

**Summary of Colorado Supreme Court Water Case Decisions
September, 2006 – October, 2007**

1) **Natural Energy Resources Company v. Upper Gunnison River Water Conservancy District, 142 P.3d 1265 (Colo. 2006), September 11, 2006**

The Supreme Court affirmed the water court's dismissal of Natural Energy Resources Company's ("NECO's") 2004 application seeking a finding of reasonable diligence in a conditional water rights decree. NECO sought to satisfy its ongoing diligence requirement under the "can and will" statutes for NECO's conditional water rights. *See* §§ 37-92-103(6) and 37-92-301(4), C.R.S. NECO's 1984 original decree contemplated using Taylor Park Reservoir as a forebay and afterbay for the proposed higher-elevation Union Park Reservoir for the production of hydroelectric power and water storage. In two subsequent applications filed in 1986 and 1988, and denied by the water court, NECO had sought to expand the capacity of the Union Park Reservoir and obtain numerous other rights and decreed uses for the proposed Union Park Project, which was intended to transfer water from the Gunnison River Basin to Arapahoe County. The Supreme Court affirmed the water court's denial of these applications in *Arapahoe II*. *See Bd. of County Comm'rs of County of Arapahoe v. Crystal Creek Homeowners' Assoc.*, 14 P.3d 325 (Colo. 2000). In these two cases, the water court found that NECO's proposed use was "inimical" to the use of Taylor Park Reservoir by the United States and the Uncompaghre Valley Water Users Association and would constitute a "major operational change" requiring government permits. The water court also found NECO had failed to prove it would secure the necessary permits for either the use of Taylor Park Reservoir as a forebay or an afterbay or for the installation of a pumping plant at Taylor Park Reservoir for its proposed hydroelectric installation. In the 2004 due diligence case, because such uses of the Taylor Park Reservoir were a necessary feature of the original conditional decree, NECO needed to show it could secure the necessary permits in order to satisfy the "can and will" test. However, because the likelihood of NECO securing the necessary permits had been raised and finally adjudicated in the 1986 and 1988 cases, the judicial principal of issue preclusion barred NECO from relitigating the issue in the 2004 case. Accordingly, the Supreme Court affirmed the water court's dismissal of NECO's application for a finding of due diligence, and the water court's cancellation of NECO's conditional water rights.

2) **Concering the Application for Water Rights of Central Colorado Water Conservancy District, 147 P.3d 9 (Colo. 2006), November 6, 2006**

Central filed two applications to change the use of a portion of the 1882 Jones Ditch Water Right in Water Division 1. The water court was required to determine: (1) the lawful historic use of the Jones Ditch Water Right under the 1882 appropriation, and (2) Central's share of the consumptive use of the water right. Although, by 1920, the Jones Ditch irrigated at least 700 acres, the water court found that the water right was limited to the volume of water sufficient to irrigate approximately 344 acres, which the water court determined was the amount of acreage contemplated at the time of the 1882 decree. The expanded irrigation from 1882 to 1920 could not be considered part of the

Jones Ditch's lawful historic use. The Supreme Court affirmed the water court's determination that the 1882 decree adjudicated an absolute water right that is impliedly limited to the amount of water necessary to irrigate the acreage originally irrigated by the appropriator in 1882. The Court rejected Central's argument that the Opposers were barred under the laches doctrine from challenging the lawful historic use of the Jones Ditch Water Right. The Court also reversed the water court's decision that because a prior 1992 case changing a portion of the Jones Ditch Water Right relied on a parcel-by-parcel analysis of historic consumptive use, the doctrine of claim preclusion prevented the water court from conducting a ditch-wide analysis of consumptive use under the Jones Ditch. Under the parcel-by-parcel analysis, the water court had awarded Central 66.65 acre-feet of annual consumptive use for the 37 acres owned by Central. However, preliminary evidence of a ditch-wide analysis had indicated that only 361 acre feet of consumptive use was available under all of Central's shares in the Jones Ditch Company and Central had already been awarded 401 acre feet under its previously changed shares. Thus, it appeared that no consumptive use may remain for Central's remaining 77 shares in the present change case. The Supreme Court reversed the water court's award of 66.65 acre-feet because the water court failed to consider the results of a ditch-wide analysis. Because the water court had previously indicated that additional fact-finding was necessary before it could conduct a ditch-wide analysis, the Supreme Court remanded the case to the water court for further proceedings as to whether Central should be awarded any additional consumptive use credit.

3) **Gallegos v. Colorado Ground Water Commission, 147 P.3d 20 (Colo. 2006), November 6, 2006**

In this case the Supreme Court clarified the jurisdiction of the Colorado Ground Water Commission with respect to surface water rights within a designated ground water basin. Appellants, the Gallegos family, brought an action before the Commission claiming that their senior surface water rights were being injured by certain water diversions and well pumping within the Basin. The Commission held that the Gallegos were barred by res judicata from calling out designated basin wells, because the Gallegos family or its predecessors-in-interest had the opportunity during the designation hearings to object to the designation of the Basin. The Gallegos appealed to the District Court. The District Court held that the the Gallegos' claims were not barred by res judicata. The District Court held that the Commission has jurisdiction over surface water rights when designated ground water impacts such rights. The District Court held that in such circumstances, the Commission must administer junior designated ground water wells for the benefit of senior surface water rights in accordance with the Groundwater Management Act and the modified prior appropriation system.

The Supreme Court reversed the District Court's decision in part. The Supreme Court held that the Groundwater Commission has limited jurisdiction over surface water rights within a designated groundwater basin, only for the purpose of altering the boundaries of a designated ground water basin. A surface water rights holder who believes that pumping within a designated ground water basin is causing injury to those surface rights has the burden of proving to the Commission that the ground water alleged

to cause the injury is hydrologically connected to the stream and has been improperly included in the designated Basin. The evidence presented on connectivity and injury must be different from that which was before the Commission when the Basin was originally designated. Upon such a showing, the Commission is required to alter the Basin's boundaries to exclude the improperly designated ground water. Once the ground water is no longer designated, jurisdiction over that water rests in the water courts and the State Engineer.

4) **Cherokee Metropolitan District v. Simpson, 148 P.3d 142 (Colo. 2006), November 27, 2006**

The Supreme Court affirmed the water court's interpretation of a stipulated decree provision contained in Cherokee's conditional water rights diligence decree. The contested provision concerned Cherokee's use of two sets of wells in the Upper Black Squirrel Creek Designated Ground Water Basin, known as Cherokee Wells 1-8 in the northern part of the basin and the Sweetwater Wells in the southern part of the basin. The diligence decree allows water from the Sweetwater Wells to be utilized within and outside of the designated basin, while Cherokee Wells 1-8 are limited to uses within the basin that discharge any unconsumed water back into the designated basin. Two exceptions to the in-basin limitation on Wells 1-8 allow water from these wells to be utilized outside the basin for "emergency and backup purposes" that "include the inability to get sufficient supply from Cherokee owned Sweetwater wells." The water court found that the stipulated provision providing for these exceptions was ambiguous and heard extrinsic evidence as to its intent. The water construed the provision to provide that Wells 1-8 may be used to supply water outside of the basin only for emergency and backup purposes when its Sweetwater Wells are unable to produce a sufficient supply of water to meet the commitments that existed at the time the parties entered into the stipulation. The water court found that, at the time the parties entered the stipulation, Cherokee's commitments outside of the basin totaled no more than 2,683 acre feet, and at the time of trial the Sweetwater Wells were capable of producing 3,407 acre feet. After the stipulation, Cherokee undertook a series of commitments to supply water to new developments within its boundaries but outside the designated basin, which increased its out-of-basin commitments to 4,944.02 acre feet. Cherokee sought to use the existing Wells 1-8 to meet some of its out-of-basin commitments rather than develop three more Sweetwater Wells. However, the water court found that the Sweetwater Wells developed at the time of trial already provided water sufficient to meet Cherokee's out-of-basin commitments that existed at the time of the stipulation. Accordingly, Wells 1-8 could not be used as a backup source for Cherokee's out-of-basin commitments.

5) **Tonko v. Mallow, 154 P.3d 397 (Colo. 2007), March 19, 2007**

In this minor decision concerning an appeal from Water Division 2, the Supreme Court held that the Water Court erred in dismissing on the grounds of issue preclusion the Appellants' application for a change in water right. The Appellants, Johnny and Donna Tonko, had initially brought a condemnation proceeding in district court seeking a ditch right-of-way. The district court held that it lacked subject matter jurisdiction to

determine whether the Tonkos had or could obtain an adjudicated water right, a requisite to obtaining a ditch right-of-way. The Tonkos initiated an action in Water Court seeking confirmation of their water use rights. The Water Court dismissed the application with prejudice, ruling that the Tonkos had the opportunity to litigate their water use rights in district court and had lost. The Supreme Court reversed, finding that the district court properly ruled that it lacked subject matter jurisdiction to adjudicate the Tonkos' water use rights; thus, the Water Court erred in finding that the Tonkos had a full and fair opportunity to litigate their claimed entitlement to a water use right.

This decision is relatively straightforward. However, in reaching its decision, the Court does provide a useful overview of Colorado law pertaining to ditch rights-of-way, issue preclusion, and changes of water rights. Most notably, the court stresses that "water use at a place other than that anticipated by the original decree can be used to establish historic use in a change proceeding only if the change is inconsequential and there is no question of enlargement or abandonment."

6) **Spring Creek Ranchers Ass'n v. McNichols, 165 P.3d 244 (Colo. 2007), June 25, 2007**

The Supreme Court affirmed Senior Judge Ossola's decision in Water Division 5 to award attorney fees to Spring Creek Ranchers Association and to allow Judge Petre to recuse himself from hearing this case. The Appellants challenged Judge Petre's recusal because he had not provided an explanation for the recusal on the record. The Supreme Court presumed that Judge Petre had recused himself because he had been the water referee who had made the order the McNichols and another homeowner were protesting. However, the Court found that there is no requirement that a judge disclose on the record the basis of the judge's disqualification and seek remittal of the disqualification. The Court also found that Judge Petre had not abused his discretion in recusing himself. As to attorney fees, the Court affirmed Judge Ossola's finding that the Appellants had been stubbornly litigious by continuing to relitigate a settled issue against the water court's warning. The water court had found that Appellants' repetitive arguments lacked substantial justification and lengthened the water court proceeding.

7) **The Fort Lyon Canal Company v. High Plains A&M, LLC, 167 P.3d 726 (Colo. 2007), September 10, 2007**

The Fort Lyon Canal Company had sought an order from the water court declaring certain of its stockholders liable, by authority of the company's bylaws, for fees and costs the company incurred as an objector to the stockholders' earlier application for a change of water rights. The Supreme Court affirmed the water court's decision that the unambiguous language of the company's bylaws extends liability to stockholders seeking a change of water right only for the legal and engineering expenses incurred by the company's board in determining whether and upon what conditions to approve the stockholders' requested changes. The by-laws did not extend liability to the stockholders for the board's additional costs and fees incurred in defending the board's decision in subsequent legal proceedings.

8) **Upper Eagle Regional Water Authority v. Simpson, 167 P.3d 729 (Colo. 2007), September 10, 2007**

The Supreme Court affirmed the water court's approval of the Upper Eagle Regional Water Authority's augmentation plan for the replacement of 10.8 acre-feet of the Authority's depletions by exchange through releases from Wolford and Ruedi Reservoirs. The Court decided two issues in this case.

First, the Court affirmed the water court's approval of the Authority's use of a table of estimated monthly depletion rates to calculate out-of-priority depletions in six of the Authority's service areas. The CWCB and the State and Division Engineers opposed the use of the table because it was based on 20-year-old predictions of the Authority's future mix of uses, and the Authority did not show its actual mix of uses occurring today during the irrigation season. The State argued that the Authority had failed to provide strict proof of its actual mix of uses and depletions occurring today, and that the Authority was required to show such uses and depletions in order to satisfy their prima facie burden of proof. The Court disagreed and found that the pronouncement of the Authority's expert in the absence of evidence that the table does not accurately reflect the Authority's actual mix of use or actual depletion rates was sufficient to satisfy the Authority's prima facie burden of proof. The Authority's expert pronounced that the table accurately replaces current depletions in time and amount, but "no other evidence was put forth to verify that the table accurately reflects depletion rates for outdoor irrigation, and more specifically, for sprinkler use." Despite the Court's "significant reservations about the Authority's use of the projected depletion table, which was never premised upon an actual mix of use or actual depletion rates but rather dated estimates of those figures," the Court affirmed the water court's approval of the table to calculate the Authority's replacement obligations. In doing so, the Court did not address the meaning of the term "strict proof." The Court also found that more definite answers regarding the Authority's use of the table "may hinge on the water court's retained jurisdiction, which will operate as a test period for the water court's findings by allowing for reconsideration of the depletion table if actual operation of the plan results in injury."

Second, the Court found that claim preclusion did not bar the CWCB from challenging the Authority's reliance on the depletion table in this case because, in a prior case to which the CWCB was party, the CWCB had failed to oppose use of the depletion table to calculate replacement obligations in a previous case. The Court found that the table at issue consisted of "dated estimates as to future depletion rates and potential mix of uses – hardly the stuff upon which to bar new information or data in later augmentation adjudications." The Court also found that "[j]ust as differences from one change of point of diversion action to another render claim preclusion inappropriate, so to do small differences between augmentation plans prevent operation of claim preclusion." "As each augmentation case, like each change case, must rest on circumstances as they are found to exist at the time that change is requested, res judicata cannot preclude consideration of the individual circumstances of each plan."

9) **Pagosa Area Water and Sanitation District and San Juan River Conservancy District v. Trout Unlimited**, --- P.3d ---, 2007 WL 3053321 (Colo. 2007), October 22, 2007

The Colorado Supreme Court clarified issues relating to the application of the anti-speculation doctrine to governmental water supply agencies. Applicants, the Pagosa Area Water and Sanitation District and the San Juan River Water Conservancy District (the “Districts”), sought a conditional storage water right for a 29,000 acre-feet of water, the right to fill and refill the reservoir continuously to achieve a total annual amount of stored water of 64,000 acre-feet. The Districts also sought an 80 cfs direct flow right independent of the storage right, and the right to use and reuse all of its water.

The Water Court granted the Districts’ application. The Supreme Court reversed the Water Court’s judgment. The Supreme Court held that the Water Court had failed to make sufficient findings of fact to establish that the District’s proposed appropriation is non-speculative or that it satisfies the “can and will” test, and remanded the matter back to the Water Court to make such findings. In reaching its decision, the Supreme Court held that a governmental agency must satisfy three elements to demonstrate an appropriation is non-speculative. First, the governmental agency must demonstrate that it has relied upon a reasonable water supply planning period. The Court noted that “although [a] fifty year planning period . . . is not a fixed upper limit . . . the water court should closely scrutinize a governmental agency’s claim for a planning period that exceeds fifty years.” Opinion, at 27.

Second, the governmental agency must demonstrate that its claimed appropriation is consistent with substantiated population projections based on a normal rate of growth for that period. The Supreme Court emphasized that such projects cannot be based on mere conjectural projections: “Municipalities must do more than represent to the water court that if they had water, they would be able to grow.” Opinion at 21, *citing City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 39 n.25 (Colo. 1996).

Third, the governmental agency must demonstrate that the appropriation claims an amount of water reasonably necessary to serve the projected population for the claimed planning period. In determining the amount of water necessary to meet population needs, the Water Court should make findings concerning future land use mixes and per capita water usage requirements, taking into account implementation of water conservation measures. In addition, the Water Court must take into account the effect of reuse rights. The Supreme Court noted that “the effect of decreeing reuse rights is to greatly increase an entity’s usable water supply.” Opinion, at 31. The Court also seemed to disfavor granting simple direct diversion rights without any volumetric limitation, noting that it had previously approved the imposition of volumetric limitations in *Thornton v. Bijou*.

Finally, the governmental agency must demonstrate under the “can and will” test that it has the ability to construct the facilities necessary for the appropriation and perfect the use of the water claimed under the appropriation.

In addition to setting forth the test for a non-speculative appropriation by a governmental agency, the Supreme Court made several other comments or observations that bear repeating. Most notably, the Supreme Court indicated that appropriations made by a governmental agency for sale or use outside of the agency's boundaries are "bound by the anti-speculation standards applicable to private appropriators." In addition, the court noted that a desire to appropriate water before such water is tied up by virtue of an instream flow appropriation, a recreational in-channel diversion, or a federal permit condition is not a valid consideration for evaluating water availability.

There were two concurring opinions to the Supreme Court's decision. Two Justices (Justices Eid and Rice) agreed that the Water Court had failed to make sufficient findings to support granting the Districts' appropriation, but disagreed with the Supreme Court's imposition of a "narrow" construction on the governmental agency exception to the anti-speculation doctrine. In particular, these Justices felt that imposition of a "de facto" fifty year planning limit was inappropriate. One Justice (Justice Coats) agreed that the Supreme Court should reverse the Water Court's decision, but argued that the decision should be reversed for failing to satisfy the "can and will" statute. Justice Coats argued that nothing in the anti-speculation exception for governmental agencies relieved such agencies from the "can and will" requirement that they show they could complete a proposed project within a reasonable time in light of the legal, engineering and economic circumstances of the project.

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