Colorado Water Law – Environmental Considerations

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Instream Flow Law in CO -- Context
• Prior Appropriation System
dates from mid-19th Century.
• First in Time, First in Right
• Lose it or Use it
• Beneficial Use, No Waste
• Many Rivers fully appropriated by 1900
• Environmental Era starts in late 1960's – expressed new values
• Clean water
• Flowing streams

Colorado’s Instream Flow Statute
• Passed in 1973
• Gives right to appropriate minimum amount necessary to preserve environment to reasonable degree exclusively to Colorado Water Conservation Board
• Today: 1500+ rights, almost 9000 stream miles protected
• In 1977, CWCB also given right to acquire diversionary water rights for change to instream flow
• CWCB has never used funds to purchase rights
• Mostly used to Clinch (Aspen, Boulder) & Nature Conservancy
• In 2002, CWCB given right to acquire rights not just for minimum amounts, but for improvements
• Two transactions since

Streams Included in Colorado’s Instream Flow Program

ISF Water Rights Strengths & Limitations
• Rights mostly VERY Junior
• Useful where little or no development by 1970’s
• Program can result in modification to new development
• Key: “Call within a call” concept (2005 Central City Decision)
• Program can result in modification to proposed new changes to uses
• Primarily effective to require augmentation for mountain development
• Enforcement through examination of water court summaries; filing of statements of opposition
• Little on-the-ground enforcement; few calls; no field staff
• Little impact effect on restoring healthy flows
• Virtually no monitoring to prove effectiveness
• Many streams with important environmental values still have low flows

Who is Trout Unlimited?
• TU is a 150,000 member national, fishery conservation non-profit
• The Western Water Project mission is to conserve, protect and restore healthy flows in the cold-water fisheries of California, Colorado, Idaho, Montana, Utah & Wyoming
• Underlying premises:
  • Healthy rivers are a necessary part of healthy ecosystems
  • Restoring rivers strengthens their neighboring communities
  • Fish need water every day
Trout Streams with Low Flows

Why is the quality-quantity interface important?
- Loss of dilution water may cost millions in increased treatment costs
  - Fraser R. sends 60% of headwaters to Denver; faces increased sewage treatment
  - On Arkansas, repeated diversions, uses & polluted return flows make river undrinkable
  - Lower Valley Conduit will cost US taxpayer $290M

What about Water Rights & Water Quality?
- Water Quality mostly not a consideration in prior appropriation systems
- Water rights system trumps water quality protection much of the time
  - Federal Clean Water Act allows regulation of water allocation to protect quality
  - Colorado Water Quality Control Act does not
  - 2007 legislation allows water court to consider water quality impacts of large changes to water rights
  - Only applies to new filings

Quality-Quantity Issues
- Should transbasin diversions of polluted water need CWA permits?
- Should diversions bear any responsibility for poor water quality linked to low flows?
- Should Clean Water Act even apply to intermittent & ephemeral streams (75% of Colorado's river miles)?

Is there enough water for all Colorado needs?
- Population growth
- Geography (people & water not in same place)
- Recreation Economy
- Climate Change
- Water-Energy Nexus
- Decline of native species
  - 79% of West's fishes extirpated, threatened or gone

Population Growth
The state demographer projects that Colorado will add another 2.8 million residents by 2030. Of that amount, 1.5 million or 54% is due to net migration into the state.
Recreation Economy
- Colorado recreation (skiing, but also rafting & kayaking, fishing & hunting & other outdoor tourism) is big business.
- Water is key ingredient
- Rascalland is changing hands – amenity buyers want views, quiet & often, water
- Colorado law allows cities to appropriate water for "recreational in-channel diversions"
- A limited water right
- Only a few state-wide: Golden, Vail, Breckenridge, Steamboat, Buena Vista, Salida, Longmont, Durango has applied.

Energy-Water Nexus
- Energy Development takes Water
  - Hydropower
  - Non-consumptive
  - Create fish barriers
  - Cooling for electricity production
  - Biofuels (corn ethanol requires 1000 gallons/gallon fuel)
  - Oil Shale
- Water Delivery takes Energy
  - Proposed pipeline from Flaming Gorge to Front Range would require 800M year in energy
- Water Treatment takes Energy
  - The more treatment (reverse osmosis) the more energy

What Else Can Be Done?
- Encourage Sustainable Water Development
- Increase legal flexibility to invigorate true market for instream flow water rights
- Regulate ground water withdrawals seriously
- Explore Collaboration
  - 1177 roundtables and compact committees
  - Habitat & flow restoration partnerships

Conclusion
- Wallace Stegner says that the West is the native land of hope
- Need to find ways to live here and sustain environment
- Need to balance immediate, specific on-the-ground restoration with new accommodations in system that reflect the value of protecting healthy fisheries
- Failure is not an option