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# THE CITY OF GOLDEN'S APPLICATION FOR SURFACE WATER RIGHTS: A KAYAK COURSE, INSTREAM FLOW, DILUTION, OR WHAT?

AMY BEATIE AND JAMES FOSNAUGHT

## I. INTRODUCTION

The City of Golden, Colorado ("Golden") has submitted an application<sup>1</sup> to the District Court, Water Division 1, in the State of Colorado, for confirmation of absolute surface water rights for eight existing structures in Golden's White Water Rafting Course ("Course") on Clear Creek in Jefferson County, Colorado, and for conditional water rights for ten structures Golden intends to add to the course.<sup>2</sup> Various local governments and private water users have filed statements of opposition to Golden's application. The application tolls four primary issues that have potentially wide reaching effects on water allocation: (1) whether Golden "can and will" complete the conditional appropriations; (2) whether Golden's application constitutes an instream flow which, by statute, only the Colorado Water Conservation Board may acquire and administer; (3) whether the appropriations constitute waste; and (4) whether the appropriation will affect upstream future developments.

## II. CAN AND WILL DOCTRINE

The statements of opposition raise the issue of whether the City of Golden "can and will" put the requested conditional water rights to beneficial use.<sup>3</sup> In Colorado, an applicant for a conditional water right

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1. For a more detailed description of the application and statements of opposition, see the Colorado Water Rights Applications section of this issue, *infra* at 358.

2. City of Golden Application for Surface Water Rights, Case No. 98CW448 (Water Division 1, December 10, 1998) [hereinafter Golden's Application].

3. Filed on March 3, 1999, the City of Arvada's statement of opposition requests that Golden be held to strict proof with respect to "whether the claimed conditional appropriations can and will be completed with diligence and within a reasonable time." City of Arvada Statement of Opposition, § 2(B)(4). Filed on January 26, 1999, Coors Brewing Company's statement of opposition states that, "[i]f it is proven that a lawful appropriation has been made, Applicant must then demonstrate that the water rights can and will be administered in priority." Coors Brewing Company Statement of Opposition, § 2(G). Filed on March 3, 1999, the Town of Georgetown's statement of opposition requests Golden be held to strict proof about, "[t]he reasonably anticipated future legal and physical availability of water for water rights sought." Town of Georgetown Statement of Opposition, § 3(E)(1).

must show that the water "can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time."<sup>4</sup>

The can and will requirement, codified in 1979, is a relatively new addition to Colorado water law.<sup>5</sup> The primary goal of the statute's enactment is to prevent speculation.<sup>6</sup> Section 305(b) requires an applicant to establish a substantial probability that the intended appropriation can and will reach fruition.<sup>7</sup>

When reviewing an application for satisfaction of the can and will doctrine, a court will consider economic capability, need, present availability of water, the feasibility of the project, and whether the applicant can complete the project with diligence and within a reasonable time.<sup>8</sup> One commentator stated that, although statutory language fails to address many of the issues that have been litigated under the rubric of the can and will doctrine, precedent had dictated that the Colorado judiciary "address heretofore unconsidered issues of public interest when adjudicating conditional water rights."<sup>9</sup>

Under section 305(9)(b) an applicant must make a threshold showing of the reasonable availability of water to put to beneficial use to prove that the applicant "can" complete the appropriation.<sup>10</sup> In *Aspen Wilderness Workshop, Inc. v. Hines Highland Limited Partnership*,<sup>11</sup> the Colorado Supreme Court stated that an applicant must demonstrate the availability of water based upon the "river conditions existing at the time of the application, in priority and on sufficiently frequent occasions, to enable the applicant to complete the appropriation with diligence and within a reasonable time."<sup>12</sup> The court, recognizing the necessity of imputing reasonableness into this availability, noted that availability is based upon "necessarily imperfect predictions of future events and conditions."<sup>13</sup> The court further stated, "[a] showing of reasonable availability does not require a demonstration that water will always be available to the full extent applied for in the decree."<sup>14</sup> The court rejected an argument that the

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4. COLO. REV. STAT. § 37-92-305(9)(b) (1998).

5. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 42 (Colo. 1996).

6. *Id.* (noting legislative goal of Colo. Rev. Stat. § 37-92-305(9)(b) is to reduce speculation associated with conditional decrees and to increase the certainty of the administration of water rights in Colorado).

7. *Id.*

8. *Southeastern Colo. Water Conservation Dist. v. City of Florence*, 688 P.2d 715, 718 (Colo. 1984).

9. Mark E. Hamilton, *The "Can and Will" Doctrine of Colorado Revised Statute Section 37-92-305(9)(b): Changing the Nature of Conditional Water Rights in Colorado*, 65 U. COLO. L. REV. 947, 963 (1994).

10. *Aspen Wilderness Workshop v. Hines Highland Ltd. Part.*, 929 P.2d 718, 722 (Colo. 1996).

11. *Id.*

12. *Id.*

13. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 43 (Colo. 1996).

14. *Id.* at 724.

applicant show, in order to obtain a conditional decree, that water will be available at any time the applicant wishes to make a diversion.<sup>15</sup> The court held that in order to promote development and maximize utilization, an applicant for a conditional water right "need only prove that there is a substantial probability that the appropriation can and will be completed . . . ."<sup>16</sup>

Clear Creek is greatly overappropriated.<sup>17</sup> In *Himes*, Maroon Creek was underappropriated. Because the decrees sought by Golden do not remove water from the stream bed, the over or underappropriation of the stream is less significant as it applies to senior appropriators. Once the junior appropriator has obtained a conditional water right decree the junior may not, when prior appropriators need the water, make a diversion.<sup>18</sup> The key element needed for Golden to prove it "can" perfect the right is that enough water actually exists for the City to complete its appropriation. In *Florence*, the court rejected a probability that an appropriation would become available once every twenty-five years as insufficient to determine that a conditional decree "can" be completed.<sup>19</sup> Golden is better able to show the availability of water.

The U.S. Geologic Survey measures the actual and estimated streamflow on surface waters throughout Colorado. Diagram 1 shows the actual and estimated streamflow of Clear Creek at Golden for the years 1981 through 1997. Peak flows during the May, June, and July period have exceeded 1,000 CFS in eight of the seventeen years. Diagram 2 shows the actual or estimated flows for 1996, in which the flow exceeded 1,000 CFS for a period of approximately four weeks during the month of June. Because historically water has been available, it is likely that Golden can satisfy the requirement of section 305—that it can and will be able to complete the diversion.

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15. *Id.* In footnote 13, court states that this requirement would make it impossible for any new applicant to obtain conditional water rights. *Id.*

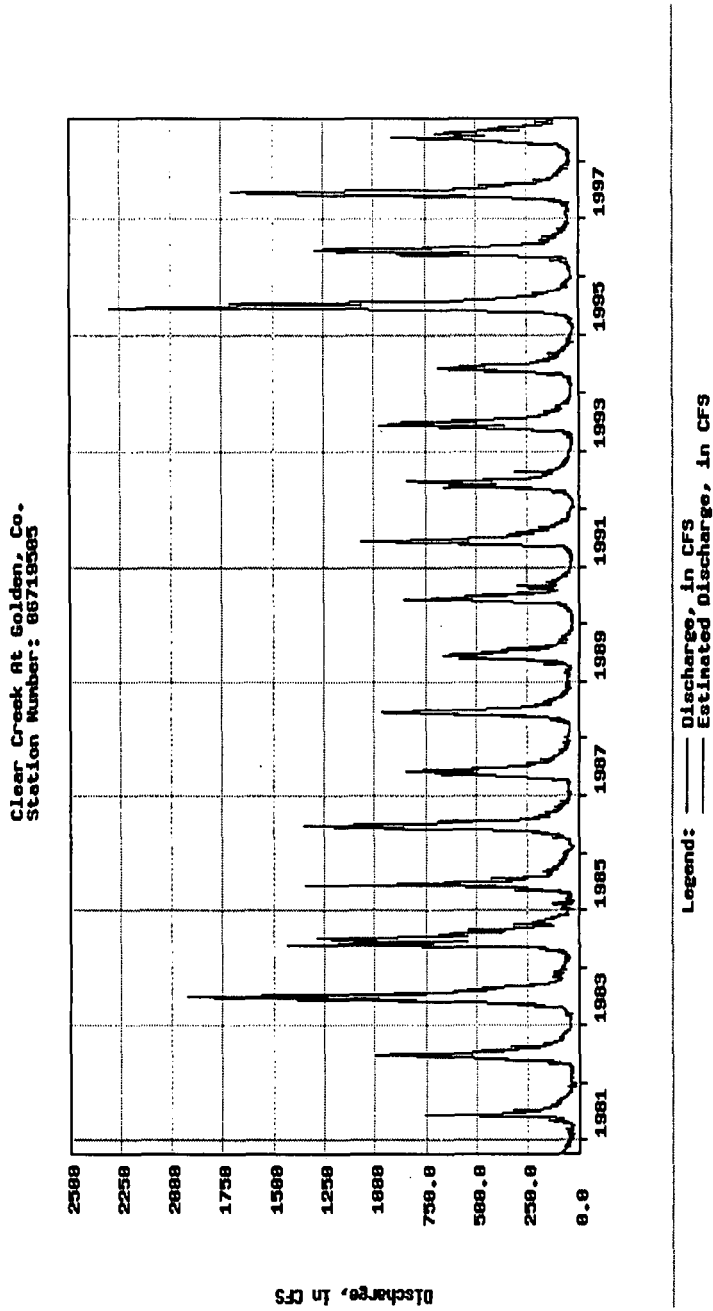
16. *Id.* at 724.

17. *City of Thornton v. Clear Creek Users Alliance*, 859 P.2d 1348, 1351 (Colo. 1993). The court notes in footnote 4 that a 1985 a report prepared for the Denver Board of Water Commissioners indicated that the "[p]resent use made of Clear Creek water is a mix of municipal, industrial, and agricultural. The stream is greatly over-appropriated, with water rights totaling about 20 times the average rate of stream flow and about 50 percent more than the maximum recorded flow during the past ten years." *Id.*

18. COLO. REV. STAT. § 37-92-102(2)(d) (1998).

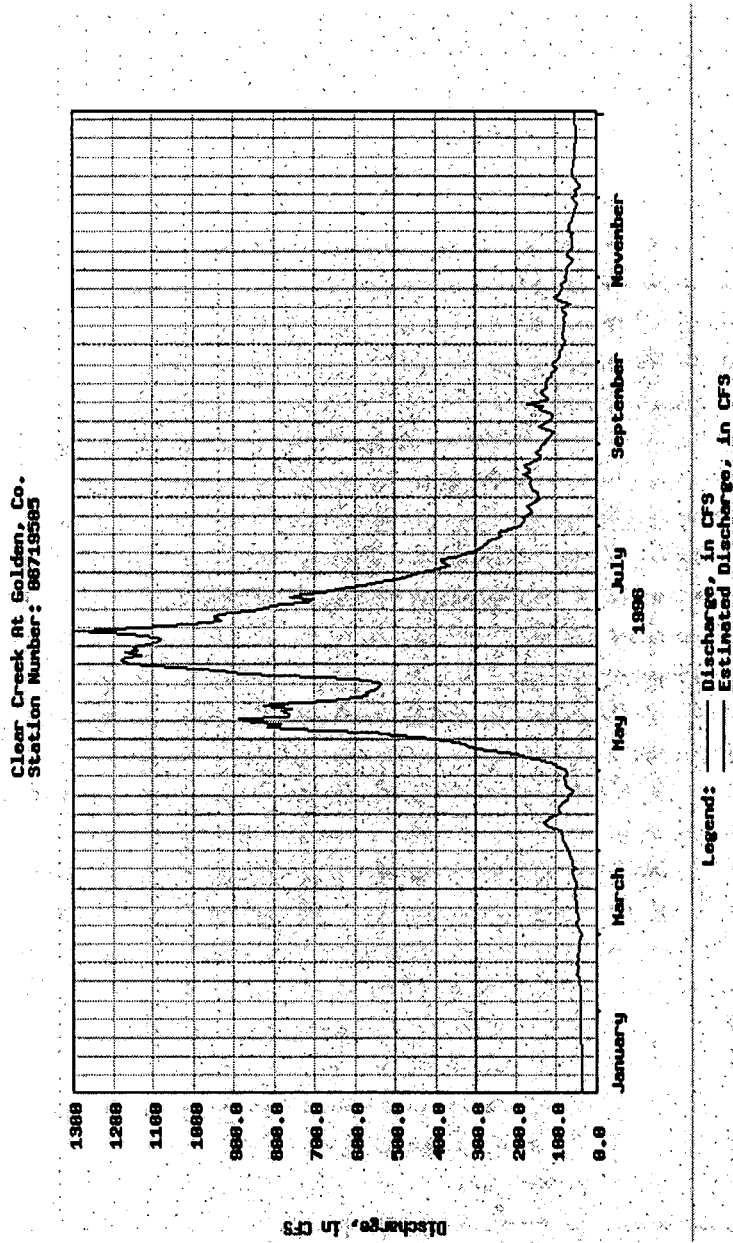
19. *Southeastern Colo. Water Conservation Dist. v. City of Florence*, 688 P.2d 715 (Colo. 1984).

Diagram 1<sup>20</sup>



20. USGS Website for Historical Streamflow Daily Values (visited April 25, 1999) <<http://waterdata.usgs.gov/nwis-w/CO/?statnum=06719505>>.

Diagram 2<sup>21</sup>



21. *Id.*

### III. INSTREAM FLOW APPROPRIATIONS

Golden's application seeks confirmation of absolute rights and additional conditional rights for the Course. The diversions do not remove water from the watercourse of Clear Creek. Of the eight objectors, five object either overtly<sup>22</sup> or impliedly<sup>23</sup> to the application due to, *inter alia*, its resemblance to an instream flow.

In Colorado, authority to appropriate or acquire water for an instream flow resides solely with the Colorado Water Conservation Board ("CWCB"). The relevant statutory provision states that:

[T]he Colorado water conservation board is hereby vested with the exclusive authority . . . to appropriate . . . such waters of natural streams and lakes as the board determines may be required for minimum stream flows . . . to preserve the natural environment to a reasonable degree. . . . [N]o other person or entity shall be granted a decree adjudicating a right to water . . . for instream flows in a stream channel between specific points . . . for any reason whatsoever . . . .<sup>24</sup>

The objectors assert that Golden's failure to physically divert water from the stream creates an instream flow right, a right exclusively vested in the CWCB, thereby causing Golden's application to fail as a legally cognizable claim. Whether Golden's application falls under the rubric of an instream flow will turn upon analysis of several Colorado water statutes and the water court's interpretation of the applicability

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22. Clear Creek Skiing Corporation and the Colorado Water Conservation Board overtly object to the appearance of Golden's application as an instream flow application. Filed on March 3, 1999, Clear Creek Skiing Corporation's statement of opposition to Golden's application reads: "The Colorado Water Conservation Board is the only entity in the State of Colorado authorized to obtain minimum stream flow water rights." Clear Creek Skiing Company Statement of Opposition, § 2(B). Also filed on March 3, 1999, the Colorado Water Conservation Board's statement of opposition states that the purpose of Golden's application is "similar in nature to instream flow use;" "does not constitute a legally cognizable beneficial use of water;" and therefore violates COLO. REV. STAT. § 37-92-102(3). Colorado Water Conservation Board Statement of Opposition, § 3(a)-(c).

23. The City of Arvada, Coors Brewing Company, and the City of Westminster impliedly object to the instream flow nature of Golden's application. Filed on March 3, 1999, the City of Arvada's statement of opposition reads: "Applicant must be placed on strict proof with respect to each element of its claim for absolute and conditional surface water rights including, but not limited to . . . [w]hether applicant can be granted a decree for the claimed water rights." City of Arvada Statement of Opposition, § 2(B). Filed on January 26, 1999, Coors Brewing Company's statement of opposition states that Golden must meet the criteria for a valid appropriation and a conditional decree, stating specifically that, "Applicant must prove that it has the requisite authority and intent to appropriate water in accordance with the law." Coors Brewing Company Statement of Opposition, § 2(F). Filed on March 3, 1999, The City of Westminster's opposition statement states that: "Applicant must be held to strict proof that it has diverted and put to beneficial use the portion of water rights claimed as absolute." City of Westminster Statement of Opposition, § 2(D).

24. COLO. REV. STAT. § 37-92-102(3) (1998); *see* City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 93-94 (Colo. 1996); City of Thornton v. City of Fort Collins, 830 P.2d 915, 930 (Colo. 1992).

of *City of Thornton v. City of Fort Collins*.<sup>25</sup>

Under Colorado law, an "[a]ppropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law.<sup>26</sup> Colorado statute defines "beneficial use" as: "the use of that amount of water that is reasonable and appropriate . . . and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery and wildlife."<sup>27</sup> The statute provides that recreational, piscatorial, fishery, and wildlife appropriations are beneficial uses; thus, it appears likely a court will find Golden's declared uses beneficial under Colorado law. Golden's application names the beneficial uses to which the requested water will be put: "[b]oating (including kayaking, rafting and canoeing), piscatorial, and general recreational uses."<sup>28</sup>

The criteria for award of a conditional decree are also statutory. Any water that "can and will be diverted, stored, or otherwise captured, possessed, and controlled" satisfies the requirements for a conditional decree. According to Golden's application, its existing eight structure Course controls and concentrates the flow of Clear Creek for boating, and the intended extension of the Course will do the same. Golden's application uses language obviously intended to place the application under the purview of the "or otherwise captured, possessed, and controlled" language of the conditional decree statute.<sup>29</sup> However, even if a court finds Golden's application does not fall within that language, Colorado statutes and case law define "diversion" broadly.

Colorado statute defines diversion as "removing water from its natural course or location, or *controlling water in its natural course* . . ."<sup>30</sup> The Colorado Supreme Court has held the "or" within the statute as creating two discrete categories;<sup>31</sup> thus, "diverting"—physically removing the water from the watercourse for use at another location—is distinct from and not required by "controlling."<sup>32</sup>

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25. 830 P.2d 915 (Colo. 1992). In its application, Golden states, "Precedence (sic) for the requested water right is specifically set forth in *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992) and further supported by C.R.S. §§ 37-92-305(9)(b) and 37-92-103(7)." Golden's Application, *supra* note 2, at 39. Golden carefully crafted the language in its application from the holdings of *City of Thornton* and applicable statutes. Although reciting a case as precedent cannot force the hand of any court, it must here. The similarity of Golden's application to Fort Collins' application in *City of Thornton* will force a court to examine *City of Thornton*.

26. COLO. REV. STAT. § 37-92-103(3)(a) (1998).

27. COLO. REV. STAT. § 37-92-103(4) (1998).

28. Golden's Application, *supra* note 2, at 39.

29. In describing the existing structures for which Golden seeks confirmation of absolute water rights, Golden describes the eight structures as "designed to control and concentrate the flow of Clear Creek." *Id.* at 37. Golden's description of the intended Extension uses similar language: "The Extension will consist of approximately 10 additional dam structures, each of which is designed to control, concentrate, and direct the stream flow . . ." *Id.* at 38.

30. COLO. REV. STAT. § 37-92-103(7) (1998) (emphasis added).

31. *Bloomer v. Boulder County Bd. of Comm'rs*, 799 P.2d 942, 946 (Colo. 1990).

32. *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 929-30 (Colo. 1992); *see*



In *City of Thornton v. City of Fort Collins*,<sup>33</sup> the Colorado Supreme Court addressed an issue strikingly similar to the one here. In *City of Thornton*, the court assessed whether the appropriation of water effectuated by two dams on the Cache La Poudre River constituted control of water within the meaning of the statutes set out above. After reasoning that control of water within its natural course could constitute a valid appropriation,<sup>34</sup> the court held that "water may be appropriated by a structure or device which . . . controls water within its natural course, assuming such action puts the water to beneficial use."<sup>35</sup> Differentiating control from an instream flow, the court stated that one of the salient features of an instream flow is absence of a structure or device, whereas diversion or control requires a structure or device.<sup>36</sup>

In *City of Thornton*, Fort Collins intended two dams, structurally different and serving different purposes, to satisfy their requested appropriations. Although the first dam, the Nature Dam, built in order to divert the Cache La Poudre River back to its historic channel, is dissimilar from the structures at issue in Golden's application, the court's holding with respect to the structure is important. The court held that "to control water within its natural course or location means that the appropriator exercises control over the water at least to the extent that the water continues to be put to a beneficial use."<sup>37</sup>

With respect to the second structure, the Power Dam, a structure containing both a boat chute and a fish ladder, the court held that, "boat chutes[,] . . . when properly designed and constructed, are structures, which concentrate the flow of water to serve their intended purposes. A chute . . . therefore may qualify as a 'structure or device' which controls water in its natural course or location under section 37-92-103(7)."<sup>38</sup> The court remanded the case to the water court to determine if the structure can and will put the requested water to beneficial use.

The instream flow objections to Golden's application echo the instream flow objections in *City of Thornton* so much that it seems

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Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570, 573, 574 (Colo. 1979).

33. 830 P.2d 915 (Colo. 1992).

34. *City of Thornton*, 830 P.2d at 930 ("Controlling water within its natural course or location by some structure or device for a beneficial use thus may result in a valid appropriation").

35. *Id.* at 930-31.

36. *Id.* at 931. The court also stressed that even though preservation of nature, the beneficial use required for an instream flow, would incidentally manifest from Fort Collins' application, this similarity in result does not qualify the application as an application for an instream flow. *Id.* Furthermore, the Colorado Constitution in article XVI, section 6 guarantees the right to appropriate water for beneficial use by diversion or control, and the Colorado Supreme Court has held that provision as distinct from and not in conflict with the CWCB's statutory right to appropriate water for instream flows. Board of County Comm'rs v. Collard, 827 P.2d 546, 548 n.4 (Colo. 1992).

37. *City of Thornton*, 830 P.2d at 931-32.

38. *Id.* at 932.

unlikely, if the issue is litigated, that the opposers will prevail. Golden will have to show that the water appropriated will serve the beneficial uses outlined in its application and that the structures will effectively control the water (*i.e.*, can and will put the water to the beneficial uses named). Based on the nature of the application, these required showings do not appear insurmountable.

Golden may trip on a few points, however. Golden's application is factually distinct from the one at issue in *City of Thornton* in one crucial way: where Fort Collins claimed water rights for only two structures, Golden seeks water rights for eight existing and ten additional structures, effectively spanning the course of Clear Creek as it flows through the City of Golden. The court could possibly view this application as a thinly veiled plan to create an expansion of river fortified against future appropriations, establishing Golden as the future gatekeeper of the water of Clear Creek.<sup>39</sup>

The court may also face the possibility that the appropriation is not solely for the purpose of a kayak course, but a disguised private instream flow for the purposes of waste dilution. In *City of Thornton v. Bijou Irrigation Co.*, the Colorado Supreme Court found that Kodak had no right to dilute its discharges to comply with water quality standards and, thus, frustrate a challenged exchange.<sup>40</sup> The appropriation of water for an environmentally appealing purpose may hide a purpose of municipal sewage dilution.

It seems likely that a court will find Golden's stated beneficial use meets state statutory requirements; that the structures effectively control the water, even though the water remains within its natural water course; and that although the application may preserve nature as an incidental benefit, that result does not force the application under the rubric of an instream flow.

#### IV. WASTE

In its statement of opposition, the Clear Creek County Board of Commissioners requested that Golden "be put on strict proof that the use of the amount of water claimed is reasonable and appropriate under reasonably efficient practices to accomplish *without waste* the purpose for which the appropriation is lawfully made."<sup>41</sup>

Colorado statutes define the beneficial use of water 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 . . . ."<sup>42</sup> Judicial interpretation of what constitutes waste is limited, but has established that it "is settled law that an appropriator is limited in his use of water to his actual

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39. See *infra* Part V.

40. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 89-95 (Colo. 1996).

41. Board of County Commissioners of the County of Clear Creek Statement of Opposition, § 2(A) (emphasis added).

42. COLO. REV. STAT. § 37-92-103(4) (1998) (emphasis added).

needs. He must not waste it, and if there is a surplus remaining after use, it must be returned to the stream whence it came."<sup>43</sup>

Golden's application may be subject to attack based on waste, or an argument that the appropriation of essentially the entire year-round flow of Clear Creek is not reasonable and appropriate under reasonably efficient practices. Kayakers, of course, love water and feel that the more water, the better. However, kayak courses can be designed for average low water levels, as was the Confluence Kayak Park in central Denver. The Confluence Park attracts boaters year round at levels of less than 150 cfs, substantially lower than the levels Golden intends to appropriate. A course such as Golden's, designed for up to 1,000 cfs, which occurs at most four weeks per year, may not be well designed or appropriate for use during the average normal flow of less than 200 cfs.

The water court, when faced with the upstream implications of the appropriation, will need to grapple with the issue of whether the size of the new appropriation is reasonable, or if it constitutes waste of Colorado's precious water resources.

## V. UPSTREAM IMPLICATIONS

In its statement of opposition, the Town of Georgetown requested that Golden be placed on strict proof about, "[t]he impact on Clear Creek, to be anticipated from proposed water rights."<sup>44</sup> The upstream implications of the appropriation are of interest to existing and potential water users along Clear Creek. Through the act of appropriating an amount nearly equal to all of the historical year round flow of Clear Creek, Golden has effectively precluded the future development of junior direct flow rights and upstream storage facilities for augmentation of out of priority diversions. The appropriation will also preclude the ability of other appropriators to operate junior exchanges to move senior water upstream through Golden. The immediate effect may be seen in the ability of Golden to deny Georgetown the capacity to operate its proposed exchange from the Farmer's Highline Ditch, just below Golden, upstream to Georgetown. This exchange is eleven days junior to Golden's date of appropriation.<sup>45</sup> Georgetown may now be required to find and use senior exchange water or senior water above Georgetown. This can only make existing absolute and conditional storage and direct flow rights upstream of Golden more valuable, including existing transmountain diversions, such as the Vidler Tunnel; will add value to existing rights; and may create a viable water market along the upper reaches of Clear Creek.

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43. See *Pulaski Irrigating Ditch Co. v. City of Trinidad*, 203 P. 681, 682 (1922).

44. Town of Georgetown Statement of Opposition, § 3(E)(3).

45. See Application for Change of Use of Water Right, and for Plan for Augmentation, Including Exchange, 98CW439, Resume, Water Division No. 1. (December, 1998). See also the Colorado Water Rights Applications section of this issue *infra* at 358.

## VI. CONCLUSION

If Golden's proposed appropriation is decreed by the water court, the implications for various water basins statewide could be profound. For example, one need only imagine the construction of a similar boating course and appropriation by the City of Grand Junction at the confluence of the Colorado and Gunnison Rivers. Through the appropriation of the entire flow of both rivers to provide water for the beneficial use of recreational boaters all future upstream water development would be severely affected, if not entirely curtailed throughout most of Western Colorado.

While the water court may be precluded from considering the public policy implications of granting Golden what amounts to a large instream flow right and a gatekeeping function over an entire watershed, the legislature or the Supreme Court through judicial interpretation of waste and reasonable use, or a review of *City of Thornton v. City of Ft. Collins*, may soon be required to address this important issue.