

Private Interests in Instream Flows

By

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Program on

"Water for Instream Flow Needs:
Is Colorado Law Adequate?"

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I. COMMON LAW AND STATUTORY BACKGROUND

A. Early Cases on "diversion" requirement".

1. Thomas v. Guiraud, 6 Colo. 530, 533 (1883) (natural overflow):

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

2. Larimer County Res. Co. v. People ex rel. Luthe, 8 Colo. 614, 616, 9 P. 794, 795 (1885) (natural reservoir in bed of stream):

The word "divert" must be interpreted in connection with the word "appropriation".

3. Empire Water & Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913) (natural waterfall):

Undoubtedly a landowner may rely upon an efficient application by nature, and need do no more than affirmatively avail himself of it.

4. Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370, 378 (1960) (natural potholes):

It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.

But see:

1. Windsor Reservoir and Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 729 (1908).

2. City and County of Denver v. Northern Colorado Water Conservancy District, 130 Colo. 375, 276 P.2d 992, 998 (1954).

3. Lamont v. Riverside Irrigation District, 179 Colo. 134, 498 P.2d 1150 (1972).

B. Meadow Act, C.R.S. §37-86-113 (1879):

1. Recognizes priority of appropriation for irrigation of meadow land "by the natural overflow or operation of the water" of a natural stream.

2. Appropriator has right to construct ditch to replace natural overflow and retain original priority.

Rights acquired by natural overflow were described as "vested" in Humphreys Tunnel and Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909).

C. Colorado River Water Conservation District power:

To file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish....

C.R.S. §37-46-202(1)(j) (1937). Claims made under this statute were disapproved as a matter of statutory interpretation by the Supreme Court in Colorado River Water Conservation District v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1965).

D. Codification of diversion requirement in 1969 Act, C.R.S. §37-92-103:

1. "Appropriation", "beneficial use", and "priority" were originally defined in relation to "diversion".

2. "Diversion" was defined as "removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, by-pass, pipeline, conduit, well, pump, or other structure or device".

3. "Beneficial use" included "the impoundment of water for recreational purposes, including fishery or wildlife".

E. Colorado Water Conservation Board powers:

1. S.B. 97 (1973).

a. Deletion of diversion requirement from §37-92-103;

b. CWCB is "vested with the authority, on behalf of the people of the State of Colorado", to "appropriate in a manner consistent with Sections 5 and 6 of Article XVI of the State Constitution", such water as "may be

required to preserve the natural environment to a reasonable degree". §§37-92-102(3), 103.

The constitutionality of this statute was upheld in Colorado River Water Conservation District v. Colorado Water Conservation Board, 197 Colo. 469, 594 P.2d 570 (1979). The court held that there was no constitutional requirement for a "diversion" of water in order to effect an appropriation.

2. S.B. 481 (1979).

a. Amended the definition of "appropriation" in §37-92-103(3) to require a:

specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

No claim for water right or conditional water right may be "recognized", and no decree may be "granted", without compliance with these terms.

3. S.B. 414 (1981).

CWCB appropriation subject to four "principles and limitations", including subordination to preexisting undecreed water uses and exchanges, and a required finding that the natural environment can exist "without material injury to water rights."

4. S.B. 91 (1986).

a. Authorizes CWCB to acquire and change existing water rights "as the Board determines may be required to preserve the natural environment to a reasonable degree".

b. CWCB to request recommendations from USDA and USDOJ.

c. Filings for appropriations by CWCB shall be "consistent with other appropriations" and with requirements of Article 92.

5. S.B. 212 (1987).

a. "Reaffirms, rather than changes", general assembly's "original intent and the existing law" that CWCB is "the only person or entity authorized by state law to appropriate or acquire water for minimum stream flows or lake levels".

b. Provides that "no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes".

c. Sets deadline for CWCB response to contract offer and provides for enforcement of contract terms.

d. Authorizes CWCB to adjudicate exchanges.

II. PRIVATE INSTREAM FLOW DECREES AND APPLICATIONS

A. Vader decrees, Taylor River and tributaries, Water Division No. 4 (1975).

B. Rocky Mountain Biological Laboratory decrees, East River tributaries, Water Division No. 4 (1972-75).

C. Applications by City of Fort Collins, Poudre River, Water Division No. 1 (1987).

D. Application by South Platte River Greenway Foundation, Inc., South Platte River, Water Division No. 1 (1983).

E. Application by Citizens Committee for Protection of Middle Park Water, Case No. 87-CW-040; Water Division No. 5, order denying application entered February 4, 1988 (attached).

III. MECHANISMS FOR PRIVATE PROTECTION OF INSTREAM FLOWS

A. Appropriation without diversion.

1. Constitutional right?

a. Colo. Const., Art. XVI, Sec. 6 - "right to divert". Simply a rejection of riparianism without beneficial use, and a guarantee of right to appropriate by non-landowner? See Colorado River Water Conservation District v. Colorado Water Conservation Board, supra.

b. Colo. Const., Art. V, Sec. 25 - prohibition on special legislation.

c. U.S. Const. Am. XIV, Sec. 1 - equal protection.

2. Common-law right.

- a. Pre-1969 Act.
 - b. Post-S.B. 97, Pre-S.B. 481.
 - c. Pre-S.B. 212.
 - d. Issue of retrospective legislation and taking of vested appropriative rights without compensation under U.S. Const., Am. V; Colo. Const., Art. II, Sec. 25.
- B. Appropriation with diversion.
- 1. Reservoir storage and release. E.g., applications of Upper Gunnison River Water Conservancy District, Case Nos. 86CW202, 203, Water Division No. 4.
 - a. What is the scope of §37-92-103(4), or common-law right to beneficial instream use of stored water?
 - b. What is the downstream terminus? Is this necessarily prohibited by S.B. 212?
 - 2. Rechannelization for fishery or recreational purposes.
 - a. Right to rechanelize overlapping CWCB rights.
 - b. Environmental constraints.
- C. Appropriation by "control" of water.
- 1. Boating structures.
 - 2. Fish habitat improvements.
 - 3. Water quality structures.
- D. Appropriative rights of exchange.
- 1. Between existing reservoirs or ditches. E.g., Reservoir Storage and Exchange Agreement between United States, Upper Gunnison River Water Conservancy District, Colorado River Water Conservation District, Uncompahgre Valley Water Users Association, August 28, 1975.
- E. Contractual arrangements with CWCB.
- 1. Purchase and dedication.
 - 2. Brokering of third-party leases or exchanges.

F. Contractual arrangements with water users.

1. Exchanges.
2. Reservoir releases.
3. Bypass by senior water rights.

G. Enforcement.

1. Stream flow measurement and reporting.
2. Private attorney-general, third-party beneficiary, or public trust action in water court. E.g., Sierra Club actions in Case Nos. 85CW456 and 457, Water Division No. 1; 85CW151, 582, 583, Water Division No. 5.
3. Mandamus action against CWCB.

IV. DEFICIENCIES IN COLORADO SYSTEM

A. Water quality vs. water rights. E.g., protection of Q 7-10 flows in Case Nos. 84CW177, 84CW202, Water Division No. 2.

B. Economic interests not served by CWCB.

C. Public interests not served by CWCB.

D. Exclusive authority in state agency: is socialism really consistent with the doctrine of prior appropriation?

E. The federal presence: reserved rights, endangered species programs, permit conditions, and permit denial.

CHAPTER 373

WATER RIGHTS AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

(Senate Bill No. 31. By Senators Gill, Denny, Anderson, Armstrong, Birmingham, Chance, Cisneros, DeBerard, Dines, Enstrom, H. Fowler, L. Fowler, Garnsey, Hodges, Jackson, Kemp, Locke, MacFarlane, Massari, Minister, Ohlson, Rockwell, Schiefelin, Shoemaker, Stockton, Strickland, and Williams; also Representatives Bain, Braden, DeMoulin, Pentress, Grimschaw, Mullen, E. Newman, Sack, and Sanchez.)

A N A C T

CONCERNING WATER, AND ENACTING THE "WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969".

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Chapter 148, Colorado Revised Statutes 1963, as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 21

WATER RIGHT DETERMINATION AND ADMINISTRATION

148-21-1. Short title.—This article shall be known and may be cited as the "Water Right Determination and Administration Act of 1969".

148-21-2. Declaration of policy.—(1) It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state.

(2) Recognizing that previous and existing laws have given inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state, it is hereby declared to be the further policy of the state of Colorado that in the determination of water rights, uses and administration of water the following principles shall apply:

(a) Water rights and uses heretofore vested in any person by virtue of

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previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.

(b) The existing use of ground water, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights, provided, however, at his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

(c) The use of ground water may be considered as an alternate or supplemental source of supply for surface decrees heretofore entered, taking into consideration both previous usage and the necessity to protect the vested rights of others.

(d) No reduction of any lawful diversion because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available to and required by water rights having senior priorities.

148-21-3. Definitions.—(1) For the purposes of this article, unless the context clearly indicates a different meaning:

(2) "Person" means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States of America, or any other legal entity, public or private.

(3) "Waters of the state" means all surface and underground water in or tributary to all natural streams within the state of Colorado, except waters referred to in 148-18-2 (3).

(4) "Underground water" as applied in this act for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in 148-18-2 (3).

(5) "Diversion" or "divert" means removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, by-pass, pipeline, conduit, well, pump, or other structure or device.

(6) "Appropriation" means the diversion of a certain portion of the waters of the state and the application of the same to a beneficial use.

(7) "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the diversion is lawfully made and without limiting the generality of the foregoing, shall include the impoundment of water for recreational purposes, including fishery or wildlife.

(8) "Water right" means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same.

(9) "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.

(10) "Priority" means the seniority by date as of which a water right is entitled to divert or conditional water right will be entitled to divert and

1973

CHAPTER 442

WATER RIGHTS AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

SENATE BILL NO. 97. BY SENATORS Anderson, Kinnie, McCormick, H. Brown, DeBerard, Schieffelin, Noble, Kogovsek, Birmingham, Cisneros, H. Fowler, Garney, Kinnie, MacManus, and Plock; also REPRESENTATIVES Strang, Edmonds, Arnold, Baer, Benavidez, Bendelow, Cooper, Gunn, Hayes, Howe, Hybl, Lamm, Ross, Smith, Taylor, Valdez, and Webb.

AN ACT

CONCERNING THE APPROPRIATION OF WATER, AND PROVIDING FOR THE APPROPRIATION OF WATER BY THE STATE OF COLORADO TO PROTECT THE NATURAL ENVIRONMENT.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 148-21-3 (6), (7), and (10), Colorado Revised Statutes 1963 (1969 Supp.), are amended to read:

148-21-3. Definitions. (6) "Appropriation" means the diversion of a certain portion of the waters of the state and the application of the same A CERTAIN PORTION OF THE WATERS OF THE STATE to a beneficial use.

(7) "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the diversion APPROPRIATION is lawfully made and, without limiting the generality of the foregoing, shall include the impoundment of water for recreational purposes, including fishery or wildlife. FOR THE BENEFIT AND ENJOYMENT OF PRESENT AND FUTURE GENERATIONS. "BENEFICIAL USE" SHALL ALSO INCLUDE THE APPROPRIATION BY THE STATE OF COLORADO IN THE MANNER PRESCRIBED BY LAW OF SUCH MINIMUM FLOWS BETWEEN SPECIFIC POINTS OR LEVELS FOR AND ON NATURAL STREAMS AND LAKES AS ARE REQUIRED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE.

(10) "Priority" means the seniority by date as of which a water right is entitled to divert USE or conditional water right will be entitled to divert USE and the relative seniority of a water right or a conditional water right in relation to other water rights and conditional water rights deriving their supply from a common source.

Section 2. 148-21-2, Colorado Revised Statutes 1963 (1969 Supp.), is amended BY THE ADDITION OF A NEW SUBSECTION to read:

Capital letters indicate new material added to existing statutes; dashes through words indicate

148-21-2. Declaration of policy. (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

Section 3. 148-21-18 (1) (d), Colorado Revised Statutes 1963 (1971 Supp.), is amended to read:

148-21-18. Applications for water rights or changes of such rights — plans for augmentation. (1) (d) The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen dollars. If more than one water right is requested in any application, a fee of five dollars for each additional right shall be assessed. NO FEE SHALL BE ASSESSED TO THE STATE OF COLORADO OR ANY AGENCY OF ITS EXECUTIVE DEPARTMENT UNDER THIS SUBSECTION (1).

Section 4. Effective date. This act shall take effect July 1, 1973.

Section 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 23, 1973

L. 1979
1366

WATER AND IRRIGATION

Ch. 346

CHAPTER 346

WATER AND IRRIGATION

APPROPRIATION AND USE OF WATER

SENATE BILL NO. 481. BY SENATORS Anderson, Allshouse, Clark, H. Fowler, Hatcher, McCormick, Phelps, Powers, Sosah, Strickland, Wham, Yost, and Zakheim; also REPRESENTATIVES Burtford, Davoren, Hamlin, Lillpop, Reeves, Shoemaker, Showalter, and Theos.

AN ACT

CONCERNING WATER SUBJECT TO APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 37-82-101, Colorado Revised Statutes 1973, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

37-82-101. Waters of natural surface streams subject to appropriation. (1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream. The waters of natural streams of Colorado do not include underground waters not in or tributary to natural surface streams nor underground waters which, when withdrawn, do not impair the flow of natural surface streams. All waters not in or tributary to a natural stream, as described in this subsection (1), shall be subject to such administration and use as the general assembly may provide by law. Such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

(2) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in subsection (1) of this section.

Section 2. 37-82-106, Colorado Revised Statutes 1973, is amended to read:

37-82-106. Right to reuse of imported water. (1) Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume

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Ch. 346

WATER AND IRRIGATION

1367

can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.

(2) TO THE EXTENT THAT THERE EXISTS A RIGHT TO MAKE A SUCCESSION OF USES OF FOREIGN, NONTRIBUTARY, OR OTHER DEVELOPED WATER, SUCH RIGHT IS PERSONAL TO THE DEVELOPER OR HIS SUCCESSORS, LESSEES, CONTRACTEES, OR ASSIGNS. SUCH WATER, WHEN RELEASED FROM THE DOMINION OF THE USER, BECOMES A PART OF THE NATURAL SURFACE STREAM WHERE RELEASED, SUBJECT TO WATER RIGHTS ON SUCH STREAM IN THE ORDER OF THEIR PRIORITY, BUT NOTHING IN THIS SUBSECTION (2) SHALL AFFECT THE RIGHTS OF THE DEVELOPER OR HIS SUCCESSORS OR ASSIGNS WITH RESPECT TO SUCH FOREIGN, NONTRIBUTARY, OR DEVELOPED WATER, NOR SHALL DOMINION OVER SUCH WATER BE LOST TO THE OWNER OR USER THEREOF BY REASON OF USE OF A NATURAL WATER COURSE IN THE PROCESS OF CARRYING SUCH WATER TO THE PLACE OF ITS USE OR SUCCESSIVE USE.

Section 3. 37-87-101, Colorado Revised Statutes 1973, is amended to read:

37-87-101. Right to store waters. (1) Persons ~~desirous~~ DESIRING to construct and maintain reservoirs for the purpose of storing water have the right to store therein any of the unappropriated waters of the state not thereafter needed for immediate use for domestic or irrigating purposes, and to construct and maintain ditches for carrying such water to and from such reservoirs, and to condemn lands required for the construction and maintenance of such reservoirs and ditches in the same manner as now provided by law; except that after April 18, 1935, the appropriation of water for any reservoirs hereafter constructed when decreed, shall be superior to an appropriation of water for direct application claiming a date of priority subsequent in time to that of such reservoirs.

(2) UNDERGROUND AQUIFERS ARE NOT RESERVOIRS WITHIN THE MEANING OF THIS SECTION EXCEPT TO THE EXTENT SUCH AQUIFERS ARE FILLED BY OTHER THAN NATURAL MEANS WITH WATER TO WHICH THE PERSON FILLING SUCH AQUIFER HAS A CONDITIONAL OR DECREED RIGHT.

Section 4. 37-92-102 (1), Colorado Revised Statutes 1973, is amended to read:

37-92-102. Legislative declaration. (1) (a) It is hereby declared to be the policy of the state of Colorado that all ~~waters~~ WATER IN OR TRIBUTARY TO NATURAL SURFACE STREAMS originating in or flowing into this state ~~whether found on the surface or underground;~~ have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with ~~law~~ SECTIONS 5 AND 6 OF ARTICLE XVI OF THE STATE CONSTITUTION AND THIS ARTICLE. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state.

(b) A STREAM SYSTEM WHICH ARISES AS A NATURAL SURFACE STREAM AND, AS A NATURAL OR MAN-INDUCED PHENOMENON, TERMINATES WITHIN THE STATE OF COLORADO THROUGH NATURALLY OCCURRING EVAPORATION AND TRANSPIRATION OF ITS WATERS, TOGETHER WITH ITS UNDERFLOW AND TRIBUTARY WATERS, IS A NATURAL SURFACE STREAM SUBJECT TO APPROPRIATION AS PROVIDED IN PARAGRAPH (a) OF THIS SUBSECTION (1).

Section 5. 37-92-103 (3), Colorado Revised Statutes 1973, is amended, and the said 37-92-103, as amended, is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

37-92-103. Definitions. (3) (a) "Appropriation" means the application of a certain SPECIFIED portion of the waters of the state to a beneficial use PURSUANT TO THE PROCEDURES PRESCRIBED BY LAW; BUT NO APPROPRIATION OF WATER, EITHER ABSOLUTE OR CONDITIONAL, SHALL BE HELD TO OCCUR WHEN THE PROPOSED APPROPRIATION IS BASED UPON THE SPECULATIVE SALE OR TRANSFER OF THE APPROPRIATIVE RIGHTS TO PERSONS NOT PARTIES TO THE PROPOSED APPROPRIATION, AS EVIDENCED BY EITHER OF THE FOLLOWING:

(I) THE PURPORTED APPROPRIATOR OF RECORD DOES NOT HAVE EITHER A LEGALLY VESTED INTEREST OR A REASONABLE EXPECTATION OF PROCURING SUCH INTEREST IN THE LANDS OR FACILITIES TO BE SERVED BY SUCH APPROPRIATION, UNLESS SUCH APPROPRIATOR IS A GOVERNMENTAL AGENCY OR AN AGENT IN FACT FOR THE PERSONS PROPOSED TO BE BENEFITED BY SUCH APPROPRIATION;

(II) THE PURPORTED APPROPRIATOR OF RECORD DOES NOT HAVE A SPECIFIC PLAN AND INTENT TO DIVERT, STORE, OR OTHERWISE CAPTURE, POSSESS, AND CONTROL A SPECIFIC QUANTITY OF WATER FOR SPECIFIC BENEFICIAL USES.

(b) NOTHING IN THIS SUBSECTION (3) SHALL AFFECT APPROPRIATIONS BY THE STATE OF COLORADO FOR MINIMUM STREAM FLOWS AS DESCRIBED IN SUBSECTION (4) OF THIS SECTION.

(10.5) "Storage" or "store" means the impoundment, possession, and control of water by means of a dam. Waters in underground aquifers are not in storage or stored except to the extent waters in such aquifers are placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right.

Section 6. 37-92-305, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (9) (a) No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have

been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum stream flows as described in section 37-92-103 (4).

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

Section 7. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 22, 1979

CHAPTER 431

WATER AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION — GENERAL

SENATE BILL NO. 414. BY SENATORS Yost, Anderson, Clark, D. Sandoval, Soxsh, and Fowler; also REPRESENTATIVES Spano, Younglund, Hinman, Shoemaker, Botcy, Winkler, Bledsoe, Gillis, Lillpop, Paulson, and Reeves.

AN ACT

CONCERNING THE ESTABLISHMENT OF PRINCIPLES AND LIMITATIONS WHICH GOVERN APPROPRIATIONS OF WATER MADE BY THE COLORADO WATER CONSERVATION BOARD FOR THE PURPOSE OF PRESERVING THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO SECTION 37-92-102 (3), COLORADO REVISED STATUTES 1973.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 37-92-102 (3), Colorado Revised Statutes 1973, is amended to read:

37-92-102. Legislative declaration. (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. ANY APPROPRIATION MADE PURSUANT TO THIS SUBSECTION (3) SHALL BE SUBJECT TO THE FOLLOWING PRINCIPLES AND LIMITATIONS:

(a) ANY SUCH APPROPRIATION WHICH IS BASED UPON WATER IMPORTED FROM ONE WATER DIVISION TO ANOTHER BY SOME

OTHER APPROPRIATOR SHALL NOT, AS AGAINST THE APPROPRIATOR OF SUCH IMPORTED WATER OR HIS SUCCESSOR IN INTEREST, CONSTITUTE A CLAIM, BAR, OR USE FOR ANY PURPOSE WHATSOEVER.

(b) ANY SUCH APPROPRIATION SHALL BE SUBJECT TO THE PRESENT USES OR EXCHANGES OF WATER BEING MADE BY OTHER WATER USERS PURSUANT TO APPROPRIATION OR PRACTICES IN EXISTENCE ON THE DATE OF SUCH APPROPRIATION, WHETHER OR NOT PREVIOUSLY CONFIRMED BY COURT ORDER OR DECREE.

(c) BEFORE INITIATING A WATER RIGHTS FILING, THE BOARD SHALL DETERMINE THAT THE NATURAL ENVIRONMENT WILL BE PRESERVED TO A REASONABLE DEGREE BY THE WATER AVAILABLE FOR THE APPROPRIATION TO BE MADE; THAT THERE IS A NATURAL ENVIRONMENT THAT CAN BE PRESERVED TO A REASONABLE DEGREE WITH THE BOARD'S WATER RIGHT, IF GRANTED; AND THAT SUCH ENVIRONMENT CAN EXIST WITHOUT MATERIAL INJURY TO WATER RIGHTS.

(d) NOTHING IN THIS SECTION IS INTENDED OR SHALL BE CONSTRUED TO ALLOW CONDEMNATION BY THIS STATE OR ANY PERSON OF EASEMENTS OR RIGHTS OF WAY ACROSS PRIVATE LANDS TO GAIN ACCESS TO A SEGMENT OF A STREAM OR LAKE WHERE A WATER RIGHT DECREE HAS BEEN AWARDED TO THE WATER CONSERVATION BOARD.

Section 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

This act became law without the Governor's signature, June 23, 1981.

CHAPTER 235

WATER AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

SENATE BILL NO. 91. BY SENATORS Ezzard, Bishop, Allard, McCormick, Rizzuto, Baca, Beatty, Callihan, Fenlon, Fowler, Gallagher, Groff, Helley, P. Powers, Strickland, and Traylor; also REPRESENTATIVES D. Williams, Brown, Shoemaker, Bryan, Allison, M.L. Bird, Campbell, Dambman, Fish, Herzog, Mutzebaugh, and Taylor-Little.

AN ACT

CONCERNING THE ACQUISITION OF WATER BY THE COLORADO WATER CONSERVATION BOARD FOR THE PURPOSE OF PRESERVING THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. The introductory portion to 37-92-102 (3), Colorado Revised Statutes, as amended, is amended, and the said 37-92-102 (3) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

37-92-102. Legislative declaration. (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, ~~or acquire~~, such waters of natural streams and lakes as **THE BOARD DETERMINES** may be required to preserve the natural environment to a reasonable degree. **THE BOARD ALSO MAY ACQUIRE, BY GRANT, PURCHASE, BEQUEST, DEVISE, LEASE, EXCHANGE, OR CONTRACTUAL AGREEMENT, FROM OR WITH ANY PERSON, INCLUDING ANY GOVERNMENTAL ENTITY, SUCH WATER, WATER RIGHTS, OR INTERESTS IN WATER AS THE BOARD DETERMINES MAY BE REQUIRED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE, AND THE BOARD MAY INITIATE APPLICATIONS WHICH IT DETERMINES ARE NECESSARY OR DESIRABLE FOR UTILIZING SUCH WATER, WATER RIGHTS, OR INTERESTS IN WATER, INCLUDING APPLICATIONS FOR CHANGES OF WATER RIGHTS OR AUGMENTATION PLANS FOR THIS PURPOSE.** Prior to the initiation of any such appropriation OR ACQUISITION, the board shall request recommendations from the division

Capital letters indicate new material added to existing statutes; dashes through words indicate

of wildlife and the division of parks and outdoor recreation. **THE BOARD ALSO SHALL REQUEST RECOMMENDATIONS FROM THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE UNITED STATES DEPARTMENT OF THE INTERIOR.** Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. Any appropriation made pursuant to this subsection (3) shall be subject to the following principles and limitations:

(e) All recommendations, including those of the United States, which are transmitted to the board for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing in order that any appropriation made by the board may be integrated into the statewide system for the administration of water rights. Filings for appropriations by the board shall be consistent with other appropriations and with the requirements of this article.

Section 2. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 3, 1986

CHAPTER 269

WATER AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

SENATE BILL NO. 212. BY SENATORS McCormick, Bishop, Brandon, DeNier, Wattenberg, Winkler, and Strickland.
also REPRESENTATIVES Paulson, Carpenter, McInnis, Berger, Anderson, Chlouber, Dambman, Entz, Mutzebaugh, Norton,
Pankey, Reeser, and Trujillo.

AN ACT

CONCERNING THE OBTAINING OF WATER RIGHTS FOR INSTREAM FLOWS BY THE COLORADO WATER CONSERVATION BOARD, AND, IN CONNECTION THEREWITH, PROVIDING FOR NATURAL SURFACE WATER LEVELS OR VOLUMES FOR NATURAL LAKES AND FOR THE EXCLUSION OF ALL OTHER PERSONS OR ENTITIES FROM OBTAINING SUCH WATER RIGHTS FOR ANY PURPOSE WHATSOEVER.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Legislative intent. The general assembly hereby finds, determines, and declares that this act reaffirms, rather than changes, the general assembly's original intent and the existing law that the Colorado water conservation board is the only person or entity authorized by state law to appropriate or acquire water for minimum stream flows or for natural lake levels.

Section 2. The introductory portion to 37-92-102 (3), Colorado Revised Statutes, as amended, is amended to read:

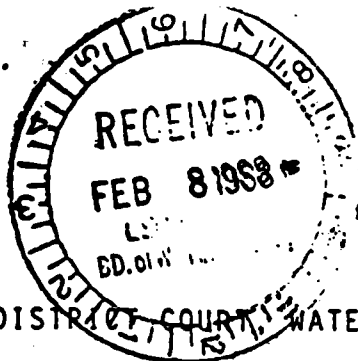
37-92-102. Legislative declaration. (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the EXCLUSIVE authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required FOR MINIMUM STREAM FLOWS OR FOR NATURAL SURFACE WATER LEVELS OR VOLUMES FOR NATURAL LAKES to preserve the natural environment to a reasonable degree. IN THE ADJUDICATION OF WATER RIGHTS PURSUANT TO THIS ARTICLE AND OTHER APPLICABLE LAW, NO OTHER PERSON OR ENTITY SHALL BE GRANTED A DECREE ADJUDICATING A RIGHT TO WATER OR INTERESTS IN WATER FOR INSTREAM

FLOWS IN A STREAM CHANNEL BETWEEN SPECIFIC POINTS, OR FOR NATURAL SURFACE WATER LEVELS OR VOLUMES FOR NATURAL LAKES, FOR ANY PURPOSE WHATSOEVER. The board also may acquire, by grant, purchase, bequest, devise, lease, exchange, or OTHER contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water as the board determines may be required FOR MINIMUM STREAM FLOWS OR FOR NATURAL SURFACE WATER LEVELS OR VOLUMES FOR NATURAL LAKES to preserve the natural environment to a reasonable degree. and AT THE REQUEST OF ANY PERSON, INCLUDING ANY GOVERNMENTAL ENTITY, THE BOARD SHALL DETERMINE IN A TIMELY MANNER, NOT TO EXCEED ONE HUNDRED TWENTY DAYS UNLESS FURTHER TIME IS GRANTED BY THE REQUESTING PERSON OR ENTITY, WHAT TERMS AND CONDITIONS IT WILL ACCEPT IN A CONTRACT OR AGREEMENT FOR THE ACQUISITION BY IT FROM SUCH PERSON OR GOVERNMENTAL ENTITY OF WATER, WATER RIGHTS, OR INTERESTS IN WATER TO BE HELD BY THE BOARD FOR MINIMUM STREAM FLOWS TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE. ANY CONTRACT OR AGREEMENT EXECUTED BETWEEN THE BOARD AND ANY PERSON OR GOVERNMENTAL ENTITY WHICH PROVIDES WATER, WATER RIGHTS, OR INTERESTS IN WATER TO THE BOARD SHALL BE ENFORCEABLE BY EITHER PARTY THERETO AS A WATER MATTER UNDER THIS ARTICLE, ACCORDING TO THE TERMS OF THE CONTRACT OR AGREEMENT. The board may initiate SUCH applications which AS it determines are necessary or desirable for utilizing such water, water rights, or interests in water APPROPRIATED, ACQUIRED, OR HELD BY THE BOARD, including applications for changes of water rights, EXCHANGES, or augmentation plans. for this purpose. Prior to the initiation of any such appropriation or acquisition, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. The board also shall request recommendations from the United States Department of Agriculture and the United States Department of the Interior. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. Any appropriation made pursuant to this subsection (3) shall be subject to the following principles and limitations:

Section 3. Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 20, 1987



DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

Case No. 87 CW 040

ORDER

IN THE MATTER OF THE APPLICATION FOR SURFACE WATER RIGHTS OF:
WILLIAM THOMPSON IN HIS OWN BEHALF AND AS AGENT FOR THE CITIZENS
COMMITTEE FOR THE PROTECTION OF MIDDLE PARK WATER,
IN MIDDLE COLORADO RIVER AND LOWER BLUE RIVER FISHERY,
IN GRAND COUNTY.

This matter came before the Court on the Motion to Dismiss filed by the City and County of Denver on May 8, 1987; the Motion for Dismissal of Application, or, in the Alternative, for Summary Judgment filed by Water Supply and Storage Company on June 4, 1987; and the Motion for Summary Judgment filed by the Colorado Water Conservation Board, Northern Colorado Water Conservancy District, and Municipal Subdistrict, Northern Colorado Water Conservancy District on July 15, 1987.

The application in this case is for instream flow rights to preserve the fishery in portions of the Colorado and Blue Rivers. No structures are intended as a part of the appropriation.

Similar water rights were before the Colorado Supreme Court in Colorado River Water Conservation District v. Rocky Mountain Power Company, 158 Colo. 331, 406 P2d 798 (1965). In that case the Court held that such appropriations could not be recognized because of a lack of any diversion of water from the streams natural course. It also pointed out that a right to the maintenance of the flow of the stream is a riparian right which is totally inconsistent with the doctrine of prior appropriation.

The question of instream appropriation was again before the Colorado Supreme Court in Colorado River Water Conservation District v. Colorado Water Conservation Board, 197 Colo 469, 594 P2d 570. There the Court upheld the constitutionality of legislation authorizing instream appropriation in certain limited circumstances.

In 1973 the legislature amended the statutes to provide for minimum stream flow appropriations. Ch. 442 L. 1973. It changed the definition of "appropriation" from "diversion of a certain portion of the waters of the state" to "application of a certain portion of the waters of the state." It also provided that, "For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." The legislation further provided that, "the Colorado Water Conservation Board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with Sections 5 and 6 of Article XVI of the state constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree." Thus such minimum stream flow appropriations were authorized only by the state of Colorado on whose behalf the Colorado Water Conservation Board was authorized to act.

The applicant in this case seeks to appropriate a portion of the flow of the stream in order to maintain a certain rate of flow in the stream for the support of fish life in the stream. Such an attempted appropriation was denied legal recognition in Colorado River Water Conservation District v. Rocky Mountain Power Company, Supra. Therefore the petitioners' attempted appropriation may only achieve legal recognition if it is authorized by the 1973 amendments previously referred to. However, those amendments restricted stream flow appropriations to those made by the Colorado Water Conservation Board acting on behalf of the state of Colorado. Therefore, the applicant, as a private individual (and as agent for the Citizens Committee for the Protection of Middle Park Water, a private organization), is not authorized to make such an appropriation for his own benefit and lacks standing to make such an appropriation for the public or the state of Colorado.

