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Water Law Conference and Annual Meeting

farms. Mr. Cech urged that groundwater cannot be over allocated, but it is hard to decide who is right and, ultimately, what is needed is more fairness and flexibility in the law.

The final panelist was Russell George from the Colorado Department of Natural Resources to discuss SB 222 regarding future rules for the Colorado State Engineer. There are similar issues along the Pecos River and Snake River, where groundwater use is facing more regulation. Most states do not want to regulate exempt wells. Mr. George continued by stating the importance of shifting the current strategy toward groundwater regulation. He suggested a preventive approach combined with a scientific understanding of groundwater. In conclusion, Mr. George emphasized the need for the eastern and western parts of Colorado to work together to find mutually beneficial solutions.

*Blake Johnston
Dara Lum
Susan Curtis*

WATER LAW CONFERENCE AND ANNUAL MEETING

Steamboat Springs, Colorado June 18-19, 2004

Water law frequently changes, especially in Colorado and other Western states. Water law practitioners, judges, and professors need constant updates on the status quo of the river basins and water situation in Colorado, as well as the ever-changing case law and legislation. The annual "Water Law Conference," a two-day conference at the elegant Sheraton resort in Steamboat Springs, Colorado, provided an opportunity for people practicing water law, studying water law, or using water law for agricultural and other purposes to inform one another about legal changes and geographical changes regarding this crucial resource. On day two, the Water Law Conference merged with the Agricultural Law Conference to discuss issues pertinent to both overlapping areas of law.

DAY ONE

WATER LAW ISSUES

SESSION ONE: LEGISLATIVE AND CASE LAW UPDATE

After an introduction from planning committee member David A. Bailey, Peter C. Fleming, the in-house General Counsel of the Colorado River Water Conservation District, commenced the conference with a discussion of legislative and case law updates. He began with the proposition that recent legislation addressing water law is drought-

inspired. He noted that there are two broad themes from recently enacted legislation: 1) a rush to “solve” drought-related problems, which are not always effective, and 2) a focus on enacting legislation that increases the State Engineer’s authority.

Regarding the “drought solution legislation,” Mr. Fleming noted that in addition to the usual water projects funded by the legislation, last year’s constriction fund bill also included \$500,000 to study the Colorado River Return project and \$3 million to conduct a “politically charged” Statewide Water Supply Initiative. He also discussed the Legislature’s failure to adopt three water conservation bills from 2003; however, another bill increased the authority of the Office of Water Conservation, which will only be valuable if there is increased financial support through future budget processes.

Mr. Fleming also discussed the ramifications of increased State Engineer authority. One bill authorizes the State Engineer to approve temporary changes in water rights annually, therefore, allowing the State Engineer to address immediate water shortage situations while a water right application is pending in court. Mr. Fleming also addressed a bill that provided the State Engineer authority to approve interruptible supply plans. Mr. Fleming believes that this shift in the State Engineer’s authorities and duties may potentially allow for too much agency discretion regarding water rights.

RIGHTS OF WAY

John A. Akolt, counsel to Farmers Reservoir and Irrigation Company, the Burlington Ditch Reservoir and Land Company, and the Wellington Reservoir Company for thirty-one years, addressed the history and status quo of the “rights of way” methods to water rights. He began with real estate law concepts and terminology that related to rights of way. Mr. Akolt presented an overview using fee interest terminology. He then gave an introduction to the meaning of easements, fee estates, and intent of deeds granting such interests.

Next, Mr. Akolt narrowed on his discussion for canal easement rights. These rights are dependent on the characterization of the quality of title held by the right of way owner. He noted that easements provide for the bulk of cases resolving relative rights of owners of real estate. Next, Mr. Akolt addressed the public use of irrigation canals, which add another dimension to classing water interests in this area. He stressed that like the government, ditch companies are also empowered with the rights of eminent domain, which are co-equal with the rights of the public highway authority. Mr. Akolt concluded that there will always be a variety of real estate interests in irrigation canals and the interests vary for each set of parties and circumstances.

TITLE ISSUES

William R. Fischer, a shareholder in Fischer, Brown & Gunn, PC and a member of a multitude of water law committees, gave a presentation on title issues when approaching water rights. He first discussed the nature of a water right and that the title to the water of the natural streams is vested to the people in the State of Colorado. He also skimmed the Prior Appropriation Doctrine, which, coupled with the preferential right, constitutes an individual's water right.

Mr. Fischer spent a majority of his speaking time discussing title issues regarding ditches. He articulated that the best method for determining the nature of private rights in ditches is to walk along the ditch from its point of diversion to its end to locate the undisclosed interest, meaning that in a deed, the water right was not explicitly conveyed. Also, Mr. Fischer warned that mutual ditch companies constitute the predominant source of water supply, and that the ditch company is usually the holder of the naked legal title.

Mr. Fischer concluded his presentation by stating that title issues also arise in regard to wells, deeds, and ditch easements. He believes that doctrinal change is necessary and inevitable regarding this area of law.

SESSION TWO: COLORADO RIVER COMPACT ISSUES

Before Session Two, the water law conference attendees ate lunch with the attendees of the agricultural conference and listened to a keynote presentation by Richard Collins, Professor of Law and director of the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado School of Law, on Judicial Independence in Colorado.

Carol Angel, the First Assistant Attorney General for the Federal and Interstate Water Unit in the Colorado Attorney General's office, presented relevant issues in the Colorado River Compact. She discussed the history of the compact, negotiated in 1922 by the federal government and representatives of the Colorado River Basin states. This compact split the basins into an Upper Basin and Lower Basin and gave them protection.

Ms. Angel discussed the basins in details. The Upper Colorado River Basin Compact in 1948 subsequently included provisions about measurement of depletions, overuse of apportionments, and defined the Upper Basin's share of consumptive use. The Lower Basin Apportionment, resolved in 1963, allows surpluses and shortages for each state to be decided by the Secretary of the Interior. Also, a 1945 Treaty with Mexico allows an allotment of a surplus in the Lower Basin to Mexico.

Ms. Angel concluded her presentation with discussion topics pertaining to the ramifications of this compact to endangered species and compacts, lower basin overuse, and even tribal claims.

IT TAKES MORE THAN A GOOD WATER RIGHT TO MAKE SNOW

Scott Fifer, a professional hydrologist and President of Resource Engineering, a Glenwood Springs, Colorado water resources engineering company, discussed the economic incentives and importance of developing a reliable water supply to make snow. He commented that this is imperative for ski resorts and tourism revenue. Mr. Fifer also indicated that snowmaking improves skier safety by covering obstacles and worn areas on the slopes. Snowmaking is 20% consumptive, meaning that 80% of the water used to make the snow is returned to the river as snowmelt. Mr. Fifer added that because of the nature of the water's use, snowmaking water rights are fairly low on the priority scale.

Mr. Fifer's focus was that recent drought conditions could make attaining snowmaking water rights even more difficult. These drought conditions are anticipated for the upcoming years. Additionally, Mr. Fifer warned, the United States Forest Service is establishing specific standards for snowmaking activities at Colorado Ski Resorts as an effort to rectify dwindling stream health. Mr. Fifer believes that ski resorts can attain sufficient water rights for their snowmaking activities, but they will have to diligently comply with all rules and regulations.

RECREATIONAL IN-CHANNEL DIVERSIONS

The first day of the conference concluded with Cynthia F. Covell, Peter C. Fleming, and Ted Kowalski. Cynthia F. Covell is a partner at Alperstein & Covell, PC in Denver, Colorado, and Ted Kowalski is a member of the Colorado Water Conservation Board. This joint session discussed the importance of Colorado's recreation industry and the need to maintain water flows in streams and water levels and lakes. Because of the increasing use of water for recreation, Colorado courts and legislature must address "diversion" and "beneficial use" in the context of a river channel. Such distinctive water rights are appropriately labeled as "recreational in-channel diversion" water rights, which are subject to certain additional steps in the confirmation of rights process and is only appropriated to specific entities.

DAY TWO**WATER LAW MERGES WITH AGRICULTURAL AND RURAL LAW****ENDANGERED SPECIES AND RURAL COLORADO**

The second day of the conference consisted of four attorney panelists discussing endangered species and rural Colorado. Participants in the Agricultural and Rural Law conference also attended this unique session.

Kent Holsinger from Hale Hackstaff Friesen, LLP in Denver, Colorado began the panel by discussing the recent efforts to list the sage Grouse and de-list the Preble's Meadow Jumping Mouse from the list of endangered species. Deborah L. Freeman, a partner at Trout Wither & Freedman discussed the Platte River species draft and environmental impact statements. Thomas R. Graf, an attorney at the United States Department of the Interior, Office of the Regional Solicitor in Lakewood, Colorado presented "an agency attorney's view" of endangered species in Colorado. Finally, Eric Kuhn from the Colorado River Water Conservation District discussed Yampa and Colorado River endangered fish issues.

The two-day conference concluded with an ethics seminar on Conflicts of Interest and Ex Parte Contracts in Rural Practice, conducted by the Honorable J. Steven Patrick, the Honorable Michael O'Hara, the Honorable Thomas W. Ossala, and Cynthia F. Covell.

Becky Bye

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
12TH SECTION FALL MEETING**

San Antonio, Texas October 6-10, 2004

For its 12th annual meeting, the attorneys who make up the ABA's Section of Environment, Energy, and Resources convened in San Antonio to discuss issues and developments currently facing attorneys in the section. Although the conference did not focus solely on water law issues, water law was the subject of several classes, and the focus of our attendance at the conference. Water attorneys found a variety of interesting topics on subjects ranging from the impacts posed to agriculture by the expansion of the Clean Water Act's jurisdiction to the history of the Edwards Aquifer. The upcoming 2004 Presidential election was an undercurrent of the entire conference. The contrasting environmental views and goals of the two primary platforms provided fertile ground for discussion.