

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No. 98-6056-CIV – LENARD/KLEIN

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MICCOSUKEE TRIBE OF INDIANS OF)	
FLORIDA,)	
)	
Plaintiff,)	
)	
v.)	
)	
SOUTH FLORIDA WATER MANAGEMENT)	
DISTRICT and CAROL WHELE, as Executive)	
Director,)	
)	
Defendants.)	
<hr/>)	

**MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF THE
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM OF LAW**

The National Water Resources Association, the Western Urban Water Coalition, the Western Coalition of Arid States, the Association of California Water Agencies, the Central Arizona Water Conservation District, the Metropolitan Water District of Southern California, the City and County of Denver [Colorado] acting by and through its Board of Water Commissioners, the Albuquerque Bernalillo County [New Mexico] Water Utility Authority, the Metropolitan Water District of Salt Lake & Sandy [Utah], the Fremont Madison [Idaho] Irrigation District, the Northern Colorado Water Conservancy District, the City of Aurora [Colorado], and the [California] State Water Contractors, by and through their undersigned attorneys, move for leave to appear as *amici curiae* in support of the South Florida Water Management District's Motion for Summary Judgment, and as grounds therefore state as follows:

Identity and Interest of *Amici Curiae*

West of the 100th Meridian,¹ the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Since most precipitation in the west falls as snow, water must be captured when and where the snow melts, far from the major urban and agricultural centers that need the water. Hence, it is necessary to transfer water through complex systems of manmade and natural conveyances and reservoirs. Water transfers allow the west to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. Similarly, many of the nation's great cities could not exist, including Albuquerque, Denver, Los Angeles, Phoenix, Reno, Salt Lake City, and San Francisco.

Under individual water rights determined pursuant to State water law, *Amici* and countless other public and private entities in the western United States divert water from natural streams and lakes. Many then transfer water through manmade tunnels, canals, and pipelines into other natural streams and lakes to meet the domestic, agricultural, and commercial/industrial water needs of residents in another watershed. These water transfers range from a few hundred thousand gallons per year needed to irrigate a high-mountain pasture in northern Idaho to 2.4 trillion gallons per year delivered by California's Central Valley Project for municipal, irrigation, and other uses. Water transfers may be as mundane as the diversion of water from a river into a nearby (but hydrologically separate) stream for delivery to a nearby town or field, or as massive as the transfer of Sacramento River water by the federal Central Valley Project and California State Water Project to serve citizens throughout northern, central, and southern California. By way of further example, in the Upper Colorado River Basin alone there are at least 36 major water transfers that move approximately 229 billion gallons of water per year from the basin of origin for use in another basin. Extending the NPDES program to water transfers potentially supersedes, abrogates, or impairs each of these water transfers, which could prevent *Amici* from meeting essential domestic, agricultural and commercial/industrial water demands.

¹ The 100th Meridian forms the eastern boundary of the Texas panhandle, and splits the states of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

The National Water Resources Association (“NWRA”) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the western United States. Its members range from the Metropolitan Water District of Southern California, which serves most of California’s south coast, an area of 3,328,000 acres, to the farmer who owns the McCormick Rowe Ditch in St. Anthony, Idaho, which is used to irrigate 240 acres of farmland.² NWRA members directly engage in, or rely on water from, innumerable water transfers.³ If these water transfers were effectively halted or became prohibitively expensive to operate due to NPDES program requirements, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Western Urban Water Coalition (“WUWC”) is an association of the largest municipal water utilities in the western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members⁴ own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including water transfer facilities. The continued, unimpeded operation of these facilities is essential to the continued ability of WUWC members to serve the water needs of the major population centers of the west.

The Western Coalition of Arid States (“WESTCAS”) is the voice of water quality in the arid west and an advocate for laws, regulations and policies that ensure sustainable supplies of

² Other NWRA members include the Arizona Cattlemen’s Association (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Talent Irrigation District (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

³ NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation (“Reclamation”), as many of its members are the operators or beneficiaries of Reclamation water projects, including projects with significant water transfer components, for example Colorado’s Frying-Pan Arkansas Project, California’s Friant-Kern Canal (part of Central Valley Project), and New Mexico’s San Juan-Chama Project.

⁴ WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix, Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle.

water for the arid west and protect public health and the environment. WESTCAS was formed over 12 years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique arid ecosystems are the norm. Many WESTCAS members⁵ depend upon water transfers both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems.

The Association of California Water Agencies (“ACWA”) is a voluntary, statewide non-profit association of 440 public water agencies. Together, these agencies are responsible for more than 90 percent of the water delivered in the state. In addition to public agency members, ACWA also includes 28 affiliate members, consisting of mutual water companies and other non-public, non-profit water related agencies, and 302 associate members including firms and corporations in the law and engineering fields with an interest in California water issues. ACWA’s mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner. Although the largest conveyance facilities in California are often the focus of attention, there are literally thousands of small conveyance systems in the state whose operators have used natural channels to convey developed waters for over a century.

The [California] State Water Contractors (“SWC”) represents 27 of the 29 public water agencies operating within California who contract with the California Department of Water Resources for water supplies from the State Water Project (“SWP”).⁶ The SWP diverts water from the Sacramento-San Joaquin Delta through the California Aqueduct for distribution to the San Joaquin Valley and delivery over the Tehachapi Mountains into southern California. The

⁵ WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix (AZ), Tucson Water (AZ), the Salt River Project (AZ), Eastern Municipal Water District (CA), Los Angeles County Sanitation District (CA), the Sweetwater Authority (CA), Denver Metro Wastewater District (CO), Clark County Water Reclamation District (NV), the cities of Albuquerque and Santa Fe (NM), and El Paso Water Utilities (TX).

⁶ The agencies that comprise the State Contractors are the following: Alameda County Flood Control and Water Conservation District, Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, County of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Geronimo Pass Water Agency, San Luis

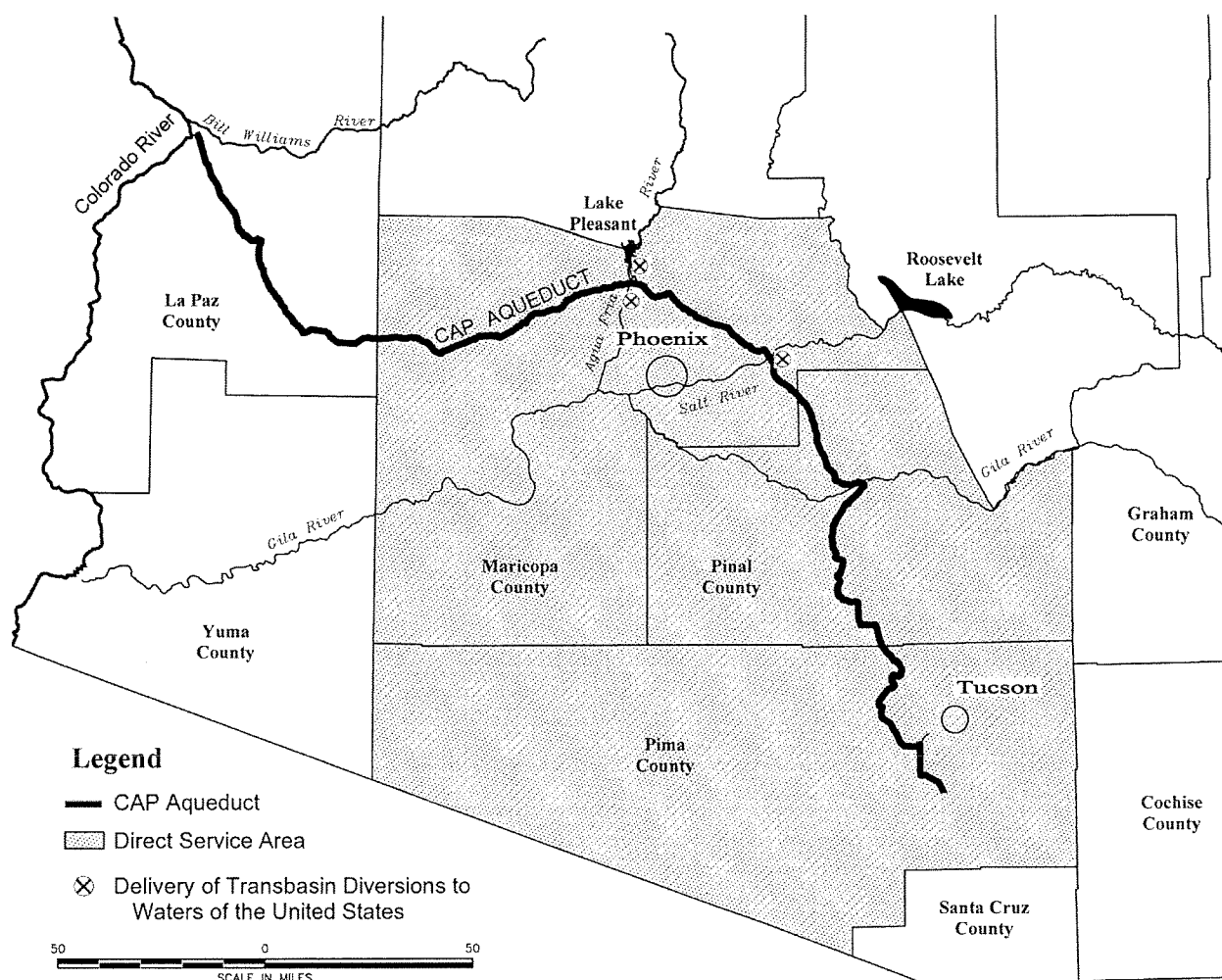
Project supplies water for drinking, commercial, industrial and agricultural purposes to public water agencies, encompassing a population of over 22 million Californians -- about two-thirds of the State's population -- and over 750,000 acres of farm land throughout the San Francisco Bay area, the Central Valley, and Southern California. The SWP constitutes a significant portion of the supplies available to SWC members. As a result, the SWC is very concerned with matters affecting the SWP, the Sacramento-San Joaquin Delta, and tributaries to the Delta.

Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

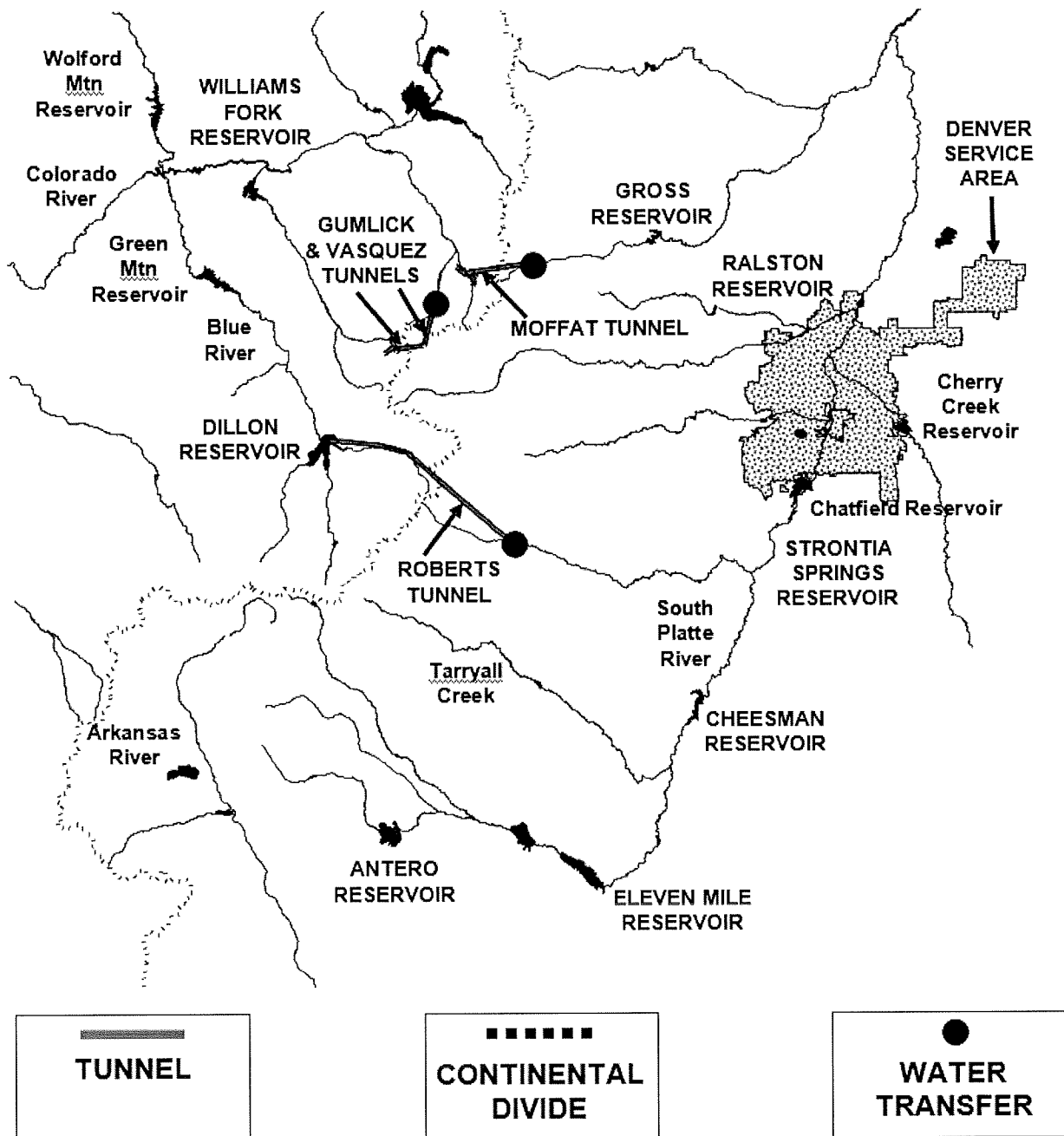
The Metropolitan Water District of Southern California ("Metro"), a public entity made up of 26 member public agencies, imports water from the Colorado River through the Colorado River Aqueduct and from northern California through the California Aqueduct, as shown in the map below. Metro serves water to approximately 18 million people in a 5,200 square mile service area that includes Los Angeles, Orange, San Diego, Riverside, and Ventura counties. In fiscal year 2005-06 Metro expects to deliver 1.9 million acre feet of water, the equivalent of over 619 billion gallons.



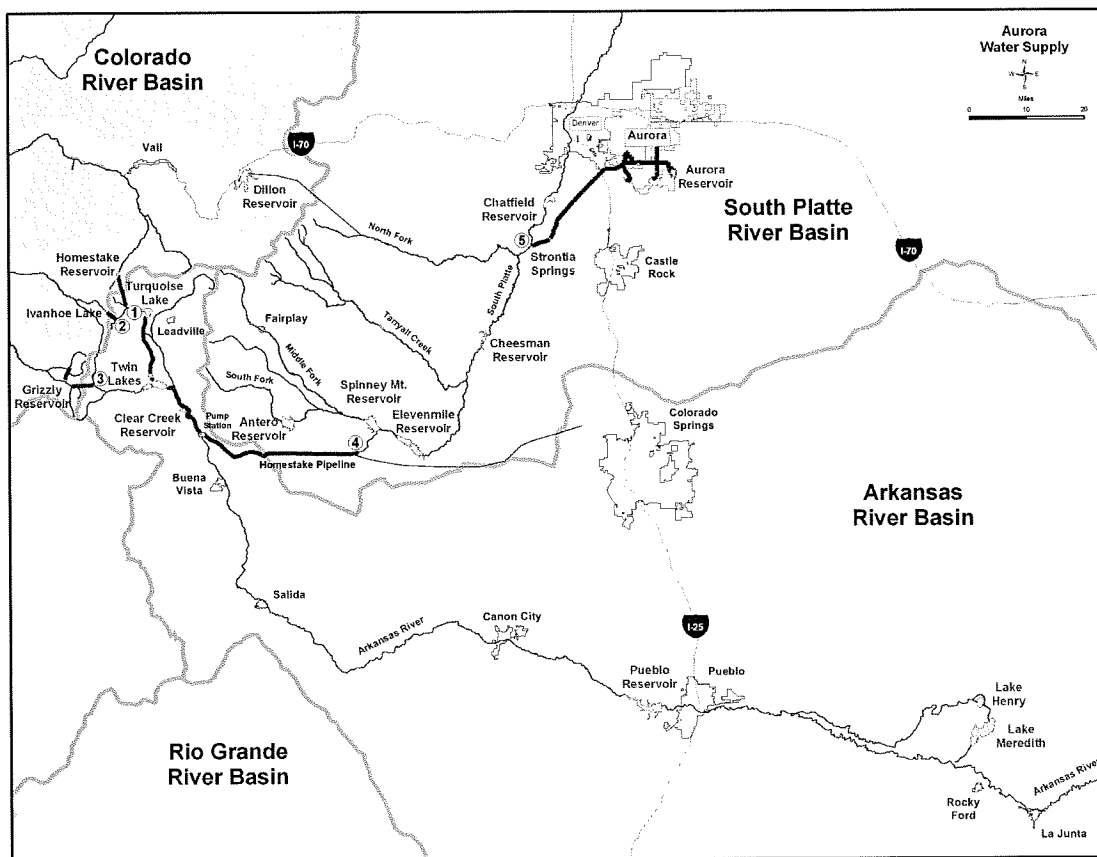
The Central Arizona Project (“CAP”), operated by the Central Arizona Water Conservation District, is a 336-mile long water transfer system of pumping plants, concrete-lined canals, inverted siphons, tunnels and pipelines that annually moves about 489 billion gallons of Colorado River water from Lake Havasu on the Colorado River to central and southern Arizona. The CAP water supply represents Arizona’s largest renewable water supply; it serves municipal and industrial customers, non-Indian agricultural users and Indian communities. The service area of the CAP encompasses eighty percent (80%) of Arizona’s water users, including the Phoenix and Tucson metropolitan areas. There are at least three operational points on the CAP system where Colorado River water is released into other waters of the United States, as depicted below.



The City & County of Denver acting by and through its Board of Water Commissioners ("Denver Water") provides an average of 65 billion gallons per year of potable, raw and recycled water to approximately 1.2 million people in the Denver metro area. Water is diverted from 42 streams and numerous smaller tributaries and transferred via two pump stations, 77 miles of canals, tunnels, siphons, and four trans-mountain tunnels. Water is stored in 13 reservoirs, with a combined storage capability of over 221 billion gallons.

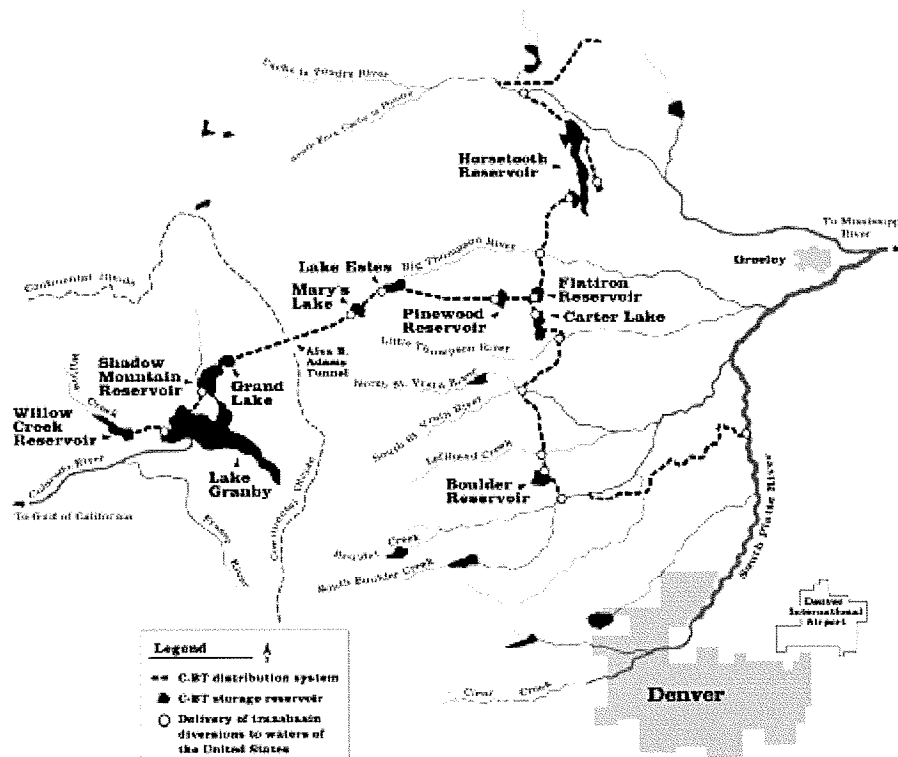


The City of Aurora is the third largest city in Colorado, with a population of 300,000. Nearly one-half of Aurora's water is supplied from sources in the Arkansas and Colorado River Basins. All of this water is collected at Twin Lakes and is transported to the South Platte Basin via the Otero Pump Station. Water transferred via the Otero Pump Station flows in an open channel to Aurora's Spinney Mountain Reservoir and then down the Middle Fork of the South Platte River to Strontia Springs Reservoir where it is again diverted and piped into Aurora for municipal use.



- 1 Homestake Tunnel (Homestake Collection System) transfer above Turquoise Lake
- 2 Carlton Tunnel (Busk-Ivanhoe Sysem) transfer above Turquoise Lake
- 3 Independence Pass Tunnel (Twin Lakes System) transfer above Twin Lakes Reservoir
- 4 Otero Pump Station (Arkansas & Colorado Basins) transfer above Spinney Mountain Reservoir
- 5 Strontia Springs Reservoir (South Platte Basin) transfer above Rampart Reservoir

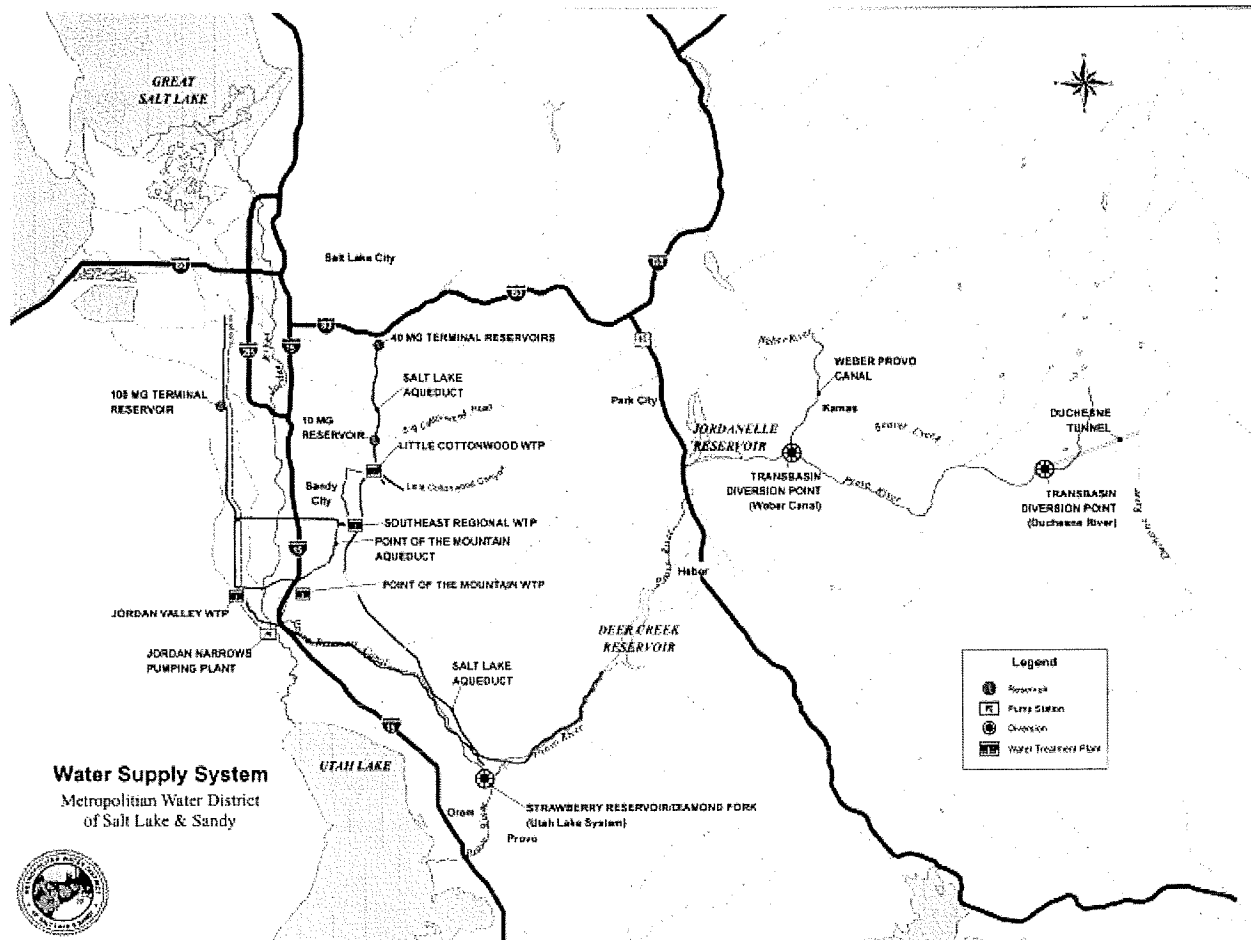
The Colorado-Big Thompson Project (“C-BT”), operated by the Northern Colorado Water Conservancy District, conveys an average of 74 billion gallons per year through the Rocky Mountains and the Continental Divide to irrigate over 693,000 acres and to supply approximately 750,000 people in 31 cities and towns and 16 water districts.⁷ C-BT diverts water from four source lakes, reservoirs, and streams, and conveys that water with gravity and three pump stations through two tunnels and nine canals into 17 different streams, rivers, lakes and reservoirs, as illustrated below.⁸



⁷ The Municipal Subdistrict of the Northern Colorado Water Conservancy District, an NWRA member, also operates the Windy Gap transbasin diversion project that is designed to provide approximately 16 billion gallons of water per year on average for municipal/industrial use.

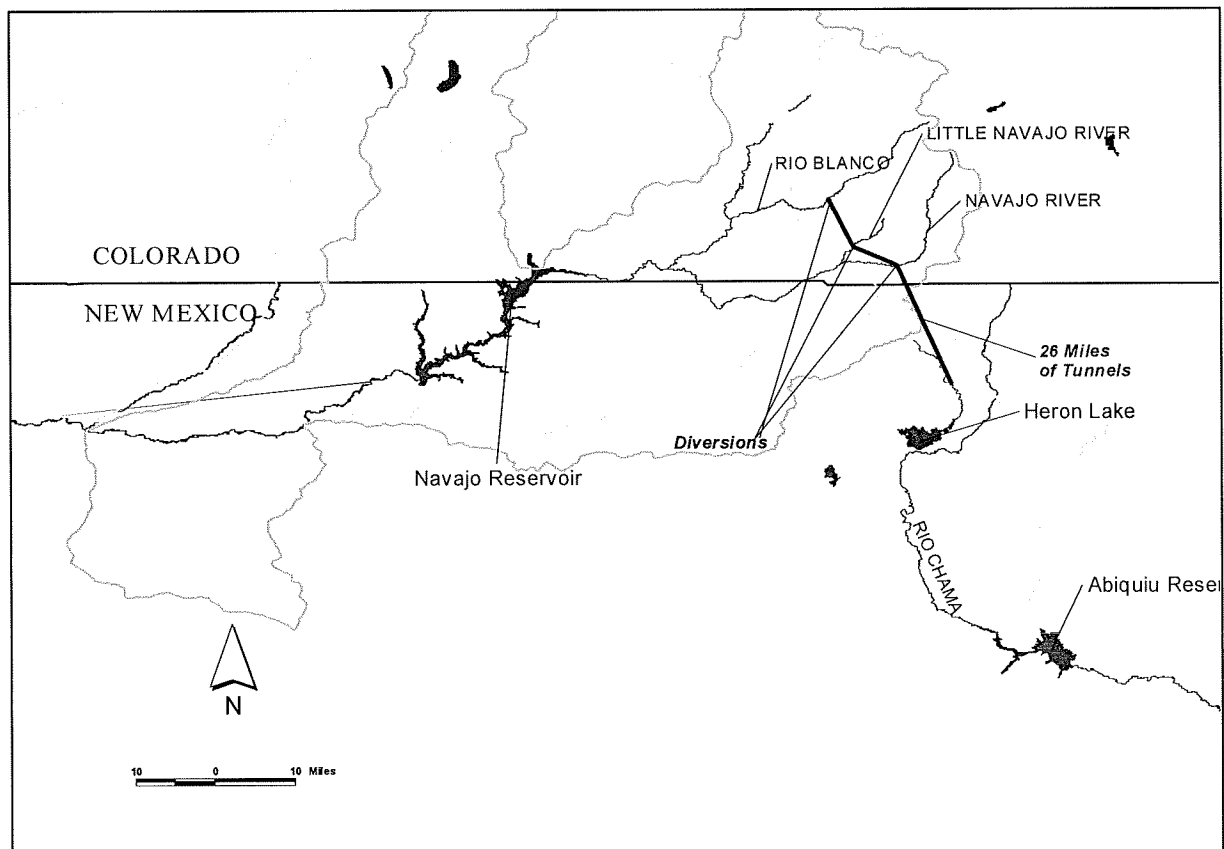
⁸ Although C-BT is the largest transbasin diversion in Colorado, it is not unusually complex in comparison to other western systems.

Metropolitan Water District of Salt Lake & Sandy, Utah provides supplemental wholesale water that makes up at least a portion of the water supply for an estimated 400,000 people in the Salt Lake Valley. Metro is the largest subscriber of water from the Provo River Project, a U.S. Bureau of Reclamation project that was completed between the 1930s and 1950s, and the second largest subscriber of water from the Bonneville Unit of the Central Utah Project, a partially completed U.S. Bureau of Reclamation project. The Provo River Project includes the Duchesne Tunnel, a 388 MGD capacity tunnel that transfers water from the Duchesne River to the Provo River, and the Weber-Provo Canal, a 646 MGD capacity canal that transfers water from the Weber River to the Provo River. The Bonneville Unit of the Central Utah Project, is serving the needs of a growing population in large part through a trans-basin diversion of water from tributaries of the Duchesne River. Roughly half of Metro's water supply depends upon trans-basin diversions.



The San Juan-Chama Project was authorized for construction by Congress in 1956. The Project imports water from the Colorado River basin into the Rio Grande basin, and consists of three diversions in Southern Colorado that divert water from the San Juan River, a tributary of the Colorado River, through a series of tunnels across the Continental Divide and into Heron Lake on the Rio Chama in New Mexico. The Project imports about 35 billion gallons of water annually that is provided to San Juan-Chama Contractors at the outlet to Heron Lake.

The Albuquerque Bernalillo County Water Utility Authority is the largest San Juan-Chama Contractor and holds a contract for approximately 16 billion gallons per year. This water is the key to the metropolitan Albuquerque area's water future through the use of surface water to replace unsustainable ground water mining. Currently, the Authority is constructing the \$375 million Drinking Water Project to transition from the aquifer to San Juan-Chama water. The San Juan-Chama water will constitute 90% of Albuquerque's supply when the project comes on-line in 2008 and more than 70% of the supply in 2040.



The Fremont-Madison Irrigation District provides water for farm irrigation in the St. Anthony area of eastern Idaho. The Cross-Cut Canal, a critical component of the Fremont-Madison Irrigation District's system, transfers approximately 260 MGD from the Henry's Fork of the Snake River to the Teton River to irrigate nearly 50,000 acres of farmland.

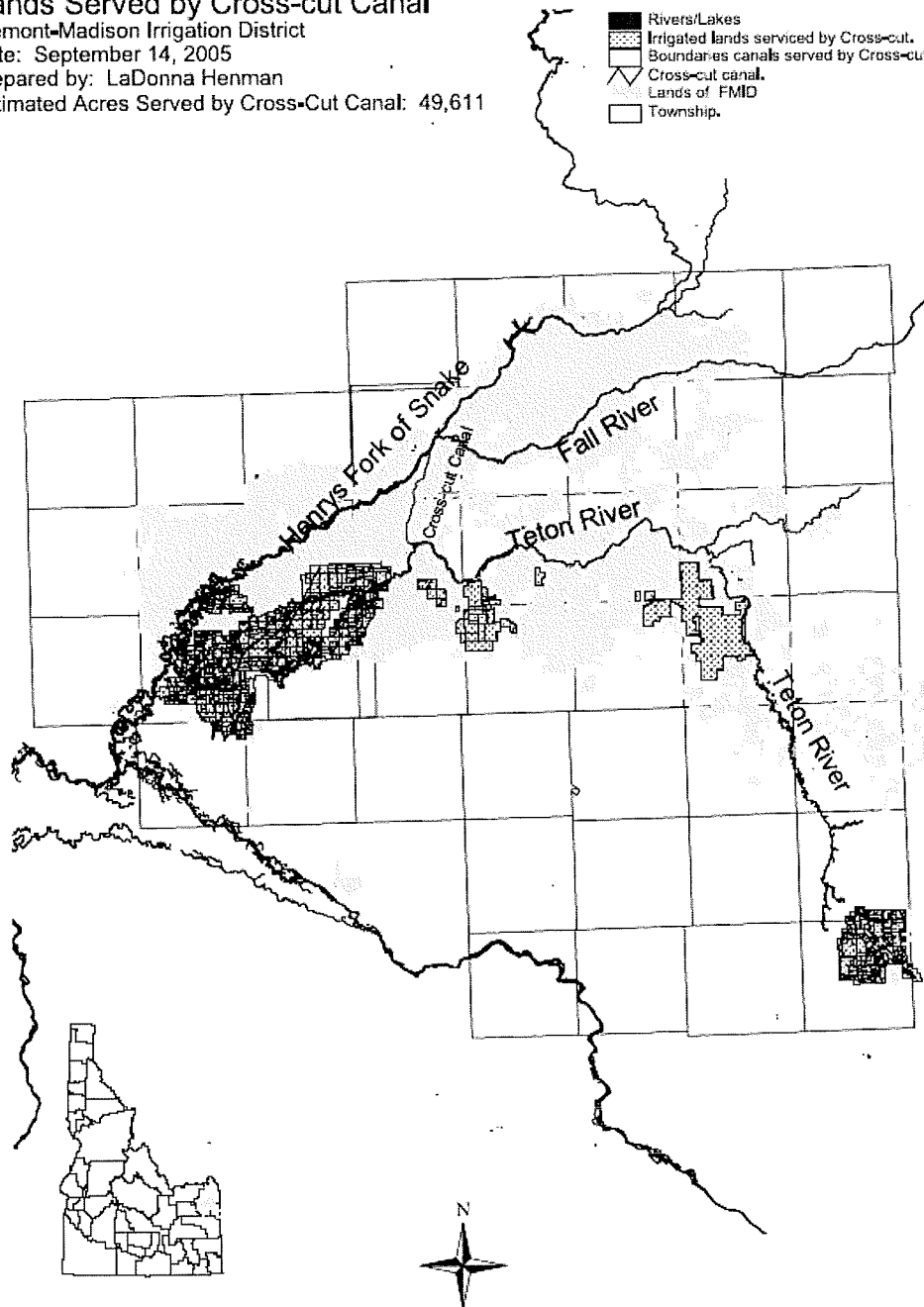
Lands Served by Cross-cut Canal

Fremont-Madison Irrigation District

Date: September 14, 2005

Prepared by: LaDonna Henman

Estimated Acres Served by Cross-Cut Canal: 49,611



In sum, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the western United States, as the above examples illustrate. Moving

water through engineered water transfers is essential to meet such municipal, industrial, and agricultural demands.

Argument

The issue before the court is nationally important. In addition to *Amici*, who serve approximately 25 million residents in eight states, countless other public agencies across the nation, from New York City to Los Angeles, are following the case with keen interest through their respective counsel and national associations.

The court's ruling on the summary judgment motions could have broad impacts nationwide on residents and water users who rely on water transfers, particularly the more than 60 million residents of the arid west. *Amici* are uniquely positioned to inform the Court about these wide-ranging public impacts that could affect water transfers throughout the western United States, which impacts are both qualitatively and quantitatively different than those presented in this case. Counsel for *Amici*, who have participated in the *Miccocukee*, *Catskill* appeals as well as *Friends of Everglades v. South Florida Water Management District*, Case No. 02-CV-80309 (So. Fla. Dist., Miami Div.), are also eminently qualified to present the legal arguments of the western water users, apprehensive bystanders to this case. This perspective is crucial because application of the NPDES program to water transfers could affect projects that operate under a State legal doctrine of water allocation that is different from Florida's. Therefore, the court should exercise its discretion to allow *Amici* to appear in this case as *amici curiae* in support of the South Florida Water Management District's Motion for Summary Judgment.

While the Federal Rules of Civil Procedure do not regulate the appearance of *amici curiae*, the District Court "has the inherent authority to appoint *amici curiae*, or 'friends of the court,' to assist it in a proceeding." *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1501 (S.D. Fla. 1991). "Inasmuch as an *amicus* is not a party and 'does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.'" *News & Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988) (quoting *Linker v. Custom-Bilt Machinery, Inc.*, 594 F. Supp. 894, 897 (E.D. Pa. 1984)). *Amicus* status may be granted "where there is an issue of general public interest, the *amicus* provides supplemental assistance to existing counsel, or the *amicus* insures a 'complete and plenary presentation of difficult issues so that the court may

reach a proper decision.’” *Alliance of Automobile Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003) (quoting *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974)).

The scope and extent of the participation of an *amicus* is also a matter that is left to the sound discretion of the court. Because of the significant issues of general public interest and the *Amici*’s special expertise regarding these issues, the court should allow the National Water Resources Association, the Western Urban Water Coalition, the Western Coalition of Arid States, and other western water users to appear as *amici curiae*.

The issue currently before the court is one of “general public interest.” *See Gwadowsky*, 297 F. Supp. 2d at 307. The court is asked to rule on the applicability of the NPDES program to water transfers. As discussed earlier, this issue has nationwide importance, particularly in the western United States, an area as dependent on water transfers for its survival as Broward County.

The *Amici* will provide “supplemental assistance to existing counsel.” *See id.* The *Amici* have expertise in the issues of water supply and water quality that are unique to the western United States, which operate under a different legal system of water allocation than Florida and the eastern States. This allows the *Amici* to present arguments and issues that the parties may not have anticipated, and to alert the court to the potential impact of its ruling beyond the parties that are before the court.

Finally, the participation of *Amici* will ensure a “complete and plenary presentation of difficult issues” to the court, *see id.*, including construction of the Clean Water Act. Resolution of these issues requires an examination of the nationwide issues that Congress addressed in the Act. Many of these nationwide issues may have not been directly raised by the parties before the court because the legal doctrine on water allocation in Florida is different from the western prior appropriation doctrine. Allowing the participation of *Amici*, who represent the water users of the western States, will ensure that the court has the benefit of a complete and plenary presentation of these difficult issues.

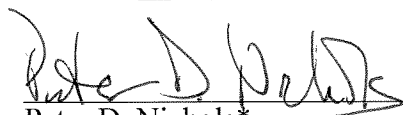
This request for participation as *amici curiae* is timely and will not prejudice the parties. The *Amici* became aware of the South Florida Water Management District’s intent to file a Motion for Summary Judgment on or about June 1, 2006. Neither argument on the motions for summary judgment nor the trial are scheduled. Thus, the request to participate as *Amici* is timely because it is brought during the briefing of motions for summary judgment. *See United States ex*

rel. Roby v. Boeing Co., 73 F. Supp. 2d 897, 900 (S.D. Ohio 1999) (granting motion to appear as *amicus* filed during briefing of cross motions for summary judgment); *compare News & Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31-32 (S.D. Fla. 1988) (denying as untimely motion to appear as *amicus* filed after judgment issued). The *Amici* seek only to inform the court as to relevant legal arguments regarding the interpretation of the CWA, not to litigate factual matters as a party.

Conclusion

For the above reasons, the Court should exercise its discretion and permit the National Water Resources Association, the Western Urban Water Coalition, the Western Coalition of Arid States, the Association of California Water Agencies, the Central Arizona Water Conservation District, the Metropolitan Water District of Southern California, the City and County of Denver [Colorado] acting through its Board of Water Commissioners, the Albuquerque Bernalillo County [New Mexico] Water Utility Authority, Metropolitan Water District of Salt Lake & Sandy [Utah], the Fremont-Madison [Idaho] Irrigation District Northern Colorado Water Conservancy District, the City of Aurora, [Colorado, and the [California] State Water Contractors, to participate in this case as *amici curiae* in support of the South Florida Water Management District's Motion for Summary Judgment.

Dated this 30 day of June 2006.



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Gabriel Racz

Robert V. Trout

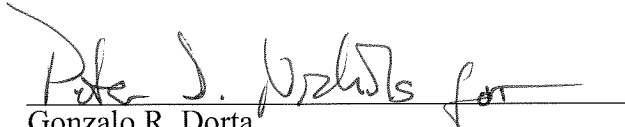
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CERTIFICATE OF SERVICE

CASE NO.: 98-CV-6056-LENARD/KLEIN

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S.
Mail this 30th day of June, 2006 on:

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