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GREEN DEVELOPMENTS IN COLORADO WATER LAW

Robert Wigington moderated a panel of three public interest water law attorneys and organizers. Wigington, the western water policy counsel at The Nature Conservancy, has been affiliated with both western water issues and freshwater biodiversity conservation efforts since he started working at the Conservancy. He noted his main goals are restoring rivers back to their natural condition and keeping them that way.

Drew Peternell, Colorado director of the Western Water Project at Trout Unlimited ("TU"), discussed how his organization works to maintain and restore flows in Colorado's rivers and streams, primarily by using the resources offered in the Colorado water court system and in various administrative agencies. TU is a national non-profit organization, with the goal of conserving and protecting trout and salmon in their natural habitats. As a sportsman conservation group, TU attracts many fisherpersons who support protecting fish populations in rivers. Because of the organization's aims, the Colorado office works specifically on streamflow issues to preserve healthy trout populations, taking a water quantity, as opposed to quality, approach.

Peternell detailed three reasons why low streamflow is a major problem in the West: (1) the arid climate; (2) the prior appropriation doctrine, which creates incentives to remove water without providing incentives to leave water instream; and (3) population growth, creating increased demands for water and putting additional pressure on stream ecosystems. Peternell also highlighted three of the major tools his office uses to protect streams: the Instream Flow Program, the Wild and Scenic Rivers Act, and the Reserved Rights Doctrine.

Colorado's Instream Flow Program vests authority in the Colorado Water Conservation Board ("CWCB") to hold appropriation permits for "instream" use, creating a water right to leave water in the channel. Before this legislation, water permits only allowed permit holders to divert water out of the stream. Two subsequent bills helped to strengthen the Program. The first bill appropriated money to the Program, and the second removed a disincentive in the law to lease water. This second bill quashed fears that a permit holder could lease his water for a non-consumptive use, resulting in a loss of his permit because he failed to put the water to a consumptive use.

The CWCB obtains permits in two ways: through new appropriations, and by acquiring senior water rights and converting those rights to instream flow permits. However, there is a limitation to the former method. Because Colorado follows the prior appropriation doctrine, these new instream permits only have priority over subsequent junior rights holders. Thus, senior permit holders may continue to use as much water as their permits allow, and the CWCB's instream use cannot affect the quantity of senior rights holders' consumptive use.

Another tool Peternell uses at TU is the federal Wild and Scenic Rivers Act. This act allows the U.S. Fish and Wildlife Service to designate rivers as wild and scenic, and the designation gives these rivers greater protection. However, many states have reservations about relying solely on this Act. Water law is historically a state issue, and states are thus concerned with federal agencies exercising jurisdiction over state problems. As a result, Colorado only has one designated river.

The final tool Peternell detailed was the Reserved Rights Doctrine. Under this doctrine, the federal government sets aside a parcel of land for some special purpose, entitling the federal government to a water right to serve that purpose. For example, when the government designates a National Park, such as Black Canyon, a water right becomes necessary to maintain the fish in the Park's rivers. However, the process of obtaining water rights under is tedious, requiring a lengthy time to obtain.

Finally, Peternell detailed two problems with Colorado's water system, each of which impedes water protection. First, the water court system does not consider the public interest or environmental impacts in its decision-making. But, the court does offer some remedies. A person can object to a water application, which will require the applicant to prove all elements under strict scrutiny, including proof of anti-speculation and proof of a reasonable need for a reasonable amount of water for a specific purpose. Second, conservationists argue that the state standard for minimum flow level utilizes very low instream flow numbers, which are inadequate for the survival of fish. This allows for minimum values that are too low for any real protection of fish populations.

Next, Becky Long of the Colorado Environmental Coalition ("CEC") spoke about the environmental work of her organization. The CEC's goal is to share information obtained by other environmental groups to form a well-educated environmental community. They have built networks among conservationists, local governments, water providers, and other interested parties. The CEC not only promotes policies that promote a healthy environment, but also policies that encompass sound economic plans. By bringing different groups together, environmentalists are able to benefit from the work of others and utilize the combined resources and strengths of groups with different, but similar, goals.

The CEC provided indispensable work for the passing of the 2006 Colorado legislation for recreational in-channel diversions. This legislation recognized and expanded recreational diversions. The CEC worked to bring all the important stakeholders together to ensure the legislation passed. The group had a site-specific approach, concentrating on Golden's kayak park, and a community-based approach, ensuring that all people and groups involved understood the consequences of the new program.

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-