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In Memoriam: James K. Groves

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IN MEMORIAM

The Judiciary of Colorado and the legal profession suffered a tremendous loss with the death of Colorado Supreme Court Justice James K. Groves. Justice Groves died April 6, 1980, after being hospitalized for a stroke and resulting complications. He was appointed to Colorado's high court by Governor John A. Love in April, 1968. Justice Groves was the first appointee to the court under the merit system of selection.[1] As an Associate Justice during his twelve years on the supreme court bench, he authored more than 540 opinions—many of which are recognized as landmark decisions.

Justice Groves was born on August 29, 1910, in Grand Junction. He attended Mesa College and received his undergraduate degree in 1932 from the University of Colorado. He was graduated with honors from the University of Colorado law school in 1935.

Following law school, Justice Groves returned to Grand Junction where he began building a reputation as one of the state's best trial attorneys. As a private practitioner, he specialized in the areas of water and mineral law. From 1940 to 1944, he served as a Mesa County Deputy District Attorney and in 1948 became an Assistant District Attorney. In 1952, he became Grand Junction's city attorney and remained in that capacity until 1956.

Justice Groves was one of the founders of the Rocky Mountain Mineral Law Foundation, a nationally recognized institution which publishes an annual legal journal utilized by many practitioners in the mineral law area. He served as its president in 1935. Another significant legal accomplishment was his membership, since 1958, in the House of Delegates of the American Bar Association.[2] In 1972, he was installed as chairman of this arm of the ABA—the second highest position in the organization. He served in such capacity until 1974. Justice Groves also served as president of the Colorado Bar Association in 1949 and president of the Mesa County Bar Association in 1938.

While in law school, Justice Groves was editor-in-chief of the Rocky Mountain Law Review. He also served as co-editor of the American Law of Mining and wrote several law review articles. Among the awards he received were the Colorado Bar Association's Award of Merit in 1959, the Mesa College Distinguished Alumnus Award in 1969, and the University of Colorado's William Lee Knous Award in 1969. In 1977, he was awarded a doctor of law degree from the William Mitchell College of Law at St. Paul, Minnesota. Justice Groves was also a fellow of the American College of Trial Lawyers and the American Bar Foundation.

The remainder of this remembrance is dedicated to a discussion of some

1. Prior to selection of Justices based upon the merit system, the Colorado Supreme Court positions were filled in popular elections.

2. The House of Delegates is the American Bar Association's policy-making branch.

of the many significant Colorado Supreme Court decisions Justice Groves authored.

Significant Water Law Decisions

Late in 1978, over 100 water applications involving claims for thousands of wells and over twenty million acre feet of water in underground reservoirs were filed in Colorado by various individuals, groups, and joint venturers. The Southeastern Colorado Water Conservancy District and others[3] commenced an original proceeding in the Colorado Supreme Court requesting that the water cases be consolidated for a determination of common questions of law.[4]

In *Southeastern Colorado Water Conservancy District v. Huston*,[5] Justice Groves granted relief for the petitioners. On the basis of the supervisory powers granted to the court by the Colorado Constitution,[6] Justice Groves ordered consolidation of the water cases and provided for the appointment of a special water judge to make a determination of various threshold questions of law.[7] He ruled that the various petitioners had standing to seek consolidation of the cases for determining these common legal issues.[8]

The threshold legal questions, resolution of which will represent a landmark for Colorado water law, are (1) whether non-tributary waters in Colorado are subject to appropriation; (2) if so, by what authority can such water be appropriated; (3) can non-tributary waters outside the boundaries of designated ground water basins be appropriated by persons having no property interest in the surface; (4) can non-tributary waters outside the boundries of designated ground water basins be appropriated for use by persons other than the claimant or those whom the claimant is authorized to represent; and (5) can applications for non-tributary waters outside the boundaries of designated ground water basins be filed (a) without first obtaining permits from the state engineer and, if so, (b) without first applying for such permits.[9] Because these issues were not settled by constitutional

3. The Northern Colorado Water Conservancy District and the Southwestern Colorado Water Conservation District were also petitioners.

4. The basis for the proceeding was the supreme court's supervisory powers granted by COLO. CONST. art. VI, § 2(1): "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

5. 593 P.2d 1347 (Colo. 1979).

6. *See* note 4 *supra*.

7. 593 P.2d at 1349-51. Because the special water judge was temporarily assigned as an additional water judge for each of the seven water divisions, original jurisdiction of the water judges was not deprived and an improper change of venue did not occur. *Id.* at 1351-52.

8. *Id.* at 1352.

9. *Id.* at 1349. In a supplemental order, the court approved consideration of the following additional issues by the water judge in his discretion: (1) can a decree be obtained for a right to store tributary water in an underground reservoir created by the impoundment of water behind a naturally-occurring glacial terminal moraine; (2) are non-tributary waters obtained from wells in underground non-tributary aquifers subject to appropriation under the Colorado Constitution; (2)(a) if not, under what legal authority or status, and with what limitations, if any, does any right to such water exist; (2)(b) under what procedure, if any, may or must such rights be determined or confirmed; (3) when non-tributary, or *de minimus* tributary water infiltrates un-

law, statutory provisions, or judicial decision, Justice Groves ruled that assignment of the issues to a special water judge for a consolidated ruling did not deny the respondents due process or equal protection of the law.[10]

There is no doubt that Justice Groves' expertise in the water area and consideration of these issues would have had a significant impact upon the ultimate outcome of the consolidated cases. He would have had the opportunity to author another decision of landmark importance in Colorado water law. The decision will have tremendous legal and social significance affecting the rights of Colorado landowners and governing future developments.[11]

In *Fellhauer v. People*,[12] a water division engineer shut off thirty-nine wells in the Arkansas River alluvium without any written rules, regulations, or prescribed guidelines. Since the Arkansas River Basin was over-appropriated, the action was taken in order to make more water available for satisfying adjudicated, senior surface rights. While the legislation (then in effect) under which the engineer was acting was deemed a proper grant of authority,[13] Justice Groves ruled that for such action to be constitutional under the equal protection clause of the fourteenth amendment of the United States Constitution and the due process clause in article II, section 25 of the Colorado Constitution, it must be performed pursuant to and "in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of the regulative orders."[14] After the decision, the state engineer began to promulgate rules and regulations for administering tributary ground waters.[15]

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derground structures and such infiltrating water would, if not intercepted, reach a natural stream, may an applicant who does not allege ownership, or is not an owner of such structure , obtain a decree for such water which is free from the call of the river; (4) are unconsumed withdrawals, return flows or waste water from non-tributary sources which are not recaptured by the developer, subject to claim under any right (appropriation or otherwise) independent of claims on the stream or aquifer to which such waters ultimately discharge or return; (4)(a) if so, what is the nature of such right; (5) can a decree be obtained for the right to store in a non-alluvial aquifer; (6) regarding issue (1) in the initial opinion, (a) may such waters be appropriated pursuant to the doctrine of prior appropriation, (b) may such waters be appropriated under a theory of "developed water," and (c) can such waters be appropriated by persons having no property interests in the surface but having the knowledge or consent of the surface owner or agreements between the claimant and the surface owner; and (7) is the owner in fee of the surface land also the owner of the non-tributary ground water lying under the land by virtue of his capacity as an owner or is such water to be claimed and decreed in accordance with the doctrine of appropriation by such owner. Southeastern Colorado Water Conservancy Dist. v. Huston, No. 79 SA 38 (Colo., Aug. 29, 1979) (supplemental order considering additional questions of law).

10. 593 P.2d at 1353-54.

11. A decision in the consolidated cases is expected to be rendered by the special water judge, Judge Shivers, in 1980. Southeastern Colorado Water Conservancy Dist. v. Huston, No. 79 CW 1 (Arapahoe County Dist. Ct., Colo., filed Apr. 16, 1979).

12. 167 Colo. 320, 447 P.2d 986 (1968).

13. *Id.* at 330, 447 P.2d at 991.

14. *Id.* at 334, 447 P.2d at 993. Two additional requirements were noted:

(2) Reasonable lessening of material injury to senior rights must be accomplished by the regulation of the wells.

(3) If by placing conditions upon the use of a well, or upon its owner, some or all of its water can be placed to a beneficial use by the owner without material injury to senior users.

Id.

15. Greer, *A Review of Recent Activity in Colorado Water Law*, 47 DEN. L.J. 181, 186 (1970).

Of significant importance is Justice Groves' amplification of the Colorado Constitution's[16] establishment of the prior appropriation doctrine for acquiring rights in the waters of any natural stream:

> It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.[17]

The Colorado legislature reacted favorably to the introduction of the new era of maximum utilization of water in the state. Comprehensive legislation, the Water Right Determination and Administration Act of 1969,[18] was enacted to provide for the administration, distribution, and regulation of all surface and underground water in or tributary to all natural streams in Colorado.[19] While the doctrine of maximum utilization is subject to restrictions against waste, it is unsettled whether the doctrine is readily applicable to non-tributary ground water, when one considers the over-appropriated conditions of tributary surface and ground waters and the significant value of scarce, easily accessible non-tributary ground water sources to the surface owner.[20]

Four additional issues were presented in *Fellhauer* but were not directly ruled upon.[21] Justice Groves noted that "subsurface channel," while incapable of precise definition and determination, generally referred to the portion of the alluvium beneath and adjacent to the surface channel.[22] Relative to ground water administration, he noted that date of priority was not the sole consideration for determining which wells were to be shut off first. Other factors such as proximity, actual effect, futile calls, supply predictions, and economic planning were noted.[23] However, a determinative resolution of these issues and others pertaining to the right of senior users to support surface flow by uplifting groundwater was reserved.[24]

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16. "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of approporation shall give the better right as between those using the water for the same purpose . . . ." COLO. CONST. art. XVI, § 6.

17. 167 Colo. at 336, 447 P.2d at 994 (emphasis in original).

18. COLO. REV. STAT. § 37-92-101 (1973).

19. *See* Kuiper v.Well Owners Conservation Ass'n, 176 Colo. 119, 126, 490 P.2d 268, 271 (1971).

20. The scope of maximum utilization of water in Colorado will be more defined after resolution of the consolidated cases. *See* note 11 *supra*.

21. 167 Colo. at 337, 447 P.2d at 994.

22. *Id.* at 337-38, 447 P.2d at 995. Because the defendant's well was determined to be within the "subsurface channel," a legislatively created rebuttable presumption regarding lack of injury to vested rights could not operate in his favor. *Id.*

23. *Id.* at 341-42, 447 P.2d at 996-97 (quoting Morgan, *Appropriation and Colorado's Ground Water: A Continuing Dilemma?*, 40 U. COLO. L. REV. 133, 138, 139-40 (1967)). The trial court disposed of defendant's argument that later priority wells be shut off first by noting that defendant's rights were so junior to affected senior rights that no consideration need be given to priority dates. *Id.* at 340, 447 P.2d at 996.

24. *Id.* at 342-43, 447 P.2d at 997.

City and County of Denver v. Fulton Irrigating Ditch Co.[25] involved a declaratory judgment action commenced by Denver and the Adolph Coors Company to determine Denver's rights in water obtained through transmountain diversions. The diversions involved a transfer of water from the Colorado River Basin on the Western Slope to the South Platte River Basin on the Eastern Slope. The defendant ditch companies diverted water from the South Platte River downstream from the discharge point of a sewage plant which processed Denver's sewage. A goal of minimum use of imported water was recognized in a United States District Court decree which fixed the priorities of Blue River water imported by Denver.[26]

Denver wished to know whether it could make successive uses of the transmountain water while its dominion over the water continued.[27] Defendants' principal argument was that Denver could not make a disposition of the water after use. The defendants feared Denver would use primarily imported water during the irrigating season with recaptured portions going to its transferees and primarily South Platte River water in the non-irrigating season thereby depriving the defendants of imported water returned to the river.[28]

Writing for the court, Justice Groves held that Denver, in the absence of agreement otherwise, could re-use, make a successive use of, and after use make a disposition of imported transmountain water.[29] The court felt this would be the law even absent a statute[30] apparently giving Denver such rights.[31] An analogy was drawn from the law of developed water. Developed water is that which has been added to the supply of a stream and which never would have come into the stream but for the efforts of the person producing it. Developers of such water are entitled to use, re-use, make successive use of, and dispose of the water.[32] No distinction was made between the rights of a developer in developed water and those of Denver in imported water.[33] In effect, a downstream appropriator has no right to rely on the discharge of foreign water into a stream following its use, re-use, and successive use by the importer.[34]

Justice Groves also established the following definitions:

> "Re-use" means a subsequent use of imported water for the same purpose as the original use.
>
> "Successive use" means subsequent use by the water importer for a different purpose.

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25. 179 Colo. 47, 506 P.2d 144 (1972).
26. *Id.* at 54-55, 506 P.2d at 148.
27. Another issue was whether Denver could exchange water under a 1969 agreement with Coors. Because of an earlier agreement entered into by Denver, the court ruled that Denver could not exchange water under the Coors agreement. *Id.* at 51, 59-64, 506 P.2d at 146, 150-53.
28. *Id.* at 55, 506 P.2d at 148-49.
29. *Id.* at 51, 506 P.2d at 146.
30. COLO. REV. STAT. § 37-83-101 (1973).
31. 179 Colo. at 52, 506 P.2d at 147.
32. *See* Ripley v. Park Center Land & Water Co., 40 Colo. 129, 90 P. 75 (1907).
33. 179 Colo. at 53, 506 P.2d at 147.
34. *Id.* at 53-54, 506 P.2d at 147-48. *See also* Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

> "Right of disposition" means the right to sell, lease, exchange or otherwise dispose of effluent containing foreign water after distribution through Denver's water system and collection in its sewer system.[35]

Regarding defendants' primary argument noted above, Justice Groves held that such a pattern of use by Denver would be unreasonable and would unconstitutionally deprive defendants of their water rights in the South Platte River.[36] He ruled that Denver was not to depart substantially from its past practice of returning water originating in the South Platte basin during the irrigation season.[37] Justice Groves also reversed the lower court's determination that Denver lost dominion over water when it was delivered to the customer's tap on the ground that Denver controls the amount of water it treats and the amount passed on to other treatment facilities.[38] Moreover, the delivery of imported water to an agent of Denver for treatment did not constitute an abandonment of this water because the City did not so intend to abandon.[39]

In *Kuiper v. Lundvall*,[40] the defendant had three wells each located in a quarter section pumping from a designated ground water basin. His application for a well on a fourth quarter section was denied on the ground that the area was over-appropriated. He then began to transport water from one of the existing wells to irrigate the quarter section having no well. The state engineer brought an action to enjoin the defendant from transporting this water since under the Central Yuma County Ground Water Management District's rules, designated ground water could not be used on land other than that described in the permit. The defendant counterclaimed asking that the Colorado Ground Water Management Act[41] be declared unconstitutional. The lower court, finding the water was tributary, held the Act to be unconstitutional.

The Colorado Supreme Court reversed the lower court's decision. At the outset, Justice Groves held that water taking over a century to reach the stream is of a *de minimus* tributary character and therefore not tributary to the stream.[42] Without reaching the constitutionality issue, the court reversed the lower court's finding that the Colorado Ground Water Management Act as applied to tributary ground water was unconstitutional.

Justice Groves also reversed the lower court's finding that the Act was unconstitutional because it delegated judicial functions to an administrative agency. He ruled that the Colorado Constitution does not prevent the legislature from placing jurisdiction for water administration in an agency, even

35. 179 Colo. at 52, 506 P.2d at 146-47.
36. *Id.* at 56, 506 P.2d at 149.
37. *Id.*
38. *Id.* at 56-57, 506 P.2d at 149.
39. *Id.* at 58-59, 506 P.2d at 150.
40. 187 Colo. 40, 529 P.2d 1328 (1974), *appeal dismissed*, 421 U.S. 996 (1975).
41. COLO. REV. STAT. § 148-18-1 to -38 (1965 Perm. Supp.) (currently COLO. REV. STAT. § 37-90-101 (1973)).
42. 187 Colo. at 44, 529 P.2d at 1331.

though water adjudication has been traditionally in the courts.[43]

Justice Groves again noted the concept of maximum utilization he introduced in *Fellhauer*.[44] He recognized that the Colorado legislature, in the Colorado Ground Water Management Act, had provided a means by which the maximum utilization of designated, non-tributary ground water in Colorado can be obtained.[45] He also noted that the state engineer and ground water commission were proceeding under this Act consistently with the doctrine of maximum utilization.[46]

The above cases represent only a few of the significant water law decisions authored by Justice Groves. Altogether, he wrote more than fifty water law opinions. He will be long remembered for his vast and important contributions to the development and growth of Colorado water law.

Other Significant Decisions

Justice Groves also wrote landmark opinions in areas other than water law. In *Lovato v. District Court*,[47] the Colorado Supreme Court was asked to resolve a difficult controversy about the proper legal definition of death. The mother and guardians *ad litem* of an infant commenced an original proceeding seeking review of a district court's order directing the guardians to execute a document authorizing the treating physician and hospital to remove all life support systems if, in the doctor's opinion, the child was legally dead.

After ruling that the juvenile court had jurisdiction to order the removal of the life support system sustaining the infant, Justice Groves reviewed the petitioners' allegation that the juvenile court had exceeded its jurisdiction and abused its discretion in recognizing the concept of brain death.[48] He held that the absence of a legislative answer to the question whether an irreversible cessation of brain functioning can be used to determine death did not preclude the court from resolving the issue.[49]

Thus, relying on current scientific views and medical opinions, judicial decisions, and legislation enacted in other states, the court established for Colorado the proposed Uniform Brain Death Act which defines legal death as an irreversible cessation of all functioning of the brain.[50] This test was adopted as an alternative to the traditional standard of death based upon total stoppage of blood circulation and a cessation of vital functions such as respiration and pulse.[51]

43. *Id.* at 46, 529 P.2d at 1332 (quoting Larrick v. North Kiowa Bijou Management Dist., 181 Colo. 395, 404, 510 P.2d 323, 328 (1973)).

44. 167 Colo. 320, 447 P.2d 986 (1968).

45. 187 Colo. at 45, 529 P.2d at 1331.

46. *Id.*

47. 601 P.2d 1072 (Colo. 1979).

48. *Id.* at 1075.

49. *Id.* at 1081.

50. *Id.* " 'For legal and medical purposes, an individual who has sustained irreversible cessation of all functioning of the brain, including the brain stem, is dead. A determination under this section must be made in accordance with reasonable medical standards.' " *Id.*

51. *Id.* at 1076.

In *Walker v. Colorado Springs Sun, Inc.*[52] the operators of an antique shop brought a libel action against a newspaper for publication of material concerning the purchase for resale of allegedly stolen goods. The Colorado Supreme Court was asked to fashion a standard of liability applicable to a publisher or broadcaster of a defamatory falsehood injurious to a private individual but involving a matter of general public interest.

In *Gertz v. Robert Welch, Inc.*,[53] the United States Supreme Court expressly gave the states authority to create appropriate standards for such situations. Accordingly, Justice Groves, speaking for a majority of the Colorado court, adopted the Supreme Court's plurality opinion in *Rosenbloom v. Metromedia, Inc.*[54] He held that the publisher of a defamatory statement concerning one who is not a public official or public figure but involving a matter of public concern will be liable to the person defamed only if the publisher knew the statement was false or if the statement was made with a reckless disregard for its truth or falsity.[55]

Justice Groves qualified the adoption of the *Rosenbloom* rule, however, with the limitation that a finding of reckless disregard need not be based upon a finding that the publisher actually had serious doubts about the truth of the statement published.[56] Justice Groves noted that his holding was based on the court's conclusions that a simple negligence rule would result in such a chilling effect on the media that only insufficient facts would be printed in order to protect itself against libel actions and this insufficiency would be more harmful to the public interest than an absence of adequate compensation to a defamed private individual.[57]

Hiigel v. General Motors Corp.[58] was a products liability suit presenting the issue whether a manufacturer's failure to warn of dangers inherent in the use or misuse of a product can render defective a product that is otherwise free of defect. The case involved an action by the purchaser of a motor home against the manufacturer and retailer for damages resulting when the rear wheels separated from the vehicle during operation. The supreme court, through Justice Groves, expressly adopted for Colorado the doctrine of strict liability in tort as articulated in section 402A of the second Restatement of Torts.[59] He then pronounced the existence of a duty to warn of potential hazards and held that a failure to comply with this duty may make a product defective when the proximate cause of an injury is a breach of this

52. 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).
53. 418 U.S. 323, 347-48 (1974).
54. 403 U.S. 29 (1971).
55. 188 Colo. at 98-99, 538 P.2d at 457.
56. *Id.* at 98, 538 P.2d at 457.
57. *Id.* at 99, 538 P.2d at 458.
58. 190 Colo. 57, 544 P.2d 983 (1975).
59. *Id.* at 63, 544 P.2d at 987. This portion of the Restatement is as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

duty.[60]

The court disagreed with the lower court's ruling that the plaintiff was precluded from recovery by reason of his general experience and knowledge as to wheel maintenance. Justice Groves held that the general knowledge of wheel maintenance and of the fact that stud nuts must be kept tight was not the legal equivalent of knowledge of the manufacturer's torque requirements. Only relevant knowledge and understanding of the plaintiff, for example, if the plaintiff voluntarily and unreasonably proceeded to encounter a known risk, could amount to a defense under section 402A's strict liability theory.[61]

Justice Groves further ruled that the duty to warn is not satisfied by instructions about use of the product which say nothing about inherent dangers likely to arise if the instructions are not followed.[62] Additionally, the court extended the doctrine of strict liability to cover damage done to the defective product as well as harm caused the ultimate user or consumer and his property. However, the court declined to extend this doctrine to cover commercial or business loss.[63] And, finally, Justice Groves announced that where a component part is incorporated without change into some larger product, the remote manufacturer will be strictly liable to the ultimate user or consumer for damage resulting from defects in the part.[64]

CONCLUSION

Despite his wide travels and significant legal accomplishments, Justice Groves remained in his heart a Western Slope citizen. He was very devoted to his wife, Verna, and his three children. His high dedication to the legal profession is reflected in an outstanding scholastic record as a law student, his success and national reputation as a private practitioner, and his regard as a hard working, outstanding, and distinguished jurist on the Colorado Supreme Court. This dedication to the law and a desire for improving judicial processes resulted in his significant contribution to the body of Colorado law. This contribution, in turn, is one of the reasons Colorado's judicial system enjoys a fine national reputation. The memories of Justice James K. Groves as an outstanding person, lawyer, and jurist will long remain.[65]

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(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1979).

60. 190 Colo. at 63, 544 P.2d at 988.

61. *Id.* at 64, 544 P.2d at 988.

62. *Id.*

63. *Id.* at 64-65, 544 P.2d at 989.

64. *Id.* at 65, 544 P.2d at 989.

65. The DENVER LAW JOURNAL wishes to recognize Randall J. Feuerstein, Diane L. Burkhardt, and Stephen M. Brown for their efforts in the preparation of this article.