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The Devolution of the No-Injury Standard in Charges of Water Rights

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THE DEVOLUTION OF THE NO-INJURY STANDARD IN CHANGES OF WATER RIGHTS

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I. INTRODUCTION

Colorado courts established the no-injury doctrine and prior appropriation doctrine around the same time, and the General Assembly codified them thereafter. Courts considered the right to change a prior water right as a "stick in the bundle" of a water right and an important tool for adapting to the changing needs of water users. The statutes were, and still are, permissive in nature, authorizing changes unless injury is established. If injury is established, the court may impose terms and conditions on the change to avoid any injurious effects to vested or conditional water rights.

However, over the past couple decades Colorado courts have departed from the application of a fact-based, proof-driven no-injury test in change cases. Courts now apply a two-part test. In 1999 the Colorado Supreme Court established "quantification of historical consumptive use" as an independent test for change cases. In recent years, the quantification of historical use has risen to supremacy, often relegating the no-injury standard to an afterthought. While courts have been eager to quantify historical consumptive use in change cases, their emphasis on quantification as the touchstone of change cases—when quantification is not necessarily required to prevent injury—is not without consequences and is inconsistent with other important state water policies.

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson marks the dividing line between past and present tests.[1] In *Santa Fe Trail Ranches*, the Colorado Supreme Court articulated the two-part test, expressly adding a historical consumptive use requirement to the long-standing no-injury requirement in change cases. Since *Santa Fe Trail Ranches*, state administrators and courts have taken historical consumptive use quantification to an extreme, discounting the role the no-injury test should play when considering changes to water rights. This article contends that the no-injury test should be front and center in change proceedings. Courts should apply historical use limitations on the changed right when necessary to prevent fact-based, demonstrated injury, rather than potential or theoretical injury.

1. *See* Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54, 57-58 (Colo. 1999).

Applying historical use quantification without restraint threatens senior water rights—the bedrock of Colorado's prior appropriation system—by subjecting them to proceedings that are not balanced by a strong no-injury test. Quantification, without a showing of on-the-ground injury, deprives senior water rights owners of flexibility and value. Quantifying water rights, including in "second generation" change cases, creates a windfall for junior right holders. Under the guise of protecting "entitlement to stream conditions as the juniors found them at the time of their appropriation," courts are causing the redistribution of water rights across the state. Rote quantification of historical consumptive use of pre-interstate compact water rights also diminishes Colorado's overall entitlement to water. Furthermore, the ransacking of senior water rights in change cases exacerbates the "buy-and-dry" of irrigated agriculture as thirsty cities need to acquire even more water to compensate for what was left on the trial court floor.

This article explores the above issues in four parts. Part II of this Article traces the historical origins and application of the no-injury test in case law and statute. Part III examines the two-part test outlined in *Santa Fe Trail Ranches.* Part III also reviews recent legislation and statutory changes, which signal some legislative pushback against the *Santa Fe Trail Ranches* test. Part IV analyzes the interaction of the quantification standard with other state water policies. Additionally, we also observe the effects of quantifying historical consumptive use unbounded by a strong no-injury standard. Last, Part V concludes by urging the re-adoption of the no-injury standard as the touchstone for analyzing water rights change cases.

II. THE DEVELOPMENT AND APPLICATION OF THE NO-INJURY TEST

Before the *Santa Fe Trail Ranches* decision, the no-injury rule was the standard that courts applied in water rights change cases. The no-injury rule originated in the nineteenth century alongside the Colorado Doctrine.[2] While past courts considered evidence of historical use—such as diversions, return flows, duty of water, and expansion of use—they applied limitations based on that historical use only when necessary to prevent injury. It was a means to an end, not an end in itself.

Nineteenth-century cases detailing the origins of Colorado's no-injury rule are described below. A discussion of the subsequent development of statutes and additional case law follows, tracing the evolution of the no-injury rule and its application.

A. ESTABLISHMENT OF THE NO-INJURY RULE

Before the Colorado General Assembly codified the no-injury rule, courts outlined its basic tenets in some of the earliest water law cases. Though courts favored using the term "injury," they also used "detriment" to express the same principle.[3] As early as the 1880s, Colorado courts recognized the foundational

2. *See Santa Fe Trail Ranches,* 990 P.2d at 53-54; *see also* DAVID SCHORR, THE COLORADO DOCTRINE 30 (2012). David Schorr also argues the stimulating thesis that the prior appropriation system was grounded in distributive justice principles designed to broaden state citizens' use of water resources as much as possible. *Id.* at 4-6.

3. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447, 451 (1882).

role the no-injury standard played in water rights cases.[4] In *Coffin v. Left Hand Ditch Co.*, the Colorado Supreme Court articulated the injury concept as a "detriment" and recognized that this concept was fundamental to the state's system of prior appropriation: a "'detriment' at the time of diversion could only exist where the water diverted had been previously appropriated or used; if there had been no previous appropriation or use thereof, there could be no present injury or 'detriment.'"[5] The Court explained that injury, or "detriment," only existed within the priority framework of the prior appropriation system.

The Colorado Supreme Court first applied the no-injury rule in a case concerning a change in point of diversion in *Sieber v. Frink*.[6] In *Sieber*, the Court permitted a change in point of diversion because "both points of appropriation were upon the same stream; no change was made in the quantity of water diverted, and no one was injured by the removal; the use and the points of application of such use remained the same."[7] The Court therefore held that a simple change of point of diversion on the same stream, where no other user was injured, was permissible.[8]

In 1888 the Colorado Supreme Court decided the seminal case *Fuller v. Swan River Placer Mining Co.*[9] In *Fuller*, the Court adopted the "*Kidd* rule" from California's state courts:

> We think that the rule announced in *Kidd v. Laird*, 'that, in the *absence of injurious consequences* to others, any change which the party chooses to make is legal and proper,' is the *only rule* under which the rights of the prior appropriator can be fully exercised, and his rights, and the rights of all other persons, fully protected. The right to change, so limited, includes the point of diversion, and place and character of use.[10]

This no-injury rule was foundational to Colorado water law. The Court cited *Fuller* in later water cases for that principle.[11]

Notably, in *Strickler v. City of Colorado Springs*, the Colorado Supreme Court held that a "prior appropriator of water from a stream may change the point of diversion and the place of use without losing his priority, provided the rights of others are not injuriously affected by the change."[12] *Strickler* concerned a matter of first impression: whether water right owners could convey their water

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4. *See id.* at 451.

5. *Id.*

6. *See* Sieber v. Frink, 2 P. 901, 904 (Colo. 1884); *see also* GEORGE VRANESH, VRANESH'S COLORADO WATER LAW 258 (James N. Corbridge & Teresa A. Rice, eds., rev. ed. 1999) (discussing the early history of the no-injury rule).

7. *Sieber*, 2 P. at 904.

8. Later, the legislature deemed it necessary to establish the "simple change" principle by statute in response to *Burlington Ditch*. *See infra* Section III.D.1.

9. *See* Fuller v. Swan River Placer Mining Co., 19 P. 836 (Colo. 1888).

10. *Id.* at 839 (emphasis added).

11. *See, e.g.*, Strickler v. City of Colorado Springs, 26 P. 313, 316 (Colo. 1891) (quoting *Fuller*, 19 P. at 839) ("It seems to be well settled by these decisions that a prior appropriator of water from a stream may change the point of diversion and the place of use, without affecting his rights of priority, and all the cases reviewed . . . make the right to make such change dependent upon the condition that the change shall not injuriously affect others." (internal quotation marks omitted)).

12. *Id.* at 314.

rights separate from the land.[13] The Court affirmed that a water right owner had a "paramount right" to use and transfer a water right to other property "by sale so long as the rights of others . . . are not injuriously affected thereby."[14]

The Court explained its reasoning in detail, citing *Fuller* in support of its holding.[15] In *Fuller*, the Court held that "one who has the right by appropriation to divert the waters of a stream may change the place of diversion, and also the place of use."[16] This disposed of the plaintiff's contention in *Strickler* that "water is only appropriated for a particular tract of land, and that the appropriation will not hold for any other."[17] The *Fuller* Court also found it "well settled" that a prior appropriator "may change the point of diversion and the place of use, without affecting his rights of priority . . . [on] the condition that the change shall not injuriously affect others."[18] The Court found only one case that held otherwise.[19] The *Strickler* Court concluded its analysis by adopting the rule announced in *Kidd* and *Fuller* that, "'in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper,' is the *only rule* under which the rights of the prior appropriator can be fully exercised, and his rights, and the rights of all other persons, fully protected."[20] The Court agreed that the right to change a water right included changes to the point of diversion, place, and character of use.[21]

By adopting the *Fuller-Kidd* rule as the "only rule" that fully protects the rights of appropriators and other persons, the Colorado Supreme Court identified the no-injury rule as a bedrock principle of Colorado's prior appropriation system. The Court continued by explaining why the rule was beneficial: it promoted flexibility and efficient use of the resource and "seems to be fair to all parties concerned."[22] For example, "If A. is the owner of 160 acres of land, with a water-right for only 80 acres, it may be of great benefit to him to change the place of use as the soil upon a portion of the tract becomes exhausted or impoverished by the raising of crops," resulting in greater beneficial use of the water right.[23] If a trial court denied such changes, the Court explained, it would be harming the applicant without benefitting others.[24] Assuming no injury to other water rights, an appropriator's right to change the place of use "cannot be made to depend upon the *locus* of the use."[25] Furthermore, "The authority for changing the place of use from one part of a quarter section of land to another place upon the same quarter section will permit the purchase of land elsewhere, and utilizing the water in its cultivation."[26]

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13. *Id.* at 315-16.
14. *Id.* at 316.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* (quoting *Fuller*, 19 P. at 839) (internal quotation marks omitted).
19. *Id.* (recognizing contradictory holding in Davis v. Gale, 32 Cal. 27 (1867)).
20. *Id.* (emphasis added).
21. *Id.*
22. *See id.*
23. *Id.*
24. *Id.*
25. *Id.* (emphasis in original).
26. *Id.*

The early judicial rationale expressed the importance of protecting valuable senior rights and flexibility to use those prior rights, balanced by protection of junior rights holders from injury as a result of the change—something that is absent in recent cases.

B. THE EARLY CODIFICATION OF THE NO-INJURY STANDARD AND APPLICATION

Statutes that governed changes of water rights from 1899 to 1969 continued to employ the no-injury standard from *Fuller* and *Strickler*.[27] The first legislation on changes in points of diversion, Senate Bill 429 in 1899, provided the framework of the current statutory law: notice to other water users, presentation of evidence on the injury question, and approval of the change if there is no injury.[28] It provided, in part, that in the case of changes of points of diversion the court shall hear evidence to determine "whether or not such change will injuriously affect the vested rights of others in and to the use of water; and if the said court shall find that such change will not injuriously affect the rights of others, a decree shall be entered allowing said party to make such change."[29]

The legislature expanded upon this language in 1903 when it enacted House Bill 370, which required courts to include terms and conditions to prevent injury from a change in point of diversion.[30] The statute did not require specific terms and conditions; instead, it gave the courts discretion to impose the terms and conditions in a way to alleviate the injury demonstrated.[31]

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27. *See* 1943 Colo. Sess. Laws 613, 629 (enacting S.B. 90, 34th Gen. Assemb., Reg. Sess.); 1903 Colo. Sess. Laws 278, 278-79 (enacting H.B. 370, 14th Gen. Assemb., Reg. Sess.); 1899 Colo. Sess. Laws 235, 235-36 (enacting S.B. 429, 12th Gen. Assemb., Reg. Sess.).

28. *See* 1899 Colo. Sess. Laws at 235-36.

29. *Id.* The full quote is as follows:

> Every person desirous of changing the point of diversion of his right to use water from any of the streams of this state, shall present his petition to the district court from which the original decree issued, praying that such change may be granted to him, and the practice and procedure on the hearing of such petition shall be the same as if said petition were for an original decree. The court shall require proof that all parties who may be affected by such change have been duly notified of the proceeding; and shall hear evidence to determine whether or not such change will injuriously affect the vested rights of others in and to the use of water; and if the said court shall find that such change will not injuriously affect the rights of others, a decree shall be entered allowing said party to make such change.

Id.

30. *See* 1903 Colo. Sess. Laws at 278-79. H.B. 370 stated:

> The court shall require proof that all parties who may be affected by the change have been duly notified in the proceeding, as in the case of an original adjudication, and shall hear evidence to determine whether such change [in the point of diversion] will injuriously affect the vested rights of others in and to the use of water, and a decree shall be entered permit[t]ing the change as prayed for, unless it appear that such change will injuriously affect the vested rights of others; and if such injury appear, the court shall decree the change only upon such terms and conditions as may be necessary to prevent such injurious effect, or to protect the parties affected or if impossible to so do, may deny said application.

Id.

31. *See id.*

Subsequent cases applied the statutes and affirmed the no-injury principle. It should be noted that jurists also used the terms "damage" and "infringe" to describe the no-injury or anti-detriment principle regarding changes to water rights.[32]

1. Early Cases Applying the No-Injury Standard

Courts in the first half of the nineteenth century developed the no-injury standard by approving changes based upon terms and conditions that prevented injury to junior water right holders. Quantification of the historical use of the water right was not mandated, but prevention of injury was required.

i. The Injury Standard is Paramount

In *City of Telluride v. Davis*, two men acted together in constructing a ditch and making an appropriation.[33] Each then applied their respective one-half share to their separate lands.[34] The water was not held jointly, but separately and severally.[35] The Court determined that the no-injury test applied: because of the independent ownership of water rights, "there can be no question of the right of either to change his place of use of the water or the point of its diversion, if such change does not damage or infringe the right of the other."[36]

The Colorado Supreme Court also confirmed the importance of the no-injury principle in *Hassler v. Fountain Mutual Irrigation Co.*, where the Court declared that this principle was so fundamental to Colorado water law that it needed no citations![37] The Court called attention,

> in passing, to the principle firmly established in this state that . . . a water right may be alienated apart from the land, or its use transferred from one place to another, or even the character of use changed, provided only that in each instance no injury results to vested rights of other appropriators. We take it that no citations are necessary in this connection.[38]

The Court further stated that "water appropriated and decreed may be applied to a larger or smaller acreage, and on a different kind or character of land, so long as such operation does not divert a larger quantity of water than was decreed," once again concluding "that authorities need not be cited."[39] Ultimately, the Court found no injury to the vested rights of others.[40]

ii. The Importance of Terms and Conditions

In *Bates v. Hall*, the Colorado Supreme Court applied section 2 of the 1903

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32. *See* Lower Latham Ditch Co. v. Bijou Irrigation Co., 93 P. 483, 484 (Colo. 1907); *see also* City of Telluride v. Davis, 80 P. 1051, 1053 (Colo. 1905).
33. *City of Telluride*, 80 P. at 1052.
34. *Id.* at 1052-53.
35. *Id.* at 1053.
36. *Id.*
37. Hassler v. Fountain Mut. Irrigation Co., 26 P.2d 102, 103 (Colo. 1933).
38. *Id.*
39. *Id.*
40. *Id.*

no-injury statute to a case involving a change in point of diversion or place of use.[41] The Court found that injury would result and chastised the lower court's refusal to impose any terms and conditions preventing injury, despite its own finding of injury.[42] Importantly, the evidence in the case demonstrated that the proposed change would result in real–not potential–injury.[43] Later opinions, such as *San Luis Valley Irrigation District v. Knowlton (In re Priority Rights to Use of Water in Water District Number 20)*, continued to describe the no-injury test as "the all important consideration" for water rights change cases.[44]

iii. Injury to Water Rights

Any opposer in a change case must have a vested water right, or since 1969, a conditional right, that is at risk of injury.[45] In *Brighton Ditch Co. v. City of Englewood*, the applicant proposed a change in point of diversion and a change in use from irrigation to domestic and municipal.[46] The objectors claimed injury on three grounds: (i) "the decree fails to safeguard said protestants from the injurious effects of substantial diminution of flow of water in the ditch"; (ii) "the change of diversion deprives them of the benefits of rotation of use of water in the ditch"; and, (iii) "the decree does not protect [certain] users against damage by increased seepage and evaporation losses."[47] The Colorado Supreme Court held that the evidence sustained the finding that objectors' vested rights would not be injured.[48] It focused on the proximate cause of the injury in its analysis:

> The term "injured," as used in the sections of the statute, applies to injury to the water right of another. It has no application to any damage or injury that may accrue to another growing out of the fact that he is a tenant in common of the same conduit with the owner of the water transferred. In other words, the *proximate cause* of the injury to appellant is not the change of point of diversion, or the place of use, but the failure of respondents to longer use the Soda canal in common with appellant.[49]

In addition, the provisions of the decree at issue "did not concern any vested right of these objectors and were not ones to which they were legally entitled."[50] Put another way, in order to have standing to obtain a remedy from a court, the proximate cause of the injury to a vested right must be the change of the water rights at issue.

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41. Bates v. Hall, 98 P. 3, 6-7 (Colo. 1908).

42. *Id.* at 7.

43. *Id.*

44. San Luis Valley Irrigation Dist. v. Knowlton (*In re* Priority Rights to Use of Water in Water Dist. No. 20), 21 P.2d 177, 178 (Colo. 1933).

45. *See* Brighton Ditch Co. v. City of Englewood, 237 P.2d 116, 120 (Colo. 1951), *distinguished by* Metro. Denver Sewage Disposal Dist. v. Farmers Reservoir & Irrigation Co., 499 P.2d 1190, 1193 (Colo.1972) (holding that the rules governing changes in point of diversion do not apply to changes in point of return of waste water); *see also infra* note 87 and accompanying text.

46. *Brighton Ditch Co.*, 237 P.2d at 118.

47. *Id.* at 120.

48. *Id.* at 118-19.

49. *Id.* at 120-21 (emphasis added) (internal quotation marks omitted) (quoting *In re* Johnson, 300 P. 492, 494 (Idaho 1931)). The court also noted the fact that petitioner and the objectors were co-tenants in a ditch, not shareholders in a mutual ditch company. *Id.*

50. *See id.* at 121.

In *City of Colorado Springs v. Yust*, the city petitioned to change its points of diversion for rights on various tributaries of the Blue River, alleging it would not injuriously affect other right holders.[51] Yust, the Colorado River Water Conservation District, and Clayton Hill protested the city's petition.[52] The trial court denied the petition and found that the city failed to establish that the change would not injure the vested rights of others.[53] Demonstrating the importance of evidence in these inherently fact-based change cases, the Colorado Supreme Court agreed that the only burden of proof on the petitioner is to answer the injuries that objectors assert, because those objectors are in the best position to identify the manner in which they may suffer harm.[54]

2. The 1943 Adjudication Act

In 1943 the Colorado General Assembly recodified the statutes using language similar to the change-related provisions in previous statutes.[55] For example, the recodified statutes provided for change approval if "the proposed change will not injuriously affect the vested rights of others," but "if such change will injuriously affect the vested rights of others then" the court will consider the petitioner's suggested terms and conditions "to prevent such injurious effect and to protect the parties affected."[56] Thus, the no-injury standard endured.

3. City of Golden and the Duty of Water

Farmers Highline Canal and Reservoir Co. v. City of Golden concerned a change in point of diversion and a change from irrigation to municipal use.[57] The Court found that the evidence supported a finding of injury to junior appropriators if the full amount were transferred.[58] The Court here reasoned that the burden of proof rested upon the petitioner to show that the change would not injuriously affect the rights of others from the same source.[59] The Court

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51. City of Colo. Springs v. Yust, 249 P.2d 151, 152 (Colo. 1952).

52. *Id.*

53. *Id.*

54. *See id.* at 155 (quoting Tanner v. Humphreys, 48 P.2d 488 (Utah 1935)). The court stated:

> The burden of proof on petitioner in such a proceeding requires him to meet only the grounds of injury to protestants asserted by them. As said by the Utah court, in Tanner v. Humphreys . . . "In an application for a change of diversion, it is not necessary for a party so applying each time to make a showing that it has beneficially used its water right. If it has not, then the protestants may so show. It is assumed that where the water has been used upon the land for which it is diverted, that such amount was beneficially used. It would be impracticable to require the plaintiff to ferret out all of the ways in which the others might perchance be injured and offer proof in negation thereof as a part of its affirmative case. The general negative as against injury to the protestants is sufficient [to] carry the case over a motion for a nonsuit in that respect."

Id. (citation omitted).

55. *See* 1943 Colo. Sess. Laws 613, 629 (enacting S.B. 90, 34th Gen. Assemb., Reg. Sess.).

56. *Id.*

57. Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 630 (Colo. 1954).

58. *See id.* at 633, 636.

59. *Id.* at 631.

further stated that "the well-recognized right to change either the point of diversion of the water right or its place of use is always subject to the limitation that such change shall not injure the rights of subsequent appropriators."[60] It noted that a change of water right "may be permitted by proper court decree," but "only in such instances as it is specifically shown that the rights of other users from the same source are not injuriously affected by such change, and that the burden of proof thereof rests upon petitioner."[61] Furthermore, "these principles have been enunciated by our Court time and again. . . . [and] as we have repeatedly held . . . junior appropriators have vested rights in the continuation of stream conditions."[62]

i. Injury to the Stream

The Court in *City of Golden* considered the trial court's holding that "the bulk of evidence bearing on the question of supposed injury during the growing season had to do with injury to Clear Creek generally, rather than with reference to injury to any particular water right, as appears to be required under the [*Brighton Ditch Co. v. City of*] *Englewood* case."[63] The Court took issue with the trial court's decision regarding general versus particular injury to the stream.[64] The trial court "presumed to enter a finding that no injurious effect would result if the entire amount of the two older priorities . . . [were] transferred, and that if any injury did result therefrom, it would be a general injury and could not affect any of the respondents specifically."[65] What is more, the Court considered "the fallacy of such presumption [to be] readily apparent."[66] The Court explained:

> When any injury is permitted under the assumption that it is general to the stream, it immediately becomes clear that such instances multiplied might become very serious. Where general injury would result to the stream by the transfer, the change could not be authorized without injury to junior appropriators because it is their rights, proportionate with senior rights, that consume the whole stream.[67]

The Court clarified the burden of proof. The vested rights of others "include not only [a] right to diversion of water from the stream in the chronological order of priority, but also the right to maintenance of conditions on the stream existing at the time of appropriation."[68] However, the burden of proof

60. *Id.* at 632 (quoting Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co., 183 P.2d 552, 555 (Colo. 1947)).

61. *Id.* at 631.

62. *Id.*

63. *Id.* at 632 (citing Brighton Ditch Co. v. City of Englewood, 237 P.2d 116 (Colo. 1951)).

64. *Id.* 632–33.

65. *Id.* at 633.

66. *Id.*

67. *Id.*

68. *Id.* (quoting Brighton Ditch Co. v. City of Englewood, 237 P.2d 116, 120 (Colo. 1951)). In full, the court stated:

> It apparently was the impression of the trial court, and is contended by counsel on behalf of petitioner, that the rules and principles hereinabove discussed were modified

for showing such injury—that is, proving a change in stream conditions—rests with the petitioner.[69]

ii. The Duty of Water

The Court in *City of Golden* was concerned that acceptance of such "general" injuries would upset the system.[70] This case planted the first seeds of the historical consumptive use concept.[71] The Court reasoned that any conditions and limitations imposed to prevent injury depended on the facts and surrounding circumstances of each particular case.[72] Accordingly, trial courts should account for not only the quantity of water the original lands reasonably required for irrigation and the original return flow, but also the actual consumptive use and probable return flow.[73] As the Court noted, courts should consider and account for "all elements of loss to the stream by virtue of the proposed change" and should insert "appropriate provisions of limitation . . . in[to] the decree as the facts would seem to warrant" to accomplish the law's purpose of protecting all appropriators.[74]

In order to protect other water users, a trial court must consider the duty of water and amount of return flow in change of point of diversion cases.[75] In the case of a change of a point of diversion or use, "the right is strictly limited to the extent of former actual usage."[76] Additionally, a court's decree must include terms and conditions to prevent injury.[77] These conditions serve to counteract the loss when the desired change will deplete the supply source and injure junior appropriators.[78] Consequently, a court should deny a change decree only "where it is impossible to impose reasonable conditions" to prevent injury to

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> by our decision in the case of Brighton Ditch Co. v. City of Englewood. . . . A careful study of that opinion will show that, instead of being in relaxation of the foregoing rules, it is in complete conformity therewith, the holding being specifically that vested rights of others "include not only right to diversion of water from the stream in the chronological order of priority, but also the right to maintenance of conditions on the stream existing at the time of appropriation." It is indicated that our Court in the Englewood case, supra, placed the burden of proof to show injury upon the protestant, but this is not an accurate impression. We therein held that a protestant must rely upon injury to himself and not to his neighbor, and that where he claims special damage or injury accruing particularly to him on account of peculiar surrounding conditions, he must show those conditions and the manner in which he will be especially affected by the proposed change; but neither of those issues is presented here. The facts in the Englewood case also were considerably different from the facts in the present case. There, former changes had been decreed and conditions imposed which carried over into the Englewood case, and further conditions and limitations were offered by Englewood, resulting in the trial court finding that no additional conditions were required.

Id. (citation omitted).

69. *See id.*
70. *See id.*
71. *See id.* at 634–35.
72. *Id.* at 635.
73. *Id.*
74. *Id.* (citing Dry Creek No. 2 Ditch Co. v. Coal Ridge Co., 129 P.2d 292 (Colo. 1942)).
75. *Id.*
76. *Id.* at 634.
77. *See id.* at 635.
78. *Id.*

juniors.[79]

4. The Enlargement of Use Doctrine

Appropriators may transfer their water rights to another use as long as the change in use is limited to actual historical usage.[80] However, appropriators may not "enlarge" their appropriations through the change.[81] Specifically, senior appropriators are not entitled to enlarge their water rights by changing them and then diverting the full amount of the water decreed to the original diversion.[82] Stated another way, a senior appropriator may not increase the historical use of a water right—even if historical use is less than the decreed amount. Such an increase in use may injure other water users; therefore, "a change of water right must limit the amount of water being changed to the 'same amount historically diverted through . . . the original decreed points of diversion'" to ensure that other water users are not injured.[83]

C. THE 1969 WATER RIGHT DETERMINATION AND ADMINISTRATION ACT

In 1969 the legislature created the first incarnation of the modern water rights statutes by adopting the Water Right Determination and Administration Act ("Act").[84] This Act continued to use the longstanding "will not injuriously affect" and "terms and conditions" language for changes of water rights.[85] Subsection 148-21-21(4) of the Act provided discretionary examples of such terms and conditions, that "may be included," but these terms were tied to preventing injury and were not independent elements.[86] The language of the Act provided in part as follows:

> (3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. If it is determined that the proposed change or plan as presented in the application would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or applicants or any person opposed to the application an opportunity to propose terms and conditions which would prevent such injurious effect.
>
> (4)(a) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:
>
> (b) A limitation on the use of the water which is subject to the change, taking

79. *Id.*

80. *See* Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co., 183 P.2d 552, 552-56 (Colo. 1947).

81. *Id.* at 554-55.

82. *Id.*

83. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999) (quoting Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1224 (Colo. 1988)).

84. *See* 1969 Colo. Sess. Laws 1200 (enacting S.B. 81, 47th Gen. Assemb., 1st Reg. Sess.) (originally codified as COLO. REV. STAT. § 148-21-1 *et seq.* (1969)); *see also* COLO. REV. STAT. §§ 37-92-101 *et seq.* (2014).

85. *See* 1969 Colo. Sess. Laws at 1211.

86. *Id.*

into consideration the historic use and the flexibility required by annual climatic differences.

(c) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators.

(d) A time limitation on the diversion water for which the change is sought in terms of months per year.

(e) Such other conditions as may be necessary to protect the vested rights of others.[87]

It is important to note that these provisions in Subsection 4 provided examples of conditions to prevent injury. In other words, they are permissive and not mandatory.

After renumbering the section as 37-92-305, the Colorado General Assembly amended subsection (3) of the Act in 1989.[88] Senate Bill 166 clarified that, when a party files a Statement of Opposition, (i) it was the duty of an applicant to provide proposed terms and conditions to prevent injury, in the form of a proposed ruling or decree; and (ii) notice would be provided to all parties entering the proceeding–putting the onus of monitoring for threats to one's water rights on the opposers.[89]

It is also worth noting that, since the 1969 Act, the no-injury standard for change cases has also protected decreed conditional water rights.[90] However, the no-injury standard has otherwise remained substantially similar to the language first used in the early twentieth century.

D. POST-1969 ACT, PRE-*SANTA FE TRAIL RANCHES* CASE LAW

1. Limitations Based on Historical Use

In *Weibert v. Rothe Brothers, Inc.*, the Court reviewed a decision concerning an amended application that requested a change in point of diversion and place of use from Well F, an existing well irrigating 130 acres surrounding Well F, to Well R, a proposed well irrigating 130 acres surrounding Well R.[91] Well R was located about thirty miles downstream from Well F.[92]

87. *Id.*

88. 1989 Colo. Sess. Laws 1431 (enacting S.B. 166, 57th Gen. Assemb., 1st Reg. Sess.).

89. *Id.*

90. 1969 Colo. Sess. Laws at 1211; *see also* Wagner v. Allen (*In re* Application for Water Rights of Certain S'holders in Las Animas Consol. Canal Co.), 688 P.2d 1102, 1108 (Colo. 1984) (quoting COLO REV. STAT. § 37-92-305(3) (1973)) (noting the 1969 Act's no-injury standard's consideration of decreed conditional rights).

91. Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1369 (Colo. 1980).

92. *Id.*

The water court granted the point of diversion change but limited diversions because it caused changes in return flow patterns.[93] The Colorado Supreme Court reversed.[94] The Court determined that the water court erred in three ways: (i) by ruling that historical use under the original decree was res judicata and prevented consideration of historical use of Well F; (ii) by refusing to consider evidence of historical use in determining the adequacy of the augmentation plan; and (iii) by failing to include in the decree a provision regarding retained jurisdiction on the question of injury to vested rights of others.[95]

The Court held that the right to change a point of diversion or type of use is limited to the "duty of water."[96] Moreover, the Court held that the applicant's historical use of the water right limited the change right: "The right to change a point of diversion or place of use is also limited in quantity and time by historical use. Historical use could be less than the optimum utilization represented by the 'duty of water' in the instant case because [Well F] could not physically produce at the decreed rate on a continuing basis."[97] The Court held that the water judge erred by holding that res judicata barred any inquiry into historical use.[98] Despite the earlier adjudication, the Court concluded that the water judge needed to consider new historical use information when analyzing the proposed change.[99]

2. The Burden of Proof of Historical Use

In *Wagner v. Allen* (*In re Application for Water Rights of Certain Shareholders in Las Animas Consolidated Canal Co.*), the Court considered who had the burden of proof regarding historic use in change cases.[100] In this instance, mutual ditch companies and an electric utility company applied for a change of water rights, seeking changes in the type, place, and manner of use.[101] The Court approved the change of water rights but remanded with directions to amend the decree.[102]

With respect to the burden of proof, the Court rejected the objectors' argument that "applicants failed to sustain their burden of demonstrating historic use because an assumption of *pro rata* distribution cannot replace evidence of

93. *Id.* at 1368-69.
94. *Id.*
95. *Id.* at 1369-70.
96. *Id.* at 1371.
97. *Id.* at 1371-72 (citations omitted).
98. *Id.* at 1372.
99. *Id.* at 1372-73 ("Often the period and pattern of use are not known with certainty at the time a water right is adjudicated. We have long recognized that there is read into every decree awarding priorities the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made, regardless of the fact that such limitation may be less than the decreed rate of diversion. It follows that historical use was not in issue in adjudication of the Furrow water right. . . . It was error to refuse to consider evidence of historical use." (citations omitted)).
100. Wagner v. Allen (*In re* Application for Water Rights of Certain S'holders in Las Animas Consol. Canal Co.), 688 P.2d 1102, 1108 (Colo. 1984).
101. *Id.* at 1103, 1105.
102. *Id.* at 1103.

actual consumption."[103] Here, the applicants successfully relied upon the presumption of pro rata consumption by shareholders to establish the historical consumption of junior priorities.[104] The Court also found that the applicants presented reliable evidence showing the methods by which all shareholders had historically diverted water.[105]

The Court looked to the change of water rights statute, Colorado Revised Statutes section 37-92-305(3), which stated that "[a] change of water right . . . shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or decreed conditional water right."[106] Citing the statute and case law, the Court also reiterated that applicants have the burden of proving that their proposed change will not injure other users.[107] Once the applicants establish a prima facie case, the burden shifts to the objectors.[108]

3. Foreshadowing Quantification of Historical Consumptive Use

The 1980s saw a greater application of the no-injury standard, but also increased discussion of historical use. For example, in *Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Co.*, the Colorado Supreme Court addressed the change of storage rights for three reservoirs.[109] The water court had found that the transfers of storage rights were legal, provided there was no injury to the vested rights of others.[110] The opposers alleged injury, arguing that the change of use of storage rights and storage of direct flow rights would reduce the amount of return flows available for other appropriators.[111] The Court responded by explaining its previous holding in *City of Westminster v. Church*, which held that a "[c]hange of use does not create a greater burden as to storage water."[112] According to the Court in *Southeastern*:

> *Westminster* also reiterated the rule that an application to change the use or diversion point of direct-flow rights is strictly limited to the amount of water actually historically diverted rather than the full amount of the "paper decree." In *Westminster*, we used "historical use" to mean the actual amount of water historically *diverted* under the decrees.[113]

Despite mentioning historic diversion and use, the Court still maintained

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103. *Id.* at 1107.

104. *Id.* at 1108.

105. *Id.* at 1107-08. The Court noted, however, that the case's unique facts, in which mutual ditch companies and a utility company sought changes of water rights, distinguished it from more common cases involving individual users and accordingly involved a different burden of proof based on *pro rata* ownership interests and evidence of actual receipt of water. *Id.*

106. *Id.* at 1108 (citing COLO. REV. STAT. § 37-92-305(3) (1973)).

107. *Id.*

108. *Id.*

109. Se. Colo. Water Conservancy Dist. v. Ft. Lyon Canal Co., 720 P.2d 133, 133 (Colo. 1986).

110. *Id.* at 139.

111. *Id.* at 144.

112. *Id.* at 144-45 (quoting City of Westminster v. Church, 445 P.2d 52, 58 (1968)).

113. *Id.* at 145 (emphasis in original).

that courts must reject or modify applications on the basis of injury.[114] In addition, the Court mentioned the quantification of historic water use.[115] The Court recited that the duty of water and the historical use both limit the right to change the use or point of diversion of a water right.[116] This case foreshadowed the historical consumptive use concept in later water rights change cases.

In *Wagner*, as discussed above in subpart D.2, mutual ditch companies and an electric utility applied for a change of water rights.[117] The Court held that the conditions the water court imposed in the decree adequately protected the objectors' from injury.[118] Specifically, "The objectors argu[ed] that the decree [did] not include sufficiently detailed findings concerning historic use of the junior priorities."[119] While the objectors claimed that "the applicants failed to sustain their burden of demonstrating historic use because an assumption of *pro rata* distribution cannot replace evidence of actual consumption," the Court rejected this argument "in the context of this case."[120] The Court stated:

> The applicants did present reliable evidence of the various means by which all shareholders historically received water. Any inability to establish actual shareholder-by-shareholder consumption under the junior priorities resulted from the fact that no reliable records of such specific consumption are extant. Furthermore, it is not disputed that the objectors at all times actually received at least the amount of water their *pro rata* ownership interests under the junior priorities entitled them to receive.[121]

Under these particular circumstances, the water court found, and the Court agreed, that the applicants were entitled to a presumption that the company shareholders historically used water on the basis of their legal entitlement to their pro rata share of the company's water right.[122] The Court therefore held that the water court appropriately applied the burden-shifting requirements to find that, by presumption and despite a lack of evidence, the applicants had met their burden and could change their water rights.[123]

4. Injury is not Potential, but Fact Based

In *Thornton v. Bijou Irrigation Co.*—the largest successful change of water rights application that has reached the Colorado Supreme Court—the Court applied the no-injury standard for approval of changes of water rights.[124] The Court recited that the burden is on the applicant to show that no injury would result from a proposed change of water right; only if the applicant can make a prima

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114. *Id.* at 146.
115. *Id.*
116. *Id.* (citing Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1371 (Colo. 1980)).
117. Wagner v. Allen (*In re* Application for Water Rights of Certain S'holders in Las Animas Consol. Canal Co.), 688 P.2d 1102, 1102 (Colo. 1984).
118. *Id.* at 1109.
119. *Id.* at 1107.
120. *Id.*
121. *Id.*
122. *Id.* (citing Great W. Sugar Co. v. Jackson Lake Reservoir & Irrigation Co., 681 P.2d 484 (Colo. 1984); Jacobucci v. Dist. Court, 541 P.2d 667 (Colo. 1975)).
123. *Id.* at 1107-08.
124. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 87-88 (Colo. 1996).

facie showing of no injury does the burden shift to the objectors to show evidence of injury to existing water rights.[125] Additionally, the objector must demonstrate such injury "by evidential facts and *not by potentialities*."[126] The Court added that the water court must engage in "a factual inquiry . . . to assess the credibility of competing evidence presented by the parties," and that "[t]he issue of injurious effect is inherently fact specific and one for which we have always required factual findings."[127]

In *Thornton v. Bijou*, the Court considered the "floating shares" testimony of Dan Ault, a water engineer.[128] Ault testified that "the [Water Supply and Storage Company] system is a water-short system," and that "complete dry-up is unnecessary because there will be insufficient water to expand irrigation onto additional lands."[129] The water court accepted this characterization and found that "dry-up of lands historically associated with the 'floating shares' was not required to prevent injury."[130] The Colorado Supreme Court agreed.[131] Based on its review of the record, the Court determined that "sufficient competent evidence existed to support the water court's determination."[132]

Thornton v. Bijou provides two important observations of how the injury standard and the historical use analysis should be applied. First, both the trial and appellate courts worried about real injury—not potential injury, not theoretical injury, and not recitations of platitudes such as the oft-misapplied maxim that juniors are entitled to stream conditions as they found them.[133] Second, both the trial and appellate courts relied upon evidence of historical use; the courts were not concerned with actual use of the floating shares on specific parcels and associated dry-up because there was no specific associated parcel.[134] Rather, because the owner was a mutual ditch company, the water attributed to the floating shares irrigated various lands under the ditch.[135] Because the ditch was water-short, removing the shares for the changed use would prevent consumption and hence any injury.[136]

III. *SANTA FE TRAIL RANCHES* AND ITS IMPACT

A. *SANTA FE TRAIL RANCHES*

In 1999 the Colorado Supreme Court issued its opinion in *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*.[137] In *Santa Fe Trail Ranches*, the

125. *Id.* at 88 (citation omitted).
126. *Id.* (quoting Simpson v. Yale Invs., Inc., 886 P.2d 689, 696 (Colo. 1994)) (emphasis added).
127. *Id.* (quoting State Eng'r v. Castle Meadows, Inc., 856 P.2d 496, 508 (Colo. 1993)).
128. *Id.* "Floating shares" refers to those of Thornton's shares not assigned to a particular farm. *Id.* at 79.
129. *Id.* at 88.
130. *Id.* at 89 (citation omitted).
131. *Id.*
132. *Id.*
133. *See id.* at 88-89.
134. *See id.* at 87, 89
135. *Id.* at 87.
136. *Id.* at 89.
137. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999).

applicant sought to change the use of two of its water rights, which the Colorado Fuel and Iron Company ("CF&I") had previously appropriated and decreed for manufacturing use.[138] CF&I appropriated these water rights on the Purgatoire River in the 1860s and 1870s to support coke production.[139] CF&I transferred all of its interest in the water rights to a third party in 1985.[140]

The applicant had an option to purchase these rights; however, the exercise of the option depended on a successful change of water rights.[141] So, the applicant sought to change both of CF&I's water rights from manufacturing to a variety of uses.[142] In no previous change proceeding had a court determined the historical use of these two water rights.[143] Because of the lack of information on historical use, the State and Division Engineers argued that the change might injure other water users through enlargement.[144]

Although the water rights were originally decreed for manufacturing use, the water rights' actual historical use was mixed.[145] CF&I used some of its appropriations for irrigation—a use that the state water officials never curtailed.[146] While CF&I had maintained use records, the records had "disappeared."[147] In response, the *Santa Fe Trail Ranches* opinion articulated a new two-prong test for change cases.[148]

It appears that *Santa Fe Trail Ranches* proves the old adage that "bad facts make bad law." Here, the applicant attempted to resurrect old manufacturing water rights that had been applied to irrigation on the opposite side of the river and to change the rights to a host of other non-specific uses.[149]

The *Santa Fe Trail Ranches* opinion expressly added the quantification of historical consumptive use as the first prong of the test, with the no-injury standard as the second prong:

> Contrary to Santa Fe Ranches' contention that a change of use proceeding focuses only on injury to other water rights, the continuous stream of Colorado water law demonstrates that change of use involves *two primary questions*: (1) What historical *beneficial use* has occurred pursuant to the appropriation that is proposed for change? *and* (2) What conditions must be imposed on the change to prevent *injury* to other water rights? Only when these questions are satisfactorily addressed may the water court turn to consideration of the terms for a decree approving the change of use.
>
> These basic predicates for a change of use have their roots in nineteenth-century water rights law, which provided that: (1) the extent of beneficial use of the original appropriation limits the amount of water that can be changed to

138. *Id.* at 49–50.
139. *Id.* at 50.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 51.
144. *Id.*
145. *See id.*
146. *Id.*
147. *Id.*
148. *Id.* at 53.
149. *See id.* at 50.

another use, and (2) the change must not injure other water rights.[150]

The legal basis for the Court's two-prong test was an 1894 treatise.[151]

The Court outlined its reasoning for applying historical consumptive use quantification in this case by stating that beneficial use is "the basis, measure, and limit of the appropriation."[152] Then the Court defined "appropriation" and "beneficial use."[153] The key term for describing both definitions, the Court held, is "lawful"—that is, the appropriation must be made pursuant to the law.[154]

Next, the Court reiterated that water rights are usufructuary.[155] The Court then explained that,

> Because beneficial use defines the genesis and maturation of every appropriative water right, we have held that every decree includes an implied limitation that diversions cannot exceed that which can be used beneficially, and that the right to change a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use. . . . Thus, the right to change a point of diversion, or type, place, or time of use, is limited in quantity by the appropriation's historical use.[156]

While the result of *Santa Fe Trail Ranches* is not surprising given the bad facts presented, the announcement of an independent, additional requirement in every change case of quantification of historical consumptive use has represented a sea change in change cases. The Court has seemingly relegated the no-injury rule to an afterthought.

B. POST-*SANTA FE TRAIL RANCHES* CASES

Post-1999 Colorado case law reflects this decision; rote quantification of historical consumptive use is now the endgame. Today, water courts apply this rote quantification analysis in change cases rather than looking at historical use and including limiting conditions based upon that historical use as a means to prevent injury when necessary.

1. Where is the injury?

State Engineer v. Bradley (*In re Application for Water Rights in Rio Grande County*) is one case that demonstrates the problem of not focusing on the no-injury standard.[157] Bradley, the pro se applicant, applied to change the point of diversion of his well from the corner of his property to the center, and

150. *Id.* (emphasis added).

151. *Id.* (citing CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION 375 (1894)).

152. *Id.* (citing Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882); Yunker v. Nichols, 1 Colo. 551, 555 (1872)).

153. *Id.*

154. *See id.*

155. *Id.* at 54.

156. *Id.* (citing Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1371-72 (Colo. 1980)) (citation omitted).

157. *See generally* State Eng'r v. Bradley (*In re* Application for Water Rights in Rio Grande Cnty.), 53 P.3d 1165 (Colo. 2002).

to utilize the well with his surface supplies.[158] The only evidence of *potential injury* was that the proposed well "might not affect" the aquifer in the same way.[159] The parties presented limited evidence of the historical use.[160] Based on the evidence presented, the trial judge approved the change and found that there would be no injury.[161] The State and Division Engineers appealed.[162] The Colorado Supreme Court focused on the fact that there was no "quantifiable evidence" of the historic use, and reversed.[163] The Court explained that actual historic use is a limit on decreed water rights:

> An absolute decree, whether expressed in terms of a flow rate or a volumetric measurement, is itself not an adjudication of actual historical use but implicitly is further limited to actual historical use. In order to determine that a requested change of a water right is merely that, and will not amount to an enlargement of the original appropriation, actual historic use must therefore, in some fashion and to some degree of precision, be quantified. As we have previously observed, once an appropriator exercises the right to change a decreed water right, he runs the real risk of requantification of the right based upon actual historic consumptive use at an amount less than his original decree.[164]

In *Bradley* the Court equated "actual historic use" with requantification.[165] Rather than focusing on whether there would be any injury to other water users, the Court focused on a change of water rights case as an opportunity to recalculate the amount of the water right. Methods of measuring water use to determine historic use and to ensure no enlargement included calculating not only the acreage under irrigation, but also the duty of water.[166] That being said, the Court stated that, when a water court cannot differentiate between multiple water rights that have contemporaneously irrigated the same land, "calculation of the productivity and needs of the acreage alone can never be sufficient."[167]

After this discussion, the Court discussed the requisite no-injury prong. The Court elevated the *Santa Fe Trail Ranches* historical use prong over the no-injury prong.[168] The Court stated that

> It is well-established that the applicant for a change of water right bears the burden of proving by a preponderance of the evidence that the requested change will not injure other users. . . . Although less expressly articulated, an obligation to demonstrate that the requested change remains within the scope of the original right and does not require a new and independent appropriation is necessarily included within this burden. While the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also

158. *Id.* at 1167.
159. *Id.*
160. *See id.*
161. *Id.* at 1168.
162. *Id.*
163. *Id.* at 1167, 1171.
164. *Id.* at 1170 (citation omitted).
165. *See id.*
166. *Id.*
167. *Id.*
168. *See id.*

> simply does not constitute a permissible "change" of an existing right. The applicant therefore bears the risk of nonpersuasion with regard to historic use as well as the absence of injury to other rights. . . . If the record fails to contain evidence from which both can be favorably resolved, the application must be denied.[169]

The Court correctly stated that quantification was insufficient without examination of injury. Yet, the application of this two-part test was more extreme.

In *Bradley* the Court announced two separate and independent burdens for historic consumptive use and no-injury, which means that an applicant must establish historic consumptive use of the water rights in question, regardless of whether there is injury.[170]

Subsequently, courts have interpreted *Bradley* to the point of nearly reading no-injury out of change cases. For instance, in *Trail's End Ranch, L.L.C. v. Colorado Division of Water Resources*, the Colorado Supreme Court stated:

> Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Because an absolute decree is itself not an adjudication of actual historic use but is implicitly further limited to actual historic use, in order to insure that a change of water right does not enlarge an existing appropriation, its "historic beneficial consumptive use" . . . must be quantified and established before a change can be approved.[171]

2. The Culmination of the Demise of the No-Injury Standard

In 2011 the Colorado Supreme Court published the *Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation District* opinion.[172] In that case, a number of entities sought to change certain water rights from irrigation to municipal use.[173] Though the Court here endorsed the no-injury standard as "the key principle" underlying Colorado's appropriation system, it stated that "a change of water right proceeding precipitates quantification based on actual historical consumptive use, in order to protect other appropriators."[174] The multiple proposed changes in use, points of diversion and storage, and place of use raised the issue of unlawful expansion of water rights.[175] Because both the water court and the Colorado Supreme Court agreed that the entities would thereby unlawfully enlarge their water rights, both courts concluded that such undecreed enlargements could not be the basis for a change decree.[176] A key factor in this decision was the entities' intent to eventually pursue a system-wide quantification of shares; the entities claimed the water court overstepped its jurisdiction by requantifying shares not actually before the water

169. *Id.* (citations omitted).

170. *See id.*

171. Trail's End Ranch, L.L.C. v. Colo. Div. of Water Res., 91 P.3d 1058, 1063 (Colo. 2004) (citation omitted).

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

173. *See id* at 653-54.

174. *Id.* at 674-75 (citation omitted).

175. *Id.* at 675.

176. *Id.*

court, but the Court disagreed.[177] The Court reasoned that the water court had in rem jurisdiction over the water rights "clearly put at issue by the parties' change applications" and therefore could impose terms and conditions on all shares and water rights in the ditch.[178]

Burlington Ditch represents the culmination of the destruction of senior water rights that can come from long-practiced but undecreed uses. In the quest to quantify historical use under the ditch-wide analysis, the court substantially reduced farmers' water entitlements—that were or still are being used—by limiting the direct right of two hundred cubic-feet per second for use above Barr Lake and restricting reservoir storage releases from Barr Lake to lands irrigated prior to 1909.[179] The case presents a disincentive to seek a ditch-wide analysis, which the Court has elsewhere deemed preferable.[180]

Burlington Ditch also represents the difficult yet practical struggle of water lawyers and courts trying to divine the answer to the independent test: what was the lawful historical consumptive use? Here, the Court adopted a study period from 1885 to 1909.[181] Due to the ancient study period, no one still alive would have personal knowledge about the historical use during this time period, and records were likely nonexistent, destroyed, or incomplete. Because the study period ended in 1909, there are few (if any) contemporary aerial photographs to show irrigated land, records of precipitation and crop production are dubious if they exist at all, and parties are left to glean and speculate about what happened and why. As former Division One Water Judge Robert Behrman once observed, "the further back you go, the further from the truth you get."[182]

The case also penalized the ditch companies by reducing the lawful amount of water historically diverted at the Burlington Ditch by 9,600 acre-feet for the Metro Pumps and an additional reduction for the Globeville Project.[183] Both of these projects were created in response to serious health and safety concerns; the Metro Pumps for facilitating cleaner disposal of sewage than the old Northside Plant, and the Globeville Project to protect the neighborhood of Globeville from a hundred-year flood.[184] The case could cause reluctance in ditch companies to cooperate with other public agencies to address important health and safety issues.

C. BILLS IN THE 2000S

The Colorado General Assembly included concepts from *Santa Fe Trail Ranches* in subsequent legislation and focused on historic consumptive use and quantification. It amended Colorado Revised Statutes subsections 37-92-305(3)

177. *Id.* at 675-676.

178. *See id.*

179. *Id.* at 675.

180. *See* Ryan M. Donovan et al., *One Step Forward and Two Steps Back: The Prospects for Ditch-Wide Quantifications and Alternative Transfer Methods*, 17 U. DENV. WATER L. REV. 267, 275 (2014) (discussing ditch-wide analysis in detail).

181. *Burlington Ditch*, 257 P.3d at 665-66.

182. Personal knowledge and observations of the author.

183. *Burlington Ditch*, 257 P.3d at 659-60.

184. *Id.* at 659.

and (4) in 2006 by adding provisions for crop rotation contracts.[185] In particular, new subsection 305(4)(a)(IV) expressly addressed "historical consumptive use limits" for land parcels subject to rotational crop management contracts.[186] This new subsection provided that, "to the extent that some or all of the water that is the subject of the contract is not utilized at a new place of use in a given year, such water may be utilized on the originally irrigated lands if so provided in the decree and contract."[187] To address the fear of non-use in a future requantification, the law provided that the owner "shall *not* be deemed to reduce the amount of historical consumptive use that the owner of the water rights has made of the water rights."[188]

Amended subsection 305(4)(b)(II) added other conditions that may be necessary to protect the vested rights of others.[189] Under this subsection, a water judge "*shall* make affirmative findings that the implementation of the rotational crop management contract . . . will neither expand the historical use of the original water rights nor change the return flow pattern from the historically irrigated land in a manner that will result in an injurious effect as specified in subsection (3)."[190] This provision applies the no-injury standard to other water rights in the context of rotational crop management contracts.

In 2008 House Bill 1280 amended section 37-92-305(3) to include subsection (b), authorizing the use of the changed rights to improve Colorado Water Conservation Board ("CWCB") instream flows.[191] This bill provided that water right change decrees concerning instream programs, "shall provide that . . . the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the changed water right" as fully consumable water.[192] Like other water rights, the change is "subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights."[193]

D. PUSHBACK, POST-*SANTA FE TRAIL RANCHES* IN 2010S

Water users began to push back, through legislative changes, on courts' application of historical use quantification, for fear of being penalized for engaging in conservation measures and simple changes. A series of recent examples are discussed below.

1. Simple change in point of diversion

In 2012 the legislature started to chip away at judicially-required historical use quantification and the onerous results of the *Burlington Ditch* case. Senate

185. *See* 2006 Colo. Sess. Laws 999, 1000-02 (enacting H.B. 1124, 65th Gen. Assemb., 2d Reg. Sess.).
186. *Id.* at 1000-01.
187. *Id.*
188. *Id.* (emphasis added).
189. *Id.* at 1001-02.
190. *Id.* (emphasis added).
191. 2008 Colo. Sess. Laws 587, 589-90 (enacting H.B. 1280, 66th Gen. Assemb., 2d Reg. Sess.).
192. *Id.*
193. *Id.*

Bill 12-097 added subsection 37-92-305(3.5), which permits water rights owners to apply for a "simple change in a surface point of diversion" where there is no intervening surface diversion point or instream flow, without having to requantify the water right.[194] If the courts had instead continued to apply the ruling of the old *Sieber* case focusing on injury, this legislation would have been unnecessary.

Under SB 97, in a simple point of diversion case an applicant must prove, "through the imposition of terms and conditions if necessary," that the change will not: (i) "result in the diversion of a greater flow rate or amount of water than has been decreed and, *without requantifying the water right*, is physically and legally available at the diversion point from which a change is being made;" or, (ii) "injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."[195] If the applicant makes such a prima facie showing, the proposed change is a "simple change in a surface point of diversion," which is subject to the rebuttable presumption that it "will not cause an enlargement of the historical use associated with the water rights being changed."[196]

This simple change bill relieved some of the concern of re-quantification and focused on injury. Such simple changes in surface points of diversion do not harm other water users by definition. Without intervening streams or water rights, whether a water right is diverted one foot, one-hundred feet, or one mile further downstream makes little practical difference. No other water user would be harmed. However, this is a rebuttable presumption; should another water rights owner be injured, they are welcome to challenge the proposed change.[197]

2. Correction to an established, but erroneously described point of diversion

Like the "simple change" law, the Colorado legislature in 2013 set forth, in detail, the ability of water users to change points of diversion if they were erroneously described in the decree,[198] a common reality in this state. To protect the water user, the new statute created a rebuttable presumption that such change would not cause enlargement of the historical use and would not cause injury.[199] Yet, the legislature went further and expressly established a standard that "[t]he decree *must not requantify the water rights.*"[200]

3. Protection from reductions in historical use for enrollment in land conservation programs

In 2013 the state legislature specifically prohibited water judges in Divisions Four, Five, and Six from considering a decrease in use where

194. 2012 Colo. Sess. Laws 199, 199-201 (enacting H.B. 97, 68th Gen. Assemb., 2d Reg. Sess.).

195. *Id.* at 199-200 (emphasis added).

196. *Id.* at 199-201.

197. *See id.*

198. 2013 Colo. Sess. Laws 181 (enacting S.B. 78, 69th Gen. Assemb., 1st Reg. Sess.) (codified at COLO. REV. STAT. § 37-92-305(3.6)).

199. *Id.* at 183.

200. *Id.* (emphasis added).

(I) The land on which the water from the water right has been historically applied is enrolled under a federal land conservation program; or

(II) The nonuse or decrease in use of the water from the water right by its owner for a maximum of five years in any consecutive ten-year period as a result of participation in:

(A) A water conservation program [approved by state or local water authorities];

(B) A water conservation program established through formal written action or ordinance . . .

(C) An approved land fallowing program as provided by law in order to conserve water or to provide for compact compliance; or

(D) A water banking program as provided by law.[201]

These provisions protect water in these programs from later reduction. In this instance, the Colorado General Assembly adopted a policy of protecting these water rights from the exacting knife of modern quantification capabilities.

4. The Legacy Ditch Bill

Senate Bill 13-074 (the "Legacy Ditch Bill"), also enacted in 2013, amended subsection 37-92-305(4)(a)(I) by adding a subsection (b) to address the concerns with reverting to ancient study periods, about which no one living would have personal knowledge, in an attempt to deduce the historical use during those periods.[202] It provides that

For purposes of determining lawful historical use . . . the lawful maximum amount of irrigated acreage equals the maximum amount of acreage irrigated in compliance with all express provisions of the decree during the first fifty years after entry of the original decree, unless a court . . . has entered final judgment to the contrary. Irrigated acreage not exceeding the lawful maximum amount and located within a reasonable proximity to the ditch . . . as constructed within the first fifty-year period after entry of the original decree, may be included in the historical average in an historical consumptive use analysis supporting a change of water right application.[203]

Like Senate Bill 13-019, the Legacy Ditch Bill protected water rights from overzealous application of a historical consumptive use analysis by focusing on the use of the irrigation right during a more representative time.

5. Relocation of ditch in response to floods

In response to the devastating floods in September 2013 along Colorado's

201. 2013 Colo. Sess. Laws 1171, 1171-72 (enacting S.B. 19, 69th Gen. Assemb., 1st Reg. Sess.) (codified at COLO. REV. STAT. § 37-92-305(3)(c)).

202. *See* 2013 Colo. Sess. Laws 372, 372-73 (enacting S.B. 74, 69th Gen. Assemb., 1st Reg. Sess.).

203. *Id.*

Front Range, the Colorado General Assembly enacted House Bill 14-1005.[204] It amended an ancient self-help statute that allowed water users to relocate a ditch as a result of the stream changing course.[205] In doing so, the bill expressly states that the owner relocating a ditch as a result of the stream changing course "does not need to file a change of water right application," thus relieving the owner from having to face the risk of re-quantification.[206]

These recent bills show that legislators, and their constituents, have started to realize the negative implications that can result from the over-application of historical consumptive use quantification in change of water rights proceedings.

IV. ANALYSIS: CONSEQUENCES OF SHIFT AWAY FROM FOCUS ON INJURY

The principles discussed above in Section I evolved in the early development of water law in the state, with the keystone being the protection of junior water rights from injury. One of the oft-cited principles was that junior appropriators are entitled to maintenance of the conditions on the stream when they made their respective appropriations.[207] From that premise flowed protective terms designed to prevent injury, such as replicating return flows in time, location, and amount; seasonal use limitations to prevent a direct flow irrigation right from diverting through the non-irrigation season; annual and monthly volumetric limitations on the changed right to prevent greater diversion under the changed right; and so forth.[208] These conditions are appropriate when necessary to prevent demonstrated potential injury.

The trend in recent years, however, with the primary focus on quantification of historical use as the primary test, is the diminishing requirement of proof of actual injurious effect. As longtime practitioner Jack Ross puts it, "how is your ox getting gored?"[209]

This Section highlights the need to focus on material injury, not potential injury to "junior-juniors," as defined in subpart A below. It then focuses on the consequences, intended or not, of the "carving up" of "senior-senior" rights by requiring quantification of historical use, outside the lens of injury, to the detriment of other important state policies.

A. SENIOR-SENIORS, SENIOR-JUNIORS, JUNIOR-JUNIORS

Not to be mistaken, juniors need to be protected from real injury. But too often, and often long after the objecting water users have settled with the applicant, the State and Division Engineers ("Engineers") continue to challenge applicants seeking to change water rights irrespective of injury.[210] Most often cited is the rubric of juniors' entitlement to stream conditions as they found them

204. 2014 Colo. Sess. Laws 725 (enacting H.B. 1005, 69th Gen. Assemb., 2d Reg. Sess.).

205. *Id.* at 725.

206. *Id.* at 725-26.

207. *See* Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217, 1223-24 (Colo. 1988).

208. *See, e.g.*, Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799, 804, 808 n.6 (Colo. 2001).

209. Statements to witnesses in water court, heard by the author on several occasions.

210. *See, e.g.*, State Eng'r v. Bradley (*In re* Application for Water Rights in Rio Grande Cnty.), 53 P.3d 1165, 1167 (Colo. 2002) (involving a pro se party and a case in which the Engineers intervened and argued that aquifer conditions might be different).

when they made their appropriation. But what does that really mean? Did those juniors, especially junior-juniors, really rely upon the stream conditions?

Many of the river basins in Colorado are over-appropriated.[211] A review of the South Platte River mainstem call records demonstrates the fallacy of the rubric of junior-juniors relying upon stream conditions.[212] Absent the creation of augmentation plans in the 1969 Act,[213] "junior-junior" water rights, as described using the Appendices discussed below, would not be able to divert at all except for under free river conditions. For example, in the South Platte Basin there are "senior-senior" appropriators with appropriation dates of roughly 1860 to 1900 that often control the call during the irrigation season. There are also "senior-juniors" with appropriation dates of roughly 1900 to 1930 that call during the irrigation season or that hold storage rights and call in the non-irrigation season; it is this group of water users, and some in the senior-seniors group, that came to the stream later in time and rely upon uses and return flows from those senior to them. Finally, there are "junior-juniors" with appropriation dates of roughly 1930 and later that rarely, if ever, call and can generally divert only when there is a free river.[214]

The graph in Appendix A illustrates the Division of Water Resources' ("DWR") call records for the number of times water rights on the mainstem of the South Platte River placed a call between April 1950 and April 2014. Calls are labeled by "Administrative Number" on the x-axis (corresponding generally to dates, with the more senior rights to the left and the more junior rights to the right on the x-axis). The number of calls placed by each right between April 1950 and April 2014 is indicated on the y-axis.[215]

The associated table in Appendix B shows DWR Administrative Numbers and the corresponding appropriation date for each right with the number of calls per right. A review of these two appendices shows that seniors with rights from 1860 to 1900 placed over seventy percent of the calls during this period.[216] The DWR data shows no calls by water rights more junior than December 31, 2002 (North Sterling Canal); the most senior calling right dates to November 28, 1860 (City Ditch Pl.).[217] After the 1930s, calling water rights are far less frequent.[218] In fact, after the December 31, 1929, water rights (Admin. No.

211. *See* Upper Eagle Reg'l Water Auth. v. Wolfe, 230 P.3d 1203, 1210 (Colo. 2010).

212. *See DWR Calls History*, COLORADO.GOV, https://data.colorado.gov/Information-Sharing/DWR-Calls-History/t7na-sz5k (last visited Oct. 13, 2014) (click on the menu button at the top of the "Water Source Name" column, select "Filter This Column" from the drop-down menu, scroll down on the list of rivers that appears, and then click on "South Platte River").

213. *See generally* David F. Jankowski et al., *The 1969 Act's Contribution to Local Governmental Water Suppliers*, 3 U. DENV. WATER L. REV. 20, 29 (1999).

214. *See infra* notes 216, 217.

215. *See* app. A; *see also DWR Calls History, supra* note 213 (source of data used to create graph; sorted to show call records for the South Platte River mainstem). The author exported call data for the South Platte River mainstem from the website for review. The author only used data points with an appropriation date listed; there were a number of calls that had no appropriation date listed, or "bypass" calls, and these were excluded from the analysis.

216. *See* app. B. Senior-seniors made 70.33% of all calls; 96.54% when senior-juniors are included; and 99.99% including junior-juniors. *Id.* The reader should note this table reflects *only what was available* on the database and there may be unaccounted for records or calls that were not included in the DWR's dataset and does not include bypass calls.

217. *See id.*

218. *See id.*

31423.29219 for Jackson Lake, Prewitt Reservoir, Riverside Canal), the next calling water right's appropriation date is over thirty years younger: 1962 (Denver Foothills Pl. 26).[219] This call data reveals that junior-junior water rights rarely, if ever, call.[220] As shown in Appendix B, these junior-junior rights placed only 3.45% of the calls on the South Platte River mainstem,[221] "bypass" calls excluded, during this sixty-four year study period.

Today, it is a myth that the junior-junior water rights owners could actually rely upon stream conditions. These juniors-juniors come to the stream knowing they might divert occasionally under "free river" conditions, but knowing otherwise they need an augmentation plan in order to protect seniors. There is a limited amount of water in the stream system, of course. Under the guise of "quantification of historical use," these junior-juniors receive a windfall when more senior rights are requantified, destroying, or at least diminishing, very senior water rights, which are critical to the existing and evolving use of water in this state.

B. DIMINISHMENT OF PRE-COMPACT WATER RIGHTS

The unnecessary quantification of historical use—that is, doing so without endeavoring to prevent injury—reduces the amount of water available for use in Colorado under its interstate compacts. Interstate compacts govern the major river basins in the state and generally exempt the application of the compact to water rights that were appropriated prior to their ratification or otherwise protect pre-compact rights in some fashion.[222]

Each time a court quantifies and requantifies pre-compact rights absent a showing of actual injury to in-state water users, as the Engineers propose in several ongoing cases for the protection of junior-juniors,[223] it reduces the amount of water that Colorado is entitled to under its interstate compacts. Continuing to ratchet down pre-compact rights allocates Colorado's water to post-compact water rights that are then subject to compact curtailment. As time goes on, this problem will only be exacerbated, as second-, third-, and fourth-generation

219. *See id.*

220. *See* app. A.

221. *See* app. B.

222. *See, e.g.*, Colorado River Compact (1922), COLO. REV. STAT. § 37-61-101 art. VIII (2014) (present perfected rights as of November 24, 1922 are not subject to curtailment); Upper Colorado River Compact (1948), COLO. REV. STAT. § 37-62-101 art. IV(c) (rights perfected prior to November 24, 1922 are not subject to curtailment); South Platte River Compact (1923), COLO. REV. STAT. § 37-65-101 art. VI.2 (no curtailment of water rights in Water District 64, senior to June 14, 1897, to meet a flow of 120 cubic-feet per second at the Balzac gage between April 1 and October 15); Rio Grande River Compact (1938), COLO. REV. STAT. § 37-66-101 art. VII (protection of pre-1929 storage in Colorado); Arkansas River Compact (1948), COLO. REV. STAT. § 37-69-101, art. IV.D (protection of existing uses by prohibiting future development in Colorado that may materially deplete the usable quantity of water for state line flows).

223. *See, e.g.*, Opening Brief of the State Engineer and the Division Engineer for Water Division 1 at 45, Wolfe v. Sedalia Water & Sanitation Dist., No. 14SA12 (Colo. filed Apr. 25, 2014) (in an appeal of a "second-generation" change case initially entered in 1986: "There is no guarantee junior appropriators coming on the stream during the twenty-four years of nonuse of the Ball Ditch water right will continue to enjoy their average annual use."); Order Re: Black Hawk and Coors' Motion for Determination of Questions of Law Concerning Previously Changed Water Rights at 2, *In re* Application for Water Rights of City of Black Hawk, No. 12CW303 (Colo. Water Ct. Div. No. 1 May 29, 2014).

changes of pre-compact water rights are re-quantified, without demonstrable evidence showing whether any in-state water rights are actually injured.

C. INCREASING ADDITIONAL "BUY-AND-DRY" OF IRRIGATED AGRICULTURE

After the 2002 drought, Colorado embarked on the State Water Supply Initiative ("SWSI").[224] The latest version of this effort, SWSI 2010, finds that by 2050 Colorado's population will double to between 8.6 and 10 million people; there will be an unmet demand, or gap, of municipal and industrial needs between 190,000 and 630,000 acre-feet depending upon the success of Identified Projects and Processes ("IPPs"); and between 500,000 and 700,000 acres of irrigated agriculture may be dried up due to urbanization and water transfers, or changes of water rights, to accommodate growing urban demand.[225] Limiting "buy-and-dry" of irrigated agriculture through alternative transfer methods is one of the prime objectives of this state planning effort.[226]

House Bill 13-1248 created the potential for pilot projects for the leasing and fallowing of irrigated agricultural lands, as approved by the CWCB;[227] the General Assembly affirmed its policy to implement alternative transfer measures of fallowing-leasing in place of traditional transfers that result in permanent agricultural dry-up.[228] Likewise, Colorado Governor Hickenlooper mandated that CWCB create a Colorado State Water Plan, and announced that the "current rate of purchase and transfer of water rights from irrigated agriculture (also known as 'buy-and dry') is unacceptable."[229]

The consequence of quantifying historical use simply for its own sake, and not to prevent injury, is that it will require applicants that received less water than anticipated in a change case to buy more irrigation rights in order to replace water that was left on the trial court floor. This in turn will intensify the pressure on irrigated agriculture as municipal users seek to fill their immediate needs for more water and to fill their future gap in supplies.

For example, one of the strategies municipalities rely upon to meet their existing and future gaps is to transfer or change irrigation rights, either permanently or through alternative transfer methods.[230] Overzealous quantification of these irrigation rights will reduce the amount of water these water providers have

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224. Sara M. Dunn, *Drought Triggers Flood of Legislation in Colorado*, ABA WATER RESOURCES COMMITTEE NEWSL. (Am. Bar Ass'n), Aug. 2003, at 7-8.

225. COLO. WATER CONSERVATION BD., STATEWIDE WATER SUPPLY INITIATIVE 2010, EXECUTIVE SUMMARY 12, 18, 23 (2010), *available at* http://cwcb.state.co.us/water-management/water-supply-planning/Documents/SWSI2010/SWSI2010ExecutiveSummary_v2.pdf.

226. *See* Ryan McLane & John Dingess, *The Role of Temporary Changes of Water Rights in Colorado*, 17 U. DENV. WATER L. REV. 293, 294 (2014) (discussing various alternative transfer methods).

227. 2013 Colo. Sess. Laws 878, 878-79 (enacting H.B. 1248, 69th Gen. Assemb., 1st Reg. Sess.).

228. *See id.*

229. Colo. Exec. Order No. D 2013-005 art. II.C (2013).

230. *See* COLO. WATER CONSERVATION BD., CDM TECHNICAL MEMORANDUM: 2050 MUNICIPAL AND INDUSTRIAL GAP ANALYSES app. B (2011), *available at* http://cwcb.state.co.us/water-management/water-supply-planning/Documents/SWSI2010/Appendix%20J_Technical%20Memorandum%202050%20Municipal%20and%20Industrial%20Gap%20Analysis.pdf. A number of water providers in the state rely upon traditional and alternative transfer methods to meet their existing and future demands. *Id.*

to rely upon, and in turn, cause them to seek to "buy-and-dry" more irrigated land, either temporarily or permanently.

It is also likely that water providers will implement regional cooperation and projects to share each others' water supplies and infrastructure to help meet projected shortfalls in water supply.[231] These regional projects may require changing the points of diversion or places of use of previously changed water rights. Water providers are not likely to pursue regional water projects if the Engineers' position that requantification of historical use should occur in second generation changes prevails.

D. SECOND GENERATION CHANGES

Colorado's ability to meet the demands of municipal growth, which has blossomed since World Water II, in large part relies upon a reallocation of senior irrigation water rights through change of water rights cases.[232] As Colorado moves into the twenty-first century and water users "shuffle the deck," we begin to see what are termed "second generation change cases"—for example, where a water provider acquires a previously changed water right from another water user and seeks to change it again,[233] or where a water user needs to make further water rights changes to accommodate new uses at different places or points of diversion, or in response to events beyond the water user's control.[234]

In many of these cases, the Engineers have been pressing for a requantification of the historical consumptive use since the first change case, and in doing so, have been ignoring the preclusive effect of the first change case. *Williams v. Midway Ranches Property Owners Ass'n (In re Application for Water Rights of Midway Ranches Property Owners' Ass'n)* stands for the proposition that "when historical usage has been quantified for the ditch system by previous court determination, the yield per share which can be removed for use in an augmentation plan is not expected to differ from augmentation case to augmentation case, absent a showing of subsequent events which were not previously addressed by the water court but are germane to the injury inquiry in [this] case."[235]

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231. *See* COLO. WATER CONSERVATION BD., STATEWIDE WATER SUPPLY INITIATIVE 2010, at 7-1, 7-14, *available at* http://cwcb.state.co.us/water-management/water-supply-planning/Documents/SWSI2010/SWSI2010Section7.pdf. Collaborative regional planning is a critical element moving forward, as water demand can be transferred from one local area to another.

232. *See, e.g.*, Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217, 1217-22 (Colo. 1988).

233. *See, e.g., In re* Application for Water Rights of City of Black Hawk, No. 12CW303, at 6 (Colo. Water Ct. Div. No. 1 June 8, 2014) (municipality acquiring changed water rights from brewing company for its municipal use); *In re* Application for Water Rights of Sedalia Water & Sanitation Dist., No. 10CW261, at 3 (Colo. Water Ct. Div. No. 1 Dec. 10, 2014) (water and sanitation district acquiring changed water rights from concrete company for municipal use), *appealed*, No. 14SA12 (Colo. argued Nov. 5, 2014).

234. *See, e.g., In re* Application for Water Right of Farmers Reservoir & Irrigation Co., No. 02CW403, at 33 (Colo. Water Ct. Div. No. 1 May 11, 2009) (ditch company moving point of diversion to protect neighborhood from flooding); *In re* Application for Water Rights of the City of Thornton, No. 2011CW74, at 7 (Colo. Water Ct. Div. No. 1 Dec. 14, 2012) (municipality changing decreed point of return flows based on wastewater treatment plant relocating and changing the discharge point).

235. Williams v. Midway Ranches Prop. Owners Ass'n (*In re* Application for Water Rights of Midway Ranches Prop. Owners' Ass'n), 938 P.2d 515, 526 (Colo. 1997).

The Engineers argue that the mere passage of time is a "changed circumstance" that requires re-quantification. In doing so, the Engineers assert that juniors are entitled to conditions on the stream at the time of their appropriations. In *In re Application for Water Rights of Sedalia Water and Sanitation District*, a prior change occurred in 1986, but the Engineers asserted protections for the junior-juniors.[236] There was not a shred of evidence that juniors were injured; in fact, the junior water users (that participated in the case) all stipulated over the proposed thirteen-acre-foot change.[237] As noted above, in recent years junior-juniors came to the stream knowing that they would likely only divert during free river or if they had an augmentation plan. As to the prior change, they came to the stream knowing that the prior change had removed the consumptive use from the stream and it was not part of the water lawfully available.

E. CONSEQUENCE OF INSECURITY AND ADDITIONAL COST IN MEETING PRESENT AND FUTURE GAPS

Growing backlash against the rote quantification of historical consumptive use is apparent in the simple change and correction of erroneously described point of diversion statutes and the Legacy Ditch Bill.[238] These are mere bandages on the problem. Municipal water users currently are afraid to go to water court to change their acquired senior water rights.[239] Water users with existing water rights fear subjecting their decreed changed rights to further modifications because of the risk of requantification based on post-original-change study periods.[240] The current state of change cases in water court is like running a gauntlet through land mines with a guillotine waiting at the end.

One of the hallmarks of Colorado's prior appropriation system has been its flexibility and adaptability to allow changes of senior water rights to accommodate new uses while retaining the seniority to provide a firm supply, especially in times of drought. In the past, this has been a real benefit to municipal water users.[241] Water providers should be able to rely on the security obtained from a decree as they meet the daunting task of supplying safe drinking water to their citizens. Responsible water providers are generally not in the business of ransacking other water users' water supplies in change cases. Rather, those responsible water providers are interested in protecting their own portfolios of water rights from injury in change cases. Yet, when others seek to improve their position and obtain a windfall or quantify historical use without a fact-based showing of injury, the system is broken and in need of readjustment. There is no longer any security or reliability to Colorado's system of water law.

The cost of acquiring senior water rights is staggering. Firm consumptive

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236. *See* Opening Brief of the State Engineer and the Division Engineer for Water Division 1 at 2, 8-10, Wolfe v. Sedalia Water & Sanitation Dist., No. 14SA12 (Colo. filed Apr. 25, 2014); *see also* Order Re: Sedalia's Motion for Summary Judgment and the State and Division Engineer's Cross Motion for Summary Judgment, *In re* Application for Water Rights of Sedalia Water and Sanitation District, No. 10CW261 (Colo. Water Ct. Div. No. 1 Nov. 24, 2013).

237. *See* Opening Brief of the State Engineer, *supra* note 237, at 2, 4, 8-10.

238. *See supra* Section III.D.

239. Personal communications by the author with a number of large and small water providers.

240. *Id.*

241. *See* Jankowski et al., *supra* note 214, at 26-27.

use water on the South Platte can fetch anywhere from $10,000 to $100,000 per acre-foot depending upon location, seniority, amount, and other factors.[242] The value realized to both the seller and the buyer is substantially decreased if the right is severely limited through its quantification without attendant injury. Acquiring and changing water rights is, and will continue to be, an expensive proposition; furthermore, needlessly subjecting senior water rights to quantification and re-quantification for its own sake, without a showing of real injury, results in an economic re-distribution of the value of those senior water rights to junior appropriators. This runs counter to the pillars of Colorado's long-standing priority system in which senior water rights holders have a clear legal advantage over juniors. It is also inconsistent with the state policy of protecting pre-compact water rights and of reducing the "buy-and-dry" of irrigated agriculture.

V. CONCLUSION: COURTS SHOULD RETURN TO NO-INJURY AS THE ANALYTICAL TOUCHSTONE IN WATER RIGHTS CHANGE CASES

The thesis of this article is not radical or revolutionary. It is simple: return to the application of the no-injury standard as the cornerstone of change cases. In accordance with existing case law and statutes, the courts should require a demonstration of real, material injury to other vested and conditional water rights—not potentialities. Overall, case law and statutes require examination of historical use though the lens of preventing injury as set out in the 1969 Act, rather than as an independent test that courts use to eviscerate valuable pre-compact, senior water rights.

The no-injury standard and its application of historical use considerations evolved during a time when senior-juniors' water supply was based upon the return flows from senior-seniors. The no-injury standard has recently devolved to the point of being forgotten, crowded out and nearly replaced by the fully independent standard of quantification of historical consumptive use. It is time to resuscitate the no-injury standard as the touchstone analysis in change cases, especially as Colorado moves to provide supplies to meet the current and future water supply gap and to protect invaluable pre-compact water rights.

That being said, there are a few modest legislative tweaks that could help ensure courts apply the no-injury rule to protect the holders of water rights (i.e., those with standing) as the essential element in a change of water right:

- Amending Colorado Revised Statutes section 37-92-305 concerning standards in change proceedings to provide that if the historical consumptive use of a water right was determined in a prior change, that it must not be re-quantified in a subsequent change case of that same water right (similar to the additions of subsections 3.5 and 3.6);

- Amending Colorado Revised Statutes section 37-92-302(1)(b): "Any person **with standing, ~~including the state engineer,~~** who wishes to oppose . . .";

- Amending Colorado Revised Statutes section 37-92-302(4): "The water judge may request a written report from the state engineer **limited**

242. Personal communications by the author with water providers and brokers, and personal knowledge.

to issues of administration of the decree if the water judge desires";

- Amending Colorado Revised Statutes section 37-92-304(2): "any person **with standing**~~, including the state engineer,~~ who wishes to protest . . ."

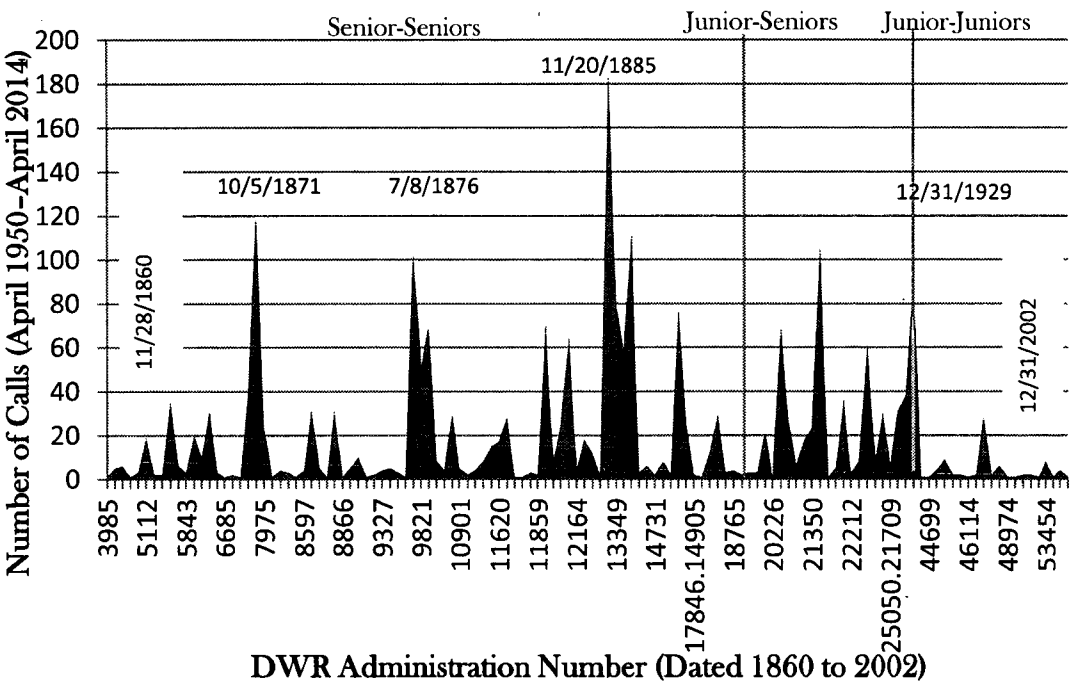
- Amending Colorado Revised Statutes section 37-92-304(3): "The division engineer shall appear to furnish pertinent information **limited to issues of administration of the decree** . . ." and "Any person **with standing** may move to intervene . . ."[243]

243. COLO. REV. STAT. §§ 37-92-302(1)(b), (4), 37-92-304(2), (3), 37-92-305 (2014). Bold text indicates an addition to the statute, strikethrough indicates a deletion.

VI. APPENDIX A

NUMBER OF CALLS BY WATER ADMINISTRATION NUMBER ON THE SOUTH PLATTE RIVER MAINSTEM: RIVER MAIN STREAM: APRIL 1950–APRIL 2014*

* RANGE BASED ON AVAILABLE "DWR CALLS HISTORY" DATA FOR SOUTH PLATTE RIVER



VII. APPENDIX B

DWR Call History for the South Platte River Mainstem: Calls from April 1950 to April 2014

Water Right Admin. No.	Corresponding Appropriation Date	Number of Times Called	Total No. of Calls by Decade	Percentage of Total Calls (%)	Cumulative % of Total Calls
3985	11/28/1860	1			
4260	8/30/1861	5			
4352	11/30/1861	6			
4717	11/30/1862	1			
5083	12/1/1863	3			
5112	12/30/1863	19			
5205	4/1/1864	2			
5478	12/30/1864	2			
5600	5/1/1865	35			
5803	11/20/1865	6			
5843	12/30/1865	3			
5965	5/1/1866	20			
5967	5/3/1866	10			
5969	5/5/1866	31			
6637	3/3/1868	3			
6685	4/20/1868	1	148	6.53	6.53
7659	12/20/1870	2			
7671	1/1/1871	1			
7892	8/10/1871	39			
7948	10/5/1871	119			
7975	11/1/1871	23			
8157	5/1/1872	1			
8218	7/1/1972	4			
8501	4/10/1873	3			
8511	4/20/1873	1			
8597	7/15/1873	4			
8659	9/15/1873	31			
8661	9/17/1873	5			
8670	9/26/1873	1			
8689	10/15/1873	31			
8866	4/10/1874	1			
9075	11/5/1874	5			
9112	12/12/1874	10			
9131	12/31/1874	1			
9252	5/1/1875	2			
9327	7/15/1875	4			
9497	1/1/1876	5			
9542	2/15/1877	3			
9597	4/10/1876	1			
9686	7/8/1876	102			
9821	11/20/1876	51			
10180	11/14/1877	69			
10215	12/19/1877	8			
10480	9/10/1878	4			
10610	1/18/1879	29			
10901	11/5/1879	5	565	24.93	31.46

DWR Call History for the South Platte River Mainstem: Calls from April 1950 to April 2014

Water Right Admin. No.	Corresponding Appropriation Date	Number of Times Called	Total No. of Calls by Decade	Percentage of Total Calls (%)	Cumulative % of Total Calls
11049	4/1/1880	2			
11139	6/30/1880	4			
11251	10/20/1880	8			
11338	1/15/1881	15			
11620	10/24/1881	17			
11622	10/26/1881	28			
11629	11/2/1881	1			
11804	4/26/1882	1			
11807	4/29/1882	3			
11859	6/20/1882	2			
11861	6/22/1882	70			
11935	9/4/1882	9			
11975	10/14/1882	24			
11979	10/18/1882	64			
12164	4/21/1883	5			
12327	10/1/1883	18			
12470	NA - bypass calls	1638			
12516	4/7/1884	11			
12924	5/20/1885	2			
13108	11/20/1885	183			
13349	7/19/1886	78			
13985	4/15/1888	59			
14154	10/1/1888	112			
14185	11/1/1888	3			
14519	10/1/1889	6	725	31.99	63.45
14731	5/1/1890	2			
15585	9/1/1892	8			
15598	9/14/1892	2			
16554	4/28/1895	76			
17332	6/14/1897	24			
17846.14905	10/22/1890	2			
17846.15269	10/21/1891	1			
17846.16496	3/1/1895	12			
18018	5/1/1899	29	156	6.88	70.33
18687	3/1/1901	3			
18765	5/18/1901	4			
19009	1/17/1902	2			
19055	3/4/1902	3			
19083	4/1/1902	3			
19765	2/12/1904	20			
20226	5/31/1907	1			
20969	5/31/1907	69			
21031	8/1/1907	25			
21150	11/28/1907	6			
21252	3/9/1908	17			
21350	6/15/1908	23			
21562	1/3/1909	103			
21564	1/15/1909	1			
21698	5/29/1909	6			
25050.21709	6/9/1909	7			
21709	6/9/1909	1	294	12.97	83.3
22059	5/25/1910	36			

DWR Call History for the South Platte River Mainstem: Calls from April 1950 to April 2014

Water Right Admin. No.	Corresponding Appropriation Date	Number of Times Called	Total No. of Calls by Decade	Percentage of Total Calls (%)	Cumulative % of Total Calls
22212	10/25/1910	3			
22239	11/21/1910	8			
22254	12/6/1910	61			
22355	3/17/1911	10			
22370	4/1/1911	30			
26302.23522	5/27/1914	27			
26302.23953	8/1/1915	38	213	9.40	92.7
31423.29219	12/31/1929	87	87	3.84	96.54
47481.40987	3/21/1962	2			
41776	5/18/1964	1	3	0.13	96.67
44706	12/31/1971	4			
44723	6/12/1972	8			
45364	3/15/1974	2			
45804	5/29/1975	2			
46114	4/3/1976	1			
47847.46567	6/30/1977	6			
46590	7/23/1977	2			
46748	12/28/1977	28	53	2.34	99.01
48974	2/1/1984	1			
49826	6/2/1986	1			
49841	6/17/1986	2			
50403.49841	6/17/1986	1			
50466	3/3/1988	2	7	0.31	99.32
52960.52699	4/14/1994	1			
53454	5/8/1996	8			
53558	8/20/1996	1			
55882.53771	3/21/1997	1	11	0.49	99.81
55882	12/31/2002	4	4	0.18	99.99
Total			2266	100.00	99.99