Denver Law Review

Volume 42 | Issue 2 Article 2

April 2021

Foreign Water in Colorado - The City's Right to Recapture and Re-Use Its Transmountain Diversion

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INTRODUCTION

The celebrated growth in population of the western states following World War II scarcely requires elaboration.[1] It is reflected in Colorado particularly in the strip of cities and counties of the eastern slope running from Boulder in the north to Pueblo in the south,[2] and continues apace through the 1960s.[3]

This expansion has increased to the point of severity the demands upon a water supply which has been historically meager[4] and which had already prompted cities to finance transmountain diversions from the state's western slope watershed to meet present and anticipated requirements.[5] Impressive as they are in quantity, these

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[1] In the decade 1950-60, by United States census, the population of Arizona increased by 73.7% to 1,302,161; California by 48.5% to 15,717,204; Colorado by 32.4% to 1,753,947; New Mexico by 39.6% to 951,023. COLORADO YEAR BOOK 1959-1961, at 280 (1962).

[2] In the decade 1950-60, Boulder County grew by 53.7% to a popoulation of 74,254; Denver by 18.8% to 493,887 (and to a metropolitan population of 929,383, twenty-sixth in size in the nation); El Paso County (Colorado Springs, Fort Carson, Air Force Academy) by 92.9% to 143,742; Pueblo County by 31.6% to 118,707. *Id.* at 282, 284.

[3] *E.g.*, Colorado Springs' Size Doubles in Four Years.

> Colorado Springs—This city, seventh-fastest growing metropolis of its size in the United States, has doubled its size [acreage] in the past four years . . . officials reported . . . . The city . . . during 1964 [brought its size by annexation] to 21,506 acres. This compares with . . . 10,874 acres in Jan. 1, 1961 . . . . Latest estimates by city planners peg the Colorado Springs population at 90,000, which is 20,000 more than the 1960 census figure of 70,194 . . . . The Denver Post, Jan. 1, 1965, p. 27, col. 1 (final ed.).

[4] The Colorado mean annual precipitation is 17 inches, but is considerably less at many lower elevations on both eastern and western slopes: In the Denver, Greely, and Ft. Morgan area, 10-15 inches; Colorado Springs, Pueblo, and Canon City, 10-15 inches; Lamar, La Junta, and Arkansas Valley, 10-15 inches; San Luis Valley, less than 10 inches; but in Ft. Collins, Lyons, Boulder, and Golden, 15-20 inches; and Akron, Julesburg, and Wray, 15-20 inches. Distribution of Precipitation in Colorado (Colorado Statae Planning Division, Denver) (July 1957). *Cf.* Arkansas mean annual precipitation, 48 inches; Louisiana, 55; the New England States, 42; Wisconsin, 31. MILLER, GERAGHTY N COLLINS, WATER ATLAS OF THE UNITED STATES plate 3 (1963).

An average of about ninety million acre-feet of water falls annually as precipitation in Colorado, but a large part is lost by evapotranspiration, and only about sixteen milion acre-feet appears as runoff in the major streams. S. Comm. on Interior and Insular Affairs, *Mineral and Water Resources in Colorado,* REPORT OF THE UNITED STATES GEOLOGICAL SURVEY IN COLLABORATION WITH THE COLORADO MINING INDUSTRIAL DEVELOPMENT BOARD, 88TH CONG., 2D SESS. 233 (Comm. Print 1964), hereafter cited as REPORT OF THE U.S.G.S.

[5] See, *e.g.*, Lewis, *Transmountain Water Diversions,* 14 DICTA 185 (1937). For a summary of Federal projects under construction, authorized, and those completed, and water tunnels through the Colorado mountains, see COLORADO YEAR BOOK 1962-1964 at 519-29 (State Planning Div., Denver 1965). The prospect of any immediate

transmountain diversions are already heavily committed; their capacity to maintain the foreseeable growth in population and industry is limited. Inevitably then, a city would seek to recapture and re-use at least some of the water from its transmountain diversion, considering such use vital to its sustained and competitive growth. The city would propose, after sewage treatment, to hold captive the water (or recapture it) before abandonment into a natural stream, convey it to city storage or pumping works, and use it for non-potable purposes such as cooling of the municipal steam plant, watering public parks and golf courses, street sprinkling, and flushing. It also could seek to sell or lease to nearby private users such as golf clubs, estates, or colleges with extensive lawns and plantings, and corporate water districts outside the city boundaries but within the metropolitan area which would take either by direct line or by exchange sale.[6] The city would hope by this recapture and re-use

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relief through federal desalinization programs is remote. But desalinization is indeed an ongoing plan, as demonstrated by the following:

> Advances Seen in Desalting Program.
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> Washington—Interior Secretary Stewart L. Udall said . . . he anticipates within the next four years a big economic breakthrough in the accelerated water desalting program now moving toward unprecedented intensity . . . . The water program is now costing about twelve million dollars a year out of a departmental budget of about $1.17 billion. AP report, Rocky Mountain News, Jan. 1, 1965, p. 8, col. 1 (city ed.).

Late in the 1965 session, Congress approved a notable expansion and acceleration of the Secretary of Interior's saline water-conversion development program, authorizing an additional $15 million for fiscal 1967 and authorizing as much as $185 million through 1972. 79 Stat. 509. (U.S. CODE CONG. & AD. NEWS, p. 2412 (Sept. 5, 1965)). And on Oct. 4, 1965, the White House announced an agreement with Mexico to explore the possibilities of erecting a nuclear-powered desalting plant to serve neighboring arid regions of both nations. AP report, The Denver Post, Oct. 4, 1965, p. 11, col. 1 (home ed.).

[6] The identification of the water would be by volume-intake measurement, to distinguish it within the corpus of sewage effluent from water appropriated from the local watershed. That is, by measuring the inflow of transmountain water to its system, the city maintains a continuous current record of that volume under its control as contrasted to the remaining water which comes from local sources. The amount recorded as present in the system from transmountain sources is that amount which could be put to reuse.

Water measurement is made by numerous devices, among them the sharp-edged orifice; the nozzle with pressure gauge; the venturi meter, which is widely used to measure large flows in pipelines and lends itself to the installation of automatic continuous recording devices; the weir, used often to measure the flow from wells and in ditches and small streams; and proportional meters, which measure large flows by metering a small known fraction thereof. Rates of flow by pump capacity and plant output are often expressed in terms of gallons-per-minute and million gallons-per-day. The flow of streams, however, is measured in "second-feet," *i.e.*, cubic feet per second. Usual hydrological arithmetic equates an output of one cubic foot per second for 24 hours with about 646,300 gallons per day. HIRSCH, MANUAL FOR WATER PLANT OPERATORS at 238-50, 251-57 (1945). See also STEEL, WATER SUPPLY AND SEWERAGE at 16-17, 601-03 (4th ed. 1960).

Fresh-water use (exclusive of hydroelectric power use) in Colorado in 1960 was about 9700 mgd (million gallons per day) or 10.8 million acre-feet per year. Of this, 7100 mgd of surface water and 1800 mgd of ground water was used for irrigation; 320 mgd of surface water (of which 200 mgd was for public-utility fuel-electric power and 35 mgd of ground water was used for industry; 250 mgd of surface water and 41 mgd of ground water for public supply. Hydroelectric power use was about 3200 mgd. REPORT OF THE U.S.G.S. *supra* note 4, at 234.

to recoup a portion at least of its outlay for the original purchase or establishment of appropriation rights to the water, the construction and maintenance of transmountain diversion works, the cost of treating used water in sewage works, and the administrative costs of serving as supplier to its system area.

The water to be re-used has heretofore been discharged into natural streams, swelling their volume and redounding to the benefit of downstream appropriators. These appropriators have shown no sentiment for assuming any proportionate burden of the expense of this imported water. Indeed, they can be expected vigorously to challenge the city's right to dispose of the water by any means other than simple discharge into the public watercourses.

The purpose of this note is to examine the city's right in Colorado to recapture its transmountain water, upon its own premises, following purification from sewage, and re-use it for municipal purposes or for sale to beneficial users in the metropolitan area.

The point of departure is the settled body of water law in Colorado, that: the water of natural streams is the property of the public, is dedicated to the use of the people of the state, and is subject to use by appropriation;[7] the right to divert water is based upon the taking and putting to a beneficial use, and the use may be subject to a constitutional order of preferences;[8] a decreed water right is valuable property, and its use may be changed and its point of diversion relocated;[9] a municipal corporation is not precluded from

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[7] COLO. CONST. art. 16, § 5:

> Water of streams public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

And see generally the two articles by Burke, *The Origin, Growth and Function of The Law of Water Use,* 10 WYO. L.J. 95; *Western Water Law,* 10 WYO. L.J. 180 (1956).

[8] COLO. CONST. art. 16, § 6:

> Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the waters for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purposes, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

The appropriation law of the western states is *sui generis.* For an historical perspective of its development independent of, or by modification of, the old common-law Riparian Doctrine, see Wiel, *Fifty Years of Water Law,* 50 HARV. L. REV. 252 (1936); 3 FARNHAM, THE LAW OF WATER AND WATER RIGHTS, § 649 at 2017 (1904); HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST, U.S. Dept. of Agri., Misc. Pub. 418 (Washington, D.C. 1942) at 30-73.

[9] Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 579, 272 P.2d 629, 631 (1954). *Cf.* Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder, 402 P.2d 71, 74 (Colo. 1965).

purchasing water rights previously used for agricultural purposes and devoting them to municipal uses;[10] a municipal corporation does not have any different status from that of an individual or any other party to a proceeding pertaining to rights for irrigation or for rights to water for purposes other than irrigation;[11] the policy of the law is to enforce an economical use of the waters of the natural streams;[12] diversion of appropriated water from one stream across the watershed to the basin of another is permissible under the appropriation doctrine;[13] a city may acquire by transmountain diversion an amount of water to meet its future needs for a normal increase of population within a reasonable time;[14] the owners of a water right may conduct the waters legally appropriated and stored into and along any of the natural streams of the state and may take the same out again at any point with due regard to prior and subsequent rights of others to the other waters in such natural streams,[15] but whenever any person diverts water from one stream through another stream, he takes it out again subject to deduction for seepage and evaporation.[16]

Unfortunately, a situation obtains which encumbers an attempt to assess water law and apply it to modern municipal and industrial problems. The judicial decisions and the statutes of water adminis-

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[10] Farmers Highline Canal & Reservoir Co. v. City of Golden, *supra* note 9.

[11] City and County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375 388, 276 P.2d 992, 999 (1954).

[12] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 366, 40 Pac. 989, 992 (1895).

[13] Coffin v. Left Hand Ditch Co., 6 Colo. 443, 449-50 (1882). See also Lewis, *Transmountain Water Diversions,* 14 DICTA 185, 188 (1937).

[14] City and County of Denver v. Sheriff, 105 Colo. 193, 202, 96 P.2d 836, 842 (1939). Regarding Denver as a supplier: The Denver Water Board presently provides nearly 200,000 acre-feet annually to some 700,000 persons, of whom 25% are suburbanites. Consumption is expected to increase in ten years to 310,000 acre-feet for one million persons, and to 430,000 acre-feet by 1985 for 1.4 million persons, 50% of whom will be non-Denver residents. Denver has spent, between 1955 and 1965, $130 million for water resources. Statement of R. S. Shannon, Jr., President, Denver Water Board. The Denver Post, No. 25, 1965, P. 60, col. 3 (final ed.).

[15] COLO. REV. STAT. § 148-5-2 (1963); Twin Lakes Reservoir & Canal Co. v. Sill, 104 Colo. 215, 219, 89 P.2d 1012, 1014 (1939). And see Trelease, *Reclamation Water Rights,* 32 ROCKY MT. L. REV. 464, 471-72 (1960).

[16] COLO. REV. STAT. § 148-6-1 (1963). All the principles just enumerated rest on the past federal deference to the state's water law and customs. But for an assessment of the alarm which has been raised in recent years that the federal government seeks a reversal of the national policy, to the effect that ownership of water rights rests in the federal government independent of state law, subject to its exclusive regulation and even termination of present appropriation rights, see National District Attorney's Association, Western Water Law Symposium 1963 *passim*; Trelease, *supra* note 15, at 481-85; Federal-State Water Rights, *Hearings Before the Committee on Interior and Insular Affairs, United States Senate, on Problems Arising from Relationships Between the States and the Federal Government with Respect to the Development and Control of Water Resources,* 87th Cong., 1st Sess., June 15-16, 1961.

tration are grounded to a substantial degree in agricultural and mining use. Thus the policy decisions that must be made upon the demands of urban use are largely unrelated to those of an agrarian economy.[17]

I. THE CONSTITUTIONAL INQUIRY

The re-use contemplated by the city is of its wasted[18] or flow-back transmountain water — *i.e.,* of imported or "foreign" water.[19] There can be no re-use or sale by the city of sewage-treated water from its local watershed, under the bar of *Pulaski Irrigating Ditch Co. v. City of Trinidad.*[20] There the City of Trinidad, diverting water from the (local) Las Animas River, purified its sewage in settling pits adjoining the river. A certain amount of the water-content of the sewage seeped back into the river and became part of the stream's supply to appropriators below. When Trinidad built modern purification plants and proposed to sell the purified water

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17 Some of our present difficulties in water administration stem from this early emphasis on irrigation, because the early laws were not drafted to deal with the large industrial and municipal water uses of today . . . . Since that time, this basic law has been patched, added to and tinkered with in attempts to make it more workable, but it has never been thoroughly revised to meet modern conditions of water use. Danielson, *Water Administration In Colorado, Higher-ority or Priority?,* 30 ROCKY MT. L. REV. 293, 294-95 (1958).

In view of the comparatively recent rapid growth of the cities and towns in Colorado, there have not been many decisions . . . involving municipal water rights. We must therefore look to the irrigation decisions as the source of much of our municipal water law on the subject of appropriation . . . . [A] water right is created by diversion and use. This statement was first formulated in relation to irrigation. The same rule applies in regard to an appropriation by a municipality. Lindsey, *Legal Problems in City Water Supply,* 22 ROCKY MT. L REV. 356, 363 (1950).

18 *Compare* Hutchins' definition of waste water *with* that of Kinney a generation earlier:

Waste waters are principally those waters which, after having been diverted from sources of supply for use, have escaped from conduits or structures in course of distribution or from irrigated lands after application to the soil . . . . [S]ome water is purposely released from control by the project management, because of the inability of consumers to make complete use of all waters diverted. These waters are also referred to as waste, but in the usual case they are returned to the stream from which diverted, or to some other surface stream, by means of artificial channels controlled by the project, and therefore become available for use by downstream diverters. HUTCHINS, *op. cit. supra* note 8, at 23-24.

Waste water may be defined to be such water as escapes from the works or appliances of appropriators without being used; or such water as escapes from an appropriator's land after he has made all the beneficial use thereof that is possible and which cannot be returned into the natural stream from which it was originally taken. 2 KINNEY, IRRIGATION AND WATER RIGHTS § 661 at 1150-51 (2d ed. 1912).

19 The term "foreign waters" is applied to waters taken from one watershed for use in a different drainage basin. These waters are foreign, in that they are not naturally a part of the water supply of the area in which used. HUTCHINS, *op. cit. supra* note 8, at 375.

20 70 Colo. 565, 203 Pac. 681 (1922). *Accord,* Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764, 773 (1925).

to its co-defendant, the lower appropriators sought an injunction against the sale. The injunction was denied, but the supreme court reversed, holding that when sewage water is purified it is again the thing which was diverted originally, that a title by such use is not gained and when the use has been completed the right of user terminates, that such water is not "developed" water after purification, and if there is a surplus remaining after use it must be "returned to the stream whence it came."[21] The court cited no cases. The *Pulaski* case points up what is perhaps the strongest argument against the right of the city to recapture its water. The Colorado Constitution provides that "The water of every natural stream, not heretofore appropriated . . . is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation . . . ."[22] An appropriator has, then, only a usufructuary right, not a right of ownership.[23] If an appropriator has only the right to use water until it has accomplished the purpose for which it was appropriated, it can logically be argued that it remains the property of the public during the entire time of use, and must be returned to the public as soon as the purpose is accomplished. A re-use would in effect be a second appropriation. On the other hand, the *Pulaski* case involved water from the local watershed, water that was subject to the adjudicated priorities of the protesting downstream appropriators. The city today would seek immediately to distinguish the fact that but for its transmountain diversion the water would never appear in the stream and lower users of the discharge could hold no rights or expectations in water which was developed and imported by the city alone.[24]

The city's proposed re-use of its imported water may well be

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[21] *Id.*, 70 Colo. at 568, 203 Pac. at 682.

[22] COLO. CONST. art. 16 § 5, *supra* note 7.

[23] *E.g.*, Pulaski Irrigating Ditch Co. v. City of Trinidad, *supra* note 21, at 568, 203 Pac. at 682; Fort Morgan Reservoir & Irr. Co. v. McCune, 71 Colo. 256, 262, 206 Pac. 393, 395 (1922).

[24] " 'Developed' water . . . is not water already in the stream and saved from loss, but is new water added to the stream by the efforts of man . . . . Developed water is water which would not have augmented the stream flow under natural conditions." HUTCHINS, *op. cit. supra* note 8, at 362. *But cf.* Kinney's much narrower definition: " 'Developed water' is such subterranean or underground water as is discovered and brought to the surface by the exploitation of man." 2 KINNEY, *op. cit. supra* note 18, § 1205 at 2186; State *ex rel* Mungas v. District Court, 102 Mont. 533, 538, 59 P.2d 71, 73 (1936) (water diverted from a running stream and conveyed elsewhere cannot be called developed water). It is perhaps an arguable inference that the *Pulaski* court contemplated the distinction between local water and foreign or developed water as being the decisive factor in its holding, from its statement,

> To turn this water back into the river will not increase the river's flow above what it would have been had the water not been diverted, and it is *not therefore developed* water. (Emphasis supplied).

70 Colo. at 569, 203 Pac. at 683.

opposed on other principles, principles which, it must again be noted, arose usually from decisions in agricultural disputes. The owner of a priority has no right, if it works to the detriment of junior appropriators, to increase the amount or extend the time of his diversion in order to put the water to double use, by irrigation of other lands in addition to those for which it was appropriated, nor has he the right to lend, rent, or sell the excess water after irrigation of the land for which it was appropriated if it works a similar detriment.[25] The appropriator may be held strictly limited to the extent of former actual usage when he seeks to change the place of use.[26] When collected water in an irrigator's drainage canal is discharged into a natural watercourse, it becomes a part of that stream and is subject to public appropriation and use.[27] Junior appropriators have a vested right in the continuance of conditions as they

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[25] Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co., 116 Colo. 580, 586, 183 P.2d 552, 554 (1947), a case which also involved waters from the Las Animas River; Fort Lyon Canal Co. v. Rocky Ford Co., 79 Colo. 511, 515, 246 Pac. 781 (1926) (by implication). *Cf.* White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 195-96, 43 Pac. 1028, 1030, 31 L.R.A. 828 (1896) (appropriator more than doubled his diversion from a ditch, on the strength of his preceding contract with the ditch company's grantors; that enlargement was stopped, on the principle that any private contract regarding sale of water rights must bow to the state system of regulation). See Galiger v. McNulty, 80 Mont. 339, 356-57, 260 Pac. 401, 405 (1927) (mining operators diverted from an alien watershed, then attempted to sell rights to downstream irrigator who was to take flume discharge and unused volume).

[26] Farmers Highline Canal and Reservoir Co. v. City of Golden, 129 Colo. 575, 584-85, 272 P.2d 629, 634 (1954). There the city purchased the right of a former irrigator who had not put his entire decree to a beneficial use; the city sought to change the point of diversion and to assert its right to enlarge the use for city needs to the extent of the entire decree. The court rejected the attempt, holding, 129 Colo. at 584-85, 272 P.2d at 634, that regardless of the amount decreed, by changing the point of diversion the city was restricted to former actual usage. The water involved was local, in which the protestants held appropriation rights. *Cf.* Hall v. Blackman, 22 Idaho 556, 558-59, 126 Pac. 1047, 1048 (1912) (upstream appropriator perpetually enjoined from carrying part of his appropriation beyond the land formerly irrigated, because in so doing he deprived a junior of the use of seepage, waste, and percolating waters which the latter formerly received from the use of the waters on land to which they were decreed); Hutchinson v. Stricklin, 146 Ore. 285, 300, 28 P.2d 225, 230 (1933) (an appropriator for power purposes, a non-consumptive use, had no right to contract with irrigators to change the character of use to irrigation, a consuming use, to the effect of depriving the lower appropriator of water to which he was entitled by appropriation); Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 Utah 569, 579, 164 Pac. 856, 860 (1917) (landowner may not appropriate water for one purpose and then apply it or any part of it to another purpose).

[27] Quirico v. Hickory Jackson Ditch Co., 130 Colo. 481, 488, 276 P.2d 746, 750 (1954); Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 94, 53 Pac. 386, 388 (1898). *Cf.* Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 260, 17 P.2d 1074, 1079-80 (1933) (even fugitive waters originally introduced from another watershed which have, by percolation, reached a natural channel as waste water constitute part of that watercourse). Other jurisdictions supporting this principle specify the intent to abandon or the loss of dominion by discharging. Jones v. Warmsprings Irr. Dist., 162 Ore. 186, 91 P.2d 542 (1939) (discharge without intent to reserve or recapture works an abandonment); Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 187 Pac. 555 (1920) (the creator of an artificial flow of water is owner thereof so long as it is confined to his property, but not after the creator has lost his dominion over it by deposit in a natural stream).

existed on the stream at the time they made their appropriations,[28] including the general method of use of water therefrom.[29] Yet, again there must be pointed out what may be called a material distinction in these cases. With hardly an exception, they show that the disputes between appropriators concerned water from the local stream and its watershed, and that the disputants were all actual holders of appropriation rights in the source. It is this distinction which the city would hold out in its contention for right to re-use, disclaiming any concern for transmountain water wilfully abandoned but setting up that since the rights in the water belong to the city alone, those below are no proper complainants because when there are no rights existing there can be no rights injured.

It would seem, then, that the protestants to recapture and re-use stand more firmly upon the constitutional argument based upon Section 5 of Article XVI,[30] *viz.,* that water appropriated from a natural stream in Colorado, whether or not from the watershed in which it is used, cannot, under the same appropriation, be recaptured or re-used or transferred to others for re-use after it has once been put to beneficial use by the appropriator thereof. The thrust of the argument is that transfer of the water by its appropriator (i.e., the city) across a divide and into a watershed to which its presence is foreign nevertheless confers upon all appropriators therein the right and expectation of receiving the total discharge as part of the local supply which is "the property of the public." This reasoning entails the application of the *Pulaski* rule without reservation or distinction based on the foreign origin of the water, and would in effect allow users below the city a bonus of water imported entirely through the efforts of the city. This argument was made before the State Engineer of Colorado in 1965, by protestants to a contract for exchange sale of water by the City of Colorado Springs to a

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[28] DeHerrera v. Manassa Land & Irr. Co., 379 P.2d 405, 407 (Colo. 1963); Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co., 120 Colo. 423, 429, 210 P.2d 982, 985 (1949); Faden v. Hubbell, 93 Colo. 358, 369, 28 P.2d 247, 251 (1933).

[29] Monte Vista Canal Co. v. Centennial Irr. Ditch Co., 24 Colo. App. 496, 503, 135 Pac. 981, 984 (1913). California holds that whenever water in a natural stream or watercourse is not reasonably required for beneficial use by owners of paramount rights, whether the water is foreign or part of the natural flow, such owners cannot prevent use of the waters by other persons, and it must be regarded as surplus water subject to appropriation. True indeed, the appropriator may prevent waste of the water by selling it to a willing purchaser, but he cannot *compel* anyone to purchase his unneeded surplus water. Stevinson Water Dist. v. Roduner, 36 Cal.2d 264, 270-71, 223 P.2d 209, 213 (1950) (when the irrigator contracted to take all the excess foreign water sent down the creek to him, and interdisposed irrigators took therefrom what they estimated was excess, the court refused to order compensation to be paid by the latter unless the one who contracted for the water was accepting the excess with an actual need and intent to put it to use).

[30] *Supra* note 7.

private suburban water company.[31] The argument was rejected by the State Engineer.[32]

II. SOME STATUTORY RAMIFICATIONS

The city also faces the negative implications, or commands, of certain statutes. The first to be encountered contains a puzzling closing sentence.

> 139-79-1. Leasing of water — no rights vested. — In the event any municipal appropriator of water having a population in excess of two hundred thousand people shall hereafter lease water not needed by it for immediate use, no rights shall become vested to a continued leasing or to a continuance of the conditions concerning any return waters arising therefrom, so as to defeat or impair the right to terminate the leases, or change the place of use. Any leasing shall

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[31] The City of Colorado Springs contracted to sell to the South Suburban Water Company, a water company within its metropolitan area, amounts up to 600 acre-feet in any calendar year. The water so sold was denominated as strictly from the city's imported Blue River water, following sewage treatment, and was to be delivered, by exchange methods, as solely "successive use water." The water company sought by the agreement to supplement its appropriations on the local Cheyenne Creek. Cheyenne Creek is tributary to Fountain Creek, which drains the Colorado Springs area, and in which owners downstream from Colorado Springs held appropriation rights senior to the water company. The exchange method agreed upon between the city and water company provided that the water company would take water from Cheyenne Creek, out of its order of priority, notify the city of the amount taken, and the city would charge the water company's account for the Blue River water which it had discharged into Fountain Creek. The effect was a substitution of imported Blue River water into Fountain Creek to replace the amount taken by the water company out of order of priority. The downstream appropriators, noting that Colorado Springs had always discharged its once-used Blue River water into Fountain Creek adding to its natural volume, and that the city had no facilities for retaining physical control of the water after sewage treatment, protested that the substituted water was not new water available to the water company for that purpose but rather was water that already belonged to the stream and was subject to existing stream priorities. The protestants argued chiefly that water appropriated from a natural stream in Colorado, whether imported or not, cannot under the same appropriation be recaptured, re-used, or transferred to others for re-use after it has once been put to beneficial use by the appropriator; that the very discharge of the treated water into Fountain Creek indicated exhaustion of the beneficial use by the city, and so the public water again is part of that dedicated to the people of Colorado under article 16, § 5, Colorado Constitution; and that a second or partial use of water cannot be transferred to a new user by sale, loan, or exchange, while the water right is retained in the transferor, to the injury of those who need the water for beneficial uses on the stream of discharge. Brief of Protestants, In the Matter of the Hearing Before the State Engineer Regarding Storage of Water by the South Suburban Water Company in Water District No. 10, Irrigation Division No. 2, Colorado State Engineer's Office, State Services Annex Bldg., Denver (April 21, 1965).

[32] The State Engineer of Colorado expressly distinguished foreign from local water and gave as his ruling that when an importer of water increases the amount of water in the stream of beneficial use he is entitled to use the new water to the best of his ability, and that other appropriators on the stream to which the water has been imported, having exerted no effort in said importation, are not entitled to participate in any benefits arising therefrom. The ruling expressly referred to the fact that in the original federal decree which allowed use of Blue River water to Colorado Springs, Decree of the United States District Court, District of Colorado, United States v. Northern Colo. Water Conservancy Dist., Civil Nos. 2782 (incorporating Nos. 5016, 5017), Oct. 12, 1955, the city was under a duty to measure regularly the quantities of return flow from its municipal uses of the transmountain water and to report regularly to the Secretary of the Interior of the United States what steps, by legal action or otherwise, the city has taken to utilize such return flow by exchange or otherwise so as to reduce or minimize the demands of the city upon Blue River water. Ruling of the State Engineer, In the Matter of the Hearing Before the State Engineer, *supra* note 31, at 2-4.

> not injuriously affect rights theretofore vested in other appropriators. *Nothing contained in this section shall authorize an appropriator to recapture water for a second use after it has once been used by it.*[33]

The statute protects Denver, in its lease of water to outside consumers, from the latter acquiring vested rights in such leases. It came under examination by the supreme court in *City and County of Denver v. Sheriff*[34] in 1939 and *City of Englewood v. City of Denver*[35] in 1951, and though the court found no issue involving that final sentence and made no interpretation of it, an examination of the cases is germane to the subject here.

In *City and County of Denver v. Sheriff,* the city appealed from a general (transmountain) water adjudication decree which (a) subjected the city's new western slope water to a restrictive condition that Denver's use of the imported water was to be merely supplemental and contingent upon prior use of its earlier (eastern slope) appropriations, and (b) denied the city any appropriation whatever based upon general irrigation purposes. The trial court (a western slope jurisdiction) was quite candid in stating that its decree was intended to guard "against the City of Denver going into the business of selling water or disposing of a part or all of her present [eastern slope] water rights and substituting the [imported] water acquired . . . in this proceeding for her present water supply."[36] The supreme court modified the decree, striking down the restrictive condition, (a) *supra,* on the principle that the eastern slope appropriations, being a property right in absolute unconditional decrees, could not be so restricted, nor so dealt with by a court alien to eastern slope jurisdiction, and that the supreme court had previously stated in *Denver v. Brown,* 65 Colo. 216, 138 Pac. 44 (1914), that the city could lease its eastern slope water to irrigators under certain conditions.[37] The court, in examining Section 139-79-1 (then known as Chapter 163, Section 398, Colorado Statutes Annotated 1935), held that under the section there is a difference between use of water for municipal purposes and use of water for irrigating and that cities having a population of 200,000 or more may by prudent management appropriate an adequate supply for a reasonable time in the future.[38] It made no reference, however, to the final sentence of the

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[33] COLO. REV. STAT. § 139-79-1 (1963) (emphasis supplied).

[34] 105 Colo. 193, 96 P.2d 836 (1939).

[35] 123 Colo. 290, 229 P.2d 667 (1951).

[36] City and County of Denver v. Sheriff, *supra* note 34, 105 Colo. at 201, 96 P.2d at 840, 841.

[37] *Id.* at 201, 96 P.2d at 840.

[38] *Id.* at 202, 96 P.2d at 841-42.

section.[39] There was no issue requiring it, for the dispute concerned a decree, not recapture or re-use. The court did sustain the trial court in its denial of the city's appropriation based on beneficial use for irrigation purposes outside of the Denver Municipal Water System area; the court made clear that the city was not prohibited from leasing water not needed for immediate use, under the decision of *Denver v. Brown, supra,* but it just as clearly held that the need of water to satisfy beneficial use necessarily must apply to the system area.[40]

The supreme court was similarly silent in its later consideration of Section 139-79-1 in *City of Englewood v. City of Denver.*[41] Englewood, whose residents had been purchasing water from Denver, (a) petitioned against Denver's increasing the rates to Englewood, on the ground that Denver was operating as a public utility and so was fully subject to the jurisdiction of the state public utilities commission, and (b) sought a finding that Denver was contractually bound to furnish water to Englewood consumers at the rates prevailing in Denver itself. The trial court entered declaratory judgment of dismissal. The supreme court affirmed, holding that Denver's prime purpose was to supply water to its residents, an act of a "municipal utility" rather than a "public utility"; that the act of supplying water to users beyond the territorial limits of the city [Denver] did not impress the business with a public interest because the outside users had no right to demand the service;[42] that so operating on a utility basis, Denver could collect charges and make such conditions as it wished, all without liability of any vested right for a continued sale or lease of water, and that Denver "holds such water as is not needed by it for immediate use in its proprietary capacity, in which it has a well defined property right . . . ."[43] There was no intimation as to the final sentence of Section 139-79-1.

The sentence patently means the seller or lessor of water—*i.e.,* the city as appropriator—and not the purchaser or lessee. The wording "Nothing . . . shall authorize an appropriator to recapture water for a second use after it has once been used by it" contains no positive prohibition to recapture, but rather a negative implication, "Nothing . . . shall authorize . . . ." Possibly the legislators meant

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[39] The section was worded at the time, "Provided, further, that nothing herein contained shall authorize an appropriator to recapture water for a second use after it has once been used by it." COLO. STAT. ANN. ch. 163, § 398 (1935).

[40] 105 Colo. at 210, 96 P.2d at 844.

[41] 123 Colo. 290, 229 P.2d 667 (1951).

[42] *Id.,* 123 Colo. at 298, 229 P.2d at 671-72.

[43] *Id.,* 123 Colo. at 300-01, 229 P.2d at 673.

in drafting the statute in 1931[44] that the city, in leasing or selling to outsiders, could not retake that volume from the stream into which the outside purchaser or lessee would discharge it after use. In any event, that final sentence of Section 139-79-1, with its serious negative implications, must eventually be interpreted by the courts as cities proceed with, or expand, their methods of re-use of appropriations.

There is another statute which, if germane, must be satisfied by the city.

> 148-2-6 . . . . Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever. The provisions of this section shall not prohibit any city or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes.[45]

The apparent strictness of this injunction has been vitiated by the supreme court, *e.g.*, in *City and County of Denver v. Sheriff*[46] wherein it said:

> The term "municipal uses" never has been used in connection with water adjudication proceedings before, to our knowledge. This term necessarily includes agricultural purposes within the city area. . . . We said [*in Denver v. Brown,* 56 Colo. 216, 138 Pac. 44 (1914)] "Irrigation means the application of water for the purpose of nourishing plants. We think the application of water to grow trees upon streets and to irrigate trees, shrubs, grasses, and other plant life usually grown in parks constitutes the use of water for irrigation just as much as the application of water to grow crops upon farms . . . ."
>
> Counsel for defendants in error say in their brief . . . "There is no desire on the part of the defendants in error . . . to deny the City of Denver its right to use the appropriated water for all municipal purposes, including the irrigation of its parks, lawns, and shrubbery."[47]

Upon this the city presumably could contend that it may also, *inter alia,* water golf courses ("parks").[48]

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[44] Colo. Sess. Laws 1931, ch. 172, p. 811, § 1.

[45] COLO. REV. STAT. § 148-2-6 (1963).

[46] 105 Colo. 193, 96 P.2d 836 (1939).

[47] *Id.,* 105 Colo. at 209-10, 96 P.2d at 844.

[48] Indeed, the city might consider it reasonable also to argue its right to sell its non-potable, sewage-treated water for use in areas within its system even though outside its corporate limits. The court did specify in Denver v. Sheriff, 105 Colo. at 210, 96 P.2d at 844, "The need of water to satisfy beneficial use . . . necessarily must apply to the system area." So, it could be contended, if a city's water system runs outside its actual municipal limits, water may be leased or sold throughout the system both inside and outside the city limits. See Van Tassel Real Estate & Livestock Co. v. City of Cheyenne, 49 Wyo. 333, 365-66, 54 P.2d 906, 916, *cert. denied,* 299 U.S. 574 (1936) (the municipality having prior appropriation of waters for municipal use is entitled to dispose of surplus water to places — in this case a military reservation — closely adjacent to the city which, so far as "municipal use" of water is concerned, may be considered as parts of the city).

III. THE CITY AS AN APPROPRIATOR

The city is not prevented from arguing from the perspective of common sense and justice. Recalling that it owns the rights in the transmountain water, has imported it at substantially its own direct expense, will or can hold it on its premises, means to apply it or grant its application to a beneficial use, and is acting in good faith to prevent wastage and unnecessary expense, the city finds certain strong grounds upon which to base its argument. Note, however, that none is as close to the specific point of re-use of sewage water as is the *Pulaski* case.[49]

When an appropriator has actually diverted water from a stream under his priority, the water he has taken is (as against would-be appropriators thereof) no longer a right but a possession, not an interest in real estate as it had been, but personal property.[50] Water once lawfully in an appropriator's possession may, in the absence of an intent to abandon, be prevented from escaping, or may be recaptured while escaping, and such waters are not the subject of appropriation,[51] and this even though there has been ac-

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[49] 70 Colo. 565, 203 Pac. 681 (1922), *supra* note 20 and accompanying text.

[50] Tongue Creek Orchard Co. v. Town of Orchard City, 131 Colo. 177, 183, 280 P.2d 426, 428-29 (1955) (by implication) Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 373, 237 P.2d 116, 120 (1951); Madison v. McNeal, 171 Wash. 669, 674, 19 P.2d 97, 98 (1933); Riggs Oil Co. v. Gray, 46 Wyo. 504, 512-13, 30 P.2d 145, 147 (1934); 2 KINNEY, IRRIGATION AND WATER RIGHTS, § 661 at 1153, § 773 at 1340 (2d ed. 1912); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, § 35 at 33 (3rd ed. 1911). *See* Knapp v. Water Dist., 131 Colo. 42, 52-53, 279 P.2d 420 (1955).

[51] McKelvey v. North Sterling Irr. Dist., 66 Colo. 11, 14-15, 179 Pac. 872, 874 (1919); Colthorp v. Mountain Home Irr. Dist., 66 Idaho 172, 182, 157 P.2d 1005, 1007 1945) (though upwards of 75% of the water decreed to the upper ranch had wasted, following irrigation, into the creek and had been made use of for 40 years by the complaining lower ranch, the upper could not be required to continue the waste of water, nor prevented from recapturing it on its land for a beneficial use); Cleaver v. Judd, 393 P.2d 193, 195 (Ore. 1964) (an irrigation district as a municipal corporate entity is regarded as an owner for the purpose of the principle that an owner may recapture waste and seepage water before it leaves his land); Barker v. Sonner, 135 Ore. 75, 79, 294 Pac. 1053, 1054 (1931) (waste water is not waste water so long as it remains upon the land of the original appropriator); McNaughton v. Eaton, 121 Utah 394, 404, 242 P.2d 570, 574 (1952) (as long as original appropriator has possession and control, he may recapture and use the waters for further beneficial uses); Lasson v. Sealey, 120 Utah 679, 687-89, 238 P.2d 418, 421-22 (1951) (even built a check-dam, under statutory limitations). And see Trelease, *Reclamation Water Rights,* 32 ROCKY MT. L. REV. 464, 470-72 (1960); Breitenstein, *Some Elements of Colorado Water Law,* 22 ROCKY MT. L. REV. 343, 350-51 (1950). Care must be taken, however, to distinguish such as the *McKelvey* case, *supra,* in which water broke through its ditch and ran down a dry draw, from the well known Colorado rule that water which percolates underground from a reservoir or ditch, and would naturally reach the stream if not interfered with, is considered a part of the stream, not subject to retaking under the appropriation which first captured it. *E.g.,* Fort Morgan Reservoir & Irr. Co. v. McCune, 71 Colo. 256, 261, 206 Pac. 393, 395 (1922); Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co., 68 Colo. 437, 443-44, 191 Pac. 129, 130-31 (1920); Trowell Land & Irr. Co. v. Bijou Irr. Dist., 65 Colo. 202, 214, 176 Pac. 292, 296 (1918); Comstock v. Ramsay, 55 Colo. 244, 255-56, 133 Pac. 1107, 1111 (1913).

quiescence in another's use of the waste water.[52] There is expansive language that an appropriator, after his right as a ditch supplier has ripened, if there has been no abandonment since the decree of appropriation, may apply the water to other land than that upon which the first application was made, or sell it to others who may apply it to other lands; the water decreed for irrigation is not confined to the land upon which such a right ripened, and may be applied to new or additional lands without putting the appropriation to a double use or duty.[53]

Among the cases—predominantly agricultural as they are, but upon which reliance must be made for judicial guidelines—those involving foreign waste waters are noticeably rare. There are, though, at least three Colorado cases concentrating on such waters: *San Luis Valley Irr. Dist. v. Prairie Ditch Co. and Rio Grande Drainage Dist.*,[54] *Coryell v. Robinson*,[55] and *Brighton Ditch Co. v. City of Englewood*.[56] In *San Luis Valley* one defendant, Rio Grande Drainage District, constructed a drainage canal which discharged its waste water across a watershed into the Rio Grande River; the other defendant, Prairie Ditch Company, which had not participated in the construction of the drainage canal, tapped the canal sometime later and then procured a decree of No. 1 priority to forty second-feet therefrom, upon the district court's finding that but for the drainage canal the water would never have entered the Rio Grande River—*i.e.*, the canal was discharging foreign water into the river. An attack by the San Luis Valley Irrigation District against the Prairie Ditch appropriation was rejected. The supreme court affirmed, holding that since the water was not a part of the river and never could constitute a source of supply thereto, the claimants in the river could not complain that a new taker (Prairie Ditch) had injured them with its diversion.[57] The implication is clear that such outside waters are

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[52] Burkart v. Meiberg, 37 Colo. 187, 190, 86 Pac. 98, 99 (1906) (surface overflow from irrigated lands onto claimant's land was suddenly, and validly, cut off by the appropriator, who caught the water in a ditch on his side of the property line); Fairplay Hydraulic Mining Co. v. Weston, 29 Colo. 125, 128, 67 Pac. 160, 161 (1901) (mining company which permitted irrigator to enter and divert placer waste from the company's flume was under no obligation to maintain either a flow clean enough for irrigation or the flow itself).

[53] New-Brantner Extension Ditch Co. v. Kramer, 66 Colo. 429, 436-37, 182 Pac. 17, 20 (1919). The language of this case seems deceptively and contrarily broad. It was uttered with reference to a mutual ditch with numerous owners who at times used only part of their irrigation water—or none at all. The court decided, then, that such unused water may flow down to others on the ditch, permitting the irrigation of a larger number of acres than that upon which the right ripened, without putting the water to a double duty. The court has not examined the holding since.

[54] 84 Colo. 99, 268 Pac. 533 (1928).

[55] 118 Colo. 225, 194 P.2d 342 (1948).

[56] 124 Colo. 366, 237 P.2d 116 (1951).

[57] 84 Colo. at 106, 268 Pac. at 535.

introduced independently of the local watershed and its appropriators and are subject to recapture and, if abandoned, appropriation by the first taker (in this case, Prairie Ditch).

But in *Coryell v. Robinson* twenty years later (1948) the court apparently flew in the face of the implied authority of *San Luis Valley* by deciding that the first taker was qualified to do so only if he had contributed the new water by his own efforts. Again, the diversion was transwatershed, although remaining in the same general basin (Gunnison River). An irrigator, Coryell, had purchased with the tract the right to take five-eighths of the waste water from the remaining lands of his grantor, who apparently was one McKinnon. Coryell constructed three ditches on McKinnon Draw, which was so situated that water would move there by seepage or surface flow before moving down to other courses and on into the river. Later, water was imported into the watershed by others via the Cedar Mesa Ditch, which ran near McKinnon Draw and gave off waste and seepage. The waste and seepage were caught by Coryell's ditches and so prevented from running down to the lower appropriators. In a subsequent general water adjudication of the district, Coryell was awarded only .75 second-feet to his ditches, a right apparently far below the waste he was catching, and junior in time to those below him. He never appealed the decree, and continued to take the waste. Finally the seniors below complained, the water commissioner ruptured the ditches several times, and Coryell attempted to enjoin them all and quiet his title. His action was defeated, and although the supreme court affirmed, relying heavily on both the *San Luis Valley* case and a 1914 case, *Ironstone Ditch Co. v. Ashenfelter,*[58] it announced a rule contrary in effect to *San Luis Valley, viz.* that any prior and independent right to foreign water lay only in the person who had by his own labor and efforts contributed it to the normal flow of the watershed and hence, in absence of such effort on his part, Coryell the junior must defer to his seniors below under the regular order of appropriative right:

> In both of the cases [referring to *San Luis Valley* and *Ironstone Ditch*], the successful litigants had, *by their own efforts, lawfully contributed water to the stream or stream basin which otherwise would not have reached it* . . . . In the instant case, plaintiff [Coryell] *has not by his own labor or efforts contributed extraneous water to the normal flow of the watershed* . . . . The water would appear to belong to the watershed, to be distributed with other waters in the watershed according to the decreed-priorities.[59]

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[58] 57 Colo. 31, 140 Pac. 177 (1914).

[59] Coryell v. Robinson, 118 Colo. at 233-34, 194 P.2d at 346. (Emphasis the court's.)

Yet in *San Luis Valley,* the "successful litigant," Prairie Ditch Company, had not worked to import the waste water. It had merely tapped on and later secured a No. 1 priority to forty second-feet therefrom. On its face, then, *Coryell* may seem to stand as potentially a persuasive support of the city which today asserts a preference in recapturing and re-using its imported water, for it fits the description "own efforts . . . contributed . . . extraneous water." But it has been severely criticized as poorly reasoned and as misstating the facts and misapplying the holding of *San Luis Valley,* and as causing a "tangled web of uncertainty" as to whether a transwatershed appropriator really can recapture his water.[60]

As to the other case, *Ironstone Ditch Co. v. Ashenfelter,*[61] which the court coupled with *San Luis Valley* to turn away Mr. Coryell: the water involved was apparently local, but trapped and immobile in marshes not far from the stream. Certain appropriators, Numbers 2 and 3 (as their priorities and ditches were designated by the courts) became frustrated by the ungovernable pirating of their water by juniors upstream (the juniors even ambushed some of the headgate patrolmen and threw them into the river) and by vast and irremediable seepage into sand bars long before the remaining water reached their headgates. So Numbers 2 and 3 went across, and down, the river and ditched the seepage and waste water from the marshes upstream for a mile, dumped it into the river just above their headgates, found it adequate for their needs, and then sold their 2 and 3 priorities to a canal miles upstream from everybody. The change of point of diversion of these priorities was approved in the court below. The supreme court affirmed, rejecting the protestants' theory that some seepage from the canal would get down to 2 and 3 and thus set up a double use of the priorities. More important, the court held that the feeder ditch of Numbers 2 and 3—the one from the marshes—was carrying water by an independent right, separate from their original decree and developed since its adjudication. The court first reiterated the basic rule that an appropriation right depends in no way upon the place of its application and that the point of diversion, the conduit, the place of application, and character of use may each and all be changed.[62]

Then came the statement to which the *Coryell* court later turned. Attention is called particularly to note 63 *infra,* following the quota-

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[60] Martz, *Seepage Rights in Foreign Waters,* 22 ROCKY MT. L. REV. 407, 409 (1950).
[61] 57 Colo. 31, 140 Pac. 177 (1914).
[62] *Id.,* 57 Colo. at 39, 40, 140 Pac. at 180.

tion, explaining the stigma of "dictum" which lay upon that statement until the *Coryell* court coupled it with *San Luis Valley* as authority. The statement in *Ironstone Ditch Co.*:

> It must not be forgotten that No. 3 consumers constructed at their own labor and expense the Feeder ditch by which the seepage water . . . doing no one any good, was conveyed a mile up the river . . . . This was an independent appropriation from extraneous sources . . . . If, by their efforts, they lawfully contributed water to the stream, which otherwise would not have reached it . . . it was theirs, independent of the original adjudication decree, and because, by their labor, they contributed extraneous water to the normal flow is no reason why they may not sell their priorities, and irrigate their land with the independent water.[63]

The recapturing city would point to this paragraph as designating its foreign appropriation not subject to past decrees of the local appropriators who claim rights to receive the full discharge. It points to the strong language regarding efforts to contribute extraneous water as implying exclusivity of control by him who labors for and secures that water.

Thus, from *Ironstone Ditch Co.* and *Coryell* (even with the infirmities of both) the city could logically contend today that he who by his labors and expense procures water not otherwise avail-

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[63] *Id.*, 57 Colo. at 42-43, 140 Pac. at 181. Here let it be pointed out that the *Coryell* court, choosing *Ironstone Ditch Co.* as an authority for giving preference to a developer of extraneous water and holding such water to be an independent supply, implicitly abandoned a decision in 1920 which had labelled as dictum part of the *Ironstone Ditch Co.* opinion, and which, although not specifying the part, seemed to mean that part just quoted in the text, *supra.* The 1920 case was Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co., 68 Colo. 437, 191 Pac. 120 (1920), which reiterated the rule that seepage which escapes from a reservoir and percolates toward the stream is now again part thereof and cannot be reappropriated by the reservoir which held it. In the case, the reservoir company, contending that it could recapture its seepage, relied on *Ironstone Ditch Co. v. Ashenfelter,* apparently contending that recapturing its seepage was merely capturing waste extraneous water. That this was probably the reservoir company's theory is indicated in the dissent by Garrigues, J. Justice Garrigues (who wrote the *Ironstone Ditch Co.* opinion) said, 68 Colo. at 445, 191 Pac. at 132, that he thought that the disputed water was extraneous to the natural or regular flow of the stream, and later cited the syllabus of *Ironstone Ditch Co.* as stating that "seepage water which is being wasted is the subject of appropriation." At any rate, the opinion of *Rio Grande Reservoir* said, 68 Colo. at 444, 191 Pac. 131, that

> That part of the opinion in *Ironstone Ditch Co. v. Ashenfelter* . . . quoted by the plaintiff in error . . . is purely gratuitous and volunteer matter, and not responsive to any issue in that case . . . . The proceedings there brought were to change the point of diversion of certain appropriations, and the only question for decision was whether the proposed change would injuriously affect vested rights to the use of water from that stream. The dictum . . . relied upon . . . can be considered only as the individual opinion of a single justice of this court, and of course, while persuasive, can in no sense be held to be the opinion of this court . . . .

But now, a generation later, *Coryell* calls upon that portion of *Ironstone Ditch Co.* as authority, and ignores the *Rio Grande Reservoir* opinion. Clarification must come, to determine whether the *Coryell* court was, indeed, intent on making new law. It is this last possibility which has cast a pall of uncertainty about *Coryell.*

able for use in the watershed has a right to its use independent of others.[64]

These irrigation cases are cited and discussed because of the working rules which have emerged. These rules, if applicable also to a municipal entity, may well be weapons of attack for the city, and seemingly the best available, for they extend preference and more than a shadow of license to the one responsible for artifically developed water. The importing city seeks to fit itself into the law's formula: "artificially developed" water is that produced which would not otherwise naturally have reached the stream.[65]

In *Brighton Ditch Co. v. City of Englewood*[66] the city moved to change its point of diversion and the character of use from irrigation to domestic and municipal purposes, thus to effect a radical decrease in the city's purchase of water from Denver. Downstream appropriators protested that this would reduce their amount of waste water because Denver would import less water from the western slope. The supreme court rejected that protest, holding that appropriators on a stream have no vested right to a continuance of importation of foreign water which another has brought into the watershed.[67] The same applies to local water: there is no obligation upon an owner to continue to maintain conditions so as to supply water to appropriators of waste water at any time or in any quantity, when

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[64] *Cf.* Leadville Mine Dev. Co. v. Anderson, 91 Colo. 536, 17 P.2d 303 (1932) (Where a person by his own efforts has increased the flow of water in a natural stream, he is entitled to the use of the water to the extent of the increase, but he must prove that it was produced and contributed by him and that it would not otherwise have reached the stream); Comrie v. Sweet, 75 Colo. 199, 225 Pac. 214 (1924); Bieser v. Stoddard, 73 Colo. 554, 216 Pac. 707 (1923). See also Platte Valley Irr. Co. v. Buckers Irr., Milling & Improvement Co., 25 Colo. 77, 82, 53 Pac. 334, 336 (1898) (dictum); Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641, 642-43 (1909).

Could the city even argue that it could sell all its other rights and use the developed water for its own needs? This raises the apprehension, it may be recalled, that was uttered by the trial court in *Denver v. Sheriff, supra* note 36, that Denver was "going into the business of selling water or disposing of a part or all of her present water rights and substituting the water acquired" for her present water supply. 105 Colo. at 201, 96 P.2d at 840-41. The apprehension seems much slighter now, negated by the city's effort to re-use what it has at present.

[65] Dalpez v. Nix, 96 Colo. 540, 544, 45 P.2d 176, 178 (1935); Comrie v. Sweet, *supra* note 64. *Cf.* West Side Ditch Co. v. Bennett, 106 Mont. 422, 433, 78 P.2d 78, 81 (1938) (the theory of a development of a new water supply contemplates the increase of a stream occasioned through the exertion of man directed to that end, and does not contemplate accessions to the stream through the process of nature, as by percolating waters); Spaulding v. Stone, 46 Mont. 483, 488, 129 Pac. 327, 329 (1912) (exclusive use for any purpose of a new supply of water developed or collected from lands forming no part of the source of the flow).

[66] 124 Colo. 366, 237 P.2d 116 (1951).

[67] 124 Colo. at 377, 237 P.2d at 122. The court cited in support the broadly-worded California case, Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 90 P.2d 58 (1939), which is discussed below (note 72 and accompanying text).

acting in good faith.[68] Or if a senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transportation and consumptive use and no waste water returns, no appropriator can complain.[69] A claimant to waste waters acquires a temporary right only to whatever water escapes which cannot find its way back to the source of supply. No permanent right can be acquired to have discharge of waste water continued—not by appropriation or prescription or estoppel or acquiescence.[70] No action therefore will lie for the diversion (*i.e.*, cessation) of an artificial watercourse where from the nature of the case it is obvious that the enjoyment of it depends upon temporary circumstances and is not of a permanent character.[71] This logically leads, the importing city would contend, to the conclusion that he who has no right cannot be injured by him who does have the right. A loss of a luxury—*viz.*, a windfall or bonus-type of increased flow—which has been forthcoming merely from convenience, arose from exactly that: convenience.

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[68] *E.g.*, Tongue Creek Orchard Co. v. Town of Orchard City, 131 Colo. 177, 181, 280 P.2d 426, 428 (1955); Green Valley Ditch Co. v. Schneider, 50 Colo. 606, 610, 115 Pac. 705, 706 (1911) (and conversely, the ditch owner cannot maliciously divert the water away to vacant lands); Burkart v. Meiberg, 37 Colo. 187, 190, 86 Pac. 98, 99 (1906); Mabee v. Platte Land Co., 17 Colo. App. 476, 479, 68 Pac. 1058, 1059 (1902); Fairplay Hydraulic Mining Co. v. Weston, 29 Colo. 125, 128, 67 Pac. 160, 161 (1901); Twin Falls Co. v. Damman, 277 Fed. 331 (S.D. Idaho 1920); Wedgworth v. Wedgworth, 20 Ariz. 518, 523, 181 Pac. 952, 954 (1919); Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 34, 276 Pac. 1017, 1029 (1929); Application of Boyer, 73 Idaho 152, 162, 248 P.2d 540, 546 (1952); Meine v. Ferris, 126 Mont. 210, 217, 247 P.2d 195, 198 (1952) (by implication); Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 656, 187 Pac. 555, 558 (1920); Tyler v. Obiaque, 95 Ore. 57, 61, 186 Pac. 579, 581 (1920); Garns v. Rollins, 41 Utah 260, 272, 125 Pac. 867, 872 (1912); Binning v. Miller, 55 Wyo. 451, 469, 102 P.2d 54, 59-60 (1940).

[69] Bower v. Big Horn Canal Ass'n, 77 Wyo. 80, 101, 307 P.2d 593, 601 (1957).

[70] 2 KINNEY, IRRIGATION AND WATER RIGHTS, § 661 at 1151 (2d ed. 1912); Ryan v. Gallio, 52 Nev. 330, 345, 286 Pac. 963, 967 (1930).

True, artificial flow claimants may, by taking the abandoned waste water, have priority among *themselves,* but they can have no right of continuance against the owner of the natural supply, except by grant, condemnation or dedication. 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, § 56 at 50 (3d ed. 1911). That the sale of water by a city to outside users is no "dedication" to a public use without the intention thereof by the seller, see City of Englewood v. City and County of Denver, 123 Colo. 290, 299, 229 P.2d 667, 672 (1951), and cases cited.

[71] 1 WIEL, *op. cit. supra* note 70, § 57 at 55.

COLO. REV. STAT. § 148-2-2 (1963) provides:

> Priority of right to spring water.—All ditches constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same law relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; provided that the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands.

This prior right to "waste, seepage, or spring waters," redounds to the benefit of the importing city under the restrictive interpretation applied to the statute in 1929 when, in substantially the same wording and known as Colo. Laws 1921, § 1637, it was held to apply only to non-tributary waters, *i.e.*, waters that do not "belong to the stream." Nevius v. Smith, 86 Colo. 178, 181, 279 Pac. 44, 45-46 (1929).

And the city which now chooses to exercise its right unto itself is acting within the only right in sight, its own.

The type of broad holding supporting the right which the Colorado city now contemplates, to recapture and re-use its foreign supply was made by the Supreme Court of California in an irrigation case, *Stevens v. Oakdale Irrigation District*.[72] The land of the complaining waste-taker was located on a creek below the boundary of the defendant District. From about 1912 the District imported foreign water, the waste and percolation of which considerably increased the creek's volume. The complainant took it from the creek and used it without interruption for about twenty-two years. Then the District began to recapture the waste by diverting it from the creek within its (the District's) boundaries. At the trial the complainant prevailed. The Supreme Court of California reversed. The court set forth the issue in this way:

> Stating the question another way, where the producer of an artificial flow does not decrease it at the source, but after importing it, acts upon it a second time while it is still within his land and before it leaves his control, . . . may lower appropriators assert a right to enjoin any decrease in the volume of abandoned water?[73]

The court answered in the negative. It explained first that transwatershed diversions reduced to possession are private property during the period of possession, and that when the actual water, or corpus, has been relinquished or discharged without intent to recapture, the property in it ceases; but such abandonment is not abandonment of a water *right,* but merely abandonment of the specific portions of water, *i.e.,* the very particles which are discharged or have escaped from control; and the past abandonment by the importer of certain water, as distinguished from a water right, does not confer any right to the complainant to compel a like abandonment in the future or to control the District's use upon its own land of such water as it imports—and this, despite the fact that the complainant built diversion works in reliance upon the continued volume. In the process of growth, the court said, the District, which cannot perfect its system "in a day," discharges a large volume of arificial flow over a long period of formative years, but that should not constitute an abandonment of the right to such waters.[74]

In elaborating the breadth of its opinion, the court cited with

[72] 13 Cal.2d 343, 90 P.2d 58 (1939).

[73] *Id.,* 13 Cal.2d at 350, 90 P.2d at 61.

[74] *Id.,* 13 Cal.2d at 351, 90 P.2d at 61-62.

approval *United States v. Haga*,[75] an irrigation case in which recapture of seepage and percolation beyond the boundaries of origin was permitted where it was contemplated in advance, and then concluded:

> [A]s a general proposition, an irrigation district, after importing water from one river, passing it through irrigation works, and discharging it into a natural creek bed in the second watershed, may change the flow of water imported or the volume of water discharged from its works into the second stream, or stop the flow entirely, so long as this is done above the point where the water leaves the works of the district or the boundaries of its land. An exception to the rule is not created by the fact that the district may act upon the water a second time while in its possession, by retaking it at a point of drainage for further beneficial application.[76]

By analogous application of such reasoning as appears in *Stevens,* and with existing mechanical statutory power,[77] the city would seem to present a plausible argument for right to recapture from its sewage works for subsequent recirculation for municipal uses, including irrigation of parks and golf courses and out-of-boundaries supply (whether by exchange measurement or directly) to suburban water companies, manufacturers, military installations, private

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[75] One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses . . . . It is requisite, of course, that he be able to identify it; but subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. United States v. Haga, 276 Fed. 41, 43-44 (S.D. Idaho 1921).

There may well be small comfort, however, to the Colorado appropriator in this holding, for aside from the contingency that the recapture is contemplated in advance, Colorado authority has long since held that seepage and percolation cannot be recaptured outside their source once they begin the movement toward a natural tributary. *E.g.,* Fort Morgan Reservoir & Irr. Co. v. McCune, 71 Colo. 256, 261, 206 Pac. 393, 395 (1922); Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co., 68 Colo. 437, 443-44, 191 Pac. 129, 130-31 (1920).

[76] Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 352, 90 P.2d 58, 62-63 (1939). The *Stevens* rule was applied in a municipal case, Los Angeles v. Glendale, 23 Cal.2d 68, 77-78, 142 P.2d 289, 295 (1943), in which the City of Los Angeles was held to retain its right to the use of its foreign water even though some was *sold, en route,* to irrigators and, as foreseen at the time of sale, percolated after use by the latter into the city's underground reservoir and abided there ready for city use. Speculation in California now turns to whether or not recapture may be made of ground (seepage) water which was origially foreign water imported and put to use by the Bureau of Reclamation Project which now contemplates recapture. Comment, *Recapture of Reclamation Project Ground Water,* 53 CALIF. L. REV. 541 (1965).

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

> Powers of governing bodies.—The governing bodies in cities and towns shall have the following powers: . . .
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> (38) To construct public wells, cisterns and reservoirs in the streets and other public and private places within the city or town, or beyond the limits thereof, for the purpose of supplying the same with water; to provide proper pumps and conducting pipers or ditches; to regulate the distribution of water for irrigating and other purposes, and to levy an equitable and just tax upon all consumers of water for the purpose of defraying the expense of such improvements . . . .
>
> (39) To supply water from their water systems to consumers outside of the corporate limits of the cities and towns; and to collect therefor such charges and upon such conditions and limitations as said towns and cities may impose by ordinance.

clubs, etc., which are now or will be linked to the metropolitan water system.[78]

The city is not without its burden in this. It may indeed show itself as one recapturing or holding captive its foreign water within its works or boundaries, and so not within reach of the established Colorado rule that diverted or stored water which is allowed to seep off and move toward a stream becomes a part of it, free from the appropriation which first took it.[79] Yet there stands such a principle as holds in California, that one may not compel another to purchase, or pay for taking, the former's unneeded surplus water.[80] The city may show that Colorado holds that a city, in operating a waterworks system, acts in its proprietory or business capacity and when a surplus of the material (water) distributed is acquired it may be sold to consumers without the city,[81] but the city may face disallowance from deliberately producing a surplus merely for profitable outside dealing. Court decrees of water rights can be, and are, aimed at preventing an appropriator's right from developing—wilfully or not—into a real abuse of a public resource in short supply.[82]

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[78] As to the possibilities of discharging the treated water into the natural streams, just as heretofore, but now with a contract to furnish to the users below (and with express intent not to abandon), that is potentially a source of complaint by those downstream who have enjoyed the increase to the stream gratis for years. Those who would contract to purchase from the city and take delivery by means of a natural stream must, inevitably, include junior appropriators or even those with no appropriation at all. Indeed, would they not be the first customers in line? They would be anxious to purchase, and would expect the seniors to stand still and permit the measured "contract water" to pass by. And the seniors—they could never rest well in any aloof assumption that the city could not store or itself re-use all that treated sewage water and would *have* to discharge it. Such an assumption would be unrealistic, for the city would (a) in its performance of its constitutional duty restrain its own intake of foreign water to its current needs and beneficial use, regardless of the excess available to it by appropriation right, and (b) with the passage of years and continued growth of both quantity and variety of demand, apply more and more of the treated water to its own uses in its own system, eventually reaching capacity—*i.e.*, its volume of consumptive water use would equal the potential supply, thus consuming totally the treated foreign water which formerly was discharged.

[79] *E.g.*, Fort Morgan Reservoir & Irr. Co. v. McCune, 71 Colo. 256, 261, 206 Pac. 393, 395 (1922); Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co., 68 Colo. 437, 443-44, 191 Pac. 129, 130-31 (1920); Comstock v. Ramsay, 55 Colo. 244, 255-56, 133 Pac. 1107, 1111 (1913).

[80] Stevinson Water Dist. v. Roduner, 36 Cal.2d 264, 270-71, 223 P.2d 209, 213 (1950), *supra* note 29.

[81] Larimer County v. City of Fort Collins, 68 Colo. 364, 367, 189 Pac. 929, 930 (1920), in which the court considered and upheld as not ultra vires, the city's contract to reimburse construction costs of extension of its water line beyond the corporate limits. And see 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, §§ 37, 38 at 36-38 (3d ed. 1911).

[82] *E.g.*, The final (consent) decree of the United States District Court, District of Colorado, in United States v. Northern Colo. Water Conservancy Dist., Civil Nos. 2782 (incorporating Nos. 5016, 5017), Oct. 12, 1955, applying to numerous rights and containing careful stipulations as to duty of use and ability to draw pro tanto upon both transmountain and other sources; Denver v. Sheriff, 105 Colo. 193, 210, 96 P.2d 836, 844 (1939), in which the state supreme court agreed that from the facts in that particular case, there was no basis upon which the trial court could have awarded the city an appropriation based on beneficial use for irrigation purposes outside of the Denver Municipal Water System area.

CONCLUSION

It seems possible and reasonable that a resolution of the questions here presented may emerge from a certain fundament of all the cases, of all law — duty. There is a duty unmistakable in all the circumstances considered. It is duty to preserve and not to destroy, to use and not to abuse. It is, in a more familiar term, a duty not to waste.

There may be no waste of water.[83] The law requires economical use.[84] The duty not to commit "waste" is imposed upon all users, *i.e.,* not to use "needlessly or without valuable result; [nor] to employ prodigally or without any considerable return or effect, [nor] to use without serving a purpose."[85] Appropriators owe a duty so to use water as to effect the highest duty reasonably possible.[86] The appropriator must exercise that reasonable degree of care to prevent waste, and use without excessive waste should be made even though expense is incurred in constructing facilities therefor.[87] In the arid states the conservation of water is of the utmost importance to the public welfare; to waste water is to injure that public welfare.[88] So it would seem that an appropriator should be "commended for recapturing water that has already been used by himself and applying it again in a beneficial manner."[89]

The essence of the city's contention would be that in holding what is properly taken, carefully extracting maximum benefit of use, and prudently protecting what is already built, and is planned for the future — what is that but the very definition of duty to preserve and use a resource which is not constant in amount[90] and in all events

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[83] Combs v. Agricultural Ditch Co., 17 Colo. 146, 153-54, 28 Pac. 966, 968 (1892).

[84] *E.g.,* Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 430, 94 Pac. 339, 341, 15 L.R.A. (N.S.) 238 (1908); New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 366, 40 Pac. 989, 992 (1895).

[85] Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 447, 90 P.2d 537, 548 (1939), quoting Webster's New International Dictionary (2d ed. 1934).

[86] Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 22, 276 Pac. 1017, 1024 (1929); Tudor v. Jaca, 178 Ore. 126, 141, 164 P.2d 680, 686, *reh. denied,* 178 Ore. 176, 165 P.2d 770 (1946).

[87] Broughton v. Stricklin, 146 Ore. 259, 275, 28 P.2d 219, 224 (1933), *reh. denied,* 146 Ore. 259, 30 P.2d 332 (1934).

[88] Brian v. Fremont Irr. Co., 112 Utah 220, 224-25, 186 P.2d 588, 590 (1947).

[89] Barker v. Sonner, 135 Ore. 75, 79, 294 Pac. 1053, 1054 (1931).

[90] The maximum flow of the rivers of Colorado has varied significantly and repeatedly. *E.g.,* the Colorado River, largest of all (and which yields about 69% of the state's total supply), has been so erratic as to range from 146% of average in the high-water year of 1907 to only 50% of average in the drought year of 1934. As measured at Glenwood Springs, before the river collects the major part of its tributary inflow, the average discharge for the 31-year period 1900-30 (2.31 million acre-feet) was some 37% higher than for the succeeding 33-year period 1931-63 (1.82 million acre-feet). On the eastern slope, the Arkansas River, measured at Canon City, has declined in average a full one million acre-feet in the priod 1925-63 (4.5 million acre-feet) from the preceding period 1889-1924 (5.5 million acre-feet). REPORT OF THE U.S.G.S. *supra* note 4, at 235-37, 247.

declines proportionately to the growth of population and industry.

The idea of re-use is itself far from revolutionary.

> The reclamation of sewage and waste waters is not as unconventional as it first appears. . . . In 1953 reclaimed waters were used for irrigation at 106 places and for recharge of ground water at 112 places, all in California. There were also 118 places in the United States where such waters were used for industrial purposes. . . .[91]

It seems also that the city which seeks to recapture and re-use its treated water is suggesting no radical invasion of legal and economic principles of either the state or the Republic. Consider: the proposal involves originally developed or purchased, perfected water rights of precise amount and strict supervision; there is nothing that smacks of invasion by expropriation or seizure. The act and method of re-use seem, at the best, to find support by the reasoning of statutory and case law under article 16 §§ 5, 6 of the Colorado Constitution, and, at the worst, to be open to serious question only in the extent and location of the re-use beyond the general metropolitan area and its water system. And of further importance, there appears to be no just standing of those below the city to protest the diminution of a discharge of foreign water.[92] Standing lies, in the law, with those who assert rights not in the waste but in the source of the water — those across the mountains who take from the same source as the city. Where these latter are protected in thir rights, an actionable protest does not arise from the circumstances herein contemplated.

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[91] HIRSHLIEFER, DEHAVEN & MILLIMAN, WATER SUPPLY: ECONOMICS, TECHNOLOGY AND POLICY 324 n. 87 (1960). See also MCCARTHY, *Research and Development for Re-Use of Water*, WESTERN RESOURCES CONFERENCE 1963 at 55 (Univ. of Colo. Press, Boulder 1964). Industrial re-use of water which had previously been used for municipal purposes has long been practiced in the United States. See Cannon, *Industrial Re-Use of Water: An Opportunity for The West.* WESTERN RESOURCES CONFERENCE 1963 at 69.

[92] See Martz, *Seepage Rights in Foreign Waters*, 22 ROCKY MT. L. REV. 407, 416-17 (1950).