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Archuleta v. Gomez: Reinforcing the Requirement of Beneficial Use of Water in Colorado Adverse Possession Law

D. Austin Rueschhoff

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Archuleta v. Gomez: Reinforcing the Requirement of Beneficial Use of Water in Colorado Adverse Possession Law

ARCHULETA V. GOMEZ: REINFORCING THE REQUIREMENT OF BENEFICIAL USE OF WATER IN COLORADO ADVERSE POSSESSION LAW

D. AUSTIN RUESCHHOFF

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I. INTRODUCTION

In the arid West, where water is scarce and senior water rights are valuable, obtaining a water right by adverse possession is understandably difficult. In December 2012, the Colorado Supreme Court decided *Archuleta v. Gomez* (*Archuleta II*), which clarified its 2009 decision (*Archuleta I*) by adding a new requirement a claimant must prove in order to succeed in a water rights adverse possession case.¹ Adding to the common law elements for real property adverse possession, the Court required proof of “the amount of water expressed in acre feet . . . that the adverse claimant has placed to beneficial consumptive use.”² The Court’s decision adjusted adverse possession jurisprudence to better mirror the beneficial use requirements of Colorado’s prior appropriation water law.

Prior to *Archuleta I*, the elements for adverse possession of a water right were the same as other real property rights: actual, adverse, hostile, and under a claim of right, as well as open, notorious, exclusive, and continuous for the eighteen-year statutory period.³ Through its decision in *Archuleta I*, the Colorado Supreme Court demonstrated the inherent difficulty trying to establish an adverse possession of water rights claim under the same elements as adverse possession of land.⁴ Traditionally, a claimant proved the element of actual use

1. *Archuleta v. Gomez* (*Archuleta II*), 290 P.3d 482, 482 (Colo. 2012).

2. *Archuleta v. Gomez* (*Archuleta I*), 200 P.3d 333, 346 (Colo. 2009) (emphasis added).

3. *Id.* at 344 (citing *Farmer v. Farmer*, 720 P.2d 174, 176 (Colo. App. 1986)).

4. *Id.* at 344-45.

by evidence of water diversion expressed in cubic feet per second ("cfs").⁵ As the Court pointed out in *Archuleta II*, however, a user's decreed right to divert a specified amount of water is insufficient to prove actual use of a mature water right.⁶ Rather, parties must quantify their historical consumptive use to determine beneficial use of water for a certain acreage of land, as required in prior appropriation water law.⁷ *Archuleta II* made this distinction for the first time in Colorado adverse possession in the context of water law, and will ensure future cases apply the fundamental tenets of the prior appropriation doctrine to adverse possession of water cases.

II. BACKGROUND

Ralph Archuleta and Theodore Gomez were adjacent landowners with water rights in three ditches that divert from the Huerfano River in Huerfano County near Redwing, Colorado.⁸ Both parties received title to their land and water rights from a common predecessor-in-interest, Sabino Archuleta, Ralph Archuleta's grandfather.⁹ Gomez received his "upper parcel" from Sabino in 1962, with water rights in the Archuleta Ditch, and his "lower parcel" in 1968 with water rights in all three ditches.¹⁰ Ralph Archuleta received his parcel, along with water rights in all three ditches, in 1991 through the estate of his father, Lupe Archuleta.¹¹ See Figure 1.0 for a detailed map of the parcels and ditches.

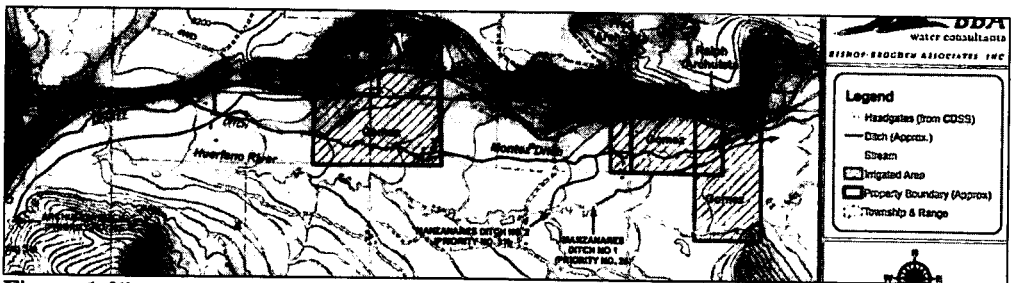


Figure 1.0¹²

The three ditches in controversy were the Archuleta Ditch, the Manzanares Ditch No. 1, and the Manzanares Ditch No. 2.¹³ The Archuleta Ditch

5. See *Matter of Water Rights of V-Heart Ranch, Inc.*, 690 P.2d 1271 (Colo. 1984) (allowing an adverse possession claim based on evidence of diversion expressed in cubic feet per second).

6. *Archuleta II*, 290 P.3d at 485.

7. *Id.*

8. *Archuleta I*, 200 P.3d at 337.

9. *Id.*

10. *Id.*

11. *Id.*

12. Plaintiff's Remand Exhibit 3, *Archuleta v. Gomez*, Case No. 06CW92 at *1 (Water Div. 2 2011) (The author notes the locations of the Montez Ditch and Archuleta Ditch are incorrect as represented on the western portion of the map. However, the portions relevant to the litigation are an accurate depiction of the ditches as they cross the affected properties.).

13. *Archuleta I*, 200 P.3d at 337.

ran through Gomez's upper parcel and stopped before reaching his lower parcel.¹⁴ The evidence showed the Archuleta Ditch did not run onto Gomez's lower parcel or to the Archuleta parcel since at least 1968, which is when Gomez acquired the lower parcel.¹⁵ The Manzanares Ditch No. 1 ran across the western portion of Gomez's lower parcel, across the Archuleta parcel, and onto the eastern portion of Gomez's lower parcel, which surrounds and encloses the Archuleta parcel.¹⁶ The Manzanares Ditch No. 2 ran across the western portion of Gomez's lower parcel and ended before reaching Archuleta's parcel.¹⁷ The parties agreed Gomez plowed under the Manzanares Ditch No. 2 on his lower parcel so that it no longer ran onto the Archuleta parcel.¹⁸

The controversy over ownership of the ditches began in the late 1990s, when Gomez found Archuleta using the Manzanares Ditch No. 1, and told Archuleta he did not own any rights to the ditch and instructed him to cease using it.¹⁹ In response, Archuleta brought an action against Gomez in the District Court of Huerfano County ("district court"), seeking damages and an injunction to restore the ditches and allow water to pass through to his parcel.²⁰ The district court dismissed the complaint and ruled Gomez adversely possessed the water rights in all three ditches.²¹ Archuleta appealed to the Colorado Court of Appeals, which affirmed the district court in part and vacated its decision in part, and remanded the case to the District Court, Water Division No. 2 ("water court").²² The water court affirmed Gomez's adverse possession and determined Archuleta's claim was frivolous and awarded attorney's fees to Gomez.²³ Archuleta appealed to the Colorado Supreme Court, contending Gomez failed to satisfy his burden of demonstrating a specific, required element of adverse possession: the actual beneficial use of Archuleta's water right.²⁴

III. ARCHULETA I, THE 2009 COLORADO SUPREME COURT DECISION

On appeal, Archuleta argued the water court erred because Gomez did not satisfy his burden of proof concerning the beneficial use element of adverse possession.²⁵ Archuleta further argued that, even if Gomez proved Archuleta abandoned his water right, it did not follow that Gomez automatically

14. *Id.* at 338.

15. *Id.* at 338-39.

16. *Id.* at 338.

17. *Id.*

18. *Id.*

19. *Archuleta II*, 290 P.3d at 488.

20. *See Archuleta v. Gomez*, Case No. 2003 CV 2 (Dist. Ct. Huerfano County, Colo. Sept. 15, 2004).

21. *Id.*

22. *Archuleta v. Gomez*, 140 P.3d 281 (Colo. App. 2006).

23. *Archuleta I*, 200 P.3d at 336.

24. *Id.* at 337.

25. *Id.* at 336-37.

acquired the right.²⁶ The Court held it was unable to rule on the adverse possession claim without a quantification of the parties' historic consumptive use of the water, expressed in acre-feet, and remanded the case to the water court to allow the parties to proffer such evidence.²⁷

A. ARGUMENTS BEFORE THE COLORADO SUPREME COURT

Archuleta first argued Gomez should restore Archuleta's right-of-way because Gomez did not satisfy the beneficial use element of adverse possession.²⁸ Archuleta contended Gomez must prove he beneficially used the amount of water transferred to Archuleta under his deeds during the rotation cycle.²⁹ A rotation cycle is an agreement made between parties who own water rights in a ditch to determine when each party is permitted to divert water from the ditch.³⁰ Although rotation cycles do not necessarily reflect the precise water right to which each party is entitled,³¹ the number of days attributed to each party in the cycle is generally proportionate to their deeded water rights. Archuleta's argument (to which the Court agreed) was that, in order for Gomez to prove he beneficially used Archuleta's water, Gomez would need to quantify the amount of Archuleta's water he diverted and used, in addition to Gomez's own appropriated water.³² Archuleta's opening brief relied on *Anderson v. Cold Spring Tungsten, Inc.*, a case in which an adverse possession claim failed because the claimant did not quantify the amount of real property he actually occupied.³³ Archuleta argued, for Gomez to prove the amount of water he appropriated, he needed to demonstrate that his time spent in the rotation schedule was proportionate to the amount of water deeded to Archuleta and Gomez in their combined legal interest.³⁴

Archuleta's second argument responded to Gomez's contention that Archuleta abandoned his water right.³⁵ Even if he had abandoned his right, Archuleta argued, it would not follow that the right would automatically transfer to Gomez.³⁶ Archuleta noted the bulk of evidence Gomez offered attempted to show Archuleta and his predecessors did not use their water rights, but Gomez failed to produce evidence establishing that he, himself, actually used the water.³⁷ Archuleta argued his own failure to use the water would result in abandonment of the water right and a return of the water to the public, not an automatic transfer to Gomez.³⁸

26. *Id.*

27. *Id.* at 347.

28. *Id.*

29. Opening Brief of Appellant at 11, *Archuleta I*, 200 P.3d 333 (2009) (No. 08SA109), 2008 WL 4203502.

30. *Archuleta I*, 200 P.3d at 345.

31. *See id.*

32. Opening Brief of Appellant, *supra* note 29, at 12.

33. *Id.* at 11 (citing *Anderson v. Cold Spring Tungsten, Inc.*, 485 P.2d 756 (Colo. 1969)).

34. *Id.* at 12.

35. *Id.* at 17.

36. *Matter of Water Rights of V-Heart Ranch, Inc.*, 690 P.2d at 1274.

37. Opening Brief of Appellant, *supra* note 29, at 13.

38. *Id.* at 14.

Gomez, for his part, argued his use in the rotation agreements was roughly proportionate to his and Archuleta's combined deeded interest.³⁹ To illustrate this, Gomez offered evidence showing his four days out of a twenty-day rotation on the Manzanares Ditch No. 1 was equivalent to a twenty percent share—more than enough to satisfy the combined record ownership of 16.7 percent Gomez and Archuleta shared.⁴⁰ Gomez relied on *Matter of Water Rights of V-Heart Ranch, Inc.*, in which the Court noted that a rotation agreement among owners of water rights does not necessarily prove the rights of each owner.⁴¹ Gomez explained these agreements are often made out of convenience so “no one had to get up during the middle of the night to start their turns in the rotation.”⁴² Admitting a rotation agreement does not equate to ownership of water rights; Gomez used the evidence to establish he actually used the water and his use was roughly proportionate to the combined Archuleta and Gomez interests.⁴³

In his Reply, Archuleta argued a rotational share roughly proportionate to the amount of water used is not a sufficient quantification of water.⁴⁴ Archuleta claimed Gomez's calculation did not take into account the shares other parties had in relation to their deeded interests—a key fact in determining whether the rotation times Gomez received correlated with all the interests of the shareholders.⁴⁵ Archuleta surmised many factors could be involved in another agreement with shareholders giving Gomez increased time in the rotation.⁴⁶ For instance, Gomez may have used someone else's water, or someone other than Gomez may have used Archuleta's water.⁴⁷

Finally, Archuleta also argued in his Reply that, even if Gomez showed he diverted Archuleta's share, Gomez failed to put the water to beneficial use.⁴⁸ Archuleta pointed out that, although Gomez offered evidence demonstrating the rotational days that other owners agreed upon, there was no showing that Gomez actually *used* the water during his days.⁴⁹

B. THE COLORADO SUPREME COURT'S OPINION IN *ARCHULETA I*

In response to the numerous arguments put forth by Archuleta and Gomez, Justice Gregory J. Hobbs, Jr., writing for the majority, stated the Court simply did not have enough information to determine whether the water right was adversely possessed without a quantification of the parties' consumptive

39. Answer Brief of Theodore Gomez, Defendant-Appellee at 13, *Archuleta I*, 200 P.3d 333 (2009) (No. 08SA109), 2008 WL 4991985.

40. *Id.* at 18.

41. *Id.* at 18-19 (citing *Matter of Water Rights of V-Heart Ranch, Inc.*, 690 P.2d 1271 (Colo. 1984)).

42. *Id.* at 19.

43. *Id.* at 19-20.

44. Reply Brief of Appellant at 5, *Archuleta I*, 200 P.3d 333 (2009) (No. 08SA109), 2008 WL 4641881.

45. *Id.* at 6.

46. *Id.* at 8.

47. *Id.* at 7.

48. *Id.* at 5.

49. *Id.*

use, expressed in acre-feet.⁵⁰ The Court held, aside from the standard requirements for adverse possession of real property, adverse possession of a water right requires the claimant show the quantified beneficial use of the adversely possessed water.⁵¹

The Court pointed out that although it was clear Gomez diverted and used some share of Archuleta's water right openly, exclusively, and with hostility for the eighteen-year statutory period, the facts in the record did not establish whether Gomez possessed all of Archuleta's water right.⁵² The Court stated "A portion of Archuleta's adjudicated water rights may have been abandoned to the stream, a portion may have been adversely possessed by Gomez, and a portion may still belong to Archuleta."⁵³ The Court determined both parties deserved the opportunity to present quantitative evidence of the amount of water used, rather than simply diverted, in order to establish the rights Archuleta maintained and the rights Gomez acquired.⁵⁴

The second issue the Court addressed was whether the record established whether Gomez made beneficial use of Archuleta's water in addition to his own water rights.⁵⁵ Testimony in the record showed Archuleta may have beneficially used the water even without the use of irrigation ditches by sub-irrigation from Gomez's tail water.⁵⁶ The Court held, without quantification of actual beneficial use of the water by either party, it could not sustain an adverse possession claim.⁵⁷ In order to quantify the amount of water each party put to beneficial use, the Court reversed the water court's judgment and remanded the case to the water court to allow the parties to present the newly required evidence.⁵⁸

Justice Alex J. Martinez filed a dissenting opinion to protest the requirement that a claimant must show it beneficially used a specific amount of water expressed in acre-feet to succeed on an adverse possession claim.⁵⁹ Justice Martinez relied on both the statutory requirements for adverse possession and previous Court decisions to assert this was the first time the Court made quantification in acre-feet a requirement of adverse possession of a water right.⁶⁰ Further, Justice Martinez claimed the majority's opinion created a new re-

50. *Archuleta I*, 200 P.3d at 347.

51. *Id.*

52. *Id.* at 337.

53. *Archuleta I*, 200 P.3d at 337.

54. *Id.*

55. *Id.* at 339.

56. *Id.*

57. *Id.* at 340.

58. *Id.* at 349.

59. *Id.*

60. *Id.* Justice Martinez turned to COLO. REV. STAT. § 38-41-101 (2012), which requires adverse possession claimants to "satisfy all of the elements of a claim for adverse possession required under common law in Colorado," and to *Matter of Water Rights of V-Heart Ranch, Inc.*, 690 P.2d at 1273, which stated "[a] party seeking to establish ownership of a water right by adverse possession has the burden of establishing that such a possession is actual, adverse, hostile, and under a claim of right, as well as open, notorious, exclusive, and continuous for the prescribed statutory period."

quirement that the claimant mathematically quantify the amount of water beneficially used in consultation with experts.⁶¹

IV. REMAND TO THE WATER COURT IN *ARCHULETA I*

The water court heard the case on remand in February, April, and May of 2011.⁶² Both parties presented expert testimony to establish their consumptive beneficial use of the contested water, expressed in acre-feet. The water court described the case as a “classic example of each side presenting the necessary facts to support his legal position.”⁶³ Therefore, the water court was tasked with determining which side’s evidence was more credible.⁶⁴ At the conclusion of the testimony, the water court found Gomez had adversely possessed Archuleta’s interest in the Archuleta Ditch and Manzanares Ditch No. 1, but Archuleta maintained his interest in the Manzanares Ditch No. 2.⁶⁵ The water court also enjoined Gomez from interfering with Archuleta’s rights to that ditch.⁶⁶

A. ARCHULETA DITCH

The undisputed facts concerning the Archuleta Ditch showed Gomez had four days in the twelve-day ditch rotation to use in irrigating his upper parcel.⁶⁷ The ditch had not extended to the lower parcel of the Archuleta property since at least 1968, and Archuleta did not use the water on his property during the eighteen-year statutory period for adverse possession.⁶⁸ Therefore, the central question was whether or not Archuleta received any tail water from Gomez’s use of the Archuleta Ditch.⁶⁹

Archuleta argued Gomez ran his portion of the Archuleta Ditch water through the Manzanares Ditch No. 2 to irrigate the lower parcels abutting Archuleta’s property, and Archuleta used tail water from irrigation on Gomez’s lower parcel to irrigate his upper pasture.⁷⁰ Jeffrey Clark, Archuleta’s expert, presented evidence to bolster Archuleta’s claim.⁷¹ Gomez, and the District 79 Water Commissioner Ray Garcia, testified Gomez did not divert Archuleta Ditch water through the Manzanares Ditch No. 2.⁷² The water court did not find credible Archuleta’s testimony concerning the diversion of the Archuleta Ditch through the Manzanares Ditch No. 2, and declared it would be impossible for Archuleta to receive tail water from the Archuleta Ditch because the

61. *Id.* at 350.

62. Archuleta v. Gomez, Case No. 06CW92 at *1 (Water Div. 2 2011).

63. *Id.* at *5.

64. *Id.*

65. *Id.* at *16.

66. *Id.*

67. *Id.* at *5.

68. *Id.*

69. *Id.*

70. *Id.* at *6.

71. *Id.*

72. *Id.*

ditch did not reach Gomez's lower parcel.⁷³ Therefore, the water court found Gomez's use of the Archuleta Ditch met the requirements for adverse possession.⁷⁴

To show Gomez's beneficial use of Archuleta's water right from the Archuleta Ditch, Gomez's expert, Gary Thompson, testified that between 1968 and 1986, Gomez's average annual consumptive use was 91.2 acre-feet.⁷⁵ Thompson analyzed the conditions prior to 1968, concluding Gomez's consumptive use averaged 82.3 acre-feet annually and Archuleta's deeded amount averaged 13.7 acre-feet annually, totaling consumption of 96 acre-feet.⁷⁶ Therefore, during the requisite eighteen-year period, Gomez beneficially and consumptively used 8.9 acre-feet of Archuleta's water right. The water court found, during that eighteen years, Gomez's use was actual, adverse, hostile, notorious, exclusive and continuous, thus giving Gomez absolute ownership of Archuleta's interest in the ditch.⁷⁷

B. MANZANARES DITCH NO. 1

To determine the parties' use of Manzanares Ditch No. 1, the water court considered a rotation agreement based on historic use and the testimony of additional parties either living in or frequently visiting the area.⁷⁸ All of the parties with an interest in the ditch in 1984 signed and recorded the rotation agreement.⁷⁹ The agreement stated the parties allocated Gomez four days in a twenty-day rotation, and a twenty percent ownership of the ditch.⁸⁰ The agreement did not include Archuleta, though the water court determined there was no evidence indicating he was deliberately excluded.⁸¹

Additionally, many witnesses testified on behalf of both parties as to the use of the ditch.⁸² The water court found "extreme differences" between Archuleta's witnesses' testimony, and Gomez's witnesses' testimony.⁸³ One fact, however, both parties agreed on was that, in the late 1990s, Gomez found Archuleta using the ditch and told Archuleta he did not own any rights to the ditch and needed to cease using it (which ultimately lead to the initial court action).⁸⁴ The water court noted if Archuleta used the ditch over the decades previous to the confrontation, the confrontation would have happened much earlier.⁸⁵

73. *Id.* at *7.

74. *Id.*

75. *Id.* at *14.

76. *Id.*

77. *Id.* at *7.

78. *Id.* at *7-11.

79. *Id.* at *7.

80. *Id.*

81. *Id.* at *11.

82. *Id.* at *8-11.

83. *Id.* at *9.

84. *Id.* at *10.

85. *Id.*

Because of the substantial conflict between the two parties' respective testimony, the water court relied on the 1984 rotation agreement to reach its decision.⁸⁶ The water court concluded that, because the agreement was based on historic use, the agreement would have included Archuleta even if he only occasionally used the ditch.⁸⁷ Also, the agreement called for the sharing of expenses, and it was undisputed that Archuleta never contributed labor or money to maintain the ditch.⁸⁸ The water court ultimately concluded Archuleta's version of the facts was not credible, and Gomez had satisfied the requirements for adverse possession.⁸⁹

To determine beneficial use of the ditch, the water court again relied on the analysis of Gomez's expert, Gary Thompson.⁹⁰ Thompson testified that, prior to 1968, Gomez's average annual consumptive use was 53.7 acre-feet and Archuleta's was 8.4 acre-feet, totaling 62.1 acre-feet.⁹¹ The water court found from 1968 to 1986, Gomez's consumptive use was 59.2 acre-feet, which indicated Gomez was using 5.5 acre-feet of Archuleta's right.⁹² The water court again found Gomez's use was actual, hostile, notorious, exclusive, and continuous for the eighteen-year period, thus giving Gomez absolute ownership of Archuleta's interest in Manzanares Ditch No. 1.⁹³

C. MANZANARES DITCH NO. 2

The parties agreed Manzanares Ditch No. 2 had not reached Archuleta's property since 1968 and Gomez plowed up the ditch so it no longer reached Archuleta's property.⁹⁴ Archuleta argued, however, that tail water from the ditch sporadically ran onto his property during the adverse possession period.⁹⁵ The water court found the tail water was sufficient in quantity to support the growth of pasture grass on Archuleta's property.⁹⁶ The water court also found Archuleta consumptively used all or a portion of his irrigation water with tail water rather than ditches.⁹⁷ The water court found Gomez did not adversely possess Archuleta's water right for Manzanares Ditch No. 2 because Archuleta continued to irrigate his land with tail water.⁹⁸ The water court concluded the key question was how Archuleta would transport water from the ditch to his property after Gomez plowed up the ditch because it was uncertain whether anything more than tail water would reach Archuleta's property.⁹⁹ The water court enjoined Gomez from interfering with Archuleta's rights to water from

86. *Id.* at *11.

87. *Id.*

88. *Id.* at *11.

89. *Id.*

90. *Id.* at *16.

91. *Id.*

92. *Id.*

93. *Id.* at *11.

94. *Id.* at *12.

95. *Id.* at *12-13.

96. *Id.* at *12.

97. *Id.*

98. *Id.*

99. *Id.* at *13.

the ditch, but left Archuleta without a remedy for Gomez's destruction of the ditch.¹⁰⁰

V. *ARCHULETA II*, THE 2012 COLORADO SUPREME COURT DECISION

In 2012, both parties again appealed the water court's decision to the Colorado Supreme Court.¹⁰¹ Archuleta claimed the water court erred in deciding Gomez adversely possessed the Archuleta Ditch and Manzanares Ditch No. 1, and also erred in not granting mandatory injunctive relief requiring Gomez to restore the Manzanares Ditch No. 2 to Archuleta's property.¹⁰² Gomez did not challenge the water court's ruling on Manzanares Ditch No. 2, and only appealed on the issue of attorney's fees.¹⁰³

Archuleta first argued Gomez did not prove adverse possession of the two ditches because Gomez did not show he consumptively used all of Archuleta's water.¹⁰⁴ Archuleta based this argument on Gomez's testimony establishing his irrigation efficiency at only fifty percent.¹⁰⁵ The Court quickly dismissed this argument, saying Archuleta misconstrued its holding in *Archuleta I* and, therefore, Archuleta's argument was based on his erroneous belief that his legal interests include the right to return flows.¹⁰⁶ The Court emphasized the expert testimony that had stated fifty-percent efficiency is typical for crop water consumption in the area.¹⁰⁷ Further, the Court noted return flows are not part of the water right's legal interest, but rather they belong to the public—a longstanding tenet of prior appropriation water law.¹⁰⁸

Starting with the Archuleta Ditch, the Court upheld the water court's determination that Gomez had adversely possessed Archuleta's water right.¹⁰⁹ The Court relied on the water court's findings that, since 1968, the ditch did not extend to Archuleta's property and therefore it would be impossible for the property to receive tail water from the Archuleta Ditch.¹¹⁰ The Court also upheld the water court's finding that Gomez adversely possessed the Manzanares Ditch No. 1 because Lupe Archuleta never used the ditch after 1968 and Ralph Archuleta began using the ditch only in the mid-to-late 1990s, which was insufficient to interrupt the eighteen-year statutory period of use by Gomez.¹¹¹ The Court also relied on the 1984 rotational agreement among the parties with a legal interest in the Manzanares Ditch No. 1.¹¹² The Court held Ar-

100. *Id.*

101. *Archuleta II*, 290 P.3d at 482.

102. *Id.* at 492 n.1.

103. *Id.*

104. *Id.* at 486.

105. *Id.*

106. *Id.* at 487.

107. *Id.*

108. *Id.* at 487.

109. *Id.* at 488.

110. *Id.* at 488-89.

111. *Id.* at 488.

112. *Id.*

chuleta's non-participation in the agreement showed he did not even sporadically use the ditch prior to the agreement.¹¹³

Following the precedent it created in *Archuleta I*, the Court next examined whether Gomez made actual beneficial use of the water rights in the Archuleta Ditch and Manzanares Ditch No. 1.¹¹⁴ The Court examined evidence showing Gomez increased his consumptive use above the amount available under his right, to the exclusion of Archuleta in both ditches, but did not enlarge the historical beneficial use associated with Archuleta's legal interest.¹¹⁵ The expert evidence at the water court level indicated Gomez's land was "water short" at times and he was therefore able to beneficially use Archuleta's water for crop production.¹¹⁶

Gomez did not appeal the water court's finding that he had not adversely possessed Archuleta's interest in Manzanares Ditch No. 2 and that he wrongly severed the ditch so that it did not extend to Archuleta's property.¹¹⁷ The Court held Gomez's increased use of water from the ditch was an illegal enlargement of the ditch because Archuleta never abandoned his water right in Manzanares No. 2.¹¹⁸ The Court further explained that all Gomez did by severing the ditch before it reached Archuleta's land was possess water that would have returned to the Huerfano River, and therefore the water belonged to the public.¹¹⁹

The Court also held Gomez illegally destroyed the Manzanares Ditch No. 2.¹²⁰ To rectify this abuse of Archuleta's water right, the Court directed the water court to enter an injunction ordering Gomez to reconstruct the ditch and provide an easement across the northern part of his lower parcel to Archuleta's adjoining parcel.¹²¹ The Court further directed the water court to use any appropriate terms to protect Archuleta's legal interest in Manzanares Ditch No. 2.

Accordingly, the Court affirmed the judgment of the water court regarding Gomez's adverse possession of the Archuleta Ditch and Manzanares Ditch No. 1, and remanded the case for an injunction consistent with the Court's opinion as to Manzanares Ditch No. 2.¹²²

VI. LOOKING FORWARD

Archuleta I established a new blueprint for evaluating claims of adverse possession of water rights, aligned the jurisprudence more closely with traditional tenets of Colorado prior appropriation water law, and increased the burden on claimants attempting to prove adverse possession. For the first time, the Colorado Supreme Court clarified the requirement that, to succeed

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 488.

117. *Id.* at 489.

118. *Id.* at 490.

119. *Id.*

120. *Id.*

121. *Id.* at 491.

122. *Id.* at 484.

in an adverse possession claim, the claimant must “prove by a preponderance of the evidence that, behind the headgate, he—hostile to the owner and under claim of right—notoriously, adversely, exclusively, and continuously made *actual beneficial consumptive use* of all or a portion of [defendant’s] deeded water interests . . . for the eighteen-year adverse possession period, not just that he intercepted water.”¹²³ Prior to this decision, adverse possession cases considered a mere diversion of water sufficient to adversely possess another party’s water.¹²⁴ In *Archuleta II*, however, the Court relied upon the well-established principle that a “diversion flow rate specified in a decree is neither the measure of a matured water right nor conclusive evidence of the appropriator’s need for which the appropriation was originally made” and that proof of historic consumptive use is the true standard.¹²⁵

In future cases, proving beneficial consumptive use of the water claimed to be adversely possessed now requires the claimant to show a quantification of its consumptive use, which is designed to ensure compliance with the “duty of water.” In Colorado, the duty of water requires that “any given acreage of cropland needs and is limited to a *productive amount of water*.”¹²⁶ This rule keeps a claimant from adversely possessing an amount of water that exceeds his needs, even if all elements of adverse possession are met, because “no more water can be diverted than can be used beneficially.”¹²⁷ The Court stressed that adverse possession in the context of water law does not promote wasteful use or illegal enlargement of a water right, and the water court must look at all circumstances surrounding the claimant’s use of contested water rights.¹²⁸

The Court further explained that in an irrigation rights adverse possession case, “‘exclusive’ and ‘continuous’ proof requirements necessitate both (i) intercepting water within the ditch that belongs to another person’s right, *at times and in amounts the adverse possessor’s crop production required* and (ii) placing the intercepted water right to an actual beneficial *use that results in water consumption for crop production*.”¹²⁹ Therefore, quantification of historical beneficial use is necessary both to ensure that the owner’s legal interest has been lost and the claimant has not illegally enlarged that legal interest.¹³⁰

The Court’s decision in *Archuleta II* ensures water courts consider a foundational element of Colorado water law, beneficial use, when evaluating adverse possession claims. But how will it affect claimants in the future? Claimants now have the additional burden of showing both a diversion of a water right owned by another, and application of that water to their acreage in an amount not exceeding the requirements for crop production (or whatever the beneficial use may be). As *Archuleta I and II* demonstrate, securing ex-

123. *Id.* at 485 (emphasis added).

124. *Id.*

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.* at 486.

128. *Id.*

129. *Id.* at 486 (emphasis added).

130. *Id.*

pensive expert evidence and testimony is likely necessary to prove the newly clarified requirement for a successful adverse possession claim. As water rights continue to increase in value in the arid and populated West, at what point does the cost and time of litigation become more expensive than the cost of a successful claim? After *Archuleta II*, settlements may become more attractive to opposing parties faced with difficult, costly litigation that brings with it an uncertain outcome.

