

State and Federal Water Law Issues

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Presentation Outline

- *Basics of Arkansas Water Law:* Grant Ballard
- *The Arkansas Water Plan and Surrounding issues:* Harrison Pittman
- *Relevant Federal Regulatory Law:* Walter Wright.

What is Water Law?

The Basics

- Laws regulating water and the right to use water typically involves the following issues:
 - 1) Water Use
 - 2) Water Allocation
 - 3) Water Quality

Arkansas' Water Resources

- As we all know, Arkansas is blessed with bountiful water resources when compared to many other states.
- However, our state is not immune to significant water quality and availability issues.

What water issues are in our future?

- Issues of water availability & allocation
 - Examples Include:
 - **Groundwater Depletion**
 - By agriculture-
 - We are currently drawing water from the alluvial aquifer at an unsustainable rate (a rate more rapid than the rate of recharge)
 - By other industries-
 - For example, natural gas exploration which requires significant water and, oftentimes, interbasin water transfers

Future issues continued. . .

- **Water Allocation**

- With an increasingly limited available supply of water, how much water should competing users be allocated?

- **Water Quality**

- Future issues may include more stringent federal regulation of agriculture.
- Oklahoma vs. Arkansas Litigation over Phosphorous levels is a prime example of potential water quality issues.

Future issues continued. . .

- **The Arkansas Water Plan**
 - A comprehensive plan for the conservation, development, and protection of Arkansas's water resources.
 - Yet to be seen. . .

Where is Arkansas Water Law Heading?

“We have reached the time in our state when we have to start thinking seriously in terms of a scarcity of water and of the competing interests for our water . . . No longer can we assume there is an abundance of water there for everyone's taking for any and all purposes.”

- Justice Hickman's dissent in *Nillson v. Lattimer*, 281 Ark. 325 (1984).

Water Law: Background

- Water law has traditionally been a state law issue
- However, there is a significant amount federal water regulation
 - i.e., Clean Water Act and the Safe Drinking Water Act

State Water Law Doctrine

- Water use is generally governed by one of the following allocation regimes:
 - 1) **Riparianism**- riparian landowners (those landowners owning land adjacent to water sources) possess rights to use water from an adjacent water body. Water rights are not extended to non-riparian users
 - 2) **The Doctrine of Prior Appropriation**- “first in time-first in right”; This right of first use is a system where water usage rights are unconnected with land ownership
 - 3) **A hybrid system** of prior appropriation and riparianism

The Arkansas Approach

- Arkansas Courts have adopted and distinguished the Riparian Rights Doctrine
- The “Reasonable Use” Theory was embraced by the Supreme Court of Arkansas in the case of *Harris v. Brooks*, where the Court placed some limits on the right of a riparian land owner to use water adjacent to the user’s property
 - *Harris v. Brooks*, 225 Ark. 436 (1955)

Arkansas Limitations on Riparian Rights

- In *Harris v. Brooks*, the Court was faced with competing land owners and water users. All needed water in a time of drought and water scarcity.
 - Held that riparian landowners were only entitled to a “reasonable use” of water
 - Limiting the rights of riparian land owners
 - When is a use unreasonable?
 - When it is to the detriment of other riparian users.

The Judicial Development of Arkansas Water Law

- In the 1950's, a time of severe drought, Arkansas Courts determined that when one riparian use interferes with another, the question is one of reasonableness
- The Courts also applied the riparian doctrine and the “reasonable use” requirement to groundwater.
 - *Jones v. Oz-Ark-Val Poultry Co.*, 228 Ark. 76 (1957)

Further Judicial Limitation of the Riparian Doctrine

- The Supreme Court of Arkansas indicated that a riparian owner could remove (ground)water for non-riparian uses so long as this use was not a detriment to the common supply of riparian owners
 - *Lingo v. City of Jacksonville*, 258 Ark. 63 (1975)
- A significant departure from the riparian doctrine in its most traditional sense

The move toward a “regulated riparianism”

- Actions of the Legislature have meshed to make Arkansas a state with a system of “regulated riparianism.”
- While implementation has been slow to take effect, the Arkansas General Assembly has enacted multiple pieces of legislation directed at solving water issues and conflicts through administrative regulation and adjudication, as opposed to case-by-case judicial analysis.

State Agencies Currently Involved in Water Regulation:

- **The Arkansas Natural Resources Commission (ANRC)**
 - Generally deals with water quantity and availability
 - Maintains statutory authority to allocate surface water during periods of water shortage

ANRC Water Usage Reporting

- ANRC manages water use reporting and is a significant regulator of private water rights
 - Certain water users are required to register groundwater and surface water diversions with ANRC (Quantity, location, and type of use)
 - Arkansas Code Annotated § 15-22-26
 - ANRC Rules § 302

State Agencies Currently Involved in Water Regulation:

- The Arkansas Groundwater Protection and Management Act (AGPMA)-1991
 - Provided ANRC authority to designate critical groundwater areas and establish a permit-like system for obtaining a right to withdraw water

State Agencies Currently Involved in Water Regulation:

- **The Arkansas Department of Environmental Quality (ADEQ)**
 - Generally deals with water quality issues
 - Works with developing water quality standards, as well as inspection and enforcement
 - Issues NPDES Permits for discharges of point source wastewater

Additional Limitation of Traditional Riparianism

- The legislature has given explicit approval for the use of “excess surface water” away from riparian lands.
 - Allowing what is known as interbasin or intrabasin transfer

Other Agencies and Entities that are Relevant to Arkansas' Water Management

- Arkansas Forestry Commission
- Arkansas Game and Fish Commission
- Arkansas Oil and Gas Commission
- Drainage Districts
- Levee Districts
- Conservation Districts

Navigability:

Is a water body public or private?

- Navigability is generally determinative of the ownership of a water body.
- Title to riparian lands only gives an owner title to the high water mark, when a water bed is navigable.
- Title to the “bed” of a navigable water body belongs to the state.

Non-Navigable Waterways

- The riparian owner upon a non-navigable stream is entitled to ownership to the center of the water body.
- The navigability of a stream or water body will generally determine whether the water body is public or private property.

Navigability

- Navigation in fact is widely regarded as the proper test of navigability.
 - *State v. McIlroy*, 268 Ark. 227 (1980).
 - Arkansas originally adopted a definition of navigability that only took business and trade into account.
 - *Little Rock, Mississippi River and Texas R.R. Co. v. Brooks*, 39 Ark. 403 (1882).

Recreational Use

- The definition of navigability has developed to include public recreational use.
- The Supreme Court of Arkansas expanded the traditional “*commercial use*” definition, in holding that a river could be navigable for the purposes of public use because of recreation.
 - State v. McIlroy, 268 Ark. 227 (1980).

Recreational Use

- The Arkansas Court of Appeals has affirmed that the former definition of navigability was expanded by the Supreme Court, in *McIlroy*, to include a water's recreational use as well as its commercial use for the purposes of determining navigability.
 - *Arkansas River Rights Comm. v. Echubby Lake Hunting*, 83 Ark. Ct. App. 276, 126 S.W.3d 738 (2003).

Navigability Conclusion

- Navigability determines public or private ownership.
- The current test for navigability combines both business aspects of navigability and recreation when determining whether a stream is navigable.

Arkansas State Water Plan

- What is the Arkansas State Water Plan?
- The comprehensive program for the orderly development and management of the State's water and related land resources developed by the Commission
- All state agencies, commissions, and political subdivisions shall take the plan into consideration in all matters pertaining to the discharge of their respective duties and responsibilities as they may affect the comprehensive plan

(Ark. Code Ann. § 15-22-503; ANRC Rule § 301.3(D))



Arkansas State Water Plan

- Act 217 of 1969 made ANRC responsible for development of state water plan
- First plan published in 1975
- Act 1051 of 1985 directed ANRC to update the 1975 Plan
- ANRC then developed the 1990 State Water Plan,
 - which is the most recent

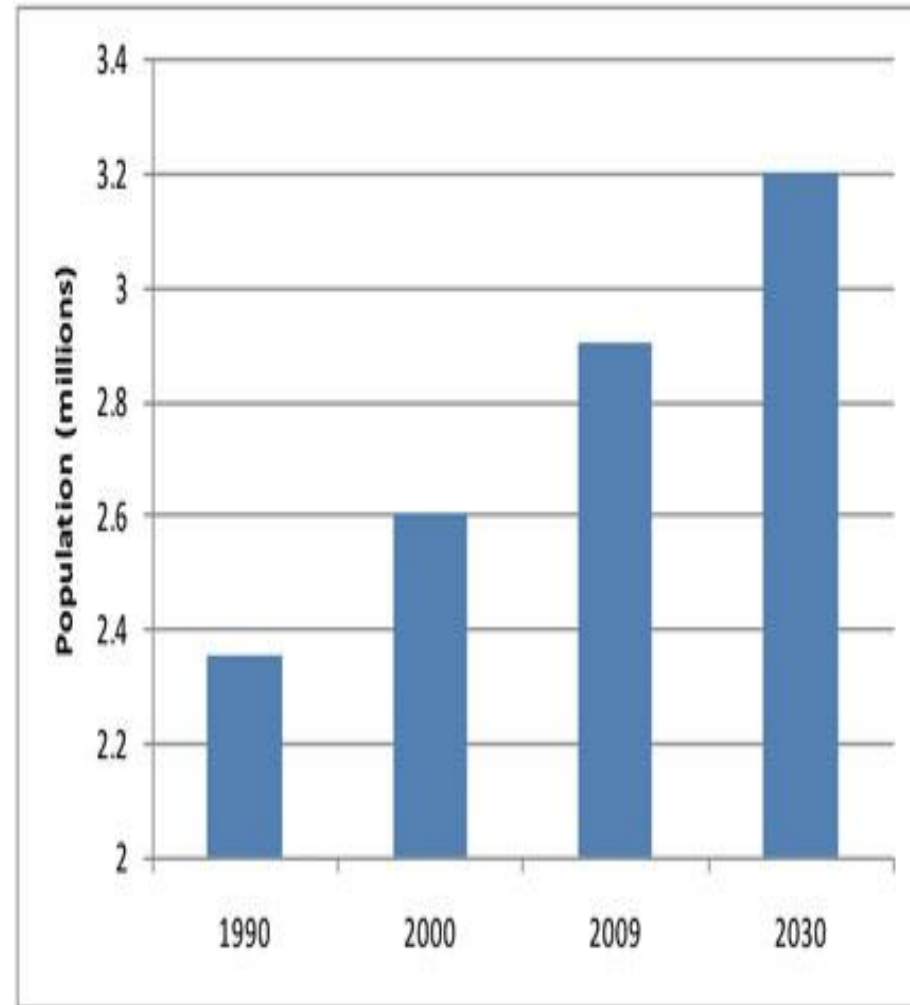


Figure 1. Arkansas Population Trends and Projections

Arkansas State Water Plan

- 1990 State Water Plan:
 - Executive Summary
 - 12 separate Basin Reports
- Addressed overarching water quantity/quality issues across state
- Described key features, issues, and recommendations for each basin
- Examined trends in water use and forecast through 2030

Arkansas State Water Plan

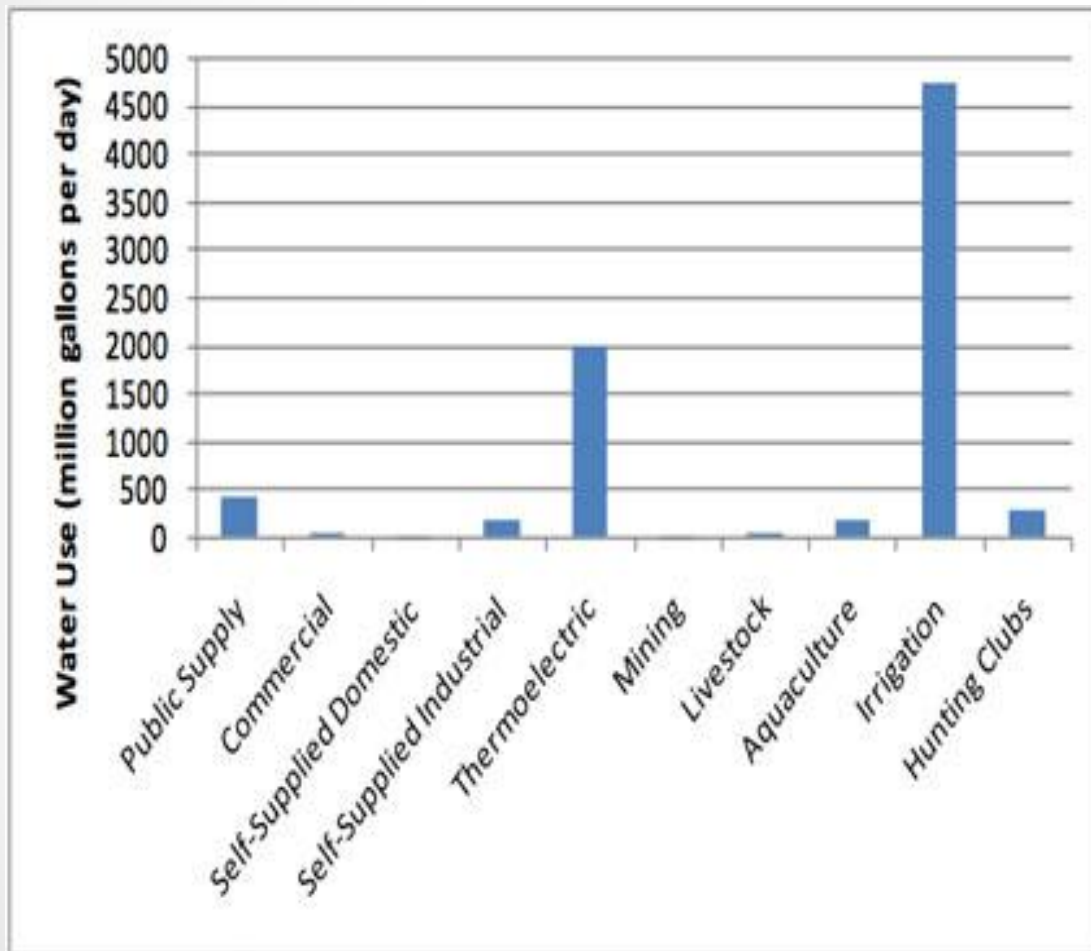


Figure 2. Water Use by Sector (2005)

Arkansas State Water Plan

- Legislature provided \$4 million to develop new water plan
- Arkansas Game and Fish Commission contributed an additional \$1 million
- Will “forecast” water needs through 2050
- Goal is to have plan completed on or before November 2014

Arkansas State Water Plan

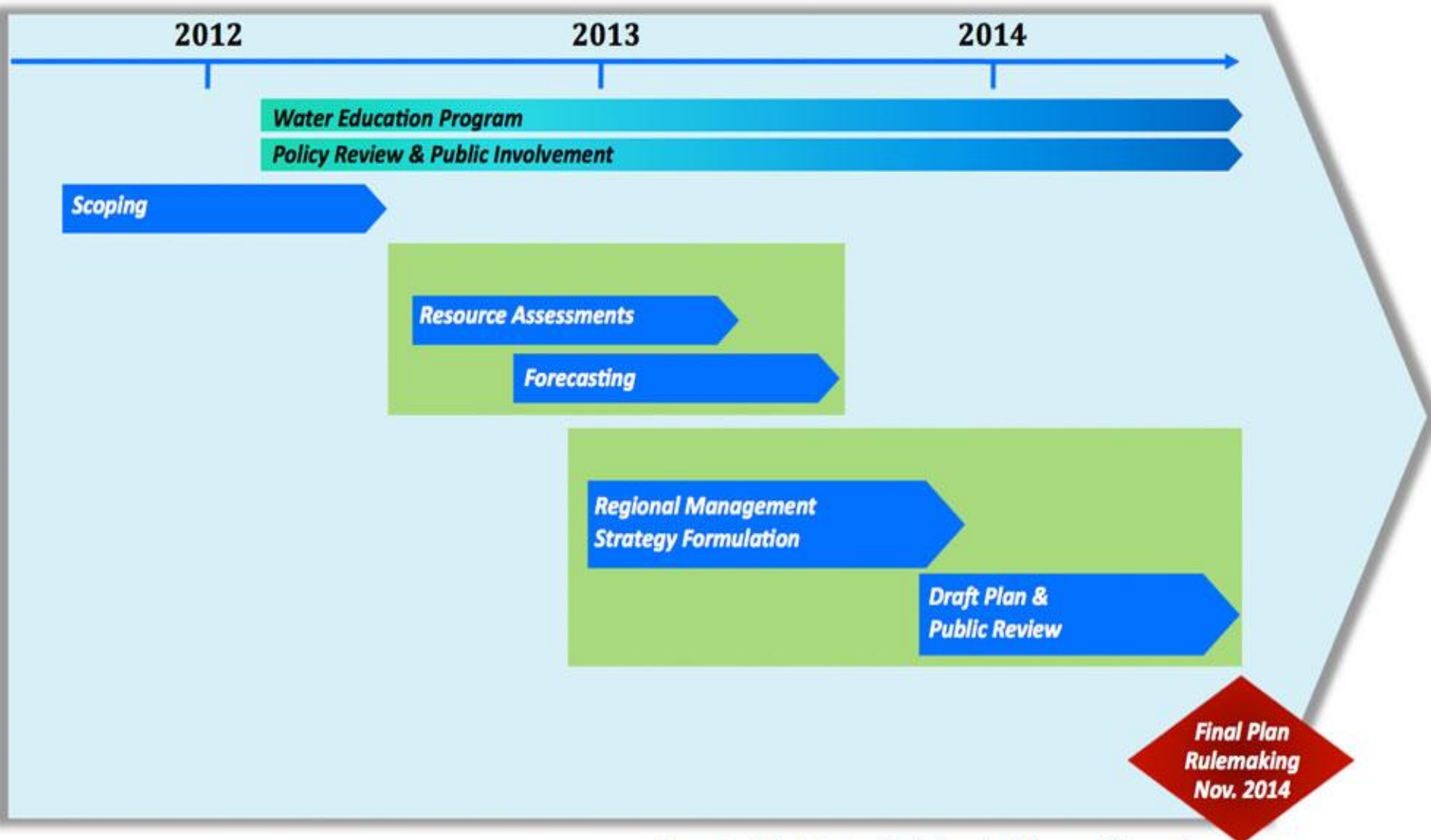


Figure 3. Schedule for Updating the Arkansas Water Plan

Surface Water Transfer

Issue: How is a water right acquired when person or entity is not a riparian landowner?

- Must obtain Non-Riparian Water Use Permit from ANRC
- Procedures found under Title III of ANRC Rules for Utilization of Surface Water
 - Surface Water Permits for Intrabasin Use by Non-Riparians (Subtitle IV; ANRC Rules §§ 304.1 – 304.16)
 - Issuance of Surface Water Permits for Interbasin Use by Non-Riparians (Subtitle V; ANRC §§ 305.1 – 305.20)
 - Interstate Transfer (Subtitle VI; ANRC §§ 306.1 – 306.6)

Surface Water Transfer

- Regardless of applicable procedure, ANRC must determine that there exists “excess surface water”:

Twenty-five percent (25%) of the amount of water available on an average annual basis from any watershed (as determined by ANRC) above the amount required to satisfy all of the following:

- (1) Existing riparian rights as of June 28, 1985;
- (2) The water needs of federal water projects existing on June 28, 1985;
- (3) The firm yield of all reservoirs in existence on June 28, 1985;
- (4) Maintenance of instream flows for fish and wildlife, water quality, aquifer recharge requirements, and navigation; and
- (5) Future water needs of the basin of origin as projected in the state water plan

(Ark. Code Ann. § 15-22-304; ANRC Rule § 301.3(R))

Surface Water Transfer

- 1990 State Water Plan establishes excess surface waters for each of the five major basins (Delta, Ouachita, Red River, White River, and Arkansas River Basins)
 - Calculations based on projected riparian uses, minimum streamflow requirements for fish and wildlife, and navigations needs through 2030
 - Quantification of these needs subtracted from the average annual flow
 - 25% of that amount constitutes the “excess surface water”
- Each non-riparian permit application must apply these calculations and subtract the reported water use
 - Ark. Code Ann. § 15-22-215 (water use reporting)

Surface Water Transfer

- If “excess surface water” criteria is satisfied, ANRC must then must determine:
 1. The water will be applied to reasonable and beneficial use
 2. The diversion will cause no significant adverse environmental impact

(Recall that specific procedures triggered based on whether transfer is intra/interbasin or interstate transfer)

Surface Water Transfer

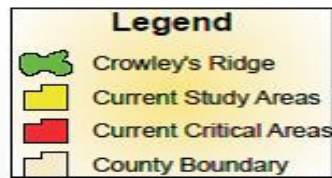
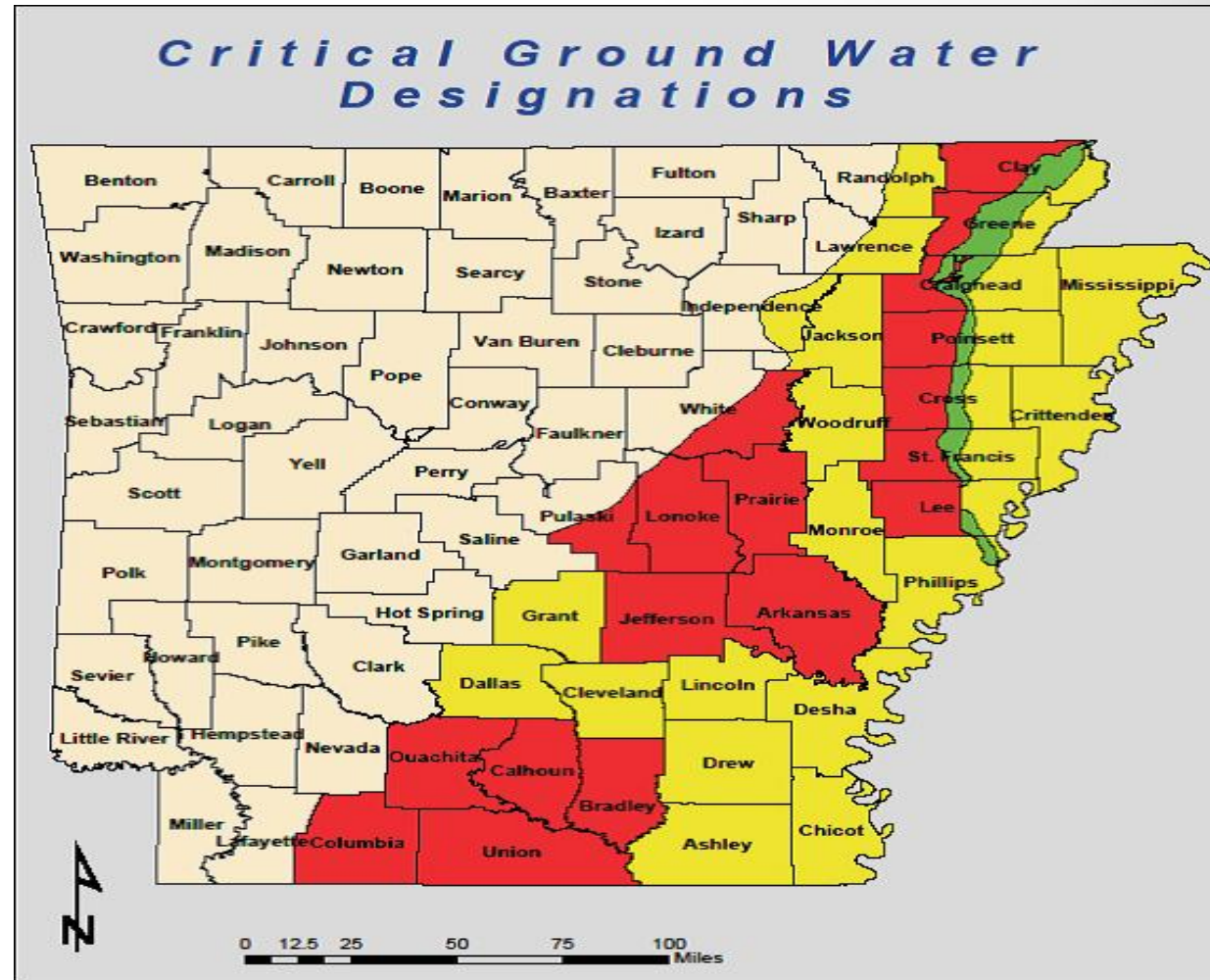
- Non-riparian intrabasin transfers have a higher preference than nonriparian interbasin transfers
- Interstate transfers are last in order of preference
- When transfer is interbasin, ANRC must consider protection of the basin of origin and insure against an adverse impact on other lawful users in the basin
- Interstate transfer requires an ANRC study and recommendation to General Assembly

Critical Groundwater Area

- Ark. Code Ann. § 15-22-903(6): “‘Critical groundwater area’ is defined in the Arkansas Water Plan developed by the commission under its authority in § 15-22-503”
- ANRC Rule § 401.3: “An area judged by the Commission to have significant groundwater depletion and/or degradation, as defined in Ark. Code Ann. § 15-22-503”
- See *also* ANRC Rule § 403.1 (“Designation”)

Critical Groundwater Area

- 3 Areas designated in Arkansas:
 - South Arkansas Critical Ground Water Area (1996)
 - Grand Prairie Critical Ground Water Area (1998)
 - Cache Critical Ground Water Area (2009)



South Arkansas Study Area for Sparta in 1996
Grand Prairie Study Area for Sparta & Alluvial in 1998
Cache Study Area for Memphis Sand & Alluvial in 2009



Critical Groundwater Area

- Designation vs. Regulation
 - Designation must occur before regulatory program can be implemented
- For designation to occur, ANRC must:
 - Hold public hearings in counties within the area proposed to be designated as a CGA;
 - Must describe the proposed action(s) and reasons for the proposed designation prior to the hearing; and
 - Must describe the recommended boundaries prior to hearings
- Tax credit available for conversion to surface water, with added incentives triggered by designation
 - ○ Ark. Code Ann. §§ 26-51-1007 and 1008

Critical Groundwater Area

- Designation vs. Regulation
- Separate process for implementing regulatory program
- ANRC must:
 - Make a declaration that such regulation is necessary
 - Must comply with procedures established in Ark. Code Ann. § 15-22-909, including:
 - Comply with Arkansas Administrative Procedures Act
 - Public hearings in each county

Critical Groundwater Area

- Regulatory system would be regulated through issuance of “water rights”
- Prioritized by usage type (just as with surface water)
 - Sustaining life, maintaining health, and increasing wealth

Critical Groundwater Area

- Once ANRC determines regulation is necessary w/in the CGA AND declares that water rights are required for water withdrawal, then:
 1. Registered users of ground water w/in the CGA will be individually evaluated for issuance of a water right (unless exempted under ANRC Rule § 404.5)
 2. ANRC will issue water rights to registered users after review, considering exemptions or other options under ANRC Rules
 3. A periodic review of all wells within the designated area will be conducted by ANRC to determine reporting compliance

Critical Groundwater Area

- Wells can be grandfathered in (ANRC Rule § 404.3)
 - Upon application within one year of initiation of regulatory authority, ANRC shall issue applicant a water right for existing wells equal to the average quantity of water over past three years
 - Prior years can be used if past three are significantly below normal
- New wells constructed during the first year of initiation of regulatory activity shall, upon application, be issued a water right equal to the quantity of water necessary for beneficial use
 - Failure to apply during this period creates conclusive presumption of abandonment of use
- Water rights issued under § 404.3 exempt from public notice requirements

Critical Groundwater Area

- Water right application shall include:
 - Name, address, and phone number of water user;
 - Number, location, and size of proposed wells;
 - Quantity of water to be withdrawn for direct use;
 - The quantity of water to be stored away from the point of withdrawal;
 - The total amount of water to be withdrawn;
 - The proposed time or times of withdrawal;
 - The purpose for which the water is to be withdrawn (**Note:** different criteria for agricultural and non-agricultural use)
 - The proposed conservation plan; and
 - Description of the availability of alternative water supplies
- Commission shall publish a notice of application for water rights in a statewide newspaper

Critical Groundwater Area

- Persons who may be affected by water rights issuance to applicant may request a hearing before ANRC within 15 days of publication of notice
- Water rights issued are subject to ANRC review and modification

Critical Groundwater Area

- Several exemptions (ANRC Rule § 404.5), including, but not limited to:
 - No regulation of the withdrawal of ground water from existing or proposed wells that have maximum potential flow of less than 50,000 gpd
 - No regulation of the withdrawals of ground water from individual household wells used exclusively for domestic use
 - **Note:** “Domestic use” includes watering of livestock, poultry, and animals
 - No regulation of replacement wells, subject to compliance with process for disposition of original well
 - Marketers of bottled water and public water supply systems shall not be restricted in the place of use of ground water
 - No reduction or limitation of withdrawal from existing wells in a “sustaining aquifer” for which water right is grandfathered in, unless alternative surface supplies are available

Critical Groundwater Area

- ANRC can cancel water rights when:
 1. Water is used for a purpose other than that for which the water right was issued
 2. For non-use or failure to put water to a reasonable beneficial use within reasonable time of water right issuance
 - Unless non-use is for implementing conservation measures, crop rotation, conversion to surface water sources, or climatic conditions
 3. For failure to report water use or pay applicable fees for two consecutive years

Environmental Regulatory Programs

Potentially Applicable to Water Quantity /Projects

Note a blog addressing this and other issues

- Arkansas Environmental, Energy, and Water Law Blog
- <http://www.mitchellwilliamslaw.com/category/environmental-blog>
- Three posts five days a week.

Federal Environmental Regulatory Programs

- May have a material impact on some water withdrawals or projects
- Example – Common Law Riparian Right to withdraw water may be affected by presence of a Federal Endangered Species
- Example – A water project receiving a federal permit or funding may have to comply the federal National Environmental Policy Act

Example

Water Supply Development

- Recognize significant water source development activities (or acquisition of water for expanded use) could face greater challenges on certain waters.
- The development of new facilities to extract, store, impound, and/or transport water can involve complex technical, political, legal and regulatory issues.
- They potentially include those involving:
 - Presence of Endangered Species Act critical habitat and/or threatened or endangered species
 - Federal Energy Regulatory Commission License
 - Interstate or interbasin transfers
 - Waters whose substantial use will engender opposition by state/federal authorities, tribes or significant environmental organizations
 - Federal reservation of rights
 - 404/Clean Water Act/Wetlands
 - Federal funding/permitting – National Environmental Policy Act

Development of Water Supplies

- Start permitting early
- Pursue all required permits simultaneously (if possible)
 - Example: 404 Nationwide/NPDES/ESA
- Recognize Construction/Design Issues
 - Development of water supply facilities are often complex projects

Development of New Water Facilities

- Performance Guarantees and Acceptance Testing/Contracting
 - Potentially great benefit of design-build
 - Problems for water and wastewater sector:
 - Subjective standards for water quality
 - Broad range of influent parameters
 - Effluent standards that are more stringent than applicable law
 - Taste and Order
 - Measuring the standards
 - Impact of operations ability to meet guarantee
 - Baseline for raw water

Federal Endangered Species Act (ESA)

- Protection and recovery of species listed as rare, threatened or endangered
- ESA administered by USFWS and National Marine Fisheries Service, but it must be followed by every federal agency and all private and public entities that might affect listed species
- List of species illegal to “take” an individual or habitat without a “take permit”
- No federal actions can “jeopardize” a species survival
- Tools: habitat conservation plans (HCPs), recovery plans, biological opinions
- Arkansas examples: Ivory Billed Woodpecker, mussels, etc.

Potential Role of Endangered Species Act in Water Supply Development

- The ESA can be a material issue or hurdle for large or small water projects if an endangered or threatened species is potentially affected.
 - Key Sections are 7 and 9
 - Relevant scenarios may involve development or operation of dams, reservoirs, canals, pipelines (i.e., flow, quantity issues)
 - Dam footprint, diversion of waters, etc. can potentially trigger ESA
 - Project might not be able to proceed, or conditions attached
 - What is critical habitat? (Note: Grand Prairie/White River decision)
 - Future species listing?

Endangered Species Act

Critical Habitat

- The Endangered Species Act requires the Fish and Wildlife Service to designate critical habitat for species that are listed as endangered or threatened.
- Critical habitat can affect the development potential of land when a federal agency plays a role in the development process, for example, by contributing funding or issuing a permit for the development.
- Section 7 of the ESA requires federal agencies to consult with the Fish and Wildlife Service prior to taking action that could jeopardize species or modify/destroy critical habitat.
- Section 7 can operate to limit agency actions including issuance of permits.

The Section 9 “Take” Prohibition in the Endangered Species Act

- Section 9 – Take, Harass, Modify Habitat, etc.
 - Applies to public and private entities
 - Arkansas Examples – Ivory Billed Woodpecker, Burying Beetle
- Prohibits all kinds of taking, including direct death and injury, and “harm” and “harassment”
- Harass: Harass is defined as an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns.....
- Harm: Harm is defined as any act that actually kills or injures wildlife including significant habitat modification

Endangered Species Act

Relevant Case Law Involving Water

- In *NRDC v. Kemphorne* (2007) a federal court held that water managers in California must protect the Delta Smelt, a fish listed as a threatened species under the federal Endangered Species Act, even if it meant reducing water promised to irrigators and municipalities regardless of available state based water rights.
- A preliminary injunction was issued requiring the project operators to substantially reduce water withdrawals from the Delta but not directing how they achieve those reductions.
- Pumping reductions would reduce water exports out of the Delta to irrigators and municipalities such as Sacramento and Los Angeles.
- Increased upstream water releases or altered seasonal pumping would reduce water storage and would be particularly challenging to achieve during the low flow summer months.

Action Alleging Texas Commission on Environmental Quality Officials Violated Endangered Species Act in Their Management of Flow of Fresh Water Into the San Antonio Bay

- The Arkansas Project, a nonprofit corporation brought an action pursuant to the Endangered Species Act (“ESA”) against several Texas Commission on Environmental Quality (“TCEQ”) officials.
- The Project alleged that TCEQ officials failed to adequately manage the flow of fresh water into the San Antonio Bay ecosystem during the 2008-2009 winter resulted in a “taking” of Whooping Cranes, an endangered species, in violation of Section 9 of the ESA.
- The Project argued that the reduced flow of fresh water into the ecosystem increased salinity, reducing the food and water supply for the whooping cranes, thus weakening and ultimately resulting in the death of 23 whooping cranes.
- The plaintiff’s request for relief included an assurance that the whooping cranes would have sufficient water resources to prevent a future “taking”.
• The parties filed various motions for partial summary judgment.

Action Alleging Texas Commission on Environmental Quality Officials Violated Endangered Species Act in Their Management of Flow of Fresh Water Into the San Antonio Bay

- The TCEQ officials contended that, as a matter of law, the Project is not entitled to recovery under Section 9 of the ESA because imputing liability to regulatory agencies for merely carrying out their regulatory duties runs contrary to the ESA.
- TCEQ officials also attempted to distinguish case law cited by the plaintiff arguing that the agency had almost no authority to modify or revoke water permits because such permits reflect property rights that are constitutionally protected under Texas law.
- Project further argued that permit holders have rights to water, but ultimately water is the property of the state.
- Court rejects the TCEQ officials argument that Section 9 of the ESA does not extent to suits brought against regulators whose actions indirectly result in the taking of an endangered species.

- National Environmental Policy Act (NEPA)
 - Major federal action such as the re-allocation or apportionment of waters between states would need to go through specific procedural requirements.
 - While application of NEPA does not necessarily change the outcome of a federal decision on apportionment, it would require consideration of impacts from the project and alternatives to the proposed action.

Key NEPA Concepts

- NEPA purpose?
- Procedural / Not Substantive Statute
- Jurisdictional Test – Major federal action / significant impact on the environment (2 part test)
- Relevant Issues
 - Must prepare an Environmental Impact Statement (“EIS”)
 - AWF Grand Prairie decision canal / pipeline / natural stream mix change, etc.
 - Small handle problem (outfall example)
 - Scope of EIS
 - Subsequent developments (woodpecker?)
 - What range of alternatives must be considered? (reasonable alternatives)
 - AWF Grand Prairie – dry farming, congressional direction to provide surface water to farmers

Clean Water Act § 402 NPDES Discharge Permit NPDES Statutory Framework

- All “point” sources
- “Discharging pollutants”
- Into “waters of the United States”
- Must obtain a NPDES permit from EPA or an authorized state

Rapanos (U.S. Supreme Court)

What are “waters in the US”?

- Justice Kennedy in the opinion that may control stated:
 - Wetlands can be adjacent to navigable water or to tributaries and can be intermittent or ephemeral
 - Significant nexus but is required not speculative, must significantly affect the chemical, physical or biological integrity of navigable waters
 - Increased uncertainty will be a fact/technical determination made on a case by case basis
 - Anyone anticipating work in or near these water bodies should now, more than ever, carefully consider possible permit requirements at each level of government: federal, state (beaver example) and local.
 - Does the adjacent channel contain waters of the U.S.?
 - Does the wetland have a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland beings?

Clean Water Act

Section 401

- Section 401 of the CWA requires state water quality agencies (i.e., ADEQ) to give prior approval to federally permitted and licensed activities that may result in a pollutant discharge to waterways.
- For example – requires state certification for all Corps' dam permits.

Water Transfers: Do They Require an NPDES Permit?

- The question of whether or not a NPDES permit is required for water transfers has arisen because activities that result in the movement of waters of the U.S. such as trans-basin transfer of water to serve municipal, agricultural and commercial needs, can also move pollutants from one water body (donor water) to another (receiving water.)
- South Florida – Water Management District decisions

Water Transfers: South Florida Water Management District v. Miccosukee Addition of a Pollutant?

- The U.S. Supreme Court's key findings:
 1. Tribe argued that a pump station that drew in water from one body of water and discharged the water, unchanged, into another body of water required a NPDES permit because the water discharged from the pump contained higher levels of phosphorous and other pollutants than naturally occur in the receiving water body, even though the water district was not responsible for the increased pollutant levels in the originating water body.
 2. Court unanimously rejected the water district's argument that the NPDES program applies to a point source "only when a pollutant originates from the point source".
 3. Court relied on the Act's definition of the jurisdictional term "discharge of pollutant" as "any addition of any pollutant to navigable waters from any point source" to mean that, so long as there is a point source, such point source "need not be the original source of the pollutant; it need only convey the pollutant to navigable waters."
 4. Even though the pump station at issue "does not itself add pollutants to the water," an NPDES permit may be required because the pump station added pollutants to the receiving, more pristine water body.
 5. Pumping or moving water within a single body of water does not require a permit, but
 - pumping or moving water between separate water bodies may require a permit.

Concerns Regarding These Decisions?

- Do they mean that operations of any kind of infrastructure resulting in the movement of water from one water body (with its own characteristics) (water supply, etc.) to another water body (with different characteristics) must apply for and obtain a NPDES permit?
- In addition, do these decisions signal a revisiting of how courts will treat releases from dams? Are they also relevant to canals, irrigation districts, flood control, etc.

EPA Water Transfer “Clarification” Rule

- An EPA policy clarifies that permits are not required for transfers of water from one water to another.
- Such transfers include routing water through tunnels, channels, stream courses for public water supplies, irrigation, power generation, flood control and environmental restoration.
- Thousands of water transfers currently in place are vital to the water infrastructure.
- The proposed rule would define such transfers as the transfer of water between bodies of water without subjecting the water to intervening industrial, municipal or commercial use.

What Water Quality Permits May be Required?

- Rivers and Harbors Act § 10 Permit – for construction, excavation, or filling activities below the ordinary high water mark of commercially navigable waters of the United States and their tributaries.
 - This permit program is administered in coordination with the § 404 program to avoid duplication.

Wetland Protection

- Section 404 of the Clean Water Act
 - Principal protection for wetlands
 - No one can discharge dredged or fill materials into a jurisdictional wetland without a permit from the Corps of Engineers
 - Applies to navigable waters defined as “waters of the United States including the territorial seas”
 - Courts have interpreted this to encompass wetlands that would not have been considered navigable
 - Downside – regulates only a limited set of activities and contains a number of broad exemptions

Regulation

- Section 404 of the Clean Water Act – No dredged or fill material can be placed into any waterway of the US (including wetlands) without a permit.
- Note: does not prevent draining, clearing or polluting wetlands (but hard to get permission to do)

Section 404 - Permit

- Permit application must show that you have:
 - Taken steps to avoid wetland impacts where practicable
 - Minimized potential impacts to wetlands
 - Provide compensation for any remaining, unavoidable impacts through activities to restore or create wetlands

Authorities – Section 404

- All waters of the U.S., including wetlands
 - Streams-ephemeral, intermittent, perennial
 - Rivers
 - Ponds and lakes
- Regulate the discharge of dredged or fill material and mechanized land clearing if there is a discharge of fill material

Wetland Definitions

- Corps/EPA definition – for Clean Water Act Section 404 purposes:
 - 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 – cc CFR 328.3(b)

33 CFR 323.4

Discharges Not Requiring Permits

- Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products
- COE does not consider certain activities that may be considered agricultural by NRCS, such as Christmas tree farms, ornamental nursery plants, horses (this is not an inclusive listing)

33 CFR 323.4(a)(3) Discharges Not Requiring Permits

- Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches.
- Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

Water Quality Issues Can Affect Water Supply

City of Tulsa v. Tyson, et al

- *City of Tulsa v. Tyson, et al* (filed December 2001)
 - Water quality issues relating to city's water source
 - Lake Eucha and Oologah are drinking water sources for the City of Tulsa