A PRIMER ON COLORADO WATER LAW

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PREFACE

Today, in Colorado, water rights are becoming more valuable than ever before. As population pressure continues to increase, so will the demand on Colorado's limited water resources. It is, therefore, very important that the water rights owned or used by state agencies be properly protected and managed. Unfortunately, most people are unfamiliar with the laws governing water rights. As a result many of the water rights owned or used by state agencies are poorly managed, underutilized and not properly protected.

The following materials are intended as a general overview to familiarize the reader with basic water law principles and issues. It is hoped that, by becoming familiar with the materials presented in this and other water law seminars, you, as attorneys for public agencies, will be able to recognize water rights problems and help your client agencies properly manage their water rights.

The above paragraphs were written by Bill Paddock in 1980, as the preface to the original Primer on Colorado Water Law. His words remain true 5 1/2 years later, and so the need for such a primer continues. In certain areas, such as nontributary ground water and interstate water exports, the law has been in flux. In revising the primer, I have concentrated primarily on updating those areas in which statutory changes have occurred and significant cases been decided since 1980.

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The history of early water resources development in Colorado consists in part of recorded documentary evidence and in part of tales and traditions passed on orally from generation to generation.

While the original states were discussing the pros and cons of ratifying the United States Constitution, one Juan Bautista de Anzi (or Anga), then Governor of the Spanish Province of New Mexico, in the year 1787, sent a group of twenty Spanish farmers to initiate an irrigation project in collaboration with the Jupe tribe of Comanche Indians. This project, located on the St. Charles River near its confluence with the Arkansas River, about 8 miles east of the present city of Pueblo, was abandoned after a lapse of several years.

The next known attempt at irrigation was made by the Bent Brothers in the year 1832, on the north bank of the Arkansas River, midway between the present cities of La Junta and Las Animas. A ditch was constructed taking its water from the river for the irrigation of 40 acres. The crops planted and grown were corn, beans, squash, and melons. The project failed after a few years because tribes of Indians, who congregated near Fort Bent during the growing season, either purposely or inadvertently permitted their ponies to graze upon and destroy the growing crops.

The next irrigation enterprise in Colorado was begun in 1841, at a settlement near the mouth of the Fountain River, the progenitor of the present city of Pueblo. This program continued until 1854 when the inhabitants were practically exterminated by "friendly" Indians.

In 1852, construction was commenced on the Peoples' Ditch in the San Luis Valley of Colorado on the Rio Grande River. The ditch has been used continuously since completion and has a decreed priority dating to 1852, making it the earliest decreed ditch in Colorado.

About this same time several other projects were begun, the largest on El Rio de Las Animas Perdidos en Purgatorio (The River of Lost Souls in Purgatory), commonly called the Picketwire River, about 20 miles downstream from the City of Trinidad. While the ditch was not used continuously in the beginning, it is still in operation today.

Following the gold rush of 1859, a great influx of people, familiar for generations with the practice of irrigation in New Mexico, came into Colorado and immediately constructed fairly exten-

sive irrigation works. This was not only true in the valleys of the Rio Grande and the Picketwire, but also to a lesser extent in the South Platte River Basin. The development, however, in southern Colorado was quite extensive. For instance, the average or normal flow of the Picketwire during the irrigation season was completely appropriated by the year 1864.

Subsequently, the larger irrigation systems on the South Platte and its tributaries, the Arkansas and its tributaries, and the Rio Grande and its tributaries were constructed and have continually expanded. Around the turn of the century, many of the irrigation systems on the South Platte which were financed by English companies failed economically. These systems were taken over by local irrigators who mad them pay by providing holdover storage. The irrigation systems in the three basins still furnish the foundation and basis for a large part of the economic wealth of the State of Colorado.2/

II. RIPARIAN RIGHTS

The riparian rights doctrine has its roots in the common law of England. It extends to all persons who own property which abuts or is bounded by a natural stream. It entitles each riparian owner to have the natural flow of the stream pass his lands undiminished in quantity and unimpaired in quality. This water right is an appurtenance of the property. It cannot be sold apart from the property, nor is the right lost by failure to utilize the water.

The riparian doctrine is the law in this country for all those states lying totally east of the 98th meridian, except for Florida and Mississippi. (Those two states utilize the appropriation doctrine.) However, the common law rule of riparian rights stated above has now been largely replaced by the "reasonable use" rule. Under the old rule, uses such as irrigation were not allowed. Under the "reasonable use" rule, each riparian owner can now make a reasonable use of the water in the stream consistent with like uses by the other riparian owners on the stream. This modification provides for much greater flexibility in water use in riparian states.

III. DOCTRINE OF PRIOR APPROPRIATION

A. Overview

The doctrine of prior appropriation is a "first in time is first in right" system for allocation of water. Simply stated, the first person to appropriate water and apply it to a beneficial use has the first right to use water from that source. Each successive appropriator may only take his share of the water after all those water rights senior to his are satisfied.

The doctrine of prior appropriation has always been the law in Colorado. This was established by the Colorado Supreme Court in Coffin v. Left Hand Ditch Company, 6 Colo. 443, 446, 447 (1882), in which the court stated:

> It is contended by counsel ... that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution (of Colorado). But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state.
>
> ....
>
> 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.

The doctrine of prior appropriation is enforced by the state engineer, discussed infra, through the seven division engineers and numerous water commissioners who enforce the priority system by ordering junior water rights to cease diverting when seniors "call" for their water in times of shortage.

B. Colorado version of prior appropriation doctrine

1. Constitutional right to appropriate

The doctrine of prior appropriation is established by the Colorado Constitution. Article XVI, sections 5 and 6 provide:

> 5. Water of streams 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.
>
> 6. Diverting unappropriated water -- priority of 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 water for the same purposes; but when the waters of any natural stream are not sufficient for the service of all those desiring to 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.

a. Scope of constitutional right

The constitutional right to appropriate is limited in two respects. The first limitation on the right is that it only applies to water of every natural stream. Water of the natural stream includes the surface water and all ground water tributary thereto. Tributary ground water is underground water the withdrawal of which will affect the rate or direction of flow of a surface stream.

Neither the Colorado Constitution nor case law precisely defined "affect" in terms of either time period or magnitude.3/ In 1985, the General Assembly enacted Senate bill 5 which, for the first time, defined nontributary ground water:

> "Nontributary ground water" means that ground water ... the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream ... at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal.4/

The constitutional right to appropriate the unappropriated waters of the state was long thought not to apply to nontributary ground water.5/ Senate bill 213, enacted in 1973, provided for the allocation of nontributary ground water based on land ownership.6/ In 1983, in what is popularly known as the Huston case,7/ the Colorado Supreme Court confirmed that the constitutional right to appropriate does not apply to nontributary ground water, the use of which is instead subject to reasonable regulation by the legislature. In Senate bill 5, the General Assembly accepted the court's invitation and established a comprehensive system governing the withdrawal and use of nontributary ground water, as well as "not nontributary" ground water in certain deep aquifers (more on this later).

All underground water is, however, presumed to be tributary to the surface stream.8/ The person who asserts the contrary has the burden of proof.9/

The second limitation on the right to appropriate is that the water involved be unappropriated. Most major Colorado rivers are already overappropriated. This means that there are more decreed water rights than the amount of water annually available for use and, therefore, no water available for appropriation. The fact that a river has unappropriated waters during flood flows does not mean there is unappropriated water available for use at any other time.10/ However, even in an overappropriated stream system, water may be made available for appropriation by obtaining a decreed plan of augmentation.11/ An augmentation plan is a detailed plan to make more water available for appropriation by shifting the time and place of depletions on the stream and/or by pooling water, providing substitute supplies or other acceptable means.12/

b. Constitutionally preferred uses

Article XVI, section 6, supra, contains a ranking of preferred uses of water. The section gives domestic uses priority over all other uses. Agricultural users have preference over those using water for manufacturing purposes. These preferences would appear to be contrary to the principles of prior appropriation. Howev-

er, the Colorado Supreme Court has construed this provision not to allow preferred users to demand that less preferred users not take water in times of short supply, but only to allow preferred users to purchase or condemn less preferred users' water rights.13/ Any other construction would be unconstitutional because a water right is a property right which cannot be taken or damaged without just compensation.14/

The practical result of this preference scheme has been the large scale condemnation of agricultural water rights by municipalities. Agricultural rights are condemned instead of industrial or manufacturing rights because they are less expensive to acquire. In an attempt to reduce the amount of agricultural water rights being condemned by municipalities the state legislature in 1975 enacted the Water Rights Condemnation Act.15/ The primary restriction placed on the power of condemnation by the 1975 Act is that only enough water to meet the municipality's anticipated needs for the next 15 years may be condemned.16/ To establish this need the municipality has to prepare a detailed community growth and development plan.17/ In addition the municipality is required to prepare a detailed statement describing the water rights to be condemned, the effects upon the river basin from the loss of the irrigated lands, unavoidable adverse and irreversible effects of the condemnation and alternative sources of water supplies with cost comparisons.18/

The constitutionality of the Act was reviewed by the Colorado Supreme Court in City of Thornton v. Farmers Reservoir and Irrigation Company, 194 Colo. 526, 575 P.2d 382 (1978). The court held certain provisions of the act to be unconstitutional as applied to home rule cities. In particular, the court held that the provisions of the Act which call for a determination of necessity and limit the right of condemnation to anticipated water needs for the next 15 years were in violation of Article XX of the Colorado Constitution, which grants home rule cities the power of eminent domain.

2. Priority of the water right and the postponement doctrine

In order to implement the priority aspect of the prior appropriation doctrine it was necessary to provide a means for establishing the amount and priority of the various appropriations. This role has historically been, and continues to be, filled by the courts. Whenever an owner or claimant of a water right wants a court decree establishing the amount and priority of his water right, he must apply to the court for an adjudication of that right. The court will then hear the evidence and enter a decree

confirming the date of appropriation of the water right, the amount of the right and the purposes for which it may be used. A decree is not necessary in order to obtain a water right, however, it is the best evidence of the existence of the right and provides an enforcible priority date.19/

Prior to 1969, water rights were adjudicated by the district courts. When water users desired to adjudicate their water rights they would petition the court to commence an adjudication. Notice of the adjudication proceeding would be given to all persons within the water districts or irrigation division involved. A decree would ultimately be entered confirming the water rights of all those who entered the adjudication proceeding. Any person who failed to enter such an adjudication proceeding was bound thereby and subject to the postponement doctrine.

The postponement doctrine simply provides that a person who fails to enter an adjudication proceeding by which he will be bound cannot thereafter obtain a priority for his water right senior to the most junior right decreed in that adjudication proceeding. This has the effect of making senior water rights junior to those with later appropriation dates if the junior rights are adjudicated first. This sometimes harsh result was designed to require everyone to adjudicate their rights at the earliest possible time. The doctrine insures that those who have their rights decreed can rely on the decrees of the court as establishing what rights are senior to their own. This prevents an unadjudicated senior right from coming in later, getting a senior decree and, thereby, upsetting the expectations of appropriators with decreed rights that had relied on their relative priority dates.

This manner of adjudicating water rights has been modified by the Water Right Determination and Administration Act of 1969, sections 36-92-101 to 602, C.R.S. (1973 & 1985 Supp.). Under the 1969 Act, water courts were established which continuously adjudicate water rights. However, the postponement doctrine is carried forward in the 1969 Act.20/ The Act provides that the dates of appropriation shall control the relative priorities among all water right applications filed in the same year. However, a water right application filed in any year is junior to all water right applications filed in previous years.

The operation of the postponement doctrine shows why it is essential to adjudicate a water right as soon as possible. Failure to adjudicate the right results in continual loss of priority regardless of the date of initiation of the right. Failure to adjudicate water rights and consequent loss of priority is a serious problem for state agencies.

3. Elements of an appropriation

Historically, with little exception it has been the rule that there are two basic elements to an appropriation. The first is that the water must be diverted from its source. The second is that the water diverted must be applied to some beneficial use.

a. Diversion requirement

The diversion requirement is generally held to mean the actual physical taking of water from a stream and transporting it to another location for use. The requirement of a diversion prevented the appropriation of water for instream uses, such as the propagation of fish and maintenance of the natural environment.21/ In 1973, the Colorado legislature revised sections 37-92-102 and 103, C.R.S. (1973), to authorize the Colorado Water Conservation Board 22/ to acquire instream water rights and minimum lake levels to preserve the natural environment to a reasonable degree. The Colorado Supreme Court stated that a diversion is not constitutionally required and upheld the constitutionality of this statute.23/ The Water Conservation Board is now in the process of adjudicating minimum stream flow and minimum lake level water rights.

In addition, the means of diversion must be a reasonably efficient one. At his own point of diversion on a 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 to which he is entitled.24/ This principal applies equally to those who take their water from surface and underground sources. Thus, well owners have been held not to be entitled to the maintenance of a certain ground water level.25/

b. Beneficial use

The constitution and applicable statutes all require that water be placed to a beneficial use. The term beneficial use remained undefined until the passage of the 1969 Act. Prior to that time, the courts treated beneficial use as a question of fact which depended upon the circumstances of each case.26/ The statutory definition 27/ does little to clarify the meaning of the term except to make clear that the impoundment of water for recreational purposes, including fishery and wildlife propagation, is a beneficial use. It also makes clear that minimum stream flows and lake levels obtained by the Colorado Water Conservation Board are beneficial uses of water. Other categories of beneficial use of water which have been approved by the courts include domestic

28/, agricultural 29/, industrial 30/, municipal 31/, dust control 32/ and land reclamation.33/

Beneficial use of water is defined to require efficient use of the water and to preclude waste.34/ An appropriator is entitled to take only so much water as he actually needs and any surplus must be returned to the stream.35/ Therefore, a vested water right may not be obtained for water diverted but not needed for beneficial use.

4. Absolute and conditional water rights

a. Absolute water rights

As stated above, all that is necessary for the appropriation of a water right is diversion of the water and application to beneficial use. Once this has been accomplished, the owner has an absolute water right which entitles him to use, in priority, a certain portion of the waters of the natural stream.36/

b. Conditional water rights

Speaking generally, the priority date of a water right is established by the time at which water is first diverted and placed to beneficial use. This method for determining priorities works well for those who can build their diversion works and apply water to beneficial use within a reasonably short period of time. However, large projects, such as some reservoirs and transmountain diversions, require a long time to complete. If the priority date for such projects were determined by the date of application of water to beneficial use, many such projects would not have been built because there would have been no assurance that when they were completed sufficient water would have remained for appropriation. The doctrine of conditional water rights evolved to solve this problem.

A conditional water right means a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.37. A conditional water right decree determines that the first step toward appropriating a certain amount of water has been taken and the date upon which this occurred.38/

(1) Elements of a conditional water right

To initiate an appropriation for a conditional water right, two elements must coexist. First, the appropriator must have formed an intent to take water and apply it to beneficial use.39/ Sec-

ond, the appropriator must demonstrate this intent by an overt act sufficient to (1) manifest the intent to appropriate; (2) demonstrate a substantial step toward the application of water to beneficial use; and (3) put third parties on notice.40/ The element of intent need not precede or be contemporaneous with the work on the land. What is required is that at some point in time the two elements coexist and the priority date is set not earlier than the date on which both elements are present.41/

What constitutes a sufficient first step varies in every case and is determined on an ad hoc basis by the court.42/ No precise guidelines have developed on what is necessary to constitute a sufficient first step. A field survey is a common and acceptable method of accomplishing the first step.43/ However, a survey alone is not sufficient in all situations. One appropriator may not rely on the survey of another person when there is no privity between the appropriator and the person performing the survey.44/

Conditional water rights may not be obtained for speculative purposes. The appropriator must actually intend to take the water and apply it to some definite beneficial use. Accordingly, the appropriator must actually intend to build the project himself.45/ This intent may be evidenced by attempting to procure lands for irrigation use or development of a power plant, formation of a water district or attempts to procure financing. One who intends to provide water for municipal or domestic uses must represent the municipal users or have contracts to supply them with water.46/ If the appropriation is for a speculative purpose, it will be denied.

(2) Relation back doctrine and the requirement of reasonable diligence

The chief virtue of a conditional water right is that, if the appropriation is completed, then the priority date relates back to the date of initiation of the appropriation. This is known as the relation back doctrine and allows an appropriator to preserve an early priority date while he builds the structures necessary to apply water to a beneficial use.

To be entitled to the benefits of the relation back doctrine the appropriator must proceed with reasonable diligence to build the structures necessary to apply water to beneficial use.47/ What constitutes reasonable diligence is a question of fact to be decided in light of all the circumstances of the particular case. The factors to be considered include the size and complexity of the project; the extent of the construction season; the availability of materials, labor and equipment; the economic ability of

the appropriator; and the intervention of outside delaying factors such as wars, strikes and litigation 48/ (of which the worst is, of course, litigation).

Holders of conditionally decreed water rights are now required to come into court every 4 years to prove they have been diligently pursuing completion of their water rights.49/ Failure to seek this quadrennial finding of reasonable diligence will result in forfeiture of the water right.50/ Thus, it is absolutely essential that a holder of a conditional water right, including all state agencies, proceed with diligence toward completing his appropriation and file quadrennially for a determination of reasonable diligence.

5. Nature of right acquired

A water right is a usufructory right. This means the water right holder is entitled to the use of a certain amount of water but is not the owner of certain molecules of water. Thus, once the water diverted has been used, the unconsumed portion must be allowed to return to the stream for use by other appropriators.51/

A water right may be obtained for direct flow or storage purposes. It is a property right and the right to change its type, time and/or place of use is inherent in the property right and cannot be denied so long as the change does not injure the vested rights of others.52/

Both junior and senior appropriators have a vested right in the maintenance of the stream conditions substantially as they were at the time of their appropriations.53/ Accordingly, they may successfully resist all proposed changes of use of water which in any way materially injure or adversely affect their rights.54/

Injury is a question of fact to be determined from the circumstances of each case.55/ However, there are certain limitations upon changes which must be observed to prevent injury to other water rights. The change of the right is limited to the historic use of the water right, both in terms of time of use and quantity consumed.56/ The change may not increase the consumptive use of the water right nor may it alter historic return flow patterns to the detriment of junior appropriators.57/ The burden of proof to establish that a change of use will not injure other water rights rests upon the person seeking the change.58/ If the water court finds that injury will result from the proposed change, the applicant and the objectors must be given an opportunity to propose terms and conditions which would prevent injury.59/

6. Loss of the right

There are three ways in which a water right may be lost. An absolute water right may be lost either by abandonment or adverse possession. A conditional water right may be lost by abandonment or forfeiture.

a. Abandonment

Abandonment has two elements, nonuse and intent to relinquish the right.60/ All or just a portion of a water right may be abandoned. The question of the intent of an owner of a water right is essentially a question of fact.61/ Nonuse for an unreasonable period of time creates a presumption of abandonment.62/ Section 37-90-402(11), C.R.S. (1985 Supp.) creates a presumption of abandonment after 10 years of nonuse. To rebut the presumption arising from long periods of nonuse, there must be established more than mere expressions of a desire or hope or intent to use water but, rather, some fact or condition excusing such long nonuse.63/ When unaided by the presumption, abandonment becomes a question of fact which must be established by evidence of both nonuse and intent to abandon.64/

The burden of proof is on the party who is asserting abandonment to establish an intent to abandon by a preponderance of the evidence. Section 13-25-127(1), C.R.S. (1973).65/ Once a water right has been abandoned, subsequent attempts to use the water will not revive the right.66/ The water which has been abandoned reverts to the stream and may be taken by other appropriators according to their priorities.67/

b. Adverse possession

To establish a water right by adverse possession it is necessary for the claimant to prove that his possession was actual, adverse, hostile, under claim of right, open, notorious, exclusive and continuous for the prescribed statutory period.68/ To make out adverse use, the claimant must be in actual possession of the water, using it himself.69/ Open and notorious use requires that the owner of the water right be on notice that his right is being invaded.70/ To make out hostile use, the use must not be permissive and there must not be sufficient water to supply both the needs of the owner and those of the adverse claimant.71/ Continuous use must be uninterrupted for the statutory time period and exclusive of the true owner.72/ The statutory time period is 18 years. Section 38-41-101, C.R.S. (1982).73/

Adverse possession may not be effected against all other users

from a stream 74/ because the exclusive means for making a claim to waters of a stream is by appropriation. Thus, as a practical matter, adverse possession is of little value in acquiring water rights.

c. Forfeiture

See conditional water rights, supra, at p. 11.

7. Ditch companies

There are three basic types of ditches: unincorporated ditches in which water users are cotenants; carrier ditches; and mutual ditch companies.

a. Unincorporated ditches

In an unincorporated ditch, the water users transporting water in the ditch are cotenants.75/ The cotenants are not protected against any injury which may result from one cotenant ceasing to carry water in that ditch.76/

b. Carrier ditches

A carrier ditch company is a for-profit organization 77/, which sells water to users on a contract basis.78/ Legal title to the ditch is held by the company.79/ However, the company is not the appropriator of the water 80/ but, rather, sells it to consumers. As such, it is the intermediate agency aiding consumers in the exercise of their right to appropriate.81/

The ditch company is a quasi-public entity.82/ Its rates are subject to regulation by the county commissioners.83/ The ditch company is obligated to deliver water upon written demand and tender of payment.84/ The user may lose his right to water from the ditch if he ceases using it.85/

c. Mutual ditch companies 86/

Mutual ditch companies in Colorado are quasi-public carriers. They are non-profit corporations existing primarily for the benefit of their shareholders. They are engaged in the business of storing and/or transporting water to shareholders who own the right to use the water. Delivery of water to consumers is conditioned on payment of annual assessments levied by the company to meet operating expenses.

The relationship between the mutual ditch corporation and its

shareholders arises out of contract, implied in the subscription for stock and construed by the provisions of a charter or articles of incorporation. The articles of incorporation set forth the express purposes which the corporation undertakes to carry out. The corporation is not only obligated to furnish a proper proportion of water to each of its shareholders, but is liable for failure to do so. The corporation must preserve and protect the interests of the shareholders by keeping the ditches, canals, reservoirs and other works in good repair, the expense of which is paid from the special assessments.

The shares of stock in a mutual ditch represent the consumers' interest in the reservoir, canals, ditches and water rights. The benefit derived from such stock is the right to the exclusive use of the water it represents, the water being divided pro-rata according to the number of shares held by each shareholder. Shareholders, not the corporation, are the real parties in interest in any condemnation action.

Shareholders have the right to change the place of use of their water so long as others are not injured. However, a reasonable ditch company by-law precluding transfer without consent of the board of directors, in existence at the time the stock was acquired, may be upheld to prohibit transfer of the water without board consent.87/ Alternatively, a by-law adopted after purchase of the stock at issue, purporting to prevent transfer of the water without consent of the board of directors, was found to be arbitrary and capricious action.88/ Thus, prior to purchase of any stock in a mutual ditch company, the by-laws of the company ought to be examined for restrictions incompatible with the intended use of the water.

Water rights are real property and are to be transferred by deed. Shares of stock are personalty and should be conveyed by assignment. To effect a transfer of stock in a mutual ditch company it is necessary to have the name of the owner changed in the books of corporation. The safest approach in conveying such rights is to do all three.

IV. GROUND WATER

The 1980 primer stated:

> Colorado divides the world of ground water into three parts, tributary ground water,

> nontributary ground water and designated ground water.

Since that was written, in 1985, Senate bill 5 established a fourth category of ground water -- "not nontributary" ground water. How this type of ground water differs from tributary ground water will be discussed below.

It remains true that, prior to constructing any well 89/ to obtain ground water, it is necessary to obtain a well permit from the proper authority.90/

A. Tributary ground water

All ground water is presumed to be tributary to the natural stream.91/ As such, it is subject to the doctrine of prior appropriation.92/ However, since withdrawals of water by wells do not have an immediate impact on the stream 93/, they are subject to different standards of administration.94/

To implement these different standards of administration, the state engineer has promulgated rules and regulations governing the withdrawal of ground water in Water Divisions No. 1 95/, No. 2 96/ and No. 3 97/.

The rules and regulations in Water Division No. 1 require total curtailment of all ground water diversions except from exempt wells or nontributary wells after January 1, 1976. Thereafter, a well may only operate if the owner of the well submits proof to the division engineer 98/ and upon the basis of that proof the division engineer finds:

> (1) That the well is operating pursuant to a decreed plan of augmentation, that the well is operating pursuant to a decree as an alternate point of diversion, or that a change in point of diversion to the well has been decreed for a surface water right; or
>
> (2) That the ground water appropriation can be operated under its priority without impairing the water supply to which a senior appropriator is entitled; or
>
> (3) That the water produced by a well (is nontributary ground water).

The rules and regulations for Water Division No. 2 require that all nonexempt wells which were the subject of applications for determination of water rights prior to July 1, 1972 99/ can only pump Monday through Wednesday of any week. All other nonexempt wells are not allowed to pump at all. The limitations of these rules and regulations may be waived if the division engineer approves a plan submitted by the appropriator whereby the amount of depletion to the stream by the subject well(s) will be returned to the stream so that prior appropriators are not materially injured. Finally, any appropriator may elect to treat any well(s) as a temporary alternate point of diversion for all or part of a decreed surface right upon approval by the division engineer, provided no material injury will result.

The Water Division No. 3 rules and regulations were rejected by the Water Court in September of 1979 after an extensive and expensive 12 week trial. On appeal, the Colorado Supreme Court upheld portions of the rules and remanded other portions to the state engineer for further consideration.100/

B. Nontributary ground water and "not nontributary" ground water

As noted above, nontributary ground water is not subject to the constitutional doctrine by prior appropriation, but is subject to reasonable regulation by the General Assembly. Senate bill 5 provides a comprehensive framework for the withdrawal and use of nontributary ground water. Nontributary ground water is to be allocated based on ownership of the overlying land.101/ The mining of nontributary ground water is allowed, but the rate of withdrawal is to be based on an aquifer life of 100 years.102/ Rights to use nontributary ground water may be determined by the appropriate water court,103/ but such rights differ from other water rights in certain respects. For one, nontributary ground water shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary ground water need not include a date of initiation of the withdrawal project.104/ For another, such determinations shall not require subsequent showings or findings of reasonable diligence.105/

"Not nontributary" ground water is a Senate bill 5 category that stems from the General Assembly's particular concerns about the Denver Basin aquifers. These aquifers -- the Dawson, Denver, Arapahoe, and Laramie-Fox Hills -- contain a large supply of ground water that is nontributary in some areas and tributary in others.106/ To the extent that ground water in the Denver Basin

aquifers is tributary, the Colorado Constitution requires that withdrawals not be allowed to deplete the surface stream systems (South Platte and Arkansas river basins) to the injury of senior surface water rights. At the same time, tributary ground water in the Denver Basin aquifers, like nontributary ground water, is subject to mining and the same policy considerations regarding conservation apply. The General Assembly dealt with the dual aspects of tributary Denver Basin ground water in Senate bill 5 by creating the classification of "not nontributary" ground water. Such water is treated like tributary ground water insofar as its withdrawal requires the augmentation of surface streams,107/ but is treated like nontributary ground water insofar as it is allocated based on land ownership and a 100 year aquifer life.108/

Senate bill 5 directed the state engineer to promulgate rules for the withdrawal of ground water from the Denver Basin aquifers by December 31, 1985.109/ The state engineer met this statutory deadline 110/ and the Denver Basin Rules are currently before the water court for judicial review.111/ Senate bill 5 also permitted the state engineer to promulgate other rules for granting or denying well permits for nontributary ground water and other ground water in the Denver Basin aquifers.112/ The state engineer elected to promulgate statewide rules which took effect on March 3, 1986.113/

C. Designated ground water

Designated ground water is still another statutory classification of ground water, established by the Colorado Ground Water Management Act ("1965 Act"), sections 37-90-101 to 141, C.R.S. (1973 & 1985 Supp.). The definition of designated ground water provides in pertinent part:

> "Designated ground water" means that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin. "Designated ground water" shall not include any ground water

within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formation located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983;

Section 37-90-103(6)(a), C.R.S. (1985 Supp.).

Designated ground water basins may be determined by the Colorado Ground Water Commission pursuant to section 37-90-106, C.R.S. (1973 & 1985 Supp.) if the ground water contained therein meets the above definition, regardless of whether the ground water is tributary or nontributary.

Designated ground water is subject to a modified system of prior appropriation. Section 37-90-102(1), C.R.S. (1985 Supp.). The Commission manages each designated ground water basin in accordance with policies developed for the particular basin. Management responsibilities may be shared with local management districts. Sections 37-90-111, 118 to 135, 140, and 141, C.R.S. (1973 & 1985 Supp.). Although the 1969 Act does not apply to designated ground water, common law principles of prior appropriation have been held to apply interstitially where the 1965 Act is silent.114/

V. INTERSTATE AND INTERNATIONAL STREAMS

Colorado contains the headwaters for many interstate and several international streams. The majority of these streams are subject to international treaties, interstate compacts or interstate decrees. Any time you are dealing with water from one of these interstate/international streams, it is important to be aware that Colorado may have an obligation to deliver a portion of those waters to downstream states and that the treaty, compact or decree may limit the use of waters from that stream. In this sense, interstate/international agreements can place a "call" on the stream requiring Colorado water users to stop taking water so that it may be made available to uses in downstream states. The following is a tabulation of the present interstate/international compacts, treaties and decrees affecting use of water in Colorado:

A. International treaties

1. Mexican Treaty on Rio Grande, Tiajuana and Colorado

Rivers. The treaty was ratified by the United States Senate on April 18, 1945, and became effective on November 8, 1945.

B. Interstate compacts

1. Colorado River Compact, 1922, sections 37-61-101 to 104, C.R.S. (1973).

This compact covers the Colorado River and all its tributaries within the United States. It binds the States of Wyoming, Utah, Colorado, New Mexico, Arizona, Nevada and California. The compact divides the river system into the "Upper Basin" and "Lower Basin." The "Upper Basin" means those parts of Wyoming, Utah, Colorado, Arizona and New Mexico within and from which waters naturally drain into the Colorado River system above Lee's Ferry, Arizona (located just below Glen Canyon Dam near Page, Arizona).115/ Conversely, the "Lower Basin"116/ includes those parts of New Mexico, Arizona, Utah, Nevada and California from and within which waters naturally drain into the Colorado River system below Lee's Ferry.

The compact apportions the available flows between the upper and lower basins. Each basin is entitled to the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum. In addition, the lower basin is given the right to increase its beneficial consumptive use of water by an additional one million acre-feet per year.

Lee's Ferry is the dividing point. The upper basin states are required to deliver 75,000,000 acre-feet of water for any period of 10 consecutive years reckoned in a continuing progressive series. The delivery must be made at Lee's Ferry. The delivery requirement has the effect of requiring the upper basin to guarantee the performance of the river for the lower basin. Thus, in years of low flows, the upper basin will have to greatly reduce its consumptive use of water to insure deliveries to the lower basin. This requirement increases the need for upstream storage in the upper basin. Such storage would allow the upper basin to store water in years of high flows to be used in later years of low flows.

2. Upper Colorado River Compact, 1948, sections 37-62-101 to 106, C.R.S. (1973).

This compact is among the states of the "Upper Basin." It is designed to allocate the water available to the "Upper Basin" under

the Colorado River compact among the upper basin states.

3. La Plata River Compact, 1922, sections 37-63-101 to 102, C.R.S. (1973).

This compact is between the States of Colorado and New Mexico. It apportions the water flowing in this river between the two states from February 15 to December 1 of each year. The apportionment is based on the flows of the river and establishes no absolute delivery requirements.

4. Animas-La Plata Project Compact, 1963, section 37-64-101, C.R.S. (1973).

This compact is between the States of Colorado and New Mexico. The compact was entered into to implement the Animas-La Plata federal reclamation project which has not yet been built.

5. South Platte River Compact, 1923, section 37-65-101, C.R.S. (1973).

This compact is between the States of Colorado and Nebraska. The compact establishes the obligation of Colorado to deliver water to Nebraska from April 1 to October 15 of each year. During that time, Colorado is to provide a flow of 120 cubic feet per second of water at the interstate gauging station. If the flow drops below this rate, then Colorado must curtail water rights junior to June 14, 1897, diverting water between the western boundary of Washington County and the Colorado-Nebraska state line. The effect of this delivery requirement is to prevent the State of Nebraska from "calling out" water rights senior to June 14, 1987, to satisfy the compact obligations. It also prevents the Nebraska call from going upstream beyond the western county line of Washington County, Colorado.

6. Rio Grande River Compact, 1938, sections 37-66-101 to 102, C.R.S. (1973).

This compact is among Colorado, New Mexico and Texas. It is a rather complicated compact in terms of both language and administration. Much of the complexity arises from the fact that the compact is premised on the upstream states developing storage capacity to store water not presently needed downstream. Because the compact contemplates upstream storage of water, it also makes provisions for allowing states not to meet their delivery requirements by retaining water in storage.

The basic allocation of waters between the states in accomplished

by variable delivery schedules. In both Colorado and New Mexico, several gauging stations are established. A percentage of the water measured at the upstream gauges in both states must be delivered to the downstream state. The percentage of water that must be delivered to the downstream states increases as the total flow increases.

In 1968, the States of New Mexico and Texas sued the State of Colorado alleging Colorado had failed to meet its delivery requirements under the compact. New Mexico and Texas alleged that Colorado had underdelivered by a total of 900,000 acre-feet of water. Prosecution of this lawsuit was stayed by stipulation among the states. The stipulation required Colorado to meet its exact delivery obligation each and every year without fail and also provided that, if Elephant Butte Reservoir in New Mexico spilled, Colorado's alleged debt would be cancelled. In 1985, Elephant Butte spilled and the suit was dismissed by stipulation.

7. Republican River Compact, 1942, sections 37-67-101 to 102, C.R.S. (1973).

This compact is among the states of Colorado, Nebraska and Kansas. The compact apportions the waters not only of the Republican River but of the Republican River Basin. Therefore, it encompasses more streams in Colorado than the Republican River. The compact gives specific allocations of water to each state based on the average annual virgin water supply originating in the various drainage basins within the Republican River Basin.

8. Amended Costilla Creek Compact, 1963, sections 37-68-101 to 102, C.R.S. (1973).

This is yet another interstate compact between Colorado and New Mexico. It allocates water between the Colorado and New Mexico users on Costilla Creek.

9. Arkansas River Compact, 1948, sections 37-69-101 to 106, C.R.S (1973).

This compact is between the states of Colorado and Kansas. The centerpiece of the compact is John Martin Reservoir, a large flood control and reclamation project reservoir located on the mainstream of the Arkansas River near La Junta, Colorado. Under the compact, water is continuously stored in the conservation pool of John Martin. During the winter storage season, November 1 to March 31, Kansas is not entitled to demand that any water be passed through John Martin. Colorado users downstream of John Martin are entitled to up to 100 cfs. of flow through the reser-

voir during that time.

During the summer storage season, both Kansas and Colorado have the right to demand releases of water from John Martin. So long as there is water in storage in the conservation pool, Colorado water users below the reservoir may not "call out" upstream Colorado water users. When no water remains in storage in the conservation pool of John Martin, Kansas is not entitled to any of the flow entering the reservoir. Additionally, when the conservation pool is exhausted, the Colorado water users below John Martin are administered in the priority system with all water rights on the Arkansas River. During this time, the senior water rights below John Martin may "call out" upstream junior water rights.

The waters of the Arkansas River have been overappropriated since at least the turn of the century and, prior to the compact, were the subject of several protracted disputes between Kansas and Colorado in the United States Supreme Court. In recent years, Kansas has charged Colorado with violating the compact and, in December 1985, Kansas again sued Colorado in the Supreme Court. Colorado has requested that the court not accept jurisdiction because Kansas has failed to exhaust its administrative remedies under the compact.

C. Interstate Decrees (United States Supreme Court)

1. Wyoming v. Colorado, 353 U.S. 953 (1957).

This is a consent decree equitably apportioning the flows of the Laramie River arrived at after years of protracted litigation. It limits the total amount of water that may be used in Colorado, the place of its use and the type of its use.

2. Nebraska v. Wyoming, 325 U.S. 589 (1954).

This decree equitably apportions the flows of the North Platte River among Colorado, Wyoming and Nebraska.

3. Colorado v. New Mexico, 103 S. Ct. 539 (1982) and Colorado v. New Mexico, 104 S. Ct. 2433 (1984).

Colorado brought an action in the United States Supreme Court seeking an equitable apportionment of the Vermejo River. Colorado had no existing uses of water but sought an allocation for future development; New Mexico had existing uses. In the first decision, the Court established the legal principles to be applied and remanded the case to the special master for additional

findings. After remand, the Court held that Colorado had not met its burden of proving that a future diversion by it should be permitted.

D. Water Exports

Wanting to retain the right to use its full allocations of interstate streams and all of its intrastate waters, the State of Colorado has historically restricted the export of surface and ground water. The recent case of Sporhase v. Nebraska, 458 U.S. 941 (1982), which struck down a Nebraska statute prohibiting the export of ground water to states that did not grant reciprocal rights to export water into Nebraska, cast serious doubt on the constitutionality of state limitations on the export of water. The court held, first, that water was an article of commerce and, second, applying the strict commerce clause scrutiny reserved for facially discriminatory state legislation, that Nebraska's reciprocity requirement imposed an impermissible burden on interstate commerce. Finally, the court held that, while Congress could consent to what would otherwise be impermissible regulation of commerce by the states, it had not done so for the statute in question.

As a result of Sporhase, in 1983, the General Assembly revised Colorado's export statutes to tie them more closely to Colorado's entitlements under congressionally approved compacts and United States Supreme Court decrees.

Prior approval of the water court or appropriate administrative agency is required before water may be exported from Colorado. Section 37-81-101, C.R.S. (1985 Supp.). However, rather than forbidding the export of water, the statutes now seek to ensure that Colorado receives credit for waters exported to other states and that no exports are approved that will interfere with Colorado's ability to meet its obligations under compacts or decrees. Sections 37-81-101 and 103, C.R.S. (1985 Supp.). The Attorney General has a statutory duty to bring an action to enjoin any unauthorized export of water. Section 37-81-102, C.R.S. (1985 Supp.).

In 1985, legislation was enacted to require the state engineer to assess and collect a "fee" of fifty dollars per acre-foot on water exported from Colorado. Section 37-81-104, C.R.S. (1985 Supp.). The Attorney General opined that imposition of this export tax would violate the interstate compacts and decrees to which Colorado is a party and would also be unconstitutional. The state engineer has not sought to enforce the statute.

VI. STATE AGENCIES AND WATER RIGHTS

A. Authority of state engineer

The state engineer has broad administrative authority over water use in Colorado. He is empowered, inter alia, to administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado and all other applicable laws.117/ This regulatory authority does not extend to designated ground water, which is administered by the Ground Water Commission.118/ As discussed above, his authority to administer nontributary ground water is limited to the issuance of well permits.

B. Duty of State departments to consult with state engineer

Due to the broad regulatory and administrative responsibilities of the state engineer, the Governor sent the following letter to all department heads:

> Mr. C. J. Kuiper /former state engineer/
> Colorado state engineer
> 1313 Sherman Street
> Denver, Colorado 80203
>
> Dear Mr. Kuiper:
>
> The problem of acquiring the water necessary to allow State departments and institutions to fulfill their statutory functions grows increasingly more difficult. I am concerned that the various agencies of State government whose functions cause them to acquire water rights do so in a way that is entirely consistent with your responsibilities and the water rights of our citizens.
>
> In order to insure that no State agency, department or institution acts in a manner inconsistent with your responsibilities, I call upon you to provide each such agency, department and institution with any required counsel and service in the acquisition, modification or disposal of water rights.

By copy of this letter, I am requesting each of my department heads to consider requesting your help prior to the institution of any proceedings involving water rights, with the understanding that they must reimburse you for any expenses you incur.

Sincerely,

/S/Richard D. Lamm
Governor

cc: All Department Heads.

According to the terms of the foregoing letter, if any state agency is involved in any proceeding involving water rights, it must do so in a manner consistent with the state engineer's responsibilities. It is, therefore, best for each agency to consult with the state engineer prior to getting involved in a water rights transaction. This is also necessary to avoid conflicts of interest in the attorney general's office arising from one agency taking a position in a water rights proceeding that conflicts with the position of the state engineer.

C. Assisting agencies in managing water rights

1. Identifying water rights

Frequently agencies have not given enough attention to their water rights. As a consequence, many agencies do not even know what water rights they own. Thus, the first task in beginning to help an agency manage its water rights is to identify water rights they own and establish a portfolio of those rights. There are two basic sources for this information. The first is the agency itself. The second is the records of the state engineer.

An agency can determine many of the water rights it owns from its own records and from a physical inspection of its facilities. The agency records are probably incomplete, so field investigation will be necessary. This entails a review by the agency of all water stored or used at all of its facilities. A list should be prepared containing all sources of water other than a public water supply system used or stored at all facilities. The source of the water should be determined and the nature of the agency's right to use or store such water ascertained. Through this process most agency water rights should be discovered.

The second source is the records of the state engineer. These records contain all water right decrees, records of well permits and a tabulation 119/ of water rights. The decrees are indexed by name of structure and by name of owner/claimant. Well permits are also indexed by owners. Finally, one version of the tabulation is an owner/claimant list of all decreed water rights. A search should be made of all these records to identify water rights held in the agency's name. By using these two methods, a majority of the agency's water rights will be discovered.

The above-mentioned sources of information are not foolproof. They may not reveal water rights not decreed in the agency's name, interests in ditch companies, unused water rights, water used under lease agreements or unadjudicated (undecreed) water rights. The only solution to this problem is continued diligent monitoring of agency water use.

When the process of identifying agency water rights has been completed, the rights should be catalogued. The catalogue should show the rights, their location, their permitted uses, whether the rights have been adjudicated and, if adjudicated, whether the decree is absolute or conditional. All unadjudicated water rights should be immediately adjudicated. For all conditional water rights, steps should be taken to insure that the agency is aware of its responsibility to proceed with diligence in perfecting those rights.

2. Management of water rights

a. Utilization

It is necessary to insure that agency water rights are properly utilized. Utilization is a question of use generally and of the proper type and place of use of the water right. An adjudicated water right must be used in accordance with its decree. If the use varies from the decree in terms of either point of diversion, time, type or place, then an application for change of use should be filed with the appropriate water court. In the alternative, any unauthorized uses must be discontinued. If the right is unadjudicated, a decree should be obtained which confirms the present uses. If a water right is not being used at all, the agency should begin use of the right as soon as practicable to avoid problems of abandonment or diminution of the right by reduced historic usage.

b. Protection

Protection of a water right is only partially accomplished by

proper utilization. Protection also involves protecting the right from injury by other water users. This, in turn, entails being aware of what other water users from the same source of supply are doing with their rights. This information is available in the form of the monthly resume 120/ put out by the various water courts. The resume is a listing of all water right applications filed in the water court during the preceding month. It contains a summary of each application including a description of the water rights involved, their location and the nature of the change sought, if any. By reading the resume, one can determine what applications, if any, may adversely affect his water rights.

In order to be effective in the review of resumes it is necessary to have a person familiar with all the agency's water rights review them. Thus, it is recommended that each agency appoint one person or several persons to become familiar with the agency's water rights. These persons would then be responsible for reviewing the resumes. Each time they see an application which could potentially adversely affect agency water rights, the agency should have the Attorney General file a statement of opposition 121/ in the water court proceeding.

3. Conveyance and purchase of water rights

Conveyance or purchase of water rights is a very ticklish business. The first and greatest problem is that of assuring title to the water right. This is a very difficult problem with old water rights because title insurance on water rights is unavailable, conveyancing patterns are sloppy and there is no root of title comparable to a patent. Thus, determining title becomes a complex job including reviewing abstracts, reviewing water court decrees and physical inspection of the place of use of the water right. A good discussion of this problem is found in King, Colorado Practice, Vol. I, sections 171-177.

If title to the right can be adequately established, the next problem is determining the nature and extent of the right involved. This involves an analysis of the historic use of the right, including the amount of water actually used, when it was used, what the water was used for and where it was used. It also requires a determination of potential adverse user claims. Reviewing these matters involves a search of the state engineer's records on use, court records affecting the water right and on-the-ground physical inspections.

Assuming the water right's title can be adequately assured and the historic use of the right is acceptable, then it is necessary to evaluate if the right is suitable for the purchaser's pur-

poses. If the purchaser intends to make the same use of the water right in the same place, no problem should arise. However, if the purchaser wants to change any aspect of the water right's use, court approval of the change must be obtained. Evaluation of a water right for the purpose of changing its use is a most difficult problem. It requires an assessment of whether the change of water right to suit the purchaser's need can be legally and physically accomplished. To determine this legal and engineering advice (expert conjecture) should be obtained. This advice should be sought in advance of any purchase and no purchase should be consummated without it.

Assuming that the water right is to be sold, it must be conveyed with the same formalities as real property, e.g., by deed.122/ The purchaser will always want a warranty deed. When buying water rights for a state agency, attempt to require a warranty deed and an acceptable title opinion. If a warranty deed is not available, demand a special warranty deed and acceptable title opinion. A quit claim deed should only be accepted as a last resort and then only at a very favorable price for the water right. If any title clearing needs to be done make that an obligation of the seller prior to conveyance. (When selling a water right, you obviously would want to do the converse of the above to the extent possible.)

A proper contract for purchase of a water right is also essential, especially where a change of water right is contemplated. In such situations, it is best not to buy the water right outright. Rather, the contract should base payment on the amount of water that is successfully changed in a water court proceeding. In addition, the seller should be required to be a co-applicant and fully cooperate with the buyer in prosecution of the water court action. If the purchaser is unable to change the water right to fit his needs, then the contract should become null and void.

In drafting conveyances and contracts for the sale of water rights, one area merits exceptional caution. That area is the description of the water right. Colorado adheres to the rule of expressio unis est exlusio alterious. For example, a deed purported to convey

> any and all water rights, water, ditches, reservoirs and water easements and profits thereunto belonging or in any wise appertaining which are now or here after may be used on said premises, the together with all shares of shares of stock or shares of

> water from any ditch ... to water for irrigation or domestic purposes on said premises, and including the following, to wit: seventy two (72) shares of Capital stock of ... (a certain ditch company and specifying other ditch rights).

The Colorado Supreme Court, in Denver Joint Stock Land Bank v. Markham, 106 Colo. 509, 107 P.2d 313 (1940), held that only the specifically described rights in the deed had been conveyed. Thus, be sure to accurately describe each and every right you intend to buy or sell.

In conclusion, the purchase or sale of a water right should be approached with great caution. Only by careful review of the applicable law and available evidence of title will you avoid the many pitfalls in this type of transaction. If you have any serious problems on any of the above-mentioned issues, expert advice should be sought.

1/ The introductory material on irrigation history was prepared by former Special Assistant Attorney General Donald H. Hamburg.

2/ See A Hundred Years of Irrigation in Colorado, 1852-1952, published by the Colorado Water Conservation Board, 1952.

3/ Hall v. Kuiper, 181 Colo. 130, 510 P.2d 329 (1973); Kuiper v. Lundvall, 187 Colo. 40, 529 P.2d 1328 (1975); District 10 Water Users v. Barnett, 198 Colo. 291, 599 P.2d 894 (1979); C.R.S. 1973, 37-92-103(13). As the above cases show, the Colorado Supreme Court found that water the withdrawal of which takes over 100 years to affect the stream is nontributary. The Court also found that water the withdrawal of which will affect the stream within 40 years is tributary. The time period between 40 and 100 years was not addressed.

4/ Section 37-90-103(10.5), C.R.S. (1985 Supp.).

5/ See Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).

6/ Section 37-90-137(4), C.R.S. (1973).

7/ State Dep't of Natural Resources v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, ___ U.S. ___ (1984).

8/ Safranek v. Limon, 123 Colo. 330, 228 P.2d 975, 977 (1951); see, In re German Ditch & Reservoir Co., 56 Colo. 252, 271, 139 P.2d 9 (1914).

9/ Safranek v. Limon, supra n. 8; Comrie v. Sweet, 75 Colo. 199, 225 P. 214 (1924).

10/ Hall v. Kuiper, supra, n. 3.

11/ Cache La Poudre Water Users Ass'n. v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 228 (1976); Kelley Ranch v. Southeastern Colorado Water Conservancy District, 191 Colo. 65, 550 P.2d 297 (1976).

12/ Section 37-92-103(9), C.R.S. (1973).

13/ Town of Sterling v. Pawnee Ditch Extension Company, 42 Colo. 421, 94 P. 339 (1908); Nevius v. Smith, 86 Colo. 178, 279

P. 44 (1929); Black v. Taylor, 128 Colo. 449, 264 P.2d 502 (1953).

14/ Town of Sterling, supra, n. 13; Colo. Const. art. II, sec. 15.

15/ Sections 38-6-201 to 216, C.R.S. (1982).

16/ Section 38-6-202(2), C.R.S. (1982).

17/ Section 38-6-203(1), C.R.S. (1982).

18/ Section 38-6-203(1), C.R.S. (1982).

19/ Cresson v. Whitten, 139 Colo. 273, 338 P.2d 278 (1959); Alamosa Creek Co. v. Nelson, 42 Colo. 140, 147, 93 P. 1112 (1908).

20/ Section 37-92-306, C.R.S. (1973).

21/ Colorado River District v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1956).

22/ Sections 37-60-101 to 122, C.R.S. (1973 & 1985 Supp.).

23/ Colorado River Water Conservation Dist. v. Colorado Water Conservation Board, 197 Colo. 469, 594 P. 2d 570 (1979).

24/ Schodde v. Twin Falls Land and Water Co., 224 U.S. 107, 119, 32 S. Ct. 470, 56 L. Ed. 686 (1912); Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961); Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1969).

25/ Colorado Springs v. Bender, supra, n. 24.

26/ Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939).

27/ Section 37-92-103(4), C.R.S. (1973).

28/ Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 P. 235 (1891).

29/ See, e.g., Billings Ditch Co. v. Industrial Comm'n., 127 Colo. 69, 253 P.2d 1058 (1973).

30/ See generally, North American Exploration Co. v. Adams, 104 F. 404 (8th Cir. 1900); San Luis Roller Mills, Inc. v. San Luis Power & Water Co., 103 Colo. 119, 77 P.2d 128 (1938).

31/ Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968).

32/ State Dep't of Natural Resources v. Southwestern Colorado Water Conservation District, supra, n. 7.

33/ Id.

34/ Section 37-92-103(4), C.R.S. (1973).

35/ Pulaski Irr. Ditch Co. v. City of Trinidad, 70 Colo. 565, 203 P. 681 (1922).

36/ See section 37-92-103(12), C.R.S. (1973).

37/ Section 37-92-103(6), C.R.S. (1973).

38/ Colorado River Water Conservation District v. Vidler Tunnel Water Company, 197 Colo. 413, 594 P.2d 566 (1979); Four Counties Water Users Ass'n v. Colo. River Water Conservation District, 159 Colo. 499, 414 P.2d 469 (1968).

39/ Colo. River Water Conservancy Dist. v. Vidler Water Tunnel Company, supra, n. 38.

40/ Bar 70 Enterprises, Inc. v. Tosco Corp., 703 P.2d 1297 (Colo. 1985); City of Aspen v. Colo. River Water Conservation Dist., 696 P.2d 758 (Colo. 1985).

41/ Elk Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

42/ Four Counties Water Users Assn., supra, n. 38.

43/ Taussig v. Moffat Tunnel Water and Development Co., 106 Colo. 348, 106 P. 2d 363 (1940).

44/ Bunger v. Uncompahgre Valley Water Users Ass'n., 192 Colo. 159, 557 P.2d 389 (1976); Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 174 Colo. 309, 486 P.2d 438 (1971).

45/ Bunger, supra, n. 44, Denver v. Northern Colo. Water Conservancy District, 130 Colo. 375, 276 P.2d 992 (1954).

46/ Bunger, supra, n. 44; Colorado River Dist. v. Vidler Tunnel, supra, n. 38.

47/ Four Counties Water Users Ass'n., supra, n. 38.

48/ Colorado River Water Conservation District v. Twin Lakes Reservoir and Canal Co., 171 Colo. 561, 468 P.2d 853 (1970).

49/ Section 37-92-301(4), C.R.S. (1973).

50/ Town of DeBeque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980); Simineo v. Kelling, 199 Colo. 225, 607 P.2d 1289 (1980).

51/ Pulaski Irr. Ditch Co., supra, n. 35.

52/ See, e.g., Weibert v. Rothe Bros., Inc., 200 Colo. 310, 618 P.2d 1367 (1980); Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

53/ See, e.g., Weibert v. Rothe Bros, Inc., supra, n. 52; City of Westminster v. Church, supra, n. 31.

54/ See, e.g., Green v. Chaffee Ditch Co., supra, n. 52.

55/ Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).

56/ See, e.g., Weibert v. Rothe Bros., Inc., supra, n. 52; City of Westminster v. Church, supra, n. 31.

57/ Twin Lakes Res. Co. v. City of Aspen, 193 Colo. 478, 568 P.2d 45 (1977); City of Boulder v. Boulder and Left Hand Ditch Co., 192 Colo. 219, 557 P.2d 1182 (1976); cf., Metropolitan Denver Sewage v. Farmers Res. & Irr. Co., 179 Colo. 36, 499 P.2d 1190 (1972).

58/ Weibert v. Rothe Bros., Inc., supra, n. 52; Farmers Highline Canal & Reservoir Co. v. City of Golden, supra, n. 55.

59/ Weibert v. Rothe Bros., Inc., supra, n. 52; section 37-92-305(3) and (4), C.R.S (1973).

60/ See, e.g., In re CF&I Steel Corp., 183 Colo. 135, 515 P.2d 456 (1973).

61/ Masters Investment Co. v. Irrigationists Assoc., ___ P.2d ___ (Colo. 1985).

62/ Id.

63/ Knapp v. Colorado River Water Conservation District, 131 Colo. 42, 279 P.2d 410 (1953).

64/ Commonwealth Irr. Co. v. Rio Grande Canal, 96 Colo. 478, 45 P.2d 622 (1935).

65/ Masters Investment Co. v. Irrigationists Assoc., supra, n. 61.

66/ Farmers Res. & Irr. Co. v. Fulton, 108 Colo. 482, 120 P.2d 196 (1942); Parson v. Fort Morgan Res. & Irr. Co., 56 Colo. 146, 136 P. 1024 (1913).

67/ Grandby Ditch & Res. Co. v. Hallenbeck, 127 Colo. 236, 255 P.2d 636 (1953).

68/ Bagwell v. V-Heart Ranch, Inc., 690 P.2d 1271 (Colo. 1984).

69/ Bowers v. McFadzean, 82 Colo. 138, 257 P. 361 (1927).

70/ Ashley v. Clark, 34 Colo. 285, 82 P. 588 (1905).

71/ Surface Creek Ditch & Res. Co. v. Grand Mesa Resort Co., 114 Colo. 543, 168 P.2d 906 (1946); Church v. Stilwell, 12 Colo. App. 43, 54 P. 395 (1898).

72/ Lomas v. Webster, 109 Colo. 107, 122 P.2d 248 (1942); Dzuris v. Kucharik, 164 Colo. 278, 434 P.2d 414 (1967); but see Bagwell v. V-Heart Ranch, Inc., supra, n. 68 (a continuous and exclusive scheduled use by a claimant may satisfy the burden of proof even if the disputed water is at times used by others).

73/ Bagwell v. V-Heart Ranch, Inc., supra, n. 68.

74/ Grandby Ditch and Res. Co., supra, n. 68.

75/ Brighton Ditch Co. v. Englewood, supra, n. 53.

76/ Id.

77/ See, e.g., Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 (1887).

78/ Id.

79/ Id.

80/ Id.

81/ See, e.g., City and County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

82/ Id.

83/ Colo. Const. art. XVI sec. 8; sections 37-85-101 to 111, C.R.S. (1973).

84/ Denver v. Brown, supra, n. 81.

85/ Denver v. Brown, supra, n. 81; section 37-85-102, C.R.S. (1973).

86/ See Jacobucci v. District Court, 541 P.2d 667 (1975) and authority cited therein.

87/ Model Land & Irr. Co. v. Madsen, 87 Colo. 166, 285 P. 1100 (1930).

88/ Costilla Ditch Co. v. Excelsior Ditch Co., 100 Colo. 433, 68 P.2d 448 (1937).

89/ Section 37-90-103(21), C.R.S. (1973).

90/ Sections 37-90-107 & 137 & 37-92-602, C.R.S. (1973 & 1985 Supp.).

91/ Safranek v. Limon, supra, n. 8.

92/ Hall v. Kuiper, supra, n. 3.

93/ Hall v. Kuiper, supra, n. 3; Fellhauer v. People, supra, n. 24.

94/ Section 37-92-501, C.R.S. (1973); Bohn v. Kuiper, 575 P.2d 402 (Colo. 1978).

95/ Section 37-92-201(1)(a), C.R.S. (1973); Kuiper v. Well Owners Conservation Association, 176 Colo. 119, 490 P.2d 268 (1971).

96/ Section 37-92-201(1)(b), C.R.S. (1973); Fellhauer v. People, supra, n. 24; Kuiper v. Atchison, T & S.F. Rv., 195 Colo 557, 581 P.2d 293 (1978).

97/ Section 37-92-201(1)(c), C.R.S. (1973); In re Rules and Regulations Governing Water Rights, 196 Colo. 197, 583 P.2d 910 (1978); Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

98/ Section 37-92-202, C.R.S. (1973).

99/ Section 37-92-301(3)(c), C.R.S. (1973).

100/ Alamosa-La Jara Water Users Protection Ass'n v. Gould, supra, n. 97.

101/ Section 37-90-137(4), C.R.S. (1985 Supp.).

102/ Id.

103/ Sections 37-90-137(6) & 37-92-203, C.R.S. (1985 Supp.).

104/ Section 37-92-305(11), C.R.S. (1985 Supp.).

105/ Id.

106/ See section 37-90-103(10.5), C.R.S. (1985 Supp.).

107/ Section 37-90-137(9)(c), C.R.S. (1985 Supp.).

108/ Section 37-90-137(4), C.R.S. (1985 Supp.).

109/ Section 37-90-137(9)(b), C.R.S. (1985 Supp.).

110/ 2 CCR 402-6.

111/ Section 37-90-137(9)(a), C.R.S. (1985 Supp.).

112/ Id.

113/ 2 CCR 402-7.

114/ Danielson v. Kerbs Ag., Inc., 646 P.2d 363 (Colo. 1982).

117/ Section 37-92-501, C.R.S. (1973); see also title 37, art. 80-89, C.R.S. (1973).

118/ Sections 37-90-101 to 141, C.R.S. (1973).

119/ Sections 37-92-401 to 402, C.R.S (1973 & 1985 Supp.).

120/ Section 37-92-302(3), C.R.S. (1973).

121/ Sections 37-92-302(I)(a) & (b), C.R.S. (1973).

122/ Section 38-30-102, C.R.S. (1973); but see Mutual Ditch Companies at p. 14.