Guest Editorial

Jack F. Ross

A Water Law System for the 21st Century: The Colorado Answer

It seems to have become popular over the past few years to criticize our water law system. Doomsayers question its usefulness in helping society to cope with the changes in water use needs which they foresee as inevitable as we move into the 21st century. They conclude that nothing short of wholesale revisions resulting in a massive overhaul of the system is required to avert certain disaster.

Curiously, such criticisms do not seem to emerge from the ranks of those who actually use the legal system to solve real, present day water supply problems. Instead, the complainers, apparently without having had any practical experience in using the system, urge that it provides no vehicle for achieving what they perceive to be society’s broader needs.

Let us examine that legal system and see if it can provide an answer to the question of whether those critics are merely a vocal minority or whether they are real clairvoyants whose prophecies of doom should be heeded. Let’s start with a forecast of what problems of water supply, water quality protection, and water conservation, flood control and other related water needs of Texas out to the year 2030.

The plan provides for a portion of the Central Arizona Project (CAP) to be up-front funded and cost shared with the federal government. There are six significant reasons why there is interest in the concept or proposal that Arizona is now negotiating with the federal government to up-front fund and cost share a portion of the Central Arizona Project (CAP).

I believe there are six significant reasons why there is interest, not only in Arizona and the West, but in Washington. One is the magnitude of the cost of the offer. Although I was somewhat taken back by Texas when they started talking billions of dollars, in Arizona we talk in terms of hundreds of millions before we get into billions.

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The genius of our system is that it was originally devised to provide a very practical, workable method for fairly allocating a variable, but nearly always limited natural resource among competing users. The system accomplished that result by allocating the best right to the first person who, through his own investment of money and labor, did whatever was necessary to make a beneficial use of water. The priority of the right to the use of water that person earned when he made the investment of his time and money protected his water supply against the competing demands of later comers when the natural supply ran low.

To the premonitions, the appropriation system was the most equitable way of allocating a scarce resource, and by now almost all of the waters of the state have been allocated under that legal system by the water users themselves, not by some bureau of government attempting to decide on his own whose uses were more beneficial to society.

But since nearly all of the waters of the state have already been allocated under the priority system, what is the answer to the newcomer who says “value more highly than the ‘economic’ uses upon which the system was created?” All too often that newcomer concludes that the system must be changed so that he can get what he wants (usually without having to pay for it.)

Invariably, the first answer that is heard to this question is that the state must develop a water plan. “Planning” for the allocation or reallocation of the resource has, in the view of some, become the panacea for what they perceive to be an historic misallocation of the resource.

How many times has the water community been admonished by those who have no responsibility for the development and delivery of water for people’s use, that no further water development should go forward until there is a “plan,” and a particular development

Water Development/Three States Response

Texas: .................................................. Arizona: .................................................. Utah: ..................................................

Dr. I.M. Rice ........................................ Larry Linser ........................................ Wayne C. Evans

The Texas Water Plan, adopted in 1984, is a comprehensive analysis of the needs and of the action required to solve future problems of water supply, water quality protection, water conservation, flood control and other related water needs of Texas out to the year 2010. The plan provides estimates of the cost of carrying out recommended actions.

It is Texas policy for the state to assist local governments in undertaking water projects by means of loans from the Texas Water Development Fund. The primary source of funds for loans is general obligation bonds of the State, bonds being retired as loans are repaid. State bonds must be authorized by voters at a general election. Such an election

The state of Utah, your neighbor to the west, is only less dry than our neighbor to our west, Nevada. Utah is the second driest state in the nation. Water isn’t important to us, it’s everything. The primary mountains which create our drainage are the Wasatch Range running north to south and the Uinta range running east and west. All of our water drains into the Colorado Basin, or into the Great Basin and into the Great Salt Lake. There are two basic drainage systems into the Great Salt Lake: The Bear River on the north and the direct Wasatch Front drainage from Brigham City to Provo. When the early emigrants
drained the Great Salt Lake.

There has been a significant amount of interest generated in the concept or proposal that Arizona is now negotiating with the federal government to up-front fund and cost share a portion of the Central Arizona Project (CAP). I believe there are six significant reasons why there is interest, not only in Arizona and the West, but in Washington. One is the magnitude of the cost of the offer. Although I was somewhat taken back by Texas when they started talking billions of dollars, in Arizona we talk in terms of hundreds of millions before we get into billions. Arizona interests are proposing to up-front fund $37 million dollars to help pay for a portion of the Central Arizona Project. The second

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of 67 new major reservoirs and two salt water barriers to meet water supply needs. It also contained a conceptual plan to add storage space in two other locations, one of which was to be imported from outside the state, should it become available.

By 1984, 43 major new reservoirs had been built and three others enlarged. These facilities increased the state's storage capacity by about 10 million acre feet. Twenty-four reservoirs were for water supply, 18 were for flood control, and three were for recreation. Adding pond storage and reservoirs was for controlling natural chloride contamination of surface water.

The most controversial item in the 1968 Texas Water Plan was importation of surface water from outside the state. It was to be used primarily for irrigation in agricultural areas of south Texas and west Texas. Subsequent studies showed that it was likely that Texas would have to increase its water imports if it was to have sufficient water for its purposes. It also may be politically infeasible to import water from another state, even if financial requirements could be met.

State financial participation in water projects was first authorized in 1957 when the legislature created the Texas Water Development Board. By constitutional amendment, the voters authorized the Board to administer a Water Development Fund of $200 million. Its purpose was to help local communities develop water supplies. The Development Fund was to be used for loans specifically applicable at times when the supply of water was generally limited to cities and districts which could not obtain financing for water projects from the private sector. The catalyst which brought about this amendment was the Board having $8 million of unexpended Bond Fund was a seven-year drought, 1950-57, which is still remembered as the drought of record in Texas.

Originally the emphasis of state financial participation in water projects was on water supply. By 1970, the need for state participation in water quality projects was evident. In 1971, the voters, again by amendment of the constitution, authorized $100 million for water quality enhancement. This was also to be used in the form of loans at interest rates calculated to fully reimburse the state.

By 1975, a need was perceived by state water planners to provide additional state financing capability to aid local water supply and water quality projects. Constitutional amendments were proposed to authorize a water supply surplus of $400 million and water quality funds by $100 million. Loans were to continue to be restricted to hardship cases. There was opposition to the amendments. A new generation of voters having no memory of the disastrous 1950-57 drought participated in the election. Preservation of the environment was a concern of many and they were skeptical of the need for providing more water which in turn would support increased population. Since water loans were then restricted to hardship cases, citizens of the major cities which could finance their own water projects saw no immediate advantage to themselves. Some feared that state money would be used to subsidize agriculture by financing water importation schemes to move water from the Mississippi River to the panhandle of Texas. Some complained that the Texas Water Plan was outdated and that the state water planners would be given carte blanche to utilize the money. The result of the 1976 constitutional amendment was that the $400 million for water development was defeated, while the $100 million for water quality was passed.

The Texas Water Development Board reacted quickly to the accusation that the 1968 Texas Water Plan was outdated and contained unwelcome proposals such as the importation of water. A draft study was released in 1977 which was entitled “Continuing Water Resources Planning and Development for Texas.” It combined regional studies into a statewide document for use in a major revision of the Texas Water Plan.

In another effort to provide financing for water development, the legislature put on the ballot for a general election in 1981, a proposal to amend the constitution to dole a one-half the surplus revenues of the state to water projects. The Texas constitution prohibits a deficit budget. The legislature meets bi-annually and must approve two annual budgets. Since revenue projections are uncertain, perpetual bonds require a margin of safety in setting limits on expenditures. The result is always a surplus, which has been as much as a billion dollars, and which the legislature must use for emergency expenditures. For example, it has been used for a needed pay raise for school teachers. As a stopgap funding measure pending outcome of the general election, the Comptroller of the legislature also created water assistance fund and appropriated $40 million to it. It also placed on the ballot a proposal to raise the ceiling on interest on authorized but unissued state water bonds from 6% to 12%. There was no market for tax-exempt bonds paying only 6% in 1981.

The constitutional amendment to dedicate surplus revenues was defeated. It faced much the same opposition as the 1976 proposals — lack of voter conviction that Texas had a water problem and did not have a proper water plan, and persons who preferred no-growth to creating new reservoirs and who felt the water problem could be solved by conserving existing supplies. A new proposal in 1983, was defeated. Some projects as competition for a source of funds that could be used in the education system, and they campaigned against the measure.

The proposition passed in arid, thinly populated western Texas but failed in more densely populated, water-rich east Texas. The proposition raised the interest rate to 12% passed, thus making it possible for the state to administer bonds and replenish the Water Development Fund.

The next legislation again grappled with the problem of creating a state water project financing method that would be acceptable to sections of the voting public that had been instrumental in defeating the previous efforts. It was perceived that there had to be something in the financing scheme that would be attractive to the eastern part of the state.

A broad-based public involvement program was conducted early in 1982 to obtain citizens’ views and ideas regarding Texas water problems and solutions. A comprehensive and comprehensive analysis of the problem was conducted. A conceptual plan was developed which described basic water policy issues in the State and was widely distributed for public review and comment. Public input was much needed. In the broad-based public involvement scheme that would be attractive to the eastern part of the state.

Results were considered by a broad-based Task Force on Water Resources Use and Conservation. Approximately 100 water leaders and leading citizens from all parts of Texas worked on this project, including presidents of chambers of commerce — East, West, South, and Rio Grande Valley. The Task Force organized three working committees as follows: Financial, Water Resources Use and Conservation; and Water Importation.

The Task Force Committees developed recommendations on the basis of the results of the public involvement program, regarding water quality protection, water conservation, public education, environmental protection, water supply development, flood protection, water importation studies, water management, and State participation in water financing. A special committee of the Texas Municipal League also recommended that flood control needs be included within a revised water plan and that additional research and planning, and public education be emphasized.

Key factors in water planning are anticipated population and economic growth. Revised population and economic growth were made for the period 1980 through 2030, by decades, for each county, and in the case of population for major cities as well. From these, estimates were made of the required water supplies (reservoirs, treatment plants, distribution systems, and for sewerage systems, for municipal and domestic needs as well as for industrial water use) in the state. Water supply and water demand projections were made on a high-low basis, giving a range of expected needs. Needs were translated into specific projects and these were costed in 1983 prices. Costs were tabulated according to the anticipated source of funds; federal, state or local. These were reported on two bases, 1983 prices with no inflation and 1983 prices inflated at 8% per year.

For the bi-annual periods, 1984 through 2030, the total cost of Texas water projects in the revised plan at 1983 prices and no inflation was $21.2 billion. Inflated at 8% annually, the total cost would be $43.8 billion. At the uninflated rate, the state’s share of the $31.9 billion figure would be $13.5 billion. At 8% inflation, the state share would be $16 billion for 2121.

Using a more realistic inflation rate of 4% annually, the financial contribution from federal, state or local government for the water projects for the three bienniums 1986 to 1991 inclusive are: Federal—$0.4 billion. State—$5.1 billion. Local—$14.2 billion. Total—$44.9 billion.

The report was published in 1984 in two volumes. The first is a summary. The second volume contains back-up data. It is called the Texas Water Plan For The Future. It is a very useful planning tool. It is not a detailed blueprint for authorizing and appropriating funds for specific projects because this must rest on local decisions. It is divided separately for each of the 23 river and coastal basins.

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Arizona v. California What It Means To The Upper Basin

by Charles Meyers

Arizona v. California is more than 30 years old, it started out in 1952. But despite it’s age, it still has, I think, a good deal of interest to the Upper Basin. What I’m talking about is what the case did, what it didn’t do, and what its current implications may be. It might give you some sense of feel about that case. If I tell you a little bit about the case, without the benefit of the one hundred and thirty pages of the transcript, you can see, unless the federal government consents to the suit, and the federal government wouldn’t consent to the suit, because Arizona wouldn’t sign the compact. So we had impasse — probably not the first time in water matters and probably not the last time.

Finally, however, Arizona did sign the compact, about 1944 or so, and Secretary of Interior Ikeik began to speak to them, they began to get visions of the Central Arizona Project, and at the very tail end of the Truman Administration, the United States consented to be sued — the suit was begun in 1952.

The first Special Master died, some people said from frustration and others attributed his death to higher authority and Judge Rikiki was appointed to be the Special Master and I was appointed to be his law clerk. We were a strange team, because I was in full time practice of law in New York, and I was an assistant professor of law trying to get tenure. And that was the team — that was it. We tried the case in the summers, beginning in 1956, and I’ll never forget the very first day of trial. In my naivete, I walked into the courtroom on the side, the Judge was on the bench — and one of the attorneys, and said “My, this case has attracted a great deal of attention and popular interest.” Well, it turned out in fact, that every person in that room was either a lawyer or an engineer, hired by one of the comprehending parties. And I’ll never forget the very first day of trial. In my naivete, I walked into the courtroom on the side, the Judge was on the bench — and one of the attorneys, and said “My, this case has attracted a great deal of attention and popular interest.”

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Arizona v. California is more than a bit about that case, it’s a history of the water conservations programs, and possibly the last time.

The first thing that happened in Arizona v. California, which I think is very important to you, is that it provided a standard for measuring reserved water rights. The principle that Indians have water on the reservation, by virtue of a federal law, was established, as the Attorney General held earlier this morning, in the Winters case in 1908. But although Arizona v. California, not much attention was paid to qualifications. To begin with the result, the Indian reservations in the lower basin of the lower Colorado River, for instance, had an unauthorized or non-compete use of water, which is about 1/7 of the supply. They got it on a standard called “practicable irrgitable acreage” — FIA — which is inferential, but still might be the controlling rule. It was the Continued on page 10

Rice: Texans Grapple with Growing Water Demands

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The report contains planned actions and policy recommendations on:

Water Conservation and Public Education

Water Quality Management

Management of Freshwater inflows to Bays and Estuaries

Protection of Water Resources

Groundwater Management

Instream Flow Management

Mitigation

Flood Protection

Water Importation

With regard to water importation, which was the most controversial item in the original Texas Water Plan, the report notes that there will come a time when there are no significant potable water resources in Texas left undeveloped. However, it recommends only that a multi-state water committee be established with neighboring states to carry on discussions relative to water importation.

With an updated and comprehensive Texas Water Plan in hand, political leaders, water industry leaders, conservationists, preservationists, and developers were ready to make a concerted effort to have the legislation, which convened in January 1985, enact a comprehensive water bill. Such a bill would need to provide adequate financing and also would have to recognize demands for protection of the environment and to fund environmental preservation. The lessons of past defeats were to be taken into account. The driving force behind the proposed dedication of surplus revenue from water, which was defeated in 1981, was then Speaker of the House Billy Clayton. In the next legislature, a water legislation package was developed in the Senate under the guidance of Lt Governor Hobby and Speaker Lewis. All pledged to press for enactment of a water bill.

It was the draft bill released by Governor White, Lt Governor Hobby and Speaker Lewis, which finally passed, was a hard fought struggle between opposing interests. Environmental activists demanded guaranteed water flows to the bays and estuaries, as well as protection of a mandatory statewide water conservation program, as their price for non-opposition to any financing bill. Others were concerned that the amount of funding proposed in the initial draft bill released by Governor White, Lt Governor Hobby and Speaker Lewis was just prior to convening the legislature, fell short of the estimates of financing needs listed in the revised Texas Water Plan.

House Bill 2 creates new water use and water financing policies for Texas. It represents a compromise between pro- and anti-water development interests. Provisions to require municipal water conservation programs, protection of the bays and estuaries, and control of groundwater were included at the insistence of environmentalists and preservationists. Adequate funds to finance the state’s portion of water projects were included at the insistence of development and agricultural interests. The bill, as finally adopted, had the backing of the Governor, Lt Governor and Speaker of the House.

The November election provided Texas voters with two clear alternatives. One was to authorize enough funding to at least meet the initial state share of financing sorely needed for water projects for supply for human consumption, for upgrading the quality of our streams, for controlling flooding and for assisting farmers to install more efficient irrigation methods. It also provided protection for the bays and estuaries, for the 1985 session, a joint (House/Senate) committee on water resources was formed, and it held hearings through­out the state during 1984. Just before the session opened, a bill was drafted that had the endorsement of Governor White, Lt Governor Hobby and Speaker Lewis. All pledged to press for enactment of a water bill.

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reason is that we have a project that is under construction, on schedule, in fact, perfectly on the schedule anticipated when we broke ground thirteen years ago. The third reason is that CAP is authorized to be fully funded by the federal government. No cost sharing or up-front funding is required. The second reason is the Safety of Dams Act. This is for a replacement structure rather than for repair of existing structures. The fifth reason — we're using power revenues — which is the surplus power that is made available by the project from the Navajo power plan generation (PAGE) — of which a portion is the CAP facility. The Hoover Power Plan Act of 1984 provides that we can use revenues from the sale of surplus power to fund the local up-front funding. This is a unique provision. Lastly, the provision of the agreements that obligates the federal government to a construction schedule and thereby reduces the cost — reduces the inflation involved with the project itself — and to realize early benefits from the project, and third, to avoid exceeding the cost ceiling of the authorized project. When CAP was authorized, there was a cost ceiling attached and there is concern that the project as now envisioned might exceed the cost ceiling.

CAP is a multi-purpose project. Not only will it deliver agricultural and M & W to Central Arizona; it is also authorized to provide flood control mostly in the Phoenix Metropolitan area and is a flood control benefit. You've heard a lot of Plan 6. When CAP was authorized, it was authorized to include Orme Dam, which was a flood control regulatory storage facility, right below the confluence of the Salt and Verde Rivers. When we went through the environmental analysis of Orme Dam, we ran into problems. It inundated an Indian Reservation, and we had a substantial amount of wildlife and environmental problems. So we undertook an analysis to evaluate the alternatives to Orme Dam. What came out of a number of plans was the recommendation from the local interest and later approved by the Secretary of Interior on Plan 6. Plan 6 involves three new dams: New Waddell, that really replaces the existing Waddell Dam, which is on the Salt River; and a modified Roosevelt Dam. Roosevelt now exists on the Salt River. Cliff Dam will also inundate an existing reservoir on the Verde River. Incorporated into the project at this time was safety of dam purposes because we had unsafe structures on both the Salt and Verde Rivers. And, reconstruction of Stewart Mountain Dam was incorporated into the Plan 6 proposal.

The existing Roosevelt Dam is the first multi-purpose structure in the entire project. It has hydropower, irrigation and flood control power. It is the one structure they propose to modify — by adding onto the top of the dam, adding about another million acre feet of storage. The reservoir currently holds about 1.2 million acre feet, so the modified dam will hold about 3.2 million acre feet. Plan 6 will provide additional conservation storage, flood control and provide safety and dam surcharge. In the Stewart Mountain the Bureau is going to reconstruct the spillway. The spillway has been damaged and there may be some major work involved in that.

As far as the agreement itself, in discussing what the provisions contain, here is where we stand on the cost of CAP and its magnitude. The estimated cost of the project in today's dollars is 3.2 billion dollars. In 1968, when it was authorized, the envisioned cost was about $80 million dollars. Since that time, new federal dam projects have increased in cost by a total of $100 million- and 112 million dollars. This is primarily on Plan 6 because we have confidence that Congress will, through appropriations averaging about $170 million dollars — and it is this difference which stimulated the interest in the up-front funding agreement. If we were to only receive $170 million per year into the future, the schedule would drag out until the year 2012, assuming an inflation rate of 5 percent. The expected results of cost sharing $371 million dollars up-front on this project results in this change of construction schedules. We expect the aqueduct to be complete by 1993 and the terminal storage facilities in Tucson by 1995. New Waddell Dam is scheduled to be completed by 1995; $170 million dollars toward New Waddell Dam; the Roosevelt Dam completion seven years, from a completion date of 2002 up to 1995. Cliff Dam similarly would go up from 2009 to 1997 and Stewart Mountain would stay the same. So we can see the benefits are not realized here through early construction. These are the provisions of the up-front funding agreement — which has been reached with Bureau staff. It has not been signed, but it basically has been drawn up and is now going through the trap line in the Department of the Interior and through necessary approvals in Arizona.

Central Arizona Water Conservation District (CAWCD), a three county district which signed a contract to repay CAP, will up-front fund $175 million dollars toward New Waddell Dam. They are the beneficiary of regulatory storage. It is this regulatory storage facility that provides power marketing benefits by allowing pumping in the winter, releases in the summer, and sale of surplus power in the summer under the provisions of the Hoover Power Plant Act. We can tack on a surcharge or surcharges to generate additional cost. The sale of that power will help repay the $175 million which will be up-front funded by CAWCD.

The six valley cities in the Phoenix metropolitan area will collect the up-front funds from the project's facilities on the Salt and Verde Rivers, Cliff Dam and modified Roosevelt Dam. That is estimated to be about 62.5 million dollars, which we will up-front fund from 80.1 million dollars. That is a quarter of any federal cost sharing, which would otherwise be a reimbursable project cost. Maricopa County Flood Control District will contribute 20% of the cost allocated to flood control where storage is in modified Roosevelt Dam, which is estimated at 80.1 million dollars. That is a total cost-share — it is a federal obligation to pay all the flood control costs of the Central Arizona Project under its authorization. The county flood control district is interested in flood control and they're convinced that the early completion of these dams will provide sufficient benefits to justify the $80 million dollars contributed.

The Salt River Project which owns the existing dams has the Safety of Dams responsibility and will contribute 15% of the Safety of Dams costs associated with the facilities. This is estimated at $2.2 million dollars. Another provision in the contract is the power marketing provision. The Secretary of the Interior is obligated under the Hoover Power Plant Act to adopt a marketing plan to sell power, and after appropriations are available for the project, in the agreement that the authorized ceiling will not be exceeded — that the local contribution will count against the federal amount. We have proposed that their contribution count toward interest bearing obligation, but the agreement that was struck was that 75% would be interest bearing. 25% were against non-interest bearing obligation. The state contribution also will be against interest bearing obligations.

The penalties. If the federal government doesn't live up to its end of the bargain and provide appropriations to meet the construction schedule the penalties go against the pay-up of the CAWCD obligation. The amount depends upon whether there is a one, two or three year delay in the construction schedule. The penalties on the local side, if they're not living up to their end of the bargain, is that the past contribution goes toward non-reimbursable cost. One other item. The state will provide $2 million to start an environmental protection fund to purchase private land along the Verde River so that we can get some habitat for a Bald Eagle which now has its nest at the Cliff Dam site and others as the dams go in.

The CAP is real, the Phoenix treatment plant is under construction. We expect delivery to that very large plant this spring and to start putting our Colorado River water to use at full speed in the next two to three years.
CWC Officers

RALPH CURTIS
CWC President Ralph Curtis. General Manager of the Rio Grande Water Conservation District in Alamosa, Colorado, is a native of the San Luis Valley and a life-long resident of Saguache. After graduation from the New Mexico Military Institute in Roswell, New Mexico, he attended the University of Colorado, receiving a B.S. degree with a major in Business Administration in 1953. Commissioned in the U.S. Army Corps of Engineers, he served two years in military service. Returning to the San Luis Valley in 1955, he entered the family ranching operation. When the ranch was sold in 1975, he purchased farmland near Center, Colorado. In September, 1980, he assumed the responsibilities of his present position as General Manager of the Rio Grande Water Conservation District. Ralph is a member of the Board of Supervisors of the Center Soil Conservation District and serves as Vice President of the Colorado Association of Conservation Districts. He is a member of the Colorado Cattlemen’s Association, the National Cattlemen’s Association, the American Legion and the Saguache United Methodist Church.

JOHN R. FETCHER
John R. Fetcher was elected Vice President of the CWC at the February meeting. Fetcher, a consulting engineer and rancher, has been a well-known leader in state and local water activities for many years. He currently holds the position of Secretary-Director of the Upper Yampa Water Conservancy District in Steamboat Springs. Fetcher holds a B.S. degree in electrical engineering and a masters degree in Business Administration & Engineering from Harvard. He was employed by the Budd Company, Philadelphia, as a technical representative in Paris from 1936-37 for the construction of stainless steel railway passenger cars for the French railways, and later as Chief Plant Engineer for that company, until 1949, when he moved to Steamboat to start in the cattle business with his brother. He served as President of the Steamboat Ski area from 1959 to 1970 and was instrumental in the successful promotion of that area. He has also served as Manager of the Mount Werner Water & Sanitation District, as a representative on the Colorado Water Quality Control Commission and as Chairman of the Colorado Water Conservation Board.

LARRY D. SIMPSON
Larry D. Simpson of Loveland, Secretary-Manager of the Northern Colorado Water Conservancy District and Municipal Subdistrict, was elected CWC Treasurer at the February annual convention of the Congress. For a four year period (1972/76), Simpson was a member of the Larimer-Weld Regional Planning Commission and then the Larimer Weld Land Use and Transportation Committee of the Larimer-Weld COG. Simpson has a civil engineering degree from the Colorado School of Mines. In addition, he has a Master’s degree in Business Administration from California State University at Los Angeles. He has also done graduate work in engineering at the University of Southern California. Simpson is a licensed civil engineer in both California and Colorado. Simpson is a member of the American Society of Civil Engineers, the Four States Irrigation Council, Water Resources Congress and the National Water Resources Association. Larry is married and he and his wife, Ruby, have two children (Ty and Bemiss Jane). Larry also does some farming in both the Loveland and Lucerne areas.

HAROLD MISKEL
Harold E. Miskel of Colorado Springs serves an Immediate Past President of the Colorado Water Congress. He currently holds the position of Manager of Planning and Resource Development for the Department of Utilities to the City of Colorado Springs. A native Oklahoman, Miskel has worked in Colorado Springs since 1966, serving in several public utility capacities. A graduate of the University of Colorado at Colorado Springs, Miskel serves on the Governor’s Metropolitan Roundtable, is a past member of the Front Range Project Natural Resource Committee and is active in the Chamber of Commerce. He is a member of the American Water Works Association and Water for Colorado as a member of the Steering Committee. Harold and his wife Karen are the parents of Melissa, 24 and Lori, age 21. The Miskels are also active in community activities in the Springs.

RICHARD D. “DICK” MACRAVEY
Richard D. “Dick” MacRavey is in his seventh year as Secretary and Executive Director of the Colorado Water Congress. MacRavey has no stranger to Colorado. He served three years as Executive Director to the Larimer-Weld COG and seven years as Executive Director of the Colorado-Municipal League. During his tenure with the Larimer-Weld COG, he was responsible for developing and guiding the early stages of the Larimer-Weld “208” Water Quality Management Planning effort. In 1970, MacRavey served as Chairman of the Colorado Good Government Committee for the promotion of the State Constitutional Amendments One, Two and Three. All three amendments were approved overwhelmingly by the people of Colorado. MacRavey is a member of the American Society of Association Executives, Colorado Society of Association Executives, Colorado Water Congress, American Water Works Association, and International City Management Association (cooperating member). MacRavey is married and he and his wife, Barbara, have six children (Pam, Mike, Doug, Brad, Laura and Mark). MacRavey has a bachelor of science degree from the University of Wisconsin and a master of science degree (in public administration) from the University of Colorado.
28th Annual
Colorado Water Congress
Convention

![Image: Group photo of attendees]

Veteran water attorney, Glenn L. Saunders and Attorney General Diane Woodard chat at one of the breaks.

(Clockwise) Fred Krugger receives the 6th Annual "Wayne W. Augspuhl Water Leader of Your Year Award" from Award Committee Chairman, Fred Goulis. Fred Krugger receives a bison from Leonard Bice, Indian Tribal Council Chairman of the Southern Ute Indian Tribe, Ignacio, Colorado. Senator Jim Beatty, a delegate at the reception and G. E. B. Representative Ron Campbell of Ignacio, Frank Croyer of Meeker, Bill Golny of Grand Junction and John Murphy of Denver.

(Opposite clockwise) W.D. Fair of Greeley, Chris Arians of Grand Junction share a few laughs at the reception. It was a "come as we please together" group that included G. E. B. former Senate President Fred Anderson, CWC President Harald Minkel and Ed Pulek of the Denver Water Department. G. E. B. Bill McDonald, Director of the State Water Conservation Board, Representative Ruth Wright of Soudal and Attorney Ray Peters of Denver. G. E. B. U. Kapp, Executive Director of the Water Resources and Power Development Authority and Senator Titus Bishop discuss some water matters at the reception. State Wildlife Director Jim Riech tells about the one that got away.

(Center of photo) Some of the featured speakers:
Jerry McDermott with the films of McDermott, Barnes, Anderson and Reynolds of Denver, Jan Eggle, President/Editor, Inc. of New York and Washington, D.C. Bill Bigg, Iront, Supples, Byrne and Pacin, F.C., Denver, Former Governor John Vanhouten of Grand Junction and former Director of the State Water Conservation Board, Bob Sparks of Lakewood.

Each of the six convention workshops were well attended.
(D. D. C. Titus Bishop of Grand Junction. Representative Titus Bishop of Grand Junction, Chairman of the House Committee on Water Conservation, and Roy Kramer of Loveland, Assistant Director of the House of Representatives, present the annual report of the Water Conservation Board. Participants in the Legislative Breakfast: G. E. B. Representative Bruce Williams of New Mexico, Senator Titus Bishop of LaVeta, and CWC President Harald Minkel. Right: all of the meals were well attended and afforded the opportunity for informal discussion.

(left) A group of others, at the annual convention, was well attended.

(right) The 28th Annual Convention of the Colorado Water Congress was well attended.
Utah's Citizens Authorize $335 Million

We laid out a 12-month plan to make certain everyone would at least know the facts, if they were at all interested. However, the program up until just weeks before the election, was low key. We increased our news releases, particularly to the rural areas and ran a public opinion poll in the two major population areas to identify geographical and ideological weaknesses. On the basis of the research data (incidentally, we had a 7% approval even at that time), we produced some targeted literature and mailed it to areas and to doctors, dentists, barbers — those who are likely to put the literature into their waiting rooms. We identified major influence areas and began a program asking for the opportunity to meet with the boards of directors and other leadership groups to present the CUP story. The pamphlet was for us. The county administrator's associations, bankers, contractors, labor groups, the Farm Federation, realtors, Chambers of Commerce, Urban City and County Councils and many others were surveyed. A 16-page, colorful, four-wheel-drive slide presentation and some maps were prepared which we took around to these meetings. We developed a list of key community leaders who didn't necessarily fit into these groups and made a point of meeting one-on-one with them. We planned a specific flight of the small community meetings and news blitz stories to correlate with the period just before the announcement of the election. Utah's governor (at that time, Scott Matheson) asked for an independent state study of the project. We worked with the governor on this with little success. We found we were being asked to keep them informed, educate if you will, about what we are going and why.

The elements of that on-going program have included:

1. New stories about every significant action of the CUP board, contract that is, project that is finished, etc. 2. At the same time, we have invited media representatives to all our meetings, responded to their requests open and honestly and invited them, when they are interested, to join us on tours around the project — made friends with them. 3. The project spans a broad geographic area and a very diverse population — agricultural, urban, mining communities, etc. We have, therefore, made it a policy to go with our board members from state to state to the community meetings and new blits in each area once or twice a year. When there, we meet with the county commissioners, the city council, the county engineer, the state senator, the state representative, the state commissioner of agriculture, the state highway engineer, the state treasurer, and the county auditor. We address the Rotary Club or the Chamber of Commerce. Then, between meetings, we call on the local newspapers and radio stations. 4. Since the project was in the legislative package, we have addressed federal, state and local legislators, state administration, federal agencies, and Washington delegation several times a year, usually during nice weather, when we invite VIP tours of the project, bringing them by bus and four-wheel-drive to see what is happening in the project and the good it is doing the communities. 5. We have a 19-person board, representative of the entire area served by the project. These leaders in their respective communities have also been very helpful in passing on the "good news" of the CUP. 6. Periodically, perhaps every 5 years, we have done a little public opinion research to discover how people are feeling about the project, and any areas of ignorance or misinformation that might hurt us. As the project moved through the years, we found we were not communicating well with the young people who had not been involved with the project from the beginning.

We believe the taxpayers have the right to know and we try to fill that need. Ignorance is our worst enemy, in the end. The second phase was quite different in many ways. Nearly two years ago the project managers became aware that it would be necessary to go back to the voters and ask for an additional contract authorization. As it turned out it was for an additional $335 million plus a possible 10 percent. Rather than wait until that time came, the CUP management came to us and asked us to augment their one-man staff especially to communicate effectively. We made it clear that we thought the public was "educated", i.e. ready for the election.

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Continued from page 1

As indicated, there is consistent with that plan. For that matter, how many times have recognized water leaders, such as Larry Sparks, responded to such admonitions by pointing out that the state does have a plan: the appropriation plan. And that under the "plan" the available supplies have already been spoken for by the people who were willing to invest of themselves in creating water supplies to meet the needs they foresee. The simple fact is that those who would develop grandiose "plans" at this point in our history, are, in truth really only saying that they want the state to develop grandiose plans themselves. Department bureaucrats manipulate the use of the private property of others. Fortunately our constitution protects us against that kind of expropriation of our property.

However, the simple fact is that the state has already spoken for by those who would benefit from such practices could have avoided to invest any of their resources in achieving such a result.

An examination of the validity of this premise demands but a brief review of all the pertinent arguments upon which it is based and therefore equally wrong.

The first shibboleth is that the system encourage its opponents to find a new meaning for the word "conservation." The word came to describe the perfect solution to all the water supply problems of the future. The concept was, not to capture and save erratic supplies when they occurred, but to develop a new source of water. The only problem is to require people to use less water so that it would reduce the need to manage the resource. It was a program for the management of people, not for the management of the resource. In its extreme, this concept embraces a basic value judgment that the highest and best values for the use of water are for purposes other than sustenance or a living environment made possible by having water available for irrigation of environmental amenities and food crops. But the value judgments which forged the new concept of "conservation" do not seem to be shared in common by enough of our people to be translated, through our democratic processes, into viable programs which have the support of legislative as well as judicial and executive branches of our government. As of now, such a coming together has yet to occur, which allows me to conclude that advocates of the new "conservation" ethic have chosen to attempt to influence regulatory agencies to accept and implement their views. Such efforts tend to subvert rather than strengthen the democratic process.

This is not to imply that the current system does not evolve new efficiencies and innovations. New agricultural approaches being considered in the Grand Valley of Colorado are designed to address the salinity issue and should result in efficiencies in water use. The new planting techniques being developed and the construction of low-loss systems are less water than those used in the past and this will result in lower municipal demands in the future. The exact amount of savings projected is subject to change, but the fact is we won't know until we have many more years of experience on which to base such projections. What we can be sure of is that technological developments and the realities of the marketplace will continue to create a beneficial result over time. But "counting those chickens before they hatch" can be risky; sound water supply managers must be careful and prudent.

In the meantime, while market forces work their way and until there are legislatively approved programs for the attainment of the new "conservation," the question is whether our legal system can provide a vehicle for attaining the objectives of those who support the new "conservation" ethic. We all agree, as was discussed earlier, that the rule of law prohibits waste. This shibboleth holds that owners of water rights are compelled to divert more water than that which is necessary to meet those changed deeds. For example, in 1958, the state supreme court found a new meaning for the term "conservation." It was a program for the management of people as well as resources. It was a program for the management of people as well as resources. The proponents of such values will have little trouble convincing the legislature to appropriate the necessary funds to make the state an able competitor in private water markets.

But it is argued that there is a major constraint on the free operation of the marketplace. It is the necessity for a purchased water right to be obtained in a judicial proceeding. Such a proceeding, if true, could be much more fairly and efficiently handled by the State Engineer. The thing I find curious about such a criticism is that it only hear it from people who are not actively engaged in buying and selling water rights in the marketplace. The people who are active in the marketplace are not out hearing the bushels for "reform." The very ones who have the most experience in the marketplace do not seem to find that.

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While the state's present in-stream flow appropriation program results in the creation of only very junior rights, there is no reason why the state cannot enter private markets and purchase more senior rights for any of the various uses which are socially desirable in the 21st century. To those who believe those values should be given a free ride, such a thought is anathema. But if those values are so universally accepted by a constituency that demands the expenditure of public monies to achieve them, the proponents of those values will have little trouble convincing the legislature to appropriate the necessary funds to make the state an able competitor in private water markets.

Before we ask our legislature to junk a working system we really ought to ask whether that system is as great a failure as it is claimed to be. Fortunately we don't have to rely on the unsubstantiated claims of the "reform" proponents to find out. We can look at statistics of actual water court experience and form our own judgments. Marcie Spelts and Ray Liesman, the equally fine referees in Water Division No. 1 recently took a poll of their colleagues in the other six divisions. They have created within the state.

... the occasional big, expensive case which is trotted out as an example of why the system is broken and needs fixing, is both complicated and expensive because parties chose to make it so.

The real question of whether a legal system fairly serves the need of the people who must use it can often be answered by asking, how many of those who use the system thought they had been unfairly treated that they had to ask a judge to correct the errors of the referee? Well, the statistics show that out of the 2,024 referee's rulings issued in that 18-month period, only 90 or just short of 25 percent of those cases were filed by the applicants themselves and went through the system without the involvement of any attorneys at all.

What about the contentions of the system? Well, only 46 or just a little over 14 percent of the cases had any opposition at all. That means that nearly 86 percent of them had no opposition as they went through the system to get their decrees.

The fact is that water users purchased 2,024 rulings, some on cases filed before July 1, 1984. How many of those rulings were handed down without the necessity of hearings to bundle the applicant? A spectacular 1,735, representing nearly 90 percent of the total. That left only 229 or 11 percent of the matters which required the referees to hold hearings.

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The genius of the system also allows the use of a very efficient method for real, locating that resource: the marketplace.

To the proponents of that new system, the proponents of "conservation" say that the marketplace is inherently inefficient. But it is argued that there is a major constraint on the free operation of the marketplace. It is the necessity for a purchased water right to be obtained in a judicial proceeding. Such a proceeding, if true, could be much more fairly and efficiently handled by the State Engineer.

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Meyers: Arizona v. California and Indian Water Rights

rule the Master adopted, it was the rule the Supreme Court affirmed, but no where did the Supreme Court say this is the only standard that will be applicable. But it seems to be now commonly thought by water lawyers, that PIA is the standard — and it certainly the one the government has been pursuing in the litigation of Indian water claims. Let me give you the defense for that standard as opposed to some of the other options that were presented to us. One option was that we would have an open-ended decree; as of 1960, when we wrote our report, that Indians need so much water, and when they think they need more water, they could apply at the foot of the decree, reopen the case, and get more water. We thought that was an unsatisfactory standard. From the point of view of certainty and of costs, that option was unspeaking. The second option we had was a fixed decree, qualifying foreseeable needs. We would look at the population, extrapolate the population growth, and so on and so on, and permanently fix the amount. That was regarded as unacceptable, because we did not think people could really foresee the future; it was obvious by a standstill measure. So the Special Master adopted a fixed standard, measured by evidence that the experts could bring forward, of practicably irrigable acreage. It was not very well applied in that case, but the fault is not necessarily that of the Special Master — it was the fault of the federal government, who asserting the PIA principle, had engineers draw red lines on maps saying this is what is practicably irrigable. I suspect that the Indians got more water than they deserved under that standard, because the standard really also contains an economic ingredient: without subsidy, how much water can this reservation use for growing crops? And from the economic standpoint, the Master included in his report one use but irrigation; the Master’s Report says that the water is not tied to agriculture. It is measured by agricultural needs, but it can be transferred to other uses and it can be transferred, with the consent of the Secretary, off the reservation. Then, you have on Indian reservations a quantified property right in water not all that different from a farmer’s property right in water in the state of Colorado, which is being sold every day.

One last point — of all the talk about what Indian water rights will do to non-Indian users — and there is no question but that they have the potential of inflicting great harm — but I will say two things about the compact. I think it’s clear that this is an uncomplicated right, not an inflected great harm. Everything goes on about the same way it did before, because Indian water rights can inflict great harm. It’s clear from the economic standpoint, that the compact will result in as much an appropriation from the federal government, or money from the private sector, to build works, and until they build works, they are in about the same position that the Upper Basin is in with respect to the Lower Basin — the water runs past the Indian reservation downstream to the non-Indian users.

Next, what did Arizona v. California do practically? It established the path for the Central Arizona Project, which is now on stream, as the Attorney General told us. It is on stream using water from the Upper Basin. It increased the demand on the system, and it put Arizona in a position to oppose any Upper Basin development, because if the Upper Basin ever uses its full allotment, under the Colorado River Compact, the lower basin might want to transfer water out of the Upper Basin to the Lower Basin. It doesn’t seem impossible to me, despite III(e) of the compact, that something might be done in the upper basin in the way of a public organization transferring water to the lower basin.

I see three alternatives facing the Upper Basin in its present situation without much federal support for agricultural and other water developments. You can do nothing. I don’t think I’m wrong, but I do disagree with the Attorney General and I don’t think the Upper Basin may want to consider in legislation seeking to authorize a public entity to transfer water out of the Upper Basin to the Lower Basin. It doesn’t seem impossible to me, despite III(e) of the compact, that something might be done in the upper basin in the way of a public organization transferring water to the lower basin.

Ross: Making Colorado a competitor in private water markets

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We do not have meaningful statistics on how many of those cases were actually tried by the courts during that 18-month period because during that period of time, the courts were also hearing a number of cases that had been filed before July 1, 1984. What we do know is that during that 18-month period the courts heard 144 contested cases. Again, the test of the parties’ acceptance of how well the court did its job may be measured by those cases which were appealed. There were 30, leaving a significant 134 or more than 87 percent satisfied that the water judges had not committed error in the handling of their cases. These impressive statistics tell me much more eloquently than the most reasoned arguments of the opponents of our system, that it is a viable, working system and that it produces the result the water users seek with a minimum of hassle and expense. It is important to remember also that the occasional, big, expensive case which is trotted out as an example of why the system is broken and needs fixing, is both complicated and expensive because parties chose to make it so. With a track record like the oneMarcie Spelts reports on, those cases are very clearly the exception rather than the rule.

These statistics hardly portray a bankrupt legal system. If anything they show that the system and the few people in it make it serve the needs of the people who must use it exceptionally well. Instead of junking the Adjudication system, let us go forward, only tinkering with it to fine tune it as may be necessary. If left alone, the property law system we cultivate the appropriation doctrine and the operation of the marketplace can help us solve the problems that changing water use needs will create in the 21st century. It can work and we should be proud that it can. Don’t let the ignorance and bias of the prophets of doom prevent the people of our state from making an imaginative use of that legal system.

Ros F. Ross is an attorney with Saunders, Ross and Dickson in Denver. This address was delivered at the 26th Annual Convention of the Colorado Water Congress on February 28, 1986.
GUEST EDITORIAL — REVISITED

A Message to Colorado

by Wayne N. Aspinall, 1896-1983

It is both stimulating and encouraging to one who has devoted over a half a century to the conservation and development of the water resources of my home State to observe the intense interest currently being shown in the water rights system in Colorado. This is a subject that is often discussed but seldom fully understood, even by those discussing it. Having reached the stage where the finite remaining undeveloped water supply in Colorado is approaching its limit — perhaps in the neighborhood of two million acre-feet, or less, in all five of the major river basins that originate in the State — it is timely and proper for our knowledgeable water people to begin thinking about constructive changes in the administration of water rights that might result in broader benefits to the people of the State from more efficient water resource management.

This guest editorial is addressed to the fact that, in the writer’s mind, there never has been, there is not today, and there never will be a status quo in the administration of water rights under the doctrine of appropriation. The old adage to the effect that we live in an ever-changing world certainly applies to the administration of water rights in Colorado.

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Colorado Water Congress
1300 Logan Street, Room 312
Denver, Colorado 80203

1982 Aspinall Message Still Good

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cipation. Because of its supereroded position all of its
major streams are interstate in character. Also, because of
its elevation, rugged topography, associated climate, etc.
Colorado lagged far behind the lower States in every river
basin in the establishment of modern civilizations, and,
consequently, in the prior consumptive uses of water.
Fortunately, the writers of the U.S. Constitution provided a
"Compact Clause" in that document under which sovereign
States are authorized to enter into interstate agreements for
settling disputes between and among themselves involving
the division of the use such vital resources as water. Under
the Colorado doctrine, had it not been for that provision in
the U.S. Constitution, Colorado might have found the great
bulk of her water appropriated for use in as many as eighteen
other States before she had a chance to put it to beneficial
consumptive use.

Colorado is now a party to nine interstate water compacts.
It is noteworthy that these contracts were not attained until
conditions had reached the point where interstate negotia-
tions resulted in about 70% of the water originating in our
State must pass downstream for use in other States. One
should now be able to expect that under these compacts
Colorado would forever be protected against adverse posses-
sion of the use of her waters by other States. This may or
may not prove to be a reasonable expectation.

In view of the many changes that have occurred during
the past 60 years, and so far as interstate relationships are
concerned, it is mandatory that Colorado recognize the
potential dangers that exist in unconfessed reliance on
interstate compacts alone. One must face the realities that
Colorado's relationships with downstream States have two
very important facets. One of these facets is contractual.
The other is political.

The contractual relationships are best illustrated by the
agreements consummated in the terms of nine interstate
compacts. There is nothing wrong with a well-written con-
tact or compact per se. The troubles involving compacts
arise over the various interpretations of their terms. At this
point we encounter political relationships.

In the political arena the existence of interstate river com-
pacts has not always been used to the benefit of Colorado.
In spite of the fine language utilized by capable negotiators
in the past in writing compacts, the documents are suscep-
tible to different parties under different political situations
at later times. An excellent example is the 1922 Colorado
River Compact. In the 1950's California bitterly opposed
the construction of water development projects in Colorado
on the grounds that under her interpretation of the compact
there was insufficient water in the river to fill Colorado's
share, and that the upper basin States should bear all of the
shortage in water supply as part of their compact allocation.
Arizona and California endeavored to interpret the compact
in such a way that Colorado and the other upstream States
would be charged with all of the shortages in water supply
plus the delivery of one-half of the United States annual
contribution obligation to Mexico (not one-half of any deficiency
as stated in the compact) plus losses in the river to make the
Mexican water delivery. Other examples could be cited
— some having the apparent concurrence of the federal
Government.

Colorado must heed those warning flags that have been
hoisted in her face, particularly those related to the interpre-
tations of the compacts and river operating criteria that were
incorporated into law to protect the water resource interests
of Colorado. Our State's rights to the use of water under
the compacts are slowly and surely being eroded away by
the superior, united political power of Arizona and Califor-
nia, sometimes aided and abetted by the federal government,
which is also influenced by political pressures.

At times in the past Colorado has been reluctant to cross
swords with the Secretary of the Interior and the lower basin
States of the Colorado River, fearing that to do so would
jeopardize the authorization of projects or the appropriation
of federal construction funds because of the superior political
power of Arizona and California. That day is now past.
Neither Congressional authorization of new projects or the
appropriation of funds by the Congress appear on the horizon.

Colorado now has to stand on her own legs. She can do
it. First and foremost, and almost as an emergency, we must
develop a firm position with respect to a water conservation
and development program for the State. For success in meet-
ing assaults on our compacts and the protection of the use
of Colorado's remaining water resources there is a funda-
mental prerequisite that must be met. That prerequisite is
the formulation and adherence to a unified course of action
by all Colorado water interests at the local, regional, and
State levels, and hopefully at the Congressional level. Only
through this type of action will outsiders become cognizant
that Colorado sincerely places the high value on water that
is expressed in her rhetoric.

Colorado get busy!