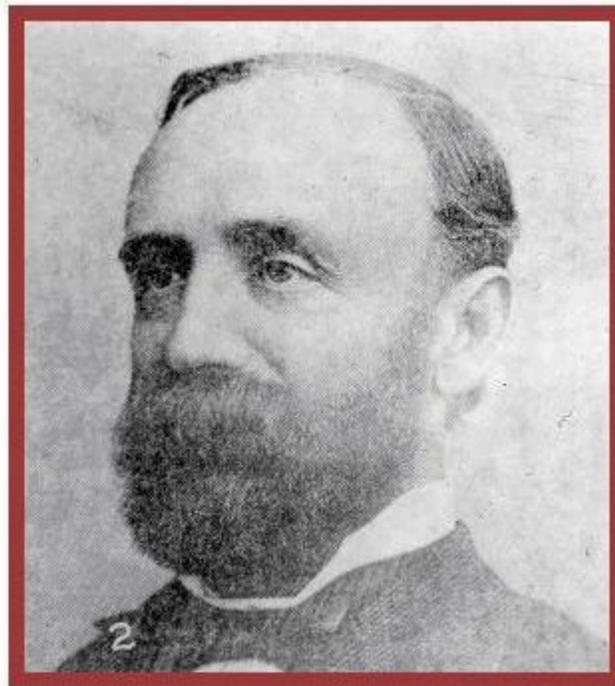


"In a dry and thirsty land it is necessary to divert the waters of the streams from the natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law."

(Chief Justice Moses Hallett from his Territorial Supreme Court Opinion in the case of *Yunker v. Nichols* in 1872.)

Chief Justice Moses Hallett's opinion in the case of Yunker v. Nichols, 1872. The text reads: "In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels in order to obtain the fruits of the soil and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of"

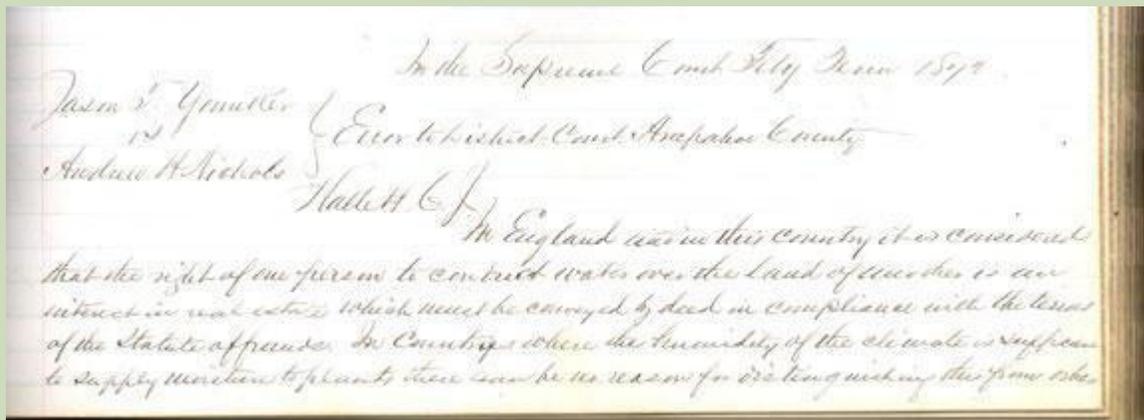


Chief Justice Moses Hallett

In the Jefferson Territory's first and only General Assembly in 1859-1860, the "Short Act Concerning Irrigation" set out laws of water rights for irrigation. It drew on the codes that miners set up in their courts allowing water diversions to their mine operations. These early laws prevented the application of the riparian rights rules which had two central principles - that the right to use water lay only with the owners of land along a water course, and that a user could not appreciably alter the flow of a stream. Either principle would have made western irrigation impossible as the entire purpose of canal and ditch building was to bring water to properties away from the stream and allow it to soak into the fields. The riparian rule also meant that corporate monopolies could be formed to control the "liquid

gold” for mining as well as for irrigation. In 1861 the “Irrigation Statute,” passed which provided for private rights of way through land for the construction of water ditches. This also reflected the opinion that the necessity for water by the public outweighed the rights of individual property owners.

Ten years later much of this early law was tested when Jason Yunker brought suit against Andrew Nichols for diverting all the waters from a jointly constructed irrigation canal passing from Bear Creek through the defendant's farm to that of the plaintiff's. The canal was constructed in 1871 by Jason Yunker, Andrew Nichols and John Bell under a verbal agreement to share equally in the water conveyed. Subsequently, Nichols, having a riparian estate, consumed all the water so that none passed down to Yunker whose lands were below.



It became obvious in the dispute that the doctrine of riparian rights that had evolved in English common law and was practiced in the eastern United States, was inapplicable in the arid American West.

Through this Supreme Court case Justice Hallett revolutionized existing doctrine by breaking from the riparian rights system and creating the doctrine of prior appropriation which was used thereafter in the West. Hallett's opinions were used in 1876 when the Colorado Constitutional Convention met with the intention of resolving existing and potential disputes by constitutional law.

IRRIGATION.

Section 5. 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.

Section 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Section 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

(The above excerpt comes from the *Proceedings of the Constitutional Convention for the State of Colorado*, pg. 700).

The Constitution laid the foundations for state control by declaring that "*The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public.*" Drawing on customs recently evolved in farming communities and in the mining districts, where water was diverted for placer operations, the constitution also stated formally the doctrine of prior appropriation:

"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using water for the same purpose...those using the water for domestic purposes shall have preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

The Supreme Court opinion in *Coffin v. Left Hand Ditch* six years after the Colorado Constitution was ratified in 1876 expanded this premise by stating that water could be conveyed from one watershed to another to its place of beneficial use. These laws and Supreme Court decisions resulted in the “Colorado Doctrine” which mandated the public control of water on the basis of prior appropriation and had a vital impact on the development of Colorado and the West.

Litigation between the states over water rights became common as many western states disagreed with Colorado’s diversion of water before it got to the states downstream. Litigation occurred at the federal level until 1907 when the United States Supreme Court handed down an opinion which stated that each state had a right to some of the water in the rivers within its boundaries. In the 1920's a number of treaties with other states were ratified that helped to ensure an equitable division of river water for irrigation and other uses. The first of these was the Colorado River Compact in 1922, followed in Colorado by 8 other compacts.

Water litigation has proliferated over the years as populations in the West have swelled and other uses for water as well as environmental considerations have become important. While the water laws up to this time have largely been adequate to deal with the explosion of suits within Colorado and with the other western states, the demands on the water supply only get greater. To deal with these significant challenges the State of Colorado with all of its water stakeholders are developing a “Water Plan.” Time will tell if we can successfully pass this important crossroad of our history.