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# WATER LAW REVIEW

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## **COLORADO WATER LAW: AN HISTORICAL OVERVIEW, 1 U.DENV.WATER L. REV. 1 (1997)**

JUSTICE GREGORY J. HOBBS, JR.<sup>‡</sup>

(NOTE: IN THE ELECTRONIC VERSION AND PRINT-OUTS FROM THE ELECTRONIC VERSION, PAGE NUMBERS MAY NOT BE THE SAME AS IN THE PRINTED REVIEW. THIS ELECTRONIC VERSION ALSO INCLUDES THREE SUBSEQUENT UPDATES TO THE ORIGINAL ARTICLE )

### **TWO RIVERS**

Thomas Hornsby Ferril

Two rivers that were here before there was  
A city here still come together: one  
Is a mountain river flowing into the prairie;  
One is a prairie river flowing toward  
The mountains but feeling them and turning back  
The way some of the people who came here did.

Most of the time these people hardly seemed  
To realize they wanted to be remembered,  
Because the mountains told them not to die.

I wasn't here, yet I remember them,  
That first night long ago, those wagon people  
Who pushed aside enough of the cottonwoods  
To build our city where the blueness rested.

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<sup>‡</sup> After receiving his J.D. from the University of California Berkeley (Boalt Hall), Justice Hobbs was law clerk to Judge William E. Doyle of the Tenth U.S. Circuit Court of Appeals. He then served as an enforcement attorney with the U.S. Environmental Protection Agency, and then as the First Assistant Attorney General for the State of Colorado, Natural Resources Section. Upon entering the private sector, Justice Hobbs developed a practice that emphasized water, the environment, land use, and transportation. Formerly a senior partner with the Denver law firms of Davis, Graham & Stubbs, LLP, and then of Hobbs, Trout & Raley, PC, he was appointed Justice of the Colorado Supreme Court in May of 1996.

They were with me, they told me afterward,  
When I stood on a splintered wooden viaduct  
Before it changed to steel and I to man.  
They told me while I stared down at the water:  
'If you will stay we will not go away.'<sup>1</sup>

## INTRODUCTION

Rivers, plains, and mountains make us Coloradans. Residing on one of two sides of this Continent's backbone, some of us look to the West to the Great Divide, others to the East. When our hearts follow our eyes, when we think about this magnificent land and our fellow Coloradans on the other side, we truly gain the power of this rivered place. Thomas Hornsby Ferril called on us—his fellow Coloradans—to remember and to live our origins: strength of mountain stream, hope of prairie stream.

Beneficial use and preservation are two primary public policies which guide western natural resource law; they are the two chambers of our western heart, the two lobes of our brain. Colorado water law establishes the right of water appropriation to serve public and private needs. New uses and changes in existing water rights continue to exist and evolve within the framework of the water law. The preservation interests are addressed primarily by state and federal land use law and environmental regulatory law, such as is evidenced by the acquisition of open space and parks by public entities, as well as federal land reservations for national parks, monuments, wilderness areas, and wildlife preserves.

Western prior appropriation water law is a property rights-based allocation and administration system, which promotes multiple use of a finite resource. The fundamental characteristics of this system guarantee security, assure reliability, and cultivate flexibility. Security resides in the system's ability to identify and obtain protection for the right of use. Reliability springs from the system's assurance that the right of use will continue to be recognized and enforced over time. Flexibility emanates from the fact that the right of use can be transferred to another, subject to the requirement that other appropriators not be injured by the change.

Dean Frank Trelease described an "ideal water law" as being a property rights system of uses, which rewards initiative, promotes reliable planning and decision making, and subjects those property rights to regulation in the public interest:

An ideal water law should give a water right those characteristics that will encourage and enable people to make the best decisions as

to water use in their own interests and hence ultimately in the public interest. Private uses of water should be based upon property rights not dissimilar to the property rights in more stable and tangible assets, and like other

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1. Thomas Hornsby Ferril, *Two Rivers*, in THOMAS HORNSBY FERRIL AND THE AMERICAN WEST 122 (Robert C. Baron et al. eds., 1996).

property rights they should be subject to regulation in the public interest.<sup>2</sup>

Colorado water law illustrates the public interest at work through the interplay of two forces. On the one hand, individual and public entity initiative secure water supplies for beneficial use in a system of property rights creation. On the other hand is the enforcement of those rights, subject to local, state, and federal regulation aimed at meeting societal choices made by legislative means.

This article focuses on major historical and legal themes that emerge from Colorado's water experience. It is accompanied by an appendix intended to highlight the major historic, statutory, and case law events that give structure to Colorado water law.

### CUSTOM AND NECESSITY IN THE COLORADO TERRITORY

President Thomas Jefferson wrote to Meriwether Lewis that "[t]he object of your mission is single, the direct water communication from sea to sea formed by the bed of the Missouri & perhaps the Oregon."<sup>3</sup> His use of the term *perhaps* suggests that Jefferson, the scientist, was at work. But Jefferson's mistaken belief in a mighty waterway of commerce crossing an entire continent stemmed directly from his grounding in the law of running water, and from his assumption that the geography of well watered climes also existed in the Louisiana Territory.

The Justinian Code of the fifth century enunciated what we recognize today as the riparian doctrine: running water is the property of the public for use by traders and fisherman, whereas the banks of the river are the property of the adjoining landowner.<sup>4</sup> The law of running water was inclusive of a riparian landowner's right to make a *de minimus* use, or reasonable use, for milling and domestic purposes. Of course, this use was subject to the water's return to the stream without substantial alteration to either its quality or quantity. This law of running water was carried into the English common law.<sup>5</sup> But as the waters ran out in the vast mountainholds of the new American West, Lewis and Clark would ultimately ditch their boats and trek by foot and horse. So, too, would the western territories ultimately ditch riparian water law as inapplicable to their clime and use.

Of the public lands secured to the United States by the Louisiana Purchase of 1803 and the 1848 Treaty of Guadalupe Hidalgo, Colorado was carved out of the then-existing Kansas, Nebraska, Utah and New Mexico Territories when Kansas became a state in 1861. Thirty-seven percent of

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2. Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 8-9 (1965).

3. LETTERS OF THE LEWIS AND CLARK EXPEDITION, WITH RELATED DOCUMENTS 1783-1854, 136-38 (Donald Jackson ed., 2d ed. 1978) reprinted in STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON AND THE OPENING OF THE AMERICAN WEST 116 (Simon and Schuster 1996).

4. See JAMES WILLIAMS, THE INSTITUTES OF JUSTINIAN ILLUSTRATED BY ENGLISH LAW 84 (2d ed. 1893).

5. *Id.*

Colorado still resides in federal ownership.<sup>6</sup> The settlers of the new frontier were invited onto the public domain through policies enacted by the federal government aimed at securing the occupation of the continent by citizens of the United States. One of these settlers, Benjamin Eaton, was to have a profound role in early Colorado water use.

After gold was discovered at the confluence of Cherry Creek and the South Platte River, Eaton traveled from Iowa to the very western part of the Kansas Territory, journeying with an 1859ers hope of locating vast riches. Born into an Ohio farming family, he viewed canals as a means by which to float boats and barges towards the mighty rivers rather than a means by which to water crops. First attempting to make a life in the Front Range mining camps, Eaton eventually struck out for the San Juans in the dead of winter by way of the Sangre de Cristos. The promise of quick riches was soon played out. However, in the course of his introduction to the extremes of mountain weather and living, Eaton came to learn how water could be re-routed from a more abundant stream for use at water deficient mining locations.

Eaton ventured away from the Colorado mining camps to work the irrigated farm land of the Maxwell Land Grant outside Cimarron in northern New Mexico. Tapping into a rich Southwestern water heritage, he soon added to his growing appreciation for Western water usage. It was in New Mexico that he was introduced to *acequias*, the community ditches that had utilized gravity to deliver water to the fields of northern New Mexico since the founding of Santa Fe in 1609.<sup>7</sup> By 1700, an estimated sixty *acequias* were operating in New Mexico, with an additional one hundred in the 1700s, and then three hundred more in the 1800s.<sup>8</sup> Because the official seats of government were located far away in Spain and Mexico, expediency dictated that local custom become the law in a pioneering New Mexico. In order to serve local conditions, many equitable principles of community cooperation were applied when distributing water.<sup>9</sup> Of course, these early Spanish settlers did not invent Southwestern irrigation. Native peoples of the Americas had practiced irrigation long before the Spanish entrance into the New World. Indeed, a Spanish explorer entering New Mexico in 1583 reported finding “many irrigated corn fields with canals and dams” built by Pueblo Indians.<sup>10</sup>

Eventually, Benjamin Eaton left the New Mexico territory and began to draw on his experiences with the New Mexican *acequias*. In 1864, he dug a direct flow ditch from the Poudre river to his farm. He helped other settlers in Greeley in the construction of the Union Colony No. 2 Canal in the early 1870s. It was Eaton who oversaw the construction of the incredibly long and wide Larimer and Weld Canal in Northern Colorado. He then assisted

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6. See *People v. Schafer*, 946 P.2d 938 (Colo. 1997).

7. JANE E. NORRIS & LEE G. NORRIS, WRITTEN IN WATER: THE LIFE OF BENJAMIN HARRISON EATON 32, 220-22 (1990).

8. NEW MEXICO STATE ENGINEER'S OFFICE, 1997 ACEQUIAS 4 (1997).

9. IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 15 (1987).

10. NEW MEXICO STATE ENGINEERS OFFICE, *supra* note 8, at 3.

in laying out the High Line Canal that would run through the Denver basin. As a member of the Territorial and State Legislatures, Eaton worked to shape water legislation, including the Adjudication Acts of 1879<sup>11</sup> and 1881.<sup>12</sup> He served as Governor from 1885-87, and later founded the town of Eaton, to which he brought a sugar beet factory.<sup>13</sup>

Eaton was just one of many Colorado pioneers. Throughout the state, farms and towns took shape interdependently. The Homestead Act of 1862<sup>14</sup> was instrumental in promoting settlement on the public domain, and as the mining camps disappeared, communities sprang up as agricultural activity and productivity increased. Soon the valleys of the Arkansas, the Gunnison, the San Luis, and the Grand, blossomed. The homestead entries in the State of Colorado totaled 107,618, and covered 22,146,400 acres of land. Only Montana and North Dakota experienced more entries.<sup>15</sup>

Settlers of the West favored independent action and feared corporate monopolies. The Jeffersonian ideal of strong families civilizing the continent through farming<sup>16</sup> animated the Homestead Law as well as the Western water doctrine of beneficial use, whose principles spurned waste and speculation. Water served the public interest as that interest was then perceived in Colorado. In 1861, the Territorial Legislature provided that water could be taken from the streams to lands not adjoining the waterways.<sup>17</sup> Thus occurred, at the earliest opportunity, Colorado's departure from the common law riparian doctrine and its reasonable use corollary.<sup>18</sup> In 1872, the Colorado Territorial Supreme Court recognized rights of way by reason of the "natural law" of custom and necessity. No one could now dispute that water could be carried to the place of use through intervening lands owned by others.<sup>19</sup>

### CONGRESSIONAL DEFERENCE AND THE COLORADO CONSTITUTION

Through the 1866 Mining Act,<sup>20</sup> the 1877 Desert Lands Act,<sup>21</sup> and subsequent legislation, Congress provided that states and territories could estab-

11. 1879 Colo. Sess. Laws 99-100.

12. 1881 Colo. Sess. Laws 142.

13. NORRIS & NORRIS, *supra* note 7, at 94, 104, 122, 139, 140, 146, 214.

14. Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976).

15. CARL UBBELOHDE ET AL., A COLORADO HISTORY 259 (1972).

16. In the words of Jefferson, "[t]hose who labor in the earth are the chosen people of God." (THOMAS JEFFERSON, JEFFERSON HIMSELF: THE PERSONAL NARRATIVE OF A MANY-SIDED AMERICAN 34 (Bernard Mayo ed., 1970)).

17. Colo. Territorial Laws 67-68 (1861).

18. See *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312); *Pyle v. Gilbert*, 265 S.E. 2d 584 (Ga. 1980). This "pure" prior appropriation doctrine contrasts, for example, with California's riparian/prior appropriation/public trust hybrid which California chose by reason of its own custom and law; see *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Lux v. Haggin*, 10 P. 674 (Cal. 1886).

19. *Yunker v. Nichols*, 1 Colo. 551, 570 (1872).

20. Mining Act of 1866, ch. 262, §9, 14 Stat. 253 (1866) (current version at 43 U.S.C. §§661-66 (1994)).

21. Desert Lands Act, ch. 107, 19 Stat. 377 (1877) (current version at 43 U.S.C. §§641-48 (1994)).

lish their own water laws and create property rights to unappropriated water on and off the federal lands:

What we hold is that following the act of 1877 if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.<sup>22</sup>

The oft-reiterated congressional choice not to adopt a federal water law system reflected the nation's pro-settlement agenda and its preference for federalism. Just like the appropriation doctrine itself, congressional deference to state water law choices arose out of the westward-leaning frontier experience.

The Colorado Constitution of 1876 declared that unappropriated water is "the property of the public . . . dedicated to the use of the people of the state, subject to appropriation,"<sup>23</sup> that the right to appropriate the unappropriated waters of the natural streams of the state for beneficial use in order of priority shall never be denied,<sup>24</sup> and that rights of way for the conveyance of water by ditches, canals, and flumes can be secured for agricultural, domestic, mining, and manufacturing purposes from the stream across intervening public, private, or corporate lands by payment of just compensation.<sup>25</sup>

Riding on the notoriety of his audacious Colorado River expeditions of 1869 and 1871,<sup>26</sup> John Wesley Powell informed Congress of

the need for an irrigation survey to locate reservoir sites, and the need for recognition of the "natural law" of appropriation and use of water arising by custom and necessity in the arid lands west of the hundredth meridian.<sup>27</sup> Powell wrote that "monopoly of land need not be feared. The question for legislators to solve is to devise some practical means by which water rights may be distributed among individual farmers and water monopolies prevented."<sup>28</sup> In Colorado, neighboring farmers also recognized this critical fact and began to form mutual ditch companies for water delivery.<sup>29</sup> A share in a

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22. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *see also California v. United States*, 438 U.S. 645, 662 (1978)("[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.").

23. COLO. CONST. art. XVI, § 5.

24. COLO. CONST. art. XVI, § 6.

25. COLO. CONST. art. XVI, § 7.

26. *See* DAVID LAVENDER, *RIVER RUNNERS OF THE GRAND CANYON* 12-21 (1985).

27. JOHN WESLEY POWELL, *LANDS OF THE ARID REGION OF THE UNITED STATES* 12-14, 41-43 (Harvard Press 1983) (1879).

28. *Id.* at 41.

29. *See* CARL ABBOTT ET AL., *COLORADO, A HISTORY OF THE CENTENNIAL STATE* 166 (3d ed. 1994).

mutual ditch company represents the ownership *pro rata* of the water rights and the waterworks of that company.<sup>30</sup> In contrast, carrier ditches were corporate entities formed to construct and operate waterworks for profit. Under the state constitution, they were made the subject of county commission rate regulation.<sup>31</sup>

Colorado water law often exhibits its anti-speculation, pro-individual public policy choice. Within the context of state water law, governmental regulation is employed for the primary purpose of identifying and administering rights which water users enjoy by virtue of appropriation for beneficial use under Colorado's Constitution and statutes. Colorado Supreme Court case law and the statutes of the Colorado General Assembly are the primary sources which define and describe this state's water law. Of course, United States' public land law, natural resource law, and environmental law have also had a profound effect on water development and use in Colorado.

### ENDURING AND EVOLVING PRINCIPLES OF BENEFICIAL USE

A water right is a property right that arises solely by the act of placing water, theretofore unappropriated, to the appropriator's beneficial purpose. Its place of diversion and use may occur in different watersheds.<sup>32</sup> Successful application to a beneficial use is required, regardless of the method of capture or conveyance.<sup>33</sup> The essential element and value of a water right is its priority for beneficial use to the exclusion of others not then in priority.<sup>34</sup> Beneficial use, the concept of fructifying the land and its product through human labor, is the means by which a water use ripens into a vested water right. Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for purposes of change. The right is typically quantified not in a flow measurement of cubic feet per second of diversion, but rather in acre-feet of water consumed.<sup>35</sup> Beneficial use is not a defined term in the Colorado Constitution, but the statutory definition of "beneficial use" is the "use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."<sup>36</sup>

An efficient means of diversion suitable to the use must be effectuated. For example, a municipality diverting a domestic water supply cannot utilize a large, open and leaky structure for conveyance to a location remote from the source of supply.<sup>37</sup> Indeed, an irrigator utilizing an inefficient surface diversion may be required to employ wells to effectuate the diversion if a ju-

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30. See *Jacobucci v. District Court*, 541 P.2d 667, 672 (Colo. 1975).

31. See *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & County of Denver*, 928 P.2d 1254, 1264 (Colo. 1996).

32. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447, 449 (1882).

33. See *Thomas v. Guiraud*, 6 Colo. 530, 532-33 (1883).

34. See *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1378-80 (Colo. 1982).

35. See *Williams v. Midway Ranches Property Owners Ass'n*, 938 P.2d 515, 521 (Colo. 1997).

36. COLO. REV. STAT. § 37-92-103(4) (1997).

37. See *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 48 P. 532, 534 (Colo. 1896).

nior appropriator who might benefit undertakes to pay the expenses involved.<sup>38</sup>

Following application to beneficial use, unconsumed water in the form of return flows must be made available to fill subsequent appropriations.<sup>39</sup> The owner of a water right has no right as against a junior appropriation to waste water or to divert more than can be used beneficially. Nor may that owner extend the time or quantity of diversion and use above that for which the appropriation was made.<sup>40</sup> Imported or developed water, such as transmountain or non-tributary water, may be consumed to extinction for beneficial purposes.<sup>41</sup> Reservoirs may be constructed in the natural bed of a stream, provided that their operation does not injure senior water rights.<sup>42</sup>

Discharge of pollution by a senior appropriator which impairs junior beneficial uses, such as mining waste, cannot be justified as a beneficial use of water under the senior appropriation.<sup>43</sup> Extended non-use or intentional acts may result in an abandonment of either the whole water right, or a part thereof.<sup>44</sup>

Colorado case law and statutes have emerged which recognize myriad purposes. These include traditional agricultural, stock watering, domestic, municipal, commercial, and industrial uses, power generation, and flood control uses, as well as new and ever-evolving uses such as minimum stream flow appropriations by the Colorado Water Conservation Board, dust suppression, mined land reclamation, boat chutes, fish ladders, nature centers, fish and wildlife culture, recreation, residential environment, release from storage for boating and fishing flows, and augmentation of depletions in order to divert water out-of-priority for the purpose of making a beneficial use which otherwise would be curtailed.<sup>45</sup>

Only the State Water Conservation Board may obtain an appropriation

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38. See *Alamosa La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 935 (Colo. 1983).

39. See *Comstock v. Ramsay*, 133 P. 1107, 1110-11 (Colo. 1913).

40. See *Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1371 (Colo. 1980).

41. See *City & County of Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144, 147 (Colo. 1972).

42. See *Larimer County Reservoir Co. v. People ex rel. Luthe*, 9 P. 794, 796 (Colo. 1886).

43. See *Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co.*, 48 P.2d 828, 832-33 (Colo. Ct. App. 1897).

44. See *City & County of Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283, 286 (Colo. 1996); *Master's Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268, 271-72 (Colo. 1985).

45. See *Board of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 849-50 (Colo. 1992) (providing reservoir release for fish, wildlife, boating, and recreation); *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 919, 932 (Colo. 1992) (utilizing boat chute, fish ladder, nature center); *Zigan Sand & Gravel, Inc. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 175, 182 (Colo. 1988) (providing for residential environment); *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 173 (Colo. 1988) (utilizing mined land reclamation); *May v. United States*, 756 P.2d 362, 371 (Colo. 1988) (providing for reservoir recreation, fishery); *State v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1322-23 (Colo. 1983) (recognizing dust suppression); *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 550 P.2d 288, 295 (Colo. 1976) (recognizing augmentation).

without a means for capturing, possessing and controlling water.<sup>46</sup> This exception was made for the purpose of preserving the natural environment to a reasonable degree.<sup>47</sup> The Board may appropriate water for minimum flow and lake levels in priority, and it may also buy or accept the donation of other rights for change of use to instream flow.<sup>48</sup> The Water Conservation Board holds instream flow rights on approximately 8,000 miles of Colorado streams.<sup>49</sup>

### **ADJUDICATION OF RIGHTS FOR ADMINISTRATION OF PRIORITIES**

So as to assure that rights may be administered in relation to each other under varying conditions of available supply, a priority system of water rights for beneficial use requires a mechanism for determining the source of supply, type of uses, date and amount of appropriation, location and identity of the diversion structure, and place of use.

Soon after statehood, Colorado undertook the identification of existing rights and claimed rights through a litigation process. The Adjudication Acts of 1879<sup>50</sup> and 1881<sup>51</sup> provided: (1) for the identification of irrigation rights by priority and quantity through judicial

decree proceedings, and (2) for the administration of these court judgments to occur under the watch of state water officials. This intermixed governance of water rights by the state legislative, executive, and judicial branches continues to this day under the provisions of the State Constitution and statutes. Of course, the act of an appropriator placing water to beneficial use alone can bring into existence a Colorado water right.<sup>52</sup>

Government surveys of sections and townships had not yet been completed when settlers made their agricultural claims under the 1879 and 1881 Adjudication Acts. They estimated their present and future need for water. The result was that considerably more water was allotted in some instances than actually utilized, and priorities were recognized for more than the flow of the stream. Because claims not yet perfected do not enjoy the full status of being water rights, courts began to distinguish between “conditional” rights and those water rights arising by application of water to beneficial use.<sup>53</sup>

Failure to timely adjudicate a water right results in its postponement to those rights which have been adjudicated. Priorities are now set according to the year in which the application for a decree is filed and then ranked in or-

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46. See COLO. REV. STAT. § 37-92-103(3), 37-92-305(9) (1997).

47. See *Board of County Comm'rs v. United States*, 891 P.2d 952, 972 (Colo. 1995).

48. See COLO. REV. STAT. § 37-92-102(3) (1997).

49. See COLORADO WATER CONSERVATION BOARD, *INSTREAM FLOW/NATURAL LAKE LEVEL PROGRAM UPDATE OF 1996 ACTIVITIES I* (1997).

50. 1879 Colo. Sess. Laws 99-100.

51. 1881 Colo. Sess. Laws 142.

52. See *Platte Water Co. v. Northern Colo. Irrigation Co.*, 21 P. 711, 713 (Colo. 1889).

53. See *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34-35 (Colo. 1997).

der of the date of appropriation.<sup>54</sup> The 1969 Water Right Determination and Administration Act<sup>55</sup> created a system of seven water divisions with water judges and division engineers assigned to adjudicating and administering decreed rights to the natural streams and all surface and groundwater tributary thereto.

A conditional water right, pursued diligently to completion, preserves a priority which relates back to the first step initiating the appropriation, assuming the use is perfected.<sup>56</sup> An absolute decree: (1) confirms that amount of depletion from the stream which can be taken in priority as a property right, and (2) entitles the subsequent operation of the right in the amount of its decreed quantity, so long as the water is applied beneficially.<sup>57</sup> Water officials enforce decrees of the courts, not unadjudicated claims.<sup>58</sup>

### CHANGES OF WATER RIGHTS

Not until 1903 did the Legislature provide for the adjudication of domestic and all uses other than irrigation.<sup>59</sup> Because of its relatively small consumptive burden and its obvious necessity for sustenance of farmers, miners, laborers, and residents of nascent towns, the use of domestic water was considered incidental and non-injurious to agricultural use.<sup>60</sup> Also, the Colorado Constitution might have appeared to provide that domestic use could supersede all other uses, regardless of appropriation date: “[W]hen the waters of any natural stream are not sufficient for the service of all of 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.”<sup>61</sup>

The rise of cities claiming the domestic use preference to supersede other water rights resulted in two important legal developments: (1) water rights can be sold and changed from one use and location to another, and (2) senior vested water rights cannot be taken or superseded without payment of just compensation. In 1891, the Colorado Supreme Court determined that agricultural water rights could be sold to a city provided that the water rights of others are not injuriously affected by the change. The court reasoned that running water in its natural course is “the property of the public.”<sup>62</sup> Howev-

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54. See *United States v. Bell*, 724 P.2d 631, 641-42 (Colo. 1986).

55. COLO. REV. STAT. § 37-92-101 to -602 (1997).

56. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 276 P.2d 992, 1001 (Colo. 1954); see also *Dallas Creek Water Co.*, 933 P.2d at 35.

57. *Dallas Creek Water Co.*, 933 P.2d at 35.

58. See *Fort Morgan Reservoir & Irrigation Co. v. McCune*, 206 P. 393, 394 (Colo. 1922).

59. 1903 Colo. Sess. Laws 298.

60. *Armstrong v. Larimer County Ditch Co.*, 27 P. 235, 238 (Colo. Ct. App. 1891).

61. COLO. CONST. art. XVI, § 7.

62. *Strickler v. City of Colorado Springs*, 26 P. 313, 316 (Colo. 1891).

er, a “right . . . to its use . . . will be regarded and protected as property . . . .”<sup>63</sup> “The exclusive right to divert and use the water . . . may be transferred and conveyed like other property.”<sup>64</sup> Invoking the Fourteenth Amendment of the United States Constitution, and the takings<sup>65</sup> and due process<sup>66</sup> clauses of the state constitution, the court held that a city could not rely upon the domestic water preference clause of the Colorado Constitution to supersede the priority of a senior appropriation unless the city paid just compensation for the senior right and proceeded in accordance with authorizing eminent domain legislation.<sup>67</sup>

The Colorado Supreme Court also held that changes of water rights require notification and the opportunity to be heard so that those who might be adversely affected may be protected.<sup>68</sup> A water rights transfer is limited in time and quantity to the amount of water

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63. *Id.* at 316 (quoting *Kid v. Laird*, 15 Cal. 161 (1860)).

64. *Id.* (quoting JOHN M. GOULD, *LAW OF WATERS*, § 234, (3d ed 1900)).

65. COLO. CONST. art. II, § 15.

66. COLO. CONST. art. II, § 25.

67. *Strickler*, 26 P. at 317.

68. *See New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co.*, 87 P. 799, 800 (Colo. 1906).

historically withdrawn and consumed over time in the course of applying water to beneficial use under the tributary appropriation without diminishment of return flows.<sup>69</sup>

### PROGRESSIVE CONSERVATION

The progressive conservation movement of the late nineteenth and early twentieth century had its most dramatic test of conflict and durability in Colorado. The principal subject was water. Again, natural law and gravity played strongly into law, policy, and politics. President Grover Cleveland, followed by President Theodore Roosevelt, withdrew millions of acres of forest land from settlement under the Homestead Act.<sup>70</sup> Senator Henry Teller of Colorado literally screamed for the federal lands in Colorado to be transferred to state and private ownership. John Muir of California argued just as passionately for preservation and non-use of the public lands. Gifford Pinchot, Roosevelt's progressive forester, argued eloquently for the scientific management of timber so as to preserve and enhance water supplies. Because the forested watersheds were the site of numerous ditches, dams, reservoirs, and settled water rights utilized for the capture, possession and control of water for a beneficial use of federal property by both farmers and municipalities, farmers and municipalities in Colorado, dependent for their water on continued access to the forests, supported Roosevelt and Pinchot:

The attitude of Coloradans toward Roosevelt and Pinchot clearly illustrated the divergence of opinion that existed in the state over the conservation issue. For while the two men were accorded widespread contempt in the Colorado backwoods, they also commanded a large following all across the state.

Roosevelt's support came primarily from urban centers, plains cities such as Denver, Colorado Springs, and Pueblo and Western Slope settlements like Delta and Montrose, areas dependent on the preservation of mountain watersheds for irrigation and water supplies.<sup>71</sup>

The pledge to Colorado and the West that congressional forest reservations would not operate in derogation of state water law was enacted as a provision of the National Forest Organic Act of 1897.<sup>72</sup> Nearly a century later, the United States Supreme Court relied on this provision to reject the notion that the National Forest reservations were intended to create federal instream flow rights.<sup>73</sup> As of 1973, the Forest Service was administering 14.3 million acres of Colorado timberland.<sup>74</sup>

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69. *Williams v. Midway Ranches Property Owner's Ass'n, Inc.*, 938 P.2d 515, 522 (Colo. 1997).

70. Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976).

71. G. MICHAEL MCCARTHY, *HOOR OF TRIAL: THE CONSERVATION CONFLICT IN COLORADO AND THE WEST 1891-1907*, 76-77, 89 (1977).

72. 16 U.S.C. § 475 (1994) (dictating in part the applicability of state water law within forest reservations).

73. *See United States v. New Mexico*, 438 U.S. 696, 712 (1978); *United States v. City & County of Denver*, 656 P.2d 1, 17-18 (Colo. 1982).

74. *Id.* at 262.

## THE RECLAMATION ERA

Progressive conservationists viewed water storage as a matter of the public interest: “The movement to construct reservoirs so as to conserve spring flood waters for use later in the dry season gave rise both to the term ‘conservation’ and to the concept of planned and efficient progress, a concept which lay at the heart of the conservation idea.”<sup>75</sup> With its provisions for both storage and distribution works, farmers in Colorado embraced the 1902 Reclamation Act.<sup>76</sup> These works would be constructed and financed by the federal government subject to low interest repayment of a portion of the capital and operating costs. As with the National Forest Organic Act, the Reclamation Act preserved the application of state water law.<sup>77</sup>

Whether constructed with federal funds or other financial resources, reservoirs were essential to Colorado’s economic well-being. Because stream levels radically drop after the mountain snow melt, Colorado farmers found that direct flow water rights could not supply the “finish water” in August and September before the harvests were in. The growing municipalities were junior in time and right to the senior agricultural ditches and required year round supply. Water storage rights allowed unappropriated water to be captured and preserved for the time of need. Farmers and small towns could not afford the construction of significant and expensive waterworks for storage and long distance conveyance. A revision to the Reclamation Act allowed municipal use to be added as a component of Bureau of Reclamation Reservoirs.<sup>78</sup> The Reclamation Era thus took Powell’s survey of water storage sites into the Twentieth Century—first for agricultural use, and then for multi-purpose municipal, industrial, power, and recreational use.

The Reclamation Act gave rise to Colorado irrigation districts, water conservancy districts, and water conservation districts. These districts were empowered by the General Assembly with contracting and financing authority designed to enable local sponsors to enter into reclamation partnerships with the federal government. The earliest projects served Western Slope irrigation uses, such as the Uncompahgre Project on the Gunnison and the Grand Valley Project on the Colorado. The immediate result was that irrigated land on the Western Slope doubled from three hundred thousand to six hundred thousand acres.<sup>79</sup> Much of the effort by Colorado Congressmen Ed Taylor and Wayne Aspinall on behalf of the state was to ensure that citizens on the Colorado River side of the Divide would also benefit.<sup>80</sup>

The Colorado–Big Thompson Project (C–BT) was the first reclamation project to pierce the Continental Divide. It included the Adams Tunnel for bringing water to the farms, cities, and businesses of the seven counties lying

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75. SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920, 5 (1959).

76. Reclamation Act, ch. 1093, 32 Stat. 388 (1902)(current version at 43 U.S.C. §§ 371-616 (1994 and Supp. 1995)).

77. 43 U.S.C. § 383 (1994).

78. 43 U.S.C. § 390 (1994).

79. ABBOTT ET AL., *supra* note 28, at 179-80; MEL GRIFFITHS & LYNNEL RUBRIGHT, COLORADO 145, 224 (1983).

80. See CAROL EDMONDS, WAYNE ASPINALL: MR. CHAIRMAN (1980).

in the northeastern part of the state. In 1937, an historic agreement between Western Slope and Eastern Slope water users provided for the construction and operation of Green Mountain Reservoir for the benefit of the Western Slope as a mitigation plan in connection with Eastern Slope diversions through the C–BT Project.<sup>81</sup> The Fryingpan–Arkansas Project of the Bureau of Reclamation and the Southeastern Water Conservancy District, which included Reudi Reservoir for the Western Slope, followed suit.<sup>82</sup>

As a result of this 1937 agreement, the Colorado Legislature created the Colorado Water Conservation Board,<sup>83</sup> the Colorado River Water Conservation District,<sup>84</sup> and the Northern Colorado Water Conservancy District.<sup>85</sup> Other reclamation projects followed. The Rio Grande Water Conservation District sponsored the Closed Basin Project<sup>86</sup> while the Animas–La Plata Water Conservancy District and Southwestern Water Conservation District are attempting to implement the Ute Indian Water Rights Settlement—a settlement predicated on Bureau of Reclamation construction of the Animas–La Plata Project.<sup>87</sup> To ensure Upper Colorado River Basin water uses while Colorado River compact deliveries are made to the Lower Basin States of Arizona, Nevada, and California, the Aspinall (Curecanti) Unit of the Colorado River Storage Project exists outside of Gunnison to operate in connection with Navajo Dam in New Mexico, Glen Canyon Dam in Utah, and Flaming Gorge Dam in Wyoming.<sup>88</sup> Were Major Powell to have returned in 1951, he would have “g[otten] the impression that resurrection morn had really dawned.”<sup>89</sup>

Reclamation reservoirs form only a part of Colorado and the West’s water supply infra-structure. As of 1990, Colorado reservoirs numbered more than 1,900 statewide, with the capability of storing 8.85 million acre feet of water.<sup>90</sup>

### GREAT AND GROWING CITIES

In 1908, the Colorado Supreme Court reiterated that cities could not divert water belonging to senior priorities for domestic or other uses without

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81. See DANIEL TYLER, *THE LAST WATER HOLE IN THE WEST* (1992).

82. ABBOTT ET AL., *supra* note 28, at 183.

83. COLO. REV. STAT., § 37-60-101 to -130 (1997).

84. COLO. REV. STAT., § 37-45-101 to -153 (1997).

85. *Id.*

86. See *Closed Basin Landowners Ass’n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 629 (Colo. 1987).

87. See *Taxpayers for the Animas–La Plata Referendum v. Animas–La Plata Water Conservancy Dist.*, 739 F.2d 1472 (10th Cir. 1984).

88. See NORRIS HUNDLEY, JR., *WATER AND THE WEST* 334-36 (1975); JOHN UPTON TERRELL, *WAR FOR THE COLORADO RIVER*, VOL. 2, 276 (1965).

89. WALLACE STEGNER, *BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 353 (1954) (But Stegner, Powells’ biographer, a quintessential westerner, and an early admirer of both beneficial use and preservation, later became a severe critic of the Reclamation Bureau as the environmental era progressed; see WALLACE STEGNER, *Striking the Rock*, in *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST* 76, 79-80 (1992)).

90. COLORADO WATER RESOURCES INSTITUTE, *COLORADO’S WATER: CLIMATE, SUPPLY AND DROUGHT* 6 (1990).

paying just compensation for the taking of property.<sup>91</sup> The court also cautioned that municipal users must be efficient: “the law contemplates an economical use of water . . . . Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated or by waste resulting from the means employed to carry it to the place of use.”<sup>92</sup>

A 1913 case established that one town could not prevent another town’s water pipeline from passing through its boundaries.<sup>93</sup> The court determined that any person, corporation, or public entity has a right of condemnation under the Colorado Constitution for the conveyance of domestic water, but the town through which the pipeline passes may reasonably regulate the manner in which the pipeline is maintained.<sup>94</sup>

Ownership by a city of its public works, including water, was another goal of progressive conservationists. Denver’s purchase of the Union Water Company and its establishment of a citizen water board in 1918 had the primary aim of converting a privately owned monopoly into a public asset.<sup>95</sup> Denver’s Moffat Tunnel, built between 1922 and 1928 for the dual purpose of carrying the railroad and Denver’s Fraser River and Williams Fork River water, preceded the Northern District’s Adams Tunnel, which was commenced in 1944. Denver’s Dillon Reservoir on the Blue River, a reservoir which stores water for delivery through the Roberts Tunnel, is junior to Green Mountain Reservoir and the Colorado–Big Thompson project.<sup>96</sup> Decades of litigation between Denver on the one hand, and the United States, the Northern District, and the Colorado River District on the other hand, established the senior status of the Western Slope and Northeastern Colorado diversions in this regard.

The General Assembly has vested cities with the authority outside of the jurisdiction of the Public Utilities Commission to set water rates for service within their boundaries and extra-territoriality, and to enter into perpetual water contracts.<sup>97</sup> That great and growing cities have a broad need to serve municipal water purposes was enunciated by the Colorado Supreme Court in 1939.<sup>98</sup>

Today, municipal and quasi-municipal governmental entities such as water and sanitation districts, intergovernmental authorities, water conservancy and water conservation districts, are the foremost actors in the water acquisition arena. For example, the City of Thornton acquired close to half of the shares of a northern Colorado mutual irrigation company. Subsequently, the city’s decree for conditional water rights, and exchange and augmentation plans was quantified and approved with numerous conditions to prevent in-

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91. *Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P. 339, 340-41 (Colo. 1908).

92. *Id.* at 341.

93. *Town of Lyons v. City of Longmont*, 129 P.198, 200 (Colo. 1913).

94. *Id.* (Explaining that the town of Lyons has the authority to prescribe all reasonable and necessary rules and regulations).

95. *See Bennett Bear Creek Farm Water & Sanitation Dist. v. City and County of Denver*, 928 P.2d 1254, 1259 (Colo. 1996).

96. *See United States v. Northern Colo. Water Conservancy Dist.*, 608 F.2d 422 (10th Cir. 1979).

97. *Id.* at 1261-62.

98. *See City & County of Denver v. Sheriff*, 196 P.2d 836 (Colo. 1939).

jury. The retained jurisdiction of the water court is included in the decree to monitor uses by the city that may not mature until the mid-twenty first century.<sup>99</sup>

Between 1960 and 1990, withdrawals for domestic uses of water in the West more than doubled, rising from six and a half to fourteen million acre-feet while the region's population grew by seventy-five percent. Agriculture still accounted for seventy-eight percent of total water withdrawals and ninety percent of total consumptive use. Nonetheless, over the next twenty-five years it is projected that the West will add another twenty-eight million residents,<sup>100</sup> and the significance of municipal and quasi-municipal entities will continue to grow.

Because of contemporary permitting difficulties in constructing additional projects for capturing unappropriated water,<sup>101</sup> municipalities must consider alternative water supplies. Possible alternative supplies include the following: the conversion of senior agricultural water through change of use proceedings, the tapping of tributary and non-tributary groundwater, and demand side conservation management, recharge, exchange, and augmentation.

### EQUITABLE APPORTIONMENT AND WATER COMPACTS

At midnight on December 21, 1857, Lieutenant Joseph Ives of the United States Corps of Topographical Engineers commenced a steamboat journey up the Colorado River from the Gulf of California. Progress upstream was steady but slow as the explorers surveyed the River and the surrounding countryside. In early March of 1858, the steamboat came to a stunning crash on a rock where Lake Mead now stands in the Black Canyon outside of Las Vegas, Nevada. Ives declared that point of the Colorado River to be the upper end of navigation, and he proceeded overland to the rim of the Grand Canyon where he proclaimed an end to human visitation of this region: "Ours has been the first, and will doubtless be the last, party of whites to visit this profitless locality. It seems intended by nature that the Colorado River, along the greater portion of its lovely and majestic way, shall be forever unvisited and undisturbed."<sup>102</sup>

The 1858 Ives map shows the Little Colorado River as the source of the Colorado River. Eleven years later, Major Powell, tied to a chair on a wooden dory, roared into the gut of the primordial chasm of the Grand Canyon from a long upstream reach. From that point on, the water geography, politics, and law of the Colorado River would tie the Upper Basin and the Lower Basin together.

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99. See *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

100. "WATER IN THE WEST: THE CHALLENGES FOR THE NEXT CENTURY," REPORT BY THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION 2-27, 2-44, (October 1997).

101. See *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 488-89 (D. Colo. 1996) (Two Forks permit veto under Clean Water Act); *City of Colorado Springs v. Board of County Comm'rs*, 895 P.2d 1105 (Colo. Ct. App. 1994) (exercise of authority under Land Use Act and Local Government Land Use Control Act).

102. JOSEPH IVES, ARMY CORPS OF TOPOGRAPHICAL ENGINEERS, REPORT UPON THE COLORADO RIVER OF THE WEST 100 (1861).

Colorado came to the 1922 Colorado River Compact negotiations fully informed of the equitable apportionment doctrine and its consequences. In 1907, the United States had argued that the remaining unappropriated waters of the West had been withdrawn from appropriation through the enactment of the 1902 Reclamation Act; development would occur under this theory as the national government saw fit, not otherwise.<sup>103</sup>

Kansas and Colorado argued diametrically opposing theories. Kansas alleged that its riparian water law should require Colorado to by-pass water supplies of the Arkansas River to Kansas because the Kansas Territory, created in 1854, had run to the Continental Divide origins of that river prior to the formation of the Colorado Territory in 1861. Colorado contended that its state constitutional doctrine of prior appropriation had been accepted by the United States Congress when Colorado was admitted to the Union in 1876; thus, all water arising in Colorado was subject to use therein.

Enunciating the doctrine of equitable apportionment, the Supreme Court ruled that each state can choose its own water law, whether riparian or prior appropriation, but no state can impose its choice of law on another state.<sup>104</sup> The national government's interest in the reclamation of arid lands could not supplant the water law selection of either state, and an equitable apportionment of the interstate water body can be ordered through the exercise of the Court's original jurisdiction. Although they had defeated the national government's water reservation claim, both states were left with the possibility of continuous litigation to determine from time to time what an equitable apportionment between them might be.

Because the irrigated valley of the Arkansas River within Colorado had perfected water rights and productive uses, Colorado won the opening rounds of its struggle with Kansas. However, in 1922, Colorado received a bitter lesson in the judicial application of prior appropriation to the equitable apportionment doctrine.<sup>105</sup> The Court found Wyoming's uses in the Laramie and North Platte River basins to be senior and controlling, thereby precluding future development within Colorado. Even the most ardent proponents of Western prior appropriation law were thunderstruck with the nerve shattering implications of a first in time—first in right state anchoring the interstate river and controlling the destiny of its elevated neighbors.

Delph Carpenter had represented Colorado in the Wyoming case and in disputes with Nebraska over the waters of the Platte River. He turned to the Compact Clause of the United States Constitution as Colorado's best hope for a secure and perpetual allocation of waters arising in Colorado, but shared by eighteen downstream states.<sup>106</sup>

The Colorado River Compact negotiators intended to allow each state to effectuate its own choice of water law and to use its allocated water within its boundaries whenever it might choose in the future—this all without fear of the timing of development in other states, and also to ensure that the Unit-

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103. *Kansas v. Colorado*, 206 U.S. 46, 92 (1907).

104. *Id.* at 113-14.

105. *Wyoming v. Colorado*, 259 U.S. 419, 496 (1922).

106. See Daniel Tyler, *Delph E. Carpenter And The Principle Of Equitable Apportionment*, in 9 WESTERN LEGAL HISTORY 36, 43 (1996).

ed States would not allocate the water contrary to the choice of the states.<sup>107</sup> However, Arizona did not ratify the Colorado River Compact until 1944. As a result of Arizona's delay, and pursuant to the terms of the 1928 Boulder Canyon Project Act,<sup>108</sup> the Secretary of Interior became the administrator and contracting officer for the Lower Basin apportionment among Arizona, California, and Nevada.

A compact is both state and federal law. It is meant to govern interstate water allocation and replace the original jurisdiction of the United States Supreme Court, except with regard to enforcement of the compact. For example, in 1995, the 1948 Arkansas River Compact was enforced against Colorado by decision of the United States Supreme Court.<sup>109</sup> Ratification of a compact may be seen as the exercise by Congress of its power to consent to interstate commerce limitations inherent in fulfillment of the compact's purpose.<sup>110</sup> A state may create and vest water rights as property, but only with regard to its allocated share of the interstate waters.<sup>111</sup>

Due to the work of Carpenter and many others, Colorado is a signatory to nine congressionally ratified interstate compacts with other states commencing with the Colorado River agreement in 1922: Colorado River Compact,<sup>112</sup> La Plata River Compact,<sup>113</sup> South Platte River Compact,<sup>114</sup> Arkansas River Compact,<sup>115</sup> Rio Grande River Compact,<sup>116</sup> Republican River Compact,<sup>117</sup> Upper Colorado River Compact,<sup>118</sup> Amended Costilla Creek Compact,<sup>119</sup> and Animas-La Plata Project Compact.<sup>120</sup>

Three equitable apportionment decrees in which Colorado has a continued water allocation interest are *Nebraska v. Wyoming*, *Wyoming v. Colorado*, and *Colorado v. New Mexico*.<sup>121</sup>

## INTEGRATION OF FEDERAL RIGHTS

Colorado, like other western states, allocated water and created water rights under its own system of law. In 1907, the United States Supreme Court enunciated the federal reserved water rights doctrine, first recognized

107. See L. Ward Bannister, *The Silver Fox Of The Rockies: A Critic's Views of Delphus Emory Carpenter And The Colorado River Compact* 15 (presented by Daniel Tyler at the Colorado River Compact Symposium, Water Education Foundation, May 29, 1997).

108. See *Arizona v. California*, 376 U.S. 340, 342-43 (1964).

109. See *Kansas v. Colorado*, 514 U.S. 673 (1995).

110. See *Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1249 (Colo. 1996).

111. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

112. 43 U.S.C. 617 (Boulder Canyon Project Act ratifying the Colorado River Compact), COLO. REV. STAT. 37-61-101 ch. 72 (1997), 42 STAT. 171 ch. 72 (1921) (congressional consent to enter into the compact).

113. COLO. REV. STAT. 37-63-101, ch. 110 (1997), 43 STAT. 796 ch. 110 (1925).

114. COLO. REV. STAT. 37-65-101, ch. 46 (1997), 44(2) STAT. 195 ch. 46 (1926).

115. COLO. REV. STAT. 37-69-101, ch. 155 (1997), 63 STAT. 145 ch. 155 (1949).

116. COLO. REV. STAT. 37-66-101, ch. 155 (1997), 53 STAT. 785 ch. 155 (1939).

117. COLO. REV. STAT. 37-67-101, ch. 104 (1997), PUB.L. 60, 57 STAT. 86 ch. 104 (1943).

118. COLO. REV. STAT. 37-62-101, ch. 38 (1997), 63 STAT. 31 ch. 48 (1949).

119. COLO. REV. STAT. 37-68-101, PUB.L. 88-198, 77 STAT. 350 (1963).

120. COLO. REV. STAT. 37-64-101 (1997), PUB.L. 90-537, 82 STAT. 898 (1968).

121. *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Wyoming v. Colorado*, 353 U.S. 953 (1957); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

for Native American tribal reservations.<sup>122</sup> A federal land reservation, by necessary implication, may involve a United States reservation of unappropriated waters necessary for the primary purposes of the reservation. The water reservation dates to the creation of the land reservation.

Due to the fact that the states could not integrate the federal reserved water rights claims into a unitary system of water rights administration without congressional waiver of sovereign immunity and consent to join federal agencies in state forums, Congress adopted the McCarran Amendment in 1952.<sup>123</sup> This provided for state court adjudication jurisdiction over federal claims. Colorado led the way in three different cases before the United States Supreme Court in requiring the appearance of the United States in state water proceedings.<sup>124</sup> As a result, the United States has obtained decrees in the seven water division courts for its federally reserved and state appropriative rights to serve uses on federal lands and in federal facilities.

## GROUNDWATER

Between 1943 and 1969, the use of tributary groundwater rose dramatically as surface irrigators and municipalities (particularly in the South Platte and Arkansas River Basins) discovered that wells were an efficient means of diversion and were not then subject to curtailment administration in the same manner as surface diversions.

The 1943 Adjudication Act<sup>125</sup> recodified the provisions of Colorado's adjudication law, provided a mechanism for supplementary adjudication and transfers of water rights to changed uses, but made no specific mention of adjudicating rights to groundwater. In contrast, the 1969 Water Right Determination and Administration Act declared that "it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state."<sup>126</sup>

Knowledge of groundwater and its impact on surface rights grew in the years between the 1943 and the 1969 Adjudication Acts. As out-of-priority pumping of groundwater connected to surface streams came to be recognized as a significant detriment to surface supply, the Colorado Supreme Court, in 1951, articulated a presumption that all groundwater finds its way to a surface stream and is subject to appropriation and administration in priority in times of short supply. One claiming that groundwater is not tribu-

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122. See *Winters v. United States*, 207 U.S. 564 (1907).

123. 43 U.S.C. § 666 (1994 and Supp. 1995).

124. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810, 820 (1976); *United States v. District Court*, 401 U.S. 527, 530 (1971); *United States v. District Court*, 401 U.S. 520, 525 (1971).

125. Adjudication Act of 1943, ch. 190, 1943 Colo. Sess. Laws 613 (codified at COLO. REV. STAT. §§ 148-9-1 to -27 (1963), *repealed by* The Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200, 1223.)

126. The Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200, 1220 (codified as amended at COLO. REV. STAT. § 37-92-102(1)(a) (1997)).

tary has the burden of proving that fact by clear and convincing evidence.<sup>127</sup> The Court also held that a well user must sink a tributary well to a reasonable depth and cannot command the level of the aquifer by fixing the point of withdrawal at a shallow depth. However, when the well is at a reasonable depth, a junior may be required by decree to bear the expense of providing the senior with an adequate means of diversion if the junior's lowering of the water table will cause the senior well to fail.<sup>128</sup>

In 1965, the General Assembly adopted the Groundwater Management Act,<sup>129</sup> thereby providing the State Engineer with the authority to issue, condition against injury, or deny permits for any diversion effectuated by means of a well. The Act also established the means for designating groundwater basins to be managed by local groundwater districts, subject to the authority of the Ground Water Commission. Designated groundwater basins are those wherein aquifers with modest recharge and attenuated connection to the stream system are the main source of an area's water supply, such as the Ogallala Aquifer.<sup>130</sup>

With the advent of conjunctive use of tributary groundwater and surface water, the maximum utilization of the waters of the state, through vested rights, was heralded as Colorado's constitutional water law doctrine.<sup>131</sup> Wells which make out-of-priority diversions must replace their depletions by an approved substitute supply or augmentation plan to enable continued operation.<sup>132</sup>

Non-tributary water is not part of the "natural stream" to which the Colorado Constitution's appropriation provisions apply. It is subject instead to the plenary power of the Legislature with regard to its allocation and use.<sup>133</sup> The General Assembly has provided for the establishment of non-tributary groundwater rights according to surface land ownership. Non-tributary groundwater rights become vested rights either by construction of a well or an adjudication, with the amount of authorized withdrawals based upon a hundred year life of the non-tributary supply and the acreage amount of surface ownership.<sup>134</sup> Certain Denver Basin deep groundwater formations are the subject of provisions requiring some augmentation of the surface stream; these bear the confusing designation "not non-tributary."<sup>135</sup>

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127. See *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951).

128. See *City of Colorado Springs v. Bender*, 366 P.2d 552, 555 (Colo. 1961).

129. COLO. REV. STAT. §§ 37-90-101 to -143 (1997).

130. See *Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 215 (Colo. 1996); *Danielson v. Vickroy*, 627 P.2d 752, 756 (Colo. 1981).

131. See *Fellhauer v. People*, 447 P.2d 986, 994-95 (Colo. 1968).

132. See COLO. REV. STAT. §§ 37-90-137(2), 37-92-305(5), (6), (8) (1997).

133. See *State v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1316 (Colo. 1983).

134. See COLO. REV. STAT. § 37-90-137(4) (1997); *Bayou Land Co. v. Talley*, 924 P.2d 136 (Colo. 1996).

135. See COLO. REV. STAT. § 37-90-137(9)(c)(I) (1997). (The definition of "not non-tributary" is found at COLO. REV. STAT. § 37-90-103(10.7). "Not nontributary ground water" means ground water located within those portions of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers that outside the boundaries of any designated ground water basin in existence on January 1, 1985, the withdrawal of which will, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101(2)

The Legislature has provided that small capacity wells which draw from tributary aquifers for domestic single household purposes may divert under a presumption of non-injurious effect to other rights. These wells may be adjudicated with a date of priority relating back to issuance of their permit for the purpose of seeking protection vis-a-vis water rights that are junior to them.<sup>136</sup>

### THE ENVIRONMENTAL ERA

In 1965 the Colorado Supreme Court declared that the maintenance of instream flow “is a riparian right and is completely inconsistent with the doctrine of prior appropriation.”<sup>137</sup> However, in 1979, the Court upheld the constitutionality of Colorado’s 1973 statute which allowed the Colorado Water Conservation Board to make and enforce minimum stream flow and lake level appropriations in priority for the purpose of preserving the environment to a reasonable degree.<sup>138</sup> The environmental era had intervened. The Legislature was concerned about potential preemption of Colorado water law if a way to integrate instream flow rights within the appropriation doctrine could not be devised. The Conservation Board’s statutory program requires the Board to consult with and take into account federal agency recommendations, including those of the Forest Service and the U.S. Fish and Wildlife Service, but the ultimate determination of the amount to be appropriated and maintained is assigned to the Conservation Board’s sound discretion under the statute’s criteria.<sup>139</sup>

In contrast to California, Colorado has not adopted the public trust doctrine.<sup>140</sup> Nor is “the public interest” employed as a water allocation factor in Colorado water adjudication proceedings.<sup>141</sup> Nonetheless, since a water right comes into being only by application of water to beneficial use, the inability to obtain a needed regulatory permit or obtain financing for needed waterworks may effectively prevent the maturation of a conditional right into a perfected water right. Colorado’s “can and will” doctrine recognizes that conditional rights, which hold a place in the priority system predicated on actual use being made, might not ripen into water rights.<sup>142</sup> Speculative acquisition or retention of conditional rights is not allowed,<sup>143</sup> and water users hoping to improve the priority status of their rights often challenge each

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and 37-92-102(1)(b), at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal”).

136. See *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739 (Colo. 1997).

137. See *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 406 P.2d 798, 800 (Colo. 1965).

138. See *Colorado River Water Conservation Dist. v. Colorado Water Conservation Board*, 594 P.2d 570, 574-76 (Colo. 1979).

139. See COLO. REV. STAT. § 37-92-102(3), (4) (1997); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 94 (Colo. 1996).

140. See *People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979).

141. See *Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. Partnership*, 929 P.2d 718 (Colo. 1996).

142. See *Board of County Comm’rs v. United States*, 891 P.2d 952, 972 (Colo. 1995).

143. See *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 35 (Colo. 1997); *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979).

others' conditional rights at the time a finding of reasonable diligence is sought from the water court.

The maximum utilization doctrine enunciated in *Fellhauer*<sup>144</sup> has been tempered by the Colorado Supreme Court's reference to "optimum use" requiring that "proper regard for all significant factors, including environmental and economic concerns," be taken into account.<sup>145</sup> The court foreshadowed the possibility that a balancing of resource use might be applicable when it refused to endorse the removal of water loving vegetation as a means for "developing" water free of the river's call.<sup>146</sup> Draining of a peat bog or wetlands,<sup>147</sup> or creating impermeable land surfaces, such as by paving,<sup>148</sup> have likewise been disallowed as a means for obtaining additional consumptive use or augmentation water.

The Endangered Species Act,<sup>149</sup> the Federal Clean Water Act<sup>150</sup> and the Federal Land Policy and Management Act<sup>151</sup> have created significant environmental review and approval requirements attendant to obtaining a federally required permit to build waterworks necessary to perfect a water right.<sup>152</sup> The Environmental Protection Agency ("EPA") vetoed the Two Forks Project Permit under its section 404(c) Clean Water Act authority.<sup>153</sup> At the state level, Eagle County invoked Colorado land use statutes to review a water project of the cities of Aurora and Colorado Springs.<sup>154</sup> In *Riverside Irrigation District v. Andrews*, the court construed section 101(g) of the Clean Water Act<sup>155</sup> as expressing that "Congress did not want to interfere any more than necessary with state water management." Furthermore, the Court refused to decide whether, in the event of irreconcilable conflict, the Endangered Species Act supersedes the congressionally ratified South Platte River Compact.<sup>156</sup> Colorado has worked to avoid head-on conflict. Endangered species recovery plans in the Platte and Upper Colorado River Basins are being pursued in conjunction with Colorado's use of its water compact entitlements.<sup>157</sup>

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144. See *Fellhauer v. People*, 447 P.2d 986, 986 (Colo. 1968).

145. See *Alamosa La Jara Water Users Protection Ass'n. v. Gould*, 674 P.2d 914, 923 (Colo. 1983).

146. See *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321, 1327 (Colo. 1974).

147. *R.J.A., Inc. v. Water Users Ass'n*, 690 P.2d 823, 828 (Colo. 1984).

148. See *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 510 (Colo. 1993).

149. 16 U.S.C. §§ 1531-1544 (1994 and Supp. 1995).

150. 33 U.S.C. §§ 1251-1387 (1994 and Supp. 1995).

151. 43 U.S.C. §§ 1701-1784 (1994 and Supp. 1995).

152. See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 514 (10th Cir. 1985).

153. 33 U.S.C. § 1344(c) (1994 and Supp. 1995). See *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 488-89 (D. Colo. 1996).

154. See *City of Colorado Springs v. Board of County Comm'rs*, 895 P.2d 1105 (Colo. Ct. App. 1995).

155. 33 U.S.C. § 1251(g) (1994 and Supp. 1995).

156. See *Riverside Irrigation Dist.*, 758 F.2d at 513.

157. See David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 623-65 (1997)(examining the Cooperative Agreement For Platte River Research And Other Efforts Relating To Endangered Species Habitats Along The Central Platte River in Nebraska).

Basin wide efforts to meet environmental standards while the states continue development and use of their interstate apportioned waters have precedent. The Colorado River Basin Salinity Control Program is a seven basin state/federal initiative designed to maintain water quality standards for salinity at three compliance points in the Lower Basin. State line salinity standards were deemed unnecessary in light of this undertaking to achieve salinity water quality standards adopted by the EPA.<sup>158</sup> An effort to require EPA permit regulation of dams throughout the United States as point sources of pollution was also rejected by the Federal Court of Appeals.<sup>159</sup> The State of Colorado and several of its water user districts appeared as *amicus* on behalf of EPA in both cases, while environmental organizations active in Colorado appeared as plaintiff in those suits.

Colorado environmental and water user interests joined in supporting the 1986 congressional designation of seventy-five miles of the Cache La Poudre River as a Wild and Scenic River with its attendant creation of a federal water right junior to pre-existing state water rights.<sup>160</sup> These interests also supported the 1993 Colorado Wilderness Act<sup>161</sup> which preserved any pre-existing federal water rights and disclaimed congressional intention to create a wilderness reserved water right with regard to that Act.

State and federal statutes and administrative policies have always affected Colorado's prior appropriation law. The Colorado Water Quality Control Commission has extensive authority to regulate point and non-point sources of pollution,<sup>162</sup> but cannot impose minimum stream flows for pollution program purposes.<sup>163</sup> State water law does not attempt to comprehensively address environmental concerns; those are addressed primarily through land use and environmental regulatory laws, and land and water purchase and reservation programs.

Colorado's system of transferable water rights allows a market in new and changed uses to occur. Riparian water law, unlike prior appropriation law, is not well suited to a market approach because that legal system restricts the use of water to riparian landowners within the watershed, severely limits the amount of water that can be consumed, and does not promote the efficient allocation of water.<sup>164</sup>

Market transfers are grounded in property law and depend upon the right to reduce a public resource to private possession:

Four characteristics (have been identified as) necessary to convert a common property resource to a regime of individual property rights in order to induce market allocation. They are (1) maximum exclusivity within the constraint of the physical nature of the resource; (2)

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158. See *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 288 (D.C. Cir. 1981).

159. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

160. Act of Oct. 30, 1986, Pub. Law No. 99-590, 100 Stat. 3330-32.

161. Colorado Wilderness Act of 1993, Pub. Law No. 103-77, 107 Stat. 756-65.

162. COLO. REV. STAT. § 25-8-101 to -703 (1997).

163. See *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 91-92 (Colo., 1996).

164. See A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES*, 2.05(1) at 2-12.

free transfer at costs which are low relative to the value of the resource; (3) absence of positive and negative externalities that prevent the transfer of the resource or impose excessive, unaccounted for costs on third parties, and (4) a clear, general definition of permitted and prohibited activities.<sup>165</sup>

As a result of over-appropriated streams, environmental permitting requirements for surface diversions, and resistance by local areas to diversions for other areas of the state, cities seeking additional water sources, and use of non-tributary water.<sup>166</sup>

### CONCLUSION

The irrigated use sector contains a large reservoir of water for agricultural production, conserved open space, and infra-structure that has long-lasting value to Colorado. To what extent that resource should support the increasing urbanization of the state will be determined by voluntary market transfers and regulatory choices. Under Colorado law, conditional water rights and water storage rights will continue to function as an essential element in use of the state's allocated share of interstate waters. The needs and values of twenty-first century citizens will shape and reshape a water law which is well-grounded in the history and heritage of this magnificent land.

Prior appropriation law is egalitarian, equitable, and efficient in that: (1) beneficial uses are recognized without regard to the economic value which will be produced therefrom (e.g., the individual subsistence farmer and the manufacturing corporation are equally entitled to appropriate unappropriated water); (2) access to the available supply is based on the need for a beneficial purpose; and (3) no more water belongs to the water right than the amount reasonably necessary under the circumstances to effectuate the use.

If economic efficiency is defined to mean that water should serve the highest value need, then economic efficiency is not achieved by the system except through voluntary transfers in the market place. Furthermore, reallocating water to junior uses by involuntary means to serve emerging social and environmental policy choices is not permitted under the water law, unless the reallocation is carried out through the proper channels of condemnation, with payment of just compensation. Nevertheless, regulation within the police power of local, state and federal governmental authority may significantly affect the operation of the appropriation doctrine. For example, when the necessary permits to construct water works cannot be obtained, a conditional water right may not become a vested, perfected water right.

Because of its birth within the public domain, the West has been, is, and

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<sup>165</sup>. See DeVany et al., *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic Engineering Study*, 21 Stan. L. Rev. 1499 (1969), cited in A. Dan Tarlock, *Law of Water Rights and Resources*, 2.05(1) at 2-11, n.3.

<sup>166</sup>. See *Williams v. Midway Ranches Property Owners Ass'n, Inc.*, 938 P.2d 515, 521-22 (Colo. 1997).

always will be shaped by values of beneficial use and preservation amidst a vast, beautiful, and rapidly urbanizing landscape. Water, the intermediary substance of life, will flow and pool, be guarded and traded, dance and sing, be used, consumed, and returned as Colorado, mother of many rivers, continues to play its vital role in water policy.

## **COLORADO WATER LAW: A SYNOPSIS OF STATUTES AND CASE LAW**

Selections by Justice Gregory J. Hobbs, Jr.

### **Institutes of Justinian**

"By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations."

*Institutes of Justinian*, 2.1.1 (with Introduction, Translation and Notes by Thomas Collett Sandars, 1876).

"All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men."

*Id.* at 2.1.2.

"The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons therefore are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons."

*Id.* at 2.1.4.

### **English Common Law**

"Running water, as far as it is not tidal, belongs prima facie to the owners of the land on either side of it, subject to the public right of navigation, where such exists . . . therefore the public cannot gain by prescription or otherwise a legal right to fish in a non-tidal river, even though it be navigable . . . ."

James Williams, *The Institutes of Justinian Illustrated by English Law* 84 (2d ed. 1893).

### **Constitution of the United States**

#### **Property Clause**

##### **Territory or Property of the United States**

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

U.S. CONST. art. IV, § 3(2).

#### **Commerce Clause**

##### **Power of Congress to Regulate Commerce**

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

U.S. CONST. art. I, § 8(3).

#### **Supremacy Clause Supreme Law**

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby, any things in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST. art. VI, (2).

### **Takings Clause of Fifth Amendment**

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. V.

### **Takings Clause of Fourteenth Amendment**

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, § 1.

### **The Louisiana Purchase of 1803**

Treaty between the United States of America and the French Republic, Apr. 30, 1803, U.S. - Fr., 8 Stat. 200-13.

### **The Lewis and Clark Expedition**

"The object of your mission is single, the direct water communication from sea to sea formed by the bed of the Missouri & perhaps the Oregon."

Letters of the Lewis and Clark Expedition, with Related documents 1783-1854, 136-38 (Donald Jackson ed., 2d ed. 1978) reprinted in Stephen E. Ambrose, *Undaunted Courage: Meriwether Lewis, Thomas Jefferson and the Opening of the American West* 116 (Simon and Schuster 1996).

### **Homestead Act of 1862**

#### **An Act to secure Homesteads to actual Settlers on the Public Domain.**

"[A]ny person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter sec-

tion or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim . . . ."

Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976).

### **Mining Act of 1866**

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed . . . ."

Mining Act of 1866, ch. 262, §9, 14 Stat. 253 (1866) (current version at 43 U.S.C. §661 (1994)).

### **Riparian Doctrine (common law)**

#### **Tyler v. Wilkinson**

"Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, usque ad filum aquae. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all . . . . There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not."

Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312).

**Reasonable Use**  
**Pyle v. Gilbert**

"Under a proper construction [of the pertinent Code sections] every riparian owner is entitled to a reasonable use of the water in the stream. If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof. Every riparian owner is entitled to a reasonable use of the water. Every such proprietor is also entitled to have the stream pass over his land according to its natural flow, subject to such disturbances, interruptions, and diminutions as may be necessary and unavoidable on account of the reasonable and proper use of it by other riparian proprietors. Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another, but each is entitled to a reasonable use of the water with respect to the rights of others."

Pyle v. Gilbert, 265 S.E.2d 584, 587 (Ga. 1980) (quoting Price v. High Shoals Mfg. Co., 64 S.E. 87, 88 (Ga. 1909)).

**Riparian/ Prior Appropriation Hybrid (California Doctrine)**  
**Lux v. Hagin**

"[O]ne who acquired a title to riparian lands from the United States prior to the act of July 26, 1866, could not (in the absence of reservation in his grant) be deprived of his common-law rights to the flow of the stream by one who appropriated its waters after the passage of that act."

Lux v. Hagin, 10 P. 674, 727 (Cal. 1886).

**Colorado Territorial Laws 1861**  
**An Act to Protect and Regulate the Irrigation of Lands****Section 1.**

"That all persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of Colorado Territory, as defined in the Organic Act of said Territory, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river, for the purposes of irrigation, and making said claims available, to the full extent of the soil, for agricultural purposes."

Colo. Territorial Laws 67 (1861).

**Section 2.**

"That when any person, owning claims in such locality, has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water necessary to irrigate his land, or that his farm or land, used by him for agricultural purposes, is too far removed from said stream and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes as herein before stated."

*Id.* at 67.

**Section 4.**

"That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire county through which it passes, then the nearest justice of the peace shall appoint three commissioners as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water upon certain or alternate weekly days to different localities, as they may, in their judgment, think best for the interests of all parties concerned, and with due regard to the legal rights of all . . . ."

*Id.* at 68.

**Prior Appropriation (Colorado Doctrine)**

**Yunker v. Nichols**

"When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said, that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law."

Yunker v. Nichols, 1 Colo. 551, 555 (1872).

"I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water for the irrigation of so much of his

land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate . . . ."  
*Id.* at 570.

"It seems to me, therefore that the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed."  
*Id.*

"If we say that the statute confers the right, then the statute may take it away, which cannot be admitted."  
*Id.*

**Colorado Constitution of 1876**  
**Article XVI Mining and Irrigation**  
**Irrigation**

**Section 5. Water of Streams of public property.**

"The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."  
COLO. CONST. art. XVI, § 5.

**Section 6. Diverting unappropriated water—priority preferred uses.**

"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the 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."  
COLO. CONST. art. XVI, § 6.

**Section 7. Right-of-way for ditches, flumes.**

"All persons and corporations shall have the right-of-way across public, 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."  
COLO. CONST. art. XVI, § 7.

### **Adjudication Act of 1879**

#### **Section 18.**

"It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural stream of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream."

1879 Sess. Laws at 99-100.

#### **Section 19.**

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceeding for said purpose, as hereinafter provided for, shall be commenced . . . ."

1879 Sess. Laws at 99-100.

### **Adjudication Act of 1881**

#### **Section 1.**

"In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A.D. 1881, file with the clerk of the district court having jurisdiction of priority of

right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number \_\_\_\_\_, as the case may be . . . ."

1881 Sess. Laws at 142.

### **Coffin v. Left Hand Ditch Company**

"We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

"We have already declared that water appropriated and diverted for a beneficial purpose, is, in this country, not necessarily an appurtenance to the soil through which the stream supplying the same naturally flows. If appropriated by one prior to the patenting of such soil by another, it is a vested right entitled to protection, though not mentioned in the patent."

*Id.* at 449.

"In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed."

*Id.*

### **Thomas v. Guiraud**

"We concede that Guiraud could not appropriate more water than was necessary to irrigate his land; that he could not divert the same for the purpose of irrigating lands which he did not cultivate or own, or hold by possessory right or title, to the exclusion of a subsequent bona fide appropriator."

Thomas v. Guiraud, 6 Colo. 530, 532 (1883).

"The true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial."

*Id.* at 533.

### **Larimer County Reservoir Co. v. People *ex rel.* Luthe**

"While a diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed. Of course such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay . . . . The act of utilizing as a reservoir a natural depression, which included the bed of the stream, or which was found at the source thereof, was not in and of itself unlawful."

Larimer County Reservoir Co. v. People *ex rel.* Luthe, 9 P. 794, 796 (Colo. 1886).

"He who attempts to appropriate water in this way does so at his peril. He must see to it that no legal right of prior appropriators, or of other persons, is in any way interfered with by his acts. He cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow, to the detriment of others who have acquired legal rights therein superior to his . . . ."

*Id.*

"While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from natural streams upon the public domain, that body has the power to regulate the manner of effecting such appropriation or diversion. It may, by reasonable and constitutional legislation, designate how the water shall be turned from the stream, or how it shall be stored and preserved."

*Id.* at 797.

### **Farmers High Line Canal & Reservoir Co. v. Southworth**

"It is well established that no mere diversion of water from a stream will constitute the constitutional appropriation. To make it such it must be applied to some beneficial use, and in case of irrigation it must be actually applied to the land before the appropriation is complete."

Farmers High Line Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1029 (Colo. 1889).

**Strickler v. City of Colorado Springs**

"The fundamental principle of this system is that priority in point of time gives superiority of right among appropriations for like beneficial purposes . . . . [I]f . . . the appropriator of water from a stream be held to have no claim upon the water of the tributaries of that stream, then defendant's water supply is liable to be cut off by settlers above at any time,—a conclusion so manifestly unjust that it must be discarded."  
Strickler v. City of Colorado Springs, 26 P. 313, 315 (Colo. 1891).

"The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer, as contended by appellee, would in many instances destroy much of its value . . . . We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby."  
*Id.* at 316.

**Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co.**

"[W]e are quite of the opinion that the title and rights of the prior appropriating company were not absolute, but conditional, and they were obligated to so use the water that subsequent locators might, like lower riparian owners, receive the balance of the stream unpolluted, and fit for the uses to which they might desire to put it."  
Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co., 48 P. 828, 832 (Colo. Ct. App. 1897) (citations omitted).

"It is therefore quite consonant with the apparent purpose and declared will of the people to subject the rights of the appropriators of the public waters of the state to such limitations as shall tend not only to conserve the property interests which the appropriators may acquire, but to preserve the remaining unappropriated waters in their original condition for the use and benefit of late comers, who by their labors and industry may further develop our interests and resources."  
*Id.*

### **National Forest Organic Act of 1897**

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

National Forest Organic Act of 1897, ch. 2, § 1, 30 Stat. 36 (1897) (current version at 16 U.S.C. § 481 (1994)).

### **Reclamation Act of 1902**

#### **§ 372. Water right as appurtenant to land extent of right.**

"The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Reclamation Act of 1902, ch. 1093, § 8, 32 Stat 390 (1902) (current version at 43 U.S.C. § 372 (1994)).

#### **§ 383. Vested rights and State laws unaffected.**

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof."

Reclamation Act of 1902, ch. 1093, § 8, 32 Stat 390 (1902) (current version at 43 U.S.C. § 383 (1994)).

### **Adjudication Act of 1903**

#### **Section 1.**

"That the owner or owners of any water rights derived from any natural stream, water-course or any other source, acquired by appropriation and used for any beneficial purpose other than irrigation, may have his or their right thereto established and decreed by the district court having jurisdiction of the adjudication of water rights for irrigation purposes in the water district in which said water rights are si-

tuated, by petitioning said court in the same manner and by complying with the procedure and the requirements of the law now applicable to the adjudication of water rights for irrigation purposes."

1903 Colo. Sess. Laws at 297.

### **New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co.**

"The object of the irrigation statutes providing for the adjudication of priorities was to settle such priorities and secure the orderly distribution of water for irrigation purposes. To further effect this object officials have been designated, whose duty it is to distribute the water in accordance with the adjudication. The decree in such proceedings is the guide for such officials from which they must determine, in the discharge of their duties, the relative rights of parties, the volume to which different ditches are entitled, the point of diversion, and all other data necessary to a distribution of water in accordance with its provisions. To obtain an order allowing a change in the point of diversion is, in effect, a modification or change in the adjudication decree. In order to protect officials in the discharge of their duties in distributing water, to preserve the peace, to prevent a multiplicity of suits, to relieve the officer from being required to ascertain, at his peril, any of the various questions which he might be required to consider when requested to change the point of diversion, and finally, that there may be a judicial ascertainment of the right to such change, which shall bind all parties and not leave the place of diversions to the whim of interested parties, the act of 1899 was passed . . . . All persons who may be affected by the desired change must be notified of the proceeding, and given an opportunity to be heard before the court is authorized to enter an order allowing such change."

New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co., 87 P. 799, 800 (Colo. 1906).

### **Kansas v. Colorado**

"[Each State] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."

Kansas v. Colorado, 206 U.S. 46, 94 (1907).

"[I]f the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes. The decree will also dismiss the bill of the state of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river."

*Id.* at 117-18.

### **Winters v. United States**

"The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation."

*Winters v. United States*, 207 U.S. 564, 575 (1907).

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."

*Id.* at 577 (citations omitted).

### **Town of Sterling v. Pawnee Ditch Extension Co.**

"Section 6, art. 16, Const., states that those using water for domestic purposes shall have the preference over those claiming for any other purpose, but this provision does not entitle one desiring to use water for domestic purposes, as intended by the defendant town of Sterling to take it from another who has previously appropriated it for some other purpose, without just compensation. Rights to the use of water for a beneficial purpose, whatever the use may be, are property, in the full sense of that term, and are protected by section 15, art. 2, Const.,

which says that 'private property shall not be taken or damaged for public or private use without just compensation.'"

*Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P. 339, 340 (Colo. 1908).

"The law contemplates an economical use of water. It will not countenance the diversion of a volume from a stream which, by reason of the loss resulting from the appliances used to convey it, is many times that which is actually consumed at the point where it is utilized. Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated or by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss, or loss of a volume which is greatly disproportionate to that actually consumed. An appropriator, therefore, must exercise a reasonable degree of care to prevent waste through seepage and evaporation in conveying it to the point where it is used."

*Id.* at 341-42 (citations omitted).

#### **Sternberger v. Seaton Mountain Electric, Light, Heat & Power Co.**

"Not only the name of the corporation, but certain allegations of the complaint, indicate that defendant corporation was organized for a legitimate purpose and can lawfully acquire, by making an appropriation in its own behalf, or by purchase a valid appropriation of the waters of a natural stream in this state, by using which, as an agency, it may produce and sell light, heat, and power."

*Sternberger v. Seaton Mountain Electric, Light, Heat & Power Co.*, 102 P. 168, 170 (Colo. 1909).

#### **Town of Lyons v. City of Longmont**

"The sole question involved is, whether the city of Longmont has the right to condemn a right of way for its pipeline through the streets and alleys of the town of Lyons. Independent of statutory provisions cited by counsel for plaintiff in error, we think this right is conferred by the constitutional provision above quoted. It declares that all persons and corporations shall have the right of way across public, private and corporate lands, for the purpose of conveying water for domestic purposes. The intent of a constitutional provision is the law. Manifestly the intent of the provision under consideration was to confer upon all

persons and corporations the right of way across lands, either public or private, by whomsoever owned, through which to carry water for domestic purposes, and necessarily embraces a municipal corporation seeking a right of way for such purposes. It covers every form in which water is used, domestic, irrigation, mining, and manufacturing, . . . the kind of conduit employed and utilized is of no material moment . . . ."

Town of Lyons v. City of Longmont, 129 P. 198, 200 (Colo. 1913).

### **Comstock v. Ramsay**

"We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine, 'first in time first in right,' and to substitute in its stead, fortunately, as yet, an unrecognized one, 'last in time first in right.'"

Comstock v. Ramsay, 133 P. 1107, 1110 (Colo. 1913).

### **Wyoming v. Colorado**

"In suits between appropriators from the same stream, but in different states recognizing the doctrine of appropriation, the question whether rights under such appropriations should be judged by the rule of priority has been considered by several courts, state and federal, and has been uniformly answered in the affirmative."

Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

### **Ft. Morgan Reservoir & Irrigation Co. v. McCune**

"Under the statutes and decisions of this court, the water officials must distribute water according to the tabulated decrees; they have to do only with decreed priorities; with unappropriated waters they have no concern."

Ft. Morgan Reservoir & Irrigation Co. v. McCune, 206 P. 393 (Colo. 1922).

"So long as all the water is required to supply decreed priorities, said officials should permit no water to be diverted for new appropriations. Whenever there is a surplus of water, either from floods, or because of small demands therefor by appropriators, the officers have no right to interfere in the diversion of such surplus. All new appropriations must be made from surplus water, whether for storage or direct irrigation." *Id.* at 394.

### **California Oregon Power Co. v. Beaver Portland Cement Co.**

"What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

### **Hinderlider v. La Plata River & Cherry Creek Ditch Co.**

"Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

### **Safranek v. Town of Limon**

"Under our Colorado law, it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. The burden of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence." *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951) (citations omitted).

### **McCarran Amendment of 1952**

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit."

McCarran Amendment of 1952, ch. 651, title II, § 208 (a)-(c), 66 Stat. 560 (1952) (current version at 43 U.S.C. § 666 (1994)).

**City and County of Denver v. Northern Colorado Water Conservancy Dist.**

"[A]n appropriation is not complete until actual diversion and use, still, the right may relate back to the time when the first open step was taken giving notice of intent to secure it, (4) that right to relate back is conditional that construction thereafter was prosecuted with reasonable diligence, and conditional further that there was then 'a fixed and definite purpose to take it up and carry it through.'"

City and County of Denver v. Northern Colorado Water Conservancy Dist., 276 P.2d 992, 999 (1954) (citations omitted).

"The priority of a water right may not be dated back to the date of survey or filing of plat of a diversion proposal which has been abandoned in favor of another and very different plan."

*Id.* at 1001.

"The doctrine of relation back is a legal fiction in derogation of the constitution for the benefit of claimants under larger and more difficult projects and should be strictly construed."

*Id.*

**Federal Power Comm'n v. Oregon**

"There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others."

Federal Power Comm'n v. Oregon, 349 U.S. 435, 444-45 (1955) (footnote omitted).

### **Colorado Springs v. Bender**

"At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below, where there would be an adequate supply for the senior's lawful demand."

Colorado Springs v. Bender, 366 P.2d 552, 555 (Colo. 1961) (citation omitted).

"In determining the facts mentioned . . . the conditions surrounding the diversion by the senior appropriator must be examined as to whether he has created a means of diversion from the aquifer which is reasonably adequate for the use to which he has historically put the water of his appropriation. If adequate means for reaching a sufficient supply can be made available to the senior, whose present facilities for diversion fail when water table is lowered by acts of the junior appropriators, provision for such adequate means should be decreed at the expense of the junior appropriators, it being unreasonable to require the senior to supply such means out of his own financial resources."

*Id.* at 556.

### **Arizona v. California**

"We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide

river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."

Arizona v. California, 373 U.S. 546, 565-66 (1963) (footnote omitted).

**Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.**

"There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream."

Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798, 800 (Colo. 1965).

"[M]aintenance of the 'flow' of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation."

*Id.*

**Colorado Groundwater Management Act of 1965**

"It is declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section 37-90-103(6). While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner defined in this article."

COLO. REV. STAT. § 37-90-102(1) (1997).

**Fellhauer v. People**

"It is implicit in these constitutional provisions that, along with vested rights, there shall be maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of maximum utilization and how constitutionally that doctrine can be integrated into the law of vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it." *Fellhauer v. People*, 447 P.2d 986, 994 (Colo. 1968).

### **Water Right Determination and Administration Act of 1969**

"It is hereby declared to be the policy of the state of Colorado that all water in or tributary to natural surface streams, not including nontributary ground water as that term is defined in section 37-90-103, originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of article XVI of the state constitution and this article. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state." *COLO. REV. STAT. § 37-92-102(1)(a)* (1997).

### **United States v. District Court *ex rel.* Eagle County**

"[W]e do not read § 666(a)(2) [of the McCarran Amendment] as being restricted to appropriative rights acquired under state law . . . . (2) covers rights acquired by appropriation under state law and rights acquired 'by purchase' or 'by exchange', which we assume would normally be appropriative rights. But it also includes water rights which the United States has 'otherwise' acquired. The doctrine of *ejusdem generis* is invoked to maintain that 'or otherwise' does not encompass the adjudication of reserved water rights, which are in no way dependent for their creation or existence on state law. We reject that conclusion for we deal with an all-inclusive statute concerning the adjudication of rights to the use of water of a river system' which in §666(a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights."

United States v. District Court *ex rel.* Eagle County, 401 U.S. 520, 524 (1971) (footnote omitted).

### **United States v. District Court for Water Div. No. 5**

"It is pointed out that the new statute [1969 Colorado Adjudication Act] contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded."

United States v. District Court for Water Div. No. 5, 401 U.S. 527, 529 (1971).

"The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review."

*Id.* at 529-30.

### **City and County of Denver v. Fulton Irrigating Ditch Co.**

"'[D]eveloped water' is that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it . . . . It follows that the developers without hindrance could use, re-use, make successive use of and dispose of the water."

City and County of Denver v. Fulton Irrigating Ditch Co., 506 P.2d 144, 147 (Colo. 1972).

### **Federal Water Pollution Control Act**

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

33 U.S.C. 1251(a) (1994 and Supp. 1995) (originally enacted June 30, 1948 as Act, ch. 758, 62 Stat. 1155).

**Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.**

"The planting and harvesting of trees to create water rights superior to the oldest decrees on the Arkansas would result in a harvest of pandemonium. Furthermore, one must be concerned that once all plant life disappears, the soil on the banks of the river will slip away, causing irreparable erosion."

We are not unmindful that the statute speaks of the policy of maximum beneficial and integrated use of surface and subsurface water. But efficacious use does not mean uplifting one natural resource to the detriment of another. The waters of Colorado belong to the people, but so does the land. There must be a balancing effect, and the elements of water and land must be used in harmony to the maximum feasible use of both."

*Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321, 1327 (Colo. 1974).

**Jacobucci v. District Court**

"Mutual ditch companies in Colorado have been recognized as quasi-public carriers."

*Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975).

"[T]he shares of stock . . . represent a definite and specific water right, as well as a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized."

*Id.* at 672.

"The condemnation action here in issue has the potential of seriously disrupting the shareholders' property interests. That the water rights owned by Farmers' shareholders are property rights is well established by Colorado law."

*Id.* at 675 (citations omitted).

"Their ability to protect those individualized interests would surely be impaired if this action were allowed to proceed in their absence."

*Id.*

**Colorado River Water Conservation Dist. v. United States**

"We conclude that the state court had jurisdiction over Indian water rights under the [McCarran] Amendment."

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 809 (1976).

"The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system."

*Id.* at 819.

### **Federal Land Policy and Management Act of 1976**

"The Congress declares that it is the policy of the United States that— (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in the Act, it is determined that disposal of a particular parcel will serve the national interest . . . ."

43 U.S.C. § 1701(1) (1994).

### **California v. United States**

"[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters."

California v. United States, 438 U.S. 645, 662 (1978).

### **United States v. New Mexico**

"Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

United States v. New Mexico, 438 U.S. 696, 700 (1978) (footnote omitted).

"This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation was created,

it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."

*Id.* at 701-02 (footnote and citations omitted).

"Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress' failure to recognize these goals as purposes of the national forests, it would defeat the very purpose for which Congress did create the national forest system . . . . The water that would be 'insured' by preservation of the forest was to 'be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.' As this provision and its legislative history evidence, Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West. The government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for purposes quite inconsistent with this goal."

*Id.* at 711-13 (footnote and citations omitted).

### **Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.**

"To initiate an appropriation, two elements—an intent and an act—must co-exist. First, the applicant must have an intent to take the water and put it to beneficial use. Secondly, the applicant must demonstrate this intent by an open physical act sufficient to constitute notice to third parties."

Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566, 568 (Colo. 1979) (footnote and citation omitted).

"Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship,

with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would—as a practical matter—discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains."

*Id.*

### **Colorado River Water Conservation Dist. v. Colorado Water Conservation Board**

"[I]t is obvious that the General Assembly in the enactment of S.B. 97 certainly did intend to have appropriations for piscatorial purposes without diversion.

We hold that under S.B. 97 the Colorado Water Board can make an in-stream appropriation without diversion in the conventional sense." Colorado River Water Conservation Dist. v. Colorado Water Conservation Board, 594 P.2d 570, 574 (Colo. 1979).

"The legislative intent is quite clear that these appropriations are to protect and preserve the natural habitat and that the decrees confirming them award priorities which are superior to the rights of those who may later appropriate. Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed."

*Id.* at 575.

"The legislative objective to preserve reasonable portions of the natural environment in Colorado. Factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing should be delegated to an administrative agency which may avail itself of expert scientific opinion."

*Id.* at 576.

### **People v. Emmert**

"It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands."

People v. Emmert, 597 P.2d 1025, 1027 (1979).

"We recognize the various rationales employed by courts to allow public recreational use of water overlying privately owned beds, i.e., (1) practical considerations employed in water right states such as Florida, Minnesota and Washington; (2) a public easement in recreation as an incident of navigation; (3) the creation of a public trust based on usability, thereby establishing only a limited private usufructary right; and (4) state constitutional basis for state ownership. We consider the common law rule of more force and effect, especially given its long-standing recognition in this state."

*Id.* at 1027.

"The interest at issue here, a riparian bed owner's exclusive use of water overlying his land, is distinguished from the right of appropriation. Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands. Without permission, the public cannot use such waters for recreation. If the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end."

*Id.* at 1029 (citations omitted).

### **Weibert v. Rothe Bros.**

"We have always recognized limitations on the right of the owner of a water right to divert at the full decreed rate at all times. The owner of a water right has no right as against a junior appropriator to waste water, i.e., to divert more than can be used beneficially. Nor may he extend the time of diversion to enable him to irrigate lands in addition to those for which the water was appropriated. These limitations are read into every water right decree by implication."

"The right to change a point of diversion or type of use with respect to water rights decreed for irrigation purposes is limited to the 'duty of water' with respect to the decreed place of use."

*Weibert v. Rothe Bros.*, 618 P.2d 1367, 1371 (1980) (citations omitted).

"The right to change a point of diversion or place of use is also limited in quantity and time by historical use . . . 'Historical use' as a limitation on the right to change a point of diversion has been considered to be an application of the principle that junior appropriators have vested

rights in the continuation of stream conditions as they existed at the time of their respective appropriations."

*Id.* at 1371-72 (citations omitted).

"A plan for augmentation is to be approved by the water judge based on the same criterion involved in evaluating an application for change of water right . . . ."

*Id.* at 1373.

"In order to determine the adequacy of the plan to accomplish its intended purpose, it is necessary to consider the adequacy of the replacement water rights."

*Id.*

### **Danielson v. Vickroy**

"The Colorado Ground Water Management Act . . . was enacted in 1965 to establish a procedure for appropriation of designated ground water and for devoting it to beneficial use. It was designed to permit the full economic development of designated ground water resources. Designated ground water, the definition of which is considered in more detail later, includes water not tributary to any stream, and other water not available for the fulfillment of decreed surface rights."

*Danielson v. Vickroy*, 627 P.2d 752, 756 (Colo. 1981) (citations omitted).

"The Management Act creates a Ground Water Commission . . . which has authority to determine designated ground water basins . . . ."

*Id.*

### **Fort Lyon Canal Company v. Catlin Canal Company**

"The concept that the rights incident to water right ownership can be modified by private agreement is not novel."

*Fort Lyon Canal Company v. Catlin Canal Company*, 642 P.2d 501, 506 (Colo. 1982).

"[A] mutual ditch company bylaw imposing reasonable limitations, additional to those contained in section 37-92-305, C.R.S. 1973, upon the right of a stockholder to obtain a change in the point of diversion can be enforced."

*Id.* at 508.

"We find no reason in public policy to deny the directors, pursuant to bylaw authorization, the right to review a proposed change of place of delivery to assure that it does not create the injury upon which the by-law focuses."

*Id.* at 509 (footnote omitted).

### **Navajo Development Co. v. Sanderson**

"Federal reserved water rights, by their nature, exist from the time that the legislative or executive action created the federal enclave to which the water right attaches. If Congress or the President wish to obtain more water for the federal lands after the initial reservations, they must use the state appropriation machinery or condemn the desired water."

Navajo Development Co. v. Sanderson, 655 P.2d 1374, 1379 (Colo. 1982) (citations omitted).

"Federal reserved water rights must be understood as a doctrine which places a federal appropriator within the state appropriation scheme by operation of federal law."

*Id.*

"A grantor cannot warrant that it will snow or rain, or that all senior appropriators will not withdraw their share of water. The value of a water right is its priority and the expectations which that right provides."

*Id.* at 1380.

### **United States v. City and County of Denver**

"The power of the United States to legislate a federal system for the use and disposition of unappropriated non-navigable waters on federal lands generally, and on reserved lands specifically, is derived from the Property Clause of the United States Constitution."

United States v. City and County of Denver, 656 P.2d 1, 17 (Colo. 1982) (footnote omitted).

"[T]he existence of a federal reservation does not in and of itself denote a reservation of water. Rather, there must be a determination of the precise federal purpose to be served, a determination that the pur-

pose would be frustrated without water, and a determination of the minimum quantity of water required to fulfill the purpose."

*Id.* at 18.

"For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water—the minimal need . . . required for such purposes."

*Id.* at 20.

"Thus, any water in excess of that needed to fulfill the purposes of the national forests was made available by congress to subsequent private appropriators."

*Id.* at 22.

"We conclude that MUSYA [Multiple Use Sustained Yield Act] does not reserve additional water for outdoor recreation, wildlife, or fish purposes. We believe that Congress intended that the federal government proceed under state law in the same manner as any other public or private appropriator."

*Id.* at 27.

### **Public Trust – California**

#### **National Audubon Soc'y v. Superior Court of Alpine County**

"This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values . . . the two systems of legal thought have been on a collision course."

National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983).

"In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control

over the navigable waters of the state and the lands underlying those waters."

*Id.* at 712.

"Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs."

"The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."

*Id.* at 728 (footnote omitted).

#### **Alamosa La Jara Water Users Protection Ass'n v. Gould**

"We note that the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers. Section 37-92-501(2)(e) makes clear that the objective of 'maximum use' administration is 'optimum use.' Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns."

*Alamosa La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 935 (Colo. 1983) (footnote omitted).

#### **Colorado v. Southwestern Colo. Water Conservation District**

"[W]e believe that, given the state's plenary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilization of this unique resource."

*State v. Southwestern Colo. Water Conservation District*, 671 P.2d 1294, 1316 (Colo. 1983).

"Nontributary ground water is not subject to appropriation under Colo. Cons. Art. XVI, §§ 5 and 6, or to adjudication or administration under the 1969 Act. The modified doctrine of prior appropriation provided for the 1965 Act applies to nontributary ground water, and rights to such water in designated ground water basins must be obtained through the procedures established in that Act."

*Id.* at 1319.

"In light of the flexible approach taken in the case law toward application of the 'beneficial use' concept, and given the legislative expressions of concern for reclamation of mined land and abatement of dust pollution, we believe that land reclamation and dust control are beneficial uses."

*Id.* at 1322.

**Great Western Sugar Co. v. Jackson Lake Reservoir and Irrigation Co.**

"Absent some express exception, a shareholder of stock in a mutual ditch company is entitled to a ratable portion of the water obtained by exercise of the company's water rights."

Great Western Sugar Co. v. Jackson Lake Reservoir and Irrigation Co., 681 P.2d 484, 490 (Colo. 1984).

"The right of a shareholder of a mutual ditch company to change its water rights is limited by the requirement that such change not injure others who possess vested water rights."

*Id.* at 493.

**Masters Investment Co., Inc. v. Irrigationists Ass'n.**

"In Colorado, the issue of whether a water right has been abandoned invariably turns on the question of whether the owner of the right intended to abandon the right."

Masters Investment Co., Inc. v. Irrigationists Ass'n., 702 P.2d 268, 271 (Colo. 1985).

"Evidence of an unreasonably long period of non-use is sufficient to create a presumption of the owner's intent to abandon, requiring the owner to produce some evidence supporting the argument that the owner did not intend to abandon the water right."

*Id.* at 272.

**Riverside Irrigation Dist. v. Andrews**

"Plaintiffs argue that, even if the Corps can consider effects of changes in water quantity, it can do so only when the change is a direct effect of the discharge. In the present case, the depletion of water

is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge. However, the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. To require it to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose. The fact that the reduction in water does not result 'from direct federal action does not lessen the appellee's duty under § 7 [of the Endangered Species Act].' The relevant consideration is the total impact of the discharge on the crane." *Riverside Irrigation Dist. v. Andrews*, 758 F. 2d 508, 512 (1985) (citations omitted).

"The Wallop Amendment does, however, indicate 'that Congress did not want to interfere any more than necessary with state water management.' A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process.

We need not reach the question raised by plaintiffs of whether Congress can unilaterally abrogate an interstate compact. The action by the Corps has not denied Colorado its right to water use under the South Platte River Compact."

*Id.* at 513-14 (citation omitted).

### **United States v. Bell**

"The resume notice provision of the Act, § 37-92-302(3), 15 C.R.S. (1973 & 1985 Supp.), requires the water clerk to prepare a resume of all applications in the water division filed during the preceding month, to publish the resume in newspapers of general circulation, and to mail a copy of the resume to persons who will be affected or to those who have requested resumes."

*United States v. Bell*, 724 P.2d 631, 636 (Colo. 1986).

"Under Colorado law, vested appropriative water rights are subject to the postponement doctrine set out in section 37-92-306, 15 C.R.S. (1973). Priority of appropriation determines the relative priority among water rights or conditional water rights awarded in one calendar year, but, regardless of the date of appropriation, water rights or conditional water rights decreed in one year are necessarily junior to

all priorities awarded in decrees in prior years. § 37-92-306. Water rights are obtained by a combination of acts and intent constituting appropriation and are not dependent upon adjudication. [B]ut failure to adjudicate the rights results in the rights being junior to rights previously adjudicated . . . . The priority of unadjudicated water rights, relative to previously adjudicated water rights, is therefore 'postponed.'

Because the United States was not subject to joinder prior to the McCarran Amendment and its absence from previous adjudications was privileged, once it is properly joined and provided the opportunity to adjudicate its claims, it may be decreed reserved water rights with priorities that antedate other adjudicated water rights to the date of the reservation. To that extent the postponement doctrine does not prevent the United States from receiving the priorities to which it would otherwise have been entitled. However, the postponement doctrine does apply to the United States' amendment claiming water from the mainstem of the Colorado River. Were the amendment to relate back to the original application, and thus antedate prior claims, the purposes of the McCarran Amendment would be frustrated, and the United States would have avoided the equivalent of a filing deadline."

*Id.* at 641-42 (footnotes and citations omitted).

### **FWS Land and Cattle Co. v. State Div. of Wildlife**

"[F]ollowing the enactment of section 37-92-305(9)(b), an applicant seeking a conditional decree must prove by a preponderance of the evidence that the appropriation will be completed with diligence before a conditional decree may be issued."

FWS Land and Cattle Co. v. State Div. of Wildlife, 795 P.2d 837, 840 (Colo. 1990).

"FWS must be able to establish that water 'can and will be diverted, stored, or otherwise captured, possessed, and controlled . . . and that the project can and will be completed with diligence and within a reasonable time.' The ownership of and an applicant's right of access to a reservoir site are appropriate elements to be considered in the determination of whether a storage project will be completed. In granting DOW's motion for summary judgment, the water court properly considered FWS's ability to use the state lands for increased storage purposes."

*Id.*

**City of Thornton v. City of Fort Collins**

"To establish the date of the appropriation, the applicant must show the 'concurrence of the intent to appropriate water for application to beneficial use with an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties.' The concurrence of intent and overt acts qualifies as the first step toward an appropriation of water, and the date on which the first step is taken determines the date of the appropriation."

City of Thornton v. City of Fort Collins, 830 P.2d 915, 924-25 (Colo. 1992) (citation omitted).

"The relevant acts 'must be of such character as to perform three functions . . . .' The three required functions are: '(1) to manifest the necessary intent to appropriate water to beneficial use; (2) to demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) to constitute notice to interested parties of the nature and extent of the proposed demand upon the water supply.'"

*Id.* at 925.

"[T]he appropriation date cannot be set before the latest date in that series, which is the date on which it can be said that the first step has been taken to appropriate water."

*Id.*

"Water can be appropriated either by diverting water or by otherwise controlling water. An application for a conditional water right may be adjudicated if either diversion of water or control of water is established, assuming that the resultant use is beneficial. A diversion in the conventional sense is not required."

*Id.* at 929.

"This statute [37-92-103(4)] provides that water appropriated for municipal, recreation, piscatorial, fishery and wildlife purposes is water put to beneficial uses."

*Id.* at 930.

"The type of beneficial use to which the controlled water is put may mean that the water must remain in its natural course. This is not an appropriation of a minimum stream flow, an appropriation given exclusively to the CWCB. A minimum stream flow does not require removal or control of water by some structure or device. A minimum

stream flow between two points on a stream or river usually signifies the complete absence of a structure or device."

*Id.* at 931.

"[I]t is clear that the Nature Dam is a structure which either removes water from its natural course or location or controls water within its natural course or location given that the Poudre's 'historic' channel may be considered the River's natural course or location. The uses of the Poudre River water so controlled are recreational, piscatorial and wildlife uses, all valid under the Act."

*Id.*

"In general, boat chutes and fish ladders, when properly designed and constructed, are structures which concentrate the flow of water to serve their intended purposes. A chute or ladder therefore may qualify as a 'structure or device' which controls water in its natural course or location under section 37-92-103(7)."

*Id.* at 932.

**Board of County Comm'rs of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.**

"As we have previously determined, the provisions of the 1975 contract demonstrate the District's control over the application of refill water in the Taylor Park Reservoir to further fishery and recreational beneficial uses. The contract authorizes the District to request the Association to release refill water from the Taylor Park Reservoir, with the approval of the United States, and to participate in supervising and coordinating exchanges of water between the Aspinall Unit and the Taylor Park Reservoir. It is undisputed that refill water was in fact released from the Taylor Park Reservoir."

Board of County Comm'rs of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist, 838 P.2d 840, 849 (Colo. 1992).

"The evidence also supports the water court's finding that these releases resulted in the following specific benefits, with no injury to any downstream junior appropriations: easing headgate management by downstream irrigators; aiding fisheries by avoiding disruption of spawn and fry life stages and maintaining constant flows within an optimum range for all life stages; reducing flooding to the benefit of landowners; enhancing recreation uses by providing more predictable river and boating flows; and minimizing reservoir spills."

*Id.* at 849-50.

**Board of County Comm'rs of the County of Arapahoe v. United States**

"A conditional water right decree does not reflect actual water usage. The extent to which a conditional decree will be perfected cannot be predicted with certainty and depends upon the completion of the requirements necessary to appropriate and put the water to a beneficial use."

Board of County Comm'rs of the County of Arapahoe v. United States, 891 P.2d 952, 970 (Colo. 1995).

"The water court's interpretation of the 'can and will' statute prohibits future appropriations based on unrealistically high assumptions of water utilization by holders of absolute and senior conditional water rights decrees."

*Id.*

"Although a conditional water rights decree may affect the calculation of the availability of water when the rights are exercised, it is difficult to predict whether, and to what extent, the appropriation will be completed. Rather than speculate about the extent to which conditional rights will be exercised, and without the assumption that conditional rights will be exercised to the decreed amount, river conditions existing at the time of the application for a conditional water rights decree should be considered to determine water availability. Present conditions provide a more accurate representation of what water is being beneficially used and what water is available for appropriations. Conditional water rights under which diversions have not been made or none are being made should not be considered in determining water availability."

*Id.* at 970-71.

"We have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs. The degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate."

*Id.* at 972.

### **Kansas v. Colorado**

"Article IV-D of the Compact permits future development and construction along the Arkansas river Basin provided that it does not materially deplete stateline flows 'in usable quantity or availability.'" Kansas v. Colorado, 514 U.S. 673, 684-85 (1995).

"[I]mproved and increased pumping by existing wells clearly falls within Article IV-D's prohibition against 'improved or prolonged functioning of existing works,' if such action results in 'materia[l] deplet[ions] in usable' river flows."  
*Id.* at 690.

### **Simpson v. Highland Irrigation Company**

"[T]he Engineer can and should enforce compact delivery requirements with regard to Colorado water rights, adhering to the terms of the Compact and consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration. In this manner, citizens of Colorado can partake reliably of the state's compact apportionment through property rights perfected for beneficial use within the state."  
Simpson v. Highland Irrigation Company, 917 P.2d 1242, 1248 (1996) (citation omitted).

"Colorado law favors efficient water management, optimum use, and priority administration."  
*Id.* at 1252 (footnote omitted).

"Its priority is the essential element of a Colorado water right. Under the decreed, priority, the owner or beneficiary of a water right is entitled to effectuate capture, possession, and control of a specified quantity of water from the physically available, decreed source of supply at an identified point of diversion for application to beneficial use to the exclusion of all other uses not then operating in decreed priority."  
*Id.* at 1252 n.17.

"Security for the rights of Colorado water users largely depends upon the sound exercise of the Engineer's diversion curtailment enforcement power."

*Id.* at 1253.

### **Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.**

"The [1965 Ground Water Management] Act creates a permitting system for the allocation and use of ground waters within designated ground water basins. The Commission is empowered to act on conditional and final well permit applications, changes of water rights to designated ground water . . . and to 'supervise and control the exercise and administration of all rights acquired to the use of designated ground water.'"

Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd., 919 P.2d 212, 215 (Colo. 1996).

"Here, the ground water judge for Adams County recognized that APA rulemaking review in the Denver District Court would 'provide for uniformity in review of rules in one central authority rather than providing for the balkanization of decision making.' The ground water judge correctly interpreted the Act and the APA. The 'acts' and 'decisions' of the Commission referenced in section 37-90-115 are non-rulemaking in nature, such as those involving the application of statutes or rules to specific well permit applications, water rights, change of water rights, or other matters focusing on particular water users in specific circumstances."

*Id.* at 220-21 (citation omitted).

### **Bayou Land Co. v. Talley**

"[I]t is clear that the legislature intended from its enactment of Senate Bill 213 and later Senate Bill 5 to confer control over nontributary ground water to owners of the overlying land. The legislature has done so by making ownership of land or consent of the landowner a prerequisite to application for a well permit and ultimately to the utilization of ground water. Through these enactments, the legislature has created an inchoate right to control and use a specified amount of nontributary ground water in owners of the overlying land.

Because this right is incident to ownership of land, it is not dependent upon formal adjudication by a water court. For instance, the right to withdraw nontributary ground water may be severed from the land

prior to adjudication through the consent provisions of section 37-90-137(4) or by sale."

*Bayou Land Co. v. Talley*, 924 P.2d 136, 148-49 (Colo. 1996) (citations omitted).

"We describe the right to extract nontributary ground water prior to construction of a well and/or adjudication as inchoate to emphasize that it is not a vested right. The right does not vest until the landowner or an individual with the landowner's consent constructs a well in accordance with a well permit from the state engineer and/or applies for and receives water court adjudication. Until vesting occurs, the right to extract nontributary ground water is subject to legislative modification or termination."

*Id.* at 149 (footnote and citations omitted).

"We conclude that because the right to withdraw nontributary ground water is integrally associated with and incident to ownership of land, such right is presumed to pass with the land either in a deed or a deed of trust unless explicitly excepted from the conveyance instrument. A party claiming that the right to withdraw nontributary ground water was not transferred with the land must prove that the grantor affirmatively did not intend to transfer such right."

*Id.* at 150.

"The presumption may be overcome by a showing that the landowner previously transferred the right to withdraw ground water to a third party or entity explicitly or by operation of statute. See 37-90-137(4)(b)(II), 15 C.R.S. (1995 Supp.)."

*Id.* at 151 n.23.

### **City of Thornton v. Bijou Irrigation Co.**

"We have applied the inquiry notice standard in a number of recent cases. With the exception of cases presenting circumstances that suggested the misleading inclusion or omission of material facts, we have consistently accepted a broad definition of inquiry notice and found adequate the resume notice provided by the applicant."

*City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 26 (Colo. 1996).

"In *Department of Natural Resources v. Ogburn*, we determined that jurisdiction over a change of transmountain water rights rested with the water courts in both the basin of origin and the basin of use. How-

ever, we noted that the appropriate venue for determination of the requested change of use is the court in the basin of use."

*Id.* at 30 (citation omitted).

"[U]nder section 37-92-103(3)(a), a municipality may be decreed conditional water rights based solely on its projected future needs, and without firm contractual commitments or agency relationships, but a municipality's entitlement to such a decree is subject to the water court's determination that the amount conditionally appropriated is consistent with the municipality's reasonably anticipated requirements based on substantiated projection of future growth."

*Id.* at 39 (footnote omitted).

"[T]he 'can and will' requirement should not be applied rigidly to prevent beneficial uses where an applicant otherwise satisfies the legal standard of establishing a nonspeculative intent to appropriate for a beneficial use."

*Id.* at 43 (footnote omitted).

"[I]t is within the water court's authority to include conditions in the decree that limit the yield of the rights to the amount for which water is available and for which the applicant has established a need and a future intent and ability to use."

*Id.* at 47.

"[T]he court's setting of a project yield limit below established need and availability could be valid if necessary to protect other water users against injury to their existing rights."

*Id.* at 48.

"Thornton's proposals violate both the spirit of the WCA and the Re-payment Contract and the letter of the NCWCD rules and the Allotment Contract. Thornton's proposal to use CBT water to satisfy replacement obligations will allow the city to increase the amount of water that it applies to municipal uses outside the boundaries of NCWCD. Although the direct use remains within the district, Thornton would receive indirect benefits outside of the district that derive from its use of CBT water within the district. Similarly, the operation of the exchange on CBT water, even if the character of exchange rule applies and the direct use is deemed to occur within the district, results in significant quality and quantity benefits to Thornton outside of the NCWCD boundaries. Furthermore, Rule IV(A) of the NCWCD rules

and Article 2 of the Allotment Contract specifically preclude the acquisition of extra-district benefits by exchange. The trial court correctly assessed Thornton's proposals as attempts to extend benefits to its lands outside of the district in contravention of the provisions of the governing statutes, rules, and contracts."

*Id.* at 59 (footnotes omitted).

"A contract water user is, in effect, a consumer whose rights are determined by the terms of that contract, and successors in interest can acquire no greater right."

*Id.* at 60.

"Appropriators of water native to a public stream have no automatic right to capture and reuse this water after the initial application to beneficial use. Instead, these return flows and seepage waters become water tributary to a natural stream and subject to diversion and use under the appropriations and associated system of priorities existing on the stream. Thus, a user of native water can secure a right to reuse return flows only by establishing the elements necessary to complete an independent appropriation of those waters."

*Id.* at 65.

"[W]e conclude that an importer of transmountain water need not have an intent to reuse this water at the time of the original appropriation and importation to maintain the subsequent right of reuse."

*Id.* at 70.

"The reuse right remains with the importer until the right is transferred by the importer or the importation ceases."

*Id.*

"[W]e have consistently maintained that appropriators on a stream have no vested right to a continuance of importation of foreign water which another has brought to the watershed."

*Id.* at 72.

"[L]aches is not applicable to a party who has no duty to act."

*Id.* at 74.

"We noted above that it has long been the rule in Colorado that downstream users cannot establish vested rights in the continuation of the importation of foreign water. In light of this rule, Fort Collins and the

other downstream users were not justified in relying on the continued release of these foreign water return flows. Because their reliance was unreasonable, the downstream users cannot establish the requisite prejudice attributable to WSSC's alleged delayed initiation of its reuse right. Thus, we hold that Thornton's proposed reuse of its foreign water is not barred by the doctrine of laches."

*Id.* (citation omitted).

"One of the basic tenets of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations . . . . This protection extends not only to surface water users but to users of all water tributary to a natural stream, including appropriators of tributary underground water . . . . [T]his protection extends to junior appropriators' rights in return flows . . . ."

*Id.* at 80.

"Thus, unlike water imported from across the Continental Divide, Thornton's irrigation water is not new to the system; Thornton essentially changed only the place of use of that water. This type of diversion is common in Colorado and users downstream from these diversions have every reason to believe that they are among those protected against injury."

*Id.* at 81.

"Senator McCormick's statements reveal a recognition that a water court has acted properly in imposing revegetation requirements prior to the consideration and passage of Senate Bill 92-92. The bill was intended to codify and institutionalize the use of these revegetation conditions and did not represent the creation of a new form of condition on changes in use of water rights."

*Id.* at 85.

"In addition to this dual focus on maximum beneficial use and the protection of water rights, water judges must give consideration to the potential impact of the utilization of water on other resources. Our decisions establish that the goal of maximum utilization must be 'implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources.'"

*Id.* at 86.

"[W]e agree with the trial court that the legislative water quality scheme is not designed to protect against quality impacts unrelated to discharges or substitute water and specifically prohibits the water court from imposing the protective measures necessary to remedy depletive impacts of upstream appropriations on an appropriator in Kodak's situation."

*Id.* at 93.

"The sole negative impact of the Poudre River exchange on Kodak's treatment operations results from a diminution in the flow of excess river water—i.e., water that would otherwise flow by Kodak's plant but that is in excess of the amount that can be diverted under Kodak's water right . . . . [T]o avoid this impact on Kodak's treatment operations, the trial court would have had to impose conditions that required maintenance of sufficient volume in the stream to preserve the average low-flow values that determine Kodak's effluent limits. Despite Kodak's arguments to the contrary, such protection would necessarily require the imposition of conditions creating a private instream flow right for Kodak for the purpose of waste dilution or assimilation."

*Id.*

"Pursuant to section 37-92-102(3), 15 C.R.S. (1990), the General Assembly vested exclusive authority in a state entity, the Colorado Water Conservation Board (CWCB) to appropriate minimum stream flows and limited the purpose for these appropriations to 'preserv[ation of] the environment to a reasonable degree.'

*Id.* at 93.

"[T]he judiciary is without authority to decree an instream flow right to a private entity . . . . "The legislature similarly prohibited the Colorado Water Quality Commission and the Water Quality Division from imposing minimum instream flows in the course of their water quality protection activities. These agencies must perform their duties subject to the following restriction: 'Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows . . . .' § 25-8-104(1), 11A C.R.S. (1989). This language reinforces the legislative intent expressed in the water right adjudication provisions that minimum stream flows are not a valid tool for protecting water quality."

*Id.* (citations omitted).

"The decision whether further to integrate the consideration and administration of water quality concerns into the prior appropriation system is the province of the General Assembly or the electorate."

*Id.* at 94-95.

"Under both the statute and the regulations, the mandate of the state engineer in reviewing the quality aspects of an exchange is clear: the substitute supply must be of a quality to meet the requirements of use to which the senior appropriation has normally been put. The regulations are sufficiently broad to allow the state engineer's office to exercise its professional judgment in adopting a method of regulation that will ensure that the statutory standard is met, and the absence of more specific direction will not compromise the protective goals of the statute. Accordingly, we hold that the state engineer is capable of ensuring compliance with these provisions without specific instructions on where to measure the quality of the substituted water . . . . If water quality monitoring at the point of discharge is insufficient to ensure compliance with section 37-80-120(3), the decree does not prevent the state engineer's office from taking additional action to fulfill its statutory duty to protect downstream users."

*Id.* at 97.

"The state engineer and division engineer are legislatively assigned broad powers and responsibilities for administration, distribution, and regulation of waters of the state. We have discovered no statutory authority that would authorize a court to impose on a private party any part of the expense incident to exercise of those powers or fulfillment of those responsibilities."

*Id.* at 99 (citation omitted).

### **The City and County of Denver v. Middle Park Water Conservancy Dist.**

"Intent is the critical element in determining abandonment. Continued and unexplained non-use of a water right for an unreasonable period of time creates a rebuttable presumption of intent to abandon."

*The City and County of Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283, 286 (Colo. 1996) (citations omitted).

"Water rights are usufructuary in nature, and the use entitlement may be lost or retired to the stream. When this occurs, the property rights adhering to the particular water right no longer exist. The effect of

such abandonment on any other water right diverting from the same source of supply is not the subject of the abandonment inquiry." *Id.* (citations omitted).

**Bennett Bear Creek Farm Water and Sanitation Dist. v. City and County of Denver**

"The legislature chose not to confer extraterritorial water service rate-setting authority on the PUC. Section 31-35-402(1)(f) has displaced the common law and the PUC in regard to rate making for extraterritorial water service. Rate setting under section 31-35-402(1)(f) is legislative in nature."

*Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver*, 928 P.2d 1254, 1262 (Colo. 1996) (footnote omitted).

"Contracts containing terms regarding rates and charges must be construed and given effect in light of the legislative authority of the governmental entity which supplies the water service." *Id.*

"[O]ur inquiry regarding the applicable standard must be informed by rules, statutes, and case law pertinent to judicial review of local governmental legislative action. Such review occurs by means of declaratory judgment under C.R.C.P. 57 and sections 13-51-101 to -115, 6A C.R.S. (1987), not by way of on-the-record review under the State Administrative Procedure Act, § 24-4-106, 10 A.C.R.S. (1988), or C.R.C.P. (106)(a)(4)." *Id.* at 1268.

"Rates that are not rationally related to a local governmental utility purpose are subject to being set aside if those challenging the rate carry their burden of proving lack of such a relationship." *Id.* at 1269.

"Contracts of a governmental entity cannot divest its legislative powers, and contracting parties are charged with knowledge of the retained nature of such authority." *Id.* at 1269-70.

"Legitimate utility factors, and the justified use of governmental power, must be the basis for decisionmaking, and a judicial remedy is available by way of declaratory judgment action to redress rate-

making actions which lack a rational relationship to the utility function of the governmental entity."

*Id.* at 1273.

**Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership**

"Under the can and will statute, the applicant must make a threshold showing of reasonable availability of water to prove that the applicant "can" complete the appropriation. The applicant for water rights must demonstrate that 'water is available based upon river conditions existing at the time of the application, in priority, in sufficient quantities and on sufficiently frequent occasions, to enable the applicant to complete the appropriation with diligence and within a reasonable time.'

A showing of reasonable availability does not require a demonstration that water will always be available to the full extent applied for in the decree. The applicant need only prove that there is a substantial probability that the appropriation can and will be completed, based upon necessarily imperfect prediction of future conditions."

*Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership*, 929 P.2d 718, 723-24 (Colo. 1996) (footnotes and citation omitted).

"Any potential injury caused by new appropriations from streams that are not over-appropriated can normally be mitigated if junior appropriators curtail their diversions when senior users need water."

*Id.* at 724.

"We recognize that there may be situations in which any use by a junior appropriator would cause persistent injury to senior water users. In those cases, the water court must eliminate the injury by imposing conditions on the exercise of the junior right. The water court may require the applicant to provide augmentation water to protect against injury to senior users."

*Id.* (citation omitted).

"Whether the proposed appropriation can and will be completed is a question of fact for the water court to determine. The issues of water availability and injurious effect are inherently fact specific and thus require factual findings by the water court. The water court's findings will not be disturbed on appeal if they are supported by competent evidence in the record."

*Id.* at 725 (citation omitted).

"[A] public interest argument is not a valid objection to a decree for a new conditional water right because such an argument conflicts with the doctrine of prior appropriation. Second, such an argument presupposes that the existing rights will not be administered fairly and in compliance with the priority system."

*Id.* (citation omitted).

"[T]o the extent the appellants argue injury to the CWCB's decreed instream flow rights, we note that the CWCB was an objector in the case. The CWCB holds the decreed instream flow right."

*Id.* at 726.

"Therefore, the argument of injury to the instream flow is much less persuasive when the holder of that right was a party to this action, satisfied itself that its interests were being protected, and did not oppose entry of the decree."

*Id.*

### **Dallas Creek Water Co. v. Huey**

"An absolute decree confirms that amount of depletion from the stream that can be taken in priority as a property right."

Dallas Creek Water Co. v. Huey, 933 P.2d 27, 34 (Colo. 1997).

"Since conditional water rights function to reserve a priority date for an appropriation of water to beneficial use that has not been achieved yet, they are subject to continued scrutiny to prevent the hoarding of priorities 'to the detriment of those seeking to apply the state's water beneficially.'"

*Id.* at 35.

"The above-emphasized reference to diligence in the statutory provisions governing conditional water rights plainly indicates legislative intent to require, in subsequent diligence proceedings, a demonstration that the decreed conditional appropriation is being pursued in a manner which affirms that capture, possession, control and beneficial use of water can and will occur in the state, thereby justifying continued reservation of the antedated priority pending perfection of a water right."

*Id.* at 37 (footnote omitted).

"Its priority, location of diversion at the source of supply, and amount of water for application to beneficial uses are the essential elements of the water right."

*Id.* at 38.

"Water rights are decreed to structures and points of diversion, in recognition that a water right is a right of use and constitutes real property in this state, and the owners and users of such water rights may change from time to time."

*Id.* at 39 (citation omitted).

"Water application requirements should not be construed to defeat substitution of parties when a water user who depends upon the appropriation at issue has, in fact, filed a timely diligence application through an agent and the resume notice sufficiently describes the right for which diligence is sought."

*Id.* at 41.

"A person desiring to pursue the conditional decreed appropriation to completion must show that the preferential status enjoyed for the initial appropriation is entitled to continuation under the antedated priority. This is accomplished by a demonstration of due diligence by an owner or lawful user of the conditionally decreed appropriation."

*Id.* at 42.

### **Shirola v. Turkey Canon Ranch Ltd. Liab. Co.**

"Therefore, in a water adjudication involving a proposed plan for augmentation or a change of water right, any person may object to the application itself and participate in the adjudication by holding the applicant to a standard of strict proof. However, for that objector to have standing to assert injury to his or her water right, the objector must show that he or she has a legally protected interest in a vested water right or a conditional decree."

*Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 747 (Colo. 1997) (footnote omitted).

"Absent an adjudication under the Act, water rights are generally incapable of being enforced. Once a water right has been adjudicated, it receives a legally vested priority date that entitles the owner to a certain amount of water subject only to the rights of senior appropriators

and the amount of water available for appropriation. The holder of an adjudicated right is entitled to the use of a certain amount of water unless called out by senior users or unless the stream itself contains insufficient flow."

*Id.* at 749 (citations omitted).

"In an effort to protect small agricultural or domestic well water users, the General Assembly has created a statutory category for exempt wells that differs from all other water rights. By that statutory exception, the General Assembly has awarded the expectancy of a certain priority date, unaffected by the year in which the exempt well owner files for adjudication. Thus, vested water rights in exempt wells are not subject to the postponement doctrine set forth in section 37-92-306. Because of the statutory provisions regarding exempt wells, we conclude that an exempt well owner may attain a legally protected interest in his or her vested water right merely by filing an application for adjudication of such well."

*Id.* at 749-50 (footnote and citation omitted).

"Rather, upon adjudication, 602 wells will receive as a priority date the date of their well permit, without reference to the date of the application for the adjudication. See § 37-92-602(4)."

*Id.* at 751.

"We read the statute to require the state engineer to take into account all vested water rights of which he has notice whether or not adjudicated, in determining the impact of a proposed non-exempt well. The General Assembly provided that exempt wells are entitled to a presumption that they do not materially injure the rights of others; the General Assembly did not provide that exempt wells are burdened by an inverse presumption that no other use materially injures them."

*Id.* at 752.

"Consistent with encouraging maximum beneficial use of the waters of the state, the senior appropriator is not entitled to command the whole or a substantial flow of the underground aquifer merely to facilitate his taking the fraction of the flow to which he is entitled. The cost to the senior of reaching a lowered water table can be assigned to the junior."

*Id.* at 754 (citation omitted).

**Williams v. Midway Ranches Property Owners Ass'n, Inc.**

"Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes, typically quantified in acre-feet of water consumed."

Williams v. Midway Ranches Property Owners Ass'n, Inc., 938 P.2d 515, 521 (Colo. 1997) (footnote omitted).

"Absolute water rights used in one location may be quantified and changed for use in an augmentation plan to provide replacement water releases, so that diversion and use of water may be made out-of-priority elsewhere."

*Id.* at 521-22 (footnote omitted).

"Thus, the decreed flow rate at the decreed point of diversion is not the same as the matured measure of the water right. Into every decree awarding priorities is read the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made.

Because water rights are usufructuary in nature, the measure of a water right is the amount of water historically withdrawn and consumed over time in the course of applying water to beneficial use under the tributary appropriation without diminishment of return flows."

*Id.* at 522.

"Determining the historic usage of a tributary water right is not restricted to change and augmentation plan proceedings . . . equitable relief is available, upon appropriate proof, to remedy expanded usage which injures other decreed appropriations."

*Id.* at 522-23.

"All water rights are subject to beneficial use as the measure of the right. When prior change decrees are subject to interpretation in subsequent change proceedings, the ordinary interpretation to be made in the absence of a quantification or otherwise controlling terms of a prior judgment is that historic usage under the appropriation at its decreed point of diversion governs the extent of usage under the change decree."

*Id.* at 523 (citation omitted).

"Under the 1969 Act, water courts have jurisdiction, based upon an adequate application and resume notice, to adjudicate the amount of water allocable to each share for augmentation plan replacement purposes, calculated upon the historic usage of a ditch company's tributary water right."

*Id.* at 525 (citation omitted).

"[W]hen historical usage has been quantified for the ditch system by previous court determination, the yield per share which can be removed for use in an augmentation plan is not expected to differ from augmentation case to augmentation case, absent a showing of subsequent events which were not previously addressed by the water court but are germane to the injury inquiry in the present case."

*Id.* at 526 (footnote omitted).

*(the following was added after publication of the article, in order to update the synopsis)*

*First Update to Colorado Water Law: An Historical Overview,  
2 University of Denver Water Law Review 223(1999)*

**Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Association**

"Waters of the natural stream, including tributary ground water, belong to the public and are subject to use under Colorado's constitutional prior appropriation doctrine and implementing statutes...Rights of use thereto become perfected property rights upon application to beneficial use...In contrast, the right to use water in designated ground water basins, nontributary water outside of designated ground water basins, or any Dawson, Denver, Arapahoe, or Laramie-Fox Hills ground water outside of a designated ground water basin, is governed by the provisions of the Groundwater Management Act...Ground water located in designated basins is subject to a modified system of prior appropriation administered by the ground water commission...Use of nontributary ground water and Denver Basin aquifer water outside of designated ground water basins is subject to the provisions of section 37-90-137(4). Regardless of whether water rights are obtained in accordance with prior appropriation law, or pursuant to the Ground Water Management Act, no person "owns" Colorado's public water resource as a result of land ownership."

Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Association, 956 P.2d 1260, 1268 (Colo. 1998)(citations omitted).

“ In *Bayou Land Co. v Talley*...we reiterated that a right to use nontributary ground water outside of a designated basin is purely a function of statute and landowners do not have an absolute right to ownership of water underneath their land. Rather, landowners have an inchoate right to extract and use the nontributary water in accordance with section 37-90-137(4)... We held that the right does not vest until the landowner or an individual with the landowner’s consent constructs a well in accordance with a well permit from the state engineer and/or applies for and receives water court adjudication. Until vesting occurs, ground water is subject to legislative modification or termination.  
*Id.*(citations omitted).

“By means of Senate Bill 5...the General Assembly subjected Denver Basin ground water, whether nontributary or not nontributary, to the separate water use system of section 37-90-137(4) and required the state engineer to promulgate rules for use of this water under section 37-90-137(9)(b).”  
*Id.* at 1270 (citations omitted).

### **City of Grand Junction v. City and County of Denver**

“(W)e disagree with Grand Junction’s claim that the Water Court exceeded its jurisdiction when it examined and construed the provisions of the Blue River Decree. We hold that the Water Court possessed the authority to review the Blue River Decree in order to ascertain whether Denver’s application would interfere with the terms or objectives of the decree. In doing so, we also reaffirm the principle...that a court of coordinate jurisdiction does not possess the authority to enter a decree that modifies or interferes with the objectives or terms of another court's decree.”  
City of Grand Junction v. City and County of Denver, 960 P.2d 675, 682-83 (Colo. 1998) (citations omitted).

“Therefore, in the context of the priorities described in the decree, Denver can fill Dillon Reservoir only once. In other words, all priorities to Blue River water awarded in the Blue River Decree are senior to Denver’s rights, if any, to fill Dillon Reservoir more than once. In the instant case, Denver ultimately sought a refill right with a

priority date of 1987, a date junior to all priorities described in the Blue River Decree. Hence, Denver's new claim is entirely consistent with those terms of the Blue River Decree that relate specifically to refilling Dillon reservoir."

*Id.* at 683.

"Furthermore, Denver's claim to a refill right at Dillon Reservoir was not even among the subjects addressed by the Blue River Decree. The refill right was not, and could not have been, before the Federal Court in 1955 because Denver's first appropriation date for the refill of the reservoir was 1965...As the Water court explained, the Federal court in the Blue River Decree addressed only those relative priorities at issue at the time of adjudication. The Federal Court enjoined the parties from asserting in the future any priorities different from those described in the Blue River Decree. Accordingly, the Federal Court has thwarted subsequent efforts by Denver to modify, intentionally or otherwise, the United States' senior rights to Blue River water."

*Id.* at 684.

"The Federal Court's continuing jurisdiction is limited to the purpose of effectuating the objectives of the Blue River Decree...Denver's refill right does not interfere with the objectives of the Blue River Decree because Denver's refill right is subject to all of the provisions of the Blue River Decree...Consequently, Denver's application for a refill right with respect to Dillon Reservoir did not implicate the Federal court's exclusive jurisdiction to implement the Blue River Decree. We hold, therefore, that the Water court possessed subject matter jurisdiction over Denver's application."

*Id.* at 685.

### **City of Boulder v. New Anderson Ditch Company**

"The conditional decree contemplated that Lafayette would not obtain an absolute decree if it no longer had a lawful right to divert water through the Anderson Ditch. Lafayette did not meet this test because at the time of the trial and the entry of the proposed absolute decree, Lafayette had no legal right to exchange water using the Anderson Ditch for application to beneficial use." Lafayette argues that the water court improperly injected an additional requirement for the perfection of a conditional water right by requiring the applicant to possess facilities to transport the water when it ruled that 'absent a permanent means of transporting water, there can be no absolute water

right.’ We agree with Lafayette that the water court’s ruling is inaccurate, since Colorado law contemplates that legal arrangements for a means of diversion may be perpetual or for a term of years...Consistent with the terms of the stipulation between these parties, we have concluded that the water court was correct in declining to enter an absolute decree following trial, because Lafayette then had no legal right to use the point of diversion identified in the decree. In conclusion, we hold that Lafayette demonstrated reasonable diligence in developing the rights set forth in the 1987 decree, and that the water court properly continued Lafayette’s conditional rights to exchanges to the Anderson Ditch for another diligence period.”

City of Lafayette v. New Anderson Ditch Company, 962 P.2d 955, 963 (Colo. 1998).

### **Campbell v. Orchard Mesa Irrigation District**

“Irrigation districts were created ‘to provide means...for bringing into cultivation the arid lands of the state and making them highly productive by the process of irrigation.’...To accomplish this objective, the legislature authorized irrigation districts to levy and collect special assessments at the expense of those landowners whose lands were serviced by irrigation waters...However, legal authority to levy and obtain collection of special assessments does not transform an essentially private entity into a governmental entity for Amendment 1 purposes...We have repeatedly said that irrigation district special assessments are not general taxes characteristic of government...While general taxes exact revenue from the public at large for general governmental purposes, an irrigation district’s special assessment benefits specific landowners whose land the district supplies with water. These special assessments are designated to pay the expenses, including servicing debt, incurred in irrigating the land. The assessments are levied in proportion to land ownership and are paid only by the landowners who receive the benefits. In summary, a 1921 Act irrigation district serves the interests of landowners within the district and not the general public. As such, it cannot be said that an increase of an irrigation district’s special assessment increases the burden of the tax-paying public which Amendment 1 sought to regulate.”

Campbell v. Orchard Mesa Irrigation District, 972 P.2d 1037, 1040 (Colo. 1998).

“(W)e conclude that the private character of a 1921 Act irrigation district differs in essential respects from that of a public governmental entity exercising taxing authority contemplated by Amendment 1. An irrigation district exists to serve the interests of landowners not the general public. Rather than being a local governmental agency, a 1921 Act irrigation district is a public corporation endowed by the state with the powers necessary to perform its predominantly private objective...Accordingly, we hold that an irrigation district is not a local government within the meaning of Amendment 1’s taxing and spending election requirements.”

*Id.* at 1041.

*Second Update to Colorado Water Law: An Historical Overview, 4 University of Denver Water Law Review 111 (2000).*

### **Farmers High Line Canal & Reservoir Co. v. City of Golden**

“[P]rior to the modern trend of implementing express volumetric limitations in decrees, most water rights were quantified by a two-part measurement. First, a decree contained a flow-rate of water, in c.f.s., which the owner was entitled to divert from the stream. Second, a decree stated the use to which that diverted water could be put, such as irrigation of crops or municipal uses.”

*Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 197 (Colo. 1999) (citation omitted).

“From the late 1800s to the early 1970s, courts primarily employed one standard method in order to protect the vested rights of juniors in change proceedings. Under this method, the court would order the petitioner to abandon a portion of his or her originally decreed flow right back to the stream. This flow abandonment was then incorporated into the express terms of the change decree.”

*Id.* at 197–98 (citation omitted).

“With the advent of improved engineering techniques, courts began to utilize another approach to prevent injury to juniors in change proceedings. Under the modern method, courts now translate the petitioner’s historical consumptive use into a volumetric limitation stated in acre-feet. Courts then incorporate the volume limit into the express terms of the decree. Therefore, most modern change decrees impose an acre-foot limit on the amount of water an appropriator may consume in the average year.

This shift in the methods employed to protect juniors in change proceedings accounts for the difference between Golden's decrees, granted in the early 1960s, and Con Mutual's change decree, granted in 1993. Whereas the 60s decrees only required Golden to abandon a portion of its flow entitlement in order to protect junior users, Con Mutual's decree imposed a volumetric limit on the amount of Priority 12 water it is entitled to consume."

*Id.* at 198 (citations omitted).

"Appellants argue that their claim requesting the addition of volumetric limitations to the 60s decrees is not precluded because, as a matter of law, the 60s decrees contain implied volumetric limitations. In support of this contention, the appellants urge us to extend the rule first announced in *Orr*, to the facts of the instant case. However, as we decline to extend the rule in *Orr*, we find the appellants' claim that volumetric limitations should be added to the 60s decrees is precluded."

*Id.* at 199–200 (citation omitted).

"An examination of *Orr* and *Midway Ranches* reveals the proper standard for our review. In each individual case, we must review the record of the prior proceeding in order to determine whether historical consumptive use was calculated and relied upon in the formation of the earlier decree. If so, we will not modify the resulting decree by implying volumetric limitations into its terms. The implied volumetric limitation doctrine in *Orr* was developed in order to prevent injury to juniors when a prior change decree did not address or contemplate the question of historical consumptive use. This doctrine was not developed in order to provide juniors with a method to insert volumetric limitations where they were previously absent, even though historical consumptive use formed the basis for the earlier decree."

*Id.* at 201 (citations omitted).

"[W]e find that the doctrine of issue preclusion is unavailable to the appellants in this case. Appellants contend that Golden is precluded from asserting that the 60s decrees contain no volumetric limitations because . . . the 1993 Con Mutual proceedings cannot accomplish that which is barred by virtue of claim preclusion."

*Id.*

"If we were to allow the 60s decrees to be reopened for the addition of volumetric limitations, then the appellants' argument that the 1993 lit-

igation collaterally establishes the appropriate acre-footage terms of these decrees would be relevant. However, as we will not reopen the 60s decrees in order to imply volumetric limitations, the appellants' reliance on issue preclusion is misplaced."

*Id.*

"While it is true that a decree for change in use may not again be collaterally attacked insofar as previously litigated injurious effects are concerned, this does not bar junior appropriators from bringing later suits regarding new injuries that were not previously litigated and which arose after the change was decreed."

*Id.* at 202 (citations omitted).

"As Golden's municipal use had not even been decreed at the time of the 60s proceedings, it is obvious that the appellants could not have brought their claims of enlarged use based on changing municipal use patterns and increased lawn irrigation. Furthermore, the appellants' second and third claims of enlarged use in the instant case are sustained by different evidence than that presented in the 60s proceedings. As the water court is not precluded from considering new claims of injury based on allegations of changed circumstances, the appellants' allegations of enlarged use in the instant case are permissible."

*Id.* at 203.

"Therefore, in the instant case, Golden may not enlarge the use of its decreed rights by changing its pattern of municipal use or by using its water to irrigate lawn acreage which was not anticipated at the time its change in use decree was entered. As it would contradict the most basic principles governing all water decrees were we to allow a party to enlarge its use in such a manner, we must reject Golden's assertion that the appellants' second and third enlarged use claims are precluded."

*Id.*

**Municipal Subdistrict, Northern Colorado Water Conservancy District v. Chevron Shale Oil Co.**

"The water court recognized that, in light of the fact that the production of oil from shale is not currently economically feasible, Chevron's efforts, although minimal, were sufficient to demonstrate a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner. We defer to those findings. In

addition, we reject the Subdistrict's contention that Chevron was required to additionally prove that it 'can and will' use the water rights." Mun. Subdist., N. Colo. Water Conservancy Dist. v. Chevron Shale Oil Co., 986 P.2d 918, 923 (Colo. 1999).

"We agree with Chevron that the water court properly considered the current economic feasibility of the shale oil project. The plain language of section 37-92-301(4)(c) recognizes that current economic conditions beyond the control of the applicant might adversely affect efforts to perfect the water right. This provision prohibits courts from using such a circumstance to deny a diligence application when there is other evidence of reasonable diligence. As a result, when current economic conditions beyond the control of an applicant slow progress towards the perfection of a conditional water right, it is not improper for a court to consider the effect of the adverse economic conditions." *Id.* at 923–24.

"In this case, there is undisputed evidence that Chevron exercised reasonable diligence despite the adverse economic conditions in the shale oil industry. As noted, *supra*, the water court found that Chevron had planned for a diversion facility, planned a dam on Roan Creek, planned for pipeline facilities, prepared environmental baseline studies, prepared a detailed master planning document for Chevron's Parachute Creek Unit, and had participated in miscellaneous activities related to the conditional water rights such as litigation, research projects, and studies. Therefore, we hold that it was not improper for the water court to consider the economic conditions of the shale oil industry when it made its reasonable diligence determination, and we reject the Subdistrict's contention." *Id.* at 924.

### **Park County Sportsmen's Ranch, L.L.P. v. Bargas**

"The recommendations of the Getches and Bishop Committees formed the basis of Senate Bill 5, which the General Assembly eventually enacted with a nontributary definition as set out in section 37-90-103(10.5). . . . [T]he senators were aware that different hydrological formations in different areas of the state might require distinct administration. . . . Elliott and Simpson's statements corroborate what appears clear from all of the Senate hearings: that the designation of the Dawson, Denver, Arapahoe, and Laramie–Fox Hills aquifers in subsection (10.5) was designed to modify the definition of nontributa-

ry for purposes of the Denver Basin only. The senators understood that this modification would result in the loss of approximately 40,000 acre feet of ground water then discharging from the four enumerated aquifers, because the hydrostatic head of those aquifers would be disregarded in determining whether they were nontributary. However, they also understood that Senate Bill 5 accounted for this loss by requiring augmentation from the four aquifers back into the Denver Basin to an extent that would sufficiently offset the loss of the hydrostatic overflow, which in the Denver Basin formations of the four enumerated aquifers was approximately 40,000 acre feet per year. There is no indication anywhere in the legislative record that any senators were aware of the existence of the South Park formation of the Laramie–Fox Hills aquifer. Moreover, they had no knowledge concerning the amount of hydrostatic overflow occurring in that formation or the amount of augmentation that would be necessary to avoid injury to senior surface water rights in proximity to that formation.”

Park County Sportsmen’s Ranch, L.L.P. v. Bargas, 986 P.2d 262, 271–72 (Colo. 1999).

“Mr. Harrison also explained the augmentation requirements of Senate Bill 5 for nontributary and “not nontributary” wells. Like the definitional subsection at (10.5), the augmentation provisions at sections 37-90-137(9)(b) and (c) referred only to ‘the Dawson, Denver, Arapahoe, and Laramie–Fox Hills aquifers.’ They made no express mention of the Denver Basin. After detailing the rules for augmentation, Mr. Harrison told the representatives: ‘Again let me put this overall perspective on it. *These specific rules apply only to the Denver Basin formations.*’”  
*Id.* at 272–73.

“Thus, [Park County Sportsmen’s Ranch] is entitled to pursue water rights to the ground water beneath its lands in South Park pursuant to the doctrine of prior appropriation in accordance with the Water Right Determination and Administration Act of 1969, but, to the extent that it makes out-of-priority diversions, it must avoid material injurious depletions to senior surface rights.”  
*Id.* at 275.

**Municipal Subdistrict, Northern Colorado Water Conservancy  
District v. OXY USA, Inc.**

“The very nature of a conditional right suggests that the ‘can and will’ test applies until the right matures into an absolute decree. A conditional water right ‘encourage[s] development of water resources by allowing the applicant to complete financing, engineering, and construction with the certainty that if its development plan succeeds, it will be able to obtain an absolute water right.’ At each successive stage of the project, parties must appear before the court to demonstrate sufficient work to prove that the applicant is moving toward completion of the project. Unless the applicant makes this showing, the conditional right is speculative and violates the anti-speculation doctrine. In this respect, the anti-speculation doctrine and the ‘can and will’ requirement are closely related, although the ‘can and will’ test is slightly more stringent.

Recently in *Chevron*, we stated that the holder of a conditional water right was not required to meet the ‘can and will’ test in addition to proving reasonable diligence. However, in that case, the court already had determined that Chevron sufficiently demonstrated ‘a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner.’ Under the facts of that case, that conclusion by the water court was sufficient to satisfy both the ‘can and will’ standard and the reasonable diligence standard.

In general, the ‘can and will’ test requires an applicant to establish ‘a substantial probability that this intended appropriation can and will reach fruition. . . . ‘Proof of such a substantial probability involves use of current information and necessarily imperfect predictions of future events and conditions.’ An analysis of current economic conditions beyond the control of the applicant is a part of the ‘can and will’ test.

We perceive no error in the water court’s ruling either as to the statement of the law or the application of that law to the facts. The water court concluded that the oil shale project is technically feasible given current technology—or, in other words, that OXY ‘can’ complete the project. The court found that OXY ‘will’ complete the project when the current economic conditions facing the oil shale industry no longer exist. As we noted in *Chevron*, the General Assembly has made a policy decision that the infeasibility of development of oil shale under current economic conditions should not cause applicants like OXY to lose their conditional rights. We are bound by that policy determination.”

Mun. Subdist., N. Colo. Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 708 (Colo. 1999) (citations omitted).

“The Subdistrict correctly claims that hexennial diligence applications are subject to the anti-speculation doctrine and that section 37-92-301(4)(c) does not exempt conditional water rights from application of that doctrine. We declined to address this issue in *Chevron* because the parties did not properly raise the question before the water court.

The anti-speculation doctrine, which prohibits the acquisition of a conditional right without a vested interest or a specific plan to possess and control water for a specific beneficial use, clearly applies to the initial entry of a conditional decree.

The anti-speculation doctrine initially was intended to prohibit the entry of conditional decrees when the holder had nothing more than an intent to sell the right at an unknown time in the future for profit. However, because a conditional right, or some portion of that right, may become speculative over time, we now hold that just as the ‘can and will’ test continues to apply in later diligence proceedings, so does the anti-speculation doctrine. Again, the nature of a conditional water right dictates this conclusion. If a water right initially clears the anti-speculation hurdle, yet later becomes speculative, then the project is not moving toward completion and beneficial use. ‘Speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires.’

In the instant case, the water court’s finding that OXY demonstrated steady effort to complete the appropriation was sufficient on this point. OXY’s investments, in this diligence proceeding and earlier proceedings, demonstrate that it intends to pursue the project to completion in the future. No questions were raised about the need for the full water rights once OXY actually begins to produce oil shale. The only issues that the Subdistrict asserts are those related to economic feasibility and timing of the project. Accordingly, the water court findings are sufficient to satisfy both the ‘can and will’ standard and the anti-speculation requirements of Colorado law.”  
*Id.* at 708–09 (citations omitted).

### **Santa Fe Trail Ranches Property Owners Ass’n v. Simpson**

“Property rights in water are usufructuary; ownership of the resource itself remains in the public. Because beneficial use defines the genesis and maturation of every appropriative water right in this state, we have held that every decree includes an implied limitation that diversions cannot exceed that which can be used beneficially, and that the

right to change a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use. Thus, the right to change a point of diversion, or type, place, or time of use, is limited in quantity by the appropriation's historic use.

These limitations advance the fundamental principles of Colorado and western water law that favor optimum use, efficient water management, and priority administration, and disfavor speculation and waste. Adherence to these principles serves to extend the benefit of the resource to as many water rights as there is water available for use in Colorado.

Quantification of the amount of water beneficially consumed in the placement of water to the appropriator's use guards against rewarding wasteful practices or recognizing water claims that are not justified by the nature and extent of the appropriator's need." Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54-55 (Colo. 1999) (citations omitted).

"An undecreed change of use of a water right cannot provide the basis for quantifying the right for change purposes. The amount of consumable water available for transfer depends upon the historic beneficial consumptive use of the appropriation for its decreed purpose at its place of use. However, when historic use of a water right has been litigated and determined through a prior change proceeding, the court's judgment and decree control the matter, and the historic use inquiry cannot be reopened, absent a further undecreed change or enlargement."

*Id.* at 59.

"The question before the Water Court was whether an undecreed change of the two [Colorado Fuel and Iron Company] water rights can be the basis for decreeing a change of those rights, without regard to the amount of water consumed beneficially for CF & I's original appropriation. The Water Court correctly refused to allow Santa Fe Ranches to substitute evidence of an undecreed change to irrigation use under the El Moro Ditch for evidence of the historic manufacturing usage of the two CF & I water rights for its facility."

*Id.*

**Upper Black Squirrel Ground Water Management District v. Goss**

“Because the [Ground Water] Commission has authority to supervise and control the exercise and administration of rights acquired to the use of designated ground water ‘except to the extent that similar authority is vested in ground water management districts pursuant to section 37-90-130(2),’ § 37-90-111(1)(a), the Management District has jurisdiction over controversies between appropriators regarding issues of injury to senior well withdrawals by junior well withdrawals. This authority includes the capacity ‘by summary order [to] prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawal of water from said well would cause unreasonable injury to prior appropriators,’ authority which the Commission would have in the absence of the Management District.” *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1187 (Colo. 2000) (footnote omitted).

“We have deferred to the General Assembly’s choice to allocate and enforce rights in ground water not part of the natural stream waters, in three subcategories: (1) designated ground water; (2) nontributary water outside of designated ground water basins; and (3) nontributary and not-nontributary Denver Basin bedrock water of the Dawson, Denver, Arapahoe, and Laramie–Fox Hills aquifers.” *Id.* at 1182.

**Municipal Subdistrict, Northern Colorado Water Conservancy District v. Getty Oil Exploration Co.**

“As we noted in *OXY*, the addition of this section [§ 37-92-301(4)(c)] is evidence that ‘the General Assembly has made a policy decision that the infeasibility of development of oil shale under current economic conditions should not cause applicants like *OXY* to lose their conditional rights.’”

*Mun. Subdist., N. Colo. Water Conservancy Dist. v. Getty Oil Exploration Co.*, 997 P.2d 557, 565 (Colo. 2000) (citation omitted).

“The ‘can and will’ test requires an applicant to establish ‘a substantial probability that this intended appropriation can and will reach fruition. . . . Proof of such a substantial probability involves the use of current information and necessarily imperfect predictions of future events and conditions.’ As we noted in *OXY*, an analysis of current economic conditions beyond the control of the applicant is part of the ‘can and will’ test.

We conclude that our resolution of this issue is governed by our decision in *OXY*. As in *OXY*, the water court in the instant case found that the oil shale project is technically feasible given current technology, thus demonstrating that Getty ‘can’ complete the project. The water court also found that Getty ‘will go forward with the project when it becomes economically feasible.’ Therefore, we hold that the water court properly interpreted and applied section 37-92-301(4)(c) to the facts of the instant case.”

*Id.* (citation omitted).

### **Haystack Ranch, L.L.C. v. Fazzio**

“The evidence of disrepair and unusable conditions of the ditches in this case and their non-repair is consistent with a finding of nonuse. Water rights are usufructuary in nature, and nonuse retires the use entitlement to the stream. When this occurs, the property rights adhering to the particular water right no longer exist. In *Twin Lakes*, we upheld a water court’s decree of abandonment after looking to evidence showing the unusable state of the ditches in question. We stated, ‘Nonuse can be manifested by conditions inconsistent with active use of a water right. Such conditions include failure to make beneficial use of water [and] failure to repair or maintain diversion structures.’” *Haystack Ranch, L.L.C. v. Fazzio*, 997 P.2d 548, 553 (Colo. 2000) (citations omitted).

### **Board of County Commissioners v. Crystal Creek Homeowners’ Ass’n<sup>167</sup>**

“In 1956, Congress passed the Colorado River Storage Project Act (CRSPA). *See* 43 U.S.C. §§ 620-620o (1994). This act authorized the construction of several dams in the Upper Basin, including Glen Canyon, Flaming Gorge, Navajo, and the Wayne N. Aspinall Unit (previously Curecanti). *See id.* § 620. Congress enacted CRSPA to assist the Upper Basin states in developing their allocation of water, producing hydropower, and ensuring Compact deliveries, among other uses.”

*Bd. of County Comm’rs v. Crystal Creek Homeowners’ Ass’n*, 14 P.3d 325, 333 (Colo. 2000).

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<sup>167</sup> A transcription of the oral argument to the Colorado Supreme Court follows this summary.

“Congress approved the construction and operation of several dams and reservoirs, including the Aspinall Unit, for the nonexclusive purposes of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes. *Id.* § 620. Congress also stated that it did not intend for CRSPA to impede the Upper Basin’s development of the water apportioned to it by the Compact. *See id.* § 620b (1994).

We agree that the CRSPA reservoirs are part of a plan to allow Colorado to develop and preserve Compact apportionment. However, we find that the stored water provides Colorado with an ability to satisfy the Compact delivery mandates without eroding other rights decreed to beneficial use in the state. *See* H.R. Doc. No. 201, at 31 (1959). By banking CRSPA water for Compact deliveries and using the reservoirs for their other decreed purposes, Colorado continues development of its water entitlements. *See id.* The Aspinall Unit holds absolute decrees, and a right to use the water for the decreed purposes—including hydropower generation. Contrary to Arapahoe’s assertion, we do not view those waters as being available for appropriation.”

*Id.* at 334–35.

“Arapahoe contends that the Aspinall Unit’s operations cannot preclude in-state water users from developing the Basin’s water resources. The water court found that BUREC stored and released water from the Aspinall Unit not only for hydropower, but for other beneficial purposes, including flood control, fish and wildlife, recreation, irrigation, and domestic uses, under the appropriative rights for the Unit. Hence, in establishing the parameters for water availability based on our 1995 decision, the water court properly ordered the parties to respect the historic exercise of the Aspinall absolute decrees for all its beneficial uses.”

*Id.* at 336.

“Arapahoe argues that CRSPA section 620 reflects Congressional intent to subrogate the generation of hydropower to other CRSPA uses, and that section 620b provides that Congress did not in-

tend for the authorized projects to interfere with the Upper Basin States' comprehensive development of their apportioned water. *See* 43 U.S.C. §§ 620, 620b. Arapahoe posits that these provisions alone demand the subordination of hydropower generation to other beneficial uses in Colorado.”

*Id.*

“The United States has absolute decrees for the Aspinall Unit. The decrees permit power generation, and Colorado law defines power generation as a legitimate beneficial use. *See* § 37-95-103(2), 10 C.R.S. (2000). Thus, senior water rights for hydropower generation may place a call on the river. The General Assembly, and our 1995 decision in this case, did not set forth any different treatment for hydropower rights.

In the second trial, the water court gave effect to the state water rights for the Aspinall Unit in order of the decrees. We agree that federal preemption does not provide otherwise. The water court recognized that CRSPA authorized the construction of the Aspinall Unit only after economic justification of the project. *See* 43 U.S.C. § 620. Therefore, the water court directed the parties to model the conditions of the river, including the historical use of water by Aspinall Unit for all of its decreed purposes, despite references in CRSPA that characterize hydropower generation as an incidental use. The historical use of the full decreed amount by the Aspinall Unit within Colorado for its decreed purposes prevents Arapahoe County from claiming any portion of the appropriated water for its project.”

*Id.* at 337.

“43 U.S.C. § 620f (1994) . . . plainly states that CRSPA's hydroelectric powerplants shall not interfere with the other major compacts affecting the Upper Basin, nor the appropriation of water for domestic and agricultural purposes under state law.

In this case, the other major compacts impacting the Upper Basin are the Colorado River Compact and the Upper Basin Compact. Section 620h of CRSPA specifically demands that courts interpret CRSPA consistently with the Colorado River Compact and the Upper Colorado River Basin Compact. *See* 43 U.S.C. § 620h (1994).

Article IV(c) of the Colorado River Compact provides that ‘[t]he provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.’ § 37-61-101, art. IV(c), 10 C.R.S. (2000). This provision defers to Colorado's water law.

Additionally, the Upper Basin Compact states that ‘the provisions of this compact shall not apply to or interfere with the right or power of any signatory state to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such state by this compact.’ § 37-62-101, art. XV(b), 10 C.R.S. (2000) (also referring to storage and use of water for generation of electrical energy). Thus, the hydropower components of both compacts defer to state law.

Colorado law provides for priority administration of decreed hydropower appropriative rights within the state. Congress clearly expressed its intent that the hydropower features of CRSPA neither operate to prevent the Upper Basin States from meeting their Compact requirements at Lee Ferry, nor to change the Upper Basin state allocation of waters. On the other hand, Congress deferred to state law for deciding and administering appropriative rights within the boundaries of each state. Congress did not intend to create a different law for the Aspinall Unit.

We conclude that the water court did not err in giving effect to the hydropower water rights of the Aspinall Unit for purposes of determining availability of water for junior conditional rights under the ‘can and will’ test.”

*Id.* at 338.

“Colorado law also identifies flood control as a beneficial use. We reject Arapahoe’s argument that operation of the Aspinall Unit for flood control purposes results in a waste of water and that Arapahoe should be able to appropriate water that would otherwise be evacuated from the Aspinall Unit in the flood control operation. CRSPA provides for flood control as one of the purposes of its authorized reservoirs. *See* 43 U.S.C. § 620. The United States holds state appropriative rights and decrees for ‘flood control’ purposes and may exercise them along with all other decreed uses of the project.”

*Id.* at 338–39.

“Arapahoe also addresses the United States’ impoundment and release of water from the Aspinall Unit for fish and wildlife and recreational uses. Arapahoe contends that Congress intended those uses, like power generation, as incidental uses that would be subordinate to junior upstream water rights.

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. . . Congress established the Curecanti National Recreation Area at the Aspinall Unit. *See* 16 U.S.C. § 410fff-9 (Supp. 1999). Congress invested nearly \$30,000,000 in the site and it draws over a million visitors annually. To accommodate the great number of boaters, Blue Mesa must be kept at an adequate level to maximize the navigable surface of the lake.

The *Jicarilla* court rejected the construction of reservoirs solely for recreational purposes. Here, of course, the reservoirs are not solely for recreation. More persuasively, the 1968 Act, not mentioned by the Tenth Circuit in its opinion, as well as the existence of the absolute water rights for recreation and fish and wildlife support the water court's legal conclusions. Recreation and fish and wildlife are recognized beneficial uses in Colorado. Accordingly, we hold that both because Congress specifically authorized a recreational use and because the recreational use is but one of the purposes of the reservoirs, *Jicarilla* does not apply.”  
*Id.* at 339–40.

“We affirm the water court in its conclusions that the 60,000 acre-feet to which BUREC agreed to subordinate their uses are available only to in-basin users; and the 240,000 acre-foot marketable pool is available for use in-basin or transbasin, but only by contract with BUREC.”  
*Id.* at 340.

“We find the in-basin 60,000 acre-foot subordination by the United States valid. The construction of the Aspinall Unit greatly benefited the Gunnison River Basin, but not without adverse effects. The dams inundated many miles of prime trout fishing and flooded several properties. To offset these losses, the United States agreed to set aside 60,000 acre-feet of water for future projects to benefit the Upper Gunnison River Basin.

. . . .

We agree with the water court that Arapahoe is not entitled to the benefit of the subordination agreement because of its proposed transbasin uses, and therefore we find it unnecessary to consider if BUREC has consented to increase the subordination beyond 60,000 acre-feet.

. . . .

. . . [T]he storage and release of water from the Aspinall Unit for Compact delivery purposes aids Colorado in meeting its Compact obligations, thereby benefiting the state's water users. Second, the commitment of the United States to make the marketable pool available for uses within Colorado will serve the CRSPA purpose of aiding the state's use of its Compact apportionment. Third, by enforcing the Aspinall absolute decrees as we would any other absolute decree, we clarify that the water rights of the United States carry the same benefits and responsibilities as all other decreed water rights." *Id.* at 341–42 (footnote omitted).

"The water court made a factual finding that Aspinall's marketable pool consisted of 240,000 acre-feet of water available for consumptive use. BUREC currently uses this water for multiple decreed purposes, and has contracted with others for only a small fraction of the total available marketable pool. The United States conceded on oral argument that both the Eastern and Western Slopes could use this pool beneficially through reoperation of the reservoir. . . . Section 620c of CRSPA authorizes BUREC to enter into both irrigation and municipal contracts with water users. *See* 43 U.S.C. § 620c (1994). The beneficial uses listed in the Aspinall Unit's final decree, Case No. 80CW156, include domestic and municipal uses. Therefore, although Arapahoe may not obtain a separate appropriation of the waters already decreed to the Aspinall Unit, Arapahoe may seek a contract with BUREC to use the water for municipal purposes." *Id.* at 342.

### ORAL ARGUMENT

#### *Board of County Commissioners v. Crystal Creek Homeowners' Ass'n*<sup>168</sup>

*Board of County Commissioners v. Crystal Creek Homeowners' Ass'n* was a complex decision involving several different facets of water law. The case has been in progress for almost ten years. In 1995, the Colorado Supreme Court held that the trial court erred in the first trial by considering conditional decrees senior to the Aspinall Unit decree. The court also held that only historically exercised decrees should be counted when determining the amount of water available to meet the

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<sup>168</sup> 14 P.3d 325 (Colo. 2000).

“can and will” test. The supreme court remanded the case to the trial court to determine the historic operation of the Aspinall Unit. The trial court again found that insufficient water for the applicants to meet the “can and will” test existed. The applicants appealed that decision on several grounds. A transcription of the oral argument to the Colorado Supreme Court from the second appeal follows.

JUSTICES IN ATTENDANCE AT ORAL ARGUMENT, MARCH 1, 2000:

Chief Justice Mary J. Mullarkey  
Justice Gregory Kellam Scott<sup>169</sup>  
Justice Rebecca Love Kourlis  
Justice Gregory J. Hobbs, Jr.  
Justice Alex J. Martinez  
Justice Michael L. Bender  
Justice Nancy E. Rice

CHIEF JUSTICE MULLARKEY: Parties are at counsel table and we’re ready for the appellant.

MR. ZILIS: Good morning. May it please the court? My name is Paul Zilis and I’m joined at counsel table this morning by John Henderson. We’re both with the law firm of Vranesh and Raisch and we represent the appellants in this case the Board of County Commissioners of the County of Arapahoe and the Union Park Water Authority. During my argument this morning, I plan to address this court’s mandates from the first appeal in this case and their importance in protecting the Constitutional right to appropriate water in the state of Colorado. I would also like to address the manner in which the U.S. facilities at the Aspinall Unit on the Gunnison River should be considered in determining water availability. This is also an issue of statewide concern because the Gunnison River provides a large percentage of the outflows of water from the state of Colorado in the Colorado River Basin and the rulings in this case may very well determine whether water will be appropriable under our apportionments under the Colorado River compacts. As you know, this case concerns the Union Park Reservoir Project. It’s a large project proposed for development in the Upper Gunnison Basin and the primary issue before this court today is whether water is available for the conditional water

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<sup>169</sup> By the time the court decided this case, Justice Gregory K. Scott had retired from the court and Justice Nathan B. Coats participated in the decision.

rights for that project. The reason that is the primary issue in this appeal is that the Union Park Reservoir Project proposes to divert water only under its own junior priorities. It will not require the dry up of any agricultural lands and it will not require the acquisition of any senior agricultural water rights in making water available for multiple purposes. Because of this design it would divert water under junior priorities which would mean that it would probably divert, and the engineering analyses indicate that would divert, the vast majority of its water only during the period of spring runoff, usually from the months of April through early July. The reason that the project is designed in this fashion is that there is a vast amount of water physically available in the Gunnison Basin. We've prepared an exhibit here today (eight and a half by eleven copies were passed out to the justices before argument) to show the amount of water that flows out of the Gunnison Basin under current conditions after use by all existing absolute water rights.

QUESTION: Before you comment on that, is there any objection to the use of this exhibit?

MR. SIMS: No.

CHIEF JUSTICE MULLARKEY: Go ahead.

MR. ZILIS: Thank you. As you can see from the exhibit, there are currently annual average outflows of approximately 500,000 acre-feet out of the East and Taylor Rivers, which are the rivers from which the Union Park Reservoir would divert, and those outflows occur after use by all existing senior water rights. As the Gunnison River continues downstream, it continues to grow exponentially. At the Aspinall Unit, which I referred to earlier, there are approximately 1.2 million acre-feet which flow through that facility on an average annual basis.

QUESTION: Let me ask you about this 500,000, is that water that is also released from the Aspinall Unit after having been stored for the multiple purposes of the project?

MR. ZILIS: The 500,000 acre-feet is above the Aspinall Unit. The 1.2 million acre-feet is the average amount that's released through the Aspinall Unit on an average annual basis.

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QUESTION: Ok, I'm still trying to figure out what you're saying about the 500,000 acre-feet, is it stored or is it not stored in the Aspinall Unit?

MR. ZILIS: 500,000 is flowing out of the Upper Gunnison River Basin after use by all the irrigation rights upstream. In other words, at the confluence of the East and Taylor Rivers that form the Gunnison River, there are 500,000 acre-feet which flow out of that Upper Gunnison Basin and continue downstream.

QUESTION: Presumably they're going through the hydroelectric facilities and they're passed through the Aspinall Unit.

MR. ZILIS: Correct. As a matter of fact, as the Gunnison River continues to the Aspinall Unit it picks up other tributaries and it's passing through an average of 1.2 million acre-feet per year.

QUESTION: Ok, thank you.

MR. ZILIS: The Gunnison River continues to grow as it continues downstream. By the time it reaches its confluence with the Colorado River near the city of Grand Junction, almost 2 million acre-feet flow out of the Gunnison Basin annually. This is after use by all existing water rights. Now, this case has been in litigation for over ten years for a public entity to show that a portion of that water is available for appropriation. The first trial was held in 1991 and the water court found that only 20,000 acre-feet are available for appropriation out of this vast amount of water that's flowing out of the Gunnison Basin. That case was appealed to this court and this court reversed and remanded the trial court on numerous grounds and set forth numerous standards for the water court to consider in any remand proceedings. It held that essentially the standards that were applied in the first trial in that case foreclosed recognition of applications for conditional water rights decrees that had every prospect of resulting in completed appropriations within a reasonable time. It held that it's implicit in the constitution that there shall be maximum utilization of water in the state of Colorado. Water is a very scarce and valuable resource in this state and this court ordered the water court to consider applications for conditional water rights in a manner that would encourage the development of water resources in the state. The court set forth some other standards. It set forth the standards of what river conditions should be considered when a conditional water rights application is before the

court. It held that only the conditions on the river at the time the applications were filed should be considered in determining water availability, because those conditions give the best picture of what water is available for appropriation and what water is being put to beneficial use. This court also held that absolute water decrees should only be considered based on the historic use rather than their full decreed amounts. This court held that conditional water rights should not be considered in determining water availability if diversions are not being made under those rights. And it generally made it very clear that the inquiry should be limited in determining water availability to issue a conditional water right. The case was remanded and the trial court held a second trial in October of 1997. In that trial, it actually found less water available for appropriation than it did in the initial trial. It found only approximately 15,000 acre-feet available for appropriation. And the issue before this court today is whether the water court did comply with the mandates and standards set forth in the first appeal. It's our position that the water court did not, and it does not apply the doctrine of maximum beneficial use in a way that would encourage the development of water resources in the state. Now, the water court relied primarily on two federal facilities to find that there was virtually no water available for appropriation. They relied on the Aspinall Unit which I referred to earlier, and the Taylor Park Reservoir. Now, the Aspinall Unit is the other issue I'd like to discuss briefly this morning and I'd like to set out for the court the posture of the issues surrounding the Aspinall Unit for the remand trial as they relate to the mandates from this court and as they relate to the way that the unit was considered for determining water availability. The Aspinall Unit was at issue in the initial trial and the water court held that the 1.2 million acre-feet that are flowing through the Aspinall on an average annual basis, that Justice Hobbs inquired about, is unavailable for upstream appropriation. Those issues were appealed to this court and this court elected not to specifically address the Aspinall Unit issues. However, it's our position that it certainly addressed those issues by setting forth the mandates that the water court was to consider in determining water availability on remand.

QUESTION: Let me ask you about that because it looked in the various orders that the trial court issued regarding the modeling and the legal assumptions to be made on water availability, that he did look at the absolute decrees for recreation, fish, hydropower, that had been previously granted in 1980, I believe, the absolute decrees, and he also factored in, it seemed to me, this 240,000 acre-foot contract pool that

apparently is stored in the Aspinall Unit but used for these other various purposes, and also the flood control purpose. So why isn't the posture of this case that all the storage in the Aspinall Unit, in fact, has been exercised in the past under these state decrees under section 8 of the Reclamation Act in the River District's assignment to the United States of those rights?

MR. ZILIS: That's an excellent question Justice Hobbs. The water court actually held that none of the massive amounts of water which do flow through the Aspinall Unit are available for appropriation, and it held that in considering water availability one cannot look at what purposes those water rights are used for. So in essence, what the Water Court held, was that any water that flows through the Aspinall Unit, from the minute it was built, is now appropriated under state law and that there's no water available above that amount, in other words, the full 1.2 million acre-feet which flow through the Aspinall Unit. It's our position that that's directly contrary to the mandates of this court and directly contrary to the mandates and the Congressional directives in the Colorado River Storage Project Act, which authorized the construction of that unit. As you are aware from the extensive briefing on this issue, "CRSPA," or the Colorado River Storage Project Act, was actually passed by Congress to allow the Upper Basin states to use their compact apportionments. If this analysis that the water court applied to the Aspinall Unit, is applied to the other Colorado River Storage Project units, it would turn CRSPA on its head and would actually prevent any further appropriations upstream of those units once those units were on line. So it was our position in court that one has to look at the individual uses of the water at the Aspinall Unit to determine whether those uses should preclude upstream appropriation. It's very clear from CRSPA that the very intent of this was to provide carry over storage so that water could be stored in wet years and then only released to the downriver states, the Lower Basin states, during prolonged dry periods, so that the Upper Basin states would be allowed to continue to divert and to develop their apportionments under the compacts.

QUESTION: Mr. Zilis, if we were to take your position, would it mean that the full 1.2 million acre-feet would be available for domestic and municipal appropriation?

MR. ZILIS: Under current river conditions, we take the position that the Aspinall Unit could not place a call on the river. That is because it

has not yet been used for these compact purposes. To date, it's never been needed to release water to the downriver states in the dryer periods.

QUESTION: So the answer is yes.

MR. ZILIS: The answer is not yes. I think that the Colorado River Storage Project Act was put into place so that the carry over storage could be provided. Under current river conditions, I suppose one could apply for very, very large appropriations upstream of that, but it needs to be considered in a way that the carry over storage could be available to the Lower Basin states. Under present conditions though, it's not being used for consumptive uses to any extent. As Justice Hobbs pointed out, it has a pool that's been aside for consumptive uses in the amount of 240,000 acre-feet and it's only been used to the extent of 78 acre-feet. The main function of the Aspinall Unit to date has been the generation of power and flood control.

QUESTION: So the answer to the question would be that the only use for which the domestic and municipal uses could be called out would be to supply water at Lee's Ferry in accordance with the compact. Is that right? Is that what you're saying?

MR. ZILIS: No, I think the other primary purposes are consumptive uses.

QUESTION: So are the 200,000 and some odd acre-feet that are reserved for consumptive uses and/or the historical or actual consumptive use of 78 acre-feet at present?

MR. ZILIS: It would be the 78 acre-feet at present. I think that's very clear under the mandates of this court when it held that water rights need to be viewed in light of their historic use rather than their decreed amounts.

QUESTION: Let me ask you this. Suppose the project proceeds and the water is taken over to the east slope and then the United States exercises its contract rights which would be clearly senior under Colorado priorities, right?

MR. ZILIS: Correct.

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QUESTION: Now, wouldn't that then totally interfere with the operation of this project in the future, Arapahoe County's project?

MR. ZILIS: Not necessarily, and again we're looking at future conditions. But, if Arapahoe County's project came on line, the projected diversions would average about 120,000 acre-feet per year. That means that there would still be an excess of 1.1 million acre-feet available to the Aspinall Unit for all of its various functions.

QUESTION: My second question is, if the water is taken through the divide, is it then not available to meet this compact call circumstance in a prolonged drought cycle, the back up protection for Colorado's beneficial use?

MR. ZILIS: You know, we do not have to reach that issue in this case because it's never been used for that purpose. In the initial trial, the division engineer actually testified that the United States would not be able to preclude upstream diversions based on compact demands. However, again, based on the conditions on the river in this case, I think what we're looking at is water availability based on current circumstances or the circumstances when the applications were filed in this case. At that time, it's never been needed for compact purposes. The two primary functions though, to reiterate, are compact purposes and consumptive uses. And I think for purposes of this case, you could conclude that they could call for those water rights. But the only issue before this court in this case is whether the applicant should be denied the right to appropriate 100,000 acre-feet under the conditions on the river at the time the applications were filed. The conditions at that time were passing 1.2 million acre-feet through the Aspinall Unit annually, and that would cut that amount to 1.1 million acre-feet, which are passing through the Aspinall Unit and unavailable for appropriation in this state. It's generally our position that if the mandates of this court were followed closely, and if the purposes of CRSPA and the Congressional directives are followed that there should be ample amount of water available for appropriation upstream of the Aspinall Unit.

QUESTION: Here's my concern. My concern is that based on this project history and the way it was put together and the debates and so on, there is 240,000 acre-feet that can be used through that project, apparently, any place in Colorado, east slope or west slope, upon a contract. And that in fact, the way you've postured the case, does not,

I would ask you to answer, answer the question that in fact, a part of the bargain made for the building of this unit was that there would be water available for consumptive use, and it is sitting there, in fact, under the water rights for the Aspinall Unit, and why isn't this application then a second and independent dip at the same water?

MR. ZILIS: I don't believe it is a second and independent dip for several reasons. First, the 240,000 acre-feet that's been set aside for future contracts has not been yet used, and I think under the mandates of this court from the first appeal, that one needs to examine the historic use for that decreed purpose which has only been 78 acre-feet.

QUESTION: But it's sitting in storage for recreation, the flood control, the fish and wildlife, the National Recreation Area use, is it not? Isn't it being used?

MR. ZILIS: It's being used, but as I think is briefed extensively, it's being used for purposes that are incidental to the primary purposes of the whole act. If the United States were to take this position at all of the other Colorado River Storage Project units, it would have control of the entire Upper Basin and could preclude any diversions by any water uses in Upper Basin states unless they have a contract with the United States. Now, I think there's a big difference between appropriations under state law upstream of the Aspinall Unit and uses of water directly from the Aspinall Unit. I think if the applicants were attempting to take advantage of the pool after it's stored in the Aspinall Unit, that they would very well have to contract with the United States and would have to purchase that water. However, it's our position that the Colorado River Storage Project Act cannot preclude appropriations under the Upper Basin state's apportionments upstream so that it can sell water from the actual structures themselves. This position has never been taken at the other units. In fact, it was not even the position taken on this unit at the time this application was brought. It has been a new position that has been taken by the United States, in this case, for the first time ever and, it was adopted by the water court. And I think that if that position is recognized, then it will mean that Colorado has given away the Upper Gunnison Basin and control of that Gunnison Basin to the United States, which I don't think was ever the intent of CRSPA or the state of Colorado in authorizing CRSPA and approving of it. If there are no further questions, I'd like to have John Henderson address this court regarding the issues surrounding Taylor Park Reservoir. Thank you very much.

MR. HENDERSON: May it please the court? My name is John Henderson. I would like to follow up on one question that was asked to Mr. Zilis about the compact water, and that is Justice Hobbs, if the United States has been traditionally releasing four or five hundred thousand acre-feet from Blue Mesa for flood control in the spring in anticipation of runoff, and Arapahoe County begins to take 100,000 acre-feet of that upstream at each year on average, I'm assuming that the United States will simply adjust its operations so that it releases less water in storage for compact purposes for flood control in the spring. That fits in with the policy of maximization of beneficial use. If I might say, with all the respect to Sherlock Holmes, sometimes it's the dog that doesn't bark that tells us the most about a case. In the 300 pages of the opposer briefs here, no one mentioned the actual historical use of the first fill of Taylor Park Reservoir for irrigation. It's not because that number is a secret, it's in the decree at section 33a and at footnotes five and six. The amount, using the larger figure used at trial by any of the parties, is 21,831 acre-feet of historic first fill. The second fill was quantified in the trial court, there in 1990, in what we know as the Upper Gunnison case. That case was affirmed here in 1992. As a matter of fact, the quantification for the second fill of Taylor Park Reservoir was affirmed here. That quantification was 19,905 acre-feet. That is found at 838 P.2d at page 846 where the finding is discussed and affirmed at 848. If you add those two average figures together, members of the Supreme Court, it's approximately 42,000 acre-feet, in a basin which produces approximately 145,000 on average, at the Taylor Park Dam. The evidence is clear as is the decree, that when the opposers modeled the first and second fill of Taylor Park they were not constrained to using the first fill water for irrigation purposes only. We won half of the case that was up here on appeal in Upper Gunnison — the Upper Gunnison case, that I've cited to you earlier, decided in 1992. The half we won was that half of that decree, the irrigation decree, the district being the Upper Gunnison district, was not able to add additional uses to the irrigation fill. If you look at this decree at section 37d, you will see that Mr. Helton was not constrained to modeling historic use of the first irrigation fill. If you look at 38d, you'll see that Mr. Book was not constrained by the historic irrigation use of the first fill. And if you read 38d, you will find that Mr. Book testified that the difference between reservoir releases averaging 70,157 acre-feet and the diversions of 20,594 acre-feet, the figure used by Mr. Book, through the Gunnison tunnel for irrigation equals 49,550 acre-feet, which at the end of the year is transferred to

the Aspinnall Unit for use as part of its decreed purposes. That's 50,000 acre-feet a year that they ran down the river and did not use for irrigation purposes. That 50,000 acre-feet then could be second fill up at Taylor Park, meaning that on average we lost 100,000 acre-feet per year of the Taylor River drainage that was not used for historic purposes. Over a 15 year study period, which we used here, that's a million and a half acre-feet that vanishes out of the Taylor River without ever having to be used for a decreed purpose.

QUESTION: Let me ask you this, there's an accounting sheet that is attached to the court's refill decree. Am I not correct on that?

MR. HENDERSON: That is absolutely correct, Justice Hobbs.

QUESTION: Ok, now, did that accounting sheet vary in any way, or the assumptions for the modeling vary in any way between the first time that case was tried on the refill right and the modeling for the trial that we're now reviewing?

MR. HENDERSON: Indeed Justice Hobbs, as a matter of fact, at section 36a of the decree in this case, you'll find that the district modeled the accounting in a different way than it did in the Upper Gunnison case. The court must also remember that the accounting sheet is simply a sheet that's attached to a decree. And the decree is subject to the rules of interpretation in this court. This court has been emphatic over the decades, that the measure of a water right is its historic use for decreed purposes, most recently, in the Santa Fe Ranches case, which was decided only a month or two ago. In a case where you're determining if there's unappropriated water in a basin, it's even more important that when we look at historic use in the basin, when we're trying to encourage development, that we look at actual historic use. If you look at the decree for those two cites, that show that the 37d and 38d, that neither of the opposers model was constrained to historic use in modeling the first fill, you can see how they took that water away from us.

QUESTION: Counsel, may I ask you a question please?

MR. HENDERSON: Indeed.

QUESTION: I'm looking at the trial court's position on that topic. I think it's found at page 22, where he says that basically the argument

you're making to us right now has a lot of logical sense, but in his opinion it flies in the face of the Supreme Court's decision in Gunnison District 202203. What do you have to say about that, please?

MR. HENDERSON: Justice Rice, what I have to say is this, and that is that in 202203, when we argued Upper Gunnison here, seven years ago, approximately, we had a pretty good idea of what they might do to us on a retrial of our case, they hadn't done it yet. We lost only half of that case, but this court did quantify the second fill during almost the identical historical period at 19,900 acre-feet. They're now coming back and telling us they've reinterpreted the accounting provisions and it's now 106,000 in most years, which is the full capacity of the reservoir. Your Honor, they can't do that without taking that first fill irrigation right and running it down the stream. We won the part of that case, Your Honor, where we restricted the right of the first fill to irrigation use only. The district was not permitted to add additional uses, including recreation, to that first fill irrigation use. So it doesn't fly in the face of the holding in Upper Gunnison.

QUESTION: As a matter of law. You're saying that the facts haven't changed, but as a matter of law it doesn't "fly in the face," it's not in-apposite, is that correct?

MR. HENDERSON: It does not fly in the face of either of those holdings of this court. Your Honor, if I may summarize, reserving the rest of our five minutes for rebuttal. We've been up in this court for more than ten years, twelve to be precise, trying to prove that there's water available in one of the wettest basins in the state. When we started this case, I didn't even have kids. They're now approaching the fifth grade. This court has held that municipal entities and appropriators in this state are not to be held to enormous or unusual burdens in trying to prove that there's water available for appropriation. This case is about the heart and soul of the Colorado River, Justices of the Supreme Court, because if we lose the 2 million acre-feet out of the Gunnison to California, we're never going to get it back. And if we accept the position that the United States controls this river basin and can determine who can appropriate and can determine that there are not transbasin diversions, then we've lost the river. We reserve the remainder of our time for rebuttal. Thank you.

MR. SIMS: Good morning, my name is Steve Sims. I'm first assistant Attorney General. I represent the State Engineer and the Division

Engineer for Water Division 4. With me in the courtroom today is the Attorney General of Colorado, Mr. Ken Salazar; also at counsel table is special litigation counsel for the Department of Justice, Hank Meshorer, and Dick Bratton from the Upper Gunnison District. In the audience with us is Hal Simpson, the State Engineer of the state of Colorado, and Wayne Schieldt, the division engineer for Water Division number 4. Arapahoe County in this case seeks to build Union Park Reservoir. Union Park Reservoir will be the second largest water right in the state of Colorado — three times the size of Dillon Reservoir. Arapahoe County's main problem in this case is that Union Park Reservoir, the second largest right in the state, is proposed to be located just immediately upstream from the Aspinall Unit, which is the largest water right in the state of Colorado. This case is really all about the priority system. Recognizing senior rights, the historic use of those senior rights, and not allowing a junior right to divert out of priority. In the simplest way, that's what this case is really about. The Aspinall Unit is really the key to water availability for Union Park, and 620f in the hydro provisions are really the key to understanding the Aspinall rights. Before I get into that, let me just briefly comment on the ten minutes of argument that we heard about Taylor Park Reservoir. Judge Brown kind of hit the nail on the head with those issues to say that, even if all of Arapahoe County's argument on Taylor Park Reservoir was correct, that water that they deem to be available for Union Park would only be able to be diverted by Union Park if Aspinall would not call. So it assumed, Taylor Park is only relevant if Aspinall isn't considered.

QUESTION: That's because it's delivered into the Aspinall pool at the three reservoirs?

MR. SIMS: No, primarily it's because Aspinall is a senior right and can call out the Union Park Reservoir, and therefore if Taylor Park wasn't taking the water, Aspinall would be taking the water.

QUESTION: So given the operation of all the state decreed rights for their purpose, there's, what, 15,000 acre-feet left for appropriation?

MR. SIMS: That's correct.

QUESTION: Regardless of the modeling assumptions you do on the refill, right?

MR. SIMS: That's correct. So we're not going to discuss Taylor Park anymore than that, just because it really doesn't make any difference. Aspinall is the key. And the key to Aspinall, as I said, was 620f. The state and the United States are both going to appear before you today and argue that we are both in agreement that Arapahoe's argument about 620f and hydro-use is just wrong. And it's wrong for five basic reasons. First of all, Congress did not intend to impose stricter conditions on CRSP reservoirs than the limitations placed on any hydro reservoirs by the compact. All Congress intended was to put those same hydro restrictions, that the compact put on, on their own reservoirs. Nothing more, nothing less. So when you look at it that way, you really have to understand the compact, because the compact itself makes intrastate water matters off limits. It doesn't purport to talk to that. There is one provision, article 4c of the 1922 compact, the Colorado River Compact, that makes it clear that intrastate—within the state of Colorado—the intrastate water regulation issues, are completely left to the states. The Compact was not intended to have any impact on that. Also, we will show that Governor Johnson, then the Governor of the state of Colorado, when CRSP was being considered in Congress, actually asked for restrictive intrastate provisions to be placed on the CRSP reservoirs. Specifically he asked, he said, that if the CRSP reservoirs are allowed to obtain a hydropower right, we'll be in the same position that we are in in the Green Mountain / Dillon dispute. And he said, once the United States got hydro-rights for that reservoir, they were allowed to call out upstream water rights. He asked them not to allow hydro-rights to be acquired. Congress specifically rejected that. When they were having the discussion in the committee here and Sandra Watkins (all of this is in my brief), what Sandra Watkins said, well, wouldn't your language restrict all hydro-generation on these CRSP reservoirs? And Governor Johnson said yes. So when they actually marked up the legislation, when they dealt with the legislation that was being discussed in that committee hearing, about ten days after Governor Johnson's statements, they struck out any language that referred to waters in the upper tributaries or in the states, and the reason they gave in the explanations for why they struck it out was to protect hydropower generation against other uses.

QUESTION: I'm a little concerned about the argument in the fact that it suggests to me that perhaps even though there's a theoretical 240,000 acre-foot consumptive use allocation of that project, that the hydropower rights would be exercised within the state, perhaps even

under the judge's ruling in the trial court, in preference to that consumptive pool. So what is your response to that?

MR. SIMS: Well, actually, my response to that is that the 240,000 acre-foot pool—actually, we call it the marketable yield pool because it was never really quantified at 240,000—the marketable yield pool is completely consistent with the hydropower uses.

QUESTION: In what way?

MR. SIMS: The water in the marketable yield pool could be used either upstream or downstream and not detract from the hydropower uses.

QUESTION: Well, it wouldn't be going through the turbines, would it, if it was taken across the divide? And apparently you concede, and the United States concedes, that that pool could be marketed for that purpose.

MR. SIMS: That's true, it could be. And actually it is being used now. One misconception that Arapahoe likes to argue is that it's just sitting there unused. It is being used now. What the marketable yield pool is really doing is that the marketable yield pool is water that is currently being used for hydro that they have said they don't need to use for hydro in the future. They can sell it off and use it for other purposes. It could be diverted over the hill, it could be diverted upstream, and it wouldn't affect the economic feasibility of the unit. And that's really the key, is the connection between that and the economic feasibility. Did that answer your question?

QUESTION: In some ways it did and in some ways it didn't. The direct flow power rights that were decreed and made absolute in 1980, they were to be fully exercised, and that would impinge in using upstream any part of this 240,000 acre-foot pool. How is that resolved in regard to the operation of the project?

MR. SIMS: Well, actually, on average, the direct flow rights use about 550,000 acre-feet of water, on average. So those direct flow rights could be fully exercised and there'd still be water to use, the marketable yield pool upstream.

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QUESTION: Ok, same question with regard to recreation, fish and wildlife, and the flood control rights. I mean, how does that impact whether or not the United States is actually going to be in a position to market any of that water?

MR. SIMS: Well, they certainly, the recreational uses, are mainly within the reservoir, so anything that gets to the reservoir is used for recreational purposes.

QUESTION: I understand, but it wouldn't be there, if it was marketed to somebody who was able to use it up above.

MR. SIMS: That's correct, and that's water that, just in the project planning, they said, the whole project would still work even if this water wasn't here. All the purposes would still work if this water wasn't here.

QUESTION: I guess all I'm asking you is, the state's taking a position here that appears to say, that in fact, there was a reserved pool that can be used for any of the purposes of Colorado beneficial consumptive use which would go against the Compact entitlement. I understand Arapahoe County to, in effect, be saying first of all, it's never been used for that purpose, and we shouldn't be shut down from at least speaking for that amount of water and much less, maybe 100,000 acre-feet of the 240,000, as long as it isn't being used, and perhaps it'll never be used, given the state of Colorado's and the United States' position here, and in fact it's a blocking action to consumptive use under the Compact.

MR. SIMS: Yes, I understand that's their argument, but the United States and the State both agree that the 240,000, as you call it now, the marketable yield pool, is currently being used. That's water that is being used for these other purposes. And all that the sale or transfer of that water will do is shift it essentially from one use to another use, to the consumptive use purposes. So to say that it's just sitting there not being used, as Arapahoe has, is just wrong. It's currently being used. And even if it was just a pool sitting there, it's sitting there under a senior right. It's sitting there, as many reservoirs in the state are, storing water and making it available for water users to come in and use. The whole purpose of reclamation law is "build it and they will come." Unlike other water users in the state, governmental and municipal water users in the state are not required to have firm contracts before they

actually develop water. Building a dam and putting it in and holding it is developing water. That's not what's happening here, but even if that was the case, they would be allowed to do that because they have a senior water right, and that's the key.

QUESTION: Mr. Sims, am I correct that the net effect of your position is that no other entity can make use of that 1.2 million acre-feet except under contract with the United States, and then only except as to the marketable yield pool, yes?

MR. SIMS: Basically, yes. And it's no different than any other water user. Once you acquire a water right, once you appropriate it, once you've developed it, once you've put it in your bucket, it's up to you to dispose of that water right. And right now, the marketable yield pool is that extra part that they can go out and contract to new uses, but if they never find another user, it's all being used now. And Judge Brown pointed that out when he was disputing the way that Arapahoe had characterized this interference, this general subordination that all CRSP projects must subordinate to any junior water user that comes in upstream. Judge Brown said no, that's not right, that's an improper reading of CRSP. CRSP, and Aspinall in particular, have aided compact development in the state. He made that finding. Jim Lochhead testified about that. And in the '91 trial, Judge Brown pointed out some very specific instances in which they had made compact development possible in Colorado. And that's the Dolores Project, McPhee Reservoir, and the West Divide Project, which is Ridgeway Reservoir. These are big, participating projects, Colorado River Storage projects putting water to beneficial consumptive use for irrigation. These projects would have a lot of their yield taken away for water that would have to be delivered for endangered species purposes on the Colorado River. A lot of the yield of those projects wouldn't be there, but for the fact that Aspinall makes releases for them, for endangered species purposes. So this shows one of the ways that Judge Brown found, that in fact, there was compact development being encouraged by Aspinall. And another thing—this goes to another misconception of Arapahoe's argument—they say the water in Aspinall has never been used for compact purposes, for delivery purposes, because there's never been a compact call. Well, there's not supposed to be a compact call. If everything works the way that the Colorado River Storage Project and the 1968 Basin Project Act have been designed, there will never be a compact call. And the way this works is that they regulate the rivers; this is the whole reason CRSP was built. I

mean, when the Colorado River Compact was negotiated, the negotiators made a basic mistake, and that mistake was they assumed that there was a least 15 million acre-feet to divide in the river. There wasn't. It was more like 12 to 13 million acre-feet. Well, if that's the case, Upper Basin states who have made a promise to the Lower Basin states, that they will always deliver 75 million acre-feet over ten years, they're going to be severely constrained to develop water. They aren't going to get half, they're going to get much less than half, unless they've got storage, unless they can take the big peaks in the hydrograph that occur in the Colorado River and store them and gradually release them over ten years so it evens out the flow of the river. If that doesn't happen, then why would you ever build a project in the Upper Basin? Because in many, many years, you wouldn't be able to divert anything; and most water users don't put a bunch of money into a project; even the Federal Government wouldn't put a bunch of money into a project, if they weren't going to be able to use it. So that's the real purpose for CRSP, is to even out the flows of the river. And they have done that. It's worked. The fact that there's never been a disaster, a compact call, proves it's been working. And Arapahoe seeks to undermine that. And that's one of the reasons that the State Engineer is in this case. The State Engineer is neither opposing nor supporting the project. But the State Engineer is very concerned about these arguments that could have a drastic impact on the law of the river. This law of the river has been developing since even before the compact. It's been developing for 75 to 80 years, and they're trying to turn it on its head. Just so they can get water available for their junior project. Perhaps I should mention a couple other things, because again, if 620f doesn't fly, and I think we've shown that it doesn't, the house manager's report that's in the legislative history—the final conference report where the Senate and the House negotiators came together to work out the differences between their two bills, and they told us why 620f was put in there—what they told us was it was put in there so everyone would live up to the compact. So these compromises that were made over the years over hydropower wouldn't be disrupted, there was no intention to put stricter requirements on. So if you just look at 620f, we think it is plain on its face.

QUESTION: But under your interpretation, it would only apply to the hydropower facilities of Lake Powell, right? It would prevent them being used at the Glen Canyon Dam to call out Colorado water, isn't that the interstate issue?

MR. SIMS: Yes, absolutely. We agree with that. 620f was intended just to make the hydro compromise stick; it wasn't going to change it. California was trying to change it when they were adopting the statute and they just wouldn't let them get away with it.

QUESTION: But you're saying the Colorado sponsors of the project didn't have any concern about the hydropower rights being exercised in Colorado?

MR. SIMS: Well, absolutely they did. Colorado did not want any interstate calls. I mean, that was the Upper Basin issue, really. These big reservoirs should not be extending calls beyond state lines. And that's when Arapahoe argues that the state's position is going to prevent any development upstream. They forget that little part of the argument, which is we have never agreed that Glen Canyon can call above a state line or that Flaming Gorge can call above a state line, or that Navajo can call above a state line. Actually the only reservoir in the system that's purely intrastate is Aspinall. Because remember, Glen Canyon is built right on the Arizona-Utah border. I mean, the dam that would be calling would have almost nothing in Arizona that it could call out. Same with Flaming Gorge, where the dam is built on the Utah-Wyoming border. There's almost no intrastate area that it could call out. So that's why we look at 620f as an interstate matter. Everything in the compact is interstate or interbasin.

QUESTION: What about the 60,000 subordination depletion allowance and the 240,000 marketable yield, 300,000 acre-feet. What's the state's position with regard to hydropower rights effect on that 300,000 acre-feet?

MR. SIMS: Well, the priority dates of all the rights are the same, so you couldn't say that a hydro right would call out any of the marketable yield rights because it's one decree with one priority with multiple uses. A direct flow right with the exact same date as a storage right is not deemed to have a better right. I mean, for quite a few years we have dispelled that notion. So there really is no conflict between the two, it's just merely the way you operate all these bundles of rights together. So the hydro couldn't affect the 240,000, if that's a direct answer to your question, that's our position. Just to sum up a little bit, there's one other subordination issue that came up besides this general CRSP must subordinate to any state development, and I think we've talked about that and I've dealt with that in our brief, but there's also

the argument that since the Bureau of Reclamation subordinated the 60,000 acre-feet of in-basin upstream depletions, that that somehow created a selective subordination. And the basis for this argument was a memo done by Dr. Danielson, the former state engineer, where in that memo he said I'm going to deem the Aspinall Unit the most junior rights in the basin because they have selectively subordinated to these upstream uses. And I just wanted to remind you how the trial court dealt with this, and what the trial court said is, first of all, we're not sure that this was ever a real policy of the state engineer. There was a lot of conflicting facts on this and, after they balanced all of those facts, they said Dr. Danielson was not really creating this policy where he made these water rights the most junior in the basin. What he did was he was bluffing and trying to force the Bureau of Reclamation to come out and formally recognize their 60,000 acre-foot subordination, which had never been done in writing, and tried to force them into water court to get this decree. But it wasn't an effort to actually make them the most junior in the basin. And the court went on to say, even if that was his intent, which it wasn't, but even if it was the state engineer's intent, the state engineer didn't have any power to do that. He didn't have any power to make the Aspinall rights the most junior in the basin. And it's interesting that he also found, and the division engineer testified at trial, they never changed the tabulation as a result of that memo either. So that last subordination is kind of a non-issue. In summary, and I'm going to turn the rest of my time over to Mr. Meshorer, but in summary, Arapahoe seeks to disregard the priority system. They want to let their junior Union Park right divert before the Aspinall Unit rights. And they've come up with a myriad of excuses as to why that should occur, but really, the priority system works in Colorado. The Compact does not change that. 620f does not change that. We have to recognize these senior water rights. Judge Brown, in a very thorough, complete, scholarly opinion—he's been dealing with this case for fourteen years—really did his work. He did a good job. He made the correct decisions, and his ruling should be affirmed. Thank you.

MR. MESHORER: May it please the court? My name is Hank Meshorer, special litigator for the U.S. Department of Justice. Many of the issues I was going to talk about were handled well by Mr. Sims, so I'm going to go to some points that maybe weren't addressed. I want to mention three things that were undisputed facts at the initial trial. First, that the trial court found that all of the senior state decrees of the Aspinall Unit have been continually, without interruption, uniformly

used to their fullest extent. Second, that as part of CRSPA, Aspinall has been used in a multi-use integrated fashion. Third, that Aspinall has been operated at all times to assist both the Upper and Lower Basins to achieve their full allocations of water in accordance with the various compacts. I could stop right here. Arapahoe says these facts are disputed. I counted the number of paragraphs that the water court supports this as matters of fact, and I don't want to list them because I haven't got that much time, but there are twenty paragraphs as to the first proposition (and they're all stated in my brief) that the senior state water right decrees of the Aspinall Unit have been continuously, without interruption, used to their fullest extent. Seventeen paragraphs in the court's first order support the second proposition that Aspinall is operated in a multi-use integrated fashion. And sixteen paragraphs in the court's opinion all found as a matter of fact, indicate that the Aspinall Unit, without a doubt, has been operated to assist both the Upper and Lower Basins. I find it rather ironic that Arapahoe makes the argument that the federal government will control the water. I find it insulting, and I would think it's more insulting to the court than it is to me because it's a pandering. It comes from weakness. It's ironic that Arapahoe is the only party in this litigation that seeks federal preemption. They're the only party that says that the state water decrees need to be preempted by federal law in three or four instances—hydropower, fish, recreation, and wildlife. No one else makes that assertion. The question was asked about the 240,000 acre-foot marketable yield and Mr. Sims handled that, I think, to the satisfaction of the court. I would add this: if that water was to be used for other uses, as indicated in my brief, the Bureau would have to make elections and change the way the uses are allocated after the NEPA process and all other environmental laws were complied with. And would most likely, Justice Hobbs, lead to, and I say most likely because I do not know, that the hydropower waters would be lessened. The marketable yield is a pool sitting there for use by anybody in Colorado. Transbasin diversion, they have to pay for it. The project was built by the Bureau to make water available and they have to pay for it. The 60,000 subordination was for the western slope and, as Judge Brown stated exhaustively, was meant to be restricted to in-basin use, juniors only, and with a contract, and be as compensatory for the local impact of that huge project. The 240,000 acre-feet of water is not a separate water right. It is not physically separate. It cannot be carved out and used by Arapahoe at its choosing, or by anyone else. If the water's to be used, the Bureau would have to change its operations. Arapahoe says that these uses that they challenge are incidental, and

incidental uses are not allowed under CRSPA. First of all, this begs the question if the multiple use regime, as found by the court as a matter of fact, is not valid. Let's assume that to be true for purposes of argument. Even if you segregate these uses out, they've all been used in their totality. As the court found as a matter of fact, none of them are used solely, just for one purpose. Arapahoe bases its primary-incidental argument solely on the *Jicarilla* case. Back up a second. None of the uses of the water by the Aspinall Unit are incidental. They're all sanctioned by the CRSPA statute, by the 1968 Colorado River Basin Project Act, as primary. Let's assume that one or two of them was incidental. All that the *Jicarilla* case says [is] that an incidental use cannot justify a use of water if that use is contradictory to a primary purpose. Just because it's an incidental use does not mean it can't justify the use of water. Now, also in the *Jicarilla* case, the water that was used at the Elephant Butte Reservoir was for recreation only, and it was not a recognized use under state law, and it was being used solely for that purpose. It wasn't recognized in New Mexico because the water was being stored, there were no buyers, and the City of Albuquerque said we're going to hang onto this water and use it for recreation until we get a buyer. That was not a recognized use under New Mexico law.

QUESTION: Did the 1968 Act change the 1956 Act's effect with regard to the uses of the Aspinall Unit, regarding recreation, fish and wildlife?

MR. MESHORER: The fish and wildlife was a purpose under CRSPA, Justice Hobbs, but it was again explicitly stated to be a purpose in the 1968 Act, as primary.

QUESTION: As a primary purpose?

MR. MESHORER: Yes sir.

QUESTION: The absolute decrees were obtained in 1980?

MR. MESHORER: Yes sir. -- I am not following your question.

QUESTION: I'm just wondering if there's any argument left on it being an incidental use, if in fact the project is authorized for primary purposes and include these other kinds of purposes and they match with the state decrees that were made absolute.

MR. MESHORER: I agree Your Honor, I was just making the argument for purposes of conceding to Arapahoe, which we don't, but to show that their argument reaches a logical absurdity. That even if these uses were incidental, and they are not, they are primary. But even if these uses were incidental, I think it would only be fish and wildlife. There is no way you could call compact purposes incidental, or flood control, but let's say it is fish and wildlife and recreation. Even if they were incidental, which we say they are not, the statute specifically lists them as primary. They are consistent with the other primary uses, and therefore the *Jicarilla* case would not apply. Because *Jicarilla* said only if a use is incidental and is inconsistent with the other primary purposes, then it can't be used. Also in *Jicarilla*, I would add, that case did not decide the issue, and did not turn on a CRSPA reservoir, but on a reservoir built under a different act.

QUESTION: Would you concede that the legislative history and the project history of the Aspinall Unit does envision that the 240,000 acre-feet in whole or in part might be used on the eastern slope of Colorado?

MR. MESHORER: Most certainly sir. I see my time is expired. Thank you.

QUESTION: Rebuttal.

MR. ZILIS: Thank you. The United States and the State essentially argue that the Colorado River Storage Project Act does not control operations at the Aspinall Unit. They have now postured this case to say that you only look at state decrees under state law, and that any restrictions in the Colorado River Storage Project Act have no impact whatsoever on how that project is operated. The Colorado River Storage Project does explicitly state that hydropower generation is incidental to the primary uses. That's right in the very first section of CRSPA, section 620f. Section 620f, which Mr. Sims referred to, specifically states that subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the Colorado River Storage Project units shall preclude or impair appropriations for domestic and agricultural uses under state law. That now means nothing, as far as appropriations in the state of Colorado.

QUESTION: I have a little problem with that. In *California v. U.S.*, the court is very plain that absent a specific provision of federal law there is no preemption and it refers back to state law. Now, are you saying that that language you just mentioned is so clear that there is a federal preemption of state water decrees obtained under section 8 of the Reclamation Act?

MR. ZILIS: Yes I am. I think that that language is absolutely clear that the federal government cannot preclude instate consumptive uses so that it can generate power. I think that CRSPA was enacted, in fact CRSPA was clearly enacted, to allow the Upper Basin states to develop their compact apportionments. If the Federal Government were to take the same position it's taking at the Aspinall Unit at the other three primary storage units, there'd be no water left available for appropriation in the Upper Basin states. I think *Arizona v. California* was very clear that one must look at the entire legislative scheme, the direct Congressional objectives, and the scheme for the storage and distribution of water in determining how it should be interpreted. And that case, I think, is very enlightening on this issue. We have with the Boulder Canyon Project Act, but it really set forth the guidelines on how a court should interpret a specific Congressional directive like this. Again, if the hydropower operations at CRSPA facilities were allowed to preclude upper state appropriations, they could virtually shut down the Upper Basin. That's directly contrary to the whole purpose that CRSPA was enacted. You had asked whether the state had taken any position on this issue when the Colorado River Storage Project was passed. The Colorado Water Conservation Board submitted a resolution to the United States Congress, which set forth several very important points for the state of Colorado. One of them was that specific provisions should be made in authorizing legislation to assure that no rights vest in the use of water for power generation in units of the project which will prevent or handicap the beneficial consumptive use upstream of the waters of the Colorado River System, to which any Upper Basin state is entitled. That was Colorado's intent when CRSPA was enacted. The state has taken a new position in this litigation, and I will say it has taken a new position for the very first time regarding this issue. The United States has also never taken this position at the other Colorado River Storage Project facilities. The state of Colorado was also very clear that the primary units were not to infringe on its ability to place water to beneficial consumptive use. And one more quote from the legislative history, this is again from the CWCB resolution that was passed on to the U.S. Congress:

Most importantly the hold over storage reservoirs will not fulfill their primary function if they are so used as to prevent the authorization and construction of junior Upper Basin projects, which use water within the apportioned share of any state. Due regard for this important matter must be made, and all priorities awarded any units of the project.

The state has absolutely taken the opposite now and says that any water that passes through the Aspinall Unit is now unavailable for any future upstream uses.

QUESTION: That's just not the same thing as saying that Colorado is blocked from developing its compact entitlement, is it? Because every acre-foot of water that goes across the state line, released from Aspinall, is credited to Colorado's delivery, allowing other uses within Colorado on other tributaries, through other projects, on other water rights. Isn't that correct?

MR. ZILIS: Well that's correct, Justice Hobbs, however, the way that the Aspinall Unit is operated under current conditions is that it basically has all the water, all the inflow, passed down to Glen Canyon on an annual basis. It's not holding any water back because there aren't any consumptive uses right now upstream of the Aspinall Unit. So it needs to pass all that water downstream. But the question really becomes, what's the difference of having the Aspinall Unit and not having it? Basically all of those flows would end up in Glen Canyon anyway. The only thing that the Aspinall Unit has provided --

QUESTION: But they wouldn't be regulated flows for purposes of the carry over storage, end of drought cycles, protecting Colorado's beneficial consumptive use under the compact, would they?

MR. ZILIS: Actually they would, because the Aspinall Unit does not hold water back. As I think the evidence very clearly shows, it passes an average amount of 1.2 million acre-feet through every year. It doesn't hold water back for dry periods. And this water continues to flow downstream. This is flood control, and I think the U.S. witnesses were very clear in their testimony that water is released for purposes of flood control after the flood control function is completed, then water is stored for compact purposes.

CHIEF JUSTICE MULLARKEY: Thank you counsel. I want to thank both counsel, all counsel, for your arguments, the case will stand submitted, and we'll go on to the next case.

**Third Update to *Colorado Water Law: An Historical Overview*,  
Vol. 6, Issue 1, Fall 2002**

**Park County Water Preservation Coalition v. Columbine Associates**

“Subject-matter jurisdiction concerns ‘the court’s authority to deal with the class of cases in which it renders judgment.’ (W)e have held that subject-matter jurisdiction vests in the water court upon the timely filing of the application and publication of the resume notice.” *Park County Water Preservation Coalition v. Columbine Associates*, 993 P.2d 483, 488 (Colo. 2002) (citations omitted).

“The reasonableness of the notice is determined by applying an inquiry standard—whether the notice is sufficient to reveal to potential parties the nature of the claim being made, so that such parties can determine whether to conduct further inquiry into the full extent of those claims so a determination can be made whether to participate in the proceedings.”  
*Id.* at 489-90 (citation omitted).

“Consequently, alleged deficiencies invalidate the resume only if the resume taken as a whole is insufficient to inform or put the reader on inquiry of the nature, scope, and impact of the proposed diversion.”  
*Id.* at 490 (citation omitted).

“Here, the notice stated the location and points of diversion, the proposed structures, the amount of water claimed, and the proposed beneficial uses. The content of the published resume provided all of the information required by section 37-92-302(3)(a). Appellant argues that it did not have notice and would have opposed the 83CW360 application if it had known that Aurora was the applicant. However, Park County Coalition and the residents of Park County had sufficient notice. The information provided was consistent with that required by statute, and the application clearly stated that the storage right might affect the residents of Park County.”  
*Id.*

### **Farmers Reservoir and Irrigation Company v. Consolidated Mutual Water Company**

“Essential functions of change of water right proceedings are to: (1) identify the original appropriation’s historic beneficial use; (2) fix the historic beneficial consumptive use attributable to the appropriation by employing a suitable parcel-by-parcel or ditch-wide methodology; (3) determine the amount of beneficial consumptive use attributable to the applicant’s ownership interest; and (4) affix protective conditions for preventing injury to other water rights in operation of the judgment and decree.”

Farmers Reservoir and Irrigation Company v. Consolidated Mutual Water Company, 33 P.3d 799, 807 (Colo. 2001) (citation omitted).

“Water engineers play an important role in change of water right and augmentation plan proceedings. When serving as expert witnesses, their tasks typically include establishing: (1) the historic beneficial consumptive use of the appropriations at issue; and (2) the protective conditions that will maintain the conditions of the stream upon which decreed water rights depend in order to prevent injury.” *Id.* (citation omitted).

“The 1981 amendment to section 304(6) extended the mandatory inclusion of a retained jurisdiction provision to judgments and decrees for changes of water rights, in addition to plans for augmentation. Ch. 434, sec. 1, § 37-92-304(6), 1981 Colo. Sess. Laws 1792-93. . . . As a result of these amendments, the current version of section 304(6) addresses six features of a judgment and decree involving changes of water rights and augmentation plans: (1) the judgment and decree for changes of water rights and augmentation plans must contain a retained jurisdiction provision for reconsidering the question of injury to the vested rights of others; (2) the water judge has discretion to set the period of retained jurisdiction; (3) the water judge has discretion to extend the period of retained jurisdiction; (4) the water judge’s findings and conclusions must accompany the condition setting forth the period of retained jurisdiction; (5) all provisions of the judgment and decree are appealable upon their entry, including those relating to retained jurisdiction or extension of retained jurisdiction; and (6) the water judge has discretion to reconsider the injury question. *Id.* at 808 .

“The General Assembly intended that the retained jurisdiction provision of the decree would function as a test period for operation of the change or augmentation plan, in order to test the prediction and finding of non-injury the water court made upon entry of the judgment and decree. If other water rights thereafter experience water shortages resulting from failure to implement the protective conditions, or because the protective conditions adopted in the judgment and decree did not sufficiently protect against injury, the water judge on a sufficient showing of injury reopens the inquiry into protective conditions or, in the alternative, extends the period of retained jurisdiction so that the test period can operate longer. In contrast, historic consumptive use is capable of evidentiary resolution in the process of considering and entering the judgment and decree; exercise of the retained jurisdiction provision is not the context for reopening these determinations.”

*Id.* at 811.

“We conclude that the retained jurisdiction feature of section 37-92-304(6) reflects two stages of future injury analysis, the first based in some measure on predicting future effects, the second based on operational experience. Because the water court has determined non-injury at the time of decree entry, the persons seeking to invoke reconsideration of the injury question under the decree’s retained jurisdiction provision have the initial burden of establishing that injury has occurred to their water rights from placing the change of water right or augmentation plan into operation. Upon such a showing, the burden of showing non-injury shifts to the decree holder. The water judge may require additional or modified protective conditions to prevent injury upon determination that such injury exists. The water judge may also extend the period of retained jurisdiction as long as necessary to ascertain the nonoccurrence of injury from operation of the change or augmentation plan. If a person has met the initial burden of establishing injury within the meaning of the retained jurisdiction provision, and the decree holder does not meet the burden of demonstrating non-injury, the water court abuses its discretion if it refuses to require additional or modified protective conditions to prevent the injury, or refuses to extend the period of retained jurisdiction to ascertain the non-occurrence of injury.”

*Id.* at 812 .

“As we held in Midway Ranches, the consumptive use methodology and allocations the Water Court adopts in a noticed and actually litigated change case normally apply to subsequent change cases involving the same water rights. The fundamental object of a change

proceeding is to secure to owners their allocated share of historic beneficial consumptive use determined by an appropriate parcel-by-parcel or ditch-wide methodology, while protecting against injury to other water rights when the change of water right or plan operates in the surface and tributary groundwater stream system.”

*Id.* at 814 (citation omitted).

### **Roaring Fork Club, L.P. v. St. Jude’s Company**

“We now hold that the owner of property burdened by a ditch easement (hereinafter ‘burdened estate’) may not move or alter that easement unless that owner has the consent of the owner of the easement (hereinafter ‘benefited estate’); OR unless that owner first obtains a declaratory determination from a court that the proposed changes will not significantly lessen the utility of the easement, increase the burdens on the owner of the easement, or frustrate the purpose for which the easement was created. We further clarify that the right to inspect, operate, and maintain a ditch easement is a right that cannot be abrogated by alteration or change to the ditch.”

Roaring Fork Club, L.P. v. St. Jude’s Company, 36 P.3d 1229, 1231 (Colo. 2001).

“Because ditches are important, so too are the rights attendant upon a ditch easement. The holder of a ditch easement has the right to inspect, operate, maintain, and repair the ditch.”

*Id.* at 1232.

“Accordingly, we find ourselves at the onset of the 21st century with competing land uses in Colorado proliferating and somewhat unclear common-law precedent as to the interlocking rights of estates benefiting from easements and those estates burdened by them. On the one hand, Cherrichigno states unequivocally that a burdened estate owner may not move a ditch easement without the consent of the benefited estate owner. On the other hand, Stuart indicates it can be done if the burdened owner provides an adequate substitute.”

*Id.* at 1234.

“We observe that the development of the common law on point appears to serve two purposes: first, that ditch easements are a property right that the burdened estate owner may not alter absent consent of the benefited owner; and second, that there may be some circumstances in which such alteration would work no harm to the benefited owner and would greatly serve the burdened owner.”

*Id.*

“The Restatement articulates the balance between burdened and benefited estate holders as follows:

Unless expressly denied by the terms of an easement, . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not

- a) significantly lessen the utility of the easement,
- b) increase the burdens on the owner of the easement in its use and enjoyment, or
- c) frustrate the purpose for which the easement was created.

*Id.* at 1235-36 (citation omitted).

“Clearly, the best course is for the burdened owner and the benefited owner to agree to alterations that would accommodate both parties’ use of their respective properties to the fullest extent possible. Barring such an agreement, we do not support the self-help remedy that Club exercised here. When a dispute arises between two property owners, the court is the appropriate forum for the resolution of that dispute and - in order to avoid an adverse ruling of trespass or restoration – the burdened owner should obtain a court declaration before commencing alterations. If a burdened owner seeks to move or alter a ditch easement and the benefited owner refuses to consent, then the burdened owner may seek a declaratory determination from a court that the alteration does not damage the benefited owner(s).

*Id.* at 1237-38.

“In evaluating damage, or the absence of damage, the trial court must not only look at the operation of the ditch for the benefited owner, but also look at the maintenance rights associated with the ditch. If the maintenance rights of the owner of the ditch easement are adversely affected by the change in the easement, then such change does not comport with the Restatement requirements. Furthermore, the water provided to the ditch easement owner must be of the same quantity, quality, and timing as provided under the ditch owner’s water rights and easement rights in the ditch. A water right operating in combination with the collection of rights and obligations are vested

property rights. They cannot simply be replaced with the mere “delivery” of a fixed quantity of adjudicated water. Ditches are linear delivery systems that function as a part of a whole.”

*Id.* at 1238 (citation and footnote omitted).

“Nonconsensual, unilateral alterations jeopardize valuable vested property rights both in the easement and in the water rights exercised by means of the ditch. . . .”

*Id.*

“We . . . clearly disapprove of . . . any unilateral alterations by burdened estate owners in the future.”

*Id.* at 1239.

### **Empire Lodge Homeowners’ Association v. Moyer**

“Colorado’s prior appropriation system centers on three fundamental principles: (1) that waters of the natural stream, including surface water and groundwater tributary thereto, are a public resource subject to the establishment of public agency or private use rights in unappropriated water for beneficial purposes; (2) that water courts adjudicate the water rights and their priorities; and (3) that the State Engineer, Division Engineers, and Water Commissioners administer the waters of the natural stream in accordance with the judicial decrees and statutory provisions governing administration. The right guaranteed under the Colorado Constitution is to the appropriation of unappropriated waters of the natural stream, not to the appropriation of appropriated waters.” *Empire Lodge Homeowners’ Association v. Moyer*, 39 P.3d 1139, 1147 (2001) (citations omitted).

“Adjudication and administration are essential to protection of water rights. The reason for adjudicating a water right, whether an appropriative water right under state water law or a water right created under federal law, is to realize the value and expectations that enforcement through administration of that right’s priority secures.”

*Id.* at 1148-49 (citations and footnotes omitted).

“Both responses (Fellhauer and the 1969 Act) centered on: (1) reinforcing the adjudication and administration of decreed water rights in order of their priority; and (2) maximizing the use of Colorado’s limited water supply for as many decreed uses as possible consistent with meeting the state’s interstate delivery obligations under United States Supreme

Court equitable apportionment decrees and congressionally approved interstate compacts.”

*Id.* at 1150 (citation omitted).

“The General Assembly chose to implement a policy of maximum flexibility that also protected the constitutional doctrine of prior appropriation. Through the 1969 Act, the General Assembly created a new statutory authorization for water uses that, when decreed, are not subject to curtailment by priority administration. This statutory authorization is for out-of-priority diversions for beneficial use that operate under the terms of decreed augmentation plans. Plans for augmentation allow diversions of water ‘out-of-priority while ensuring the protection of senior water rights.’ Decreed water rights receive a replacement water supply that offsets the out-of-priority depletions. . . . ‘Depletions not adequately replaced shall result in curtailment of the out-of-priority diversions.’”

*Id.* at 1150.

“A person desiring to divert out of priority through the device of an augmentation plan must file an application with the water court for approval.”

*Id.* at 1153 (citations omitted).

“In City of Florence, 793 P.2d at 151, we held that the General Assembly intended to differentiate exchanges from augmentation plans. Under section 37-83-104 and sections 37-80-120(2) through 37-80-120(4), an exchange is a water management practice the State Engineer administers between decreed points of diversion. When a junior appropriator makes a sufficient substitute supply of water available to a senior appropriator, the junior may divert at its previously decreed point of diversion water that is otherwise bound for the senior’s decreed point of diversion. Four critical elements of an exchange are that: (1) the source of substitute supply must be above the calling water right; (2) the substitute supply must be equivalent in amount and of suitable quality to the downstream senior appropriator; (3) there must be available natural flow at the point of upstream diversion; and (4) the rights of others cannot be injured when implementing the exchange.

Justice Erickson, in his City of Florence concurring opinion, explained the primary distinction between an exchange and a plan for augmentation. The operator of an exchange may obtain a conditional or absolute decree with a priority for the exchange. The State Engi-

neer may allow an exchange in absence of a decree confirming it. If the exchange is adjudicated, it receives the priority date of its appropriation, without application of the postponement doctrine, pursuant to section 37-92-305(10). Adjudication of an exchange assigns it a priority vis-à-vis other exchanges operating in the affected stream reach. In contrast, an augmentation plan operates to replace depletions to the water supply of the natural stream upon which appropriations depend and allows a diversion outside of the priority system; an adjudication is required to authorize such a diversion and no priority results.”

*Id.* at 1155 (citations omitted).

“The consistent thread of Colorado law conjoining appropriation, adjudication, and administration—which we have reviewed in this opinion—establishes that, to have standing to challenge another’s water use on the basis of an alleged injury to one’s water right, the challenger must both possess a water right and obtain a decree for it.”

*Id.* at 1156.

“[W]ithout a judicially decreed priority date, a water right owner has no right to request the Division Engineer to call out junior users in order to satisfy its own use.’ Administrative action, forbearance of enforcement, or State Engineer acquiescence in water use practices does not substitute for judicial determination of use rights. . . . Decreed appropriations are entitled to maintenance of the condition of the stream existing at the time of the respective appropriation. Lacking an adjudication of its rights, Empire Lodge did not possess a legally cognizable right to invoke, in court, the futile call doctrine or enlargement doctrines against the Moyers’ water use. These are rights that only decreed water rights holders have standing to assert. Exercise of the State Engineer’s enforcement discretion does not obviate the requirement that those making water uses must obtain a decree adjudicating their rights if they desire to have standing to enforce them.”

*Id.* at 1139 (citations omitted).

“The Moyers, on the other hand, had standing to allege injury to their decreed water right due to Empire Lodge’s out-of-priority diversions and to seek an injunction to curtail Empire Lodge’s out-of-priority diversions. . . . (T)he Moyers invoked a decreed water right and alleged injury to the right, sufficient for standing purposes to contest Empire Lodge’s undecreed water use.”

*Id.* at 1157.

“The change of water right and augmentation plan statutes provide that applications for approval of the water use practices they encompass are mandatory, not discretionary. They are designed to provide notice and the opportunity for potentially affected decreed water rights holders to participate in proceedings in order to protect their rights. The purpose of these adjudication proceedings is not to confirm an undecreed pre-existing change of water right or out-of-priority diversion, but rather to: (1) authorize, deny, or condition the change of water right or the out-of-priority diversion; and (2) allow water rights holders like the Moyers to assert and protect their decreed water rights.”

*Id.* at 1158-59 (citations omitted).

“It is the role of the General Assembly, not the State Engineer or the courts, to provide amendments to the current statutes if additional State Engineer approval authority is desirable.”

*Id.* at 1159.

*(Subsequent to the announcement of Empire Lodge, the General Assembly enacted section 37-92-308; 2002 Colo. Sess. Laws, Ch. 151, at 459-463 addressing substitute water supply plans)*

### **Mount Emmons Mining Company v. Town of Crested Butte**

“The Aspinall Unit water rights are generally subject to Colorado law and are further specifically subject to a subordination obligation. The River District assigned the state adjudicated water rights for the Unit to the BUREC on the condition that in-basin projects on the Gunnison and its tributaries above the Unit could deplete at least 60,000 acre-feet of water. This obligation was an outgrowth of negotiations between the River District, local interests, the United States, and the Colorado Water Conservation Board to accommodate development of water resources in the natural basin of the Gunnison River. The water court has found, and this court has confirmed, that such understanding resulted in a binding, enforceable agreement. The effect of the subordination is to make water available for appropriation that BUREC could otherwise call for the Unit in the exercise of its absolute water rights.”

Mount Emmons Mining Company v. Town of Crested Butte, 40 P.3d 1255, 1257 (Colo. 2002) (citation omitted).

“The State strives to distribute the resource in ways that respect historical uses without thwarting growth or entrepreneurial development. One of the cornerstones of this state’s water policy is that the resource be administered to maximize its beneficial uses. An applicant may commence the process of developing a beneficial use by filing for a conditional right, defined by statute as ‘a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation.’ A conditional right is a right that serves to hold the place of the appropriator in the ‘first in time, first in right’ system in effect in Colorado. If the appropriator diligently puts the water to beneficial use, the conditional right can mature into an ‘absolute’ water right, with a priority that dates back to the initiation of the conditional right.”  
*Id.* at 1257-58 (citations omitted).

“Thus, as a prerequisite to receiving a conditional decree, applicants must show water is available that can be diverted.”  
*Id.* at 1258 (citation omitted).

“Typically, to satisfy the ‘can and will’ test, new appropriators must convince the water court that their diversion will cause no harm to senior appropriators: i.e., that water is available. In the Gunnison basin, however, to satisfy the water availability test, a new, in-basin appropriator must only convince the water court that a portion of the 60,000 acre-foot depletion allowance remains unused. Because we have already determined that this amount was made available for in-basin users, the remaining question for the water court is only what amount, if any, of the 60,000 acre-feet remains. This in turn depends on the exercise of absolute decrees for in-basin, junior uses above the Unit. We hold that the absence of a contract between Applicant and BUREC does not preclude satisfaction of the ‘water availability’ test of the ‘can and will’ doctrine.”  
*Id.* at 1260 (citations omitted).

### **SL Group, LLC v. Go West Industries, Inc.**

“Notice of proceedings to determine water rights is now provided through the special statutory procedure set forth in section 37-92-302(3). In lieu of personal service, the statute’s resume-notice procedure is designed to put all interested parties of pending water rights proceedings, to the extent reasonably possible, on inquiry notice of the nature, scope, and impact of a proposed decree by requiring the

preparation of a monthly resume of applications from pertinent information provided by the applicants, which the water clerk must then publish in local newspapers of general circulation and mail to potentially affected parties. In aid of the clerk's mailing obligation, every application is required to state the name and address of the owner or reputed owner of the land upon which any structure is or will be located, upon which water is or will be stored, or upon which water is or will be placed to beneficial use."

SL Group, LLC v. Go West Industries, Inc., 42 P.3d 637, 640-41 (Colo. 2002) (citations omitted).

"The statutory scheme further protects the due process concern for notice by, in effect, tempering the finality of a water decree in limited circumstances involving nonparticipants whose rights are adversely affected. Even substantive (as distinguished from merely clerical) errors in a judgment and decree may be corrected by the water judge upon petition within three years by any person whose rights were adversely affected by the adjudication and who failed to file a protest through mistake, inadvertence, or excusable neglect." *Id.* at 641.

"In the adjudication proceeding at issue here, it is clear that Go West did not identify SL as the owner of property upon which water from the West Shavano Extension was being used or include any reference to SL in its application. It is also clear that the water clerk did not mail a copy of the resume to SL. In SL's petition for reconsideration pursuant to section 37-92-304(10), filed a year and a half after the final decree, SL alleged that it was unaware of the application until a year after the decree. SL's petition further alleged not only that it and its predecessors continuously used water from the West Shavano Extension from long before the 1989 abandonment decree until the time of the petition, and that its historical irrigation practices had been adversely affected by the decree granted to Go West, but also that it owned the land upon which the historical use offered in support of Go West's 1938 priority actually took place." *Id.* at 641-42.

"Under the circumstances of this case, the adjoining landowner's failure to otherwise become aware of the application and file a timely protest must be considered excusable within the meaning of section 37-92-304(10)." *Id.* at 642.

**Farmers Reservoir and Irrigation Company v. City of Golden**

“We have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation. From this principle springs the equally well-established rule that a change of water right cannot be approved if the change will injuriously affect the vested rights of other water users. ‘A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder’s decreed water right operating in priority.’ To ensure that this most fundamental condition on the right to change the use of a water right is satisfied, a change in use must be accomplished ‘(1) by proper court decree,’ (2) only for ‘the extent of use contemplated at the time of appropriation,’ and (3) ‘strictly limited to the extent of formal actual usage.’ Implicit within these basic precepts of our prior appropriation system is the elementary and straightforward principle that a change in the use of a water right cannot effect an enlargement in the use of that right.”  
Farmers Reservoir and Irrigation Company v. City of Golden, 44 P.3d 241, 245-46 (Colo. 2002) (citations and footnotes omitted).

“Safeguarding junior appropriators’ right to immutable stream conditions in the face of a change from agricultural to municipal use requires that there be parity in the consumptive use of the right before and after the change – and that this parity endures.”  
*Id.* at 246.

“Because enlargement of use constitutes a change in circumstance sustained upon evidence that did not exist at the time of the original change proceeding, claim preclusion does not bar relief therefor.”  
*Id.* at 247.

“Nor does it bar a water court from determining the extent of historic use under the water right in ascertaining whether there has been an injurious enlargement. Of course, where historic consumptive use has been determined in a previous proceeding relitigation of that element will not be permitted.  
*Id.*

“Wheeler determined that 4.66 c.f.s. of Priority 12 water could be diverted and utilized by Golden continuously during the irrigation season without injury to junior appropriators so long as Golden did not use this water to irrigate more than 225 acres of lawn or apply more than 53% of this water to lawn irrigation. Because Wheeler’s calculations formed the basis of the 60s decrees, we hold that both of these limits serve to define the permissible use Golden may make of its Priority 12 water. Thus, we hold that Golden may irrigate up to 225 acres of lawn with up to 53%, or 900 acre-feet, of its Priority 12 entitlement. . . . Appellants presented un rebutted and credible evidence that Golden applies 1.78 acre-feet of water on each acre of lawn. Given this application rate, Golden irrigated approximately 267 acres of lawn with Priority 12 water. This is 42 acres more than Wheeler anticipated would be irrigated with Priority 12 water, and is therefore an expansion of use. However, Golden has never applied more than 476 acre-feet of Priority 12 water to lawn irrigation in any given year. Therefore, the water court correctly concluded that Golden has not impermissibly expanded its use of Priority 12 water by applying a greater amount of Priority 12 water to lawn irrigation than Wheeler anticipated in the 60s proceedings.

Accordingly, we affirm in part and reverse in part and remand this case to the trial court with instructions that it enter an injunction prohibiting Golden from irrigating more than 225 acres of lawn with its Priority 12 water or from applying more than 900 acre-feet of Priority 12 water to lawn irrigation.”

*Id.* at 255-56.

### **City of Thornton v. City and County of Denver**

“Section 37-92-305(3) expressly requires augmentation plans be made with due regard for the rights of other appropriators of the same water source. A water court proceeding for approval of an augmentation plan is mandatory and can be approved only if there is “no-injurious effect” to a vested water right. Where injury is likely to occur, terms and conditions may be included in decrees for augmentation plans to prevent injury. § 37-92-305(3), (4). If the substituted water is “of a quantity and quality so as to meet the requirements for which the water of the senior appropriator has normally been used”, the proposed substitution must be accepted. § 37-92-305(5).”

*City of Thornton v. City and County of Denver*, 44 P.3d 1019, 1025 (Colo. 2002) (citations omitted).

“Current statutory law delegates most authority over water quality issues to the WQCC (Water Quality Control Commission). The general assembly enacted the WQCA (Water Quality Control Act), §§ 25-8-101 to -703, 8 C.R.S. (2001), in response to the federal Clean Water Act. The purpose of the WQCA is

to prevent injury to beneficial uses made of state waters, to maximize the beneficial uses of water, and to develop water to which Colorado and its citizens are entitled, and, within this context, to achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state.

§ 25-8-103, 8 C.R.S. (2001). Thus, the Act sought to provide the maximum protection for water quality possible without threatening the prior appropriation system and the state’s policy of maximum beneficial use of the water. . . . Although the WQCA gives the WQCC general authority over water quality issues, the WQCA is not intended to interfere with the water court’s role in adjudicating water rights administered by the State Engineer. Section 25-8-104(1) of the WQCA explicitly provides that:

No provision of this article shall be interpreted so as to supercede, abrogate, or impair rights to divert water and to apply water to beneficial uses in accordance with sections 5 and 6 of article XVI of the constitution of the state of Colorado, compacts entered into by the state of Colorado, or the provisions of articles 80 to 93 of title 37, C.R.S., or Colorado court determinations with respect to the determination and administration of water rights.

§ 25-8-104(1) (emphasis added). We read these provisions of the WCQA to allow the WCQA to work within the context of the prior appropriation system.”

*Id.* at 1028-29 (citations and footnotes omitted).

“The WRDAA (1969 Water Rights Determination and Administration Act) explicitly requires the water court to consider water quality issues in the case of an augmentation plan in which water is being actively substituted into a stream for the use of other appropriators. The substituted water must be of a quality and continuity to meet the requirements for which the water of the senior appropriator has normally been used. § 37-92-305(5).”

*Id.* at 1030 (citations omitted).

“Despite the general assembly’s assignment of water quality issues to the WQCC, the language of the WQCA clearly expresses a legislative intent for water quality issues to remain within the purview of the water court as set forth in the WRDAA. See § 25-8-104(1). Section 25-8-104(1) explicitly states that the water court retains authority over the question of whether material injury to water rights exists and the remedy for such injury. Injury occurs under the WRDAA where the water provided by an augmentation plan is not of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used. See § 37-92-305(3), (5). The WRDAA and the WQCA therefore preserve the common law standard that the introduction of pollutants into a water supply constitutes injury to senior appropriators if the water is no longer suitable for the senior appropriator’s normal use because of the substitute supply. See § 25-8-104(1).”  
*Id.* (citations omitted).

“The legislature provided for both a determination of non-injury to senior appropriators at the time of the initial decree approving an augmentation plan, and a period of retained jurisdiction during which the water court could reconsider its initial determination of non-injury in light of the actual operation of the plan. See § 37-92-305; § 37-92-304(6). Although Thornton initially agreed that it would not be injured by the use of Bi-City effluent in Denver’s Augmentation Plan, the stipulation governed only the water court’s initial determination of non-injury to Thornton during the first stage of the injury analysis. The second stage of the injury analysis occurs later, once an augmentation plan becomes operational. The question of operational injury remained open for reconsideration at the second stage of the injury analysis under the retained jurisdiction provision. See 37-92-304(6).”  
*Id.* at 1031.

“In the interest of finality, the water court sets the period of retained jurisdiction at the period of time it finds necessary to preclude or remedy any injury that may emerge once the augmentation plan becomes operational. The retained jurisdiction provision therefore provides the water court with flexibility to implement programs that maximize the beneficial use of water without sacrificing the vested water rights of Thornton and other senior appropriators. Retained jurisdiction should be invoked where the actual operation of an augmentation plan reveals that substituted water is unsuitable for a

senior appropriator's normal use of the water in comparison to the quality of the water it would otherwise receive at its point of diversion if the augmentation plan had not been instituted. See § 37-92-305(5). *Id.* at 1032.

### **Board of County Commissioners v. Park County Sportsmen's Ranch**

“(B)ecause the declaratory judgment act is to be liberally construed; because resolution of property ownership issues affecting water use rights is established in our case law as a proper matter for water court determination; and because PCSR has stated that, whatever action we might take with respect to its pending conditional decree application appeal, it intends rejoin the property ownership issue by re-filing its application, we find that the case before us is not moot.”

Board of County Commissioners v. Park County Sportsmen's Ranch, 45 P.3d 693, 609 (2002).

“Some states that allocate their surface water by the principles of prior appropriation nevertheless allocate ground water by a rule of capture that permits overlying landowners to possess the ground water appearing under their land without regard to the effect of its extraction upon other ground water and surface water users. However, such a rule of capture defies hydrologic reality and impairs the security and reliability of senior water use rights that depend on an interconnected ground and surface water system. Colorado law contains a presumption that all ground water is tributary to the surface stream unless proved or provided by statute otherwise.”  
*Id.* at 701-02 (citations and footnotes omitted).

“The extent of underground storage available for artificial recharge without interfering with the aquifer's natural recharge capacity or injuring senior ground or surface water rights is a central issue in any proposal to use an aquifer for artificial recharge and storage. . . . Some aquifers may be more suitable for storage of artificially recharged water than others. Whether a particular aquifer can accommodate a proposed conjunctive use project is a factor to consider in a Water Court decree application in Colorado and the determination will turn upon the facts of the case.”  
*Id.* at 703 (citations omitted).

“The General Assembly’s authorization for conjunctive use projects implements basic tenets of Colorado water law that the legislature has clearly enunciated: (1) a natural stream consists of all underflow and tributary waters, § 37-92-102(1), 10 C.R.S. (2001); (2) all waters of the natural stream are subject to appropriation, adjudication, and administration in the order of their decreed priority, § 37-92-102(1)(a) & (b); (3) the policy of the state is to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of the state, § 37-92-102(2); and (4) the conjunctive use of ground and surface water shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights in accordance with the law. § 37-92-102(2)(b).”  
*Id.* at 704-05.

“Construing the General Assembly’s wording and intent and effectuating evident legislative purposes, we determine that the General Assembly has authorized the issuance of decrees for artificial recharge and storage of water in an aquifer when the decree holder lawfully captures, possesses, and controls water and then places it into the aquifer for subsequent beneficial use. The applicant bears the burden of demonstrating that the aquifer is capable of being utilized for the recharge and storage of the applicant’s water without impairment to the decreed water rights of senior surface or ground water users who depend upon the aquifer for supply.”  
*Id.* (footnote omitted).

“Based upon the principles of Colorado law embodied in the statutes and our case law, the applicant would have to meet conditions to utilize an aquifer for storage of artificially recharged water. The applicant, at least: (1) must capture, possess, and control the water it intends to put into the aquifer; (2) must not injure other water use rights, either surface or underground, by appropriating the water for recharge; (3) must not injure water use rights, either surface or underground, as a result of recharging the aquifer and storing water in it; (4) must show that the aquifer is capable of accommodating the stored water without injuring other water use rights; (5) must show that the storage will not tortiously interfere with overlying landowners’ use and enjoyment of their property; (6) must not physically invade the property of another by activities such as directional drilling, or occupancy by recharge structures or extraction wells, without proceeding under the procedures for eminent domain; (7) must have the intent and

ability to recapture and use the stored water; and (8) must have an accurate means for measuring and accounting for the water stored and extracted from storage in the aquifer.”

*Id.* at n.19.

“Advancing the national agenda of settling the public domain required abandonment of the pre-existing common-law rules of property ownership in regard to water and water use rights. Reducing the public land and water to possession and ownership was a preoccupation of territorial and state law from the outset. A new law of custom and usage in regard to water use rights and land ownership rights, the “Colorado Doctrine,” arose from “imperative necessity” in the western region. This new doctrine established that: (1) water is a public resource, dedicated to the beneficial use of public agencies and private persons wherever they might make beneficial use of the water under use rights established as prescribed by law; (2) the right of water use includes the right to cross the lands of others to place water into, occupy and convey water through, and withdraw water from the natural water bearing formations within the state in the exercise of a water use right; and (3) the natural water bearing formations may be used for the transport and retention of appropriated water. This new common law established a property-rights-based allocation and administration system which promotes multiple use of a finite resource for beneficial purposes.”

*Id.* at 706 (citation omitted).

“Upon adoption of Colorado’s constitution, the state struck an accommodation between two kinds of property interests--water use rights and land rights--by requiring the owners of water use rights to obtain the consent of, or pay just compensation to, owners of land in, upon, or across which the water right holders constructed dams, reservoirs, ditches, canals, flumes, or other manmade facilities for the diversion, conveyance, or storage of water. But, this requirement does not extend to vesting in landowners the right to prevent access to the water source or require compensation for the water use right holder’s employment of the natural water bearing surface and subsurface formations on or within the landowners’ properties for the movement of its appropriated water.”

*Id.* at 708 (citation omitted).

“In deference to the laws of nature, which we held to be foundational in Yunker v. Nichols, Colorado law does not recognize a

land ownership right by which the Landowners can claim control of the aquifers as part of their bundle of sticks. To the contrary, '[a]s knowledge of the science of hydrology advanced, it became clear that natural streams are surface manifestations of extensive tributary systems, including underground water in stream basins,' and passage of appropriated water through the natural streams is part of the Colorado law of water use rights. However, Article XVI, section 7 does subject the construction of artificial water facilities on another's land to the payment of just compensation and grants a right of private condemnation for the construction of such waterworks." *Id.* at 709 (citations omitted).

"In sum, the holders of water use rights may employ underground as well as surface water bearing formations in the state for the placement of water into, occupation of water in, conveyance of water through, and withdrawal of water from the natural water bearing formations in the exercise of water use rights. . . . We reject the Landowners' claim that the *cujus* doctrine provides them with a property right to require consent for artificial recharge and storage of water in aquifers that extend through their land." *Id.* at 710 (citations omitted).

"(A)n applicant for a conditional decree to utilize available aquifer storage space must demonstrate that it will capture, possess, and control water lawfully available to it and, without injury to other water rights, will artificially recharge that water into the aquifer, such as through a constructed injection well or structure built on the land's surface. To obtain an absolute decree for aquifer storage, the applicant must artificially recharge the water into the aquifer pursuant to a decreed water use right for storage and subsequent beneficial use." *Id.* at 712.

"In so providing, the General Assembly preserved the requirement of proceeding by eminent domain for the construction of waterworks facilities under section 37-87-101(1), including artificial recharge structures and wells, when such features are located on or in another's land without consent. Article XVI, section 7, Article II, sections 14 and 15, and section 37-87-101(1) establish a private right of condemnation of private property through eminent domain for 'those interests in real property reasonably necessary for the construction, maintenance, or operation of any water storage

projects.’ . . . In the case before us, the proposed project facilities include constructed wells, dams, recharge reservoirs, and other water works, but the project does not include the location of any artificial features on or in the Landowners’ properties. Thus, PCSR would not need the consent of the Landowners or an easement, nor would it have to pay just compensation to them, and no trespass occurs simply as the result of water moving into an aquifer and being contained or migrating in the course of the aquifer’s functioning underneath the lands of another.”

*Id.* at 713 (citations omitted).

“Allowing property owners to control who may store water in natural formations, or charging water right use holders for easements to occupy the natural water bearing surface or underground formations with their appropriated water, would revert to common-law ownership principles that are antithetical to Colorado water law and the public’s interest in a secure, reliable, and flexible water supply made available through the exercise of decreed water use rights. It would disharmonize Colorado’s historical balance between water use rights and land ownership rights. It would inflate and protract litigation by adding condemnation actions to procedures for obtaining water use decrees. It would counter the state’s goals of optimum use, efficient water management, and priority administration.”

*Id.* at 714 (citation omitted).

### **State Engineer v. Bradley**

“Diversions are implicitly limited to an amount sufficient for the purpose for which the appropriation was made, without waste or excessive use. A diversion of water decreed for irrigation purposes is limited by the ‘duty of water’ with respect to the decreed place of use. In addition, diversions are implicitly limited in quantity by historic use at the original decreed point of diversion. The actual historic diversion for beneficial use could be less than the optimum utilization represented by the duty of water in any particular case, either because the well or other facility involved cannot physically produce at the decreed rate on a continuing basis, or because that amount has simply not been historically needed or applied for the decreed purpose

In the past, we have explained this limitation by noting that ‘over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.’”

State Engineer v. Bradley, 53 P.3d 1165, 1169 (Colo. 2002)(citations omitted).

“The acreage under irrigation is a common basis of measuring the use of water in the adjudication of priorities, but if the same acreage is also being irrigated by water from appropriations other than the one for which a change is sought, some measure of the applicable appropriation’s historic contribution to the duty of water is necessary to determine its historic use and ensure that the appropriation will not be enlarged by the change.”

*Id.* at 1170 (citation omitted).

“Bradley’s property has been served by at least three distinct water sources for over sixty years. The record contained no suggestion that the well had ever been the sole source of water for the acreage in question, even during the two years since the implementation of the center-pivot sprinklers. Though he made no attempt to quantify the contribution of his surface water rights to the overall duty of water on the irrigated acreage, the record indicated that the ground water appropriation, for which the change was sought, was used only in a supplemental capacity, being applied each year only later in the growing season, after the available surface water ran out. Because Bradley’s application requested enough water from the new point of diversion to irrigate, by itself, 128 acres of the same 150 acre-field, his burden required, at the least, a demonstration that historic diversions from the corner well amounted to approximately eighty-five percent of the water historically applied to the entire field. The record failed to support, and was almost certainly inconsistent with, such a determination.

The inadequacy of the applicant’s presentation was not due merely to a lack of precision or accuracy in quantifying historic use. It resulted from a conceptual failure to distinguish actual historic use from the face amount of the decree, and therefore a failure to even attempt to establish the historic use of the well-water, separate and apart from historic use of the applicant’s surface water. In approving the request, the water court appears to have conflated the historic use of the land as a whole with the historic use of the groundwater. Admirable as the applicant’s attempt to improve the efficiency of his irrigation technique may have been, a water right is a property right, which can be sold or further changed once it is established. An enlargement of the applicant’s right would at the very least have the effect of advancing his priority to any additional water over that of junior appro-

priators, and in the overappropriated systems of the San Luis Valley it would necessarily be injurious to other vested rights.”  
*Id.* at 1170-71.

### **Double RL Company v. Telluray Ranch Properties**

“Both sections 301(4)(a)(I) and 305(7) use the word "shall" and are therefore mandatory. If section 301(4)(a)(I) is applied, as it was in this case, without the required notice of section 305(7), such an application would render the notice provision of section 305(7) inoperative to accomplish the legislative intent of preventing loss of a conditional water right. The only interpretation that provides harmonious effect to the language and legislative intent of both section 301(4)(a)(I) and section 305(7) is to require that the water court provide notice to an owner of a conditional water right before the right expires or is canceled -- even when the holder of the right fails to file within the statutory time period an application for a finding of reasonable diligence. The water court's failure to give notice only extends the time period in which the diligence application may be filed. It does not relieve the applicant of its burden to prove that reasonable diligence occurred during the six year diligence period.

Therefore, we hold that the water court may not cancel a conditional water right and the conditional water right does not expire without first providing notice of cancellation or expiration under section 305(7).”

Double RL Company v. Telluray Ranch Properties, 54 P.3d 908, 912 (2002)(citation omitted).

### **West Elk Ranch v. United States**

“Indeed, the General Assembly eliminated a ‘wait and see’ approach to determining conditional water rights. Instead, it opted to require an applicant to show in the conditional decree proceedings that it ‘can and will’ complete the appropriation of water with diligence and within a reasonable time before a court may issue a conditional decree.”  
West Elk Ranch v. United States, Slip Op. at 6 (No. 02SA93 December 2, 2002)(2002 W:31681910).

“Here, we have to determine if West Elk has made the requisite showing that it ‘can and will’ develop the water pursuant to its plan. Be-

cause the Forest Service's denial of the SUP eliminates the only alternative available to West Elk, this case is more similar to FWS than to In re Gibbs.

West Elk argues that it still may obtain a permit; however, there is no evidence in the file indicating a pending appeal or other proceeding that will potentially result in the issuance of an SUP to West Elk.

The Federal Land Policy and Management Act of 1976, and the regulations that implement the Act, grant the Forest Service the authority to issue Special Use Permits for National Forest land. Applicants must seek a permit from the Forest Ranger or Supervisor with jurisdiction over the affected area, but the application itself does not convey any use rights. Upon receipt of the application, the Forest Service does an initial screening for minimum requirements. If the applicant cannot meet the minimum standards, the Forest Service will deny the application without further consideration. Here, the Forest Service District Ranger denied West Elk's SUP application because it failed to meet a minimum requirement that the SUP cannot conflict or interfere with National Forest uses. Upon review, the Supervisor agreed.

Without an SUP, West Elk cannot put the water to beneficial use. West Elk presented insufficient evidence to the water court to demonstrate a substantial probability that it will eventually obtain an SUP. Accordingly, the water court properly granted summary judgment against West Elk.”

*Id.* at 9-11 (citations omitted).

## ARTICLE UPDATE

Fourth Update to  
Colorado Water Law: An Historical Overview  
University of Denver Water Law Review  
The Honorable Gregory J. Hobbs, Jr.

To provide our readers with the most up-to-date water law information, the editors periodically include updates of works previously published in the *Water Law Review*. The following is the fourth update to *Colorado Water Law: An Historical Overview, Appendix—Colorado Water Law: A*

*Synopsis of Statutes and Case Law*,<sup>170</sup> selected by the Honorable Gregory J. Hobbs, Jr.

**Simpson v. Bijou Irrigation Co.**

“As a result of the (1969) Act’s stated policy of conjunctive use, wells were required to be integrated into the priority system, although unadjudicated wells in existence prior to 1969 were allowed to continue. . . The Act nevertheless encouraged the adjudication of existing wells by allowing well owners who filed an application by July 1, 1971, to receive a water decree with a priority dating back to their original appropriation date.

The 1969 Act also introduced the concept of augmentation plans into the water law adjudication and administration scheme. Augmentation plans were the primary means provided by the Act for integrating groundwater into the state priority system . . .”

*Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 60 (Colo. 2003)(citations and footnotes omitted).

“In response to the large number of augmentation plan applications which had been filed, in 1974 the General Assembly vested the State Engineer with the authority to grant temporary approval of augmentation plans. Significantly, however, a precondition to even temporary approval by the State Engineer was that the water user had an augmentation plan application pending in water court . . . In an effort to address the concern expressed by this court about

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<sup>170</sup> Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 27 (1997). The first update to Justice Hobbs’ article appears at 2 U. DENV. WATER L. REV. 223 (1999); the second update is at 4 U. DENV. WATER L. REV. 111 (2000); and the third update is at 6 U. DENV. WATER L. REV. 116 (2002).

the constitutionality of the 1974 amendments in Kelly Ranch v. Southeastern Colorado Water Conservancy District . . . however, the General Assembly in 1977 repealed the State Engineer's authority to approve temporary augmentation plans. Before passage of the 1977 Act, the legislature considered, but rejected, an alternative bill that would have retained the State Engineer's temporary augmentation plan approval authority while adding additional notice provisions to cure the perceived procedural shortcomings of the statute. The rejection of the alternate bill was at least partially motivated by concern over the potential overlap of administrative and adjudicative functions it would have created in the State Engineer."

*Id.* at 61 (citations and footnotes omitted).

In response to this court's holding in Empire Lodge and in order to 'establish some additional authority for the state engineer to approve substitute water supply plans,' section, the General Assembly in 2002 enacted . . . that 'the state engineer is authorized to review and approve substitute water supply plans that allow out-of-priority diversions only under the circumstances and pursuant to the procedures set forth in this section.' § 37-92-308(2). The statute then sets out four limited circumstances under which the State Engineer may grant temporary approval of substitute supply plans:

(1) If an applicant had a substitute supply plan approved prior to January 1, 2002, the State Engineer may approve one additional year of use. After that year, applicants are required to seek an augmentation plan decree from the water court.

(2) If an applicant has filed an application with the water court for approval of an augmentation plan upon which the court has not yet ruled, the State Engineer, after providing sufficient notice to other water users and making a finding of no injury, can temporarily approve the augmen-

tation plan for up to one year. This approval is annually renewable for up to three years, with a showing of justifiable delay necessary for extensions beyond three years.

(3) If an applicant's use will not exceed five years, the State Engineer, after providing sufficient notice to other users and making a determination of no injury, may approve the plan annually for up to a total of five years.

(4) If the State Engineer determines that an emergency situation exists and has made a finding of no injury, he may grant temporary approval of a substitute supply plan for up to ninety days.

This review of legislative history convinces us of the General Assembly's intent to consign the matter of approving ongoing out-of-priority groundwater diversions using replacement water exclusively to the water courts. In 1969 and again in 1977 when it repealed the State Engineer's short-lived temporary augmentation plan approval authority, the General Assembly rejected the idea of granting the State Engineer such approval power due to concern over overlapping administrative and judicial authority and the inordinate amount of power this would have vested in the State Engineer. Even when the State Engineer was given temporary approval authority during the period between 1974 and 1977, that approval was conditioned upon the water user having filed an augmentation plan application in water court. Those bills which were enacted into law in 1969 and 1977 evidence a steadfast legislative intent to make augmentation plan approval an adjudicatory function of the water courts as opposed to an administrative task of the State Engineer.

Any lingering doubt as to this intent was conclusively put to rest with the enactment in 2002 of section 37-92-308, 10 C.R.S. (2002), which unambiguously provides that it is the province of the water courts to approve and decree augmentation plans, except in the four limited circumstances set out in subsections (3), (4), (5), and (7) of the statute, which

allow the State Engineer to grant temporary substitute supply plan approval pursuant to the express provisions of those subsections.”

*Id.* at 62-63 (citations and footnotes omitted).

“We affirm the trial court’s ruling voiding the proposed 2002 South Platte River basin rules to the extent those rules provide for State Engineer approval of ‘replacement plans’ allowing the out-of-priority diversion of groundwater in the absence of any provision requiring that an application for an augmentation plan be filed with the water court. We hold that the State Engineer can only grant temporary approval of augmentation plans pursuant to the four narrowly circumscribed situations set forth in sections 37-92-308(3), (4), (5), and (7), 10 C.R.S. (2002).

We reverse the trial court’s ruling that the State Engineer is without authority to promulgate rules to enforce the terms of the South Platte River Compact pursuant to section 37-80-104. We disagree with the trial court’s conclusion that the compact is self-executing, holding instead that due to increased well pumping and the advent of maximum utilization of the waters of the state, simple priority administration as provided for in the compact is insufficient to ensure compact compliance. In exercising his compact rule power, however, the State Engineer is constrained by all statutory restrictions imposed on his water rule power, including those set forth in section 37-92-308, 10 C.R.S. (2002).

Finally, we affirm the trial court’s holding that State Engineer promulgated rules and regulations may not take effect until protests have been judicially heard and resolved pursuant to the procedures provided in sections 37-92-501(3) and 37-92-304, 10 C.R.S. (2002). We therefore remand this case to the trial court for further proceedings consistent with this opinion.”

*Id.* at 72.

## **Ground Water Appropriators of South Platte v. City of Boulder**

“For virtually all of the reasons we gave for interpreting C.R.C.P. 41(a)(2) to authorize an award of attorney fees as a condition of dismissal without prejudice, the rule cannot be understood to authorize attorney fees as a condition of dismissal with prejudice. A dismissal with prejudice does not circumvent the limitations of *res judicata* or afford any advantage for which attorney fees are the ‘*quid pro quo*.’ The plaintiff is barred from future litigation of the same issues to the same extent as would be the case if he had proceeded to adverse judgment. And if a plaintiff were subject to attorney fees despite moving to dismiss with prejudice upon determining that his claim was no longer meritorious, there would be little incentive in moving to dismiss rather than proceeding to some other resolution. Like the corresponding federal rule, C.R.C.P. 41(a)(2) does not provide a separate basis for imposing attorney fees as a condition of dismissing an action with prejudice.”

*Ground Water Appropriators of South Platte v. City of Boulder*, 73 P.3d 22, 25-26(Colo. 2003)(before trial, applicant dismissed two of its claimed storage rights with prejudice and proceeded on the third).

“In conjunction with a cross-motion for summary judgment, the irrigation companies and Boulder challenged the temporary substitute supply plan approved by the state engineer in 1972 and moved to enjoin GASP members from extracting water pursuant to the plan. The water court denied the motion as unrelated to the pending application, noting that the irrigation companies and Boulder could bring a separate action pursuant to C.R.C.P. 65 . . . The jurisdiction of water judges over all water matters . . . extends well beyond the special statutory proceedings for determination of water rights.”

*Id.* at 26-27 (citation omitted).

“Because C.R.C.P. 41(a)(2) does not authorize the imposition of attorney fees as terms and conditions for the voluntary dismissal of applications for water rights with prejudice, the Water Court’s order for attorney fees is reversed; and because the injunction sought by the irrigation companies and the City of Boulder is outside the statutorily prescribed scope of a proceeding for the determination of water rights and would conflict with the purposes of such a proceeding, the water court’s denial of the motion made by the irrigation companies and the City of Boulder is affirmed.”

*Id.* at 27-28.

### **Vought v. Stucker Mesa Domestic Pipeline Co.**

“To decree a conditional water right, the water court must find and conclude that the applicant completed the first step for an appropriation and that the applicant can and will complete the appropriation diligently and within a reasonable time. . . The priority date of the water right is a function of the appropriation date and the adjudication date. The adjudication date is the year in which the application is filed; the appropriation date is the date on which the appropriator completed the first step towards the appropriation.

The first step towards an appropriation is complete when overt acts coalesce to openly demonstrate the applicant’s intent to appropriate the water for a beneficial use; whether the intent or the acts occurred first makes no difference.”

Vought v. Stucker Mesa Domestic Pipeline Co., 76 P.3d 906, 912 (Colo. 2003)(citations omitted).

“The first prong of the first step test requires the intent to appropriate water. Intent to appropriate requires ‘a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source.’

The intent must be relatively specific regarding the amount of water to be appropriated, its place of diversion, and its type of beneficial use; but, for the purposes of a conditional water right decree, the applicant need not know the exact amount of water or point of diversion at the time of the first step. The applicant may demonstrate intent by filing the conditional water right application.

The second prong of the first step test requires that the applicant perform an overt act or acts in furtherance of the intent to appropriate water and apply it to a beneficial use.

The overt act or acts must fulfill three functions: (1) manifest the necessary intent to appropriate water to beneficial use; (2) demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) constitute inquiry notice to interested persons of the nature and extent of the proposed demand upon the water supply. The overt acts can be physical acts or other useful acts towards effectuating an appropriation, such as planning the appropriation of water, undertaking studies regarding feasibility of the diversion, expending human or financial capital in activities connected with the appropriation, or applying for required permits.

The first function of the second prong of the first step test, manifesting intent to appropriate water for a beneficial use, is similar to the first prong (intent). When the applicant proves an overt act demonstrating intent, he or she also proves the first prong of the first step test. Filing an application for a conditional water right can satisfy the intent prong of the first step test and fulfill the first function of the second prong, manifesting the intent to appropriate water. The second function of the second prong of the first step test, taking a substantial step towards applying the water to a beneficial use, turns on the facts of the case. There is no bright line rule for when an act constitutes a sufficient 'substantial step.' In Thornton, we explained that it is unlikely that the act of filing an application for a conditional water

right, without any other actions, will fulfill the second function of the second prong of the first step test. A detailed field survey can constitute a substantial step in some circumstances. However, whether a field survey performs this function is fact-specific. In Bar 70, we held that a field trip by applicants fell short of constituting a substantial step toward appropriation, when the applicants failed to approach the proposed pumping site, failed to survey the points of diversion and storage, and failed to locate monuments or set stakes.

The third function of the second prong of the first step test, giving notice to interested persons of the nature and extent of the proposed demand upon the water supply, is perhaps the most important function. It must place other potential or actual appropriators on inquiry notice regarding the source of the water supply, point of diversion, beneficial use, and amount of diversion.

Inquiry notice requires more than mere notice of an unrefined intent to appropriate, but less than a detailed summary of exact diversion specifications. Filing an application for a conditional water right can provide sufficient notice of the intent to appropriate. A field survey of the proposed appropriation site, without visible staking or posting, does not provide the required notice. Even a field survey, where signs are posted alerting readers of a pending water right application, provides insufficient notice where the signs do not indicate the potential uses or potential quantities of water proposed for diversion. . . . In addition to satisfying both prongs of the first step test, the applicant must demonstrate that he or she meets the can and will test.” *Id.* at 912-913 (citations and footnote omitted).

“We hold that the water court correctly determined that the second visit to the site, when the GPS location was fixed, manifested Stucker Mesa’s intent to appropriate the water from the springs for beneficial use and constitutes a

substantial step toward appropriation, but the water court incorrectly determined that the visit is sufficient to place other appropriators on inquiry notice of the nature and scope of the appropriation. Stucker Mesa first gave the requisite inquiry notice when it filed its water court applications. As a matter of law, Stucker Mesa's date of appropriation is October 6, 2000, the first date on which Stucker Mesa's overt acts coalesced to fulfill the three required functions of the second prong of the first step test." *Id.* at 916-17.

**East Twin Lakes Ditches and Water Works, Inc. v. Board of County Commissioners of Lake County**

"Because intent is a subjective element that is difficult for a complainant to prove by direct evidence, Colorado law provides that failure to apply water to a beneficial use for a period of ten years creates a rebuttable presumption of abandonment. The presumption of abandonment shifts the burden of going forward to the water rights owner, but is insufficient in and of itself to prove abandonment. Rather, the element of intent remains the touchstone of the abandonment analysis, and the owner of the water right can rebut the presumption of abandonment by introducing evidence sufficient to excuse the non-use or demonstrate an intent not to abandon. Acceptable justifications for an unreasonably long period of non-use are limited, however, and a successful rebuttal requires objective and credible evidence, not merely subjective statements of intent by the water rights owner." *East Twin Lakes Ditches and Water Works, Inc. v. Board of County Commissioners of Lake County*, 76 P.3d 918, 921 (Colo. 2003)(citations omitted).

"Because resolution of an abandonment case is largely based upon the weighing of evidence and assessing the credibility of witnesses, this court has consistently held that

the water court's resolution of an abandonment case will not be disturbed on appeal unless the evidence contained in the record is 'wholly insufficient to support the decision.' It is therefore incumbent upon this court to search the record for any evidence in support of the decision, and if successful, to uphold the decision even if, had this court been the trier of fact, it might have held differently."

*Id.* at 922 (citations omitted).

### **Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District**

"First, we hold that House Bill 98-1151 does not violate Article XVI, sections 5 and 6 of the Colorado Constitution because the doctrine of prior appropriation does not apply to the allocation and administration of designated ground water located within the Denver Basin Aquifers. As is the case with nondesignated, nontributary water, the General Assembly exercises plenary authority over Denver Basin bedrock aquifer ground water. Hence, the legislative provision in question, which concerns the allocation and administration of designated Denver Basin ground water, is constitutional and we affirm the trial court on this issue.

Second, we reverse the ground water judge's construction of subsection (7). We hold that § 37-90-107(7) vests the Commission with the authority to determine a use right for the withdrawal of Denver Basin designated ground water by overlying landowners, or those acting with landowner consent, whose land lies within the boundaries of a designated ground water basin that is located in the Denver Basin. The Commission determines the applicant's use right. A use right is a specific entitlement to a quantity of Denver Basin ground water underneath the applicant's land which constitutes a final determination of the water right. The Commission retains authority, however, to adjust this amount to conform to the actual aquifer characteristics en-

countered upon drilling the well or test holes. The Commission's determination of this use right constitutes a final determination of the right, and the landowner need not drill a well to obtain this determination. The owner of land that both overlies the Denver Basin Aquifers and is located within a designated ground water basin possesses a statutorily-created, inchoate right to apply to the Groundwater Commission for the right to use the waters of the aquifers underneath his land by virtue of land ownership.

Third, we affirm the ground water judge and hold that the Ground Water Management Districts possess no statutory authority to determine an applicant's water use right under § 37-90-107(7). The District's regulatory authority begins once a permit has been issued. Hence, an applicant seeking the Commission's determination of its use right need not initially submit its application to the Water District for approval.

Fourth, because all water within this state, surface or ground water, is a public resource and no person owns the public's water, we reverse the ground water judge and hold that the anti-speculation doctrine applies to the Commission's determination of the applicant's right to use these waters. The applicant must establish a threshold showing that either there is a beneficial, non-speculative use that will not create unreasonable waste for the water on the applicant's land, or that the applicant has a contract with a private or public entity for the water's beneficial use if the use will occur on land other than the applicant's.

Lastly, we remand this case to the ground water judge with directions to reinstate his finding from his initial orders that the Bradburys' applications were not speculative and satisfied the anti-speculation doctrine. We then direct him to return the case to the Commission for further proceedings consistent with this opinion.”

Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District, 77 P.3d 62, 66-67 (Colo. 2003).

“Whether portions of the Denver Basin aquifers lie underneath designated ground water basin areas, subject to Commission jurisdiction, or nondesignated areas, subject to either the jurisdiction of the state engineer or the water court, the allocation of Denver Basin ground water is subject to the same standard: withdrawals are based upon an aquifer life expectancy of one hundred years and the quantity of water available for withdrawal shall be that quantity of water underlying the land owned by the applicant or someone acting with her consent.”

*Id.* at 74.

“The plain wording of House Bill 98-1151 thus provided the Commission with new authority to determine the use right of Denver Basin designated ground water in the same manner that a water court would for nondesignated Denver Basin ground water. In addition, House Bill 98-1151 eliminated the two step Commission permit process, and the landowner need not construct a well to determine her use right. As such, this legislation corrected the inconsistent treatment that existed between future well users in designated and nondesignated areas of the Denver Basin.”

*Id.* at 77 (footnote omitted).

“All water within Colorado is a public resource, and no person owns the public's water. Rather, persons may obtain rights of use under applicable provisions of law. The administration of a water use right, as we have seen, depends upon the statutory allocation of the category of waters to which the right attaches. Even though Denver Basin ground water is allocated and managed differently from tributary surface waters,

the CGMA mirrors the anti-speculation, beneficial use, and non-waste precepts of Colorado water law.”

*Id.* at 78.

“(I)t would be logically inconsistent to apply this conservation doctrine to waters that are seasonably replenishable but not to waters that are finite and exhaustible. . . This conservation doctrine should apply when the Commission fixes or quantifies the landowner's water use right. In other words, the anti-speculation doctrine applies when the Commission makes the final determination of the amount of ground water allocated to the use right, acting pursuant to the provisions of subsection (7). § 37-90-107(7)(c)(III).

Thus, when the Commission determines a water use right to designated ground water in the Denver Basin under § 37-90-107(7), an applicant must establish a threshold showing that there exists a beneficial, non-speculative use for the amount of allocated designated Denver Basin ground water that will not create unreasonable waste. If the use will occur on land other than the applicant's, then the applicant must establish that the applicant has a contract or agency relationship with another entity for the water's beneficial use.”

*Id.* at 80.

### **Moyer v. Empire Lodge Homeowners' Association**

“As this court has previously recognized, the Uniform Local Rules For All State Water Court Divisions indicate their intent that the Colorado Rules of Civil Procedure, ‘including the state-wide practice standards set out in C.R.C.P. 121,’ apply to water court practice and procedure, ‘[e]xcept as expressly provided in these rules.’ C.R.C.P. 121, § 1-22, requires a party claiming costs to file a Bill of Costs within 15 days of judgment or ‘such greater time as the court may allow.’ Although the water court did not specify an alternate deadline in its original Order and Judgment, in response to

the Moyers' first request for extension of time, it expressly ordered that they be granted to and including April 28, 2000, within which to file."

*Moyer v. Empire Lodge Homeowners' Association*, 78 P.3d 313, 314-15 (Colo. 2003)(citations omitted).

"When the Moyers finally filed their Bill of Costs, Empire Lodge objected, and the water court denied the Bill of Costs as untimely. Treating Empire's failure to object to the April 25, 2000 motion for enlargement as a confession of the additional time it requested, the water court found that the Bill of Costs was nevertheless filed 20 months outside the time requested by the Moyers and acquiesced in by Empire. . . Because the Bill of Costs was not filed within the time ordered by the water court and the water court did not abuse its discretion in failing to permit a 20-month late filing, the order of the water court is affirmed."

*Id.* at 315-16.

### **City of Golden v. Simpson**

"The City of Golden, the petitioner, makes two arguments. First, it claims that the water court was incorrect when it employed the plain language of the 1966 change decree to hold that Golden did not have a valid right to 3.42 cfs of Priority No. 5 water when two conditions were met: over 3.5 cfs of water was flowing at the Oulette Ditch headgate, and FHL had a call on Clear Creek. Second, Golden argues that the water court erred when it dismissed Golden's complaint for injunctive relief without a separate hearing on the matter.

We reject both arguments. Although the City of Golden offers several creative interpretations of the 1966 change decree, we agree with the water judge that the terms are clear: Golden does not have the right to divert water from Clear Creek when the two conditions are satisfied, and

in this case they were. Because the decree is clear on its face, no extrinsic evidence is admissible to alter its plain meaning.”

*City of Golden v. Simpson*, 83 P.3d 87, 91-92 (Colo. 2004).

“Once a change is adjudicated, courts consider the matter fully litigated, and will not reopen a final case in order to alter or add to the terms of the decree. A change decree includes a specified period of retained jurisdiction to address injurious effects that may result from placing the change of water right into operation.

Courts interpret a stipulated change decree as they would interpret a contract. A court’s primary goal is to implement the intent of the parties as expressed in the language of the decree. To ascertain this intent, the courts turn to the plain and ordinary meaning of its terms. If the terms are clear, a court will neither look outside the four corners of the instrument, nor admit extrinsic evidence to aid in interpretation. Disagreement between the parties involved does not necessarily indicate that the documents are ambiguous. Instead, the court must adopt the plain and generally accepted meaning of the words employed. If the contract involved is a stipulation, such as this change decree, any party that participated in the original stipulation is proscribed from introducing legal contentions contrary to the plain meaning of the decree. This approach lends consistency and stability to Colorado water law and decrees.” *Id.* at 92-93 (citations omitted).

“(T)he drought of 2002 was remarkably severe, and the lack of enforcement of the decree’s conditions in the past cannot be dispositive of the 2002 situation . . . Golden’s various interpretations of the 1966 change decree and attempts to introduce extrinsic evidence are ineffective because the decree is plain on its face. The water judge was correct in deciding that the decree requires Golden to cease

and desist diverting water under its Priority No. 5 rights at the Church Ditch whenever: (1) FHL makes a call at the FHL Canal headgate, and (2) the total flow at the Oulette Ditch headgate is greater than 3.5 cfs. This interpretation satisfies the intent of the parties to prevent the change decree from injuring users of Clear Creek water.”

*Id.* at 96.

“When water rights are in dispute, and one party is not receiving its entitled allotment, time is of the essence. That is why section 37-92-503 requires the water court to expedite a 503 hearing and decide the case at the conclusion of the hearing. This case offers similar concerns. FHL was not receiving the water to which it was entitled. Golden continued diverting water despite FHL’s call and the state’s cease-and-desist order. When the court decided, as a matter of law, that Golden was not entitled to the 3.42 cfs of water that it continued to divert, the court properly dismissed Golden’s case and upheld the cease-and-desist order.”

*Id.* at 98.

### **Hammel v. Simpson**

“Abandonment need not be proved directly; the water court may infer the intent to abandon from the facts of the case. Here, the trial court found that no beneficial use of water from the decreed well was made from at least 1974 to 1998 . . . Because our review of the record does not disclose any evidence rebutting the presumption of abandonment, we affirm the water court’s order.”

Hammel v. Simpson, 83 P.3d 1122 (2004).

### **Trail’s End Ranch v. Colorado Division of Water Resources**

“Although one of the incidents of a water right is the right to change the point of diversion (to the extent that it neither enlarges the right nor injuriously affects other users), such a change constitutes a change of the water right itself. It must therefore be applied for and adjudicated in substantially the same manner as the initial determination of the water right.”

*Trail’s End Ranch v. Colorado Division of Water Resources*, 91 P.3d 1058, 1061(Colo. 2004).

“In light of the stipulation of facts and the arguments advanced throughout by Trail’s End, there can be no dispute that it proposed to divert water from Spruce Creek at its decreed points of diversion and, before applying that water to a beneficial use or placing it into a decreed place of storage, return it by ditches to Spruce Creek, for subsequent removal further downstream. The proposal would not add to the creek any water that was not already there and would clearly have no effect on the natural course of the creek. The water subject to downstream removal would therefore continue to flow along the existing course of Spruce Creek at the undeclared points proposed for its removal, whether or not it were briefly detoured at an upstream location by Trail’s End. Under these circumstances, the proposed downstream takings constitute diversions within the contemplation of the statute and cannot benefit from the priorities of existing water rights without a change of those rights.”

*Id* at 1062.

“Far from a mere formality, the adjudication of changes to the point of diversion of an existing water right provides an important protection for potentially affected decreed water rights holders. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Because an absolute decree is itself

not an adjudication of actual historic use but is implicitly further limited to actual historic use, in order to insure that a change of water right does not enlarge an existing appropriation, its “historic beneficial consumptive use,” must be quantified and established before a change can be approved. There is no apparent purpose, other than circumventing the statutory requirement to adjudicate a change of water right, to be served by Trail’s End’s proposed rerouting operations, and none has been offered by Trail’s End.”  
*Id.* at 1063.

### **Black Hawk v. Central City**

“Unlike West Elk and FWS, this case does not involve a final denial of access to state or federal property. Here, even though Black Hawk’s claim for a conditional water right in Chase Gulch Reservoir had been filed a decade before, Central City waited until nine days before trial to pass a nonbinding resolution stating that it would not enter into agreements with third parties seeking to use its property interests to construct water projects. The resolution was general in nature and referred to neither Black Hawk nor Chase Gulch Reservoir. The mayor of Central City admitted that the resolution may not bind future city councils. In light of this testimony, the water court found that Black Hawk satisfied the access to property element of the can and will test.

After reviewing the evidence presented at trial, we hold that the water court did not err in finding that Black Hawk adequately satisfied the access to property requirement of the can and will statute. The court’s finding was not ‘so clearly erroneous as to find no support in the record.’ We base this holding on the fact that lack of current access to property is not typically dispositive of whether the can and will test is satisfied, and on the water court’s finding that Black Hawk had satisfied all of the other requirements

of the can and will statute. In addition, our holding relies upon a recognition that the can and will statute should not be rigidly applied in cases not involving speculation and that the existence of contingencies in a water application does not prevent the can and will test from being satisfied.” *Black Hawk v. Central City*, No. 03SA295, slip opinion at 18-20 (Colo. September 13, 2004)(citations omitted).

“According to our precedent, neither the applicable notice provisions nor the can and will statute itself requires an application for a conditional water decree to contain the level of detail necessary for the water project to be carried out immediately upon the granting of such a decree. For example, an applicant proposing to build a water project often waits to proceed with the detailed testing, design, and permitting necessary to determine the precise location and configuration of water structures until receiving a conditional decree. Similarly, when an applicant proposes to build or construct a reservoir, parties that object to the proposal at the conditional decree stage often agree to drop their objections or participate in the project at a later stage. Recognizing the nature of this process and the importance of water storage in Colorado, the General Assembly recently directed that ‘[s]tate agencies shall, to the maximum extent practicable, cooperate with persons desiring to acquire real property for water storage structures.’ Ch. 189, sec. 3, § 37-87-101(1)(b), 2003 Colo. Sess. Laws 1367, 1368.” *Id.* at 23-24.

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