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A Guide to the Examination of Water Tabulations

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A GUIDE TO THE EXAMINATION OF WATER TABULATIONS

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Attorneys, by the nature of their profession, are continually being called upon to familiarize themselves with current legislative enactments and the practical procedures that usually accompany their implementation. The recent change in Colorado water law with respect to the tabulation of water rights presents such a situation. Mr. White, in this timely and informative article, discusses this complex area and presents a guide to examining the recently published tabulation lists. In a very practical manner, the author attempts to help many attorneys understand and utilize these tabulations so that the water rights of their clients may be adequately safeguarded.

INTRODUCTION

IN accordance with the "Water Right Determination and Administration Act of 1969,"[1] division engineers throughout the state have prepared tabulations of all decreed water rights and conditional water rights in their respective divisions in order of seniority.[2] All owners of water rights are thus faced with the problem of determining whether their water rights are correctly listed in the various tabulations prepared by the division engineers. Although many owners may attempt this process on their own, its complexity usually requires the attention of a lawyer who is familiar with water law as well as the records maintained by the state engineer.[3]

Under the 1969 Act, two initial tabulations in 1970 and regular bi-annual tabulations after 1974 are required.[4] The state and division engineers are to prepare the tabulations, describing

> [e]ach water right and conditional water right by some appropriate means [setting] forth the priority and amount thereof as established by court decrees. . . . so that only those water rights and conditional water rights which take or will take water from the same source and are in a position to affect one another will be on the same priority list.[5]

Each tabulation will be subject to protest or objection based on the incorrect entry or omission of a water right or conditional water right.[6]

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[1] COLO. REV. STAT. ANN. §§ 148-21-1 *et seq.* (Supp. 1969).

[2] COLO. REV. STAT. ANN. § 148-21-27(1)(a) (Supp. 1969).

[3] If you are located near one of the division engineers, it would be worthwhile to call his office to find out what records are kept there.

[4] COLO. REV. STAT. ANN. §§ 148-21-27(1)(a), -28(1) (Supp. 1969).

[5] *Id.* § 148-21-27(1)(a).

[6] *Id.* §§ 148-21-27(3), (5); *id.* §§ 148-21-28(2)(c), (e).

Consequently, a lawyer representing the owner of any water right or conditional water right must determine two things: first, that the contents of the decree, resulting from the adjudication of his right, are correctly entered in the tabulation; second, that his right is given its correct priority vis-a-vis all the other rights listed in the same tabulation. This article suggests one approach lawyers might use to determine whether rights have been correctly listed in the tabulations.

I. DETERMINING THE STRUCTURE NAME

Since many owners do not know either the extent or identity of their water rights, an attorney must first obtain this information before he can determine if the tabulation accurately reflects his client's rights. Since the tabulation entries are listed by *structure name*[7] rather than by the name of the owner, the first problem is to ascertain those structures in which the owner may have an interest. If the structure name is unknown to the owner, it can be found in a variety of ways. Perhaps the simplest method is to examine the documents, or the abstracts thereof, in the owner's chain of title. Unfortunately, however, even if these documents can be found, they may not specify the water rights conveyed.[8] Consequently, an examination of certain records in the office of the state engineer may be in order.

If the owner was himself the claimant of an adjudicated water right or if he knows the name of the claimant, the structure name can be found by examining the file index in the state engineer's office labeled "Filings by Claimant."[9] The index cards in the claimant's file are arranged alphabetically by claimants' names, and a structure name will appear on the card for the appropriate claimant. Once a structure name has been found, it should be verified as the correct structure by reference to other documents in the state engineer's office.[10]

If the name of the original claimant is not known or if the name of an appropriate structure cannot be found on a claimant's card, the structure name may be found if the legal description of the point of diversion is known.[11] By examining the map obtainable at the state engineer's office which points out the boundaries of the former water

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[7] COLO. REV. STAT. ANN. § 148-21-27(1)(a) (Supp. 1969) provides that: "Such tabulation shall describe each water right and conditional water right by some appropriate means . . . ." *Id.* The "appropriate means" has taken the form of structure names to describe each water right.

[8] Comment, *Water Title Examinations*, 34 ROCKY MT. L. REV. 509, 510-14 (1962).

[9] *See* Worksheet #1 in APPENDIX *infra.*

[10] To make sure that the structure name which is found on the claimant's card is the correct structure, verify that the structure's location is where the client diverts his water. Instructions for making this determination are given elsewhere (*see* text at 215 *infra*).

[11] *See* Worksheet #2 in APPENDIX *infra.*

districts,[12] the particular water district in which the legal description falls can be determined. After the district has been determined, then the decree ledger books (which are also obtainable at the state engineer's office) should be consulted; they contain a listing of all adjudicated structures in each of the old districts and a description of the location of each structure. To utilize the books, run down the listing for the appropriate district to determine if there is a location description that matches the legal description of a client's structure. If the structure at the described location does not appear to be the correct one or if no location description can be found that corresponds to the legal description of the client's structure, then note the name and date of the adjudication of the last structure listed in the decree ledger book. It is possible that relatively recent decrees have been issued which are not listed in the appropriate decree *ledger* book but which are listed in the appropriate decree *page* book (located in the state engineer's office) which appears in several volumes for each district and which contains copies of all the decrees issued in that district. By using the date of adjudication of the last structure listed in the decree ledger book, it can be determined if there are any decrees in the district page book which have not yet been entered in the ledger book. If so, run through the legal descriptions of any structures which have been subsequently adjudicated.

II. Identifying the Appropriate Tabulation List

Once the structure name is known, the next step is to determine the tabulation list upon which it appears. Each division engineer prepares one tabulation list for each separate source within his division[13] "so that only those water rights and conditional water rights which take or will take water from the same source and are in a position to affect one another will be on the same priority list."[14] Sources are comprised of entire drainage basins of the major rivers and streams of the state. For example, Division No. 2 contains two sources: the drainage basin of the Arkansas River and the drainage basin of the Dry Cimarron River.[15] With certain exceptions, each drainage basin is located, in its entirety, within a single water division.[16] For a fee,[17] the

[12] Colo. Rev. Stat. Ann. § 148-21-27(1)(b)(iv) (Supp. 1969).

[13] *Id.* § 148-21-27(1)(a).

[14] *Id.*

[15] *Id.* § 148-21-8(3).

[16] The water division within which a particular drainage area is located may be determined by examining the map published by the state engineer showing the boundaries of the new water division or by referring to Colo. Rev. Stat. Ann. § 148-21-8 (Supp. 1969).

[17] Colo. Rev. Stat. Ann. § 148-21-18(1) (Supp. 1969).

tabulation for any particular drainage area may be obtained from the appropriate division engineer.[18]

III. EXAMINING THE TABULATION

Each tabulation contains information with respect to (1) the findings and decrees in original or supplemental adjudication proceedings[19] and (2) the priority of a particular structure as against all other structures listed in the tabulation.[20] The task of the lawyer is to determine the accuracy of this information.

A. Comparing the Decree Information with Tabulation Entries

It is relatively easy to ascertain that the decree information has been transferred correctly to the tabulation. First, the structure name should be found by examining the left-hand column of the tabulation. If, after a careful examination, the structure name cannot be found,[21] then an objection is in order,[22] if the structure was the subject of a decreed priority.[23]

Provided that the structure name is listed on the tabulation, the next step is the examination of the decree itself; copies of all decrees can be found in the decree page book.[24] To use this book, first consult the card index labeled "Filing by Title" and find the card which contains the name of the structure, noting the district number; move to the card file index labeled "Decrees", look in the drawer labeled with the appropriate district number, and check the card containing the name of the structure, noting the page of the

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[18] As of October 6, 1970, the names and addresses of the division engineers were:

#1 W. G. Wilkinson
Room 208
8th and 8th Office Bldg.
Greeley, Colorado 80631

#2 Rudolph Styduhar
1906 West Northern Avenue
Pueblo, Colorado 81004

#3 Wayne M. Crosby
P.O. Box 269
Alamosa, Colorado 81101

#4 Ralph V. Kelling, Jr.
P.O. Box 456
Montrose, Colorado 81401

#5 Donald L. Smith
P.O. Box 926
Glenwood Springs, Colorado 81601

#6 Wesley E. Signs
P.O. Box 95
Steamboat Springs, Colorado 80477

#7 George E. Barklay
P.O. Box 551
Durango, Colorado 81302

[19] Name of structure, type of structure, name of source, number of the original water district, the use, the amount, the type of adjudications, the location of the point of diversion, the date of the adjudication, the date of the previous adjudication (if any), and the appropriate date for the structure. For certain entries, numerical or letter codes (explained on the tabulation's cover sheet) are used.

[20] With the exception of structures receiving their priorities in an original adjudication, this priority cannot be determined by reference to the underlying decree alone.

[21] It is possible that a structure is included in the "District List," described at 218 *infra*, but not carried over into the tabulation for the entire source. Consequently, check the "District List"; if the structure appears there, mention that fact in the protest.

[22] COLO. REV. STAT. ANN. § 148-21-27(3) (Supp. 1969).

[23] To be certain that the structure did receive a decreed priority, see text at 217 *infra*.

[24] *See* text at 215 *supra*.

decree page book on which a copy of the decree can be found. By comparing the information contained in the decree with the entries in the tabulation,[25] any discrepancy can be ascertained; discrepancies constitute grounds for objection.[26]

B. Verifying the Tabulation Priority Number

The number in the far right-hand column of the tabulation is the structure's priority vis-a-vis all other structures in that tabulation. Whether or not the listed priority is correct is the most difficult issue facing a lawyer making a tabulation examination.

Generally, it is completely impractical to be absolutely certain that the priority numbers given to structures senior to a client's structure are correct. Such a task would entail checking the tabulation entries for each senior structure against the information contained in each supporting decree.

However, if a client's structure has a relatively low priority number or was given its priority in an original adjudication, a thorough examination is possible. To make the examination, obtain the appropriate decrees for each senior structure[27] and compare them with the entries in the tabulation.[28]

On the other hand, this procedure will usually be impractical if a client's structure has a relatively high priority number. Consequently, anyone making an examination will be forced to accept as correct all tabulation entries for senior structures.

After the correctness of all tabulation entries for senior structures has been checked or it has been decided to accept the correctness of those entries, the next step is to determine if a client's structure has been given the proper priority number.

The following statutory provisions are the ground rules for establishing priority numbers:

> As among water rights decreed in the *same water district* in the *same adjudication suit*, the historic date of initiation of appropriation shall determine the relative priorities, beginning with the earliest right.
>
> As among water rights decreed in the *same water district* in *different adjudication suits*, all water rights decreed in an adjudication suit shall be senior to all water rights decreed in any subsequent adjudication suit.
>
> As among water rights decreed in the various *original adjudication suits* in the *various water districts* of the same water division, the decreed date of initiation of appropriation shall determine the relative priorities in numbered sequence, beginning with the earliest right.
>
> As among water rights decreed in the various *supplemental adjudication suits* in the *various water districts* of the same water division, the actual priority date of any decree in any district shall not

[25] *See* Worksheet #3 in APPENDIX *infra*.

[26] COLO. REV. STAT. ANN. § 148-21-28(c) (Supp. 1969).

[27] For instructions on how to conduct this examination, see text § III (A) *supra*.

[28] *See* Worksheet #3 in APPENDIX *infra*.

> extend back further than the day following the entry of the final decree in the preceding adjudication suit in such district.
>
> If the preceding principles would cause in any particular case a substantial change in the priority of a particular water right to the extent theretofore lawfully enjoyed for a period of not less than *eighteen years,* then the division engineer shall designate the priority for that water right in accordance with *historic practice.*[29]

There are two major exceptions to these rules. First, if the client's structure is a well (designated by a "2" on the tabulation), if his priority has been awarded in a decree after June 7, 1969, and if he has filed an application under the 1969 Act before July 1, 1971,[30] then the priority number is not limited by the date of the previous adjudication but should align the well with other structures of like date of appropriation.[31] Second, if the priority was awarded for nonirrigating uses, then the priority number should likewise align the client's structure with other structures of like appropriation date, unless the prior adjudication date is July 11, 1903, or later and unless the prior adjudication was open to nonirrigating uses.[32] It should be noted, however, that these exceptions are subject to being supplanted by an historic practice of 18 years duration;[33] but the statutory term "historic practice" is so ambiguous that an objection should be filed in order to protect a client's interest in spite of the passage of 18 years.

Given the basic rules and exceptions, the first place to begin the examination of the accuracy of the tabulation is with the appropriate "District List," a computer printout found in the state engineer's office.[34] By using the structure's priority number on the tabulation, locate the structure and note its working date. Based on this date, it can be determined if the structure was given its proper priority within its original district of adjudication. Disregarding the exceptions noted above for wells and for nonirrigating uses, the working date for each structure should be either the appropriation date or the previous adjudication date, whichever is later. Unless the working date

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[29] COLO. REV. STAT. ANN. § 148-21-27(1)(b)(iii-vii) (Supp. 1969) (emphasis added).

[30] In Water Division 3, an application need not be filed until July 1, 1972. *Id.* § 148-21-22.

[31] The statute states that:

> [W]ith respect to water rights which are diverted by means of wells, the priorities for which have not been established or sought in any such decree or proceeding, if the person claiming such a water right files an application for determination of water right and priority not later than July 1, 1971, except in Water Division 3, where such application must be filed not later than July 1, 1972, and such application is approved and confirmed, such water right, subject to the provisions of section 148-21-21(1), shall be given a priority date as of the date of actual appropriation and shall not be junior to other priorities by reason of the foregoing provision. *Id.* § 148-21-22.

[32] Ch. 130, § 1, [1903] Colo. Sess. Laws 297 brought nonirrigating uses into the adjudication systems. Before the effective date of that act, decrees could not award priorities for purposes other than irrigation. Doll v. McEllen, 21 Colo. App. 7, 12-13, 121 P. 149, 151 (1912). Consequently, the first subsequent supplemental adjudication for nonirrigating uses must be considered as an original adjudication.

[33] COLO. REV. STAT. ANN. § 148-21-27(1)(b)(vii) (Supp. 1969).

[34] *See* Worksheet #4 in APPENDIX *infra.*

is correct, there is little or no chance that the tabulation priority is correct. Consequently, an incorrect working date constitutes grounds for objection.

The last step in the investigation is the examination of the tabulation itself. Again with the exception of wells and nonirrigating uses, a client's structure should be listed senior to any structure which has an appropriation date later than the appropriation date of the client's structure. However, if a structure has an adjudication date earlier than a client's structure, then it should be senior to the client's structure.[35] Determining such a fact involves a careful examination of the appropriate entries for each senior structure.[36]

CONCLUSION

The procedure outlined above represents a proven technique for examining water tabulations. Although it is not necessarily the only acceptable or best technique, it has been used successfully to examine a large number of structures in the initial tabulations published pursuant to the 1969 Act. For lawyers beginning their first tabulation examination, it will provide a starting point for that exercise and a vehicle through which they can develop an approach to the tabulation better fitted to their own predilictions and the needs of their clients.

APPENDIX

WORKSHEET #1
DETERMINATION OF STRUCTURE NAME BASED ON CLAIMANT'S NAME

1. Claimant's Possible Name:_____.
2. Name of Structure from Claimant's Card:_____
_____.
3. Complete and attach hereto Worksheet #3.

WORKSHEET #2
DETERMINATION OF STRUCTURE NAME BASED ON LEGAL DESCRIPTION OF POINT OF DIVERSION

1. Suspected Legal Description:_____
_____
_____
_____

[35] COLO. REV. STAT. ANN. § 148-21-27(1)(b)(iv) (Supp. 1969).
[36] *See* Worksheet #5 in APPENDIX *infra*.

2. Original Water District within which legal description falls based on examination of map showing boundaries of former Water Districts:_____

3. The structure in the appropriate decree *ledger* book, which (based on its location) appears to be the client's:

_____

4. Name and date of adjudication of the last structure listed in the decree *ledger* book:

_____ _____/____/_____

5. If no appropriate structure appears in the decree *ledger* book, note the name of the structure in the decree *page* book for the Water District in "2" above, which:
   a. Received priorities in adjudications subsequent to the date entered in "4" above, ***and***
   b. Has a legal description which indicates that it is the client's **structure:**

_____

6. Complete and attach hereto worksheet #3.

WORKSHEET #3
MATCHING DECREE INFORMATION
AND
TABULATION ENTRIES

1. From the card bearing the structure's name in the file labeled "Filing by Title", note the district number:

_____.

2. In the file labeled "Decrees", look in the drawer labeled with the district number in "1" above, and, from the card bearing the structure's name, note the page number at which the decree appears in the decree page book:

_____.

	TABULATION	DECREE
3. Name of structure:	_____	_____

4. Type of structure: (circle one)
   (1) ditch
   (2) well
   (3) reservoir
   (4) springs
   (5) seeps
   (6) mine

(7) pipeline
(8) surface pumps
(9) power plant
(10) other

5. Name of source: _____ _____

6. WD (Water District) _____ _____
(tab. 71 = dist. 34;
tab. 74 = dist. 42)

7. Type of use(s): (circle one)
(1) irrigation
(2) municipal
(3) commercial
(4) industrial
(5) recreation
(6) fishery
(7) fire
(8) domestic
(9) stock
(10) others

8. Amount: _____ _____

9. Type of adjudication: (circle one)
(1) original
(2) supplemental
(3) original conditional
(4) original transfer to
(5) original transfer from
(6) original abandoned
(7) original alternate
(8) original conditional transfer to
(9) original conditional transfer from
(10) original conditional abandonment

(11) original conditional alternate
(12) supplemental conditional
(13) supplemental transfer to
(14) supplemental transfer from
(15) supplemental abandonment
(16) supplemental alternate
(17) supplemental conditional transfer to
(18) supplemental conditional transfer from
(19) supplemental conditional abandonment
(20) supplemental conditional alternate

10. Location:
    (1) Meridian (circle one)
    S — Sixth
    N — New Mexico
    U — Ute
    C — Costilla
    (2) Township _____ _____
    (3) Range _____ _____
    (4) Section number _____ _____
    (5) Portion of Section _____ _____
11. Adjudication date: _____ _____
12. Previous adjudication date: _____ _____
13. Appropriation date: _____ _____
14. Complete and attach hereto Worksheet #4.

WORKSHEET #4
VERIFICATION OF WORKING DATE ON DISTRICT LIST

Working Date:_____

1. COLO. REV. STAT. ANN. § 148-21-27(1)(b) (Supp. 1969):
   (ii) As among water rights decreed in the same water district in the *same adjudication suit,* the historic date of initiation of appropriation shall determine the relative priorities, beginning with the earliest right.
   (iii) As among water rights decreed in the same water district *in different adjudication suits,* all water rights decreed in any adjudication suit shall be senior to all water rights decreed in any subsequent adjudication suit.
2. Is the working date the latest of the following? *yes/no*
   (1) appropriation date: _____
   (2) prior adjudication date: _____
3. *Exception for nonirrigating use:* For any *non*irrigating use (all but "1") the working date should not be the prior adjudication date unless the prior adjudication date is July 11, 1903, or later, and the prior adjudication was open to non-irrigating uses. Does the client's structure fall within this exception?
   yes/no (circle one)
4. *Exception for wells.* When the client's structure is a well ("2") and his priority has been awarded in a decree after 6/7/69, and he has submitted an application under the 1969 Act on or before 7/1/71 (7/1/72 for division 3), the working date should align the well with other structures of like date of appropriation. COLO. REV. STAT. ANN. § 148-21-22 (Supp. 1969). Does the client's structure fall within this exception?
   yes/no (circle one)
5. Is the working date correct?
   yes/no (circle one)
   (1) If so, are the working dates of all senior structures earlier than the client's?
   yes/no (circle one)
   (2) If not, which ones are later?

	Structure name	*Priority number*
(1)		
(2)		
(3)		
(4)		

6. Complete and attach hereto Worksheet #5.

WORKSHEET #5
VERIFICATION OF PRIORITY NUMBER ON TABULATION

1. Client's structure
   a. Name:_____
   b. Date of appropriation: _____/_____/_____
   c. Previous date of adjudication:_____.
2. Since this verification involved only structures in other districts, bear in mind the following provisions of COLO. REV. STAT. ANN. § 148-21-27(1)(b) (Supp. 1969):

   (iv) As among water rights decreed in the various *original adjudication suits* in the various water districts of the same water division, the decreed date of initiation of appropriation shall determine the relative priorities in numbered sequence, beginning with the earliest right.

   (v) As among water rights decreed in the various *supplemental adjudication suits* in the various water districts of the same water division, the actual priority date of any decree in any district shall not extend back further than the day following the entry of the final decree in the preceding adjudication suit in such district.
3. Do all structures with a lower priority number have an earlier appropriation date?
   yes/no (circle one)
4. If not, what are their priority numbers?

   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
5. Do any of the structures with the priority numbers listed above have a previous adjudication date which is later than the previous adjudication date of your client's structure?
   yes/no (circle one)
6. If so, what are their priority numbers?

   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____
   _____ _____ _____

7. *If your client's structure is a well* and its priority was awarded in a decree after June 7, 1969, and he has submitted an application under the 1969 Act on or before 7/1/71 (7/1/72 for division 3), its priority number is not limited by the previous adjudication date of other structures. Consequently, has your client's structure been given a priority number commensurate solely with its date of appropriation?
   yes/no (circle one)
   If not, what should its adjudicated priority number be?
   _____A.

8. *If your client's water right or conditional water right is for non-irrigation uses,* do any senior structures have both:
   a. an appropriation date later than the appropriation date of the client's structure, *and*
   b. an adjudication date earlier than July 11, 1903?
      yes/no (circle one)

9. If so, what are their priority numbers?

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

10. If so, what priority number should be assigned to the client's structure to align it with other structures with the same date of appropriation?
    _____A.