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Section 8: Should Water Quality Be Regulated in Changes of Water Rights Proceedings?

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Section 8: Should Water Quality Be Regulated in Changes of Water Rights Proceedings?

mine water quality injury based on the facts of any given injury action. Under the first theory, statutory quality requirements and the standards set by the WQCC bind water courts, eliminating court discretion to set water quality standards. Under the second theory, water courts may make quality determinations based on the evidence on a case-by-case basis. Ms. Klahn stated her preference for the first theory on the basis that the legislature is better-equipped to deal with the complex issues surrounding water quality. Furthermore, in contradiction to Ms. Pray's supposition, Ms. Klahn suggested that water courts do not have the expertise to determine water quality standards in relation to the myriad of regulated and non-regulated water constituents. Specifically, water courts should not impose standards beyond those propagated by the WQCC, nor beyond those determined by permit from the WCD.

Ms. Klahn took the analysis a step further by detailing some of the pitfalls associated with litigation of water quality issues and possible practitioner mitigation efforts. Ms. Klahn suggested that practitioners consider quality at both discharge and diversion; initiate thorough sampling programs as a water quality case is only as good as the data collected; learn the language of the scientific and technical aspects of the issue; advise clients that costs of such cases are exorbitant, retain the best experts possible; and ask for a bench trial due to the long length of the trial.

Mr. DiNatale, an expert in water quality and a registered professional engineer, outlined the basic issues and arguments from both sides of the spectrum. Mr. DiNatale suggested that municipal effluent is a reliable source of water in an over-appropriated watershed, considerably less expensive than purchasing or developing new water rights, and sufficiently regulated under the NPDES permit process. Further, Mr. DiNatale suggested that a NPDES permit might constitute "prima facie evidence that a permitted discharge is acceptable water quality for downstream uses." On the other hand, Mr. DiNatale pointed out that downstream users might be injured if water substituted by an upstream user degrades water quality and the downstream user already invested significant resources to insure a high water quality. Simply, Thornton's injury may be legitimate given that non-regulated constituents present in municipal effluent might necessitate expensive filtration processes not required prior to the exchange.

Matthew Smith

SECTION 8: SHOULD WATER QUALITY BE REGULATED IN CHANGES OF WATER RIGHTS PROCEEDINGS?

The final section of the conference concerned whether giving the water courts jurisdiction over quality issues in change of water rights cases would address perceived decreases in water quality. Mr. Paddock moderated the discussion.

Mr. Peter D. Nichols of Trout, Raley, Montano, Witwer & Freeman, P.C. was the first panelist to speak. Mr. Nichols supported granting jurisdiction to water courts over quality issues in change of water rights cases. Mr. Nichols addressed past legislative proposals to grant water courts jurisdiction over quality issues, including the recent Colorado House Bill 1352 (“HB 1352”), which the Colorado Senate voted down by one vote in May of 2006. HB 1352 permitted a water judge to consider decreases in water quality caused by a change of the type of water-rights use. The bill also allowed judges to include a term or condition when they issued a decree to address the decrease in water quality. This legislation would have established jurisdiction only to cases that included a change in the point of diversion of at least 1000 acre-feet of water per year.

Mr. Nichols argued that while the trigger of 1000 acre-feet might seem arbitrary, it represented an attempt to limit the water courts’ jurisdiction to address concerns that the bill would effectively stop all water transfers. Supporters of HB 1352 were concerned that if the legislature did not speak at all on this issue, courts would be left to create their own rules. Mr. Nichols also highlighted general community support to address publicly perceived negative quality impacts from the water change proceedings. Thus, HB 1352 represented an attempt to address any impairment to water quality resulting from transfers while not broadly impairing the process of transfers in the water courts.

Conference attendees voiced numerous concerns, including the bill’s methods for determining the standards by which a change in quality would be measured and the bill’s silence as to how or what the entity must do to guarantee the quality following a change.

Mr. Brian Nazarenus of Ryley, Carlock & Applewhite, P.A., was the next panelist to speak. Mr. Nazarenus opposed granting jurisdiction to water courts over quality issues in change of water rights cases. Mr. Nazarenus’ concerns could be broken down into three main arguments: (1) impacts to water quality resulting from the change or exchange are marginal; (2) water court decisions affect only a minor amount of flow; and (3) historical land use activities and impacts from non-point sources are the major cause of decreases in water quality. In effect, Mr. Nazarenus argued that shifting the burden onto entities that pursue a change or exchange will provide only minimal benefits in addressing water quality. Giving water courts jurisdiction to impose water quality limits in change cases, however, would impose social costs, such as increases in litigation costs and delays in change of water rights cases.

Instead, Mr. Nazarenus argued, Colorado should consider methods to create and institute a systemic approach to improve the water quality of historically impaired streams. Mr. Nazarenus suggested that any bill the legislature proposes concerning water quality improvement should first broadly address watershed restoration and the quality of

intervening reaches by obtaining funding to help clean up non-point sources. Additionally, Mr. Nazaraenus argued, the United States Environmental Protection Agency's ("EPA") strategic plan through 2011 identifies watershed restoration as a main priority. Accordingly, the EPA will in any event soon require that Colorado identify the processes by which watershed restoration will occur within the state. Thus, Mr. Nazaraenus' proposed legislation would address not only the more certain causes of poor water quality in Colorado, but would also anticipate the EPA's strategic plan.

Patrick Greenleaf