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Colorado Bar Association CLE

Dulcinea Hanuschak

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Colorado Bar Association CLE

WATER ADMINISTRATION
COLORADO BAR ASSOCIATION CLE

Denver, Colorado April 4, 2008

On April 4, a sizeable crowd gathered in a CLE classroom on Grant Street to hear about the fundamentals of water administration, new technology that facilitates water administration, and some of the more pressing logistical and legal issues that are currently facing water administrators, water attorneys, and water courts.

Ken Knox, P.E. of the Colorado Division of Water Resources and Richard Stenzel, P.E. of the Applegate Group, Inc., introduced the group to the basics of Water Administration. Knox explained the fundamentals of the prior appropriation system in Colorado, and that water courts adjudicate water rights in the seven drainage basins within the state, sometimes appointing water referees to help the courts investigate water rights. Knox then explained that the Division of Water Resources ("DWR") has statutory authority to oversee water allocation and distribution throughout Colorado under the supervision of the State Engineer and through the daily administrative acts of Water Commissioners. Pursuant to its duties as water administrator, DWR oversees Colorado's water deliveries outside the state, reviews groundwater well permit applications, oversees dam safety, conducts hydrologic investigations for use in resource planning, and keeps records of water right decrees and court information so that the public may use this information. Knox also noted that DWR advises the water courts by providing consultation about technical aspects of water court applications. While there are clearly many facets to water administration, Knox emphasized that communication lies at the heart of the administrative process. Water Commissioners must be in constant communication with diverse clients because water administration is a public service that affects both large water systems and individual operators and that involves a constant juggling of supply and demand.

Stenzel then focused on the details of how to balance water supply and demand by discussing how to administer a water call. When a water user demands more water, that user makes a "call" on the water supply. Stenzel explained that once a user makes a "call," the Water Commissioner makes a "valid call" when the Commissioner determines the most junior right that may divert water and still allow enough water to reach senior water right holders. Stenzel provided details about how a Commissioner is able to determine the specifications of a "valid call." The Commissioner assesses the supply of water available based on information from stream gauging stations and the particular calls placed by water users. Because stream conditions are constantly fluctuating, the Commissioner is in frequent communication with users about how much water they may use. Stenzel explained that such communication

may occur via telephone, Internet, or in certain rare cases, handwritten notes left in a coffee can at crucial points on the stream.

William H. Caile, Esq. of Holland & Hart, LLP, then moved the discussion to out-of-priority diversions via augmentation plans and the unique administration issues that augmentation plans present to the legal community. Caile first explained that a water court must approve an augmentation plan in order for the plan to be valid. The court will approve such a plan only if it provides senior water right holders with water in the same timing, location and volume of water necessary to fulfill the senior's decreed water right. It is often difficult for applicants to show that they have met those requirements, however. Caile noted that in order to meet such specifications, augmentation plans are becoming increasingly complex and now incorporate concepts such as retiming of depletions, use of temporary replacement water sources, use of undecreed replacement water sources, and use of projection tools that serve as a term and condition to quantify permissible groundwater pumping. Caile concluded that due to the nature of augmentation plans, such plans are uniquely difficult to administer.

Next, Jim Hall, P.E., Division Engineer of Water Division 1, and Brent Schantz, District 1 and 64 Water Commissioner of DWR, spoke about augmentation plans and changes of water rights. Hall and Schantz explained that augmentation plans and changed water rights resemble one another. Water administrators make sure that operators of both augmentation plans and changed water rights follow terms and conditions that prevent injury to other water users. Also, administrators usually require that users of augmentation plans and changed water rights provide accounting for their administration. Hall and Schantz went on to discuss new technology that administrators currently use to administer both augmentation plans and changed water rights. DWR has used a satellite monitoring program for the past twenty-five years, enabling DWR to keep close to real-time information of water flows as they pass gages. DWR now uses the Internet and email to provide users with call information and other relevant data. On the South Platte River from Kersey to the Colorado border, electronic data loggers and telemetry are also being used to report flow information about ditches and return structures in close-to-real time. The data provided by these devices allow water commissioners and users to make sure that users are diverting only their decreed amounts of water and that the appropriate volume of water is passing delivery or augmentation structures. A grant from the Colorado Water Conservation Board ("CWCB"), will allow expansion of electronic data loggers and telemetry this year to the South Platte River between Denver and Kersey. Hall and Schantz lauded these technological advances as helping water administrators ensure that users are not injured as the number of augmentation plans and change plans increase in both number and complexity.

Janet P. Williams, P.E. of Leonard Rice Engineers, then spoke about the role of water rights engineers in the administrative juggling act. Notably, Williams emphasized a point Ken Knox raised earlier in the day: the vital importance of communication in the water administration process. Specifically, Williams explained that water engineers often can serve as invaluable liaisons between parties: between diverse users such as the state and an individual small farmer but also between water attorneys, administrators, and the water courts. Williams further explained that in their roles as liaisons, water engineers discuss factors that complicate water use, interpret technical questions, help resolve conflicts, and communicate generally about client needs and administrative limitations. In concluding her remarks, Williams also noted that engineers aid water administration efforts by helping develop plans, quantify the limits of those plans, establish accounting, and facilitate reporting.

Colorado Supreme Court Justice Gregory Hobbs roused the crowd at lunchtime. Justice Hobbs was primarily interested in getting feedback for the Water Court Committee of the Colorado Supreme Court, which will submit a report to the Chief Justice by August 1, 2008. As chairman of the Committee, Justice Hobbs energetically solicited the crowd for insight about what he should put in the report, which the Governor and the General Assembly will be able to review and potentially use as a basis for reform of water court system.

Justice Hobbs expressed concern that the current water court process places a heavy burden on small water users. In discussing potential changes to the water court system, Justice Hobbs posed the following question: do small operators really feel so intimidated by the system that they are dissuaded from filing suit even when their rights are impaired—and more pointedly, why should we tell senior right holders that they need to keep going to court to defend their rights? Justice Hobbs suggested that one way to better serve small users would be to allow small cases to be brought before a referee, effectively front-loading the use of engineers and reducing small users' expenditure of time and money in water court. Justice Hobbs also opined that water court proceedings should be subject to emergency procedures that would allow the court to review water applications more expeditiously. During the question and answer session, David Taussig, Esq. of White & Jankowski, LLP countered that he believes that the current water court system works well and that perhaps the best reforms would be to simply provide additional mechanisms by which water judges can move along the adjudication process. Justice Hobbs responded that he welcomes all suggestions about what to include in the Committee Report.

Jeff Deatherage, P.E. and Don West, P.E. of the DWR State Engineer's Office then brought the group back to the basics of the current system with their discussion of how and when changes of water rights and substitute water supply plans ("SWSPs") receive administrative ap-

proval. Deatherage and West gave an overview of the history of SWSP legislation and then explained the process by which the State Engineer will approve or deny a SWSP. Each SWSP must include four elements: a narrative description of the SWSP project, a description of the means by which the applicant has estimated depletions, identification of sources of replacement water, and finally, operation and accounting procedures. Deatherage and West explained that a SWSP application may be separate from a court application for a change of water right.

Jeff Baessler, Assistant Section Chief of CWCB, then gave a thoughtful presentation on how the CWCB administers its instream flow rights ("ISFs"). In 1973, Senate Bill 97 gave CWCB exclusive authority to hold ISFs. Baessler explained that ISF legislation has evolved since 1973 because the legislature has specified that CWCB has the authority to protect ISFs by accepting existing, decreed water rights from senior water right holders and by accepting temporary loans or leases of water for ISFs. Baessler also noted that legislation is currently pending that would provide water right holders with incentives to loan or lease their rights to CWCB. This legislation, House Bill 08-1280, would guarantee that if a water right holder loans or leases water rights for ISFs, such loans or leases will not decrease the owner's historic consumptive use in any subsequent change of water right proceedings and will not be used as evidence of intent to abandon the water rights. Baessler also explained that it is often difficult to enforce ISFs. However, sophisticated new monitoring techniques, such as satellite telemetry that gives CWCB real-time information about stream conditions, have helped CWCB better protect its ISFs. Still, if CWCB becomes aware of low water levels it may only request administration of the affected area. CWCB also performs monthly resume reviews to assess ISF conditions and may file statements of opposition in water court if it detects potential injury to the ISF; if CWCB is not able to reach a settlement of the matter, it may litigate the issue. Baessler explained that CWCB continues to work with DWR to try to improve procedures for monitoring and enforcement of ISFs.

Veronica (Ronni) Sperling, Esq. of Buchanan & Sperling, PC, then discussed "hot topics" in water administration. Sperling explained the controversy over the meaning of the term "year" for the purposes of the one-fill rule of reservoir storage. The "one-fill" rule specifies that reservoirs may be filled to decreed capacity once each year, absent some specific right to the contrary. Sperling explained that current litigation in Division 1 involves a determination of the meaning of "year." In particular, the case deals with the length, starting date and ending date of the "water year," for the purposes of the one-fill rule.

Sperling then went on to discuss the problems associated with out of priority upstream storage, discussing the "upstream out-of-priority storage statute," Colorado Revised Statute section 37-80-120(1). Sperling noted that in July 2006, Jim Hall, Division Engineer for Water Divi-

sion 1, wrote a letter explaining procedures for public notice and comment on the operation of the statute, and provisions to implement a "paper fill" for downstream reservoirs when out-of-priority storage takes place upstream. Sperling noted that Hall's letter specified that State water administrators have discretion over whether to implement the procedures Hall set forth.

Next, Sperling noted recent litigation concerning how to administer water user agreements and how to quantify transit losses. Water user agreements include agreements between water users that make one user's priority inferior to another; courts can make such agreements legally enforceable. Administrators quantify transit losses so as to know how much water is available for replacement of out-of-priority depletion, historic return flow, substitute supplies in exchange agreements, and re-diversion downstream. Water courts continue to examine how administrators quantify transit losses and administer certain kinds of water user agreements.

Sperling also addressed the authority of the State Engineer pursuant to Colorado Revised Statute section 37-92-305(8). Sperling explained that recent and pending litigation has failed to determine the nature and reach of the State Engineer's authority under section 37-92-305(8), but that the Division 5 water judge has held that the statute grants the State Engineer authority to alter replacement terms of decreed augmentation plans. In 2007, the Senate Agriculture Committee indefinitely postponed Senate Bill 07-13, which was designed to specify the extent of the State Engineer's authority under section 37-92-305(8). SB 07-13 specifies that State water administrators need to administer augmentation plan decrees pursuant to their terms and conditions, and that they may not alter such terms and conditions without approval from the water court.

Finally, Jack Byers, P.E. of the State Engineer's Office, offered closing remarks about the Future of Water Administration in Colorado. Speaking as the substitute for Dick Wolfe, Byers praised the work done by the State Engineer's Office.

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