

# [***ARTICLE: PLANS FOR AUGMENTATION UNDER THE 1969 ACT: PROVIDING FLEXIBILITY FOR MAXIMUM UTILIZATION OF COLORADO'S WATERS***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5XBK-6JB1-F7VM-S434-00000-00&context=1516831)

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**Text**

**[\*210]**

I. Introduction

The Water Right Determination and Administration Act of 1969, commonly referred to as the 1969 Act, completely reshaped the legal and administrative authority of ***Colorado*** water law. One of the 1969 Act's primary purposes was to integrate the use and administration of groundwater and surface water. As an important tool in achieving that purpose, the 1969 Act created plans for augmentation, which are the main focus of this article. A plan for augmentation allows a water user to divert water out-of-priority as long as the water user provides replacement water of sufficient quantity and quality at an appropriate time and location to prevent injury to senior downstream water rights.

Plans for augmentation have evolved in the last fifty years through legal precedent and statutory amendments. After the 1969 Act, relevant amendments on plans for augmentation followed, particularly in 1974, 1977, 1996, and 2003. Some of these changes were in response to ***Colorado*** Supreme Court decisions, which will be discussed in depth in this article and in companion articles in the *University of Denver Water Law Review*. Although some legal and administrative principles surrounding plans for augmentations have been refined since 1969, the essential goal for their use remains the same - to ensure flexibility and maximum utilization of waters while protecting senior rights in over-appropriated stream systems throughout ***Colorado***.

Section II of this article provides a historical overview of the 1969 Act's provisions on plans for augmentation, focusing on the evolution of this concept from the initial legislation and resulting research that assisted in formulating the 1969 Act through the enactment of the 1969 Act and later amendments. Sections III and IV discuss some important ways in which plans for augmentation have evolved in ***Colorado***'s water law system since 1969. Section III describes the role of changes of water rights in plans for augmentation. Section IV examines how State Engineer's rulemaking authority intersects with augmentation plans and interstate compact enforcement and compliance, particularly in the Arkansas ***River*** Basin. Section V provides a few concluding thoughts on the value of augmentation plans in ***Colorado*** and whether the inherent flexibility envisioned for this tool is being realized.

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II. Historical Overview

By 1969, ***Colorado***'s population was growing at an accelerating rate, and the impacts of well pumping on stream systems were increasingly evident, exacerbating the over-appropriation of several streams. To mitigate this growing dilemma, it was imperative that the ***Colorado*** General Assembly: (1) establish an appropriate form of authority to properly and efficiently adjudicate water rights in ***Colorado***; (2) create legal and engineering mechanisms to promote maximum utilization of ***Colorado***'s water; and (3) successfully integrate the administration of surface and groundwater rights.

A. Setting the Stage for the 1969 Act

1. 1967 Legislative Session

The ***Colorado*** General Assembly's attention to water issues in the 1967 Legislative Session followed a productive 1965 session where the General Assembly passed the ***Colorado*** Groundwater Management Act, placing groundwater within the regulatory authority of the state engineer, who could consider injury to senior surface water rights when evaluating well permit applications. [[2]](#footnote-3)2The 1965 Act also recognized the tributary connection between surface water and most groundwater, which would provide a basis for integrating the two in the forthcoming 1969 Act. [[3]](#footnote-4)3

On April 19, 1967, the ***Colorado*** General Assembly began laying the foundation for the 1969 Act, passing a bill that committed state resources to studying ***Colorado***'s appropriation system in order to create more effective legislation in the future. [[4]](#footnote-5)4This act provided $ 50,000 in funding to the Department of Natural Resources to consult with lawmakers, policy experts, and engineering experts to research potential administrative or legal methods to integrate surface and groundwater, while protecting vested rights. [[5]](#footnote-6)5S.B. 407 directed the DNR:

To investigate relationships in the areas where intermingled surface and ground water are commonly used in conjunction with each other on the same lands, or lands immediately adjoining, for the same purpose of irrigation; to determine the need for and content of legislation that would provide for integrated administration of all diversions and uses of water within the state; *protect all vested water rights, conserve water resources for maximum beneficial use, and permit full utilization of all waters in the state*; in connection with such study, to employ such technological and legal and practical assistance as may be reasonably required; to cooperate with any interim joint water committee that is established by the general assembly; to hold public hearings if necessary in any of the water divisions of the state; and to draw upon the experience of other states so far as it is applicable to conditions in ***Colorado*** (emphasis **[\*212]**added). [[6]](#footnote-7)6

Furthermore, S.B. 407 called on engineering firms:

To review existing water laws of the state of ***Colorado*** to determine their sufficiency and the need for any modifications or supplementations thereto in order to provide an effective system for administration, development, and control of water use in ***Colorado***, and *to achieve maximum utilization of water resources compatible with the requirements of the state constitution*. [[7]](#footnote-8)7

The research called for in S.B. 407 provided a crucial foundation for the general assembly to efficiently and comprehensively address water issues two years later in the 1969 Session, making possible the enactment of the 1969 Act.

2. Engineering Reports Commissioned by S.B.407

By late 1968, six reports were prepared by several water engineering firms at the request of the Department of Natural Resources under S.B. 407. The reports analyzed a full range of ***Colorado*** water issues, including the current water administration as of October 1968, studies of integrated water use on the South Platte ***River***, and investigations of potential water legislation impact on the Arkansas ***River*** Basin. Specifically, some of the reports analyzed or discussed a mechanism or system of conjunctive use that would assist in maximum utilization of ***Colorado***'s waters - what would eventually become known as "plans for augmentation."

The first study was the Study of Integrated Water Use, South Platte ***River*** Basin, Water District No. 8, conducted by Wright Water Engineers in July 1968. [[8]](#footnote-9)8This study provided "conclusions relative to improved water utilization in Water District No. 8 ... along with recommendations ... to the formulation of legislation leading to the conjunctive use of the ground and surface waters of the State." [[9]](#footnote-10)9In anticipating the creation of mechanisms now known as plans for augmentation, the study concluded that "water resources and the physical mechanisms for better utilization of our water resources exists, or could be constructed, which would provide for a more dependable supply and/or increased water use." [[10]](#footnote-11)10

The second study was the Water Utilization Study, Water District 2, conducted by Morton W. Bittinger and Associates in July 1968. [[11]](#footnote-12)11The purpose of this study was to "provide the necessary physical and engineering information to develop realistic and practical legislation directed at harmonious administration and use of both surface water and groundwater where the two supplies are **[\*213]**closely interrelated." [[12]](#footnote-13)12

The third study was the Report on Engineering Water Code Studies for the South Platte ***River*** conducted by Morton W. Bittinger and Associates and Wright Water Engineers in August 1968. [[13]](#footnote-14)13This study summarized conclusions from multiple reports conducted by separate water engineering consultants on South Platte ***River*** reaches in Water Districts 64, 1, 2, and 8. [[14]](#footnote-15)14One conclusion in this study, which foreshadowed the creation of plans for augmentation, was that if it "can be shown from a physical standpoint that a greater beneficial use, a better dependability of supply and an alleviation of conflicts between water users can be accomplished through planned integrated management without infringing upon vested rights, the legal problems of implementing and operating such a program can be surmounted." [[15]](#footnote-16)15

The fourth study was broken into two reports - the Summary Report [[16]](#footnote-17)16and the Comprehensive Report on Water Legislation Investigations for the Arkansas ***River*** Basin, conducted by W.W. Wheeler and Associates and Woodward-Clyde-Shepard and Associates. [[17]](#footnote-18)17This study specifically focused on developing plans to integrate groundwater and surface water uses in the Arkansas ***River*** Basin in accordance with the priority system that would provide the maximum benefit from the water resources in the Arkansas ***River*** basin. [[18]](#footnote-19)18The report also detailed the impact of mass pumping of groundwater from wells tributary to the Arkansas ***River***, recommending that a "management plan for conjunctive use must be basin-wide to protect vested water rights in accordance with the [prior] Appropriation Doctrine." [[19]](#footnote-20)19

The fifth study was the October 1968 Report on ***Colorado*** Water Administration conducted by Clyde-Criddle-Woodward, Inc. [[20]](#footnote-21)20This study, unlike the others, concluded that "major changes in the laws through legislation is probably not needed and should not be attempted at this time. Changes in state water laws through "common' or "case' law approach, although slower than legislation, is safer and believed to be adequate for most needs." [[21]](#footnote-22)21

In the final study, conducted and published in November 1969 after passage of the 1969 Act, Morton W. Bittinger and Associates used the Farmers Pawnee Canal Company ("FPC ***Co***.") as an example to develop model procedures and techniques within the South Platte ***River*** Basin to utilize the provisions of the 1969 Act to accomplish integrated administration and management **[\*214]**of surface water and ground water. [[22]](#footnote-23)22This study discussed how FPC ***Co***. could utilize plans for augmentation to provide existing sources of replacement water (mainly reservoirs and groundwater supplies) to offset depletions to the South Platte ***River*** caused by any well pumping. [[23]](#footnote-24)23

3. Explanation of Proposed Water Legislation

Supplementing S.B. 407 and the engineering reports, the Water Committee of the ***Colorado*** Legislative Council issued an Explanation of Proposed Water Legislation in December 1968, including a detailed committee report on the wealth of information provided by the engineering reports commissioned under S.B. 407. [[24]](#footnote-25)24This Report included a summary of an early draft version of what would become the 1969 Act. [[25]](#footnote-26)25The summary discussed how the proposed version "would provide for the administration of ***Colorado*** water on a ***river*** basin concept, with strengthened administrative authority residing in the state engineer and the division engineers' offices" [[26]](#footnote-27)26and would provide for the appointment of a referee to make preliminary findings of fact in water cases. [[27]](#footnote-28)27The Explanation of Proposed Legislation, however, only made short note on plans for augmentation, describing how a water judge appointed by the ***Colorado*** Supreme Court would have exclusive jurisdiction over "priority determinations, transfer proceedings, abandonment, and augmentation (substituted supply)." [[28]](#footnote-29)28

4. Fellhauer v. People

While the engineering reports were being prepared during 1967-68, the ***Colorado*** Supreme Court heard and decided an important case that established foundational principles for the 1969 Act - *Fellhauer v. People (*" *Fellhauer*"). [[29]](#footnote-30)29The supreme court held that the state engineer's regulation of wells to protect senior surface water rights should be "in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of regulative orders" to prevent arbitrary and/or discriminatory action by the State Engineer. [[30]](#footnote-31)30Additionally, the court held that the regulation of wells must accomplish the "reasonable lessening of material injury to senior rights ... ." [[31]](#footnote-32)31Finally, Justice Groves' opinion includes his memorable statement that "as administration of water approaches its second century, the curtain **[\*215]**is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights.*" [[32]](#footnote-33)32This principle of integrating maximum utilization and vested rights was a guiding factor for the 1969 General Assembly in drafting the 1969 Act, and, in particular, articulated what became the basis for plans for augmentation. [[33]](#footnote-34)33

B. Legislative Session and Enactment of the 1969 Act

1. The 1969 Legislative Session

***Colorado*** lawmakers entered the 1969 Legislative Session eager to resolve issues in the water administration and adjudication system. The ***Colorado*** General Assembly, having commissioned the engineering reports under S.B. 407, was primed to dedicate much of the session to considering a new water administration system and statute. As attorney Bob Welborn recalled,

To show the tremendous importance that the Legislature placed on the matter, the entire membership of the State Senate was constituted as a water committee with hearings to commence at the very start of the 1969 legislative session ... So critical was the matter, and so numerous were those interested in the outcome, that hearings on the bill were held several times a week over the course of several months. It is doubtful that any bill in years before or after was more thoroughly considered. [[34]](#footnote-35)34

Both the ***Colorado*** State Senate and the House of Representatives proposed bills regarding potential adjudication systems for water rights. Senate Bill 81, sponsored by Senators Gill and Denny, was entitled the Water Right Determination and Administration Act of 1969. In the house, two bills emerged - House Bill 1307 (Representative McCormick, also known as the "Sparks Bill") and House Bill 1295 (Representative Jackson). [[35]](#footnote-36)35Senate Bill 81 was the only bill to survive multiple amendments on its way to becoming the 1969 Act, while H.B. 1307 and H.B. 1295 did not make it out of committee hearings before the session ended. [[36]](#footnote-37)36

*2. Scope of the 1969 Act*

The 1969 Act, as enacted in S.B. 81, opened with a declaration of policy that echoed Justice Groves' *Fellhauer*opinion, providing that "it shall be the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state." [[37]](#footnote-38)37

**[\*216]**Following this declaration, the 1969 Act codified multiple changes to ***Colorado***'s water administration and adjudication systems, including:

Establishing seven water divisions with a water court in each division;

Providing for a water judge in each water division to hear all proceedings regarding water matters in that division;

Initial proceedings were to be handled by a water referee, subject to rereferral to the water judge;

Case-by-case adjudication and decrees instead of periodic general adjudication proceedings addressing multiple parties' claims in the various water districts;

Effective rulemaking and enforcement authority for the state and division engineers to administer groundwater rights to protect senior vested rights and interstate compact requirements; and

Most importantly for the purpose of this article, the authorization and definition of plans for augmentation as a primary mechanism for integrating the administration and adjudication of groundwater and surface water. [[38]](#footnote-39)38

*3. Plans for Augmentation Defined and Authorized in the 1969 Act*

The 1969 Act included several statutory provisions - most of them remaining codified (with amendments) in ***Colorado*** statutes today - detailing plans for augmentation and how the plans would function in the new water court system. [[39]](#footnote-40)39First, the 1969 Act defined a "plan for augmentation" as:

[A] detailed program to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water or by any other appropriate means. [[40]](#footnote-41)40

A few additions have been made to this statutory definition since 1969, including an amendment clarifying the temporary or perpetual duration of plans [[41]](#footnote-42)41and exclusions for salvage of tributary waters using phreatophytes and use of tributary water collected from impermeable land surfaces. [[42]](#footnote-43)42However, the core of the original 1969 Act definition remains intact.

Next, the 1969 Act enacted a provision for applications, currently [*C.R.S. § 37-92-302*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G0-00000-00&context=1516831) (Applications for water rights or changes of such rights - plans for augmentation). This section prescribed the process for submitting applications to the water court and deadlines for filing opposition. It included applications for plans for augmentation in the resume notice and referee system, and authorized standard forms to use in applying for a plan for augmentation; all these **[\*217]**provisions remain codified in the ***Colorado*** statutes. [[43]](#footnote-44)43

The 1969 Act also established the primary standard for judicial approval of augmentation plans:

A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right ... If it is determined that the proposed change or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect. [[44]](#footnote-45)44

This no-injury standard remains the central tenet of ***Colorado*** water law surrounding plans for augmentation today. This section of the 1969 Act also provided initial examples (since expanded by amendments) of certain terms and conditions to prevent injury in a decree for a change of water right or plan for augmentation. [[45]](#footnote-46)45

Finally, the 1969 Act imposed a water quality requirement for plans for augmentation. The current provision, now codified at [*C.R.S. § 37-92-305(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), remains unaltered from the original Act:

In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point or points of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights. [[46]](#footnote-47)46

This provision from the 1969 Act continues to set the standard for replacement or substituted water in plans for augmentations and exchanges, assuring both the quality and quantity of such supplies will be adequate for senior appropriators' uses.

C. Early Case Law Under 1969 Act

The ***Colorado*** Supreme Court first contemplated some of the issues surrounding plans for augmentation in *Shelton Farms v. Southeastern* ***Colorado*** *Water Conservancy District*. [[47]](#footnote-48)47That decision disallowed augmentation credit for **[\*218]**removing phreatophytes, a result codified in an amendment to the statutory definition of "plan for augmentation" discussed above. [[48]](#footnote-49)48

The first two cases in which water court decisions on plans for augmentation were appealed to the ***Colorado*** Supreme Court were *Cache La Poudre Water Users Association v. Glacier View Meadows* [[49]](#footnote-50)49and *Kelly Ranch v. Southeastern* ***Colorado*** *Water Conservancy District.* [[50]](#footnote-51)50 The supreme court decided *Cache LaPoudre Water Users Association v. Glacier View Meadows (*" *Glacier View Meadows*") on the same day as *Kelly Ranch*. [[51]](#footnote-52)51While the two cases involved relatively similar fact patterns, the Division 1 Water Court reached the opposite conclusion regarding Glacier View Meadows' plan for augmentation than the Division 2 Water Court in *Kelly Ranch*. [[52]](#footnote-53)52

1. Cache La Poudre Water Users Association v. Glacier View Meadows

Glacier View Meadows sought approval for plans for augmentation to replace depletions from water consumed from wells for domestic use in its neighborhood development west of Fort Collins. [[53]](#footnote-54)53North Poudre Irrigation Company and Cache La Poudre Water Users Association objected to the plan, arguing that unless there was 100 percent replacement of the water taken from the wells, senior water rights would be injured in violation of the 1969 Act and the rules and regulations of the State Engineers Office. [[54]](#footnote-55)54The opposers also argued that the water court had "usurped the functions and duties of the State Engineer" and that a well permit is a condition precedent to filing an application for approval of the plan of augmentation. [[55]](#footnote-56)55The Division 1 Water Court rejected the opposers' arguments and approved the applicant's plans. [[56]](#footnote-57)56

On appeal, the ***Colorado*** Supreme Court held that "under the plans for augmentation involved water is available for appropriation when the diversion thereof does not injure holders of vested rights." [[57]](#footnote-58)57The court said it did "not agree with the water court's requirement that the State Engineer fix an appropriation date of each well for which a permit is issued." [[58]](#footnote-59)58It reasoned that the water court had not considered that there would be priorities enforced against different well owners acting under the proposed plan for augmentation, and that if the use of well water under the plan caused unlawful injury, the use violated the terms of the plan. [[59]](#footnote-60)59Finally, in rejecting the opposers' arguments that depletions caused by diversion of well water cannot be determined with sufficient accuracy, the court quoted the water court:

Inherent in the hydrological and geological analysis upon which the plan for **[\*219]**augmentation herein is founded, is a degree of uncertainty, but the uncertainty is no greater than that inherent in the administration of water rights generally and is not of great significance. The assumptions upon which the plan is based allow more than adequate latitude. If the plan for augmentation is operated in accordance with the detailed conditions herein, it will have the effect of replacing water in the stream at the times and places and in the amounts of the depletions caused by the development's use of water. As a result, the underground water to be diverted by the development wells, which would otherwise be considered as appropriated and unavailable for use, will now be available for appropriation without adversely affecting vested water rights or decreed conditional water rights on the South Platte ***River*** or its tributaries. [[60]](#footnote-61)60

Based on this, the court generally upheld the plan for augmentation. [[61]](#footnote-62)61

2. Kelly Ranch v. Southeastern ***Colorado*** Water Conservancy District

In *Kelly Ranch*, a residential developer sought approval for a plan for augmentation in the Division 2 Water Court, relying on water made available by changing a historical irrigation water right. [[62]](#footnote-63)62The stated purpose of the plan was to provide water through wells in three proposed subdivisions in the Buena Vista area. [[63]](#footnote-64)63The main opposers, Southeastern ***Colorado*** Water Conservancy District and the Division 2 Engineer, claimed that the plan for augmentation was an expansion of the irrigation water rights allowing the applicant to divert quantities in excess of those historically used. [[64]](#footnote-65)64The Division 2 Water Court dismissed the application, concluding that the application did not include a plan for augmentation because there was no addition of new water into the stream system. [[65]](#footnote-66)65The water court also held that the state engineer erred in granting temporary approval to the Kelly Ranch Augmentation Plan as it would allow for "a theory of replacement of estimated consumptive use which would ignore the priority doctrine." [[66]](#footnote-67)66

On appeal, the supreme court analyzed the legislative intent behind the 1969 Act along with *Fellhauer.* It concluded that Kelly Ranch's application included a proper plan for augmentation similar to Glacier View's because plans for augmentation incorporate maximum utilization of the state's water into the administration and adjudication of decreed water rights. [[67]](#footnote-68)67The court also discussed the flexibility of plans for augmentation, describing the plans as flexible programs tailored to water users' specific needs and uses, based on the "valid exercise of ingenuity of persons seeking to maximize the use of water." [[68]](#footnote-69)68The *Kelly Ranch*decision also discussed the effect of temporary augmentation plan approvals by the state engineer, [[69]](#footnote-70)69but that discussion served mainly to lay the **[\*220]**foundation for a 1977 amendment that removed that authority while clarifying the continuing administrative role of the state and division engineers.

In upholding both applicants' plans for augmentation, the ***Colorado*** Supreme Court demonstrated its agreement that the flexibility afforded by these plans was necessary in order to promote maximum utilization of ***Colorado***'s limited water supply.

D. Significant Amendments since the 1969 Act Regarding Plans for Augmentation

1. 1977 Amendment

The first major amendment to the 1969 Act came in 1977. The 1977 Amendment was enacted after the *Kelly Ranch*case, and repealed an earlier amendment that had given the state engineer broader authority to approve temporary plans for augmentation. [[70]](#footnote-71)70The 1977 Amendment also made two significant statutory additions. [[71]](#footnote-72)71The first clarified the continuing role of the state and division engineers:

*Consistent with the decisions of the water judges* establishing the basis for approval for plans for augmentation and for the administration of groundwater, the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary exchanges of water and may make such rules and regulations and shall take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. In so doing, the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights . [[72]](#footnote-73)72

The second codified a more detailed standard for determining injury from augmentation plans:

In reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. [[73]](#footnote-74)73

These statutes shifted authority to approve plans for augmentation from the state engineer to the water courts, while clarifying the state engineer's administrative role and the standard for the water court's decisions. [[74]](#footnote-75)74

**[\*221]**

2. 1996 Amendments

The ***Colorado*** General Assembly passed House Bill 1292 in 1996, expanding the provisions codified in [*C.R.S. §§37-92-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) and 305(8). [[75]](#footnote-76)75The Act added to the definition of a plan for augmentation that such a plan "may be either temporary or perpetual in duration." [[76]](#footnote-77)76It also added to the standards for plan approval:

A proposed plan for augmentation that relies upon a supply of augmentation water which, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, so long as the terms and conditions of the plan prevent injury to vested water rights. Said terms and conditions shall require replacement of out-of-priority depletions that occur after any groundwater diversions cease. [[77]](#footnote-78)77

This amendment further increased the flexibility for water users to apply for a plan for augmentation, even when the proposed supply of water may be limited in duration. [[78]](#footnote-79)78Senate Bill 124 was also enacted in 1996, and is discussed later in the context of the Water Division 2 rules that it authorized. [[79]](#footnote-80)79

3. 2003 Amendments

The general assembly passed another important amendment - S.B. 03-073 - in 2003, entitled "Concerning an Increase in the State Engineer's Authority to Approve the Use of Water." [[80]](#footnote-81)80This bill significantly expanded the statute on substitute water supply plans adopted in 2002 and added to standards for water court approval of plans for augmentation. [[81]](#footnote-82)81Consistent with the ***Colorado*** Supreme Court's decision in *Simpson v. Bijou*, [[82]](#footnote-83)82this bill confirmed state engineer authority to approve plans for replacement of depletions in Water Division 2 and further restricted its authority to make such approvals in Water Division 1. [[83]](#footnote-84)83This bill added a sentence to [*C.R.S. § 37-92-305(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831):

A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed **[\*222]**for such use. [[84]](#footnote-85)84

The ***Colorado*** Supreme Court recently observed that "the only amendments to augmentation plans that the pertinent statute [section 37-92-305(8)] appears to contemplate are amendments to allow "additional or alternative sources of replacement water,' if the augmentation plan provides a procedure for seeking such changes." [[85]](#footnote-86)85

III. The Role of Changes of Water Rights in Plans for Augmentation

A. Changes of Water Rights and Plans for Augmentation

The 1969 Act also introduced the statutory definition for a "change of water right," which means a:

Change in the type, place, or time of use, a change in the point or points of diversion, a change from a fixed point or points of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point or points of diversion, a change in the means of diversion, a change in the place or places of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place or places of storage to alternate places of storage, a change from alternate places of storage to a fixed place or places of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights. [[86]](#footnote-87)86

This definition of a change of water right has remained the same since the enactment of the 1969 Act. [[87]](#footnote-88)87To change a water right, the holder of the right must file an application with the water court of jurisdiction over the basin in which the water right is located. [[88]](#footnote-89)88The water court shall approve the change of water right if the change "will not injuriously affect the owner of or persons entitled to use water under a vested water rights or a decreed conditional water right." [[89]](#footnote-90)89

In changing an absolute water right, four "essential functions of change of water right proceedings are to: (1) identify the original appropriation's historic beneficial use; (2) fix the historic beneficial consumptive use attributable to the appropriation by employing a suitable parcel-by-parcel or ditch-wide methodology; (3) determine the amount of beneficial consumptive use attributable to the applicant's ownership interest; and (4) affix protective conditions for preventing **[\*223]**injury to other water rights in operation of the judgment and decree." [[90]](#footnote-91)90With "improved engineering techniques, courts began translating ... historical consumptive use into a volumetric limitation stated in acre-feet to more accurately prevent injury to juniors in change proceedings." [[91]](#footnote-92)91

Augmentation plans often include changes of absolute water rights or rely on previously changed rights. An augmentation plan must include dedicated and decreed sources of replacement water. [[92]](#footnote-93)92Water rights decreed for irrigation use or other beneficial uses are often changed for use as replacement water in augmentation plans. [[93]](#footnote-94)93Water that was historically depleted from the stream by the exercise of a water right in priority will instead be released to the stream to replace new depletions from the "augmented" out-of-priority diversion. [[94]](#footnote-95)94To change a water right for augmentation use, the applicant must apply for a change of water rights and a plan for augmentation and must prove non-injury using the same statutory standard for both the change and the augmentation plan. [[95]](#footnote-96)95"Changes of water rights are limited in quantity and time by historic use." [[96]](#footnote-97)96Therefore, if the water right has not been previously changed, the water court must determine the historical consumptive use of the water right. [[97]](#footnote-98)97Recent case law and legislation have confirmed legal standards for such quantification, and the effects of previous change cases that quantified the same water right. [[98]](#footnote-99)98

B. Quantification and Requantification

One frequently litigated issue that arises in a change of water rights, which may or may not include a plan for augmentation, is quantification of historical consumptive use of the water right that the applicant is seeking to change. [[99]](#footnote-100)99In order to ensure the changed water right is not expanded, and thereby to avoid injury, an applicant must prove the extent of this historical consumptive use. [[100]](#footnote-101)100

1. Midway Ranches

The ***Colorado*** Supreme Court 1997 decision in *Williams v. Midway Ranches*established legal principles for quantification of historical consumptive **[\*224]**use in a change proceeding. [[101]](#footnote-102)101In that case, Midway Ranches Property Owners' Association filed an application for a plan for augmentation, "proposing to utilize shares of the Fountain Valley Mutual Irrigation Company (FMIC) to replace depletions from out-of-priority version and use of water by a tributary well in connection with a central water supply system for a new subdivision development between ***Colorado*** Springs and Pueblo." [[102]](#footnote-103)102In previous change cases, the Division 2 Water Court had determined that "each FMIC share yielded 0.7 acre-foot of net average consumptive use for replacement purposes." [[103]](#footnote-104)103In a pre-trial order, the water court employed *res judicata*, or claim preclusion, to "bar redetermination of the previous quantification of the FMIC rights." [[104]](#footnote-105)104On appeal, an objector asserted that this ruling was erroneous. [[105]](#footnote-106)105

The ***Colorado*** Supreme Court articulated the rationale for historical consumptive use quantification, explaining that a "pattern of historic diversions and use" under a decreed right matures over an "extended period of time" and becomes the "measure of the water right for change purposes, typically quantified in acre-feet ... consumed." [[106]](#footnote-107)106The court further explained that "quantification of the amount of water beneficially consumed in the placement of water to the appropriator's use guards against rewarding wasteful practices or recognizing water claims which are not justified by the nature and extent of the appropriation's need." [[107]](#footnote-108)107In discussing the significance of quantification of a changed right for use in a plan for augmentation, the court held that "absolute water rights used in one location may be quantified and changed for use in an augmentation plan to provide replacement water releases, so that diversion and use of water may be made out-of-priority elsewhere." [[108]](#footnote-109)108Finally, the court explained that "because water rights are usufructuary in nature, the measure of a water right is the amount of water historically withdrawn and consumed over time in the course of applying water to beneficial use under the tributary appropriation without diminishment of return flows." [[109]](#footnote-110)109

The court also discussed the proper application of *res judicata*and its "collateral estoppel component." [[110]](#footnote-111)110When a party argues that a claim is barred from being relitigated in a present case, "a water court must determine whether: (1) the court entering the prior judgment possessed subject matter jurisdiction; (2) the same subject matter and claim or cause of action are involved in both cases; and (3) the party seeking to litigate an issue or claim should be bound by the prior determination." [[111]](#footnote-112)111The court proclaimed that "the application of *res ju* *dicata*, **[\*225]**including its collateral estoppel component, in appropriate circumstances is important to the stability and reliability of ***Colorado*** water rights." [[112]](#footnote-113)112In analyzing whether subsequent litigation is "barred by *res judicata*, ... a water court examines the resume notice and the ensuing court judgment and decree in the prior proceeding to determine which matters were at issue then and are foreclosed from being redetermined in the current proceeding." [[113]](#footnote-114)113

The court decided that the historical consumptive use of all FMIC shares was properly determined in previous water court cases that fixed the augmentation credits available for change, and accordingly, that the objections were precluded. [[114]](#footnote-115)114However, the court stated that it did not

hold that *res judicata*should bar the water court from addressing circumstances which have changed subsequent to the previous determination, nor does this doctrine preclude the water court from determining historic use in a change, augmentation, or expanded use injury case when such historic use has not been determined in a previous proceeding. [[115]](#footnote-116)115

The court concluded that the water court allowed and considered evidence of potential changed circumstances, and that it correctly employed a combination of res judicata and evidence at trial in determining the same 0.7 acre-feet augmentation credit for the Midway Ranches augmentation plan. [[116]](#footnote-117)116

2. Farmers High Line v. Golden

The court further analyzed historical consumptive use quantification in changes of water rights in *Farmers High Line Canal and Reservoir Company v. City of Golden*, decided in 1999. [[117]](#footnote-118)117In 1995, Farmers High Line, Farmers Reservoir and Irrigation Company ("FRICO"), and the cities of Westminster, Thornton, and Arvada filed a complaint alleging that Golden had expanded the historic use of its decreed water rights to the detriment of junior rights holders on Clear Creek. [[118]](#footnote-119)118Golden had purchased senior irrigation rights (Priority 12 from Clear Creek) in 1960 and filed to change the decreed use of the rights from irrigation to municipal use. [[119]](#footnote-120)119Prior to the 1969 Act, the district court denied the change petition based on multiple parties' objections, but the ***Colorado*** Supreme Court overturned that decision in *Mannon v. Farmers' High Line Canal & Reservoir* ***Co****.*and instructed the district court on remand "to determine whether a change decree with limiting conditions would be sufficient to prevent injury to junior users as a result of the transfer." [[120]](#footnote-121)120The parties eventually entered into a consent decree limiting the maximum annual flow Golden could divert **[\*226]**to 2.86 c.f.s. [[121]](#footnote-122)121However, unlike many subsequent change decrees, the consent decree did not contain an express volumetric limitation, stated in acre-feet, on the amount of water Golden could consume each year. [[122]](#footnote-123)122

In challenging Golden's potential enlargement of its historical use, the appellants argued that the court should add volumetric limitations to the express terms of the 1960s decree and should award injunctive relief as "Golden has enlarged its current annual acre-footage consumption beyond said limitations." [[123]](#footnote-124)123The appellants also argued that Golden altered its "right from a peak flow right to a base flow right" and that it increased "the acreage of lawn irrigated with the right." [[124]](#footnote-125)124

The court found that the appellants' claim that volumetric limitations should be added to the 1960s decree was precluded. [[125]](#footnote-126)125The court, citing *Orr v. Arapahoe Water & Sanitation District*and *Midway Ranches*, determined that preclusion should apply if: (1) there was a previous historical consumptive use quantification, and if so, then (2) the Court "will not modify the resulting decree by implying volumetric limitations into its terms." [[126]](#footnote-127)126It determined that there was a quantification of historical consumptive use in a previous change case that fully litigated historic use. [[127]](#footnote-128)127Accordingly, applying preclusion, the court did not modify the resulting decree terms by implying volumetric limitations. [[128]](#footnote-129)128However, the court determined that the appellants' other claims were not precluded because Golden's altered municipal use and amount of lawn acreage irrigated with the right were not anticipated at the time of the original litigation in the 1960s. [[129]](#footnote-130)129The decision demonstrates that historical use determinations from a previous change, with or without volumetric quantification and limits, can be preclusive in later change cases.

3. Sedalia and S.B. 15-183

In recent years, "second changes" of water rights, in which the historical consumptive use of the water right has been quantified in a previous change proceeding, have increasingly been litigated. For example, a right changed for use in an augmentation plan may be changed again, for use in a different augmentation plan. First the courts, then the general assembly in 2015, addressed the question of whether the water court should rely on past quantification of the water right, or if an entirely new quantification is appropriate in determining the historical consumptive use of the water right being changed again. [[130]](#footnote-131)130In some cases, a number of years had passed between the initial quantification and the new change application. Often, requantification has emerged as an issue when previously quantified rights have been changed and held for use as replacement **[\*227]**water in augmentation plans.

The ***Colorado*** Supreme Court decided such a case regarding requantification of changed water rights in February 2015. In *Wolfe v. Sedalia Water and Sanitation District*, Sedalia Water and Sanitation District ("Sedalia") applied to the Division 1 Water Court to change an 1872 irrigation right as part of a plan for augmentation to provide municipal water to its customers. [[131]](#footnote-132)131The 1872 irrigation right was previously changed in 1986 when the previous owner of the right (Owens Concrete) adjudicated an augmentation plan, and the water court determined that the historical consumptive use of the right was thirteen acre-feet per year. [[132]](#footnote-133)132However, Owens Concrete did not complete its intended well, and therefore the "company left its thirteen acre-feet of historical consumptive use water in the stream for twenty-four years pursuant to its augmentation plan, but never took credit for out-of-priority tributary groundwater depletions." [[133]](#footnote-134)133

Sedalia and the State Engineer's Office settled all issues in the case except for "whether the water court should requantify the annual average historical consumptive use amount of thirteen acre-feet of water decreed to the original 1872 priority." [[134]](#footnote-135)134The water court ruled that the state engineer could not relitigate the historical consumptive use determined in the 1986 quantification, and that holding otherwise would "result in a de facto finding of abandonment of this part of the 1872 priority, depriving Sedalia of an opportunity to offer evidence rebutting the presumption of abandonment arising from a lengthy period of nonuse." [[135]](#footnote-136)135The state engineer appealed this decision to the ***Colorado*** Supreme Court. [[136]](#footnote-137)136

On appeal, the ***Colorado*** Supreme Court affirmed in part and reversed in part. [[137]](#footnote-138)137It held that issue preclusion applied to prevent relitigation of the historical consumptive use determined in 1986, but did not prevent the water court from inquiring into the twenty-four years of post-1986 nonuse alleged by the state engineer. [[138]](#footnote-139)138In discussing the reasons for quantification, the court focused on the "actual beneficial use" of the appropriation, stating that the water court "has a duty to ensure that the true right - that which has ripened by beneficial use over time - is the right that continues in its changed form under the new decree." [[139]](#footnote-140)139This beneficial use must be calculated over a "representative period of time," raising the question whether the twenty-four years of nonuse alleged by the state engineer would constitute "changed circumstances" requiring requantification of the water right. [[140]](#footnote-141)140

Reversing the water court, the supreme court held that "prolonged unjustified nonuse calls into question the appropriate representative period of time for calculating the annual average consumptive use amount, and therefore, the **[\*228]**amount legally available for the subsequent change decree." [[141]](#footnote-142)141The court did not decide whether any of the twenty-four years of nonuse counted towards requantification, but it remanded to the water court for factual findings, to consider whether the years of nonuse following the 1986 decree were sufficiently prolonged and unjustified to constitute a changed circumstance requiring consideration of a new representative period. [[142]](#footnote-143)142The decision points out that non-use of water rights decreed for augmentation use often may be justified, since "augmentation plans are often fashioned, or operate by default, to supply more augmentation water to the stream than proves to be necessary." [[143]](#footnote-144)143While such over-replacement may benefit other water users, "there is no entitlement to continuation of such a gratuity." [[144]](#footnote-145)144The court concluded that "the water court has discretion to select a representative period of time of the water right's exercise in calculating the amount of consumptive use water available for inclusion to the changed water right." [[145]](#footnote-146)145

Just days after the *Sedalia*decision was released, the ***Colorado*** General Assembly introduced Senate Bill 15-183, "Concerning the Quantification of the Historical Consumptive Use of a Water Right." [[146]](#footnote-147)146The Bill was enacted, effective May 4, 2015, adding statutory criteria for quantifying historical consumptive use. [[147]](#footnote-148)147S.B. 183 focused on two key aspects of historical consumptive use quantification the court had discussed in *Sedalia*. First, the bill required that quantification of the actual historical consumptive use of the water right be based on a representative study period that: (1) includes wet years, dry years, and average years; (2) does not include years of undecreed use of the subject water right; and (3) need not include every year of the entire history of use of the subject water or periods of nonuse of the water right. [[148]](#footnote-149)148Second, the bill prohibits a water judge from reconsidering or requantifying the historical consumptive use of a water right if the historical consumptive use has already been quantified in a previous change decree. [[149]](#footnote-150)149The water judge may impose terms and conditions on "that portion of the water right that is the subject of the change as needed to limit the future consumptive use of that portion of the water right to the previously quantified historical consumptive use." [[150]](#footnote-151)150

In establishing concrete principles for water courts to use in quantification and requantification of water rights in change proceedings, the general assembly effectively overturned a portion of the ***Colorado*** Supreme Court's decision in *Sedalia*. Previous quantifications are preclusive, providing a clear standard for water judges to adhere to in the future, without collateral consideration of whether there was unjustified nonuse after the previous decree. This clear standard better advances the underlying policy of the 1969 Act promoting flexibility and maximum utilization of ***Colorado***'s waters, a concept the court in **[\*229]** *Sedalia*acknowledged in noting the importance of preserving decreed augmentation supplies that may not be used each year.

C. Changes of Water Rights and Plans for Augmentation on Clear Creek

Numerous plans for augmentation including changes of water rights have been adjudicated on Clear Creek, a tributary of the South Platte ***River*** west of Denver. Clear Creek's headwaters are near the Eisenhower Tunnel on the Continental Divide, and the stream descends along I-70 and Highway 6 to Golden, then flowing through Wheat Ridge and north Denver before its confluence with the South Platte ***River***. One of ***Colorado***'s largest industrial water users, Coors Brewing Company (Coors), [[151]](#footnote-152)151conducts extensive operations on the banks of Clear Creek just east of Golden. The growing Denver suburbs of Arvada, Westminster, and Thornton also obtain much of their water from Clear Creek, so the stream system is in a near-constant state of overappropriation. Most senior Clear Creek water rights were originally decreed and used for irrigation in a large area of Jefferson County, mostly north and east of Golden. With substantial urbanization in this area, most of these water rights have been changed to municipal and industrial use, including complex plans for augmentation. Thus, the stream system presents an interesting study on how the 1969 Act and its provisions on changes and plans for augmentation have been implemented as water uses have evolved over fifty years.

1. Coors Augmentation Plans on Clear Creek

Coors, operating as one of the state's largest industrial water users on a severely overappropriated stream, requires substantial augmentation plans in order to keep its brewery in operation. Coors adjudicated the first major augmentation plan on Clear Creek, decreed in 1977 (Coors Augmentation Plan I). [[152]](#footnote-153)152Its water sources decreed and used for augmentation include changed shares of senior irrigation rights on Clear Creek, transmountain and developed water rights, and storage rights. Ken Wright of Wright Water Engineers, who provided the engineering and resolved numerous issues raised in Coors Augmentation Plan I, describes the history of this augmentation plan in the 1969 Act context in his concurrent article, "An Engineer's Recollections of the Water Right Determination and Administration Act of 1969." [[153]](#footnote-154)153As he explains, resolution of the case depended on many parties reaching agreement on the appropriate factors for augmentation replacement credits and return flow replacement obligations for each of the changed water rights. The same factors were used in numerous augmentation plans and changes on Clear Creek for over **[\*230]**thirty years. Using a similar approach, Coors obtained two further augmentation plan decrees in 1993 (Coors Augmentation Plan II) [[154]](#footnote-155)154and 2007 (Coors Augmentation Plan III). [[155]](#footnote-156)155

2. FRICO v. Consolidated Mutual

Following the litigation on Clear Creek in *Farmers High Line v. Golden*, similar issues arose in *FRICO v. Consolidated Mutual Water Company*. [[156]](#footnote-157)156FRICO filed a complaint in water court alleging that Consolidated Mutual (Consolidated), another owner of the same Priority 12 right on Clear Creek litigated in *Farmers High Line v. Golden*, had impermissibly expanded its use of the water right by making winter diversions. [[157]](#footnote-158)157The water court dismissed the complaint, but required Consolidated to file a change application. [[158]](#footnote-159)158The water court relied on Golden's expert in calculating the ditch-wide historical consumptive use of Priority 12 and then allocated part of this consumptive use to Consolidated and fashioned protective conditions for Consolidated's use of water. [[159]](#footnote-160)159The decree included a five-year retained jurisdiction provision, and a provision that:

adopted a ditchwide method of analysis for the water rights that are the subject of this proceeding, because that method is both appropriate and consistent with the method used in previous transfers from this ditch, particularly those transfers made by the City of Golden. *Any future transfers should be based on the same method of analysis to prevent injury to vested water rights*. [[160]](#footnote-161)160

In 1998, FRICO filed a petition under [*C.R.S. § 37-92-307(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G6-00000-00&context=1516831) requesting the water court to extend or invoke the period of retained jurisdiction pending the *Farmers High Line*appeal. [[161]](#footnote-162)161

On appeal the ***Colorado*** Supreme Court addressed the purposes of retained jurisdiction for both changes of water rights and augmentation plans under [*C.R.S. § 37-92-304(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G2-00000-00&context=1516831), currently codified as enacted in 1969. [[162]](#footnote-163)162The court determined that the general assembly "(1) intended to preclude review of consumptive use determinations the water court made upon entry of the judgment and decree, except through taking an appeal; and (2) intended the retained jurisdiction provision to address injurious effects that result from placing the change of water right or augmentation plan into operation." [[163]](#footnote-164)163In making this determination, the court reasoned that "scarcity and value of the water resource **[\*231]**has always driven ***Colorado*** water law; accordingly, the state's policy is to efficiently manage, administer, and optimize water use for operation of as many decreed uses as there is available supply." [[164]](#footnote-165)164The court also discussed the role that water engineers play in change of water right and augmentation plan proceedings, stating that when these engineers serve "as expert witnesses, their tasks typically include establishing: (1) the historic beneficial consumptive use of the appropriations at issue; and (2) the protective conditions that will maintain the conditions of the stream upon which decreed water rights depend in order to prevent injury." [[165]](#footnote-166)165The court then delineated how these two tasks apply to the water court's role in analyzing changes of water rights and augmentation plans:

The first function applies to the Water Court's role in determining the measure of the appropriation proposed for change, a question of evidentiary historical fact. The second function applies to the Water Court's role in ascertaining the timing and delivery of return flows and/or substitute water necessary to supply other water rights with the quantity of water they would otherwise enjoy absent the change of water right or augmentation plan. This question involves predictions of future injury and the measures that will likely prevent it. [[166]](#footnote-167)166

In *FRICO*, the court clearly established guidance on the proper role of retained jurisdiction in addressing operational terms but not historical findings for changes of water rights and plans for augmentation.

3. Coors v. Golden

The most recent case on Clear Creek involving issues in plans for augmentation and changed water rights is *Coors Brewing Company v. City of Golden*. [[167]](#footnote-168)167In operating its three plans for augmentation, Coors is required to replace its depletions to Clear Creek resulting from out-of-priority diversions. [[168]](#footnote-169)168Much of the replacement water comes from changed senior water rights native to Clear Creek. Based on the operation of the plans, Coors typically has more replacement water than is necessary to replace those depletions, sometimes resulting in greater stream flows than would occur if the augmentation plans were not operating. [[169]](#footnote-170)169Until 2014, the state and division engineers allowed Coors to lease excess water replaced to the stream under the augmentation plans to downstream users. [[170]](#footnote-171)170In 2014, the state engineer changed its position and concluded that the augmentation plan decrees contained no terms allowing Coors to lease the excess water for successive use. [[171]](#footnote-172)171

Determining a question of law in a Coors lessee's augmentation plan application, the Division 1 Water Court agreed with the state engineer, concluding that Coors' augmentation plans allowed only a single use of the water diverted **[\*232]**by Coors for the purposes specified in the decrees, which do not authorize reuse or successive use of water from native sources. [[172]](#footnote-173)172After receiving this ruling, Coors filed an application to amend its existing augmentation plan decrees to allow reuse or successive use of the resulting return flows. [[173]](#footnote-174)173In denying Golden's motion to dismiss this application, the water court concluded that "Coors may not obtain the right to reuse return flows through an amendment to its decreed augmentation plans, but instead may only obtain the right to reuse return flows by adjudicating a new water right." [[174]](#footnote-175)174

Coors raised three issues on appeal, arguing that the water court erred by: (1) "concluding that Coors may not obtain rights of reuse or successive use by amending its augmentation plan decrees but rather must adjudicate a new water right," (2) "concluding that the return flows at issue are subject to appropriation by other water users," and (3) "interpreting Coors's augmentation plan decrees to require permanent dedication of return flows to the stream, regardless of whether such return flows are needed to replace fully augmented depletions." [[175]](#footnote-176)175The court rejected all three of Coors's arguments after discussing case law limiting reuse in the prior appropriation system and statutes governing plans for augmentation. [[176]](#footnote-177)176

First, the court rejected Coors's argument that the water court may amend its augmentation plans to add rights of reuse or successive use. [[177]](#footnote-178)177The court first questioned whether water courts may entertain augmentation plan amendments that are not expressly authorized by [*C.R.S. § 37-92-305(8)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831). [[178]](#footnote-179)178The court noted that it did not attempt to "delineate any applicable standards" except that amending a plan for augmentation must, at a minimum, comply with [*C.R.S. §§37-92-305(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), (5), and (8) and the court's case precedents. [[179]](#footnote-180)179The court recited case law precedent that "in order to reuse or make successive use of return flows, all of the elements of an independent appropriation must be established and decreed as a separate water right," and rejected Coors's argument that augmentation plans operate outside this constraint of the prior appropriation system by keeping senior priorities whole. [[180]](#footnote-181)180

Next, the court upheld the water court's conclusion that Coors's augmented return flows are subject to appropriation by other water users. [[181]](#footnote-182)181Coors argued that the "water that it diverts and fully replaces under its decreed augmentation plans is akin to foreign and developed water," creating an "implied right to reuse and make successive use of such water, which should not be available for appropriation by other users." [[182]](#footnote-183)182The court instead held that the water Coors diverts from Clear Creek is largely native water that may not be reused, and that the "mere act of diverting and fully replacing water under an augmentation plan **[\*233]**does not effectively change the character of the diverted water as native, tributary water." [[183]](#footnote-184)183

The court's decision leaves potential issues for future litigation or legislation on the procedures and parameters for amending augmentation plans generally.

D. Implications for Flexibility of Augmentation Plans

Changes of water rights are central to many plans for augmentation, providing replacement for future depletions with water that was historically depleted from the stream under senior water rights. Changes of water rights for augmentation use rely heavily on quantification of historical consumptive use, which determines the amount of replacement credits available for use in an augmentation plan. Many changed water rights that are held for augmentation use may only be used infrequently, as the balance of depletions and replacements in an augmentation plan will vary from year to year. Thus, requantification of such rights for diminished use generally will be inappropriate. S.B. 15-183 establishes a clear legal standard for issue preclusion in the water courts, and *Wolfe v. Sedalia* recognizes the justification for non-use of such rights.

While the *Sedalia* decision recognized that augmentation plans may over-supply the stream without creating any entitlement to continued oversupply, the practice of amending augmentation plans to remedy the imbalance was thrown into question by *Coors v. Golden*. Unless future case law brings clarity, legislation may be necessary to provide clear authority for non-injurious amendments to augmentation plans. Such an amendment would honor the fundamental principle that augmentation plans are mechanisms that exist to provide inherent flexibility so that the maximum utilization of ***Colorado***'s waters will coexist with protection of vested rights in the priority system. These concepts, first enshrined in the 1969 Act, still provide important guidance for changes of water rights and plans for augmentation.

IV. State Engineer Rulemaking, Interstate Litigation and Augmentation Plans

A. Statutory Authority for Rulemaking and Plans for Augmentation

The 1969 Act included multiple tools for integrating groundwater rights with surface water rights. In addition to authorizing water court approval of plans for augmentation, the Act authorized the state and division engineers to administer groundwater rights to prevent injury to senior surface water rights and to adopt rules and regulations to assist in such administration. [[184]](#footnote-185)184The state engineer also has parallel authority to adopt regulations as necessary to assure ***Colorado***'s compliance with interstate compacts. [[185]](#footnote-186)185

In adopting rules to integrate groundwater administration and assure compliance with compacts, one of the state engineer's favored tools involves the use of plans to replace depletions to affected streams. In addition to water court- **[\*234]**approved augmentation plans, the state engineer has, at times, advocated administrative approval of replacement plans as an alternative tool for replacing out-of-priority depletions. Such plans have been an effective solution for Compact compliance and protecting senior surface water rights in Water Division 2. However, the ***Colorado*** Supreme Court subsequently rejected the use of such plans elsewhere, holding that with limited exceptions, the water courts have exclusive authority to approve plans for replacing out-of-priority depletions. [[186]](#footnote-187)186Thus, augmentation plans generally remain the primary method for approving replacement of depletions, and require water court approval.

B. Arkansas ***River*** Litigation and Rulemaking

Of central concern in *Kansas v.* ***Colorado*** (1995) is the 220-mile reach of the Arkansas ***River*** from Pueblo Dam, just west of Pueblo, ***Colorado*** to Garden City, Kansas, which is sixty-three miles below the state line. The ***river*** has eroded the rock formations over which it flowed, creating a trough filled with sand and gravel. This alluvium, which varies from 1.8 to 3.4 miles wide, is filled with water that moves at 3 to 5 feet per day. Between Pueblo and the state line, there are 2,000,000 acre-feet of water in the alluvium. The average annual surface supply is around 700,000 acre-feet. [[187]](#footnote-188)187The alluvial ground water and surface flows of the Arkansas ***River*** are interconnected, so depletion of the alluvium by well pumping results in depletion of stream flows.

1. Early Rules

Since long before most well development, the Arkansas ***River*** in ***Colorado*** has been greatly over-appropriated: one study showed ***Colorado*** had 4,200,000 acre-feet of decreed surface water rights in the basin, with average surface supply of only 700,000 acre-feet. [[188]](#footnote-189)188To alleviate this shortage, irrigators turned to wells tapping into the estimated 2,000,000 acre-feet in alluvial groundwater between Pueblo and the state line.

A crisis of well depletions came to a head in the *Fellhauer* case shortly before the 1969 Act, as discussed above and explained in Bill Hillhouse's companion article. [[189]](#footnote-190)189The 1965 Ground Water Management Act brought wells under the State Engineer's Office's jurisdiction for permitting to enable administration in the priority system. The state engineer authorized water users to apply to the court for an injunction to curtail groundwater pumping by wells that materially injure vested rights of other appropriators. Ben Stapleton, Chairman of the CWCB, said in 1966 that this legislation was designed to force the state engineer to regulate wells, a power he implicitly had held all along but **[\*235]**which he hesitated to enforce because of controversy. [[190]](#footnote-191)190

Pursuant to the 1969 Act, the state engineer adopted the 1973 Rules for Division 2 (adopted in 1972, effective February 1973). [[191]](#footnote-192)191The 1973 Rules were the state engineer's first comprehensive effort to regulate wells in the Arkansas ***River*** basin. The 1973 Rules applied to all alluvial and other tributary groundwater in Water Division 2, except statutory exempt wells. [[192]](#footnote-193)192Well rights not filed for adjudication by July 1, 1972 were considered junior and could not pump without augmentation of all depletions. [[193]](#footnote-194)193

The 1973 Rules provided different standards for wells filed for adjudication by June 1972. Rule 3 of the 1973 Rules provided that diversions by such wells "will be continuously curtailed False ... on a basis not to exceed 4/7 of the time to provide for a reasonable lessening of material injury." The Rules enabled well users to augment depletions from additional pumping to avoid curtailment, if the division engineer approved a plan "whereby the amount of the depletion from the stream by said well or wells will be returned to the stream so that prior vested rights are not damaged." If curtailment of a well did not contribute to surface water flows (i.e., a futile call), well pumping could continue. The 1973 Rules allowed water users to use wells as "temporary alternate points of diversion" for a decreed surface right, if the division engineer approved the plan, and the plan resulted in no material injury to prior vested rights. There were no protests filed to these rules. Thus, beginning in 1973, State Engineer Rules allowed pre-1972 wells to pump three days per week.

In January 1974, the state engineer proposed to amend Rule 3. The amended rule provided that curtailment in 1974 was not to exceed five days a week; in 1975, no more than six days; and in 1976, total curtailment would begin for all wells, excluding those diverting the user's own senior surface water rights, those with approved augmentation plans, or those not depleting surface water. The purpose of the amendment was to protect senior decreed surface water rights from encroachment by wells.

The 1974 Amendment was challenged and ultimately rejected in *Kuiper v. Atchison, Topeka, and Santa Fe RW* ***Co****.* ( *Kuiper v. AT&SF*). [[194]](#footnote-195)194The ***Colorado*** Supreme Court noted that, in 1972, there were over 1,700 ***Colorado*** wells pumping 100 g.p.m. or more; in volume, these wells pumped more than **[\*236]**200,000 a.f./year, about half of which did not return to the mainstem or alluvium. [[195]](#footnote-196)195While AT&SF had two wells with a 1907 priority, neither the 1973 Rules nor the 1974 Amendment recognized the seniority of well users. [[196]](#footnote-197)196

The *Kuiper* court held that the state engineer erred in adopting the amendment of Rule 3, since it was "not promulgated on the basis of an investigation and experience under the 1973 Rules"; instead, it was based more on the state engineer's experience on the Platte ***River***. [[197]](#footnote-198)197The court also said that the state engineer did not show from experience under the 1973 Rules for Division 2 that total curtailment of wells would make more water available, or that the amendment was required to prevent material injury to vested senior rights at the time of seniors' need: "There was a duty upon the State Engineer, before adopting the amendment, to determine that it would make additional water available for senior priorities. This he did not and could not do because he did not know the effect resulting from the 1973 Rules." [[198]](#footnote-199)198

2. Kansas v. ***Colorado*** Litigation

The scarce waters of the Arkansas ***River***, depleted by well pumping, have heavily impacted the development of large areas in both Kansas and ***Colorado***. The battle waged between Kansas and ***Colorado*** over the waters of the ***river*** has led to repeated litigation, settled for a time by the two states' 1948 Compact. Justice Hobbs, writing for the ***Colorado*** Supreme Court in 1996, described the importance of the Arkansas ***River*** to these two states:

The states of ***Colorado*** and Kansas share a vital interest in the waters of the Arkansas ***River***. As this ***river*** has nurtured the economy of bothFalse ... conflict over what share shall be enjoyed by the water users of each state has forged the federal law of equitable apportionment and of interstate water compact enforcement. This case before us again demonstrates that the ***river***'s reach continues to be matched by the vigilance of those who depend upon its strength. [[199]](#footnote-200)199

Following the suggestion of the U.S. Supreme Court in *State of* ***Colorado*** *v. State of Kansas*, [[200]](#footnote-201)200***Colorado*** and Kansas negotiated the Arkansas ***River*** Compact pursuant to the U.S. Constitution's Compact Clause. [[201]](#footnote-202)201Both states signed the Compact in December 1948, and Congress ratified it in 1949. [[202]](#footnote-203)202The primary purposes of the Compact are to: "settle existing disputes and removes causes of future controversy... concerning the waters of the Arkansas ***River***" and to "equitably divide and apportion" those waters, "as well as the benefits arising from the construction, operation and maintenance by the United States **[\*237]**of the John Martin Reservoir." [[203]](#footnote-204)203

The recent *Kansas v.* ***Colorado*** litigation focused on Compact Article IV-D, which protects usable stream flow against depletion from new developments or improvements:

This compact is not intended to impede or prevent future beneficial development of the Arkansas ***river*** basin in ***Colorado*** and Kansas... which may involve construction of dams, reservoirs and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas ***river***, as defined in article III, shall not be materially depleted in usable quantity or availability for use to the water users in ***Colorado*** and Kansas under this compact by such future development or construction. [[204]](#footnote-205)204

Kansas's Complaint included allegations that ***Colorado*** violated Article IV-D in operations of the Trinidad Reservoir and in a Winter Water Storage Program, part of the Fryingpan-Arkansas Project, that allows a portion of the Arkansas ***River***'s winter flow to be stored under senior priorities in Pueblo Reservoir. [[205]](#footnote-206)205However, those claims were dismissed because Kansas failed to establish the operations caused material depletions to Stateline flows. [[206]](#footnote-207)206More importantly, Kansas also alleged that post-Compact well pumping in ***Colorado*** caused a "significant decline" in the Arkansas ***River***'s surface flow. [[207]](#footnote-208)207Both ***Colorado*** and Kansas acknowledged that several of the wells in ***Colorado*** existed before the Compact and "that a certain amount of post-Compact well pumping is allowable under the Compact." [[208]](#footnote-209)208

In his 1994 Report, the special master found that there was no doubt that post-compact Stateline flows had averaged less than flows in earlier years. [[209]](#footnote-210)209Kansas had alleged that Stateline depletions were due to post-compact wells in ***Colorado***, which pumped 150,000 acre-feet of groundwater per year. [[210]](#footnote-211)210The special master agreed with Kansas that ***Colorado***'s well development depleted Stateline flows. [[211]](#footnote-212)211Specifically, the special master stated "***Colorado*** allowed hundreds of wells to be constructed in the ***river*** alluvium without regard to their impact upon the surface flows of the Arkansas ***River***, either in ***Colorado*** or in Kansas." [[212]](#footnote-213)212The special master concluded that post-compact well pumping in ***Colorado*** "clearly depletes the surface flows of the Arkansas ***River***." [[213]](#footnote-214)213Even though many studies only showed depletions of Arkansas ***River*** surface flows from Pueblo to the Stateline, the special master said that, from this evidence, it would be difficult to rationalize that flows across the Stateline were not also depleted. [[214]](#footnote-215)214

**[\*238]**The Supreme Court's decision regarding the post-Compact well pumping had several points. The U.S. Supreme Court agreed with the special master that the best method for determining whether the development in ***Colorado*** resulted in material depletions of usable flow is the approach developed by Kansas's expert witnesses with some corrections prompted by ***Colorado***. [[215]](#footnote-216)215In general terms, this approach calculates the amount of usable flow by comparing the ***river*** diversions with the actual Stateline flows and accounting for seasonal changes. [[216]](#footnote-217)216To prove a violation of Article IV-D, Kansas must show that "development in ***Colorado*** resulted in material depletions of "usable' ***river*** flow. The Compact does not define the term "usable.'" [[217]](#footnote-218)217The court, however, approved an approach for the state's use in calculating the percentage of usable Arkansas ***River*** flows. [[218]](#footnote-219)218This approach combined the efforts of Kansas's expert witnesses and corrected errors that ***Colorado*** revealed during the trial. [[219]](#footnote-220)219

The special master determined that post-Compact well pumping should be limited to the ""highest annual amount shown to have been pumped during the negotiations [for the Compact], namely 15,000 acre-feet, should be allowed under the Compact.'" [[220]](#footnote-221)220***Colorado*** argued that the limit on ***Colorado*** pumping was the amount allowed under ***Colorado*** law. [[221]](#footnote-222)221The U.S. Supreme Court rejected ***Colorado***'s exception to the special master's finding. The U.S. Supreme Court held that "regardless of subsequent practice by the parties, improved and increased pumping by existing wells clearly falls within Article VI-D's prohibition against "improved or prolonged functioning of existing works,' if such action results in "material depletions in usable' ***river*** flows." [[222]](#footnote-223)222The court also agreed with the special master's use of reports prepared by the U.S. Geological Survey and the ***Colorado*** Legislature to determine that the largest amount of pre-Compact pumping in ***Colorado*** was 15,000 acre-feet. [[223]](#footnote-224)223

3. 1996 Rulemaking

In 1996, the ***Colorado*** General Assembly passed Senate Bill 96-124, which strengthened the state engineer's authority to enforce rules and orders. [[224]](#footnote-225)224In response to the U.S. Supreme Court's decision finding violations of the Arkansas ***River*** Compact due to excessive pumping of post-Compact wells, S.B. 96-124 enabled the state engineer to impose fines against water users who violated either: (1) rules or regulations adopted by the state engineer to regulate or measure diversions of groundwater or any plan approved pursuant to such rules and regulations, or (2) orders or rules issued by the state engineer to replace depletions cause by the diversions of groundwater and whose failure to replace such **[\*239]**depletions caused violation of an interstate compact. [[225]](#footnote-226)225In subsequent case law, [[226]](#footnote-227)226the state engineer pointed to this enforcement power as proof of legislative intent to grant the authority to approve replacement plans. [[227]](#footnote-228)227

The state engineer adopted the 1996 Well Use Rules largely in response to the decision in *Kansas v.* ***Colorado***. [[228]](#footnote-229)228The dual purpose of the 1996 Rules is to prevent future Compact violations and to prevent injury to senior surface rights in ***Colorado***. [[229]](#footnote-230)229The Rules require that for the state and eivision engineers ("Engineers") to allow continued pumping of tributary ground water in the Arkansas ***River*** basin, either the water court must approve a plan for augmentation or the Engineers must approve a replacement plan to replace depletions to stream flows from the pumping. [[230]](#footnote-231)230The Engineers review and approve replacement plans annually, based on the extent of depletions and replacement water available to a plan in each year. [[231]](#footnote-232)231

The Water Court for Division 2 determined that the state engineer had the authority to adopt such rules, including the requirement for replacement plans. [[232]](#footnote-233)232"The authority of the State Engineer to promulgate rules in this area and for the purposes intended is set out by statute and is not questioned." [[233]](#footnote-234)233***Colorado*** already had experience with augmentation plans as a way to avoid or remedy depletions to streamflow from well pumping and modified that tool by providing for replacement plans to be approved by the state engineer. [[234]](#footnote-235)234The water court found that the rules recognized and preserved the priority system. [[235]](#footnote-236)235From ample evidence, the water court deemed the rules a reasonable way to allow the wells to continue pumping "while accomplishing the stated purpose of reducing depletions to usable stateline flow and preventing continued material injury to senior surface users." [[236]](#footnote-237)236

The water court found that this was a proper exercise of the state engineer's rulemaking authority to avoid injurious depletions to senior surface rights users in ***Colorado*** and flows under the Compact. The water judge made several findings of fact pertaining to the need for the Well Use Rules, including the extent to which the Arkansas ***River*** is over-appropriated, the increase in both the number of ***Colorado*** wells and the amount of water pumped per year, the depletions to usable Stateline flow, and the injury to senior surface rights caused by pumping. [[237]](#footnote-238)237The court also determined that the earlier 1973 Rules governing well **[\*240]**pumping were ineffective because they did not preserve the priority system, allowed continued pumping despite damage to senior rights, and could not be enforced by the state engineer and division engineer due to inadequate resources. [[238]](#footnote-239)238The information learned from the special master's 1994 findings in the *Kansas v.* ***Colorado*** litigation, improvements in hydrologic computer modeling, and evidence of continued depletions to usable Stateline flow provided sufficient support for the state engineer's decision to replace the 1973 Rules. To support the replacement plan requirement under the Well Use Rules, the water court found that "there is an abundant supply of replacement water available for the foreseeable future. [[239]](#footnote-240)239The court found that "optimum use of water is assured by these [Well Use] rules. [[240]](#footnote-241)240The Rules became effective in Water Division 2 as of June 1, 1996.

4. ***Colorado***'s Compact Compliance Based on the Rules

After the U.S. Supreme Court confirmed that ***Colorado***'s post-Compact well pumping had violated Compact Article IV-D in *Kansas v.* ***Colorado****,* [[241]](#footnote-242)241the special master held further proceedings and entered rulings on continuing compliance measures, as well as remedies for past violations. The U.S. Supreme Court required ***Colorado*** to follow a remedy plan that allowed well pumping but required it to achieve and demonstrate compliance with Article IV-D. The Special Master's Second Report [[242]](#footnote-243)242outlined the plan to bring ***Colorado*** into compliance using its own Well Measurement Rules [[243]](#footnote-244)243and Well Use Rules [[244]](#footnote-245)244The Well Measurement Rules require ***Colorado*** to obtain records of measured pumping to quantify the impacts of well pumping and to enforce pumping allocations. The Well Use Rules require replacements of depletions to usable Stateline flows from post-Compact well pumping.

The Special Master's Fourth Report found that augmentation and replacement plans were effectively replacing depletions to usable Stateline flows, and finalized the two-part remedy plan. The U.S. Supreme Court generally adopted the plan in *Kansas v.* ***Colorado***. [[245]](#footnote-246)245The special master found that prospective compliance analysis by Kansas's expert was not sufficient to show that the ***Colorado*** Use Rules would not assure future Compact compliance. However, he also found that ***Colorado***'s evidence was not sufficient to prove that the Use Rules necessarily would assure future Compact compliance:

"The Use Rules, as implemented during 1997-99, were sufficient to assure compact compliance. However, these were wet years, and it remains to be seen whether they will perform satisfactorily over a longer period of time including **[\*241]**average and dry years." [[246]](#footnote-247)246

The special master found that a longer period of time was needed to determine whether ***Colorado*** would continue to meet its Compact obligations. Thus, he accepted ***Colorado***'s proposal to use the results of the H-I model over a ten-year period to measure ***Colorado***'s Compact compliance. [[247]](#footnote-248)247

The U.S. Supreme Court rejected Kansas's request to appoint a ***River*** Master to decide future technical disputes regarding decree enforcement. [[248]](#footnote-249)248The court held that the type of disputes that may arise regarding Compact compliance likely will involve complex legal issues and thus would be inappropriate for a ***River*** Master to decide. [[249]](#footnote-250)249Additionally, the states have other dispute-resolution methods available such as joint consultation with experts, negotiation, and informal mediation. [[250]](#footnote-251)250

The Use Rules required Replacement Plans, which were implemented by owners of irrigation wells along the Arkansas ***River***. [[251]](#footnote-252)251Three associations (which are nonprofit corporations) - the Arkansas Groundwater Users Association ("AGUA"), ***Colorado*** Water Protection and Development Association ("CWPDA"), and the Lower Arkansas Water Management Association ("LAWMA") - became vehicles for preparing Replacement Plans as required by the Rules. [[252]](#footnote-253)252The LAWMA Replacement Plan requires any farmer who is trying to add a new well to the plan to bring his own source of replacement water. [[253]](#footnote-254)253The special master cited specific well data from Replacement Plans:

In 1999 there were 1199 active irrigation wells included in Replacement Plans ... During 1997-99 pumping by sole source wells ranged between 32,999 and 42,581 acre-feet ... Supplemental well pumping varied between 54,106 and 76,853 acre-feet. [[254]](#footnote-255)254

When the special master issued his Fourth Report, there were 2,130 irrigation wells in ***Colorado***'s database subject to Rule 3 of the Use Rules located within the valley fill and surficial aquifers of the Arkansas ***River*** between Pueblo and the Stateline. [[255]](#footnote-256)255During 1997-99, almost all of the active irrigation wells located in the Arkansas ***River*** valley were included in AGUA, CWPDA, or LAWMA Replacement Plans. [[256]](#footnote-257)256AGUA, LAWMA, and CWPDA currently operate under a combination of replacement plans (for pre-1985 wells) and augmentation plans (for post-1985 wells); each association has acquired and **[\*242]**changed surface irrigation water rights for use in such plans. [[257]](#footnote-258)257The Southeastern ***Colorado*** Water Conservancy District also sells reusable return flows from Fryingpan-Arkansas Project water to all three associations, which they use as a significant source of replacement water to the extent their augmentation and replacement plans replace depletions from beneficial use within the boundaries of the Southeastern District. [[258]](#footnote-259)258

The special master determined that the results of the H-I model should be applied over a ten-year period to measure Compact compliance, as the model is not sufficiently accurate on a monthly or yearly basis. According to the Special Master's Fourth Report, the 2002 drought decreased the amount of transmountain water available for ***Colorado***'s replacement supplies. However, the Special Master's Fifth Report found that ***Colorado*** "is now in compliance with its compact obligations" based on the initial ten-year period from 1997-2006. [[259]](#footnote-260)259

In 2009, the U.S. Supreme Court entered the final decree in the *Kansas v.* ***Colorado*** case. [[260]](#footnote-261)260The Special Master's Fourth Report had found that "***Colorado***'s Use Rules, and the replacement water provided thereunder, brought ***Colorado*** into compliance with its obligations under the Arkansas ***River*** Compact for the period 1997-99." [[261]](#footnote-262)261The special master proposed the final decree in his Fifth Report. [[262]](#footnote-263)262The special master reviewed the 1996 Well Use Rules and operation under the Rules and found that replacement plans were an effective way to avoid depletions under the Compact. The consent decree recognized ***Colorado***'s use of replacement plans to comply with Compact requirements. Section I.B. of the Final Decree explains the procedure for determining Compact compliance. The Decree requires ***Colorado***'s compliance to be evaluated annually over a moving ten-year period. In an interim order, the U.S. Supreme Court agreed with the special master's recommendation that the H-I Model should use a ten-year measurement period. [[263]](#footnote-264)263The court rejected Kansas's proposal to use a one-year measurement period, agreeing with the special master's findings that "model results over measurement periods less than ten years are highly inaccurate," but that the model functioned with acceptable accuracy over longer periods of time. [[264]](#footnote-265)264The court further determined that "Kansas is unlikely to suffer serious harm through use of a 10-year period because ***Colorado*** has developed a ***river*** water replacement plan to minimize depletions." [[265]](#footnote-266)265

Both states are required to use the H-I Model to calculate the effects of **[\*243]**groundwater pumping and replacements on accretions and depletions to Usable Stateline Flow. The annual calculations for previous years are final. [[266]](#footnote-267)266"Groundwater pumping" as used in Section I.B. of the Decree is not limited to water pumped for irrigation use. Section V of the Final Decree defines "Groundwater Pumping" to mean "Pumping of water from wells ... ...in excess of 50 gallons per minute, from the alluvial and surface aquifers along the mainstem of the Arkansas ***River***" between Pueblo and the Stateline within the domain of the H-I Model. ***Colorado*** is entitled to a credit for replacement of depletions to Usable Stateline Flow. [[267]](#footnote-268)267If a ten-year run of the H-I Model shows a net depletion to Usable Stateline Flows, ***Colorado*** is required to repay Kansas for the shortfall by delivering water. ***Colorado*** may deliver water to the Offset Account in John Martin Reservoir according to the Compact Compliance Accounting Procedures in Appendix A to the Decree. [[268]](#footnote-269)268Appendix H to the Final Decree outlines a dispute resolution procedure, consistent with the court's earlier decision. [[269]](#footnote-270)269

5. Division 2 Rules Survive Rejection of Division 1 Rules

The ***Colorado*** Supreme Court addressed the 1996 Division 2 Well Use Rules while reviewing similar rules proposed for Water Division 1 in *Simpson v. Bijou Irrigation* ***Co***. [[270]](#footnote-271)270The court, applying ***Colorado*** law, declined to allow similar flexibility for administrative approval of replacement plans in Division 1. However, the court and the legislature upheld the validity of the Rules and replacement plans under the Division 2 Rules. In *Simpson v. Bijou*, the state engineer had proposed well use rules for the South Platte ***River*** Basin in Water Division 1 that were similar to those that had been approved for Water Division 2. The Division 1 Water Court denied approval for these rules, concluding that the state engineer did not have the authority to promulgate rules governing ground water with conditions permitting the use of replacement plans to avoid curtailment of groundwater pumping. The ***Colorado*** Supreme Court upheld the Division 1 Water Court's decision. [[271]](#footnote-272)271

The ***Colorado*** Supreme Court further held that its ruling regarding the South Platte Basin Rules did not affect the existing Arkansas ***River*** Basin Well Use Rules in Water Division 2. [[272]](#footnote-273)272The court held "rules and regulations pertaining to one water basin are inapplicable to others." [[273]](#footnote-274)273Further, the court concluded that because the validity of the Arkansas ***River*** Basin Well Use Rules was not an issue before the court and no party had appealed those Rules, the Rules remained in force and the decision did not affect them. [[274]](#footnote-275)274

On the same day that the ***Colorado*** Supreme Court entered its decision in **[\*244]** *Simpson v. Bijou*, the governor signed Senate Bill 03-73. [[275]](#footnote-276)275SB 03-73 provided the state engineer with limited authority to approve substitute water supply plans while augmentation plans were pending in Division 1 Water Court. [[276]](#footnote-277)276Two provisions specifically addressed the Division 2 Well Rules, ratifying the 1996 Rules and authorizing future amendments:

"The general assembly hereby ratifies the amended rules governing the diversion and use of tributary groundwater in the Arkansas ***river*** basin of ***Colorado***, as approved by the water judge for water division 2, that became effective on June 1, 1996." [[277]](#footnote-278)277

"On and after January 1, 2003, the state engineer shall have the authority in water division 2 to promulgate and amend well administration rules pursuant to sections 37-80-104 and 37-90-501 that include the authority to approve replacement plans that allow the continuing operation of wells causing out-of-priority depletions without requiring a plan for augmentation approved by the water judge." [[278]](#footnote-279)278

C. Implications of Augmentation for Interstate Compact Compliance

Replacement of depletions under the 1996 Rules has proven to be an effective solution for ***Colorado***'s compliance with the Arkansas ***River*** Compact while protecting senior surface water rights, utilizing both state engineer-approved replacement plans and water court-approved augmentation plans. However, there are legal obstacles to adopting similar solutions for compliance with other interstate compacts. For example, the ***Colorado*** Supreme Court recognized that the state engineer has authority to promulgate rules to avoid violations of the South Platte ***River*** Compact from well pumping, but is constrained by statutory restrictions on rulemaking, including the general prohibition on administrative approval of plans to replace out-of-priority depletions. [[279]](#footnote-280)279However, augmentation plans approved by the Division 1 Water Court since 2003 have largely integrated groundwater use by large irrigation wells into the prior appropriation system. [[280]](#footnote-281)280

***Colorado*** and Nebraska have acknowledged violations of the Republican ***River*** Compact from stream depletions caused by post-compact well pumping. [[281]](#footnote-282)281However, ***Colorado***'s compliance with that Compact is complicated by the fact that the groundwater at issue is part of the Northern High Plains Designated Ground Water Basin. Under the 1965 Ground Water Management Act, designated groundwater basins are administered separately from the administration **[\*245]**of surface water rights, under the authority of the ***Colorado*** Ground Water Commission. [[282]](#footnote-283)282Recent litigation in Water Division 1 has challenged the state engineer's effort to respect these separate legal regimes by providing for Compact compliance without curtailing permitted rights to use designated groundwater. [[283]](#footnote-284)283Meanwhile, the state engineer has promulgated rules for compliance with the Republican ***River*** Compact, now pending review in the water court. [[284]](#footnote-285)284The state's compliance relies on plans developed by the Republican ***River*** Water Conservation District to retire irrigated acreage and a compliance pipeline delivering water to the stream, to avoid future Compact violations from well depletions. [[285]](#footnote-286)285

While the Arkansas ***River*** Compact's key provision prohibits material depletions to Stateline flows, the ***Colorado*** ***River*** Compact imposes an obligation on the four Upper Basin states collectively, specifying they will not deplete flows at Lee's Ferry below 75 million acre-feet in every ten-year period. [[286]](#footnote-287)286The seven states' current proactive compliance efforts are focused on drought contingency planning in order to stabilize water storage levels in Lake Powell and Lake Mead. ***Colorado***'s plan provides for demand management, in cooperation with other Upper Basin states and consistent with ***Colorado*** law, to "avoid or mitigate the risk of involuntary compact curtailment." [[287]](#footnote-288)287Somewhat like temporary augmentation or replacement plans, the plan may include "voluntary, temporary and compensated reductions in consumptive use of waters that otherwise would deplete the flow of the Upper ***Colorado*** ***River*** System for the specific purpose of helping assure compact compliance," or importation of water from outside the ***Colorado*** ***River*** watershed. [[288]](#footnote-289)288

V. Conclusion

The development of augmentation plans since 1969 has, in many ways, fulfilled the legislative intent of adding flexibility to the prior appropriation system to further the maximum utilization of ***Colorado***'s scarce water supplies while protecting vested rights. Augmentation plans, along with similar administrative replacement plans where allowed, have facilitated the integration of groundwater rights into the prior appropriation system, providing replacement water to avoid injury to senior water rights in ***Colorado*** and, particularly on the Arkansas ***River***, to maintain interstate compact compliance. Augmentation plans also provide replacement for out-of-priority depletions for other types of water use, such as evaporative loss from on-channel reservoirs, and facilitate protection for **[\*246]**newer types of water uses, such as instream flows. [[289]](#footnote-290)289

Even so, improvements may help augmentation plans better realize the flexibility for which they were designed. ***Colorado***'s Water Plan (adopted by the ***Colorado*** Water Conservation Board in 2015) called for water-sharing agreements to help meet gaps in water supply available for growth without further permanent dry-up of agricultural lands. [[290]](#footnote-291)290A water user with surplus augmentation supplies could lease the surplus to one with a deficit in a given year so that both augmentation plans remain in balance, providing sufficient replacement water to prevent injury to senior rights. However, it is unclear if current law would allow such sharing given the *Coors v. Golden* decision, [[291]](#footnote-292)291at least where decrees may require amendment and native replacement sources are involved.

The Well Use Rules in Water Division 2 have provided needed flexibility for ***Colorado*** to maintain compliance with the Arkansas ***River*** Compact and protect senior rights while allowing irrigation well use to continue, to the extent well associations can provide adequate replacement water each year under plans approved by the state and division engineers. [[292]](#footnote-293)292With plans submitted and approved each year, the Engineers can assure that well pumping may occur to the extent replacement supplies are available that year. ***Colorado*** has not allowed such flexibility for administrative approvals in Water Division 1. Instead, significant use of wells typically requires water court approval of augmentation plans. [[293]](#footnote-294)293The addition of replacement water to augmentation plans requires further proceedings in water court, unless the augmentation decree provides for temporary addition of sources through a substitute water supply plan. [[294]](#footnote-295)294These provisions provide ample due process to assure protection for senior rights, but they limit flexibility for balancing annual depletions and replacements, and may impede the goal of maximum utilization.

As ***Colorado*** continues to implement its Water Plan, augmentation plans and other replacement plans will continue to be useful tools in maximizing the use of scarce water supplies to fill gaps in meeting the state's future water demands within the constraints of the prior appropriation system and interstate compacts. To the extent recent decisions have limited the flexibility of augmentation plans to meet such needs, the general assembly may wish to consider whether some modest statutory amendments will better serve the purposes for which augmentation plans were designed in the 1969 Act.

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**End of Document**

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2. 2 *See generally****Colo.*** Groundwater Mgmt. Act, ***Colo.*** Rev. Stat. §§148-11-1-21 (1965) (codified as amended at [***Colo.*** *Rev. Stat.§§37-90-101-143*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3C1-00000-00&context=1516831) (2019)). [↑](#footnote-ref-3)
3. 3 [***Colo.*** *Rev. Stat. § 37-90-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3C2-00000-00&context=1516831) (2019). [↑](#footnote-ref-4)
4. 4 *See*Act of April 19, 1967, ch. 175,§§1-6, 1967 ***Colo.*** Sess. Laws 249 (providing for a study of water resources, uses, and administration of applicable water laws); *see* *also****Colo.*** Legis. Council, Report to the ***Colo.*** Gen. Assemb.: Explanation of Proposed Water Legis., No. 143, 47th Gen. Assemb., at 2 (1968). [↑](#footnote-ref-5)
5. 5 ***Colo.*** Legis. Council, *supra* note 4, at 2. [↑](#footnote-ref-6)
6. 6 *Id.* at 1. [↑](#footnote-ref-7)
7. 7 *Id.* [↑](#footnote-ref-8)
8. 8 Wright Water Eng'rs, Study of Integrated Water Use, S. Platte ***River*** Basin, Water Dist. No. 8 (July 1968); *see also*K. Wright, *An Eng'rs Recollections of the Water Right Determination and Admin. Act of 1969*, [*22 U. Denv. Water L. Rev. 2, 104 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-9)
9. 9 Wright Water Eng'rs, *supra* note 8, attached letter to James Geissinger. [↑](#footnote-ref-10)
10. 10 *Id.* at 2. [↑](#footnote-ref-11)
11. 11 Morton W. Bittinger and Assocs. Water Utilization Study, Water District 2, 4 (July 1968). [↑](#footnote-ref-12)
12. 12 *Id.* [↑](#footnote-ref-13)
13. 13 Morton W. Bittinger and Assocs. & Wright Water Eng'rs, Report on Eng'g Water Code Studies for the S. Platte ***River***, Vol. 1 (Aug. 1968). [↑](#footnote-ref-14)
14. 14 *Id.* at 1. [↑](#footnote-ref-15)
15. 15 *Id.* at 2. [↑](#footnote-ref-16)
16. 16 W.W. Wheeler and Assocs., Summary Report on Water Legis. Investigations for the Ark. ***River*** Basin (Sept. 1968). [↑](#footnote-ref-17)
17. 17 W.W. Wheeler and Assocs. & Woodward-Clyde and Assocs., Comprehensive Report on Water Legis. Investigations for the Ark. ***River*** Basin in ***Colo.***, Vol II  *(*Sept. 1968). [↑](#footnote-ref-18)
18. 18 *See id.* at 1. [↑](#footnote-ref-19)
19. 19 *Id.* at v-vi. [↑](#footnote-ref-20)
20. 20 *See generally*Clyde-Criddle-Woodward, Inc., Report on ***Colo.*** Water Admin. (Oct. 1968). [↑](#footnote-ref-21)
21. 21 *Id.* at 36. [↑](#footnote-ref-22)
22. 22 Morton W. Bittinger and Assocs., Dev. of Model Procedures Pursuant to Provisions of S. B. 81, 1 (Nov. 1969). [↑](#footnote-ref-23)
23. 23 *Id.*at 29, 35-37. [↑](#footnote-ref-24)
24. 24 ***Colo.*** Legis. Council, *supra* note 4, at 1, 3. [↑](#footnote-ref-25)
25. 25 *Id.* at 6-8. [↑](#footnote-ref-26)
26. 26 *Id.* at 6. [↑](#footnote-ref-27)
27. 27 *Id.* at 6-7. [↑](#footnote-ref-28)
28. 28 *Id.* at 7. [↑](#footnote-ref-29)
29. 29 [*Fellhauer v. People, 447 P.2d 986 (****Colo.*** *1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831). For a more in-depth summary with deeper analysis on this case, please refer to William Hillhouse, John Justus, and Karoline Henning, *Plans for Augmentation Under the 1969 Act - The Augmented Version*, [*22 U. Denv. Water L. Rev. 2, 189-90 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-30)
30. 30 [*Id. at 993*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831). [↑](#footnote-ref-31)
31. 31 *Id.* [↑](#footnote-ref-32)
32. 32 [*Id. at 988, 994*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831). [↑](#footnote-ref-33)
33. 33 *See*Water Right Determination and Admin. Act of 1969, sec. 1, at § 148-21-35(4) (codified as amended at [***Colo.*** *Rev. Stat. § 37-92-502(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:637R-W883-GXJ9-334R-00000-00&context=1516831) (2019)). [↑](#footnote-ref-34)
34. 34 Robert F. Welborn, *Two* ***Colorado*** *Water Crises*, 1 U. Denv. Water L. Rev. 307, 310 (1998). [↑](#footnote-ref-35)
35. 35 For a more detailed history of the competing House Bills, *see*Justice Gregory J. Hobbs, Jr., Christopher Hudson, & Hannah Oakes, *History of the Referee, Div. Eng'r, St. Eng'r, and Water Court Consultation Process Under the Water Right Determination and Admin. Act of 1969*, [*21 U. Denv. Water L. Rev. 1 (2017)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5RYT-7GY0-00SW-50SV-00000-00&context=1516831). [↑](#footnote-ref-36)
36. 36 Hobbs, *supra* note 35, at 5. [↑](#footnote-ref-37)
37. 37 Water Right Determination and Admin. Act of 1969, sec. 1, at § 148-21-2(1) (codified as amended at [***Colo.*** *Rev. Stat. § 37-92-102(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2019)). [↑](#footnote-ref-38)
38. 38 *See generally* Water Right Determination and Admin. Act of 1969, ch. 373, sec. 1, § 148-21-1 *et seq*., 1969 ***Colo.*** Sess. Laws 1200, 1200-19 (1969); *see also*Justice Gregory J. Hobbs, Jr., ***Colo.****'s 1969 Adjudication and Admin. Act: Settling In*, [*3 U. Denv. Water L. Rev. 1, 18 (1999)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VV0-00C3-W0TR-00000-00&context=1516831). [↑](#footnote-ref-39)
39. 39 *See generally*Water Right Determination and Admin. Act of 1969, sec. 1, § 148-21-1 *et seq*. [↑](#footnote-ref-40)
40. 40 *Id.* at § 148-21-3(12). [↑](#footnote-ref-41)
41. 41 [***Colo.*** *Rev. Stat § 37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2019) (amended in 1996 to add "temporary and perpetual" language); *see* 1996 ***Colo.*** Legis. Serv. H. B. 96-1252 (West). [↑](#footnote-ref-42)
42. 42 *Id.* at § 37-92-103(9) (amended in 1975 to add language on salvage of tributary waters using phreatophytes). [↑](#footnote-ref-43)
43. 43 *See*Water Right Determination and Admin. Act of 1969, sec. 1, at § 148-21-18. [↑](#footnote-ref-44)
44. 44 *Id.* at § 148-21-21(3). [↑](#footnote-ref-45)
45. 45 *Id.* at §§148-21-21(4)(a)-(e). [↑](#footnote-ref-46)
46. 46 Water Right Determination and Admin. Act of 1969, sec. 1, at § 148-21-21(5); *see* [***Colo.*** *Rev. Stat § 37-92-305(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-47)
47. 47 [*529 P.2d 1321 (****Colo.*** *1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1N70-003D-93WB-00000-00&context=1516831). For more analysis on *Shelton Farms*, *s*ee William Hillhouse, John Justus, and Karoline Henning, *Plans for Augmentation Under the 1969 Act-The Augmented Version*, [*22 U. Denv. Water L. Rev. 2, 193-94 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-48)
48. 48 [***Colo.*** *Rev. Stat. § 37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2018). [↑](#footnote-ref-49)
49. 49 [*550 P.2d 288 (****Colo.*** *1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-50)
50. 50 [*550 P.2d 297 (****Colo.*** *1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-51)
51. 51 [*Glacier View Meadows, 550 P.2d at 293-94*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-52)
52. 52 *Compare* [*Glacier View Meadows, 550 P.2d at 289*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831), *with* [*Kelly Ranch, 550 P.2d at 301*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-53)
53. 53 [*Glacier View Meadows, 550 P.2d at 289*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-54)
54. 54 [*Id. at 292*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-55)
55. 55 *Id.* [↑](#footnote-ref-56)
56. 56 [*Id. at 289*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-57)
57. 57 [*Id. at 294*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-58)
58. 58 [*Id. at 293*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-59)
59. 59 [*Glacier View Meadows, 550 P.2d at 293*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-60)
60. 60 [*Id. at 296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BD-00000-00&context=1516831). [↑](#footnote-ref-61)
61. 61 *Id.* [↑](#footnote-ref-62)
62. 62 [*550 P.2d at 299*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-63)
63. 63 *Id.* [↑](#footnote-ref-64)
64. 64 *Id.*;  *see also*Joseph P. McMahon, *Groundwater Augmentation Plans in* ***Colorado***, 6 Denv. J. Int'l L. & Pol'y 552, 556 (1976). [↑](#footnote-ref-65)
65. 65 [*Kelly Ranch, 550 P.2d at 301*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-66)
66. 66 *Id.* [↑](#footnote-ref-67)
67. 67 [*Id. at 303-04*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-68)
68. 68 [*Id. at 304*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-69)
69. 69 [*Id. at 304-05*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1KB0-003D-93BF-00000-00&context=1516831). [↑](#footnote-ref-70)
70. 70 [*Simpson v. Bijou Irrigation* ***Co****., 69 P.3d 50, 61 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-71)
71. 71 Act of June 19, 1977, ch. 483, sec. 4, 5,§§37-92-305(8), 37-92-501.5, 1977 ***Colo.*** Sess. Laws 1702, 1703-04 (codified as amended at [***Colo.*** *Rev. Stat. §§37-92-305(8)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), 501.5 (2019)). [↑](#footnote-ref-72)
72. 72 *Id.* at 1704. [↑](#footnote-ref-73)
73. 73 *Id.* at 1703. [↑](#footnote-ref-74)
74. 74 *See id*. at 1703-04. [↑](#footnote-ref-75)
75. 75 Act of Mar. 25, 1996, ch. 34, sec. 1, 2,§§37-92-103(9), 37-92-305(8), 1996 ***Colo.*** Sess. Laws 125, 125-26 (codified as amended at [***Colo.*** *Rev. Stat. §§37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), [*37-92-305(8)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019)). [↑](#footnote-ref-76)
76. 76 [*Id. at 125*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-77)
77. 77 [*Id. at 126*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-78)
78. 78 [*Id. at 125-26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-79)
79. 79 Act of Mar. 1, 1996, ch 7, sec. 1-7, 1996 ***Colo.*** Sess. Laws 19, 19-24 (1996). [↑](#footnote-ref-80)
80. 80 *See generally*Act of Apr. 30, 2003, ch. 204, sec. 1-5, 2003 ***Colo.*** Sess. Laws 1446, 1446-1455 (codified as amended at [***Colo.*** *Rev. Stat.§§37-90-137*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SN93-GXF6-81VM-00000-00&context=1516831), [*37-92-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), [*37-92-305*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), [*37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2018). [↑](#footnote-ref-81)
81. 81 *See id.* [↑](#footnote-ref-82)
82. 82 [*69 P.3d at 72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-83)
83. 83 Act of Apr. 30, 2003, sat 1446-1447. [↑](#footnote-ref-84)
84. 84 *Id.* at 1454. [↑](#footnote-ref-85)
85. 85 Coors Brewing ***Co***. v. City of Golden<cedil> [*2018* ***CO*** *63, P 26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SN5-1BV1-JW09-M1GP-00000-00&context=1516831). [↑](#footnote-ref-86)
86. 86 Water Right Determination and Admin. Act of 1969, ch. 373, sec. 1 § 148-21-3(11), 1969 ***Colo.*** Sess. Laws 1200, 1202 (codified as amended at [***Colo.*** *Rev. Stat.§§37-92-103(5)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)-(b) (2019)). [↑](#footnote-ref-87)
87. 87 [***Colo.*** *Rev. Stat. § 37-92-103(5)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)-(b) (2019). [↑](#footnote-ref-88)
88. 88 *Id.* at § 37-92-302(1)(a). [↑](#footnote-ref-89)
89. 89 *Id.* at § 37-92-305(3)(a); *see* [*High Plains A&M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 716, 719 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) (holding the applicant must show the change is for actual beneficial use, not for speculative purposes). [↑](#footnote-ref-90)
90. 90 [*Farmers Reservoir and Irrigation* ***Co****. v. Consol. Mut. Water* ***Co****., 33 P.3d 799, 807 (****Colo.*** *2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) ( *FRICO*). [↑](#footnote-ref-91)
91. 91 [*Wolfe v. Sedalia Water and Sanitation Dist., 2015* ***CO*** *8, P 19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831); *see also*[*Farmers High Line Canal and Reservoir* ***Co****. v. City of Golden, 975 P.2d 189, 201 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) (stating that the "implied volumetric limitations doctrine ... was developed in order to prevent injury to juniors when a prior change decree did not address or contemplate the question of historical consumptive use."). [↑](#footnote-ref-92)
92. 92 *See*[*Williams v. Midway Ranches Prop. Owners' Ass'n, Inc., 938 P.2d 515, 522 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-93)
93. 93 [*Id. at 521*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-94)
94. 94 [*Id. at 520-21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-95)
95. 95 *See* [***Colo.*** *Rev. Stat. § 37-92-305(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). For further discussion on the non-injury standard in changes of water rights, and specifically whether quantification is a requirement independent from non-injury, *see generally*David C. Taussig, *The Devolution of the No-Injury Standard in Changes of Water Rights*, [*18 U. Denv. Water L. Rev. 116, 118-44 (2014)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5FFH-9X60-00SW-50D3-00000-00&context=1516831). [↑](#footnote-ref-96)
96. 96 [*FRICO., 33 P.3d at 807*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) (as modified on denial of reh'g, Nov. 13, 2001). [↑](#footnote-ref-97)
97. 97 [*Midway Ranches, 938 P.2d at 522*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-98)
98. 98 *See* [*id. at 524-26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-99)
99. 99 *See* [*id. at 521-24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-100)
100. 100 *See* [*id. at 522*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-101)
101. 101 *See generally id.* [↑](#footnote-ref-102)
102. 102 [*Id. at 518*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-103)
103. 103 [*Midway Ranches, 938 P.2d at 518*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-104)
104. 104 *Id.* [↑](#footnote-ref-105)
105. 105 *Id.* [↑](#footnote-ref-106)
106. 106 [*Id. at 521*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-107)
107. 107 *Id.* [↑](#footnote-ref-108)
108. 108 [*Id. at 521-22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-109)
109. 109 [*Midway Ranches, 938 P.2d at 522*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831) (citing [*Danielson v. Kerbs Ag., Inc., 646 P.2d 363, 373 (****Colo.*** *1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-18H0-003D-9175-00000-00&context=1516831). [↑](#footnote-ref-110)
110. 110 *See* [*id. at 524-26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-111)
111. 111 [*Id. at 524*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-112)
112. 112 [*Id. at 525*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-113)
113. 113 *Id.* [↑](#footnote-ref-114)
114. 114 [*Midway Ranches, 938 P.2d at 525*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). [↑](#footnote-ref-115)
115. 115 *Id.* [↑](#footnote-ref-116)
116. 116 [*Id. at 526*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831). For more discussion on *Midway Ranches* and its holding, *see generally*Lee E. Miller, *Claim and Issue Preclusion in Water Cases: What Fat Lady? She Sang When?*, 28 ***Colo.*** Law. 57, 57-60 (Dec. 1999). [↑](#footnote-ref-117)
117. 117 [*975 P.2d 189 (****Colo.*** *1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-118)
118. 118 [*Id. at 192-93*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-119)
119. 119 [*Id. at 193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-120)
120. 120 [*Id. at 193-94*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831) [↑](#footnote-ref-121)
121. 121 [*Id. at 194*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-122)
122. 122 *Id.* [↑](#footnote-ref-123)
123. 123 [*Farmers High Line, 975 P.2d at 199*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-124)
124. 124 *Id.* [↑](#footnote-ref-125)
125. 125 [*Id. at 199-200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-126)
126. 126 [*Id. at 201*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-127)
127. 127 *See* [*id. at 200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-128)
128. 128 [*Id. at 201*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-129)
129. 129 [*Farmers High Line, 975 P.2d at 203*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4X-WBJ0-0039-43RJ-00000-00&context=1516831). [↑](#footnote-ref-130)
130. 130 *See* S.B. 183, 70th Gen. Assemb., Reg. Sess. (***Colo.*** 2015); ***Colo.*** Legis. Serv., Dig. of B.s, 70th Gen. Assemb., at 154 (2015). [↑](#footnote-ref-131)
131. 131 [*2015* ***CO*** *8, P 1-2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-132)
132. 132 *Id.* [↑](#footnote-ref-133)
133. 133 *Id.* P 6. [↑](#footnote-ref-134)
134. 134 [*Id. P 8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-135)
135. 135 *Id.* [↑](#footnote-ref-136)
136. 136 *Wolfe v. Sedalia*, P 9. [↑](#footnote-ref-137)
137. 137 [*Id. P 10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-138)
138. 138 *Id.* [↑](#footnote-ref-139)
139. 139 [*Id. P 21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831) (citing [*Santa Fe Trail Ranches Prop. Ass'n v. Simpson, 990 P.2d 46, 55 (****Colo.*** *1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831). [↑](#footnote-ref-140)
140. 140 *See* [*id. PP 21-23, 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-141)
141. 141 *Id.* PP 3, 34. [↑](#footnote-ref-142)
142. 142 *Wolfe v. Sedalia*, P 3. [↑](#footnote-ref-143)
143. 143 [*Id. P 34*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-144)
144. 144 *Id.* [↑](#footnote-ref-145)
145. 145 [*Id. P 39*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-146)
146. 146 S.B. 183, 2015 70th Gen. Assemb., Reg. Sess. (***Colo.*** 2015). [↑](#footnote-ref-147)
147. 147 *Id.* (codified at [***Colo.*** *Rev. Stat.§§37-92-305(3)(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), (e) (2019)). [↑](#footnote-ref-148)
148. 148 *Id.* at sec. 1, § 37-92-305(3)(d)(I)-(II). [↑](#footnote-ref-149)
149. 149 *Id.* at sec. 1, § 37-92-305(3)(e). [↑](#footnote-ref-150)
150. 150 *Id.* [↑](#footnote-ref-151)
151. 151 Coors is a wholly owned subsidiary of Molson Coors Brewing ***Co***. ("MCBC") and supplies water to the Golden Brewery, operated by MillerCoors LLC (another MCBC subsidiary). [↑](#footnote-ref-152)
152. 152 In the Matter of the Application for Water Rights of Adolph Coors Company, Case Nos. W-8036(75) & W-8256(76) (***Colo.*** Dist. Ct. Water Div. 1 1977) [hereinafter Coors Augmentation Plan I]. [↑](#footnote-ref-153)
153. 153 K. Wright, *An Engineer's Recollections of the Water Right Determination and Administration Act of 1969*, [*22 U. Denv. Water L. Rev. 2, 105-06 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-154)
154. 154 Concerning the Application for Water Rights of Adolph Coors Company, Case No. 89CW234 (***Colo.*** Dist. Ct. Water Div. 1 1993) [hereinafter Coors Augmentation Plan II]. [↑](#footnote-ref-155)
155. 155 Concerning the Application for Water Rights of Coors Brewing Company, Case No. 99CW236 (***Colo.*** Dist. Ct. Water Div. 1 2007) [hereinafter Coors Augmentation Plan III]. [↑](#footnote-ref-156)
156. 156 [*Farmers Reservoir and Irrigation* ***Co****. v. Consol. Mut. Water* ***Co****., 33 P.3d 799 (****Colo.*** *2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) ( *FRICO*). [↑](#footnote-ref-157)
157. 157 [*Id.at 803*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-158)
158. 158 *Id.* [↑](#footnote-ref-159)
159. 159 [*Id.at 804*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-160)
160. 160 [*Id. at 804-05*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-161)
161. 161 [*Id. at 805*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-162)
162. 162 [*FRICO, 33 P.3d at 806*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-163)
163. 163 *Id*. [↑](#footnote-ref-164)
164. 164 *Id*. [↑](#footnote-ref-165)
165. 165 [*Id. at 807*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-166)
166. 166 [*Id.at 807-08*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-167)
167. 167 [*2018* ***CO*** *63*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SN5-1BV1-JW09-M1GP-00000-00&context=1516831). [↑](#footnote-ref-168)
168. 168 *Id.*P 4. [↑](#footnote-ref-169)
169. 169 *Id.*P 5. [↑](#footnote-ref-170)
170. 170 *Id.* [↑](#footnote-ref-171)
171. 171 *Id.* P 6. [↑](#footnote-ref-172)
172. 172 *Id.*P 7. [↑](#footnote-ref-173)
173. 173 *Coors v. Golden*, P 11. [↑](#footnote-ref-174)
174. 174 *Id.* [↑](#footnote-ref-175)
175. 175 *Id.* P 15. [↑](#footnote-ref-176)
176. 176 *Id.* PP 16-24. [↑](#footnote-ref-177)
177. 177 *Id.* P 25. [↑](#footnote-ref-178)
178. 178 *Id.* P 26; *see also*[***Colo.*** *Rev. Stat. § 37-92-305(8)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-179)
179. 179 *Coors v. Golden,*n.1. [↑](#footnote-ref-180)
180. 180 [*Id. PP 27, 29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831) (citations omitted). [↑](#footnote-ref-181)
181. 181 [*Id. P 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-182)
182. 182 [*Id. P 34*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-183)
183. 183 [*Id. at P 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F87-WX41-F04C-3006-00000-00&context=1516831). [↑](#footnote-ref-184)
184. 184 [***Colo.*** *Rev. Stat. § 37-92-501(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GH-00000-00&context=1516831), (2) (2019). [↑](#footnote-ref-185)
185. 185 [***Colo.*** *Rev. Stat. § 37-80-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J35H-00000-00&context=1516831) (2019). [↑](#footnote-ref-186)
186. 186 Simpson v. Bijou Irrigation ***Co*** [*., 69 P.3d 50, 67 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). Following this decision, the General Assembly added an exception for plans to replace depletions in Water Division 3. *See*[***Colo.*** *Rev. Stat. § 37-92-501(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GH-00000-00&context=1516831). The implementation of this provision is described in Bill Paddock's article. William A. Paddock, Implementation of Integrated Surface and Groundwater Administration Under the 1969 Act in the Rio Grande Basin, Water Division No. 3, [*22 U. Denv. Water L. Rev. 2, 312-16 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-187)
187. 187 [*Kuiper v. Atchison, Topeka and Santa Fe Railway Company, 581 P.2d 293, 295 (****Colo.*** *1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-188)
188. 188 *Id. (*citing unnamed study). [↑](#footnote-ref-189)
189. 189 William Hillhouse, John Justus, and Karoline Henning, *Plans for Augmentation Under the 1969 Act-The Augmented Version*, [*22 U. Denv. Water L. Rev. 2, 189-90 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-190)
190. 190 *See*Order of the State Engineer, *In the Matter of the Proposed Rules and Regulations Governing the Use, Control, and Protection of Surface and Ground Water Rights located in the Arkansas* ***River*** *and its Tributaries (*February 9, 1973); *see also* [*Kuiper v. AT & SF, 581 P.2d 293, 294 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-191)
191. 191 *See*Order of the State Engineer, *In the Matter of the Proposed Rules and Regulations Governing the Use, Control, and Protection of Surface and Ground Water Rights located in the Arkansas* ***River*** *and its Tributaries (*February 9, 1973); *see also* [*Kuiper v. AT & SF, 581 P.2d 293, 294 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-192)
192. 192 *See*Order of the State Engineer, *In the Matter of the Proposed Rules and Regulations Governing the Use, Control, and Protection of Surface and Ground Water Rights located in the Arkansas* ***River*** *and its Tributaries (*February 9, 1973); *see also* [*Kuiper v. AT & SF, 581 P.2d 293, 294 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-193)
193. 193 *See*Order of the State Engineer, *In the Matter of the Proposed Rules and Regulations Governing the Use, Control, and Protection of Surface and Ground Water Rights located in the Arkansas* ***River*** *and its Tributaries (*February 9, 1973); *see also* [*Kuiper v. AT & SF, 581 P.2d 293, 294 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-194)
194. 194 [*581 P.2d 293, 294 (****Colo.*** *1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-195)
195. 195 *Id.* [↑](#footnote-ref-196)
196. 196 [*Id.at 296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831) [↑](#footnote-ref-197)
197. 197 [*Id.at 296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831) [↑](#footnote-ref-198)
198. 198 [*Id. at 297*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-199)
199. 199 People  [*ex rel. Simpson v. Highland Irrigation* ***Co****., 917 P.2d 1242, 1245 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YX20-003D-91KF-00000-00&context=1516831). [↑](#footnote-ref-200)
200. 200 [*320 U.S. 383, 392 (1943)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3XB0-003B-71TC-00000-00&context=1516831). [↑](#footnote-ref-201)
201. 201 [*U.S. Const., art. I § 10, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PPF2-8T6X-72VY-00000-00&context=1516831); [*State of Kansas v. State of* ***Colorado****, 514 U.S. 673, 678 (1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-202)
202. 202 [*63 Stat. 145*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CCB-R1P0-01XN-S06T-00000-00&context=1516831); *see* [*Kansas v.* ***Colorado****, 115 S.Ct. at 1738*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-203)
203. 203 Arkansas ***River*** Compact, Arts. I-A, I-B (quoted in [*Kansas v.* ***Colorado****, 514 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831)). [↑](#footnote-ref-204)
204. 204 Arkansas ***River*** Compact, Arts. IV-D. [↑](#footnote-ref-205)
205. 205 *See* [*Kansas v.* ***Colorado****, 514 U.S. at 684*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-206)
206. 206 *See* [*Id. at 684*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-207)
207. 207 [*Id. at 679-80*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831) [↑](#footnote-ref-208)
208. 208 [*Id. at 689*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831) [↑](#footnote-ref-209)
209. 209 Kansas v. ***Colorado***, No. 105, 1994 WL 16189353, at 60, 143 (U.S. Oct. 3, 1994). [↑](#footnote-ref-210)
210. 210 *Id.* at 6. [↑](#footnote-ref-211)
211. 211 *See id.* at 59. [↑](#footnote-ref-212)
212. 212 *Id.* [↑](#footnote-ref-213)
213. 213 *Id.* [↑](#footnote-ref-214)
214. 214 *Id.* [↑](#footnote-ref-215)
215. 215 *See* [*Kansas v.* ***Colorado****, 514 U.S. 673, 685-86 (1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-216)
216. 216 *See* [*id. at 685*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-217)
217. 217 [*Id. at 685*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831) (citing [***Colorado*** *v. Kansas, 320 U.S. 383, 396-97 (1943))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3XB0-003B-71TC-00000-00&context=1516831). [↑](#footnote-ref-218)
218. 218 [*Id.at 686*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-219)
219. 219 [*Id. at 685*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-220)
220. 220 [*Id. at 689*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-221)
221. 221 [*Kansas v.* ***Colorado****, 514 U.S. at 689-90*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-222)
222. 222 [*Id. at 690*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-223)
223. 223 [*Id. at 691*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-224)
224. 224 SB 96-124, 1996 ***Colo.*** Sess. Laws 19, ch. 7, § 5, (codified as amended at [***Colo.*** *Rev. Stat. § 37-92-503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GM-00000-00&context=1516831) (2019)). [↑](#footnote-ref-225)
225. 225 *Id.* [↑](#footnote-ref-226)
226. 226 *See*[*Simpson v. Bijou Irrigation* ***Co****., 69 P.3d 50, 50 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-227)
227. 227 SB 96-124, § 5 (codified as amended at [***Colo.*** *Rev. Stat. § 37-92-503(6)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GM-00000-00&context=1516831) & (7) (2019)). [↑](#footnote-ref-228)
228. 228 *See* Amended Rules and Regs. Governing the Diversion and Use of Tributary Groundwater in the Ark. ***River*** Basin, ***Colo.***, at 1-2 (***Colo.*** Dist. Ct. Water Div. 2, June 4, 1996). [↑](#footnote-ref-229)
229. 229 *Id.*at 12. [↑](#footnote-ref-230)
230. 230 *Id.* at 5. [↑](#footnote-ref-231)
231. 231 *Id.* at 7-8. [↑](#footnote-ref-232)
232. 232 *See* *In re*Amended Rules and Regs. Governing the Diversion and Use of Tributary Groundwater in the Ark. ***River*** Basin, ***Colo.***, PP 30, 58 (***Colo.*** Dist. Ct. Water Div. 2, April 30, 1996) (No. 95CW211). [↑](#footnote-ref-233)
233. 233 *Id.* P 23. [↑](#footnote-ref-234)
234. 234 [*In re Arkansas* ***River****, 581 P.2d 293, 296 (****Colo.*** *1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1GF0-003D-92JJ-00000-00&context=1516831). [↑](#footnote-ref-235)
235. 235 Amended Rules and Regs. Governing the Diversion and Use of Tributary Groundwater in the Ark. ***River*** Basin, ***Colo.***, P 57 (***Colo.*** Dist. Ct. Water Div. 2, June 4, 1996). [↑](#footnote-ref-236)
236. 236 *Id.* [↑](#footnote-ref-237)
237. 237 *See id*. PP 3, 8-9. [↑](#footnote-ref-238)
238. 238 *Id.* PP 26-27. [↑](#footnote-ref-239)
239. 239 *Id.*P 16. [↑](#footnote-ref-240)
240. 240 *Id. P*19. [↑](#footnote-ref-241)
241. 241 *See* [*Kansas v.* ***Colorado****, 514 U.S. 673 (1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3D-0XY0-003B-R3M8-00000-00&context=1516831). [↑](#footnote-ref-242)
242. 242 Arthur L. Littleworth, Second Report of the Special Master, Original No. 105, *Kansas v.* ***Colorado***, U.S. Supreme Court (1997). [↑](#footnote-ref-243)
243. 243 Amendments to Rules Governing the Measurement of Tributary Ground Water Diversions Located in the Arkansas ***River*** Basin, ***Colo.*** (***Colo.*** Dist. Ct. Water Div. 2, July 15, 1994). [↑](#footnote-ref-244)
244. 244 Amended Rules and Regs. Governing the Diversion and Use of Tributary Groundwater in the Ark. ***River*** Basin, ***Colo.*** (***Colo.*** Dist. Ct. Water Div. 2, June 4, 1996). [↑](#footnote-ref-245)
245. 245 [*543 U.S. 86, 106 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-246)
246. 246 Arthur L. Littleworth, Fourth Report, Original No. 105, *Kansas v.* ***Colorado***, at 32 (2003) [hereinafter Fourth Report]. [↑](#footnote-ref-247)
247. 247 Fourth Report, at 139. [↑](#footnote-ref-248)
248. 248 [*Kansas v.* ***Colorado****, 543 U.S. at 94*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-249)
249. 249 *See* [*id. at 92*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-250)
250. 250 [*Id. at 93*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-251)
251. 251 Fourth Report, at 13. [↑](#footnote-ref-252)
252. 252 *Id.* at 13-14. [↑](#footnote-ref-253)
253. 253 *Id.* at 48. [↑](#footnote-ref-254)
254. 254 *Id.* at 48. [↑](#footnote-ref-255)
255. 255 *Id.* at 18. [↑](#footnote-ref-256)
256. 256 *Id.* at 18. [↑](#footnote-ref-257)
257. 257 *See* Decrees in Case Nos. 04CW62 (AGUA) (***Colo.*** Dist. Ct. Water Div. 2, June 18, 2007), 02CW181 (LAWMA) (***Colo.*** Water Div. 2, June 13, 2016), 05CW52 (LAWMA) (***Colo.*** Dist. Ct. Water Div. 2, July 21, 2013), 07CW127 (CWPDA) (***Colo.*** Water Ct. Div. 2, May 26, 2013), and 07CW128 (CWPDA) (***Colo.*** Dist. Ct. Water Div. 2, June 7, 2013). [↑](#footnote-ref-258)
258. 258 *See* Fourth Report, at 10, 11. [↑](#footnote-ref-259)
259. 259 Arthur L. Littleworth, Fifth Report, Vol. I, Original No. 105, *Kansas v.* ***Colorado***, at 21 (2009) [hereinafter Fifth Report]. [↑](#footnote-ref-260)
260. 260 [*Kansas v.* ***Colorado****, 556 U.S. 98, 99 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VT0-N5R0-TXFX-122P-00000-00&context=1516831). [↑](#footnote-ref-261)
261. 261 Fourth Report, at 137. [↑](#footnote-ref-262)
262. 262 Fifth Report, at 10. [↑](#footnote-ref-263)
263. 263 [*Kansas v.* ***Colorado****, 543 U.S. 86, 101 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-264)
264. 264 *Id.* [↑](#footnote-ref-265)
265. 265 *Id.* [↑](#footnote-ref-266)
266. 266 Arthur L. Littleworth, Fifth and Final Report, Vol. II, Proposed Judgment and Decree, Original No. 105, *Kansas v.* ***Colorado***, § I.B.2 (2008) (approved in [*Kansas v.* ***Colorado****, 556 U.S at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VT0-N5R0-TXFX-122P-00000-00&context=1516831)  *(*2009)) [hereinafter *Final Decree*]. [↑](#footnote-ref-267)
267. 267 *Id.* at § I.B.3. [↑](#footnote-ref-268)
268. 268 *Id.* at § I.C.2. [↑](#footnote-ref-269)
269. 269 [*Kansas v.* ***Colorado****, 543 U.S. at 87*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYT-9560-004B-Y013-00000-00&context=1516831). [↑](#footnote-ref-270)
270. 270 [*69 P.3d 50 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-271)
271. 271 [*Id.at 55*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-272)
272. 272 [*Id. at 67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-273)
273. 273 *Id.* (citing [***Colo.*** *Rev. Stat.§§37-92-501(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GH-00000-00&context=1516831), (a)(2) (2002)). [↑](#footnote-ref-274)
274. 274 *Id.* [↑](#footnote-ref-275)
275. 275 Codified in [***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-276)
276. 276 [***Colo.*** *Rev. Stat. § 37-92-308(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-277)
277. 277 [***Colo.*** *Rev. Stat. § 37-92-308(1)(c)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-278)
278. 278 [***Colo.*** *Rev. Stat. § 37-92-308(1)(c)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-279)
279. 279 [*Simpson v. Bijou, 69 P.3d at 70-71*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-280)
280. 280 *See, e.g.,*[*Well Augmentation Subdistrict of the Cent.* ***Colo.*** *Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (****Colo.*** *2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X58-H3W0-YB0K-Y019-00000-00&context=1516831); P. Andrew Jones and Tom Cech, *The South Platte Well Crisis and Beyond: Evolving Alluvial Ground Water Regulation*, [*22 U. Denv. Water L. Rev. 2, 161 (2019)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VN1-X540-00SW-50W7-00000-00&context=1516831). [↑](#footnote-ref-281)
281. 281 *See* Final Settlement Stipulation and Second Report of the Special Master, *Kansas v. Nebraska and* ***Colorado***, No. 126, Original, U.S. Supreme Court (2003). [↑](#footnote-ref-282)
282. 282 *See, e.g.,*[*N. Kiowa-Bijou Mgmt. Dist. v. Ground Water Comm'n, 505 P.2d 377, 379-80 (****Colo.*** *1973)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1RR0-003D-94KP-00000-00&context=1516831). [↑](#footnote-ref-283)
283. 283 Jim Hutton Educational Foundation v. State Engineer, Case No. 15CW3018, (Water Ct. Div. 1), dismissed June 16, 2019; *see also* Hutton Foundation v. Rein, \_\_ P.3d \_\_ (***Colo.*** 2018) (upholding dismissal of Hutton's constitutional claim on jurisdictional grounds). [↑](#footnote-ref-284)
284. 284 *In re* Rules and Regulations for Compliance with the Republican ***River*** Compact, Case No. 19CW3002 (Water Ct. Div. 1). [↑](#footnote-ref-285)
285. 285 *Id.* [↑](#footnote-ref-286)
286. 286 ***Colorado*** ***River*** Compact, Art. III(d) (1922). [↑](#footnote-ref-287)
287. 287 ***Colorado*** Water Conservation Board, *Support and Policy Statements Regarding* ***Colorado******River*** *Drought Contingency Plans, Demand Management, and Compact Administration* 4 (Nov. 15, 2018). [↑](#footnote-ref-288)
288. 288 *Id.* [↑](#footnote-ref-289)
289. 289 *See*[***Colo.*** *Water Conservation Board v. City of Central, 125 P.3d 424, 427-28 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831). [↑](#footnote-ref-290)
290. 290 *See****Colorado*** Water Conservation Board, ***Colorado****'s Water Plan* 156, [*https://www.****colorado****.gov/pacific/cowaterplan/plan*](https://www.colorado.gov/pacific/cowaterplan/plan) (2015). [↑](#footnote-ref-291)
291. 291 *See*[*2018* ***CO*** *63, PP 25-33*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SN5-1BV1-JW09-M1GP-00000-00&context=1516831). [↑](#footnote-ref-292)
292. 292 Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas ***River*** Basin, ***Colorado***, Rules 3-7, 14 (1996). [↑](#footnote-ref-293)
293. 293 [*Simpson v. Bijou Irrigation* ***Co****.,69 P.3d 50, 66 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831). [↑](#footnote-ref-294)
294. 294 *See*[***Colo.*** *Rev. Stat. 37-92-305(8)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-295)