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The Road to Water Policy Reform: Where We've Been, and Can We Avoid Going There Again

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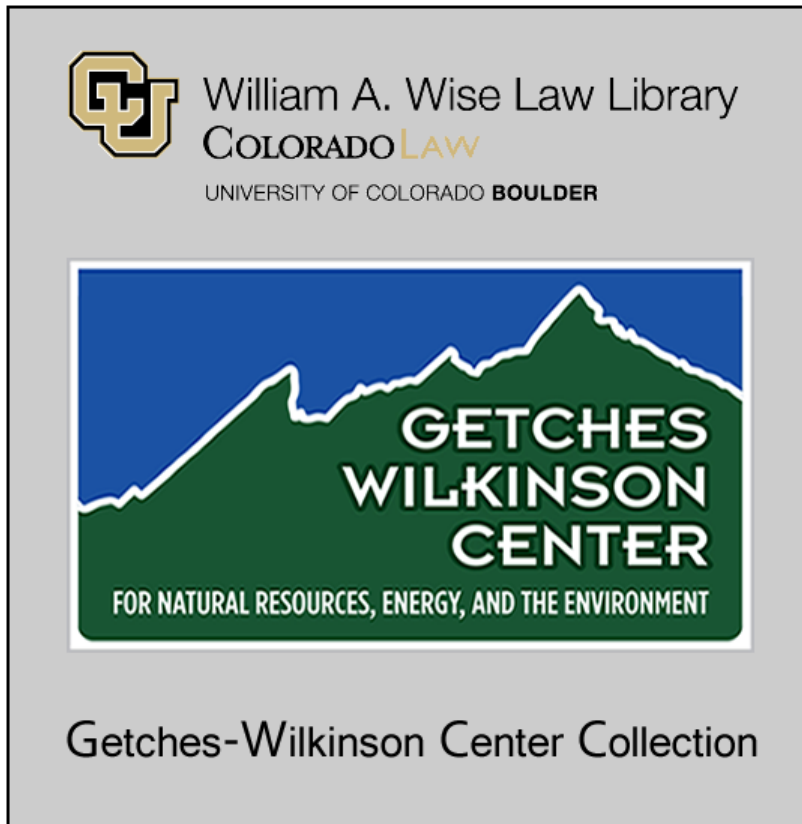
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THE ROAD TO WATER POLICY REFORM:
WHERE WE'VE BEEN, AND CAN WE AVOID
GOING THERE AGAIN?

Luncheon Address - June 13, 2001

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Two Decades of Water Law and Policy Reform:

A Retrospective and Agenda for the Future

June 13-15, 2001

NATURAL RESOURCES LAW CENTER

University of Colorado
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I. **Opening caveats:** This is an outline in progress, not a finished paper, and my remarks as delivered may not conform slavishly to this. Further, my remarks are aimed primarily at allocation issues, not water quality issues, and I am excluding the entire universe of Indian water rights issues.

II. **Reform of water law and policy in general:** Ideas for reform are not in short supply. Practically everyone seems to agree that water law and policy need to do a better job in the following interrelated areas:

Curbing waste and promoting more efficient uses of water;

Dealing with water transfers with the goal of promoting shifts of water from lower to higher valued uses, while addressing third party effects;

Having better ways to identify, protect and, in appropriate cases, restore instream flows primarily for environmental ends, primarily biodiversity.

Better addressing groundwater (GW) issues, especially dealing more forthrightly with GW overdrafts; managing GW with hydrologically connected surface water; and providing a firmer legal basis for groundwater storage and recovery projects.

The recommendations for improvement are aimed primarily at state law systems because of their central role in water law and policy. But many involve the national government to some extent as well, because its laws and policies are important influences on practically all river systems.

III. Reform at the national level: There have been some major shifts in national policy in the last decade or so. This has come about not through sweeping national legislation or bold, overarching directives. Instead, it has usually come by individual, site or watershed specific decisions, often arrived at through negotiations with watershed stakeholders. (Sometimes it has come by reclamation-project-specific reform legislation; e.g., the Central Valley and Central Utah Project Reform Acts, but these fit the model described in the previous sentence).

The primary impetus for nearly all these changes has been the Endangered Species Act, which is an important force in every major western water basin B a catalyst, lever, or bludgeon for the kinds of reforms that have otherwise mostly been talked about for decades.

I'll offer some thoughts on the future of the ESA, in the executive, in the Congress and in the courts.

IV. Reform at the state level:

Apart from ESA-induced changes in particular settings, there seems to have been very little reform in state water policy and management in the past fifteen years or so, except in the area of GW storage and recovery. I'll discuss some of the reasons for this dismal record.

I will argue some reforms are still worth considering, especially accounting for GW-surface water connections, and doing more in the area of instream flow protection.

On the latter, most states recognize some form of legal protection for streamflow, but very few have been at all systematic about it. Flows get protected in a much more haphazard way, such as through an ESA biological opinion, by assertion of federal reserved right, by calls from downstream water right holders, or some agreement worked out by stakeholders, often in response to an ESA problem. These protections vary in permanence and formality.

V. A particular problem:

More and more around the west we find willing sellers, willing buyers, and money available for the purpose of acquiring and converting water rights perfected under state law for consumptive use to instream flow protection. That is, federal agencies like USFWS, USFS and BLM as well as private parties like The Nature Conservancy are interested in consensually acquiring consumptive use water rights perfected under state law in order to retire the consumptive uses and convert the water use to an instream flow. The willing sellers are usually ranchers or farmers who, for one reason or another, want to cash out of their property and water rights.

On the face of it, the ingredients are there for win-win consensual transactions to manage water more progressively, worked out in a state law framework.

But this may be oversimplified: If the state water agency is asked to convert the place and type of use of the water right to an instream flow right, the first issue is likely whether there is any negative effect on existing water rights. Again on the face of it, the answer seems simple: No, because the transfer will keep water in the river system and available for other uses downstream.

But I can think of several kinds of possible complications, any of which could result in the state denying the transfer, which would thwart the effort.

State law may not recognize an instream flow, or may not allow it to be held by the federal agency or private entity. Or some other users may be able to argue that the transfer would impair their rights (such as to seepage, return flows, or hydrologically related groundwater). Or someone may argue that the transfer would be inconsistent with the “public interest.” (This is the Sleeper “third party effects” issue. It is the same one raised by purchases and retirements of public land grazing allotments.) Or, finally, a special water district or other entity in the area may claim veto power over the transfer.

These complications make federal agencies and private funders nervous about investing in the purchase and conversion of existing water rights, even though it seems otherwise like such a nice opportunity.

Some possible cures.

The federal government might be able to argue that, if the acquisition and restoration of instream flow is intended to serve an important objective of federal law, state transfer law is preempted. (I discuss this general idea in an article on securing water for federal conservation lands to be published in the next issue of *Water Law Review*.) This could be controversial.

The purchaser can protect itself by conditioning the acquisition upon state approval of the transfer. This would protect the investment, but may do little to protect or restore instream flows.

States could amend their state laws to provide directly for this situation. I would advocate, for example, that state law embody a strong presumption in favor of such environmentally protective or restorative transfers. For the reasons discussed earlier, I'm not holding my breath waiting for state law reforms.

VI. Conclusion: Time to Dangle the Carrot of Federal \$\$ to Reform State Water Law and Policy?

Perhaps the time has come for more radical action. Consider that (1) the states will remain on the front lines of water management; (2) there is general agreement state laws be reformed to better achieve the objectives of ecological restoration and protection; but (3) reform efforts have generally failed, or not even been tried, for credible reasons.

Perhaps we ought to seriously consider a federal grant program to induce the states to adopt such reforms. Because most states spend relatively paltry sums on water administration, the federal government could, at modest cost, provide a comparatively substantial fiscal carrot to underwrite the costs of substantial improvements in state water law and administration. The money could be made available to those states who agree to undertake certain kinds of improvements. Besides money, the states would get some additional assurance that they would remain on the front lines of water management, and an excuse to do the right thing and modernize their systems.

Obviously the devil is very much in the details on such crucial matters as: How much money; how to apportion it; how detailed and directive to make the federal standards; how much time to give the states to adopt reforms; how much continuing federal oversight there would be; and how long to continue the program.

But nothing else has seemed to work.