

# **A DECADE OF COLORADO SUPREME COURT WATER DECISIONS 1996-2006**

by Justice Greg Hobbs

Acknowledgments: This article is adapted from the decisions of the Colorado Supreme Court issued between 1996 and 2006. It contains excerpts from opinions authored by Justices Lohr, Mullarkey, Kourlis, Hobbs, Martinez, Bender, Rice, Coats and Eid. This article first appeared in *The Water Report*, February 15, 2007, is reprinted with permission, and contains additions to the original article.

## **Introduction**

Colorado, like other western states, is experiencing rapid urbanization and increased expectations for use of its limited water supply. In 1970 Colorado had a population of two million persons. Colorado's population is now 4.6 million and rising. By 2030, 2.5 million more persons may be added. Approximately one million acres of farm ground have yielded to urbanization in the past ten years.

Urbanizing communities want water left in the streams. They also want water readily available for their use. Yet the available water is severely limited by both natural and legal constraints. The natural hydrograph is subject to wide variations through flood and drought. Because of nine interstate compacts and three US Supreme Court "equitable apportionment" decrees, Colorado is entitled to consume only about one-third of the naturally available water in its streams and tributary groundwater aquifers.

In contrast to an annual average of 16 million acre-feet of water available in Colorado watersheds, the drought year of 2002 produced only four million acre-feet (AF). Most of that had to be delivered downstream to make the interstate delivery requirements. Colorado lived on six million AF of water released from its nearly 2000 reservoirs that had been stored in good water years, coming within one-half million AF of exhausting its live storage capacity. Conservation measures, such as watering restrictions and rate hikes combined with citizen response to crisis, reduced customer municipal water demand by one-third in the Denver metropolitan communities.

This article has been written in conjunction with the American Bar Association's (ABA'S) 25<sup>th</sup> Annual Water Law Conference. The paradigm subject of this year's conference: "Changing Values—Changing Conflicts" — is not new. Conflict and change have dramatically shaped western water law and policy over its entire 140+ year history.

The age-old reality of western water scarcity and the beauty of this great western landscape continue to play their starring roles.

What is truly new, however, is: (1) the huge population growth the western states have experienced since World War II; and (2) the persistent effort in more recent times to integrate environmental water values into the water law's use right structure.

This article addresses a decade of Colorado Supreme Court's water decisions. The early 21<sup>st</sup> Century drought and the over-appropriated status of three of Colorado's four

major river basins—the Platte, the Arkansas, the Rio Grande—are two themes laced throughout the Colorado Supreme Court’s 64 decisions issued between 1996 and 2006.

These water decisions arose from actual facts and conflicts and thus provide windows into a shared community experience. You might look upon them as vessels floating on the currents of precedent flowing from the source of all law — i.e. the evolving customs and values of the people; or perhaps as new wine being poured into vintage water skins.

Join me, if you will, in identifying these currents, these vessels, this process of alchemy.

### **Water Is A Public Resource**

The profound depths of the rubric “water is a public resource” are still being plumbed. In a case where overlying landowners claimed a right of ownership and control over underground aquifer storage, the nature and extent of the “Colorado Doctrine” was again tested.

The Colorado Supreme Court responded by holding that Colorado law had wholly replaced the riparian and *cujus* common law doctrines, which tied water use rights to ownership of property abutting the stream or land overlying an aquifer. This break from the common law was so complete as to make all surface water and groundwater in the state, along with the water-bearing capacity of streams and aquifers, a public resource dedicated to the establishment and exercise of water use rights created in accordance with the applicable law.

The Colorado Doctrine arose from the “imperative necessity” of water scarcity in the western region, and includes these features: (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 transportation systems, occupy and convey water through those lands, and withdraw water from the natural water-bearing formations; and (3) the natural water-bearing formations may be used for the transport and retention of appropriated water. This new common law of the arid region created a property-rights-based allocation and administration system that promotes multiple use of a finite resource for beneficial purposes. *Board of County Commissioners v. Park County Sportsmen’s Ranch*, 45 P.3d 693, 706 (Colo. 2002).

In so holding, the court relied on a water act adopted by the first Colorado Territorial General Assembly in 1861 and a series of United States Congress public domain acts, including the 1866 Mining Act and subsequent acts.

TOGETHER, THESE PAST STATE AND FEDERAL ACTS HAD:

- (1) effectuated a severance of water from the land patents issuing out of the public domain
- (2) confirmed the right of the states and territories to recognize rights to water established prior to the federal acts

(3) granted the right to states and territories to legislate in regard to water and water use rights.

Although the water and the water-bearing formations constitute a public resource, constructing a water feature on another person's land — such as a ditch, reservoir, or well — requires the consent of the landowner or the exercise of the private right of condemnation over private lands upon payment of just compensation (see Article XVI, section 7, and Article II, sections 14 and 15, of the Colorado Constitution and implementing statutes). *Id.*, 45 P.3d at 711. Other western states have similar condemnation statutes.

The public's water resource is allocated and administered by Colorado law according to four classifications.

COLORADO'S FOUR CLASSIFICATIONS FOR WATER ALLOCATION INCLUDE:

- (1) waters of the natural stream, which includes surface water and groundwater that is tributary to the natural stream
  - (2) designated groundwater
  - (3) nontributary water outside of designated groundwater basins
  - (4) nontributary and not-nontributary Denver Basin water of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers.
- Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000).

All of these types of water belong to the public, but only the first is subject to allocation by the Doctrine of Prior Appropriation under Article XVI, Sections 5 and 6, Colorado Constitution. The other three types of groundwater are subject to allocation and administration by the Colorado General Assembly exercising its plenary authority. *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District*, 77 P.3d 62, 70 (Colo. 2003).

The public's water resource that has been federally reserved is allocated out of theretofore unappropriated water pursuant to the laws of the United States, and is administered by Colorado according to decrees entered by the United States courts or by the Colorado courts pursuant to the McCarran Amendment. *United States of America v. Colorado State Engineer*, 101 P.3d 1072, 1079 (Colo. 2004).

### **Interstate Compacts**

The State Engineer must enforce compact delivery requirements, 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 apportionments through property rights perfected for beneficial use within the state. *Simpson v. Highland Irrigation Company*, 917 P.2d 1242, 1248 (1996).

In 1956, Congress passed the Colorado River Storage Project Act (CRSPA). It authorized the construction of several dams in the Upper Basin, including Glen Canyon, Flaming Gorge, Navajo, and the Wayne N. Aspinall Unit. Congress enacted CRSPA to assist the Upper Basin states in developing their allocation of water, producing hydropower, and ensuring compact deliveries, among other uses. *County Comm'rs v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 334-35 (Colo. 2000).

Congress approved the construction and operation of these dams and reservoirs, including the Aspinall Unit, for the nonexclusive purposes of: (1) regulating the flow of the Colorado River; (2) storing water for beneficial consumptive use; (3) making it possible for the States of the Upper Basin to utilize, consistent 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; and (4) 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. 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.

The CRSPA reservoirs are part of a plan to allow Colorado to develop and preserve compact apportionment. 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. By banking CRSPA water for compact deliveries and using the reservoirs for their other decreed purposes, Colorado continues development of its water entitlements. The Aspinall Unit holds absolute decrees, and a right to use the water for the decreed purposes—including hydropower generation, recreational, and fish and wildlife uses.

The Colorado Supreme Court held, because only 15,700 acre-feet of water annually remained unappropriated in the upper Gunnison River basin, that Arapahoe County's proposed transmountain diversion project was infeasible under Colorado's "can and will" test. This test requires the applicant for a conditional decree to show, taking into account the historic exercise of senior water rights, that there is unappropriated water yet available for beneficial use by the proposed project. *Id.* at 331, 333-34.

## **Beneficial Use and Anti-Speculation**

The roots of Colorado water law reside in the agrarian, populist efforts of miners and farmers to resist speculative investment that would corner the water resource to the exclusion of actual users settling into the territory and state.

In this context, Colorado's adoption of the principle that the public owns the water, its complete departure from riparian-based water law, its constitutional limitations on maximum rates that individuals or corporate suppliers can charge for water, the actual beneficial use limitation restricting the amount of water that can be appropriated from the public's water resource, and the right to obtain a right-of-way to construct water facilities across the private lands of another with payment of just compensation, all reflect the anti-monopolistic undergirding of the state's water law. *High Plains A & M*,

*LLC v. Southeastern Colorado Water Conservancy District*, 120 P.3d 710, 719 n. 3 (Colo. 2005).

Priority of appropriation for beneficial use is the foundation upon which the exercise of decreed prior appropriation water rights in their original or changed form depends. Under the statutes and case law, the appropriator or the appropriator's agent appears in a conditional water right, absolute water right, or change of water right judicial proceeding for the purpose of demonstrating the actual beneficial use to be made of the appropriation.

The applicant must show a legally vested interest in the land to be served and a specific plan and intent to use the water for designated purposes. This requirement can be satisfied by a showing that the appropriator of record is a governmental agency, or a person who will use the changed water right for his or her own lands or business or has an agreement to provide water to a public entity and/or private lands or businesses to be served. *Id.* at 720.

A municipality may be decreed conditional water rights based solely on its projected future needs (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. The water court can set a water yield limit below established need and availability, if necessary to protect injury to existing water rights. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d at 39, 48.

### **A Water Right is a Right to Use a Portion of the Public's Water Resource**

Because water is indispensable to life, allocation of the natural water supply to as many uses as possible is one of the highest priorities of government at all levels.

The objective of the water law system is to guarantee security, assure reliability, and cultivate flexibility in the public and private use of this scarce and valuable resource. Security resides in the system's ability to identify and obtain protection for the right of water use. Reliability springs from the system's assurance that the right of water use will continue to be recognized and enforced over time. Flexibility emanates from the fact that the right of water use can be changed, subject to quantification of the appropriation's historic beneficial consumptive use and prevention of injury to other water rights. *Empire Lodge Homeowners' Association v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001).

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. *Id.* at 1147.

The property recognized as a Colorado prior appropriation water right is a right to use beneficially a specified amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree. This right may be exercised to the exclusion of all others not then in priority under a decreed water right. It comes into existence only by application of the water to the appropriator's beneficial use; the actual beneficial use made of the appropriation then becomes the basis, measure, and limit of the appropriation. *Santa Fe Trail Ranches Prop. Owners Ass'n. v. Simpson*, 990 P.2d 46, 53 (Colo. 1999).

Appropriators of water native to a public stream have no automatic right to capture and reuse water after the initial application to beneficial use. Instead, return flows and seepage waters from application to a beneficial use are part of the public's water resource, and are subject to diversion and use under the appropriations and associated system of priorities existing on the stream. *Ready Mixed Concrete Company in Adams County v. Farmers Reservoir and Irrigation Company*, 115 P.3d 638, 642-43 (Colo. 2005).

Thus, a user of native water can make only one use of the diverted water. A right to reuse return flows after the first use of native waters can be established only through an independent appropriation in priority. *Thornton v. Bijou*, 926 P.2d at 65.

However, an importer of transmountain water (see map below) need not have an intent to reuse this water at the time of the original appropriation and importation to maintain the right to reuse that water to extinction (i.e. in its entirety). The reuse right remains with the importer until the right is transferred by the importer or the importation ceases. *Id.* at 70. 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.

Property rights in water are usufructuary (i.e. use-based rights). Ownership of the resource itself remains in the public. Because actual beneficial use defines the genesis and maturation of every appropriative water right, 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 beneficial consumptive 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*, 990 P.2d at 54-55.

Prior 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.

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

### **Importance of Adjudication and Administration of Prior Appropriation Water Rights**

Adjudication and administration are essential to protection of prior appropriation water rights. In 1919, the General Assembly required adjudication of all such rights, in order to establish their priorities and enforce them. The reason for adjudicating a water right is to realize the value and expectations that enforcement of that right's priority secures. *Empire Lodge*, 39 P.3d at 1148-49.

From the water right owner's standpoint, the reason for adjudicating the right is to realize the value and expectations secured through administration of that right's priority. If not adjudicated, the priority cannot be enforced by the State Engineer. An express feature of the water law is maximization of as many decreed uses as possible within Colorado's allocation of interstate-apportioned waters. *High Plains*, 120 P.3d at 718.

THE ESSENTIAL ELEMENTS OF A PRIOR APPROPRIATION WATER RIGHT INCLUDE:

- the priority date
- the location of diversion at the source of supply
- the amount of water for application to beneficial use(s)

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, and the owners and users of such water rights may change from time-to-time. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 38-39 (Colo. 1997).

Any person may object to a water court application 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. 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. *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 747, 749 (Colo. 1997).

Unlike state-created prior appropriation, federally-reserved water rights do not arise from application of water to an actual beneficial use; but rather from the terms of the reservation determined in accordance with federal law. Nevertheless, they are subject to identification by adjudication in federal or state courts under the McCarran Amendment to determine their location, priority, quantity, and type of use, so they can be administered along with all other water rights. *United States of America v. Colorado State Engineer*, 101 P.3d at 1079.

### **Instream Flow and Lake Level Water Rights**

Instream flow and lake level water rights can be appropriated by the Colorado Water Conservation Board (Board). These rights are creatures of statute, they do not require points of diversion, and they cannot be appropriated by any person or entity other than this state agency. The Board holds them in the name of the people of Colorado for preservation of the environment to a reasonable degree. *Thornton v. Bijou*, 926 P.2d at 93.

The Board may acquire interests in other water rights to supplement its instream flow water rights, by grant, purchase, donation, bequest, conveyance, lease, exchange or other contractual agreement, but may not use eminent domain or deprive the people of Colorado of their beneficial use allocations under interstate law and compact, *section 37-92-102(4), C.R.S.(2006)*.

Instream flow water rights must be protected against injury by changes of water rights and augmentation plans. Despite its junior status to prior-appropriated water rights, the legislature envisioned the primary value of an instream flow right to derive from the basic tenet of water law that preserves to a water right the maintenance of stream conditions existing at the time of its appropriation.

Water right proceedings are typically concerned with either appropriating a new water right or adapting an existing water right to a new use. To effectuate the General Assembly's purpose of preserving the environment by ensuring the minimum streamflows deemed necessary for such preservation, the Board is entitled to necessary protective terms and conditions in the decree that approves a change of water right or augmentation plan.

Many Colorado basins are fully- or over-appropriated, and it is therefore infeasible to obtain a reliable supply of water based on new appropriations. As a result, the majority of water right adjudications coming before the Colorado water courts—and thus the biggest threat to maintaining minimum flows—involve adapting old water rights to new water requirements through changes and plans for augmentation, including exchanges. Absent an ability to assert injury against a senior water right adapting to a new or enlarged use, instream flows could be eliminated by a change of water right or plan for augmentation.



Thus, a junior instream flow right may resist all proposed changes in time, place, or use of water from a source which in any way materially injures or adversely affects the decreed minimum flow, in the absence of adequate protective conditions in the change of water right or augmentation decree. This rule best effectuates the clear legislative intent to protect and preserve the natural habitat through minimum streamflows.

In the absence of this rule, senior diverters could simultaneously increase the supply of water yet divert around or from an existing instream flow right by a water project exchange or other means. The legislature clearly did not intend this to happen. The General Assembly identified instream flows as the mechanism to effect a basic tenet of Colorado water law it statutorily recognized: “to correlate the activities of mankind with some reasonable preservation of the natural environment.” *Colorado Water Conservation Board v. City of Central*, 125 P.3d 424, 439-40 (Colo. 2005).

In addition to its water rights (water *quantity*) responsibilities, Colorado also administers water *quality* programs. The legislature has 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 restriction that “Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows.” 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. *Thornton v. Bijou*, 926 P.2d at 93.

### **In-Channel Recreational Water Rights**

The Colorado General Assembly has enacted statutory provisions for the appropriation of recreational in-channel diversion water rights, *sections 37-92-103(10.3), 37-92-102(6)(b), and 37-92-305(13)*, C.R.S. (2006). These water rights are limited to appropriation in priority by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district.

Such rights involve the diversion, capture, control, and placement to beneficial use of water between specific points defined by in-channel control structures. They are limited to the minimum amount of stream flow needed for a reasonable recreational experience in and on the water from April 1 to Labor Day of each year, unless the applicant can demonstrate that there will be demand for the reasonable recreational experience on additional days. They are also limited to a specified flow rate for each period claimed by the applicant.

Within 30 days of initiating a filing for adjudication of such a water right, the applicant must submit a copy of it to the Colorado Water Conservation Board. After deliberation in a public meeting, the Board is obligated to consider a number of factors and make written findings as to each.

BOARD FINDINGS REGARDING RECREATIONAL IN-CHANNEL DIVERSION APPLICATIONS MUST INCLUDE:

- (1) whether the adjudication and administration of the recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements
- (2) whether exercise of the right would cause material injury to instream flow rights appropriated by the board
- (3) whether adjudication and administration of the right would promote maximum utilization of the waters of the state

The water court must consider the Board's findings of fact, which are presumptive as to such facts, subject to rebuttal. In addition, the water court must consider evidence and make certain affirmative findings.

WATER COURT AFFIRMATIVE FINDINGS MUST INCLUDE DETERMINING THAT THE RECREATIONAL IN-CHANNEL DIVERSION WILL:

- (1) not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact allocations
- (2) promote maximum utilization of waters of the state
- (3) include only that reach of stream that is appropriate for the intended use
- (4) be accessible to the public for the recreational in-channel use proposed
- (5) not cause material injury to the board's instream flow water rights.

The statute contains other criteria for determining the flow rate and for state engineer enforcement.

The 2006 legislative amendments occurred after the Colorado Supreme Court issued its opinion addressing a prior version of the statute, under which previous and now-grandfathered recreational water rights were established. *Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy District*, 109 P.3d 585 (Colo. 2005).

### **“Can and Will” Test for Conditional Water Right and Diligence Decrees**

The anti-speculation doctrine noted above prohibits the acquisition of a conditional right without a specific plan to possess and control available-yet-unappropriated water for a specific beneficial use. This doctrine applies to the initial entry of a conditional water right decree (subject to the can and will test) and to subsequent diligence decrees.

A conditional water right is a placeholder in the priority system pending placement of the water to actual beneficial use. It encourages 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 with an antedated priority specified in the conditional decree.

The conditional water right decree holder must appear before the water court in diligence proceedings once every six years to demonstrate that sufficient work has occurred to move the project toward completion. 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.

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.

In one example, the water court concluded that an applicant's oil shale project was technically feasible given current technology, and applicant would complete the project when the current economic conditions facing the oil shale industry no longer exist. The General Assembly had enacted a statutory provision that the infeasibility of oil shale development under current economic conditions should not cause loss of a conditional right. *Mun. Subdist., N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 708 (Colo. 1999).

Lack of current access to property on which a water structure, such as a ditch, pipeline, or reservoir is to be built, is not typically dispositive of whether the can and will test is satisfied. The can and will statute should not be rigidly applied in cases not involving speculation. The existence of contingencies in a water application does not prevent the can and will test from being satisfied. 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 has directed that state agencies shall, to the maximum extent practicable, cooperate with persons desiring to acquire real property for water storage structures, *section 37-87-101(1)(b), C.R.S. (2006)*. *Black Hawk v. Central City*, 97 P.3d 951, 959-60 (Colo. 2004).

Nevertheless, federal environmental and land use laws may prevent issuance of a conditional or diligence decree if a project is not feasible. For example, 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 (SUPs) 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.

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 forest supervisor agreed. Without an SUP, West Elk could not 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. *West Elk Ranch LLC. v. United States*, 65 P.3d 479, 482-83 (Colo. 2002).

The purpose of the can and will statute is to subject conditional rights to continued scrutiny to prevent the hoarding of priorities (and water rights) to the detriment of those seeking to apply the state's water beneficially. The General Assembly intended to reduce speculation associated with conditional decrees and to increase the certainty of the administration of water rights in Colorado. Accordingly, the substantial probability standard is employed to curb indefinite speculation, not to protect a conditional water right where only the thinnest possibility remains that the project can and will be completed.

In a diligence proceeding, the water court and the Colorado Supreme Court cancelled the prior-issued conditional water right for a hydroelectric project. The feasibility of the project depended, in part, upon the proposed use of the US Bureau of Reclamation's Taylor Park Reservoir as a forebay and afterbay, and the installation and use of a pumping station at Taylor Park Reservoir. There was no proceeding pending to obtain the approvals required to be issued by the federal government, and no factual showing that the applicant would ever receive them. *Natural Energy Resources Company v. Upper Gunnison River Water Conservancy District*, 142 P.3d 1265, 1277-78 (Colo. 2006).

### **Tributary Groundwater Like Surface Water is Subject to Priority Adjudication and Administration**

Through the 1969 Water Right Determination and Administration Act (1969 Act), the General Assembly enacted basic tenets of Colorado water law that include conjunctive use of surface water and tributary groundwater for priority adjudication and administration.

BASIC TENETS OF THE 1969 ACT INCLUDE:

- (1) a natural stream consists of all underflow and tributary waters
- (2) all waters of the natural stream are subject to appropriation, adjudication, and administration in the order of their decreed priority
- (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
- (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

*Park County Sportsmen's Ranch*, 45 P.3d at 704-05.

Another basic tenet of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream which existed 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, and to appropriators' rights in return flows. *Thornton v. Bijou*, 926 P.2d at 80. Colorado law contains a presumption that all groundwater is tributary to the surface stream unless proved or otherwise provided by statute. *Park County Sportsmen's Ranch*, 45 P. 3d at 702.

The 1969 Act provides the statutory framework for implementing the constitutional right to divert the unappropriated surface water and tributary groundwater. The 1969 Act created the current system of seven water divisions and water courts. It also vested the State, seven Division Engineers, and local water commissioners with administrative duties. These duties include the non-discretionary duty to administer rights to waters subject to the 1969 Act according to the prior appropriation system. *Gallegos v. Colo. Ground Water Commission*, 147 P.3d 20 (Colo. 2006).

### **Conditions for Establishing a Conditional Use Right in Aquifer Storage**

Underground aquifers are not reservoirs for purposes of obtaining an adjudicated right to store water in them, except to the extent they are filled by other than natural means with water to which the person filling the aquifer has a conditional or decreed right, *section 37-87-101(2), C.R.S. (2006)*. An application for an underground storage right must meet certain conditions.

MINIMALLY, THE APPLICANT FOR SUCH A RIGHT:

- (1) must capture, possess, and control the water it intends to put into the aquifer for storage
- (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
- (8) must have an accurate means for measuring and accounting for the water stored and extracted from storage in the aquifer

*Park County Sportsmen's Ranch*, 45 P.3d at 704-05 n.19.

Relying on findings it made, the water court in the subsequent *Park County Sportsmen's* case held that the groundwater model (as operated in the case) failed to produce sufficiently reliable results to permit a reasonably accurate determination of the timing, amount, and location of depletions, or the timing and amount of aquifer recharge. The water court further held that the surface water model (as operated in

this case) failed to produce sufficiently reliable results to permit a reasonably accurate determination of either average stream flow or legal availability of augmentation water. In upholding the water court's dismissal of the conditional decree application, the Colorado Supreme Court relied upon the water court's findings that the models were unsuitable in the case and did not assist reliably in meeting the applicant's burden of predicting and protecting against injury to other water rights. *City of Aurora v. Colorado State Engineer*, 105 P.3d 595, 608, 612-13 (Colo. 2005).

### **Changes of Water Rights Quantification and Injury Rules**

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 water right "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 on a priority basis. 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 the 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).

The subject of a change decree proceeding is a conditional or an absolute water right. The status of the appropriation and the appropriator are subject to identification, examination, and verification in the change proceeding. A change of water right decree recognizes that the priority of the existing right can be operated for new uses at different locations under conditions necessary to maintain the appropriation without injury to other decreed appropriations.

FOR EXAMPLE, COLORADO WATER LAW APPLICABLE TO CHANGES OF WATER RIGHTS FROM AGRICULTURAL TO MUNICIPAL USE INCLUDES THE FOLLOWING:

- (1) the water resource is the property of the public
- (2) the priority of a use right obtained by irrigating a particular parcel of land is a property right that can be separated from the land
- (3) the owner of the use right may sell it to another person or governmental entity
- (4) the courts may decree a change in the point of diversion, type, time, and/or place of beneficial use, subject to no injury of other water rights.

*High Plains*, 120 P.3d at 718.

Each water right includes a specific site identified by the point of the diversion and the place to which the water is delivered for actual beneficial use. A water right requires both an appropriator and a place where the appropriation is put to actual beneficial use. Accordingly, a change decree recognizes a new situs for the appropriation. A basic predicate of an application for a decree changing the place of use, is a sufficiently described actual beneficial use to be made at an identified location or locations under the change decree. *Id.* at 720-21.

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).

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 appropriation, without diminishment of return flows upon which other water rights depend.

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. When historical usage has been quantified for a 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.

Colorado statutes address six features of a judgment and decree involving changes of water rights and augmentation plans.

THESE SIX FEATURES INCLUDE:

- (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
- (6) the water judge has discretion to reconsider the injury question.

*Farmers Reservoir and Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799, 808 (Colo. 2001).

The terms and conditions of a change of water right decree shall include provisions for revegetation of lands from which water is removed, *section 37-92-305(4.5)(a), C.R.S.(2006)*. The water court can also impose transition mitigation payments to offset reduced property tax revenues, as well as bonded indebtedness payments, due to the removal of agricultural water from one county for use in another (*section 37-92-305(4.5)(b), C.R.S.(2006)*).

## **Augmentation Plans**

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. Replacement water can come from any legally available source of water, such as mutual ditch company shares, successive use of transmountain water, nontributary water, and/or artificial recharge of aquifers to generate augmentation credits. Depletions not adequately replaced shall result in curtailment of the out-of-priority diversions. *Empire Lodge v. Moyer*, 39 P.3d at 1150.

As a result of the 1969 Act's stated policy of conjunctive use, wells were required to be integrated into the priority system. The Act 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 introduced the concept of augmentation plans into the water law adjudication and administration scheme as the primary means to integrate tributary groundwater into the state priority system. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 60 (Colo. 2003).

The General Assembly's intent was to consign the matter of approving ongoing out-of-priority groundwater diversions using replacement water exclusively to the water courts. In 1969 and 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 evidenced 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)*. The statute unambiguously provided that it is the province of the water courts to approve and decree augmentation plans, except in four limited circumstances set forth in that law, which allow the State Engineer to grant temporary substitute supply plan approval pursuant to the express provisions of those subsections. *Id.* at 62-63.

*Section 37-92-305(3), C.R.S. (2006)* expressly requires that 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. When injury is likely, terms and conditions may be included in decrees for augmentation plans to prevent injury. If the substituted water is of a quantity and quality that meets the requirements for which the water of the senior appropriator has normally been used, the proposed substitution must be accepted. *City of Thornton v. City and County of Denver*, 44 P.3d 1019, 1025 (Colo. 2002).

Current statutory law delegates most authority over water quality issues to the Water Quality Control Commission. The general assembly enacted the state's Water Quality Control Act 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. 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. The Act is not intended to interfere with the water court's role in adjudicating water rights administered by the State Engineer. *Id.* at 1028-29. 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. *Id.* at 1032.

## **Temporary Changes**

In addition to permanent changes of water rights, Colorado water law now allows for a variety of means by which the type or place of use decreed to a water appropriator may be changed temporarily upon approval by the State Engineer.

ALLOWED TEMPORARY WATER RIGHT CHANGES INCLUDE:

- (1) water banking programs for leasing, loaning, and exchanging stored water rights
- (2) exchanges of water between streams or between reservoirs and ditches
- (3) loans between agricultural water users in the same stream system for up to 180 days in a year
- (4) temporary interruptible water supply agreements for up to three-out-of-ten years. *ISG, LLC v. Arkansas Valley Ditch Association*, 120 P.3d 724, 732 (Colo. 2005).

The statutorily authorized temporary changes of use proceed through the state or division engineer. Each of the temporary changes requires particular evidence to be presented regarding the timing, duration, purpose, and volumetric measure of the temporary change to be made and approved. For example, the applicant for an interruptible water supply agreement is required to submit a written report estimating historical consumptive use, return flows, and potential for injury. The state engineer provides copies of approval or denial to all parties and the decision can be reviewed by the water court.

On appeal, the water court reviews questions of injury. The water court may review the applicant's initial estimate of the historic consumptive use of water and the state or division engineer's determination that no injury to other users will result.

By enacting these statutes, the General Assembly has authorized short-term changes that do not penalize the appropriator owning the water right in any subsequent change of water right proceeding. The methodology for calculating historic consumptive use of the water rights over a representative period of time for a permanent change will not count or discount the years of authorized temporary use. Statutes provide that temporary nonuse of water under state conservation programs, municipal conservation programs, approved land fallowing programs, or water banks does not indicate an intent to abandon or discontinue permanent use.

The legislature clearly intended to promote flexibility in the administration of water rights, especially in the circumstances of temporarily transferring water from agricultural use to municipal use on a contract basis. It did not intend to penalize owners of decreed appropriations for properly taking advantage of these statutes in accordance with their terms. *Id.* at 733-34.

In its 2006 session, the Colorado General Assembly authorized rotational crop management contracts that may be the subject of change of water right applications and decrees, *sections 37-92-103(10.6) and 37-92-305(3), C.R.S. (2006)*. These are written contracts in which owners or groups of owners of irrigation water rights agree, by fallowing and crop rotation, to implement a change of the rights to a new use by foregoing irrigation of a portion of the lands historically irrigated, without injury to other water rights.

### **Allocation of Groundwater Not Subject to the State Constitutional Doctrine of Prior Appropriation**

The three categories of groundwater that are not subject to allocation by the constitutional Doctrine of Prior Appropriation, but rather to the plenary authority of the General Assembly are: (1) designated groundwater, (2) nontributary groundwater, and (3) Denver Basin groundwater of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills formations. *Colorado Ground Water Commission v. North Kiowa-Bijou*, 77 P.3d at 70-72.

Designated groundwater includes water that is not tributary to any stream and other water not available for the fulfillment of decreed surface rights. Use of this water has a

de minimus effect on any surface stream. Colorado's 1965 Groundwater Management Act provides that the Colorado Ground Water Commission can draw—and from time to time redraw—the boundaries of any designated groundwater basin.

The Ground Water Commission has permitting authority over the allocation and use of designated groundwater utilizing a modified Doctrine of Prior Appropriation, whereas surface water and tributary groundwater are subject to allocation under the Doctrine of Prior Appropriation, adjudication by the water courts, and enforcement by the State Engineer pursuant to the 1969 Act.

Under the modified prior appropriation system, the Commission is charged with the task of permitting the full economic development of designated ground water resources, protecting prior appropriators of designated ground water, and allowing for reasonable depletion of the aquifer. The General Assembly made the Commission's powers to curtail the pumping of junior wells for the benefit of senior appropriators discretionary. *Gallegos v. Colo. Ground Water Commission*, 147 P.3d 20, 27 (Colo. 2006).

There are currently eight designated groundwater basins (see map). They comprise a large portion of Colorado's eastern high plains. *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d at 1184.

Use of nontributary ground water outside of designated basins and Denver Basin groundwater is subject to the 1965 Ground Water Management Act, but not to the jurisdiction of the Colorado Ground Water Commission. Nontributary groundwater is groundwater the withdrawal of which will not, within 100 years, deplete the flow of a natural stream at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal, *section 37-90-103(10.5), C.R.S. (2006)*.

The General Assembly subjected nontributary groundwater and Denver Basin groundwater (whether inside or outside of a designated basin) to an overlying land owner allocation system. The overlying landowner may pump at a rate of 1/100th per year the quantity of aquifer water under the land (100-year aquifer life). *Colorado Ground Water Commission v. North Kiowa-Bijou*, 77 P.3d at 74.

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. The right to use designated groundwater, nontributary groundwater outside of a designated basin, or Denver Basin groundwater is purely a function of statute, and landowners do not have an absolute right to ownership of water underneath their land. *Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Association*, 956 P.2d 1260, 1268-70 (Colo. 1998).

Landowners have an inchoate right to extract and use the nontributary and Denver Basin groundwater. The right to use such water 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, nontributary groundwater allocation and use is subject to legislative modification or termination. *Bayou Land Co. v. Talley*, 924 P.2d 136, 148-49 (Colo. 1996).

In regard to the Denver Basin only, the definition of nontributary was modified. The General Assembly understood that approximately 40,000 acre feet of ground water was discharging from the four enumerated aquifers into surface streams, because of the historic hydrostatic head of those aquifers. Augmentation requirements for nontributary and “not nontributary” wells in the Denver Basin were put into place by the legislature to protect surface rights from injury from pumping the groundwater. *Park County Sportsmen’s Ranch, L.L.P. v. Bargas*, 986 P.2d 262, 271–73 (Colo. 1999).

## **Abandonment**

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. Water rights are usufructary 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. *City and County of Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283, 286 (Colo. 1996). Evidence of disrepair and unusable conditions of ditches and their non-repair is consistent with a finding of nonuse. *Haystack Ranch, L.L.C. v. Fazzio*, 997 P.2d 548, 553 (Colo. 2000).

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).

## **Invalid Enlargement**

A water right decreed for irrigation purposes cannot lawfully be enlarged beyond the amount of water necessary to irrigate the number of acres for which the appropriation was originally made, even though the decree stated only a flow rate of water for irrigation use. In a change proceeding, the determination of transferable beneficial consumptive use does not include enlarged usage of the appropriation. Even though many years of enlarged usage may have occurred, opposers who have not acted fraudulently or deceitfully may challenge the enlargement. A shareholder in a mutual ditch or reservoir company is entitled to water in proportion to his or her

ownership of shares in the company. In a change of water right proceeding, a ditch-wide analysis of historic consumptive use is preferable in order to prevent expensive relitigation of consumptive use. *Central Colorado Water Conservancy District v. City of Greeley*, 147 P.3d 9, 14, 17-19 (2006).

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. *State Engineer v. Bradley*, 53 P.3d 1165, 1169 (Colo. 2002). 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.

## **Water Use Contracts**

Colorado law distinguishes between an adjudicated water right and a contractual entitlement to make use of water. The value of an adjudicated water right is such that, absent consent, only the owner of the decreed water right may change it. The rights represented by contract are not water rights with a statutory right to change the use. Contractually-delivered water rights are far different than a water right acquired by original appropriation, diversion, and application to beneficial use. Courts construe contractual grants to use a decreed water right narrowly to avoid depriving a decreed rights holder of property that it did not specifically grant for use.

*Public Service Company of Colorado v. Meadow Island Ditch Company No. 2*, 132 P.3d 333, 340 (2006).

Where the water consumer is neither an appropriator nor a shareholder, he may nonetheless have contractual rights to make use of water. However, the instrument granting rights of use becomes the dispositive instrument. *East Ridge of Fort Collins, LLC v. Larimer and Weld Irrigation Co.*, 109 P.3d 969, 973 (Colo. 2005).

## **Ditch Easements and Rights of Way**

The owner of property burdened by a ditch easement or right of way may not move or alter that easement unless that owner has the consent of the owner of the easement. If consent cannot be obtained, the underlying property owner may apply for 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. 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).

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 legal 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. Nonconsensual, unilateral alterations jeopardize valuable vested property rights both in the easement and in the water rights exercised by means of the ditch. *Id.* at 1238

## **State Engineer Enforcement Orders**

*Section 37-84-112(1), C.R.S. (2006)* requires the owner of an irrigation ditch to install and maintain at the point of intake a suitable and proper headgate to control the water at all ordinary stages. The statute also requires an owner to install and maintain a suitable and proper measuring flume and wastegate in connection with the ditch. A headgate must be sufficient to control the inflow of water at all ordinary stages, *section 37-84-125, C.R.S. (2006)*. *Tatum v. People ex rel. Simpson*, 122 P.3d 997, 998 (Colo. 2005).

Upon non-compliance with an order mandating partial or total discontinuance of any diversion, *section 37-92-502(1), (2), C.R.S. (2006)*, the state and division engineers have a duty under *section 37-92-503, C.R.S. (2006), (2005)*, to apply for an injunction enjoining the person to whom the order was directed from further violations. Contempt sanctions are available to punish any violation of such an injunction, and civil penalties per day of violation also apply, *sections 37-92-503(1),(4), (6)*. *Vaughn v. People ex rel. Simpson*, 135 P.3d 721, 723 (Colo. 2006). Circumstantial evidence that the well owner was aware of well pumping in violation of the division engineer's order will support sanctions against him or her, even in the absence of direct evidence that he authorized or participated in the pumping. *Id.* at 725.

## **Decree Stipulations**

Once a change of water right 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 a 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. *City of Golden v. Simpson*, 83 P.3d 87, 91-93 (Colo. 2004); see also *Cherokee Metropolitan District v. Harold D. Simpson, Colorado State Engineer*, 148 P.3d 142 (2006).

## Conclusions

In the decade spanning closure of the 20<sup>th</sup> Century and commencement of the 21<sup>st</sup> Century, the Colorado Supreme Court has faced in its water decisions the reality of rapid population growth, the same cyclical limited water supply, and the statutory creation of new water use rights such as instream flow and recreational in-channel water rights.

There is essentially no “new water” available for appropriation within Colorado from the waters of the Platte, the Arkansas, and the Rio Grande watersheds, and only a limited quantity of water, perhaps 400,000 acre-feet, that remains to be put to actual beneficial consumptive use under Colorado’s allocation of Colorado River Compact waters.

Much of the business of the Colorado water courts and the Colorado Supreme Court now involves review of change of water rights from agricultural to municipal use, and augmentation plans that allow out-of-priority diversions to be made by replacing depletions to over-appropriated streams, so that decreed water rights will not be injured by the new water uses that are primarily municipal, commercial, recreational, and environmental in nature.

Colorado has had an active market in the sale and purchase of senior water rights. The more senior the water right’s priority date, the more valuable the water right. Valuable rights also include those with good direct flow and storage historic beneficial consumptive use associated with them, based on past water supply and diversion records. If the priority system is not enforced by courts and the water officials, however, established water rights are devalued and the market will not function as a redistribution mechanism to serve the newer uses.

The newer uses include not only the needs of all the new residents, but also the restoration of low water flows in certain stream segments, and the preservation of agricultural water for open space and wildlife habitat, through the temporary change, leasing, and land and water conservation trust statutes the General Assembly has recently enacted.

The Doctrine of Prior Appropriation is a law of scarcity not of plenty. Due to drought and a dearth of decreed augmentation plans that adequately replace injurious depletions to seniors in over-appropriated rivers, the State Engineer was required during the early 21<sup>st</sup> Century drought to curtail nearly 2000 junior wells that depleted tributary groundwater in the South Platte basin and 1000 junior wells in the Arkansas River Basin. This caused a reduction in property values and great hardship to many families. Yet, if the water law is not enforced in appropriate circumstances, senior water right users will suffer deprivation of their valuable water use rights.

Management of the available water supply has always been the key to life in the western United States. The four reservoirs the ancient Puebloans built and operated at Mesa Verde (see picture, page 14) between 750 and 1180 are testament. So, too, is the operation of the oldest continuous Colorado water right that precedes the establishment of Colorado Territory in 1861 — the 1852 San Luis People's Ditch (see picture, this page) built by Hispano settlers from New Mexico onto the Sangre de Cristo land grant in Colorado's San Luis Valley.

Colorado is an active participant in the endangered species recovery plans for the Colorado River Basin and the Platte River Basin. These joint efforts of the United States and the watershed states of the awesome Continental Divide bridge a wide range of the public interest in beneficial water use and environmental restoration and preservation.

Colorado has established a water roundtable process in every hydrological region of the state, coordinated by a statewide roundtable, to plan for the state's future, *sections 37-75-101-106, C.R.S. (2006)*. The General Assembly has charged these roundtables with looking to the needs of each basin, and to Colorado as a whole, in negotiating agreements where possible to meet Colorado's future water needs and to resolve conflict in the midst of change.

Because of the political, social, and financial costs of large-scale new projects or water transfers, demand reduction and conservation measures that include less water devoted to landscaping are becoming the first tier of water planning. The second tier is water sharing among users, for example, through exchanges, stored water banks, leases of water, and rotational crop management agreements between the agricultural and municipal sectors. The third tier is the application of technologies that include reuse of treated water, recharge of aquifers to generate augmentation credits, desalinization, cloud seeding, off-stream and underground storage, enlargement of existing dams and reservoirs, and measures for drought-year sharing of water, such as those proposed in 2006 by the Colorado River Basin states. In over-appropriated stream systems, changes of water rights and augmentation plans will be necessary to meet the needs of urbanizing communities.

The landscape of Colorado and the West will continue to be the landscape of the customs and values of the people established and enforced through their water law and policy.

**Justice Greg Hobbs** took office as a member of the Colorado Supreme Court on May 1, 1996. He practiced water, environmental, land use and transportation law for 25



years before that. He is a co-convenor of the western water judges educational project, *Dividing the Waters*; Vice President of the Colorado Foundation for Water Education; and the author of *Citizen's Guide to Colorado Water Law*, Second Edition (Colorado Foundation for Water Education 2004), *In Praise of Fair Colorado, The Practice of Poetry, History, and Judging* (Bradford Publishing Co. 2004), *Colorado Mother of Rivers, Water Poems* (Colorado Foundation for Water Education 2005), and *The Public's Water Resource, Articles on Water Law, History, and Culture* (Continuing Legal Education in Colorado, Inc. forthcoming 2007).