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Water for Recreation: A Plea for Recognition

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WATER FOR RECREATION: A PLEA FOR RECOGNITION

INTRODUCTION

The State of Colorado has reason to be concerned with the allocation of water resources in order that the use thereof will not be denied for recreational purposes. The importance of the recreational use of water both to Colorado residents and to its tourist industry is indicated by a survey of various statistics. In 1965 alone 416,793 resident and non-resident fishing and combination fishing and small game licenses were sold[1] bringing in a revenue of $1,838,559.[2] $69,176,055.23 was spent by resident and non-resident fishermen in Colorado in the same year.[3] In 1966, 462,337 fishermen spent nearly twenty-five million hours fishing in Colorado.[4] Of a total of 31 state parks and recreation areas, only two are non-water oriented.[5] In 1966, 1,871,843 persons attended these parks and recreation areas.[6]

These figures cannot but emphasize the importance to the people of Colorado of the state's water resources and their desirability for recreational use. It becomes important to inquire into what action can be taken to insure that water will be available in the future for recreational use. The importance of the issue is increased by the fact that in normal, non-drought years, Colorado water at least in the Arkansas, South Platte and Rio Grande basins is already over-appropriated.[7]

In its constitution, adopted in 1876, Colorado declared its adherence to the appropriation system of allocating water resources.[8]

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
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> Colo. Const. art. XVI, § 5

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[1] Colo. Game, Fish & Parks Dep't, Game Management Div., Economic Value of Hunting & Fishing to the People of the State of Colorado — 1965, March 31, 1966.

[2] *Ibid.*

[3] *Ibid.*

[4] Colo. Game, Fish & Parks Dep't, Information & Education Div., Fact Finder, April 16, 1967.

[5] Colo. Game, Fish & Parks Dep't, Fish Management Div., Colo. Park and Recreation System.

[6] Colo. Game, Fish & Parks Dep't, Information & Education Div., Fact Finder, April 16, 1967.

[7] Interview With Colorado Deputy State Engineer, William R. Smith, in Denver, Colo., April 10, 1967.

[8] The appropriation system has been adopted by most of the arid western states. SAX, WATER LAW 1 (1965). This system permits a user to obtain a right to water without the necessity of owning or occupying the land adjacent to the surface stream or lake as is required under the riparian system.

> 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.
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> Colo. Const. art. XVI, § 6

The constitutional provisions raise the major issue with which this note is concerned: whether or not water for recreational uses can be appropriated. The possibility of appropriating water for recreation is first discussed as though there were adequate supplies of water available for appropriation. The subsequent portion of the paper is devoted to a discussion of the need for compensation if unappropriated waters are unavailable, and to the desirability of a permit system as such a system would relate to the preservation of water for recreational use.

I. Appropriation of Water for Recreational Use

The elements traditionally recognized as being necessary to accomplish an appropriation of water are a declared intent to use the water for a beneficial use, a diversion of the water from the stream, and an application of the water to the intended use within a reasonable time.[9] The problems posed for a recreational use by the required elements are the scope of "beneficial use" and the need for a diversion.

A. *Beneficial Use*

The requirement of a beneficial use is explicitly stated in the Colorado Constitution.[10] The Colorado Supreme Court decisions have consistently recognized the necessity for a beneficial use.[11] The problem arises in defining the scope of beneficial use in order to discover whether or not a recreational use of water is within that scope. The Colorado Constitution does not provide that definition, but instead merely names three possible uses and arranges them in a hierarchy, giving use for domestic purposes precedence over agricultural use, and agricultural use priority over water use for manu-

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[9] Kinney, The Law of Irrigation 227-28, 242, 246-50, 252 (1894); Sax, Water Law 10 (1965).

[10] Art. XVI, § 6.

[11] See, *e.g.*, Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 79 P.2d 373 (1938); Drach v. Isola, 48 Colo. 134, 109 Pac. 748 (1910); Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028 (1889).

facturing.[12] Several states have expressly declared, by statute, that recreation is a beneficial use.[13] On March 9, 1966, the General Assembly of Colorado approved an act to prevent and control water pollution and for the first time mentioned "recreation" as a beneficial use.[14] By statute Colorado has also stated that the use of water for private and public bathing establishments is beneficial.[15]

There is no Colorado Supreme Court case which would indicate definitively that that court would consider a recreational use of water beneficial. Some cases seem to assume that the constitution intended an economic use when it used the word beneficial.[16] Other cases emphasize the idea of economic in the sense that the use be not wasteful.[17] Under either interpretation a recreational use could be justified.

In a case that was subsequently overruled, but on different grounds, the Colorado Federal District Court held that recreation is a beneficial use.[18] In that case, the Cascade Town Company sued to enjoin the defendant power company from storing water in reservoirs and piping it down the mountain, taking the water from the creek from which the plaintiff derived its water source. The defendant's action would dry up the creek which flowed through the plaintiff's property and destroy a waterfall which created luxuriant vegetation from its spray and mist. The plaintiff had spent a significant amount of money to improve the area as a resort. The trial court decided that the plaintiff's use of the water to promote an environment conducive to rest and relaxation was beneficial and, on this basis, granted the injunction. The Eighth Circuit, on appeal, reversed the district court's ruling.[19] Although the appellate court agreed that the promotion of rest and relaxation is a beneficial use,[20] it interpreted the lower court decision as being based on an

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[12] COLO. CONST. art. XVI, § 6. It has been noted that the drafters of the Colorado Constitution probably intended a "true preference," *i.e.*, a use not necessitating compensation if displacing an inferior use, but the Colorado court has held compensation necessary. THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 124-25 (Haber & Bergen ed. 1958).

[13] IDAHO CODE ANN. § 67-4301 to -4305 (1949); KAN. GEN. STAT. ANN. § 82a-707 (1964); OKLA. STAT. ANN. tit. 82, § 577 (Supp. 1966); ORE. REV. STAT. § 536.310 (1965); TEX. CIV. STAT. ANN. art. 7471 (Vernon 1964).

[14] Colo. Sess. Laws 1966, ch. 44, § 1, at 199.

[15] COLO. REV. STAT. § 148-2-3 (1963).

[16] Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933) (water diverted for *commercial* propagation of fish is beneficial use); *cf.* Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729 (1908) (fish propagation not beneficial use).

[17] Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908); Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532 (1896).

[18] Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011, 1017-18 (D. Colo. 1910), *rev'd on other grounds*, 205 Fed. 123 (8th Cir. 1913).

[19] Empire Water & Power Co. v. Cascade Town Co., 205 Fed. 123 (8th Cir. 1913).

[20] *Id.* at 128.

appropriation for irrigation. The circuit court found that the trial court's emphasis on the artistic beauty of the waterfall resulted in that court's overlooking the effectiveness of the plaintiff's use of the water as compared with more customary methods of irrigation. The appellate court felt utility, not beauty, was the dominant idea of the lawmakers and therefore the Cascade Town Company could not claim all of the water unless it was efficiently using all of it.[21]

Since we are without any clear judicial pronouncement establishing recreation as a beneficial use, it is to be hoped that the legislature will, at the next opportunity, reinforce its intent as expressed in the 1966 water pollution act and declare recreation to be a beneficial use within the broad scheme of water appropriations.

B. *Diversion*

Another element often considered necessary to complete an appropriation of water is that of a diversion. The term "diversion" contemplates a taking of the water from the stream so that it may be applied to the intended beneficial use. The cases in which insistance on a diversion is made require, for the most part, some affirmative *act* of the appropriator.[22] Thus, the cases are referring not to a natural diversion, but to a mechanical one. However, Colorado cases are far from uniform in requiring a diversion. In the early case of *Larimer County Reservoir Co. v. People ex rel. Luthe*[23] the state contended that since the constitution recognized appropriation by diversion, it thereby excluded appropriation without a diversion.[24] The state brought a quo warranto proceeding to obtain the forfeiture of the company's corporate franchise claiming that the company could not use the bed of a non-navigable natural stream as a reservoir. The court, in refusing to uphold the state's claim, declared that an appropriation requires no immediate diversion. Rather, said the court, the true test of an appropriation is the successful application of the water to a beneficial use and the method of distribution or diversion is immaterial.[25] The court adopted the California Supreme Court's definition of appropriation as "the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use."[26] The Colorado court added that the appropriation is legally completed when the act evidencing the intent is performed,

[21] *Id.* at 129.

[22] See, *e.g.*, City and County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 386, 276 P.2d 992, 1001 (1954); Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 361, 79 P.2d 373, 378 (1938).

[23] 8 Colo. 614, 9 Pac. 794 (1885).

[24] *Id.* at 616, 9 Pac. at 796.

[25] *Ibid.*

[26] *Ibid.*

noting that the act must be followed up within a reasonable amount of time,[27] *i.e.*, steps must be taken to apply the water to the intended beneficial use. Numerous other cases have followed the example of *Larimer* in stating that an appropriation of water does not require a diversion.[28]

Other cases insist just as strongly that a diversion is essential.[29] A recent case in which the requirement of a diversion defeated the plaintiff's claim to water rights is *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*[30] In this case, the district claimed water rights under a Colorado statute which gave the district the power to hold for the public use enough water of any natural stream to maintain a stream flow for the preservation of fish.[31] The trial court dismissed the district's claim and the supreme court affirmed basing its decision on the necessity of a diversion.[32] Surprisingly enough in view of the above discussion, the supreme court added that the legislature could not have intended to depart so radically from established doctrine by not requiring a diversion and that therefore the statute worked no such departure.[33] Although the case was decided as if the plaintiff were attempting to establish a right to the use of water, the statute might have been viewed as an exercise of the police power and this would not involve the question of appropriation.

The most probable reason for the elusiveness of the requirement of diversion is that, in most cases, in order to use the water, it must be taken from the stream. In an early treatise, Kinney stated that the theory of the appropriation system is based upon a prior possessory right and that no possession or exclusive property could be obtained without diverting the water from its natural channel.[34] The unusual case is that of the *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*[35] in which a stream flow was desired to be maintained without any need for taking the water from the stream.

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[27] *Id.* at 617, 9 Pac. at 796.

[28] Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011, 1018 (D. Colo. 1910), *rev'd on other grounds,* 205 Fed. 123, 129 (8th Cir. 1913); Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960); Thomas v. Guiraud, 6 Colo. 530, 533 (1883).

[29] See, *e.g.,* Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965); City and County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 386, 276 P.2d 992, 1001 (1954); Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 361, 79 P.2d 373, 378 (1938); Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729 (1908).

[30] 406 P.2d 798 (Colo. 1965).

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

[32] Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798, 800 (Colo. 1965).

[33] *Ibid.*

[34] KINNEY, THE LAW OF IRRIGATION 252 (1894).

[35] 406 P.2d 798 (Colo. 1965).

Thus, although cases recognize that there can be an appropriation without diversion[36] they contemplate a subsequent diversion, which is what they refer to when stating that the act evidencing the intent to appropriate must be followed up with reasonable diligence.[37]

There are several statutory provisions which indicate that a diversion need not always be required. Under the "Meadow Act" no mechanical diversion was required.[38] The present Colorado statute which succeeds that act allows persons who have used the natural overflow of a stream for irrigation to construct ditches and claim a priority as of the first use if the natural overflow should diminish.[39] It will be noted that, although there was no mechanical diversion when the water was first claimed, the water left the stream. Another Colorado statute[40] provides for the storage of water in stream beds if the proper steps are taken to comply with measurement requirements which insure that the reservoir owner will not encroach on the water rights of senior appropriators.[41] Allowing the storage of water in stream beds certainly indicates that at least no immediate diversion is essential to acquire a right to water.

Even though they do not require an immediate diversion, all of the cases and statutes discussed above, with the exception of one,[42] contemplate a diversion in order to use the water. But the use of water for recreation does not necessarily require a diversion for it is often a non-consumptive use[43] which is effected while the water remains in the stream bed. Should a diversion still be required in a case such as this in which it is unnecessary? That there are valid reasons for requiring a diversion cannot be denied. The diversion helps in establishing exclusive possession; it aids in determining the amount of water appropriated; and it gives others notice of a prior claim to the use of the water.[44] But there are alternative

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[36] See note 28 *supra.*

[37] Larimer County Reservoir Co. v. People *ex rel.* Luthe, 8 Colo. 614, 9 Pac. 794 (1885).

[38] Colo. Sess. Laws 1877, § 37, at 106. For examples of cases brought under this act, see Broad Run Investment Co. v. Devel & Snyder Improvement Co., 47 Colo. 573, 108 Pac. 755 (1910); Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 Pac. 1093 (1909).

[39] COLO. REV. STAT. § 148-3-14 (1963).

[40] COLO. REV. STAT. § 148-7-17 (1963).

[41] A supplementary provision was added in 1965 which allows the state engineer to order water released from reservoirs in stream beds as necessary to prevent evaporation from the reservoir from depleting the natural flow which would otherwise be available to appropriators. COLO. REV. STAT. § 148-7-17(5) (Supp. 1965).

[42] Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965).

[43] But note that the preservation of a water level in a stream bed or lake, and especially in a reservoir, results in additional evaporation which must be taken into consideration. See note 41 *supra.*

[44] Comment, *Developments in Colorado Water Law of Appropriation in the Last Ten Years,* 35 U. COLO. L. REV. 493, 508 (1963).

measures that could be taken to obtain the same security without entailing the handicap of inflexibility inherent in requiring a diversion. A Colorado statute presently gives the state engineer supervisory control over the public waters of the state with authority to measure the flows of natural streams and to compute diversions.[45] Such authority coupled with a flexible permit system could provide the necessary security of an established water right while preserving and protecting valuable and scarce water resources.

II. THE USE AND REGULATION OF WATER FOR RECREATION

If an appropriation of water for recreational use is allowed and a diversion is not required, one must still face the problems of determining when such an appropriation may be made and under what conditions. Further, in some situations, an appropriation would be unnecessary to regulate water use. Several hypothetical situations must at this point be distinguished. If no claim has yet been made to the body of water one wishes to appropriate for recreational purposes, no real problems arise, assuming appropriation for a recreational use is recognized. It is this type of situation to which the first part of the paper has been directed. However, as soon as the preservation of water for recreation interferes with water rights previously acquired through appropriation, the issue of compensation is raised. Before discussing this issue, one must distinguish between a private use and a public use. Further, within the scope of a public use a "taking" under the power of eminent domain must be distinguished from regulation under the police power.

If an individual wishes to appropriate water for a recreational use, and the water source from which the individual wants to draw is already fully appropriated, the individual will be unable to achieve his goal. Certainly he could buy up any water rights offered for sale, but he cannot force a change in use to recreation. An individual apparently has in Colorado the power to condemn a prior right to the use of water,[46] but this power is limited to the situation in which the individual seeks to appropriate for a higher use, within the constitutional hierarchy,[47] than the use to which the water is currently being put.

The state, on the other hand, has both the power of eminent domain and the police power. It is often difficult in any given situa-

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[45] COLO. REV. STAT. § 148-11-3 (1963).

[46] Black v. Taylor, 128 Colo. 449, 457, 264 P.2d 502, 506 (1953) (court indicates constitutional preferences apply to individual appropriators if compensation); Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 Pac. 235 (1891) (court disallowed taking without compensation). For a brief discussion of preferences in Colorado, see Trelease, *Preferences to the Use of Water*, 27 ROCKY MT. L. REV. 133, 145-47 (1955).

[47] COLO. CONST. art. XVI, § 6.

tion to decide which power is being, or should be, used. The decision is an important one for on it hinges the right to compensation. If the state in the exercise of its power has *taken* the property of a citizen, the state has exercised its power of eminent domain, and compensation for the "taking" is required.[48] On the other hand, if the state action is merely regulatory, the act is within the police power, and any loss to the property owner is not compensable.[49] The problem is in drawing the line between regulation and taking.

A. *Eminent Domain*

The right to the use of water, established by an appropriation, is considered a property right[50] and thus is subject to the exercise of the state's power of eminent domain. The Colorado Constitution dedicated the water of natural streams to the public use and declared the same to be the property of the public.[51] The state has title to the water of natural streams and therefore the right to control its use.[52] But the usufructuary right[53] obtained by the appropriator has been held subject to compensation if taken under the state's power of eminent domain.[54] In *Town of Sterling v. Pawnee Ditch Extension Co.* it was said:

> That a city or town cannot *take* water for domestic purposes which has been previously appropriated for some other beneficial purpose, without fully compensating the owner, is so clear that further discussion seems almost unnecessary.[55]

The issues with which this paper is concerned, within the scope of eminent domain, are the possibility of taking water for recreational purposes and the discovery of situations in which state action would be considered a "taking."

It is clear that the state, or by delegation, municipal authorities, can exercise the power of eminent domain to secure water for municipal use,[56] and this is true though the prior appropriator was using the water for domestic purposes.[57] Given the nature of the power of

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[48] Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

[49] *Ibid.*

[50] *E.g.,* Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 53, 279 P.2d 420, 425 (1955); Taussig v. Moffat Tunnel Water & Development Co., 106 Colo. 384, 106 P.2d 363 (1940); Fort Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032 (1892).

[51] COLO. CONST. art. XVI, § 5.

[52] Stockman v. Leddy, 55 Colo. 24, 129 Pac. 220 (1912).

[53] See Pulaski Irrigating Ditch Co. v. City of Trinidad, 70 Colo. 565, 203 Pac. 681 (1922).

[54] Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960) (dictum); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 426, 94 Pac. 339, 340 (1908).

[55] 42 Colo. 421, 427, 94 Pac. 339, 341 (1908) (emphasis added).

[56] COLO. REV. STAT. § 139-32-1(78) (1963).

[57] Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908) (dictum).

eminent domain and lack of limitation thereon, it would seem clear that the state is not subject to the priorities of the constitution.

By statute the state has granted the power of eminent domain to municipalities to acquire property for recreational use.[58] If a city were to consider recreation high on a list of preferred public projects and should allocate funds to promote it, the city could condemn water and divert it to a recreational use under its statutory power.

The state has the power of eminent domain. The next issue is to decide when it is exercising the power and is, therefore, within the scope of the constitutional provision requiring compensation.[59] Joseph Sax has attempted to draw the line between a taking and a regulation by distinguishing between an economic loss resulting from the government's enhancement of its resource position in its enterprise capacity and a loss resulting from the government acting solely in an arbitral capacity.[60] According to Sax, the former would be a compensable taking; the latter would be a regulation within the police power and non-compensable. Under Sax's formula, a state agency or city acquiring water to provide a supply for domestic municipal use or for irrigation would clearly be exercising its power of eminent domain, if depriving a prior appropriator.[61]

Preserving water for recreational use, however, does not fall so neatly into either of Sax's categories. In most instances, the use of water for recreation is nonconsumptive.[62] But, the preservation of certain lake or stream levels might require different patterns of use for other appropriators, whether up or downstream, requiring either abstention from use during certain seasonal periods or abstention from use which would impair the desired levels. Any action by the state to insure the most beneficial use of the water might be seen either as an enhancement of its resources or as the performance of an arbitral function, depending on the viewpoint from which one approached the problem. The decision as to which power should be used to control the allocation of water is ultimately one for the legislature to make.

B. *The Police Power*

Regulation of the use of water for recreational purposes could be justified under the police power. The police power has often been very broadly interpreted to allow state action to protect the health,

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[58] COLO. REV. STAT. § 114-1-4 (1963).

[59] COLO. CONST. art. II, § 15.

[60] Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964).

[61] See, *e.g.*, Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908).

[62] One must recall, however, that evaporation from water stored for recreational use could be considerable.

morals, safety and welfare of the community.[63] The limitations on the exercise of the power are few. All property is held subject to a reasonable exercise of the police power.[64] Reasonableness requires that legislation in exercise of the police power serve a legitimate public purpose and bear a reasonable relationship to the desired goal.[65] Recognized goals, for the attainment of which the exercise of the police power has been legitimated, include development and conservation of a state's resources.[66]

In an early case, the Colorado Supreme Court held that legislation regulating the distribution of water through irrigation canals was within the state's police power.[67] Colorado's permit system, which applies only to underground water, is a further example of the use of the police power to regulate the use and development of a valuable natural resource.[68]

Whether or not the legislature would wish to exercise the power it possesses will depend on several factors, *e.g.*, the extent of benefit to the public, the quantity and quality of harm to the individual property owner, and alternative methods of achieving the same goal. As to the court's position, one writer has stated that in light of the Colorado court's liberal attitude toward the exercise of the police power and its restricted view of the power of the court to challenge regulatory legislation, "Colorado must be listed among the states which would uphold any extensive regulation of water resources."[69]

CONCLUSION

Colorado has important interests, both in the tourist industry[70] and in the health and welfare of its citizens, to consider in making any decision as to the best method of preserving a limited and valuable resource. The state also has an obligation under its constitution to protect the vested water right of an appropriator. Perhaps

[63] See, *e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). For an excellent analysis of the scope of the police power, see King, *Regulation of Water Rights Under the Police Power*, in UNIVERSITY OF MICHIGAN LAW SCHOOL, LEGISLATIVE RESEARCH CENTER, WATER RESOURCES AND THE LAW 271 (1958).

[64] Thiele v. City and County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

[65] King, *op. cit. supra* note 63, at 282.

[66] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 430 (1936); Geer v. Connecticut, 161 U.S. 519, 534 (1895); Maitland v. People, 93 Colo. 59, 23 P.2d 116 (1933).

[67] White v. Farmers' High Line Canal & Reservoir Co., 22 Colo. 191, 43 Pac. 1028 (1896).

[68] COLO. REV. STAT. § 148-18-1 to -15 (Supp. 1965).

[69] King, *op. cit. supra* note 63, at 318-19.

[70] According to a January 1967 report of The Colorado Visitors Bureau, 7,142,105 visitors came to Colorado in 1966 and spent $555,478,354. These figures can be compared to a total of 6,287,755 visitors in 1965 who spent $499,782,666. If these increases, exceeding 10% in one year, continue, the need for water for recreation will also increase.

one possibility of achieving a balance between these interests in time of conflict would be the adoption of a permit system to regulate the use of surface waters.

The ideal system of water law has been stated to consist of the following elements: (1) the system should encourage the development of water resources toward the optimum benefits of a limited resource; (2) the system should provide security to the water user for his investment; (3) the system should permit flexibility; and (4) the system should protect public interests in the water against waste and for use for navigation, fishing, and recreation.[71] A permit system could be designed that would aid in approximating the listed goals including the promotion of a recreational use of water. Obviously no system should have as its central theme the preservation of water for recreation. All systems, given the scarcity of a resource, should aim primarily at obtaining the maximum beneficial use of that limited resource. The latter goal will, even if only incidentally, promote the former. Given the fact that a recreational use is relatively non-consumptive, the recreational use to that extent would add to the benefit derived from the water.

A meaningful permit system must allow an administrative agency to view an individual's request for the use of water in comparison with other competing uses and in light of the overall quantity of a limited resource. The greatest problem in creating a useful permit system is deciding what standards to set as a framework for the administrative agency's decision as to what constitutes the "best" use of water at any given time. One way in which to make such a decision less crucial, and at the same time to make the permitted use of water more flexible and more able to meet changing needs and priorities, would be to limit the duration of a permit. If, for example, a certain lake now holds more than sufficient water to provide for recreational use, it would be wise to permit the use of at least some portion of the water elsewhere. If the time should come when the level of water in the lake is seriously impaired, and the most beneficial use is declared to be the preservation of the lake, a change in use patterns would be required at the expiration of the permit.

A permit system could be very significant in preserving water for recreational use if the legislature were to declare that use to be of high priority as a matter of public policy. The legislative declaration would weight recreation heavily in any administrative choice as to the preferred use of water at any given time.

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[71] Trelease, *Desirable Revisions of Western Water Law*, RESOURCES DEVELOPMENT: FRONTIERS FOR RESEARCH 203, 204 (Western Resources Conf. 1960).

It should also be noted, assuming a permit system is adopted,[72] that the regulation of water through the use of the permit system is an exercise of the police power and would not result in the need for compensation. The need to compensate could, however, be built into the permit system if such a result were desired. The statute could require reasonable payment for any change in use at the expiration of the permit, thus forcing the individual who can put the water to a more beneficial use to compensate the individual who is to lose his permit. It would be hoped that equity could be built into the permit system, for example, by allowing a permit to last long enough to permit a reasonable return on an original investment, without requiring compensation as uses change. The latter could force a recreational use, which has an inestimable non-monetary value, out of the system to the extent it is a consumptive use.

The adoption of the permit system would, hopefully, incorporate both flexibility and certainty into Colorado water law. No solution to a water use problem can guarantee both absolute flexibility and absolute certainty. Where the objectives conflict, each must give somewhat to achieve a desired balance. In the past, certainty has been emphasized. To preserve water for recreational use more flexibility is required than we now have.

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[72] Some questions might arise as to the constitutionality of a permit system as applied to surface waters in Colorado, considering the constitutional provisions set forth at the beginning of this paper. These questions cannot be addressed in the limited scope of this note. For an excellent analysis demonstrating the constitutionality of extensive regulation of a constitutionally created right to water, see King, *op. cit. supra* note 63.