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Application of the Law of Prior Appropriation: Outline

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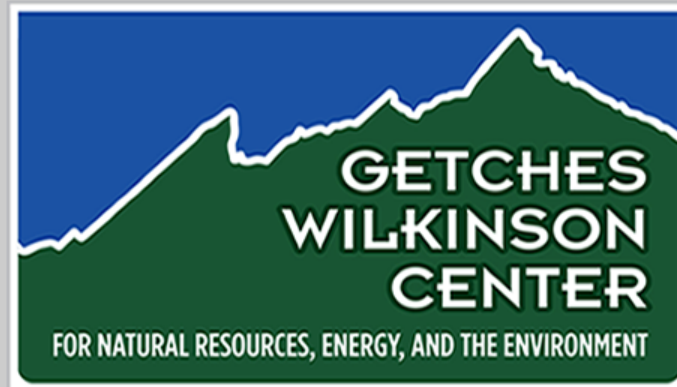
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OUTLINE
APPLICATION OF THE LAW OF
PRIOR APPROPRIATION

BY

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WATER RESOURCES ALLOCATION:
LAWS AND EMERGING ISSUES

THE UNIVERSITY OF COLORADO SCHOOL OF LAW

I. DIRECT FLOW RIGHTS

A. Acquisition of a right

1. Substantive requirements

a. Intent to appropriate; diversion; application to a beneficial use; without waste

(1) Intent -- physical activity manifesting the intent; Four Counties Water Users Ass'n v. Colorado River Water Conservation District, 161 Colo. 416, 425 P.2d 259 (1967)

(2) The need for a diversion

- Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960)

- minimum stream flows and instream appropriations

- Colorado River Water Conservation District v. Colorado Water Conservation Board, 197 Colo. 469, 594 P.2d 570 (1979); McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976); State Dept. of Parks v. Idaho Dept. of Water Administration, 96 Ida. 440, 530 P.2d 924 (1974)

(3) Beneficial use; hostility to speculation; Colorado River Water Conservation District v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979); Gossner v. Utah Power & Light, ___ Ut. ___, 612 P.2d 337 (1980)

C.R.S. 1973, §37-92-103(4):

"Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

b. Waters subject to appropriation

- (1) All waters
- (2) Stream waters
- (3) Natural streams
- (4) Ground water vs. surface water
- (5) Tributary v. non-tributary
 - tributary presumption
 - the "global" concept of the natural stream
 - Safranek v. Limon, 123 Colo. 330, 228 P.2d 975 (1951)

2. Procedural requirements

a. Permit states

(1) Montana: Mont. Rev. Codes Ann. §§89-865 et seq. (Supp. 1973), as amended.

- Application to Department of Natural Resources and Conservation
- Notice and objectives; public hearings
- Completion of appropriation; certificate of water right
- Restrictions on permits
- Reservation of water: the public interest

b. Colorado

(1) Decreed right

(a) Water Right Determination and Adjudication

Act of 1969, C.R.S. 1973, §§37-92-101 et seq.

(b) The water clerk, referee and water judge

- jurisdiction over "water matters"

(c) Application for a water right

- forms provided by water court
- resume (monthly)
- statement of opposition
- referee's determination
- protest
- hearings by water judge
- appeals (to Colorado Supreme Court),
- postponement doctrine -- C.R.S. 1973, §37-92-306

- (d) Injury to vested rights not at issue in application for a surface water right; administration is adequate
- (2) The conditional decree
 - (a) The need for such a decree
 - transmountain diversions
 - the "great and growing cities" doctrine
 - "reasonable" diligence
 - the postponement doctrine
 - no need for application to a beneficial use until decree finalized
 - (b) Initiating the decree
 - application under 1969 Act
 - Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976)
 - Four Counties Water Users Ass'n v. Colorado River Water Conservation Dist., 161 Colo. 416, 425 P.2d 259 (1967)
 - (c) Due diligence
 - C.R.S. 1973, §37-92-103(1); C.R.S. 1973, §37-92-301(4); every fourth calendar year
 - Denver v. Northern Colorado Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954) (Blue River); Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961) (Metro);

Four Counties Water Users Ass'n v. Colorado River Water Conservation Dist., 159 Colo. 499, 414 P.2d 469 (1966); Colorado River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973); Town of DeBeque v. Enewold, ___ Colo. ___, 606 P.2d 48 (1980); Simineo v. Kelling, ___ Colo. ___, 607 P.2d 1289 (1980).
- Montana Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d 1110 (1977)

(3) Plan for augmentation

(a) Defined -- C.R.S. 1973, §37-92-103(9)

(as amended):

"Plan for augmentation" means a detailed program to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means. "Plan for augmentation" does not include the salvage of tributary waters by the eradication of phreatophytes, nor does it

include the use of tributary water collected from land surfaces which have been made impermeable, thereby increasing the runoff but not adding to the existing supply of tributary water.

- (b) No injury to vested water rights or decreed conditional water rights; C.R.S. 1973, §37-92-305(3)
- (c) Terms and conditions to prevent injury; C.R.S. 1973, §37-92-305(4)
- (d) Special standards; C.R.S. 1973, §37-92-305(8) (added 1977)
- (e) Case law: Cache LaPoudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976); Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976)

3. Substance of the water right

- one use; not re-use
- enforcement of priority
- put a call on the river, as long as not a "futile" call; C.R.S. 1973, §37-92-102(2)(d); Gilbert v. Smith, 97 Ida. 735, 552 P.2d 1220 (1976)
- protected as both senior and junior appropriator
- not overflow irrigation
- quantity of water -- decree or historic use, whichever was less
- exchanges; C.R.S. 1973, §37-83-101 et seq.

B. Transfer problems

1. Protection of junior appropriators; the junior is entitled to stream conditions as he finds them when he makes his appropriation; Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962); Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954); Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co., 120 Colo. 423, 210 P.2d 982 (1949); Honey Boy Haven, Inc. v. Roybal, 92 N.M. 603, 592 P.2d 959 (1978); Huff v. Bretz, 285 Or. 507, 592 P.2d 204 (1978); Basin Electric Power Coop. v. State Board of Control, ___ Wyo. ___, 578 P.2d 557 (1978); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974).
2. 1969 change of water right; C.R.S. 1973, §37-92-103(5): "Change of water right" means a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion, a change in the means of diversion, a change in the place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes. The term "change"

of water right" includes changes of conditional water rights as well as changes of water rights.

3. Method of protection -- reduction of decreed amounts; replacement water

C. Some variations

1. Change in point of return; Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irr. Co., 179 Colo. 36, 499 P.2d 1190 (1972); City of Boulder v. Boulder & Left Hand Ditch Co., 192 Colo. 219, 557 P.2d 1182 (1976)
2. The "silty" water debate
 - A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1979)
 - but see Game and Fish Comm'n v. Farmers Irr. Co., 162 Colo. 301, 426 P.2d 562 (1967); juniors protected against pollution
3. The seepage appropriator
 - not entitled to the continuation of the seepage
 - Lamont v. Riverside Irr. District, 179 Colo. 134, 498 P.2d 1150 (1972)
4. Recapture rights
 - distinguish from re-use
 - global concept
 - recapture tightly limited; Fort Morgan Reservoir & Irrigation Co. v. McCune, 71 Colo. 256, 206 P. 393 (1922)
5. Lining of ditches -- who has the right to the "saved" water, if any?

- Salt River Valley Water Users Ass'n v. Kovacovich,
3 Ariz. App. 28, 411 P.2d 201 (1966)

D. Other "types" of water

1. Developed water

- a. Definition: would not have been in a stream system but for efforts of developer; "foreign" water
- b. Special privileges -- re-use, successive use, right to dispose of; not subject to call on the river
- c. Loss of dominion
- d. Cases: Pikes Peak Golf Club v. Kuiper, 169 Colo. 309, 455 P.2d 882 (1969); City and County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972); Thayer v. City of Rawlins, ___ Wyo. ___, 594 P.2d 951 (1979)

2. Salvaged water

- a. Definition: would have been in stream, is lost, then recovered
- b. Is subject to call on the river
- c. The phreatophyte problem: Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974)

E. Loss of a water right

1. Abandonment

- distinguished from "never put to beneficial use"
- distinguished from forfeiture
- intent to abandon required; mere non-user said to be insufficient

- ten-year rebuttable presumption; C.R.S. 1973,
§37-92-402(11) (as amended)
- Gardner v. State of Colorado, ___ Colo. ___, 614
P.2d 357 (1980)

2. Forfeiture

- Wyo. Stat. Ann. § §41-47 to -53 (1957); Ward v. Yoder,
355 P.2d 371, rehearing denied, 357 P.2d 180 (Wyo.1960)
- Utah Code Ann. §73-1-4 (1980); Hammond v. Johnson, 94
Ut. 20, 66 P.2d 894 (1937)

3. Prescription

II. STORAGE RIGHTS

A. Integration with direct flow rights

- quantity -- acre feet
- rate and time of filling -- the reservoir's "priority"

B. Off-stream reservoirs

1. Filled to gauge height
2. Handling of evaporation losses

C. In-channel reservoirs

1. Solving the priority problem; inflow and outflow
measurement
2. Handling of evaporation losses

D. The "one filling" rule

- Windsor Reservoir and Canal Co. v. Lake Supply Ditch Co.,
44 Colo. 214, 98 P. 729 (1908)
- Denver v. Northern Colorado Water Conservancy Dist.,
130 Colo. 375, 276 P.2d 992 (1954); one filling rule
plus pioneer rule