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DEDICATION BY JUSTICE GREGORY HOBBS, JR.[†]

I have the great privilege of writing this dedication to Justice George E. Lohr.

Justice Lohr served as a member of the Colorado Supreme from December 14, 1979 to January 14, 1997. He came to the court after serving as a district judge from 1972-1979 and, part of that time, as chief judge for the Ninth Judicial District, which comprises Pitkin, Garfield and Rio Blanco counties.

He was the water judge for Water Division No. 5 from 1976 to 1979. Before his judicial career, Justice Lohr practiced law with Davis, Graham & Stubbs for ten years and for the Snowmass American Corporation for three years as in-house general counsel. After retiring from the supreme court, he served from 1997 to 2006 as a senior judge, accepting trial court assignments throughout Colorado.

[†] In a periodic series for the Water Law Review, Justice Hobbs has provided illustrative excerpts of all water opinions issued by the Colorado Supreme Court since May of 1996. See Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, Appendix, 61-74 (1997); 2 U. DENV. WATER L. REV. 223 (1999); 4 U. DENV. WATER L. REV. 111 (2000); 6 U. DENV. WATER L. REV. 116 (2002), 8 U. DENV. WATER L. REV. 213 (2004); 10 U. DENV. WATER L. REV. 391 (2007). See *also A Decade of Colorado Supreme Court Water Decisions 1996-2006, Headwaters*, Colorado Foundation for Water Education (Fall 2006).

Smart, humble, and kind, Justice Lohr set very high standards for himself. Though our service as justices overlapped for only eight months, I saw how hard and meticulously he worked. He was a rigorous scholar and grammarian. He insisted on a work atmosphere that permitted him to concentrate intensely on his own work and the proposed opinions of his colleagues.

In one of the rarest of occurrences, saying something to the press, he remarked on his reasons for retiring from the supreme court: "I've enjoyed it very much. It's an interesting and challenging job, and the only reason one would leave is because it requires more energy than one has."

I would say it this way. He preferred being in outdoor Colorado, but the attention he devoted to the court's work mostly kept him indoors. Chief Justice Mary Mullarkey says, "He loves hiking, and anyone who has ever walked with him knows it. He is a fast walker, and can walk almost anyone into the ground. Every spring he would take a backpacking trip, often in the Utah canyon lands area, and often with his daughter Karen. His daily exercise was to walk from the court to Cheesman Park and back over the lunch hour. Only the worst weather would deter him."

On the trial bench he had a reputation for thoroughly scrutinizing every proposed order or decree. Former chief judge and water judge Tom Ossola remembers from his own practice days that, "No matter how routine, long, or complex the document, Judge Lohr would read every word and pass judgment on every comma. To get an order or decree signed on the first try was a great achievement. Few succeeded."

I learned from Justice Lohr there is no substitute for a scholarly and experienced appellate judge who studies hard, thinks expansively, and writes precisely.

Early in my effort to write opinions, I sought him out on a draft opinion I had proposed to the court. He proceeded right into the discussion, as he had read every case I had cited, plus several more he thought I could have (and should have) addressed.

He specialized in de-grouping the complex sentence that gropes its way to obscurity. He liked a good quip about the use of language. In one of our weekly Thursday morning decisional conferences he suggested to the opinion's author that a semi-colon might be used to separate independent but coordinate thoughts. "You mean hook up the boxcars," I interjected. "Just like that," he smiled.

At the informal retirement goodbye the other six of us gave him (he wanted no formal send off), we declared him a lover of alternative ties (he liked to wear bow ties) and presented him a magnificent southwestern bolo tie (he might have preferred no gift, I imagine).

Water lawyers, judges, and supreme court justices continue to rely on Justice Lohr's water opinions written over the span of seventeen years.

They deal with difficult state and federal law issues Colorado faces in the post-1950s' era of rapid growth, over-appropriated streams, and depleting tributary and non-tributary aquifers. Of course, the decisions of the court are always the decisions of the multiple justices, but the author bears a particular burden of expression on behalf of the court.

His colleague on the court, Justice Jean Dubofsky, credits Justice Lohr for the broader context he brought to water decisions. "His water law decisions in the early 1980's were my education about water law. Most of the decisions prior to his arrival on the court began and ended with the dispute in question. His decisions placed the dispute in the broader context of water law and policy; reading several of those decisions made the nuances of an important area of law available to those of us who were not water law practitioners."

In my view, Justice Lohr's enduring contributions are the opinions he authored identifying the following features of Colorado water law: (1) by constitution and statute, all water in Colorado is a public resource; (2) use rights to water of the natural stream, including tributary groundwater, are allocated and administered according to the prior appropriation provisions of the Colorado constitution and statutes; (3) designated groundwater and non-tributary groundwater are subject to allocation and administration in the exercise of the General Assembly's plenary power, not by the constitutional doctrine of prior appropriation; (4) changes of prior appropriation water rights, including for tributary groundwater, are subject to quantification based on actual historical beneficial use and the imposition of decree conditions necessary to alleviate injury to other water rights; (5) decreed augmentation plans are the means under the 1969 Act for preventing injury to other water rights caused by out-of-priority surface or tributary groundwater diversions; and (6) a person cannot claim a water right free of the call of prior appropriation water rights, by such devices as removing peat bogs, cutting vegetation, or "unintentionally" intercepting tributary groundwater through sand and gravel mining, for example.

This is a substantial body of work that the Colorado Supreme Court has relied upon in many subsequent decisions. In each case, Justice Lohr clearly detailed the facts and based the court's decision on constitutional and statutory provisions, as well as the prior case law, clarifying and distinguishing it when necessary. I summarize briefly.

In his first full year on the court Justice Lohr authored Weibert v. Rothe Brothers, 200 Colo. 310, 618 P.2d 1367 (1980). This case involved a change in point of diversion from an existing irrigation well to a new irrigation well, together with an augmentation plan. The new well would pump groundwater tributary to the South Platte River thirty miles downstream. The water court had not considered the actual historic beneficial use of the groundwater made by means of the existing

well. Nor, in ruling on the augmentation plan application, had the water court taken evidence concerning the adequacy of the proposed replacement water source to alleviate injury to other water rights by the change. Nor had the water court included a provision in the decree retaining jurisdiction to examine injury to other water rights.

Relying on cases dating to the late 19th Century, Justice Lohr wrote in Weibert that "Historical use" as a limitation on the right to change a point of diversion has been considered to be an application of the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations." Id., 200 Colo. at 317, 618 P. 2d at 1372. Citing 1969 Act statutory provisions, this decision required the water judge to allow evidence concerning the adequacy of replacement water rights to alleviate injury to water rights diverting from the South Platte River, "including the amount and timing, to be made available" under the augmentation plan. And the opinion required inclusion of a retained jurisdiction provision in the decree, as provided by statute.

In Danielson v. Vickroy, 627 P.2d 752 (1981), the proposed change in point of diversion filed in water court under the 1969 Water Right Determination and Administration Act was from a ditch diverting surface water to a well that would intercept groundwater of a designated groundwater basin. Justice Lohr wrote that the water court had no jurisdiction over designated groundwater. Under the 1965 Groundwater Management Act, such jurisdiction belonged to the Colorado Groundwater Commission and the established management district for the designated basin.

Groundwater "hydraulically connected" to the natural stream "which can influence the rate or direction of movement of the water" in an "alluvial aquifer or a natural stream" is subject to the jurisdiction of the water court under the 1969 Act, not designated groundwater. "Designated ground water . . . includes water not tributary to any stream, and other water not available for the fulfillment of decreed surface rights." Id. at 756. The burden of proving that designated groundwater did not qualify for designation belongs to the person who makes such a contention. Id. at 758-59.

Having written that designated groundwater is not subject to the constitutional doctrine of prior appropriation, as implemented by the 1969 Act, Justice Lohr authored the supreme court's opinion in State v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (1983). This incredibly important decision holds that "(F)ederal statutes, as interpreted by the United States Supreme Court, recognize Colorado's authority to adopt its own system for the use of all waters within the state in accordance with the needs of its citizens, subject to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters." Id. at 1307.

Thus, the state's authority extends to all water, whether surface water, tributary groundwater, nontributary groundwater. Because Colorado's prior appropriation constitutional and implementing statutory provisions of the 1969 Act apply only to the integration of "water in or tributary to streams," the General Assembly may determine in its sole discretion how to allocate and administer nontributary groundwater. Id. at 1308-09.

Supreme Court decisions in the 1890s had held that "underground waters supplying a natural stream and underground currents that flow in well-defined channels are governed by the same rules of appropriation as surface streams. These (named early decisions) indicate an early awareness of tributary underground waters but show an imperfect understanding of the interrelation of surface streams and underground waters." Id. at 1309. By adjudicating and administering surface stream and tributary groundwater under the 1969 Act, "(The) vested rights of senior appropriators can be fully protected by seasonal regulation of diversion by junior appropriators." Id. at 1313

In contrast, nontributary water is subject to depletion, causing "a mining condition," Id. at 1313. Because such water belongs to the public and not the landowner as an inherent part of his or her land property rights, the General Assembly may establish the principles for its allocation. "(We) believe that, given the state's plenary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilization of this unique resource." Id. at 1316.

Accordingly, Justice Lohr's opinion on behalf of the court definitively put to rest three very contentious issues about the nature of water rights in Colorado, by answering them as follows: first, Colorado did not obtain title to all water arising in the state by reason of its admission to the Union, instead it received from Congress authority to create property use rights in the public's unappropriated water resource; second, surface water and tributary groundwater rights are subject to curtailment in reverse order of adjudicated priority, junior to senior, when there is not enough supply naturally available to satisfy all rights; and third, nontributary groundwater is a public resource, the allocation and administration of which resides in the plenary authority of the General Assembly because it is not an inherent attribute of land ownership.

On a different subject, Justice Lohr in a trio of cases authored opinions prohibiting the recognition of "developed" water rights free of the call of prior appropriation water rights on the stream, by such devices as draining a marsh, thereby reducing evaporation, R.J.A., Inc. v. Water Users Association of District No. 6, 690 P.2d 823 (1984); or by intercepting tributary groundwater "unintentionally" in the course of sand

and gravel mining, Three Bells Ranch Associates v. Cache La Poudre Water Users Association, 758 P.2d 164 (Colo. 1988) and Zigan Sand and Gravel, Inc. v. Cache La Poudre Water Users Association, 758 P.2d 175 (Colo. 1988).

He wrote that "Nowhere in the entire scheme of the 1969 Act is there a suggestion that rights to tributary water independent of the priority system can be obtained." R.J.A., 690 P.2d at 825. "The water rights sought here are based upon alterations of long existing physical characteristics of the land. Alteration of natural conditions and vegetation in order to save water carries with it the potential for adverse effects on soil and bank stabilization, soil productivity, wildlife habitat, fisheries production, water quality, watershed protection and the hydrologic cycle." Id. at 828. The court left to the General Assembly such questions of reducing historical consumptive uses by modifying conditions found in nature.

Justice Lohr reasoned that construction of sand and gravel pits results in a "diversion" of tributary groundwater, as to which the State Engineer or Division Engineer must issue an "order of discontinuance . . . if the water is required by water users having senior priorities," unless depletions to the South Platte River causing injury to other water rights are replaced. Zigan, 758 P.2d at 181, 183-84. "As knowledge of the science of hydrology has advanced, it has become clear that natural streams are simply the surface manifestations of extensive tributary systems including underground water in stream basins . . . . The 1969 Act provides for the adjudication and administration of tributary water under a system of priorities, implementing the constitutionally based right of prior appropriation." Three Bells, 758 P.2d at 170.1

Justice Lohr's final water opinion for the supreme court addresses the law governing municipal conditional water right appropriations and changes of water rights agricultural to municipal use. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (1996) establishes among other principles that: (1) "a municipality may be decreed conditional water rights based solely on its projected future needs, and without firm contractual commitments or agency relationships, but a municipality's entitlement to such a decree is subject to the water court's determination that the amount conditionally appropriated is consistent with the municipality's reasonably anticipated requirements based on substantiated projection of future growth," Id. at 39; (2) importers of water that is not native to the watershed may use and reuse the water to

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[1] Subsequent to *Three Bells* and *Zigan*, the General Assembly enacted a specific statutory provision, section 37-80-120(5), applicable to sand and gravel mining operations that expose ground water to evaporation. This section does not require replacement of depletions caused by the preexisting vegetative cover when such operations convert the area to permanent open surface water.

extinction, but an appropriator of native waters may make only one use because return flows and seepage waters belong to the stream to fill other appropriations, absent a decreed appropriation securing a right of reuse, Id. at 65, 70-72; (3) in a change of water right proceeding, surface and tributary groundwater appropriators whose water rights depend on return flow and seepage patters existing as of the date of their decreed appropriations are entitled to protection against injury, Id. at 80; (4) a water conservancy district may prevent the exportation of its water supply to areas outside the district, Id. at 59; and (5) the water court may not require an instream flow for the purpose of diluting pollutant discharges, Id. at 93.

Justice Lohr more than deserves this issue's dedication to him. His contributions to Colorado water law will continue to guide the use and administration of the public's water resource.