# Western States Water Council

Legal and Water Quality Committees
Summer Council Meeting
July 22, 2010

# EPA Water Transfers Rule
# Impacts in WSWC Member States

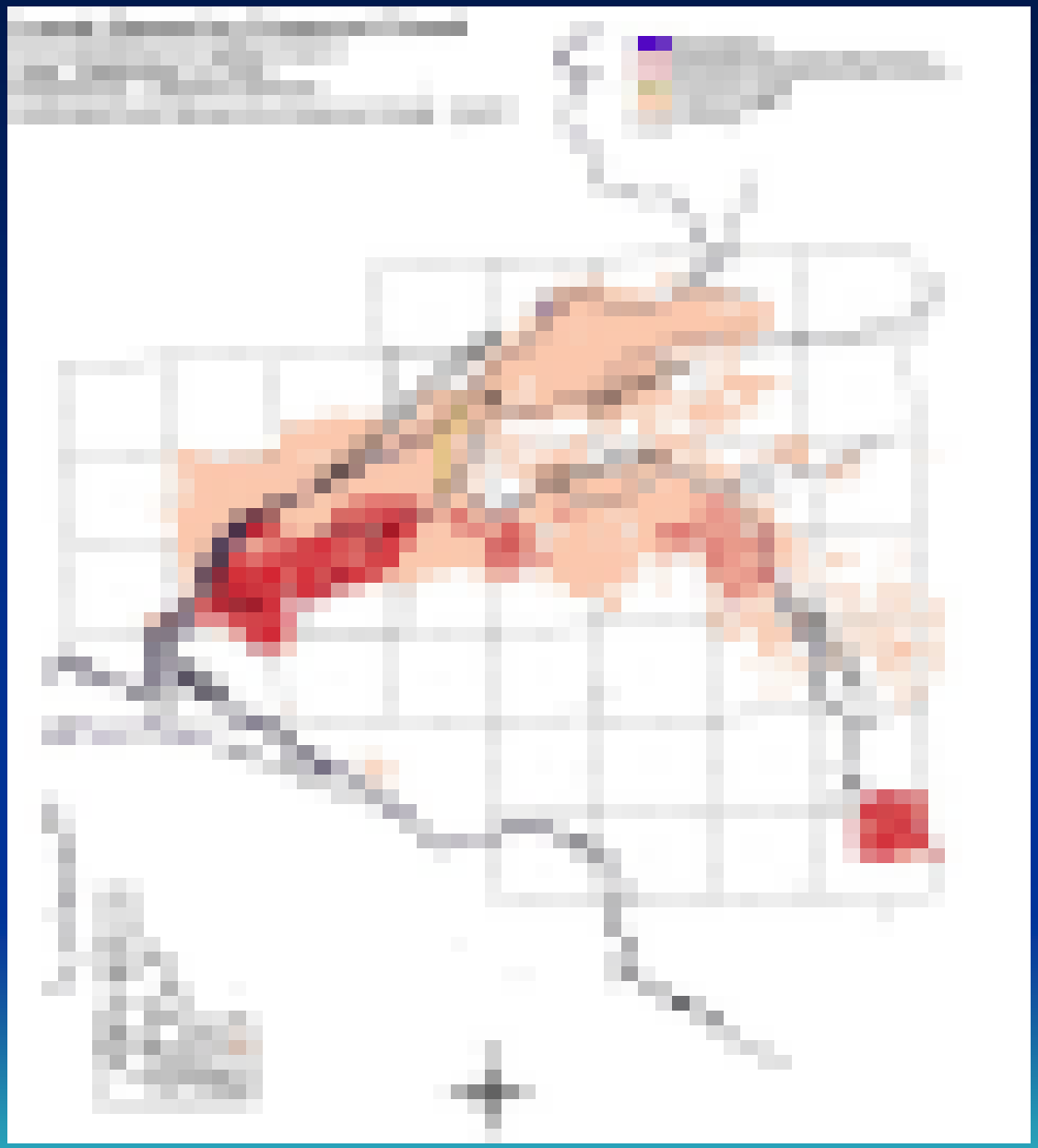
Peter Nichols, Esq.
Trout, Raley, Montano, Witwer & Freeman (Denver)

# Issue

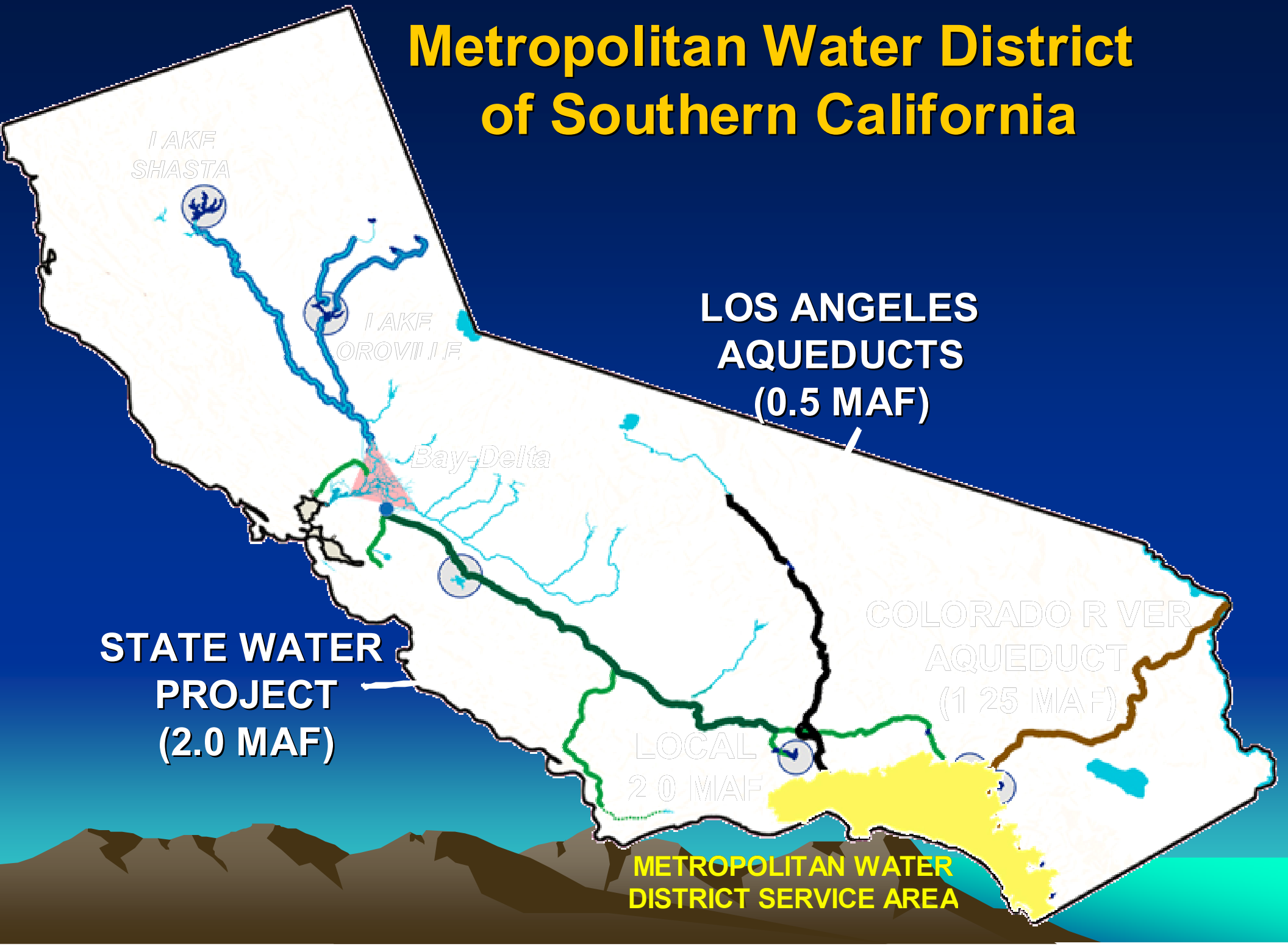
- Whether water transfers – that do not add anything to the water – are subject to National Pollutant Discharge Elimination System ("NPDES") permitting under section 402 of the Clean Water Act. [33 USC § 1342]
  - The courts have employed a "but for" test for water transfers
  - > 60 million residents and 10 million irrigated acres in arid west rely on water transfers daily

# NV - Truckee Meadows Water Authority

# Idaho

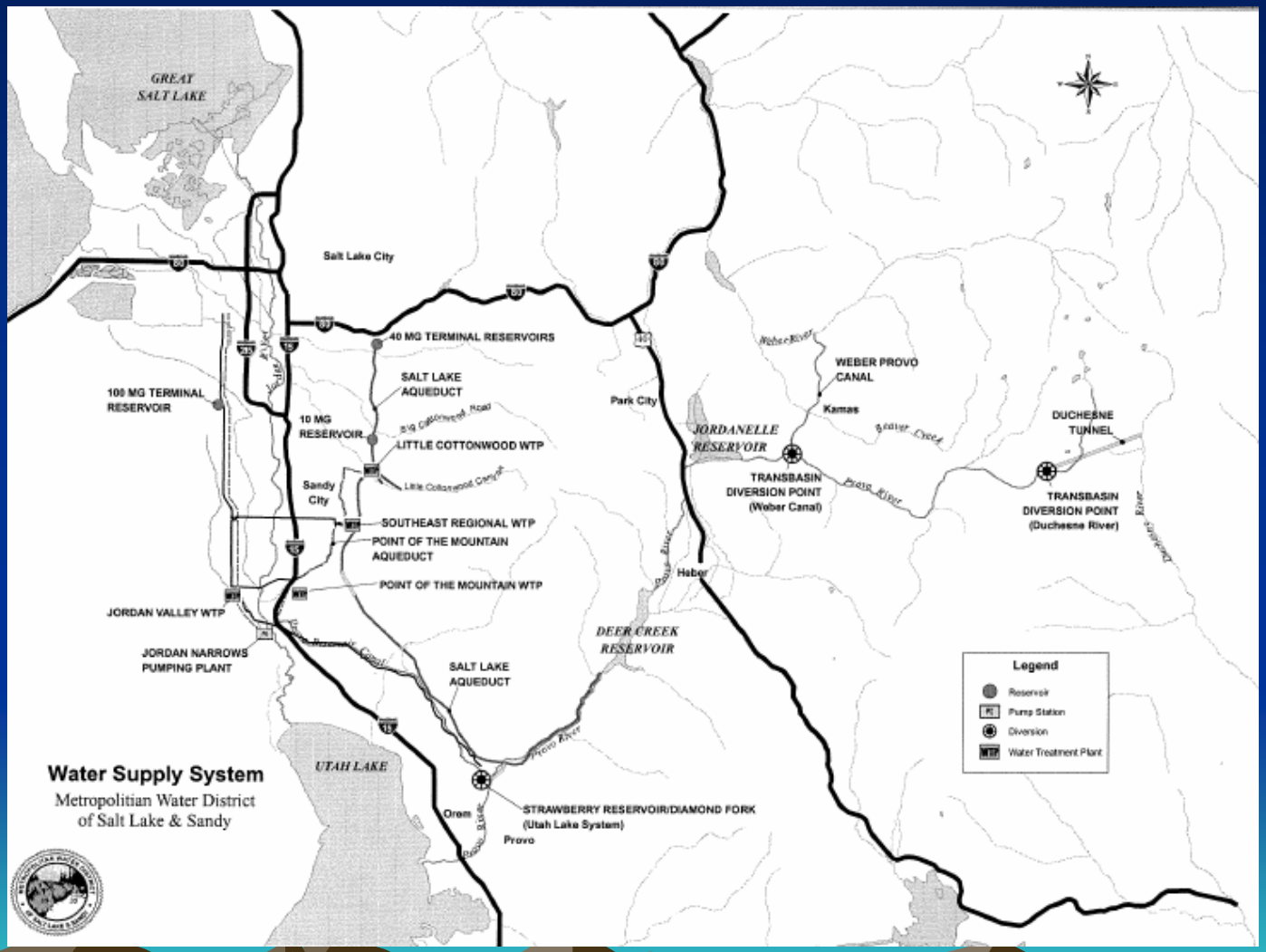


# Metropolitan Water District of Southern California

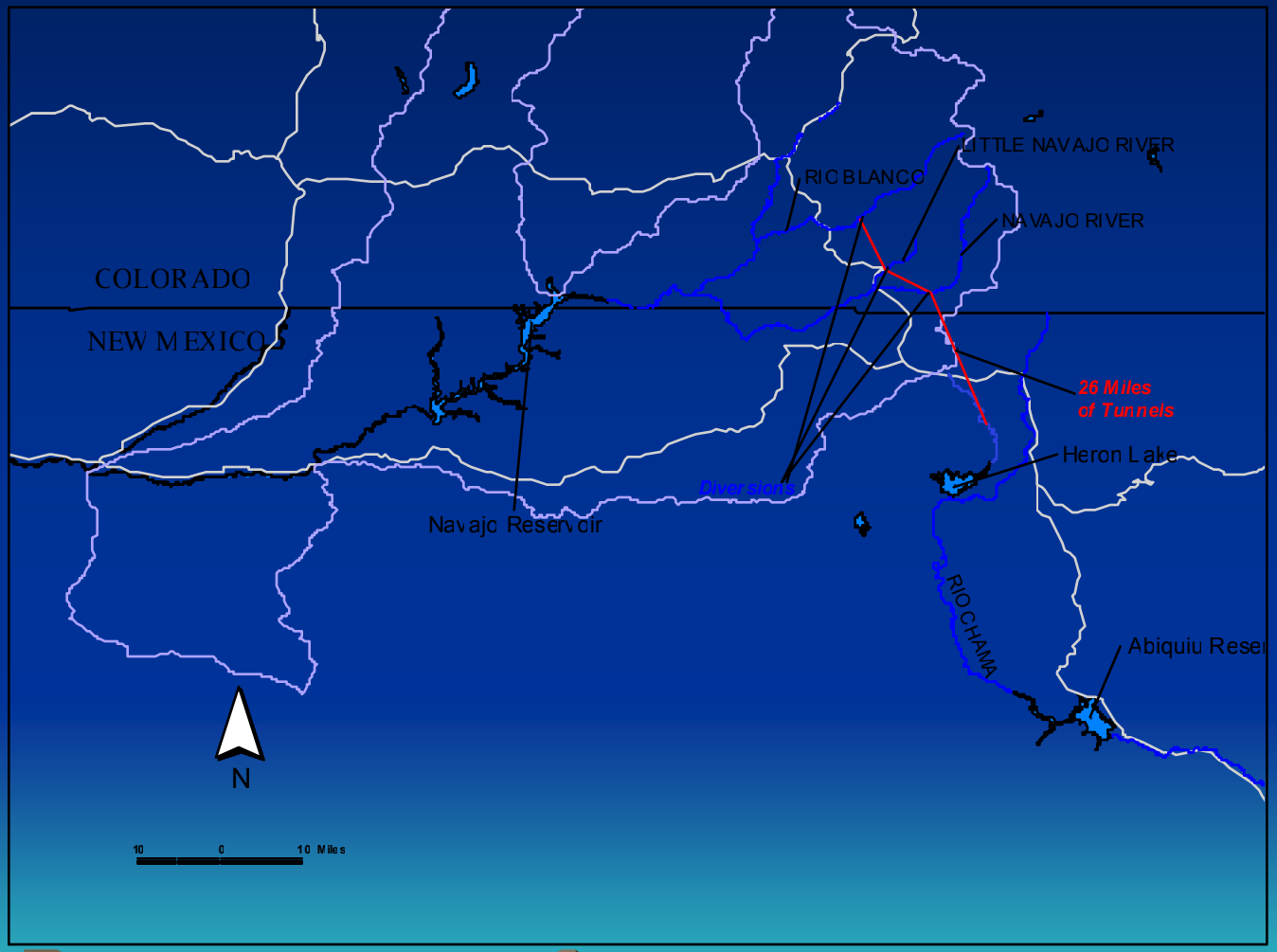


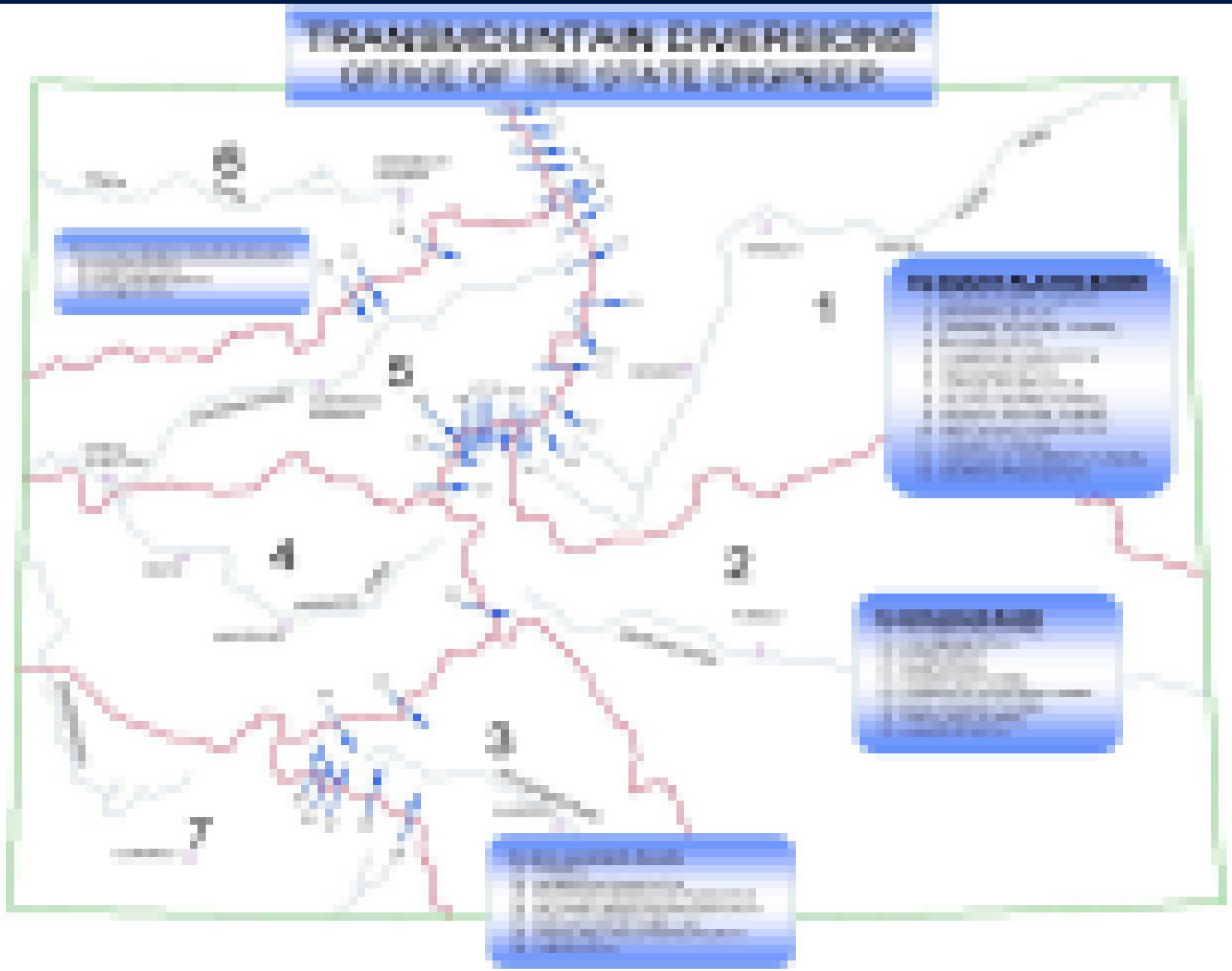
# AZ - Central Arizona Project System

# UT - Salt Lake & Sandy



# NM – San Juan Chama Project




TRANSMOUNTAIN DIVERSIONS
OFFICE OF THE STATE ENGINEER
1
2
3
4
5
6
7

# Water Quality Impacts

- None for many/most transfers
- Many transfers exceed or contribute to the exceedence of water quality standards:
  - Total Suspended Solids (TSS) from non-point sources during spring run off, storm events
  - Groundwater transfers reflecting local geology
  - Surface transfers reflecting local geology
  - Nutrients from non-point sources introduced prior to/during transfer to lakes/reservoirs

# NPDES Permit Requirements

1. Water quality limits on water transfers:

- If contribute mass loading to receiving waters that do not meet standards [33 USC § 1313(d); 40 CFR § 130.7].
- If receiving waters meet standards (anti-degradation) [40 C.F.R. § 131.12(a)(2)].
- If reasonable potential for receiving waters to exceed standards [40 CFR § 122.44(d)].

# NPDES Permit Requirements (cont'd)

2. Anti-degradation
   - Applies to *each* parameter, e.g., Fe, TDS

3. Technology requirements
   - BMPs don't ensure compliance w/ water quality limits or anti-degradation

# NPDES Compliance Costs

- For ~ 6 western systems w/ ~ 50 transfers
  - $20 *billion* capital
  - $7 *billion* annual operation and maintenance

# Chronology

- 1970s “Dam Cases” (D.C. Cir.; 6th Cir.)
- 1996 *Dubois* (1st Cir.)
- 2001 *Catskills I* (2nd Cir.)
- 2002 *Miccosukee* (11th Cir.)

# Circuit Courts of Appeals
## 1st, 2nd, 9th, 11th Cir. – 1996—2006

- Clean Water Act is not ambiguous
  - Act prohibits "the discharge of *any pollutant* by any person" unless in compliance with permit requirements.
  - The Act defines discharges as "*any addition* of any pollutant to navigable waters from any point source."
  - NPDES permits are required for water transfers.

# Supreme Court *Miccosukee* (2004)

- "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."
- Remanded to determine whether transfer between meaningfully distinct water bodies. If not, permit not required.
  - *Did not say reverse*, i.e., that if transfer *is* between meaningfully distinct water bodies a permit is required.
- Invited EPA to weigh in.
- *Amici* Colo, NM, Haw, Id, Neb, Nev, ND, SD, Tx, Ut, Wyo

# Chronology (cont'd)

- 2005 EPA Interpretation
- 2006 EPA Proposed Water Transfers Rule
  - EarthJustice open records act requests
- 2006 *Catskills II* (2nd Cir.)
  - *Amici* Colo, NM, Id, Neb, ND, Ut
- 2007 "Lake Okeechobee" (S. Fla. Dist.)
  - *Amici* NWRA, WUWC, Westcas, ACWA, MWD, Central AZ WCD, Cal Water Contractors, Truckee Meadows, Salt Lake & Sandy, Fremont-Madison ID, Denver, Aurora, Northern Water
- 2008 EPA Water Transfers Rule
- 2009 Lake Okeechobee Appeal (11th Cir.)

# EPA's 2008 Water Transfers Rule

- 40 CFR § 122.3 Exclusions. (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred (2008).
  - Multiple legal challenges (consolidated in 11th Cir.)
    - Challengers: Environmentalists; New York, Wash & 7 States; Penn; *et al*.
    - Unopposed motions to intervene filed by NM, Colo, Alaska, Id, Neb, Nev, SD, Ut & Wyo (denied, reconsideration pending) & Cal (pending)
    - Stayed by 11th Cir. pending resolution of Lake Okeechobee appeal

# Lake Okeechobee (11th Cir. 2009)

- *Amici* NM, Colo, Fla, Alaska, Id, Neb, Nev, ND, Ut
  - State AGs *amicus* appearance by right
    - EarthJustice objected to *amicus* anyway
- *Amici* NWRA, WUWC, ACWA, Truckee Meadows, Pioneer ID, El Dorado ID, Central Az WCD, Central Ut WCD, Salt Lake & Sandy, Denver, Aurora, Pueblo, Albuquerque, Fremont-Madison ID, Id Water Users, Northern Water, SECWCD, LAVWCD, Az Dept Water Resources
  - EarthJustice objected to *amicus* participation
  - Court denied *amicus* participation

# Plaintiffs' Legal Argument

Plain Meaning

- Clean Water Act is unambiguous
  - Act prohibits "the discharge of *any pollutant* by any person" unless in compliance with permit requirements.
  - The Act defines discharges as "*any addition* of any pollutant to navigable waters from any point source."
- Plaintiffs: EarthJustice, Audubon, Miccosukee Tribe, Friends of the Everglades
- Accepted by courts in1st, 2nd Circuits; 11th until 2009

# Defendants' Arguments

Plain Statement Rule

- Clean Water Act is unambiguous
  - No "addition" to navigable waters by transferor as required by definition of "discharge:"
    - "any <u>addition</u> of any pollutant to navigable waters from any point source."
      - Unitary waters theory: absence of "any" before "navigable"
- Defendant: So Fla Water Mgmt Dist
- Not accepted by any courts

# USA's Arguments

Clean Water Act is ambiguous

- Holistic reading of Act (EPA)
  - The statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program and the statutory definition of "discharge of a pollutant" itself supports that conclusion.
- Unitary Waters Theory (DOJ)
  - "The waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.
- Agency Rule entitled to *Chevron* deference
- Unitary Theory accepted by 11th Circuit in (2009)

# Western States on Record Supporting Water Transfers Exemption

- Colorado
- New Mexico
- Alaska
- Arizona
- California
- Hawaii
- Idaho
- Nebraska
- Nevada
- North Dakota
- South Dakota
- Texas
- Utah
- Wyoming

# Western States on Record Opposing Transfers Rule

- Washington

## Western States not on Record

- Kansas
- Montana
- Oregon

# Western Assn Support for Water Transfers Exemption

- National Water Resources Assn
- Western Urban Water Coalition
- Western Coalition of Arid States
- Assn of California Water Agencies
- Assn of California Water Contractors
- Idaho Water Users

# Western Agency Support for Water Transfers Exemption

- Truckee Meadows
- Metropolitan Water District of Southern California
- Salt Lake & Sandy
- Denver
- Colorado Springs
- Aurora
- Pueblo
- Boulder
- Albuquerque
- Yuba County
- Central Az WCD
- Central Ut WCD
- Fremont-Madison ID
- Pioneer ID
- Imperial ID
- El Dorado ID
- Browns Valley ID
- Yolo County WCD
- Northern Colo WCD
- Lower Ark WCD
- Southeast Colo WCD
- Southwest Colo WCD

# Western Argument

## Clear Statement Rule

1. Courts may not alter the established federal-state framework of deference to State water law by permitting federal encroachment upon a traditional state power unless Congress conveys its purpose clearly.
   - Congress has clearly conveyed its purpose to *preserve* the established federal-state framework (Wallop Amendment).
   - The Supreme Court has affirmed State, not federal, water pollution controls on State water allocations (SD Warren, PUD No. 1)
   - Extension of the NPDES Program to water transfers would supersede State water law, and abrogate individual water rights.
     - **Supreme Court recognized issue in *Miccosukee***
2. Extension of the NPDES Program to water transfers would interfere with Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.
3. The Clean Water Act authorizes States to impose water pollution controls on water transfers, in their discretion. *All* states have such authority.

# Western Argument

## Clear Statement Rule

- Courts may not alter the established federal-state framework of deference to State water law by permitting federal encroachment upon a traditional state power unless Congress conveys its purpose clearly.
  - *Rapanos v. U.S.,126 S. Ct. 2208, at 2244 (2006)*
  - *California v. United States,* 438 U.S. 645, at 653 (1978)
- Congress has clearly conveyed its purpose to *preserve* the established federal-state framework.
  - 33 USC § § 1251(a), 1251(g) [Wallop Amendment], 1370

# Western Argument

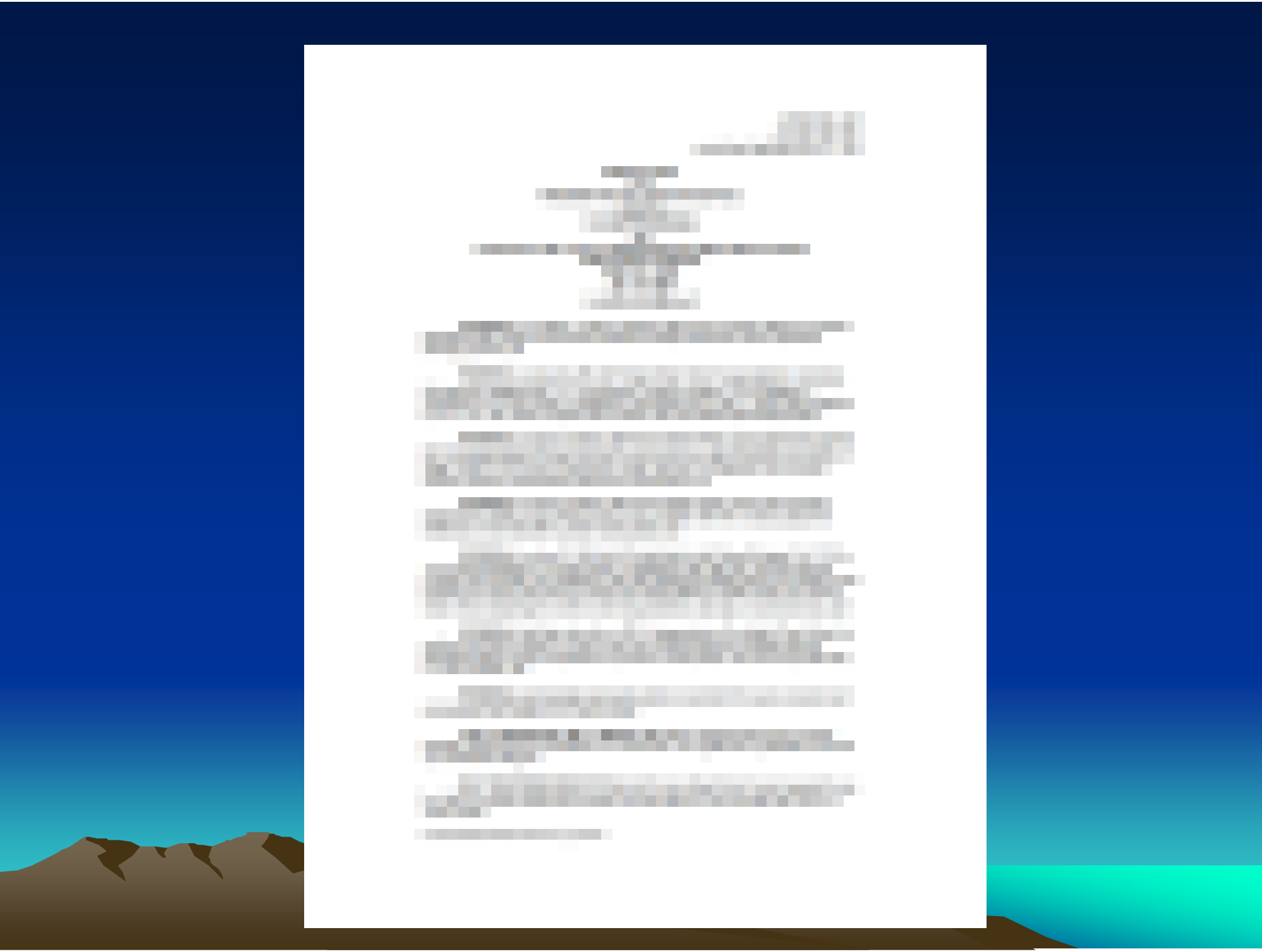
- The Supreme Court has affirmed State, not federal, water pollution controls on State water allocations.
  - *S.D. Warren v. Maine*, 547 U.S. 370, 126 S. Ct. 1843 (2006)
  - *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994)

# Western Argument

- The Clean Water Act authorizes States to impose water pollution controls on water transfers, in their discretion.
  - 33 USC § 1370
  - *Every* state has authority under state law to address water pollution independent of the Clean Water Act.

# Western Argument

- Extension of the NPDES Program to water transfers would supersede State water law, and abrogate individual water rights.
- Extension of the NPDES Program to water transfers would interfere with Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.



# Lake Okeechobee (11th Cir. 2009)

- Clean Water Act is ambiguous
  - The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language of the Act
    - Entitled to *Chevron* deference
    - No permit required for water transfers
  - Plaintiffs' Petition for Rehearing *en banc* denied

# Where do things stand?

Lake Okeechobee (11th Cir. 2009)

- The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language of the Act
  - Entitled to *Chevron* deference
- Petition for rehearing en banc denied 5/7/2010
  - 90 days to petition Supreme Ct for *cert* (Aug 8)
    - Miccosukee Tribe probably will
    - Environmentalists will not
    - Defendants may not object
  - Denial of *cert* would lift stay on EPA Rule challenges
    - Circuit bound by Okeechobee decision to uphold EPA Rule

# EPA Reconsideration of Water Transfers Rule

"EPA recently formed a workgroup with many of our federal partners, including DOI,DOJ, DOE, USDA, USACE, and CEQ. The purpose of this workgroup is to help EPA better understand the potential water quality impacts that might result from such water transfers. EPA anticipates that the efforts of this workgroup will significantly inform the Agency's direction as EPA considers potential further action regarding regulation of water transfers."

# What's Coming?

1. If Lake Okeechobee *cert* filed and accepted
   - Supreme Court will decide in 2011
2. If Okeechobee *cert* not filed or not accepted
   - 11th Circuit will uphold Rule challenges
     - Environmentalists will appeal
     - Supreme Court will decide (2012?)
3. If EPA repeals or weakens Rule
   - Western states and water users will likely challenge
     - Loser will appeal to Supreme Court
     - Supreme Court will decide

# Conclusion – Questions?

- More than 60 million residents and 10 million irrigated acres in arid west rely on water transfers daily.
- Critical legal issue concerning traditional federal deference to the States' water law.
- *All* States have State authority to address any water quality problems from water transfers.