

# [***ARTICLE: CONDITIONAL WATER RIGHTS AND THE PROBLEM OF SPECULATION***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5GNG-SK30-00SW-50H0-00000-00&context=1516831)

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**Author:** AARON PETTIS\*

\* JD, Indiana University Maurer School of Law. This Article would not exist without the guidance, support, and patience of Professor Robert Fischman. Many thanks also to Aaron Clay for his helpful suggestions.

**Text**

**[\*313]**

[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). Introduction

To those who think of ***Colorado*** just as purple mountain majesties above the fruited plains, the northwest corner of the state may come as a surprise. Out there, the landscape levels off into an emptiness of sagebrush and sandstone, of antelope and bizarre flat-topped mesas. The torpid ***rivers*** belie their colorful names and flow tepid and flat. It is a lonely place.

But underneath all of that is the Green ***River*** Formation, an oil shale formation that lies beneath parts of ***Colorado***, Utah, and Wyoming. [[1]](#footnote-2)1 The Formation contains about three trillion barrels of oil, an "amount about equal to the entire world's proven oil reserves." [[2]](#footnote-3)2

It is hard not to get excited about the prospects of oil shale development. [[3]](#footnote-4)3 That much oil could lead to energy security and independence. Jobs would be created. [[4]](#footnote-5)4 Taxes would be collected. Federal and state governments would collect royalty payments.

It is also hard not to be discouraged about the prospects of oil shale development: interest in oil shale is over a hundred years old, [[5]](#footnote-6)5 commentators have been noting the unlikelihood of its development for over forty years, [[6]](#footnote-7)6 and it remains undeveloped to this day. To extract the oil from the rock, the rock must be heated to somewhere between 650 and 1000 degrees Fahrenheit. [[7]](#footnote-8)7 Because the oil shale in the Green ***River*** Formation is so deep underground, the most likely technique for extraction is an in-situ process, in which drillers insert heaters into holes in the rock and collect oil as it is released. [[8]](#footnote-9)8 No one has ever demonstrated this technology on a large scale. [[9]](#footnote-10)9

In-situ oil shale development demands significant amounts of water: one to twelve forty-two-gallon barrels of water are required to extract each barrel of oil. [[10]](#footnote-11)10 This is, of course, a tremendous amount of water, especially in such an arid region, but the companies interested in oil shale hold enough water rights - or are confident that they can purchase additional rights - to begin development. [[11]](#footnote-12)11 The vast majority of these rights are conditional water rights. [[12]](#footnote-13)12

In ***Colorado***, water is the property of the public, not subject to private **[\*314]** ownership, [[13]](#footnote-14)13 but private individuals can acquire the right to use water by appropriating it and putting it to beneficial use. [[14]](#footnote-15)14 Between users, the priority of the appropriation gives the better right [[15]](#footnote-16)15 so that in times of scarcity those appropriators with junior rights will have to defer to those with senior rights. Finally, beneficial use is the "basis, measure, and limit" of that right. [[16]](#footnote-17)16 Conditional rights act as a placeholder in this priority system by allowing appropriators to preserve seniority in the time that it takes them to complete the project to put water to beneficial use. [[17]](#footnote-18)17 All water rights, both absolute and conditional, must be appropriated for beneficial use, rather than speculative investments. [[18]](#footnote-19)18

The oil companies are not the only holders of conditional rights. Statewide, conditional claims constitute sixty-one percent of perfected claims, and some of these are nearly a century old. [[19]](#footnote-20)19 Consequently, holders of conditional rights have been able to retain senior priorities without ever putting the water to beneficial use.

This Article argues that the current test for canceling conditional rights has proven ineffective. Part II outlines the policies served by prior appropriation and analyzes the prohibition against speculation. Parts III and IV examine the necessity of conditional rights and the general legal doctrines used to grant or limit conditional rights. With these policy and legal underpinnings in place, this Article moves to the current state of the law. Part V studies a number of the most important cases over the last fifteen years, which have substantially modified the nature of conditional water rights. Part VI discusses these cases in light of the policies discussed in Part II and argues that current doctrine has been ineffective at achieving a chief goal of prior appropriation: the wide distribution of water to potential beneficial users.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). Policies Served by Prior Appropriation

The prior appropriation system, with its requirement of beneficial use, serves three fundamental purposes: (i) to prevent speculation and monopolies, (ii) to prevent waste and overuse, (iii) and to provide users with flexibility in the water's use. [[20]](#footnote-21)20 Of these, this Article focuses primarily on the problem of speculation.

Speculation and monopolization are not the same. [[21]](#footnote-22)21 Monopoly "refers to super-concentrated market power, whereby the monopolist controls so much **[\*315]** of a resource that he can depress supply and/or quality and inflate price." [[22]](#footnote-23)22 In economic theory, speculation is much more difficult to define, and "a satisfactory general definition is still not available (and probably never will be)." [[23]](#footnote-24)23 To make matters even more complicated, the ***Colorado*** Supreme Court has not always been consistent. The Court has sometimes differentiated between speculation and monopolization [[24]](#footnote-25)24 and sometimes has collapsed the distinction. [[25]](#footnote-26)25 Following previous commentators, this Article will consider "speculation [as] the act of acquiring a resource for the purpose of subsequent use or resale." [[26]](#footnote-27)26 This definition focuses entirely on intent. But, since conditional rights may become speculative over time, [[27]](#footnote-28)27 this Article includes as speculative those appropriations that have the effect of hoarding water rights without putting those rights to beneficial use.

In order to analyze how the prior appropriation doctrine tries to prevent speculation, Subpart A first lays out the philosophical underpinnings of prior appropriation itself. Subpart B then looks at the two modern rationales for preventing speculation - that it is a moral wrong and that it prevents the wide distribution of water among potential users - and argues that this latter rationale is the better of the two and should form the basis for critiques of current doctrine.

A. The Lockean Underpinnings of Prior Appropriation

John Locke wrote the second of the Two Treatises of Government in 1690. [[28]](#footnote-29)28 Neither the ***Colorado*** Supreme Court nor the Court of Appeals has cited him. Yet Locke remains important for a number of reasons. As scholars have noted, Locke's insights are particularly helpful for understanding both the roots of Western water law and for developing the law for the future. [[29]](#footnote-30)29 Further, recent scholarship by David Schorr has argued that prior apHD **[\*316]** propriation developed as an expression of radical Lockeanism. [[30]](#footnote-31)30 Schorr's work is particularly important because the ***Colorado*** Supreme Court has repeatedly embraced it when striking down conditional water rights as unduly speculative. [[31]](#footnote-32)31

Locke dedicates much of the Second Treatise to his theory of property. [[32]](#footnote-33)32 For Locke, one's own labor belongs to oneself, and applying that labor to nature creates a property right in that resource. [[33]](#footnote-34)33 Labor is essential, and the application of labor is the moment of creation of private property - the applied labor distinguishes the natural resources now held as private property from the resources still held in common. [[34]](#footnote-35)34 Locke's example is particularly relevant:

Though the water running in the fountain be every one's, yet who can doubt, but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself. [[35]](#footnote-36)35

But appropriation has limits. The law of nature forbids appropriation if it leads to spoilage, [[36]](#footnote-37)36 and the appropriator can only appropriate that which could be traced to actual labor: "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property." [[37]](#footnote-38)37 The law of nature and the theory of property thus limit a person even in the absence of others. One could not take all the apples or shoot all the game for him or herself, for the inevitable spoilage would violate the law of nature. Nor could **[\*317]** one claim land without applying labor to it. The law of appropriation thus has a moral element for Locke, expressed in two ways. First, there is the sense that spoilage is immoral. Second, the act of working - and being rewarded with the fruits of one's labor through the creation of private property - is a moral act in itself, a kind of virtue ethics. "God gave the world … to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious." [[38]](#footnote-39)38

The second limitation on appropriation comes from the presence of others. For Locke, the appropriation could not harm others. By limiting one's property to that to which one has applied labor, one could not appropriate away from others, and could not exclude others who had a better claim to the property. [[39]](#footnote-40)39 Again, Locke's example is relevant:

No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole ***river*** of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same. [[40]](#footnote-41)40

There comes a point, however, when one cannot appropriate water without hurting others - the entire problem of the West is that there is not enough water to begin with. In this scenario, Locke argues that society is better off because of the prior appropriations, that "he who appropriates land to himself by his labour, does not lessen, but increases the common stock of mankind." [[41]](#footnote-42)41 This is an early example of cost-benefit balancing, [[42]](#footnote-43)42 where, "for those without rights, money and commerce have allowed them to share in the social product created by the initial appropriators." [[43]](#footnote-44)43

From this, one can build the doctrine of prior appropriation from scratch. [[44]](#footnote-45)44 In the state of nature that was the early mining camps, [[45]](#footnote-46)45 the water was a public resource, available for use by appropriation. [[46]](#footnote-47)46 A person could **[\*318]** appropriate water, but could not waste it. [[47]](#footnote-48)47 From these principles - that one must apply water to a beneficial use and that one can acquire property only through labor - comes the topic of this Article, the prohibition against speculation.

B. The Critique of Speculation

1. Speculation as a Moral Wrong

Western water has a distinctive feature: the right to use water is a property right that can be bought and sold like other property rights, [[48]](#footnote-49)48 but it cannot be held and sold purely for profit.

That any speculation is evil or is a moral wrong is well-engrained in popular culture, [[49]](#footnote-50)49 though laws in other areas try to regulate and control speculation rather than prohibit it altogether. The laws that apply to water "are highly distinctive and apply to "virtually nothing else.'" [[50]](#footnote-51)50 In western water law, then, there is "a strong sense that speculation in water is just plain wrong." [[51]](#footnote-52)51

Courts have sometimes resorted to this type of moral language. The ***Colorado*** Supreme Court has called speculation the "sinister purpose," [[52]](#footnote-53)52 and it has noted that "speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires." [[53]](#footnote-54)53

**[\*319]** The Court came closer to articulating the rationale for the prohibition of speculation in City & County of Denver v. Northern ***Colorado*** Water Conservancy District, [[54]](#footnote-55)54 in which the Court condemned "promoters and speculators - not appropriators" who had "done only token work to give pretense of a right which they might sell." [[55]](#footnote-56)55 Indeed, "mere speculators … cannot by survey, plat and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." [[56]](#footnote-57)56

This last passage hints at two of the primary reasons why speculation in water seems morally wrong. The right to appropriate - unlike, say, the right to purchase land or commodity futures - is a right the ***Colorado*** Constitution guarantees. [[57]](#footnote-58)57 In other words, to deprive those who would actually use the water is to deprive them of their constitutional right. This raises the second reason why speculation in water seems morally wrong: there is a strong suggestion that those who do work - here the "bona fide appropriators" against the "mere speculators" - are morally preferable to those who do not.

This leads back to Locke, for "Locke's injunction that a person has a right to that property which "he hath mixed his Labour with' can be used to attack the speculator and trader in the name of the "workingman.'" [[58]](#footnote-59)58 In other words, "property derived from trade or speculation [does] not possess the same moral justification as property derived from "real' work." [[59]](#footnote-60)59

Of course, the moral justification for the antispeculation doctrine is hardly compelling, especially when the law permits speculation in any number of other natural resources. [[60]](#footnote-61)60 Further, in light of economists' strong pro-speculation arguments, [[61]](#footnote-62)61 it is hard to justify the law's approach in promoting personal virtue ethics.

2. Hoarding and Distributive Justice

A better argument for the antispeculation doctrine is that it helps to distribute the scarce resource among potential beneficial users. This is consistent with Professor Schorr's interpretation of radical Lockeanism.

The prohibition against speculation is part of prior appropriation itself: **[\*320]** courts established the beneficial use requirement as a "general anti-speculation doctrine of appropriation law targeting big water corporations in practice." [[62]](#footnote-63)62 The beneficial use requirement came directly from the mining camps, and its purpose was to prevent absentee owners from selling the water at a profit and to make the water available for actual users. [[63]](#footnote-64)63

Fears of speculation and monopolization were not limited to water law, [[64]](#footnote-65)64 but were "expressions of an agrarian, populist world view widespread in the western United States in the nineteenth century, an ideology locked in a secular struggle with corporate capitalism and speculative investment, particularly in western lands." [[65]](#footnote-66)65 Scarce resources created concerns among western settlers that the resources would not be available to the actual settlers and miners, but instead would "be disposed of to absentee speculators and corporations controlled by eastern and European investors." [[66]](#footnote-67)66

The earliest ***Colorado*** reference to the prohibition against speculation appears to be in Combs v. Agricultural Ditch ***Co***. [[67]](#footnote-68)67 The Court in Combs cited no precedent for the prohibition against speculation - rather, the prohibition derived directly from the requirement of beneficial use. [[68]](#footnote-69)68 This prohibition was **[\*321]** bolstered by the public policy argument that speculation would drive consumers out of the market and would prevent irrigation. [[69]](#footnote-70)69 The argument retains vitality today and is often deployed by the ***Colorado*** Supreme Court. [[70]](#footnote-71)70 That rationale - that the opportunity to use those priorities would not be fairly distributed - remains the most convincing argument for the prohibition against speculation.

C. A Brief Defense of Speculation

Among the criteria bandied about in public discussions on the allocation of water supplies are such phrases as "fair shares," "reasonable requirements," "needs," "beneficial uses," etc.; in some cases these can only be regarded as noises with emotive content used as substitutes for rational analysis. [[71]](#footnote-72)71

Locke took one more step that never made it into ***Colorado*** water law: he reevaluated appropriation rules in light of the introduction of money. [[72]](#footnote-73)72 Since **[\*322]** money cannot spoil, appropriators could avoid the strictures of the law of nature by over-appropriating and selling natural resources. [[73]](#footnote-74)73 Appropriators could accumulate money without the fear of spoilage.

***Colorado*** water law refused to take this step. The prohibition against speculation in water treats water as something fundamentally different from other sources, often couched in the necessity of water to both life and livelihood. [[74]](#footnote-75)74 While this notion is deeply engrained in western water law, it produces much eye-rolling among economists, who reject the "nonsense [that] has been written on the unique importance of water supply to the nation or to particular regions… . [because] whatever reason we cite … the alleged unique importance of water disappears upon analysis." [[75]](#footnote-76)75 In this view, water is just like any other economic good - that is, "an economist might be defined as someone who doesn't see anything special about water." [[76]](#footnote-77)76 For the economist, the true evil is not speculation on the market, but speculation taking the place of reason.

Despite the popular antipathy toward speculation, economists typically favor it because it is economically efficient. [[77]](#footnote-78)77 In general, economists argue that speculation serves a number of goals: it shifts the risk of failure onto those who are most able to bear it, [[78]](#footnote-79)78 it helps adjust market prices to more accurately reflect supply and demand, [[79]](#footnote-80)79 it allows development to take place at an appropriate time [[80]](#footnote-81)80 and in creative or innovative ways, [[81]](#footnote-82)81 and it allows the market - rather than the judiciary - to correct failures. [[82]](#footnote-83)82

These justifications for speculation are not exclusive to water, either. **[\*323]** Speculative investing shifts risk onto investors in two ways. First, investors bear the risk of uncertain water supplies, caused both by year-to-year fluctuations in rain and snowfall and the persistent threat of climate change. [[83]](#footnote-84)83 For economists, this uncertainty makes water especially suitable for the market - that is, adjustments to the water market can reallocate risk just like any number of other markets. [[84]](#footnote-85)84 If the value or supply of water plummets, the investor bears the loss. [[85]](#footnote-86)85 The second way that speculation shifts risk is that it allows investors, rather than consumers, to bear the risk of failed projects. [[86]](#footnote-87)86 In this sense, speculation is not limited to a strict economic definition but includes any right that would be canceled by a court. Because Vidler requires that an appropriator have either firm contractual commitments or an agency relationship with the end beneficial user, only users of water itself - not investors - carry the risk of failed projects. [[87]](#footnote-88)87

Furthermore, the antispeculation doctrine is undesirable to the extent that it hampers viable water markets. Commentators have argued that treating water like any other economic good has the potential to solve the very real problems of inefficient agricultural use and environmental degradation. [[88]](#footnote-89)88 Water markets facilitate the distribution of water according to its most valuable economic use. Thus, since "the economic value of [agricultural] water to cities dwarfs the value of the same water to the farmers[,] it makes economic sense to let the water support the higher value activity." [[89]](#footnote-90)89 Thus, the argument goes, the result under ***Colorado*** water law is the unnecessary injection of the judiciary into matters that the market should regulate. [[90]](#footnote-91)90

**[\*324]** This discussion is not an exhaustive defense of water speculation; commenters have raised some important counterarguments. [[91]](#footnote-92)91 Rather, this brief defense highlights the problems with a moral prohibition on water speculation - in other words, that it is not as easy as simply dismissing it as "evil" or "sinister." The perception that there is something intrinsically different about water is so deeply engrained within the culture and courts that it is unlikely to change. Still, the arguments based on the presumed evil of speculation are not persuasive. A more persuasive argument is that water held without being put to beneficial use removes that water from the pool of resources available to those who could use it immediately.

This is important conceptually as well. If speculation is evaluated by how it affects third parties, then it is more appropriate to talk about speculative effects rather than speculative intent. [[92]](#footnote-93)92

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). Conditional Rights

The problem with the beneficial use doctrine is readily apparent: if water rights do not form until appropriators put the water to beneficial use, then appropriators cannot secure rights until after they complete a project, at which time other appropriators may have gained seniority over them. Without protection, appropriators have no incentive to engage in long-term, complicated projects. To solve this problem, early courts developed the doctrine of conditional water rights. [[93]](#footnote-94)93

Conditional water rights are an exception to the rule that appropriators must put water to beneficial use before they can establish a right. [[94]](#footnote-95)94 A conditional water right is "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." [[95]](#footnote-96)95 Conditional rights thus serve as placeholders within the priority system and allow an appropriator to preserve seniority **[\*325]** while completing the necessary steps for the project. [[96]](#footnote-97)96

The rule has generally remained unchanged since Sieber, [[97]](#footnote-98)97 though the ***Colorado*** Supreme Court has interpreted the statute as requiring a three-part test. To establish a conditional water right, the applicant must demonstrate that (i) it has taken a first step toward appropriation, (ii) its intent is not speculative, and (iii) "there is a substantial probability that the applicant "can and will' complete the appropriation with diligence and within a reasonable time." [[98]](#footnote-99)98 The first requirement is a notice requirement for other users. The second requirement is the statutory version of the Vidler antispeculation doctrine. The third requirement is the statutory imposition of the can-and-will doctrine.

Even though an appropriator can use the doctrine of conditional water rights for any size of water project, [[99]](#footnote-100)99 the doctrine is especially important for the type of large-scale projects that are increasingly dominating the most important questions in ***Colorado*** water law. [[100]](#footnote-101)100 As the ***Colorado*** Supreme Court has noted, "The doctrine of relation back is a legal fiction in derogation of the constitution for the benefit of claimants under larger and more difficult projects." [[101]](#footnote-102)101

While the prohibition against speculation is intrinsic to the doctrine of prior appropriation itself, [[102]](#footnote-103)102 the prohibition can be separated into two general eras, divided in 1979 by ***Colorado*** ***River*** Water Conservation District v. Vidler Tunnel Water ***Co***., which established the modern bright-line test for determining speculation. [[103]](#footnote-104)103

A. Balancing Before Vidler

Before Vidler, courts were able to approach the antispeculation doctrine with more discretion. These cases show that courts would give substantial leeway to important projects as long as the applicant put in some effort to develop the project.

The definitive example of balancing speculation against prospective deHD **[\*326]** velopment appears in City & County of Denver v. Sheriff, in which the ***Colorado*** Supreme Court held that it would not hold cities to the same scrutiny for speculation as it would other appropriators. [[104]](#footnote-105)104 Indeed, "it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time." [[105]](#footnote-106)105 The Court chastised the defendants' lawyers who, in approaching the rights as if they were for agricultural use, "did not fully comprehend the issues involved in this case" and "missed entirely the outstanding fact that more than one-third of the population of the state is seeking a measure of security in water supply." [[106]](#footnote-107)106 The balancing struck in Sheriff is so important that the entire antispeculation doctrine would likely be unworkable without it. [[107]](#footnote-108)107

Mid-century cases reflect the ***Colorado*** Supreme Court's willingness to support large-scale projects. The point is apparent: large projects are essential to the wellbeing of the state and they need some flexibility. No matter what evil the Robber Barons wreaked upon the West, they were instrumental in developing the country, creating a national infrastructure, and "creating enormous national wealth and dramatically raising American living standards." [[108]](#footnote-109)108 Likewise, significant projects - especially complicated projects that require tunneling through the Continental Divide - need some sort of leeway in their development.

In Taussig v. Moffat Tunnel Water & Development ***Co***., [[109]](#footnote-110)109 the ***Colorado*** Supreme Court upheld conditional rights for a transmountain project that carried Western Slope water into the South Platte basin. [[110]](#footnote-111)110 The water company had spent money trying to develop the water, [[111]](#footnote-112)111 but there was no indication of how the water would be used or who would use it. [[112]](#footnote-113)112 The Court, in upholding the conditional rights, emphasized the necessity of large-scale projects and the protection that courts should give these projects. [[113]](#footnote-114)113

[*Twenty*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T262-8T6X-730V-00000-00&context=1516831) years later, the Court relied heavily on Taussig in upholding another transmountain diversion in Metropolitan Suburban Water Users Ass'n v. ***Colorado*** ***River*** Water Conservation District. [[114]](#footnote-115)114 There, appropriators **[\*327]** sought to divert Western Slope water from the Eagle ***River***, then transfer the water across the mountains into the Arkansas ***River*** Basin, and finally transport the water into the South Platte ***River*** Basin. [[115]](#footnote-116)115 The Arkansas water would reach Pueblo and the South Platte water Denver, Aurora, and ***Colorado*** Springs. [[116]](#footnote-117)116 The trial court found, among other things, that the entire "project [was] speculative, the financing uncertain and that there [was] no need for the water to be appropriated." [[117]](#footnote-118)117 The ***Colorado*** Supreme Court quickly rejected these findings as having no evidentiary basis. [[118]](#footnote-119)118 The Court dismissed the fear of speculation that had compelled the trial court:

Similar views and fears prevailed with reference to the Big Thompson, Moffat Tunnel, Roberts Tunnel and other major projects - to many if not most people, these projects appeared to be the dreams of visionaries; today they are beneficent realities. The trial court had no right to substitute its opinion as to the course of future events, for that of those charged with the duty of supplying adequate water for municipalities and other public bodies, who have made careful studies of the questions and problems presented and have in good faith put their vision, work, money and energies into a program by which they seek to put the public waters of the state to beneficial use. [[119]](#footnote-120)119

While the Court had called speculation a "sinister purpose" earlier in its opinion, [[120]](#footnote-121)120 this passage reads like a modern economic justification for speculation - that markets, rather than courts, should determine the allocation of water. [[121]](#footnote-122)121 The Court even concluded with a straightforward endorsement of the risk-shifting justification of speculation: "If they have miscalculated and fail, the loss is theirs - if they succeed, it will be for the eternal benefit of the peoples of the state of ***Colorado***." [[122]](#footnote-123)122 In this, the Court, channeling Locke, [[123]](#footnote-124)123 found that proper appropriations imbued with labor increase the overall wellbeing of everyone as a whole. Consequently, the loss of opportunity for others to appropriate is less significant, since everyone would be better off if the project succeeded. The Court's reliance on Taussig also suggests that it was not relying on a public work's involvement; instead, it appears as if the Court's rationale could apply equally to private appropriators. [[124]](#footnote-125)124

This is not to say that courts were unwilling to find speculation. Bunger v. Uncompahgre Valley Water Users Ass'n [[125]](#footnote-126)125 represents one of the more tentative projects proposed, and one of the easier cases to decide. Bunger involved a "complex and massive" plan that collected water from multiple Western Slope ***rivers*** and redistributed the water to ***rivers*** and unbuilt reservoirs on **[\*328]** both sides of the Continental Divide. [[126]](#footnote-127)126 Unused water would flow back into the Gunnison ***River***, [[127]](#footnote-128)127 with the "only purpose in seeking an appropriation was to save the water for ***Colorado***. [Bunger] merely expressed Hopes to irrigate 600,000 acres of land - where and owned by whom he had no idea." [[128]](#footnote-129)128 Bunger's intent was probably not speculative in the sense of an appropriation made solely for its sale expectancy. Instead, it seems like a harebrained scheme that was high on hopes but low on logistics. The move between Metropolitan Suburban and Bunger has less to do with speculation per se but with the practicalities of the projects at hand.

B. Vidler

In 1979, the ***Colorado*** Supreme Court decided ***Colorado*** ***River*** Water Conservation District v. Vidler Tunnel Water ***Co***., [[129]](#footnote-130)129 which established the beginning of the modern era of the antispeculation doctrine by establishing a bright-line test for speculative use. To survive a challenge of speculation, the appropriator must demonstrate either a firm contract or an agency relationship with a proposed user who will put the water to beneficial use. [[130]](#footnote-131)130 Vidler has become more than just precedent: it has become the talisman that the Court invokes whenever it decides to cancel a right as speculative, a ceremony in which the high priests begin by intoning, "Our constitution guarantees a right to appropriate, not a right to speculate." [[131]](#footnote-132)131 Indeed, the ***Colorado*** Supreme Court today no longer cares to justify the rule on policy grounds: "It is now too well-settled to merit elaboration that the intent to appropriate water for a beneficial use … cannot be based on the speculative sale or transfer of the appropriate rights." [[132]](#footnote-133)132

The ***Colorado*** Supreme Court has consistently insisted that Vidler was not new law and that it "expressly relied upon prior holdings" and "reaffirmed [the Court's] longstanding view." [[133]](#footnote-134)133 It is true that the prohibition of speculation has always been inherent in prior appropriation. But, Vidler, in requiring a contract or an agency relationship, [[134]](#footnote-135)134 went beyond what precedent required, [[135]](#footnote-136)135 **[\*329]** and it is apparent that the Court was more interested in creating a predictable rule of law than in reaching a precise result in every case, especially since "Vidler's efforts possibly went beyond mere speculation." [[136]](#footnote-137)136 The ***Colorado*** legislature has codified Vidler, [[137]](#footnote-138)137 and the case now stands as the first defense against speculative appropriations. The second is the can-and-will doctrine.

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). The Early Can-and-Will Test

After an applicant takes the first step toward appropriation and satisfies the Vidler antispeculation doctrine described above, the applicant must show "there is a substantial probability that the applicant "can and will' complete the appropriation with diligence and within a reasonable time." [[138]](#footnote-139)138 Like the Vidler antispeculation doctrine, the ***Colorado*** legislature has codified the can-and-will doctrine [[139]](#footnote-140)139 in order "to reduce speculation associated with conditional decrees and to increase the certainty of the administration of water rights in ***Colorado***." [[140]](#footnote-141)140 Of the two doctrines, the can-and-will doctrine is "slightly more stringent." [[141]](#footnote-142)141 Importantly, however, the two doctrines do separate work, and the ***Colorado*** Supreme Court has resisted arguments to collapse the two into a single test. [[142]](#footnote-143)142

The most thorough review of the can-and-will doctrine is a twenty-one-year-old student comment by Mark E. Hamilton. [[143]](#footnote-144)143 Hamilton's comment drew the attention - and citation - of the ***Colorado*** Supreme Court [[144]](#footnote-145)144 The following Subpart provides a brief overview of Hamilton's argument and evaluates his predictions in light of the intervening twenty-one years.

A. Overview

Hamilton's comment analyzed the can-and-will doctrine in light of four ***Colorado*** Supreme Court cases decided between 1984 and 1993 - **[\*330]** Southeastern ***Colorado*** Water Conservancy District v. City of Florence, [[145]](#footnote-146)145 FWS Land & Cattle ***Co***. v. State, Div. of Wildlife, [[146]](#footnote-147)146 Public Service ***Co***. of ***Colorado*** v. Board of Water Works of Pueblo, ***Colorado***, [[147]](#footnote-148)147 and Gibbs v. Wolf Land ***Co***. [[148]](#footnote-149)148

In Florence, the city and town applicants sought a conditional right for 100 c.f.s. from the Arkansas ***River*** to cover their anticipated population growth. [[149]](#footnote-150)149 The Court noted that "the Arkansas ***River*** is severely over-appropriated, and expert witnesses testified that water might be available under the right for approximately once every 25 years." [[150]](#footnote-151)150 Testimony at trial suggested five to ten c.f.s. of water could meet applicants' future needs, but the applicants were about $ 1 million short on financing, and their infrastructure could only handle about 4.7 c.f.s. [[151]](#footnote-152)151 The Court rejected the argument that an applicant should not have to prove the existence of available water at the time of the conditional right was decreed, since "the availability of water depends upon unpredictable factors such as climate, economics and technology." [[152]](#footnote-153)152 Hamilton, interpreting this rejection, found that Florence "held that an applicant for a conditional water right must show that unappropriated water is available and will be diverted… . [which] is not unlike the law in most other western "prior appropriation' states, which often requires permit applications to demonstrate available unappropriated water." [[153]](#footnote-154)153

In FWS Land & Cattle, the applicant appealed a summary judgment dismissal of a conditional storage right for water in lakes partially owned by the state. [[154]](#footnote-155)154 The ***Colorado*** Supreme Court upheld the water court's determination that FWS could not prove that it could and would use the water because it had neither complete ownership of the lakes, nor permission to use the state lands for water storage. [[155]](#footnote-156)155 Hamilton argued that FWS Land & Cattle "marked the emergence of the "can and will' doctrine as the primary determinant of conditional rights… . [by] broadening the interpretation of section 305(9)(b) to require an applicant to demonstrate than an indeterminate number of hurdles (regulatory, legal, economic, engineering, etc.) "can and will' be surmounted." [[156]](#footnote-157)156

In Public Service ***Co***., the water court dismissed an application for conditional rights of exchange on the Arkansas ***River***. [[157]](#footnote-158)157 The water court, as part of a 1984 change decree, mandated that the Public Service Company of ***Colorado*** ("PSCo") build an off-channel reservoir to go along with a proposed power **[\*331]** plant. [[158]](#footnote-159)158 In 1987, the water court granted conditional storage rights in that same reservoir. [[159]](#footnote-160)159 PSCo postponed construction of the new plant indefinitely "based on many factors, including decreased demand for electrical power, the changing economics of generating such power, and Public Utilities Commission regulatory standards concerning the authorization of new power generation facilities." [[160]](#footnote-161)160 At the time, a PSCo executive testified that the company still planned on building the plant, perhaps within the next ten to twenty years, "but the decision would be based on future developments, many of which [were] not within PSCo's control." [[161]](#footnote-162)161 PSCo subsequently sought to exchange the rights for use in its existing upstream power plant. [[162]](#footnote-163)162 The water court dismissed the application, concluding that PSCo did not intend to construct the reservoir in accordance with the 1984 change decree, a prerequisite for the exchange. [[163]](#footnote-164)163

On appeal, PSCo argued, among other things, that the water court's finding that PSCo had no present intent to construct the reservoir was in conflict with and was a collateral attack on the 1987 storage decree. [[164]](#footnote-165)164 The ***Colorado*** Supreme Court rejected this argument, concluding that the can-and-will doctrine applied at the time that PSCo applied for the exchange. [[165]](#footnote-166)165 "That PSCo no longer intended to construct [the reservoir] is not inconsistent with a finding that it did not have such an intent at the time it secured the 1987 storage decree." [[166]](#footnote-167)166 For Hamilton, the Public Services ***Co***. court used the can-and-will doctrine to invalidate a conditional decree instead of the Vidler antispeculation doctrine or diligence doctrine, thus "widening the reach of the "can and will' doctrine and establishing its use as a catch-all objection to large projects." [[167]](#footnote-168)167

In Gibbs v. Wolf Land ***Co***., the water court granted a conditional water right for a well located on the protestor's property. [[168]](#footnote-169)168 The ***Colorado*** Supreme Court affirmed the decision, holding that the applicant could rely on the private right of condemnation to meet the can-and-will statute. [[169]](#footnote-170)169 The Gibbs court distinguished itself from FWS Land & Cattle ***Co***. on the grounds that "FWS is premised on the fact that under no circumstances, absent the consent of the DOW, could the applicant have obtained access to the [protestor's] lands." [[170]](#footnote-171)170 Thus, for Hamilton, Gibbs "retained the scope of the "can and will' doctrine's broad inquiry enunciated in previous cases while limiting the preponderance standard to a legal impossibility test." [[171]](#footnote-172)171

**[\*332]** From these cases, Hamilton drew two primary conclusions. First, "the can and will doctrine has substantially broadened the scope of the permissible inquiry a water court can make when adjudicating a conditional water right." [[172]](#footnote-173)172 Second, because of this broadened inquiry, the can-and-will doctrine has made ***Colorado*** water law resemble the permit systems of other western states. [[173]](#footnote-174)173

B. Analysis

While Hamilton's comment was accurate and admirable at the time, the ***Colorado*** Supreme Court has stepped away from some of his foundational principles, and his predictions have not come to fruition.

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), the ***Colorado*** Supreme Court has not used the can-and-will doctrine as a judicial permit system. Hamilton relied on Florence and a decision by the water court in the Union Park Reservoir litigation to argue that courts should take into account other conditional rights in determining whether there was sufficient unappropriated water in the stream. [[174]](#footnote-175)174 Hamilton argued that "failure to consider existing conditional decrees would be tantamount to disregarding adjudicated property rights. The consideration of senior conditional rights by water courts is comparable to the power of most water permitting agencies in other Western states." [[175]](#footnote-176)175 The ***Colorado*** Supreme Court rejected this argument a year later in Board of County Commissioners v. United States (Arapahoe I), [[176]](#footnote-177)176 in which the Court held that senior conditional rights were not to be considered in determining the amount of unappropriated water available. [[177]](#footnote-178)177 The Court, in reaching this result, relied on the policies of maximum utilization or maximum beneficial use. [[178]](#footnote-179)178

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), it is not apparent that the can-and-will doctrine has become "the primary determinant of conditional rights." [[179]](#footnote-180)179 Rather, courts have used the can-and-will doctrine in conjunction with the Vidler antispeculation doctrine. In some cases, an applicant will lose on both doctrines. [[180]](#footnote-181)180 In others, each doctrine will do independent work - for instance, in a case of competing conditional claims, one party might lose on the antispeculation doctrine while the other loses on the can-and-will doctrine. [[181]](#footnote-182)181 It seems that the can-and-will doctrine has become a secondary inquiry, applied when the Court senses that there is some speculative intent: "The "can and will' requirement should not be applied rigidly to prevent beneficial uses where an applicant otherwise satisHD **[\*333]** fies the legal standard of establishing a nonspeculative intent to appropriate for a beneficial use." [[182]](#footnote-183)182

[*Third*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831), the ***Colorado*** Supreme Court has rejected the notion that the can-and-will doctrine is a legal impossibility test. In FWS Land & Cattle ***Co***., the Court held that FWS could not satisfy the can-and-will requirement because it could not legally obtain access to the land necessary to complete the appropriation. [[183]](#footnote-184)183 This issue arose later in Gibbs when the applicant sought conditional rights to a well located on the protestor's land. [[184]](#footnote-185)184 The protestor argued that Gibbs had failed the can-and-will test because Gibbs had not established an unrestricted right of access across the private property. [[185]](#footnote-186)185 Both the water court and the ***Colorado*** Supreme Court rejected this argument, holding that Gibbs had satisfied the can-and-will test by "relying on the potential right of private condemnation." [[186]](#footnote-187)186 From this, Hamilton concluded that Gibbs established a legal impossibility test - "that is to say that the "can and will' doctrine should not inhibit issuance of a conditional decree unless it is a legal impossibility that the water will be applied to a beneficial use in the future (e.g., a necessary permit cannot be obtained, under any circumstances)." [[187]](#footnote-188)187

While Gibbs remains good law, the court has emphasized that it should be interpreted as a factor in determining whether applicants have satisfied the can-and-will test. In Vermillion Ranch, the water court had held that "the application should be denied under the "can and will' requirement "only if the impediments make it impossible' for the applicant to complete the appropriation… ." [[188]](#footnote-189)188 The water court erred, however, for the proper test "is a balancing test that turns on several factors." [[189]](#footnote-190)189 In City of Black Hawk v. City of Central, [[190]](#footnote-191)190 the Court held that Black Hawk satisfied the can-and-will test even after Central City had passed a nonbinding general resolution that barred third parties from using its property for water projects. [[191]](#footnote-192)191 The Court in Vermillion Ranch interpreted City of Black Hawk as a factor case: "We based our holding on the fact that the lack of current access to property is not typically dispositive of whether the "can and will' test is satisfied, and on the water court's finding that Black Hawk had satisfied all the other requirements of the "can and will' statute." [[192]](#footnote-193)192 Thus, "[precedent] does not suggest that a court has no basis to deny an application under the "can and will' requirement unless the impediments make the project impossible to complete." [[193]](#footnote-194)193 "In other words, absence of a **[\*334]** final denial of access is a necessary, but not sufficient, condition for satisfaction of the can and will requirement." [[194]](#footnote-195)194 Thus, applicants have failed the can-and-will requirement when authorization was possible, but would have required congressional approval [[195]](#footnote-196)195 or when the proposed use was possible but unlikely. [[196]](#footnote-197)196

The can-and-will test has substantially more leeway than Hamilton predicted from the early cases. Courts today have the option to emphasize either the Vidler doctrine or the can-and-will doctrine and have the ability to cancel conditional rights based on a number of factors. This has developed into the substantial probability test.

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). The Modern Can-and-Will Doctrine

A. Substantial Probability

The most important development in the can-and-will doctrine since Hamilton's comment is the development of the substantial probability test, first articulated in 1995 in Arapahoe I. [[197]](#footnote-198)197 For the Arapahoe I court, the substantial probability test was a more precise articulation of the can-and-will statute and was inherent in the traditional doctrine that applicants should pursue conditional rights with diligence. [[198]](#footnote-199)198 Under the substantial probability test, "the applicant bears the burden of proving, through evidence, a substantial probability that the project can and will be completed, with diligence and within a reasonable time, and … whether an applicant has demonstrated that it has met the "can and will' requirement is a balancing test that examines several relevant factors." [[199]](#footnote-200)199 Because the future is uncertain, courts must evaluate evidence in terms of factors instead of elements. [[200]](#footnote-201)200 The presence of future contingencies is a nondispositive factor that courts must consider together with all the facts and **[\*335]** circumstances of each particular case. [[201]](#footnote-202)201 A nonexhaustive list of factors includes:

(1) economic feasibility; (2) the status of requisite permit applications and other required governmental approvals; (3) expenditures made to develop the appropriation; (4) the ongoing conduct of engineering and environmental studies; (5) the design and construction of facilities; and (6) the nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected. [[202]](#footnote-203)202

While the substantial probability test remains the standard test for the can-and-will statute, some of the most important cases in the last fifteen years deal with how the can-and-will statute interacts with other policy decisions made by the ***Colorado*** General Assembly.

B. Recent Can-and-Will Cases

This Subpart outlines some of the most important can-and-will cases of the last fifteen years. Part VI evaluates these cases more fully.

1. The Oil Shale Cases

Over the course of 1999 and 2000, the ***Colorado*** Supreme Court decided three cases concerning conditional water rights for oil shale development in northwestern ***Colorado***. All of these cases were appeals from hexennial diligence findings.

In Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. Chevron Shale Oil ***Co***., [[203]](#footnote-204)203 the ***Colorado*** Supreme Court affirmed the water court's finding that Chevron had demonstrated reasonable diligence in developing its conditional rights. [[204]](#footnote-205)204 Chevron's conditional rights were dated in the early 1950s but were still not absolute; the Subdistrict argued that "Chevron intended to hold these water rights for over 100 years without exercising reasonable diligence and that such inaction constituted unlawful speculation in conditional water rights." [[205]](#footnote-206)205 Chevron had deferred its oil shale development after oil prices dropped in the 1980s and its number of employees dropped from fifty or sixty to only one. [[206]](#footnote-207)206 Further, Chevron had not started construction of any necessary facilities, even though its conditional rights were forty-five years old. [[207]](#footnote-208)207 Chevron had spent $ 1.5 million over the six-year diligence period, but "nearly one-third was spent on litigation unrelated to perfecting the conditional water rights." [[208]](#footnote-209)208 For these and other reasons, the Subdistrict argued that Chevron had failed to meet its statutory burden of showing a steady effort to complete the appropriation in a reasonably expedient and efficient **[\*336]** manner. [[209]](#footnote-210)209

The ***Colorado*** Supreme Court rejected the Subdistrict's claim and affirmed the water court's finding of diligence because Chevron's efforts, albeit minimal, were sufficient to demonstrate "a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner" given that the production of oil from shale was not then economically feasible. [[210]](#footnote-211)210

The Subdistrict's final argument was that the water court had misapplied the "current economic conditions" limitation in section 37-92-301(4)(c), which provided that:

neither current economic conditions beyond the control of the applicant which adversely affect the feasibility of perfecting a conditional water right or the proposed use of water from a conditional water right nor the fact that one or more governmental permits or approvals have not been obtained shall be considered sufficient to deny a diligence application, so long as other facts and circumstances which show diligence are present. [[211]](#footnote-212)211

It contended that the court should not have relied on the fact that the current state of the economy made shale oil production economically unfeasible in considering whether Chevron's efforts constituted reasonable diligence because that allowed Chevron to delay the project indefinitely. [[212]](#footnote-213)212 Again, the court rejected this argument, noting that not only should the water court consider the statute but that such interpretation was implicit in the case law that established that economic feasibility was one of the factors to be considered in a diligence proceeding. [[213]](#footnote-214)213

Chevron Shale was clarified and expanded four months later in Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. OXY USA, Inc. [[214]](#footnote-215)214 For the second time, the ***Colorado*** Supreme Court affirmed the water court's findings of diligence. The water court held, and the Court agreed, that the can-and-will test applies even during the hexennial review proceedings - that is, the diligence proceedings are not merely backward-looking, evaluating how the applicant has moved toward beneficial use, but require an inquiry into whether the applicant has a substantial probability of putting the water to beneficial use. [[215]](#footnote-216)215

Even though OXY admitted before the water court that it could not extract the oil shale because low oil prices made the project economically infeasible, and that it was unlikely to extract any shale until oil prices increased or the government subsidized the project, the Court held that OXY had met its **[\*337]** burden. [[216]](#footnote-217)216 OXY had spent $ 5,052,235 during the six-year period, including drilling natural gas wells that provided data on oil shale reserves and income to offset the cost of maintaining the oil shale assets, and had conducted some other activities. [[217]](#footnote-218)217 The Court reaffirmed its holding in Chevron Shale and emphasized its deference to the legislature: "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." [[218]](#footnote-219)218

The ***Colorado*** Supreme Court decided the third of the oil shale cases the following spring. In Municipal Subdistrict, Northern ***Colorado*** Water Conservancy District v. Getty Oil Exploration ***Co***., [[219]](#footnote-220)219 the Court once again upheld the water court's finding of reasonable diligence. [[220]](#footnote-221)220 Like Chevron and OXY, Getty had spent some money and some resources in developing its rights. [[221]](#footnote-222)221 The result was foregone: noting section 37-92-301(4)(c), Chevron Shale, and OXY USA, the Court held that Getty had been sufficiently diligent to retain its conditional rights, "despite the presence of adverse economic factors making the project's ultimate completion date uncertain." [[222]](#footnote-223)222

2. Pagosa

In 2007, the ***Colorado*** Supreme Court embarked on "a new era of judicial scrutiny of conditional water rights applications by municipalities." [[223]](#footnote-224)223 MuHD **[\*338]** nicipalities had traditionally received significant leeway from both the courts [[224]](#footnote-225)224 and the legislature. [[225]](#footnote-226)225 In 1996, the Court held that municipalities did not enjoy complete immunity from speculation challenges. [[226]](#footnote-227)226 While a municipality can appropriate without firm contractual relations or agency relationships, as required by Vidler, a municipality can only conditionally appropriate an amount that is "consistent with the municipality's reasonably anticipated requirements based on substantiated projects of future growth." [[227]](#footnote-228)227

The ***Colorado*** Supreme Court went even farther in Pagosa Area Water District v. Trout Unlimited (Pagosa I). [[228]](#footnote-229)228 Though the water court had upheld extensive conditional appropriations by the small Western Slope town of Pagosa Springs, [[229]](#footnote-230)229 the Court held that the water court had failed to make sufficient findings that Pagosa Springs had satisfied both the antispeculation doctrine and the can-and-will statute. [[230]](#footnote-231)230 In doing so, the Court established, for the first time, a series of elements that a government water supply agency had to demonstrate:

(1) what is a reasonable water supply planning project; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply. [[231]](#footnote-232)231

The Court disagreed about the length of the planning period involved. In Bijou, the Court had upheld a fifty-year planning period, which the Court used as a model in Pagosa I. [[232]](#footnote-233)232 The majority noted, "Although the fifty year planning period we approved in Bijou is not a fixed upper limit, and each case depends on its own facts, the water court should closely scrutinize a governmental agency's claim for a planning period that exceeds fifty years." [[233]](#footnote-234)233 Three justices disagreed. Justice Coats argued that the approval of a fifty-year planning period eliminated the reasonable time requirement of the can-and-will statute, [[234]](#footnote-235)234 and Justice Eid, joined by Justice Rice, argued that the majority had imposed a mandatory fifty-year cap on development in the state. [[235]](#footnote-236)235 The full effects of these questions are still unclear and are discussed in the following Part.

**[\*339]**

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). Discussion

To summarize the preceding discussion: The prohibition against speculation is deeply entrenched in ***Colorado*** water law, and, while there are strong economic arguments to allow speculation in certain circumstances, these reasons will not be persuasive before the court. The most powerful justification for the prohibition against speculation is that water should be distributed to those who will put the water to beneficial use - that is, water rights should not be tied up to the detriment of others. This means that courts should study the speculative effects of a project as readily as the speculative intent of the appropriator. This Part argues that the can-and-will doctrine, as currently applied, has led to significant speculative effects. To curb these effects, this Part argues that the legislature should adopt a statutory time limit for conditional rights.

A. The Problem with the Can-and-Will Doctrine

It has been argued that the combination of the Vidler antispeculation doctrine and the can-and-will doctrine has been successful in curbing speculation. [[236]](#footnote-237)236 But this is only true in the very narrow sense of prohibiting the treatment of water as a commodity to invest in. This Subpart argues that the current doctrine has been ineffective at achieving the policy that grounds the antispeculation doctrine to begin with: the distribution of water to potential beneficial users.

The oil shale cases discussed above - Chevron Shale, OXY USA, and Getty Oil - demonstrate the problems with the Vidler antispeculation doctrine and the can-and-will doctrine of section 37-92-305(9)(b). In each of those three cases, the appropriator was a private party appropriating water for itself, so Vidler, which applies to private parties only when they are appropriating for another use, [[237]](#footnote-238)237 never applied. Thus, the only check on the companies was the can-and-will doctrine. [[238]](#footnote-239)238

The oil shale cases stand not just for a point of law, but for an empirical fact as well. Each of those three cases demonstrates an instance in which a single user was able to retain conditional water rights that were half a century old, even when the rights had not been put to beneficial use and the user had no intention of putting the rights to use within the foreseeable future. [[239]](#footnote-240)239 Conditional rights for oil shale have priorities that date back to 1936, [[240]](#footnote-241)240 and the holders of those rights still have not put them to beneficial use.

The oil shale cases are perhaps the highest profile example of this, but they are not the only example. [[241]](#footnote-242)241 Conditional rights are common in every baHD **[\*340]** sin in the state, including irrigation, municipal, and industrial uses. [[242]](#footnote-243)242 Charles Podolak and Martin Doyle recently demonstrated how extensive conditional claims are, finding that conditional claims equal 61% of the amount of perfected rights and that some of these claims are nearly a century old. [[243]](#footnote-244)243 They found that, at the end of 2012, 92% of conditional rights (by amount of flow) were older than six years, and 23% were older than thirty years. [[244]](#footnote-245)244 They also reported that, in the last thirty years, the primary reduction in conditional rights was due to abandonment and not to perfection. [[245]](#footnote-246)245 In other words, not only are conditional rights holders hanging onto these rights for a long time, they are not putting them to beneficial use.

1. The Can-and-Will Doctrine Has Been Diluted

It is hard to say that the ***Colorado*** Supreme Court got the oil shale cases wrong as a matter of law. Because section 37-92-301(4)(c) prohibits the water court from denying an application solely because economic conditions have affected the feasibility of the project when the applicant proves other diligence, [[246]](#footnote-247)246 the Court could not consider the economic infeasibility of the oil shale project.

But these cases strain credulity. The Court accepted the economic feasibility argument, noting that "this interpretation has been implicit in [the] caselaw that sets forth the requirements for an ad hoc finding of reasonable diligence." [[247]](#footnote-248)247 But this is an important doctrinal shift: while economic feasibility has always been important, commentators traditionally interpreted it as a factor for canceling conditional rights rather than as a tool to delay development. [[248]](#footnote-249)248 This is why Hamilton predicted that the can-and-will statute would be such a powerful tool for courts, [[249]](#footnote-250)249 and earlier cases supported this proposition. [[250]](#footnote-251)250

Furthermore, the current application of the can-and-will statute is at odds with the fundamental purpose of conditional rights. Conditional rights should protect appropriators during the construction of large-scale, long-term projects - Taussig and Metropolitan Suburban illustrate this well - rather than allow companies to choose when to put the water to beneficial use. This was not the case in the oil shale cases. In Chevron Shale, the company had reduced its entire operation to one person; [[251]](#footnote-252)251 in OXY USA, the company had admitted that it was not immediately planning to extract oil. [[252]](#footnote-253)252 In Getty Oil, the ColoraHD **[\*341]** do Supreme Court seemed to shrug its shoulders: even though "the project's ultimate completion date [was] uncertain," Getty had satisfied the can-and-will test. [[253]](#footnote-254)253 The Court concluded:

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 37-92-201(4)(c) to the facts of the instant case. [[254]](#footnote-255)254

Getty was able to appropriate the water but chose not to because it would be unprofitable. Under this interpretation, the reasonable diligence and can-and-will tests become effectively meaningless: if a court is going to protect conditional rights under the can-and-will test, then the court cannot at the same time require that the appropriator take steps to put the water to beneficial use. When both the appropriator and the court know that development will be postponed until the market changes, [[255]](#footnote-256)255 any work done for a diligence proceeding will be token construction. [[256]](#footnote-257)256 As such, appropriators have been able to hoard priorities in a way that is reminiscent of other resources that are not limited by speculation prohibitions. [[257]](#footnote-258)257 Consequently, the notion that the antispeculation doctrine provides a "judicial "check' on speculative transactions that adversely affect third parties and ecological needs by depriving them of water" [[258]](#footnote-259)258 is largely rhetorical.

Holders of conditional rights initially seem different from other hoarders. While timber companies once hoarded vast forests and waited for the price of timber to increase, [[259]](#footnote-260)259 the holders of conditional water rights can maintain their conditional rights until the project becomes economically feasible and, as such, do not share a speculative intent. But, as discussed above, the prohibition against speculation only makes sense as a prohibition against speculative **[\*342]** effects, not intent. [[260]](#footnote-261)260 The effect on potential beneficial users is the same, regardless of whether the water is being held until its price increases or indefinitely and until the project becomes feasible.

2. ***Colorado*** Water Law Has Created Basin-Wide Monopoly Without Beneficial Use.

It has been said that "there is no Wal-Mart, ExxonMobil or General Electric of the water world… ." [[261]](#footnote-262)261 Agricultural users make up the vast majority of water users, and those rights are distributed among hundreds of thousands of individual users. [[262]](#footnote-263)262 Single users are permitted to appropriate and own as much water as they can put to beneficial use, which may give them control over a single stream or other localized area. [[263]](#footnote-264)263 While some buyers may entertain thoughts of vast accumulations of water rights, [[264]](#footnote-265)264 large-scale monopolies are unlikely to control water rights today. [[265]](#footnote-266)265

But the ExxonMobil of the water world is ExxonMobil. [[266]](#footnote-267)266 Localized control is not a monopoly in an economic sense, [[267]](#footnote-268)267 but rights holders may be able to hoard priorities to the detriment of potential beneficial users. [[268]](#footnote-269)268 This is what the Pagosa I court had in mind when it addressed the "monopolist pitfalls" [[269]](#footnote-270)269 of speculation: the concern should not be on large-scale monopoly, but it should be on whether a user has unfairly driven out any other potential beneficial users. [[270]](#footnote-271)270 As long as water is put to beneficial use, the law must tolerate monopoly. This is the return to Locke implicit in ***Colorado*** law. For Locke, proper appropriation took something away from the common property, but this did not harm the public, because the act of applying labor developed the resource, thus bettering humankind as a whole [[271]](#footnote-272)271 by effecting an efficient alloHD **[\*343]** cation of resources. [[272]](#footnote-273)272 Presumably, Coloradans are better off [[273]](#footnote-274)273 when users put water to beneficial use, expressed in any number of ways: jobs, local agricultural, cultural identity. This is the point of the maximum utilization policy.

3. The Extensive Number of Conditional Rights Creates Uncertainty for Water Users.

Statewide, Podalak and Doyle discovered that 88% of conditional rights are abandoned or perfected after the initial six-year diligence period. [[274]](#footnote-275)274 After that, 30% of perfected rights took longer than twenty-four years to perfect, and 5% took longer than seventy-two years. [[275]](#footnote-276)275 Twenty-four percent of rights that were eventually abandoned took longer than twenty-four years to be abandoned, and 4% took longer than seventy-two years. [[276]](#footnote-277)276

While conditional rights provide their holder with certainty of seniority, the conditional right also creates uncertainty for users farther down the priority list. [[277]](#footnote-278)277 When senior rights remain conditional, it effectively gives the junior appropriator a much higher priority. But if those senior rights are ever put to beneficial use, then the junior right will be bumped down the chain. Of course, this is how the system is supposed to work, but the problem is the uncertainty created when the junior user cannot predict when it will lose its deliveries, especially when conditional rights take so long to be perfected or abandoned. [[278]](#footnote-279)278 A junior user who is behind decreed appropriations can plan for future deliveries and likely predict with reasonable accuracy how much water it will have available for the coming year. [[279]](#footnote-280)279 But the junior user behind conditional rights cannot predict if, or when, those conditional rights will mature. Not only does this create planning uncertainties, but junior users will also lose any investments they make if the conditional rights are perfected. [[280]](#footnote-281)280 A rights holder who is hoarding priorities for a single large-scale project may be unlikely to sell off those rights to junior users, making market solutions ineffective. [[281]](#footnote-282)281

The corollary of this is that the system leads to perpetual litigation. In order to guard against this uncertainty and to protect their investments, junior **[\*344]** users must protest every hexennial diligence finding, all in the hope that they can knock out some of the senior conditional rights. [[282]](#footnote-283)282 As the oil shale cases show, the current substantial-probability doctrine makes it very difficult for users to successfully challenge these rights.

B. Why Pagosa Got It Right

The judicial scrutiny of municipalities in Pagosa I is far removed from the deference in Sheriff. [[283]](#footnote-284)283 Municipalities do need flexibility to plan for growth, [[284]](#footnote-285)284 and some have criticized Pagosa I for the restraints that it imposed on municipalities. [[285]](#footnote-286)285 Because courts are generally reluctant to substitute their judgment in other municipal decisions, such as zoning, annexations, rate making, and condemnations, they should likewise exercise caution in interfering in municipalities' water use decisions. [[286]](#footnote-287)286

But this argument only makes sense if water is like other resources and water planning decisions are like other municipal decisions. Since the policy of the state constitution, the courts, and the legislature is that water is a unique resource, then it is appropriate for courts to hold municipalities to some form of an antispeculation doctrine, for the impact of speculative appropriations - that is, hoarding priorities - is the same whether the holder of that priority is private or public. Indeed, Pagosa Springs' very intent was to hoard priorities. [[287]](#footnote-288)287 For that reason, the Pagosa I court got it right as a matter of policy, since "the need for flexibility, of course, does not relieve a governmental entity from demonstrating that the conditional decree it seeks is non-speculative and meets the "can and will' requirement." [[288]](#footnote-289)288

The full fall-out of Pagosa I has yet to be determined, and several questions remain unanswered.

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), one commentator has raised-but has not answered-the question of whether the Pagosa doctrine should extend to private appropriators. [[289]](#footnote-290)289 Because the ***Colorado*** Supreme Court explicitly noted that it derived the doctrine from law that applies to both public and private appropriators, the argument goes, a broad reading of the Pagosa doctrine may extend to private appropriators as well. [[290]](#footnote-291)290

It is unlikely that the Pagosa doctrine will extend to private appropriators as a matter of law. The fifty-year planning period in Pagosa serves the same function as a normal application for a conditional water right. If a private applicant wants to apply for a conditional right, they must apply for a certain **[\*345]** quantity of water. The reasonable planning period in Pagosa I does the same thing by trying to quantify a certain amount of water while attempting to provide municipalities the flexibility they need to develop. In this sense, the planning period in Pagosa I is a compromise position, and, while it is a significant departure from early cases like Sheriff, the application of some constraints on municipalities is consistent with the policies underlying the antispeculation doctrine as a whole.

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), as Justice Coats noted in concurrence, the Pagosa I court seemed to collapse the requirements of the antispeculation doctrine with the can-and-will doctrine. [[291]](#footnote-292)291 Justice Coats argued that imposing a planning period requirement overlooked the reasonable time requirement of the can-and-will statute and would "encourage governmental agencies and water courts alike to tie up the state's water resources with conditional decrees long beyond the time reasonably required to complete a particular project and actually put the resulting water to a beneficial use." [[292]](#footnote-293)292 His test would be simply that "the "can and will' statute requires completion within a reasonable time, in light of the legal, engineering, and economic circumstances of the project." [[293]](#footnote-294)293 Even though Justice Coats would have canceled Pagosa Springs' conditional rights for failure to meet this standard, [[294]](#footnote-295)294 his proposed test falls victim to the problems discussed above - that, as a matter of fact, conditional rights are allowed to continue indefinitely.

C. A Way Forward

The most significant reform that the ***Colorado*** legislature could make is to establish an expiration date on conditional rights. Utah, for instance, has already established a time limit on how long an appropriator has to put the water to beneficial use. Initially, appropriators are given a seven-year time frame to put the water to beneficial use, [[295]](#footnote-296)295 but this time frame can be extended on two conditions: not only must the applicant show reasonable due diligence or a reasonable cause for delay, but the extension cannot be granted after fifty years from the date the application is approved. [[296]](#footnote-297)296 Further, while the Pagosa doctrine represented a significant change in ***Colorado***, [[297]](#footnote-298)297 Utah has a codified version of the doctrine, which provides, "The reasonable future water requirement of the public is the amount of water needed in the next 40 years by the persons within the public water supplier's projected service area based on projected population growth or other water use demand." [[298]](#footnote-299)298 Utah solves the problem highlighted in Metropolitan Suburban - that is, that massive projects may take a significant amount of time - by allowing public water suppliers and wholesale electrical cooperatives to extend beyond the fifty-year deadline if they meet certain requirements and have constructed or have made substantial **[\*346]** expenditures to construct the works necessary to put the water to beneficial use. [[299]](#footnote-300)299 Utah has made the policy decision to use statutory authority to ensure that water hoarding is limited. [[300]](#footnote-301)300 Utah's reasoning is unsurprising in light of the preceding discussion, but what is surprising is that ***Colorado*** courts have made the same types of pronouncements while hoarding is allowed to continue. [[301]](#footnote-302)301

Other states have fashioned statutory deadlines that account for problems that might be encountered in the development of a project. While Idaho requires applicants to put water to full beneficial use within five years from the date of approval, it also grants certain extensions. [[302]](#footnote-303)302 For instance, the law will not penalize an applicant if litigation holds up the project. [[303]](#footnote-304)303 So long as the applicant "is proceeding diligently and in good faith," the department of water resources will extend the permit to cover the time that the project has been delayed. [[304]](#footnote-305)304 Large projects in Idaho may be extended for an additional twelve years beyond the initial development deadline contained in the permit, so long as the applicant has expended at least $ 100,000. [[305]](#footnote-306)305

Similarly, Washington allows extensions if projects are held up by the imposition of federal laws. [[306]](#footnote-307)306 In New Mexico, projects must be completed within five years, and water must be put to beneficial use within four years after that period. [[307]](#footnote-308)307 Applicants must pursue their projects diligently, but they will not be penalized by acts of God, operation of law, or other causes outside of their control that interfere with construction. [[308]](#footnote-309)308 Generally, extensions will only be granted up to ten years from the date the application was approved, but the state engineer may choose to waive this deadline if at least one-fourth of the actual construction project has been completed within such period, the applicant demonstrates good faith, and "the project will be to the interest of the deHD **[\*347]** velopment of the state." [[309]](#footnote-310)309

In other words, ***Colorado*** could craft a nuanced statute that would allow active developers to pursue their projects while curtailing those projects that have been postponed until development becomes profitable. [[310]](#footnote-311)310 A time limit would prevent some projects, but that is the necessary trade-off for a predictable rule of law. This is the determination the ***Colorado*** Supreme Court made in Vidler - while the company may not have had speculative intentions, it was preferable to have a bright line rule that helped prevent priorities hoarding.

[*VII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831). Conclusion

***Colorado*** water law is based on the egalitarian principle that water should be broadly distributed among potential beneficial users. The application of beneficial use changes the distribution, however, by allowing appropriators to accumulate as much as they can beneficially use. Until then, potential beneficial users should have equal opportunity to appropriate water. Without conditional rights, long-term, forward-thinking projects would never reach fruition. But the purpose of conditional rights is to provide security until a project is completed, not to allow appropriators to postpone development until it is most profitable. Under current law, appropriators have the ability to preserve conditional rights indefinitely, and judicial checks, often in deference to the legislature, have been ineffective at curbing appropriators from abusing conditional rights. Some conditional rights have been waiting for development for a century. This is not consistent with the purpose of conditional rights, nor is it consistent with the policies underlying prior appropriation as a whole. Because of this, ***Colorado*** should adopt a statutory expiration date for conditional rights. This would build certainty back into the priority system, consistent with the principles of egalitarianism and justice on which prior appropriation was founded.

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**End of Document**

1. 1 U.S. Gov't Accountability Office, GAO-11-35, Energy-Water Nexus: A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development 1 (2010) [hereinafter Gov't Accountability Office]. [↑](#footnote-ref-2)
2. 2 Id. [↑](#footnote-ref-3)
3. 3 Nothing in this article is meant to minimize the serious potential social, economic, and environmental problems posed by oil shale development. See id. at 7-14. [↑](#footnote-ref-4)
4. 4 See, e.g., Jan Falstad, Pace of Construction in Billings Jumped in 2013, Billings Gazette, Dec. 29, 2013 (stating that Billings saw record levels of commercial construction in 2013 thanks to the shale oil boom in North Dakota). [↑](#footnote-ref-5)
5. 5 See [*Gov't Accountability Office, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MDJ-D1S0-0039-44T0-00000-00&context=1516831) note 1, at 4. [↑](#footnote-ref-6)
6. 6 Richard L. Dewsnup, Assembling Water Rights for a New Use: Needed Reforms in the Law, 17 Rocky Mtn. Min. L. Inst. 22 (1972). [↑](#footnote-ref-7)
7. 7 [*Gov't Accountability Office, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MDJ-D1S0-0039-44T0-00000-00&context=1516831) note 1, at 7. [↑](#footnote-ref-8)
8. 8 Id. [↑](#footnote-ref-9)
9. 9 See id. [↑](#footnote-ref-10)
10. 10 Id. at 15. [↑](#footnote-ref-11)
11. 11 Id. at 25. [↑](#footnote-ref-12)
12. 12 See generally Lawrence J. MacDonnell, W. Resource Advocates, Water on the Rocks: Oil Shale Water Rights in ***Colorado*** (2009). [↑](#footnote-ref-13)
13. 13 ***Colo.*** Const. art. XVI, § 5. [↑](#footnote-ref-14)
14. 14 Id. § 6. [↑](#footnote-ref-15)
15. 15 Id. [↑](#footnote-ref-16)
16. 16 [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 719 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-17)
17. 17 See infra Part III. [↑](#footnote-ref-18)
18. 18 [***Colo.*** *Rev. Stat. § 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014). [↑](#footnote-ref-19)
19. 19 Charles J.P. Podolak & Martin Doyle, Conditional Water Rights in the Western United States: Introducing Uncertainty to Prior Appropriation?, 51 J. Am. Water Resources Ass'n 14, 14, 25, 29 (2015). [↑](#footnote-ref-20)
20. 20 Janet C. Neuman, Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use, [*28 Envtl. L. 919, 963-66 (1998).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3WJW-B7N0-00CW-B0D6-00000-00&context=1516831) [↑](#footnote-ref-21)
21. 21 [*Id. at 964.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3WJW-B7N0-00CW-B0D6-00000-00&context=1516831) [↑](#footnote-ref-22)
22. 22 Id. [↑](#footnote-ref-23)
23. 23 Oliver D. Hart & David M. Kreps, Price Destabilizing Speculation, 94 J. Pol. Econ. 927, 928 (1986). [↑](#footnote-ref-24)
24. 24 See, e.g., [***Colo.******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566, 568 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) ("The right to appropriate is for use, not merely for profit… . To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would - as a practical matter - discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains."). [↑](#footnote-ref-25)
25. 25 See [*Pagosa Area Water Dist. v. Trout Unlimited (Pagosa I), 170 P.3d 307, 313 (****Colo.*** *2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) ("***Colorado***'s system of public ownership of water, combined with the creation of public and private use rights therein by appropriation, circumscribes monopolist pitfalls. When the beneficial use requirement was put into practice in the nineteenth century, its fundamental purpose was to establish the means for making the public's water resource available to those who had the actual need for the water, in order to curb speculative hoarding.") (citing David B. Schorr, Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3, 9, 22 (2005)). [↑](#footnote-ref-26)
26. 26 Sandra Zellmer, The Anti-Speculation Doctrine and Its Implications for Collaborative Water Management, [*8 Nev. L.J. 994, 1005 (2008).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4W0Y-MGK0-0198-G0Y4-00000-00&context=1516831) [↑](#footnote-ref-27)
27. 27 [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 709 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-28)
28. 28John Locke, Second Treatise of Government (C.B. MacPherson ed., Hackett Publishing ***Co***. 1980) (1690). [↑](#footnote-ref-29)
29. 29 See Kenichi Matsui, Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada 31 (2009); Alfred G. Cuzan, Appropriators Versus Expropriators: The Political Economy of Water in the West, in Water Rights: Scarce resource Allocation, Bureaucracy, and the Environment 13, 14-17 (Terry L. Anderson ed., 1983); Joe B. Stevens, John Locke, Environmental Property, and Instream Water Rights, 72 Land Econ. 261, 262 (1996). [↑](#footnote-ref-30)
30. 30 David Schorr, The ***Colorado*** Doctrine: Water Rights, Corporations, and Distributive Justice on the American Frontier 26-27 (2012). This is not to say that early miners were reading the Second Treatise by candlelight. Instead, Locke is helpful for understanding the political environment of the nineteenth century. Cf. Laura J. Scalia, The Many Faces of Locke in America's Early Nineteenth-Century Democratic Philosophy, 49 Pol. Res. Q. 807, 814-21, 30-32 (1996) (explaining that no other philosopher more closely paralleled the views of politicians and citizens in early nineteenth-century America, but warning that Locke's teachings are too ambiguous to be considered a single political belief). [↑](#footnote-ref-31)
31. 31 See Gregory J. Hobbs, Jr., Reviving the Public Ownership, Antispeculation, and Beneficial Use Moorings of Prior Appropriation Water Law, [*84 U.* ***Colo.*** *L. Rev. 97, 105-06 (2013)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:57K0-T6W0-00CV-N097-00000-00&context=1516831) (noting Schorr's "brilliant work"). Justice Hobbs has been Schorr's primary advocate, but his speculation opinions have garnered a majority of the Court. See [*Pagosa I, 170 P.3d 307, 313 n.5 (****Colo.*** *2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (citing Schorr, supra note 25, at 9, 22; David B. Schorr, The First Water-Privatization Debate: ***Colorado*** Water Corporations in the Gilded Age, 33 Ecol. L.Q. 313, 319-20 (2006)); [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 719 n.3 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) (citing Schorr, supra note 25, at 33, 41, 55-56). Justice Hobbs has relied on Schorr in other water law contexts as well. See [*In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 45, 274 P.3d 576, 585 n.2 (****Colo.*** *2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55DV-KC11-F04C-302D-00000-00&context=1516831) (Hobbs, J., dissenting) (citing Schorr, supra note 25, at 4). [↑](#footnote-ref-32)
32. 32 Much of the following discussion is indebted to Stevens, supra note 29. [↑](#footnote-ref-33)
33. 33 Locke, supra note 28,§§27-28. [↑](#footnote-ref-34)
34. 34 Id. § 28. [↑](#footnote-ref-35)
35. 35 Id. § 29 (emphasis in original). [↑](#footnote-ref-36)
36. 36 Id. § 31. [↑](#footnote-ref-37)
37. 37 Id. § 32 (emphasis in original). [↑](#footnote-ref-38)
38. 38 Id. § 34 (emphasis in original). [↑](#footnote-ref-39)
39. 39 Id. § 36. [↑](#footnote-ref-40)
40. 40 Id. § 33. [↑](#footnote-ref-41)
41. 41 Id. § 37. [↑](#footnote-ref-42)
42. 42 See Stevens, supra note 29, at 264. [↑](#footnote-ref-43)
43. 43 Id. at 267. [↑](#footnote-ref-44)
44. 44 Locke's English example most appropriately describes the reasonable use requirement of riparian water law. See Joshua Getzler, A History of Water Rights at Common Law 1 (2004). Even so, western prior appropriation is an evolution of Locke's property theory. Matsui, supra note 29, at 31. [↑](#footnote-ref-45)
45. 45 See Stevens, supra note 29, at 262-63 (describing the mining camps as "a most Lockean setting" in which the development of the doctrine of prior appropriation developed "in the Lockean tradition of how man evolves out of a state of nature into civil society - via private property and assent to a government that would protect that property"). [↑](#footnote-ref-46)
46. 46 Compare Locke, supra note 28, § 26 ("The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given for the use of men, there must of necessity be a means to appropriate them some way or other, before they can be of any use, or at all beneficial to any particular man." (emphasis in original)), with ***Colo.*** Const. art. XVI, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of ***Colorado***, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."). [↑](#footnote-ref-47)
47. 47 Compare Locke, supra note 28, § 31 ("As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others."), with [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014) (""Beneficial use' means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."), and [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 719 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) ("Actual beneficial use is the basis, measure, and limit of an appropriation."). [↑](#footnote-ref-48)
48. 48 See Zachary Donohew, Property Rights and Western United States Water Markets, 53 Austl. J. Agric. & Resource Econ. 85, 90 (2009). [↑](#footnote-ref-49)
49. 49 See, e.g., Sebastian Lotz & Andrea R. Fix, Not All Financial Speculation Is Treated Equally: Laypeople's Moral Judgments About Speculative Short Selling, J. Econ. Psychol., Aug. 2013, at 34, 35 ("More or less implicitly, financial speculation - either short or long - has always been subjected to moral judgment. In fact, financial speculation has been viewed as somewhat similar to gambling, which is - to say the least - more closely associated with immoral behavior than moral behavior."); Marc Levinson, An Evil Virus Is Upon Us - The Real Problem Is an Old Scourge: Speculation, Newsweek, Mar. 13, 1995, at 49; Sarah McInerney, Labour TD Suggests Land Price Cap to Stop Booms, Sunday Times (London), Oct. 20, 2013, at 2 (speculation of real property); David Warren, Editorial, A Weapon Against the Great Inflationary Evils, Ottawa Citizen, Mar. 18, 2012, at A9 (speculation of currency); Joe Zhang, China Deprives Itself of Monetary Tools, Wall St. J. (Asia), June 5, 1995, at 6 (speculation of futures); cf. [*People v. Weller, 207 A.D. 337, 347 (N.Y. App. Div. 1923)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y960-003D-V1T5-00000-00&context=1516831) (discussing speculation and theatre tickets). [↑](#footnote-ref-50)
50. 50 Zellmer, supra note 26, at 1011 (quoting Joseph L. Sax, Understanding Transfers: Community Rights and the Privatization of Water, 1 Hastings W.-Nw. J. Envtl. L. & Pol'y 13, 14 (1994)). [↑](#footnote-ref-51)
51. 51 Id. at 1030. [↑](#footnote-ref-52)
52. 52 [*Metro. Suburban Water Users Ass'n v.* ***Colo.******River*** *Water Conservation Dist., 365 P.2d 273, 284 (****Colo.*** *1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-53)
53. 53 [*Knapp v.* ***Colo.******River*** *Conservation Dist., 279 P.2d 420, 427 (****Colo.*** *1955).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XCN0-0040-0348-00000-00&context=1516831) Of course, this is circular: the doctrine of beneficial use was designed to prevent speculation, and speculation is wrong because it is inconsistent with beneficial use. [↑](#footnote-ref-54)
54. 54 ***276 P.2d 992 (Colo. 1954).*** [↑](#footnote-ref-55)
55. 55 ***Id. at 1008.*** [↑](#footnote-ref-56)
56. 56 ***Id. at 1009.*** [↑](#footnote-ref-57)
57. 57 See Lotz & Fix, supra note 49, at 35 (suggesting that layperson's bias comes from a general intuitive notion of fairness, "whereas understanding the upsides of speculation usually requires reflective judgment"). [↑](#footnote-ref-58)
58. 58 Richard J. Ellis, Radical Lockeanism in American Political Culture, 45 W. Pol. Q. 825, 827 (1992) (citation omitted). [↑](#footnote-ref-59)
59. 59 Id. at 828. [↑](#footnote-ref-60)
60. 60 See, e.g., Ulrich Krach, The Secrets of Successful Speculation: What Wall Street Doesn't Want You to Know 224 (2008) ("Timber as an investment has actually beaten the stock market, with less risk, over the long run… . Adding timberland to a well-diversified portfolio enhances the return potential, while reducing risk (volatility)."). To be fair, though, this raises the reverse question: If speculation in water is so wrong, why is speculation in other natural resources not? See infra note 257 for a discussion of the problems of timber speculation. [↑](#footnote-ref-61)
61. 61 See infra Part II.C. [↑](#footnote-ref-62)
62. 62 Schorr, supra note 30, at 75. There is occasionally some confusion about the difference between the general prohibition against speculation and the Vidler antispeculation doctrine, and sometimes the two are conflated. See, e.g., Doug Cannon, Closing the Door on Water Speculations: Nevada's Adoption of the Anti-Speculation Doctrine, Nev. Law., Sept. 2009, at 12, 13; Casey S. Funk & Daniel J. Arnold, Pagosa-The Great and Growing Cities Doctrine Imperiled: An Objective Look from a Biased Perspective, [*13 U. Denv. Water L. Rev. 283, 293 (2011);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:50GM-G420-00SW-502S-00000-00&context=1516831) see also [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 37 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) The distinction is this: courts have always prohibited speculation, but Vidler established an important bright-line test. [↑](#footnote-ref-63)
63. 63 Schorr, supra note 30, at 19-22. [↑](#footnote-ref-64)
64. 64 See id. at 26-27, 96-97. [↑](#footnote-ref-65)
65. 65 Id. at 25. Water law is not the only area where these concerns have been relevant. See, e.g., Douglas M. Spencer & Abby K. Wood, Citizens United, States Divided: An Empirical Analysis of Independent Political Spending, [*89 Ind. L.J. 315, 331 (2014)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5B9D-XP20-00CW-G0SN-00000-00&context=1516831) ("Modern campaign finance laws are rooted in the Progressive Era of the early 1900s and were a part of a broad political reform movement to limit the power of corporate interests over state legislatures (e.g., railroad "robber barons' in California and "copper kings' in Montana) … ." (footnote omitted)). After the U.S. Supreme Court's decision in [*Citizens United v. Fed. Elections Comm'n, 558 U.S. 310 (2010),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XKV-KRG0-YB0V-9128-00000-00&context=1516831) Montana unsuccessfully tried to defend its campaign expenditure law on its unique state history of corruption. Spencer & Wood, supra, at 337-39. [↑](#footnote-ref-66)
66. 66 Schorr, supra note 30, at 25, 71. The fear of outsiders is still alive and well today. See Aaron Pettis, Note, Takings and the Right to Fish and Float in ***Colorado***, [*89 Ind. L.J. 473, 474 n.10 (2014)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5B9D-XP20-00CW-G0SS-00000-00&context=1516831) (describing a widespread xenophobic attitude of Coloradans toward Texan outsiders). [↑](#footnote-ref-67)
67. 67 [*28 P. 966 (****Colo.*** *1892).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2KT0-0040-021G-00000-00&context=1516831) [↑](#footnote-ref-68)
68. 68 [*Id. at 968*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2KT0-0040-021G-00000-00&context=1516831) ("The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation."). The doctrine in Combs was unremarkable among the Western states at the time. See, e.g., [*Miocene Ditch* ***Co****. v. Campion Mining & Trading* ***Co****., 3 Alaska 572, 585-86 (D. Alaska 1908)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:646T-PMN1-JGHR-M1HK-00000-00&context=1516831) ("The evidence shows that even the leading officers of the Miocene Ditch Company regarded the Hammond location and diversion as made, or at least held, for speculative purposes merely. If made with no intent to construct a ditch to be devoted to some beneficial or useful industry, the law would annex to the location no validity as an appropriation of the water attempted to be converted to the locator's benefit. [P] That the locator, with intention to locate a water right and hold it for speculative and not for beneficial uses, gains no rights by going through the forms of locating a water right, is supported by numerous authorities … ."); [*Weaver v. Eureka Lake* ***Co****., 15 Cal. 271, 272-73 (1860)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SJ0-13F0-0039-4187-00000-00&context=1516831) ("To render valid a claim of water by appropriation, the claim must be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer… . [A] bare claim to a water right without some actual steps towards appropriation, could confer no rights capable of ownership or sale."); [*Toohey v. Campbell, 60 P. 396, 397 (Mont. 1900)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YYM-4CV0-00KR-F2JD-00000-00&context=1516831) ("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses."); [*Nev. Ditch* ***Co****. v. Bennett, 45 P. 472, 482-83 (Or. 1896)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XSP-RJH0-00KR-C377-00000-00&context=1516831) ("The water of a public stream is eventually applied to a beneficial use … . Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of the waters of public streams. The appropriator cannot withhold the water from a beneficial use… . [The plaintiffs] had a reasonable expectation that there would be a demand for water as soon as they could convey it to a convenient place for the intended use, and in this respect the scheme could not be said to be merely speculative, impracticable, or visionary."). But cf. [*Scherck v. Nichols, 95 P.2d 74, 78-79 (Wyo. 1939)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YXJ-CWN0-00KR-C2DF-00000-00&context=1516831) (acknowledging the Toohey rule but noting that mere speculation "is hardly possible under the extensively regulative laws of this state"). While these cases might come out differently today (especially Nevada Ditch ***Co***.), the point is simply that early courts were concerned about speculation and monopoly and derived this doctrine directly from the requirement of beneficial use. In the years following Combs, parties occasionally raised the argument that an appropriation was unduly speculative, but early cases were decided on other grounds. See, e.g., [*Bijou Irrigation Dist. v. Weldon Valley Ditch* ***Co****., 184 P. 382, 385-86 (****Colo.*** *1919);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0D30-0040-01MX-00000-00&context=1516831) [*Blakely v. Ft. Lyon Canal* ***Co****., 73 P. 249, 255 (****Colo.*** *1903).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-26K0-0040-00BR-00000-00&context=1516831) Trial courts were receptive to the argument, though, and were willing to cancel water rights that they found speculative. See, e.g., [*Hough v. Lucas, 230 P. 789, 790 (****Colo.*** *1924).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-00P0-0040-000K-00000-00&context=1516831) [↑](#footnote-ref-69)
69. 69 [*Combs, 28 P. at 968*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2KT0-0040-021G-00000-00&context=1516831) ("If ditch companies were at liberty to divert water without limit, and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigating canals,-water rights would soon become a matter of speculation and monopoly, and tillers of the soil would have to pay exorbitant rates for the use of water, or our arid lands would become unproductive."). But cf. Zellmer, supra note 26, at 1023 (noting that speculation and monopoly are distinct problems). [↑](#footnote-ref-70)
70. 70 E.g., [*Natural Energy Res.* ***Co****. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 142 P.3d 1265, 1277 (****Colo.*** *2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KW4-PHN0-0039-422S-00000-00&context=1516831) ("The purpose of the "can and will' statute is to subject conditional rights "to continued scrutiny to prevent the hoarding of priorities to the detriment of those seeking to apply the state's water beneficially.' … Accordingly, the "substantial probability' standard is employed to curb indefinite speculation, not to protect a conditional water right where only the thinnest possibility remains that the project can and will be completed." (citations omitted)). [↑](#footnote-ref-71)
71. 71 Jack Hirshleifer, James C. De Haven & Jerome W. Milliman, Water Supply: Economics, Technology, and Policy 36 (1960). [↑](#footnote-ref-72)
72. 72 See Locke, supra note 28, §§36-37. [↑](#footnote-ref-73)
73. 73 Id. § 37. [↑](#footnote-ref-74)
74. 74 See Zellmer, supra note 26, at 1008. [↑](#footnote-ref-75)
75. 75 Hirshleifer et al., supra note 71, at 4-5. [↑](#footnote-ref-76)
76. 76 Timothy D. Tregarthen, Water in ***Colorado***: Fear and Loathing of the Marketplace, in Water Rights: Scarce Resource Allocation, Bureaucracy, and the Environment, supra note 29, at 119, 119-20 ("Neither water's great usefulness nor its scarcity pose problems that distinguish it from other economic goods."). [↑](#footnote-ref-77)
77. 77 See Lynn A. Stout, Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives, [*48 Duke L.J. 701, 707 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3WT2-CV60-00CV-50C4-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 See Richard A. Epstein, Why Restrain Alienation?, [*85 Colum. L. Rev. 970, 989 (1985).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S0M-9TW0-00CW-72XN-00000-00&context=1516831) [↑](#footnote-ref-79)
79. 79 Stout, supra note 77, at 707. [↑](#footnote-ref-80)
80. 80 Daphna Lewisohn-Zamir, More Is Not Always Better than Less: An Exploration in Property Law, [*92 Minn. L. Rev. 634, 694 (2008).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4RXT-7YG0-00CW-810R-00000-00&context=1516831) [↑](#footnote-ref-81)
81. 81 See Epstein, supra note 78, at 989. [↑](#footnote-ref-82)
82. 82 Tregarthen, supra note 76, at 124 ("One wonders how other markets would function if such judicial determinations of usefulness were required."). A nineteenth-century newspaper put it like this:

    To make a long matter short, what has the government to do with speculation or overtrading, that this continued war upon all credit should be kept up for their prevention? Why not enjoin it upon all to till the ground, because the price of grain is high? Why not establish a curfew-bell to ring all subjects to bed, because they burn too much whale-oil? Why not lay an excise on butcher's meat, because, forsooth, men eat more beef than is wholesome? Ordinary men have supposed that such matters were better left alone than meddled with; but our rulers choose to try experiments for the purpose of settling the question to their own satisfaction.

    Editorial, Speculation and Overtrading, Daily Herald & Gazette (Cleveland), May 2, 1837, at 2. [↑](#footnote-ref-83)
83. 83 This is apparent to anyone who has ever lived in ***Colorado***. See [*City & Cnty. of Denver v. Sheriff, 96 P.2d 836, 838 (****Colo.*** *1939)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) ("The water flow in [the South Platte] is extremely variable. The stream and the yield from the water rights of the city originating therefrom is far from uniform."); [*Van Tassel Real Estate & Live Stock* ***Co****. v. City of Cheyenne, 54 P.2d 906, 908 (Wyo. 1936)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YXP-P5B0-00KR-C34D-00000-00&context=1516831) ("The climate in Wyoming and throughout the Rocky Mountains is semiarid; the precipitation of rain and snow is light, irregular, and uncertain as to time."). Not only does annual precipitation vary wildly, but climate change shortens the snow season, causes faster snow melt, increases run off, and creates higher evaporation losses. Robert Glennon, Water Scarcity, Marketing, and Privatization, [*83 Tex. L. Rev. 1873, 1874-75 (2005)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4HCM-SHX0-02BN-0076-00000-00&context=1516831) ("Higher temperatures produce a shorter snow season (more precipitation falls in the form of rain), faster snow melt, and increased runoff… . Global warming also creates higher evaporation losses from the surfaces of lakes, reservoirs, and ***rivers***."). [↑](#footnote-ref-84)
84. 84 Tregarthen, supra note 76, at 120-21. [↑](#footnote-ref-85)
85. 85 [*Metro. Suburban Water Users Ass'n v.* ***Colo.******River*** *Water Conservation Dist., 365 P.2d 273, 288 (****Colo.*** *1961)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) (asserting those who invest time, money, and energy into unsuccessful water supply projects bear the loss); Stout, supra note 77, at 736-37 (arguing speculators in trade agreements, such as farmers, risk bearing a loss by selling later at market price rather than early at a lower price). [↑](#footnote-ref-86)
86. 86 See Tregarthen, supra note 76, at 132. [↑](#footnote-ref-87)
87. 87 Id. [↑](#footnote-ref-88)
88. 88 Glennon, supra note 83, at 1888. [↑](#footnote-ref-89)
89. 89 Id. [↑](#footnote-ref-90)
90. 90 Tregarthen, supra note 76, at 135-36 ("The courts that regulate this market have exhibited, in ruling after ruling, a fundamental lack of confidence in the efficacy of private-market solutions. The result is a needlessly costly and uncertain system in which innovation is difficult. The fear and loathing of the private market under prior appropriation doctrine, of course, does have one other significant result - a greatly expanded role for the judicial system that administers it."); cf. infra text accompanying note 119. Of course, those on the losing side of judicial decisions are often wont to argue that the courts have overstepped their authority. Cf. Funk & Arnold, supra note 62, at 312 (criticizing the role of trial courts after Pagosa I). But see [*Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (Pagosa II), 219 P.3d 774, 788 (****Colo.*** *2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XM0-4FD0-TXFN-N2RK-00000-00&context=1516831) (dedicating half a page to rebutting Funk and Arnold's argument). While ***Colorado*** has the strictest antispeculation doctrine in the West, Zellmer, supra note 26, at 1027, its water law is practically laissez faire compared to the permit systems of other states, which allow applications to be denied for any number of grounds, see, e.g., [*Ariz. Rev. Stat. Ann. § 45-153*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8VDF-SGS2-D6RV-H4Y1-00000-00&context=1516831) (2014) ("When the application or the proposed use conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public, the application shall be rejected."); [*Nev. Rev. Stat. § 533.370(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:68GG-1KJ3-CGX8-000X-00000-00&context=1516831) (2014) (requiring the State Engineer to consider, among other things, "whether the proposed action is environmentally sound as it relates to the basin from which the water is exported," "whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported," and "any other factor the State Engineer determines to be relevant"). [↑](#footnote-ref-91)
91. 91 See generally Zellmer, supra note 26. [↑](#footnote-ref-92)
92. 92 The ***Colorado*** Supreme Court has sometimes used this type of language. See, e.g., [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 709 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) ("[A] conditional right, or some portion of that right, may become speculative over time … ."). [↑](#footnote-ref-93)
93. 93 See [*Sieber v. Frink, 2 P. 901, 903-04 (****Colo.*** *1884).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2YW0-0040-03BF-00000-00&context=1516831) In a case of reciprocity, Nevada recently adopted ***Colorado***'s antispeculation doctrine. [*Bacher v. Office of State Eng'r, 146 P.3d 793, 798-99 (Nev. 2006).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MDJ-D1S0-0039-44T0-00000-00&context=1516831) [↑](#footnote-ref-94)
94. 94 See [*Centennial Water & Sanitation Dist. v. City & Cnty. of Broomfield, 256 P.3d 677, 684 (****Colo.*** *2011).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-B1J1-652G-H02B-00000-00&context=1516831) [↑](#footnote-ref-95)
95. 95 [***Colo.*** *Rev. Stat. § 37-92-103(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014). [↑](#footnote-ref-96)
96. 96 [*Rocky Mountain Power* ***Co****. v.* ***Colo.******River*** *Water Conservation Dist., 646 P.2d 383, 387 (****Colo.*** *1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-18G0-003D-916Y-00000-00&context=1516831) ("The purpose of a conditional water decree has always been to allow an ultimate appropriation of water to relate back to the time of the "first step' toward that appropriation."). [↑](#footnote-ref-97)
97. 97 Compare [*Sieber, 2 P. at 903-04*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2YW0-0040-03BF-00000-00&context=1516831) ("Although the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." (quoting [*Ophir Silver Mining* ***Co****. v. Carpenter, 4 Nev. 534, 544 (1869))),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XT0-4BX0-00KR-D09P-00000-00&context=1516831) with [***Colo.*** *Rev. Stat. § 37-92-103(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014) (""Conditional water right' means a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based."). [↑](#footnote-ref-98)
98. 98 [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056, 1064 (****Colo.*** *2013).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-99)
99. 99 See, e.g., [*Dallas Creek Water* ***Co****. v. Huey, 933 P.2d 27, 42 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RH5-SXG0-003D-9002-00000-00&context=1516831) (project using ten c.f.s. of water); [*Talco, Ltd. v. Danielson, 769 P.2d 468, 469 (****Colo.*** *1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0XG0-003D-94JP-00000-00&context=1516831) (project using 0.555 c.f.s.); [*Orchard Mesa Irrigation Dist. v. City & Cnty. of Denver, 511 P.2d 25, 28 (****Colo.*** *1973)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1R80-003D-94FD-00000-00&context=1516831) (project using one hundred c.f.s.). [↑](#footnote-ref-100)
100. 100 C.f. A. Dan Tarlock, Prior Appropriation: Rule, Principle, or Rhetoric?, [*76 N.D. L. Rev. 881, 895 (2000)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4372-XJ10-00CW-30M2-00000-00&context=1516831) (discussing the decreasing importance of agriculture, especially small irrigation communities, and the associated rise in importance of urban water planning interests). [↑](#footnote-ref-101)
101. 101 ***City & Cnty. of Denver v. N. Colo. Water Conservancy Dist., 276 P.2d 992, 1001 (Colo. 1954).*** [↑](#footnote-ref-102)
102. 102 See supra Part II.B.2. [↑](#footnote-ref-103)
103. 103 [*594 P.2d 566, 568-69 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-104)
104. 104 [*96 P.2d 836, 840-42 (****Colo.*** *1939).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-105)
105. 105 [*Id. at 841.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-106)
106. 106 [*Id. at 840-41.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-107)
107. 107 C.f. Zellmer, supra note 26, at 1029. The doctrine has seen important changes in recent years. See infra Part V.B.2. [↑](#footnote-ref-108)
108. 108 Christian C. Day, Risky Business: Popular Images and Reality of Capital Markets Handling Risk - From the Tulip Craze to the Decade of Greed, ***113 Penn St. L. Rev. 461, 507-08 (2008).*** [↑](#footnote-ref-109)
109. 109 ***106 P.2d 363 (Colo. 1940).*** [↑](#footnote-ref-110)
110. 110 ***Id. at 365-68.*** [↑](#footnote-ref-111)
111. 111 ***Id. at 366.*** [↑](#footnote-ref-112)
112. 112 See ***id. at 367.*** [↑](#footnote-ref-113)
113. 113 See ***id. at 366*** ("All the facts and circumstances surrounding these claims indicate an enterprise of considerable magnitude. Only under the circumstances before us would it be possible for private enterprise to bring water from the Western Slope to the South Platte basin on the Eastern Slope. Until there is a reasonable assurance culminating in conditional decrees, such as are before us, it would not be possible for any private enterprise to risk such a large amount of capital … ."). [↑](#footnote-ref-114)
114. 114 [*365 P.2d 273, 285-86 (****Colo.*** *1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-115)
115. 115 [*Id. at 275.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-116)
116. 116 [*Id. at 275, 277-78.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-117)
117. 117 [*Id. at 287.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-118)
118. 118 [*Id. at 287-88.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-119)
119. 119 [*Id. at 288.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-120)
120. 120 [*Id. at 284.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-121)
121. 121 See supra Part II.C. [↑](#footnote-ref-122)
122. 122 [*Metro. Suburban, 365 P.2d at 288.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-123)
123. 123 See supra Part II.A. [↑](#footnote-ref-124)
124. 124 See [*Metro. Suburban, 365 P.2d at 285.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) [↑](#footnote-ref-125)
125. 125 [*557 P.2d 389 (****Colo.*** *1976),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) disavowed on other grounds by [*City of Aspen v.* ***Colo.******River*** *Water Conservation Dist., 696 P.2d 758, 763-65 (****Colo.*** *1985).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1490-003D-90F6-00000-00&context=1516831) [↑](#footnote-ref-126)
126. 126 Id. at 391. [↑](#footnote-ref-127)
127. 127 Id. [↑](#footnote-ref-128)
128. 128 Id. at 394. [↑](#footnote-ref-129)
129. 129 [*594 P.2d 566 (****Colo.*** *1979),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) superseded by statute, [***Colo.*** *Rev. Stat. § 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2014), as recognized in [*FWS Land & Cattle* ***Co****. v. State, Div. of Wildlife, 795 P.2d 837, 840 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-130)
130. 130 Id. at 568. [↑](#footnote-ref-131)
131. 131 Id.; see also [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056, 1064 (****Colo.*** *2013);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [*Upper Yampa Water Conservancy Dist. v. Wolfe, 255 P.3d 1108, 1111 (****Colo.*** *2011);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82K4-T7G1-652G-H002-00000-00&context=1516831) [*Burlington Ditch Reservoir & Land* ***Co****. v. Metro Wastewater Reclamation Dist., 256 P.3d 645, 662 (****Colo.*** *2011);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:530B-V381-F04C-300J-00000-00&context=1516831) [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 720 (****Colo.*** *2005);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [***Colo.*** *Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62, 79 (****Colo.*** *2003);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4B7P-R660-0039-4529-00000-00&context=1516831) [*Bd. of Cnty. Cmm'rs of Arapahoe v. United States (Arapahoe I), 891 P.2d 952, 959 (****Colo.*** *1995);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [*Water Supply & Storage* ***Co****. v. Curtis, 733 P.2d 680, 684 (****Colo.*** *1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1190-003D-953B-00000-00&context=1516831) [*Jaeger v.* ***Colo.*** *Ground Water Comm'n, 746 P.2d 515, 518 (****Colo.*** *1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-10B0-003D-94X4-00000-00&context=1516831) [*Rocky Mountain Power* ***Co****. v.* ***Colo.******River*** *Water Conservation Dist., 646 P.2d 383, 388 (****Colo.*** *1982).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-18G0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-132)
132. 132 [*Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C., 249 P.3d 794, 798 (****Colo.*** *2011).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52KP-R6R1-JCN9-C078-00000-00&context=1516831) [↑](#footnote-ref-133)
133. 133 See, e.g., [*Rocky Mountain Power, 646 P.2d at 388.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-18G0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-134)
134. 134 [*Vidler, 594 P.2d at 568.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-135)
135. 135 See, e.g., [*Metro. Suburban Water Users Ass'n v.* ***Colo.******River*** *Water Conservation Dist., 365 P.2d 273, 287 (****Colo.*** *1961);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WX60-0040-011K-00000-00&context=1516831) ***Taussig v. Moffat Tunnel Water & Dev. Co., 106 P.2d 363, 367 (Colo. 1940).*** [↑](#footnote-ref-136)
136. 136 [*Vidler, 594 P.2d at 569*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) (citing [*Bunger v. Uncompahgre Water Valley Users' Ass'n, 557 P.2d 389 (****Colo.*** *1976),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) disavowed on other grounds by [*City of Aspen v.* ***Colo.******River*** *Water Conservation Dist., 696 P.2d 758 (****Colo.*** *1985)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1490-003D-90F6-00000-00&context=1516831) [↑](#footnote-ref-137)
137. 137 [***Colo.*** *Rev. Stat. § 37-92-103(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014). [↑](#footnote-ref-138)
138. 138 [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056, 1064 (****Colo.*** *2013).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-139)
139. 139 [***Colo.*** *Rev. Stat. § 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) ("No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time."). [↑](#footnote-ref-140)
140. 140 [*FWS Land & Cattle* ***Co****. v. State, Div. of Wildlife, 795 P.2d 837, 840 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-141)
141. 141 [*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) [↑](#footnote-ref-142)
142. 142 See [*City of Aurora v. ACJ P'ship, 209 P.3d 1076, 1088 (****Colo.*** *2009).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VYB-15H0-Y9NK-S0KX-00000-00&context=1516831) But see [*Pagosa I, 170 P.3d 307, 320-21 (****Colo.*** *2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Coats, J., concurring in the judgment) (arguing that the majority had collapsed the distinction). [↑](#footnote-ref-143)
143. 143 Mark E. Hamilton, Comment, The "Can and Will" Doctrine of [***Colorado*** *Revised Statute Section 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831): Changing the Nature of Conditional Water Rights in ***Colorado***, [*65 U.* ***Colo.*** *L. Rev. 947 (1994).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TCF0-00CV-N07P-00000-00&context=1516831) [↑](#footnote-ref-144)
144. 144 See infra note 177. [↑](#footnote-ref-145)
145. 145 [*688 P.2d 715, 718 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-146)
146. 146 [*795 P.2d 837, 840 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-147)
147. 147 ***831 P.2d 470, 476 (Colo. 1992).*** [↑](#footnote-ref-148)
148. 148 [*856 P.2d 798, 803 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-149)
149. 149 [*Florence, 688 P.2d at 716.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 [*Id. at 716 n.1.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-152)
152. 152 [*Id. at 717-18.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-153)
153. 153 Hamilton, supra note 143, at 955. [↑](#footnote-ref-154)
154. 154 [*FWS Land & Cattle* ***Co****. v. State, Div. of Wildlife, 795 P.2d 837, 838 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-155)
155. 155 [*Id. at 839, 841.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-156)
156. 156 Hamilton, supra note 143, at 958. [↑](#footnote-ref-157)
157. 157 ***Pub. Serv. Co. of Colo. v. Bd. of Water Works of Pueblo, Co., 831 P.2d 470, 472 (Colo. 1992).*** [↑](#footnote-ref-158)
158. 158 ***Id. at 473.*** [↑](#footnote-ref-159)
159. 159 Id. [↑](#footnote-ref-160)
160. 160 Id. [↑](#footnote-ref-161)
161. 161 Id. [↑](#footnote-ref-162)
162. 162 Id. [↑](#footnote-ref-163)
163. 163 ***Id. at 476.*** [↑](#footnote-ref-164)
164. 164 ***Id. at 477.*** [↑](#footnote-ref-165)
165. 165 Id. [↑](#footnote-ref-166)
166. 166 Id. [↑](#footnote-ref-167)
167. 167 Hamilton, supra note 143, at 961. [↑](#footnote-ref-168)
168. 168 [*856 P.2d 798, 799 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-169)
169. 169 [*Id. at 799, 803.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-170)
170. 170 [*Id. at 802*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) (emphasis in original). [↑](#footnote-ref-171)
171. 171 Hamilton, supra note 143, at 962. But see infra notes 183-193 and accompanying text. [↑](#footnote-ref-172)
172. 172 Hamilton, supra note 143, at 968. [↑](#footnote-ref-173)
173. 173 Id. [↑](#footnote-ref-174)
174. 174 Id. at 967 nn.124-26. [↑](#footnote-ref-175)
175. 175 Id. at 967 [↑](#footnote-ref-176)
176. 176 [*891 P.2d 952, 958-59 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-177)
177. 177 [*Id. at 961-62.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) Compare [*Id. at 961*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) (majority favorably citing Hamilton's comment), with [*Id. at 976-77 n.27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) (Mullarkey, J., dissenting) (responding directly to Hamilton's comment by rejecting the argument that the can-and-will doctrine was a judicial version of other states' permitting systems and noting that such a system was purview of the legislature). [↑](#footnote-ref-178)
178. 178 [*Id. at 962.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-179)
179. 179 See Hamilton, supra note 143, at 958. [↑](#footnote-ref-180)
180. 180 E.g., [*Pagosa I, 170 P.3d 307, 309-10 (****Colo.*** *2007).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-181)
181. 181 E.g., [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P. 3d 1056, 1059, 1062 (****Colo.*** *2013).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-182)
182. 182 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 43 (****Colo.*** *1996);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) see also [*City of Aurora v. ACJ P'ship, 209 P.3d 1076, 1089 (****Colo.*** *2009);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VYB-15H0-Y9NK-S0KX-00000-00&context=1516831) [*Pagosa I, 170 P.3d, at 322*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Eid, J., specially concurring); [*City of Black Hawk v. City of Central, 97 P.3d 951, 957 (****Colo.*** *2004);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D9W-YF50-0039-453C-00000-00&context=1516831) [*Mun. Subdist., N.* ***Colo.*** *Conservatory Dist. v. OXY USA, Inc., 990 P.2d 701, 708 & n.3 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-183)
183. 183 [*FWS Land & Cattle* ***Co****. v. State, Div. of Wildlife, 795 P.2d 837, 839, 840 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-184)
184. 184 [*Gibbs v. Wolf Land* ***Co****., 856 P.2d 798, 799 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-185)
185. 185 See [*id. at 800.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-186)
186. 186 [*Id. at 803.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-187)
187. 187 Hamilton, supra note 143, at 962 n.95. [↑](#footnote-ref-188)
188. 188 [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056, 1070 (****Colo.*** *2013).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-189)
189. 189 [*Id. at 1071.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-190)
190. 190 [*97 P.3d 951 (****Colo.*** *2004).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D9W-YF50-0039-453C-00000-00&context=1516831) [↑](#footnote-ref-191)
191. 191 [*Id. at 958.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D9W-YF50-0039-453C-00000-00&context=1516831) [↑](#footnote-ref-192)
192. 192 [*Vermillion Ranch, 307 P.3d at 1071*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) (citing [*City of Black Hawk, 97 P.3d at 951, 958).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D9W-YF50-0039-453C-00000-00&context=1516831) [↑](#footnote-ref-193)
193. 193 Id. [↑](#footnote-ref-194)
194. 194 [*City of Aurora v. ACJ P'ship, 209 P.3d 1076, 1085 (****Colo.*** *2009).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VYB-15H0-Y9NK-S0KX-00000-00&context=1516831) [↑](#footnote-ref-195)
195. 195 [*Natural Energy Res.* ***Co****. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 142 P.3d 1265, 1278-79 (****Colo.*** *2006).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KW4-PHN0-0039-422S-00000-00&context=1516831) [↑](#footnote-ref-196)
196. 196 [*Bd. of Cnty. Comm'rs of Arapahoe v. Crystal Creek Homeowners' Ass'n, 14 P.3d 325, 344 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41PW-C4S0-0039-403H-00000-00&context=1516831) [↑](#footnote-ref-197)
197. 197 Arapahoe I, 891 P.2d 952, 962 (***Colo.*** 1995) ("The "can and will' statute was intended to prevent approval of a conditional water right that cannot or will not be completed with diligence and within a reasonable time. Therefore, to acquire a conditional water right decree, an applicant must establish that there is a substantial probability that within a reasonable time water can and will be appropriated and put to a beneficial use. The applicant must prove, as a threshold requirement, that water is available based upon ***river*** conditions existing at the time of the application, in priority, in sufficient quantities and on sufficiently frequent occasions, to enable the applicant to complete the appropriation with diligence and within a reasonable time. When ***river*** conditions existing at the time of the application for a conditional water right decree prevent completion of the proposed appropriation, there is no substantial probability that the project will be completed with diligence within a reasonable time. Conditional water rights under which no diversions have been made, or are being made, should not be considered, and absolute water rights should be considered to the extent of historical diversions rather than on the assumption that maximum utilization of the decreed amount is the amount used. Our construction of the "can and will' statute is in accord with our prior case law, with the intent of the intent of the General Assembly, and with the policy of maximum beneficial use of water."). [↑](#footnote-ref-198)
198. 198 See id. [↑](#footnote-ref-199)
199. 199 [*Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056, 1071-72 (****Colo.*** *2013).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RC-0BY1-F04C-3005-00000-00&context=1516831) [↑](#footnote-ref-200)
200. 200 [*Arapahoe I, 891 P.2d at 961 n.9.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-201)
201. 201 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 43-44 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-202)
202. 202 [*Dallas Creek Water* ***Co****. v. Huey, 933 P.2d 27, 36 (****Colo.*** *1997).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RH5-SXG0-003D-9002-00000-00&context=1516831) [↑](#footnote-ref-203)
203. 203 [*986 P.2d 918 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-204)
204. 204 [*Id. at 920.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-205)
205. 205 Id. [↑](#footnote-ref-206)
206. 206 [*Id. at 922.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-207)
207. 207 Id. [↑](#footnote-ref-208)
208. 208 Id. [↑](#footnote-ref-209)
209. 209 [*Id. at 921.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-210)
210. 210 [*Id. at 923.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) The minimal efforts were activities within the following categories: "planning for a diversion facility, planning a dam on Roan Creek, planning for pipeline facilities, preparing environmental baseline studies, preparing a detailed master planning document for Chevron's Parachute Creek Unit, and participating in miscellaneous activities related to the conditional water rights such as litigation, research projects, and studies." [*Id. at 921.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-211)
211. 211 [***Colo.*** *Rev. Stat. § 37-92-301(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (2014). [↑](#footnote-ref-212)
212. 212 [*Chevron Shale, 986 P.2d at 923.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-213)
213. 213 [*Id. at 924*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) (citing [*Dallas Creek Water* ***Co****. v. Huey, 933 P.2d 27, 36 (1997)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RH5-SXG0-003D-9002-00000-00&context=1516831) [↑](#footnote-ref-214)
214. 214 [*990 P.2d 701 (1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-215)
215. 215 [*Id. at 707-08.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-216)
216. 216 [*Id. at 705.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-217)
217. 217 Id. These other activities included the following:

     1) completing technological and economic feasibility studies for the property; 2) attempting to solicit financial partners for the project; 3) participating in the ***Colorado*** ***River*** Project on Threatened and Endangered Species, the ***Colorado*** ***River*** Simulation Model Project (CORSIM), the Rocky Mountain Oil and Gas Association, Oil Shale Committee, and the ***Colorado*** Water Congress' ***Colorado*** ***river*** Project on Water Quality Standards; and 4) gathering data regarding water supply. OXY incurred additional expenses for salaries, engineering fees, legal fees, and litigation costs to protect its water rights.

     Id. [↑](#footnote-ref-218)
218. 218 [*Id. at 708.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-219)
219. 219 [*997 P.2d 557 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-220)
220. 220 [*Id. at 564.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-221)
221. 221 [*Id. at 563-64*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) ("Although the rock barrage was never constructed, the water court found that the following work in three site-specific areas was performed at an approximate cost of $ 325,000. In regard to the diversion facility, a preliminary design and cost estimate was prepared; geologic field conditions were investigated; planned specifications and cost estimates were prepared; an existing permit was amended to include the proposed rock barrage; ***Colorado*** ***River*** morphology was reviewed; and monitoring and recording of ***Colorado*** ***River*** water levels was conducted for use in design work and operation studies. In regard to the Roan Creek dam, geological and geotechnical investigations of the dam foundation, outlet works, and spillways were performed, as well as investigation of embankment borrow areas for the dam. In regard to the pipeline facilities, a preliminary design and cost estimate for a pumping plan were performed; pipeline alternative alignment studies were performed; geotechnical investigations of alternate pipeline routes were performed; and cost estimates of the alternative pipeline alignments were revised based on the geotechnical investigations."). [↑](#footnote-ref-222)
222. 222 [*Id. at 564.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-223)
223. 223 Derek L. Turner, Comment, Pagosa Area Water & Sanitation District v. Trout Unlimited and an Anti-speculation Doctrine for a New Era of Water Supply Planning, [*82 U.* ***Colo.*** *L. Rev. 639, 668 (2011).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:52HB-NB30-00CV-N0C3-00000-00&context=1516831) Or, in more moderate terms, the court made "further … refinements" to the municipal exception to the antispeculation doctrine. Sarah A. Klahn, 2A ***Colo.*** Prac., Anti-Speculation Doctrine § 76:8 (2013). [↑](#footnote-ref-224)
224. 224 See supra text accompanying notes 104-07. [↑](#footnote-ref-225)
225. 225 See [***Colo.*** *Rev. Stat. § 37-92-103(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2014) (excluding municipalities from the Vidler requirements). [↑](#footnote-ref-226)
226. 226 [*City of Thornton v. Bijou Irr.* ***Co****., 926 P.2d 1, 38 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-227)
227. 227 [*Id. at 39.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-228)
228. 228 [*170 P.3d 307, 309-10 (****Colo.*** *2007).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-229)
229. 229 [*Id. at 309.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-230)
230. 230 [*Id. at 309-10.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-231)
231. 231 Id. [↑](#footnote-ref-232)
232. 232 See [*id. at 315-17.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-233)
233. 233 [*Id. at 317.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-234)
234. 234 [*Id. at 320-21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Coats, J., concurring in the judgment only). [↑](#footnote-ref-235)
235. 235 [*Id. at 322*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Eid, J., specially concurring). [↑](#footnote-ref-236)
236. 236 See Hamilton, supra note 143, at 948-50, 961. [↑](#footnote-ref-237)
237. 237 See [***Colo.******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566, 568-69 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-238)
238. 238 See [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Chevron Shale Oil* ***Co****., 986 P.2d 918, 922-23 (****Colo.*** *1999);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 705, 707-09 (1999);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Getty Oil Exploration* ***Co****., 997 P.2d 557, 564-65 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-239)
239. 239 See [*Chevron Shale, 986 P.2d at 923.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-240)
240. 240 MacDonnell, supra note 12, at 46 tbl.B-1. [↑](#footnote-ref-241)
241. 241 And the point here is not to demonize the oil shale companies. [↑](#footnote-ref-242)
242. 242 Podolak & Doyle, supra note 19, at 14, 25 tbl.2. [↑](#footnote-ref-243)
243. 243 Id. at 14. [↑](#footnote-ref-244)
244. 244 Id. at 27. [↑](#footnote-ref-245)
245. 245 Id. at 28. [↑](#footnote-ref-246)
246. 246 [***Colo.*** *Rev. Stat. § 37-92-301(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (2014). [↑](#footnote-ref-247)
247. 247 [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Chevron Shale Oil* ***Co****., 986 P.2d 918, 924 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-248)
248. 248 Klahn, supra note 223, § 76:7. [↑](#footnote-ref-249)
249. 249 See Hamilton, supra note 143, at 960-61. [↑](#footnote-ref-250)
250. 250 See, e.g., ***Pub. Serv. Co. of Colo. v. Bd. of Water Works, 831 P.2d 470, 478-79 (Colo. 1992).*** [↑](#footnote-ref-251)
251. 251 [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Chevron Shale Oil* ***Co****., 986 P.2d 918, 922-23 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XD9-D0F0-0039-4550-00000-00&context=1516831) [↑](#footnote-ref-252)
252. 252 [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 705 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) [↑](#footnote-ref-253)
253. 253 [*Mun. Subdist., N.* ***Colo.*** *Water Conservancy Dist. v. Getty Oil Exploration* ***Co****., 997 P.2d 557, 564 (****Colo.*** *2000).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-254)
254. 254 [*Id. at 565.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:400W-YF60-0039-40V7-00000-00&context=1516831) [↑](#footnote-ref-255)
255. 255 See also [*OXY USA, 990 P.2d at 705*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3R-HFP0-0039-419S-00000-00&context=1516831) ("OXY admitted before the water court that it currently cannot extract the oil shale because low oil prices make the project economically infeasible. Until oil prices rise or the government subsidizes the project, OXY is unlikely to extract any shale."). [↑](#footnote-ref-256)
256. 256 C.f. supra text accompanying notes 54-56. [↑](#footnote-ref-257)
257. 257 The experience of the Pacific Northwest, where a select few timber companies gained a monopoly of the timber reserves and held them speculatively, is illustrative. See U.S. Dep't of Commerce & Labor, Bureau of Corporations, The Lumber Industry: Standing Timber, at xxii (1913) ("The largest holders are cutting little of their timber. They thus reserve to themselves those incalculable profits which are still to accrue with the growth of the country, the diminishing of timber supply, and the further concentration and control thereof. Many of the very men who are protesting against conservation and the national forest system because of the "tying up' of natural resources are themselves deliberately tying them up far more effectively for private gain. The fact that mature timber is thus withheld from use is clear evidence that great additional profits are expected to accrue through further increase in value.") [hereinafter U.S. Bureau of Corporations]. [↑](#footnote-ref-258)
258. 258 Zellmer, supra note 26, at 998. [↑](#footnote-ref-259)
259. 259 See U.S. Bureau of Corporations, supra note 257, at xxii. [↑](#footnote-ref-260)
260. 260 See supra Part II.C. [↑](#footnote-ref-261)
261. 261 Zellmer, supra note 26, at 1023; see also Neuman, supra note 20, at 969 ("There is no Microsoft(R) of western water."). [↑](#footnote-ref-262)
262. 262 See Zellmer, supra note 26, at 1023. [↑](#footnote-ref-263)
263. 263 Neuman, supra note 20, at 969. [↑](#footnote-ref-264)
264. 264 See Zellmer, supra note 26, at 1000 (2008) ("[T. Boone] Pickens has been acquiring more land overlying the [Ogalalla] Aquifer [in Texas] so that he can pump and sell as much as 200,000 acre-feet per year of water to one of the state's large metropolital centers. Pickens' own website proclaims that his company … is the largest private holder of groundwater rights in the United States."). [↑](#footnote-ref-265)
265. 265 See Neuman, supra note 20, at 969. [↑](#footnote-ref-266)
266. 266 This point is not to single out ExxonMobil, but it is worth mentioning that ExxonMobil is the only remaining major oil company with federal leases in northwestern ***Colorado*** since Shell and Chevron left. Jennifer A. Dlouhy, Shell Quits ***Colorado*** Oil Shale Effort, Houston Chron., Sept. 26, 2013, at 3. ExxonMobil also holds more conditional water rights (in c.f.s.) in both the ***Colorado*** and White ***River*** Basins than any other oil company. See MacDonnell, supra note 12, at xiv, 19-21. [↑](#footnote-ref-267)
267. 267 See Zellmer, supra note 26, at 1023. [↑](#footnote-ref-268)
268. 268 See generally Podalak & Doyle, supra note 19, at 16-17 (discussing purchasing senior conditional rights as a possible way for junior users to gain certainty). [↑](#footnote-ref-269)
269. 269 [*Pagosa I, 170 P.3d 307, 313 (****Colo.*** *2007).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-270)
270. 270 [*Natural Energy Res.* ***Co****. v. Upper Gunnison Water Conservancy Dist., 142 P.3d 1265, 1277 (****Colo.*** *2006).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KW4-PHN0-0039-422S-00000-00&context=1516831) [↑](#footnote-ref-271)
271. 271 Locke, supra note 28, § 37; see also [*Allen v. Petrick, 222 P. 451, 452 (Mont. 1924)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:401R-4MS0-00KR-F48M-00000-00&context=1516831) ("The use of water in Montana is vital to the prosperity of our people. Its use, even by an individual, to irrigate a farm, is so much a contributing factor to the welfare of the state that the people, in adopting the Constitution, declared it to be a public use."); [*Id. at 453*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:401R-4MS0-00KR-F48M-00000-00&context=1516831) ("It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated."). [↑](#footnote-ref-272)
272. 272 Stevens, supra note 29, at 264. [↑](#footnote-ref-273)
273. 273 Generally and broadly speaking, that is. This is not to deny important environmental consequences. [↑](#footnote-ref-274)
274. 274 Podalak & Doyle, supra note 19, at 28. [↑](#footnote-ref-275)
275. 275 Id. [↑](#footnote-ref-276)
276. 276 Id. [↑](#footnote-ref-277)
277. 277 See generally Podalak & Doyle, supra note 19. [↑](#footnote-ref-278)
278. 278 See id. [↑](#footnote-ref-279)
279. 279 That is, even though precipitation is highly variable in ***Colorado***, there are certain repeatable events that provide some measure of consistency. After runoff peaks, the flow of ***Colorado***'s ***rivers*** gradually decreases over the summer, and users have some idea when the senior rights will put a call on the ***river***. The variability of precipitation changes the base levels of this process - that is, runoff may begin earlier or later, may last shorter or longer - but the overall trend will remain the same. [↑](#footnote-ref-280)
280. 280 See [*Pagosa I, 170 P.3d 307, 316 (****Colo.*** *2007).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-281)
281. 281 See Podalak & Doyle, supra note 19, at 29-30 (discussing purchasing senior conditional rights as a possible way for junior users to gain certainty). [↑](#footnote-ref-282)
282. 282See [*Pagosa I, 170 P.3d at 316-17;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) see also Jan G. Laitos, The Effect of Water Law on the Development of Oil Shale, 58 U. Denv. L.J. 751, 757 (1981); Podalak & Doyle, supra note 19, at 30. [↑](#footnote-ref-283)
283. 283 See text accompanying supra notes 104-07. [↑](#footnote-ref-284)
284. 284 Zellmer, supra note 26, at 1029. [↑](#footnote-ref-285)
285. 285 Funk & Arnold, supra note 62, at 312. [↑](#footnote-ref-286)
286. 286 Id. [↑](#footnote-ref-287)
287. 287 See [*Pagosa I, 170 P.3d at 321*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Coats, J., concurring in the judgment only) (noting that testimony had made clear that the conditional rights were sought only "as a bid to preempt intervening appropriations for more immediate needs"). [↑](#footnote-ref-288)
288. 288 [*Id. at 322*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Eid, J., specially concurring). [↑](#footnote-ref-289)
289. 289 Turner, supra note 223, at 670. [↑](#footnote-ref-290)
290. 290 See id. at 669-70. [↑](#footnote-ref-291)
291. 291 [*Pagosa I, 170 P.3d at 320*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) (Coats, J., concurring in judgment only). [↑](#footnote-ref-292)
292. 292 Id. [↑](#footnote-ref-293)
293. 293 [*Id. at 321.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831) [↑](#footnote-ref-294)
294. 294 Id. [↑](#footnote-ref-295)
295. 295 See ***Utah Code Ann. § 73-1-4(2)(a)*** (LexisNexis 2014). [↑](#footnote-ref-296)
296. 296 Id. § 73-3-12(2)(b)(i)-(ii). [↑](#footnote-ref-297)
297. 297See supra Part VI.B. [↑](#footnote-ref-298)
298. 298 ***Utah Code Ann. § 73-1-4(2)(f)(i)***. [↑](#footnote-ref-299)
299. 299 Id. § 73-3-12(4). [↑](#footnote-ref-300)
300. 300 See ***Carbon Canal Co. v. Sanpete Water Users Ass'n, 425 P.2d 405, 407-08 (Utah 1967).*** [↑](#footnote-ref-301)
301. 301 Compare id. ("[Applicant]'s successful extensions for decades leaving but few years to go, impel this court, in a conceded equity case, to canvas the facts to determine if, in this arid state, where a drop of water is a drop of gold, one, by extension after extension, may equitably prevent beneficial use of water by others through procedural stagnation for about forty years. We think not."), with ***City & Cnty. of Denver v. N. Colo. Water Conservancy Dist., 276 P.2d 992, 1005 (Colo. 1954)*** ("In order to sustain Denver's claim, we should have to establish as a law of ***Colorado*** that a great city or a great corporation, by the filing of a plat of a water diversion plan and the fitful continuance of surveys and exploratory operations, could paralyze all development in a ***river*** basin for a period of nineteen years without excavating a single shovel full of dirt in actual construction and without taking any step towards bond issue or other financing plan of its own for carrying out its purpose; that for nineteen years no farmer could build a ditch to develop his farm and no other city or industry could construct a project for use of water in that area without facing loss of their water when and if the city or corporation which filed the plat should actually construct its project. This we cannot do."). In other words, "one should not be permitted to play the dog in the manger with water he does not or cannot use for a beneficial purpose when other lands are crying for water." [*Allen v. Petrick, 222 P. 451, 453 (Mont. 1924).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:401R-4MS0-00KR-F48M-00000-00&context=1516831) [↑](#footnote-ref-302)
302. 302[*Idaho Code Ann. § 42-204*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63F7-1PR1-DYB7-W23G-00000-00&context=1516831) (2014). [↑](#footnote-ref-303)
303. 303 Id. § 42-204(1). [↑](#footnote-ref-304)
304. 304 Id. [↑](#footnote-ref-305)
305. 305 Id. § 42-204(2). [↑](#footnote-ref-306)
306. 306 [*Wash. Rev. Code § 90.03.320*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BB3-WN41-66P3-2102-00000-00&context=1516831) (2014). [↑](#footnote-ref-307)
307. 307 [*N.M. Stat. Ann. § 72-5-6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GJT1-64V8-10CW-00000-00&context=1516831) (2014). [↑](#footnote-ref-308)
308. 308 Id. § 72-5-8. [↑](#footnote-ref-309)
309. 309 Id. § 72-5-14. [↑](#footnote-ref-310)
310. 310 See Podolak & Doyle, supra note 19, at 16, 29 ("A small percentage (9%) of conditional water rights are perfected in the first two diligence periods (12) years. The remainder seems to be held until they become more valuable to the user."). [↑](#footnote-ref-311)