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Sixth Update to Colorado Water Law: An Historical Overview

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ARTICLE UPDATE

SIXTH 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 sixth 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.

In re Tonko

"The remedies and procedures in a district court right-of-way condemnation proceeding are substantially different from those of a water court application proceeding. The condemnation action involves issues such as necessity and valuation in determining the compensation award for a ditch or pipeline right-of-way needed for water transport in the exercise of a water right. The prerequisite for maintaining the condemnation action, pursuant to section 7 of article XVI of the Colorado Constitution and section 37-86-104(1), C.R.S. (2006), is an adjudicated conditional or absolute water right, but the adjudication of such a right is not within the district court's jurisdiction. Adjudication of water use rights belongs to the water court.

The water court process involves a division engineer's consultation report, a referee's investigation, discovery, and a trial regarding contested issues of fact involving claimed water use rights. A water court applicant has incentives and the opportunity to try water use questions that a condemnation proceeding lacks.

The existence or non-existence of the Tonkos' water use rights by reason of the 1908 decree and coterminous conveyance by Picco and Milano to Delisa of a 2/7ths interest in the Tatman Ditch water rights is not identical to the condemnation of a ditch right-of-way issues the district court had before it. The Tonkos' immediate predecessors-in-

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); and the fifth update is at 10 U. DENV. WATER L. REV. 391 (2007).

interest did not have the same incentive or opportunity to litigate water use matters in the condemnation proceeding as they are provided by statute in the water court.

We conclude that the Tonkos' predecessors-in-interest did not have a full and fair opportunity to litigate their water use rights in the condemnation action. The fourth element of issue preclusion is not satisfied.

The Tonkos argue that irrigation of their land is within the 1908 decree and that an undecreed invalid enlargement has not occurred in regard to the Delisa interest in the Tatman Ditch water rights. The Tonkos have asserted facts in support of this contention that are properly triable in the water court, not the district court.

Whether Mallow lawfully extinguished the Delisa Ditch right-of-way across his land and whether the Tonkos proceed with a condemnation action turn on the outcome of their change of water rights application. Because the Tonkos' application to confirm their water use rights comes within the exclusive jurisdiction of the water court, it must be allowed to proceed."

In re Tonko, 154 P.3d 397, 407 (Colo. 2007) (case citations omitted).

Fort Lyon Canal Company v. High Plains A&M, LLC

"We have previously treated the bylaws of a mutual ditch company, like the bylaws of other corporations, as provisions of a contract between the corporation and its stockholders, and we have enforced them as such, as long as a bylaw purporting to further condition or limit the right to change a water right can be given effect consistent with allowing full scope to the jurisdiction of the water court. Whether or not a contract between a mutual ditch company and its stockholders, requiring stockholders to bear the company's legal expenses for opposing their application for a change of water right, without regard to the merits of the application or the opposition to it, would be consistent with the court's statutory discretion to award attorney fees, the provisions of Fort Lyon's bylaws in this case simply do not purport to impose any such burden.

Fort Lyon Canal Company v. High Plains A&M, LLC, 167 P.3d 726, 727-28 (Colo. 2007) (case citations omitted).

"The bylaw refers to a determination by the board whether, and under what circumstances, a requested change may be made without causing injury. It separately refers to proceedings in the water court to obtain a final decree or to challenge the board's determination as arbitrary or capricious. There can be no doubt that the language of the bylaw expressly refers to the board's required determination as "such determination," and it expressly juxtaposes "such determination" and subsequent proceedings challenging its validity "in a court of law having jurisdiction over water matters." Equally clearly, this provision of the bylaws imposes an obligation on the requesting stockholder only for expenses incurred by the board of directors in making "such

determination," and not for additional expenses incurred by the board should it choose to participate in subsequent water court proceedings . . . A contract must be construed to ascertain and effectuate the intent of the parties, as expressed in the contract itself."
Id. at 728 (case citations omitted).

"Fort Lyon argues that the context and circumstances surrounding the adoption of the provision in question demonstrate that it was intended to insulate the company from all expenses associated with a stockholder's application for a change of water right, including the expense of defending the interests of the company's remaining stockholders in proceedings before the water court. Even if that were the case, however, such an intent is not reflected in the unambiguous language of the bylaw. Regardless of the expectations of the drafters of this bylaw or those who voted to adopt it, nothing in the provision itself can reasonably be interpreted to impose an obligation on stockholders to cover any expense beyond that of the "legal and/or engineering services" required by the board in evaluating their written request."
Id. at 729.

Pagosa Area Water and Sanitation District v. Trout Unlimited

"We hold that a governmental water supply agency 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 addition, it must show under the "can and will" test that it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time."
Pagosa Area Water and Sanitation District v. Trout Unlimited, 170 P.3d 307, 309-10 (Colo. 2007).

"As we explained in Bijou, the statute excuses governmental agencies from the requirement to have a legally vested interest in the lands or facilities served, but the exception 'does not completely immunize municipal applicants from speculation challenges.' A governmental agency need not be certain of its future water needs; it may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period

The governmental agency does not have carte blanche to appropriate water for speculative purposes; in effect, the statute provides for a limited exception from certain requirements otherwise applicable to private appropriators. Public agencies must still substantiate a non-speculative intent to appropriate unappropriated water, and they must 'have a specific plan and intent to divert, store, or

otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.' § 37-92-103(3)(a)(II). Accordingly, the governmental agency has the burden to demonstrate that its conditional appropriation is not speculative.

The conditional appropriation must be consistent with the governmental agency's reasonably anticipated water requirements based on substantiated projections of future growth within its service area.

Only a reasonable planning period for the conditional appropriation is allowed. In Bijou, the water court's findings of fact addressed what constitutes a reasonable water supply planning period, fifty years in that case, and found the existence of substantiated population and water use projections. The judgment and decree we upheld also included sufficient 'reality checks' for the purpose of ensuring in subsequent diligence proceedings that the appropriator will utilize the 'newly appropriated rights for its own purposes and does not become a permanent lessor or wholesaler of water yielded by these rights.'

We also determined in Bijou that use of a volumetric limitation in a conditional decree, rather than a flow rate standard, curbs the otherwise speculative tendency of a lengthy conditional appropriation period.

Requiring adjusted, realistic estimates of future need in subsequent diligence proceedings is consistent with the purpose underlying both the anti-speculation doctrine and the diligence requirement, i.e., preserving unappropriated water for future users having legitimate, documented needs.

The anti-speculation and the 'can and will' requirements are closely related. A conditional decree applicant cannot reasonably prove that its project can and will be completed with diligence and within a reasonable time if it lacks the requisite non-speculative intent.

The factors a court considers under the 'can and will' requirement in diligence proceedings include, but are not limited to: 1) economic feasibility; 2) status of requisite permit applications and other required governmental approvals; 3) expenditures made to develop the appropriation; 4) ongoing conduct of engineering and environmental studies; 5) design and construction of facilities; and 6) nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected. The purpose of the diligence proceeding is to gauge whether the conditional appropriator is making steady progress in putting the water to beneficial use with diligence and within a reasonable period of time.

The reason for continued scrutiny of the conditional appropriation through diligence proceedings is to prevent the hoarding of priorities to the detriment of those seeking to use the water beneficially. The effect of a long-term conditional right is to preclude other appropriators from securing an antedated priority that will justify their

investment.

Those in line behind a conditional appropriation for a long planning period risk losing any investment they may make in the hope that the prior conditional appropriation will fail. They also may not be able to raise the necessary funds in the first instance that will enable them to proceed, in light of their subordinated status. Those who obtain a priority date junior to the antedated priority and proceed to put the water to beneficial use must involve themselves in a continued expensive struggle throughout numerous six year diligence periods to knock out all or part of the antedated conditional appropriation, in order to protect their appropriations. The General Assembly's intent is to prevent decreed conditional appropriations from accumulating to the detriment of those whose priority will be advanced by cancellation of the senior conditional priority in whole or part, or those who might proceed to initiate a new or enlarged appropriation.

Thus, in the design of water law, the essential function of the water court in a conditional decree proceeding is to determine the amount of available water for which the applicant has established both a need and a future intent and ability to actually use. As a prerequisite, the applicant has the burden of demonstrating a nonspeculative intent to put the water to beneficial use and, under the 'can and will' test, a substantial probability that its intended appropriation will reach fruition."

Id. at 315-17.

"Based on Colorado's statutory requirements and Bijou, the limited governmental agency exception to the anti-speculation doctrine should be construed narrowly, in order to meet the state's maximum utilization and optimum beneficial use goals. Although the fifty year planning period we approved in Bijou is not a fixed upper limit, and each case depends on its own facts, the water court should closely scrutinize a governmental agency's claim for a planning period that exceeds fifty years.

The ultimate factual and legal issue in a governmental agency conditional appropriation case involves how much water should be conditionally decreed to the applicant. The experts who testified at the water court trial in this case were called upon to address such pertinent factors as: (1) implementation of reasonable water conservation measures for the planning period; (2) reasonably expected land use mixes during that period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes for that period; and (4) the amount of consumptive use reasonably necessary for use through the conditional appropriation to serve the increased population."

Id. at 317-18 (cases citations and statutory quotations omitted).

Buffalo Park Development Company v. Mountain Mutual Reservoir Company

"Any person or organization may maintain a statement of opposition for the purpose of holding the applicant for a conditional water right to a standard of strict proof. In addition, ground water appropriators for small capacity domestic water wells hold vested water rights pursuant to section 37-92-602(3)(II)(A), C.R.S. (2008). These vested water rights are entitled to protection when new conditional water rights or augmentation plans are proposed, independent of whether their owners adjudicate the water rights.

In an effort to protect small agricultural and domestic water users, the General Assembly has created a statutory category for exempt small capacity ground water rights that differ from all other water rights. When issuing permits for small capacity ground water wells for domestic use under section 37-92-602(3)(II)(A), C.R.S. (2008), where the return flow from the single family residential household use is returned to the same stream system in which the well is located, the State Engineer is entitled to presume that this use will not materially injure the vested water rights of others. However, pursuant to section 37-92-602(3)(b)(III), C.R.S. (2008), this presumption does not apply to subdivision ground water appropriations proposed after June 1, 1972.

Thus, the owners of small capacity ground water wells hold vested ground water rights, obtained when they complete their wells and put the ground water to beneficial use. They are exempt from having to apply to the water court for recognition of their water rights and from priority administration by the water officials. Yet, they are entitled to protection of their water rights when new conditional ground water uses or augmentation plans are proposed pursuant to the 1969 Act and the well permit provisions of the Groundwater Management Act.

Section 37-90-137(2)(b)(I), C.R.S. (2008), provides that the State Engineer must make four findings before granting a permit application to construct a well: (1) there is unappropriated water available, (2) the vested water rights of others will not be materially injured, (3) hydrological and geological facts substantiate the proposed well, and (4) the proposed well will be located over 600 feet from any other existing wells. (Emphasis added). Otherwise, the State Engineer must deny the well permit application.Pursuant to section 37-92-305(6)(a), C.R.S. (2008), the water court must accord presumptive validity to the State Engineer's well permit findings.

In lieu of applying for a well permit first, an applicant may elect to file a conditional water right application and/or an augmentation plan application directly with the water court. As the State Engineer must determine whether there is unappropriated water available to supply the proposed new ground water diversion, so must the water court. Pursuant to section 37-92-305(9)(b), C.R.S. (2008), the water court determines whether the applicant claiming the availability of unappropriated water has proved at trial that there is unappropriated water available for appropriation. If not, the court determines pursuant

to section 37-92-305(3),(5) &(8), C.R.S. (2008), whether the applicant has proposed and proved an adequate augmentation plan the operation of which, in accordance with the water court's decree including protective terms and conditions, will prevent material injury to vested water rights or decreed conditional water rights.

In cases where a statement of opposition has been filed to an applicant's augmentation plan, the applicant must provide the water court a proposed ruling or decree to prevent injurious effect to a vested water right or a decreed conditional water right prior to any hearing on the merits of the application. § 37-92-305(3), C.R.S. (2008).

The owner of a vested small capacity ground water right may contest the adequacy of a proposed subdivision well augmentation plan through a statement of opposition in the case, and file for adjudication of his or her in-house residential ground water right's antedated priority date."

Buffalo Park Development Company v. Mountain Mutual Reservoir Company, 195 P.3d 674, 686-87 (Colo. 2008) (case citations omitted).

"Buffalo Park's augmentation plan proposal centered on protecting surface water users. It proposed no augmentation water to protect the vested ground water rights in the vicinity of the Mountain Park Homes and Bear Mountain Vista subdivisions. Its plan for the Cragmont subdivision was based on precipitation and septic return flows being sufficient to replace depletions to the existing wells. It made no evidentiary showing about the timing and amount of depletions and the sufficiency of legally available replacement water, in time and amount, to alleviate injury to the vested ground water rights of the existing well owners in the face of evidence that precipitation infiltrating into the aquifer could not be intercepted without causing injury to existing rights.

Thus, Buffalo Park's evidence did not meet the legal standards for a non-injurious augmentation plan in connection with proposed new ground water diversions, set forth in City of Aurora ex rel. Util. Enter. In contrast, the opposers produced evidence, summarized in part I of this opinion, that the proposed wells for these three subdivisions would materially injure the vested ground water rights of existing home owners. Although section 37-92-305(3), C.R.S. (2008), allows an applicant to propose terms and conditions for an augmentation plan decree necessary to protect against injury to existing vested water rights and conditional water rights, this provision assumes that the applicant bears its burden of proving the amount and timing of depletions from its proposed new diversions and the amount and timing of replacement water from legally available sources to remedy the injurious impact of those depletions upon pre-existing vested rights. This proof cannot be postponed for determination later under retained jurisdiction."

Id. at 690.

Simpson v. Cotton Creek Circles, LLC.

"This is an appeal from a water court's Findings of Fact, Conclusions of Law, Judgment and Decree ("judgment") upholding rules related to certain new withdrawals from the confined aquifer in Water Division Three ("the rules"). Appellant Cotton Creek Circles, LLC ("Opponent") asserts that the rules are invalid because they are contrary to statute and violate the Colorado Constitution. We disagree, and we affirm the water court's judgment upholding the rules."
Simpson v. Cotton Creek Circles, LLC., 181 P.3d 252, 254 (Colo. 2008).

"We affirm the water court's findings of fact 'unless they are so clearly erroneous as to find no support in the record.' However, we review the water court's legal conclusions de novo.

Some of Opponent's arguments implicate the wisdom of the rules. In general, water law regulations are presumed to be valid until shown otherwise by a preponderance of the evidence. However, while courts defer to policy determinations in rule-making proceedings, that deference 'does not extend to questions of law such as the extent to which rules and regulations are supported by statutory authority.' In addition, Opponent makes several challenges to the constitutionality of parts of HB 98-1011 and SB 04-222. 'Statutes enacted by the General Assembly are presumed constitutional and a party asserting that a particular statute violates constitutional provisions assumes the burden of establishing such assertion beyond a reasonable doubt.'
Id. at 260-61 (case citations omitted).

A. Artesian Pressure Provisions Are Valid

Opponent argues that the artesian pressure provisions in SB 04-222 and the rules are invalid. Because the artesian pressure requirements in the rules merely follow the legislative mandate, this is best described as an argument against the validity of the statute itself.

According to Opponent, the artesian pressure requirements violate the right to appropriate by "locking up unappropriated water." Before we turn to this argument, we first explain the appropriation doctrine as it applies in this case. There is no right to divert additional water from the confined aquifer, unless there is unappropriated water available and that withdrawal will not materially injure the vested rights of others. See § 37-90-137(2)(b)(I) (providing that the state engineer may not issue a permit to construct a well unless he or she finds that unappropriated water is available for withdrawal and that the vested rights of others will not be materially injured). Therefore, Opponent's arguments that the rules violate the appropriation provision of the Colorado Constitution must fail unless the confined aquifer contains unappropriated waters. However, the water court found that the waters in both the confined and the unconfined aquifers are overappropriated.

Opponent asserts that the correct measure of whether water is available for new appropriation is whether its use causes material injury

to a senior vested right. This argument does not support overturning the water court's ruling, however, because the water court found that new or increased withdrawals from the confined aquifer system will cause material injury to existing water rights. Consequently, the artesian pressure requirements in SB 04-222 and those in the rules do not violate the constitutional right to divert unappropriated waters because the waters in the confined aquifer are not unappropriated, and thus are not subject to that right.

In addition, the provision in SB 04-222 withstands scrutiny because it has several rational bases. As the water court noted, the artesian pressure requirements help to protect vested water rights, maintain a sustainable water supply in the confined aquifer, and prevent underground water use from interfering with the state's ability to fulfill its obligations under the Rio Grande Compact. The provisions in the rules are based on the legislative mandate from SB 04-222, and are valid as such.

B. One-for-One Replacement Requirement is Valid

Opponent similarly contests the requirement in Rule 6.B.2 that will frequently have the effect of requiring an applicant for a new withdrawal from the confined aquifer to make a one-for-one replacement of that withdrawal. Opponent assumes that the water court's finding that the water is being "mined' is the "linchpin" for Rule 6.B.2, but this assumption is misplaced.

The basis for Opponent's challenge to Rule 6.B.2 is its assertion that the rule violates the right to appropriate. However, as discussed above, the provision cannot violate the constitutional right to divert unappropriated waters because there are currently no unappropriated waters in the confined aquifer. Consequently, while we are not convinced by Opponent's assertion that the water court's finding of mining is unsupported by the record, we need not reach that issue.

C. Nonirrigated Native Vegetation

Opponent also argues that the rules related to nonirrigated native vegetation must be invalidated. Specifically, Opponent objects to the rules' use of the phrase, 'unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation.' See Rule 6.A.2, 6.B.7. In support of its argument that the specified language should not be included in the rules, it notes that SB 04-222 does not contain the phrase quoted above. However, the statutory authority for the phrase is found in HB 98-1011, which uses the quoted language three times. See § 37-90-137(a); § 37-90-137(12)(b)(I) (repealed 2004); § 37-92-305(6)(c). Because the rules mirror statutory law, they do not exceed the scope of the statutory authority.

Because we find that there is a statutory basis for the rules, Opponent's other arguments regarding the treatment of nonirrigated native vegetation are best treated as attacks on the validity of the

statutory provisions. We hold that there is a rational basis for those provisions. For example, the provisions may represent an attempt by the legislature to balance the potential environmental consequences of encouraging eradication of phreatophytes against the potential benefits of salvaging water that would have been used by them.The question of whether to encourage such changed conditions in order to permit increased water use is 'fraught with important public policy considerations.' Thus, the legislature properly exercised its authority by resolving that issue.

D. Finding of Injury is Permissible

Citing Alamosa-La Jara, Opponent asserts that the rules impermissibly create an irrebuttable finding of injury in every instance of a new withdrawal. In Alamosa-La Jara, we held that provisions of rules that presumed 'that each underground water diversion materially injures senior appropriators' were permissible. In so holding, however, we noted that the rules allowed individuals to "retain the right in 'each case' to challenge the application of the aquifer-wide determination of material injury to 'each diversion.'" Opponent notes that Rule 5.F states that new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer will cause material injury and therefore must be properly augmented. Therefore, Opponent argues that the rules eliminate any possibility of showing that a particular diversion will not in fact cause injury to vested water rights.

In fact, the rules are based on a finding of fact that a new withdrawal of groundwater from the confined aquifer will cause injury unless it is properly augmented. Rule 5.F. This finding provides the basis for a requirement that any new withdrawal must prevent injury to senior water rights. See Rule 6.B. Because the confined aquifer is overappropriated all the time, the only way to prevent injury to senior rights would be to require full replacement.

We also note that the rules provide an opportunity to rebut the presumption that the RGDSS model accurately determines the amount, time, and location of depletions and fluctuations in artesian pressure that would be caused by a new withdrawal. Rule 6.B.6. If an applicant for a new withdrawal successfully presents evidence that demonstrates that the withdrawal would not impact artesian pressures, the rules leave open the possibility that the applicant would be permitted to withdraw new water.

E. The Rules Are Not Invalid Because They Fail to Regulate Existing Users

The rules at issue regulate only new withdrawals from the confined aquifer. Opponent argues that by failing to regulate existing wells, the state engineer is abdicating his responsibility. To the extent that Opponent argues that the rules must fail because they regulate only new withdrawals, and fail to also regulate existing users, we reject their argument.

Opponent does not cite any statutory provisions that could be construed as requiring the rules to regulate both existing and new water users of the confined aquifer. Indeed, SB 04-222 gives the state engineer 'wide discretion to permit the continued use of underground water consistent with preventing material injury to senior surface water rights.' § 37-92-501(4)(a). In addition, we note that nothing in the rules precludes further regulation of existing wells. Thus, we find that the rules do not violate statutory authority by regulating only new water uses.

F. HB 98-1011, SB 04-222, and the Rules Do Not Violate Equal Protection

Similarly, Opponent argues that the rules violate equal protection because they regulate new diversions without regulating existing diversions, and because they regulate withdrawals from the confined aquifer but not withdrawals from the unconfined aquifer. To the extent that these distinctions are required by HB 98-1011 and SB 04-222, they argue that those statutes similarly violate equal protection.

In order to succeed in showing that equal protection was denied, Opponent is required to show that the classification at issue 'lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated.' In addition, '[i]f any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.' Because a rational basis exists for treating the groups at issue here differently, Opponent's argument fails.

First, there is a rational basis for treating those who would make new withdrawals from the unconfined aquifer differently from those who would make new withdrawals from the confined aquifer. While the confined and unconfined aquifers are hydraulically connected, they are separate systems with different characteristics. For instance, as the water court notes, the confined aquifer is under artesian pressure while the unconfined aquifer is not, and there is substantial evidence as to the negative effects of decreasing artesian pressure. Therefore, it would be rational to conclude that the issues facing regulation of the confined aquifer are acute and different from the issues facing regulation of the unconfined aquifer.

In addition, there is a rational basis to distinguish between those who currently have the right to withdraw water from the confined aquifer and others who have not yet obtained a water right. There are fewer, if any, due process issues with regulating potential water users who do not have any existing water rights as compared with those who have perfected a water right by actual beneficial use. Therefore, a rational basis exists for the distinction, and it does not violate equal protection.

Id. at 261-64 (case citations omitted).

Archuleta v. Gomez

"In addition to standing for the proposition that an adverse possession claimant must demonstrate actual beneficial use of the deeded owner's water right, our cases establish that no person can revive or adversely possess an abandoned water right. Thus, adverse possession cases should address whether the deeded owner abandoned the water right. If the right has been abandoned, the water belonging to it for beneficial use reverts to the stream, and the right cannot be revived through adverse possession.

Instead, the adverse possession claimant must show that the adjudicated irrigation water right at issue was continuously put to beneficial use on lands irrigated by the claimant, rather than the deeded owner, during the statutory period. Section 37-92-402 (10), C.R.S. (2008), of Colorado's 1969 Water Right Adjudication and Administration Act provides that ten or more years of non-use of a water right by the person entitled to use the right creates a rebuttable presumption of abandonment to the stream of the right, or that part of the right, which has not been exercised. Abandonment is defined as 'the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.'

§ 37-92-103(2), C.R.S. (2008) (emphasis added).

A presumption of abandonment requires the concurrence of two elements: non-use for the statutory period (ten years) and the intent to abandon. This presumption may be rebutted by evidence of the owner's intent not to abandon the right; evidence rebutting the presumption of abandonment may include such acts as loaning or leasing the water to others or good faith efforts to sell the water right. Abandonment of a water right may occur in whole or in part; the amount of water abandoned reverts to the stream, to the benefit of other rights in order of their adjudicated priority. Evidence rebutting the presumption of abandonment may also be adduced by an adverse possession claimant who demonstrates his or her continuous use of the deeded owner's interest in the adjudicated water right."

Archuleta v. Gomez, 200 P.3d 333, 344 (Colo. 2009).

"We summarize our precedent applicable to the 'actual' use element of adverse possession in an irrigation water rights case. Because actual beneficial use is the basis, measure, and extent of an appropriative water right for irrigation in Colorado, an adverse possession claimant to an irrigation water right has the burden to establish, by a preponderance of the evidence, the amount of water expressed in acre feet belonging to the deeded owner's water right that the adverse claimant has placed to beneficial consumptive use. Quantification proof is essential because the effect of a successful adverse possession claim is to transfer, in whole or in part, the ownership of the irrigation water right's beneficial consumptive use

entitlement, under its adjudicated priority, from the deeded owner to the adverse claimant.

Water that an adverse possession claimant has intercepted in the ditch from the deeded owner's interest in the adjudicated irrigation water right, but which has not been beneficially consumed by either the claimant or the deeded owner, presumably has returned to the tributary aquifer or the surface stream. Mere diversion of water cannot be counted as an actual beneficial use upon which adverse possession can be founded because 'to make [a diversion of water into a constitutional appropriation] it must be . . . actually applied to the land.' In addition, return flow water belongs to the stream as part of the public's water resource for use by others in order of their decreed priorities."

Id. at 346 (citations omitted).

North Sterling Irrigation District v. Simpson

"The General Assembly has charged the state engineer and division engineers with administering, distributing, and regulating the waters of the state. § 37-92-501(1), C.R.S. (2008). Water officials must distribute water according to the order of priority as fixed by judicial decrees.Direct flow water rights and storage water rights are entitled to administration based on their priority, regardless of the type of beneficial use for which the appropriation was made. The state engineer is authorized to adopt rules and regulations to assist in, but not as a prerequisite to, the fulfillment of these duties. § 37-92-501(1). The state and division engineers are also authorized to curtail diversions that contravene applicable law. § 37-92-502, C.R.S. (2008).

One such applicable law is the 'one-fill' limitation on water storage rights. Colorado law dictates that a reservoir is limited to one annual filling, according to its decreed capacity. Where a decree expressly addresses how diversions are to be accounted for under the one-fill rule, the water officials must administer the storage right pursuant to the decree. However, where, as here, storage decrees are silent on the issue, the state engineer and division engineers are bound by their statutory mandate to account for, and if necessary, curtail diversions that violate the one-fill rule.

On the basis of the foregoing, the water court held that the Engineers are vested with the authority to institute a fixed water year in order to fulfill their statutory function of administering NSID's storage rights pursuant to law. According to the court, by instituting a fixed water year beginning November 1, the Engineers are able to keep track of how much water has been diverted during a one-year period. Once the holder of a water storage right has filled its right once, the right is satisfied and the Engineers can refuse to honor a call during the remainder of that one-year period. The court concluded that such fixed-year administration was necessary to protect against the enlargement of NSID's storage rights beyond its one fill in a given year."

"Because NSID's rights have historically been administered

consistent with a fixed water year, NSID has not demonstrated any legal injury associated with a change in administrative policy. In any event, such a claim of injury would not be cognizable, as NSID's decrees do not address how diversions are to be accounted for under the one-fill rule. Where storage decrees are silent with respect to the administration of the one-fill rule, the Engineers have authority under sections 37-92-501 and 502 to determine how to administer Colorado's one-fill mandate. 'In times of short supply, water users depend on the Engineers to curtail undecreed uses and decreed junior uses in favor of decreed senior uses.' Here, the Engineers have implemented a fixed water year in order to prevent the undecreed use of water in excess of the one-fill rule and thereby attain the security of other adjudicated water rights. This action is within the authority conferred upon them by law."

North Sterling Irrigation Dist. V. Simpson, 202 P.3d 1207, 1210-11 (Colo. 2009) (citations omitted).

Cornelius v. River Ridge Ranch Landowners Association (No. 08SA83, March 2, 2009)

"Here, there was extensive nondisclosure. Cornelius failed to provide any initial disclosures required by Rule 26(a), although he was notified several times of the need to do so. Rule 26(a) disclosures begin the discovery process and provide parties with a starting point for gathering information about the case. Under Rule 26(a), among other things, parties must disclose the names and addresses of individuals with discoverable information; copies of, or a description by category and location of all documents and tangible things in each party's possession relevant to the case; and the identity of any person who may testify as an expert at trial. With the information provided by Rule 26(a) disclosures, parties may make specific requests for information or clarification of disclosed information.

Cornelius's applications required precise information about senior appropriations in the basin, whether his proposed diversion would harm senior water rights, and the replacement of source water resulting from his proposed out-of-priority diversions. The applications contained only general categories stating the proposed beneficial use of the water — domestic, commercial, and livestock — and did not identify end users or the particular manner in which the water would be used. Because the Arkansas and Cucharas Rivers are overappropriated, Cornelius's proposed plan for augmentation was crucial. However, Cornelius only proposed to augment one of the thirty wells from which he was seeking to appropriate. Accordingly, as a threshold matter, Cornelius would need to demonstrate his proposed diversions would not harm senior rights — a difficult task in an overappropriated basin when not relying on an augmentation plan. Further, Cornelius's proposed single well augmentation plan provided almost no detail with regard to the manner in which it would operate. It simply stated the well in question would 'be engaged and piped to the Cucharas River in

an adequate amount to augment the water consumed.'"

Cornelius v. River Ridge Ranch Landowner Ass'n, 202 P.3d 564, 570 (Colo. 2009) (case citations omitted).

"Cornelius argues that, if it was not error to dismiss the cases, it was nonetheless improper for the trial court to dismiss the cases with prejudice. He contends dismissal with prejudice was improper for two reasons: (1) the Opposers could have mitigated any harm caused by his delay in prosecution through filing a motion to compel or interrogatories; and (2) Cornelius is now likely to comply with the disclosure requirements because he is represented by counsel. Cornelius did not present this argument to the water court, and raises it for the first time on appeal.

Cornelius's argument does not change our analysis of whether dismissal was proper. A trial court retains the discretion to dismiss an action with or without prejudice. C.R.C.P. 41(b). After balancing the unreasonableness of the delay with the proffered mitigating circumstances, dismissal with prejudice may be appropriate if the defendants are harmed as a result of the plaintiff's failure to prosecute. As we stated above, the Opposers were harmed as a result of Cornelius's delay, and Cornelius's proffered mitigating circumstances do not outweigh the unreasonableness of that delay.

Cornelius's argument that the Opposers could have mitigated harm through filing a motion to compel or interrogatories is unpersuasive because, as discussed above, it is the plaintiff's duty to prosecute a case. Cornelius's argument that he is now likely to comply with the disclosure requirements similarly fails. The simple fact that, given a second chance, a plaintiff would prosecute a case more diligently does not excuse an initial failure to prosecute or mean that a case should not be dismissed with prejudice. Cornelius has presented no case law suggesting the contrary. Rather, he again argues that because he was previously not represented by counsel, he did not know of his disclosure obligations. As discussed above, pro se parties are held to the same rules as parties represented by counsel.

We conclude that the water court did not abuse its discretion in dismissing with prejudice Cornelius's applications for appropriation of water rights and plan for augmentation. Cornelius's large-scale nondisclosure and failure to provide the Opposers and water court with any information about his applications other than that contained in his initial applications constituted a failure to prosecute. The Opposers were prejudiced by this delay and Cornelius has failed to provide any mitigating reasons to account for the delay."

Id. at 572-73. (case citations omitted).