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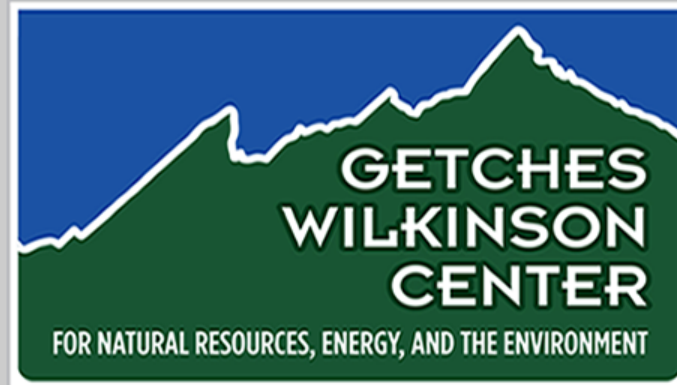
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Converting Conditional Water Rights to Instream Flow Protection:
A Property Transfer Strategy

David L. Harrison

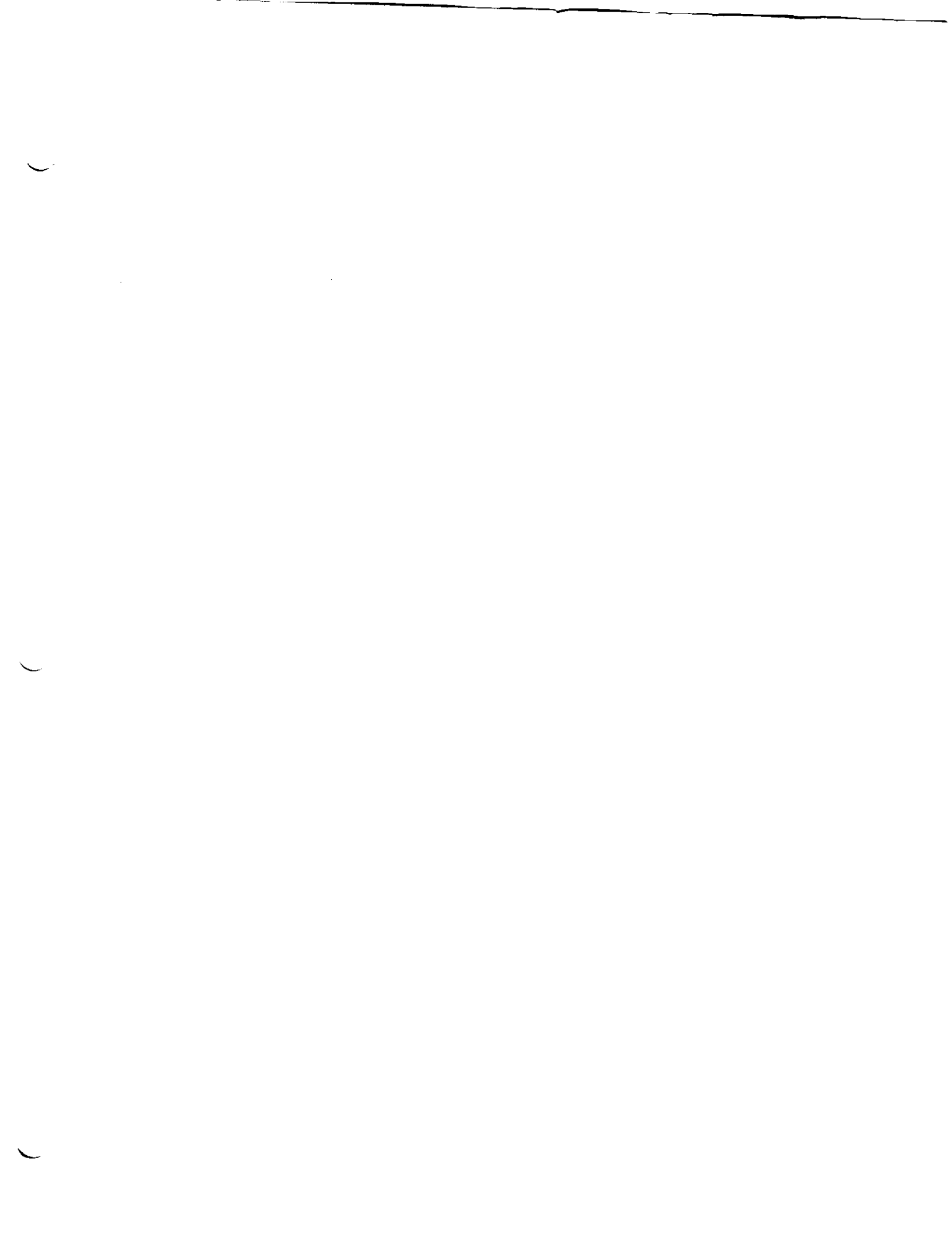
Moses, Wittemyer, Harrison, & Woodruff

Robert F. Wigington

The Nature Conservancy

Water as a Public Resource: Emerging Rights & Obligations

Natural Resources Law Center
University of Colorado School of Law
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I. Introduction

- A. A proposal that water rights be acquired under state law to protect the instream habitat of endangered fish in the Upper Colorado River Basin has recently received much attention. Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin, Final Draft, January 9, 1987.
- B. Such instream flow protection is sometimes not a problem of retiring existing water uses and improving instream flow regimes, but one in which a choice must be made between the existing instream flow regime and proposals for the development of new water projects that would deplete or dramatically alter existing flows.
- C. The same problem may be encountered with proposals to designate wild & scenic rivers. Since the passage of the Wild & Scenic River Act in 1968, 35 river segments in Colorado have been inventoried, 10 have been extensively studied, but only one has been designated, the Cache La Poudre, last year.
- D. In Colorado the plans for proposed water projects are embodied in a form of real property: conditional water rights. This

suggests a strategy in which the choice between new water projects and the protection of instream flows could sometimes be resolved through the acquisition of conditional water rights in the marketplace, and through the change of those water rights to instream flow protection. An analogous strategy may be possible in other western states depending on their approach to conditional water rights.

II. What Are Conditional Water Rights?

A. The Colorado law of conditional water rights is thoroughly reviewed by Hallford in Development of Conditional Water Rights Law, The Colorado Lawyer, 353-362 (March 1985). This article is attached to this outline with the permission of The Colorado Lawyer, as Appendix A.

1. A conditional water right is a "right to perfect a water right with a certain priority upon completion with reasonable diligence of the appropriation upon which such water right is to be based." C.R.S. Section 37-92-103(6).

2. Thus when there is some time between the first step of a plan to put water to use and the completion of that plan, the priority of the appropriation or water

right "relates back" to the first step.

"The doctrine offers the security of priority needed to plan and finance major water projects, particularly long range municipal and industrial water plans."

Hallford, Conditional Water Rights at 353.

See Metropolitan Suburban Water Users v. Colorado River Water Conservation District, 365 P2d 273, 285 (Colo. 1961).

3. Conditional water rights might be viewed as a kind of private system of water development planning, with the earliest plan, as tested against the standards of a bona fide plan of beneficial water use and diligent progress toward such use, being sanctioned by the state. In terms of the most economic, efficient, or optimal public allocation of water, the first proposed plan may not be the best one. But it may nevertheless enjoy the doctrine of relation back, and since the plan also constitutes transferable property, the problem of a less than optimal allocation can be addressed in a private market transaction. In effect, one test of whether a later plan is clearly better is whether it can buy out

the earlier.

4. The doctrine of relation back, however, stands in contrast to the Colorado constitutional doctrine of appropriation of water rights because it recognizes a water right before satisfaction of the fundamental requirement of actually putting water to beneficial use. Hallford points out the tension between the need to recognize conditional water rights for costly, long range water projects and the need to guard against speculation and hoarding undeveloped water rights. Hallford, Conditional Water Rights at 353. Much of the Hallford article concerns a recent trend in Colorado to strictly apply the law of conditional water rights, and perhaps to weed out some of the less viable water projects in favor of better ones. See especially C.R.S. Sections 37-92-103(3)(a) and 305 (9)(b); Trans-County Water, Inc. v. Central Colorado Water Conservancy District, 727 P2d 60 (Colo. 1986); Denver v. Colorado River Water Conservation District, 696 P2d 730 (Colo. 1985); Southeastern Colorado Water

Conservancy District v. City of Florence,
688 P2d 715 (Colo. 1984); Colorado River
Water Conservation District v. Denver, 640
P2d 1139 (Colo. 1982); Colorado River Water
Conservation District v. Vidler Tunnel
Water Co., 594 P2d 566 (Colo. 1979).

B. At first blush, one might think that the Colorado Water Courts were edging toward water development planning and toward deciding which proposed water projects are the most efficient and economical.

1. In Colorado River Water Conservation District v. Denver and Trans-County Water, the Colorado Supreme Court talked about the diligence issue in terms of whether continuing the subject conditional water rights was the "most" beneficial use of water. 640 P2d at 1142; 727 P2d at 65. In both cases, the Court also suggested that the standard for diligence may be higher where competing water developers could show that continuation of a more senior conditional water right frustrated their legitimate water needs. 640 P2d at 1141; 727 P2d at 65.

2. A recent ruling by the Division No. 5 Water

Court in Case No. 84 CW 70 holds that the doctrine of res judicata does not bar the reexamination of the plan or intent to put water to beneficial use in a diligence proceeding, and that the arguably tougher standards articulated in Vidler and City of Florence for establishing a new conditional water right could be considered in deciding whether a previously decreed one should be continued. This ruling is attached as Appendix B.

- C. Some may think that this trend offers a strategy for incorporating the protection of existing flow regimes into water development planning. That strategy would be to resist the award of new conditional water rights, as the National Wildlife Federation (NWF) is seeking to do with Aurora's Collegiate Range Project, or to police diligence filings, as the Denver Water Board or Colorado River Water Conservation District sometimes do, arguing in both instances for application of the new and tougher standards against speculation.
- D. But unlike traditional diligence contests between competing conditional water rights holders, NWF may only seek to protect existing

flows rather than a competing reservoir or collection system. If NWF has no standing to protect instream flows because that job has been delegated exclusively to the Colorado Water Conservation Board (CWCB), then the new standards against speculation would offer little comfort to NWF. Moreover as the Denver Water Board, the River District, and many others have learned, it requires a tremendous commitment of resources to monitor, let alone prevail, in continual conditional water right proceedings.

E. More importantly, the Colorado Water Courts are not about to take on the job of water development planning.

1. While the Colorado Supreme Court talked about the most beneficial and efficient use of water and about the needs of competing water users, the Court upheld the cancellation of the conditional water right in Colorado River Water Conservation District v. Denver not because it was shown to be less efficient or economical than competing projects, but because nothing specific had been done to further the original project. General litigation and

lobbying to promote water development did not constitute diligence on a particular project. 640 P2d at 1142. But the conditional water right would have been continued had its owner applied project specific effort even though it may not have been the best project, and the Court declined to inject itself into water development planning.

2. The Court went no further in Trans County Water than to confirm that some very stringent diligence criteria concerning project feasibility and financing which had been included in the decree awarding a conditional water right could be considered in deciding whether the right was being diligently developed. 727 P2d at 65-66. The Court observed that the water right owner had acquiesced in the incorporation of the stringent criteria into the original decree and permitted the owner to be held to this somewhat self imposed diligence standard, but again the Court did not attempt its own water development planning.
3. The Division No. 5 ruling in Case No. 84 CW 70 also probably does not go that far. The

original water development plan may be subject to reexamination and the Vidler and City of Florence standards considered in a diligence case, but this may only mean a more rigorous review of the progress on the original plan, and not a wholesale planning exercise in which the economics and efficiency of the plan are weighed against all others.

4. In Metropolitan Suburban Water Users, the Colorado Supreme Court said:

"The trial court had no right to substitute its opinion as to the course of future events, for that of those charged with the duty of supplying adequate water for municipalities and other public bodies, who have made careful studies of the questions and problems presented and have in good faith put their vision, work, money and energies into a program by which they seek to put the public waters of the state to beneficial use. If they have miscalculated and fail, the loss is theirs-if they succeed, it will be for the eternal benefit of the peoples of the State of Colorado."

365 P2d at 288. Whether one agrees with the Court's rhetoric on the public benefit of water development, the statement stands as an expression of current law.

- F. Under prevailing Colorado law, the acquisition of conditional water rights in the marketplace for change to instream flow protection may be

the only realistic alternative in some situations for an instream flow protection strategy; diligence litigation does not offer a satisfactory forum for water development planning.

III. A Theory for a Conditional Water Rights Market in Colorado

- A. Conditional water rights are vested property rights under Colorado law. C.R.S. Section 37-92-305(3); Mooney v. Kuiper, 573 P2d 538, 539 (Colo. 1978); Rocky Mountain Power Company v. White River Electric Association. 376 P2d 158, 162 (Colo. 1962).
- B. Conditional water rights are also changeable property rights.
 1. The change of the proposed point of diversion or use of a conditional water right poses a fundamental policy question.
 - a. The continuation of a "fixed and definite purpose" to carry out the original intent or plan for beneficial water use is an accepted diligence standard. Denver v. Northern Colorado Water Conservancy District, 276 P2d 992, 999 (Colo. 1954). But a change in a conditional water right may imply a

discontinuation of the original plan and a shift to a new one.

b. A conditional water right that was infeasible at its original point of diversion might be feasible at another. If a change of a conditional water right to a new point of diversion is not permitted, then the original water project could fail and never burden the stream. But if a change is permitted, the project could get new life and require all others to account for its potential draft on the stream at the new point of diversion.

2. This policy question has been resolved by the Colorado General Assembly in favor of permitting changes of conditional water rights.

a. Conditional water rights include the same right to change the right as other water rights. C.R.S. Section 37-92-103(5); Twin Lakes Reservoir and Canal Co. v. Aspen, 568 P2d 45 (Colo. 1977); Judgement and Decree in Case No. 2686, Water Division No. 5 at 10 (George E. Lohr, Water Judge). An excerpt from

this Judgement and Decree is attached as Appendix C. If there is no injury to other water rights, the change "shall be approved." C.R.S. Sections 37-92-305(3).

b. These statutes codify the case law that one incident of a water right as private property is the right to change its point of diversion or use so long as no other water rights are injured. Wiebert v. Rothe Bros., Inc., 618 P2d 1367 (Colo. 1980).

3. But while changes of conditional water rights are clearly authorized by statute, the inquiry as to whether such changes will cause injury requires special attention.

a. With absolute water rights where water has been diverted and used over a period of time, the injury question posed by changing such water rights is usually framed in terms of historic consumptive use. Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Company, 720 P2d 133 (Colo. 1986). Wiebert v. Rothe Bros, Inc.

b. Even though more water could have been

diverted over time under a particular absolute water right, the amount that can be used under the changed water right is limited by the amount actually diverted under the original right so that the amount of water left in the stream and the supply to other water rights is not diminished by the change.

c. Often much of what is diverted returns to the stream unconsumed, and only that which was historically consumed can be consumptively used under the changed water right, again so that the supply to others is not affected.

4. A hypothetical standard to prevent injury is required for changes of conditional water rights since, definitionally, water has not yet been put to use.

a. The "contemplated draft" standard for changing conditional water rights was reviewed in Twin Lakes.

1) Several municipalities sought to change the conditional decrees for the Independence Pass Transmountain Diversion System from irrigation to municipal use, but without changing

the season of use or the points of diversion from the Roaring Fork River Basin.

2) In determining whether the change of the conditional water rights from irrigation to municipal use would adversely affect the supply remaining in the Roaring Fork Basin the Division No. 5 Water Court examined how much water would have been diverted across the continental divide for irrigation use had the conditional decrees been perfected for that use, found that the maximum amount that would be diverted for municipal use was no greater, and concluded that the Roaring Fork River Basin suffered no injury. The Colorado Supreme Court endorsed this analysis. 568 P2d at 49-50.

b. Hallford argues that where the timing of diversions or more importantly the amount and timing of return flows are implicated, "contemplated consumption" should be the standard for determining

whether a change of conditional water rights is injurious. Hallford, Conditional Water Rights at 358. Such a standard is not inconsistent with Twin Lakes because the contemplated transmountain diversions for irrigation use would have been just as consumptive to the Roaring Fork River Basin as transmountain diversion for municipal use-both would have been 100% consumptive.

- c. The "contemplated draft" standard was also applied by the Division No. 5 Water Court in Case No. W-2686 involving the change of conditional water rights for the Rocky Mountain Power Company's (ROMPOCO) hydropower project. See Appendix C. Like the Independence Pass Transmountain Diversion System in Twin Lakes, this project proposed to divert water out of the White River Basin into the Colorado River Basin, without any return flow to the basin of origin.
 - 1) In 1975, one of the principal proposed points of diversion for

the ROMPOCO project and part of one reservoir site were included in the Flattops Wilderness Area.

The wilderness designation greatly reduced the feasibility of developing the ROMPOCO project as originally proposed and decreed.

An unprecedented exemption from the President was now required to develop the project and the prospects for securing federal land use permits became quite dim.

- 2) The conditional water rights were nonetheless purchased by an oil shale company who sought to change their points of diversion from the wilderness headwaters to a pumping pipeline 87 miles downstream near the energy rich Piceance Basin.
- 3) This change of water rights was resisted on the grounds that the contemplated draft of the ROMPOCO project was effectively reduced to zero by the wilderness designation and that the requested change of water rights was so fundamental

that it amounted to an abandonment of the original project.

- 4) The Water Court noted that in the case of conditional water rights, the amount to be diverted at the original point of diversion was inherently uncertain. Because of design changes or permitting requirements, a constructed water project may divert less than the conditionally decreed amount, and it is possible that a project will never be built at all. The Water Court found, however, that this inherent uncertainty did not preclude the change altogether or a showing of non-injury. Judgement and Decree in Case No. 2686 at 16-19.
- 5) Citing Twin Lakes and further noting that the permitting requirements that would have limited diversions by the original project would not apply at the new point of diversion far downstream, the Court concluded that the

contemplated draft of the conditional water rights was the full amount of water divertable in priority by the original project, less transit losses, notwithstanding the wilderness designation or permitting requirements faced by the original project. Judgement and Decree in Case No. 2686 at 17-19, 22-23.

- 6) The Court characterized the increased supply that would have become available to juniors in the White River Basin had the contemplated draft been limited by permit conditions as a windfall on which juniors were not entitled to rely. Such juniors were accordingly not injured by the exercise of the ROMPOCO priority at the new point of diversion to call the full amount divertable by the original project, less transit losses. Judgement and Decree in Case No. 2686 at 22-23.

d. Two important qualifications: The same

analysis might not apply where the diversions under the original project were not 100% consumptive to the basin of origin and where return flow has to be considered or where the point of diversion for a conditional water right is moved upstream, above some of the originally decreed sources of supply.

e. One important implication of the ROMPOCO case: If a land use designation or federal permitting requirement calls the feasibility of a proposed water project into question, the hypothetical yield of conditional water rights may still be enjoyed to the extent that the water rights can be developed elsewhere without injuring other water rights.

D. A limited market in conditional water rights has developed in Colorado around these principles. Besides the Twin Lakes and ROMPOCO sales:

1. The conditional water rights for the Four Counties and Bear Reservoir projects in the headwaters of the Yampa River Basin were acquired by the Colorado Ute Electric

Association, which in turn obtained change of water rights decrees and sold them to the Upper Yampa River Water Conservancy District for use in development of the Stagecoach Reservoir.

2. Small portions of the conditional water rights for the Juniper-Cross Mountain project in the lower Yampa River Basin have also been acquired by Colorado Ute and changed to alternate points of storage upstream.
3. Very small pieces of the conditional water rights for the Basalt and West Divide projects have been carved off and marketed for use in augmentation plans for residential developments in the lower Roaring Fork Valley and the Rifle-DeBeque corridor.
4. As part of a land exchange, the U.S. acquired a number of conditional water rights on Castle Creek near Ashcroft, and then obtained state water court decrees changing them to instream uses and making them absolute. Case Nos. 84 CW 180, 181, 182, 183, 184 and 185, Water Division No. 5.

E. The appraisal of the value of conditional water rights for the market may present some difficult questions:

1. What is the highest and best use of a conditional water right, and how should the feasibility and permit requirements of the originally decreed project be considered?
2. Is there another point of diversion where the conditional water right can be developed or can it be developed for new use if it is not feasible to develop the right as originally decreed, and what is the market value at the new point or of the new use?
3. Will the yield of a conditional water right at a new point of diversion or for a new use be any greater than the yield of a new and consequently the most junior appropriation on the stream?
4. What development and operating costs must be incurred to realize the value of the water right as originally decreed, at the new point of diversion, or for a new use, and what interest and other financial assumptions should be made in estimating any such costs?

5. If the market value of the original or changed conditional use is based on a comparison to the market value of developed water supplies for the same use, should the costs that must be incurred to develop the right be deducted from the comparable value?
6. Is there intrinsic value in the original location of conditional water rights even though they will be developed elsewhere?
7. See Ross, Valuation of Water Rights for Acquisition, Condemnation, and Taxation Purposes, 18 Rocky Mountain Mineral Law Institute 563-593 (1973).

IV. Changing Conditional Water Rights to Instream Flow Protection

- A. Once the questions of contemplated draft and market value are resolved, the change of conditional water rights to instream flow protection can be straightforward.
- B. In Colorado, the statutory requirement of diversion from the stream as an element of a water right has been repealed, and the CWCB has been authorized, perhaps exclusively, to appropriate or acquire water rights for instream flow protection. C.R.S. Sections 37-

92-102(3) and 103(4).

1. The CWCB may acquire conditional water rights, change their use to instream flow protection in state water court, and exercise the acquired priority to protect instream flows, provided the contemplated draft standard is met and no other water rights are injured.
2. A private party that was interested in protecting instream flows could also acquire conditional water rights and then convey them to the CWCB for change to instream flow protection.
 - a. The CWCB has already entered such contracts with the City of Aspen and The Nature Conservancy who turned over absolute irrigation and municipal water rights for change to instream flow protection.
 - 1) The City of Aspen simply licensed some of its Hunter Creek water rights to the CWCB and joined the CWCB as a co-applicant in the change of water rights proceeding.
 - 2) The Nature Conservancy purchased the Berkeley Ditch water right on

Boulder Creek subject to its successful change to instream flow protection with the CWCB as a co-applicant, and then conveyed the water right to the CWCB on the condition that the water right would revert to The Nature Conservancy if the CWCB did not use it for instream flow protection.

b. An amendment to Colorado's instream flow statute was introduced this year (S.B. 212) which suggests that the CWCB's authority to exercise and defend water rights acquired for and changed to instream flow protection may be enforced under the contract by which the CWCB acquired the water right.

C. The U.S. is also able to acquire and change water rights to instream flow protection.

1. In the Castle Creek cases mentioned above, the U.S. brandished its Property and Supremacy powers and obtained decrees from the Division No. 5 Water Court changing conditional water rights to instream flow protection without licensing or conveying any interest in the water rights to the

CWCB and without the CWCB joining in the water court proceeding.

2. The U.S. is currently seeking to change a number of water rights acquired in the expansion of Rocky Mountain National Park to instream flow protection and other uses, again without the support of the CWCB.
3. This year's proposed amendment to Colorado's instream flow statute (S.B. 212) would recognize this federal prerogative to change acquired water rights to instream uses in state water court without the CWCB.

- D. Such prerogatives of the CWCB or the U.S., however, may not satisfy a private party who feels unable to persuade either the CWCB or the U.S. to exercise and defend instream flow water rights with the same zeal that he or she would like. This year's proposed amendment to Colorado's instream flow (S.B. 212) statute would expressly preclude any private right of appropriation for instream flow protection, while it would authorize limited review of the CWCB actions to prevent injury to the instream flow water rights which it holds.
- E. In expressly precluding any private right of appropriation for instream flow protection, the

proposed amendment does not make it impossible for a private party like The Nature Conservancy to effectively act as a real estate agent for the CWCB or the U.S. The Conservancy could explore the market and obtain options fixing price and the seller's willingness, and then assign the option to the CWCB or the U.S. which could take title and change the water right to instream flow protection. The Conservancy could also help the CWCB or the U.S. raise money to exercise the option. The Conservancy could even hold the acquired water rights on a short term basis for later conveyance to the CWCB or the U.S. In such a case, the Conservancy would not be acting much differently than a private water broker who purchased agricultural water rights for resale to a municipality and who lacked the legal capacity to put the acquired water rights to municipal use. The Conservancy would of course not seek to profit on resale, and would only be interested in protecting instream habitat. But the temporary acquisition of a water right by the Conservancy with the intent to convey it to the CWCB or the U.S. for change to instream flow protection would not automatically

extinguish the acquired water right under the proposed amendment. The Conservancy would only risk abandonment of the acquired water right if the Conservancy was unable to convey the water right to the CWCB or the U.S. or otherwise put it to beneficial use after a reasonable period of time.

V. An Example: The Acquisition and Change of Conditional Water Rights to Protect Instream Flows in the Black Canyon and Gunnison Gorge.

A. The Gunnison River as it flows through the Gunnison Gorge just below the Black Canyon is a remarkable instream flow resource of national significance.

1. The Gunnison Gorge Reach is a Wild Trout/Gold Medal trout fishery, was once a home to the river otter, a Colorado endangered species, is important wintering habitat for the bald eagle, and is becoming a popular rafting run.
2. The Gorge is accessible only by foot or horseback and is soon expected to be recommended for wilderness designation by the BLM.
3. In 1986, federal legislation was introduced to designate 29 miles of the Gunnison

River, including all of the Gunnison Gorge, as a national wild & scenic river, and to change the status of the Black Canyon of the Gunnison National Monument to a national park.

- B. There are also overlapping plans to develop some major water projects in the Gorge, each with decreed conditional water rights in good standing. The largest of the proposed projects, that proposed by the Pittsburg and Midway Coal Company, includes a dam and reservoir that would back water up to the boundary of the National Monument and completely inundate the Gorge.
- C. The best strategy for resolving this conflict between the development of dams and the protection of instream flows probably does not include litigating the viability of the conditional water rights, but might include the acquisition and conversion of these water rights to instream flow protection.
 - 1. Pittsburg and Midway has agreed to donate 300 cfs out of its conditional water rights in the Gorge to The Nature Conservancy and has promised in the same agreement not to develop its remaining conditional water

rights within a 26 mile reach of the Gunnison River which includes most of the Gorge. The Nature Conservancy plans to offer the donated water right to the CWCB for change to instream flow protection.

2. The holders of the other major conditional water rights in the Gorge have signaled their interest in essentially trading their rights for developed storage supplies upstream at Blue Mesa Reservoir.

VI. Conclusion

- A. Under the law of conditional water rights in Colorado, private initiative is an important vehicle for water development planning. Such private initiative has conventionally been tested in lawsuits over whether a conditional water right for a project should be granted and continued. There may be little room to incorporate instream flow protection into such a lawsuits.
- B. But because water development plans in the form of conditional water rights are transferable property, and since conditional water rights can be changed to instream flow protection so long as other water rights are not injured, stalemates over the protection of instream

flows in Colorado might be resolved through market transactions based on the property interests of private developers in conditional water rights.

Developments in Conditional Water Rights Law



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by David C. Hallford

Unappropriated water has become increasingly scarce in parts of Colorado and, as a result, decreed conditional water rights have become significant considerations for water supply developers. As Colorado water use continues to change from agricultural and mining to municipal, industrial and other uses, water use relationships are being refined and adjusted. Currently, changing economic conditions have affected the viability of some decreed conditional projects, making it desirable to alter some projects either to serve different ends or to accomplish original goals differently. Also, several large conditional projects involve the same water supply, casting doubt on the feasibility of the more junior projects.

The need for greater certainty in water planning, the intensifying competition for and protection of supplies, and the desirability of altering some projects have spurred developments in conditional rights law. The parameters of the legal framework are being defined in the courts and the General Assembly. During the past few years, changes have been and are continuing to be made in the requirements for initiating and establishing diligence in developing conditional rights; and in the standards for changing and perfecting conditional rights.¹ These developments have importance beyond water law. They are relevant in real estate, property development and municipal law practice since they will affect the activities and decisions of property owners and developers, as well as those of private and public water suppliers.

BACKGROUND

A conditional water right is an inchoate right to use water that has been

initiated for a project that has not been completed. It is defined by statute as a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.²

Conditional water rights were first recognized in the development of the doctrine of "relation back." This provides that if adequate intention is formed and actions are taken to initiate a water project, its priority date under the appropriation system may "relate back" to the date of those acts if the project is completed diligently.³ The doctrine offers the security of priority needed to plan and finance major water projects, particularly long-range municipal and industrial water plans. The doctrine is in derogation of the Colorado Constitution, and it is strictly construed and applied.⁴

Two major policy goals must be addressed in the development of conditional rights law: (1) the certainty of priority, needed to justify development of costly and long-range projects; and (2) the desirability of maximum use of Colorado's water and the concomitant prevention of hoarding of undeveloped rights. Both goals require flexibility in standards for developing and changing conditional projects, as well as the establishment of firm requirements so that speculative appropriations are denied or cancelled. These two considerations are not mutually exclusive, but at times can conflict.

Striking and maintaining a balance between these two policies is helpful. Maximum utilization depends ultimately on certainty of priority since large water projects probably cannot be financed and developed without it. In contrast, certainty of priority does not

depend on the realization of maximum use because it focuses on individual water rights. An emphasis on fostering certainty of priority, however, would impede maximum use due to the chilling effects of perpetuating conditional decrees without actual development efforts. Certainty of priority is a tool which can be used either to meet or to defeat maximum utilization.

INITIATION OF WATER RIGHTS

To initiate a conditional water right, an intent to divert and use specific waters must be formed, and overt actions must be taken to give notice of the intent to third parties. The intent and action requirements are "distinct and separate" elements, and the priority date of a conditional right is the date on which both elements are satisfied and "coexist."⁵ The adequacy of both intent and action is a factual matter. The water court's findings are binding if supported by competent evidence.⁶ The intent and action "prongs" of initiation are of equal concern to an appropriator, and several significant recent developments concerning the requirements for each should be considered carefully.

The Intention Prong

Initiation of an appropriation, conditional or absolute, requires "an intent to appropriate a definite quantity of water for beneficial use. . . ." Analytically, intent appears to have two elements: intent to divert water and intent to use water. These elements often overlap.

Intent to Use Versus Speculation:

In the 1970s, what is known as the "speculation" doctrine was applied

with increasing strictness. In brief, this doctrine provides that requisite intent to obtain a conditional decree does not exist when an applicant seeks such a decree for unspecified uses of water or to supply water to third parties with whom the applicant is neither in contractual privity nor an agent or governmental agency. The applicant who falls within any of these categories is considered a speculator, and the court would deny a conditional decree.

The problem of distinguishing between bona fide intent and speculation is not new.⁸ Recent developments, however, are that (1) there is increasingly frequent application of the speculation doctrine; (2) the Colorado Supreme Court and General Assembly have refined factual indicia of speculation; and (3) the doctrine has been applied to public, as well as private, water suppliers.

In *Bunger v. Uncompaghe Valley Water Users Assoc.*, the court upheld the denial of a conditional decree based on the following evidence of lack of requisite intent: the applicant had no plans for constructing or financing the project; the applicant's eventual water uses were unspecified; and the applicant had not calculated the amount of water to be appropriated.⁹

After *Bunger*, a four-judge majority directed the entry of a conditional decree in *Twin Lakes Reservoir and Canal Co. v. City of Aspen*.¹⁰ The central issue was whether the construction of a canal many years before Twin Lakes formed the intent to divert and use more water demonstrated adequate intent. The majority reasoned that the "action" prong of initiation may be satisfied before the formation of specific intent and may coexist with a subsequent decision to divert water. A three-judge minority urged denial of the decree because, although most water users in an arid region have an obvious desire to acquire all possible water, such an "open-ended" intention focuses on neither specific waters nor specific uses.¹¹

The minority's reasoning proved to be a precursor for the decision in *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*¹² That decision applied the speculation doctrine and reversed an award of conditional rights. The applicant had developed plans for a large storage project and had granted the City of Golden an option to purchase a small amount of the water. The court held that the applicant had

not formed an intent to use water, distinguishing between mere "speculation" and the constitutionally guaranteed right to appropriate for beneficial use.

The court specifically held that recognizing conditional appropriations by those who will not use the water personally and who do not act as agents for or have contractual relationships with the ultimate water users would promote monopolization of the resource by profiteers and chill the developmental efforts of bona fide water users. The court reversed the water court's decree except for the amount granted to the City of Golden.¹³

Even as *Vidler* was being decided, the General Assembly modified the statutory definition of "appropriation" to require that a prospective appropriator must be the ultimate water user, or the municipal agency for the ultimate users, or must have an agency or contractual relationship with the ultimate users.¹⁴ The *Vidler* definition of speculation was thereby codified by the General Assembly.

Three years later, in *Rocky Mountain Power Co. v. Colorado River Water Conservation District*, the court upheld the denial of a conditional claim for water proposed to be sold by the applicant to unidentified municipalities. Significantly, the court held that *Vidler* was an affirmation, not a reversal or modification, of prior law.¹⁵ *Lionelle v. Southeastern Colorado Water Conservancy District*, decided in 1984, continued the consistent application of the speculation doctrine, bolstered by the statutory modification.¹⁶

The applications and refinements of the speculation doctrine from *Vidler* through *Lionelle* involved private applicants. In the recent decision in *Denver v. Colorado River Water Conservation District*,¹⁷ the Colorado Supreme Court addressed the issue of a municipality's capacity to appropriate waters conditionally to supply suburban users who are not residents of the municipality. The court made two significant holdings concerning intent to appropriate, brought *Vidler* almost full circle, and raised new questions to be addressed by the water courts.

The court first held that a resolution of the Denver Board of Water Commissioners broadly directing the appropriation "of all possible raw water out of the Colorado River, and its tributaries" was insufficient to evidence the required fixed intention to appropriate specific waters. This holding follows the

dissenting view in *Twin Lakes*, discussed above, that a general desire for additional water is legally inadequate. Nevertheless, the court held that the subsequent refinement of the Board's general desire by authorized staff who prepared detailed maps of diversion points and estimated diversion amounts from specific streams constituted formation of the required intent, even though the Board never specifically approved that subsequent work.¹⁸

The court's second significant holding applied the *Vidler* requirements to Denver's conditional claims, which were predicated upon proposed service to water suppliers outside of Denver's boundaries. The court rejected an argument that Denver lacked legal capacity to appropriate waters for such suburban service, but recognized that, in implementing such service, municipalities act in a proprietary capacity and are subject to regulation by the General Assembly.¹⁹

In determining the need for and scope of Denver's appropriations for such purposes, the court held that *Vidler* is controlling as "an application of long-standing principles." The court directed that the water judge determine on remand the extent of Denver's agency and contractual obligations to suburban suppliers on the dates of initiation of the several appropriations.²⁰

In summary, the *Vidler* court's analysis of the speculation doctrine has been recognized as a long-standing legal requirement and has been codified and applied to claims of both private and public water developers. Therefore, prospective appropriators must meet one of the following four tests to demonstrate necessary intent to appropriate water: the applicant must be (1) the ultimate user, (2) the municipal agency of such users, (3) the agent of such users or (4) the contract supplier for such users:

Intent to Divert Unappropriated Water:

Colorado law now requires that an appropriator of conditional rights demonstrate an ability to divert or store unappropriated water. While an award of conditional groundwater rights clearly depends on availability of unappropriated water,²¹ traditionally it was not necessary to show that unappropriated water was or would be available to obtain a conditional decree for surface waters.²² In 1979, however, legislation was enacted requiring that a conditional right cannot be decreed un-

less the waters claimed "can and will be" captured and beneficially used within a reasonable period of time.²³ This statute has been interpreted to require proof that unappropriated water will be available under a conditional water right within a reasonable time.

Lionelle, noted above, presented an opportunity for review of this new statute.²⁴ In that case, the Colorado Supreme Court upheld the denial of a conditional decree. The court's affirmation of the denial focused on injury rather than unavailability of unappropriated water. Injury can occur to vested rights if water is taken out of priority, but, in adjudicating a conditional right, the case law and statutes²⁵ indicate that the precise criterion for the award of a right is availability of unappropriated water, not injury. The *Lionelle* result was consistent with a strict interpretation of the new statutory requirement, although it did not apply it expressly, causing some uncertainty.

Southeastern Colorado Water Conservancy District v. City of Florence clarified the ambiguity created by *Lionelle* and expressly applied the new statute on conditional decrees.²⁶ This appli-

cant applied for a surface water right that would be in priority very infrequently. The court rejected an "injury" attack on the application. Based on the new statutory requirement, the court held that the applicant had not proven availability of unappropriated water.²⁷ The court's remand, however, directed reconsideration under both the statutory criteria and the possible injury to senior appropriators.²⁸

In summary, the recent legislation as interpreted by the courts requires that adequate proof of availability of unappropriated water must support a conditional decree in the absence of a plan for augmentation.²⁹ This rule is consistent with a strict interpretation of the speculation doctrine.

Standards for initiating conditional rights and for diligence in developing such rights are related. The existence of conditional decrees could prevent prospective appropriators from showing that "unappropriated" water will be available for their capture and use. For example, *City of Florence* involved the heavily over-appropriated Arkansas River basin. Therefore, the Colorado Supreme Court has not yet decided

whether decreed conditional rights must be considered in determining whether unappropriated water will be available to a new conditional right. If such rights must be considered, further tightening of diligence standards eventually may be warranted. Otherwise, the perpetuation of decreed conditional rights with minimal development effort could strangle the plans of those prepared to develop but who cannot because they lack "unappropriated" water and are denied decrees. It may be more logical for the courts not to consider decreed conditional rights in assessing available water for new conditional projects, because such rights are not completed appropriations.

The Action Prong

"[I]ntention alone has never constituted an appropriation."³⁰ Initiating an appropriation requires both intent and overt physical acts sufficient to give notice to third parties.³¹ An often-cited test for the required overt acts requires "open and notorious" physical activity which demonstrates a fixed purpose to divert and use water. The primary purpose of this action is to give notice to

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others "of the proposed use and consequent demand upon the water supply involved."³²

The overt action requirement has been applied with varying degrees of strictness. In 1961, the Colorado Supreme Court directed the issuance of a conditional decree where uncontradicted factual findings showed that no survey had been made of a project.³³ In contrast, the 1976 *Bunger* court found that preliminary survey work was done "merely to fulfill appellant's mistaken concept of the statutory requirement," and was inadequate.³⁴ Thus, the adequacy of particular overt actions to initiate a conditional right had been analyzed differently by the court, creating some ambiguity.

Fortunately, two recent Colorado Supreme Court decisions clarify the nature of overt actions required to initiate a conditional right. In *City of Aspen v. Colorado River Water Conservation District*, the court held expressly that work "on the land" is not an absolute prerequisite to initiating a conditional water right.³⁵ The court carefully reviewed its prior decisions and concluded that prior statements which seemed to require that work be performed "on the land" did not really require this for disposition of the particular cases. The court remanded the case for determination as to the adequacy of the applicant's actions to (1) "manifest the necessary intent," (2) demonstrate that a "substantial step" had been taken or (3) "constitute proper notice."³⁶ Thus, this case established three qualities which must comprise adequate physical action.

Denver v. Colorado River Water Conservation District also considered the adequacy of overt actions.³⁷ In determining whether Denver had initiated several appropriations, the court cited the *City of Aspen* clarification of the "on the land" question. It also focused carefully on the performance of physical surveys in determining the priority dates to be assigned to the several claims.³⁸ Significantly, the court declined to extend a 1961 decision which had permitted work in one drainage basin to constitute overt activity for an appropriation in an entirely separate basin, holding that such separate work would neither provide notice to others nor manifest required intent.³⁹

These decisions clarify two important rules concerning the adequacy of overt activity. First, such activity need not include work "on the land." Sec-

ond, the activity must accomplish three purposes: evidence the applicant's fixed intent, demonstrate a substantial step and provide notice to others. Neither decision provides a clear answer to the question of whether the notice objective of overt activity can be fulfilled merely by filing a water court application and by subsequently publishing the application.

It is logical for the physical actions necessary to initiate an appropriation to relate to establishing the bona fides of intent to divert and use water rather than to giving notice to others. It is unreasonable to assume that even significant survey work would serve the traditional notice objective of coming to the attention of other water users. Those users, however, can be notified by the water court's resume publication if the project is made the subject of a conditional rights application to establish a meaningful priority.⁴⁰ Therefore, actual notice of a conditional claim can be provided through the resume publication. The action prong then should be met if the physical activity evidences fixed intent and demonstrates the taking of a substantial step on the project.

DILIGENCE IN DEVELOPING RIGHTS

Required Work

To preserve a conditional right until the project is completed, the water court must determine every four years that diligence was exercised in developing the right during the previous four years.⁴¹ As with the test for initiation of rights, the question of diligence involves factual determinations.⁴² The statutory diligence requirement and proceedings serve to maximize beneficial use of state waters. As noted by the Colorado Supreme Court, "[a] basic principle underlying Colorado's water law is that the most beneficial use is made of the state's water."⁴³ This policy underlies diligence determinations.

Diligence is traditionally defined as "the steady application to business of any kind, constant effort to accomplish any undertaking."⁴⁴ Under Colorado law, a diligence finding requires that "concrete actions" have been taken in developing the project and that the appropriator has a continuing intent to use the water.⁴⁵ Thus, the intent and action requirements for initiating rights are mirrored in the diligence test.

The decision in *Colorado River Water Conservation District v. Denver* gives

notice of stricter factual requirements for diligence findings by requiring that the water court determine whether a water right is being developed "in the most expedient and efficient fashion possible under the circumstances."⁴⁶ The court affirmed the water court's cancellation of conditional rights. The applicant claimed that extensive non-project activities such as general litigation, lobbying and political efforts should establish diligence for several conditional projects. The court held, however, that lack of project-specific work justifies cancellation for lack of diligence.

The "expedient and efficient/project-specific work" test could be significant if it is strictly applied by the water courts. Many conditional projects are questionably feasible from either hydrologic or economic standpoints, and little money is spent for project-specific work on those projects. It is comforting to know that diligence is determined on the facts presented by each application, and that traditional factors concerning financial difficulty, wars, strikes and other matters beyond the appropriator's control may excuse inactivity.⁴⁷ The *City of Aspen* ruling that work is not required "on the land" to initiate a conditional right may lead to the determination that "project-specific" diligence does not necessarily require work on the land either.

Filing Requirements

The Colorado Supreme Court has addressed the statutory requirement for filing of diligence applications. In *Town of De Beque v. Enewold*, the court held that failure to file timely a diligence application results in forfeiture of the conditional priority.⁴⁸ The court also held that omission of a conditional right from a diligence application and the resulting omission of the right from the water judge's decree does not constitute clerical error. The court analogized the diligence statute to a statute of limitations.

Subsequent to the untimely filing of an application by the Town of De Beque, legislation was enacted requiring that, before cancelling a conditional water right, the water court must give notice to the appropriator.⁴⁹ The Town of De Beque asked that this statute be applied retroactively to its untimely filing.⁵⁰ Failure of the water clerk to give the required notice logically would then excuse a late filing, and the statutory amendment would have provided a

safety net. However, the court held that the statute cannot be applied retroactively to prevent cancellation due to an untimely filing.

Bar 70 Enterprises, Inc. v. Highland Ditch Assoc. also involved a late-filed diligence application.⁵¹ The Colorado Supreme Court followed *Town of De Beque* and directed cancellation of the conditional right. Because the applicant had received a pre-cancellation notice from the water clerk, the issue of excuse for failure of such notice was not addressed. The water court held that delinquent applicants should be given a cancellation notice by registered or certified mail and be permitted to show cause why the conditional decree should not be cancelled. The Supreme Court reversed, holding that the water court's ruling was erroneous under the statute.⁵²

At least two questions remain to be resolved concerning diligence application filing requirements. First is a question not present in prior cases—Does a failure to receive the statutory pre-cancellation notice excuse a late filing? Second is the possibility intimated in *Town of De Beque*⁵³—Can circumstances beyond the control of an applicant excuse a late filing?

Possible Effect of Others' Needs on Diligence

The statutes provide that "any person" may file a statement of opposition to a diligence application,⁵⁴ and injury or water right ownership are not recognized requirements for such opposition. The Colorado Supreme Court may have suggested that competition for water could be used in defeating a diligence application. In *Colorado River Water Conservation District v. Denver*, the court stated that the purpose of the statutory diligence requirement is to:

prevent the accumulation of conditional water rights without diligent efforts to complete the projects *to the detriment of those needing and seeking to make immediate beneficial use of the same water.*⁵⁵ (*Emphasis added.*)

The emphasized language might support a novel argument that a diligence objector can establish that identifiable water users will be detrimentally prevented from developing water supplies if diligence is awarded without consideration of the legitimate water needs of junior appropriators. The rationale is that such needs should require a higher standard in determining whether condi-

tional rights are being developed expediently and efficiently.

CHANGES OF CONDITIONAL RIGHTS

By statute, water rights, including conditional water rights, can be changed in type, place or time of use to new, alternate or supplemental points of diversion. They can also be changed in means of diversion or place of storage, from direct use to storage or from storage to direct use.⁵⁶ Changes must be permitted if they will not "injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." Terms and conditions to prevent any injury may be imposed to allow such changes.⁵⁷

Changes of absolute water rights are generally permissible if use under the decreed change is limited to the prior historical usage of the water rights as established by the applicant.⁵⁸ In short, historical use limitations are keys in changing an absolute water right without injuring other users. In a change of conditional water rights, however, water has not been used, and there is no historical use on which to base terms and conditions to prevent injury. As applications to change conditional rights have become more numerous, courts are addressing the standards which should be imposed in changing such conditional priorities.

In *Twin Lakes Reservoir and Canal Co. v. City of Aspen*,⁵⁹ the water court approved a change of conditional rights from irrigation use to irrigation "and other uses" based on the "contemplated draft" of the project as originally decreed. In applying that limitation, the water court examined the need for water for the originally decreed irrigation use at its originally intended location.⁶⁰ The Colorado Supreme Court approved that factual analysis, but did not rule expressly that "contemplated draft" is the measure of a changed conditional water right.

An application filed in Division 5 of the water court for change of conditional rights was granted by the water judge⁶¹ and appealed to the Colorado Supreme Court. The appeal was dismissed on stipulation after oral argument, but the water court's decree is instructive concerning the application of the "contemplated draft" analysis.

Objectors urged that permitting restrictions which would have limited the

project's water yield as originally decreed should limit diversions at new points of diversion. The water court rejected these contentions and held that the "contemplated draft" of conditional rights is the amount of water available in priority at the original points of diversion or places of storage. The court reasoned that environmental or regulatory permitting restrictions would have been imposed only to protect environmental values, and the loss to other appropriators of benefits arising from such permit limitations does not constitute injurious effects to the water rights of others.⁶²

A change of conditional water rights to new types or places of use could result in greater consumption of water, even if a "contemplated draft" limitation precludes enlarged diversions or storage under the change.⁶³ The Colorado Supreme Court has not addressed such a problem, and it is an open question whether the statutes which now expressly permit changes of conditional rights would preclude limitations to prevent enlarged consumption.

Rules concerning changes of conditional rights are developing so that they will mirror somewhat the requirements for changes of absolute rights. Specificity of ultimate water uses and availability of unappropriated water now are prerequisites to securing a conditional decree. Those conditions are analytically similar to the "historical use" facts which must support a change of absolute rights. While there is obvious merit in permitting latitude in changing conditional rights, in this author's opinion, "contemplated consumption" should become a required element of "contemplated draft" for changes of conditional rights. The measure of an absolute right in a change proceeding is not merely the amount and timing of its historical diversions but, more importantly, the amount and timing of water consumption and return flows under those diversions. Imposing "contemplated consumption" conditions on changes of conditional rights would preserve to junior appropriators the maintenance of stream conditions which existed when they initiated their rights.⁶⁴

PERFECTION OF CONDITIONAL RIGHTS

Conversion of a conditional right to absolute status through judicial determination of diversion and use of water "perfects" the appropriation. A decreed

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conditional water right can be judicially converted to "absolute" status to the extent that water is captured by diversion or storage and beneficially used within a reasonable period of time. Mere diversion or storage are inadequate for conversion to absolute status—actual beneficial use of the water must be demonstrated.⁶⁵ Perfection is significant because it eliminates the need to show diligence in the future for the portion of the right which is made absolute.

Broyles v. Fort Lyon Canal Co. held that diversions of water at undecreed points of diversion cannot satisfy the diversion aspect of converting conditional rights to absolute status.⁶⁶ The court focused on the notice requirements of the statutes and the requirement that changes of water rights must be subjected to scrutiny under the non-injury standard. The case held that changes in points of diversion for conditional rights must be judicially approved through a change of water right proceeding. After approval, diversions at points not originally decreed will support conversion of conditional rights to absolute status.

The *Broyles* rationale logically applies to all changes of the type, place or manner of use of conditional rights. Therefore, it should be presumed that use of water diverted under conditional rights for undecreed purposes will not establish the beneficial use required for conversion to absolute status. Any required changes of use should be approved by the water court to lay the foundation for future perfection of conditional rights. This will require more detailed and long-range planning by developers of conditional projects. The ultimate practical goal of such developers is to perfect the maximum amount of a conditional water right expeditiously. That goal will be met best through careful and timely consideration of ultimate diversion points and water uses.

One significant issue concerning the perfection of conditional rights that has not yet reached the Colorado Supreme Court is whether an applicant for conversion of a conditional right to absolute status must prove that diversions or storage were made in priority. In other words, the applicant may be called upon to establish that he did not take someone else's water, regardless of whether he was advised by state water administration officials to curtail his diversions or storage.

By law, an absolute water right can be decreed to the extent of the proven capture and beneficial use of water.⁶⁷ A plain reading of the statute indicates that an applicant for conversion of a conditional right to absolute status must prove only capture and use and not that the water was taken in priority.

This interpretation is supported by the court's holding in another context that diversions which technically are "out-of-priority" can be considered in establishing historical water use for a change of water right.⁶⁸ A contrary interpretation would create great proof difficulties for applicants, but would be consistent with the rule that a conditional decree cannot be entered without proof of availability of unappropriated water.

CONCLUSION

There is still a large quantity of undeveloped water in Colorado, but a good portion is tied up in conditional decrees. Limited developed supply and growing demand traditionally reflect economic conditions favoring a free market approach to resource development. The trend of Colorado's law, however, may diminish the ability of private water developers to acquire conditional priorities. In striving toward maximum utilization, it will make little difference whether private or public entities speculate for or hoard water under conditional decrees. Vigorous application of the speculation doctrine ultimately might hinder water development unless it is uniformly applied to all appropriators, including municipal entities.⁶⁹

Decreed conditional priorities, particularly those for large projects, increase in value with time. Such rights can become difficult to cancel simply because of their age. Moreover, as a decree becomes older, pressure for actual development should increase. The apparent tightening of requirements for establishing diligence should begin culling out some conditional decrees which have been preserved in the past with minimal development efforts. Focusing the diligence test on the existence of continuing and affirmative intent to develop rights and the performance of work which actually will result in use of water is important. Such emphasis may require water suppliers to make hard choices as to which conditional rights should be developed and which should be allowed to lapse.

Conditional rights issues remain a frontier of Colorado water law. The bedrock principles are fairly clear, but there are still some uncertainties. Tension exists between the need for flexibility in developing and perfecting conditional rights and the need for firm standards for bona fide development efforts which will result in actual water use. Development of a consistent doctrine will require a continual balancing of the two competing, yet related elements—certainty of priority and maximum utilization.

Maximum utilization is the state's ultimate goal, while certainty of priority is the objective of the individual appropriator. There is a practical tension and a constitutional tension between the two policies.⁷⁰ The challenge is to achieve maximum utilization for the benefit of Colorado and its citizens without impairing vested rights. In meeting this challenge, it must be remembered, first, that the principle underlying conditional water rights, relation back of priority, is in derogation of the constitutional appropriation doctrine, and, second, that a conditional right is an inchoate and tenuous right

which is not "vested" in the sense that an absolute right is vested.

NOTES

1. Significant questions also presently exist concerning the applicability of conditional rights law and the priority system to rights to use nontributary groundwater located outside the boundaries of designated groundwater basins. See Phillips, "Non-tributary Groundwater: The Continuing Saga," 13 *The Colorado Lawyer* 68 (Jan. 1984). The law in this area is sufficiently unique and in flux that it may be premature to address these questions. The Groundwater Legislation Committee issued a report on August 1, 1984, concerning potential legislative modifications affecting the acquisition, development and administration of such rights. These matters are the subject of legislation pending before the Colorado General Assembly as of the date of this writing. See, S.B. 5, 55th General Assembly, 1st Reg. Sess.

2. CRS § 37-92-103(6). See also, 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 583-84 (1971).

3. CRS § 37-92-305(1). See, *Harvey Land & Cattle Co. v. Southeastern Colorado Water Conservancy Dist.*, 631 P.2d 1111, 1113 (Colo. 1981).

4. See, *Denver v. Northern Colorado Wa-*

ter Conservancy Dist., 276 P.2d 992, 997, 1001 (Colo. 1954); *Fruitland Irrigation Co. v. Kruebling*, 162 P.161, 163 (Colo. 1916).

5. See, *Rocky Mtn. Power Co. v. Colorado River Water Conservation Dist.*, 646 P.2d 383, 387 (Colo. 1982); *Bunger v. Uncompahgre Valley Water Users Ass'n*, 557 P.2d 389, 394 (Colo. 1976); *Elk-Rifle Water Co. v. Templeton*, 484 P.2d 1211, 1215 (Colo. 1971), respectively.

6. *Harvey Land & Cattle*, *supra*, note 3 at 1113; *Elk-Rifle Water Co.*, *supra*, note 5 at 1215; *Colorado River Water Conservation Dist. v. Denver*, 640 P.2d 1139, 1143 (Colo. 1982); *Colorado River Water Conservation Dist. v. Denver*, 642 P.2d 510, 513 (Colo. 1982).

7. *Rocky Mtn. Power Co.*, *supra*, note 5 at 387.

8. See, *Denver*, *supra*, note 4 at 1008-09.

9. *Supra*, note 5 at 395.

10. 557 P.2d 825, 828-29 (Colo. 1977).

11. *Id.* at 831 (Erickson, J., dissenting).

12. 594 P.2d 566, 567 (Colo. 1979).

13. *Id.* at 568-69.

14. CRS § 37-92-103(3)(a). Colo. Sess. Laws, 1366, § 5 (1979).

15. *Supra*, note 5 at 389.

16. 676 P.2d 1162, 1169-70 (Colo. 1984).

17. 14 Colo.Law. 482 (March 1985)(S.Ct. No. 82SA259, *ann'd* Jan. 21, 1985).

18. *Id.* at 488-89.

19. *Id.* at 485-88.

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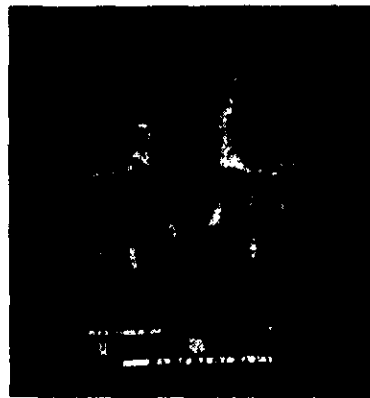
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20. *Id.* at 493.
21. *Bahn v. Kuiper*, 575 P.2d 402, 403 (Colo. 1978).
22. See, *Vidler*, *supra*, note 12 at 569.
23. CRS § 37-92-305(9)(b), Colo. Sess. Laws, 1366, § 6 (1979).
24. *Lionelle*, *supra*, note 16 at 1167.
25. See, CRS § 37-92-305(3), which subjects changes of water rights, plans for augmentation and exchanges to a non-injury standard; CRS § 37-92-305(9)(b) concerns conditional rights and the availability of unappropriated water.
26. 688 P.2d 715 (Colo. 1984).
27. *Id.* at 716-17.
28. *Id.* at 718.
29. In addition to *Lionelle* and *City of Florence*, see also, *Denver v. Colorado River Water Conservation District*, *supra*, note 17 at 491.
30. 5 Clark, *Waters and Water Rights* § 409.2 at 108 (1972), citing, 1 Wiel, *Water Rights in the Western United States* §§ 380-381 (3d ed. 1911).
31. *Fruitland Irrigation Co.*, *supra*, note 4 at 163.
32. *Id.*
33. See, *Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 280, 288-89 (Colo. 1961).
34. *Bunger*, *supra*, note 5 at 395.
35. 14 Colo. Law, 495 (March 1985)(S.Ct. No. 82SA478, *ann'd* Jan. 21, 1985).
36. *Id.* at 497-98.
37. *Supra*, note 17.
38. *Id.* at 488-93.
39. *Id.* at 490-91.
40. See, CRS § 37-92-302(3). Also, in 1981, the Colorado General Assembly enacted CRS § 37-92-306.1, which permits water users to relate water right applications back to the date of the filing of a competing application for purposes of priority administration. This provision can rectify the "claim jumping" that occasionally occurs in water rights adjudication.
41. CRS § 37-92-301(4).
42. *Colorado River Water Conservation Dist.*, *supra*, note 6 at 1142; *Denver v. Sheriff*, 96 P.2d 836, 839 (Colo. 1939).
43. *Colorado River Water Conservation Dist.*, *supra*, note 6 at 1142.
44. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 546 (1868).
45. *Orchard Mesa Irrigation Dist. v. Denver*, 511 P.2d 25, 28 (Colo. 1973).
46. *Supra*, note 6 at 1142.
47. *Id.* at 1141-42, citing, *Colorado River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 468 P.2d 853, 856 (Colo. 1970).
48. 606 P.2d 48, 53 (Colo. 1980); see also, *Simineo v. Kelling*, 607 P.2d 1289 (Colo. 1980).
49. CRS § 37-92-305(7), Colo. Sess. Laws 1398, § 1 (1975).
50. *Town of De Beque*, *supra*, note 48 at 53.
51. 14 Colo. Law 461 (March 1985)(S.Ct. No. 83SA353, *ann'd* Jan. 14, 1985).
52. *Id.* at 462-63.
53. *Supra*, note 48 at 53 n. 3.
54. CRS § 37-92-302(1)(b).
55. *Colorado River Water Conservation Dist.*, *supra*, note 6 at 1141.
56. CRS § 37-92-103(5).
57. CRS § 37-92-305(3), (4).
58. See, *Wiebert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1371 (Colo. 1980); *Farmers Highline Canal Co. v. Golden*, 272 P.2d 629, 634 (Colo. 1954).
59. 568 P.2d 45 (Colo. 1977).
60. *Id.* at 49.
61. *Application of Gulf Oil Corp.*, Case No. W-2686, District Court for Water Division No. 5 (April 30, 1975).
62. Findings of Fact, Conclusions of Law, and Judgment and Decree, Case No. W-2686, District Court for Water Division No. 5 (December 5, 1979) at 17-18, 22-23.
63. In *Twin Lakes*, both the water court and Colorado Supreme Court dismissed an "enlarged consumption" objection because under both the original decree and the change of use all water would be diverted

transmountain from the Roaring Fork River basin to an entirely separate basin, the Arkansas River. Thus, the diversion would constitute a 100 percent depletion to the Roaring Fork River, regardless of the nature of ultimate water use. *Twin Lakes*, *supra*, note 59 at 50. See also in this regard, CRS § 37-82-106, concerning rights to use "imported" or "foreign" waters.

64. Colorado law has long provided that appropriators secure a vested right in the maintenance of stream conditions in existence at the time their appropriations were made. See, e.g., *Weibert*, *supra*, note 58 at 1371-72.

65. See, *Rocky Mtn. Power Co. v. White River Elec. Ass'n*, 376 P.2d 158, 161 (Colo. 1962); compare, CRS § 37-92-305(9)(a) with -305(9)(b).

66. 638 P.2d 244, 250-51 (Colo. 1981).

67. CRS § 37-92-305(9)(a).

68. See, *Southeastern Colorado Water Conservancy District v. Rich*, 625 P.2d 977, 982 (Colo. 1981). Compare, *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 550 P.2d 288, 294 (Colo. 1976) (senior users cannot show injury and they cannot prevent beneficial use of water by others).

69. The same diligence standard applies to all appropriators, and municipal corporations have no special status under Colorado water law. See, *Denver*, *supra*, note 4 at 999.

70. The Colorado Supreme Court has noted:

It is implicit in these constitutional provisions [concerning the appropriation doctrine] that along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*.

Felthauer v. People, 447 P.2d 986, 994 (Colo. 1968) (*emphasis in original*).

Legal Aid Foundation Fund-Raiser To be a Fun Run Saturday, April 27

The Colorado Bar Association Young Lawyers Section and the Legal Aid Foundation is sponsoring a combination Fun Run and Fund-Raiser. Anyone may participate by paying the entry fee and/or by pledging additional dollars. Proceeds will benefit the Legal Aid Foundation. The 5k and 10k run will be held Saturday, April 27 at 9 A.M. in Denver's City Park. The \$10 preregistration fee (\$12 on day of race) includes a T-shirt. Awards will be given to the top male and female finishers in three age categories and special prizes will be awarded to those who collect the most pledges. For more information, call the Legal Aid Foundation at 863-9544.

Register for CBA Mid-Year Meeting Now!
Call 860-1112

JUL 23 1986

COLORADO RIVER WATER
CONSERVATION DISTRICT

DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

Action No. 84 CW 70

ORDER

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF:

THE COLORADO RIVER WATER CONSERVATION DISTRICT, THE BASALT
WATER CONSERVANCY DISTRICT, THE WEST DIVIDE WATER CONSERVANCY
DISTRICT, THE MIDDLE PARK WATER CONSERVANCY DISTRICT, AND THE
WATER USERS ASSOCIATION NO. 1 IN THE COLORADO RIVER WATER
CONSERVATION DISTRICT, in Grand, Routt, Moffat, Eagle, Pitkin,
Rio Blanco, Garfield, Mesa, and Gunnison Counties, Colorado.

This matter came before the Court on the Applicant's Motion
in Limine filed on February 24, 1986.

This is an application for a finding of quadrennial diligence.
The Applicant requests an order determining that the rule in
Colorado River Water Conservation District v. Vidler Water Co.,
197 Colo. 413, 594 P2d 566 (1979) is not applicable to diligence
proceedings. The rule in Vidler to which the District refers
requires that to establish intent to appropriate water an applicant
for a conditional water right must show that it has plans to put
the water to use itself or that it has firm contractual commitments
to supply water to users or is in an agency relationship with such
users.

The Applicant argues that the only issue before the Court in
a diligence proceeding is whether the applicant has proceeded with
reasonable diligence in the last diligence period to complete the
appropriation.


To prove due diligence there must be shown an intention to use the water, coupled with concrete action amounting to diligent efforts to finalize the intended appropriation. Orchard Mesa Irrigation District v. City and County of Denver, 182 Colo. 59, 511 P2d 25 (1973). The rule in Vidler forms a part of the definition of intent.

The Applicant argues that the existence of intent was determined at the hearing on the application for a conditional decree and that a re-examination of that issue in a diligence proceeding would render meaningless the doctrine of res judicata. In ruling that intent is an issue in a diligence proceeding, the Court is not re-examining an issue already determined at the conditional decree hearing. The issue decided at the conditional decree hearing was whether, at that time, the applicant had the necessary intent to appropriate water. The issue to be examined in a diligence hearing is whether the intent to appropriate water has continued to exist during the diligence period. Intent is not a static condition but is subject to change. For instance, in the context of Vidler, the applicant may at the time of the conditional decree hearing have intended to use the water itself, but may no longer so intend during the diligence period.

It Is Therefore Ordered that the issue of the continued existence during the relevant diligence period of the intent to appropriate water is relevant to diligence proceedings and that the rule stated in Colorado River Water Conservation District v. Vidler Water Co., 197 Colo. 413, 594 P2d 566 (1979) is applicable thereto.

Dated: July 17, 1986.

BY THE COURT:



GAVIN D. LITWILLER,
Water Judge
Water Division No. 5.

Copy of the foregoing mailed to all
Counsel of record Water
Refer to Div. Engineer and
State Engineer Date 7-22-86
G. Jordan

Deputy Comm. Water Div. No. 5

Hamburg
Funk
Cajon
Leavenworth

JUL 28 1986

JUL 23 1986

COLORADO RIVER WATER
CONSERVATION DISTRICT

DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

Action No. 84 CW 70

ORDER

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF:

THE COLORADO RIVER WATER CONSERVATION DISTRICT, THE BASALT
WATER CONSERVANCY DISTRICT, THE WEST DIVIDE WATER CONSERVANCY
DISTRICT, THE MIDDLE PARK WATER CONSERVANCY DISTRICT, AND THE
WATER USERS ASSOCIATION NO. 1 IN THE COLORADO RIVER WATER
CONSERVATION DISTRICT, in Grand, Routt, Moffat, Eagle, Pitkin,
Rio Blanco, Garfield, Mesa, and Gunnison Counties, Colorado.

This matter came before the Court on the Applicant's Second
Motion in Limine filed on May 5, 1986.

This is an application for a finding of quadrennial diligence.
The Applicant requests an order determining that C.R.S. 37-92-305(9)(b)
has no application to a diligence proceeding.

That statute provides:

"No claim for a conditional water right may be recognized
or a decree therefore granted except to the extent that
it is established 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."

The Applicant argues that the Colorado Supreme Court in
Southeastern Colorado Water Conservancy District v. City of Florence,
688 P2d 715 (Colo. 1984) determined that C.R.S. 37-92-305(9)(b)
applies only to proceedings on an application for a conditional

decree. Southeastern cannot be so construed. The proceedings there were on an application for a conditional decree. The Court did rule that the requirements of the statute must be met before the entry of a conditional decree. It did not rule that that was the only circumstance in which the statute was applicable.

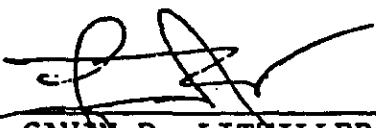
The statute itself provides that no conditional water right may be recognized unless the statutory requirements have been met. Diligence proceedings involve the recognition of a conditional water right.

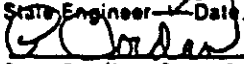
To the extent that the statute was not plead in the statement of opposition, one of the purposes of the pretrial conference is to determine if the pleadings must be amended. To the extent that the statute was not plead in the statement of opposition, it will be deemed to have been amended by the pretrial order.

It is Therefore Ordered That C.R.S. 37-92-305(9)(b) is applicable to quadrennial proceedings.

Dated: July 17, 1986.

BY THE COURT:


GAVIN D. LITWILER,
Water Judge
Water Division No. 5

Copy of the foregoing mailed to all
Counsel of record ~~Water~~
Referee ~~Div. Engineer~~ and
State Engineer ~~Date~~ 7-22-86

Deputy Clerk / Water Div. No. 5

Hamburg
Lusk
Coyler
Leavenworth
Harris
Kerst.

IN THE DISTRICT COURT IN AND FOR

WATER DIVISION NO. 5

STATE OF COLORADO

Case No. W-2686

501

IN THE MATTER OF THE APPLICATION)	
FOR WATER RIGHTS OF)	
GULF OIL CORPORATION, STANDARD OIL)	FINDINGS OF FACT,
COMPANY (INDIANA) AND ROCKY MOUNTAIN)	CONCLUSIONS OF LAW
POWER CO.)	AND JUDGMENT AND DECREE
IN THE WHITE RIVER BASIN)	
IN RIO BLANCO AND GARFIELD COUNTIES,)	
COLORADO.)	

These proceedings were initiated by the filing of an Application for Change of Water Rights on April 30, 1975, by the Applicants Gulf Oil Corporation and Standard Oil Company of Indiana (hereinafter referred to, collectively, as "Gulf-Standard") and Rocky Mountain Power Co. (hereinafter referred to as "Rompoco"). Notice of the Application was duly published in the resume of the Water Clerk in the month of May, 1975.

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Timely Statements of Opposition were filed in these proceedings by Objectors Colorado River Water Conservation District, The Superior Oil Company and Union Oil Company of California. Union Oil Company withdrew its Statement of Opposition by motion filed herein on August 8, 1975.

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A stipulation (hereinafter referred to as the "Stipulation") was negotiated and entered into between the Applicants and the remaining Objectors who had filed Statements of Opposition, specifying terms, conditions and restrictions for protection of the rights of the Objectors and agreeing to join in the request for entry of a decree in these proceedings embodying such terms, conditions and restrictions. The Stipulation has been filed herein and appears as a part of the record of this case.

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the Northwest corner of Section 15, Township 3 South, Range 87 West of the 6th P.M. bears South 86°24' East 66,364 feet. (The above water rights are hereinafter referred to as the "Subject Water Rights".)

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2. The Subject Water Rights (together with other water rights not involved in this proceeding) comprise the "Sweetwater Hydroelectric Project No. 482" as designated in ~~the~~ the aforementioned Decree. Under the Sweetwater Hydroelectric Project, Rompoco planned to divert and to store waters derived from the Subject Water Rights, and then conduct such waters through the divide which separates the South Fork of the White River drainage basin from the Sweetwater Creek drainage basin. The South Fork drainage basin drains into, and is tributary to, the White River which flows from the State of Colorado into Utah and thence into the Green River. The Sweetwater Creek drainage basin drains into, and is tributary to, the Colorado River which flows in a westerly direction and departs from the State of Colorado. The Colorado River drainage basin in Colorado is separated from the White River drainage basin by a divide. Accordingly, under the Sweetwater Hydroelectric Project, a transbasin diversion was planned whereunder waters diverted and utilized under the Subject Water Rights would be entirely diverted from the basin of origin of such waters (the White River Basin) and no return flow therefrom would return to such basin within the State of Colorado.¹

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3. Since the date of the award of the Subject Water

1. The evidence indicated that the Sweetwater Hydroelectric Project contemplated regulation of the penstock pressure system such that waters could be made to flow from the Sweetwater side through the Plateau Tunnel to the South Fork side. The evidence establishes, however, that in the event of such use the water so transported would be temporarily impounded in the Meadows Reservoir and then reconducted through the Plateau Tunnel to be discharged through the planned hydroelectric plants situated on the Sweetwater side of the drainage divide. Hence, as planned, ultimately all waters diverted for use from the South Fork drainage would be utilized in the Sweetwater (Colorado) drainage basin and not returned to the White River drainage area.

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Rights, Applicants have made applications for findings of reasonable diligence within the times and in the manner required by applicable statutes, and Orders and Findings of Diligence have been entered with respect to each such application. The Court finds that the Subject Water Rights have not been abandoned and are in force and effect.

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4. Dry Creek argues that the Subject Water Rights should never have been granted or should now be cancelled for failure to exercise due diligence in their development. These arguments are not well-taken for several reasons. The original decree is res adjudicata with respect to the validity of the water rights decreed therein. See Boulder and Weld County Ditch Co. v. Lower Boulder Ditch Co., 22 Colo. 115, 43 P. 540 (1896); Reagle v. Square S. Land and Cattle Co., 133 Colo. 392, 296 P.2d 235 (1955); City of Grand Junction v. Kannah Creek Water Users Ass'n., 192 Colo. 279, 557 P.2d 1169 (1976); Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962). The speculation issue urged by Dry Creek was specifically raised by an objector and implicitly resolved by the District Court's decree adjudicating the Subject Water Rights. That decree was affirmed on appeal. Colorado River Water Conservation District v. Rocky Mountain Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. den. 405 U.S. 996 (1972). With respect to due diligence, Dry Creek is bound by the series of decrees obtained in proceedings conducted pursuant to statute in which it has been found that Applicants and their predecessors in interest have exercised due diligence in development of the Subject Water Rights. See Reagle v. Square S. Land and Cattle Co., *supra*; Otto Lumber Co. v. Water Supply and Storage Co., 106 Colo. 546, 107 P.2d 1046 (1940). The last

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of these decrees was issued July 28, 1977, approving and confirming a Ruling of Referee in W-719-76 based on an application filed May 28, 1976. By the terms of that decree the next application for quadrennial finding of reasonable diligence is to be filed in May of 1980. The statutes contain no requirement that a demonstration of reasonable diligence be made as part of a change of water right proceeding. The pre-trial order does not list this as an issue. Finally, the record in this proceeding amply demonstrates reasonable diligence to maintain the Subject Water Rights in effect and to proceed toward development thereof by extensive and diligent efforts to obtain changes in water rights necessary to permit development to occur after the original plan was impaired by inclusion of part of the Meadows Reservoir site and the point of diversion of Patterson Creek Diversion Pipe within the Flat Tops Wilderness by Congressional action on December 12, 1975.

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5. On December 12, 1975, subsequent to the institution

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of these proceedings, Public Law 94-146 was enacted by the United States Congress which designated certain lands in Rio Blanco County for inclusion within the Flat Tops Wilderness. The designation of areas to be included was made under the National Wilderness Preservation System Act, 16 U.S.C. 1132 et seq. The point of diversion of one of the Subject Water Rights as originally decreed (the Patterson Creek Diversion Pipe) lies within the area designated to be included within the Flat Tops Wilderness Area as do portions of the land which would be inundated by the Meadows Reservoir.

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6. Dry Creek argues that once development of facilities to permit diversions pursuant to a water right have been precluded because facility locations are included within a wilderness area the water right is effectively extinguished. It would then follow that no change of water right application to remove the facility locations from the wilderness area could be entertained. Dry Creek's argument is unpersuasive. A conditional water right constitutes a vested property right. Mooney v. Kuiper, 194 Colo. 477, 573 P.2d 538 (1973). One incident of that right is the right to change of point of diversion, change of use, or both, if no injury is caused to others. C.R.S. (1973) 37-92-103(5); 37-92-305(3); City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952)*. If Dry Creek's contention were correct, the wilderness legislation would effect a taking of conditional water rights without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article II, section 15 of the Constitution of the State of Colorado. No such intent can be imputed to Congress. See Ex Parte Endo, 323 U.S. 283 (1944). Congress carefully preserved, or provided compensation for the taking of, property

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*This case involves change of point of diversion only.

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rights of other kinds incident to creation of wilderness areas. 16 U.S.C.A. § 1133 (c), 1134. Provision is made for establishment and maintenance within a wilderness area of "reservoirs, water-conservation works, public projects ... and other facilities needed in the public interest," with Presidential approval and "upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; ..." 16 U.S.C.A. § 1133(d)(4). If there is any ambiguity, the limited legislative history on this point indicates that it was assumed to be clear that Colorado law would permit changes of points of diversion to move points of diversion encompassed within the Flat Tops Wilderness Area to new locations outside the wilderness boundaries. See Dry Creek Exhibits 1 and 2, Hearings before the Subcommittee on the Environment and Land Resources of the Committee on Interior and Insular Affairs United States Senate, especially the comments of Senator Haskell at pages 382-383 of Exhibit 1, and Exhibit T at pages 7-8. The Court concludes that the inclusion of the point of diversion of Patterson Creek Diversion Pipe and portions of land to be encompassed within Meadows Reservoir within Flat Tops Wilderness does not prevent the change of point of diversion of the aforementioned rights as sought in these proceedings.

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7. On January 8, 1974, Applicants Gulf-Standard, as the successful bidders therefor, were awarded an oil shale lease by the United States of America, pursuant to the Federal Prototype Oil Shale Leasing Program. The said oil shale lease covers lands designated as "Tract C-a" in Rio Blanco County, Colorado, situated in parts of Township 1 South and Township 2 South, Range 99 West of the 6th P.M.

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8. The Applicants, Gulf-Standard, after the acquisition of the Tract C-a Lease commenced exploration and development operations on and in connection with such Tract under the name of "Rio Blanco Oil Shale Project". Subsequently, the parties (Gulf and Standard) formed a general partnership for the development and mining of Tract C-a under the name of "Rio Blanco Oil Shale Company" which will hereinafter be referred to as "Rio Blanco." Rio Blanco has expended more than \$200,000,000 in connection with the Tract C-a Project. Tract C-a was denominated as a tract particularly amenable to development through open-pit mining methods. At present Rio Blanco plans that initial experimental development will take place over some four years and will be through a modified in situ extraction method.

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9. Upon being awarded the lease on Tract C-a, Applicants Gulf-Standard commenced studies of water supply systems to meet the requirements of the oil shale project. The said Applicants submitted applications to this Court for water rights in connection with the "Yellow Creek Reservoir" situated on Yellow Creek, a tributary of the White River, at a distance of approximately four miles upstream from the point that Yellow Creek discharges into the White River.² The location of the dam of the Yellow Creek Reservoir is determined by a line extending along the axis of the dam, which line begins at a point on the right (North) abutment thereof located 19,909 feet North 31°42' West of the Southeast corner of Section 1, Township 1 North, Range 98 West, 6th P.M.; thence bearing South 18°00' West a distance of 2,200 feet.

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2. The case designations of applications for water rights with respect to the Yellow Creek Reservoir in this Court are W-2221, W-2514 and W-2541.

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10. Shortly after the award of the Tract C-a Lease, Gulf-Standard commenced investigations of the available water rights which might be acquired by purchase to supply a dependable source for the water requirements of the company's project. Negotiations were commenced in early 1974 by Gulf-Standard with Rompoco seeking to obtain the right to acquire the Subject Water Rights. These negotiations culminated in the execution of a contract on April 15, 1975, providing for the acquisition of the Subject Water Rights by Gulf-Standard. In accordance with the provisions of the said contract, these proceedings were instituted seeking the change of the Subject Water Rights, on an alternative basis, from the points of diversion, character of use and type of decrees specified in the original decrees for said rights, in order that said rights may be diverted at the new point of diversion from the White River, designated below, transported therefrom to the Yellow Creek Reservoir for impoundment therein, and/or transported to the vicinity of Tract C-a to be utilized, either by direct flow application or by storage, and thereafter application for mining, industrial, refining, retorting, power, domestic, irrigation, fish and wildlife propagation and recreational uses. In its Application, Applicants propose that a portion of the said waters derived from the subject water rights may be allocated by Applicants, Gulf-Standard, to existing or proposed municipalities or housing developments in the general region in which Tract C-a is situated to supply the increased municipal and domestic water needs properly attributable to Rio Blanco's developments and activities incident thereto. In addition, the Application proposes that portions of said waters may be utilized in implementation of the Plan of Augmentation of Applicants,

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Gulf-Standard, approval of which is sought in the said Case W-2514, or for the purposes of exchange of use with other water rights as permitted by applicable law.

11. Applicants, Gulf-Standard, seek as an alternative to the points of diversion specified in the decrees for the Subject Water Rights, the right to divert the water represented thereby from the White River at a point below the Town of Meeker, Colorado, described as follows:

The intersection of the axis of the diversion dam (which is coincident with the center line of the diversion conduit) with the left (South) bank of the White River is situated at a point whence the Northwest Corner of Section 13, Township 2 North, Range 98 West, 6th Principal Meridian, bears North 81°09' West a distance of 3,905 feet.

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12. Applicants, Gulf-Standard, propose to construct a concrete overflow diversion structure, together with earthen dike extensions across the White River, or other appropriate diversion works, at the point designated in Paragraph 11 above, incorporating an intake and pumping plant of sufficient capacity to divert the water attributable to the Subject Water Rights into a pipeline, tunnel and related works to convey such water, either directly to the point of use in the vicinity of Tract C-a, or for storage in the Yellow Creek Reservoir, and retention therein for later conveyance through conduits and pumping stations to the points of use.

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13. By utilization of the Subject Water Rights by Rio Blanco as sought in these change proceedings, the waters attributable to such rights would be permitted to flow, unimpeded, from the location of the original points of diversion or impoundment along the natural course of the South Fork of the White River thence down the White River to the new point of diversion specified in Paragraph 11 above, where

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such waters would be collected in the forebay to be created by the structure described in Paragraph 12 above, situated on the White River below the Town of Meeker at a point approximately 87 stream miles below the original points of diversion.

14. Dry Creek is the owner of the following vested

water rights:

<u>Structure</u>	<u>Amount</u>	<u>Adjudication Date</u>	<u>Appropriation Date</u>
Little Ditch	3.00 cfs absolute	10/22/1890	04/04/1886
Delaney Enl., Little Ditch	2.80 cfs absolute	10/10/06	04/01/01
Little Ditch, 2nd Enl.	4.03 cfs absolute	05/26/42	04/15/02
John Delaney Ditch	1.80 cfs absolute	08/19/20	10/15/1892
John Delaney Ditch, 1st Enl.	2.24 cfs absolute	08/19/20	10/15/1892
Blair Ditch	2.40 cfs absolute	08/24/29	04/15/1883
Blair Ditch	4.00 cfs cond.	08/24/29	04/15/1883
Blair Ditch 1st Enl.	1.80 cfs absolute	08/24/29	07/01/12
Blair Ditch 2nd Enl.	3.65 cfs absolute	05/26/42	10/01/12
Blair Ditch 3rd Enl.	1.34 cfs absolute	05/26/42	06/01/31
Forney-Corcoran Ditch	6.00 cfs absolute	05/26/42	03/15/1898
Forney-Corcoran Ditch 1st Enl.	5.47 cfs absolute	05/26/42	03/01/70
Raley Reservoir	23,649 AF cond.	11/06/72	04/03/70
Henry Reservoir	37,116 AF cond.	11/03/72	04/03/70

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The points of diversion of some or all of these rights are on the White River or its tributaries between the original

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points of diversion of the Subject Water Rights and the proposed alternate point of diversion of the Subject Water Rights. The Court takes judicial notice that the records of the water court reflect the existence of numerous other absolute and conditional water rights, some senior and some junior to the Subject Water Rights, having points of diversion at various locations on the White River and its tributaries below the original points of diversion of the Subject Water Rights.

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15. Fundamental questions of policy inhere in a decision whether conditional water rights should be subject to changes of points of diversion and of use. A conditional water right which might be uneconomical to develop at its original location might become economically attractive at a new point of diversion or for application to a different beneficial use. Thus, a change of such a conditional water right might result in development of a project which would never have burdened the stream were the change not permitted.

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Major projects founded upon conditional water rights frequently change substantially in scope and features as progressively more refined engineering studies advance such projects from initial conception to completion. The changes may result in differences in the draft on the stream. Thus, until a conditional water right becomes absolute by application of water to beneficial use the draft on the stream cannot be known with certainty. The legislature undoubtedly was mindful of these and other problems incident to changes of conditional water rights when it resolved the fundamental policy questions in favor of permitting changes of conditional water rights. C.R.S. (1973) 37-92-103(5); C.R.S. (1973) 37-92-305(3). The only question which an application for change of water

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right presents for judicial consideration is whether the change will "injuriously affect the owner of or persons entitled to use water under a vested water right or decreed conditional water right," C.R.S. (1973) 37-92-305(3).

If it will not, the change of water right "shall be approved." Id.

16. In the case of change of point of diversion of an absolute water right, limitation of the quantity to be diverted at the new location to the amount historically diverted at the original point of diversion provides one reliable criterion to prevent injury to other water rights, and such criterion has been adopted. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962). In the case of a conditional water right the amount to be diverted at the original point of diversion is inherently uncertain. The project when built might divert less than the quantity conditionally decreed; indeed, the project might never be built at all. As a result, an applicant for change of conditional water right cannot establish with certainty what the draft on the stream would have been had the project gone forward in the logical development of its original conception. To hold that for such reason an applicant for change of point of diversion could not carry his burden of proof to show absence of injury to other water rights would utterly defeat the legislative purpose to allow such changes. C.R.S. (1973) 37-92-103(5). The task for the Court is to adopt a construction which will implement the purpose of the legislature³. The direction to be taken has already been indicated. In Twin Lakes Reservoir and Canal Co. v. City of Aspen, 193 Colo. 478, 563 P.2d 45 (1977) ("Twin Lakes") it was recognized if not held that the appropriate measure of the water divertible at a changed or alternate point of diversion of a conditional water right is the draft

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3. Mooney v. Kuiper, supra; Frohlick Crane Service, Inc. v. Mack, 132 Colo. 34, 510 P.2d 34 (1973).

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on the stream contemplated at the time of the original appropriation (the "Contemplated Draft"). In Twin Lakes the Contemplated Draft was established by the needs of the project lands upon which the water was to be applied to beneficial use. In the present case, the Contemplated Draft was for the principal, or first in time, beneficial use of power generation. The initial and continuing need for the power cannot be demonstrated with the certainty that applied to proof of initial and continuing needs of the project lands in Twin Lakes. Indeed, if the changes of water rights are granted no power will be generated. To

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hold that such indefiniteness disables Rompoco from carrying its burden of proof to show absence of injury to other water rights would effectively prohibit change of water rights with respect to the Subject Water Rights and other conditional water rights of similar character. Such could not have been the legislative intent. The contemplated power generation at the time of the original appropriation was adequate to support the adjudication of the Subject Water Rights. The Contemplated Draft for purpose of the change of water rights proceeding must be concluded to be determined based on the original contemplated power generation.

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17. It is found that the Contemplated Draft on the sources of supply of the Subject Water Rights was all waters available, in priority, to such rights at the respective points of diversion originally decreed in the adjudication proceeding, which the claimant anticipated to average 106,295 acre feet per year, in the aggregate, from all of the sources of supply, being composed of 77,395 acre feet from the South Fork of the White River and its tributaries above Meadows Dam, 12,000 acre feet from Wagon Wheel Creek and 16,900 acre feet

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from Patterson Creek. This is supported by the record in the original adjudication proceedings and the testimony of witnesses Fleming, Van Sickle and Witaschek in this proceeding.

18. In accordance with the Stipulation entered into between Applicants and the Colorado River Water Conservation District and The Superior Oil Company, Applicants Gulf-Standard are required to maintain a system of gaging stations to measure the flow at the original points of diversion from which the water officials shall calculate the water which may be diverted or otherwise utilized at the proposed new point of diversion after deduction of by-passes required to meet the demands of senior appropriators under the priority system after deduction of amounts to compensate for transportation losses between the decreed points and the new point of diversion and, after employment of a time delay factor to reflect the period of time required for waters measured at the original points of diversion to reach the new point of diversion.

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19. The Stipulation contains the following provision with respect to losses incurred in transporting waters from the original points of diversion to the new point sought in these proceedings:

"As shown in Exhibit B hereto, the current estimate of maximum stream losses in transportation of said water is Five percent (5%) based upon the approximate criteria utilized by the State Engineer of the State of Colorado. Engineering studies are currently in progress, however, by Applicants to more accurately determine the stream losses for the specific reaches of the stream pertaining to the change of point of

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diversion sought herein, and the factor to be applied for reduction of water available for diversion at the new point of diversion shall be the actual losses as demonstrated by the engineering data developed by said studies."

The Court finds that the evidence introduced in these proceedings establishes the reasonableness of the estimates of transportation losses which were derived from studies made pursuant to the Stipulation, being in the amounts of 5% transportation loss in July, August and September and 2.5% loss for months from October through June.

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20. The Court finds from the evidence introduced in these proceedings, which finding is supported by the evidence and testimony entered in the adjudication proceedings in which the Subject Water Rights were decreed, that the components of the Sweetwater Hydroelectric Project were designed in such manner that water lost by system inefficiencies (i.e., the annual average amount of water that would percolate through or under the storage dams, diversion dams, canals, or other structures or facilities) would aggregate not more than three-tenths of a percent (0.3%) of the average annual yield projected for the Subject Water Rights. There was no showing that the timing of such losses or any part thereof would have made the water so lost available for diversion based on water rights having points of diversion downstream from the Sweetwater Hydroelectric Project at times when such diversions would occur.

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21. Due notice of these proceedings has been given as required by law and the Court has jurisdiction over the parties to, and the subject matter of, such proceedings.

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22. As specified in the Stipulation, Applicants have caused a gaging system to be installed to measure flows from the various sources of supply of the Subject Water Rights at or near the various original points of diversion of such rights. Attached hereto as Attachment A is a map portraying the gaging system so installed by Applicants. Gage numbered 3 situated in Patterson Creek as shown on Attachment A was located within the boundaries of the Flat Tops Wilderness Area and was required to be removed on October 7, 1977. Pursuant to the Stipulation, Applicants have conducted studies in order to correlate by statistical analysis flows on Patterson Creek at the original point of diversion of the Patterson Creek Diversion Pipe with the readings of gage numbered 4 (as portrayed on Attachment A) which measures flows on the South Fork of the White River immediately outside of the Flat Tops Wilderness boundary. From such studies Applicants have developed a correlation curve which is attached hereto as Attachment B which gives an equivalent relationship between the flows measured at gage numbered 4 and at the original point of diversion of the Patterson Creek Diversion Pipe. The utilization of correlation by statistical analysis is a recognized method frequently utilized for water measurement purposes; in this case, the method adequately reflects the flow at the original point of diversion of the Patterson Creek Diversion Pipe.

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23. Dry Creek has proposed certain terms and conditions to prevent the proposed changes of water rights from injuriously affecting the owner of or persons entitled to use water under a vested water right or a decreed conditional water right, pursuant to C.R.S. (1973) 37-92-305. Except as those proposed terms and conditions are incorporated in this decree

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it is found and concluded that they are unnecessary for such purpose. The more significant of Dry Creek's proposed terms and conditions are discussed in the following subparagraphs.

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a. Dry Creek urges that diversions at the alternate point of diversion must be limited to those which would have occurred had the project upon which the Subject Water Rights are based been constructed as planned, citing Twin Lakes. Dry Creek contends that minimum stream flow conditions, maximum reservoir fluctuation conditions, maximum rate of discharge conditions and other conditions would have been imposed by the Federal Energy Regulatory Commission to protect fishlife in the stream and other environmental values. On the basis of the evidence, this appears to be correct. Dry Creek then contends that such conditions must be imposed at the alternate point of diversion to satisfy the Contemplated Draft criterion of Twin Lakes. No case has been found which addresses this precise question. However, any such conditions would have been imposed for the protection of environmental and recreational values such as maintenance of fishlife. To impose such conditions on diversions at the alternate point of diversion is entirely unnecessary to the intended purpose, for when the alternate point of diversion is being utilized the entire flow which could have been diverted in priority at the original points of diversion based upon the Subject Water Rights remains in the stream until it reaches the alternate point of diversion some 87 miles downstream. Any benefit accruing to junior appropriators through imposition of those conditions is incidental and irrelevant to their purpose. Loss of the

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possible benefit is concluded not to constitute an injurious effect to decreed conditional water rights within the meaning of C.R.S. (1973) 37-92-305(3). As Applicants note, the evidence establishes the likelihood that construction of the diversion structure at the alternate point of diversion will be subject to conditions imposed by the federal agencies from which permits for such construction must be obtained. To impose additional conditions on diversion based upon conditions which would have been imposed had the original project been constructed would subject the Subject Water Rights to a double burden completely unnecessary to accomplish the purpose for which the conditions relating to the original project would have been imposed. It is concluded that conditions which would have been imposed had the project upon which the Subject Water Rights are based been constructed as originally planned need not be imposed on diversions at the alternate point of diversion in order to meet the standard of Twin Lakes or for any other reason.

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b. Dry Creek urges that conditions would occur from time to time which would have required that water divertible in priority pursuant to the Subject Water Rights be passed down the South Fork of the White River because the capacity of the components of the Sweetwater Hydroelectric Project would have been insufficient to permit the water to be applied directly to beneficial use or stored. The evidence does not support that contention. The record upon the basis of which the Subject Water Rights were initially decreed in Civil Action No. 1269 in Rio Blanco County District Court, and the testimony of Messrs. Fleming, Van Sickle and Witaschek in this proceeding for change of water rights are adequate to establish a prima facie case that Rompoco designed the

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components of the Sweetwater Hydroelectric Project in order to divert and utilize all waters available to the Subject Water Rights in priority. It is found that no spillage or foregone diversions would have taken place had the project been constructed as contemplated at the time of the original decrees. Therefore it is unnecessary to limit diversions based upon the Subject Water Rights to reflect any spillage or foregone diversions resulting from lack of capacity of the project facilities to accommodate all water divertible in priority.

24. The Court finds and concludes from the evidence introduced that the limitations, terms and conditions specified in the Stipulation which are hereinafter incorporated into this Decree, together with the other limitations, terms and conditions specified in this Decree will prevent the change of water rights sought by Applicants from injuriously affecting the owner of or persons entitled to use water under a vested water rights or a decreed conditional water right, within the meaning of C.R.S. (1973) 37-92-305(3).

JUDGMENT AND DECREE

IT IS HEREBY ADJUDGED AND DECREED THAT a change of water rights of the Subject Water Rights to establish an alternate point of diversion is hereby granted and decreed as follows:

1. The Subject Water Rights may be diverted from White River at an alternate point of diversion at the Creek Dam Diversion and Pumping Works which will be located such that the intersection of the axis of the diversion dam (which will be coincident with the center line of the diversion conduit) with the left (South) bank of the river is situated at a point whence the Northwest corner

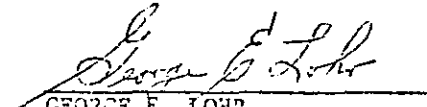
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water judge on the question of injury to the vested rights of others for a period of two years from the date hereof, subject to further extension upon further order of the water judge, all pursuant to C.R.S. (1973) 37-92-304(6), as amended.

It is further ordered that a copy of this Judgment and Decree shall be filed with the State Engineer and the Division Engineer as provided by C.R.S. (1973) 37-92-304(8).

In view of anticipated delay in mailing copies of this Judgment and Decree to interested parties, on the Court's own motion, it is further ordered that the time for filing motions directed hereto is extended to and including January 15, 1980.

Done this 5 day of December, 1979.


GEORGE E. LOHR,
Water Judge