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## New Rules in the Land of Cool Sunshine

## CASE NOTE

### NEW RULES IN THE LAND OF COOL SUNSHINE

A judge who always likes the result they reach is a bad judge. Many credit Justice Antonin Scalia with this phrase and even the newest Supreme Court Justice, Neil Gorsuch, made the exact same point when accepting his appointment on the Supreme Court.<sup>1</sup> Does a similar principle exist in the Colorado Doctrine (the “Prior Appropriation Doctrine” or “Doctrine”)?

The San Luis Valley (“Valley”) is incredibly unique.<sup>2</sup> While the entire state works to meet the growing demands on the Colorado water system, the Valley needs a more tailored solution.<sup>3</sup> The Valley’s limited water supplies have been over appropriated since 1900.<sup>4</sup> Pairing that with the driest consecutive four-year period on record for the Upper Rio Grande, the reality of exhausted water supplies became quickly apparent.<sup>5</sup> Throughout the drought, many Valley farmers “relied upon their wells, with a resulting substantial overdraft of the confined and unconfined aquifer systems.”<sup>6</sup> In order to find a solution, many looked back to 1975, when State Engineer Clarence Kuiper first attempted to adopt groundwater rules and regulations for Water Division No. 3.<sup>7</sup>

Kuiper’s rules were eventually remanded back to the State Engineer by the Colorado Supreme Court for reconsideration.<sup>8</sup> By the time the Court re-

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1. Nolan D. McCaskill, *The 11 most memorable Scalia quotes*, POLITICO (Feb. 14, 2016, 12:59 AM), <https://www.politico.com/story/2016/02/best-antonin-scalia-quotes-21927>; *Judge Gorsuch’s Full Opening Statement*, NBC NEWS (Mar. 20, 2017, 1:35 PM), <https://www.nbcnews.com/news/us-news/here-s-judge-gorsuch-s-full-opening-statement-n735961>.

2. See *Alamosa-La Jara Water Users Protection Ass’n v. Gould* (“*Alamosa-La Jara*”), 674 P.2d 914, 918 (Colo. 1984) (providing a comprehensive description of the unique geology, geography, and hydrology of the Valley); see also *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 367 (Colo. 1994).

3. See generally COLO. WATER CONSERVATION BD., COLORADO’S WATER PLAN (2015) (creating a goal to reduce the supply and demand gap).

4. *Alamosa-La Jara*, 674 P.2d at 918.

5. COLO. DIV. OF WATER RES., STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE FOR RULES GOVERNING THE WITHDRAWAL OF GROUNDWATER IN WATER DIVISION NO. 3 (THE RIO GRANDE BASIN) AND ESTABLISHING CRITERIA FOR THE BEGINNING AND END OF THE IRRIGATION SEASON IN WATER DIVISION NO. 3 FOR ALL IRRIGATION WATER RIGHTS 7 (2015) [hereinafter STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE] (The period 2002–05 was the driest consecutive four-year period on record for the Upper Rio Grande. In 2002, the annual streamflow of the Rio Grande as gauged at Del Norte was 160,000 acre-ft, as compared to a long-term average of about 640,000 acre-feet per year).

6. *Id.*

7. See *In re Rules Governing New Withdrawals of Groundwater in Water Division No.3 Affecting the Rate or Direction of Movement of Water in the Confined Aquifer System* (“*New Confined Groundwater Rules for Div. 3*”), No. 04CW24, at \*30–31 (Colo. Water Ct. Div. No. 3 2006).

8. See *Alamosa-La Jara*, 674 P.2d at 935–36; *New Confined Groundwater Rules for Div. 3*, Case No. 04CW24, at \*181 (“[t]he Colorado Supreme Court upheld the presumption of material

manded Kuiper's rules, Valley residents had already shifted their focus to a federal reclamation project. Valley residents hoped the project would add "a new water supply to the Rio Grande, reducing 'the curtailment of surface diversions that would otherwise be required by the Rio Grande Compact, while at the same time reducing claims of stream depletion from well pumping.'" However, the project, better known as the Closed Basin Project, failed to yield the expected quantities of water to the disappointment of its planners.<sup>10</sup>

Valley residents also faced threats of tapping the Valley aquifers for export, potentially for use in the Colorado Front Range municipalities, during the same time span.<sup>11</sup> This expended large amounts of irrigator resources, including an election to pass a mill levy to finance the litigation to oppose groundwater exports of water from the Valley.<sup>12</sup>

Running out of time and options, the State Engineer filed the Rules Governing the Withdrawal of Groundwater in Water Division No. 3 and Establishing Criteria for the Beginning and End of the Irrigation Season Rules for Water Division No. 3 for All Irrigation Water Rights ("Rules") in Water Division No. 3 Water Court on September 23, 2015.<sup>13</sup> The State Engineer had stipulated to amendments to the Rules with multiple opposers, but the time had come to make a determination on the Rules with trial set to begin January 24, 2018.<sup>14</sup> This paper analyzes the Rules proposed by the State Engineer and offers some predictions on some of the potential effects the Rules will have on Valley residents who desperately need a solution to their water problem.

It is true that at some point, on the quantity axis the marginal utility from larger water rights would likely diminish, so that it would be more efficient for water exceeding that quantity to be used by another user.<sup>15</sup> The problem is who makes that decision? The Prior Appropriation Doctrine establishes distributive justice, preventing the ownership of water from accumulating in the hands of those owning land next to the stream. The Doctrine has and will continue to

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injury to senior rights from groundwater withdrawals based on the finding of material injury on a Valley wide basis . . . but remanded the rules and regulations for reconsideration in accordance with the policy of 'maximum-optimum utilization' and the 'reasonable-means-of-diversion' doctrine").

9. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 5.

10. See *New Confined Groundwater Rules for Div. 3*, Case No. 04CW24, at \*33 ("The agreement over-optimistically contemplated that the Project would provide not less than 250,000 acre-feet of additional water over any ten-year period once phase 4 of the Project was in operation."); see *id.* at \*32-33 (stating that originally decreed for 106,000 acre-feet per year, at present the Rio Grande Water Conservation District has made absolute 43,520 acre-feet of water but reduced the remaining conditional water right by 32,000 acre-feet).

11. *Am. Water Dev., Inc.*, 874 P.2d at 358.

12. *Id.* at 376-77 (following a 1991 trial, the Water Court denied and dismissed American Water Development, Inc.'s ("AWDI") application to withdraw water under the Baca Grant No. 4 (a tract of land near the Great Sand Dunes National Park and Preserve). The Water Court issued a judgment against AWDI to compensate the objectors for attorneys' fees and costs incurred relating to the claims dismissed on the eve of trial, and costs for the claims that went to trial. The Colorado Supreme Court upheld both judgments. *Id.* at 376-77, 386.

13. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 1; see Resume Notice Issued by Water Court Division No. 3, No. 15CW3024 (Oct. 15, 2015).

14. *Water rules trial begins Monday*, ALAMOSA NEWS, <https://www.alamosanews.com/article/water-rules-trial-begins-monday> (last visited May 27, 2018).

15. See PAUL KRUGMAN & ROBIN WELLS, ECONOMICS 271-73 (3rd ed. 2012).

protect the interest of small scale farmers.<sup>16</sup> This Lockean view helped shape the Colorado Doctrine, and now shapes the Rules.<sup>17</sup> The Rules effect, aside from the targeted replenishment of Valley aquifers, is essentially the same. The decline in well depletions theoretically returns surface rights back to a useable level. This is distributive justice. Returning usable water to as many as possible, while also replenishing the parched aquifers.

#### GETTING TO JANUARY

The Colorado General Assembly mandated the adoption of both the Groundwater and Irrigation Season Rules for Water Division No. 3 and the Confined Aquifer New Use Rules “in stages.”<sup>18</sup> The Rules reflect the State Engineer’s stepwise approach to the integrated administration of surface and groundwater in the San Luis Valley.<sup>19</sup> One of the bills adopting the Rules, House Bill 98-1011 (“H.B. 98-1011”), “served as a catalyst for initiating the Rio Grande Decision Support System Study, a study of the Valley’s aquifer systems.”<sup>20</sup> The Water Court for Division No. 3 called this study “one of the most comprehensive studies of the Valley’s geology and hydrology that has ever been undertaken.”<sup>21</sup> This study became the basis for the development of a new groundwater model (“RGDSS Model”).<sup>22</sup> The RDGSS Model is a computerized mathematical model designed to “simulate, among other things, the flow of groundwater,” and can be updated as new information about the aquifer systems becomes available.<sup>23</sup>

The other bill, Senate Bill 04-222 (“S.B. 04-222”), helped guide the rule-making. S.B. 04-222 approved the maintenance of a sustainable water supply in each aquifer and encouraged the use of groundwater management subdistricts.<sup>24</sup> However, the bill’s directive raised the issue of how to create subdistricts that limit the ability of water appropriators to exercise their rights, while still furthering the principles of certainty, equity, and justice. The State Engineer took many precautionary steps to ensure the Rules were a local product in an effort to prevent state oversight. For example, the State Engineer created multiple committees to aid the rulemaking process and to receive local input into the groundwater rules.<sup>25</sup>

16. *See generally* DAVID SCHORR, *THE COLORADO DOCTRINE* 142 (Yale Univ. Press 2012).

17. *See* JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 27, 31 (Thomas P. Pardon ed. 1953).

18. *Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 263 (Colo. 2008).

19. *See* H.B. 98-1011, 61st Gen. Assemb., Reg. Sess. (Colo. 1998) (codified at COLO. REV. STAT. § 37-90-137(12)); *see also* S.B. 04-222, 64th Gen. Assemb., Reg. Sess. (codified at COLO. REV. STAT. § 37-92-501(4)).

20. STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 9.

21. *Cotton Creek Circles*, 181 P.3d at 257.

22. *Id.* at 258.

23. *Id.*; *see also* STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 9.

24. *See* S.B. 04-222. Before passing S.B. 04-222, pursuant to COLO. REV. STAT. § 37-92-501(1), the State Engineer already possessed the authority to “administer, distribut[e], and regulate the waters of the state,” and that included the authority to adopt rules and regulations to further the performance of the State Engineer’s duties. STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 9.

25. *See* Dick Wolfe, Order Establishing Advisory Committee for Rules and Regulations

### THE PROPOSED NEW RULES

The Rules are designed to allow withdrawals of groundwater while providing for the identification and replacement of injurious stream depletions. The Rules apply to all withdrawals of groundwater within Water Division No. 3, unless the withdrawal is specifically exempted.<sup>26</sup> The Rules governing the irrigation season apply to all irrigation water rights.<sup>27</sup> Ultimately, the Rules seek to achieve and maintain a sustainable water supply in each aquifer system, while not unreasonably interfering with the state's ability to fulfill its obligations under the Rio Grande Compact.<sup>28</sup>

#### *Rule 6: Requirements for Withdrawals of Groundwater in Water Division No. 3*

There are only three ways in which well users may make lawful groundwater withdrawals that are subject to the Rules: (1) pursuant to a groundwater management plan for a subdistrict; (2) a plan for augmentation decreed by the Water Court; or (3) a substitute water supply plan—each of which must comply with the Rules.<sup>29</sup> “Once the phase-in period has expired, it will be illegal to make any groundwater withdrawal that is subject to the Rules without having obtained one of the three plans listed above.”<sup>30</sup>

#### *Rule 7: Standards for Determinations of Stream Depletions*

The RGDSS Model is the default tool used to calculate stream depletions within Water Division 3.<sup>31</sup> The RGDSS Model is designed to determine stream depletions from large groups of wells over large geographic areas. Currently, it cannot determine stream depletions caused by a single well or a small group of wells with reasonable reliability. However, response functions, derived from the RGDSS Model on the effect of groundwater withdrawals from all wells in a response area can be used to determine the proportional stream depletions predicted by the response function attributable to consumption via a single well or small group of wells in the response area. Response areas are smaller hydrogeological areas within the larger RGDSS Model Domain.<sup>32</sup>

The State Engineer must establish a lower limit of reliability of the RGDSS Model to ensure that predicted stream depletions actually occur.<sup>33</sup> This means that the State Engineer must determine the lowest variation of consistency allowed as a basis for what areas the model is sufficiently reliable enough to use.

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Governing the Diversion and Use of Underground Waters in Water Division 3, Division of Water Resources (Dec. 31, 2008).

26. Rules Governing the Withdrawal of Groundwater in Water Division No. 3 and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for all Irrigation, Rule 3.1 [hereinafter *Div. No. 3 Groundwater Rules*].

27. *Id.*

28. See STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 8.

29. *Div. No. 3 Groundwater Rules*, Rule 6.

30. *Id.* at Rule 3.

31. *Id.* at Rule 7.

32. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 23.

33. *Div. No. 3 Groundwater Rules*, Rule 7.2.

Response functions are not used on streams on which the RGDSS Model predicts stream depletions in volumes below this lower limit of reliability.<sup>34</sup>

There are procedures for a well user whose well lies outside of the RGDSS Model Domain.<sup>35</sup> These areas generally lie above the valley floor and do not have aquifers acting as reservoirs for groundwater storage similar to that of the Confined Aquifer System and the Unconfined Aquifer of the Closed Basin.<sup>36</sup>

*Rule 8: Standards and Monitoring Methods for Achieving and Maintaining a Sustainable Water Supply*

The Rules divide Water Division No. 3 into three areas: (1) areas within the RGDSS Model Domain in which the Confined Aquifer System provides the majority of groundwater withdrawals; (2) areas within the RGDSS Model Domain in which the Unconfined Aquifer provides the majority of groundwater withdrawals; and (3) areas outside of the RGDSS Model Domain.<sup>37</sup> The requirements for sustainability differ depending on the area.<sup>38</sup>

*Rule 9: Subdistrict's Proposed Groundwater Management Plan*

Groundwater management plans are required to contain certain information and must meet specific requirements.<sup>39</sup> The plan must show replacement or a similar remedy for injurious stream depletions caused by subdistrict wells.<sup>40</sup> The plan also must describe what the subdistrict will do to achieve and maintain a sustainable water supply in its response area.<sup>41</sup> "If a subdistrict fails to make progress toward achieving and maintaining a sustainable water supply within ten years, the subdistrict must then take action above and beyond the requirements of its Groundwater Management Plan."<sup>42</sup> It is not yet clear what "actions above and beyond" would be. One would assume it would be additional sustainability focused actions on top of what the plan already calls for, as the plan is not actually accomplishing its goal.

*Rule 10: Plans for Augmentation*

An alternative to joining a subdistrict is obtaining a plan for augmentation in order to satisfy the obligation to address any injurious stream depletions

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34. *Id.* at Rule 7.2.6.

35. *Id.* at Rule 7.6.

36. *See* STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 23.

37. *Div. No. 3 Groundwater Rules*, Rule 8.

38. *See id.* at Rule 8.1 (containing a specific sustainability standard for areas where groundwater withdrawals are predominantly from the Confined Aquifer System); *see id.* at Rules 8.2-8.4 (wells in areas within the RGDSS Model Domain and in which groundwater withdrawals are predominantly from Unconfined Aquifers are subject to the Unconfined Aquifer sustainability standards); *id.* at Rules 8.5-8.6 (wells in areas not specified must propose an Alternate Plan to achieve a Sustainable Water Supply in the aquifers from which they withdraw groundwater).

39. *Id.* at Rule 9.

40. *Id.* at Rule 9.1.3.

41. *Div. No. 3 Groundwater Rules*, Rule 9.1.

42. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 25.

caused by groundwater withdrawals and achieve and maintain a sustainable water supply.<sup>43</sup> The plan must adequately prevent injury and operate in compliance with the requirements specific to Water Division No. 3, set forth in the Colorado Revised Statute section 37-92-501(4) and the Rules.<sup>44</sup>

Plans for augmentation are allowed to use response functions to determine stream depletions.<sup>45</sup> However, if the plan includes wells located outside the RGDSS Model domain, the plan is not allowed to use response functions from the Model to determine stream depletions.<sup>46</sup> Plans for augmentation within the RGDSS Model domain are allowed to use an alternative method instead of response functions to determine stream depletions.<sup>47</sup> Plans for augmentation outside the RGDSS Model domain are required to use an alternative method instead of response functions to determine stream depletions.<sup>48</sup> Whatever method is chosen, well users with plans for augmentation must provide the State Engineer with the information required to generate and utilize the method.<sup>49</sup>

#### Rule 14: Irrigation Season

Rule 14 sets the criteria the Division Engineer will use to establish irrigation seasons in Water Division No. 3 each year.<sup>50</sup> The presumptive irrigation season begins on April 1 and ends on November 1.<sup>51</sup> However, the Division Engineer has discretion to modify these dates in response to climatic change and other unprecedented conditions.<sup>52</sup> Irrigation seasons may differ based on factors specific to each region: local hydrology, weather patterns, crop types, etc.<sup>53</sup> Continuing the current practice, the Rules require the Division Engineer or members of his staff to meet with water user groups and set the irrigation season, providing notice to all interested water users.<sup>54</sup> The Rules also require an expedited appeals process for challenging the dates of the irrigation season set by the Division Engineer.<sup>55</sup> The State Engineer must make a determination on the appeal within two days because of practicality concerns.<sup>56</sup> A longer period of time may make it impossible for the Division Engineer to readjust the beginning or end date of the irrigation season based on the appellate decision.

#### Rule 21: Benchmarks/Phase-in

Because these plans are subject to litigation, well users cannot know for certain how much time they will need to come into compliance with the Rules. Rule 21 sets a two-year time limit for well users who are currently operating

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43. *Div. No. 3 Groundwater Rules*, Rule 10.  
44. COLO. REV. STAT. § 37-92-501(4).  
45. *Div. No. 3 Groundwater Rules*, Rule 10.2.  
46. *Id.*  
47. *Id.*  
48. *Id.*  
49. *Id.*  
50. *Id.* at Rule 14.  
51. *Div. No. 3 Groundwater Rules*, Rule 14.1.  
52. *Id.*  
53. *Id.*  
54. *Id.* at Rules 14.2, 14.3.  
55. *Id.* at Rule 14.4.  
56. *Id.*

under plans for augmentation to continue their operations, provided that the user files an application in water court and is diligently litigating the plan for augmentation.<sup>57</sup> "Plans must contain terms sufficient to meet all of the applicable requirements of the Rules."<sup>58</sup>

Rule 21 also creates a timeline for subdistricts to form and develop their groundwater management plans.<sup>59</sup> The rules create benchmarks for subdistricts to compare with to insure compliance with Rule 21. The first benchmark requires subdistricts to have petitioned for their formation within one year of the effective date of the Rules.<sup>60</sup>

The Rules also contain provisions that apply only to entities that are legally precluded from joining a subdistrict other than by contract.<sup>61</sup> Because it is unlikely that subdistricts in areas other than Subdistrict No. 1 will be operating under approved groundwater management plans as of the effective date, Rule 21.2 allows these specified entities additional time to enter into contracts with subdistricts.<sup>62</sup>

The State Engineer has discretion to extend deadlines for compliance with the Rules upon showing good cause.<sup>63</sup> This means a well user must demonstrate they diligently and in good faith attempted to comply with the Rules, but nevertheless have been unable to do so.<sup>64</sup>

#### Rule 24: RGDSS Model, Lower Limit of Reliability, and Response Functions

"This Rule explains the role of the RGDSS Model."<sup>65</sup> The State Engineer must notify interested persons when his office makes significant changes to the RGDSS Model or response functions.<sup>66</sup> The State Engineer is also required to start an additional formal rulemaking process if the State Engineer determines that new technology should be used in place of the RGDSS Model.<sup>67</sup>

### THE EFFECTS OF THE NEW RULES

In essence, the Rules further principles underlying the Colorado Doctrine. Those who believe in the Colorado Doctrine undoubtedly will see successes in the Rules, whether they like the Rules or not. Diverging from, and in contrast to, the modern interpretation of prior appropriation as a paradigm of private-property rights,<sup>68</sup> a distributive justice focus that keeps the public resource of water out of the hands of speculators and monopolists continues to be the main focus of the prior appropriation system. Achieving allocative efficiency through

57. *Div. No. 3 Groundwater Rules*, Rule 21.

58. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 28.

59. *Div. No. 3 Groundwater Rules*, Rule 21.1.2.

60. *Id.* at Rule 21.1.2.1.

61. *Id.* at Rule 21.2.

62. *Sec id.*

63. *Id.* at Rule 21.3.

64. *Id.*

65. STATE ENGINEER'S STATEMENT OF BASIS AND PURPOSE, *supra* note 5, at 29.

66. *Div. No. 3 Groundwater Rules*, Rule 24.4.

67. *Id.* at Rule 24.6.

68. *See, e.g.,* Mark W. Tader, *Reallocating Western Water: Beneficial Use, Property, and Politics*, 1986 U. ILL. L. REV. 277, 284 (Western states have long "recognized property rights in water that surpassed any interest protected at common law").

freely conveyable private-property rights was not a primary goal of the farmers, lawyers, and publicists who advocated for and developed the Colorado Doctrine.<sup>69</sup> This is because water rights in Colorado fall outside the bipolar continuum of property rights, “with purely private property on one end and common property [or resources] on the other.”<sup>70</sup> The difference between these two types of property rights is most clearly illustrated by a concentration of wealth and the right to exclude on one end and egalitarian distribution and inclusion on the other.<sup>71</sup> Ironically, Colorado rejected the common-property regime of riparian law because it was “too exclusionary and tended to the concentration of water in the hands of an underserving few.”<sup>72</sup> However, Article 16 of the Colorado Constitution applies Lockean principles of wide distribution though rules that promote ditch easements, the priority principle, public ownerships of the state’s surfaces water, and the beneficial use requirement.<sup>73</sup> Thus Colorado water law falls somewhere within the continuum of private property laws and public property laws, and based on the theory of distributive justice.

The one thing that was known when this process began was that the current laws governing groundwater usage and distribution in Water Division 3 are causing injury.<sup>74</sup> While the Rules face many who dissent, they are necessary to protect not only the valuable resource of water, but also the residents that call the unique high-altitude desert landscape of the San Luis Valley home. There are three major components of these rules: (1) determination of depletions; (2) operation of the subdistricts; and (3) sustainability.<sup>75</sup>

The key focus of the Rules is to return to the priority system and achieve sustainability. While the State Engineer retained the authority to specify how water is replaced, the State Engineer left it up to the well owners in the Valley to decide how they want to replace the water. Thus, the water users of the area sculpted the mandate into an idea that fit the unique area, as well as the issues it faces, and protected themselves from micromanagement by the state. While there are really three options a well owner has: (1) join a subdistrict; (2) seek approval for an augmentation plan; or (3) shut down their well, the Rules are crafted broadly to allow flexibility for the water users. By leaving the Rules broad, water users can be creative in finding solutions to help protect the rights of the water right holders and in creating legal remedies for those who have invested heavily in high capacity wells.

Ultimately, the Rules were the only option left for the San Luis Valley other than direct state intervention.<sup>76</sup> The use of the Advisory Committee and the subcommittees helped the residents protect their interests, while working towards a common goal. The committees help protect the individual rights of each appropriator. The Rules entered the courtroom on January 24, 2018 and

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69. *Sec* SCHORR, *supra* note 16, at 142.

70. *Id.* at 161–62.

71. *Sec id.* at 162.

72. *Id.* at 162.

73. *Sec* LOCKE, *supra* note 17, at §§ 27, 31; COLO. CONST. art. XVI.

74. *Alamosa-La Jara*, 674 P.2d at 935–36.

75. Sustainability is meant in the sense of protecting surface water rights from injury and work towards matching water supplies with the amount of groundwater that irrigators are pumping.

76. *Sec* H.B. 98-1011 (codified at COLO. REV. STAT. § 37-90-137(12); *see also* S.B. 04-222 (codified at COLO. REV. STAT. § 37-92-501(4)).

will soon become the way of life for water users in the land of cool sunshine.

#### THE ANSWER

Thus, to the question: if a water user likes every rule that is implemented, are they truly a good water user? The answer is no. One need not look any further than the Prior Appropriation Doctrine to find similarities in necessity and operation. The Prior Appropriation Doctrine as developed in nineteenth-century Colorado was viewed at the time as striking a blow at private property in order to advance distributive justice.<sup>77</sup> The Prior Appropriation Doctrine is not without critics, yet the doctrine is what generates the growth of Colorado.<sup>78</sup> The flexibility allowed under the Doctrine is what now allows for the creation of the Rules. The Rules face similar critiques. The Rules, in operation, prevent high capacity wells from operating at maximum potential in order to ensure surface appropriators water and that the Valley meets Compact requirements. However, like the Prior Appropriation Doctrine, the benefits do not stop at distributive justice. There are seemingly no feasible alternatives, not unlike the need to appropriate water away from a river in Colorado.<sup>79</sup> Western water requires creativity. Western water requires pioneers. And yes, Western water requires the adoption of certain rules, however unpopular at the time, that further the purpose behind the Prior Appropriation Doctrine.

*Kole Kelley*

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77. SCHORR, *supra* note 16, at 2.

78. *Id.* at 142.

79. *See Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

