The Top Ten Things You Need to Know About Western Water Law

Janet Neuman

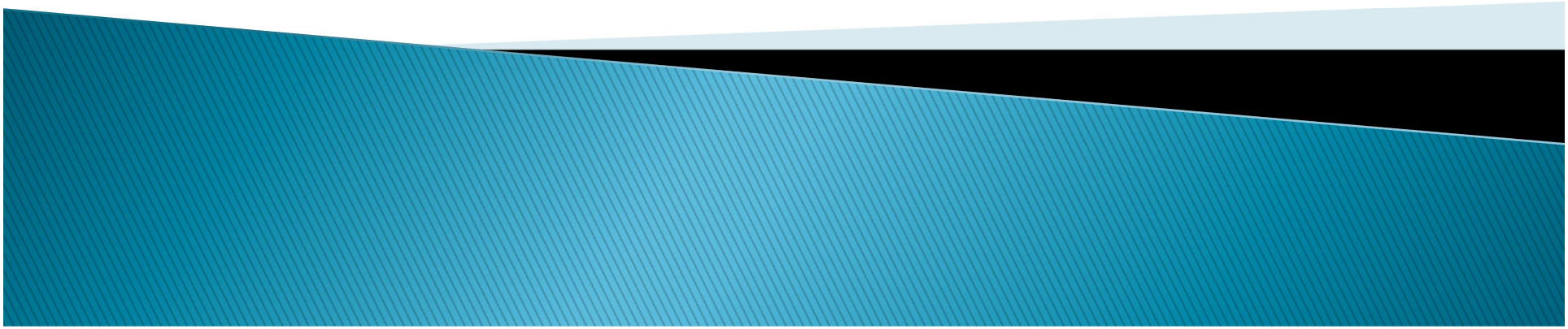
Tonkon Torp, LLP

1. "Water law" falls under the category of natural resource laws, not environmental laws.
    a. Water law as a term of art refers to the law pertaining to water allocation and quantity. Who gets to use water? Where, when and how, and more importantly how much?
    b. Water law does not refer to the laws regulating water pollution or quality or the laws regulating management of water-dependent species.
2. Water law came first, before environmental law.
    a. Water was viewed as a resource to be divided up and used, long before it was viewed as pollution to be cleaned up, or habitat to be protected.
3. Western water law is a product of history and geography.
    a. Part of that history is what I just mentioned, but there's more to it than that:
        i. Settlement of eastern US: riparianism
        ii. Westward expansion: prior appropriation
4. Oregon water law is a hybrid of riparianism and prior appropriation.
5. Oregon's Water Code was adopted in 1909.
    a. 60-70 years after the beginning of migration on the Oregon Trail.
    b. 50 years after Oregon became a state.
    c. stopped new riparian rights; adopted PA going forward
    d. provided adjudication process to sort out pre-code rights
6. In spite of several significant additions, the basic framework remains the same: prior appropriation doctrine.
    a. Permit, followed by certificate
    b. First in time, first in right
    c. Use it or lose it
    d. Beneficial use without waste (waste is defined by custom)
    e. Regulation and enforcement by watermasters
    f. Other elements of water right, in addition to priority date, are also specified
        i. source
        ii. point of diversion
        iii. amount
        iv. type of use
        v. place of use (appurtenancy)
    g. Changes require approval/ no injury review
7. Water rights are a species of property right

    a. usufructuary right
    b. defeasible subject to condition subsequent
8. overlay of federal reserved rights
9. overlay of federal environmental laws
10. Western water law generally—and Oregon water law specifically—was not designed to provide sustainable use of water resources, but instead were designed to "settle the west," promote economic development, and allocate a scarce resource among consumptive uses.

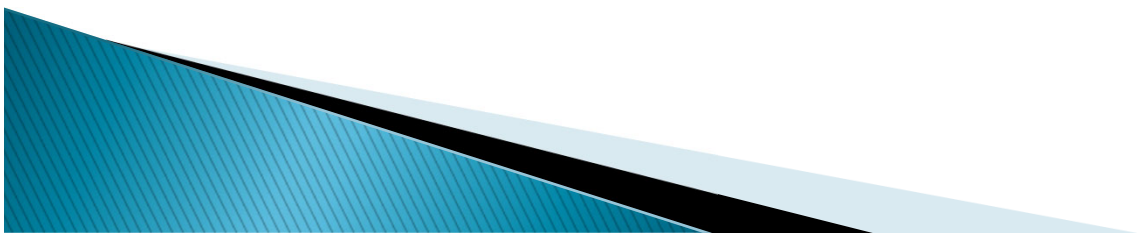
Water Quantity Management "Water Law 101"

Jan Neuman
Senior Counsel
Tonkon Torp LLP



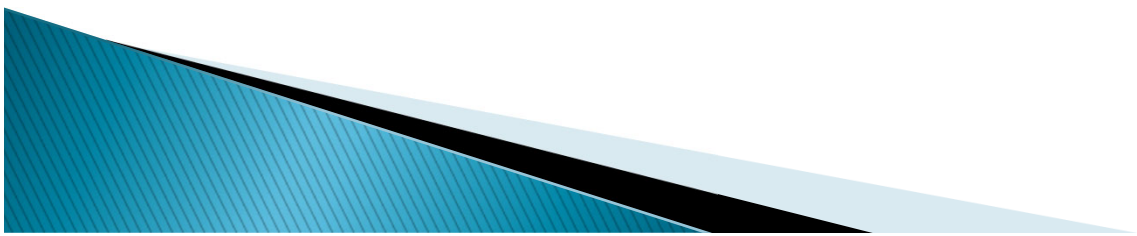
What is "Water Law?"

- Law of water allocation
  - Who gets to use water, for what purpose, where, when, and how much?
  - What if there's not enough for everybody?
- Three most important points
  - Water Law is primarily state law
  - Water quantity and water quality laws are bifurcated
  - Two different systems of state law—east and west



Origins of water law

- Why?
  - Bifurcation between quantity and quality?
  - State law?
- Product of history and geography
  - Water was considered property to be divided up long before it was viewed as a polluted resource to be cleaned up
  - Property rights have traditionally been governed by state law

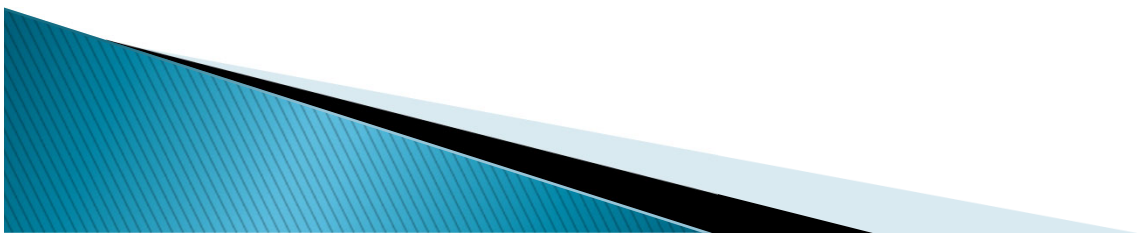


East v. West

- English settlers/English common law
  - England in 17th and 18th centuries

Riparian Doctrine

- Every riparian has an equal and correlative right to the reasonable use of water on riparian land.
- *Who?* Riparians
- *For what?* "Natural" uses
- *Where?* On riparian land
- *When?* Whenever
- *How much?* Maintain natural flow
- *What if not enough?* Pro rata reduction
- Share and share alike
- Limitations?



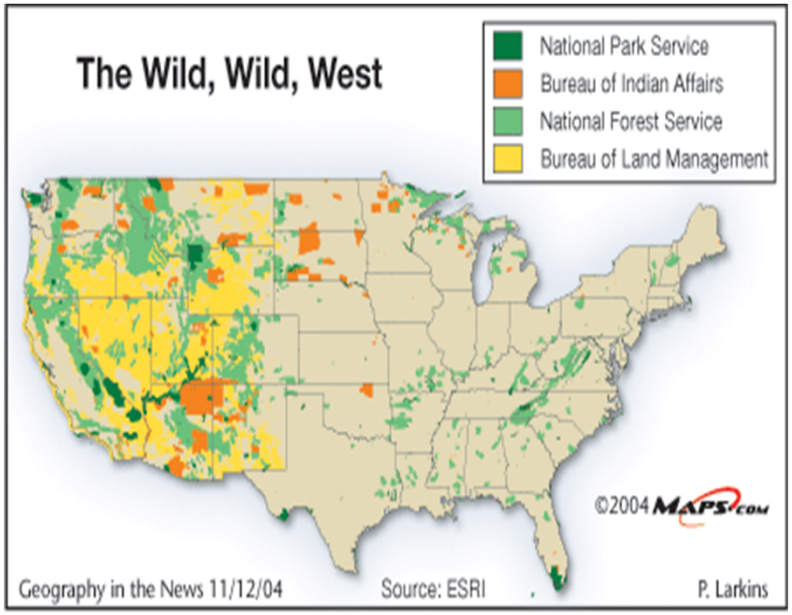
Evolution of the riparian doctrine

- Water power and industrialization
- From natural flow to reasonable use

From evolution to revolution

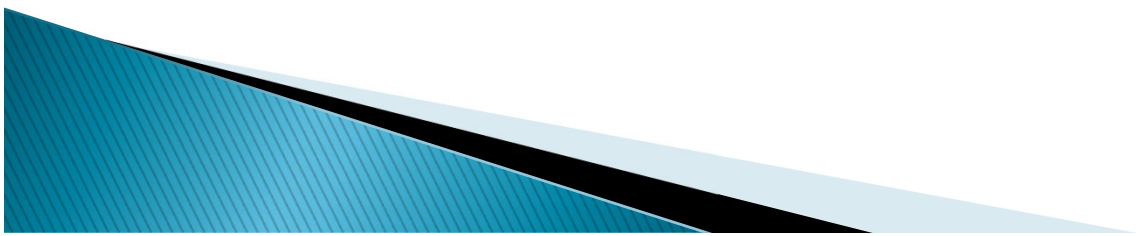
- Westward expansion of settlement

- 100th Meridian
- Public domain



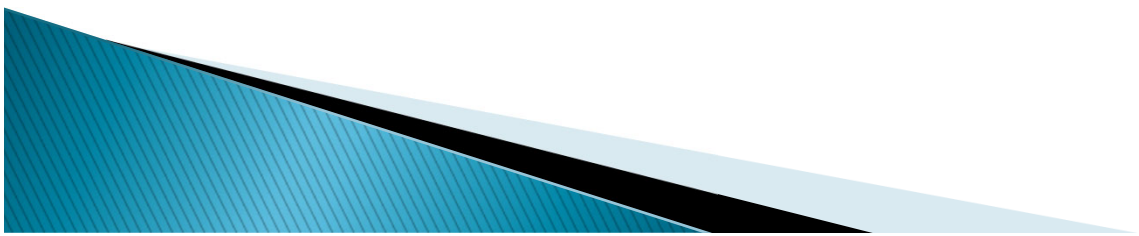
Prior appropriation doctrine

- The first person to appropriate water and apply it to a beneficial use has the best right.
- *Who?* Anyone
- *For what?* Beneficial use
- *Where?* Anywhere*
- *When?* In order of seniority
- *How much?* As much as you need*
- *If not enough?* Cut back in order of seniority
- First in time, first in right; use it or lose it.
- Limitations?



Crystals versus Mud

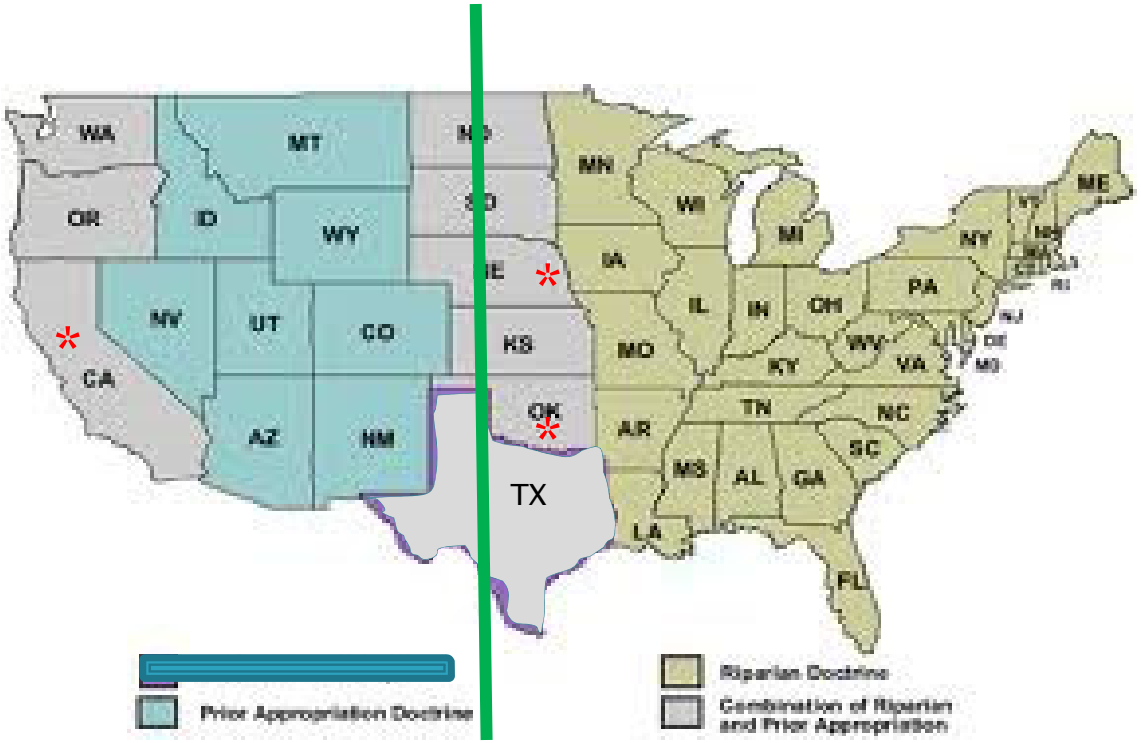
- When a resource is plentiful, rules of allocation tend to be muddy.
- When a resource is scarce, rules of allocation tend to be more crystalline.
- (Carol Rose, Crystals and Mud in Property Law, 1988)



Utilitarianism

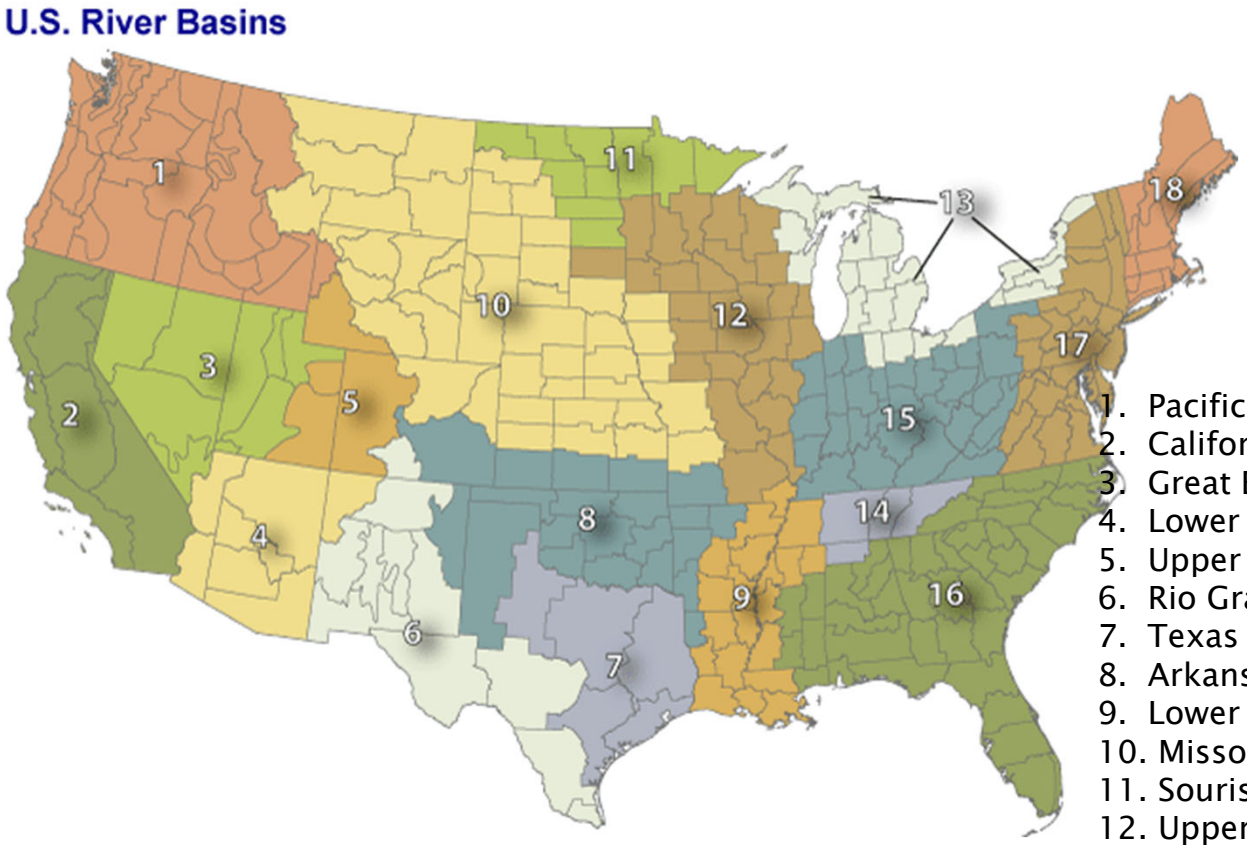
- Law is to guide behavior and settle disputes
- The useful is the good!
  - Accommodation of industrialization
  - Adaptation to aridity & public lands
  - Both doctrines promoted settlement and development as needed in their different times and places
- Concepts of utility change over time

Distribution of doctrines



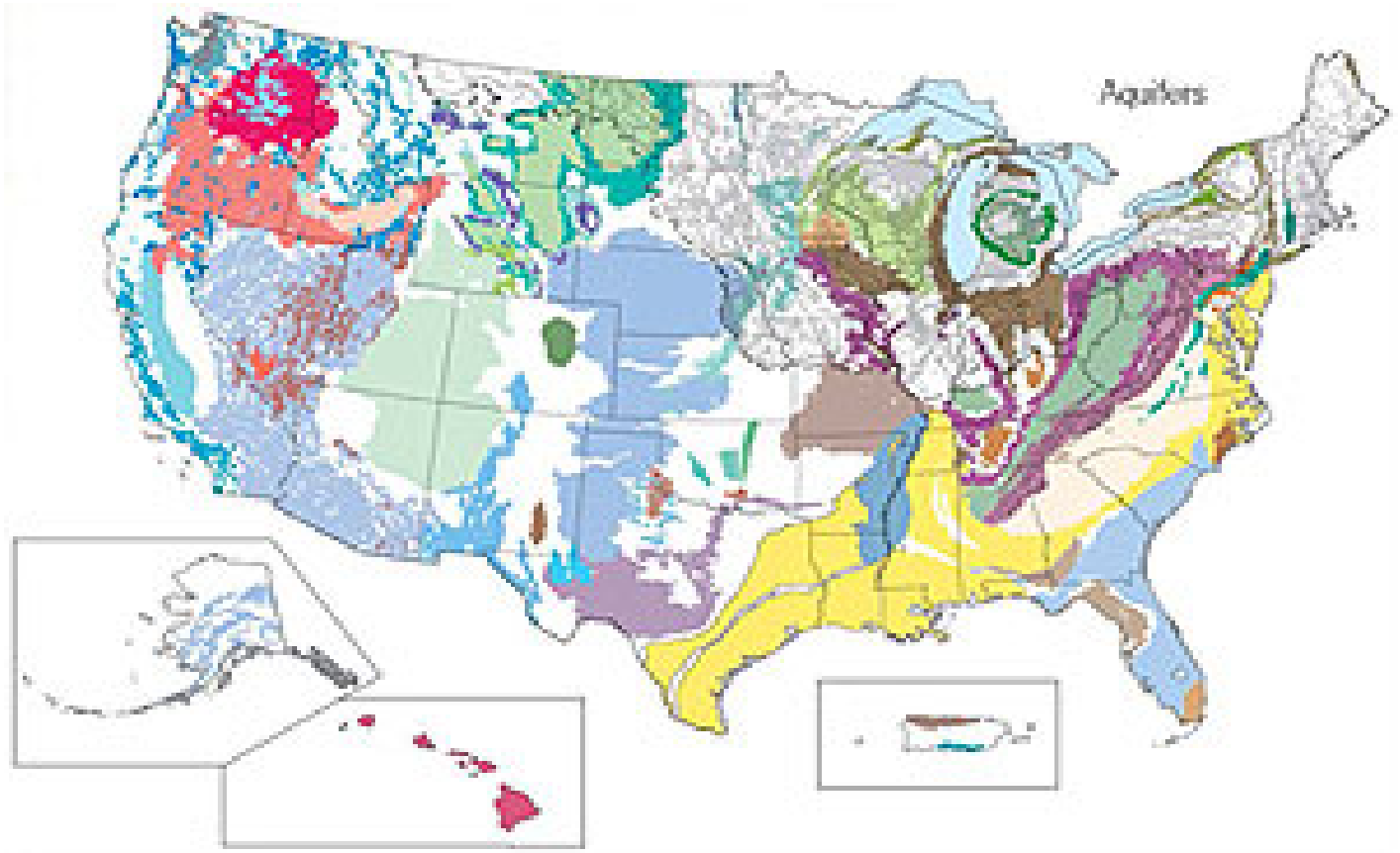
"pure" riparian, "pure" prior appropriation, and hybrid (actual and sequential)

Human law v. the law of nature



1. Pacific Northwest/Columbia
2. California
3. Great Basin
4. Lower Colorado River Basin
5. Upper Colorado River Basin
6. Rio Grande River Basin
7. Texas Gulf Coast Basin
8. Arkansas-White-Red Basin
9. Lower Mississippi River
10. Missouri River Basin
11. Souris-Red-Rainy Basin
12. Upper Mississippi Basin
13. Great Lakes Basin
14. Tennessee River Basin
15. Ohio River Basin
16. South Atlantic-Gulf Basin
17. Mid-Atlantic Basin
18. New England

Groundwater



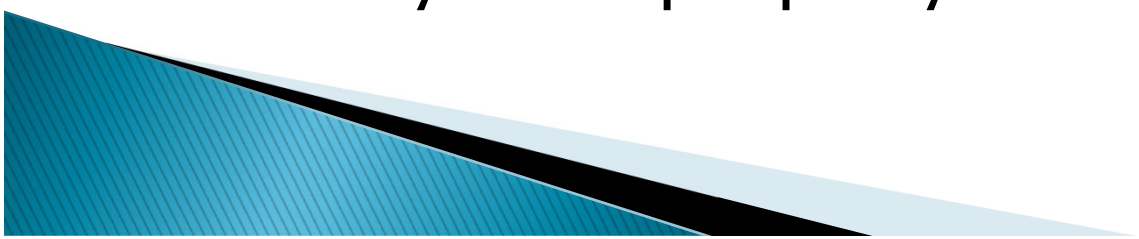
What if….?

J.W. Powell

G.J. Kauffman

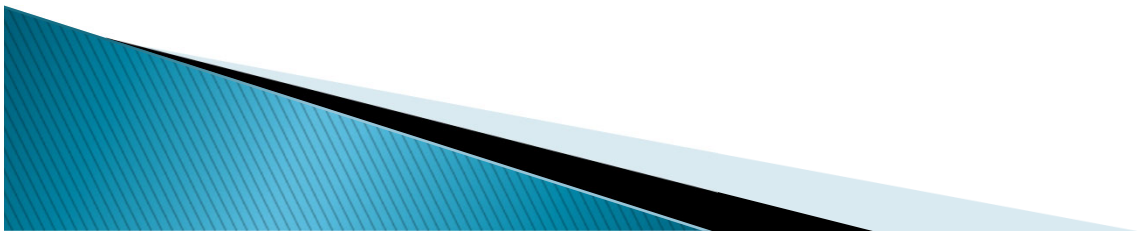
Back to reality

- Changes in the law to adapt to natural reality, while living within historical and political realities.
  - Interstate compacts
    - Also Supreme Court original jurisdiction, federal allocation
  - Federal water development projects
  - Federal reserved water rights
  - Instream flow protections and restorations
  - Water markets
- Uneasy tension between environmental overlays and property underlayment.

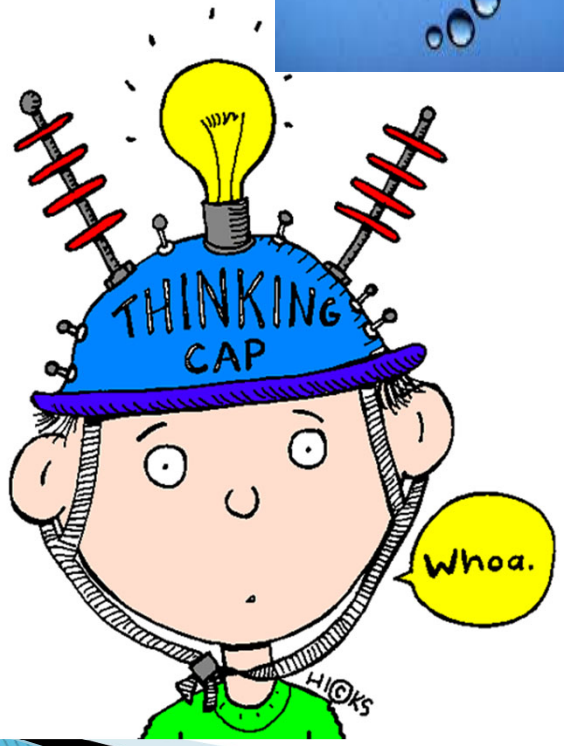


Governing the water commons

- Tragedy of the commons
  - Overuse and destruction
- Responses?
  - Create private property rights/market
  - Government ownership/permits
  - Community control



Water policy of the future…..



Oregon Civil Rights Newsletter

IN THIS ISSUE

September 2016

The Oregon Civil Rights Newsletter is published by the Civil Rights Section of the Oregon State Bar.

The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

IS CLEAN DRINKING WATER A "CIVIL RIGHT"?

by Janet Neuman, Tonkon Torp LLP

The Flint Water Crisis

Unless you have been living under a rock, you have heard about the public health crisis in Flint, Michigan, where the city's water supply is poisoned with lead. Within a fairly short period of time after the lead contamination became public, Karen Weaver, the mayor of Flint, declared a state of emergency in the city, Michigan Governor Rick Snyder declared an emergency under state law in Genesee County, and President Obama declared a state of emergency under federal law, thereby authorizing federal emergency funding to help respond to the crisis. Unfortunately, lead poisoning is irreversible, so in spite of the tripartite crisis response, much damage had already been done.

A Case of Environmental Injustice

There are many angles to the Flint story—short-term cost-savings decisions with disastrous consequences, bureaucratic bungling and finger-pointing, loss of the public's trust in government, and critical long-term public-health ramifications. One aspect of the Flint story that is particularly galling is that the community saddled with this crisis is poorly equipped to deal with it. A task force appointed by Governor Snyder concluded as follows:

> The facts of the Flint water crisis lead us to the inescapable conclusion that this is a case of environmental injustice. Flint residents, who are majority black or African-American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities.[1]

On March 25, 2016, the *New York Times* put an even finer point on the task force's finding. In an editorial titled "The Racism at the Heart of Flint's Crisis," the *Times* stated bluntly that "the *principal cause* of the water crisis in Flint" was "the state government's *blatant disregard for the lives and health of poor and black residents* of a distressed city."[2]

1 Flint Water Advisory Task Force, "Final Report" 54 (Mar. 2016), *available at* https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf. The report notes that nearly forty-two percent of Flint residents live below the federal poverty level, and nearly sixty percent are black or African-American. *Id.* at 15.

2 "The Racism at the Heart of Flint's Crisis," N.Y. Times, Mar. 25, 2016, at A24, *available at* http://www.nytimes.com/2016/03/25/opinion/the-racism-at-the-heart-of-flints-crisis.html?_r=0 (emphasis added).

Several governmental employees have been fired in the wake of the Flint revelations, and some have been subjected to criminal charges. Unsurprisingly, lawsuits are piling up—more than a dozen at last count, many of them filed as class actions.[3] Several of the lawsuits allege conventional claims for relief. For example, one case seeks compensation in tort for negligent and reckless behavior on the part of state and city officials in providing the water even when they knew of the dangers, and another tort case claims professional negligence on the part of the companies hired by the governmental agencies to do planning and engineering for the water system. More than one lawsuit alleges statutory violations of the federal Safe Drinking Water Act.

Even before the lead crisis, class action suits were pending against the City of Flint for numerous excessive water-rate increases, punitive shut-off policies for non-payment, and diversion of water revenues to the city's general fund rather than to maintain the water system.[4] In fact, in 2015, Flint's water was listed as the most expensive water in the country in a Food and Water Watch study.[5] Once the lead-contamination evidence surfaced, the irony of being forced to pay a premium for toxic water was not lost on the city's residents.

Constitutional Claims for Flint Residents?

One lawsuit arising out of the Flint water crisis stands out for its inclusion of federal constitutional claims. However, the claims do not sound in discrimination or equal protection, as might seem logical when a gubernatorial task force has officially found environmental injustice, but rather the claims are stated in terms of substantive due process. A class action complaint filed against the City of Flint, the State of Michigan, and several governmental employees in both their official and individual capacities alleges that these state actors violated the Fourteenth Amendment due process clause. Specifically, the complaint says,

> Defendants, who are all state of Michigan . . . or Flint government[al] employees, acting under the color of law, deliberately deprived Plaintiffs and the Plaintiff Class of the rights and guarantees secured by the 14th Amendment to the United States Constitution in that they deprived Plaintiffs of life, liberty and property without due process of law when they took from Plaintiffs safe drinking water and replaced it with what they knew to be a highly toxic alternative solely for fiscal purposes.[6]

The complaint states claims under 42 U.S.C. § 1983 for violations of the plaintiffs' *substantive* due process rights by exposing them to a "state-created danger" and violating their rights to "bodily integrity."[7] The plaintiffs charge the defendants with conduct that was "culpable in the extreme . . . so egregious and so outrageous that it shocks the conscience . . . made with deliberate indifference" to the serious and foreseeable medical risks.[8]

As constitutional and civil rights lawyers are well aware, violations of substantive due process are tough claims to make out—one constitutional law scholar characterized pursuing these claims as an "uphill battle."[9] Substantive due process claims are difficult for several reasons. No Supreme Court opinion has ever clearly defined the concept, and in many cases, the Supreme Court and lower courts have narrowed the situations justifying the claim.[10] In general, however, a substantive due process claim presents "the question of whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose." In trying to show that the governmental conduct is arbitrary and unjustified, cases have coined the phrases that are used verbatim in the Flint complaint—"culpable in the extreme," "shocks the conscience," "deliberate indifference."[11]

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3 *See* Ray Sanchez, "Flint water crisis lawsuits: 5 things to know," CNN, *available at* http://www.cnn.com/2016/03/11/us/flint-crisis-lawsuits-five-things/index.html.
4 *See, e.g.*, *Kincaid v. City of Flint*, Case No. 12-98490-CZ (Genesee Cnty., Mich. Cir. Ct).
5 Food and Water Watch, "The State of Public Water in the United States" 10 (2016), *available at* http://www.foodandwaterwatch.org/sites/default/files/report_state_of_public_water.pdf
6 Complaint at 2, *Mays v. Snyder*, Case No. 5:15-CV-14002-JCO-MKM (E.D. Mich. Nov. 13, 2015).
7 *Id.* at 24, 26.
8 *Id.* ¶¶ 91, 101.
9 Erwin Chemerinsky, "Substantive Due Process," 15 Touro L. Rev. 1501, 1502 (1999).
10 *Id.* at 1501, 1533–34; *see also* Rosalie Berger Levinson, "Reining in Abuses of Executive Power through Substantive Due Process," 60 Fla. L. Rev. 519, 519–20 (2008) (both discussing the limited availability of substantive due process claims).
11 *See, e.g.*, Chemerinsky, *supra* note 9, at 1522–28; Levinson, *supra* note 10, at 529–35 (discussing the language used in substantive due process cases).

A Right to Water?

The facts are quite clear at this point: Flint residents have been drinking contaminated water for several years. Many of them, especially children and other vulnerable groups, are already suffering from irreversible health problems. Responsible officials at several levels of government apparently knew what was happening and did nothing. Why do the Flint residents need to fit their claims into traditional boxes of tort, contract, and administrative law claims or harder yet, carry their water claims uphill, pursuing a disfavored and challenging substantive due process claim? Can they simply say "We have a right to clean water, and that right was violated"?

The short answer is "no." A slightly longer answer is provided by Brian Palmer in a piece posted on March 3, 2016, on the Natural Resources Defense Council website:

> Is access to safe, clean water a human right?
>
> It's not in the U.S. Constitution. The word *water* appears only once in the Constitution, in a provision that permits Congress to auction off enemy warships. The Bill of Rights guarantees all sorts of things, like the right to refuse overnight accommodations to U.S. soldiers, but it doesn't say anything about a glass of water. Then again, the founding fathers rarely drank the stuff (they preferred hard cider). And it was hard to foresee the Flint water scandal—or even indoor plumbing—in 1791.
>
> The U.S. Code contains thousands of mentions of water, but nowhere does it state that water is a human right. In fact, the only such statement I could find in the whole of U.S. law is in the California Water Code, which boldly declares that "every human being has the right to safe, clean, affordable, and accessible water." Two sentences later, however, the code undercuts its guarantee with a teeny detail: The government doesn't have to actually provide the water. It's the legislative equivalent of "Just sayin'."
>
> On the international front, the United Nations General Assembly voted in 2010 to recognize "the right to safe and clean drinking water as a human right." But here, again, there are caveats. First, the U.N. permits the "progressive realization" of human rights. Countries must only do their best with the resources available to provide water. Therefore, the 1.1 billion people worldwide who lack a water tap are not suffering a human rights violation, as long as their governments are making an effort. The other major caveat is that the U.N. declaration does not apply to Americans. The United States and 40 other countries abstained from the U.N. vote to recognize access to water as a human right.[12]

Although Mr. Palmer's comments are somewhat flip and cheeky, they actually provide a succinct and accurate statement of the "law" of the right to water. Neither the US Constitution, nor the US Code, nor state laws provide a "right" to clean drinking water. On July 28, 2010, the United Nations General Assembly adopted Resolution 64/292. The resolution "[a]cknowledg[es] the importance of equitable access to safe and clean drinking water and sanitation as an integral component of the realization of all human rights" and "[r]ecognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights." The resolution passed 122 to 0, but the United States and many other developed countries abstained, expressing concern that the resolution did not reflect existing international law and that the legal implications of declaring a right to water had not been fully considered.[13] Even if the United States had voted for the resolution, it would not have any legal teeth.[14]

Many Flint residents have recently carried signs saying that "water is a human right" in angry demonstrations against the city and state. The statement may reflect a moral imperative, but it is not a legally cognizable right under either international or domestic law. In the developed world, we tend to take our water and sanitation

12 Brian Palmer, "Is Water a Human Right?" Natural Res. Def. Council (Mar. 3, 2016), *available at* https://www.nrdc.org/onearth/water-human-right.

13 Press Release, United Nations, "General Assembly Adopts Resolution Recognizing Access to Clean Water" (July 28, 2010), *available at* http://www.un.org/press/en/2010/ga10967.doc.htm. In abstaining from the vote, the US delegation was not likely thinking about water issues within the United States, but rather about what the developed countries' responsibilities might be to help the billions of people worldwide with inadequate access to drinking water and sanitation. *See generally* Erik B. Bluemel, "The Implications of Formulating a Human Right to Water," 31 Ecology L.Q. 957 (2004); Dena Marshall & Janet Neuman, "Seeking a Shared Understanding of the Human Right to Water: Collaborative Use Agreements in the Umatilla and Walla Walla Basins of the Pacific Northwest," 47 Willamette L. Rev. 361 (2011); Janet Neuman, "Chop Wood, Carry Water: Cutting to the Heart of the World's Water Woes," 23 J. Land Use & Envtl. L. 203 (2008).

14 The vague language used in UN resolutions is by design, so this declaration is no more wishy-washy than any other such international document. *See* UN4MUN "Drafting Resolutions," http://outreach.un.org/mun/guidebook/skills/drafting-resolutions/ (last visited Sept. 12, 2016). The style is not surprising, since UN resolutions represent the ultimate example of "drafting by committee," with a crucial overlay of diplomatic relations and the ever-present concern for sovereignty and international conflict.

systems for granted, which includes an expectation that the water that comes out of our taps will *not* be dangerous to our health. That expectation has been badly breached in Flint.

Following Flint

The Flint water fiasco may be particularly egregious for a number of reasons, but it is not an isolated instance. We need look no further than the Portland public schools to find another instance of drinking water contaminated with lead. Though the problem is not limited to poor or minority neighborhoods, it may have other similarities to the Flint debacle.

Looking more broadly, there are many other examples of what the Flint task force called "environmental injustice" across the United States. In 2012, a book published by the Oxford University Press reported the following statistics concerning drinking water in the United States:

- Sixty-one percent of drinking water systems on Native American reservations had health violations or other significant reporting violations in 2006, compared with 27 percent of all public systems in the United States . . . .
- In the Appalachia region of West Virginia, the drinking water supply of low-income communities has been contaminated with coal slurry injections containing a host of toxic chemicals . . . .
- An analysis of California health data suggested that about 250,000 Californians sometimes go without water due to insufficient supply or are exposed to contaminated water, and that many of these residents "reside in rural, economically disadvantaged communities" . . .
- In rural subdivisions, called *colonias*, along the 2,000-mile border between the United States and Mexico, just about one-quarter of all residents lack treated water and 44 percent of the houses do not have wastewater plumbing. Residents are overwhelmingly Latino, of Mexican descent, and immigrants. About one-third of these residents live below the poverty level and average incomes are as low as $5,000 per year in some areas.[15]

In other words, what happened in Flint is bad, but Flint is not alone. Other poor and minority communities across the United States may benefit if the spotlight now shining on Flint begins to illuminate other water problems. Clean drinking water may not yet be an enforceable "human right" under the law, but clean water is certainly a fundamental human need. Tort lawyers, business lawyers, and even civil rights lawyers can be instrumental in assuring that all groups and communities have equal access to this key component of public health and quality of life.

Janet Neuman is senior counsel with Tonkon Torp's water law and environmental and natural resources practice groups.

15 Juliet Christian-Smith et al., *A Twenty-First Century Water Policy* 57–59 (2012).

RECENT DECISIONS

by Richard F. Liebman and Anthony Kuchulis, Barran Liebman LLP

Ninth Circuit Court of Appeals

***Morris v. Ernst & Young, LLP*, ___ F.3d ___, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *appeal docketed*, No. 16-300 (U.S. Sept. 8, 2016)**

Becoming the second circuit to do so, the Ninth Circuit held that an employer's arbitration agreement with employees that blocked employees from joining with other employees in a legal claim, whether in court or in arbitration, violates the National Labor Relations Act. Thus, the Ninth Circuit has come out against the Fifth Circuit and two other circuits on this point. With five separate circuits ruling on the issue and the NLRB continuing to rule that such agreements are illegal, it now becomes apparent that the case will head to the Supreme Court for a final decision.

***Bagley v. Bel-Aire Mech., Inc.*, ___ F. App'x ___, No. 13-17386, 2016 WL 1393428, 2016 U.S. App. LEXIS 6457 (9th Cir. Apr. 8, 2016)**

An employee had his § 1981 claim revitalized because an employer did not meet its burden of production of proving a bona fide reason for termination by merely stating factors allegedly causing the termination without relating those to the specific case. Notably, the employee was able to show causation by a 36-day span between the date of his complaint and his termination. The case is remarkable in terms of providing litigants research on issues of proof and summary judgment, timeliness, retaliation, a prima facie case, and pretext. The case is a compendium of Ninth Circuit law on these points.

***Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150 (9th Cir. 2016)**

The Ninth Circuit affirmed class certification for a group of commissioned sales associate employees bringing a wage claim on the basis that they were required to do many tasks unrelated to sales and entitled to additional pay. The court rejected the employer's argument to decertify the class on the basis of an alleged uniform lack of proof, suggesting that would be an issue for summary judgment. Further, the court reiterated that class certification will not fail solely because of individual questions about the amount of damages allegedly incurred by different class members.

Other Circuit Courts of Appeal

***Swank v. CareSource Mgmt. Grp. Corp.*, ___ F. App'x ___, No. 15-4193, 2016 WL 4376432, 2016 U.S. App. LEXIS 15291 (6th Cir. Aug. 17, 2016)**

The Sixth Circuit held that to decide if a job function is essential, the court must consider the employer's judgment, a written job description prepared prior to the issue arising, the amount of time an employee would spend performing the function, the consequences of not performing the function, and the work experience of former, current, and other companies' employees. An employee with rheumatoid arthritis, who could not drive to patients' homes, was unable to show that her employer had a reasonable accommodation that would have allowed her to perform the function. The court specifically looked at the requirements for other nurse employees in the geographical area, including those employed by other companies. The court also found that the company was not required to transfer the employee to other positions in another city because she specifically stated that she was unwilling to relocate.

Oregon Court of Appeals

***Medina v. State*, 278 Or. App. 579 (2016)**

A plaintiff's increasingly frequent discipline after complaining about racial discrimination in the Oregon Department of Fish and Wildlife's promotional process raised a sufficient issue of material fact to preclude summary judgment on the plaintiff's discrimination and retaliation claims. The plaintiff was passed up for several promotions and complained that the process was discriminatory. Following that complaint, the plaintiff was disciplined six times in two years, allegedly for conduct that similarly situated Caucasian employees were not disciplined for. The court held that evidence was sufficient pretext to overcome the employer's otherwise lawful explanation for the plaintiff's discipline history and termination.

***Lacasse v. Owen*, 278 Or. App. 24 (2016)**

A declaration that counsel has retained an unnamed expert may create an issue of fact on the issue of causation. The plaintiff alleged his termination was motivated by his involvement in a complaint of sexual harassment occurring at a different company whose ownership interests were intertwined with the employer's. The defendant prevailed on summary judgment by arguing that the plaintiff had no evidence that his termination was motivated by improper motives as opposed to poor work performance. The court of appeals reversed and remanded, reasoning that the trial court did not give due consideration to an expert declaration from the plaintiff's counsel that he had retained an unnamed qualified expert to testify to admissible facts or opinions, creating a question of fact. As an issue related to whether the employer had fabricated computer files to create a false pretext, the court believed a computer expert could raise an issue of fact for the jury.

Multnomah County Circuit Court

***Loczi v. Daimler Trucks N. Am.*, Case No. 14cv15265 (Multnomah County Cir. Ct. June 6, 2016)**

A jury awarded $1.2 million to a 57-year-old former engineer for alleged age discrimination. Daimler was not permitted to defend itself against the employee's claim because the judge found bad faith in its failure to provide discovery requested by the plaintiff's attorneys. On multiple days of trial, Daimler's attorneys produced boxes of discovery that the court determined to have been previously requested and highly relevant to the claims. The judge took the extraordinary step of sanctioning Daimler with a default judgment on the issue of liability. As the world of electronic information grows in diversity and complexity, where most employees have multiple devices and some use of their devices for both business and personal uses, this case highlights the importance of carefully coordinating thorough discovery efforts to comply with the rules of civil procedure and avoid disastrous consequences.

Richard F. Liebman is a partner and Anthony Kuchulis is an attorney with Barran Liebman LLP, representing employers in labor and employment law.

CIVIL RIGHTS CLE

Please join the Civil Rights Section for its CLE seminar Civil Rights Issues in an Election Year on Friday, October 21, 2016, from 9 a.m. to 1:30 p.m. at the Mark O. Hatfield United States Courthouse, 1000 SW Third Ave., Portland.

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"Voter Identification Laws" – Former State Rep. Jefferson Smith and Jill Gibson

"Religious Liberty Laws" – Jennifer Middleton and Tyler Smith

"Federal Ownership of Land" – Prof. Jim Huffman and Prof. Michael Blumm

"Gun Rights" – Former U.S. Attorney Dwight Holton and David Angeli

"The Year in Civil Rights" – David Angeli

CLE Credits are pending. ***Click here for a brochure and complete schedule.***

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$60	Civil Rights Section Members
$75	Non-section Members
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A box lunch is included with registration.

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