Transmountain Diversions of Water in Colorado

Raphael J. Moses

Follow this and additional works at: https://digitalcommons.du.edu/djilp

Recommended Citation

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,digitalcommons@du.edu.
Transmountain Diversions of Water in Colorado

RAPHAEL J. MOSES*

Most of Colorado's internal water problems arise from the fact that Colorado is a rectangular state, established by Congress, in its infinite wisdom, without regard to river basin drainages. Thus we find ourselves, on our Centennial anniversary, with most of the people living east of the Continental Divide, and most of the water running in streams on the western side of that same divide.

The exterior boundaries of Colorado may be great for cartographers, but they are a constant source of friction for water users. Not only does the western half of Colorado lie in the drainage of the Colorado River and its tributaries, but North Park should, geographically, be part of Wyoming; and the San

* A.B. (1935), LL.B. (1937), J.D. (1972), University of Colorado; Visiting Lecturer and Regent Emeritus at the University of Colorado; Consultant to Colorado Water Conservation Board. The author was the Special Assistant Attorney General for the Rio Grande Compact, 1957-58. Member of the firm, Moses, Wittemeyer, Harrison & Woodruff, Boulder, Colorado.

1. The writer became so fascinated with the background of Colorado's "rectilinearism," if a word may be coined, that a long detour in preparation occurred. Unfortunately, there appears to be little to indicate how Colorado's shape evolved. L.R. Hafen, in a 1926 article, mentions it only briefly. He said:

The bill for creation of "Colorado Territory" introduced in the previous session (April 3, 1860) was brought up in the Senate January 30, 1861, and the name changed to "Idaho Territory." The original bill had designated the Green and the Colorado rivers as the western boundary of the Territory, while the other boundaries were identical with those of the present state. This western boundary was first changed (in the bill) to the 33rd meridian and finally to the 32d (from Washington). The bill was again considered February 4th and Senator Wilson "at the request of the delegate from that Territory" proposed to substitute the name "Colorado" for "Idaho." The bill was so amended and immediately passed.

The bill now went to the House and was considered on the 18th. The Delegate from New Mexico objected to having Colorado include that portion of New Mexico north of the 37th parallel, but his objections were disregarded. The bill with minor changes was passed by the House and now returned to the Senate. The Senate concurred in the amendment on the 26th and the President approved the measure two days later...

Hafen, Steps to Statehood in Colorado, 3 THE COLORADO MAGAZINE 97,106 (1926). It should be noted that even if the western boundary of Colorado had been the Green and Colorado Rivers, the transmountain diversion problems would not have been eliminated. Only by making the Continental Divide the western boundary would the problem go away.
Luis Valley, ethnically, historically, and geographically should have been part of New Mexico.

Originally, no legal inhibitions barred transmountain diversions of water designed to overcome quirks of geography. The Colorado Constitution provides:

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 . . . .

In *Coffin v. Left Hand Ditch Company*, the landmark decision which resulted in what is now commonly known as the "Colorado Doctrine," our Supreme Court said:

[W]e hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has . . . a prior right thereto, to the extent of such appropriation.

[T]he right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed.

*Coffin* itself involved a transmountain diversion, albeit a very low mountain. The Left Hand Ditch Company had taken water out of the St. Vrain Creek across a divide into the watershed of Left Hand Creek, and Coffin, a downstream riparian owner on the St. Vrain, complained. The analogy applies to the Continental Divide as well. A prior appropriator from the Western Slope to the Eastern Slope retains his priority, and the place of use is not material.

Colorado has had many private transmountain diversions. Some of the most significant are the diversion from the Laramie River to the Poudre watershed, the substantial Twin Lakes Diversion from the headwaters of the Roaring Fork to Lake Creek—a tributary of the Arkansas, the Busk-Ivanhoe Tunnel in the same vicinity, and smaller ones from the Pine and Piedra, tributaries of the San Juan, into the headwaters of the Rio Grande.

By far the largest transmountain diversions have been made by cities and by water conservancy districts. The largest transmountain diversion in the state is that of the Northern

---

3. 6 Colo. 443, 19 P. 466 (1882).
Colorado Water Conservancy District, some 340,000 acre-feet diverted from the headwaters of the Colorado River into northeastern Colorado by way of the Adams Tunnel. This Bureau of Reclamation Project, commonly known as the Colorado-Big Thompson, is controlled by operating principles set out in United States Senate documents. Plans are underway by the Municipal Subdistrict of the Northern Colorado Water Conservancy District to increase this amount by 30,000 acre-feet by means of the Six Cities Project.

Going south along the Continental Divide, we next encounter the transmountain diversions by the City and County of Denver, consisting of existing divisions through the Moffat and Roberts Tunnels diverting respectively from the Fraser River and the Blue River and their tributaries, and proposed diversions from the Piney and the Gore. The proposed diversions would utilize the existing Dillon Reservoir and Roberts Tunnel.

Colorado Springs and Aurora have joined together to construct the first phase of the Homestake Project, which takes water from Homestake Creek, a tributary of the Eagle, through a tunnel into the Upper Arkansas. The second phase of this project has been deferred because of the additional costs associated with additional restrictive environmental constraints.

The Frying Pan-Arkansas diversion will take 67,000 acre-feet of water from the upper tributaries of the Frying Pan River and Hunter Creek through the Boustead Tunnel into enlarged Turquoise Reservoir on the Upper Arkansas, there to enlarged Twin Lakes Reservoir on Lake Creek, a tributary of the Arkan-

---

4. In his excellent article entitled *Compensatory Storage*, 22 Rocky Mt. L. Rev. 452, 455 (1950), Charles J. Beise expresses it this way:

At the time the foregoing developments occurred, one individual representing the West Slope assumed an outstanding role as protector of that area. Congressman Edward T. Taylor, as Chairman of the Appropriations Committee of the House, was, by virtue of his position, able to enforce his edicts and to preclude the development of any publicly financed project which would divert water from his congressional district to the East Slope, unless the proponents of such project were willing to make such concessions as he deemed necessary. This is no criticism of Congressman Taylor, who was sincere in his belief that an area developing more slowly needed protection from one developing more rapidly. Thus, because of Congressman Taylor's political prominence, the West Slope was placed in an unusually strong bargaining position.
sas River, for irrigation and municipal use in the valley of the Arkansas and Fountain Creek.

In the 1930s, the sponsors of the Colorado-Big Thompson were pushing strongly for authorization. Concerned citizens of the Western Slope, visualizing the loss of their water to the Eastern Slope and buttressed by the fact that their representative, Congressman Ed Taylor, was chairman of the House Appropriations Committee, were able to accomplish two things: the establishment of the Colorado Water Conservation Board as the State’s policymaking entity in water matters, and the formation of water conservancy districts.5

The act authorizing formation of conservancy districts contains the first area-of-origin protective legislation ever adopted in Colorado. The act provides:

[A]ny works or facilities planned and designed for the exportation of water from the natural basin of the Colorado river and its tributaries in Colorado, by any district created under this article, shall be subject to the provisions of the Colorado river compact and the “Boulder Canyon Project Act.” Any such works or facilities shall be designed, constructed, and operated in such manner that the present appropriations of water, and in addition thereto prospective uses of water for irrigation and other beneficial consumptive use purposes, including consumptive uses for domestic, mining, and industrial purposes, within the natural basin of the Colorado River in the State of Colorado, from which water is exported, will not be impaired nor increased in cost at the expense of the water users within the natural basin. The facilities and other means for the accomplishment of said purpose shall be incorporated in and made a part of any project plans for the exportation of water from said natural basin in Colorado.6

Sec. 1(c) of that same act provides:

To have and to exercise the power of eminent domain and dominant eminent domain and in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers granted in this article; except that such district shall not have or exercise the power of eminent domain over or by means thereof to acquire the title to or beneficial use of vested water rights for transmountain diversion, and in connection therewith such district shall not have the power to carry or transport water in transmountain diversion, the

6. Id.
title to which has been acquired by any municipality by virtue of eminent domain proceedings against any such vested rights.

As a result of these provisions, and the operating principles of the Colorado-Big Thompson Project, Green Mountain Reservoir was constructed at Eastern Slope water users' expense, as a compensating reservoir for the Big Thompson Project.

Similarly, Ruedi Reservoir was constructed, under the provisions of the same statute and of the operating principles of the Frying Pan-Arkansas Project, as a compensating reservoir for the Frying Pan-Arkansas Project.

Subsequently, the Colorado Water Conservation Board, responsive to continued Western Slope concerns, adopted a resolution that it would approve no further federally financed transmountain diversions until the total water requirements of the Water Slope had been determined. To date, such a determination has not been made.

The increased concern on the part of Western Slope residents about the inadequacy of water supplies for Western Slope development will be a major obstacle to future major transmountain diversions. However, increased environmental constraints pose an even greater threat to such diversions.

For example, the inclusion by the Congress of a substantial part of Denver's proposed Eagle-Piney watershed in the Gore Creek Wilderness Area will, in the opinion of the Denver Water Board, increase the cost of that project by several hundred million dollars. Such environmental expenditures may render the project economically impracticable.

The necessity for the sponsor of a transmountain diverter to obtain federal rights of way across the federal forest lands that blanket the Continental Divide may further impede the construction of such projects. Colorado Springs and Aurora

11. Colorado Springs and Aurora have each acquired other water rights in lieu of presently developing the second stage of Homestake. See, e.g., Preliminary Official Statement and Notice of Sale, $27,000,000 City of Colorado Springs Utilities Improvement Revenue Bonds, Series 1976A (released July 31, 1976).
have already been advised that materials, supplies, and equipment for the second phase of their Homestake Project will have to be helicoptered to the site. The additional costs, over the estimated cost, together with inflation, have combined to cause these cities to defer construction of the second phase. Instead, these cities are purchasing additional water rights formerly used for agriculture.\textsuperscript{11} The problems which arise from this kind of a policy decision could be the subject of an entire additional paper.

In 1973, the Colorado legislature approved the instream appropriation of water by the Colorado Water Conservation Board, on behalf of the people:

\begin{quote}
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.\textsuperscript{12}
\end{quote}

Although the constitutionality of this legislation is, as of the moment, untested, the Water Conservation Board has blanketed the Western Slope with applications for instream decrees which will effectively bar future filings for transmountain diversions.

What are the ethics of transmountain diversions? I suspect that most people, regardless of which side of the mountain they live on, sympathize with the Western Slope’s desire to keep the water over there. This feeling undoubtedly permitted the passage of the area-of-origin legislation earlier referred to.\textsuperscript{13}

It should be noted that such legislation refers only to transmountain diversions by water conservation districts, so that major cities are not restricted save by the environmental constraints which translate into costs which make the economics questionable.

We have always maintained that water seeks its own economic level, or as it is sometimes expressed, “water flows uphill to money.” However, there is a limit to the money available, particularly where alternate choices exist, and they do exist.

\textsuperscript{12} COLO. REV. STAT. ANN. §37-92-103(4) (1973).

If one desired to be fanciful, he could resort to what I call the "reverse domino" scenario. That goes something like this: Western Colorado will agree to transmountain diversions the day that California agrees to forego its Colorado River entitlement. That will happen only when all of Southern California's needs are supplied from Northern California. Northern California will let its water go when Oregon agrees to replace it. Oregon will replace the water when Washington agrees to furnish the water Oregon gives up, and Washington will do this only if Canada foregoes its Columbia River rights. Canada will act only if the flow of the MacKenzie is reversed to supply the Columbia needs, and that will only happen when the United States supplies Canada with water from the Yukon.

Everyone who thinks any of these events will soon occur, please stand up.

In short, the day of major transmountain diversions of water in Colorado has passed, and we are unlikely to see built even those that have been on the drawing board for years. Politics, ethics, economics, and environmental concerns all raise obstacles. Any one is probably enough. The combination is overwhelming.