

GREGORY HOBBS

PS: This is October 12, 2006 and we're here in Denver doing oral history interviews for the Colorado River Water Users Association. I am Pam Stevenson doing the interview. Bill Stevenson is the videographer. I always like to let you introduce yourself.

GH: I'm Greg Hobbs. I have the privilege of serving as a member of the Colorado Supreme Court. There are seven of us. This is my eleventh year on the court.

PS: I'd like to start with some general personal background about you. When and where were you born?

GH: Gainesville, Florida. My dad was an Air Force officer, and so we were assigned to Panama, Virginia, Alaska, California, Texas as I was growing up but I had the fortunate experience of living in Alaska when it was a territory in 55 to 58 and California when it was really starting to boom up in Marin County but also in San Bernadino before going to Texas. Went to Notre Dame as an undergraduate, went to the University of California-Berkeley for law school, right across the bay from where I'd spent two and a half years in high school.

PS: When were you born?

GH: 1944.

PS: Sounds like you've seen a lot of the country for various reasons.

GH: I have. I have a great interest in Central and South America. I served with my wife in the Peace Corps in South America in 1967-68. I was a history major at Notre Dame. My hobby is Western history and particularly the southwest.

PS: So how did you end up going into law?

GH: Default. My wife got pregnant when we were in the Peace Corps. I had been studying Latin American history in the PhD program at Columbia University after getting out of Notre Dame, but decided that that was gonna take too long. I'd rather go to Latin America. We applied to go to the Peace Corps together. I taught sixth grade in New York City for a semester while she ended up graduating from the University of Northern Colorado here. Then we went in and served together, started training four days right after our marriage in June of 1967.

PS: What part of South America?

GH: We were assigned to Colombia in an educational television program.

PS: Sounds like an interesting experience. We're not here to talk about it unfortunately. So you served how long down there?

GH: We served for a year. Came back and then I needed to go do a useful trade since we had a family coming along and applied to and was accepted at the University of California-Berkeley Law School. I was there from '68 to '71. My wife is from Colorado so I came out to clerk for a federal judge, United States Circuit Court Judge William Doyle, in '71.

PS: Did you, at that time, plan to make Colorado your home?

GH: I did not. In fact, I went back to San Francisco to practice for eleven months, but my wife, Bobbie, and I missed Colorado so much that we came back and I started with the Environmental Protection Agency new regional office in Denver in 1973. Of course when I went to law school, the environmental era hadn't really happened yet. I got in then on the bottom floor. I was an air

pollution enforcement attorney at the EPA from '73 to '75, and then joined the Colorado Attorney General's office in 1975 with my long-time colleague, David Robbins, who was also at the Environmental Protection Agency. He was a water quality attorney. I was an air quality attorney. Together we helped start the Natural Resources Section of the Colorado Attorney General's office in 1975. So that had the water and environmental attorneys advising the state agencies.

PS: When you went to law school, had you thought about what you were going to do as a lawyer?

GH: No. I did not. You know, I knew I wanted to clerk from the earliest days in law school when I recognized that the discipline of the law involved analyzing particular cases, figuring out how to resolve them, and that the law happens, case by case in the judicial method. I decided in the first month of law school, that if I ever had the opportunity to be an appellate judge, that's what I wanted to do. I suppose that the only aim I had at starting out within the profession was to clerk for a judge and see what it looked like from the inside. So I'm pleased to be on a Supreme Court. I hire law clerks, of course. I think that's one of my duties and responsibilities is to help bring lawyers along into what the judicial method really looks like from the inside, and I know that that helped me a lot in practice, both public and private practice, and I hope to help my law clerks in the year that they're with me, to understand what we really need to do. Solve problems in society.

PS: That's a pretty broad.....

GH: Using the law, of course, in our responsibility. We're not a legislature, of course.

PS: Sometimes you have a little more power.

GH: Well, a lot less than I think that sometimes you can have in practice. My principal client for 17 years was the Northern Colorado Water Conservancy District. That is the district that is the partner with the United States Government on the Colorado-Big Thompson Project, so I did a lot of legislative work and administrative law work, the legislative work here in the State Capitol in Colorado and of course the Congress on various water statutes. I practiced obviously with the Water Quality Control Commission, and the state engineer, the water resources side of things, so in the Attorney General's office from '75 to '78, I had a lot of background advising state agencies and then went into private practice in June of 1979 at the law firm of Davis, Graham and Stubbs and understudied John Sayre, who was the principal counsel for the Northern Colorado Water Conservancy District at that time, and then was counsel to that client until Governor Romer appointed me in 1996 to the Court.

PS: Let's go back and talk about some of those things that you've done. When you were with the Attorney General's office, what were the big water issues back in the early 70s?

GH: One of the initial ones, of course, was whether or not the states of the Colorado River Basin would have to have state line salinity standards. The Environmental Defense Fund had brought a suit against the EPA to require each state to adopt salinity standards and David Robbins and I worked with other western state Attorney Generals to resist that notion. Because the Salinity Control Act was set up with three salinity checkpoints on the Colorado River in the Lower Basin, and it was our viewpoint that that program that Congress enacted took care of the interstate salinity issues that were of concern. That point of view was upheld by the courts. We were very concerned, of course, that Colorado would be able to develop its compact entitlements and, at that time, the Clean Water Act was very young in its existence, having been adopted in 1972. I think we were concerned that water quality regulation might be used to interfere with the development of Colorado's compact entitlement. So that was one of the

early cases that I remember. Another very important one was the litigation over the McCarren Amendment and whether or not tribes could be joined under the McCarren Amendment so that state courts could adjudicate the priorities of the federal reserve water rights for the tribes. We were successful in that litigation in the Tenth Circuit, recognizing that the state of Colorado water courts could adjudicate the tribal water rights. Of course, applying the law of federal reserve water rights.

PS: Is that the same case that went to the U.S. Supreme Court?

GH: That's the one. So basically, that ended up in a victory for the states. Since 1952, the McCarren Amendment, the idea was to have the state courts be able to adjudicate the state water rights and the federal water rights so that we would know in order of priority what amounts and the locations of the diversion and the beneficial uses so it could be administered in a unitary system. So Colorado pioneered, in the U.S. Supreme Court, three cases that finally convinced the Justice Department, I think, and the tribes that, in fact, there was a waiver of sovereign immunity to allow the state courts to proceed to adjudicate the federal water rights.

PS: So you stayed with the Attorney General's office for four or five years?

GH: Until 1979.

PS: What made you decide to leave?

GH: Well, I figured that I had done public service, done it in a way that prepared me to do other things. I knew that John Sayre was looking for an understudy for the Northern Colorado Conservancy District. Of course, part of my duties at the Attorney General's office did include the water rights duties. When David became Deputy Attorney General, I became head of the Natural

Resources Section, so not only was I doing the environmental quality side of the enforcement matters, air quality and water quality assigned to the Colorado Health Department, I then picked up the Water Conservation Board and the State Engineer's Office, the water entities, as the supervisor for the attorneys doing that. The opportunity at Davis, Graham and Stubbs to understudy John Sayre was an outstanding one, because the Water Conservancy District has a long and highly reputable existence as a premier United States water agency, so that was the opportunity that I left the Attorney General's office for.

PS: What were the big issues then, that would have been in the late 70s and 80s that you worked with the Northern Colorado Water Conservancy District?

GH: Yes, I worked as John Sayre's understudy until 1986. When he retired, I became the principal counsel to the Northern Water District and served in that capacity until 1996. And then Bennett Raley, who went on to become the Assistant Secretary for Water and Science. Of course, John Sayre, when he retired, didn't really retire. He became the Assistant Secretary for Water and Science. So you can see the Northern District has produced some outstanding water managers and water engineers and water lawyers. So working as John's understudy, my first job was to get the environmental permits for the Windy Gap transmountain diversion project for the utilities and municipalities of northern Colorado.

PS: Tell me about that project. What was significant about it?

GH: Well, transmountain diversion is always highly controversial and the west slope was united through the Colorado River Water Conservation District and the Grand County commissioners and the environmental interests, and either one, stopping the project, or two, getting satisfactory mitigation for it. We were able to negotiate with all the interests. We had the first subordination of a senior water right to a junior in stream flow water right. In 1973, the State Legislature

adopted the first in stream flow law in the west. It was Colorado's in stream flow law. The issue in the one-to-get project was would we bypass sufficient water for 26 miles downstream to support the gold metal fishery that existed there. It became obvious that we could not get through the NEPA process or get the requisite House Bill 1041 permit from the Grand County commissioners unless we had a good mitigation package. So that was my assignment and I think John hired me basically because I came from the environmental side that was now a new addition to the traditional water law practice. We did get the permit for the one to get project, both the federal permits, the Grand County permits, through a negotiated settlement which John Sayre was principally in charge of. So I worked as his understudy and was very pleased to do that.

PS: So you did figure out how to keep the water in the stream for those fisheries?

GH: We did that because we provided that the pumps would not operate if the minimum flow was not there at the bypass point at the Windy Gap diversion. It's a pump back project, back up into Lake Granby, the biggest feature of the Colorado-Big Thompson transmountain diversion project. But we knew from the history, and history has always been very important to Colorado, this interlocking history of the Colorado River Water Conservation District to the Northern Colorado Conservancy District and the United States Bureau of Reclamation. They have stood together for decades vis a vis Denver, because Denver had its own system. It was insisting throughout the time that I was water attorney, both in the AG's office and then in private practice for the northern district. Denver was insisting on a priority for the upstream Dillon Reservoir above the Green Mountain Reservoir on Blue River. The Green Mountain Reservoir was the first feature built for the Colorado-Big Thompson project which was a reservoir basically for the western slope for the Colorado River Water Conservation District area, so an historic battle within Colorado, I gotta call it that, was the priority of Green Mountain over Dillon Reservoir and that was always successful.

Ironically, the federal court actually had that litigation because back in the early 50s when it started, it wasn't clear that the states could adjudicate the water rights for the federal projects. The McCarren Amendment cleared away all that underbrush, but the federal court retained jurisdiction over the Green Mountain Reservoir and its key features on the west slope. So I think that we now live in an era where it's all straightened out and there is much more communication between the river district, the northern district, the Colorado River district and the Denver Water Board than there ever was. Not to say that there aren't real differences still, but those old battles over the priorities of Green Mountain Reservoir and Dillon are gone now.

PS: You mentioned about the junior water right overriding the senior water right. How do you see the whole appropriation doctrine, first in time, first in right, do you think that's going to survive the current demands of new population and the drought?

GH: Well, it's the only way to meet the demands and the new population because the priority of the water right is the most valuable aspect of a water right. We have a very active change of water rights system in Colorado water law. We have seven water courts, and since we are in over appropriated status, legally and physically, the water supply, two-thirds of it has to go out of state under the nine interstate compacts and the three equitable apportionment decrees which govern the delivery of Colorado water out of state. Colorado can only live on one-third of the water it produces in its streams, rivers and tributary aquifers. So we're over appropriated in the Platte, the Arkansas and the Rio Grande. Probably some more water which we could develop under the Colorado River Basin Compact of '22 and the Upper Basin Compact of '48, but that's water that would come at a heavy price of infrastructure and negotiation with the west slope, and I've no doubt that's going to be accomplished at some point. But my point about the prior appropriation water rights is that we have to have a market for the transfer of water given the scarcity from those who have the senior rights,

those are basically mutual ditch companies originally started by farmers but now bought into by cities, and we have a very act of transfer of permanent rights and leased water rights to the municipal sector. Now, you can't have security, reliability or flexibility in a water allocation system unless you have enforcement. Because in a low water year, you're not going to get your pull of water through a direct flow ditch or into your reservoirs, so cities need to have water, particularly storage water, that they can put into storage in priority. Priority is the key to it. As our water courts allow a change of water right based on quantifying the historic beneficial consumptive use that was made by the crop, and then transferring that amount, since all juniors have come subject to that amount already being consumed. If conditions are placed in the change decree preventing injury, that is non interception of the return flows that go back and fill other water rights, subsurface or surface, then you can transfer that quantity of water. So now if you think about it, the power appropriation document was a doctrine of scarcity. That's when it operates, because in a time of plenty, people can divert. In a time of scarcity, they need to be shut down. So the water administration is absolutely necessary to enforce the decrees of the water courts which set the priorities and that's the way Colorado has it set up. Now realize that every state can have its own system and they do, under the 1866 Mining Act. Congress left this to the states and territories, deciding how to create water use rights in a public resource. Now that's incredibly important. The water is always a public resource. It's in the public domain. All you can get under the doctrine of prior appropriation is the right to perfect a beneficial use, and when you perfect the beneficial use, then the beneficial use you make of that appropriation is the basis, measure, extent, scope of the water right. A lot of people don't understand that. They think diversion is their true water right. It is not. The true water right is tested in the change of water right system because you have to do this historic analysis of how the diversion is actually applied to beneficial use, how much water is consumed by that without waste. That is the true measure of the water right. Because the rest of it is return flow that belongs, unless it's transported from another basin and was never native to the in basin

tributary system. That's a different doctrine under Colorado water law. You can use one hundred percent of the water you import, but you can only make one use of native water because the return flows are so valuable, so in some prior appropriation doctrine and enforcement, is the future of the west, in my opinion, because if you do not enforce priorities, juniors intercept water belonging to seniors, you destroy the original value of the water right and then you spread the water out so much, that you cannot really have the water supply you need to make your use. The system was established on the ground and worked through for a century and a half by the legislatures, the courts, by the experience of those in the west who are used to cyclical droughts and floods. That is why storage is so critically important. The municipalities need a year round use. Municipalities tend to be the junior users, along with the environment. Now we're finding out that reservoirs are extremely important to regulating flows into the environment as well as delivering water to the cities. So it was the 1880s, not long into the development of the west, that the direct flow water rights were being fully appropriated in a lot of areas of the west, and John Wesley Powell predicted this, that reservoir storage was going to be necessary. In fact, when he was head of the United States Geologic Survey, he sponsored the reservoir survey that withdrew land from the Homestead Act, drove western senators crazy, and he didn't want to release it back into the public domain for homesteading until they knew where they were going to be able to use the reservoirs and hold it until when they were going to be able to use it. He was destroyed because the boomer psychology was free up the land for homesteading. But he was absolutely right that storage to regulate the huge fluctuations of the stream flow in the west, which is basically snow pack, and maybe under global climate change, disappearing, or diminishing snow pack. To me, these cyclical conditions that historically now have been proven by the tree ring studies in the Colorado River Basin, will demand additional storage and regulation, not less. A lot more conservation and demand and curtailment and everything that goes into marshaling the water into the reservoirs and keeping it there as long as possible to anticipate the days of drought. We're in, as you know, a rapidly expanding

west. We are the great urban democracy, not the great agricultural democracy that John Wesley Powell and all those folks who were the granddaddies of the 1902 Reclamation Act. So in this age where we have a lot of young women engineers and attorneys, we've opened up the field a lot more. The public is a lot more interested in water than it used to be. Because of this 21st century drought, we have all these watershed groups. There's a lot more responsibility, I think, in those who are in the profession directly to be transparent, to be communicative, to explain what this law is. And how it operates and to make adjustments as necessary. I don't think it's a hide mound doctrine.

PS: Talking about adjustments, some people have suggested that the 1922 compact that allocated the Colorado River water might be reopened and restudied because of the new research saying that perhaps there was never as much water as they divided out.

GH: I think that's not going to happen. The compact requires the seven Basin states to agree to amend it. I don't see it happening. There's nobody that's going to give up their allocation. The history of the Colorado River Compact has really been brilliant in that it set up the seven states as partners in the use of the Colorado River with Congress authorizing it. I think the basic charter was a good one. Now they were too optimistic. They erred as it turns out, on the basis that there would be more water on the average available than turns out to be. The tree ring studies correlated with the actual stream flow gauge data for the 20th century would put the figure between 14.3 and 14.7 million acre-feet available on the average. But here's the point. These negotiators of the Colorado River Compact were not dumb. There was a big drought in the 1890s going into 1902 so they knew in their own generation that despite the huge water supply in the teens and early 20s when the compact was finally negotiated that they would have dry times. Now this was why Delph Carpenter did not agree to an annual delivery guarantee when he was bargaining for the Upper Basin. Norviel of Arizona was holding out for an annual minimum delivery guarantee. Now

instead, what ended up in the compact, was a 10 year running average of 75 million acre-feet at Lee Ferry. Now they knew there were going to be years of water shortage so, first of all, they put the average in there. Secondly, there was explicit discussion in the compact negotiations that storage was going to be necessary in both the Lower and Upper Basin to make the compact work. So they weren't absolutely sure even though they hoped there would be an average of 17 million acre-feet, they knew the only way to ever get close to that was to put in major reservoirs. And, in fact, I was able to dig up from the state archives here in Colorado a couple years ago, an exhibit that Ralph Meeker, the state engineer who was sitting beside Colorado's representative, Delph Carpenter, the architect of the compact idea when applied to water, had in his hip pocket and that exhibit shows a 52 million acre-foot reservoir where Lake Powell now is. And it showed a 30 million acre-foot reservoir where Lake Mead is. Now Powell didn't get built at 50 million acre-feet because the Rainbow Bridge was very sacred to the Navajos and the environmental era needed to be preserved, so the cap off was 26 million acre-feet. Still a good three to four year supply to help fill this obligation to the Lower Basin that the Upper Basin would not withhold, and would have to let go by Lee Ferry this 75 million acre-feet on a 10 year running average. The negotiators of the compact also knew that, at some point, Mexico was probably going to get some water. So it's clear that in the negotiations that there was a marker there for Mexico. They knew that water was going to have to come out ...when the United States and Mexico....and they did end up negotiating that 1944 treaty and getting that done. And it also was a marker for the tribes. They knew because of the 1908 Winters case on the Milk River Reservation that the tribes may get some water in the future. They simply were not in the position to determine how much the tribes would get, but I think it's fairly clear that they left that issue for future resolution and that the tribal quantities would come out of the apportionment of the states and of the Upper Basin and the Lower Basin.

PS: They did a pretty good job then.

GH: They did an excellent job and the idea that anybody is going to give up a piece of their allocation is, to me, not rational. Okay, so then what do you have? You have a framework exactly where it ought to be where the seven states can negotiate, adjust, work with the United States to manage these big reservoirs which are the most flexible instruments you have for addressing water supply and water shortage. Now, sure, it's not good looking at a Lake Powell that's less than 50 percent full. On the other hand, we came close in Colorado here in 2002 of draining all the active capacity of our nearly 2000 reservoirs in Colorado. Our river systems produced four million acre-feet that year, not the sixteen million acre-feet average. What did we live on? We lived on six million acre-feet of storage that we had to put to use. So I don't believe that the western states would have survived this latest drought as well as it has if we didn't have the water project reservoirs in place. Now, can they be reoperated? Well, as you know, that is a subject of much discussion and negotiation among the states and the federal government, listening to what the community at large has to say. But I do not think that you can come up with a better mechanism than the states after all, because under the idea of equitable apportionment, which is how this all started in the U.S. Supreme Court, compacts are the alternative to going back to the U.S. Supreme Court from time to time and finding out what an equitable apportionment among states sharing the interstate river basin is. It's much better to compact it and then assign to the states the responsibility of trying to figure out the flexibility. Now one of the original bugaboos, of course, in the compact negotiation of '22 is that there was no apportionment among the states. They tried to do that. The first six sessions, they tried to do it by acreage of irrigable land in each of the seven states, and they couldn't agree on how much land was irrigable or whether that was really a logical method of dividing the water. So they ended up with this Upper Basin, Lower Basin division which was sensible at the time but leaving the Lower Basin with what turned out to be *Arizona v. California* to decide what the apportionment among the states was there and the Upper Basin got a little bit smart, and also the 30s and 50s droughts intervened, so when it came to the negotiating an Upper Basin

compact, the Upper Basin states negotiated percentages of the water available to them that would then be allocated among themselves, so that tells you that drought very much influenced the building of the Colorado Storage Project Act reservoirs, Powell, Flaming Gorge, Fontanelle, the Aspinall, and the Navajo unit. The great battery so that water could go to the Lower Basin to fulfill this 75 million acre-feet 10-year running average without curtailing the Upper Basin. But the Upper Basin Compact also started to anticipate shortage conditions among the Upper Basin states. If you want to look at who got the bad deal, the bad deal is really the Upper Basin having to agree to this 10-year running average. But it was also a good deal. Because Delph Carpenter would not have been able to get the compact without moving the ball towards the Upper Basin by getting rid of a yearly guarantee that Arizona in particular wanted in favor of this 10-year running average, and then marshalling the political resources to get Congress to build out the necessary infrastructure. Herbert Hoover, the chair of the 1922 Compact Commission, said that storage was absolutely going to be necessary to make the compact work. Now the Upper Basin wanted the compact before the Lower Basin got what turned out to be Lake Mead.

PS: We talked about the importance of all those major big projects, Glen Canyon Dam, Hoover Dam, and some of the others in Colorado. Some people have said that there won't be any more big projects. Do you agree with that or do you think there is a need for perhaps some more big storage projects?

GH: No, I think the cards are there, the water is there for really big projects. I mean look at Lake Granby, over 500,000 acre-feet in storage there. I would think that the Water Conservation Board of Colorado, in using a 500,000 acre-foot developable remaining piece of the compact for Colorado's development, is probably fairly realistic. And I expect that when that is used, it will be highly negotiated between the east slope and the west slope and there will be smaller probably off stream projects benefiting all of Colorado. Trying to get the money to build a big dam, a place to build it, and get it all through the NEPA process is

probably not in the cards, but we are absolutely going to need more storage, probably a combination of aquifer storage, above ground storage, but we're gonna need it.

PS: You said in the compact that nobody really got a bad deal, but it seems like Nevada is the one that kind of lost out.

GH: Well, nobody anticipated that Nevada, including Nevada now, come on, their negotiator was there, who would have believed that it would become the great urban and tourist recreational area that it is, you know? Relatively, figuring out how gigantic California was in its demands and after all, you know, California is now being cut back. Arizona is using its supply by banking it in storage and using it and making some agreement with Nevada that is going to relieve some of its pressure. But each of the states need to look to the development of its own water resources and the mix the states want to do between the environment and the environmental uses we now recognize and the environmental constraints as well as the water supply necessities. See, I think the climate is absolutely right for this. And we've got the wake up call of a big 21st century drought, not these three year cyclical droughts that have been the water supply kind of planning measure, but with the tree ring studies and this prolonged drought in the early 21st century, demand and efficiency, demand curtailment, better planning and use of water, marketing, augmentation plans, exchanges, all these devices now that the states are going to look at when they're thinking about shortage criteria. The most innovative management now of the Colorado River is going to occur through those kinds of maybe incremental kinds of agreements among the Upper Basin states themselves, the Lower Basin states themselves, and then jointly. So do we need an overall compact commission for the seven basin states? That might be realistic. That won't happen, I don't think. Does the Lower Basin want a compact commission instead of the Secretary of the Interior running the contracting of the water and the hand on the valve direct approach that now is empowered under the Boulder Canyon Project Act. Can they agree on a

compact commission that can then meet with the Upper Basin Compact Commission? I think that may be a possibility, but I don't think it's a necessity. We've had long experience of adjustment among the seven states and of negotiation, threats truly of returning to the U.S. Supreme Court, but nobody really, I don't think, has their heart in that when it comes down to it. The big Arizona v. California battle shows that you don't necessarily know what's going to come out of that. You don't know what someone's going to find in some federal law. Who would have known that the Boulder Canyon Project Act actually would have turned out to be the apportionment mechanism to the Lower Basin? I don't know that all lawyers would have, I know they didn't, anticipate that that would be the result.

PS: Looking back over water history of the western region here, what project or legal development do you feel was the most significant?

GH: Certainly the recognition of environmental uses within the water law, the in stream flow laws. Here in Colorado, we now have kayak courses. If you'd told me that as a young water lawyer we'd have a recreational water right, I'd say I'm pretty doubtful, knowing that that group across the Civic Center Park here, the Legislature is what I'm looking at, right in my face from my chambers. But they've made these adjustments, you know. It wasn't the court. The Legislature passed the in stream flow law in '73 in Colorado. It passed in the midst of a drought in the early 21st century, passed a kayak course law that allows public entities such as municipalities, water conservancy districts, water and sand districts to appropriate flows for kayaking which has become a big economic generator. It shows the changing values, I think, of the west. That's why we made the agreement on the Windy Gap Project for the in stream flow subordinating the Windy Gap water right to the junior in stream flow right because, very frankly, when we did the skull session on this, with our client, the Northern Colorado Water Conservancy District, we ended up concluding that if we don't do these kinds of recognition of the new values that were emerging in

the environmental movement, we would not get the project. Well, Denver came along, I think, a little bit too late for realization about the cooperation that's necessary to get through the process and they got their Two Forks permit, the keystone of their future plans, vetoed in the 1980s. They just had not developed the relationships or the credibility and they had a lot of people throughout the state opposing Two Forks. And then it turned out, of course, it was the suburban entities, not the city and county of Denver itself, the Denver Water Board area, that really needed the water from the Two Forks, it was the ground suburbs. So at that point, they didn't get through the process. I think that's now all on the wall for this and we've always had an entrepreneurial system under the prior appropriation document. You do not have a water right until you can actually turn the water from the stream. Now since the environmental overlay on permitting, the 404, Endangered Species Act, all of these laws require now a great public process in mitigation that those who can get the structures permitted are those who are going to be able to perfect water rights for the remaining unappropriated water, because under Colorado appropriation law, there is no such thing as a water right that isn't put to beneficial use. A conditional water right is only a placeholder. So the strategy now is entirely different on developing a water project. When I look at it, 35 years into practice as a lawyer and as a judge, than it was when I was entering into the field in the mid 1970s.

PS: Another legal issue that Dick Brown brought up to us is the private property rights when the stream goes through a farmer or rancher's property and the recreational users want to pass through there, whether they have the right to pass through the property.

GH: That's a big issue on contention. In 1979, our court, our predecessors, decided the Emmert case which said for sure that the bed of the stream belongs to the adjoining property owner, so that if you actually step into the stream, step on the stream bed, or cross the private property without permission, you may be in trespass. Now if you don't, and you're able to float it, there's always been this

issue that the water is the public's water resource. The private property owner doesn't own the flowing water coming down the stream. Now he or she may have a water right to divert water into their head gate but that's not the same thing as saying you own the water that's going through there, so there's this dynamic tension between the flowing water belonging to the public and in stream flows now and access to the stream to put in a boat, so I'm not going to say anymore about it. I expect some time in the future this issue may be back in front of the court, and I know it's a big bone of contention, but I do tell you there's a great blessing in all of this, that one-third of Colorado's still in federal ownership and is publicly accessible and that counties and cities also recognize the value of the recreational economy of rafting and now we can negotiate launch points with private property owners. They do need compensation if they're going to allow that, or launch from public parks. I think the most controversial thing is whether ranchers can string up barbed wire and prevent people from floating down there without interfering with the private property right, which is the bed and banks of the streams. So as in a lot of things in community, maybe some dynamic tension is a good thing there. Ultimately, I believe the Legislature is the proper entity to figure out what the solution is.

PS: It sounds like something that could go all the way to the U.S. Supreme Court. You know in Arizona the public property rights with eminent domain and condemnation became a big issue.

GH: I understand that. And the in stream flow law in Colorado doesn't allow condemnation for the purpose of the in stream flow law. This court will decide cases that come before it based on what the law is at the time, statutory, constitutional, case law decisions. That's what I love about the case by case method. We don't pie in the sky hypotheticals. It's very salutary. Regardless of what the public may think of judges, we have a lot of built-in constraints about what we can do and what we say is always transparent because we have to govern by the written opinion. The other two branches of government don't

necessarily have to explain how they got to where they got, but then we have to rationalize and write about conflicts and statutes, new developments in the law. If we want to overrule a prior case or modify it, we have to do it in writing. We have to stand for a 14-day rehearing period so that the attorneys can further educate us on behalf of the clients, so it's a good method. But the Legislature has a lot to say about these new and evolving uses and the integration of them with the prior use rights. However, there are constitutional protections in the state and federal constitution for the protection of private use rights in water. Those are property rights. So the government can't just simply wave its hand and say the senior priorities are not going to be ignored this year, we don't like you growing alfalfa, should go to the city or it should go to the kayak course. That's not how we work. The ameliorating principal at work is the change of water rights, the market, and now in the Legislature, in the drought years, realizing that they maybe don't want to have these great agricultural water rights necessarily all be transferred to cities, has allowed leasing, dry year leasing, fallowing, water banks, legislation that allows the agricultural ditch companies and users to keep the permanent rights to the extent they want to, but lease the historic consumptive use through a stream line permit system, not necessarily have to go to water court to adjudicate it as you would a permanent water right. We recognize that now in a decision in a high plains case which also prevented the people who were trying to just get a big change of use for the Fort Lyon Ditch Company, up to 40% of it without identifying where the water was going to be used. Now we held an opinion that I authored in high plains, a unanimous court opinion that you cannot speculate in water rights transfers. You have to show where the water's going to come from, you have to show where it's going to go to, because this is a beneficial use doctrine. So you can't simply tie up a bunch of shares and get a change. You have to demonstrate your plan that the water, when changed with that senior priority, is actually going to be beneficial use. So it's very interesting to see how this doctrine in Colorado which originated with the farmers, the only right we recognize between 1861 and 1902 as being able to be adjudicated was an agricultural water right, and that was because of this idea

that agriculture was going to be the permanent consumptive fixture of the west. By 1902, ironically at the dawn of the Reclamation Act to help irrigation agriculture, it's clear that the great and growing municipalities of the west are going to probably be the bigger water users in the long term. Of course, that's exactly what we're experiencing. The water law has to track the changing values, customs, and economy of the west so we have a lot more beneficial uses now, including the environmental uses than we ever had before. And that's probably just right as long as we don't take people's senior rights.

PS: Looking back over your long career, what accomplishments relating to Colorado water, are you proudest of?

GH: The Windy Gap Project certainly has to be there, negotiating on behalf of the water users the only wild and scenic river in Colorado, the Poudre River, 75 miles of free flowing stream. I was one of the three water user negotiators. John Sayre and Larry Simpson were the other two. Maggie Fox, Barney White, and Chuck Weiner were the environmental negotiators. Hank Brown, as a congressman, was instrumental in that. Certainly withstood pressure from some very conservative farming elements thinking you didn't want to have a federal reserve water right, a wild and scenic river and he, using his great credibility and putting his political career at risk, said we can have a free flowing Poudre above Fort Collins. We can still have reservation of a reservoir site there and we can have a heritage corridor for the rest of the Poudre down to its juncture with the Platte where the historic Union Colony of 1870 was founded. So he put together a package of legislation that recognized water user interests and environmental interests, federal interests, historical cultural interests, Being involved in that negotiation, word for word, we drafted that bill among the environmental and water user groups, held it together all the way through Congress. It got enacted in 1986. That was a great, great moment, I think, in the contributions that I've been able to do but the real thanks belong to the Northern Colorado Water Conservancy District Board, to the water users within the service area, the

Poudre River and to the environmental groups that were willing to compromise. They wanted the in stream flow to go all the way to Fort Collins. Eight miles above Fort Collins was set aside for a possible future reservoir. May or may not ever be built. There was also a subordination of the new reserve water right to all prior conditional and absolute water rights on the Poudre. Then the idea that in 1986, Martha Ezzard's legislation, which I helped to draft, again for the northern district, but also for the Colorado Water Congress, was to use the water market priorities to get in more water for the in stream flow rights which were very junior so that the water conservation board could accept leases and raise money to purchase senior priorities. So those are among the things that I got to do.

PS: Are there any things you worked on that you would have done differently?

GH: Well, I might have kept my temper more than I did in those days. You have to mature a little bit as a judge, you get a little bit more objectivity. I think I fell under more siege than I needed to. When you're in an advocacy position, your client expects you to be there for them, and sometimes I think that I was more intense than I needed to be. However, I'm also proud of what we did. I think it was necessary. There was a lot of balls up in the air now between the emerging environmental movement and the traditional water user movement, I had the great privilege of being right in the middle of that and, as a judge, of course, since we do water rights cases, whatever controversies come along, it's very satisfying. I've always been entirely fascinated by the Colorado River and its workings, its legal, cultural history. I'm now involved with a project to help educate Navajo teachers. Going to the reservation next month and what I'm talking about is the history and culture and laws of the people of the Colorado River Plateau. And certainly the Native Americans historically have had a big stake in it. The Anasazi, the Puebloans as we now call them, had four reservoirs operating in Mesa Verde between 750 and 1180 A.D. The Native Americans have reserve water rights that are finally being negotiated and quantified. The Animas-La Plata Project is being built with the Navajo water component, the

water component for the southern Ute and mountain Ute tribes. All of that was ongoing, by the way, when David Robbins and I were at the Attorney General's office in the mid 70s. It's finally good to see the Animas-La Plata Project proceeded. It's a long time and those things have a lot of rich history to them and sometimes in our battles to get projects built or not built, we got a lot of rhetoric out there, but I think if you look at it, there are also a lot of common sense settlements that have been happening and will necessarily have to happen to utilize the great resource of the Colorado River. Of course, there's nothing like rafting the Grand Canyon either. I've done that a couple of times so it is impossible to see the beauty of that and not realize that there is also a great preservation heritage operating in this Basin.

PS: The Native Americans, it seems like they are winning a lot of their water right cases, particularly in Arizona. A lot of the Colorado River water is going to be used to settle water rights cases with even the Indians who aren't on the River.

GH: Yes, but a very interesting part of those settlements is that they're working also with the non-Native American communities to help supply the needs. That's where it needs to be. We thought in setting aside reservations in the west, we I'm saying the Anglo settlers and the government, thought we'd make farmers out of them. The Arizona Supreme Court now has a notion of a productive homeland, for those reserve water rights and the settlements like the Gila River Settlement and maybe the Hopi settlement and maybe the Navajo settlement, all these will have to take into account the larger community. The Native American and non-Native American leasing, the Native Americans maybe keeping the permanent right, getting income leasing to their neighbors. These are all things that are in the works and are very positive. The judges have always taken a position that settlements have a lot more flexibility than necessarily deciding a lawsuit in a pitched argument to a court of law.

PS: It is ironic though that some of the Anglo cities are going to be dependent on leasing or buying water from their Indian neighbors.

GH: It's ironic, but that's what the Winters case in 1908 put on the roadmap. A lot of these projects are junior, to those reservations that were created on unappropriated water. The federal reservations operated on then unappropriated water. What the state appropriators didn't know or didn't realize fully, the United States Supreme Court had articulated was that there was a marker to make those reservations productive. So it's been a big wake up call to western water users, but the fact of the matter is, when you're junior, you have to negotiate.

PS: What surprises you most about water issues today?

GH: How adaptable and flexible our water laws really turn out to be. How necessary it is to be in community and watersheds throughout a state and interstate. We now have this round table process in Colorado where there's eight Basin round tables and a central round table to try to see now how are we going to have water transfers from agriculture, how are we going to develop our remaining portions of the Colorado River Compact we could develop, for the interests of the Basins, that's always going to be important, within our own states, the state as a whole, and then we're going to have to also live with our neighbors. Frankly, the Upper Basin would like a no call agreement on that 75 million acre-foot, 10-year running average in extreme shortage conditions. These tree ring studies that Connie Woodhouse and her colleagues are doing up at Noah, as reported by the Western Water Assessment that Brad Udall is doing such a good job putting on the web, are showing us that we could suffer jointly and together, Upper Basin and Lower Basin. That's why this February letter to the Secretary of the Interior trying to outline studying all possible strategies to agree on shortage criteria is extremely significant. If I had to change one thing, I'd love to be in the middle of that. On the other hand, I enjoy being a judge, so I also am enjoying watching what the states may come up with.

PS: Is there anything you wanted to bring up that I didn't ask you about?

GH: No. I think we have a new generation of water leaders which is very exciting. Men and women. The people of my generation have a duty to help bring them along. I hope I'm doing that with some of my law clerks. I think that the law firms, the engineering firms, water consultants need to do this. The Legislature in Colorado, in the midst of the 2002 droughts, set up the Colorado Foundation for Water Education. I have the privilege of serving as its Vice President. I think that people who have had the opportunity to be in the water field like I've had for 35 years need to help bring others along, and give them the responsibility and opportunity to do these things. I was shocked how much the generation in front of me actually helped train me and bring me along and are now not there and how fast, that's the shocking part of it, I'm now in the position of helping to make it possible for others. We have this great water leadership program at the Water Foundation to bring in new water leaders. We've got 13 of them right now from environmental and water utility interests, other interests, engineering interests that we're taking through a mentor program.

PS: I guess we're out of tape.....