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A REVIEW OF RECENT ACTIVITY IN COLORADO WATER LAW‡

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Recent legislative, administrative, and judicial developments have significantly modified the procedures for adjudicating and administrating water rights in Colorado. In this article, Mr. Greer focuses on the procedures outlined in S. 81, noting in particular the shortcomings of S. 81 with respect to the problem of integrating the priorities of surface and ground water users. He also points out the major administrative developments which stem from the conflict between the use of ground and surface water and discusses the requirements of Fellhauer *as well as subsequent decisions which deal with the promulgation of rules and regulations for the administration of waters of the state. He concludes by considering the case of* United States v. District Court, *wherein the Colorado Supreme Court found that the water rights of the United States were subject to the jurisdiction of the Colorado district courts under their plenary powers; and the case of* Pikes Peak Golf Club, Inc. v. Kuiper, *wherein the court held that nontributary water was not subject to administration by the state engineer.*

INTRODUCTION

AS the demand for water in Colorado has grown, all three branches of government have become increasingly concerned with the use and administration of this valuable resource and have added significant substance to the body of Colorado water law. Recently, for example, the legislature has amended procedures of long standing for adjudicating, using, and modifying water rights; the executive, acting through an administrative body, has probed more deeply into the old underground-surface water conflict; and the judiciary has marked off new boundaries between state and federal rights in and powers over Colorado waters. This review will discuss these and other significant developments in all three areas of governmental activity.

I. LEGISLATIVE DEVELOPMENTS

The year 1969 witnessed the enactment of the most extensive and comprehensive water legislation in Colorado in recent years. Pursuant to the 1967 Water Study Act,[1] seven major water bills, prepared under the direction of the Natural Resources Coordinator, were introduced

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[1] COLO. REV. STAT. ANN. § 148-2-9 (Supp. 1967).

in the General Assembly. Of this package of seven bills, two were enacted into law after extensive revision:[2] S. 81, the Water Right Determination and Administration Act of 1969,[3] and S. 105, dealing with the office and duties of the state engineer.[4] Of these two, S. 81 made the most significant changes in the law.

The most important water legislation enacted since the Adjudication Act of 1943[5] and the core of the 1967 Water Study Act package, S. 81 provides entirely new procedures for adjudication and administration of water rights:[6] It abolishes existing water districts and irrigation divisions and substitutes for them seven new water divisions which have roughly the same boundaries and limits as the former seven irrigation divisions;[7] it provides that each division shall have a specific water

[2]Among the Water Study Act bills introduced which were not enacted were S. 75, 47th Assembly, 1st Sess. (1969), a volumetric limitation bill; S. 86, 47th Assembly, 1st Sess. (1969), which would have authorized the development of water projects with state funds; S. 87, 47th Assembly, 1st Sess. (1969), a bill which would have created water advisory committees, S. 88, 47th Assembly, 1st Sess. (1969), dealing with storage, reservoir refill, seepage recapture, and temporary conversion of direct flow water rights to storage water rights; and S. 104, 47th Assembly, 1st Sess. (1969), providing for exchanges and authorizing the division engineer to make certain requirements therein with respect to wells.

In addition, there were other water bills which were presented and enacted that were not a part of the Water Study Act. For example, S. 258 (COLO. REV. STAT. ANN. §§ 148-22-1 to -8 (Supp. 1969)) authorized the creation of river basin authorities with all the powers generally held by quasi-municipal corporations, including powers to raise revenue by taxing property and water rights and by issuing bonds. While it is envisioned that such authorities may eventually make use of such powers to construct and operate various water projects and to appropriate water and establish standards for its use within their territorial limits, no such authority has yet been created. Further, the County Commissioners of the counties making up the "Upper South Platte" river basin authority, as authorized by this enacted legislation, have considered and rejected such action. Other enactments amended the Ground Water Management Act. *Id.* §§ 148-18-3, -15 (Supp. 1969).

[3] The major portion of the 1969 Act deals with administering and adjudicating water rights and is designated COLO. REV. STAT. ANN. §§ 148-21-1 to -45 (Supp. 1969). The remaining sections of the Act deal with a variety of matters and are scattered throughout Chapter 148 of the statutes. [This Act is hereinafter cited as S. 81].

[4] *Id.* §§ 148-11-23 to -25 (Supp. 1969).

[5] Ch. 190, §§ 1-25, [1943] Colo. Sess. Laws 613-31 (repealed 1969); ch. 254, § 1, [1945] Colo. Sess. Laws 724 (repealed 1969); ch. 287, § 1, [1957] Colo. Sess. Laws 860 (repealed 1969).

[6] *See, e.g.,* COLO. REV. STAT. ANN. § 148-21-18 (Supp. 1969). The word "determination" is used to redefine actions analogous to, but broader in scope than, adjudications under the 1943 Act. For example, judicial approval of "Plans for Augumentation," defined as "detailed programs to increase the supply of water" by a variety of techniques limited in number and scope only by a water user's resourcefulness and imagination (*id.* § 148-21-3(12)), is provided by the Act. *Id.* § 148-21-18(1). Similarly, a "change of water right" covers not only the familiar changes in point of diversion but also includes virtually every conceivable kind of change in type, place and time of diversion and of use of water, thus providing procedural devices whereby the owner of a water right may obtain prior court approval of various kinds of changes and modifications of his right in addition to changes in point of diversion. *Id.* § 148-21-3(11). For further discussion of these provisions of S. 81, see Note, *A Survey of Colorado Water Law,* 47 DENVER L.J. 226, 296 (1970).

[7] *Id.* § 148-21-8. The appointment of a division engineer for each division is authorized. *Id.* § 148-21-9. Each division engineer may establish one or more field offices with a water commissioner for each such office. Hence, though the official boundaries between the old water districts are obliterated, the water user is likely to find familiar faces at the new field offices.

judge who is to be a district judge and who alone is authorized to act with respect to "water matters"[8] for all of the district courts situated within the water division; and it makes provision for each division to have a water clerk who is to be an associate clerk of the district court and who is to maintain records of all proceedings of the water judge.[9] In addition, the water judge of each division, unless he elects to perform such functions himself,[10] shall appoint such referees as may be necessary[11] for the purpose of making investigations[12] and rulings[13] on applications for water determinations or changes of water rights which are regularly referred to the referees by the water judge.[14]

The general procedural plan of S. 81 requires a water user who desires a determination or a change of water rights to file an application[15] with the water clerk of the appropriate division. This application is then referred by the water judge to a referee who makes an initial determination[16] after due notice of the application has been given to other users[17] and after the referee has made such investigations as he may find necessary to determine the truth of the representations made in the application (or in the statement of opposition filed by an opponent).[18] Since this ruling by the referee is subject to judicial review by the water judge in a formal hearing,[19] it may be confirmed, modified, reversed, or reversed and remanded.[20] Yet in any event, the

[8] *Id.* § 148-21-10.

[9] *Id.* § 148-21-11. It should be noted that it is incorrect to refer to a Colorado "water court." The new legislation does not create a water court, as such, but merely authorizes one of the several district judges sitting in the several district courts within a water division to be designated Water Judge to hear all water matters arising within the geographic boundaries of that division. S. 81.

[10] COLO. REV. STAT. ANN. § 148-21-10(5) (Supp. 1969).

[11] *Id.* § 148-21-10(4).

[12] *Id.* § 148-21-18(4).

[13] *Id.* § 148-21-19.

[14] *Id.* § 148-21-10(7). For further discussion of water judges, water clerks, and referees, see Note, *A Survey of Colorado Water Law,* 47 DENVER L.J. 226, 296 (1970).

[15] A water user may apply for a

> determination of a water right or a conditional water right and the amount and priority thereof including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, determination with respect to a change of a water right, approval of a plan for augmentation or biennial finding of reasonable diligence.

Id. § 148-21-18(1).

[16] *Id.* § 148-21-17(2).

[17] *Id.* § 148-21-18(3).

[18] *Id.* § 148-21-18(4).

[19] *Id.* § 148-21-20(3). A careful reading of the statute is required for a full appreciation of the somewhat intricate procedural timetables for processing an application. Such timetables and a useful "flow chart" showing the process in a diagram form have been published. *See* Colorado Water Congress Newsletter No. 7, July 2, 1969 (Supp.).

[20] *Id.* § 148-21-20(5).

final ruling is embodied in a judgment and a decree subject to appellate review.[21]

In addition to providing procedures for adjudicating determinations of water rights, S. 81 provides for division-wide inventories or "tabulations" of decreed rights to be completed by the offices of the several division engineers.[22] When the tabulation is accomplished, the various lists of rights and priorities in the 70 former districts will have been integrated and consolidated into priority lists of all appropriators who take water from the same source without regard to the former district boundaries. The division engineers are currently authorized to omit from the tabulated lists of water rights those rights which they determine to be abandoned,[23] but at the time this article was written substantial amendments to the tabulation and abandonment sections had been proposed and appeared likely to be enacted.[24]

S. 81 also provides a response to the need for integrated administration of the diversion of surface and underground water supplies, one of the major objectives of the Water Study Act. It approaches the problem by permitting the owner of a surface water right to secure authorization to have a well used as an alternate point of diversion for the surface right, provided that the well is situated so as to draw water from the same stream system as the surface right.[25] Wells which are not so situated are to be integrated into the lists of priorities for their respective water divisions, and the priority is determined by the date of the actual appropriation, if the well owner files an application for such determination before the cut-off date of July 1, 1971.[26] How-

[21] *Id.* § 148-21-20(9). For additional discussion of the procedure provisions of S. 81, see Note, *A Survey of Colorado Water Law,* 47 DENVER L.J. 226, 298 (1970).

[22] *Id.* §§ 148-21-27 to -28 (Supp. 1969).

[23] *Id.* § 148-21-28.

[24] Pursuant to recent legislation, the Legislative Council Committee on Water was appointed and held public meetings during the latter months of 1969 throughout the state at which the impact of the 1969 legislation was reviewed and users' suggestions received. H. J. Res. No. 1034, [1969] Colo. Sess. Laws 1286-88. The Committee reported that water users were apprehensive that the tabulation and abandonment sections might unfairly and adversely affect existing rights. Specifically, they felt that abandonment proceedings should be separated from the tabulation process and should include provisions for notice and court hearings with a burden of showing abandonment to be placed on the state water officials. Additional concern was expressed that the initial tabulation proceedings scheduled for completion by July 1, 1970, could not be completed by that time. [Ed. note: the tabulations were not completed by that time]. Amendments designed to separate abandonment proceedings from the division engineer's tabulation process, to postpone the first tabulation, and to reschedule subsequent periodic tabulations have been suggested. *See* COLORADO LEGISLATIVE COUNCIL, PROPOSED AMENDMENTS TO 1969 WATER LEGISLATION 3 (Research Pub. No. 147, 1969). These amendments were not, however, enacted by the General Assembly in the 1970 session. For additional discussion of the tabulation procedures see Note, *A Survey of Colorado Water Law,* 47 DENVER L.J. 226, 305 (1970).

[25] COLO. REV. STAT. ANN. §§ 148-21-17(a)-(d) (Supp. 1969).

[26] *Id.* § 148-21-22. The date is July 1, 1972, for wells in water division No. 3 (San Luis Valley). *Id.*

ever, this approach has not resolved all of the problems with respect to the integration of ground and surface water. The following report of the Legislative Council on Water in December, 1969, describes some of the difficulties which remain:

> Water users stated that they were having difficulty deciding whether to use their wells as alternate points of diversion under Senate Bill 81. The state engineer was asked for assistance in the form of suggested guidelines and methods to integrate ground and surface water use.
> The law was interpreted by some water users as permitting old surface rights from which water had never been obtained with any regularity, to be used to give the owners of such rights an unfair advantage in the priority system, especially over persons having only wells. In other words, wells with relatively junior priorities or dates of application, but attached to an unusable surface decree, might be given a relatively senior priority to wells which had been drilled much earlier, but which have no surface priority.
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> . . . .
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> One interpretation given to Senate Bill 81, which some senior water appropriators thought unfair, concerned charging the use of a well against a surface right. It was stated that the division engineer would require a senior appropriator who had a well to use the well at his own expense before he could put a call on the river. The objection was that a senior should be allowed to leave his well idle and call the river, or if juniors upstream wish to divert water when the senior is short, the juniors should pay for the operation of the well. The well was drilled for the purpose of adding to the water supply in some areas, but it could become merely a more expensive point of diversion for the same amount of water as used in the past.[27]

The general nature of the difficulties illustrated by these expressions of dissatisfaction with the provisions of S. 81 has been recognized for a number of years.[28] Yet a satisfactory and comprehensive solution continues to be elusive. Therefore, what appeared to be the last in a continuing series of legislative attempts to resolve the conflict between the use of ground and surface water may only be a temporary response.

II. ADMINISTRATIVE ACTIVITY

The major administrative developments in Colorado water law also stem from this conflict between the use of ground and surface water. In 1965, the General Assembly enacted legislation which authorized the state engineer to administer surface waters and "underground waters tributary thereto in accordance with the right of priority

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[27] COLORADO LEGISLATIVE COUNCIL, PROPOSED AMENDMENTS TO 1969 WATER LEGISLATION 3 (Research Pub. No. 147, 1969).

[28] *See, e.g.*, Kelly, *Colorado Ground Water Act of 1957*, 31 ROCKY MT. L. REV. 165 (1959); McHendrie, *Underground Water Legislation*, 23 ROCKY MT. L. REV. 439 (1950); McHendrie, *The Law of Underground Water*, 13 ROCKY MT. L. REV. 1 (1940); Moses & Vranesh, *Colorado's New Ground Water Laws*, 38 U. COLO. L. REV. 295 (1966).

of appropriation . . . ."[29] While the Colorado Supreme Court sustained this grant of authority to the state engineer in *Fellhauer v. People*,[30] it went on to state that for such regulation to be constitutional under the "equal protection clause of the fourteenth amendment of the United States Constitution and the due process clause in article II, section 25, of the Colorado constitution," it must be accomplished under and "in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of the regulative orders."[31]

After the decision in *Fellhauer,* the state engineer began almost immediately to promulgate rules and regulations for the administration of diversions of tributary ground waters[32] and by the date of enactment of S. 81[33] had completed the task subject to approval of the Attorney General.[34] These rules and regulations were to have become effective on August 8, 1969, and to have remained in effect until October 15, 1969.[35] However, before the state engineer had an opportunity to apply the new rules, the case of *Well Owners Conservation Association v. Kuiper*[36] was filed, seeking an injunction against the exercise of the regulations. The *Well Owners* case was set for trial on plaintiff's application for preliminary injunction on August 5, 1969. After the lapse of several days (during which time the rules were suspended and an application by the state engineer for a Writ of Prohibition failed

[29] Ch. 318, § 1, [1965] Colo. Sess. Laws 1244, *as amended* COLO. REV. STAT. ANN. §§ 148-21-34 to -36 (Supp. 1969). The general statute charging the state engineer with the responsibility for the administration and distribution of water of the State is COLO. REV. STAT. ANN. § 148-21-17 (Supp. 1969). Both the state engineer and his predecessor have actively administered those wells which, in their determination, have used water which is tributary to a natural stream. The case of Fellhauer v. People, 447 P.2d 986 (Colo. 1968) was one of several lawsuits which arose from such legislation. For an extensive discussion of the attempts to integrate ground and surface water, see Note, *A Survey of Colorado Water Law,* 47 DENVER L.J. 226, 331 (1970).

[30] Fellhauer v. People, 447 P.2d 986, 991 (Colo. 1968).

[31] *Id.* at 993.

[32] Drafts of proposed rules were available for discussion at informal and formal hearings held in Denver on March 24, 1969, and April 2, 1969, respectively.

[33] June 7, 1969. Early drafts of the rules and regulations recited that they were adopted pursuant to COLO. REV. STAT. ANN. § 148-11-22 (Supp. 1965) and *Fellhauer.* Enactment of S. 81, with its repeal of § 148-11-22 created certain doubts about statutory authority for the regulations. Later drafts recited authority for the regulations in those sections of S. 81 which amended or replaced § 148-11-22, *i.e.,* COLO. REV. STAT. ANN. §§ 148-21-34 to -36 (Supp. 1969), but the rules and regulations were required in any event by the constitutional standards stated in *Fellhauer.*

[34] *See* COLO. REV. STAT. ANN. § 3-16-2(8)(b) (Supp. 1967).

[35] Rules and Regulations, Office of the State Engineer, para. 1 (July 14, 1969) [hereinafter cited as Rules and Regulations].

[36] No. W-2 (Dist. Ct., Weld Co., November 20, 1969).

in the Colorado Supreme Court), an injunction was issued based upon numerous grounds among which were the following:

(a) There was no evidence on the part of the state engineer that shutting down of wells as proposed would produce water at the time when, and, at the point which, calls on the stream may be anticipated.[37]

(b) The regulations promote and encourage futile calls and permit senior appropriators to command the whole flow of the stream, merely to facilitate the taking of a fraction of the whole flow.[38]

(c) The regulations do not take into consideration relative priorities of wells.[39]

(d) The regulations fail to require a surface decree holder to satisfy his needs by first pumping from wells located on the

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[37] The Rules and Regulations provide:

> 5. In administering waters of the state, the state engineer, division engineers and authorized representatives shall consider the weather conditions, present and prospective water supply conditions, records of the state engineer's office, past experience gained in administering water, and any other pertinent conditions, in implementing the rules and regulations set forth herein. Pursuant to these rules and regulations there shall be no curtailment of any diversion, whether it be by surface diversion, wells, or any other means, unless such curtailment together with other curtailments shall result in a reasonable lessening of material injury to a senior appropriator requiring water in time of shortage or projected shortage.

Good intentions do not appear to be enough. While the courts may now generally accept the principle that surface and underground waters are hydrologically interconnected in such a way that well pumping affects surface flows at *some* time and place, they may require, as between well user and surface owner, some evidence that diversions by one affect the supply of the other at a time when the other is in need and, by virtue of his priority, eligible to curtail the use of the first. Rules and Regulations, *supra* note 35, para. 5.

[38] It has been suggested that the "futile call" problem is more or less inherent in the priority system because appropriation rules look exclusively to seniority, disregarding other equally important factors such as proximity of junior right to senior right and actual effect of junior pumping on senior rights. *See* Fellhauer v. People, 447 P.2d 986, 996-97 (Colo. 1968), *quoting from* Morgan, *Appropriation and Colorado's Ground Water: A Continuing Dilemma?* 40 U. COLO. L. REV. 133 (1967).

[39] 6. All rights to divert ground water that have not been adjudicated according to Colorado law, shall be administered as if they all had the same date of priority and the same right to divert until such time as these rights have been adjudicated. The priority dates of those ground water rights which have heretofore been adjudicated shall be fully recognized; provided, however, that such adjudicated rights shall not be regulated to a greater extent than unadjudicated rights.

Rules and Regulations, *supra* note 35, at 997. The Court in *Fellhauer* invited presentation of this issue in clearest terms:

> These wells must be administered in accordance with priority, along with other factors. Offhand, we know of no reason why the state engineer cannot take into account the relative priorities of wells, subject to appropriate judicial review. However, the issues involved have not been presented too thoroughly in the briefs and, therefore, it will be the better part of wisdom for us not to speak determinatively. Also, these questions can better be presented after the state engineer acts according to plan, rules and regulations.

Fellhauer v. People, 447 P.2d 986, 997 (Colo. 1968).

lands supplied by the surface decree, and charging water pumped against his surface decree.[40]

(e) The regulations provide for the zoning of wells on a geographic basis contrary to law.[41]

(f) The regulations were prematurely promulgated, were discriminatory, arbitrary and capricious, contrary to law, unreasonable, vague and unenforceable, unconstitutional and void under the 14th Amendment to the Constitution of the United States, and article II, section 25, of the constitution of the State of Colorado.

Since S. 81 charges the state engineer with the responsibility of administrating and distributing waters of the state[42] and provides for the integration of ground and surface water,[43] the decree in the *Well Owners* case as framed appears to present a sufficient number of issues to provide not only amplification of the rule-making requirements of the *Fellhauer* case but also a thorough test of the groundwater sections of S. 81.

III. JUDICIAL ACTIVITY

The judiciary, like the other governmental branches, has also been adding to the body of Colorado water law. Two recent cases have provided the most significant developments in this area.

A. *United States v. District Court*[44]

In 1967 the Colorado Water Conservation District (petitioner) initiated proceedings in the District Court for Eagle County, Colorado[45]

[40] The proposed rules provided that an appropriator *may elect* to treat any well or wells as alternate points of diversion for part or all of any decreed surface right upon submission and approval of a written plan to the division engineer. The district court found unfairness in the elective approach in that it may permit a "double use" of wells and surface decrees. On the basis of policy declarations in S. 81 calling for integration of use of underground and surface uses, *e.g.*, COLO. REV. STAT. ANN. § 148-21-2(2) (Supp. 1969), the court found that the state engineer is *obliged* to charge pumped underground water against surface decrees when the water is used on the same lands by the same owners as is supplied by the surface decree before recognizing a surface "call" by the decree owner. Contrast the concern expressed by surface owners before the Legislative Council Committee, *supra* note 24.

[41] The proposed rules and regulations involved a plan of dividing river basins into strip zones paralleling the surface stream. Different regimens were to be applicable to wells in different zones to account for the time lag between diversion by pumping and its impact on the surface flow of the stream.

[42] COLO. REV. STAT. ANN. § 148-21-17 (Supp. 1969).

[43] *Id.* § 148-21-2. *See also* Note, *A Survey of Colorado Water Law*, 47 DENVER L.J. 226, 331 (1970).

[44] 458 P.2d 760 (Colo. 1969), *cert. granted*, 397 U.S. 1005 (1970). For another discussion of this case, see Moses, *Federal-State Water Problems*, 47 DENVER L.J. 194 (1970).

[45] The Colorado River water conservation district is authorized by law "to make filings upon . . . water and initiate appropriations for the use and benefit of the ultimate appropriators, and to do and perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing and domestic purposes." COLO. REV. STAT. ANN. § 150-7-5(3) (1963).

for supplemental adjudication[46] of priorities to the use of water in water district No. 37, irrigation division No. 5.[47] Several claimants appeared and entered the proceedings to have their claims adjudicated. The petitioner sought to make the United States a party under the consent-to-suit provisions of the McCarran Amendment.[48] The United States moved to have itself dismissed, but the motion was denied. The United States then sought a writ from the Colorado Supreme Court to prohibit the trial court from asserting jurisdiction over the federal government.

In support of its request for a Writ of Prohibition, the United States urged three arguments upon the court. First, the federal government contended that the McCarran Amendment covers only general adjudications of an entire river system in which all rights of all water users are before the court.[49] In support of this contention, the United States asserted that water district No. 37 was not an entire river system but only one of the tributaries of the Colorado River. It was further alleged that in supplemental adjudication proceedings in Colorado no priority earlier than the last preceding adjudication can be awarded;[50] that, therefore, not all the rights of all the users of the river system are affected or are before the court for determination at once; and that,

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[46] Pursuant to COLO. REV. STAT. ANN. § 148-9-7 (1963), there have been a number of previous adjudications in the district, the last of which was decreed in February, 1966. The United States has not been a party to these proceedings.

[47] "District No. 37 shall consist of all lands lying in the state of Colorado irrigated by waters taken from the Eagle River and its tributaries." COLO. REV. STAT. ANN. § 148-13-38 (1963). The Eagle River has its headwaters near the continental divide in southeastern Eagle County. It flows northerly and westerly, joined by Homestake, Cross, Gore, Brush, Gypsum and other small creeks, to its confluence with the Colorado River near Dotsero at the west boundary of Eagle County. It drains portions of the White River National Forest and the Camp Hale Military Reservation.

[48] 43 U.S.C. § 666 (1964), which provides in part:

> (a) Consent is given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
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> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Id.

[49] United States v. District Court, 458 P.2d 760, 762 (Colo. 1969), *cert. granted,* 397 U.S. 1005 (1970).

[50] Hardesty Res., Canal & Land Co. v. Arkansas Valley Sugar Beet & Irr. Land Co., 85 Colo. 555, 559, 277 P. 763, 765 (1929).

consequently, the provisions of the McCarran Amendment are not applicable.

The second major argument of the United States also stemmed from the supplemental adjudication proceedings.[51] Specifically, the federal government argued that it has rights with dates of initiation earlier than the latest priority dates awarded in district No. 37, but that because of the rule that no priority earlier than the last decreed priority can be awarded in a supplemental adjudication, the Eagle County District Court is powerless to award the United States its actual priority dates. The effect is to bind the United States to decrees in past adjudications to which it was not a party.

The third contention involved the federal government's claim to reserved water rights[52] based on federal law which assertedly entitles the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject to water rights vested as of the date of any particular withdrawal.[53] With respect to these reserved rights,

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[51] United States v. District Court, 458 P.2d 760, 762 (Colo. 1969), *cert. granted,* 397 U.S. 1005 (1970).

[52] *Id.*

[53] The exact nature of the United States' types of claims only recently became known. Mr. Justice Groves noted in his opinion:

> In its application here, the United States makes the statement, "The court had no jurisdiction to adjudicate rights other than those arising under Colorado law, but the United States claims rights otherwise arising." We are not sure whether by this statement the United States asserts that none of its rights have arisen under Colorado law. For the purpose of our discussion we will assume that it claims both (a) water rights reserved in connection with the withdrawal of public lands and which it asserts have not arisen under Colorado law and (b) appropriations arising under Colorado law . . . .
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> The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially ante-dating several of the supplementary decrees in Water District 37 under the authority of Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542; Federal Power Commission v. Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215; Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340; United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S.Ct. 770, 43 L. Ed. 1136.

Id. at 768. The United States affirmed the dual nature of its claim in its application for *certiorari* in the United States Supreme Court. Petitioner's Brief for Certiorari at 3, United States v. District Court, 458 P.2d 760, *cert. granted,* 397 U.S. 1005 (1970). Actually, the United States has not formally claimed water rights in Water District No. 37 by filing in court but has merely informally advised the various courts before which it has appeared at stages of this proceeding of its assertions of water rights. The Colorado Supreme Court was particularly troubled by this fact, saying:

> Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This created an undesirable, impractical and chaotic situation.

Id. at 765.

See generally 2 E. MORREALE, WATERS AND WATER RIGHTS 1-109 (R. Clark ed. 1967).

the United States asserted that district courts in Colorado have no jurisdiction since such rights are nonappropriative and do not arise under state law.[54]

The Colorado Supreme Court rejected these arguments and discharged a rule to show cause why the writ should not be granted. The court found from legislative history[55] that Congress intended to authorize state jurisdiction over federal water rights and that the Colorado court adjudication procedure was fully comprehended within the consent given in the McCarran Amendment. No distinction between original and supplemental proceedings was intended but rather, Congress meant only to exclude private disputes from its waiver of immunity.[56] Differences between Colorado's procedures for adjudication of rights in segmentary districts and those of other states for statewide or drainage basin-wide adjudications are differences only in degree and do not support any attempt to exclude Colorado on the ground that it does not adjudicate rights of an entire river system at once.[57]

With respect to the United States' claims to appropriative priorities antedating those already awarded in prior decrees, the court suggested that the United States may collaterally attack decrees to which it was not a party. The court stated:

> However, the decree can speak only as to matters within the jurisdiction of the court, and where the court in such a statutory proceeding attempts to determine matters beyond its competence, its decree, as to such matters, is not conclusive; "If the court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the court had jurisdiction of the parties and of the subject-matter." [citations omitted][58]

The court thus indicates that courts in earlier adjudication proceedings

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[54] This argument is apparently double-barreled. It says (1) that the adjudicative jurisdiction of district courts in Colorado does not provide for and encompass water rights which are outside the appropriation system and (2) Congress did not intend to consent to suits for the adjudication of its reserved rights when it enacted the McCarran Amendment.

[55] The Court quoted and relied on the Desert Land Act, ch. 107, § 1, 19 Stat. 377 (1877), *as amended* 43 U.S.C. § 321 (1964); Reclamation Act, ch. 1093, § 8, 32 Stat. 39, *as amended* 43 U.S.C. § 372 (1964), and legislative history of the 1952 McCarran Amendment.

[56] The United States has argued that the McCarran Amendment relates only to general adjudications, not supplemental ones, since it is objectionable to the government to be subjected to the burden of piecemeal litigation. The Court noted that Colorado's supplemental proceedings are general in the sense of being quasi-public in nature as opposed to being private suits.

[57] The court observed that COLO. REV. STAT. ANN. § 148-9-17 (1963) effected a correlation between water districts and that S. 81 creates a water division for each river system after 1969 so that the same practical result obtains in Colorado as in other states not having water districts. United States v. District Court, 458 P.2d 760, 767 (Colo. 1969).

[58] *Id.* at 771 (citations omitted).

lacked jurisdiction to "fix and settle" rights of users in such a way as to exclude the United States from priority.[59]

As to the argument of the United States that its reserved rights were beyond the reach of state courts, the court found jurisdiction under the *plenary* powers of Colorado district courts[60] sufficient to make the relative rights of the United States the subject of their decrees and to bring all necessary parties before them. The court held that the McCarran Amendment was intended to give consent to suit with respect to the reserved rights although the court declined to decide whether or not the United States actually has any such reserved rights,[61] noting that the federal government has yet to present such rights to a trial court so that issues of law and fact may be clearly drawn.

Since this case touches upon both present and future[62] uses of water by the United States on public land and upon the rights of appropriators of waters of the state, its importance is apparent. The ultimate resolution of the issues which the case raises should affect virtually every water user within Colorado and should command continuing attention.

B. *Pikes Peak Golf Club, Inc. v. Kuiper.*[63]

Defendants (State Engineer Kuiper, the division engineer and water commissioners), acting for the purpose of protecting the supply of Fountain Creek and certain appropriators therefrom, ordered the plaintiff golf club to release certain water for the benefit of said appropriators. The golf club asserted that the water involved was salvaged water and that since it was not and never had been tributary to any natural water course, it was not subject to administration by state water officials. The District Court for El Paso County sustained the state engineer's order, and the plaintiff golf club appealed. The evidence showed that annually some 240 acre-feet of water, which the state engineer was requiring the plaintiff to release to Fountain Creek, had subirrigated natural hay and wild plants and had been lost to

[59] The court here likens the position of the United States to that of out-of-state users of Colorado water. For example, in West End Irrigation Co. v. Garvey, 117 Colo. 109, 184 P.2d 476 (1947), it was held that Utah users of water appropriated in Utah from Rock Creek which arises in Utah, flows into Colorado, and returns to Utah — might collaterally attack a Colorado decree affecting their rights even after the expiration of the four-year period prescribed by COLO. REV. STAT. ANN. § 148-9-17 (1963) for attacks on decrees by persons whose rights are outside the water district for which the decree was rendered.

[60] COLO. CONST. art. VI.

[61] The court outlined the arguments made to it on the reserved right question, noting Stockman v. Leddy, 55 Colo. 24, 129 P. 220 (1912) and observing that no authorities cited to it by the United States (*see* note 47 *supra*) are directly in point as far as its rights in Colorado are concerned.

[62] In disclosing the rights it considers it has by reservation, the United States designates various classes of uses some of which are called "current" and others, "foreseeable". Memorandum of United States in support of Motion to Dismiss at 13, *In re* Adjudication, Water District No. 37, No. 1529 (Dist. Ct. Eagle County, Oct. 1967).

[63] 455 P.2d 882 (Colo. 1969).

transpiration. The plaintiff golf club constructed an extensive drain system under the land thus irrigated and collected this water in a system of small ponds and reservoirs, having the effect of drying out a substantial portion of the lands previously subirrigated and making water available for irrigation of 95 acres of irrigated golf course. Improved drainage resulted in a net accretion to a Fountain Creek tributary below plaintiff's lands.

In reversing the judgment of the trial court, the Colorado Supreme Court noted that the thrust of the state engineer's order and the demand of the Fountain Creek appropriators was that the full 240 acre-feet per year collected and salvaged by the plaintiff should be released to the stream. Noting further that this 240 acre-feet of water was not historically tributary water, the court held that it was not subject to administration by the state engineer. In making this finding, the court relied upon two separate theories:[64] (1) the principle of salvaged water, as illustrated by the cited case of *Leadville Mining Development Co. v. Anderson,*[65] in which it was held that "[w]here a person by his own efforts has increased the flow of water in a natural stream, he is entitled to the use of the water to the extent of the increase";[66] and (2) the Colorado statutory doctrine of limited riparian rights in nontributary spring water,[67] exemplified by *Cline v. Whitten,*[68] in which it was held that a person owning land on which nontributary spring water arises is entitled to use such water on his lands.[69]

CONCLUSION

Although all three branches of government have recently been attempting to provide more efficient use and administration of water in Colorado, none of the solutions have been complete. In particular, significant problems with respect to the integration of ground and surface water and the relationship between the water rights of the state and federal governments need a more definitive response. Hence it can be anticipated that these difficulties will continue to cause uncertainty for water users and lawyers and that additional attempts to find solutions will be made by the legislature, the executive, and the judiciary.

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[64] *Id.* at 884.

[65] 91 Colo. 536, 17 P.2d 303 (1932).

[66] *Id.* at 537, 17 P.2d at 303.

[67] COLO. REV. STAT. ANN. § 147-2-2 (1953), *as amended* COLO. REV. STAT. ANN. § 148-2-2 (1963).

[68] 144 Colo. 126, 355 P.2d 306 (1960).

[69] *Id.* at 128, 355 P.2d at 884.