Denver Law Review

Volume 57 | Issue 4 Article 8

February 2021

Colorado River Water Conservation District v. Colorado Water Conservation Board: Diversion as an Element of Appropriation

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COLORADO RIVER WATER CONSERVATION DISTRICT V. COLORADO WATER CONSERVATION BOARD: DIVERSION AS AN ELEMENT OF APPROPRIATION

I. INTRODUCTION

In *Colorado River Water Conservation District v. Colorado Water Conservation Board*,[1] the Colorado Supreme Court held that the Colorado Water Conservation Board (Board) can make an in-stream appropriation of water without diverting it from the streambed.[2] Such a holding constituted a major step away from the established Colorado doctrine of prior appropriation.

The issue of whether the Colorado Constitution requires a physical diversion for a valid appropriation arose when the Board applied for minimum stream flow rights for recreational purposes, fishery and wildlife. The application was made pursuant to Colorado legislation popularly known as Senate Bill 97.[3] The Colorado River Water Conservation District (District) objected to the Board's application, contending that Senate Bill 97, which allows for an in-stream appropriation, was unconstitutional because the state constitution requires a diversion for appropriation.[4]

The Colorado Supreme Court, after looking to the state constitution and to relevant case law, held that physical diversion of the water was not a constitutional mandate. In light of this, the court found that Senate Bill 97 was a valid exercise of legislative authority.[5]

After surveying the developments of Colorado water law in relation to the necessity of a physical diversion, the applicable law in the prior appropriation states of California and Idaho will be briefly examined.[6] In the analysis, it will be shown that, while the Colorado Supreme Court was correct in holding that no physical diversion is required for a valid appropriation, the decision would have been more firmly grounded had the court's approach been different.

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1. 594 P.2d 570 (Colo. 1979).
2. *Id.*
3. Currently codified in COLO. REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).
4. The Colorado Constitution states:

> 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 the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

COLO. CONST. art. XVI, § 6.

5. 594 P.2d 570 (Colo. 1979).
6. All nineteen of the western states utilize, in varying degrees, the doctrine of prior appropriation to determine water rights. This Comment will briefly examine the law of California, which requires a physical diversion or control of water for appropriation, and Idaho, whose constitution and laws require no diversion.

II. LEGAL BACKGROUND OF THE CASE

A. *Diversion: Case Law*

Traditionally, an appropriation of water was effected upon the conjoining of two acts: the diversion of water from the natural stream and application of the water to a beneficial use.[7] The use of the doctrine of prior appropriation in Colorado antedates the state constitution.[8] Accordingly, a number of early Colorado cases contain language which indicates that diversion is an essential element of appropriation.[9]

In spite of the fact that a physical diversion was seemingly required for an appropriation under Colorado law, the courts seemed willing to forego this element in certain situations. Thus, in *Thomas v. Guiraud*,[10] the court emphasized the application of the water to a beneficial use, stating that the true test of appropriation was the application of the water to the beneficial use, the method by which the water was diverted being immaterial.[11] Although later cases also appear to indicate that beneficial use, not diversion, is the essence of appropriation,[12] these cases, like *Thomas*, involved no issue as to whether diversion was necessary for appropriation.

One of the few Colorado cases in which the issue of diversion did arise was *Larimer County Reservoir Co. v. Luthe*.[13] In this case Luthe alleged that, since the reservoir company had stored water, not diverted it, there was no appropriation. The main thrust of his argument was based upon the maxim *expressio unius est exclusio alterius*. Luthe contended that, because the Colorado Constitution specifically mentions diversion as a means of appropriating water,[14] there are no other acceptable methods by which to effect an appropriation.[15]

The Colorado Supreme Court rejected his argument, stating that the word "divert" must be interpreted in connection with the word "appropria-

7. A complete discussion of the doctrine of prior appropriation is beyond the scope of this Comment. *See generally* W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971); C. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM (1971) (Report to the National Water Commission); Carlson, *Report to Governor John A. Love On Certain Colorado Water Law Problems*, 50 DEN. L.J. 293 (1973).

8. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1883).

9. *E.g.*, Central Colo. Water Conservancy Dist. v. City and County of Denver, 189 Colo. 272, 539 P.2d 1270 (1975); Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972); Rocky Mountain Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962); Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961); City and County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954); Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 79 P.2d 373 (1938); Woods v. Sargent, 43 Colo. 268, 95 P. 932 (1908); Fort Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032 (1892); Farmer's High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 P. 1028 (1889); Sieber v. Frink, 7 Colo. 148, 2 P. 901 (1884).

10. 6 Colo. 530 (1883).

11. *Id.* at 533.

12. *See, e.g.*, Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (C.C.D. Colo. 1910), *rev'd in part*, 205 F. 123, *modified in part*, 205 F. 130 (8th Cir. 1913); Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960).

13. 8 Colo. 614, 9 P. 794 (1886).

14. COLO. CONST. art. XVI, § 6.

15. 8 Colo. 614, 9 P. 794.

tion."[16] The court stated that an appropriation was complete when an individual, by some open, physical demonstration, indicated an intent to take for a beneficial use and through his demonstration succeeded in applying the water to the use designed.[17]

Colorado River Water Conservation District v. Rocky Mountain Power Co.[18] most closely approaches the issue decided in the instant case. Ironically, the District, in the former case, was attempting to appropriate water without diversion, whereas, in the latter, the District opposed the Board's attempted in-stream appropriation.

In *Rocky Mountain*, the District attempted to appropriate a minimum flow of water for piscatorial and recreational purposes pursuant to statutory authorization.[19] Each of the District's claims[20] alleged that water was not to be diverted from the stream, but was to be preserved and kept in the stream to the extent necessary for the preservation of fish. Rocky Mountain Power Company alleged that the purported appropriation was not an appropriation, that fish maintenance and recreational purposes were not beneficial uses, and that the state constitution did not allow an appropriation of water flowing in the stream for the use of the public as against a diversion and appropriation of water for beneficial use.

The Colorado Supreme Court did not reach the constitutional argument, because it held that an appropriation for piscatorial purposes must be accomplished by means of diversion.[21] Although the court indicated that water could be beneficially used to maintain fish if there were a physical diversion, it stated that to allow such use without diversion would constitute a riparian right, forbidden in Colorado.[22]

B. *Diversion: Statutory Enactments*

Diversion, as a requisite for the acquisition of water rights, was a court-created element of appropriation in Colorado until 1969.[23] In that year, the Colorado General Assembly passed the Water Determination and Administration Act of 1969 (Act).[24] Not only did the General Assembly define "diversion,"[25] but it also defined "appropria-

16. *Id.*

17. *Id.*

18. 158 Colo. 331, 406 P.2d 798 (1965).

19. Among other designated powers, this statute allowed the water conservation district:

> [t]o file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish, and to use such water in connection with retaining ponds for the propagation of fish for the benefit of the public. (Statute in effect at time case was decided.)

COLO. REV. STAT. § 150-7-5(10) (1963).

20. The District made three claims, each with a priority date of June 7, 1937. It asserted rights in and to 1) waters of the south fork of White River and its tributaries, 2) waters of Wagonwheel Creek and its tributaries, 3) waters of Buck Creek and its tributaries.

21. 158 Colo. at 335, 406 P.2d at 800.

22. *Id.* at 336, 406 P.2d at 800.

23. 594 P.2d at 574.

24. COLO. REV. STAT. § 148-21-3 (Perm. Cum. Supp. 1969) (current version at COLO. REV. STAT. § 37-92-101 (1973)).

25. The Colorado General Assembly defined "diversion" or "divert" as "removing water from its natural course or location, or controlling water in its natural course or location, by

tion"[26] and "beneficial use"[27] in terms of diversion. Because the element of diversion was recognized as essential to appropriation through legislative definition, the constitutional issue of the validity of appropriation of water absent a diversion was temporarily placed in abeyance.

In 1973, the Water Determination and Administration Act of 1969 was amended.[28] Today's Act, as did its predecessor, contains definitions of "appropriation," "beneficial use," and "diversion."[29] Although the definition of "diversion" remains unchanged, the General Assembly radically changed the definitions of "appropriation" and "beneficial use." Indeed, it appears that it was the intent of the legislature to eliminate entirely any requirement of diversion for a valid appropriation.[30] A similar change was effected in the definition of "beneficial use."[31]

C. *Trends in Other Prior Appropriation States*

There does not seem to be a clear trend in other appropriation states as to whether a physical diversion or control of water is necessary for a valid appropriation. While a number of the western states have recognized recreation, fisheries, and wildlife as falling within the ambit of "beneficial use,"[32] the requirements vary from jurisdiction to jurisdiction as to how such use must be effected in order to be valid.

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means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device." COLO. REV. STAT. § 148-21-3(5) (Perm. Cum. Supp. 1969) (current version at COLO. REV. STAT. § 37-92-103(7) (1973)).

26. " 'Appropriation' means the diversion of a certain portion of the waters of the state and the application of the same to a beneficial use." COLO. REV. STAT. § 148-21-3(6) (Perm. Cum. Supp. 1969) (current version at COLO. REV. STAT. § 37-92-103(3) (1973)).

27. " 'Beneficial use' is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the diversion is lawfully made and . . . shall include the impoundment of water for recreational purposes, including fishery or wildlife." COLO. REV. STAT. § 148-21-3(7) (Perm. Cum. Supp. 1969) (current version at COLO. REV. STAT. § 37-92-103(4) (1973)).

28. 1973 Colo. Sess. Laws, ch. 442, at 1521.

29. COLO. REV. STAT. §§ 37-92-103(3)-(4), (7) (1973).

30. The definition of "appropriation" was amended as follows (dashes through words indicate material deleted, whereas all capital letters indicate material added): " 'Appropriation' means ~~the diversion of a certain portion of the waters of the state and~~ the application of ~~the same~~ A CERTAIN PORTION OF THE WATERS OF THE STATE to a beneficial use." 1973 Colo. Sess. Laws, ch. 442, at 1521.

31. "Beneficial use" was redefined as (lines through words indicate material deleted, whereas all capital letters indicate material added):

> [T]he use of that amount of water that is reasonable and appropriate . . . to accomplish without waste the purpose for which the ~~diversion~~ APPROPRIATION is lawfully made and . . . shall include the impoundment of water for recreational purposes, including fishery or wildlife. FOR THE BENEFIT AND ENJOYMENT OF PRESENT AND FUTURE GENERATIONS, "BENEFICIAL USE" SHALL ALSO INCLUDE THE APPROPRIATION . . . OF SUCH MINIMUM FLOWS BETWEEN SPECIFIC POINTS OR LEVELS . . . ON NATURAL STREAMS . . . AS ARE REQUIRED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE.

1973 Colo. Sess. Laws, ch. 442, at 1521.

32. *E.g.*, ARIZ. REV. STAT. ANN. § 45-141 (Supp. 1977); IDAHO CODE § 36-1601(b) (Supp. 1976); MONT. CODE ANN. § 85-2-102(2) (1979); NEV. REV. STAT. § 533.030 (1973); OR. REV. STAT. § 390.815 (1977); WASH. REV. CODE ANN. § 90.22.010 (Supp. 1976).

1. California

In some states, the question of diversion is not a constitutional issue because of the manner in which the relevant portions of the state constitution are framed. For example, the California Constitution, which emphasizes the requirements of "beneficial use,"[33] expressly provides that the state legislature may enact laws consonant with the constitutional mandate. Accordingly, California water law is determined by the provisions of a comprehensive water code.[34]

Although neither the water code nor the state constitution contains an express requirement of physical diversion for appropriation, water law in California has consistently required diversion for valid appropriation. Thus, in *Fullerton v. California State Water Resources Control Board*,[35] the California Court of Appeal held that the State Department of Fish and Game could not appropriate a minimum flow of water for piscatorial purposes without some physical act by the appropriator.[36]

2. Idaho

At odds with the California position as to the necessity of control or diversion of water for an appropriation is the State of Idaho. In *State Department of Parks v. Idaho Department of Water Administration (State Department of Parks)*,[37] the Idaho Supreme Court held that, for purposes of recreation and preservation of scenic views, the Department of Parks could constitutionally appropriate water without a physical diversion.[38]

The issue of whether diversion was constitutionally mandated arose when the Idaho State Department of Parks attempted to appropriate water for scenic beauty and recreational purposes, pursuant to statutory authorization.[39] After deciding other issues raised by the Department of Water Administration,[40] the Idaho Supreme Court concluded that diversion was not a

33. The California Constitution commands that

> [T]he water resources of the State be put to beneficial use to the fullest extent of which they are capable, . . . and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof . . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

CAL. CONST. art. X, § 2 (1976).

34. CAL. WATER CODE (West 1943).

35. 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (Ct. App. 1979).

36. *Id.* at 604, 153 Cal. Rptr. at 527.

37. 96 Idaho 440, 530 P.2d 924 (1974).

38. *Id.*

39. The Idaho Code provides:

> The state park board is hereby authorized and directed to appropriate in trust for the people of . . . Idaho the unappropriated natural spring flow arising upon the area [of Malad Canyon]. . . .
>
> The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of . . . Idaho is hereby declared to be a beneficial use of such water . . . .

IDAHO CODE § 67-4307 (Supp. 1979).

40. The Department of Water Administration raised three issues. In addition to the question of the necessity of a physical diversion, the Department also alleged that a state agency cannot constitutionally appropriate unappropriated waters of natural streams and that the preservation of aesthetic values and recreational opportunities are not beneficial uses that will sup-

constitutional requisite of an appropriation made by the State Department of Parks.

The Idaho Supreme Court relied upon the fact that Colorado, which has a constitutional provision similar to that of Idaho,[41] does not consistently require a diversion for an appropriation. After citing the Colorado case *Genoa v. Westfall*[42] for the proposition that no diversion is needed, the court noted that the later Colorado case *Lamont v. Riverside Irrigation District*[43] cast some doubt upon the *Genoa* rationale; but it concluded that the issue was resolved by the passage of the 1973 legislation.[44]

III. ANALYSIS OF THE CASE

Faced with conflicting language in Colorado cases as to whether the state constitution requires diversion for a valid appropriation of water, the Colorado Supreme Court squarely addressed this issue for the first time in *Colorado River Water Conservation District v. Colorado Water Conservation Board*.[45] Although the supreme court was correct in holding that the Board could constitutionally appropriate water without actually diverting it, the court's rationale is weak because of the manner in which the issue was approached. This is particularly true in relation to the court's treatment of *Rocky Mountain*[46] and *State Department of Parks*.[47]

A. *The Rocky Mountain Power Case*

Although the court in the instant case held that the Colorado Constitution does not require diversion for appropriation, the decision emphatically stated that it was not overruling any of its previous opinions, which had held that diversion is an essential element of appropriation.[48] The court deemed its past decisions distinguishable. Whereas most of the past decisions can be distinguished on one of the bases given by the supreme court,[49] *Rocky Mountain* cannot be reconciled with the court's latest decision on diversion.

In certain respects, the two cases are factually similar. In each, a state governmental agency or body attempted to appropriate a minimum flow of

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port an appropriative water right under the state constitution. The Idaho Supreme Court held that such uses are beneficial and that such an appropriation could constitutionally be made by the state agency in question.

41. IDAHO CONST. art. 15, § 3 states that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . . "

42. 141 Colo. 553, 349 P.2d 370 (1960).

43. 179 Colo. 134, 498 P.2d 1150 (1972).

44. COLO REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).

45. 594 P.2d 570 (Colo. 1979).

46. 158 Colo. 331, 406 P.2d 798 (1965).

47. 96 Idaho 440, 530 P.2d 924 (1974).

48. 594 P.2d at 574.

49. The many cases [which held diversion essential] are distinguishable. Several really had no issue as to diversion. Others involved (1) a diversion (proposed or actual), (2) a beneficial use (involved or contemplated) clearly requiring a diversion, (3) situations in which the evidence and measurement of an appropriative intent could be predicated only upon the capacity to divert, (4) circumstances where there could not be a bona fide appropriation without a physical diversion, or (5) matters in which a lack of diversion violated the principle of maximum utilization . . . . "

Id.

water for piscatorial and recreational purposes pursuant to statutory authorization.[50] However, the result was different: One appropriation was allowed and one was not.

The Colorado Supreme Court, in the instant case, distinguished the two cases by stating that *Rocky Mountain* held the attempted appropriation by the District a forbidden riparian right.[51] This was *not* the holding of the case. Rather, while indicating that the appropriation *may* have been riparian in nature, the case held that, by enacting the statute in question,[52] the Colorado General Assembly did not intend to so radically depart from the established doctrine of prior appropriation so as to permit appropriation for piscatorial purposes without a diversion.[53]

While acknowledging the legislative intent at the time of *Rocky Mountain*, the court stated: "[I]t is obvious that the General Assembly in the enactment of S.B. 97 certainly did intend to have appropriations for piscatorial purposes without diversion."[54] If indeed Senate Bill 97[55] states the current legislative intent in regard to appropriation for piscatorial purposes and that intent differs from the legislature's earlier intent, then *Rocky Mountain* no longer states the law.

The court in the instant case also purported to distinguish *Rocky Mountain* on the basis that the latter case involved a riparian right and not an appropriation.[56] In fact, the appropriations involved in the two cases are indistinguishable.

Although the court in *Colorado River Water Conservation District v. Colorado Water Conservation Board* held that the Board may make an *in-stream* appropriation without diversion, the Board had applied for *minimum stream flow* rights[57] pursuant to a statute providing for appropriation "of such *minimum flows* between specific points or levels . . . as are required to preserve the natural environment to a reasonable degree."[58] The court found this standard to be constitutionally permissible, stating that it could be implemented by agencies having specific expertise."[59]

In *Rocky Mountain*, the District attempted to appropriate water pursuant to a statute which authorized the District "[t]o file upon and hold . . . *sufficient* water . . . to maintain a constant stream flow in the amount *necessary* to preserve fish . . . for the benefit of the public. (emphasis supplied)"[60] The court did not discuss the standard contained in this statute, but the standard

50. In *Rocky Mountain*, the District relied upon COLO. REV. STAT. § 150-7-5(10) (1963); in *Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.*, the Board relied upon the authority of COLO. REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).

51. 594 P.2d 570.

52. COLO. REV. STAT. § 150-7-5(10) (1963).

53. 158 Colo. at 336, 406 P.2d at 800.

54. 594 P.2d at 574.

55. Currently codified in COLO. REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).

56. 594 P.2d at 574.

57. *Id.* at 571.

58. COLO. REV. STAT. § 37-92-103(4) (1973) (emphasis added).

59. 594 P.2d at 576.

60. COLO. REV. STAT. § 150-7-5(10) (1963).

does not appear to differ substantially from that allowed in *Colorado River Water Conservation District v. Colorado Water Conservation Board.*

Because of the similarity of the attempted appropriations involved in the two cases, the distinction that one involves a riparian right, whereas the other does not, is tenuous at best. The appropriation in the instant case is no less—nor any more—a riparian right than that in question in *Rocky Mountain.*

B. *The Idaho Case*

Although the Colorado Supreme Court did not rely heavily on *State Department of Parks* in reaching its decision,[61] the case was mentioned in support of the proposition that the Colorado Constitution, whose provisions in relation to water appropriation are similar to those of the Idaho Constitution, does not require an actual diversion for a valid appropriation.[62]

The reliance of the Colorado Supreme Court upon the Idaho case was misplaced because *State Department of Parks*, in holding that the Idaho Constitution does not require a physical diversion for appropriation, looked to the Colorado Constitution and past decisions of the Colorado Supreme Court.[63] In short, this portion of the reasoning contained in the instant case is circular.

The Idaho Supreme Court, after noting that the two state constitutions are substantially the same in relation to their water law provisions,[64] cited *Genoa v. Westfall*[65] for the proposition that no physical diversion is necessary for appropriation.[66] The court then continued:

> The rationale of *Genoa* became suspect after the decision of the Colorado court in *Lamont v. Riverside Irrigation District*, but the matter appears to have been laid at rest following the 1973 Colorado legislation wherein *its statutory law of appropriation was amended so as to permit appropriation without actual diversion.*[67]

The 1973 legislation to which the Idaho Supreme Court was referring is Senate Bill 97,[68] whose constitutionality was being challenged in *Colorado River Water Conservation District v. Colorado Water Conservation Board.* This appears to be a classic case of "the tail trying to wag the dog." By mentioning the Idaho case in support of its holding that an in-stream diversion is constitutional, the Colorado Supreme Court was relying upon a case which had used Colorado case reasoning to reach its result.

In yet another way the Colorado Supreme Court's reliance upon the Idaho case was misplaced. Although the state consitutions are similar, they

61. 594 P.2d at 573:
"Idaho has a similar constitutional provision. Its supreme court has held 'that our constitution does not require actual physical diversion.' *State Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974)."
62. *Id.*
63. 96 Idaho 440, 530 P.2d 924.
64. *Compare* COLO. CONST. art. XVI, § 6 *with* IDAHO CONST. art. 15, § 3.
65. 141 Colo. 533, 349 P.2d 370.
66. 96 Idaho 440, 530 P.2d 924.
67. *Id.* at 445, 530 P.2d at 928 (emphasis added).
68. Currently codified in COLO. REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).

are not identical. Whereas the Colorado Constitution provides that the right to divert water shall never be denied,[69] the Idaho Constitution indicates that the right to divert *and* appropriate shall never be denied.[70] Both provisions seem to define the nature of the right, rather than how the right is to be exercised. Nonetheless, if the manner in which the right is to be exercised is co-extensive with the right itself, it appears that the Idaho constitutional provision is broader than that of Colorado. In this case, it could be argued that the Colorado Constitution does not allow appropriation without diversion, whereas the Idaho Constitution does allow such appropriation.

IV. CONCLUSION

The holding of *Colorado River Water Conservation District v. Colorado Water Conservation Board*, that diversion is not a constitutional necessity for appropriation of water, is not seriously open to question. As the Colorado Supreme Court indicated in that case, the word "divert" is used only once in the constitution and then only to negate any thought that Colorado would follow the riparian doctrine in the acquisition of water.[71] Furthermore, if a literal construction of the constitutional provision were pursued, it would mean that every person has an absolute right to divert, for a beneficial use, as much water as he/she needed. Because Colorado's water supply is finite, whereas the number of potential water users is infinite, such a strict construction addresses a factual impossibility. As indicated in the dissenting opinion in *Vogts v. Guerette*, constitutional generalities make for living documents which cover change in a developing society.[72]

In addition to the constitution itself, a long line of cases, beginning with *Thomas v. Guiraud*,[73] indicate that diversion is not always essential for an appropriation of water. These decisions have been reinforced by various pieces of legislation enacted from time to time, such as the "Meadow Act"[74] and Senate Bill 97.[75] Both of these statutes appear to allow appropriation for beneficial use without diversion.

Even though the decision of the Colorado Supreme Court has much to commend it, the case holding would have been more firmly grounded had the court overruled *Rocky Mountain* rather than distinguishing it. The facts of the two cases are so similar that to distinguish them is to attempt to distinguish the indistinguishable.

Moreover, the Colorado Supreme Court should have approached *State Department of Parks* in a different manner. By not clearly stating how that decision was reached and what factors it took into account, it appears that the Colorado Supreme Court was attempting to bootstrap an in-stream appropriation into existence without looking to the constitutional mandate.

69. COLO. CONST. art. XVI, § 6.
70. IDAHO CONST. art. 15, § 3.
71. 594 P.2d at 573.
72. 142 Colo. 527, 351 P.2d 851 (1960) (Frantz, J., dissenting).
73. 6 Colo. 530 (1883).
74. COLO. REV. STAT. § 37-86-113 (1973).
75. Currently codified in COLO. REV. STAT. §§ 37-92-102(3), -103(3)-(4), (10) (1973).

In spite of these weaknesses in the court's rationale, it seems that its interpretation of the word "divert," as used in the Colorado Constitution, will be longlasting. As our society grows and becomes increasingly complex, more and more people will seek to return to the basics of nature. "If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary."[76]

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76. Empire Water & Power Co. v. Cascade Town Co., 205 F. 123, 129 (8th Cir. 1913).