

Bridging the Divide between Water Quality and Quantity

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PRESSURE POINTS

Takings

The takings analysis framework that courts use evolved primarily in the context of real property and land use disputes. Its application to appropriative water rights has not proven simple, nor is it yet clear.

But, the possibility that a court may find water quality protection to be a “taking” has been influential.



PRESSURE POINTS

The Wallop Amendment

It is the policy of Congress that the **authority of each State to allocate** quantities of water within its jurisdiction **shall not be superseded, abrogated or otherwise impaired** by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to **supersede or abrogate rights to** quantities of **water** which have been established by any State. Federal agencies shall **co-operate** with State and local agencies **to develop comprehensive solutions** to prevent, reduce and eliminate pollution in concert with programs for managing water resources. [33 U.S.C. § 1251(g)]



PRESSURE POINTS

State Law

MONT. CODE ANN. §75-5-705

Nothing in [the Water Quality Assessment] part [of the water quality statute] may be construed to divest, **impair**, or diminish any water right recognized pursuant to Title 85.



WATER QUALITY

Water Quality Standards & Assessment Parameters

- Water quality standards (set by the state) include designated uses and criteria.
 - Better align beneficial uses and designated uses
 - Where appropriate, include consideration of water quantity in designating uses for water segments.
- Where appropriate, make water quantity an explicit part of assessing whether designated uses are being met.



WATER QUALITY

Reflect Flow Issues in the Integrated Report

- Use Category 4C
- Reference flow in addition to the pollutant(s) in listings



WATER RIGHTS

List Quality as a Beneficial Use

Different states list as beneficial uses of water (quantity):

- “Water quality”
- “Pollution abatement”
- “Contamination remediation” and
“ sediment control in a reservoir”



WATER RIGHTS

Other Beneficial Uses Can Support Water Quality

For example:

- Fish and wildlife use
- Domestic use / municipal supply



WATER RIGHTS

Allow Water Quantity to Be Used to Address Quality Problems

Regardless of whether “water quality” is listed as a beneficial use, the law might expressly allow water to be used for quality purposes:

- Generally
- By specific parties
- In specific instances



WATER RIGHTS

Quality as a Water Right Impairment

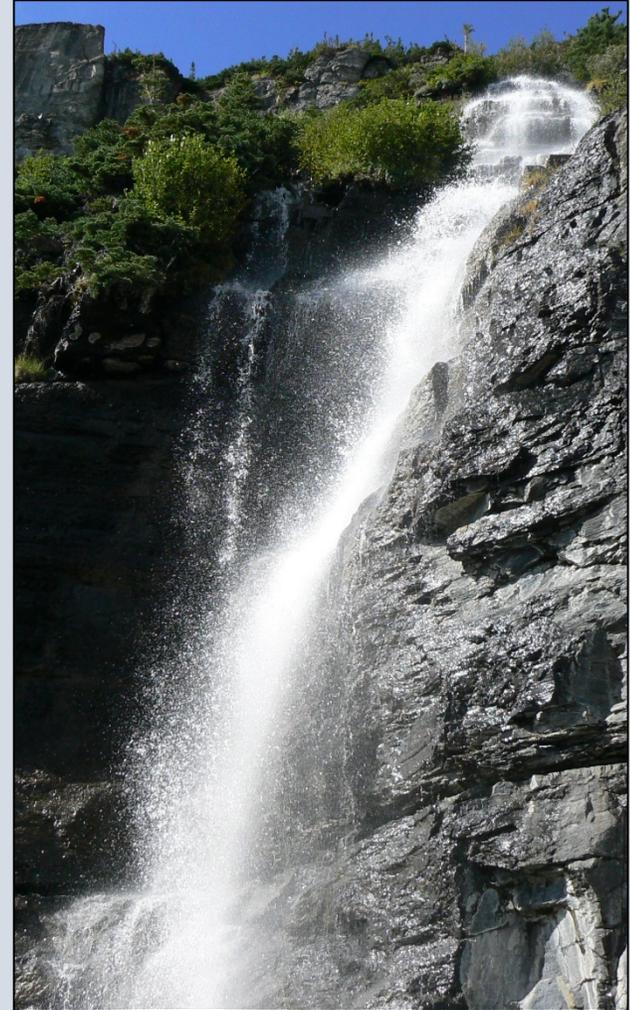
The quality of water may make it unsuitable for the purpose of a water right. Water quality has been viewed as:

- An inherent part of a water right
- A consideration in the course of a new appropriation or change review



PROCESS

- General Coordination
- Case-Specific Consultation
- Allocation Processes that Consider Water Quality
- Allocation Conditions for Water Quality Purposes
- Water Quality Processes that Consider Water Quantity



STRUCTURE

When water quantity and quality authorities are housed in different agencies, the following can help with coordination:

- Co-location of agencies
- Staff changes/rotations among the agencies/programs
- One executive or office of counsel over both water quality and quantity



Web search:

“At the Confluence of the Clean Water Act and Prior Appropriation.”

