1-29-2001

City of Thornton v. City & County of Denver ex rel. Bd. of Water Comm'rs (In re Plan for Augmentation of City & County of Denver)

SUPREME COURT, STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203 Phone Number: 303.837.3790	
Appeal from: Water Court for Water Division 1, the Honorable Jonathan W. Hays, Case No. 91CW028.	
Appellant: CITY OF THORNTON (Objector)	▲ COURT USE ONLY ▲
Appellees: THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS (Applicant) and CENTENNIAL WATER & SANITATION DISTRICT, THE CITY OF AURORA, THE CITY OF ENGLEWOOD, HENRYLYN IRRIGATION DISTRICT (Objectors) and RICHARD STENZEL, Division Engineer for Water Division 1 (pursuant to C.A.R. 1(e))	Case No.: 00SA302
Attorneys: Michael D. White, #2425 William A. Hillhouse II, #2959 Austin C. Hamre, #17823 Address: 511 Sixteenth Street, #500 Denver, Colorado 80202 Phone Number: 303.595.9441 Fax Number: 303.825.5632	

OPENING BRIEF

The City of Thornton, Colorado,("Thornton") submits its Opening Brief.

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1. Whether the trial court violated C.R.S. § 37-92-304(6) in refusing to exercise its retained jurisdiction under a water rights decree that provided for retained jurisdiction to reconsider issues of injury, based upon the importance that the trial court attached to the finality of decrees.

2. Whether prohibiting the invocation of retained jurisdiction by a party who consented to the entry of the decree because of the inclusion of that retained jurisdiction provision in the consent decree denies that party the benefit of its bargain.

3. Whether jurisdiction under C.R.S. § 37-92-304(6) includes reconsideration of injury of the type alleged in the pleadings, or whether a showing of changed conditions or unforeseen circumstances must be made.

5. Whether the trial court erred by denying Thornton's petition without making factual findings or taking evidence on which to base such findings.

STATEMENT OF THE CASE

This is an appeal of the rejection by the Division 1 Water Court, Judge Jonathan W. Hays, of Thornton's Petition Invoking Retained Jurisdiction in Case No. 91CW028.

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The decree in 91CW028 was entered on May 24, 1993, after a prima facie hearing in April, 1993. All parties had stipulated prior to the hearing (Record, p. 86) and, in accordance with Denver's Stipulation with Thornton, the decree retained jurisdiction for seven years until May 24, 2000. Record, p. 99, ¶20. On May 23, 2000, Thornton timely

filed its Petition Invoking Retained Jurisdiction ("Petition"), alleging that Denver was injuring Thornton. Record, p. 103. Denver filed an "objection," attaching affidavits, to which Thornton replied, attaching affidavits of its own. The Division 1 Water Court, (hereinafter "trial court") entered an order ("Order") recognizing that Thornton's Petition was timely filed, but nevertheless denying Thornton's Petition. Record, p. 189-190. The trial court entered its Order without conducting a hearing, or taking any evidence on the injury alleged. Thornton then filed this appeal.

2. STATEMENT OF FACTS

Case No. 91CW028 involved an application by the City and County of Denver, acting by and through its Board of Water Commissioners ("Denver"), for approval of a change of irrigation rights and a plan for augmentation. Denver's plan uses municipal effluent discharged from the Bi-City Waste Water Treatment Plant ("Bi-City") to replace out-of-priority diversions of Platte River water for irrigation of the Overland Park Golf Course. Thornton owns and operates its own water supply system; its current service population is approximately 95,000 and that number is expected to grow to more than 150,000 by 2025. Thornton diverts water for this municipal use from the South Platte River downstream of Bi-City WWTP at the headgate of the Burlington Ditch. In response to Denver's application, Thornton alleged both potential water quality and quantity injuries. Record, p. 24-25 (Thornton's Statement of Opposition). In particular, Thornton was concerned about the effect the Overland Park augmentation plan would have on the concentrations of pollutants in the river at the Burlington headgate. Record, p. 59-60

(Thornton's Disclosure Certificate); p. 71-72 (Thornton's Expert Witness Summary). When Thornton and Denver agreed upon a proposed decree in May, 1993, that decree did not contain specific terms and conditions addressing water quality issues. Instead, the parties agreed on a longer period of retained jurisdiction than Denver initially proposed, during which injury to Thornton from the Overland Park augmentation plan could be identified and addressed. See stipulation and proposed decree at ¶ 19 (Record, p. 108), both attached as Exhibit A to Thornton's Petition. (Denver apparently never filed with the court any of its stipulations with the objectors in this case.) Since the entry of the consent decree in this case, the science regarding the impacts to human health caused by pollution from municipal effluent in drinking water supplies has advanced considerably, leading Thornton to conclude that the operation of the Overland Park Augmentation Plan, without further protective limitations, is injuring Thornton. See affidavit of Joseph S. Broberg at ¶ 5, attached to Thornton's Reply to Denver's Objection, Record, p. 164. In addition, Thornton has commissioned site specific studies of the water quality at the Burlington headgate, and the sources of the pollution impacting that source which formed the basis of Thornton's allegations of injury. Petition at ¶ 8, Record, p. 104.

Currently, in Case No. 96CW145, Thornton and Denver are engaged in an intense and extended trial litigating the water quality and quantity effects attributable to exchanges that Denver operates using Bi-City effluent and other sources of substitute supply. Thornton's allegations of injury in its Petition in this case parallel its positions in 96CW145, and several factual issues are common to both cases, including the suitability of Bi-City

effluent as a substitute supply for a downstream senior who is a municipal water supplier. Thornton's Petition requested that either: 1] proceedings be held to determine what modifications of the Overland Park decree are necessary, or 2] the trial court extend the period of retained jurisdiction in the Overland Park decree. To promote judicial economy, Thornton suggested that the trial court defer resolving the injury questions in this case pending the resolution of the common factual questions in Case No. 96CW145. Petition at ¶ 13, Record, p. 105.

The trial court held that the need for finality of water decrees should outweigh the need to prevent injury despite the presence of an explicit retained jurisdiction provision and that modifying a decree based on later factual findings would be improper. According to the trial court, Thornton could not seek reconsideration in the Overland Park case of the injury it alleges, but could do so only in some other, unspecified, future case. Order, Record at p. 189. The court further ruled that the injury alleged by Thornton was not a change in conditions, and therefore not the type of injury allegation contemplated by the retained jurisdiction statute. *Id.*

SUMMARY OF ARGUMENT

The statute governing retained jurisdiction over water rights decrees, C.R.S. § 37-92-304(6), requires that a water court revisit and modify a decree granting a plan for augmentation or a change of water rights if it is shown that the activity decreed is causing injury. It further requires that the court preserve its ability to do so until the nonoccurrence

of injury is conclusively established. Section 304(6) represents a legislative decision that finality on questions of injury in these water cases must be postponed until the absence of injury has been demonstrated through actual operation of the decree over time. The fact that Thornton consented to the entry of a proposed decree including protection in the form of retained jurisdiction does not curtail, but instead bolsters Thornton's right to invoke retained jurisdiction because that was the bargain struck between Denver and Thornton. As demonstrated by the language of § 304(6) in its present form, as well as the amendments of that statute since its enactment, the only consideration before the trial court when Thornton's Petition invoking retained jurisdiction was filed was whether or not Denver's augmentation plan is causing injury to Thornton, and how that injury can be avoided. Once the trial court's retained jurisdiction was timely invoked by the filing of Thornton's Petition, the court was required to address and to resolve the questions of injury before it. The court did not have discretion to deny the Petition without taking evidence, and must determine whether the non-occurrence of injury had been conclusively established.

ARGUMENT

I. INTRODUCTION

C.R.S. § 37-92-304(6) states in pertinent part:

> Any decision of the water judge ... dealing with a change of water rights or a plan for augmentation shall include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the

question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury. ... The water judge shall specify his determination as to such period in his decision, but the period may be extended upon further decision that the nonoccurrence of injury shall not have been conclusively established. ... All decisions of the water judge, including decisions as to the period of reconsideration and extension thereof, shall become a judgment and decree as specified in this article and be appealable upon entry, notwithstanding conditions subjecting the decisions to reconsideration on the question of injury to the vested rights of others as provided in this subsection (6).

[Emphasis added.]

II. THE TRIAL COURT ERRED BY HOLDING THAT CONSIDERATIONS OF FINALITY ABROGATED THE RETAINED JURISDICTION PROVIDED FOR IN THE DECREE

The heart of the trial court's ruling on Thornton's Petition is the following language:

To allow jurisdiction to be retained, pending the factual findings of a later case, would frustrate the final judgments of the Water Court, as well as the justifiable reliance of the parties on the finality of the prior proceedings. If new light has been shed on the injurious effects of effluent upon other users, the proper forum in which to address this potential injury is to oppose subsequent applications that implicate such injury.

Order; Record at p. 189. In effect, the trial court said that once entered, such decrees are beyond the reach of the court and of water users who are being injured, notwithstanding the statute requiring retained jurisdiction to address injury. Saying that Thornton's remedy is opposing subsequent applications which cause additional injuries is to say there is no remedy at all for the injury that Denver is causing now. This ruling cannot be reconciled with the language of § 304(6), which clearly contemplates later factual findings, the imposition of further terms and conditions, and a continuation of retained jurisdiction for as long as necessary to ensure the nonoccurrence of injury. If the trial court's view were correct, the judicial doctrine of finality would eliminate the retention of jurisdiction under § 304(6).

A. The General Assembly Already Has Defined the Balance Between the Competing Interests of Finality of Decrees and Prevention of Injury

A balance must be struck between finality of water rights decrees and the prevention of injury to water rights. That balance has been struck by the General Assembly, and must be enforced by the courts.

In Colorado, water users are given the broadest possible latitude in developing innovative solutions to meeting the State's water needs[1] but this flexibility is checked: The

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[1] *See, e.g.,* C.R.S. §§ 37-92-103(5) and (9), providing very flexible provisions for creative plans for augmentation and changes of water rights. *See, e.g.*, C.R.S. § 37-92-305(3) (if a change or plan is found to cause injury, parties must be given opportunity to propose terms and conditions); *Farmers Highline Canal v. City of Golden*, 975 P.2d 189,

benefits of finality must be postponed until certainty of non-injury is reached. Because Colorado's liberal approach in allowing augmentation plans and changes increases the risk of injury to established water rights, the General Assembly gave the water courts broad powers and responsibilities to modify decrees for augmentation plans and changes of water rights when injury appears.

The General Assembly accommodated the need to prevent injury and the need for ultimate finality in § 304(6). Rather than requiring that retained jurisdiction be perpetual, § 304(6) states that it should come to an end at some point. Instead of a "one-size-fits-all" approach specifying a set period of time for all decrees, § 304(6) now states that the parties and ultimately the water judge, who have gained a familiarity with the proposed change or plan through negotiation or litigation of the application, are best situated to make the initial estimation of how long a period will be necessary. Section 304(6) further states that if any doubts remain at the end of the selected period, those doubts should be resolved in favor of extending retained jurisdiction.

Before retained jurisdiction terminates, the balance is tipped strongly in favor of preventing injury; after the close of retained jurisdiction, the balance tips in favor of finality. Contrary to the trial court's view, implementing this statutory scheme does not "frustrate the final judgments of the Water Court" because they are not final. Similarly, any reliance

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197 (Colo. 1999) (water court has a duty to aid parties in crafting decree conditions to prevent injury).

by water court applicants upon determinations of non-injury that are expressly subject to reconsideration is, by definition, not justifiable.

B. Doctrines of Preclusion Do Not Foreclose The Reconsideration Sought by Thornton

The existence of retained jurisdiction and the potential that the terms of a decree may change to remedy injury prevent that decree from having preclusive effect until non-injury is finally established. The General Assembly obviously recognized and sought this result, because the final sentence of § 304(6) both allows an immediate appeal and recognizes that questions of injury may be reopened.

"The doctrine of res judicata, which, strictly speaking, refers to claim preclusion, holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. It bars relitigation not only of all issues actually decided, but of all issues that might have been decided." *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989). Consistent with the language and purpose of § 304(6), this doctrine is inapplicable to later proceedings in the same case. It applies only to subsequent, i.e. different, actions on the same claim.

According to MOORE'S FEDERAL PRACTICE, 3d Ed., the doctrine of res judicata is not concerned with a direct attack on a prior judgment, which is an attempt to have the judgment corrected, reversed, vacated or declared void. *Id.*, ¶ 131.02[1][a]. "Thus the doctrine is not applicable to such matters as ... efforts to obtain supplemental relief in the original action, or direct attacks on the judgment." *Id.*, ¶ 131.31[1]. Colorado law is in accord with Moore: "The doctrine of merger or claim preclusion prohibits parties from

relitigating issues which were or could have been raised in a previously adjudicated claim, and applies only to final judgments, not to settlements." *Ferris v. Bakery, Confectionary and Tobacco Union, Local 26*, 867 P.2d 38, 42 (Colo.App. 1993)(emphasis added).

Issue preclusion (collateral estoppel) is inapplicable for similar reasons. Collateral estoppel precludes the relitigation of an issue if it is: (1) Identical to an issue; (2) Actually litigated and; (3) Necessarily adjudicated in a prior proceeding; (4) Which involved the same parties (or privies); (5) Resulting in a final judgment determining the merits of the issue; (6) Under circumstances offering a full and fair opportunity to litigate the issue. *City & County of Denver v. Consolidated Ditches Co. of Dist. #2*, 807 P.2d 23, 32 (Colo. 1991). By including the retained jurisdiction provision in the original decree herein, the court said that the merits of the injury issue in this case had not been finally determined, and that to the contrary, questions of injury were open for reconsideration at any time within seven years.[2]

This Court has recognized before that § 304(6) denies finality on issues of injury and is an express, legislative exception to the judicial preclusion doctrines. In *Thornton v. Clear*

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[2] Issue preclusion cannot apply here for the additional reason that the "actually litigated" element is not met.

> As a general rule, a fact established in prior litigation not by judicial resolution but by stipulation, has not been actually litigated, and therefore is the proper subject of proof in subsequent proceedings. For issue preclusion purposes, an issue is not deemed to be actually litigated if it is the subject of a stipulation between the parties.

Moore's Federal Practice, 3d Ed., § 132.03[2][h][i].

Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993), CCWUA sought to change a conditional storage right for 110,000 acre feet to several alternate points of storage. Thornton objected that the change would result in expanded use because physical constraints at the originally decreed location would never allow storage of more than 35,000 a.f. at a time. This Court ruled that Thornton's confession of a motion *in limine* foreclosed Thornton's opportunity to litigate in that case the actual capacity of the original site. *Id.* at 1356. Despite this preclusion, the Court went on to rule that Thornton would be able to invoke the water court's retained jurisdiction at a later time to reconsider questions of injury resulting from an expanded use. *Id.* at 1360. The decree at issue here presents an even more compelling case for reconsideration than *Clear Creek WUA*.

III. THE TRIAL COURT ERRED BY DENYING THORNTON THE BENEFIT OF ITS BARGAIN

It is not clear from the Order whether, in the trial court's view, it was simply the entry of the decree, or the fact that Thornton stipulated to the decree that foreclosed any opportunity to reconsider questions of injury under retained jurisdiction. The Order refers to this as "a case settled seven years ago," but fails to acknowledge that a provision for reconsideration of injury was an integral part of that settlement. In any event, the result of the trial court's ruling is to rewrite an agreement between Denver and Thornton to the severe detriment of Thornton.

A. As a Matter of Contract and of Interpretation of the Negotiated Decree, Thornton Should Not Be Precluded From Invoking Retained Jurisdiction.

This is not a case of Thornton waiving its right to raise an issue. This is a case of both parties agreeing to put off the fight over that issue until it could be determined whether or not a fight was necessary. The "central characteristic" of consent judgments is that "the court has not actually resolved the substance of the issues presented." WRIGHT, MILLER & COOPER, 18 Fed. Pract. & Proc., § 4443. The 2000 supplement to this section states that "courts should not insist on claim preclusion if the parties have found it desirable to settle a lawsuit on terms that finally dispose of one part of a single claim but that seek to leave another part of the claim open for further litigation." That effectively summarizes Thornton's agreement with Denver. The stipulation was a short, one-page document stating that Thornton consented to the entry of the proposed decree attached thereto. Record, p. 108. The stipulated decree expressly provided for retained jurisdiction pursuant to § 304(6). In fact, Thornton negotiated for an extended period of retained jurisdiction, and stipulated only after Denver consented to that longer period. Record, p. 161 (Affidavit of Walid Hajj, Attached to Thornton's Reply to Denver's Objection). Denver cannot at once affirm its agreement with Thornton, accepting its benefits, and avoid the burdens of that agreement. *Trimble v. City & County of Denver*, 697 P.2d 716, 723 (Colo. 1985). Nowhere does the stipulation or the decree it incorporates suggest that the retained jurisdiction provision should be subordinated to, or rendered moot by, any other provision. In interpreting an instrument, courts "must attempt to harmonize and to give effect to all

provisions so that none will be rendered meaningless." *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984). Neither do the stipulation or decree limit Thornton's ability to invoke the retained jurisdiction it asked for, and to which Denver agreed. If the parties had intended that only water users other than Thornton would be the beneficiaries of the protection negotiated by Thornton, the stipulation surely would have so stated. *USI Properties East v. Simpson,* 938 P.2d 168, 174 (Colo. 1997). Besides, since all parties consented to the decree, (Record, p. 86), that interpretation would make retained jurisdiction unavailable to any of them.

In another case in which the parties specifically agreed to a retained jurisdiction provision, but one asserted res judicata when modification was sought, the Court of Appeals said: "The agreement was expressly adopted as the order of the trial court, and neither of the parties may now complain when such retained jurisdiction is exercised." *In Re Marriage of Hiner*, 669 P.2d 135, 136-37 (Colo.App. 1983) (although six month time limit of C.R.C.P. 60(b) had expired, *res judicata* did not prevent reopening of divorce decree where jurisdiction was retained to divide subsequently discovered assets of either party).

B. Public Policy Supports Allowing Objectors to Invoke the Retained Jurisdiction in a Consent Decree to Prevent Injury

Public policy favors settlement of disputes out of court. *Trimble*, 697 P.2d at 723. Denying an objector the right to rely upon a term and condition of the decree, inserted for the protection of that objector, because the objector consented to the decree, not only re-writes the agreement made by the parties, it cancels the retained jurisdiction provision of

that decree. That result, if allowed to stand, creates a strong incentive, perhaps a necessity, for objectors to avoid settlement. Indeed, such a rule would have the anomalous effect of forcing objectors to litigate now just to preserve their right to litigate injury questions again later. Parties to water court applications should be allowed to agree to put off litigating factual injury questions until it is apparent that sufficient facts are available to prove the matter one way or the other.

IV. THE TRIAL COURT ERRED IN RULING THAT RECONSIDERATION IS AVAILABLE ONLY ON A SHOWING OF CHANGED CIRCUMSTANCES

The trial court's Order also stated:

> Thornton contends that in recent years the detrimental water quality effects of wastewater treatment plant effluent have "come to be better understood," giving rise to the occurrence of injury. This is not the type of specific injury, born of circumstances unforeseen at the time of the entry of the decree, which is within the purview of the retained jurisdiction statute.

Order; Record at p. 189. Essentially, the trail court ruled that retained jurisdiction may not be invoked unless the party seeking relief proves not only a change of circumstances, but also that such change was unforeseeable. That approach, however, is wrong on at least three counts: (1) it is inconsistent with § 304(6), which explicitly allows "reconsideration" of injury, not merely the consideration of injury arising after the entry of the decree; (2) it decides the injury question without a hearing, an error that is explained further in Section V of this brief; and (3) it ignores the fact that, although not required by law, Thornton did allege injury that was unforeseen at the time of the decree. *See* Section V.B, below.

To require changed conditions and unforeseen circumstances is to say that there are two classes of injury, one of which the court will remedy, and one that it will not. The statutory language cannot be reconciled with such an interpretation. C.R.S. § 37-92-304(6) requires that a water court retain jurisdiction in order to "preclude or remedy any... injury"

A. The Language and History of § 304(6) Show That the Existence of Injury Is the Sole Criterion for Invoking Retained Jurisdiction.

The language of the statute is mandatory, both as to the inclusion of this condition in decrees and as to its use when injury appears. Such decrees "shall be subject to reconsideration" and the court must "preclude or remedy any such injury." The language of § 304(6) comprehensively applies to all injury, regardless of the type, and without any requirement that the injured water users make any showing in addition to injury. It directs the court to maintain its ability to reconsider and redress any injury until the nonoccurrence of all injury is "conclusively established," including by extending the period of retained jurisdiction if necessary. Section 304(6) in four different places speaks of the "reconsideration" of injury, a choice of language that demonstrates that the General Assembly had no intention of limiting review to new circumstances and foreclosing review of the types of injury that were litigated, or could have been litigated, at the time the decree was entered. Relief for changed circumstances is available without invoking § 304(6). *See, e.g., Williams v. Midway Ranches Property Owners' Assoc., Inc.*, 938 P.2d 515, 525-6 (Colo. 1997). The reason is that if the circumstances have changed, the issue presented now is different from the prior case, and there is no re-litigation or re-examination of the previously decided issue. *Farmers Highline v. Golden*, 975 P.2d at 203. If the same

changed conditions standard applies to decrees subject to § 304(6) as would apply in its absence, there would be no need for this statutory provision at all.

1. Amendments of § 304(6) Show the General Assembly's Focus on Preventing Injury as the Basis for Exercising Retained Jurisdiction

The evolution of the retained jurisdiction statute since its initial adoption with the rest of the Water Right Adjudication and Administration Act of 1969 (now codified at 10 C.R.S. § 37-92-101, et seq.) demonstrates the General Assembly's concern with preventing injury, and shows consistent efforts to broaden the scope of retained jurisdiction to cover all sorts of injuries.

When first enacted, the retained jurisdiction provision was codified as C.R.S. (1963) § 148-21-20(6) (attached as Appendix A). It said that the court may retain jurisdiction in decrees dealing with changes of water rights and plans for augmentation, but that the hearing to reconsider any injury must occur within two years after the year in which the decree was originally entered.

In 1977 the General Assembly passed S.B. 4 (attached as Appendix B), amending several provisions of the 1969 Act, including § 304(6). S.B. 4 made retained jurisdiction mandatory for augmentation plans, deleted the two year limit in favor of "such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury," and added the authority to further extend the period of retained jurisdiction if "the non-occurrence of injury shall not have been conclusively established."

Section 304(6) was again amended in 1981 by H.B. 1055 (attached as Appendix C) which, among other things, made retained jurisdiction mandatory both for changes of water

rights and for augmentation plans. This is the form of the retained jurisdiction statute in effect when the court entered its initial decree in Case No. 91CW028.

Statutes that are remedial in effect are to be given broad interpretation. *Moeller v. Colo. Real Estate Comm'n,* 759 P.2d 697, 701 (Colo. 1988). The substance of § 304(6) is remedial in nature, and the amendments to it were obviously intended to remedy shortcomings in the statute's effectiveness in avoiding injury. The amendments of § 304(6) show a consistent pattern of broadening the scope of the statute's coverage to make it more effective. It must be implemented to achieve its remedial purpose.

B. Prior Opinions of This Court Indicate That the Existence of Injury is the Sole Criterion for Invoking Retained Jurisdiction

Although no prior decisions of this Court have dealt with the denial of a Petition invoking retained jurisdiction,[3] this Court has previously ruled on some aspects of the purpose and application of the statute. Consistently this Court has interpreted it broadly. No decision limits retained jurisdiction to instances of changed circumstances. Instead, the thrust of the decisions extends to situations in which the injury from the circumstances in existence at the time of the original decree becomes apparent later.

1. A Retained Jurisdiction Provision that Does Not Address Potential Injury Broadly is Inadequate

In *Weibert v. Rothe Bros., Inc.,* 618 P.2d 1367, 1373 (Colo. 1980), the trial court retained jurisdiction for the purposes of "review[ing] the validity of a call, or requirement for

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[3] Case No. 00SA229 is currently pending before this Court and raises many of the same issues as this appeal.

providing replacement water or any question as to the administration of the plan of augmentation herein approved." This Court rejected that provision as insufficient, saying: "It makes no reference to the criterion of injury to the vested rights of others and accordingly is not adequate to satisfy Section 37-92-304(6)." *Id.*

2. Time and Experience are the Best Proof of Non-injury

This Court has acknowledged that even with intensive study and engineering analysis of a proposal for a new use of senior water rights, the parties and the water court can only estimate what the consequences will be when a change or augmentation plan is implemented. It has also acknowledged that time and operational experience will give the true impacts of a proposal a chance to come to light:

> The retained jurisdiction provision of section 37-92-304(6) is a recognition by the General Assembly that predictions of future injury caused by plans of augmentation and changes of water rights involve an inherent amount of uncertainty. The retained jurisdiction provision allows the water court and water users to achieve flexibility in implementing programs to increase the beneficial use of water and at the same time ensures protection of vested water rights.

City of Florence v. Pueblo Bd. of Waterworks, 793 P.2d 148, 157 (Colo. 1990) (Erickson specially concurring). Recognizing the uncertainty involved, the statute does not try to presage the type of injury that may later come to light, nor does it limit the statute's coverage to injury growing out of circumstances that did not exist or were not foreseen

when the decree was entered. To the contrary, it requires the elimination of all injury. If the "predictions" of injury made at the time of the decree prove wrong, they are to be revisited.

3. A Higher Level of Certainty of Non-injury is Required to Terminate Retained Jurisdiction Than is Required to Grant the Original Decree.

The standard of proof required to obtain a water right decree in the first instance is a preponderance of the evidence. C.R.S. § 13-25-127(1). However, this Court has held that under § 304(6), the standard of proof to terminate retained jurisdiction is conclusive proof. In *Clear Creek WUA, supra*, the Court twice noted that no change decree can be entered until the absence of injury from the change has been demonstrated, but in the next breath stated that this determination can be revisited until the water court is convinced that non-injury has been conclusively established:

> It is well settled under Colorado law that a water court generally may not grant an application for a change in water right unless the applicant has demonstrated that the change will not injure the rights of other water users.
>
> ...
>
> A showing of no injurious effect, however, is a prerequisite to granting an application for a change.
>
> ...
>
> Section 37-92-304(6) ... allows the water court to reconsider the question of injury until it is convinced that the nonoccurrence of injury to the City of Thornton's water rights is conclusively established.

Id. 859 P.2d at 1360.

4. If Earlier Predictions of Non-injury Are Shown to be Wrong, the Court Must Fix the Problem.

The role of § 304(6) as a safety net is apparent from this Court's opinion in *Williams v. Midway Ranches Property Owners' Assoc., Inc.*, 938 P.2d 515 (Colo. 1997). There, objectors to a change application appealed several aspects of the water court's ruling, including its determination that no provision requiring dry-up of historically irrigated lands was necessary. This Court upheld the water court, saying that if it later appears that the decree does not prevent injury, retained jurisdiction could be invoked and the decree modified appropriately. *Id.* at 527. By so ruling, this Court determined that the original issues of injury – not just those arising out of changed circumstances – are within the scope of retained jurisdiction.

C. **The General Assembly Intentionally Omitted any Requirement for Alleging Changed Circumstances in Order to Modify a Water Court Decree Pursuant to Retained Jurisdiction**

The specificity of the General Assembly in requiring changed circumstances in other statutes providing for modification of judgments is in sharp contrast to the broad and unqualified directive of § 304(6). When the General Assembly believes a specific showing is a prerequisite for reopening an issue, it says so clearly. Frequently, the General Assembly has specified two or more standards in the same statute and set out the facts and circumstances that dictate which of those standards should be used in a given case. A few examples follow:

C.R.S. § 14-10-122(1)(a) identifies three distinct standards for modifying certain aspects of marriage dissolution decrees: "changed circumstances so substantial and

continuing as to make the terms unfair;" "changed circumstances that are substantial and continuing," and the "existence of conditions that justify the reopening of a judgment." Which variation of this standard is used depends on whether a change of maintenance, child support, or division of property is being sought. The statute involved in this case makes no reference to changed circumstances whatsoever.

C.R.S. § 14-10-129(1) provides authority to modify parenting time rights "whenever such order or modification would serve the best interest of the child." However, if certain additional changes are sought simultaneously, the court must first find "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the party with whom the child resides the majority of the time and that the modification is necessary to serve the best interest of the child." C.R.S. § 14-10-129(2) (emphasis added). The standard in § 14-10-129(1) is similar to the "any injury" standard of § 37-92-304(6) in that it identifies an outcome and directs the court to achieve it, without regard to what the court's prior orders on the subject might have been. The additional requirements in § 14-10-129(2) are quite similar to those applied by the trial court in this case, but nowhere do they appear in § 37-92-304(6).

Whether circumstances have changed or unforeseen circumstances have occurred plays no part in § 304(6). Its focus is exclusively on whether the absence of injury has been conclusively established. If not, the question is whether the decree must be modified

now, or whether more time to monitor its effects must be allowed before retained jurisdiction is allowed to expire.

V. THE TRIAL COURT ERRED BY RESOLVING FACTUAL ISSUES WITHOUT AN EVIDENTIARY BASIS

The trial court apparently viewed Thornton's Petition as a motion which it could grant or deny. Its Order declines to accept jurisdiction to consider Thornton's allegations. That view is incorrect. In Colorado, filing a petition invokes the court's jurisdiction and reopens the case. Thereafter, the court does not have discretion to dispose of the case without deciding the factual issues put before it. "The issue of injurious effect is inherently fact specific and one for which we have always required factual findings." *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 508 (Colo. 1993). Without holding a hearing and taking evidence, the court has no basis on which to grant or deny any relief. "While the trial court's findings cannot be set aside if supported by the record, [citation omitted] they cannot stand if the record contains no evidence to support them." *Wright v. Horse Creek Ranches*, 697 P.2d 384, 390 (Colo. 1985). Here, Thornton's Petition raised issues of injury. The trial court's disposition of the Petition was erroneous because it disposed of factual issues without an evidentiary basis, and because it terminated the period of retained jurisdiction without making a finding that the non-occurrence of injury had been conclusively established. The trial court's ruling that the injury alleged by Thornton was insufficient is unsupported by evidence as well as being contrary to the language of § 304(6).

A. A Decree Subject to Retained Jurisdiction is Reopened Simply by the Act of Filing a Petition

In the context of a petition to modify a child support order, the Court of Appeals has said: "The statutory power of court to increase the support order was invoked by the filing of the petition for increase in support money. From and after the filing of the petition, the court had the discretionary power to increase the support order...." *Keffler v. Keffler*, 491 P.2d 94, 96 (Colo.App. 1971)(not selected for official publication). This holding is particularly significant in the context of that case, because under the statute in effect at the time, C.R.S. 1963 § 46-1-5(4), success on the merits of such a petition required proof of changed circumstances. Despite this requirement, the act of filing the petition was the only act necessary to reopen the case.

The approach articulated in *Keffler* is consistent with more general statements by this Court regarding invoking a court's jurisdiction when a case is initiated: "It is not sufficient that the court has, in the abstract, the authority to decide the particular class of case which is before it. The court's authority must be invoked before it can act." *In re Marriage of Stroud*, 631 P.2d 168, 171 (Colo. 1981). "To invoke the jurisdiction of a water court, a person seeking a determination of a water right must file an application with the water clerk [setting forth the claim and relief sought]." *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist,*. 734 P.2d 627, 632 (Colo. 1987). Just as an applicant need not obtain the court's permission before invoking its jurisdiction by filing an application, a party need not obtain permission before invoking retained jurisdiction. Once invoked, the court has factual issues before it that must be addressed.

B. Thornton's Petition Put Factual Issues Before the Court

Thornton's Petition raised issues of injury by making the following allegations:

> For example, the use of Bi-City effluent has caused injurious water quality effects that include, but are not limited to, increasing concentrations of phosphorous, nitrate and nitrite, harmful types of dissolved organic carbon and microbiological contaminants. Thornton may be injured in other ways as well, including but not limited to, under-replacement of depletions.

Petition at ¶ 8; Record, p. 104. Thornton's allegations of injury put three independent factual issues before the court. First, whether the injury alleged by Thornton does in fact exist, second; what modification of Denver's decree is warranted at this time, and third; whether the non-occurrence of injury had been conclusively established, or whether the period of retained jurisdiction should be further extended. The trial court's ruling not only denied Thornton any relief at this time, but by refusing to accept retained jurisdiction, foreclosed any possibility of relief at any time in the future, contrary to the statutory language.

CONCLUSION

For all of the foregoing reasons, Thornton requests that this case be remanded to the trial court directing the trial court to assume jurisdiction and to determine whether the nonoccurrence of injury from Denver's Overland Park augmentation plan has been conclusively established. If not, the period of retained jurisdiction should be extended. The remand should also direct to trial court to determine whether that augmentation plan

is injurious to Thornton's water rights, and if so, to impose additional terms and conditions to preclude or remedy such injury.

Respectfully submitted this 29th day of January, 2001.

WHITE & JANKOWSKI, *LLP*

By: _____

Michael D. White, #2425
William A. Hillhouse II, #2959
Austin C. Hamre, #17823

ATTORNEYS FOR THORNTON

CERTIFICATE OF MAILING

I hereby certify that on this 29th of January, 2001, a true and correct copy of the foregoing **OPENING BRIEF** in **Case No. 00SA302** was served by placing a copy in the United States mail, postage prepaid, and addressed to the following parties:

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CHAPTER 373

WATER RIGHTS AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

(Senate Bill No. 81. By Senators Gill, Denny, Anderson, Armstrong, Bermingham, Chance, Cisneros, DeBerard, Dines, Enstrom, H. Fowler, L. Fowler, Garnsey, Hodges, Jackson, Kemp, Locke, MacFarlane, Massari, Minister, Ohlson, Rockwell, Schieffelin, Shoemaker, Stockton, Strickland, and Williams; also Representatives Bain, Braden, DeMoulin, Fentress, Grimshaw, Mullen, E. Newman, Sack, and Sanchez.)

A N A C T

CONCERNING WATER, AND ENACTING THE "WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969".

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Chapter 148, Colorado Revised Statutes 1963, as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 21

WATER RIGHT DETERMINATION AND ADMINISTRATION

148-21-1. Short title.—This article shall be known and may be cited as the "Water Right Determination and Administration Act of 1969".

148-21-2. Declaration of policy.—(1) It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state.

(2) Recognizing that previous and existing laws have given inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state, it is hereby declared to be the further policy of the state of Colorado that in the determination of water rights, uses and administration of water the following principles shall apply:

(a) Water rights and uses heretofore vested in any person by virtue of

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they may submit their names and addresses at any time thereafter for inclusion on the list subject to the foregoing. In order to obtain a copy of a resume for a particular month, a person's name and address must be received not later than the fifth day of that month. A fee of twelve dollars shall be payable each time a person's name is submitted for inclusion in said mailing list.

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies.

(5) Persons alone or in concert may initiate and implement plans for augmentation including water exchange projects. Water conservancy districts, irrigation districts, mutual or public ditch and reservoir companies, municipalities, or other entities which are governed by a board of directors or similar body, may initiate and implement plans for augmentation for the benefit of all water users within their boundaries.

148-21-19. Rulings by the referee.—(1) Within the month following the last month in which statements of opposition may be filed with respect to a particular application the referee shall make his ruling on such application unless he determines to rerefer the matter to the water judge as specified in subsection (2) of this section. The ruling may disapprove the application in whole or in part in the discretion of the referee even though no statements of opposition have been filed. The ruling of the referee shall give the name or names of the applicants with respect to each water right or conditional water right involved, the location of the point or points of diversion or place or places of storage, the means of diversion, the type or types of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, such ruling shall include a complete statement of such plan as approved or disapproved. The ruling shall be entered by the referee in his records and shall become effective upon such entry, subject to judicial review pursuant to section 148-21-20. A copy of the ruling shall be filed with the division engineer and the water clerk of the division. A copy of the ruling shall be mailed by the water clerk by registered mail to the applicant or applicants and to each person who has filed a statement of opposition.

(2) In the case of applications with respect to which a statement or statements of opposition have been filed the referee may determine in his discretion not to make a ruling as specified in subsection (1) of this section and to rerefer the matter to the water judge for a decision as hereinafter provided. Such rereferral shall be accomplished by order of the referee which shall be entered within the month following the last month in which statements of opposition may be filed with respect to the particular application. A copy of the order shall be mailed by the water clerk by registered mail to the applicant or applicants and to each person who has filed a statement of opposition.

148-21-20. Proceedings by the water judge.—(1) On the first Tuesday of March and September in division 1, the second Tuesday of March and September in division 2, the third Tuesday of March and September in division 3, the fourth Tuesday of March and September in division 4, the first Tuesday of April and October in division 5, the second Tuesday of April and October in division 6 and the third Tuesday of April and

October in division 7, the water judge for the particular division shall commence hearings with respect to the subject matter of protests filed and orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order, however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

(2) Within twenty days after the entry thereof any person who wishes to protest a ruling of the referee shall file a written protest with the water clerk and a copy thereof with the referee. Such protest shall clearly identify the ruling being contested and shall state the factual and legal grounds for the protest. Promptly after the same is filed, a copy of such protest shall be sent by the water clerk by registered mail to the applicant or applicants and to persons who have filed statements of opposition, except that no copy need be sent to the protestant. Upon filing of such a protest, the protestant shall pay a filing fee of twenty dollars plus an additional amount which is sufficient to cover the costs of mailing the copies thereof as required in this subsection.

(3) As to the rulings with respect to which a protest has been filed and as to matters which have been rereferred to the water judge by the referee, there shall be hearings conducted in accordance with trial practice and procedure, except that no pleadings shall be required. The court shall not be bound by findings of the referee. The division engineer shall appear to furnish pertinent information and may be examined by any party, and if requested by the division engineer, the attorney general shall represent the division engineer. The applicant or applicants shall appear either in person or by counsel and shall have the burden of sustaining the application, whether it has been granted or denied by the ruling or been rereferred by the referee and in the case of a change of water right the burden of showing absence of any injurious effect alleged in the protest or a statement of opposition. All persons interested shall be permitted to participate in the hearing either in person or by counsel if they enter their appearance in writing prior to the date on which hearings are to commence as specified in subsection (1) of this section. Such entry of appearance shall identify the matter with respect to which the appearance is being made. Service of copies of applications, statements of opposition, protests or any other documents is not necessary for jurisdictional purposes, but the water judge may order service of copies of any documents on any persons and in any manner which he may deem appropriate.

(4) If an applicant, a person who has filed a statement of opposition, or a protestant requests, the hearing shall be conducted by the water judge in the district court of the county in which are located the point or points of diversion of the water right or water rights or conditional water right or conditional water rights involved. In case the hearing involves points of diversion located in more than one county, the hearing shall be conducted by the water judge in the district court of that county in which is located the major part, as determined by the water judge, of the diversions or proposed diversions involved.

(5) A decision of the water judge with respect to a protested ruling of the referee shall either confirm, modify, reverse or reverse and remand such ruling, and in the case of the modification of a ruling the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully

of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve as part of his judgment and decree a ruling of the referee with respect to which no protest was filed, provided that the water judge may reverse or reverse and remand any such ruling which he deems to be contrary to law.

(6) Any decision of the water judge as specified in subsection (5) of this section dealing with a change of water right or a plan for augmentation may include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others during any hearing commencing in the two calendar years succeeding the year in which the decision is rendered, and such decision may contain any other provision which the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge shall become part of the judgment and decree hereinafter specified.

(7) Promptly after the hearings have concluded on all matters, the water judge shall enter a judgment and decree. The judgment and decree shall give the name or names of the applicants with respect to each water right or conditional water right involved, the location of the point or points of diversion or place or places of storage, the means of diversion, the type or types of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, the judgment and decree shall contain a complete statement of the plan.

(8) A copy of such judgment and decree shall be filed with the state engineer and the division engineer, and a copy thereof shall be provided by the water clerk to any other person requesting same upon payment of a fee of one dollar per page, not to exceed a maximum of ten dollars. Promptly after receiving a judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to priority, location, and use of the water rights and conditional water rights, and they shall regulate the distribution of water accordingly.

(9) Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

(10) Clerical mistakes in said judgment and decree may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest with the water clerk within the time specified in this section. Any petition referred to in the preceding sentence shall be filed with the water clerk within two years after the date of the entry of said judgment and decree. The water judge may order such notice of any such correction proceedings as he determines to be appropriate. Any order of the water judge making such corrections shall be subject to appellate review as specified in subsection (9) of this section.

(11) If any application is granted in whole or in part by the referee pursuant to this article, any person who asserts that he will be damaged by any acts authorized by such ruling may within thirty days after the issuance thereof apply ex parte to the water judge of such division for an order directed to the applicant to show cause why the operation of such

CHAPTER 483

WATER AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION

SENATE BILL NO. 4. BY SENATORS Kinnie, Anderson, McCormick, Cooper, Hatcher, Soash, Woodard, and Wunsch; also REPRESENTATIVES Hinman, Burns, Sears, Spano, Strahle, Younglund, and Zakhem.

AN ACT

AMENDING THE "WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969".

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 37-92-301 (2), Colorado Revised Statutes 1973, as amended, is amended to read:

37-92-301. Administration and distribution of waters. (2) In accordance with procedures specified in this article, the referee in each division shall in the first instance have the authority and duty to rule upon determinations of water rights and conditional water rights and the amount and priority thereof. INCLUDING A DETERMINATION THAT A CONDITIONAL WATER RIGHT HAS BECOME A WATER RIGHT BY REASON OF COMPLETION OF THE APPROPRIATION, determinations with respect to changes of water rights, PLANS FOR AUGMENTATION, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of water rights or conditional water rights; and he may include in any ruling for a determination of water right or conditional water right any use or combination of uses, any diversion or combination of points or methods of diversion, and any place or alternate places of storage and may approve any change of water right as defined in this article. ~~Plans for augmentation shall be subject to the special provisions of section 37-92-307.~~

Section 2. 37-92-302 (1) (d) and (3) (b), Colorado Revised Statutes 1973, are amended to read:

37-92-302. Applications for water rights or changes of such rights - plans for augmentation. (1) (d) The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen

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dollars. If more than one water right is requested in any application OR IF MORE THAN ONE WATER RIGHT IS SOUGHT TO BE APPROVED IN A PLAN FOR AUGMENTATION, a fee of five dollars for each additional right shall be assessed AT THE TIME SUCH APPLICATION OR PLAN FOR AUGMENTATION IS FILED. No fee shall be assessed to the state of Colorado or any agency of its executive department under this subsection (1).

(3) (b) Not later than the end of such month, the water clerk shall cause such publication to be made of each resume or portion thereof in a newspaper or newspapers as is necessary to obtain general circulation once in every county affected, as determined by the water judge. IF AT THE REQUEST OF OR AS THE RESULT OF AMENDMENTS MADE BY AN APPLICANT THE RESUME OF AN APPLICATION IS REPUBLISHED, THE APPLICANT SHALL PAY THE COST OF SUCH REPUBLICATION.

Section 3. 37-92-304 (6), Colorado Revised Statutes 1973, is amended to read:

37-92-304. Proceedings by the water judge. (6) Any decision of the water judge as specified in subsection (5) of this section dealing with a change of water right ~~or a plan for augmentation~~ may, AND IN THE CASE OF A PLAN FOR AUGMENTATION SHALL, include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others ~~during any hearing commencing in the two calendar years succeeding the year in which the decision is rendered, and such~~ FOR SUCH PERIOD AFTER THE ENTRY OF SUCH DECISION AS IS NECESSARY OR DESIRABLE TO PRECLUDE OR REMEDY ANY SUCH INJURY. THE WATER JUDGE SHALL SPECIFY HIS DETERMINATION AS TO SUCH PERIOD IN HIS DECISION, BUT THE PERIOD MAY BE EXTENDED UPON FURTHER DECISION BY THE WATER JUDGE THAT THE NONOCCURRENCE OF INJURY SHALL NOT HAVE BEEN CONCLUSIVELY ESTABLISHED. ANY decision may contain any other provision which the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge, INCLUDING DECISIONS AS TO THE PERIOD OF RECONSIDERATION AND EXTENSION THEREOF, shall become a judgment and decree as specified in this article AND BE APPEALABLE UPON ENTRY, NOTWITHSTANDING CONDITIONS SUBJECTING THEM TO RECONSIDERATION ON THE QUESTION OF INJURY TO THE VESTED RIGHTS OF OTHERS AS PROVIDED IN THIS SUBSECTION (6).

Section 4. 37-92-305, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (8) In reviewing a proposed plan for augmentation and in considering terms and conditions which may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water which would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. A plan for augmentation shall be sufficient to permit the continuation of

diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his lawful entitlement by the applicant's diversion. Decrees approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

Section 5. Part 5 of article 92 of title 37, Colorado Revised Statutes 1973, is amended BY THE ADDITION OF A NEW SECTION to read:

37-92-501.5. Special procedures with respect to plans for augmentation. Consistent with the decisions of the water judges establishing the basis for approval for plans for augmentation and for the administration of groundwater, the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary exchanges of water and may make such rules and regulations and shall take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. In so doing, the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

Section 6. **Repeal.** 37-92-307, Colorado Revised Statutes 1973, as amended, is repealed. Notwithstanding the repeal of said section 37-92-307, the provisions thereof shall remain effective as to temporary plans for augmentation submitted to the state engineer prior to the effective date of such repeal, except that the provisions of subsection (5) of said section pertaining to the prima facie effect of the state engineer's findings shall not apply. A hearing on a temporary plan for augmentation approved by the state engineer shall be set by the water judge at the next date specified in section 37-92-304, Colorado Revised Statutes 1973, for the setting of matters for hearing.

Section 7. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 19, 1977

CHAPTER 434

WATER AND IRRIGATION

WATER RIGHT DETERMINATION AND ADMINISTRATION — DETERMINATION AND ADMINISTRATION OF WATER RIGHTS

HOUSE BILL NO. 1055. BY REPRESENTATIVES Boley, Armstrong, DeNier, Hinman, Hudson, Lillpop, Mielke, Paulson, Reeves, Robb, Shoemaker, and Younglund;
also SENATORS Yost, Clark, and Soash.

AN ACT

CONCERNING APPLICATIONS RELATING TO WATER RIGHT DETERMINATIONS AND CONDITIONAL WATER RIGHTS, AND SPECIFYING PROCEDURES AND CRITERIA RELATING THERETO.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 37-92-304 (6), Colorado Revised Statutes 1973, is amended to read:

37-92-304. Proceedings by the water judge. (6) Any decision of the water judge as specified in subsection (5) of this section dealing with a change of water right ~~may, and in the case of~~ OR a plan for augmentation shall, include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury. SUCH CONDITION SETTING FORTH THE PERIOD ALLOWED FOR RECONSIDERATION SHALL BE DETERMINED BY THE WATER JUDGE AFTER MAKING SPECIFIC FINDINGS AND CONCLUSIONS INCLUDING, WHEN APPLICABLE, THE HISTORIC USE TO WHICH THE WATER RIGHTS INVOLVED WERE PUT, IF ANY, AND THE PROPOSED FUTURE USE OF THE WATER RIGHTS INVOLVED. The water judge shall specify his determination as to such period in his decision, but the period may be extended upon further decision by the water judge that the nonoccurrence of injury shall not have been conclusively established. Any decision may contain any other provision which the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge, including decisions as to the period of reconsideration and extension thereof, shall become a judgment and decree as specified in this article and

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be appealable upon entry, notwithstanding conditions subjecting ~~them~~ THE DECISIONS to reconsideration on the question of injury to the vested rights of others as provided in this subsection (6).

Section 2. **Effective date - applicability.** This act shall take effect July 1, 1981, and shall apply to applications for water right determinations and conditional water rights submitted on or after said date.

Section 3. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 28, 1981