1987

Colorado Water Law

George Vranesh

Follow this and additional works at: https://scholar.law.colorado.edu/books_reports_studies

Part of the Environmental Law Commons, Indian and Aboriginal Law Commons, Natural Resources Law Commons, State and Local Government Law Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information
https://scholar.law.colorado.edu/books_reports_studies/134
GEORGE VRANESH, COLORADO WATER LAW (Vranesh Publications 1987) [abstract and table of contents only].

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
Colorado Water Law


Colorado Water Law serves as a reference resource for attorneys practicing in the field of water law, as well as a thorough introduction for those just getting started in the subject. It will also be a helpful reference work for individuals and institutions interested in the acquisition and distribution of water: municipalities, water conservancy districts, irrigation organizations, water engineers, and hydrologists.
VOLUME 1

CHAPTER 1

INTRODUCTION TO WATER LAW

§ 1.1 Physical Properties
   Measurement of Water
   Availability of Water
   Hydrologic Cycle
   Demand for Water
   Water and Cultural Development

§ 1.2 Western Development
   Pre-Statehood
   Statehood and the Constitution
   Growth Demands on Colorado Water

CHAPTER 2

HISTORY OF WATER RIGHTS

§ 2.1 Basic Doctrines—An Introduction

§ 2.2 Riparian Doctrine—English Development
   Early Property Concepts of Water
   Natural Flow—Reasonable Use
   Natural Flow—Reasonable Use
TABLE OF CONTENTS

Distinction Between Natural Flow and Reasonable Use
Governmental Modifications of Common Law
Factors Limiting or Defining Riparian Rights
Watershed Limitations
Transfer of Riparian Rights
Doctrine of Appurtenance

§ 2.3 Appropriation Doctrine—Western States
   Origin of the Appropriation Doctrine
   Federal Implications
   Elements of An Appropriation
   Transfer of a Water Right

§ 2.4 Comparison of the Appropriation and Riparian Doctrines

§ 2.5 Dual System States
   The California Doctrine
   The Oregon Doctrine
   Remaining Dual System States

§ 2.6 Permitting
   Permitting in the Eastern States
   Permitting in the Western States
   The Colorado Experience

CHAPTER 3
THE NATURE OF THE RIGHT

§ 3.1 Introduction—Taking and Applying
   The Taking
   The Applying
   Water of Every Natural Stream
   Right to Appropriate
   Water as a Property Right

§ 3.2 The Elements of a Water Right Appropriation
   Diversion
   Beneficial Use
TABLE OF CONTENTS

Beneficial Use Limitations
Duty of Water
Historic Use Limitation
Efficiency of Use
Conditional Water Rights
Availability of Unappropriated Water
Speculation

§ 3.3 Ditch Rights
The Ditch Right-of-way
Methods of Acquisition
Scope of the Right-of-way
Loss of the Right-of-way-
Maintenance and Repair of Ditch
Liability of Ditch Owners

§ 3.4 Storage Rights
Impounding of Water
One Filling Rule
Appropriation of Seepage Right
Conditional Rights
Change in Right
Abandonment of Reservoir Rights
Liability for Leakage, Breakage, or Overflow
Liability of Parties
“Act of God” Defense
Liability for Operation of a Reservoir
Statute of Limitations

§ 3.5 Ground Water Rights
Ground Water Mining
Ground Water Rights
Case Law Prior to 1953
Statutory Development from Territorial Days
to 1953
The 1953 Act
Colorado Ground Water Law of 1957
The 1965 Ground Water Management Act
Tributary Ground Water
Nontributary Ground Water
Designated Ground Water
TABLE OF CONTENTS

§ 3.6 Conditional Rights
   Requirement of a First Step
   Reasonable Diligence
   Periodic Proof of Diligence
   Finalization of the Decree

§ 3.7 Miscellaneous Water Rights
   Diffused Surface Water
   Seepage and Spring Waters
   Salvaged and Developed Water
   Waste Water
   Return Flow
   Foreign Water

§ 3.8 Geothermal Water
   The Federal Geothermal Steam Act of 1970
   Federal Litigation
   The Colorado Geothermal Resources Act

§ 3.9 Weather Modification
   Basic Legal Issues
   Interjurisdictional Disputes
   Intrajurisdictional Disputes
   Liability of WeatherModifiers
   Right to the Water Generated by Weather Modification

§ 3.10 The Livestock Water Tank Act
   Incentives to Construct a Livestock Water Tank
   Operation of the Livestock Water Tank Act

CHAPTER 4
WATER RIGHT DETERMINATION AND ADMINISTRATION

§ 4.1 Introduction

§ 4.2 Role of the Water Court
   Jurisdiction
   Function of the Water Court
### TABLE OF CONTENTS

Venue  
Procedure in the Water Court  

§ 4.3 The Water Right Determination and Administration  
Act of 1969  
Introduction  
Determination and Administration of Water Rights  

§ 4.4 Plans for Augmentation  
Introduction  
Augmentation and the Integration of Ground Water  
Statutory Limitations on Plans for Augmentation  
Unresolved Problems Associated with Plans for Augmentation  
Procedural Aspects of a Plan for Augmentation  

§ 4.5 Authority of the State Engineer  
Tabulation of Water Rights  
Exemptions and Presumptions  

§ 4.6 Regulation by the State Engineer  
Standing of the State Engineer  
Regulation of Wells  

§ 4.7 A Procedural Summary  

### CHAPTER 5  

ADMINISTRATION OF WATER  

§ 5.1 The Water Court  
The Water Judge  
The Water Referee  
The Special Master  
The Water Clerk  

§ 5.2 Role of the Water Officials  

§ 5.3 Role of the Water Commissioner  
Historical Role
TABLE OF CONTENTS

Court Decisions
The Present Situation

§ 5.4 Role of the Division Engineer
The Current Situation
Distribution of Water
Standing of the Division Engineer
Orders as to Distribution of Water
Out-of-State Diversions
Administration of Diversion Works
Tabulation of Priorities and Abandonment Lists
Procedures for 1978 Tabulations and Abandonment Lists
Procedures for Future Tabulations and Abandonment Lists
Future Tabulations
Future Abandonment Lists

§ 5.5 Role of the State Engineer
The State Engineer’s Office
Litigation Concerning the State Engineer’s Role
Current Duties of the State Engineer
Rule Making Authority
Order of the State Engineer
Measuring Devices
Water Exchanges
Reservoir Administration
Ground Water Administration
Interstate Water Administration

§ 5.6 Water Officials’ Records
Measuring Devices
Records as Evidence
Diversion Records
The Water Decree
Summaries of Decrees
Transcripts Accompanying Decrees
Well Records
Miscellaneous Information

xii
TABLE OF CONTENTS

§ 5.7 Role of the County Commissioners
   Setting Water Delivery Charges
   Subdivision Regulation
   Water and Sewage Facilities
   State Reservoir and Land Use
   River Basin Authorities

§ 5.8 Role of Other Administrative Agencies
   Colorado Land Use Commission
   Colorado Wildlife Commission
   Colorado Oil and Gas Conservation Commission
   Colorado Water Quality Control Commission
   Colorado Soil Conservation Board

§ 5.9 Map and Statement

VOLUME 2

CHAPTER 6

TRANSFER OF WATER RIGHTS

§ 6.1 Conveyance of Water Rights
   Introduction: Water Rights as Property Rights
   Exchange of Water
   Water Rights Transferred with the Land
   Express Transfer of Specific Rights:
      Colorado Rule of Construction
   The Silent Deed: Determining when a Water Right is Appurtenant to Land in Colorado
   Appurtenant Rights

§ 6.2 Ownership of the Right
   Who Owns the Right: Ditch Companies, Irrigators, and Stockholders
   Ditch Rights

§ 6.3 Changes in Water Rights: The Prevention of Injury to Vested Junior Rights
TABLE OF CONTENTS

Change in Point of Diversion
No-Injury Rule
Terms and Conditions
Burden of Proof
Place of Use
Change in Method of Use: Direct Flow to Storage

§ 6.4 Measure of Injury
  Abandonment
  Enlarged Use
  Consumptive Use and Return Flow
  Waste Water
  Foreign Water

§ 6.5 Transfer of Point of Diversion Procedures
  Validity of Title
  Jurisdiction of the Court
  The Burden of Proof in a Change Proceeding
  Proof of Abandonment
  Ground Water

§ 6.6 Futile Call

§ 6.7 Minimum Stream Flow

§ 6.8 Priority of Appropriation
  Tabulation and Priority Lists
  Judicial Interpretation of Constitutional Provision
  Preferred Use

§ 6.9 Land Use vs. Water Use:
  Private Property vs. Public Water

CHAPTER 7

TRANSMOUNTAIN AND INTERSTATE WATERS

§ 7.1 The Legal Battle for Transmountain Water
  Introduction
  The Continuing Battle
  Compensatory Storage
# TABLE OF CONTENTS

Condemnation of Out-of-basin Water Rights  
Conditional Water Rights  
Minimum Stream Flows  

§ 7.2 Use and Reuse of Foreign Waters  
Pre-Brighton Ditch Case Law  
Procedural Issues  

§ 7.3 Transmountain Projects  
City and County of Denver Projects—Denver Water Board  
Northern Colorado Water Conservancy District (NCWCD)  
Municipal Subdistrict, Northern Colorado Water Conservancy District (NCWCD)  
Southeastern Colorado Water Conservancy District  
Additional Diversions  

§ 7.4 Use of Land for Transmountain Diversions  
State Rights-of-Way  
Colorado Land Use Act  
Local Government Land Use Act of 1974  
Federal Laws Affecting Land Use  
Federal Land Policy and Management Act (FLPMA)  
The Wild and Scenic Rivers Act  
The Wilderness Act  
The Federal Power Act  
The National Historic Preservation Act  
The Endangered Species Act  
The National Environmental Policy Act (NEPA)  
The Clean Air Act  
The Colorado Air Quality Control Act  

§ 7.5 Quality of Water  
Salinity  
The Mexican Treaty—Minute 242  
The Colorado River Basin Salinity Control Act  
Colorado Projects Under CRBSCA  
Paradox Valley Unit  
Grand Valley Unit  
Lower Gunnison Basin Unit  
McElmo Creek Unit
TABLE OF CONTENTS

Glenwood-Dotsero Springs Unit
Meeker Dome Unit
Clean Water Act
Areawide Waste Treatment Management
   (CWA § 208 Plans)
Dredge and Fill Permits
Conclusion

§ 7.6 Interstate Water and Exportation
   Introduction
   State Control Through General Welfare Power
   Equitable Apportionment of Interstate Streams
   Interstate Compacts
   Congressional Apportionment
   Administration of Water in Accordance with
      Interstate Apportionments
   Effect of Transmountain Diversions on
      Interstate Apportionments
   The Dormant Commerce Clause
   Colorado’s Export Statute
   Conclusion

CHAPTER 8
WATER ORGANIZATIONS

§ 8.1 Introduction—Joint Ditches
   Tenants in Common
   Enforceable Rights of Participants
   Right to Contribution—The Ditch Lien Statute

§ 8.2 Mutual Ditch Companies
   Introduction
   Organization
   Stock
   Relationship of Stock to Water Rights:
      Transferability of Right
   Necessity of Application to Beneficial Use
   Assessments on Stock
### TABLE OF CONTENTS

Nature of the Company-Shareholder Relationship

§ 8.3 Carrier Ditch Companies

§ 8.4 Cities and Towns
   - Municipal Acquisition of Water
   - The Denver Water Board
   - Home Rule Authority/City Charter
   - Extra-Territorial Water Service
   - Public Utility Status
   - Contractual Limitations on a Municipal Waterworks
   - Statutory Authority for Municipal Water Facilities

§ 8.5 Irrigation Districts
   - Introduction
   - Article 41—Irrigation District Law of 1905
   - Article 42—Irrigation District Law of 1921
   - Article 43

§ 8.6 Water Conservancy Districts
   - Statutory Powers
   - Case Law

§ 8.7 Water Conservation Districts

§ 8.8 River Basin Authority

§ 8.9 State Government

§ 8.10 Colorado Water Conservation Board
   - Introduction
   - Composition of the Board
   - Duties of the Board
   - Water Studies
   - Intrastate Conflict
   - Flood Control
   - Funding of Projects by the Board
   - Appropriation of Minimum Stream Flows
   - Federal and Interstate Coordination
   - Significant Federal Legislation Involving the CWCB

xvii
### TABLE OF CONTENTS

- Role of the Commissioner in Interstate Activity
- Future Prospects for the CWCB
- Interaction with the Colorado Water Resources and Power Development Authority

#### § 8.11 Federal Appropriation of Water
- Introduction
- Federal Appropriation Under the Reserved Rights Doctrine
- State Court Jurisdiction over Federal Reserved Rights Claims
- Priority Dates: Federal Reserved Rights vs. State Appropriations
- Quantity of Water Subject to Reserved Rights
- Nondiversionary Uses of Water under Federal Reserved Rights
- The Rise and Fall of Non-Reserved Federal Water Rights
- Federal Appropriations for Federally Funded Reclamation Projects
- “Secondary” Uses of Water on Reserved Land

#### CHAPTER 9

**SPECIAL WATER ORGANIZATIONS**

#### § 9.1 Creatures of Statute

#### § 9.2 Water and Sanitation Districts
- District Formation
- Inclusion—Exclusion—Consolidation—Dissolution
- Elections
- Board of Directors
- Powers of Special Districts
- Overlap of Local Powers
- Three Lakes Water and Sanitation District

#### § 9.3 Metropolitan Districts
- Metropolitan Water Districts
- Metropolitan Sewage Disposal Districts
§ 9.4 Ground Water Management Districts
Introduction
Ground Water Commission
Duties of the State Engineer under the Ground Water Management Act
Ground Water Management Districts

§ 9.5 Flood Control Conservancy Districts
Introduction
Conservancy Districts
District Formation
Subdivision—Consolidation—Dissolution
Case Law
The Urban Drainage and Flood Control District

§ 9.6 Additional Statutory Districts
Public Improvement Districts
Drainage Districts
Internal Improvement Districts
Soil Conservation Districts
Regional Service Authorities (RSAs)

VOLUME 3
CHAPTER 10
PROTECTION OF WATER QUALITY IN COLORADO

§ 10.1 Introduction

§ 10.2 Common Law Protection of Water Quality

§ 10.3 Development of State Water Quality Statutes

§ 10.4 Current Statutory Protection of Water Quality

§ 10.5 Federal Water Quality Statutes
The Clean Water Act
Other Federal Statutes

§ 10.6 Federal Water Quality Laws and Mining
Section 208—Areawide Waste Treatment Management
TABLE OF CONTENTS

Section 301—Point Source Regulations
Section 303—Water Quality Standards
Section 402—National Pollutant Discharge Elimination System (NPDES)

§ 10.7 Specific Colorado Water Quality Issues
Municipal and Industrial Wastes
Mine Drainage and Tailings
Feedlot Pollutants

CHAPTER 11

FEDERAL-STATE WATER RELATIONS

§ 11.1 Federal Constitutional Authority
Introduction
The Supremacy Clause
The Commerce Clause
The Spending Power
The Property Power
The War Power
The Treaty Power
The Tenth Amendment
State Ownership
Equal Footing Doctrines
Congressional Deference to State Water Law

§ 11.2 Commerce Clause
Introduction
Federal Power Over Navigation
Commerce Clause Legislation Affecting Western Water
  Navigation
  Flood Control
  Hydroelectric Power
  Water Pollution
Effect of Commerce Clause Legislation on State Law
The Navigation Servitude
Waiver of the Navigation Servitude
<table>
<thead>
<tr>
<th align="left">§ 11.3</th>
<th align="left">Dormant Commerce Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td align="left">The Dormant Commerce Clause Generally</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Water Export Limitations</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Sporhase v. Nebraska</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Colorado’s Export Statute</td>
<td align="left"></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th align="left">§ 11.4</th>
<th align="left">Federal Reclamation</th>
</tr>
</thead>
<tbody>
<tr>
<td align="left">Introduction</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">History and Development of the Reclamation Act</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">The 1982 Reclamation Reform Act</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">State-Federal Relations</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Early Cases</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Modern Cases</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Areas of Conflict Between State and Federal Power</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Transfers and Changes in Use</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Federal Changes</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Local Distribution Changes</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Individual Use Changes</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Administrative Rulemaking</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Other Recent Developments</td>
<td align="left"></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th align="left">§ 11.5</th>
<th align="left">The Clean Water Act—Section 404 Dredge and Fill Permits</th>
</tr>
</thead>
<tbody>
<tr>
<td align="left">Introduction</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Jurisdictional Issues</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Exemption from § 404 Permitting</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Section 404 Individual Permits</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Section 404 General Permits</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Section 404 Permitting in Colorado</td>
<td align="left"></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th align="left">§ 11.6</th>
<th align="left">Federal Reserved Water Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td align="left">Development of the Reserved Rights Doctrine</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Implications of New Mexico and Denver for Federal</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Reservations in Colorado</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">National Forests</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">National Parks</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">National Monuments</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Wilderness Areas</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Wild and Scenic Rivers</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">National Grasslands</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">National Recreation Areas</td>
<td align="left"></td>
</tr>
<tr>
<td align="left">Arapahoe National Recreation Area</td>
<td align="left"></td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

Curecanti National Recreation Area
National Wildlife Refuges
Naval Oil Shale Reserves
Public Domain Lands
FLPMA
Springs and Waterholes on Public Domain Lands
Hot Springs and Mineral Springs on the Public Domain
Integration of Federal Reserved Rights with State Administration Systems
Prioritization and Quantification
Change in Use/Transfer
Appurtenance
Use by Lessees

§ 11.7 Indian Reserved Rights
Reservation Introduction
Priority Dates
Quantification of Reserved Rights
Changes in Use
Transfers
Federal Government as Trustee
Jurisdiction
Colorado Tribal Reservations

§ 11.8 Sovereign Immunity

§ 11.9 Federal Agencies and Laws
Introduction
Land Management Agencies
Forest Service
Bureau of Land Management
National Park Service
Fish and Wildlife Service
Bureau of Indian Affairs
Water Project Construction Agencies
Water Development Regulators
Federal Energy Regulatory Commission
Environmental Protection Agency
Financial Assistance Agencies
Correlative State Agencies
National Environmental Policy Act
TABLE OF CONTENTS

§ 11.10 Federal Water Development in Colorado
   Introduction
   Corps of Engineers
   Bureau of Reclamation
   Other Regulatory Agencies
   Future Water Development

CHAPTER 12
INTERSTATE COMPACTS

§ 12.1 Interstate Compacts
   Introduction
   Equitable Apportionment
   Congressional Apportionment
   Interstate Compacts—Congressional Consent
   Interpretation and Enforcement of Compacts
   Amendment of Compacts
   Administration of Compacts

§ 12.2 Colorado River Compact
   Background
   Development of the Compact
   Arizona v. California Cases
   The Upper Basin Compact of 1948
   Arizona v. California (1963)
   Colorado and the Colorado River Compact
   Conclusion

§ 12.3 Upper Colorado River Basin Compact
   Background
   The Compact
   Water Use in the Upper Basin States Since
   the Formation of the Compact

§ 12.4 South Platte River Compact
   Introduction
   The Saga of the Narrows Project

xxiii
TABLE OF CONTENTS

§ 12.5 Rio Grande Compact
Other Provisions of the Rio Grande Compact
The Closed Basin Project

§ 12.6 Republican River Compact
Apportionment of the Water
The Weiland v. Pioneer Irrigation Co. Case
State and Federal Interaction

§ 12.7 Costilla Creek Compact

§ 12.8 Arkansas River Compact

§ 12.9 La Plata River Compact
Hinderlider v. La Plata River & Cherry Creek Ditch Co.

§ 12.10 Animas-La Plata Project Compact

§ 12.11 Other Interstate Compacts
The Little Snake River and the Upper Colorado River Compact
The North Platte River and Nebraska v. Wyoming
The Laramie River and Wyoming v. Colorado

CHAPTER 13
MEXICAN TREATIES

§ 13.1 Mexican Treaties
Terms of the 1944 Treaty
Salinity Disputes with Mexico

CHAPTER 14
CONDEMNATION OF RIGHTS

§ 14.1 Condemnation of Water Rights
Introduction
Compensation
Condemning Powers of Lesser Entities
TABLE OF CONTENTS

§ 14.2 The Individual’s Right to Condemn
   Condemnation in Order to Convey Water
   The Individual’s Right to Condemn Water

§ 14.3 Inverse Condemnation
   Introduction
   Damages
   The Statute of Limitations
   Federal Law

§ 14.4 Condemnation of Ditch Rights-of-Way
   Introduction
   Right of a Corporation to Condemn Rights-of-Way
   Flume and Pipeline Companies
   Individual Right-of-Way Rights
   Incorporation of Lateral Ditch Owners
   Right-of-Way for Extending Head of Ditch Upstream
   Meadow Rights
   Express and Implied Rights-of-Way
      Contract or Grant
      Parol License
      Prescription
      Torrens Title System

§ 14.5 Condemnation of Well Sites

§ 14.6 Condemnation of Reservoir Sites

§ 14.7 Procedural Rules in Eminent Domain Proceedings