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Fourth Update to Colorado Water Law: An Historical Overview

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ARTICLE UPDATE

FOURTH UPDATE TO COLORADO WATER LAW: AN HISTORICAL OVERVIEW

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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 fourth 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.

Simpson v. Bijou Irrigation Co.

"As a result of the [1969] Act's stated policy of conjunctive use, wells were required to be integrated into the priority system, although unadjudicated wells in existence prior to 1969 were allowed to continue. The Act nevertheless encouraged the adjudication of existing wells by allowing well owners who filed an application by July 1, 1971, to receive a water decree with a priority dating back to their original appropriation date.

The 1969 Act also introduced the concept of augmentation plans into the water law adjudication and administration scheme. Augmentation plans were the primary means provided by the Act for integrating groundwater into the state priority system . . . ."

Simpson v. Bijou Irrigation Co., 69 P.3d 50, 60 (Colo. 2003) (citations and footnotes omitted).

"In response to the large number of augmentation plan applications which had been filed, in 1974 the General Assembly vested the State Engineer with the authority to grant temporary approval of augmentation plans. Significantly, however, a precondition to even temporary approval by the State Engineer was that the water user had an augmentation plan application pending in water court.

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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); and the third update is at 6 U. DENV. WATER L. REV. 116 (2002).

In an effort to address the concern expressed by this court about the constitutionality of the 1974 amendments in *Kelly Ranch v. Southeastern Colorado Water Conservancy District,* however, the General Assembly in 1977 repealed the State Engineer's authority to approve temporary augmentation plans. Before passage of the 1977 Act, the legislature considered, but rejected, an alternative bill that would have retained the State Engineer's temporary augmentation plan approval authority while adding additional notice provisions to cure the perceived procedural shortcomings of the statute. The rejection of the alternate bill was at least partially motivated by concern over the potential overlap of administrative and adjudicative functions it would have created in the State Engineer."
Id. at 61 (citations and footnotes omitted).

"In response to this court's holding in *Empire Lodge* and in order to 'establish some additional authority for the state engineer to approve substitute water supply plans,' section 37-92-308(1)(a), the General Assembly in 2002 enacted section 37-92-308, 10 C.R.S. (2002). [T]he statute provides that 'the state engineer is authorized to review and approve substitute water supply plans that allow out-of-priority diversions only under the circumstances and pursuant to the procedures set forth in this section.' § 37-92-308(2). The statute then sets out four limited circumstances under which the State Engineer may grant temporary approval of substitute supply plans:

(1) If an applicant had a substitute supply plan approved prior to January 1, 2002, the State Engineer may approve one additional year of use. After that year, applicants are required to seek an augmentation plan decree from the water court.

(2) If an applicant has filed an application with the water court for approval of an augmentation plan upon which the court has not yet ruled, the State Engineer, after providing sufficient notice to other water users and making a finding of no injury, can temporarily approve the augmentation plan for up to one year. This approval is annually renewable for up to three years, with a showing of justifiable delay necessary for extensions beyond three years.

(3) If an applicant's use will not exceed five years, the State Engineer, after providing sufficient notice to other users and making a determination of no injury, may approve the plan annually for up to a total of five years.

(4) If the State Engineer determines that an emergency situation exists and has made a finding of no injury, he may grant temporary approval of a substitute supply plan for up to ninety days.

This review of legislative history convinces us of the General Assembly's intent to consign the matter of approving ongoing out-of-priority groundwater diversions using replacement water exclusively to the water courts. In 1969 and again in 1977 when it repealed the State

Engineer's short-lived temporary augmentation plan approval authority, the General Assembly rejected the idea of granting the State Engineer such approval power due to concern over overlapping administrative and judicial authority and the inordinate amount of power this would have vested in the State Engineer. Even when the State Engineer was given temporary approval authority during the period between 1974 and 1977, that approval was conditioned upon the water user having filed an augmentation plan application in water court. Those bills which were enacted into law in 1969 and 1977 evidence a steadfast legislative intent to make augmentation plan approval an adjudicatory function of the water courts as opposed to an administrative task of the State Engineer.

Any lingering doubt as to this intent was conclusively put to rest with the enactment in 2002 of section 37-92-308, 10 C.R.S. (2002), which unambiguously provides that it is the province of the water courts to approve and decree augmentation plans, except in the four limited circumstances set out in subsections (3), (4), (5), and (7) of the statute, which allow the State Engineer to grant temporary substitute supply plan approval pursuant to the express provisions of those subsections."

Id. at 62-63 (citations and footnotes omitted).

"We affirm the trial court's ruling voiding the proposed 2002 South Platte River basin rules to the extent those rules provide for State Engineer approval of 'replacement plans' allowing the out-of-priority diversion of groundwater in the absence of any provision requiring that an application for an augmentation plan be filed with the water court. We hold that the State Engineer can only grant temporary approval of augmentation plans pursuant to the four narrowly circumscribed situations set forth in sections 37-92-308(3), (4), (5), and (7), 10 C.R.S. (2002).

We reverse the trial court's ruling that the State Engineer is without authority to promulgate rules to enforce the terms of the South Platte River Compact pursuant to section 37-80-104. We disagree with the trial court's conclusion that the compact is self-executing, holding instead that due to increased well pumping and the advent of maximum utilization of the waters of the state, simple priority administration as provided for in the compact is insufficient to ensure compact compliance. In exercising his compact rule power, however, the State Engineer is constrained by all statutory restrictions imposed on his water rule power, including those set forth in section 37-92-308, 10 C.R.S. (2002).

Finally, we affirm the trial court's holding that State Engineer promulgated rules and regulations may not take effect until protests have been judicially heard and resolved pursuant to the procedures provided in sections 37-92-501(3) and 37-92-304, 10 C.R.S. (2002). We

therefore remand this case to the trial court for further proceedings consistent with this opinion."
Id. at 72-73 (citations and footnotes omitted).

Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder

"For virtually all of the reasons we gave for interpreting C.R.C.P. 41(a)(2) to authorize an award of attorney fees as a condition of dismissal without prejudice, the rule cannot be understood to authorize attorney fees as a condition of dismissal with prejudice. A dismissal with prejudice does not circumvent the limitations of res judicata or afford any advantage for which attorney fees are the 'quid pro quo.' The plaintiff is barred from future litigation of the same issues to the same extent as would be the case if he had proceeded to adverse judgment. And if a plaintiff were subject to attorney fees despite moving to dismiss with prejudice upon determining that his claim was no longer meritorious, there would be little incentive in moving to dismiss rather than proceeding to some other resolution. Like the corresponding federal rule, C.R.C.P. 41(a)(2) does not provide a separate basis for imposing attorney fees as a condition of dismissing an action with prejudice."
Groundwater Appropriators of S. Platte River Basin, Inc. v. City of Boulder, 73 P.3d 22, 25-26 (Colo. 2003) (before trial, applicant dismissed two of its claimed storage rights with prejudice and proceeded on the third).

"In conjunction with a cross-motion for summary judgment, the irrigation companies and Boulder challenged the temporary substitute supply plan approved by the state engineer in 1972 and moved to enjoin [Groundwater Appropriators of the South Platte] members from extracting water pursuant to the plan. The water court denied the motion as unrelated to the pending application, noting that the irrigation companies and Boulder could bring a separate action pursuant to C.R.C.P. 65.

. . . .

The jurisdiction of water judges over all water matters . . . extends well beyond the special statutory proceedings for determination of water rights."
Id. at 26-27 (citation omitted).

"Because C.R.C.P. 41(a)(2) does not authorize the imposition of attorney fees as terms and conditions for the voluntary dismissal of applications for water rights with prejudice, the Water Court's order for attorney fees is reversed; and because the injunction sought by the irrigation companies and the City of Boulder is outside the statutorily prescribed scope of a proceeding for the determination of water rights

and would conflict with the purposes of such a proceeding, the water court's denial of the motion made by the irrigation companies and the City of Boulder is affirmed."
Id. at 27-28.

Vought v. Stucker Mesa Domestic Pipeline Co.

"To decree a conditional water right, the water court must find and conclude that the applicant completed the first step for an appropriation and that the applicant can and will complete the appropriation diligently and within a reasonable time.

. . . The priority date of the water right is a function of the appropriation date and the adjudication date. The adjudication date is the year in which the application is filed; the appropriation date is the date on which the appropriator completed the first step towards the appropriation.

The first step towards an appropriation is complete when overt acts coalesce to openly demonstrate the applicant's intent to appropriate the water for a beneficial use; whether the intent or the acts occurred first makes no difference."
Vought v. Stucker Mesa Domestic Pipeline Co., 76 P.3d 906, 912 (Colo. 2003) (citations omitted).

"The first prong of the first step test requires the intent to appropriate water. Intent to appropriate requires 'a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source.' The intent must be relatively specific regarding the amount of water to be appropriated, its place of diversion, and its type of beneficial use; but, for the purposes of a conditional water right decree, the applicant need not know the exact amount of water or point of diversion at the time of the first step. The applicant may demonstrate intent by filing the conditional water right application.

The second prong of the first step test requires that the applicant perform an overt act or acts in furtherance of the intent to appropriate water and apply it to a beneficial use. The overt act or acts must fulfill three functions: (1) manifest the necessary intent to appropriate water to beneficial use; (2) demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) constitute inquiry notice to interested persons of the nature and extent of the proposed demand upon the water supply. The overt acts can be physical acts or other useful acts towards effectuating an appropriation, such as planning the appropriation of water, undertaking studies regarding feasibility of the diversion, expending human or financial capital in activities connected with the appropriation, or applying for required permits.

The first function of the second prong of the first step test, manifesting intent to appropriate water for a beneficial use, is similar to the

first prong (intent). When the applicant proves an overt act demonstrating intent, he or she also proves the first prong of the first step test. Filing an application for a conditional water right can satisfy the intent prong of the first step test and fulfill the first function of the second prong, manifesting the intent to appropriate water.

The second function of the second prong of the first step test, taking a substantial step towards applying the water to a beneficial use, turns on the facts of the case. There is no bright line rule for when an act constitutes a sufficient 'substantial step.' In [*City of*] *Thornton* [*v. Bijou Irrigation Co.*], we explained that it is unlikely that the act of filing an application for a conditional water right, without any other actions, will fulfill the second function of the second prong of the first step test. A detailed field survey can constitute a substantial step in some circumstances. However, whether a field survey performs this function is fact-specific. In *Bar 70* [*Enters., Inc. v. Tosco Corp.*], we held that a field trip by applicants fell short of constituting a substantial step toward appropriation, when the applicants failed to approach the proposed pumping site, failed to survey the points of diversion and storage, and failed to locate monuments or set stakes.

The third function of the second prong of the first step test, giving notice to interested persons of the nature and extent of the proposed demand upon the water supply, is perhaps the most important function. It must place other potential or actual appropriators on inquiry notice regarding the source of the water supply, point of diversion, beneficial use, and amount of diversion.

Inquiry notice requires more than mere notice of an unrefined intent to appropriate, but less than a detailed summary of exact diversion specifications. Filing an application for a conditional water right can provide sufficient notice of the intent to appropriate. A field survey of the proposed appropriation site, without visible staking or posting, does not provide the required notice. Even a field survey, where signs are posted alerting readers of a pending water right application, provides insufficient notice where the signs do not indicate the potential uses or potential quantities of water proposed for diversion.

. . . .

In addition to satisfying both prongs of the first step test, the applicant must demonstrate that he or she meets the can and will test."
Id. at 912-913 (citations and footnote omitted).

"We hold that the water court correctly determined that the second visit to the site, when the GPS location was fixed, manifested Stucker Mesa's intent to appropriate the water from the springs for beneficial use and constitutes a substantial step toward appropriation, but the water court incorrectly determined that the visit is sufficient to place other appropriators on inquiry notice of the nature and scope of the appropriation. Stucker Mesa first gave the requisite inquiry notice

when it filed its water court applications. As a matter of law, Stucker Mesa's date of appropriation is October 6, 2000, the first date on which Stucker Mesa's overt acts coalesced to fulfill the three required functions of the second prong of the first step test."
Id. at 916-17.

East Twin Lakes Ditches and Water Works, Inc. v. Board of County Commissioners of Lake County

"Because intent is a subjective element that is difficult for a complainant to prove by direct evidence, Colorado law provides that failure to apply water to a beneficial use for a period of ten years creates a rebuttable presumption of abandonment. The presumption of abandonment shifts the burden of going forward to the water rights owner, but is insufficient in and of itself to prove abandonment. Rather, the element of intent remains the touchstone of the abandonment analysis, and the owner of the water right can rebut the presumption of abandonment by introducing evidence sufficient to excuse the non-use or demonstrate an intent not to abandon. Acceptable justifications for an unreasonably long period of non-use are limited, however, and a successful rebuttal requires objective and credible evidence, not merely subjective statements of intent by the water rights owner."
E. Twin Lakes Ditches and Water Works, Inc. v. Bd. of County Comm'rs of Lake County, 76 P.3 d 918, 921-22 (Colo. 2003) (citations omitted).

"Because resolution of an abandonment case is largely based upon the weighing of evidence and assessing the credibility of witnesses, this court has consistently held that the water court's resolution of an abandonment case will not be disturbed on appeal unless the evidence contained in the record is 'wholly insufficient to support the decision.' It is therefore incumbent upon this court to search the record for any evidence in support of the decision, and if successful, to uphold the decision even if, had this court been the trier of fact, it might have held differently."
Id. at 922 (citations omitted).

Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District

"First, we hold that House Bill 98-1151 does not violate Article XVI, sections 5 and 6 of the Colorado Constitution because the doctrine of prior appropriation does not apply to the allocation and administration of designated ground water located within the Denver Basin Aquifers. As is the case with nondesignated, nontributary water, the General Assembly exercises plenary authority over Denver Basin bedrock aquifer ground water. Hence, the legislative provision in question, which concerns the allocation and administration of designated Den-

ver Basin ground water, is constitutional and we affirm the trial court on this issue.

Second, we reverse the ground water judge's construction of subsection (7). We hold that § 37-90-107(7) vests the Commission with the authority to determine a use right for the withdrawal of Denver Basin designated ground water by overlying landowners, or those acting with landowner consent, whose land lies within the boundaries of a designated ground water basin that is located in the Denver Basin. The Commission determines the applicant's use right. A use right is a specific entitlement to a quantity of Denver Basin ground water underneath the applicant's land which constitutes a final determination of the water right. The Commission retains authority, however, to adjust this amount to conform to the actual aquifer characteristics encountered upon drilling the well or test holes. The Commission's determination of this use right constitutes a final determination of the right, and the landowner need not drill a well to obtain this determination. The owner of land that both overlies the Denver Basin Aquifers and is located within a designated ground water basin possesses a statutorily-created, inchoate right to apply to the Groundwater Commission for the right to use the waters of the aquifers underneath his land by virtue of land ownership.

Third, we affirm the ground water judge and hold that the Ground Water Management Districts possess no statutory authority to determine an applicant's water use right under § 37-90-107(7). The District's regulatory authority begins once a permit has been issued. Hence, an applicant seeking the Commission's determination of its use right need not initially submit its application to the Water District for approval.

Fourth, because all water within this state, surface or ground water, is a public resource and no person owns the public's water, we reverse the ground water judge and hold that the anti-speculation doctrine applies to the Commission's determination of the applicant's right to use these waters. The applicant must establish a threshold showing that either there is a beneficial, non-speculative use that will not create unreasonable waste for the water on the applicant's land, or that the applicant has a contract with a private or public entity for the water's beneficial use if the use will occur on land other than the applicant's.

Lastly, we remand this case to the ground water judge with directions to reinstate his finding from his initial orders that the Bradburys' applications were not speculative and satisfied the anti-speculation doctrine. We then direct him to return the case to the Commission for further proceedings consistent with this opinion."

Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt Dist., 77 P.3d 62, 66-67 (Colo. 2003).

"Whether portions of the Denver Basin aquifers lie underneath designated ground water basin areas, subject to Commission jurisdic-

tion, or nondesignated areas, subject to either the jurisdiction of the state engineer or the water court, the allocation of Denver Basin ground water is subject to the same standard: withdrawals are based upon an aquifer life expectancy of one hundred years and the quantity of water available for withdrawal shall be that quantity of water underlying the land owned by the applicant or someone acting with her consent."
Id. at 74 (citations omitted).

"The plain wording of House Bill 98-1151 thus provided the Commission with new authority to determine the use right of Denver Basin designated ground water in the same manner that a water court would for nondesignated Denver Basin ground water. In addition, House Bill 98-1151 eliminated the two step Commission permit process, and the landowner need not construct a well to determine her use right. As such, this legislation corrected the inconsistent treatment that existed between future well users in designated and nondesignated areas of the Denver Basin."
Id. at 77 (footnote omitted).

"All water within Colorado is a public resource, and no person owns the public's water. Rather, persons may obtain rights of use under applicable provisions of law. The administration of a water use right, as we have seen, depends upon the statutory allocation of the category of waters to which the right attaches. Even though Denver Basin ground water is allocated and managed differently from tributary surface waters, the CGMA mirrors the anti-speculation, beneficial use, and non-waste precepts of Colorado water law."
Id. at 78 (citations omitted).

"[I]t would be logically inconsistent to apply this conservation doctrine to waters that are seasonably replenishable but not to waters that are finite and exhaustible. . . .

This conservation doctrine should apply when the Commission fixes or quantifies the landowner's water use right. In other words, the anti-speculation doctrine applies when the Commission makes the final determination of the amount of ground water allocated to the use right, acting pursuant to the provisions of subsection (7). § 37-90-107(7)(c)(III) . . . .

Thus, when the Commission determines a water use right to designated ground water in the Denver Basin under § 37-90-107(7), an applicant must establish a threshold showing that there exists a beneficial, non-speculative use for the amount of allocated designated Denver Basin ground water that will not create unreasonable waste. If the use will occur on land other than the applicant's, then the applicant must establish that the applicant has a contract or agency relationship with another entity for the water"s beneficial use."

Id. at 80 (citation omitted).

Moyer v. Empire Lodge Homeowners' Ass'n

"As this court has previously recognized, the Uniform Local Rules For All State Water Court Divisions indicate their intent that the Colorado Rules of Civil Procedure, 'including the state-wide practice standards set out in C.R.C.P. 121,' apply to water court practice and procedure, 'except as expressly provided in these rules.' C.R.C.P. 121, § 1-22, requires a party claiming costs to file a Bill of Costs within 15 days of judgment or 'such greater time as the court may allow.' Although the water court did not specify an alternate deadline in its original Order and Judgment, in response to the Moyers' first request for extension of time, it expressly ordered that they be granted to and including April 28, 2000, within which to file."
Moyer v. Empire Lodge Homeowners' Ass'n, 78 P.3d 313, 314-15 (Colo. 2003) (citations omitted).

"When the Moyers finally filed their Bill of Costs, Empire Lodge objected, and the water court denied the Bill of Costs as untimely. Treating Empire's failure to object to the April 25, 2000 motion for enlargement as a confession of the additional time it requested, the water court found that the Bill of Costs was nevertheless filed 20 months outside the time requested by the Moyers and acquiesced in by Empire. . . .

Because the Bill of Costs was not filed within the time ordered by the water court and the water court did not abuse its discretion in failing to permit a 20-month late filing, the order of the water court is affirmed."
Id. at 315-16.

City of Golden v. Simpson

"The City of Golden, the petitioner, makes two arguments. First, it claims that the water court was incorrect when it employed the plain language of the 1966 change decree to hold that Golden did not have a valid right to 3.42 cfs of Priority No. 5 water when two conditions were met: over 3.5 cfs of water was flowing at the Oulette Ditch headgate, and FHL had a call on Clear Creek. Second, Golden argues that the water court erred when it dismissed Golden's complaint for injunctive relief without a separate hearing on the matter.

We reject both arguments. Although the City of Golden offers several creative interpretations of the 1966 change decree, we agree with the water judge that the terms are clear: Golden does not have the right to divert water from Clear Creek when the two conditions are satisfied, and in this case they were. Because the decree is clear on its face, no extrinsic evidence is admissible to alter its plain meaning."
City of Golden v. Simpson, 83 P.3d 87, 91-92 (Colo. 2004).

"Once a change is adjudicated, courts consider the matter fully litigated, and will not reopen a final case in order to alter or add to the terms of the decree. A change decree includes a specified period of retained jurisdiction to address injurious effects that may result from placing the change of water right into operation.

Courts interpret a stipulated change decree as they would interpret a contract. A court's primary goal is to implement the intent of the parties as expressed in the language of the decree. To ascertain this intent, the courts turn to the plain and ordinary meaning of its terms. If the terms are clear, a court will neither look outside the four corners of the instrument, nor admit extrinsic evidence to aid in interpretation. Disagreement between the parties involved does not necessarily indicate that the documents are ambiguous. Instead, the court must adopt the plain and generally accepted meaning of the words employed. If the contract involved is a stipulation, such as this change decree, any party that participated in the original stipulation is proscribed from introducing legal contentions contrary to the plain meaning of the decree. This approach lends consistency and stability to Colorado water law and decrees."
Id. at 92-93 (citations omitted).

"[T]he drought of 2002 was remarkably severe, and the lack of enforcement of the decree's conditions in the past cannot be dispositive of the 2002 situation.

. . . Golden's various interpretations of the 1966 change decree and attempts to introduce extrinsic evidence are ineffective because the decree is plain on its face. The water judge was correct in deciding that the decree requires Golden to cease and desist diverting water under its Priority No. 5 rights at the Church Ditch whenever: (1) FHL makes a call at the FHL Canal headgate, and (2) the total flow at the Oulette Ditch headgate is greater than 3.5 cfs. This interpretation satisfies the intent of the parties to prevent the change decree from injuring users of Clear Creek water."
Id. at 96.

"When water rights are in dispute, and one party is not receiving its entitled allotment, time is of the essence. That is why section 37-92-503 requires the water court to expedite a 503 hearing and decide the case at the conclusion of the hearing. This case offers similar concerns. FHL was not receiving the water to which it was entitled. Golden continued diverting water despite FHL's call and the state's cease-and-desist order. When the court decided, as a matter of law, that Golden was not entitled to the 3.42 cfs of water that it continued to divert, the court properly dismissed Golden's case and upheld the cease-and-desist order."
Id. at 98.

Hammel v. Simpson

"Abandonment need not be proved directly; the water court may infer the intent to abandon from the facts of the case. Here, the trial court found that no beneficial use of water from the decreed well was made from at least 1974 to 1998.

. . . .

Because our review of the record does not disclose any evidence rebutting the presumption of abandonment, we affirm the water court's order."
Hammel v. Simpson, 83 P.3d 1122 (Colo. 2004).

Trail's End Ranch v. Colorado Division of Water Resources

"Although one of the incidents of a water right is the right to change the point of diversion (to the extent that it neither enlarges the right nor injuriously affects other users), such a change constitutes a change of the water right itself. It must therefore be applied for and adjudicated in substantially the same manner as the initial determination of the water right."
Trail's End Ranch v. Colo. Div. of Water Res., 91 P.3d 1058, 1061 (Colo. 2004) (citations omitted).

"In light of the stipulation of facts and the arguments advanced throughout by Trail's End, there can be no dispute that it proposed to divert water from Spruce Creek at its decreed points of diversion and, before applying that water to a beneficial use or placing it into a decreed place of storage, return it by ditches to Spruce Creek, for subsequent removal further downstream. The proposal would not add to the creek any water that was not already there and would clearly have no effect on the natural course of the creek. The water subject to downstream removal would therefore continue to flow along the existing course of Spruce Creek at the undecreed points proposed for its removal, whether or not it were briefly detoured at an upstream location by Trail's End. Under these circumstances, the proposed downstream takings constitute diversions within the contemplation of the statute and cannot benefit from the priorities of existing water rights without a change of those rights."
Id at 1062.

"Far from a mere formality, the adjudication of changes to the point of diversion of an existing water right provides an important protection for potentially affected decreed water rights holders. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Because an absolute decree is itself not an adjudication of actual historic use but is implicitly further limited to actual historic use, in order to insure that a change of

water right does not enlarge an existing appropriation, its 'historic beneficial consumptive use,' must be quantified and established before a change can be approved. There is no apparent purpose, other than circumventing the statutory requirement to adjudicate a change of water right, to be served by Trail's End's proposed rerouting operations, and none has been offered by Trail's End."
Id. at 1063 (citations omitted).

City of Black Hawk v. City of Central

"Unlike West Elk and FWS, this case does not involve a final denial of access to state or federal property. Here, even though Black Hawk's claim for a conditional water right in Chase Gulch Reservoir had been filed a decade before, Central City waited until nine days before trial to pass a nonbinding resolution stating that it would not enter into agreements with third parties seeking to use its property interests to construct water projects. The resolution was general in nature and referred to neither Black Hawk nor Chase Gulch Reservoir. The mayor of Central City admitted that the resolution may not bind future city councils. In light of this testimony, the water court found that Black Hawk satisfied the access to property element of the can and will test.

After reviewing the evidence presented at trial, we hold that the water court did not err in finding that Black Hawk adequately satisfied the access to property requirement of the can and will statute. The court's finding was not 'so clearly erroneous as to find no support in the record.' We base this holding on the fact that lack of current access to property is not typically dispositive of whether the can and will test is satisfied, and on the water court's finding that Black Hawk had satisfied all of the other requirements of the can and will statute. In addition, our holding relies upon a recognition that the can and will statute should not be rigidly applied in cases not involving speculation and that the existence of contingencies in a water application does not prevent the can and will test from being satisfied."
City of Black Hawk v. City of Central, 97 P.3d 951, 958 (Colo. 2004) (citations omitted).

"According to our precedent, neither the applicable notice provisions nor the can and will statute itself requires an application for a conditional water decree to contain the level of detail necessary for the water project to be carried out immediately upon the granting of such a decree. For example, an applicant proposing to build a water project often waits to proceed with the detailed testing, design, and permitting necessary to determine the precise location and configuration of water structures until receiving a conditional decree. Similarly, when an applicant proposes to build or construct a reservoir, parties that object to the proposal at the conditional decree stage often agree to drop their objections or participate in the project at a later stage. Recognizing

the nature of this process and the importance of water storage in Colorado, the General Assembly recently directed that '[s]tate agencies shall, to the maximum extent practicable, cooperate with persons desiring to acquire real property for water storage structures.' Ch. 189, sec. 3, § 37-87-101(1)(b), 2003 Colo. Sess. Laws 1367, 1368)."
Id. at 959-60 (citation omitted).