

**Attorney General Mark Shurtleff
Friends of Alta Water Symposium
Alta, Utah
August 20, 2008**

I really appreciate that from the man who has so many interests and is involved in so many ways, its amazing, you would think he would just dealing after experience in the Clinton Administration with land issues and water issues and natural resources issues but he has come in and talked a lot about drug abuse and... the amount of contacts he has is just tremendous. And, I really appreciate that. You know, if your guy wins I hope he brings you on board because if you want a guy who understands western issues like water and natural resources a guy from Chicago ain't the guy, alright. My guy from Arizona though is the western stock. Although as I was just being asked what if he wants to try and renegotiate the Colorado River, you guys are going to be butting heads on that, and that's for sure. I appreciate the chance to come and speak with you today about a couple issues. I am sorry I didn't see Bill Levitt, I worked a lot with him when I was County Commissioner and greatly admire the man, it's a shame not to have him here and I know we don't last forever. I hope he feels better and we have him around a lot longer. Absolutely, Bill is amazing. He taught me a lot when I was Commissioner on how to be a public servant.

I grew up at the mouth of Little Cottonwood Canyon myself, and moved out to Willow Creek. I played in Little Cottonwood creek when I was growing up and I learned to ski up here as well, until I started messing up my legs. Its great to be back, I haven't been back this time of year since my mother in law passed away. Her annual trek up here in the spring was to Secret Lake and we always brought her up here, she passed away last fall and I was in a wheel chair this spring so we didn't make the trek. But we'll get the kids back up here, its just beautiful and you have a lot to be grateful for.

Water, talking about issues that are obviously amazingly full of vigor, lets say. I really applaud the Friends of Alta for doing this symposium. Water resources in this very arid state, second most arid in the nation. Amazing when I bring the Attorney Generals out here how they suddenly have chappy lips and they are suddenly like "why is it so dry here". "Don't you have a lot of snow?" That's what makes it the greatest, that low moister content, that's why we have the powder that's better than anywhere else.

The United States Supreme Court and the Utah Supreme Court have certainly likened a drop of water to a drop of gold. We all know how important it is out here in the west, and actually to everybody. Wallace Stegner says "water is true wealth in a dry land".

I am gong to give out a copy of quick questions here and then get to some more serious topics and I'll make sure that I am done before lunch, I don't want to keep you from that. Right now everybody is thinking the big issues that people are going to fight over and what really is the life blood of our country, and that's oil. How many of you saw the movie that Daniel Day Lewis was in called "There Will Be Blood"? About oil. There talking about oil but I'll tell you what when it comes to water there probably been people killed over water then over oil battles. Listening to

Doug Wright right now about how he doesn't understand the oil business. I've got a brother, who is in the oil business right now, and trying to use new technologies to bring it up. Again, water is so critical to that. In order to get either oil shale turned into oil or brought up, like my brother plans to do, you need water. Water is critical.

There is a little exchange between Daniel Day Lewis' character, Plainview, and that evangelical preacher, Eli Sunday, in the movie that could apply as well to water throughout the years. Remember that Eli Sunday, Daniel Day Lewis' Plainview, the oil man, didn't like him called him a false profit. The preacher didn't like Plainview. So they were constantly at each others throats in this movie. At one point the preacher, Eli Sunday starts thinking there might be some benefit in getting some oil, I might make a little money off of this deal so he finally says, he's got one of these parishioners who owns this crack of land is the only one Plainview hasn't been able to get, Plainview wants it, had fought for years trying to get it, Eli Sunday finally says, come to him and says I'll make you a deal, I can get my guy to give you that land but I want \$100,000 so on and so forth. Plainview says "Well, you really want it, your going to have to admit you're a false profit." And he really plays with this guy, I remember this exchange, "you have to say 'I am a false profit and God is a superstition'". He finally gets him today it. "I am a false profit and God is a superstition" he says it three times. He says, "Is that good enough" and he goes "Well, I just wanted to hear it, I don't really need that land we already drilled it". And Eli Sunday says "What, no you haven't. You know what we are talking about? We are talking about the bandit track, there's no rigs there, there's no derricks there, you haven't drilled it." "You don't understand" says Eli Sunday. He says "No you don't understand, it's called drainage." He says "I own everything around it, so I get everything under it". He said "Eli, I drink your water, I drink it up, everyday I drink the blood of land from bandits track."

Same thing with water: drainage and people's prior use, and people downstream, and everything else... it really has been, water has been the life blood of the west and really of this country and the world. It's a problem everywhere. I love this article that Pat sent me this week from the New York Times where it is getting so bad in some places, even in the West, in California, the headline on the article is "A Tall Cool Drink of Sewage?" Its talking about recycling wastewater and sewage water. If you like the idea lawyers with words is a tool they say. They call it indirect potable reuse. If you don't like it its toilet to tap. People are getting used to the idea that maybe we are going to have to recycle.

Here's a question for you that I am going to give away an Attorney General pin. Whose birthday... One of the greatest actors to ever live celebrated, it was his 100th birthday, he passed away but they celebrated his 100th birthday. Who? And this was the guy who was very famous for... greatest western actor of all time. Who said John Wayne first?

Alright name the movie that he... well I'll tell you the movie, you've got to tell me his name. In "Riders of Destiny" he played a government undercover agent who was coming out west to protect people's water rights ...you ought to go see it if your interested in water rights, he had a funny name, do you know what his name was? You've got to be a real John Wayne fanatic. My chief of law enforcement who has a giant life size poster of John Wayne in his office would know this. Nobody? This was before Rooster. This was back in the 30's when you were a kid,

I'm kidding. You won't know. Singing Sandy was his name. The whole movie is about coming in and trying to protect peoples water rights.

Utah's pioneers were obviously among the first white settlers to put water to use here in the western territories along with the miners who were out here, speaking of this area. Early territory water uses were protected against those who came later. In Utah and other areas that law of prior appropriation took root. Now implementation of that legal document continues to this day and tens of thousands of water rights have been established in place in priority on each water source of course depending on the date of creation. Now some, a lot of people call that prior appropriation doctrine too ridged, they say it's outdated, it should be abandoned in favor of other apportions. But my personal belief, and that of the lawyers, many of the lawyers who work with me, that while you might be able to tweak that law a little bit but for the most part, prior appropriation doctrine has proven itself to be both adaptable and responsive. The idea of wholesale abandonment really is unrealistic, unwise, and probably impossible frankly.

You've had great panels to talk to you today already about water conservation and in this segment, obviously, we are going to talk about watershed management. Let me just give a few thoughts on the legal scene when it comes to these issues. First of all water conservation, some observers have decided that the prior appropriation doctrine and the use-it-or-lose-it principle promotes inefficiency. In my experience and in discussing this with my water lawyers and cases we have been involved in, most water use in Utah is actually quite efficient. One, water has become to valuable of a commodity for people to waste it. And in this regard the prior appropriation doctrine allows market forces, I'm a big believer in free market and market forces, to move water to its highest and its best use. Wise use promotes the best return on investment, whether it's agricultural, manufacturing, or in a commercial setting. Now some government programs like the Colorado River Basin solidity control that and the Utah Division of Resources' revolving loan program make funds available for water users to switch to more efficient uses of water, for example from flood to sprinkler irrigation or piping water that's now in canals. And these educational programs like Slow the Flow and others are really starting to show that they are motivating people to use less water. But there are users who seem oblivious to the need for conservation, they just are. My wife used to say, "Mark you're the worst" because I leave the water running when I brush my teeth. My wife, thank heavens, is really on top of that. She is constantly after me, she thinks I am the biggest water waster that ever lived.

If the residents of a municipality, citizen rate structure should be set to charge significantly higher per unit and a certain maximum amount of use has been reached, current law allows for such pricing. It does allow that higher pricing as long as it's rationally based and consistently applied. If water abusers hold primary water rights and use water in excess of their water rights, then they clearly should face legal consequences. If they do... and they do face those consequences since the legislature two years ago, in the 2006 session enacted a statute in Title 73 of Utah Code which gave enforcement power to the State Engineer to take action against those who uses in excess of their water rights. Couple points: this law provides administrative penalties, and the criminal penalties that our office will be involved in certain instances. Many enforcement actions come as a result from referrals from you, the citizens who are observant, who witness water use and excessive of water rights, and then report at the State Engineers office under Mike's division. Of course our attorneys, who represent natural resources division, the

State Engineer help with these enforcement actions. Already we have secured several fines from water rights abusers including a recent stipulated settlement in a case where a \$75,000 fine was paid. We are starting to use these tools that the legislature has given us to go after those who are violating, abusing water, in excess of their rights.

Another important legal aspect of promoting water conservation is to address situations where water can be claimed for use outside our traditional water state law system. Typically such threats come from federal laws, especially the Federal Power Act, Endangered Species Act, and in particular the Reserve Water Rights Doctrine. I am sure you are already aware that these Reserve Water Rights date back to the case of *Winters v. United States* in 1908. Where the United States Supreme Court held that even though no water was claimed under Montana law in the Fort Belknap Indian Reservation, which is set aside from public land, and even though virtually all the water in the Milk River which runs through the reservation was claimed by irrigators with Montana water rights, establishment of the Federal Indian Reservation impliedly, the Court ruled, created federal reserve water rights for the reservation. Which trumped the State created rights because without such rights Indian land was useless. Later case law held that the Reserve Rights Doctrine applied not only to Indian Reservations but also to other federal reservations, national parks, monuments, and even military reservations. Now western states have resisted the Reserve Rights Doctrine in some cases that have actually spent millions of dollars, tax payers dollars, in litigating. In Utah we have chosen to negotiate with the federal agencies rather than litigate at current time, doesn't mean we still might not turn around and sue them. But we have negotiated to quantify these reserve water rights to try and reach settlements to satisfy federal, state, and local needs as well as the needs whether it's an Indian reservation, national park, or monument. Currently we continue, we have actually reached a number of settlements, we continue actively right now with several parks and monuments and a couple of Indian tribes. In working to quantify Reserve Water Rights, Utah's State Engineer and other state water officials continue to meet Federal and Native American officials while at the same time protecting rights of holders here in Utah.

Another important legal aspect regarding water conservation is to carefully address the situation where we share water sources with other states. And this gets fun, fun in that we get together with attorney generals and one thing that keeps us battling each other is water, nothing else. Obviously the Bear River and Colorado River are two examples of that. Both rivers are compacted. Typically things have run smoothly with Idaho and Wyoming as we worked on the Bear River issues but Colorado River management is obviously much more complicated. We've worked very hard, very closely with the other compact states, California, Nevada, New Mexico, and Colorado and also Wyoming to address a number of issues to be able to work things out with them. Most recently we negotiated a pretty remarkable agreement framework to share shortages on the river to better coordinate the upper region of Lake Powell and Lake Meade.

Now when it comes to watershed management and legal issues related to management, some people assert that the Prior Appropriation Doctrine does not promote such management. But I disagree. I don't see anything about prior appropriation that precludes it. And I support it. First, because managing a watershed is holistic. I believe it's the most effective and appropriate approach to water management. Second, managing on a watershed basis requires the coordination of several levels of government: federal, state, county, local, and individual citizens

and citizen interest rights groups to regulate the variety of land and water uses. Third, most of the legal protections for watersheds come from local or county ordinances which limit certain uses that impact water resources with some protections coming from water quality standards for certain streams up with an interest by the State of Utah. And fourth, the most critical watershed management issues are not really watershed issues. There controlling erosion. So protect watersheds obviously we must also protect soils, I learned that as a boy scout getting my merit badge making my little erosion, they teach a lot of boys about that over the years. So we have to protect the soils movement and flooding from contamination and really Utah's achieved a number of successes that are somewhat unusual in the watershed management under the DNR's watershed restoration program. This is an award winning program. Its formally recognized, and not just recognized its actually imitated, by the Federal Departments of Interior and Agriculture. So it really is a model for the west. It's a model because its based on locally led teams that coordinate activities having potential impacts on soils and specifically on watershed in general. The important part of this restoration program is promoting the health of vegetation with careful treatment when necessary that results in watershed health. And that includes wise timber management and fire suppression activities. It's been most active in rural Utah but there really is something poking up for every area in the state of Utah. I don't know if Friends of Alta has taken advantage of the program, people I talked to weren't sure to tell me that. You might want to consider doing so if you haven't taken a look at that program.

Another legal matter related to watershed management of course is the ability to control and establish legally protected in-stream flows. That In-Stream Flow Doctrine is codified again in Title 73 of the Utah Code. Somewhat restrictive in scope, the law is but in its infancy and needs the legislature to give it more precise definition. I think we ought to be talking to the legislature about how we best do that and an economically viable means to implement such a doctrine.

So basically in closing, so we can go to Q&A and some lunch, we've experienced, I think, a lot of success in Utah regarding water conservation and watershed management. It doesn't mean we can rest on our laurels we really need to double our efforts in the future because if we are not careful we'll prove this person, all give away another pin for who said, "Whiskey is for drinking and water is for fighting". Mark Twain, someone over here said it first.

Since water is a limited resource here in our desert state it really behooves every one of us to do everything we can to improve our efforts to conserve, enhance, protect, and to manage wisely. With that let me just give you some information, some of these questions might come up. The Division of Water Rights enforcement engineer is our own Singing Sandy. I don't know if Kerry Carpenter should be called Singing Kerry but we can call him that from now on. Kerry Carpenter is his name. He is the water rights enforcement engineer, if you don't know that I have the numbers here if you want them. I appreciate the chance to be here.