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Let Colorado Water Markets Work

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Introduction

For 150 years, Colorado Water Law has been developed with a healthy respect for property rights - protecting the prior rights to water use established by the hard work of those who came before. Most attempts to centralize water resources in Colorado have failed, although there have been repetitive attempts to implement "Soviet style" statewide water planning in Colorado. The drought of 2002 created a new wave of demands on the Colorado General Assembly to "do something" about water. But many of those demands appear to be based on little knowledge about how Colorado water law works. Current attacks on private property water rights include proposed county "tariffs" and other restrictions on water transfers, as well as applications of the "public trust doctrine", and proposed "anti speculation" restrictions on the use of groundwater not subject to the appropriation doctrine.

Restrictions on Water Transfers

Some people in Colorado seem to think they have a right to prevent others from taking (claiming) water from streams, water that has not yet been appropriated for use. Not so, no matter how many years these people have watched that water flow by their land, UNLESS they have a bona fide water right, for which water has been or will be put to an established beneficial use. In other words, people with existing water rights can claim injury against new or changed uses of water, but others cannot. Some people want to expand the number of people who can tell water right owners how to use their water rights, whether under the guise of protecting future uses, water quality or other "environmental" concerns. All such proposals for additional legislation amount to the same thing: a restriction on the availability of water. I hope you understand that even if you would not steal your neighbor's car, you deprive him equally of its usefulness, if you tell him he can only drive it on Monday and only after he pays you a fee for not slashing his tires. This is a very bad idea, yet it amounts to the same kind of "taking" that would be enforced by proposed new water legislation.

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The Colorado Constitution says:

> *"The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."*
>
> *"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied..."*

"Subject to appropriation" means those of you in the public who have not appropriated water for a legal beneficial use, do not have a claim against those who have. "The right to divert…shall never be denied" means exactly that. However, it does not mean without limit or common sense. Colorado water law has wisely evolved to allow anyone to appropriate (claim) a water right for a beneficial use, as long as they have a legitimate claim and do not hurt other water rights in the process.

The Freedom Tax – a very bad idea

Governments always want more of your money. I suppose if some counties thought they could get away with charging an export "tariff" when you take your car and personal possessions out of their counties, they would do it. If you and your "stuff" moved away, you would get gas and tune-ups elsewhere, to the "detriment" of those left behind. If you moved your business out of the county, it would be even worse. Some cities and counties seem to think they own the people and property under their jurisdictions.

It's easy to see the silliness of a tariff, or freedom tax, on moving your personal possessions from one county to another, but it might not be so easy to see what is wrong with the same principle applied to

water rights transfers. Perhaps this is because of the limited knowledge most people in Colorado have about water.

Water Law Basics

Colorado water law guarantees water users the right to change their water rights to other uses or locations, as long as they don't hurt other water rights in the process. Water courts have dealt with these issues in the context of protecting private property rights – a long and respectable tradition in Colorado. In Colorado, anyone can buy or create a water right, but he or she has to either pay the price for an existing right, or prove he or she actually has a need for the water from a new right they might claim. In either case, the person owns a property right that enjoys the legal right to be moved or changed.

Water rights can be valuable commodities, in some cases more valuable than the land on which they are used. Much of this value comes from the ability to freely transfer water rights from one location and type of use to others. That is, as long as other water rights are not injured. This "non injury" principle is fundamental to Colorado water law, but currently applies only to bona fide water right owners. The water court standard applies to water rights, not to a list of other perceived social ills from someone's imagined claim about the public good. To restrict or tax water transfers in favor of someone with an imagined impact from the use of a resource to which they have no legal claim, would be downright silly.

No one can legally take water from a stream in Colorado unless they have a water right. Newcomers imagine they can just drop a pump in a creek and water their lawns, but they often find out the hard way that other water users downstream own the use of the water passing their property. This long-established legal principle ("first in time, first in right") evolved over a century and a half of cooperation and conflict, balancing the competing needs of those with legal rights to use water. In our water law system, even junior water rights can prevent a senior water right from changing its historical use pattern, if that change would involve an expansion of use or otherwise adversely affect the junior right. So, there are mechanisms in place to limit new appropriations and changes in water rights, but they are wisely limited to water rights injury, injury to those who have a right to use the resource.

People without an investment in this important resource do not have the legal right to control it without acquiring water rights. The general public ownership of water in Colorado is guaranteed by the constitution, but that right is nebulous and diffuse. The right to private appropriation for the use of that resource is also guaranteed by the constitution, but this right is specific to people who have undertaken the work necessary to put the water to beneficial use. This requires a serious investment of time and money, unlike the attacks on property rights by those who don't have water rights but want to control water anyway. Property (water) rights should not be upset because some jealous people don not like the freedom water right owners currently have. This freedom is the strength of Colorado's water law system, not a weakness to be corrected by legislation.

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However, there would be a tremendously negative impact on Colorado's economy and general welfare if the legislature were to succumb to special interests and overregulated this complicated, scarce resource. The legislature would in effect be imposing a new tax on the right to use property, making that property less valuable, without paying just compensation. It is bad enough taking someone's property with compensation. Taking it without compensation, as self-appointed water regulators would, is unconscionable.

Many rules of water law have evolved to protect existing water users against frivolous or excessive claims for water. For example, new surface water appropriators must prove to the water court that unappropriated water is available and that the appropriation can and will be accomplished. Water rights senior to new appropriations can "call out" new water rights, when the existing (senior) rights are short of water. According to the appropriation

doctrine, senior water rights may cause junior water rights to be curtailed when senior rights are short of water, but this is not injury even though the junior is deprived of his "use" right at times. That is because the property rights are protected by our system of "first in time, first in right." To over legislate would disrupt this hard-fought, time-tested balance.

Transmountain Diversions

If there is enough water available to satisfy all existing water rights, a person or entity with a legitimate new water claim, is entitled to take any additional water available, up to the maximum amount allowed by a decree issued by the water court. This right, guaranteed by the Colorado constitution, does not currently discriminate against people who live on the east side of the Continental Divide, if they have a legitimate need for water. It's a fact that most of the growing demands for water are on the Front Range, east of the Continental Divide, and most of the unappropriated water is on the west slope.

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If a city or other water user on the Front Range wants to appropriate water on the west slope, it must show that it can and will be able to divert the water. This means getting permits for pipelines, pumps, ditches and other means of getting water from its diversion points, through a tunnel or over a mountain pass, and then delivered to its final destination through other facilities. If existing pipelines are used, they must be owned or contracts must be negotiated with the entities who own them. If the facilities cross state or federal land, permits must be acquired for their use. Each of these steps is expensive and time consuming, usually subject to extensive public input. So, even under the best of conditions, the new appropriator today has a difficult path. Many new appropriations of water are made by existing water users who need additional supplies.

New Realities

In the past, large Front Range cities such as Denver and Aurora were able to acquire transmountain diversion systems or move other water rights into them without having to deal much with west slope interests. Since existing transmountain systems already took water from the west slope, some operating for many decades before cities got involved, it did not make much difference whether the water went to one use or another after getting to the Front Range. However, as demands grew and fewer existing systems became available for use, more people on the west slope became alarmed at the trend of developing new projects. Although you would not know it from the west slope interests crying "foul" about today's new proposed transmountain diversions, the perceived problem of such diversions is already being solved without the help of the Colorado General Assembly.

Ever since Denver's famous Two Forks Project was stopped in the 1980's due to the inability to get federal permits, Denver has worked closely with west slope groups to create partnerships that make sense to both sides. This has been done constructively, helped by water experts, affected parties and others with high stakes on both sides, and this has worked well for that limited purpose. It is not possible today to bring to fruition a new transmountain diversion water right without going through extensive public meetings, debates among competing interests to water and consideration of leaving some water developed from the project on the west slope. More legislation, which is swapping cooperation and informed mutual interest for a sledgehammer, would only inhibit this process.

Any legislation that would give any local community on either slope a veto over the creation of a new water right or the movement of water would turn the clock back to a time when robber barons ruled parts of the west. The excuse for such legislative proposals is that west slope water needs protection from east slope demands, which is already being done through the permitting process and cooperative arrangements such as those negotiated by Denver. The real agenda behind this type of law is

to destroy water markets, replacing their system of law with a system of ransom, based on the Public Trust Doctrine.

Public Trust Doctrine

The "Public Trust Doctrine" is a politically correct term that means the "public" has a right to take your property without compensation. More specifically, the public trust doctrine is a legal principle that encourages more government regulation of water resources through councils, public forums and an expansion of reasons to limit the freedom of water right users to appropriate or move their water rights.

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How can anyone argue with improving the public trust? Well, no one knows what the public trust is or to whom it applies, who pays the bill, or how easily special interests use this term to couch their particular agendas in terms voters (or legislators) would approve. Why, if something is good for the "public trust," it can be used to justify just about any kind of infringement on freedom, property rights or other shenanigans.

Here is what the Center for Environmental Education has to say about the Public Trust Doctrine:

"The Public Trust Doctrine may very well become the most important tool for citizens seeking to protect their streams and rivers from harmful water developments and users, especially in states with no established minimum instream flows. Its general premise is that a state's natural resources are held in the public trust and even senior, appropriated water users do not have the right to destroy the public's natural resources."

And,

"The Public Trust Doctrine may very well emerge as the most comprehensive river protecting tool available to the river activist. Its strength is evident in the fact that it can override senior water rights in the name of the public trust."

This is a very, very dangerous idea and it is gaining popularity by leaps and bounds. It attacks the very foundation of the appropriation doctrine and Colorado water law. Proposals to restrict the transfer or appropriation of water rights are thinly-veiled attacks on those water rights under the guise of this socialistic doctrine. It says, in essence, that anything the "public" wants, it can take from you, without compensation.

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In Colorado, water right owners are fortunate that the state constitution makes public ownership of water "subject to appropriation." The Public Trust Doctrine is promoted by a variety of groups who think it is perfectly acceptable to force senior water right owners to give up their property rights so that someone can "protect" streamflow. As I pointed out in another paper for the Independence Institute last year ("Use it or Lse it – Colorado's Oldest and Best Recycling Program"), Colorado water law has evolved to protect not only water rights for cities and power plants, but also water rights for environmental protection and streamflow enhancement. As usual, the problem is that people who imagine themselves as protectors of the environment, or more conveniently, the "public," do not want to pay for their economic choices. They would rather have the Colorado General Assembly take water rights from others and give them to these "protectors," without buying senior water rights or filing for new ones.

In California, the public trust doctrine is all the rage – socialism on steroids. Anyone with a vivid imagination, whether or not they are movie stars, can bring a few friends to a public meeting and influence public-minded "servants" to just about steal anything from anyone.

Speculation and Denver Basin Aquifers

The legal right to appropriate water has been clarified by Colorado courts since the Colorado

Constitution was adopted. For example, water law has evolved to not allow "speculative" appropriations of surface water rights. This means if you do not have a real, bona fide use for the water, you cannot appropriate a water right because you "think" you might be able to sell it to someone else. The reason for this is that if you do not use the water in a stream, someone else downstream can use it. The more they rely on your unused water in the future, the less right you have to it. As difficult as this might be for some to accept, it makes sense that you do not own what you cannot control, if others can use it. The appropriation of Colorado surface water rights are based on the idea that you can appropriate water you can and will use, but no more than that. That is why most of the available water is on the west slope – there simply are not enough people to put much more of it to beneficial use.

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The Denver Basin is a series of four underground aquifers (water-bearing formations) that stretch from Colorado Springs to Greeley and from the foothills to Limon. Wells drilled into these aquifers may be from about 200 feet to almost 2000 feet in depth.

Denver Basin wells are a finite supply of water because for the most part, they are not connected to surface streams. This means once the water is pumped out, it is gone forever because natural recharge (refilling by precipitation) is minimal. It is more like a mineral right than a water right diverted from the stream. Surface water rights, though subject to droughts, are at least part of a renewable supply, since rain and snow will continue to replenish those streams in future years. This highly variable supply is why a system of priorities is needed to allocate water during a drought.

While renewable water supplies from streams can likely be counted on for centuries into the future, Denver Basin groundwater cannot. Denver Basin groundwater is allocated like a mineral right, based on the amount of overlying land ownership – NOT by the appropriation doctrine ("first in time, first in right"). This means unused water under the property does not immediately become available to others, contrary to the situation with surface water rights. The rule for allocating this water at the State level is based on the so-called, "100-year rule." Based on the depth of groundwater under a particular property and the number of acres of property ownership above the aquifer, the total amount of water in storage is calculated. Assuming a 100-year aquifer life, 1/100 of this water may be taken out each year. Theoretically, at this rate, the water will last 100 years. In some parts of the aquifer near its center where the aquifer is deepest, the water should last much longer. In areas around the edges of the aquifer, it could last much less than 100 years.

Water in Denver Basin aquifers can slowly migrate from one property to another, but for all practical purposes, water not used is property that is saved to be used another day.

The idea of speculation, as applied to surface water rights, has an important foundation in the simple fact that surface water not used is immediately available to others. From a factual point of view, applying the anti-speculation principle in the Denver Basin is unfounded. Water in Denver Basin aquifers can slowly migrate from one property to another, but for all practical purposes, water not used is property that is saved to be used another day. Some Denver Basin well users are already pumping surface water back into the ground to save this precious resource.

The unique character of Denver Basin groundwater is that it is physically tied to the overlying land in a way that surface water is not. Proposing to restrict Denver Basin groundwater based on speculation is an attempt to solve a non existent problem.

Conclusions

Proposals to allow committees, water judges or County Commissioners to restrict the transfer of water rights or transmountain diversions amount to an unconstitutional power grab by people who do not have water rights. Especially in the case of counties or other political entities without specific water rights, this amounts to a freedom tax - a simple property taking without compensation. By standing

firm against the public trust doctrine and refusing to impose further limitations on Denver Basin groundwater, the Colorado General Assembly can uphold Colorado's proud tradition against such intrusions on property rights.

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