Plumbing the Dimensions of the Colorado Doctrine of Prior Appropriation

By Gregory J. Hobbs, Jr.

Introduction

Cooperative yet competitive community-building shaped the constitutional moorings of the Colorado Doctrine of Prior Appropriation which are public water ownership, anti-speculation, beneficial use, and priority administration for use rights created in the people's water resource.[1] Carved out of the public domain by Congress at the outset of the Civil War in February of 1861, Colorado Territory inherited a great expanse of Rocky Mountain prairie, mountain, and canyon country comprising the headwaters of five major river systems, the Platte, the Republican, the Arkansas, the Rio Grande, and the Colorado. In becoming the Centennial State in 1876, Colorado forged a water governance geography founded upon Union, federalism, and towns situated amidst farm ground requiring irrigation.

Colorado's Constitutional Convention Forges a New Law for Living in the Arid Lands

Fashioning the water provisions of the Colorado constitution to fit a wildly fluctuating water supply became one of Colorado's primary contributions to the western experience of settling in. Meeting from December 20, 1875 to Wednesday March 15, 1876, the convention appointed a nine member "Committee on Irrigation, Agriculture and Manufactures" chaired by S. J. Plumb of Weld County. Its members included La Fayette Head of Conejos County, Casimiro Barela of Las Animas County, W.B. Felton of Saguache County, J. S. Wheeler of Weld County, William Lee of Jefferson County, F. J. Ebert of Arapahoe County, J. W. Widderfield of Bent County, and A. D. Cooper of Fremont County.[2]

Though he was not on the committee, Byron Carr of Boulder County offered a first draft in the following resolution referred to the Irrigation Committee on January 5, 1876:

> "Sec.___The primary right of ownership in the waters of all of the streams in this State is and shall be at all times in the State, and the said streams and the waters therein are and shall be subject to the control of the Legislature.
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> Sec.___ It shall be the duty of the Legislature from time to time to pass such laws as may be necessary to secure a just and equitable distribution of the water in the streams of the State, for mining, irrigating and manufacturing purposes, in such a manner as to foster and encourage these great industries of the State; promote the greatest good to the greatest number of the citizens of the State; and at the same time to provide for the security and protection of all persons in their individual rights."
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> Sec. ___The Legislature may pass general laws authorizing the use of water for mining, agricultural, and manufacturing purposes by corporations, associations or individuals, which laws may be altered or repealed at any time."[3]

If included in the Colorado Constitution, this proposition would have made the State of Colorado the owner of all streams within its boundaries and would have assigned plenary control over water distribution to the Legislature. Its exercise of this authority would be discretionary. This first draft provided that the legislators "may" pass or repeal laws authorizing the use of water for three purposes, mining, irrigating, and manufacturing. Though the second section of this initial draft stated a desire "to promote the greatest good to the greatest number of the citizens of the State" and "provide for the security and protection of all persons in their individual rights," no provision contained standards for allocating whatever water might be available to competitors for the same limited supply, no provision recognized the rights of pre-existing water users, and no provision was made for domestic use by households, towns, or cities. Worse for any consumptive water use need on lands not bordering a stream, the first section's grant of power for a "just and equitable" distribution of stream water could just as well be viewed as adopting the riparian common law of England and the eastern United States. Only the owners of land along the banks of a stream would have a right to draw upon its water and then only on the condition that the withdrawn amount would be returned undiminished, as upstream and downstream riparians would have a correlative right to stream flow. [4]

Ways of Necessity and the Public Domain

It's as if Colorado's pre-territorial and territorial experience with consumptive use irrigation to grow crops had gone missing. Yet, small communities in the Arkansas and Rio Grande basins of southern Colorado dating back to the early 1850s were irrigating through diversion ditches under the acequia form of community governance introduced from dry southern Spain. North along Colorado's Front Range, the 1859ner gold rush immigration sparked the construction of direct flow ditches to grow food, supply water to new communities, and support a promising variety of mining, manufacturing, and commercial uses. The very first territorial legislature in 1861 had provided for ditches to be built across intervening public and private lands to divert water to lands capable of irrigation but having no frontage on the stream.[5] In 1872, the Territorial Supreme Court upheld this act on the basis that settlement in the arid lands required such a way of necessity to convey water to where it was needed.[6]

None of these water uses could have gained any legal status were it not for Congress authorizing entry onto the public domain for its use and possession, along with any other natural resource facilitating settlement, such as timber and minerals. Soon after the creation of Colorado Territory in February of 1861, the Homestead[7] and Railroad Acts, [8] both enacted in 1862, provided for available public land to be transferred to non-federal ownership. The 1866 Mining Act recognized the authority of the states and territories to enact and enforce their own water laws for determining who could obtain a right to water use.[9]

Members of the convention's water committee were freshly attuned to the rigors of building new towns and the water conflicts arising among them and the irrigators. Settlers of the 1870 Union Colony near the confluence of the Poudre and South Platte Rivers arrived by train and assembled their town and farm ground through purchasing railroad lands and making homestead claims. Their 1870-71 construction and operation of two ditches dependent on Poudre River diversions was soon followed by the location of another community diverting from the Poudre upstream, the Fort Collins Agricultural Colony. Primary contributors to the Union Colony's irrigation success, General R.A. Cameron, E.S. Nettleton, and Benjamin Eaton, were instrumental in constructing the Fort Collins diversion and other competing canals upstream on the Poudre. Three-eighths of the Union Colony's No. 3 ditch water was dedicated to the cultivation of house lots, gardens, flowers, lawns, trees, the dressings of domestic life for families.[10] Operating their new canal in the drought summer of 1874, the Fort Collins settlers took the entire available flow of the River, depriving the Union Colony of town and farm water. Union Colonist David Boyd, its first ditch superintendent, described this seminal water conflict between the two colonies as follows:

> "Before our crops were made, the river was dry at the head of Number Three, and there appeared to be great danger that the trees, small fruits, and lawns of our town would be ruined . . . the Collins parties were told that if their policy of the ditches highest up stream taking what they wanted was the one to be pursued, then we would go above them, and there would be an interminable and exhaustive race in which the greatest number and the largest purses would come out the winner. . . A general rainstorm came in about a week afterwards and saved us; but from this day forth we had set our hearts on having some regulations looking towards a distribution of the waters of the state in harmony with the principle of priority of appropriation. "[11]

Towns and Farms Focus the Framers

The Greeley-Fort Collins conflict, as well as Colorado's pre-territorial and territorial experience with the arid lands, was not lost on the members of the convention's irrigation committee. On February 11, 1876, their Chairman, S.J. Plumb of Weld County reported back to the convention a wholesale rejection of the initial Byron Carr proposal.

Section 1 of the wholly revised draft declared "the water of every natural stream within the State . . . to be the property of the people of the state . . . dedicated to their use forever." Section 2 stated that "Priority of appropriation shall give priority of right" except from June 1 to September 1 of each year when "agricultural purposes shall have preference." Section 3 provided for rights of way "across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for the irrigation of agricultural lands and for mining and manufacturing purposes and for drainage." Section 4 made all these structures "subject to all acquired rights to the waters upon said stream above and below the head of such ditch or flume." Section 5 directed the Board of County Commissioners in each county "to

regulate the price to be charged for the use of water, whether furnished by individuals or by corporations, so as to secure justice between the contracting parties." Section 6 prohibited separate taxation of irrigation ditches, canals, and flumes apart from the land being irrigated.[12]

On February 18, the convention agreed to a revision of section 1 to provide that "The unappropriated water of the natural streams within the State of Colorado is hereby declared to be dedicated to the use of the public."[13] Through a further change on February 22, section 1 read in full that "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 their use as herein provided by this Constitution."[14]

On March 1 the term "beneficial use" was first inserted in section 2 of the draft, which now stated, "the right to direct the unappropriated waters of any natural stream to beneficial uses shall never be denied."[15] Notably, this occurred in the convention after the Territorial Legislature, meeting while the constitutional framers were at work, adopted a law on February 9, 1876 preventing any person from running through an irrigating ditch "any greater quantity of water than is absolutely necessary" for irrigation, domestic and stock purposes." In full, this statutory provision stated:

> "During the summer season, it shall not be lawful for any person or persons to run through their irrigating ditch any quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes: it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water."[16]

This provision carried over into the 1877 General Laws of the new State of Colorado and remains virtually unchanged in today's statutory water provisions. [17]

Colorado's Charter Centers On Appropriation for Beneficial Use of the Public's Water

Further amendments to the working draft on March 6,[18] March 8,[19] and March 14[20] produced the final text of the Colorado Constitution's water provisions set forth in Article XVI, Mining and Irrigation, Sections 5, 6, 7, and 8, as follows:

> "Section 5. 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.
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> Section 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same,

those using the water for domestic purposes shall have preference over any other purpose, and 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.

Section 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Section 8. The General Assembly shall provide by law that the Board of County Commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

Article X, Section 3 of the Constitution's revenue provisions separately provided that "Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed, so long as they shall be owned and used exclusively for such purpose."

Accordingly, from first draft through amendment to final draft, the principle of ownership of natural stream water changed from ownership by the State of Colorado to ownership by the public. Unappropriated water is dedicated to the people's use by appropriation for beneficial uses. Priority of appropriation is the means for determining who has the better right. When there is not sufficient water for all uses, preference goes first to domestic purposes, then agricultural purposes, then manufacturing purposes. This preference clause does not supersede priority of appropriation; instead it provides for the use of condemnation authority to obtain a needed domestic water supply, upon payment of just compensation.[21] Rights of way across the lands of others can be obtained upon the payment of just compensation to construct water diversion and conveyance structures. To prevent monopoly charges by private canal companies, the Board of County Commissioners in each county has authority to set maximum rates to be charged for the use of water furnished by individuals or corporations.

The Granger agrarian movement was at its height in Colorado and the rest of the country even as our state's constitutional convention was meeting.[22] Its reform agenda aimed to prevent railroad, other corporate monopolies, and moneyed interests from speculating in and monopolizing access to land, water, and other natural resources the Congress had made available for settlement within the public domain.[23] Homestead entries in Colorado eventually covered 22,146,400 acres of land totaling 107,618 entries.[24] The colony movement played a prominent role in pairing new Colorado towns with surrounding agricultural land in irrigable portions of Colorado in the South Platte, Arkansas, and Rio Grande basins.[25] Spurred by Congressional grant of alternating sections of land, railroad builders linked the agricultural economy to the

mining and municipal economies taking shape across the Midwest into the Rocky Mountain West.[26]

Colorado's Constitution Creates New Water Law

The water provisions of the Colorado Constitution made an original, highly-emulated contribution to water law by (1) extinguishing the riparian privilege of land owners along stream banks, (2) opening up the available water supply to every person, public or private entity who could establish a use right in the public's water resource by putting unappropriated water to an actual beneficial use, (3) establishing priority of appropriation as the basis for administering water use rights, and (4) providing for condemnation, if necessary, of rights-of-way across privately-owned lands for the construction and operation of the required diversion, storage, and conveyance infrastructure for water delivery to use right's place of use.

In establishing this foundational legal infrastructure, Colorado's constitutional framers plumbed the core of federalism at work in our federal constitutional system. The treaty making powers of Congress, in particular the 1803 Louisiana Purchase[27] and the 1848 Treaty of Guadalupe Hidalgo,[28] brought into the United States a vast region of Rocky Mountain and Southwest public domain capable of being opened to settlement when the National Government entered into treaties with the Indian Tribes for cession of lands they were occupying.[29]

A basic proposition of the Property Clause of the U.S. Constitution is that Congress determines how its property shall be disposed of or retained, and it has the power to make regulations applicable to use of the public lands.[30] Colorado's experience of obtaining and using possessory interests in the public domain led to the Centennial State tying its water charter to enduring public ownership. It recognized that water, the most essential natural resource to settlement, was already owned by the public and should remain so, subject to the right of the people to have enduring use rights therein. The legislature could not be trusted with plenary control over water allocation and distribution in the future. It might not continue to recognize use rights already perfected and it might foreclose or limit the people's continued ability to make additional appropriations.

The Natural Stream Of Interconnected Groundwater and Surface Water

By choosing the term "natural stream," as differentiated from "surface stream" appearing in the convention's initial water draft, the framers incorporated the hydrological truth of river systems, that tributary groundwater and surface water are inter-connected. To be sustainable, a water allocation law must respect the laws of nature and live within them. Prior appropriation administration in Colorado accomplishes this by curtailing junior groundwater and/or surface rights taking water from the real-time need of senior rights entitled to it. [31]

By setting up the state's water allocation system for the appropriation of "heretofore unappropriated water," the framers not only grandfathered the ongoing exercise of rights already

established in the public's water, such as the 1852 San Luis People's Ditch,[32] they accommodated the dual authority of the national government to appropriate or reserve yet-unappropriated water for the present or future use of Indian Tribes and other federal land and water reservations, such as National Parks, Monuments, and Wild and Scenic rivers within the state.[33]

Nor, in any event, could an assertion of state ownership of water arising within its boundaries have precluded the right of other states to have an allocation of interstate streams arising in Colorado. A basic proposition of the Supremacy Clause of the U.S. Constitution is One Union, Fifty States! [34] In the first part of the 20th Century, a first generation descendent of the Union Colony, Delph Carpenter, distinguished himself as a constitutional scholar, U. S. Supreme Court litigator, and architect of water compact compromises in helping to preserve for Colorado a share of the interstate waters arising within its boundaries.[35] Use of the public's water resource in any given state is subject to a division of interstate waters between upstream and downstream states. Colorado became the mother of water compacts, because the law of the land requires equitable apportionment among states achieved either by resort to the compact clause of the U.S. Constitution or the United States Supreme Court on a case by case basis.[36]

The framers' provision for prior appropriation of use rights in the public's water resource also led to creation of the nation's first water market. In 1891, the Colorado Supreme Court recognized water rights as valuable property rights that could be bought, sold, leased, and changed, retaining their senior priority, so long as the change does not injure the exercise of other water rights.[37] For change purposes, the basis, measure, and limit of a prior appropriation water right is the amount of beneficial consumptive use made of the public's water resource over a representative historical period of time, including wet years, average years, and dry years.[38] Colorado's water market is made possible as well constrained by the public resource, anti-speculation, beneficial use, and prior appropriation principles embodied in the constitution's water provisions and implemented by statutes and court case decisions.[39]

Adjudication and Administration of Water Rights

Colorado's second most important contribution to water law after the constitution's water provisions was the General Assembly's codification in 1879 and 1881 of adjudication and administration laws. [40] Again, on the ground experience prompted legal action. The Greely and Fort Collins people banded together seeking laws that would implement and enforce the Colorado Doctrine of Prior Appropriation. Other large ditches on the Poudre were being constructed above theirs. Also, "The condition of affairs on the St. Vrain was becoming as critical as our own," David Boyd relates, "So there was a general call for a convention of delegates representing the different ditches, to meet in Denver during the last days of December, 1878, to formulate some scheme of irrigation legislation."[41] L. R. Rhodes had just been elected a Senator from Larimer County; he favored the courts undertaking the task of deciding who held

what priority and for how much water. Others favored an administrative system of water commissioners to resolve conflicts.

A smaller committee chaired by Boyd considered the bill's contents. One faction contended "that the construction of a ditch entitled its owners to the use of water for all the lands it could irrigate, and that the appropriation dated from the time work was commended in good faith and afterwards prosecuted with diligence."[42] Another argued "that only an actual application to the land worked an appropriation" and a just distribution of water would require knowing not only "the order of the priority of the respective ditches, but also the order of application to the different parcels of land under each ditch."[43] No consensus was reached except to form a bill drafting committee, again chaired by Boyd. The drafting committee included J. S. Stranger, editor of *The Colorado Farmer*, Daniel Witter of Boulder, John C. Abbott of Fort Collins, and I. L. Bond of Boulder. The bill the committee drafted contained the following points Boyd summarizes:

> "First. Dividing the state into water districts corresponding with the regions irrigable from certain natural streams. Eight of these districts were named, all parts of the Platte or its tributaries. No other parts of the state had expressed any desire to have any system of distribution, but provision was made to add such other districts as should apply. Second. A water commissioner was to be appointed by the governor for each district, whose duty it would be to divide the water from the natural stream according to priority as established by a record provided for. Third. A plan for securing of a record of priorities. This was the most difficult problem the committee had to encounter and was impeded at every step by the opposing views of Dr. Bond, who wanted it based upon application to each parcel of land. The rest of the committee held to the other view; but such was the ability and persistence with which he advocated his position that a sort of compromise was made, illogical as all compromises are. Fourth. A provision that where a piece of land had once been allowed the use of water by a company selling water, it should never be deprived of that use provided its owner paid the rent, which was to be fixed in case of dispute in all cases by the county commissioners. Fifth. It drafted regulations for the construction of reservoirs which were substantially the law as it now stands on the subject. Sixth. It provided for a state engineer and gauging the streams."[44]

Henry P. H. Bromwell, who was a Granger and member of the Illinois constitutional convention of 1869-1870, had become a member of the Legislature's committee on irrigation in Colorado's House of Representatives. As Boyd relates, "He spent night and day every spare hour he had upon this bill, and especially deserves credit for formulating a procedure by which a record could be obtained of the priorities in the different districts."[45] With this change, which Boyd viewed as a great improvement, the bill was passed, except the provision for a State Engineer. At the instigation of the Greeley people, the Poudre district became the first to petition a court for the appointment of a referee to make a field investigation for preparation of evidence. In the fall of 1879, Judge Victor Elliott of the Second Judicial District appointed H. N. Haynes,

son of Judge Haynes of Greeley, as referee. "The spring of 1880 was one of the driest and windiest in our experience, and water was scarce during the early part of the summer," Boyd reported, "So a number of these districts that had been so remise and indifferent, now awoke to the importance of having some better way than every man help himself and the devil take the "down streamer."[46]

Getting the Priorities Decreed

Getting the irrigation priorities decreed stalled when Judge Elliott opined that the 1879 Adjudication Act might be unconstitutional because it did not conform to the normal court process of filing a complaint with the court and serving the interested parties.[47] The Greeley people petitioned the state's supreme court for a writ ordering Judge Elliott to proceed with the case. Observing that the process set up by the Legislature was not the usual kind of court case, "no provision is made for suits upon the dockets of the courts or for parties thereto, nor for personal service of process upon owners of water rights, and persons whose titles to alleged appropriations are to be affected by such decrees," the Colorado Supreme Court wrote that the trial court appeared to have the matter in hand and should make a decision because "it must be remembered that these property rights in water are as important as valuable and as extensive as the broad acres to be reutilized thereby, for without one the other is almost valueless."[48] However, it refused to determine whether or not the 1879 Act[49] was constitutional. Frustrated by the high court's deference to the trial court continuing to handle the case without supreme court intervention, and worried about the time delay, uncertainty, and expense of trying to obtain a decision that might turn out to be illegal, the farm and town interests turned back to the Legislature. It proceeded to adopt the 1881 Adjudication Act[50] for a court proceeding with service of process on interested parties and a referee to gather evidence for the court's consideration. Through another act it created the office of State Engineer to supervise the priority administration of water rights recognized by court decrees in all water divisions and the installation of measuring devices for the accurate measurement of appropriated water. [51]

In the following year, 1882, Judge Elliott entered the first decree adjudicating priorities of the Poudre River ditches, among others. [52] The referee who took the evidence supporting this decree was Henry Bromwell.[53] Also in 1882, the Colorado Supreme Court definitively held that the Colorado Constitution's water provisions had wholly extinguished the common law riparian doctrine.[54]

There's No Business Like Private and Public Business

It's clear from tracking the Constitution's 1876 water provisions, and their implementation through statutes and court cases before 1900, that farm and town experiences produced in Colorado a rule of law framework involving all three branches of government. The people of the Centennial State insisted on public governance principles lodged in its constitution. The legislature and the courts responded by setting in place a water rights system fostering

beneficial use without waste. By 1899 reservoir construction led to a cooperative system of exchanges on the Poudre River, so that the junior priorities higher up on the stream could take into their ditches water they would otherwise have to pass to the senior rights. The General Assembly codified this practice in conjunction with a change of water rights law providing for the courts to hear evidence "to determine whether or not such change will injuriously affect the vested rights of others in and to the use of water" and allow the change if no injury. This statute further provided that the "water commissioner shall allot the priority right to the use of water to the new ditch, and shall recognize such change in the distribution of water," and it authorized temporary loans and exchanges of water "for the purpose of saving crops or of using the water in a more economical manner" upon written notice to the water commissioner.[55]

Changes of Water Rights, Exchanges Utilizing Reservoirs Gain National Attention

These innovations in private and public water management and law gained nationwide attention. In 1901 the U.S. Department of Agriculture published E.S. Nettleton's report on the reservoir and exchange system operating in the Poudre Valley.[56] This report emphasizes the importance of irrigation seepage, return flow, and ground water in augmenting river flow at times of the year when natural flow of the stream would not otherwise be present:

> "It was found that the flow of the river opposite the irrigated country was augmented by ground or seepage water coming into the river channel in the form of small springs just at the surface of the water."[57]

Nettleton, an original member of the Union Colony who became Colorado's second State Engineer, brought home to the Nation how Colorado's experience and law forged a cooperative union extending the reach of available water through a common interest in storage.

> "The plan of exchange or 'trading round' water was conceived, agreed to and carried on by the people themselves without legislative enactments, court decrees, or legal counsel or advice. It was simply the outcome of necessity to dispose of water profitably that could be utilized on lands in one locality by transferring it to another, thus benefiting one and often both of the parties to the exchange. It was first brought about by practical men, getting together in a friendly, neighborly, and businesslike manner, and consolidating the rights each might have under existing laws into one common interest in the storage of water . . . It has been necessary, however, to have a uniform method of determining quantities used in the exchange; also to have someone delegated to act as a sort of public gager."[58]

Curbing Speculation in the Public's Water Resource

The public water ownership, beneficial use, antispeculation, and prior appropriation provisions of the Colorado Constitution fostered and sustained a marriage of practicality and the rule of law, creating and preserving water use rights and giving rise to a cautiously regulated

water market. Colorado Supreme court decisions in the late 19th Century reinforced the antispeculation underpinning the constitutional framers wove into the water law. Relying on the constitution, the court prohibited canal builders from extracting monopoly profits from farmers. No construction of a ditch alone, no mere diversion of water could create a water right. Instead, only the actual beneficial use of the water would ripen into a valid appropriation.

> "Our constitution dedicates all unappropriated water in the natural streams of the state 'to the use of the people,' the ownership thereof being vested in 'the public'. . . to constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use; that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer, though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch."[59]

Today, beneficial uses have grown to include instream flow water rights appropriated by the Colorado Water Conservation Board and in-channel diversion rights appropriated by local governments.[60] Changes of water rights, typically senior irrigation rights, allow the beneficial consumptive use of water – the measure, scope, and limit of a water right – to be leased or sold for other uses at other points of diversion and places of use, including by the Colorado Water Conservation Board to enhance instream flows, under protective conditions that guard against injury to other water rights.[61] Read into every decree, regardless of its stated provisions, is the implied condition of need at any given time for the actual, beneficial use of the water being diverted.[62]

Always, the gift of rivers is the sustaining force of community. Use of the public's groundwater and surface water within a state, and interstate, for the needs of the people and the environment continues to be one of the most profound virtues of our states carved out of the public domain wedded to our national union.

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[1] See Gregory J. Hobbs, Jr., Reviving the Public Ownership, Antispeculation, and Beneficial Use Moorings of Prior Appropriation Water Law, 84 U. Colo. L. Rev. 97 (2013); see also Hobbs, Snake River Basin Adjudication and John Wesley Powell's Much Misunderstood Water Commonwealth Governance Proposal, 52 Idaho Law Review 1 (2016).
[2] Proceedings of the Constitutional Convention, Colorado 1875-1876, 15-17, 37.
[3] Constitutional Convention 44.
[4] Tyler v. Wilkinson, 24 F.Cas. 472,474 (C.C.D.R.I.) (No. 14.312).
[5] An Act to Protect and Regulate the Irrigation of Lands, 1861 Territorial Laws, Sec. 2, at 67.
[6] Yunker v. Nichols, 1 Colo. 551 (1872).

[7] Homestead Act of 1862, ch. 75, 12 Stat. 392.
[8] Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489.
[9] Act of July 26, 1866, ch. 262, Sec.9, 14 Stat. 253; See California v. United States, 438 U.S. 645, 660-62; California Oregon Power Co. v Beaver Portland Cement Co., 295 U.S. 142, 162-64 (1935).
[10] Deed of The Union Colony of Colorado to Town of Greeley, February 23, 1875, Weld County Records Book 12-206. 1-14 to 1-15.
[11] David Boyd, A History: Greeley and The Union Colony of Colorado at 120 (The Greeley Tribune Press 1890).
[12] Constitutional Convention 296.
[13] Constitutional Convention 344.
[14] Constitutional Convention 392.
[15] Constitutional Convention 504.
[16] An Act To Prevent the Waste of Water During the Irrigating Season, 1876 Territorial Laws 78-79.
[17] See 1877 General Laws, 1386, Sec. 2; 37-84-108, C.R.S. (2016).
[18] Constitutional Convention 594-595.
[19] Constitutional Convention 615-616.
[20] Constitutional Convention 700-701. See Colo. Const., Art. XVI, Secs. 5-8.
[21] Town of Sterling v. Pawnee Ditch Extension Co., 94 P. 339, 340 (Colo. 1908).
[22] See Robert G. Dunbar, The Origins of the Colorado System of Water-Right Control, The Colorado Magazine, Volume XXVII, Number 4, 253 (The State Historical Society of Colorado October 1950).
[23] Colorado's Territorial Grange lobbied for recognition of public ownership of water. David Schorr, The Colorado Doctrine, Water Rights, Corporations and Distributive Justice on the American Frontier (Yale University Press 2012).
[24] Carl Ubbelohde Et. Al., A Colorado History 259 (1972).
[25] Richard Stenzel and Tom Cech, Water, Colorado's Real Gold, A History of the Development of Colorado's Water, the Prior Appropriation Doctrine and the Division of Water Resources 93-104 (2013).
[26] Jane and Lee G. Norris, Written in Water, The Life of Benjamin Harrison Eaton, 80-82 (Swallow Press, Ohio University Press 1990).
[27] Louisiana Purchase Treaty, U.S. Fr., April 30, 1803, 8 Stat. 200.
[28] Treaty of Guadalupe-Hidalgo, U.S. Mex., February 2, 1848, 9 Stat. 927.
[29] See Winters v. United States, 207 U.S. 564, 575 (1908).
[30] U.S. Const., Art. IV, 3(2).
[31] Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139, 1147 (Colo. 2001).
[32] Alvin T. Steinel, History of Agriculture in Colorado, 1858-1916 (The State Board of Agriculture 1926).
[33] See United States v. City and County of Denver, 656 P.2d 1, 17 (Colo. 1982).
[34] U.S. Const., Art. VI(2).
[35] Daniel Tyler, Silver Fox of the Rockies, Delphus E. Carpenter and Western Water Compacts (University of Oklahoma Press 2003).
[36] See Kansas v. Colorado, 206 U.S. 46, 94, 117-18 (1907).
[37] Strickler v. City of Colorado Springs, 26 P. 313-15 (Colo. 1891).

[38] Williams v. Midway Ranches Property Owners Assn.938 P.2d 515, 521 (Colo. 1997).
[39] High Plains A&M, LLC. v. Southeastern Colorado Water Conservancy Dist., 120 P.2d 710. 716 (Colo. 2005).
[40] See, generally, Gregory J. Hobbs, Jr., Colorado's 1969 Adjudication and Administration Act: Settling In," 3 University of Denver Water Law Review 1 (1999).
[41] Boyd 121.
[42] Boyd 121-122.
[43] Id.
[44] Boyd 122-123.
[45] Id.
[46] Boyd 127.
[47] Dunbar 256.
[48] See The Union Colony of Colorado v. Victor A. Elliott, 5 Colo. 371, 380-81 (1880).
[49] Act of February 19. 1879 to Regulate the Use of Water for Irrigation and Providing for Setting the Priority of Right Thereto, and for Payment of the Expenses thereof, and for Payment of all Costs and Expenses Incident to said Regulation of Use, 1879 Colo. Sess. Laws 94-108.
[50] Act of February 23, 1881 to Make Further Provisions for Settling the Priority of Rights to the Use of Water for Irrigation, in the District and Supreme Courts, and for Making Record of Such Priorities, and for Payment of Costs and Expenses Incident Thereto, 1881 Colo. Sess. Laws 142-161. Not until 1903's Adjudication Act did the Legislature provide for adjudication of priorities of uses other than for irrigation. This had the result of allowing other use priorities, such as domestic, to claim their original dates of appropriation in a noticed adjudication. Act of April 11 1903, ch. 130, Sec. 1, 1903 Colo. Sess. Laws 297. See Platte Water Co. v. Northern Colorado Irrigation Co., 21 P. 711, 712 (Colo. 1889).
[51] Act of March 5, 1881 to Provide for the Appointment of a State Engineer, and to Define his Duties and Regulate his pay, and for the Establishment of his Assistants, and the Establishment of Water Divisions, 1881 Colo. Sess. Laws 119-122.
[52] First Adjudication Proceedings In Water District No. 3, Book III, 597-672, Book VIII, 7-8.
[53] Dunbar 260.
[54] Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).
[55] Act of April 6, 1899, Ch. 105, Secs. 1-4.
[56] E.S. Nettleton, "The Reservoir System of the Cache La Poudre Valley," Bulletin No. 92, U.S. Department of Agriculture, Office of Experiment Stations (Government Printing Office 1901).
[57] Id. at 36.
[58] Id. at 37.
[59] Wheeler v. Northern Colorado Irrigating Co., 10 Colo. 582, 587-88 (1888).
[60] Farmers Water Dev. Co. v. Colorado Water Conservation Bd., 346 P.3d 52, 54 (2015).
[61] Santa Fe Trail Ranches v. Simpson, 990 P.2d 46, 54–55 (Colo. 1999).
[62] Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1371 (Colo. 1980).