The First Water-Privatization Debate: Colorado Water Corporations in the Gilded Age

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Abstract

Contemporary debates over the worldwide trend toward privatization of water systems and supplies have a historical precedent in the controversies that raged in Gilded Age America over the control of irrigation-canal systems by eastern- and foreign-owned corporations. This Article shows how the law developed in Colorado in this period advanced the agrarian ideal of wide distribution of property in water by carrying forward the principles of the appropriation doctrine.

The involvement of corporations funded by outside capital in Western water projects was seen as a threat to the contemporary yeoman ideal of small, family farms, an ideal that many hoped would solve the social and economic ills of the time. This Article discusses several concrete legal issues that arose in Colorado in the 1880s and ‘90s, demonstrating how the principle of public ownership of water and the use requirement were applied to curtail the power of water corporations and preserve the profits of irrigated agriculture for small-scale farmers.

In conclusion, the Article discusses several implications of this early western water-corporation law. First, it calls into question the view of Gilded Age law as primarily serving the interests of the wealthy and powerful. Second, it challenges the common typology of property, in which private property is opposed with public, demonstrating that these two ideas can be in harmony, with the more important dichotomy dividing widespread, diffuse ownership from concentrated ownership. Finally, the Article briefly points to several implications of this history for today’s water-privatization controversies.
Keywords: water law, prior appropriation, privatization, water corporations, property law, natural resources, irrigation, corporate regulation, Gilded Age, western frontier, environmental law
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The involvement of corporations funded by outside capital in Western water projects was seen as a threat to the contemporary yeoman ideal of small, family farms, an ideal that many hoped would solve the social and economic ills of the time. This Article discusses several concrete legal issues that arose in Colorado in the 1880s and ‘90s, demonstrating how the principle of public ownership of water and the use requirement were applied to curtail the power of water corporations and preserve the profits of irrigated agriculture for small-scale farmers.

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THE FIRST WATER-PRIVATIZATION DEBATE

INTRODUCTION

One of the most contentious issues of natural-resources policy today is the privatization of water supplies and water-delivery systems.1 Around the world, the increasing prominence of multinational corporations in the provision of water services has attracted attention, and often opposition.2 Among the many factors driving business involvement in a field that has traditionally been the preserve of governments is the private sector’s superior ability to mobilize capital.3 This is an attractive feature to governments with little spare cash facing burgeoning needs for investments in infrastructure.

The demand for capital investment in water infrastructure, the accompanying rush of large corporations to fill this need, and vehement public opposition all have striking parallels in an earlier historical episode. The rapid

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1. While until recently the debate primarily has concerned water systems in developing countries (see, e.g., Patricia Brett, Water Supply Bogs Down in Complexity, INTERNATIONAL HERALD TRIBUNE, Aug. 20, 2005; Isabelle Fauconnier, The Privatization of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts, 13 BERKELEY PLANNING J. 37 (1999); Peter H. Gleick et al., The New Economy of Water 21 (2002)), the issue has been gaining prominence in the U.S. context, as well. See, e.g., Mike Hudson, Misconduct Taints the Water in Some Privatized Systems, LOS ANGELES TIMES, May 29, 2006; Tim Reiterman, Small Towns Tell a Cautionary Tale about the Control of Private Water, LOS ANGELES TIMES, May 29, 2006.


3. Gleick et al., supra note 1, at 22.
settlement of agricultural lands in the American West in the late nineteenth century created a demand for investment in irrigation projects on a scale beyond the means of the settler-farmers who would use the water. Foreshadowing our own time’s massive investment by multinationals in developing areas’ water systems, outsider capitalists of the day eagerly stepped in to supply the necessary capital, attracted by the potential profits of irrigated agriculture on the western frontier. They set up corporations to build and operate canals and reservoirs, as well as deal in the land irrigated by their projects. The threat of outside corporate control of this vital resource, like today’s corporate control of water systems, aroused intense opposition by many locals.

This Article examines this precursor of today’s water-corporation controversy, continuing the analysis of early Colorado water law begun in a previous article. There I demonstrated that the “Colorado doctrine” of prior appropriation was concerned primarily with guaranteeing a maximal distribution of water resources, within the constraints of ensuring that each irrigator had a sufficient amount to water his crops. My focus turns now to how Colorado law dealt with the attempts of Gilded Age capitalists to gain control of the state’s water through canal corporations in the closing decades of the nineteenth century, revealing that just as for the law of prior appropriation in general, Colorado also led the way in this sub-field of water law.

While building a system of legal rules that allowed leveraging of outside investment capital for the construction of critical water infrastructure, Colorado preserved the benefits of the state’s water supplies for the public. It did so on the basis of the fundamental principles of the Colorado “pure appropriation” doctrine itself: public ownership of water and the recognition of appropriation only when based on actual use, rather than for speculative or profit-making purposes.

This Article’s purpose is twofold. First, it is a further chapter in the legal history of western water law, a body of law which not only remains important in practice, but has assumed increased significance as a model of private property in natural resources. Second, the history of Colorado’s early efforts to deal with control of water by outside capital illuminates today’s controversies over water privatization in unexpected ways. Not only might some of the legal doctrines created on the nineteenth-century western frontier be applicable in the modern context, but they reveal a way of thinking about privatization—and property in natural resources in general—that seems alien today. In particular, Colorado water-corporation jurisprudence highlights for us what is often truly at stake in issues about control of resources: the identity and type of the owner, not whether the type of property at hand is public or

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5. See Schorr, supra note 4, at 7–10.
private. Whether the revival of this now obscure approach to natural-resources property law will turn out to be practically useful is uncertain, but the historical angle it provides should at least add a new perspective to current discussions.

This Article proceeds as follows: Part I supplies historical and legal background to the developments in the Colorado law of water corporations discussed in the following sections. Part II then examines the main legal issues that arose in connection with the huge growth in the construction of corporate canals in Colorado in the 1880s and ‘90s. In conclusion, Part III touches upon some issues raised by this discussion which may have relevance for today’s corporate canal controversy.

I. BACKGROUND

Before examining Colorado’s law of water corporations, some background information is in order. This Part begins by sketching the agrarian and anti-corporate ideologies that were widespread in nineteenth-century America, particularly in the West, and which provided the impetus for many of the developments in Colorado water law in the latter part of the century. Next, the basic doctrines of the Colorado law of appropriation, analyzed in a previous article, are briefly outlined. Finally, Part II’s analysis of Colorado’s water-corporation law is prefaced with a delineation of the issues contemporaries raised regarding the massive investment in western irrigation by outside capitalists.

A. Agrarian and Anti-Corporate Ideology in the American West

As explained in an earlier article, the Colorado doctrine of prior appropriation had its intellectual roots in the agrarian, “radical Lockean” ideology prevalent in the nineteenth-century American West. This set of beliefs had at its core the Jeffersonian vision of a nation of smallholding yeomen; widespread private property was seen as essential to fostering the individual independence necessary for democracy to function. Related to this view of property was the position that only labor—or use—gave a person a legitimate claim on property. Land reformers thus advocated limiting acquisitions from the public domain to actual settlers (as opposed to absentee investors or speculators) and restricting those acquisitions to the amount considered appropriate for a family farm. Besides the appropriation doctrine, these ideals found expression in the informal laws of various claim clubs and mining camps in the West, as well as in legislation such as the federal

Preemption Acts and Homestead Act. 10 Earlier in the century, this ideology was often associated with Jacksonian Democracy; by late-century, the period of our study, it was linked to reform movements such as National Reform, the Farmers Alliances and the People’s Party.

Agrarian reformers constantly invoked fears of dreaded “monopoly,” a term which became something of a catch-all for anything they opposed. 11 “The word monopoly has an ominous sound to American ears,” observed a prominent jurist, “and whenever the appellation fairly attaches itself to any thing, it is already condemned in the public mind.” 12 The term also had a more specific sense, referring to the accumulation of property on a scale beyond what was practical for personal use, particularly for purposes of speculation or deriving income from tenants. These were viewed as violations of the Lockean labor theory of property and the Jeffersonian ideal of wide distribution to actual settlers, and hence illegitimate. 13

Anti-monopolism was also related to another aspect of agrarian ideology: its anti-corporate bent. Corporations, in particular those created by legislative charter, were viewed as beneficiaries of unfairly granted privileges, as Jackson himself had made clear in his famous veto of the Second Bank of the United States:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. . . . When the laws undertake . . . to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. 14

Reformers accordingly advocated the passage of general incorporation laws so that all businesses would operate on an equal footing.

It should be emphasized that the radical-Lockean reform ideology of the nineteenth century was not socialistic; private property, distributed widely, was


12. Thomas McIntyre Cooley, Limits to State Control of Private Business, 1 PRINCETON REV. 233, 257 (1878).


seen rather as a bulwark of liberty and human dignity. On the other hand, neither were radical Lockes necessarily opposed to public or state ownership of property. In fact, they often viewed private property as the antithesis not of these types of property, but of corporate ownership, itself held by some not to be private property at all. The opposition between private and corporate ownership was so strong that state ownership could be justified in terms of Lockean individualism as necessary to keep power out of the concentrated hands of capitalists and monopolies.

As I argued in my earlier article, the Colorado water-law appropriation doctrine may be best understood as part of a complex of pro-settler and anti-speculator laws and rules prevalent in mid-nineteenth-century America, especially in the West; norms that put the agrarian ideology into practice. Seeking to distribute western land in parcels sufficient for a single homesteader’s use, while keeping it out of the hands of speculators and “monopolists,” reformers enacted the Homestead Act of 1862. When it came to water in the arid West, the appropriation doctrine served the same goals.

B. Early Colorado Water Law

In the case of water, the speculators and monopolists with whom Colorado law at first concerned itself were riparian landowners. Under the traditional doctrine of riparian rights, which, along with the rest of the common law, presumptively applied to the western lands settled by Americans in mid-century, surface water was owned by the owners of the land adjacent to it. In the humid lands of the eastern United States and England, this rule did not create inequities, since surface water was both widely dispersed and relatively unimportant for farming. In Colorado, however, with its sparse rainfall, land without water was practically worthless; irrigation was a near-absolute necessity for agriculture. At the same time, most land was located relatively far

17. See WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 122–24 (1977); Turpin v. Locket, 10 Va. 113, 156 (1 Call) (1804) (Tucker, J., dissenting) (arguing that property of corporation not private property, could be taken by state). Compare also Radin, supra note 6 (advocating greater protection for “personal” property than for other types).
20. Homestead Act of 1862, 37 Cong. Ch. 75, §§ 1, 2, 5, 6, 12 Stat. 392.
from reliable water sources. Control of the area’s limited water sources thus effectively meant control of huge swaths of land, even where the water’s owner did not hold title to the land. The common-law riparian doctrine would have concentrated control of Colorado’s water, and thus land, in the hands of those with the means to gain strategic control of the territory’s riparian lands. Such a process was well underway in the early decades of white settlement of the area, and led to widespread opposition to the riparian rule.21

Colorado law—statutes, case law, and provisions of the state constitution of 1876 (when Colorado joined the Union)—responded to the threat of riparian monopoly by applying the egalitarian principles of agrarian ideology to water law. The principle that the state’s surface water was public property was expressed in the opening section of the constitution’s water law provisions:

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.22

Public ownership meant, first and foremost, abolition of riparian ownership: water was now available for appropriation by all settlers, regardless of whether or where they held title to land.23 But public ownership had additional implications. With ownership of the state’s water vested in the people, private actors could acquire only the right to use that water, and then only under conditions stipulated by the owner through its agent, the state.24 This notion of public ownership provided the theoretical basis for much of the law developed to counter water companies and speculators in Colorado. It also created something like a local version of the public trust doctrine for inland freshwater sources, limiting the power of the legislature to dispose of the state’s water to “monopolists” and “pools.”25

The second fundamental element of Colorado’s anti-riparian law was the use requirement:26 an appropriation was valid only if made for actual use of the water, and was limited by the extent of that use.27 The use requirement neutralized attempts to monopolize the state’s water through control of riparian lands, since under the Colorado doctrine, riparian ownership without use was irrelevant to the question of water rights. It also stood in the way of attempts to

22. COLO. CONST. art. XVI, § 5.
23. See Schorr, supra note 4, at 42, 44–45.
24. See id. at 42.
26. See COLO. CONST. art. XVI, § 6 (“The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.”).
gain control of Colorado’s water by speculative appropriations—those intended not for immediate use but for holding on to in hopes of turning a profit by later sale or driving up the price of land.

Though the Colorado doctrine is often called “prior appropriation,” the element of priority was originally an auxiliary principle, simply an expression of the property-law rule that in case of two bona-fide claims to the same entitlement, the first in time prevails. In effect, it modified the egalitarian promise of equal access to water resources and limits on appropriations to the amount necessary for actual use—with a guarantee of sufficiency. The right to use water was open to all as long as enough remained for all to make effective use; but new appropriators would not be allowed to over-appropriate the water source, diluting the rights of those who had come before them to the point of worthlessness.

In sum, the water law created in Colorado’s territorial period and codified in its constitution aimed to ensure as wide a distribution as possible of the critical resource, keeping it out of the hands of speculators in riparian land. It achieved this primarily through the use doctrine, backed up by the fundamental principle of public ownership. The principles of public ownership and appropriation based on use alone succeeded in fending off the threat of water monopoly based on riparian rights in the 1860s and ‘70s, and were to serve as the basis for Colorado’s efforts to counter the new threat posed by canal corporations in the 1880s and ‘90s.

C. Colorado’s Water Corporations

While Colorado law in the territorial period and the first decade of statehood had not ignored the issue of water companies, its primary concern was the threat of water monopoly by riparian proprietors. In 1887, though, the state supreme court noted that a watershed had been reached:

The subject of water rights has always been justly regarded as one of the most important dealt with in the legislation and jurisprudence of Colorado. Hitherto attention has been mainly directed to the adjustment of priorities and differences between individual consumers; but hereafter, owing to the rapid settlement of the eastern part of the state, the status of the carrier and its relations with the consumer will command the most earnest and thoughtful consideration.

Indeed, until about 1870, Colorado irrigation projects had mostly been built as a result of individual effort or cooperation between neighboring farmers. Farmers organized for this purpose in cooperatively-owned “mutual companies,” sometimes incorporated, but often not; the reluctance to

29. Id. at 16–20, 51–53.
30. See infra notes 84–91; Schorr, supra note 4, at 37–39, 55–56.
incorporate was due, at least in part, to the farmers being “prejudiced against stock corporations.” The 1870s saw the advent of larger-scale cooperative projects, pioneered by the Union Colony at Greeley. From around 1880, though, large corporations began to dominate, financing extensive projects with outside capital. These canals, benefiting from substantial capital investments, state-of-the-art engineering, and the economies of scale these made possible, quickly became the largest and most important in the state.

Contemporaries recognized this corporate dominance of the irrigation infrastructure as an explosive issue, part of a larger concern over the postwar growth of corporate influence on the economy and politics in general. Some saw it in a positive light: “Colorado is a State of corporations. In fact, without them it would be little more to-day than an unimproved wilderness.”

But others recognized the potential for conflict posed by corporate control of irrigation and viewed any attempt to profit from this control as immoral. “Next to bottling the air and sunshine,” wrote one influential publicist, “no monopoly of natural resources could be fraught with more possibilities of abuse than the attempt to make merchandise of water in an arid land.”

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34. E.S. Nettleton, Third Biennial Report of the State Engineer of the State of Colorado 216–17 (1887).

35. See, e.g., William W. Cook, The Corporation Problem 118 (New York, G.P. Putnam’s Sons 1893) (“The Corporation Problem’ in its entirety has become one of the great social questions of the age.”).


With what corporations have done, and are now doing, and promise to do, it is a great Commonwealth, destined to become the home of millions of happy, prosperous, and contented people. Whatever may be the ultimate outcome of this corporate power in the State, no one here questions its present value and importance. . . . Its first roads and ditches were the work of companies, and among the most prosperous Colorado corporations now are those formed (some of them with large capital) to irrigate the arable portions of the State.

Id. at 41; see also The Wright Law, Irrigation Age, Feb. 1, 1892, at 442 (praising corporate-led development of irrigation facilities).

37. See Nettleton, supra note 34, at 217 (“Under the old system . . . the interest of the canal owner and farmer were usually identical, because united in the same person. But in canals built by individual or corporate capital, the interests of the ditch owner and farmer are not always considered identical . . . .”).

Moreover, corporate control of water posed a grave threat to hopes for western irrigation as a boon to the smallholding, independent yeoman ideal. Many influential Americans saw irrigation as a panacea for the social and economic ills plaguing Gilded Age America, with its rapid industrialization and urbanization: “The future belongs to Arid America. There alone can the population safely expand; there alone can labor win independence; there alone can a new and better civilization be erected under the impulse of the new century about to be born.”

Irrigation, its enthusiasts believed, would reinvigorate the homestead ideal, banish monopoly, and “save the nation and the state for democracy—making possible small-scale autonomous communities, egalitarian harmony and justice.” It would “guarantee industrial independence, and the small farm unit, the equality of man,” while breaking up large landholdings and the power of the corporations, returning power to the people. Cooperative ditch-building and ownership, through the vehicle of mutual companies, would bring to these farmers the benefits of independence, self-sufficiency, and social equality, obviating the need for outside capital.


42. See, e.g., J.S. GREENE, ACQUISITION OF WATER RIGHTS IN THE ARKANSAS VALLEY IN COLORADO 67 (U.S.D.A. Office of Experiment Stations Bulletin No. 140, 1903); William Hammond Hall, Irrigation in California, 1 NAT’L GEOGRAPHIC MAG. 277, 289 (1889); 1 RICHARD J HINTON, IRRIGATION IN THE UNITED STATES: PROGRESS REPORT FOR 1890, at 16–19, Sen. Exec. Doc. No. 53 (1891); Richard J. Hinton, The Irrigation Year, IRRIGATION AGE, Feb. 1, 1892, at 395, 397; WILLIAM E. SMYTHE, THE CONQUEST OF ARID AMERICA 43–45 (rev. ed. 1905); The Republic of Irrigation, IRRIGATION AGE, May 1894, at 187; Advantages and Benefits of Farming by Irrigation, 23 MANUFACTURER & BUILDER 204 (1891); Irrigation and Farmers’ Movements, IRRIGATION AGE, Feb. 15, 1892, at 482; see also Martin E. Carlson, William E. Smythe: Irrigation Crusader, 7 J. OF THE WEST 41 (1968); DONALD E. GREEN, LAND OF THE UNDERGROUND RAIN 25 (1973); RICHARD WHITE, IT’S YOUR MISFORTUNE AND NONE OF MY OWN 403 (1991); Worster, supra note 40, at 32.

To many, development of irrigation infrastructure by capitalists threatened this vision: “The water, as a matter of right, belongs to the men who till the soil, and rich corporations should not be allowed to take it from those to whom it properly and of right belongs.” Since land in the arid West without water was essentially without value, outside capital’s control of water meant, economically and practically speaking, control of the land. As an influential foreign observer explained,

In the West, all value may be said to inhere in the water. Land is plentiful; and almost worthless. The owner of the water really owns the land, for it is useless without his supply. The quantity of available water, and not the area of a territory, defines its agricultural extent; consequently, where capitalists have built canals to lands which they do not own, and have secured the water, they have really acquired the land too. They have the farmers absolutely at their mercy, and enjoy a monopoly of the most arbitrary kind . . . .

Levi Booth, head of the Colorado Grange, also warned against this danger:

These companies are taking possession of our waters, without any regard to prior rights or prior use of such waters. And if we do not look well to our rights we shall soon find to our sorrow, that we have allowed them to even rob us of our lands, for if they can take the water they thus deprive us of the use of our lands, for without water they are useless.

And indeed, despite the ideals and efforts of the irrigation movement, speculative investment capital flowed from the East and from Europe into western irrigation infrastructure. “Men began to dream,” wrote Elwood Mead, an influential civil servant and one of the movement’s leaders, “of a new race of millionaires, created by making merchandise of the melting snows, by selling ‘rights’ to the ‘renting’ of water, and collecting annual toll from a new class of society, to be known as ‘water tenants.’” During his tenure as Assistant State Engineer in Colorado, he colorfully described this threat of a new, corporate feudalism in a speech to Colorado farmers:

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45. ALFRED DEAKIN, ROYAL COMMISSION ON WATER SUPPLY FIRST PROGRESS REPORT: IRRIGATION IN WESTERN AMERICA 46 (Melbourne: John Ferres, 1885). Extracts of Deakin’s report were reprinted as an appendix to RICHARD J. HINTON, IRRIGATION IN THE UNITED STATES, Sen. Misc. Doc. No. 15, at 197, 219 (1887).
46. The Grange was part of a larger post-Civil-War agrarian movement, often referred to as “the Granger movement,” whose goals included strengthening the independence of yeoman farmers and combating the power of the corporations. See generally SOLON JUSTUS BUCK, *THE GRANGER MOVEMENT* (1913); CARL C. TAYLOR, *THE FARMERS’ MOVEMENT, 1620–1920*, at 139 (1953). On the Colorado Grange, see Wayne E. Fuller, *The Grange in Colorado*, 36 COLO. MAG. 254 (1959).
47. Levi Booth, Speech to the Meeting of the Colorado Grange, in *Sons of the Soil*, ROCKY MTN. NEWS, Jan. 13, 1881, at 3.
Six hundred years ago when a King of France wanted to reward a noble he gave him the waters of a stream. To-day for the noble, who was a man and could be reached and treated as such, we have substituted that pulpy individuality called a corporation, and have said here is a fertile and bounteous land; the ditch which provides its water supply holds the key to its value. Build the ditch; the water you can have for nothing; and at the same time virtually own the land.49

William Smythe, another of the movement’s leaders, played upon a similar theme. “This attempt to fasten a water monopoly upon the budding civilization of the arid region,” he wrote,

if successful, . . . would create a system essentially feudal, since ownership of the water in an arid region is practically equivalent to ownership of the land. In this feudal system the man who owns the water is the great proprietor; those who use that water and pay him tribute are the peasants. The political influences which might grow out of such a system, and their far-reaching effect upon the future, may be readily imagined.50

The new fear of water tenancy played into the traditional radical invocation of “the ghosts of monarchy, aristocracy, and feudalism,” already by mid-century an established trope in arguing for agrarian land policies in general.51 Now, in the post-bellum period, the threat of feudalism was most immediately identified with the “immense and powerful corporations” of the age, as argued by a Grange leader in 1873: “Men came to see that it was only a question of time when these monopoly interests should be as absolute in their ownership of the agricultural and producing classes of the country as the nobles of Russia are of the serfs.”52

One source of agrarian sentiment against the big canal companies was their foreignness. Xenophobia in the context of Colorado’s water was intensified by the fact that most of the state’s large irrigation works were built and controlled by outside capital, “from Boston, New York, and from over the sea.”53 Travelers Insurance Company of Connecticut built some of the biggest projects, especially in the south and west of the state. In the Denver and Front Range areas of the northeast, where the earlier ditches had been mostly small-
scale or cooperative efforts, many of the major canals were built by the British-owned Northern Colorado Irrigation Company, referred to locally as the “English Company.”

European ownership stoked locals’ fears that corporate control of water would lead to renewed feudalism, with tenant farmers working the lands of absentee owners, leaving the Colorado farmer “in the position of a peon or tenant.” Critics made dire comparisons to the situations in Ireland and “Asiatic countries,” where absentee landlords were held to oppress a downtrodden peasantry. Less bombastically, Master Booth of the Grange argued, “Vast ditch companies are being formed, controlling a large amount of foreign capital—capital that has no sympathy for us or ours.” As one historian notes,

Even if British enterprises behaved as any American capitalistic concern would, and even if their activities were not such as to press upon every one of the exposed nerves of western agrarian anti-British feeling, their British character could never be forgotten, and it embittered any conflict. The building of irrigation works on the High Plains in the 1880’s provided a rich matrix in which these animosities might luxuriate.

Hostility to the canal companies and fear of feudal tenancy were heightened by the contractual terms on which the canals sold water. These standard-form contracts took one of two forms: either the sale of a perpetual “water right” or annual “rental” of water from the company. Under both plans, the irrigator was bound to pay and the company was held free of liability, regardless of how much water was actually delivered, or whether any was even delivered at all, an arrangement the Governor was to call “a monopoly that


56. See Roger V. Clements, British-Controlled Enterprise in the West Between 1870 and 1900, and Some Agrarian Reactions, 27 AGR. HIST. 132, 136 n.30 (1953) (quoting ROCKY MTN. NEWS, Feb. 9, 1891).


58. Booth, supra note 47.


60. An additional form was a modified version of the sale of a water right, with title to the canal passing to the irrigators once a certain number of rights had been sold; see infra notes 166–67.

61. For examples of contracts, see 3 REPORT OF THE SPECIAL COMMITTEE, supra note 39, at 297–303, 330–39. For a case with this situation, see The Rights of Farmers and Ditch Owners, ROCKY MTN. NEWS, Mar. 24, 1874, at 4; see also Fox, State Regulation, supra note 33, at 173.
only the cheek of a paid lobbyist can defend.”62 In addition, the farmer’s land was usually made security for his obligation.63 Given that the farmer relied on the supply of water to grow the crops from the sale of which he planned to pay the water company, the combined effect of these terms was to make the canal company the practical owner of the farmer’s land. Even the President of the United States inveighed against the dangers that this type of corporate landlordism posed to irrigators: “If this matter is much longer neglected private corporations will have unrestricted control of one of the elements of life, and the patentees of arid lands will be tenants at will of the water companies.”64

Giving this arrangement yet greater draconian force was the water companies’ practice of selling water rights based on the theoretical capacity of the ditch, usually significantly in excess of the actual available supply. Their contractual guarantee of payment in full regardless of quantity delivered was obviously an incentive to do so.65 The farmer, on the other hand, when forced to irrigate a smaller acreage than he had planned for, nonetheless had to make his payments to the company from the proceeds of his reduced yield, often an impossible proposition. This imbalance was a major source of friction between the farmers and the big canal companies. One local leader attributed nefarious motives to the companies:

An irrigation company can destroy a settler in two or three days, if it chooses. It can sell him the land, give him plenty of water for two or three years, till he gets it well improved. Then at the critical moment it can withhold the water for a few days, destroy his crops for that season, and ruin him. He is unable to meet his payments. The company takes his land, rendered more valuable by the improvements he has put on it, sells it over again, and makes money by the transaction. I am sorry to say that is being done all the time.66

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63. See, e.g., A Ray of Light, ROCKY MTN. NEWS, Nov. 3, 1881 (one-sided contract allowed Golden Canal Co. to take farmers’ money in advance and then fail to supply water). For condemnations of the contracts, see Fox, Populism in Colorado, supra note 55, at 9; Fox, State Regulation, supra note 33, at 163; GREENE, ACQUISITION OF WATER RIGHTS IN THE ARKANSAS VALLEY IN COLORADO, supra note 42, at 63–65; Elwood Mead, Irrigation in the United States, 54 TRANS. AM. SOC’Y CIV. ENG’RS. 83, 94 (1905); F.H. NEWELL, REPORT ON AGRICULTURE BY IRRIGATION IN THE WESTERN PART OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 94–95 (Washington, G.P.O. 1894); R.P. Teele, The Organization of Irrigation Companies, 12 J. POL. ECON. 161, 163 (1904); ULRICH, supra note 32, at 52.
64. C.C. Wright, Irrigation on Popular Principles, IRRIGATION AGE, Feb. 1, 1892, at 446, 448 (quoting President Harrison).
65. Fox, Populism in Colorado, supra note 55, at 26. It seems this was done in bad faith, with the investors, too, victims of the promoters initiating the projects. See Teele, supra note 63, at 165. For overselling of rights and unrealistic paper appropriations by companies, usually going unfilled, see Kienast, supra note 55, at 30; NEWELL, supra note 63, at 91; James Earl Sherow, Discord in the “Valley of Content”: Strife over Natural Resources in a Changing Environment on the Arkansas River Valley of the High Plains 91 (1987) (unpublished Ph.D. dissertation, University of Colorado); Sherow, Watering the Plains, supra note 55, at 5–7; SHEROW, WATERING THE VALLEY, supra note 43, at 13, 24; 3 REPORT OF THE SPECIAL COMMITTEE, supra note 39, at 346.
66. Teele, supra note 63, at 165 (quoting Commander Booth-Tucker of the Salvation Army).
Elwood Mead, too, decried the deleterious effects of these lopsided contracts:

We need . . . to correct the abuses which have fastened themselves on our methods of distributing water. . . . I refer to the inequitable water contracts and oppressive charges of many of the canals engaged in the business of selling water. . . . I have yet to find a contract for the sale of water whose provisions are fair toward the buyer, or that offers any incentive or inducement to secure its economical use.67

And Denver’s Rocky Mountain News, reflecting classic Jacksonian anti-corporate rhetoric, editorialized against “corporations which, through the ownership or control of water, seek to absorb the farm lands of Colorado”:

No Irish absentee landlord ever required his tenants to sign a more infamous contract than this company forced on the farmers under their canal. . . . To collect pay for water they do not carry, to demand six months’ pay for two months’ work, to require royalties and bonuses before they will sell water at all, to set themselves up as privileged individuals or organizations not subject to commercial losses like other people—all these assumptions are a part and parcel of the arrogance which characterizes corporations, and which has been borne long enough.68

If water were to be kept from becoming “an instrument of monopoly and extortion,”69 it would have to be subject to the same wide distribution that the yeoman ideal required of land.

The dominance of corporations in irrigation was thus of unambiguous legal significance, as pointed out by early irrigation economist R.P. Teele:

The number of farmers who own their own ditches and take water direct from streams, subject to no conditions by those imposed by the laws and by nature, is so small that it can be neglected. The forms of organizations and the conditions prescribed by them are almost wholly independent of irrigation law, but have fully as much influence on the development of an arid region as the laws, or perhaps more, and have a much more direct relation to the everyday affairs of the farmer. . . . The farmer is much more directly affected by the rules of his company than by the water laws of his state.70

More specifically, the question of ownership was paramount. When ditches were owned by the farmers who used them, it mattered little whether the law recognized the user or the ditch owner as the owner of the diverted water. The advent of the outsider-owned canal corporation, however, meant that the question could no longer be avoided: Who owned the irrigation water, the canal company or the end-user?71

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68. Mr. Goudy and Water, ROCKY MTN. NEWS, Feb. 9, 1891, at 4.
69. Mead, Rise and Future, supra note 40, at 600.
70. Teele, supra note 63, at 161.
71. See Mead, Rise and Future, supra note 40, at 595–96.
As it did for the prior appropriation doctrine, Colorado also pioneered the law of irrigation companies. In 1893, when the West Publishing Company published a posthumous, revised edition of the influential John Norton Pomeroy’s treatise on water rights, updated by Henry Campbell Black (of Black’s Law Dictionary fame), not only did the added chapter on “Irrigation and Ditch Companies” cite mostly to Colorado cases, but Black stated:

The laws of [Colorado] contain one of the most complete and detailed systems for the regulation of irrigation companies. And as these regulations were adopted, in part, as early as 1868, they must be regarded as constituting the original system, from which those in force in the other states were copied or imitated with greater or less closeness.

Other treatises, too, recognized Colorado as the leader in this field, especially in basing regulation on the theory of public ownership, with the company having the status of a mere carrier of the water.

How did Colorado law deal with the issues related to corporations and their control of irrigation water? Conventional wisdom has it that the Colorado government in this period was “dominated by a strongly entrenched business interest which dictated legislation, influenced the courts, and controlled the economic life of the state,” that the prior appropriation doctrine paved the way for corporate development, and that “canal corporations were fostered rather than controlled by State law.” A dictum of Colorado’s supreme court, though, reveals its perception of the law’s bias in controversies surrounding canal corporations:

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.

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73. Pomeroy, supra note 72, at 369. For the origins of irrigation company regulation in Colorado, actually beginning as early as the first territorial legislature in 1861, see infra notes 84–93; Schorr, supra note 4, at 37–39.


75. Barnett, supra note 33, at 51–52.

76. See, e.g., Donald J. Pisani, Promotion and Regulation: Constitutionalism and the American Economy, 74 J. Am. Hist. 740, 750 (1987); see also sources cited in Schorr, supra note 4, at 9 n.17.

77. Fox, Populism in Colorado, supra note 55, at 25.

In the eyes of their final arbiter, at least, the state’s constitution and legislative acts were so strongly anti-capital that an extra measure of caution was called for to prevent undue deterrence of investment in irrigation facilities.79

But significant for this study is not only the fact that Colorado law came down consistently on the side of the yeoman farmer and the consumer in their struggle against big-business interests, but also the doctrinal and theoretical bases on which it relied. While other American courts tended to view the issue of control of the ascendant corporations through the prism of the police power or regulation of a business impressed with a public trust, Colorado courts argued for limitations on the power of water companies based on the state’s principles of property rights in water, especially the constitutional tenets of public ownership and the use requirement.

This observation about public ownership requires some clarification. Some Coloradans proposed to fight corporate control by instituting state ownership of all ditches. As early as 1874, the *Rocky Mountain News* was writing that it would “prefer a state control of all irrigation companies, since in this country the ditch owners will control the land, and, consequently all large ditch companies should be controlled at some point by the people.”80 Throughout the irrigation controversies of the 1880s and ’90s, some continued to advocate for this solution.81 As we shall see, though, this was not the path Colorado took; instead it acted to ensure a wide distribution of the benefits of the state’s scarce water by other means, consonant with the agrarian ideology of prior appropriation.

II. THE LAW OF WATER CORPORATIONS

How did Colorado counter the power of water companies over the state’s yeoman irrigators in the closing decades of the nineteenth century? One legal tool to prevent speculative water appropriations was the strict application of the beneficial-use principle in a variety of contexts.82 Though the limitations beneficial use imposed on property rights in water applied equally to all appropriators, whether corporate or individual, it primarily affected—as intended—the investor-owned canal companies.

79. Fox, *State Regulation*, supra note 33, at 171–72, writes that Colorado courts “have shown commendable zeal in dispensing even-handed justice to farmer and capitalist alike,” but proceeds to enumerate substantive legal issues decided by the court, all of them in favor of the small farmer.

80. DAVID BOYD, A HISTORY: GREELEY AND THE UNION COLONY OF COLORADO 102 (Greeley, Colo., Greeley Tribune Press, 1890).


Alongside this general anti-speculation doctrine of appropriation law targeting big water corporations in practice, a number of issues considered by Colorado courts in this period pertained specifically to corporate control of water. The most significant and salient of these, to be discussed first, was the legitimacy of the rates charged by canal corporations for water supplied to farmer-consumers. Throughout the 1880s and ‘90s, in both the legal and public opinion arenas, farmers and their supporters waged a bitter battle with water companies over the latter’s attempts to evade price controls imposed on them by law. In several of the highest-profile American water-law cases of the period, the state’s high court sided with the farmers, applying the principles of public ownership and beneficial use, discussed above, to limit the power of canal corporations over the water they diverted. The principles of the supreme court’s water-price jurisprudence served as important precedents for the other major water-corporation issue facing the court in this period, discussed next: the power of the corporations to prorate water shortages among their consumers. Beneficial use was again the guiding principle in the next issue: the validity of legislative grants of water rights to corporations. Finally, this Part notes the Colorado Court of Appeals’ peculiar application of the law regarding ditch easements to canal companies, another context in which the law vindicated consumer interests.

A. Controversies over Water Prices

From its inception, Colorado law imposed or allowed for price limits on water, restraining the ability of water companies to profit from the territory’s water. As early as October 1861, a month before any general water-law legislation was passed, private acts chartering ditch companies included in their terms price caps on the water sold. The next year, Colorado enacted its first general incorporation law, giving the power to set water rates to “the tribunal transacting county business” (later amended to the county commissioners). Some later company charters also gave the commissioners the power to set a

83. See supra § 1.B.
84. See, e.g., An Act to Incorporate the Blue River and Buffalo Flats Ditch Company § 8, 1861 Colo. Sess. Laws 441, 442 (50¢ per “inch” during day, 25¢ at night).
86. An Act to Enable Road, Ditch, Manufacturing and Other Companies to Become Bodies Corporate § 14, 1862 Colo. Sess. Laws 48 [hereinafter General Incorporation Act 1862].
87. An 1864 amendment to the Incorporation Act required the rates to be fixed “by the county commissioners, or the tribunal transacting county business,” An Act to Amend “An Act to Enable Road, Ditch, Manufacturing and Other Companies to Become Bodies Corporate” § 33, 1864 Colo. Sess. Laws 59, while the post-statehood codification struck the “tribunal” language and left only the commissioners with this power, An Act to Provide for the Formation of Corporations § 87, 1877 Colo. Gen. Laws 143, 172 [hereinafter General Incorporation Act 1877]. There was most likely no actual distinction between these bodies.
“reasonable price” for their water. The state constitution, in 1876, affirmed the policy of “reasonable maximum rates” to be set by the county commissioners.

Lawmakers realized, however, that price caps alone were insufficient to prevent companies from profiteering in water. Companies could easily evade the rules by keeping prices within the legal limit, but tying water supply to the purchase of land—the price of which was not controlled—from the company. To prevent this, the General Incorporation Act of 1862 required that:

Any company constructing a ditch under the provisions of this act shall furnish water to the class of persons using water in the way named in the certificate [of incorporation] as the way the water is designated to be used . . . whenever they shall have water in their ditch unsold . . .

This rule, too, had been preceded by similar provisions in company charters.

The law requiring water companies to sell water to all, regardless of whether the buyer bought land, was criticized by some for “transferring to landowners who had invested nothing in canals part of the profit to be made by those who had so invested.” However, from the agrarian point of view, allowing companies to leverage water in their canals to derive profits from land would have been unacceptable: “A monopoly sought to be secured in [water] for the purpose of selling lands held for speculation would be a crying injustice.” A canal company was entitled to a fair return on its investment, but not to economic rents deriving from its control of the water, since the water in its ditch was not really its own.

The new General Incorporation Act passed in Colorado’s first year of statehood carried over these provisions, while also attacking the hoarding issue from another angle: The law subjected companies’ water rights to forfeiture if work on the ditch were not commenced and completed within specified periods, thereby limiting the ability of companies to gain control of water supplies in advance of settlement. This statute, along with the water-law sections of the state constitution, laid the groundwork for resolution of the major controversies that erupted in the 1880s and ‘90s over corporate development of Colorado’s water.

89. COLO. CONST. art. XVI, § 8.
91. See, e.g., An Act to Incorporate the Blue River and Buffalo Flats Ditch Company § 16, 1861 Colo. Sess. Laws 443.
92. DEAKIN, supra note 45, at 46.
93. The Irrigating Convention, supra note 44, at 2.
95. Id. § 106, at 179–80.
1. The 1879 Irrigation Act and the Right to Purchase Water

Colorado’s groundbreaking 1879 Irrigation Act, drafted by and passed under pressure from agrarian interests, had as its primary goal institution of an administrative system for determining the validity and priority of water rights, but it opened by restating the price-regulation power of county commissioners. A new twist on this old theme was the addition of a provision granting irrigators the right to continue purchasing water at the price set by the commissioners if the price had been so set; if it had not, then the consumer could demand the sale of water at the price at which the ditch owners were then selling the water or had done so in the preceding year.

Just a few years later, in *Golden Canal Co. v. Bright*, the state supreme court explained the purpose of these provisions as protecting consumers from having to submit to new and potentially onerous conditions, other than those regarding price, that companies might try to force on them. The customer cannot be required, the court said, as a condition precedent of exercising his right to continue purchasing water,

to acknowledge the equity of all the rules adopted by the ditch owner; to say that he could [be so required], would be, in a measure, to place him at the mercy of such proprietor, for he could thus be coerced into compliance with the most oppressive and unjust regulation. If the rule is fair and reasonable, and in harmony with law, his obedience thereto will probably be enforced regardless of prior approval; but the reasonableness thereof is a matter to be determined in some proper tribunal.

Notably, the court justified the commissioners’ power not in terms of the law of business regulation, but against the background of the public’s property right in Colorado’s water:

If these persons or corporations [furnishing water to farmers] were entirely uncontrolled in the matter of prices, it requires no prophetic vision to see that injustice and trouble would follow. If allowed to speculate upon that which is properly a part of the public domain and protected in the possession thereof, it is exceedingly appropriate that they should be subjected to reasonable regulations in connection therewith. Hence, the

96. See *Meeting of the Colorado Agriculturists*, ROCKY MTN. NEWS, Nov. 21, 1873, at 4; *The Farmers’ Congress*, ROCKY MTN. NEWS, Dec. 8, 1878, at 1; David Boyd, *Appendix*, in E.S. Nettleton, *Report of the State Engineer to the Governor of Colorado for the Years 1883 and 1884*, 116 (Denver, Times Co. 1885); *Boyd, A History*, supra note 80, at 120-23; *David Boyd, Irrigation Near Greeley*, COLORADO 61–62 (Water Supply and Irrigation Papers of the U.S.G.S. No. 9, 1897); Frank J. Annis, *The Limitations and Qualifications of Statutory and Equitable Water Right Decrees*, 18 REP. COLO. BAR ASS’N. 94, 98 n.11 (1915); Fuller, *supra* note 81, at 115; Fuller, *supra* note 46, at 259.


98. Id. § 3, at 96–97.

99. 6 P. 142 (Colo. 1884).

100. Id. at 144–45.
wisdom and justice of section 8 of the constitution [giving county commissioners power to set rates] . . . .101

Public control of water prices was thus explained in terms of the resource being “properly a part of the public domain.” Private rights were recognized, but only to the extent they served the public purpose of water distribution to as many irrigators as possible. Beyond that, public control was retained.

2. The Royalty Controversy

Faced with public control of the rates they could charge farmers for water on the one hand, and the reservation of most federal lands for actual settlers, canal companies hit upon a new way to structure their relationships with consumers so as to increase profits: selling water only to farmers who first purchased a so-called “water right” from them.102 The holder of such a right would still have to pay on an annual basis for the water he needed,103 but while the latter transaction was subject to the maximum prices set by county commissioners,104 the former was not.105 Thus, even without technically owning any land, the companies, through their ownership of the water, could force the settlers to share with them the expected profits of irrigated agriculture, in effect capturing the increased value of the land due to irrigation.106 The investors justified their demand for economic rents on the basis of the increased value they imparted to surrounding lands,107 and may have also felt this type of

101. Id. at 144; see also Colo. Const. art. XVI, § 8, discussed supra note 89.
102. The water right was typically for the water necessary to irrigate an 80-acre tract, usually defined as not to exceed 1.44 cubic feet per second (c.f.s.). Fox, State Regulation, supra note 33, at 163; see also § I, Water Contract, The Fort Morgan Land and Canal Company, supra note 61; Wright v. Platte Valley Irrigation Co., 61 P. 603 (Colo. 1900).
103. Or, as an eastern journalist put it,

   The plan may be justly described as making the farmers pay down at the outset for the privilege of having water afterward by paying for it over again every year. Like cows who come home to be milked at night-fall, the settlers of Colorado must ‘give down’ each year or go dry.

   Ralph, supra note 53, at 945.
104. See supra notes 84–89.
106. See Ray Palmer Teele, Irrigation in the United States 99 (1915); contra Richard Moss Alston, Commercial Irrigation Enterprise, The Fear of Water Monopoly, and the Genesis of Market Distortion in the Nineteenth Century American West 108–09 (1978) (arguing that settlers could wait for the companies to default on interest payments before buying water rights, and thus capture the rents for themselves).
107. See Ditch Debates, Rocky Mtn. News, Feb. 22, 1885, at 4; Greene, Acquisition of Water Rights in the Arkansas Valley in Colorado, supra note 42, at 61; Ansel Watrous, History of Larimer County Colorado 69 (1911). For some figures on increased values, see Clements, supra note 56, at 139. For a justification, in wealth-maximization terms, of the capture by infrastructure companies of increased land values due to their development, see the discussion of railroad companies in Richard A. Posner, Economic Analysis of Law 101–02 (1972).
deal was necessary to help the companies recoup the large up-front capital investments necessary for the large canal systems.  

Though this sort of profit division might seem unobjectionable, it was seen at the time as contradicting the agrarian ethos, according to which public land should be reserved to actual settlers. While Coloradans agreed that canal companies should be compensated at a rate sufficient to pay shareholders a market rate of return on their investment, the new surcharge, termed by opponents a “royalty” or “bonus,” appeared to represent the monopolists’ “arrogant claim of ownership in that most vital of natural elements to an arid land” and an illegitimate attempt to profit from the settlement of the public domain. "Why should a royalty near Denver be worth $30 and a royalty a certain distance from Denver be worth only $5" asked one opponent. The royalty, said a Grange leader, was depriving irrigators of “their bread of life—their water rights.”

Farmers reacted angrily to the new contracts offered by the “evilly disposed ditch companies and their agents.” A particular target of their ire was the “foreign method of doing business” of the “English Company.” The idea of a royalty upon water was un-American,” it was said. “It was not the idea of an American brain or an American heart.” Opponents whipped up “folk memories of 1776,” invoking the Stamp Act and Boston Tea Party, with Denver’s Tribune Republican protesting that “John Bull had lots of cheek, and that it seemed as if the old days of English tyranny were coming back.”

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108. See, e.g., COLORADO AS AN AGRICULTURAL STATE: THE PROGRESS OF IRRIGATION 12 (Denver, Local Comm. of Arrangements for the National Irrigation Cong. 1894):

109. See, e.g., R.Q. Tenney, The Water Problem, COLO. FARMER, Feb. 4, 1891, at 2; Fuller, supra note 81, at 117 (quoting DENVER REPUBLICAN Jan. 11, 1883).

110. Smythe, supra note 38, at 649.

111. See 25 HUBERT HOWE BANCROFT, WORKS 643 (San Francisco, History Co. 1890); TEELE, supra note 106, at 99, 196.


113. Anti-Royalty, supra note 112 (quoting Hon. I.E. Barnum, Speech in Colorado Senate Committee on Agriculture and Irrigation).


115. ROCKY MTN. NEWS, Mar. 2, 1887, at 4.

116. See supra note 55.

117. Anti-Royalty, supra note 112 (quoting Hon. I.E. Barnum, Speech in Colorado Senate Committee on Agriculture and Irrigation).

118. Cromwell, supra note 56, at 138.


120. See Clements, supra note 56, at 138.
When the company’s foes, led by prominent members of the state Grange and other farmers’ organizations, introduced an “Anti-Royalty Bill” in the state legislature, anti-corporate invective in support of the bill rose to new heights. The Grangers argued that the corporations were working to make slaves of the industrial classes. One legislator proclaimed, “There’s an insolence about a corporation that I never could understand, and more so than in any than in these corporations which claim to own water. They don’t own a drop of it.” The Rocky Mountain News opined:

If this bill becomes a law, the death knell of the water monopolists will have been sounded. Having grown rich upon the larceny of water—the constitutional property of the people—they now hope to be allowed to continue their robbery until the people’s heritage shall have been exhausted, and the entire waters of the state shall have passed into the hands of corporations as soulless as their gains are ill-gotten. . . . The anti-royalty bill has but one purpose, and that is to put an end to this larceny of water. . . . Senators . . . must vote to free the people from this outrage and oppression, or to bind them more tightly in the hands of the monopolists. Gentlemen of the senate, are you for English royalties or for the rights of American farmers. Your vote on this bill will determine.

Opponents of the companies played not only upon fear of corporations and Anglophobia, but also upon other core elements of the farmers’ agrarian ideology discussed earlier. In keeping with the radical-Lockean or Jeffersonian ideals of property—that is, property based on labor and widely distributed—they saw the state constitution’s declaration of public ownership of water as guaranteeing the resource’s availability for actual users, not profit-making corporations. The News editorialized that it “has advocated free water as a natural right. . . . It is labor that gives value to nearly everything. . . . Ditches in themselves imply no water rights.” It also reported speeches by supporters of the anti-royalty bill sounding on the same themes:

It was a fundamental law of the state that the natural streams were the common property of the state. Let any one read the provisions of the constitution of Colorado and he will see that we have upset the common law. No man has a right to sell an inch of water in this state from a natural stream. A corporation doesn’t own one drop of it. It belongs to the people.

Water, [even] before the laws of 1876, was clearly regarded as public property. Every person in the land has a right to that which the constitution declares he is entitled to . . . . If [charging for water rights] continues, we will have in the free state of Colorado a tenant system which has all the

121. Sherow, Discord in the “Valley of Content,” supra note 65, at 10 (quoting C.F. Strong).
122. Steck, supra note 112.
125. Steck, supra note 112.
incipient elements of all the worst tenant systems of other and older countries. The greatest evil that threatens our nation to-day is the danger of great landed corporations and other monopolies. . . . Mr. Wright insisted . . . that the water, according to the constitution of Colorado, belonged to the people. It was simply the right to use the water that was granted to companies or individuals and not the right to own a single inch of it. It belongs to all of us, thank God. (Applause.) It is one of the free things in this country.126

If the people were the true owners of the water, it was argued, it followed that the canal companies were nothing more than common carriers, and subject to regulation as such. As put slightly later by the editor of the influential *Irrigation Age*,

We believe the water, like the air and the sunshine, belongs to the public. When a company of men “appropriate” it and build ditches to distribute it over the land, they merely take charge of it for the public and handle it as common carriers. For this service they should be reasonably paid. . . .127

Proponents of the legislation passed a resolution tying all these issues together:

Whereas . . . the lands, and what is much worse, the waters, of the state are rapidly passing into the control of corporations and syndicates, both domestic and foreign; and speculation in the unused water of the state is openly claimed as a right . . . and is exercised as such in defiance of the sense of the community and against common right; and . . .

Whereas, We are not only threatened but actually confronted by the presence of organized syndicates, taking up and intending to hold for their own gain, the waters of the state, which are the life blood of the common welfare; and keeping the public waters from the use of the people, until their own profits can be secured; therefore, be it . . .

Resolved, That monopoly and its promoters under whatever pretext must be overthrown together, and the country rescued from the designs of such, whether cloaked under the pretense of claiming water for the future appropriation of stockholders in the pool, or of watering lands at a future day—as all such and other claims for seizing and holding the public waters for future speculation are in fraud of the common right.

Resolved, That the recent awakening of the entire people of the United States to a proper understanding of the enormous evils of monopoly in the case of the railroad management, as shown by the passage of the “Inter-state Commerce Bill,” should not be despised by the legislative bodies of Colorado, who now hold in their power the future welfare of the state, that the people must be heard and not the agents of speculators.

126. *A People’s Voice*, supra note 57; see also *Bancroft*, supra note 111, at 643 (water companies “condescendingly sold the water which belonged to the people”).

127. *The Wright Law*, supra note 36. For a version of this argument made by a Colorado legislator in the context of the royalty controversy, see *Barnum*, supra note 117.
Resolved, That the passage of necessary legislation for the protection of the people from the designs of those who are now preparing to take advantage of the looseness of the corporation law and other enactments supposed to permit unlimited aggression on the public interests is demanded now; . . .

Resolved, That the ownership of land by corporate bodies, except for the purpose of sufficient grounds for buildings and enclosures and right of way necessary for the transaction of business, is an intolerable evil fraught with ruin to the welfare of the state, and contrary to the intent of the constitution, and of the statutes of this state concerning corporations.128

The farmers’ lobbying efforts met with success in the 1887 Anti-Royalty Act, which criminalized charging for any royalty, bonus or premium over and above the rates set by the county commissioners, and gave the Attorney General power to initiate *quo warranto* proceedings for dissolution of violators.129

3. The Wheeler Litigation: The Royalty Controversy in Court

In parallel, the farmers also pursued litigation in an attempt to have the courts declare the new contract structure illegal. Dr. Byron Wheeler, a prominent member of the state Grange and the new Farmers’ Protective Association,130 had tendered to the corporate owners of the High Line Canal131 their annual water rental price of $1.50 per acre for his farm near Denver, but refused to pay the further sum of $10 per acre demanded as a precondition for the annual rental. When the company, as expected, refused to supply him with water, Wheeler instituted mandamus proceedings to compel them to do so. Upon losing in the district court, he appealed to the state supreme court. Wheeler apparently conceded that the up-front charges by a water company might be justifiably considered part of the legal water rates if related to the company’s expenses in furnishing the water,132 but argued that this was not the case for the High Line’s charges. As the “royalty” demanded varied not with the distance of the irrigated land from the head of the ditch or other cost-related factors, but with the supposed value of the land, the company clearly was trying to profit from the sale, not just earn a reasonable return on its investment.133

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130. 14TH PROCEEDINGS COLORADO GRANGE, supra note 53, at 23; 3 REPORT OF THE SPECIAL COMMITTEE, supra note 39, at 346–47.
131. See discussion of the Northern Colorado Irrigation Company, or “English Company” *supra* text accompanying note 55.
In its 1888 ruling in favor of the farmers' movement activist, the court’s
discussion ranged considerably beyond the narrow grounds on which it
ultimately rested its decision—that the General Incorporation Act, requiring
companies to sell unsold water at the established rate,\footnote{134} prevented the
company from charging a fee for the water beyond the rate quoted for the water
rental itself.\footnote{135} Its wider argument reflected those made by the anti-royalty
bill’s supporters, quoted above. First, the court explained, under the Colorado
Constitution the canal corporation was not the owner of the water it sold:

Our 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.” The same instrument guaranties in the strongest terms the
right of diversion and appropriation for beneficial uses . . . .

The constitutional convention, . . . in its wisdom, ordained that the
ownership of water should remain in the public, with a perpetual right to its
use, free of charge, in the people.\footnote{136}

Caught between the paramount ownership of the public on the one hand,
and the use-right of the actual user (i.e., the consumer) on the other, the water
company essentially had no “salable interest”\footnote{137} in the water, and thus could
not demand payment for the right to receive it. Such was the decree of the
state’s fundamental law, in particular its public ownership and beneficial use
provisions. The company, the court stated, had the status of a “quasi-public
servant or agent,” a common carrier, and as such would have been subject to
public control even absent the constitutional authorization of water-corporation
regulation\footnote{138} and relevant statutes.\footnote{139}

For this last strand of its reasoning the court cited the recent \textit{Granger Cases}, in which the U.S. Supreme Court had upheld state regulation of
railroads,\footnote{140} as well as Illinois precedents on the same issue.\footnote{141} It also referred
to a California case upholding regulation of canal companies.\footnote{142} California law
recognized the water company as the owner of the water it was selling,\footnote{143}
justifying restrictions on the business as deriving from the corporation’s
exercise of public power, especially that of eminent domain.\footnote{144} It was, in

\begin{footnotes}
\item[134] 1877 General Incorporation Act § 87 (codified as \textit{COLO. GEN. STATS.} § 311 (1883)); \textit{see supra text accompanying notes} 90–94.
\item[136] \textit{Id.} at 489–90 (\textit{citing COLO. CONST.} art. XVI, § 5 (\textit{quoted supra text accompanying note} 22), § 6 (\textit{quoted supra note} 26)).
\item[137] \textit{LONG, supra note} 72, at 495.
\item[138] \textit{COLO. CONST.} art. XVI, § 8, discussed \textit{supra text accompanying note} 89.
\item[139] Wheeler, 17 P. at 490.
\item[140] 94 U.S. 113 (1887).
\item[141] Vincent v. Chicago & Alton R.R. Co., 49 Ill. 33 (1868) (holding that railroad cannot discriminate in charges for service mandated by statute); Chi. & Nw. Rwy. Co. v. People, 56 Ill. 365 (1870) (finding the railroad a common carrier, thus cannot discriminate).
\item[142] Price v. Riverside Land & Irrigating Co., 56 Cal. 431 (1880).
\item[143] \textit{1 WIEL, supra note} 74, at 432.
\item[144] \textit{Price}, 56 Cal. at 433.
\end{footnotes}
Granger Cases terms, a business “affected with a public interest,” or, as the California Supreme Court put it, one which had “impressed upon it a public trust.”

The Colorado Supreme Court, on the other hand, while nodding in the direction of the public-service precedents, really provided an entirely different theoretical basis for its decision: the public’s constitutionally protected property right in water. As the State Engineer later pointed out, this principle seemed to rule out any charge by the canal companies, other than for the expense of distributing the water:

The constitutional provision declaring “the water . . . not heretofore appropriated . . . to be the property of the public . . . subject to appropriation . . .” is the striking feature of our water laws. It is generally admitted that what is thus declared law was law before such declaration and even from the first, so that at no time were the waters of the streams other than the property of the public. To this fundamental declaration the constitutional provision recognizing the right to charge for the use of water furnished offers an apparent contradiction; and seemingly affords a basis for the claim that the lease or sale of the waters of the streams is legitimate, since it apparently recognizes a right in water almost equivalent to ownership in the person effecting the diversion and conveyance thereof. But in giving to those portions of the Constitution relating to water the interpretations which make of them a complete and consistent whole, it becomes evident that this provision is designed to permit a charge for the furnishing of water rather than for the water which is furnished.

The court relied on similar reasoning, ruling, moreover, that the principles of public ownership and beneficial use, and the ideal of broad distribution, meant that the company was powerless to impose oppressive conditions on the consumer:

The [Constitution’s] primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier’s right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitution also unequivocally asserts the consumer’s right to its use, upon payment of such compensation. Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject. . . .
We must declare the $10 exaction illegal. Respondent [company] cannot collect of [Wheeler] the sum of $10, or any other sum, for the privilege of exercising his constitutional right to use water. . . .

In fact, the majority of those who till the soil are too poor to comply with such a demand; to say that they must do so or have no water is to deprive them of their right to its use just as effectually as though the right itself had no existence. . . . The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation.

Besides the extraordinary power mentioned, the carrier would also, under [respondent company’s] counsel’s view, be able to consummate a most unreasonable and unjust discrimination. [One consumer] could have water because he can pay for its carriage twenty years in advance; [another] could not have water because he is unable to pay in advance for its carriage beyond a season or two.149

Furthermore, the constitutional status of the beneficial use doctrine meant that even the legislature would be powerless to authorize oppressive company regulations:

The legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the rights secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law.150

The Wheeler decision was understandably hailed by farmers as a decisive victory, which struck down the canal companies’ “monstrous plea” to be recognized as the appropriators of the water they diverted.151 As long as the law prevented corporations from gaining ownership of the water, opined the Denver Republican, there was no danger of them gaining a “monopoly” of the region’s water or land.152 Elwood Mead elaborated on Wheeler’s significance, commenting that prior to the decision:

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150. Id. at 492.
151. Mr. Goudy and Water, supra note 68; see also Steinel, supra note 81, at 208.
152. COLO. FARMER, Sep. 4, 1890, at 8.
The price of water rose steadily with the value of the land; $10, $12, $15, $20 per acre for water rights were the prices marked up each year, as the increasing tide of settlement made land more scarce and dear, until at last the charges became for most prohibitive. A fortune was necessary to begin farming in this new state; with its free land and state water. The poor man of the East seeking a home could not find it here, however much it was desired.153

Wheeler, he felt, by stopping these corporate practices, would put an end to the excessive charges.154 It actually did even more than that, setting in motion a process by which most investor-owned canals passed into the hands of the water users.155

Soon after, the court took its pro-consumer stance on price regulation a step further, ruling that the maximum price set by county commissioners applied even when consumers had petitioned the commissioners for the rate after having previously contracted for water with a canal company at a higher price—despite a statutory proviso to the effect that the commissioners’ action should not affect existing contracts.156 Chief Justice Helm engaged in some dubious interpretation of the statute and contract at hand, ruling that as the contract with the water company was terminable at will by consumers, the proviso did not apply to the case. Nor was any effect given to the contractual language according to which failure of the consumer to pay the specified annual charge led to forfeiture of all claims to water in the ditch; this was explained as applying only to claims under the contract, not the consumer’s constitutional right to water, which existed independently of any contract and so survived its termination. The court intimated that a consumer might not have the power to waive his constitutional right to water in any case.157 Once again, what is significant here is not only the court’s aggressive advancement of the irrigators’ interests at the expense of the corporations’, but the legal basis for its ruling: Colorado’s water jurisprudence rested on the agrarian ideology of wide distribution of property to individuals, as expressed in the state constitution.

4. Stock Ownership as a Condition of Receiving Water

With their “royalties” banned on both statutory and constitutional grounds, the canal companies tried once again to achieve the same result by other means. Now their method was to require that the customer buy stock in the company, with a certain number of shares representing a water right.158 In the 1892 case

154. Id.
157. Id. at 505.
of *Combs v. Agricultural Ditch Co.*, the Colorado Supreme Court once again intervened in the struggle between farmers and corporations over the profits of irrigated agriculture. As in the royalty controversy, the court invalidated the companies’ new rules, explaining that the element of use was not only necessary, but also sufficient, for the acquisition of a water right, and that stock ownership was neither:

Priority of appropriation to actual beneficial use, and not mere ownership of stock in a ditch company, gives the better right to such use. Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock. But neither the company nor any stockholder of the company can thus withhold the water from beneficial use, nor reserve it for the future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those who in the mean time may undertake, in good faith, to make a valid appropriation thereof.

The policy considerations behind this ruling were made explicit by Justice Elliott:

If the law were to be declared otherwise, —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 irrigating canals, —water-rights would soon become a matter of speculation and monopoly. . . . The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation.

Authority for this proposition was found in *Wheeler’s dictum* that unreasonable regulations imposed by a water company that operated to frustrate the consumer’s constitutional right to water would be illegal, even in the absence of legislation on the subject.

Interestingly, Chief Justice Helm added in his concurrence that this ruling would not apply to cooperative mutual companies, who could continue to supply water to shareholders only. Justice Elliott also implied that this might be his view, and later decisions seem to have accorded with this position. From a doctrinal point of view, this qualification seems difficult to square with the invalidation of this practice when carried out by for-profit corporations,

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160. *Id.* at 967.
161. *Id.* at 968.
162. *Id.* (citing *Wheeler v. N. Colo. Irrigation Co.*, 17 P. 487, 491 (Colo. 1888)).
163. *Id.* at 969.
164. *Id.* at 967.
165. *See, e.g.*, *Oppenlander v. Left Hand Ditch Co.*, 31 P. 854, 855 (Colo. 1892); *Long*, *supra* note 72, at 524.
since the use requirement and priority rule should have applied equally to rights acquired from both sorts of companies. On the other hand, the differential treatment of mutual and for-profit companies was supported by the deeper foundations of the decision. Since mutual companies were organized and controlled by settlers themselves, and charged for shares at a level sufficient only to cover costs, there was no capture of economic rents or indirect ownership of public-domain land in their limiting sales to shareholders, and hence no need to insist upon enforcement of priorities. Here, too, the influence of radical-Lockean ideology is clearly visible in the formative stage of Colorado water law.

Also noteworthy is the fact that while the court required companies to sell unused water to non-shareholders, it let stand the practice of bundling water rights into company stock, with shares representing water rights, and control of the corporation passing to its customers when capacity (or some proportion thereof) had been reached. Though economically similar to the outlawed royalty, this new practice was allowed, probably because the customers would in due course be the owners of the entire works. With control of water ultimately removed from the ownership of outside investors and placed in the hands of users, the court felt that there was no need to intervene to prevent monopoly and to ensure broad distribution to actual settlers.

5. Conclusion: Public Ownership of Water

In summary, it is important to note not only that Colorado law clearly took the side of the farmers in their disputes with big canal companies over the sale of water, but the doctrinal basis on which it did so. The power of the state to impose price controls was seen as a necessary derivative of public ownership of water, as enshrined in the state constitution. Writing of the state’s reservation of the power to regulate water rates, Henry Campbell Black opined that:

Such a reservation, in view of the important interests affected by such corporations, and in view of the frequent opportunities they would otherwise have of almost unlimited extortion and oppression, as well as in view of the valuable rights and franchises conceded to them, must be regarded as eminently just and reasonable.

The justification was found not only in the important interests at stake, but in the view that the companies were being granted concessions or franchises in what was properly understood as public property.

166. For examples of this type of contract see, e.g., Murray v. Bd. of Comm’rs of Montrose County, 65 P. 26 (Colo. 1901); Butterfield v. O’Neill, 72 P. 807 (Colo. Ct. App. 1903).
167. MILLS, supra note 158, at 196.
168. POMEROY, supra note 72, at 392.
B. Priority and Prorating

The 1879 Irrigation Act had among its provisions one which, though seemingly unremarkable, was to be the source of considerable mischief and litigation. The statute declared that when a canal did not receive the full amount of its water right, so that there was not enough water in a ditch to satisfy all rights-holders, the water should be divided pro rata among the irrigators, “so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to which he, she or they should have received in case no such deficiency of water had occurred.”169 Here was a partial return to one of the principles of riparianism: sharing of shortages. While not mandating that all users from a stream share the water without regard to priorities, the legislature did order sharing among the users taking water from the new, massive artificial streams that were being constructed in this period to deliver water to customers.

Prorating to share losses is arguably a fairer system than one of absolute temporal priority—if equality is the principle applied.170 It is also, due to decreasing marginal returns from water use at the individual irrigator level, likely more efficient in terms of aggregate wealth. Put another way, by distributing shortages as widely as possible (loss spreading), it might be possible to avoid total ruin for all.171 The intense hostility this rule provoked among small-scale farmers and the organizations that advocated on their behalf, like the Grange and Farmers’ Protective Association, thus puzzles at first glance. The 1890 platform of the farmers’ Independent Party, for instance, demanded in its leading plank the recognition of priorities among co-consumers,172 and the Colorado Grange warned of attempts to abolish the rule of priority, which it felt was “just and should be maintained.”173 The farmers’ opposition is yet more surprising in light of numerous contemporary reports to the effect that they often shared their water, in disregard of legal priorities, as well as through devices such as the mutual irrigation company.174

169. 1879 Irrigation Act § 4, 1879 COLO. SESS. LAWS 97.
172. Fox, State Regulation, supra note 33, at 169.
173. 16TH PROCEEDINGS COLORADO GRANGE, supra note 39, at 57–59. Alliance Demands, ROCKY MNT. NEWS, Nov. 27, 1890, at 2 (Farmers’ Alliance favors law securing priority of water).
174. See, e.g., G.G. Anderson, Some Aspects of Irrigation, 1 TRANS. DENVER SOC’Y CIV. ENGRS & ARCHITECTS 52, 58 (1890); MARK FIEGE, IRRIGATED EDEN 26–27 (1999); JOHN E. FIELD, IRRIGATION FROM BIG THOMPSON RIVER 51 (U.S.D.A. Office of Experiment Stations Bulletin No. 118, 1902); J.S. GREENE, FOURTH BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF COLORADO, pt. 1, 99–100 (1889); RICHARD J. HINTON, A REPORT ON IRRIGATION AND THE CULTIVATION OF THE SOIL
The radicals’ hostility to prorating may be understood, though, on the background of the sufficiency principle, discussed briefly above, and in light of the corporate-canal controversy. As in the miners’ codes and the priority principle expressed in the constitution, the fear was that forced application of the equality principle would lead to dilution of water rights beyond the point where they had any significant value for the individual user (here, the yeoman farmer). In the context of corporate ditches, this fear was heightened by the contractual terms offered by the companies, which, as discussed above, required payment by the consumer regardless of whether water was actually delivered or not. With canal companies typically selling water rights beyond their ability to deliver, the effect of the prorating rule was that the addition of each new customer to a canal directly harmed existing customers by shrinking the amount of water that would be supplied to them. At the same time, the increased revenue for the company was pure profit, since no additional costs need be incurred as a result of adding the additional customer.

Evidence of opposition to prorating by the farmers appears as early as 1887, when the legislation committee of the Denver-area Farmers’ Protective Association reported that “Law regulating water pro rata should be repealed.” The committee made its report through Dr. Wheeler; the meeting was chaired by R.A. Southworth, an officer in the state Grange and general anti-corporate activist on behalf of small-scale irrigators. The farmers chose a lawsuit filed by Southworth against the High Line Canal as their vehicle for attacking prorating. They alleged that High Line Canal was violating his right to the quantity of water he had been using since 1881 by threatening to cut back his water allotment, in accordance with the prorating statute, if there were not enough in the ditch for all customers.

Though it rejected Southworth’s suit on the grounds of defective pleadings, the state supreme court used the opportunity to address the apparent conflict between the principles of prorating and priority, with the

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175. See supra text accompanying note 29.
177. COLO. CONST. art. XVI, § 6.
178. See supra text accompanying note 61.
179. See supra text accompanying note 65.
justices differing on whether a carrier could legally prorate among consumers whose use had commenced at different times. Two of three justices felt it could not: since, as explained in Wheeler,183 the Colorado Constitution decreed that the consumer’s use, not the company’s diversion, created the water right, that right of necessity must date from the time such use began. Applying the prorating statute to any rights other than those the use of which began at the same time would therefore be unconstitutional.184 Even though under the law of common carriers the carrier must serve additional customers even if the result is a reduction in service to prior customers,185 Wheeler’s reliance on the theory of ownership of the water by the public and the users, on top of the law of common carriers,186 allowed the court in Southworth to ignore this arm of common-carrier law.

Significantly, the policy considerations adduced in support of this judgment were the same as those which had earlier led to adoption of the priority principle in miners’ codes and the state constitution.187 Justice Elliott warned of the “disastrous consequences which would ensue if the prorating statute should be made the rule for the distribution of water for purposes of irrigation, instead of the rule of priority”:188 The earliest irrigators would be compelled “to prorate with all subsequent consumers until the amount of water that each would receive would become so infinitesimally small as to be of no practical value, and would eventually be entirely wasted before it could be applied.”189 The majority’s adoption of the Grangers’ legal position was thus motivated by the same concern behind the adoption of the priority principle in general: ensuring settlers a sufficient quantity of water for irrigating their land, and preventing later (and better-funded) comers from taking away their water under color of equal rights to the water.

In the minority on this point, though concurring in the judgment, was Chief Justice Helm, erstwhile herald of priority,190 who felt that the prorating statute, though in derogation of the priority rule, was constitutional. While agreeing with the majority that the water right was created by the consumer’s use, he argued that a water right’s priority date “related back” to the date of diversion by the corporation acting as the consumer’s agent, so that the rights of all consumers from a given canal effectively had the same priority, regardless of when their actual use began.191 Though in the minority, Helm’s

184. Southworth, 21 P. at 1028, 1030–32.
185. See Epstein, supra note 171, at 303.
186. See supra notes 136–49.
188. Farmers’ Highline Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1032 (Colo. 1889).
189. Id.
191. Southworth, 21 P. at 1034. On the rule of “relation back” or “relating back,” according to which an appropriation was considered to date from the day on which work on the diversion began, see
opinion seems to have been accepted as the applicable rule in some circumstances, as will be seen presently. Perhaps this was due to the administrative difficulties inherent in determining and enforcing priorities among irrigators from a canal, as would have been required by the opinions of the other justices.\(^\text{192}\) In any case, Chief Justice Helm’s approach of allowing prorating did not mean corporations would be allowed to oversell water rights to the detriment of their existing customers. Recognizing, rather, the potential of the prorating rule to facilitate oppression of smallholding farmers, he suggested that sales beyond the amount diverted would be unlawful, and trigger appropriate (though as-yet unspecified) remedies.\(^\text{193}\)

The prorating issue arose again soon enough. In *Wyatt v. Larimer & Weld Irrigation Co.*,\(^\text{194}\) a conflict between farmers using water from the Cache la Poudre River, in northern Colorado, and the canal which supplied their water (predictably enough owned by the “English Company”). Because of over-appropriation of the river, the company was already unable to supply the full quantity of water due to its customers, and with their cooperation had been prorating the available water among them. Now, though, the company had plans to sell a large number of new water rights to Benjamin Eaton, one of its directors and a local representative of its British owners, as part of a deal also involving the transfer of thousands of acres of land to Eaton, to be irrigated by the new water rights.\(^\text{195}\) The other farmers sued to enjoin the deal, as it would further dilute the value of their water rights by increasing the number of shares among which the available water would have to be divided. For its defense, the company relied on its standard contract terms, which not only provided for prorating and absolved the company of liability for shortages, but allowed it to sell water rights up to “the estimated capacity of the company’s canal to furnish water.”\(^\text{196}\)

The court of appeals ruled in favor of Eaton and the company, basing its decision in part on the theory that the company was the owner of the water it carried in its canal.\(^\text{197}\) On this point it was roundly rebuked by the state supreme court, which pointed out that it had already ruled otherwise in a series

Sieber v. Frink, 2 P. 901 (Colo. 1884); Taughenaugh v. Clark, 40 P. 153 (Colo. Ct. App. 1895); 1 WIEL, *supra* note 74, at 423–27.


193. *Southworth*, 21 P. at 1037; see also Wyatt v. Larimer & Weld Irrigation Co., 33 P. 144 (Colo. 1893), discussed *infra* notes 194–206 (enjoining sale of water rights beyond estimated capacity to furnish water); Blakely v. Ft. Lyon Canal Co., 73 P. 249 (Colo. 1903).

194. 33 P. 144 (Colo. 1893).


of decisions, including several of those discussed above, and that this issue was in any case irrelevant to the proceedings at hand.

The case, rather, turned on the interpretation of the contractual clause limiting the number of water rights the company could sell to those covered by the "estimated capacity" of the canal. The company claimed, plausibly enough, that it was entitled to sell water rights up to the physical capacity of the ditch, as seems to have been the general practice. Any difference between this capacity and the amount to which it was entitled during any given irrigation season, argued the company, would have to be split among the right-holders on a proportional basis. Wyatt and the other appellants, on the other hand, claimed that the "estimated capacity" referred to in the contract should be interpreted as the canal’s ability to furnish water to its customers (under typical conditions), a function not only of physical capacity but of available water in the river and the priority dates of the canal’s appropriations. They argued that the prorating clause was meant to apply only under conditions of unusual drought or accident, not to foreseeable shortages resulting from the sale of water rights that the canal could not reasonably be expected to cover, given its seniority relative to other appropriators on the stream.

In keeping with its prior decisions, the court sided with the farmers in this case, highlighting again the importance of the sufficiency principle in its water jurisprudence:

If appellees’ contention is correct, and the irrigation company by the terms of these contracts have the right to dispose of definite water rights, and by ambiguous expressions in subsequent provisions reserve the power to render them uncertain and indefinite in quantity, by disposing of water rights admittedly in excess of its ability to furnish water, they are not only inequitable and unfair, but clearly illegal under the decision of this court in F.H.L.C. & R. Co. v. Southworth, . . . wherein it is said: “A contract to carry more water than has been lawfully diverted would be unlawful; and to prevent injuries resulting therefrom, or to recover damages in case the injuries are suffered, ample legal remedies exist.”

The citation from Southworth is from Chief Justice Helm’s minority opinion, and gives some indication of what type of remedy his approach


201. Wyatt v. Larimer & Weld Irrigation Co., 33 P. at 148.

202. Id. at 149 (citing Southworth, 21 P. at 1037).

203. See supra text accompanying notes 190–93. The reason for the court’s (and appellants’) adoption of Helm’s minority opinion from Southworth is uncertain. The majority opinion in that case, which found prorating among rights of different priorities unconstitutional, would have rendered the
envisioned. The Wyatt rule allowed prorating of true shortages when agreed to by consumers, but prohibited dilution of water rights on a grander scale by refusing to give effect to contracts for water rights beyond the ability of the carrier to furnish. This combination of the prorating and priority rules is interesting from a theoretical point of view, as it displays a resolution of the tension between two distributive-justice principles, equality and sufficiency, similar to that encountered earlier in the miners’ codes. As in those codes, where the basic principle of water rights was proportional division between the claimants, with priority kicking in when division would lead to diminution of rights beyond the point sufficient for a miner to carry out his work,\textsuperscript{204} the regime proposed by Helm in Southworth and adopted by the majority in Wyatt encouraged sharing of unusual shortages, but drew the line where equal division would lead to the shrinking of water rights beyond the point necessary for irrigation.\textsuperscript{205} While the earlier customers of a water company, who had bought their rights when the canal’s typical water supply was sufficient to fulfill its contracts, had to share shortages among themselves, they could invoke the priority principle to enjoin sales beyond that level.\textsuperscript{206}

Southworth was also significant for its practical annulment of the statutory system of water rights based on ditches and diversions, as opposed to actual use. Though the decision left in place the administrative and judicial procedures under which rights were decreed to ditches and dated according to the beginning of diversion,\textsuperscript{207} all the judges agreed that the substantive rights in fact belonged to the individual appropriators and were created by use, not diversion.\textsuperscript{208} In effect, this approach created a two-tiered system of water

\textsuperscript{204} See Schorr, supra note 4, at 16–20.

\textsuperscript{205} Statutory language to similar effect was proposed in the 1890s. J.S. Greene, Concerning Rights in the Water of the Natural Streams of Colorado, supra note 148; see also Blakely v. Ft. Lyon Canal Co., 73 P. 249 (Colo. 1903) (invalidating water rights issued after estimated capacity of canal had been reached).

\textsuperscript{206} Contra Pisani, supra note 170, at 58 (“Later settlers were left to bear water shortages alone because the courts required Colorado ditch companies to serve customers according to the strict priority of individual rights, even though the earliest users often wasted water and claimed far more than they actually used.”).

\textsuperscript{207} See 1879 Irrigation Act § 30, 1879 Colo. Sess. Laws 94, 104.

\textsuperscript{208} Note that while the opinion of Helm, C.J. upheld the statute’s basing of relative priorities on the dates of company-canal diversions, these diversions were significant only due to the rule of “relation

Wyatt appellants immune to the effects of the proposed Eaton deal, avoiding the factually difficult question of whether the canal’s outstanding water rights had exhausted its capacity to furnish water. It is possible that the facts of Wyatt were thought to be distinguishable, as the appellants had contractually agreed to prorating (and had even previously acquiesced in it) whereas in Southworth the company was apparently relying on the force of the prorating statute alone. See Larimer & Weld Irrigation Co. v. Wyatt, 48 P. 528, 532 (Colo. 1897); cf. O’Neill v. Ft. Lyon Canal Co., 90 P. 849, 852 (Colo. 1907) (prorating allowed when authorized by contract). The majority rule in Southworth, according to which the prorating statute did not apply to consumers with different priority dates supplied by the same canal, was followed in several subsequent cases, including the two just mentioned. See Farmers’ Indep. Ditch Co. v. Agric. Ditch Co., 45 P. 444, 447 (Colo. 1896); Brown v. Farmers’ High Line Canal & Reservoir Co., 56 P. 183 (Colo. 1899); Farmers’ High Line Canal & Reservoir Co. v. White, 75 P. 415 (Colo. 1903); 1 WIEL, supra note 74, at 328 n.6.
rights. Water decrees ordering the priorities of all the ditches in a watershed would have real legal effect only in disputes among canal corporations; as these paper rights, based on diversion, were not true (i.e., use-based) rights at all, they had no real legal effect when it came to the relative priorities of actual users.

C. Special Charters

As noted earlier, one of the pet causes of Jacksonian Democracy and related groups had been attacking monopoly power created by the grant of special privileges and powers to corporations. The primary legal vehicle for doing so was the enactment of general incorporation acts, a trend that accelerated after the Civil War. Colorado’s territorial legislature failed to enact such a law in its first session, in 1861, meanwhile creating a number of corporations, including ditch companies, by private act. Before the next session, though, Governor Evans told the General Assembly:

To facilitate the organization of corporate companies . . . . I would advise the passage of general laws, so that all persons may enjoy equal rights and privileges under them. . . .

The granting of exclusive rights and privileges—always of doubtful propriety—cannot be too sedulously guarded against. . . .

Responding to this call, the legislature enacted a general incorporation act in 1862, though it created some companies by special legislative act as late as 1867.

The issue of special privileges granted to corporations took on particular urgency in the case of water companies, given the extreme sensitivity of farmers to attempts by capitalists to gain control of water, and through it, land. As discussed above, the prior appropriation doctrine had been aimed in part at the threat to widespread distribution posed by legislative grants of water to corporations. Such special privileges were anathema to Jacksonian anti-corporation and anti-monopoly sentiment, and ran afoul too of the radical-Lockean belief that property should be earned by labor, not by political connections. Though, as noted, the issue of such charters had already fallen back; they applied only retroactively, and were conditioned on actual use by an irrigator. See supra text accompanying note 191.

209. See supra text accompanying note 14.
211. Id. at 45–46, 106 (twenty-seven corporations created; nine water companies).
212. John Evans, Governor’s Message, ROCKY MTN. NEWS, July 19, 1862, at 2.
215. See supra text accompanying notes 44–53; Schorr, supra note 4, at 49–50.
216. See supra text accompanying note 25.
217. See supra text accompanying note 14.
218. See supra text accompanying note 9.
into disfavor in the territorial period, some such corporations remained in business into the statehood period, sometimes claiming exclusive control of certain bodies of water on the basis of their chartering acts.219

The Colorado Supreme Court faced such a claim in 1889, in *Platte Water Co. v. Northern Colorado Irrigation Co.*220 In 1860, with much of what was to become Colorado still formally part of the Kansas Territory, the legislature of that territory had granted a charter to the Capitol Hydraulic Company, predecessor of the appellant, which included a grant of exclusive rights to the water in Cherry Creek and the South Platte in the Denver area.221 In 1883, the Colorado district court adjudicating the water rights in the area based the parties’ rights on the dates of actual appropriation. Platte Water appealed this decision, claiming that its predecessor’s charter had vested it with the exclusive right not only to the water necessary for agricultural and other uses in 1860, but also to the water needed for irrigating all lands that might be settled in the area “for all times thereafter.”222 Its rights acquired under the charter, it claimed, were vested rights, and therefore immune to impairment under the U.S. Constitution as well as the federal Mineral Lands Act of 1866.223

But, as the state supreme court pointed out, the Mineral Lands Act said nothing about the protection of rights acquired by legislative grant, recognizing instead only rights acquired by “priority of possession.”224 Under Colorado law, “from the earliest times,” the court explained, water rights could be acquired by one method only: diversion with beneficial use. Such was the rule set down in Colorado’s Constitution and statutes, and reinforced in judicial decisions from the foundational *Yunker v. Nichols*225 and *Coffin v. Left Hand Ditch Co.*226 to the recent *Wheeler* decision, where the court had ruled that an appropriation’s validity was dependent on consumer use.227 The law of prior appropriation, thus correctly understood as protecting “actual appropriation,”228 was “a refuge to all *bona fide* appropriators of water from the natural streams of Colorado,”229 but not to those claiming under legislative grant. The latter would be subordinated to the rights of actual settlers acquired through use.

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219. For an example of such a charter, issued by the Jefferson Territory legislature in November 1859 to the Consolidated Ditch Company, see Minutes of the Consolidated Ditch Co. Board of Directors, Consolidated Ditch Co. collection, Archives, Univ. of Colo. at Boulder Libraries.
220. 21 P. 711 (Colo. 1889).
221. Id. at 711.
222. Id.
223. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, 39th Cong., 14 Stat. 251 (1866).
229. Id.
D. Ditch Easements

One of the legal invasions of private property in the name of universalizing access to water, associated from the beginning with prior appropriation, was the grant of ditch easements to irrigators over lands between their land and the water source.230 The point of this statutory right of way was to prevent riparian owners from monopolizing water sources by using their land to block non-riparians from gaining access to the water.231 Later, in 1881, the legislature acted to mitigate the burden this rule placed on servient lands by prohibiting the construction of more than one canal over any parcel if one canal would be sufficient.232

However, when litigation arose over one company’s attempt to enjoin another from constructing a canal across its land, a project that would compete with the first company’s canal, the court of appeals ruled that anti-monopoly principles of the state’s water law made the 1881 statute inapplicable when the burdened land was that of another canal company:

No authorities are presented which intimate that the construction of one canal is sufficient reason to prohibit the construction of another because it runs parallel with the first. If that rule would obtain it would result in the creation and continuation of a monopoly against which the constitution of our state and the statutes are directly aimed. And even if there were no provisions of the constitution and statute, no court has yet held or would hold that such contention should prevail.233

The statute’s protection of private property was thus held to apply only to private landowners, not canal companies. This discrimination can be understood only as an expression of agrarian, radical-Lockean ideology, which stressed the importance of private property when widely distributed but opposed it when held by speculators or corporations to the detriment of actual users.

CONCLUSION

A. Corporate Regulation in the Gilded Age

The common image of Gilded Age America, a land of corporations run amok and lawmakers and judges all too willing to do their bidding, is commonly assumed to have been particularly valid with regard to the development of Colorado’s water resources in the closing decades of the

230. See, e.g., COLO. CONST. art. XVI, § 7; Yunker v. Nichols, 1 Colo. 551 (1872).
nineteenth century. Yet, looking at the legal developments regarding corporate ditches in this period, we can see clearly that in the conflict between absentee capital and local settlers, Colorado law came down firmly on the side of the latter. Informed contemporaries had much the same opinion; so much so that in 1893 the editor of *Irrigation Age* could laugh at the suggestion by eastern journalist Julian Ralph that Colorado water corporations were “milking” its settlers:

To those who are familiar with Colorado legislation and court decisions, Mr. Ralph’s discovery that the corporations have the people by the throat is very entertaining. At last accounts the people had the corporations by the throat.

... The fact is that many of the corporations complain bitterly of the tyranny of the people in making laws which hamper enterprise and discourage investment.

John Wesley Powell had made a similar observation about the West in general:

There is a sentiment in the land that the farmer must be free, that the laborer in the field should be the owner of the field. Hence by unfriendly legislation and by judicial decision—which ultimately reflect the sentiment of the people—these farming corporations and water corporations of the West have often failed to secure brilliant financial results, and many have been almost destroyed. Thus there is a war in the West between capital and labor—a bitter, relentless war . . .

A few years later, a history of Colorado agriculture could sum up this period by saying that “For a time threat of corporate monopoly of water hung over the agricultural industry, but court decisions and legislative action ended this menace.”

B. Private, Public, and Corporate Property

As shown above, many of the state supreme court’s decisions favoring consumer interests over those of canal companies rested on the doctrinal basis of public ownership of all surface water and the use requirement as an element of water rights which could be satisfied by the consumer only, not the canal company. An editorial in *Irrigation Age* summed up well the connection between these issues:

Water, sunshine and air are natural elements, existing for the benefit and essential to the life of all . . . . The universal law that water must be applied to “a beneficial use” is in itself a denial of the right of ownership. What a man owns he may apply as he pleases. Water is public property . . . . When

234. See supra text accompanying notes 75–77.
235. See Ralph, supra note 53.
238. STEINEL, supra note 81, at 202.
239. See 2 WIEL, supra note 74, at 1238–39.
any other view of water ownership is admitted it will be time not merely for a king but for a slave-driver. Private investment in works will always be protected, but private ownership of water will not be conceded until air and sunshine are sold in bottles.\textsuperscript{240}

The public-ownership theory of corporate regulation, advanced first and most forcefully by the Colorado Supreme Court, was a bold one, going beyond the more widespread theory legitimating regulation based on the common-carrier theory of a business affected with a public interest.\textsuperscript{241} But in the agrarian jurisprudence of the day, public ownership of water did not mean a negation of private rights—it was, rather, wholly consistent with private water rights, as long as they were acquired by actual use. The theory seems to have been that water was the common property of the public, with the use regime for its owners based on the amount needed for their beneficial use: “Equity demands that flowing water shall be considered as a common stock or fund, the right to the use of which shall be regulated, and beneficial use shall be the measure and the limit of such right.”\textsuperscript{242}

Some, such as the Chief of the U.S. Bureau of Statistics, saw the relationship between public ownership and private rights as a two-stage process, with the latter deriving from the former:

The idea appears to have taken deep hold upon the public mind in Colorado and Wyoming, that while in the beginning the State or Territorial Government must assert its control of all running water as the common property of the people, yet that the ownership and control of water rights . . . must eventually be vested in the people who are to use such works, subject to the supervisory power of Government.\textsuperscript{243}

But others saw public ownership and private use as a seamless whole. As explained earlier, jurists of the Jeffersonian and Jacksonian persuasions tended to distinguish between corporate property and what they considered true private property, i.e., property distributed widely among individuals. Private property was not seen as antithetical to the public sort, but could be wholly consistent with it, even a logical expression or consequence of it. Property was “public” when controlled by the broad population, regardless of whether it took the legal form of widely-distributed private property or more concretely state or public assets. The important distinction was between property in the hands of the broad public and property concentrated in the hands of a powerful few—typically through corporations and “monopolies.”\textsuperscript{244} Following this Jacksonian conception of property, Samuel Wiel, the great Progressive-era scholar of western water law, completely conflated private and public rights in his

\textsuperscript{240} The Ownership of Water, IRRIGATION AGE, July 1894, at 3, 5.
\textsuperscript{241} See supra text accompanying notes 138–46.
\textsuperscript{242} 6 TWELFTH CENSUS OF THE UNITED STATES, CROPS AND IRRIGATION 814 (1902).
\textsuperscript{243} JOSEPH NIMMO, JR., UNCLE SAM’S FARM: THE RECLAMATION OF THE ARID REGION OF THE UNITED STATES BY MEANS OF IRRIGATION 30 (1890).
\textsuperscript{244} See supra text accompanying notes 16–18.
analysis of Colorado water law. As he pointed out, the law’s recognition of the public-private property of appropriative rights was aimed at defeating corporate control:

[The constitutional declaration of state ownership] has been tacitly taken for what it says—State or public proprietorship or ownership of waters the same as in a public building. The result has been in Colorado and the interior States to build a system of law of water distribution upon the basis that consumers from a distributing system are the real proprietors of the system, and the distributor or canal company but their agent to care for the works and bring the water to the consumers’ land.\footnote{245}

I have argued elsewhere that the early history of Colorado’s appropriation doctrine undercuts the usual identification of private property with exclusion and concentration, and that of common property with inclusion and equality.\footnote{246} Now we can observe further that application of the Colorado doctrine to corporate canals breaks down another common conception of the forms of property. Public and private property are usually seen as polar opposites, with corporate property merely a particular form of the private sort. This dominant typology leads to the framing of many issues, from intellectual property to environmental regulation, in terms of a private/public dichotomy: critics often see either too much or too little of either private or public property.

The Colorado jurisprudence of water corporations, on the other hand, shows that a clearer picture of the real issues regarding control of resources may be gained by avoiding a focus on conceptual categories like public and private, instead paying closer attention to who will effectively control the resource in question. What is often truly at stake is not the type of property at hand, but the identity and type of the owner.\footnote{247} Thus, in our case, though the relevant statutes made no distinction between the title to water registered under the name of an individual user and that registered in the name of a diverting corporation, Colorado’s courts forged a new body of law based on distinguishing ownership of water by individuals and user-owned corporate bodies from control by investor-owned companies, giving different legal effects to what was, on paper, one type of property.\footnote{248}

C. Current Applications

While the context in which water-corporation law developed over a century ago in the Rocky Mountain West was obviously different in many ways from that of today’s water-corporation controversies, the similarities are

\footnote{245}{2} WIEL, \textit{supra} note 74, at 1149–50; see \textit{id.} at 1237 n.8 (in which the earliest authorities cited in support of the public ownership theory are all cases from Colorado: \textit{Wheeler, Southworth, Combs} and \textit{Wyatt}, discussed \textit{supra} Parts II.A.–II.B.).
\footnote{246}{See Schorr, \textit{supra} note 4, at 68–69.}
\footnote{247}{Cf. Radin, \textit{supra} note 6 (suggesting greater protection for property related to “personhood” than for other, “fungible,” types).}
\footnote{248}{See \textit{supra} notes 163–65, following note 208; Part II.D.}
striking. In both cases, capitalists undertook massive investments in the acquisition and development of water infrastructure. In the late nineteenth century, the investment capital for projects in frontier areas (the arid West) came primarily from wealthy, economically developed regions (the eastern United States and Europe); today, much of the opposition to privatization has arisen in the context of similar takeovers of water supplies in areas of relative underdevelopment (the global South) by companies based and funded in the developed world (the North). Then, as now, wealthy foreign actors’ control of this elemental resource, as well its effect on local users, aroused intense opposition. Given these parallels, the law as developed in the western United States holds lessons for today’s situation. Here, in conclusion, are a few possible areas of relevancy:

1. The significance of privatization: Many have objected to the creation of private property in water per se, seeing it as necessarily negating public ownership. Yet, as argued in the preceding section, the recognition of private rights in what had been considered hitherto a public resource is not necessarily antithetical to retaining its public nature. If carried out in the proper way, privatization may effectively advance the value of broad distribution of water among its actual users, and prevent its monopolization by the wealthy or well-connected. The link the appropriation doctrine made between ownership and use was the critical factor in keeping water under broad public control in Colorado. Other legal strategies may yield similar results.

2. Corporate ownership: Similarly, the Colorado experience demonstrates that recognition of corporate ownership need not be synonymous with subordination of consumers’ interests to that of the companies charged with developing or controlling water resources. Legal recognition of public ownership of water sources may provide a basis for enforcing public and consumer rights, even when legislation has presumed to grant the water to a corporation.


250. See supra Part III.B.

251. For arguments of this type, see PUBLIC CITIZEN, WATER PRIVATIZATION FIASCOS (2003), http://www.citizen.org/documents/privatizationfiascos.pdf.

252. See supra Part II.A–II.C. Though the way forward for judicial recognition of public rights was facilitated in Colorado by relatively clear constitutional provisions, similar doctrines might be developed even in their absence. Cf., e.g., Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (explaining the development of the public-trust doctrine in the common law); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970). It should also be kept in mind that the pro-consumer decisions of the Colorado courts were based on a self-consciously expansive view of what was mandated by the state constitution. See, e.g., Wheeler v. N. Colo. Irrigation
3. **Water rates**: One major point of contention in modern water-privatization controversies concerns radical increases in prices sometimes imposed by corporations that have taken over water-supply systems.\(^{253}\) The Colorado precedent shows that recognition of the public nature of water can provide a theoretical basis not only for imposition of price controls, but also for other legal measures designed to prevent water companies from extracting excessive economic rents from water sales. Colorado courts of the late nineteenth century saw clearly that while investors funding the development of water systems had a legitimate claim to a reasonable return on their investment, profits beyond this level properly belonged to users—the true owners of the water.

4. **Prior users**: Another injustice decried by critics of modern water privatization is the practice of forcing users to pay multinational companies for water from sources from which they had been drawing water before the company took over.\(^{254}\) As argued in my earlier article, the primary motivation behind the adoption of the appropriation doctrine in the West was the desire to prevent similar ousting of early uses by riparian landowners.\(^{255}\) The current article has shown that the threat posed specifically by corporations granted water rights by the government was dealt with in similar fashion—judicial invocation of the use requirement to invalidate legislative grants and preserve the prior rights of those who developed the water resources on their own.\(^{256}\) The principle of prior use may be a valuable tool today, too, in protecting traditional and local uses of water from expropriation by well-connected corporations.\(^{257}\)

Policymakers, jurists, and other actors involved in today’s water-privatization controversy may eschew the concrete doctrinal innovations of Colorado law in the Gilded Age. Nonetheless, they may draw inspiration from the judges and legislators of the Rocky Mountain frontier who succeeded in creating a body of law that dealt creatively with the social and economic challenges posed by the similar controversy of those days.

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\(^{254}\) See Finnegan, *supra* note 2 (foreign-controlled water company in Cochabamba, Bolivia, was given control of all area water, including cooperative wells previously dug by locals).


\(^{256}\) See *supra* Part II.C.

\(^{257}\) Cf. Finnegan, *supra* note 2 (reacting to perceived abuses by foreign water corporation, law passed recognizing traditional uses and customs).
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