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Looking Ahead to Efficiency and Consistency

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Create Value.” Ms. Love gave a detailed talk of the design of power plant intakes to reduce impingement and entrainment of aquatic creatures as required by Section 316(b) of the Clean Water Act. She discussed various technology options, such as reducing the intake flow by implementing closed-loop cooling, exclusion through low-velocity screens, or using traveling screens that collect fish and return them to the river. These technology options have their trade-offs; for instance, closed-cycle cooling is low-use, but high consumption, because there is no return flow to the river.

The moderator, Commissioner Maye, asked the panel questions to conclude the session. The first went to Ms. Love on the impact of Section 316(b). Ms. Love replied she thought the overall impact would be low because of the variety of technology options available other than closed-loop cooling. Mr. Case added that Section 316(b) has site-specific provisions to balance fish impacts with increased water usage. Commissioner Maye then asked Mr. Holleman and Mr. Case about a coal ash lagoon operator’s potential criminal exposure. Mr. Case responded that most industrial activities have some criminal and civil liability if they are done improperly. He disagreed with Mr. Holleman’s view that operation of a coal ash pit is independently illegal. Mr. Holleman responded by stating that almost every site he has seen is not necessarily criminally operated, but is at least civilly illegal. He said he had seen some seepages clearly visible from Google Earth, and that a knowing or negligent violation of the Clean Water Act is a criminal offense.

A final questioner asked whether there was a risk of contaminant leaching from concrete made of ash. The panel confirmed, based on EPA studies, leaching from concrete is very low. Mr. Holleman said that beneficial re-use of ash has to be managed in ways that do not backfire on the industry, for example, coal ash re-use in agriculture. Mr. Holleman warned that agricultural re-use would be inconsistent with the growing business of many grocery stores in natural and organic products. With that, Commissioner Maye thanked the speakers and closed the session.

Chris Ainscough

**COLORADO SUPREME COURT WATER COURT COMMITTEE
MEETING: LOOKING AHEAD TO EFFICIENCY AND
CONSISTENCY**

Denver, Colorado

October 26, 2015

The University of Denver Water Law Review would like to thank Retired Justice Gregory Hobbs for his help in preparing this piece.

Members of the Colorado Supreme Court’s Water Court Committee focused their discussions on ways to improve efficiency and consistency among the State’s seven water divisions. Supreme Court Justice Allison Eid, chair of the committee, presided over the meeting. A permanent standing committee since 2009, the Water Court Committee works to “[identify] possible ways

through rule and/or statutory change to achieve efficiencies in water court cases while still protecting quality outcomes, and [ensuring] the highest level of competence in water court participants,” according to the water court’s website.

For two hours, members engaged in a roundtable discussion of potential issues regarding water court procedures and rules to see if they might recommend any changes to the State’s seven water court judges and the Colorado Supreme Court. Among the topics were alternative dispute resolution, the role of the State and Division engineers in the early stages of a case, abandonment, and the duty to preserve evidence.

The Committee first addressed the idea that clients want to be more involved in the early stages of the water court process. Jennifer Ashworth, Project Engineer and co-founder of White Sands Water Engineers, Inc., said that some clients have expressed the desire to attend expert meetings, which are currently a series of confidential meetings in which engineers discuss their findings, agreements, and disagreements. Committee members pointed out that expert meetings are critical points at which engineers can work through dense technical issues among themselves and then report to the clients and their attorneys.

Committee members concluded that expert meetings may not be the place for clients to get involved, because settlement discussions could involve broader considerations about settling the case. They suggested there might be some point early in the process, perhaps an evaluation or mediation stage, where clients, attorneys, and experts could meet and attempt to resolve issues. John Cowan, Water Division One Water Referee, said judges already have the power to order mediation, but adding an express water court rule change for this may be helpful. At the request of Justice Eid, several members volunteered to study and report back on encouraging alternative dispute resolution in water cases.

Justice Gregory Hobbs, the Committee’s Chair until his retirement from the Supreme Court at the end of August of 2015, stated that if and when the State Engineer becomes a party in a water court case is another issue of concern. He suggested that the referee process might work better if the State and Division Engineers can consult in a non-adversarial way until it becomes clear that a water court trial may be necessary. Committee members discussed the issue that not every water division handles the referee process in the same way. State Engineer Dick Wolfe suggested that it may be helpful to hear from the water judges and referees about making the consultation process more consistent among the divisions. Justice Eid designated a sub-committee to look into this.

Next, Holly Kirsner Strablizky, Water Division Five Water Referee, suggested that there is confusion in the water law community about how abandonment cases should proceed. Particularly, she said that there is some misunderstanding among attorneys and judges on timelines and exactly what should happen when an abandonment action goes before a court. Justice Eid assigned Ms. Kirsner Strablizky and other members to study and report on this topic.

Mr. Witwer then presented to the Committee the issue of evidence preservation. Specifically, Mr. Witwer pointed out that the duration and means of the duty to preserve is unclear, especially in the electronic age and with regard to conditional water rights. He noted that preservation is especially important in water law cases because such cases can span years or even decades. He said it is particularly difficult to know exactly what information a client must retain and

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