A WATER RIGHTS PRIMER

WATERSHED FORUM TRAIL WEST RESORT BUENA VISTA APRIL 7 & 8, 1994
By: KEN BAKER, Attorney and General Manager of Upper Arkansas Water Conservancy District

Occasionally I am called upon to offer an opinion or advice concerning water and water rights. On other occasions I encounter "experts" in water law. The most touching "expert" memory is from a story told me by an old Italian who spent many years as a rancher in Pitkin County. He was also a board member of the Colorado Water Conservation District regulating the Colorado River on the Western Slope and a Pitkin County Commissioner.

Orest Gerbaz was testifying among experts before the House Interior Committee concerning the Fryingpan-Arkansas Project. He opened his remarks by stating that all he knew about water law was learned at the end of an irrigation shovel while he was wearing irrigation boots. Judge Chenoweth, a longtime representative from the Trinidad area, stopped the proceedings at that point and made his own comments. He said, "For several days we have listened to water experts come and go and we have finally encountered a man who knows what he's talking about."

I relate to this story because I feel, for the most part, what I know about water law I learned as a young man while nurturing newly planted alfalfa seeds to come to life and irrigating hay fields with a ditch that ran only part-time. I learned very early the definition of a water call, the definition of priority and the definition of senior water right and junior water right. Jeff has asked me to include in this audience a diverse group of people, including agricultural, mining, water development, recreation, environmental interests and local, state and federal officials. Let me begin by attempting to explain the doctrine of prior appropriation. At the very heart of water rights in the State of Colorado, and throughout the West, the legal doctrine of prior appropriation is a concept which is fundamental to water law. Prior appropriation means possessory interest or possessory rights. It is a doctrine of appropriation or preemption having its roots in ancient law and has been a major factor in the privatization of public lands throughout western United States. The doctrine of prior appropriation and prior use was a valid method of acquiring private property out of the public domain. The western livestock man took his cue for privatizing the grazing land from the farming and mining settlers who competed with him for land and water. The miner and the farmer appropriated water and land and the United States government recognized title to both. The prevailing western doctrine of prior appropriation, as it is now recognized throughout the western states and Alaska, is traceable to local customs and regulation which developed spontaneously on public land. With considerable uniformity these simple, but effective, principles became formalized into legal doctrine by decision of the courts and enactment of the legislatures and upon this doctrine has been built the current, complicated and voluminous water codes and cases of the West. The seeds of the appropriation doctrine is discernible in the law and customs of the Spanish settlements in parts of the Southwest, the Mormon colonization of Utah, and the California gold rush. It also existed under the laws and customs of the Mexican Republic at the time of acquisition of New Mexico and is applied in New Mexico and Arizona.

Utah water law began under the migration and settlement when Brigham Young brought

the Mormons into the Great Salt Lake valley in 1847. The Mormons established their own government, but at the same time extracted from Mexican law a system of water titles based upon the doctrine of prior appropriation.
California and Nevada water law was primarily influenced by the California gold rush and the customs of the miners. The miners were emphatically the lawmakers as respects mining upon public lands in the state and from mining law the principles embodied in their customs were the foundation of water law. The mines could not be worked without water. Without water the gold would remain forever buried in the earthen rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became therefore an important and necessary business in carrying on mining. Here also the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of common law respecting the rights of riparian owners were not considered as applicable or, if at all, only in a very limited degree. The waters of rivers and lakes were consequently carried great distances in ditches and flumes constructed with vast labor and enormous expenditures of money along the sides of mountains, through canyons and ravines to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted or assumed to exist from their obvious justness for the security of these ditches and flumes and protection of rights to water, not only between the different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts and received their sanction. Properties, to the values of many millions, rested upon them.

Because the statutes were silent, common law became an underpinning of the doctrine of possessory rights. Without direct precedent or specific legislation, the courts had to resort to common law analogies which were uncomfortable ground for judges. Fortunately the common law analogies were not too far fetched. In one case relating to controversies over possession of water between persons without title in which the real owner was absent, the analogy was made to the rules of law regarding priority of possession of land. The diversion of water was declared to be the equivalent of possession and the doctrine was laid down that he who was first in time, was first in right. An extensive body of case law derived from common law grew up protecting possessory interests. Mining and diverting water were ruled to be equally inferred and stood on equal footing. The right to the use of running water on public domain was held to exist without private ownership of the soil on the basis of either prior location on the land or of prior appropriation and use of water, a ruling that permitted cattlemen to survive. The doctrine of appropriation had been accepted throughout the West by 1875. This was the period during which stockmen, both original settlers and eastern capitalists, had competed to lay claim to the western grazing lands. Their claiming of the waters on federal lands gave them control of grazing lands within the distance livestock would normally travel to and from water.

In more recent times the federal government has tightened its hold on public lands and essentially eliminated the use of homestead rights as a concept by which private individuals could obtain ownership of public land. In the same manner that the privatization of public land has been restricted by the federal government, the

government has pursued the issue of federal reserve water rights. Throughout the 1870's and the 1880's western ranchers became aware of the potential for restrictive land withdrawals from public domain. In 1864 the federal government conveyed Yosemite Valley, but not the surrounding High Sierra territory in today's national park, to California for a state park. At that time livestock grazing, timber cutting and mining were excluded. In 1890 the High Sierra country surrounding Yosemite, but not the valley itself, was made a national park. Subsequently the federal government has created many national parks throughout the western United States and Alaska and has concentrated its efforts in more recent time to create wilderness areas. The wilderness areas, by definition, in Colorado represent a geographic area in which the snowpack is created and water rights are created. It also represents, by definition, an area in which the federal government would exert a claim to reserve water rights if a claim were to be asserted. The doctrine of prior appropriation, however, has carried over to state law and to this date the state has asserted its right of original jurisdiction over all water matters, including water rights which would be acquired by the federal government. In effect the State has held that the federal government stands in the same position as an individual in making a claim to water rights. More recently, legislation has been enacted by the federal government touching on wilderness areas and water rights and the doctrine of prior appropriation still applies with respect to individual and privatized water rights. The federal government, however, has not rested its case.

Jeff has asked me to briefly touch upon the concept of water exchanges. An exchange of water rights, in its simplest terms, means to transfer the point of diversion of the water right from its historical and natural setting, normally from a stream, to another location. One exchange of water rights may mean a transfer of the consumptive value of the water from an irrigation ditch to a reservoir or to transfer the same water through a pipeline from its original point of diversion to a city in another location. An example of exchange which we would use in the upper valley is to exchange Twin Lakes water from the Arkansas River up a tributary of the Arkansas River to a point of use in which Twin Lakes water would not customarily flow. There are complex engineering principles which must be resolved and certain legal issues which must be resolved, but, in theory and in practicality, Twin Lakes Reservoir and Canal Company water flowing in the Arkansas River could be diverted at Trail West through a well.

The issue of water rights between the State of Kansas and the State of Colorado is a prominent and current concern. The recent Special Master's draft decision in the Kansas v. Colorado water dispute has caused considerable speculation regarding water rights, and in particular, well rights in the Upper Arkansas Valley.
The Master's reasoning may result in a finding that the irrigation wells in the lower valley have depleted the system and that the pumping would need to cease to prevent further damage to Kansas. This means that every well adjudicated or permitted after 1948 may have to shut down. The focus of the ruling is directed primarily to wells below John Martin Reservoir, however well users above John Martin, e.g., commercial and industrial wells, and some irrigation wells, will be equally effected. The Master's draft decision and its effect on water administration deserve some historical review. A review would not be complete, however, it if did not include a brief "look back" at other water demons that

have played a significant role in the lives of our Chaffee County citizens--some still alive and some who died in an effort to protect Upper Valley water.

In 1973 the legislature amended the 1969 Water Administration Act with a bill known as "Senate Bill 97." The bill created a non-consumptive beneficial use of water that could be adjudicated as an instream flow without a requirement of diversion from the stream. It is called a "minimum stream flow." The right exists exclusively in the Colorado Water Conservation Board. In the late fall of 1977, the Colorado Water Conservation Board (CWCB) began to file claims for instream flows in the Arkansas River system and other Colorado streams. The proposed appropriations in many instances were greater than the historic stream flow. Some, as later experienced in Custer County, were appropriations for dry stream beds. The CWCB approached its mission with newborn enthusiasm. Local water users, supported by the doctrine of prior appropriation and a history of pride in ranches built on water flowing in ditches constructed by hand labor and horse-drawn slips across miles of rock hillsides, approached the new onslaught of state bureaucracy with equally firm resolve. Adding fuel to burning embers, the winter and summer drought of 1976-1977 kept most of the ditches closed. Diverted water in many cases never reached the fields it was intended to serve.

In September, 1977 a meeting was scheduled in Cortez to discuss, and perhaps resolve, the instream flow dilemma. On September 23, 1977 a cross-section of citizen leaders left Harriet Alexander field to attend the meeting. On board: Tom McCurdy, President of Southeastern Colorado Water Conservancy District; George Everett, a director of that board and a true link to pioneer ranching; Dan Everett, George's brother; Eddie Holman, a lovable rancher-philosopher; and Eddie Krocesky, a Buena Vista humanitarian. The latter two were Chaffee County Commissioners. Like the drought that scorched the fields, the wind that day was unmerciful. The small airplane crashed within sight of the airport. When the dead were buried and the widows had grieved, the CWCB had its instream flows in place.

The spring and summer of 1978 began as an instant replay of the 1977 drought. An 1874 ditch call was ordered by the Division Engineer. Such a call virtually shuts down every major ditch in the Upper Valley. The ranchers reluctantly acknowledged the call. It is the doctrine of prior appropriation which makes the system work. It is a rule of order. The word spread, however, that the irrigation wells were pumping in the lower valley, and under Rules and Regulations Governing Use, Control and Protection of Surface and Ground Water Rights, the State Engineer was permitting wells to pump and irrigate under decrees seventy-five years junior to ditch decrees ordered shut down. A small group of Chaffee County community leaders who were also in the ranching industry looked the State Engineer in the eye and refused to shut down unless the out-of-priority wells were curtailed. "Right is right and fair is fair" they said. The Engineer blinked, and then, with the force of the Attorney General's office, and the threat of court, persuaded these law-abiding citizen-ranchers that "might is right." The wound did not heal. The scar festered in the memories of these rebels, some of whom were still grieving from loss of family in the 1977 airplane crash. Time heals, but the Master in the Kansas-Colorado case may have helped heal the old wounds. Sixteen years after the 1978 rebellion the Special

Master concurs with the sparky group of dissenters--the wells are pumping out of priority and the State of Colorado was wrong to permit the use.

Following the CWCB incursion into our headwaters and following the 1978 abortive rejection of the State Engineer's order, the citizens at large rallied around the 1978 dissenters and petitioned the court to authorize the Upper Arkansas Water Conservancy District. The District was approved and the order signed in the spring of 1979. It included all of Chaffee County, the western half of Fremont County, and later included Custer County. The District has struggled for fifteen years to protect the waters of the Upper Valley and to provide a vehicle which could one day provide a convenient source for individual augmentation plans. As the gates close on a water appropriation regulation which gave initial impetus for the birth of the Upper Arkansas Water Conservancy District, the District has in place a blanket augmentation plan which, may provide ready and convenient relief from the consequences of the Master's draft decision in Kansas v. Colorado.
On February 18, 1994 the Water Court, Division 2, approved a plan of augmentation for the Upper Arkansas Water Conservancy District covering major portions of the District's boundaries, including western Fremont County and Chaffee County. This plan will afford the opportunity for well users who may be affected by the Kansas/Colorado case to supplement or replace waters which may otherwise be discontinued by the State.