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Quality of Life Decision Making; Planning Uncertainties and Legal Obstacles Perspective from Denver Water

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acknowledge the complexity of attorney-client relationships by including the client's reasonable expectations as a consideration, but positional conflicts may require an attorney to seek informed consent of the conflicting clients, or even to withdraw if unable to balance competing conflicts among common clients.

John McKee

QUALITY OF LIFE DECISION MAKING; PLANNING UNCERTAINTIES AND LEGAL OBSTACLES PERSPECTIVE FROM DENVER WATER

Casey Funk, in-house counsel for the Denver Board of Water Commissioners (the "Board"), and Marc Waage, Manager of Water Resource Planning at the Denver Water Department ("Denver Water"), discussed the Anti-Speculation Doctrine as a legal obstacle to planning for future water uncertainties, including those uncertainties associated with climate change.

The Board, composed of five members, is the primary decision maker at Denver Water. The mayor appoints the members of the non-political Board. It makes all policy decisions, including to whom to serve water and how to serve that water. In 2006, the Board adopted a new policy to plan for uncertainties, in part because of the worst drought in recorded history in 2002.

Denver Water emphasizes efficiency, including conservation and water reuse. Denver Water utilizes many conservation methods: (1) education and outreach; (2) diagnostics, including audits and monitoring habits; (3) rebates and incentives; (4) rules; (5) research, monitoring, and evaluation; and (6) tiered rates, for example if one uses more water, that user pays more per unit. One important policy issue the Board must decide is what uncertainties to plan for and how to plan for those uncertainties. Some examples include variations from pine beetle kill, potential wild fires, and climate change.

Mr. Waage noted the planning method of the Traditional Future method; future water use is extrapolated from past trends, without anticipating any major changes. Denver Water, however, plots a cone of uncertainty to plan for a range of solutions in different situations. This cone allows Denver Water to prepare for a wide range of uncertainty, and best suites planning for climate change. Scientists predict that climate change will cause more frequent and severe droughts. However, since Denver Water does not know what is going to happen, it prefers a range of solutions, instead of waiting for scientists to figure out the exact future.

As discussed above, Denver Water takes significant steps to increase efficiency, but efficiencies alone will not solve all the possible problems associated with climate change. Casey Funk proposes that laws should permit Denver Water to save water to provide options for the future. However, saving water violates the Anti-Speculation Doctrine because a water user needs a vested interest and a specific plan. The can and will

statute does not currently permit water saving without the capability of putting that water to beneficial use in a reasonable amount of time. The courts have interpreted these doctrines to ensure that applicants will be able to actually use the water.

Casey Funk argued that these principles are misplaced and should not apply to government agencies trying to plan for the future of its constituency. Mr. Funk detailed the history of these principles. A few private citizens tried to obtain all the remaining water rights in Colorado. However, they did not have a specific plan of how to use that water, but instead wanted the rights for future investments. The courts would not allow this attempted water purchase because individuals should not obtain water rights while only speculating as to that water's use.

Nevertheless, Mr. Funk argued that a government agency planning for climate change is significantly different from those private citizens. Scientists know that climate change is going to happen and that there will be changes to the water supply, even though these scientists cannot predict the specific changes. Mr. Funk argues that the law should allow Denver Water to account for water reserves to plan for when those changes eventually occur. Courts should give government agencies some deference for strategic planning.

The current law treats government agencies like every other water applicant. Mr. Funk thinks this approach is incorrect. Because governments are inherently different, they should have some ability or leeway to plan for uncertainties. A study of the legislative history of the Anti-Speculation Doctrine shows that the courts were concerned with a monetary speculation scheme, and not government agencies planning for the future needs of their constituencies. Courts should give some deference to the government that must supply water to its citizens.

Shannon L. Carson

WATER LAW AND CLIMATE CHANGE, STRATEGIS FO ADAPTATION AND MITIGATION

Professor A. Dan Tarlock of Chicago-Kent School of Law, Illinois Institute of Technology gave the keynote address at the 2010 University of Denver Water Law Review Symposium. Professor Tarlock discussed the different ways water managers could adapt to the challenges brought on by global climate change.

First, Professor Tarlock discussed that worldwide mitigation to slow the effects of global climate change could take from 100 to 1000 years for the benefits to show. Therefore, Professor Tarlock said adaptation is the key to slow the effects of greenhouse gases.

Earlier in the Symposium, Brad Udall, Director of CU-NOAA, Western Water Assessment, presented the projected climate change impacts on our water supplies. Professor Tarlock agreed with Mr. Udall's conclusions that the change in climate will create both extreme