

Western States Water Council  
Spring Council Meeting  
Legal Committee  
April 13, 2017

# Physical Water Transfers and the Federal Clean Water Act

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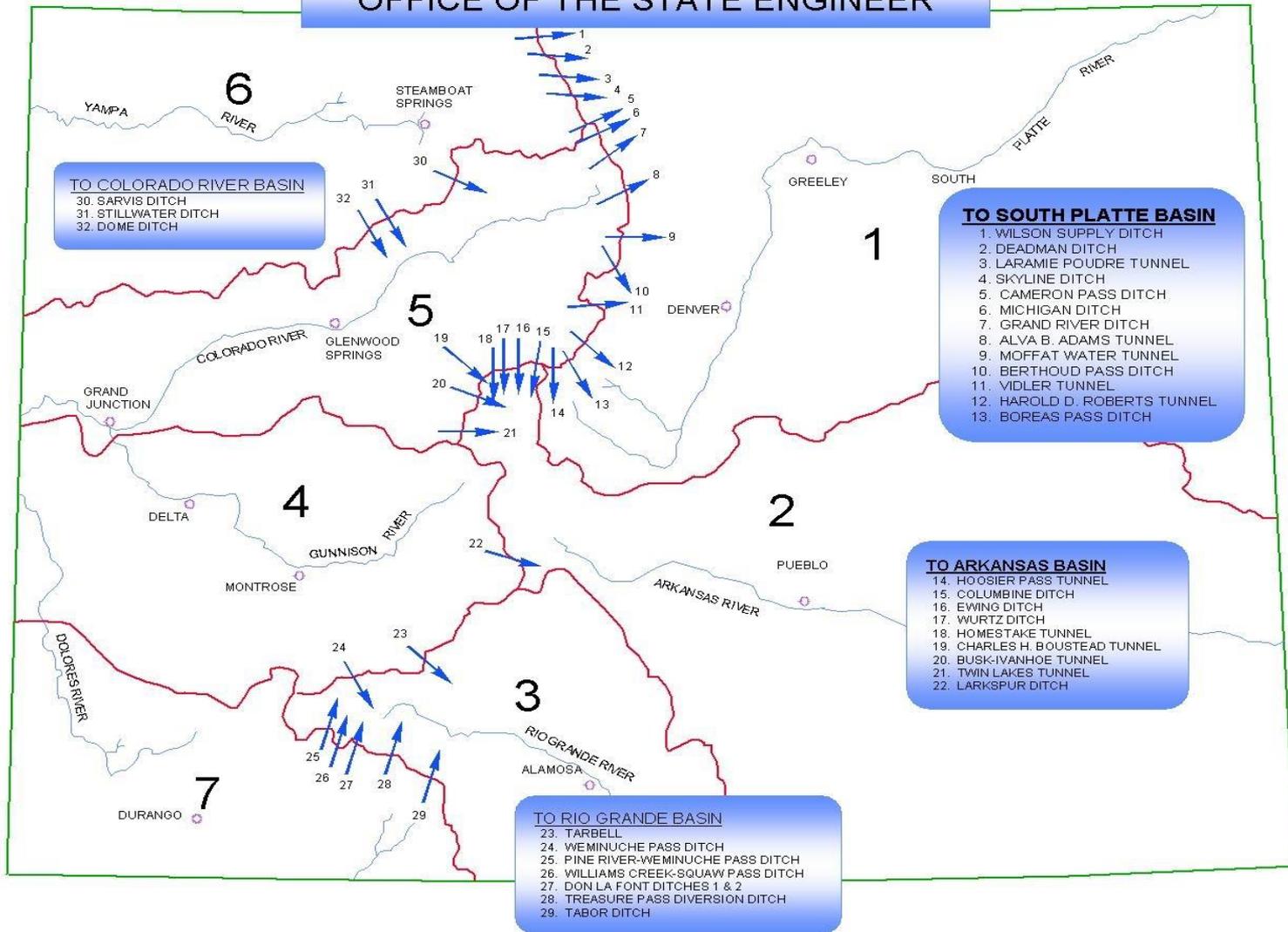
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Lead Counsel – Western Water Providers

# Water Transfers Issue

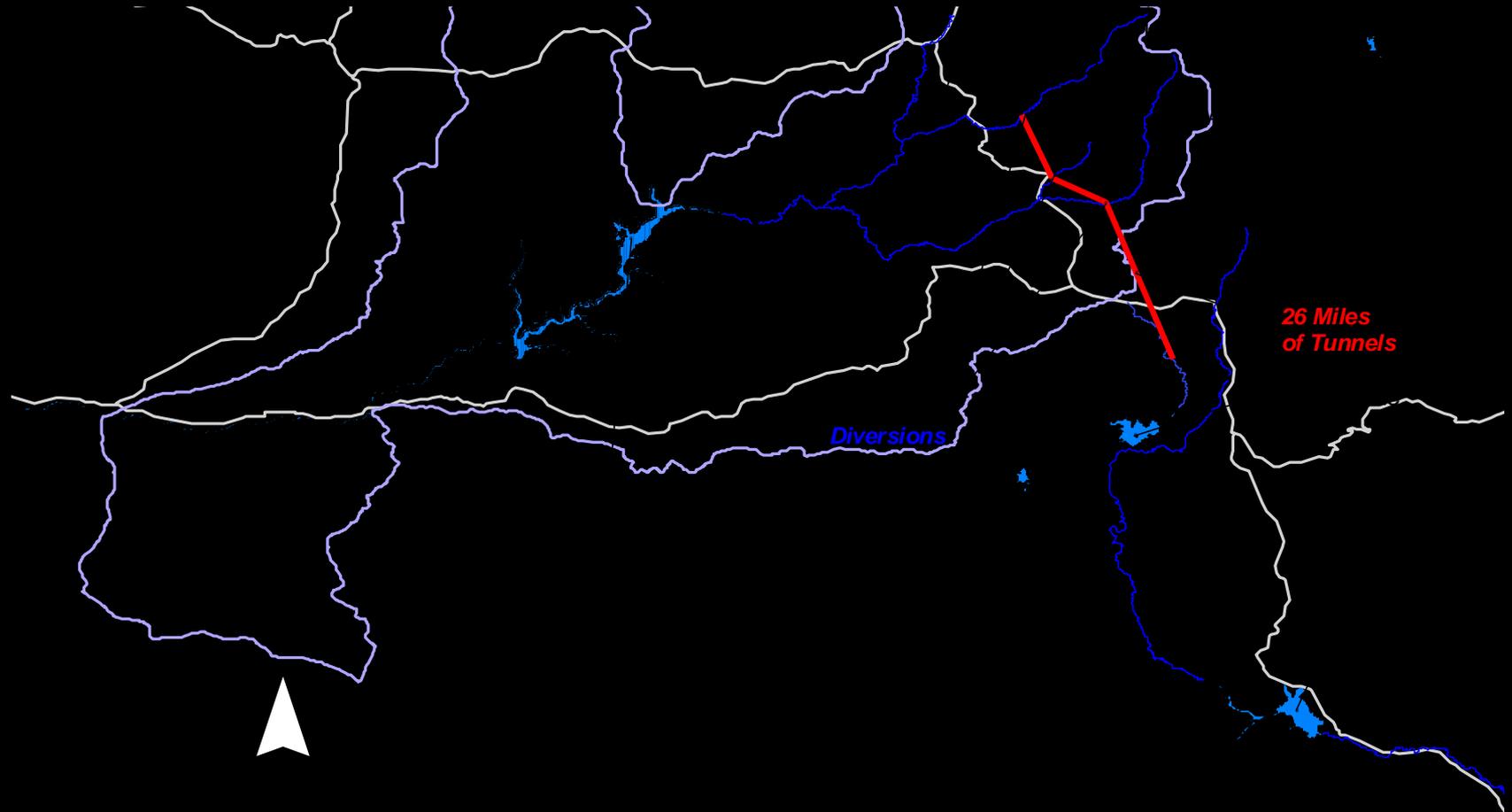
- Are physical water transfers that do not add anything to the water subject to National Pollutant Discharge Elimination System (“NPDES”) permitting under section 402 of the Clean Water Act? [33 USC § 1342]
  - 10,000s of water transfers in West [73 Fed. Reg. 33,698]
    - Water transfers occur under the authority of each State to allocate quantities of water within its jurisdiction [33 USC 1261(g)]
      - A water transfer counts as a discharge of pollutants only if the two separate bodies of water are meaningfully distinct.
        - » *ONRC v. U.S. Bureau of Reclamation*, No. 12-35831 (9<sup>th</sup> Cir., Aug. 21, 2015), citing *L.A County Flood Control v. Natural Resources Defense Council*, 133 S. Ct 710 (2013)

# TRANSMOUNTAIN DIVERSIONS

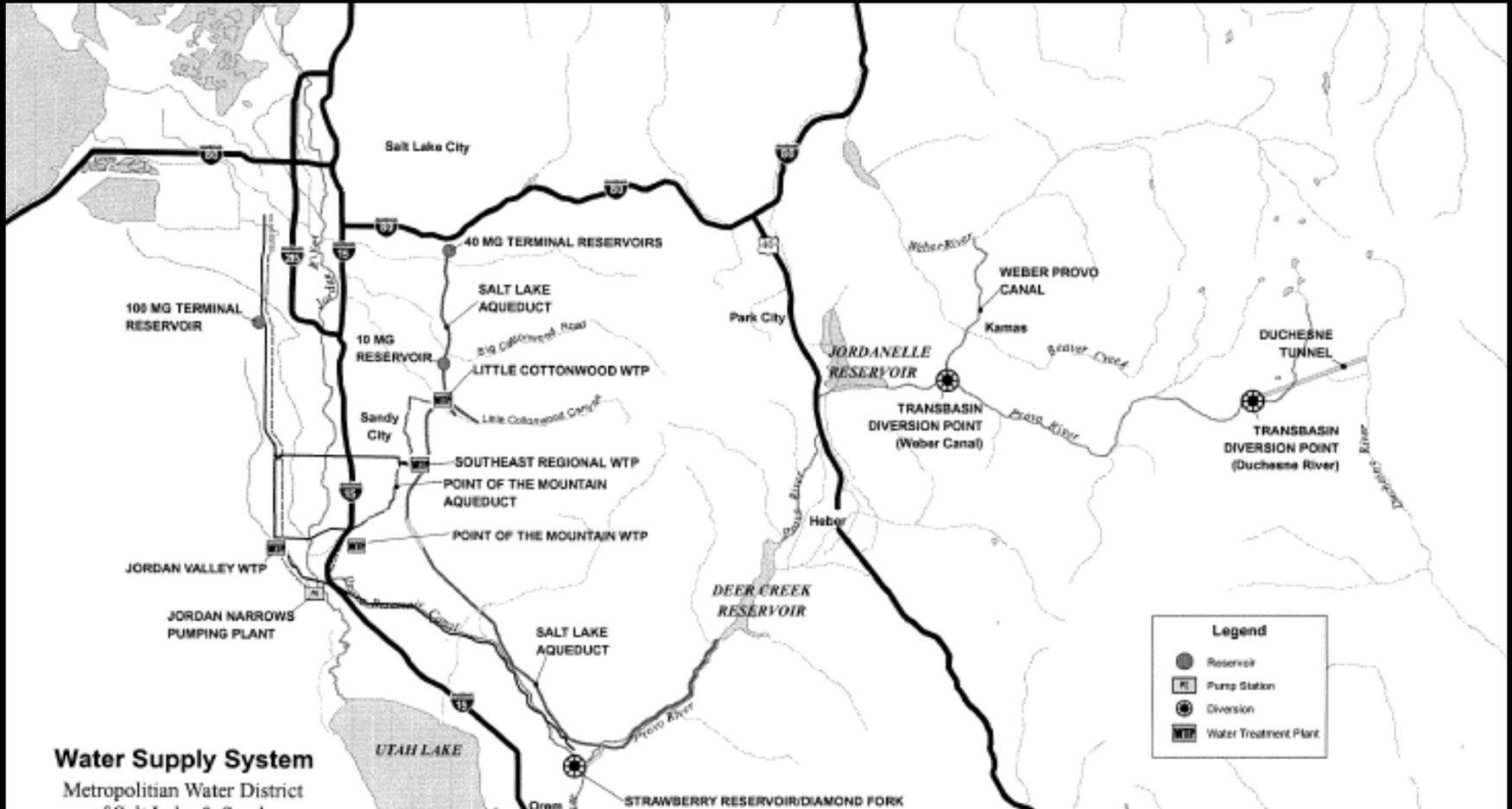
## OFFICE OF THE STATE ENGINEER



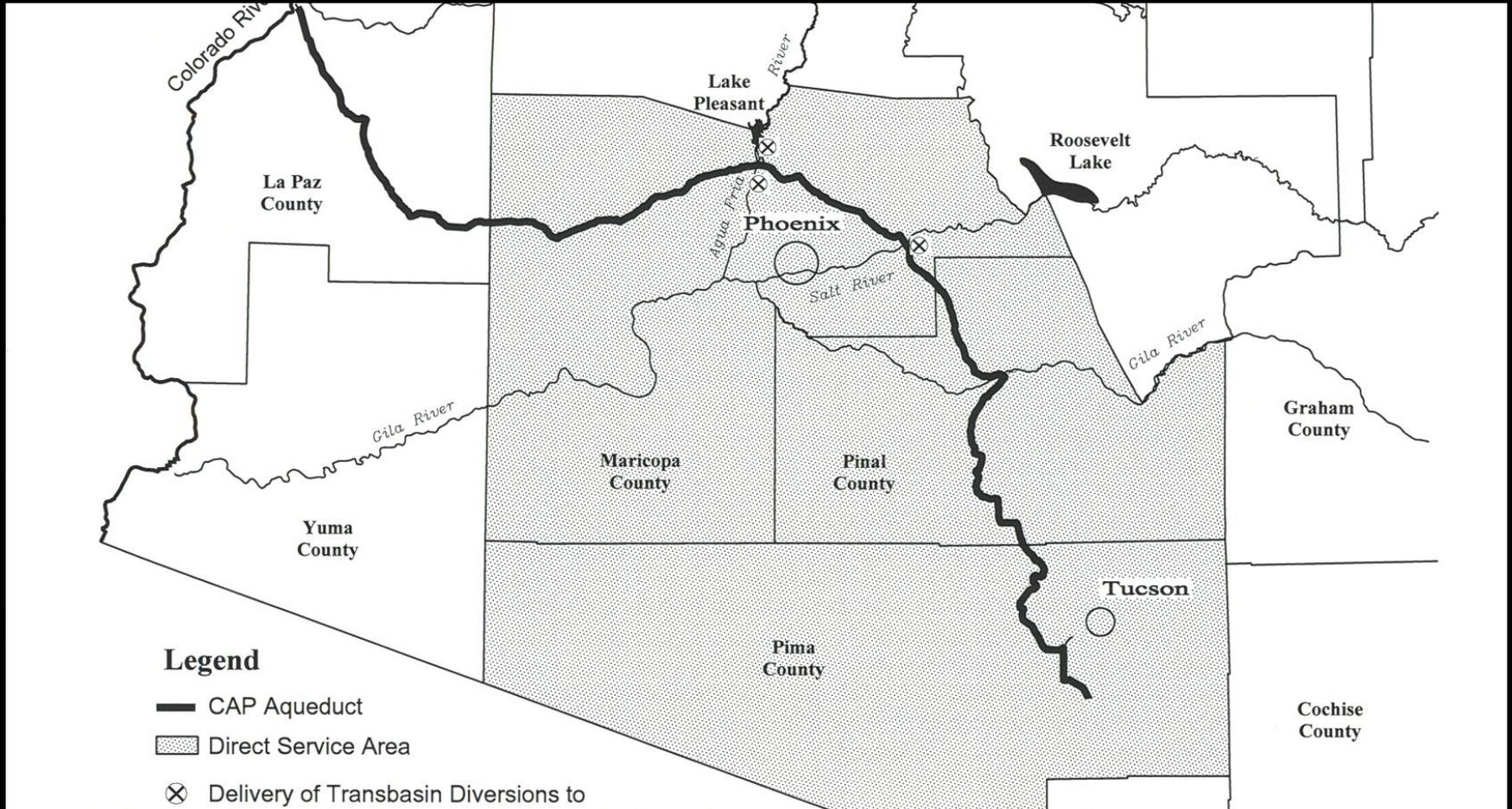
# Interstate expl: San Juan Chama Project – Colo-NM



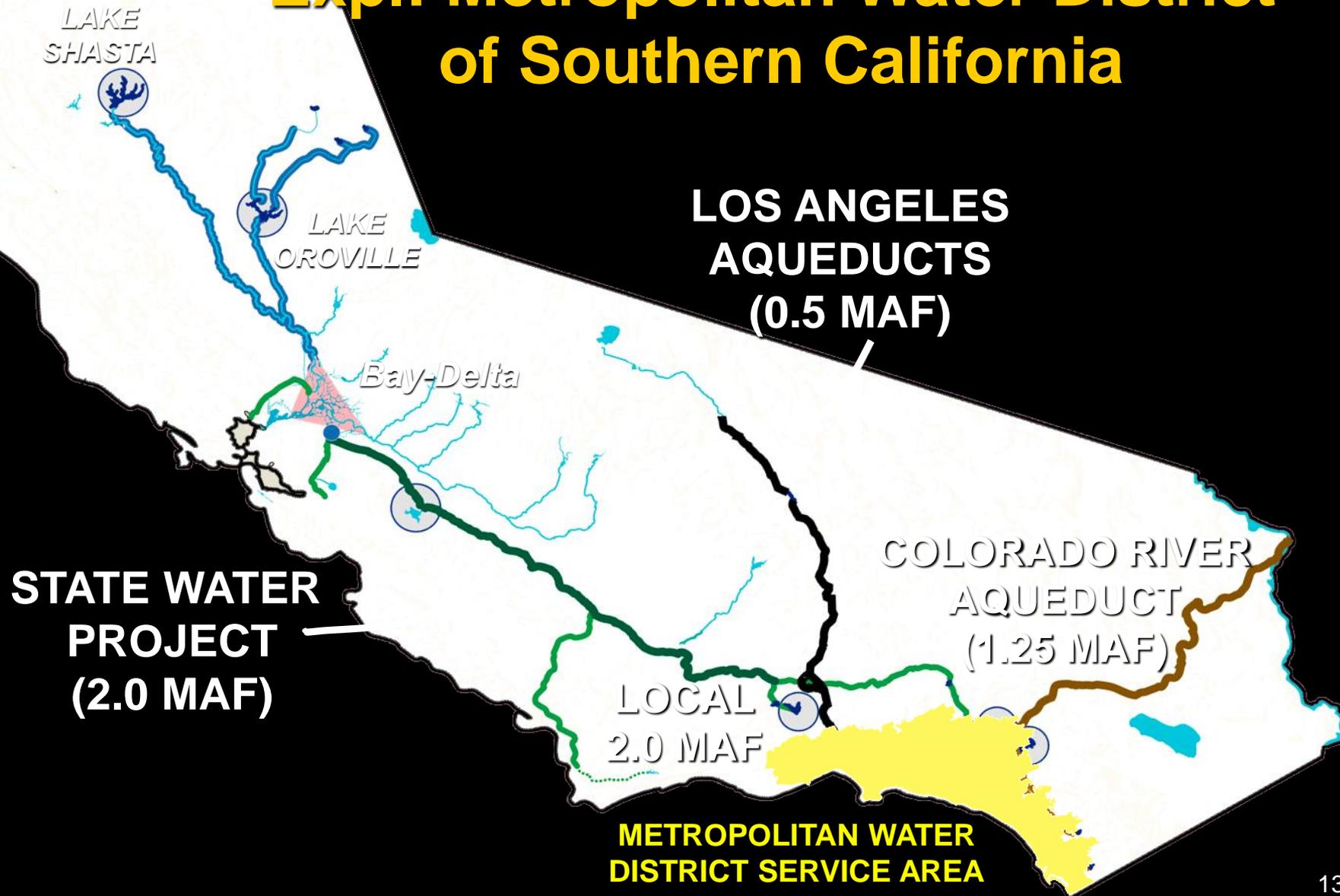
# Expl: Salt Lake & Sandy



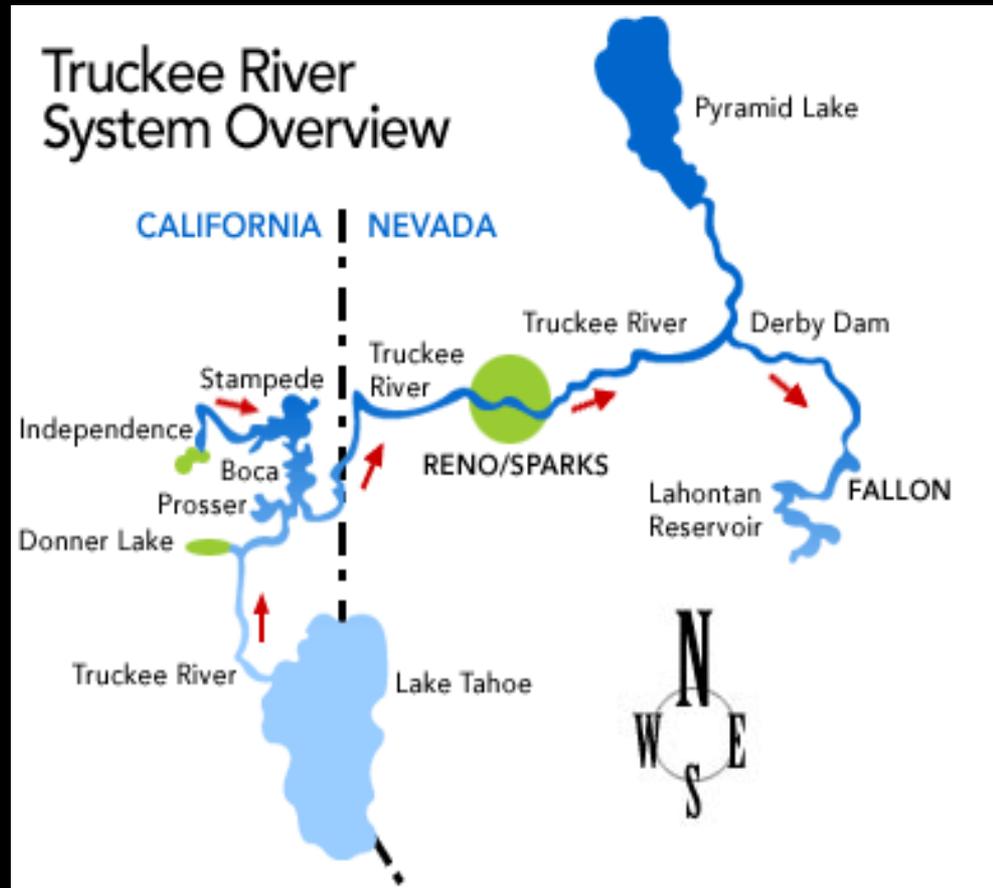
# Expl: Central Arizona Project



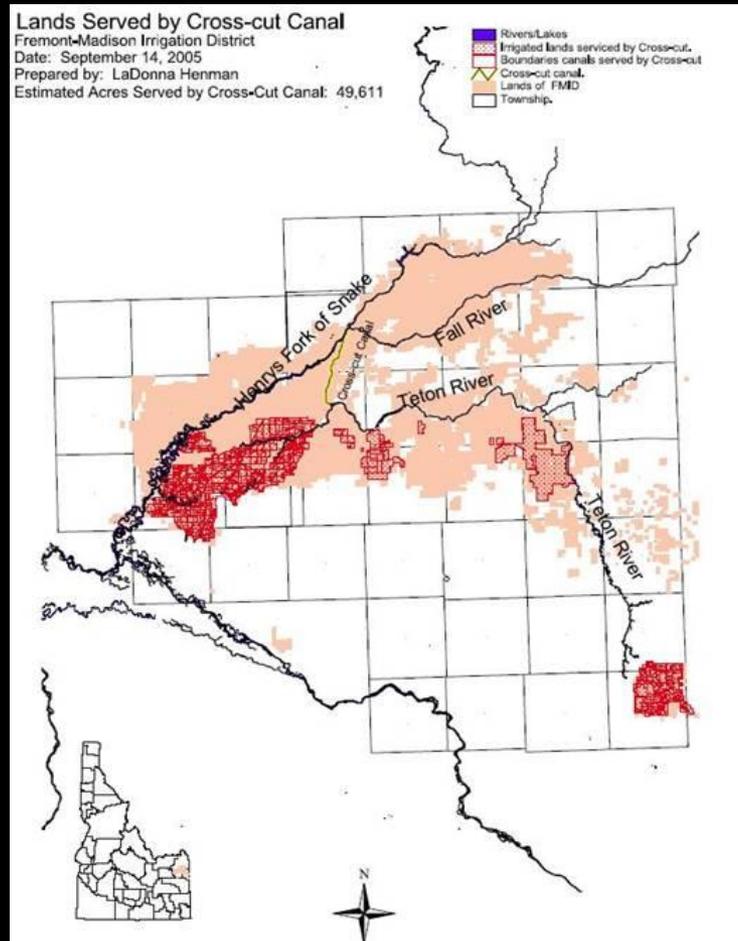
# Expl: Metropolitan Water District of Southern California



# Expl: Truckee Meadows Water Authority



# Expl: Cross-cut Canal, Idaho



# Water Quality Standards

## Established by States for every segment

- **Designated uses**
  - Agriculture, recreation, water supply, aquatic life
- **Plus numeric standards** (more than 100 individual standards)
  - Biological
    - *E. coli*
  - Chemical
    - Organics, inorganics
  - Physical
    - Temperature, D.O., TSS, DSS, pH
- **And narrative standards**
  - “Free From”

# Water Quality Impacts of water transfers on receiving waters

- None for many water transfers
- Many water transfers exceed or contribute to the exceedance of some water quality standards
  - Total Suspended Solids (TSS) from non-point sources during spring snow melt/run off, storm events
  - Nutrients from non-point sources introduced prior to or during transfer to lakes/reservoirs
  - Elevated metals reflecting local geology
  - Groundwater transfers reflecting local geology
    - Not usually “waters of the United States” but typically “waters of the state”

# NPDES Permit Requirements to meet every Water Quality Standard

## Mandatory water quality limits on discharges:

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

# Compliance to meet WQS under NPDES?

- Treatment plants req'd for most water transfers
  - Economically infeasible
    - For a few major Colorado River Basin transfers
      - \$300 million per transfer
      - \$9 *billion* one-time capital
      - \$4.6 *billion* annual operation and maintenance
  - Technically challenging
    - Must be able to operate from minimum to maximum rates
      - Rapid and wide swings in water volume and water quality
  - Environmentally difficult
    - Transfers in/adjacent to national parks, recreation areas, wilderness areas, federal lands
      - Site availability limited and permitting very difficult

# If cannot meet WQS under NPDES?

- **Forgo transfers when cannot meet standards**
  - Most water transfers during spring runoff to capture snow melt under prior appropriation doctrine western states use to allocate water
    - The times most unlikely to meet standards
- **Transfer and face fines of \$51,500/day?**
- **Bottom line: supersede, abrogate or impair the authority of each State to allocate quantities of water and supersede or abrogate rights to quantities of water established by a state**
  - Significant reduction in water transfers and net loss of water supplies

# U.S. Supreme Court

## *Miccossukee*, 541 U.S. 95 (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.’ ”
- “If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado et al. as Amici Curiae 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. **It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress’ specific instruction that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired” by the Act.** ” (O’Connor for majority)
  - **Invited EPA to weigh in**
  - Western States and Western Providers amicus *inter alia*

# 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.

# *Catskill Mountains Chapter of Trout Unlimited, Inc. v. United States Environmental Protection Agency,*

Nos. 14-1823, 14-1909, 14-1991, 14-1997, 14-2003 (Jan. 18, 2017)

- Majority: The Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers.
  - EPA’s Water Transfers Rule is reasonable.
- Dissent: “I would hold that the plain language and structure of the Act is unambiguous and clearly expresses Congress’s intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit.
- Petition for rehearing/rehearing *en banc* (6 March 2017)
  - “necessary to maintain uniformity of court’s decisions?” FRAP 40
    - *Catskills I* (2001) & *Catskills II* (2006)
      - Dissent: Circuit held meaning of Act “plain and unambiguous”
      - Majority: Circuit did not hold that “addition . . . to navigable waters” could bear only one meaning” and therefore the Act is not unambiguous

# The Bottom Line

- **Western residents rely on water transfers daily**
  - More than 100 million residents of arid west
    - *Every major western city/ag area relies on transfers for some water*
- **Economically, technically, environmentally impossible to meet NPDES requirements**
  - General permits have same legal requirements and enforcement risks as individual permits
- **Critical legal issue concerning traditional federal deference to the states' water law/water rights**
  - States have adequate authority to deal with any water quality issues

# Time for Legislation?

- Codify Rule without change while EPA/courts agree
  - Need all interested western parties to agree
    - WGA, CWAG, WSWC, NWRA, WUWC, *et al.*
    - Coordination necessary to get/keep on same page
- Pursue under banner of WGA
  - Best public face
  - NWRA, WUWC, individual western water agencies will have to coordinate strategy, carry lobbying burden in DC

115TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To enact into law a regulation relating to certain discharges excluded from the permit requirements of the National Pollutant Discharge Elimination System Program.

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IN THE SENATE OF THE UNITED STATES

introduced the following bill; which was read twice  
and referred to the Committee on

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**A BILL**

To enact into law a regulation relating to certain discharges excluded from the permit requirements of the National Pollutant Discharge Elimination System Program.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PERMIT NOT REQUIRED.**

4 Section 122.3(i) of title 40, Code of Federal Regula-  
5 tions (as in effect on the date of enactment of this Act),  
6 is enacted into law.

# Western Interests that historically oppose NPDES permitting

## Western States

- Alaska
- Arizona
- California
- Colorado
- Hawaii
- Idaho
- Kansas
- Nebraska
- Nevada
- New Mexico
- North Dakota
- South Dakota
- Texas
- Utah
- Wyoming
- Western Governors Assn
- Western States Water Council

## “Western Water Providers”

- National Water Resources Association (NWRA)
- Western Urban Water Coalition (WUWC)
- Western Coalition of Arid States (WESTCAS)
- Assn of California Water Agencies (ACWA)
- Metropolitan Water Dist of Southern California
- San Francisco Public Utilities Commission
- San Diego Water Authority
- Imperial Irrigation District
- El Dorado [Cal] Irrigation District
- PG&E
- [Cal] State Water Contractors
- Northern Colorado WCD
- Lower Arkansas WCD
- Southeastern Colorado WCD
- Denver Water
- Colorado Springs
- Boulder
- Aurora Water
- Salt Lake & Sandy Metro District
- Central Utah WCD
- Washington County [UT] WCD
- Kane County [UT] WCD
- Central Arizona WCD
- Salt River Project
- Truckee Meadows [Nv] Water Authority
- Las Vegas Water District / So Nv Water Authority
- Idaho Water Users Assn