Water Law Review

Volume 3 | Issue 1 Article 9

9-1-1999

The 1969 Act and Environmental Protection

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THE 1969 ACT AND ENVIRONMENTAL PROTECTION

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I. INTRODUCTION

This essay might appropriately be subtitled "A Short Subject" because intersections between the 1969 Water Right Determination and Administration Act[1] ("the Act") and environmental protection have been few, quite by design. The Act addresses environmental concerns through a single narrow prism: the provision establishing an instream flow program under the control of the Colorado Water Conservation Board ("CWCB" or "Board").[2] This article briefly surveys the various efforts put forth in an attempt to fit environmental issues under the Act's narrow umbrella.

II. THE BACKDROP: COLORADO'S INSTREAM FLOW PROGRAM

In 1973, the Colorado legislature enacted Senate Bill 97 to create a program with the modest goal of "preserv[ing] the natural environment to a reasonable degree."[3] The program sought to fit new flow rights into the prior appropriation system, a phenomenon that by 1973 had begun to flourish around the West. These rights, instream

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1. Water Right Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (1999).

2. COLO. REV. STAT. § 37-92-102(3) (1999).

3. *Id.*

flow rights, left water in the stream. The instream flow water rights adjudicated under the new program were assessed priorities "70 years junior to the senior rights on most rivers in settled areas," consistent with the prior appropriation principle of first in time, first in right.[4] The law allowed for the establishment of instream flows by accomplishing two important things: (1) recognizing that instream flows constituted a beneficial use of water; and (2) eliminating the diversion requirement for an appropriation of a water right.[5]

A number of water districts soon challenged the constitutionality of the instream flow program, as well as particular appropriations on the Crystal River.[6] They based their constitutional challenge on the provision in Colorado's constitution that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[7] The Colorado Supreme Court held that the use of the term "divert" did not require diversion as a prerequisite for an appropriation, but only negated the notion that Colorado would follow the riparian doctrine.[8] In short, the law survived the challenge, but soon underwent the first of several amendments intended to respond to fears that the program might outgrow the modest goals initially set in Senate Bill 97.

In 1981, the legislature added four new subsections[9] designed to address the fear that the instream flow program would interfere with development and consumptive use of water in the state. These amendments affected the CWCB's appropriations in many ways, including that the Board commenced appropriation of "separate winter and summer flow rates for its instream flow reaches and divided the reaches to be preserved . . . into shorter segments," results caused by a water availability finding required in one of the limitations.[10]

In 1986, the legislature authorized the CWCB to acquire water rights for the instream flow program "by grant, purchase, bequest, devise, lease, exchange or other contractual agreement."[11] The 1986 amendment also required the CWCB to request recommendations from the United States Departments of Agriculture and Interior prior to appropriating instream flows. The purpose of this was to give the federal government the option of participating in the state instream flow program instead of relying on acquisition of federal reserved water rights, which were regarded as a far more intrusive means of

4. Steven O. Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection Into a Prior Appropriation System, in* INSTREAM FLOW PROTECTION IN THE WEST 12-1, 12-2 (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

5. *Id.*

6. *See* Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570, 571 (Colo. 1979).

7. COLO. CONST. art. XVI, § 6.

8. *Colorado River Water Conservation Dist.*, 594 P.2d at 573.

9. COLO. REV. STAT. § 37-92-102(3)(a)-(d) (1999).

10. Sims, *supra* note 5, at 12-4.

11. COLO. REV. STAT. § 37-92-102(3) (1999).

protecting the environment.[12]

In 1987, the legislature amended the instream flow statute once again. This time it clarified that the CWCB is the only entity vested with the authority to appropriate instream flows.[13] The exclusivity language responded to several attempts by private parties to appropriate or assert instream flow rights, as described below in more detail.

In 1994, the legislature added a detailed provision to the Act which limited the authority of the CWCB to acquire conditional water rights or to change conditional water rights to instream inflow uses. The amendment limited the acquisition of conditional rights to water rights located in the Yampa Basin which the CWCB could use to recover a threatened or an endangered species as part of a species recovery program and to benefit the species in a way that an initial appropriation could not.[14]

Finally, in the wake of the *Aspen Wilderness Workshop* decision described below, the legislature once again amended the instream flow statute to specify the procedure by which the CWCB could decrease an instream flow.[15]

III. ESTABLISHING PRIVATELY-HELD INSTREAM FLOW RIGHTS

Citizen acquisition of instream flows began immediately after the Colorado legislature enacted the instream flow law. In 1975, a group of ranchers and citizens in Gunnison County appropriated flows in several mountain streams and obtained rights to significant instream flows for stock water, recreation, wildlife, fish, and heritage preservation in the Taylor River and in eight of its tributaries.[16]

In 1986, the City of Fort Collins applied for instream rights in the Poudre River through a reach in the city designated as the Poudre River Recreational Corridor. The CWCB objected on the ground that only the CWCB could appropriate such rights. The CWCB settled its objections with Fort Collins prior to trial on the condition that the city formally delete the claim of an instream flow use and designate specific, discrete points of diversion for the water rights claimed. Other objectors continued to oppose the "thinly disguised minimum stream flow" application.[17] The Colorado Supreme Court issued a ruling that confirmed the right of the City of Fort Collins to appropriate both of the rights that it originally sought.[18] The opinion distinguished the Fort Collins appropriation, which incidentally protected a stretch of river between two definite points of diversion,

12. *Id.*; *see also* Sims, *supra* note 5, at 12-4 to -5.

13. *See* COLO. REV. STAT. § 37-92-102(3) (1999); *see also* Sims, *supra* note 5, at 12-5.

14. COLO. REV. STAT. § 37-92-102(3)(c.5)(I) to (III) (1999).

15. COLO. REV. STAT. § 37-92-102(4)(a) (1999).

16. Amended ruling of water referee, *In re* Application for Water Rights of R.I. Vader & Sons, Inc., No. W-1991 (Colo. Water Court, Div. No. 4, Jan. 21, 1975).

17. City of Thornton v. City of Fort Collins, 830 P.2d 915, 920-21 (Colo. 1992).

18. *Id.* at 933.

from the CWCB's instream flow right, which ordinarily signifies the complete absence of diversion structures.[19]

In 1992, the Colorado Supreme Court affirmed a water court decree to the Upper Gunnison River Water Conservancy District for a second fill of Taylor Park Reservoir for releases to produce fishery habitat, rafting flows, and supplemental irrigation supplies.[20] The CWCB opposed the application, but here, too, withdrew its opposition once the water district limited its application to use of previously stored waters for instream uses within a defined stream reach. The court based its affirmation of the water court on the fact that the water district controlled river water by storage and release to accomplish the designated beneficial uses, uses distinct from the CWCB instream flow right purposes.[21] Interestingly, the court affirmed the water district's right on the basis that it provided year–round protection to the fishery, while the CWCB right only protected fish for short periods of time.[22] In the eyes of a CWCB attorney, these cases:

> illustrate an alternative type of instream flow right recognized in Colorado. The alternative instream flow right is not equivalent to the CWCB's instream flow rights since it apparently cannot exist in the absence of diversion structures. Nonetheless, this right does allow parties to claim an instream use of water if the applicant can prove that previously diverted water is being used instream for a beneficial purpose.[23]

Because these decisions postdated the amendment of the instream flow statute giving the CWCB an "exclusive" right to appropriate, this alternative type of instream flow right apparently remains viable to this day.[24]

IV. ENFORCING THE STATE'S INSTREAM FLOW RIGHTS

While on its face the instream flow program was a near–revolutionary development in Colorado water law, the program soon received a variety of harsh criticisms from citizens' organizations,

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19. *Id.* at 931.

20. Board of County Comm'rs v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840, 847, 856 (Colo. 1992).

21. *Id.* at 854.

22. *Id.*

23. Sims, *supra* note 5, at 12-6.

24. In *Board of County Commissioners v. Collard*, the Colorado Supreme Court upheld the validity of a private instream flow right acquired prior to enactment of the statutory exclusivity language, turning back a collateral attack on the water court's subject matter jurisdiction to grant that water right without endorsing the court's reasoning. *Board of County Comm'rs v. Collard*, 827 P.2d 546, 549, 551-53 (Colo. 1992); *see generally* Christopher H. Meyer, *Instream Flows: Integrating New Uses and New Players Into the Prior Appropriation System*, INSTREAM FLOW PROTECTION IN THE WEST (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993); Lori Potter, *People Preserving Rivers: The Public and its Changing Role in Protecting Instream Flows*, INSTREAM FLOW PROTECTION IN THE WEST (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

fishing groups, and environmental organizations. These groups criticized the program for appropriating very minimal rates of flow and for limiting the purposes of the appropriations to preserving cold water fisheries, while ignoring other instream uses such as rafting, maintaining riparian and wetland vegetation, aesthetics, and channel maintenance.

Organizations and individuals also scrutinized the CWCB for deciding not to enforce or to protect its instream flow rights in a number of instances. The CWCB's decisions to reduce or not to enforce its decreed instream flow rights gave rise to several instances of citizens' organizations taking enforcement action to the courts on their own.[25] These types of actions culminated in a direct challenge to the CWCB's authority to reduce an instream flow by failing to enforce the full effect of the right when a developer's plans to consume water would have reduced the CWCB's right below the decreed amount.

In *City of Aurora v. Division Engineer for Water Division Number 5*,[26] the Colorado Mountain Club and Holy Cross Wilderness Defense Fund opposed a change in the diversion points of conditional water rights for the Homestake II water project. The change would have moved the diversion points further upstream and deeper into a federal wilderness area. The stream reaches that the city's water rights would dewater were subject to decreed, junior instream flow rights held by the CWCB, but the CWCB did not oppose the change in point of diversion. The conservation groups argued that the CWCB's rights and the federal reserved water rights for the wilderness would be harmed by the diversions associated with the water project. The water court rejected the conservation groups' challenge for three reasons: (1) the CWCB withdrew its statement of opposition to the change; (2) the United States Forest Service did not oppose the change; and (3) the Forest Service had imposed bypass requirements on the affected reaches, and the CWCB retained lowered instream flow rights there.[27] The Colorado Supreme Court affirmed those aspects of the water court's holding but vacated an inconsistent ruling that the state instream flow rights be administered as senior to the changed points of diversion notwithstanding the findings just outlined.

The *City of Aurora* case squarely raised the question of citizens' standing to object to injury to the CWCB instream flow rights. The water court found that such standing existed, a finding not later appealed.

Likewise, a later case raising essentially the same issue received no definitive ruling by the Colorado Supreme Court.[28] In *Aspen Wilderness*

25. *See, e.g.*, Lori Potter, *The Public's Role in the Acquisition and Enforcement of Instream Flows*, 23 LAND & WATER L. REV. 419, 429-31 (1988).

26. City of Aurora v. Division Engineer for Water Div. No. 5, 799 P.2d 33 (Colo. 1990).

27. *Id.* at 36.

28. Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. Partnership, 929 P.2d 718, 726 n.15 (Colo. 1996).

Workshop, Inc. v. Hines Highlands Limited Partnership, the court found that "[t]he issue of whether the appellants have standing to assert injury to the CWCB's instream flow rights is not before us and we do not address it."[29] The court noted that the extent to which the citizens argued injury to the decreed instream flow rights remained unclear, but reasoned that since the CWCB was itself a party to the proceedings, had satisfied itself that its interests were being protected, and did not oppose entry of the decree, the argument of injury asserted by the citizens was unpersuasive.[30]

The CWCB's policies for enforcement of its instream flow rights came under direct attack in *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board.*[31] In that case, the CWCB held decreed instream flows on Snowmass Creek of 12 c.f.s. year–round.[32] Faced with a proposal by the Aspen Ski Company to increase snowmaking diversions from Snowmass Creek in the winter, the CWCB examined the year–round 12 c.f.s. flow and determined that, among other things, the winter flow could be reduced in amounts sufficient to allow the snowmaking proposal to proceed.[33] The Aspen Wilderness Workshop filed suit against the CWCB in Denver District Court pursuant to the State Administrative Procedure Act, arguing that the "decision not to enforce the full instream flow appropriation . . . amounted to a permanent relinquishment of a public instream flow right."[34] The district court held that the CWCB had acted within its power to modify its appropriation. Further, the court held that like any other water right holder, the CWCB need not enforce its rights or use a portion of its decreed right in excess of the amount needed. Any such correction by the CWCB did not require water court adjudication.[35]

The Aspen Wilderness Workshop argued on appeal that the CWCB breached a fiduciary duty to the public by failing to enforce the right as decreed.[36] The Colorado Supreme Court agreed. The court found that the statutory provision authorizing the instream flow program limited the CWCB's authority in two important respects. First, it burdened the Board's actions by "creating a unique statutory fiduciary duty between the Board and the people of the state so that the Board may only appropriate the . . . minimum amount of water necessary to preserve the natural environment."[37] Second, once the CWCB adjudicated the minimum stream flow required to preserve the natural environment, it was required to fulfill its unique statutory responsibility to the public by administering its water rights

29. *Id.*
30. *Id.* at 726.
31. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).
32. *Id.* at 1260.
33. *Id.* at 1255.
34. *Id.*
35. *Id.* at 1256.
36. *Aspen Wilderness Workshop,* 901 P.2d at 1255.
37. *Id.* at 1256-57.

accordingly.[38] If the CWCB determined that a previously adjudicated right needed change in order to maintain necessary stream flows, it could return to the water court to change the decree. But until and unless that determination and change had been made, the supreme court agreed that the CWCB's fiduciary duty to the public barred it from administratively relinquishing a portion of the instream flow decreed for the benefit of the public.[39]

The *Aspen Wilderness Workshop* decision precipitated the 1996 amendments to the instream flow law. The decision and the later statutory modification also caused a flurry of agency rule-making to establish procedures for appropriation, for modification of instream flows, and for addressing the related issue of when an instream flow could be modified by inundation.[40]

V. THE QUEST FOR A PUBLIC INTEREST REVIEW OF WATER RIGHT APPLICATIONS

Most Western states' water codes require that the entity vested with power to review and grant water rights applications ensure the right will conform with the public interest or public welfare.[41] Such provisions allow denial of water right applications if approval runs contrary to the public interest.

Lacking such a public interest condition in the 1969 Act, a coalition of fishing, environmental, and citizens' groups attempted to establish one as a matter of common law as part of their challenge to a major trans-basin diversion from the Gunnison Basin to the Front Range.[42] While these objectors prevailed in arguing that the application should be denied as speculative, both the water court and the Colorado Supreme Court ruled that a water court is not required to consider the environmental factors such as effects on wildlife habitat, recreation, water quality, and property values in determining whether the applicant had proved that the water would be put to beneficial use.[43] The crux of the objectors' argument was that the trans-basin diversion, known as the Union Park project, would have widespread and adverse impacts on the fisheries, wildlife habitat, recreation, tax base, and general quality of life in the Gunnison Basin.[44] Both courts flatly rejected this objection, holding that "[t]he limited inquiry required to determine whether to issue a conditional rights decree in this case does not include evaluation of environmental

38. *Id.*

39. *See* Lori Potter, *Putting Some Teeth in Public Enforcement: The Colorado Supreme Court's Decision in the Snowmass Creek Case*, 17 U. DENV. WATER CT. RPTR. 1, 2 (1995-96).

40. *See* 2 COLO. CODE REGS. § 408-2 (1998).

41. Lori Potter, *The Public's Role in the Acquisition and Enforcement of Instream Flows*, 23 LAND & WATER L. REV. 419, 432 (1988).

42. Board of County Comm'rs v. United States, 891 P.2d 952, 971 (Colo. 1995).

43. *Id.* at 973.

44. *Id.* at 971.

factors."[45] The court specifically rejected arguments that the statutory definition of beneficial use encompassed the public policy of protecting the environment. Rather, it found that the statutory provision providing for instream flow protection through the CWCB program was the mechanism whereby the state could protect the interests of concerned citizen objectors.[46] In sum, the supreme court directed the objectors' concerns back to the legislature. The justices stated that:

> [w]e have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs. The degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate.
>
> Conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy. Arapahoe County offered evidence that it intended to divert water for municipal use; this use of water has always been deemed a beneficial use under Colorado law and has been given priority over other competing beneficial uses by the General Assembly. [The objectors] do not cite any authority that authorizes a water court to deny an application for a conditional decree because of environmental concerns, and we reject [their] invitation to create a complex system of common law to balance competing public interests.[47]

VI. THE TWO LITTLE WORDS THAT CAN'T BE SPOKEN

Many Western hands have been wrung over the prospect that Colorado water rights would someday be argued as subject to the doctrine of the public trust.[48] The dreaded day has not come to pass here, however. The plaintiffs in *Aspen Wilderness Workshop v. Colorado Water Conservation Board* were careful to base their challenge to the CWCB's inaction upon a statutory fiduciary duty and not a common law notion of the public trust.[49] Nonetheless, the dissent went out of its way to state that "[t]his court has never recognized the public trust

45. *Id.*

46. *Id.*

47. *Board of County Comm'rs*, 891 P.2d at 972-73.

48. *See generally* Harrison C. Dunning, *Instream Flows and the Public Trust*, INSTREAM FLOW PROTECTION IN THE WEST 4-1 (Lawrence J. MacDonnell & Teresa A. Rice, eds., rev. ed., 1993).

49. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251, 1255 (Colo. 1995).

doctrine with respect to water."[50] The dissent argued that "the concept of a public trust has no independent content. . . . Where the legislature has provided statutory directives for the management and protection of public resources, those statutory duties comprise all the responsibilities which defendants must faithfully discharge."[51] Thus, in the dissent's view, the CWCB's statutory responsibilities and its public trust obligations—if any—were coterminous.[52]

In defense of a charge of criminal trespass against boaters who rafted through private property, the public trust was advanced as the basis of a use right to float through the property and to touch the bed and banks of the river.[53] The Colorado Supreme Court made short work of the argument, concluding that the common law rule giving the riparian land owner title to the stream bed and banks was "of more force and effect"[54] than the public trust principle. Again, the court noted that the argument in essence sought a change in long-established judicial precedent and, therefore, needed to be taken to the legislature.[55]

VII. IMPORTING WATER QUALITY CONSIDERATIONS INTO WATER RIGHTS MATTERS

The Colorado Supreme Court addressed the relationship between water quality and appropriative rights in detail in *City of Thornton v. Bijou Irrigation Co.*,[56] where it held that the water court was explicitly required to consider water quality issues only in the case of an exchange whereby water was being actively substituted into the stream for the use of other appropriators.[57] An appropriator who alleges water quality impacts as a result of appropriative depletion, rather than substandard discharge or supply water, receives no relief under the present system.[58] The court stated that by requiring maintenance of sufficient volume in the stream to preserve the effluent limits of a downstream appropriator, a water court effectively would be creating a private instream flow right for waste dilution, which the instream flow statute did not allow.[59]

The extent and nature of water quality considerations which are relevant to diligence applications, exchanges, and applications to make conditional rights absolute are at issue in a case litigated in

50. *Id.* at 1263 (Mullarkey, J., dissenting).
51. *Id.* (quoting Sierra Club v. Block, 622 F. Supp. 842, 866 (D. Colo. 1985)) (internal quotation marks omitted).
52. *Id.*
53. People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).
54. *Id.*
55. *Id.*
56. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).
57. *Id.* at 92.
58. *Id.*
59. *Id.* at 93.

Water Division No. 1 in November, 1999.[60] Additional issues related to the water quality restrictions on exchanges were concurrently litigated in another case in Water Division No. 1.[61] The results of both cases will have important ramifications for the relationship between water quality and water rights in Colorado.

VIII. CONCLUSION

Presently in Colorado, it would seem, all avenues for environmental protection in water rights cases lead back to the same intersection: the explicit terms of the 1969 Act, and, in particular, its instream flow provision. Attempts to import common law concepts or other non-statutory innovations into water rights matters have generally hit a dead end. The cases make for interesting reading, but the story has a tendency to come out the same every time: environmental protection in water matters is what the legislature has said that it is, nothing more and nothing less.

60. Application for Finding of Reasonable Diligence and to Make Absolute a Conditional Water Right, *In re* Application for Water Rights of the City and County of Denver, No. 96-CW-145 (Colo. Water Court, Div. No. 1, June 28, 1996).

61. Motion by the City of Black Hawk to Consolidate for Trial All Water Quality Issues, *In re* Application for Water Rights of the City of Central, No. 92-CW-168, No. 92-CW-059, No. 94-CW-036 (Colo. Water Court, Div. No. 1, Apr. 17, 1998).