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Water Court Committee: Designed to Evaluate the Functions of the Water Court

Mr. Sims also briefly described other laws applicable to the use of ARR which included: the State Engineer Guidelines for Lining Gravel Pits, the EPA Underground Injection Control Program found in Part C of the Safe Drinking Water Act, and other Denver Basin recharge issues originating from Colorado statute section 37-90-137(9)(d), which deals with well permitting and locating requirements.

All three speakers discussed the importance of water reuse technologies in maintaining municipal water supplies and how Colorado's variable water supplies make water reuse a great strategy for municipalities like Aurora and Denver. The overall message from this panel is that, although many of these technologies are new, Colorado water law can accommodate them. Thus, Colorado municipalities should increasingly consider water reuse as a viable water management strategy.

Steven Earl

WATER COURT COMMITTEE: DESIGNED TO EVALUATE THE FUNCTIONS OF THE WATER COURT

Justice Hobbs opened his report on the Water Court Committee with a poem about rust on the hinges of a tackle box. He wondered aloud if there is rust on the hinges of the water law that resulted from the 1969 "Adjudication Act." He noted that three quarters of Colorado's water basins are over appropriated. Also, Colorado is only able to use one third of its resources because the other two thirds must go to the out-of-basin states. The Adjudication Act, known officially as the "Water Right and Determination and Administration Act of 1969," provided that water judges would determine both water rights and conditional water rights, approve plans for augmentation, and eventually take over jurisdiction of water adjudications pending at the time of the passage of the Act. The Act also gave responsibility for administration and distribution of water to the state or division engineer and provided that the water judge of the involved division should issue any injunction to enforce orders of the state or division engineer. Justice Hobbs noted that the government has known since the 1890s that both the Platte and the Arkansas River systems are over appropriated.

Justice Hobbs explained the legislature passed the Adjudication Act partially because judicial districts do follow water boundaries, and a system of water courts, water judges, and division engineers to adjudicate and change water rights was clearly necessary. Justice Hobbs mentioned there were two major bills in 1969, a Senate Bill and a House Bill. Attorneys authored the Senate Bill, while Felix Sparks, director of the Water Conservation Board, drafted the House bill. The Senate Bill proposed that the initially the division engineer would make a determination of all water rights applications. Under this bill, the division engineer would become responsible for ruling and making a determination on the application on a case-by-case basis. The water courts would then review this ruling. The bill did not introduce a standard of

review, however, and so it was unknown whether the courts would review the matter *de novo*. The House Bill recommended commissions of 3-5 persons appointed by the director of the Department of Natural Resources. In this bill, the commission would make the determination of the application, which the water courts would then review *de novo*. These commissions would be made up of experts. However, the House Bill did not grapple with the well problem.

Once introduced, the legislature used the Senate Bill as a starting place, and the House struck their version of the Bill. To the Senate Bill the legislature added a provision for water referees, who would receive appointment by the DNR. A water referee is a judicial-type official who exercises an informal approach, which has become controversial because the referees do not have to be engineers. Also, the process is informal and not very well defined, except that there must be an investigation and a ruling, however, there is no time limit. Also, if anyone protests the ruling there must be a full-scale trial.

Justice Hobbs noted that the Water Court Committee was born out of study groups that suggested that the Colorado Supreme Court look at procedures that will expedite water court proceedings and make them less expensive. Some of the reforms requested would require statutory change. Justice Mullarkey, Chief Justice of the Colorado Supreme Court, has formed a 21-person committee, which Justice Hobbs chairs to look at whether the Colorado Supreme Court should propose rules or recommend statutory change. Justice Hobbs noted that the court has always guarded its rule-making power, which the Colorado Constitution grants to it, creating a delicate balance between special statutory schemes and the courts rule-making authority.

The Water Court Committee report is due on August 1, 2008, and Justice Hobbs encouraged all the attorneys present at the conference to email him ideas for the upcoming scoping hearing. The committee will be deciding what modifications can be made by rule and what changes should be made by statute. The committee will be deliberating for the next four months and would appreciate the input of fellow attorneys. The committee will propose rules, but it will be the responsibility of the Colorado Supreme Court to draft the rules. Justice Hobbs acknowledged the criticisms of this process: it is both expensive and dominated by lawyers. Many also have thought there should be reform of the expert witness role in the water courts. Some think courts, not individual parties, should appoint expert witnesses due to problems of adversarial bias in the system.

Overall, the system set in place is currently far advanced compared to other up-and-coming systems, however, Justice Hobbs agrees there is always room for improvement, and the Water Court Committee is determined to clean the rust from the hinges of this tackle box.

Kathlyn Bullis