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Day Two: Friday, March 13, 2009

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lawyers. According to Mr. Robbins, a problem among water courts is a lack of any uniform understanding of water allocation. Without such uniformity, water courts cannot make the best possible decisions. In addition, water courts serve many *pro se* litigants, and the lack of user-friendly legal materials creates a great disadvantage for these non-legal claimants.

Brandon Campbell

DAY 2: FRIDAY, MARCH 13, 2009

FARMERS RESERVOIR AND IRRIGATION COMPANY: A CASE STUDY

John P. Akolt, III, General Counsel, Farmer's Reservoir and Irrigation Company ("FRICO"), the Burlington Ditch, Reservoir and Land Company, and the Wellington Reservoir Company, opened Day Two of the conference with a case study on an irrigation-to-municipal change of water right for two ditch companies, FRICO and the Burlington Ditch, Reservoir and Land Company ("Burlington"). Akolt first gave a brief history of the ditch companies at the turn of the 20th century, which irrigated eastern Colorado. The courts originally decreed Burlington the direct flow and storage rights in question in 1885, and FRICO allegedly expanded the rights in 1909. Akolt focused on issues surrounding the direct flow right, although the case involved litigation over both the storage and direct flow rights.

Akolt framed the presentation in terms of two major legal considerations with general applicability for the audience, namely, the use of the Burlington water rights adjudicated in 1893, and the preclusion effects of previous change-use cases on the rights. The Water Division One court held in November 2008 that Burlington did not have the right to change its decreed 1885 rights because neither Burlington nor FRICO proved intent to apply direct flow water below Barr Lake. The court construed "susceptible to irrigation" from historical testimony as insufficient for intent to irrigate the full amount of the direct flow water decreed, and held that twenty years was an unreasonable amount of time to perfect an appropriation. Akolt considered the rights in the case the water court cited for "reasonable period of use" for perfecting an appropriation distinguishable from the Burlington rights. The rights in the court-cited case involved conditional water rights, not already adjudicated rights, so Akolt reasoned that the court should have also limited other ditches' rights by this logic. Akolt also respectfully disagreed with the court that the issues it litigated in a previous case were identical and thus barred from re-litigation by issue and claim preclusion. He reasoned that the previous litigation involved a general adjudication allocating priorities while the current case involved changes issues in terms of the historical use of the 1885 Burlington

water rights. Akolt ended the presentation saying that FRICO and Burlington would appeal and file Motions for Reconsideration on some aspects of the findings following the water court's entry of a Final Decree, which the court had not yet filed as of this conference date.

THE WESTERN SLOPE'S RESPONSES TO THE UNCERTAINTY OF FUTURE
WATER AVAILABILITY: WILL THERE BE ENOUGH WATER TO SUPPORT
DEVELOPMENT? THE ECONOMICS OF OIL SHALE; MANAGING THE
COMPACT

Eric Kuhn, Director of the Colorado River Water Conservation District in Glenwood Springs, discussed the Western Slope's challenges and responses to managing uncertainties of the Colorado River system water supply. Kuhn discussed three major categories of uncertainty affecting the current water demands of the Colorado River Compact ("Compact") states: hydrology, including climate change; unresolved legal disputes; and future demand uncertainties. Kuhn presented paleo-hydrological studies demonstrating a more realistic mean flow supply of 13.5 to 14.8 million acre-feet per year at Lee Ferry versus the Compact's projected 17.5 million acre feet. He related that although climate change studies have yielded different results, all recent projections have showed a decline in runoff for most of Colorado's rivers. Kuhn was particularly emphatic that the results were even more dire considering "the certainty of future temperature increase trumps the uncertainty of future precipitation levels," and that even small changes in mean natural flow at Lee Ferry (e.g. 10%) could cause "significant unacceptable impacts throughout Basin." The two major legal uncertainties he discussed involved Mexico under the 1922 Colorado River Compact and 1944 Mexican Treaty and Navajo Indian rights issues under the Compact. Kuhn discussed the consequences for signatory states in the event of surplus and drought in terms of the agreements with the Republic of Mexico, particularly for the Gila River system, which cannot currently efficiently deliver to Mexico. Kuhn was concerned with the failure of parties to quantify the Navajo reserved rights, which has Upper and Lower Basin interests. Finally, Kuhn explained how Southern California's water demand could affect supply in upstream states because challenges facing supply from the California State Water Project might force Southern California to rely more heavily on Colorado River water supplies.

Kuhn explained that Colorado's potential oil shale development could arguably consume the state's remaining entitlements under the Compact. Maintaining that no major changes to the "Law of the River" were likely in the near future, Kuhn described three types of responses imperative for meeting demand challenges: identifying and avoiding unacceptable outcomes with health and safety as top priorities, maintaining effective working relationships among stakeholders, and increasing reliance on science in decision-making, particularly in imple-

mentation. He praised the Upper Colorado River Commission for fostering positive stakeholder relationships but warned that future challenges may overwhelm voluntary cooperation among states.

In closing, Kuhn cautioned against giving people the impression that they have more water than they do, proffering that the river is only the “sum of its parts.” He fielded questions on curtailment scenarios, maintaining that Colorado should have contingency plans using its pre-1922 Compact rights, and that the Basin states would likely achieve an agreement with their lawyers before United States Supreme Court intervention.

MUNICIPAL CHALLENGES TO WATER USE OPTIMIZATION: WATER
QUALITY CONSTRAINTS; AGRICULTURE TO URBAN TRANSFERS;
DROUGHT/CLIMATE CHANGE; PRAIRIE WATERS PROJECT FROM THE
CITY’S PERSPECTIVE

Mark Pifher, Director of Aurora Water, painted a picture of what the city of Aurora is doing to optimize its water use. Pifher look at five variables: scarcity, climate change, statutory and regulatory changes in terms of quality, statutory and regulatory changes in terms of quantity, and “competing values” (e.g. agricultural to municipal transfers). Pifher focused on agricultural to municipal transfers as the low-hanging fruit, transitioning from the politically unacceptable “buy & dry” to a “continued farming” program. Aurora is currently putting together a template on facilitating such transfers, looking at the size of the transfers relative to affected areas and the transfers’ water quality impacts. The city is tackling the problem from a basin-wide perspective and focusing transfers on investment versus yield on unproductive lands and moving waters off individual parcels rather than whole ditches or farms. Aurora’s “continued farming” program installs highly efficient irrigation systems, changes cropping patterns and alternates sources of water. The program helps keep fields in irrigation, alleviates drought concerns, adds infrastructure improvements, converts some of the land back to native grasses, and maintains agricultural “ownership” of its water rights, providing a win-win situation for agricultural and municipal interests. Finally, Pifher discussed the status of the rules affecting water transfers through the most recent major federal cases, with the courts split on whether water transfers require Clean Water Act National Pollution Discharge Elimination System (NPDES) permits. The Colorado rule currently excludes non-treated water, which would otherwise implicate thousands of additional permits, but Colorado is starting to resolve the issue through legislative hearings.

SETTLEMENT AND THE USE OF NEGOTIATION: LESSONS FROM THE BLACK CANYON OF THE GUNNISON

Bart Miller, Water Program Director of Western Resource Advocates, Boulder, John H. McClow, General Counsel for Upper Gunnison River Water Conservancy District, Gunnison, and David Gehlert of the Natural Resource Section Environmental & Natural Resources Division of the United States Department of Justice, Denver, then presented lessons learned from the negotiation of the Black Canyon of the Gunnison ("Black Canyon") water flow rights following litigation of that case. Miller first described the federal component of the issue, which involved a federally-reserved water right which spawned litigation in 2003, following a back-room agreement in which the federal government delegated the federally-reserved right to Colorado. The district court held in 2006 that the federal government improperly delegated the determination and acquisition of the park's flows to the state but still neglected to quantify the water rights. Miller described the history of the water rights in the Black Canyon (designated a National Park in 1999), pointing out that the federal government did not try to clarify the conditional water rights for the Black Canyon's proper flows until 2001, which met with huge opposition because of Upper Gunnison property owners' rights becoming junior to the park's rights and potentially impacting a number of uses.

McClow described how dozens of parties then ultimately entered into formal mediation from September 2007 to June 2008 to reach agreement on the final stipulated decree. The negotiated settlement involved wet, dry and average year analyses for determining desired flows, contingency plans for dry-year flows to protect listed species and their habitat in the Gunnison River, incorporating benefits into the flows such as fishery health and the "Roar of the River" aesthetics of the famous gorge, and attempted coordination with the Aspinall Unit's Environmental Impact Statement.

Gehlert discussed the challenges and successes of the settlement and negotiation, including the large number of parties in the case, and the conflicts not just between groups, but also among them. The biggest lessons learned included the willingness of parties to serve as quasi-mediators, despite having one overall professional mediator, forming breakout groups without lawyers, and the importance of reducing the number of parties involved. Gehlert also mentioned the importance of letting people simply vent, intense word-smithing to avoid giving the appearance that one party favors one more than another, putting aside conflicts over the law and science, and being creative and willing to compromise, cautioning not to "let 'perfect' be the enemy of 'good enough.'"

SUPER DITCH FOLLOW-UP: AN UPDATE FROM THE LOWER ARKANSAS VALLEY

Peter Nichols of Trout, Raley, Montano, Witwer & Freeman presented on the Super Ditch Company (“the Company”) and Lower Arkansas Valley Water Leasing program, a follow-up on the temporary water leasing program alternative to conventional “buy and dry” of irrigated land in the Lower Arkansas Valley. Nichols explained the purpose of the Super Ditch, namely to preserve irrigated agricultural production in the Lower Arkansas Valley while allowing municipal and other users to lease water to meet their unmet consumptive and non-consumptive needs.

The Lower Arkansas Valley Water Conservancy District (“District”) established the Super Ditch in 2008 to allow irrigators in the valley to work collectively to maximize the value of their water rights, particularly during fallowing periods, with irrigators participating to the extent they desire (i.e. up to 100% of their land). Nichols explained that the Company would act as the broker between cities and irrigators, negotiating leases and determining the yield of leasable shares, among other things. To date, the District has spent over \$600,000 of its own funds to evaluate the feasibility of the program, prove the concept, and address essential antecedent issues to the formation of the Company. Such activities included a field trip to the Palo Verde Irrigation District in California in 2006, in which local Lower Arkansas Valley ditch owners collected information on an ongoing successful fallowing-leasing arrangement between the Palo Verde district and the Metropolitan Water District of Southern California, economic analyses of regional water markets and impacts, and legal considerations on articles of incorporation and antitrust issues for the “Lower Arkansas Valley Super Ditch Company.” Nichols ended the presentation by stating that the District plans to come into operation during the 2009 water year and will be filing its first water court change applications for its first leases. Nichols received questions involving allocating demand for multiple party interests and whether there were any complications with lenders.

INVASIVE SPECIES: ZEBRA MUSSELS IN COLORADO

Elizabeth Brown, Invasive Species Coordinator, Colorado Division of Wildlife, closed the conference with an update on the zebra (*Drissena polymorpha*) and quagga (*Drissena rostriformis bugensis*) mussel infestation problem in Colorado and the west. Brown gave a short history of the infestation problem, beginning with the zebra mussels’ first United States sighting in 1988 in the Great Lakes via a transoceanic vessel from the Black and Caspian seas and their first western sighting in Lake Mead in 2007, explaining that the mussels travel over land on boats and trailers or downstream in natural or conveyed water flow. Brown then gave an overview of the mussels’ biology, describing such

powerful invasive characteristics as their byssal threads, which they use to attach to substrate and which clog water distribution systems, their destruction of the food chain base in aquatic ecosystems through plankton removal and their excretion of heavy metals, and their prolific propagation, with a single female producing up to one million eggs per year, ten to fifteen percent of which reach maturity. The mussels damage boats, fishing, and beach recreation with a total yearly cost to businesses and communities of over five billion dollars. She then described actions environmental enforcement officials are taking in Colorado, which has infestation problems in Pueblo Reservoir, Tarryall Reservoir, Jumbo Reservoir, and the four Colorado-Big Thompson lakes. Colorado passed the ANS Act (Aquatic Nuisance Species Act) in May 2008, making it "illegal to possess, import, export, ship, transport, release, plant, place, or cause an ANS to be released." Brown ended the presentation describing ongoing statewide monitoring, prevention and law enforcement efforts designed to eradicate and mitigate contamination.

Suzanne Lieberman

UNIVERSITY OF DENVER WATER LAW REVIEW

2009 SYMPOSIUM

Denver, Colorado

March 4, 2009

WATER LAW 101: UNDERSTANDING THE FUNDAMENTALS OF WATER LAW

Dan Vigil, Assistant Dean and Lecturer, University of Denver Sturm College of Law, presented one of the first sessions of the day on the fundamentals of water law.

Mr. Vigil briefly explained that Colorado follows the doctrine of prior appropriation, where the use of the water need not be near the source of the water itself. He mentioned that the courts previously discussed but ultimately decided against the possibility of Colorado being a hybrid state, where some water owners have prior appropriation rights and some have riparian rights. Mr. Vigil noted that practicing in hybrid states is difficult and many are trying to move away from prior appropriation.

Next, Mr. Vigil explained the doctrine of riparianism, where those who own land abutting a watercourse have the right to use the water. Riparianism gives owners the right to use the water, but only on the land abutting the watercourse, thus it ties water use to the watercourse. Under this doctrine, a landowner owns to the middle of the stream and the land ownership gives the owner the right to use the water.