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The City of Central Decision, Victory for Colorado's Instream Flow Program, Colorado's Prior Appropriation System, and Colorado

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**THE CITY OF CENTRAL DECISION, VICTORY FOR
COLORADO’S INSTREAM FLOW PROGRAM,
COLORADO’S PRIOR APPROPRIATION SYSTEM,
AND COLORADO**

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The opinions expressed in this article are those of the authors, not of the Colorado Water Conservation Board or the Colorado Office of the Attorney General.

I. INTRODUCTION

A governing principle of Colorado's prior appropriation system is the protection of existing water users from injury caused by new water rights applications. This principle applies both to senior water users affected by a new junior right, and to junior water users adversely affected by a change or adaptation of a senior appropriation. As the Colorado Supreme Court explained, "junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations."¹

The Colorado Supreme Court reaffirmed this principle on November 28, 2005, in *Colorado Water Conservation Board v. City of Central*, when the Court unanimously ruled that an applicant for a new augmentation plan must protect existing Colorado Water Conservation Board ("CWCB") instream flow rights from injurious changes in stream conditions caused by new "adaptations" of existing rights.² The Colorado Supreme Court held that such a ruling was consistent with "the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations," and that the General Assembly, in creating Colorado's Instream Flow Program, intended to rely upon this principle to "effect a basic tenet of Colorado water law: 'to correlate the activities of mankind with some reasonable preservation of the natural environment.'"³

The Colorado Supreme Court's decision in *City of Central*, granting protection for instream flow water rights from injury caused by new plans for augmentation, is one of the most important in the history of Colorado's Instream Flow Program. Environmental groups, such as Trout Unlimited, supported the holding as essential to the continued success of the CWCB Instream Flow Program in protecting Colorado's environment.⁴ Additionally, the Colorado State Engineer and some of the largest water users' groups across the state, including the Colorado River Water Conservation District, Southeastern Colorado Water Conservancy District, and Northern Colorado Water Conservancy District, supported the holding, understanding that the Colorado Supreme

1. *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954).

2. *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 435, 441 (Colo. 2005).

3. *Id.* at 440 (citation omitted).

4. Amicus Curiae Brief of Trout Unlimited, *City of Central*, 125 P.3d 424 (2005) (No. 04SA145).

Court's decision was necessary to protect the orderly administration of all water rights across Colorado.⁵

Notwithstanding this widespread support, the *City of Central* decision has faced some criticism.⁶ To summarize the criticisms, the decision: (1) unjustly prevents water users from diverting according to their decreed priority in a manner contrary to Colorado law; (2) unfairly grants instream flow water rights a unique ability to claim an interest in stream conditions during times of a senior downstream call⁷ in a manner inconsistent with the intent of the Colorado General Assembly; (3) improperly ignores existing yet undecreed water uses in a manner inconsistent with historical practice; and (4) impracticably allows instream flow water rights and other junior water rights to "tie up" stream reaches in a manner contrary to the future needs of Colorado's prior appropriation system.⁸

The authors strongly disagree with these criticisms. The Colorado Supreme Court's decision in *City of Central* correctly recognizes that instream flow water rights must have protection against injury that changes or "adaptations" of senior water rights may cause, and that to rule otherwise would be inconsistent with both the intent underlying Colorado's Instream Flow Program and the basic principle of Colorado water law granting water users a vested right in those stream conditions existing at the time of appropriation. The Court's decision is thus consistent with existing Colorado law, with Colorado's Instream Flow Pro-

5. The State Engineer and the Division Engineer for Water Division 1 were appellants in the Central City appeal, and jointly filed a brief supporting the position of the CWCB. Reply Brief of the State and Division Engineers in Support of the Colorado Water Conservation Board, *City of Central*, 125 P.3d 424 (2005) (No. 04SA145). The Colorado River Water Conservation District, the Southeastern Colorado Water Conservancy District, and the Northern Colorado Water Conservancy District, among others, were granted permission to file *amicus curiae* briefs in support of the CWCB. See *Amici Curiae* Brief of Southeastern Colorado Water Conservancy District & Colorado River Water Conservation District, *City of Central*, 125 P.3d 424 (2005) (No. 04SA145); *Amicus Curiae* Brief of the Northern Colorado Water Conservancy District, *City of Central*, 125 P.3d 424 (2005) (No. 04SA145).

6. See, e.g. Case Comment, *Colorado Supreme Court Requires Protection for Instream Flow Water Rights in Plans for Augmentation*, 10 W. WATER L. & POL'Y REP. 80, 82 (2006).

7. The language "claim an interest in stream conditions during times of a senior downstream call" refers to the ability of junior water users to protect water flowing within a stream reach during times of a downstream call from new or enlarged diversions caused by new water rights applications. Typically such new diversions occur as a result of a new plan for augmentation, exchanges, plans for augmentation including exchange, and changes of water rights. These new diversions may not result in a reduction in the amount of water available to a downstream senior calling right, but would result in a reduction in the amount of water available within a particular reach of stream, thus adversely affecting junior water users that rely upon the presence of water within the affected stream reach.

8. See, e.g., Case Comment, *supra* note 6, at 82; see also *City of Central*, 125 P.3d at 439 (discussing criticism that instream flow water rights complicate development by "tying up" a stream).

gram, and with the future needs of Colorado's prior appropriation system.

Part I of this article describes the *City of Central* litigation, including the factual background for the lower court's decision, the arguments advanced on appeal by the parties, and the legal bases for the Colorado Supreme Court's decision.

Part II explains that the *City of Central* decision was correct under Colorado law. Specifically, the decision is consistent with the principle, as incorporated into Colorado law, that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations.

Part III describes the history of Colorado's Instream Flow Program and how the Colorado Supreme Court's decision is consistent with both the legislative history and the historical administration of that program. As the Colorado Supreme Court correctly recognized, the General Assembly's intent in creating Colorado's Instream Flow Program was to protect Colorado's natural environment in a manner consistent with the principle granting junior appropriators a vested right to existing stream conditions.

Part IV describes how Colorado's Instream Flow Program recognizes historical water uses in existence at the time of an instream flow water right appropriation.

Part V discusses the ramifications of this decision on future water rights administration and on Colorado's Instream Flow Program in general.

In short, this article demonstrates how the Colorado Supreme Court's decision in *City of Central* is the correct one for Colorado's prior appropriation system, for Colorado's Instream Flow Program, and for Colorado.

II. THE CITY OF CENTRAL DECISION

A. CENTRAL CITY'S APPLICATION

The City of Central ("Central City") is a municipality located in the mountains to the northwest of Denver, in the North Clear Creek basin, tributary to Clear Creek. Central City has historically relied upon water rights from a number of diversion structures within the North Clear Creek basin for its municipal water supply. This includes water rights from two diversion structures located on Miner's Gulch and Peck's Gulch, two gulches that are tributary to North Clear Creek. Central City's most senior water rights on Miner's and Peck's Gulches were decreed for the amounts of 1.6 cubic foot per second ("cfs") and .101

cfs, respectively.⁹ The appropriation dates for these senior rights were 1903 for the Miner's Gulch right and 1876 for the Peck's Gulch right.¹⁰ There has been some dispute as to the exact rate of Central City's historic diversions from these two locations, but physical limitations upon Central City's water system limited the diversions from these locations to approximately 150 gallons per minute, or one third of one cfs.¹¹

During the 1980s, the CWCB identified North Clear Creek as a stream eligible for protection under the CWCB's Instream Flow Program. The CWCB accordingly applied to the Water Court for an instream flow water right on the reach of North Clear Creek extending from the confluence of North Clear Creek and Pine Gulch downstream to the confluence of North Clear Creek and Chase Gulch. In Case No. 87CW273, the Division 1 Water Court granted the CWCB's application.¹² The water court found that 1.5 cfs was the minimum amount of streamflow necessary to preserve the environment to a reasonable degree within the identified stream reach, and awarded the CWCB an instream flow water right for that amount under a 1987 priority as against other claims to water within that same stream reach.¹³ This stream reach includes a section of North Clear Creek to which Miner's Gulch and Peck's Gulch are tributary.¹⁴

With the advent of gaming in Colorado and the resultant development in Central City, in the early 1990s Central City found need to expand its water supply system. Central City's ability to take additional water from the North Clear Creek basin was limited, however, both physically by the size of its system, and legally by calls from senior calling rights downstream in the Clear Creek Basin. These downstream calling rights were senior to Central City's rights, including Central City's rights on Miner's and Peck's Gulches. Accordingly, these downstream calling rights had the right to call out Central City's rights to prevent diversions under these rights from diminishing the amount of water available to the downstream calling rights.¹⁵

9. *In re* Application for Water Rights of the City of Central, No. 92CW168, slip op. at 23, ¶ 45 (Colo. Dist. Ct., Water Div. 1 Jan. 16, 2007). Central City later obtained junior water rights from these same locations, for the amount of 3.1 cfs. These junior water rights were not at issue in the *City of Central* litigation.

10. *City of Central*, 125 P.3d at 429.

11. *In re* Application for Water Rights of the City of Central, No. 92CW168, slip op. at 39, ¶ 66.2 (Colo. Dist. Ct., Water Div. 1 Jan. 16, 2007).

12. *In re* Application for Water Rights of the Colorado Water Conservation Board on Behalf of the People of the State of Colorado in North Clear Creek, No. 87CW273, slip op. at 2, ¶ 8 (Colo. Dist. Ct., Water Div. 1 Sept. 30, 1988).

13. *Id.* at 2, ¶¶ 5-8.

14. *City of Central*, 125 P.3d at 429.

15. Central City presented evidence that Central City's diversions had been allowed to continue even during times of a downstream senior call on Clear Creek, as a result of the water commissioner not administering diversion structures located in the North Clear Creek basin. *Id.* at 433. However, as of the time of the *City of Central* decision,

To increase its physical ability to take water out of the North Clear Creek Basin, Central City increased the capacity of its physical system.¹⁶ To increase its legal ability to take additional water out of North Clear Creek, notwithstanding the existence of the downstream calling rights, Central City applied to the water court for approval of a change of use of water rights, plan for augmentation, and appropriative right of exchange.¹⁷ By this application, Central City sought approval to divert water out-of-priority at certain diversion points in the North Clear Creek Basin, including its diversion structures on Miner's and Peck's Gulches, and from certain wells owned by the Gilpin County School District ("Gilpin County Wells") during times Central City otherwise would have been legally unable to make such diversions as a result of the downstream call.¹⁸

The change of water right portion of this application included a request to change certain Farmers High Line Canal and Wannamaker Ditch water rights that had previously been diverted downstream on Clear Creek and used for irrigation purposes in Jefferson, Weld, and Adams Counties, Colorado.¹⁹ Pursuant to the change application, Central City would be entitled to use these water rights for municipal uses upstream in the North Clear Creek basin.²⁰ The plan for augmentation portion of this application relied upon engineering that identified the amount and timing of Central City's out-of-priority diversions from, and return flows to, the North Clear Creek Basin; and the amount and timing of Farmers High Line Canal and Wannamaker Ditch water needed to replace Central City's net depletions to the stream system and to the downstream calling right.²¹ The exchange portion of Central City's application recognized that Central City's Farmers High Line Canal and Wannamaker Ditch replacement sources would be located downstream of the point for Central City's municipal diversion structures, including its Miner's Gulch and Peck's Gulch structures. This portion of the application thus claimed an appropriative right of exchange, with a 1992 priority, to be administered as against other water rights for that reach of North Clear Creek and Clear Creek located between Central City's upstream diversion points and downstream replacement sources.²²

Central City's North Clear Creek diversions had been curtailed to provide water to the downstream senior call. *Id.* at 429.

16. *Id.* at 428.

17. *Id.*

18. *See id.*; *In re Water Rights of the City of Central*, No. 92CW168, slip op. at 23-26, ¶¶ 45-46 (Colo. Dist. Ct., Water Div. 1 Jan. 16, 2007).

19. *City of Central*, 125 P.3d at 428.

20. *Id.*

21. *Id.* at 428-29.

22. *Id.* at 428.

B. THE WATER COURT'S DECISION

The CWCB reviewed Central City's application for potential injury to the CWCB's instream flow water right on North Clear Creek. The CWCB determined that Central City's proposed plan for augmentation and exchange would result in Central City diverting water out-of-priority from North Clear Creek at times differing from and in amounts exceeding Central City's historic diversions from Miner's Gulch and Peck's Gulch.²³ In addition, Central City's proposal would allow Central City to divert water out-of-priority from the Gilpin County Wells.²⁴ Because the augmentation sources that would replace these new out-of-priority diversions were downstream from the stream reach containing CWCB's North Clear Creek instream flow water right, this augmentation plan and exchange would reduce the amount of water available to that instream right.²⁵

Accordingly, the CWCB filed a statement of opposition to Central City's application.²⁶ The CWCB requested that Central City include in its plan for augmentation terms and conditions to ensure that its plan would be operated in a manner that would not cause injury to the CWCB's water right. Specifically, the CWCB requested that Central City recognize that its plan for augmentation relies upon a new appropriative right of exchange, subject to a 1992 priority date, extending from Central City's downstream Wannamaker Ditch and Farmers High Line Canal replacement sources to its upstream Miner's Gulch and Peck's Gulch diversion structures.²⁷ The CWCB requested that Central City not make new out-of-priority diversions under this plan for augmentation including exchange when so doing would reduce the amount of water available to the CWCB's 1987 North Clear Creek instream flow water right below the 1.5 cfs appropriated to that right.²⁸ In short, the CWCB requested that Central City agree to operate the exchange claimed under its plan for augmentation in priority as against the CWCB's senior right.

Central City refused the CWCB's request. Central City agreed that diversions made under its 1992 appropriative right of exchange were junior to and operated in priority as against the CWCB's 1987 instream flow water right.²⁹ Central City argued, however, that the out-of-priority diversions made under its augmentation plan were not made pursuant

23. *Id.* at 429-30.

24. *Id.* at 430.

25. *Id.* at 429.

26. *Id.* at 427.

27. *Id.* at 430.

28. *Id.*

29. *Id.*; see also Motion for Determination of Questions of Law Pursuant to C.R.C.P. Rule 56(h), *In re* Water Rights of the City of Central, No. 92CW168 (Colo. Dist. Ct., Water Div. 1 Mar. 17, 2003) [hereinafter Central Motion].

to this 1992 exchange.³⁰ Rather, Central City argued that the new out-of-priority diversions from the Miner's and Peck's Gulch diversion structures and from the Gilpin County Wells made under the plan were actually made under its existing Miner's Gulch and Peck's Gulch and Gilpin County Well rights.³¹ Central City argued that these diversions were thus "senior" to the CWCB's existing instream flow water right, and that Central City was under no obligation to protect the CWCB's "junior" instream flow water right from injury resulting from these "senior" diversions.³²

The CWCB responded that Central City was incorrect in claiming that it could claim the senior priority date of an existing water right as the priority date for its new out-of-priority diversions made pursuant to a plan for augmentation including exchange.³³ The CWCB argued that Central City's position was not only inconsistent with Colorado law, but would upset the administration of water rights, particularly those under exchanges and plans for augmentation, across Colorado.³⁴ In addition, even if Central City's out-of-priority diversions could somehow be considered diversions of its existing senior water rights, the CWCB was entitled to protection from new out-of-priority diversions made from these rights, pursuant to the explicit language of Colorado Revised Statutes sections 37-92-305(3), -305(5), and -305(8), and pursuant to Colorado's century-old principle granting water users a vested right in those stream conditions existing at the time of appropriation.³⁵ Thus, whether one considered Central City's out-of-priority diversions under its plan to be new diversions made by a new junior exchange, or new diversions made by adapting existing water rights, these out-of-priority diversions were new diversions. Central City was required to protect the CWCB against injury caused by changed stream conditions resulting from Central City's new plan for augmentation.

Unable to resolve their disagreement, the CWCB and Central City filed opposing motions for determination of questions of law with the water court, both parties requesting a ruling as to whether Colorado law requires Central City to protect the CWCB's water rights from injury resulting from Central City's plan for augmentation.³⁶ The water

30. *City of Central*, 125 P.3d at 430.

31. *Id.* at 430-31.

32. *Id.* at 431.

33. *Id.*; See also Motion for Determination of a Question of Law at 4, *In re Water Rights of the City of Central*, No. 92CW168 (Colo. Dist. Ct., Water Div. 1 Mar. 13, 2003) [hereinafter CWCB Motion].

34. CWCB Motion, *supra* note 33 at 2.

35. *Id.* at 4-8.

36. See *City of Central*, 125 P.3d at 430-31; CWCB Motion, *supra* note 33; Central Motion, *supra* note 29.

court ruled in favor of Central City.³⁷ In so doing, the water court did not address CWCB's arguments that Central City's diversions under its plan for augmentation should be administered under the priority date of a new junior exchange, and instead assumed, without discussion, that Central City's new diversions under its plan for augmentation were diversions made pursuant to the senior priority of Central City's curtailed rights.³⁸ The water court held, as a matter of law, that under Colorado Revised Statute section 37-92-305, plans for augmentation need not protect "junior" water rights from injury caused by reduced streamflow.³⁹

The water court did recognize that, under Colorado law, junior water users have a vested interest in those stream conditions existing as of the time of appropriation.⁴⁰ The water court held, however, that this principle does not apply to new plans for augmentation.⁴¹ Rather, the water court found that in enacting section 37-92-305(8), the legislature intended to limit application of this principle only to changes of water rights.⁴² Moreover, the water court found that the CWCB was not entitled to protection even if the principle did apply to plans for augmentation.⁴³ Although the water court noted that the change in stream conditions at issue occurred during a downstream call, it found that the CWCB could not claim an interest in stream conditions existing during times of a downstream call, and thus could not object to any change in such stream conditions resulting from Central City's new plan for augmentation.⁴⁴

C. THE CWCB'S APPEAL

The CWCB appealed the Division 1 Water Court's decision, advancing three primary arguments.

First, the CWCB argued that the water court erred in accepting, without discussion, Central City's argument that the diversions made under its augmentation plan were entitled to the senior priority date of Central City's out-of-priority water rights.⁴⁵ Under Colorado law, diversions of water that are replaced from a downstream replacement source are diversions made by exchange, and receive the priority date

37. See Amended Order re: Motions for Determination of Questions of Law at 10, *In re* Water Rights of the City of Central, No. 92CW168 (Colo. Dist. Ct., Water Div. 1 Apr. 2, 2004).

38. *Id.* at 7.

39. *Id.* at 8.

40. *Id.* at 9.

41. *Id.* at 8.

42. *Id.* at 8-9.

43. *Id.* at 9.

44. *Id.*

45. Opening Brief of the Colorado Water Conservation Board at 15-16, *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424 (Colo. 2005) (No. 04SA145).

of the exchange, regardless of whether those diversions are made pursuant to a plan for augmentation.⁴⁶ Indeed, Colorado law specifically classifies augmentation plans that rely upon a downstream augmentation source to replace upstream out-of-priority diversions as "plans for augmentation including exchange."⁴⁷

Second, the CWCB argued that regardless of the priority date awarded Central City's new diversions, under its plan Central City must protect the CWCB against injury from changed stream conditions resulting from those new diversions.⁴⁸ Colorado Revised Statute sections 37-92-305(3), -305(5), -305(8), and Colorado's principle protecting the rights of junior appropriators, entitle the CWCB to protection against injury from changed stream conditions caused by "adaptations" or changes in the manner of use of senior water rights, whether those changed stream conditions occur as a result of a change of water right or implementation of a plan for augmentation.⁴⁹

Third, the CWCB argued that the water court erred in finding that the CWCB's instream flow water right did not entitle it to claim a right to those stream conditions existing within a reach of stream during times of a downstream call.⁵⁰ The CWCB noted that Colorado law had long recognized that water users could claim such a right, most notably through recognition of appropriative rights of exchange.⁵¹

D. THE COLORADO SUPREME COURT'S DECISION

The Colorado Supreme Court ruled unanimously in favor of the CWCB.

First, the Colorado Supreme Court held that the water court had erred in finding that plans for augmentation are not subject to the principle protecting junior water users from changes in stream conditions, at least as that principle applies to instream flow rights.⁵² The supreme court noted that it is through this principle that a water user gains the ability to realize and protect the user's reasonable expectations in those general stream conditions in existence at the time of the appropriation:

This court has often said, in substance, that a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation. *If this means anything, it is that when*

46. *Id.* at 16-17.

47. *Id.* at 17.

48. *Id.* at 20.

49. *See id.* at 20-29.

50. *See id.* at 29-36.

51. *Id.* at 31-33.

52. *City of Central*, 125 P.3d at 439-40.

*the junior appropriator makes his appropriation he acquires a vested right in the conditions then prevailing upon the stream, and surrounding the general method of use of water therefrom. He has a right to assume that these are fixed conditions and will so remain, at least without substantial change, unless it appears that a proposed change will not work harm to his vested rights. . . .*⁵³

The supreme court recognized that an important element of an adjudicated water right is also “the right to adapt an existing water right to a new use,”⁵⁴ and that “[s]uch adaptations are, as here, accomplished primarily through changes of water rights and plans for augmentation.”⁵⁵ However, the court remarked: “Key to adapting an existing water right to a new use is the question of injury.”⁵⁶

The Colorado Supreme Court noted that the general injury standard applicable to changes of water rights and plans for augmentation, set forth at Colorado Revised Statute section 37-92-305, requires that the court approve changes and plans for augmentation if they do not cause injury to vested water rights.⁵⁷ The court remarked that other provisions within section 37-92-305 focus in part on the maintenance of historical use. The court held that this focus on historical use stems from the recognition that water users are entitled to protection against changes in stream conditions.⁵⁸

Second, the court held that the protection from injury that plans for augmentation must provide other water users includes protecting CWCB instream flow water rights against changes in stream conditions during times of a downstream call.⁵⁹ In reaching this holding, the Colorado Supreme Court turned to the Colorado General Assembly’s intent in creating the CWCB Instream Flow Program.⁶⁰ The Colorado Supreme Court held that the purpose of the legislation was to balance the interests of Colorado’s environment with the need to develop water.⁶¹ The Colorado Supreme Court held that the general assembly struck this balance by allowing the CWCB to appropriate water to preserve the natural environment to a reasonable degree within stream reaches and to protect this water from future development:

“The legislative intent is quite clear that these appropriations are to protect and preserve the natural habitat and the decrees confirming them award priorities [that] are superior to the rights of those who

53. *Id.* at 434-35 (quoting *Vogel v. Minn. Canal & Reservoir Co.*, 107 P. 1108, 1111 (Colo. 1910)).

54. *Id.* at 435 (citing COLO. REV. STAT. § 37-92-302 (2005)).

55. *Id.*

56. *Id.* at 436.

57. *Id.*

58. *Id.* at 439.

59. *Id.*

60. *Id.* at 438-439.

61. *Id.* at 439.

may later appropriate. *Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed.*⁶²

The court noted that, due to the overappropriated nature of Colorado's stream systems, the majority of new development would occur through applications to adapt existing water rights through changes of water rights, plans for augmentation, and exchanges:

Yet many Colorado basins are fully appropriated or overappropriated and it is infeasible to obtain a reliable supply of water based on new appropriations. As a result, the majority of water right adjudications . . . involve adapting old water rights to new water requirements through changes and plans for augmentation, including exchanges.⁶³

The court found that the general assembly thus recognized that the value of instream flow rights would be to protect water remaining in stream reaches after the senior calling rights are satisfied.⁶⁴

Accordingly, the court held that the general assembly intended that the CWCB would have the right to protect stream reaches from changes in stream conditions caused by changes and plans for augmentation, including exchanges. The court concluded:

This rule best effectuates the clear legislative intent to protect and preserve the natural habitat through minimum streamflows. In the absence of this rule, senior diverters could simultaneously increase the supply of water yet divert around or from an existing instream flow right by a water project exchange or other means. Were this permitted, the prohibited result we noted in *Colorado River Water Conservation District* would occur: upstream adaptations could later be made, the streams dried up, and the whole purpose of the legislation destroyed.⁶⁵

Third, the Colorado Supreme Court disagreed with the water court's assumption that Central City was not diverting by exchange when it made new out-of-priority diversions under its plan for augmentation. The court held that due to Central City's reliance upon an upstream diversion point and a downstream replacement source, the city's augmentation plan included a new exchange—at least with respect to the city's surface diversions from its Miner's Gulch and Peck's Gulch diversion structures.⁶⁶

62. *Id.* (quoting *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 575 (Colo. 1979).

63. *Id.* (citing LEONARD RICE & MICHAEL D. WHITE, *ENGINEERING ASPECTS OF WATER LAW 77-78* (1987))(citations omitted).

64. *Id.* at 439.

65. *Id.* at 440.

66. *Id.* at 441. The Supreme Court found that Central City was operating an exchange with respect to its out-of-priority diversions made from its surface diversions,

The court concluded that Central City's new out-of-priority diversions and new exchange made under its plan for augmentation could constitute a change in stream conditions against which the CWCB was entitled to protection.⁶⁷ The court found that, in order to protect CWCB's rights, Central City's exchange to its Miner's and Peck's Gulch diversion structures should be operated in priority as against the CWCB's senior instream flow right.⁶⁸ The Court held that the CWCB was also entitled to terms and conditions protecting its instream flow water right from injury caused by out-of-priority diversions from the Gilpin County Wells.⁶⁹

III. THE CITY OF CENTRAL DECISION AND COLORADO WATER LAW

The Colorado State Engineer and the largest water user groups in Colorado supported the CWCB's position in the *City of Central* appeal as necessary to ensure the orderly administration of water rights across the state. Supporters of the decision understood that the water court must hold plans for augmentation to the same injury standard as changes of water rights and other water rights applications, and those plans must require protection of junior water users from injury caused by changed stream conditions.⁷⁰ Holding plans for augmentation to a lesser standard would jeopardize not only instream flow rights, but exchanges, other augmentation plans including exchange, hydropower rights, and other similarly situated water users.

Despite this support for the Colorado Supreme Court's decision, the decision has also faced criticism. The most common criticism advanced is that the decision unfairly subordinates the priorities of senior water rights to junior water users.⁷¹ According to this viewpoint, a water user who diverts water out-of-priority by exchange under a new augmentation plan from a diversion structure associated with a curtailed senior water right should be entitled to claim the senior priority date of the curtailed water right for its new, out-of-priority diversions, rather

whether those diversions were characterized as being made by exchange or being made under Central City's plan for augmentation. However, as is discussed below, the Supreme Court did not address whether Central City was operating an exchange with respect to its out-of-priority diversions made from the Gilpin County Wells.

67. *Id.* at 440-41.

68. *Id.* at 442-43.

69. *Id.* at 443.

70. See Amicus Curiae Brief of the Northern Colorado Water Conservancy District, *City of Central*, 125 P.3d 424 (No. 04SA145); Amici Curiae Brief of Southeastern Colorado Water Conservancy District & Colorado River Water Conservation District, *City of Central*, 125 P.3d 424 (No. 04SA145); Reply Brief of the State & Division Engineers in Support of the Colorado Water Conservation Board, *City of Central*, 125 P.3d 424 (No. 04SA145).

71. See, e.g., Case Comment, *supra* note 6, at 82.

than the junior priority date of the new exchange.⁷² Requiring a water user to divert water under a new junior priority date unjustly prevents water users from exercising their senior priority to its full decreed amount.⁷³

This criticism, however, simply ignores Colorado law. First, this criticism is inconsistent with Colorado law governing the priority date of exchanges. Under Colorado law, the priority date for diversions made by exchange is the date the exchange began operating, not the date of a senior out-of-priority water right.⁷⁴ The authors are aware of no case law supporting the proposition that a water user may claim a senior priority date for a new junior exchange. Moreover, as is discussed in Part V of this article, such a result would jeopardize the reasonable expectations of existing water users and confuse the administration of water rights across Colorado.

Second, this criticism ignores Colorado law governing the measurement, quantification, and administration of water rights in Colorado. Colorado law defines the measurement of a water right not by the amount decreed to the right, but by the legal historical use of the right.⁷⁵ Thus, a water user may not change the point of diversion, the type or place of use, or the timing of use of a right so as to reduce the water supply that would otherwise be available to other water users.⁷⁶ This rule applies whether a change of water rights would reduce the water available to holders of senior or junior water rights.⁷⁷ Further, this rule applies even if a new expanded use is less than the amount decreed to the right:

a senior appropriator is not entitled to enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the origi-

72. *Id.*

73. *Id.*

74. COLO. REV. STAT. § 37-92-305(10) (2006); *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001).

75. *See In re Water Rights in Rio Grande County*, 53 P.3d 1165, 1169 (Colo. 2002); *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999); *In re Water Rights of Midway Ranches Prop. Owners Ass'n, Inc.*, 938 P.2d 515, 521 (Colo. 1997).

76. *See, In re Water Rights in Rio Grande County*, 53 P.3d at 1168-70; *Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001); *Santa Fe Trail Ranches Prop. Owners Ass'n*, 990 P.2d at 54; *Weibert v. Rothe Brothers, Inc.*, 618 P.2d 1367, 1372-73 (Colo. 1980).

77. *See Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 197 (Colo. 1999) ("When a petition for a change in use or point of diversion is filed, junior appropriators are given the opportunity to object to the change on the grounds that it will encroach upon their vested water rights"); *see also Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064, 1067 (Colo. 1981) ("[A]n appropriator has no right as against a junior appropriator . . . to extend the time of diversion to irrigate lands other than those for which the appropriation was made").

nal point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.⁷⁸

The rule that a senior water user may not expand the historic use of a senior right so as to injure junior water rights is, in effect, a restatement of the principle that junior water users are entitled to stream conditions at the time of their appropriation.⁷⁹ The doctrine of historical use preserves the vested right of water users in those stream conditions existing as of the time of appropriation by limiting the amount of water that a water user may divert and consume under a changed senior water right to the amount of water legally and historically diverted and consumed under that right.⁸⁰

Accordingly, the criticism that the Colorado Supreme Court's decision in *City of Central* improperly limits senior water rights by preventing senior water users from relying upon new plans for augmentation to increase the amount of water that they may legally divert under their right is inconsistent with basic principles of Colorado law. The measure of a right is the legal historical use, not solely the terms of a decree. A water user has never been entitled to use a water rights application to enlarge the use of a senior water right beyond its historical use.⁸¹ The Colorado Supreme Court's decision in *City of Central* prohibiting water users from using plans for augmentation to increase the amount of water that they may legally divert under a senior water right is a continuation of existing Colorado law. The Colorado Supreme Court's decision reaffirms the basic principle protecting the vested rights of Colorado water users in those stream conditions existing as of the time of appropriation.

IV. THE CITY OF CENTRAL DECISION AND COLORADO'S INSTREAM FLOW PROGRAM

A second criticism levied at the *City of Central* decision is that the decision improperly defines "stream conditions" in a manner inconsistent with Colorado law.⁸² According to this viewpoint, the Colorado Supreme Court erred in holding that CWCB instream flow rights could claim an interest in stream conditions during times of a senior call, and

78. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988).

79. *See, e.g., Farmers Reservoir & Irrigation Co.*, 33 P.3d at 807 (stating that the purpose of the terms and conditions imposed on any change is to assure maintenance of surface and tributary groundwater stream conditions); *see also Weibert*, 618 P.2d at 1372.

80. *See, e.g., In re Water Rights in Rio Grande County*, 53 P.3d at 1169; *In re Water Rights of Midway Ranches Prop. Owners Ass'n, Inc.*, 938 P.2d at 521; *Orr*, 753 P.2d at 1224.

81. *In re Water Rights of Midway Ranches Prop. Owners Ass'n, Inc.*, 938 P.2d at 521 (stating that the doctrine of historical use as a measure of a water right applies to plans for augmentation as well as changes of water rights); *Orr*, 753 P.2d at 1224.

82. *See, e.g., Case Comment, supra* note 6, at 82.

could assert this interest against reductions in streamflow caused by new plans for augmentation and exchanges. These critics argue that Colorado law requires the state engineer to curtail all junior water during times of a senior call, whether or not curtailing an individual junior water right is necessary to provide water to the call.⁸³ Thus, under this criticism, the Colorado Supreme Court erred in finding that CWCB's instream flow water rights entitle the CWCB to claim an interest in maintaining stream conditions on North Clear Creek from changes caused by a plan for augmentation during times that a senior downstream call is in effect. In so doing, the Colorado Supreme Court conferred upon CWCB instream flow water rights a unique vested interest in stream conditions, beyond that recognized under Colorado law in other water rights, and beyond that intended by the Colorado General Assembly.

This criticism is legally incorrect. First, contrary to this criticism, under Colorado law, junior water rights are not necessarily curtailed during times of a downstream call. Rather, Colorado law only requires the curtailment of junior rights when necessary to provide water to a senior calling right.⁸⁴ Thus, water rights that do not reduce the amount of water available to downstream senior water users, and that the Division Engineer has not curtailed, may continue to use water even when a downstream call is in effect.⁸⁵

Second, Colorado law has long specifically recognized that certain types of water rights may operate within stream reaches during times when a downstream call is in effect.⁸⁶ For example, by definition, exchanges provide water to a downstream senior right, and thus operate only during times of a downstream senior call.⁸⁷ Moreover, Colorado law provides that certain water rights may appropriate that water present within a stream reach during times of a downstream call.⁸⁸ Colorado law specifically recognizes an exchange as an appropriative water

83. See *Amicus Curiae* Brief of the City of Golden, the Upper Eagle Regional Water Authority, the Eagle River Water & Sanitation District, Wildcat Ranch Association, and the Eagle Park Reservoir Company at 10-11, *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 435, 441 (Colo. 2005) (No. 04SA145); Opening-Answer Brief of the City of Central at 23, *City of Central*, 125 P.3d 424 (No. 04SA145) [hereinafter *Central Answer Brief*]; Answer Brief of the City and County of Denver, Acting By and Through its Board of Water Commissioners at 7, *City of Central*, 125 P.3d 424 (No. 04SA145); Case Comment, *supra* note 6, at 82.

84. See COLO. REV. STAT. §§ 37-92-501 to -502 (2006); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 81-82 (Colo. 1996).

85. COLO. REV. STAT. §§ 37-92-501 to -502 (2006).

86. John J. Cyran, *The City of Central Decision and the Future Administration of Colorado Water Rights*, 10 W. WATER L. & POL'Y REP. 151, 154 (2006).

87. See COLO. REV. STAT. § 37-80-120(4) (2006) ("Whenever substitute water is supplied to a senior ditch, the supplier . . . may take an equivalent amount for beneficial use").

88. See *id.*

right that “may be adjudicated or otherwise evidenced as any other right of appropriation.”⁸⁹

Thus, notwithstanding the fact that exchanges rely upon the water present within a stream reach during times of a downstream call, Colorado law entitles exchanges to appropriate that water, and to protect this appropriation from injury caused by other exchanges, other plans for augmentation, or other water rights seeking to make use of that water.⁹⁰ In short, contrary to the critics of the City of Central decision, Colorado law has long recognized the right of water users to claim an interest in those stream conditions existing within a stream during times of a downstream call.⁹¹ Indeed, as argued in more detail in Part V of this article, recognition of this right is essential to the administration of Colorado’s prior appropriation system.

Third, as the Colorado Supreme Court correctly held, the legislative history of Colorado’s Instream Flow Program demonstrates that the General Assembly specifically intended that CWCB instream flow rights, like exchanges, would have the right to claim an interest in those stream conditions existing during times of a downstream call, and assert that interest as against exchanges and plans for augmentation.⁹² The City of Central decision thus holds special significance for Colorado’s Instream Flow Program in confirming that instream flow water rights merit the same protection from injury that Colorado law has granted other types of water rights. A brief background of the program is helpful to understanding this significance.

The concept of Colorado’s Instream Flow Program dates back to the 1950s, when, in the context of the proposed Fryingpan-Arkansas project, it became evident that future water projects could completely dewater streams in the state.⁹³ Efforts were made to address this issue by creating a mechanism to protect instream flows, but these efforts were complicated by the fact that Colorado’s prior appropriation system only recognized appropriations of water based upon diversions of water out of a stream.⁹⁴ Eventually, in recognition of the need to “correlate the activities of mankind with some reasonable preservation of the natural environment,” the Colorado General Assembly created the

89. *Id.*; *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001).

90. *Empire Lodge Homeowners’ Ass’n*, 39 P.3d at 1155; *City of Florence v. Bd. of Waterworks of Pueblo*, 793 P.2d 148, 156 (Colo. 1990).

91. Cyran, *supra* note 86, at 154.

92. *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 439 (Colo. 2005).

93. Steven J. Shupe, *The Legal Evolution of Colorado’s Instream Flow Program*, 17 COLO. LAW. 861, 861 (1988).

94. *City of Central*, 125 P.3d at 438; *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 573 (Colo. 1979).

Instream Flow Program.⁹⁵ This program vested in the CWCB the exclusive authority to appropriate water between two points on a stream reach, without need for a diversion, “such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels . . . to preserve the natural environment to a reasonable degree.”⁹⁶ The Colorado Supreme Court has held that this exclusive authority creates in the CWCB a “unique statutory fiduciary duty” to the Colorado public.⁹⁷ The CWCB “may only appropriate such waters as ‘may be required for *minimum* stream flows . . . to preserve the environment.’”⁹⁸ However, once the CWCB has determined this minimum amount of stream flow and made an appropriation, the CWCB must act to ensure the protection of that appropriation as against other water users.⁹⁹

Over time, CWCB’s Instream Flow Program has proven to be a remarkably effective tool for preserving Colorado’s natural environment “to a reasonable degree.”¹⁰⁰ The CWCB currently holds decrees for approximately 1200 water rights, the largest number of water right decrees held by one entity in the State of Colorado.¹⁰¹ These water rights protect 8500 miles of stream and over 480 natural lakes in all seven water divisions.¹⁰² Since the inception of the Instream Flow Program, the CWCB has reviewed the water court resumes in each water division to assure that a proposed change of water rights, plan for augmentation, or exchange will not injuriously affect a decreed instream flow or natural lake water right. If a water rights application has the potential to injure an instream flow or natural lake water right, CWCB staff works with the Office of the Attorney General to file a statement of opposition, which the CWCB Board ratifies at a subsequent CWCB meeting.¹⁰³ The Office of the Attorney General and CWCB staff then work with the water rights applicant to arrive at terms and conditions that will permit the application to go forward while ensuring continued maintenance of CWCB minimum stream and lake levels.

95. COLO. REV. STAT. § 37-92-102(3) (2006).

96. *Id.*

97. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1260 (Colo. 1995).

98. *Id.*

99. *Id.* at 1259-60.

100. COLO. REV. STAT. § 37-92-102(3) (2006).

101. Edward (Ted) R. Kowalski, *Colorado Water Conservation Board*, in *COLORADO WATER LAW BENCHBOOK* 10-1, 10-3 (Carrie L. Ciliberto ed., 2006). *See also* <http://www.cwcb.state.co.us> (follow “Water Information” hyperlink; then follow “Electronic Data Management” hyperlink; then follow “Instream Flow and Natural Lake Level Water Rights Database” hyperlink) (provides a tabulation of all of the water rights held by the CWCB).

102. Kowalski, *supra* note 101, at 10-3.

103. Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 COLO. CODE REGS. §§ 408-2(8a) to -2(8c) (2003).

Over the more than three decades since the inception of the Instream Flow Program, the CWCB has filed statements of opposition in countless water rights applications involving changes of water rights, augmentation plans, and exchanges.¹⁰⁴ Through these statements of opposition, the CWCB has sought and obtained terms and conditions protecting instream flow rights from injury due to changed stream conditions resulting from such applications. These terms and conditions maintain existing stream conditions when necessary to preserve minimum streamflows, typically by requiring applicants for plans for augmentation to curtail new out-of-priority diversions made under the plan, or to release water from upstream replacement sources, only at such times when new out-of-priority diversions made under the plan would otherwise injure an instream flow water right.¹⁰⁵ By requiring the inclusion of these terms and conditions, the CWCB has sought not to prevent the operation of new plans for augmentation and plans for augmentation including exchanges, but rather to meet its statutory fiduciary duty to balance “the activities of mankind with some reasonable preservation of the natural environment,” by ensuring that the operation of such plans will maintain the minimum amount of streamflow necessary to preserve the natural environment to a reasonable degree.

It was perhaps the success of the CWCB’s Instream Flow Program that has led to the criticisms now levied against it and the Colorado Supreme Court’s *City of Central* decision. The CWCB’s success at requiring water rights applicants to include terms and conditions protecting minimum stream flows has led to the charge that the Instream Flow Program impedes water development in Colorado by “tying up” water within certain stream reaches, in a manner inconsistent with the intent of the general assembly.¹⁰⁶ These water users claim that the general assembly did not intend to authorize the CWCB to limit the removal of water from stream reaches pursuant to new plans for augmentation and exchanges during times of a senior call, for the asserted reason that granting the CWCB such authority that might constrain future Colorado water development.

This claim is without merit. The general assembly created the CWCB in 1937 to assist in the protection and development Colorado’s water resources for the benefit of the present and future inhabitants of the state.¹⁰⁷ By granting the CWCB—the State entity whose role tradi-

104. Interview with Dan Merriman, Chief of the CWCB Stream and Lake Protection Section (Feb. 13, 2007) (on file with author).

105. *Id.*

106. *See, e.g.,* Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424, 439 (Colo. 2005) (discussing criticism that instream flow water rights complicate development by “tying up” a stream); Case Comment, *supra* note 6 at 82.

107. COLO. REV. STAT. § 37-60-102 (2006).

tionally has been to promote water development—with the unique authority to protect the natural environment “to a reasonable degree” by appropriating rights to instream flows and natural lake levels, the general assembly clearly intended that the Instream Flow Program would neither sacrifice Colorado’s environment to its need for future water development, nor sacrifice Colorado’s need for future water development to its environment. Rather, as the Colorado Supreme Court specifically found in upholding Colorado’s Instream Flow Program against one of the original challenges to the Program, the General Assembly’s intent was that the Program would maintain a balance between the need for development, and the need to protect Colorado’s environment by preserving a minimum level of water in Colorado’s lakes and streams.¹⁰⁸

The Colorado Supreme Court’s decision in *City of Central* reaffirms its earlier holding finding that the General Assembly’s intent in vesting the CWCB with the authority over the newly created Instream Flow Program was to balance development with protection of stream flows and lake levels.¹⁰⁹ The Court in *City of Central* reviewed the history of Colorado’s Instream Flow Program for the precise purpose of determining whether the General Assembly intended to authorize the CWCB to protect a minimum flow within stream reaches from new water developments resulting from plans for augmentation and plans for augmentation including exchanges. The Court noted that, due to the overappropriated nature of Colorado’s stream systems, the majority of new water rights applications involve applications to adapt existing water rights through changes of water rights, plans for augmentation, and exchanges, rather than applications for new water rights to divert water from the stream.¹¹⁰ Such adaptations, which have the potential to change stream conditions during the majority of times in which there is a senior call, are the chief mechanism by which new water rights applicants seek to develop water within Colorado.¹¹¹ Accordingly, in order to meet the stated objective of the Instream Flow Program of protecting Colorado’s environment, the general assembly must have intended that the program would provide a means for the CWCB to protect a minimum level of water within Colorado’s streams as against such adaptations during the majority of times in which Colorado’s streams are subject to a senior call.¹¹² To rule otherwise would defeat the intent of the general assembly and effectively emasculate Colo-

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

109. *City of Central*, 125 P.3d at 440.

110. *Id.* at 439 (citing LEONARD RICE & MICHAEL D. WHITE, *ENGINEERING ASPECTS OF WATER LAW* 77, 78 (1987)).

111. *Id.*

112. *Id.* at 440.

rado's Instream Flow Program: "upstream adaptations could later be made, the streams dried up, and the whole purpose of the legislation destroyed."¹¹³

In sum, the Colorado Supreme Court correctly held that in creating Colorado's Instream Flow Program, the general assembly intended to create not an impotent program but a program that works, by protecting the minimum amount of water necessary to preserve the environment to a reasonable degree. The general assembly did this by bestowing upon instream flow water rights the same rights that Colorado has long granted other water users: the right to claim a vested interest in those stream conditions existing as of the time of appropriation, and the right to protect that interest from new appropriations or "adaptations" that could dry up Colorado's stream system.

V. THE CITY OF CENTRAL DECISION AND HISTORICAL WATER USE

A third criticism that has been leveled at the *City of Central* decision is that the Colorado Supreme Court, in issuing its decision, improperly ignored actual historical use on North Clear Creek.¹¹⁴ Specifically, Central City asserted that it was justified in making out-of-priority diversions from its Miner's Gulch and Peck's Gulch diversions structures, for the asserted reason that these out-of-priority diversions were historical practices in existence at the time the CWCB appropriated its North Clear Creek instream flow water right, due to the water commissioner's alleged failure to administer Central City's water rights on North Clear Creek.¹¹⁵ The Colorado Supreme Court erred in not considering these diversions as a legitimate pre-existing use.

This criticism, however, is unfounded. First, the Colorado Supreme Court did not address issues pertaining to Central City's historic out-of-priority diversions from North Clear Creek for a very good reason: these issues were not a subject of the appeal. The subject of the *City of Central* appeal was whether, as a matter of law, Colorado law required Central City to include terms and conditions protecting the CWCB instream flow water right from injury caused by Central City's plan for augmentation. The Colorado Supreme Court referred the specific issue of whether and to what extent Central City's proposal would result in such injury to the Water Court for consideration on remand. Thus, any criticism arguing that the Colorado Supreme Court should have addressed factual issues regarding pre-existing uses is simply without merit.

113. *Id.*

114. *See, e.g.,* Case Comment, *supra* note 6 at 82.

115. *See* Central Motion, *supra* note 29 at 2-3.

Second, even if Central City had argued on appeal that it factually was not obligated to protect the CWCB's instream flow water right, this argument would have failed. Central City did not argue that its past out-of-priority diversions were made by virtue of a recognized exchange or court-approved plan for augmentation. Central City did attempt to present evidence at trial that the water commissioner had not curtailed such diversions.¹¹⁶ However, the Colorado Supreme Court has held that an illegal diversion of water may not provide a basis for determining the historical use of a right.¹¹⁷ This rule holds true even if a water commissioner overlooked or previously permitted such past diversions.¹¹⁸ Thus, a water user may not rely upon past illegal uses in an attempt to prove that its new uses are not causing injury to another water right.

Third, to the extent Central City could have proven its past out-of-priority diversions to be a legal use, Colorado law provides a specific avenue for recognizing such uses. The General Assembly enacted a specific statutory section expressly intended to address the relationship between instream flow water rights and legal pre-existing uses. Specifically, Colorado Revised Statute section 37-92-102(3)(b) expressly addresses the treatment of historical water uses under Colorado's Instream Flow Program.¹¹⁹ Colorado Revised Statute section 37-92-102(3) governs the CWCB's appropriation of instream flow water rights. Subsection 102(3)(b) provides that:

Any such appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.¹²⁰

The General Assembly enacted Senate Bill 81-414 (codified at section 37-92-102(3)(b)) in part to address the concerns of agricultural water users regarding their ability to operate their historical unadjudicated uses or exchanges if a water court decreed an instream flow water right to the CWCB.¹²¹ According to a June 4, 1981 letter to Governor Richard Lamm from John M. Sayre and Gregory J. Hobbs, at the time that Senate Bill 414 was enacted, many agricultural water users were operating unadjudicated exchanges and were concerned that an

116. *City of Central*, 125 P.3d at 433.

117. *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 57 (Colo. 1999) (holding water user may not rely upon evidence of use of water for an undecreed purpose to prove historical use of a water right).

118. *Id.* at 57-58.

119. COLO. REV. STAT. § 37-92-102(3)(b) (2006).

120. *Id.*

121. Letter from John M Sayre & Gregory J. Hobbs to Richard Lamm, Governor, in Support of Northern Colorado Water Conservancy District for S.B. 414, Minimum Stream Flows (June 4, 1981) (on file with author).

instream flow appropriation could prevent such exchanges.¹²² Another concern at that time was the impact of instream flow appropriations on water users who had changed their point of diversion, but had not obtained a decree for such change.¹²³ The June 4, 1981 letter addressed Governor Lamm's concerns that Senate Bill 414 would impose too many limits on the CWCB's Instream Flow Program and pointed out that the CWCB had always recognized ongoing uses and exchanges, and that the statute was stating an existing practice of the CWCB.¹²⁴

The CWCB interprets section 102(3)(b) to subject an instream flow water right to actual, legal, but undecreed, uses of water occurring on the date the CWCB appropriated the water right or within a reasonable time period in proximity to that date, in the amounts and season in which the water was used.¹²⁵ Water users have invoked and the CWCB has agreed to the applicability of this provision in numerous water court cases, including both instream flow water right applications filed by the CWCB and other water rights applications that the CWCB has opposed to prevent injury to an instream flow water right.¹²⁶ Most often, section 102(3)(b) has applied to unadjudicated exchanges and diversions of water rights at points other than the decreed point of diversion.¹²⁷

The CWCB staff implements section 37-92-102(3)(b) by requiring a person claiming that a use of water existed at the time of an instream flow water right appropriation to provide an affidavit from a person with personal knowledge of the existing use. The affidavit should set forth:

- a) the person's name and how the person obtained personal knowledge of the use;
- b) a full description of the amount diverted, months diverted and type of use; and
- c) a statement that the use was occurring on or about the date that the CWCB appropriated the ISF water right.¹²⁸

Upon receipt of such an affidavit, the CWCB staff consults with the water commissioner for the affected area to verify the claimed use.¹²⁹ After receiving verification, the CWCB includes the description of the claimed use in its instream flow water right decree so the Division of

122. *Id.*

123. *Id.*

124. *Id.*

125. Interview with Dan Merriman, *supra* note 104.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

Water Resources knows to administer the instream flow water right as junior to the existing use.¹³⁰ In the context of a water rights application that the CWCB has opposed, the CWCB and the applicant include a description of the claimed use in their stipulation and the resulting decree, again to inform the division engineer of the relative priorities of the two uses under the statute for administrative purposes.¹³¹

The CWCB does not, however, interpret section 37-92-102(3) (b) to subject instream flow water rights to out-of-priority or otherwise illegal diversions occurring on or near the date the CWCB appropriated an instream flow water right, because such diversions were not in accordance with the priority system. In enacting section 37-92-102(3) (b), it is presumed that the Colorado General Assembly intended that the entire statute (Colorado Revised Statute Title 37, Article 92) would be effective.¹³² Because no provision of Colorado Revised Statute Title 37, Article 92, allows illegal uses of water, such as diverting out-of-priority to the detriment of other water rights, section 37-92-102(3) (b) cannot reasonably be interpreted to apply to illegal uses.¹³³

In the context of the *City of Central* litigation, Central City raised no argument on appeal that any of its past out-of-priority diversions from its Miner's Gulch or Peck's Gulch diversion structures were made pursuant to a legal, undecreed exchange or court approved plan for augmentation. At trial, Central City failed to provide the CWCB with an affidavit or any other proof describing the existence and the amount of such an exchange or plan.¹³⁴ Thus, any argument that the Colorado Supreme Court improperly failed to consider historic uses on North Clear Creek in issuing its decision in *City of Central*, or that the Colorado Supreme Court's decision will hinder the CWCB's future ability to consider such historic uses, is simply without merit.

VI. THE CITY OF CENTRAL DECISION AND COLORADO WATER RIGHTS ADMINISTRATION

A final criticism levied at the *City of Central* decision is that it is the wrong result for the future development of water in Colorado.¹³⁵ According to this criticism, the Colorado Supreme Court's decision greatly complicates the ability of water users to develop water in Colo-

130. *Id.*

131. *Id.*

132. COLO. REV. STAT. § 2-4-201(1)(b) (2006).

133. *See, e.g.,* *Martinez v. Cont'l Enters.*, 730 P.2d 308, 315 (Colo. 1986) (discussing that statutes must be construed as whole to further legislative intent by entire statutory scheme).

134. Interview with Dan Merriman, *supra* note 104.

135. *See, e.g.,* *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 440 (Colo. 2005) (discussing criticism that instream flow rights complicate development by "tying up" a stream); Case Comment, *supra* note 6 at 82.

rado, by allowing the CWCB, and potentially other water users, to claim a right to stream conditions within stream reaches during times of a downstream call. It has been argued that such a result allows water users such as the CWCB to “tie up” stream reaches during times of a downstream call, reducing the ability of other water users to divert water from such stream reaches pursuant to new exchanges, plans for augmentation, or plans for augmentation including exchange.¹³⁶ This argument is incorrect, both with respect to Colorado’s Instream Flow Program, and to the proper administration of Colorado’s prior appropriation system.

First, the *City of Central* decision was clearly necessary to the continued success of Colorado’s Instream Flow Program. The Colorado Supreme Court’s decision recognizes that it is the ability of the Instream Flow Program to protect stream conditions during times of a senior call as against new “adaptations” of existing senior rights that gives instream flow water rights their value.¹³⁷ If the Colorado Supreme Court held that CWCB instream flow water rights are not entitled to the maintenance of historical stream conditions during the majority of times when streams are subject to a senior call, “upstream adaptations could later be made, the streams dried up, and the whole purpose of the [instream flow] legislation destroyed.”¹³⁸

The Colorado Supreme Court recognized that allowing instream flow rights to actually maintain minimum flows on Colorado’s streams does complicate the development of new water projects. Yet, as the court observed, “all water rights complicate the efforts of new or existing users to develop sources of supply. This result is endemic to the priority system and property rights generally.”¹³⁹ Nonetheless, in creating Colorado’s Instream Flow Program, the Colorado General Assembly decided to offer some level of protection for Colorado’s environment from continued efforts to divert water from Colorado’s streams. The Colorado Supreme Court’s decision was necessary, and proper, to effect this decision.

Second, as is evidenced by the support of water users groups such as the Colorado River Water Conservation District, Southeastern Colorado Water Conservancy District, and Northern Colorado Water Conservancy District, the Colorado Supreme Court’s decision is necessary not only to Colorado’s Instream Flow Program, but to the further development of water in Colorado. As noted, the court’s decision in *City of Central* recognizes that in an overappropriated stream system, the majority of new water development projects do not seek to appropriate water from the streams during the few times when there is no senior

136. *City of Central*, 125 P.3d at 440.

137. *Id.* at 439.

138. *Id.* at 440.

139. *Id.* (citations omitted).

call in effect and unappropriated water is available for diversion.¹⁴⁰ Rather, the majority of new water projects rely upon existing stream conditions during times of a senior call in order to effectuate new exchanges, plans for augmentation including exchange, and changes of water rights.¹⁴¹ Water users must be entitled to claim a right to the maintenance of these stream conditions. Absent the ability to claim such a right, Colorado law would have no method for water users to sort out the various claims to water within stream reaches during the majority of times when streams are subject to call. Indeed, water users have historically attempted to protect stream conditions as against future developments or adaptations of existing rights by obtaining appropriative rights of exchange.¹⁴²

The Colorado Supreme Court's decision is significant in addressing the right of Colorado water users to claim a right to protect existing stream conditions. The Colorado Supreme Court specifically addressed CWCB instream flow rights.¹⁴³ However, the Court's decision also protects the ability of other water users to claim a right to protect water uses against new upstream adaptations. For example, the court stated that an applicant for a new plan for augmentation including a new junior exchange could not have its new diversions administered under a senior priority as against other water users.¹⁴⁴ Had the court held otherwise, it would jeopardize the priority dates of exchanges across Colorado. A water user who, thirty years ago, had obtained an appropriative right of exchange to protect the amount of water available within a particular exchange reach could find the usefulness of that right defeated by a new exchange operated under a new plan for augmentation. Such a result would hinder the development of water projects by removing the certainty that any water project including an exchange would not be jeopardized by a new plan for augmentation. Such a result does not serve the interest of Colorado water users.

As with any Colorado Supreme Court decision, there are questions left unanswered. The first such question involves the operation of an exchange to a well. Central City argued that no exchange exists between the point of depletion for the Gilpin County Wells and Central City's replacement source for the wells, notwithstanding the fact that the depletions from the Gilpin County Wells are upstream of replacement sources, for the asserted reason that an exchange cannot be operated to a well.¹⁴⁵ A contrary position would hold that an exchange

140. *Id.* at 439 (citing LEONARD RICE & MICHAEL D. WHITE, *ENGINEERING ASPECTS OF WATER LAW* 77, 78 (1987)).

141. *Id.*

142. *Id.* at 436 (citing TROUT, WITWER & FREEMAN, P.C., *ACQUIRING, USING AND PROTECTING WATER IN COLORADO* 137 (2004)).

143. *Id.* at 438-40.

144. *Id.* at 442-43.

145. *Id.* at 441-42.

can operate to a well, or at least to the location where the wells depletions affect the stream. The Colorado Supreme Court declined to address this argument, in part because Central City had not provided support of its argument or sufficient information regarding the location of the Wells, and in part because deciding this issue was not necessary to decide the legal issue of whether Central City must protect the CWCB's water rights from injury.¹⁴⁶ Accordingly, the failure of the Colorado Supreme Court to address this issue is a failure of the record, not of the court's decision.

Second, the Colorado Supreme Court did not hold that all types of appropriations are entitled to the maintenance of historical stream conditions during times of a downstream call. Based upon Colorado statute, exchanges clearly should be entitled to claim such a right.¹⁴⁷ Based upon the Colorado Supreme Court's ruling in *City of Central*, CWCB instream flow rights may also now claim such an interest. However, the Court based its conclusion regarding CWCB instream flow water rights upon a detailed review of the legislative history of the Instream Flow Program. The court could conclude that the general assembly did not intend certain other types of water rights to operate in a similar manner.

The limitations in the Colorado Supreme Court's decision do not, however, overshadow the importance, or the correctness, of the decision. In basing its decision upon the principle granting water users a vested right in those stream conditions existing at the time of appropriation, the court served both the interests of water rights developers who seek to protect their investment, and the CWCB in its efforts to protect instream flow water rights for the benefit of Colorado's environment and Colorado's future.

146. *Id.*

147. *See* COLO. REV. STAT. § 37-80-120(4) (2006) ("Whenever substitute water is supplied to a senior ditch, the supplier . . . may take an equivalent amount for beneficial use").

