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# WATER QUALITY ISSUES IN AUGMENTATION PLANS AND EXCHANGES

CARMEN SOWER-HALL AND HOLLY I. HOLDER<sup>‡</sup>

## INTRODUCTION

In Colorado, a water right "is among the most valuable property rights known to the law."<sup>1</sup> However, the extent to which the quality of the water encompassed within that right is protected is another matter. The purpose of this paper is to analyze the relationship and interaction between water quality and water rights, specifically, whether the issue of water quality has any impact on the adjudication or administration of augmentation plans or exchanges. This is an issue that is being raised in Colorado's water courts with increasing frequency. However, Colorado's existing statutory framework and case law may not adequately address the critical interplay between water rights and water quality.

## DISCUSSION

As a preliminary matter, one must first understand what is meant by a water right. As noted above, a Colorado water right "is among the most valuable property rights known to the law."<sup>2</sup> Coupled with the notion of valued property right is the state's goal of maximum beneficial use of state waters. The Colorado Constitution confirms that "[t]he right to divert the unappropriated waters of any natural stream

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An inductee of the Order of St. Ives, Holly I. Holder graduated with honors in 1980 from the University of Denver College of Law. An active member of several Denver Regional Council of Governments water quality subcommittees, Ms. Holder serves as a municipal judge and is president of Holly I. Holder, P.C. The firm's primary emphases are on water rights, and environmental and water quality law.

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1. *White v. Farmers Highline Canal Reservoir. Co.*, 43 P. 1028, 1030 (Colo. 1896).
2. *Id.*

to beneficial uses shall never be denied."<sup>3</sup> Additionally, a Colorado water right is freely alienable, includes a priority date, a quantity, a right to the maintenance of stream conditions existing at the time of appropriation, and a specified source, among other aspects.<sup>4</sup> This is the meaning of a "water right" as opposed to a water quality issue that might affect that right.

In today's world of environmental awareness, issues of water quality are starting to arise in traditional water right contexts. Of course, it should be noted from the outset that as early as 1897, the right to appropriate water was subject to some quality protection, such as the prohibition against polluting remaining flows so as to preserve the utility of the water for subsequent water users.<sup>5</sup> However, it is only within the past few years that the issue has been asserted with any frequency.

The focus of this paper is the tension between water rights and water quality in the context of augmentation plans and exchanges. Specifically, what happens when upstream appropriators have a duty to provide return flows pursuant to an augmentation plan when either: (1) their use of the water alters the quality of the return flows, or (2) they provide return flows by relying on a separate source, the quality of which differs from that of the original supply. Two Colorado statutes play an integral role in the analysis of the issue. Each addresses the quality of water that the senior appropriator may expect in any substitution. First is Colorado Revised Statutes ("C.R.S.") section 37-92-305(5):

Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.<sup>6</sup>

Second is C.R.S. section 37-80-120(3) which states that "[a]ny substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put."<sup>7</sup> Before discussing the impact of these statutes, the following provides a brief sketch of Colorado's adjudicative and administrative oversight over water right and water quality issues.

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3. COLO. CONST. art. XVI, §6.

4. See *Brighton Ditch Co. v. City of Englewood*, 237 P.2d 116 (Colo. 1951); *People ex rel. v. Hinderlider*, 57 P.2d 894 (Colo. 1936); *Nichols v. McIntosh*, 34 P. 278 (Colo. 1893); *Farmers Highline Canal & Reservoir. Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954); *Stonewall Estates v. CF&I Steel Corp.*, 592 P.2d 1318 (Colo. 1979).

5. *Suffolk Gold Mining and Milling Co. v. San Miguel Consol. Mining & Milling Co.*, 48 P. 828 (Colo. Ct. App. 1897), *appeal dismissed*, 52 P. 1027 (Colo. 1898).

6. COLO. REV. STAT. § 37-92-305(5) (1997).

7. COLO. REV. STAT. § 37-80-120(3) (1997).

### 1. *Administration of Water Rights versus Administration of Water Quality*

In Colorado, the responsibility for issues involving one's water rights and for issues involving the quality of the water under those rights is divided between two distinct entities. Generally, the water courts oversee the adjudication of water rights, and typically focus on the amount and quality of water received under a right. With respect to strict issues of quality, the quality of discharged effluent is subject to administrative review by the Water Quality Control Commission.

Colorado's water rights appropriation system is presided over by water courts in a judiciary system as set forth in the Water Right Determination and Administration Act of 1969.<sup>8</sup> The Office of the State Engineer ("State Engineer") is taxed with the general administration of water rights as determined by the water courts.<sup>9</sup> As noted above, the Colorado Constitution and common law are very clear in their protection of these valuable property rights. Thus, the State Engineer plays an important role in water right adjudications and permitting processes.

To understand the management involved in water quality issues, it is necessary to first review the Federal Clean Water Act ("CWA").<sup>10</sup> The CWA requires that each state institute comprehensive water quality standards.<sup>11</sup> The CWA also requires that all dischargers obtain a permit before they may lawfully discharge into state waters.<sup>12</sup> To this end, the CWA requires that states provide quality certification before granting a discharge permit. Certification means that any discharge complies with the applicable quality standards.<sup>13</sup> In Colorado, the Water Quality Control Act coordinates these requirements of the CWA. Pursuant to statute, the Water Quality Control Commission ("Commission") was created specifically to manage water quality.<sup>14</sup> In turn, the Commission then recognizes that the State Engineer also has water quality responsibilities, such as those set forth in C.R.S. sections 37-92-305(5) and 37-80-120.<sup>15</sup> Indeed, the Commission is practically precluded from regulating those activities that specifically fall within the State Engineer's jurisdiction.<sup>16</sup>

The state Water Quality Control Act limits the ability of the Commission and the Water Quality Division (which also has authority over water quality issues) to impact the appropriate water rights established under the judiciary system:

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8. COLO. REV. STAT. §§ 37-92-101 to -602 (1997).
  9. COLO. REV. STAT. § 37-92-301(1) (1997).
  10. 33 U.S.C. §§ 1251-1384 (1995).
  11. 33 U.S.C. § 1313 (1995).
  12. 33 U.S.C. § 1342 (1995).
  13. 33 U.S.C. § 1341 (1995).
  14. COLO. REV. STAT. § 25-8-202(1) (1997).
  15. COLO. REV. STAT. § 25-8-202(7) (1997).
  16. COLO. REV. STAT. § 25-8-202(7)(b)(ii) (1997).

No provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the Constitution of the State of Colorado, compacts entered into by the State of Colorado, or the provisions of articles 80 to 93 of title 37, C.R.S., or Colorado court determinations with respect to the determination and administration of water rights. Nothing in this article shall be construed, enforced,<sup>17</sup> or applied so as to cause or result in material injury to water rights.

This language is consistent with Colorado's emphasis on the protection of water rights. However, as might be suspected, it is impossible to completely divorce water quality issues from water rights issues and maintain a clear dichotomy.

## 2. *Statutory Water Quality Requirements for Substitute Water Supplies in Water Rights Cases*

An augmentation plan is a water court decree that allows the depletion associated with the exercise of a tributary water right to be replaced by water from another source. The result is an increase in the supply of water available for beneficial uses.<sup>18</sup> There are literally thousands of operative adjudicated augmentation plans in place in Colorado. Many more plans are pending in water court applications. Pursuant to statute, an augmentation plan, including exchanges, allows a supplier to take an equivalent amount of water at his or her point of diversion if water is available and will not impair the rights of others.

Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.<sup>19</sup>

This statutory language appeared in the original Water Right Determination and Administration Act of 1969, and has remained consistent throughout the subsequent modifications to the Act.<sup>20</sup> Also important to note is the statutory requirement that "[a]ny substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put."<sup>21</sup>

Rules and regulations ("Rules") exist that clarify the State Engineer's role in water quality issues.<sup>22</sup> According to Rule 3.2, the Rules apply when the State Engineer has water quality authority, such as that

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17. COLO. REV. STAT. § 25-8-104(1) (1997).

18. COLO. REV. STAT. § 37-92-103(9) (1997).

19. COLO. REV. STAT. § 37-92-305(5) (1997).

20. 1969 Colo. Sess. Laws 1211, and amendments thereto.

21. COLO. REV. STAT. § 37-80-120(3) (1997).

22. Rules and Regulations For Implementation of Subsection 25-8-202(7), C.R.S., 2 COLO. CODE REGS. §402-8 (1992).

conferred by C.R.S. sections 37-80-120 and 37-92-305(5).<sup>23</sup> Rules 6.5.6 and 6.5.6.1 expressly state that the State Engineer may require that an applicant provide water quality data and analysis indicating whether a substitute supply is of a quality for which senior appropriation has normally been put:

The State Engineer shall, under normal circumstances, consider proof of the following substitute supplies as evidence that the requirements of use to which a senior appropriation has normally been put will be met:

Water discharged to surface streams in compliance with either a valid state discharge permit or with the applicable water quality standards under these Rules, where the applicable stream classifications include all uses to which the senior appropriation has normally been put and the standards include all parameters necessary to protect the requirements of use of the senior appropriator . . . .<sup>24</sup>

It would appear then that compliance with a discharge permit is, *under normal circumstances, evidence* that the statutory quality requirement has been met for purposes of the State Engineer's review of an application if *the applicable stream classifications include all uses to which the senior appropriation has normally been put*. However, this is in no way binding on the water courts when they review an application. Moreover, there is no corresponding provision concerning the determinations to be made by the water courts.

As discussed above, the Water Quality Control Commission is charged with promulgating quality control regulations.<sup>25</sup> The statutes list those factors which the Commission is to consider when promulgating these regulations. However, *not* included in this list is the quality of water necessary to meet those uses to which the water has been put by senior appropriators. If this factor had been included, the argument that compliance with a discharge permit should satisfy the statutory quality requirements would be strengthened.

Two writers have advocated this approach which would give more credence to compliance with National Pollutant Discharge Elimination Standards ("NPDES") in quality issues. As Gregory Hobbs and Bennett Raley explain:

The statutes directing the court to consider water quality impacts of plans for augmentation, substitution, and exchange were adopted at a time when Colorado did not have a comprehensive water quality regulatory program, and, therefore, the water courts were called upon to provide protection for existing water uses.<sup>26</sup>

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23. *Id.*

24. *Id.*

25. COLO. REV. STAT. § 25-8-205 (1997).

26. Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Quality Versus Water Quantity: A Delicate Balance*, 34 ROCKY MTN. MIN. L. INST. 24-1, 24-54 (1988). Other articles touching upon this subject include: Michael D. White, David F. Jankowski, David S. Taussig

The creation of the Water Quality Control Commission added, for the first time, a regulatory body charged with the responsibility and authority to develop water quality criteria to protect uses of water. The expenditure of millions of dollars by state and private entities in the course of the adoption of stream classifications and water quality standards created, in the Commission, an administrative agency with the expertise and experience necessary to address the highly technical issues of water quality. Accordingly, the water courts should accord deference to determinations by the Commission regarding the criteria necessary to prevent injury to uses of water where the Commission has set water quality standards for the contaminant in question.

The practical application of this approach in an application for approval of a plan for augmentation, substitution, or exchange would involve a consideration by the water court of whether existing stream standards, use classifications, and enforcement mechanisms address the quality-related injury asserted by the affected water right. Under this analysis, a reduction in dilution capacity of the stream would not result in a denial of the application and the proposed plan would be approved, so long as the replacement water supply will meet applicable water quality standards for downstream uses. If the proposed plan would affect uses not protected by existing classifications, or if the replacement water supply contains pollutants not regulated by the Commission, the water court should not consider the issue until it has been presented to the Water Quality Control Commission. If the Commission acts, the water court would then accord deference to the administrative decision. If the Commission declines to act, the court would consider the issue independently. This deference to the Commission preserves the Commission as the primary water quality control agency of the state. Inconsistent decisions will be minimized, and, more important, the burden of controlling the pollutant or protecting a new use would not be imposed solely on those who are before the water court.<sup>27</sup>

We now turn to review the decisions which have addressed quality concerns in water rights cases.

### 3. Existing Case Law Addressing Quality Concerns of Return Flows

In a 1986 case before Colorado's Division 1 Water Court, the Court was presented with an issue of water rights versus water quality within the context of treated sewage effluent.<sup>28</sup> The City of Golden sought to

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and Austin C. Hamre, *City of Thornton v. Bijou Irrigation Co.: The Thornton Northern Project*, 26 COLO. LAW. 67 (1997); Melinda Kassen, *The Burden of Maintaining Colorado's Water Quality*, 18 COLO. LAW. 23 (1989); Jan G. Laitos, *Water Rights and Water Quality: Recent Developments*, 23 COLO. LAW. 2343 (1994); Mark T. Pifher, *Quality Versus Quantity: The Continued Right to Appropriate - Part I*, 15 COLO. LAW. 1035 (1986); Mark T. Pifher, *Quality Versus Quantity: The Continued Right to Appropriate - Part II*, 15 COLO. LAW. 1204 (1986); Jan G. Laitos, *Constitutional Limits on Police Power Regulations Affecting the Exercise of Water Rights*, 16 COLO. LAW. 1626 (1987); Jan G. Laitos, *Assault on the Citadel, Part I: Water Quality Laws and the Exercise of Water Rights*, 17 COLO. LAW. 1305 (1988); Jan G. Laitos, *Assault on the Citadel, Part II: Dams, Diversions and Water Quality Regulations*, 17 COLO. LAW. 2003 (1988).

27. Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Quality Versus Water Quantity: A Delicate Balance*, 34 ROCKY MTN. MIN. L. INST. 24-1, 24-55 to 24-56 (1988).

28. In the Matter of the Application for Water Rights of the City of Golden, in

divert water out of priority from Clear Creek and to replace that water with a substitute supply derived from a variety of sources, including treated sewage effluent. Because the treated sewage effluent would be discharged into Clear Creek immediately above other points of diversion, owners of these water rights objected to Golden's application. The issue presented to the court was whether the treated sewage met the quality requirements of C.R.S. sections 37-92-305(5) and 37-80-120. Perhaps due to the novelty of the issue before it, the court issued a separate ruling solely to address the water quality issues.<sup>29</sup>

The treated sewage effluent was being discharged pursuant to a valid wastewater permit issued by the Water Quality Control Division as required by the rules and regulations promulgated by the Water Quality Control Commission.<sup>30</sup> However, the water court specifically noted that "[t]he [discharge] permit does not assure that the discharge will be of a quality that meets the requirements for which the Objector's water has normally been used."<sup>31</sup> The water court then went on to discuss the negative impacts of the decreased water quality and concluded that the requirements of C.R.S. sections 37-92-305(5) and 37-80-120 had not been met. Thus, this part of the application was denied.

Of particular note in the decision is the way in which the water court resolved the conflict between water rights and water quality:

No conflict exists between this Court's determination and the determination by the Water Quality Control Division to issue a discharge permit for the [sewage treatment plant]. The Division and the Court address different issues and answer different questions, subject to different standards. The Division determines whether to allow any discharge at all by balancing competing interests on the stream. The Court determines whether to allow the discharger to divert water it would not otherwise be entitled to take by furnishing a substitute supply to users downstream. The Court considers the effects on particular water users, and applies the standards of non-injury and suitability for the normal uses of the receiving waters.

A plan for augmentation is a water matter within the exclusive jurisdiction of the water judge. The Water Quality Control Division may not interfere with the jurisdiction of the Water Court or take any action that would result in injury to water rights.

The uses to be protected pursuant to C.R.S. section 37-92-305(3) and (5) are the actual uses that have normally been made of the re-

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Clear Creek, Jefferson and Adams Counties, (Dist. Ct., Water Div. No. 1, Colo. 1986) (No. 83-CW-361).

29. Supplemental Findings of Fact, Conclusions of Law, Judgment and Decree, in the Matter of the Application for Water Rights of the City of Golden, in Clear Creek, Jefferson and Adams Counties, (Dist. Ct., Water Div. No. 1, Colo. 1986) (No. 83-CW-361).

30. NPDES Permit No. CO-00039 issued to the City of Golden and the Adolph Coors Company as joint permittees.

31. *Supra* note 28.

ceiving waters even if those uses have not been decreed. The actual uses of water from Standley Reservoir include use for municipal drinking water, as well as recreation and irrigation. The decreed uses of water from Standley Reservoir include domestic, irrigation, and municipal uses . . . . The Court concludes that the [treated sewage] effluent does not meet the quality requirements of the actual or decreed uses of water from Standley Lake.

As a matter of law, the degradation of water quality identified . . . constitutes injury to the legally protected rights of the Objectors.<sup>32</sup>

In reaching this conclusion, the water court relied on a 1983 Colorado Supreme Court case which discussed the concept of "maximum use" and limits thereon.<sup>33</sup>

In *Alamosa-Lajara Water Users Protection Ass'n v. Gould*, the Colorado Supreme Court wrote:

We note that the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers. Section 37-92-501(2)(e) makes clear that the objective of "maximum use" administration is "optimum use." Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns.<sup>34</sup>

It is interesting to note, however, that the mandate of section 37-92-501(2)(e) is not necessarily this clear. This statutory section states that rules and regulations promulgated "shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights."<sup>35</sup> But the language makes no reference to significant factors such as environmental and economic concerns. In fact, in the later case of *City of Thornton v. Bijou Irrigation Co.*,<sup>36</sup> the same court expressly stated that under the existing statutory framework, the issue of water quality is clearly subordinated to that of water appropriation.

In *Thornton*, the Colorado Supreme Court was presented with several water quality issues. The Colorado division of the Eastman Kodak Company ("Kodak") was one of many objectors to the City of Thornton's proposed Northern Project. Kodak operated a manufacturing plant on the Poudre River which utilized over one million gallons of water per day. After treating the water, Kodak discharged it back into the Poudre River pursuant to a wastewater discharge permit issued by the Water Quality Control Division. The discharge permit specified effluent limits for various chemicals in the discharge water which, in

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32. *Id.* at 6 (citations omitted).

33. *Id.* at 7.

34. *Alamosa-La Jara Water User's Protection Ass'n v. Gould*, 674 P.2d 914, 935 (Colo. 1983).

35. COLO. REV. STAT. § 37-92-501(2)(e) (1997).

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

turn, were based in part on average low-flow values in the vicinity of Kodak's discharge point in the Poudre River. The City of Thornton sought an exchange which would divert water from the Poudre River above the Kodak plant, and return a substitute supply of water below the Kodak plant. The result would be a reduced flow near the Kodak plant which in turn would affect the average low-flow rates. Kodak argued that stricter unionized ammonia limits would then be placed on its discharge permit, which would require construction of a new treatment facility at a cost of at least nine million dollars. The Colorado Supreme Court affirmed the ruling of the trial court and held that Kodak's request constituted a request for a minimum instream flow right, a right which is forbidden by statute.<sup>37</sup> The court went on, however, to provide an analysis of the relationship between the appropriation doctrine and quality issues:

From the earliest cases, Colorado courts have given at least some recognition to water quality concerns, holding, for example, that a water right does not include the right to discharge pollutants that detrimentally affect downstream users. However, beyond recognition of this general prohibition on unreasonable discharges, the system of water quality regulation in Colorado reflects a continued conflict with and subordination to the prior appropriation system.<sup>38</sup>

[S]ection 25-8-104(1) [quoted *supra*] serves notice that despite the importance of water quality regulation, the legislature's primary emphasis in enacting this scheme is to maximize beneficial use and to minimize barriers to further beneficial appropriation. The result of this policy decision is essentially to focus water quality regulation on uses culminating in unreasonable discharges, as such discharges are not part of any appropriative right under common law.<sup>39</sup>

For better or worse, this dual system limits the ability of both the water court and the water quality control agencies to address certain water quality issues.

Implicit in the court's decision was the recognition that, in the case of discharges or substitute water supplies, the legislative scheme may protect against quality impacts by virtue of C.R.S. section 37-92-305(3). The court did not go on to address this issue because Kodak did not allege any quality impacts in the substitute supply itself (i.e., the injury alleged resulted solely from diminution in flow).<sup>40</sup> However, the court did address related water quality issues involving the substitute supplies affecting other objectors.

Several objectors argued that the decree would not protect their

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37. COLO. REV. STAT. § 37-92-103 (1997). This statute vests exclusive authority to appropriate minimum stream flows in the Colorado Water Conservation Board and limited the purpose for these appropriations to those necessary to "preserve the natural environment to a reasonable degree."

38. *Bijou Irrigation Co.*, 926 P.2d at 91-92 (citations omitted).

39. *Id.* at 92.

40. *Id.* at 92-93.

rights based on the requirement that the quality of the substitute flow be measured at the point of entry into the canal, rather than at the point at which the objectors diverted water for their use. The objectors contended that such measurements would not provide protection to their headgates located miles downstream of the discharge point due to a general deterioration in water quality as it moves downstream. This argument was premised on the requirement of C.R.S. section 37-80-120(3), which states that substituted water "be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put."<sup>41</sup> The court explained that

[U]nder both the statute and the regulations, the mandate of the state engineer in reviewing the quality aspects of an exchange is clear: the substitute supply must be of a quality to meet the requirements of use to which the senior appropriation has normally been put. The regulations are sufficiently broad to allow the state engineer's office to exercise its professional judgment in adopting a method of regulation that will ensure that the statutory standard is met, and the absence of more specific direction will not compromise the protective goals of the statute.<sup>42</sup>

Thus, the court declined to hold that water quality monitoring at the point of discharge was insufficient to ensure compliance with the statutory mandate.

#### 4. *Quality Issues Presented in Pending Water Rights Cases*

The question left unanswered by *Thornton* is, what if return water that is being discharged pursuant to a discharge permit is meeting all effluent limits set forth in the permit? This issue is expected to be litigated early next year in an application involving the City and County of Denver.<sup>43</sup> This issue is also being asserted in several pending applications for diligence.<sup>44</sup>

One aspect likely to be raised in these pending cases is whether applicants who meet all water quality standards and otherwise comply with discharge permit requirements may rely on their compliance as prima facie evidence that the substituted water is of an adequate quality. As discussed above, this issue appears to have been addressed in the 1986 *City of Golden* water court decision in which the court held that water being discharged under a discharge permit must meet the historical use requirements set forth in C.R.S. section 37-92-305(5).<sup>45</sup>

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41. COLO. REV. STAT. §37-80-120(3) (1997).

42. *Bijou Irrigation Co.*, 926 P.2d at 97.

43. Concerning the Application for Water Rights of the City and County of Denver, acting by and through its Board of Water Commissioners, (Dist. Ct., Water Div. No. 1, Colo. 1997) (No. 96-CW-145).

44. *See, e.g.*, Concerning the Application for Water Rights of the Town of Castle Rock, (Dist. Ct. Water Div. No. 1, Colo. 1996) (No. 96-CW-199).

45. Supplemental Findings of Fact, Conclusions of Law, Judgment and Decree, In the Matter of the Application for Water Rights of the City of Golden, in Clear Creek,

In the pending application filed by the City and County of Denver, one objector, the City of Thornton, has recently moved for summary judgment on these very issues.<sup>46</sup> In this case, Denver operates an exchange by making out of priority diversions from Strontia Springs Reservoir in exchange for the discharge from the Bi-City wastewater treatment plant effluent destined for the South Platte River. It is the City of Thornton's position that the wastewater effluent does not meet the statutory quality criteria of C.R.S. section 37-80-120(3):

[P]ursuant to C.R.S. section 25-8-104(1) [of the Water Quality Control Act], such a "discharger must comply with all of the applicable provisions of articles 80 to 93 of Title 37, C.R.S.," including C.R.S. section 37-80-120(3) under which substituted water provided in any exchange must "be of a quality . . . to meet the requirements of use to which the senior appropriation has normally been put."

Consequently, mere compliance with a discharge permit does not satisfy the section 120 Quality Requirements . . . .

Thornton does not here question Bi-City W[aste] W[ater] T[reatment] P[lant] discharges in conformity with its permit. Denver, however may not use the discharge permit as a shield to effectuate the exchange of clean water at Strontia Springs for Bi-City WWTP effluent, unless the effluent meets the section 120 Quality Requirements.<sup>47</sup>

Thornton argues that Denver's attempts to: (1) make absolute its exchange, and (2) to obtain a finding of diligence should be denied.<sup>48</sup>

As for Denver's position, Denver has just recently moved for partial summary judgment on the issue, arguing that it is inappropriate for the water court to consider quality issues in the context of diligence proceedings and/or proceedings to make absolute a conditional water right.<sup>49</sup> A diligence proceeding serves a narrow function. Quite simply, the presiding officials must determine whether a holder of a conditional water right has taken the requisite steps in diligently applying the water to a beneficial use. The diligence statute does not require

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Jefferson and Adams Counties, (Dist. Ct., Water Div. No. 1, Colo. 1986) (No. 83-CW-361).

46. Thornton's Dispositive Motion Pursuant to C.R.C.P. 56(b) and 56(h) Regarding Water Quality Issues, Including Legal Authorities, Concerning the Application for Water Rights of the City and County of Denver, acting by and through its Board of Water Commissioners, (Dist. Ct., Water Div. No.1, Colo. 1997) (No. 96-CW-145).

47. *Id.* at 5.

48. Amended Statement of Opposition at 2, Concerning the Application for Water Rights of the Town of Castle Rock In Douglas County, (Dist. Ct., Water Div. No. 1, Colo. 1997) (No. 96-CW-199) (asserting a C.R.S. section 37-90-120(3) quality argument against a finding of diligence).

49. Motion For Partial Summary Judgment Pursuant to C.R.C.P. 56, Concerning the Application for Water Rights of the City and County of Denver, acting by and through its Board of Water Commissioners, (Dist. Ct., Water Div. No.1, Colo. 1997) (No. 96-CW-145).

that an applicant establish any quality standards for water which may be used for exchange purposes.<sup>50</sup> With respect to Denver's situation, the applicable decree at issue permitted Denver to use effluent as a source of substitute supply.<sup>51</sup> Denver thus maintains that injury is wholly irrelevant in diligence proceedings. Denver likewise argues that quality is not an appropriate consideration in an application to make absolute a conditional water right. Denver claims that the only element which the water court should consider is whether the water has been placed to a beneficial use, because there simply is no statutory requirement that an applicant make any quality showing on a substitute supply before a conditional right may be made absolute.<sup>52</sup> It is therefore Denver's position that Thornton be precluded from raising water quality issues in this pending case. In the alternative, Denver argues that even if the water court determines that quality issues may be considered, the court must then determine a host of other issues:

To determine if the substitute water is acceptable, the court must determine which appropriation is senior. This court would then have to determine the use to which that appropriation has normally been put. What effect does a change of water right by the senior appropriator have on the required quality? What standard determine the appropriate quality? Is Thornton subject to the stream conditions when it purchased, appropriated, or changed its water rights? Is Thornton subject to equitable defenses of waiver, laches, or assumption of risk?<sup>53</sup>

It will be interesting to track the water court's rulings on these pending motions for summary judgment.

## CONCLUSION

Pursuant to Colorado statute, substituted water shall be of a "quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used,"<sup>54</sup> and substituted water "shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put."<sup>55</sup> Juxtaposed against these requirements are the effluent requirements imposed on individual dischargers. The 1986 Division 1 Water Court decision in the *City of Golden* held that there is no true conflict under the statutory framework, and that any water quality concerns are, in effect, in addition to those requirements imposed in the administration of

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50. COLO. REV. STAT. § 37-92-301(4) (1997).

51. See *City & County of Denver v. City of Englewood*, 826 P.2d 1266 (Colo. 1992).

52. See *Taussig v. Moffat Tunnel Water & Dev. Co.*, 106 P.2d 363, 367 (Colo. 1940).

53. *Supra* note 46, at 5-6.

54. COLO. REV. STAT. § 37-92-305(5) (1997).

55. COLO. REV. STAT. § 37-80-120(3) (1997).

water rights.<sup>56</sup> However, the 1996 Colorado Supreme Court case of *City of Thornton v. Bijou Irrigation Co.* acknowledged a conflict in the statutory framework, but ultimately concluded that the prior appropriation system must take precedence.<sup>57</sup> Thus, whether a conflict is perceived or not, the result will most likely be the same: the historical use requirements established under C.R.S. section 37-92-305 (5) appear to be in addition to any effluent limitations established in a discharge permit. Mere compliance with a discharge permit is evidence that substituted water is of adequate quality, but is not conclusive proof in and of itself.

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56. Supplemental Findings of Fact, Conclusions of Law, Judgment and Decree, In the Matter of the Application for Water Rights of the City of Golden, in Clear Creek, Jefferson and Adams Counties, (Dist. Ct., Water Div. No. 1, Colo. 1986) (No. 83-CW-361).

57. *Bijou Irrigation Co.*, 926 P.2d 1, 91 (Colo. 1996).