9-29-2004

Colo. Water Conservation Board v. Upper Gunnison River Water Conservancy Dist.

SUPREME COURT, STATE OF COLORADO
Court Address: 2 East 14th Avenue, 4th Floor
Denver, CO 80203

Appeal from the District Court, Water Division No. 4, Case No. 02CW38, Honorable J. Steven Patrick

Appellants-Opposers:
THE COLORADO WATER CONSERVATION BOARD, STATE ENGINEER AND DIVISION ENGINEER FOR WATER DIVISION 4,

v.

Appellee-Applicant:
THE UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT.

Appellees-Opposers:
Parties in Water Court proceeding including Uncompahgre Valley Water Users Association, Colorado River Water Conservation District, Virgil and Lee Spann Ranches, Robert and Geraldine Howard, Trout Unlimited, City of Gunnison and Gerald Bullock, *et al.*

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Case Number: 04SA44

ANSWER BRIEF OF THE COLORADO RIVER WATER CONSERVATION DISTRICT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

STATUTES

I. STATEMENT OF ISSUES

A. Whether the water court actually held that the limitations imposed by Senate Bill 01-216 ("SB 216") infringe on the constitutional right to appropriate.

B. Whether the water court properly applied SB 216 by determining that a recreational in-channel diversion ("RICD") water right should be measured first by the intent of the appropriator, subject to possible reduction, and that a single minimum flow for the Gunnison RICD was not appropriate.

C. Whether the legislature eliminated both the role of the water court and the intent of the appropriator, and instead delegated to the CWCB the sole authority to determine the minimum stream flow for a reasonable recreation experience.

D. Whether the CWCB's Findings of Fact that are based on a non-adjudicatory hearing without any sworn testimony or opportunity for cross-examination are subject to rebuttal by a preponderance of the evidence, and whether the CWCB's Recommendations are entitled to any presumptive validity.

II. STATEMENT OF CASE

The Colorado River Water Conservation District ("River District") adopts the Statement of Case set forth by the Applicant, the Upper Gunnison River Water Conservancy District ("Upper Gunnison District") and states further as follows:

The River District is statutorily delegated the duty to promote the conservation, use and development of the water resources of the Colorado River basin (including the Gunnison River) and is provided broad powers to safeguard for Colorado, all waters to which the state is equitably entitled under the Colorado River compact. C.R.S. § 37-46-101 (2003). The River District also is charged with the duty of promoting the growth and development of the entire district and the welfare of all of its inhabitants. *Id.* The River District approached this case with its unique dual statewide and

regional perspectives firmly in mind: (1) the River District wished to ensure that, if granted, the application would not materially impair the ability of Colorado to develop its Colorado River Compact entitlement; and (2) the River District wished to protect and support the ability of its constituent, the Upper Gunnison District, to develop water resources necessary to benefit the local economy.

The Upper Gunnison District fully addressed any potential that the claimed RICD would impair Colorado's compact entitlement by agreeing to the terms of the September 4, 2003, stipulation between the River District and the Upper Gunnison District. (R., v. II at 424-27.) That stipulation requires the Upper Gunnison District to substantially reduce the potential circumstances during which the RICD might otherwise be entitled to place a call on upstream junior water rights. (R., v. II at 425.) This "call-limitation" means that the RICD will be entitled to place an administrative call on junior water rights far less often than it otherwise would be entitled. (R., v. IX, UG Ex. 13, admitted at v. V, p. 24, lines 6-9.) Importantly, the call-limitation stipulation has the most benefit during the driest periods. *Id.* Furthermore, the call limitation provision applies to both in-basin and transmountain water rights. (R., v. II at 424-27.) If the Upper Gunnison District had a nefarious intent to use the RICD water right to thwart future transmountain diversions, it would have limited the applicability of the call-limitation provision to in-basin water rights only.

The evidence presented at trial demonstrated that the recreational use sought by the Upper Gunnison District will provide a substantial benefit to the City of Gunnison and the regional economy of Gunnison County, which is consistent with the River District's statutorily defined role

in promoting the beneficial use of water for the welfare of its inhabitants. (R., v. IV at p. 37, lines 11-17; p. 38 lines 6-19; p. 48, line 2 to p. 49, line 13; p. 198, line 4 to p. 199, line 25.)

III. SUMMARY OF ARGUMENT

The State mistakenly believes that the water court, in order to protect the constitutional right to appropriate, refused to reduce the flow rate claimed by the Upper Gunnison District. To the contrary, the water court plainly acknowledged that SB 216 might require a reduction in the claimed RICD if warranted by the evidence. The water court's reference to the constitutional right to appropriate therefore was merely intended to confirm that SB 216 must be applied to the flow rates claimed by the appropriator, not a flow rate determined by the CWCB.

The State tries to construct an odd argument that SB 216 created an entirely new type of non-diversionary instream flow water right; one similar to the non-diversionary instream flow rights appropriated by the CWCB to protect the natural environment. The argument is peculiar because, by definition, SB 216 requires that recreational in-channel diversion water rights must include a diversion of water. The Division 4 Water Court properly found in its Findings of Fact, Ruling of Law and Order that "as designed the [kayak] course will divert, capture and control the water applied for in its natural course and location..." (R., v. III at 1109.) In fact, the water court correctly noted that the ability of the designed course to meet the statutory definition of diversion by controlling water in its natural course was not disputed at trial. *Id.* The CWCB therefore has no special expertise on RICDs that would justify the argument that the CWCB is vested with the exclusive oversight of such water rights.

The State believes that SB 216 gave the CWCB the absolute authority to determine the RICD flow rate claimed by an entirely different entity. Moreover, the State believes that the CWCB was provided with the authority to determine whether a recreational experience is reasonable. Neither premise is at all plausible. SB 216 did place significant limitations on RICD water rights but it cannot reasonably be interpreted to entirely remove the role of the water court or to take the appropriator's intent out of the hands of the appropriator and place it in the hands of the CWCB.

The word "minimum" in SB 216 does not apply to a single reasonable recreation experience to be determined by the CWCB on a statewide basis because (1) RICDs are physically different than instream flow rights appropriated by the CWCB, and (2) SB 216 did not remove intent of the appopriator from the equation. Rather, the word "minimum" must be applied to the reasonable recreation experience that is sought by the applicant, and should be interpreted in light of traditional water law principles of avoiding waste and speculation.

The water court properly applied a "preponderance of evidence" burden for the rebuttal of the CWCB's Findings of Fact.

IV. ARGUMENT

A. The water court did *not* hold that SB 216 infringes on the constitutional right to appropriate.

The State and *amici*, the Rio Grande Water Conservation District, *et al.*, misinterpret the water court's statement on the constitutional right to appropriate. The water court stated that "to preclude an Applicant from determining precisely the size and scope of any recreational in channel

diversion would appear to infringe on the constitutional right to appropriate." (R., v. III at 1106.) Findings of Fact, Conclusions of Law and Order, p. 19. The State and *amici* take this statement out of context and run with it, using scare tactics to twist the interpretation of the water court's ruling into one that would allow unfettered recreational instream water rights to proliferate unchecked throughout Colorado.

1. The water court properly applied SB 216 and acknowledged that SB 216 might require a reduction in the claimed flow rate.

SB 216 provides a series of checks and balances for the adjudication of an RICD water right. First, SB 216 limits those who may appropriate an RICD to certain local governments. C.R.S. § 37-92-103(10.3) (2003). Second, the Act confirms that the water right is limited to the minimum stream flow for the reasonable recreation experience sought by the appropriator. *Id.* Third, it provides that the CWCB may hold a hearing to apply the so-called "SB 216 balancing factors" (*e.g.*, appropriate access, compact impairment, and maximum utilization) (a.k.a. the "Section 102(6)(b) balancing factors") to the claimed RICD. C.R.S. § 37-92-102(6) (2003). The CWCB may then issue Findings of Fact on whether the claimed RICD violates any of the SB 216 balancing factors. The Findings of Fact are presumptively valid, subject to rebuttal at trial. *Id.*; and C.R.S. § 37-92-305(13) (2003). Finally, the water court separately applies the SB 216 balancing factors and may reduce the claimed flow rate on its own initiative. C.R.S. § 37-92-305(13) (2003).

In this case, the water court carefully analyzed and applied all of the constraints imposed by SB 216 to the RICD flow rate claimed by the Upper Gunnison District. (R., v. III at 1107-09.) The

court clearly acknowledged that SB 216 might require a reduction in the flow rate claimed, if warranted by the evidence. For example, the court indicated its willingness to reduce the claimed flow rate if the evidence showed that the applicant requested too much water, stating in the ruling that:

> The Court concludes that the scope of the project, subject to waste, speculation and the foregoing criteria [*i.e.*, the S.B. 216 balancing factors], are (sic) up to Applicant. CWCB may make a finding that the quantity applied for is excessive, but did not do so here.

(R., v. III at 1108-09.)

The court also stated that it "will not second guess the Applicant *in its requested amount*." (R., v. III at 1106.) (Emphasis added). This statement does not mean that the court refused to reduce the amount sought by the Upper Gunnison District, but only that the court based its overall analysis on the flow rate requested by the Upper Gunnison District. In fact, the court's ruling suggests that a reduction was a distinct possibility if the weight of evidence had demonstrated that the amount claimed violated any of the SB 216 balancing factors.

> This Court concludes that the CWCB has not found nor does the Court, that at any of the levels requested by the Applicant this RICD will impair Colorado's ability to fully develop and put to beneficial use its compact entitlements, injure any CWCB instream flow right, is inconsistent with maximum utilization or will not divert, capture or control the requested water.

(R., v. III at 1107.)

The water court therefore assumed (properly so) that a reduction in the claimed flow rate for the RICD might be required if the CWCB actually had made a Finding of Fact or produced sufficient evidence at trial that the amount claimed runs afoul of SB 216. As noted by the water court in its

ruling, the "CWCB does not find that the amounts applied for either do or do not comport with the 102(6) factors." (R., v. III at 1102.) Instead, the CWCB's Findings of Fact assumed that the application had been filed for a flow rate of 250 c.f.s. (R., v. I at 87-90.) The CWCB's decision to ignore the intent of the appropriator and focus instead on its own determination of the flow rate for a reasonable recreation experience cannot now justify re-analysis of the actual flow rates claimed by the Upper Gunnison District.

Read in the light of the entire ruling, it is clear that the water court did not ignore the limitations imposed by SB 216. Instead, the court properly applied the limitations of SB 216 to the flow rate claimed by the Upper Gunnison District, and correctly refused to accept the State's argument that the CWCB should be the sole arbiter of what constitutes the minimum flow for a reasonable recreation experience.

2. Recreational use is an established beneficial use of water.

The State's argument that the CWCB is vested with the exclusive authority to determine an RICD flow rate is built on a very wobbly foundation. The State suggests that the criminal trespass case of *People v. Emmert*, 595 P.2d 1025 (Colo. 1979), supports the notion that there is no constitutional right to use water for recreational purposes. *People v. Emmert* involved the right to access private property for recreational purposes, and its holding cannot in good faith be extended to the appropriation of water rights. The appropriation of water rights simply was not at issue in that case, and the court mentioned water rights only for the specific purpose of distinguishing the access and trespass issues from the appropriation of water rights. *Id.* at 1028. The State's reliance on

People v. Emmert is therefore misplaced and the Court should summarily reject the State's analogy of criminal trespass law to the issues at hand in this case.

Perhaps more importantly, whether the Colorado Constitution expressly guarantees a right to the recreational use of water is largely irrelevant because what constitutes a beneficial use is not established by the Constitution. Rather, it is based on the acts of appropriators who control water for their own purposes. *Sante Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 53, 55 (Colo. 1999) ("*Sante Fe Trail v. Simpson*") (beneficial use is not defined or limited by the Colorado Constitution; rather, "what constitutes a beneficial use tracks legislative enactments, court decisions, and *principally, the acts of appropriators who control the water for their purpose.*") (Emphasis added).

The principle confirmed in *Santa Fe Trail v. Simpson*, has allowed water users to obtain water rights for numerous "new" uses of water throughout the years, including water rights for recreational uses. This Court has had the opportunity in several important cases to acknowledge and confirm some of the many recreational rights decreed throughout Colorado. See *Board of County Comm'rs of Arapahoe County v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 340 (Colo. 2000) ("Recreation and fish and wildlife are recognized beneficial uses in Colorado."), *citing, May v. United States*, 756 P.2d 362, 371 (Colo. 1988); *Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1251 (Colo. 1996)(impounded water "can be beneficially applied to fish, recreational, and flood control uses therein."); *Board of County Comm'rs of Arapahoe County v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 848 (Colo. 1992) (recreational use recognized by exercise

of control over refill water released from reservoir); *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 173 (Colo. 1988)(use of man-made ponds for recreational purposes "falls within the statutory definition of beneficial use"). This case law unequivocally demonstrates that recreation was confirmed as a beneficial use of water long before the adoption of SB 216.

3. *By definition*, an RICD requires a statutory diversion of water.

The State suggests that an RICD is an entirely new creature of statute, and that SB 216 therefore should be construed in a tortuous manner that effectively would place absolute control of recreational water rights in the hands of the CWCB. The basis of the State's position is that SB 216 legislatively enacted a rare exception to the historical diversion requirement necessary to obtain a water right and that an RICD therefore is a new type of instream flow. State's Opening Brief, p. 8, 13. The State then claims that, because the CWCB has special expertise in non-diversionary water rights, SB 216 vested the CWCB with the exclusive authority to determine the minimum flow rate of an RICD. State's Opening Brief, p. 19. The State's argument fails for a number of reasons, but particularly because it requires the Court to ignore that an RICD, *by definition*, requires a statutory diversion of water.

An RICD is statutory defined as:

> The minimum stream flow as it is *diverted, captured, controlled* and placed to beneficial use between specific points *defined by physical control structures* pursuant to an application filed by [certain municipal and quasi-municipal entities] for a reasonable recreation experience in and on the water.

C.R.S. § 37-92-103(10.3) (2003) (Emphasis added).

Because an RICD is statutorily defined to require a diversion water, the State's argument that it has specific expertise to determine the flow rate simply fails to make sense.

In 1992, this Court recognized that the statutory definition of diversion contained in the 1969 Act permits a water user to make an in-channel diversion for recreational purposes. *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 929-930 (Colo. 1992) ("*Fort Collins*"). It is important to note that this Court in *Fort Collins* did not create RICD water rights out of thin-air. Rather, this Court simply recognized, for the first time, the existing statutory authority to appropriate in-channel diversions for recreational purposes. That authority has existed at least since the adoption of the Water Right Determination and Administration Act of 1969, C.R.S. §§ 37-92-101 to -602 (the "1969 Act"). From the time it was first enacted, the 1969 Act has contained a definition of diversion that expressly includes "controlling water in its natural course or location...."

> "Diversion" or "divert" means removing water from its natural course or location, *or controlling water in its natural course or location, by means of a* ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other *structure or device.*

ch. 373, sec. 1, § 148-21-3(5), 1969 Colo. Sess. Laws 1200, 1201 (currently codified as C.R.S. § 37-92-103(7)) (2003) (Emphasis added).

SB 216 modified the definition of "diversion" by restricting who may appropriate an RICD, but it did not change the language that provides a diversion may occur by controlling water in its natural course with a structure or device. C.R.S. § 37-92-103(7) (2003).

The legislature expressly acknowledged, through the Legislative Statement for SB 216, that the authority to appropriate an RICD water right already existed when it adopted SB 216:

> SB 216 is designed to ensure that decrees for recreational in-channel diversions, *as recognized by the Colorado Supreme Court in the City of Thornton v. City of Fort Collins case*, are integrated into the state prior appropriation system in a manner which appropriately balances the need for water based recreational opportunities with the ability of Colorado citizens to divert and store water under our compact entitlements for more traditional consumptive use purposes, such as municipal, industrial and agricultural uses.

Legislative Statement for SB 216. (Emphasis added) (R., v. III at 945.)

Any ambiguity in SB 216 must be interpreted in light of the legislature's assumption that the authority to appropriate RICDs existed prior to SB 216. It would stretch the bounds of reason for the legislature to name the water right a "recreational in-channel *diversion*" if it did not intend that the appropriation of such a water right would actually require a statutory diversion. The State's argument that SB 216 created the second "exception to the diversion requirement" is therefore without merit. See State's Opening Brief, p. 8. It follows that, because an RICD inherently requires a diversion, the CWCB has no special expertise to determine the appropriate flow rate for an RICD. Likewise, because a diversion is necessary for an RICD, the word "minimum" does not supercede the rest of SB 216 or otherwise impose extraordinary meaning separate from the traditional water law principles of avoiding waste and speculation.

B. SB 216 requires the court to measure an RICD first by the intent of the appropriator, subject to possible reduction. A single minimum flow rate for an RICD is not required.

SB 216 contemplates that the water court (1) determine whether the amount of water claimed by the applicant is the minimum flow that can be controlled (*i.e.*, diverted and put to beneficial use without waste) for the reasonable recreation experience sought by the applicant, and (2) then apply the SB 216 "balancing factors" to the flow rate claimed by the applicant. The State's interpretation

of SB 216 would require that the court ignore the intent of the appropriator and rely solely on the CWCB to determine a single minimum flow rate for an experience determined only by the CWCB to be reasonable.

1. SB 216 requires that the initial measure of an RICD must be based on the intent of the appropriator.

Contrary to the State's interpretation, nothing in SB 216 eliminates or reduces in any way, the long established principle that the intent of the appropriator is critically important to determine the measure of a water right. See *Sante Fe Trail v. Simpson, supra,* at 53, 55 ("what constitutes a beneficial use tracks legislative enactments, court decisions, and *principally, the acts of appropriators who control the water for their purpose.*") (Emphasis added).

The necessity to consider the intent of the appropriator also is firmly embodied within the statutory definition of beneficial use, which was amended by SB 216 to expressly incorporate uses for RICD purposes:

> "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the *purpose for which the appropriation is lawfully made*, and without limiting the generality of the foregoing includes the . . . diversion of water by [certain municipal and quasi-municipal entities] for recreational in-channel diversion purposes.

C.R.S. § 37-92-103(4) (2003) (Emphasis added).

The statutory definition of an RICD contains another express incorporation of the intent of the appropriator in the measure of an RICD water right by emphasizing that an RICD is determined "pursuant to an application filed by [the appropriator]". C.R.S. § 37-92-103(10.3) (2003).

The intended purpose of the appropriator is therefore a key factor in determining the appropriate flow rate of an RICD, just as the intent of the appropriator is important for determining the measure of any other type of water right. *Sante Fe Trail v. Simpson*, supra at 53, 55.

2. The minimum flow for a reasonable recreation experience can vary substantially, based on the type of recreational use sought by the appropriator who will put the water to beneficial use.

The water court is in the best position to determine if the intended purposes of a claimed RICD are reasonable, and whether the amount of water claimed is the minimum flow rate to serve the intended purposes. As with any other type of water right, the appropriate flow rate must be viewed in light of the amount necessary to achieve the intended purposes of the appropriation. The flow rate for the Gunnison RICD will necessarily be different than the flow rate for an RICD on a different stream, appropriated by a different entity. The issue is inherently fact specific and will vary depending on a number of factors, including: (1) the specific purposes sought to be achieved by the entity appropriating the RICD; (2) the natural characteristics of the stream channel in which the artificial control structures will be placed; and (3) the natural hydrograph of the particular stream. Even though the appropriate flow rate may vary from one RICD to another, and may even vary within the same RICD, the flow rate decreed to an RICD must not exceed the minimum flow for the specific recreational activity sought by the appropriator.

In the current case, the Upper Gunnison District appropriated a range of flows in the shape of the natural hydrograph (but well below the peak flows of the natural hydrograph), in order to attract expert boaters throughout the runoff season. The evidence at trial showed that low flows in

the Gunnison whitewater course during periods when other rivers and whitewater courses throughout the state would have higher flows would not achieve the purposes sought by the Upper Gunnison District. (R., v. III at 1101-02.)

The water court carefully reviewed the claimed flow rates to determine whether the flows were the minimum rate for the intended purposes of the RICD. The water court gave substantial consideration to the meaning of the term "minimum" and determined that the word "minimum" must be read in the context of the entirety of SB 216, together with traditional principles of water law, including waste and speculation. (R., v. III at 1106-07.) The court ruled that the claimed flow rates would accomplish the purposes sought without waste, so that a reduction in the variable rates claimed was not necessary in order to meet the stream flow required by SB 216 for the reasonable recreation experience sought by the Upper Gunnison District. *Id.*

3. The State ignores the obvious difference between instream flow rights and recreational in-channel diversion rights.

In order to justify its argument that RICDs are new exceptions to the historical diversion requirement, the State blatantly ignores the fundamental difference between instream flow water rights and recreational in-channel diversions. Instream flow rights (which are limited to appropriation by the CWCB) have no control structures and therefore do not constitute a statutory diversion. C.R.S. § 37-92-102(3) (2003) ; and *Colorado River Water Conservation Dist. v. Colorado Water Conservation Board*, 594 P.2d 570, 574 (Colo. 1979). In contrast, an RICD water right must make a diversion of water by using man-made structures or devices to control water in its natural course or location. C.R.S. §§ 37-92-103(7) and 37-92-103(10.3) (2003). Because RICDs

are fundamentally different than instream flows appropriated by the CWCB to protect the environment, the State's analogy to the instream flow program is misplaced. No justification therefore exists to limit an RICD to an absolute minimum flow for a single uniform "reasonable" recreation experience. Instead, the water court must first look to the recreation experience that is sought by the appropriator. The experience sought must be reasonable, but it does not have to be uniform throughout the state.

C. The legislature reserved to the water court the authority to determine the minimum stream flow for the reasonable recreation experience sought by the appropriator.

The State ignores the intent of the appropriator and argues that the CWCB has the exclusive authority to determine a single, uniform minimum flow rate for recreation experience determined by the CWCB to be reasonable. See State's Opening Brief, p. 19. SB 216 does not support this "one-size-fits-all" approach to RICDs. If the legislature had intended to remove the appropriator's intent from the equation and to provide the CWCB with the authority to determine what constitutes a reasonable recreation experience and what the minimum flow rate for that experience should be, it would have said so in express terms. Instead, the primary reason the legislature enacted SB 216 was to operate as a kind of a "checks and balances" on RICD claims. (R., v. III at 945.) SB 216 therefore includes a list of "balancing factors" that are intended to protect against potentially mischievous water right filings by entities or individuals seeking to usurp the entire water development capacity of a river basin. C.R.S. §37-92-102(6)(b) (2003). SB 216 requires that the CWCB apply the "balancing factors" to the claimed RICD and make Findings of Fact and

Recommendations to the water court based on the "balancing factors." This requirement is the only authority delegated to the CWCB by SB 216. The statute provides in pertinent part that:

> (b) In determining whether the [CWCB] shall *recommend* that the water court grant, grant with conditions, or deny [an RICD] application, the [CWCB] shall consider the following factors and make written findings thereon:
>
> (I) Whether the adjudication and administration of the recreational in-channel diversion would impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;
>
> (II) The appropriate reach of stream required for the intended use;
>
> (III) Whether there is access for recreational in-channel use;
>
> (IV) Whether exercise of the recreational in-channel diversion would cause material injury to instream flow water rights appropriated pursuant to subsections (3) and (4) of this section;
>
> (V) Whether adjudication and administration of the recreational in-channel diversion would promote maximum utilization of waters of the state as referenced in paragraph (a) of subsection (1) of this section; and
>
> (VI) Such other factors as may be determined appropriate for evaluation of recreational in-channel diversions and set forth in rules adopted by the [CWCB], after public notice and comment.

C.R.S. § 37-92-102(6)(b) (2003) (Emphasis added).

Nothing in the "102(6)(b) factors" listed above, or anywhere else in SB 216, provides the CWCB with the responsibility or authority to judge whether the applicant is seeking a reasonable

recreation experience. Nor does the statute direct the CWCB to determine what the minimum flow for the recreational experience sought should be. Rather, those questions are properly reserved to the water court based on the intent of the appropriator as reflected in the water court application and any supporting evidence.

D. SB 216 contemplates that the Findings of Fact issued by the CWCB are rebuttable by a preponderance of the evidence and that the CWCB's Recommendations are not entitled to any presumptive validity.

1. SB 216 provides the CWCB with the authority to make presumptively valid findings only on certain limited factual issues.

SB 216 does not provide the CWCB with the broad powers it seeks in this appeal. Its powers are limited to making presumptively valid factual findings only on the matters identified in the SB 216 balancing factors. C.R.S. §§ 37-92-102(6) and 37-92-305(13). To the extent the CWCB's Findings of Fact can be interpreted to include findings on matters not set forth in the balancing factors, no presumption of validity can be applied. The CWCB's recommendations are not entitled to any presumption of validity. *Id.*

2. A preponderance of the evidence is the correct burden to rebut the CWCB's Findings of Fact.

The statute does not specify the applicable burden of proof to rebut the CWCB's Findings of Fact. The water court therefore properly used the "preponderance of the evidence" standard – the customary standard in water rights matters where a statutory presumption arises under the 1969 Act. For example, the 1969 Act provides that failure to use a water right for a period of ten years creates a rebuttable presumption of abandonment of the right. C.R.S. § 37-92-402(11). The statute does

not specify the burden of proof necessary to overcome the presumption of abandonment but this Court has confirmed that the correct burden is a "preponderance of the evidence." See *East Twin Lakes Ditches and Water Works, Inc. v. BOCC of Lake County*, 76 P.3d 918, 921 (Colo. 2003); *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 552 (Colo. 2000).

The cases cited by the State in support of its argument that a "clear error" standard applies concern administrative agencies operating in an adjudicatory or quasi-adjudicatory role. A strict burden of proof cannot be applied in this case because the CWCB's hearing did not meet any of the normal criteria for an adjudicatory or quasi-adjudicatory proceeding. No witnesses were sworn-in, no evidentiary rules were applied, and no cross-examination was permitted. (R. v. III at 1133-34.)

3. Sufficient evidence was presented at trial to overcome any presumption of validity on the matters delegated to the CWCB.

The evidence at trial was sufficient to overcome even the strictest burden of proof applied to the CWCB's findings. As discussed above, no presumption of validity applies to matters not set forth in the balancing factors. Only two of the SB 216 balancing factors were seriously disputed at trial. (R., v. III at 1108-1109.)

Contrary to the assertion of the State, there was no evidence that the claimed RICD would impair Colorado's compact entitlement.[1] The testimony at trial relied on by the State indicates only

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[1]The State inappropriately cites to State's Ex. 8 as evidence of the potential impact of the RICD. See State's Opening Brief, p. 2. State's Ex. 8 is a transcript of the CWCB's informal hearing on the claimed RICD. That exhibit was admitted for the limited purposes of demonstrating the deliberations of the CWCB based on the evidence that was submitted to the CWCB. (R., v. III, p. 187, line 12 to p. 190, line 6; v. IV, p. 144, line 1 to p. 149, line 25.) The exhibit was not offered or admitted to prove the truth of the evidence submitted to the CWCB.

that the claimed RICD could place an administrative call on currently unknown junior water rights located upstream of the RICD in certain limited circumstances. See State's Opening Brief, p. 26. The simple fact that the RICD, just like any other water, has the potential to call-out more junior water rights on occasion does not result in compact impairment.

The great weight of testimony at trial was provided by James Lochhead, a former executive director of the Colorado Department of Natural Resources, who served at trial as the Upper Gunnison District's expert witness on compact and maximum utilization issues. (R., v. V, p. 205, line 25 to p. 206, line 1; v. V, p. 213, line 2, p. 118, line 13 to p. 219, line 3.) Mr. Lochhead testified that there would not be any compact impairment because the state's Colorado River Compact entitlement is allocated to the state as a whole, not to individual river basins. (R., v. V, p. 221, line 5 to p. 225, line 9; v. VI, p. 12, lines 9-16; p. 19, line 8 to p. 20, line 10.)

The state's compact entitlement therefore can be developed in other river basins. In addition, new water development can occur upstream of the RICD, even in circumstances where the RICD might be entitled to place an administrative call under the priority system on a junior water right. The doctrine of maximum utilization requires that all water rights, including possible future projects, use reasonable means to effectuate their diversions. To promote maximum utilization, future projects must take advantage of the flexible nature of Colorado water law to develop projects through the use of augmentation plans, new storage facilities, and exchanges. (R., v. VI, p.5, line 7 to p. 7, line 17.)

V. CONCLUSION

Whether SB 216 created an entirely new type of water right or simply recognized existing law and imposed certain limits on future RICDs may present an interesting intellectual debate. In this case, however, it is mostly irrelevant because: (1) the legislature assumed that such rights did exist when it adopted SB 216, so any ambiguity in SB 216 must be interpreted with that assumption in mind; (2) the RICD water right at issue meets the long-standing statutory definition of diversion; (3) the water court gave appropriate weight to the Findings of Fact and Recommendations of the CWCB; (4) the water court properly applied SB 216, including a detailed review of the compact impairment and maximum utilization "balancing factors"; and (5) the evidence presented by the Upper Gunnison District was more than sufficient to overcome any presumption of validity that may be applicable to the CWCB's Findings of Fact.

WHEREFORE, the River District respectfully requests that the Court affirm the Findings of Fact, Conclusions of Law and Order, and the Decree of the Division 4 Water Court.

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Supreme Court, State of Colorado (Appeal from District Court, Water Division No. 4, Case No. 02CW38)
Case No. 04SA44: *Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy District*
Answer Brief of the Colorado River Water Conservation District

Respectfully submitted on September 29, 2004.

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Supreme Court, State of Colorado (Appeal from District Court, Water Division No. 4, Case No. 02CW38)
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER BRIEF OF THE COLORADO RIVER WATER CONSERVATION DISTRICT was placed in the United States Mail at Glenwood Springs, Colorado, first class, postage prepaid, on September 29, 2004, addressed as follows:

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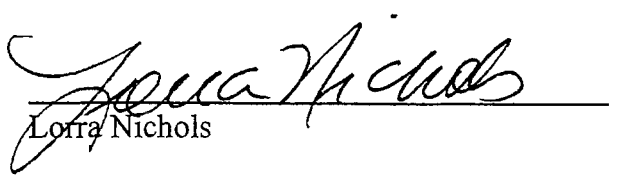

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