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Gregory J. Hobbs, Jr.

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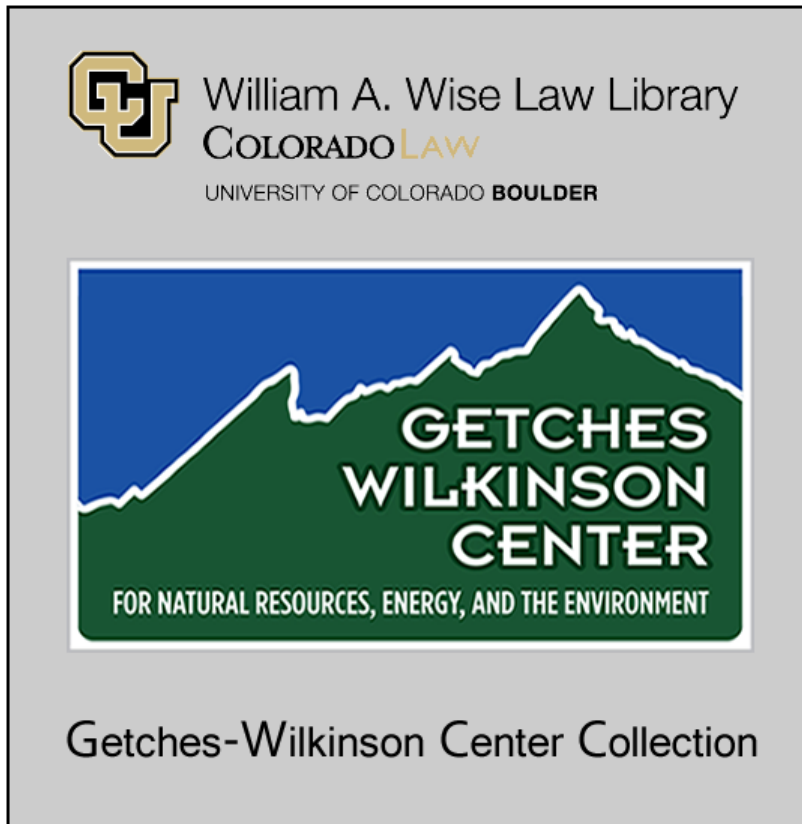


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**COLORADO WATER COURTS:
ARE THEY CHANGING?**

Justice Gregory J. Hobbs, Jr.
Colorado Supreme Court

Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
June 8-11, 1999

NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado

COLORADO WATER COURTS: ARE THEY CHANGING?

by
Justice Gregory J. Hobbs, Jr.

This question is like asking a river whether it should stand still. It's the natural order of geography for a river to keep on moving--and for those who would understand rivers--to walk in their path, sometimes pushing against the current, sometimes going with the flow.

When you've walked a long time on the floor of a river,
And up the steps and into the different rooms,
You know where the hills are going, you can feel them,
The far blue hills dissolving in luminous water,
The solvent mountains going home to the oceans.
Even when the river is low and clear
And the waters are going to sleep in the upper swales,
You can feel the particles of the shining mountains
Moping against your ankles toward the sea.

I push uphill behind the vertebrate fish
That scurry uphill, ages ahead of me.
I stop to rest but the order keeps on moving;
I mark how long it takes an aspen leaf
To float in sight, pass me, and go downstream;
I watch a willow dipping and springing back
Like something that must be a water-clock,
Measuring mine against the end of mountains.

From "Time of Mountains" by Thomas Hornsby Ferril

Colorado water law has always been changing--and remaining the same. From the earliest days of the Territorial district courts and supreme court, it's been so. There's no contradiction in this. Law courts exist to decide actual cases, based on constitutions and statutes—state and federal—in light of the facts of each case and prior precedent, with a peek at the future, always hoping the decisions made are as good as they can be at the time.

Oliver Wendell Holmes said that: “The life of the law is not logic but experience. . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” Holmes, *The Common Law I* (1881). Mountains and rivers - like the lives of all creatures living among them - don’t lend themselves neatly to a tape measure. You have to experience stretching your legs and your heart to understand depth and distance. Water law incorporates geography and experience.

My outline (attached) consists of a synopsis of major water law developments to date. Obviously, I could have chosen additional cases, other statutes, but the themes of running through these other choices would sound familiar. The major themes of the water law include (1) beneficial use as the basis and measure of an appropriative right, (2) adjudication and enforcement of rights, (3) relationship of rights with the federal government, (4) relationship of rights with other states.

1. Beneficial Use

Western prior appropriation law is based on the “law of nature” which holds the lands barren “until awakened to fertility by nourishing streams of water,” said the Territorial Supreme Court in 1872, *Yunker v. Nichols*. In a 1999 case, the State Supreme Court said that “A water right comes into existence only by applying waters to beneficial use,” *Farmer’s Reservoir v. City of Golden*. In between, on both sides of the Divide, Colorado and its people have grown inseparably.

Water is a public resource, *Southwestern Water Conservation District* (1983). Beneficial use is the basis and measure of an appropriative right, *Weibert* (1980). The content of the term “beneficial use” is not defined - or confined - by the 1876 Colorado constitution, which recognized prior appropriation as the law of Colorado. Rather, what constitutes beneficial use tracks the economic and community values of people at work and play and leaving go. Traditional agricultural, domestic, municipal, and industrial uses have now been joined by new

uses such as recreation, fish and wildlife, snowmaking, mined land reclamation, dust suppression, residential, boat chute, nature center, and instream flow uses.

Instream flow use has been the most dramatic innovation. In 1965, reiterating longstanding rejection of riparian water law, the supreme court proclaimed in *Rocky Mountain Power* that “maintenance of the ‘flow’ of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation.” Fourteen years later, in *Colorado Water Conservation Board* (1979), the court jumped the boundaries: “it is obvious that the General Assembly in the enactment of S.B. 97 certainly did intend to have appropriations for piscatorial purposes without diversion. We hold that under S.B. 97 the Colorado Water Board can make an in-stream appropriation without diversion in the conventional sense.” Thus, prior appropriation law can evolve to protect riparian-like values through enforceable water rights that are subject to senior appropriative rights, *Aspen Wilderness Workshop*, 901 P.1d 1251 (1995).

The action of the legislature in assigning this unique program to the State of Colorado, acting on behalf of the people, was the key to recognizing its constitutionality. The supreme court - as it did in *City of Thornton v. Bijou Irrigation* (1996) - has consistently said that “the judiciary is without authority to decree an instream flow right to a private entity” because “pursuant to section 37-92-102(3), the General Assembly vested exclusive authority in a state entity, the CWCB, to appropriate minimum stream flows and limited the purpose for these appropriations to ‘preservation of the environment to a reasonable degree.’”

Nevertheless, the supreme court has upheld decrees for appropriations for the benefit of recreation and the environment that were unknown until very recently. The key? Some method for capturing, possessing or controlling a specified amount of water for an appropriation to beneficial use administered in decreed priority. *City of Fort Collins* (1992) recognized a boat chute and a nature center diversion dam as valid means for effectuating an appropriation - not constituting an instream flow - but nevertheless serving recreation, fish and wildlife and piscatorial uses. *Arapahoe County* (1992) recognized that water captured under a storage water right in

Taylor Park Reservoir can be released and administered for recreational and fishery enhancement of a long stretch of the Taylor and Gunnison Rivers to the Aspinall Unit. Since creation of the Colorado Territory out of the Kansas, Nebraska, Utah and New Mexico Territories in 1861, Court decisions and legislative enactments demonstrate that prior appropriation water law has served - and will serve as change proceeds - the needs and values of the people of Colorado and of the United States.

2. Adjudication and Enforcement

Colorado has turned to its state judiciary for resolution of water disputes and security of water rights throughout its history. The legislature made this choice early in the state's history and has constantly reaffirmed it. The Territorial supreme court had been tentative about its role. It wrestled, for example, with whether it had jurisdiction to determine whether a proposed diversion for domestic, fire fighting, and industrial uses in Central City could be recognized, *Central City Water Co. v. Kimber*, 1 Colo. 475 (1872). The mill owners who claimed senior rights by use, together with the domestic water company which was proposing to serve Central City, stipulated that they would abide by the final decision of the courts. Each side would select a "competent engineer, who shall choose a third, who shall make an accurate measurement" of the affected waters and submit these results - and other testimony the parties desired - to the state district court.

Speaking for the Colorado Territorial supreme court, Chief Justice Hallett refused to recognize the jurisdiction of the courts because the domestic water company had not yet made any diversion, so no injury could have occurred to the mill owners. With no injury being shown, there could be no judgment or decree by a court of law. Said Hallett: "If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, our courts will become schools of instruction, with little time to attend to their proper and legitimate duties. The question propounded in this record is interesting and probably important, but we must decline to answer it."

We have no trouble today recognizing the importance of the question and dealing with it. Adjudicating a priority for future use - based on the condition that the use actually occurs through the exercise of subsequent diligence - is now a routine and essential element of the responsibility shared by Colorado's seven water courts, *City of Boulder v. New Anderson Ditch Company* (1999). The law of conditional water rights promotes planning and investment, but, on the other hand, discourages wasted investment if the available supply is overappropriated or the purported use is too speculative, *Dallas Creek v. Huey* (1997).

Colorado adopted its first adjudication act in 1879, only three years after statehood. To the judiciary the legislature assigned the responsibility of "hearing, adjudicating and settling all questions concerning the priority of appropriations" and "all other questions of law or right growing out of or in any way involved or connected therewith." The same act empowered water commissioners to administer the priorities. One hundred and twenty years later, the judicial and executive branches still have these responsibilities. As Colorado's waters become fully appropriated, changes of water rights and augmentation plans to replace out-of-priority depletions consume more and more water court time, *Midway Ranches* (1997), while the water courts and the supreme court endeavor to recognize the *res judicata* effect of prior decrees as well as the fundamental principle that historic use is the basis and measure of a water right, *Farmers Reservoir v. City of Golden* (1999).

The Water Right Determination and Administration Act of 1969 is today the fundamental structure for adjudication of water rights arising under state law to surface water and tributary groundwater and, thanks to the McCarran Amendment of 1952, of United States and Native American reserved water rights. The 1965 Ground Water Management Act governs well permits and rights for designated groundwater, non-tributary groundwater, and water of the Denver bedrock aquifers, *Bayou Land Co.* (1996), *Chatfield East* (1998). These acts contain extensive procedural and substantive law that the General Assembly continues to change, thereby requiring change in the courts.

Security, reliability, and flexibility are the hallmarks of the water law and of the judicial and executive roles in furtherance thereof.

3. Relationship with the United States

Colorado has always benefitted from federal legislative and executive water law and policy. Colorado has always resisted federal legislative and executive water law and policy. There's no contradiction in this. We are citizens of the Colorado and the United States. There are two chambers to our western heart, two lobes of our brain - beneficial use and preservation. Colorado was formed out of the public land; its waters have nurtured us; we treasure its vistas; we benefit from its resources, we wish to preserve what remains of wild America.

The United States Constitution recognizes the right and duty of state judges to interpret and apply federal law, as well as state law. Starting with the Mining Act of 1866, Congress consigned the primary responsibility for allocating water - enunciating the water law and creating property rights in the use of water - to the states and territories, with the exception of federal reserved water rights which are created by virtue of federal supremacy in theretofore unappropriated water, *Winters* (1907), *U.S. v. New Mexico* (1978).

Colorado strongly supported passage of the McCarran Amendment of 1952 to effectuate joinder of the federal reserved and Native American water right claims in state water adjudications. Colorado successfully litigated three United States Supreme Court cases in the 1970s which compelled implementation of McCarran, *U.S. v. District Court for Eagle County* (1971), *U.S. v. District Court for Water Div. No. 5* (1971), *Colorado River District v. U.S.* (1976).

In *City and County of Denver* (1982), the Colorado supreme court upheld certain federal reserved water rights, despite the contention of some water user organizations that Colorado received title to its waters when admitted to the Union. It denied other asserted reserved rights claims, notably

instream flows for the National Forests and Dinosaur National Monument. Looking to decisions of the United States Supreme Court, the state court held that the primary purposes of these reservations did not include reservation of water for such a use. In the state courts, the federal government has successfully obtained decrees for appropriative rights under state law for federal use. The state and federal courts of Colorado have cooperated in matters of the Blue River decree, which was adjudicated in federal court in a mid-1950s case removed to the U.S. District Court for Colorado. Though the Blue River case remains in the federal court, the Colorado courts have continued to exercise their jurisdiction over new appropriations while interpreting and enforcing the Blue River decree, *City of Grand Junction v. City and County of Denver* (1998).

Colorado's experience demonstrates the workability of the McCarran Amendment. The United States participates in the monthly resume notice, application, and statement of opposition process, as does any other water user; its rights are recognized; its decrees are administered. Having the United States participate in state water adjudication is a significant change for the Colorado courts.

Commencing most notably with the Wilderness Act of 1964 then through the National Environmental Policy Act of 1969, the Federal Water Pollution Control Act of 1972, the Endangered Species Act of 1973, and the Federal Land Policy and Management Act of 1976, United States policy favoring western water development has shifted to environmental protection and preservation. The necessity to obtain a Clean Water Act section 404 dredge and fill permit for a dam or diversion work that taps surface water has placed federal agencies in a regulatory role over additional Colorado water development. This has spurred conservation measures, increased use of tributary, nontributary, and not-nontributary groundwater, change of agricultural rights to municipal use, water exchange projects, and augmentation plans. Existing reservoirs have become even more critical to meeting Colorado's water needs - as new reservoirs face a long, difficult, and uncertain permitting course. Since water rights are perfected in Colorado only by application of water to beneficial use, the necessity to obtain required federal approvals and permits directly affects whether water users are in a position to obtain absolute decrees from the

Colorado water courts. Until the structures are built to turn water to beneficial use a water right cannot be perfected, *Dallas Creek v. Huey* (1997).

4. Relationship with Other States

Colorado water use is governed by nine interstate compacts and two equitable apportionment decrees. In-state priorities, even those very senior, can be curtailed to meet delivery requirements to other states, *Hinderlider* (1938). Post-1948 well use of tributary ground water in the Arkansas River Basin led Colorado into violations of the Arkansas River Compact, *Kansas v. Colorado* (1995).

In light of that experience, the Colorado supreme court has said that the State Engineer “can and should enforce compact delivery requirements with regard to Colorado water rights, adhering to the terms of the Compact and consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration. In this manner, citizens of Colorado can partake reliably of the state’s compact apportionment through property rights perfected for beneficial use within the state, *Simpson v. Highland Irrigation* (1996).

Colorado’s present and future is closely tied to its rights under interstate compacts and equitable apportionment decrees; it must respect the rights of other states, as it would have them respect Colorado. Since the compacts and equitable apportionment decrees are the law of the United States, they are subject to federal and state enforcement on behalf of the states entitled to the water apportionments made thereby. The water courts of Colorado will be called upon to review and enforce statutes and State Engineer rules related to providing Colorado and other states with the benefit of their water entitlements.

Conclusion

So long ago my father led me to
The dark impounded orders of this canyon,
I have confused these rocks and waters with
My life, but not unclearly, for I know
What will be here when I am here no more.

From "Time of Mountains" by Thomas Hornsby Ferril

Appendix

COLORADO WATER LAW: A SYNOPSIS OF STATUTES AND CASE LAW

Selections by Justice Gregory J. Hobbs, Jr.

Institutes of Justinian

"By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations."

Institutes of Justinian, 2.1.1 (with Introduction, Translation and Notes by Thomas Collett Sandars, 1876).

"All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men."

Id. at 2.1.2.

"The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons therefore are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons."

Id. at 2.1.4.

English Common Law

"Running water, as far as it is not tidal, belongs prima facie to the owners of the land on either side of it, subject to the public right of navigation, where such exists . . . therefore the public cannot gain by prescription or otherwise a legal right to fish in a non-tidal river, even though it be navigable"

James Williams, *The Institutes of Justinian Illustrated by English Law* 84 (2d ed. 1893).

Constitution of the United States

Property Clause

Territory or Property of the United States

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

U.S. CONST. art. IV, § 3(2).

Commerce Clause

Power of Congress to Regulate Commerce

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

U.S. CONST. art. I, § 8(3).

Supremacy Clause

Supreme Law

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any things in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST. art. VI, (2).

Takings Clause of Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. V.

Takings Clause of Fourteenth Amendment

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, § 1.

The Louisiana Purchase of 1803

Treaty between the United States of America and the French Republic, Apr. 30, 1803, U.S. - Fr., 8 Stat. 200-13.

The Lewis and Clark Expedition

"The object of your mission is single, the direct water communication from sea to sea formed by the bed of the Missouri & perhaps the Oregon."

Letters of the Lewis and Clark Expedition, with Related documents 1783-1854, 136-38 (Donald Jackson ed., 2d ed. 1978) reprinted in Stephen E. Ambrose, *Undaunted Courage: Meriwether Lewis, Thomas Jefferson and the Opening of the American West* 116 (Simon and Schuster 1996).

Homestead Act of 1862

An Act to secure Homesteads to actual Settlers on the Public Domain.

"[A]ny person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim"

Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976).

Mining Act of 1866

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed"

Mining Act of 1866, ch. 262, §9, 14 Stat. 253 (1866) (current version at 43 U.S.C. §661 (1994)).

Riparian Doctrine (common law)

Tyler v. Wilkinson

"Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, usque ad filum aquae. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not."

Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312).

Reasonable Use

Pyle v. Gilbert

"Under a proper construction [of the pertinent Code sections] every riparian owner is entitled to a reasonable use of the water in the stream. If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof. Every riparian owner is entitled to a reasonable use of the water. Every such proprietor is also entitled to have the stream pass over his land according to its natural flow, subject to such disturbances, interruptions, and diminutions as may be necessary and unavoidable on account of the reasonable and proper use of it by other riparian proprietors. Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another, but each is entitled to a reasonable use of the water with respect to the rights of others."

Pyle v. Gilbert, 265 S.E.2d 584, 587 (Ga. 1980) (quoting *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 88 (Ga. 1909)).

Riparian/ Prior Appropriation Hybrid (California Doctrine)

Lux v. Hagin

"[O]ne who acquired a title to riparian lands from the United States prior to the act of July 26, 1866, could not (in the absence of reservation in his grant) be deprived of his common-law rights to the flow of the stream by one who appropriated its waters after the passage of that act."

Lux v. Hagin, 10 P. 674, 727 (Cal. 1886).

Colorado Territorial Laws 1861

An Act to Protect and Regulate the Irrigation of Lands

Section 1.

"That all persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of Colorado Territory, as defined in the Organic Act of said Territory, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river, for the purposes of irrigation, and making said claims available, to the full extent of the soil, for agricultural purposes."

Colo. Territorial Laws 67 (1861).

Section 2.

"That when any person, owning claims in such locality, has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water necessary to irrigate his land, or that his farm or land, used by him for agricultural purposes, is too far removed from said stream and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or

tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes as herein before stated."

Id. at 67.

Section 4.

"That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire county through which it passes, then the nearest justice of the peace shall appoint three commissioners as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water upon certain or alternate weekly days to different localities, as they may, in their judgment, think best for the interests of all parties concerned, and with due regard to the legal rights of all"

Id. at 68.

Prior Appropriation (Colorado Doctrine)

Yunker v. Nichols

"When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said, that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law."

Yunker v. Nichols, 1 Colo. 551, 555 (1872).

"I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate"

Id. at 570.

"It seems to me, therefore that the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed."

Id.

"If we say that the statute confers the right, then the statute may take it away, which cannot be admitted."

Id.

Colorado Constitution of 1876
Article XVI Mining and Irrigation
Irrigation

Section 5. Water of Streams of public property.

"The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

COLO. CONST. art. XVI, § 5.

Section 6. Diverting unappropriated water—priority preferred uses.

"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

COLO. CONST. art. XVI, § 6.

Section 7. Right-of-way for ditches, flumes.

"All persons and corporations shall have the right-of-way across public, and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation."

COLO. CONST. art. XVI, § 7.

Adjudication Act of 1879

Section 18.

"It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural stream of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream."

1879 Sess. Laws at 99-100.

Section 19.

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all

other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceeding for said purpose, as hereinafter provided for, shall be commenced"

1879 Sess. Laws at 99-100.

Adjudication Act of 1881

Section 1.

"In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A.D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number _____, as the case may be"

1881 Sess. Laws at 142.

Coffin v. Left Hand Ditch Company

"We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

"We have already declared that water appropriated and diverted for a beneficial purpose, is, in this country, not necessarily an appurtenance to the soil through which the stream supplying the same naturally flows. If appropriated by one prior to the patenting of such soil by another, it is a vested right entitled to protection, though not mentioned in the patent."

Id. at 449.

"In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed."

Id.

Thomas v. Guiraud

"We concede that Guiraud could not appropriate more water than was necessary to irrigate his land; that he could not divert the same for the purpose of irrigating lands which he did not cultivate or own, or hold by possessory right or title, to the exclusion of a subsequent bona fide appropriator."

Thomas v. Guiraud, 6 Colo. 530, 532 (1883).

"The true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial."

Id. at 533.

Larimer County Reservoir Co. v. People *ex rel.* Luthe

"While a diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed. Of course such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay

The act of utilizing as a reservoir a natural depression, which included the bed of the stream, or which was found at the source thereof, was not in and of itself unlawful."

Larimer County Reservoir Co. v. People *ex rel.* Luthe, 9 P. 794, 796 (Colo. 1886).

"He who attempts to appropriate water in this way does so at his peril. He must see to it that no legal right of prior appropriators, or of other persons, is in any way interfered with by his acts. He cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow, to the detriment of others who have acquired legal rights therein superior to his"

Id.

"While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from natural streams upon the public domain, that body has the power to regulate the manner of effecting such appropriation or diversion. It may, by reasonable and constitutional legislation, designate how the water shall be turned from the stream, or how it shall be stored and preserved."

Id. at 797.

Farmers High Line Canal & Reservoir Co. v. Southworth

"It is well established that no mere diversion of water from a stream will constitute the constitutional appropriation. To make it such it must be applied to some beneficial use, and in case of irrigation it must be actually applied to the land before the appropriation is complete."

Farmers High Line Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1029 (Colo. 1889).

Strickler v. City of Colorado Springs

"The fundamental principle of this system is that priority in point of time gives superiority of right among appropriations for like beneficial purposes [I]f . . . the appropriator of water from a stream be held to have no claim upon the water of the tributaries of that stream, then defendant's water supply is liable to be cut off by settlers above at any time,—a conclusion so manifestly unjust that it must be discarded."

Strickler v. City of Colorado Springs, 26 P. 313, 315 (Colo. 1891).

"The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer, as contended by appellee, would in many instances destroy much of its value We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby."

Id. at 316.

Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co.

"[W]e are quite of the opinion that the title and rights of the prior appropriating company were not absolute, but conditional, and they were obligated to so use the water that subsequent locators might, like lower riparian owners, receive the balance of the stream unpolluted, and fit for the uses to which they might desire to put it."

Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co., 48 P. 828, 832 (Colo. Ct. App. 1897) (citations omitted).

"It is therefore quite consonant with the apparent purpose and declared will of the people to subject the rights of the appropriators of the public waters of the state to such limitations as shall tend not only to conserve the property interests which the appropriators may acquire, but to preserve the remaining unappropriated waters in their original condition for the use and benefit of late comers, who by their labors and industry may further develop our interests and resources."

Id.

National Forest Organic Act of 1897

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

National Forest Organic Act of 1897, ch. 2, § 1, 30 Stat. 36 (1897) (current version at 16 U.S.C. § 481 (1994)).

Reclamation Act of 1902

§ 372. Water right as appurtenant to land extent of right.

"The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Reclamation Act of 1902, ch. 1093, § 8, 32 Stat 390 (1902) (current version at 43 U.S.C. § 372 (1994)).

§ 383. Vested rights and State laws unaffected.

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof."

Reclamation Act of 1902, ch. 1093, § 8, 32 Stat 390 (1902) (current version at 43 U.S.C. § 383 (1994)).

Adjudication Act of 1903

Section 1.

"That the owner or owners of any water rights derived from any natural stream, water-course or any other source, acquired by appropriation and used for any beneficial purpose other than irrigation, may have his or their right thereto established and decreed by the district court having jurisdiction of the adjudication of water rights for irrigation purposes in the water district in which said water rights are situated, by petitioning said court in the same manner and by complying with the procedure and the requirements of the law now applicable to the adjudication of water rights for irrigation purposes."

1903 Colo. Sess. Laws at 297.

New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co.

"The object of the irrigation statutes providing for the adjudication of priorities was to settle such priorities and secure the orderly distribution of water for irrigation purposes. To further effect this object officials have been designated, whose duty it is to distribute the water in accordance with the adjudication. The decree in such proceedings is the guide for such officials from which they must determine, in the discharge of their duties, the relative rights of parties, the volume to which different ditches are entitled, the point of diversion, and all other data necessary to a distribution of water in accordance with its provisions. To obtain an order allowing a change in the point of diversion is, in effect, a modification or change in the adjudication decree. In order to protect officials in the discharge of their duties in distributing water, to preserve the peace, to prevent a multi-plicity of suits, to relieve the officer from being required to ascertain, at his peril, any of the various questions which he might be required to consider when requested to change the

point of diversion, and finally, that there may be a judicial ascertainment of the right to such change, which shall bind all parties and not leave the place of diversions to the whim of interested parties, the act of 1899 was passed All persons who may be affected by the desired change must be notified of the proceeding, and given an opportunity to be heard before the court is authorized to enter an order allowing such change."

New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co., 87 P. 799, 800 (Colo. 1906).

Kansas v. Colorado

"[Each State] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."

Kansas v. Colorado, 206 U.S. 46, 94 (1907).

"[I]f the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes. The decree will also dismiss the bill of the state of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river."

Id. at 117-18.

Winters v. United States

"The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation."

Winters v. United States, 207 U.S. 564, 575 (1907).

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."

Id. at 577 (citations omitted).

Town of Sterling v. Pawnee Ditch Extension Co.

"Section 6, art. 16, Const., states that those using water for domestic purposes shall have the preference over those claiming for any other purpose, but this provision does not entitle one desiring to use water for domestic purposes, as intended by the defendant town of Sterling to take it from another who has previously appropriated it for some other purpose, without just compensation. Rights to the use of water for a beneficial purpose, whatever the use may be, are property, in the full sense of that term, and are protected by section 15, art. 2, Const., which says that 'private property shall not be taken or damaged for public or private use without just compensation.'"

Town of Sterling v. Pawnee Ditch Extension Co., 94 P. 339, 340 (Colo. 1908).

"The law contemplates an economical use of water. It will not countenance the diversion of a volume from a stream which, by reason of the loss resulting from the appliances used to convey it, is many times that which is actually consumed at the point where it is utilized. Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated or by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss, or loss of a volume which is greatly disproportionate to that actually consumed. An appropriator, therefore, must exercise a reasonable degree of care to prevent waste through seepage and evaporation in conveying it to the point where it is used."

Id. at 341-42 (citations omitted).

Sternberger v. Seaton Mountain Electric, Light, Heat & Power Co.

"Not only the name of the corporation, but certain allegations of the complaint, indicate that defendant corporation was organized for a legitimate purpose and can lawfully acquire, by making an appropriation in its own behalf, or by purchase a valid appropriation of the waters of a natural stream in this state, by using which, as an agency, it may produce and sell light, heat, and power."

Sternberger v. Seaton Mountain Electric, Light, Heat & Power Co., 102 P. 168, 170 (Colo. 1909).

Town of Lyons v. City of Longmont

"The sole question involved is, whether the city of Longmont has the right to condemn a right of way for its pipeline through the streets and alleys of the town of Lyons. Independent of statutory provisions cited by counsel for plaintiff in error, we think this right is conferred by the constitutional provision above quoted. It declares that all persons and corporations shall have the right of way across public, private and corporate lands, for the purpose of conveying water for domestic purposes. The intent of a constitutional provision is the law. Manifestly the intent of the provision under consideration was to confer upon all persons and corporations the right of way across lands, either public or private, by whomsoever owned, through which to carry water for domestic purposes, and necessarily embraces a municipal corporation seeking a right of way

for such purposes. It covers every form in which water is used, domestic, irrigation, mining, and manufacturing, . . . the kind of conduit employed and utilized is of no material moment"
Town of Lyons v. City of Longmont, 129 P. 198, 200 (Colo. 1913).

Comstock v. Ramsay

"We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine, 'first in time first in right,' and to substitute in its stead, fortunately, as yet, an unrecognized one, 'last in time first in right.'"
Comstock v. Ramsay, 133 P. 1107, 1110 (Colo. 1913).

Wyoming v. Colorado

"In suits between appropriators from the same stream, but in different states recognizing the doctrine of appropriation, the question whether rights under such appropriations should be judged by the rule of priority has been considered by several courts, state and federal, and has been uniformly answered in the affirmative."
Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

Ft. Morgan Reservoir & Irrigation Co. v. McCune

"Under the statutes and decisions of this court, the water officials must distribute water according to the tabulated decrees; they have to do only with decreed priorities; with unappropriated waters they have no concern."
Ft. Morgan Reservoir & Irrigation Co. v. McCune, 206 P. 393 (Colo. 1922).

"So long as all the water is required to supply decreed priorities, said officials should permit no water to be diverted for new appropriations. Whenever there is a surplus of water, either from floods, or because of small demands therefor by appropriators, the officers have no right to interfere in the diversion of such surplus. All new appropriations must be made from surplus water, whether for storage or direct irrigation."
Id. at 394.

California Oregon Power Co. v. Beaver Portland Cement Co.

"What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

Hinderlider v. La Plata River & Cherry Creek Ditch Co.

"Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938).

Safranek v. Town of Limon

"Under our Colorado law, it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. The burden of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence."

Safranek v. Town of Limon, 228 P.2d 975, 977 (Colo. 1951) (citations omitted).

McCarran Amendment of 1952

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit."

McCarran Amendment of 1952, ch. 651, title II, § 208 (a)-(c), 66 Stat. 560 (1952) (current version at 43 U.S.C. § 666 (1994)).

City and County of Denver v. Northern Colorado Water Conservancy Dist.

"[A]n appropriation is not complete until actual diversion and use, still, the right may relate back to the time when the first open step was taken giving notice of intent to secure it, (4) that right to relate back is conditional that construction thereafter was prosecuted with reasonable diligence, and conditional further that there was then 'a fixed and definite purpose to take it up and carry it through.'"

City and County of Denver v. Northern Colorado Water Conservancy Dist., 276 P.2d 992, 999 (1954) (citations omitted).

"The priority of a water right may not be dated back to the date of survey or filing of plat of a diversion proposal which has been abandoned in favor of another and very different plan."

Id. at 1001.

"The doctrine of relation back is a legal fiction in derogation of the constitution for the benefit of claimants under larger and more difficult projects and should be strictly construed."

Id.

Federal Power Comm'n v. Oregon

"There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others."

Federal Power Comm'n v. Oregon, 349 U.S. 435, 444-45 (1955) (footnote omitted).

Colorado Springs v. Bender

"At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below, where there would be an adequate supply for the senior's lawful demand."

Colorado Springs v. Bender, 366 P.2d 552, 555 (Colo. 1961) (citation omitted).

"In determining the facts mentioned . . . the conditions surrounding the diversion by the senior appropriator must be examined as to whether he has created a means of diversion from the aquifer which is reasonably adequate for the use to which he has historically put the water of his appropriation. If adequate means for reaching a sufficient supply can be made available to the

senior, whose present facilities for diversion fail when water table is lowered by acts of the junior appropriators, provision for such adequate means should be decreed at the expense of the junior appropriators, it being unreasonable to require the senior to supply such means out of his own financial resources."

Id. at 556.

Arizona v. California

"We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."

Arizona v. California, 373 U.S. 546, 565-66 (1963) (footnote omitted).

Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.

"There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream."

Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798, 800 (Colo. 1965).

"[M]aintenance of the 'flow' of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation."

Id.

Colorado Groundwater Management Act of 1965

"It is declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section 37-90-103(6). While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner defined in this article."

COLO. REV. STAT. § 37-90-102(1) (1997).

Fellhauer v. People

"It is implicit in these constitutional provisions that, along with vested rights, there shall be maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of maximum utilization and how constitutionally that doctrine can be integrated into the law of vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it."

Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

Water Right Determination and Administration Act of 1969

"It is hereby declared to be the policy of the state of Colorado that all water in or tributary to natural surface streams, not including nontributary ground water as that term is defined in section 37-90-103, originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of article XVI of the state constitution and this article. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state."

COLO. REV. STAT. § 37-92-102(1)(a) (1997).

United States v. District Court *ex rel.* Eagle County

"[W]e do not read § 666(a)(2) [of the McCarran Amendment] as being restricted to appropriative rights acquired under state law (2) covers rights acquired by appropriation under state law and rights acquired 'by purchase' or 'by exchange', which we assume would normally be appropriative rights. But it also includes water rights which the United States has 'otherwise' acquired. The doctrine of *eiusdem generis* is invoked to maintain that 'or otherwise' does not encompass the adjudication of reserved water rights, which are in no way dependent for their creation or existence on state law. We reject that conclusion for we deal with an all-inclusive statute concerning the adjudication of rights to the use of water of a river system' which in §666(a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights."

United States v. District Court *ex rel.* Eagle County, 401 U.S. 520, 524 (1971) (footnote omitted).

United States v. District Court for Water Div. No. 5

"It is pointed out that the new statute [1969 Colorado Adjudication Act] contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded."

United States v. District Court for Water Div. No. 5, 401 U.S. 527, 529 (1971).

"The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review."

Id. at 529-30.

City and County of Denver v. Fulton Irrigating Ditch Co.

"'[D]eveloped water' is that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it It follows that the developers without hindrance could use, re-use, make successive use of and dispose of the water."

City and County of Denver v. Fulton Irrigating Ditch Co., 506 P.2d 144, 147 (Colo. 1972).

Federal Water Pollution Control Act

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

33 U.S.C. 1251(a) (1994 and Supp. 1995) (originally enacted June 30, 1948 as Act, ch. 758, 62 Stat. 1155).

Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.

"The planting and harvesting of trees to create water rights superior to the oldest decrees on the Arkansas would result in a harvest of pandemonium. Furthermore, one must be concerned that once all plant life disappears, the soil on the banks of the river will slip away, causing irreparable erosion.

We are not unmindful that the statute speaks of the policy of maximum beneficial and integrated use of surface and subsurface water. But efficacious use does not mean uplifting one natural resource to the detriment of another. The waters of Colorado belong to the people, but so

does the land. There must be a balancing effect, and the elements of water and land must be used in harmony to the maximum feasible use of both."

Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1327 (Colo. 1974).

Jacobucci v. District Court

"Mutual ditch companies in Colorado have been recognized as quasi-public carriers."

Jacobucci v. District Court, 541 P.2d 667, 671 (Colo. 1975).

"[T]he shares of stock . . . represent a definite and specific water right, as well as a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized."

Id. at 672.

"The condemnation action here in issue has the potential of seriously disrupting the shareholders' property interests. That the water rights owned by Farmers' shareholders are property rights is well established by Colorado law."

Id. at 675 (citations omitted).

"Their ability to protect those individualized interests would surely be impaired if this action were allowed to proceed in their absence."

Id.

Colorado River Water Conservation Dist. v. United States

"We conclude that the state court had jurisdiction over Indian water rights under the [McCarran] Amendment."

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 809 (1976).

"The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system."

Id. at 819.

Federal Land Policy and Management Act of 1976

"The Congress declares that it is the policy of the United States that—(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in the Act, it is determined that disposal of a particular parcel will serve the national interest"

43 U.S.C. § 1701(1) (1994).

California v. United States

"[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters."

California v. United States, 438 U.S. 645, 662 (1978).

United States v. New Mexico

"Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

United States v. New Mexico, 438 U.S. 696, 700 (1978) (footnote omitted).

"This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."

Id. at 701-02 (footnote and citations omitted).

"Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress' failure to recognize these goals as purposes of the national forests, it would defeat the very purpose for which Congress did create the national forest system The water that would be 'insured' by preservation of the forest was to 'be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.' As this provision and its legislative history evidence, Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West. The government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for purposes quite inconsistent with this goal."

Id. at 711-13 (footnote and citations omitted).

Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.

"To initiate an appropriation, two elements—an intent and an act—must co-exist. First, the applicant must have an intent to take the water and put it to beneficial use. Secondly, the applicant must demonstrate this intent by an open physical act sufficient to constitute notice to third parties."

Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566, 568 (Colo. 1979) (footnote and citation omitted).

"Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would—as a practical matter—discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains."

Id.

Colorado River Water Conservation Dist. v. Colorado Water Conservation Board

"[I]t is obvious that the General Assembly in the enactment of S.B. 97 certainly did intend to have appropriations for piscatorial purposes without diversion.

We hold that under S.B. 97 the Colorado Water Board can make an in-stream appropriation without diversion in the conventional sense."

Colorado River Water Conservation Dist. v. Colorado Water Conservation Board, 594 P.2d 570, 574 (Colo. 1979).

"The legislative intent is quite clear that these appropriations are to protect and preserve the natural habitat and that the decrees confirming them award priorities which are superior to the rights of those who may later appropriate. Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed."

Id. at 575.

"The legislative objective to preserve reasonable portions of the natural environment in Colorado. Factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing should be delegated to an administrative agency which may avail itself of expert scientific opinion."

Id. at 576.

People v. Emmert

"It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands."

People v. Emmert, 597 P.2d 1025, 1027 (1979).

"We recognize the various rationales employed by courts to allow public recreational use of water overlying privately owned beds, i.e., (1) practical considerations employed in water right states such as Florida, Minnesota and Washington; (2) a public easement in recreation as an incident of navigation; (3) the creation of a public trust based on usability, thereby establishing only a limited private usufructuary right; and (4) state constitutional basis for state ownership. We consider the common law rule of more force and effect, especially given its long-standing recognition in this state."

Id. at 1027.

"The interest at issue here, a riparian bed owner's exclusive use of water overlying his land, is distinguished from the right of appropriation. Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands. Without permission, the public cannot use such waters for recreation. If the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end."

Id. at 1029 (citations omitted).

Weibert v. Rothe Bros.

"We have always recognized limitations on the right of the owner of a water right to divert at the full decreed rate at all times. The owner of a water right has no right as against a junior appropriator to waste water, i.e., to divert more than can be used beneficially. Nor may he extend the time of diversion to enable him to irrigate lands in addition to those for which the water was appropriated. These limitations are read into every water right decree by implication.

The right to change a point of diversion or type of use with respect to water rights decreed for irrigation purposes is limited to the 'duty of water' with respect to the decreed place of use."

Weibert v. Rothe Bros., 618 P.2d 1367, 1371 (1980) (citations omitted).

"The right to change a point of diversion or place of use is also limited in quantity and time by historical use . . . 'Historical use' as a limitation on the right to change a point of diversion has been considered to be an application of the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations."

Id. at 1371-72 (citations omitted).

"A plan for augmentation is to be approved by the water judge based on the same criterion involved in evaluating an application for change of water right"

Id. at 1373.

"In order to determine the adequacy of the plan to accomplish its intended purpose, it is necessary to consider the adequacy of the replacement water rights."

Id.

Danielson v. Vickroy

"The Colorado Ground Water Management Act . . . was enacted in 1965 to establish a procedure for appropriation of designated ground water and for devoting it to beneficial use. It was designed to permit the full economic development of designated ground water resources. Designated ground water, the definition of which is considered in more detail later, includes water not tributary to any stream, and other water not available for the fulfillment of decreed surface rights."

Danielson v. Vickroy, 627 P.2d 752, 756 (Colo. 1981) (citations omitted).

"The Management Act creates a Ground Water Commission . . . which has authority to determine designated ground water basins"

Id.

Fort Lyon Canal Company v. Catlin Canal Company

"The concept that the rights incident to water right ownership can be modified by private agreement is not novel."

Fort Lyon Canal Company v. Catlin Canal Company, 642 P.2d 501, 506 (Colo. 1982).

"[A] mutual ditch company bylaw imposing reasonable limitations, additional to those contained in section 37-92-305, C.R.S. 1973, upon the right of a stockholder to obtain a change in the point of diversion can be enforced."

Id. at 508.

"We find no reason in public policy to deny the directors, pursuant to bylaw authorization, the right to review a proposed change of place of delivery to assure that it does not create the injury upon which the bylaw focuses."

Id. at 509 (footnote omitted).

Navajo Development Co. v. Sanderson

"Federal reserved water rights, by their nature, exist from the time that the legislative or executive action created the federal enclave to which the water right attaches. If Congress or the President

wish to obtain more water for the federal lands after the initial reservations, they must use the state appropriation machinery or condemn the desired water."

Navajo Development Co. v. Sanderson, 655 P.2d 1374, 1379 (Colo. 1982) (citations omitted).

"Federal reserved water rights must be understood as a doctrine which places a federal appropriator within the state appropriation scheme by operation of federal law."

Id.

"A grantor cannot warrant that it will snow or rain, or that all senior appropriators will not withdraw their share of water. The value of a water right is its priority and the expectations which that right provides."

Id. at 1380.

United States v. City and County of Denver

"The power of the United States to legislate a federal system for the use and disposition of unappropriated non-navigable waters on federal lands generally, and on reserved lands specifically, is derived from the Property Clause of the United States Constitution."

United States v. City and County of Denver, 656 P.2d 1, 17 (Colo. 1982) (footnote omitted).

"[T]he existence of a federal reservation does not in and of itself denote a reservation of water. Rather, there must be a determination of the precise federal purpose to be served, a determination that the purpose would be frustrated without water, and a determination of the minimum quantity of water required to fulfill the purpose."

Id. at 18.

"For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water—the minimal need . . . required for such purposes."

Id. at 20.

"Thus, any water in excess of that needed to fulfill the purposes of the national forests was made available by congress to subsequent private appropriators."

Id. at 22.

"We conclude that MUSYA [Multiple Use Sustained Yield Act] does not reserve additional water for outdoor recreation, wildlife, or fish purposes. We believe that Congress intended that the federal government proceed under state law in the same manner as any other public or private appropriator."

Id. at 27.

Public Trust (California)

National Audubon Soc'y v. Superior Court of Alpine County

"This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values . . . the two systems of legal thought have been on a collision course."

National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983).

"In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."

Id. at 712.

"Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."

Id. at 728 (footnote omitted).

Alamosa La Jara Water Users Protection Ass'n v. Gould

"We note that the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers. Section 37-92-501(2)(e) makes clear that the objective of 'maximum use' administration is 'optimum use.' Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns."

Alamosa La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914, 935 (Colo. 1983) (footnote omitted).

Colorado v. Southwestern Colo. Water Conservation District

"[W]e believe that, given the state's plenary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilization of this unique resource."

State v. Southwestern Colo. Water Conservation District, 671 P.2d 1294, 1316 (Colo. 1983).

"Nontributary ground water is not subject to appropriation under Colo. Cons. Art. XVI, §§ 5 and 6, or to adjudication or administration under the 1969 Act. The modified doctrine of prior appropriation provided for the 1965 Act applies to nontributary ground water, and rights to such water in designated ground water basins must be obtained through the procedures established in that Act."

Id. at 1319.

"In light of the flexible approach taken in the case law toward application of the 'beneficial use' concept, and given the legislative expressions of concern for reclamation of mined land and abatement of dust pollution, we believe that land reclamation and dust control are beneficial uses."

Id. at 1322.

Great Western Sugar Co. v. Jackson Lake Reservoir and Irrigation Co.

"Absent some express exception, a shareholder of stock in a mutual ditch company is entitled to a ratable portion of the water obtained by exercise of the company's water rights."

Great Western Sugar Co. v. Jackson Lake Reservoir and Irrigation Co., 681 P.2d 484, 490 (Colo. 1984).

"The right of a shareholder of a mutual ditch company to change its water rights is limited by the requirement that such change not injure others who possess vested water rights."

Id. at 493.

Masters Investment Co., Inc. v. Irrigationists Ass'n.

"In Colorado, the issue of whether a water right has been abandoned invariably turns on the question of whether the owner of the right intended to abandon the right."

Masters Investment Co., Inc. v. Irrigationists Ass'n., 702 P.2d 268, 271 (Colo. 1985).

"Evidence of an unreasonably long period of non-use is sufficient to create a presumption of the owner's intent to abandon, requiring the owner to produce some evidence supporting the argument that the owner did not intend to abandon the water right."

Id. at 272.

Riverside Irrigation Dist. v. Andrews

"Plaintiffs argue that, even if the Corps can consider effects of changes in water quantity, it can do so only when the change is a direct effect of the discharge. In the present case, the depletion of water is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge. However, the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. To require it to ignore the indirect effects that result from its actions would be to

require it to wear blinders that Congress has not chosen to impose. The fact that the reduction in water does not result 'from direct federal action does not lessen the appellee's duty under § 7 [of the Endangered Species Act].' The relevant consideration is the total impact of the discharge on the crane."

Riverside Irrigation Dist. v. Andrews, 758 F. 2d 508, 512 (1985) (citations omitted).

"The Wallop Amendment does, however, indicate 'that Congress did not want to interfere any more than necessary with state water management.' A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process.

We need not reach the question raised by plaintiffs of whether Congress can unilaterally abrogate an interstate compact. The action by the Corps has not denied Colorado its right to water use under the South Platte River Compact."

Id. at 513-14 (citation omitted).

United States v. Bell

"The resume notice provision of the Act, § 37-92-302(3), 15 C.R.S. (1973 & 1985 Supp.), requires the water clerk to prepare a resume of all applications in the water division filed during the preceding month, to publish the resume in newspapers of general circulation, and to mail a copy of the resume to persons who will be affected or to those who have requested resumes."

United States v. Bell, 724 P.2d 631, 636 (Colo. 1986).

"Under Colorado law, vested appropriative water rights are subject to the postponement doctrine set out in section 37-92-306, 15 C.R.S. (1973). Priority of appropriation determines the relative priority among water rights or conditional water rights awarded in one calendar year, but, regardless of the date of appropriation, water rights or conditional water rights decreed in one year are necessarily junior to all priorities awarded in decrees in prior years. § 37-92-306. Water rights are obtained by a combination of acts and intent constituting appropriation and are not dependent upon adjudication. [B]ut failure to adjudicate the rights results in the rights being junior to rights previously adjudicated The priority of unadjudicated water rights, relative to previously adjudicated water rights, is therefore 'postponed.'

Because the United States was not subject to joinder prior to the McCarran Amendment and its absence from previous adjudications was privileged, once it is properly joined and provided the opportunity to adjudicate its claims, it may be decreed reserved water rights with priorities that antedate other adjudicated water rights to the date of the reservation. To that extent the postponement doctrine does not prevent the United States from receiving the priorities to which it would otherwise have been entitled. However, the postponement doctrine does apply to the United States' amendment claiming water from the mainstem of the Colorado River. Were the amendment to relate back to the original application, and thus antedate prior claims, the purposes of the McCarran Amendment would be frustrated, and the United States would have avoided the equivalent of a filing deadline."

Id. at 641-42 (footnotes and citations omitted).

FWS Land and Cattle Co. v. State Div. of Wildlife

"[F]ollowing the enactment of section 37-92-305(9)(b), an applicant seeking a conditional decree must prove by a preponderance of the evidence that the appropriation will be completed with diligence before a conditional decree may be issued."

FWS Land and Cattle Co. v. State Div. of Wildlife, 795 P.2d 837, 840 (Colo. 1990).

"FWS must be able to establish that water 'can and will be diverted, stored, or otherwise captured, possessed, and controlled . . . and that the project can and will be completed with diligence and within a reasonable time.' The ownership of and an applicant's right of access to a reservoir site are appropriate elements to be considered in the determination of whether a storage project will be completed. In granting DOW's motion for summary judgment, the water court properly considered FWS's ability to use the state lands for increased storage purposes."

Id.

City of Thornton v. City of Fort Collins

"To establish the date of the appropriation, the applicant must show the 'concurrence of the intent to appropriate water for application to beneficial use with an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties.' The concurrence of intent and overt acts qualifies as the first step toward an appropriation of water, and the date on which the first step is taken determines the date of the appropriation."

City of Thornton v. City of Fort Collins, 830 P.2d 915, 924-25 (Colo. 1992) (citation omitted).

"The relevant acts 'must be of such character as to perform three functions' The three required functions are: '(1) to manifest the necessary intent to appropriate water to beneficial use; (2) to demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) to constitute notice to interested parties of the nature and extent of the proposed demand upon the water supply.'"

Id. at 925.

"[T]he appropriation date cannot be set before the latest date in that series, which is the date on which it can be said that the first step has been taken to appropriate water."

Id.

"Water can be appropriated either by diverting water or by otherwise controlling water. An application for a conditional water right may be adjudicated if either diversion of water or control of water is established, assuming that the resultant use is beneficial. A diversion in the conventional sense is not required."

Id. at 929.

"This statute [37-92-103(4)] provides that water appropriated for municipal, recreation, piscatorial, fishery and wildlife purposes is water put to beneficial uses."

Id. at 930.

"The type of beneficial use to which the controlled water is put may mean that the water must remain in its natural course. This is not an appropriation of a minimum stream flow, an appropriation given exclusively to the CWCB. A minimum stream flow does not require removal or control of water by some structure or device. A minimum stream flow between two points on a stream or river usually signifies the complete absence of a structure or device."

Id. at 931.

"[I]t is clear that the Nature Dam is a structure which either removes water from its natural course or location or controls water within its natural course or location given that the Poudre's 'historic' channel may be considered the River's natural course or location. The uses of the Poudre River water so controlled are recreational, piscatorial and wildlife uses, all valid under the Act."

Id.

"In general, boat chutes and fish ladders, when properly designed and constructed, are structures which concentrate the flow of water to serve their intended purposes. A chute or ladder therefore may qualify as a 'structure or device' which controls water in its natural course or location under section 37-92-103(7)."

Id. at 932.

Board of County Comm'rs of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.

"As we have previously determined, the provisions of the 1975 contract demonstrate the District's control over the application of refill water in the Taylor Park Reservoir to further fishery and recreational beneficial uses. The contract authorizes the District to request the Association to release refill water from the Taylor Park Reservoir, with the approval of the United States, and to participate in supervising and coordinating exchanges of water between the Aspinall Unit and the Taylor Park Reservoir. It is undisputed that refill water was in fact released from the Taylor Park Reservoir."

Board of County Comm'rs of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist, 838 P.2d 840, 849 (Colo. 1992).

"The evidence also supports the water court's finding that these releases resulted in the following specific benefits, with no injury to any downstream junior appropriations: easing headgate management by downstream irrigators; aiding fisheries by avoiding disruption of spawn and fry life stages and maintaining constant flows within an optimum range for all life stages; reducing flooding to the benefit of landowners; enhancing recreation uses by providing more predictable river and boating flows; and minimizing reservoir spills."

Id. at 849-50.

Board of County Comm'rs of the County of Arapahoe v. United States

"A conditional water right decree does not reflect actual water usage. The extent to which a conditional decree will be perfected cannot be predicted with certainty and depends upon the completion of the requirements necessary to appropriate and put the water to a beneficial use."
Board of County Comm'rs of the County of Arapahoe v. United States, 891 P.2d 952, 970 (Colo. 1995).

"The water court's interpretation of the 'can and will' statute prohibits future appropriations based on unrealistically high assumptions of water utilization by holders of absolute and senior conditional water rights decrees."
Id.

"Although a conditional water rights decree may affect the calculation of the availability of water when the rights are exercised, it is difficult to predict whether, and to what extent, the appropriation will be completed. Rather than speculate about the extent to which conditional rights will be exercised, and without the assumption that conditional rights will be exercised to the decreed amount, river conditions existing at the time of the application for a conditional water rights decree should be considered to determine water availability. Present conditions provide a more accurate representation of what water is being beneficially used and what water is available for appropriations. Conditional water rights under which diversions have not been made or none are being made should not be considered in determining water availability."
Id. at 970-71.

"We have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs. The degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate."
Id. at 972.

Kansas v. Colorado

"Article IV-D of the Compact permits future development and construction along the Arkansas river Basin provided that it does not materially deplete stateline flows 'in usable quantity or availability.'"
Kansas v. Colorado, 514 U.S. 673, 684-85 (1995).

"[I]mproved and increased pumping by existing wells clearly falls within Article IV-D's prohibition against 'improved or prolonged functioning of existing works,' if such action results in 'materia[l] deplet[ions] in usable' river flows."
Id. at 690.

Simpson v. Highland Irrigation Company

"[T]he Engineer can and should enforce compact delivery requirements with regard to Colorado water rights, adhering to the terms of the Compact and consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration. In this manner, citizens of Colorado can partake reliably of the state's compact apportionment through property rights perfected for beneficial use within the state."

Simpson v. Highland Irrigation Company, 917 P.2d 1242, 1248 (1996) (citation omitted).

"Colorado law favors efficient water management, optimum use, and priority administration."

Id. at 1252 (footnote omitted).

"Its priority is the essential element of a Colorado water right. Under the decreed, priority, the owner or beneficiary of a water right is entitled to effectuate capture, possession, and control of a specified quantity of water from the physically available, decreed source of supply at an identified point of diversion for application to beneficial use to the exclusion of all other uses not then operating in decreed priority."

Id. at 1252 n.17.

"Security for the rights of Colorado water users largely depends upon the sound exercise of the Engineer's diversion curtailment enforcement power."

Id. at 1253.

Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.

"The [1965 Ground Water Management] Act creates a permitting system for the allocation and use of ground waters within designated ground water basins. The Commission is empowered to act on conditional and final well permit applications, changes of water rights to designated ground water . . . and to 'supervise and control the exercise and administration of all rights acquired to the use of designated ground water.'"

Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd., 919 P.2d 212, 215 (Colo. 1996).

"Here, the ground water judge for Adams County recognized that APA rulemaking review in the Denver District Court would 'provide for uniformity in review of rules in one central authority rather than providing for the balkanization of decision making.' The ground water judge correctly interpreted the Act and the APA. The 'acts' and 'decisions' of the Commission referenced in section 37-90-115 are non-rulemaking in nature, such as those involving the application of statutes or rules to specific well permit applications, water rights, change of water rights, or other matters focusing on particular water users in specific circumstances."

Id. at 220-21 (citation omitted).

Bayou Land Co. v. Talley

"[I]t is clear that the legislature intended from its enactment of Senate Bill 213 and later Senate Bill 5 to confer control over nontributary ground water to owners of the overlying land. The legislature has done so by making ownership of land or consent of the landowner a prerequisite to application for a well permit and ultimately to the utilization of ground water. Through these enactments, the legislature has created an inchoate right to control and use a specified amount of nontributary ground water in owners of the overlying land.

Because this right is incident to ownership of land, it is not dependent upon formal adjudication by a water court. For instance, the right to withdraw nontributary ground water may be severed from the land prior to adjudication through the consent provisions of section 37-90-137(4) or by sale."

Bayou Land Co. v. Talley, 924 P.2d 136, 148-49 (Colo. 1996) (citations omitted).

"We describe the right to extract nontributary ground water prior to construction of a well and/or adjudication as inchoate to emphasize that it is not a vested right. The right does not vest until the landowner or an individual with the landowner's consent constructs a well in accordance with a well permit from the state engineer and/or applies for and receives water court adjudication. Until vesting occurs, the right to extract nontributary ground water is subject to legislative modification or termination."

Id. at 149 (footnote and citations omitted).

"We conclude that because the right to withdraw nontributary ground water is integrally associated with and incident to ownership of land, such right is presumed to pass with the land either in a deed or a deed of trust unless explicitly excepted from the conveyance instrument. A party claiming that the right to withdraw nontributary ground water was not transferred with the land must prove that the grantor affirmatively did not intend to transfer such right."

Id. at 150.

"The presumption may be overcome by a showing that the landowner previously transferred the right to withdraw ground water to a third party or entity explicitly or by operation of statute. See 37-90-137(4)(b)(II), 15 C.R.S. (1995 Supp.)."

Id. at 151 n.23.

City of Thornton v. Bijou Irrigation Co.

"We have applied the inquiry notice standard in a number of recent cases. With the exception of cases presenting circumstances that suggested the misleading inclusion or omission of material facts, we have consistently accepted a broad definition of inquiry notice and found adequate the resume notice provided by the applicant."

City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 26 (Colo. 1996).

"In *Department of Natural Resources v. Ogburn*, we determined that jurisdiction over a change of transmountain water rights rested with the water courts in both the basin of origin and the basin of

use. However, we noted that the appropriate venue for determination of the requested change of use is the court in the basin of use."

Id. at 30 (citation omitted).

"[U]nder section 37-92-103(3)(a), a municipality may be decreed conditional water rights based solely on its projected future needs, and without firm contractual commitments or agency relationships, but a municipality's entitlement to such a decree is subject to the water court's determination that the amount conditionally appropriated is consistent with the municipality's reasonably anticipated requirements based on substantiated projection of future growth."

Id. at 39 (footnote omitted).

"[T]he 'can and will' requirement should not be applied rigidly to prevent beneficial uses where an applicant otherwise satisfies the legal standard of establishing a nonspeculative intent to appropriate for a beneficial use."

Id. at 43 (footnote omitted).

"[I]t is within the water court's authority to include conditions in the decree that limit the yield of the rights to the amount for which water is available and for which the applicant has established a need and a future intent and ability to use."

Id. at 47.

"[T]he court's setting of a project yield limit below established need and availability could be valid if necessary to protect other water users against injury to their existing rights."

Id. at 48.

"Thornton's proposals violate both the spirit of the WCA and the Repayment Contract and the letter of the NCWCD rules and the Allotment Contract. Thornton's proposal to use CBT water to satisfy replacement obligations will allow the city to increase the amount of water that it applies to municipal uses outside the boundaries of NCWCD. Although the direct use remains within the district, Thornton would receive indirect benefits outside of the district that derive from its use of CBT water within the district. Similarly, the operation of the exchange on CBT water, even if the character of exchange rule applies and the direct use is deemed to occur within the district, results in significant quality and quantity benefits to Thornton outside of the NCWCD boundaries. Further-more, Rule IV(A) of the NCWCD rules and Article 2 of the Allotment Contract specifically preclude the acquisition of extra-district benefits by exchange. The trial court correctly assessed Thornton's proposals as attempts to extend benefits to its lands outside of the district in contravention of the provisions of the governing statutes, rules, and contracts."

Id. at 59 (footnotes omitted).

"A contract water user is, in effect, a consumer whose rights are determined by the terms of that contract, and successors in interest can acquire no greater right."

Id. at 60.

"Appropriators of water native to a public stream have no automatic right to capture and reuse this water after the initial application to beneficial use. Instead, these return flows and seepage

waters become water tributary to a natural stream and subject to diversion and use under the appropriations and associated system of priorities existing on the stream. Thus, a user of native water can secure a right to reuse return flows only by establishing the elements necessary to complete an independent appropriation of those waters."

Id. at 65.

"[W]e conclude that an importer of transmountain water need not have an intent to reuse this water at the time of the original appropriation and importation to maintain the subsequent right of reuse."

Id. at 70.

"The reuse right remains with the importer until the right is transferred by the importer or the importation ceases."

Id.

"[W]e have consistently maintained that appropriators on a stream have no vested right to a continuance of importation of foreign water which another has brought to the watershed."

Id. at 72.

"[L]aches is not applicable to a party who has no duty to act."

Id. at 74.

"We noted above that it has long been the rule in Colorado that downstream users cannot establish vested rights in the continuation of the importation of foreign water. In light of this rule, Fort Collins and the other downstream users were not justified in relying on the continued release of these foreign water return flows. Because their reliance was unreasonable, the downstream users cannot establish the requisite prejudice attributable to WSSC's alleged delayed initiation of its reuse right. Thus, we hold that Thornton's proposed reuse of its foreign water is not barred by the doctrine of laches."

Id. (citation omitted).

"One of the basic tenets of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations This protection extends not only to surface water users but to users of all water tributary to a natural stream, including appropriators of tributary underground water [T]his protection extends to junior appropriators' rights in return flows"

Id. at 80.

"Thus, unlike water imported from across the Continental Divide, Thornton's irrigation water is not new to the system; Thornton essentially changed only the place of use of that water. This type of diversion is common in Colorado and users downstream from these diversions have every reason to believe that they are among those protected against injury."

Id. at 81.

"Senator McCormick's statements reveal a recognition that a water court has acted properly in imposing revegetation requirements prior to the consideration and passage of Senate Bill 92-92. The bill was intended to codify and institutionalize the use of these revegetation conditions and did not represent the creation of a new form of condition on changes in use of water rights."
Id. at 85.

"In addition to this dual focus on maximum beneficial use and the protection of water rights, water judges must give consideration to the potential impact of the utilization of water on other resources. Our decisions establish that the goal of maximum utilization must be 'implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources.'"
Id. at 86.

"[W]e agree with the trial court that the legislative water quality scheme is not designed to protect against quality impacts unrelated to discharges or substitute water and specifically prohibits the water court from imposing the protective measures necessary to remedy depletive impacts of upstream appropriations on an appropriator in Kodak's situation."
Id. at 93.

"The sole negative impact of the Poudre River exchange on Kodak's treatment operations results from a diminution in the flow of excess river water—i.e., water that would otherwise flow by Kodak's plant but that is in excess of the amount that can be diverted under Kodak's water right [T]o avoid this impact on Kodak's treatment operations, the trial court would have had to impose conditions that required maintenance of sufficient volume in the stream to preserve the average low-flow values that determine Kodak's effluent limits. Despite Kodak's arguments to the contrary, such protection would necessarily require the imposition of conditions creating a private instream flow right for Kodak for the purpose of waste dilution or assimilation."
Id.

"Pursuant to section 37-92-102(3), 15 C.R.S. (1990), the General Assembly vested exclusive authority in a state entity, the Colorado Water Conservation Board (CWCB) to appropriate minimum stream flows and limited the purpose for these appropriations to 'preserv[ation of] the environment to a reasonable degree.'
Id. at 93.

"[T]he judiciary is without authority to decree an instream flow right to a private entity
The legislature similarly prohibited the Colorado Water Quality Commission and the Water Quality Division from imposing minimum instream flows in the course of their water quality protection activities. These agencies must perform their duties subject to the following restriction: 'Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows' § 25-8-104(1), 11A C.R.S. (1989). This language reinforces the legislative intent expressed in the water right adjudication provisions that minimum stream flows are not a valid tool for protecting water quality."
Id. (citations omitted).

"The decision whether further to integrate the consideration and administration of water quality concerns into the prior appropriation system is the province of the General Assembly or the electorate."

Id. at 94-95.

"Under both the statute and the regulations, the mandate of the state engineer in reviewing the quality aspects of an exchange is clear: the substitute supply must be of a quality to meet the requirements of use to which the senior appropriation has normally been put. The regulations are sufficiently broad to allow the state engineer's office to exercise its professional judgment in adopting a method of regulation that will ensure that the statutory standard is met, and the absence of more specific direction will not compromise the protective goals of the statute. Accordingly, we hold that the state engineer is capable of ensuring compliance with these provisions without specific instructions on where to measure the quality of the substituted water If water quality monitoring at the point of discharge is insufficient to ensure compliance with section 37-80-120(3), the decree does not prevent the state engineer's office from taking additional action to fulfill its statutory duty to protect downstream users."

Id. at 97.

"The state engineer and division engineer are legislatively assigned broad powers and responsibilities for administration, distribution, and regulation of waters of the state. We have discovered no statutory authority that would authorize a court to impose on a private party any part of the expense incident to exercise of those powers or fulfillment of those responsibilities."

Id. at 99 (citation omitted).

The City and County of Denver v. Middle Park Water Conservancy Dist.

"Intent is the critical element in determining abandonment. Continued and unexplained non-use of a water right for an unreasonable period of time creates a rebuttable presumption of intent to abandon."

The City and County of Denver v. Middle Park Water Conservancy Dist., 925 P.2d 283, 286 (Colo. 1996) (citations omitted).

"Water rights are usufructary in nature, and the use entitlement may be lost or retired to the stream. When this occurs, the property rights adhering to the particular water right no longer exist. The effect of such abandonment on any other water right diverting from the same source of supply is not the subject of the abandonment inquiry."

Id. (citations omitted).

Bennett Bear Creek Farm Water and Sanitation Dist. v. City and County of Denver

"The legislature chose not to confer extraterritorial water service rate-setting authority on the PUC. Section 31-35-402(1)(f) has displaced the common law and the PUC in regard to rate

making for extraterritorial water service. Rate setting under section 31-35-402(1)(f) is legislative in nature."

Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver, 928 P.2d 1254, 1262 (Colo. 1996) (footnote omitted).

"Contracts containing terms regarding rates and charges must be construed and given effect in light of the legislative authority of the governmental entity which supplies the water service."
Id.

"[O]ur inquiry regarding the applicable standard must be informed by rules, statutes, and case law pertinent to judicial review of local governmental legislative action. Such review occurs by means of declaratory judgment under C.R.C.P. 57 and sections 13-51-101 to -115, 6A C.R.S. (1987), not by way of on-the-record review under the State Administrative Procedure Act, § 24-4-106, 10 A.C.R.S. (1988), or C.R.C.P. (106)(a)(4)."
Id. at 1268.

"Rates that are not rationally related to a local governmental utility purpose are subject to being set aside if those challenging the rate carry their burden of proving lack of such a relationship."
Id. at 1269.

"Contracts of a governmental entity cannot divest its legislative powers, and contracting parties are charged with knowledge of the retained nature of such authority."
Id. at 1269-70.

"Legitimate utility factors, and the justified use of governmental power, must be the basis for decisionmaking, and a judicial remedy is available by way of declaratory judgment action to redress rate-making actions which lack a rational relationship to the utility function of the governmental entity."
Id. at 1273.

Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership

"Under the can and will statute, the applicant must make a threshold showing of reasonable availability of water to prove that the applicant "can" complete the appropriation. The applicant for water rights must demonstrate that 'water is available based upon river conditions existing at the time of the application, in priority, in sufficient quantities and on sufficiently frequent occasions, to enable the applicant to complete the appropriation with diligence and within a reasonable time.'

A showing of reasonable availability does not require a demonstration that water will always be available to the full extent applied for in the decree. The applicant need only prove that there is a substantial probability that the appropriation can and will be completed, based upon necessarily imperfect prediction of future conditions."

Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership, 929 P.2d 718, 723-24 (Colo. 1996) (footnotes and citation omitted).

"Any potential injury caused by new appropriations from streams that are not over-appropriated can normally be mitigated if junior appropriators curtail their diversions when senior users need water."

Id. at 724.

"We recognize that there may be situations in which any use by a junior appropriator would cause persistent injury to senior water users. In those cases, the water court must eliminate the injury by imposing conditions on the exercise of the junior right. The water court may require the applicant to provide augmentation water to protect against injury to senior users."

Id. (citation omitted).

"Whether the proposed appropriation can and will be completed is a question of fact for the water court to determine. The issues of water availability and injurious effect are inherently fact specific and thus require factual findings by the water court. The water court's findings will not be disturbed on appeal if they are supported by competent evidence in the record."

Id. at 725 (citation omitted).

"[A] public interest argument is not a valid objection to a decree for a new conditional water right because such an argument conflicts with the doctrine of prior appropriation. Second, such an argument presupposes that the existing rights will not be administered fairly and in compliance with the priority system."

Id. (citation omitted).

"[T]o the extent the appellants argue injury to the CWCB's decreed instream flow rights, we note that the CWCB was an objector in the case. The CWCB holds the decreed instream flow right."

Id. at 726.

"Therefore, the argument of injury to the instream flow is much less persuasive when the holder of that right was a party to this action, satisfied itself that its interests were being protected, and did not oppose entry of the decree."

Id.

Dallas Creek Water Co. v. Huey

"An absolute decree confirms that amount of depletion from the stream that can be taken in priority as a property right."

Dallas Creek Water Co. v. Huey, 933 P.2d 27, 34 (Colo. 1997).

"Since conditional water rights function to reserve a priority date for an appropriation of water to beneficial use that has not been achieved yet, they are subject to continued scrutiny to prevent the hoarding of priorities 'to the detriment of those seeking to apply the state's water beneficially.'"

Id. at 35.

"The above-emphasized reference to diligence in the statutory provisions governing conditional water rights plainly indicates legislative intent to require, in subsequent diligence proceedings, a demonstration that the decreed conditional appropriation is being pursued in a manner which affirms that capture, possession, control and beneficial use of water can and will occur in the state, thereby justifying continued reservation of the antedated priority pending perfection of a water right."

Id. at 37 (footnote omitted).

"Its priority, location of diversion at the source of supply, and amount of water for application to beneficial uses are the essential elements of the water right."

Id. at 38.

"Water rights are decreed to structures and points of diversion, in recognition that a water right is a right of use and constitutes real property in this state, and the owners and users of such water rights may change from time to time."

Id. at 39 (citation omitted).

"Water application requirements should not be construed to defeat substitution of parties when a water user who depends upon the appropriation at issue has, in fact, filed a timely diligence application through an agent and the resume notice sufficiently describes the right for which diligence is sought."

Id. at 41.

"A person desiring to pursue the conditional decreed appropriation to completion must show that the preferential status enjoyed for the initial appropriation is entitled to continuation under the antedated priority. This is accomplished by a demonstration of due diligence by an owner or lawful user of the conditionally decreed appropriation."

Id. at 42.

Shirola v. Turkey Canon Ranch Ltd. Liab. Co.

"Therefore, in a water adjudication involving a proposed plan for augmentation or a change of water right, any person may object to the application itself and participate in the adjudication by holding the applicant to a standard of strict proof. However, for that objector to have standing to assert injury to his or her water right, the objector must show that he or she has a legally protected interest in a vested water right or a conditional decree."

Shirola v. Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 747 (Colo. 1997) (footnote omitted).

"Absent an adjudication under the Act, water rights are generally incapable of being enforced. Once a water right has been adjudicated, it receives a legally vested priority date that entitles the owner to a certain amount of water subject only to the rights of senior appropriators and the amount of water available for appropriation. The holder of an adjudicated right is entitled to the use of a certain amount of water unless called out by senior users or unless the stream itself contains insufficient flow."

Id. at 749 (citations omitted).

"In an effort to protect small agricultural or domestic well water users, the General Assembly has created a statutory category for exempt wells that differs from all other water rights. By that statutory exception, the General Assembly has awarded the expectancy of a certain priority date, unaffected by the year in which the exempt well owner files for adjudication. Thus, vested water rights in exempt wells are not subject to the postponement doctrine set forth in section 37-92-306. Because of the statutory provisions regarding exempt wells, we conclude that an exempt well owner may attain a legally protected interest in his or her vested water right merely by filing an application for adjudication of such well."

Id. at 749-50 (footnote and citation omitted).

"Rather, upon adjudication, 602 wells will receive as a priority date the date of their well permit, without reference to the date of the application for the adjudication. See § 37-92-602(4)."

Id. at 751.

"We read the statute to require the state engineer to take into account all vested water rights of which he has notice whether or not adjudicated, in determining the impact of a proposed non-exempt well. The General Assembly provided that exempt wells are entitled to a presumption that they do not materially injure the rights of others; the General Assembly did not provide that exempt wells are burdened by an inverse presumption that no other use materially injures them."

Id. at 752.

"Consistent with encouraging maximum beneficial use of the waters of the state, the senior appropriator is not entitled to command the whole or a substantial flow of the underground aquifer merely to facilitate his taking the fraction of the flow to which he is entitled. The cost to the senior of reaching a lowered water table can be assigned to the junior."

Id. at 754 (citation omitted).

Williams v. Midway Ranches Property Owners Association, Inc.

"Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes, typically quantified in acre-feet of water consumed."

Williams v. Midway Ranches Property Owners Ass'n, Inc., 938 P.2d 515, 521 (Colo. 1997) (footnote omitted).

"Absolute water rights used in one location may be quantified and changed for use in an augmentation plan to provide replacement water releases, so that diversion and use of water may be made out-of-priority elsewhere."

Id. at 521-22 (footnote omitted).

"Thus, the decreed flow rate at the decreed point of diversion is not the same as the matured measure of the water right. Into every decree awarding priorities is read the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made."

Because water rights are usufructuary in nature, the measure of a water right is the amount of water historically withdrawn and consumed over time in the course of applying water to beneficial use under the tributary appropriation without diminishment of return flows."

Id. at 522.

"Determining the historic usage of a tributary water right is not restricted to change and augmentation plan proceedings . . . equitable relief is available, upon appropriate proof, to remedy expanded usage which injures other decreed appropriations."

Id. at 522-23.

"All water rights are subject to beneficial use as the measure of the right. When prior change decrees are subject to interpretation in subsequent change proceedings, the ordinary interpretation to be made in the absence of a quantification or otherwise controlling terms of a prior judgment is that historic usage under the appropriation at its decreed point of diversion governs the extent of usage under the change decree."

Id. at 523 (citation omitted).

"Under the 1969 Act, water courts have jurisdiction, based upon an adequate application and resume notice, to adjudicate the amount of water allocable to each share for augmentation plan replacement purposes, calculated upon the historic usage of a ditch company's tributary water right."

Id. at 525 (citation omitted).

"[W]hen historical usage has been quantified for the ditch system by previous court determination, the yield per share which can be removed for use in an augmentation plan is not expected to differ from augmentation case to augmentation case, absent a showing of subsequent events which were not previously addressed by the water court but are germane to the injury inquiry in the present case."

Id. at 526 (footnote omitted).

Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Association

"Waters of the natural stream, including tributary ground water, belong to the public and are subject to use under Colorado's constitutional prior appropriation doctrine and implementing statutes...Rights of use thereto become perfected property rights upon application to beneficial use...In contrast, the right to use water in designated ground water basins, nontributary water outside of designated ground water basins, or any Dawson, Denver, Arapahoe, or Laramie-Fox Hills ground water outside of a designated ground water basin, is governed by the provisions of the Groundwater Management Act...Ground water located in designated basins is subject to a modified system of prior appropriation administered by the ground water commission...Use of nontributary ground water and Denver Basin aquifer water outside of designated ground water basins is subject to the provisions of section 37-90-137(4). Regardless of whether water rights are obtained in accordance with prior appropriation law, or pursuant to the Ground Water Management Act, no person "owns" Colorado's public water resource as a result of

land ownership.”

Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Association, 956 P.2d 1260, 1268 (Colo. 1998)(citations and footnotes omitted).

“In *Bayou Land Co. v Talley*...we reiterated that a right to use nontributary ground water outside of a designated basin is purely a function of statute and landowners do not have an absolute right to ownership of water underneath their land. Rather, landowners have an inchoate right to extract and use the nontributary water in accordance with section 37-90-137(4)...We held that

the right does not vest until the landowner or an individual with the landowner’s consent constructs a well in accordance with a well permit from the state engineer and/or applies for and receives water court adjudication. Until vesting occurs, the right to extract nontributary ground water is subject to legislative modification or termination.

Id.(citations and footnotes omitted).

“By means of Senate Bill 5...the General Assembly subjected Denver Basin ground water, whether nontributary or not nontributary, to the separate water use system of section 37-90-137(4) and required the state engineer to promulgate rules for use of this water under section 37-90-137(9)(b).”

Id. at 1270 (citations and footnotes omitted).

City of Grand Junction v. City and County of Denver

“(W)e disagree with Grand Junction’s claim that the Water Court exceeded its jurisdiction when it examined and construed the provisions of the Blue River Decree.

We hold that the Water Court possessed the authority to review the Blue River Decree in order to ascertain whether Denver’s application would interfere with the terms or objectives of the decree. In doing so, we also reaffirm the principle...that a court of coordinate jurisdiction does not possess the authority to enter a decree that modifies or interferes with the objectives or terms of another court’s decree.”

City of Grand Junction v. City and County of Denver, 960 P.2d 675 (Colo. 1998) (citations and footnotes omitted).

“Therefore, in the context of the priorities described in the decree, Denver can fill Dillon Reservoir only once. In other words, all priorities to Blue River water awarded in the Blue River Decree are senior to Denver’s rights, if any, to fill Dillon Reservoir more than once. In the instant case, Denver ultimately sought a refill right with a priority date of 1987, a date junior to all priorities described in the Blue River Decree. Hence, Denver’s new claim is entirely consistent with those terms of the Blue River Decree that relate specifically to refilling Dillon reservoir.”

“Furthermore, Denver’s claim to a refill right at Dillon Reservoir was not even among the subjects addressed by the Blue River Decree. The refill right was not, and could not have been, before the Federal Court in 1955 because Denver’s first appropriation date for the refill of the reservoir was 1965...As the Water court explained, the Federal court in the Blue River Decree addressed only those relative priorities at issue at the time of adjudication. The Federal Court enjoined the parties from asserting in the future any priorities different from those described in the Blue River Decree. Accordingly, the Federal Court has thwarted subsequent efforts by Denver to modify, intentionally or otherwise, the United States’ senior rights to Blue River water.”

“The Federal Court’s continuing jurisdiction is limited to the purpose of effectuating the objectives of the Blue River Decree...Denver’s refill right does not interfere with the objectives of the Blue River Decree because Denver’s refill right is subject to all of the provisions of the Blue River Decree...Consequently, Denver’s application for a refill right with respect to Dillon Reservoir did not implicate the Federal court’s exclusive jurisdiction to implement the Blue River Decree. We hold, therefore, that the Water court possessed subject matter jurisdiction over Denver’s application.”

City of Boulder v. New Anderson Ditch Company

“The conditional decree contemplated that Lafayette would not obtain an absolute decree if it no longer had a lawful right to divert water through the Anderson Ditch. Lafayette did not meet this test because at the time of the trial and the entry of the proposed absolute decree, Lafayette had no legal right to exchange water using the Anderson Ditch for application to beneficial use.” Lafayette argues that the water court improperly injected an additional requirement for the perfection of a conditional water right by requiring the applicant to possess facilities to transport

The water when it ruled that ‘absent a permanent means of transporting water, there can be no absolute water right.’ We agree with Lafayette that the water court’s ruling is inaccurate, since Colorado law contemplates that legal arrangements for a means of diversion may be perpetual or for a term of years...Consistent with the terms of the stipulation between these parties, we have concluded that the water court was correct in declining to enter an absolute decree following trial, because Lafayette then had no legal right to use the point of diversion identified in the decree. In conclusion, we hold that Lafayette demonstrated reasonable diligence in developing the rights set forth in the 1987 decree, and that the water court properly continued Lafayette’s conditional rights to exchanges to the Anderson Ditch for another diligence period.”

City of Lafayette v. New Anderson Ditch Company, 962 P.2d 955 (Colo. 1998).

Campbell v. Orchard Mesa Irrigation District

“Irrigation districts were created ‘to provide means...for bringing into cultivation the arid lands of the state and making them highly productive by the process of irrigation.’...To accomplish this

objective, the legislature authorized irrigation districts to levy and collect special assessments at the expense of those landowners whose lands were serviced by irrigation waters...However, legal authority to levy and obtain collection of special assessments does not transform an essentially private entity into a governmental entity for Amendment 1 purposes...We have repeatedly said that irrigation district special assessments are not general taxes characteristic of government...While general taxes exact revenue from the public at large for general governmental purposes, an irrigation district's special assessment benefits specific landowners whose land the district supplies with water. These special assessments are designated to pay the expenses, including servicing debt, incurred in irrigating the land. The assessments are levied in proportion to land ownership and are paid only by the landowners who receive the benefits. In summary, a 1921 Act irrigation district serves the interests of landowners within the district and not the general public. As such, it cannot be said that an increase of an irrigation district's special assessment increases the burden of the taxpaying public which Amendment 1 sought to regulate.”

“(W)e conclude that the private character of a 1921 Act irrigation district differs in essential respects from that of a public governmental entity exercising taxing authority contemplated by Amendment 1. An irrigation district exists to serve the interests of landowners not the general public. Rather than being a local governmental agency, a 1921 Act irrigation district is a public corporation endowed by the state with the powers necessary to perform its predominantly private objective...Accordingly, we hold that an irrigation district is not a local government within the meaning of Amendment 1's taxing and spending election requirements.”

Campbell v. Orchard Mesa Irrigation District, 972 P.2d 1037 (Colo. 1998)

Farmers High Line Canal and Reservoir Company v. City of Golden

“(P)rior to the modern trend of implementing express volumetric limitations in decrees, most water rights were quantified by a two-part measurement. First, a decree contained a flow-rate of water, in c.f.s., which the owner was entitled to divert from the stream. Second, a decree stated the use to which that diverted water could be put, such as irrigation of crops or municipal uses.”

“From the late 1800s to the early 1970s, court primarily employed one standard method in order to protect the vested rights of juniors in change proceedings. Under this method, the court would order the petitioner to abandon a portion of his or her originally decreed flow right back to the stream. This flow abandonment was then incorporated into the express terms of the change decree.”

“With the advent of improved engineering technique, courts began to utilize another approach to prevent injury to juniors in change proceedings. Under the modern method, courts now translate the petitioner's historical consumptive use into a volumetric limitation stated in acre-feet. Courts then incorporate the volume limit into the express terms of the decree. Therefore, most modern change decrees impose an acre-foot limit on the amount of water an appropriator may consume in the average year.”

“This shift in the methods employed to protect juniors in change proceedings accounts for the difference between Golden’s decrees, granted in the early 1960s, and Con Mutual’s change decree, granted in 1993. Whereas the 60s decrees only required Golden to abandon a portion of its flow entitlement in order to protect junior users, Con Mutual’s decree imposed a volumetric limit on the amount of Priority 12 water it is entitled to consume.”

“Appellants argue that their claim requesting the addition of volumetric limitations to the 60s decrees is not precluded because, as a matter of law, the 60s decrees contain implied volumetric limitations. In support of this contention, the appellants urge us to extend the rule first announced in *Orr*, to the facts of the instant case. However, as we decline to extend the rule in *Orr*, we find the appellants’ claim that volumetric limitations should be added to the 60s decrees is precluded.”

“An examination of *Orr* and *Midway Ranches* reveals the proper standard for our review. In each individual case, we must review the record of the prior proceeding in order to determine whether historical consumptive use was calculated and relied upon in the formation of the earlier decree. If so, we will not modify the resulting decree by implying volumetric limitations into its terms. The implied volumetric limitation doctrine in *Orr* was developed in order to prevent injury to juniors when a prior change decree did not address or contemplate the question of historical consumptive use. This doctrine was not developed in order to provide juniors with a method to insert volumetric limitations where they were previously absent, even though historical consumptive use formed the basis for the earlier decree.”

“(W)e find that the doctrine of issue preclusion is unavailable to the appellants in this case. Appellants contend that Golden is precluded from asserting that the 60s decrees contain no volumetric limitation because the 1993 Con Mutual proceedings cannot accomplish that which is barred by virtue of claim preclusion.”

“If we were to allow the 60s decrees to be reopened for the addition of volumetric limitations, then the appellants’ argument that the 1993 litigation collaterally establishes the appropriate acre-footage terms of these decrees would be relevant. However, as we will not reopen the 60s decrees in order to imply volumetric limitations, the appellants’ reliance on issue preclusion is misplaced.”

“While it is true that a decree for change in use may not again be collaterally attacked insofar as previously litigated injurious effects are concerned, this does not bar junior appropriators from bringing later suits regarding new injuries that were not previously litigated and which arose after the change was decreed.”

“(A)s Golden’s municipal use had not even been decreed at the time of the 60s proceedings, it is obvious that the appellants could not have brought their claims of enlarged use based on changing municipal use patterns and increased lawn irrigation. Furthermore, the appellants’ second and third claims of enlarged use in the instant case are sustained by different evidence than that presented in the 60s proceedings. As the water court is not precluded from considering new

claims of injury based on allegations of changed circumstances, the appellants' allegations of enlarged use in the instant case are permissible.”

“Therefore, in the instant case, Golden may not enlarge the use of its decreed rights by changing its pattern of municipal use or by using its water to irrigate lawn acreage which was not anticipated at the time its change in use decree was entered.” As it would contradict the most basic principles governing all water decrees were we to allow a party to enlarge its use in such a manner, we must reject Golden's assertion that the appellants' second and third enlarged use claims are precluded.”

Farmers High Line Canal and Reservoir Company v. City of Golden, (Colo.No. 97SA343, March 29, 1999)(citations and footnotes omitted).