AGENDA: Western Water Law in Transition

University of Colorado Boulder. Natural Resources Law Center

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WESTERN WATER LAW IN TRANSITION

AGENDA

Monday, June 3, 1985

8:15 - 8:45  Registration & Coffee
8:45 - 9:00  Welcome and introduction
            Dean Betsy Levin, University of Colorado School of Law
            Larry MacDonnell, Director, Natural Resources Law Center

9:00 - 10:20  The Prior Appropriation System in Western Water Law: The Law Viewed Through the Example of the Rio Grande Basin
            Professor Charles Wilkinson, Visiting Professor, University of Colorado School of Law
            Professor James Corbridge, University of Colorado School of Law

   The speakers will discuss the development of western water law and policy in the context of the Rio Grande River Basin, which illustrates most important elements, including historical water rights, the shift to the appropriation doctrine, reserved Indian rights, and the challenge of compact administration in an arid region. This presentation will introduce the concepts of water allocation that will subsequently be dealt with in greater detail.

10:20 - 10:40  Break

Tuesday, June 4, 1985

8:30 - 9:45  Developments in Groundwater Law
            Professor J. David Aiken, University of Nebraska

   The regulation of groundwater development and use, long neglected in water law, has emerged recently as a subject of great importance. The speaker will discuss the special problems of conjunctive use of surface and groundwater, the administration of heavily used aquifers, and important new developments in the law related to nontributary groundwater.

9:45 - 10:00  Break

10:00 - 11:00  Interstate Transfers of Water: Opportunities and Obstacles
               Professor A. Dan Tarlock, Chicago/Kent Law School, Illinois Institute of Technology

   Two related questions will be addressed. First, when can a state block or restrict an application to transport water out of state? Second, when can a state allow the transport of water out of state over the objections of in-state users? This presentation will examine the constitutional and state legislative restraints on anti-export legislation and compact, statutory, and case law limitations on state discretion to export or to allow the export of water. New Mexico's efforts to prevent the export of water to El Paso, Texas, South Dakota's efforts to sell Missouri River water for western coal development, and other recent interstate transfer proposals will be discussed.

11:00 - 12:00  Representing the Water Client
               David Robbins, Hill & Robbins, Denver

   The special problems of representing a client in a water matter, including the use of an engineer and the ethical problem of multiple water clients will be considered.

12:00 - 1:45  Lunch (on the town)

1:45 - 2:30  Water Quality Considerations
            Julia Epley, Pillsbury, Madison & Sutro, San Francisco

   Activities affecting the quality of water resources are subject to substantial federal and state regulation. The speaker will provide an overview of the general regulatory framework and then discuss important developments including federal/state relationships, nonpoint source and point source control, Superfund and the new RCRA amendments.

2:30 - 3:15  Legal Implications of Instream Flows and Other Nonconsumptive Uses
            Steven J. Shupe, Private consultant and water lawyer, Denver

   The prior appropriation doctrine requires that water be applied to a recognized beneficial use in order to obtain a vested right. Many states now provide a means to assure water availability for fish and wildlife protection, recreation, and other nonconsumptive purposes. The speaker will discuss the approaches taken to integrate the unique aspects of nonconsumptive uses into the existing framework of water law and administration.

3:15 - 3:30  Break

3:30 - 4:15  The Public Trust Doctrine: Conflict with Traditional Western Water Law?
            Professor Harrison Dunning, University of California, Davis

   In recent years the public trust doctrine has emerged as an important factor affecting the use of water in several western states. The speaker will explain the development and application of this doctrine. Recent case law will be discussed. The impact of this doctrine on traditional western water law will be considered.

4:15 - 5:00  Inefficiency, Waste, and Loss: Water Supplies of the Future?
            John Krautkraemer, Environmental Defense Fund, Berkeley

   Some argue that the primary source of "new" water supplies will come from conservation of water in existing uses. The speaker will discuss opportunities for more efficient use of water, including the transfer of conserved water to other uses. Legal, economic, and institutional impediments and incentives to water conservation and transfers will be discussed, with emphasis on recent developments in California.

5:00  Cocktails on the lawn.

The Prior Appropriation System (cont'd)
Lunch: Senior U.S. Circuit Judge Jean S. Breitenstein

Topic: Western Water Law in Historical Perspective

Administering Water Rights: The Permit System
Lawrence J. Wolfe, State Attorney General's Office, Cheyenne, Wyoming

The procedures for obtaining, utilizing, and transferring water rights under the permit system approach to the prior appropriation doctrine will be discussed. Important new developments in such permit states as California, Wyoming, Utah, New Mexico, and Washington will be referenced.

Break

Administering Water Rights: the Colorado System
Ray Petros, Kirkland & Ellis, Denver

The procedures for obtaining, utilizing, and transferring water rights under the Colorado system will be explained. Unique features of this system, including the use of water courts, plans for augmentation, and conditional decrees, will be discussed as will be significant new developments in Colorado water law.

Cocktails followed by banquet (Fleming Law Building)
AGENDA

Wednesday, June 5, 1985

8:45 - 10:00  Federal/State Relations in Theory and Practice
Professor Charles T. DuMars, University of New Mexico
The speaker will provide an historical overview of the
delicate area of federal/state relations in the water
field, laying the background for a number of points of
present conflict. Topics covered include reserved
rights, the navigation servitude, the federal reclamation
program, hydroelectric power development, and
interstate compacts.

10:00 - 10:15  Break

10:15 - 11:15  Unresolved Issues in Federal Reserved Rights
Michael D. White, White & Jankowski, Denver
This unbiased diatribe will explore such questions as:
When will the U.S. finally be forced to play by the
procedural rules? When is a flushing flow entitled to a
reserved right? When does "unappropriated" actually
mean "unadjudicated"? Does election of remedies
apply or does the United States get two bites of the
apple? Why fuss about wilderness areas? Where is
there an administrable reserved right? How can we
talk about these things with a straight face?

11:15 - 12:00  The Endangered Species Act and Western Water
Projects
Lawrence J. MacDonnell, University of Colorado
School of Law
The protection of endangered species and their habitat
may conflict with the development of water projects as
well as other water using activities in the west. This
presentation addresses the Endangered Species Act
and especially its administration in relation to water
development activities in the upper Colorado River
Basin and the Platte River Basin.

12:00 - 1:30  Lunch

Topic: The Future of Western Water Law
David Getches, Executive Director, Colorado
Department of Natural Resources

1:30 - 2:45  Putting Undeveloped Indian Water Rights to Use
Professor Richard Collins, University of Colorado
School of Law
Indian reserved water rights represent a major claim to
water resources in the western United States. While
the essential outline of these rights has been
established in key judicial decisions, the fundamental
problem of quantifying and allocating these rights is
now in the process of being resolved. This
presentation will address the nature of Indian reserved
water rights and discuss current developments in
translating these "paper" rights to "wet" water rights.

2:45 - 3:00  Financing Water Projects: Where Do We Go From
Here?
Henry Caulfield, Colorado State University
Local public and private financing, together with
federal financing after 1902, have been the past
sources of finance. With the exception, most notably,
of California, states have not been a source of finance
until recently. With continued decline from the federal
source, where do we go — to the states and more
local public and private responsibility? How?

Panel respondents:
J. William McDonald, Colo. Water Conservation Board
Dunn Krahl, Boettcher & Co., Denver
Robert Kerr, Attorney, Boulder
Christopher R. Paulson, Attorney and Colorado State
Representative

4:30  Adjourn
CONFERENCE ORGANIZERS

JAMES N. CORBRIDGE, JR. (A.B. English, Brown University 1955; LL.B. Yale Law School, 1963) is Professor of Law at the University of Colorado School of Law, specializing in water law and mining. He was Vice Chancellor for Academic Affairs at the University of Colorado, 1974-77, and Visiting Fellow at the Institute for Advanced Legal Studies at the University of London, 1977-78. His recent publications include "Special Water Districts—Challenge for the Future," and "Surface Rights in Artificial Watercourses." He is Mining Law Editor for the Rocky Mountain Mineral Law Foundation's Mineral Law Newsletter, and has co-chaired several Natural Resources Law Center conferences since 1980.

LAWRENCE J. MacDONNELL (B.A. Political Science, University of Michigan, 1966; J.D. Natural Resources Law, University of Denver College of Law, 1972; and Ph.D. Mineral Economics, Colorado School of Mines, 1974) became Director of the Natural Resources Law Center in November 1983. Prior to that he was a research economist at the Denver Research Institute and Adjunct Professor at the Graduate School of Business and Public Management at the University of Denver, 1980-83. He has served as a consultant to the Colorado Office of Energy Conservation, as an instructor and course director for the Colorado Outward Bound School, as Assistant Professor in the Dept. of Mineral Economics at the Colorado School of Mines, and as a Special Insular Affairs. He is a member of the Colorado Bar Association and the Association of Environmental and Resource Economists.
J. DAVID AIKEN (B.A. cum laude, English, Hastings College, 1972; J.D. with honors, George Washington University, 1975) is Associate Professor of Agricultural Economics at the University of Nebraska. His publications include "Ground Water Mining Law and Policy," "The National Water Policy Review and Western Water Rights Law Reform," "Ground Water Mining and Western Water Rights Law: The Nebraska Experience," as well as numerous technical reports. He is also the editor of Nebraska Water Law Update and the Nebraska Reporter for Rocky Mountain Mineral Law Foundation's Water Law Newsletter. Mr. Aiken has given several invited presentations on water issues at various conferences during the past three years. He was a member of the Nebraska Governor's Water Independence Congress in 1983. He has been on the Executive Committee for the Natural Resources Section of the Nebraska State Bar Association since 1978, and has served as its chairman since 1982.

JEAN S. BREITENSTEIN (A.B. University of Colorado, 1922; LL.B. University of Colorado, 1924; LL.D. University of Denver, 1960; LL.D. University of Colorado, 1965) is Senior U.S. Circuit Judge for the Tenth Judicial Circuit. He was appointed to the Circuit Court in 1957, and has held senior status since 1970. Before his appointment he practiced law in Denver, 1933-54; served as Assistant U.S. Attorney, 1930-33; and was Colorado Assistant Attorney General, 1925-29. He was a member of the Colorado Supreme Court Committee on Rules of Civil Procedure, 1937-54, and chairman of that committee, 1946-54. He was also a member of the Colorado Supreme Court Bar Examining Committee, 1942-54, and President of the Colorado Bar Association, 1952-53. He is chairman and a member on various committees of the Judicial Conference of the United States and is Special Master, appointed by the U.S. Supreme Court, in two original jurisdiction suits.
HENRY P. CAULFIELD, JR. (B.S. 1940, M.P.A. 1949, Harvard University) is Professor of political science at Colorado State University, specializing in natural resources and environmental politics. Prior to his joining the faculty of Colorado State University in 1969, he spent 23 years with the Federal government, mainly with the Office of the Secretary, Department of the Interior. During the 1960's he was Assistant Director and then Director, Resources Program Staff, Department of the Interior. He then became the Executive Director for the U.S. Water Resources Council. He has been a member of the Fort Collins Water Board for the past eleven years, and is now its Vice Chairman.

RICHARD B. COLLINS (B.A. Yale University, LL.B. Harvard University Law School) is Associate Professor of Law at the University of Colorado School of Law, specializing in courses in property, constitutional law, and trial practice. He served as a Legal Services Attorney, 1967-75 and as Staff Attorney for the Native American Rights Fund, 1975-82. He serves on the Editorial Board of Cohen's Handbook of Federal Indian Law. He is the author of "Implied Limitations on the Jurisdiction of Indian tribes."
CHARLES T. DuMARS (B.S. University of Oregon, 1966; J.D. University of Arizona, 1969) is a Professor of Law at the University of New Mexico, specializing in courses on water law, mining law, constitutional law, and comparative private international law. Previously he was counsel for the New Mexico Legal Rights Project, 1973-76, and counsel for the Mexican American Legal Defense and Education Fund, Inc., 1972-73. He is the author of numerous books and articles in the areas of water law, constitutional law, and private international law. He is a member of the Western States Water Council and the Bureau of Land Management Advisory Board for New Mexico.

HARRISON C. DUNNING (A.B., summa cum laude, Dartmouth College, 1960; London School of Economics, 1960-61; LL.B., cum laude, Harvard University, 1964; University of Paris, Faculty of Law, 1964-65) is Professor of Law at the University of California at Davis. Since joining the faculty he has also served as Staff Director of the Governor's Commission to Review California Water Rights Law, 1977-78 and the Director of the Davis Program in Law and the Environment, 1970-75. He was a Visiting Professor at the University of Michigan School of Law, fall 1973. Previously he taught at the Haile Sellassie I University, Addis Ababa, Ethiopia, 1965-69. He was chairman of the Conference on the Public Trust Doctrine in Natural Resources Law and Management, 1980, and of the California Water Protection Council, 1982-83. He was also a member of the California Water Commission, 1982-83. Presently he is chairman of the Bay Institute of San Francisco, as well as a member of the Coordinating Board of the University of California Water Resources Center and the Committee for Water Policy Consensus.
JULIA EPLEY (B.S. Chemistry, University of Illinois, 1965; J.D. University of California at Berkeley, 1980) practices environmental law with the firm of Pillsbury, Madison & Sutro in San Francisco. Since joining the firm in 1980 she has specialized in hazardous waste/substance regulation. She works with major federal legislative and regulatory developments in this area, including the Federal Resource Conservation and Recovery Act (RCRA) and related California statutes and regulations; Comprehensive Environmental Response, Compensation and Liability Act (Superfund); Toxic Substances Control Act; Safe Drinking Water Act; and various statutes involving groundwater quality control. She established, and for two years chaired, the American Petroleum Institute's CERCLA (Federal Superfund) Task Force. Previously she has been an Air Pollution Inspector for the Bay Area Pollution Control District (1975-77). She currently chairs the American Institute's RCRA Litigation Steering Committee.

DAVID H. GETCHES (A.B. 1964, Occidental College; J.D. University of Southern California Law School, 1967) was appointed Director of the Colorado Department of Natural Resources in August 1983. He is on leave as an Associate Professor of Law at the University of Colorado School of Law. Previously he had a law practice in Boulder, Getches & Greene, and was Directing Attorney for the Native American Rights Fund. He has taught at the University of Denver School of Law, the University of Alaska Center for Northern Education Research, and the University of California at San Diego. His publications include Cases and Materials on Federal Indian Law (with Rosenfelt and Wilkinson); Water Law in a Nutshell for West Publishing; and "Water Rights on Indian Allotments." He is on the Editorial Board of Cohen's Handbook of Federal Indian Law.
ROBERT C. KERR (B.Sc. Economics, Colorado State University, 1971; M.A. Philosophy, University of Hawaii at Manoa, 1975; J.D. University of Colorado, 1979) has a private law practice in Boulder, specializing in water and natural resources law. His most recent publications include "A Market Approach to Water Resource Allocation--A System Unique to the West or a Blueprint for Future Water Allocation in the East?" and "The Role of Private Development in Regional Water Resource Planning," and "Water Export." He also contributes to various Colorado publications in natural resources, water and environmental areas. He is a member of the American, the Colorado, and the Boulder County Bar Associations; the Colorado Trial Lawyers Association; the National Wildlife Federation Natural Resource Clinic Technical Advisory Board; the Colorado Conservation Foundation; and the Water Committee of the Colorado Cattleman's Association.

DUNN KRAHL (Engineering, Colorado School of Mines) is a Senior Vice President of Boettcher & Company with over 20 years experience in the Municipal Finance Department. He has provided extensive knowledge and expertise to the financing needs of many of the Colorado front range communities. His background and experience has led to a specialization in special purpose revenue bond financings for communities, higher education facilities, and authorities. Over the years he has been Boettcher & Company's representative as co-manager in the underwriting of Platte River Power Authority Revenue Bonds, the Northern Colorado Water Conservancy District, Municipal Subdistrict, Revenue Bonds, and the recent City & County of Denver Airport Revenue Bonds. He is a past president of the Colorado Municipal Bond Dealers Association, a member of its Legislative Committee, and a former member of the Board of Directors of the Public Securities Association.
JOHN W. KRAUTKRAEMER (B.S. Biology, Stanford University, 1974; J.D. University of California School of Law, 1978) is an attorney with the Environmental Defense Fund. His areas of expertise include energy, public utility, water resources, and pesticide issues. He has worked on a precedent setting case before federal and state administrative agencies to promote development of alternative energy sources. Previously he has been a staff attorney with the U.S. Environmental Protection Agency (1980-81) and the U.S. Department of Energy (1978-79); a teaching fellow at the University of Santa Clara Law School (1982-83); and a biological research assistant with the U.S. Geological Survey (1974-76). He is a member of the California Bar Association.

J. WILLIAM (BILL) McFONALD (B.S. Chemistry, Colorado College; J.D. University of Chicago Law School; M.S., Natural Resources Management, University of Michigan) is the director of the Colorado Water Conservation Board, a division of the Colorado Department of Natural Resources. When he joined the Department of Natural Resources in 1976, he was responsible for a statewide water policy study and an assessment of the impacts of energy development on the water resources of the Upper Colorado River Basin. Previously he was on the staff of the Great Lakes Basin Commission where his primary activity was as study manager of the first phase of a water policy study for the Michigan Department of Natural Resources. From 1971-73 he was a policy analyst for the U.S. Army Corps of Engineers where he dealt with a wide range of legislative and administrative matters pertaining to all aspects of the Corps' civil works programs.
CHRISTOPHER R. PAULSON (B.S. International Affairs Masters Program, U.S. Air Force Academy, 1969; J.D. University of Denver, 1976) is state representative from District 37 in Arapahoe County. He has practiced law in Denver with Saunders, Snyder, Ross & Dickson, P.C. since his graduation. The practice is devoted to water and environmental law. He was elected as Chairman of the Water Policy Committee for the Western Legislative Conference of the Council of State Governments; he was appointed to the Executive Committee of the Western Legislative Conference of the Council of State Governments; and he has been selected to serve on the Water Conservation Task Force of the Governor's Water Roundtable. Since 1983 he has been a member of the Colorado Round Table on International Exchange, and in 1984 he represented Colorado on an exchange visit to the Republic of China with representatives of the Western Legislative Conference.

RAYMOND L. PETROS, JR. (B.A., magna cum laude, Colorado College, 1972; J.D. University of Colorado, 1975) has been in private practice in Denver since 1977, specializing in natural resources law, with particular emphasis on water rights, real estate, and land use. He has been a partner at Kirkland & Ellis since joining the firm in 1981. Prior to this he was a partner at Hall & Evans. His recent publications include "Land Use Legislation: H.B. 1034 and H.B. 1041," (with White), Colorado Lawyer (1977); "Comment, Statutory Conclusive Presumptions and the Right to Take the Bar Exam: Is ABA Imprimatur Necessary: Rossiter v. State Board of Examiners, Colorado Law Review (1974); and he spoke on the topic of "Water Rights Issues and State Water Regulation" at the Joint Conference on the Future of Hydroelectric Energy Regulation, co-sponsored by the American, Colorado, and Utah Bar Associations (1983).
DAVID W. ROBBINS (B.A. Stanford University, 1966; J.D. University of Wisconsin-Madison, 1969) is a partner in the law firm of Hill & Robbins, specializing in the fields of natural resources law, environmental law, state and federal administrative law, antitrust law, and commercial litigation. Previously he was Deputy Attorney General (1977-78), and First Assistant Attorney General, Natural Resources Section (1975-77) for the State of Colorado. He is a member of the Colorado Water Conservation Board and chairman of the Colorado River Salinity Control Forum and Colorado River Salinity Control Advisory Council. He is also a member of the Colorado Bar Association (vice-chairman, Water Law Section; member, Environmental Law Section; and member, Administrative Law Committee), the American Bar Associations (member, Natural Resources Section), and the State Bar of California.

STEVEN J. SHUPE (B.S., Civil Engineering, Stanford University, 1974; M.S., Environmental Engineering, Stanford University, 1975; J.D. University of Oregon School of Law, 1982) is a water consultant and lawyer practicing in Denver. Previously Mr. Shupe has been an Assistant Attorney General for Colorado, representing the state in various areas of water law and an attorney with the Denver law firm of Davis, Graham & Stubbs. He has also worked in the Water and Land Resources Department of Battelle Northwest. He writes extensively on western water issues, with particular emphasis on efficiency needs, Indian water rights, and instream flow uses. In addition to his private water practice, he is also a professional mediator.
A. DAN TARLOCK (A.B. and LL.B., Stanford University) is Professor of Law at the Chicago-Kent College of Law of the Illinois Institute of Technology. He is a member of the Advisory Board of the Natural Resources Law Center of the University of Colorado School of Law. He spoke at the Water Resources Allocation short course in 1982, and presented a symposium in Denver on the impacts of the U.S. Supreme Court decision on *Sporhase v. Nebraska* in January, 1983. He is co-author of *Environmental Law and Policy* (with Eva and John Hanks), and *Water Resource Management* (with Meyers); author of "*Western Water Law and Coal Development,*" and several law review articles on instream flow maintenance. He has served as consultant to private law firms, industry, local, state and federal agencies, and was a Visiting Professor of Law at the University of Michigan.

MICHAEL D. (SANDY) WHITE (B.S. West Point; M.S. University of Southern California; J.D. Cornell Law School) is a partner in the Denver firm of White & Jankowski, emphasizing water right matters in state and federal courts, as well as administrative agencies, throughout the western United States. He has been a member of the engineering faculty at Colorado State University and a member of the adjunct faculty at both the University of Denver College of Law and the University of Colorado Law School. The author of over three dozen articles and papers on water law, he is a frequent speaker at professional programs and is a past chairman of both the Water Law Section and the Environmental Law Section of the Colorado Bar Association. As the Master-Referee for the Colorado water courts, he heard complicated cases involving such matters as transmountain diversions as well as the reserved water right claims of the federal government. His water clients have included states, a variety of districts, municipalities, energy companies, developers, and individual water users.
CHARLES F. WILKINSON (B.A. Denison University; LL.B. Stanford University) is Professor of Law at the University of Oregon School of Law, and currently is a Visiting Professor at the University of Colorado School of Law. He was formerly a staff attorney for the Native American Rights Fund in Boulder. His recent publications include Cases and Materials on Federal Indian Law (with Getches and Rosenfelt), Federal Public Land and Resources Law (with Coggins), and "The Field of Public Land Law: Some Connecting Threads and Future Directions." He has also given presentations at The Federal Land Policy and Management Act Short Course, (June 1984), and at the Management of National Forests in the Rocky Mountains (March 1985), both sponsored by the Natural Resources Law Center.

LAWRENCE J. WOLFE (A.B. University of California, 1974; J.D. University of Wyoming College of Law, 1980) is a Senior Assistant Attorney General for the Wyoming Attorney General's Office, Cheyenne, Wyoming, where he is the head of the Natural Resources Division. While in law school he was Managing Editor of the Land and Water Law Review. He has worked extensively in the area of water rights, water development, and environmental law. He is the author of "Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts," 29 Rocky Mountain Mineral Law Institute 851 (1984).