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SLIDES: Rethinking Western Water Law: Restoring the Public Interest in Western Water Law

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The Challenges Facing Western Water

- Climate change
  - Changes in rain and snow patterns
  - Changes in evaporation and evapo-transpiration rates
  - Warmer temperatures with earlier snow pack melting
  - Glaciers retreating or disappearing altogether
- Population growth
  - Between 2000 and 2040, Western states population is projected to grow by 65%
  - Approximately one million additional people every year
- Drought

We Are Running Out of Water

- "Lake Mead May Dry Up by 2021" (National Geographic, Feb. 23, 2008)
- "Clearly we're on a collision course between supply and demand."
  - Brad Udall, Director, Western Water Assessment (AP, Dec. 5, 2008)
- "Stationarity is dead." http://www.water-data.com/
- In the water resources context, how do we respond?

The Bath Tub Ring at Lake Powell

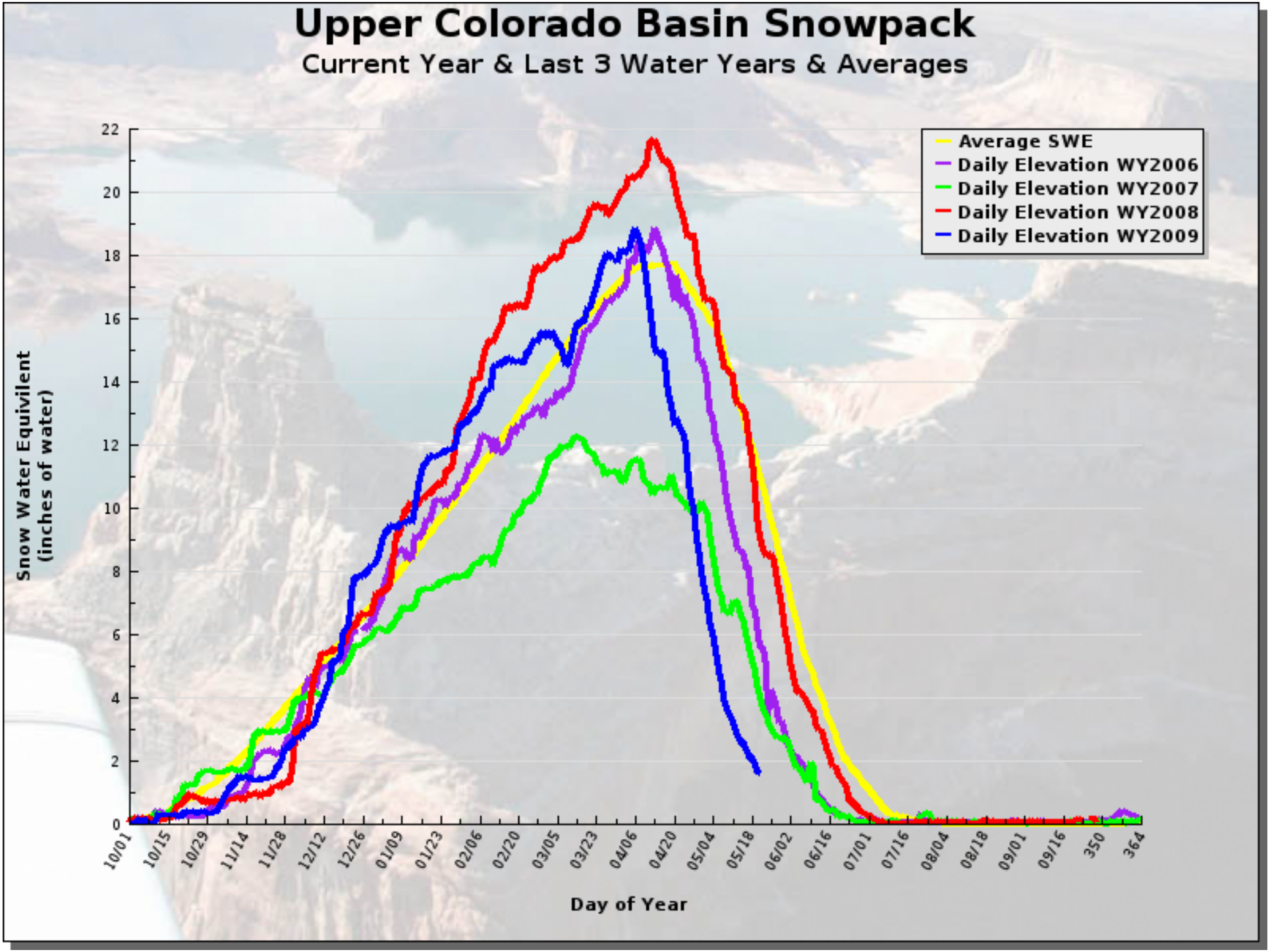
Last Chance Bay at Lake Powell

As of June 5, 2009 – Lake Powell at 61%; Lake Mead at 43%

NPR photo – David McNew

Upper Colorado Basin Snowpack

Current Year & Last 3 Water Years & Averages



Law is Part of the Problem; It Must Be Part of the Solution

- Water is universally considered the *property of the state*, but water rights are often treated as permanent and largely inviolate property rights

- The oldest water rights – usually agricultural rights – were often overly generous
  - Irrigated agricultural still consumes from 80-95% of water resources in the West– much of it for low value crops
  - The most junior rights are often those that protect public values like instream flows

- In a water constrained future, change seems inevitable

Rethinking Western Water Law

- Rethinking beneficial use to gradually reduce consumption
- Rethinking reallocation to promote more efficient distribution of water resources
- Rethinking the public's rights in water resources

Private Rights vs. Public Rights

- Our water law, which universally recognizes water resources as *public resources*, has evolved primarily to protect private water rights over the broader public interest in water

- Can we and *should we* restore and protect public values associated with water?

The Public Interest in Western Water Law

- With the exception of Colorado, every Western state requires that water rights be administered *in the public interest*
  - Wyoming Constitution, Article 8, §3: "No appropriation shall be denied, *except as demanded by the public interests*." (Same as Nebraska)
  - New Mexico Stat. Ann. § 72-5-7: [The State Engineer] may … refuse to consider or approve any application … if, in his opinion, approval would be contrary to the conservation of water within the state or *detrimental to the public welfare* of the state. (Similar to Utah.)

The Public Interest in Western Water Law

- Oregon: Oregon law creates a *rebuttable presumption* that a water rights application is in the public interest. Factors considered in public interest analysis – use efficiency and waste avoidance; threatened, endangered, or sensitive species; water quality; fish and wildlife; recreation; economic development; and local land use regulations. Or. Rev. Stat. § 536.300 (2007)

- Colorado: *Board of County Comm'rs v. United States*, 891 P.2d 952 (Colo. 1995). "Conceptually, *a public interest theory is in conflict with the doctrine of prior appropriation* because a water court cannot, *in the absence of statutory authority*, deny a legitimate appropriation based on public policy."

How well does Western water law protect the public interest?

- Despite explicit public interest standards in the laws of most Western states, and despite universal recognition of water resources as public property, States often fail to consider public interest criteria "*on the record*" of agency decisions
- Many states with public interest standards fail even to define the term, thus hindering its application in individual cases
- The public trust doctrine may seem attractive alternative but is unlikely to solve the problem

The Limits of the Public Trust Doctrine

- *National Audubon Society v. Superior Court* (*Mono Lake case*) suggests that the public trust doctrine offers the potential for restoring some balance between public and private rights

- But the public trust doctrine is a matter of *common law*, and most Western states have been reluctant to use the doctrine to address changing public values, and changing needs
  - By contrast, the public interest is embedded in statutes and constitutions

How Might Restoration of the Public Interest Impact Water Law?

- Most importantly, no water right would be granted unless and until the water official determines ***on the written record*** of the decision that its issuance would not prove detrimental to the public interest
  - Without a record, judicial review of the decision on public interest grounds is not possible (*Overton Park*)

The Public Interest is not Self-Defining

- It will likely involve a balancing of various interests
  - Alaska requires consideration of 8 separate criteria, including, for example, economic benefits and costs, opportunity costs, fish and wildlife impacts and recreational impacts
- And it will likely be defined to mean different things in different states
- But it is unlikely that any state will deny the importance of instream values in the calculus

Applying a Public Interest Screen

- Would likely lead to conditions on rights
  - E.g., limiting a water right to a term of years; requiring protection of minimum stream flows; assuring protection of environment in the exercise of water rights

- Might require some form of environmental assessment, including a cumulative impacts assessment
  - But see, *William F. West Ranch v. Tyrell*, 206 P.3d 722 Wyo. 2009) (Court holds that claim was not presently justiciable.)

Is it too late?

- Would the imposition of standards, permit terms, or other limits on existing water rights effect a "taking" of private property under the 5th Amendment?
  - Would the imposition of standards result in a *total taking*? (See *Lucas v. SCCC*, 505 U.S. 1003 (1992)
  - If not, consider the character and impact of the regulations, and whether they interfere with "*reasonable, investment-backed expectations*"? (See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)

Natural Resources Law Center Study

- Survey Western states' water law to determine the extent to which they establish and use public interest standards for allocating water
- Review decisions approving applications for water rights in selected States to determine whether and how these States have considered the public interest in reaching their decision
- Analyze the likely consequences and impacts that might be expected if the States were to address their public interest/public ownership obligations on the record

Proposed Outputs from NRLC Study

- Develop model guidelines, rules, and other recommendations for implementing public interest/public ownership standards

- Meet with States, citizen groups, and other interested parties to discuss the findings of the study and to develop strategies for restoring public interest standards

The Future of Western Water Law

- Water rights will be administered more flexibly
  - Regulation of and restrictions on water rights will grow just as the regulation of land has grown
  - The public interest in water will be better defined to expressly encompass aesthetic, ecological, and recreational values, and ways will be found to restore public rights that have been lost

- Water rights will be protected as property but the strict regulation of water uses will not be enough to support a takings claim
  - *Priorities will be protected*, but perhaps not for the amounts of water historically used

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