

# [***ARTICLE UPDATE: SECOND UPDATE TO COLORADO WATER LAW: AN HISTORICAL OVERVIEW***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42Y0-72B0-00SW-501C-00000-00&context=1516831)

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**Text**

**[\*111]**

To provide our readers with the most up-to-date water law information, the editors periodically include updates of works previously published in the Water Law Review. The following is the second update to ***Colorado*** Water Law: An Historical Overview, Appendix - ***Colorado*** Water Law: A Synopsis of Statutes and Case Law, [[1]](#footnote-2)1 selected by The Honorable Gregory J. Hobbs, Jr.

Farmers High Line Canal & Reservoir ***Co***. v. City of Golden

"Prior to the modern trend of implementing express volumetric limitations in decrees, most water rights were quantified by a two-part measurement. First, a decree contained a flow-rate of water, in c.f.s., which the owner was entitled to divert from the stream. Second, a decree stated the use to which that diverted water could be put, such as irrigation of crops or municipal uses."

[*Farmers High Line Canal & Reservoir* ***Co****. v. City of Golden, 975 P.2d 189, 197 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citation omitted).

"From the late 1800s to the early 1970s, courts primarily employed one standard method in order to protect the vested rights of juniors in change proceedings. Under this method, the court would order the petitioner to abandon a portion of his or her originally decreed flow right back to the stream. This flow abandonment was then incorporated into the express terms of the change decree."

[*Id. at 197-98*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citation omitted).

"With the advent of improved engineering techniques, courts began to utilize another approach to prevent injury to juniors in change proceedings. Under the modern method, courts now translate **[\*112]** the petitioner's historical consumptive use into a volumetric limitation stated in acre-feet. Courts then incorporate the volume limit into the express terms of the decree. Therefore, most modern change decrees impose an acre-foot limit on the amount of water an appropriator may consume in the average year.

This shift in the methods employed to protect juniors in change proceedings accounts for the difference between Golden's decrees, granted in the early 1960s, and Con Mutual's change decree, granted in 1993. Whereas the 60s decrees only required Golden to abandon a portion of its flow entitlement in order to protect junior users, Con Mutual's decree imposed a volumetric limit on the amount of Priority 12 water it is entitled to consume."

[*Id. at 198*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citations omitted).

"Appellants argue that their claim requesting the addition of volumetric limitations to the 60s decrees is not precluded because, as a matter of law, the 60s decrees contain implied volumetric limitations. In support of this contention, the appellants urge us to extend the rule first announced in Orr, to the facts of the instant case. However, as we decline to extend the rule in Orr, we find the appellants' claim that volumetric limitations should be added to the 60s decrees is precluded."

[*Id. at 199-200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citation omitted).

"An examination of Orr and Midway Ranches reveals the proper standard for our review. In each individual case, we must review the record of the prior proceeding in order to determine whether historical consumptive use was calculated and relied upon in the formation of the earlier decree. If so, we will not modify the resulting decree by implying volumetric limitations into its terms. The implied volumetric limitation doctrine in Orr was developed in order to prevent injury to juniors when a prior change decree did not address or contemplate the question of historical consumptive use. This doctrine was not developed in order to provide juniors with a method to insert volumetric limitations where they were previously absent, even though historical consumptive use formed the basis for the earlier decree."

[*Id. at 201*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citations omitted).

"We find that the doctrine of issue preclusion is unavailable to the appellants in this case. Appellants contend that Golden is precluded from asserting that the 60s decrees contain no volumetric limitations because … the 1993 Con Mutual proceedings cannot accomplish that which is barred by virtue of claim preclusion."

Id.

"If we were to allow the 60s decrees to be reopened for the addition of volumetric limitations, then the appellants' argument that **[\*113]** the 1993 litigation collaterally establishes the appropriate acre-footage terms of these decrees would be relevant. However, as we will not reopen the 60s decrees in order to imply volumetric limitations, the appellants' reliance on issue preclusion is misplaced."

Id.

"While it is true that a decree for change in use may not again be collaterally attacked insofar as previously litigated injurious effects are concerned, this does not bar junior appropriators from bringing later suits regarding new injuries that were not previously litigated and which arose after the change was decreed."

[*Id. at 202*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (citations omitted).

"As Golden's municipal use had not even been decreed at the time of the 60s proceedings, it is obvious that the appellants could not have brought their claims of enlarged use based on changing municipal use patterns and increased lawn irrigation. Furthermore, the appellants' second and third claims of enlarged use in the instant case are sustained by different evidence than that presented in the 60s proceedings. As the water court is not precluded from considering new claims of injury based on allegations of changed circumstances, the appellants' allegations of enlarged use in the instant case are permissible."

[*Id. at 203.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831)

"Therefore, in the instant case, Golden may not enlarge the use of its decreed rights by changing its pattern of municipal use or by using its water to irrigate lawn acreage which was not anticipated at the time its change in use decree was entered. As it would contradict the most basic principles governing all water decrees were we to allow a party to enlarge its use in such a manner, we must reject Golden's assertion that the appellants' second and third enlarged use claims are precluded."

Id.

Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. Chevron Shale Oil ***Co***.

"The water court recognized that, in light of the fact that the production of oil from shale is not currently economically feasible, Chevron's efforts, although minimal, were sufficient to demonstrate a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner. We defer to those findings. In addition, we reject the Subdistrict's contention that Chevron was required to additionally prove that it "can and will' use the water rights."

[*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Chevron Shale Oil* ***Co****., 986 P.2d 918, 923 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831)

"We agree with Chevron that the water court properly considered the current economic feasibility of the shale oil project. The plain language of section 37-92-301(4)(c) recognizes that current economic conditions beyond the control of the applicant might adversely affect efforts to perfect the water right. This provision prohibits courts from using such a circumstance to deny a diligence application when there is other evidence of reasonable diligence. As a result, when current economic conditions beyond the control of an applicant slow progress towards the perfection of a conditional water right, it is not improper for a court to consider the effect of the adverse economic conditions."

[*Id. at 923-24.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831)

"In this case, there is undisputed evidence that Chevron exercised reasonable diligence despite the adverse economic conditions in the shale oil industry. As noted, supra, the water court found that Chevron had planned for a diversion facility, planned a dam on Roan Creek, planned for pipeline facilities, prepared environmental baseline studies, prepared a detailed master planning document for Chevron's Parachute Creek Unit, and had participated in miscellaneous activities related to the conditional water rights such as litigation, research projects, and studies. Therefore, we hold that it was not improper for the water court to consider the economic conditions of the shale oil industry when it made its reasonable diligence determination, and we reject the Subdistrict's contention."

[*Id. at 924.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831)

Park County Sportsmen's Ranch, L.L.P. v. Bargas

"The recommendations of the Getches and Bishop Committees formed the basis of Senate Bill 5, which the General Assembly eventually enacted with a nontributary definition as set out in section 37-90-103(10.5)… . The senators were aware that different hydrological formations in different areas of the state might require distinct administration… . Elliott and Simpson's statements corroborate what appears clear from all of the Senate hearings: that the designation of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers in subsection (10.5) was designed to modify the definition of nontributary for purposes of the Denver Basin only. The senators understood that this modification would result in the loss of approximately 40,000 acre feet of ground water then discharging from the four enumerated aquifers, because the hydrostatic head of those aquifers would be disregarded in determining whether they were nontributary. However, they also understood that Senate Bill 5 accounted for this loss by requiring augmentation from the four aquifers back into the Denver Basin to an extent that would sufficiently **[\*115]** offset the loss of the hydrostatic overflow, which in the Denver Basin formations of the four enumerated aquifers was approximately 40,000 acre feet per year. There is no indication anywhere in the legislative record that any senators were aware of the existence of the South Park formation of the Laramie-Fox Hills aquifer. Moreover, they had no knowledge concerning the amount of hydrostatic overflow occurring in that formation or the amount of augmentation that would be necessary to avoid injury to senior surface water rights in proximity to that formation."

[*Park County Sportsmen's Ranch, L.L.P. v. Bargas, 986 P.2d 262, 271-72 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XDB-1PH0-0039-404C-00000-00&context=1516831)

"Mr. Harrison also explained the augmentation requirements of Senate Bill 5 for nontributary and "not nontributary" wells. Like the definitional subsection at (10.5), the augmentation provisions at sections 37-90-137(9)(b) and (c) referred only to "the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers.' They made no express mention of the Denver Basin. After detailing the rules for augmentation, Mr. Harrison told the representatives: "Again let me put this overall perspective on it. These specific rules apply only to the Denver Basin formations.'"

[*Id. at 272-73.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XDB-1PH0-0039-404C-00000-00&context=1516831)

"Thus, [Park County Sportsmen's Ranch] is entitled to pursue water rights to the ground water beneath its lands in South Park pursuant to the doctrine of prior appropriation in accordance with the Water Right Determination and Administration Act of 1969, but, to the extent that it makes out-of-priority diversions, it must avoid material injurious depletions to senior surface rights."

[*Id. at 275.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XDB-1PH0-0039-404C-00000-00&context=1516831)

Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. OXY USA, Inc.

"The very nature of a conditional right suggests that the "can and will' test applies until the right matures into an absolute decree. A conditional water right "encourages development of water resources by allowing the applicant to complete financing, engineering, and construction with the certainty that if its development plan succeeds, it will be able to obtain an absolute water right.' At each successive stage of the project, parties must appear before the court to demonstrate sufficient work to prove that the applicant is moving toward completion of the project. Unless the applicant makes this showing, the conditional right is speculative and violates the anti-speculation doctrine. In this respect, the anti-speculation doctrine and the "can and will' requirement are closely related, although the "can and will' test is slightly more stringent.

Recently in Chevron, we stated that the holder of a conditional **[\*116]** water right was not required to meet the "can and will' test in addition to proving reasonable diligence. However, in that case, the court already had determined that Chevron sufficiently demonstrated "a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner.' Under the facts of that case, that conclusion by the water court was sufficient to satisfy both the "can and will' standard and the reasonable diligence standard.

In general, the "can and will' test requires an applicant to establish "a substantial probability that this intended appropriation can and will reach fruition… . "Proof of such a substantial probability involves use of current information and necessarily imperfect predictions of future events and conditions.' An analysis of current economic conditions beyond the control of the applicant is a part of the "can and will' test.

We perceive no error in the water court's ruling either as to the statement of the law or the application of that law to the facts. The water court concluded that the oil shale project is technically feasible given current technology - or, in other words, that OXY "can' complete the project. The court found that OXY "will' complete the project when the current economic conditions facing the oil shale industry no longer exist. As we noted in Chevron, the General Assembly has made a policy decision that the infeasibility of development of oil shale under current economic conditions should not cause applicants like OXY to lose their conditional rights. We are bound by that policy determination."

[*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 708 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) (citations omitted).

"The Subdistrict correctly claims that hexennial diligence applications are subject to the anti-speculation doctrine and that section 37-92-301(4)(c) does not exempt conditional water rights from application of that doctrine. We declined to address this issue in Chevron because the parties did not properly raise the question before the water court.

The anti-speculation doctrine, which prohibits the acquisition of a conditional right without a vested interest or a specific plan to possess and control water for a specific beneficial use, clearly applies to the initial entry of a conditional decree.

The anti-speculation doctrine initially was intended to prohibit the entry of conditional decrees when the holder had nothing more than an intent to sell the right at an unknown time in the future for profit. However, because a conditional right, or some portion of that right, may become speculative over time, we now hold that just as the "can and will' test continues to apply in later diligence proceedings, so does the anti-speculation doctrine. Again, the nature of a conditional water right dictates this conclusion. If a water right initially clears the anti-speculation hurdle, yet later becomes speculative, then the project is not moving toward completion and beneficial use. "Speculation on the market, or sale expectancy, is wholly foreign to the principle of **[\*117]** keeping life in a proprietary right and is no excuse for failure to perform that which the law requires.'

In the instant case, the water court's finding that OXY demonstrated steady effort to complete the appropriation was sufficient on this point. OXY's investments, in this diligence proceeding and earlier proceedings, demonstrate that it intends to pursue the project to completion in the future. No questions were raised about the need for the full water rights once OXY actually begins to produce oil shale. The only issues that the Subdistrict asserts are those related to economic feasibility and timing of the project. Accordingly, the water court findings are sufficient to satisfy both the "can and will' standard and the anti-speculation requirements of ***Colorado*** law."

[*Id. at 708-09*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) (citations omitted).

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson

"Property rights in water are usufructuary; ownership of the resource itself remains in the public. Because beneficial use defines the genesis and maturation of every appropriative water right in this state, we have held that every decree includes an implied limitation that diversions cannot exceed that which can be used beneficially, and that the right to change a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use. Thus, the right to change a point of diversion, or type, place, or time of use, is limited in quantity by the appropriation's historic use.

These limitations advance the fundamental principles of ***Colorado*** and western water law that favor optimum use, efficient water management, and priority administration, and disfavor speculation and waste. Adherence to these principles serves to extend the benefit of the resource to as many water rights as there is water available for use in ***Colorado***.

Quantification of the amount of water beneficially consumed in the placement of water to the appropriator's use guards against rewarding wasteful practices or recognizing water claims that are not justified by the nature and extent of the appropriator's need."

[*Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54-55 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) (citations omitted).

"An undecreed change of use of a water right cannot provide the basis for quantifying the right for change purposes. The amount of consumable water available for transfer depends upon the historic beneficial consumptive use of the appropriation for its decreed purpose at its place of use. However, when historic use of a water right has been litigated and determined through a prior change proceeding, the court's judgment and decree control the matter, and **[\*118]** the historic use inquiry cannot be reopened, absent a further undecreed change or enlargement."

[*Id. at 59.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831)

"The question before the Water Court was whether an undecreed change of the two [***Colorado*** Fuel and Iron Company] water rights can be the basis for decreeing a change of those rights, without regard to the amount of water consumed beneficially for CF & I's original appropriation. The Water Court correctly refused to allow Santa Fe Ranches to substitute evidence of an undecreed change to irrigation use under the El Moro Ditch for evidence of the historic manufacturing usage of the two CF & I water rights for its facility."

Id.

Upper Black Squirrel Ground Water Management District v. Goss

"Because the [Ground Water] Commission has authority to supervise and control the exercise and administration of rights acquired to the use of designated ground water "except to the extent that similar authority is vested in ground water management districts pursuant to section 37-90-130(2),' 37-90-111(1)(a), the Management District has jurisdiction over controversies between appropriators regarding issues of injury to senior well withdrawals by junior well withdrawals. This authority includes the capacity "by summary order [to] prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawal of water from said well would cause unreasonable injury to prior appropriators,' authority which the Commission would have in the absence of the Management District."

[*Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss, 993 P.2d 1177, 1187 (****Colo.*** *2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YMN-C580-0039-431V-00000-00&context=1516831) (footnote omitted).

"We have deferred to the General Assembly's choice to allocate and enforce rights in ground water not part of the natural stream waters, in three subcategories: (1) designated ground water; (2) nontributary water outside of designated ground water basins; and (3) nontributary and not-nontributary Denver Basin bedrock water of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers."

[*Id. at 1182.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YMN-C580-0039-431V-00000-00&context=1516831)

Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. Getty Oil Exploration ***Co***.

"As we noted in OXY, the addition of this section [37-92-301(4)(c)] is evidence that "the General Assembly has made a policy **[\*119]** decision that the infeasibility of development of oil shale under current economic conditions should not cause applicants like OXY to lose their conditional rights.'"

[*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Getty Oil Exploration* ***Co****., 997 P.2d 557, 565 (****Colo.*** *2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) (citation omitted).

"The "can and will' test requires an applicant to establish "a substantial probability that this intended appropriation can and will reach fruition… . Proof of such a substantial probability involves the use of current information and necessarily imperfect predictions of future events and conditions.' As we noted in OXY, an analysis of current economic conditions beyond the control of the applicant is part of the "can and will' test.

We conclude that our resolution of this issue is governed by our decision in OXY. As in OXY, the water court in the instant case found that the oil shale project is technically feasible given current technology, thus demonstrating that Getty "can' complete the project. The water court also found that Getty "will go forward with the project when it becomes economically feasible.' Therefore, we hold that the water court properly interpreted and applied section 37-92-301(4)(c) to the facts of the instant case."

Id. (citation omitted).

Haystack Ranch, L.L.C. v. Fazzio

"The evidence of disrepair and unusable conditions of the ditches in this case and their non-repair is consistent with a finding of nonuse. Water rights are usufructuary in nature, and nonuse retires the use entitlement to the stream. When this occurs, the property rights adhering to the particular water right no longer exist. In Twin Lakes, we upheld a water court's decree of abandonment after looking to evidence showing the unusable state of the ditches in question. We stated, "Nonuse can be manifested by conditions inconsistent with active use of a water right. Such conditions include failure to make beneficial use of water [and] failure to repair or maintain diversion structures.'"

[*Haystack Ranch, L.L.C. v. Fazzio, 997 P.2d 548, 553 (****Colo.*** *2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4013-XP20-0039-413X-00000-00&context=1516831) (citations omitted).

Board of County Commissioners v. Crystal Creek Homeowners' Ass'n [[2]](#footnote-3)2

"In 1956, Congress passed the ***Colorado*** ***River*** Storage Project Act (CRSPA). See [*43 U.S.C. 620*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73SX-00000-00&context=1516831)-[*6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831)[*20*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T262-8T6X-730V-00000-00&context=1516831)o (1994). This act authorized the **[\*120]** construction of several dams in the Upper Basin, including Glen Canyon, Flaming Gorge, Navajo, and the Wayne N. Aspinall Unit (previously Curecanti). See [*id. 620.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4013-XP20-0039-413X-00000-00&context=1516831) Congress enacted CRSPA to assist the Upper Basin states in developing their allocation of water, producing hydropower, and ensuring Compact deliveries, among other uses."

[*Bd. of County Comm'rs v. Crystal Creek Homeowners' Ass'n, 14 P.3d 325, 333 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41PW-C4S0-0039-403H-00000-00&context=1516831)

"Congress approved the construction and operation of several dams and reservoirs, including the Aspinall Unit, for the nonexclusive purposes of regulating the flow of the ***Colorado*** ***River***, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the ***Colorado*** ***River*** Compact, the apportionments made to and among them in the ***Colorado*** ***River*** Compact and the Upper ***Colorado*** ***River*** Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes. Id. 620. Congress also stated that it did not intend for CRSPA to impede the Upper Basin's development of the water apportioned to it by the Compact. See id. 620b (1994).

We agree that the CRSPA reservoirs are part of a plan to allow ***Colorado*** to develop and preserve Compact apportionment. However, we find that the stored water provides ***Colorado*** with an ability to satisfy the Compact delivery mandates without eroding other rights decreed to beneficial use in the state. See H.R. Doc. No. 201, at 31 (1959). By banking CRSPA water for Compact deliveries and using the reservoirs for their other decreed purposes, ***Colorado*** continues development of its water entitlements. See id. The Aspinall Unit holds absolute decrees, and a right to use the water for the decreed purposes - including hydropower generation. Contrary to Arapahoe's assertion, we do not view those waters as being available for appropriation."

Id. at 334-35.

"Arapahoe contends that the Aspinall Unit's operations cannot preclude in-state water users from developing the Basin's water resources. The water court found that BUREC stored and released water from the Aspinall Unit not only for hydropower, but for other beneficial purposes, including flood control, fish and wildlife, recreation, irrigation, and domestic uses, under the appropriative rights for the Unit. Hence, in establishing the parameters for water availability based on our 1995 decision, the water court properly ordered the parties to respect the historic exercise of the Aspinall absolute decrees for all its beneficial uses."

Id. at 336.

**[\*121]** "Arapahoe argues that CRSPA section 620 reflects Congressional intent to subrogate the generation of hydropower to other CRSPA uses, and that section 620b provides that Congress did not intend for the authorized projects to interfere with the Upper Basin States' comprehensive development of their apportioned water. See [*43 U.S.C. 620,*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73SX-00000-00&context=1516831) 620b. Arapahoe posits that these provisions alone demand the subordination of hydropower generation to other beneficial uses in ***Colorado***."

Id.

"The United States has absolute decrees for the Aspinall Unit. The decrees permit power generation, and ***Colorado*** law defines power generation as a legitimate beneficial use. See [*37-95-103(2), 10 C.R.S.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831) (2000). Thus, senior water rights for hydropower generation may place a call on the ***river***. The General Assembly, and our 1995 decision in this case, did not set forth any different treatment for hydropower rights.

In the second trial, the water court gave effect to the state water rights for the Aspinall Unit in order of the decrees. We agree that federal preemption does not provide otherwise. The water court recognized that CRSPA authorized the construction of the Aspinall Unit only after economic justification of the project. See [*43 U.S.C. 620.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73SX-00000-00&context=1516831) Therefore, the water court directed the parties to model the conditions of the ***river***, including the historical use of water by Aspinall Unit for all of its decreed purposes, despite references in CRSPA that characterize hydropower generation as an incidental use. The historical use of the full decreed amount by the Aspinall Unit within ***Colorado*** for its decreed purposes prevents Arapahoe County from claiming any portion of the appropriated water for its project."

Id. at 337.

"[*43 U.S.C. 620f*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73T8-00000-00&context=1516831) (1994) … plainly states that CRSPA's hydroelectric powerplants shall not interfere with the other major compacts affecting the Upper Basin, nor the appropriation of water for domestic and agricultural purposes under state law.

In this case, the other major compacts impacting the Upper Basin are the ***Colorado*** ***River*** Compact and the Upper Basin Compact. Section 620h of CRSPA specifically demands that courts interpret CRSPA consistently with the ***Colorado*** ***River*** Compact and the Upper ***Colorado*** ***River*** Basin Compact. See [*43 U.S.C. 620h*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73TB-00000-00&context=1516831) (1994).

Article IV(c) of the ***Colorado*** ***River*** Compact provides that "the provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.' 37-61-101, art. IV(c), 10 C.R.S. (2000). This provision defers to ***Colorado***'s water law.

Additionally, the Upper Basin Compact states that "the provisions of this compact shall not apply to or interfere with the right or power of any signatory state to regulate within its boundaries the **[\*122]** appropriation, use and control of water, the consumptive use of which is apportioned and available to such state by this compact.' 37-62-101, art. XV(b), 10 C.R.S. (2000) (also referring to storage and use of water for generation of electrical energy). Thus, the hydropower components of both compacts defer to state law.

***Colorado*** law provides for priority administration of decreed hydropower appropriative rights within the state. Congress clearly expressed its intent that the hydropower features of CRSPA neither operate to prevent the Upper Basin States from meeting their Compact requirements at Lee Ferry, nor to change the Upper Basin state allocation of waters. On the other hand, Congress deferred to state law for deciding and administering appropriative rights within the boundaries of each state. Congress did not intend to create a different law for the Aspinall Unit.

We conclude that the water court did not err in giving effect to the hydropower water rights of the Aspinall Unit for purposes of determining availability of water for junior conditional rights under the "can and will' test."

Id. at 338.

"***Colorado*** law also identifies flood control as a beneficial use. We reject Arapahoe's argument that operation of the Aspinall Unit for flood control purposes results in a waste of water and that Arapahoe should be able to appropriate water that would otherwise be evacuated from the Aspinall Unit in the flood control operation. CRSPA provides for flood control as one of the purposes of its authorized reservoirs. See [*43 U.S.C. 620.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73SX-00000-00&context=1516831) The United States holds state appropriative rights and decrees for "flood control' purposes and may exercise them along with all other decreed uses of the project."

Id. at 338-39.

"Arapahoe also addresses the United States' impoundment and release of water from the Aspinall Unit for fish and wildlife and recreational uses. Arapahoe contends that Congress intended those uses, like power generation, as incidental uses that would be subordinate to junior upstream water rights.

… .

… Congress established the Curecanti National Recreation Area at the Aspinall Unit. See [*16 U.S.C. 410fff-9*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S7X-DBF2-D6RV-H0P7-00000-00&context=1516831) (Supp. 1999). Congress invested nearly $ 30,000,000 in the site and it draws over a million visitors annually. To accommodate the great number of boaters, Blue Mesa must be kept at an adequate level to maximize the navigable surface of the lake.

The Jicarilla court rejected the construction of reservoirs solely for recreational purposes. Here, of course, the reservoirs are not solely for recreation. More persuasively, the 1968 Act, not mentioned by the **[\*123]** Tenth Circuit in its opinion, as well as the existence of the absolute water rights for recreation and fish and wildlife support the water court's legal conclusions. Recreation and fish and wildlife are recognized beneficial uses in ***Colorado***. Accordingly, we hold that both because Congress specifically authorized a recreational use and because the recreational use is but one of the purposes of the reservoirs, Jicarilla does not apply."

Id. at 339-40.

"We affirm the water court in its conclusions that the 60,000 acre-feet to which BUREC agreed to subordinate their uses are available only to in-basin users; and the 240,000 acre-foot marketable pool is available for use in-basin or transbasin, but only by contract with BUREC."

Id. at 340.

"We find the in-basin 60,000 acre-foot subordination by the United States valid. The construction of the Aspinall Unit greatly benefited the Gunnison ***River*** Basin, but not without adverse effects. The dams inundated many miles of prime trout fishing and flooded several properties. To offset these losses, the United States agreed to set aside 60,000 acre-feet of water for future projects to benefit the Upper Gunnison ***River*** Basin.

… .

We agree with the water court that Arapahoe is not entitled to the benefit of the subordination agreement because of its proposed transbasin uses, and therefore we find it unnecessary to consider if BUREC has consented to increase the subordination beyond 60,000 acre-feet.

… .

… The storage and release of water from the Aspinall Unit for Compact delivery purposes aids ***Colorado*** in meeting its Compact obligations, thereby benefiting the state's water users. Second, the commitment of the United States to make the marketable pool available for uses within ***Colorado*** will serve the CRSPA purpose of aiding the state's use of its Compact apportionment. Third, by enforcing the Aspinall absolute decrees as we would any other absolute decree, we clarify that the water rights of the United States carry the same benefits and responsibilities as all other decreed water rights."

Id. at 341-42 (footnote omitted).

"The water court made a factual finding that Aspinall's marketable pool consisted of 240,000 acre-feet of water available for consumptive use. BUREC currently uses this water for multiple decreed purposes, **[\*124]** and has contracted with others for only a small fraction of the total available marketable pool. The United States conceded on oral argument that both the Eastern and Western Slopes could use this pool beneficially through reoperation of the reservoir… . Section 620c of CRSPA authorizes BUREC to enter into both irrigation and municipal contracts with water users. See [*43 U.S.C. 620c*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73T3-00000-00&context=1516831) (1994). The beneficial uses listed in the Aspinall Unit's final decree, Case No. 80CW156, include domestic and municipal uses. Therefore, although Arapahoe may not obtain a separate appropriation of the waters already decreed to the Aspinall Unit, Arapahoe may seek a contract with BUREC to use the water for municipal purposes."

Id. at 342.

ORAL ARGUMENT

Board of County Commissioners v. Crystal Creek Homeowners' Ass'n [[3]](#footnote-4)3

Board of County Commissioners v. Crystal Creek Homeowners' Ass'n was a complex decision involving several different facets of water law. The case has been in progress for almost ten years. In 1995, the ***Colorado*** Supreme Court held that the trial court erred in the first trial by considering conditional decrees senior to the Aspinall Unit decree. The court also held that only historically exercised decrees should be counted when determining the amount of water available to meet the "can and will" test. The supreme court remanded the case to the trial court to determine the historic operation of the Aspinall Unit. The trial court again found that insufficient water for the applicants to meet the "can and will" test existed. The applicants appealed that decision on several grounds. A transcription of the oral argument to the ***Colorado*** Supreme Court from the second appeal follows.

Justices in attendance at oral argument, march 1, 2000:

Chief Justice Mary J. Mullarkey

Justice Gregory Kellam Scott [[4]](#footnote-5)4

Justice Rebecca Love Kourlis

Justice Gregory J. Hobbs, Jr.

Justice Alex J. Martinez

Justice Michael L. Bender

Justice Nancy E. Rice

CHIEF JUSTICE MULLARKEY: Parties are at counsel table and we're **[\*125]** ready for the appellant.

MR. ZILIS: Good morning. May it please the court? My name is Paul Zilis and I'm joined at counsel table this morning by John Henderson. We're both with the law firm of Vranesh and Raisch and we represent the appellants in this case the Board of County Commissioners of the County of Arapahoe and the Union Park Water Authority. During my argument this morning, I plan to address this court's mandates from the first appeal in this case and their importance in protecting the Constitutional right to appropriate water in the state of ***Colorado***. I would also like to address the manner in which the U.S. facilities at the Aspinall Unit on the Gunnison ***River*** should be considered in determining water availability. This is also an issue of statewide concern because the Gunnison ***River*** provides a large percentage of the outflows of water from the state of ***Colorado*** in the ***Colorado*** ***River*** Basin and the rulings in this case may very well determine whether water will be appropriable under our apportionments under the ***Colorado*** ***River*** compacts. As you know, this case concerns the Union Park Reservoir Project. It's a large project proposed for development in the Upper Gunnison Basin and the primary issue before this court today is whether water is available for the conditional water rights for that project. The reason that is the primary issue in this appeal is that the Union Park Reservoir Project proposes to divert water only under its own junior priorities. It will not require the dry up of any agricultural lands and it will not require the acquisition of any senior agricultural water rights in making water available for multiple purposes. Because of this design it would divert water under junior priorities which would mean that it would probably divert, and the engineering analyses indicate that would divert, the vast majority of its water only during the period of spring runoff, usually from the months of April through early July. The reason that the project is designed in this fashion is that there is a vast amount of water physically available in the Gunnison Basin. We've prepared an exhibit here today (eight and a half by eleven copies were passed out to the justices before argument) to show the amount of water that flows out of the Gunnison Basin under current conditions after use by all existing absolute water rights.

QUESTION: Before you comment on that, is there any objection to the use of this exhibit?

MR. SIMS: No.

CHIEF JUSTICE MULLARKEY: Go ahead.

MR. ZILIS: Thank you. As you can see from the exhibit, there are currently annual average outflows of approximately 500,000 acre-feet out of the East and Taylor ***Rivers***, which are the ***rivers*** from which the **[\*126]** Union Park Reservoir would divert, and those outflows occur after use by all existing senior water rights. As the Gunnison ***River*** continues downstream, it continues to grow exponentially. At the Aspinall Unit, which I referred to earlier, there are approximately 1.2 million acre-feet which flow through that facility on an average annual basis.

QUESTION: Let me ask you about this 500,000, is that water that is also released from the Aspinall Unit after having been stored for the multiple purposes of the project?

MR. ZILIS: The 500,000 acre-feet is above the Aspinall Unit. The 1.2 million acre-feet is the average amount that's released through the Aspinall Unit on an average annual basis.

QUESTION: Ok, I'm still trying to figure out what you're saying about the 500,000 acre-feet, is it stored or is it not stored in the Aspinall Unit?

MR. ZILIS: 500,000 is flowing out of the Upper Gunnison ***River*** Basin after use by all the irrigation rights upstream. In other words, at the confluence of the East and Taylor ***Rivers*** that form the Gunnison ***River***, there are 500,000 acre-feet which flow out of that Upper Gunnison Basin and continue downstream.

QUESTION: Presumably they're going through the hydroelectric facilities and they're passed through the Aspinall Unit.

MR. ZILIS: Correct. As a matter of fact, as the Gunnison ***River*** continues to the Aspinall Unit it picks up other tributaries and it's passing through an average of 1.2 million acre-feet per year.

QUESTION: Ok, thank you.

MR. ZILIS: The Gunnison ***River*** continues to grow as it continues downstream. By the time it reaches its confluence with the ***Colorado*** ***River*** near the city of Grand Junction, almost 2 million acre-feet flow out of the Gunnison Basin annually. This is after use by all existing water rights. Now, this case has been in litigation for over ten years for a public entity to show that a portion of that water is available for appropriation. The first trial was held in 1991 and the water court found that only 20,000 acre-feet are available for appropriation out of this vast amount of water that's flowing out of the Gunnison Basin. That case was appealed to this court and this court reversed and remanded the trial court on numerous grounds and set forth numerous standards for the water court to consider in any remand proceedings. It held that essentially the standards that were applied in the first trial in that case foreclosed recognition of applications for conditional water rights decrees that had every prospect of resulting in **[\*127]** completed appropriations within a reasonable time. It held that it's implicit in the constitution that there shall be maximum utilization of water in the state of ***Colorado***. Water is a very scarce and valuable resource in this state and this court ordered the water court to consider applications for conditional water rights in a manner that would encourage the development of water resources in the state. The court set forth some other standards. It set forth the standards of what ***river*** conditions should be considered when a conditional water rights application is before the court. It held that only the conditions on the ***river*** at the time the applications were filed should be considered in determining water availability, because those conditions give the best picture of what water is available for appropriation and what water is being put to beneficial use. This court also held that absolute water decrees should only be considered based on the historic use rather than their full decreed amounts. This court held that conditional water rights should not be considered in determining water availability if diversions are not being made under those rights. And it generally made it very clear that the inquiry should be limited in determining water availability to issue a conditional water right. The case was remanded and the trial court held a second trial in October of 1997. In that trial, it actually found less water available for appropriation than it did in the initial trial. It found only approximately 15,000 acre-feet available for appropriation. And the issue before this court today is whether the water court did comply with the mandates and standards set forth in the first appeal. It's our position that the water court did not, and it does not apply the doctrine of maximum beneficial use in a way that would encourage the development of water resources in the state. Now, the water court relied primarily on two federal facilities to find that there was virtually no water available for appropriation. They relied on the Aspinall Unit which I referred to earlier, and the Taylor Park Reservoir. Now, the Aspinall Unit is the other issue I'd like to discuss briefly this morning and I'd like to set out for the court the posture of the issues surrounding the Aspinall Unit for the remand trial as they relate to the mandates from this court and as they relate to the way that the unit was considered for determining water availability. The Aspinall Unit was at issue in the initial trial and the water court held that the 1.2 million acre-feet that are flowing through the Aspinall on an average annual basis, that Justice Hobbs inquired about, is unavailable for upstream appropriation. Those issues were appealed to this court and this court elected not to specifically address the Aspinall Unit issues. However, it's our position that it certainly addressed those issues by setting forth the mandates that the water court was to consider in determining water availability on remand.

QUESTION: Let me ask you about that because it looked in the various orders that the trial court issued regarding the modeling and the legal assumptions to be made on water availability, that he did look at the absolute decrees for recreation, fish, hydropower, that had been **[\*128]** previously granted in 1980, I believe, the absolute decrees, and he also factored in, it seemed to me, this 240,000 acre-foot contract pool that apparently is stored in the Aspinall Unit but used for these other various purposes, and also the flood control purpose. So why isn't the posture of this case that all the storage in the Aspinall Unit, in fact, has been exercised in the past under these state decrees under section 8 of the Reclamation Act in the ***River*** District's assignment to the United States of those rights?

MR. ZILIS: That's an excellent question Justice Hobbs. The water court actually held that none of the massive amounts of water which do flow through the Aspinall Unit are available for appropriation, and it held that in considering water availability one cannot look at what purposes those water rights are used for. So in essence, what the Water Court held, was that any water that flows through the Aspinall Unit, from the minute it was built, is now appropriated under state law and that there's no water available above that amount, in other words, the full 1.2 million acre-feet which flow through the Aspinall Unit. It's our position that that's directly contrary to the mandates of this court and directly contrary to the mandates and the Congressional directives in the ***Colorado*** ***River*** Storage Project Act, which authorized the construction of that unit. As you are aware from the extensive briefing on this issue, "CRSPA," or the ***Colorado*** ***River*** Storage Project Act, was actually passed by Congress to allow the Upper Basin states to use their compact apportionments. If this analysis that the water court applied to the Aspinall Unit, is applied to the other ***Colorado*** ***River*** Storage Project units, it would turn CRSPA on its head and would actually prevent any further appropriations upstream of those units once those units were on line. So it was our position in court that one has to look at the individual uses of the water at the Aspinall Unit to determine whether those uses should preclude upstream appropriation. It's very clear from CRSPA that the very intent of this was to provide carry over storage so that water could be stored in wet years and then only released to the downriver states, the Lower Basin states, during prolonged dry periods, so that the Upper Basin states would be allowed to continue to divert and to develop their apportionments under the compacts.

QUESTION: Mr. Zilis, if we were to take your position, would it mean that the full 1.2 million acre-feet would be available for domestic and municipal appropriation?

MR. ZILIS: Under current ***river*** conditions, we take the position that the Aspinall Unit could not place a call on the ***river***. That is because it has not yet been used for these compact purposes. To date, it's never been needed to release water to the downriver states in the dryer periods.

**[\*129]** QUESTION: So the answer is yes.

MR. ZILIS: The answer is not yes. I think that the ***Colorado*** ***River*** Storage Project Act was put into place so that the carry over storage could be provided. Under current ***river*** conditions, I suppose one could apply for very, very large appropriations upstream of that, but it needs to be considered in a way that the carry over storage could be available to the Lower Basin states. Under present conditions though, it's not being used for consumptive uses to any extent. As Justice Hobbs pointed out, it has a pool that's been aside for consumptive uses in the amount of 240,000 acre-feet and it's only been used to the extent of 78 acre-feet. The main function of the Aspinall Unit to date has been the generation of power and flood control.

QUESTION: So the answer to the question would be that the only use for which the domestic and municipal uses could be called out would be to supply water at Lee's Ferry in accordance with the compact. Is that right? Is that what you're saying?

MR. ZILIS: No, I think the other primary purposes are consumptive uses.

QUESTION: So are the 200,000 and some odd acre-feet that are reserved for consumptive uses and/or the historical or actual consumptive use of 78 acre-feet at present?

MR. ZILIS: It would be the 78 acre-feet at present. I think that's very clear under the mandates of this court when it held that water rights need to be viewed in light of their historic use rather than their decreed amounts.

QUESTION: Let me ask you this. Suppose the project proceeds and the water is taken over to the east slope and then the United States exercises its contract rights which would be clearly senior under ***Colorado*** priorities, right?

MR. ZILIS: Correct.

QUESTION: Now, wouldn't that then totally interfere with the operation of this project in the future, Arapahoe County's project?

MR. ZILIS: Not necessarily, and again we're looking at future conditions. But, if Arapahoe County's project came on line, the projected diversions would average about 120,000 acre-feet per year. That means that there would still be an excess of 1.1 million acre-feet available to the Aspinall Unit for all of its various functions.

**[\*130]** QUESTION: My second question is, if the water is taken through the divide, is it then not available to meet this compact call circumstance in a prolonged drought cycle, the back up protection for ***Colorado***'s beneficial use?

MR. ZILIS: You know, we do not have to reach that issue in this case because it's never been used for that purpose. In the initial trial, the division engineer actually testified that the United States would not be able to preclude upstream diversions based on compact demands. However, again, based on the conditions on the ***river*** in this case, I think what we're looking at is water availability based on current circumstances or the circumstances when the applications were filed in this case. At that time, it's never been needed for compact purposes. The two primary functions though, to reiterate, are compact purposes and consumptive uses. And I think for purposes of this case, you could conclude that they could call for those water rights. But the only issue before this court in this case is whether the applicant should be denied the right to appropriate 100,000 acre-feet under the conditions on the ***river*** at the time the applications were filed. The conditions at that time were passing 1.2 million acre-feet through the Aspinall Unit annually, and that would cut that amount to 1.1 million acre-feet, which are passing through the Aspinall Unit and unavailable for appropriation in this state. It's generally our position that if the mandates of this court were followed closely, and if the purposes of CRSPA and the Congressional directives are followed that there should be ample amount of water available for appropriation upstream of the Aspinall Unit.

QUESTION: Here's my concern. My concern is that based on this project history and the way it was put together and the debates and so on, there is 240,000 acre-feet that can be used through that project, apparently, any place in ***Colorado***, east slope or west slope, upon a contract. And that in fact, the way you've postured the case, does not, I would ask you to answer, answer the question that in fact, a part of the bargain made for the building of this unit was that there would be water available for consumptive use, and it is sitting there, in fact, under the water rights for the Aspinall Unit, and why isn't this application then a second and independent dip at the same water?

MR. ZILIS: I don't believe it is a second and independent dip for several reasons. First, the 240,000 acre-feet that's been set aside for future contracts has not been yet used, and I think under the mandates of this court from the first appeal, that one needs to examine the historic use for that decreed purpose which has only been 78 acre-feet.

QUESTION: But it's sitting in storage for recreation, the flood control, the fish and wildlife, the National Recreation Area use, is it not? Isn't it **[\*131]** being used?

MR. ZILIS: It's being used, but as I think is briefed extensively, it's being used for purposes that are incidental to the primary purposes of the whole act. If the United States were to take this position at all of the other ***Colorado*** ***River*** Storage Project units, it would have control of the entire Upper Basin and could preclude any diversions by any water uses in Upper Basin states unless they have a contract with the United States. Now, I think there's a big difference between appropriations under state law upstream of the Aspinall Unit and uses of water directly from the Aspinall Unit. I think if the applicants were attempting to take advantage of the pool after it's stored in the Aspinall Unit, that they would very well have to contract with the United States and would have to purchase that water. However, it's our position that the ***Colorado*** ***River*** Storage Project Act cannot preclude appropriations under the Upper Basin state's apportionments upstream so that it can sell water from the actual structures themselves. This position has never been taken at the other units. In fact, it was not even the position taken on this unit at the time this application was brought. It has been a new position that has been taken by the United States, in this case, for the first time ever and, it was adopted by the water court. And I think that if that position is recognized, then it will mean that ***Colorado*** has given away the Upper Gunnison Basin and control of that Gunnison Basin to the United States, which I don't think was ever the intent of CRSPA or the state of ***Colorado*** in authorizing CRSPA and approving of it. If there are no further questions, I'd like to have John Henderson address this court regarding the issues surrounding Taylor Park Reservoir. Thank you very much.

MR. HENDERSON: May it please the court? My name is John Henderson. I would like to follow up on one question that was asked to Mr. Zilis about the compact water, and that is Justice Hobbs, if the United States has been traditionally releasing four or five hundred thousand acre-feet from Blue Mesa for flood control in the spring in anticipation of runoff, and Arapahoe County begins to take 100,000 acre-feet of that upstream at each year on average, I'm assuming that the United States will simply adjust its operations so that it releases less water in storage for compact purposes for flood control in the spring. That fits in with the policy of maximization of beneficial use. If I might say, with all the respect to Sherlock Holmes, sometimes it's the dog that doesn't bark that tells us the most about a case. In the 300 pages of the opposer briefs here, no one mentioned the actual historical use of the first fill of Taylor Park Reservoir for irrigation. It's not because that number is a secret, it's in the decree at section 33a and at footnotes five and six. The amount, using the larger figure used at trial by any of the parties, is 21,831 acre-feet of historic first fill. The second fill was quantified in the trial court, there in 1990, in what we know as the Upper Gunnison case. That case was affirmed here in **[\*132]** 1992. As a matter of fact, the quantification for the second fill of Taylor Park Reservoir was affirmed here. That quantification was 19, 905 acre-feet. That is found at [*838 P.2d at page 846*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) where the finding is discussed and affirmed at 848. If you add those two average figures together, members of the Supreme Court, it's approximately 42,000 acre-feet, in a basin which produces approximately 145,000 on average, at the Taylor Park Dam. The evidence is clear as is the decree, that when the opposers modeled the first and second fill of Taylor Park they were not constrained to using the first fill water for irrigation purposes only. We won half of the case that was up here on appeal in Upper Gunnison - the Upper Gunnison case, that I've cited to you earlier, decided in 1992. The half we won was that half of that decree, the irrigation decree, the district being the Upper Gunnison district, was not able to add additional uses to the irrigation fill. If you look at this decree at section 37d, you will see that Mr. Helton was not constrained to modeling historic use of the first irrigation fill. If you look at 38d, you'll see that Mr. Book was not constrained by the historic irrigation use of the first fill. And if you read 38d, you will find that Mr. Book testified that the difference between reservoir releases averaging 70,157 acre-feet and the diversions of 20,594 acre-feet, the figure used by Mr. Book, through the Gunnison tunnel for irrigation equals 49,550 acre-feet, which at the end of the year is transferred to the Aspinall Unit for use as part of its decreed purposes. That's 50,000 acre-feet a year that they ran down the ***river*** and did not use for irrigation purposes. That 50,000 acre-feet then could be second fill up at Taylor Park, meaning that on average we lost 100,000 acre-feet per year of the Taylor ***River*** drainage that was not used for historic purposes. Over a 15 year study period, which we used here, that's a million and a half acre-feet that vanishes out of the Taylor ***River*** without ever having to be used for a decreed purpose.

QUESTION: Let me ask you this, there's an accounting sheet that is attached to the court's refill decree. Am I not correct on that?

MR. HENDERSON: That is absolutely correct, Justice Hobbs.

QUESTION: Ok, now, did that accounting sheet vary in any way, or the assumptions for the modeling vary in any way between the first time that case was tried on the refill right and the modeling for the trial that we're now reviewing?

MR. HENDERSON: Indeed Justice Hobbs, as a matter of fact, at section 36a of the decree in this case, you'll find that the district modeled the accounting in a different way than it did in the Upper Gunnison case. The court must also remember that the accounting sheet is simply a sheet that's attached to a decree. And the decree is subject to the rules of interpretation in this court. This court has been emphatic over the decades, that the measure of a water right is its **[\*133]** historic use for decreed purposes, most recently, in the Santa Fe Ranches case, which was decided only a month or two ago. In a case where you're determining if there's unappropriated water in a basin, it's even more important that when we look at historic use in the basin, when we're trying to encourage development, that we look at actual historic use. If you look at the decree for those two cites, that show that the 37d and 38d, that neither of the opposers model was constrained to historic use in modeling the first fill, you can see how they took that water away from us.

QUESTION: Counsel, may I ask you a question please?

MR. HENDERSON: Indeed.

QUESTION: I'm looking at the trial court's position on that topic. I think it's found at page 22, where he says that basically the argument you're making to us right now has a lot of logical sense, but in his opinion it flies in the face of the Supreme Court's decision in Gunnison District 202203. What do you have to say about that, please?

MR. HENDERSON: Justice Rice, what I have to say is this, and that is that in 202203, when we argued Upper Gunnison here, seven years ago, approximately, we had a pretty good idea of what they might do to us on a retrial of our case, they hadn't done it yet. We lost only half of that case, but this court did quantify the second fill during almost the identical historical period at 19,900 acre-feet. They're now coming back and telling us they've reinterpreted the accounting provisions and it's now 106,000 in most years, which is the full capacity of the reservoir. Your Honor, they can't do that without taking that first fill irrigation right and running it down the stream. We won the part of that case, Your Honor, where we restricted the right of the first fill to irrigation use only. The district was not permitted to add additional uses, including recreation, to that first fill irrigation use. So it doesn't fly in the face of the holding in Upper Gunnison.

QUESTION: As a matter of law. You're saying that the facts haven't changed, but as a matter of law it doesn't "fly in the face," it's not inapposite, is that correct?

MR. HENDERSON: It does not fly in the face of either of those holdings of this court. Your Honor, if I may summarize, reserving the rest of our five minutes for rebuttal. We've been up in this court for more than ten years, twelve to be precise, trying to prove that there's water available in one of the wettest basins in the state. When we started this case, I didn't even have kids. They're now approaching the fifth grade. This court has held that municipal entities and appropriators in this state are not to be held to enormous or unusual burdens in trying to prove that there's water available for **[\*134]** appropriation. This case is about the heart and soul of the ***Colorado*** ***River***, Justices of the Supreme Court, because if we lose the 2 million acre-feet out of the Gunnison to California, we're never going to get it back. And if we accept the position that the United States controls this ***river*** basin and can determine who can appropriate and can determine that there are not transbasin diversions, then we've lost the ***river***. We reserve the remainder of our time for rebuttal. Thank you.

MR. SIMS: Good morning, my name is Steve Sims. I'm first assistant Attorney General. I represent the State Engineer and the Division Engineer for Water Division 4. With me in the courtroom today is the Attorney General of ***Colorado***, Mr. Ken Salazar; also at counsel table is special litigation counsel for the Department of Justice, Hank Meshorer, and Dick Bratton from the Upper Gunnison District. In the audience with us is Hal Simpson, the State Engineer of the state of ***Colorado***, and Wayne Schieldt, the division engineer for Water Division number 4. Arapahoe County in this case seeks to build Union Park Reservoir. Union Park Reservoir will be the second largest water right in the state of ***Colorado*** - three times the size of Dillon Reservoir. Arapahoe County's main problem in this case is that Union Park Reservoir, the second largest right in the state, is proposed to be located just immediately upstream from the Aspinall Unit, which is the largest water right in the state of ***Colorado***. This case is really all about the priority system. Recognizing senior rights, the historic use of those senior rights, and not allowing a junior right to divert out of priority. In the simplest way, that's what this case is really about. The Aspinall Unit is really the key to water availability for Union Park, and 620f in the hydro provisions are really the key to understanding the Aspinall rights. Before I get into that, let me just briefly comment on the ten minutes of argument that we heard about Taylor Park Reservoir. Judge Brown kind of hit the nail on the head with those issues to say that, even if all of Arapahoe County's argument on Taylor Park Reservoir was correct, that water that they deem to be available for Union Park would only be able to be diverted by Union Park if Aspinall would not call. So it assumed, Taylor Park is only relevant if Aspinall isn't considered.

QUESTION: That's because it's delivered into the Aspinall pool at the three reservoirs?

MR. SIMS: No, primarily it's because Aspinall is a senior right and can call out the Union Park Reservoir, and therefore if Taylor Park wasn't taking the water, Aspinall would be taking the water.

QUESTION: So given the operation of all the state decreed rights for their purpose, there's, what, 15,000 acre-feet left for appropriation?

MR. SIMS: That's correct.

**[\*135]** QUESTION: Regardless of the modeling assumptions you do on the refill, right?

MR. SIMS: That's correct. So we're not going to discuss Taylor Park anymore than that, just because it really doesn't make any difference. Aspinall is the key. And the key to Aspinall, as I said, was 620f. The state and the United States are both going to appear before you today and argue that we are both in agreement that Arapahoe's argument about 620f and hydro-use is just wrong. And it's wrong for five basic reasons. First of all, Congress did not intend to impose stricter conditions on CRSP reservoirs than the limitations placed on any hydro reservoirs by the compact. All Congress intended was to put those same hydro restrictions, that the compact put on, on their own reservoirs. Nothing more, nothing less. So when you look at it that way, you really have to understand the compact, because the compact itself makes intrastate water matters off limits. It doesn't purport to talk to that. There is one provision, article 4c of the 1922 compact, the ***Colorado*** ***River*** Compact, that makes it clear that intrastate - within the state of ***Colorado*** - the intrastate water regulation issues, are completely left to the states. The Compact was not intended to have any impact on that. Also, we will show that Governor Johnson, then the Governor of the state of ***Colorado***, when CRSP was being considered in Congress, actually asked for restrictive intrastate provisions to be placed on the CRSP reservoirs. Specifically he asked, he said, that if the CRSP reservoirs are allowed to obtain a hydropower right, we'll be in the same position that we are in in the Green Mountain/Dillon dispute. And he said, once the United States got hydro-rights for that reservoir, they were allowed to call out upstream water rights. He asked them not to allow hydro-rights to be acquired. Congress specifically rejected that. When they were having the discussion in the committee here and Sandra Watkins (all of this is in my brief), what Sandra Watkins said, well, wouldn't your language restrict all hydro-generation on these CRSP reservoirs? And Governor Johnson said yes. So when they actually marked up the legislation, when they dealt with the legislation that was being discussed in that committee hearing, about ten days after Governor Johnson's statements, they struck out any language that referred to waters in the upper tributaries or in the states, and the reason they gave in the explanations for why they struck it out was to protect hydropower generation against other uses.

QUESTION: I'm a little concerned about the argument in the fact that it suggests to me that perhaps even though there's a theoretical 240,000 acre-foot consumptive use allocation of that project, that the hydropower rights would be exercised within the state, perhaps even under the judge's ruling in the trial court, in preference to that consumptive pool. So what is your response to that?

**[\*136]** MR. SIMS: Well, actually, my response to that is that the 240,000 acre-foot pool - actually, we call it the marketable yield pool because it was never really quantified at 240,000 - the marketable yield pool is completely consistent with the hydropower uses.

QUESTION: In what way?

MR. SIMS: The water in the marketable yield pool could be used either upstream or downstream and not detract from the hydropower uses.

QUESTION: Well, it wouldn't be going through the turbines, would it, if it was taken across the divide? And apparently you concede, and the United States concedes, that that pool could be marketed for that purpose.

MR. SIMS: That's true, it could be. And actually it is being used now. One misconception that Arapahoe likes to argue is that it's just sitting there unused. It is being used now. What the marketable yield pool is really doing is that the marketable yield pool is water that is currently being used for hydro that they have said they don't need to use for hydro in the future. They can sell it off and use it for other purposes. It could be diverted over the hill, it could be diverted upstream, and it wouldn't affect the economic feasibility of the unit. And that's really the key, is the connection between that and the economic feasibility. Did that answer your question?

QUESTION: In some ways it did and in some ways it didn't. The direct flow power rights that were decreed and made absolute in 1980, they were to be fully exercised, and that would impinge in using upstream any part of this 240,000 acre-foot pool. How is that resolved in regard to the operation of the project?

MR. SIMS: Well, actually, on average, the direct flow rights use about 550,000 acre-feet of water, on average. So those direct flow rights could be fully exercised and there'd still be water to use, the marketable yield pool upstream.

QUESTION: Ok, same question with regard to recreation, fish and wildlife, and the flood control rights. I mean, how does that impact whether or not the United States is actually going to be in a position to market any of that water?

MR. SIMS: Well, they certainly, the recreational uses, are mainly within the reservoir, so anything that gets to the reservoir is used for recreational purposes.

**[\*137]** QUESTION: I understand, but it wouldn't be there, if it was marketed to somebody who was able to use it up above.

MR. SIMS: That's correct, and that's water that, just in the project planning, they said, the whole project would still work even if this water wasn't here. All the purposes would still work if this water wasn't here.

QUESTION: I guess all I'm asking you is, the state's taking a position here that appears to say, that in fact, there was a reserved pool that can be used for any of the purposes of ***Colorado*** beneficial consumptive use which would go against the Compact entitlement. I understand Arapahoe County to, in effect, be saying first of all, it's never been used for that purpose, and we shouldn't be shut down from at least speaking for that amount of water and much less, maybe 100,000 acre-feet of the 240,000, as long as it isn't being used, and perhaps it'll never be used, given the state of ***Colorado***'s and the United States' position here, and in fact it's a blocking action to consumptive use under the Compact.

MR. SIMS: Yes, I understand that's their argument, but the United States and the State both agree that the 240,000, as you call it now, the marketable yield pool, is currently being used. That's water that is being used for these other purposes. And all that the sale or transfer of that water will do is shift it essentially from one use to another use, to the consumptive use purposes. So to say that it's just sitting there not being used, as Arapahoe has, is just wrong. It's currently being used. And even if it was just a pool sitting there, it's sitting there under a senior right. It's sitting there, as many reservoirs in the state are, storing water and making it available for water users to come in and use. The whole purpose of reclamation law is "build it and they will come." Unlike other water users in the state, governmental and municipal water users in the state are not required to have firm contracts before they actually develop water. Building a dam and putting it in and holding it is developing water. That's not what's happening here, but even if that was the case, they would be allowed to do that because they have a senior water right, and that's the key.

QUESTION: Mr. Sims, am I correct that the net effect of your position is that no other entity can make use of that 1.2 million acre-feet except under contract with the United States, and then only except as to the marketable yield pool, yes?

MR. SIMS: Basically, yes. And it's no different than any other water user. Once you acquire a water right, once you appropriate it, once you've developed it, once you've put it in your bucket, it's up to you to dispose of that water right. And right now, the marketable yield pool **[\*138]** is that extra part that they can go out and contract to new uses, but if they never find another user, it's all being used now. And Judge Brown pointed that out when he was disputing the way that Arapahoe had characterized this interference, this general subordination that all CRSP projects must subordinate to any junior water user that comes in upstream. Judge Brown said no, that's not right, that's an improper reading of CRSP. CRSP, and Aspinall in particular, have aided compact development in the state. He made that finding. Jim Lochhead testified about that. And in the "91 trial, Judge Brown pointed out some very specific instances in which they had made compact development possible in ***Colorado***. And that's the Dolores Project, McPhee Reservoir, and the West Divide Project, which is Ridgeway Reservoir. These are big, participating projects, ***Colorado*** ***River*** Storage projects putting water to beneficial consumptive use for irrigation. These projects would have a lot of their yield taken away for water that would have to be delivered for endangered species purposes on the ***Colorado*** ***River***. A lot of the yield of those projects wouldn't be there, but for the fact that Aspinall makes releases for them, for endangered species purposes. So this shows one of the ways that Judge Brown found, that in fact, there was compact development being encouraged by Aspinall. And another thing - this goes to another misconception of Arapahoe's argument - they say the water in Aspinall has never been used for compact purposes, for delivery purposes, because there's never been a compact call. Well, there's not supposed to be a compact call. If everything works the way that the ***Colorado*** ***River*** Storage Project and the 1968 Basin Project Act have been designed, there will never be a compact call. And the way this works is that they regulate the ***rivers***; this is the whole reason CRSP was built. I mean, when the ***Colorado*** ***River*** Compact was negotiated, the negotiators made a basic mistake, and that mistake was they assumed that there was a least 15 million acre-feet to divide in the ***river***. There wasn't. It was more like 12 to 13 million acre-feet. Well, if that's the case, Upper Basin states who have made a promise to the Lower Basin states, that they will always deliver 75 million acre-feet over ten years, they're going to be severely constrained to develop water. They aren't going to get half, they're going to get much less than half, unless they've got storage, unless they can take the big peaks in the hydrograph that occur in the ***Colorado*** ***River*** and store them and gradually release them over ten years so it evens out the flow of the ***river***. If that doesn't happen, then why would you ever build a project in the Upper Basin? Because in many, many years, you wouldn't be able to divert anything; and most water users don't put a bunch of money into a project; even the Federal Government wouldn't put a bunch of money into a project, if they weren't going to be able to use it. So that's the real purpose for CRSP, is to even out the flows of the ***river***. And they have done that. It's worked. The fact that there's never been a disaster, a compact call, proves it's been working. And Arapahoe seeks to undermine that. And that's one of the reasons that the State Engineer is in this case. The State Engineer is neither **[\*139]** opposing nor supporting the project. But the State Engineer is very concerned about these arguments that could have a drastic impact on the law of the ***river***. This law of the ***river*** has been developing since even before the compact. It's been developing for 75 to 80 years, and they're trying to turn it on its head. Just so they can get water available for their junior project. Perhaps I should mention a couple other things, because again, if 620f doesn't fly, and I think we've shown that it doesn't, the house manager's report that's in the legislative history - the final conference report where the Senate and the House negotiators came together to work out the differences between their two bills, and they told us why 620f was put in there - what they told us was it was put in there so everyone would live up to the compact. So these compromises that were made over the years over hydropower wouldn't be disrupted, there was no intention to put stricter requirements on. So if you just look at 620f, we think it is plain on its face.

QUESTION: But under your interpretation, it would only apply to the hydropower facilities of Lake Powell, right? It would prevent them being used at the Glen Canyon Dam to call out ***Colorado*** water, isn't that the interstate issue?

MR. SIMS: Yes, absolutely. We agree with that. 620f was intended just to make the hydro compromise stick; it wasn't going to change it. California was trying to change it when they were adopting the statute and they just wouldn't let them get away with it.

QUESTION: But you're saying the ***Colorado*** sponsors of the project didn't have any concern about the hydropower rights being exercised in ***Colorado***?

MR. SIMS: Well, absolutely they did. ***Colorado*** did not want any interstate calls. I mean, that was the Upper Basin issue, really. These big reservoirs should not be extending calls beyond state lines. And that's when Arapahoe argues that the state's position is going to prevent any development upstream. They forget that little part of the argument, which is we have never agreed that Glen Canyon can call above a state line or that Flaming Gorge can call above a state line, or that Navajo can call above a state line. Actually the only reservoir in the system that's purely intrastate is Aspinall. Because remember, Glen Canyon is built right on the Arizona-Utah border. I mean, the dam that would be calling would have almost nothing in Arizona that it could call out. Same with Flaming Gorge, where the dam is built on the Utah-Wyoming border. There's almost no intrastate area that it could call out. So that's why we look at 620f as an interstate matter. Everything in the compact is interstate or interbasin.

QUESTION: What about the 60,000 subordination depletion **[\*140]** allowance and the 240,000 marketable yield, 300,000 acre-feet. What's the state's position with regard to hydropower rights effect on that 300,000 acre-feet?

MR. SIMS: Well, the priority dates of all the rights are the same, so you couldn't say that a hydro right would call out any of the marketable yield rights because it's one decree with one priority with multiple uses. A direct flow right with the exact same date as a storage right is not deemed to have a better right. I mean, for quite a few years we have dispelled that notion. So there really is no conflict between the two, it's just merely the way you operate all these bundles of rights together. So the hydro couldn't affect the 240,000, if that's a direct answer to your question, that's our position. Just to sum up a little bit, there's one other subordination issue that came up besides this general CRSP must subordinate to any state development, and I think we've talked about that and I've dealt with that in our brief, but there's also the argument that since the Bureau of Reclamation subordinated the 60,000 acre-feet of in-basin upstream depletions, that that somehow created a selective subordination. And the basis for this argument was a memo done by Dr. Danielson, the former state engineer, where in that memo he said I'm going to deem the Aspinall Unit the most junior rights in the basin because they have selectively subordinated to these upstream uses. And I just wanted to remind you how the trial court dealt with this, and what the trial court said is, first of all, we're not sure that this was ever a real policy of the state engineer. There was a lot of conflicting facts on this and, after they balanced all of those facts, they said Dr. Danielson was not really creating this policy where he made these water rights the most junior in the basin. What he did was he was bluffing and trying to force the Bureau of Reclamation to come out and formally recognize their 60,000 acre-foot subordination, which had never been done in writing, and tried to force them into water court to get this decree. But it wasn't an effort to actually make them the most junior in the basin. And the court went on to say, even if that was his intent, which it wasn't, but even if it was the state engineer's intent, the state engineer didn't have any power to do that. He didn't have any power to make the Aspinall rights the most junior in the basin. And it's interesting that he also found, and the division engineer testified at trial, they never changed the tabulation as a result of that memo either. So that last subordination is kind of a non-issue. In summary, and I'm going to turn the rest of my time over to Mr. Meshorer, but in summary, Arapahoe seeks to disregard the priority system. They want to let their junior Union Park right divert before the Aspinall Unit rights. And they've come up with a myriad of excuses as to why that should occur, but really, the priority system works in ***Colorado***. The Compact does not change that. 620f does not change that. We have to recognize these senior water rights. Judge Brown, in a very thorough, complete, scholarly opinion - he's been dealing with this case for fourteen years - really did his work. He did a good job. He made the correct **[\*141]** decisions, and his ruling should be affirmed. Thank you.

MR. MESHORER: May it please the court? My name is Hank Meshorer, special litigator for the U.S. Department of Justice. Many of the issues I was going to talk about were handled well by Mr. Sims, so I'm going to go to some points that maybe weren't addressed. I want to mention three things that were undisputed facts at the initial trial. First, that the trial court found that all of the senior state decrees of the Aspinall Unit have been continually, without interruption, uniformly used to their fullest extent. Second, that as part of CRSPA, Aspinall has been used in a multi-use integrated fashion. Third, that Aspinall has been operated at all times to assist both the Upper and Lower Basins to achieve their full allocations of water in accordance with the various compacts. I could stop right here. Arapahoe says these facts are disputed. I counted the number of paragraphs that the water court supports this as matters of fact, and I don't want to list them because I haven't got that much time, but there are twenty paragraphs as to the first proposition (and they're all stated in my brief) that the senior state water right decrees of the Aspinall Unit have been continuously, without interruption, used to their fullest extent. Seventeen paragraphs in the court's first order support the second proposition that Aspinall is operated in a multi-use integrated fashion. And sixteen paragraphs in the court's opinion all found as a matter of fact, indicate that the Aspinall Unit, without a doubt, has been operated to assist both the Upper and Lower Basins. I find it rather ironic that Arapahoe makes the argument that the federal government will control the water. I find it insulting, and I would think it's more insulting to the court than it is to me because it's a pandering. It comes from weakness. It's ironic that Arapahoe is the only party in this litigation that seeks federal preemption. They're the only party that says that the state water decrees need to be preempted by federal law in three or four instances - hydropower, fish, recreation, and wildlife. No one else makes that assertion. The question was asked about the 240,000 acre-foot marketable yield and Mr. Sims handled that, I think, to the satisfaction of the court. I would add this: if that water was to be used for other uses, as indicated in my brief, the Bureau would have to make elections and change the way the uses are allocated after the NEPA process and all other environmental laws were complied with. And would most likely, Justice Hobbs, lead to, and I say most likely because I do not know, that the hydropower waters would be lessened. The marketable yield is a pool sitting there for use by anybody in ***Colorado***. Transbasin diversion, they have to pay for it. The project was built by the Bureau to make water available and they have to pay for it. The 60,000 subordination was for the western slope and, as Judge Brown stated exhaustively, was meant to be restricted to in-basin use, juniors only, and with a contract, and be as compensatory for the local impact of that huge project. The 240,000 acre-feet of water is not a separate water right. It is not physically separate. It cannot be carved out and used by Arapahoe at its **[\*142]** choosing, or by anyone else. If the water's to be used, the Bureau would have to change its operations. Arapahoe says that these uses that they challenge are incidental, and incidental uses are not allowed under CRSPA. First of all, this begs the question if the multiple use regime, as found by the court as a matter of fact, is not valid. Let's assume that to be true for purposes of argument. Even if you segregate these uses out, they've all been used in their totality. As the court found as a matter of fact, none of them are used solely, just for one purpose. Arapahoe bases its primary-incidental argument solely on the Jicarilla case. Back up a second. None of the uses of the water by the Aspinall Unit are incidental. They're all sanctioned by the CRSPA statute, by the 1968 ***Colorado*** ***River*** Basin Project Act, as primary. Let's assume that one or two of them was incidental. All that the Jicarilla case says [is] that an incidental use cannot justify a use of water if that use is contradictory to a primary purpose. Just because it's an incidental use does not mean it can't justify the use of water. Now, also in the Jicarilla case, the water that was used at the Elephant Butte Reservoir was for recreation only, and it was not a recognized use under state law, and it was being used solely for that purpose. It wasn't recognized in New Mexico because the water was being stored, there were no buyers, and the City of Albuquerque said we're going to hang onto this water and use it for recreation until we get a buyer. That was not a recognized use under New Mexico law.

QUESTION: Did the 1968 Act change the 1956 Act's effect with regard to the uses of the Aspinall Unit, regarding recreation, fish and wildlife?

MR. MESHORER: The fish and wildlife was a purpose under CRSPA, Justice Hobbs, but it was again explicitly stated to be a purpose in the 1968 Act, as primary.

QUESTION: As a primary purpose?

MR. MESHORER: Yes sir.

QUESTION: The absolute decrees were obtained in 1980?

MR. MESHORER: Yes sir. - I am not following your question.

QUESTION: I'm just wondering if there's any argument left on it being an incidental use, if in fact the project is authorized for primary purposes and include these other kinds of purposes and they match with the state decrees that were made absolute.

MR. MESHORER: I agree Your Honor, I was just making the argument for purposes of conceding to Arapahoe, which we don't, but to show that their argument reaches a logical absurdity. That even if these uses were incidental, and they are not, they are primary. But even if these **[\*143]** uses were incidental, I think it would only be fish and wildlife. There is no way you could call compact purposes incidental, or flood control, but let's say it is fish and wildlife and recreation. Even if they were incidental, which we say they are not, the statute specifically lists them as primary. They are consistent with the other primary uses, and therefore the Jicarilla case would not apply. Because Jicarilla said only if a use is incidental and is inconsistent with the other primary purposes, then it can't be used. Also in Jicarilla, I would add, that case did not decide the issue, and did not turn on a CRSPA reservoir, but on a reservoir built under a different act.

QUESTION: Would you concede that the legislative history and the project history of the Aspinall Unit does envision that the 240,000 acre-feet in whole or in part might be used on the eastern slope of ***Colorado***?

MR. MESHORER: Most certainly sir. I see my time is expired. Thank you.

QUESTION: Rebuttal.

MR. ZILIS: Thank you. The United States and the State essentially argue that the ***Colorado*** ***River*** Storage Project Act does not control operations at the Aspinall Unit. They have now postured this case to say that you only look at state decrees under state law, and that any restrictions in the ***Colorado*** ***River*** Storage Project Act have no impact whatsoever on how that project is operated. The ***Colorado*** ***River*** Storage Project does explicitly state that hydropower generation is incidental to the primary uses. That's right in the very first section of CRSPA, section 620f. Section 620f, which Mr. Sims referred to, specifically states that subject to the provisions of the ***Colorado*** ***River*** Compact, neither the impounding nor the use of water for the generation of power and energy at the ***Colorado*** ***River*** Storage Project units shall preclude or impair appropriations for domestic and agricultural uses under state law. That now means nothing, as far as appropriations in the state of ***Colorado***.

QUESTION: I have a little problem with that. In California v. U.S., the court is very plain that absent a specific provision of federal law there is no preemption and it refers back to state law. Now, are you saying that that language you just mentioned is so clear that there is a federal preemption of state water decrees obtained under section 8 of the Reclamation Act?

MR. ZILIS: Yes I am. I think that that language is absolutely clear that the federal government cannot preclude instate consumptive uses so that it can generate power. I think that CRSPA was enacted, in fact CRSPA was clearly enacted, to allow the Upper Basin states to develop **[\*144]** their compact apportionments. If the Federal Government were to take the same position it's taking at the Aspinall Unit at the other three primary storage units, there'd be no water left available for appropriation in the Upper Basin states. I think Arizona v. California was very clear that one must look at the entire legislative scheme, the direct Congressional objectives, and the scheme for the storage and distribution of water in determining how it should be interpreted. And that case, I think, is very enlightening on this issue. We have with the Boulder Canyon Project Act, but it really set forth the guidelines on how a court should interpret a specific Congressional directive like this. Again, if the hydropower operations at CRSPA facilities were allowed to preclude upper state appropriations, they could virtually shut down the Upper Basin. That's directly contrary to the whole purpose that CRSPA was enacted. You had asked whether the state had taken any position on this issue when the ***Colorado*** ***River*** Storage Project was passed. The ***Colorado*** Water Conservation Board submitted a resolution to the United States Congress, which set forth several very important points for the state of ***Colorado***. One of them was that specific provisions should be made in authorizing legislation to assure that no rights vest in the use of water for power generation in units of the project which will prevent or handicap the beneficial consumptive use upstream of the waters of the ***Colorado*** ***River*** System, to which any Upper Basin state is entitled. That was ***Colorado***'s intent when CRSPA was enacted. The state has taken a new position in this litigation, and I will say it has taken a new position for the very first time regarding this issue. The United States has also never taken this position at the other ***Colorado*** ***River*** Storage Project facilities. The state of ***Colorado*** was also very clear that the primary units were not to infringe on its ability to place water to beneficial consumptive use. And one more quote from the legislative history, this is again from the CWCB resolution that was passed on to the U.S. Congress:

Most importantly the hold over storage reservoirs will not fulfill their primary function if they are so used as to prevent the authorization and construction of junior Upper Basin projects, which use water within the apportioned share of any state. Due regard for this important matter must be made, and all priorities awarded any units of the project.

The state has absolutely taken the opposite now and says that any water that passes through the Aspinall Unit is now unavailable for any future upstream uses.

QUESTION: That's just not the same thing as saying that ***Colorado*** is blocked from developing its compact entitlement, is it? Because every acre-foot of water that goes across the state line, released from Aspinall, is credited to ***Colorado***'s delivery, allowing other uses within ***Colorado*** on other tributaries, through other projects, on other water rights. Isn't that correct?

**[\*145]** MR. ZILIS: Well that's correct, Justice Hobbs, however, the way that the Aspinall Unit is operated under current conditions is that it basically has all the water, all the inflow, passed down to Glen Canyon on an annual basis. It's not holding any water back because there aren't any consumptive uses right now upstream of the Aspinall Unit. So it needs to pass all that water downstream. But the question really becomes, what's the difference of having the Aspinall Unit and not having it? Basically all of those flows would end up in Glen Canyon anyway. The only thing that the Aspinall Unit has provided -

QUESTION: But they wouldn't be regulated flows for purposes of the carry over storage, end of drought cycles, protecting ***Colorado***'s beneficial consumptive use under the compact, would they?

MR. ZILIS: Actually they would, because the Aspinall Unit does not hold water back. As I think the evidence very clearly shows, it passes an average amount of 1.2 million acre-feet through every year. It doesn't hold water back for dry periods. And this water continues to flow downstream. This is flood control, and I think the U.S. witnesses were very clear in their testimony that water is released for purposes of flood control after the flood control function is completed, then water is stored for compact purposes.

CHIEF JUSTICE MULLARKEY: Thank you counsel. I want to thank both counsel, all counsel, for your arguments, the case will stand submitted, and we'll go on to the next case.

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1. 1 Gregory J. Hobbs, Jr., ***Colorado*** Water Law: An Historical Overview, 1 U. Denv. Water L. Rev. 1, 27 (1997). The first update to Justice Hobbs' article appears at 2 U. Denv. Water L. Rev. 223 (1999). [↑](#footnote-ref-2)
2. 2 A transcription of the oral argument to the ***Colorado*** Supreme Court follows this summary. [↑](#footnote-ref-3)
3. 3 [*14 P.3d 325 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41PW-C4S0-0039-403H-00000-00&context=1516831) [↑](#footnote-ref-4)
4. 4 By the time the court decided this case, Justice Gregory K. Scott had retired from the court and Justice Nathan B. Coats participated in the decision. [↑](#footnote-ref-5)