Gunnison Basin/Grand Valley Water Forum Newsletter

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Interview With Justice Greg Hobbs

Telephone Interview on July 17, 2002, by Greg Trainor • 970-244-1564 • gregt@ci.grandjct.co.us

1. Your topic at the Water Workshop in Gunnison is "Scarcity and the Opportunity for Community." As one of Justices, I presume that your comments will be centered on the more neutral position of crises create opportunities for parties-on both side of the Divide. What kind of advice will you be giving to the legislature, the public and water agencies in crafting "community" in the months to come?

Answer: *Please understand that I am not speaking for the Court, but reflecting on my personal observations as a citizen with a long tenure dealing with Colorado water issues, and as a "westerner."*

Water is a public resource, the access to which our constitution says shall never be denied when there is unappropriated water remaining for appropriation. This is a finite resource, whose careful conservation should be a top public policy priority. This conservation best occurs at the local level where the customs and values of the people are most directly expressed and affected.

The state and federal governments can help to foster conservation. But local city councils, conservation and conservancy districts, reservoir and ditch boards, public forums-this is where decisions are made about how to plan for a water supply and how to endure shortages. What a community wastes this year may be next year's missing supply. At the heart of living in the West is how to use the water wisely and how to respect the water rights of others.

Drought reminds us, in the most pointed way, about the value of water and that "juniors" are subordinate to those with senior priorities. I am not suggesting rearranging Colorado's system of water rights when I talk about "opportunity for community," but I am talking about "efficiency" and making the most of our intelligence and financial resources. We are up against the limits, our natural stream and groundwater is over-appropriated in basins such as the Platte, Arkansas, and Rio Grande. We have compact obligations, we have seniors with higher priority water uses, we have to live within Colorado's allocations.

How do we do this? By looking to the whole gamut of tools. Water markets, certainly. Colorado was one of the first western states to recognize the concept of transferable water rights. We may not have called it a "water market," but junior appropriators or suppliers with important needs, such as a municipality seeking drinking water, have always had the ability to buy water rights from willing existing users. Other tools? Conservation, efficiency of operation, revised management and enlargement of existing facilities, conjunctive use that combine surface flow and groundwater, using aquifers for recharge and interim storage, augmentation plans that actually replace injury to other water rights and so allow out-of-priority diversion, leases, new storage - I'm sure there are other alternatives awaiting the exercise of common sense and investment.

Inevitably these are community decisions because the public sector has the single largest demand for water in the 21st century—for municipal, environmental, and recreational uses.

2. At the March workshop in Delta, you outlined the basic provisions of water law. The priority system was designed to take care of allocations during times of shortage, regardless of the use. First if time, first in right. Will we see "first in time" modified/supplemented by "importance of use"

concepts anytime in the future? On the other hand, is this too subjective for anyone to ever agree?

Answer: *The cases construing the Colorado constitution establish that no use is more important than any other use in the appropriation of water. This keeps government out of deciding whether someone gets to use the water allocated to his or her decreed use. For example, the instream flow water rights of the Water Conservation Board—which it appropriates and holds for the people—are no less or no more important than any other use that can be made in priority under a decree. The water we must deliver to downstream states under the nine interstate compacts and two equitable apportionment decrees has the additional benefit of providing long stretches of stream flow for fishing and boating and walking along.*

But, if someone has a decreed use and water is available within Colorado's allocation to satisfy the decree in priority, or if someone is making an out-of-priority diversion that actually replaces injury to other water rights, the government must allow this to occur unless it condemns the water right temporarily or permanently in accordance with law, paying just compensation. This has been the law of Colorado for 140 years.

The Colorado constitution contains a preference clause for domestic use, but this operates only with the condemnation powers of those who supply water for human needs. Changes of water rights typically operate in a voluntary context to transfer the water to a new or different use. The amount of water that can be transferred turns upon the historical consumptive use of the water right measured over a representative period of time for the decreed uses, regardless of what the decree says on its face. A water right is a use right in the public's water resource, and its measure, scope and limit is the beneficial use the decree holder actually makes, without waste.

The doctrine of prior appropriation promotes planning and certainty in the face of inevitable scarcity, and does not turn upon someone else's notion of what kind of use in more important at any given time. We need to plan for the environment and recreation within the water rights system, along with all other uses.

I don't see fundamental principles of Colorado water law changing, but I think there will be a renewed emphasis on efficiency of water use to stretch the supply. In-west efficiency has always included storage as a necessity. In good years we need to recharge aquifers and replenish storage structures. Waste in any year takes from the next. Sound water planning takes into account the natural hydrograph and the exercise of senior rights.

3. Your tenure as a Justice has given you opportunities to rule or advise on subjects that, as a private attorney, you certainly felt close to or of great importance to the State. Looking in your crystal ball, can you list a few of the current or future issues you see that might constitute significant change in what is known as Colorado water law? Again, very subjective but it might be food for thought in the months to come.

Answer: *Western water law has always tracked the customs and values of the people. People love the singing rivers and depend on the working rivers. The new beneficial uses are public sector demands—for fish, wildlife, recreation, and open space. The Colorado legislature continues to address how these uses can be integrated into the doctrine of prior appropriation, while serving Colorado's farms, cities and businesses. More citizens not fewer citizens are interested in water matters.*

I've helped to judge a water poetry contest for Colorado school children the past couple of years. When these kids think of Colorado they think of water, fishing, rafting, watching the ducks land, and not polluting the water. When the kids lead, their parents won't be far behind.

4. Your poetry comments on the natural world as well as the politics of water. Can one get a sense of your judicial leanings from your poetry?

Answer: *I am a westerner. I like to reflect on the landscape and its effect on people. My leanings are western leanings. My hobbies are history and poetry. I read Stafford, Stegner, and Ferril and many others. Their western experience is the same we see by walking through Civic Center Park or climbing up to the top of the Poudre watershed.*

I write poetry, essays, and judicial opinions. These are all windows for seeing Colorado's community. I like the ironic and the whimsical part of living here, as well as the majesty. For example, "The Difference between a Duck" (recently published by the University of Denver Water Law Review) came from one of my father's favorite questions. "Greg," he'd say, "Do you know the difference between a duck?" Then he'd remind me for the umpteenth time, while I waited for his sly grin to reappear. "The other leg's the same."

A duck's a duck. Water is water. Ducks take to water. Regardless of what professors, theoreticians, elected representatives, or supreme court justices have to say, if their decisions don't reflect scholarship, common sense, and experience, they don't fly.

Interview with Greg Hobbs continued

THE DIFFERENCE BETWEEN A DUCK
A duck don't know the difference
Between jurisdictional waters
And a pothole, if there's water
He'll land. Sometimes the law
Don't know the difference
Between a duck.

4. Past water policy makers could always bolster their "resume" by indicating they were raised on the business end of a shovel-that they understood water because they "worked the water." Will this be a problem for future legislators, water board members, water commissioners, etc. who do not have a tie to the land or the direct experiences of drought, construction of storage, or allocation?

Answer: *Well, having people making water policy decisions that are not irrigators will hurt us. However, those people are being augmented by greater numbers of people wanting to be involved in water policy development. I see this as a good thing. Water is a public resource and the public has to be involved.*

Meeting Announcement

Colorado Water Workshop
Friday, August 31, 2002
Western State College, Gunnison, Colorado
Conference Theme: *Reclamation at the Century Mark: The Legacy and the Challenge*
For more information: George Sibley, Coordinator
(970) 943-2055

Meeting Announcement

Gunnison Basin-Grand Valley Water Forum Board Meeting and Reception
The GGWF Board will be hosting at reception an short board meeting on Wednesday, July 31, 2002 i conjunction with the Colorado Water Workshop Members and interested individuals are welcome t attend. The agenda will be discussion of ideas for suc cess as a regional organization. The meeting begins a 5 PM at 519 East Georgia Avenue in Gunnison Directions: Southwest corner of the intersection of Eas Georgia and Pitkin, on the south side of the Wester State College campus. The house has lots of very larg trees and a old dirty white pickup parked in front. Fo more information call Butch Clark at 970-641-2907.

About Justice Gregory Hobbs

Justice Gregory Hobbs is a poet, a teacher, an historian, a conservationist, and a writer. He is a father, a husband, a Colorado Supreme Court Justice, a lover of the southwest, and a student of western water law.

Hobbs studied history at Notre Dame, and graduated Magna Cum Laude in 1966. He went on to graduate school at Columbia University. "I found out pretty immediately that New York was such a grand place, and graduate school was not, that I ended up spending a semester getting to know New York." Hobbs said.

After dropping out of graduate school, Hobbs taught sixth grade for a semester at St. Paul's Catholic School in Manhattan. "That's the hardest job I've ever had in my life! But it was wonderful, too." He then spent a year in the Peace Corps in Latin America, after which Hobbs came back to the United States to begin his law career. Hobbs tried private practice in San Francisco for 11 months, but missed the mountains of Colorado. Hobbs moved back to Denver in October of 1973 where he found a job with the EPA doing air pollution enforcement. He then moved on to start the Natural Resources section of the Attorney General's office, where he began to learn water law.

Eventually, Hobbs returned to private practice, joining Davis, Graham, & Stubbs in 1979. "I was hired to help get the permits for the Windy Gap water project, and that was whe first started to work for the Northern Colorado Wa Conservancy District," Hobbs said. "Nobody could war better water client than the Northern District. That boar totally dedicated not only to the seven counties it serves, to the role of water agencies in society." As general cou for the Northern District, Hobbs worked with the legislat the courts, farmers, developers, and community leader Northern Colorado.

On April 18, 1996, Hobbs was appointed to the Color Supreme Court by former Governor Roy Romer. Color voters retained him for a 10-year term which expires in 20 During his time on the Court, Hobbs had seen every type law in Colorado, but water law continues to be his chief in est. The future of water law in Colorado is of primary conc to Hobbs. "Part of the water business is the changing val and attitudes. I think we have a very flexible water doctrin Colorado," Hobbs said. "The water law builds on the val and customs of the people." Hobbs is also concerned ab the continuing urbanization of Colorado. "Educating urbanites regarding the history and culture of the water p cy and the law is absolutely critical, or we will not have s port for having stable systems of allocation and adminis tion," Hobbs said.