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Seventh Update to Colorado Water Law: An Historical Overview

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ARTICLE UPDATE

SEVENTH UPDATE TO COLORADO WATER LAW: AN HISTORICAL OVERVIEW

THE HONORABLE GREGORY J. HOBBS, JR.

To provide our readers with the most up-to-date water law information, the editors periodically include updates of works previously published in the *Water Law Review.* The following is the seventh update to *Colorado Water Law: An Historical Overview, Appendix—Colorado Water Law: A Synopsis of Statutes and Case Law,*[1] selected by the Honorable Gregory J. Hobbs, Jr.

Vance v. Wolfe

"While the term 'beneficial use' is undefined in the Colorado Constitution, the 1969 Act defines it broadly as 'the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.' Under the language of the 1969 Act, the CBM [Coalbed Methane] process 'uses' water – by extracting it from the ground and storing it in tanks - to 'accomplish' a particular 'purpose' – the release of methane gas. The extraction of water to facilitate CBM production is therefore a 'beneficial use' as defined in the 1969 Act.

Arguing against this interpretation, the Engineers and BP'[British Petroleum] assert that the use of the water during the CBM process cannot be a 'beneficial' one because the water is merely a nuisance. They stress that the goal of the CBM process is to capture the gas, not the water. The water, they continue, is simply an unwanted byproduct of the process. In sum, they question how the use of the water in this case can be termed 'beneficial' when they consider it to be a hindrance. . . . '[W]e disagree . . .

Vance v. Wolfe, 205 P.3d 1165, 1169 (2009) (citations omitted).

In fact, the presence of water and its subsequent extraction during

1. Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview,* 1 U. DENV. WATER L. REV. 1, 27 (1997). The first update to Justice Hobbs' article appears at 2 U. DENV. WATER L. REV. 223 (1999); the second update is at 4 U. DENV. WATER L. REV. 111 (2000); the third update is at 6 U. DENV. WATER L. REV. 116 (2002); the fourth update is at 8 U. DENV. WATER L. REV. 213 (2004); the fifth update is at 10 U. DENV. WATER L. REV. 391 (2007); the sixth update is at 13 U. DENV. WATER L. REV. 389 (2009).

CBM production is far more than an 'inevitable result.' Indeed, the presence and extraction of water are integral components to the entire CBM process. CBM producers rely on the presence of the water to hold the gas in place until the water can be removed and the gas captured. Without the presence and subsequent extraction of the water, CBM cannot be produced. . . . While the Engineers and BP are correct that no Colorado case has *specifically* held that water used during CBM production is a beneficial use, this fact does not prevent us from finding such a beneficial use where our case law and the language of the 1969 Act so dictate.

Id. at 1170.

As the water court noted, the Ranchers' central concern is the protection of their vested senior water rights. We agree with the district court that our prior appropriation system exists to protect water rights holders. Here, the extraction, storage, and reinjection of water during CBM make the water inaccessible to other water rights holders such as the Ranchers. When the water is stored in surface tanks, a small quantity is lost to evaporation. At a later time, the water is typically reinjected, via underground injection control wells, into designated geologic formations that lie deeper than the aquifer from which the methane is produced. Consequently, 'beneficial use' also means use of water for a designated purpose – the result of which is to make the water inaccessible to other water rights holders.

Id. at 1171.

We emphasize that determining the boundaries of 'beneficial use' requires careful case-by-case factual analysis and our holding today addresses the unique circumstances involved in CBM production. The definition of 'beneficial use,' however, is a 'broad' one, and we agree with the Ranchers that it is broad enough to cover the extraction of water to facilitate CBM production. In rendering our decision, we observe that the General Assembly may choose to make modifications to the statutes in light of our opinion.

Id. at 1172.

In sum, while the production of oil and gas is subject to extensive regulation by COGCC [Colorado Oil and Gas Conservation Commission], it is also subject to the 1969 Act and the Ground Water Act. And, as noted above, we find that the extraction of water to facilitate CBM production is a beneficial use under those provisions."

Id. at 1173.

City of Aurora v. ACJ Partnership

"This appeal concerns a water court application in which the Appellant, the City of Aurora ('Aurora'), sought conditional water storage rights. Aurora appeals from the water court's order granting partial summary judgment in favor of Opposer-Appellee Rangeview Metropolitan District ('Rangeview'), and dismissing that part of Aurora's application claiming conditional water storage rights in three

disputed sites. These three sites significantly overlap reservoir sites which Rangeview currently leases from the state. Under a lease agreement, the Colorado State Board of Land Commissioners ('Land Board'), which administers the land on which the disputed sites are situated on behalf of the state, is required to convey rights-of-way to Rangeview for construction of its reservoirs when such construction is imminent. The water court ruled that, as a result of its contractual obligations to Rangeview, the Land Board was precluded from granting Aurora any access to the disputed sites. Thus, the water court concluded that, as concerns the disputed sites, Aurora could not satisfy the statutory 'can and will' requirement for a decree of conditional water rights. The 'can and will' requirement mandates that in order to establish a conditional water right, an applicant must show that the waters can and will be diverted and beneficially used, and that the project can and will be completed with diligence and within a reasonable time. We affirm.

We hold that Aurora failed to demonstrate by a preponderance of the evidence that there is a substantial probability that it can and will gain access to the disputed sites. Because Aurora failed to advance any genuine issue of material fact concerning its present or prospective ability to access the disputed sites, we conclude that the water court appropriately dismissed Aurora's claims for conditional water storage rights in those sites on partial summary judgment. We remand the case to the water court for proceedings consistent with this opinion."

City of Aurora v. ACJ Partnership, 209 P.3d 1076, 1080 (2009) (citations omitted).

Cotton Creek Circles, LLC v. Rio Grande Water Conservation District

"[T]he 1969 Act provides that '[t]he state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of [the state engineer's] foregoing duties.' Rules and regulations are designed to help administer tributary ground water to ensure that enforcement is not arbitrary, that the rules will prevent material injury to senior appropriators, and that the rules take into consideration the means for achieving optimum use of ground water . . . Colorado has a long history of handling water issues through adjudication rather than through administrative proceedings. Dating back to the Adjudication Acts of 1879 and 1881, Colorado has provided for judicial proceedings to administer water rights. Although most other states direct water issues through administrative procedures, in drafting the 1969 Act, the General Assembly decided to maintain the system of adjudicative proceedings to handle the determination of water rights. Moreover, as the water court noted, the General Assembly did not require the state engineer to conduct a public hearing on proposed rules and regulations such as is required by the Colorado Administrative Procedure Act ('CAPA'). Rather, the

1969 Act . . . provides the opportunity for interested parties to protest potential infringements on their water rights as the means to prevent unreasonable exercises of administrative discretion by the state engineer.

Cotton Creek Circles, LLC v. Rio Grande Water Conservation District, 218 P.3d 1098, 1101-102 (2009) (citations omitted).

Because the type of proceeding at issue in the present case more closely resembles a contested adjudication than a quasi-legislative rulemaking, it follows that those parties who, in the discretion of the presiding judge, prevailed on a significant issue and derived some benefits sought by the litigation may be entitled to costs. Here, the Proponents [two water districts and a water users association that supported the rules] acted in concert with the state engineer to successfully defend the proposed rules and regulations from the Objectors' protests. The Proponents were thoroughly involved in the extensive proceedings at issue and expended significant time and effort in pursuing the ratification of the proposed rules and regulations. We conclude that the water court's determination that the Proponents were 'prevailing parties' for purposes of C.R.C.P. 54(d) was not manifestly arbitrary, unreasonable, or unfair. Therefore it was not an abuse of discretion and we uphold that decision."

Id. at 1104-105.

Pagosa Water and Sanitation District v. Trout Unlimited (II)

"We uphold the Water Court's determination that a 50-year water supply planning period to the year 2055 is reasonable. However, in light of the standards we set forth in *Pagosa I,* we hold that the evidence currently in the record does not support the amounts of water contained in the remand conditional decree. The essential function of the water court in a conditional decree proceeding is to determine the amount of available unappropriated water for which the applicant has established a need, a future intent, the ability to actually use, and, under the "can and will" test, a substantial probability that its intended appropriation will reach fruition. . . .

In particular, the existing record in this case lacks sufficient evidentiary support for the following conditional decree provisions: (1) provision no. 11.1.6, which provides for water releases to benefit hypothetical recreational in-channel rights, instream flow rights decreed to the Colorado Water Conservation Board, and bypass flow requirements of any federal permits obtained for development of the Dry Gulch Reservoir; (2) provision no. 31, which provides for a direct flow diversion right into Dry Gulch storage of 100 cfs to account for the uncertainty of federal bypass flow requirements; (3) provision no. 43, which provides for a direct flow diversion right of 50 cfs into the Districts' water system for use anywhere in the Districts' service area; and (4) provision no. 44, which provides for a storage right of 25,300 acre-feet of water annually in Dry Gulch Reservoir.

Pagosa Water and Sanitation District v. Trout Unlimited (II), 219 P.3d 774, 777 (2009) (citations omitted).

[G]overnmental water supply entities have a limited exception from the anti-speculation and beneficial use standards applicable to non-governmental conditional water right appropriators. The conditional appropriation must be consistent with the governmental agency's reasonably anticipated water use requirements based on substantiated projections of future growth within its service area and only a reasonable planning period is allowed. In addition to demonstrating non-speculative intent, a governmental agency must satisfy the 'can and will' requirement in order to obtain a conditional decree . . .

Id. at 779.

The ultimate factual and legal issue in a governmental agency conditional appropriation case involves how much water should be conditionally decreed to the applicant above its currently available water supply. A governmental entity has the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of unappropriated water: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period above its current water supply.

In the water court's application of the third element, we articulated four non-exclusive considerations relevant to determining the amount of the conditional water right: (1) implementation of reasonable water conservation measures during the planning period; (2) reasonably expected land use mixes during the planning period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes during the planning period; and (4) the amount of consumptive use reasonably necessary to serve the increased population.

Id. at 780.

At least a part of the remand decree amount is ascribable to the speculative recreational in-channel diversion, instream flow, and/or bypass flow amounts we have discussed above. On remand from this decision, the Water Court should take additional evidence and determine what amounts of water for storage and direct flow diversions are necessary to meet the Districts' reasonably anticipated needs for the 2055 planning period above the existing baseline water rights the Districts currently hold. The remand decree does not contain a finding regarding the amount of annual dry year yield available from the Districts' existing water rights.

Id. at 788.

[W]e reject the position of the Districts and amici municipal water suppliers that they act in a legislative capacity when they make

conditional water appropriations; thus, they argue that the courts owe deference to the claimed amounts of water the suppliers deem reasonably necessary for their future use. To the contrary, the Colorado statutes and case law we have cited in *Pagosa I* and in this opinion provide that both public and private appropriators must carry the burden of proving their claims for a conditional decree. While the General Assembly has made an accommodation to governmental water suppliers by allowing their conditional appropriations to be made and decreed for a future reasonable water supply period in reasonably anticipated amounts, it has assigned to the courts the responsibility to conduct the necessary proceedings for these determinations under a de novo standard of review . . . "

Id. at 788.

Well Augmentation Subdistrict v. City of Aurora

"We affirm the water court's requirement that WAS [Well Augmentation Subdistrict of the Central Colorado Water Conservancy District] provide replacement water for pre-2003 depletions that have a continuing injurious effect on surface waters.

Well Augmentation Subdistrict v. City of Aurora, 221 P.3d 399, 404 (2009) (citations omitted).

Water rights are decreed to structures and points of diversion in specified amounts for beneficial uses. Water court approval of a plan for augmentation allows a water right with a junior priority date to divert out-of-priority, provided that the junior right supplies additional augmentation water to offset the out-of-priority depletion. Because water rights are 'kept in the name of the diversion or storage structure, rather than by owner name, and water right transfers are not recorded,' terms and conditions decreed by the water court attach to the water right and follow it regardless of who may own or operate the right. In the context of plans for augmentation, the water rights included in the plan are augmented, and the court cannot approve a plan if senior vested rights will be harmed through out-of-priority diversions made by the water rights included in the plan, regardless of ownership of the rights.

Here, when WAS filed the plan for augmentation . . . it invoked the water court's jurisdiction over the water rights included in the plan. The water court then had a duty . . . to ensure that operation of the plan would not prove injurious to senior vested water rights and decreed conditional water rights. In order to fulfill this duty and prevent harm to senior water rights, the water court conditioned approval of the augmentation plan on the requirement that WAS provide replacement water for pre-2003 depletions that are currently affecting surface water conditions. Requiring WAS to provide replacement water for such depletions is specifically aimed at preventing injury to senior water rights, and is accordingly within the scope of the proceedings outlined in [the 1969 Act]. Therefore, an

analysis of 'the nature of the claim and the relief sought,' reveals that requiring WAS to provide augmentation water for pre-2003 diversions presently affecting surface water conditions is directly related to the plan for augmentation, and the water court therefore had jurisdiction to impose such a requirement.

Id. at 409.

Here, certain wells contained in the WAS augmentation plan engaged in out-of-priority pumping prior to the filing of the augmentation plan application in 2003. The pumping of alluvial, or tributary, wells reduces surface flows to the rivers to which the wells are hydrologically connected. However, the time and amount of the reduction depends on several factors, including the distance between the well and the stream, the transmissibility of the aquifer, the depth of the well, the time and volume of pumping, and return flow characteristics. Because groundwater depletions can lag behind surface water conditions by many years, the effects of a groundwater depletion may not be felt by surface waters for long periods of time. In this case, the water court found that certain pre-2003 depletions have a continuing future impact on surface water conditions. Therefore, as a term and condition to approval of the augmentation plan, the water court ordered WAS to provide replacement water for pre-2003 depletions that will continue to affect the river in the *future.*"

Id. at 412.

Upper Eagle Regional Water Authority v. Wolfe

"The Authority argues, as a matter of law, that water court retained jurisdiction. . . . can be invoked to remedy only actual injury to a decreed water right. The Engineers and the CWCB counter that . . . the water court's use of retained jurisdiction 'as is necessary or desirable to preclude or remedy any such injury,' and the water court should extend the period of retained jurisdiction for such time as 'the nonoccurrence of injury shall not have been conclusively established.' We agree with the Engineers and the CWCB.

We hold that the water court erred in dismissing the petitions of the Engineers and the CWCB in both of these cases. The petitions allege sufficient facts which, if proved, meet the petitioners' burden of going forward to show that injury has occurred or is likely to occur, based on operational experience involving the out-of-priority diversions and depletions covered by the augmentation plans. Reviewing the petitions, the water court should have conducted additional proceedings in both of these cases.

On remand, the Engineers and the CWCB have the burden of going forward with sufficient evidence that injury has occurred or is likely to occur because the existing decree provisions are inadequate to preclude or remedy injury. If the Engineers and the CWCB provide such evidence, the Authority must demonstrate non-injury and the adequacy of existing decree provisions to preclude and

remedy injury to other water rights. The water court should then make findings of fact, conclusions of law, and decree revisions, as appropriate, for the purpose of precluding and remedying injury to vested water rights and decreed conditional water rights.

If the water court finds that not enough operational experience exists to permit it to consider the question of injury or to conclusively establish non-injury, it should extend the period of retained jurisdiction by an additional specified period . . ."

Upper Eagle Regional Water Authority v. Wolfe, 230 P.3d 1203, 1206-207 (2010) (citations omitted).

V Bar Ranch LLC v. Cotton

"V Bar argues the operative date for purposes of determining the land on which the water right may be used is the date of adjudication, not the date of appropriation. Accordingly, V Bar argues that water from Well No. 1 can be used to irrigate both the Southwest and Northwest Quarters of Section 3 because, at the time of adjudication, both Quarters were being irrigated with well water. We disagree. V Bar's position disregards the significance of the beneficial use contemplated at the time of the 1946 appropriation and embraces the erroneous view that a lawful decree can be premised upon an unlawful expansion of use. Because we determine that the scope of a water right is defined by the intent of the appropriator at the time of appropriation, we hold that the application of water from Well No. 1 to the Northwest Quarter of Section 3 represented an unlawful expansion of use and the replacement well permit should have been limited to irrigation of the Southwest Quarter.

V Bar Ranch LLC v. Cotton, 233 P.3d 1200, 1208 (2010) (citations omitted).

In Colorado, appropriations of water for irrigation are made by and for use on specific land. Water which was appropriated for use on one parcel of land cannot be applied to new or different lands without a decree issued by the water court allowing the change in use. The amount of water appropriated is defined by the beneficial use to which the water is put. "Beneficial use" is defined as 'that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.' Consequently, because the amount of water that is reasonable and appropriate must be based on the purpose of the appropriation, the amount of acreage to be irrigated and the location of the irrigation must be contemplated at the time of the appropriation.

Id. at 1208.

V Bar requested, and the water court confirmed, an absolute water right under a 1946 appropriation, which means that the water right had been put to its intended beneficial use in 1946. Nothing in the record indicates that the water right was appropriated in

anticipation of future acquisition of the Northwest Quarter. Consequently, because the water right was created upon the completion of the appropriation, the scope of that right and the lands upon which it may be exercised are defined by the beneficial use for which the water was appropriated. Therefore, the water right at issue is limited to irrigation of the Southwest Quarter, and, in order to irrigate lands beyond the Southwest Quarter, V Bar must petition the water court for a change decree recognizing a new situs for the appropriation."

Id. at 1209.

City of Englewood v. Burlington Ditch, Reservoir and Land Co.

"We . . . agree with the water court's finding that the Agreement is neither a selective subordination agreement nor a general subordination agreement. Englewood is incorrect in arguing that no-call agreements are a type of subordination agreement. . . . [A]n appropriator may contract to make its priority inferior to another. . . . No-call agreements and subordination agreements are similar in that senior appropriators in each are effectively contracting away part of the bundle of sticks that compose their water rights, with the general result that water that could otherwise go to the senior appropriator is made available to some or all junior appropriators. However, the agreements are fundamentally different in terms of what is being contracted away by the senior appropriator. In a subordination agreement, 'the holder of an otherwise senior water right consents to stand in order of priority behind another person or persons holding a junior water right.' At its core, subordination 'is essentially a matter of status between parties' and 'establishes priorities between those parties by some means other than the automatic or statutory scheme.' In contrast, a no-call agreement provides that a senior appropriator will not place a call on a particular water right that it holds. Thus, a no-call agreement contracts away the *right to place a call* to the Division Engineer requesting more water to fulfill the senior right whereas a subordination agreement contracts away the senior appropriator's more *senior priority status* (either to specific junior appropriators in a selective subordination or all junior appropriators in a general subordination).

City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061, 1068 (2010) (citations omitted)

There is no requirement that a senior water right holder place a call on the river to effectuate its water rights, or any statutory authority for the State or Division Engineers to require the placement of a call. Instead, we have explicitly recognized that a water right holder may contractually choose to not request calls on its rights."

Id. at 1069-070.

City of Aurora v. Northern Colorado Water Conservancy District

"Colorado water law states that, in addition to other elements, an applicant for an appropriative right of exchange must show that there is no injury to the water rights of others when implementing the exchange. Northern Water claims no injury to itself or its users from Aurora's proposed PWP exchange reach.

Despite this, Northern Water claims that . . . the combined effect of the WCA [Water Conservancy Act], the Repayment Contract, and Northern Water's own rules supersedes this general law and gives Northern Water the authority to deny any entity extra-district benefits from the use of C-BT water. Some amount of C-BT [Colorado-Big Thompson] water flows through Aurora's proposed exchange reach outside the boundaries of the Northern Water district. Northern Water contends that the inclusion of this water in Aurora's calculation of the exchange potential of the exchange reach is prohibited and that the resulting larger exchange potential is an indirect extra-district benefit unlawfully derived from C-BT water.

City of Aurora v. Northern Colorado Water Conservancy District, 236 P.3d 1222, 1225 (2010) (citations omitted).

Northern Water claims no injury to its water rights from Aurora's proposed PWP exchange reach, and . . . [our case law] prohibiting extra-district indirect benefits pertains only to parties that contract with Northern Water. Therefore, Northern Water cannot successfully petition the water court to impose a condition that excludes any possible C-BT flows in the exchange reach when Aurora calculates its exchange potential."

Id. at 1226.

City and County of Broomfield v. Farmers Reservoir and Irrigation Company (I)

"The water court shall approve an application for a change of water rights if 'such change . . . will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.' The applicant for a change of water right bears the initial burden of establishing a prima facie case that the proposed change will not have an injurious effect on others' water rights. Once the applicant successfully meets this initial burden, the opposers have the burden of going forward with evidence that the proposed change will result in injury to existing water rights. If the opposers present contrary evidence of injury, then the ultimate burden of showing the absence of injurious effect by a preponderance of the evidence remains with the applicant. The issue of injurious effect is inherently fact specific, and we require the water court to make findings on this issue. In evaluating whether a proposed change will have an injurious effect, the water court may have to make determinations about the historic beneficial consumptive use of the water rights in question.

We defer to the water court's findings of fact unless the evidence is wholly insufficient to support those determinations. This is a highly deferential standard that recognizes the water court's unique ability to evaluate the evidence and make factual determinations in complex water allocation decisions. We defer to the water court's finding that FRICO's post-trial tables and calculations were new evidence because they were not introduced at trial. Therefore, in evaluating each of FRICO's arguments, we rely only upon the evidence presented at trial, not the tables and calculations in FRICO's proposed decree, to determine whether the record supports the trial court's findings."

City and County of Broomfield v. Farmers Reservoir and Irrigation Company, 235 P.3d 296, 299-300 (2010).

Streu v. City of Colorado Springs

"The decision to dismiss an action for failure to prosecute lies within the sound discretion of the water court. We review the water court's dismissal under an abuse-of-discretion standard. Under this standard, we reverse a trial court's determination only if it was 'manifestly arbitrary, unreasonable, or unfair.' It is not necessary that we agree with the trial court's decision.

The plaintiff bears the burden of prosecuting a case 'in due course without unusual or unreasonable delay.' An unreasonable delay or lack of diligence in prosecution will justify dismissal, unless the plaintiff presents mitigating circumstances sufficient to excuse the delay.

We have articulated several nonexclusive factors that a court should consider when evaluating a motion to dismiss for failure to prosecute. These factors include: the length of the delay; the reason for the delay; any prejudice that may result to other parties; any difficulties in trying the case that may have resulted from the delay; and the extent to which the applicant has renewed efforts to prosecute the case.

Based on the record before us, and considering the many factors that support dismissal, we cannot conclude that the water court acted in a manifestly arbitrary or unreasonable manner when it dismissed Streu's case with prejudice for failure to prosecute. Although we may disagree with the water court, its decision to dismiss under these circumstances does not exceed the bounds of its rationally available choices.

[T]he seventeen-month delay far exceeded the time required to establish a prima facie case of failure to prosecute. Our courts have affirmed dismissals for failure to prosecute following similar, and on occasion shorter, delays.

Streu v. City of Colorado Springs, No. 09SA251, § III, ¶¶ 2-6 (announced Sept. 20, 2010) (citations omitted).

The lengthy delay in prosecution also prejudiced the opposers. They invested time and money to answer Streu's application. They

retained counsel, investigated Streu's claims, and filed timely responses before the proceedings came to a seventeen-month halt.

. . . .

[T]he record indicates that Streu failed to prosecute this case diligently since its inception. The district court ordered Streu to file her application in water court by February 18, 2007. She filed this case two months late, on April 18, 2007. Streu also missed the first two deadlines set forth in the case management order. She did not exchange information with the opposers on August 29, 2007, and she filed her disclosures thirty-three days late. When she filed her disclosures, she failed to include a request for extension of time to file late disclosures, and she failed to explain the reason for the month-long delay."

Id. at § III, ¶¶ 12, 14.

City and County of Broomfield v. Farmers Reservoir and Irrigation Co. (II)

"The rule enumerates three groups that are generally exempt from paying costs: the State of Colorado, its officers, and its agencies. By enumerating these three groups that are explicitly exempt from costs, the statute implies that all other groups are not exempt from costs. A mutual ditch company, which acts in a representative capacity for many municipalities, does not fall within the specified groups that are exempt from costs. . . .

City and County of Broomfield v. Farmers Reservoir and Irrigation Co. (II), No. 09SA269, § III. A., ¶ 4, Announced Sept. 27, 2010(citations omitted).

Because the right to oppose another's water application is not a fundamental constitutional right and because . . . classification of governmental and non-governmental entities does not create a suspect class, we review the award of costs against a non-governmental agency pursuant to the rational basis test. Under that test, we consider whether the rule is rationally related to a legitimate state purpose.

Rule 54(d) permits the water court to award costs against private persons but not against the state or its subdivisions. Under the state constitution, the court possesses plenary authority to create procedural rules in both civil and criminal cases. The purpose of this distinction is to protect the public treasury, which, in turn, is consistent with the concept that the government cannot be sued without its consent (i.e., sovereign immunity). The legislature alone has the power to balance the interests between protecting the public against excessive financial burdens and allowing individual parties to sue the government.

If the classification between governmental and non-governmental entities under Rule 54(d) did not exist, then the court would possess the discretion to award litigation costs against the government when it

is not the prevailing party. The government would face the potential of paying its opponent's costs in addition to its own when it pursues a case that is ultimately unsuccessful. Thus, the classification between governmental and non-governmental entities . . . is rationally related to the goal of protecting the public treasury because the rule prohibits a water court from awarding costs to a party who prevails against the government. Hence, we hold that Rule 54(d) violates neither due process nor equal protection guarantees contained in the United States and Colorado Constitutions."

Id. at § III. E., ¶¶ 1-3.