

# [***COMMENT: THE "CAN AND WILL" DOCTRINE OF***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TCF0-00CV-N07P-00000-00&context=1516831) [***COLORADO REVISED STATUTE SECTION 37-92-305(9)(b)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831)[***: CHANGING THE NATURE OF CONDITIONAL WATER RIGHTS IN COLORADO.***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TCF0-00CV-N07P-00000-00&context=1516831)

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**Author:** MARK E. HAMILTON

**Text**

**[\*947]** I. INTRODUCTION

The doctrine of prior appropriation began as a simple mining camp concept -- first in time, first in right -- water was for the taking. As the West was settled, all of the "dry-core states subscribe[d] to the '***Colorado*** doctrine' of prior appropriation," integrating into state law the custom of Gold Rush miners who diverted streams for their mining operations. [[1]](#footnote-2)1 However, early Westerners little realized that "[w]hat had started as some simple rules to divide water among miners [would develop] into a legal principle that was to guide the growth and development of the western states for the next hundred years." [[2]](#footnote-3)2 As the twenty-first century approaches, this simple water allocation concept is much the same today in the technologically complex West as it was in those first mining camps over a century ago. By contrast, in other natural resource allocation systems such as grazing and mineral leasing, more modern considerations of conservation and reservation have begun to replace nineteenth century concepts of appropriation. [[3]](#footnote-4)3 Western water policy likewise deserves modern reconsideration.

Over the past twenty-five years, ***Colorado*** has begun to address allocation problems in one area of water law -- conditional water rights. As modern speculators discovered the ease of water **[\*948]** acquisition under ***Colorado***'s traditional rules of prior appropriation, both the judiciary and the legislature responded with strict prohibitions against speculation. [[4]](#footnote-5)4 The resultant statutory prohibition on speculation, the so-called "can and will" doctrine, [[5]](#footnote-6)5 has, through its judicial interpretation, the power to be a significant step away from the doctrine of prior appropriation as it has been traditionally known in ***Colorado***. [[6]](#footnote-7)6 At its inception this "significant step" may not have been intended to be a major change. Yet, judicial interpretation has made the "can and will" doctrine the single most important factor in deciding the future of large water projects in ***Colorado***.

The "can and will" doctrine brings ***Colorado*** closer to other western states' permit systems while retaining ***Colorado***'s unique judicial system of water rights administration. This comment first discusses the origins of the "can and will" doctrine. Second, it seeks to demonstrate how judicial interpretations have expanded upon the concept implicit in the language of the "can and will" statute to allow for a much broader inquiry by water courts when adjudicating conditional water rights. Third, in the context of ongoing litigation over a proposed water project in the Gunnison Basin, this comment takes a closer look at two of the major issues under the doctrine: project permitting and water availability. Finally, a comparison of the developments under the "can and will" doctrine with administrative water permitting standards in other Western states demonstrates how ***Colorado*** has begun to assimilate some permitting principles while retaining the core of its judicial allocation system. These changes leave ***Colorado*** water courts better able to manage the future of the state's water resources.

**[\*949]** II. ORIGINATION OF THE "CAN AND WILL" DOCTRINE

The "can and will" doctrine embodied in [***Colorado*** *Revised Statute section 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) is a relatively new addition to the field of conditional water rights in ***Colorado***. Historically, conditional water rights were relatively freely issued to applicants who had the requisite intent to appropriate water in the future and had demonstrated that intent by taking an open physical first step towards making that appropriation. [[7]](#footnote-8)7 In the 1970's, speculators sought to gain control of ***Colorado*** water through the establishment of conditional rights. [[8]](#footnote-9)8 The ***Colorado*** Supreme Court affirmed that conditional decrees would not be granted for speculative purposes in ***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****.* [[9]](#footnote-10)9 This "anti-speculation" ruling was subsequently codified in 1979; the "can and will" doctrine was part of this codification. [[10]](#footnote-11)10

A. *The History of Conditional Water Rights in* ***Colorado***

The doctrine of conditional water rights has long been recognized as a refinement of the ***Colorado*** constitutional right to appropriate unappropriated water. [[11]](#footnote-12)11 [***Colorado*** *Revised Statute section 37-92-103(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) defines a conditional water right as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." [[12]](#footnote-13)12 The doctrine of conditional water rights essentially applies the relation back concept to water rights acquisition. [[13]](#footnote-14)13 Large projects, such as transbasin diversions, are often not able to put **[\*950]** water immediately to beneficial use; thus, the doctrine of conditional water rights allows an appropriator to secure an appropriation date which can be preserved by periodic demonstrations of "due diligence" -- purposeful movement towards actual diversion and use. [[14]](#footnote-15)14 Only upon actual application of the water to a beneficial use does the holder of a conditional right become entitled to a final decree. [[15]](#footnote-16)15

Historically, initiation of a conditional water right required satisfaction of a two-part "first step" requirement: first, an open physical demonstration of intent to appropriate water (to give notice to third parties); second, an actual intent to divert and use specific water. [[16]](#footnote-17)16 The first step requirement could be satisfied in many ways and was essentially a factual inquiry. [[17]](#footnote-18)17 The open act must have been "of such a character that [third parties could] thereby be charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand on the water supply involved." [[18]](#footnote-19)18 This relatively simple showing could create a protected priority date without any present diversion or use of water. However, failure to show due diligence in moving towards actual appropriation could result in cancellation of a conditional right. [[19]](#footnote-20)19

B. *Limiting Speculation: The Vidler Decision* [[20]](#footnote-21)20

The mere concept of a conditional water right conjures notions of speculation because initiation of the right provides assurance of a favorable appropriation date should diversion and use ever come into being. Initially, conditional rights in ***Colorado*** *were* used for somewhat speculative purposes. In 1939, the ***Colorado*** Supreme Court in *City & County of Denver v. Sheriff* [[21]](#footnote-22)21 upheld a third party, non-municipal lease of water not immediately needed by Denver **[\*951]** from the Moffat tunnel diversion. Denver's lack of immediate need for water from the diversion in 1939 presented no legal impediment to its right to appropriate the Western Slope water, as it was clear Denver would put the water to use in the future. [[22]](#footnote-23)22 However, as water has become increasingly scarce and the concept of maximum utilization [[23]](#footnote-24)23 has taken hold, courts have strictly limited the availability of conditional decrees to non-speculative applicants. [[24]](#footnote-25)24

In *Bunger v. Uncompahgre Valley Water Users Ass'n,* [[25]](#footnote-26)25 decided in 1976, the ***Colorado*** Supreme Court used an objective standard to determine whether a project was for speculative purposes. Applicant Bunger sought a conditional decree without specifying "appropriations from any of the many streams and ***rivers*** mentioned in both districts" or knowing what "entity or entities would ultimately put the water to beneficial use." [[26]](#footnote-27)26 Bunger claimed that "his only purpose in seeking an appropriation" [[27]](#footnote-28)27 for a "complex and massive water collection, diversion, and storage plan called the Gunnison-Arkansas Project" [[28]](#footnote-29)28 was to "save the water for ***Colorado***." [[29]](#footnote-30)29 Thecourt denied a conditional decree in *Bunger* largely because the applicant did not have the objective capacity to form the necessary intent to appropriate. The specifics of the project were so ill-defined that no one under those circumstances could have shown an intent to divert. [[30]](#footnote-31)30

**[\*952]** ***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****.* [[31]](#footnote-32)31 introduced a more subjective modern standard for determining whether a proposed water project is speculative. The *Vidler* decision involved a conditional storage right application for a proposed reservoir on the main stem of the ***Colorado*** ***River*** in Grand County, ***Colorado***. [[32]](#footnote-33)32 The annual firm yield of the storage right was to be approximately 90,000 acre feet, yet applicant Vidler's only firm contract for use of the water was an option granted to the City of Golden to purchase 2000 acre feet (with a right of first refusal to another 3000 acre feet.) [[33]](#footnote-34)33 Vidler also planned to irrigate its own lands with 2000 acre feet. [[34]](#footnote-35)34 Although Vidler held preliminary negotiations with many municipalities about purchasing water, [[35]](#footnote-36)35 it secured no firm contractual commitments for the remaining 85,000 acre feet of annual yield. Denying a conditional decree for water beyond that which was to be used on Vidler's own lands, the court in *Vidler* held that the "constitution guarantees a right to appropriate, not a right to speculate . . . the right to appropriate is for *use,* not merely for profit." [[36]](#footnote-37)36 Thus, *Vidler* held that firm contractual commitments with municipalities were required to show that an applicant would, in fact, apply a large appropriation to beneficial use within a reasonable time after the granting of a conditional decree.

C. *Codification of Vidler: Statutory Anti-Speculation Provisions*

The *Vidler* "anti-speculation doctrine" was codified in the same year, 1979, as part of a series of amendments to the Water Right Determination and Administration Act of 1969 ("1969 Water Act"). [[37]](#footnote-38)37 One amendment reflecting the *Vidler* doctrine was additional language inserted in the definition of appropriation in [***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):

"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 **[\*953]** 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. . . . [[38]](#footnote-39)38

The ***Colorado*** Supreme Court has acknowledged the link between section 103(3)(a) and the *Vidler* decision. [[39]](#footnote-40)39 Section 103(3)(a)(II) requires stricter scrutiny under the "intent" test demanded for the initiation of a conditional water right. A conditional water right will not be granted without a concrete demonstration of *who* will use the water.

Another amendment to the 1969 Water Act, [***Colorado*** *Revised Statute section 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) ("section 305(9)(b)"), [[40]](#footnote-41)40 implemented a new requirement for granting conditional decrees. [[41]](#footnote-42)41 Although also added in the wake of *Vidler,* this amendment moved beyond mere *prohibition of speculation* and created an entirely new statutory requirement for the acquisition of a conditional right. Section 305(9)(b) tightened the requirements for issuance of a conditional decree by mandating that:

No claim for a conditional water right may be recognized or a decree therefore 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* ***[\*954]*** *used* and that the project *can and will be completed* with diligence and within a reasonable time. [[42]](#footnote-43)42

This "can and will" doctrine, literally read, seems to require far more certainty of actual future diversion and use before issuance of a conditional decree than the original anti-speculation doctrine. Courtshave utilized the language of section 305(9)(b) to broaden substantially the inquiry made before a conditional water right (a vested property right) will be granted. [[43]](#footnote-44)43

In spite of the subsequent actual effect of section 305(9)(b), its legislative history does not suggest that the legislature harbored any intent to make a major change to the doctrine of conditional water rights in ***Colorado***. As mentioned above, section 305(9)(b) was part of a larger water bill proposed in early 1979 as Senate Bill 481 ("S.B. 481"). This bill also contained the anti-speculation language added to [***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). Neither the Senate nor the House committees responsible for consideration of S.B. 481 gave it the level of consideration one would expect when considering a significant deviation from traditional ***Colorado*** water law. [[44]](#footnote-45)44 No specific mention of section 305(9)(b) was made in either House in spite of intense debate over legislation affecting groundwater speculation. [[45]](#footnote-46)45 Moreover, in refusing to address the issue of instream flows, the House Committee on Agriculture, Livestock, and Natural Resources cited the "non-partisan" nature of S.B. 481 as well as the intention to codify case law regarding speculation and "maintain the status quo." [[46]](#footnote-47)46 Over the past decade, the ***Colorado*** Supreme Court has adopted a more literal interpretation of section 305(9)(b)'s "non-partisan" language. In addition to showing an open act and intent, an applicant for a conditional water right must now show that a proposed water project "can and will" be completed. This **[\*955]** new showing has substantially broadened the scope of water courts' inquiries when adjudicating conditional rights.

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). CASE LAW INTERPRETING THE "CAN AND WILL" DOCTRINE OF [***COLORADO*** *REVISED STATUTE SECTION 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831)

Four recent cases [[47]](#footnote-48)47 considering section 305(9)(b) show that the ***Colorado*** Supreme Court has expanded interpretation of section 305(9)(b) from a codification of the *Vidler* holding to the current "can and will" doctrine, which requires applicants for conditional water rights to demonstrate what might be described as "pre-decree diligence." [[48]](#footnote-49)48 This broader inquiry enables water courts to consider many issues previously deemed irrelevant when issuing a conditional water right.

The first case to validate the use of section 305(9)(b) beyond preventing economic speculation was *Southeastern* ***Colorado*** *Water Conservancy Dist. v. City of Florence,* [[49]](#footnote-50)49 which held that an applicant for a conditional water right must show that unappropriated water *is* available and *will* be diverted. This is not unlike the law in most other western "prior appropriation" states, which often requires permit applicants to demonstrate available unappropriated water. [[50]](#footnote-51)50 The court then elevated the "can and will" doctrine to make it the primary statutory determinant in the issuance of conditional decrees. In a 1990 case, *FWS Land & Cattle* ***Co****. v. Division of Wildlife,* [[51]](#footnote-52)51 the ***Colorado*** Supreme Court applied the doctrine to project permitting, **[\*956]** and denied a conditional decree when it found that an applicant would not be able to obtain necessary land use permits for water storage. Prior to the "can and will" doctrine, conditional water rights were decreed without such inquiry, thereby allowing an applicant time to overcome such procedural requirements without jeopardizing priority. [[52]](#footnote-53)52

In *Public Service* ***Co****. of* ***Colorado*** *v. Board of Water Works of Pueblo,* ***Colorado*** [[53]](#footnote-54)53 *("P.S.* ***Co****."),* decided in 1992, the ***Colorado*** Supreme Court exhibited a preference for "can and will" over traditional objections to conditional rights by denying an application for a conditional right to exchange water due to the applicant's lack of intent to build a reservoir (for which a conditional storage decree already existed). Instead of using section 305(9)(b) as the basis for its decision, the *P.S.* ***Co****.* court could have relied on either of two established legal doctrines to deny the decree, lack of diligence or the original *Vidler* anti-speculation doctrine. Yet, in relying on "can and will," the court once again strengthened the doctrine's applicability.

Most recently, in *Gibbs v. Wolf Land Company,* [[54]](#footnote-55)54 the ***Colorado*** Supreme Court qualified the seemingly rigid development of the "can and will" doctrine of prior cases and allowed for more flexible judicial interpretation. The *Gibbs* court distinguished *FWS* and allowed an applicant to rely on a "potential right of private condemnation in satisfying the can and will requirement unless the record clearly indicates that there are no circumstances under which the applicant may obtain access to the property necessary to finalize the conditionally decreed right." [[55]](#footnote-56)55 *Gibbs* demonstrates that while "can and will" has certainly broadened the permissible inquiry a water court will make when considering issuing a conditional decree, the doctrine may really amount to no more than a prudent "legal impossibility" test.

**[\*957]** A. *The Florence Decision: Applicants Must Demonstrate Water Availability*

*Southeastern Water Conservancy Dist. v. City of Florence* marked the emergence of a "new battleground for parties adjudicating, or opposing the adjudication of, new conditional water rights." [[56]](#footnote-57)56 In *Florence,* the ***Colorado*** Supreme Court overturned the award of a conditional right to divert 100 cubic feet per second ("c.f.s.") from the over-appropriated Arkansas ***River***. [[57]](#footnote-58)57 Expert testimony demonstrated that the right might be in priority "approximately once every 25 years" (under flood conditions). [[58]](#footnote-59)58 However, objectors to the decree succeeded in arguing that section 305(9)(b) precludes the issuance of a conditional right "unless it is found that there is or will be water available for diversion and that the applicants *will* divert that water." [[59]](#footnote-60)59

As recently as *Vidler,* the ***Colorado*** Supreme Court had affirmed that "[a]n actual, certain availability, or of a showing of good faith belief in the availability, of unappropriated water is not a prerequisite for an award of a *conditional* right to waters from surface streams." [[60]](#footnote-61)60 Specifically, the *Vidler* court noted that although a stream may be fully appropriated prior to issuance of a conditional right, "water may still be available for appropriation from the stream's overflow." [[61]](#footnote-62)61 However, *Florence* discredited this language, noting that *Vidler* "was decided before the General Assembly adopted section 305(9)(b)." [[62]](#footnote-63)62 In so doing, the *Florence* court established that **[\*958]** the "can and will" requirement is not simply equivalent to *Vidler's* anti-speculation holding; it is necessarily somewhat broader. [[63]](#footnote-64)63

*Florence* left unanswered many questions concerning exactly what showing an applicant must make regarding the availability of water for appropriation in order to secure a conditional decree under section 305(9)(b). A broad reading of the holding would preclude the issuance of a conditional right on any "fully appropriated" stream. Such an interpretation would mandate denial of any additional conditional water rights on many of the major ***Colorado*** ***river*** systems. Another question left open by *Florence* is whether an assessment of the availability of water for appropriation should encompass *all* existing water rights, *especially the numerous conditional rights which may or may not ever be exercised.* [[64]](#footnote-65)64

B. *The FWS Decision: "Can and Will" an Applicant Obtain Necessary Permitting?*

In *FWS Land & Cattle* ***Co****. v. Division of Wildlife,* [[65]](#footnote-66)65 the ***Colorado*** Supreme Court, citing the *Florence* decision, held that section 305(9)(b) creates a third statutory requirement for the issuance of a conditional decree: a showing by a preponderance of the evidence that an appropriation "can and will be made absolute." [[66]](#footnote-67)66 The decision marked the emergence of the "can and will" doctrine as the primary determinant of conditional rights. *FWS* broadened the interpretation of section 305(9)(b) to require an applicant to demonstrate that an indeterminate number of hurdles (regulatory, legal, economic, engineering, etc.) "can and will" be surmounted.

In *FWS,* a conditional decree was denied to FWS Land & Cattle Company by the water court on the ground that it "could not meet the requirements for a conditional storage right at that time." [[67]](#footnote-68)67 FWS sought a conditional right to store and use water in two **[\*959]** interconnected lakes for "hydroelectric power generation, . . . recreation and piscatorial purposes." [[68]](#footnote-69)68 The State of ***Colorado*** through the Division of Wildlife and the State Board of Land Commissioners held title to ninety percent of the underlying land and claimed that a conditional decree should not be granted to FWS because it "did not have and could not obtain" any rights to use the land for water storage. [[69]](#footnote-70)69 FWS argued that it had either a "prescriptive easement, a license coupled with an interest, or an easement by necessity . . . [giving it the] . . . legal right to expand the capacity of its usage of the lakes." [[70]](#footnote-71)70 The *FWS* court denied a conditional decree, holding that "FWS must be able to establish that . . . the project can and will be completed. . . . The ownership of and an applicant's right of access to a reservoir site are appropriate elements to be considered in the determination of whether a storage project will be completed." [[71]](#footnote-72)71 *FWS* has since been interpreted by the ***Colorado*** Supreme Court as mandating denial of a conditional decree when "under no circumstances" can an applicant obtain use of the land necessary to finalize a conditional decree. [[72]](#footnote-73)72

The ***Colorado*** Supreme Court's interpretation of the "can and will" doctrine in *FWS* further modified the law surrounding section 305(9)(b). Under *FWS,* a conditional decree may be denied if an applicant cannot prove by a preponderance of the evidence that *the right to use necessary land will be acquired.* This reasoning can be (and has been) extended to all sorts of permitting. [[73]](#footnote-74)73 Objectors to conditional decrees can now argue that applicants must show what permitting is necessary, and prove by a preponderance of the evidence that it "can and will" be obtained.

**[\*960]** C. *The* P.S. ***Co***. *Decision: A Preference for "Can and Will" Over Traditional Bases for Denying Conditional Water Rights in* ***Colorado****?*

The *P.S.* ***Co****.* decision [[74]](#footnote-75)74 illustrates the continued growth of the "can and will" doctrine as a limit on many conditional decrees. *P.S.* ***Co****.* involved complex applications for a series of changes and exchanges of conditional rights. In 1984, P.S. ***Co***.'s application was granted for a modification of conditional water rights from irrigation to direct application and storage for the generation of hydroelectric power at a proposed "Southeast Plant" to be constructed in southeastern ***Colorado***. [[75]](#footnote-76)75 In the meantime, P.S. ***Co***. would continue to use the water for agricultural purposes. [[76]](#footnote-77)76 In 1987, after indefinitely postponing construction of the Southeast Plant, P.S. ***Co***. sought to exchange the water for use at another power plant. [[77]](#footnote-78)77 The ***Colorado*** Supreme Court affirmed the water court's denial of a conditional right of exchange, holding that there was no evidence that P.S. ***Co***.'s 1984 conditional decree would ever become absolute. [[78]](#footnote-79)78 The ***Colorado*** Supreme Court then refused to condition a new conditional decree on another one which may never become absolute. [[79]](#footnote-80)79

Objectors to P.S. ***Co***.'s second application argued successfully that the "can and will" provision of section 305(9)(b) required the ***Colorado*** Supreme Court to assess the actual likelihood that the proposed Southeast Plant would come into existence. [[80]](#footnote-81)80 The ***Colorado*** Supreme Court held that P.S. ***Co***. had failed to prove by a preponderance of the evidence under section 305(9)(b) that construction of the Southeast Plant reservoir, upon which the first decree was conditioned, was economically feasible. [[81]](#footnote-82)81 The court based this determination on its findings that "no plans [had] been **[\*961]** prepared for the Southeast reservoir" and that P.S. ***Co***. simply had no present intent to construct it. [[82]](#footnote-83)82

One can argue that in *P.S.* ***Co****.,* the ***Colorado*** Supreme Court utilized two established legal mechanisms within the purview of the "can and will" requirement: the *Vidler* anti-speculation doctrine [[83]](#footnote-84)83 and the diligence requirement for the continuance of a conditional right. [[84]](#footnote-85)84 First, P.S. ***Co***.'s intent was certainly speculative under *Vidler.* P.S. ***Co***.'s own testimony about its long range plans revealed that it was not currently "disbursing or budgeting any funds towards construction" of the reservoir and that "the plant may be built within the next ten to twenty years . . . but the decision will be based on future developments." [[85]](#footnote-86)85 P.S. ***Co***. overtly sought to tie up large amounts of Arkansas ***River*** water in a conditional right which *probably* would never become absolute, and this is exactly what the *Vidler* holding prohibits.

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), P.S. ***Co***. had certainly not shown due diligence in moving towards appropriation since its 1984 conditional decree was awarded. Although the 1987 proceeding was not a diligence proceeding under section 301(4)(a), [[86]](#footnote-87)86 "P.S. ***Co***.'s application for conditional rights of exchange necessitated an earlier inquiry into P.S. ***Co***.'s continuing intent." [[87]](#footnote-88)87 The purpose of requiring showings of due diligence every six years is to assess continual diligence over the statutory period, not merely at the exact time of the diligence proceeding. [[88]](#footnote-89)88 There seems to be little doubt that the ***Colorado*** Supreme Court could have denied P.S. ***Co***.'s 1987 application on the basis of P.S. ***Co***.'s lack of diligent progress which, by P.S. ***Co***.'s own testimony, [[89]](#footnote-90)89 would have continued beyond its next required showing of diligence.

In choosing to invalidate P.S. ***Co***.'s claim under the "can and will" requirement of section 305(9)(b), instead of on the adequate grounds provided by both *Vidler* and requirements of diligence, the *P.S.* ***Co****.* court widened the reach of the "can and will" doctrine and established its use as a catch-all objection to large projects. Water **[\*962]** courts now have a broader window through which to evaluate proposed uses.

D. *The* Gibbs *Decision: A Legal Impossibility Test*

*Gibbs v. Wolf Land* ***Co****.,* [[90]](#footnote-91)90 the most recent ***Colorado*** Supreme Court decision interpreting section 305(9)(b), somewhat limited the showing required by *FWS.* In *Gibbs,* a property owner filed an application for a conditional right for diversion of tributary water from a well located on a neighbor's property. [[91]](#footnote-92)91 The water court held that a property owner could rely on a potential right of private condemnation to satisfy the "can and will" requirement regarding her ability to obtain access to land required for a pipeline to transport the water. [[92]](#footnote-93)92 The *Gibbs* court affirmed, holding that *FWS* did not require her to show a "right of access to the necessary parcels of property prior to obtaining a conditional decree." [[93]](#footnote-94)93 In order for the applicant to satisfy "her burden of establishing by a preponderance of the evidence that she [could] and [would] be able to develop the decreed water right," she could "rely on either [a] previously granted easement or the right of private condemnation." [[94]](#footnote-95)94 Thus, *Gibbs,* in applying section 305(9)(b) to land access issues, retained the scope of the "can and will" doctrine's broad inquiry enunciated in previous cases while limiting the preponderance standard to a legal impossibility test. [[95]](#footnote-96)95

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). APPLYING THE "CAN AND WILL" DOCTRINE: LITIGATION OVER THE UNION PARK PROJECT

Ongoing litigation over the proposed Union Park Project (the "Project") in Gunnison County, ***Colorado***, exemplifies the practical application of the "can and will" doctrine to a large modern hydroelectric project. The proposed Project is a "transbasin water **[\*963]** diversion project, including integral hydropower features" to benefit growing communities on the ***Colorado*** Front Range. [[96]](#footnote-97)96 It involves the construction of a large new storage facility, the Union Park Reservoir, to serve as the upper end of a pumped storage facility in conjunction with the existing Taylor Park Reservoir. [[97]](#footnote-98)97 The proposed new reservoir would flood a basin "approximately four miles long and slightly more than two miles wide at its widest point." [[98]](#footnote-99)98 The application for a preliminary hydroelectric permit from the Federal Energy Regulatory Commission notes that "the type of dam . . . will depend on further evaluation of topography, geology, availability of materials, spillway requirements, environmental considerations, and economics . . . [and that] several alternate arrangements [are] being considered" for the entire project. [[99]](#footnote-100)99 The complexity of the Project illuminates the significance of the showing required by the "can and will" requirement.

Applicants for water rights for the Project, several municipalities along the ***Colorado*** Front Range, were confronted with the force of the "can and will" requirement when objectors to the rights raised section 305(9)(b) issues including permitting and water availability. Resolution of these issues demonstrates how the broadened inquiry allowed under "can and will" has empowered the ***Colorado*** judiciary to address heretofore unconsidered issues of the public interest when adjudicating conditional water rights. [[100]](#footnote-101)100

A. *Permitting at Union Park Under the "Can and Will" Doctrine*

A complex network of federal, state, and local regulatory requirements exist for proposed water projects in ***Colorado***. [[101]](#footnote-102)101 **[\*964]** Requirements may vary according to the type of undertaking, although some are applicable to almost all types of projects. [[102]](#footnote-103)102 As noted above, the *FWS* and *Gibbs* decisions bring regulatory permitting within the bounds of the "can and will" inquiry. [[103]](#footnote-104)103

Compliance with the National Environmental Policy Act of 1969 [[104]](#footnote-105)104 ("NEPA") is the major determinant of the time and effort required to obtain government approvals for water development projects in ***Colorado***. [[105]](#footnote-106)105 Under the provisions of NEPA, a minimum of three federal agencies (the Army Corps of Engineers, the Fish and Wildlife Service, and the Environmental Protection Agency) play significant roles in project permitting. [[106]](#footnote-107)106 Permits or approvals are also required from at least three state agencies, the Water Quality Control Commission, [[107]](#footnote-108)107 Air Pollution Control Division, [[108]](#footnote-109)108 and the State Historical Society. [[109]](#footnote-110)109 Furthermore, county land use controls are often applicable to water resources in ***Colorado***. [[110]](#footnote-111)110 The major requirement for large projects (as mandated by NEPA) is the preparation of an Environmental Impact Statement ("EIS"), although small projects may only require an Environmental Assessment ("EA"). Preparation of a full EIS can be "extremely time consuming and costly." [[111]](#footnote-112)111 Its purpose is the coordination of federal decision-making regarding the environmental impacts of a given project (which must have several alternative designs, including a "no-action" alternative). [[112]](#footnote-113)112 The "time frame for obtaining all government approvals," if a full EIS is required, "is likely to be *two years or more."* [[113]](#footnote-114)113

**[\*965]** The Union Park Project requires eleven federal, nine state, and one county permit. [[114]](#footnote-115)114 Objectors to Arapahoe County's application for conditional water rights raised "can and will" arguments regarding this necessary permitting. [[115]](#footnote-116)115 Arapahoe County made a motion under [***Colorado*** *Rule of Civil Procedure 56(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63CY-K261-DYDC-J0NJ-00000-00&context=1516831) for a clarification of the necessary evidentiary showing under section 305(9)(b) regarding regulatory permitting. [[116]](#footnote-117)116 Opponents to the water rights argued that under *FWS,* an applicant must prove by a preponderance of the evidence that all permits "can and will" be obtained, and that "the water court must consider all relevant evidence pertaining to whether the applicant can and will complete its project." [[117]](#footnote-118)117 Applicants replied that first, "the 'can and will' doctrine does not require the adjudication of shadow permits," [[118]](#footnote-119)118 and [*second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), that "absent a showing of legal impossibility, [305(9)(b)] requires only a limited showing, or no showing at all, of applicants' legal authority to obtain and to hold interests in land." [[119]](#footnote-120)119 Noting the "precious little case law available," [[120]](#footnote-121)120 the water court held that the burden of proof should be allocated as follows:

Opposers will bear the initial burden of going forward with evidence to establish a prima facie case of any legal impediments and factual inabilities which inhibit [applicants'] ability to obtain necessary permits, approvals and land interests to **[\*966]** complete this project. If the Opposers establish a prima facie case in this regard, *then* [applicant] shall have the burden *in rebuttal* to demonstrate by a preponderance of the evidence that it is reasonably certain that it can overcome the claimed legal impediments or factual inabilities, or that it is exempt from compliance with the same, or that it has a viable alternative which will allow it to complete its proposed project without said compliance. [[121]](#footnote-122)121

Judge Robert A. Brown's solution to the dilemma presented by theapplication of the "can and will" doctrine to permitting was a compromise of the parties' arguments. It allows a court to consider each permitting issue raised by an opposer in some detail, yet avoids preempting the role of the federal and state permitting agencies themselves. Such a judicial role promotes the laudable goal of "weeding out" such impossible projects *before* the issuance of conditional water decrees, which, in ***Colorado***, are vested property rights.

B. *Water Availability for the Union Park Project: Developing* Florence

The question left open by the *Florence* decision -- what showing must an applicant make as to water availability before issuance of a conditional right -- was addressed in the context of the Union Park litigation. On appeal to the ***Colorado*** Supreme Court, Arapahoe County argued that senior conditional decrees need not be considered in assessing water availability under the "can and will" standard. [[122]](#footnote-123)122 In response, objectors argued that Judge Brown's consideration of existing conditional decrees in assessing water availability was proper, and that Arapahoe's position "undermines the 'can and will' doctrine by neglecting an important constraint on the availability of water to the proposed project; is inconsistent with **[\*967]** the statutory requirement that vested conditional water rights be protected against out-of-priority diversions; requires the water court to disregard findings in existing decrees that senior conditional decrees 'can and will' be developed; and is contrary to the principle of maximum utilization, because it encourages speculation, promotes wasted investment, and leads to inefficient water rights administration." [[123]](#footnote-124)123

If Judge Brown's holding that the *Florence* [[124]](#footnote-125)124 analysis properly includes consideration of existing conditional decrees senior to the water rights claimed by an applicant, [[125]](#footnote-126)125 water judges will have added ability to consider the propriety of a particular project in light of other projects whose conditional decrees, also issued under section 305(9)(b), "can and will" be made absolute. Failure to consider existing conditional decrees would be tantamount to disregarding adjudicated property rights. The consideration of senior conditional rights by water courts is comparable to the power of most water permitting agencies in other Western states. [[126]](#footnote-127)126

**[\*968]** V. THE FUTURE OF THE "CAN AND WILL" DOCTRINE: MOVING TOWARDS PUBLIC INTEREST REVIEW?

As the case law discussed above illustrates, the "can and will" doctrine has substantially broadened the scope of the permissible inquiry a water court can make when adjudicating a conditional water right. As these new issues have become clearer, the doctrine has begun to resemble substantially the inquiry made by permitting agencies in neighboring western states which adhere to the "Wyoming system" of administrative water allocation. These systems mandate an even broader review before issuing a permit, which is a property interest somewhat less than the vested right created by a conditional right in ***Colorado***. [[127]](#footnote-128)127 Thus, the "can and will" doctrine may signify an organic move by the judiciary towards a permit system. Although many may feel "uncomfortable following the court down the path to a permitting process," [[128]](#footnote-129)128 the "can and will" doctrine is a prudent accommodation of ***Colorado***'s judicial system of water rights administration with much needed broader review available under most permit systems. Hence, "can and will" may successfully prevent dilemmas like Two Forks [[129]](#footnote-130)129 while leaving the door open for prudent, practicable water development projects which may become more necessary in the future.

**[\*969]** A. *Comparing the "Can and Will" Standard to Permit Limitations in Other Western States*

Permitting systems have been adopted in all of the western prior appropriation states except ***Colorado***. [[130]](#footnote-131)130 These systems differ from ***Colorado***'s judicial system of water rights administration in substance as well as the fact that decision-making is delegated and coordinated within a state administrative agency. As the first permit system, Wyoming's method of administering water rights was emulated by many other western states, and still serves as a representative example of such systems. [[131]](#footnote-132)131 The Wyoming Constitution delegates responsibility for the administration of water rights to a Board of Control, presided over by the State Engineer. [[132]](#footnote-133)132 The Wyoming Constitution also states that "[n]o appropriation shall be denied *except when such denial is demanded by the public interests.*" [[133]](#footnote-134)133 In satisfaction of this constitutional mandate, the Wyoming legislature enacted statutory permitting requirements which include broad criteria which may be a basis for administrative denial of a permit to appropriate, and similarly broad terms for cancellation of the same permit if it is found to contradict the public interest. For example, the Wyoming state engineer is given a statutory mandate to:

Approve all applications [for permits] . . . which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. *But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.* [[134]](#footnote-135)134 **[\*970]** Water permits may also be conditioned in time (not to exceed five years) and canceled upon default with permit requirements. [[135]](#footnote-136)135

The "can and will" doctrine can be seen as a move towards such criteria by the ***Colorado*** Supreme Court as case law under the "can and will" statute parallels these permitting requirements to a certain extent. For instance, *Florence* [[136]](#footnote-137)136 mandates denial of a conditional water right where it cannot be shown that unappropriated water is available. By allowing water courts to look at threshold regulatory-environmental permitting issues as part of the "can and will" inquiry, *FWS* [[137]](#footnote-138)137 and *Gibbs* [[138]](#footnote-139)138 also might be viewed as a rudimentary public interest review. However, ***Colorado***'s system remains uniquely judicial, especially by its creation of vested property rights when conditional decrees are granted. There is no parallel method to temporally limit conditional rights in ***Colorado*** beyond statutory diligence proceedings. [[139]](#footnote-140)139 However, by combining ***Colorado***'s judicial system of water rights administration with section 305(9)(b)'s infusion of permitting concepts, ***Colorado*** may be better suited to **[\*971]** accommodate future water planning than it was before the expansion of the "can and will" doctrine.

B. *Lessons from Two Forks Dam*

In 1989, an Environmental Protection Agency ("EPA") decision to veto a section 404 permit [[140]](#footnote-141)140 for the proposed Two Forks Dam "dash[ed] longstanding plans for the largest non-federal water project in the West and end[ed] a political journey as circuitous as the South Platte ***River***, which the City of Denver wanted to block and pool thirty miles upstream to supply water for its burgeoning suburbs." [[141]](#footnote-142)141 "[P]lans for the 1.1 million acre-foot dam . . . would [have] directly affect[ed] a 30-mile stretch of the South Platte known nationally for thriving rainbow and brown trout and used widely for mountain hiking, camping, canoeing, picnicking and scenic viewing." [[142]](#footnote-143)142

"Hundreds of acres of the ***river***" would have been flooded "removing the habitat for 38,000 pounds of trout and eliminating 90 percent of stream fishing and 77 percent of boating." [[143]](#footnote-144)143 About $ 40 million dollars was spent on the EIS for Two Forks; it resulted in the compilation of hundreds of thousands of pages of material. [[144]](#footnote-145)144

Properly applied, the "can and will" doctrine stands to help prevent fiascos like Two Forks. Because the environmental impact from Two Forks would have been so extensive, a water judge could have found that there were, under the *FWS/Gibbs* analysis, legal impediments to permitting the project, and as a result deny conditional rights. Such a decision would still be appealable to the ***Colorado*** Supreme Court.

However, the Two Forks EIS did illuminate that if the population along ***Colorado***'s Front Range continues to grow, additional municipal water will be needed. [[145]](#footnote-146)145 The analysis assumed that the **[\*972]** population of the Denver Metropolitan Area [[146]](#footnote-147)146 would grow from 2,019,600 in 1990 to between 3.5 and almost 4 million people by 2035. [[147]](#footnote-148)147 Under such an assumption, the region would demand an additional 166,000 acre feet of water per year beyond current sources. [[148]](#footnote-149)148 Thus, if the metropolitan region continues to grow, additional sources will be needed. The judicial discretion established by the "can and will" doctrine's broad inquiry does not extinguish the possibility that a prudent and practicable future project which accommodates these needs may be constructed. Indeed, if municipal water supplies are dangerously low in the future, one can be certain that circumstances will dictate that water "can and will" be found and appropriate. But, Two Forks was neither prudent nor practicable and, as such, could possibly have been thwarted at the outset by applying the modern "can and will" requirement.

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

The "can and will" doctrine is filling a void. No longer can ***Colorado*** afford to dole out property rights in water without some consideration of the propriety of a particular use or plan. While ***Colorado*** is unlikely to establish an administrative water permitting system anytime soon, broader inquiry under the "can and will" statute enables ***Colorado***'s water courts to consider water issues beyond the context of two litigants fighting over a disputed piece of property. The doctrine enables water decisions to emerge from isolated litigation, more overtly considering effects on other water rights holders and even, to a certain extent, the public at large. As the twenty-first century nears, the "can and will" doctrine recognizes that "western water policy is changing in fundamental ways, in spite of the legacy of the prior appropriation doctrine." [[149]](#footnote-150)149 The late Wallace Stegner's description of the dilemma facing early settlers connotes the growth of the "can and will" doctrine as an element of ***Colorado*** water law:

**[\*973]** Aridity.

And what do you do about aridity if you are a nation accustomed to plenty and impatient of restrictions and led westward by pillars of fire and cloud? You may deny it for a while. Then you must either try to engineer it out of existence or *adapt to it.* [[150]](#footnote-151)150

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1. 1 Wallace Stegner, *Living Dry, in* THE AMERICAN WEST AS LIVING SPACE (1987), *reprinted in* WALLACE STEGNER, WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST 62 (1992). [↑](#footnote-ref-2)
2. 2 1 GEORGE VRANESH, ***COLORADO*** WATER LAW § 2.3 (1987). [↑](#footnote-ref-3)
3. 3 *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 967 (1993). For instance, the Wilderness Act, [*16 U.S.C. §§ 1131*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S7X-DBF2-D6RV-H4B8-00000-00&context=1516831)-1136 (1988), serves to protect certain remaining areas of wilderness from degradation from many uses including mineral extraction, timber harvesting, and motor vehicle recreation. COGGINS ET AL., *supra,* at 1017-21. [↑](#footnote-ref-4)
4. 4 *See infra* Part II.B to II.C. The ***Colorado*** Supreme Court began denying applications for conditional water rights due to their speculative nature more frequently in the 1970's. *See* [*Bunger v. Uncompahgre Valley Water Users Ass'n, 557 P. 2d 389, 394 (****Colo.*** *1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [***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) After the *Vidler* decision in 1979, the ***Colorado*** legislature amended the 1969 Water Act to include a prohibition against speculation. [***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) (1990). [↑](#footnote-ref-5)
5. 5 [***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) (1990):

   No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time. [↑](#footnote-ref-6)
6. 6 *See infra* Part III.A to III.D. [↑](#footnote-ref-7)
7. 7 *See infra* Part II.A. [↑](#footnote-ref-8)
8. 8 *See infra* notes 25-36 and accompanying text. [↑](#footnote-ref-9)
9. 9 [*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) *see also infra* notes 25-30 and accompanying text. [↑](#footnote-ref-10)
10. 10 *See infra* Part II.C. [↑](#footnote-ref-11)
11. 11The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." ***COLO.*** CONST. art. XVI, § 6; *see also* David C. Hallford, *Developments in Conditional Water Rights Law,* 14 ***COLO.*** LAW. 353 (1985). [↑](#footnote-ref-12)
12. 12 [***COLO.*** *REV. STAT. § 37-92-103(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1990). [↑](#footnote-ref-13)
13. 13 1 VRANESH, *supra* note 2, § 3.6. The relation back concept is codified in [***COLO.*** *REV. STAT. § 37-92-305(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (1990):

    In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence. [↑](#footnote-ref-14)
14. 14 [***COLO.*** *REV. STAT. § 37-92-301(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (1990) requires filings of applications for findings of "reasonable diligence" with the water clerk every six years during the period in which one seeks to keep a conditional right alive. [↑](#footnote-ref-15)
15. 15 1 VRANESH, *supra* note 2, § 3.6. [↑](#footnote-ref-16)
16. 16 [*Elk-Rifle Water* ***Co****. v. Templeton, 484 P.2d 1211, 1215 (****Colo.*** *1971).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1VM0-003D-906P-00000-00&context=1516831) [↑](#footnote-ref-17)
17. 17 *Id.* [↑](#footnote-ref-18)
18. 18 [*Fruitland Irrigation* ***Co****. v. Kruemling, 162 P. 161, 162 (****Colo.*** *1916).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0KD0-0040-02FC-00000-00&context=1516831) [↑](#footnote-ref-19)
19. 19 ***Taussig v. Moffat Tunnel Water & Dev. Co., 106 P.2d 363 (Colo. 1940).*** [↑](#footnote-ref-20)
20. 20 [***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) [↑](#footnote-ref-21)
21. 21 [*96 P.2d 836 (****Colo.*** *1939).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-22)
22. 22 *Id.* [↑](#footnote-ref-23)
23. 23 *See* [*Fellhauer v. People, 447 P.2d 986, 994 (****Colo.*** *1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831) (emphasis added):

    It is implicit in [the ***Colorado*** Constitution] that, along with vested rights, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of maximum utilization and how constitutionally that doctrine can be integrated into the law of vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though of violated, principle that *the right to water does not give the right to waste it.*

    *See also* [*State Eng'r v. Castle Meadows, Inc., 856 P.2d 496, 505 (****Colo.*** *1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-08T0-003D-94P1-00000-00&context=1516831) (maximum utilization requires that "water resources are used in harmony with the protection of other valuable state resources"). [↑](#footnote-ref-24)
24. 24 *See* [*Vidler, 594 P.2d at 568;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [*Rocky Mountain Power* ***Co****. v.* ***Colorado******River*** *Water Conservation Dist., 646 P.2d 383, 389 (****Colo.*** *1982);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-18G0-003D-916Y-00000-00&context=1516831) [*Southeastern* ***Colorado*** *Water Conservancy Dist. v. Huston, 593 P. 2d 1347, 1354 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F70-003D-9292-00000-00&context=1516831) [↑](#footnote-ref-25)
25. 25 [*557 P.2d 389 (****Colo.*** *1976).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [↑](#footnote-ref-26)
26. 26 [*Id. at 393.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [↑](#footnote-ref-27)
27. 27 [*Id. at 394.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [↑](#footnote-ref-28)
28. 28 [*Id. at 391.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [↑](#footnote-ref-29)
29. 29 [*Id. at 394.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1JR0-003D-9358-00000-00&context=1516831) [↑](#footnote-ref-30)
30. 30 *Id.* [↑](#footnote-ref-31)
31. 31 [*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) [↑](#footnote-ref-32)
32. 32 [*Id. at 567.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-33)
33. 33 *Id.* [↑](#footnote-ref-34)
34. 34 *Id.* [↑](#footnote-ref-35)
35. 35 *Id.* [↑](#footnote-ref-36)
36. 36 [*Id. at 568.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-37)
37. 37 [***COLO.*** *REV. STAT. §§ 37-92-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FM-00000-00&context=1516831) to -602 (1990 & Supp. 1993). [↑](#footnote-ref-38)
38. 38 *Id.* § 37-92-103(3)(a) (1990) (emphasis added). The law defines two types of evidence of speculation:

    (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.

    *Id.* [↑](#footnote-ref-39)
39. 39 *See* [*Jaeger v.* ***Colorado*** *Ground Water Comm'n, 746 P.2d 515, 522 (****Colo.*** *1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-10B0-003D-94X4-00000-00&context=1516831) (recognizing codification of *Vidler* in [***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)). [↑](#footnote-ref-40)
40. 40 [***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) (1990). [↑](#footnote-ref-41)
41. 41 *See* Robert V. Trout, *"Can and Will": The New Water Rights Battleground,* 20 ***COLO.*** LAW. 727 (1991). In September 1984, the ***Colorado*** Supreme Court issued its decision in *Southeastern* ***Colorado*** *Water Conservancy Dist. v. City of Florence.* While not necessarily apparent at the time, *Florence* in retrospect was the beginning of a new battleground for parties adjudicating, or opposing adjudication of, new conditional water rights for controversial (and usually large) water development projects. *Id.* (footnote omitted). [↑](#footnote-ref-42)
42. 42 [***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) (emphasis added) (§ 305 sets "[s]tandards with respect to rulings of the referee and decisions of the water judge"). [↑](#footnote-ref-43)
43. 43 *See infra* parts III.A to III.D. [↑](#footnote-ref-44)
44. 44 *Hearing on S.B. 481 Before the* ***Colorado*** *Senate Comm. on Agriculture, Natural Resources and Energy,* March 13 & 15, 1979 [hereinafter *March Hearing*] (committee spent less than four hours in consideration of the whole bill); *Hearing on S.B. 481 Before the* ***Colorado*** *House Comm. on Agriculture, Livestock, and Natural Resources,* May 7-8, 1979 [hereinafter *May Hearing*] (committee spent less than two hours). [↑](#footnote-ref-45)
45. 45 *March Hearing, supra* note 44; *May Hearing, supra* note 44. [↑](#footnote-ref-46)
46. 46 *May Hearing, supra* note 44. [↑](#footnote-ref-47)
47. 47 The cases selected for discussion are notable for their powerful interpretations of the "can and will" doctrine. Other cases discussing the "can and will" doctrine include: City of Thornton v. City of Fort Collins, 830P.2d 915 (***Colo.*** 1992); [*Fox v. Division Eng'r for Water Div. 5, 810 P.2d 644 (****Colo.*** *1991);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0MN0-003D-929G-00000-00&context=1516831) [*May v. United States, 756 P.2d 362 (****Colo.*** *1988);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0YG0-003D-94RF-00000-00&context=1516831) [*City & County of Denver v.* ***Colorado******River*** *Water Conservation Dist., 696 P.2d 730 (****Colo.*** *1985).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14B0-003D-90F7-00000-00&context=1516831) [↑](#footnote-ref-48)
48. 48***Colorado*** has long required owners or users of conditional water rights to file applications for findings of reasonable diligence at specified times in order to maintain the conditional right." [*Upper Gunnison* ***River*** *Water Conservancy Dist. v. Board of County Comm'rs, 841 P.2d 1061, 1064-65 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0D30-003D-90B1-00000-00&context=1516831) The "can and will" requirement is similar to the diligence inquiry in which "an applicant . . . must prove 'an intention to use the water, coupled with concrete action amounting to diligent efforts to finalize the intended appropriation.'" [*Talco, Ltd. v. Danielson, 769 P.2d 468, 472 (****Colo.*** *1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0XG0-003D-94JP-00000-00&context=1516831) (quoting [*Orchard Mesa Irrigation Dist. v. City & County of Denver, 511 P.2d 25, 28 (****Colo.*** *1973)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1R80-003D-94FD-00000-00&context=1516831) [↑](#footnote-ref-49)
49. 49 [*688 P.2d 715 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-50)
50. 50 *See infra* Part V.A. [↑](#footnote-ref-51)
51. 51 [*795 P.2d 837 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-52)
52. 52 *See generally* 1 VRANESH, *supra* note 2, § 3.2 for a discussion of conditional water rights. [↑](#footnote-ref-53)
53. 53 ***831 P.2d 470 (Colo. 1992).*** [↑](#footnote-ref-54)
54. 54 [*856 P.2d 798 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-55)
55. 55 [*Id. at 803.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 Trout, *supra* note 41, at 727. [↑](#footnote-ref-57)
57. 57 [*Florence, 688 P.2d at 716.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) The City of Florence, the Town of Coal Creek, and the Town of Williamsburg had been decreed a conditional right to divert 100 c.f.s. from the Arkansas ***River***. In appealing the water court decision, the Southeastern ***Colorado*** Water Conservancy District argued that "the water court erred in decreeing the conditional right absent a finding that water can and will be diverted from the already over-appropriated Arkansas ***River***." *Id.* [↑](#footnote-ref-58)
58. 58 *Id.* [↑](#footnote-ref-59)
59. 59 [*Id. at 717*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-60)
60. 60 [***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566, 569 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) The ***Colorado*** Supreme Court further noted that "an applicant for a conditional decree may know that at the time he applies no water is available for appropriation . . . yet he may anticipate that by the time his proposed diversion project is completed unappropriated water will have become available." *Id.* [↑](#footnote-ref-61)
61. 61 *Id.* [↑](#footnote-ref-62)
62. 62 [*Florence, 688 P.2d at 717.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-63)
63. 63 The *Florence* opinion noted that the applicants claimed the future diversion was "necessary to serve their anticipated population growth" although opposition was made to the amount claimed. [*Id. at 716.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-64)
64. 64 This issue has recently been addressed in litigation over the proposed Union Park Project in ***Colorado***'s Gunnison Basin. *See infra* Part IV.B. [↑](#footnote-ref-65)
65. 65 [*795 P.2d 837 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-66)
66. 66 [*Id. at 841.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) "The issuance of a conditional decree is dependent on a showing of intent to appropriate, proof that an overt first step towards completing that appropriation has been made, and pursuant to section 37-92-305(9)(b), a showing that the appropriation can and will be made absolute." *Id.* [↑](#footnote-ref-67)
67. 67 [*Id. at 839.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-68)
68. 68 [*Id. at 838.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-69)
69. 69 [*Id. at 839.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-70)
70. 70 [*Id. at 840.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 *Id.* [↑](#footnote-ref-72)
72. 72 [*Gibbs v. Wolf Land* ***Co****., 856 P.2d 798, 802-03 (****Colo.*** *1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) (distinguishing *FWS).* [↑](#footnote-ref-73)
73. 73 *See infra* Part IV.A. [↑](#footnote-ref-74)
74. 74 ***Public Service Co. v. Board of Water Works, 831 P.2d 470 (Colo. 1992).*** [↑](#footnote-ref-75)
75. 75 ***Id. at 473*** (change decree granted in *In re* Water Rights of Certain Shareholders in the Las Animas Consolidated Canal ***Co***. & the Consolidated Extension Canal ***Co***., No. 80CW52 (***Colo.*** Dist. Ct. Water Div. 2 1984)). [↑](#footnote-ref-76)
76. 76 *Id.* [↑](#footnote-ref-77)
77. 77 *Id.* (citing *In re* Water Rights of Public Serv. ***Co***., No. 85CW114 (***Colo.*** Dist. Ct. Water Div. 2 1987)). [↑](#footnote-ref-78)
78. 78 ***Id. at 478, 481-82.*** [↑](#footnote-ref-79)
79. 79 ***Id. at 476.*** [↑](#footnote-ref-80)
80. 80 ***Id. at 477.*** [↑](#footnote-ref-81)
81. 81 ***Id. at 476, 478-79.*** [↑](#footnote-ref-82)
82. 82 *Id.* [↑](#footnote-ref-83)
83. 83 *See supra* Part II.B. [↑](#footnote-ref-84)
84. 84 *See supra* Part II.A. [↑](#footnote-ref-85)
85. 85 ***Public Serv. Co., 831 P.2d at 473.*** [↑](#footnote-ref-86)
86. 86 [***COLO.*** *REV. STAT. § 37-92-301(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (1990 & Supp. 1993). [↑](#footnote-ref-87)
87. 87 ***Public Serv. Co., 831 P.2d at 477.*** [↑](#footnote-ref-88)
88. 88 *See supra* notes 14 & 19 and accompanying text. [↑](#footnote-ref-89)
89. 89 ***Public Serv. Co., 831 P.2d at 477.*** [↑](#footnote-ref-90)
90. 90 [*856 P.2d 798 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-91)
91. 91 [*Id. at 799.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-92)
92. 92 [*Id. at 801;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) *see* [***COLO.*** *REV. STAT. § 37-86-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J38W-00000-00&context=1516831) (1990). [↑](#footnote-ref-93)
93. 93 [*Gibbs, 856 P.2d at 801.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-94)
94. 94 *Id.* [↑](#footnote-ref-95)
95. 95 That is to say that the "can and will" doctrine should not inhibit issuance of a conditional decree unless it is a legal impossibility that the water will be applied to a beneficial use in the future (*e.g.,* a necessary permit cannot be obtained, under any circumstances). [↑](#footnote-ref-96)
96. 96 United States of America Before the Federal Energy Regulatory Commission, Application for Preliminary Permit: Upper Gunnison Basin Project 1-4 (Nov. 1990) (submitted by the County of Arapahoe and the Town of Parker, ***Colorado***) [hereinafter Application for Preliminary Permit]. A preliminary permit was issued for the project by the Federal Energy Regulatory Commission on March 24, 1994. *See* Order Issuing Preliminary Permit, 66 Fed. Energy Reg. Comm'n Rep. (CCH) P 61,342 (Mar. 24, 1994). [↑](#footnote-ref-97)
97. 97 Application for Preliminary Permit, *supra* note 96. [↑](#footnote-ref-98)
98. 98 *Id.* [↑](#footnote-ref-99)
99. 99 *Id.* at 1-5. [↑](#footnote-ref-100)
100. 100 This "empowerment" is not unlike the power wielded by water permitting agencies in other Western states. *See infra* Part V.A. [↑](#footnote-ref-101)
101. 101 Steve Norris, Water Project Approval in ***Colorado*** (Nov. 18, 1988), *reprinted in* Offer of Proof, Permits, and Approvals, *In re* Water Rights of the Bd. of County Comm'rs of the County of Arapahoe, Nos. 86CW226 & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Apr. 22, 1991), *consolidated on appeal* No. 92SA68. Steve Norris was the Program Director for the ***Colorado*** Joint Review Process, ***Colorado*** Department of Natural Resources. [↑](#footnote-ref-102)
102. 102 *Id.* at 1. [↑](#footnote-ref-103)
103. 103 *See supra* notes 65-73, 90-95 and accompanying text. [↑](#footnote-ref-104)
104. 104 National Environmental Policy Act of 1969, [*42 U.S.C. §§ 4321*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SHT-0722-D6RV-H24F-00000-00&context=1516831)-4361 (1988). [↑](#footnote-ref-105)
105. 105 Norris, *supra* note 101, at 1. [↑](#footnote-ref-106)
106. 106 *Id.* [↑](#footnote-ref-107)
107. 107 [***COLO.*** *REV. STAT. §§ 25-8-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:688K-76X3-CGX8-02S8-00000-00&context=1516831) to -208 (1989). [↑](#footnote-ref-108)
108. 108 *Id.* § 25-7-114 (1989). [↑](#footnote-ref-109)
109. 109 *Id.* § 24-80-406 (1988). [↑](#footnote-ref-110)
110. 110 *Id.* §§ 24-65.1-1 to -502 (1988 & Supp. 1993); *see also* Norris, *supra* note 101, at 5. [↑](#footnote-ref-111)
111. 111 *See* Norris, *supra* note 101, at 5; *see also infra* Part V.B for a discussion of the EIS required for Two Forks Dam. [↑](#footnote-ref-112)
112. 112 [*42 U.S.C. § 4332*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:68DB-9963-GXF6-80PF-00000-00&context=1516831)(c). [↑](#footnote-ref-113)
113. 113 Norris, *supra* note 101, at 2 (emphasis added). [↑](#footnote-ref-114)
114. 114 Offer of Proof, Permits, and Approvals, *In re* Water Rights of the Bd. of County Comm'rs of the County of Arapahoe, Nos. 86CW226 & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Apr. 22, 1991), *consolidated on appeal* No. 92SA68. [↑](#footnote-ref-115)
115. 115 *Id.* at Part III. Objectors included the town of Crested Butte and the High Country Citizen's Alliance ("HCCA"), a local western slope environmental group. [↑](#footnote-ref-116)
116. 116 Applicants' Motion for Determination of Questions of Law Under Rule 56(h) -- Permits, Approvals, and Land Acquisition, Nos. 86CW37, 86CW226, & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Jan. 10, 1991), *consolidated on appeal* No. 92SA68. [↑](#footnote-ref-117)
117. 117 State Response to Motions by Applicants at 2, Nos. 86CW37, 86CW226, & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Feb. 15, 1991), *consolidated on appeal* No. 92SA68. [↑](#footnote-ref-118)
118. 118Shadow permitting" occurs when a court makes permitting determinations before the appropriate regulatory agency has itself considered the particular matter. [↑](#footnote-ref-119)
119. 119 *See supra* note 117, at 2. [↑](#footnote-ref-120)
120. 120 Order re: Arapahoe's Rule 56(h) Motion -- Can and Will Test at 2, *In re* Water Rights of the City of Aurora, No. 86CW37, the County of Arapahoe, 86CW226 & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Mar. 21, 1991), *consolidated on appeal* No. 92SA68. The reader should note that this order was issued prior to the *Gibbs* decision which announced a similar requirement that an applicant demonstrate no legal impediment to ability to use necessary parcels of land. [*Gibbs v. Wolf Land* ***Co****., 856 P.2d 798 (****Colo.*** *1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0900-003D-94R7-00000-00&context=1516831) [↑](#footnote-ref-121)
121. 121 Amended Order re: Arapahoe's Rule 56(h) Motion -- Can and Will Test at 1-2, *In re* Water Rights of the City of Aurora, No. 86CW37, the County of Arapahoe, Nos. 86CW226 & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Apr. 1, 1991), *consolidated on appeal* No. 92SA68. In its original order, the court recognized that it "must be careful not to encourage 'shadow permitting,'" and that "it is not to sit as a permitting agency." *See* Order re: Arapahoe's Rule 56(h) Motion -- Can and Will Test, *supra* note 120, at 2. [↑](#footnote-ref-122)
122. 122 Applicants' Opening Brief at 14, *In re* Water Rights of the Bd. of County Comm'rs of the County of Arapahoe, No. 92SA68 (***Colo.*** Oct. 8, 1993) (appeal from the ***Colo.*** Dist. Ct. Water Div. 4, Nos. 86CW226 & 88CW178 *(consolidated),* the Honorable Robert A. Brown, Water Judge). [↑](#footnote-ref-123)
123. 123 Responsive Brief and Opening Brief in Support of Cross-Appeal by the Crystal Creek Homeowners Ass'n and Ernest H. Cockrell at 3, *In re* Water Rights of the Bd. of County Comm'rs of the County of Arapahoe, No. 92SA68 (***Colo.*** Jan. 7, 1994) (appeal from the ***Colo.*** Dist. Ct. Water Div. 4, Nos. 86CW226 & 88CW178 *(consolidated),* the Honorable Robert A. Brown, Water Judge). [↑](#footnote-ref-124)
124. 124 [*Southeastern Water Conservancy Dist. v. City of Florence, 688 P.2d 715 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-125)
125. 125 Findings of Fact, Conclusions of Law, and Judgment & Decree at 40, *In re* Water Rights of the Bd. of County Comm'rs for Arapahoe County for the Union Park Project, Phase I on Water Availability, Nos. 86CW226 & 88CW178 (***Colo.*** Dist. Ct. Water Div. 4 Oct. 21, 1991):

     The [water] [c]ourt had authorized the parties to develop and present their respective theories in the modeling of conditional rights. Rather than to select and study individual conditional water rights, the Applicant's approach in modeling conditional decrees . . . was to examine the needs of the Upper Gunnison Basin for water over and above the amount already decreed absolute. On the other hand, the Opposers['] experts by and large selected a few critical individual conditional rights to perform their analysis.

     *Id.* at 39. Therefore, the water court did not actually consider *all* existing conditional decrees which might affect the availability of water for the project. [↑](#footnote-ref-126)
126. 126 *See infra* Part V.A. [↑](#footnote-ref-127)
127. 127 *See* Mark Squillace, *A Critical Look at Wyoming Water Law,* 24 LAND & WATER L. REV. 307 (1989); *see also* Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values,* 19 ARIZ. ST. L.J. 681 (1987). In Wyoming, the administrator may deny a permit "where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest." [*WYO. STAT. § 41-4-503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56VF-H6T1-73WF-64DG-00000-00&context=1516831) (1977). [↑](#footnote-ref-128)
128. 128 Interview with David L. Harrison, Attorney at Moses, Wittemyer, Harrison & Woodruff, P.C., Boulder, ***Colorado***, also a member of the ***Colorado*** Water Conservation Board, in Boulder, ***Colorado*** (Dec. 1, 1992). It is not advisable to give policy-making authority to a water judge as opposed to legislative or administrative decisionmakers. *Id.* The judiciary is by its very nature apolitical and insular; judges take set policies and apply them in the context of providing a forum in which litigants resolve disputed issues. *Id.* [↑](#footnote-ref-129)
129. 129 *See infra* Part V.B. [↑](#footnote-ref-130)
130. 130 CHARLES J. MEYERS ET AL., WATER RESOURCE MANAGEMENT 262 (1988). [↑](#footnote-ref-131)
131. 131 *See* Squillace, *supra* note 127, at 308. [↑](#footnote-ref-132)
132. 132 WYO. CONST. art. VIII, §§ 2, 5; [*WYO. STAT. § 41-4-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56VF-H6T1-73WF-648S-00000-00&context=1516831) (1977). [↑](#footnote-ref-133)
133. 133 WYO. CONST. art. VIII, § 3 (emphasis added). [↑](#footnote-ref-134)
134. 134 [*WYO. STAT. § 41-4-503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56VF-H6T1-73WF-64DG-00000-00&context=1516831) (1977) (emphasis added). Other Western states maintain similar requirements for permits issuance.

     New Mexico requires that:

     [T]he state engineer shall determine, from the evidence presented by the parties interested . . . whether there is *unappropriated water available for the benefit of the applicant.* If so, *and if the proposed application is not contrary . . . to the public welfare of the state,* the state engineer shall endorse his approval on the application, which shall become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed and the time within which water shall be applied to a beneficial use; provided that the state engineer may, in his discretion, approve any application for a less amount of water or may vary the periods of annual use, and the permit to appropriate water shall be regarded as limited accordingly.

     [*N.M. STAT. ANN. § 72-5-6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GJT1-64V8-10CW-00000-00&context=1516831) (Michie 1985) (emphasis added); *see also* [*Young & Norton v. Hinderlider, 110 P. 1045 (N.M. 1910).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831)

     Utah requires that:

     If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonably affect public recreation or the natural stream environment, *or will prove detrimental to the public welfare,* it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.

     [*UTAH CODE ANN. § 73-3-1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BKJ-YP21-6VSV-052J-00000-00&context=1516831) (1989) (emphasis added); *see also* [*Tanner v. Bacon, 136 P.2d 957 (Utah 1943).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJN-64N0-00KR-D3BT-00000-00&context=1516831) [↑](#footnote-ref-135)
135. 135 [*WYO. STAT. § 41-4-506*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:628F-9S83-GXJ9-33R2-00000-00&context=1516831) (1977). Similar standards apply in New Mexico and Utah. *See* [*N.M. STAT. ANN. § 72-5-6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GJT1-64V8-10CW-00000-00&context=1516831) (Michie 1978); ***UTAH CODE ANN. § 73-3-8*** (1953). [↑](#footnote-ref-136)
136. 136 [↑](#footnote-ref-137)
137. 137 [↑](#footnote-ref-138)
138. 138 [↑](#footnote-ref-139)
139. 139 [↑](#footnote-ref-140)
140. 140 Clean Water Act, [*33 U.S.C. § 1344*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0FN2-D6RV-H3HD-00000-00&context=1516831) (1988). [↑](#footnote-ref-141)
141. 141 Michael Weisskopf, *EPA's Reilly to Veto Dam; Effects of Denver Project 'Unacceptable',* WASH. POST, Nov. 23, 1990, at A1. [↑](#footnote-ref-142)
142. 142 *Id.* [↑](#footnote-ref-143)
143. 143 *Id.* [↑](#footnote-ref-144)
144. 144 *Id.; see also* Two Forks Administrative Record, *microformed* on Techlaw Inc. (Mar. 21, 1990) (this document consists of hundreds of thousands of pages on microfiche). [↑](#footnote-ref-145)
145. 145 Two Forks Administrative Record, *supra* note 144, at 001493. [↑](#footnote-ref-146)
146. 146 This area encompasses the Counties of Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson. *Id.* at 00262. [↑](#footnote-ref-147)
147. 147 *Id.* (citing the Denver Regional Council of Governments, *Task 2.1 Report, Population and Employment Projections, Regional Water Study,* Feb. 28, 1983; U.S. Bureau of the Census, selected years). [↑](#footnote-ref-148)
148. 148 *Id.* at 001493. [↑](#footnote-ref-149)
149. 149 SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 151 (1993). [↑](#footnote-ref-150)
150. 150 Stegner, *supra* note 1, at 75 (emphasis added). [↑](#footnote-ref-151)