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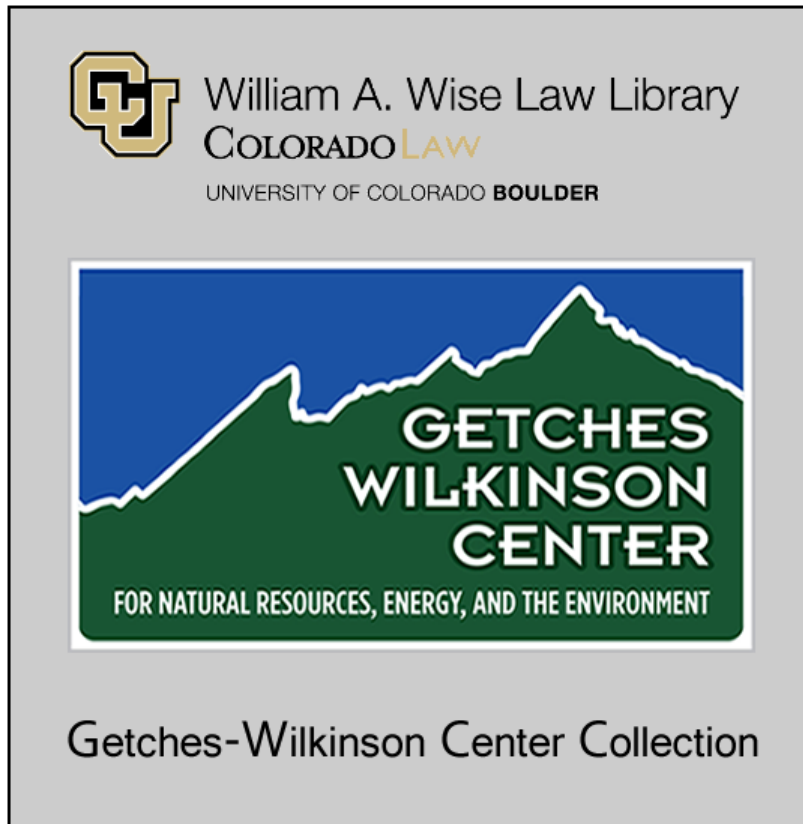
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**COLORADO WATER COURTS:
WHERE ARE THEY?**

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Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
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NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado

COLORADO WATER COURTS: WHERE ARE THEY?

By

The Honorable Jonathan W. Hays

I. Scope and Purpose

This presentation will explore current decisions and practices in the Colorado Water Courts. The purpose of the presentation is to outline the nature of the claims and issues that are at the forefront of present litigation. The presentation will describe the various means of resolving disputes, including actual litigation, omnibus agreements among users with mutual interests, and private agreements between opposers and applicants.

A. Nontributary Rights. Litigation has evolved away from disputes over the character of an aquifer as tributary or nontributary, and necessity of augmenting aquifer withdrawals. Present litigation centers on the use of aquifers as storage vessels. The principal focus is upon the Denver Basin aquifers.

1. Historical Background.

- a) Time immemorial to 1969. Water arising from springs, but not reaching a stream, is recognized as nontributary. *Bruening v. Dorr*, 23 Colo. 195 (1896). Nontributary water held not subject to call by senior appropriators. *Ripley v. Park Center Land & Water Co.*, 40 Colo. 129 (1907). All groundwater is presumed to be tributary, and Colorado law held not to apply to nontributary groundwater. *Safranek v. Limon*, 123 Colo. 330 (1951). Nontributary groundwater held to be not subject to appropriation. *Whitten v. Coit*, 153 Colo.157 (1963). The *Groundwater Management Act of 1965* creates a commission to designate groundwater basins, and requires well permits from the State Engineer for out-of-basin wells.

- b) 1969 to the present. The *Water Right Determination and Administration Act of 1969* (the “Act”) enacts the basic current statutory scheme.
- c) In 1973, S.B. 213 [now, § 37-90-137(4)] allocated nontributary water on the basis of overlying land ownership. *Hall v. Kuiper*, 181 Colo. 130 (1973) held that underground flow that would reach the stream in 40 years, was tributary to the stream.
- d) In 1975, *Kuiper v. Lundvall*, 187 Colo. 40, concluded that water that did not reach the stream system in 100 years was nontributary, and in 1979 the basis for nontributariness was changed from the question of how long it took water to reach the stream system, to how long it took for pumping to affect the stream system. *District 10 Water Users Assn. v. Barnett*, 198 Colo. 291 (1979).
- e) In 1983, *Colorado v. Southwestern Colo. Water Conservancy Dist.*, 671 P.2d 1294 (1983) [*Huston II*] concluded that nontributary groundwater was not subject to appropriation, and was not subject to adjudication under the Act. *Huston II* essentially overruled *Ft. Lyon Canal v. Perdue*, 184 Colo. 219 (1974), which had concluded that nontributary water issues were “water matters” within the meaning of the 1969 Act. Following the *Huston II* decision, the legislature enacted S.B. 439 [now, § 37-90-137(6)] in 1983, overruling *Huston II* and conferring jurisdiction over nontributary water upon the water courts.

During the period 1951 to 1983, water litigation centered on whether the courts had jurisdiction to determine nontributary rights, and if so, what did “nontributary” mean.

- f) In 1985, S.B. 5 [now, § 37-90-103 (10.5)] defined the term “nontributary groundwater”, refining the 100-year rule and applying special augmentation rules to the Denver Basin aquifers. Eleven years later, in 1996, S.B. 74 [now, § 37-90-

103 (10.7)] defined *not nontributary* groundwater, in essence, as groundwater within the Denver Basin aquifers that is *tributary*, but which is to be administered under the Denver Basin rules rather than the prior appropriation doctrine. From 1985 to 1992, litigation centered on issues regarding the nature of sufficient resume notice, e.g., *Danielson v. Jones*, 698 P.2d 240 (1985) and *Monaghan Farms v. Denver*, 807 P.2d 9 (Colo. 1991).

2. The Denver Basin Aquifers.

As required by § 37-90-137(9), the State Engineer promulgated rules for administering the Denver Basin aquifers. As part of the legislative mandate, the State Engineer determined the characteristics of each of these aquifers, including the boundaries of the nontributary and not nontributary portions of each aquifer. These regulations and associated presumptive aquifer characteristics, constitute *The Denver Basin Rules*, and were effective as of December 30, 1985.

- a) Aquifer characteristics. The four aquifers, the Dawson, Denver, Arapahoe and Laramie-Fox Hills formations, are superimposed, cover an area of about 6700 square miles, and contain an estimated 250,000,000 acre feet of water. They frequently outcrop along their perimeters, underlying active stream beds in some locations, producing artesian springs in others. Increased pumping over the past quarter century has lowered the artesian head, so that fewer springs exist today. They range in maximum thickness from 350' for the Laramie-Hills aquifer to 1200' for the Dawson aquifer, and in maximum depth below ground surface to the bottom of the aquifer from about 1000' for the Dawson aquifer to about 3500' for the Laramie-Fox Hills aquifer. The amount of water, as a percentage of total aquifer volume, that can be physically withdrawn is about 17% for each of the four aquifers. Litigation involving these aquifers has focussed on augmentation of post-pumping depletions, and adjustment of aquifer boundaries.

- b) Post-pumping depletions. Decrees for *not nontributary* water require replacement of 4% of water pumped from wells that are more than one mile from the closest contact of the aquifer to the stream. § 37-90-137 (9)(c) also requires continuation of replacement of water, after pumping has ceased, to augment injurious stream depletions that occur thereafter. *Danielson v. Castle Meadows*, 791 P.2d 1106 (Colo. 1990) [*Castle Meadows I*], represents the first litigation of issues regarding augmentation of depletions that result from withdrawal of *not nontributary* water. The litigation continued with *State Engineer v. Castle Meadows*, 856 P.2d 496 (Colo. 1993) [*Castle Meadows II*], and *Simpson v. Yale Investments*, 886 P.2d 889 (Colo. 1994) [*Castle Meadows III*].
- c) Aquifer boundaries. The Denver Basin Rules establish aquifer boundaries that define the demarcation between the *nontributary* and *not nontributary* portions of each of the Denver Basin aquifers, as well as boundaries that define their geological extent. Until § 37-90-103 (10.5) was amended in 1996, the character of a Denver Basin aquifer would be transformed from *not nontributary* to *nontributary*, once the water level in the aquifer fell below the base of the stream alluvium, so as to sever its hydrologic connection with the stream system. This was so, because once the connection was severed, withdrawal of water from the aquifer no longer affected the stream system; stream depletion then became constant, and was unaffected by the water level in the aquifer, no matter how far below the aquifer-stream contact the water level fell. § 37-90-103 (10.5) now provides that *not nontributary* water shall not become *tributary solely* because pumping from the aquifer has lowered the hydrostatic pressure in the aquifer below the stream alluvium.

B. Tributary Rights.

1. Historical Background. Litigation has evolved from disputes concerning the legal rights to divert, and to change place and type of use, to disputes over applications for conditional decrees, findings of diligence and abandonment.

- a) Pre-1969. *Coffin v. Left Hand Ditch*, 6 Colo. 443 (1882) recognized the prior appropriation doctrine and rejected the doctrine of riparian rights. *Coffin* also held that the extent of a water right was limited to the amount beneficially used. *Strickler v. Colorado Springs*, 16 Colo. 61 (1891) extended the right of senior diverter to place a call, not only upon the stream from which he took his water, but upon its upstream tributaries, as well. The existence of conditional rights was recognized in *Sieber v. Frink*, 7 Colo. 148 (1884). The necessity of adjudicating changes in points of diversion was established by *New Cache La Poudre Irr. Co. v. Arthur Irr. Co.*, 37 Colo. 530 (1906), and the right to condemn rights of way for the exercise of water rights was held to include pipelines in *Lyons v. Longmont*, 54 Colo. 112 (1913). There was relative peace and quiet, in water litigation that established significant legal principles, between 1912 and 1951, when *Safranek v. Limon*, 123 Colo. 330 (1951) established the presumption that all groundwater was tributary to the stream.

Other pre-1969 cases, which will be addressed later, concerned the relation back of conditional decrees (the “first step” doctrine), the requirement that a diverter employ a reasonable means of diversion (a shallow alluvial well cannot command a minimum stream flow), and a restatement that a vested right is limited to its maximum utilization, not its maximum diversion (a precursor of the historical consumptive use doctrine relating to transfers).

- b) From the enactment of the Water Right Determination and Administration Act of 1969 (the “Act”), litigation, cases are more easily considered by category than by chronology. Among the significant categories are the refinement of the law relating to conditional rights, historical consumptive use, and water quality.

Conditional Rights. The concept was recognized in 1883 (*Sieber*, supra), and the term “conditional right” was coined in *Suffolk Gold Mining & Milling v. San*

Miguel Consolidated Mining & Milling, 9 Colo. App. 407 (1897). The principle that a conditional right, once made absolute, related back to the “first step” taken toward assertion of the conditional right was announced in *Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375 (1954).

The “can and will” doctrine was enacted in 1972, now § 37-92-305 (9)(b). The doctrine requires, as an element of a “first step”, that an applicant for a conditional decree establish that the water rights he seeks *can and will* be diverted and applied to a beneficial use, and that his proposed project *can and will* be completed within a reasonable time. This principle was applied in *Southeastern Colorado Water Conservancy District v. Florence*, 688 P.2d 715 (Colo. 1984), and reaffirmed in *FWS Land & Cattle Co. v. Colo. Div. of Wildlife*, 795 P.2d 837 (Colo. 1990). *FWS* held that an element of the *can and will* doctrine is proof that the applicant either owns the land necessary to his project, or can acquire it by condemnation. Other elements of the *can and will* doctrine include a substantial probability the applicant can appropriate the necessary water within a reasonable time, *Board of County Commissioner, Arapahoe County v. U.S.*, 891 P.2d 952 (Colo. 1995). Sufficient water must be available, in priority, in sufficient quantities, and with sufficient frequency to enable the applicant to complete his appropriation within a reasonable time. *Application of Hines Highlands Ltd. Partnership*, 929 P.2d 718, 723 (Colo. 1996). *Thornton v. Ft. Collins*, 830 P.2d 915 (Colo. 1992) held that the “first step” in a conditional appropriation requires a concurrence of the applicant’s intent to appropriate and an overt act by the applicant that is sufficient to put third parties on notice of the applicant’s intent. While an applicant’s speculative future needs are not sufficient to establish that he can and will put his water to beneficial use, *Thornton v. Bijou Irr. Co.*, 926 P.2d 1 (Colo. 1996) concluded that a municipality may acquire a conditional right based solely on its projected future needs. However, the amount to be appropriated by the municipality must be consistent with its reasonably anticipated requirements, which are in turn based upon substantial projections of future growth. *Thornton*, *supra*,

830 P.2d at 39.

Historical Consumptive Use. The earliest appellate decision regarding prior use appears to be *Westminster v. Church*, 167 Colo. 1 (1968), although earlier litigation of applications for change of use considered whether the change created an expanded use that would result in injury. See *Farmers Highline Canal & Reservoir Co. v. Golden*, ___ P.2d ___, 1999 WL 167671 (Colo. 1999). Westminster defined historical use as the amount of water historically diverted. The term “historical consumptive use” was first applied in *Danielson v. Kerbs Ag.*, 646 P.2d 363 (Colo. 1982). The court therein held that the determination of whether a decreed use had been expanded must consider not only the amount that had been historically diverted, but must exclude the amount that historically had returned to the stream. *Kerbs* also held that an appropriator who seeks to change his right, risks quantification of his historical consumptive use. *Wiebert v. Rothe Bros.*, 200 Colo. 310 (1980) held that the doctrine of res judicata did not bar the court from determining the actual extent of historical use in determining the nature and extent of a previously decreed water right. The principle was reaffirmed in *Orr v. Arapahoe Water & Sanitation District*, 753 P.2d 1217 (Colo. 1988). *Wiebert* also stated that the right to change diversion was limited to the “duty of water,” i.e., “that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon.” *Supra*, 200 Colo. at 310. See also, *Farmers Highline Canal & Reservoir Co. v. Golden*, supra 129 Colo. at 584. Whatever doubt remained on this issue was dispelled in *Williams v. Midway Ranches P.O.A.*, 938 P.2d 515 (Colo. 1997), holding that the measure of a water right is its historical consumptive use.

Water Quality. *Suffolk Gold Mining & Milling, supra*, enjoined the discharge of polluted water into the stream system. This principle was litigated in a variety of fact situations until 1953, without significant change. From 1953 to 1973, legislation was enacted that prohibited stream pollution and created criminal penalties for doing so. In 1973, the Colorado Water Quality Control Act [WQCA] was enacted, empowering the Water Quality Control Commission to establish pollution standards that regulated discharges to the stream, and a related Division that is responsible for issuing permits. The regulation of discharges to the stream is within the exclusive jurisdiction of the Commission, § 25-8-202 (7) (a), and challenges to regulation and enforcement are by judicial review of final agency action. *E.g., National Wildlife Federation v. Cotter Corp.*, 655 P.2d 598 (Colo. 1983). However, the jurisdiction of the Commission is expressly limited. The Colorado Water Quality Control Act provides that the act “shall not be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses” under Colo. Const. ART.XVI, §§ 5 and 6; nor shall the act be “applied so as to cause or result in material injury to water rights”, § 25-8-204 (1).

The water court derives its authority over matters involving water quality from §§ 37-92-305 (3) and (5), which provide generally that applications for change, for exchange and for plans of augmentation shall not injuriously affect other vested users, and that substituted water “shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used.” § 37-92-305 (5). Thus, Colorado has created a dual system of water quality regulation. There has been little litigation in the water court, to date, over water quality issues, *Thornton v. Bijou Irr. Co.*, *supra* 926 P.2d at 92-92. Unresolved issues centering on water quality are framed in pending applications, and will be addressed below.

C. Currently Pending Issues. The issues now at the forefront of litigation necessarily arise in applications that are presently pending in the water courts. While this presentation will avoid

discussing the merits of such litigation, it is instructive to identify and examine them for their potential impact on the direction and nature of future litigation. The issues are: water quality jurisdiction; and aquifer recharge and storage.

1. Water Quality. The issue of jurisdiction has been raised in *96 CW 145, Application of Denver*. In that application, Denver seeks an exchange, in which it seeks to take water from the Strontia Springs outfall in return for water from other downstream sources, including treated effluent discharges from the Bi-City Wastewater Treatment Plant. Denver claims that the WQCA preempts §§ 37-92-305(3) and (5), therefore, any discharges to the stream that comply with its NPDES permit should be deemed to meet the water quality needs of other vested users. Thornton opposes the application, arguing that the express disclaimers in the WQCA confer exclusive jurisdiction on the water court to adjudicate water quality issues that arise in water court applications. Thornton argues, in essence, that the WQCA limits the Commission's jurisdiction to regulating the quality of discharges unrelated to replacement water that is decreed under the 1969 Act. Upon the parties' motions, the Division 1 water court determined that the Commission had exclusive jurisdiction to establish the maximum level of pollutants that could be lawfully discharged into the stream system, whether the discharge was related to the exercise of a decreed water right or not. The court further concluded that §§ 37-92-305(3) and (5) empower the court to impose stricter water quality standards, if a vested user can establish that his water quality needs are not met by WQCA standards. Denver's application has been set for trial, and the water court's ruling will undoubtedly be a subject of any appeal.

In other pending cases, opposers who divert from Clear Creek, above its confluence with the South Platte River, have objected to any lowering of water quality in the South Platte that would require them to discharge water of higher quality than they are now permitted to, in order to maintain existing quality conditions in the reach of the South Platte below its confluence with Clear Creek. *Thornton, supra*, 926 P.2d at 92-93, is persuasive if not dispositive; however, argument remains to be heard.

2. *Aquifer Storage.* In the *Application of North Colorado Water Conservancy District*, 92 CW 130 B 92 CW 140, the *District* seeks to capture water, when the river is free, and store it in a number of reservoirs and an unnamed, shallow aquifer located in Weld county. The geographical limits of the aquifer have not yet been determined. Although it is presumed to be tributary, the rate of discharge into the stream system, if any, has not been ascertained.

In the *Applications of Park County Sportsmens' Ranch and Aurora*, 96 CW 14, the applicants seek to capture water, when the river is free, and store it in the South Park Formation in Park county. Two major technical issues to be determined are the rate of aquifer recharge that the applicants can achieve, and the rate of aquifer discharge into the stream. Application of these two factors will determine the amount of water available for withdrawal by the applicants at a given point in time. A third major issue is whether operation of the applicants' storage and recharge plan will impair the water quality within the aquifer, as well as water quality within the surface system.

D. Dispute Resolution. The expense of litigation has prompted several means of resolving issues short of trial. These methods include private agreements between some, but not all, of the opposers and the applicant. Other agreements have been executed by holders of water rights on a particular reach of the stream system, in which they agree to forbear from objecting to each others' change applications, e.g., the "Cosmic Agreement". Finally, agreements between irrigators, suppliers of substitute and augmentation water, and the State Engineer under temporary substitute supply plans, permit irrigators on a designated reach of the South Platte to divert out-of-priority, and insure successful crop yield without injury to downstream seniors, e.g., GASP.

1. *Application of Centennial WSD*, 85 CW 415, presents an example of an agreement between a single opposer and an applicant. Centennial sought to exchange water from Chatfield Reservoir in return for effluent discharge, just below the Chatfield dam. In

order to insure the quality of water reaching its municipal treatment plant, Thornton agreed to withdraw its opposition if Centennial agreed to limit its effluent discharges, depending upon the rate of flow at the Chatfield dam outfall. While this agreement avoided a potential water quality dispute, it resurfaced in *Application of Consolidated Mutual Water Company*, 93 CW 151 (Con. Mutual). Con. Mutual sought a similar exchange of Chatfield water in return for the discharge of downstream effluent. Thornton objected, because Con. Mutual's exchange would frustrate Thornton's earlier agreement with Centennial.

2. *The Cosmic Agreement*. This is a detailed 84-page agreement between Coors Brewing Co. and the cities of Golden, Thornton and Westminster. The signatories have engaged in long-standing disputes concerning their respective rights on Clear Creek, and have attempted to put them to rest by this agreement. An analysis of this document is a Herculean task, and beyond the scope of this presentation. Vastly oversimplified, each party agrees not to litigate either *quality* or *quantity* issues, in over 60 enumerated pending and prospective judicial proceedings. The agreement covers diversion and discharges into the Croke Canal, the Farmer's Highline Canal and the Church Ditch, as well as discharges to the Standley Lake/Reservoir and the West Gravel Lakes. In addition, the agreement covers effluent discharges from Coors' general wastewater treatment plant and its brewing operations wastewater treatment plant. Suffice it to say that interminably complex and protracted litigation has been avoided by the execution of this agreement. The only litigation known to this court has been limited to narrow issues of whether a proposed exchange is covered by the agreement.
3. *Groundwater Appropriators of the South Platte ("GASP")*: a non-profit corporation, created in May of 1972 to provide augmentation to wells from the upper reaches of the South Platte River near Fairplay to the Nebraska state line near Julesberg, under a non-decreed plan that that operates under the authority of the State Engineer's Substitute Supply Plan provision. GASP has three primary replacement water

sources: recharge ponds, direct wells, and reservoir and ditch company rights. In 1998, GASP provided 85,000 acre-feet to replace the depletions of 3,200 wells that pump out-of-priority. Annual fees to members are based on the amount of water that a well owner pumps during the year, in addition to an initial start-up fee. GASP offers a variety of contracts to the members based on their well use: pre-1969 irrigation wells; pre-1969 wells with expanded uses; wells with adequate accompanying surface water to cover depletions, but without a decreed plan for augmentation or substitute supply plan; and individual contracts to cover multi-well complex cases.

4. *Central Colorado Water Conservancy District* (“*Central*”) formed in 1965 by public petition and vote pursuant to the 1937 Water Conservancy Act. Central serves portions of Adams, Morgan, and Weld Counties. In 1973, the Groundwater Management Subdistrict (“Subdistrict”) was formed to administer the augmentation of wells. The Subdistrict contains over 300 square miles and augments over 1,000 wells, also under the authority of the State Engineer’s substitute supply provision. Central’s member wells have an annual depletion of approximately 74, 000 acre-feet, which translates into 24,000 acre-feet of replacement water being introduced into the system, April to October, from supplies such as senior surface water rights owned by the Subdistrict, leased surface water rights, water pumped from well fields, recharge projects, and lined gravel pit storage reservoirs. The annual assessment is figured differently than GASP as it is based on the consumptive use of each individual petitioner, rather than acre-feet pumped, and the type of use irrigation, non-irrigation, or municipal. The Board of Directors for Central adopted a policy on November 15, 1994 requiring new water allotment contract petitioners to either purchase or lease adequate surface water to cover the depletions caused by the pumping of their wells as a prerequisite to acceptance to Central Augmentation Plan.

E. Summary.

Emerging issues in groundwater litigation center upon the use of aquifers for storage. The principal concerns are computation of the amount of stored water available for withdrawal, and the impact on the quality of aquifer water that may result from artificial recharge.

The principal current issue in surface water litigation is the effect of use transfers and exchanges upon stream water quality. The issue of the water court's jurisdiction to require stricter quality standards for replacement water, than is required by water quality regulations, remains unresolved at this time.

Parties to water litigation will continue to rely on private agreements in order to reduce the complexity, cost, and consumption of time associated with water trials.

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Application of Hines Highlands Ltd. Partnership, 929 P.2d 718, 723 (Colo. 1996)

Board of County Commissioner, Arapahoe County v. U.S., 891 P.2d 952 (Colo. 1995)

Bruening v. Dorr, 23 Colo. 195 (1896)

Coffin v. Left Hand Ditch, 6 Colo. 443 (1882)

Colorado v. Southwestern Colo. Water Conservancy Dist., 671 P.2d 1294 (1983) [*Huston II*]

Danielson v. Castle Meadows, 791 P.2d 1106 (Colo. 1990) [*Castle Meadows I*]

Danielson v. Jones, 698 P.2d 240 (1985)

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Denver v. Northern Colorado Water Conservancy District, 130 Colo. 375 (1954)

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Ft. Lyon Canal v. Perdue, 184 Colo. 219 (1974)

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Lyons v. Longmont, 54 Colo. 112 (1913)

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New Cache La Poudre Irr. Co. v. Arthur Irr. Co., 37 Colo. 530 (1906)

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Simpson v. Yale Investments, 886 P.2d 889 (Colo. 1994) [*Castle Meadows III*]

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Suffolk Gold Mining & Milling v. San Miguel Consolidated Mining & Milling, 9 Colo. App. 407 (1897)

Thornton v. Bijou Irr. Co., 926 P.2d 1 (Colo. 1996)

Thornton v. Ft. Collins, 830 P.2d 915 (Colo. 1992)

Westminster v. Church, 167 Colo. 1 (1968)

Whitten v. Coit, 153 Colo.157 (1963)

Wiebert v. Rothe Bros., 200 Colo. 310 (1980)

Williams v. Midway Ranches P.O.A., 938 P.2d 515 (Colo. 1997)