Water Law Case Studies

Overview
1) Navigability - What’s the big deal?

• Confers Clean Water Act (CWA) protections
• EPA administers the CWA
• Stems from early Interstate Commerce needs
• UA Army Corps of Engineers (USACE) administers CWA dredge and fill (404a) permits
The Upper Santa Cruz River

Effluent-dominated reaches

A. Tubac-Continental Rd
B. Roger Rd-Pinal Co Line
Meltzer: Santa Cruz ruled "navigable"  
AZ Daily Star, Fri. 12/5/08

• 12/3/08 - EPA Asst. Adm. of Water Benjamin Grumbles rules portions of Santa Cruz “navigable”

• Based on:
  – Width and depth of recorded flows
  – Presence of activities like canoeing and birding
  – Potential for more water due to on-going restoration
  – Susceptible to future navigation; has been navig. in past

• Environmentalists – new guidelines still confusing
• Rep Raul Grijalva – part of Bush admin. business agenda
  – a “last ditch” effort
• Opposed by SAHBA and Pima Co (initially)
Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors
Questions for Discussion - Navigability

• What was original intent?
  – What is the relevance of navigability? What kinds of navigation?
  – What is the relevance of interstate vs. intrastate commerce?
  – What is commercial? recreation; tourism; small business?
  – What is sig. of past, current or potential future navigability?

• How much water; What constitutes a signif. connection to a nav. river?

• If flow is not perennial, how much water for how long?

• How much is too much – what should be excluded?
  – Ag (why); Private property? Roadside ditches?

• Why can’t we easily revise the CWA to be more precise?
Broader issues

Congress passed the CWA for the stated purpose of ‘restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters’

• How do you protect the headwaters and ephemeral streams ... to preserve downstream water quality?

• To what extent should we include:
  – wetlands; upland ephemeral streams; recreational waters; tributary waters; waters home to migrating birds?
Legal Cases

• CWA: navigable waters = waters of the US
  – traditional navigable waters include waters which, although used, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway

  – abandoned sand and gravel pit; Limits applicability for isolated waters that are both intrastate and non-navigable and home to migratory bird

  – four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. Rapanos had backfilled three of the areas without a permit. SC held that Navigable Waters does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall
Rapano’s 2008 Guidance, 12/2

The agencies will assert jurisdiction over the following waters:

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- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- Tributary Wetlands
- Wetlands adjacent to relatively permanent non-navigable tributary

The agencies will apply the significant nexus evaluation as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.
Early Cases

• The Montello, 87 U.S. 430, 441-42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water’s capacity for navigation alone is not sufficient; that capacity must be indicative of the water’s being “generally and commonly useful to some purpose of trade or agriculture.”

• U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940) (“... lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”
The Clean Water Act - 1972

- Sec. 303 Threatened and Impaired Waters List- “Pollutants”
  - Total Maximum Daily Load (TMDL) calculations
- Sec. 401 Water quality certification- Requires federal agencies to obtain certification from the state, territory, or Indian tribes before issuing permits that could result in increased pollutant loads to a water body. The certification is issued only if such increased loads would not cause or contribute to exceedances of water quality standards.
- Sec. 404: Regulates the discharge of dredged or fill materials into wetlands and other Waters of the United States. Wetlands are those areas that are inundated or saturated by surface or ground water 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 as evidence by hydrology, ecology and soils.
- Sec. 402: National Pollutant Discharge Elimination System (NPDES) program, Covers point sources of pollutants discharging into a surface water body
- Sec. 319: Addresses nonpoint sources of pollution, such as most farming and forestry operations
Davis: **Report: Army official ignored Santa Cruz data**, AZ Daily Star, 12/17/08

- June 2006: The U.S. Supreme Court limits the scope of Clean Water Act protection for isolated rivers, streams and wetlands. Justice Kennedy writes that they **must have a significant connection to “a navigable waterway, in the traditional sense,”** to be legally entitled to federal protection.
- May 2008: The USACE decides that 54 miles of the Santa Cruz River north and south of Tucson deserve classification as a traditional navigable waterway, and, thus, regulation under the Clean Water Act.
- June 2008: The Corps suspends the river’s navigable determination for at least 60 days as part of a broader, national review of navigability.
- August 2008: Two U.S. House committee chairmen vote to investigate the Corps’ handling of the Santa Cruz decision, at the request of Rep. Raúl Grijalva of Tucson.
- August 2008: The Board of Supervisors supports navigability for a much longer stretch of the Santa Cruz, from the Mexican border to the Pinal County line. The Environmental Protection Agency moves to take over handling of the navigability issue.
- November 2008: House report – USACE decision based “a sweet whisper in the ear” or the perception that the SC was “pretty dry” despite staffs’ scientific analysis. “This report details unethical actions taken by political appointees within the Army Corps. The Bush Administration has once again revealed its tendency to subvert science and transparent decision-making within federal agencies for the benefit of a few private interests.” Raúl Grijalva

• This appeal involves the long-standing battle to determine who owns the beds of rivers within the State of Arizona, specifically bedlands of the Lower Salt River, which runs from Granite Reef Dam above Phoenix through the highly populated Salt River Valley to the confluence with the Gila River. The crucial question to be resolved is whether the River was navigable in its ordinary and natural condition.

• If it was navigable, title to the bedlands passed to the State from the federal government at statehood on February 14, 1912, and the State retains title to those bedlands.

• If the River was not navigable, the neighboring riparian owners hold title

• The commission has ruled that only the Colorado River in Arizona is navigable.

• The court held in favor of the State, agreeing that the Navigability rule was misapplied.
Timeline

• 1985 – State assert title to bedlands
• 1987 – Leg. passes HB2017 relinquishing all rights; grandfathering existing rightholders; public retain recreational use
• 1992 – Leg. establishes ANSAC
• 1993 – ANSAC classifies Lower Salt as navigable
• 1994 – Leg. requires ANSAC to apply more stringent rules; Taken to court by Defenders of Wildlife
• 2004 – ANSAC rules Lower Salt not navigable at statehood; Taken to court by State Land Dept.
• 2010 – AZ Ct. of Appeals rules pre-statehood flows must be considered.
3) Water Rights Adjudication

- Legal process to fairly allocate water among competing users
- Cases literally spend decades in court
- Requires enormous time for discovery, weighing competing claims, education, political capital
- For tribes, more often entails negotiating for water and federal dollars for infrastructure
Jenkins: The Colorado River's Sleeping Giant Stirs, HCN, 4/28/03

- 60's – Colo. River Indian Tribes claim 717 kaf of water using PIA criteria
- Navajo Reservation 63 times larger; est. 1868
- Strategy – trade some water rights for infrastructure $$$
- 2001- AZ SC allows more complex determination of water needs

- Regardless of size, Navajo claim will come from AZ’s allotment of 1.2 Maf to CAP: cities v. Ag
Kracker: **The New Water Czars**, HCN, 3/15/04

- Gila River Indian Comm. (GRIC)
- 20,000 members; 375 kac; est. 1859
- Supplied all flour to North and South in Civil War!
- Use 200 kaf on 20 kac
- Seek 650 kaf for 146 kac
- 1890’s – water “stolen” by upstream diverters
- Potential flow of Gila ~ 2 Maf
- Ironies: Massive expansion of Irrig. Ag; Others likely to use GW
- Status:

Deal:
- Tribe gets 650 kaf, 200 kaf from farmers, who can waive $73 M in CAP debt
- Can lease 41 kaf to cities > $41 M
- $200 M for water infrastructure; San Carlos Irrigation Project
McKinnon: **Arizona Navajo, Hopi water deal stirs controversy**, AZ Rep, 5/13/12

- 160 kaf of unclaimed water in Little Colorado
- 31 kaf of Colorado River water (postponed)
- $800 M CR pipeline; $350 M GW dist. network (3)
- “Limits” Tribe’s GW rights
- If Page plant coal lease renewed, 6400 af more
- In a rush – Kyl is nearing retirement
- Settlement will change life on the reservation – the good ($, less hauling) and the bad (cultural/spiritual loss)
2) Water Rights – other issues

News Stories:

- Corbett: [Mining Company Buys Planet Ranch](#), 12/23/11 “knowing what we know now, we would probably not have purchased it”
- Glennon: [Arizona's Precious Water Factor](#), 8/9/09 “use price signals and market forces to encourage conservation and to reallocate water from existing users to new uses”
- McKinnon: [Farms Looked at as Resources Vanish](#), 10/25/09 “70% of water, 1% economic impact”
- Buchele: [Taking a Deeper Look at the Texas Supreme Court’s Ruling on Water](#), 3/1/12 “landowners’ greater claim to the state’s limited water supply will complicate long term planning”
- Matlock: [AG locked in Elephant Butte water fight](#), 8/14/1 “ill-advised” some argue
Transferring Mainstream Colorado River Water Rights: The Arizona Experience


Because Arizona’s portion of Colorado River water is almost completely allocated, the only viable source of Colorado River water available for new uses is the sale, lease, or exchange of existing water rights. Such transfers, often dubbed water marketing, raise significant and controversial issues. This Article will explore some of these challenges by examining case studies of individual transfers that have occurred or been proposed.
Patching the Holes in the Bucket: Safe Yield and the Future of Water Management in Arizona

RITA PEARSON MAGUIRE | 49 Ariz. L. Rev. 361 (2007)

This Article examines the current and projected water budgets in the two Active Management Areas (“AMAs”), the reasons why safe yield is not being met, the consequences of failing to achieve safe yield by 2025, and whether safe yield will continue to be the best measure of water management success in the future.
Good Intentions, Unintended Consequences: The Central Arizona Groundwater Replenishment District


The 1980 Arizona Groundwater Management Act is widely celebrated as a progressive piece of legislation that attempted to halt excessive groundwater pumping. A key component of the Act was its requirement that developers demonstrate an “assured water supply” (“AWS”) before receiving permission to build. In the early 1990s, the legislature created an optional method for securing AWS compliance: membership in the Central Arizona Groundwater Replenishment District (“CAGRD”). This option has turned out to be far more attractive than was originally envisioned. This paper explores the good intentions but unintended consequences brought about by the CAGRD option. This article also offers a set of options that would reform how CAGRD operates.
How to Take Climate Change Into Account: A Guidance Document for Judges Adjudicating Water Disputes

by Carolyn Brickey, Kirsten Engel, Katharine Jacobs, Julia Matter, Daniel F. Luecke, Marc L. Miller, Jonathan Overpeck, and Bradley Udall

Editors' Summary

This report is intended for use by federal, state, and administrative judges who are confronted with a legal dispute involving a water resource that is alleged to be impacted by climate change. It may be useful as well for attorneys litigating or experts working on water adjudications. The purpose of this document is to summarize the manner in which climate change may impact rights and frameworks established under state and federal law concerning water resources and to anticipate the issues that water-related climate claims will pose to legal decisionmakers. This report arose out of the November 11-12, 2009, workshop, “Water Law and Climate Change,” held in Reno, Nevada, and sponsored by the National Judicial College and Dividing the Waters, a nonprofit organization of federal and state water adjudicators. No judge who attended the workshop has reviewed or approved the content of this document. This document does not reflect the personal opinion of any individual judge.

Water management and the resolution of water disputes have long relied on a simple and fundamental assumption: the past is a way to understand the present and to predict the future. Thus, for example, water allocation decisions—whether made by states in negotiating an interstate compact or by courts quantifying reserved rights—were made based on the historic record of water supply availability.

Climate change undermines the basic premise in water disputes that the past is a fair predictor of the future. Climate change is already affecting some hydrological regimes, and, in the future, such effects will increase. Decisions that depend on projections of what may occur in the future present courts with a greater degree of uncertainty than they faced in the past.

Climate change issues are being raised and increasingly considered in water litigation and in environmental policy more generally. This document notes the escalating importance for water management of the “climate change/hydrologic cycle” link and sketches implications for courts. The general problem climate change presents to courts in water disputes is how to deal with decisionmaking in light of greater uncertainty. The report surveys several tools judges can use to understand and the new science of climate change, and some of the options for resolving water disputes in ways that reflect a more rapidly changing and uncertain world.

Many courts are already deciding issues related to climate change. In fact, climate change has been considered in dozens of cases handed down by federal and state courts. Several of the most significant cases thus far involve actions to compel federal agencies to regulate or consider the emissions of greenhouse gas (GHG) emissions under existing environmental laws. Of these cases, Massachusetts v. EPA is the most important. A second important line of cases seeks to compel