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Ethics in the Practice of Water Law

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Ethics in the Practice of Water Law

Advocates collaborated with Trout Unlimited and the Colorado Environmental Coalition to release a report called: *Filling the Gap*. This report talks about the current water supply, the growing demand, and how Colorado can meet those future needs. The report discusses their ideas on how to fill the gap. They believe in keeping the waters in the streams because of all the benefits the state receives from the water. Using SWSI 2010, they focused on the Front Range counties of the South Platte Basin, which contains the majority of the population in Colorado.. Given a medium population growth scenario, there will be, by 2050, an increase in demand of about 365 thousand-acre-feet of water. The report talks about how to fill this gap and provides about 200,000 acre-feet in excess of demand needs. Although many people believe that additional trans basin diversions are the answer to future water needs, this report shows that water conservation is an answer as well.

There are many tools for water suppliers to conserve, including rates, rebates, retrofits, and land-use planning. Moreover, public norms are an interesting area for water conservation. Energy providers have successfully done this through bills that show how much a customer is using compared to surrounding neighbors. If Colorado can change the social norms regarding water use, there is significant potential for accelerating water conservation.

Beckwith concluded by stating that water conservation could help meet future water needs in Colorado. There are multiple examples of states in similar situations that have had success through conservation. There will be similar success in Colorado, as the state implements programs that focus on continuing water conservation.

Collin Zundel

ETHICS IN THE PRACTICE OF WATER LAW

John J. Cyran, First Assistant Attorney General for the Water Rights Unit at the Colorado Office of the Attorney General, presented on ethical issues pertaining to legal conflicts between past, current, and future clients in the practice of water law in Colorado.

But first, John Cyran talked about balloons. Cyran analogized river systems in Colorado to a pressure-filled balloon: a squeeze on one end will inevitably affect the pressure on the other end. Cyran used this analogy to show that a water user's application for, or change to a water right affects other users in a water system. For example, in a situation where a lawyer's current client, Client A, owns water rights on River 1, the lawyer may encounter a conflict in representing future Client B on River 1, or even River 2, in a change application if the water systems are at all connected.

Throughout his presentation, Cyran referred to CBA Ethics Opinion 58: Water Rights, Representation of Multiple Clients. According to Rules of Professional Conduct 1.7(a), a conflict of

interest exists if (i) the representation of one client will be directly adverse to another client; or (ii) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or third person. Cyran, in discussing the CBA Ethics Opinion, focused on the language "directly adverse" and whether the lawyer's representation "may be materially limited" by representation of two water users. Cyran explained that this question must be answered on a case-by-case basis according to whether the water right will actually be impaired.

At one point, Cyran presented the following scenario: counsel has a current Client A with water rights on one river, and potential Client B seeks junior water rights on another river. However, a stream connects the two water supplies, and there is a senior User C upriver that is calling water from both rivers via the connected stream. Using the balloon analogy, Cyran indicated that advising Potential Client B could result in water use that affects the water rights of current Client A because squeezing the balloon on potential Client B's end will affect current Client A. This situation could constitute a conflict under 1.7(a) because the representation of potential Client B could materially limit the lawyer's responsibilities to current Client A.

Particularly where change cases affect entire divisions (such as transmountain augmentation plans), the situation becomes even more complicated. If a potential Client B, a junior water rights holder, wants to apply for an augmentation plan on the same stream as current Client A, the lawyer must be concerned with the chance that the augmentation plan will be executed improperly, effectively injuring Client A.

Cyran then expanded his geographical range. Because Colorado is the "Most Compact State" in America (Colorado has entered into seven different compacts, or agreements, with surrounding states that limit water use in order to promote conservation; these agreements have been codified into state law), removing large amounts of water from, for example, the Colorado River also has ethical implications as it pertains to out-of-state water users. Because under its many compacts Colorado has agreed to draw a limited amount of water from the Colorado River, increased water use from Colorado water users could affect the amount of water available to Colorado users in the future.

Cyran explained that, while there are many ethical pitfalls for water lawyers when it comes to representing multiple water users, there is hope. According to the CBA Ethics Opinion, Cyran noted that 1.7(b) allows a lawyer to get informed consent from his or her client if the lawyer believes he or she can still provide diligent representation. Cyran made clear that when obtaining consent from potentially conflicting clients, "informed" is the critical word. The client must understand what he or she is consenting to, particularly where the water right is located on the same or connected stream as the new rights applicant or change applicant.

When a lawyer considers whether to take on a new client whose

water use may affect an existing client, the lawyer must engage in a fact-specific inquiry. This inquiry must consider all circumstances: connections on the stream, what the potential client is retaining the lawyer's services for, and what impact such actions might have on current clients. After doing so, if the lawyer feels that he or she cannot provide diligent representation with informed consent, or that taking on potential Client B will be directly adverse to Current Client A, the lawyer must decline representation.

Chelsea L. Huffman

AN UPDATE ON THE COLORADO WATER CONGRESS AND CURRENT WATER LEGISLATION

Doug Kemper, the executive director, former president, and twenty-one year member of the Colorado Water Congress (CWC), concluded the symposium with his presentation. Mr. Kemper provided a brief historical introduction of the CWC followed by an overview of its inter-workings. Mr. Kemper explained that the CWC represents water interests in the state and has existed for fifty-three years. It was originally created by Democratic Governor of Colorado, Stephen McNichols, and Republican Attorney General of Colorado, Duke Dunbar. The goal was to facilitate statewide representation of water interests. The CWC's 350 members consist of representatives from law firms, engineering firms, and environmental interest groups. The members meet twice a year for a conference. The largest conference is in January, which took place in Australia this year. The other conference meets in August. This year, it was in Steamboat Springs. The CWC has a bicameral legislature of one-hundred members with sixty-five in the house and thirty-five in the senate. Members of the CWC form committees. The House Agricultural Committee or the Senate Agricultural Committee typically hears water related legislation. The most active committee is the State Affairs Committee (SAC), which has 190 members. During legislative sessions, the SAC meets Monday mornings at eight o'clock in the morning to review, introduce, and take positions on legislation. There are more than five legislators and between seventy and eighty attorneys at the Monday meetings. The SAC takes positions on about twenty bills and tracks about forty bills annually. Thirty to forty bills typically make adjustments to Colorado water law each year. In the last thirty years, almost no bill the SAC opposed was signed into law, and about eighty-five percent of the bills it supports are signed into law.

After an overview of the CWC's infrastructure, Mr. Kemper discussed some current legislation while guiding the audience through the Colorado Water Courts website and demonstrating the site's features. The website provides complete access to all information without a login or fee. Users can track and read current legislation as well as listen to audio recordings of discussions of the bills. One