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State Regulation of the Canal Corporation in Colorado

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STATE REGULATION OF THE CANAL CORPORATION IN COLORADO.

INAPPLICABILITY of the common law doctrine of riparian rights to conditions in the arid region moved the first territorial legislature of Colorado to recognize the counter doctrine of prior appropriation. In fact, the right to the water in the streams of Colorado, by prior appropriation, antedated any legislation. "It was the common law of the people, and legislation, both national and territorial, was but a recognition declaratory of the right as it had theretofore and then existed."[1] Adhering to territorial precedent, Colorado was the first state to incorporate the priority doctrine in its organic law.

The state constitution declares the water of every natural stream to be public property and dedicated to the use of the people of the state. It guarantees the right to divert for a beneficial purpose the unappropriated waters of every natural stream (within the state) to riparian and non-riparian lands. To this end the right of eminent domain is granted across public, private and corporate lands, to persons, associations and corporations constructing ditches, canals and flumes. The controlling principle of water apportionment is that priority of appropriation gives superiority of right among appropriators for a like beneficial purpose.[2]

No sooner was the organic law promulgated than it was strained by a lack of correspondence with new economic conditions. Blind to the impending growth and importance of the canal corporation, the constitutional convention had merely assimilated it to general principles of control evolved with reference to non-corporate canals. Upon the legislature, consequently, fell the difficult task of giving effect to the general principles and adapting them to the character of the canal corporation.

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[1] 1 Colo. App. 57. Armstrong v. Larimer County Ditch Company.

[2] Colo. Const. XVI., secs. 5-7; 6 Colo. 449. To illustrate the distribution of water for irrigation under this theory: the first appropriator from a stream takes what he needs up to the decreed limit of his right; then, if water remains in the stream, the later appropriators take their supply in the order of date of acquisition of rights. If the volume of a stream were uniform from year to year, all appropriations up to the flow of the stream would be equally assured, and the only important feature of a water-right would be its volume. But the flow of a stream varies daily and annually. At times it will supply all the diverting canals; and at other times, only a few of them. In the event of inadequate flow the appropriators are supplied in the order of the date of their water-rights. J. S. Greene, Acquirement of Water-Rights in the Arkansas Valley in Colorado, 1913, in U. S. Dept. of Agr., Office of Exp. Sta., Bull. No. 140, p. 12.

When the constitutional convention met, the canal corporation was a negligible factor in Colorado agriculture. Prior to 1878 most canals were constructed on a small scale, either by individual farmers or co-operative associations of farmers to water their own lands. With agricultural expansion to lands above the first river bottom, the necessary irrigation works required a larger outlay of capital than the farmer could furnish and canal development temporarily halted. Presently capital observed in canal construction a lucrative field; and foreign or eastern corporations hastened to build large canals in advance of agricultural settlement, hoping to reap profits from the sale of water-rights and land to settlers.[3]

This development was begun in northeastern Colorado by a Scotch corporation in the years 1878-1883. It built the Larimer and Weld canal of 50 miles at a cost of $150,000, and the High Line of 83 miles at a cost of $750,000. The same company later constructed the Loveland and Greeley canal of 25 miles and the Platte Valley canal of 20 miles. Together these four canals had a capacity to water 115,000 acres.[4] Four hundred miles of corporate canals were being constructed in 1884 alone. By 1885-1886 a majority of the canals building were financed by corporations as speculative enterprises. Numerous large irrigation works were commenced, and some completed, by corporate interests in 1887-1890.[5] In the bench lands north of La Junta the Colorado Land and Water Company built a 75-mile canal capable of watering 50,000 acres. The Empire Land and Canal Company had 100,000 acres under ditch on the Rio Grande del Norte and in San Luis park. Other large enterprises in the San Luis valley were the Rio Grande canal, capable of watering 240,000 acres, and the Del Norte with a similar capacity.[6] Not all of the tributary acres were actually cultivated; many were merely under ditch. This exploitation was made possible by the railroad extension into the unsettled regions in the eighties, inviting immigration and offering facilities calculated to reimburse the promoter.

[3] Agriculture as Developed by Irrigation in Colorado, by a Committee of the National Irrigation Congress, 1894, p. 10; Report of the Colorado State Engineer, 1885-1886, p. 216.

[4] 13 Annual Report of the U. S. Geological Survey, 1891-1892, Part III, 139; R. J. Hinton, Progress Report on Irrigation, Sen. Misc. Docs., 49 Cong., 2 Sess., I., No. 15, pp. 132-133.

[5] Elwood Mead, The Ownership of Water. Danger from Monoplies. Denver, Times Printing Works, 1887, p. 6; Report of Colo. State Engineer, 1885-1886, p. 216; 11 U. S. Census, Agriculture by Irrigation, 91.

[6] 13 Annual Report, U. S. Geol. Survey, Part III., 215; R. J. Hinton, Progress Report on Irrigation, p. 125; 11 U. S. Census, Agriculture by Irrigation, 129; Select Committee on Irrigation and Reclamation of Arid Lands, Sen. Reports, 51 Cong., 1 Sess., IV., No. 928 (Stewart Report), Pt. 4, p. 325.

Although non-corporate ditches predominated in 1890, a growing number of eastern slope irrigators depended for their water supply upon canal corporations controlling the largest and most important canals in the state. Those eastern counties where canal capacity exceeded the normal water supply in 1889—among which were the leading agricultural counties of the state—were largely served by corporate canals.

When the constitution was framed (1876), irrigators as individuals or co-operative groups diverted directly from the natural stream and made beneficial use of the water on their own land. Hence the constitution made diversion from a natural stream, plus beneficial use, essential to a prior appropriation of water.[7] With the introduction of the canal corporation the owners of a ditch diverting from a natural stream were not themselves users of water for a beneficial purpose. Should the legislature grant priorities to the canal corporation which did divert from a natural stream but did not make beneficial use of the water diverted; or, to the irrigator under the canal who made beneficial use of the water but diverted from an artificial stream?

The legislature did not give effect to the constitutional provisions governing appropriation until 1879. Alarmed by large canal projects higher up stream, the Union Colony irrigators on the Cache-la-Poudre united with irrigators from the Saint Vrain and Boulder to demand legislation enforcing priorities vested by the constitution. They met in convention in 1878 and drafted a report which became the basis of the state law of 1879. This law amended in detail, not in principle, remains the basis of the Colorado system of water administration. The convention recommended (1) determination of priorities by the courts; (2) granting of priorities to the ditch owner rather than attachment to the land watered; (3) basing of the volume of water decreed upon the capacity of the canal instead of the amount of water used.[8] Doubtless these proposals seemed advantageous to the convention of irrigators owning their ditches or holding stock in a colony ditch.

By the incorporation of these proposals in a law of 1879 the legislature served a purpose near to its heart, viz., the encouragement of ditch construction with its consequent attraction of a farming population. It was seen that grants of water-rights to canals, with the privilege of sale to the working farmers, promised a liberal return upon the cost of construction: an opportunity cer-

[7] 13 Colo. 120.

[8] D. Boyd, Irrigation Near Greeley, in House Docs., 54 Cong., 2 Sess., v. 70, No. 351, pp. 61-62.

tain to tempt the investment of outside capital.[9] How successfully the legislature fostered corporate canal construction is attested by figures cited above.

The act of 1879, regulating the use of water for irrigation, ordered the district courts to enter a decree determining priorities of the several ditches in a district, each according to the date of construction and enlargement, with the amount of water appropriated by said construction and enlargement. The capacity of a ditch became the basis of a priority decree; beneficial use was disregarded. The law recognized no distinct and independent priority in the consumers under the carrier canal. Thus in time of scarcity of water, when the aggregate supply of the carrier canal was reduced, the law ordered a pro rata distribution to consumers, based on the amount of water used rather than on priority of appropriation from the canal.[10] In accord with the statutes, the courts, generally waiving the constitutional requisite of beneficial use, issued decrees of priority to the ditch corporation. Moreover, they did not inquire into the priorities of the several users, or secondary appropriators, under a corporate canal. Neither did the state water commissioners divide the water among the users under a corporate ditch.[11] The commissioners diverted the aggregate water accruing to the priority of the canal corporation, which then divided it among its consumers without state interference.

As an outgrowth of the law of 1879 primary and secondary appropriations developed.

A primary appropriation was a water-right derived directly from the state by judicial decree, under the public laws governing the acquisition and administration of water-rights. The primary appropriator owned the ditch diverting water from the natural stream and ripened the appropriation by beneficial use on his land. Most Colorado farmers of 1890 belonged to this class. Canal corporations were also primary appropriators though they did not ripen their appropriation by beneficial use—this function being performed by irrigators.[12]

A secondary appropriation was a water-right not derived directly from the state by judicial decree under the public laws governing the acquisition and administration of water-rights, but from a contract with corporations who qualified as primary appropriators.

[9] Elwood Mead, Op. cit., 5-6.

[10] Colo. Session Laws, 1879, p. 97, sec. 4, p. 104, sec. 30; 13 Colo. 123-124.

[11] J. S. Greene, in Annual of the American Society of Irrigation Engineers, 1892-1893, pp. 140-141.

[12] J. S. Greene, Acquirement of Water-Rights in the Arkansas Valley in Colo., 12, 34.

Secondary appropriators were irrigators who did not own the ditch diverting water from the natural stream, but participated by contract in the priority of the canal coporation. The contract, though partially subject to state water law, imposed conditions not prescribed by constitution or statute. A large and growing number of Colorado farmers were secondary appropriators in 1890.[13]

Legislative encouragement of corporate canal construction was not without dangerous consequences. It interposed the canal corporation as a middleman between one class of irrigators and the public waters dedicated by the constitution to the use of the people of the state. To a large extent the state abdicated legislative and administrative control over secondary appropriators in favor of the contractural control of the canal corporation. Thus the prosperity of the secondary appropriator depended largely upon the terms and execution of his contract with the water corporation. The measure of state interference to guarantee equitable water contracts becomes the criterion of fair and effective regulation of the ditch corporations.

The canal corporation secured revenue from the sale of water-rights and lands under ditch. Ofter the corporations owned land under their canal and sold farms with water-rights on long term and partial payments, taking a mortgage as security on lands thus sold.[14] Though the canal corporation had a natural monopoly in its district, the farmer might choose among the contracts of companies in various localities, provided he purchased both land and water. But once having purchased land and water from a corporation, he became dependent upon it for his water supply. Likewise the farm owner purchasing a water-right seldom found more than one source of supply available. To offset this natural monopoly, the companies were required, wherever they had unsold water in their ditch, to sell it to the class of users specified in the certificate of incorpation, at a legally established rate. Also, any person having purchased and used water for irrigation of his land from any ditch or reservoir, was guaranteed the right to continue an equivalent purchase at a legally established rate, provided he did not stop his purchase with the intent to procure water from some other source of supply.[15]

Water contracts were of two classes: one selling a perpetual wa-

[13] J. C. Ulrich, Irrigation in the Rocky Mountain States, 1899, in U. S. Dept. of Agr., Office of Exp. Sta., Bull. No. 73. p. 51.

[14] 11 U. S. Census, Agriculture by Irrigation, 91; R. J. Hinton, Op. cit., 40 ,133; Irrigation Age, Feb. 1, 1892, p. 469.

[15] General Statutes of Colorado, 1883, sec. 311, p. 199; sec. 1740, p. 568.

ter-right itself; the other selling a perpetual or determinate right to rent water annually. The unit water-right was the supply of water necessary to irrigate 80 acres of land, 1 44-100 cubic feet of water per second flowing over a weir at one of the lateral headgates of the canal.

In most cases the farmers under a corporate canal purchased a perpetual water-right. The canal company in return for payments on the principal agreed to furnish each year a stated amount of water continuously during a defined irrigating season; such water to be used only for irrigation and domestic purposes on the tract described. It exacted, in addition to the principal, an annual assessment not to exceed twelve dollars per water-right for maintenance of the canal works. The manner of regulating the supply of water was at all times under the control of the canal company. In case the canal was unable to carry and distribute a volume of water equal to its estimated capacity, either from casual or unforeseen or unavoidable accident; or if the volume of water proved insufficient from drouth, or from any other cause beyond the control of the company, it was not liable for shortage so caused. During the insufficiency of the water supply to satisfy all outstanding water-rights, the corporation had the right to distribute available water to consumers on a pro rata basis.[16]

The parties agreed that, in event of failure by the consumer to make the instalment payments on the principal or to pay the interest when due, the entire principal of the contract fell due, and the company had the right, at the expiration of a certain period, to foreclose and terminate the contract; provided, the consumer were given notice of such intent. Often the company held a mortgage on the consumer's farm as a pledge for the payment of his water-right. The mortgage was so executed that failure to make a single payment caused the principal to fall due.[17]

When the consumer completed the payment of the principal sum of this water contract, he received in exchange therefor a water deed, which differed from the contract only in acknowledging the receipt of its principal sum. The consumer continued to pay an annual assessment for canal operation and maintenance to the corporation.[18] Perpetual water-rights sold at prices varying from $400 to $1,200, plus the annual maintenance charge.

Frequently the company agreed, when the volume of water-rights

[16] Stewart Report, VI., Pt. 4, pp. 297, 331, 338.

[17] Ibid., VI. Pt. 4, 298, 332, 339; V., Pt. 1, p. 76; 11 U. S. Census, Agriculture by Irrigation, 95.

[18] Stewart Report, VI., Pt. 4, p. 303.

sold approximated the estimated capacity of the canal, to transfer to the individual consumer shares of stock, proportionate to the interest which a consumer's water-rights bore to the entire number of water-rights outstanding.[19]

Only a few canal companies rented water annually to irrigators. Under this contract the canal corporation not only sold a short term or perpetual right to buy water, but exacted from irrigators an annual rental charge for the delivery of water, greater than the pro rata cost of canal operation and maintenance. Such contracts incorporated certain standard provisions of the outright sale contract: concerning control of the distribution of water, irresponsibility of the canal company for water shortage, and penalty for a consumer's failure to make partial payments promptly. There was no provision for ultimate transfer of canal stock to the consumers under ditch. The High Line canal charged a bonus of $10 per acre for the right to buy water, and an annual rental of $1.50 per acre for delivery of the water. To justify these charges the high cost of canal construction was pleaded. The rental not only defrayed operating expenses but applied to the principal of construction cost. In 1887 the anti-royalty act invalidated the bonus feature of the rental contract; whereupon some consumers preferred the determinate rental contract to the perpetual sale contract.[20]

How did the state interfere to guarantee equitable water contracts?

The constitution declares the general assembly shall provide by law that the boards of county commissioners in their respective counties shall have power, when application is made by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations. Accordingly, the law of 1879 constituted the elective board of county commissioners a quasi-judicial body to fix a just maximum rate for ditches, canals and reservoirs furnishing and selling water, the whole or upper part of which lay in the county limits. Requisite for board action was an affidavit by a consumer showing reasonable ground to believe that unjust prices were, or were likely to be, charged for water from such ditch, canal or reservoir. If the boards regarded the affidavit as convincing, they set a date, not sooner than forty days after the receipt of the affidavit, when the consumer and carrier were to be heard. The board examined the testimony of both sides, issued subpoenas to witnesses, compelled at-

[19] Ibid., 298-299, 331, 338.

[20] J. S. Greene, Acquirement of Water Rights in the Arkansas Valley in Colorado, 81-83; R. J. Hinton, Op. cit., 132.

tendance and production of books and papers. Thereupon the commissioners fixed a just maximum price, which was subject to change once in two years.[21] The price-fixing power applied only to companies renting water annually. Establishment of a rate by the commissioners did not *per se* affect existing contracts between the irrigator and the vendor of water; nor did it affect or hinder the making of contracts at a rate above that fixed by the commissioners if the higher rate were acceptable to both contracting parties. Under the act of 1879 the county boards were impotent to fix a rate for a canal the head-works of which lay in another county.

This defect led to the basic decision of *Wheeler* v. *Northern Colorado Irrigation Company,* which clearly defined the status of the canal corporation and declared the bonus or royalty of the rental contracts unconstitutional.

The appellant owned a farm east of Denver watered by the High Line Ditch, the property of the Northern Colorado Irrigation Company. He refused to buy in advance, at $10 per acre, the right to procure water at an annual rental of $1.50 per acre; whereupon the High Line refused to deliver water, though the rental was proffered. Since the headgates of the canal lay in Douglas county, the commissioners of Arapahoe were impotent to intervene and fix a maximum rental. Failing in his original proceedings for mandamus in the supreme court, Wheeler as relator instituted mandamus proceedings in the district court of Arapahoe county. The respondent company demurred to the alternative writ; the demurrer was sustained and judgment entered for the respondent. The plaintiff then appealed to the supreme court and was heard in the December term, 1887.[22]

Both the constitution and the common law were invoked to reverse the decision of the district court. (1) The constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people", the ownership thereof being vested in "the public". (2) After appropriation the title to the water remains in the general public, while the paramount right to its use continues in the appropriator. To constitute a valid appropriation the water diverted must be applied within a reasonable time to some beneficial use. Thus the diversion ripens into a valid appropriation only when the water is utilized by the consumer.[23] (3) It follows that the canal company does not become a "proprietor" of the water diverted, but a mere carrier, a quasi-public servant or agent. The

[21] Colo. Session Laws, 1879, pp. 94-96, secs. 1-2.
[22] 9 Colo. 248, 256, 257; 10 Colo. 582-585.
[23] 10 Colo. 587, 588.

constitutional recognition of the carrier's right to compensation for transporting water, and the provision for a quasi-judicial tribunal to fix an equitable maximum charge, must be correspondingly interpreted. Carrier's status is not that of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others, being engaged in the business of transporting for hire, water owned by the public, to the people owning the right to its use. The carrier is permitted to appropriate water and to exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits are fairly guaranteed. In return for these privileges, it is, for the public good, charged with certain duties and subjected to a reasonable control. (4) By fair implication "any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right (use of water) by the consumer must be held illegal, even though there be no express legislative declaration on the subject".[24]

The respondent's demand of $10 per acre, as an advance payment of part of the transportation charge for the remaining years of its corporate existence, was declared "illegal as well as unreasonable and oppressive".[25]

Barring constitution and statutes, the court found strong legal ground for the position that the carrier's demands for rates, and the time and manner of collection, must be reasonable. "The carrier voluntarily engages in the enterprise; it has, in most instances, from the nature of things, a monopoly of the business along the line of its canal; its vocation, together with the use of its property, are closely allied to the public interest; its conduct in connection therewith materially affects the community at large; it is charged with what the decisions term a public duty or trust * * *. For these reasons it would be held at common law to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulation of charges". In short the doctrine of *Munn* v. *Illinois* was applied to carriers of water.[26]

Early in 1887 the farmers had no assurance that the supreme court would pronounce royalties illegal. Court proceedings were at best a cumbersome and expensive method of controlling the rental of water by corporations. And the Wheeler decision, though favorable to consumers, would apply to a past irrigating season. Would there not be an ever recurring struggle to escape the payment of royalties; and would not the attendant delay prevent actual ir-

[24] Ibid. 590.
[25] Ibid. 594.
[26] Ibid. 589, 590.

rigation of crops? Speaking to farmers on the ownership of water in 1887, Elwood Mead divined in the speculative development of canals the intent to charge water rates far above the cost of canal construction, and the foundation of monopolies a hundred-fold more exacting than Irish landlordism.[27] Beset by these fears the irrigators under the High Line in Arapahoe, Jefferson and Douglas counties, launched the Farmers' State Protective Association to lobby for the enactment of an anti-royalty bill by the legislature. The executive committee of the association was composed of Wheeler and two other irrigators, all active Grangers. The fight in the senate was long and bitter; for three weary months the committee labored incessantly.[28] On April 4, 1887, the anti-royalty bill received the governor's approval and was in force three months later. It forbade the ditch companies to impose a royalty, bonus, or premium, prerequisite or condition precedent to the right or privilege of applying or bargaining for and procuring water. The penalty for violation of the law was a fine of not less than $100 nor more than $500, or imprisonment of the officers or agents of a ditch company for a term of not less than three months, nor more than one year.[29]

The legislature of 1887 also passed an act enabling the county commissioners to fix rates within their county for "any ditch, canal, conduit, or reservoir, the whole or any part of which shall lie in such county".[30] Thus was remedied the defect in the statute of 1879 which forced Wheeler to seek judicial relief from oppressive water rates in his county.

Renters of water now seemed doubly fortified against the imposition of royalties. During the session of 1888 the master of the Grange thanked God "that royalty * * * is dead—killed first by public sentiment. Then by the noble justices of the Supreme Court —Helm and Beck—who fearlessly put their heels upon the serpent's hydra head. It has long threatened to crush within its deadly folds the occupation, the life and liberty of the farmer."[31]

Water shortage in the late eighties crystallized the growing discontent with the operation of the water laws and the results of the leading court decisions.[32]

Senior consumers under corporate canals resented the inclusion of pro rating clauses, validated by the law of 1879, in all types of

[27] Elwood Mead, Op. cit., 6, 7.
[28] Journal of Proceedings of the Colorado State Grange, 1888, pp. 18, 23.
[29] Colo. Session Laws, 1887, pp. 308, 309.
[30] Ibid., 291, 292, sec. 1.
[31] Journal of Proceedings of the Colorado State Grange, 1888, p. 24.
[32] Report of Colo. State Engineer, 1889-1890, I., 51.

water contracts. The constitutionality of this practice was challenged in the case of *Farmers' High Line Canal and Reservoir Co. et al* v. *Southworth* (1889), an appeal to the supreme court from the district court of Arapahoe county. Appellant sought to enjoin the pro rating of the carrier's diminished supply of water (in 1888) between himself and certain consumers taking from the canal subsequent to April 1, 1881, the date of the appellant's appropriation; and to compel the company to furnish him the entire quantity of water heretofore used by him. As stated by the chief justice the issue was "Does the priority of appropriation, which by virtue of the constitution gives the better right, apply to individual consumers taking water through the agency of a carrier, so that notwithstanding the pro rating statute, each consumer acquires a separate constitutional priority of right, entitled to judicial enforcement, dating from the beginning of his specific use?"[33] Injunction was denied the appellant by two of the three justices, each reaching his conclusion by independent arguments. Subsequent decisions have followed the opinion of the chief justice; so this alone will be considered. The court held: (1) That the act of turning water from the carrier's canal into his lateral cannot be regarded as a diversion within the meaning of the constitution; nor can this act by itself, when combined with use, create a valid constitutional appropriation. (2) There is therefore no escape from the conclusion in the Wheeler action, that in cases like the present the carrier's diversion from the natural stream must unite with the consumer's use in order to create a complete appropriation within the meaning of our fundamental law. The constitution recognizes priorities only among those taking water from the natural streams. (3) All co-consumers taking water from the same ditch within a reasonable time have priorities of even date with each other.[34]

The United States Senate Select Committee on Irrigation, visiting Denver in 1890, found the great complaint in Colorado arose from the payment of royalties to ditch companies and the alleged sale of water the carrying companies could not deliver.[35]. Farm leaders admitted that the law forbade royalties and gave the county commissioners power to fix a just water rate. However, the canal corporations continued to include royalties in their water rates and often forced payment by the irrigators. The board of county commissioners was powerless to force the observance of their rate by canal companies. If the latter refused to deliver water at the

[33] 13 Colo. 119, (1889).
[34] Ibid. 120, 121.
[35] Stewart Report, V., Pt. 1, p. 76.

legally established rate, the irrigator was left to compel delivery by *mandamus*.[36] But the cost of legal action and the inevitable delay incident to court procedure sometimes made the payment of royalties the lesser of two evils. Further, both renters and purchasers of water-rights denounced the corporations who in their eagerness for revenue sold water-rights beyond their capacity to deliver. Frequently the farmer did not receive the water paid for in advance; he found his crops burned and was unable to meet the interest on the mortgage given to the water company for land and water-right. There was repeated testimony that the water company had all the penalties on the farmer, and that he was powerless to collect damages for non-delivery of water stipulated in his contract.[37]

To give temporary relief to the irrigators, it was urged that the state have power to say when the waters of a given stream were exhausted, and to prevent further building of ditches under such conditions; also, that state officials should control the headgates and laterals of consumers under a corporate canal. Then the state could check the sale of water to consumers with the amount delivered and with the volume of the canal's priority. The ultimate remedy proposed was state ownership of corporate canal works.[38]

Under the auspices of leaders of farm organizations the irrigators launched an independent party in the state campaign of 1890. The leading plank of the Independent platform demanded the recognition of priorities among co-consumers and the establishment of a system whereby "the state may acquire, conduct, own, and operate all ditches and reservoirs".[39] Following the surer mode of zigzag the Republican convention urged a revision of the irrigation laws, and deprecated the practice in vogue of ditch companies selling and receiving pay in advance for water which they could not possibly deliver.[40] Since the consumers under corporate canals were but a minority of the farming population, which in turn was outnumbered by other occupations, the outcome of this state election is not surprising. The Independents polled 6.7% of the combined vote of the old parties.[41] Lack of leadership, funds and organization made doubly sure the defeat of the Grangers at the polls.

Early in 1891 the Colorado Farmers' Protective Union was formed to check the dissipation of strength inherent in isolated and in-

[36] Ibid. VI., Pt. 4, pp. 348, 361, 362.
[37] Ibid., V., Pt. 1, p. 76; VI., Pt. 4, pp. 346, 347, 351.
[38] Ibid., VI., Pt. 4, pp. 348, 350.
[39] Rocky Mountain News, Aug. 22, 1890.
[40] Denver Republican, Sept. 19, 20, 1890.
[41] Colo. House Journal, 1891, p. 23.

dependent organizations seeking reform of water law.[42] The executive committee of the Union lobbied in the legislature for a bill providing public officials to measure the exact amount of water delivered by ditch companies to each farmer; for two deposits in the county treasurer's office to cover the annual water charge, said deposits to be disbursed to the ditch company only upon evidence that the water was actually furnished to the irrigator; and for the dissolution of any company overselling its water supply. This bill died in the legislature.[43]

Apropos of the Union's legislative activities, the *Rocky Mountain News* denounced corporate efforts to repeal the anti-royalty act and bitterly arraigned the water companies. "To collect pay for water they do not carry, to require royalties and bonuses before they sell water, to set themselves up as privileged organizations not subject to commercial losses, as other people,—all these assumptions are a part and parcel of corporate arrogance borne far too long."[44]

Eminent engineers and a non-partisan commission have in large part confirmed the various indictments of water companies. The Colorado Irrigation Commission provided by the legislature in 1889 consisted of an ex-state engineer, a ditch promoter, and a judge, appointed by the governor to report a revision of the state irrigation law. Reporting in 1890 the commission essayed a remedy for the over-sale of water-rights, but did not subscribe to the denunciation of royalties by the engineer member or to his demand for greater protection of co-consumers under a corporate ditch.[45] Mr. J. S. Greene, the minority member, vigorously assailed the Colorado water law in a paper read before the American Society of Irrigation Engineers in 1892. He declared statute law had encouraged one class of citizens to prey upon another by a failure to recognize the full constitutional rights of users of water, and by magnifying the rights of those who simply effected the diversion and conveyance of water. Hence the ditch companies had assumed not only the rights of appropriators of water but claimed a right in water equivalent to ownership, and presumed to dictate not only the price of water-rights, but also who may and who shall not use the public waters.[46] He urged stringent legislation to prohibit royalties effectively, and to establish an equality of rights between car-

[42] Colorado Farmer, Jan. 1, 1891; Rocky Mountain News, Jan. 9, 1891.

[43] Rocky Mountain News, Jan. 10, 1891.

[44] Ibid. Feb. 9, 1891.

[45] Report of the Commission Appointed by His Excellency, the Governor of the State of Colorado, to Revise the Laws of the State Regulating the Appropriation, Distribution and Use of Water, Denver, 1890, p. 10.

[46] Annual of the American Society of Irrigation Engineers, 1892-1893, p. 140.

riers and consumers by a determination of (1) the manner of acquiring the right to divert, right to use and the right to appropriate water, (2) the extent of enjoyment of these rights, (3) the mutual relations of these rights and the necessary limitations upon their exercise.[47] A year earlier Elwood Mead, at one time assistant state engineer, wrote "there is no question of the need to guard the rights and privileges connected with the diversion and transportation of water to the place of use, but this does not necessitate total disregard of the rights of a user. The basing of appropriation on construction of ditches was a primitive conception * * *. Appropriation should be based on use, and when made for irrigation, should be attached to the land reclaimed and water rights made to go with land titles."[48]

The Granger agitation for drastic reform of the water law evoked no response from the legislators preoccupied with the vagaries of a Populist administration, industrial disorders, and free silver politics. Neither in the nineties nor subsequently did the legislature enact any fundamental changes in the laws of 1879 and 1887 regulating ditch corporations. Matters clearly within the province of the legislature have been thrown upon the courts, and the slow and cumbrous judicial machinery has been set to grinding out a conclusion concerning water rights, which the dictum of the legislature could have established by law in a single session. If the legislature has been remiss in its obligation to afford equal protection under the law to irrigators and ditch corporations, the courts—by contrast at least—have shown commendable zeal in dispensing even-handed justice to farmer and capitalist alike. There has been slight deviation from the ideal of the supreme bench enunciated in 1887: "The courts should protect the consumer in the full enjoyment of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier, and so deal with it (the constitution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water".[49] A long line of decisions following and expanding the Wheeler case has done much to solve vexing problems properly within legislative competence, such as definition of the property right in priorities, prevention of speculative holding of water, provision of damages for a failure to deliver the volume of water paid for in advance, protection of the rights of irrigators against excess sale of water by the canal company, definition of

[47] Ibid. 1892-1893, p. 142.
[48] Irrigation Age, June 15, 1891, p. 85.
[49] 10 Colo. 587.

"estimated capacity" as used in water contracts, and the adoption of a standard for fixing reasonable water rates.

The decision of the supreme court in *Strickler* v. *Colorado Springs* (1891) awakened the fear that ditch companies would be permitted to hold water as a purely speculative commodity. It was held that "a priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened".[50] However, a reassuring exposition of this decision in *Combs* v. *Agricultural Ditch Company* (1892) removed such apprehension. Basic premises were found in the Wheeler and Southworth cases: (1) the carrier in and of itself has no independent priority (though the irrigation statutes use language that might give this impression), and any rights it may hold in connection with the water diverted depend for their continuance upon the *use* made by consumers. (2) The carrier becomes the agent of the consumer, and exists for the purpose of aiding him in the exercise of his constitutional right to the use of water owned by the public.[51] Therefore, the court found that "the ownership of a prior right to the use of water is essentially different from the ownership of stock in an irrigating company. The ownership of the stock like the title to other property may be acquired by descent or purchase; the ownership of the prior right can be acquired originally only by the actual beneficial use of the water * * *. He (the stockholder) may transfer his stock to whom he will; but he can only transfer his priority to some one who will continue to use the water * * *. If ditch companies were at liberty to divert water without limit and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigation canals, water rights would soon become a matter of speculation and monopoly * * *."[52]

The practical import of this decision was that ditch owners not making beneficial use of diverted water within a reasonable time, had to dispose of it for a proper consideration to irrigators prepared to make beneficial use thereof. To this end the writ of mandamus was an appropriate remedy. But such writ was inappropriate to secure a perpetual right to the use of water; at most it enforced an annually recurring right dependent, among other things, upon an annual tender of the water rate. In the *New Mercer Ditch Company* v. *Armstrong* (1895) non-use of water for

[50] 16 Colo. 61, 62.
[51] 13 Colo. 121, Farmers' High Line Canal and Reservoir Company v. Southworth.
[52] 17 Colo. 151, 152, Combs v. Agricultural Ditch Company.

a period of nine years was considered unreasonable and working forfeiture of the priority.[53]

A fruitful cause of Granger discontent was that water contracts, while they penalized the irrigator for the slightest delay in payment of water rates, practically absolved the ditch company from liability for failure to deliver the stipulated volume of water. In *Pawnee Land and Canal Company* v. *Jenkins* (1892) the ruling was: "a ditch company that contracts with a patron to furnish him water for irrigation, and fails to comply with its contract, by reason whereof the patron suffers damages in loss of crops, is not relieved from liability to damages by the mere fact of scarcity of water in the stream from which the ditch was supplied, if by the diligent employment of proper measures to utilize the water that was in the stream the catastrophe might have been averted. The company can only be exonerated on proof of circumstances clearly showing that the failure to perform was chargeable to *vis major*, and not to negligence and inattention."[54] A similar decision, *Rocky Ford Canal, Reservoir, Land, Loan and Trust Company* v. *Simpson* (1894), was gratefully acclaimed by the *Rocky Mountain News*. "For years they (ditch companies) have been robbing farmers of the state by collecting rents in advance and then delivering water or not as the same was convenient. If the farmer failed to get his water, and lost his crop, he did not even get back the money he paid for it. The robbery is now ended."[55]

Of vital importance to purchasers of perpetual water-rights was the interpretation of the term "estimated capacity" employed in water contracts. Upon this construction depended (1) the protection of early purchasers of water-rights against subsequent excess sale; (2) the date of transfer of the ditch company's stock to a new company composed of paid-up purchasers of the first company's water-right; (3) the extent of responsibility of the new company for water-rights sold by the original ditch corporation.

In *Wyatt et al.* v. *The Larimer and Weld Irrigation Company* the appellants sought to enjoin the company from selling additional water-rights beyond the 366½ then outstanding, and from pro rating any of the water flowing in its canal at any time, when there is not sufficient water to supply the existing water-rights, among any other or additional holders in excess of 366½ rights; for the canal could not furnish water in excess of these rights.[56] The ap-

[53] 21 Colo. 358, 365.
[54] 1 Colo. App. 425.
[55] 5 Ibid., 34, 35; Irrigation Age, June, 1894, v. 6, p. 271.
[56] 18 Colo. 299, 304.

pellees admitted the inability of the company to furnish water in excess of the water-rights then outstanding, but contended, notwithstanding, that it had the right to dispose of water-rights (according to its contracts) up to the estimated capacity of the canal. Pro rating of earlier priorities would assure some supply to the later holders. The issue was clearly joined: did estimated capacity mean the *carrying capacity* of the canal or the *furnishing capacity,* the ability to supply and deliver water?[57] Viewing the contract in the light of the status accorded to canal corporations in the Wheeler case the court sustained the plea of *furnishing capacity* as the proper meaning of "estimated capacity." Contracts giving a corporation the right to dispose of definite water-rights, and by ambiguous expressions in subsequent provisions reserving the power to render such rights uncertain and indefinite, by disposing of water-rights admittedly in excess of its ability to furnish water, were not only inequitable and unfair but clearly illegal. Under such circumstances the canal corporation impaired well defined rights of consumers instead of acting as an intermediate agency to aid them in the exercise of their constitutional rights.[58]

Important applications of this interpretation of estimated capacity were made in *La Junta and Lamar Canal Company* v. *Hess* (1895), and *Larimer and Weld Irrigation Company et al.* v. *Wyatt* (1897). In these cases it was held that the company having sold and outstanding water-rights equal to its capacity to furnish water, for two-thirds of which it had been paid, the appellee was entitled to relief compelling the company to perform that part of its contract relating to the organization of a new corporation and the change of ownership and control of the canal.[59] Thus performance of the water company's agreement to transfer its stock under certain conditions to paid-up purchasers of a fixed percentage of its water-right was guaranteed.

With the transfer of a water corporation's stock to paid-up vendees of its priority, the question arose, "Were the vendees bound to recognize the sale of water-rights by the vendor in excess of its canal's estimated capacity?" This question was squarely before the court in *Blakely* v. *The Fort Lyon Canal Company* (1903). Here it was declared that the purchasers of water-rights up to the estimated capacity of the canal became its owners; by their contracts of purchase they assumed no obligations other than those mentioned in the several deeds, which were limited to the maintenance and

[57] Ibid. 309-311.
[58] 18 Colo. 308, 313, 315.
[59] 6 Colo. App. 498, 507.

control of the system after the ownership was vested in a company representing the purchasers; that the company now representing the purchasers assumed no further obligations; and that when the estimated capacity of the canal had been disposed of, there was nothing more vested in either of the vendor companies to sell, and the purchasers of excess rights took nothing by their purchase. Moreover, the contracts of excess purchasers stated that the vendor company had authority only to sell rights within the estimated capacity of its canal; hence the purchasers were put upon inquiry into previous sales. Since a reasonably diligent inquiry into the status of the vendor's right to water would have disclosed its previous disposal, the excess purchasers had acquired constructive notice of this disposal at the time of their respective purchases.[60] The plea that the canal had an estimated capacity equivalent to the volume evidenced by recognized deeds and contracts cancelled as excess sales, was unavailing. In the Wyatt case it was authoritatively settled that estimated capacity meant the ability of the canal to supply or deliver water; that into this determination entered not only physical capacity of the canal but the volume of its decreed priority, and the probability of obtaining water therefrom under normal conditions during the season of irrigation.[61]

A crowning difficulty thrust upon the courts for solution was the establishment of water rates satisfactory both to consumer and the ditch corporation. Exaction of a bonus or royalty has taken one of two forms: (1) imposition as a prerequisite to the right to rent water annually; (2) inclusion of the bonus in the annual rental in the shape of excessive water rates. Both forms have been repeatedly nullified by orders of the county commissioners and court decrees. However, the county commissioners are powerless to enforce their rates; so the consumer must often resort to mandamus to compel delivery of water at the legally established rate. As recently as 1912 the supreme court was called upon to declare invalid the exaction of a bonus by a ditch corporation, as a condition of performing its constitutional duty, the delivery of water to the consumer.[62]

The counter evil to royalties was the establishment of confiscatory water rates by the county commissioners responsible to the people. In *Golden Canal Company* v. *Bright* (1884) the supreme court announced, "We may agree fully with counsel that a review of the decision of the board of county commissioners in the premises ought

[60] 31 Colo. 234, 235.
[61] Ibid. 237-239.
[62] 22 Colo. App. 563, 570, 571, Northern Colorado Irrigation Co. v. Pouppirt.

to be provided. There is opportunity for gross injustice to the ditch owner on the one hand, or the consumer on the other, as the interest or inclination of the commissioners might dictate. But *our* duty is to construe the statute, not to enact it; and as the law now stands no appeal from such decisions is provided".[63] This opinion was reaffirmed in *South Boulder and R. C. Ditch Company* v. *Marfell et al.* (1890); and the causing the county commissioners to fix a rate for water from the company's ditch, and declining to pay more than such a rate, was adjudged a proper termination of a rental contract.[64]

Drawing upon the armory of federal precedents the courts found warrant, 1895-1896, for the judicial review of water rates fixed by the county commissioners. In *Leadville Water Company* v. *City of Leadville et al.* (1896) the supreme court following *C. M. & St. P. Ry. Company* v. *Minnesota* (134 U. S. 418) admitted the power of the legislature to regulate the compensation of individuals or corporations exercising public franchises or services, provided such compensation were reasonable, subject to judicial inquiry and determination, and not so inadequate as to work confiscation of property, or to take property without due process of law.[65] Aside from federal precedents this decision was a logical extension of the Wyatt case protecting prior purchasers of water against impairment of their rights by excess sale. The court then said: "a priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without 'due process of law'." Both the ditch company and consumer shared the property right in a prior appropriation of water.

The doctrine of judicial review of the rates established by the county commissioners was amplified in *Montezuma County* v. *Montezuma Water and Land Company* (1907). Fortified by the federal decisions in *Covington, etc. Company* v. *Sandford, Smyth* v. *Ames,* and the *Railroad Commission* cases, the supreme court denied that the county commissioners' regulatory power gave them the authority to confiscate the property of the ditch owner; neither did it give them the authority to compel the ditch owner to carry the water without compensation. And since it clearly appeared from the allegations of the complaint that the revenue to be derived by the plaintiff under the maximum rate as fixed by the commissioners was insufficient to pay the expense of maintenance and operation of the system of canals and pay the taxes thereon, so

[63] 8 Colo. 155.
[64] 15 Colo. 303, 309.
[65] 22 Colo. 305.

that water could not be delivered without a loss, the result was not only that plaintiff's property was taken without compensation, but the plaintiff was compelled to pay for the privilege of rendering the service of its waterworks. Hence the injunction of the district court to restrain the enforcement of the rate fixed by the county commissioners of Montezuma was sustained.[66]

The strength of this decision was impaired by *McCracken* v. *Montezuma Water and Land Company* (1914). In 1895 the district court of Montezuma county enjoined the enforcement of a water rate fixed by the county commissioners. Upon a second petition the commissioners re-enacted the same rate (1903) set down in the order vacated by the district court in 1895. It was held by the court of appeals that fixing of the same rate by the board was not to be regarded as a violation of the injunction, and not being assailed in any direct proceeding, and no lack of jurisdiction or excess authority being shown, the rate prescribed thereby became the lawful maximum rate binding on all concerned. Such ruling would appear to entail a vicious circle of rate-fixing and injunctions.[67]

To conclude. In the wake of railroad extension came the speculative development of canal corporations in the eighties, fostered rather than controlled by legislative enactments. Since 1890 Colorado has been deeply concerned with the full utilization of canals constructed in the eighties, and the adjustment of the relations of the ditch corporation and its consumers to each other and the state. The period of adjustment has not yet ended. To this fact the unsettled problems of state intervention in the sale and delivery of water by corporations bear ample testimony. But various factors have operated to ease the strain incident to the dependence of consumers for their prosperity upon the policy of the corporate middleman interposed between themselves and the water dedicated to the public use. Chief among these mitigating factors have been the increase in water supply by the construction of reservoirs and the more economical use of water, the rise in general farm prices, and the gradual mutualization of corporate canals in accordance with the stipulations of water contracts. By the transfer of corporate stock to consumers, co-operative management of canal works is effected, and the evils of corporate control are practically eliminated. This transitional nature of the canal corporation must be borne in mind to avoid misapprehension of its economic significance

[66] 39 Colo. 173-176.
[67] 25 Colo. App. 280-281, 287.

on the basis of current census statistics of commercial and co-operative irrigation enterprises.

By its invitation to settlement in the traditional desert the canal corporation advanced the conquest of arid America, our last frontier. And the pioneer, fully provided with canals and surrounded by neighboring consumers of water, invoked state aid to protect himself against corporate control of his water supply. He appealed in vain to the legislature which continued to exemplify a tendency decried by Major Powell in 1879. "The pioneers in the new countries of the United States have invariably been characterized by enterprise and industry and an intense desire for the speedy development of their new homes * * *. Under the impetus of this spirit, irrigation companies are organized and capital invested in irrigating canals, and but little heed is given to philosophic considerations of political economy or to the ultimate condition of affairs in which their present enterprises will result."[68] The quickest and most effective response to the pioneer appeals came from the courts. They proved to be more alive to the necessity of state control over the relations of carrier and consumer in the interest of equal justice to both and the public welfare than the guardians of popular rights in the legislature.

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[68] Mead, Op. cit., 5.