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Legislative Update of Water Issues

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Finally, Amy Beatie from the Colorado Water Trust (“CWT”) spoke about the relatively new idea about the “greening” of water quantity, as opposed to merely quality. This is contrary to past thinking about water use because, traditionally, users removed water from streams for consumptive use. A psychological switch is occurring as more lawmakers and community members think that ecological and scientific uses of water are just as important as consumptive uses.

CWT concentrated its attack around land trust developments, which have been the most successful conservation efforts. Using this approach, the Trust worked on projects in the Instream Flow Program, primarily to create new water acquisitions. These acquisitions, which move water into the Instream Flow Program, are a good way to put water to green quantity uses because more water stays in the river. Additionally, CWT protects and enhances streamflow, using a wide range of other programs, including moving points of diversions and creating fish ladders. Finally, CWT consults with land trusts as they encounter water issues, to ensure protection of water on these lands.

Shannon Carson

LEGISLATIVE UPDATE OF WATER ISSUES

INTRODUCTION

Chris Treese, the Manager of External Affairs for the Colorado River Water Conservation District, discussed the legislative history of water issues here in Colorado. There is a dynamic system of water law in Colorado. In his work for the Colorado River District, Treese makes sure that Western Colorado has a voice in the evolution of water law in the state, especially in relation to the Colorado River. Its mission is to conserve and protect the Colorado River water for Western Colorado, and to put water from the Colorado River and its tributaries to beneficial use for the State of Colorado. Treese discussed some of the historical bills that have affected water rights in Colorado, starting with those regarding instream flow protection. He also covered the legislation regarding recreation in-channel diversion, planning and development, flexibility, conservation, and other important issues.

Legislation Regarding Instream Flows

In 1973, House Bill 73-097, the legislature introduced instream flow protection in Colorado, allowing the environment to appropriate and hold water to use in priority. This bill allowed for the holding of a minimum amount of water for the protection of the environment. In 2002, Senate Bill 02-156 allowed for the creation of a Water Trust, and allowed for a change from absolute water rights to instream flow rights. The purpose of this change was to allow for the protection of the environment. This bill led to a debate about how the language might im-

pact environmental groups, and whether improvement of the natural environment was feasible. The next year, House Bill 03-1320 provided a short-term loan of existing absolute perfected water rights to an in-stream flow. In 2008, House Bill 08-1280 provided for the long-term lease or loan of existing traditional water rights to an instream flow. The No Injury Rule would apply to these loans.

Recreation In-Channel Diversion

In 2001, the legislature responded to judicial precedent with Senate Bill 01-216. The legislature decided under what circumstances it would allow water rights for recreation in-channel diversions. The legislature reviewed this bill in 2006, passing Senate Bill 06-037, which developed some further side guidelines and additional clarifications concerning the appropriation of recreation in-channel diversions. Treese noted these laws recognize the many reasons that recreation is invaluable to Colorado, especially economically.

Planning and Development Legislation

As the Colorado legislature is truly a representation of its people, there have been several bills put forth with the help of planners and engineers. In 2003, Senate Bill 03-110 authorized the Water Conservation Board's activities, one being a Statewide Water Supply Investigation to examine statewide demands and water supplies looking out 20 to 30 years. This project did not answer the question of who needed to be in charge of the planning process. Most of this responsibility would go to the in-state water utilities and water districts. The Big Straw Project was a proposal based on the idea that the Colorado River has some unappropriated waters, and that Coloradoans should go below Grand Junction and put in either an on-channel or off-channel arrangement for pumping, so as to pump that water back up to its headwaters. This would serve many different basins in Colorado. In 2005, House Bill 05-1177 created a roundtable process for the seven major basins and the Denver Metropolitan area. The roundtable process of citizens ensures that Colorado continues to have value-driven water development, and that peoples' voices are heard. This bill has been important in bringing different types of people, including those involved with community development, into the water law discussion. In 2007, Senate Bill 07-122 authorized a study to look at what amount of water in Colorado, and the risks of development of the Colorado River System. Then in 2008, for the first time the same piece of legislation tied together water and land use, by House Bill 08-1141. This bill requires that a developer must demonstrate an adequate, permanent water supply before it can get a development permit. Although logical, a very long and difficult debate preceded the enactment of this bill.

Flexibility

Treese noted the Water law system in Colorado is responsive, and to be responsive, it must be flexible. Many of these bills are in response to the droughts of 2001 through 2003. In 2001 with House Bill 01-1354, the legislature authorized water banking, a notion that you could store surplus water from that year in a physical location and hold it for later. This bill, however, only applied to the Arkansas River Basin. In 2002, House Bill 02-1414 gave the State Engineer the authority to make approvals for substitute water supplies, and to authorize the moving of water around the basin within the prior appropriation system; the Senate passed a similar bill in 2003, Senate Bill 03-073. The House authorized water banking statewide under House Bill 03-1318, whereas the previous bill only allowed water banking in the Arkansas River Basin. However, even though water banking is available, no one has used it yet in Colorado. House Bill 03-1001 gave the State Engineer temporary authority to approve changes of water rights, recognizing the amount of time it takes the judiciary to settle many of these cases. Also in 2003, House Bill 03-1334 authorized interruptible supply plans, where a city may contract with a farmer to allow the city to compensate him or her for the cessation of irrigation so that the city may use the water in times of drought. In order for this to be legal, however, the Governor must have officially declared a state of drought. Nonetheless, in 2004, House Bill 04-1256 removed the requirement that the Governor had to declare a drought in order for an entity to utilize an interruptible water supply agreement. Expanding on this concept, House Bill 06-1124 created an arrangement similar to interruptible water supply agreements, known as a rotational crop management contracting. The No Injury Rule applies to these contracts.

Conservation Bills

In 2003, three water conservation bills failed. Following that, in 2004 House Bill 04-1365 required that any municipality with a population over 10,000 must have a water and drought preparedness plan, and must file such plan with the state. In House Bill 05-1070, the legislature invalidated Homeowners' Association covenants that would limit or prohibit xeriscaping. Finally, House Bill 05-1254 created a water grant program to promote water efficiency.

Other Legislation

In 1998, House Bill 98-1006 created the Species Conservation Trust Fund. This would especially become pertinent to those species on the Colorado River. The bill also addressed candidate species, in order to prevent listing under the federal Endangered Species Act. In 2002, House Bill 02-1252, gave the voters of certain counties the right to

change the voter structure for Commissioner elections, and created the Colorado Foundation for Water Education. While Senate Bill 03-278 imposed fees on water rights, this concept proved largely unadministrable. In 2007, House Bill 07-1168 allowed for the creation of forest health districts, in recognition that forest health is ultimately a water quality and quantity issue. House Bill 07-1132 allowed the water court to consider water quality impacts in change of water right cases. Finally, in 2009, Senate Bill 09-080 and House Bill 09-1129 addressed the capture of precipitation.

The second speaker, Brett Fox, an Associate at Brownstein Hyatt Farber Schreck, LLP, discussed the Colorado water legislation currently in progress in both the State Senate and House. Fox noted that a few issues have garnered sufficient attention for the formation of a subcommittee on the topic. One such issue is surface water versus groundwater usage in the South Platte River Basin. Fox explained that a few irrigation districts with water rights postdating 1900 are objecting strenuously to the groundwater bills. The recent development of groundwater access and its relation to prior surface water rights have garnered controversy in Colorado. While the law recognized the relationship between groundwater and surface water rights early on, the system in place was slow to catch up. The 1969 Adjudication Act enabled well pumping out of priority, if the water user replaced the amount through an augmentation plan. By 2000, there were several Colorado Supreme Court cases regarding the State Engineer's authority to allow junior appropriators to pump out of priority under augmentation plans. The legislature responded, and passed legislation to put the augmentation plans into action. The two pieces of legislation that are currently under consideration are House Bill 1174, which exempts out-of-priority depletions caused by pumping prior to March 15, 1974 from replacement requirements in any future augmentation plan entered in Water Division 1. Senate Bill 147 authorizes substitute water supply plans for replacement of out-of-priority lagged depletions caused by pumping of wells included in decreed augmentation plans prior to January 1, 2003. The bill would allow use of augmentation water sources that the augmentation plan does not identify, that the court has not previously decreed for augmentation use, and that a pending water court application for change of a water right to augmentation and replacement uses would not include. This bill has support from the Water Congress and does not have any significant opposition. Fox noted that these two bills reflect the tension that has existed for generations regarding how to integrate groundwater into the prior appropriation system without injuring senior appropriators.

Fox also discussed two bills that focus on rainwater harvesting. House Bill 1129 would allow ten new developments to conduct pilot projects for non-potable uses, using a 30 percent augmentation requirement and permanent augmentation plans upon pilot project

completion (or project retirement). Similarly, Senate Bill 80 would authorize limited rainwater collection for household, fire protection, stock watering, and irrigation of up to one acre of lawns and gardens. The bill is structured as an alternative means of diversion for exempt wells under statute Section 37-92-602, and small capacity wells in designated basins under statute Section 37-90-105.

The next speaker, Steve Sims, a Shareholder at Brownstein Hyatt Farber Shreck, LLP, focused on the current legislation regarding coalbed methane production and its effect on water quality. First, he provided a brief overview of the process. Sims stated that where there is coal, there is methane. One can burn and use the methane just like natural gas. Engineers have found the best way to harvest the methane is to sink wells down into the coal formations. For this process to work, the engineers must remove the water that is in the coalbed formations to eliminate some of the hydrostatic pressure, causing the gas to release. The problem is that some of the coal seams have connections to streams, resulting in the pollution of streams through the discharge of coalbed wastewater.

Currently, there is a draft bill that will create some safe harbors where the well operators will know whether or not the coal seam that they are pumping is tributary to a stream. There is also a directive to the State Engineer to encourage a rulemaking that will firmly delineate the presumptive lines between tributary and not tributary. The new rules could also apply to oil and gas producers, since they often release a small amount of water during production. Sims noted that countries all over the world, as well as other states, look to Colorado as a place where the government has integrated groundwater and surface water rights.

Kathlyn Bullis

ADVANCING FRESHWATER CONSERVATION IN THE CONTEXT OF ENERGY
AND CLIMATE POLICY: PRACTICAL APPROACHES IN FAST MOVING
STREAMS

Adell Amos, Esq., Assistant Professor and Director of the Environment and Natural Resources Program at the University of Oregon School of Law, discussed using prior appropriation to manage water resources in light of increased demand from energy and reduced supply as a result of climate change. Specifically,

[p]rior appropriation in coming years may prove its value or its failure as a tool for the management of water resources as opposed to mechanism for allocating water rights. The urgent question is whether the doctrine of prior appropriation has the agility and flexibility to deal with the changing landscape at the intersection of water, energy and climate policy. In the modern era, states have allocated many, if not all, of the water rights, so the prior appropriation doctrine now