

# [***COMMENTARY: THE ANTI-SPECULATION DOCTRINE EXTENDED TO CHANGE OF WATER RIGHTS CASES: A NEW DILEMMA FOR WATER RIGHTS OWNERS***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4VWJ-C0K0-00SW-50B4-00000-00&context=1516831)

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**Text**

**[\*577]** **I. OVERVIEW**

This article discusses, from the water right owner's perspective, the ***Colorado*** Supreme Court's disposition of an appeal of a July 2, 2004 Order ("July Order") by Judge Dennis Maes, Water Division Two. The July Order summarily dismissed the change applications of High Plains **[\*578]** A&M, LLC in Cases Nos. 02CW183 and 03CW028. On appeal, High Plains sought reversal of the July Order and asked the court to remand the cases for a new trial on the merits.

High Plains A&M, LLC ("High Plains") [[1]](#footnote-2)1 acquired approximately 30% of the shares in the Fort Lyon Canal Company ("FLCC"), [[2]](#footnote-3)2 a mutual ditch irrigation company in the Arkansas ***River*** Valley. High Plains applied to the water court to change both the type of use and the place of use of the water rights represented by the FLCC shares. At about the same time, forty-five farmers and ranchers, who were share-holders in FLCC, formed ISG, LLC ("ISG"). [[3]](#footnote-4)3 ISG and its members were the appellants in Case No. 03CW068. ISG applied for the same change of ISG members' shares in FLCC as High Plains. The change of use would have allowed the ISG farmers and ranchers to continue using their water for irrigation when weather and economic conditions favored farming, but also would have allowed the use of their water for municipal and other purposes in dry years. The proposed changes of use would allow High Plains to complete its plans to construct reservoirs, pumps and pipelines to deliver its FLCC water to new users.

In December 2003 and January 2004, both High Plains and ISG filed section 56(h) motions under the ***Colorado*** Rules of Civil Procedure ("CRCP") asking the water court to make determinations of law that the anti-speculation doctrine for new and conditional water rights does not apply to changes in existing absolute water rights, in accord with ***Colorado******River*** *Water Conservation District v. Vidler Tunnel Water Company* [[4]](#footnote-5)4 and ***Colorado*** statutory law, [[5]](#footnote-6)5 which hold specifically that the anti-speculation doctrine applies to new appropriations. Southeastern ***Colorado*** Water Conservancy District ("Southeastern") and other objectors to the proposed changes filed a motion for summary judgment in High Plains' two cases, arguing that the applications should not go forward because the proposed changes were speculative. The water court denied the Rule 56(h) motions and entered summary judgment against High Plains and ISG, ruling that the anti-speculation doctrine applied to changes of absolute water rights because the proposed uses were "such a deviation from the original right that they take on the characteristics of a new water right." [[6]](#footnote-7)6

**[\*579]** High Plains and ISG appealed the dismissals of their applications on various grounds, arguing that: (1) the water court erred as a matter of law in finding that the implementation of the proposed changes could not occur without injury to water rights of others; (2) the water court's application of the anti-speculation doctrine to these changes of vested absolute water rights was not proper; and (3) it was error to enter summary judgment against ISG because no motion for summary judgment was ever filed against ISG in the water court. The ***Colorado*** Supreme Court affirmed both dismissals. [[7]](#footnote-8)7

**II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE WATER COURT**

High Plains filed its application in Case No. 02CW183 in the District Court, Water Division Two, on December 31, 2002. The application sought to change water rights represented by 22,939.08 (about 24.4%) of outstanding shares in FLCC. High Plains filed a similar application in Case No. 03CW028 on March 31, 2003, seeking to change water rights represented by 5,617.28 (about 6.0%) of outstanding shares in FLCC. ISG filed its application in Case No. 03CW068 on August 6, 2003, and filed an amended application on August 29, 2003. ISG sought to change water rights represented by 8,520.55 (about 8.8%) of outstanding shares in FLCC. The changes sought in all three cases included changes in type and place of use. Each application included the complete statement of the proposed changes, as required under [***Colorado*** *Revised Statute 37-92-302(2) (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G0-00000-00&context=1516831), including descriptions of all changed water rights, a map showing the approximate location of historic use of the rights, and summaries of records of actual diversions of the water rights. The changes included proposed future use in 28 ***Colorado*** Front Range counties and included a comprehensive list of future municipal uses. [[8]](#footnote-9)8 High Plains and ISG moved to consolidate the cases for trial purposes only, and the water court granted the consolidation.

On June 11, 2003, the water court ordered the applicants to make a presentation to the FLCC board of directors under the approval process for changes of ditch company shares in FLCC's bylaws. Over the course of five days in November and December 2003, the applicants made their presentation before the FLCC board. The presentation included details of the plans for diversions and deliveries and for maintaining historical return flows.

**[\*580]** On December 12, 2003, High Plains filed a [*C.R.C.P. 56(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63CY-K261-DYDC-J0NJ-00000-00&context=1516831) motion, and ISG filed a similar motion on December 19, 2003. The motions asked the water court to rule as a matter of law that the anti-speculation doctrine does not apply to changes of absolute water rights. Objector City of Aurora responded, agreeing that the anti-speculation doctrine, codified in [***Colorado*** *Revised Statute 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), and the "can and will" requirements of section 305(9)(b) do not apply to changes of absolute water rights. The state engineer responded that the court should extend the anti-speculation doctrine to changes in water rights and urged that changes of water rights constitute new appropriations. Objector Pueblo Board of Water Works' response to the motions stated that sections 103(3)(a) and 305(9)(b), by their express terms, do not apply to changes of water rights.

On January 26, 2004, Southeastern filed a motion for summary judgment in High Plains' two cases. Based on its argument that the requested changes of water rights were unlawful speculation, Southeastern's motion asked the court to dismiss the two applications. The state engineer filed a joinder in Southeastern's summary judgment motion. No objector filed a motion for summary judgment in ISG's case.

On July 2, 2004, the water court granted Southeastern's motion and denied High Plains' and ISG's Rule 56(h) motions. This July Order dismissed all three applications. The water court separately found in each of the three cases, "[t]he Applicants have purchased the Fort Lyon shares for purposes of marketing them and do not yet have contracts with any end users." [[9]](#footnote-10)9 The court also found that the "[a]pplicants admit they possess no contract for use of the water except leases for the current irrigation purposes." [[10]](#footnote-11)10 The court described the applications as seeking "the change for virtually any use where water may be necessary without identifying the specific use and/or end user." [[11]](#footnote-12)11 Based solely on the applications, and ignoring the five days of transcribed hearings before the FLCC board, the court found: "Applicants' plan is so expansive and nebulous that it is impossible for other holders of water rights to determine whether they will be injured," and "[t]he proposed uses by Applicants are all inclusive and are such a deviation from the original right that they take on the characteristics of a new water right." [[12]](#footnote-13)12 Seeing "no reason to distinguish between appropriated and unappropriated water," the court concluded that the "anti-speculation doctrine **[\*581]** and [*C.R.S. 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) and [*C.R.S. 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) apply to applications for changes of water rights." [[13]](#footnote-14)13 Based on these findings, the court ruled in each case that the "current application violates the anti-speculation doctrine," and granted summary judgment dismissing the applications. [[14]](#footnote-15)14

In their respective appeals, High Plains and ISG sought reversal of the court's summary judgment and dismissal of their applications and of the denial of their [*C.R.C.P. 56(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63CY-K261-DYDC-J0NJ-00000-00&context=1516831) motions.

**III. HIGH PLAINS' PLANNED USE OF WATER**

High Plains and ISG own their water rights through their shares in FLCC. FLCC incorporated in 1897. [[15]](#footnote-16)15 The mutual ditch company owns the Fort Lyon Canal and the Fort Lyon Storage Canal in southeastern ***Colorado***. The main canal runs for about 105 miles from La Junta to Lamar, roughly parallel to the north bank of the Arkansas ***River***. FLCC owns many direct flow and storage priorities on the Arkansas ***River***, including several very senior priorities predating 1900. Original financing for the acquisition of water rights and the construction of the canals came from private investors in Denver and outside ***Colorado***. [[16]](#footnote-17)16 As of 1980, FLCC water irrigated approximately 93,000 acres of agricultural land.

High Plains' applications comprehensively listed new municipal uses for the change of water rights and listed 28 counties along the Front Range and in the Arkansas Valley that could use the water after the change. At the 2003 FLCC board proceedings, Mark Campbell, manager of High Plains, explained that at that time High Plains had invested $ 40 million in its project. This investment was at about $ 50 million when the supreme court held oral arguments in June of 2005. Mr. Campbell explained that High Plains was not purchasing shares for mere resale. Rather, High Plains intended to continue using the water on its farms for several years while the shares were in water court and to continue to pay ditch company assessments "*ad infinitum*." High Plains proposed to take delivery of its FLCC water on the same rotational basis as the other shareholders. The diversion of the changed water rights would not occur upstream of historical diversion locations. The delivered water would flow through one or two new lateral headgates on the Fort Lyon Canal into forebay reservoirs, from which pumped water would go to the existing FLCC reservoirs. From there, **[\*582]** the pumped water would go to new uses once the court entered the change decree. The pumped water would be limited to the historical consumptive use of about 1.85 acre-feet per share. Accordingly, there was about 68,600 acre-feet of water involved for the 37,077 shares in the three cases. As explained in multi-volume reports, High Plains' water engineers proposed to replicate historical return flows for the change of water rights. The return of all historical return flows would travel to the Arkansas ***River*** to protect other water users.

Presentation of a proposed operating agreement went to the FLCC board. Based on the presentation, the Fort Lyon board determined that the proposed delivery of water in rotation would prevent injury to other Fort Lyon shareholders if the deliveries and return flows were limited to historical use.

High Plains, as a private enterprise, undertook considerable risk when it acquired the water rights and incurred engineering and legal costs to change the water rights in court. Delivery of any water to municipal users will require High Plains to invest in new reservoirs, pumping stations and pipelines. High Plains argued to the ***Colorado*** Supreme Court that a completed adjudication of the historical consumptive use is required before that investment could occur.

**IV. ISSUES REVIEWED BY THE *COLORADO* SUPREME COURT**

High Plains and ISG raised issues on appeal including whether the water court:

1. Erred in finding that the applications and their published resumes failed to provide notice to other water rights owners.

2. Erred in finding as a matter of law, without a trial, that the implementation of the changes proposed could not occur without injury to the water rights of others.

3. Erred in determining that changes of absolute water rights are appropriations of "new water rights."

4. Erred in finding without a trial that the applicants' intent was unlawful speculation.

5. Erred in ruling that there is no reason to distinguish between appropriated and unappropriated water and in extending the anti-speculation doctrine, announced in *Vidler*, and codified in [***Colorado*** *Revised Statute 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) and 305(9)(b), to changes of absolute water rights.

6. Erred in dismissing the applications, thereby violating the vested property right to change a water right.

**[\*583]** 7. Erred, in ISG's case, in granting summary judgment *sua sponte*, without a summary judgment motion and without giving ISG a chance to respond to the dismissal.

**V. HIGH PLAINS' ARGUMENTS ON APPEAL**

On appeal, High Plains argued that the water court made unfounded findings of fact that the applications were so broad as to not allow other water users the opportunity to determine if the changes could injure their water rights. In other cases, the ***Colorado*** Supreme Court has found that a broad application, with published resume notice, gives notice to other water users that they should appear and defend their water rights. [[17]](#footnote-18)17 High Plains noted that because over 250 water users appeared as opponents in this case, it was hard to conceive that any water user was not aware of this case both from publication of the resume and due to the widespread publicity in the state and local newspapers. The applications requested new uses in addition to irrigation use, including "all beneficial uses." Broad claims occur often in water court applications. [[18]](#footnote-19)18 Far from failing to give *any* notice as found by the water court, High Plains and ISG argued that their applications gave *all* notice.

High Plains also argued that the water court erred when, without taking any evidence, it made findings of fact that the applications were so broad that they could not prevent injury to other water rights. The applications involved changes of historic consumptive use of vested absolute water rights. High Plains argued that the engineering data in the record of the FLCC board hearings and the expert water engineer's affidavits filed in opposition to the motion for summary judgment showed that the court could impose terms and conditions to protect other water users. High Plains noted that the changed uses and their locations are legally irrelevant to injury if the water available for changed use at the new location is limited to the historical consumptive use of the water rights.

High Plains also argued that the water court erred in determining that it could not possibly impose terms and conditions that could prevent injury. ***Colorado*** statutes provide that terms and conditions are **[\*584]** first to be proposed prior to trial, not when filing an application. [[19]](#footnote-20)19 If it is shown at trial that the proposed terms and conditions do not prevent injury, both the applicant and opposers may propose additional terms and conditions. [[20]](#footnote-21)20 If the proposed terms and conditions are sufficient to prevent injury, the court shall incorporate those conditions into a final decree approving the change. [[21]](#footnote-22)21 As additional protection against injury, the water court may review post-decree actual operation of a change under retained jurisdiction. [[22]](#footnote-23)22 Therefore, there are three stages at which the imposition of terms and conditions occur.

In *High Plains*, the water court found that the proposed changes were "such a deviation from the original right that they take on the characteristics of a new water right." [[23]](#footnote-24)23 On appeal, High Plains argued **[\*585]** that the changed absolute water rights were not available for appropriation by others, and that High Plains and ISG are not "monopolizing a previously unused resource," but are seeking to change the use of their water rights as they have a right to do under ***Colorado*** law. "[T] he transfer of an absolute right . . . is not subject to the anti-speculation doctrine." [[24]](#footnote-25)24 Changes of water rights are instead subject to the non-injury standard, which serves "to hold the owners of water rights to their adjudicated allocation of historic beneficial consumptive use and assure maintenance of surface or tributary groundwater stream conditions that existed at the time of other water rights appropriations." [[25]](#footnote-26)25

Although the water court ruled that the anti-speculation doctrine in *Vidler* and codified at [***Colorado*** *Revised Statute section 37-92-103(3) (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) [[26]](#footnote-27)26 should extend to changes of absolute water rights, High Plains argued that the statutes and case law do not support this determination. Until *High Plains*, every ***Colorado*** case [[27]](#footnote-28)27 applying the anti-speculation **[\*586]** doctrine involved a new appropriation, not a change of an absolute water right.

High Plains' project was of considerable scope and vision. Public funding was not likely to be available for a project of this scale. Historically, the development of ***Colorado*** water rights was in large part by persons seeking some profit on their investment. High Plains argued to the ***Colorado*** Supreme Court that they are businessmen, and that High Plains undertook considerable risk to acquire the water rights, proceed with the engineering and legal costs to have those rights changed in court, and then develop and construct reservoirs, pump stations, and pipelines to deliver water to thirsty cities and other municipal water users. High Plains noted that a current determination on whether or not the efforts will succeed cannot occur at this point. However, there is nothing unlawful about these efforts. Public monies no longer appear to be available for such large projects. Private enterprise is necessary. Private enterprise may fail. But private enterprise furthers the policy of maximum utilization of water by increasing the utility of water when public funds are scarce or unavailable.

In 1876, the ***Colorado*** Constitution established a policy that "water is a public resource available for public agency and private use in a system of maximum utilization for beneficial use under decreed rights." [[28]](#footnote-29)28

History shows that the development of most major ditch systems in ***Colorado*** occurred in the late 19th century through the efforts of private, profit-seeking investors with vision and openness to risk, and without public money. Yet, High Plains argued, the water court has told the 21st century beneficiaries of those investors, *i.e*., the current owners of the FLCC water rights, that investing their own money in private water projects is unlawful speculation.

Private capital, raised mostly outside the state, financed large-scale early water development in ***Colorado***. [[29]](#footnote-30)29 It was a business "attended with considerable hazard, [requiring] large and continuing expenditures of money." [[30]](#footnote-31)30 In the 1870s and 1880s, ***Colorado*** irrigation was an attractive investment, not only nationally but internationally. [[31]](#footnote-32)31 That capital investment was entitled to a possible, but always uncertain, return, **[\*587]** was acknowledged by the Chairman of the Special Committee of the United States Senate on the Irrigation and Reclamation of Arid Lands. [[32]](#footnote-33)32

Private, profit-seeking investors paid to move the dirt and develop the diversion works and delivery systems for irrigation in the Arkansas Valley. [[33]](#footnote-34)33 The Fort Lyon Canal itself attained its present scope only with the support of private capital from outside the Arkansas Valley. [[34]](#footnote-35)34 The Great Plains reservoir storage system at the eastern edge of the Fort Lyon system also received financing from private interests. [[35]](#footnote-36)35 As early ***Colorado*** historian Frank Hall phrased it, "[c]anals could not be built by individual effort; it must be done either by large combinations of farmers, or by strong corporations supported by unlimited capital, and **[\*588]** made a distinct branch of the business." [[36]](#footnote-37)36 The Irrigation Congress in August 1905 adopted a resolution which began: "Believing that too much capital, public and private, cannot and will not be invested in the reclamation of the arid lands. . ." [[37]](#footnote-38)37

Today, as High Plains argued, the issue is water for thirsty cities rather than reclaiming arid lands. But the principle announced in 1905 remains valid: too much private capital cannot be invested in meeting ***Colorado*** residents' need for water. Both public treasure, if available, and private capital *should* be invested.

In the past, state-formed special purpose districts, which received large amounts of financing from the federal government, sponsored large diversion and storage projects, such as the ***Colorado***-Big Thompson Project and the Frying Pan-Arkansas Project. Such projects are part of the past. An example of movement away from projects like this is the veto of the Two Forks Darn by the Environmental Protection Agency on November 23, 1990. [[38]](#footnote-39)38 ***Colorado*** voters rejected state funding of large water projects by voting "no" on Referendum A by a 2-to-1 margin in the 2003 General Election.

High Plains argued that the water court, has articulated a new policy which simultaneously discourages investors from a lawful opportunity, tells urban water users to risk public funds even when private funds are available, and deprives owners of agricultural water rights of their most promising markets.

Finally, High Plains noted that in other important change cases, entities other than municipalities were the first to acquire and change senior, absolute water rights. [[39]](#footnote-40)39

**VI. OBJECTORS' ARGUMENTS ON APPEAL**

The discussion of the objectors' viewpoint occurs in a separate article in this issue of the *Water Law Review*. In brief, objectors argued that the applications violated the anti-speculation doctrine, failed to provide a specific plan for use of the water, and were not ripe for adjudication.

**[\*589]** **VII. ORAL ARGUMENTS**

The ***Colorado*** Supreme Court viewed the huge financial investment and scope of the water owners' project not as evidence of High Plains' long-term, non-speculative intent, but rather as a danger in need of a defense:

JUSTICE HOBBS: But your view apparently is you can take 50,000 acre-feet of water, quantify it volumetrically, and then put it on the shelf, controlling that amount of water until the price rises to a point where you want to do something with it. Couldn't you just under your theory do that?

MR. CURTIS: I don't think that's my theory. I don't think that's the facts.

JUSTICE HOBBS: Well, wouldn't that be the plain implication of allowing this kind of a transfer without saying who the end user is and what their reasonable use of water would be? [[40]](#footnote-41)40

From the water rights owners' perspective, the court overlooked that, had a trial occurred, the water court would have made findings of fact, and based on its findings, could have imposed terms and conditions to prevent "putting the water on the shelf."

The ***Colorado*** Supreme Court had not previously articulated the premise that when a water right owner seeks to change an absolute water right, the owner is, as a matter of law, appropriating the water all over again. In light of the following exchange, it appears that once an owner seeks to change an absolute water right, its absolute character may now vanish:

JUSTICE HOBBS: But you're asking on behalf of your clients for a change of the appropriation; correct? This is an appropriation? It's an absolute water right and you're changing it; correct?

MR. CURTIS: Changing the water right. The appropriation was completed about 120 years ago.

JUSTICE HOBBS: But 37-92-103(3)(a) talks about an appropriation is the application of a specified portion of the waters to a beneficial use pursuant to the procedures.

MR. CURTIS: Correct.

**[\*590]** JUSTICE HOBBS: So the procedures that we're talking about here are the change of water right procedures and the appropriation is the one that you -- your client would continue to enjoy the benefits of; right?

MR. CURTIS: The original water right, which is the best water right, is complete appropriation, for which we're changing. So, yes, we'd enjoy the historic consumptive use.

JUSTICE HOBBS: But -- but the change of use, including the place of use, you've applied for a change in place of use --

MR. CURTIS: Yes.

JUSTICE HOBBS: The named parts are 28 counties; right?

MR. CURTIS: Yes.

JUSTICE HOBBS: All right. So I want you to focus on the definition of "appropriation" and tell me whether or not if this is decreed, it continues to be an appropriation and what about the language having to do the place of use, the purported appropriation, and it would require that it not be speculative in nature.

And now I'm talking not about the further provision in the statute having to do with conditional rights, but the definition of what an appropriation is, which would -- seems to include the continued use of the water in a nonspeculative fashion. So would you -- would you address that? [[41]](#footnote-42)41

The transformation of a change into a new appropriation also overlooks the doctrine of abandonment. Instead, the court referred to a previously unarticulated doctrine of reasonably continuous use:

JUSTICE HOBBS: . . . The public owns the resource, but the appropriator always holds under a decree, whether it's a -- the original or a change decree, has the right to a use. And we have the doctrine of -- I'm going to call it for lack of another word, reasonably continuous use. And if you can't use it, it goes to other persons in priority. [[42]](#footnote-43)42

Further:

JUSTICE HOBBS: So I'm interested in your analysis of whether this change case is -- is really about quantifying so that you don't have to **[\*591]** make continuous use of the water right, like another irrigator would have to. [[43]](#footnote-44)43

Formerly, proof of reasonably continuous use was useful to rebut the presumption of abandonment. [[44]](#footnote-45)44 However, no objector in the High Plains case could argue for abandonment, as all the water rights in issue were being used for their decreed agricultural purposes and would continue to be so used until the infrastructure for the changed uses could be financed and constructed. Moreover, if opposers were in doubt that the water rights in issue would be beneficially used, they could request that "continuous beneficial use" be an explicit term or condition of the change decree.

At one point, the role of trier of fact merged into the role of opposer:

JUSTICE HOBBS: It would seem to me the speculative nature of that had to do with the fact that it described virtually the entire Front Range of ***Colorado*** without identifying by contract or contractual arrangement where the actual place or municipal place of use or -- correct? I mean, doesn't -- doesn't someone, to defend against something like this, have to see whether or not the use right will continue reasonably in existence? And by "someone," I mean actually the duty of the water judge to finally determine that. [[45]](#footnote-46)45

The water rights owners' concerns that, under *Santa Fe Trail Ranches*, an owner would lose consumptive use credit for years when it leased its water for undecreed uses, was apparently misunderstood as a claim to a particular historical consumptive use:

JUSTICE HOBBS: What -- what about this idea that the applicant will lose its historic beneficial consumptive use over -- over time, by the time those come in batches? What -- what would be your response to that?

MR. LENHARDT (sic): Well, continuing the same historical irrigation use would continue the record of historic use that High Plains brings to the Court today, only if High Plains does not continue that beneficial use as decreed, would they lose the consumptive use credit to --

JUSTICE HOBBS: Then that -- then that shows that there's no fixed quantity of water in perpetuity to a -- to a use right, that change has to be a representative period of use over an historic time. So it is very -- and **[\*592]** the water is never lost. It's -- it's used by other users in their priority; correct?

MR. LENHARDT (sic): When the water is not used by one water user, yes, it is used by the other users. [[46]](#footnote-47)46

Even though the applications sought only changes of absolute water rights, the court evidently feared they sought something else:

JUSTICE HOBBS: So I'm interested in your analysis of whether this change case is -- is really about quantifying so that you don't have to make continuous use of the water right, like another irrigator would have to. [[47]](#footnote-48)47

During rebuttal, it became clear that the distinction between the change of an absolute water right and the appropriation of a new water right was not as sharp as may have appeared from the statutes:

JUSTICE HOBBS: The change includes the type, the place, or time of use. And apparently you don't want us to put "beneficial" in front of that word use, yet the definition right above it is the key one in ***Colorado*** water law, which is "beneficial use." It seems to me that your application here identifies types of use but it doesn't actually identify the use. So a change means from/to. That's the normal sense of how we would look at something; right? You're changing from something to something. So why isn't this perfectly understandable, type, place, place very important to the reason this was dismissed, or time of use, i.e, beneficial use? How can it mean anything other?

MR. CURTIS: My viewpoint is that the -- the water court treated this as a new appropriation. The statute does not say it's a change of appropriation. It states it's a change of water right. A change of water right is separately defined to be the right -- a water right is separately defined to be the right to use the water in accordance with --

JUSTICE HOBBS: But we're not bound by the way that the trial court framed the law. We're -- we're a court of law. And we're determining a matter of law; correct? It's de novo review. [[48]](#footnote-49)48

Overshadowing the oral argument was an apparent factual assumption not rooted in the evidentiary record: that the water rights in issue, if changed, would go unused for years until a buyer appeared who was willing to purchase the water rights at a grossly inflated price. This factual assumption apparently colored the court's interpretation of the two key statutory subsections.

**[\*593]** **VIII. *COLORADO* SUPREME COURT DECISION**

On September 12, 2005, in an opinion written by Justice Gregory J. Hobbs, Jr., the ***Colorado*** Supreme Court affirmed the water court's judgment dismissing High Plains' change of water rights applications. The court stated that the affirmed dismissal was "without prejudice to re-filing when a definite location or locations for beneficial use of the water can be identified in the applications and confirmed in the water court's proceedings." [[49]](#footnote-50)49

High Plains had argued that the dismissal would cause prejudice because it had already invested over $ 50 million dollars in its change cases, including engineering to determine historical consumptive use of the water rights, and because High Plains must first get court-approved change decrees and design a supply system to get the water to users before the end users could sign the contracts. The ***Colorado*** Supreme Court disagreed.

As to ISG, the court ruled that ISG had notice of its vulnerability to summary judgment against it from High Plains' two companion cases. [[50]](#footnote-51)50 The court also found ISG's application was insufficient as a matter of law. [[51]](#footnote-52)51 Finally, the court rejected ISG's argument that parties cannot count temporary uses under ***Colorado*** statutes [[52]](#footnote-53)52 as historic consumptive uses under *Santa Fe Trail Ranches* [[53]](#footnote-54)53 because the legislature "did not intend to penalize owners of decreed appropriations for properly taking advantage of these statutes according to their terms." [[54]](#footnote-55)54

**IX. ANALYSIS**

The ***Colorado*** Supreme Court found that dismissal of High Plains' applications did not cause prejudice for several reasons. [[55]](#footnote-56)55 First, the court held that High Plains could continue to use its FLCC shares for irrigation of its farms in the FLCC system, which would benefit the local economy and consumers. [[56]](#footnote-57)56 Second, the court noted that the utilization of extensive engineering on historic consumptive use, like that completed for High Plains, could occur in future mutual ditch company change cases ensuring that the treatment of all shareholders of a **[\*594]** mutual ditch company would be equal and preventing expensive relitigation of historic consumptive uses in change cases involving the same water rights. [[57]](#footnote-58)57 Third, the court stated that changes of water rights are changes of appropriations, and "applicants have been required to specify with reasonable particularity where the transferred water is going to be put to beneficial use." [[58]](#footnote-59)58 Accordingly, ***Colorado*** law now requires that new applications for changes of water rights must include a specific proposal for the new place of use. Fourth, the court noted that High Plains' water rights can be changed for use outside of the Arkansas Basin: "Since the inception of statehood and the prompt adoption of the first water rights adjudication acts, . . . we have held that appropriations may be decreed for diversion from one basin for actual beneficial use at a location in another basin." [[59]](#footnote-60)59 Fifth, the court noted that mutual ditch and reservoir company shares are valuable assets and opined that the High Plains' investors were "not in danger of losing value in their mutual company shares any more than any other share-holder who is also subject to prevailing economic conditions." [[60]](#footnote-61)60 Sixth, the court stated that the General Assembly adopted statutes allowing temporary water use without a change case upon approval by the State Engineer. [[61]](#footnote-62)61 The court further remarked that "all agricultural water transfers, whether temporary or permanent, require identification of the particular location where the beneficial use will actually occur." [[62]](#footnote-63)62 Finally, the court ruled that "[w]ithout prejudice to consideration of future applications for change of water rights associated with shares of FLCC High Plains now owns, we uphold the trial court's order dismissing the applications in this case." [[63]](#footnote-64)63

The ***Colorado*** Supreme Court discussed at length the definition of a "change of water right" and the definition of "appropriation," but the ***Colorado*** Supreme Court never mentioned [***Colorado*** *Revised Statute 37-92-305(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), which establishes the proof of lack of injury as the standard for approving change cases. Before *High Plains*, courts ascertained evidence of actual injury in change of water rights proceedings by evidentiary facts, not by potentiality. [[64]](#footnote-65)64 Until the *High Plains'* redefinition, the statutes provided "[a] change of water right . . . *shall be approved if such change . . . will not injuriously affect* the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." [[65]](#footnote-66)65 The basis for this statute is that water rights are **[\*595]** vested property rights under article XVI, section 6 of the ***Colorado*** Constitution. ***Colorado*** courts have long held that a water right is a property right. [[66]](#footnote-67)66 The right to change one's water right is also a property right. [[67]](#footnote-68)67 "Not only is the right to change the use of a vested water right an important component of the policy underlying the prior appropriation system as a whole, it is also an important stick in the bundle of rights that constitute a ***Colorado*** water right. [[68]](#footnote-69)68 Until *High Plains*, the issue of injury was inherently fact specific and required the court to hear the evidence and make factual findings. [[69]](#footnote-70)69 In a change proceeding, a water court was to determine the amount of beneficial historic consumptive use of the applicant's interest and impose the proper terms and conditions that would prevent injury to other appropriators. [[70]](#footnote-71)70

In *High Plains*, the ***Colorado*** Supreme Court did not address the water court's finding of unpreventable injury to water rights of others. High Plains' water engineer submitted affidavits under [*C.R.C.P. 56(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63CY-K261-DYDC-J0NJ-00000-00&context=1516831) in response to the summary judgment motion. These unrebutted affidavits showed that the water court could impose terms and conditions to limit the water rights to their historic consumptive use, maintain historical return flows, and protect water rights of others from injury. Because "a party against whom summary judgment is sought is entitled to the benefit of all favorable inferences that may be drawn from the facts, [[71]](#footnote-72)71 High Plains urged that the water court erred in finding from its review of the applications that, as a matter of law and not fact, unpreventable injury would occur as a result of the requested changes. High Plains relied on *State Engineer v. Castle Meadows, Inc*., where the ***Colorado*** Supreme Court rejected the state engineer's request that an injury determination would result as a matter of law:

The state engineer has cited no cases, and we have discovered none, in which we have determined the existence of injury as a matter of law, and we decline to do so in the present cases. *The issue of injurious effect is inherently fact specific and one for which we have always required factual findings*. [[72]](#footnote-73)72

**[\*596]** It is unclear after *High Plains* how actual injury will play a role in change of water rights cases, since the applicant must show continuous use at the new location for the new use before a trial may occur.

Instead of following its straightforward, time-honored non-injury standard, mandated by [***Colorado*** *Revised Statute 37-92-305(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) in change cases, the ***Colorado*** Supreme Court has now found that the legislature "anticipated" that the anti-speculation doctrine should apply to change applications. [[73]](#footnote-74)73 In the court's analysis of the 1969 Act, it found "that the appropriator's interest in the appropriation for an actual beneficial use is a prerequisite For maintaining the application and obtaining a decree." [[74]](#footnote-75)74 The applicant for a change of absolute water rights now will have the threshold burden of showing in its application that actual continuous beneficial use will occur at a specific identified location for specific uses in order to obtain a trial to prove non-injury. Unless an applicant can satisfy this additional heavy burden, the court will not try a change application case.

**X. WHERE DO WE GO FROM HERE**?

A. "Can and Will"

For the time being, "can-and-will" applies to changes of absolute water rights in the Arkansas Basin. The July Order held that [***Colorado*** *Revised Statute 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) applies to applications for changes of water rights, without stating any reasoning for that determination. [[75]](#footnote-76)75 Yet, the statute plainly applies only to conditional water rights:

No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time. [[76]](#footnote-77)76

The "can and will requirements" operate in claims for conditional water rights to prevent decrees for such rights, unless the appropriator demonstrates that the placement of the water "can and will" be put to a beneficial use within a reasonable time. The ***Colorado*** Supreme Court most recently reviewed the legislative history of [***Colorado*** *Revised Statute* ***[\*597]*** *37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) in *In re Application for Water Rights of Vought*: "The General Assembly enacted [*section 37-92-305(9)(b), 10 C.R.S.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2002), to reduce speculation associated with conditional water decrees and to increase certainty in the administration of water rights." [[77]](#footnote-78)77 The plain meaning of the statute section and the reported cases show the "can and will" statute does not apply to changes of absolute water rights.

The ***Colorado*** Supreme Court did not reach this issue in *High Plains*. Thus, the water court's ruling that the "can and will" requirements of section 305(9)(b) apply to applications for changes of absolute water rights was not disturbed by the ***Colorado*** Supreme Court and remains the law in Water Division No. 2.

B. New Requirements for Changes of Water Rights

After *High Plains*, a change of water rights must satisfy the requirements for new appropriations under [***Colorado*** *Revised Statute 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), which states:

"Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the *proposed appropriation* is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the *proposed appropriation*, as evidenced by either of the following:

(I) The *purported appropriator* of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.

(II) The *purported appropriator* of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses. [[78]](#footnote-79)78

The legislature enacted this statute to prevent "would-be appropriators from tying up unappropriated water for the purpose of extracting a profit rather than accomplishing a beneficial use. [[79]](#footnote-80)79 The ***Colorado*** Supreme Court has extended [***Colorado*** *Revised Statute 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) **[\*598]** to applications for changes of vested absolute water rights. [[80]](#footnote-81)80

In *High Plains*, the Court held that a "change applicant must show a legally vested interest in the land to be served by the change of use and a specific plan and intent to use the water for specific purposes." [[81]](#footnote-82)81 This showing must be made at the time of the application, otherwise the application will be subject to dismissal.

[***Colorado*** *Revised Statute 37-92-302(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G0-00000-00&context=1516831) provides the *pre-High Plains* requirements for applications for changes of water rights:

In the case of applications for approval of a change of water right or plan for augmentation, the forms shall require a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historic use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist. [[82]](#footnote-83)82

The water court standard form for applications for changes of water rights requires the following information:

Proposed change: (a) describe change requested: alternate point of diversion/replacement/change of use; (if well, please list pertinent information from well permit) (b) location; (c) use; (d) amount; (e) give proposed plan for operation (if (b) thru (e) applicable, please give full descriptions.) [[83]](#footnote-84)83

Under *High Plains*, an applicant for change of water rights will also need to identify the proposed end user(s) of the water rights (and possibly attach any contracts for said use), the specific locations at which the changed water rights will be used, and possibly provide details as to the means of delivery of the water to such end user(s). This may require investment in infrastructure by a potential user prior to receiving a determination as to how much, if any, water it will be entitled to use for the changed uses.

C. Are Governmental Entities Immune?

The ***Colorado*** Supreme Court's opinion suggests that governmental entities may be immune from the new doctrine of anti-speculation in their change cases. [[84]](#footnote-85)84 However, courts have yet to rule on this.

**[\*599]** *High Plains* suggests that the result might have been different if the applicant had been a municipality seeking to change the water rights for its own use: "There is a critical difference between High Plains's (sic) change application and the changes approved by water courts addressed in our prior decisions involving type and place of use changes from agricultural to municipal." [[85]](#footnote-86)85

In conditional water rights appropriations, the ***Colorado*** Supreme Court has ruled against "a strict application of the anti-speculation doctrine to municipalities seeking to provide for the future needs of their constituents." [[86]](#footnote-87)86 The limits of the anti-speculation doctrine for new conditional water rights as applied to municipalities are reflected in [***Colorado*** *Revised Statute 37-92-103(3)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), which states that no appropriation of water will be held to occur if

[t]he purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, *unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation*. [[87]](#footnote-88)87

This statutory exception, however, "does not completely immunize municipal applicants from speculation challenges." [[88]](#footnote-89)88 The court in *City of Thornton v. Bijou Irrigation Company* held that

under section 37-92-103(3)(a), a municipality may be decreed conditional water rights based solely on its projected future needs, and without firm contractual commitments or agency relationships, but a municipality's entitlement to such a decree is subject to the water court's determination that the amount conditionally appropriated is consistent with the municipality's reasonably anticipated requirements based on substantiated projections of future growth. [[89]](#footnote-90)89

*High Plains* held that "[s]ection 37-92-103(3)(a)(I) and (II) apply in a change in type and place of use proceeding because the absolute decree for a water right is reopened by virtue of a change application[.]" [[90]](#footnote-91)90 As a result, the "municipal exception" and its limits in *Bijou* may apply similarly to municipal applications for changes of absolute water rights. If this is the case, municipalities seeking to change water rights for municipal use will need to make a showing to the court that the change in the amount of water "is consistent with the municipality's reasonably anticipated requirements based on substantiated projections **[\*600]** of future growth." [[91]](#footnote-92)91 This would require demographic proof of growth projections and engineering proof of water needed within the municipality's boundaries or for water needed under binding contracts to serve water to users outside the boundaries.

It is unrefuted that much water is necessary for municipal growth. The ***Colorado*** Water Conservation. Board's November 2004 Statewide Water Supply Initiative ("SWSI") Report estimates that transfers of agricultural water rights may result in a decrease of between 59,000 and 144,000 acres of irrigated land statewide by the year 2030. [[92]](#footnote-93)92 The SWSI Report estimates a statewide increase in municipal and industrial water demand of 630,000 acre-feet per year by 2030, and identifies agricultural transfers as one of the primary sources of water to meet that increase. [[93]](#footnote-94)93 The *High Plains* court acknowledged that "this state's future well-being likely depends on continued transfers of appropriated agricultural water to other uses at other places." [[94]](#footnote-95)94

In order to meet this all but certain increase in demand, special districts have filed some applications for changes of water rights and, as governmental entities, seek to enjoy the limited municipal exception under the anti-speculation doctrine. In some cases, there are allegations that the formation of the special district was specifically for the purpose of evading the anti-speculation doctrine. [[95]](#footnote-96)95

Challenges to these and other applications may occur on the basis that the requested changes of water rights are speculative. Even if such applicants are entitled to the benefit of the municipal exception to the anti-speculation doctrine, they are likely to be subject to the additional burden of establishing their reasonably anticipated requirements based on substantiated projections of future growth in order to obtain a change of water rights.

D. Chicken or the Egg: Plat. Approval or Court Decree?

The decision in *High Plains* may create difficulty for small subdivision augmentation plans since county commissioners usually require a decree for an augmentation plan to get a subdivision approval. Augmentation plans usually include changes of water rights. Without the decree, the commissioners may not approve a subdivision. After this case, opponents to a subdivision may argue the water court cannot approve the change application since there is no proof that the applicant is not speculating and because the applicant cannot prove it can and **[\*601]** will use the water on the agricultural lands it owns until the land use is changed to residential or commercial use by county approval.

As an example, the Jefferson County Land Regulations require a water supply report, including "[e]vidence of ownership or right of acquisition of or use of existing and proposed water rights including water augmentation plan if applicable." [[96]](#footnote-97)96 On the one hand, if there is no decreed change of water rights for the subdivision, the county may not approve the water supply as sufficient for the subdivision. Alternatively, if an applicant for change of water rights has not obtained land use approvals for the area, the application may be subject to dismissal as speculative.

E. The Quandary for Small Ranchers and Farmers

The *High Plains* decision may create a "catch-22" for sellers of agricultural water. Buyers or lessees of "ag water" want to know what they are getting. But, after *High Plains*, a conclusive determination as to the historic consumptive use of the water rights will not be available until after the finalization of a purchase contract or lease.

One element of an application for a change of water rights is the determination of the historical consumptive use of the water rights. [[97]](#footnote-98)97 Since the anti-speculation doctrine and *Vidler* will now apply to applications for changes of water rights, farmers and ranchers will need to enter into "firm contracts" with new municipal users for the transfer of their water in order to obtain a court determination of the historic consumptive use of the water rights.

As the court in *High Plains* notes, "a sufficient ditch-wide historic consumptive use analysis in a change of water right case can be utilized in another change case for allocation of the amount of water to which the mutual company shareholder is entitled." [[98]](#footnote-99)98 Thus, water right owners and buyers on a ditch, which has already been subject to a "ditchwide" change under *Midway Ranches*, may be able to estimate the yield of their water rights with some certainty. After *High Plains*, on ditches where there has been no quantification of the historic consumptive use on a ditch-wide basis, water users will not be able to establish the actual historical consumptive yield, whether firm or average, of their water rights until after they have already entered into a contract for the water and obtained a change decree based on the contract.

Water right owners may also be restricted in their ability to take advantage of statutory programs allowing them to lease or to bank their **[\*602]** water rights without a permanent transfer to municipal use. One such example is the Arkansas ***River*** Water Bank Pilot Program. [[99]](#footnote-100)99 The program allows a water user to "bank" storage rights during an irrigation season, which allows another user to purchase this water and use it on a temporary basis without a permanent change of use or ownership. [[100]](#footnote-101)100

Under the rules promulgated to govern the Water Bank Pilot Program, various ditches on the lower Arkansas ***River*** are assigned "presumptive" historic consumptive use values for water placed in the bank. In order to claim values differing from the "presumptive" values, a user may submit a historic consumptive use analysis for consideration by the State and/or Division Engineers. A water court change decree should be conclusive evidence as to the historic consumptive use of the water in question. In the absence of a court decree quantifying the historic consumptive use of water rights, an agricultural user may be unable to obtain higher credit for banked water in excess of the "presumptive" values.

F. The New "Cloud": The Dilemma for Water Rights Owners

*High Plains* and another recent decision create a cloud of uncertainty for owners of existing absolute water rights decrees. The *High Plains* court's basis for holding that [***Colorado*** *Revised Statute 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) applies to changes of water rights was the holding that "the absolute decree for a water right is reopened by virtue of a change application." [[101]](#footnote-102)101

An applicant for a change of water rights has long been subject to the risk that a reduction in the amount of changed water may occur due to the level of the actual proven historic consumptive use or it could be lost entirely due to abandonment. [[102]](#footnote-103)102 In *Ready Mixed Concrete Company v. Farmers Reservoir and Irrigation Company*, the court held that erroneous determinations in an absolute water right decree are protected by *res judicata* only so long as operation of the water right is in accordance with the original decree. [[103]](#footnote-104)103 Neither *Ready Mixed* nor *High Plains* define what, if any, limits exist on the reopening of absolute water decrees during a change of water rights. Reopening of final determinations made in the 1880's may occur based both on advances of modern science and a dearth of evidence as to the facts weighed in a court in 1881 or 1885, when original adjudications occurred. This **[\*603]** specter removes the "finality" which previously protected absolute water rights by virtue of *res judicata* and collateral estoppel. A new dilemma for the owner of an absolute water right is that a change application will reopen the owner's decree and also require the owner to have enforceable contracts for the new uses before the owner can file the application. Reopening may lead to a loss of a water right. Contracts for sales of unchanged water rights may be difficult to obtain without giving up substantial value to induce a purchaser to risk the hurdles placed before it by *High Plains*.

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**End of Document**

1. 1 High Plains, with Wollert Enterprises, Inc., filed an application for change of water rights in Case No. 02CW183. High Plains also filed an application for change of water rights in Case No. 03CW28. This article refers to applicants-appellants in Cases Nos. 02CW183 and 03CW28 collectively as "High Plains." [↑](#footnote-ref-2)
2. 2 For a description of the Fort Lyon canal system, see [*Se.* ***Colo.*** *Water Conservancy Dist. v. Fort Lyon Canal* ***Co****., 720 P.2d 133, 136-37 (****Colo.*** *1986).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-12F0-003D-9039-00000-00&context=1516831) [↑](#footnote-ref-3)
3. 3 ISG stands for "Independent Shareholders Group." [↑](#footnote-ref-4)
4. 4 [*594 P.2d 566, 568 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-5)
5. 5 [***COLO.*** *REV. STAT. §§ 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), -305(9)(b) (2005). [↑](#footnote-ref-6)
6. 6 Concerning Application for Change of Water Rights of Wollert Enters., Inc., Nos. 02CW183, 03CW28, 03CW68 at 15 (***Colo.*** Water Ct. Div. 2 July 2, 2004) (order granting summary judgment dismissing change of water rights applications), *available at* [*http://www.courts.state.****co****.us/supct/watercourts/wat-div2/Order.pdf*](http://www.courts.state.co.us/supct/watercourts/wat-div2/Order.pdf). [↑](#footnote-ref-7)
7. 7 *Id*. at 714; [*ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724, 727 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-8)
8. 8 [*High Plains, 120 P.3d at 715;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [*ISG, 120 P.3d at 728.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-9)
9. 9 Concerning Application for Change of Water Rights of Wollert Enters., Inc., Nos. 02CW183, 03CW28, 03CW68 at 4 (***Colo.*** Water Ct. Div. 2 July 2, 2004) (order granting summary judgment dismissing change of water rights applications), *available at* [*http://www.courts.state.****co****.us/supct/watercourts/wat-div2/Order.pdf*](http://www.courts.state.co.us/supct/watercourts/wat-div2/Order.pdf). [↑](#footnote-ref-10)
10. 10 *Id*. [↑](#footnote-ref-11)
11. 11 *Id*. at 14. [↑](#footnote-ref-12)
12. 12 *Id*. at 14-15. [↑](#footnote-ref-13)
13. 13 *Id*. [↑](#footnote-ref-14)
14. 14 *Id*. at 15-16. [↑](#footnote-ref-15)
15. 15 [*Se.* ***Colo.*** *Water Conservancy Dist. v. Fort Lyon Canal* ***Co****., 720 P.2d 133, 136 (****Colo.*** *1986).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-12F0-003D-9039-00000-00&context=1516831) [↑](#footnote-ref-16)
16. 16 1 ***COLORADO*** AND ITS PEOPLE: A NARRATIVE AND TOPICAL HISTORY OF THE CENTENNIAL STATE, 420 (LeRoy R. Hafen ed., 1948) [hereinafter ***COLORADO*** AND ITS PEOPLE]. [↑](#footnote-ref-17)
17. 17 The purpose of resume notice is to provide other water users with inquiry notice that they should appear and protect their water rights. [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 24-27 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) (noting that the broad statement of uses proposed by Thornton was sufficient to put other water users on inquiry notice to appear and protect their water rights); [*City & County of Denver v. City of Englewood, 826 P.2d 1266, 1272 (****Colo.*** *1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H40-003D-917B-00000-00&context=1516831) (stating that notice of Denver's intent to use water "in any public stream" in Denver's exchanges constituted notice that the use of water could include West Slope water). [↑](#footnote-ref-18)
18. 18 *See, e.g.,* [*Bijou., 926 P.2d at 19-20;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [*Twin Lakes Reservoir & Canal* ***Co****. v. City of Aspen, 568 P.2d 45, 46 (****Colo.*** *1977).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1HR0-003D-92WS-00000-00&context=1516831) [↑](#footnote-ref-19)
19. 19 [***COLO.*** *REV. STAT. § 37-92-305(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2005). [↑](#footnote-ref-20)
20. 20 Applicants are entitled to two bites at the apple. First, the applicant must propose protective terms and conditions shortly before trial. *Id*. Once the applicant makes a *prima facie* showing at trial that a change will not cause injury, the opposers have the burden of proving injury. [*Wagner v. Allen, 688 P.2d 1102, 1108 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14S0-003D-90HH-00000-00&context=1516831) Then, if after hearing evidence a water court finds potential injury still exists, the applicant (and opposers) *must* be given a second opportunity to propose terms and conditions that would prevent injury:

    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 which would prevent such injurious effect.

    § 37-92-305(3) (emphasis added). [↑](#footnote-ref-21)
21. 21 [*Wagner, 688 P.2d at 1108-09.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14S0-003D-90HH-00000-00&context=1516831) [↑](#footnote-ref-22)
22. 22[*Farmers Reservoir & Irrigation* ***Co****. v. Consol. Mut. Water* ***Co****. (FRICO), 33 P.3d 799, 811 (****Colo.*** *2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) Water courts commonly enter change decrees for large amounts of water. Formulation of terms and conditions at trial to prevent all injury from post-decree operations can complicate matters. The ***Colorado*** General Assembly recognized this in adopting title 37, article 92, section 304(6), requiring a period of retained jurisdiction in change decrees. The water court may also retain jurisdiction to take into account the fact that the applicant had not determined the ultimate location of the points of diversion for alternate places of storage. [*City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348, 1360 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0850-003D-94FY-00000-00&context=1516831) In analyzing *Clear Creek Water Users*, the court in *FRICO* said:

    We rejected the proposition that the water court could not decree the change of water right without seeing what injury might manifest itself in the future [.] . . . In [*Clear Creek*], the water judge "found that there was no showing of injury to the City of Thornton at the time it entered the decree granting the Company's application." The water judge, we said, properly reserved the issue of injury from the location of the alternate points of storage for later consideration under the decree's retained jurisdiction provision, because "proving injury in the absence of specified diversion points would be difficult; accordingly, the water court retained jurisdiction for a period of five years."

    [*33 P.3d at 811.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-23)
23. 23 Concerning Application for Change of Water Rights of Wollert Enters., Inc., Nos. 02CW183, 03CW28, 03CW68 at 15 (***Colo.*** Water Ct. Div. 2 July 2, 2004) (order granting summary judgment dismissing change of water rights applications), *available at* [*http://www.courts.state.****co****.us/supct/watercourts/wat-div2/Order.pdf*](http://www.courts.state.co.us/supct/watercourts/wat-div2/Order.pdf). [↑](#footnote-ref-24)
24. 24 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 52 n.43 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-25)
25. 25 [*Farmers Reservoir & Irrigation* ***Co****., 33 P.3d at 807.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-26)
26. 26 *Compare* [***COLO.*** *REV. STAT. § 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2005) defining "appropriation" *and* § 37-92-103(5) defining "change of water right." [↑](#footnote-ref-27)
27. 27 *See* [***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) ("*Vidler*"), which led to codification of the anti-speculation doctrine in title 37, article 92, section 103(3)(a). Vidler Tunnel Water Company applied for a conditional storage right. Because Vidler had no municipal contracts, the court ruled that the purported appropriation for municipal purposes was speculative. [*Id. at 569.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) A conditional appropriation is an original appropriation, not a change of an already appropriated absolute water right. Every reported case where the *Vidler* doctrine has applied has been in the context of conditional appropriations of water. For example:

    a. "The anti-speculation doctrine precludes the appropriator who does not intend to put water to use for her own benefit, and has no contractual or agency relationship with one who does, from obtaining a water use right." [***Colo.*** *Ground Water Comm. v. N. Kiowa Bijou Groundwater Mgmt. Dist., 77 P.3d 62, 78-79 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4B7P-R660-0039-4529-00000-00&context=1516831) (regarding determination of use rights to Denver Basin groundwater in designated groundwater basins).

    b. "While the conditional decree system encourages investment in more expensive or time-consuming water projects by reserving priority dates for the appropriation of the water, the conditional rights are subject to scrutiny to prevent abuse and speculation." [*West Elk Ranch, LLC v. United States, 65 P.3d 479, 481 (****Colo.*** *2002).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47C3-T9P0-0039-447J-00000-00&context=1516831)

    c. "A conditional decree may not be entered if 'the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation.'" [*Dallas Creek Water* ***Co****. v. Huey, 933 P.2d 27, 37 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RH5-SXG0-003D-9002-00000-00&context=1516831) (citing [*§ 37-92-103(3)(a), 15 C.R.S.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1990)).

    d. "The anti-speculation doctrine prohibits would-be appropriators from tying up unappropriated water for the purpose of extracting a profit rather than accomplishing a beneficial use. . . . [T]he transfer of an absolute right . . . is not subject to the anti-speculation doctrine." [*Bijou, 926 P.2d at 52 n.43.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-28)
28. 28 [*Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693, 714 (****Colo.*** *2002).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45J9-VSF0-0039-427X-00000-00&context=1516831) [↑](#footnote-ref-29)
29. 29 The Larimer and Weld Canal, Loveland and Greeley Canal, and High Line Canal were built by the ***Colorado*** Mortgage and Investment Company based in London, England, and referred to in ***Colorado*** as "the English Company." Travelers Insurance Company financed the North Poudre Canal. ***COLORADO*** AND ITS PEOPLE, *supra* note 16, at 123; 1 HISTORY OF ***COLORADO*** 494 (Wilbur Fisk Stone ed., 1918); ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 24 (Univ. of Neb. Press 1983). [↑](#footnote-ref-30)
30. 30 [*Wheeler v. N.* ***Colo.*** *Irrigation* ***Co****., 17 P. 487, 492 (****Colo.*** *1888).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2VF0-0040-02W7-00000-00&context=1516831) [↑](#footnote-ref-31)
31. 31 *See generally* DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902 209-10 (Univ. of N.M. Press 1992). [↑](#footnote-ref-32)
32. 32 S. REP. No. 928, pt. 4, at 360 (1890) (stating that Senator Stewart's observation was that a good profit should satisfy capital). [↑](#footnote-ref-33)
33. 33 *See* PERCY S. FRITZ, ***COLORADO***: THE CENTENNIAL STATE 327 (1941). Private financing for the ***Colorado*** Canal and the Twin Lakes Reservoir was with out-of-state funds. Dena S. Markoff, *A Bittersweet Saga: The Arkansas Valley Beet Sugar Industry, 1900-1979, in* 56 ***COLO.*** HISTORICAL SOCIETY, ***COLO.*** MAGAZINE 161, 164 (1979); Nina B. Giffin, *The Beginning of Ordway,* ***Colorado****, in* 11 ***COLO.*** HISTORICAL SOCIETY, ***COLO.*** MAGAZINE 23, 25 (1934). What became the Bessemer Irrigation Project began as the private project of the Central ***Colorado*** Improvement Company. Joseph O. Van Hook, *Development of Irrigation in the Arkansas Valley, in* 10 COLO HISTORICAL SOCIETY, ***COLO.*** MAGAZINE 3, 9 (1933); JAMES E. SHEROW, WATERING THE VALLEY: DEVELOPMENT ALONG THE HIGH PLAINS ARKANSAS ***RIVER***, 1870-1950 21 (Univ. Press of Kan. 1990) [hereinafter "SHEROW II"]. The Fort Lyon Canal, Bessemer Canal, Amity Canal and Bob Creek Canal (now the ***Colorado*** Canal), and the Otero Canal were built by corporate capital, [*HISTORY OF* ***COLORADO****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) note 29 at 494; CARL UBBELOHDE ET AL., A ***COLORADO*** HISTORY 189 (7th ed. 1995). For Amity Canal history, *see* [*Fort Lyon Canal* ***Co****. v. Ark. Valley Sugar Beet & Irrigated Land* ***Co****., 230 P. 615, 615 (****Colo.*** *1924);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-00D0-0040-055G-00000-00&context=1516831) [*Great Plains Water* ***Co****. v. Lamar Canal* ***Co****., 71 P. 1119, 1120 (****Colo.*** *1903).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-26X0-0040-00DH-00000-00&context=1516831) [↑](#footnote-ref-34)
34. 34 Otis L. Haskell, a private developer in Denver, organized the Arkansas ***River*** Land, Reservoir and Canal Company to turn the initial Fort Lyon Canal, begun as a United States Army structure intended to assist the agricultural education of the Cheyenne and Arapaho tribes, into a massive canal built with private funds. SHEROW II, *supra* note 33 at 17-20; FRANCES B. KECK, CONQUISTADORS TO THE 21ST CENTURY: A HISTORY OF OTERO AND CROWLEY COUNTIES ***COLORADO*** 244 (1999). In 1889, the President of the Arkansas ***River*** Land, Reservoir and Canal Company was J. R. Burton, an out-of-state lawyer. S. REP. No. 928, pt. 4, at 308 (1890). For corporate history of the Fort Lyon Canal, *see* [*O'Neil v. Fort Lyon Canal* ***Co****., 90 P. 849, 850, 852 (****Colo.*** *1907).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2240-0040-04SB-00000-00&context=1516831) [↑](#footnote-ref-35)
35. 35 In 1897, Henry B. Hyde, described as "the prominent life insurance man," announced an investment of $ 750,000 in the Amity Land and Canal Company to "widen the Lamar and La Junta Canals along the line of the Santa Fe," and to build reservoirs northwest of Lamar. *To Irrigate Arid Land*, DENVER EVENING POST, Apr. 13, 1897, at 1. Private financing was also provided to Twin Lakes Reservoir, formed in 1897 to provide storage for the ***Colorado*** Canal. *See* TWIN LAKES RESERVOIR ***CO***., ARTICLES OF INCORPORATION (1897), *available at* [*http://www.sos.state.****co****.us*](http://www.sos.state.co.us) (follow "Search Business Database" hyperlink; search by "ID or document number;" enter "19871024801" into the "ID or document number" field; click on the link to Twin Lakes Reservoir; follow the "View History and Document" link; then follow link to "Articles of Incorporation" (last visited May 3, 2006). [↑](#footnote-ref-36)
36. 36 FRANK HALL, HISTORY OF THE STATE OF ***COLORADO*** 543 (1889). [↑](#footnote-ref-37)
37. 37 RIO GRANDE LAND & CANAL ***CO***., GOVERNMENT RECLAMATION OF ARID LANDS AS OPPOSED TO RECLAMATION BY PRIVATE ENTERPRISE ON THE RIO GRANDE ***RIVER*** IN ***COLORADO*** (1906). [↑](#footnote-ref-38)
38. 38 *See* [*Alameda Water & Sanitation Dist. v. Reilly, 930 F.Supp. 486, 489 (D.* ***Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-K2N0-006F-P043-00000-00&context=1516831) [↑](#footnote-ref-39)
39. 39 *See, e.g*., [*Twin Lakes Reservoir and Canal* ***Co****. v. City of Aspen, 568 P.2d 45, 46 (****Colo.*** *1977).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1HR0-003D-92WS-00000-00&context=1516831) [↑](#footnote-ref-40)
40. 40 [*Transcript of Oral Argument at 15-16, High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservation Dist., 120 P.3d 710 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) (No. 04SA266/267) [hereinafter Transcript]. [↑](#footnote-ref-41)
41. 41 *Id*. at 7-9. [↑](#footnote-ref-42)
42. 42 *Id*. at 14-15. [↑](#footnote-ref-43)
43. 43 *Id*. at 37. [↑](#footnote-ref-44)
44. 44 *See* [***COLO.*** *REV. STAT. § 37-92-402(11)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GF-00000-00&context=1516831) (2005) (stating that "failure for a period of ten years or more to apply to a beneficial use . . . shall create a rebuttable presumption of abandonment of a water right . . ."). [↑](#footnote-ref-45)
45. 45 [*Transcript, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) note 40, at 21. [↑](#footnote-ref-46)
46. 46 *Id*. at 36-37. [↑](#footnote-ref-47)
47. 47 *Id*. at 37. [↑](#footnote-ref-48)
48. 48 *Id*. at 50-51. [↑](#footnote-ref-49)
49. 49 [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 714 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-50)
50. 50 [*ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724, 730-31 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-51)
51. 51 [*Id. at 731.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-52)
52. 52 [***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), -309 (2005); § 37-80.5-101 - -107. [↑](#footnote-ref-53)
53. 53 [*Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) [↑](#footnote-ref-54)
54. 54 [*ISG, 120 P.3d at 734.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-55)
55. 55 [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 722-724 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 [*Id. at 722-23.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-57)
57. 57 [*Id. at 723.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-58)
58. 58 *Id*. [↑](#footnote-ref-59)
59. 59 [*Id. at 724.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-60)
60. 60 [*Id. at 723-724.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-61)
61. 61 [*Id. at 724;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) *see, e.g*., [***COLO.*** *REV. STAT. § 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2005). [↑](#footnote-ref-62)
62. 62 [*High Plains, 120 P.3d at 724.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-63)
63. 63 *Id*. [↑](#footnote-ref-64)
64. 64 [*Cline v. McDowell, 284 P.2d 1056, 1059 (****Colo.*** *1955).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XBW0-0040-030C-00000-00&context=1516831) [↑](#footnote-ref-65)
65. 65 § 37-92-305(3). [↑](#footnote-ref-66)
66. 66 *See* [*Wheeler v. N.* ***Colo.*** *Irrigating* ***Co****., 17 P. 487, 489 (****Colo.*** *1888);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2VF0-0040-02W7-00000-00&context=1516831) [*Shirola v. Turkey Callon Ranch, LLC, 937 P.2d 739, 748 (****Colo.*** *1997);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YS70-003D-90DV-00000-00&context=1516831) § 38-30-102. [↑](#footnote-ref-67)
67. 67 [*Williams v. Midway Ranches Prop. Owners Ass'n, Inc., 938 P.2d 515, 521-522 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YRV0-003D-909H-00000-00&context=1516831) (stating that the right to change a point of diversion is a property right). [↑](#footnote-ref-68)
68. 68 [*Farmers Reservoir & Irrigation* ***Co****. v. City of Golden, 44 P.3d 241, 245 (****Colo.*** *2002).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45JB-PD10-0039-42DB-00000-00&context=1516831) [↑](#footnote-ref-69)
69. 69 [*Farmer's Reservoir & Irrigation* ***Co****. v. Consolidated Mut. Water* ***Co****., 33 P.3d 799, 812 (****Colo.*** *2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-70)
70. 70 [*Id. at 807.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 [*Churchey v. Adolph Coors* ***Co****., 759 P.2d 1336, 1340 (****Colo.*** *1988).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0Y70-003D-94P8-00000-00&context=1516831) [↑](#footnote-ref-72)
72. 72 [*State Eng'r v. Castle Meadows, Inc., 856 P.2d 496, 508 (****Colo.*** *1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-08T0-003D-94P1-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-73)
73. 73 [*High Plains A & M, LLC v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 714 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-74)
74. 74 [*Id. at 719.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-75)
75. 75 *In re* Application for Change of Water Rights of Wollert Enters., Inc., Nos. 02CW183, 03CW28, 03CW68, at 15-16 (***Colo.*** Water Ct. Div. 2, July 2, 2004) (order granting summary judgment dismissing change of water rights applications), *available at* [*http://www.courts.state.****co****.us/supct/watercourts/wat-div2/Order.pdf*](http://www.courts.state.co.us/supct/watercourts/wat-div2/Order.pdf). [↑](#footnote-ref-76)
76. 76 [***COLO.*** *REV. STAT. § 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2005). [↑](#footnote-ref-77)
77. 77 [*In re Application for Water Rights of Vought, 76 P.3d 906, 913-14 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48VP-2590-0039-426F-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 § 37-92-103(3)(a) (emphasis added). [↑](#footnote-ref-79)
79. 79 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 52 n.43 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-80)
80. 80 [*High Plains A & M, Inc. v. Se.* ***Colo.*** *Water Conservancy Dist., 120 P.3d 710, 720 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-81)
81. 81 *Id*. [↑](#footnote-ref-82)
82. 82 § 37-92-302(2)(a). [↑](#footnote-ref-83)
83. 83 ***COLO.*** R. Cry. P. 92.14. [↑](#footnote-ref-84)
84. 84 [*High Plains, 120 P.3d at 720.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-85)
85. 85 [*Id. at 721.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-86)
86. 86 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 37 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-87)
87. 87 § 37-92-103(3)(a) (I) (emphasis added). [↑](#footnote-ref-88)
88. 88 [*Bijou, 926 P.2d at 38.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-89)
89. 89 [*Id. at 39.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-90)
90. 90 [*High Plains, 120 P.3d at 720.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-91)
91. 91 [*Bijou, 926 P.2d at 39.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-92)
92. 92 ***COLO.*** WATER CONSERVATION BD., STATEWIDE WATER SUPPLY INITIATIVE REPORT 5-11 (2004). [↑](#footnote-ref-93)
93. 93 [*Id. at 6-10, 6-3.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-94)
94. 94 [*High Plains, 120 P.3d at 722.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) [↑](#footnote-ref-95)
95. 95 David Olinger & Chuck Plunkett, *A Radical New Vision*, DENVER POST, Nov. 21, 2005, at A1. [↑](#footnote-ref-96)
96. 96 BD. OF COUNTY COMM'RS OF JEFFERSON COUNTY, ***COLO.***, LAND DEVELOPMENT REGULATION § 21 A(3)(a)(8), (4)(e) (2005). [↑](#footnote-ref-97)
97. 97 [*Farmers Reservoir & 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) [↑](#footnote-ref-98)
98. 98 [*High Plains, 120 P.3d at 723*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) (citing [*Farmer's Reservoir., 33 P.3d at 807).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-99)
99. 99 *See* [***COLO.*** *REV. STAT. § 37-80.5-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831) (2005). [↑](#footnote-ref-100)
100. 100 *Id*. [↑](#footnote-ref-101)
101. 101 [*High Plains, 120 P.3d at 720*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831) (citing [*Ready Mixed Concrete* ***Co****. v. Farmers Reservoir & Irrigation* ***Co****., 115 P.3d 638, 645-46 (Cob. 2005)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDY-V8B0-0039-40X3-00000-00&context=1516831) [↑](#footnote-ref-102)
102. 102 [*Pueblo W. Metro. Dist. v. Se. Cob. Water Conservancy Dist., 717 P.2d 955, 959 (Cob. 1986);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-12K0-003D-903W-00000-00&context=1516831) [*Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 57 (Cob. 1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) [↑](#footnote-ref-103)
103. 103 [*Ready Mixed Concrete* ***Co****., 115 P.3d at 646.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDY-V8B0-0039-40X3-00000-00&context=1516831) [↑](#footnote-ref-104)