

The Great Western Water Fight John Cope

Wallace Stegner's rich and multifaced term for the American West--"the geography of hope"--is as charged with meaning now, as it was during earlier decades of Stegner's life and writing. On the manic side of his equation is hope: "...the West at large is hope's native home, the youngest and freshest of America's regions magnificently endowed with the chance to become something unprecedented and unmatched in the world." On the depressed side of his equation, is the unforgiving geography of the Desert South-West continually at war with the irrepressible hope of making the desert bloom. This side of the equation accounts for Stegner's despair as he contemplates the desperation and foolishness of water policy west of the hundredth meridian: "...neither nostalgia nor boosterism can any longer make a case for it [the West] as the geography of hope."

In Colorado, at the beginning of the 21st Century, as growth on the Western Slope begins to mirror growth on the Front Range, Stegner's "geography of hope" seems as laden with possibility and hope and yet as replete with danger and potential despair as it was 100 years ago before the Colorado River was tamed, dammed, and made to flow on demand:

Shall the Front Range, like Los Angeles, in the 1920s, accelerate its growth with water appropriated against the will of citizens from rural areas such as the Western Slope where much of the water used on the Front Range is generated? Shall growth in Western Colorado and the water which sustains it be preempted by the larger and earlier thirst of the Front Range, as is now the case in Summit County? Or shall the Front Range, unlike Los Angeles, be required to provide for its future water needs with planning, cooperation among municipal and agricultural users, conservation, advanced technology, political and economic savvy about the needs of all regions of Colorado, as well as with environmental conscience and know-how?

On the side of hope is the Metropolitan Water Supply Investigation released in January of 1999. Under the auspices of the Governor's Office and the Colorado Department of Natural Resources, the MWSI resulted from Governor Roy Romer's concern that the EPA's veto of the Two Forks Dam project might be read as handwriting on the wall for any further plans for trans-mountain diversion in Colorado.

In the process of completing the Metropolitan Water Supply Investigation, the Front Range Water Forum brought order to the 30 or more previously independent water supply agencies on the Eastern Slope and began a process of addressing future Front Range water needs with dialogue, cooperation and reason rather than with the more traditional six gun of Colorado water law-- which says, essentially, that anyone who gets there first and has the money to move it gets it. One hopeful conclusion of the MWSI is that with appropriate planning, cooperation, conservation and technology, the Front Range may be able to meet its future needs without further trans-mountain diversion --and without the expense of continued litigation or the estimated one billion dollars it will cost to construct

another trans-mountain delivery system.

On the side of despair is the fact that not only does the Front Range already divert 510 000 acre-feet (just under two full helpings the size of the Dillon Reservoir) of water per year from the Western to the Eastern Slope, but Arapaho County continues to pursue the Union Park project-- in open defiance of processes pursued and conclusions reached by the Front Range Water Forum as it conducted the MWSI. Already, at least five Colorado valleys--Middle Park, South Park, the Blue River Valley, the Williams Fork and Roaring Fork on the Upper Colorado have lost up to three-fourths of their water to cities on the Front Range. Altogether, existing trans-mountain diversion has reduced the flow of water in the main stem of the Colorado River by roughly 20 percent.

Union Park is now before the Colorado Supreme Court. It is a plan to divert 100,000 acre feet (20 billion gallons or about 40% of the capacity of Dillon Reservoir) from the headwaters of the Gunnison east to the Front Range each year. Nine years ago the people of the Gunnison Valley successfully argued in a Colorado water court that there is not enough unappropriated water in the Upper Basin of the Gunnison River to enable Union Park to proceed. Arapaho appealed the decision to the Colorado Supreme Court, which sent the case back to the original water court, asking the judge to remove from his consideration all conditional water rights and to focus his attention on historic uses of water as opposed to absolute rights that have been decreed but not used. Again, the judge denied that there is enough unused water in the Gunnison Basin to enable the Union Park to go forward. And again, Arapaho County appealed. Each trial has cost the people of the Gunnison Valley about one million dollars and proponents considerably more.

Ascending from these main-stream water issues which run through Colorado's "geography of hope" are three tributary issues which add turbulence and power to the main-stream. These tributary issues make up the key items of Gunnison Basin POWER's agenda.

All three of these tributary issues arise from the belief that Colorado water law-- as noted on the last page, rests on the rule that anyone who gets there first and has the money to move it, gets it-- cannot ever answer the moral, political, economic or environmental questions which have touched off the controversy over trans-mountain diversion. From this perspective, the **principles** underlying the controversy--principles arising from the life-style and economy of the entire state as well as the extraordinary mountain and desert environments upon which much of the economy and most of the life-style are based--are outside the precincts of water law.

Furthermore, POWER argues, even within the confines of Colorado water law, no permanent resolution of the Union Park case, let alone any permanent resolution of the trans-mountain diversion controversy, is likely. This conclusion seems justified first because--in spite of the legal principles of res adjudicata and collateral estoppel, which

prevent courts from reconsidering principles that have already been decided--legal arguments in Colorado courts can go on interminably so long as attorneys are able to show that new arguments are ever so slightly different from old ones. It is also true because down-stream states and the Federal Government have the power to overrule water policies and decisions made within Colorado so long as those policies and decisions affect water supplies down stream.

In the light of these conclusions, POWER takes the position that the people of the Gunnison Valley and Western Colorado should not limit their battles with the Front Range over trans-mountain diversion to one theater--Colorado water courts-- but should expand the conflict into other forums where underlying principles **can** be debated and where there is a chance of achieving a final resolution.

Accordingly, POWER has chosen to examine Union Park and the trans-mountain diversion controversy in the larger context of regional politics and water management--leaving the legal battle against Union Park now smoldering in Colorado water courts to our local water district and their attorneys. This approach has yielded three clusters of ideas: 1. Water Shortages in the Colorado River Basin, 2. Management of the Aspinall Unit and 3. Watershed planning.

Water Shortages in the Colorado River Basin

The key to POWER's argument about shortages in the Colorado Basin is that during most years, there is not enough water in the Upper Basin of the Colorado to (1) supply citizens of the Upper Basin with water appropriated to them by the Colorado River Compact (2) to divert any more Colorado River water to the Front Range and (3) to fulfill Colorado's obligations to down-stream states. From this perspective, Union park and/or any further plans to divert Colorado River water to the Front Range are at grave risk of provoking down- stream states of Arizona, California and Nevada to demand more rather than less water for themselves and, in the process, make less water available in Western Colorado.

One method for making such a demand might be to use the existing Compact to argue that during most years, Colorado fails to meet its Compact obligations. Such a conclusion requires a stricter interpretation of the Compact than the one which is currently being used to allocate water but one that POWER believes to be more defensible and rational than the one now in place.

In particular, the stricter interpretation involves section III (b) of the Compact, which states: "In addition to the apportionment in paragraph (a) [7.5 million acre feet per year which the Upper Basin provides to the Lower Basin] the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per anum."

Although present policy is based upon the assumption that the additional one million acre feet may be taken from Lower Basin tributaries--primarily from the Salt and the Gila-- POWER believes that, at best, such an assumption rests upon a gentlemen's agreement. It is not a written document that Lower Basin states have signed or POWER believes, would ever be willing to sign in the future. If successful, this tactic to reinterpret the Compact could mean that Front Range grabs for more water will result in less water for all of Colorado.

Another method might be for down-stream states to claim Colorado's continuing attempts to remove more and more water from the Colorado Basin as sufficient cause to rewrite the Compact altogether. Sections III, V, and IX of the Compact clearly provide them with that option. In such a case, they would most likely argue that water shortages and growing populations in the Desert South West, together with the greater wealth produced by Colorado River water in the Lower Basin than in the Upper Basin, to be more than enough justification for allotting themselves even more water than the existing Compact gives them.

Finally, should anyone doubt the outcome of an Arizona-California-Nevada coalition to reinterpret or rewrite the Compact, down stream states might pull out the stiletto of last resort by referring any Colorado River dispute with Colorado to the U.S. Congress--an option the Compact also gives them. California alone has 56 representatives in Congress; Colorado has 5. The Lower Basin is home to 3 Supreme Court Justices, Colorado home to none. Predicting the outcome of such a donnybrook does not require a crystal ball.

And why, POWER's Steering Committee has been asked, is it necessary to take such a suspicious view of Colorado's western neighbors? Our reply: The slogan, "Whiskey's for drinkin'; water's for fightin'." is just as true in Arizona, California and Nevada as it is in Colorado. Why should we expect our neighbors to the west-- who have chosen to locate tens of millions of people in a desert that cannot support them without water imported from someplace else-- be expected to act any differently than Colorado's own citizens on the Front Range who have appropriated Western Slope water in the past and show every sign of continuing to appropriate it in the future against the will of citizens who have chosen to live in a less urban and more natural environment?

While the Union Park case and the threat of trans-mountain diversion show little hope of being permanently decided in Colorado water courts, they are **exactly** the kind of water issues which in the past have been resolved with resounding finality in federal courts--in every case against Colorado (Kansas vs Colorado [in two separate cases] Nebraska vs Colorado, New Mexico vs Colorado , Texas vs Colorado and Wyoming vs Colorado). POWER has explained this cautionary interpretation of Colorado's relationship with its western neighbors to Colorado water districts, water managers county commissioners,

state senators, representatives, and the Attorney General in the hope that dangers inherent in further plans for trans-mountain diversion might be addressed within Colorado prior to the fateful time when down-stream states mount the arguments in deadly earnest. So far, POWER has received no indication that agencies or officials within Colorado are willing to consider the matter.

Management of the Aspinall Unit

As POWER has become aware of the claims upon water flowing west from the Aspinall Unit, it has gained yet another perspective which leads us to conclude once again: There is no extra water for further trans-mountain diversion.

First off, the Bureau of Reclamation--which manages the Aspinall Unit--is committed to generating hydro-electic power and through its marketer, the Western Area Power Administration, distributing that power through a 15-state grid. The Bureau is committed to sending every drop of water it can get its hands on through its turbines.

The Bureau of Reclamation must also honor the claims of the Uncompahgre Water Users who have an old irrigation right to divert 1175 cubic feet per second during the irrigating season (March through November) through the Gunnison Tunnel, below the Black Canyon. The Uncompahgre Water Users also have an additional right to 1135 cubic feet per second for purposes of generating hydro-electric power at its proposed AB Lateral Project, near Montrose. The sum of these rights is in excess of 650,000 acre feet per year--more than two thirds of the volume of Blue Mesa Reservoir and almost two-thirds of the yearly flow of the Gunnison River measured at the Crystal Dam.

Furthermore, the Bureau of Reclamation must accommodate the water rights of the Black Canyon National Monument which has an old right to something approximating the entire flow of the river during spring as a way of scouring out the Canyon and, in the process, preserving the qualities of the Canyon which account for its having been designated a National Monument in the first place (March 1930). Though not yet quantified, the enormous water rights of the Black Canyon are estimated to require about the same flows in spring as the endangered humped backed chub and the Pike minnow for which the U.S Fish and Wildlife Service claim water rights under the Endangered Species Act.

Factor into these uses of water flowing west, the 60,000 acre feet per year which the Federal Government gave the people of the Gunnison Valley in exchange for their permission to construct the Aspinall Unit during the 1960s. This 60,000 acre foot subordination--given to the people of the Gunnison Valley as protection for future development in the valley-- has been agreed to by the Bureau of Reclamation and by the

Upper Gunnison River Water Conservancy District. Though a written contract between the BOR and the Upper Gunnison River District has, unfortunately, not yet been signed by the BOR, Judge Brown, in whose court the Union Park trials have been conducted, has given full recognition to the 60,000 acre foot agreement.

Add to the sum of these claims the requirements of the Redlands Dam, located on the Gunnison just before it joins the Colorado-- which uses roughly 750 cubic feet per second to generate power-- and the U.S. and Wild Life Service's fish ladder appended to the Redlands Dam-- which uses 300 cubic feet per second --and you end up with considerably more demand than water supply.

If proponents of further trans-mountain diversion in Colorado persist in their demands, they have an unparalleled opportunity to test their metal with really big and powerful opponents such as The Bureau of Reclamation, the Western Area Power Administration, the U.S. Park Service, the U.S Fish and Wildlife Service, and the Uncompahgre Water Users Association--who don't get along too well with each other let alone with a new kid who wants to stick another straw in the cup.

Watershed Planning

In the Gunnison Valley a process similar to the one used by the Front Range Water Forum to grapple with the reality of Front Range water supply and demand and to publish its findings as the Metropolitan Water Supply Investigation is just beginning.

In our valley the process is called "watershed planning." The idea is to find out as precisely as possible how the quality of life in our valley is determined by our water. We want to know who makes a living by using our water and what the water is worth in the valley's economy. We already know how our ranchers use water to contribute to the economy and how, in the process, they have made the valley as beautiful and as undeveloped as it is. We need to know about other water users and their part in the economy. We also want to know who uses our water for recreation and what monetary, moral and political opportunities they place upon these opportunities--fishing, boating, rafting, skiing, show shoeing, hiking, mountain biking, hunting, among others. We want to know who lives in the valley or visits it because of the aesthetic and spiritual draw of its mountains and wild areas which, without our water, would resemble the surface of the moon.

POWER believes that all of the valley's citizens whose lives are significantly influenced by its water need to participate in watershed planning. The process must include all constituencies: towns, state and federal agencies who operate here, all businesses which

use or rely on our water, all agencies trusted with the management of water, all political action groups concerned with its fate, all clubs and recreational organizations whose activities depend upon it.

When, in the not-too-distant-future, the moral, political, economic and environmental issues which underlie the trans-mountain diversion controversy finally make their way into the light of state-wide public debate--as they are certain to do as Colorado's economy grows ever more dependent upon recreational uses of water such as rafting, fishing, boating, skiing, hiking, mountain biking and sight-seeing--then watershed planning will have prepared the Gunnison Valley to make its very best argument and, in the process, help to persuade **all** the people of Colorado to protect and shepherd the water resources upon which their livelihood and life style depend. Then, perhaps, all of Colorado can share in nurturing the hope and eliminating the despair inherent in Stegner's prophetic phrase, "the geography of hope."

References

Stegner's ideas about "the geography of hope" are from David Rothman's marvelous introduction to The Geography of Hope: Poets of Colorado's Western Slope, Conundrum Press, 1998.

Dick Bratton's keynote address to the 1999 Colorado Water Workshop entitled Appropriation doctrine Meets Miss Manners: Can Social Conscience Be Developed Within the Appropriation Doctrine? and George Sibley's guest editorial in the Aug. 15, 1999 issue of The Denver Post provided information about the Metropolitan Water Supply Investigation.

Butch Clark's seemingly limitless knowledge about all things aquatic supplied many of the factual details, especially the numbers.

Pete Klingsmith, Chair of POWER, is the primary source for POWER's arguments dealing with shortages in the Colorado River Basin.