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Water's Planning Division discussed watershed management and wildfire impacts. Kennedy said that over the past century or so, authorities have not properly managed Colorado's forests due to the low value of Colorado timber, leading to adverse impacts on Colorado water sources.

For example, Kennedy stated that this situation contributed to the larger and more frequent wildfires that Colorado has experienced in recent years. Kennedy highlighted the 1996 Buffalo Creek fire that consumed nearly 12,000 acres in about four and a half hours. Two months after the fire, a two-inch rainstorm created massive problems for Denver Water. The rainwater carried a large load of sediment with debris that included charred trees, propane tanks, heavy metals from burnt trees, and dissolved oxygen into the Strontia Springs Reservoir. Denver Water paid more than thirty million dollars to dredge the reservoir. This attempt to make the water potable failed, however, because it failed to remedy the water's high manganese content. Kennedy offered several mitigation techniques that, if used as preventative measures, would have been drastically cheaper and more effective than dredging the reservoir. The potential mitigation techniques ranged from straw bale check dams and contour felling of trees, to salvage logging and hydro-axing of trees to prevent sediment from getting into reservoirs.

The panel then addressed questions from the audience, one of which was, "how is Denver Water paying for its watershed ecosystem services program?" Don Kennedy explained that Denver Water does not include line item fees on bills to customers; instead it incorporates the cost of the program into rates. He added that grants from the federal government and other partnership opportunities have helped to reduce the program's cost for customers.

The RMLUI's 2014 conference was a success due to informative panels like this one. Each panel focused on timely and pressing issues while providing innovative approaches to consider for the future.

Emily Dowd

CELEBRATING 40 YEARS OF SUCCESS AND CHALLENGES FOR COLORADO'S INSTREAM FLOW PROGRAM

Denver, Colorado January 15, 2014

*"O, dear daughter, be not discomforted!
They can attempt to possess your beauty
Beyond measure, without sufficient ends
And looking glasses, frenzy, berserk, de-
Hydrate marvels they have engineered in
Fact, conveyance, deed, statute, law, decree,
Cannot substitute for the Natural Stream
Of your loving boundless intimacy."*

-Excerpt from "Mother to Daughter," written and read by Justice Gregory J. Hobbs, Jr. in celebration of the fortieth year of Colorado's instream flow law January 15, 2014.

Roughly 200 western water policy enthusiasts gathered in the Colorado Supreme Court's Courtroom on January 15, 2014 to celebrate the 40th anniversary of the state's Instream Flow ("ISF") Program and discuss the program's role in the future. Twenty-four entities generously hosted the cordial event including the Rocky Mountain Land Use Institute, the Colorado Water Congress, the Nature Conservancy, the University of Denver's Water Law Review, and the law firm Kaplan, Kirsh, & Rockwell just to name a few. Several of the attendees were *Water Law Review* former staff, Board members, and contributors.

ISF PROGRAM BACKGROUND

In 1973, the Colorado legislature integrated instream flow water rights by entrusting the Colorado Water Conservation Board ("CWCB") with the state's appropriation authority to preserve the natural environment to a reasonable degree. ISF water rights are non-consumptive and in-channel or in-lake uses of water that the CWCB holds to ensure minimum flows on certain reaches of streams and rivers and in lakes. The CWCB consults with hydrologists, engineers, natural resource scientists, and geomorphologists, among others, to make factual determinations about which lakes and stretches of stream to preserve and improve to a reasonable degree. The ISF Program helps the state protect diverse ecosystems ranging from coldwater fisheries and waterfowl habitat to glacial ponds.

A series of lawsuits challenged the CWCB's authority to appropriate water without diverting it from streams. Several water users claimed that in Colorado, the right to use water requires a physical diversion in addition to the claimant showing the water will be put to a beneficial use. Over time, the Colorado Supreme Court clarified that ISF appropriation by the CWCB is a legal means of ensuring minimum stream flow to preserve the natural environment to a reasonable degree, the CWCB's ISF water rights are subject to temporal priority under the prior appropriation doctrine and newly appropriated ISF rights are typically junior, and that the CWCB has a fiduciary duty to enforce the use right in the name of the people of Colorado.

Colorado's 1986 legislature recognized the value of marketable water rights for instream flow by allowing the CWCB to accept donations and purchase senior vested water rights. "The board also may acquire, by grant, donation, bequest, devise, lease, exchange, or other contractual agreement. . . water, water rights, or interests in water. . . The board may use any funds available to it for acquisition of water rights and their conversion to instream flow rights." In this state, the right holder vests water rights through *beneficial use* of the water. The 1986 statute permitted the CWCB to convert the beneficial use from the original right holder's use (e.g., agricultural use, irrigation) to the CWCB's use of preserving or improving the environment to a reasonable degree and maintaining minimum stream flows and lake levels.

Since 1973, the CWCB has appropriated over 9,000 miles of stream and roughly 480 natural lakes and acquired over twenty-five water right donations or long-term contracts for water totaling 500 cubic feet per second. That means that by 2014 the CWCB appropriated either junior or senior rights on nearly

one third of the state's perennial streams for preserving and improving the natural environment to a reasonable degree.

THE ISF PROGRAM'S 40TH ANNIVERSARY CELEBRATION

Colorado Supreme Court Justice Gregory J. Hobbs Jr. welcomed attendees at the ISF Program's fortieth anniversary celebration with his keynote historical overview of the state's water laws. For twenty-three years before joining this state's highest court, Justice Hobbs practiced environmental, land use, and water law. Since 1996, Justice Hobbs served the people of Colorado on our Supreme Court and plans to retire in 2016. Justice Hobbs read his fortieth anniversary ISF Program poem, "Mother to Daughter." Hobbs spoke enthusiastically about how the advocacy that led to instream flow rights demonstrates our community's common bond: a deep value in Colorado's rivers, streams, and lakes. He stressed that Coloradans put their hearts, minds, and passions into the water policy shift that the ISF Program embodies. Hobbs submitted that the ISF Program "is a landmark of the integration of the values of the flow into a prior appropriation water law system."

Justice Hobbs explained that the ISF Program came about following an intense pro-development era and represents the paradigm shift of the 1970's, when many people simply wanted to protect what was left of the natural world. During this period the United States legislature enacted the Clean Water Act, the Clean Air Act, the Endangered Species Act, and the Federal Land Policy and Management Act, along with other significant environmental legislation.

According to Justice Hobbs, the central challenge of the ISF right in Colorado was determining whether the state's water laws allow a use-right without diversion. He explained that the 1975 Colorado Supreme Court gave deference to the legislature by upholding the ISF law because the CWCB's water right is junior to the senior right holders and does not cause injury to prior water rights. Today, the ISF Program enables the CWCB to protect waterways and improve water quality. Justice Hobbs concluded his introductory remarks by characterizing the ISF Program as "work well-done and work well to be done!"

A RETROSPECTIVE ON THE ISF PROGRAM AT 40

Linda Bassi discussed the ISF Program's accomplishments and moderated the first panel of speakers, which included Patti Wells and Eric Kuhn. After working for the CWCB for a decade, Bassi is now the CWCB's Stream and Lake Protection Section Chief. She has extensive experience with the ISF Program both from her work at the CWCB and in the Attorney General's office representing the Division of Water Resources and the CWCB.

Bassi explained the ISF Program has a multifaceted role in the water community. The program involves the CWCB's (i) coordination with federal agencies to address federal resource protection goals through state-held water rights, (ii) partnerships with water suppliers to enable water projects to move forward while protecting the natural environment, and (iii) collaboration with Colorado Parks and Wildlife and conservation groups to protect and improve

Colorado's rivers, streams, and lakes. Bassi's presentation included photos of stunning landscapes and waterways throughout Colorado that the ISF Program empowered the state to protect through appropriations, acquisition agreements, and donations. Boulder Creek, the Colorado River, Dead Horse Creek, and Hanging Lake are just a few of the watercourses benefiting from the ISF Program. Bassi noted that Governor Hickenlooper's executive order compelling the CWCB to create Colorado's first Water Plan ("CWP") directs the CWCB to foster "a strong environment that includes a healthy watershed, rivers and streams, and wildlife."

Patti Wells discussed the ISF Program's elements that make it work and allow it to endure today. Wells serves as the Denver Water Board's ("DWB") General Counsel as she has since 1991. She also represents the City and County of Denver as a CWCB board member. Wells is a former board member of the Water Quality Control Commission and the Colorado Water Trust. Mayor Peña appointed Wells as Denver's first female City Attorney.

According to Patti Wells, the ISF Program's two essential elements are its "requirement for balance and the involvement of the public." To demonstrate the balance element, Wells quoted the statute's directive for the CWCB "to correlate human activity with reasonable preservation of the natural environment" and mentioned that over time this phrasing turned out to be brilliant. Wells maintains that the CWCB tends not to engage in extremist, absolutist discussions because the wording of the statute guides the CWCB to consider what is necessary to a reasonable degree.

Wells emphasized the ISF Program's public notice and comment process while comparing the administrative agency setting to litigation. Wells suggested that much of the program's flexibility is because the CWCB makes decisions in a boardroom with public input instead of in a courtroom. The fact that the CWCB's determinations are reviewed under the Administrative Procedure Act is especially significant to Wells because it means that courts usually defer to the CWCB's findings. In addition, when experts appear in front of the CWCB they do not duel each other as they might in a judicial proceeding.

Another strength of the ISF Program, according to Wells, is that the CWCB must have a natural landscape that requires protection in order to acquire rights unlike the federal government's methods of water right acquisition. She used the example of Hanging Lake to illustrate part of the CWCB's decision-making with regards to water rights acquisition. The Board hiked to Hanging Lake and after seeing "the mist in which the Columbine grows" determined that the landscape needed all unappropriated water there to protect that particular environment to a reasonable degree. Wells considers the ISF Program to function well because it is a robust form of state-based environmental protection that enables Colorado to protect itself from the "heavy hand of the federal government." Wells concluded by commending the ISF Program for its contemplation of all water uses, inherent flexibility, and great results.

Eric Kuhn followed Patti Wells in the first panel of speakers. He is the General Manager of the Colorado River Water Conservation District, (the "River District"), a former board member of the CWCB representing the Colorado River Basin, and an at-large Inter-Basin Compact Commission ("IBCC") representative. Working for the River District since 1981, Kuhn

possesses a deep understanding of the work it does in this state. The River District's charter from 1937 empowers it to "preserve and conserve for Colorado, its Colorado River Compact entitlement."

Kuhn outlined the River District's "evolution" in relation to the ISF Program, explaining that it originally opposed the program, then supported the program, then opposed the program again. Today the River District works to improve the ISF Program. A future challenge Kuhn detects for the ISF Program relates to how the state should deal with recreational activities. He clarified that providing water for recreation is outside the scope of the CWCB's charge to protect the environment to a reasonable degree but he perceives it as a looming dilemma that requires a broader discussion.

A FORECAST FOR THE ISF PROGRAM: ITS CHALLENGES FOR THE FUTURE

Melinda Kassen, the Principal of WaterJamin Legal and Policy Consulting Services and member of the IBCC, moderated the second panel, which included James Eklund, Drew Peternell, and Amy Beatie. Kassen posed several introductory questions to the panel such as "what new types of water rights could the state create;" "how far should the ISF Program go;" "should we be protecting shoulder flows;" "should we be protecting more than just cold-water fisheries;" "should we be protecting peak flows;" "what else can the state do to protect current flows while looking at warmer, drier times;" "who should be allowed to hold these flows—should it always remain exclusively in the hands of the CWCB;" and "how should the state evolve the program to make it stronger and more meaningful?"

James Eklund, the CWCB's executive director, said, "people think of Colorado water law as a slow, lumbering beast with little ability to change—but if you step back and squint your eyes a little bit, or maybe a lot, you could get the impression that we actually have the capacity to innovate when the conditions demand it in this state." Eklund submitted that the ISF Program is part of Colorado's tradition of innovation in water law and policy and asserted that the CWCB's Water Plan is the next step.

To Eklund, the Colorado Water Plan represents "shaping the future of Colorado with intention." He warned that without a comprehensive state water plan, we run the risk of chaotic consumption of our most valuable resource in a divided and inefficient way that fails to provide certainty to water users—consumptive and non-consumptive alike. Eklund urged that the Water Plan is crucial for maintaining state ownership and control over our waterways and the habitat the waters provide. He posited that if Colorado wants to maintain control over its water, then it requires "a way to preserve, improve, and enhance—to a reasonable degree—our ISF Program." Eklund said that the CWCB is in the business of learning more about Colorado's rivers, streams, and lakes. He believes the future of the ISF Program involves a deeper scientific understanding of the state's water resources that will hopefully lead to an informed and engaged public with access to good facts about water.

Drew Peternell, the Director of Trout Unlimited's ("TU") Colorado Water Project, followed James Eklund. TU is a national, nonprofit fisheries

organization. TU's Water Project mission is to maintain and restore Colorado's rivers and creeks in order to sustain healthy coldwater fisheries. Peternell argued that the future of the ISF Program would increasingly involve the acquisition of senior water rights in order to put water back into depleted streams. Additionally, Peternell urged that the CWCB must address concerns from irrigators since they own the majority of the senior water rights. Peternell understands irrigators' interests because his organization regularly partners with them on projects that mutually benefit agricultural operations and coldwater fisheries. He believes that the state needs to do more to make the ISF Program attractive to irrigators. Irrigators hesitate to participate in the program because they must transfer their beneficial water use to the CWCB. The process leading to the CWCB's acquisition of senior water rights for restoring streams is too difficult, costly, and risky for many irrigators, according to Peternell.

Peternell discussed pending legislation proposed by Senator Gail Schwartz and endorsed it as a way to make the ISF Program attractive to irrigators. Senate Bill 23 would allow irrigators who make water efficiency improvements to transfer the right to the water saved by the efficiency improvement to the CWCB for instream flow use. Otherwise, little incentive exists for irrigators to implement water efficiency measures in Colorado's prior appropriation system. This would open a new category of water for ISF use to the CWCB. This bill would also incent organizations like TU to finance repairs of irrigators' aging irrigation infrastructure and allow irrigators to modernize their diversion structures more easily, which would ultimately keep more water in the streams. Peternell's emphasis on making it simpler, less expensive, and less risky for senior water rights holders to transfer their water rights to the CWCB for IFS use seems well placed.

Amy Beatie, the Executive Director Colorado Water Trust ("CWT"), left attendees with a sense of urgency to protect Colorado's waterways. As a University of Denver Water Law Review founder and current Advisory Board member, former law clerk for Justice Hobbs, and member of the Colorado Water Congress's Board of Directors, Beatie ardently spreads her passion for water law and policy. Beatie pointed out that the CWT does not have an advocacy or policy agenda. The CWT mainly participates in projects focused on restoring streams in times of drought. Beatie said that even though the CWT does not do policy, its people can still dream about what they want Colorado's rivers to look like. Amy Beatie emphasized the "obvious, yet understated power of people." She asked the audience questions about what could be accomplished if every person in the room spent five hours thinking of ways to make the program better and acting upon their ideas. Beatie stressed the power of innovation. Beatie compelled the audience to imagine what the success of the ISF Program looks like and what they could do to make the program better. Beatie then pressed the audience to "stop imagining and let's go out the door and start doing!"

AUDIENCE QUESTIONS & CONCLUSION

Both panels fielded questions related to instream recreational water use and recreational in-channel diversions ("RICD"s). Patti Wells expressed concern

about the prospect of legally requiring water providers to deliver recreational flows and said, "I am not sure that those flows are the responsibility of the state to provide." Drew Peternell mentioned the RICD Program and suggested the state should protect recreational values in rivers that do not currently have RICD protection with a water right or protective measure that goes beyond RICD's. Amy Beatie believes adequate protections for recreational flows are in place because the Colorado Supreme Court acknowledged recreational use as a beneficial use. Beatie posited to the extent that recreational flows are "important to communities, they may be appropriated just like any other water right for a beneficial use." Justice Hobbs opined on the matter of recreational flows stating, "we should be optimistic." Hobbs does not believe Colorado needs to amend its constitution to address issues arising from recreational flows because he trusts the minds of the next generation to create new policies that serve all water users.

Some themes emerged throughout the afternoon of speakers as they discussed the ISF Program in the context of Colorado water law. Speakers stressed the ISF Program's balance and flexibility as its strong points and highlighted Colorado's role in water rights innovation. The concern about recreational flows and the RICD Program demonstrates the next horizon of innovation for instream water rights. Hobbs', Eklund's, and Beatie's optimism and enthusiasm for the future of water law and policy in Colorado left many attendees with a smile as they trickled downstairs for the reception.

Emily Dowd

COLORADO WATER CONGRESS ANNUAL CONFERENCE 2014: OUR WATER PLATFORM

INVESTING IN PUBLIC WATER EDUCATION

Denver, Colorado January 29-31, 2014

The Colorado Water Congress held its annual convention at the end of January at the Hyatt Regency Denver. On the last morning of the convention, Nicole Seltzer, the Executive Director of the Colorado Foundation for Water Education, moderated a four panel discussion titled "Platform Plank V: Investing in Public Water Education." The discussion focused on effective ways to engage citizens in the water permitting process. Seltzer explained the importance of educating the public to help make them a partner in problem solving. The panelist included Rick McCloud, the Water Resources Manager of the Centennial Water and Sanitation District; David Nickum, the Executive Director of Colorado Trout Unlimited; Brian Werner, the Public Information Officer of Northern Water; and Lurline Curran, County Manager of Grand County. The four panelists represented a range of perspectives and commented on effective ways to facilitate public input. They each commented on the purpose of public involvement, the issues associated with public communication, and suggested ways to make public communication in the permitting process more effective.