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A Laboratory for Collaboration: Where, Why and Why Not?

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Citation Information

Salazar, Ken; Hannay, Felicity; Sims, Steve; and Kowalski, Ted, "A Laboratory for Collaboration: Where, Why and Why Not?" (1999). *Strategies in Western Water Law and Policy: Courts, Coercion and Collaboration (Summer Conference, June 8-11)*. <http://scholar.law.colorado.edu/strategies-in-western-water-law-and-policy/19>

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Ken Salazar, Felicity Hannay, Steve Sims, Ted Kowalski, *A Laboratory for Collaboration: Where, Why and Why Not?*, in STRATEGIES IN WESTERN WATER LAW AND POLICY (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law, 1999).

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**A LABORATORY FOR COLLABORATION:
WHERE, WHY AND WHY NOT?**

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June 8-11, 1999

NATURAL RESOURCES LAW CENTER
University of Colorado
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Boulder, Colorado

**A Laboratory for Collaboration:
Where, Why and Why Not?**

by

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I. Collaboration versus Litigation: A Big Picture Perspective.

- A. Costs of litigation. There are inherent costs in litigation that parties must realize.
1. Money. Costs of attorneys, experts, and the possibility of water court assessing costs and attorneys' fees on the unsuccessful litigant.
 2. Time. Litigation tends to take a very long time and the water courts' dockets are especially full.
 3. Uncertainty. A water judge may give a result that does not meet each parties basic needs where a settlement allows the parties to assure certain minimum criteria are met.

B. Historically the water wars of Colorado have pitted rural communities against urban interests and the West Slope against the East Slope without consideration of the resulting impacts. There are lessons to be learned from the water wars of Two Forks, AWDI and Union Park. These were all heavily contested cases involving complex litigation. One of the most important lessons that we can take from the water wars of yesteryear is that collaboration and cooperation can be effective tools in administering and managing water resources, and should be explored and utilized where possible. Water grabs are not the best solutions for supplying water to the Front Range metropolitan communities.

II. Metropolitan Denver's Water Supply and the History of Water Wars in Colorado.

A. Colorado Big Thompson Project. "In 1937, Congress authorized a reclamation project known as the Colorado-Big Thompson Project ("CBT"). See City & County of Denver v. United States, 935 F.2d 1143, 1146 (10th Cir.1991). The CBT provided for the construction of the Green Mountain Reservoir and Power Plant on the Blue River. One of the purposes of the CBT, as set forth in Senate Document No. 80, 75th Cong., 1st Sess. (1937), was to store replacement water at Green Mountain Reservoir for use by western slope interests to compensate for other Colorado River water diverted to the eastern slope as part of the CBT." City of Grand Junction v. City and County of Denver, 960 P.2d 675 (Colo. 1998). The CBT diverts water from the Colorado River system on the western slope via a thirteen-mile tunnel to the Big Thompson River on the eastern slope for ultimate delivery to the Northern Colorado Water Conservancy District. The CBT was the first large-scale trans-basin diversion. The lesson learned was that in order to obtain the consensus necessary to build such a large project, the Front Range water providers had to mitigate the effects of their diversions by providing for future water development on the Western slope.

B. Two Forks. In the 1980's Denver considered Two Forks as the solution to its future water supply needs. The Two Forks Project would have provided 600,000 acre-feet of storage. City and County of Denver By and Through Bd. of Water Com'rs v. Colorado River Water Conservation Dist., 696 P.2d 730, 734 (Colo. 1985). The Two Forks litigation pitted environmentalists and western slope water users against Denver. The EPA determined that the project was unacceptable because of the devastating environmental impacts that would occur and because there were other practical solutions with less adverse impacts.

C. AWDI. The AWDI project involved a plan to divert 200,000 acre feet per year from the confined aquifer in the Closed Basin of the San Luis Valley and the litigation lasted many years. The Water Court awarded the objectors \$2,700,000 for attorneys fees and costs, which did not even account for the costs of the Applicant. After all of the time, money, and energy that went into fighting for and against AWDI, the Front Range communities do not have a single drop

of water to show for it. Currently there is a similar proposal that has not yet been filed, known as Stockmen's Water, and another heavily contested litigation battle seems inevitable.

D. Union Park. The proposed Union Park project would create a 900,000 acre feet Reservoir in order to divert 100,000 acre feet of water from the Gunnison Basin to the Front Range. At the present time the parties have spent in excess of six million dollars in the litigation. The process to obtain these conditional water rights began in 1986 and the case is currently before the Colorado Supreme Court--thirteen years of litigation. Like AWDI and Two Forks, this project has not provided the Front Range with one drop of water to date. There must be other more cost-effective and less harmful water solutions for the Denver Metropolitan area's needs.

E. Agriculture to Municipal wars. Municipal providers have acquired a large number of irrigation rights and changed those rights to be used for municipal and other beneficial uses. There have been many wars over these change applications. "As an example, over 30,000 acre feet of irrigation rights in the South Park area of the Upper South Platte basin have been acquired and changed to municipal use by metro Denver area providers, principally Aurora and Thornton." Metropolitan Water Supply Investigation Final Report ("MWSI"), January 1999, page 25. Another example includes the transfers that occurred in the Lower Arkansas during the 1950s during a prolonged drought that caused many farmers to leave the area. Lawrence J. MacDonnell, Charles W. Howe, and Teresa A. Rice, "Transfers of Water Use in Colorado," from The Water Transfer Process as a Management Option for Meeting Changing Water Demands, Natural Resources Law Center, University of Colorado School of Law, 1990, page 28. Aurora and Colorado Springs made additional purchases of agricultural water in the period of 1960s-1990s. Id. at 28-30.

1. Westminster v. Church. This case was the one of the first large changes from agricultural use to municipal use in the Denver metropolitan area.
2. Thornton's Northern Project. In this case, Thornton acquired 120 farms and dried them up, in order to provide up 50,000 acre feet of water for growing municipal areas. "The trial progressed intermittently from August 7, 1991, to April 15, 1992, occupying fifty-seven days and producing

almost 10,000 pages of transcripts and more than 1,300 trial exhibits.” City of Thornton v. Bijou Irr. Co., 926 P.2d 1, 22 (Colo. 1996). The Colorado Supreme Court decision resulted in a 102 page opinion, which is one of the longest opinions in the history of Colorado law. The parties spent millions of dollars on engineering and legal fees and the project ended up being one of the most expensive water acquisitions in Colorado water law history.

F. Denver Water Quality Trials. One of the consequences of the Thornton Northern Project was that Thornton is required to take steps to protect water quality before using the Northern water. This requirement has led to a number of trials where Thornton will look at other parties’ exchanges to determine the effects of these exchanges on the water quality of Thornton’s existing supplies. The City of Denver has one of the two applications that is being actively contested and, after an initial enormously expensive engineering and legal costs, Denver took the unusual step of taking the lawyers out of the negotiations, and having the engineers from Denver, Thornton and FRICO try to resolve their differences.

1. Thornton. Thornton and Denver’s negotiations have broken down and these parties are set to go to trial in January 2000.
2. FRICO. Denver and FRICO were successful in negotiating an agreement.

III. The Platte Watershed.

- A. The population of South Platte River Basin is 2,574,500. The projected future service area population is 4,269,000.
- B. In 1985 it was estimated that there were 917,640 acres of irrigated land within the South Platte River Basin, with an associated irrigation water usage of about 2,850,000 acre feet.

C. Water Supply Sources of the Platte River Watershed

1. Native water supplies are 146,500 af/year.
2. Trans-basin diversions provide 239,400 af/year.
3. In-basin agricultural transfers provide 186,900 af/year.
4. Water reuse provides 40,700 af/year.
5. Denver Basin Groundwater provides 24,500 af/year.
6. Estimated water conservation savings provides 18,500 af/year.

IV. Endangered Species Issues. The Three State Agreement. This Agreement is a good example where the a cooperative collaborative effort is occurring in the water field today. While the parties could have initiated litigation and fought, instead the parties have come together and are working hard at developing solutions. Dale Strickland's paper (and speech) will provide additional insights into this Agreement and the how the Partnership is working.

V. The History of Collaboration on the Platte. In 1986, Neil Grigg argued that water users should develop arrangements, based on a voluntary association of water users. Tradition, Innovation, and Conflict: Perspectives on Colorado Water Law, Chapter 12, 1986. Grigg argued that these groups should use computer based capabilities to maintain records, study tendencies, organize exchanges, and generally manage and administer water diversions for the benefit of all subscribing water users in a basin. Id. This concept is still evolving today. Some history of the collaboration on the Platte includes the following examples.

A. The South Platte Compact. The South Platte Compact was adopted on April 27, 1923, and is promulgated at § 37-65-101, C.R.S. (1998). The South Platte Compact had two main purposes: 1)to prevent present and future controversies, and 2) promote interstate comity. § 37-65-101, C.R.S. Preamble. The South Platte Compact resolved the controversies by dividing the Platte into two sections, and requiring certain flows and administering certain junior water rights. The Compact was adopted in part because absent a compact, the U.S. Supreme Court had indicated that the prior appropriation doctrine would apply to an equitable apportionment controversy between two states who had adopted the prior appropriation doctrine. Wyoming v.

Colorado, 259 U.S. 419, 470-71 (1922). Colorado would have lost out to California and other states that were developing much more rapidly than Colorado. Norris Hundley, Jr., Water and the West, 1975, pages 105-109. Thus, under the leadership of Delph Carpenter, Colorado negotiated a number of compacts (including the South Platte Compact) “rather than fight interminable legal battles.” Id. at 106.

B. Platte Rules for Wells. As a result of the Water Right Determination and Administration Act of 1969 and Kuiper v. Well Owners, 490 P.2d 268 (Colo. 1971) a number of well owners joined together to form organizations, such as GASP, to purchase augmentation water which could then be used to cover depletions associated with the pumping of existing wells. Tradition, Innovation, and Conflict: Perspectives on Colorado Water Law, Chapter 12, 1986, page 214. “By working with the State Engineer’s office, and the water commissioner in particular, a small amount of augmentation water could go a long way toward covering a great deal of well water pumping.” Id. These associations have permitted flexibility in the administration of water rights, and they have succeeded thus far.

C. Senate Bill 5 legislation. While some might disagree that Senate Bill 5 was a collaborative effort, given the competing factions that were involved at the General Assembly, this legislative effort allowed the parties to develop certain aspects of water law without further litigation. For example, Senate Bill 5 defined nontributary water, and authorized the State Engineer to develop rules to determine the specific yields and the saturated thickness for the Denver basin aquifers. Prior to Senate Bill 5, these issues were determined on a case-by-case basis in the litigation setting. Thus, Senate Bill 5 reduced litigation on these issues.

D. Upper Cherry Creek User Group. Aurora, Arapahoe County Water and Wastewater Authority, Cottonwood Water and Sanitation District, East Cherry Creek Valley, and Colorado State Parks all were pursuing separate augmentation plans and exchanges in the area above Cherry Creek State Park, and they were all opposing each others’ exchanges and augmentation plans. The parties decided to discuss a plan that would cover all of these entities interests and pull their resources for replacement augmentation water. These parties are currently

replacing depletions under an umbrella Temporary Substitute Supply Plan. While the parties are still working out the kinks, this has been a successful collaborative effort.

E. The Metropolitan Water Supply Investigation (“MWSI”). The MWSI was an attempt to develop cooperative solutions for the future metropolitan Denver area water supply needs that also would minimize the conflicts often associated with development of large scale water supply infrastructure, such as trans-basin diversion projects. The MWSI demonstrated that cooperative water supply options exist.

VI. Working towards a solution. In reviewing the successes and failures of developing water in the State of Colorado, one consistent theme runs through all of the water wars--the need to provide more and more water to service the fast growing Front Range metropolitan area. The water wars will continue until a long range plan is developed to provide water to the Front Range. Recently, the State has advanced closer to a statewide water plan; however, statewide water plans have always been feared. Nevertheless, most water providers are beginning to realize the benefits of negotiated cooperative agreements, which may facilitate long range statewide water planning.

A. In recent dialogues regarding water planning, water providers have expressed concerns about the costs associated with litigation that prevent efficient solutions to water planning problems in the State. Many water providers have suggested that the State of Colorado should fill a unique role in advancing cooperative water supply solutions, by acting as a mediator and a coordinator.

B. Statewide Water Planning--why it is feared.

1. Fear of bureaucracy. There is an inherent fear of bureaucrats and of elevating decisions to a larger geographic area. The larger the geographic area, the more people that are affected and involved in the decision-making process, and the longer it takes to make decisions.
2. Distrust between the parties. Poor communication and past misunderstandings have made it difficult for Denver area providers, West

- Slope interests, and environmental interests to begin to trust one another.
3. Rigidity of statewide planning. Statewide planning has been feared as too rigid and unable to account for differences between the basins. This is changing now, however, due to basin-wide decision support systems and watershed approaches.
 4. Tyranny of the majority. At present agricultural uses take up 80% of the consumptive use of water in the State. However, the number of people that are directly involved in the agriculture industry in Colorado is relatively few. Thus, there is a justifiable fear that the smaller and less politically powerful parties' needs will be sacrificed for those of the majority. This could result in clear winners and losers.
 5. If each basin would assess their own needs and water supplies, then perhaps Statewide planning could occur. This past legislative session, Rep. Matt Smith introduced a bill (H.B. 1050) that would have encouraged basin-wide planning efforts. Although this bill failed in this past legislative session, the idea is a good one and hopefully Rep. Smith will reintroduce that bill in a future legislative session. Efforts such as that one would permit win-win solutions to occur.

C. As Greg Walcher, Executive Director of the Division of Natural Resources, stated recently at the March meeting of the Colorado Water Conservation Board, four cooperative water supply options categories exist and should be encouraged in the future.

1. Conjunctive use of water supplies. Conjunctive use has been described as "a system in which physically related ground and surface water are legally integrated and used [together]." Hillhouse, "Integrating Ground and Surface Water Use in an Appropriation State," 20 Rocky Mt. Min. L. Inst. 691, 692 (1975). Conjunctive use, when properly used, can allow for maximum utilization of water resources. Conjunctive use can involve: 1) direct use of surface water with groundwater as a backup supply; 2) direct use of surface water with groundwater recharge; or 3) conjunctive use with

borrowing and groundwater recharge. MWSI, pages 39-40. Conjunctive use projects could allow water users to obtain maximum utilization of surface water rights and groundwater rights, such as the Denver Basin aquifer. There are a number of recharge and conjunctive use projects that are ongoing at this time. Centennial is recharging water into the Denver Basin aquifers. In the Lower South Platte, recharge projects are occurring to reregulate flows on the South Platte when they are physically and legally available to provide accretions to the South Platte River at different times in the hydrologic cycle. This project helps Colorado perform its obligations under the Three State Agreement. The Division of pump the alluvial aquifers at high pumping rates and then place water into recharge ponds in such a manner so that the recharged water will accrete the South Platter River so that the recharge water will increase the flows of the South Platte River during the irrigation season, when it is most needed. In addition, in the San Luis Valley a number of users have been recharging surface water into the unconfined aquifer to maintain water table levels that had dropped due to increased well pumping in the unconfined aquifer.

2. Effluent management. When water is used for municipal purposes, less than 50% of the water is physically consumed. MWSI, page 67. Management of effluent can be expanded to increases the number of times that a municipality uses "reusable water." Of course there are financial costs, water quality concerns, and public acceptance problems. Nevertheless, this is an important tool that is necessary to satisfy the Denver metropolitan area's future needs. Parker and others have instituted state of the art effluent management plans. In another effluent management plan, Denver has been providing water to the Burlington canal for FRICO. In addition, a number of municipalities have also recently quantified irrigation return flows and adjudicated decrees to allow them to reuse those return flows.

3. Interruptible supply arrangements (“ISAs”). ISAs are those arrangements where a city may have the option to pay local farmers in dry years the value of the crops he would have grown with the irrigation water, if the city had not exercised the option. Lawrence J. MacDonnell, Charles W. Howe, and Teresa A. Rice, “Transfers of Water Use in Colorado,” from The Water Transfer Process as a Management Option for Meeting Changing Water Demands, Natural Resources Law Center, University of Colorado School of Law, 1990, page 32. This promotes two separate goals 1) protection of agricultural communities; and 2) providing adequate municipal water supplies during drought years. Five factors impact the success of ISAs: 1) economic benefits; 2) reliability of the water source supplies; 3) benefits for both parties; 4) minimal agricultural operational issues; and 5) minimal third party impacts (environment, local economic impacts, and injuries to owners of other water rights). MWSI, pages 97-99.
4. Other system integration opportunities. “This concept involves the cooperative use or enhancement of several water supply systems in a manner designed to synergistically increase or maximize total combined yields.” MWSI, page 108. This idea encompasses water conservation possibilities, reuse opportunities, and ongoing studies of coordinated use of existing storage and conveyance facilities. Preliminary estimates indicate that water supply potential could be in the range of 30,000-50,000 af/year. MWSI, page 130.

E. Future Actions.

1. Recommendations.
 - a. Colorado should sponsor a cooperative supply planning forum.
 - b. Colorado should periodically update the statewide databases.
2. If successful, Colorado’s statewide planning efforts in the South Platte basin should be used as a model for other basins and other states.

VII. Conclusion.

Colorado water users and water providers are beginning to learn some important lessons from the water wars of yesteryear. The inherent costs associated with litigation, along with the fact that the litigation has not seen proven results, have prompted water users and water providers to explore collaborative solutions. The State's Computer Decision Support Systems could serve as a useful tool for promoting these type of win-win agreements. If water users continue to explore avenues of common interest, rather than pursuing litigation dead-ends, all of Colorado's water users will benefit.