

## Colorado Water Law Update: One Year of Colorado Supreme Court Cases

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Colorado continues to provide the West with a rich body of water law, as its Supreme Court issued seven (7) new water opinions between September 1999 and February 2000, underscoring the importance of water development in this arid state.

### Beneficial Use of Water in Colorado

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

If one must learn the local history to understand water law, Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999) demonstrates that maxim. This case involved a challenge to a water right change case, where the water rights involved diversions from the Purgatoire River, tributary to the Arkansas River in southern Colorado. The involved water rights were decreed for manufacturing use for production of coking coal which helped supply the steel industry in Pueblo until 1918, at which time a new by-product coke oven in Pueblo took over the function of multiple coke ovens located throughout southern Colorado. Years later, the manufacturing use of the El Moro Ditch changed, without a decree, to irrigation use elsewhere, as Colorado Fuel and Iron Co. (ACF&I) leased the water to the El Moro Ditch Company. The Applicant, Santa Fe Ranches Property Owners Association (ASanta Fe Ranches) sought to use irrigation with El Moro Ditch water to prove historic consumptive beneficial use from 1966 to 1997, and then change that water right from manufacturing use to Amunicipal, domestic, commercial, industrial, irrigation, stock water, recreation, fish, wildlife, and fire protection, exchange, augmentation, and reuse and successive uses until such water has been entirely consumed. Santa Fe Ranches sought to augment depletions from three wells, which were to serve a 459 lot subdivision near Trinidad, a city in southern Colorado.

Unfortunately for Santa Fe Ranches, there was no prior change proceeding which decreed the manufacturing right to an irrigation right, and quantified or decreed historic use of the water rights prior to 1966. Even though the water commissioner and Division Engineer had never curtailed the irrigation use (perhaps because the commissioner irrigated 95 acres of his own land with half of the El Moro ditch leased water), the water court found that A(1) historic use for the decreed use of the appropriation is determinative in a change proceeding, and an undecreed change of use cannot be the basis for the historic use determination. Santa Fe Ranches, 990 P.2d at 51. The Colorado Supreme Court upheld the dismissal of Santa Fe Ranches' application. The Supreme Court opinion, authored by Justice Hobbs, first expounded the historic concepts of beneficial use as a determinative factor to evaluate change cases, noting that A the true right B that which has ripened by beneficial use over time B is the one that will prevail in its changed form.

Id., at 55. The concern protected by the Supreme Court was that of injury to other users, and protection against expanded use. Because Santa Fe Ranches was unable to prove the historic consumptive beneficial use in the coke manufacturing, the Court was unable to determine whether the proposed change would cause injury to other vested or decreed conditional water rights.

Further, the Court approved of the inquiry into possible abandonment of the CF&I rights to the El Moro water, finding there was no evidence of use by CF&I between 1918 and 1966, which raised an inference of partial or full abandonment. The Court also spoke to the water commissioner's acquiescence of the irrigation diversion. The Court held that the right to use Colorado's water ripens solely by use, and only a court judgment or decree determines the water right's existence, while the administrative agency determines distribution issues. Id., at 58. Thus, Santa Fe Ranches was unable to meet its burden under C.R.S. ' 37-92-305(3), which provides the water court with standards to evaluate change cases, because there was inadequate proof of beneficial use under the manufacturing decree. Evidence of an undecreed change to irrigation use was simply not acceptable to prove historic beneficial use, and to ensure that the original water right use was not enlarged.

One interesting component of Santa Fe Ranches is how the Court distinguished its 1981 decision in *Southeastern Colorado Water Conservancy District v. Rich*, 625 P.2d 977 (Colo. 1981)(ARich@). In *Rich*, the issue was whether an out-of-priority junior water right diversion could constitute historic beneficial use for purposes of a change case. Because diversions in *Rich* did not result in an increase in water duty or consumptive use by the requested change from junior decreed surface water rights to a well near the applicant's house, the application in *Rich* was granted. The Supreme Court distinguished *Rich* where, because the water commissioner did not curtail the junior use, the diversion, although not in priority, could be considered for historic use purposes in a change case. However, Santa Fe Ranches did not extend the *Rich* ruling to find that the acquiescence by the water commissioner equaled a presumed absence of injury. Santa Fe Ranches further distinguished *Rich* because the original water rights were decreed absolute, while the irrigation use sought to prove historic use in Santa Fe Ranches was undecreed. In addition, a determination of no injury had been made in *Rich*, while none could be made in Santa Fe Ranches as the manufacturing historic use was unknown.

### Reasonable Diligence for Conditional Water Rights

In three recent cases decided by the Colorado Supreme Court, the reasonable diligence in development of conditional water rights was at issue. These cases illustrate a trend in more aggressive challenges to undeveloped conditional water rights, perhaps indicative of the significant growth which continues to pressure Colorado.

Conditional water rights in Colorado are undeveloped water rights, can be decreed, and are defined as Aa 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 based@ by 10 C.R.S. ' 37-92-103(6)(1999). C.R.S. section 37-92-301(4) guides the administration and distribution of

waters, including conditional water rights, and requires that one who owns or uses a decreed conditional water right must either perfect such right in a six year period, or apply to the water court for a finding of reasonable diligence in developing the conditional right. Thus, Colorado law allows a water right to be developed over time, while retaining the priority date of the initial appropriation. However, as a counter balance, the legislated requirement to prove diligent development or risk abandonment, forces some action by the conditional water right owner. See C.R.S. ' 37-92-301(4)(a)(I).

Just what level of diligence is required? This question is examined by the first two cases described below, in the context of conditional water rights held for oil shale development on Colorado=s western slope. In *Municipal Subdistrict, Northern Colorado Water Conservancy District v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999) (AChevron@), and *Municipal Subdistrict, Northern Colorado Water Conservancy District v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999) (AOXY@) the water court=s finding of reasonable diligence was upheld. The third reasonable diligence case, *In re Water Rights of Columbine Associates*, 993 P.2d 483 (Colo. 2000)(AColumbine@), the Supreme Court also affirmed the water court=s finding of reasonable diligence, addressing the subject matter jurisdiction of the water court, and the notice provisions.

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

In *Chevron*, the *Municipal Subdistrict, Northern Colorado Water Conservancy District* (ANorthern@), appealed the hexennial finding of reasonable diligence decreed by the water court in Water Division No. 5. Northern owns the Windy Gap Project, which is a junior appropriation upstream of Chevron=s rights on the Colorado River. The Windy Gap Project functions largely as a transmountain diversion from the Colorado River Basin on Colorado=s western slope, and provides water for front range cities in the South Platte River Basin on Colorado=s eastern slope. Chevron Shale Oil Company owns the conditional water rights at issue, which will be used for oil shale and related by-products production at some future time. The Court addressed three allegations of error made by Northern. First, Northern alleged error in finding that Chevron exercised reasonable diligence in perfecting its conditional water rights, and argued that the water court should apply a more stringent standard of reasonable diligence based on C.R.S. ' 37-92-301(4)(b). The thrust of Northern=s first argument was that Chevron=s efforts to perfect its conditional water rights did not demonstrate reasonable diligence, because Chevron has not offered proof of continuous work that resulted in Ameaningful progress towards the completion of the appropriation within a reasonable time, [and] because Chevron has not demonstrated that it >can and will= complete the appropriation.@ *Chevron*, 986 P.2d at 922. The Court however looked to the water court=s factual findings, and agreed with Chevron that the findings were supported by the record, and reiterated a policy of deference to the water court=s discretion. In addition, the Court rejected Northern=s Acan and will@ argument, and Chevron was not required to prove that it Acan and will@ use the conditional water rights.

The *Chevron* Court also rejected Northern=s argument that Colorado=s anti-speculation doctrine applied in diligence proceedings, as it found the issue was not properly raised before the

water court. Lastly, Northern's final issue related to the Acurrent economic conditions@ limitation in C.R.S. '37-92-301(4)(c) which states that if facts and circumstances show diligence, a water court must not deny an application solely because current economic conditions that are beyond the Applicant=s control Aadversely affect the feasibility of perfecting a conditional water right.@ The Court held that the Water Judge correctly considered the current economic conditions, which were not favorable to oil shale production, in making a finding of reasonable diligence.

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

The OXY case is very similar to Chevron, where, again, Northern opposed the water court=s findings of diligent development of OXY U.S.A. Inc.=s (AOXY=s@) conditional water rights. Again, the Supreme Court affirmed the water court=s findings. OXY=s diligence application related to water rights decreed in 1970 for oil shale production on over 10,000 acres on Colorado=s western slope. Admitting that oil shale prices are too low to economically extract oil shale, OXY still asserted that activities including producing technical reports, feasibility studies, searching for financial partners, participation in endangered species studies, and gathering related data were adequate to meet reasonable diligence standard for perfecting conditional water rights. The Court upheld the water court=s findings of diligence even in the face of the oil shale industry=s current economic infeasibility, again looking to C.R.S. ' 37-92-301(4)(c). In addition, the Court agreed with the water court=s holding that the Acan and will@ doctrine was required to be met in proving diligent development for conditional water rights, based on the reading of C.R.S. ' 37-92-305(9)(b) in conjunction with the diligence requirements in C.R.S. ' 37-92-301(4)(c). Thus, the water court=s holding that OXY Acan@ develop the oil shale project based on current technology, and Awill@ complete the project when economic conditions are more favorable to oil shale production, was affirmed.

Northern did prevail on its argument in OXY that Colorado=s anti-speculation doctrine does apply to hexennial diligence applications. However, the water court=s findings that OXY=s steady effort to complete the appropriation was sufficient proof for the Court to find that OXY=s efforts were not speculative, as there was no dispute that the water would be needed once oil shale production commences.

Northern also advanced a discovery argument, asserting that OXY failed to meet disclosure obligations, and that sanctions imposed by the water court were inadequate, and that mandated compliance or dismissal was required. The Court again upheld the water court=s discretion to order OXY to pay Northern=s expenses and attorneys fees under C.R.C.P. Rule 37 (d), rather than dismiss the case. In one other evidentiary matter, the Court also admonished the water court for taking judicial notice of facts which were disputed, but declined to find reversible error.

#### In re Water Rights of Columbine Associates

The diligence case at issue in Columbine differs factually from the two oil shale cases discussed above. However, again, in this case, the Colorado Supreme Court upheld the Division 1 water court=s finding of reasonable diligence in developing a conditional water right. Columbine

Associates (AColumbine@) originally initiated the application for a conditional water right to direct flow and storage in Park County on the South Platte River system, including a refill right for Columbine Reservoir and Dams, which was filed on December 30, 1983. The application was published in the resume and in local newspapers by the water court clerk, which provided descriptions of the proposed uses to which the Columbine Reservoir conditional rights would be applied. The City of Denver (ADenver@) initially opposed the application. The City of Aurora (AAurora@) then joined Columbine=s efforts and moved the Court to allow amendment of the application without republication, so that Aurora could be added as a co-applicant. The water court granted the motion over Denver=s objection in September 1988. In October 1988, Columbine sold its application to Aurora, and shortly after the water referee entered a Ruling granting Aurora the conditional storage and direct flow right. Denver protested the ruling, but later stipulated with Aurora, and a consent decree was entered by the water court in 1990.

Aurora performed multiple activities to develop the conditional Columbine Reservoir water rights, and in 1996, Aurora filed the requisite application for a finding of reasonable diligence in developing its conditional water right. Park County Coalition filed a Statement of Opposition and a Motion to Vacate the water right, asserting that the underlying decree was void because it was issued without proper notice, and because the water court lacked subject matter jurisdiction. The Park County Coalition further asserted that because Columbine initially had no end user for the water, it lacked the requisite intent to appropriate, and that because Aurora was not published as a co-applicant, the published notice was inadequate. The water court denied Park County Coalition=s allegations, and entered a decree finding diligent development had been accomplished by Aurora.

The Supreme Court affirmed all aspects of the water court=s decree, finding subject matter jurisdiction properly vested in the water court upon timely filing of the application and publication of the resume notice in the original application. The actual identity of the end user was not found to be a pre-requisite for the application and notice, as the information required must only be sufficient to put parties on inquiry notice, and that had been accomplished. Again, the Court held that the inquiry standard applied to the published resume notice, even if the end user and place of use were not designated in the initial notice. Thus, notice must be sufficient to reveal to potential parties the nature of the claim being made, so that parties can decide whether to inquire further, and whether to participate in the proceeding. The resume published by Columbine was found to have satisfied the inquiry standard. Failure to mention the end user and place of use was also found not fatal to the notice. Finally, the Court held that Park County Coalition could not collaterally attack the original decree, because a three year statute of limitations had expired on the water court=s ruling. Thus, the third diligence case before the Colorado Supreme Court affirmed continuation of Aurora=s conditional water rights to the Columbine reservoir.

It is interesting to note that all three diligence cases rebuffed aggressive challenges to undeveloped water rights. Though the three cases described above affirmed the water court=s findings of reasonably diligent development of conditional water rights, the message may be that stringent opposition may await long held or large conditional appropriations.

Groundwater Cases