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Citation Information

Hawes, Taylor, "Emerging Demands in the Colorado Headwaters" (2000). *Water and Growth in the West (Summer Conference, June 7-9)*.

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Taylor Hawes, *Emerging Demands in the Colorado Headwaters*, in *WATER AND GROWTH IN THE WEST* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2000).

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EMERGING DEMANDS IN THE COLORADO HEADWATERS

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Water and Growth in the West

June 6-9, 2000

NATURAL RESOURCES LAW CENTER CONFERENCE
University of Colorado
School of Law
Boulder, Colorado

Emerging Demands in the Colorado Headwaters

By Taylor Hawes, Esq.

- I. "GROWING" WATER DEMANDS IN THE HEADWATER COUNTIES OF THE COLORADO RIVER
 - A. "Emerging" is not really the appropriate term. The headwaters region is experiencing "growing" demands. These demands are not new and they have always included beneficial uses that go beyond drinking water supply and traditional consumptive uses.
 - B. In addition to supplying domestic water supplies and irrigation water for Front Range users, demands in the headwaters include domestic supply for West Slope users, agricultural use, recreational use, and adequate stream flows for wastewater dischargers.
 - C. Population growth is occurring in the headwaters for the same reasons the Front Range is burgeoning. People want to be close to water-based recreational opportunities and amenities that make Colorado attractive.
 - i. Fishing
 - ii. Rafting
 - iii. Kayaking
 - iv. Flat water boating
 - v. Hiking/camping by running streams
 - vi. Skiing
 - vii. Irrigated golf courses
 - D. There are two different ways to categorize headwater demands: headwater communities' needs and demands on headwater water resources,

generally. The latter one encompasses Front Range use of West Slope water resources, whether in the basin or out of the basin. These two types of demands are inextricably tied together. For example, is “tourism” (i.e. people from the Front Range visiting headwater counties) a headwaters’ demand or a Front Range demand? The line is not clear. Front Range and headwater demands are inseparable and will only become more tied together as Front Range water providers maximize use of their West Slope infrastructure and more people move to the Front Range, wanting to take advantage of the headwaters’ recreational opportunities. The big “straws” to the Front Range are located close to the Continental Divide in the headwater counties (Grand, Summit, Eagle, Pitkin) and yet these places are also growing, *in large part because they are close to the Front Range*. Headwater communities need to be able to provide for peak demands associated with their own residents and people coming to play on the West Slope, desiring water in the streams, reservoirs and on the ski slopes to recreate. Examples of growth and water related demands occurring in the headwaters include:

- i. Almost every wastewater treatment plant in Summit and Grand counties has either just finished an expansion, is currently expanding, or is in the planning stage of an expansion to accommodate current and expected population growth and peak demands during the “high” tourist season.
- ii. Almost all ski areas are expanding their snowmaking systems, as well as terrain, or developing a snowmaking system for the first time.
- iii. Some in-basin water users may not be able to fully use their water rights in the headwaters due to heavy metals pollution from abandoned mine sites. As more water is diverted from the

headwaters to the Front Range, the less water is in the headwater streams. This exacerbates the effect of acid mine drainage from abandoned mines, resulting in increased concentrations of naturally occurring, man-exasperated heavy metals.

The Water Quality Control Commission (“WQCC”) sets water quality standards for all streams throughout the State and the Basic Standards and Methodologies specifically state that “[a]ll classified uses will be protected.” 5 C.C.R. § 1002-31.3. Environmentalists and others argue that users diverting from water quality impaired streams (i.e., 303(d) listed streams) should not be able to degrade the waters any further below stream standards set by the WQCC.

Diversions will incrementally increase heavy metals concentrations in the stream. Junior diversions, in conjunction with existing conditions, could degrade water quality to a point where the stream can no longer support its classified uses, such as aquatic life or drinking water. If the diverter needs any kind of federal permit, the Colorado Water Quality Control Division (“WQCD”) is required to certify that the construction and operation of the project will not violate water quality standards. The courts have upheld the right of a state water quality control board to ensure that both construction and operations of the project will not violate water quality standards. In PUD No.1 v. Wash. Dept. of Ecology, 511 U.S. 700 (1994), the Supreme Court confirmed that the “text [of Section 401 of the Clean Water Act] refers to the compliance of the applicant, not the discharge. Section 401 therefore allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act.” Id. at 711. This gives the State a mechanism to ensure that a project will not impair water quality or violate the Clean Water

Act. This authority could allow the State to limit the amount of a diversion or require mitigation to ensure compliance with the Act. However, the State is reluctant to use this authority which puts greater pressure on the headwaters to find alternative solutions. Therefore, as growth occurs on both sides of the Divide and demand increases for out of stream uses, water quality may become a limitation to use.

iv. Storage reservoirs built by Front Range entities on the West Slope are becoming major recreational amenities. As the Front Range entities fluctuate reservoir levels to meet their demands, it will become more difficult for West Slope business owners to meet tourists' desires, impacting established marinas and other businesses.

E. Therefore, the needs and demands in the headwaters are not "new," they are merely expanding. The demands are increasing as a result of the entire State growing. When the Front Range grows, the rest of the State feels the impacts too, especially in the headwaters as the region tries to meet recreational demands and the Front Range needs more water to supply its thirsty new residents.

II. ON A STATE LEVEL, PERCEPTIONS ABOUT WATER RESOURCES ARE BASED ON A LACK OF EDUCATION AND DIFFERING VALUES.

A. There is a common misperception that Colorado's share of its water entitlement under the Colorado Compact with the States along the Colorado River is flowing downstream to California – wasted. When described in those terms, Front Range municipal policymakers mistakenly believe that thousands of acre-feet of water are available for diversion to the Front Range. There are two points here that are very important. First,

the Compact itself was created to recognize that Colorado would need less water than California, so it carved out a certain portion of the water for use in Colorado in contrast to the typical “use it or lose it” water law principle. If states did not have to honor federal water compacts, the State of Colorado would not be paying damages to the State of Kansas. Second, the water is not “wasted.” Colorado water users use it for many instream and out-of-stream purposes along the way.

- B. However, the headwaters, as well as the rest of the West Slope, need drinking water supply and agricultural supply too as well as water in the stream for recreation (rafting & kayaking), flat water boating, protection for fisheries, water for wastewater discharge plants and water for snowmaking. Water is necessary for a healthy economy in the headwater communities.

- D. Ironically, the more the Front Range grows, the more water the Front Range diverts from the headwaters, while at the same time Front Range people demand that there be water available for recreational uses or second homes in the headwater communities.

- E. There is also often a “disconnect” between land use decisions approving more growth and obtaining water supply for that growth. The “disconnect” is between land use planning/policymaking on the one hand, and water planning/policymaking on the other. Once growth is approved, the municipal utilities go out and find more water or they find water for expected growth. Because of gravity and existing infrastructure, transmountain diversion water is sometimes the cheapest available water. Decisions to approve growth are based on whether water is available, not impacts to other communities and to the basins of origin (example: Owens Valley in California) that might be associated with the diversion of that water.

For example, some Front Range water providers introduced legislation this year in the Colorado Legislature that would have mandated that 120,000 acre feet of water be delivered to the Front Range from the headwater basins. The bill, SB 00-215, sends the message to the West Slope that their needs are subservient to the Front Range's demands. Even though the bill would have required compensatory storage for West Slope's use, it did not consider impacts to the communities in those basins caused by such a large transmountain diversion. This kind of bill only fuels mistrust between the West Slope and Front Range. Instead, we should be looking for cooperative, mutually beneficial solutions.

- F. Policymakers need to strike a balance between West Slope demands and Front Range demands. People are flocking to Colorado to be close to the mountains and recreational opportunities there. Policymakers need to ensure that do we do not "foul our own nest" – spoiling the things that make Colorado an attractive place to live. No one has told people moving here that they must choose between having a bluegrass lawn and water in the mountain streams. Eventually, it will be a choice and policymakers should not presuppose the answer. Citizens' initiatives have become a popular tool. We must all look at the bigger picture to ensure that one part of the State is not sacrificed for another. Colorado is thriving because of the variety of opportunities it offers. We need to find a way to protect and therefore balance all those opportunities.

III. THE UPPER COLORADO RIVER PROJECT ("UPCO")

- A. UPCO is a cooperative planning effort that recognizes the legitimacy of clean water in the streams and lakes, recreational economies in the mountains, water supply needs and growing ski area demands.

solutions may include, but are not limited to, changes in operations, small storage projects, and mitigation for marinas or fish habitat.

- E. The study part of the project is underway now. We expect it to be completed by the beginning of 2001. The solutions phase, which will include as many stakeholders as possible, will begin in 2001.

- F. However, not all Front Range municipal water providers understand the impact they have on the headwater counties. Additionally, as the Front Range grows, and that growth is not checked, the West Slope will be forced to carry more of the burden. These impacts will only increase, damaging headwater recreational opportunities and the environment.

- G. As the State considers whether or not to do water planning, UPCO should be the model for the following reasons:
 - i. It balances competing demands to benefit the State as a whole.
 - ii. It avoids the typical confrontational/litigious approach and instead encourages a true problem solving approach.
 - iii. It brings the entities that can actually effect change to the table.
 - iv. It encourages varied perspectives and “buy-in” from the local communities.
 - v. It builds trust and understanding between the Front Range and the West Slope (or any basin of origin and a basin of need).