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## Colorado Water Courts Update

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obtain water rights for production of oil shale. Currently, energy companies own absolute water rights to almost 70,000-acre feet of water annually within the White and Colorado River basins. In addition, energy companies have conditional water rights in these two basins with 1960 era priority dates. If energy companies exercise the conditional water rights that they own, this could create serious impacts throughout the state. For example, many of the large water rights owned by Denver Water have junior priority dates to many of the oil companies' conditional water rights. Moreover, under the Colorado River Compact of 1922, which the various states created during a historically wet period in history, Colorado may be approaching serious risk of exceeding its allocation and having its use of Colorado River water curtailed. Additional water projects using substantial amounts of water may further lead to excess water use causing a Compact call. Such a call would first curtail the larger Front Range cities. Endangered fish also mount a cause for concern. If oil shale developers with senior rights require more water, endangered fish would lose their habitat at an alarming rate because the White and Colorado River basins contain extensive numbers of endangered fish.

Mr. Miller concluded his presentation by stating the various findings of *Water on the Rocks*, which proffers that western communities must understand and conserve water, especially if we continue our current usage of water and hope to expand to include oil shale development. The report found that commercial oil shale development would transform western water communities by changing the ways that people view and access water. Thus, we must balance the development and sustainability of water, and further strive to evaluate and understand oil shale development in terms of climate change and water availability. In order to do this, experts must quantify water needs and identify supply sources before we commit to oil shale development as the energy of the future.

*Christopher McNicholas*

#### COLORADO WATER COURTS UPDATE

Justice Gregory Hobbs of the Colorado Supreme Court discussed the history of water law in Colorado and the future of the water courts. Justice Hobbs explained that, throughout Colorado's history, the courts helped develop Colorado water law. Colorado has seven water courts, which solely handle water issues. These courts have influenced the development of Colorado water law since 1879, when the Colorado legislature created them. The Colorado Supreme Court also has a long and significant history of deciding issues of importance in water law.

According to Justice Hobbs, the Colorado Supreme Court faces significant challenges in interpreting and enforcing water laws. Several water doctrines constrain the Colorado Supreme Court. In particular,

the doctrine of equitable apportionment and various interstate water compacts limit Colorado's access to the water that exists within its borders. Due to these compacts, Colorado may only appropriate one-third of the water in Colorado. The courts must further divide this limited water among competing interests. Under the Colorado Constitution, the doctrine of prior appropriation dictates who may appropriate Colorado waters and who possesses superior water claims. Although prior appropriation controls distribution of Colorado water, the Colorado Constitution contains a preference clause that favors domestic water use over agricultural use and favors agricultural use over manufacturing use. However, the Colorado Supreme Court has found that this preference clause does not significantly modify prior appropriation. Instead, Justice Hobbs suggested that the preference clause operates as an emergency mechanism through which Colorado cities may purchase water rights from other, less favored sectors. Despite the preference clause, prior appropriation still applies to all the different uses of Colorado water, regardless of whether the appropriation is for mining, agriculture, kayaking, or other uses. However, Colorado courts must also honor federal-reserve water rights, such as tribal water rights. These rights are separate from, and generally superior to, prior appropriation water rights.

Justice Hobbs explained that, although Colorado will face challenges from climate change, the Colorado water courts are in a good position to approach these challenges. Justice Hobbs acknowledged that Colorado must address the problem of having a fixed supply of water and a rapidly expanding population. Accordingly, Colorado must find ways to stretch its water resources farther. Justice Hobbs explained that the Colorado water courts are well suited to address this issue because the water courts address individual water issues incrementally. Justice Hobbs predicted that, in the face of climate change, courts might require the appropriators of water to provide a persuasive showing that the appropriators are appropriating the water for a beneficial use and not wasting water.

Justice Hobbs also discussed recent efforts to make Colorado water courts more efficient. In the past, parties have complained that Colorado's water court system is too costly and time consuming. To address this criticism, the water courts have made all necessary forms available online and have also implemented new procedural rules, effective July 1, 2009. The rules impose stricter deadlines to promote efficiency in the water courts. In particular, a water referee now only has one year to make a decision before a water court addresses the issue. These rules attempt to streamline the water courts; however, it is too soon to tell whether these rules will make the court system more efficient.

Despite the challenges of climate change and procedural efficiency, Justice Hobbs expressed great faith in the future of the water courts. In particular, he explained that Colorado has been, and still is, a great

problem-solver of water issues to which other western states look for guidance. Justice Hobbs ended his presentation with his a reading of his poem, "Circumference." The poem described how living in a land of scarcity and opportunity connects everyone.

*Ellen Michaels*

## COLORADO LEGISLATIVE UPDATE OF WATER ISSUES

Doug Kemper, Executive Director of the Colorado Water Congress ("Water Congress"), concluded the day-long symposium with an overview of the water-related issues the Colorado legislature is currently discussing. Since 1957, the Water Congress has been the primary organization representing water interests in the state. Created by then-Governor Steve McNichols and then-Attorney General Duke Dunbar, the Water Congress now has approximately 350 members.

The Water Congress has monitored the successful Upper Colorado River Endangered Fish Recovery Program ("the Program") since the 1980s. The Program is a partnership that includes the states of Colorado, Utah and Wyoming, the Bureau of Reclamation ("BOR"), the U.S. Fish & Wildlife Service, the National Park Service, Western Resource Advocates, the Nature Conservancy, and the Water Congress's sister organizations in Utah and Wyoming. The Program protects endangered fish native to the Colorado River, including the Colorado pikeminnow, the humpbacked chub, the razorback sucker, and the bonytail chub. The Program's goal is to delist at least one of these species on the Colorado River by 2023; delisting is an indication that the species has recovered substantially. Mr. Kemper reports that the Program has already completed both the fish bypass structures and the hatchery program necessary for the delisting of each of these species. Impressively, the Program has completed 11,000 Endangered Species Act consultations to date—representing at least 2.1 million acre feet of depletions without a single lawsuit filed. Colorado's share of the cost of this program comes from a state severance tax from oil and gas revenues (ranging from ten to several hundred million dollars per year). About a quarter of the Program's revenue goes to maintaining water infrastructure, with another quarter going to operational accounts, which maintain basin amount and the water supply reserve account to fund the work of the basin roundtables). The Program also includes a fund for species conservation trust fund. Because the legislature has struggled to balance Colorado's budget over the last two years, the Program has pulled \$150 million from the Colorado Conservation Board's cash account that is no longer available for water projects.

Kemper then summarized three recent and pending pieces of legislation: first, Kemper discussed HB1188, regarding rafting and whether or not the "right to float" existed in Colorado from the time of its creation as a state. There has long been legal uncertainty about the