

# Getting Beyond All or Nothing in the Public Trust Debate

Jennifer Bock  
Water Director  
High Country Citizens' Alliance

# Many thanks to Steve Glazer!

- Over 20 years of water work in the Gunnison Basin and across Colorado.
- My mentor in Gunnison Basin water issues, and a source for many of the questions in this presentation.

# Goals

- *Start a dialogue*
- *Move beyond fear of a public trust initiative*
- *How can we evaluate the impacts of new supply on the environment in Colorado's Water Plan?*

# What is the Public Trust?

- A common law concept that holds that certain resources are preserved for public use.
- Originally applied to navigable waters.
- Proposed in 2012 as an amendment to the Colorado Constitution.

# The Mono Lake Case— *National Audubon Society v. Superior Court*

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# The Public Trust in California

“The core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and [33 Cal.3d 426] **bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests** protected by the public trust.” *National Audubon Society v. Superior Court* (1983) 658 P.2d 709.

# Hawaii's Public Trust



The Waiahole Watershed had once been dried up for agricultural use, but water began flowing again when sugar cane fields went out of production.

# Hawaii's Public Trust

- The Hawaii Supreme Court cited its Constitution which included the public trust as well as its traditional values before becoming a state.
- “courts reviewing their decisions must apply presumptions and burdens of proof in favor of public trust values, independently determining whether benefit justifies harm” (Antonio Rossmann, Op-Ed: *Restore public trust to water law*, Sacramento Bee, August 19, 2012.)



# Environmental Analysis Laws Impacting Water Development

- National Environmental Policy Act (NEPA)– only triggered when the federal govt is implicated.
- California Environmental Quality Act (CEQA)– a state version of NEPA.
- CEQA and NEPA are process laws, who's intent is to improve decision-making by disclosing impacts and ways to minimize/mitigate negative environmental effects.
- CEQA is somewhat stronger→ it contains a substantive requirement to mitigate adverse impacts unless infeasible

# (one of) California's environmental water disasters— the Salton Sea

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# What is being proposed in Colorado?

- An amendment to our state constitution:
- “the public’s estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law.” → upends the prior appropriation system.
- In addition, initiative #45 would have given citizens the ability to take legal action against water users.

# What appeal does the public trust have in Colorado?

- The initiatives sought to appeal to various Colorado constituencies by including:
  - Guaranteed access to streams for recreation
  - Elevation of water quality concerns.

# A low flow day on the Fraser River

(photo by Randy Scholfield of Trout Unlimited)

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# What protections do rivers have in Colorado?

- Instream Flow Program
- Mitigation Statute:
  - Applies to major diversions which require federal permitting
  - Project proponent submits mitigation plan to Colorado Parks and Wildlife Commission
  - Can be altered by the CWCB or the Governor
  - Funding available to aid mitigation plans

# The Colorado Water Plan

- A draft of the CWP outlines a “Framework on streamlined water project permitting processes”
  - The stated objective is to “Show how the CWP will help make water supply project permitting processes more effective and efficient, especially for **those projects that meet Colorado’s water values** and fit within the CWP framework.”

# What are Colorado's water values?

- Meeting urban demands
- Avoiding “buy and dry” that impacts agriculture
- Fulfilling our obligations downstream, avoiding compact curtailment/risk management
- endangered species
- gold metal fisheries
- riparian degradation
- pollution issues
- boating/recreational needs



# Colorado's Opportunity

- Grassroots State Water Plan Process.
- Desire to move beyond West Slope v. East Slope and come to effective compromise.
- Recognition that we value urban growth, as well as agriculture, recreation and the environment.

# The Challenge:

- Create a protocol/process that is able to balance water development and the environment.
- Ask critical environmental and recreational value questions at the outset of any evaluation of new supply.
- The ideal outcome: avoiding litigation and lengthy permitting battles.

*Our Rivers— what we want to protect for future generations...*

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