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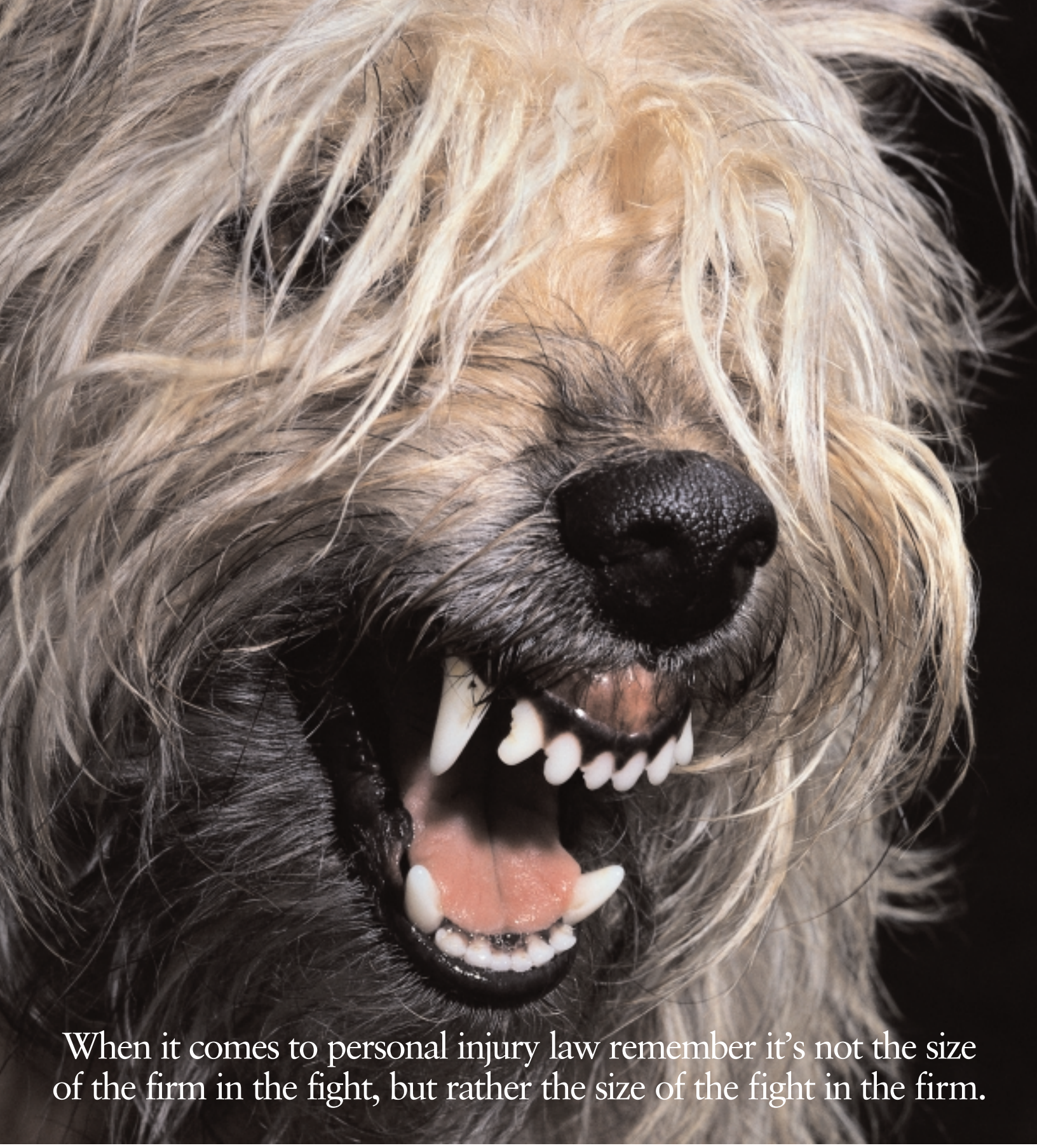
Special Water Law Issue



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MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Colorado River near Potash, Utah. Taken by first-time contributor, Joyce Guymon Smith, Blanding, Utah.

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2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
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The Utah Bar Journal

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Parched: The Future of the Glen Canyon Dam in a Drier West

by Bruce Clotworthy

Once fluctuating from a trickle to a torrent, the Colorado River has been subdued from its headwaters to its delta by water development. In just over one hundred years, we have turned her from one of the most uncontrollable rivers in the world into a tame workhorse. With all of the dams and diversions on the Colorado River, we have indeed harnessed the powers of the river for the growth of society in the West, but at what cost? Spectacular Glen Canyon was drowned, and, despite efforts to save them, the unique ecosystems of the Grand Canyon and the once vibrant wetlands of the Colorado River delta are in grave peril. Due to an unwillingness to take a comprehensive look at all of the available options, we are now faced with a water management crisis within the Colorado River basin. Any adequate analysis of these options must include some scrutiny of how the system would function without the storage created by the Glen Canyon Dam. The latest scientific information, considered in light of current conditions in the basin and the potential consequences of inaction, requires a new vision for a new century.

Climate Change and Drier Conditions

Despite the public perception that the current drier conditions are temporary, the United States Geological Survey is suggesting that the drought may actually be a return to normal, more arid conditions.[1] Tree ring records indicate that the flow of the Colorado River has historically averaged significantly less water than was divvied up between the parties who share that water.[2] To exacerbate this shortfall, the amounts promised to each user did not originally include considerations that protected the environment[3] and did not adequately consider Native American water rights.[4] Currently the demand for this limited resource far exceeds the supply needed to satisfy all of the claims on the river and demands are only expected to increase. The current water management crisis should be seen as an opportunity to reassess the way we manage water in the West, and update our current outdated water delivery system. Meeting the growing water needs of the West with a finite and potentially shrinking resource, and restoring the health of the Colorado's fragile ecosystems is the daunting challenge facing policymakers, water managers and everyone living within the river's influence. Changing conditions and social values call for a reevaluation of the management of the entire Colorado River basin in pursuit of a sustainable water delivery system. In this reevaluation, we must at least consider the evidence that the system could function more efficiently without the Lake Powell reservoir.

The Original Purposes of Glen Canyon Dam

The Glen Canyon Dam was born of the Colorado River Storage Project Act ("CRSP")[5] which was passed primarily to regulate the flow of the river and to provide storage in the upper basin that would fulfill Compact obligations to the lower basin states.[6] The Dam was built upriver from Lee's Ferry where releases from the upper basin storage are measured to see that they meet the allotted 82.3 million acre feet (maf) to be delivered to the lower basin and Mexico every ten years. Some analysts theorize that there would have been no need for the Glen Canyon Dam if they had merely changed the upper basin's delivery point from Lee's Ferry to the foot of the Hoover Dam and used Lake Mead to store the water.[7] Today, there would be even less of a need for the extra storage provided by the Glen Canyon Dam since nearly 9 maf of storage has been added above the Hoover Dam.[8] Considering the water wasted through evaporation and seepage on Lake Powell, the reservoir looks even less attractive as a storage facility under current drier conditions.[9]

The development of the Colorado River was based on a different set of conditions than currently exist. Western water law is based on a doctrine of prior appropriation[10] which historically

BRUCE CLOTWORTHY is currently the Legal Research Director at the Glen Canyon Institute.

favored private over public water use, held water rights to endure through beneficial use[11], and considered it reasonable to divert the entire flow of a stream.[12] Under prior appropriation, unused water was wasted water.[13] Fortunately, we now live in a society that places increasing value on public uses of water, has a definition of beneficial use that is increasingly concerned with waste[14] and developing laws that require some flow be left in rivers to comply with the Endangered Species Act ("ESA").[15] Despite these advances, management of western water under the pressures of current demands has not been kind to many species in the Colorado River Basin and in large part, still subscribes to the outdated policies instituted forty years ago.

ESA and the Colorado River Delta

Today, five of the eight fish species native to the Glen and Grand Canyons are endangered or extinct.[16] Some of the causes of these declines are changes in water temperatures, the introduction of exotic species, and the physical obstructions that the large western dams pose to spawning. All of these causes are the result of man's manipulation of the Colorado's flows. Programs such as the Lower Colorado River Multi-species Conservation Program ("LCR MSCP") are having some modicum of success in restoring endangered habitat, but critics of the LCR MSCP say that the program doesn't consider the health of the Colorado River delta in its programs.[17] With six major species recovery programs ongoing in the Colorado River basin, a systemic approach will be the only way to mitigate the ongoing degradation of species and ecosystems and a cooperative effort is crucial. Restoring the Colorado River to a more natural condition by eliminating Lake Powell should be considered as an alternative. The ESA indeed has the power to challenge the validity of a giant dam project as it did in the landmark case, *Tennessee Valley Authority v. Hill.*[18] In that case, the presence of the endangered snaildarter was enough to halt the construction of the mighty Tellico Dam. Today, the ESA may still be the strongest tool in challenging the Bureau of Reclamation to deauthorize Glen Canyon Dam or finding a better way to manage it to protect dwindling habitat.

A free flowing Colorado River in the Glen Canyon may do more than just restore the riparian ecosystems in the Glen and Grand Canyons. It may also provide more water for the decimated Colorado River delta. The delta wetlands have been reduced to only five percent of their original size due to a reduction of freshwater flows by as much as 75%. When the Hoover and Glen Canyon Dams were being filled, virtually no water reached the delta.[19] Deliveries of water to Mexico are guaranteed by treaty[20] but most of that water is allocated for agricultural use leaving little water for one of the most fragile and important ecosystems in the world. Both the United States and Mexico have recognized the delta area as a unique ecosystem that requires specific management.[21] One proposal for protecting this distinctive environment is to add a new minute (amendment) to the U.S./Mexico treaty that would require both countries to manage the River to maintain the health of the delta.[22] If this happens, shutting off the flow into the delta to refill Powell and Mead will be more difficult. Eliminating Powell as a storage facility may be one way to ensure some increase in flow to the delta. But even this may not ensure flows in the face of increased demands on the river.

Native American Issues

The future also holds potential legal challenges for Native American groups impacted by the problems facing management of the

Colorado's waters. Native American reserved water rights[23] have only recently begun to be addressed. There are ten tribes with vested water rights on the Colorado River. Demands by these tribes to honor reserved water rights will pressure the parties to the Compact to provide water for current uses and Native American rights. Furthermore, with many Native American cultural sites reemerging with dropping lake levels, new legal challenges similar to the fight over Rainbow Bridge[24] will also resurface. In that case, the court held that the reservoir could be filled despite the encroachment on Rainbow Bridge, a sacred Native American site. However, this ruling was based upon the assumption that "a full Lake Powell was required to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico." With new evidence that Lake Powell may not be necessary to fulfill delivery requirements, the door may be open to new legal challenges to protect places like Rainbow Bridge.[25]

Issues Surrounding the Refilling of Lake Powell Reservoir

There are many other legal challenges on the Colorado River basin that may test the validity of refilling Lake Powell. Issues dealing with the Clean Water Act, the Grand Canyon Protection Act, and the Endangered Species Act could potentially stall efforts to refill the reservoir above current levels (currently 38% of capacity). When Lake Powell was originally filled there was far less demand on the system than there is today. Lake Mead was at capacity, the Central Arizona Project was not on line, and there was little demand from the upper basin. Despite the lower demands on the river, it took 17 years to fill Lake Powell. It will be much more difficult to curtail enough demand to see it full again anytime soon, if ever. The question should be carefully asked whether refilling Lake Powell would constitute a major state action that would trigger NEPA analysis and a systemwide environmental impact study.

Furthermore, with the cost of water rising in the West, the market could push the value of the water being wasted to evaporation to a level that far exceeds any economic benefit from maintaining Lake Powell as a tenuous water storage facility. Rising water costs could push the idea of interbasin water marketing from the upper basin to the lower basin (prohibited by the Law of the River) into the courts.[26] With these changing conditions, it is time to reexamine the value and management of the most precious resource in the West. Any reexamination should consider all of the viable alternatives to the current management of the basin, including some study of the system without storage at Glen Canyon. However, there is a conscious and consistent resistance to such an examination.

The Appropriations Rider

Every year a rider latches onto the Interior Appropriations bill which reads, "No funds appropriated for the Department of the Interior by this Act or any other Act shall be used to study or implement any plan to drain Lake Powell or to reduce the water level of the lake below the range of water levels required for the operation of the Glen Canyon Dam."[27] This unfortunate language is but a small example of the unwillingness of lawmakers to adequately assess all of the alternatives to the current management of the Colorado River despite the obvious shortcomings of that management.

When it is full, the water level in Lake Powell reservoir is at 3700' above sea level. The water level currently sits at 3570' and continues to fall. Minimum power operating level, where the Glen Canyon Dam loses its capacity to generate electricity, is at 3490 feet. At 3371', the water would reach the bottom of the river outlets and the dam would not be able to release any water. At that level, Lake Powell would sit in a stagnant state known as deadpool. At deadpool, the riverbed of the Colorado could be dry through the Grand Canyon. Currently, the Bureau of Reclamation does not even have a contingency plan for the reservoir reaching this level despite the fact that under a continuation of the current drought conditions, it could reach that level in the near future.[28] This is largely a result of the appropriations rider's prohibitions on dam studies.

Conclusion

In light of the current conditions, some western water managers are calling for reforms of western water policy. Pat Mulroy, general manager of the Southern Nevada Water Authority, has been pushing Las Vegas to conserve water in creative ways from paying people to remove their lawns to pushing for a reduction in the amount of water release from the upper basin from 8.23 maf to 7.8 maf during times of drought.[29] Janine Jones of the California Department of Water Resources addresses the issue: "They divided up a very large pie, and we have a smaller pie."[30] Dennis Underwood places the current water management crisis in perspective by pointing out that, "The worst thing that could happen now is if this drought goes away and we don't do anything."[31] The current dry conditions in the West allow us as a society to reevaluate the efficiency of our current Colorado River management policies, and to take steps to ensure their sustainability.

Any analysis of the Colorado River basin should explore a broad range of management alternatives including the feasibility of deauthorizing the Glen Canyon Dam. This should consider new analysis of historical flows on the Colorado as well as future climate models. It should also take into account an economic analysis that looks at all of the costs and benefits of maintaining the dam in the long term including the following: the cost to endangered species, the cost of water wasted through evaporation and transpiration at rising rates being paid in western cities, the

inevitable costs of losing power generation during periods of extended drought, and the mounting sediment cleanup costs imposed by continued dam operation. Any comprehensive analysis of the management of western water must also consider new and better technology for storing water in arid climates and the implementation of better conservation measures.

The current conditions call for a reassessment of the entire system, including an environmental impact study for the operation of the Glen Canyon Dam that includes deauthorization as an option. A free flowing Colorado River will mitigate waste, benefit endangered species, and be a catalyst for long-overdue reform of western water policy. The situation at Glen Canyon provides us with an opportunity to evaluate change and develop a cooperative approach to future management of water in the West. It builds on the strengths of the past, while utilizing improved information and abilities. Liken it to the changes that have been made in industry – as new information becomes available, we improve and evolve; we don't stay locked into the historic way of doing business. This perspective should be applied to the Colorado River.

1. U.S. Department of the Interior, Climatic Fluctuations, Drought, and Flow in the Colorado River, USGS Fact Sheet 3062-04, June 2004 (*hereinafter* USGS Fact Sheet). This study indicates that the flow levels used to calculate the allocations under the Colorado River Compacts were made during one of the wettest periods in the last 450 years. The allocations of water under the Colorado river compacts are based on an estimated flow of over 16 million acre feet per year (mafy) of water when a more realistic long term analysis puts the flow at around 13mafy.
2. The Colorado River water is divided up among seven states and Mexico according to a series of acts of Congress, treaties, Supreme Court decisions, and state laws that have become collectively referred to as "the Law of the River." A brief summary can be found at the Bureau of Reclamation website at http://www. usbr.gov/lc/region/g1000/lawofrvr.html (last visited Oct. 6, 2004). Other laws such as the Endangered Species Act ("ESA"), 16 U.S.C. 15311544 (1994); the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997); and the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370d (1994 & Supp. III 1997); as well as Native American water rights are becoming increasingly important parts of the Law of the River and in the management of western water.
3. Most of the major environmental laws were not in place as the "Law of the River" was developing. If laws like the ESA, NEPA, or CWA had been in place when the compacts allocated water to various states, the Colorado would probably look vastly different today.
4. Both the Colorado River Compact (CRC) and the Upper Colorado River Basin Compact (UCRBC) limited language in the compact to Article VII which stated that "nothing in this compact shall be construed as affecting the obligations of the United States to Indian Tribes." CRC, 70 Cong. Rec. 324 (1928). UCRBC, Act of Apr. 6, 1949, Pub. L. No. 81-37, 63 Stat. 31 (1949).
5. Colorado River Storage Project Act of 1956, Pub. L. No. 84-485, 70 Stat. 105 (codified as amended at 43 U.S.C. §§ 620-620o (1994).
6. The generation of hydroelectric power and recreation were secondary benefits. *Id.*
7. Scott K. Miller, *Undamming Glen Canyon: Lunacy, Rationality, or Prophecy?,* 19 Stan. Envtl. L.J. 121, *at* 183.
8. *Id.* At 178.
9. *Id.* at 176. Draining Lake Powell would eliminate the loss of approximately 1maf per year.
10. *See,* Dan Tarlock, *The Future of Prior Appropriation in the West,* 41 Nat. Resources J. 769. Under the doctrine of prior appropriation, water users with the oldest priority dates have senior rights and will get their entire allotments in times of shortage. Some critics say that these "use it or lose it rights" encourage inefficient uses such as marginal agriculture and these inefficient uses often have an adverse effect on aquatic ecosystems.
11. For a discussion on the expanding definitions of beneficial use and waste, *see* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use,* 28 Entl. 919. "Beneficial use, without waste, is the basis, measure, and limit of a water right."
12. Adrian N. Hansen, *The Endangered Species Act and Extinction of Reserved Indian Water Rights,* 37 Ariz. L. Rev. 1305, at 1314
13. Chris Bromley, *A Political and Legal Analysis of the Rise and Fall of Western Dams and Reclamation Policy,* 5 U. Den. Water L. Rev. 204, 220;
14. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law,* 61 U. Colo. L. Rev. 257. "Only as more demand is placed on the river is there a need to constrain uses in order to meet the purposes of an anti-waste policy. Thus the very essence of a law of beneficial use implies revisions over time as needs and circumstances change."
15. *Rio Grande Silvery Minnow v. Keys,* 333 F.3d 1109 (10th Cir. June 12, 2003). Holding that the Bureau of Reclamation had the discretion to reduce previously contracted water deliveries to comply with the ESA and that the diversion of water for species protection was "beneficial use".
16. Miller, *supra* note 8, at 196.
17. Ethan Shaner, *Balancing Current and Future Demands for Colorado River Water With the Requirements of the Endangered Species Act,* 28 Wm. & Mary Envtl. L. & Pol'y Rev. 951.
18. 437 US 153 (1978).
19. 14 Colo. J. Int'l. L.& Pol'y 241.
20. Treaty Respecting the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3 & Nov. 14, 1944, U.S.-Mex., 59 Stat. 1219 [1944 Water Treaty].
21. International Boundary and Water Commission, *Conceptual Framework For United States – Mexico Studies for Future Recommendations Concerning The Riparian and Estuarine Ecology of the Limitrophe Section of the Colorado River and its Associated Delta* (Dec. 12, 2000), *available at* http://www.ibwc.state.gov/html/body_minutes.HTM (last visited Oct. 9, 2004).
22. *Id.*
23. In *Winters v. United States,* 207 U.S. 564 (1908), the court held that the reservation of land for tribes also implied the reservation of water rights necessary to make that land Productive. *See* Adrian Hansen, *The Endangered Species Act and the Extinction of Reserved Indian Water Rights on the San Juan River,* 37 Ariz. L. Rev. 1305.
24. *Badoni v. Higginson,* 638 F.2d 172 (10th Cir. 1980).
25. Miller, *supra* note 7, at 153.
26. Hansen, *supra* note 23, at 1337.
27. Pub. L. No. 106-113, § 1000(a)(3) (1999) (incorporating by reference H.T. 3423, 106th Cong. § 135 (1999).
28. I have been told that the Bureau of Reclamation is developing such a plan, but I have not seen a draft.
29. *Colorado River States Talking About Stemming Drop In Lake Powell*, Las Vegas Sun, Aug. 20, 2004.
30. *As Reservoirs Recede, Fears of a Water Shortage Rise*, Los Angeles Times, Oct. 3, 2004.
31. *Id.*

Miccosukee: *Can the Mere Transport of Unaltered Water Violate the Clean Water Act?*

by Rosemary J. Beless

Although the Clean Water Act (CWA) has been on the books since 1972, we are only now addressing a comprehensive enforcement question which may have serious consequences for major water projects in the arid western states. Most of us would agree that a water district violates the CWA if it actively discharges a pollutant from a point source into a water of the United States without a permit under the CWA. But what if the water district, in administering its flood control or water distribution duties, merely transports unaltered water from one water body to another? Is that a violation of the CWA? What if both the diverted and the receiving bodies of water are defined as "navigable waters of the United States," but the diverted water includes pollutants not naturally found in the receiving water? Should the district be required to treat the diverted water or be prohibited from transporting the water necessary for use in municipalities, agriculture, and industry or for flood control in populated areas?

This is the question, involving enforcement of the CWA, which the United States Supreme Court was asked to answer in *South Florida Water Management District v. Miccosukee Tribe of Indians,* 124 S.Ct. 1537 (March 23, 2004).

The Purpose of the Clean Water Act

The Federal Water Pollution Control Act, now known as the Clean Water Act, was enacted in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits "the discharge of any pollutant by any person" unless done in compliance with the CWA. § 1311(a). Pursuant to the National Pollutant Discharge Elimination System (NPDES), dischargers must obtain permits limiting the type and quantity of pollutants they can release into waters of the United States. § 1342. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" (§ 1362(12)), and defines "point source" as "any discernible, confined and discrete conveyance" "from which pollutants are or may be discharged" (§ 1362(14)). Under the CWA, "pollution" is the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Furthermore, a "pollutant" can include almost any addition to water resulting from human activity, including heat, sewage, chemical waste, biological materials, rock, sand, industrial, municipal, or agricultural waste. § 1362(6).

Consequently, under these definitions, there is generally no dispute that an NPDES permit is required when a man-made (1) pollutant is (2) discharged (3) from a point source (4) into a navigable water of the United States. 33 U.S.C. §§ 1311, 1342. Even a man-made temperature change in the water can be defined as a "pollutant" which requires an NPDES permit. § 1362(6). Moreover, courts have determined that naturally produced waste materials (such as shellfish excrement) are not pollutants under the CWA, unless human activity alters the waste materials (shellfish "heads, tails, and internal residuals" dumped back into waters after seafood processing are pollutants). *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res. Inc.,* 299 F.3d 1007, 1017 (9th Cir. 2002).

Can the Transport of Unaltered Water Require an NPDES Permit?

It is a more difficult question when water is not altered chemically, physically, biologically, or radiologically, by man, but is merely transported, by man, from one water body to another. Does it matter if this diverted water would have eventually made its way naturally to the receiving water? And what if the water is transported, in its unaltered state, to a receiving water which it would never have reached without man's intervention? Furthermore, what if the water, transported by man in its unaltered state from the diverted water body, degrades the quality of the receiving water body?

These are questions of great concern to water users in the arid

ROSEMARY J. BELESS is the head of the Environmental/Natural Resources Law Group at the law firm of Fabian & Clendenin in Salt Lake City.

western states which are dependent upon complex transbasin diversions of water to their population centers. The permitting of the diversion of unaltered water could affect flood control agencies, dam operators, municipalities, water districts, and almost any entity which manages water flows.

***Miccosukee*: Transporting Water in the Everglades**

It was the diversion of water from a flood-control canal into the Florida Everglades that posed these questions to the United States Supreme Court. In *South Florida Water Management District v. Miccosukee Tribe of Indians,* 124 S. Ct. 1537 (March 23, 2004), the Miccosukee Tribe of Indians and an environmental group, Friends of the Everglades, initially brought a CWA citizens' suit action arguing that, consistent with Section 301(a) of the CWA, the transport of water by the South Florida Water Management District (the "District") from the District's collection canal (with flows which are characterized by higher concentrations of phosphorous) to a pumping station and into an undeveloped wetland in the South Florida Everglades, triggers an NPDES permit requirement pursuant to Section 402 of the CWA.

In an unpublished decision, the District Court granted summary judgment to the Tribe and Friends. In turn, the Eleventh Circuit, 280 F.3d 1364 (2002), affirmed the permitting requirement, yet also specifically acknowledged that the pump station did not actually add any pollutants to the water being conveyed. The Eleventh Circuit held that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." 280 F.3d at 1368.

On March 23, 2004, the United States Supreme Court issued its long-awaited decision in *Miccosukee.* In an opinion, drafted by Justice O'Connor, the Court vacated and remanded the Eleventh Circuit's decision, while evaluating three separate legal arguments raised by the petitioners.

The facts of the *Miccosukee* case make an enforcement action under the CWA difficult. There is no "evil polluter" in this case. The Indian tribe and environmental organization want to preserve the ecosystem in an undeveloped wetland, which is a remnant of the original South Florida Everglades. The District wants to protect urban areas from flooding and to provide water to preserve the wetland habitat in the Everglades.

The District is the operator of the Central and South Florida Flood Control Project which was established by Congress in order to address drainage and flood control problems in reclaimed portions

of the Everglades. The District's canal collects groundwater and rainwater from urban, agricultural, and residential areas. Then, the District's pump station moves water from the canal into the undeveloped wetland in the Everglades. The District impounds the water in this wetland area in order to keep the water from flowing into the ocean and to preserve the wetland habitat. Absent the District's intervention, the water would flow backwards into the canal and flood the populated urban, agricultural, and residential areas. This backward flow is prevented by the District's levees. The combined effect of the pump station and the levees is to artificially separate the areas drained by the canal from the wetland in the Everglades, which would otherwise be a single wetland.

Although the District merely transports the unaltered water through the canal and pump station to the wetland, the District's conveyance system has an environmental impact on the wetland ecosystem. Rain falling on the areas drained by the canal absorbs contaminants, including phosphorous from fertilizers, before entering the canal. When that water is pumped across the levees, the phosphorous alters the wetland ecosystem's balance, stimulating the growth of algae and plants foreign to the Everglades.

It was this change in the character of the ecosystem in the Everglades that caused the Tribe and environmental group to file suit under the CWA against the District. Although the District did not add a pollutant to the water flowing into the wetland, the District did divert water, containing high levels of phosphorous, into the wetland, thereby changing the ecosystem in the wetland. The case before the Court was whether the mere transport of canal water to the wetland was the discharge of a pollutant from a point source into navigable waters of the United States and would, therefore, require an NPDES permit.

In its response to this question, the Court did not, as many had hoped, propound a general rule to be followed in all "water transport cases" in the future. However, the Court did give some guidance in that it stated that one who merely transports unaltered water *could* potentially be subject to an NPDES permit. The Court then remanded the case for findings regarding the specific nature of the water bodies: are the diverted (canal) and receiving (wetland) bodies of water "meaningfully distinct" bodies of water or are they hydrologically connected and basically indistinguishable?

The Court found that there was a genuine issue of material fact as to the character of the water bodies and that such factual issue must be resolved by the lower court. The District and the United States had argued that the canal and the wetland area were not distinct water bodies but were two hydrologically indistinguishable parts of a single water body. The Tribe disputed that factual premise.

The Supreme Court treats the water bodies at issue in the case as unique resources with specific characteristics which will be determinative of the enforcement question in this case. Like real property, each water body has its own unique qualities, which must be considered, in deciding the need for an NPDES permit.

The Court further implies that if the canal water and the wetland are hydrologically connected and basically one indistinguishable body of water, then the District, in its transport of the canal water into the wetland, has done nothing that would not have occurred naturally. Therefore, an NPDES permit is not required because the District has not changed the natural course or eventual quality of the water. However, if the canal is a distinct and different water body from the wetland, then the District, in transporting canal water to the wetland, has changed the water quality and character of the wetland, and an NPDES permit is required.

In the course of vacating and remanding the Eleventh Circuit's decision, the Supreme Court also addresses the three legal arguments raised by the District and the Federal Government as an *amicus* supporting the District.

A Point Source Can Discharge a Pollutant Without Generating the Pollutant

First, according to the Tribe, the District must acquire an NPDES permit because its pump station moves phosphorous-laden water from the canal into the wetland. The District does not dispute that phosphorous is a pollutant or that the canal water and the wetland are "navigable waters" within the meaning of the CWA. The District does, however, argue that its operation of the pump to transport the water from the canal into the wetland does not constitute "discharge of [a] pollutant" within the meaning of the CWA. The District argues that the NPDES program applies to a point source "only when a pollutant originates from the point source," and not when the pollutant originates elsewhere and is merely passing through the point source. 124 S.Ct. at 1543.

The Court finds the District's argument untenable and rejects the mere "pass-through" argument. The Court states that a point source is, by definition, "a *conveyance*." The definition of "point source" at § 1362(14) makes it plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to the waters of the United States. Indeed, the examples of point sources which are listed in the CWA include water conveyances, such as pipes, ditches, tunnels, and conduits. *Id*. These objects do not generate pollutants, but they transport water which may contain pollutants.

Moreover, the Court notes that one of the primary goals of the CWA is to impose NPDES permitting requirements on municipal wastewater treatment plants. For example, § 1311(b)(1)(B) establishes a compliance schedule for publicly-owned treatment works. Municipal wastewater treatment plants do not generate pollutants, but they treat and discharge pollutants added to the water by others. If the Court were to endorse the District's argument that the mere "pass-through" or transport of unaltered water cannot be the discharge of a pollutant from a point source, then the NPDES program would have virtually no regulatory authority over municipal wastewater treatment plants. Clearly, this is not the intent of the CWA. Therefore, the Court concludes that the "discharge of a pollutant" under § 1362(12) can include point sources that do not themselves generate pollutants.

The Government's "Unitary Waters" Argument

Next, the Court addresses the "unitary waters" argument generally advanced by the Federal Government in its *amicus* brief supporting the District. In its unitary approach, the Government contends that all water bodies that fall within the CWA's definition of "navigable waters" (that is, all "waters of the United States, including territorial seas," § 1362(7)) should be viewed as one unit for purposes of NPDES permitting requirements. In its simplest form, the unitary theory includes all waters of the United States as just one big unit, or bathtub, full of water. Because the CWA requires NPDES permits only when there is an *addition* of a pollutant to "navigable waters," the Government argues that a permit is not required when water from one navigable body is discharged, unaltered, into another navigable water body. Because both the diverting and the receiving bodies of water are part of the same unit of "navigable waters," it does not matter that one water body is polluted and the other is pristine, and that the two would not otherwise mix. Under the Government's "unitary waters" approach, the District's canal and pump station would not need an NPDES permit because the District is merely transporting water from one part of the "navigable waters" to another part of the "navigable waters."

The Court notes that the "unitary waters" approach conflicts with various sections of the CWA, current NPDES regulations, and statements from EPA's briefs in other CWA cases. Since neither the District nor the Government raised the unitary waters approach before the Court of Appeals or in their briefs respecting the petition for certiorari, the Court declines to resolve the unitary waters issue at this time but states that the unitary waters argument will be open to the parties on remand.

The Effect Upon the Arid Western States

Third, the Government, and numerous *amici* supporting the District, warn that requiring an NPDES permit for every engineered diversion of one navigable water into another would cause thousands of new permits to be issued, particularly in the western states, where water supply networks often rely upon engineered transfers among various water bodies. The Government and the other *amici* warn that the requirement of NPDES permits for such transfers of unaltered water would raise the costs of such transfers and virtually prohibit water distribution in the west. Various *amici* also argue that requiring NPDES permits for such water transfers would usurp each state's right to allocate water within its jurisdiction. However, the Court suggests that if such permitting authority is necessary to protect water quality, then, perhaps, the states or EPA could regulate such water distribution programs with general, rather than individual, permits. *Id*. at 1545.

The Characterization of the Two Water Bodies

Finally, the District and the Government argue that the canal and the wetland are not distinct water bodies at all, but are two hydrologically indistinguishable parts of a single water body. The Tribe does not dispute that if the canal and the wetland are parts of the same water body, then pumping water from the canal into the wetland cannot constitute an "addition" of pollutants. For example, if the cook ladles soup from one pot and puts it back in the same pot, the cook has not added anything to the soup. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 492 (2nd Cir. 2001). However, the Tribe argues that the canal and the wetland are *two distinct* water bodies and therefore "two pots of soup, not one." 124 S.Ct. at 1545.

The Court notes that because the soils in the Everglades are extremely porous, water can flow easily between groundwater and surface water to the extent there may be some significant mingling of the two waters. *Id*. at 1546. Such an argument would support the District's theory of a single water body. However, the parties cannot even agree about how the relationship between the canal and the wetland should be assessed. While the Tribe focuses on the differing "biological or ecosystem characteristics" of the two bodies of water, the District emphasizes the close hydrological connections between the two. *Id*.

Indeed, the Supreme Court finds that the District Court applied an entirely different test in stating that the two water bodies were distinct because the transfer of water from the canal to the Everglades would not have occurred naturally. The Supreme Court concludes that the District Court applied its test prematurely

and that further development of the record is necessary to resolve the dispute over the distinction between the canal water and the Everglades. The Supreme Court concludes that if the District Court finds that the canal water and the Everglades are not "meaningfully distinct water bodies," then the District need not obtain an NPDES permit for its pump station.

Tunnels as Point Sources

The *Miccosukee* case is the latest in a recent line of cases determining NPDES permitting obligations in water transport and management activities. In *Catskill Mountains v. City of New York,* the Second Circuit held that a tunnel by which the City of New York transported its drinking water from a reservoir to a creek was a "point source" under the CWA, regardless of whether the tunnel itself created the pollutants which were discharged into the creek, because the tunnel conveyed the pollutants from their original source to the navigable water. 273 F.3d 481 (2001). The Second Circuit found that the reservoir and the creek were unrelated bodies of water. The tunnel was the "point source" not necessarily because it created the pollutants, but because it was the source from which the pollutants were directly introduced into the receiving water. *Id*. at 493. In western states, drain tunnels with the sole purpose of transporting water, such as the Leadville Drain Tunnel in Lake County, Colorado, and the Ontario No. 2 Drain Tunnel in Wasatch County, Utah, have also been characterized as "point sources" requiring NPDES permits.

Water for Snow-Making

The First Circuit reached a similar conclusion in *Dubois v. U.S. Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996). In that case, a ski resort operator pumped water, without an NPDES permit, from a polluted river into a less-polluted pond in order to operate its snow-making equipment. The First Circuit held that the transfer of polluted water from one water body to another distinct water body constituted an "addition" of pollutants to the receiving water body. Although water naturally flowed from the pond into the river, water would never have naturally flowed from the river into the pond. That difference made the pumping an "addition." 102 F.3d at 1296-97.

Dams

In contrast, in two earlier dam cases, *National Wildlife Federation v. Gorsuch,* 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumer Powers,* 862 F.2d 588 (6th Cir. 1988), where the courts gave deference to EPA's interpretation of the NPDES program, the release of water from the dams did not constitute a discharge of pollutants and, therefore, did not require an NPDES permit.

Groundwater from Coal Bed Methane Extraction

A very significant "pass-through" case for the western states is the Ninth Circuit's decision in *Northern Plains Resource Council v. Fidelity Exploration and Development Co.,* 325 F.3d 1155 (2003). When a CWA citizens' suit was filed against a company which discharged groundwater derived from its coal bed methane extraction activities in Montana, the Ninth Circuit held that the extraction company was required to obtain an NPDES permit for producing the unaltered groundwater in association with methane gas extraction and discharging the groundwater into a river. 325 F.3d at 1157-58. While the extraction company did not add any chemicals to the produced groundwater before discharging it into the river, the groundwater in its natural state contained high suspended solids, heavy metals, and various other contaminants at levels far higher than those found in the receiving river. Consequently, the Ninth Circuit found the coal bed methane groundwater to be distinctly different from the receiving river water to which it was added.

The Ninth Circuit held that the discharged coal bed methane groundwater was a "pollutant" within the meaning of the CWA and that it was discharged from a point source into a navigable water without an NPDES permit. *Id*. at 1160. In this case, without a doubt, the groundwater and the river were two distinct, separate water bodies. The "saltiness" of the coal bed methane groundwater caused potential hazards for its use as irrigation water. The Ninth Circuit focused on the fact that the coal bed methane groundwater, though unaltered, seriously degraded the receiving river water to the detriment of farmers and ranchers who had historically irrigated crops with the river water. *Id*. at 1162. On October 20, 2003, the Supreme Court denied the extraction company's petition for a writ of certiorari.

Conclusion

The definitive decision on the requirement of an NPDES permit for the transport or "pass-through" of unaltered water did not occur in *Miccosukee*. However, based on the Supreme Court's guidance in *Miccosukee* and the Ninth Circuit's conclusion in *Fidelity*, it appears, at this point in time, that, under certain circumstances, the mere transport of unaltered water from the diverting water body to the receiving water body could require an NPDES permit. *See Miccosukee*, 124 S.Ct. at 1543. If the unaltered water is diverted into a receiving water body where it would not naturally flow and the diverted water degrades the receiving water body, an NPDES permit is likely to be required because, under these circumstances, the mere transport of water is a man-made alteration of nature. *See Fidelity*, 325 F.3d at 1162-1164.

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UT130

Let It Flow: Wading Through Utah's Instream Flow Statute

by Alan Matheson, Jr.

I. INTRODUCTION – STREAMS AT RISK

Autumn touched the September afternoon on Southern Utah's Boulder Mountain. The sun ignited gold-spangled aspen groves. The breeze carried a faint bite, portending the season's change. My cousin Mark and I set up camp in a clearing near the headwaters of a small creek. From its alpine birthplace, the creek cascaded to the desert below, joined with the Escalante as sculptor of fanciful canyons, and added its voice to the thunderous choir of the Colorado River. The pristine stream was clean, clear and cold, an unspoiled condition increasingly rare outside the world of memory or imagination.

Taking advantage of the lingering daylight, we rigged our fly rods and set out after one of the few remnant populations of native Colorado River cutthroat trout. Many of these wild trout likely had never seen an artificial fly, and readily yielded to temptation. We admired their brilliant coloring and vivid markings, and then gently released them to the current where they flashed to cover. Only the fading light pulled us from the water.

The night was dark and clear. From our perch at 8000 feet, the starry display was stunning and humbling; conditions that inspired introspection. We discussed the legacy we would leave our children. In particular, we wondered whether our children and grandchildren would have the opportunity, as we had, to pursue native trout in unsullied, free-flowing waters.

The concerns underlying the question raised on Boulder Mountain are real. Utah is the second driest state in the nation. Our water supplies are limited and not always directed to their highest use. Our population continues to grow and, by 2020, Utah will have a million new residents, all needing water. The consequences are predictable: supplies are stretched, pressuring water providers to pursue expensive new development; acrimony among water users is increasing; and natural stream systems are further degraded.

Over 15 years ago, the Utah Division of Wildlife Resources determined that 53 percent of the state's 6,200 miles of stream fisheries "suffer moderate to total losses of fishery potential annually by dewatering. Of the affected miles of stream, more than half lose from 60 percent to 100 percent of their natural flow by diversion."[1] The trend since then is not favorable. Achieving balanced water management that addresses natural systems along with consumptive needs will require creativity, collaboration, and commitment to explore reasonable policy changes.

II. RECOGNIZING STREAM FLOW VALUES UNDER WESTERN WATER LAW

One of the strengths of our legal system is its ability to adapt to meet society's changing demands. This process is beginning to occur in western water law.

Evolution of the Prior Appropriation System

Water allocation decisions are made by the states. Since early settlement, those arid and semi-arid states west of the 100th meridian have resolved disputes among water users under the prior appropriation system. Although application of the system may vary in detail, the fundamental elements prevail throughout the West.

The prior appropriation system was born in mining camps in the mid-1800's. To obtain a water right, an appropriator had to divert water from a stream and put it to "beneficial use," a lenient standard encompassing virtually any use of water outside the streambed. The first person to make beneficial use of the water held the senior right. The traditional prior appropriation system granted no rights to water left in the stream. In fact, the system allowed – even encouraged – the complete dewatering of the natural watercourse. A water right holder who did not exercise

ALAN MATHESON, JR. is the Director of Trout Unlimited's Utah Water Project, an initiative to protect and restore Utah's coldwater fisheries. He previously practiced water law in Arizona.

his right and left his allocation in the stream lost that right.

The prior appropriation system has served adequately as a water-allocation mechanism. Significant, unconsidered changes to the system could be economically destabilizing and unfair to those who hold senior water rights under existing law. There is a continuing role for prior appropriation. Nevertheless, as our economy, social values and scientific understanding have developed, there is increasing recognition that the traditional prior appropriation system fails to meet all demands for balanced water management, such as allocating water to its highest-valued uses and protecting important uses of water within the stream channel. Accordingly, most states, including Utah, have taken modest steps to tailor the prior appropriation system to meet modern demands, but they have further to go.

The Value of Instream Flows

Because the notion that any water left in a stream is wasted persists in certain corners, it is useful to outline some of the benefits of instream flows. Nearly a century ago, Justice Oliver Wendell Holmes, writing for the Supreme Court, said:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.
>
> . . .The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."[2]

As the Supreme Court recognized, flowing rivers provide important benefits. Our water management strategy should reflect those benefits. Of course, not all flows should be protected nor all withdrawals stopped. Our economy and very lives depend on a clean, adequate water supply for domestic, industrial, and agricultural uses. We need reasonable water development. In addition, we must also recognize the interests of existing water right holders who have obtained valid and valuable rights under prevailing law. We will all be poorer; however, if we pursue water development without regard for the economic, environmental and quality-of-life values of reasonable stream flows.

Economic Value

Recently, the National Research Council and many distinguished economists have concluded that resources such as water have "nonuse" (or, more accurately, "nonconsumptive use") values and that these values are as real as traditional commodity production values.[3] A year ago, more than 100 economists, including two Nobel Prize winners, signed a letter stating that protecting and enhancing the West's natural environments would strengthen the ability of western communities to generate more jobs and higher incomes. They concluded that the West's natural environment is, arguably, its greatest, long-run economic strength.[4]

Support for this conclusion is found in a 1990 study that compared the marginal value of water left in streams to enhance downstream fisheries with the marginal value of water withdrawn for irrigation. The study, conducted by the U.S. Department of Agriculture, reviewed all 99 major river basins in the contiguous United States and concluded that the marginal value of water for recreational fisheries exceeds its marginal value for irrigation in 52 of the 67 watersheds in which irrigation occurs.[5]

Similarly, a recent survey of studies that addressed the economic benefits that have been or could be derived from the protection of instream flows concluded: 1) The studies "strongly suggest that protection of instream flows has the potential to produce significant economic benefits;" 2) "[T]hough cost determinations are always location-specific, the costs of providing water to fulfill instream flow requirements are relatively insignificant given the benefits produced;" and 3) "[A] failure to protect instream flows could have devastating impacts on any rural economy dependent on water-oriented recreation and tourism."[6]

Improved water quality associated with healthy flows also pays significant economic dividends in the form of reduced water treatment and infrastructure maintenance costs and increased soil productivity.

Environmental Value

The environmental value of stream flows should be self-evident. As Leonardo da Vinci said, "Water is the driver of Nature." Decades of habitat alteration and dewatering have led to the extinction or near-extinction of many aquatic species. Fully 35 percent of species listed pursuant to the Endangered Species Act are aquatic. More than 20 native western fishes have become extinct in the past century, and 100 more are considered threatened, endangered, or of special concern, including Utah's state fish, the Bonneville cutthroat trout. Loss of all these species would mean destruction of 70 percent of all fish species native to the lands west of the Rocky Mountains.[7] The wildlife benefits of healthy stream habitat are not limited to aquatic species. In fact, 80% of wildlife in Utah spends at least a portion of its life cycle in riparian areas.

Healthy flowing streams provide crucial environmental services, all of which profit man and nature. Natural flows recharge groundwater – a critical function in many parts of the West where water tables are declining – and produce cleaner water, which improves public health. In addition, flowing streams provide other critical services such as sediment and nutrient transport and channel, temperature, floodplain and habitat maintenance.

Quality-of-Life Value

Rivers provide other benefits that are less tangible, but no less real. Henry David Thoreau said: "Who hears the rippling of rivers will not utterly despair of anything. We go to the river's edge for comfort, spiritual renewal, meditation, solitude; we go to the river to feel and know the continuance of life." All of us have cherished memories of rivers – maybe a family picnic by a creek, skipping rocks with kids, fishing with an old friend, an exhilarating float trip, or a quiet moment on a stream bank contemplating life's deeper questions. Too often trivialized, these experiences are essential to our physical, emotional and even spiritual health in a loud, rushed, uncompromising world. Flowing water is the music of renewal.

III. INSTREAM FLOW LAWS IN THE WEST

If we accept that flowing streams have value, that value should be reflected in law. One of the steps states have taken to mitigate the potentially destructive impacts of the traditional prior appropriation system is to create instream flow rights that are managed within the priority structure of that system.

Neighboring States

All but three western states – New Mexico, North Dakota and Oklahoma – provide some instream flow protection. Stream flow protection programs generally take one of three forms: legislatively established instream flows; agency actions to create or enforce instream flow rights; or private market mechanisms. The details and effectiveness of those programs vary greatly.

A few examples demonstrate the wide differences in approach. The legislatures in Montana, Kansas and Idaho establish or approve agency recommendations for instream rights. In 1969, Montana created a dozen such rights for blue-ribbon trout streams. In Oregon, the state water agency has established minimum flow levels for over 1,400 stream reaches and limits other diversions that would reduce flows below those levels. Arizona's administrative program allows public and private entities, including federal agencies, to hold instream flow rights just as they can hold consumptive rights. In Colorado, the Colorado

Water Conservation Board, a state agency, is the only entity entitled to hold flow rights and the Board has authority to actively pursue those rights for the enhancement of fishery and other riparian values. To date, the Board has obtained over 1,350 instream flow rights, although most are junior in priority. Montana has a leasing statute that allows water right holders to lease any portion of their rights to another person or entity for instream flow use for a period up to 30 years. Pursuant to that statute, private organizations have leased water from willing farmers and ranchers to protect important fisheries and sustain local economies, while supplementing the income of the water right holders. The water right holders maintain ownership of the right during the lease term.

As instream flow rights become more common in the West, it is apparent that they can work effectively within the prior appropriation system.

Utah's Statute

The Utah Legislature passed an instream flow statute in 1986 and made substantive amendments in 1992.[8] In its current form, the statute authorizes the Division of Wildlife Resources and the Division of Parks and Recreation to file applications to change existing consumptive uses to instream uses for the propagation of fish, public recreation, or the reasonable preservation or enhancement of the natural stream environment. Such applications may be filed for changes on: 1) perfected water rights presently owned by either division; 2) perfected water rights purchased by either division with funds appropriated by the Legislature for that purpose; 3) perfected water rights acquired by either division through lease, agreement, gift, exchange or contribution; or 4) water rights appurtenant to real property acquired by either division. Neither division may appropriate unappropriated water for the purpose of providing instream flows or acquire water rights by eminent domain. The statute also outlines a procedure for identifying the scope and purpose of the instream flow right and for perfecting that right.

In reviewing an application to change a consumptive use to an instream flow use, the State Engineer must apply the standards of Utah Code Ann. § 73-3-8(1), including that the proposed use will not impair existing rights and the application was not filed for purposes of speculation or monopoly.[9] Any right successfully changed to an instream use retains the priority date of the original appropriation. As with any other water right, an instream right will not be honored until all senior rights are satisfied.

In its eighteen years of existence, the instream flow statute has been employed to establish only four small instream rights, all donated to the Division of Wildlife Resources as elements of

larger agreements. Utah lags behind most neighboring states in protecting stream flows.

IV. ENHANCING UTAH'S INSTREAM FLOW STATUTE

Utah's instream flow statute includes significant restrictions that limit its effectiveness. Only two state agencies can hold instream flow rights and they cannot purchase rights for instream flows without a specific appropriation from the Legislature for that purpose. The Legislature has never made such an appropriation. The statute also precludes water right holders from using their water in the stream or obtaining compensation for allowing others to do so. Thus, a farmer cannot use a portion of his water right to develop a stream fishery to which he could sell access. A responsible amendment to the instream flow statute is in order.

In its last session, the Utah Legislature created a two-year Water Issues Task Force to review and recommend legislation on a number of complex issues, including instream flows. This approach is sound because it will allow all interests a careful evaluation of difficult issues outside the stress of the Legislative session. Some elements of the existing statute should be held inviolate. For instance, participation in instream flow transactions should remain voluntary. The State Engineer must retain oversight authority to ensure any instream flow transactions are in the public interest. Retaining protection against impairment of existing rights and the prohibition against obtaining instream rights through eminent domain is also critical. Beyond that, the Task Force should be open to amendments, perhaps drawing on lessons learned in other states.

The Task Force should consider authorizing additional entities to hold instream rights. They should also consider eliminating the de facto Legislative veto over water right purchases by state agencies for instream flows. Moreover, it may be appropriate to permit water right holders to sell, lease or donate – on their terms – an unused portion of their water right for instream uses, as long as the transaction does not impair other rights. This approach would allow water right holders to obtain financial benefit, avoid forfeiture of the unused portion of their right, and sustain fishery or other riparian values that could be lost for years if the stream went dry. Done right, modest amendments to Utah's instream flow statute will benefit landowners, downstream water users who will get cleaner water delivered with more flow, riparian habitat, fish and wildlife, and the people who care about these important resources. The Task Force will be successful if it stays above the political fray, draws on input from all of Utah's varied water interests, and puts the long-term needs of the State ahead of short-term, parochial concerns.

V. CONCLUSION

After the night in our mountain camp, Mark and I spent the next day working with employees of the Utah Division of Wildlife Resources on a native trout recovery project. Tired, but rewarded, we began our drive home at dusk. The road along the western slope of Boulder Mountain afforded us a spectacular view of a fiery sunset over the Tushar Mountains. We pulled over and watched quietly as the flaming brilliance cooled to glowing embers, then to fading pastels. It was September 10, 2001. The peace of the moment belied the horror that would meet the sun's rise the next morning.

The sobering events of the following day remind us that we can't take what we have for granted. John Sawhill has said, "In the end, our society will be defined not only by what we create but by what we refuse to destroy." We have the capacity to divert all rivers for other uses and to further fracture our society. But we also have the capacity to save our treasured streams and heal the current divide among diverse western neighbors. Doing so will require all interested parties to come to the table armed with an open mind, long-term focus, respect for differences, creativity and a commitment to find workable solutions to better balance water management in Utah.

The words of Thomas More are appropriate: "We let a river shower its banks with a spirit that invades the people living there, and we protect that river, knowing that without its blessings the people have no source of soul."

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8. Utah Code Ann. § 73-3-3 (11).
9. *Bonham v. Morgan,* 788 P.2d 497 (Utah 1989) (holding that the State Engineer must consider all factors listed in § 73-3-8 in approving permanent change applications).

Targeting Runoff: Storm Water Permitting & Enforcement

by Lisa A. Kirschner

Congress enacted the federal Clean Water Act ("CWA") with the goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The broad reach of the statute includes, among other things, a National Pollutant Discharge Elimination System ("NPDES") that regulates point source discharges of pollutants into waters of the United States (often referred to as "jurisdictional waters"). Under the NPDES program, permits may be issued by the Environmental Protection Agency ("EPA") or the States if they have been authorized by EPA to act as NPDES permitting authorities. Utah has such authority; it administers the Utah Pollutant Discharge Elimination System ("UPDES") program. The wide scope of the UPDES program echoes that of the federal program. Under both programs, there is – without question – a focus on runoff as a source of water pollution warranting additional regulatory attention.

According to figures sited by EPA, urban storm water runoff is a substantial contributor of pollutants to oceans, rivers, lakes and streams. The impacts associated with polluted runoff have resulted in the development of a national storm water program that is largely implemented by the state permitting authorities. The storm water program is the result of 1987 amendments to the CWA mandating that permits be obtained for storm water discharges "associated with industrial activity," storm water discharges from municipal separate storm sewer systems, and for storm water discharges that contribute to water quality violations or are otherwise "significant contributor[s] of pollutants." *See generally* 33 U.S.C. § 1342(p). The federal regulations implementing the program were promulgated in two phases. The first phase (issued in 1990) covered most industrial storm water, large municipal storm sewer systems and construction sites disturbing five acres or greater; the second phase (issued in 1999) extended the program to small municipal systems and construction sites (equal to or greater than one acre of disturbance). *See* 55 Fed. Reg. 47990 (Nov. 16, 1990); 64 Fed. Reg. 68721 (Dec. 8, 1999).

The UPDES program regulations, like their federal counterparts, include permit obligations for point source discharges of storm water. The definition of point source excludes agricultural storm water discharges and irrigation return flows but otherwise is very broad and has been liberally construed by the courts. For example, courts have held, in a number of contexts, that storm water flow is characterized as regulated point source runoff where it is collected as a result of on-site conditions and ultimately reaches a jurisdictional water. *See, e.g., Parker v. Scrap Metal Processors, Inc.,* 2004 WL 2160758 (11th Cir. 2004) (citations omitted) (storm water collected in and emanating from debris piles constitutes regulated point source flow); *United States v. Earth Sciences, Inc.,* 599 F.2d 368 (10th Cir. 1979) (systems of pumps, ditches and hoses are point sources). In short, the case law tends to consider just about any facility from which pollutants emanate to be a point source.

Although the storm water program is managed by a small portion of the staff at the Utah Division of Water Quality ("DWQ"), the program's obligations extend to a vast number of people and activities throughout the state. DWQ's storm water program applies to runoff from most industrial sites and large construction sites (greater than or equal to five acres); more recently and consistent with the NPDES requirements, the UPDES storm water program was expanded to address storm water discharges from construction sites that disturb an acre or more. The sheer number of storm water dischargers and/or the visibility of storm water flow and management practices (or lack thereof) may account for the corresponding amount of recent, much publicized storm water enforcement actions. No matter the reason, the regulated community has and should continue to take notice of its storm water management obligations; failure to abide with the storm water program can result in, at the very least, costly fines and delay. The following briefly reviews DWQ's permitting requirements, federal regulatory initiatives that if pursued would change the storm water program in Utah, and examples of enforcement actions targeting storm water in Utah and neighboring states.

Utah's Program

Utah manages most point source discharges of storm water pursuant to general permits that closely track those issued by

LISA A. KIRSCHNER is a shareholder at Parsons Behle & Latimer; she specializes in environmental and natural resources law and frequently handles matters involving water quality, wetlands and drinking water issues.

EPA. In particular, DWQ's program includes general permits for: (1) storm water discharges associated with industrial activity ("the Industrial Permit"); and (2) storm water discharges associated with construction activity ("the Construction Permit"). The Industrial Permit covers a wide ranging category of discharges from industrial sites that are subject to a variety of permit conditions. It requires, among other things, that a discharger file an application form and complete and implement a storm water pollution prevention plan ("SWPPP"). The Construction Permit covers most storm water runoff at sites greater than or equal to one acre of disturbance. As with the Industrial Permit, the construction-related discharger must complete a permit application (which can be accomplished electronically at https://secure.utah.gov/swp/client) as well as complete and implement a SWPPP.

In Utah, storm water discharge permits for construction sites must be obtained by:

> The owner, developer, or project instigator and controller (the entity responsible for obtaining funding, procuring initial contracts or agreements, selecting [or assuming the position of] a general contractor, and that has control over site specifications) as the ultimate party responsible for pursuing permit procurement and compliance responsibilities.

Construction Permit at Part II.E. A storm water permit is not typically required for construction sites disturbing less than one acre, construction sites less than five acres which certify that the project will commence and reach final stabilization between January and April of the same year, and certain sites disturbing less than five acres located within an urbanized area.

While DWQ retains substantial discretion to impose conditions on permittees (even those covered by general permits), most storm water management is accomplished through the implementation of best management practices ("BMPs"). Construction-related discharges are not, in general, subject to any specific permit limits. EPA has, however, been evaluating that approach; the ultimate results of EPA's review (and the associated litigation) could portend changes for Utah's program.

Regulatory Initiatives

As part of its overall focus on storm water, EPA has considered whether to establish uniform national technology-based standards for the construction industry (in lieu of the BMP approach) which, if adopted, would be applicable in Utah. Two EPA options published in a 2002 rulemaking proposal would require, among other things, enhanced monitoring of construction site storm water samples and the imposition of a defined framework, e.g., specific limits for evaluating when a discharge from a site would constitute a specific permit violation (along with the enhanced potential for related enforcement actions and penalties). For now, the construction industry has been granted a reprieve from such additional requirements.

In March of 2004, EPA announced its decision to delay further consideration of construction-related storm water effluent limitations (the rulemaking was published at 69 Fed. Reg. 22472 (April 26, 2004)). The agency indicated it concurred with commenters' suggestions recommending further evaluation of the effectiveness of the storm water program in lieu of the development of additional regulations. No doubt the decision was also based, in part, on assessments of financial burden on the development industry. At least one representative from the National Association of Homebuilders has maintained that EPA's determination saved its members $3.5 billion a year in compliance costs. *See* "EPA storm water decision viewed as a victory by developers" found at www.eenews.net (April 9, 2004). In contrast, environmental groups (including the Natural Resource Defense Council) have filed a petition for appellate review asking the Ninth Circuit to review EPA's alleged failure "to perform its non-discretionary duties under the Clean Water Act" and to require that it develop construction site effluent limitation guidelines. Meanwhile, there continues to be national, state and local efforts to effectively implement the storm water program; the efforts are evident in Utah and throughout the west and may have been invigorated by EPA's determination to further assess the existing program's effectiveness.

Enforcement

It has been reported that EPA and state permitting agencies have, over the last several years, specifically shifted their enforcement focus to target storm water violations at construction and industrial sites. Recent high profile storm water enforcement actions aimed at large construction and residential development sites bolster the notion that permitting authorities, including DWQ, are highlighting these larger sites in what appears to be an effort to educate the regulated community and send a clear message regarding the potential serious implications associated with storm water noncompliance.

Utah's storm water regulators were directly involved in a recent significant storm water enforcement action. On May 12, 2004, EPA announced a settlement with Wal-Mart Stores, Inc. ("Wal-Mart") for alleged storm water violations at construction sites in nine different states including Utah. The settlement requires Wal-Mart to pay a $3.1 million penalty to EPA, Utah and Tennessee, reportedly the largest penalty ever paid for violations of the storm water regulations. Wal-Mart is also required to implement an extensive, nationwide storm water compliance program designed to further ensure program compliance by its contractors. The compliance program will include, for example, daily storm water inspection obligations. The settlement also specified that Wal-Mart spend

$250,000 on supplemental environmental projects ("SEPs") to mitigate alleged impacts stemming from its storm water violations. Notably, the 2004 Wal-Mart settlement was not the first time the company had faced substantial storm water related enforcement; in 2001, Wal-Mart settled allegations regarding storm water noncompliance. That settlement also included a significant penalty, requiring Wal-Mart to pay $1 million to address alleged violations in a number of states. The Wal-Mart storm water history is evidence that storm water enforcement is serious and that proactive efforts to comply with pertinent requirements can mitigate a substantial risk.

Other recent storm water enforcement-related activities in the Intermountain West have also focused on alleged construction site violations. On August 24, 2004, EPA filed a complaint against the Idaho Department of Transportation and a contractor alleging at least 170 violations of storm water management obligations at a highway project in the Coeur d'Alene region. Among the cited violations are allegations of poorly maintained BMPs that reportedly triggered mud flows directly to jurisdictional waters. The complaint seeks $32,500 per day for violations that occurred after March 15, 2004 and $27,500 per day for earlier violations.

Similarly and during the summer of 2003, EPA announced an enforcement action seeking $928,500 in penalties against twelve construction companies building a number of different projects in the Denver metropolitan area. EPA cited, among other things, the companies' failure to develop adequate BMPs and SWPPPs, and a lack of self-initiated inspections (as required by the relevant storm water permits). These types of announcements underscore that storm water is on the "short list" for enforcement. All evidence suggests such enforcement is likely to persist.

Potential Future Directions of the Storm Water Program

In an age of limited agency resources and increasing challenges associated with achieving CWA goals, it is likely that regulatory programs will continue to develop mechanisms geared toward curbing contaminated runoff. Storm water control seems an evident means of focus for agencies trying to wrestle with a variety of federal water quality mandates. First, storm water can be detected and, at times, evaluated by others; it is, therefore, often easily tracked by the public. Additionally, whereas industry has been subject to a variety of storm water permitting and control obligations for some time, there are some aspects of contaminated runoff that remain unregulated and other aspects that are regulated but for which adequate controls are not being implemented.

Critics of the storm water program have suggested that the program be further expanded to address all significant threats to water quality, even those not being covered in the existing permitting regimes such as large parking structures and lots. *See generally* John M. Carter, *Control of Nonpoint Pollution Through Citizen Enforcement of Unpermitted Stormwater Discharges: A Proposal for Bottom Up Litigation,* 33 ELR 10876 (November 2003). EPA (and DWQ) have not yet appeared ready to take that track. Nonetheless and no matter the outcome of the public debate, storm water regulation and heightened enforcement appear here to stay. The consequences of inaction can be dire; contractors, developers, industrial site management and other storm water discharges must become familiar with and take action to comply with the storm water regulatory program. They should also track and consider providing input into regulatory initiatives by EPA and states addressing the scope and consequences of the program.

Look Before You Fill! Dredge and Fill Permitting under § 404 of the Clean Water Act

by H. Michael Keller

I. INTRODUCTION

Development in and around waters and wetlands, including seasonally dry channels and washes, can trigger the need to obtain a dredge and fill permit from the Army Corps of Engineers ("Corps") under § 404[1] of the federal Clean Water Act.[2] Failure to comply can subject a developer to enforcement action enjoining the project and assessing civil and criminal fines and sanctions. The 11th Circuit Court of Appeals recently affirmed the conviction and sentencing of a Florida man to three years in jail, three years of supervised release, and payment of restitution and a $25,000 fine for illegally filling wetlands to make a ramp to transport his jet skis to nearby Lake Okeechobee.[3]

II. THE ROLE AND ORGANIZATION OF THE CORPS

A. PERMITTING PROGRAMS.

The Corps is the primary permitting authority under § 404, but EPA holds ultimate veto authority over the Corps' § 404 permitting decisions.[4] The Corps administers the § 404 permitting program in conjunction with its permitting program under the Rivers and Harbors Appropriation Act of 1899.[5]

B. DIVISIONS AND DISTRICTS.

The Corps is highly decentralized, with eight Divisions, each headed by a Division Engineer, and thirty-six District offices, each headed by a District Engineer, throughout the United States. Utah lies within the Sacramento and Los Angeles Districts of the South Pacific Division headquartered in San Francisco and is directly served by field offices in Woods Cross and St. George. Most permitting and delineation decisions are handled at or under the direction of the District Engineer with input from local field offices.

III. SECTION 404 REGULATORY FRAMEWORK

The § 404 program is implemented through regulations issued by the Corps[6] and EPA.[7] Regulatory interpretations are issued from time to time by the Corps in the form of regulatory guidance letters. Guidance on interagency issues is provided through various memoranda of agreement between the Corps, EPA, and other agencies on such matters as enforcement, jurisdiction, and mitigation.

IV. SECTION 404 JURISDICTION.

Jurisdiction under § 404 depends upon whether the waters or wetlands are regulated "waters of the United States" and whether the contemplated development activities involve a discharge for which a permit must be obtained.

"WATERS OF THE U.S."

Geographic jurisdiction under the Clean Water Act extends to "navigable waters," which Congress defined as "the waters of the United States, including the territorial seas."[8] The statute offers little guidance on how far Congress intended to extend jurisdiction beyond waters considered commercially navigable under the Rivers and Harbors Act.

Most lower federal courts interpreting the geographic reach of Clean Water Act jurisdiction were unconstrained by traditional concepts of navigability and took a broad Commerce Clause[9] approach to the geographic reach of the Clean Water Act.[10] The Tenth Circuit concluded that the Clean Water Act was "designed to regulate to the fullest extent possible sources emitting pollution into rivers, streams and lakes" because Congress did not "use the term 'navigable waters' in the traditional sense" but, instead, "intended to extend the coverage of the [Act] as far as permissible under the commerce clause."[11]

In 1985, the U.S. Supreme Court gave support to this approach, concluding in *United States v. Riverside Bayview Homes, Inc.*[12] that Congress intended to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term and holding that Clean Water Act jurisdiction extended to wetlands adjacent to navigable waters.

Relying on an expansive Commerce Clause analysis, the Corps and

H. MICHAEL KELLER, ESQ. is a shareholder in the Salt Lake City office of Van Cott, Bagley, Cornwall & McCarthy where he practices environmental and natural resource law.

EPA broadly defined "waters of the United States" to include not only waters that are commercially navigable, but also nonnavigable tributaries, adjacent wetlands, and other waters and wetlands "the use, degradation, or destruction of which could affect interstate or foreign commerce."[13] They took the position that virtually any tie to interstate commerce rendered a water or wetland jurisdictional.[14] Their approach achieved its broadest application in 1986 when the Corps issued a guidance statement, known as the "Migratory Bird Rule," extending jurisdiction to waters simply on the basis they were or could be used as habitat by migratory birds.[15] The agencies used the rule to assert Clean Water Act jurisdiction over virtually any water or wetland, regardless of its connection to navigable waters.

In 2001, the United States Supreme Court invalidated the Migratory Bird Rule, holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*,[16] that Congress did not intend to authorize the Corps to regulate isolated, wholly intrastate waters solely on the basis the waters were used as habitat by migratory waterfowl. The court explained it was "the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[17]

After the *SWANCC* decision, the agencies issued limited guidance[18] on the scope of "navigable waters" under the Clean Water Act and began but never completed rulemaking[19] to redefine the term in light of the court's decision.

Meanwhile, the federal courts began considering the reach of Clean Water Act jurisdiction in light of the *SWANCC* decision, particularly as it may impact the upstream reach of tributary jurisdiction.

1. Tributary Jurisdiction.

The challenge in evaluating tributary jurisdiction is determining how far it may extend upstream from the navigable water. The agencies take the position that all tributaries of regulated waters are also regulated[20] upstream to the point at which the ordinary high water mark ("OHWM")[21] is no longer perceptible.[22]

Prior to *SWANCC*, the great weight of authority from the lower courts held that tributaries of navigable waters were themselves subject to Clean Water Act jurisdiction, regardless of the navigability of the tributary.[23] These cases relied on the fact that what is discharged into a tributary may eventually flow into a navigable water.[24]

Most courts read *SWANCC* narrowly as not restricting tributary jurisdiction.[25] These courts continue to rely on the "hydrologic connection" rationale espoused in *Eidson*[26] that as long as the tributary would eventually flow into the navigable body under significant rainfall, it, too, is regulated. In *Headwaters, Inc. v.*

Talent Irrigation District, the Ninth Circuit held that irrigation canals were "waters of the United States" notwithstanding a system of closed irrigation gates, because the canals were tributaries to the natural streams with which they exchanged water.[27] More recently, the U.S. Supreme Court declined to review three appeals court decisions that read *SWANCC* narrowly and concluded *SWANCC* did not restrict Clean Water Act jurisdiction from reaching non-navigable tributaries of navigable systems.[28]

The Fifth Circuit reads *SWANCC* broadly as precluding jurisdiction over waters that, although technically tributaries, are "neither themselves navigable nor truly adjacent to navigable waters… Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."[29]

In the arid West, the long reach of tributary jurisdiction can pose unexpected regulatory challenges. Tributaries may include non-perennial streams, such as intermittent streams,[30] that flow seasonally, and ephemeral streams,[31] that flow only in direct response to precipitation. Prior to *SWANCC*, the Tenth Circuit held that normally dry arroyos that flow only in response to precipitation are subject to Clean Water Act jurisdiction.[32]

2. Regulated Wetlands.
The Corps defines "wetlands" as:

> Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . Wetlands generally include swamps, marshes, bogs, and similar areas.[33]

Wetlands are delineated using the technical criteria and field indicators set forth in the 1987 edition of the Corps of Engineers Wetland Delineation Manual. Three basic factors must be considered in evaluating the existence of wetlands: wetland soils, wetland vegetation, and wetland hydrology. Wetland hydrology may exist if there is inundation or saturation to the surface for more than 5 to 12.5% of the growing season, which is a relatively short time in higher latitudes.[34]

Even if a wetland meets the characteristic test under the 1987 Manual, it must still qualify as a "water of the United States" in order to be subject to regulation under the Clean Water Act. The Corps asserts Clean Water Act jurisdiction over wetlands either on the basis the wetlands are adjacent to regulated waters[35] or on the basis that their use, degradation or destruction could affect interstate or foreign commerce.[36] The latter approach, which reached its maximum extension under the Migratory Bird Rule, has been called into question by *SWANCC*.

3. Adjacent Wetlands.
The Corps defines "adjacent" as "bordering, contiguous, or neighboring" and considers wetlands to be adjacent even if they are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes."[37] Under the adjacency approach, the Corps asserts jurisdiction over wetlands adjacent to waters which are themselves regulated, including regulated nonnavigable tributaries. The 6th Circuit recently examined the test for determining whether wetlands are "adjacent" and concluded that there is no "direct abutment" requirement but a "significant nexus" is required "which can be satisfied by the presence of a hydrological connection" between the wetlands and navigable waters.[38]

4. Isolated, Intrastate Waters.
The Corps defines "isolated waters" as those non-tidal waters of the United States that are neither part of a surface tributary system to interstate or navigable waters of the United States nor adjacent to such waters.[39] These waters include "intrastate lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" that the agencies purport to regulate if their "use, degradation or destruction . . . could affect interstate or foreign commerce."[40] After *SWANCC*, jurisdiction over such waters is problematic. The Corps takes the position that formal project-specific approval should be sought from headquarters before asserting jurisdiction over such waters.[41]

5. Artificial Waters.
Several courts have held that Clean Water Act jurisdiction is not dependent on how the water was created, and, thus, may extend to artificially created waters if they meet the criteria of navigable waters.[42]

6. Previously Altered Land.
Altering a jurisdictional area and making it fast by illegal filling does not alter its legal status as a navigable water or regulated wetland.[43]

7. Croplands.
As a general rule, agricultural lands that exhibit wetlands characteristics are subject to § 404 jurisdiction, but may enjoy the statutory exemption for normal agricultural activities.[44] However, wetlands converted to croplands for growing annual (but not perennial) crops prior to December 23, 1985, are not subject to Section 404 jurisdiction if they no longer exhibit wetlands characteristics.[45]

B. REGULATED ACTIVITIES UNDER § 404 – THE DISCHARGE OF DREDGED AND FILL MATERIAL

Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites."[46] The Clean Water Act defines a "discharge" as the "discharge of a pollutant,"[47] which is defined as "any addition of any pollutant"[48] to regulated waters.

The occurrence of a discharge of a pollutant to waters of the United States is the key to whether an activity is regulated under § 404. For example, excavation activities are not regulated under § 404, unless they involve a regulated discharge. If conducted in navigable waters regulated under Rivers and Harbors Act, however, excavation activities may be subject to the Corps' jurisdiction under § 10[49] and require a permit from the Corps, regardless of whether they involve a discharge subject to § 404.

1. Discharge of Fill Material.

The Corps defines fill material as material placed in waters of the United States that has the effect of either replacing any portion of a water of the United States with dry land, or changing the bottom elevation of any portion of a water of the United States.[50] Fill material does not include trash or garbage.[51] The Corps defines the "discharge of fill material" as "the addition of fill material into waters of the United States."[52]

2. Discharge of Dredged Material.

Dredged material means material that is excavated or dredged from waters of the United States.[53] The Corps traditionally took the view that dredging, itself, was not regulated if the dredged material was not redeposited within the waters of the United States. Controversy arose over the extent to which landclearing, trenching and other excavation activities in wetlands involved discharges of dredged material that should be regulated under § 404.

Following a lengthy period of litigation culminating in the 1998 decision in *National Mining Ass'n v. United States Army Corps of Engineers,*[54] the Corps issued a final rule[55] in 2001 modifying the definition of "discharge of dredged material" to mean "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[56] The use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, or other earth-moving activities in waters of the United States is considered to result in a discharge of dredged material, unless project-specific evidence shows that the activity only results in incidental fallback. Incidental fallback means the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that falls off the bucket into substantially the same place from which it was removed.[57]

a. Drainage. If there is no discharge of a pollutant to regulated waters, the activity should not be subject to regulation under § 404. Thus, draining a wetland should not require a § 404 permit so long as the drainage does not involve a discharge of dredged or fill material into regulated waters.[58]

b. Landclearing. As explained above, the agencies take the position that mechanized landclearing is a regulated activity because it involves more than incidental fallback. The courts

generally agree that the use of earth-moving machinery in regulated waters or wetlands constitutes a regulated discharge. In *Borden Ranch Partnership v. U.S. Army Corps of Engineers,*[59] the Ninth Circuit held the practice of "deep-ripping," which involved dragging four-to-seven foot long metal prongs behind a tractor or a bulldozer to break up the soil, to be a regulated activity. Relying on it prior decision in *Rybachek v. U.S. Environmental Protection Agency*[60] regarding placer mining activities, and the 4th Circuit's reasoning in *Deaton* regarding sidecasting, the court concluded:

> . . . by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in Rybachek and Deaton.[61]

c. Sidecasting. Sidecasting involves the placement of removed soil and material along side the excavated area. Many have argued that sidecasting should not be regulated because it does not result in the net "addition" of any pollutant. In the leading case, *U.S. v. Deaton,*[62] the Fourth Circuit rejected the argument that the activity did not constitute "addition" of a pollutant and squarely held that sidecasting of dredged material from excavation of a drainage ditch in a regulated wetland was a regulated discharge, because the dredged material was transformed into a regulated pollutant when it was excavated and redeposited.

3. Exempt Activities and "Recapture."

Section 404(f)(1) expressly exempts certain activities from permitting, including discharges of dredged or fill material from (i) normal farming, silviculture and ranching activities, (ii) maintenance of currently serviceable structures such as dikes, dams, and transportation structures, (iii) construction or maintenance of farm or stock ponds or irrigation ditches, and maintenance of drainage ditches, and (iv) construction or maintenance of farm roads or forest roads, or temporary roads for mining equipment.[63] The party claiming an exemption bears the burden of showing it applies[64] and satisfies various regulatory conditions and limitations.[65]

Even if an activity fits within one of the statutory exemptions, it will be subject to "recapture" under § 404 (f)(2)[66] and require a permit, if the activity brings an area of navigable waters into a new use and will impair the flow or circulation of regulated waters or reduce their reach.[67] In *Borden Ranch,* the Ninth Circuit held that deep ripping of wetland ranch lands to convert them into dry land for orchards and vineyards was not exempt as normal farming activity and was subject to recapture under § 404(f)(2), because the activity brought the land "into a use to which it was not previously subject" and the destruction of the soil layer "constituted an impairment of the flow of nearby navigable waters."[68]

V. PERMITS UNDER § 404

The issuance of permits is governed by the Corps' regulations in 33 C.F.R. Parts 320-38 and EPA's Guidelines in 40 C.F.R. Part 230. Although the Corps is the primary permitting authority, the EPA holds ultimate veto authority over the Corps' permitting decisions.[69] Several types of permits may be issued under § 404. These include individual permits issued on a case-by-case basis following review of individual applications, general permits authorizing a category or categories of activity in a specific region or nationwide, and letters of permission issued without the need for individual public notice.[70]

A. INDIVIDUAL PERMITS

1. Application Process.

Individual permit applications[71] should be submitted to the District Engineer of the District in which the project is located. Typically, the application is referred by the District to the local regulatory office of the Corps for review and any field investigations. Upon a determination of completeness, the District Engineer is required to issue a public notice advising of the proposed activity for which a permit is sought and soliciting comments and information on the proposal.[72] Comments received from agencies and third parties are typically provided to the applicant with a request to provide input to assist the Corps in making its determination. A public hearing may be held to consider issues raised concerning an application.[73]

2. Permit Issuance.

In evaluating a permit application, the Corps is required to evaluate the probable impact, including cumulative impacts, on the public interest. Relevant factors include conservation, economics, aesthetics, general environmental concerns, historic properties, etc.[74] Of particular concern are the potential impacts on historical and cultural resources, aquatic resources, and threatened and endangered species and their critical habitats. Issuance of an individual permit will usually trigger the Corps' obligation under the National Environmental Policy Act[75] to assess environmental impacts of the proposed development by preparing an environmental assessment or an environmental impact statement.[76]

3. EPA Guidelines.

The Corps may issue a permit if it determines that issuance would not be contrary to the EPA's Guidelines or the public interest. This involves consideration of the benefits which reasonably

may be expected to accrue from the proposal in relation to the reasonably foreseeable detriments, including cumulative impacts.[77] The benefits of the proposed alteration of wetlands must outweigh the damage to the wetlands resource.[78]

Under EPA's guidelines, a permit may be issued only if:

(i) there is no practicable alternative,

(ii) there will be no significant adverse impact on aquatic resources,

(iii) all reasonable mitigation is employed, and

(iv) there will be no statutory violations caused by the proposed discharge.[79]

4. Practicable Alternatives.
A permit must be denied if there is a practicable alternative to the proposed discharge that involves less adverse impact. The Corps considers an alternative to be practicable if it is "available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes."[80] Practicable alternatives are presumed to exist for projects which are not water dependent (*i.e.,* a shopping center, as opposed to a marina).

5. Mitigation and Mitigation Sequencing.
In accordance with the policy that there be no "overall net loss of wetlands values and functions,"[81] the Corps requires permit applicants to mitigate unavoidable adverse impacts to wetlands through a process known as mitigation sequencing. The applicant must first attempt to *avoid* adverse wetland impacts, then *minimize* unavoidable impacts to the extent appropriate and practicable by altering project plans, and finally, *compensate* for lost aquatic resource values through compensatory mitigation.[82] Compensatory mitigation through creation, restoration or enhancement of wetlands can pose an expensive and time-consuming hurdle to a developer, particularly where lands for potential mitigation projects are not readily available. Project-specific compensatory mitigation approved by the Corps and completed on or adjacent to the site of the impacts it is designed to offset is considered preferable to mitigation conducted off-site.[83] Where such on- or near-site, in-kind, mitigation is not practicable, a permit applicant may be able to satisfy its mitigation obligation financially by purchasing credits in an approved wetland mitigation bank[84] or paying an "in-lieu-fee"[85] to a qualifying resource management entity for a qualifying wetland project.

6. Section 401 Certification.
Section 401 of the Clean Water Act requires that every applicant

A Tribute to Sheri Ann Williams Mower

1961-2004

Sheri Mower was a person of exceptional integrity and intelligence. She was a brilliant lawyer with insight and gifts for analysis, argument and writing which cannot be taught. Sheri also had rock-solid values and priorities, and her top priority was her family.

Sheri had a distinguished professional resume. She was a graduate of the University of Utah College of Law and a member of the Order of the Coif. She had served as a legislative assistant in the United States Senate. She was sought-after as an attorney. She practiced at Holme Roberts & Owen, then at Wood Crapo. Sheri was extraordinarily talented and could always be relied upon to produce work that was honest, accurate, thorough, and of the highest quality. As a bonus, her personality and sense of humor lit up the office.

Sheri did her greatest work, however, at home. Sheri married Mike Mower, and they became the devoted parents of Mallory, 11, Christian, 8, Abby, 6, and Alex, 5. As the babies came, Sheri sometimes set up a mini-nursery in her office, to the delight of other lawyers and staff. Eventually, she chose to practice part-time from home, so that she could devote herself to the important work of raising her family.

Sheri was as gifted a mother as she was a lawyer. Occasionally, she would come to the office wearing a smile, bearing an impeccably written brief, and accompanied by four beautiful, bright, and happy children. Sheri was always a happy, positive person, but she was happiest when surrounded by her family.

Sheri lost her two-year battle with cancer. She will be missed and deeply mourned. Sheri was a cherished friend and a valued colleague. Everyone at the firm looked forward to the day when she had raised her family and returned to the office. Though that day will not come, Sheri spent the time she was allowed using her great talents where they mattered most.

Her Colleagues and Friends at Wood Crapo LLC

for a federal permit involving a discharge of pollutants to navigable waters provide certification from the state that the proposed discharge will meet all applicable state water quality requirements.[86] The Corps may not issue a § 404 permit for a project until the § 401 certification has been received or waived by the appropriate state water quality agency.[87] EPA regulations specify the requisite elements that must be included in an acceptable certification under § 401. Certification may be waived by a state either through a formal notice to the Corps or as a result of the state's failure to act timely on a Corps' request for certification within sixty days after receipt.[88]

B. NATIONWIDE PERMITS.

Many activities may proceed more expeditiously, with minimal delay and paperwork, pursuant to a nationwide permit ("NWP") under the Corps' regulations in 33 C.F.R. Part 330. A NWP is a general permit issued by regulation for a specific category of activities deemed to have minimal impacts. There are currently 43 NWPs.[89]

Parties relying on a NWP must comply with the notification and other specific and general conditions applicable to the permit. Most NWPs require preconstruction notice to the Corps, and many of them have very restrictive acreage limitations. NWPs may not be used twice on the same project to increase the allowable acreage of a single permit, unless a linear project (such as a highway or pipeline) is involved.[90]

The Corps is increasingly utilizing regional conditions to ensure that NWPs only authorize those activities with minimal adverse effects on the aquatic environment. Increased "regionalization" makes it even more imperative that proponents of regulated activities coordinate closely with their local and District Corps offices to ensure compliance with NWPs and applicable regional conditions.

C. REGIONAL PERMITS.

Regional permits are general permits issued by a Division or District Engineer authorizing a category of activities within the Division or District.[91] Activities covered by a regional permit are authorized without the need for obtaining an individual permit. However, the issuing Division or District Engineer may, on a case-by-case basis, override the regional permit and require individual application and review.[92]

VI. ADMINISTRATIVE APPEAL PROCESS

The Corps has an administrative appeals process allowing permit applicants to appeal adverse permit decisions or jurisdictional determinations.[93] Appeals must be filed with the division engineer within 60 days after the date of a Notice of Appealable Action from the Corps. This administrative appeal remedy must be exhausted before filing an action in court. The Corps will not accept any appeal of an approved jurisdictional determination associated with an unauthorized activity or an after-the-fact permit application, unless and until the appellant executes a statute of limitations tolling agreement with the District Engineer.[94]

VII. TAKINGS CLAIMS

Imposition of wetlands regulation may give rise to a taking of private property without compensation in violation of the Fifth Amendment to the U.S. Constitution. A taking may not be raised as a defense to an enforcement action brought under the Clean Water Act; the proper procedure is to initiate a suit for compensation in the Court of Claims.[95] The Court of Claims has sole jurisdiction for claims against the United States in excess of $10,000.[96] Recent court decisions have indicated a trend toward granting compensation when a party is deprived of the use of his or her land by the denial of a § 404 permit.[97] The claimant of a regulatory taking under § 404 must have an investment-backed expectation of development[98] and may not assert a claim until a permit has been sought and denied.[99]

VIII. ENFORCEMENT

The Clean Water Act grants independent enforcement authority to the Corps and to EPA to issue an administrative compliance order ("ACO"), assess administrative penalties, and make referrals for judicial enforcement.[100] EPA also has significant authority to conduct inspections and require dischargers to provide information regarding their discharges.[101] Under the language of the Act, failure to comply with an ACO subjects the violator to potential penalties.[102] The Act also provides that such orders are not subject to judicial review unless they also assess civil penalties.[103] Although the Tenth Circuit has upheld the non-reviewability of ACOs,[104] the Eleventh Circuit more recently held the comparable provisions of the Clean Air Act "unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of an ACO" without an opportunity for prior judicial review of the ACO.[105]

A. CIVIL LIABILITY.

The Act grants both the EPA and the Corps authority to assess administrative penalties of up to $11,000 per day per violation, not to exceed $137,500.[106] These are divided into two classes. Under Class I, penalties are only chargeable per violation, informal hearing procedures apply, only a maximum of $27,500 may be assessed, and judicial appeals are to the federal district court; under Class II, penalties are chargeable per day of violation, adjudicative hearing procedures apply, a maximum of $137,500 may be assessed, and judicial appeals are to the federal circuit court.[107] Judicially-levied civil penalties of up to $27,500 per day

per violation may be assessed for certain violations.[108]

B. CRIMINAL LIABILITY.

The Clean Water Act provides stiff criminal sanctions.[109] Criminal liability extends to *negligent* as well as knowing violations of the Clean Water Act. Maximum criminal fines range from $10,000 or imprisonment for up to two years or both for lesser offenses, to $250,000 or 15 years or both for individuals and $1,000,000 for corporations for violations involving knowing endangerment of other persons. Repeat offenders are subject to double these penalties. "Responsible corporate officers" may be held criminally liable for acts of the corporation.[110]

C. MANDATORY PENALTIES.

Courts are divided on the issue of whether civil penalties under the Clean Water Act are mandatory or discretionary. In *Leslie Salt Co. v. United States,* the Court held that once a violation has been established, a penalty is mandatory, but the court has discretion to reduce the fine. [111]

D. STATUTE OF LIMITATIONS.

There is no statute of limitations in the Clean Water Act. The Tenth Circuit has held that the general five-year federal statute of limitations in 28 U.S.C. § 2462 is applicable to enforcement actions under the Clean Water Act for civil penalties for unpermitted discharges of dredge and fill material that occurred more than five years before EPA filed a complaint, but did not bar EPA's claims for injunctive relief to require restoration or mitigation of the filled wetlands.[112]

1. *See* 33 U.S.C.A. § 1344.
2. 33 U.S.C.A. §§ 1251-1387. Such activities may also trigger the need to obtain a storm water discharge permit pursuant to the National Pollutant Discharge Elimination System (NPDES) under § 402 (33 U.S.C.A. § 1342) of the Clean Water Act. Utah has been delegated authority to administer the NPDES program, including storm water permitting, on non-Indian lands within the state. Utah Admin. Code R317-8. Utah law also requires written approval from the State Engineer to relocate any natural stream channel or to alter or change the beds or banks of any natural stream. Utah Code Ann. § 73-3-29 (Michie Repl. 1996); Utah Admin. Code R655-13 (promulgated May 4, 2004).
3. *U.S. v. Perez,* 366 F.3d 1178 (11th Cir. 2004).
4. 33 U.S.C.A. § 1344(c).
5. *See* 33 U.S.C.A. §§ 403, 407 (West 1986); 33 C.F.R. Part 329. The Rivers and Harbors Act prohibits the obstruction of or the discharge of refuse into the "navigable waters of the United States" without a permit from the Corps. Jurisdiction extends to waters that are used, have been used, or may be susceptible for use to transport interstate or foreign commerce and waters subject to the ebb and flow of the tide, but does not extend above the mean or ordinary high water line.
6. 33 C.F.R. Parts 320-338 (2002).
7. 40 C.F.R. Parts 230-233 (2002) – known as the "EPA Guidelines."
8. 33 U.S.C.A. § 1362(7).
9. U.S. Const. art. I, § 8, cl. 3.
10. See generally William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond,* ELR News & Analysis, 31 ELR 10741, 10760 (July 2001).
11. *U.S. v. Earth Sci., Inc.,* 599 F.2d 368, 373 (10th Cir. 1979) (upholding Clean Water Act jurisdiction over a nonnavigable tributary).
12. 106 S. Ct. 455 (1985).
13. 33 C.F.R. § 328.3(a)(3) (2002); 40 C.F.R. § 230.3(s)(3) (2002).
14. 45 Fed. Reg. 62733 (Sept. 19, 1980).
15. 51 Fed. Reg. 41217 (1986). The Corps also asserted jurisdiction over waters which are or would be used as habitat for endangered species and waters which are used to irrigate crops sold in interstate commerce.
16. 121 S. Ct. 675 (2001).
17. *Id.* at 680.
18. "Joint Memorandum" from Robert E. Frabricant, General Counsel, Environmental Protection Agency, and Stephen J. Morello, General Counsel, Department of the Army. 68 Fed. Reg. 1995 (Jan. 15, 2003).
19. 68 Fed. Reg. 1991 (Jan. 15, 2003).
20. *See* 33 C.F.R. § 328.3(a)(5); 40 C.F.R. § 230.3(s)(5).
21. 33 C.F.R. § 328.3(e).
22. 65 Fed. Reg. 12818, 12823 (March 9, 2000).
23. *See, e.g., U.S. v. Tex. Pipeline Co.,* 611 F.2d 345 (10th Cir. 1979) (nonnavigable tributary of a tributary of the Red River); *U.S. v. Eidson,* 108 F.3d 1336, 1341 (11th Cir. 1997) (storm ditch connected to sewer drain that led to a canal eventually leading to Tampa Bay); *Driscoll v. Adams,* 181 F.3d 1285, 1291 (11th Cir. 1999) (intermittent tributary stream).
24. *Eidson,* 108 F.3d at 1341 (concluding Congress intended to regulate "all waters that may eventually lead to waters affecting interstate commerce").
25. *See U.S. v. Rapanos,* 339 F.3d 447 (6th Cir. 2003), *cert. den.,* 124 S. Ct. 1875 (2004), *reh'g den.,* 124 S. Ct. 2407 (2004) (criminal enforcement) *U. S. v. Rapanos,* 376 F.3d 629 (6th Cir. 2004) (civil enforcement); *Treacy v. Newdunn Assocs., LLP,* 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *cert. denied,* 158 L. Ed. 2d 466, 124 S. Ct. 1874 (2004); *United States v. Rueth Dev. Co.,* 335 F.3d 598 (7th Cir. 2003), *cert. denied,* 157 L. Ed. 2d 699, 124 S. Ct. 835 (2003); *Headwaters v. Talent Irrigation District,* 243 F.3d 526 (9th Cir. 2001).
26. 108 F.3d at 1341.
27. 243 F.3d at 533.
28. *Deaton,* 332 F.3d 698 (wetlands adjacent to a roadside ditch that eventually flowed into a navigable system); *Newdunn,* 344 F.3d 407 (wetlands connected by intermittent flow to navigable waters by a series of drainage ditches, a culvert under a highway, and several miles of a non-navigable creek); *Rapanos,* 339 F.3d 447 (wetlands adjacent to a non-navigable ditch that flowed into a river tributary to Lake Huron).
29. *United States v. Needham,* 354 F.3d 340, 345-46 (5th Cir. 2003); accord *Rice v. Harken Exploration Co.,* 250 F.3d 264 (5th Cir. 2001). Both cases interpret the scope of "navigable waters" under the Oil Pollution Act, 33 U.S.C. §§ 2701-2761, which also defines "navigable waters" as the "waters of the United States, including the territorial seas." 33 U.S.C. § 2701(21).
30. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).
31. 65 Fed. Reg. 12823 (March 9, 2000).
32. *See Quivira Mining Co. v. EPA,* 765 F.2d 126 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986). Accord *Friends of Santa Fe County v. Lac Minerals, Inc.,* 892 F. Supp. 1333, 1354-56 (D. N.M. 1995). *But see Rice v. Harken,* 250 F.3d 264 (holding, in light of *SWANCC,* that discharges onto a dry creek bed were not regulated under the Oil Pollution Act).
33. *See* 33 C.F.R. 328.3(b); *U.S. v. Larkins,* 852 F.2d 189 (6th Cir. 1988) *cert. den.,* 109 S. Ct. 1131 (1989); *U.S. v. Cumberland Farms of Connecticut, Inc.,* 826 F.2d 1151 (1st Cir. 1987), *cert. den.,* 108 S. Ct. 1016 (1988).
34. *See U.S. v. Thorson,* 2004 U.S. Dist. LEXIS 5927 at *22-29 (W.D. WI.) (rejecting a challenge to the Corps' methodology for determining wetland hydrology).

35. 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(s)(7).
36. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).
37. 33 C.F.R. § 328.3(d). *See, e.g., U.S. v. Banks,* 115 F. 3d 916, 921 (11th Cir. 1997) (finding adjacency where a paved road separated wetlands from a waterway).
38. *United States v. Rapanos,* 376 F.3d at 639. Accord *U.S. v. Thorson,* 2004 U.S. Dist. LEXIS 5927 at *43-44.
39. 33 C.F.R. § 330.2(e).
40. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).
41. *See* Joint Memorandum, *supra,* n. 18.
42. *Leslie Salt Co. v. United States,* 896 F.2d 354, 358-360 (9th Cir. 1990), *cert. den.,* 111 S. Ct. 1089 (1990) ("The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate locate aquatic ecosystems regardless of their origin.")
43. *Golden Gate Audubon Soc'y, Inc. v. U.S. Corps of Eng'rs,* 700 F. Supp. 1549, 1557, amended, 717 F. Supp. 1417 (N.D. Cal. 1988).
44. 33 U.S.C.A. § 1344(f)(1)(A); 33 C.F.R. § 323.2(d)(3)(iv).
45. RGL #90-07; 33 C.F.R. § 328.3(8) (1998); 58 Fed. Reg. 45031-34 (August 25, 1993).
46. 33 U.S.C.A. § 1344(a).
47. 33 U.S.C.A. § 1362(16).
48. 33 U.S.C.A. § 1362(12).
49. 33 U.S.C.A. § 403; 33 C.F.R. Part 322.
50. 33 C.F.R. § 323.2(e).
51. *Id.*
52. 33 C.F.R. § 323.2 (f). The definition excludes, however, plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products
53. 33 C.F.R. § 232.2(c).
54. 145 F.3d 1399, 1405 (D.C. Cir. 1998).
55. 66 Fed. Reg. 4550 (January 17, 2001). A facial challenge to the new rule was rejected in *Nat'l Ass'n of Home Builders v. U.S. Army Corps,* 311 F. Supp. 2d 91 (D.D.C. 2004).
56. 33 C.F.R. § 232.2(d); 40 C.F.R. § 323.2(d).
57. *Id.*
58. *Save Our Community v. EPA,* 971 F.2d 1155 (5th Cir. 1992).
59. 261 F.3d 810, 816 (9th Cir. 2001), *aff'd,* 123 S. Ct. 599 (2002) (per curiam).
60. 904 F.2d 1276, 1285 (9th Cir. 1990) (removing material from a stream bed, sifting out the gold, and returning the material to the stream bed constituted an "addition" of a "pollutant").
61. 261 F.3d at 815. The court went on to hold that each pass of the ripper constituted a separate violation of the Clean Water Act. *Id.* at 818.
62. 209 F.3d 331 (4th Cir. 2000).
63. 33 U.S.C.A. § 1344(f).
64. *U.S. v. Larkins,* 657 F. Supp 76, 85, n.22 (W.D. Ky. 1987).
65. *See* 33 C.F.R. § 323.4.
66. 33 U.S.C.A. § 1344(f)(2).
67. *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 925 (5th Cir. 1983) (recapture provision can preclude the normal farming exemption).
68. 261 F.3d at 815, *aff'd* 123 S. Ct. 599 (2002) (per curiam).
69. 33 U.S.C.A. § 1344(c).
70. 33 C.F.R. § 325.2(e)(1).
71. *See* 33 C.F.R. Part 325, Appendix A.
72. 33 C.F.R. § 325.3.
73. 33 C.F.R. § 327.4.
74. 33 C.F.R. §325.3(c).
75. 42 U.S.C.A. §§ 4321-4370d.
76. *See* 33 C.F.R. Part 325, App. B.
77. 33 C.F.R. § 320.4(a)(1).
78. 33 C.F.R. § 320.4(b)(4).
79. 40 C.F.R. § 230.10.
80. 40 C.F.R. § 230.10(a)(2).
81. *See Memorandum of Agreement Concerning the Determination of Mitigation Under the Clean Water Act § 404(b)(1) Guidelines* (February 26, 1990), 55 Fed. Reg. 9211 (March 12, 1990).
82. *Id.*
83. *Id.*
84. *See* 60 Fed. Reg. 58605 (Nov. 28, 1995).
85. *See* 65 Fed. Reg. 6693 (Nov. 7, 2000).
86. 33 U.S.C.A. § 1341.
87. 33 C.F.R. § 325.2(b)(1)(ii).
88. 33 C.F.R. § 325.2(b)(1)(ii).
89. 67 Fed. Reg. 2019 (Jan. 15, 2002).
90. *See* RGL #88-06: Nationwide Permit Program. (June 27, 1988).
91. 33 C.F.R. § 325.2(e)(2).
92. *Id.*
93. 33 C.F.R. Part 331.
94. 33 C.F.R. § 326.3(e)(1)(v).
95. *Riverside Bayview Homes, Inc.,* 106 S. Ct. 455 (1985).
96. *Bowles v. Army Corps of Eng'rs.,* 841 F.2d 112 (5th Cir. 1988).
97. *See, e.g., Florida Rock Industries Inc. v. U.S.,* 2000 U.S. Claims LEXIS 50 (developer entitled to an award of more than $2 million plus compound interest dating back to 1980 for partial regulatory taking of a 98-acre tract of wetlands).
98. *Good v. U.S.,* 189 F.3d 1355, 1361-63 (Fed. Cir. 1999), *cert. den.,* 529 U.S. 1023 (2000).
99. 106 S. Ct. at 459.
100. *See* 33 U.S.C.A. §§ 1319, 1344(s).
101. 33 U.S.C.A. § 1318.
102. 33 U.S.C.A. § 1319(d). The original statutory amount of $25,000 per day of violation has been adjusted upward for inflation to $27,500. *See* 40 C.F.R. Part 19.
103. *See* 33 U.S.C.A. §§ 1319(g), 1344(s)(4).
104. *Laguna Gatuna, Inc. v. Browner,* 58 F.3d 564, 566 (10th Cir.1995), *cert. denied,* 116 S. Ct. 771 (1996).
105. *TVA v. Whitman,* 336 F.3d 1236, 1239 (11th Cir. 2003), *cert. denied sub nom. Leavitt v. TVA,* U.S. No. 03-1162 (2004)
106. 33 U.S.C.A. § 1319(g), as adjusted for inflation. *See* 40 C.F.R. Part 19.
107. 33 U.S.C.A. § 1319(g)(2), (8).
108. 33 U.S.C.A. § 1319(d), as adjusted for inflation. *See* 40 C.F.R. Part 19.
109. 33 U.S.C.A. § 1319(c). *See U.S. v. Perez,* 366 F.3d 1178 (11th Cir. 2004).
110. 33 U.S.C.A. § 1319(c).
111. 55 F.3d 1388 (9th Cir. 1995), *cert. denied, sub nom., Cargill, Inc. v. U.S.,* 116 S. Ct. 407 (1995).
112. *U.S. v. Telluride Co.,* 146 F.3d 1241 (10th Cir. 1998).

Commission Highlights

During its regularly scheduled meeting of October 8, 2004 which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Gus Chin noted that the Utah Minority Bar Association's Banquet is scheduled for Friday, October 29th and encouraged Commissioner attendance.
2. John Baldwin reported on 2006 Annual Convention sites. He stated that he, Richard Dibblee and Connie Howard will be conducting a site visit in three weeks to Newport Beach.
3. John Baldwin reviewed the Bar's *Pro Bono* Service that the Bar has developed in collaboration with the J. Reuben Clark Law School. This program will provide the assistance of BYU law students on *pro bono* cases. This partnership will give attorneys the opportunity to mentor a future lawyer while you perform *pro bono* work, teaching them first hand the importance of dedicating time to providing legal service to the underprivileged.
4. John Baldwin discussed the OPC annual report. John reminded Commissioners that OPC works for the Supreme Court under their rules and the Commission sets the priorities and policies. Discussion followed. George Daines commented that it would help immensely if the general membership would review this report.
5. Katherine Fox reviewed the petition status and discussion followed.
6. John Baldwin reviewed the break-out sessions with the section officers along with binders which included materials such as section bylaws, a list of section activities and a list of section membership. Discussion followed John's remarks.
7. The motion to accept and approve the July 2004 Bar Exam passing applicants passed unanimously.
8. Lauren Scholnick was chosen as the recipient of the *Pro Bono* award and Peggi Lowden was chosen as the recipient of the Community Member award.
9. George Daines reviewed the audit report, and discussion followed. The audit was unanimously accepted by the Commission.
10. The UPL Committee requested authorization from the Commission to seek a permanent injunction against Frank Saucedo. The motion passed unopposed to authorize formal action on this item.
11. D'Arcy Dixon Pignanelli discussed the Grants Committee report. A lengthy discussion followed. George Daines asked D'Arcy to bring the revised report back to the December Commission meeting.
12. David Bird gave the Judicial Council report. Dave remarked that Judge Thorne had noted at the most recent meeting that the Pew Commission is working on a project regarding children in foster care and it is a major concern nationwide and the courts are looking at increases for judicial salaries.
13. Paul Moxley said the ABA is planning on holding their Mid-Year meeting in Salt Lake City with a function on Sunday, February 6th, 2005 at 6:00 p.m. at the Wells Fargo Building on the 23rd floor.
14. Nate Alder reminded the Commissioners of the passing of Lee E. Teitelbaum, Professor of Law & former Dean at S.J. Quinney College of Law. The service in his honor was held at the Sutherland Moot Courtroom on Friday, October 8, 2004.
15. It was noted that Commissioner Mary Kay Griffin was chosen as the CPA of the year.

A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Notice of Proposed Amendments to Utah Court Rules

The Utah Supreme Court invites comments to proposed amendments to the following court rule. The comment period expires November 29, 2004.

Summary of proposed amendments
Bar Admissions Rule 11-4. Preparation, Grading and Scoring of the Bar Examination. Amend. Increases the minimum score necessary to pass the Utah Bar Examination.

How to view redline text of the proposed amendments
To see proposed rule amendments and submit comments, click on this link to: http://www.utcourts.gov/resources/rules/comments/. To view the text of the amendments from the web page, click on the rule number. You will need Adobe Acrobat Reader 6.0, which you can download for free by clicking on the link to Adobe. Proposed rule amendments are also published in the Pacific Reporter Advance Sheets.

How to submit comments
You can comment and view the comments of others by clicking on the "comments" link associated with each body of rules. It's more efficient for us if you submit comments through the website, and we encourage you to do so. After clicking on the comment link, you will be prompted for your name, which we request, and your email address and URL, which are optional. This is a public site and, if you do not want to disclose your email address, omit it. Time does not permit us to acknowledge comments, but all will be considered.

Submit comments directly through the website or to:

Tim Shea

Email: tims@email.utcourts.gov
Please include the comment in the message text, not in an attachment.

Fax: 801-578-3843

Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, Utah 84114-0241

One method of submitting a comment is sufficient.

Notice of Approved Amendments to Utah Court Rules

The Supreme Court and Judicial Council have approved amendments to the following Utah court rules. To see the text and effective date of the amendments, go to: http://www.utcourts.gov/resources/rules/approved/ and then click on the rule number.

Summary of amendments:

Code of Judicial Administration

CJA 01-205. Standing and ad hoc committees. Amend. Establishes the Judicial Outreach Committee. Technical amendments.

CJA 03-111.03. Standards of judicial performance. Amend. Establishes 30 hours per year as the minimum standard for certification.

CJA 03-114. Judicial outreach. Amend. Identifies the responsibilities of the Judicial Outreach Committee.

CJA 03-201.02. Court Commissioner Conduct Committee. Amend. Changes composition of Court Commissioner Conduct Committee.

CJA 03-202. Court Referees. Amend. Permits court to hire full or part time referee by contract.

CJA 03-403. Judicial branch education. Amend. Eliminates mandatory attendance at annual judicial conference.

CJA 03-412. Procurement of goods and services. Amend. Increases the amount of contracts within the discretion of the TCE from $1000 to $5000.

CJA 04-202.02. Records classification. Amend. Changes designation of PSI report from "controlled" to "protected" to conform with statute.

CJA 04-402. Clerical resources. Repeal and reenact. Establishes process for clerical weighted caseload.

CJA 04-701. Failure to appear. Amend. Increases bail for failure to appear.

CJA 09-101. Board of Justice Court Judges. Amend. Changes justice court representative on the Education Committee.

CJA 09-103. Certification of education requirements Amend. Amend to conform to statutes.

CJA 11-303. Special admission exception for military lawyers. New. Permits qualified military lawyers on active duty who reside, but are not licensed in Utah, to provide uncompensated limited legal services to military personnel and their dependents who suffer substantial financial hardship.

Utah Rules of Appellate Procedure

URAP 01. Scope of rules. Amend. Recognizes the new rules governing appeals in child welfare cases.

URAP 02. Suspension of rules. Amend. Adds a reference to two of the new child welfare rules.

URAP 11. The record on appeal. Amend. Requires the trial court to include any presentence investigation report as a part of the record on appeal, and clarifies the manner in which the record should be paginated.

URAP 12. Transmission of the record. Amend. Requires a certified court reporter to prepare and file a transcript index.

URAP 24. Briefs. Amend. Requires parties who are seeking attorney fees to explicitly state the basis for the request.

URAP 52. Child Welfare Appeals. New. A notice of appeal must be filed within 15 days from the order to be appealed. Cross-appeals must be filed within 15 days.

URAP 53. Notice of Appeal. New. Describes the contents and service requirements of the notice of appeal.

URAP 54. Transcript of Proceedings. New. Any necessary transcripts must be requested within 4 days after an appeal is filed.

URAP 55. Petition on Appeal. New. The appellant must file a petition on appeal within 15 days from the notice of appeal. The rule describes the format and contents of the petition.

URAP 56. Response to Petition on Appeal. New. A response to the petition on appeal must be filed with 15 days.

URAP 57. Record on Appeal; transmission of record. New. Establishes what is considered to be the record on appeal and when it must be transmitted.

URAP 58. Ruling. New. The court will issue a ruling based on the record on appeal, the petition, and the response, or the court can order that the case be fully briefed.

URAP 59. Extensions of time. New. The rule describes the procedure and circumstances for extensions of time to file the appeal, the petition, or the response.

Utah Rules of Civil Procedure

URCP 45. Subpoena. Amend. Correct reference to Rule 4 regarding methods of serving subpoena.

URCP 47. Jurors. Amend. Conforms rule regulating conversing with jurors to caselaw.

URCP 56. Summary judgment. Amend. Corrects reference to URCP 7. Technical amendments.

URCP 62. Stay of proceedings to enforce a judgment. Amend. Strikes from the rule the amendments made by HJR 16.

URCP 64. Writs in general. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64A. Prejudgment writs in general. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64B. Writ of replevin. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64C. Writ of attachment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64D. Writ of garnishment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64E. Writ of execution. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64F. Waiver of bond or undertaking. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 66. Receivers. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 69. Execution and proceedings supplemental thereto. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69A. Seizure of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69B. Sale of property; delivery of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69C. Redemption of real property after sale. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

Utah Rules of Criminal Procedure

URCrP 12. Motions. Amend. Describes the process for motions to suppress, including the contents of the motion and whether a written response is required.

URCrP 21A. Presentence investigation reports; Restitution. Renumber from URCrP 21.5 and amend. Changes designation of PSI report from "controlled" to "protected" to conform with statute.

URCrP 27. Stays pending appeal. Amend. Requires a party to serve the Attorney General when seeking a certificate of probable cause from appellate court in a felony case.

Utah Rules of Evidence

URE 608. Evidence of character and conduct of witness. Amend. Changes rule to be consistent with changes to the Federal Rule.

URE 803. Hearsay exceptions; availability of declarant immaterial. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

URE 804. Hearsay exceptions; declarant unavailable. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

URE 807. Other Exceptions. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

Utah Rules of Juvenile Procedure

URJP 44. Findings and conclusions. Amend. Clarifies requirement to review proposed order prior to signing.

URJP 45. Pre disposition reports and social studies. Amend. Identifies the official responsible for delivery of the pre-disposition report.

URJP 46. Disposition hearing. Amend. Clarifies requirement to prepare proposed order and review it prior to signing.

URJP 53. Appearance and withdrawal of counsel. Amend. Modifies certification of counsel for withdrawal after final order.

Utah Rules of Small Claims Procedure

URSCP 10. Set aside of default judgments and dismissals. Amend. Reduce time to move to set aside from 30 to 15 days. Effective May 3, 2004

URSCP 12. Appeals. Amend. Conform time to appeal to statute (30 days). Effective May 3, 2004.

Supreme Court Rules of Professional Practice

Chapter 23. Standards of Professionalism and Civility. New. Establishes standards of professionalism and civility.

Fifteenth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

The holidays are a special time for giving and giving thanks.
Please share your good fortune with those who are less fortunate.

SELECTED SHELTERS:

The Rescue Mission
Women & Children in Jeopardy Program
Jennie Dudley's Eagle Ranch Ministries

WHAT IS NEEDED?

CASH!!! cash donations can be made payable to the shelter of your choice, or to the Utah State Bar. Even a $5 donation can buy a crate of oranges or apples.

new or used winter and other clothing: for men, women & children
boots, gloves, coats, pants, hats, scarves, suits, shirts, sweaters, sweats, shoes

housewares: bunkbeds, mattresses, cribs, blankets, sheets, books, children's videos, stuffed animals, toys

personal care kits: toothpaste, toothbrushes, combs, soap, shampoo, conditioner, lotion, tissue, barrett's, ponytail holders, towels, washcloths, etc.

all types of food: oranges, apples, grapefruit, baby food, formula, canned juices, canned meats, canned vegetables, crackers, rice, beans, pasta, peanut butter, powdered milk, tuna fish
(please note that all donated food must be commercially packaged and should be non-perishable.)

DROP DATE:

Friday, December 17, 2004 • 7:30 am to 6:00 pm
Utah Law & Justice Center rear dock – 645 South 200 East • Salt Lake City
Volunteers will meet you as you drive up.

If you are unable to drop your donations prior to 6:00 pm, please leave them on the dock near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm and to coordinate the collection for the drop. If you are interested in helping please contact:
Leonard W. Burningham: (801) 363-7411 • Toby Brown: (801) 297-7027

Thank You!

Utah Standards of Professionalism and Civility

(By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved these Standards.)

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.
2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.
3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.
4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.
5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.
6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible ex parte communications.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

2005 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2005 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 17, 2005.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

Discipline Corner

DISBARMENT

On September 8, 2004, the Honorable Joseph C. Fratto, Third Judicial District Court, entered an Order of Discipline: Disbarment, disbarring Jerry Crist from the practice of law in the State of Utah pursuant to Rule 22 (Reciprocal Discipline) of the Rules of Lawyer Discipline and Disability.

In summary:

Mr. Crist was disbarred by the Supreme Court of Colorado for abandoning his law practice and his clients, and for his unlawful use of methamphetamine. Mr. Crist missed numerous pretrial conferences, motions hearings, trial dates, and other client appointments in criminal and civil matters.

ADMONITION

On September 16, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court admonished an attorney for violation of Rules 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained by a client to represent the client's interests in the client's deceased spouse's estate. The attorney indicated to the client that the deceased spouse's children should retain an attorney to represent the children, because the attorney intended to sue the children. The client's parent informed the attorney not to sue the children. The client terminated the attorney's services, but the attorney would not cease the representation. The attorney attempted to have the client sign a contract, but the client would not sign it. The attorney billed the client for services after termination of the representation, but later claimed it was an error. The attorney filed a motion in court in an attempt to avoid termination of representation from the case. The attorney finally withdrew from the case.

SUSPENSION

On September 22, 2004, the Honorable Frank G. Noel, Third Judicial District Court, entered an Order of Discipline: Suspension, suspending Charles C. Brown from the practice of law for six

months and one day for violation of Rules 1.7 (Conflict of Interest: General Rule), 1.8(a) (Conflict of Interest: Prohibited Transactions), 1.9(a) (Conflict of Interest: Former Client), and 8.4(a) (Misconduct), Rules of Professional Conduct. The effective date of suspension is November 24, 1998.

In summary:
On November 24, 1998, Mr. Brown was voluntarily placed on interim suspension pursuant to Rule 18 of the Rules of Lawyer Discipline and Disability.

Mr. Brown represented a client who held a business interest in a company while simultaneously serving on the board of directors, holding an ownership interest, and entering into an employment agreement with the company. In an action brought against the client, Mr. Brown's law firm also represented the opposing party until the court prohibited that representation.

PUBLIC REPRIMAND
On September 23, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand reprimanding Victor Lawrence for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 3.3 (Candor Toward the Tribunal), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Lawrence represented debtors in a bankruptcy matter. In a ruling, the bankruptcy court stated that the debtors did not give the notice required to the creditors. Mr. Lawrence failed to list all creditors on the court's mailing matrix of interested parties, even after receiving the trustee's objection. Mr. Lawrence's lack of competence denied the debtors their day in court. Mr. Lawrence also failed to pursue with the bankruptcy court issues of allowances and reimbursements due to the debtors and a creditor, and failed to communicate with the debtors regarding management of the cash collateral necessary to continue the debtors' business. The court stated that Mr. Lawrence admitted to filing a false certificate of mailing with the court regarding the creditors.

RESIGNATION WITH DISCIPLINE PENDING
On September 27, 2004, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Todd R. Cannon.

In summary:
On March 18, 2004, Mr. Cannon entered a guilty plea to a charge of Conspiracy to Commit Offense or Defraud the United States. Mr. Cannon submitted a Petition for Resignation with Discipline Pending to the Utah Supreme Court on August 18, 2004. Mr. Cannon's petition admits that the facts underlying his guilty plea constitute grounds for discipline.

Mr. Cannon participated in an ongoing conspiracy to promote and sell a fraudulent trust scheme designed to evade federal income taxes, defeat the lawful functioning of the Internal Revenue Service, and to fraudulently obtain money or property from United States citizens by use of the mails and wires.

Young Lawyer Division

Not Just Lawyers for Literacy

The Public Education Committee of the Young Lawyers Division needs tutors from all areas of the legal community (not just lawyers) to help improve the reading and literacy of the English Language Learners at Salt Lake's Backman Elementary.

You give a little, you get a lot!
Reading to a child at Backman for just a half-hour once a week will improve that child's life and enrich yours. Tutors are needed from 8:00 am to 2:40 pm Monday through Thursday, and Fridays from 8:00 am to 12:15 pm.

For more information, contact:
Chad Derum
363-5678
cderum@mc2b.com.

Paralegal Division

What We've Been Up to

- Partnered with the Legal Assistant Association of Utah to hold brown bag CLE events every month. If you or someone you know (your supervising attorney, hint…hint) would like to present on their area of expertise, please let me know.
- Organized the half day CLE on November 19, 2004, more information to follow.
- Sponsored one full track of CLE at the mid-year meeting in St. George and are encouraging our members to attend the annual meeting as well.
- Arranged for the inclusion of members in the upcoming issue of The Professionals Directory and The Legal Eagle.
- Working on continuing the Utilization Series in upcoming issues of the *Bar Journal*.
- Continued to assist with paralegal advertising and job placement. If you or your firm have an open paralegal position, you can forward that information to Tally Burke and it will be disseminated to the Division.
- Working on an informative flyer/brochure to educate and advertise the Division and the paralegal profession.
- Working on a joint fundraising effort for "And Justice For All" in 2005.
- Working to participate on the advisory committee on professionalism formed by Justice Wilkins.
- Assigned a liaison from the Bar Commission, V. Lowry Snow, and will be working with him to improve the Division and draw on his expertise.
- Continuing to have a position with and offering assistance to the Access to Justice endeavor.
- Planning the Paralegal Day Luncheon on May 19, 2005, at the Grand America. Mark your calendars along with your supervising attorneys.
- Peggi Lowden was presented the Community Member Award from the Utah State Bar at the Fall Forum. Congratulations, Peggi!
- Developed the first online Utilization and Salary Survey that will be up and running in late 2004 or early 2005. Keep your eyes and ears open for this one.
- The Division currently has 117 members.
- The Utah Department of Workforce Services released a list of "Five-Star Jobs" and paralegals are included. This is a very exciting time for our profession.

If you are interested in getting involved and helping with one of the many projects going on within the Division, please contact me.

Tally A. Burke, Paralegal Division Chair
Kruse Landa Maycock & Ricks, LLC
Eighth Floor, Bank One Tower
50 West Broadway • Salt Lake City, Utah 84101
(801) 531-7090 • tburke@klmrlaw.com

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/05/04	**Golf & CLE: "Erisa Claims in Litigation – A Primer."** Presenter: Scott Petersen, Fabian & Clendenin. Coral Canyon Golf Course, St. George, Utah. 8:00–10:30 am, golf at 11:00. Golf and CLE: $85 or $45 for Litigation and Southern Utah Bar Members. CLE ONLY: $25 or Free for Litigation and Southern Utah Bar Members. Space is limited to 60 so register NOW!	2.5 CLE/NLCLE
11/05/04	**What Utah Judges Really Think About Daubert.** 9:00 am–1:30 pm. $150, litigation section members $120.	4
11/12/04	**New Lawyer Mandatory.** $50. Satisfies New Lawyer Requirement for ethics.	TBA
11/15–16/04	**49th Annual Estate Planning Seminar.** Develop your estate planning strategies. Avoid traps that threaten sophisticated, as well as commonplace, estate planning arrangements. Choose the topics which meet your specific needs from the Tuesday afternoon concurrent sessions. Washington State Convention & Trade Center, Seattle, Washington. 11/15/04 8:00 am–5:20 pm. 11/16/04 7:55 am–5:05 pm. $410.00 before 11/01/04, $430.00 after.	14.5 Hours 1 Ethics
11/17/04	**Negotiation: Reaching Agreement on YOUR Terms.** Learn the components of effective negotiation – how to guide the process, and how to control the interaction. Paul M. Lisnek, J.D. Ph.D. 9:00 am–4:30 pm. $175 before 11/10/04, $200 after.	6
11/18/04	**NLCLE: Guardianship – Conservatorships & Guardianships from A-Z..** 5:30–8:30 pm. $55 for YLD and $75 for others.	TBA
TBA	**Jury Selection & Focus Groups.** Presenter: Reiko Hasuike President, Decision Quest, a Los Angeles-based consulting firm specializing in jury selection. Free to and reserved for Litigation Section Members.	1.5

To register for any of these seminars: Call 297-7033, 297-7032 or 297-7036, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

REGISTRATION FORM

Pre-registration recommended for all seminars. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis.

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard Card No. _____

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $35.00 / 51-100 words – $45.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, call (801)297-7022.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

FOR SALE

Complete set of Lexis published Utah Code Annotated, including the 2003 supplements, for sale by the Law Office of Loni F. DeLand, Inc. for $300.00. Please contact Heather at 364-1333 between 9:00 a.m. and 5:00 p.m. Monday–Friday.

POSITION SOUGHT

Attorney/CPA – Thirteen year practicing attorney and 17 year licensed Certified Public Accountant, seeking associate position with partnership potential. Experience in tax litigation and transactions, corporate transactions, estate planning and commercial litigation. I can be contacted at (801) 578-3532 or attorneyposition_2@hotmail.com

POSITIONS AVAILABLE

CORPORATE COUNSEL for fast-paced, entrepreneurial finance company needed to structure, negotiate and draft documents for equipment financing, structured lending, private equity investments, and real estate transactions. Minimum 5 years legal experience in commercial transactions required. Equipment leasing and/or secured lending experience and knowledge of finance required. Candidates must be hard working, detail-oriented, have good communications skills and be a team player. Salary commensurate with experience. Full-time with benefits. E-mail or fax resume and salary requirements to jobs@sentry financial.com or fax at 596-9630.

Immigration Attorney in Orlando, Florida: Must be articulate, well-mannered, have a strong work ethic and a strong desire to succeed. U.S. Visa Center will provide the opportunity you need to achieve success in the business boom we are experiencing in Florida. Our company has been experiencing a high level of success with immigration during the past several years and expect a continuation of high growth in this area. Bi-lingual a plus, but not a requirement. Salary plus benefits package. No experience necessary. Please call Paul Svejda @ 407-870-9300 or send resume to paulsvejda@yahoo.com

Corporate Counsel with 1-7 years of relevant experience. Litigation history required, IP and/or Corporate and/or Nutrition & Beauty Industry exposure a plus. Successful candidate will excel in a fun, fast paced environment with a willingness and ability to perform a diversity of tasks. Salary commensurate with experience level. Please send inquiries to: Utah State Bar, Confidential box #5, 645 South 200 East, Salt Lake City, Utah 84111-3834 or e-mail ccritchley@utahbar.org.

Intellectual Property Associate Position. We have openings for associates with 2 to 3 years of experience in our Technology and Intellectual Property Group. The positions will provide a mixture of patent and trademark procurement and related litigation. Registered patent attorneys are invited to apply who have an undergraduate degree in electrical engineering, computer science, biology, or biochemistry. Candidates must have strong written and oral skills, solid academic record, and the desire to work as part of a team. Please submit a transcript and writing sample with your resume. Stoel Rives LLP, Attn: Mary Ellen Hatch, Office Administrator, 201 S. Main Street, Suite 1100, Salt Lake City, Utah 84111 or email: mehatch@stoel.com

Law Clerk – First District Court. First District Court has an opening for a Law Clerk. Qualifications: Graduation from ABA accredited law school with J.D. Bar membership preferred; if not admitted to Bar, must successfully complete at next opportunity. Should possess working knowledge of state court system, Utah Law and legal terminology, skill in legal research, legal writing format and citation techniques. LEXIS proficiency, excellent communication skills also required. Salary: $18.27–$20.37/hour DOE plus benefits. Closing date: 12/01/04. Applications may be obtained from DWS or at www.utcourts.gov. Return applications to Sharon Hancey, First District Court, 135 N 100 W, Logan, UT 84321, (435) 750-1330. EOE.

OFFICE SPACE/SHARING

Architecturally unique, newly constructed law office space in convenient East Sandy location for one or two attorneys in office sharing or other arrangement with another attorney. Fabulous view, easy parking and access to building. T-1 Lines; multi-featured programmable telephone system, copier, fax, receptionist. Overflow work available for individual(s) with bankruptcy experience. Call 635-9733 or 501-0100.

Two offices now available at $1,000 month located in the Key Bank Tower, at 50 South Main, SLC. Amenities include: receptionist, conference rooms, fax, copier, and kitchenette. Contact Nedra at 531-7733.

OFFICE SHARE AVAILABLE DOWNTOWN. One, two, or three offices available with secretarial area, photocopy and fax available, high speed internet access. Call Jon 534-1447.

NEED LEGAL OFFICE SPACE IN ST. GEORGE? WE HAVE ROOM. We have 1 furnished office available. Lease includes telephone use, network, copier, conference room and reception staff. Make your presence in St. George known! No Bankruptcy attorneys please (we want to avoid a conflict). Call Thomas at (801) 641-6156.

Professional Building For Lease – 3900 sq ft, Ground Floor, Partially furnished. Law library. Rental $12.00 sq ft. Next to Trax station and to post office. 49 West Center St, Midvale, Utah. Phone 255-6834 between 10:00 am and 1:00 pm week days.

East-Side Office Space. Three large offices. 1245 sq. ft. Administrative support services, including receptionist. Large conference room. Price negotiable. Contact Eric or Jenny. 424-9088 or ericnielson@ericnielson.com.

STOCK EXCHANGE BUILDING has several available spaces, two office suites containing two to three offices, conference room and file room, as well as two individual offices and two executive suites with full services. Prices range from $400 to $1,600 per month. One-half block from state and federal courts. Contact Richard or Joanne at 534-0909.

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Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

California Probate? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, Farmington. 801-451-8400 (or: 1-888-348-3232). Licensed in Utah & California – 39 years experience.

Securities Attorney – Expert Witness: Case evaluation and strategy; expert reports and testimony; internal investigations and consulting. Civil and criminal litigation, administrative proceedings, arbitration and investigations: Securities and Exchange Commission; Department of Justice; state securities commissions; NASD and stock exchanges. Over 25 years major securities litigation and transaction experience including attorney for the U.S. Securities and Exchange Commission, New York Office – Divisions of Enforcement and Corporation Finance. Excellent CV and references. A. Thomas Tenenbaum, Tenenbaum & Kreye LLP, 6400 S. Fiddler's Green Cir. #2025, Englewood, CO 80111, (720) 529-0900, Fax: (720) 529-7003, att@tklawfirm.com.

PROBATE MEDIATION AND ARBITRATION: Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Graduate: Mediation Course, the American College of Trust & Estate Counsel.

CHILD SEXUAL ABUSE – DEFENSE. Forensic Statement Services provides a complete objective case analysis – Assess relevance of criminal charges – Identify and determine effects of evidence contamination, coersion, bias and prejudice – Evaluate for false allegations – Apply objective Daubert, peer-reviewed research to case evidence and motions to limit/suppress. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011. Member: American Psychology-Law Society.

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Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah Law and Justice Center
645 South 200 East, Salt Lake City, UT 84111-3834
Telephone (801) 531-9077 Fax (801) 531-0660

For Years _____ and _____

Name:			**Utah State Bar Number:**			
Address:			**Telephone Number:**			
Date of Activity	**Program Sponsor**	**Program Title**	**Type of Activity (see back of form)**	**Ethics Hours (minimum 3 hrs. required)**	**Other CLE (minimum 24 hrs. required)**	**Total Hours** **24**
			Total Hours			

Explanation of Type of Activity

A. Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study

No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line cle programs. Regulation 4(d)-101(a)

B. Writing and Publishing an Article, Self-Study

Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Regulation 4(d)-101(b)

C. Lecturing, Self-Study

Lecturers in an accredited continuing legal education program and part-time teaching by a practitioner in an ABA approved law school may receive three hours of credit for each hour spent lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing or part time teaching. No lecturing or teaching credit is available for participation in a panel discussion. Regulation 4(d)-101(c)

D. Live CLE Program

There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. However, a minimum of twelve (12) hours must be obtained through attendance at live continuing legal education programs. Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b) and (c) above of this Regulation 4(d)-101 may not exceed twelve (12) hours during a reporting period.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

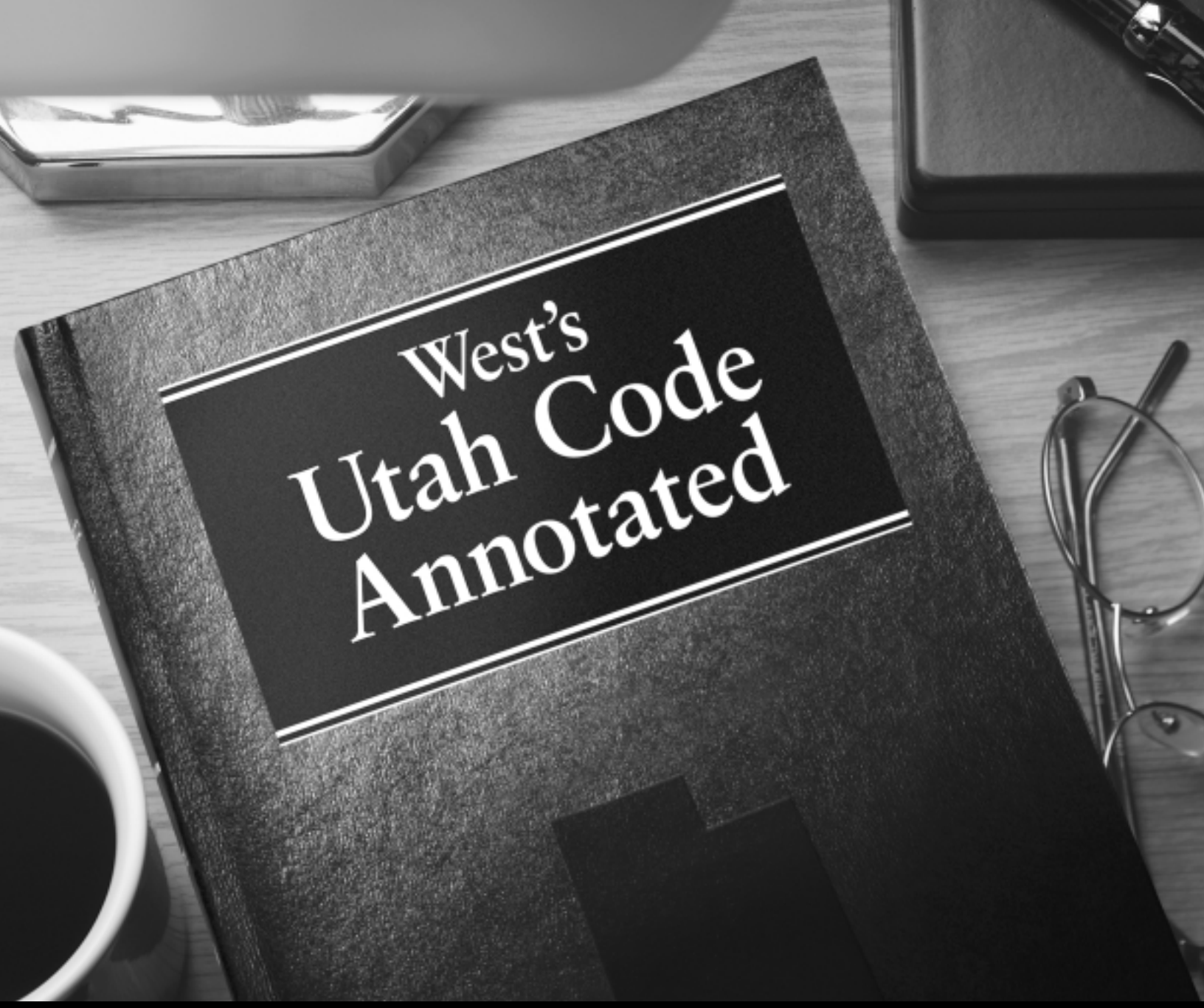
Regulation 5-101 – Each licensed attorney subject to these continuing legal education requirements shall file with the Board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

Regulation 5-102 – In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. **Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a $50.00 late fee. In addition, attorneys who fail to file within a reasonable time after the late fee has been assessed may be subject to suspension and $100.00 reinstatement fee.**

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulation 5-103(1)

Date: _____ Signature: _____

Regulation 5-103(1) – Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. The attorney shall retain this proof for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the Board upon written request.



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