



Westcas 2016 Fall Conference

Phoenix, AZ , October 26 – 28, 2016

Water and Water Quality Legal/Regulatory Update

**By: Christopher R. Stork, Esq.
stork@waterlaw.com**

Overview

1. Lake Mead Water Level
2. Duarte Nursery case
3. Coyote Lake decision
4. US Corps of Engineers v. Hawkes
5. EPA Regulatory decisions, rules, and regulations
6. Texas v. New Mexico and Colorado
7. Mississippi v. Tennessee
8. WOTUS Litigation update

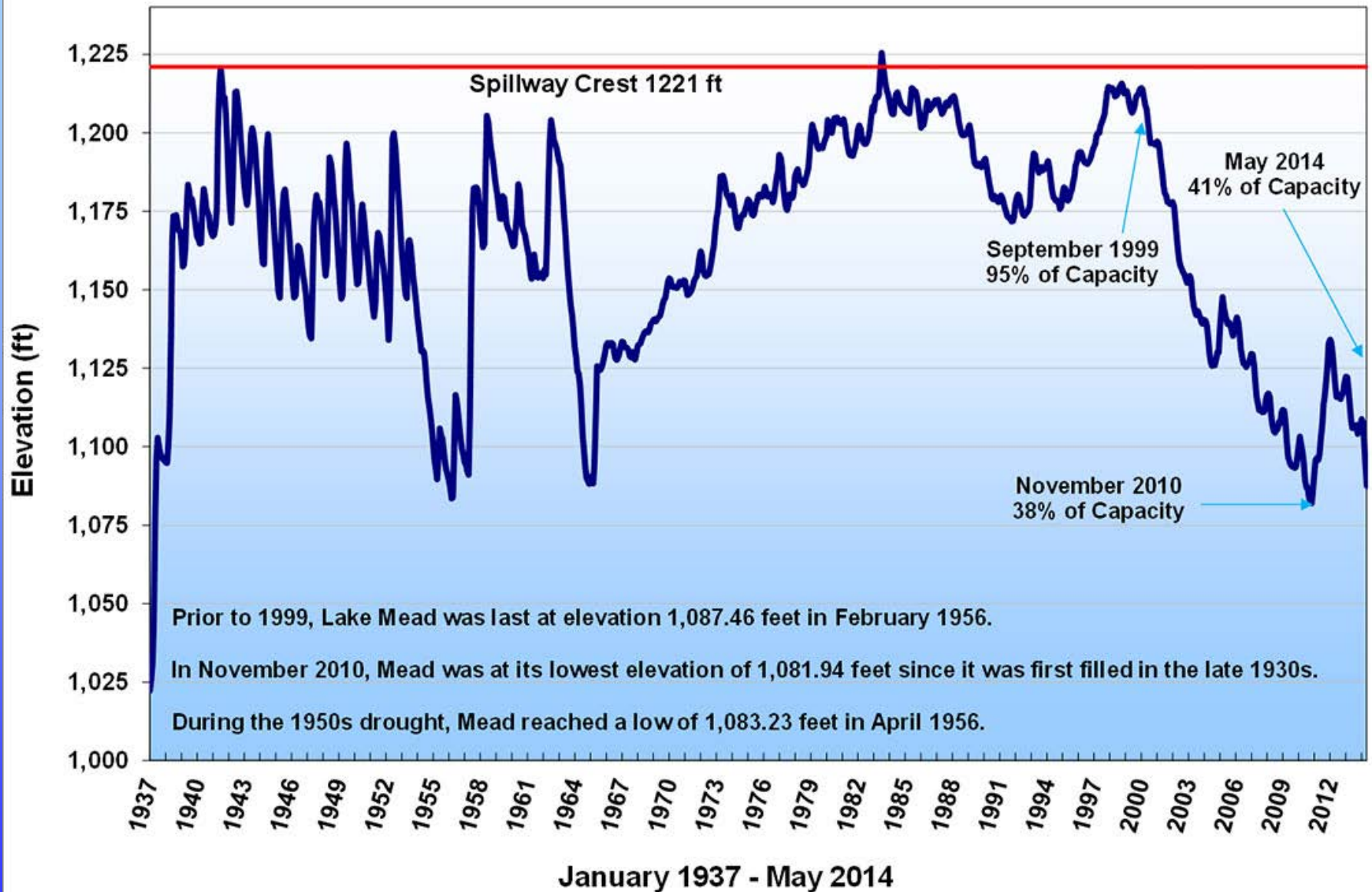


Lake Mead

- Water level at historic low
- Conservation efforts
- Future outlook



Lake Mead End of Month Elevation





Duarte Nursery v. Army Corps of Engineers, 2:13-cv-02095 (E.D. Cal. 2016)

- Background
- July 10, 2016 order granted summary judgment to United States
- Appealed to 9th Circuit
- Implications



Coyote Lake Ranch v. City of Lubbock, No. 14-0572, 2016 WL 3176683 (Tex. May 27, 2016)

- Opinion released on May 27, 2016
- Texas Supreme Court: Accommodation doctrine applies to severed groundwater estate
- Expands the decades old doctrine



US Army Corps v. Hawkes Co. Inc., Case No. 15-290 (May 31, 2016).

- Approved wetlands-designation is a “final agency action” under the Administrative Procedure Act
- May be challenged in court without landowner first obtaining a § 404 permit under the Clean Water Act



EPA Regulatory Decision

- EPA issued a decision on forest road discharges
 - Declined to regulate forest road discharges under Clean Water Act § 402.
 - Deferring to state and local programs with consultation



EPA Final Rule: Oil and Gas Effluent

- EPA issued final rule prohibiting unconventional oil and gas well operators from discharging wastewater to publicly-owned treatment works
 - Effective August 29, 2016
 - Implementation deadline August 29, 2019



EPA Selenium Regulations

- On July 1, 2016, EPA proposed a Clean Water Act Rule to tighten selenium water quality criteria for the waters of San Francisco Bay and Delta
- Proposes criteria of:
 - 8.5 micro-gram per gram fish dry weight
 - 11.3 micro-gram per gram fish muscle
 - 15 micro-gram per gram clam tissue
 - 0.2 micro-gram per liter dissolved water
 - 1 micro-gram per liter particulate water



EPA Selenium Regulations

- On July 30, 2016, EPA published a final updated national chronic aquatic life criterion
- This criterion is the EPA's first tissue based aquatic life criterion
- EPA recommends the following criteria:
 - 15.1 mg per kg for egg/ovary
 - 8.5 mg/kg for whole body
 - 1.5 micro-grams/liter of lentic waters
 - 3.1 micro-grams/liter of lotic waters

Comparison of 2016 Selenium Criterion to 1999 Criteria.

	Chronic					Short-term
Criterion Version	Egg-Ovary ¹ [mg/kg dw]	Whole Body ¹ [mg/kg dw]	Muscle ¹ [mg/kg dw]	Water Lentic ¹ [µg/L]	Water Lotic ¹ [µg/L]	Water ¹ [µg/L]
2016 Selenium Criterion	15.1	8.5	11.3	1.5 (30 day)	3.1 (30 day)	Intermittent exposure equation
1999 Selenium Criteria	N/A	N/A	N/A	5 (4 day)	5 (4 day)	Acute Equation based on water column concentration

Tribal Water Quality Standards Rule

- September 26 – EPA published notice of a final rule “Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act”
- By allowing tribes to obtain treatment as states “TAS” status, tribes may issue lists of impaired waters and develop Total Maximum Daily Loads.
- Effective October 26, 2016 (yesterday)

Texas v. New Mexico and Colorado, U.S. Sup. Ct. No. 220141

- Case pending before the Supreme Court
- Background
- June 28 - First Report of the Special Master

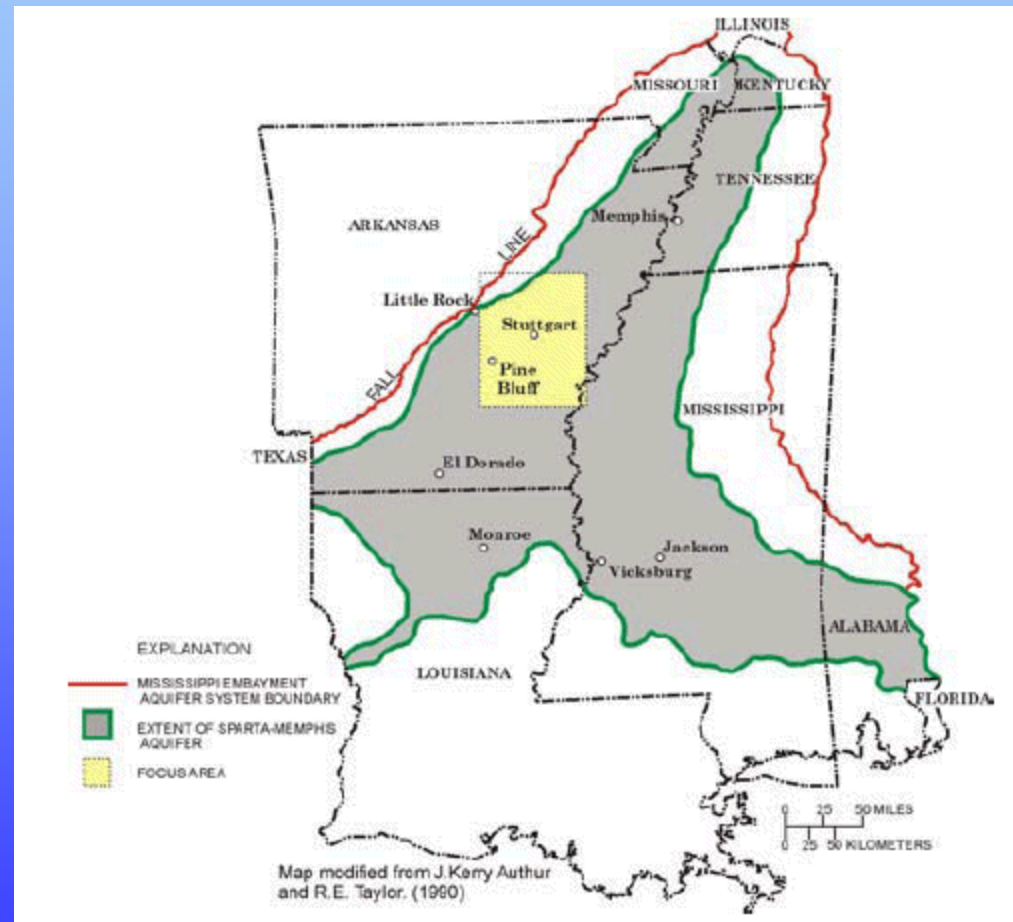


Mississippi v. Tennessee, U.S. Sup Ct. No. 220143

- Mississippi brought suit alleging Memphis, Tennessee is pumping too much water from the Sparta-Memphis and altering flow of water
- Mississippi brought suit claiming it has absolute ownership of water of aquifer in its sovereign territory
- Ruled against at district court and appellate level, appealed to US Supreme Court

Mississippi v. Tennessee, U.S. Sup Ct. No. 220143

- Current status?
- Upcoming evidentiary hearing



WOTUS Litigation Update

- *In Re: Dep't of Defense and EPA Clean Water Rule*, Case No. 15-3751 et al.
- September 2, 2016 - Writ of certiorari filed with US Supreme Court challenging 6th Circuits decision re: jurisdiction.



Questions?

Christopher R. Stork, Esq.
Patrick, Miller & Noto, P.C.
stork@waterlaw.com
(970) 920-1030

