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### Changing the Use of Water Rights in Colorado: Recent Experience

John Wittemyer

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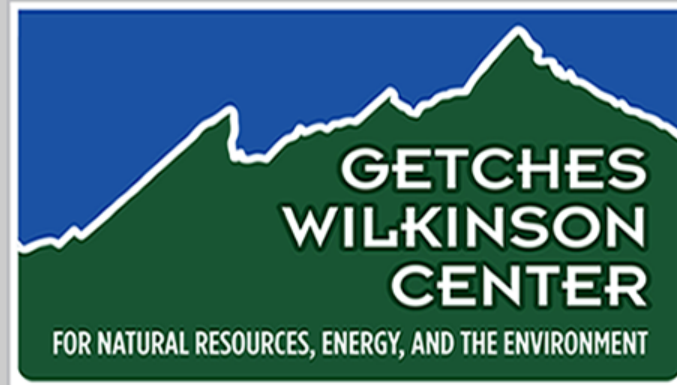
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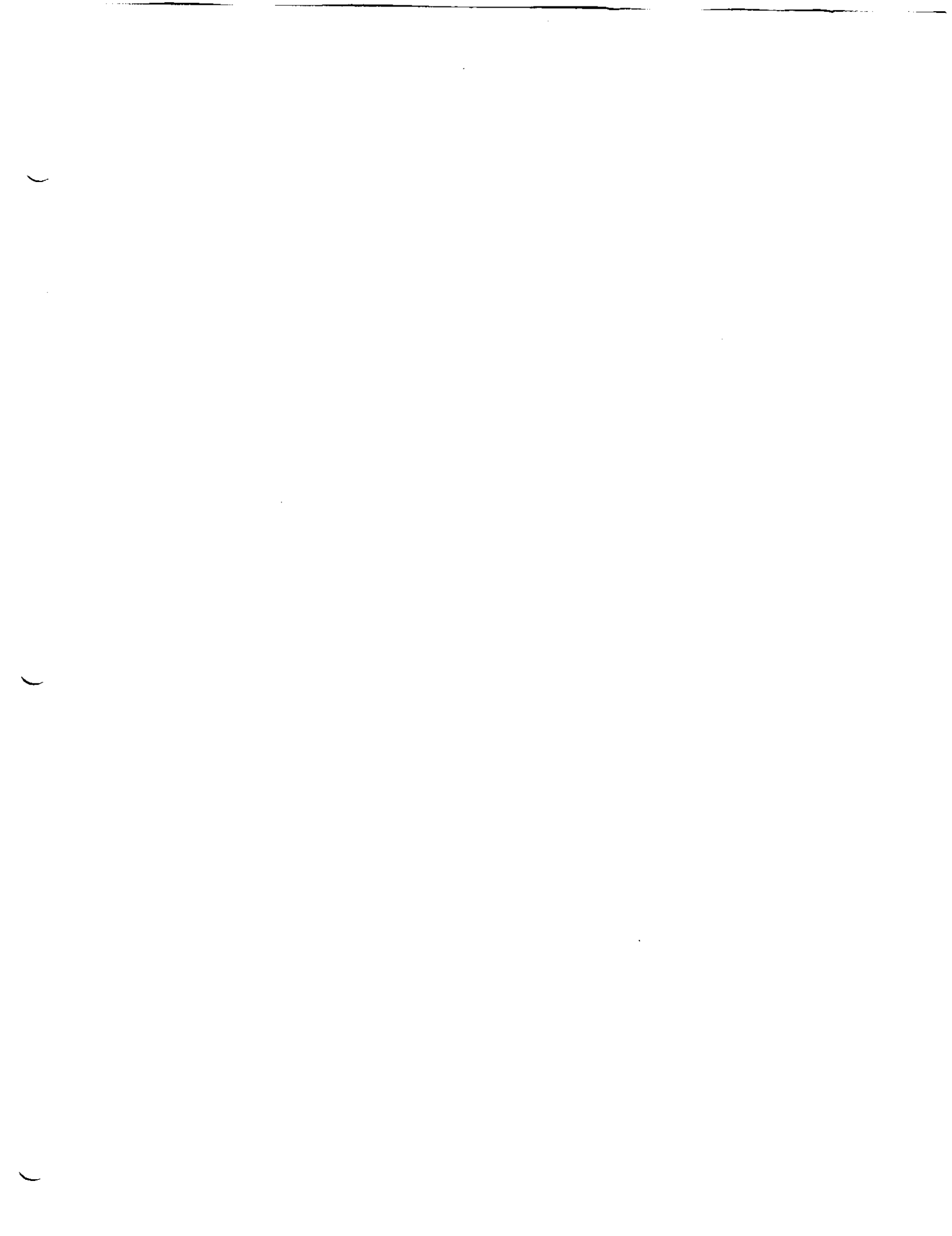
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**CHANGING THE USE OF WATER RIGHTS IN COLORADO:  
RECENT EXPERIENCE**

**John Wittemyer  
Mose, Wittemyer, Harrison & Woodruff  
Boulder, Colorado**

**WESTERN WATER: EXPANDING USES/FINITE SUPPLIES  
June 2-4, 1986**

**Natural Resources Law Center  
University of Colorado  
School of Law**



CHANGES OF WATER RIGHTS - STATUTES

§37-92-103(5), C.R.S. - "Change of water right" means a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental point of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion, a change in the means of diversion, a change in the place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights.

§37-92-302(1)(a), C.R.S. - Any person who desires . . . a determination with respect to a change of water right, . . . shall file with the water clerk in quadruplicate a verified application setting forth facts supporting the ruling sought, a copy of which shall be sent by the water clerk to the state engineer and the division engineer.

§37-92-302(2), C.R.S. - The water judges of the various divisions shall jointly prepare and supply to the water clerks standard forms which shall be used for such applications and statements of opposition. These forms shall designate the information to be supplied and may be modified from time to time. Supplemental material may be submitted with any form. . . In the case of applications for approval of a change of water right or plan for augmentation, the forms shall require a complete statement of such change of plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historic use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such record exist.

§37-92-305(3), C.R.S. - A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or decreed conditional right. If it is determined that the proposed change or plan as presented in the application would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.

§37-92-305(4), C.R.S. - Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences:

(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;

(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(d) Such other conditions as may be necessary to protect the vested rights of others.

EXCHANGES AND SUBSTITUTIONS OF WATER RIGHTS - STATUTES

§37-80-120, C.R.S. -- Upstream storage - substitute supply.

(1) In every case in which the state engineer finds that water can be stored out of priority under circumstances such that the water so stored can be promptly made available to downstream senior storage appropriators in case they are unable to completely store their entire appropriative right due to insufficient water supply, the state engineer may permit such upstream storage out of priority, but such storage water shall be promptly released on demand of a downstream senior whenever needed by such senior for actual use.

(2) Individuals and private or public entities, alone or in concert, may provide a substituted supply of water to one or more appropriators senior to them, not to exceed that to which any senior appropriator is entitled from time to time by virtue of his appropriations, and to the extent that such substituted water is made available to meet the appropriative requirements of such senior, the right of such senior to draw water pursuant to his appropriation shall be deemed to be satisfied. The rights of such senior may be used for effectuating such substitution during the period while it is in operation, and the practice may be confirmed by court order as provided for determining water rights.

(3) Any substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put.

(4) Whenever substitute water is supplied to a senior ditch, the supplier or his assignee may take an equivalent amount for beneficial use from water of the State of Colorado to the fullest extent possible without impairing the availability of water lawfully divertible by others. A practice of substitution or exchange pursuant to law may constitute an appropriative right and may be adjudicated or otherwise evidenced as any other right of appropriation.

§37-83-104, C.R.S. - Reservoirs and ditches may exchange.

When the rights of others are not injured thereby, it is lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream, and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer. The person or company desiring such exchange shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the division engineer may readily determine and secure the just and equitable exchange of water.

§37-92-302, C.R.S. - Any person who desires. . . approval of a proposed or existing exchange of water under section 37-80-120 or 37-83-104,. . . shall file with the water clerk in quadruplicate a verified application setting forth facts supporting the ruling sought, a copy of which shall be sent by the water clerk to the state engineer and the division engineer.

§37-92-305(10), C.R.S. - If an application filed under 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.



CHANGES OF WATER RIGHTS - CASE LAW

1. The right to change the point of diversion is a property right, though not absolute. It shall not be permitted if it works injury to the vested rights of others. The burden of proving no injury in changing a point of diversion rests upon the one seeking the change.

New Cache La Poudre Irr. Co. v. Water Supply Co., 49 Colo. 1, 111, P. 610, 611 (1910).

2. Junior appropriators have vested rights in the continuance of stream conditions existing at the time of their appropriations. Any change in the point of diversion is conditional on this right and limited not only by the volume stated in the decree, but also by time use as measured by the needs of the land for which the water was decreed.

Enlarged Southside Irr. Co. v. John's Flood Ditch Co., 120 Colo. 443, 210 P.2d 982, 985.

3. In a proceeding for change of use or point of diversion a full accounting is required not only of the amount which had reasonably been required for irrigation and the resulting return flows, but also of the actual consumptive use of the proposed use and its resulting return flows.

Farmers Highline Canal and Res. Co. v. Golden, 129 Colo. 575, 272 P.2d 629, 635 (1954).

4. The prevention of injury is the key issue in every change of water right case. When a change is proposed which will cause injury to other water users, conditions must be imposed to eliminate the injury.

"The right to change a place of diversion or place of use is also limited in quantity and time by historical use.

\* \* \*

'Historical use' as a limitation on the right to change a point of diversion has been considered to be an application of the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations [citations omitted]."

Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1371-1372 (Colo. 1980).

5. "An appropriator cannot change the point of diversion or the place of use if the change increases the amount of water or the historical use to the detriment of other appropriators. The historical use of a particular water right is not measured solely by the amount of water withdrawn and applied to beneficial use, but also by the amount of return flow. . . It is a fundamental principle that the consumptive use of water may not be increased to the injury of other appropriators."

Danielson v. Kerbs Ag., Inc., 646 P.2d 363, 373 (Colo. 1982).

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Division No. 2, State of  
Colorado

DISTRICT COURT, WATER DIVISION NO. 2, STATE OF COLORADO OCT 21 1985

Consolidated Case Nos. 84CW62, 84CW63 and 84CW64

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FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE  
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*Russell J. Myers*  
Clerk

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE COLORADO CANAL  
COMPANY and FOXLEY & CO., Majority Stockholder, and  
THE CITY OF COLORADO SPRINGS

IN CROWLEY, PUEBLO, LAKE, CHAFFEE, FREMONT,  
EL PASO AND OTERO COUNTIES

Case No. 84CW62

-----  
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE LAKE MEREDITH  
RESERVOIR COMPANY and FOXLEY & CO., Majority Stockholder, and  
THE CITY OF COLORADO SPRINGS

IN CROWLEY, PUEBLO, LAKE, CHAFFEE, FREMONT,  
EL PASO AND OTERO COUNTIES

Case No. 84CW63

-----  
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE LAKE HENRY  
RESERVOIR COMPANY and FOXLEY & CO., Majority Stockholder, and  
THE CITY OF COLORADO SPRINGS

IN CROWLEY, PUEBLO, LAKE, CHAFFEE, FREMONT,  
EL PASO, AND OTERO COUNTIES

Case No. 84CW64  
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THIS MATTER is before the Court for hearing upon the appli-  
cations of the above-named Applicants for change of water rights,  
including adjudication of existing and proposed exchanges and  
substitutions, as to the use of certain rights and priorities to  
the use of water from the Arkansas River, Water Division No. 2.

The Applicant canal and reservoir companies, acting on  
behalf of themselves and all their respective stockholders,  
together with their majority stockholder, Foxley & Co., appeared  
by John Wittemyer and Timothy J. Beaton of Moses, Wittemyer,  
Harrison and Woodruff, P.C. Those minority stockholders who  
filed a statement of opposition (the "Proxy Group") appeared by  
Robert F. T. Krassa for the purpose of ensuring that adequate  
terms and conditions are imposed to protect their interests and,  
with that exception, ratified the mutual companies' filing of  
these applications on their behalf. (The various individual  
stockholders of the companies, including Foxley & Co., will  
hereinafter be collectively referred to as "Applicant Stock-  
holders". The term "Applicants" will refer only to the companies  
and their Stockholders).

By Purchase and Sale Agreement dated March 20, 1985, the City of Colorado Springs ("Colorado Springs") has contracted to purchase substantially all of the Foxley & Co. ownership in the Applicant canal and reservoir companies, subject to certain preconditions and other terms specified in the agreement. Colorado Springs subsequently moved for realignment along with Applicants, which motion was granted. Colorado Springs appeared by Gregory L. Johnson of Horn, Anderson & Johnson and by John U. Carlson of Carlson, Elliott & Land.

At various times in these proceedings, the following objectors and counsel have appeared: the Holbrook Mutual Irrigating Co. by Ralph N. Wadleigh; the Southeastern Colorado Water Conservancy District by Howard Holme and Kevin B. Pratt of Fairfield and Woods; the State Engineer, Jeris A. Danielson, and the Division Engineer, Robert W. Jesse, by the Attorney General of Colorado, William A. Paddock, First Assistant Attorney General, and William H. Bassett, Assistant Attorney General; Public Service Company of Colorado by Timothy J. Flanagan of Kelly, Stansfield & O'Donnell; the City of Aspen and the Board of County Commissioners of Pitkin County by John D. Musick, Jr. and Robert F. Wigington of Musick and Cope; St. Charles Mesa Water Association and the Arkansas Valley Ditch Association by Rexford L. Mitchell of Mitchell & Mitchell, P.C.; the Fort Lyon Canal Company by Wayne B. Schroeder and David C. Hallford of Calkins, Kramer, Grimshaw & Harring, and by John J. Lefferdink of Lefferdink and Davis; the Board of Water Works of Pueblo by William F. Mattoon of Peterson & Fonda, P.C., and by John U. Carlson of Carlson, Elliott & Land; and Resource Investment Group, Ltd. by Frederick A. Fendel of Broadhurst & Petrock and William A. Hillhouse II of Davis, Graham & Stubbs.

The Court, having considered the evidence and testimony presented, having examined all exhibits, statements of counsel, the applications as amended, and all other pleadings herein, and being fully advised in the premises, doth upon such evidence and after due consideration of pertinent law make the following Findings of Fact:

#### FINDINGS OF FACT

1. The applications were all filed with the Water Clerk on May 31, 1984. The applications in Case Nos. 84CW63 (Lake Meredith Reservoir) and 84CW64 (Lake Henry Reservoir) were amended, as a matter of right, to correct a typographical error in the description of the Colorado Canal headgate.

2. The applications, as amended, were duly published according to statute, and all persons have notice of the applications pursuant to statute. The applications were re-referred by the Water Referee to the Water Judge, and the Water Judge has jurisdiction over the applications, as amended. The District Court for Water Division No. 2 has jurisdiction over the Applicants, the objectors and other persons and water users interested in or affected by these proceedings whether or not they have appeared in these proceedings.

3. The Court entered a written order on September 20, 1984 consolidating the three cases for further proceedings; providing, however, that, to the extent necessary, separate decrees will be entered in each respective case. The Court intends by this Findings of Fact, Conclusions of Law, Judgment and Decree to find the facts and make conclusions applicable to all three cases.

4. The Colorado Canal is decreed the right to divert 756.28 cubic feet of water per second of time from the Arkansas River for direct flow irrigation use with a priority date of June 9, 1890. Its headgate and point of diversion is located approximately 15 miles downstream from Pueblo near Boone, Colorado and was originally decreed at a point on the North bank of the Arkansas River in the NE $\frac{1}{4}$  of the NE $\frac{1}{4}$ , Section 10, T21S, R62W, at a point bearing S.0°58'W 426 feet from the S.W. corner of Section 2, T21S, R62W of the 6th P.M., in Pueblo County, Colorado. The Arkansas River has shifted and relocated to the northeast to the extent that the center of the diversion gates is located slightly more than 300 feet northeasterly at a point in the NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 11, Township 21 South, Range 62 West of the 6th P.M., at a point bearing South 63°14' East a distance of 117.3 feet from the S.W. corner of said Section 2. The Arkansas River is in excess of 500 feet wide at the Colorado Canal diversion dam and either point, one on the bank and one further out in the river, accurately describe the headgate of the Colorado Canal as originally decreed and constructed (the "Colorado Canal Headgate").

5. The water right decreed to the Colorado Canal was divided into 833 separate water rights, each of which was intended to serve 80 acres (the "Direct Flow Rights"). 700, or portions thereof, were conveyed by deed to farmers under the Colorado Canal. The remaining 133 were conveyed to the predecessor of the Colorado Canal Company. That residual interest,

together with all interests which have been purchased into the treasury since that time, are now held by the Colorado Canal Company for the benefit of its stockholders. Shares of capital stock in the Colorado Canal Company were issued only to the owners of the Direct Flow Rights in the ratio of one share for each eightieth of an eighty-acre water right. There are 49,638.975 acres to which interests in the Direct Flow Rights are appurtenant with 49,133.009 shares actually issued and outstanding.

6. The Colorado Canal Applicants in 84CW62 seek a change of water rights for the Direct Flow Rights to permit, as additional alternatives to direct flow irrigation use:

- 6.1 The storage in either Lake Henry Reservoir or Lake Meredith Reservoir of waters diverted thereunder with subsequent releases from storage, as necessary, to maintain historic return flow patterns.
- 6.2 The use and total consumption of the remainder of such stored waters, either directly or by exchange or substitution, for irrigation, domestic, municipal, commercial, industrial and all other beneficial uses at any location where the water can be put to beneficial use.

7. Lake Meredith Reservoir Company, a mutual reservoir company with 40,621.385 outstanding shares of capital stock, owns Lake Meredith Reservoir and the record title to the water storage rights decreed thereto (the "Lake Meredith Storage Rights") which:

- 7.1 Authorize the storage of 26,028.4 acre-feet with diversions from the Arkansas River through the Colorado Canal at a rate of 756.28 c.f.s. under a priority of March 9, 1898.
- 7.2 Authorize the release of waters stored in Lake Meredith Reservoir and the exchange of such released waters for waters diverted at the Colorado Canal Headgate for irrigation purposes with an exchange priority of March 9, 1898.

Lake Meredith Reservoir has an active storage capacity of 41,413 acre-feet. Each stockholder is entitled to a pro-rata portion of the waters realized from the operation of Lake Meredith Reservoir and the use of a pro-rata portion of Lake Meredith Reservoir space.

8. The Lake Meredith Applicants in 84CW63 seek a change of water right to permit, as additional alternatives to storage in Lake Meredith Reservoir for irrigation use by exchange, the following alternate use:

- 8.1 The release from storage, as necessary, of sufficient water to maintain historic return flow patterns and a change for the balance of the water to use for total consumption either directly or by exchange or substitution for irrigation, domestic, municipal, commercial, industrial and all beneficial uses at any location where the water can be put to beneficial use.
- 8.2 A change in the decreed right to exchange under priority date of March 9, 1898 so as to add, as an alternate to exchanges to the headgate of the Colorado Canal, the right to exchange or substitute waters released through the Lake Meredith Reservoir Outlet Canal for waters that would otherwise be released from storage in or passed through Pueblo Reservoir, which waters shall be retained in storage in Pueblo Reservoir for ultimate irrigation, domestic, municipal, commercial, industrial and all other beneficial uses at any location where the water can be put to beneficial use.

9. Lake Henry Reservoir Company, a mutual reservoir company with 8,967.58 outstanding shares of capital stock, owns Lake Henry Reservoir and record title to the water storage rights decreed thereto by the District Court, Pueblo County (the "Lake Henry Storage Rights"), which are:

- 9.1 The right to store 6,355 acre-feet for irrigation use with diversions from the Arkansas River through the Colorado Canal at a rate of 756 c.f.s. under a priority of 1891.
- 9.2 The right to store 2,000 acre-feet for uses other than irrigation with diversions from the Arkansas River through the Colorado Canal at a rate of 756 c.f.s. under a priority of September 10, 1900.
- 9.3 The right to store 3,561 acre-feet for irrigation use with diversions from the Arkansas River through the Colorado Canal at a rate of 756 c.f.s. under a priority of May 15, 1909.

Lake Henry Reservoir has an active capacity for irrigation use of 10,915 acre-feet with approximately 1500 acre-feet of additional capacity available by pipeline for feedlot and sugar factory use. Each stockholder is entitled to a pro-rata portion of the waters realized from the operation of Lake Henry Reservoir and the use of a pro-rata portion of Lake Henry Reservoir space.

10. The Lake Henry Applicants in 84CW64 seek a change of water rights to permit, as additional alternatives to storage in Lake Henry Reservoir for presently decreed uses, the following:

- 10.1 The release from storage, as necessary, of sufficient water to maintain historic return flow patterns and a change for the balance of the water to permit use and total consumption, either directly or by exchange or substitution for irrigation, domestic, municipal, commercial, industrial and all beneficial uses at any location where the water can be put to beneficial use.
- 10.2 A change in the place of storage to add, as an alternate place of storage, Lake Meredith Reservoir.

11. The Applicants in 84CW62, 84CW63 and 84CW64 seek recognition, confirmation and adjudication of an existing and proposed exchange and substitution of waters in storage in either Lake Henry Reservoir or Lake Meredith Reservoir to storage at Pueblo Reservoir by releasing such waters to and through the Lake Meredith Reservoir Outlet Canal to the Holbrook Canal, the Fort Lyon Storage Canal or the Arkansas River and substituting or exchanging such waters for waters that would otherwise be released from storage in or passed through Pueblo Reservoir. Applicants seek a priority date for such exchange or substitution of April 14, 1981 and propose that it be annually limited as follows:

- 11.1 To that quantity which can be exchanged or substituted utilizing the present active storage capacity of Lake Henry Reservoir which is 10,915 acre-feet.
- 11.2 To that quantity which can be exchanged or substituted utilizing the present active storage capacity of Lake Meredith Reservoir which is 41,413 acre-feet.
- 11.3 To a rate of exchange or substitution not to exceed 756.28 cubic feet per second of time.



12. The Applicants in 84CW62, 84CW63 and 84CW64 also seek recognition, confirmation and adjudication of a proposed exchange and substitution of waters in storage in either Lake Henry Reservoir, Lake Meredith Reservoir or Pueblo Reservoir by releasing such waters to the Arkansas River, the Holbrook Canal or the Fort Lyon Storage Canal, as the case may be, in exchange or substitution for waters placed in upstream storage in either Turquoise Reservoir, Twin Lakes Reservoir or Clear Creek Reservoir. Applicants seek a priority date for such exchange or substitution of April 14, 1981.

13. Applicants have, since 1975, participated in the winter water program which is an existing exchange and substitution program whereby waters are stored in Pueblo Reservoir and made available to meet the appropriative requirements of Applicants and other participating senior appropriators. Applicants have agreed to participate in the formalization of a winter water program so long as it is substantially the same as the programs for 1982-1983 or 1983-1984 and have joined as applicants in Case No. 84CW179 now pending before this Court which seeks to formally decree that program. Applicants propose that until the winter water program is formalized, and at any time that such decreed program is not in effect, the Water Rights, as changed herein, and the rights of exchange and substitution sought herein shall be exercised during the period from November 15th through March 15th of the following year, without asserting any earlier priority date by virtue of participation in the voluntary winter water program.

14. The reservoirs and facilities not previously described herein which Applicants propose to utilize pursuant to these consolidated applications are more particularly described as follows:

14.1 Lake Meredith Reservoir ("Lake Meredith").

Lake Meredith Reservoir is located in all or portions of Sections 15, 16, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32 and 33 in Township 21 South, Range 56 West, Sections 1, 6 and 12 in Township 22 South, Range 57 West, and in Sections 24, 25 and 36 in Township 21 South, Range 57 West, all from the 6th P.M., in Crowley County, Colorado. Lake Meredith Reservoir dam axis and the centerline of the outlet canal intersect at a point located in the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 12, Township 22 South, Range 57 West of the 6th P.M., at a point from which the West Quarter

Corner of said Section 12 bears North 27°14' West a distance of 564.30 feet.

14.2 Lake Meredith Reservoir Outlet Canal (the "Outlet Canal").

Waters released from Lake Meredith Reservoir are carried through the Outlet Canal to a point in the South Half of Section 21, Township 22 South, Range 57 West of the 6th P.M., where they can be released to the Holbrook Canal and/or discharged into the Fort Lyon Storage Canal whence they are carried southeasterly approximately one-half mile in the Fort Lyon Storage Canal to a point at which they either continue in said Fort Lyon Storage Canal or are discharged through a headgate on its Southerly bank in the Southwest Quarter of Section 22, Township 22 South, Range 57 West of the 6th P.M., in Crowley County, Colorado whence they travel South-Southeast approximately one mile to discharge into the Arkansas River in the NW¼ of the SE¼ of Section 22, Township 22 South, Range 57 West of the 6th P.M., in Otero County, Colorado.

14.3 Lake Henry Reservoir ("Lake Henry").

Lake Henry Reservoir is located in all or portions of Sections 31 and 32, Township 20 South, Range 56 West, and Sections 5 and 6, Township 21 South, Range 56 West, all from the 6th P.M., in Crowley County, Colorado; the primary outlet works for Lake Henry Reservoir are located in the South Half of said Section 6 and the Lake Henry Reservoir dam axis and the centerline of the outlet canal intersect at a point on the West line of the Southeast Quarter of said Section 6 a distance of 512 feet South of the center of Section 6, Township 21 South, Range 56 West of the 6th P.M., in Crowley County, Colorado.

14.4 Pueblo Reservoir.

Pueblo Reservoir is located in all or portions of Sections 7, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 in Township 20 South, Range 66 West, Sections 1, 2, 3, 4, 5, 9, 10 and 11 in Township 21 South, Range 66 West, and Sections 5, 8, 9, 13, 14, 15, 16, 22, 23 and 25 in Township 20 South, Range 67 West, all from the 6th P.M., in Pueblo County, Colorado. The Pueblo Reservoir dam axis and the centerline of the Arkansas River intersect at a point in Section 36, Township 20

South, Range 66 West of the 6th P.M., from which the Northeast corner of said Section 36 bears North  $61^{\circ}21'20''$  East a distance of 2,511.05 feet, all as more particularly described in the decree in Case No. B-42135 (District Court, Pueblo County).

14.5 Twin Lakes Reservoir.

Twin Lakes Reservoir is located in all or portions of Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 30 in Township 11 South, Range 81 West of the 6th P.M., in Lake County, Colorado. The Twin Lakes dam axis and the centerline of Lake Creek intersect at a point whence the Southeast corner of Section 23, Township 11 South, Range 1 West of the 6th P.M., bears South  $54^{\circ}13'08''$  East a distance of 3,803.10 feet, all as more particularly described in the decree in Civil Action No. 5141 (District Court, Chaffee County).

14.6 Turquoise Reservoir.

Turquoise Reservoir is located in all or portions of Sections 7, 8, 17, 18, 19, and 20, Township 9 South, Range 80 West, and Sections 10, 11, 12, 13, 14 and 15, Township 9 South, Range 81 West, all from the 6th P.M., in Lake County, Colorado. The Turquoise Reservoir dam axis and the centerline of Lake Fork Creek intersect at a point whence the Northwest corner of Section 16, Township 9 South, Range 80 West of the 6th P.M., bears North  $44^{\circ}46'18''$  East a distance of 10,344.35 feet, all as more particularly described in the decree in Civil Action No. 5141 (District Court, Chaffee County).

14.7 Clear Creek Reservoir.

Clear Creek Reservoir is located in all or part of Sections 7 and 8, Township 12 South, Range 79 West of the 6th P.M., in Lake County, Colorado. The Clear Creek Reservoir dam axis and the centerline of Clear Creek intersect at a point whence the South Quarter corner of Section 8, Township 12 South, Range 79 West of the 6th P.M., bears South  $27^{\circ}$  West a distance of 2,255 feet.

15. The February, 1985 report prepared by W. W. Wheeler & Associates, Inc., as revised in August and October, entitled "Final Report, Colorado Canal, Lake Meredith, Lake Henry, Change

of Water Rights" (hereinafter the "Wheeler Report"), constitutes a detailed analysis of the historic use of the Direct Flow Rights, the Lake Henry Storage Rights and the Lake Meredith Storage Rights (hereinafter and heretofore collectively referred to as the "Water Rights"). The Wheeler Report is incorporated into the findings by this reference and shall be physically attached to this Decree and shall be made a part of this Decree; however, the provisions of this Decree and the various stipulations between the parties control over the provisions of the Wheeler Report in case of conflict between such provisions. Relevant facts, analyzed and explained in greater detail in the Wheeler Report, which the Court finds are:

- 15.1 All of the Water Rights have historically been diverted through the Colorado Canal and used to irrigate at least 47,373 acres in Pueblo and Crowley Counties located below the Canal. The Direct Flow Rights have historically been used for direct irrigation. The Lake Henry Storage Rights have been carried through the Colorado Canal to Lake Henry Reservoir where they have been stored for subsequent irrigation and sugar factory use. The Lake Meredith Storage Rights have been carried through the Colorado Canal to Lake Meredith Reservoir where they have been stored for subsequent irrigation use by exchange. As Lake Meredith is located at a lower elevation than the lands which it is used to irrigate, stored waters are released to downstream use and, by exchange, an equivalent quantity (historically sometimes increased by 4% to reflect an asserted transit loss credit) has been diverted at the Colorado Canal Headgate and used to actually irrigate the lands entitled to Lake Meredith Storage Rights.
- 15.2 Historic diversion records maintained by the Colorado State Engineer have not consistently distinguished, by source, the various waters carried through the Colorado Canal. The Wheeler Report includes a comprehensive and precise reconciliation and summary of historic diversions, by source, through the Colorado Canal for the 30-year period 1954 through 1983 (the "Study Period"). This is a representative period, which avoids the distortion of the extremely wet year of 1984 and does not overemphasize the repeated dry years of the early 1950's. The Wheeler Report is found by the Court to most accurately summarize historic diversions through the Colorado Canal during the Study Period.

- 15.3 Using Colorado agricultural statistics for 1951, 1954, 1956, and 1964 through 1983, the average cropping pattern under the Colorado Canal system was determined and is set forth in the Wheeler Report. The principal crops were alfalfa, field corn, sorghum, spring grains, pasture grass, sugar beets and winter wheat.
- 15.4 The potential consumptive use of irrigation water for crops irrigated by the Water Rights was calculated in the Wheeler Report by the modified Blaney-Criddle method. Temperature data for the Rocky Ford weather station and precipitation data for the Ordway weather station was used in the calculations. The weighted potential unit consumptive use of irrigation water for all crops on a monthly basis for each year of the Study Period was determined and is set forth in Table 10. Except for limited wet periods, the water supply was insufficient to supply the water which the irrigated acreage was capable of consuming.
- 15.5 As is the case with all water-short systems, the net reduction in river flow is the amount of water removed from the river pursuant to the use of the water rights less the amount of water returned to the river as a result of the use of the water. River depletion historically was a function of diversions from the river, consumptive use, surface runoff, and groundwater flow which returned to the river. Much of the land that is irrigated by the water diverted through the Colorado Canal is unique in the fact that surface water and groundwater drain into Lake Meredith which originally was a natural lake. 15,461 acres receiving Lake Meredith Storage Rights were tributary to the Arkansas River, 23,191 acres receiving Lake Meredith Storage Rights returned to Lake Meredith, 5,029 acres receiving Lake Henry Storage Rights returned to Lake Meredith, and 3,692 acres receiving Lake Henry Storage Rights were tributary to Horse Creek, a tributary of the Arkansas River. All lands received Direct Flow Rights.

To determine historic depletion, four separate operational studies were required. The criteria used in the Wheeler Report for the operational studies was conservative.

- 15.5.1 Maximum irrigation efficiency varied by month ranging from a low of 35% to a high of 75%.

- 15.5.2 Potential consumptive use became an upper limit during wet periods.
- 15.5.3 Maximum soil moisture storage capability of 0.87 acre-feet per acre was assumed.
- 15.5.4 Canal loss actually consumed was assumed to be only 5% of the total canal loss.
- 15.5.5 Return flows to the river were determined as if wells did not exist.
- 15.5.6 Underground return flows were calculated using the Glover Formula.
- 15.5.7 Surface return flows were estimated based on field investigations, analysis of water use practices, and engineering judgment.

On an average annual basis, the river depletion, as a result of the historic exercise of the Water Rights, was 33,548 acre-feet. This means that of the 44,429 acre-feet of historic average annual diversions, 33,548 acre-feet were completely consumed by consumptive use or evaporation.

16. The Applicants have, over the years, followed an existing practice of using Lake Meredith Reservoir by exchange whenever the water could be exchanged or substituted and put to beneficial use.

- 16.1 Waters in storage in Lake Meredith have been exchanged to the Colorado Canal Headgate for direct irrigation use pursuant to the originally decreed exchange priority of March 9, 1898.
- 16.2 Since December 1, 1975, Lake Henry and Lake Meredith have been used to store winter storage program waters. Waters stored under the program have been used by exchange to the Colorado Canal Headgate and, since 1981, to Pueblo Reservoir.
- 16.3 Since April 14, 1981, waters in storage in Lake Meredith, from whatever source, have been exchanged to Pueblo Reservoir for irrigation and feedlot purposes. Storage space in Pueblo Reservoir has been used and reused and

existing exchanges and substitutions of up to 6,779.21 acre-feet annually have occurred historically.

These existing exchanges and substitutions have been limited by the carrying capacity of the Lake Meredith Reservoir Outlet Canal. So long as the priority to conduct an exchange or substitution in the future is limited to the quantity historically exchanged or substituted and historic return flows from the historical use of the water are maintained, other water users will not be injured by a change in the type of use to which the water is applied.

17. Since 1970, the Board of Directors of The Lake Meredith Reservoir Company has always been composed of the same individuals that constitute the Board of Directors of The Colorado Canal Company (the "Board"). In 1975, and from time to time thereafter, the Board discussed in detail a proposed plan to exchange and substitute waters stored in Lake Henry, Lake Meredith and/or Pueblo Reservoir to Pueblo Reservoir, Clear Creek Reservoir, Twin Lakes Reservoir and Turquoise Reservoir to be used for any beneficial purpose. On April 14, 1981, a formal resolution was adopted on behalf of The Lake Meredith Reservoir Company to lease 8,000 acre-feet of reservoir space in Pueblo Reservoir. This was the first formal overt action by the Board in implementation and appropriation of this overall plan of exchange and substitution. In 1983, an additional 10,000 acre-feet of reservoir space was leased in Pueblo Reservoir by the Colorado Canal Company, and in 1984, these actions to adjudicate this proposed plan of exchange and substitution were authorized and initiated. The proposed plan of exchange and substitution, to the extent it is prospective and conditional in nature, is only entitled to relate back to the date of formal initiation of the plan with respect to other rights filed for adjudication in 1984 and shall be administered the same as any other water right filed for adjudication in 1984.

18. Applicants propose to divert the Water Rights through the Colorado Canal and to store in Lake Henry and/or Lake Meredith all waters attributable to shares used for non-agricultural purposes. A portion of the stored waters will be released at the times and in the amounts necessary to maintain the historic return flow pattern. The remainder represents waters historically consumed and can be used to extinction either directly or by exchange for any beneficial purpose. Applicants propose to utilize the Water Rights only under the following conditions which the Court finds adequate to prevent injury to any owner of

or other person lawfully entitled to use water under a vested water right or decreed conditional water right:

- 18.1 The return flow historically resulting from the exercise of the Water Rights which is to be replaced by reservoir releases to the river or by other sources is a function of the quantity of water diverted into the Colorado Canal in the exercise of the Water Rights during the four previous 12-month periods. The factors developed from the operational studies by the Wheeler Report will be multiplied times the quantities diverted during the applicable 12-month period and the results added to arrive at the quantity to be released during the month for return flow replacement. The factors are as follows:

| <u>Period</u>                   | <u>Factor</u> |
|---------------------------------|---------------|
| First previous 12-month period  | .0036         |
| Second previous 12-month period | .0022         |
| Third previous 12-month period  | .0015         |
| Fourth previous 12-month period | .0011         |

- 18.2 The water remaining after actual ditch and reservoir seepage and return flow replacements have been deducted represents the net water totally lost to the Arkansas River system as a result of the historic use of the Water Rights (such "Net Loss Water" being defined as the difference between the amount of water available and historically diverted for irrigation and the historic return flows). Such Net Loss Water is and shall be available for use and total consumption for any beneficial purpose, including storage, either directly or by exchange or substitution to upstream reservoirs, free of deed or corporate restriction limiting the place or nature of use.
- 18.3 During the period November 15th through March 15th, until the winter water program now pending in Case No. 84CW179 is decreed, or at any time that a winter water program, whether decreed or voluntary, is not in effect, the Water Rights shall be diverted through the Colorado Canal, waters attributable to shares used for non-irrigation purposes shall be stored in Lake Henry and/or Lake Meredith, releases to compensate for historic return flows shall be made pursuant to paragraph 18.1 hereof and the remaining waters may be used pursuant to paragraph 18.2 hereof.



- 18.4 Any waters which the Applicants may receive in the operation of a winter water program decreed in Case No. 84CW179 ("Winter Waters") would have been used for irrigation under the Colorado Canal system. The proportion of return flow reaching the Arkansas River from such irrigation use would be the same as the historic return flows resulting from the historic irrigation use of the Water Rights. A portion of any Winter Waters credited to the Applicants in Lake Henry and/or Lake Meredith attributable to shares used for non-irrigation purposes shall be released to the Arkansas River pursuant to the provisions of paragraph 18.1 hereof and the remainder may be used pursuant to paragraph 18.2 hereof.
- 18.5 Winter Waters credited to the Applicants in Pueblo Reservoir and used for irrigation under the Colorado Canal system would historically be released from Pueblo Reservoir, carried in the Arkansas River to the Colorado Canal headgate and run through the Colorado Canal, for direct irrigation use resulting in return flows to the Arkansas River. Winter Water in storage at Pueblo Reservoir and attributable to shares used for non-irrigation purposes may be used directly from Pueblo Reservoir or exchanged or substituted upriver, provided:
- 18.5.1 Releases pursuant to paragraph 18.1 shall be computed as if the waters were run to storage in Lake Henry and/or Lake Meredith on March 15th.
- 18.5.2 Twelve percent (12%) of such winter water shall be released to the Arkansas River in equal daily amounts for the duration of the water year commencing on May 1.
- 18.5.3 The quantity remaining in Pueblo Reservoir may be used pursuant to paragraph 18.2.
- 18.6 Once the use of water with respect to any share of stock in any of the Colorado Canal Companies is changed to non-irrigation use, the obligation to make return flow releases to the Arkansas River pursuant to Section 18.1 with respect to such share shall commence and continue thereafter, regardless of whether such waters are ever again used for irrigation purposes. Lands as to which shares are changed to non-irrigation use shall be identified by the shareholder making the change to non-

irrigation use and thereafter shown on a map kept at the offices of the Colorado Canal Companies, a copy of which shall be furnished to the Parties. Such lands shall be dried up and shareholders shall thereafter use no wells to irrigate such lands (for which shares have been changed to non-irrigation use) unless prior Water Court approval for a bona fide plan for augmentation is obtained or water is leased or purchased from sources other than the Colorado Canal Company shareholders, except for shareholders whose shares have been converted to non-irrigation use; however, water rights in the Colorado Canal Companies used for irrigation purposes may be relocated on an acre-for-acre basis to such lands, provided return flows to the Arkansas River will not be reduced by the change of irrigated acreage and the lands from which such waters are relocated shall thereafter be considered the dried-up lands.

18.7 Applicants shall install and maintain devices and keep and provide records delivered in timely fashion to the Division Engineer, which devices shall include the following: an accurate weather station in the vicinity of Lake Meredith Reservoir collecting and recording data on temperature, precipitation, barometric pressure, wind, humidity, and pan evaporation rates; the existing flume and recorder near the Colorado Canal headgate; a flume and recorder at the Lake Meredith Outlet Canal; lake-level recorders on Lakes Meredith and Henry; in the event an accurate measuring and recording device is ever not in place on the Fort Lyon Storage Canal down canal from the wasteway which carries Lake Meredith Outlet Canal releases to the Arkansas River, a flume and recorder which shall be operated at such time as Lake Meredith outlet water is being carried in the Fort Lyon Storage Canal; measuring devices above Lake Meredith Reservoir on Bob Creek and the Lake Meredith Reservoir Inlet; and such other measuring devices and records as may be deemed necessary by the Division Engineer to effectively administer this change and exchange. Should Applicant or successors of its shareholders ever pump or divert water directly from Lake Meredith or Lake Henry, such pumping or diversion shall be appropriately measured.

18.8 Any stockholder of the Applicant canal and reservoir companies using water for purposes other than agricultural irrigation that fails to pay their or its Company

assessments within thirty (30) days after the date on which such assessment shall have been called by the Company as due and payable shall not be entitled to take water from or through Company facilities or pursuant to the terms of any change decreed herein until that non-payment is cured.

- 18.9 Any stockholder using water for purposes other than agricultural irrigation shall, so long as water is being used under the lateral where the shares were historically distributed, leave five percent (5%) of their water from each such lateral to make up incremental lateral loss. The aggregate amount of such water shall be distributed among the various laterals at the direction of the Proxy Group in such a way as to conform as near as may be to the variation of losses among laterals. However, the aggregate amount of water so left shall never exceed five percent (5%) of water used for purposes other than irrigation, and this upper limit shall be reduced by multiplying by a fraction, the numerator of which is the number of shares used for irrigation purposes at that time, and the denominator of which is the number of shares owned by the Proxy Group as of the date hereof. To the extent diverted under a storage right, this water shall be considered stored in reservoir space owned by shareholders using water for non-irrigation purposes, and shall bear its pro rata evaporation and seepage losses. Such water shall be released with runs for agricultural purposes during that water year.
- 18.10 Any stockholder of the Lake Meredith Reservoir Company using Lake Meredith Storage Rights water for purposes other than agricultural irrigation shall, in addition to the requirement for incremental lateral loss, leave twelve percent (12%) of their Lake Meredith Storage Rights water to make up incremental canal loss. This water shall be considered stored in Lake Meredith Reservoir space owned by shareholders using water for non-irrigation purposes, and shall bear its pro rata evaporation and seepage losses. Such water shall be released for exchange with exchanges for agricultural purposes within that water year. Any portion not so released shall be delivered to the river at the conclusion of the water year or as otherwise directed by the State Engineer. At such time as there is no irrigation use under the Colorado Canal, such water shall be released to the

Arkansas River in equal daily amounts for the duration of the water year commencing May 1.

18.11 All waters released through the Outlet Canal and delivered into either the Holbrook Canal or the Fort Lyon Storage Canal for use by substitution shall be of a quality, quantity and continuity to meet the requirements of use for which the water of the respective canal has normally been put, and such substitution and exchange shall be administered by and be subject to determinations as to quality, quantity and continuity made by the Division Engineer for Water Division No. 2.

18.12 The following limitations shall apply to the rights of exchange and substitution:

18.12.1 Waters stored in the exercise of the Lake Meredith Storage Rights may be exchanged or substituted at flow rates not to exceed 400 cfs. and in quantities not to exceed 26,028.4 acre-feet in any calendar year. The exchange priority shall be March 9, 1898 between the discharge point of the Outlet Canal and the Colorado Canal Headgate and May 31, 1984 between the Colorado Canal Headgate and any point further upstream on the Arkansas River.

18.12.2 Waters stored in Lake Henry Reservoir and/or Lake Meredith Reservoir, regardless of source, may be exchanged or substituted to Pueblo Reservoir in the exercise of the existing exchange at flow rates not to exceed 400 cfs. and in quantities not to exceed 6,779.21 acre-feet in any calendar year. The exchange priority shall be April 14, 1981 between the discharge point of the Outlet Canal and Pueblo Reservoir.

18.12.3 Waters stored in Lake Henry Reservoir and/or Lake Meredith Reservoir, regardless of source, may be exchanged or substituted to Pueblo Reservoir and/or, together with waters already in storage in Pueblo Reservoir, on upstream to Turquoise Reservoir, Twin Lakes Reservoir or Clear Creek Reservoir at flow rates not to

exceed 756.28 cfs. or the carrying capacity of the Outlet Canal, whichever is less, and in quantities not to exceed that quantity which can be exchanged utilizing an active storage capacity for Lake Henry Reservoir of 10,915 acre-feet and an active storage capacity for Lake Meredith Reservoir of 41,403 acre-feet. The exchange priority shall be April 14, 1981, but shall be junior and subordinate to any water right or exchange right filed for adjudication in calendar years prior to 1984. This right of exchange and substitution shall be a conditional right.

- 18.12.4 With respect to exchanges or substitutions ~~made in the future~~, the Division Engineer for Water Division No. 2 shall determine the transit <sup>losses or transit</sup> credit, if any, associated with the exchange or substitutions being made at the time under his administration and supervision, and permit the Applicants to divert at the upstream point of substitution or exchange such applicable transit credit, if any, as an addition to the quantity being exchanged or substituted. *get*
- 18.12.5 Applicants have stipulated that their rights of exchange and substitution shall be further limited as to rate of flow when in conflict with similar rights of other parties to the stipulation filed herein. Those other parties are the City of Colorado Springs ("Colorado Springs"), the Board of Water Works of Pueblo, Colorado ("Pueblo"), Resource Investment Group, Ltd., et al ("RIG"), and the City of Aurora ("Aurora"). The provisions of that stipulation are hereby approved, incorporated herein by this reference and the following provision from that stipulation shall constitute a further limitation on the rights of exchange and substitution decreed herein:

At times when the flow through or releases from Pueblo Reservoir are insufficient, on an instantaneous basis, to accommodate the exchanges or substitutions which Pueblo, Colorado Springs and/or the Applicants seek to

make into Pueblo Reservoir for waters delivered to points on the Arkansas River below Pueblo Reservoir, or the change which RIG and Aurora seek to make to storage in Pueblo Reservoir, the following allocation of the exchange opportunity shall apply as between the parties which at that time have the legal and physical ability to change or exchange into Pueblo Reservoir:

- 18.12.5.1 Pueblo shall have the first priority to exchange up to 27 c.f.s. without restriction as to use.
- 18.12.5.2 Lake Meredith Company shall have the second priority to exchange, from waters stored under the 1898 storage priority for Lake Meredith Reservoir, up to 100 c.f.s. for irrigation use under the Colorado Canal. This right shall be reduced pro rata in the proportion that the number of shares not being used for irrigation purposes bears to the number of outstanding shares of the Lake Meredith Company.
- 18.12.5.3 Pueblo and the Applicants shall share equally the third priority to exchange. Each shall be entitled to exchange up to an additional 50 c.f.s., without restriction as to use.
- 18.12.5.4 The Applicants shall have the fourth priority to exchange up to an additional 50 c.f.s., without restriction as to use.
- 18.12.5.5 Colorado Springs shall have the fifth priority to exchange up to 77 c.f.s. less that rate of flow, if any, being exchanged by Pueblo pursuant to §§18.12.5.1 and 18.12.5.2, without restriction as to use.

- 18.12.5.6 RIG-Aurora shall have the sixth priority to exercise their change of point of diversion to Pueblo Reservoir, which right shall be limited as to quantity, applicable maximum diversion rates and other matters as specified by the final decree in 83CW18. This sixth priority shall not include RIG waters reduced to storage at or below the Holbrook Canal headgate for the purpose of awaiting the occurrence of an upstream exchange opportunity by RIG.
- 18.12.5.7 Colorado Springs shall have the seventh priority to exchange up to 100 c.f.s. less any amount being exchange by Colorado Springs pursuant to §18.12.5.5, without restriction as to use.
- 18.12.5.8 Colorado Springs, the Applicants, and RIG shall share any remaining exchange opportunity on the following basis:

The Applicants shall be entitled to one-half of the remaining exchange opportunity within the exercise of their rights as may be decreed. Colorado Springs and RIG shall share the other half or more of the exchange opportunity within the exercise of their rights as may be decreed, according to the following allocation:

RIG: Up to 40 c.f.s., but not to exceed 500 a.f. annually; thereafter, 25% of said remaining exchange opportunity up to an additional 500 a.f. annually.

Colorado Springs: The balance.

It is the purpose of this allocation to allow RIG to make an upstream exchange in the event RIG is precluded at any time from storing in Pueblo Reservoir its full yield under the decree to be entered in 83CW18 because of the operation of the foregoing priorities. In such event, Colorado Springs, Pueblo, and the Applicants agree that RIG may store the decreed yield which is not simultaneously transferable to Pueblo Reservoir in any facility on RIG's land or, if it has obtained the consent of the owner thereof, in any other facility under or downstream from the headgate of the Holbrook Canal, and when river conditions permit, may work an exchange to Pueblo Reservoir under this eighth priority subject to lawful administrative constraints.

18.12.5.9 These relative priorities set forth in §§18.12.5.1 through 18.12.5.8 are summarized in the following table showing flow rates in c.f.s.:



| <u>PRIORITY</u> | <u>PUEBLO</u> | <u>COLORADO<br/>SPRINGS</u>                  | <u>COMPANIES</u> | <u>RIG-<br/>AURORA</u>   | <u>TOTAL</u> |
|-----------------|---------------|--|------------------|--|--------------|
| 1               | 27            |  |                  |  | 27           |
| 2               |               |  | 100              |  | 127          |
| 3               | 50            |  | 50               |  | 227          |
| 4               |               |  | 50               |  | 277          |
| 5               |               | 77-Pueblo<br>exchange under<br>#1 and #3     |                  |  | 277          |
| 6               |               |  |                  | Applicable<br>maximum rate<br>of flow allowed<br>by Decree in<br>83CW18  |              |
| 7               |               | 100-Colorado<br>Springs exchange<br>under #5 |                  |  |              |
| 8               |               | 1/2 minus RIG<br>under #8                    | 1/2              | Up to 40 c.f.s.<br>of 1/2, but not<br>to exceed 500 a.f.<br>annually; there-<br>after 25% of 1/2<br>up to an addi-<br>tional 500 a.f.<br>annually. |              |

This table is controlled by the terms and conditions above stated in §§18.12.5.1 through 18.12.5.8.

18.12.5.10 Lake Meredith Reservoir Company and its shareholders' right to exchange pursuant to §§18.12.5.2, 18.12.5.3 and 18.12.5.4 under an exchange priority date of March 9, 1898 shall be limited to waters stored in the exercise of the March 9, 1898 storage priority

not to exceed 26,028.4 acre-feet annually.

- 18.12.5.11 Each participating party must be physically and legally able to change and exchange. If any one party is physically or legally not able to change or exchange, the allocation of the change or exchange opportunity shown above shall apply as between the remaining parties.
- 18.12.6 Applicants have a right to exchange Lake Meredith water from the Lake Meredith Outlet Canal to the Colorado Canal headgate under priority date of March 9, 1898.
- 18.12.7 Applicants have the rights to exchange, subject to the conditions of this decree, from the Lake Meredith Outlet Canal to and above Pueblo Reservoir with a 1984 filing for decree date and a 1981 appropriation of exchange date. Applicants' exchange shall be junior to valid senior exchanges; reserving, however, to Applicants all rights, if any, to challenge any competing exchange.
- 18.12.8 Applicants' rate of exchange when exchanging by utilizing releases from the Lake Meredith Outlet Canal shall not exceed the release rate from the Lake Meredith Outlet Canal, together with the applicable transit credit, if any, recognized by the Division Engineer. Applicants' exchanges under this decree shall occur only from the Lake Meredith Outlet Canal and not from the headgate of the Colorado Canal.
- 18.12.9 The exchange as against the natural river flow from the Lake Meredith Outlet Canal to and above Pueblo Reservoir shall occur only when there is a flowing river at all points between the point of discharge and the point of storage, and only when the Division Engineer determines that implementation of such decreed

exchange will not injuriously affect the owners of or persons entitled to use water under a vested water right or a decreed conditional water right.

- 18.12.10 Applicants or shareholders of the Colorado Canal Companies shall obtain the legal right to use Pueblo Reservoir prior to the operation of exchanges into Pueblo Reservoir.
- 18.12.11 Applicants have no right to compel the District or the Bureau of Reclamation to take any action which creates exchange opportunities for Applicants.

18.13 No more than 26,028 acre-feet of water may be added to active storage in any water year under the 1898 Lake Meredith Storage Rights. No more than 6,355 acre-feet of water may be added to active storage in any water year under the 1891 Lake Henry Storage Right; no more than 2,000 acre-feet of water may be added to active storage in any water year under the September 10, 1900 Lake Henry Storage Right, and no more than 3,561 acre-feet of water may be added to active storage in any water year under the May 15, 1909 Lake Henry Storage Right. To the extent that water in storage at the beginning of a water year has been changed in use pursuant to this decree, and is so accounted for, such water shall not limit that water year's diversion under the Lake Henry and Lake Meredith Storage Rights.

18.14 The waters which are the subject of the above applications which are determined to be the historically consumed quantities of Applicants' water rights may be totally consumed in the future for any beneficial use at any location so long as the person applying the water maintains dominion and control over the water after its initial use. The Parties reserve the right to challenge the identification and quantification for reuse of consumptive use water. This provision is accepted by the Parties only in the peculiar circumstances of this case and is in no way a waiver by the Parties of their position with respect to reuse of native water; further, this provision shall not create a precedent with respect to any other case.

- 18.15 Historic return flows during the study period of 1954 through 1983 under the historical operation returning to the Arkansas River shall not be diminished by any future operation, modification or enlargement of the Colorado Canal, Lake Henry Reservoir or Lake Meredith Reservoir without keeping the river whole on a daily basis.
- 18.16 Accounting, operations and administration under this decree shall be on a daily basis. Computations made on a weekly or monthly basis shall be divided, as appropriate, to determine the average daily amount.
- 18.17 This decree is subject to the stipulation, dated December 28, 1984, between Colorado Springs, Applicants, and others in Case No. 84CW179.
- 18.18 Until any deficits in return flows owed to the river are cured, Applicants shall divert no water from any source into the Colorado Canal headgate on behalf of any shareholder of shares converted to non-irrigation use and as to which shares the return flow releases pursuant to Section 18.1 are not current, except waters to cure such deficit.
- 18.19 If, as a result of less water being run through the Colorado Canal for irrigation purposes, there is such a decrease in the head of water in the Canal as to diminish the flow of water through the lateral headgates below historic conditions, then up to two (2) additional check structures shall be constructed in the Colorado Canal, at the sole expense of shareholders using water for municipal purposes. Absent mutual agreement, the necessity for, location and design of such check structures shall be determined by binding arbitration by a committee consisting of an engineer selected by the Proxy Group, an engineer selected by the shareholders using water for municipal purposes, and an impartial third engineer selected by those two. The issues of necessity, location and design shall be considered separately, and the costs of arbitration of each issue shall be borne by the losing party upon that issue.
- 18.20 Pursuant to § 37-92-304(6), C.R.S. 1973, the Court has considered the historic use to which the Water Rights

were put, the length of time of such historic use and the testimony, documents and records herein. Based upon such consideration, the Court finds that the experience to be derived during the period ending twenty (20) years after the date shares are changed to non-irrigation use is necessary or desirable to preclude or remedy any injury to the vested rights of others. Accordingly, with respect to each share of the Colorado Canal Companies, the decree shall be subject to reopening for twenty (20) years from the conversion of that share to non-irrigation use. After such twenty-year period, the terms of the change decree entered shall not be modified so as to reduce the yield for non-irrigation use from shares which have been converted to non-irrigation use for more than twenty (20) years under the terms of the change decree. The Colorado Canal Companies, on or before February 1st of each year, shall give written notice to all parties, the Division Engineer and the Water Court specifying, by shareholder, all shares converted to non-irrigation use, the date on which converted and the date on which such 20-year period shall expire. Reconsideration shall be made only upon the petition of one of the parties hereto, including Applicants. Notice of such petition shall be made upon the parties hereto by mailing notice to each of their counsel of record at their addresses as set forth at the conclusion hereof, or at such different addresses as shall hereafter be filed with the Court or so served by mailing upon all other counsel of record.

19. The Court has reviewed and does hereby approve the various stipulations filed herein between Applicants and one or more, as the case may be, of the Objectors in this consolidated proceeding (the "Stipulations"). These Stipulations are further identified as: the stipulation executed as of March 19, 1985 between Applicants, Colorado Springs and Pueblo; the stipulation executed as of April 9, 1985 between Applicants, Aspen and Pitkin County; the stipulation executed as of June 5, 1985 between Applicants, Colorado Springs, Pueblo and RIG; the stipulation executed as of September 20, 1985 between Applicants, Colorado Springs, the Southeastern District, Public Service, Holbrook and the AVDA; the stipulation executed as of October 10, 1985 between Applicants and Fort Lyon; the stipulation executed as of October 16, 1985 between Applicants, Colorado Springs, Foxley, and the Proxy Group; and the stipulation executed as of

October 16, 1985 between Applicants and the State Engineer. The Stipulations shall remain in full force and effect, enforceable by or against any of the parties thereto, and shall not be deemed merged into this decree except to the extent specifically incorporated herein.

20. The rights of substitution and exchange from Lake Henry Reservoir and/or Lake Meredith Reservoir to Pueblo and other upstream reservoirs and the changes in type and place of use decreed herein shall not affect the limitations on transmountain diversions by the Twin Lakes Reservoir and Canal Company in the decree in Case No. 1901, Water Division No. 5, dated May 12, 1976.

21. This change of water rights and adjudication of rights of exchange and substitution will not cause injury to other water users or materially deplete the waters of the Arkansas River in usable quantity or availability for use by others. The terms and conditions imposed herein, including administration and accounting on a daily basis, limit the quantity which may be used in the future exercise of these Water Rights to that quantity historically consumed and insure the continuation of historic return flows both in time and amount.

22. This adjudication of rights of exchange and substitution and change of water rights, if granted on the terms and conditions herein set forth, including administration and accounting on a daily basis, will not injuriously affect the owners of or persons entitled to use water under a vested water right or decreed conditional water right.

#### CONCLUSIONS OF LAW

1. The Court incorporates the foregoing Findings of Fact to the extent that these may include conclusions of law.

2. The Court concludes that adjudication of these changes of water rights, existing and proposed exchanges and substitutions are authorized by law. §§37-80-120, 37-83-104, 37-92-101, et seq., C.R.S., including §37-92-302.

3. Applicants have complied with all requirements to change their water rights and adjudicate their existing and proposed exchanges and substitutions, and are therefore entitled to a decree permitting these changes, exchanges and substitutions, provided that the changes, exchanges and substitutions are

limited and conditioned as specified in the foregoing Findings of Fact in order to prevent injury to the owners of, or persons entitled to use water under, vested water rights or decreed conditional water rights.

4. Granted on the terms and conditions set forth above in the Findings of Fact, the changes of water rights, exchanges and substitutions described in such Findings will not injuriously affect the owners of, or persons entitled to use water under, vested water rights or decreed conditional water rights. Therefore the standards set forth in the Water Right Determination and Administration Act of 1969 (§§37-92-101, et seq., C.R.S.), including specifically §37-92-305, C.R.S., and other applicable provisions of Colorado law, have been met.

5. The law provides that "if an application filed under §37-92-302, C.R.S. for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such change has been administered". §37-92-305(10), C.R.S. The Applicants are therefore entitled to have the original priority dates of their existing exchanges recognized, subject to terms and conditions set out in the Findings of Fact.

#### JUDGMENT AND DECREE

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. The Findings of Fact and Conclusions of Law set forth above are hereby incorporated into the terms of this decree as if the same were fully set forth herein.

2. Applicants' changes of water rights, exchanges, and substitutions are hereby approved and adjudicated, subject to the terms and conditions specified in the foregoing Findings of Fact. No owners of, or person entitled to use water under, a vested water right or decreed conditional water right will be injured or injuriously affected by the granting of the changes of water rights, exchanges and substitutions requested by the Applicants, provided that the conditions and limitations set forth in the Findings of Fact are implemented. The Court hereby directs the entry of final judgment as to all of the claims made in these consolidated cases.

3. It is further ordered that the proposed rights of exchange and substitution herein awarded conditionally shall remain in full force and effect until October 31, 1989. If applicants desire to maintain such conditional water rights, an application for a quadrennial finding of reasonable diligence shall be filed on or before October 31, 1989, or a showing made that the conditional rights of exchange and substitution have become absolute rights by reason of the completion of the appropriation.

DONE this 21 day of Oct., 1985.

BY THE COURT:

  
Hon. John R. Tracey

xc: Moses, Wittemyer, Harrison & Woodruff (Wittemyer)  
Horn, Anderson & Johnson (Johnson and DuBois)  
John U. Carlson  
Ralph N. Wadleigh  
Fairfield and Woods (Pratt)  
Musick and Cope (Musick)  
Kelly, Stansfield & O'Donnell (Flanagan)  
Davis, Graham & Stubbs (Hillhouse)  
Calkins, Kramer, Grimshaw & Harrins (Schroeder)  
Lefferdink and Davis (Lefferdink)  
Mitchell & Mitchell  
William H. Bassett  
Holland and Hart (Castle)  
Petersen & Fonda (Mattoon)  
Robert F. T. Krassa  
John Dingess  
Division and State Engineers

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Clerk