UNIVERSITY OF DENVER
WATER LAW REVIEW

VOLUME 3 ISSUE 1 FALL 1999

COLORADO'S 1969 ADJUDICATION AND ADMINISTRATION ACT: SETTLING IN

JUSTICE GREGORY J. HOBBS, JR.‡

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

‡ Justice Hobbs authored a prior article appearing in the *Water Law Review*. Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1 (1997). His experience with the 1969 Act commenced when he became a Colorado Assistant Attorney General in January of 1975 and extended to his private practice before taking the oath of office as a Justice of the Colorado Supreme Court on May 1, 1996.

And the waters are going to sleep in the upper swales,
You can feel the particles of the shining mountains
Moping against your ankles toward the sea.[1]

I. THE LAY OF THE LAND

The Great Divide is the great reality of Colorado, the mother of many rivers— the Platte (North and South), the Republican, the Arkansas, the Rio Grande, and the Colorado complex (San Juan, Dolores, Gunnison, Colorado, White, and Yampa)— and so many tributaries magnifying them.

The authors of the Water Right Determination and Administration Act of 1969[2] (" the 1969 Act") felt the many rivers powerfully. Like Thomas Hornsby Ferril, they walked uphill into them from boundary to source. They explored their currents' resistance but resisted the temptation to settle for less than the fullest exploration they could muster. They summitted. From the Divide they could clearly see the lay of the land. From the cirques and seeps of the high range they saw the waters form and flow like the fingers of two hands extending from the spine of the earth's body towards two great oceans. Schooled in the long climb and inspired by vistas, they resolved to have Colorado water adjudication and administration track the contours of its major watersheds.

At least one early visionary had called for political boundaries and water jurisdictions to match watersheds. In 1889, addressing the Montana constitutional convention, John Wesley Powell unsuccessfully proposed that Montana employ divisions between hydrographic basins when establishing county boundaries for the new state.[3] Powell felt this would make political and economic unity possible. Within a drainage basin, the controlling element of water could tie together timber, grazing, and agriculture. The state could establish local self–government within each basin;

1. Thomas Hornsby Ferril, *Time of Mountains*, in POETRY OF THE AMERICAN WEST 119, 122 (Alison Hawthorne Deming ed., 1996).

2. Water Right Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (1999).

3. *See* WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 315-16 (1954).

the federal government could cede to the basin–county entities all the public lands within its limits; and locally elected water–masters could establish water rights within those limits, enforceable by local courts.[4]

Powell arrived both too late and too early for Colorado. He was too late because in 1859 the discovery of gold set into motion political and organizational energy based on an " it's there, let's just take and use it" approach to public domain resources. He was too early because it took 110 years of water rights experience before the state decided that adjudication and administration of water along major watershed lines made more sense than dependence on county boundaries, particularly since counties in Colorado did not encompass logical hydrologic units.

Ironically, before Colorado became a territory, its land area lay within large, loosely organized and sparsely populated watershed boundaries. Between 1854 and 1861, the Territories of Nebraska (Platte basin), Kansas (Arkansas basin), New Mexico (Rio Grande basin), and Utah (Colorado basin) stretched to the Continental Divide.[5] But, in 1861, two years after the discovery of gold at the confluence of the South Platte River and Cherry Creek, Congress united the sources of these great rivers into one great headwaters territory, Colorado.[6] Local districts became the organizing principle. Successful political energy in organizing mining districts led to subsequent successful efforts to create the Colorado territory and, then, the State of Colorado.[7] By 1900, however, mining engaged only five percent of the state's population, while farming and ranching had become a major industry throughout the state.[8] Where major mountain streams met the plains on the Eastern slope, urban Colorado began to take shape

4. *Id*. at 315.

5. *See* LEROY R. HAFEN & ANN W. HAFEN, COLORADO: A STORY OF THE STATE AND ITS PEOPLE 122 (1947).

6. *See* CARL ABBOTT ET AL., COLORADO: A HISTORY OF THE CENTENNIAL STATE 65 (3d ed. 1994).

7. *See id*. at 63. In 1859-60, Boulder county had eight mining districts, Clear Creek had twenty–seven, and Gilpin had another twenty–seven.

8. MEL GRIFFITHS & LYNNELL RUBRIGHT, COLORADO: A GEOGRAPHY 215 (1983).

as the 20th century progressed.[9] Many of the mountain towns continued to serve as health spas and recreational centers, despite boom and bust in the mining industry.[10] All of these activities required water.

Déjà vu, Powell! In 1969, the State of Colorado— with a myriad of beneficial uses in place, no end of continued growth in sight, and federal and interstate demands for water pressing the contours of its water law— replaced its seventy water districts with seven water divisions organized along major watershed geography, with a water court and division engineer in each, for adjudicating and administering its most persistently valuable treasure, the water of its natural streams.[11]

The century's lessons led to this deft reorganization; the prospects of a future century will follow its lead and, inevitably, the people's future responses to the watercourses will reshape its terms.

II.WATERS OF THE NATURAL STREAM

For all his knowledge of the Western landscape, his audacious physical and political explorations, his commitment to progressive planning and management, and his fascination with irrigated agriculture as the enduring heritage of the Western movement, Powell could not have foreseen the multi–dimensional role of water in the settled West's future economies. In his 1879 Arid Lands Report, for example, he predicated that " [a]ll of the waters of all the arid lands will eventually be taken from their natural channels, and they can be utilized only to the extent to which they are thus removed, and water rights must of necessity be severed from the natural channels." [12]

But Colorado, like the other Western states, discovered that it lacked the means, the right, and the will to dry up all the streams. Downstream

9. *See id*. at 291-92.

10. *See id*. at 292-94.

11. Water Right Determination and Administration Act of 1969, ch. 373, §§ 148-21-1 to -6, 1969 Colo. Sess. Laws 1200-24 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (1999)).

12. J.W. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 42 (1879).

states; Native Americans; federal reservations; the utility and joy of a flowing stream for fishing, boating, and walking along through urban drainage ways and rural meanderings; in sum, the people's changing values and customs at work and at play, intruded.

In his later writings, Powell's biographer, Wallace Stegner, turned our attention to the need for settling in:

> At least in geographical terms, the frontiers have been explored and crossed. It is probably time we settled down. It is probably time we looked around us instead of looking ahead. We have no business, any longer, in being impatient with history. We need to know our history in much greater depth, even back into the geology, which, as Henry Adams said, is only history projected a little way back from Mr. Jefferson.[13]

Adjudication's essential purpose, to recognize and enforce water rights, follows from the imperatives of necessity and livability in the land of little rain. The 1969 Act deals with settling in. Posited firmly on the state's antecedent water law yet still breaking major new trails, the 1969 Act addresses determination and administration of water rights to Colorado's natural streams and groundwater tributary thereto. It defines procedural and substantive law in regard to: (1) water divisions, division engineers, water judges, referees, and water clerks; (2) application and notice for determination of water rights; (3) tabulation of water right priorities; and (4) regulation and enforcement of water rights.[14] This legislation, still known as " the 1969 Act" after thirty years of legislative and judicial attention, memorializes its bedrock durability.

The Colorado Constitution provides that the " water of every natural stream" is subject to the prior appropriation doctrine.[15] In a single momentous declaration of policy opening the 1969 Act, the General Assembly confirmed that Colorado's surface and tributary ground water is a public

13. WALLACE STEGNER, WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST 205-06 (1992).

14. Water Right Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (1999).

15. COLO. CONST. art. XVI, §§ 5, 6.

resource available for disposition according to use rights that can be decreed and administered in priority. Commencing with a recitation 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,"[16] the 1969 Act declares its intent 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."[17] Comparison with prior adjudication acts clarifies why the 1969 Act constitutes a political, legal, technical, and administrative breakthrough of major dimensions.

III. PRIOR ADJUDICATION ACTS

In 1879, three years after statehood, the Colorado legislature recognized the authority of the Colorado judiciary to adjudicate water rights.[18] Prior to this legislation, in 1872, the territorial supreme court had determined that it lacked jurisdiction to adjudge the respective water rights of mill owners' existing uses and a domestic water company's proposed diversion for domestic, fire fighting, and industrial uses in Central City.[19] The mill owners claimed existing water power rights through prior appropriation. They entered an agreement with the domestic water company stipulating that each would abide by the final decision of the district court or the supreme court regarding their respective water rights. Each would select a "competent engineer, who shall choose a third, who shall make an accurate measurement" of the affected waters, and would submit the results and other testimony to the

16. Water Right Determination and Administration Act of 1969, ch. 373, § 148-21-2(1), 1969 Colo. Sess. Laws 1200, 1200.

17. *Id.*

18. *See* Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, No. 99 SA 91 (Colo. Dec. 6, 1999) (discussing Colorado's adjudication acts and beneficial use as the basis, measure, and limit of an appropriation).

19. Central City Water Co. v. Kimber, 1 Colo. 475, 478 (1872).

district court.[20] The territorial court refused, however, to entertain the case without a showing of injury. The court stated:

> The question propounded in this record is interesting and probably important, but we must decline to answer it. When it becomes necessary to determine the rights of these parties, for the purpose of affording relief to either of them, we will cheerfully perform that duty, but we cannot engage in an idle discussion which would be without any definite result or legal character.[21]

But the needs of a growing state required a means for recognizing, securing, and administering water rights. The competing needs of irrigation ditches provided the initial context for adjudication statutes. Commencing with the Adjudication Act of 1879 (" the 1879 Act"), the Colorado legislature established state court jurisdiction over " questions of law and q[u]estions of right" regarding irrigation priorities.[22] Where a water district overlapped two counties, the district court for the county that convened its first regular term the earliest in December had jurisdiction. Through the 1879 Act, the legislature also established the first ten water districts and the office of the district water commissioner. The 1879 Act directed the water commissioners to distribute water within their districts according to the " prior rights" of " the several ditches taking water." [23]

The 1879 Act placed the judiciary in a proactive role. It assigned referees the responsibility of gathering information and taking evidence regarding water rights claims. The utilization of this procedure for claims to the Cache la Poudre River provoked the district judge to question the judiciary's right to institute this inquiry in lieu of the traditional judicial method of proceeding only when an interested party brings a controversy to the court. The district court refused to enter a decree, the supreme court denied a mandamus petition, and the 1881 Adjudication Act (" the 1881

20. *Id*. at 477.
21. *Id*. at 479.
22. Act of Feb. 19, 1879, § 19, 1879 Colo. Sess. Laws 94, 99.
23. *Id*. § 18, 1879 Colo. Sess. Laws at 99.

Act") resulted.[24] The 1881 Act required irrigators to file their claims for priorities " on or before the first day of June, 1881" with the district court " having jurisdiction of priority of right to the use of water for irrigation in such water district." [25] Upon adjudication of the water right and payment of the required fee, the water right owner received a certificate from the district court clerk showing the dates and amounts of the appropriation as well as its priority.[26]

Under the 1881 Act and subsequent statutes, a person proposing to construct a new ditch, or an extension of an existing ditch, submitted a map and statement of claim to the county clerk and state engineer.[27] A typical " ditch statement" set forth the following information under written oath: the name of the structure; a legal description of the point of diversion and location of the length of the ditch; the ditch's width, depth, and carrying capacity in cubic feet per second; the name of the stream supplying the ditch; the date on which work on the ditch commenced; the uses of water; the name of the owner; and an accompanying plat map showing the stream and the ditch from its point of diversion to the terminus of the claim.[28]

The district water commissioner for each water district had the responsibility of checking and reporting on the condition of headgates and installing and measuring weirs and flumes.[29] When water became scarce in a particular stream, the commissioner could curtail diversions of junior priorities in favor of the seniors.[30] The 1881

24. John E. Thorson, *State Watershed Adjudications: Approaches And Alternatives*, 42 ROCKY MTN. MIN. L. INST. § 22.03(1)(a) at 22-6 (1996).

25. Act of Feb. 23, 1881, § 1, 1881 Colo. Sess. Laws 142, 142.

26. *See id.* § 2, 1881 Colo. Sess. Laws at 144.

27. *See* Act of Feb. 11, 1881, §§ 1-2, 1881 Colo. Sess. Law 161, 161-62; *see also* JAMES N. CORBRIDGE JR. & TERESA A. RICE, VRANESH'S COLORADO WATER LAW 233 (Revised ed. 1999).

28. *See, e.g.,* Ditch Statement and Platt of the Schuttee Ditches No. 1 and 2, Garfield County, Colorado (Aug. 6, 1887) (on file with the Office of the Colorado State Engineer).

29. *See, e.g.,* Report of Water Commissioner for Dist. No. 7 (June 18, 1887) (on file with the Office of the Colorado State Engineer).

30. Act of Feb. 19, 1879, § 18, 1879 Colo. Sess. Laws 94, 99; *see, e.g.,* Letter from J.M. McRay, Water Commissioner Dist. No. 7, to T. O'Connell, Superintendent of Irrigation Div. No. 1 (Aug. 18, 1887) (on file with the Office of the Colorado

Adjudication Act prohibited water commissioners from distributing water to any structure except in accordance with the clerk's certificate evidencing the court's judgment and decree.[31] The commissioner also had power to shut down wasteful diversions.[32] By 1905, the General Assembly had established seventy water districts existing within five irrigation divisions.[33] The irrigation divisions heralded a broader river basin administration. The division superintendents had superior authority over the water commissioners.[34] The General Assembly added a sixth irrigation division in 1919.[35]

Litigation revealed the limitations of the 1879 and the 1881 Acts. First, only irrigation rights could be adjudicated under the special statutory proceeding the legislature had instituted. Domestic users, for example, could not obtain judicial recognition of their rights. The court in *Platte Water Company v. Northern Colorado Irrigation Co.* stated: " [t]he proceedings under said acts are purely statutory, and cannot be resorted to for the purpose of determining the claims of parties to the use of water for domestic or other purposes not fairly included within the meaning of the term 'irrigation.' "[36] Second, the adjudications could not affect water rights of those who had not been served with process. Thus, they must be allowed to claim their original dates of appropriation despite two and four year reopening and acquiescence provisions contained in those statutes.[37]

Later recognizing that the legislature directed the water officials to distribute water according

State Engineer).

31. *See* Act of Feb. 23, 1881, § 22, 1881 Colo. Sess. Laws 142, 154-55.

32. Act of Apr. 13, 1895, ch. 85, § 1, 1895 Colo. Sess. Laws 197, 197.

33. Act of Apr. 10, 1905, ch. 111, § 2, 1905 Colo. Sess. Laws 243, 243; *see* Map entitled Boundaries of Irrigation Divisions and Water Districts, State of Colorado, Engineering Department 1915 (on file with the Office of the Colorado State Engineer).

34. Act of Mar. 25, 1889, § 1, 1889 Colo. Sess. Laws 469, 469.

35. Act of Apr. 9, 1919, ch. 148, § 1, 1919 Colo. Sess. Laws 497, 497.

36. Platte Water Co. v. Northern Colo. Irrigation Co., 21 P. 711, 712 (Colo. 1889).

37. Nicholas v. McIntosh, 34 P. 278, 280-81 (Colo. 1893).

to the "various decrees" as if they were "in fact, one," the court held that challenges brought by water rights claimants of another district must be brought within four years of the decree fixing the rights in the district of the adjudication.[38] The court announced that "[p]arties to adjudication proceedings in one district are bound to take notice of the rights adjudicated in other districts whereby rights are fixed in the same stream, although they are not adjudicated in the same action and in a common forum."[39]

In the course of construing the adjudication acts and applying the principles of *res judicata* to water decrees across water district lines within the broader irrigation divisions,[40] the court began to enunciate the essential foundations of Colorado water law underpinning the adjudication of priorities. Priority of appropriation for beneficial use is the foundation upon which water rights depend in Colorado.[41] A diversion of water ripens into a valid appropriation only when the water is actually used; however, "the priority of such an appropriation may date . . . from the commencement of the canal or ditch."[42]

Adjudications could include ditches whose construction had commenced but were unfinished. The decrees for unfinished ditches were "conditional, subject to the completion of the ditch by the exercise of due diligence within a reasonable time."[43] When there had been a lack of diligence, a conditional right, being inchoate, could never become fully vested and superior to a right that has become fully vested by reason of beneficial use.[44] "[T]he court was without authority to decree an absolute right to a greater

38. *See* Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co., 90 P. 1023, 1025 (Colo. 1907).

39. *Id.*

40. *See* Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 60 P.2d 629, 630 (Colo. 1900).

41. *Id.*

42. Platte Water Co. v. Northern Colo. Irrigation Co., 21 P. 711, 713 (Colo. 1889).

43. *Id.* at 712.

44. *See* Drach v. Isola, 109 P. 748, 752 (Colo. 1910) (holding that lapse of fifteen years from date of decree and twenty–three years after the construction of the ditch in putting additional claimed water to use constituted lack of diligence).

amount than was then actually applied to a beneficial use." [45]

Early, Colorado recognized water rights as property rights that could be bought and sold. Powell advocated tying irrigation water rights permanently to the land as the surest way to prevent monopolies and assure settlement.[46] However, Colorado chose to consider water rights as transferable, so long as the owner accomplished the transfer of the original appropriation without enlargement or injury to other water rights.[47] In 1893, the General Assembly established that the formalities of conveying real estate would be applicable to water rights, except where the ownership of stock in ditch companies or in other companies constituted the ownership of the right.[48]

Needs of the rising towns and cities would inevitably lead to legislative authorization for the adjudication of domestic, municipal, and other beneficial uses. Without yet amending the special statutory proceeding to so provide, the General Assembly, in 1891, recognized water use for domestic purposes, so long as it was not applied to " land or plants in any manner to any extent whatever." [49] Using domestic water for irrigation purposes constituted a misdemeanor punishable by a justice of the peace subject to appeal, as in cases of assault and battery.

The 1899 Act required adjudication for change of irrigation rights.[50] The enactment of a comprehensive adjudication act occurred early in the twentieth century. The 1903 Adjudication Act provided the courts with authority to adjudicate all water rights " acquired by appropriation and used for any beneficial purpose other than irrigation" in the same manner as " the adjudication of water rights for irrigation purposes in the water district in which said water rights are situated." [51]

45. *Id*. at 751.
46. POWELL, *supra* note 12, at 43.
47. Strickler v. City of Colorado Springs, 26 P. 313, 316 (Colo. 1891).
48. Act of Apr. 7, 1893, ch. 107, § 1, 1893 Colo. Sess. Laws 298, 298.
49. Act of Apr. 1, 1891, § 1, 1891 Colo. Sess. Laws 402, 402.
50. Act of Apr. 6, 1899, § 1, 1899 Colo. Sess. Laws 235, 235-36.
51. Act of Apr. 11, 1903, ch. 130, § 1, 1903 Colo. Sess. Laws

In 1919, the General Assembly enacted an adjudication limitation act designed to settle the priorities of water rights. It required any original claimant to an appropriation or a conditional appropriation, or any successor in title, to submit a claim for adjudication by January 1, 1921. Failure to do so resulted in a conclusive presumption of abandonment.[52] The legislature also established a biennial diligence requirement for conditional water rights.[53]

IV. ORIGINAL AND SUPPLEMENTAL ADJUDICATIONS

By the Adjudication Act of 1943 (" the 1943 Act"), the General Assembly recodified the existing adjudication law drawing together the provisions of separate acts and providing definitions. The 1943 Act continued to anticipate the issuance of unitary decrees addressing all surface rights within the water district through " original" and " supplemental" adjudications. An original adjudication " adjudicat[ed] water rights for all beneficial purposes in a single proceeding" [54] and could be commenced by " any owner or claimant of an unadjudicated water right" when " there has been no previous adjudication of water rights in said water district." [55] By " proper averment referring to the original adjudication in the water district and to any subsequent adjudication of a general nature," [56] a party could commence a supplemental adjudication.

Publication of notice for original and supplemental adjudications was by public newspaper in the water district and by mailing " to all claimants of water rights in the water district who have filings in the office of the state engineer of Colorado," and also to all persons " shown to be water users by the certificate of the water commissioner or Irrigation Division Engineer." [57] To implement this notification requirement, the

297, 297.

52. Act of Apr. 9, 1919, ch. 147, § 2, 1919 Colo. Sess. Laws 487, 488-89.

53. *Id.* § 7, 1919 Colo. Sess. Laws at 494.

54. Act of Apr. 19, 1943, ch. 190, § 3, 1943 Colo. Sess. Laws 613, 615.

55. *Id.*

56. *Id.* § 7, 1943 Colo. Sess. Laws at 618.

57. *Id.* § 5(b), 1943 Colo. Sess. Laws at 616.

court ordered the state engineer to certify to the clerk of court a true and a complete list of all claimants " who have filed maps and statements, supplemental statements or claims of any character in his office which shall not have been theretofore cancelled by him pursuant to law." [58]

Water right transfers aggravated problems of notice. Transferees of a water right could present their assignments or conveyances of water rights to the state engineer for inspection. The state engineer indexed the transfer and kept a record of the name and post office address of the transferee. Transferees who did not follow this procedure were bound by service of notice to the last person noted on the state engineer records.[59] The statute did not require service to occur on owners of water rights or claimants of rights previously adjudicated. But, if " the proceeding be supplemental as to one class of rights (i.e. irrigation) and original as to another class (i.e. non–irrigation) then service shall be necessary on those whose rights have already been adjudicated." [60]

The court decree entered in an original or a supplemental adjudication determined and established " the several priorities of right" for each structure in the water district according to the evidence of " the time of its construction . . . extension . . . or enlargement." [61] The decree specified the appropriation's source, point of diversion, location of structure, purpose, priority date, and diversion amount.[62] In a subsequent adjudication suit, priority dates for water rights of " the class theretofore adjudicated" could not be set any earlier than " one day later than the latest priority date awarded in said prior decree." [63] If a number of structures received the same priority date due to this rule, the court could specify in the decree the relative order of priority between them.

While the overall adjudication proceeded, the

58. *Id.* § 5(b), 1943 Colo. Sess. Laws at 617.
59. *Id.*
60. *Id.* § 7, 1943 Colo. Sess. Laws at 618.
61. *Id.* § 13, 1943 Colo. Sess. Laws at 622.
62. *Id.*
63. Act of Apr. 19, 1943, ch. 190, § 13, 1943 Colo. Sess. Laws 613, 623.

court on sufficient proof could award an "interlocutory decree" for a "completed appropriation." This individual interlocutory decree would "remain in full force and effect" pending entry of a final comprehensive case decree.[64] An interlocutory decree served as the "warrant of the state water officials for regulating the distribution of water accordingly."[65] The notice and statement of claim provisions contemplated that petitions for recognition of conditional water rights and changes of water rights could also be adjudicated.[66]

Changes of use were subject to two basic predicates that date from 19th century irrigation law.[67] First, the extent of beneficial use under the original appropriation limited the amount of water that could be changed to another use. Second, the change must not injure other water rights.

> By his legal appropriation of the amount of water sufficient for his original purpose he is entitled to that amount and may apply it to any of the beneficial uses he may see fit, as against other parties whose rights have accrued subsequently to his own, provided the amount of water taken by him is not thereby increased beyond that of his original appropriation, nor the rights of those coming later injured or impaired in any manner.[68]

Accordingly, under the 1943 Act, changes in "the manner of use" could be made in Colorado "by proper court decree" but "only to the extent of use contemplated at the time of appropriation" and "strictly limited to the extent of former actual usage" pursuant to the appropriation.[69]

V. TOO LITTLE DIRECTION, TOO MANY DISTRICTS

The 1943 Act provided little direction for the

64. *Id.*
65. *Id.*
66. *Id*. §§ 21-22, 1943 Colo. Sess. Laws at 628-29.
67. *See* Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, No. 99 SA 91, slip op. at 11-12 (Colo. Dec. 6, 1999).
68. CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION § 233 at 375 (1894).
69. Green v. Chaffee Ditch Co., 371 P.2d 775, 783 (Colo. 1962) (quoting Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629 (Colo. 1954).

listing of priorities by providing too many options. The district court could number all "irrigation priorities" in one series and "non-irrigation priorities" in another series; number "direct water rights" in one series and "storage rights" in another series; number "all" rights in one series; "use a different series for each source of water in a district;" or follow "the existing system of numbering theretofore used in said water district."[70] The state water officials were then required to regulate "the distribution of water accordingly" !!![71]

The 1943 Act perpetuated the artificiality of small water districts, allowing separate adjudication for streams tributary to the same river. The district court could entertain a separate adjudication for "two or more entirely distinct sources of water in any water district."[72] The 1943 Act defined "distinct sources of water" as "two or more natural stream systems or other sources of water in any water district which do not join within the boundaries of such water district."[73] The petition of a water user in another district could force reopening of a decree entered by a district court for a water district within four years of its entry. However, the user must not have received actual notice of the adjudication and must have water rights "decreed or subject to decree" in the other district.[74] The 1943 Act did not allow for or require adjudication of tributary groundwater.

Commenting on prior adjudication acts, George Vranesh summarized the difficulty of administration arising from the multitude of courts, water districts, and ways of listing priorities:

> Priorities might have all been listed in one series, and there could have been a different series for each source of water within a district. Generally there were prefixes and suffixes to denote conditional rights, or there might have been some peculiar historical method of priority listing that was preserved in a particular

70. Act of Apr. 19, 1943, ch. 190, § 14(e), (g), 1943 Colo. Sess. Laws 613, 624.
71. *Id.* § 15, 1943 Colo. Sess. Laws at 624.
72. *Id.* § 2, 1943 Colo. Sess. Laws at 614.
73. *Id.* § 2, 1943 Colo. Sess. Laws at 615.
74. *Id.* § 17, 1943 Colo. Sess. Laws at 625.

district. In short, the system did not provide a uniform method by which a water user could accurately determine his priority within a particular watershed.[75]

VI. GROUNDWATER MYSTERIES AND HYDROLOGIC REALITIES

Colorado water law has taken shape in the interaction between the water users, their advocates, the judiciary, the legislature, and the water officials. Opinions of the Colorado Supreme Court often planted the seed. How to address tributary groundwater in the absence of legislative direction, for example, became a groundbreaking question. In 1951, the court established a presumption that all ground water which finds " its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream." [76]

In response to emerging groundwater issues, the General Assembly chose to focus first on the problem of aquifer depletion in the Eastern high plains. In 1957, it established a Ground Water Commission, required registration of existing wells with the state engineer, and required application for a state engineer permit for a new well or an existing well.[77] Subsequently, the court: (1) determined that the Ground Water Commission was empowered to declare and regulate " critical ground water districts" in order to limit overdraft of aquifers; (2) restricted the state engineer's authority to that of regulating the drilling and construction of wells to prevent waste; (3) determined that it had no authority to adjudicate rights to non–tributary groundwater; and (4) determined that the state engineer had no power to administer non-tributary groundwater.[78]

In a 1961 decision, the court observed the dearth of legislation governing the adjudication and administration of tributary groundwater. It nevertheless asserted a judicial responsibility to

75. 1 GEORGE VRANESH, COLORADO WATER LAW § 4.1 at 384 (1987).
76. Safranek v. Town of Limon, 228 P.2d 975, 977 (Colo. 1951).
77. *See* Act of May 1, 1957, ch. 289, §§ 3, 5, 1957 Colo. Sess. Laws 863, 863-69.
78. Whitten v. Coit, 385 P.2d 131, 139 (Colo. 1963).

protect " relative priorities" of waters of the natural stream " whether visible or not" and " even though they have never been made the subject of a statutory adjudication." [79] The case involved competing well users drawing water from the same tributary aquifer. The court held that each must effectuate a reasonable means of diversion and that no one could command the whole source of the supply merely to facilitate taking a fraction of the flow. But, it also held that junior users might be required to bear the expense of seniors whose historical diversions were reasonably efficient but whose wells must now reach deeper as a result of the junior's use.[80]

In 1965, the General Assembly acknowledged and acted on the court's cue that the state should administer surface water and tributary groundwater together. However, it did not revise the adjudication framework to assist in meeting this goal. Instead, it directed the state engineer to " execute and administer the laws of the state relative to the distribution of the surface waters of the state including the underground waters tributary thereto in accordance with the right of priority of appropriation." [81] Further, the court authorized the state engineer to " adopt such rules and regulations and issue such orders as are necessary for the performance of the foregoing duties." [82]

The General Assembly chose to focus on the problem of groundwater mining in areas with little surface water. It adopted the 1965 Ground Water Management Act (" the 1965 Act") authorizing the Ground Water Commission to supervise the establishment of designated ground water districts where the principal reliable source of supply is groundwater.[83] Withdrawals of designated groundwater could be made under a modified system of prior appropriation through the issuance of state engineer well permits pursuant to regulations

79. City of Colorado Springs v. Bender, 366 P.2d 552, 555 (Colo. 1961).

80. *Id.* at 556.

81. Act of May 3, 1965, ch. 318, § 1, 1965 Colo. Sess. Laws 1244, 1244.

82. *Id.*

83. *See* Act of May 17, 1965, ch. 319, §§ 1-3, 1965 Colo. Sess. Laws 1246, 1246-68.

of the Commission and the local ground water district to maintain " reasonable ground water pumping levels." [84] The 1965 Act also provided for state engineer review of applications for well permits outside of designated groundwater basins.[85]

Three activities precipitated the 1969 Act. First, the state engineer began to regulate tributary groundwater wells on a case by case basis. Second, the legislature directed the Natural Resources Department to conduct an investigation of the interrelationship of groundwater and surface water and recommend legislation.[86] Third, in a contested groundwater case involving state engineer well regulation in the Arkansas River Basin, the Colorado Supreme Court urged the state engineer to take a more comprehensive approach by adopting regulations. Exclaimed Justice Groves: " It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights.*" [87] Thus, the court ratified the General Assembly's recognition of the necessity to integrate the use, adjudication, and administration of tributary groundwater and surface water. The very next year the legislature took the starring role with the adoption of the 1969 Act.[88]

VII. SO THE WATERS GO

A DIVIDE

The mystery of a divide
Is this, you can stand on opposites
And not lose your balance.

84. *Id.* § 148-18-10(1) 1965 Colo. Sess. Laws at 1254-55.
85. *See id*. § 148-18-36, 1965 Colo. Sess. Laws at 1265-66.
86. *See* Act of Apr. 19, 1967, ch. 175, § 1, 1967 Colo. Sess. Laws 249, 249-50.
87. Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968) (emphasis in original).
88. *See* Robert F. Welborn, *Two Colorado Water Crises*, 1 U. DENV. WATER L. REV. 307, 308-11 (1998).

Draw a straight line from the sky
Through the middle of your forehead,
Half of you belongs to the other ocean.

Half your mind and half your heart,
You share downstream equally
And never drift apart.[89]

Cartography follows the ground. Early mapmakers got it right when they hoofed through the territory;[90] they didn't when guessing its length, breadth, and features. The 1969 legislative drafters heard Colorado's topography of rivers practically sing to them.

The 1969 Act created seven water divisions along major hydrographic divides, from the great divide to the borders of the state, each with a water court, water clerk, and division engineer. The water clerks and courts for these divisions are headquartered in: Greeley, Division 1 (South Platte and other northeastern plains rivers); Pueblo, Division 2 (Arkansas and other southeastern plains rivers); Alamosa, Division 3 (Rio Grande and San Luis Valley rivers); Montrose, Division 4 (Gunnison and other central Western rivers); Glenwood Springs, Division 5 (Colorado River from source to state line); Steamboat Springs, Division 6 (Yampa, White, North Platte, and other northwestern rivers); and Durango, Division 7 (San Juan, Dolores, and other Southwestern rivers).[91]

Each water court publishes a monthly resume of applications received.[92] The resume summarizes important details of an application; the water courts supply standardized forms for filing.[93] The resume serves as notice to all interested persons for purposes of subject matter and personal jurisdiction.[94] Persons who do not enter the

89. Gregory J. Hobbs Jr., A Divide (November 1999).

90. Frank N. Schubert, *A Tale of Two Cartographers: Emory, Warren, and Their Maps of the Trans–Mississippi West*, *in* EXPLORATION AND MAPPING OF THE AMERICAN WEST: SELECTED ESSAYS (Donna P. Koepp, ed., 1986); JOHN NOBLE WILFORD, THE MAPMAKERS 204 (1981).

91. *See* COLO. REV. STAT. §§ 37-92-201, -203, -204 (1999).

92. *Id.* § 37-92-302(3)(a).

93. *Id.* § 37-92-302(2)(a); COLO. UNIF. R. WATER CT. 3(d).

94. *See* Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist., 734 P.2d 627, 633-34 (Colo. 1987); *see also* Gardner v. Colorado, 614 P.2d 357, 359-60 (Colo. 1980).

noticed proceeding remain nonetheless bound by the result.[95] The adequacy of the notice is subject to a "reasonable inquiry" standard regarding the nature, scope, and impact of the claim.[96]

In every water division, Colorado's adjudication is ongoing. Pursuant to the monthly resume notice, each application proceeds to judgment and to decree separately. If appealed, the application continues on to the Colorado Supreme Court for review and decision without the need to wait for any other case.[97] The state engineer compiles a tabulation of decreed water rights with their priorities and identifying features.[98] The priority date of a water right is a function of the year of the application's filing and the date of initiation of the first step of the appropriation.[99] The first step to initiate an appropriation consists of the appropriator's intent to appropriate a specified quantity of water from a particular source at a particular location for specified uses and of an action evidencing that intent.[100] The state engineer also compiles an abandonment list.[101]

One may file an application for determination of surface water rights, tributary groundwater rights, conditional water rights, perfected water rights, findings of reasonable diligence for conditional water rights, changes of water rights, augmentation plans, exchanges, and applications for out–of–state water use.[102] Augmentation plan decrees allow a right to be exercised out–of–priority by providing replacement water to otherwise senior rights in an amount suitable in quantity and quality to the affected right.[103]

Persons with or without water rights may object to an application and put the applicant to the

95. Williams v. Midway Ranches Property Owners Ass'n, 938 P.2d 515, 525 (Colo. 1997).

96. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 24 (Colo. 1996).

97. *See* United States v. District Court *ex rel*. Water Div. No. 5, 401 U.S. 527, 529 (1971); COLO. REV. STAT. § 37-92-304(7)-(9) (1999).

98. COLO. REV. STAT. § 37-92-401(1)(a) (1999).

99. *Id*. § 37-92-306.

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

101. COLO. REV. STAT. § 37-92-402(1)(a) (1999).

102. *Id.* § 37-92-302(1)(a).

103. *Id.* § 37-92-305(3), (5), (8).

required proof. Water rights holders may insist on terms in the decree that will prevent injury to their water rights.[104] The state engineer may object to applications and proceed as a party.[105] The state and division engineers also file consultation reports and recommendations on applications with the referees and water judges.[106]

Review of an application commences with the referee for the water division who may issue a ruling that is subject to entry by the water judge if no objection is made. The referee may also re–refer the application to the water judge without having made a ruling.[107] If the referee enters a ruling, any person may file a protest with the water clerk, and the water judge then hears the proceeding *de novo*.[108]

The state engineer, division engineers, and water commissioners must administer the waters of natural streams (i.e., surface water and tributary groundwater) pursuant to judicial decrees.[109] Federal agencies and Indian Tribes are bound by the resume notice, each case decree, and the Engineers' proper administration of decrees for waters within Colorado, because the United States was properly joined to Colorado's ongoing adjudication in each of the seven water divisions.[110] Failure to claim one's rights in the first available adjudication, including the failure of the United States to do so after its joinder, results in postponement of the priority date to the year in which the application is filed.[111]

Administration of non–tributary groundwater is not subject to the doctrine of prior appropriation.[112] By an amendment to the 1969 Act, water courts may decree rights to non–tributary

104. Shirola v. Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 747 (Colo. 1997).
105. Wadsworth v. Kuiper, 562 P.2d 1114, 1116-18 (Colo. 1977).
106. COLO. REV. STAT. § 37-92-302(4) (1999).
107. *Id.* § 37-92-303.
108. *Id.* § 37-92-304(2)-(3); *Wadsworth*, 562 P.2d at 1118-19.
109. COLO. REV. STAT. §§ 37-92-301(1), -301(3), -501 to 501.5 (1999).
110. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 808 (1976).
111. United States v. Bell, 724 P. 2d 631, 641-42 (Colo. 1986).
112. COLO. REV. STAT. § 37-92-305(11) (1999); *see* COLO. REV. STAT. § 37-92-203(1).

water outside of designated groundwater basins according to overlying land ownership, a hundred year aquifer life, and a withdrawal rate not exceeding one percent per year.[113] Use of Denver Basin bedrock aquifer water is subject to augmentation requirements.[114] Use of designated groundwater, which is regulated by the Colorado Groundwater Commission pursuant to the Groundwater Management Act, is not subject to the 1969 Act.[115]

The state prohibits recognition of claims that are based upon the speculative sale or transfer of appropriative rights to persons who are not parties to an appropriation.[116] Conditional water rights require making due diligence applications every six years if the conditional decree's antedated priority is to attach to the water right when it is eventually perfected by actual beneficial use.[117] Changes of water rights are subject to quantification by historic beneficial consumptive use and the imposition of conditions to prevent injury to other water rights.[118] Conditions to protect other water rights include continuation of the historic return flows that supply other appropriations, or through replacing water by means of a decreed augmentation plan.[119]

An amendment to the 1969 Act allows the Colorado Water Conservation Board to appropriate instream flows and minimum lake levels under state law for preservation of the natural environment to a reasonable degree.[120] However, only the Board may do so; all other appropriators must capture, possess, or control water in order to effectuate a valid appropriation.[121]

The 1969 Act authorizes the state engineer to issue orders for the enforcement of decreed

113. COLO. REV. STAT. § 37-90-137(4)(a)-(b) (1999).
114. Park County Sportsmen's Ranch Ltd. Liab. Partnership v. Bargas, No. 98SA208, 1999 WL 711845, at *3 (Colo. Sept. 13, 1999).
115. COLO. REV. STAT. §§ 37-90-103(8), -107 (1999); *see* COLO. REV. STAT. § 37-92-602(1)(a) (1999); *see also* Chatfield East Well Co. v. Chatfield East Property Owners' Ass'n, 956 P.2d 1260, 1268 (Colo. 1998).
116. *See* COLO. REV. STAT. § 37-92-103(3)(a), -305(9) (1999).
117. *Id.* §§ 37-92-301(4)(a), -305(1).
118. *See id.* § 37-92- 305(4)(a).
119. *Id.* § 37-92-305(8).
120. *Id.* § 37-92-102(3)-(4).
121. *Id.* § 37-92-305(9)(a)-(b).

priorities, to adopt rules for the administration of water rights, and to enforce water rights within Colorado to meet the downstream delivery requirements to other states. Colorado must deliver water down stream pursuant to nine interstate compacts and three equitable apportionment decrees of the United States Supreme Court, all of which affect Colorado water use.[122]

Rules shall have as their objective " the optimum use of water consistent with preservation of the priority system of water rights." [123] The state and division engineer may issue diversion curtailment orders,[124] order the release of water illegally or improperly stored,[125] administer the movement of augmentation water and of water use projects,[126] require the installation of measuring devises, require the submission of periodic reports based on data from the devise[127] and require production of energy use records from suppliers of energy used to pump groundwater.[128] The state engineer may seek an injunction and damages for violation of diversion curtailment orders.[129] The water officials should avoid curtailment of rights in futile call circumstances, when shutting off diversions by juniors would not reasonably make the water available to senior priorities.[130]

The 1969 Act also provides for certain exemptions from administration, for example, for small capacity household wells.[131]

VIII. ACCOMPLISHMENTS OF THE 1969 ACT

Major accomplishments of the 1969 Act include: (1) integration of surface water and tributary groundwater into a unitary adjudication and administration system; (2) specialized water court jurisdiction and engineer administration on a watershed basis; (3) resume notice procedure for

122. Simpson v. Highland Irrigation Co., 917 P.2d 1242, 1248 (Colo. 1996).
123. *See* COLO. REV. STAT. § 37-92-501(2)(e) (1999).
124. *Id.* § 37-92-502(2)(a).
125. *Id.* § 37-92-502(3).
126. *Id.* § 37-92-502(4).
127. *Id.* § 37-92-502(5)(a).
128. COLO. REV. STAT. § 37-92-502(5)(b) (1999).
129. *Id.* § 37-92-503.
130. *See id.* § 37-92-502(2)(a).
131. *Id.* § 37-92-602(1)(b).

obtaining jurisdiction for adjudication of rights; (4) case–by–case decrees and appeals in the context of an ongoing and comprehensive adjudication; (5) authorization of augmentation plans to enable otherwise out–of–priority water use through the provision of replacement water; (6) effective rulemaking and enforcement authority in the state and division engineer for the protection of state, federal, and interstate rights; and (7) explicit procedures for filing and pursuing applications and objections to applications for water rights, conditional water rights, changes of water rights, and augmentation plans.

An immediate result of the 1969 Act was Colorado's ability to proceed with adjudication and administration of federal reserved water rights, Native American tribal rights, and state appropriative rights.[132] The United States Supreme Court rejected assertions by the Justice Department that Colorado's monthly case–by–case methodology did not comply with the McCarran Amendment.[133] It vindicated the work of the 1969 Act by its opinion stating that " [t]he present suit . . . reaches all claims, perhaps month by month but inclusively in the totality; and, as we said . . . if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review." [134]

The 1969 Act's authorization for adjudication and administration of augmentation plans has been particularly important to the integration of tributary groundwater into the natural stream priority system. An extensive well economy had grown up in over appropriated stream systems, particularly in the South Platte and Arkansas River Basins. By utilizing such sources as mutual ditch company shares, non–tributary water, and imported water, augmentation plans allow Colorado to effectuate its water efficiency and optimum use policies by allowing out–of–priority diversions that would be curtailed otherwise.[135]

132. *See generally* United States v. City of Denver, 656 P.2d 1 (Colo. 1982).

133. 43 U.S.C. § 666 (1994).

134. United States v. District Court *ex rel* Water Div. No. 5, 401 U.S. 527, 529-30 (1971).

135. Williams v. Midway Ranches Property Owners Ass'n, 938

IX. CONCLUSION

The 1969 Act is a relief map to the State of the Great Divide. It reflects the contours of Colorado's watersheds. It provides for unitary adjudication and administration of state, tribal, and federal water rights. Following its flow is to go the way the waters go.

P.2d 515, 521-22 (Colo. 1997).