37-92-305. Standards with respect to rulings of the referee and decisions of the water judge.

(1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3) (a) A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if such change, contract, 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. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect.

(b) Decrees for changes of water rights that implement a contract or agreement for a lease, loan, or donation of water, water rights, or interests in water to the Colorado water conservation board for instream flow use under section 37-92-102 (3) (b) shall provide that the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the changed water right downstream of the instream flow reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

(4) (a) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(I) A limitation on the use of the water that is subject to the change, taking into consideration the historical use and the flexibility required by annual climatic differences;

(II) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant that 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 historical use or diminution of return flow to the detriment of other appropriators;

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

(IV) If the application is for the implementation of a rotational crop management contract, separate annual historical consumptive use limits for the parcels to be rotated according to the historical consumptive use of such lands. 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 and if the election to irrigate is made prior to the beginning of the irrigation season and applies to the entire irrigation season. A failure of a party to a rotational crop management contract who is not the owner of the irrigation water rights that are subject to the contract to put to beneficial use the full amount of water that was decreed pursuant to the application for approval of the contract shall not be deemed to reduce the amount of historical consumptive use that the owner of the water rights has made of the rights.

(V) A term or condition that addresses decreases in water quality caused by a change in the type of use and permanent removal from irrigation of more than one thousand acre-feet of consumptive use per year that includes a change in the point of diversion, if the change would cause an exceedance or contribute to an existing exceedance of water quality standards established by the water quality control commission pursuant to section 25-8-204, C.R.S., in effect at the time of the application, or, if ordered by the court, subsequently adopted by the commission prior to the entry of the decree, for the stream segment at the original point of diversion. Under any such term or condition, the applicant shall be responsible for only that portion of the exceedance attributable to the proposed change. Any such term or condition and any activity to be taken in fulfillment thereof shall not be inconsistent with the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and rules promulgated pursuant to said act, and implementation of section 303 (d) of the federal "Water Pollution Control Act" by the water quality control division. This subparagraph (V) shall not be interpreted to confer standing on any person to assert injury who would not otherwise have such standing.

(VI) Such other conditions as may be necessary to protect the vested rights of others.

(b) If the water judge approves the implementation of a rotational crop management contract, the rotational crop management contract shall be recorded with the clerk and recorder of the county in which the historically irrigated lands are located, and the water judge shall make affirmative findings that the implementation of the rotational crop management contract:

(I) Is capable of administration by the state and division engineers. In order to satisfy the requirement of this subparagraph (I), the water judge may require the applicant to provide signage and mapping of the lands not irrigated on an annual basis.

(II) 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) of this section; and

(III) Will comply with paragraph (a) of subsection (4.5) of this section with regard to potential soil erosion, revegetation, and weed management.

(4.5) (a) The terms and conditions applicable to changes of use of water rights from agricultural irrigation purposes to other beneficial uses shall include reasonable provisions designed to accomplish the revegetation and noxious weed management of lands from which irrigation water is removed. The applicant may, at any time, request a final determination under the court's

retained jurisdiction that no further application of water will be necessary in order to satisfy the revegetation provisions. Dry land agriculture may not be subject to revegetation order of the court.

(b) (I) If article 65.1 of title 24, C.R.S., is not applicable to a significant water development activity, the court may utilize the methods specified in this section to mitigate certain potential effects of such activity. Subject to the provisions of this article, a court may impose the following mitigation payments upon any person who files an application for removal of water as part of a significant water development activity:

(A) **Transition mitigation payment.** A transition mitigation payment shall equal the amount of the reduction in property tax revenues for property that is subject to taxation by an entity listed in section 37-92-302 (3.5) that is attributable to a significant water development activity. Such payment shall be made on an annual basis in accordance with the repayment schedule established by the court unless the applicant and the taxing entities mutually agree on an alternate payment schedule. The county shall certify, as appropriate, to the change applicant each year the amount of mitigation payment due under this subparagraph (I). Any moneys collected pursuant to this sub-subparagraph (A) shall be distributed by the board of county commissioners of the county from which water is removed among the entities in the county in proportion to the percentage of their share of the total of property taxes for nonbonded indebtedness purposes.

(B) **Bonded indebtedness payment.** A bonded indebtedness payment shall be made on an annual basis in the same manner as mitigation payments and shall be based on the bonded indebtedness on the property that is to be removed from irrigation at the time the decree is entered. The bonded indebtedness payment shall be equal to the reduction in bond repayment revenues that is attributable to the removal of water as part of a significant water development activity. The court may identify such mitigation payment as part of the decree. Whenever an application for determination with respect to a change of water rights requires a payment pursuant to this sub-subparagraph (B), the board of county commissioners of the county from which water is removed shall distribute any moneys collected among the entities in the county having bonded indebtedness in proportion to the percentage of their share of the total of such indebtedness.

(II) Unless the court determines that a greater or lesser period of time would be appropriate based upon the evidence of record, the amount of the transition mitigation and bonded indebtedness payments shall be equal to the total reduction in revenues for a period of thirty years commencing upon the date of initial reductions in such revenues as a consequence of the removal of water associated with the significant water development activity.

(III) To the extent that there is an increase in the property tax or bonded indebtedness revenues after the date of the commencement of the payment obligations identified under sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (b) as a consequence of a change in land use and accompanying modification of the assessed valuation of the land, such payment obligations shall be correspondingly reduced.

(IV) When determining the amount to be paid pursuant to this paragraph (b), if any, the court shall take into consideration any evidence of a beneficial impact to the county from which the water is to be diverted and shall adjust the amount of the payment accordingly.

(c) Paragraph (b) of this subsection (4.5) shall not apply to:

(I) Any removal of water involving water rights owned by the applicant prior to August 6, 2003; any removal of water that was accomplished prior to August 6, 2003; any removal of water for which an application for a change of water rights was pending in the water court on such date; or any removal of water for which a decree has been entered that continues to be subject to the water court's retained jurisdiction;

(II) Any removal of water when:

(A) Such change is undertaken by a water conservancy district, water conservation district, special district, ditch company, other ditch organization, or municipality;

(B) The water was beneficially used within the boundaries or service area of such entity before the removal; and

(C) The water will continue to be beneficially used within such entity's boundaries or service area after the removal; or

(III) Any removal of water where the new place of use is within a twenty-mile radius of the historic place of use, even though such new place is located within a different county. For purposes of this subparagraph (III), the distance between the historic place of use and the proposed new place of use shall be measured between the most proximate points in the respective areas.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.

(6) (a) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, other than a well described in section 37-90-137 (4), the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-302 (2) (a). The referee or water judge may thereupon grant a final or conditional decree if the construction and use of any well proposed in the application will not injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. If the court grants a final or conditional decree, the state engineer shall issue a well permit. Except in cases in which the state engineer or division engineer is a party, all findings of fact contained in the consultation report concerning the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party.

(b) In the case of wells described in section 37-90-137 (4), the referee or water judge shall consider the state engineer's determination as to such ground water as described in section 37-92-302 (2) in lieu of findings made pursuant to section 37-90-137, and shall require evidence of

compliance with the provisions of section 37-92-302 (2) regarding notice to persons with recorded interests in the overlying land. The state engineer's findings of fact contained within such determination shall be presumptive as to such facts, subject to rebuttal by any party.

(c) Any application in water division 3 that involves new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer system referred to in section 37-90-102 (3) shall be permitted pursuant to a plan of augmentation that, in addition to all other lawful requirements for such plans, shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation. In any such augmentation plan decree, the court shall also retain jurisdiction for the purpose of revising such decree to comply with the rules and regulations promulgated by the state engineer pursuant to section 37-90-137 (12) (b) (I).

(7) Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice, within not less than sixty days nor more than ninety days, by certified or registered mail to all persons to whom such conditional right was granted, at the last-known address appearing on the records of such court.

(8) In reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water which, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, so long as the terms and conditions of the plan prevent injury to vested water rights. Said terms and conditions shall require replacement of out-of-priority depletions that occur after any groundwater diversions cease. Decrees approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights. A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

(9) (a) No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum streamflows as described in section 37-92-103 (4).

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

(10) If an application filed under section 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.

(11) Nontributary ground water shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary ground water need not include a date of initiation of the withdrawal project. Such determinations shall not require subsequent showings or findings of reasonable diligence, and such determinations entered prior to July 1, 1985, which require such showings or findings shall not be enforced to the extent of such diligence requirements on or after said date. The water judge shall retain jurisdiction as to determinations of ground water from wells described in section 37-90-137 (4) as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Such decree shall then control the determination of the quantity of annual withdrawal allowed in the well permit as provided in section 37-90-137 (4). Rights to the use of ground water from wells described in section 37-90-137 (4) pursuant to all such determinations shall be deemed to be vested property rights; except that nothing in this section shall preclude the general assembly from authorizing or imposing limitations on the exercise of such rights for preventing waste, promoting beneficial use, and requiring reasonable conservation of such ground water.

(12) (a) In determining the quantity of water required in an augmentation plan to replace evaporation from ground water exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(b) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from evaporation exempted in this subsection (12) or otherwise replace water for increased calls which may result therefrom.

(13) (a) The water court shall consider the findings of fact made by the Colorado water conservation board pursuant to section 37-92-102 (6) (b) regarding a recreational in-channel diversion, which findings shall be presumptive as to such facts, subject to rebuttal by any party. In addition, the water court shall consider evidence and make affirmative findings that the recreational in-channel diversion will:

(I) Not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) Promote maximum utilization of waters of the state;

(III) Include only that reach of stream that is appropriate for the intended use;

(IV) Be accessible to the public for the recreational in-channel use proposed; and

(V) Not cause material injury to instream flow water rights appropriated pursuant to section 37-92-102 (3) and (4).

(b) In determining whether the intended recreation experience is reasonable and the claimed amount is the appropriate flow for any period, the water court shall consider all of the factors that bear on the reasonableness of the claim, including the flow needed to accomplish the claimed recreational use, benefits to the community, the intent of the appropriator, stream size and characteristics, and total streamflow available at the control structures during the period or any subperiods for which the application is made.

(c) If a water court determines that a proposed recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements, the court shall deny the application.

(d) In addition to determining the minimum amount of stream flow to serve the applicant's intended and specified reasonable recreation experience, the water court shall make a finding in the decree as to the flow rate below which there is no longer any beneficial use of the water at the control structures for the decreed purposes.

(e) If the other elements of the appropriation are satisfied, the decree shall specify the total volume of water represented by the flow rates decreed for the recreational in-channel diversion. For purposes of this subsection (13), the "total volume of water represented by the flow rates decreed for the recreational in-channel diversion" means the sum of the flow rates claimed in cubic feet per second for each day on which a claim is made multiplied by 1.98.

(f) If the court determines that the total volume of water represented by the flow rates decreed for the recreational in-channel diversion exceeds fifty percent of the sum of the total average historical volume of water for the stream segment where the recreational in-channel diversion is located for each day on which a claim is made, the decree shall:

(I) Specify that the state engineer shall not administer a call for the recreational in-channel diversion unless the call would result in at least eighty-five percent of the decreed flow rate for the applicable time period;

(II) Limit the recreational in-channel diversion to no more than three time periods; and

(III) Specify that each time period is limited to one flow rate.

(14) No decree shall be entered adjudicating a change of conditional water rights to a recreational in-channel diversion.

(15) Water rights for recreational in-channel diversions, when held by a municipality or others,

shall not constitute a use of water for domestic purposes as described in section 6 of article XVI of the state constitution.

(16) In the case of an application for recreational in-channel diversions filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district filed on or after January 1, 2001, the applicant shall retain its original priority date for such a right, but shall submit a copy of the application to the Colorado water conservation board for review and recommendation as provided in section 37-92-102 (6). The board's recommendation shall become a part of the record to be considered by the water court as provided in subsection (13) of this section.

(17) (a) Applicants for approval of a rotational crop management contract shall pay the state engineer the following fees:

(I) An application fee of one thousand seven hundred thirty-four dollars;

(II) A fee of six hundred seventeen dollars that is due annually beginning one year after submittal of the application until the application has been decreed by the water judge pursuant to section 37-92-308 (4); and

(III) An annual fee of three hundred dollars per year after the application has been decreed.

(b) The fees shall be used by the state engineer for the review of the engineering reports, field inspections, and the administration of the rotational crop management contract. The state engineer shall transmit such fees to the state treasurer, who shall deposit them in the division of water resources ground water management cash fund created in section 37-80-111.5.

Source: L. 69: p. 1211, § 1. **C.R.S. 1963:** § 148-21-21. **L. 71:** p. 1324, § 2. **L. 75:** (7) added, p. 1398, § 1, effective June 20. **L. 77:** (8) added, p. 1703, § 4, effective June 19. **L. 79:** (9) added, p. 1368, § 6, effective June 22. **L. 81:** (10) added, p. 1786, § 2, effective April 24. **L. 85:** (6) amended and (11) added, p. 1168, § 8, effective July 1. **L. 89:** (3) amended, p. 1431, § 1, effective April 20; (12) added, p. 1425, § 5, effective July 15. **L. 92:** (6) amended, p. 2312, § 3, effective March 20; (4.5) added, p. 2289, § 2, effective April 16. **L. 96:** (8) amended, p. 125, § 2, effective March 25; (6) amended, p. 327, § 3, effective April 16. **L. 98:** (6)(c) added, p. 853, § 3, effective May 26. **L. 2001:** (13), (14), (15), and (16) added, p. 1189, § 3, effective June 5. **L. 2003:** (8) amended, p. 1454, § 5, effective April 30; (4.5) amended, p. 882, § 4, effective August 6. **L. 2006:** (13) amended, p. 908, § 3, effective May 11; (3) and (4) amended and (17) added, p. 1000, § 3, effective May 25. **L. 2007:** (4)(a)(V) amended and (4)(a)(VI) added, p. 44, § 1, effective March 12. **L. 2008:** (3) amended, p. 589, § 3, effective August 5.

Editor's note: (1) Section 4 of chapter 197, Session Laws of Colorado 2006, provides that the act amending subsection (13) applies only to applications for and the administration of new recreational in-channel diversions filed on or after May 11, 2006, and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to May 11, 2006.

(2) Section 2 of chapter 15, Session Laws of Colorado 2007, provides that the act amending subsection (4)(a)(V) and enacting subsection (4)(a)(VI) applies to water rights applications that are filed on or after March 12, 2007, and does not apply to water rights applications that were filed before March 12, 2007.

(3) Section 4 of chapter 170, Session Laws of Colorado 2008, provides that the act amending subsection

(3) applies to water court determinations of historic consumptive use and abandonment occurring on or after August 5, 2008. The act was passed without a safety clause. For an explanation concerning the effective date, see page ix of this volume.

Cross references: For section 303 of the "Federal Water Pollution Control Act", see 33 U.S.C. § 1313.

ANNOTATION

Analysis

I. GENERAL CONSIDERATION.

Law reviews. For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Conditions in a Water Rights Augmentation Plan or Change Case", see 13 Colo. Law. 2039 (1984). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Continuing Groundwater Saga -- Part I: Senate Bill 5", see 15 Colo. Law. 422 (1986). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Quality Versus Quantity: The Continued Right to Appropriate -- Part I", see 15 Colo. Law. 1035 (1986). For article, "Colorado's Law of "Underground Water": A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For article, "Use of Colorado Water Rights In Secured Transactions", see 18 Colo. Law. 2307 (1989). For comment, "The Case For Private Instream Appropriations in Colorado", see 60 U. Colo. L. Rev. 1087 (1990). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "'Can and Will': The New Water Rights Battleground", see 20 Colo. Law. 727 (1991). For comment, "The 'Can and Will' Doctrine of Colorado Revised Statute Section 37-92-305 (9)(b): Changing the Nature of Conditional Water Rights in Colorado", see 65 U. Colo. L. Rev. 947 (1994).

Annotator's note. Since § 37-92-305 is similar to repealed §§ 148-9-10 and 148-9-22, C.R.S. 1963, §§ 147-9-22, 147-9-25, and 147-10-8, CRS 53, CSA. C. 90, §§ 189(22) and 190, and laws antecedent to CSA, C. 90, § 104, relevant cases construing those provisions have been included in the annotations to this section.

Decree in water adjudication confirms that steps have been completed to effect appropriation. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

The Water Right Determination and Administration Act creates two levels of adversary involvement in a water adjudication involving a proposed plan for augmentation or a change of water right: (1) Permission to file a statement of opposition; and (2) standing to assert injury. The first is

available to "any person" and allows such person to participate to the extent of holding the applicant to a standard of "strict proof". The second, however, requires the objector to show that he or she has a legally protected interest in a vested water right or conditional decree. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

Exempt "602" wells are "vested water rights" for purposes of subsection (3). Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

In adjudication and change of water rights, court applies subsection (3) standards. There is a strong public interest in adjudication and change of water rights, and in such proceedings the court must apply the standards of subsection (3). Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980).

Court cannot reopen decree on predetermined "equitable" terms. A trial court is not free to reopen a water decree on terms which the complainant itself predetermines to be "equitable". Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980).

While a decree that erroneously determined that the source of water was nontributary or independent of other priorities is protected by res judicata as long as the water right is operated in conformity with the decree, an application for a change of water right reopens the prior decree for determination of the true nature of the source of the water. The applicant failed both to demonstrate that the water was developed rather than salvaged water and to quantify the historic consumptive use of the water, and so the application was properly dismissed. Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co., 115 P.3d 638 (Colo. 2005).

All appropriations of water, and all decrees determining the respective rights of users, regardless of whether specific mention be made therein, are subject to all constitutional and statutory provisions and restrictions designed for the protection of junior appropriators from the same stream. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

A junior appropriator may not divert the water to which he is entitled to any method or means the result of which will be to diminish or interfere with the right of a senior appropriator to full use of this appropriation. City of Colo. Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961).

Junior appropriators with vested rights in underground water tributary to a natural stream are entitled to protection against injury resulting in another water user's change of rights. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

In considering whether it is necessary for applicants to compensate vested rights for stream impacts, a court must evaluate whether, in light of the proposed withdrawals, holders of other water rights will be protected from injury with respect to the amount of water they are entitled to receive and the location and time at which they are to receive it. State Eng'r v. Castle Meadows, Inc., 856 P.2d 496 (Colo. 1993).

Detailed findings of injury required. Water court erred in failing to enter specific, detailed findings of injury to other appropriators, if any, caused by diminished return flows due to either a change in direct-flow or storage rights, and in failing to enter the additional modifications and conditions in the final decrees to prevent or compensate such injuries to other users. S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

District court's failure to consider that because of the fluctuating and unpredictable nature of urban runoff, water may not be available at the times that senior users are affected by the depletions, rendered inadequate its conclusion that the applicants' pumping of their decreed amounts of water from the aquifer will not be injurious after their withdrawals cease. State Eng'r v. Castle Meadows, Inc., 856 P.2d 496 (Colo. 1993).

Case remanded to the district court to consider whether holders of water rights will be injuriously affected by post-withdrawal stream depletions, since existence of injury cannot be determined as a

matter of law and the issue of injurious effect is inherently fact specific and requires factual findings. State Eng'r v. Castle Meadows, Inc., 856 P.2d 496 (Colo. 1993).

State engineer's argument that the stream depletions caused by the applicants' withdrawals would be injurious as a matter of law rejected since this is a question involving facts that must be determined by the district court. State Eng'r v. Castle Meadows, Inc., 856 P.2d 496 (Colo. 1993).

Burden of applicant to establish historical use. Where expansion of a water use is the injury asserted, establishment of historical use is the burden of the applicant. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

The legal principles are the same whether appropriations are for underground or surface water. City of Colo. Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961).

Foreign water is exempt from the restrictions of subsection (3). Approval of the change of use of foreign water does not require compliance with the "no-injury" requirement. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Augmentation plan evaluation involves same criterion as application for changing water right. A plan for augmentation is to be approved by the water judge based on the same criterion involved in evaluating an application for a change of water right. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

Uncertainties are not fatal to a plan for augmentation. Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 550 P.2d 288 (Colo. 1976); Kelly Ranch v. Southeastern Colo. Conservancy Dist., 550 P.2d 297 (Colo. 1976); Pub. Serv. Co., v. Willows Water Dist., 856 P.2d 829 (Colo. 1993).

Application for a change in use and plan of augmentation is denied when the proposal would injure vested rights of other appropriators. Matter of May, 756 P.2d 362 (Colo. 1988).

To ensure the protection of vested water rights or a decreed conditional water right, the parties may suggest and the water court may impose conditions on the change in use of a water right, including the dry-up of previously irrigated lands. However, the dry-up is required only to the extent that it is necessary to prevent injury to water rights. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Given the factual nature of the injury inquiry, the water court's factual determinations and conclusions based thereon cannot be disturbed on appeal if they are based on the record. Accordingly, the appeals court affirmed the trial court's determination and declined to require any additional dry-up conditions. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Prior to the enactment of subsection (4.5), which provides that the terms and conditions applicable to changes of use of water rights from agricultural irrigation to other beneficial uses include reasonable provisions be made to accomplish the revegetation of lands from which irrigation water is removed, the water courts had the discretion to require revegetation. Subsection (4.5) was intended to codify and institutionalize the use of revegetation conditions and did not represent the creation of a new form of condition on changes in use of water rights. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

In addition to the dual focus on maximum beneficial use and the protection of water rights, water judges must give consideration to the potential impact of the utilization of water on other resources. Maximum utilization must be implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

An applicant must bear the initial burden of showing absence of injurious effect from a changed water right. Only if the applicant can make a prima facie showing of no injury does the burden of going forward shift to objectors to show evidence of potential injury. City of Thornton v. Bijou

Irrigation Co., 926 P.2d 1 (Colo. 1996).

All vested water rights affected by the proposed change in use must be protected against injury. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Water quality regulation that affects water rights without causing material injury or impairment is not necessarily prohibited. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The legislative water quality scheme is not designed to protect against quality impacts unrelated to discharges or substitute water and specifically prohibits the water court from imposing the protective measures necessary to remedy depletive impacts of upstream appropriations on a downstream appropriator who is concerned that decreased water quantity caused by city's upstream appropriation will result in water quality problem. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

When actual operation of an augmentation plan supports a prima facie case that substituted water is not of a quality necessary to meet the requirements for which the water has normally been used, it was error for a water judge to refuse a senior appropriator's petition to either make a finding of injury or extend the period of retained jurisdiction without holding a hearing. City of Thornton v. City & County of Denver, 44 P.3d 1019 (Colo. 2002).

Priority date of ultimate appropriation relates back to date of "first step" only if appropriation has been completed with reasonable diligence. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984); Closed Basin Landowners Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987); Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n, 14 P.3d 325 (Colo. 2000).

The priority date for an application for a 4.1 c.f.s. exchange cannot relate back to a date when the exchange was operated at 0.24 c.f.s. Because of the discrepancy between 0.24 c.f.s. and 4.1 c.f.s., the previous operation is contrary to the manner in which the exchange has been administered, and the operation failed to sufficiently notify third parties of the intent to appropriate. Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005).

Where changes in projected reservoir enlargement program are dictated for most part by finances and required engineering changes, changes are permissible providing overall plan is not drastically altered or abandoned; priority date is not affected by such changes. Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973).

Where evidence shows and court finds that applicant demonstrated its intent to enlarge reservoir by its survey in 1930 and that intent was never abandoned, applicant's failure to include any mention of intent to enlarge in 1935 adjudication when it obtained absolute decree for diversion system did not indicate that its intent to complete enlargement of reservoir was nonexistent at that time. Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973).

There was sufficient evidence to support the water court's decision to authorize a water district's augmentation plan to reuse water delivered to its customers for irrigation purposes. Sufficient evidence supported the water court's finding that a water district demonstrated that the water it intended to recapture was its non-tributary ground water and not water from the natural stream, and thereby proving non-injury to other holders of water rights. Despite questionable methods used by the water district to measure the water return flows, the challenging public service company did not demonstrate that the water district failed to produce sufficient evidence. Pub. Serv. Co. v. Willows Water Dist., 856 P.2d 829 (Colo. 1993).

When a decreed plan for augmentation is required under this section, the state engineer does not have statutory authority to approve a substitute supply plan for out-of-priority diversions under § 37-80-120, which section merely gives the state engineer enforcement discretion, and an injunction against such diversions absent a decree is proper. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001).

A plan of augmentation for a tributary aquifer that would be used as a reservoir does not qualify for the exemption from the prohibition against crediting reductions in evapotranspiration, because the aquifer is not analogous to an unlined gravel pit, and exemptions should be narrowly construed. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

Before an applicant for a plan of augmentation can establish an absence of injury to satisfy its prima facie case, it must first establish the timing and location of depletions and the availability of replacement to prevent injury from those depletions. Here, because the applicant's surface and groundwater models could not reliably predict the issue of injury, the applicant failed to establish its prima facie case, and the case was properly dismissed. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

Determination of the timing and location of depletions is integral to and is intended as an aid to the determination of injury, not an independent query that can defeat the proposed augmentation plan. Upper Eagle Reg'l Water Auth. v. Simpson, 167 P.3d 729 (Colo. 2007).

A plan for augmentation must include terms and conditions to protect a junior instream flow water right against injury caused by all out-of-priority diversions. An adjudicated in-stream flow water right, just like any other junior water right, entitles its holder to preserve the stream conditions existing at the time of the appropriation. Any other result would frustrate the clear legislative intent to protect and preserve the natural habitat through minimum stream flows. Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005).

Water right is a property right. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

Water rights governed by water deed. Where a landowner's rights were determined by the terms of a water deed through and on which his claim for water is based, he had a right to use water at such times, manner, and place as is provided in the water deed, and his rights were governed by the water deed and not by subsection (3). Merrick v. Fort Lyon Canal Co., 621 P.2d 952 (Colo. 1981).

Effect of arguing pollution would be harmful to future lot owners. Where the argument was that the pollution from a plan for augmentation would be harmful to the now unknown future owners of lots in the subdivisions, this issue did not affect the present parties and therefore did not come within the court's contemplation. Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976).

Presumption regarding historic use. Applicants for a change of water rights are entitled to a presumption that water was historically used by shareholders on the basis to which they were legally entitled to use such water. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

Applied in Twin Lakes Reservoir & Canal Co. v. City of Aspen, 192 Colo. 209, 568 P.2d 45 (1977); Kuiper v. Atchison, T. & S.F. Ry., 195 Colo. 557, 581 P.2d 293 (1978); Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980); Broyles v. Fort Lyon Canal Co., 638 P.2d 244 (Colo. 1981); Great Western Sugar v. Jackson Lake Reservoir, 681 P.2d 484 (Colo. 1984); FWS Land & Cattle Co. v. State Div. of Wildlife, 795 P.2d 837 (Colo. 1990).

II. CONDITIONAL WATER RIGHTS.

Conditional water rights in nontributary ground water. Language of subsection (11) authorizes water courts to limit the exercise of conditional water right decrees in nontributary ground water entered before July 1, 1985, by making the doctrine of prior appropriation inapplicable to such conditional water rights, as well as those entered thereafter, removing the reasonable diligence requirement associated with prior appropriation for such water rights, and allowing the water courts to retain jurisdiction over such rights to adjust withdrawal determinations based on local aquifer characteristics. The application of this subsection to conditional water rights entered prior to July 1, 1985, operates as a reasonable limitation on the exercise of a conditional water right and does not operate retrospectively in violation of article II, section 11, of the Colorado Constitution. Qualls, Inc. v. Berryman, 789 P.2d 1095 (Colo. 1990).

Although legislature cannot prohibit appropriation or diversion of unappropriated water for useful purposes, it may regulate manner in which appropriation or diversion is effected. Fox v. Division Eng. for Water Div. 5, 810 P.2d 644 (Colo. 1991).

Consent decree requiring approval of secretary of interior as condition precedent to adjudication of exchange rights did not violate Colorado water law. Application of City & County of Denver, 935 F.2d 1143 (10th Cir. 1991).

Purpose of a conditional water decree has always been to allow an ultimate appropriation of water to relate back to the time of the "first step" toward that appropriation. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982); Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

Conditional water decrees are designed to establish that the "first step" toward appropriation of certain amount of water has been taken and to allow the relation back to the ultimate appropriation to the date of that "first step". Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

Section plainly indicates legislative intent to require demonstration that decreed conditional appropriation is being pursued, such as would justify a continued reservation of the antedated priority. Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997).

A conditional water decree requires an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

The "first step" for relation back of conditional water decree requires intent to appropriate a definite quantity for beneficial use and an overt manifestation of intent through physical acts constituting notice to third parties. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

To show the first step toward appropriation of water, the applicant must show the concurrence of intent and overt acts. The date on which the first step is taken determines the date of the appropriation. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

The overt acts required under the first step test must perform the following three functions: (1) Manifest the necessary intent to appropriate water to beneficial use; (2) Demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) Give notice to interested parties of the nature and extent of the proposed demand upon the water supply. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Acts which demonstrate a substantial step toward application of water to a beneficial use and acts which constitute notice to third parties of the proposed demand upon the water supply may precede the formation of the intent to appropriate and an act manifesting such intent. However, the appropriation date of a conditional water right cannot be set prior to the formation of the necessary intent to appropriate and completion of an act manifesting such intent. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Filing of an application of a conditional water right may be evidence of an act manifesting the intent to appropriate and it may be deemed to constitute notice to third parties of the proposed demand upon the water supply, but it is doubtful that filing of an application is, by itself, a substantial step toward application of water to a beneficial use. Other overt acts would normally be required. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Relevant measures toward the application of water to beneficial use need not be physical acts. Such measures could be formal acts which perform one or more of the required functions. Formal acts would include planning which is focused on appropriation of water, studies, expenditures of human and financial capital, applying for various water permits, other related legal or quasi-legal filings apart

from the conditional water rights application, or passage of resolutions if the applicant is a public entity. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

"First step" toward a perfect appropriation not found where there is a lack of privity between irrigation company and dam builder. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984).

Making of a survey constitutes a sufficient first step in a major diversion project for the award of a conditional decree. Oak Creek Power Co. v. Colo. River Water Conservation Dist., 182 Colo. 389, 514 P.2d 323 (1973).

One who has taken the necessary first step to initiate an appropriation of waters and subsequent thereto has proceeded with diligence to finance and construct the works necessary to make an application of water to beneficial use, is entitled to a conditional decree defining his rights as of the date of the first step taken. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

In order to establish that water is to be diverted for beneficial use, applicant for conditional water rights must show that "first step" has been taken to apply water to a beneficial use and such first step may be taken by a physical act or a formal act such as planning or study. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

A project in which large amounts of water are proposed to be diverted and transported over long distances will require a greater demonstration of sufficient activity to demonstrate the "first step" than a small project tapping a very limited water supply. Thus, in light of the limited scale of a proposed appropriation, where a decree for conditional water rights is sought for 0.01 cubic feet per second, the actions of digging around a spring and installing pipes and a barrel constitutes a first substantial act taken towards placing water to beneficial use. Vought v. Stucker Mesa Domestic Pipeline Co., 76 P.3d 906 (Colo. 2003).

A second visit to the site of a proposed diversion and the use of a global positioning system to locate the point of a proposed diversion is not sufficient to place other appropriators on inquiry notice of the nature and scope of the proposed appropriation, thus the requisite inquiry notice required to show the "first step" was not provided until the time of filing the water court application. Vought v. Stucker Mesa Domestic Pipeline Co., 76 P.3d 906 (Colo. 2003).

Municipal use of water has always been deemed a beneficial use and is given priority over other competing beneficial uses by the general assembly. Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995).

One who is entitled to a conditional decree defining his rights to water for future application to use has a vested right which he may protect in case of any action by others to destroy or injure that right. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

A conditional surface decree will not result in injury to senior appropriators if it does not authorize diversions out of priority, but such decree should not issue without a plan for augmentation. Southeastern Colo. Water v. City of Florence, 688 P.2d 715 (Colo. 1984).

Finding that an application for a change of water right was noninjurious where the application applied to same amount of water as was previously decreed in conditional water right was proper under this section. City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993).

Where record established that injury would result from proposed enlargement of reservoir, a plan for augmentation for approval or evidence that the appellants had joined an organization which had an approved plan for augmentation must be submitted prior to an award of a conditional water storage right. Lionelle v. S. E. Colo. Water Conservancy Dist., 676 P.2d 1162 (Colo. 1984).

No showing of diversion and application to a beneficial use was necessary prior to the entry of

conditional decrees. Taussig v. Moffat Tunnel Water & Dev. Co., 106 Colo. 384, 106 P.2d 363 (1940).

Subsection (9)(b) requires proof that water will be diverted and that the project will be completed with diligence before a decree of conditional right is issued. Southeastern Colo. Water v. City of Florence, 688 P.2d 715 (Colo. 1984); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

By enacting the "can and will" requirement of subsection (9)(b), the general assembly intended to reduce speculation associated with claims for conditional decrees and to increase the certainty of the administration of water rights in Colorado. In re Gibbs, 856 P.2d 798 (Colo. 1993); Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995); City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

An applicant may rely on the potential right of private condemnation in satisfying the "can and will" requirement unless the record clearly indicates that there are no circumstances under which the applicant may obtain access to the property necessary to finalize the conditionally approved right. In re Gibbs, 856 P.2d 798 (Colo. 1993).

A city council's adoption of a non-binding general resolution to deny third parties access to the city's real estate for water projects in which the city did not participate is not a final denial of access to a particular reservoir site with regard to a specific project, and an applicant's lack of current access to a reservoir site is not typically dispositive of whether the "can and will" test is satisfied. City of Black Hawk v. City of Central, 97 P.3d 951 (Colo. 2004).

Subsection (9)(b) requires proof that water will be diverted and that project will be completed with diligence prior to issuance of conditional decree for water right, and decree was properly denied due to lack of plan for augmentation which would have established such proof. Fox v. Div. Eng'r for Water Div. 5, 810 P.2d 644 (Colo. 1991).

Court properly dismissed application for conditional exchange decree upon finding that applicants had no present intent to build reservoir which was key to the exchange plan and, therefore, applicants did not satisfy "can and will" requirements of subsection (9)(b). Such finding is neither inconsistent with nor does it constitute a collateral attack on a 1987 storage decree obtained by applicants, as finding in 1987 that applicants had necessary intent when the storage decree was secured did not speak to applicants' subsequent actions and intent. Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

The "can and will" requirement should be construed to require an applicant to show a substantive probability that the facility will be completed with due diligence. Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995).

"Can and will" test applies until a right matures into an absolute decree, and thus the test must be met by an applicant for a finding of reasonable diligence. Municipal Subdist., Northern Colo. Water Conservancy District v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

"Can and will" provision of the statute requires the applicant to establish a substantial probability that, within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence, and that as a result, waters will be applied to a beneficial use. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996); W. Elk Ranch v. United States, 65 P.3d 479 (Colo. 2002).

Thornton established a nonspeculative intent to put the northern project water to beneficial use and, through its substantial investment in the project, showed a commitment to completing the appropriations by application of water to a beneficial use. Thornton's evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Water court properly found that the county failed to prove that it "can and will" complete the Union Park project where it failed to prove that the United States would grant a permit for a pumping plant because its proposed use would disrupt decreed rights and would require a major operational change of the Taylor Park reservoir to continue meeting its designed purposes. Bd. of

Comm'rs v. Crystal Creek Homeowner's Ass'n, 14 P.3d 325 (Colo. 2000).

To meet the water availability prong of the "can and will" test, a junior in-basin appropriator in the Gunnison basin upstream from the Aspinall Unit need not prove a subordination contract with the federal bureau of reclamation, but rather must merely show that a sufficient portion of the original 60,000 acre-foot depletion allowance associated with the Aspinall Unit remains unused. Mount Emmons Mining Co. v. Town of Crested Butte, 40 P.3d 1255 (Colo. 2002).

Where an applicant establishes that its system design can accommodate, through storage or other means, any differences between decreed flow rates and lesser carrying capacity at points of ultimate delivery, the record does not establish a shortfall in the entire water system capacity and therefore does not act as a barrier to a finding that Thornton can and will divert at the decreed rate. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The "reality checks" imposed by the court on Thornton with regard to its existing water rights were correct because Thornton's conduct with regard to its existing water rights may be indicative of the reality of the need for the newly decreed rights. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Actual good faith work on the overall facilities necessary to consummate the ultimate goal is a part of the diligence required to continue a conditional decree and to have it ripen into an absolute decree. Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).

Work in one drainage basin cannot provide the necessary notice to initiate an appropriation of water out of a wholly separate drainage basin, no matter how integrated the proposed projects may be in theory and ultimate development. Denver v. Colo. River Water Conservation Dist., 696 P.2d 730 (Colo. 1985).

A statutory diligence determination is made solely on the basis of factual issues as presented by the evidence, and where factual issues are involved, a trial court's findings are binding upon the appellate court if there is any competent evidence in the record to support that finding. Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

Applicant has the burden of proving reasonable diligence by a preponderance of the evidence. Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

Party seeking to establish reasonable diligence with respect to a conditional water right does not have the burden of proof regarding the economic feasibility of a particular project; rather such economic feasibility is one factor to be considered in a finding of reasonable diligence. Pub. Serv. Co. v. Blue River Irr., 782 P.2d 792 (Colo. 1989); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

The statutory requisite of due diligence is met, during the period of the pendency of adjudication proceedings and until a conditional decree is awarded, by diligent action of the claimant in seeking to have his claim allowed and opposing in good faith the allowance of other claims which would, if allowed, be senior in point of time. Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).

Whether future work will satisfy future diligence is a matter to be determined in the future at hearings provided for in this section. Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).

Question of diligence must be determined in light of all factors present in particular case, including size and complexity of project; extent of construction season; availability of materials, labor, and equipment; economic ability of claimant; and intervention of outside delaying factors such as wars, strikes, and litigation. Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973); Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

Where survey includes reservoir enlargement in question, it constitutes sufficient first step for

award of conditional decree. Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973).

As long as water system as whole is being completed with due diligence, fact that small part of it is slow to progress is inconsequential. Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973).

Filing deadlines of § 37-92-301 (4) are not modified by this section. Bar 70 Enters. Inc. v. Highland Ditch Ass'n, 694 P.2d 1253 (Colo. 1985).

A water court's failure to give notice of a cancellation of a conditional water right pursuant to subsection (7) of this section, when the holder of the right fails to file a due diligence application pursuant to § 37-92-301(4), extends the time period in which the due diligence application may be filed and does not result in the cancellation of such right. Double RL Co. v. Telluray Ranch Props., 54 P.3d 908 (Colo. 2002).

III. CHANGING POINT OF DIVERSION.

It is recognized that water is a property right, subject to sale and conveyance, and that under proper conditions not only may the point of diversion be changed, but likewise the manner of use. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Language of this section encourages productive use of decreed rights. If a holder of a decreed water right can put the water to better use by obtaining an amendment to the decree, such conduct should be encouraged if the proposed change will cause no injury to other users or owners of water rights. Application for Water Rights, 799 P.2d 33 (Colo. 1990).

The water court may grant an application for a change in the point of diversion only upon the applicant demonstrating that the proposed change will not injuriously affect the vested rights of other water users. Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Applicant has burden to show injury will not result. It is the burden of the applicant desiring to change the point of diversion or place of use of a water right to show that injury will not result from a proposed change. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

The burden of showing absence of injurious effect is upon the applicant. In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); S.E. Colo. Water Cons. v. Rich, 625 P.2d 977 (Colo. 1981); S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

Burden of proof. Burden on applicants for a change in water rights to establish the lack of injurious results from proposed change, but once a prima facie case of no injury is made, burden shifts to objectors to show evidence of potential injury. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

If injury will result from application, applicant may propose terms to prevent. If the water judge determines that injury will result from a proposed change in the point of diversion or place of use of a water right, the applicant and the persons opposed to the application must be given an opportunity to propose terms or conditions which would prevent the injurious effect. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

"Duty of water" limits right to change point of diversion. The right to change a point of diversion or type of use with respect to water rights decreed for irrigation purposes is limited to the "duty of water" with respect to the decreed place of use. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

One of incidents of water right is right to change point of diversion or place of use. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

Junior appropriators have a vested right to the continuation of stream conditions as they existed at

the time of their appropriations, with the result that an application for a change in the point of diversion is always subject to the limitation that such change not injure the rights of junior appropriators. Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

City has a right to change its point of diversion if it can do so without injury to others or if reasonable conditions can be attached to prevent such an effect. Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder, 157 Colo. 197, 402 P.2d 71 (1965).

Change in water rights should be permitted where proposed conditions to request for a change will serve to prevent injury to the water rights of other parties. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

Change of right without injurious effect should be permitted. If a proposed condition will permit a change of water right to be accomplished without injuriously affecting the owner of or persons entitled to use water under a vested water right or decreed conditional water right, the change should be permitted on that condition. In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981).

A change in the place of use of a water right may be allowed only when the change will not cause unreasonable harm to a prior appropriator. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

The right to have the change depends upon, and must be controlled by, the facts of each particular case. Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910); New Cache La Poudre Irrigating Co. v. Water Supply & Storage Co., 49 Colo. 1, 111 P. 610 (1910); Farmers' Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 P.2d 756 (1933); Flasche v. Westcolo Co., 112 Colo. 387, 149 P.2d 817 (1944).

The question what will be the effect of the change, whether injurious or harmless, is the ultimate fact to be determined from evidence of the conditions which have previously prevailed and the conditions which will ensue if the change is permitted. The opinions of witnesses not based upon any facts or conditions in evidence will not satisfy the rule nor make a prima facie case. Monte Vista Canal Co. v. Centennial Irrigating Ditch Co., 24 Colo. App. 496, 135 P. 981 (1913).

It is not error to permit a change of the point of diversion, in an original proceeding for the adjudication of the water rights upon a particular stream, all parties in interest being present, and no prejudice to those complaining being shown. Phillips Inv. Co. v. Cole, 27 Colo. App. 540, 150 P. 331 (1915).

An appropriator may not change his point of diversion except upon conditions which eliminate injury to other appropriators. Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

The cases contemplate a relative evaluation of rights with a view to protection of vested junior rights. Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

Junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Junior appropriator has a right to assume that these are fixed conditions and will so remain, at least without substantial change, unless it appears that a proposed change will not work harm to his vested rights. Shawcroft v. Terrace Irrigation Co., 138 Colo. 343, 333 P.2d 1043 (1958).

Automatic cessation of diversions by junior appropriator not contemplated. Sections 37-92-501 and 37-92-502 do not contemplate automatic cessation of diversions by a junior appropriator in response to a river call. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

Division engineer evaluates each junior appropriator's diversion to determine material injury caused. The statutory plan in §§ 37-92-501 and 37-92-502 contemplates that the division engineer will evaluate each junior appropriator's diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

Except on streams in which the appropriations have not exceeded the constant supply, few instances arise in which the change of place of diversion of large quantities of water, for a long distance, can be made without substantial injury to juniors, and the utmost care and scrutiny should be exercised to guard against such injury. Shawcroft v. Terrace Irrigation Co., 138 Colo. 343, 333 P.2d 1043 (1958).

The inherent right to change the point of diversion includes not only the right to change without condition, if such change can be made without substantial injury to the vested rights of others, but also the right to change subject to conditions, if injury to rights of others may thereby be avoided, 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 effects; and, if impossible to make such terms and conditions, the application must be denied. The statute affirms that right. City of Colo. Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952); Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Where a trial court finds that if a change in the point of diversion of a water right be granted, the vested rights of others will be injured, it has a duty, under this section, to also find that such injury cannot be prevented by the imposition of terms and conditions. Means v. Pratt, 138 Colo. 214, 331 P.2d 805 (1958).

Where the trial court found that change of the point of diversion of petitioner's appropriation would result in some injury to junior appropriators, it was incumbent upon that court to devise a method whereby such junior rights could be fully compensated for injuries suffered, and if such relief could not be afforded, to deny the petition. DeHerrera v. Manassa Land & Irrigation Co., 151 Colo. 528, 379 P.2d 405 (1963).

One who asserts the right to a change in the place of diversion has the burden of proving that the change will not injuriously affect the vested rights of others, although this may involve the proof of a negative. New Cache La Poudre Irrigating Co. v. Water Supply & Storage Co., 49 Colo. 1, 111 P. 610 (1908); Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910); Farmers' High Line Canal & Reservoir Co. v. Wolff, 23 Colo. App. 570, 131 P. 291 (1913); Monte Vista Canal Co. v. Centennial Irrigating Ditch Co., 24 Colo. App. 496, 135 P. 981 (1913); Baca Ditch Co. v. Coulson, 70 Colo. 192, 198 P. 272 (1921); Hoehne Ditch Co. v. Martinez, 71 Colo. 428, 207 P. 859 (1922); San Luis Valley Irrigation Dist. v. Carr, 79 Colo. 340, 245 P. 705 (1926); Trinchera Ranch Co. v. Trinchera Irrigation Dist., 83 Colo. 451, 266 P. 204 (1928); In re Priority of Rights to Use of Water in Water Dist. No. 20, 92 Colo. 407, 21 P.2d 177 (1933); Farmers' Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 P.2d 756 (1933); Shawcroft v. Terrace Irrigation Co., 138 Colo. 343, 333 P.2d 1043 (1958).

In a proceeding by a water user to change the point of diversion and where protests have been made, the burden rests upon the petitioner to meet the grounds of injury asserted by the protestants and produce evidence from which the court will be satisfied that injury to protestants can be avoided by the imposition of terms. Terliamis v. Cerise, 133 Colo. 329, 295 P.2d 224 (1956).

Burden of proof on petitioner in a proceeding for change of point of diversion requires him to meet only the grounds of injury to protestants asserted by them. City of Colo. Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952).

Actual impairment of irreparable injury to the rights of the junior appropriator must be demonstrated by evidential facts and not by potentialities. Cline v. McDowell, 132 Colo. 37, 284 P.2d 1056 (1955).

At his own point of diversion on a natural watercourse, each diverter must establish some

reasonable means of effectuating his diversion; he is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. City of Colo. Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961).

Priority of appropriation does not give a right to an inefficient means of diversion. City of Colo. Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961).

Once it is established that injury will result from change in the point of diversion, then the burden is upon petitioner to present a plan or program whereby junior appropriators would be fully compensated for their injuries. DeHerrera v. Manassa Land & Irrigation Co., 151 Colo. 528, 379 P.2d 405 (1963).

Presentation of a plan for the protection of the vested rights of junior appropriators. Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

Where petitioner fails to show its proposed change with particularity, the trial court is not in a position to determine whether junior rights would be prejudiced, because the court has no gauge before it upon which to form a basis for a judgment; theorization with reference to hypothetical conditions could not serve to protect the rights of junior appropriators. Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

The anti-speculation requirement of § 37-92-103 (3)(a) applies in a change proceeding; accordingly, the applicant must show a legally vested interest in the place to be served by the change of use and a specific plan and intent to use the water for specific purposes. The proposed change, to any of over 50 proposed uses in any of 28 counties without a single agreement with any end user of the water, was properly dismissed. High Plains A & M, Inc. v. S.E. Colo. Water Conservancy Dist., 120 P.3d 710 (Colo. 2005); ISG, LLC v. Arkansas Valley Ditch Ass'n, 120 P.3d 724 (Colo. 2005).

Changes of points of return of waste water are not governed by the same rules as changes of points of diversion. Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

A decree giving a reservoir company a free hand to move its priorities, junior and senior, from one reservoir to another, without regard to the rights of junior appropriators, violates the basic and fundamental requirement of this section that a new point of diversion be specifically set forth. Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

The moving of priorities in a system from one reservoir to another resulting in less flow downstream, could result in prejudice to junior appropriators by delay in overflow and time of use. Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

An order permitting a change in point of diversion does not, and cannot, in any way, enlarge the right of its recipient by conferring upon him the power to divert a greater quantity of water from the stream than he theretofore took, nor permit him to use it for a longer length of time than he was previously entitled to. Larimer County Canal No. 2 Irrigating Co. v. Poudre Valley Reservoir Co., 23 Colo. App. 249, 129 P. 248 (1913).

Where a decree is sought for change of point of diversion, it is not a question of whether the amount of water decreed was adequate, but whether it was excessive. Green v. Chaffee Ditch Co, 150 Colo. 91, 371 P.2d 775 (1962).

Diversions limited to those sufficient for purposes for which water appropriation made. There is read into every decree awarding priorities in water rights 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. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Water right owner has no right to waste water. The owner of a water right has no right as against a junior appropriator to waste water, i.e., to divert more than can be used beneficially. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981).

Water right owner may not extend time of diversion. The owner of a water right may not extend the time of diversion to enable him to irrigate lands in addition to those for which the water was appropriated. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); Orr v. Arapahoe Water & Sanitation District, 753 P.2d 1217 (Colo. 1988).

Doctrine that it is entirely within the right of an appropriator of water to enlarge upon his use, even on behalf of an original appropriator, may be applied only to the extent of use contemplated at the time of appropriation. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Where a decree is sought for change of point of diversion or use, the right is strictly limited to the extent of former actual usage. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Historical use limits right to change point of diversion. The right to change a point of diversion or place of use is limited in quantity and time by historical use. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Right to change point of diversion is limited in quantity by historical use. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981); Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Where an applicant sought to change the point of diversion of a well but failed to separately quantify the historic use of the well from the historic use of a surface water right on the same land, the applicant failed to carry his burden of proving the feasibility of changing the point of diversion without injury to other vested users. State Eng'r v. Bradley, 53 P.3d 1165 (Colo. 2002).

Diversions for undecreed uses cannot be the basis for a quantification of historical use for purposes of a change application, regardless of whether the water commissioner knew of the diversions or failed to curtail them. Santa Fe Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999).

"Historical use" defined. "Historical use", as a limitation on the right to change a point of diversion, is considered to be an application of the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Res judicata does not prohibit the water court from considering and determining the actual extent of historical use at the original decreed points of diversion in order to properly determine the nature and extent of the applicants' water rights under an earlier decree which modified the points of diversion from ditches to wells and which contained the implied limitation that the quantity of water to be used at the new points of diversion would not exceed the amount of water decreed to and historically used at the original decreed points of diversion. Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

But claim preclusion does not prevent the water court from determining historical consumptive use when such has not been determined in a previous proceeding. Farmers High Line Canal and Reservoir Co. v. City of Golden, 975 P.2d 189 (Colo. 1999).

A senior appropriator is not entitled to enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion. Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

Additional limitations in mutual ditch company bylaw enforceable. A mutual ditch company bylaw

imposing reasonable limitations, additional to those contained in this section, upon the right of a stockholder to obtain a change in the point of diversion, can be enforced. Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501 (Colo. 1982); Matter of Water Rights of Ft. Lyon Canal, 762 P.2d 1375 (Colo. 1988).

An application for change of point of diversion of water having been judicially determined, may not again be litigated as to its injurious effects on the rights of others. City of Colo. Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952).

Decree allowing a change in the point of diversion was reviewable by writ of error. Ft. Collins Mining & Elevator Co. v. Larimer & Weld Irrigation Co., 58 Colo. 183, 143 P. 1091 (1914).

A statutory proceeding for change of point of diversion has a limited scope and an extraneous issue cannot be litigated therein. Otto Lumber Co. v. Water Supply & Storage Co., 106 Colo. 546, 104 P.2d 605 (1940).

The construction of a channel within a stream bed to conduct the water to a headgate did not require any proceeding under the statute to authorize the change of point of diversion, and did not constitute a change of point of diversion, because plaintiffs' right to divert and use the water from the stream at the headgate of their ditch included the right to make and change the necessary dams, channels, or other diversion works within the stream bed which might be necessary to enable them to continue the diversion of water at their headgate, provided no additional burden was made upon defendants' lands thereby, and no claim is here asserted of any additional burden by virtue of the channel excavated in the stream bed, and, in any event, such claim would not be valid here, for the reason that defendants with knowledge permitted plaintiffs to construct the channel without objection. Downing v. Copeland, 126 Colo. 373, 249 P.2d 539 (1952).

In order to use an alternate point of diversion to make absolute a conditional water right at another location, there must first be a decree establishing the new source as an alternate point of diversion. This process provides notice to interested persons of a proposed new diversion point and allows for the establishment of terms and conditions that will protect other water rights. Northern Colo. Water v. Three Peaks Water, 859 P.2d 836 (Colo. 1993).

IV. FEDERAL RESERVED WATER RIGHTS.

Federal rights defined. The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

Federal rights to be determined by Colorado law. Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

Federal reserved water rights take a priority equivalent to the date of the reservation. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

For extent of federal reserved water rights on different categories of public lands, see United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

V. RECREATIONAL IN-CHANNEL DIVERSIONS.

A beneficial use of water is defined to include recreational in-channel diversions, but only those recreational in-channel diversions that are limited to the minimum stream flow for a reasonable recreation experience in and on the water. The "minimum stream flow" means the least necessary stream flow to accomplish a given reasonable recreation experience in and on the water. The definition of a "reasonable recreation experience in and on the water" is ambiguous. Accordingly, the water court first

must make a case-by-case determination of whether the appropriation sought by the applicant, viewed objectively, is for a reasonable recreation experience in and on the water and whether the requested flow amounts are reasonable on the particular stream. The water court then must determine the minimum amount of stream flow necessary to accomplish that intended recreation experience; an applicant is not entitled to a decree merely upon a showing of water availability. Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585 (Colo. 2005).

Only the findings of fact of the Colorado water conservation board regarding an application for a recreational in-channel diversion are to be given presumptive effect, not the board's recommendation regarding whether the application ought to be granted, granted with conditions, or denied. The presumption creates a burden of production, which can be rebutted by the introduction of evidence. The water court then must weigh the preponderance of the evidence in evaluating the statutory factors. Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585 (Colo. 2005).