

# Water Law Review

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Volume 3 | Issue 1

Article 13

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9-1-1999

## Practitioner's Perspective

Water Law Review

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Water Law Review, Practitioner's Perspective, 3 U. Denv. Water L. Rev. 105 (1999).

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## Practitioner's Perspective

## PRACTITIONER'S PERSPECTIVE

To provide a personal perspective of the drafting of the Water Right Determination and Administration Act of 1969 while recognizing one of Colorado's preeminent water lawyers, the *Water Law Review* is honored to dedicate this issue to an integral part of the Act's drafting, Mr. Felix Larry Sparks. The following is an excerpt from an interview with Mr. Sparks about his experience as a water lawyer in Colorado. For more information about Mr. Sparks' remarkable life, including his nearly forty years of involvement with the United States Army, please see the *Tribute* at the beginning of this issue.

Interviewer: How did you like law school?

Mr. Sparks: Well, I liked it. Law school was always easy for me.

Interviewer: What initiated your interest in water law?

Mr. Sparks: Well, one of the strange things that happened right after I got back after the war was over and I was in Boulder was that the army disintegrated and everyone wanted to get out. There were still a lot of problems in the world and the Army was getting frantic because it didn't have any soldiers. All the National Guard units had been dissolved; the Army was anxious to get National Guard and Reserve units going again. So, I got a letter one day from the governor of Colorado. It said, "I've discovered you were one of the senior officers in your Regiment and have returned to Colorado. I would like to talk to you about getting the Regiment reorganized." So I went to Denver and met with him. He told me that they wanted to put me back on active duty for two months. I would tour the state and organize thirty units. I told him I would have to think about it. I didn't want to miss too much of law school. I talked to the dean of the law school. He said, "You're a good student, you can just take the final exam. If you pass, you pass. We'll excuse you for two months." So that's what happened. I went back on active duty and sent my wife and two kids back down to Arizona to stay with her folks. They furnished me with a military vehicle and expenses and I drove around the state trying to get things organized—Sterling, Cortez, Durango, Trinidad, you name it. Most vets I knew weren't interested in getting back into the service but I had two months to organize it. I did it and I joined as a commander. When I started my law practice, I had a little pay coming in from the Army, which helps. Starting your own law practice is not easy.

Interviewer: So, you started your own law practice? Where?

Mr. Sparks: As I toured the state, I kept my eye open thinking, "I've got to find a place to stay, a place where I can start a practice." I always had a phobia of being in a big law firm. Lots of guys I'd graduated with had gone to Holland & Hart and some of the other big firms here in Denver. That wasn't for me. But in my travels, one of the little towns I came across was Delta, Colorado. Well, I love that area because I'm an avid fisherman and hunter, and boy do they have fishing and hunting over there. And it's beautiful. Uncompahgre National Forest on one side, Grand Mesa National Forest on the other. An ideal place except that it was very small—population about three thousand. But it's the county seat and the whole county's about 15,000 people. A lot of the old lawyers over there had been veterans of World War I. And one of them said, "All of us old lawyers here are getting pretty old. We don't have a young lawyer. Why don't you start here." And there was a doctor there who was a doctor in World War I. He had the been in the Army and he owned a two story building. He encouraged me. He said, "I'll give you rent on this building. I'll just charge you ten dollars a month rent." Can you beat that? When I got out of law school I decided that was exactly where I was going. So we packed up and went over to Delta in our little '35 Chevy and I bought some second-hand furniture and an old typewriter. My wife's major in college was in business administration. She could type and she could take shorthand. So, she would come and help me at the office when I had letters and things to type. Otherwise, she took care of our two little kids.

Interviewer: Was most of the law you practiced water law?

Mr. Sparks: After I had only been there a few months in 1948, there was the election and the District Attorney wasn't going to run anymore. That district had seven counties in it at that time—Mesa, Delta, Montrose, Gunnison, Hinsdale, Ouray, and San Miguel; it's smaller now, been cut into two districts. I hadn't planned on running for anything because I didn't know anyone. But there was an Army school on nuclear warfare. The atomic bomb was new at that time. They wanted all senior officers to go to a special course at Fort Benning, Georgia, on nuclear warfare. The course was two weeks. And, I would get military pay if I went. I wasn't making anything practicing law. I enrolled in the course and when I came back, the election was heating up. The guy running on the democratic ticket got cold feet; he didn't think he could make it so he resigned. So, in desperation, the vacancy committee put my name in without consulting me while I was in Fort Benning, Georgia. When I got back into town, an attorney from town met me at the airport. He said, "We don't know about this but we had to do something. We had to get the vacancy filled and we didn't have any time left so we just put your

name in." Well damned if I didn't win. So I was the District Attorney. And then I went into practice with this older lawyer who had encouraged me to come there in the first place. See, in those days, in a district of that size the District Attorney could practice law. In the bigger districts, you couldn't. So I went in with this older attorney, and with the District Attorney's salary and private practice, I was doing alright. It didn't take very long. My partner was very much interested in water law. He had been a referee in one of the adjudication proceedings they used to have. So he got me interested. He said, "We've got a lot of fights here in this county over water rights." So I got interested in it and studied it.

Interviewer: What year was it at this point?

Mr. Sparks: I guess I was elected in '48 and took office in '49. So it must have been '49 or '50, right in there when I got started with water law.

Interviewer: What was your biggest case, a case that had a big influence on the shaping of Colorado water law?

Mr. Sparks: I won a big case at the Colorado Supreme Court. We had a client who had some money. He was a big rancher. He had a local attorney for many years, but he got mad at him. He was having trouble getting his water through his decree and his attorney was also representing the ditch company so he came in to see me. He gave me his outline of the case and I thought, boy, that's a tough one. As the years went by, I discovered that most decrees entered in the state were fraudulent. Probably at least ninety percent of them were fraudulent decrees. So I got to go into records and study the whole system.

Interviewer: How did you discover the degrees were fraudulent? What do you mean by that?

Mr. Sparks: By that I mean they used to have adjudication procedures, that anyone could open up, that would last for a year or so, and the court would appoint a referee to take testimonies. And the referee would take testimony for however long the proceedings would be open, usually around a year, and then the referee would hand down a decision granting a certain priority and a certain amount of water. And then they had the chance to contest it. The judge would enter a decree based on the referee's recommendation. The way they were fraudulent is you would get a decree for a reservoir for 1,000 acre-feet per year and the reservoir didn't hold but 300. Or have a decree for twenty cubic feet per second and the ditch didn't hold but five. Nobody checked. Unless somebody contested it. Well, I knew that practically all decrees were fraudulent but the problem was there was a two year statute of limitations. After the decree was entered by the

court, you had two years to contest it. If you didn't, it became a final decree no matter what, fraudulent or otherwise, it didn't matter.

Well, as time went on, more and more decrees were entered and water got more and more scarce and precious. This rancher owned a pretty good hunk of land and ran cattle. He was having a hard time getting his decree; in short years, his decree would run out. He got to checking. He did some investigation of his own and quickly discovered what the problem was. Here was a reservoir above him with a senior decree for about 12,000 acre-feet, a pretty good sized reservoir. Well, they were refilling it and the water commissioner would keep turning water to them. So I hired an engineer from Denver to come over and do a detailed survey of the reservoir to give me a capacity table. He reported to me that after the survey, let's say their decree was 12,000 acre-feet, actually the thing only held about 4,000. They weren't running reservoir water any more, they were just taking my client's and other people's water to make their 12,000 feet but they didn't have it stored. They were using a direct flow from the creek to make up their decree. Well, that's final. I'm thinking you can't attack it presumably. But I came up with a theory of abandonment.

It was the first case of it's kind in the state and there wasn't any law on it because no one would attack the two year statute of limitations. I told my client, "We're going to have a tough time at the trial court and we'll probably lose it. You'll have to be ready to appeal it to the supreme court." So, I filed a procedure against the State Engineer and Granby Ditch and Reservoir Company to stop them from delivering any more than the actual capacity of the reservoir.

Well, I got bopped at the trial level. The trial judge at the district court said, "That's a final decree and you can't attack it." I took it on to the supreme court and what I argued was their decree was final when it was entered but in a subsequent period of time they could never have stored the 12,000 acre-feet, only 4,000, so 8,000 acre-feet of their decree was abandoned. I said, "They didn't construct any additional facilities and, therefore, they abandoned 8,000 feet." I wanted to come in with the abandonment issue to make some real teeth in it because all the cases before the supreme court on abandonment previously had all held that abandonment was an issue of intent; there's no abandonment without the intent to abandon. So I argued that their intent was demonstrated by the fact that they didn't do anything to enlarge their reservoir and the court bought it, much to my surprise. It changed the abandonment law considerably at that point. So that set me up as a big water lawyer in nothing flat. I was winning cases left and right. Everybody had water problems.

Interviewer: What's the name of this case?

Mr. Sparks: Granby Ditch & Reservoir Company v. Hallenbeck. Hallenbeck was my client.

Interviewer: How did you become involved in the drafting of the 1969 Act?

Mr. Sparks: I knew all the holes in our water law and the problems we'd had with it over the years and the whole adjudication procedure was a mess of fraud. And what we had was decrees all over the state for water that did not exist. There were many pitfalls in the old procedure. Anybody could be a referee—you could just appoint some guy who could be anybody. There was also no real review of the various decrees. And the decree system in effect was a joke. For example, we had a major creek called Surface Creek and there were a lot of tributaries. There were different referees over the years and what we ended up with was a Number One Decree on Smith Creek, a Number One Decree on Surface Creek, a Number One Decree on Cottonwood Creek, all tributary to the Gunnison River. Now you can't have in one water district all those Number One decrees. Which one do you shut off first? You have to look at the whole system. But there was no system at all. And we had to satisfy compacts. So the whole thing had to be redone and we had to go back and find out which decree was the Number One decree instead of having four or five hundred. We had to start renumbering the whole decree system.

Interviewer: How much input did you have in the drafting of the '69 Act?

Mr. Sparks: I had a lot of input. I monitored that all the time, constantly. There were some things I wanted to go further than what they finally did but we got it set up finally where there was one system. It was a lot of work for the State Engineer's office. Years and years of work of revising the whole system so today he knows where the Number One decree on the Colorado River is, or the South Platte.

And we got into the abandonment thing. What we found out was we had a big hole with conditional decrees. We had some conditional decrees that were fifty or seventy-five years old and nothing had been done with them but they were still on the decree book, still valid conditional decrees. We had to figure out a method of not allowing people to have conditional decrees forever.

Interviewer: Enter diligence proceedings.

Mr. Sparks: Exactly. You have to go into court periodically to show due diligence which was not required under the old law, causing a lot of problems. We'd have power decrees on some of the tributaries of the Colorado to run their generators but they were speculative decrees tying up the whole system. When you put all the decrees together you'd find out the whole system was over-appropriated by several hundred percent. That was a big hole in the old proceedings.

Then I worked on some other innovations. We had no groundwater law. The next thing I tackled was groundwater law. It was after World War II and everybody started putting in wells because the farmers were getting electricity. You could run pumps on gas or electricity so, suddenly, we had a proliferation of wells everywhere. Texas and New Mexico brought suit against us in the Supreme Court because we weren't delivering our compact commitment. Well, when I got into it and put my engineers on it, I was Director of the Water Board at that time . . .

Interviewer: The Colorado Water Conservation Board?

Mr. Sparks: Yes. Well, as the years went by McNichols was elected governor of the state, it was maybe 1950, and the Water Board, for all practical purposes had ceased to exist. It was because the Eastern Slope wanted more water from the Western Slope and the Western Slope didn't want to turn it loose. The major project of contention at that time was the Fryingpan-Arkansas Project where they wanted to export water from the Colorado River to Colorado Springs and Pueblo, and other cities and the farmers down there, with the help of the Bureau of Reclamation. They came up with a plan to import water from the Colorado River. Denver was busy with its Blue River project; Denver was the number one importer. Every one of those projects caused a great deal of agony in Western Colorado. They didn't want to give up any water, a rather stupid decision, I might add, but that's the way it was. So the state was badly divided. The Water Board had four members from Western Colorado and the rest were from Eastern Colorado.

Interviewer: How many were there from Eastern Colorado on the Board at that time?

Mr. Sparks: At that time there were fourteen members—four from the Western Slope and ten from the Eastern Slope. So the Eastern Slope interests could outvote the Western Slope interests; but, there was another factor that was very important at that time. The Western Slope had its own congressman at that time, Wayne Aspinall. At that time we had four congressmen. One was from Western Colorado and the other three were from over here: Denver had its own, as did Northern and Southern Colorado. So they had three congressmen over here. To get anything done in a big way for the farmers, you had to have federal help—the Bureau of Reclamation, the Corps of Engineers, and other federal agencies. Well, they couldn't get anything done because the Water Board was fighting all the time. It just came to a very, very bitter halt.

The Water Board dictates state policy. Under the federal law, even a project in California that involved the Colorado River or any river that originates in Colorado (we've got four major rivers that start here)



the Water Board had to approve any federal participation. Under state law, the Water Board is an interstate agency as well as an intrastate agency and everything that's going to happen on the Arkansas no matter if it's in Kansas or somewhere down the line, has to be submitted to all the states for comments and objections. The endorsement of the state Water Board is critical for anybody that wants federal or state money. Because of the bitter battle between Western and Eastern Colorado, they couldn't get anything done.

The ace in the hole for the Western Slope was Wayne Aspinall. He turned out to be the most powerful man in the House because he quickly, after he got in Congress, became Chairman of the Interior Affairs Committee of the House. Throughout the history of Colorado we've only had two chairmen in either house of Congress. Chairmen run the Congress, anybody that thinks otherwise doesn't know what's going on back there. If you want to get anything done through a particular committee you have to have a chairman watching. Well, Wayne Aspinall gets that powerful position which means he can block anything that they want in Eastern Colorado that involves federal money. And so that's where we were in the state—in a complete deadlock.

This is a condition that Steve McNichols inherits when he's elected governor. Steve was an active guy with a lot of plans, one of the best governors we've ever had. He was determined to break the deadlock. First, the Board had its own attorney, with the consent of the Attorney General. It was in the statute that the Board could appoint its own attorney, which is different than most state agencies. I'm not sure how that came about originally. These water cases as they go through to the United States Supreme Court, they last sometimes fifteen years. They decided the state Water Board should have its own independent attorney for continuity. It used to be that the Attorney General's office turned over every two years. The Attorney General was only elected for two years. Those people came and went. We never really had much of an Attorney General's office over the years until recently.

Anyway, the Board had its own attorney. The first, when the Board was first born back in the 1930s, was Gene Breitenstein. Gene was appointed as the Board's first attorney. And he was quite a well-known attorney who finally was appointed to federal court. Then his place was taken by a man named Hatfield Chilson, also a well-known water lawyer in the state. He became Assistant Secretary of the Interior. Chilson resigned from the Board to take that position and that left a vacancy for the state Water Board which was always regarded as a top spot for a water attorney. The man who seemed to be in line for it was Ray Moses, a prominent water attorney from Alamosa. But Ray was a member of the Board; he had been appointed as a member from the San Luis Valley. Ray looked to be the most likely Board attorney. But he had always voted with the Eastern Slope interests; he wasn't too popular in Western Colorado. One day out of the blue McNichols called me at my office and said, "I want you to come in and talk to me." I got on the plane and came over and he said, "I want you

to be the attorney for the state Water Board." You're from Western Colorado and we've got to pull this Board together and I think you're the one man who can do it. We have millions of dollars in projects that are ready to go but we can't get them done because of our political problem in Washington with Wayne Aspinall and the other congressmen." I said, "I already heard Ray Moses was going to be appointed and never thought much about it." But he put it up to me and put me on the spot.

There were fourteen members on the Board at that time, the governor being one of them. The governor, by statute, was chairman of the Board. So I said, "I don't know if you can swing it or not, Governor." He said, "By god I can swing it. I appoint those people." He appoints nine. The other five were *ex officio* members, including the State Engineer, the State Planning Director, and the Attorney General. I said, "Well, I'm ready." He said, "I'll hold a Board meeting and recommend that you become the attorney for the Board."

So the meeting was held and the governor nominated me but somebody else on the Board nominated Ray Moses. The governor said, "Well I want Felix Sparks to be the attorney for the Board." Ray Moses made a motion for a secret ballot, which the governor had not expected, and the vote came out seven to seven. The Governor was very angry; McNichols could get very angry. He said, "I'm chairman of this Board and responsible to appoint people. My wishes should be followed." The meeting was adjourned. There was another meeting in two weeks. He told me, "I'm shocked I couldn't carry this but give me a couple weeks and I'll carry it." A couple of weeks later, at the next meeting, he placed my name in nomination and that was it—there were no other nominees. So I was unanimously elected attorney for the Board. And then I got busy with all the Western Slope projects, and with meetings with the Colorado River Board and the Southeastern Board and I got rough with them. I said, "If you people want anything done in this state, you have to pull together. There has to be common effort." I cursed at some of them that were giving me problems. I can get pretty nasty too.

Interviewer: How do you feel about the '69 Act now and the court interpretations over past thirty years?

Mr. Sparks: I think it has worked quite well. I think it has improved a lot of the problems and filled in the gaps we talked about before. It's an entirely different system than it was. Especially since there's the water court. It used to be that any judge heard water cases. I think it's working pretty well.

Interviewer: Is there anything about it you would change?

Mr. Sparks: No, I don't think so. Well, there were a few things I wanted to change at the time but couldn't get done. I think it has

worked reasonably well and the major errors have since been corrected. But the one thing I did not like about it was the thing about replacement water, augmentation plans.

Interviewer: In closing, how do you think Colorado's system compares to other states?

Mr. Sparks: Ours is as good as any, probably much better than most. We have a tight knit watershed approach to our system. Most states don't have that.