

Water Law Review

Volume 2 | Issue 2

Article 12

1-1-1999

Practitioner's Perspective

Water Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Water Law Review , Practitioner's Perspective, 2 U. Denv. Water L. Rev. 284 (1999).

This Practitioner is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Practitioner's Perspective

PRACTITIONER'S PERSPECTIVE

The *Water Law Review* is pleased to present this new section featuring personal interviews with some of the great water lawyers of the twentieth century. In May 1999, I was privileged to have interviewed Mr. Raphael J. Moses, to whom we proudly pay tribute in this issue. Mr. Moses is an intelligent and delightful gentlemen who graciously invited me to his home to meet his wife and their adorable bulldog Churchill, and to share with me his truly incredible life as a water lawyer. On behalf of the Editors and our readers, I sincerely thank Mr. Moses for his time and candid insights. I hope all who read this interview enjoy and cherish it as much as I do.

Debbie Eiland, Editor-in-Chief

Interviewer: Mr. Moses, I notice that you were born in Alabama. Did you grow up there? When did you come to Colorado?

Mr. Moses: No, my parents died before I was a year old (my mother at the time I was born, and my father shortly thereafter). There were four children, and I was the youngest. We were parceled out to different Aunts and Uncles, and I drew Albert L. Moses, who was a lawyer in Alamosa at that time. I was less than a year old when I went to Alamosa, so I don't have much of a Southern accent. My Uncle Albert and my Aunt Rosa were the only parents I ever knew.

Interviewer: You grew up then in Alamosa, and you liked Colorado and decided to stay here for college?

Mr. Moses: Well there wasn't much discussion. When I got out of high school, I got what they called a Regent's Scholarship that paid my tuition at the University of Colorado, which came to \$66.00 a year in those days. Obviously [because of the scholarship], I decided to come to the University to go to college. In those days, if one got all of his required courses out of the way in the first three years, he could go into law school before he got his AB degree. The first year of law school counted as electives so that you could get both degrees in six years, instead of getting your AB before law school. I was able to do that, and went to the University from 1931 to 1937—I got my AB in 1935, and my LL.B. in 1937. Later, when people started entering the military, I found out that people who had JDs instead of LL.B.s went in at a higher rank. So, I got two degrees at the University—one an LL.B.

and the other a JD for doing the same work because the University went back and retroactively gave law school graduates a JD.

Interviewer: So you didn't have to spend more time in school to get your JD?

Mr. Moses: No. As it happens, if you went in with an LL.B. you went in as an Ensign, but if you went in with a JD you went in as a Lieutenant Junior Grade, which made a difference in allowance, pay, and everything else.

Interviewer: Did you go into the military after you graduated from law school?

Mr. Moses: No. I got out of law school in 1937 and went back to Alamosa, and went into practice with my Uncle. Then when the war came along, I volunteered in August of 1942 and went to indoctrination school in Newport, Rhode Island and learned the difference between the Navy salute and Boy Scout salute—all those important things.

Interviewer: So you joined the Navy?

Mr. Moses: Yes. I was in Newport three months, and wound up on destroyer duty in the Pacific.

Interviewer: How long did you serve?

Mr. Moses: I served from August, 1942 to October, 1945, when I got enough points, as they called them in those days, enough time in the service, to get out. I was ready to get out. In the meantime, my Uncle had died so the office was closed for about a year. I had no idea whether there would be any practice left when I got back or not. At that time I was married to my first wife, and our little girl was five years old. When we came back to Alamosa it was touch-and-go for a while, but in five or six months I started breaking even, and pretty soon I made a little money. It worked out.

Interviewer: Since your Uncle was an attorney also, did he somehow encourage you to go into the law?

Mr. Moses: Well, most of my family had been in the law, or in the Navy. I was the seventeenth in a direct line of my family who had been commissioned in the Navy, going back to the War of 1812. I have two brothers who were career naval officers and went to Annapolis. I wanted to go, but I couldn't pass the physical so I couldn't go to Annapolis. I went to CU instead. It was one of those things that was

taken for granted that I would be a lawyer. I wanted to be a newspaper man. I had been the editor of the newspaper at the University of Colorado and I liked that, but rationality prevailed.

Interviewer: Newspaper work was not thought to be a good career back then?

Mr. Moses: I thought it was fun.

Interviewer: What kind of law did you initially practice and how did you get into water law?

Mr. Moses: I was a country lawyer. In Alamosa, you did everything. There were only eighteen lawyers in the San Luis Valley at that time. We all did some water law—represented drainage districts, irrigation districts, or ditch companies. So I had some of that. My Uncle always regretted that he didn't have enough money to raise a family and participate in Bar Association activities the way he would have liked to. So when I started to work for him he paid me \$100.00 a month, which was about the most anybody in my class got at the tail-end of the Depression (not that I was worth \$100, but he had to support me anyway). When I got married he raised me to \$150. But anyway, he said, "If you want to go to the Colorado Bar Association meeting at the Broadmoor in Colorado Springs, I'll pay your way." I practiced with him until I went into the service in 1942, and when I got out in 1945 I went to a state Bar meeting for the first time. As it turned out at the time, they were organizing a water section in the Colorado Bar, and I was the only person there from the San Luis Valley. The water law section council was made up of representatives of each of the major drainage systems in the state, and I was the only one there from the Rio Grande drainage, so somehow I got on the water law council. I was twenty-four years old.

Interviewer: That must have opened the door to a lot of other water related activities?

Mr. Moses: Yes, I've been very fortunate. Governor Thornton appointed me to the Colorado Water Conservation Board. I served for five years, then a vacancy occurred in the office of the attorney for the Board. Felix Sparks had been the attorney for the Board, then became Director of Natural Resources, so there was an opening for attorney for the Board and I got it. I served for twelve years as attorney for the Board. And that, of course, opened a lot of doors for me as far as water was concerned because I represented Colorado in all its interstate matters—the Rio Grande Compact, the Colorado River Compact, etc. Early on I went all over the country representing Colorado. I remember going down to Yuma to a meeting and to Washington a couple of times.

Interviewer: What was one of your most interesting cases?

Mr. Moses: One of the highlights was a lawsuit that ran for years and years and years involving the Rio Grande Compact. The parties included Colorado, New Mexico, Texas, and the Republic of Mexico. Colorado habitually ignored the compact and used more water than it was entitled to, and was in debt—according to the bookkeeping system used in the compact—far beyond the permissible amount. Texas and New Mexico brought suit against Colorado to enjoin us from violating the compact, and to limit the amount of water the irrigators in the San Luis Valley could use. I went back to Washington representing Colorado and met with the Solicitor General, Thurgood Marshall, and we worked out a stipulation that all the states agreed to. Colorado could go ahead so long as it did not increase its indebtedness. Well, that meant very careful management of water in the San Luis Valley. There were hundreds of irrigation wells down there, and it meant that the State Engineer had to shut down the use of those wells sometimes, for fear that we might increase the indebtedness. There was also a provision in the Compact that set-up Elephant Butte Reservoir, which is down by Las Cruces, New Mexico. If it ever spilled, all the indebtedness would be wiped out. It had never spilled, but after the agreement it did spill and so the indebtedness was wiped out.

After the Elephant Butte Reservoir spill, the people in the San Luis Valley could go back to using their water and were very careful not to get back in debt. It's easier to do now because we can regulate the wells and make fairly accurate forecasts of when the run-off will occur in the spring of each year, based on a measurement taken at the gaging stations of Del Norte on the Rio Grande, and sources on the Conejos River. We have to deliver a percentage of the amount that passes those gaging stations. If a lot of water goes by we have to deliver a lot of water. If it's a very dry year, the requirements are pretty modest. It works out pretty well.

Interviewer: Were you involved in any early water conservation projects?

Mr. Moses: We had a project that had been approved since 1936, which involved the construction of a high dam at Wagon Wheel Gap in the San Luis Valley just about seven miles before Creede on the Rio Grande. It would have backed water up almost to Creede. It also included a future canal called the Closed Basin Drain—a big drainage ditch which would take water out of what was called the Closed Basin north of Highway 160 which comes over La Veta Pass to Alamosa. It's east of Highway 17, which is the highway that comes down from Salida to Alamosa. Water accumulated in the Closed Basin from irrigation east of the big canal above Del Norte and fanned out along the west side of the San Luis Valley and irrigated lands to the east. But there

was a hydrologic divide north of the river, and about three or four miles parallel to it, that prevented the irrigation water that was applied to the lands (good agricultural lands around southern Del Norte and Monte Vista) from getting back to the River. It just went over into what they called the sump, and became stagnated—there was a lot of alkali and phreatophytes (water loving plants). To get the water across this hydrologic divide a canal was built which turned it back into the Rio Grande above the state line. That freed up water for farmers in the western part of the Valley, because it was returning water it had never returned before. That was a big help to the San Luis Valley.

Interviewer: How did these interstate cases and large projects help you to build your water law practice?

Mr. Moses: When Eisenhower was elected, a Nebraskan named Fred Seaton was appointed Secretary of the Interior. He asked Hatfield Chilson—who later became a Federal judge in Colorado—to be Assistant Secretary for Power and Water. I'd known Chilson for a long time. I'd become Attorney for the Colorado Water Conservation Board when he went into private practice. When he became a federal judge I took over some of his important water clients, and as a result I inherited a lot of Chilson's clients. He had a very active water law practice. For example, he represented ground water users around Colorado Springs, and Amax/Climax which had a very elaborate and complicated water system that took water out of the Eagle, the Arkansas, and Ten Mile Creek. He told me one time that the Amax system was so complicated that the courts would never be able to enforce it because no one understood it. Chilson had followed almost the same footsteps as Gene Breitenstein. Breitenstein had been attorney for the Denver Water Board then became a Federal judge. Chilson was also attorney for the Denver Water Board, and then he too became a federal judge.

Interviewer: You should have worked for the Denver Water Board!

Mr. Moses: Well, I might have become a Federal judge but my timing was bad. John Carroll was United States Senator, and Bill Doyle, his brother-in-law, was the one who wanted to be a federal judge, and he got to be a federal judge. He was a good judge, and I probably would not have been, so it turned out all right. Its interesting the way those things work.

Interviewer: Which of the cases you handled do you think was most important to Colorado water law?

Mr. Moses: I took over representation of all the well owners around Colorado Springs that Chilson had been representing. I think one of the more important Colorado decisions is one called *City of*

Colorado Springs v. Bender. Chilson had already lost that case, appealed it the Supreme Court, and the Supreme Court sent it back for re-trial. The facts were pretty simple. Bender had a dairy farm—about seventy acres. He drilled a hand dug well, and ran it from a tractor with a feed belt that ran the pump. That wasn't getting him very much water so he put the pump right over the well and dug the well down to shale—some seventy-five or eighty feet. In the meantime the City of Colorado Springs had drilled a big well closer to the old bed of Fountain Creek in that area, and had gone down about a thousand feet. As soon as they got below Bender's seventy-five feet, Bender's well went dry. The question was what Bender had to do to protect his water rights. The Supreme Court said he must do everything within his economic reach (whatever that means), that he had done that, and the 200 acre feet of water he had been taking before the City of Colorado Springs drilled its well preceded the Colorado Springs well in priority, so Colorado Springs furnished Bender 200 acre feet of water per year. It turned out to be a fairly landmark decision that followed an Idaho Falls, Idaho case called *Schodde*. The Idaho case says once you've done everything you can, the law protects you. Bender had done that, so he was protected.

Interviewer: Did you enjoy practicing water law?

Mr. Moses: We had a lot of fun. I was involved in a lot of litigation. In the Rainbow Bridge case [*Badoni v. Higginson*, 638 F.2d 172 (1980)], for example, I was representing Colorado. Clyde Martz and I were both in that one. Of course, Clyde was a landmark water lawyer in Colorado. The case was heard before the 10th Circuit, and went up to the Supreme Court [*cert. denied, Badoni v. Broadbent*, 452 U.S. 954 (1981)]. It was a lot of fun to represent a sovereign state. I also got to go to all the Colorado River Compact meetings. We organized a thing called the Colorado River Water Users Association. I had a feeling, and so did some of my contemporaries from other states who held similar positions, that there was such a bitterness between the upper and lower basins along the Colorado after the case of *Arizona v. California*, that if the people who actually used the water (the ditch superintendents, members of the Board of Directors of irrigation districts, etc.) could ever get together and see that their other contemporaries didn't have horns, but were people just like them trying to get along, it might be helpful—so we formed such a group. We had kind of a United Nations Security Council system. We didn't do anything without unanimous agreement, which meant that we didn't do anything. But it gave us a place to meet and talk where people weren't looking over their shoulders all the time in fear that they would be committed to something the majority would force them into. The one thing we could agree on was that we wanted to meet in Las Vegas. So for years we would go back for three days during what they called the dead ages, between Thanksgiving and Christmas, when nobody was going to Las Vegas and the room rates were low.

Interviewer: Who would you say was one of your biggest rivals?

Mr. Moses: I made a living fighting the Denver Water Board. Glen Saunders was attorney for the Water Board and we battled all the time. I worked for the Colorado Water Conservation Board because I'd have starved to death if I worked for the Denver Water Board. Nobody liked the Denver Water Board—not the good guys.

Interviewer: The Denver Water Board was looked upon badly for a long time wasn't it?

Mr. Moses: Yes, they had all the water. They had all the water on the western slope, and pretty much stymied the Arkansas transmountain diversion for a long time. Glenn was a good friend, and we got along fine. He couldn't smoke. I have asthma now, but he had it very badly. So we recognized that and we never smoked. Very bright mind, really nice guy. We had a relationship that was similar to what we call "Tavern Appeal." It's on the wall of the Law Club Bar in New York. It's a quotation that says: "Strive mightily, but eat and drink as friends." We used to butt heads all day, but go out and drink together at night.

Interviewer: Do you think members of the Bar still follow that philosophy?

Mr. Moses: No, I think the Bar has changed in a lot of ways that I don't approve of. It used to be a lawyer could call the opposing counsel for information about a case or agree upon an extension of time to plead, and the oral stipulation was honored by opposing counsel. Now you've got to have stipulations and court approval and all that. We didn't. I think a lot of the informality has gone out of it. I think a couple of things have caused this. One is the automatic copying machine which has made it easy to produce paper, and the use of depositions and interrogatories, all of which I consider to be piles of paper that consume hours and hours of time. Discovery, I think, is what makes litigation so expensive. It used to be that if you had one neighbor fighting another one, they could sue each other. Not anymore—they can't afford it. In a way that's good, because they just sit around and work it out among themselves. They know they can't afford anything else.

Interviewer: What do you think we need to do to change that, or do you think we can?

Mr. Moses: It takes tougher judges that we've got. Judges can limit the amount of discovery. It takes a judge who is willing to take the time and effort. And the judges are overworked, so I can't blame

them. They've got more than they can handle. We need a lot more judges and we need to appropriate money for it. Some judges were pretty tough. When Judge Finesilver used to say, "See you at 7:00 o'clock in the morning," you were there and he went all day.

Interviewer: What do you do in your spare time?

Mr. Moses: My wife and I travel a lot. We've been to seven continents including Antarctica, and many countries including New Guinea and Kenya where we took a ten-day trip by camel.

Interviewer: Tell me about Antarctica.

Mr. Moses: We took an ice-breaking ship, and got as close as it would go through the ice. We stopped at several international science stations including the French, Chilean, Chinese, and Russian stations. At the stations we got out and walked around. The U.S. station wouldn't let us get into it, however.

Interviewer: Tell me about riding camels. Is it different than horseback?

Mr. Moses: Oh yes. We had a very special trip. The camels were beautiful animals, and we had guides who led the camels, set up camp, and cooked all our meals for us. My wife played some pretty good tricks on the guides. They aren't used to technology or American ways. She had a tape recorder with her. The guides used to sing while we were riding down the trail. One day, without their knowing it, she taped their singing. Then one time when we were having lunch she played it back to them. Oh, they just thought that was unbelievable. Another thing, she had some bubble gum, and when she blew bubbles they thought her lungs were coming out. They screamed and ran away.

Interviewer: Do you specifically spend time choosing the places you travel?

Mr. Moses: Oh yes. We've been everywhere except some of the most obvious ones. Been to Europe probably half a dozen times, but we've never been to Scotland, Ireland, or Wales. Never was on the itinerary. We love Spain. We've been to Spain five times. I have some Spanish blood in me, I think that's one reason. One of my remote ancestors was court physician to Queen Isabella.

Interviewer: So you've done some research into your family background?

Mr. Moses: Yes, some family members are from Holland and London, England. The reason I wound up in Colorado is that my Uncle was here. He was born in Sandersville, Georgia, and he had asthma there. So he decided he was going to head West to live with an uncle in a place called Stonewall, Texas (LBJ country). I don't know if it was much better. But he thought he'd go to Colorado, to Buena Vista, in 1889. Had a wife and baby that he left in Texas for the time being. They didn't have law schools in those days in Colorado. He "read law" as they called it, which means he kind of apprenticed himself to a lawyer. He'd sleep at the office, they had a thing like an armoire, and it had a bed in it that folded down, and he slept in that. He got a job, \$25 a month being the deputy clerk for the District Court in Buena Vista, which at that time was the county seat in Chaffee County. He went to work for Mr. Libby who was Chairman of the Chaffee County Bar Examining Committee. After he'd worked for Mr. Libby for a couple of years, he went to him and said, "I think I'm ready to take the bar." They had a three man bar examining committee in each county. One man on the committee lived in Buena Vista and another one lived in Salida. So Mr. Libby called up the one who lived in Buena Vista and said, "We're going to admit Ally Moses to the bar, I'll meet you down at the Saloon in fifteen minutes." And that's how he got into the bar. Raphael J. Moses the first was my great-grandfather. He was admitted to the bar in Florida in 1834 when the requirements basically amounted to some freeholder of the circuit vouching for your good moral character, period. That was it.

Interviewer: No test? Just had to have good character?

Mr. Moses: Or, at least somebody who said you did.

Interviewer: Did you have to take the Bar Exam?

Mr. Moses: Yes. I took the January bar. I got out of law school in August. I'd taken three months off, and had been editor of the student newspaper at the University. I had an Aunt who found out there was going to be a meeting of student newspaper editors in Geneva, Switzerland in June, so she sent me \$500, which was a lot of money in the late thirties. I went to that meeting in Geneva, and as a result, I missed the spring quarter in law school in Boulder, so I couldn't take the bar in June. At that time they had the bar in June and January.

Interviewer: Do you think that water law in Colorado has evolved in a positive way?

Mr. Moses: I think it's been a leader in the West in water law, especially surface water. And I think the next challenge ahead of us is groundwater law. With the Colorado Doctrine of prior appropriation I

think Colorado has been a leader in surface water law development, and I think New Mexico is the leader in groundwater. Of course, we were the ones who developed the daunting non-tributary and not non-tributary water law. In that regard, I represented a man named Lawrence Phipps, Jr. who owned a ranch called Highlands Ranch. He sold it to a group I called the "hats." There were about eight of them, and when they had a meeting, they all kept their hats on. Marvin Davis and some of his associates, all nice gentlemen, bought the Phipps water from Lawrence Phipps, Jr. Much to my surprise they asked, "Would you stay on and represent us?" And I said "Sure." And then an outfit called Mission Viejo from California bought the Highlands Ranch from the "hats," and they asked if I'd stay on with them. And I said, "Sure." So I got to do the groundwater for Highlands Ranch, which was non-tributary. In well development in Colorado, I think that was the biggest case we've ever had. It involved more acres and more wells than any other. I was flattered that people would keep me on after I had represented the other side. You had to have everybody's consent to do it.

Interviewer: Where do you think we need to go with groundwater?

Mr. Moses: I think we've gone about as far as we can go. It's gotten to a point where we don't have measuring devices accurate enough to measure the quantities of water we seem to be fighting over. I'm reminded of my roots in the San Luis Valley. The oldest water right in Colorado is the Acequia Madre built in from 1851, controlled by a water master called a "major domo." They didn't have enough water to divide it so they had to have a system of rotation. One man would have it a couple of days, while another man took a couple of days off. That way everybody got to irrigate. They divided it up according to their shares, and they had enough water to make it to the end of the season. It was just a matter of good common sense. So the Spanish, I think, were way ahead of us in the development and management of water.

Interviewer: If you had something you'd change about your life, what would it be?

Mr. Moses: I don't know. I've enjoyed it all so much. I wouldn't have contracted asthma, as I did about six or seven years ago, but I can't think of much of anything else. I've been very fortunate.

Interviewer: What is your goal today?

Mr. Moses: To live out my life pretty much the way I'm enjoying it now. I'm very happy, and I know we don't live forever, but we keep finding things that make people live longer. Long as I have a substantial portion of my faculties—I don't plan to keep them all—I'll

be happy to go along the way I am. I have a wife who takes very good care of me.

Interviewer: What do you think is our most compelling water law issue today?

Mr. Moses: I think, probably, re-use and recharge of groundwater—cleaning up the water we use so that it can be recycled and used again. We sit here in a cosmos that has the same amount of water in it from the time of creation. Through the hydrologic cycle, clouds form over the ocean, the wind blows them over the mountains, precipitation comes down, forms rivers, goes back to the ocean, evaporates, and the cycle goes over and over. Along the way, we've managed to pollute most of it. I think our real challenge is to clean up our discharges and provide for the re-use of water as much as we can.

Interviewer: Do you think that lawyers are in any kind of unique position to make that happen? What can the Bar do, what can lawyers do, to be more proactive?

Mr. Moses: I think we have a very active Water Law Section, and, as you probably know, somehow the legislature seems to have more lawyers in it than anything else. So I think they've just got to realize the problem and try to resolve some of their individual differences and get the job done.

Interviewer: Is there anything you would like to add as we finish today?

Mr. Moses: I'd just like to share an old saying that I think is still true today. "You can kick a man's dog, you can steal his wife, but you'd better leave his water alone!"