

Colorado

Stream Lines

QUARTERLY NEWSLETTER OF THE OFFICE OF THE STATE ENGINEER
COLORADO DIVISION OF WATER RESOURCES

VOLUME II NUMBER 1

MARCH 1989

WATER COURT NEWS

By Joseph Grantham

The Colorado Supreme Court issued decisions of interest in December and January. Those cases were People v. Plank, Case No. 86SA346, State Engineer v. Milne, Case No. 87SA196, and Talco, Ltd. v. Danielson, Case No. 87SA50.

The Plank case involved an appeal by the State Engineer of a ruling issued by Judge Ogburn, Water Judge for Water Division III, in which he ruled that section 37-92-503(1)(b), C.R.S. (1973) was unconstitutional. Section 37-92-503(1)(b) provides for the award of attorney's fees to the State Engineer by a person or entity who violates an order of the State Engineer. Judge Ogburn had ruled that the statute was unconstitutional because the law failed to allow for attorney's fees to be awarded to the person or entity who allegedly violated the order of the State Engineer, should the State Engineer's order be found to be unlawful. Therefore, the Judge argued, equal protection of the law and equal access to the courts was denied.

The Supreme Court disagreed and reversed Judge Ogburn in its ruling stating that the statute in question was constitutional because "[i]n the absence of a statutory infringement on a fundamental right or the creation of a suspect class...equal protection of the laws is satisfied if the statutory classification has a reasonable basis in fact and bears a rational relationship to a legitimate government interest." The statute in question is reasonably related to a governmental interest and has a rational basis, therefore, equal protection of the laws was not denied. Also,

under the same rational basis test, the lack of an equal opportunity to recover attorney's fees did not deny the defendant equal access to the court.

In the State Engineer v. Milne, the Supreme Court once again reversed Judge Ogburn and held that an application for conditional water rights was denied because the application was not properly supplemented by valid well permits. See Kenneth M. Good Irrevocable Trust v. Bell, 759 P.2d 48, (Colo. 1988). In this case the wells were constructed and the applicant claimed that he had filed a statement of beneficial use prior to expiration of the permit with the State Engineer's Office. However, the court found that this alone did not constitute beneficial use. The real question centers around whether the applicant has in fact put the water to a beneficial use. Mr. Milne merely test pumped the wells and this in itself did not constitute beneficial use. Therefore, if there is no beneficial use, the permits were properly expired and the application was dismissed.

In Talco, Ltd. v. Danielson, Case No. 87SA50, the court found that Judge Brown, Water Judge for Water Division No. 4 (Gunnison Basin) properly dismissed applications for reasonable diligence and partial change in point of diversion

where a test well was relied upon to support the diligence claim. In this ruling, the court stated that the test well was not adequately related to the proposed appropriation because the original decree limited the applicant's diversion to surface waters from a stream. The water right was therefore abandoned, and the request for the partial change in point of diversion was denied.

COLORADO GROUND WATER COMMISSION WINS ENFORCEMENT ACTION

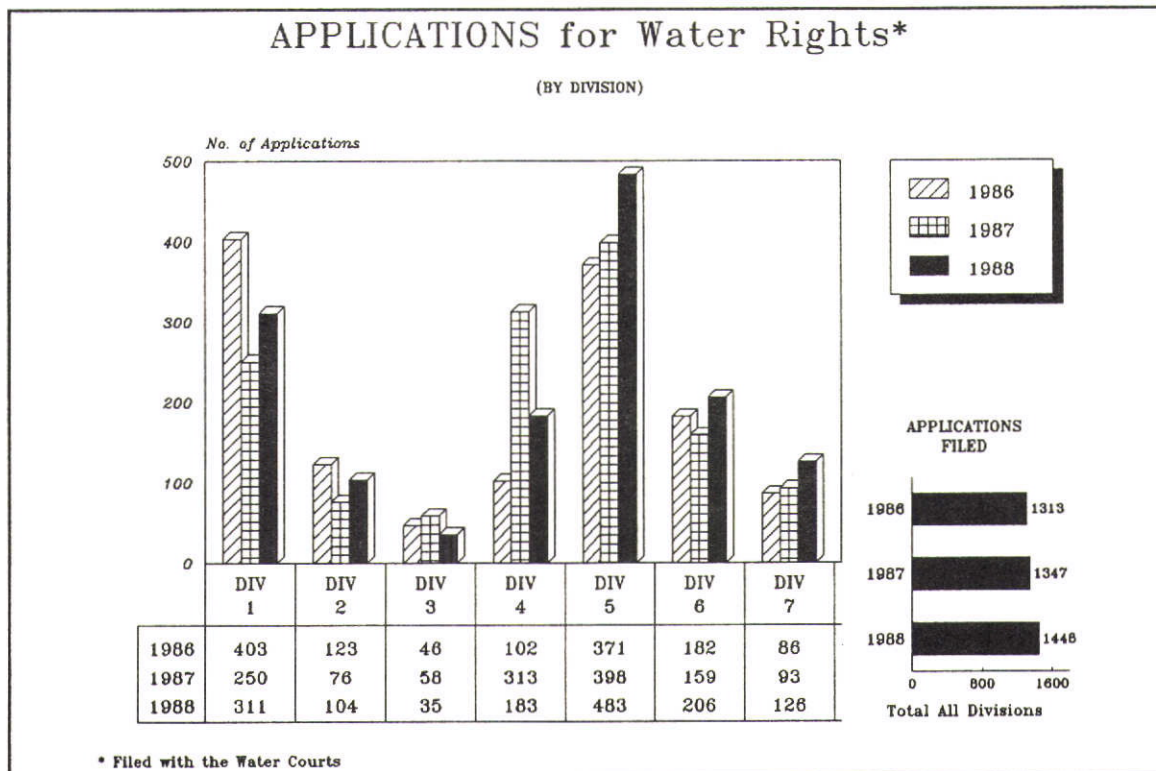
In the District Court for Yuma County, the Colorado Ground Water Commission brought Loren Dickson and Sons, Inc. before the court for violations of a previously issued order in which the Dicksons were enjoined from irrigating more than the 160 acres and utilizing more than 400 acre-feet of water to irrigate the lands in question. Mr. Dickson was found in contempt of court and ordered to pay a fine of \$23,309.50, which represented the value of the crop illegally irrigated. The funds collected will be used

exclusively for further enforcement proceedings with the Central Yuma County Ground Water Management District area. The Dicksons were also assessed \$5,266.00 for attorney's fees and costs.

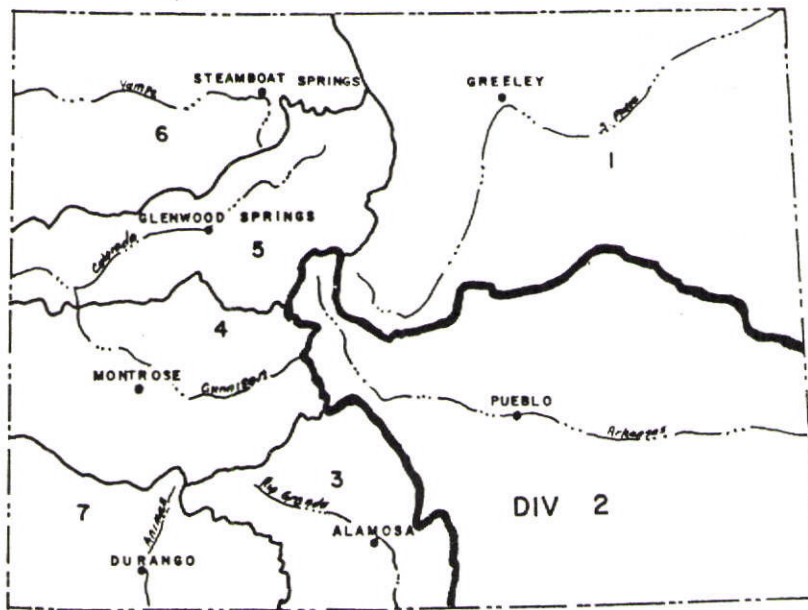
FROM THE EDITOR

This issue begins our second year of publishing **STREAM LINES**. With each issue we have attempted to improve the publication, both in the appearance and the information presented. Throughout the year, interest has grown and we now have a circulation of almost 500 issues each quarter. We hope that **STREAM LINES** is a useful publication and that we have fulfilled our objectives of presenting issues of importance and information concerning the work of the Office of the State Engineer.

We welcome any comments or suggestions you may have to improve this publication.



WATER DIVISION BOUNDARIES



WATER DIVISION II Arkansas River Basin

by Steven J. Witte
Division Engineer

Water Division II consists of the drainage basins of the Arkansas River and the Dry Cimarron River within Colorado. This 26,150 square-mile area represents 25% of Colorado and is slightly larger than the state of West Virginia.

The Arkansas River, which is one of the longest rivers in the state, originates near Leadville and flows into Kansas near Holly, Colorado. Along the way, evidence of its power is manifested by the majestic Royal Gorge; its capacity for destruction by the 1921 Pueblo flood; and its bounty, which has helped make the agricultural and industrial production of the region world renowned. Some of the major tributaries to the Arkansas River are Texas, Grape, and Fountain Creeks, as well as the St. Charles, Huerfano, Cucharas, Apishapa, and Purgatoire Rivers.

A significant portion of the water within Division II, at any point in time, originated as precipitation that fell in the Colorado River Basin, and was subsequently imported through one of the trans-mountain diversion facilities. It has been estimated that 20-25% of the flow of the Arkansas at Wellsville (above Canon City) has been imported. Some of the major trans-mountain diversion projects include the Fryingpan-Arkansas, the Twin Lakes, and the Homestake. Not all of the water that is imported to the Arkansas Basin is ultimately used there. For example, the Homestake Project is jointly owned by the Cities of Aurora (South Platte Basin) and Colorado Springs (Arkansas Basin), and the project yield is divided accordingly.

The Arkansas River system has historically been dynamic. As demand for water to support development increased, operational and administrative practices have evolved to meet the demand.

- There is evidence that the waters of the Arkansas were being diverted for irrigation as early as 1847.

- Efforts to supplement the native water supply to the Arkansas through importation were made very early and, as previously mentioned, these efforts have continued with great success.
- In 1948, Colorado entered into the Arkansas River Compact with Kansas in an attempt to resolve a longstanding dispute and to avoid future controversies through an equitable apportionment of the waters.
- As technology developed, the use of high capacity wells to produce alluvial groundwater for irrigation became practical and prevalent. This practice, however, led to a common acceptance of the interrelationship between groundwater and surface water and a recognition of a need for administrative practices to address it. As a result, rules and regulations governing groundwater use were first promulgated in Colorado for the Arkansas River in 1972.
- Although the practice of exchanging water rights has been a longstanding one on the Arkansas and elsewhere in Colorado, it has perhaps never been used as extensively as a management tool as it has in Division II.
- A major innovation in water management that has developed within the past fifteen years has been the Winter Water Storage Program. The essence of the Program is that irrigators have volunteered to agree to discontinue the historic practice of diverting water for irrigation during the period between November 15 and March 15, and instead store water in Pueblo Reservoir and other reservoirs in the basin for later use. The concept is relatively simple, but those who struggled through the arduous process of developing mutually acceptable terms to convert the concept into working reality are deserving of much credit.
- The use of both native and imported waters of the Arkansas are changing in response to increased demand and economic ascendancy of municipalities. The Arkansas Basin has been particularly susceptible to these changes in recent years.

While a number of changes have occurred within the Arkansas River regime in the past, others may develop in the near future. An impetus for potential change is currently pending before the United States Supreme Court. This litigation was initiated by Kansas against Colorado because of alleged violations of the Arkansas River Compact. In this suit, Kansas alleges injury resulting from the Winter Water Storage Program from well pumping practices and from operations of Trinidad Reservoir. The results of this dispute will not be known until after the trial which is set for early 1990.

Within the Division II Water Court in 1988 there were 104 applications for water rights and 105 decrees issued by Judge John Tracey. Clyde B. Young, Jr., is the Referee and Priscilla S. Lucero is the Clerk of the Water Court.

Water rights in Division II are administered by ten full-time and seven part-time water commissioners. The Division Engineer, Steve Witte, and his staff are located in Pueblo at 219 West 5th Street, Room 223 of the Thatcher Building. Office staff consists of six engineers, two technicians, and one secretary. Phone (719) 542-3368.

**PROPOSALS TO EXPORT WATER
FROM THE TAYLOR RIVER IN GUNNISON COUNTY**

by
Keith Kepler, Assistant Division Engineer, Division IV, Montrose

Two separate proposals seek to export water from the Taylor River to the metropolitan Denver area. The Taylor River drains an area west of the Continental Divide into Taylor Park and the Taylor Park Reservoir (elevation 9,330 feet) which is owned and operated by the Uncompahgre Valley Water Users Association. The reservoir has a capacity of 106,000 acre-feet. The Taylor River below the reservoir discharges about 144,000 acre-feet annually which flows into the East River at Almont to become the Gunnison River.

AURORA'S APPLICATION

The City of Aurora filed application for conditional water rights, storage rights and a plan for augmentation or exchange in the Division IV Water Court on April 29, 1986 (86CW37). This proposal seeks a reservoir directly above Taylor Park Reservoir to be known as Pieplant Reservoir (80,000 acre-feet). This reservoir would capture water from the Taylor River, Pieplant Creek and Texas Creek. A 280 cfs tunnel would carry stored water into the Arkansas Basin where it would be siphoned under the Arkansas River and carried by a second tunnel to Antero Reservoir. The claimed appropriation date is April 28, 1986. A second reservoir, Almont (57,700 acre-feet), would be constructed on the East River to make water available to downstream water rights in exchange for out of priority storage and diversion at Pieplant Reservoir.

ARAPAHOE COUNTY - NECO APPLICATION

Arapahoe County was recently substituted as the applicant for a proposal originally put forth by Natural Energy Resources Company

(NECO). NECO's involvement began with a December 14, 1982 application for a 325,000 acre-foot pumped storage facility (Union Park Reservoir) located south of Taylor Park Reservoir. This facility would be filled from a collection ditch and water pumped up from Taylor Park Reservoir and would be used purely as a peaking hydro-electric facility; no water would be diverted from the basin. A stipulated decree in 82CW340 granted a conditional water right for the peaking facility. A change in size and location, as well as a relocation of part of the conditional storage right to Rocky Point Reservoir, was allowed in 85CW96.

In 1986 (86CW37) NECO sought to change the use of conditional rights and sought to export water from the Taylor River Basin to the east slope. Water captured in Union Park Reservoir would be diverted through a tunnel to the Arkansas Basin and ultimately into the South Platte Basin for municipal use. This application called for the 450 cfs Union Park-Antero conduit and an enlarged (900,000 acre-foot) Union Park Reservoir which would hold a three-year supply for diversion. The application included a contract with Parker Water and Sanitation District to supply 1,000 acre-feet per year and with the City of Gunnison for an in-basin supply of 2,000 acre-feet per year. The application requested relation back to the 1982 decree and appropriation dates.

UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT IN-BASIN RECREATION AND FLOW USES

The Upper Gunnison River Water Conservancy District filed for additional rights

on Taylor Park Reservoir on December 30, 1986. The District's first proposal (86CW202) sought additional uses of water from Taylor Park to include recreation and fishery with an appropriation date of August 28, 1975. A second proposal (86CW203) sought a refill decree for Taylor Park to be used for recreational purposes including wildlife within the reservoir and fishery within and downstream of the reservoir. The claimed appropriation date was October 31, 1970.

The issue of whether the conservancy district could obtain a right to designate reservoir releases for stream flow enhancement for fishery and recreation was at question in both cases. The Colorado Water Conservation Board objected on the basis that under 37-92-203(3) C.R.S., it had the exclusive authority to seek adjudication of minimum in-stream flow rights. In a May 5, 1988 ruling on a Motion for Summary Judgment, the Division IV Water Court held that by capturing and then releasing the water, that the District's application did not constitute applications for naturally occurring in-stream flow. It was determined to be a diversion for beneficial use, the right being protected by the state constitution. The applications remain before the Court.

SHARED ISSUES--PUBLIC TRUST, MAXIMUM UTILIZATION

Several statements of opposition were filed in both the Aurora (86CW37) and NECO (86CW226) cases in which there were similar issues. To simplify the issues, the Water Court entertained several Motions for Summary Judgment to delete certain issues from future proceedings. The major issue (whether public interest issues should be considered) is the subject of a pending appeal to the Supreme Court.

Public interest issues include the ideas of public value, maximum utilization and public trust. The Public Trust Doctrine involves the concept that in the allocation of public

resources, the court should consider what is in the best interest of the public. Applicant's Motions for Summary Judgment sought to delete public interest issues from consideration. Conservation groups opposing the applications contended that the Public Trust Doctrine should be considered in the court's review.

The Water Court rejected consideration of public interest issues. Judge Brown's May 5, 1988 order determined that by the adoption of the doctrine of prior appropriation in the State Constitution, Colorado had rejected the public value doctrine as a carry-over from common law. Although Felhauer v. People set the stage for future consideration of public interest, the lack of specific legislative direction left the court without authority. The Division IV Water Court decision on the public interest issues has been appealed to the Colorado Supreme Court after an order entering Final Judgment under Rule 54(b) C.R.C.P. was entered July 12, 1988.

NECO APPLICATION DETERMINED SPECULATIVE, ARAPAHOE REAPPLIES

Several objectors filed Motions for Summary Judgment in case 86CW226 on the basis that NECO's application was speculative. The original NECO plan involved only an in-basin peaking power operation while the 1986 application sought a much greater amount of water for export for municipal use. The 1986 application included only two minor supply contracts and NECO itself had no direct use for the water.

In a December 29, 1988 Summary Judgment, Judge Brown determined that the anti-speculation doctrine requires the applicant to identify the use of the water, the place of use and the ultimate users of the water, together with a definite commitment from the ultimate users. It was further found that these specifics of the plan to appropriate water must be identified at the time of filing. Because the application must not be speculative at the time of filing, the substitution of Arapahoe County on September 1, 1988 did not cure the

deficiency of the filing.

The Water Court's December 29, 1988 order left open a very minor part of the application which sought to add the uses of recreation, fish propagation and reservoir evaporation to the conditional in-basin power generation use granted in 82CW340. The Court's judgement on the matter of speculation will be appealable only after the Court enters a final judgement which includes this minor part of the application. Arapahoe County has reapplied for the Union Park export project in case 88CW78 as an alternative should their intended appeal of 86CW226 to the Colorado Supreme Court sustain the Division IV Water Court.

COMPETITIVE WATER RIGHTS ON THE GUNNISON RIVER

The key water rights affecting the Gunnison River are the USBR storage and power rights at Blue Mesa, Morrow Point and Crystal Reservoirs. Blue Mesa has a capacity of 940,755 acre-feet which is used to regulate the river for power production through the Blue Mesa, Morrow Point and Crystal power plants. The downstream Morrow Point and Crystal Reservoirs are kept nearly full to optimize power production. Annual discharge of the river at Gunnison is 560,000 acre-feet (773 cfs) which flows into Blue Mesa along with inflow from several small streams. The decreed capacities of the Blue Mesa, Morrow Point and Crystal power plants are 3500, 5450, and 3000 cfs, respectively. The result is that the power facilities have sufficient water rights to place a call which would prevent export from the Upper Gunnison Basin in most years.

Uses within the Upper Gunnison Basin are protected from a call at Blue Mesa since the USBR has subordinated its rights to allow up to 60,000 acre-feet of additional junior depletion from the Upper Gunnison Basin. This is based on the earlier intent of the United States and the Colorado River Water Conservation District as was presented to

Congress. Trans-basin diversion is specifically not an allowable use of the 60,000 acre-feet under the USBR's October 26, 1984 Memorandum regarding the subordination. Water rights for Blue Mesa, Morrow Point and Crystal were filed in the name of the Colorado River Water Conservation District, which may still have some control on how they are to be exercised.

Taylor Park Reservoir, owned by the Uncompahgre Valley Water Users Association (UVWUA), has the capacity to store approximately 73% of the annual yield of the Taylor River above the dam site. Water released from Taylor Park is diverted downstream of the USBR dams through the Gunnison Tunnel for irrigation in the Uncompahgre Basin and is a major senior right with absolute and conditional decrees for 1,300 cfs. The Gunnison Tunnel right for irrigation is senior to the USBR reservoirs. UVWUA also has conditional rights to divert 900 cfs (82CW324) plus 235 cfs (87CW273) through the tunnel for power use, effectively extending the season during which the major diversion could operate. Further downstream, the Redlands Power Canal near Grand Junction could place a call if new junior rights or a change in the operation of Blue Mesa Reservoir depleted the river below their decrees (670 cfs in a supplemental 1912 adjudication plus 80 cfs in a 1959 adjudication).

CONCLUSIONS

Existing absolute and conditional water rights within the Gunnison Basin - both direct flow and storage - for irrigation and power production purposes are sufficient to control the river in most years. In this author's opinion, export of water from Taylor Park would not be feasible if hydro-electric power production rights on the Gunnison River are fully exercised in the future.

The Upper Gunnison River Water Conservancy District application, the Aurora

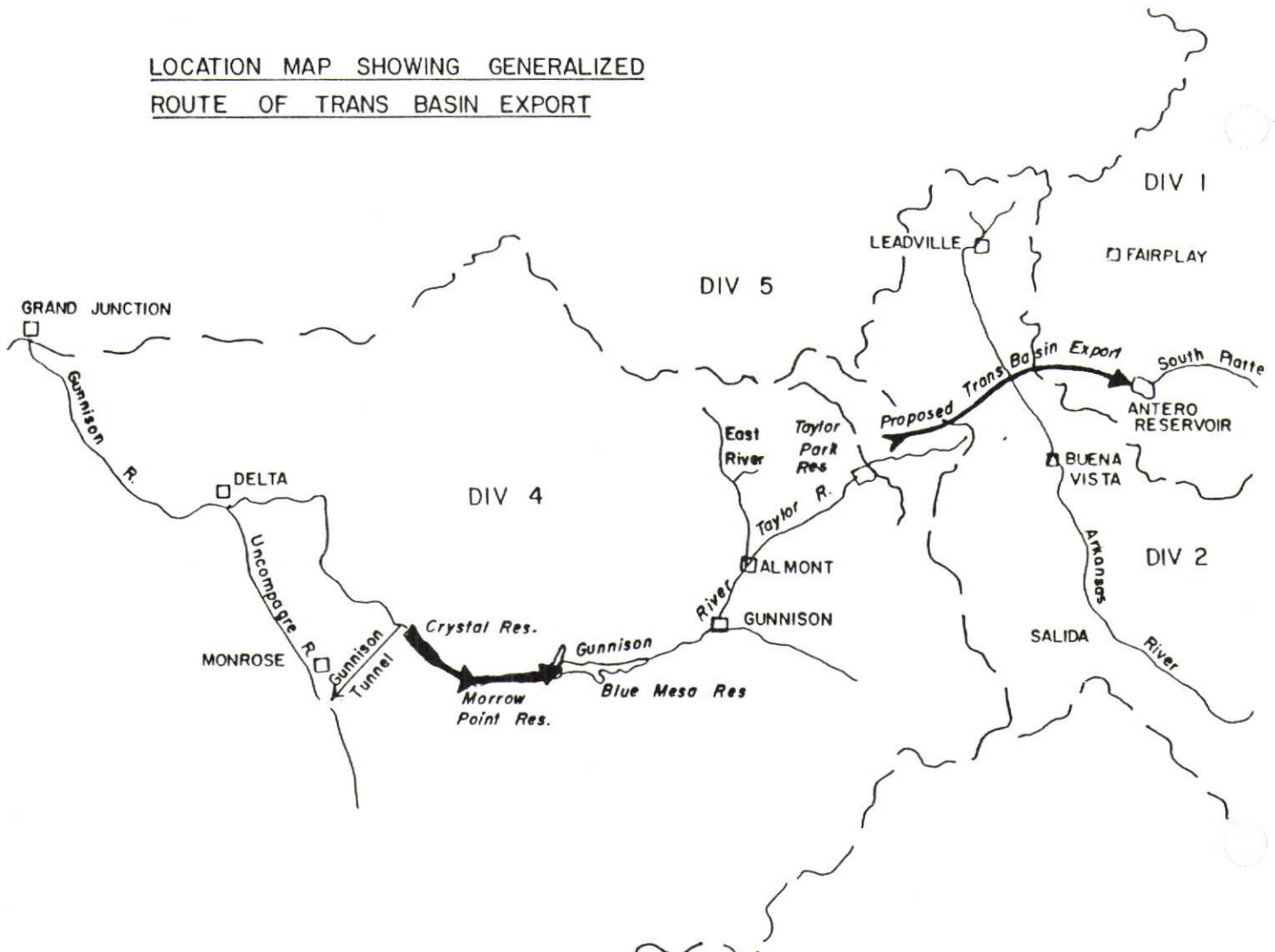
application and the NECO change application were all filed in 1986. Of the three competing applications for additional use of water in the Taylor River, the Upper Gunnison River Water Conservancy District application claims the earliest appropriation date. That proposal remains an application before the Division IV Water Court. Aurora's proposal includes an augmentation reservoir which could offset injury to downstream irrigation rights, if not the hydro-electric power rights.

The NECO-Arapahoe County application is in serious jeopardy as a result of the Division IV Water Court's Summary Judgment that it was speculative. The Colorado Supreme Court would have to reverse the Water Court's determination that the application was speculative if this application is to be

revitalized. Arapahoe County's 1988 refileing on the same project would be the most junior of several competing proposals in the Taylor River Basin. In this author's opinion, a 1988 decree would only be meaningful if the more senior applications did not proceed.

The Taylor River represents a limited resource. Three applicants, two proposing to export water and one proposing to increase in-basin use for recreation and fishery, are competing for this limited resource. Senior irrigation water rights within the Gunnison Basin have already claimed much of the available resource. Water rights for hydro-electric power generation can control the Gunnison River if fully exercised.

LOCATION MAP SHOWING GENERALIZED ROUTE OF TRANS BASIN EXPORT



EXISTING DAM MODIFIED TO WITHSTAND OVERTOPPING

by
Bill Mc Intyre

A scenic dam and reservoir known as Rainbow Dam is located at the base of Cottonwood Pass about five miles west of Buena Vista. The dam is only 15 feet high and 75 feet wide at the crest. The spillway is 12 feet wide. Although the dam is classified as "low hazard" it is required to at least pass the 100-year flood event without failing.

Due to the lack of funds for modification of the existing spillway to handle this flood flow, the owner elected to modify the structure to withstand six inches of over-topping (the predicted depth of the 100-year precipitation event). Cost of the modification, which was recently completed, was about \$30,000. The scope of the work included regrading of the downstream slope, placing rock gabions on the slope, extending the spillway walls, construction of an entrance weir in front of the existing chute spillway to increase the low flow capacity, and placing a concrete erosion bar on the crest.

This work resulted in a safer dam which will result in less damage downstream should the 100-year flood event occurs.

PUBLICATIONS

Two new publications are available. The first is a small brochure describing the duties of the State Engineer and the responsibilities of the Division of Water Resources. These are available at no cost in all Division offices as well as the Denver office.

The second publication is a booklet containing the official **Rules and Regulations for Dam Safety and Dam Construction** adopted on September 30, 1988. These are available at a cost of \$3.00.

WATER QUALITY PROGRAM AVAILABLE

ECOWATER Systems of St. Paul has announced an information program titled "Water in Your Life." The program was developed in response to water quality concerns voiced by the public. This program is available to secondary school teachers and consumer groups. An information kit containing study sheets, graphs, charts and experiments is available by writing to Carlene Kuntz, ECOWATER Systems, P.O. Box 64420, St. Paul, MN 55164.

A video tape is also available on a loan basis. Speakers are available to groups of over 300 people.

EMPLOYEE APPRECIATION

In this issue we not only honor recent employees of the Month, but also our Employees of the Year.

Tom Kelly, Division Engineer in Division IV, was given a special award for **Outstanding Management**. Rob Molloy, programmer in the Denver office, was named **Professional of the Year**. Glenn Graham of the Groundwater Section was named **Technician of the Year**. Paul Clark, water commissioner for District 22 in Division III, was named **Water Commissioner of the Year**.

In addition, the following employees were named as **Employee of the Month**: Jody Grantham, December; Will Burt, January; Steve Lautenschlager, February; Elsie Chapman, March; and David Nettles, April.

Congratulations and thanks for a job well done!

JUST THE FAX

Yes, we have joined the rest of the world! A FAX machine has been installed and is available. The phone number is 866-3589.

CALENDAR UPDATE

APRIL

- April 4 Board of Examiners of Water Well Construction and Pump Installation Contractors, Room 821, 1313 Sherman St., Denver, CO, 8:30 a.m. Contact: Bruce Debrine. (303) 866-3581.
- April 12-14 94th Quarterly Meeting of the Western States Water Council, Washington, D.C. Contact: Craig Bell, WSWC. (801) 561-5300.

MAY

- May 1-3 ASDSO Western Regional Meeting and Dam Safety Workshop, Sacramento, CA. Contact: Y-Nhi Dang Enzler. (916) 323-5368.
- May 9 1989 Annual Meeting of the Costilla Creek Compact Commission, Santa Fe, NM. Contact: Paula Lacey, DWR. (303) 866-3581.
- May 11-12 Colorado Water Conservation Board Meeting, Denver, CO. Contact: Maria Martel. (303) 866-3441.
- May 12 Colorado Ground Water Commission, Room 220, 1313 Sherman Street, Denver, CO, 9:00 a.m. Contact: Marsha Smith. (303) 866-3581.

JUNE

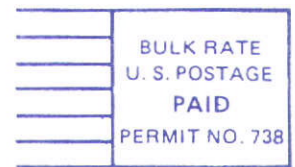
- June 6 Board of Examiners of Water Well Construction and Pump Installation Contractors, Room 821, 1313 Sherman St., Denver, CO, 8:30 a.m. Contact: Bruce DeBrine. (303) 866-3581.
- June 6-7 Association of Western State Engineers' 1989 Spring Workshop, Breckenridge, CO. Contact: Marta Ahrens or Paula Lacey. (303) 866-3581.

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