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Jan D. Laitos

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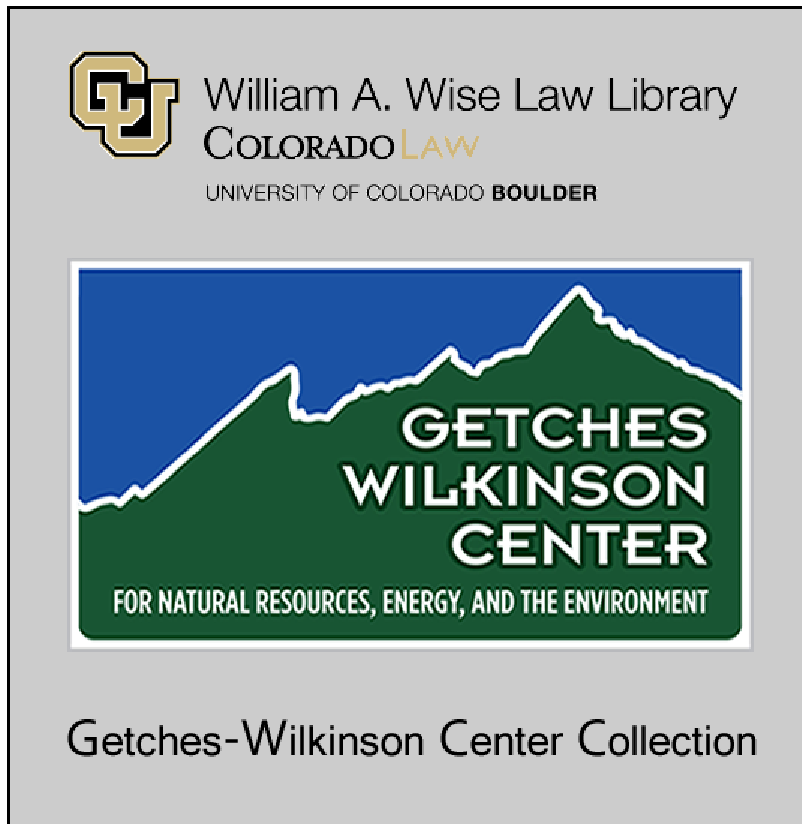

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Conflicts Between Water Rights Administration

and

Water Quality Protection

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Water as a Public Resource:

Emerging Rights and Obligations

Natural Resources Law Center

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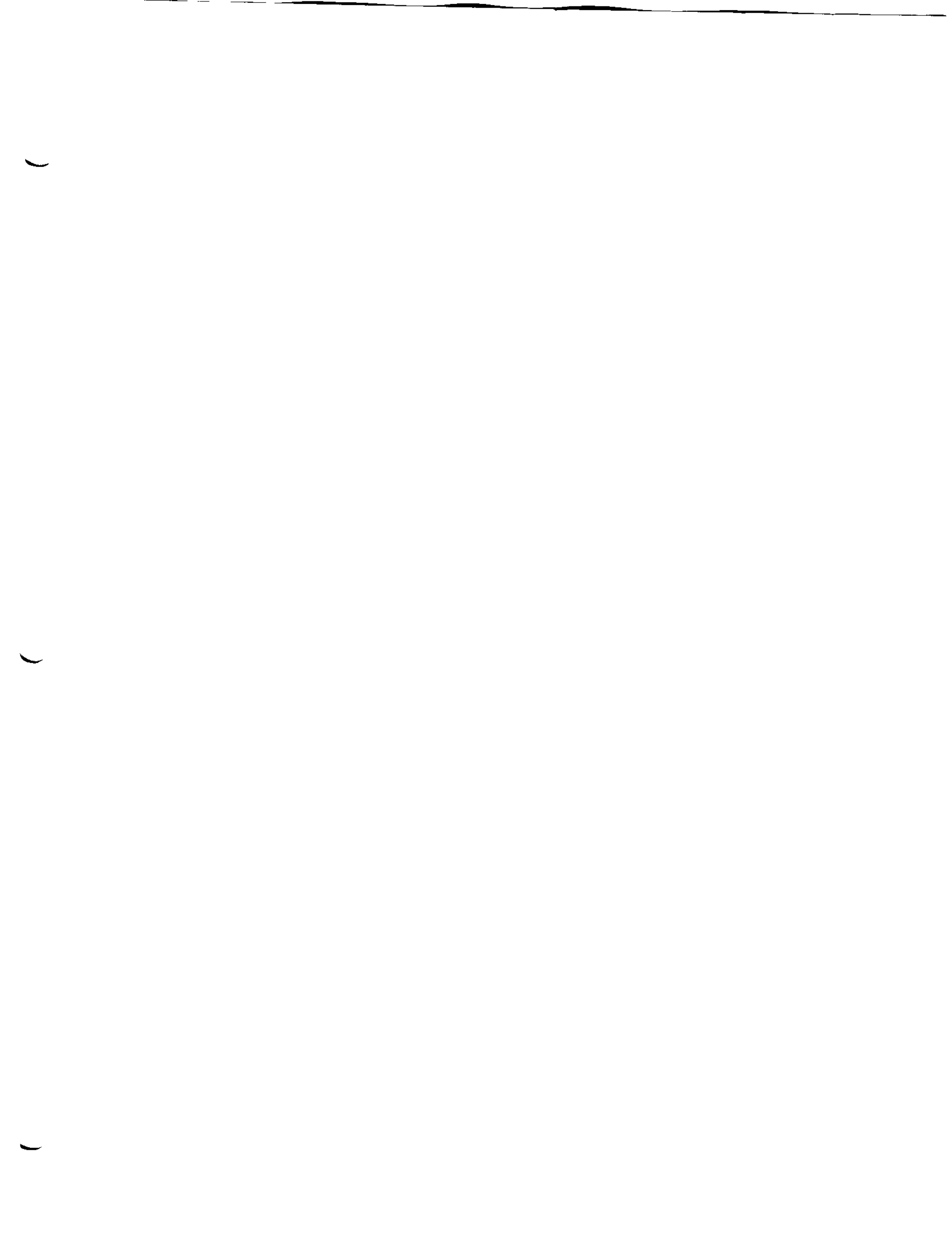

I. The Conflict: Water Rights to the Use of Water

v.

The Public's Right and the Right of

Other Appropriators to a Certain Quality of Water

A. Water Rights to the Use of Water

1. Water Rights (and in Colorado, conditional water rights) are vested property interests. (Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P.313 (1891); Rocky Mtn. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).) A vested appropriative water right includes the priority date, amount of the appropriation, source of the water, and the use of the water diverted from its natural course. (Colorado River Water Conserv. Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979); Enlarged Southside Irrig. Ditch v. John's Flood Ditch Co., 120 Colo. 423, 210 P.2d 982 (1949).)

2. Once rights to use water have been acquired and vested, they cannot be infringed upon by others, or "taken" by government action without just compensation. Nor may government regulate these property rights in water without providing due process under state and federal constitutions. (Fellauer v. People, 167 Colo. 320, 447 P.2d 986 (1968); Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P.339 (1908).)

3. The water right does not encompass ownership of the water itself; the primary right is the right to the use of the water.

   a. The right of property in water is usufructuary and consists not so much of the water molecules as the right to use those molecules (for a "beneficial use").

   b. Usufructuary rights in water are more limited and uncertain than

real property rights -- such as ownership/possessory interests in land. (U.S. v. State Water Resources Control Bd., 227 Cal. Rptr. 161 (1986).)

4. Nevertheless, "the right to the use of water...is among the most valuable property rights known to the law." (White v. Farmers Highline Canal & Reservoir Co., 22 Colo. 191, 43 P.1028 (1896).)

B. Rights to Water of a Certain Quality

1. Public Rights to "Clean" Water - Protected by Government Action

a. Through federal and state environmental protection statutes. (The Federal Clean Water Act, 33 U.S.C. § 1251; The Colorado Water Quality Control Act, Colo. Rev. Stat. § 25-8-101.) Such statutes give government agencies the power to

regulate private property so as to achieve water quality goals.

b. Through federal and state land use regulation statutes. (The Federal Land Management Policy and Management Act, 43 U.S.C. § 1701; the Colorado Land Use Act, Colo. Rev. Stat. § 24-65.1-101.) Such statutes typically give government agencies power to regulate property rights for the protection of the environment.

2. Private Rights to "Clean" Water - Guaranteed by Statute and Case Law

a. A water right does not necessarily entail the right to pollute an otherwise unpolluted waterbody. (Wilmore v. Chain O'Mines, 96 Colo. 319, 44 P.2d 1024 (1935).)

b. Changes in water rights may not injure the rights of others to the water by affecting the quality of

the water. (Colo. Rev. Stat. §§ 37-92-305(5); 37-80-120(3).)

II. Causes for the Conflict

A. Addition of Pollutants to Water by an Exercise of Water Rights

1. Pollutants may be added as a result of an exercise of water rights when:

a. there is a release of water from a dam or reservoir;

b. there is a water exchanges;

c. there is a purchase of water through a water marketing scheme;

d. there is a discharge of water in one basin from another basin after a trans-basin diversion; or

e. there is new water added to a waterbody pursuant to an augmentation plan designed to replenish

surface water taken as a result of groundwater appropriations.

2. The addition of pollutants to a waterbody may trigger environmental quality regulations intended to minimize and control pollutants.

   a. Section 402 of the Federal Clean Water Act (33 U.S.C. § 1342) may be applicable if the discharge is a point source. If Section 402 is applicable, the discharger may need a discharge permit.

   b. Section 303 of the CWA (33 U.S.C. §1313) may be relevant if the discharge is into a waterbody regulated with water quality standards. Effluent limits based on water quality standards may be imposed under Sections 301 and 302 of the CWA.

   c. Section 303(d) of the CWA may be applicable if the discharge is into a water quality-limited waterbody

where waste load allocations have previously been imposed.

d. Section 208 of the CWA (33 U.S.C. § 1288) may be applicable if the area affected by the discharge is contemplating or has in place an approved Section 208 plan. Designated management agencies may implement Section 208 plans by land use controls, permit requirements, siting of wastewater treatment plants, and imposition of best management practices. (Ipsen, Water Quality Management Plans and Their Impact on Mining Operations, 23 Rocky Mtn. Min. L. Inst. 551 (1978).) If a plan is approved, Section 402 NPDES permits and federal land use permits must conform to the plan. (33 U.S.C. §§ 1288(3); 1313.) Section 208 plans may -

(i) allocate waste loads between point and nonpoint sources;

(ii) recommend for adoption by local governments a program requiring permits for projects (including inter-basin discharges) which alter the hydrologic balance;

(iii) urge local regulation of reservoir releases to guarantee continuation of historic stream conditions.

e. Section 404 of the CWA (33 U.S.C. § 1344) may be applicable if the discharge is from an activity entailing the discharge of dredged or fill material into a navigable waterbody. If a Section 404 permit is required, that permit may be denied if the activity-discharge adversely affects water quality or environmental values. (Harrison and Woodruff, Accommodation of the Appropriation Doctrine and Federal Goals under Sections 208 and 404 of Public Law 92-500, 22 Rocky Mtn.

Min. L. Inst. 941 (1976); Blumm, The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L. Q. 410 (198); Riverside Irr. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985); U.S. v. Riverside Bayview Homes, 106 S.Ct. 455 (1985).)

If Section 404 is triggered, states or EPA must provide Section 401 certification of the Section 404 permit; a denial of 401 certification prevents a Section 404 permit from being issued. A state may refuse 401 certification if issuance of the 404 permit will violate water quality standards (Section 303) or effluent limitations (Section 402).

B. Water Quality Degradation Caused by a Diminution of Water Quantity

1. Water quality may worsen when a water appropriator exercises a water right to reduce the quantity of water. Water rights' exercises producing less water quantity may result in degraded water quantity when --

    a. there is a loss of dilution capacities;

    b. there is an alteration of temperature;

    c. there is a change in dissolved oxygen levels;

    d. there is increased absorption and concentration of minerals;

    e. there is a change in the level of suspended solids;

    f. there is an increase in alkalinity; or

g. there is an increase in the concentrations of pollutants from non-point sources.

These changes may make the water unfit for municipal or domestic use by exceeding safe drinking water standards. These changes may make the water unsuitable for agricultural use or livestock watering. The changes may affect the quality of water necessary for the preservation of fish, wildlife, or endangered species.

2. Water rights exercises depleting water supplies (and degrading water quality of the remaining water) may be caused by:

   a. storage and subsequent release of water from an instream reservoir;

   b. withdrawal of water for export to another basin; or

   c. in-basin consumptive use. (NOTE: In-basin consumptive use may also be due to water pollution control

techniques calling for increased consumptive use of water by a discharger that normally supplies return flows to the affected waterbody.)

3. The removal of water from a waterbody may encourage or require the imposition of water law, environmental law, and land use regulations designed to prohibit or minimize the deleterious effect of reduced water quantity.

   a. Minimum instream flows may be appropriated or mandated to offset reduced flows. (State Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974); In re Guadalupe River Basin, 642 S.W.2d 438 (Texas 1982) But see Galt v. Montana, 731 P.2d 912 (Mon. 1987) (provisions of statute addressing recreational uses of streams may be constitutionally overbroad).

To protect instream flows, federal law may restrict appropriations along a river (the Wild and Scenic River Act, 16 U.S.C. § 1271 - "Congress declares...a policy that would preserve...selected rivers... in their free-flowing condition to protect the water quality of such rivers...."), or prohibit or regulate construction of dams to preserve downstream endangered species. (The Endangered Species Act, 16 U.S.C. § 1531; TVA v. Hill, 437 U.S. 153 (1978); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).)

b. Local governments may adopt ordinances and regulations which protect an area's water quality by restricting the export of water to other basins. These local laws may be adopted pursuant to statutory land use planning authority, in conjunction with an approved Section 208 plan. (See Policy #2, Northwest Colorado Council of

Government's Section 208 plan, as heard (and disapproved) by the Colorado Water Quality Control Commission, Jan. 6, 1986.)

c. A Section 404 permit may be denied or conditioned because of effects downstream of a proposed dam on diminished water quantity irrespective of the 404 permit's impact on water rights involving the dam. (Riverside Irrig. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).)

d. A state agency may, pursuant to a California statute, re-prioritize vested water rights and thereby affect the export of water from a basin in order to maintain water quality standards for salinity control and for protection of fish and wildlife. (U.S. v. State Water Resources Control Bd., 227 Cal. Rptr. 161 (1986).)

e. The public trust doctrine may be employed to place water quantity

preservation (for water quality purposes) on an equal footing with prior appropriation rights. (National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 119, 658 P.2d 709 (1983).)

III. Examples of the Conflict Potentially Arising in Colorado

The water rights-water quality conflict may take several forms. In Colorado, the conflict has been characterized as:

1. Federal v. Appropriator (an exercise of federal statutory or constitutional rights to water quality arguably interferes with private appropriative rights to water).

2. State v. Appropriator (the Colorado Water Quality Control Commission is confronted with the extent of Commission power regarding appropriative rights).

3. State v. Local Government (an appropriator exercising water rights pursuant to

state constitutional and statutory protections confronts attempts by local government to regulate those rights).

4. Appropriator v. Appropriator (one appropriator's exercise of its water rights interferes with the quality of the water received by another appropriator).

A. Federal v. Appropriator

1. U.S. v. Denver, 656 P.2d 1 (Colo. 1982). In this federal reserved rights case, the United States alleged instream flow rights in national forests and national monuments for recreational, scenic, and wildlife protection purposes. While conceding the validity of federal reserved rights, and their supremacy over later-in-time appropriative rights (Denver), the court found that the purposes of the federal reservations in question were not for the purposes alleged in the instream flow right application.

2. Riverside Irrig. District v. Andrews, 758 F.2d 508 (10th Cir. 1985). Holders of a valid appropriative water right under Colorado law wishing to construct a dam, may have the Corps' issuance of a required Section 404 permit conditioned on minimizing the effects of changes in water quantity on downstream endangered species. Direct and indirect downstream environmental effects of a dam may be considered in a 404 permit. (See also Riverside Irr. Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981.)

3. May water quality standards for salinity in the Colorado River reduce water development in the upper basin states, thereby discouraging Colorado from using its full entitlement under the Colorado River Compact? (See Bloom, The Effects of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms - Can EPA Amend an Interstate Compact?, 22 Rocky Mtn. Min. L. Inst. 917 (1976).)

B. State v. Appropriator

1. When the Colorado Water Quality Control Commission classifies state waters pursuant to Colo. Rev. Stat. § 25-8-203, should the classification apply only during normal stream flows, and not during the exercise of reservoir -- filling rights of appropriators along the classified stream? (Petition of City of Loveland during hearing before the Commission, Apr. 6, 1987.)

2. May the Commission regulate, or the Colorado Water Quality Control Division issue a discharge permit regarding, a discharge from a reservoir into a creek, where the discharge is of extremely low quality water, but is done pursuant to an exercise of water rights? (In re discharges from Cheraw Reservoir, Otero County, March, 1987.)

The powers of the Commission and Division here are minimal. The Colorado Water Quality Control Act provides that it shall not be interpreted to impair

water rights. (Colo. Rev. Stat. § 25-8-104. Also, releases from lakes and reservoirs in the exercise of water rights are not considered point source discharges. (Colo. Rev. Stat. § 25-8-503(5).) And if the water quality concerns concerning the reservoir are attributable to irrigation return flows that contaminate the reservoir, such flows are not "point sources" and cannot be regulated by discharge permits. (Colo. Rev. Stat.§§ 25-8-103(14); 501.)

3. May the Commission or Division regulate a release of water from one upstream reservoir (to satisfy downstream water rights), if the release affects the quality of water in a downstream lake or reservoir, where the downstream water-body is subject to a Commission-imposed waste load allocation regulation? (Release of water from Green Mountain Reservoir to Lake Dillon, where Lake Dillon is subject to a phosphorous-loading control regulation, pursuant to Colo. Rev. Stat. § 25-8-205.)

4. The Commission's Basic Standards for Ground Water (Section 3.11) regulate activities that discharge pollutants to groundwater. Are these standards applicable to artificial recharge ponds used for plans for augmentation in the state water courts? (Letter inquiry from State Engineer to Commission, Feb. 13, 1987.)

5. Two Forks Dam

   This reservoir, proposed to augment Front Range water supplies pursuant to a valid exercise of water rights, requires a Section 404 permit. Issuance of the permit is conditional on state Section 401 certification that resulting discharges will not impair water quality standards. Is Section 401 certification limited to the effects of dredge-and-fill dam construction discharges into waters, or does it also encompass changes in hydrologic balance upstream and downstream of the dam, that will occur when the dam is completed?

C. State v. Local Government

1. Homestake II

Local governments in Colorado have been granted extensive police powers by the state, including the power to pass land use regulations. If Colorado Springs, in a valid exercise of water rights, wishes to divert and export water originating in Eagle County to another basin in the Colorado Front Range, may Eagle County regulate this exercise of water rights in order to maintain water quality (and quantity) sufficient for protection of wildlife and recreation?

(The Colorado Land Use Act, Colo. Rev. Stat. § 24-65.1-106(b)) states that the Act shall not be construed as "modifying or amending existing laws or court decrees with respect to the determination and administration of water rights." This limit precludes local land use regulations facially inconsistent with the terms of a water rights decree, but may not prevent localities from imposing

conditions on the exercise of water rights for the purpose of maintaining water quality.)

If a local government, using its land use powers, regulates an exercise of water rights in order to protect water quality (particularly to maintain minimum flow), is such local regulation preempted by the Colorado Water Quality Control Act (Colo. Rev. Stat. § 25-8-101), which creates a Commission to "develop and maintain a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state?" Colo. Rev. Stat. § 25-8-202(1).

2. May local governments use Section 208 to minimize the adverse effects of inter-basin diversions?

   a. The June, 1985 208 Plan for the Northwest Colorado Council of Governments provided as Policy #2:

(1) minimize the adverse environmental impact of water diversion...and conveyance facilities;

(2) ensure that future diversions and ancillary activities do not cause a significant deterioration in water quality conditions;

(3) ensure that development of water resources within the region for out-of-basin use is compatible with water quality objectives.

Administrative Guidelines under Policy #2 stated in part that "minimum streamflows should be maintained to mitigate the impact of water development projects on ...fisheries."

b. Would the Commission's adoption of this proposed NWCOG 208 plan infringe on the exercise of water rights guaranteed by Art. XVI of

the Colorado Constitution, and violate Section 25-8-104 of the Colorado Water Quality Control Act?

Despite advice from the Commission's legal advisor that Commission adoption of the plan as "policy" would have no legal effect absent implementing regulations by local governments within NWCOG (memo to Commission from Assistant Attorney General, Natural Resources Section, Oct. 5, 1985), the Commission failed to approve the proposed 208 plan, in large part because of Policy #2.

3. Denver v. Berglund, 517 F.Supp. 155 (D. Colo. 1981) - If Denver exercises valid water rights to appropriate water on federal land in Grand County, Colorado, is the Denver appropriation immune from environmental regulation by Grand County within Grand County boundaries?

The court found that -

a. although the Colorado Constitution confers a right (Art. XVI of the Colo. Const.) on Denver to divert and appropriate unappropriated water, that right is not absolute; the manner and method of appropriation may be reasonably regulated. (Weibert v. Rothe Bros., 618 P.2d 1367 (Colo. 1980).)

b. Colorado law provides for concurrent state and municipal power to regulate where areas of "mixed" state and local concern exist. (Pierce v. Denver, 193 Colo. 347, 565 P.2d 1337 (1977).) Grand County may impose reasonable regulation on Denver's appropriation pursuant to Colo. Rev. Stat. § 29-20-101, and § 24-65.1-101.

On appeal, the Tenth Circuit expressly declined to decide whether Grand County regulations applied to Denver's appropriation as a matter of Colorado law.

(Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982).)

4. Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984) - Is a municipal ordinance valid which is designed to protect a town's water supply (based on Colo. Rev. Stat. § 31-50-707(1)(b)), when the ordinance affects a right to appropriate water protected by Art. XVI, Sections 5 & 6 of the Colorado Constitution?

   Although the Colorado Supreme Court remanded the case due to an inadequate factual basis, the Court did note in dictum two important points regarding possible state-local preemption:

   (a) (Commission v. Locality) - "it does not follow that merely because the Colorado Water Quality Control Commission has 'final authority' in the administration of water pollution prevention, § 25-8-102(4), C.R.S., any permit issued to AMAX [the appropriator] pursuant to the

ordinance would thereby be invalid." 690 P.2d at 242.

b. (Appropriator v. Locality) - "the ordinance does not purport to control the appropriation of water rights, but only deals with water pollution control measures.... Nothing in the record warrants the conclusion that any permit issued to AMAX would be so conditioned that it impaired AMAX's right to appropriate...." 690 P.2d at 242.

D. Appropriator v. Appropriator

1. The right to appropriate is conditioned upon protection from pollution of the water so as to protect subsequent users. (Suffolk Gold Mining and Milling Co. v. San Miguel Consol. Mining & Milling Co., 48 P.828 (Colo. 1897).) Colorado common law recognizes a right to receive water of a certain unpolluted quality. (Wilmore v. Chain O'Mines, 96 Colo. 319 44 P.2d 1024 (1935).)

2. Existing appropriations are entitled to protection against uses which "seriously impair the quality" of the water. (Larimer County Reservoir v. People, 8 Colo. 614, 9 P.794 (1885).) Junior and senior appropriators are entitled to rely upon the continuation of stream conditions as they existed at the time the appropriation was made. (Farmers' Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954); Comstock v. Ramsey, 55 Colo. 244, 133 P.1107 (1913); Vogel v. Minnesota Canal Co., 47 Colo. 534, 107 P.1108 (1910).)

This common law protection is limited to recognized beneficial uses of water for which valid decreed priorities exist. This protection does not extend to the public-at-large. (Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 P.1093 (1909).)

3. If an appropriator seeks to divert water out of priority and to replace or exchange the water so diverted with a substitute supply (which may consist of treated sewage effluent), this substitute supply may not degrade the quality of the water so as to deprive downstream appropriators of their historic use of the water. (Colo. Rev. Stat. §§ 37-80-129(3); 37-92-305(5); In the matter of the application for water rights of the City of Golden, in Clear Creek, Case # 83-CW-361, Water Div. 1, Colo. Dist. Court, June 17, 1986).)

4. In Colorado, all use of minimum streamflow rights for environmental purposes is arguably only permitted for statutory appropriations by the Water Conservation Board. (Colo. Rev. Stat. § 37-92-305(9)). However, in order to prevent neighboring localities from appropriating waters in the Cache la Poudre River, and to prevent reduction of river flows necessitating expensive sewage treatment facilities, the City of Fort Collins has applied for water rights in

the river for "recreational, piscatorial, fishery, wildlife, and dilution for sewage treatment purposes." (Application for Water Rights of the City of Fort Collins, Case No. 86(W37), Colo. Water Div. #1, Dec. 31, 1986) Is this a de facto appropriation for instream flow rights?

5. There is no vested right in downstream appropriators either to maintenance of the same point of return to nutrient-rich sewage waste (Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrig. Co., 179 Colo. 36, 499) P.2d 1190 (1972)), or to a pollutant (silt) that had been a means of sealing the bed and banks of an earthen ditch. (A-B Cattle Co. v. U.S., 196 Colo. 539, 589 P.2d 57 (1978).)

6. Subsequent appropriators are protected from the discharge of sewage into a stream, even when the discharge is pursuant to an exercise of a municipality's eminent domain powers.

(Mack v. Town of Craig, 68 Colo. 337, 191 P.101 (1920).)

7. Water marketing opportunities may threaten environmental values and water quality benefits associated with adequate water quantity if environmental interests are not able to outbid large cities and land developers.

IV. <u>Legal Issues Associated with the Water Rights-Water Quality Conflict</u>

A. Constitutional Issues

1. Property rights in water

a. A vested water right to appropriate is "property" protected by federal and state constitutions. The Colorado Constitution guarantees that "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Colo. Const., Art. XVI, § 6.

b. In the context of conflicts between <u>private</u> parties (and competing private appropriators), water rights are practically absolute. (Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).)

2. To what extent may government bodies exercise the police power to <u>regulate</u> the "property" right to water without contravening due process principles?

   a. Under traditional due process case law, property may be regulated so long as (1) the regulation promotes a valid objective (public health, safety, morals, or welfare); and (2) the regulation adopts means which will accomplish the objective, and which are reasonable. (Goldblatt v. Hempstead, 369 U.S. 590 (1962).)

   b. Under this test, a police power measure designed to improve water quality by restricting a vested water right would be valid so long

as the ends-means test was satisfied.

c. In recognition of the fact that water rights may be regulated, the Colorado legislature has imposed a number of conditions on the constitutionally protected right to appropriate water. (White, the Emerging Relationship Between Environmental Regulations and Colorado Water Law, 53 _U. of Colo. L. Rev._ 597, 641-645 (1982); Larimer County Reservoir Co. v. People ex rel. Suthe, 8 Colo. 614, 9 P.794 (1886).)

d. In reviewing the constitutional validity of police power regulations under the due process clause, the courts use minimum rationality, a standard of review that prevents successful challenges absent totally arbitrary action. (Williamson v. Lee Optical, 348 U.S. 483 (1955).)

3. To what extent is the regulation of the "property" right to water a "taking" requiring just compensation?

   a. Courts have not found a taking in Section 404 permit denials, despite large financial cost consequences. (U.S. v. Riverside Bayview Homes, 106 S.Ct. 455 (1985); Deltona Corp. v. U.S., 657 F.2d 1184 (Ct. O. 1981).)

   b. Regulations may be takings either if:

      (1) they do not substantially advance legitimate state interests; or

      (2) they deny an owner economically viable use of the property. (Keystone Bituminous Coal v. DeBenedictis, 107 S.Ct. 1232 (1987); Agins v. Tiburon, 447 U.S. 255 (1980).)

c. A water rights regulation designed to further water quality goals would appear to "advance legitimate state interests" if --

(1) the exercise of water rights was injurious to health or welfare; or

(2) the burdened water rights holder enjoyed a "reciprocity of advantage" associated with the regulation. (Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

d. A regulation of water rights to further water quality goals would arguably <u>not</u> deny the rights' owner "economically viable use of the property" if:

(1) the regulation addresses a non-critical "strand" in the full "bundle" of property rights (where the right to "use" property for a profit

has not been considered as critical as the right to "possess" property) (Andrus v. Allard, 444 U.S. 51 (1979); Kaiser Aetna v. U.S., 444 U.S. 164 (1979)); or

(2) after application of the regulation to the owner's property (i.e., the right appropriate the full appropriation), the owner still has use of the remaining non-regulated "parcels" of the owner's property (e.g., the right to appropriate that which remains after the regulation). (Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).)

B. Federal-State Preemption Issues

1. Should the federal Clean Water Act be read as preempting inconsistent state water rights administration?

a. Both the Wallop Amendment (33 U.S.C. § 1251(g)) and Section 510 (33 U.S.C. § 1370(2)) evidence congressional intent that the CWA not impair or supersede state water rights. There has also been a history of deference to state water law by Congress. (California v. U.S., 438 U.S. 645 (1978).)

b. However, the legislative history of the Wallop Amendment suggests that water quality regulation would be permissible which merely sought for the appropriator to modify the method of water use. (123 Cong. Rec. 519, 677-78 (Dec. 15, 1977).) As between water rights and the CWA, Congress likely intended neither federal preemption nor complete deference to state law, but an "accommodation." (Riverside Irrig. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985); National Wildlife Federation v. Gorsuch, 693 F.2d 156, 179 (D.C. Cir. 1982).)

2. California Coastal Commission v. Granite Rock Co., 107 S.Ct. 1419 (1987), suggests in the context of a facial challenge to a state law arguably preempted by federal statute that states have more likelihood of avoiding a successful preemption challenge if the state law is categorized as "environmental" as opposed to "land use."

C. Water Quality Regulation Conflicting with Water Rights

A state wishing to carry out the requirements of the federal CWA may find that some of its regulatory measures may potentially conflict with traditional water rights schemes protected under state law. One way to avoid such conflicts is for the state water quality statute to expressly forbid water quality regulations that may produce the conflict. The Colorado Water Quality Control Act attempts to minimize the conflict by giving precedence to water rights.

1. Water quality regulatory techniques potentially impacting water rights:

   a. Increased consumptive use for dischargers;

   b. Regulation of agricultural nonpoint sources;

   c. Changes in the point of discharge;

   d. Restrictions on diversion or exchange of water from or into streams and reservoirs;

   e. Requirement of minimum stream flows.

2. Water rights affected by above water quality regulatory techniques:

   a. Increased consumptive use, regulation of agricultural nonpoint sources, and changes in the point of discharge may harm appropriators dependent on an upstream appropriator's less consumptive use.

(Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 352 (1961).) This injury is inconsistent with (1) the rule forbidding "no harm to juniors" (Farmers Highline Canal & Reservoir Co. v. Golden, 129 Colo. 575, 272 P.2d 629 (1954)), (2) the rule that water derived from tributary sources must be returned to the stream (Pulaski Irrig. Ditch Co. v. Trinidad, 70 Colo. 565, 203 P. 681 (1922)), and (3) the rule of maximum utilization of water resources. (Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968)). [Note the Colorado Water Quality Control Act's response to these conflicts in: Colo. Rev. Stat. §§ 25-8-104; 28-8-205(c)]

b. Restrictions on diversions and exchanges may interfere with the state constitutional right to appropriate and divert unappropriated waters. (Colo. Const., Art. XVI, §6.) [Note the Colorado Act's

response to this conflict in Colo. Rev. Stat. § 25-8-503(5)]

c. A minimum stream flow requirement conflicts with the common law rule that water may be appropriated only for a "beneficial use." (Colorado Water Conservation Dist. v. Rocky Mtn. Power Co., 158 Colo. 331, 406 P.2d 798 (1965)). [Note the Colorado legislature's response in Colo. Rev. Stat. § 37-92-305(9) [permitting only the Water Conservation Board to appropriate minimum stream flows], and § 25-8-104 [forbidding the Water Quality Control Commission or Division to require minimum stream flows or lake levels].]