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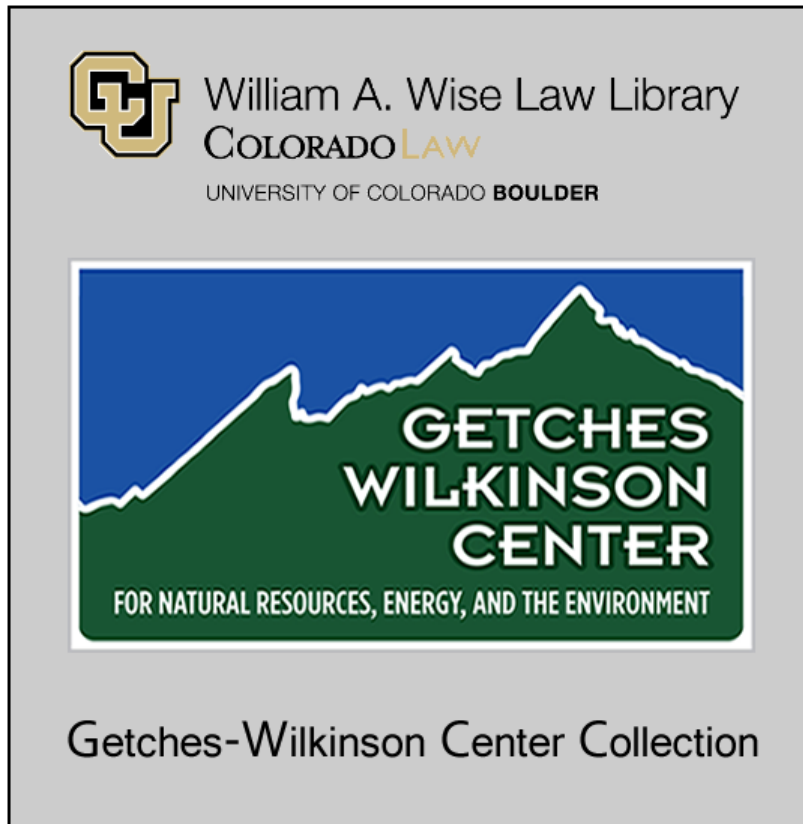


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**COLORADO WATER COURTS:
SHOULD THEY CHANGE?**

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Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
June 8-11, 1999

NATURAL RESOURCES LAW CENTER
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COLORADO WATER COURTS: SHOULD THEY CHANGE?

By Melinda Kassen

INTRODUCTION

Challenging the Status Quo while Sharing a Panel with the Judiciary

My task this afternoon is to provide some provocative ideas about changing Colorado's court-based water allocation system without completely alienating the two members of the judiciary with whom I'm sharing this panel and before whom I may someday have to appear.

A Word about the Western Water Project

My job more generally is to explore how to put more clean water in Colorado's rivers and streams for cold water fisheries using, to the maximum extent possible, state systems. Trout Unlimited, a national non-profit organization with 100,000 members (including 6,000 in Colorado) entered into a partnership with Oregon-based WaterWatch last year to start this Western Water Project. The two groups began the project by taking the notion expressed by Professor Wilkinson that, if the goal is to enhance stream flows, one must work at the state level in the West particularly on water allocation decisions, and also on water quality issues. The other main goal of the project is to increase meaningful public participation in state water allocation and water quality decisions, something that is seriously lacking throughout the West.

Need for Change is a Matter of Perspective

The reason that you need to know what I do is to understand why I was asked to talk about whether Colorado's water court system needs change. Obviously, those who benefit from the existing system will claim that there is no need for change. Those with existing, stable senior water rights, those with the resources to wage the necessary battles within the system, those who

don't believe that Colorado should embrace the public trust doctrine - or even a public interest test for the grant of a new or changed water right: these interests accept and would champion the status quo. In contrast, if one is outside the system - facing high barriers or advocating positions that the current system doesn't recognize - then one is more likely to seek change.

As Justice Hobbs has said, for example, last fall in addressing a conference on instream flows, Colorado's system is inherently flexible and changes with the times. As evidence, he noted that the courts—and the legislature—have continually expanded the definition of beneficial use to meet new needs of the eras. Not having a fixed definition of beneficial use has meant that the courts have consistently allowed applicants to expand the list of beneficial uses - from snowmaking to instream flows - that the state recognizes. This line of reasoning suggests that, because the list of beneficial uses has expanded over time, it reflects the public will.

An alternative view of the system's experience with expansion of the beneficial use doctrine is that, because neither the courts nor the legislature has ever removed a beneficial use from the list, the outcome does not reflect the public will. Last century's beneficial use is waste today, or worse. (And, I note with some irony that the last time I was on the podium for this conference, about a decade ago, I talked about the need to invigorate the policy against waste. Unfortunately, there has been no movement in that direction since.)

Moreover, absent the system having recourse to a public interest test to consider whether a use previously found to be beneficial still is, there may be no way for the current system to respond to a change in public values. As Professor Eric Freyfogle colorfully explained:

Beneficial use, as it stands today, is an affront to attentive citizens who know stupidity when they see it; who know, for instance, that no public benefit arises when a river is fully drained so that its waters might flow luxuriously through unlined, open ditches onto desert soil to grow surplus cotton and pollute the water severely.

Freyfogle, Eric, "Water Rights and the Common Wealth," 26 ENV'L. L. 27, 42 (1996).

Ultimately, if one finds that the flexibility which has expanded the definition of beneficial use over time is sufficient, along with the fact that the system has faced so many new challenges presented over the last century (from phreatophytes to not non-tributary ground water), one may see no need for change in the system. On the other hand, those who adopt Professor Freyfogle's view, like me, believe that change is necessary for the sake of system preservation. For those who are amazed at some of the uses that are still considered beneficial, the current system lacks credibility. Without credibility, the system cannot be maintained indefinitely, even by those who benefit from its anachronisms.

Without reform, the system could become increasingly irrelevant. Perhaps that is, in fact, the message of this conference, particularly the last two days on coercion and collaboration. Today's experience includes more of a federal statutory overlay, and more reliance on extra-judicial resolution mechanisms, whether broad public collaborations or private arbitrations between litigants. One reason may be that the current system does not serve all of those entities interested in water, including especially those who do not own water rights.

Ironically, however, conservationists may be better served in the long run by working towards reform of the existing system than by seeking more extra-judicial solutions. While some of the collaborations that others will discuss on Friday demonstrate how non-water rights owners can participate effectively in water allocation decisions, some of the extra-judicial remedies that are in vogue now actually result in even less open processes from the public's vantage. For example, some of the agreements reached by parties to water court litigation, such as Judge Hays describes, reflect agreements among current water rights owners, without any public scrutiny.

There are two aspects of the system to look at when considering change. The first is the process and the second is the policy. I will attempt to address both. In each case, I will focus mostly on how the system serves the non-water rights holder who is nonetheless interested in Colorado's public water resource.

PUBLIC PARTICIPATION IN DECISION-MAKING: ACCESS TO THE SYSTEM

The good news: Standing

The good news for members of the public who do not own water rights is that the standing threshold for Colorado water court proceedings is quite low. The statute provides that, “Any person ... who wishes to oppose [an] application [for a determination of a water right] may file ... a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions.” Section 37-92-302(1)(b), C.R.S. *In re Bunger v. Uncompahgre Valley Water Users Ass’n*, 192 Colo. 159, 557 P.2d 389 (1976); *FWS Land & Cattle Co. v. State Div. of Wildlife*, 795 P.2d 837 (Colo. 1990). Colorado’s wide-open approach is in line with other western states’ systems in this regard.

The Bad News: Barriers to Participation

The bad news for members of the public who want to participate in water rights allocation decisions in the water courts involves most of the rest of Colorado’s system.

Representation/Cost. The most significant barrier to public participation in the water court system is that, with a case of any complexity, it is virtually imperative for those filing applications or statements of opposition to be represented by counsel. This marks one of the major differences between permit and court systems. While it may be desirable to have legal representation in administrative permit proceedings, citizen activists across the west have demonstrated that it is not necessary to participate successfully. For examples, one actually need look no farther than Colorado’s water quality system, where interested parties, from individuals to representatives of non-profit organizations to representatives of associations as large as the Colorado Mining Association or the Sierra Club, routinely participate both in all manner of administrative proceedings, both rulemaking and permitting/adversarial, without legal counsel.

The costs of legal representation are high enough to discourage virtually all potential individual or non-profit groups from participating in water court. (These costs are also highly burdensome for many applicants. For example, in one case now wending its way to the Supreme Court for a second time, the applicant has purportedly spent close to \$3 million.) Few attorneys with water law expertise are available to provide pro bono services to public interest groups, and the bigger the case, the less likely an active water lawyer will be able to volunteer, due either to representational or time conflicts. (But citizen advocates honor and appreciate those of you in the water bar who have been willing and available to take on such cases; you know who you are; we all do.) As a result, in the hundreds of Colorado water matters filed and resolved annually, there are only a few in any given year where members of the public have participated actively.

The impact of these transaction costs appears not only in who participates in water court proceedings, but also in the nature of the proceedings that move forward. Recently, a non-profit organization sought to change a diversionary right to an instream flow right and donate that right to the Colorado Water Conservation Board, the only entity in the state who can legally hold such rights. The right was valued at over \$1 million. According to this entity's counsel, the costs of making the necessary changes in water court will ultimately exceed 10% of the value of the right. Small wonder that so few donations to the Board have occurred.

Short-term leases of water for the benefit of instream flows are another example of how operating in a court system makes simple transactions so costly as to be almost impossible. While my colleague in Montana - which has a permit system - routinely enables leases for fisheries enhancement to occur, such a practice in Colorado basically does not occur. To perfect such a right in Colorado, one would have to make a donation to the Board for a limited period of time, probably by effecting an alternative "point of diversion" (or in this case, non-diversion) change for a limited period of time. Because of the costs inherent in making the necessary changes, no entity other than another government agency has ever successfully leased water to the Board for instream flows. In Montana, there is also a change application to effect such a lease, but to the permitting agency, so that the transaction is simpler and less costly. Using the power of the

market to harness dry year leasing from farm to city would be similarly burdened in Colorado, as opposed to a permit state.

Arguments. One reason that a member of the public seeking to oppose a water rights application needs an attorney is that the water court will accept only arguments that are cognizable under Colorado water law. Public interest groups with no water rights ownership interests have therefore successfully argued against projects on the grounds of speculation (in Colorado known as the “can and will” doctrine) and water availability. *In the Matter of Board of County Commissioners, Arapahoe County*, Water Division 4, Case No. 88CW178 **Findings of Fact, Conclusion of Law, Judgment and Decree Order** 4/6/98; *In the Matter of Natural Energy Resource Co.*, Water Division 4, Case No. 96CW257, **Findings of Fact, Conclusions of Law, Judgment and Decree**, 5/28/98.

However, this same member of the public cannot argue that the proposed new or changed use would be contrary to the public interest, would abrogate the public trust or would violate a statute, such as the federal Clean Water Act or Endangered Species Act, that is not a water matter within the water court’s jurisdiction. 37-92-203(1), C.R.S. See, *In the Matter of the Water Rights of the Board of County Commissioners*, 891 P.2d 952 (Colo. 1995) (*Union Park I*); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996). Nor can a member of the public argue that an application, if decreed, will impair another’s water right. 2 CCR 408-2.

Only parties can affect outcome. The Colorado Constitution declares that, “the water of every natural stream, not heretofore appropriated [i.e., as of 1876], within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” Article XVI, §5. Notwithstanding the public’s ownership of most state waters, the citizens of Colorado usually have no role in the allocation of their property because they are not parties to the case and have no advocate before the court. Because of the court-based structure, the decision-making is not open to the public, notwithstanding the public character of the resource. One need only look at

the ongoing saga of the United States Department of Agriculture's attempts to quantify its reserved rights in Colorado to see how closed the system is to non-water users who might nonetheless have a legitimate interest in Forest Service water rights crossing Forest Service lands.

Generally in civil litigation, one must "pay to play," i.e., one must be a party to the case. Where a public resource is involved, this structure will still work to protect a public resource provided that there is some entity who can argue in favor of protecting the public interest. Thus, in most other western states, which have permit systems and a public interest test, citizens can argue about the public interest, and the administering state agency is supposed to weigh the public interest in determining whether to grant a water right. By contrast, in Colorado the courts **may not** consider the public interest. *Board of County Commissioners, supra*. Neither do the Division of Water Resources or the Water Conservation Board have a statutory mandate to argue in water court whether the grant of a water right would be in the public interest. So, the public resource may not be protected as a result of the court proceeding.

PERMIT V. COURT SYSTEMS

Permit System Advantages for Public Involvement & Open Decision-Making

There are four main advantages of a permit system in terms of public participation.

Costs. As suggested above, there is likely to be a lower threshold for participation in terms of the cost for that participation because legal representation is not as necessary. Moreover, one will have a more efficient market if the transactions are less costly because one need institute a court proceeding for every change.

Public Interest Test. Virtually all of the permit system states have a public interest test built in to the grant of a water right. It is possible in a permit system for the agency making the decision as

to whether to grant or change a water right to consider the implications of its decision for the public in large measure because the agency has staff. Whereas Colorado's water court judges are lucky even to have law clerks, the permitting system agencies have engineers, ecologists, economists and other specialists on staff who can examine issues from a number of different perspectives and who can make their own investigations, without relying simply on the parties' presentations. Again, in Colorado, the analogy is to the quality arena where, when the Colorado Water Quality Control Commission hears matters, it always hears from the Colorado Water Quality Control Division, acting as its staff.

Quality/Quantity Integration. In many western states, the agency making the decision whether to grant a water right is also the agency responsible for protecting water quality. Thus, in deciding whether to grant a water right, the agency can make a truly integrated decision regarding the health of the affected water body because it can consider the affects on quality of a decision regarding quantity. (In Colorado, state law, in combination with decisions by the Supreme Court, expressly bar the water courts from making this type of integrated decision. See, *Thornton v. Bijou, supra*; § 25-8-104, C.R.S.)

Recognition of a Finite Resource/Planning. While, on the whole, planning is antithetical to the prior appropriation system, *see, Freyfogle, supra*, at 28, permit systems come closer to allow broad consideration of the present and future in decision-making than do the court systems. While the courts must consider each case separately (albeit within accepted legal precedents), the decision-making agency operating within has the ability to consider more broadly the affects of any single decision it makes on the state's water resources as a whole. While such consideration may not constitute planning per se, it is more than what can occur in the court system.

As evidence, consider that some permit systems, e.g., in Washington State, provide for what, in Colorado, would be unthinkable: the administrative closing of a water basin to further appropriation. In fact, Colorado has taken the opposite tack; by creating plans for augmentation, Colorado has provided a mechanism for new appropriations from an over-appropriated river.

Kelly Ranch v. Southeastern Colorado Water Conservancy Dist., 550 P.2d 297 (Colo. 1976). (Montana provides for basin closures, but primarily via legislative action.) Whereas in Colorado, while a new appropriator may face opposition on the grounds of lack of water availability, there is no mechanism for closing a river to further appropriation across the board. There is always room for a junior appropriator to claim that even if water is available only in the wettest of years, it is still worth claiming the right. These very junior rights are frequently the ones that can wreak particular havoc on stream systems, by guaranteeing that even in the wettest years, the aquatic system will not receive the benefits of a spring flood/natural hydrograph.

Advantages of Court System

From the point of view of the public, an advantage of the court system is that permitting agencies can frequently become captive to the communities and constituents they regulate. Wilkinson, Charles, *CROSSING THE NEXT MERIDIAN: LAND WATER AND THE FUTURE OF THE WEST*, Island Press (1992), p. 241. Courts should be above such capture, although trial courts are not often in a position to challenge the status quo and thus, in a system that is out of step with the values of the day, court decisions may not demonstrate more freedom to think outside the box than the decisions of captured agencies.

Yet, there are a number of examples of cases in Colorado where the courts did take the lead, even without legislative guidance, to change the course of Colorado law. One of the clearest examples is the court decision in *Shelton Farms* that a water user could not claim the water saved by having cut down phreatophytes for other use. *Southeastern Colorado Water Conservancy Dist. V. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974). After the court rendered its decision, the state legislature acted the next year to confirm it. See §37-92-103(9), C.R.S. It is this robust legacy of water court activism in Colorado that the state Supreme Court rejected in *Union Park I*, above, when the court rejected any application of a public interest test absent first having the legislature act.

CONCLUSION: SHOULD COLORADO'S COURT SYSTEM CHANGE?

Lowering Barriers to Public Participation

As all water law mavens know, Colorado is alone in clinging to a court-based water rights allocation system. However, it is simply false to assume that only a court-based system is a true prior appropriation system. Wyoming has had a permit system since 1890 and all other states now opt for this allocation method; thus, permit systems cannot be antithetical to real western water law. For all of the reasons outlined above, moving to a permit system would enhance public participation in water allocation decision-making, and would also most likely result in policy changes that would allow better incorporation of changing public values.

However, I am not so naïve as to think that the current Colorado legislature is likely to make such a wholesale change to the system anytime soon. Thus, the real question is what, if any, changes can Colorado effect without moving away from its cherished court system. This is a much tougher question to answer.

One possibility might be to transform the existing referee process into one that more resembles an administrative decision. The referee would need a staff to assist in investigating and evaluating applications. Using the referee more robustly could potentially lower transaction costs and open the system to more public involvement. The referee's office could become a locus for dispute resolution, provided that there were both a mechanism for opening the process to anyone interested in the specific water resource at issue and provided that the office was created with an independent advocate to ensure that Colorado's citizens, to whom the water resource belongs, were protected. (NOTE: Because the existing water agencies, the Office of the State Engineer and the Water Conservation Board already have missions that might conflict with assessing the public interest, I do not believe that it would be possible to add this role into those agencies and emerge with meaningful protection.) I'm sure there are many other potential mechanisms for tweaking the existing system to enhance public involvement.

Underlying Policies

Achieving a greater level of public participation without also changing some of the state's policies will not reform the system sufficiently to satisfy many conservationists. Thus, unless and until a water court is as free to find that a previously recognized beneficial use is no longer beneficial as the court is free to add uses, there will be no real change in the landscape. Similarly, until the legislature broadens Colorado's water market, e.g., by allowing private, non-profit water trusts (in addition to the Water Conservation Board) to hold instream flows, transaction costs for new types of water transfers will remain high. And, without a mechanism to consider the public interest in making water allocation decisions, outcomes are likely to continue not to reflect changing public values because no one can make the relevant arguments to the system decision-makers.

Both the process and policy changes will only be successful if they are found to be redefinitions or a modernization of water rights, as opposed to interferences that might give rise to takings claims (a topic for some other presentation). Freyfogle, *supra*, at 44. Finding a way to convince those who believe in and profit by the current system that policy and system changes are necessary is the real challenge for those people, like me, who believe that the current system lacks credibility and sustainability without reform. Trout Unlimited and WaterWatch, at least, are committed to the notion that dedicated activists can effect system reform, rather than abandon the courts and rely solely on other mechanisms - like federal statutes and extra-judicial proceedings - to bring Colorado's water law system into the twenty first century.