@americanbar.org by Monday, February 4, 2019, so that your needs are noted.

DIETARY RESTRICTIONS
If any special arrangements are required for a person with a disability to attend this conference, please call Allison Read at (312) 988–5641 by Monday, February 4, 2019.

Questions? Contact environ@americanbar.org with all program-related questions.
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