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## Future of Ditch-Wide Change Cases in Colorado: Reducing Per-Share Water Quantities with Historical Consumptive Use Determinations Based on Unlawful Enlargements and Average Reservoir Releases: Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.

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## CASE NOTES

# FUTURE OF DITCH-WIDE CHANGE CASES IN COLORADO: REDUCING PER-SHARE WATER QUANTITIES WITH HISTORICAL CONSUMPTIVE USE DETERMINATIONS BASED ON UNLAWFUL ENLARGEMENT AND AVERAGE RESERVOIR RELEASES: BURLINGTON DITCH RESERVOIR & LAND CO. V. METRO WASTEWATER RECLAMATION DIST., 256 P.3D 645 (COLO. 2011)

DAVID W. BAKER

### I. INTRODUCTION

Transfer of agricultural (irrigation) water rights to municipal and industrial uses is one way water providers can meet the needs of a growing population in Colorado.<sup>1</sup> A water right owner's ability to change a water right adds value to that right and is sometimes the only way for it to generate economic benefits for the owner. Scarcity of water supply and climate change variations in rainfall and snowmelt timing threaten to reduce the available water supply across the entire state.<sup>2</sup> In the future, more farmers may look at cashing in on their valuable water rights. This case, however, is an example of the perils of submitting water rights to the scrutiny of opposing parties and how Colorado courts apply the no injury rule, which requires senior water right holders to prevent injurious

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\* With thanks to Bill Paddock, Partner, Carlson Hammond & Paddock, L.L.C., for review and comments.

1. See *The Municipal & Industrial Water Supply and Demand Gap*, COLORADO WATER CONSERVATION BOARD, <http://cwcb.state.co.us/water-management/water-supply-planning/Pages/TheWaterSupplyGap.aspx> (explaining that the Colorado Statewide Water Supply initiative includes agricultural transfers as one way to address increasing water demands).

2. *Climate Change*, COLORADO WATER CONSERVATION BOARD, <http://cwcb.state.co.us/environment/climate-change/Pages/main.aspx> ("Current climate models project that Colorado will warm by 2.5°F by 2025 and 4°F by 2050.") (last visited Dec. 22, 2011); Iris T. Stewart et al., *Changes in Snowmelt Runoff Timing in Western North America Under a "Business as Usual" Climate Change Scenario*, 62 CLIMATIC CHANGE 217, 230 (2004), available at [http://meteora.ucsd.edu/cap/stewart\\_clch.pdf](http://meteora.ucsd.edu/cap/stewart_clch.pdf) (explaining earlier peak snowmelt and warmer temperatures will affect evaporation rates in reservoirs and limit water available for beneficial use in dry months).

changes in stream conditions for the benefit of junior appropriators.<sup>3</sup> Potential transferors must take into account the real risks inherent in the court's requantification of their water rights that is part of every change of water rights proceeding.

Here, the Colorado Supreme Court clarified how it applies the measure of historical beneficial use to the one-fill rule for water storage rights in Colorado that, in turn, may impact how storage right owners exercise their water storage rights. The court also excluded long-term practices and private agreements from its calculation of historical consumptive use. Further, the applicants' ditch-wide methodology for determining historical use effectively resulted in a re-quantification of all remaining shares relying upon the same water rights in the ditch company, even though many of its shareholders never applied for a change of use. As a result of this case, shareholders in other mutual ditch companies may oppose those shareholders who wish to change water rights in the ditch based upon a ditch-wide analysis because of the resulting requantification on a per-share basis and potential reduction of all shareholders' water rights.

## II. BACKGROUND

### A. PARTIES TO THE CASE

This case was an appeal from a judgment of the District Court for Water Division No. 1 ("water court"). The appellants ("applicant below") Farmers Reservoir and Irrigation Company ("FRICO"), Burlington Ditch, Reservoir and Land Company ("Burlington"), Henrylyn Irrigation District ("Henrylyn") (collectively "Companies"), the United Water and Sanitation District ("United"), and East Cherry Creek Water and Sanitation District ("ECCV") appealed the water court's interpretation of the lawful uses of water under the decrees at issue, historical consumptive use, its analysis of the one-fill rule, and the effect of new diversion and transportation structures on the appellants' rights to divert water from the South Platte River.<sup>4</sup> The opposer-appellants took issue with parts of the water court's decree, but were not aligned on every issue because of the broad scope of the issues before the water court, so they separately argued on an issue-by-issue basis.<sup>5</sup> Those parties included the City of Thornton ("Thornton"), the City of Englewood ("Englewood"), the City of Brighton ("Brighton"), the City and County of Denver ("Denver"), the Engineer for Water Division No. 1 ("State Engineer"), the City of Aurora ("Aurora"), the Central Colorado Water Conservancy District ("Cen-

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3. See *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631 (1954) ("[J]unior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations.").

4. *Id.* at 653.

5. *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 654 (Colo. 2011).

tral”), and the Public Service Company of Colorado d/b/a Xcel Energy (“Public Service”).<sup>6</sup>

In 2003, ECCV, FRICO, and United entered into an agreement to implement the multi-million dollar United ECCV Water Supply Project. FRICO agreed to change the type and place of use of water rights represented by shares in the Burlington Ditch and Barr Lake systems that the Companies diverted from the South Platte River. The water rights at issue were the 1885 Burlington Ditch water rights and 1908 and 1909 FRICO water rights currently used for irrigation below Barr Lake. FRICO was to change the water rights so that United could augment ECCV’s well field depletions to the South Platte water in the Beebe Draw north of Barr Lake and also send water directly into ECCV’s system.<sup>7</sup> The applicants sought to quantify the historical use of these water rights using a ditch-wide methodology.<sup>8</sup> The augmentation plan itself was not at issue on appeal.<sup>9</sup>

## B. BURLINGTON BARR LAKE SYSTEM

For a basic understanding of the entire water diversion, storage, and delivery system at issue, the court went through the history of the Burlington Barr Lake System. Burlington’s original appropriation began in 1885, with an adjudication date of 1893 for a 350 cfs direct flow water right from the South Platte River and a storage right in Barr Lake and Oasis Reservoir, filled at a rate of 350 cfs from the same source.<sup>10</sup> Presently, the Burlington Barr Lake System consists of the original Burlington Canal, now the Little Burlington Canal, the Burlington O’Brian Canal (“Burlington Canal”), and Barr Lake, which is a combination of Barr and Oasis Reservoirs.<sup>11</sup> The two canals divert at the same point on the South Platte River near the Adams County line, and carry diverted water in the same canal running northwesterly, before eventually separating.<sup>12</sup> The Little Burlington Canal delivers water to irrigators above Barr Lake, while the Burlington Canal runs into Barr Lake.<sup>13</sup> Before the Burlington Canal reaches Barr Lake, it delivers water into the Denver Hudson Canal, which delivers the water into the Henrylyn system.<sup>14</sup> Below Barr Lake, a series of lateral ditches carry water from the reservoir to the irrigated

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6. *Id.*

7. *Id.*

8. *Id.* at 655; see Concerning Application for Water Rights of Midway Ranches Prop. Owners’ Ass’n, Inc. in El Paso & Pueblo Cntys., 938 P.2d 515, 526 (Colo. 1997) (validating previous ditch-wide determination of historical consumptive use per-share as controlling future augmentation plans absent changed circumstances).

9. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 655.

10. *Id.* at 656.

11. *Id.* at 655.

12. *Id.*

13. *Id.*

14. *Id.*

lands.<sup>15</sup> Before FRICO's involvement, the East and West Burlington Extension canals were the primary ditches below Barr Lake.<sup>16</sup> FRICO subsequently improved and expanded the ditches into the current Speer and Neres Canals to serve additional irrigated acreage below Barr Lake with water from the system.<sup>17</sup>

In 1909 FRICO first contracted with Burlington for its water rights "in excess of those rights . . . to fill Barr Oasis . . . and used for direct irrigation."<sup>18</sup> After that contract, FRICO enlarged the Burlington Canal and its headgate and introduced an additional 150 cfs into the system that it applied to acreage below Barr Lake.<sup>19</sup> FRICO also separately adjudicated water rights from the South Platte River with a direct flow right of 600 cfs and 900 cfs for storage in Barr Lake between 19.1 and 34 feet with a 1908 and 1909 priority date respectively.<sup>20</sup>

In 1921, the Companies agreed to share water within the Burlington Barr Lake system.<sup>21</sup> Under the agreement, the first 200 cfs of 1885 direct flow water was sent to the shareholders in the Little Burlington System above Barr Lake, and the remaining water was split at the Denver Hudson Canal, with half going to Henrylyn and the rest to the FRICO shareholders.<sup>22</sup>

### III. SUPREME COURT DECISION

The Colorado Supreme Court upheld all of the water court's findings and limitations on historical consumptive use for the direct flow and storage water rights within the Burlington Barr Lake system. The court reviewed the water court's findings of fact under a clearly erroneous standard and reviewed the water court's legal conclusions and interpretation of prior decrees de novo.<sup>23</sup>

#### A. DETERMINATION OF HISTORICAL CONSUMPTIVE USE

The court first went through the background principles of historical consumptive use. In general, historical consumptive use is the quantitative measure of a water right, "calculated based upon a pattern of diversion and use over a representative period of time, expressed in acre-feet of water."<sup>24</sup> A water right arises when an appropriator puts "a specified quantity of water to an actual beneficial use,"<sup>25</sup> decreed as of the time of

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15. *Id.*

16. *Id.* at 655-56.

17. *Id.* at 656.

18. *Id.* at 657.

19. *Id.*

20. *Id.*

21. *Id.* at 656.

22. *Id.*

23. *Id.* at 660-61.

24. *Id.* at 662.

25. *Id.* at 661 (citing *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1146 (Colo. 2001)).

appropriation.<sup>26</sup> Further, the anti-speculation doctrine “prevents unlawful enlargements,” curbs unneeded appropriations, and requires “diligence in placing water to actual beneficial use.”<sup>27</sup>

The court stated that in a change of right case, the trial court must determine historical consumptive use to maintain “optimum use and reliability” of water resources.<sup>28</sup> It will only approve a change of water right if no injury will occur to other adjudicated water rights or if it can include terms and conditions that will prevent an enlargement of historical consumptive use.<sup>29</sup> Central to this determination is that an applicants bear a “*real risk of requantification*” of the water rights sought to be changed.<sup>30</sup>

### 1. Original Burlington 1885 Decrees

Irrigation appropriations are “limited to the acreage the appropriator intended to irrigate when the appropriation was made.”<sup>31</sup> The flow rate on the face of a decree is not the equivalent of historical consumptive use.<sup>32</sup> Consumptive use in a change proceeding “does not include water from an undecreed enlargement, even if there has been a long period of enlarged use.”<sup>33</sup>

The court looked at the language of Burlington’s 1885 direct flow decree and its intent at the time of appropriation. On its face, the decree stated a direct flow water right of 350 cfs and a storage right of 11,000 acre-feet of water.<sup>34</sup> The referee’s opinion at the time identified 12,000 acres of lands above the reservoirs for irrigation, with 28,000 acres below the reservoirs “susceptible to being irrigated” and unlimited potential “as it may continue to the eastern line of Colorado.”<sup>35</sup> FRICO argued that this language included land below the current Barr Reservoir in the original decree.<sup>36</sup> The court deferred to the water courts finding that a vague potential for irrigation on undefined land was insufficient to support a finding that Burlington made an appropriation for such lands.<sup>37</sup> Burlington, at the time of appropriation, used the direct flow rights solely above Barr Lake.<sup>38</sup> In addition, the applicants did not provide the water court with evidence of a different intent.<sup>39</sup> Further, the structures in use at the

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26. *Id.* at 662.

27. *Id.* at 661.

28. *Id.*

29. *Id.* at 662.

30. *Id.* at 662 (quoting *Pueblo W. Metro Dist. v. Se. Colo. Water Conservancy Dist.*, 717 P.2d 955, 959 (Colo. 1986) (emphasis added)).

31. *Id.* at 662.

32. *See id.*

33. *Id.* at 662; *In re Water Rights of Cent. Colo. Water Conservancy Dist.*, 147 P.3d 9, 16 (Colo. 2006).

34. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 664.

35. *Id.* at 656.

36. *Id.* at 664.

37. *Id.*

38. *Id.*

39. *Id.*

time of adjudication could only divert a maximum of 200 cfs.<sup>40</sup> Therefore, FRICO's expansion of the system and use of water on additional acreage below the lake was an unlawful enlargement and Burlington's "excess water" was not part of the Companies' historical consumptive use.<sup>41</sup>

## 2. The One-Fill Rule

In Colorado, the one-fill rule governs reservoir storage. The court announced the rule in *City of Westminster v. Church*,<sup>42</sup> which held that a reservoir right permits "one fill of the reservoir per year."<sup>43</sup> However, in *Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Co.*,<sup>44</sup> the court further interpreted that rule, requiring a change of storage rights to consider "diminished return flows."<sup>45</sup> Here, the Colorado Supreme Court upheld the water court's conclusion that The Water Right and Determination and Administration Act of 1969<sup>46</sup> ("1969 Act"), required approval of a change of storage right only if no injury would result.<sup>47</sup> In a change case, "storage itself is not a beneficial use," so the court must determine the amount of actual beneficial use to determine the "proper consumptive use credit per share in the ditch or reservoir company."<sup>48</sup>

In this case, Barr Lake has a capacity of 30,000 acre-feet, but typically carried-over an average of 11,000 acre-feet of water each year.<sup>49</sup> The court held that volumetric storage limitations of historical consumptive use below the reservoir imposed by the water court were appropriate and consistent with the 1969 Act.<sup>50</sup> The court stated the limitation was proper because otherwise the changed shares could divert more South Platte River water to fill the Barr Lake storage right than was historically released and consumed for irrigation below that reservoir.<sup>51</sup> In addition, applicants failed to meet their burden of showing the change would not injure junior appropriators;<sup>52</sup> while opponents presented evidence that the

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40. *Id.*

41. *Id.* at 665.

42. *City of Westminster v. Church*, 445 P.2d 52, 58 (1968).

43. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 663.

44. *See* *Se. Colo. Water Conservancy Dist. v. Fort Lyon Canal Co.*, 720 P.2d 133, 146 (Colo. 1986) (holding modifications to decree required to protect against diminished return flows in storage rights cases).

45. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 663.

46. COLO. REV. STAT. §§ 37-92-101 to -602 (2011).

47. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 663.

48. *Id.* at 663.

49. *Id.* at 667.

50. COLO. REV. STAT. § 37-92-305(4)(a)(II) (2011) ("The relinquishment of part of the decree for which the change is sought . . . if necessary to prevent an enlargement upon the historical use or diminution of return flow to the detriment of other appropriators.").

51. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 667-68.

52. *Id.* at 667.

proposed change would enlarge historical use, alter historical fill patterns, and lengthen senior calls on the water.<sup>53</sup> Thus, the court ruled that the one-fill rule allowed FRICO one fill of the reservoir once annually in priority, charging the carry-over storage against the amount of total diversion for the year. In the future, FRICO could not reduce carryover storage and increase water use below the reservoir in excess of historical consumptive use.<sup>54</sup>

The court held that the no injury rule in change of water right cases “work[s] in concert” with the one-fill rule limit to ensure that a storage right holder does not enlarge its water right.<sup>55</sup> Therefore, the court limited FRICO’s 1885 storage right to its historical beneficial use on lands “below Barr Lake prior to FRICO’s enlargement of the system.”<sup>56</sup>

### 3. Study Periods

The court upheld the water court’s selection of appropriate study periods for historical consumptive use determinations. The water court selected time periods for calculations that excluded FRICO’s unlawful enlargement of the Burlington Barr Lake system in 1909 or were susceptible to corrections for FRICO’s unlawful uses. For Burlington’s 1885 direct flow right, the court used an 1885 to 1909 study period.<sup>57</sup> For Burlington’s 1885 storage right, the court used a 1927 to 2004 study period, excluding deliveries to the enlarged Speer, Neres, and Beebe Canals.<sup>58</sup>

### 4. Seepage Water

After FRICO’s purchased an interest in the system, it built a drain system in the embankment of Barr Lake (“toe drains”) that collected about 2 cfs of seepage water from the lake and then delivered it into the Beebe Canal.<sup>59</sup> During water court proceedings, FRICO’s general manager testified that the company installed the toe drain to “lower the saturation level and mitigate the potential for dam instability.”<sup>60</sup> FRICO claimed the historical use of the water from the toe drains and from seepage entering the Beebe Canal at other locations.

In ruling against FRICO on this claim, the water court found the Beebe Canal was a “gaining ditch” that received water from irrigated lands above the ditch and reservoir seepage.<sup>61</sup> The court explained the

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53. *In re Application for Water Rights of Farmers Reservoir & Irrigation Co. (Water Court)*, No. 02CW403 at ¶ 556 (Colo. Dist. Ct. Water Div. 1 Sept. 5, 2008).

54. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 668.

55. *Id.* at 663.

56. *Id.*

57. *Id.* at 665-66.

58. *Id.* at 666.

59. *Id.* at 658-59.

60. *In re Application for Water Rights of Farmers Reservoir & Irrigation Co. (Water Court)*, No. 02CW403 at ¶ 447 (Colo. Dist. Ct. Water Div. 1 Sept. 5, 2008).

61. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 659.

basic rule that seepage water tributary to a natural watercourse is subject to appropriation.<sup>62</sup> Because the original decrees for storage and use below the reservoir did not include the appropriation of seepage waters and FRICO did not later apply for an appropriation of seepage waters, the court upheld the water court's exclusion from historical consumptive use of seepage gains into the Beebe Canal.<sup>63</sup> Therefore, FRICO's actual reservoir releases were the appropriate measure of historical consumptive use.<sup>64</sup>

## B. PRIOR WATER COURT DECREES

FRICO and Thornton both appealed separate water court conclusions that claim preclusion did not bar a ditch-wide determination in the present case. The court discussed whether historical consumptive use of rights within the Burlington Barr Lake system was previously determined by the parties' previous water court decrees.<sup>65</sup> Under *Orr v. Arapahoe Water and Sanitation District*, the court may at a later time determine historical consumptive use even after a finding that "new points of diversion would not injure other appropriators."<sup>66</sup> When an individual user changes shares for use at a different location, a later ditch-wide analysis could then reduce the same user's allocation at the new point down to its percentage of historical consumptive use at the original diversion.<sup>67</sup>

In the first decree at issue, the water court granted FRICO a new storage right in addition to its 1885 Burlington right. The appellants unsuccessfully argued that the water court's grant of storage between 19.1 and 34 feet implicitly confirmed the first 19.1 feet for the original 1885 storage right.<sup>68</sup> The court held that the prior decree's assumptions did not meet the legal standard for claim preclusion and upheld the water courts calculation of historical consumptive use.<sup>69</sup>

For the second water court decree, Thornton in 1987 changed shares from irrigation to municipal uses on the Little Burlington system and received a consumptive use credit of 1,326 acre feet annually.<sup>70</sup> FRICO argued that the current determination of historical consumptive use for the system as a whole would injure the quantification of those vested rights. The water court's previous determination only calculated

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62. *Id.* at 666.

63. *Id.* at 666-67.

64. *Id.* at 667.

65. *See id.* at 670.

66. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1223 (Colo. 1988). In *Orr*, the applicant wanted to change from irrigation to municipal uses, but had previously changed the point of diversion from surface water to wells, where the water court determined no adverse impact. *Id.* No evidence of the amount of land irrigated was presented at the hearing. The court upheld a determination of historical consumptive use based on past use of the surface ditches. *Id.*

67. *See Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 669.

68. *Id.* at 669.

69. *Id.* at 669.

70. *Id.* at 658.

Thornton's shares in the Little Burlington system. In this case, the water court found that the entire 200 cfs under the 1885 Burlington direct flow water right was attributable to the Little Burlington System above Barr Lake. Because FRICO historically administered the shares separately and gave them first priority, those rights were not injured with a subsequent ditch-wide determination.<sup>71</sup> Therefore, claim preclusion did not bar the court's ditch-wide historical consumptive use determination.

### C. NEW STRUCTURES AND POINTS OF DIVERSION

The court analyzed the Metro Districts' delivery of water directly into the Burlington Barr Lake system below the Burlington headgate and the Globeville Project's alteration to FRICO's diversion structures on the South Platte River. The court found that both the source of water and alterations at the point of diversion constituted undecreed points of diversion and could not count towards historical consumptive use in the change proceeding.

#### 1. Metro Pumps

First, the court looked at discharges from the Metro District's wastewater treatment plant. From 1952-1963, the total available water above the Burlington Headgate included Denver's Northside Wastewater Treatment Plant's ("Northside"), which annually discharged an average of 68,000 acre-feet into the South Platte River.<sup>72</sup> When the Metro Wastewater Plant went into service in 1966, it discharged the treated wastewater below the Burlington Ditch headgate. The Companies then unsuccessfully brought an action against the Metro District to prevent the discharge below the Burlington Headgate.<sup>73</sup> The parties reached a settlement in which the Metro District agreed to install pumps at the plant and deliver an average of 9,600 acre-feet per year of treated wastewater directly into the Burlington Canal.<sup>74</sup> FRICO sought to include this water in the historical use of the water rights to be changed. The water court found however, that "no factual or legal basis" existed for it to include the water supplied by the Metro Pumps in its calculation of historical consumptive use.<sup>75</sup>

Englewood and Denver claimed that without the Metro Pumps the Companies would fill their senior reservoirs more slowly, which in turn, would delay the time when junior water could divert in priority.<sup>76</sup> The

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71. *Id.* at 670.

72. *Id.* at 659 (explaining the Companies did not establish how much was legally and physically available at the Burlington Headgate or how much of the water was actually diverted).

73. *Metro. Den. Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190 (1972).

74. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 659.

75. *Id.* at 671-72.

76. *Id.* at 672.

court held that this was not a cognizable injury because juniors cannot rely on undecreed diversions for the maintenance of stream conditions.<sup>77</sup> Further, it rejected the argument that the Metro Pumps simply replicated the pre-1968 diversions as insufficient, because every appropriation must go through the administrative process, and the state engineer's acquiescence to the agreement was not enough.<sup>78</sup> Metro District's pumping water into the canal on the other hand injured Public Service Company's downstream rights because it enlarged upstream water rights.<sup>79</sup> The court held the pumps were an "alternate point of diversion limited to the amount of water legally and physically available at the headgate," which excluded the entire 9,600 acre-feet of agreement water from historical consumptive use.<sup>80</sup>

## 2. Globeville Flood Control Project

Second, the court looked at whether flood control changes to the South Platte River at the Burlington headgate constituted a change in point of diversion.<sup>81</sup> The court explained that under Colorado statutory law,<sup>82</sup> a change occurs whenever an appropriator removes or controls water. The applicants argued that the alterations on the South Platte River were similar to those in *Downing v. Copeland*, where the appropriator constructed a channel within the streambed to control and move water towards its headgate.<sup>83</sup> In *Downing*, the court held that because the construction only moved water towards the appropriator's original headgate it did not require court authorization as a new point of diversion.<sup>84</sup> Here, new headgates capable of diverting 1000 cfs, as compared to 700 cfs, controlled the diversion and directed the water into a channel hydrologically separated from the river.<sup>85</sup> The old Burlington headgate only prevented overflow.<sup>86</sup> The Companies also argued that the new headgate was a permitted upstream extension of the original diversion,<sup>87</sup> but the court added protective conditions because "larger and more effective diversions" would injure vested rights on the over-appropriated South Platte River.<sup>88</sup> The court held that the new headgate and concrete channel constituted an undecreed point of diversion.

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 673.

82. COLO. REV. STAT. § 37-92-103(7) (2011).

83. *Downing v. Copeland*, 249 P.2d 539, 540 (Colo. 1952).

84. *Id.*

85. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 673.

86. *Id.* at 660.

87. *See* COLO. REV. STAT. § 37-86-11 (2010).

88. *Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 674.

#### D. RESUME NOTICE AND THE SCOPE OF THE WATER COURT'S DECISION

FRICO's change application included more shares than it currently sought. One of the purposes of a ditch-wide determination was so FRICO shareholders could transfer their rights into the Project at a later date without separately litigating an entirely new change case. On appeal, the FRICO shareholders who did not include their shares in the application argued that the court had no jurisdiction to re-quantify those shares unless and until they applied for a change and the water court's ruling could only bind those shares if and when they were subject to a change of use application.<sup>89</sup>

Specifically, Henrylyn argued that its rights should not be affected because it entered into a stipulation agreement with Aurora, Central, and Englewood, which the water court approved, that stated the determination of historical consumptive use did not apply to its FRICO and Burlington shares.<sup>90</sup> The court held that the published notice of the application was sufficient to confer jurisdiction on the water court over all of the FRICO and Burlington water rights at issue and a stipulation would not determine the state's administration of water rights under court decrees.<sup>91</sup>

### IV. ANALYSIS/DISCUSSION

The outcome in this case severely restricted FRICO's water rights for the Barr Lake System and deprived shareholders of what they believed were their decreed water rights. The applicants failed to produce evidence that the changes requested would not injure other appropriators on the South Platte River. Following is an analysis of the court's holding and how it may affect future agricultural transfers to municipal use.

#### A. CONTINUOUS USE AND EXPECTATIONS

The court's basic premise is that expanded use cannot ripen into a water right, no matter how long it is continued. In this case, FRICO believed it had purchased 150 cfs of "excess" water and put it to beneficial use under the original decree, and had done so for almost one hundred years. This continued use for an extended period could not ripen into a water right, but the court's decision limiting diversions may alter historical stream conditions and expectations along the South Platte River.

FRICO was unable to prove to the water court that Burlington intended to irrigate land below Barr Lake at the time it appropriated the 1885 water rights. The court focused on Burlington's lack of intent to irrigate additional lands because it had sold FRICO the rights before ever using them. However, water rights are generally transferable and owners

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89. *Id.* at 675.

90. *Id.* at 676

91. *Id.* at 677.

can sell them for a profit. Burlington's choice to sell may have been a reasonable business decision and efficient allocation of the burdens of water supply system development costs at the time. FRICO and Burlington together exercised the full extent of the decreed rights, so FRICO could simply have perfected the appropriation initiated by Burlington when it delivered water to lands below Barr Lake.

If this was the intent of that transaction, the parties did not aid their case with the "excess" language in their agreement, because even at that time a senior appropriator could not "lend, rent, or sell any *excess* water after completing the irrigation of the land for which the water was appropriated."<sup>92</sup> However, when the district court adjudicated the 1909 storage right, it assumed that FRICO's use under the 1885 decree was proper.<sup>93</sup> At that time, other appropriators on the South Platte River could have introduced evidence of unlawful enlargement or injury, but did not do so. The issue was not decided then - and without clear evidence of intent at the time of the original decree - the court deferred to the water court's findings and subtracted FRICO's expansion of the 1885 rights from historical consumptive use.

## B. METRO AGREEMENT

As described above, the court upheld the water court's decision that treated sewage from the Metro Pumps could not be included in the historical consumptive use calculation. FRICO argued that the agreement replicated historical stream conditions prior to the relocation of the wastewater treatment plant. The water court rejected the argument because undecreed alternate points of diversions are not "retroactively justified" to maintain stream conditions.<sup>94</sup> Additionally, the water court worried that recognizing this agreement would create an incentive for acts "outside of the statutory change of water right process and subsequently grandfather in such changes."<sup>95</sup>

This outcome, however, takes away from the parties' practical solution. The court had previously held that FRICO did not have a vested right in the location of sewage return flows.<sup>96</sup> If FRICO had no vested right to the location of sewage return flows, on what basis could it claim a new point of diversion for its water rights from a source it had no vested right to receive? Its right to delivery by means of the Metro Pumps into the Burlington Canal was a private agreement that replicated the water

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92. *Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co.*, 183 P.2d 552, 554 (Colo. 1947) (emphasis added); *see also* *Fort Lyon v. Chew* 33 Colo. 392, 81 P. 37, 39 (1905) (holding owners' exchange or loaning of water rights were limited to decreed volume and could not injure other appropriators).

93. *See Burlington Ditch Reservoir & Land Co.*, 256 P.3d at 669-70.

94. *In re Application for Water Rights of Farmers Reservoir & Irrigation Co.* (*Water Court*), No. 02CW403 at ¶ 172 (Colo. Dist. Ct. Water Div. 1 Sept. 5, 2008).

95. *Id.*

96. *See Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co.*, 499 P.2d 1190, 1193 (Colo. 1972).

supply at the existing Burlington point of diversion. Further, other appropriators on the river would not be injured because they also could not obtain a vested right to the location of sewage return flows. Therefore, the court could limit the water rights represented by shares to historical consumptive use absent the Metro Pumps deliveries when changing their use.

The court stressed that appropriators must adjudicate all alternate points of diversion and therefore will probably not take outside circumstances or agreements into account in the future.

### C. SEEPAGE GAINS OF WASTEWATER

The court focused on whether the water right decree's terms included the appropriation of seepage gains. Alternatively, the court might have analyzed the dam drainage as irrigation wastewater that never left FRICO's control. Return flow is "irrigation water seeping back to a stream after it has gone underground to do its nutritional function," while waste water is water carried in a ditch and then wasted into a stream.<sup>97</sup> In that circumstance, FRICO could install a toe drain in order to cease wasting the water based on the court's reasoning in *City of Boulder v. Boulder & Left Hand Ditch Company* because downstream appropriators have no right to the continuation of waste water.<sup>98</sup> The toe drains FRICO built into the dam to capture water may be different than collection of seepage water in *Lamont v. Riverside*, because here the water never left FRICO's control.<sup>99</sup> The appropriator in that case needed a separate appropriation for seepage after it migrated through the soil below the dam and percolated to the surface.<sup>100</sup> If FRICO had stopped the seepage instead of draining it from the base of the dam to promote stability, FRICO could have used that water because it would remain in storage. Here, the drain FRICO cut in the base of the dam does not necessarily return the water into the natural stream because the company measures and directs the flow into its canal for beneficial use below the reservoir.<sup>101</sup>

In addition to holding FRICO did not have a vested right to the seepage below Barr Lake, the water court concluded that delivering the seepage and replacing seepage losses in storage, per the decrees terms, amounted to double counting.<sup>102</sup> Thus, FRICO's use would exceed the decree if it counted the water delivered into the Beebe canal as a loss against reservoir storage. Overall, FRICO's delivery of water from the

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97. *City of Boulder v. Boulder & Left Hand Ditch Co.*, 557 P.2d 1182, 1185 (Colo. 1976).

98. *Id.* ("[D]uty to prevent, as far as possible, all waste of the water which they have appropriated.")

99. *Lamont v. Riverside Irrigation Dist.*, 498 P.2d 1150, 1153 (Colo. 1972) (holding Seepage water was distinguishable from irrigation waste water).

100. *Id.* at 1152.

101. *In re Application for Water Rights of Farmers Reservoir & Irrigation Co.* (*Water Court*), No. 02CW403 at ¶ 447 (Colo. Dist. Ct. Water Div. 1 Sept. 5, 2008).

102. *Id.* ¶ 452.

toe drain into the Beebe Canal promoted conservation and was similar to a reservoir release.

#### D. LIMITING WATER STORAGE RIGHTS TO RESERVOIR RELEASES

Maintaining stream conditions and preventing injury to vested rights is a part of all change cases.<sup>103</sup> If a change of a water storage right increases historical use, then the court must include conditions that prevent injury. However, a rule that limits storage rights to historical releases for beneficial use may have some unintended results. The court stopped short of declaring this rule applied to all cases, but the opinion made the analysis possible in most cases and opponents will certainly use this decision to limit storage rights.

One major issue is how this rule could affect the administration of storage rights. One of the principal values of a reservoir is to store water in times of plentiful supplies for use in dry years. Under the Court's decision one could argue that the owner of a storage right cannot annually drain a reservoir that historically carried over a portion of its water for use in dry years. This rule creates a disincentive to conservation storage. To maximize historical use, reservoir owners may begin to release all water annually to ensure they maximize their historical use, which would eliminate much of the benefit of this reservoir storage. The duty of water in Colorado prevents waste and mitigates some of this danger,<sup>104</sup> but increased use up to the standard of waste would damage the pure conservation function of reservoirs and limit the flexibility of rights.<sup>105</sup>

A second issue relates to when outside factors affect the release of stored water. The Rio Grande Water Users Association's amicus brief raised concerns over the Rio Grande Compact, which may distort historical beneficial use of water storage rights in the Rio Grande Basin.<sup>106</sup> The conservation function of carryover storage is essential for Colorado to utilize the water apportioned to Colorado under the Compact.<sup>107</sup> The use of water from storage in the Rio Grande Project in New Mexico affects when and how Colorado's post-compact water storage right holders can

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103. See *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988) (holding limitation of historical consumptive use read into every water decree by implication).

104. See *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 634 (Colo. 1954) (The duty of water "is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon.").

105. Brief for The City of Westminster at 9, *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645 (Colo. 2011) (No. 2009SA133).

106. COLO. REV. STAT. § 37-66-101 (2011) (agreement between the state of Colorado, the state of New Mexico, and the state of Texas); Brief for the Rio Grande Water Users Association at 6, *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645 (Colo. 2011) (No. 2009SA133) ("Rio Grande Water Users Association").

107. Rio Grande Water Users Association, *supra* note 106, at 6.

be exercised. Thus, looking at historical reservoir releases alone would deprive Colorado of the benefits it obtained under the Rio Grande Compact.<sup>108</sup> The court did not rule on the issue, but noted that these specific concerns would be analyzed as they arose.<sup>109</sup>

Overall, this new rule potentially makes the one-fill rule insignificant in a change of storage rights case. The one-fill rule still applies in Colorado for the administration of reservoirs, but a historical consumptive use determination will always be less than or equal to the storage right. Therefore, the court may need to clarify whether historical consumptive use was a condition in this case to prevent injury or whether historical consumptive use is always the limit of a storage right.

#### E. FUTURE DITCH-WIDE DETERMINATIONS IN CHANGE CASES

Shareholders in a mutual ditch company may look more carefully at change of water rights applications that involve a so-called ditch-wide analysis of historical use. A possibly significant reduction in their water rights from such a change prosecuted by other shareholders may discourage ditch-wide change of water rights analyses. Ditch-wide determinations could result in drying up large areas of land because agreements to change water rights will only be reached if a sufficient voting portion of the ditch is in favor of selling their rights. Therefore, the economy of entire farming communities may not survive a change case. Henrylyn argued that COLO. REV. STAT. § 37-92-305(4) only allows terms and conditions on water “subject to change” or “for which change is sought.”<sup>110</sup> When the court allocates rights to water in proportion to an owner’s shares in a ditch company, it does not take into account the individual’s consumptive and beneficial use of the water.<sup>111</sup> Ditch-wide methodology under *Williams v. Midway Ranches* required that the same quantification methodology govern future change proceedings, unless circumstances changed.<sup>112</sup> Therefore, a court proceeding is still required when a shareholder wishes to transfer their right, based on the previously determined form of calculation from the ditch-wide case.

Stipulations between adverse parties help create fair and efficient transfers. Would the court enforce an agreement between parties that limited any change to non-transferred rights? For example, the parties involved could settle concerns of increased use in a way that would not affect other shareholders until they changed the specific water rights. This case seems to point towards no. If the court finds that a ditch com-

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108. *Id.* at 13, 15.

109. *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 667 n.13 (Colo. 2011).

110. Brief of Henrylyn Irrigation Dist. at \*7, *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645 (Colo. 2011) (No. 2009SA133), 2010 WL 3973553.

111. *See id.* at 15.

112. *Id.* at 16.

pany enlarged its rights during a ditch-wide determination, then the court would limit the amount of diversion in priority to what is legally available at that company's headgate.

## V. CONCLUSION

Applicants for a change of water right bear the risk of requantification of the water rights that are subject to the application. Agricultural transfers to municipal uses will continue, but large mutual ditch companies and other water providers with common diversions have the potential to lose in these transactions. When a number of shareholders seek ditch-wide analysis, the court will quantify the entire water right at issue because the court applies historical consumptive use to every decree at the point of diversion. Further, those shareholders that oppose a ditch-wide determination don not appear to have any legal basis to stop the ditch-wide analysis once the Applicant puts the Company's water rights at issue. Adjudicating all shares may make future transfers more efficient, but it can have harsh and unfair effects on farmers who do not change their rights. The increased value of readily changeable water rights benefits ditch shareholders financially. However, the court's historical consumptive use determination may force farmers to immediately sell their rights if the per-share determination reduces the water rights to an amount that is insufficient to maintain economically feasible farming operations.