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Effects of Upstream Transfers on Water Quality Permittees: A Summary of Practical Problems and Solutions

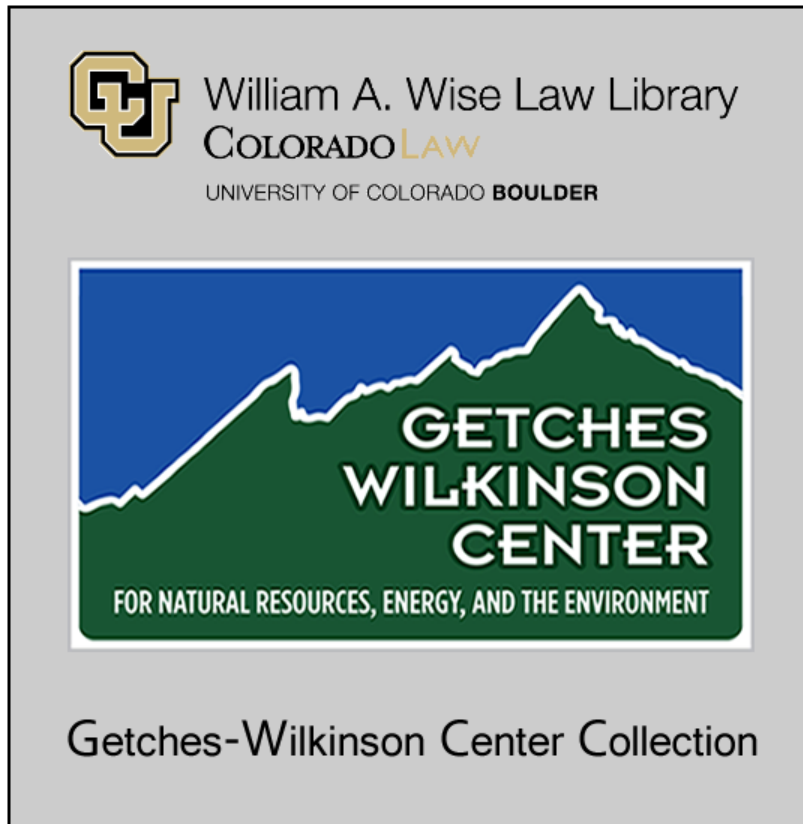
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EFFECTS OF UPSTREAM TRANSFERS ON
WATER QUALITY PERMITTEES:
A SUMMARY OF PRACTICAL PROBLEMS AND SOLUTIONS

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I. INTRODUCTION

This paper is more of a practical application or investigation of the interface of water quality standards and the water rights appropriation doctrine at the local level. It is the intent of this paper not to debate the philosophical legal issues per se but rather to place before the forum the practical and institutional concerns and suggest some possible solutions as the process evolves and as the potential conflict increase. Mr. Laitos' paper of last year¹ did an excellent job of outlining the basic legal issues surrounding the general relationship between water quantity (appropriation doctrine) and water quality (pollutant control). This paper is intended to go forward from that presentation and inquire into the administrative realities and concerns resulting from the legal and institutional conflicts between water quality protection and water rights appropriation.

Overall, the issue of water quality and water quantity relationships have been generally discussed and, frankly, politely ignored in the institutional makeup of water quality and water quantity management. The reasons for this lack of integration are many and include, but are not limited to significant turf battles at the Federal level between the various water interest groups, differences in timing of the establishment of the two legal systems, multiplicity of governmental agencies that manage water quality and quantity and the inherent difficulty of identifying clear criteria and guidelines for such integration. This is well documented by a report from the Conservation Foundation.² The attempts to integrate the quality/quantity

institutions have been feeble at best at the federal level. Assuming that there is recognition on all fronts for a three-pronged goal of water efficiency, equity and environmental quality, the fact of the federal agency's inability to integrate the quality and quantity relationships forces the discussion and forum to the state and local level.

I. HISTORICAL TRENDS

The relatively long legal history of water appropriation versus the relatively recent law related to permitted wastewater discharges has created the background of strong political forces and legal trends generally favoring the appropriations doctrine over water quality. In recent times, however, there has been an increasing recognition of water quality protection in the statutory base of law achieving its high point by the initial passage of the Federal Water Pollution Control Act and the subsequent amendments thereto.³

Another trend is the increasing influence of retail water pricing and water marketing upon the ultimate management scheme for the water resources. Because there is such an extremely high and increasing investment in wastewater treatment systems which rely upon NPDES permits, market or full value pricing philosophy will become more and more prominent in the future management of water quality and water quantity relationships.

Another emerging issue, if not trend, is the recognition in certain courts of the broad public trust doctrine as an

aspect of water quantity management programs. The most prominent examples are the recent cases in California recognizing non-consumptive, i.e. water quality values as a possible constraint on water quantity decision making.⁴

Another trend related to the public trust doctrine is the growing recognition of so-called instream flow protection in various aspects of the law. Although the focus of instream flow protection has been primarily for wildlife habitat and fish propagation, the more ancillary and broader stream regimen protection criteria will continue to be recognized and grow as a criteria for instream flow protection.⁵ This instream flow protection trend will continue to be integrated into the stream classification system under the Federal Water Pollution Control Act and its related antidegradation requirements and policies which must be implemented at the local level.⁶ While the relationship between the general public trust doctrine and its ability to impose environmental quality constraints upon water right holders has been explored and has developed in the California court system,⁷ the scenario of a NPDES permit holder having a "vested" water quality right as a direct constraint upon a quantity right holder will continue to be an increasing focus of the quality/quantity conflict and is not judicially resolved. Stated another way, the battle between quality interests and quantity interests, especially in the California example, have been focused on the general or broad public values versus the specific and discrete rights of a proponent for water diversion

or water consumption under the appropriations doctrine rather than one of a specific water quality "right holders" versus a water quantity right holder. This direct conflict between discrete entities raises the issue of the relative legal rights of the holder of a water quality permit (NPDES) and their ability to protect the permit's validity against upstream diversions which could threaten or affect the ambient water quality in the area of the permitted discharge. While the argument of the affected permittee would not primarily be a broad base or public trust assertion, the resultant substantive argument by the permittee would require protection of the instream or ambient water quality that existed at the time of the permit which allows the permittee to make the discharges into the surface waters.⁸ A question immediately emerges as to whether or not the permittee can "piggy-back" the public trust doctrine arguments as a "third-party beneficiary" of the water quality standards that do indeed recognize such broad base public trust values as fisheries habitat, recreation and water esthetics.⁹ Historically, traditional water rights appropriation doctrine has recognized water quality as simply a parameter of review as to conflicts between vested water right holders and not focused general ambient water quality protection.¹⁰ This distinction is important in that the definition of a vested water right holder with a right to participate in the appropriation system is critical which will be discussed below. Water quality and the protection of water quality in the appropriation system has been focused primarily on

the relative quality necessary to satisfy the consumptive needs of other appropriators (vested water right holders) and not third parties having interest in the general water quality not related to direct appropriator's consumptive use.

In recent decades, most western states have passed statutes in the water appropriations code that recognizes quality as a factor in the consideration by the state appropriation's officer.¹¹ In Utah this is recognized as "protection of the the instream environment."¹² These recognitions, however, are still general public value concerns and not specific to individual's interests in water quality. A shift from general water quality criteria as a broad consideration to a discrete constraint or control as to other water right holders is perhaps starting to occur. In a recent case in Colorado the water court directly recognized the need to protect the water quality as it related to an existing sewage treatment plant permittee and made such protection as a constraint on the proposed water appropriation.¹³

III. JURISDICTIONAL ISSUES

The jurisdictional scenario is usually in the context an application filed by either an existing water right holder or a potential new appropriator under the state appropriations system. The traditional jurisdiction then is either in a water court as in Colorado or a state engineer's office as in Utah wherein, a court hearing or administrative hearing is held taking the views and positions of the protestants after which a memorandum decision or a court order is issued by the appropriate

hearing officer. Immediately, the issue is raised as to whether or not a holder of an NPDES permit has jurisdictional standing before the appropriations forum. It is clear that under the Federal Water Pollution Control Act, a holder of an NPDES permit under Section 402 is bound to operate under the permit in a way that does not violate the water quality standards adopted for that stretch of river or water course into which the discharge occurs.¹⁴ Specifically, Section 301(B)(1) of the Clean Water Act requires that no Section 402 permit (NPDES permit) shall be issued unless the water quality standards are not violated by the issuance and operation of the permit. If evidence can be developed in the hearing process or by assessing the potential reduced flows from an upstream diversion showing, as a direct result of the reduced flows, the ambient water quality is reduced, the crucial and important question is whether the permit holder has a right to appear before the adjudication officer or court and protest such diversion. In Utah, the issue of who is an affected person has been litigated in a rather narrow context. The view in the Utah courts is that an affected person in the adjudication process is only someone who has a vested water right or a direct beneficiary of a vested water right.¹⁵ Notwithstanding this restrictive view, the above-mentioned amendments to the water codes recognizing instream environment and other such nonconsumptive parameters revives the question as to whether or not the NPDES permittee has direct standing to appear before the administrative body to make a direct protest to the proposed

change or upstream diversion under the auspices of water quality protection. In the Colorado case, it appears that the water court at least recognized the standing of the party holding the permit to appear before the forum. Further, the conclusions of the case indicate that the court recognized the potential threat to the permittee's ability to discharge as a possible constraint on the change in point of diversion of the appropriated water.

Overlaid upon this concern is the currently developing antidegradation policies mandated by the Federal Water Pollution Control Act and its subsequent amendments.¹⁶ The antidegradation policy is a quality driven policy to protect the existing ambient water quality in various stretches of surface water throughout the states. The adoption of these state antidegradation policies are currently occurring throughout the west and are only now becoming articulated to the degree of specificity necessary to evaluate whether or not upstream diversions would have a direct affect upon this antidegradation policy. What is not being addressed in the antidegradation policy is a declaration as to whether or not enforcement and maintenance of the antidegradation policy mandated by the Federal Water Pollution Control Act would impose upon water appropriators any requirement to not adversely affect or be inconsistent with the antidegradation policy. Stated another way, the antidegradation policies are aimed primarily at point source and nonpoint source discharges and the regulation thereof. There is very little discussion in any of the antidegradation policies and certainly no explicit

requirement from EPA to include reduction of flows in the stream or water course by massive or significant water diversions or depletions. An interesting biproduct of this lack of recognition is the question as to whether or not a NPDES permittee can argue "third party damages" as a result of reduced flows if the requirements on the permit would be more vigorously imposed and more stringent to comply with the antidegradation policies of the state. As discussed above, the recent trends and evolution of the law indicate an increasing amount of consideration of water quality in the appropriations forum which may allow for such "third party claimants".

IV. PRACTICAL ISSUES

The remainder of this paper will raise some practical considerations and propose some hopefully practical solutions as this quality/quantity conflict continues to grow and become more significant. The philosophical assumption here is that the water quality protection criteria and constraints will become more and more a part of and a substantive aspect of water appropriation doctrine. To debate whether or not this shall occur is of course the forum of the courts. This author will assume that the basic trends discussed above will create an inevitable increase in direct consideration of water quality standards in the water appropriation system. Another philosophical position of this paper is that there have been many principles evolve out of the water appropriation doctrine that should be considered and integrated into the water quality regulatory scheme. As was

stated in the Conservation Foundation article,¹⁷ the three basic goals of equity, efficiency and environmental quality require the regulatory regime of the water quality system and the appropriation common law scheme of the water rights doctrine to in essence confront each other and evolve by utilizing the better aspects of each system in an integrated and coordinated management of water as a whole resource and not to continue to portray the fictional assumption that water quality and water quantity are not related.

The following are some practical, albeit somewhat controversial suggestions on how to administer or consider administering the relationship between water quality and water quantity. The prospective of these recommendations are from the holder of a NPDES permittee and the resulting concerns such a permittee has regarding risks to their operation and potential costs as a result of ignoring the relationship between the NPDES permit and the appropriations system. The vast amounts of money that have been put at risk and committed to large wastewater treatment systems which rely directly upon a validity of a NPDES permit makes it encumbant upon the state administrations to begin to institutionally recognize the relationship between these two systems. The following are some possible suggestions on how to approach this.

1. Notification process: Inherent in the water rights appropriation system has been a long history of notice to other water users (read permittees) of any proposed appropriation change of use. This is a basic tenant of due process to allow

for those who hold property rights based on a stable resource system to have input and have their concerns voiced by a protest. It seems logically obvious that a permittee in the water quality system faces the same dilemma of due process if they are not allowed to participate in any proposed changes which disrupt the stability of the resource system to which they rely. This stability here is the water flow regime that existed at the time of the issuance of the permit. Traditionally, water rights appropriation systems have only allowed a restricted group of entities to enter into the protest process which include only vested water right holders, state authorized entities or federal agencies having claims to water rights. It seems encumbant on the process to allow, at least in a protest context, participation by water quality permittees in the hearing process for proposed water use changes or appropriations.

2. Integration of standard setting: Under the Federal Water Pollution Control Act, the state agencies through their various committees and boards adopt various standards of water quality and stream classifications. Further, and probably most importantly, the antidegradation requirements which are being adopted as a condition of compliance with the Federal Water Pollution Control Act are imposing upon the states a requirement for direct consideration of ambient water quality protection. It would again seem logical to have the state appropriations system take into consideration these antidegradation policies and stream classification standards.

While in Colorado, the statutes have explicitly stated that the water pollution control standards should not affect or in any way abridge the rights of the water right holders,¹⁸ there is no direct accounting of effect of potential water use changes under this umbrella of protection in the in adoption of the antidegradation policies. What this allows for is the water pollution control agencies to, in essence, set themselves up for violation or occurrences which, by definition, will degrade and/or violate the standards they have adopted. It would appear more logical to have the water quality and antidegradation standards recognize upfront the potential for reduction in flows from use changes in the initial adoption of standards and antidegradation policies. Otherwise, this ignoring of the deductions creates a potential conflict legally with the antidegradation policies which assume a stable water resource system at the time of the adoption of the policies. Stated another way, it has been interpreted to date that the antidegradation policy is one that will not allow any water discharge actions to occur which would in any way or fashion degrade the ambient and existing water quality.¹⁹ Implicit therein is the assumption that significant water diversions as well as discharge increases should not occur.

3. Permittee vesting and priorities: Again, relying upon what has been a rather successful system in the appropriations doctrine recognizing the first in time, first in right principle, there is perhaps some potential to borrow from that

system and to allow for some protection of those water quality permittees to rely on their "vesting" by their early investment and commitment to treatment and acquisition of a permit. While it is obvious that the federal law is not articulated in any way to recognize this priority of permits, there may be some potential for consideration at the state level to allow for some relative priority or protection of those early permittees (read prior appropriators) as "vested". Prior vested permittees as opposed to future permittees perhaps would have superior rights and less obligations to commit to the possible increased treatment resulting from a reduced flow in a stream. This, of course, is a very controversial proposal; however, the principle has been a well recognized tenant of practice in the water rights system to allow a prior right holder (permittee) to have some sanctity of protection. A variation could be a consideration of certain classes of NPDES permit holders having a certain priority over other classes for policy or other legitimate reasons. Otherwise, as water flows are reduced and if deference to the water appropriation system prevails, the imposition on all of the permittees to improve their treatment or adopt other practices to protect the quality could become onerous and a high risk to many of the early permittees placing extraordinary burdens upon them.

Another reason for considering some kind of a protection of prior permittees versus future permittees is the other major concern in the financial community relative to bonds issued to construct wastewater treatment plants which rely on the

validity of the permits. Bond counsel and others who, by issuing opinions and underwriting bonds, have relied upon the assumption that the NPDES permit will remain valid throughout the life of the bond would probably be most concerned if the potential for invalidation and/or imposition upon the wastewater treatment system of additional cost of treatment continue to cloud or hang over the permit throughout the life of the bond issuance. With so much money at risk and the vulnerability of permittees to upstream diversions existing, it appears critical to the financial community to have some attempt to develop a stability of permitting via a quasi vesting of rights similar to the water rights doctrine.

4. Water quality permits as water rights: A very radical consideration, but perhaps ultimately the most logical would be to integrate the permitting of water discharges as a water right and to incorporate it into the water appropriations system. Obviously this puts the permittee in a junior position to most water appropriators consistent with the first in time principle, however, any proposed changes which significantly alters the water use by a prior appropriator would be required to take into consideration the affect on the other "water right holder (permittee) and their "rights"" which exist coterminously and equally with the water right appropriator. While on its face, this appears to be a radical departure from the traditional system, it may be very logical in certain areas. In highly urbanizing areas where the water uses are increasingly turning to

urban uses, the urban water user or appropriator is in many cases the same entity that relies upon the discharge permit, i.e. the same class of users. In this case, the beneficiaries from both the water right diversion and the wastewater treatment are the same. In this context, to argue that allowing a permittee to impose constraints upon a water appropriator as an unfair and inequitable imposition would be contrary to the reality that both the appropriator and the permittee are the same entity or group of persons. This approach would also recognize the reality that water use does not end at the tap but is a full comprehensive use of water from the point of diversion to the point of discharge. To artificially or institutionally separate them will continue to create a continuing conflict and unacceptable risk to both entities and the public at large.

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FOOTNOTES

1 Laitos, Jan G, "Conflicts Between Water Rights Administration and Water Quality Protection" in Proceedings, Water as a Public Resource: Emerging Rights and Obligations, Natural Resources Law Center, University of Colorado School of Law, June, 1987.

2 Conservation Foundation, "The Quality/Quantity Problem" in America's Water: Current Trends and Emerging Issues, 19__.

3 Federal Water Pollution Control Act Amendments of 1972," 33 U.S.C. 1251 et. seq., Public Law 92-500, enacted October 18, 1972 commonly referred to as "The Clean Water Act" as specified in the "Water Quality Act of 1987", Public Law 100-4, enacted February 4, 1987.

4 see generally, Dunning, Harrison C., "Instream Flows, The Public Trust, and the Future of the West" in proceedings; Instream Flow Protection in the Western United States; A Practical Symposium, Natural Resources Law Center, University of Colorado School of Law, April, 1988. Therein, there is considerable discussion of the general public water quality values becoming infused in water appropriations issues with focus on the so-called "Audubon" case, Natural Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 p.2d 709 (Cal., 1983).

5 see generally, Johnson, "The Emerging Recognition of a public interest in Water: Water Quality Control by the Public Trust Doctrine in Water and the American West; Essays in Honor of Raphael J. Moses, D. Gethes (ed) 1987. (Therein, the theme is still that this recognition of water quality is primarily broad or general public interest).

6 The Environmental Protection Agency (EPA) promulgated regulations implementing the water quality planning requirements of Section 208(b) (33 U.S.C. 1288(b)), and Section 303(1), (33 U.S.C. 1313(e) (1)) requiring a development of plans in compliance with Section 303(e) (3), (33 U.S.C. 1313(e) (3)). In the regulations related to these planning criteria, EPA promulgated a regulation requiring each state to adopt a so-called "antidegradation policy," 40 C.F.R. 130.17(e).

Further, all state water quality plans must incorporate the antidegradation policy, 40 C.F.R. 130.10(b) (2).

Most importantly to this paper, once a water quality plan has been adopted, which must include an antidegradation policy, no NPDES permits granted under section 402 (33 U.S.C. 1342), shall be issued or which are inconsistent ("in conflict") with the plan, 40 C.F.R. 130.32(c)

7 see footnote 4.

8 see footnote 6, The specific limitation on the NPDES permit holder under 40 C.F.R. 130.32(c) is as follows:

40 C.F.R. 130.32 Relationship to National Pollutant Discharge Elimination System (c) No permit under section 402 of the Act shall be issued for any point source which is in conflict with a plan approved by the Regional Administrator in accordance with this part and Part 131 of this Chapter, provided however, that no such permit shall be deemed to be in conflict with any provision of such plan or portion thereof, hereafter approved, which relates specifically to the discharge for which the permit is proposed for a general discussion of the legal validity of such permits, see National Wildlife Federation v. Gorsuch, 530 F. Supp. 1291 (DC, 1982), reversed on other grounds, 693 F.2d 156.

9 The thrust of such an argument would rely on the provisions of public health being the criteria which is clearly recognized by statute and, therefore, there would be "reliance" on such criteria for implementing the water quality plans discussed in footnotes 6 and 8 to which an NPDES permittee must adhere.

10 see generally, "Water Quality Control and Common Law Remedies" Section 55.6, Volume I in Clark, (ed) Waters and Water Rights, 1967.

11 see generally Ronald B. Robie, "The Public Interest in Water Rights Administration" 23 Rocky Mt Min Law Institute, 917, (1977). Also see R. Robie, "Some Reflections on Environmental Considerations in Water Rights Administration" 2 Ecology Law Quarterly, 695 (1972).

12 Utah Code Ann., Section 73-3-8 states the State Engineer may withhold or deny an application to appropriate if he finds the proposed use of the water ". . . will unreasonably affect public welfare or the natural stream environment."

13 In the Matter of Application for Water Rights of: The Board of Water Works of Pueblo Colorado, District Court, Water Division No. 2, Case No. 84 CW177 (1988). Specifically, in the Findings of Fact, Conclusions of Law; Judgment and Decree, p. 25, the Court explicitly imposed a flow constraint on the appropriation to directly protect ". . . the quality of water" necessary to allow the wastewater treatment plant to discharge under its existing permit.

14 see footnotes 6 and 8. The "absolute" degree of compliance necessary is strongly articulated in United States v. Tom Kat Development Inc., 614 F. Supp. 613, (DC, Alaska, 1985).

15 Utah Code Ann. Section 73-3-3. The extent of allowed protestants is currently on interlocutory appeal to the Utah Supreme Court. Stanley Bohnam et al. v. Utah State Engineer,

Salt Lake County Water Conservancy District and Draper Irrigation Company. 3rd District Court, Civil No. C86-1341, (1985).

16 see footnotes 6 and 8

17 see footnote 2

18 Colorado Rev. Statutes, Section 25-8-104.

19 see footnotes 6 and 8,

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