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## Ramification of the FRICO Decision

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creates a certain degree of tension between agricultural and solar water demands.

The final energy source Burr and Watson discussed, hydropower, produces 3.7 percent of the electricity in Colorado and seven percent of electricity in the U.S. It is also responsible for seventy percent of energy produced from renewable sources in U.S. Hydropower production employs large turbines, which are turned by running water, and this means water use for hydropower is almost entirely nonconsumptive. The dynamic between state water rights administration and federal regulation of navigable waterways can cause problems for those with long-term hydropower licenses who attempt to renew their permits. Recently, the Federal Energy Regulatory Commission have begun imposing bypass flow conditions, which means certain projects may be forced to give up state law-based instream water rights that are key to operation of a hydropower plant.

The Shoshone Hydropower Plant is the oldest and most senior water right on the Colorado River. Xcel Energy owns the Shoshone water right but is not a party to the ongoing negotiations for a comprehensive Eastern Slope/Western Slope water agreement. Denver Water and the Colorado Water River Conservation District are two critical players in the potential Colorado River Cooperative Agreement. The agreement would address long-term water supplies for both regions through assuring Denver can meet its municipal water needs while guaranteeing Western Slope water users can still meet recreational and agricultural needs.

Burr and Watson concluded by explaining population growth in Colorado will increase agricultural, industrial, municipal, recreational, and energy demands on water and that the greatest challenge for the energy industry will be protecting decreed energy-related water rights from loss or attrition to increased state and federal regulation.

*Jessica Zaegel*

#### RAMIFICATIONS OF THE FRICO DECISION

Star Waring, Esq. is an attorney and shareholder at Dietze and Davis, where she is a member of the Natural Resources and Water Law Practice Group. A large part of her practice consists of representing individual farmers and groups of agricultural water users, developers, lenders, municipalities, and ditch companies in matters involving real estate and water issues. Waring attained her J.D. from the University of Colorado, is currently an Adjunct Professor at the University of Denver Sturm College of Law, and represented the Farmers Reservoir and Irrigation Company in the FRICO case.

Steven O. Sims is an attorney and shareholder at Brownstein, Hyatt, Farber and Shreck. Sims represented Aurora Water in the FRICO case at trial and in arguments before the Colorado Supreme Court. Previously he has represented clients in over five hundred water litigations and over twenty Supreme Court appeals. He is the former senior water counsel,

and currently serves as the First Assistant Attorney General for the Water Unit of the Colorado Attorney General's Office. Sims attained his J.D. from The University of Puget Sound School of Law.

Joe Tom Wood, P.E. is a water engineer at Martin and Wood Water Consultants, Inc. where he specializes in the engineering analyses associated with changes of water rights, plans for augmentation, and water supply/water demand analyses. He has provided the primary engineering for over thirty plans for augmentation in the South Platte, Colorado, Arkansas, and Rio Grande River Basins, and has been qualified as an expert in the Water Courts for Water Division I, II, III and IV, the United States Court of Claims, and the United States 10th District Court. Wood earned both his Bachelor's of Science and his Masters of Science in Civil Engineering for Hydrology from Stanford University.

Katherine Young, P.E. is a Geothermal Energy Engineer and a member of the Strategic Energy Analysis Center at National Renewable Energy Laboratory ("NREL"), where she applies her expertise in Geothermal Exploration and Permitting and Database Planning and Development. Prior to working at NREL, Young worked at Martin and Wood Water Consultants, Inc. as the engineer for the City of Englewood on the historical use of applicants' water rights in the FRICO decision. She earned her Bachelors of Science in Geology and Geological Engineering from the University of Wisconsin and Masters of Science in Geochemistry and Isotope Geology from the University of Michigan Ann Arbor.

Star Waring began the discussion, stating that the Farmington Reservoir and Irrigation Company ("FRICO") litigation was largely a change case with three major issues that will have great effects on future water use and adjudication going forward. Waring discussed Steve Sims involvement at all levels of court procedure, while she along with Professor Jan Laitos of the University of Denver College of Law were brought in later for the appeal to the Supreme Court.

The sixteen-day trial began with the court consolidating the five applicants in two cases into case 02CW403. One applicant sought to change 140 shares of the 1885 Burlington Barr Lake Division and 64 shares in The Burlington Company's ("Burlington") rights. The trial court significantly cut back the historic consumptive use of the Burlington 1885 direct flow and storage rights.

Steve Sims credits Kathryn Young with finding the "smoking gun" in the FRICO files: a contract between Burlington and FRICO in its earliest days that said Burlington would sell excess water rights to FRICO. His interpretation of the record shows the original FRICO owners as speculators who brought water rights with their land to turn a profit, rather than mere landowners. While speculative appropriation is already frowned upon, Sims stated that this case would represent a further tightening of restrictions against speculative appropriation of water in Colorado.

Joe Tom Wood reiterated that the penultimate requirement for a water court to approve a change of use is no injury, which is found through an analysis of historic consumptive use of decreed rights as a measure of a water user's right. Additionally, Kathryn Young reported on her find-

ings that were central to the final disposition in the case. Her innovative presentation simultaneously displayed an overview on one screen and different documents and maps highlighting enlargements of use on another. Young related Burlington's intent to divert to a statute requiring that ditch construction be perfected within three years of decree. She found meeting minutes and referee decrees showing Burlington's understanding of this statute. Her research demonstrated the confusion surrounding Burlington's intent as they only completed the ditch behind Barr Lake on time. Young's additional supporting evidence showed that users were not ordering to capacity from the storage rights, nor using any direct flow rights beyond that which was stored in the ditch, until after FRICO began enlarging the ditch; and in actuality users below Barr Lake were the basis for applicants' assertion of historic consumptive use.

Joe Tom Wood next highlighted some of the litigation factors regarding the arguments by Metro Pumps within the case. He also put the decreed results of the applicants' claims for historic consumptive use in perspective by comparing them with other change cases, all represented as a percentage of amount claimed.

Waring returned to speak about the lasting effects of the FRICO decision: the one-fill rule, the application of the ruling to unchanged shares, and the future use of "ditch-wide" analyses. Waring conceded that the following issues were policy arguments made to, and rejected by, the Colorado Supreme Court. Waring believes the court will require a historic consumptive analysis for the one-fill rule. This is unlike the precedent in *Westminster v. Church* or Southeastern Water Conservancy District, where a rights owner may divert in its entirety the "one fill" while return flows must be made up. Now, because the court held directly that the limit of the storage right will also be based on how much water was historically released, this will increase the incentive for senior reservoirs to release their entire right, reducing junior reservoirs' opportunity to fill. This may also serve as a disincentive to non-consumptive use such as conservation and hydropower.

Waring does not believe that FRICO's published change as a ditch-wide analysis, and requested changes to the alternate points of diversion for storage, were valid reasons for the court to apply the decision ditch-wide. Waring believes there will be a chilling effect on ditch-wide analyses going forward because of the skeletons that may be in the closet of a ditch company.

Sims refuted Waring's concerns about the FRICO decision. Arguing that despite the common myth that showing a lack of change to the return flows should be a basis for requantification, the only correct standard for a change applications is a showing of non-injury. His understanding of the fact-based decision reflects a lack of problematic changes for the future of change cases in Colorado. Sims stated that instead of a "use it or lose it" policy harming reservoir owners, the practical effect will affect only cases that go to court for a change.

Furthermore, Sims asserted that the change application is an *in rem* proceeding, and because the owners of the property in the ditch rights

were properly notified, they were on notice that the requantification applied ditch-wide. Combining the fact that Burlington offered FRICO a fair settlement and that the ditch had never been requantified, despite years of protest against FRICO, Sims believes that the villainization of Aurora Water was misplaced.

*Jonathan Culwell*

## THE PUBLIC TRUST DOCTRINE

Doug Kemper, Executive Director of the Colorado Water Congress, spoke on the Public Trust Doctrine as it relates to water law and two topical ballot initiatives currently pending in Colorado. The Public Trust Doctrine, hereinafter the "Doctrine," is an ancient doctrine that balances the public and private interests with respect to public goods, such as water. The basic premise is that governments should ensure equal access to water and adequate water supplies for all.

### *A Brief History of the Public Trust Doctrine*

The Doctrine dates back to the Justinian Code - at that time, the Doctrine was mostly concerned with public access to beaches. The Doctrine was later incorporated into the Magna Carta. During that time, nobles built private piers and access structures to waterways, impeding the King's navigable waters, and such private structures were soon forced to comply with the Doctrine and made subject to the benefit of the public. Despite this longstanding European tradition, the Doctrine did not make its way over to the United States until a little over a century ago, in the State of Illinois.

As a result of infrastructure development necessitated by the Industrial Revolution, the City of Chicago granted the Illinois Railroad a significant part of the Chicago harbor for its operations. Decades later, concern arose that Chicago had given too much of the land to the Railroads. Eventually, the Illinois Supreme Court had to step in, and determined that the Railroad could not alienate a public resource by conveying that resource to private entities.

The Doctrine continued to evolve in relation to the allocation of public resources, and most notably arose during the now infamous disputes over Mono Lake, which sits on the border of California and Nevada. In 1913, the Los Angeles Department of Water and Power ("LA DWP") diverted water from the Owens River through the Los Angeles Aqueduct to the City. In 1941, the LA DWP extended the Aqueduct to reach into the Mono Lake Basin in order to further develop water supplies for the fast-growing population of Los Angeles.

Though the LA DWP knew that withdrawing water from the lake to supply Los Angeles would lead to receding water levels in the lake, it relied on existing statutes that granted preference to domestic use over other uses, and in this case, the withdraws from Mono Lake constituted a domestic use. Litigation over the City's excessive withdraws began in the