Denver Law Review

Volume 31 | Issue 1 Article 4

June 2021

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WHO HAS THE BETTER RIGHT TO NON-TRIBUTORY GROUND WATERS IN COLORADO—LANDOWNER OR APPROPRIATOR?

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I am flattered by the opportunity your chairman has given me to participate in the program of this highly important and reputable water section of the Colorado Bar Association. I would like to think that the invitation was prompted by his belief that I might have something worthwhile and interesting to say. But I know it to be a fact that in his desire to save his flock from the usual bloodshed that accompanies these gatherings, he looked to me, a representative of the state university, as his one safe choice, free of factional ties and territorial loyalties, and fair game for you rapier minded veterans of many a water battle to draw and quarter in the sport of the morning. His precaution was unnecessary. For while the subject of today's program is a controversial one, it is unique in the ever controversial water law field in that the multiple points of view which it raises do not represent territorial differences. His ambush, I have hoped to avoid by stacking the rostrum with John Clayton of Greeley and Ray Moses of Alamosa, men I will be confident to pit against the deans among you in any jousts that follow our remarks.

As you all know, in eighty years of water resource development in this state, almost no attention has been given by our courts and legislature to the nature of private rights to percolating ground waters that do not flow in any well defined channel and which are not demonstrably tributory to surface or underground natural streams. In the early days landowners drilled many wells, principally for domestic uses, without claiming appropriation rights in the underground aquifers on the basis of their priority of use. There seemed to be an abundance of water for all their present and contemplated future uses. It is safe to assume from the absence of filings, the absence of adjudications of priorities and the absence of any legislation limiting or apportioning ground water uses that the majority believed that the common law gave them rights to such waters incident to the title to their lands.

But in the last fifteen years, as ground water uses have rapidly increased, have produced overdrafts upon many aquifers with low annual rates of recharge and have begun to lower water tables to the injury of existing wells, the lackadaisical unconcern of well users about the protection of their sources of supply and priorities of right has undergone quite a change. R.E.A. has brought inexpensive power to rural areas and has made possible large scale pumping operations for irrigation uses. New lands are being irrigated by ground waters remote from stream sources, and many

who have stream appropriations are sinking wells on adjoining lands to get a more dependable supply. Conflicts in interests are becoming increasingly acute and claims are being openly asserted to water rights, in some cases on the basis of priority of use, and in others on the basis of situs of land holdings over ground water aquifers. Pumpers are swamping the state engineer's office with filings on purported appropriations.

In response to these claims, the Honorable Paul Littler held an adjudication in 1948 in the District Court of Mesa County on waters found by him to be part of an artesian basin not tributory to any stream. Motions to dismiss, filed on the grounds that the court had no jurisdiction to adjudicate these waters, were denied, the judge concluding that the Supreme Court had early held that common law doctrines whether relating to surface or percolating ground waters have never been applicable in Colorado and that this was true even before the Constitution, and separate and apart from any legislation. He limited the decisions, however, to artesian waters on the basis that they were similar to the springs which may be appropriated under the waste, seepage, and spring water statute. (Discussed 26 Dicta 92.) The case was not appealed. This year the Honorable Henry S. Lindsley, sitting in Conejos County took the contrary position and ruled in the case of *Thomas v. Brady* that in the absence of a contitutional or statutory dedication of these waters to public use, they must be governed by the common law reasonable use or correlative rights doctrines. Concurrently with this action, however, another adjudication was started in District 3 under the direction of the Honorable Claude C. Coffin. My colleagues will give you on-the-spot reports of the circumstances leading to these current proceedings and the points of view and reactions of the people in the affected areas. I will try to lay a foundation for their remarks by reviewing the present status of the law, outlining the several alternatives open to our court and considering some of the obstacles the alternatives present to the administration of an effective ground water appropriation law.

Art. XVI, Sec. 5, of the Colorado Constitution declares that the water of every natural stream is the property of the public, rather than the property of riparian landowners, and makes such waters the subject of appropriations. The Supreme Court, conforming to the appropriation philosophy of the state, has given the phrase "natural stream" a liberal construction. It has confirmed appropriations under this section to the sublow of surface streams *Buckners Irr. Mill & Imp. Co. v. Farmer's Independent Ditch Co.*,[1] to underground streams, the channels of which can be distinctly traced *Medano Ditch Co. v. Adams*,[2] and to percolating waters which are sources of supply of surface or underground

[1] 31 Colo. 62, 72 P. 49 (1902).
[2] 29 Colo. 317, 68 P. 431 (1902).

water courses *Safranek v. Limon*,[3] and *Dalpez v. Nix*.[4] But even a liberal construction will not stretch the phrase "natural stream" to cover waters which are not tributory to either surface or underground channels. The Constitutional dedication has been supplemented by statute,[5] which subjects to appropriation non-tributory waste, surface and spring waters to the extent such waters are not needed by the owner of the land where they arise. This section does not cover percolating ground waters, though it was suggested in the Mesa County adjudication that wells in artesian basins were essentially the same as springs and might be brought under this statute by construction. Even if so construed, however, the statute would not give an appropriator of ground waters a paramount right to the man who could drill a well on his own land. Rights to non-tributory ground waters do not therefore stem from either constitutional or statutory provisions but must rest upon the common law applicable to this jurisdiction. That much is clear. But the uncertainties which are evidenced by the conflicting views of our judges arise from an absence of reliable guides as to which of four possible common law rules—absolute ownership, reasonable use, correlative rights and appropriation—is applicable in Colorado.

The absolute ownership doctrine stems from the English case of *Acton v. Blundell*[6] and has general application in England, the Eastern states, and, at one time, in a sizable number of the arid western states. It regards the percolating waters as part of the land in which they are found, and, pursuant to the *ad coelum* maxim, gives the surface owner an unqualified right to pump the water for use on his own land or as a commodity in trade. Injury to his neighbor, except as it may be caused maliciously, is regarded as *damnum absque injuria*. Under this view the water right is a vested property interest, not dependent upon use and beyond the power of the legislature to limit or destroy by regulatory conservation measures without just compensation to the user.

Although this doctrine has not positively been eliminated as a possibility in Colorado since strong and long standing local customs supporting it may still be shown, and if shown, would be persuasive on our court, it appears to be running such a poor fourth that it calls for no extensive consideration today. Notwithstanding statements in some of the early cases such as *Bruening v. Dorr*[7] that percolating water existing in the earth belongs to the soil, is a part of the realty and may be used and controlled to the same extent by the landowner, the court in the recent case of *Safranak v. Limon, supra*, has declared: "We have long since departed from the English common law doctrine of ownership of

[3] 123 Colo. 330, 228 P. 2d 975 (1951).
[4] 96 Colo. 540, 45 P. 2d 176 (1935).
[5] COLO. STAT. ANN., c. 90, §§ 20, 21 (1935).
[6] 12 Mees & W 324.
[7] 23 Colo. 195, 47 P. 290 (1896).

percolating waters by the surface owner. . . . Whether in such case [the case of non-tributory waters][8] we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined.

Reasonable use is likewise an ownership doctrine, but recognizes reasonable limitations upon the landowners' exploitation rights. It permits him to take all the water he can use for reasonable beneficial uses upon his land, but outlaws, as unreasonable, diversions to lands outside the source basin. It sets no quantitative limits, however, on individual use and allows pumpers to exceed the annual rate of recharge with impunity. In those areas of water scarcity that are committed to an ownership doctrine by statute or prior decision, this view has been gaining support. For unlike the absolutist doctrine, it tends to assure beneficial and non-wasteful use of a limited source of supply. Even under a statute declaring the proprietor to be the owner of waters percolating through his land, the Oklahoma court, prompted by these conservation objectives, has forbidden him to waste his waters and has limited him to reasonable uses upon his own land. *Canada v. City of Shawner.*[9]

Support for this doctrine may be found in Colorado, first, from the fact that it has a substantial following in states similar to ours, where common law proprietary rights may have arisen from long usage, but must now be curtailed to some extent in order to preserve a dwindling natural resource; second, from the fact that our court has recognized that other fugacious substances, namely, oil and gas, are owned in place by overlying landowners; third, by the approbation given by our legislature in the waste seepage and spring water statute to a comparable right of the proprietor of land to recapture non-tributory waters arising thereon, for, but only for, reasonable uses upon his own land; and finally, by the fact that the people of the state for some eighty years have probably assumed that they had some sort of proprietary interest in the waters that was incident to their rights in the soil. These customs have played an important part in the determination of water right, as the birth of the appropriation doctrine itself bears witness. Again in *Bristor v. Cheatham,* the Arizona court, upon rehearing a decision in which it had recognized an appropriation doctrine, reversed itself on the grounds that water users had relied for so long a time upon their ownership rights that it would not be proper to change the rule at this late date. In the *Sefranak v. Limon* case, our court seemed to ignore the American reasonable use doctrine as a possibility for Colorado, suggesting that the alternatives for non-tributary ground

[8] Explanation supplied by Author.
[9] 179 Okla. 53, 64 P. 694 (1937).

waters are correlative rights or appropriation. Its statements were, however, only dicta and were disregarded by the Honorable Henry S. Lindsley in the recent Conejos County proceeding, where he said the reasonable use doctrine should be the rule of that case.

Were this doctrine ultimately to receive the blessings of our highest court, I foresee serious consequences. In the first place, I have grave doubts that it could ever be displaced, either by statute or constitutional amendment, by a priority system or any other system designed to curb overdrafts from and the ultimate exhaustion of many ground water reservoirs. For the right of each landowner to present and future beneficial uses of his ground water supply vested in him at the date of his patent and is neither limited nor lost by the insignificance or absence of past pumping operations. That statutory or constitutional limitations upon these rights would rest on thin ice was indicated by our court in *Strickler v. Colorado Springs*, where it was said: "Art. XVI, sec. 5 and 6, (implementing the rule of priority for natural streams) are not intended to affect and do not affect prior vested rights, but all owners of such rights are entitled to compensation therefore before the same can be taken or injuriously affected." [states such as Wyoming which recognizes this rule have been unable to do more in their ground water codes than to require the filing of drilling information and the elimination of waste.] Even if an appropriation law, operating prospectively only, could be superimposed for conservation purposes upon such a proprietary system, we would face the confusion that has been inherent in the California dual system of water rights, a confusion which we have successfully avoided to date by strict adherence to the appropriation, and renunciation of riparian principles with respect to other waters of the state. Finally, under this view it is clear that the landowner has no property rights to the ground water level. So long as water is put to reasonable uses upon lands overlying the aquifer, competing pumpers can mine the source without liability and ultimately exhaust those aquifers with low annual rates of recharge. Being merely a modification of the absolutist doctrine, reasonable use has many of the same shortcomings, and should be recognized only if the state is already committed to an ownership view and must make the best of it.

The correlative rights doctrine championed only by California is merely an application of riparian law to ground waters. It regards all landowners who overlie an aquifer as joint tenants and allows each a reasonable proportion of the annual recharge for beneficial uses upon his own land. Any operation which lowers the water table or which transports water beyond the source basin is unreasonable *per se* and may be enjoined at the suit of injured tenants. Accordingly, it places quantitative limits upon the right a landowner would enjoy under the reasonable use doctrine.

Colorado has consistently rejected riparian law applications to surface waters and to underground streams. It has avoided thus

far the difficult administrative problems, which have long plagued the California court in its attempt under this doctrine to define the proportionate interests of overlying owners and the prescriptive rights of those who have effected a reduction in the water table. Superimpose on this system an appropriation doctrine for surplus waters, as California has done, and you have hopeless confusion. Only the very hardy, I believe, can read *Pasadena v. Alhambra,*[10] adjudicating the rights of overlying owners, claimants of prescriptive rights and appropriators to the waters of the Raymond Basin in California and still propose this doctrine for Colorado. Yet the court in *Safranek v. Limon* suggested this as the only alternative to appropriation.

A final possibility for our court and one I hope it will elect is the principle of appropriation. Rights based upon priority of use can exist and indeed have been held to exist in this and other states in the absence of any constitutional or statutory dedications. Idaho has subjected ground waters to appropriation by force of the common law alone. *Hinton v. Little.*[11] Utah sampled both reasonable use and correlative rights doctrines till 1935 when the court swept away all proprietary rights and held the rule of appropriation to have been law from the start.[12] Precedent exists for similar action in Colorado. In the case of *Coffin v. Left Hand Ditch Co.,*[13] our court speaking many years ago of surface streams but in words which would be equally applicable to ground waters said:

> It is contended that the doctrine of priority was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry and the soil when moistened by usual rainfall is arid and unproductive. Artificial irrigation for agriculture is an absolute necessity. . . . The right to water in this country, therefore, by priority of appropriation, we think it is and always has been the duty of the national and state governments to protect. *Snyder v. Colorado Gold Dredging Co.,* 181 Fed. 62; *Fort Collins Milling Co. v. Larimer Irri. Co.,* 61 Colo. 45, 156 Pac. 140.

The appropriation doctrine for ground waters has a full measure of rational and judicial support. First, it is the only common law doctrine that will preserve uniformity in our surface and ground water administration and apply a basic water policy throughout the State. In deciding that percolating waters were appropriable in Utah, the United States Supreme Court in *Snake*

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[10] 33 Cal. 2d 908, 207 P. 2d 17 (1949).
[11] 50 Idaho 371, 296 P. 582 (1931).
[12] Wrathall v. Johnson, 86 Utah 50, 40 P. 2d 755 (1935).
[13] 6 Colo. 443 (1882).

Creek Tunnel Co. v. Midway Irr. Co.[14] looked to the policy of the state as evidenced by its court decisions. The President's Water Policy Commission in 1950 concluded that percolating waters were subject to appropriation in Colorado because of the state's traditional appropriation policy. Professor Kirkwood, a well-known California water authority recently emphasized the importance of a uniform state water policy by saying that the principle justification for the correlative rights doctrine in California lies in the fact that it applies the same principal to ground water that the state's dual water system applies to surface and underground streams.[15] By the same sound rationale only the appropriation doctrine is fitted to the needs of a Colorado doctrine state.

Secondly, proprietary rights, even if recognized, are of relatively little value in this state. Colorado has few impervious basins with respect to which it can be said that the waters contained therein will never reach a surface or underground channel. And our court has made it virtually impossible for the landowner to show the existence of such basins by raising a presumption that all waters are tributary—a presumption that can only be rebutted by clear and convincing evidence of dikes and other barriers to movement.[16] In basins where proprietary rights are asserted today, it is likely, with the steady increase in our knowledge of ground water movements that appropriation rights will be asserted in the future. Thus, only those pumpers who have established priorities of right by actual use are secure against encroachment by future appropriators of tributary waters. In the few impervious basins where proprietary rights might exist, uncontrolled pumping will eventually exhaust the supply and the proprietors will be left with naked rights to extinct or at least high production cost aquifers.

Thirdly, appropriation of ground waters has been likened to the rule applicable to developed waters. Where a man developed a new source of supply and adds new water to a stream, he is recognized by a long line of cases as the appropriator of the source, *Ironstone Ditch Co. v. Ashenfelter.*[17] The well driller in an impervious basin also develops a new source of supply. By analogy he should be allowed to adjudicate the priority of his right and was so privileged in the Mesa County adjudication of 1948.

Finally, judicial recognition of a common law appropriation doctrine is absolutely necessary to sustain comprehensive conservation legislation designed to preserve usable water tables and protect existing investments in water supplies in critical areas.

Antipathy to the priority rule for ground water appears to rest first upon a fear that such appropriations would be sub-

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[14] 260 U. S. 596, 43 S. Ct. 215.
[15] 1 Stan. L. Rev. 9.
[16] Safranek v. Limon, 123 Colo. 330, 228 P. 2d 975; DeHaas v. Benesch, 116 Colo. 344, 181 P. 2d 453.
[17] 57 Colo. 31, 140 P. 177 (1914).

servient to the paramount rights of appropriators on streams to which such waters are presumptively tributary. And secondly, upon a belief that senior ground water appropriators may severely limit the beneficial uses in a basin by insisting upon the preservation of the natural water table. I believe these fears are groundless. In the first place, a stream appropriator can restrain the pumping of tributary ground waters only if he can show positive injury to his rights from such use, *Albia Idaho Land Co. v. Naf Irr. Co.* Generally such injury cannot be shown. The great lag between percolation water diversions and their effect upon stream flow is often so great as to postpone that effect until the critical season for stream appropriators has passed. Moreover, in the principal basins of the state where waters may fairly be presumed to be tributary, geologists inform us that the recharge from seepage is so great that little effect will ever be felt by the stream from the intra-basin uses. If positive injury to a senior stream appropriator can be shown, however, I think we would all agree that his right be protected.

With regard to the second objection, it is true that the great majority of states have held the appropriator entitled to the lift that existed at the time his appropriation was made. In *Pima Farms v. Proctor*,[18] for example, the Arizona court preserved for the senior the level of an underground stream "so that his means of capture and diversion as originally installed would not be impaired or destroyed for his uses." But the existence of this right need not restrict the total use from the aquifer. The Utah court which recognizes appropriation rights to ground waters and in particular this right to natural lift has reached a sensible compromise in *Hanson v. Salt Lake City*,[19] where it permitted reductions in reservoir levels but required that subsequent appropriators bear the added expense to the senior of bringing his water to the surface.

In choosing between the four common law doctrines, our court has no obligation to recognize that proprietary rights have vested with the patents to overlying lands, but need only consider the customs and best interests of the arid regions of the state. The Supreme Court of the United States said in *California-Oregon Power Co. v. Beaver Portland Cement Co.*[20] that following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, with the right in each state to determine for itself to what extent the rule of appropriation or the common law riparian rule should obtain. For the future, it said, land should be patented separately from water. The reasoning of this case was recently extended by the New Mexico court, in *Bliss v. Dority*,[21] and by a minority of the

[18] 30 Ariz. 96, 245 P. 369 (1926).
[19] 115 Utah 404, 205 P. 2d 255 (1949).
[20] 295 U. S. 142, 55 S. Ct. 725.
[21] 55 N. M. 12, 225 P. 2d 1007 (1950).

Arizona court in the second *Bristor v. Cheatham* [22] case so as to implement common law appropriation doctrines and thereby permit subsequent legislation to limit the pumper's rights. In the first of these cases the defendant was denied a right to take water from the Roswell basin for use on his overlying land without a permit from the state engineer. His objection, that the appropriation statute deprived him of property rights in the water incident to the title of his land, was disregarded, the court saying that he never had a vested right to the water that could be adversely affected by the water code. On first hearing of the *Bristor v. Cheatham* case, the court followed the New Mexico lead notwithstanding earlier cases such as *Howard v. Perrin* [23] to the effect that the ownership rule obtained. The court said in part: "If rule of ownership is adhered to, the legislature is shackled from enacting an underground water code to meet the present emergency." Upon rehearing the court shifted back to the ownership view because of *stare decisis* and by its own admission has prevented the legislature from limiting existing uses so far as is necessary to halt a rapid decline in critical water tables, which decline has amounted to 34 feet in Mariposa County since 1945. The priority rule for ground waters is supported by reason, is prompted by emergency conditions, and is consistent with the age-old water policies of the state. To me, it is of critical importance to our water program that we avoid the pitfall of the second Bristor case. In place of submitting to claims of ownership made by domestic users in an age when ground waters were plentiful, I hope our courts, when adjudication of ground water rights are presented to them, look to a rule, which they have a free hand to adopt, that will permit such regulation of ground waters as will be adequate to protect future supplies.

[22] 75 Ariz. 227, 240 P. 2d 185, 255 P. 2d 173 (1953).
[23] 8 Ariz. 347, 200 U. S. 71.