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**THE VIEW FROM THE BENCH:
THE PERSPECTIVE OF A WATER JUDGE**

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**UNCOVERING THE HIDDEN RESOURCE:
GROUNDWATER LAW, HYDROLOGY AND POLICY LAW
IN THE 1990s**

**Natural Resources Law Center
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School of Law
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The View from the Bench: the Perspective of a Water Judge.

I. Introduction

a. My remarks are directed to presentation of water cases to a court. The situation may be different in presentations to an administrative agency.

b. Presentation of a water case to a court is a trial. Principles relating to sound trial techniques are applicable.

c. Through experience a water judge is generally familiar with the principles applicable to the usual water case; however, if the case presented includes novel features as many do, the trial must be an educational as well as an adversarial process.

d. Generally the water judge is a lay person without extensive special training in engineering, mathematics, geology or other related subjects.

e. One of the purposes of a specialized water court is to allow the water judge to develop an expertise in water matters; however, the depth of that expertise in technical areas should not be overestimated.

II. Changes in the presentation of cases in the last fourteen years.

a. During the fourteen years I have been water judge there have been great changes in the way cases have been presented.

b. The most notable change is that cases, when actually litigated, are much longer.

c. The first "big case" I handled involved the application for nontributary water rights of the Mission Viejo Company for what is now the community of Highlands Ranch. That case took about 22 days. Last year the application of the United States required that many weeks.

d. The chief cause of this increase in length is the variety and complexity of expert testimony which is being presented, and the increased reliance on computer programs.

e. This increase in length and complexity of water cases creates numerous problems for the litigants, but it also creates substantial problems for the water judge.

III. Case preparation.

a. Water cases as presented in Water Division No. 1 seem to be almost invariably well prepared.

b. The court has little input into the area of case preparation except in the matter of discovery.

c. My impression is that there is excessive discovery in many water cases, and in my opinion it would be advantageous for the judge to be able to exercise additional control over it. This situation is not unique to water cases but also exists in civil litigation as a whole. There is some movement toward this end in the federal courts.

d. Discovery results in the accumulation of vast amounts of documentary evidence, any relevance of much of which is peripheral at best.

e. It has seemed to me that the vast numbers of exhibits which characterize certain water cases results from such discovery.

f. It should be borne in mind that where there are huge numbers of exhibits, many of which are of little probative value to the issues at hand, the danger increases that the really important exhibits will be overlooked.

g. Discovery relating to computer modeling is particularly complex. Efforts to reproduce the results secured by an opposing party from a particular program often encounter great

difficulties. Cooperation among the experts involved is the most practical solution.

IV. Types of expert testimony which is being presented.

a. Formerly the issues in water cases were largely questions of quantity.

b. Although issues of water quality lurked in the statute, the treatment given these questions was somewhat limited and cursory.¹

c. Water quality matters have become much more important, particularly in view of the large number of cases involving municipal water supplies.²

d. New interest in the reuse of sewage effluent for irrigation purposes has also emphasized water quality issues and public health issues.³

e. As in other areas, environmental concerns have played an increasing part in water cases.⁴

¹ For an example see C.R.S. §37-80-120(3) and the interpretation thereof in A-B Cattle Co. v. U.S.A., 196 Colo. 539, 589 P.2d 57 (1978).

² The first example in Water Division No. 1 where water quality issues predominated was the Application of the City of Golden. Previous Colorado Supreme Court decisions gave little guidance as to how that case should be handled. The allocation of responsibility for water quality issues is far from clear. Responsibility is divided by statute between the water courts and the Water Quality Control Commission or Division. C.R.S. §25-8-104(1). Recent legislation has given the State Engineer a role.

³ The presently pending Application of the City of Thornton in Water Division No. 1 is an excellent example of this type of case.

⁴ The well publicized Application of the United States cases, still under consideration in Water Division No. 1, are examples of cases involving many environmental issues.

f. Formerly the areas of expert testimony which were presented to the court were principally in engineering and geology. Now, because of the diversity of issues, a large array of experts is apt to be found in water cases.

g. In the last year in Water Division No. 1 water cases, experts in the fields of history, economics, fluvial geomorphology, botany, financing, population growth, public health, irrigation practices, water treatment, and many others have appeared. Many have come armed with the results of various computer programs.

V. Use of expert witnesses.

a. In view of the variety of disciplines involved in many water cases today, it is manifest that expert testimony is required.

b. As pointed out above, in most -- if not all -- of the areas of testimony, the water judge himself or herself is not an expert.

c. The litigation team must remember that testimony which cannot be understood by the water judge will probably not be convincing.

d. I believe that in even the most complex project it is possible for engineering, geological and other testimony to be presented in a manner which is understandable to the judge.

e. This requires diligence on the part of both the examining attorney and the testifying expert to avoid unnecessary technical jargon. The witness should, as far as possible, speak in ordinary English.

f. Well chosen exhibits which illustrate the testimony of experts is particularly helpful.

VI. Cross-examination of experts.

a. The same considerations apply to cross-examination of experts. The questions must be in a form which are understandable to the judge, and the examiner must insist on answers which will be understandable to the judge.

b. Cross-examination of experts is difficult, and in my opinion is frequently not effective, even when lengthy.

c. Most expert witnesses who appear in water court are experienced in giving testimony.

d. There have been cases in which a skillful cross-examiner has confronted the witness with inconsistencies which have been sufficient to make the witness admit doubt concerning the accuracy of the witnesses previous testimony. That has, however, been rare.

e. In many instances lengthy cross-examination has had only the effect of allowing the adverse witness to repeatedly restate his or her conclusions, and has thus bolstered the testimony rather than shaking it.

f. All too often lengthy cross-examination has had only the effect of prolonging the trial with little or no beneficial effect on the result of the case from the point of view of the cross-examiner.

VII. Use of computer modeling.

a. The use of computer models has become widespread in water court cases and is very helpful in many cases.

b. In using computer models their limitations as well as their capabilities must be kept in mind.

c. Computer models are very helpful because they enable an expert to approximate reality, and to evaluate the effect of the project under consideration upon others.

d. The word "approximate" must be kept in mind, as all models involve assumptions which are not exactly the same as reality.

e. One witness in my court recently stated that a computer model was an aid to judgment, not a substitute for judgment. I think that is an excellent summary of the place for computer models in water court cases.

VII. Cross-examination or countering of computer modeling evidence.

a. The cross-examination of witnesses who have testified concerning their use of a computer program and given the results of that program is particularly difficult.

b. Mind-numbing technicality should, if possible, be avoided when doing such cross-examination.

c. I do not have an answer as to how that may be done most effectively. The following are examples of techniques which have been used with some success in cross-examining or countering computer evidence:

(1) Point up the limitations in the assumptions on which the computer model is based.

(2) Point out examples where the model leads to results which are contrary to demonstrable reality.

(3) Apply statistical techniques to analyze the results; however, be sure the judge understands the basis for the statistical analysis.

(4) Point out errors in the way the model was applied.

(5) Point out that the model or program is being used for a purpose other than that for which it was intended.

d. Many other techniques no doubt exist; however, it should be borne in mind that the judge will make the ultimate decision

as in other cases. He or she will follow the evidence which seems most reasonable.

e. Here as in all cases it is essential to present the evidence in a form that is understandable to the judge.

VIII. Despite the inherent problems created by the increasing complexity of water cases, a judge has many advantages in deciding water cases, as compared to administrative agencies.

a. As repeatedly pointed out above, to be effective the litigation team must make sure that the judge, who is a layman, understands the evidence being presented.

b. This is not an argument for abandonment of our present court-centered system of water rights adjudications in favor of an administrative system. Rather, in my view, it is just the contrary.

c. Water rights determinations involve a host of disciplines.

d. Judges are trained and experienced in evaluating and acting on evidence in areas which do not involve their personal knowledge or experience.

e. This training and experience may enable a judge to decide complex water cases more fairly and efficiently than a person who is expert in a certain technical field but unfamiliar with others.

f. The technical person is apt to view a case primarily from the viewpoint of his own special discipline rather than giving full weight to all of the factors involved.

g. The present system is not perfect but it seems to me to have many advantages over alternatives.

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