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Environmental Impacts of New Solutions: Two Case Studies

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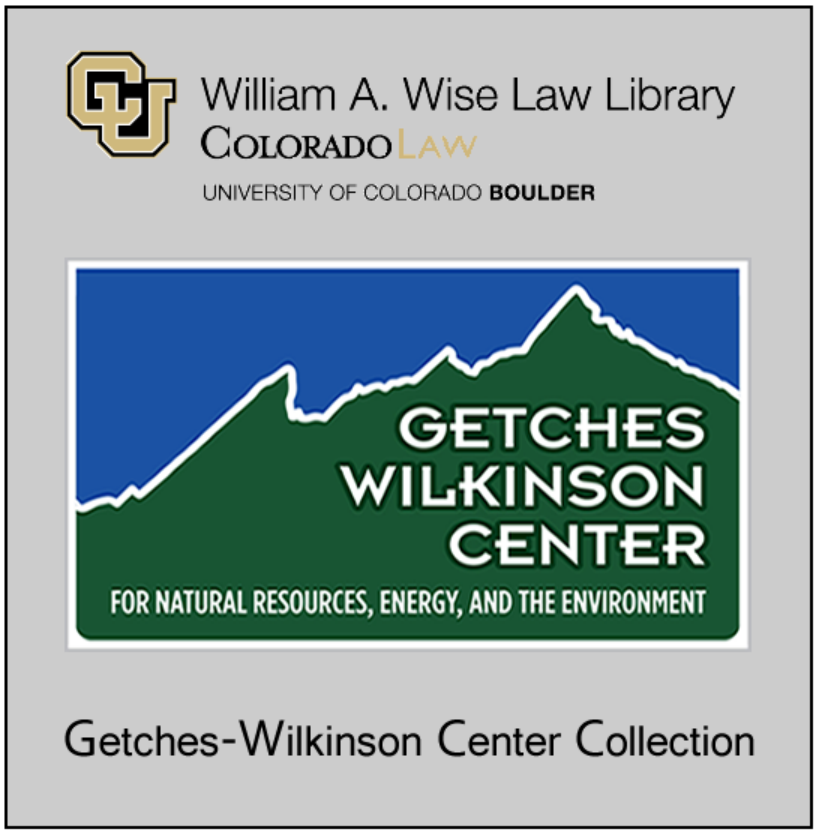

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ENVIRONMENTAL IMPACTS OF NEW SOLUTIONS: TWO CASE STUDIES

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Environmental Impacts of New Solutions:

Case Studies

I. INTRODUCTION

A. New Problems, New Solutions, and Their Consequences

Not surprisingly, increasing demands for water in the rapidly developing West have put great strains on the availability of raw water supplies both for consumptive and instream, nonconsumptive uses. One consequence of more intensive use and reuse of our remaining water is a shift from a water *quantity* focus to a water *quality* focus in the practice of water law, and the increasing incidence of water quality issues in a variety of forums. So, "new solutions" may be accompanied by a new set of challenges and problems. This session of the conference is designed to address some of these emerging issues in the context of specific case studies.

B. Additional Resources

Oliver Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program,* 28 ELR 10415 (August 1998)

Potter, The 1969 Act and Environmental Protection, University of Denver Water Law Review, Vol. 3, No. 1 (Fall 1999)

Ransel, The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology, 25 Environmental Law 255 (Northwestern School of Law of Lewis & Clark College) (Spring 1995)

II. CITY OF DENVER DILIGENCE/AUGMENTATION CASE

In the Matter of the Application of the City and County of Denver for a Finding of Reasonable Diligence, and to Make Absolute a Conditional Water Right, District Court, Water Division No. 1, Case No. 96-CW-145.

A. Facts

Denver applied for an absolute decree for certain conditional water rights on the South Platte River. Thornton, a downstream user of water on the Platte, opposed, arguing that Denver cannot show that the treated effluent it is using to augment out-of-priority depletions is meeting statutory water quality conditions. Denver is seeking an absolute decree for a conditional right of exchange. In essence, Denver wishes to divert relatively clean water from the S. Platte River at the Strontia Springs outfall and the Denver-Platte Canyon intake, upstream of the Chatfield Reservoir. As a part of the exchange for this upstream water, Denver seeks to discharge treated effluent from the Bi-City Waste Water Treatment Plant, which is downstream of Chatfield Reservoir but upstream of the Burlington Ditch headgate and a Thornton pipeline that is supplied by the Burlington Ditch.

B. Issue

When an upstream user (here, a municipal wastewater treatment plant) discharges in compliance with its NPDES permit, does a senior downstream water user have a claim under C.R.S. § 37-92-305(5) or § 37-80-120(3) that the upstream user is failing to deliver water of sufficient quality to meet the requirements for which the downstream user's water has been used.

C. Holdings by the Water Court, Div. 1

1. Relevant provisions of law

(a) § 37-80-120. Upstream storage - substitute supply - historic.

(3) Any substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put.

(b) § 37-92-305(2). Standards with respect to rulings of the referee and decisions of the water judge.

(3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include: (d) Such other conditions as may be necessary to protect the vested rights of others.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the

requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights. 37-92-305.

2. Conclusions

(a) Denver's conditional decree cannot be made absolute, in whole or in part, absent proof that the water that it has actually exchanged meets the requirements of § 37-92-305(5). The Colorado Water Quality Control Act, C.R.S. § 25-81-101, et seq., and the Federal Clean Water Act, 33 U.S.C. § 1251, et seq., preempt the authority of other agencies, including the water court, to establish minimum quality standards of water discharged into the streams of this state.

(b) C.R.S. §§ 37-80-120(3) and 37-92-305(5) empower the water court to impose water quality standards higher than the minima established by the WQCA in cases that include questions of change, exchange, augmentation or other replacement water; and in which the evidence establishes that an opposer needs and has used water of a quality higher than the standards established by the WQCA.

(c) Replacement water that meets the quality standards established by the WQCA is rebuttably presumed to meet the requirements of the senior appropriator's normal use. The burden is upon the party asserting the need for higher quality water, to prove that water meeting the quality standards established by the WQCA does not meet that party's normal requirements.

(d) Replacement water that is discharged in compliance with a valid discharge permit into waters classified for the downstream objector's use is rebuttably presumed to meet the requirements of the senior appropriators' normal use.

(e) Proof of such a substitute supply at the point of effluent discharge shifts the burden to an objector to show that it has normally required and used water of a higher quality.

D. Status of Case

Trial to the court began in the fall, 1999; currently is in recess, and will continue in the fall of 2000.

III. ARAPAHOE BASIN SKI AREA SNOWMAKING LITIGATION

Colorado Wild, Inc. v. United States Forest Service et al., Case No. 00-AP-697 (D. Colo.)

A. Facts

Arapahoe Basin Ski Area (known as A Basin), located near the Continental Divide in Colorado's White River National Forest, is one of the few major ski resorts that do not make artificial snow. The Forest Service recently approved a plan that would allow A Basin to begin doing so. The private company that operates A Basin hopes eventually to make enough artificial snow to permit skiing there almost year-round.

This snowmaking project, however, would significantly degrade the nearby Snake River. A Basin's plan would require diverting substantial volumes of water from a stream adjacent to the ski area, the North Fork of the Snake River. The North Fork flows into the main stem of the Snake River, which is heavily contaminated by acid mine drainage. Water from the relatively clean North Fork dilutes this pollution.

While most of the Snake River currently is a "dead zone," it does support fish and other aquatic life below its confluence with the North Fork. By reducing the North Fork's flow, the project will exacerbate the existing violations of water quality standards in the Snake River. It also may extend the Snake River's "dead" area.

Colorado Wild, an environmental group, filed suit in federal court this Spring to overturn the Forest Service's approval of the project. Colorado Wild charges that the project violates Colorado water quality standards and thus is inconsistent with the Clean Water Act and the White River's forest plan.

B. Legal Issues

This case addresses the inherent friction between federal water quality regulation and Colorado water rights law.

Colorado Wild argues that the Forest Service approval of the project violates the Clean Water Act's federal facilities provision, 33 U.S.C. § 1323, and the White River Forest Plan. The federal facilities provision and the forest plan both require the government to comply with the Clean Water Act and to ensure that federal projects comply with state water quality standards.

In addition, A Basin's operator must obtain a certification from the State of Colorado that the snowmaking project is consistent with Colorado's water quality standards. 33 U.S.C. § 1341. This certification is necessary because construction of the project's water diversion system will involve depositing fill material in the North Fork and other areas. These deposits of fill material require a Clean Water Act section 404 permit. 33 U.S.C. §§ 1311, 1344. The § 404 permit, however, cannot be issued without a state certification.

The language of the Clean Water Act indicates that the State cannot issue a certification if a project will cause water quality standards violations. 33 U.S.C. § 1341.

However, A Basin's operator has water rights that authorize it to make these snowmaking withdrawals from the North Fork. Colorado law governing water quality certifications does not allow the State to deny a certification if doing so would result in "material injury" to water rights. 5 C.C.R. § 1002-82.5(B)(6). And any conditions imposed as part of a certification may not require minimum stream flows or otherwise cause "material injury" to water rights. 5 C.C.R. § 1002-82.5(B)(4).

A Basin's operator has taken the position that its water rights prevent the Forest Service or the State of Colorado from requiring that the project comply with water quality standards. A Basin also contends that the Clean Water Act does not regulate the project's major water quality impacts because they result from the withdrawal of water rather than the discharge of fill material or other pollutants.

But caselaw from the United States Supreme Court and the Tenth Circuit Court of Appeals (which includes Colorado) indicate that the Clean Water Act does govern this type of project, and that A Basin's water rights do not shield it from federal

regulation. *PUD No. 1 v. Washington Department of Ecology*, 128 L. Ed. 2d 716, 511 U.S. 700 (1994); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

C. Status of Case

Colorado Wild filed its complaint on April 5. The Forest Service's Answer is due June 5.

IV. OTHER EXAMPLES

A. Keystone Ski Area

Keystone requested modification of its § 404 permit to allow diversion of an additional 800 acre feet of water annually for snowmaking (1,350 instead of 550). The Corps of Engineers initially responded with a draft requirement that Keystone study the use of storage ponds to ensure stream flow releases, and warned that Keystone might have to curtail its water use if the river is cleaned and fish inhabit it. Keystone holds water rights for snowmaking on the Snake River. The Snake today is contaminated by metals and virtually a dead river. A joint public-private clean-up is underway. The Corps' final modification decision waived the study requirement. Instead, the Corps granted the modification for increased use "in reliance on" a MOA Keystone has with the CWCB to maintain a 6 cfs winter instream flow. The Corps further advised Keystone that, "When heavy metal contamination is reduced to the point that a viable fishery and aquatic ecosystem returns, we may reevaluate in-stream flow requirements to determine compliance with 40 CFR 230.10(c). We will need to meet with you and other appropriate

parties to determine how to adequately protect the aquatic resources of the Snake River when the heavy metal contamination is abated."

THE 1969 ACT AND ENVIRONMENTAL PROTECTION

LORI POTTER‡

I. INTRODUCTION

This essay might appropriately be subtitled "A Short Subject" because intersections between the 1969 Water Right Determination and Administration Act[1] ("the Act") and environmental protection have been few, quite by design. The Act addresses environmental concerns through a single narrow prism: the provision establishing an instream flow program under the control of the Colorado Water Conservation Board ("CWCB" or "Board").[2] This article briefly surveys the various efforts put forth in an attempt to fit environmental issues under the Act's narrow umbrella.

II. THE BACKDROP: COLORADO'S INSTREAM FLOW PROGRAM

In 1973, the Colorado legislature enacted Senate Bill 97 to create a program with the modest goal of "preserv[ing] the natural environment to a reasonable degree."[3] The program sought to fit new flow rights into the prior appropriation system, a phenomenon that by 1973 had begun to flourish around the West. These rights, instream flow rights, left water in the stream. The instream flow water rights adjudicated under the new

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1. Water Right Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (1999).

2. COLO. REV. STAT. § 37-92-102(3) (1999).

3. *Id.*

program were assessed priorities "70 years junior to the senior rights on most rivers in settled areas," consistent with the prior appropriation principle of first in time, first in right.[4] The law allowed for the establishment of instream flows by accomplishing two important things: (1) recognizing that instream flows constituted a beneficial use of water; and (2) eliminating the diversion requirement for an appropriation of a water right.[5]

A number of water districts soon challenged the constitutionality of the instream flow program, as well as particular appropriations on the Crystal River.[6] They based their constitutional challenge on the provision in Colorado's constitution that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[7] The Colorado Supreme Court held that the use of the term "divert" did not require diversion as a prerequisite for an appropriation, but only negated the notion that Colorado would follow the riparian doctrine.[8] In short, the law survived the challenge, but soon underwent the first of several amendments intended to respond to fears that the program might outgrow the modest goals initially set in Senate Bill 97.

In 1981, the legislature added four new subsections[9] designed to address the fear that the instream flow program would interfere with development and consumptive use of water in the state. These amendments affected the CWCB's appropriations in many ways, including that the Board commenced appropriation of "separate winter and summer flow rates for its instream flow reaches and divided the reaches to be preserved . . . into shorter segments," results caused by a water availability finding required in one of the limitations.[10]

In 1986, the legislature authorized the CWCB to acquire water rights for the instream flow program "by grant, purchase, bequest, devise, lease, exchange or other contractual agreement . . . ."[11] The 1986 amendment also required the CWCB to request recommendations from the United States Departments of Agriculture and Interior prior to appropriating instream flows. The purpose of this was to give the federal government the option of participating in the state instream flow program instead of relying on acquisition of federal reserved water rights which were regarded as a far more intrusive means of protecting the environment.[12]

In 1987, the legislature amended the instream flow statute once again. This time it clarified that the CWCB is the only entity vested with the

4. Steven O. Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection Into a Prior Appropriation System*, *in* INSTREAM FLOW PROTECTION IN THE WEST 12-1, 12-2 (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

5. *Id.*

6. *See* Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570, 571 (Colo. 1979).

7. COLO. CONST. art. XVI, § 6.

8. *Colorado River Water Conservation Dist.*, 594 P.2d at 573.

9. COLO. REV. STAT. § 37-92-102(3)(a)-(d) (1999).

10. Sims, *supra* note 5, at 12-4.

11. COLO. REV. STAT. § 37-92-102(3) (1999).

12. *Id.*; *see also* Sims, *supra* note 5, at 12-4 to -5.

authority to appropriate instream flows.[13] The exclusivity language responded to several attempts by private parties to appropriate or assert instream flow rights, as described below in more detail.

In 1994, the legislature added a detailed provision to the Act which limited the authority of the CWCB to acquire conditional water rights or to change conditional water rights to instream inflow uses. The amendment limited the acquisition of conditional rights to water rights located in the Yampa Basin which the CWCB could use to recover a threatened or an endangered species as part of a species recovery program and to benefit the species in a way that an initial appropriation could not.[14]

Finally, in the wake of the *Aspen Wilderness Workshop* decision described below, the legislature once again amended the instream flow statute to specify the procedure by which the CWCB could decrease an instream flow.[15]

III. ESTABLISHING PRIVATELY–HELD INSTREAM FLOW RIGHTS

Citizen acquisition of instream flows began immediately after the Colorado legislature enacted the instream flow law. In 1975, a group of ranchers and citizens in Gunnison County appropriated flows in several mountain streams and obtained rights to significant instream flows for stock water, recreation, wildlife, fish, and heritage preservation in the Taylor River and in eight of its tributaries.[16]

In 1986, the City of Fort Collins applied for instream rights in the Poudre River through a reach in the city designated as the Poudre River Recreational Corridor. The CWCB objected on the ground that only the CWCB could appropriate such rights. The CWCB settled its objections with Fort Collins prior to trial on the condition that the city formally delete the claim of an instream flow use and designate specific, discrete points of diversion for the water rights claimed. Other objectors continued to oppose the "thinly disguised minimum stream flow" application.[17] The Colorado Supreme Court issued a ruling that confirmed the right of the City of Fort Collins to appropriate both of the rights that it originally sought.[18] The opinion distinguished the Fort Collins appropriation, which incidentally protected a stretch of river between two definite points of diversion, from the CWCB's instream flow right, which ordinarily signifies the complete absence of diversion structures.[19]

In 1992, the Colorado Supreme Court affirmed a water court decree to the Upper Gunnison River Water Conservancy District for a second fill of Taylor Park Reservoir for releases to produce fishery habitat, rafting flows,

13. *See* COLO. REV. STAT. § 37-92-102(3) (1999); *see also* Sims, *supra* note 5, at 12-5.
14. COLO. REV. STAT. § 37-92-102(3)(c.5)(I) to (III) (1999).
15. COLO. REV. STAT. § 37-92-102(4)(a) (1999).
16. Amended ruling of water referee, *In re* Application for Water Rights of R.I. Vader & Sons, Inc., No. W-1991 (Colo. Water Court, Div. No. 4, Jan. 21, 1975).
17. City of Thornton v. City of Fort Collins, 830 P.2d 915, 920-21 (Colo. 1992).
18. *Id.* at 933.
19. *Id.* at 931.

and supplemental irrigation supplies.[20] The CWCB opposed the application, but here, too, withdrew its opposition once the water district limited its application to use of previously stored waters for instream uses within a defined stream reach. The court based its affirmation of the water court on the fact that the water district controlled river water by storage and release to accomplish the designated beneficial uses, uses distinct from the CWCB instream flow right purposes.[21] Interestingly, the court affirmed the water district's right on the basis that it provided year-round protection to the fishery, while the CWCB right only protected fish for short periods of time.[22] In the eyes of a CWCB attorney, these cases:

> illustrate an alternative type of instream flow right recognized in Colorado. The alternative instream flow right is not equivalent to the CWCB's instream flow rights since it apparently cannot exist in the absence of diversion structures. Nonetheless, this right does allow parties to claim an instream use of water if the applicant can prove that previously diverted water is being used instream for a beneficial purpose.[23]

Because these decisions postdated the amendment of the instream flow statute giving the CWCB an "exclusive" right to appropriate, this alternative type of instream flow right apparently remains viable to this day.[24]

IV. ENFORCING THE STATE'S INSTREAM FLOW RIGHTS

While on its face the instream flow program was a near–revolutionary development in Colorado water law, the program soon received a variety of harsh criticisms from citizens' organizations, fishing groups, and environmental organizations. These groups criticized the program for appropriating very minimal rates of flow and for limiting the purposes of the appropriations to preserving cold water fisheries, while ignoring other instream uses such as rafting, maintaining riparian and wetland vegetation, aesthetics, and channel maintenance.

Organizations and individuals also scrutinized the CWCB for deciding not to enforce or to protect its instream flow rights in a number of instances. The CWCB's decisions to reduce or not to enforce its decreed instream flow rights gave rise to several instances of citizens' organizations taking

20. Board of County Comm'rs v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840, 847, 856 (Colo. 1992).

21. *Id.* at 854.

22. *Id.*

23. Sims, *supra* note 5, at 12-6.

24. In *Board of County Commissioners v. Collard*, the Colorado Supreme Court upheld the validity of a private instream flow right acquired prior to enactment of the statutory exclusivity language, turning back a collateral attack on the water court's subject matter jurisdiction to grant that water right without endorsing the court's reasoning. *Board of County Comm'rs v. Collard*, 827 P.2d 546, 549, 551-53 (Colo. 1992); *see generally* Christopher H. Meyer, *Instream Flows: Integrating New Uses and New Players Into the Prior Appropriation System*, INSTREAM FLOW PROTECTION IN THE WEST (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993); Lori Potter, *People Preserving Rivers: The Public and its Changing Role in Protecting Instream Flows*, INSTREAM FLOW PROTECTION IN THE WEST (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

enforcement action to the courts on their own.[25] These types of actions culminated in a direct challenge to the CWCB's authority to reduce an instream flow by failing to enforce the full effect of the right when a developer's plans to consume water would have reduced the CWCB's right below the decreed amount.

In *City of Aurora v. Division Engineer for Water Division Number 5*,[26] the Colorado Mountain Club and Holy Cross Wilderness Defense Fund opposed a change in the diversion points of conditional water rights for the Homestake II water project. The change would have moved the diversion points further upstream and deeper into a federal wilderness area. The stream reaches that the city's water rights would dewater were subject to decreed, junior instream flow rights held by the CWCB, but the CWCB did not oppose the change in point of diversion. The conservation groups argued that the CWCB's rights and the federal reserved water rights for the wilderness would be harmed by the diversions associated with the water project. The water court rejected the conservation groups' challenge for three reasons: (1) the CWCB withdrew its statement of opposition to the change; (2) the United States Forest Service did not oppose the change; and (3) the Forest Service had imposed bypass requirements on the affected reaches, and the CWCB retained lowered instream flow rights there.[27] The Colorado Supreme Court affirmed those aspects of the water court's holding but vacated an inconsistent ruling that the state instream flow rights be administered as senior to the changed points of diversion notwithstanding the findings just outlined.

The *City of Aurora* case squarely raised the question of citizens' standing to object to injury to the CWCB instream flow rights. The water court found that such standing existed, a finding not later appealed.

Likewise, a later case raising essentially the same issue received no definitive ruling by the Colorado Supreme Court.[28] In *Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership*, the court found that "[t]he issue of whether the appellants have standing to assert injury to the CWCB's instream flow rights is not before us and we do not address it."[29] The court noted that the extent to which the citizens argued injury to the decreed instream flow rights remained unclear, but reasoned that since the CWCB was itself a party to the proceedings, had satisfied itself that its interests were being protected, and did not oppose entry of the decree, the argument of injury asserted by the citizens was unpersuasive.[30]

The CWCB's policies for enforcement of its instream flow rights came under direct attack in *Aspen Wilderness Workshop, Inc. v. Colorado Water*

25. *See, e.g.*, Lori Potter, *The Public's Role in the Acquisition and Enforcement of Instream Flows*, 23 LAND & WATER L. REV. 419, 429-31 (1988).

26. City of Aurora v. Division Engineer for Water Div. No. 5, 799 P.2d 33 (Colo. 1990).

27. *Id.* at 36.

28. Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. Partnership, 929 P.2d 718, 726 n.15 (Colo. 1996).

29. *Id.*

30. *Id.* at 726.

Conservation Board.[31] In that case, the CWCB held decreed instream flows on Snowmass Creek of 12 c.f.s. year-round.[32] Faced with a proposal by the Aspen Ski Company to increase snowmaking diversions from Snowmass Creek in the winter, the CWCB examined the year-round 12 c.f.s. flow and determined that, among other things, the winter flow could be reduced in amounts sufficient to allow the snowmaking proposal to proceed.[33] The Aspen Wilderness Workshop filed suit against the CWCB in Denver District Court pursuant to the State Administrative Procedure Act, arguing that the "decision not to enforce the full instream flow appropriation . . . amounted to a permanent relinquishment of a public instream flow right."[34] The district court held that the CWCB had acted within its power to modify its appropriation. Further, the court held that like any other water right holder, the CWCB need not enforce its rights or use a portion of its decreed right in excess of the amount needed. Any such correction by the CWCB did not require water court adjudication.[35]

The Aspen Wilderness Workshop argued on appeal that the CWCB breached a fiduciary duty to the public by failing to enforce the right as decreed.[36] The Colorado Supreme Court agreed. The court found that the statutory provision authorizing the instream flow program limited the CWCB's authority in two important respects. First, it burdened the Board's actions by "creating a unique statutory fiduciary duty between the Board and the people of the state so that the Board may only appropriate the . . . minimum amount of water necessary to preserve the natural environment."[37] Second, once the CWCB adjudicated the minimum stream flow required to preserve the natural environment, it was required to fulfill its unique statutory responsibility to the public by administering its water rights accordingly.[38] If the CWCB determined that a previously adjudicated right needed change in order to maintain necessary stream flows, it could return to the water court to change the decree. But until and unless that determination and change had been made, the supreme court agreed that the CWCB's fiduciary duty to the public barred it from administratively relinquishing a portion of the instream flow decreed for the benefit of the public.[39]

The *Aspen Wilderness Workshop* decision precipitated the 1996 amendments to the instream flow law. The decision and the later statutory modification also caused a flurry of agency rule-making to establish procedures for appropriation, for modification of instream flows, and for

31. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).

32. *Id.* at 1260.

33. *Id.* at 1255.

34. *Id.*

35. *Id.* at 1256.

36. *Aspen Wilderness Workshop*, 901 P.2d at 1255.

37. *Id.* at 1256-57.

38. *Id.*

39. *See* Lori Potter, *Putting Some Teeth in Public Enforcement: The Colorado Supreme Court's Decision in the Snowmass Creek Case*, 17 U. DENV. WATER CT. RPTR. 1, 2 (1995-96).

addressing the related issue of when an instream flow could be modified by inundation.[40]

V. THE QUEST FOR A PUBLIC INTEREST REVIEW OF WATER RIGHT APPLICATIONS

Most western states' water codes require that the entity vested with power to review and grant water rights applications ensure the right will conform with the public interest or public welfare.[41] Such provisions allow denial of water right applications if approval runs contrary to the public interest.

Lacking such a public interest condition in the 1969 Act, a coalition of fishing, environmental, and citizens' groups attempted to establish one as a matter of common law as part of their challenge to a major trans-basin diversion from the Gunnison Basin to the Front Range.[42] While these objectors prevailed in arguing that the application should be denied as speculative, both the water court and the Colorado Supreme Court ruled that a water court is not required to consider the environmental factors such as effects on wildlife habitat, recreation, water quality, and property values in determining whether the applicant had proved that the water would be put to beneficial use.[43] The crux of the objectors' argument was that the trans-basin diversion, known as the Union Park project, would have widespread and adverse impacts on the fisheries, wildlife habitat, recreation, tax base, and general quality of life in the Gunnison Basin.[44] Both courts flatly rejected this objection, holding that "[t]he limited inquiry required to determine whether to issue a conditional rights decree in this case does not include evaluation of environmental factors."[45] The court specifically rejected arguments that the statutory definition of beneficial use encompassed the public policy of protecting the environment. Rather, it found that the statutory provision providing for instream flow protection through the CWCB program was the mechanism whereby the state could protect the interests of concerned citizen objectors.[46] In sum, the supreme court directed the objectors' concerns back to the legislature. The justices stated that:

> [w]e have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs. The degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate.

40. *See* 2 COLO. CODE REGS. § 408-2 (1998).

41. Lori Potter, *The Public's Role in the Acquisition and Enforcement of Instream Flows*, 23 LAND & WATER L. REV. 419, 432 (1988).

42. Board of County Comm'rs v. United States, 891 P.2d 952, 971 (Colo. 1995).

43. *Id.* at 973.

44. *Id.* at 971.

45. *Id.*

46. *Id.*

> Conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy. Arapahoe County offered evidence that it intended to divert water from municipal use; this use of water has always been deemed a beneficial use under Colorado law and has been given priority over other competing beneficial uses by the General Assembly. [The objectors] do not cite any authority that authorizes a water court to deny an application for a conditional decree because of environmental concerns, and we reject [their] invitation to create a complex system of common law to balance competing public interests.[47]

VI. THE TWO LITTLE WORDS THAT CAN'T BE SPOKEN

Many western hands have been wrung over the prospect that Colorado water rights would someday be argued to be subject to the doctrine of the public trust.[48] The dreaded day has not come to pass here, however. The plaintiffs in *Aspen Wilderness Workshop v. Colorado Water Conservation Board* were careful to base their challenge to the CWCB's inaction upon a statutory fiduciary duty and not a common law notion of the public trust.[49] Nonetheless, the dissent went out of its way to state that "[t]his court has never recognized the public trust doctrine with respect to water."[50] The dissent argued that "the concept of a public trust has no independent content .... Where the legislature has provided statutory directives for the management and protection of public resources, those statutory duties comprise all the responsibilities which defendants must faithfully discharge."[51] Thus, in the dissent's view, the CWCB's statutory responsibilities and its public trust obligations—if any—were coterminous.[52]

In defense of a charge of criminal trespass against boaters who rafted through private property, the public trust was advanced as the basis of a use right to float through the property and to touch the bed and banks of the river.[53] The Colorado Supreme Court made short work of the argument, concluding that the common law rule giving the riparian land owner title to the stream bed and banks was "of more force and effect"[54] than the public trust principle. Again, the court noted that the argument in essence sought a change in long-established judicial precedent and, therefore, needed to be

47. *Board of County Comm'rs*, 891 P.2d at 972-73.

48. *See generally* Harrison C. Dunning, *Instream Flows and the Public Trust*, INSTREAM FLOW PROTECTION IN THE WEST 4-1 (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

49. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251, 1255 (Colo. 1995).

50. *Id.* at 1263 (Mullarkey, J., dissenting).

51. *Id.* (quoting Sierra Club v. Block, 622 F. Supp. 842, 866 (D. Colo. 1985)) (internal quotation marks omitted).

52. *Id.*

53. People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).

54. *Id.*

taken to the legislature.[55]

VII. IMPORTING WATER QUALITY CONSIDERATIONS INTO WATER RIGHTS MATTERS

The Colorado Supreme Court addressed the relationship between water quality and appropriative rights in detail in *City of Thornton v. Bijou Irrigation Co.*,[56] where it held that the water court was explicitly required to consider water quality issues only in the case of an exchange whereby water was being actively substituted into the stream for the use of other appropriators.[57] An appropriator who alleges water quality impacts as a result of appropriative depletion, rather than substandard discharge or supply water, receives no relief under the present system.[58] The court stated that by requiring maintenance of sufficient volume in the stream to preserve the effluent limits of a downstream appropriator, a water court effectively would be creating a private instream flow right for waste dilution, which the instream flow statute did not allow.[59]

The extent and nature of water quality considerations which are relevant to diligence applications, exchanges, and applications to make conditional rights absolute are at issue in a case litigated in Water Division No. 1 in November, 1999.[60] Additional issues related to the water quality restrictions on exchanges were concurrently litigated in another case in Water Division No. 1.[61] The results of both cases will have important ramifications for the relationship between water quality and water rights in Colorado.

VIII. CONCLUSION

Presently in Colorado, it would seem, all avenues for environmental protection in water rights cases lead back to the same intersection: the explicit terms of the 1969 Act, and, in particular, its instream flow provision. Attempts to import common law concepts or other non-statutory innovations into water rights matters have generally hit a dead end. The cases make for interesting reading, but the story has a tendency to come out the same every time: environmental protection in water matters is what the legislature has said that it is, nothing more and nothing less.

55. *Id.*

56. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

57. *Id.* at 92.

58. *Id.*

59. *Id.* at 93.

60. Application for Finding of Reasonable Diligence and to Make Absolute a Conditional Water Right, *In re* Application for Water Rights of the City and County of Denver, No. 96-CW-145 (Colo. Water Court, Div. No. 1, June 28, 1996).

61. Motion by the City of Black Hawk to Consolidate for Trial All Water Quality Issues, *In re* Application for Water Rights of the City of Central, No. 92-CW-168, No. 92-CW-059, No. 94-CW-036 (Colo. Water Court, Div. No. 1, Apr. 17, 1998).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

COLORADO WILD, INCORPORATED,

Plaintiff,

v.

UNITED STATES FOREST SERVICE; and DANIEL GLICKMAN, in his official capacity as Secretary of Agriculture of the United States,.

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Colorado Wild, Incorporated brings this case to protect the Snake River, located in the White River National Forest near Dillon. While it runs through a beautiful mountain valley near the Arapahoe Basin and Keystone ski resorts, the Snake suffers from severe water pollution problems caused by past mining activities in the area. A variety of government and private efforts to clean up the Snake are underway. But the United States Forest Service recently undercut these cleanup efforts by approving a water diversion project that would further degrade the Snake. Colorado Wild brings this case to challenge the Forest Service's approval of that project.

The Forest Service has approved a plan that would allow the operator of the Arapahoe Basin Ski Area, Dundee Realty, Incorporated, to begin making artificial snow in quantities that

eventually would permit skiing 11 months per year. The novelty of year-round skiing, however, would come at a severe cost. By withdrawing large volumes of good quality water from a tributary of the Snake, Dundee Realty's snowmaking project would significantly worsen water pollution problems in the Snake. The United States Environmental Protection Agency ("EPA") has stated that by exacerbating its water quality problems, Dundee Realty would "frustrate and impair" efforts to clean up the Snake River.

As described below, the Forest Service's approval of this plan for summer skiing violates the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq., NFMA's implementing regulations, 36 C.F.R. Part 200 et seq., and the Clean Water Act, 33 U.S.C. § 1251 et seq.

PARTIES

1. Colorado Wild, Incorporated is a non-profit organization dedicated to protecting, restoring and maintaining the ecological integrity of Colorado's national forests. This goal includes limiting development of national forests to areas and to an intensity where fish habitat, water quality, and other natural resources are not damaged. Colorado Wild members hike and ski in the Snake River area near Arapahoe Basin. By degrading water quality and fish habitat, the proposed snowmaking project would injure Colorado Wild members who use this area.

2. Defendant United States Forest Service is the agency responsible for managing national forest lands, including the White River National Forest where Arapahoe Basin is located. The Forest Service has a duty to manage national forest lands in a manner consistent with federal law.

3. Defendant Daniel Glickman is the Secretary of the United States Department of Agriculture, and in that role is charged with managing national forest lands in a manner that is consistent with federal law. Secretary Glickman is sued in his official capacity only. Collectively, Defendants Glickman and the United States Forest Service are referred to herein as the "Forest Service."

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 2201-2202 (declaratory judgment action), 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. §§ 704, 706 (Administrative Procedure Act review).

5. Venue is appropriate in this judicial district and in this Court pursuant to 28 U.S.C. § 1391(b), because the events and omissions giving rise to these claims occurred in the District of Colorado.

FACTS

General

6. Arapahoe Basin operates on about 825 acres of the White River National Forest (the "White River") near Dillon, Colorado. Dundee Realty runs the ski area under a special use permit issued by the Forest Service in 1997. That permit expires in the year 2029. Arapahoe Basin's special use permit requires Dundee Realty to prepare a new Master Development Plan ("MDP") for the ski area. The MDP, which must be approved by the Forest Service, describes planned future development of Arapahoe Basin. Until recently, an MDP approved in 1982 governed the administration of Arapahoe Basin.

7. On November 10, 1999, the Forest Service approved a new MDP for Arapahoe Basin. Among other projects, the MDP authorizes Dundee Realty to install and operate a snowmaking system (the "snowmaking project"). To make snow, this system would withdraw large quantities of water from a stream adjacent to Arapahoe Basin, the North Fork of the Snake River (the "North Fork"). The North Fork flows into the main stem of the Snake River (the "Snake"). See map, attached as Exhibit 1.

8. The Snake is heavily contaminated by acid mine drainage from past mining activities in the area. Acid mine drainage is a form of pollution that occurs when rainwater runoff leaches toxic heavy metals from old mine sites and tailings piles. Acid mine drainage enters the Snake upstream of its confluence with the North Fork, and has contaminated the Snake with a variety of metals, including manganese, zinc, lead, copper and cadmium. As a result, the Snake violates applicable state water quality standards for these metals.

9. When the North Fork merges with the Snake, the North Fork's relatively clean water dilutes the acid mine drainage in the Snake. As a result, the North Fork's flow reduces the concentration of toxic metals in the Snake downstream from their confluence. While much of the Snake is too polluted to support aquatic life, some trout and other aquatic life are able to survive in the Snake below its confluence with the North Fork.

10. The Snake River's pollution problem has received a significant amount of attention and study from federal, state and local governments. For example, the Colorado Division of Minerals and Geology may attempt a demonstration project nearby that would prevent some of this mine drainage from polluting the Snake. In addition, a group of citizens, businesses and

government agencies, including EPA, the Forest Service, and the Northwest Colorado Council of Governments, has formed a task force to help clean up the Snake.

The Snowmaking System and its Impacts

11. By reducing the North Fork's flow, the snowmaking project will cause the concentration of toxic metals in the part of the Snake that currently contains fish and aquatic life to increase substantially. This increased concentration of pollutants will exacerbate the Snake's water quality problems.

12. EPA has stated that the snowmaking project will cause "a significant, measurable degradation of water quality in the Snake River that will frustrate and impair both private and taxpayer-funded efforts to reduce metals concentrations and restore the fishery on the Snake River." January 3, 2000 letter from Carol Campbell, United States Environmental Protection Agency to Martha Ketelle, United States Forest Service at 2, attached as Exhibit 2.

13. The snowmaking project would be completed in two phases. In Phase 1, the system would withdraw up to 25 percent of the North Fork's stream flow (about 90 acre feet of water annually), which would generate enough snow to permit skiing at Arapahoe Basin each year from October 1 until July 4. Phase 1 snowmaking withdrawals would cause metals concentrations in the Snake to increase by as much as 6.5 percent. The Forest Service, however, has not required Dundee Realty to undertake any specific mitigation measures that would prevent this water quality degradation. Dundee Realty has indicated that it plans to move forward with Phase 1 as soon as it obtains all required permits and approvals.

14. Under Phase 2 of the snowmaking project, Dundee Realty would build an additional water diversion system on the North Fork that would produce enough snow to permit skiing at Arapahoe Basin from early October through late August. Under Phase 2, the Forest Service

would allow Dundee Realty to withdraw as much as 349 acre feet of water per year from the North Fork. These withdrawals could increase Snake River metals concentrations by over 12 percent. While the Forest Service has required Dundee Realty to undertake several measures to protect water quality before implementing Phase 2, these measures are inadequate to protect the Snake. See Ex. 2 at 3 (EPA criticism of mitigation measures). Dundee Realty would implement Phase 2 as Arapahoe Basin's funding allowed.

15. The nearby Keystone ski area, which is located on the Snake River downstream from its confluence with the North Fork, is seeking approval from the United States Army Corps of Engineers to expand its own snowmaking operations. Under this expansion, Keystone would more than double the water it withdraws from the Snake for snowmaking. The combined withdrawals planned by Keystone and Arapahoe Basin would, at times, remove half of the Snake's water.

Procedural History

16. Before the Forest Service approved the MDP, Colorado Wild submitted comments pointing out that the snowmaking project would violate the Clean Water Act, the National Forest Management Act, and Forest Service regulations. When the Forest Service approved the MDP on November 10, 1999, Colorado Wild timely filed an administrative appeal of that decision under Part 215 of the Forest Service's regulations. 36 C.F.R. Part 215. On February 17, 2000, the Forest Service denied Colorado Wild's administrative appeal. Colorado Wild therefore has exhausted all available administrative remedies with regard to the claims asserted in this complaint.

LEGAL FRAMEWORK

Clean Water Act

A. Water Quality Standards

17. Congress passed the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a), 33 U.S.C. § 1251(a). To help achieve this goal, the CWA requires each state to establish water quality standards for its rivers, lakes and streams. 33 U.S.C. § 1313(a). Water quality standards define the state's goals for the quality of each waterbody. 40 C.F.R. §§ 130.0(b), 130.3. In establishing water quality standards for a waterbody, a state assigns a particular "use or uses to be made of the water," such as fish habitat, aquatic recreation, or drinking water supplies, and then sets numeric or narrative criteria that will protect those uses. 40 C.F.R. § 130.3.

18. The Snake River and the North Fork are classified for several uses, including cold water aquatic life (such as trout fisheries) and recreation (such as swimming and fishing). 5 C.C.R. § 1002-33, Stream Classification and Water Quality Standards Table, Region 12, Blue River Basin, Stream Segments 6, 8 ("Standards Table"); 5 C.C.R. §§ 1002-31.13(1)(a), 31.13(1)(c)(i). The State of Colorado has concluded that because of acid mine drainage, the Snake does not currently meet the applicable water quality standards to protect these classified uses.

B. Antidegradation Requirements

19. Colorado regulations implementing the CWA require that:

> "for all state surface waters existing classified uses and the level of water quality necessary to protect such uses shall be maintained and protected. No further water quality degradation is allowable which would interfere with or become injurious to these

uses. The classified uses shall be deemed protected if the narrative and numerical water quality standards are not exceeded."

5 C.C.R. §§ 1002-31.8(1)(c). These requirements are part of Colorado's antidegradation rule, which is a component of the state's water quality standards.

C. Clean Water Act Section 313

20. Section 313 of the CWA, 33 U.S.C. § 1323, requires that every agency of the federal government "(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting . . . in the discharge or runoff of pollutants, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . . ." 33 U.S.C. § 1323(a). Section 313 bars the Forest Service from authorizing an activity that would cause a violation of water quality standards, or exacerbate an existing water quality standard violation.

National Forest Management Act

21. NFMA requires that the Forest Service prepare long range land and resource management plans, often referred to as Forest Plans, to govern activities on each national forest. NFMA and its implementing regulations mandate that all "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the [Forest Plans]." 16 U.S.C. § 1604(i); see also 36 C.F.R. § 219.10(e) (similar requirement).

22. Forest Plans must protect streams and water quality on National Forests, see, e.g., 36 C.F.R. §§ 219.27(a)(1), (a)(4), and provide for compliance with the Clean Water Act. 36 C.F.R.

§ 219.23(d). The White River's current Forest Plan requires the Forest Service to:

> "[i]mprove or maintain water quality to meet State water quality standards . . . . Short-term or temporary failure to meet some parameters of the State standard, such as increased sediment from road crossing construction or water resource development may be permitted in special cases."

Land and Resource Management Plan - White River National Forest at III-45.[1]

23. Similarly, the Forest Service's regulations mandate that all special use permits allowing an activity on national forest land contain terms and conditions to require compliance with applicable state water quality standards. 36 C.F.R. § 251.56(a)(1)(i)(C). Once approved by the Forest Service, Arapahoe Basin's MDP became part of its special use permit.

FIRST CAUSE OF ACTION
VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT

24. The allegations contained in paragraphs 1-23 are incorporated by reference.

25. The Forest Service's approval of the MDP fails to require the improvement or maintenance of water quality in the Snake to meet Colorado water quality standards. See Standards Table; 5 C.C.R. §§ 1002-31.8(1)(c). In approving the MDP, the Forest Service did not indicate that the snowmaking project represents a "special case[ ]" that would justify a "[s]hort-term or temporary failure" to satisfy water quality standards. As a result, the MDP approval is inconsistent with the express requirements of the White River's Forest Plan and therefore violates NFMA and its implementing regulations. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

[1] The Forest Service currently is in the process of revising the White River's Forest Plan. See White River National Forest website, http://www.fs.fed.us/r2/whiteriver/planning.html.

26. The Forest Service's approval of the MDP also violates section 251.56(a)(1)(i)(C) of its regulations, because the MDP does not include provisions requiring the snowmaking project to comply with applicable state water quality standards. 36 C.F.R. § 251.56(a)(1)(i)(C).

SECOND CAUSE OF ACTION
VIOLATION OF CLEAN WATER ACT SECTION 313

27. The allegations contained in paragraphs 1-23 are incorporated by reference.

28. In approving the snowmaking project, the Forest Service failed to require that it comply with Colorado's water quality standards. See Standards Table; 5 C.C.R. §§ 1002-31.8(1)(c).

29. By authorizing an activity that would not comply with applicable water quality standards, the Forest Service has violated section 313 of the CWA. 33 U.S.C. § 1323.

REQUEST FOR RELIEF

WHEREFORE, Colorado Wild respectfully requests that this Court grant it the following relief:

(1) A declaration that the Forest Service's approval of the MDP violated NFMA, 16 U.S.C. § 1604(i), and sections 219.10(e) and 251.56(a)(1)(i)(C) of the Forest Service's regulations, 36 C.F.R. §§ 219.10(e), 251.56(a)(1)(i)(C);

(2) A declaration that the Forest Service's approval of the MDP violated section 313 of the CWA, 33 U.S.C. § 1323;

(3) A remand to the Forest Service of its decision to approve the MDP;

(4) An injunction barring the Forest Service from allowing construction or operation of any part of the snowmaking project until such time as the Forest Service complies with NFMA, its implementing regulations, and the CWA;

(5) A decision to retain jurisdiction over this case to ensure compliance with this Court's decree;

(6) An award to Colorado Wild of its attorney fees and costs incurred in pursuing this action; and

(7) Such other relief as this Court deems proper.

Dated this ____ day of April, 2000.

Respectfully submitted,

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