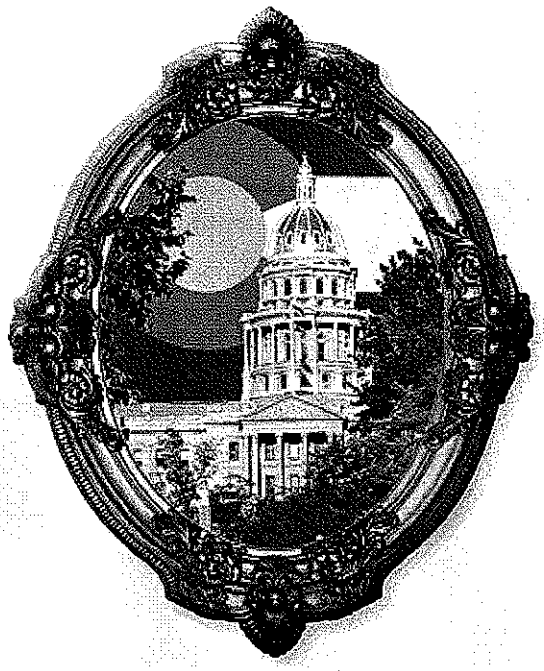
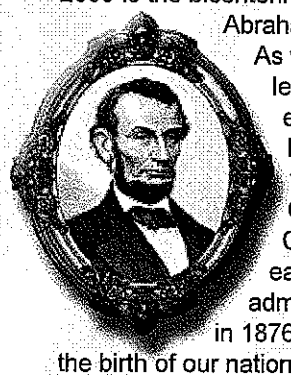
*By Justice Gregory J. Hobbs Jr., Colorado Supreme Court*



# COLORADO: CENTENNIAL STATE AT THE HEADWATERS

## Our Lincoln heritage

2009 is the bicentennial year of Abraham Lincoln's birth. As we honor his legacy of liberty and equal justice under law, it's a good time to recall that Colorado is the Centennial State, earning that status by admission to the Union in 1876, 100 years after the birth of our nation under the Declaration of Independence.



Fifteen years earlier, at the outset of the Civil War in 1861, Congress carved the territory out of the great sweep of the Continental Divide. The territory's initial responsibility was to guard the newly discovered gold fields against the Confederate army marching up the Rio Grande from Texas. At Glorieta Pass outside of Santa Fe, this was accomplished when the Colorado Militia under Colonel Chivington won victory from the high ground.

This helped free Lincoln for the rest of the fight to hold the Union together. While a Congressman, he had opposed the Mexican War, fearing that inclusion of so much more territory into the United States would only work to expand slavery. He was right.

With the addition of the Southwest into the Union by the 1848 Treaty of Guadalupe Hidalgo, the slave holders drew a bead on a southern route for the transcontinental railroad they hoped would open up new territory for them. Sen. Thomas Hart Benton of Missouri sent his son-in-law, John C. Fremont, into Colorado that same year to scout a route up the Arkansas River across the San Luis Valley and through the San Juan Mountains. Warned of an early winter by mountain men at Bent's Fort, Fremont tragically attempted a December crossing, losing 11 men to the teeth of a raging high country blizzard but he escaped to Taos.

The howling storm of the 1850s over the expansion of slavery into the newly acquired western country propelled Lincoln to the presidency. The Kansas-Nebraska Act of 1854 allowed the settlers to vote for or against slavery in each territory, repealing the 1820 Missouri Compromise that had limited slavery's extension. Lincoln condemned the U.S. Supreme Court's 1857 Dred Scott decision for "blowing out the moral lights among us." Fueling the coming conflagration, the Court prohibited Congress from prohibiting slavery in the West.

In 1860, Lincoln campaigned on a western settlement platform favoring the Homestead Act, the Railroad Act, and establishment of the land grant colleges. The Union Congress of 1862 adopted all of these. Lincoln's resolve to hold the Union produced the Civil War Amendments applicable to the states. The Thirteenth Amendment prohibited slavery and all forms of servitude, except as punishment for crimes. The Fourteenth Amendment guaranteed due process and equal protection of the laws. The Fifteenth Amendment prohibited denial of the vote based on race or previous condition of servitude.

Colorado's admission as the Centennial State heralded all of these pursuit-of-justice advancements. Our legacy of creation also includes becoming the headwaters of the four great rivers, the

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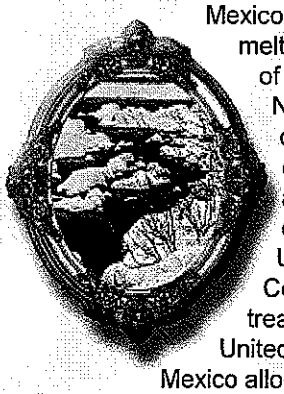
## Colorado's winter snow and springmelt law

Eighteen states and the Republic of Mexico rely upon spring melt from the snows of Colorado winters. Nine interstate compacts, two equitable apportionment decrees of the U.S. Supreme Court, and two treaties between the United States and Mexico allocate the waters of the Great Divide. As a result, Colorado has two primary duties: to deliver almost two-thirds of these waters outside of the state and to make the optimal use we can of the one-third we are entitled to consume.



With its roots in the farms needed to feed the miners and the growing communities arising on the plains, Colorado staked its water law upon the framework of open access and opportunity. Drought, the recurring type long experienced by Native Americans and Hispanic peoples of the Southwest, was occurring in the 1860s and 1870s at the same time Colorado was formulating its water principles. Supply was scare; the potential for monopolization by land speculators was great.

Small farmers feared that corporations would tie up the water supply. This was entirely possible. Under the common law of the eastern United States and England, only riparian landowners along the watercourses were entitled to use the water flowing by their property or lying beneath it. But much of the potential cropland of Colorado available for settlement under the federal land law lay away from the rivers.

In its first water act, the Territorial Legislature broke in 1861 from riparian water law. Colorado guaranteed farmers two fundamental rights: the right to make an actual beneficial use of water needed for irrigation of their lands, and the right to build, maintain, and operate a water ditch across the lands of others lying between them and the river.

The actual beneficial use requirement was antispeculative and antimonopolitic in character to stop riparian land holders from blocking access to water. Only those who had proven need for the water could obtain water rights. In light of scarcity, the Territorial Legislature of 1864 directed administration of water rights to occur based on prior appropriation. This simply means that those who have relied on an actual use of the water earlier than others have the better right of access to water in times of short supply.

The Colorado Constitution of 1876 and subsequent acts of the General Assembly embody these enduring water principles:

- the public always retains ownership of all types of water in Colorado;
- private persons and public agencies may obtain water rights for actual beneficial use;
- the water officials must administer water rights to natural stream water, which includes tributary groundwater,

in order of decreed priorities determined by the courts;

- a private right of condemnation exists, with payment of just compensation, to build, operate and maintain the necessary diversion, transport, and storage structures upon the private lands of others; and
- the streams and aquifers may be used to carry and store water in the exercise of water rights. These principles are collectively known in water law as the "Colorado Doctrine."

## The farms, the cities, and the environment

Colorado as we know it today is a far different place from its Civil War origination. Yet it's virtually the same. Mountains, plains, mesas, and canyons make this place a treasured homeland for 5 million persons now, and more are on their way.

Reflecting a changing population and economy, Colorado's water law has fostered the establishment of many uses, far more than the initial agricultural law. The cities have grown out of the farms. The environment, pinched by taking water out of the streams, now commands instream water rights under new statutes for the environment and recreation because we want it that way.

Colorado has learned to share the water resource with Indian tribes, federal agencies and other states, not because we volunteered, but because the law and good practice commands. The Union comprises more than one state, the public owns the water resource and we are part of the public that owes duties and enjoys benefits in relation to each other. Our antimonopolistic, antispeculative water law, together with prior appropriation administration, turns out to be surprisingly flexible while maintaining stability.

Because Colorado's water law recognizes water use rights as property rights in the courts and enforces them on the ground through water officials, we have a water market that has been active in Colorado since the early 1890s. The City of Colorado Springs first tested successfully in the Colorado Supreme Court the proposition that senior water right agricultural priorities could be changed to other uses, including cities and, now, in-stream uses for fish and recreation.

The necessary protection is that injury to other water rights must not occur in the changing; so we require quantification of the actual historical consumptive use of the water right based on a representative historical period of time, and we require maintenance of return flow patterns from first use of native in-basin water that other water rights depend upon for their supply. Water imported from out-of-basin sources or groundwater unconnected to the native basin stream system may be used and reused to extinction.

The antispeculation legacy of Colorado water law applies not only to agricultural water rights, but to municipal water rights as well. We know this from recent Colorado Supreme Court water cases.

The *High Plains* decision prevented a group of investors from changing one-third of the mutual ditch shares of the Fort Lyon Canal, a lower Arkansas River ditch and reservoir company, from agricultural to municipal use. The application did not specify where the water would actually be used. In effect, the proposal sought to commoditize the water rights and sell them anywhere along Colorado's populous Front Range in the future. But, Colorado water law requires a change of water right application to specify where the water will actually be used following the change, in order to verify that this portion of the public's water resource is entitled to continued recognition of its preferred senior priority status.

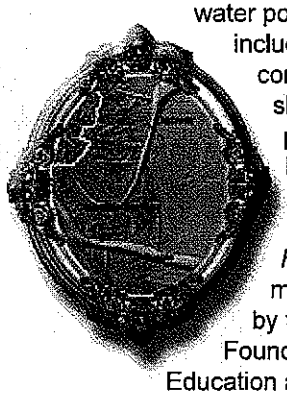
The *Pagosa Springs* decision prevented two water districts from cornering a 100-year supply of unappropriated water in the San Juan River. Although municipalities are allowed to plan for reasonably expected population growth, they have only a limited exception from the antispeculation doctrine that applies to private persons. A governmental entity has the burden of satisfying three elements demonstrating its intent to make a nonspeculative conditional appropriation: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply. The Supreme Court relied on a prior case identifying 50 years as a reasonable planning period based on the facts in evidence before the water court.

The Supreme Court listed pertinent factors to include in the water court's analysis: (1) implementation of reasonable water conservation measures for the planning period; (2) reasonably expected land use mixes during that period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes for that period; and (4) the amount of consumptive use reasonably necessary for use through the conditional appropriation to serve the increased population.

Colorado water law provides for broad standing so that members of the public can require water court applicants to meet their burden of proof. The opposer in the *Pagosa Springs* case, Trout Unlimited, expressed its interest in keeping unappropriated water in the river, so that other recognized beneficial uses, such as Colorado Water Conservation Board in-stream flows for preservation of the environment and local government in-channel recreational diversions for rafting and kayaking, could claim and perfect water rights for a portion of the remaining unappropriated water in the San Juan River.

## Innovation compelled by scarcity

Enduring characteristics of Colorado water policy and law include scarcity, competition, and sharing of a precious and limited public resource. Two recent issues of *Headwaters* magazine, published by the Colorado Foundation for Water Education and available at *www.cfwe.org*, focus on contemporary manifestations of these themes: "Colorado's Water Supply Future" and "Administering Colorado's Water Resources." The first of these highlights the basin-by basin and interbasin roundtable discussion and planning process, coordinated by Colorado's Department of Natural Resources. The second emphasizes the critical role of the state engineer and local water commissioners in monitoring stream and aquifer conditions, enforcing Colorado's law of water use rights, and keeping Colorado in compliance with the interstate compacts and U.S. Supreme Court equitable apportionment decrees.



In the midst of the early 21st-century drought, one of the most severe in the history of the Southwest, innovation proves to be a hallmark. New statutes adopted by the Colorado General Assembly allow for these significant innovations, among others: in-channel recreational water rights; crop rotational management plans for lease of water to cities and the environment as an alternative to permanent dry-up of agricultural lands; temporary change of water right and substitute supply plan approval by the state engineer while change of water right and augmentation plan applications are pending in water court; review of water quality impacts and in-lieu payment for 30 years of lost tax revenues in connection with permanent water transfers of more than 1,000 acre feet out of a county; tax credits for donating senior priority water rights for enhancement of the Colorado Water Conservation Boards in-stream flow program; and coordination of land use decision-making with water supply availability.

The integration of tributary groundwater and surface water, required by Colorado's prior appropriation system under the State's constitution and the 1969 Colorado Water Right and Administration Act, continues to measure our commitment to stable, principled, and resilient decision-making. Colorado has led in recognizing the natural law of stream and aquifer interconnection in the creation and enforcement of water rights. Persons with junior well rights cannot simply pump and cut off the supply of water upon which senior rights for traditional as well as the new in-stream flow rights depend. They must replace their injurious depletions with a like amount of water at the time, place, and in the amount and quality necessary for the senior's use.

The development of real-time stream monitoring, river basin regulations, and publicly accessible and useable hydrologic models — an effort under way but strapped by the need for funding — deserves the immediate attention of local, state, and federal government, along with water supply and environmental interests at all levels. Studies show climate change may reduce the availability of Colorado River water by 10 to 20 percent. We have been depending on our remaining undeveloped allocations under the 1922 and 1948 Colorado River Compacts.

Knowing what the water resource actually is can only lead to more informed decision-making. Contempt and ignorance make for manifest injustice. Our constitutional First Amendment right guarantees a plethora of voices. We have heard many voices at work in our watersheds loud and clear in the most recent years. Our state has joined in settling the water rights of the Southern Ute and Ute Mountain Ute tribes, and the filling of the Animas-La Plata Project for them and the Navajo Nation commenced this spring. A decree for the federal reserved water right of the Black Canyon of the Gunnison National Park is now in place, due to another settlement. A feature of that decree protects in-basin ranching and municipal water diversions above Blue Mesa Reservoir.

For the timely, fair and effective disposition of water cases, the Colorado Supreme Court has adopted a revised set of rules, effective July 1, 2009. New water court forms and a guidebook to assist nonlawyers are available on the Colorado Judicial Branch Web site at *www.courts.state.co.us* under "forms" and "water courts."

A multitude of local governmental entities exist to supply Colorado citizens and businesses with the water they need. Conservation and demand reduction measures of all types will be required, along with good planning, shared infrastructure investment, and new waterworks. Important and crucial decisions are pending.

Because water is short and the need great, we have always depended on one another.

*Justice Hobbs was appointed by Gov. Roy Romer to the Colorado Supreme Court on April 18, 1996, and retained twice by Colorado voters for 10-year terms. He practiced law for 25 years, with emphasis on water, environment, land use, and transportation. He currently serves as vice president of the Colorado Foundation for Water Education and co-convenor of Dividing the Waters (Western Water Judges Project). He is also the author of* In Praise of Fair Colorado, The Practice of Poetry, History and Judging *(Bradford Publishing Co. 2004);* Colorado Mother of Rivers, Water Poems *(Colorado Foundation for Water Education 2005); and* The Public's Water Resource, Articles on Water Law, History, and Culture *(Continuing Legal Education in Colorado, Inc. 2007).*