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## Water Law - Rights of Importers and Developers of Water - City and County of Denver v. Fulton Irrigating Ditch Co.

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**WATER LAW — Rights of Importers and Developers of Water. City and County of Denver v. Fulton Irrigating Ditch Co., 506 P.2d 144 (Colo. 1972).\***

About half the water used by the City and County of Denver is transmountain water. Denver obtains this water by diversions from the Colorado River Basin, which naturally flows westerly from the west side of the Continental Divide to the Pacific Ocean. The water is diverted from three Colorado River tributaries, the Frasier River, the Williams Fork River, and the Blue River, into the South Platte Basin on the easterly side of the Continental Divide, which flows easterly into the Missouri River. The water is used for domestic and industrial purposes as well as for some lawn irrigation. Most of the household and industrial water is collected in sanitary sewage systems, given primary sewage treatment in Denver's treatment facility and then given further treatment at the Denver Metropolitan Sewer District plant and returned to the South Platte River above the head-gates of the Fulton Irrigating Ditch Company and other defendant ditches.

In 1940, Denver agreed with the defendant ditches that, because of a cessation of sewage discharge from a Denver sewer, Denver would not make successive uses (*i.e.*, a subsequent use by Denver for a different purpose than the original use) of the transmountain water which it imports to the South Platte River Basin.

The immediate cause for the declaratory judgment action was that Denver entered into a contract with the Adolph Coors Company which would result in a successive use of the water diverted from the western slope. The Coors contract contemplated a sale by Denver of a small amount of its transmountain effluent into the South Platte for the account of Coors. Coors could use this water to supply downstream calls from ditches on the Platte and withhold an equivalent amount of Clear Creek water for general industrial uses at its brewery in Golden. Thus Denver sought a declaratory judgment as to two questions:

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(1) Whether Denver may make successive uses of the diverted transmountain water while its dominion over the water continues.

(2) Whether Denver may make an exchange of water under the agreement with Coors.

The Colorado Supreme Court held that, in the absence of an agreement on its part not to do so, Denver (1) may re-use, (2) may make successive use of, and (3) after use may make disposition of imported water. But because of the 1940 agreement with the defendant ditches, Denver may not exchange water under the Coors contract.<sup>1</sup>

The water which Denver diverts from the western slope into the Platte is clearly foreign water. Foreign waters are those imported into a basin from another watershed.<sup>2</sup> The rights which inhere in the importer of these waters are different from those relative to waters originating in the basin in which they are appropriated.<sup>3</sup> Although junior appropriators have a right to maintenance of stream conditions while in-basin water is at controversy, *Stevens v. Oakdale Irrigation District* illustrates that appropriators on a stream have no vested right to continuance of importation of foreign waters which another has brought into the watershed.<sup>4</sup> In the *Stevens* case the defendant had constructed storage and diversion facilities to bring a continuous flow from the Stanislaus River to the Lone Tree Creek watershed. The plaintiffs had gone to considerable expense for the construction of diversion works to capture the foreign flow past their property. The court held that the plaintiffs had no vested right to the continuance of the foreign water flow. In reviewing the relevant law the court said:

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1. *City and County of Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144 (Colo. 1972).
  2. F. TRELEASE, *CASES AND MATERIALS ON WATER LAW*, 100 (1967).
  3. *See, e.g., Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954), holding that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their appropriation, and subsequent to such appropriation they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights.
  4. *Stevens v. Oakdale Irr. Dist.*, 13 Cal.2d 343, 90 P.2d 58 (1939).

Waters brought in from a different watershed and reduced to possession are private property during the period of possession. When possession of the actual water, or corpus, has been relinquished, or lost by discharge without intent to recapture, property in it ceases. This is not the abandonment of a water right but merely an abandonment of specific portions of water, i.e., the very particles which are discharged or have escaped from control . . . [P]ast abandonment by defendant of certain water, as distinguished from a water right, has not conferred upon plaintiffs any right to compel a like abandonment in the future . . . .<sup>5</sup>

Thus the importer of foreign waters may abandon water after using it in the second watershed, but no abandonment of the water right accrues to the benefit of downstream appropriators. In applying this rule to the facts of the *Fulton* case it seems clear that, in the absence of an agreement to the contrary, the downstream ditches have no right to use Denver's imported water except the specific portions which Denver voluntarily allows to escape and flow down the South Platte.

A more unique example of this principle, at least from an engineering point of view, is illustrated in the case of *City of Los Angeles v. City of Glendale*,<sup>6</sup> where water was imported from distant watersheds by means of an aqueduct. Once the water was within the second watershed the plaintiff used two means to join the water with a subsurface reservoir which eventually rose to a point where the plaintiff could make a beneficial use of the water. First, it utilized spreading grounds where the foreign water sank into the ground and traveled to plaintiff's diversion works. Second, it sold water to farmers who were so situated within the basin that 27½ percent of that water sank into the ground and joined the underground reservoir. The defendant sought to remove this water through wells under claim of right. In quieting title in the City of Los Angeles to these waters, the California court said that Los Angeles did not abandon its right when it spread the water for the purpose of economical transporta-

5. *Id.* at 61-62.

6. 23 Cal.2d 68, 142 P.2d 289 (1943).

tion and storage.<sup>7</sup> Further, the court held that the use by others of this water as it flowed into the subterranean basin does not cut off plaintiff's rights.<sup>8</sup> The court referred to the *Stevens*<sup>9</sup> case, where it was recognized that one who brings water into a watershed may retain a prior right to the water after permitting others to use the water for irrigation.<sup>10</sup> Thus, since appropriators have no vested right to a continuance of importation of foreign waters by others, and the importer may make a disposition of that water without reference to the rights of other appropriators, it follows that downstream users are not entitled to an appropriation of the foreign water. The importer or developer need not have an existing appropriation in the second watershed for the rights delineated in *Stevens* and the principal case to inure to his benefit. The Colorado court, in *Coryell v. Robinson*,<sup>11</sup> ruled that where an appropriator by his efforts lawfully contributes to a natural stream or stream basin water which otherwise would not have reached the basin, it is his, independent of any original adjudication or decree, because by his labor he has contributed extraneous water to the normal flow.<sup>12</sup> But this rule was of no avail to Coryell because the seepage and percolating waters he sought to appropriate would, if allowed to continue their natural course, have reached the river draining the watershed in which Coryell sought an appropriation.

The *Fulton* court, in recognizing the applicability of these rules in Colorado, undertook to define the terms used to describe the rights of an importer of foreign water.<sup>13</sup>

“Re-use” means a subsequent use of imported water for the same purpose as the original use . . . .

“Successive use” means a subsequent use by the water importer for a different purpose . . . .

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7. *Id.* at 294.

8. *Id.* at 295.

9. *Supra* note 4.

10. *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 142 P.2d 289, 295 (1943).

11. *Coryell v. Robinson*, 194 P.2d 342 (Colo. 1948).

12. *Id.* at 346.

13. *Supra* note 1, at 146.

“Right of disposition” means the right to sell, lease, exchange or otherwise dispose of effluent containing foreign water . . .<sup>14</sup>

Though these rights accrue to an appropriator who introduces foreign water into a stream system by virtue of a recent Colorado legislative enactment,<sup>15</sup> the Colorado court has long held this to be the measure of rights at common law.<sup>16</sup> The *Fulton* court cited these cases as defining “developed water” as “that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it.”<sup>17</sup> Thus in the *Ripley*<sup>18</sup> case, the plaintiff was entitled to sell water to downstream users who were not the holders of senior decrees because the plaintiff had “developed” the water by draining water from mines which was trapped between layers of impermeable granite.<sup>19</sup> The *Fulton* court, recognizing no distinction between the rights of the developer and importer of water, said that both may use, re-use, make successive use of, and dispose of the water.<sup>20</sup>

The main principle evolving from *Fulton* and its fore-runners is that contributions to a natural stream belong to the one who made them.<sup>21</sup> It follows that appropriators on a stream have no vested right to a continuation of importation of foreign waters which another has brought to the watershed.<sup>22</sup> Moreover, the water right, as distinguished from right to the possession of a particular corpus of water, in foreign water cannot be abandoned in favor of downstream appropriators.<sup>23</sup>

#### PROBLEM OF IDENTIFICATION

Once it is determined that certain water is imported or developed water and that the water is subject to the plethora

14. *Supra* note 1, at 146-47.

15. COLO. REV. STAT. § 148-2-6 (Supp. 1969).

16. See *Comrie v. Sweet*, 225 P. 214 (Colo. 1924) and *Ripley v. Park Center Land & Water Co.*, 90 P. 75 (Colo. 1907) (hereinafter cited as *Ripley*).

17. *Supra* note 1, at 147.

18. *Ripley*, *supra* note 16.

19. *Ripley*, *supra* note 16, at 76.

20. *Supra* note 1, at 147.

21. *Ripley*, *supra* note 16, at 76.

22. *Brighton Ditch Co v. Englewood*, 237 P.2d 116, 122 (Colo. 1951).

23. *Supra* note 4, at 61.

of rights attendant thereto, the problem arises as to exactly what water it is to which these rights attach. That is, when the importer deposits the transmountain water in the basin, and it becomes commingled with in-basin waters, how does the importer know he is only taking out the imported water as opposed to the natural flow? Does the importer lose his rights once the waters are deposited in the natural stream and he loses dominion over them? The cases are in some conflict, but the better view is that to the extent the importer can identify the water he has imported he retains all his rights in it.

One view which might indicate that the importer loses some rights once the imported waters are deposited in a natural stream comes from the language in the *Stevens*<sup>24</sup> case. The *Stevens* court observed that when possession of the actual water has been relinquished, or lost by discharge without intent to recapture, property in it ceases.<sup>25</sup> Certainly if the importer could adequately establish his intent to recapture and re-use, make successive uses of, and make a disposition of the water after using it, he would retain all rights to that water. But the development of an irrigation district must necessarily be a gradual one and perfection of the system to the point of fullest beneficial use of all water is not attained in a day.<sup>26</sup> Thus problems of proof of intent may well arise given the long periods of time necessary for development of facilities to clearly manifest the intent to retain rights in the imported water.

In a case not involving imported water, but artificially developed water,<sup>27</sup> the New Mexico court said,

[O]nly natural waters flowing in streams and water courses are subject to appropriation; . . . the creator of an artificial flow of water is the owner of the water so long as it is confined to his property, but . . . when such artificial waters are deposited in a natural stream and the creator of the flow has lost his dominion over the same, such waters become part of the

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24. *Supra* note 4.

25. *Id.* at 61-62.

26. *Id.* at 63.

27. *Hagerman Irr. Co. v. East Grand Plains Drainage Dist.*, 187 P. 555 (N.M. 1920).

waters of the stream, and are subject to appropriation and use . . . .<sup>28</sup>

Certainly the importer could abandon his importation and diversion works with impunity as was seen in the *Stevens* case, but the suggestion is that the rights in the importer are diminished once the water is deposited in a natural stream.

The same thought was expressed in an early Colorado case. In *Burkart v. Meiberg*<sup>29</sup> the plaintiff had made use of surface drainage coming from the defendant's lands. After some thirteen years of such use, the defendants dug a ditch on their land and thus intercepted their surface drainage and transported it for further irrigation. The Colorado court found that the defendant had the right to so intercept the water. The court said, "So long as, and while, the water which is applied by defendants to the irrigation of their lands, remains upon the same, it is, as against the plaintiff, their exclusive property . . . ."<sup>30</sup> Certainly this case did not involve imported or developed water, but the suggestion is clear that while the water remains on an appropriator's lands, it is his, but once it escapes to the lands of another the former loses his rights to that water.

The rule in Wyoming is not entirely clear. One of the issues in *Wyoming Hereford Ranch v. Hammond Packing Co.*<sup>31</sup> involved the right to certain water contained in sewage from the City of Cheyenne. The city had contracted with Hammond Packing Co. to discharge its sewage on certain lands owned by Hammond. Because of the value in discharging sewage where it would not become a nuisance, the court said the city might so discharge the sewage "[W]ithout any consideration of the demands of water users who might be benefited by its disposition in some other manner."<sup>32</sup> But the rule was different as regards sewage discharged into a sewer line which was a channel of the stream. The court held, "[T]he quantity unconsumed and returned to the stream is then a part of the water of the state."<sup>33</sup> Thus once these waste

28. *Id.* at 558.

29. 86 P. 98 (Colo. 1906).

30. *Id.* at 99.

31. 236 P. 764 (Wyo. 1925).

32. *Id.* at 772.

33. *Id.* at 773.



waters are mingled with the waters of the stream they become part of it, with the prior appropriator having the greater rights. It might be urged, however, that since this case concerned waters already within the watershed, it would have no application to the waters contributed by an importer or developer.

Another view is illustrated in *United States v. Haga*,<sup>34</sup> where the court spoke to the problem of identification.

It is not necessary that he confine it upon his own land or convey it in an artificial conduit. 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. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.<sup>35</sup>

This rule seems preferable to one requiring the appropriator to maintain dominion and control over the water at all times. Considerations of convenience and economy demand adoption of the *Haga* rule, for to hold otherwise would be to say that an appropriator must construct recapture-facilities in places where nature has provided a ready means of recapture.

Colorado, in the *Fulton* case, has adopted the economically sound view that water is fungible or is to be treated the same as a fungible article.<sup>36</sup> With reference to the facts of the particular case the court said, "The particles of water do not have to be identified as coming from Western Colorado, but rather water, whether or not contained in effluent, can be divided volumetrically."<sup>37</sup> With the advancement of modern engineering techniques which enable one to measure and thus identify certain waters, the view adopted by the *Fulton* court is imminently preferable to a rule which would require an importer to keep the foreign water separate from natural in-basin waters. Any other rule would result in need-

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34. 276 F. 41 (D.C.D. Idaho 1921).

35. *Id.* at 43.

36. *Supra* note 1, at 150.

37. *Id.* at 150.

less waste of resources without providing any concomitant benefit.

“RE-USE, SUCCESSIVE USE, AND RIGHT OF DISPOSITION” IS  
ECONOMICALLY AND ENVIRONMENTALLY SOUND.

As demands for quality water increase, the law governing re-uses, successive uses, and rights of disposition becomes important in dictating the general quality of water, the cost of the water, and its availability for future uses. If the increased welfare resulting from application of the maximization principle<sup>38</sup> is to be realized, a rule of allowing re-use, successive use, and giving rights of disposition regarding imported and developed water is sound. By allowing an importer or developer to re-use his water, demands on the stream are decreased. Were Denver able to re-use and make successive uses of western slope water it would not need as much South Platte water to satisfy its growing needs, hence, more water would be available for economic development downstream.

As water quality becomes more important and the costs of pollution imposed by the pollutor on society increase (through lost and lessened economic opportunity), water re-use may provide an answer. One idea involves cyclic process systems.<sup>39</sup> The idea is akin to the process used in a car's cooling system or that of a refrigerator. That is, water is used to cool a part of the engine, returned to the fan to be cooled (reprocessed), then sent back through the system to do its work again. The whole process is enclosed in a system where all costs are internalized. Industry could, in some cases, adopt a similar system so that water would flow through the plant to do a job, then be returned to be processed and thereafter be sent back to be re-used. Well-designed, complete, and well-operated cyclic process systems are virtually pollutionless whether in nature or made by man. They involve least depletion of reserves, least discharge, and so least possibility of

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38. See F. TRELEASE, *A WATER CODE FOR ALASKA: A REPORT TO THE STATE OF ALASKA* 14-17 (Paper 1962).

39. Gallop, *Pollutionless Cyclic Process Systems*, in *COMPLETE WATER REUSE* 463 (L. Cecil ed. 1973).

environmental pollution.<sup>40</sup> This is not to say that every polluter will, or should, immediately embark upon a cyclic process system. Clearly in some cases the benefits to be gained from quality water as opposed to polluted effluent may not nearly approach the cost of producing a pollutionless cyclic system. Economics is the prime motivating force of industry and the use of reclaimed wastewater is governed by the scope of alternate water supply, procurement, and treatment. In locations where public water supplies of good quality and quantity are available at low cost, treatment and re-use of renovated water by industry has not been economically attractive.<sup>41</sup> But where the welfare generated by water re-use is greater than the cost of obtaining that re-use, a law allowing a water user to pursue the economically feasible course is to the benefit of society. Thus in allowing the market to allocate our resources to their maximum use the general rule allowing the importer or developer of water to allocate that water to re-use, successive uses, and giving him the freedom of disposition regarding that water gives the maximization principle the breathing room it needs.

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40. *Id.* at 475.

41. Schmidt, Beardsley, & Clements III, *A Survey of Industrial Use of Municipal Wastewater*, in COMPLETE WATERREUSE 632, 641 (L. Cecil ed. 1973).