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## History of Colorado Law

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how long that client must keep the information to avoid spoliation issues at later proceedings. Mr. Witwer volunteered to head the subcommittee that will look into the issue.

Mr. Witwer also raised the concern that some cases involving specific disputes between individual parties go before the Supreme Court unnoticed, even though they may significantly impact water law in the state. He noted that this prevents participation by amicus curiae briefs. He suggested creating some informational system that would alert the water community more broadly.

Committee members also decided to focus on updating Continuing Legal Education water courses. At the meeting's end, the Committee agreed to meet again in April and receive the reports from the subcommittees at that time.

*Whitney Phillips*

### **COLORADO WATER CONGRESS FALL 2015 WORKSHOP: HISTORY OF COLORADO LAW**

Denver, Colorado

November 16, 2015

Retired Colorado Supreme Court Justice Gregory Hobbs provided an introduction to the history of Colorado water law at an event hosted by the Colorado Water Congress on November 16, 2015. Justice Hobbs retired this fall after nearly nineteen years on the Colorado Supreme Court. During his presentation, Justice Hobbs covered the origins of water law in the state and explained some particularities that make Colorado unique, even among other Western states.

To begin, he said, "In Colorado, water is life and politics, and it contains all the things we love about our state." Justice Hobbs explained that Colorado water is vital not only for those within the state's borders, but also for a large portion of the country. Waters beginning in Colorado travel downstream to eighteen states and Mexico, and it is for this reason Justice Hobbs said sometimes the state is referred to as "the Mother of Water." In fact, Justice Hobbs discussed how out of all the water that originates in the state, Coloradans are allowed to use only a third of it; the rest is reserved for users in downstream states. Over the years, nine interstate compacts, two treaties, and three equitable apportionment decrees have determined the amount of water Colorado owes downstream.

It is no accident Colorado became the headwaters for so many major river systems, Justice Hobbs said, but rather it has to do with gold, slavery, and the Civil War. He explained how after the Kansas-Nebraska Act (which allowed white settlers in each of the territories to decide whether to allow slavery), both the South and the North looked west to see how each territory would decide. By the time the South seceded and war broke out, the area now known as Colorado had already been experiencing a major gold rush along the Front Range. Shortly after, organizers carved the Colorado Territory out of the Utah, Nebraska, and Kansas Territories, and Congress allowed it to enter on the side of

the Union. The logic, Justice Hobbs pointed out, was that it would keep the region's mineral wealth out of the hands of Confederates and help the North's war effort. Along with the gold flowing down from the Rockies, of course, came the streams themselves, several of which formed the headwaters of the region's most important rivers.

But any discussion of water law in Colorado doesn't start with the territory. In fact, Justice Hobbs spent much of his presentation on water and its uses in the region before white settlers came. From 550-1276 C.E., the Ancestral Puebloans lived in the area of Mesa Verde. As dry-land farmers, the people developed several ways of maximizing use of the sparse water in the region, including building a reservoir that is considered even today "a civil engineering marvel." During this period, the people experienced three great droughts, the third of which was severe and drove them out of the area. At the end of the period, the conflict over water became great, and in places like Hovenweep National Monument, ancient guard towers near valuable water sources show that water protection and enforcement was extremely important to the Puebloans.

Justice Hobbs also recounted John Wesley Powell's contributions as an explorer and as a thinker of the West's future. Powell saw that the area west of the Hundredth Meridian was fundamentally different from the lands to the east. This was the line that demarcated where average precipitation was less than twenty inches per year. Powell knew water availability would be the crucial issue in the West, especially if the land were to be used for agriculture. Powell presented many ideas to the United States government on how best to organize the region. But contrary to public opinion today, Justice Hobbs said that Powell did not actually advocate for watershed based state formation. Instead, Powell proposed river districts that existed within a state or across state lines, where members could decide among themselves on how best to manage their resource and settle disputes. Justice Hobbs pointed out that in many ways, Colorado enacted this exact idea in creating the state's seven water districts. Each district comprises a single major watershed and each has both its own water court to adjudicate rights and resolve disputes, as well as a division engineer to enforce those rights. In terms of water administration this is unique in the West because most states use a state agency to oversee individual water rights.

Justice Hobbs also explained that Colorado's water law system is unique to the region and is historically interesting. Colorado, like many other Western states, employs a form of water law called the Prior Appropriation Doctrine, which he summarized as "first in time in settling, first in line in times of drought." This system abolished the common law Riparian system, which American courts brought over from England and used throughout the eastern United States. The Riparian system allowed only those landowners abutting the stream banks to divert its water for non-consumptive uses only. In this system, downstream users also have correlative rights to those upstream. Colorado chose to reject this system because of the aridity of the West and the fact that few homesteaders lived along streams. Justice Hobbs explained the rejection came from the fear that corporations could buy up the land along a water source and control its use. In his opinion, the Prior Appropriation system represents a "radical agrarian anti-monopoly doctrine based on agricultural use."

Another significant point in the history of Colorado water law that Justice

Hobbs discussed came in 1922 with the Colorado River Compact. The deal divided the waters of the Colorado between the seven states laying claim to its waters. Specifically, the compact divided the water between the Upper Basin and the Lower Basin, allocating 75 million acre-feet to the Lower Basin over an averaged ten-year period, 1.5 million acre-feet to Mexico, and the rest for use by the Upper Basin states. Colorado and the other Upper Basin states subsequently decided how to split up their allotment in 1948 with the Upper Colorado River Compact. Colorado secured fifty-one percent of the Upper Basin allocation. Justice Hobbs noted that in 1922 the states were assuming a yearly flow of more than 16 million acre-feet. The problem, he said, was that this amount overestimated water availability, especially in drought years. In fact, as recently as 1902, there were only 9.5 million acre-feet of water in the basin, something that the Upper Colorado River Compact drafters knew. This deal, therefore paved the way for storage to be an integral part of water in the West—a trend that continues today.

Justice Hobbs concluded his presentation by answering participant questions about the failure of recent water law legislation, including Senate Bill 23 in 2014 and House Bill 1259 earlier this spring. Justice Hobbs closed by saying that he has seen a lot of changes in Colorado water law over the course of his career and that he was excited for the changes that the future generation of professionals working in water might encounter.

*Josh Boissevain*

## **COLORADO WATER CONGRESS WORKSHOP ON LEGAL ETHICS IN WATER AND ENVIRONMENTAL LAW: ETHICAL PRINCIPLES AND OBLIGATIONS FOR WATER LAWYERS**

· Denver, Colorado

November 16, 2015

As one portion of its two-part workshop, the Colorado Water Congress hosted a series of presentations concerning the unique interaction between the Colorado Rules of Professional Conduct (“Rules”) and situations that often arise in the practice of water law.

Stephen H. Leonhardt, a shareholder at Burns, Figa & Will, gave the first presentation. He used James P. Owen’s book *Cowboy Ethics: What Wall Street Can Learn from the Code of the West* to guide a water lawyer through various situations that he or she could encounter in practice. Starting with the precept “when you make a promise, keep it,” Leonhardt compared the book’s discussion of ethics with Rule 1.2’s guidance on the attorney-client relationship. He also mentioned that proposed amendments to the Rules address issues surrounding modern technology and social media. In closing, Leonhardt presented the maxim “remember some things aren’t for sale” to stress that expert witnesses should be a tool for the water court, not a weapon for one side to wield.

The second speaker was David S. Lipson, an expert in hydrogeology and a professor at the Colorado School of Mines. Lipson frequently appears as an