12-12-2005

Cent. Colo. Water Conservancy Dist. v. City of Greeley (In re Water Rights)

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
Denver, CO 80203

APPEAL FROM THE DISTRICT COURT,
WATER DIVISION 1, 00CW72
APPEAL FROM THE DISTRICT COURT,
WATER DIVISION 1, 02CW200

05SA120

CONCERNING THE APPLICATION FOR WATER RIGHTS OF CENTRAL COLORADO WATER CONSERVANCY DISTRICT AND GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT IN WELD COUNTY.

Applicants/Appellants/Cross-Appellees:

CENTRAL COLORADO WATER CONSERVANCY DISTRICT and GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT,

and

Opposer/Appellant:

CACHE LA POUDRE WATER USERS ASSOCIATION,

v.

▲ COURT USE ONLY ▲

Consolidated Cases

Case No. 05SA120
Case No. 05SA121

Opposers/Appellees: CITY OF GREELEY acting by and through its Water and Sewer Board, GREELEY IRRIGATION COMPANY, IRRIGATIONISTS ASSOCIATION, and CITY OF THORNTON, and **Opposers/Appellees/Cross-Appellants:** CITY OF BOULDER and CENTENNIAL WATER AND SANITATION DISTRICT, and **Appellee:** JAMES HALL, Division Engineer for Water Division No. 1.	
* * * * *	

05SA121 CONCERNING THE APPLICATION FOR WATER RIGHTS OF CENTRAL COLORADO WATER CONSERVANCY DISTRICT AND GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, IN WELD COUNTY, **Applicants/Appellants/Cross-Appellees:** CENTRAL COLORADO WATER CONSERVANCY DISTRICT and GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, and **Opposer/Appellant:** CACHE LA POUDRE WATER USERS ASSOCIATION v. **Opposers/Appellees:** CITY OF GREELEY acting by and through its Water and Sewer Board, GREELEY IRRIGATION COMPANY, CITY OF THORNTON, AGGREGATE INDUSTRIES, - WCR, INC.,	

and **Opposers/Appellees/Cross-Appellants:** CITY OF BOULDER, CENTENNIAL WATER AND SANITATION DISTRICT, and THE HARMONY DITCH COMPANY, and **Appellee:** JAMES HALL, Division Engineer for Water Division No. 1.	

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OPENING-ANSWER BRIEF OF CITY OF BOULDER, CENTENNIAL WATER AND SANITATION DISTRICT, AND THE HARMONY DITCH COMPANY

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I. INCORPORATION OF ANSWER BRIEF.

The City of Boulder, Centennial Water and Sanitation District, and the Harmony Ditch Company (collectively referred to as "Opposers") hereby file their Answer Brief on the issue of *laches* with respect to the issues presented in the appeal, and their Opening Brief on the issues presented in the cross-appeal. Opposers further adopt the Answer Brief of the City of Greeley, Acting by and Through its Water and Sewer Board, and Greeley Irrigation Company ("Greeley Brief"), including Statement of the Issues and Statement of the Case. In this Opening-Answer Brief, Opposers provide an additional Statement of the Issues and Statement of the Case with respect to the cross-appeal issues. The Opposers recommend that the Greeley Brief be read prior to the following Brief.

II. STATEMENT OF THE ISSUE ON CROSS-APPEAL.

> Did the Water Court err in finding and determining that Central Colorado Water Conservancy District and its Ground Water Management Subdistrict (collectively referred to as "Central") are entitled to additional transferable consumptive use for a water right for which Central has already received more consumptive use than Central's proportionate ownership of the water right?

III. STATEMENT OF THE CASE.

A. Nature of the Case.

Opposers adopt the statement of the Nature of the Case contained in the Greeley Brief.

B. Course of Proceedings.

Opposers adopt the statement of the Course of Proceedings contained in the Greeley Brief, with the following additions. At the conclusion of Central's case in chief, in addition to the Motion For Determination of Question of Law Pursuant to C.R.C.P.56(h) referenced in the Greeley Brief, Opposers moved to dismiss Central's applications, with prejudice, pursuant to C.R.C.P. 41(b). The C.R.C.P. 41(b) motion asserted that since Central had already been allocated more than its proportional ownership interest in the Jones Ditch Water Right historical consumptive use in Case No. 88CW127, as decreed by the District Court in and for Water Division No. 1 ("Case No. 88CW127"), Central had no remaining transferable consumptive use.

C. Disposition By the Water Judge.

Opposers adopt the statement of the Disposition By the Water Judge contained in the Greeley Brief, with the following addition. Following the filing of motions at

the conclusion of Central's case in chief, the Water Court issued Findings of Fact, Conclusions of Law, and Order on Pending Rule 41(b) and 56(h) Motions Regarding Lawful Historic Use Entitlement on February 17, 2005 ("February Order"), which denied the motion to dismiss by Opposers. R., Vol. 6, pp. 890-895. In the February Order, the Water Court found that Central was entitled to relief to the extent that the portion of the Jones Ditch Water Right associated with the shares that are the subject of the two applications herein were historically used within the 340 acres determined by the Water Court to be the lawful historical use. *Id.* at 894. Of the 293.6 acres that were historically irrigated with the portion of the Jones Ditch Water Right represented by the 77 shares that are the subject of this appeal, the Water Court found that 37 acres were within the lawfully irrigated area. *Id.* The Water Court further found and determined that notwithstanding the fact that Central had obtained a decree in Case No. 88CW127 changing more of the historical consumptive use of the Jones Ditch Water Right than was represented by Central's ownership of stock in the Jones Ditch Company, Central was entitled to an additional approximately 66.65 acre feet of transferable consumptive use.

D. Statement of Facts.

Opposers adopt the Statement of Facts contained in the Greeley Brief, with the following addition. Central owns a total of 139 of the 200 outstanding shares, or 69.5%, of the Jones Ditch Company. R., Vol. 6, p. 891 Central's expert witness, Lindsey Griffith, testified regarding her historical consumptive use analysis of the Jones Ditch Water Right, and Ms. Griffith testified that approximately 520 acre-feet was annually consumed on the 340 acres found by the Water Court to have been lawfully historically irrigated. R., Vol. 6, pp 891, 892. Based on its *pro rata* ownership of 69.5% of the Jones Ditch Water Right, Central is entitled to approximately 361 acre-feet of total annual consumptive use of water pursuant to the Jones Ditch Water Right. In Case No. 88CW127, Central filed an application to change 62 shares of stock in the Jones Ditch Company, which represented 31% of the Jones Ditch Water Right. R., Vol. 6, p. 891. The Water Court there determined that the portion of the Jones Ditch Water Right represented by the 62 shares of stock in the Jones Ditch Company had historically been used to irrigate 230 acres, all of which were located within the lawfully irrigated 340 acres, and that the historical irrigation resulted in 401.4 acre-feet of annual historical consumptive use associated with the Jones Ditch Water Right. R., Vol. 6, 891.

IV. SUMMARY OF THE ARGUMENT.

The Water Court property found and determined that (1) Opposers had no duty to act with respect to the unlawful expansion of use of the Jones Ditch Water Right by Central and its predecessors, and (2) Central had failed to establish any of the elements of *laches*. Colorado law has never required other water users to expend time and money to ferret out unlawful use of other water rights, with the potential penalty of allowing expansion of use of the water right. Colorado law requires compliance with the decrees confirming water rights, and water users who do not comply with their decrees do so at their peril. Moreover, Central adduced no evidence that would meet the elements of *laches*. Therefore, the determination of the Water Court regarding the claims of *laches* should be affirmed.

The Water Court erred in granting Central relief in the form of additional transferable consumptive use of the Jones Ditch Water Rights, and in denying the motion to dismiss with prejudice. The Jones Ditch Company is a mutual ditch company that provides water to its shareholders on a *pro rata* basis. In Case No. 88CW127, Central was allocated more historical consumptive use credit than Central's proportional ownership of the Jones Ditch Water Right. By failing to consider this previous decree and impose limitations in these cases on the use of the

subject portion of the Jones Ditch Water Right, the Water Court has authorized an unlawful expansion of use of the Jones Ditch Water Right. This is error and should be reversed.

V. ARGUMENT CONCERNING *LACHES*

A. <u>The Water Court's Factual Finding That Central Did Not Prove Laches Against Opposers is Fully Supported By the Record.</u>

The Water Court found that Central had not established any of the elements of laches at trial and that Opposers had no duty to act concerning the unlawful enlarged use of the Jones Ditch Water Right until the applications in these cases were filed. January Order, p. 13, R., Vol. 6, p. 877. These factual findings are fully supported by the record and should not be disturbed on appeal. *See, e.g., City of Black Hawk v. City of Central*, 97 P.3d 951, 956 (Colo. 2004) (factual findings will not be disturbed on appeal unless they are so clearly erroneous as to find no support in the record).

1. The Water Court correctly determined that *laches* is not applicable here because Opposers had no duty to act concerning the unlawful enlarged use of the Jones Ditch Water Right until the applications in these cases were filed.

The standard for establishing *laches* in the water right context is high and *laches* does not apply where the party against whom it is asserted has no duty to

act. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 74 (Colo. 1996); *Lower Latham Ditch Co. v. Louden Irr. Canal Co.*, 27 Colo. 267, 60 P. 629 (1900). These principles were first applied by this Court more than 100 years ago in *Lower Latham*. There, the Lower Latham Ditch Company brought suit against the Louden Irrigating Canal Company and others to compel them to recognize Lower Latham's senior water rights and to cease their junior diversions when Lower Latham's senior water rights were not satisfied. Louden asserted that Lower Latham was barred by *laches* from bringing its claim because it knew of a previous judgment purporting to authorize Louden's diversions and had not protested those diversions for almost 10 years. This Court rejected Louden's *laches* defense:

> The evidence may establish that from July, 1890, down to the date when this suit was instituted, [Lower Latham] may have been short of water, which it knew was caused by the diversion of defendant companies' ditches from the Big Thompson. No protest against this action was made. The supply of water in the streams of this state is variable. In times of low flow in a steam, or its tributaries, which is the common source of supply for many ditches, some will be unable to obtain their full share. **If a failure of one diverting water from a stream to protest every time a shortage in his supply is occasioned by another withdrawing water to which he is not entitled is to be construed as laches** or acquiescence amounting to an abandonment, **priorities as determined under the statutes would be of little value.**

Lower Latham, 27 Colo. at 273-274, 60 P. at 631 (emphasis provided). *Lower Latham* established that a water user has no duty to act simply because a shortage is occurring to his water rights from another water user's unlawful actions, even where the injured water user has actual knowledge of the injury. This rule applies in the instant cases.

Central alleges, without explanation, that Opposers had a duty to act under Section 35 of the 1881 Act at the time the unlawful expansion of the Jones Ditch Water Right occurred. *Central Opening Brief*, p. 43. This argument is without merit. Section 35 established a four year statute of limitations to attack *priorities* awarded by a decree and was not a remedy for enlarged use or injury occurring after entry of a decree. *See* 1881 Colo. Sess. Laws 160, § 35 (attached to *Central Opening Brief*) (all parties affected by decree shall be deemed to have acquiesced after the lapse of four years, and cannot thereafter assert a priority contrary to the decree). Moreover, even if this statute was applicable, Central's evidence at trial established that the use of the Jones Ditch Water Right to irrigate increased acreage began sometime after 1894 and did not reach its maximum until 1919. January Order, p. 4, R., Vol. 6, p. 868. Thus, the enlarged use did not begin until at least 12 years after entry of the 1882 Decree.

Cache La Poudre Water Users Association ("Water Users") argue that a "duty to act" is not a separate element of *laches*, but rather a restatement of other elements, and then conclude that Opposers had a duty to act because they and all appropriators had a remedy, i.e., an injunction suit. *Water Users Opening Brief*, pp. 27-29. This argument was rejected more than 100 years ago, in *Lower Latham*.

The Water Court correctly found that Opposers had no duty to act concerning the unlawful enlarged use of the Jones Ditch Water Right prior to Central's filing of the applications in these cases. At that time, Opposers were required under the provisions of the *Water Right Determination and Administration Act of 1969*, §§ 37-92-101, et seq., C.R.S., ("1969 Act") to assert their objections to the proposed change of the Jones Ditch Water Right, including the claimed historical use, or lose their right to do so. Where, as here, the record shows that Opposers timely pursued this available remedy in accordance with procedures established by the 1969 Act, *laches* cannot act as a bar to their claims. *See Bd. of County Commissioners of Boulder County v. Echternacht*, 194 Colo. 311, 315, 572 P.2d 143, 146 (1977) (County not barred by *laches* where it diligently sought to abate zoning violations after becoming aware of them).

In addition, *laches* is a form of estoppel and for estoppel to apply in the water right context, there must be evidence of deceit, fraud and moral turpitude on the part of the party against whom estoppel is sought. *City of Thornton*, 926 P.2d at 76; *Aubert v. Town of Fruita*, 192 Colo. 372, 374, 559 P.2d 232, 234 (1977); *Upper Harmony Ditch Co. v. Stunkard*, 177 Colo. 6, 8, 492 P.2d 631, 634 (1972); *Lower Latham*, 27 Colo. at 274, 60 P. at 631. The Water Court found there was no evidence of deceit, fraud or moral turpitude on the part of the Opposers and this finding is fully supported by the record. January Order, p. 13, R., Vol 6, p. 877.

2. The record fully supports the Water Court's factual finding that Central did not sufficiently establish the elements of *laches*.

The party asserting *laches* has the burden of proving the required elements; whether those elements have been established is a question of fact. *See, e.g., Robbins v. State*, 107 P.3d 384, 388 (Colo. 2005); *Superior Const. Co., Inc. v. Bentley,* 104 P.3d 331, 334 (Colo. App. 2004). The elements of *laches* are (1) full knowledge of the facts; (2) unreasonable delay in the assertion of an available remedy; and (3) intervening reliance by and prejudice to another. *City of Thornton,* 926 P.2d at 73. Each of these elements must be proven; however, full knowledge of the facts is a threshold showing.

This Court has previously defined "full knowledge of the facts" to mean actual knowledge of the relevant facts. *See Robbins*, 107 P.3d at 388; *Bd. of County Commissioners of Boulder County v. Echternacht*, 194 Colo. at 315, 572 P.2d at 146 (1977). Nonetheless, Central and Water Users argue that constructive knowledge of the relevant facts or "knowledge of circumstances" that may be equivalent to actual notice is sufficient to satisfy the full knowledge element of *laches*. *Central Opening Brief,* pp. 42-43; *Water Users Opening Brief*, pp. 21-23. Central does not cite any cases in support of its argument. Water Users cite only one Colorado case, *Colburn v. Gilcrest*, 60 Colo. 92, 151 P. 909 (1915). This case did not involve a *laches* claim, but instead was a quiet title action involving a party in physical possession of the disputed property. This Court held that the actual possession of the property at issue was sufficient notice to the other party in connection with execution and levy on a judgment. The case is not relevant here.

Central and Water Users do not identify any evidence in the record that proves the Opposers had actual knowledge of the unlawful enlarged use of the Jones Ditch Water Right prior to the filing of the applications in these cases.[2] Instead, both

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[2] Water Users requests this Court to remand for further inquiry into whether Opposers or their predecessors had knowledge of facts sufficient to put them on constructive notice. *Water Users Opening Brief*, p. 25. However, Central put on

Central and Water Users identify certain general facts they allege should have been known by Opposers, but do not identify any evidence in the record that shows these facts were actually known by any of the Opposers.[3] Under these circumstances, the Water Court's finding that the first element of *laches* was not sufficiently proven is amply supported by the record.

With respect to the second element of *laches*, an unreasonable delay in the assertion of an available remedy, Central does not specify the length of the alleged delay. Water Users argue that the alleged delay in asserting Opposers' rights was at least 85 years; and, without citing any authority, assert that this should be considered unreasonable. *Water Users Opening Brief*, pp. 25-26. Lapse of time alone is not sufficient to establish *laches* without proof of the other required elements. *Robbins,* 107 P.3d at 388; *Keller Cattle Co. v. Allison,* 55 P.3d 257, 261 (Colo. App. 2002).

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its entire case-in-chief prior to Opposers' motions, and thus was given its "day in court" to prove this affirmative defense. Water Users elected not to participate at trial. Neither Central nor Water Users should be given a "second bite at the apple" to re-try this defense.

[3] Central takes the contrary position that, while all other water users were on "actual or constructive notice" of the expansion of irrigation beyond the acreage to which Mr. Jones testified in 1879, *Central Opening Brief*, p. 42, it was "unfair" for the Water Judge to admit such testimony and burdensome for Central to have to "attempt [] to locate proof of the subjective intent of an appropriator who perished" long ago. *Central Opening Brief,* pp. 28, 44.

What constitutes an unreasonable delay for purposes of *laches* is a question of fact that is dependent on all the circumstances of each case. *Falls v. Lahmer*, 157 Colo. 521, 404 P.2d 542 (1965); *Duncan v. Colorado Investment & Realty Co.*, 116 Colo. 12, 178 P.2d 428 (1947). Because of the lack of evidence in the record showing that Opposers had actual knowledge of the enlarged use of the Jones Ditch Water Right, there is also no evidence of the date on which any such alleged actual knowledge would have been known and therefore no basis on which the Water Court could conclude that the alleged delay was unreasonable. Consequently, the Water Court's factual finding that this second element of *laches* was not sufficiently established by Central is fully supported by the record.

With respect to the final element of *laches*, intervening reliance by and prejudice to another, both Central and Water Users argue that the Jones Ditch Company shareholders, including Central, have justifiably relied on the expanded use of the Jones Ditch Water Right to their detriment. *Central Opening Brief*, p. 43; *Water Users Opening Brief*, p. 26. As noted previously, Water Users did not participate at trial and did not present any evidence concerning reliance or prejudice to Central or any other party. Nor does Water Users point to any specific evidence from the record that establishes such reliance or prejudice. Central likewise does not

identify any evidence in the record that supports its claimed reliance or prejudice, nor that of any other shareholder of the Jones Ditch Company.

Moreover, the prejudice required to establish the defense of *laches* must necessarily result from reliance on the actions of the opposing party that is *justifiable* under the circumstances of the case as a whole. *City of Thornton*, 926 P.2d at 74. Central and other shareholders of the Jones Ditch Company have no need to assert the defense of *laches* unless the expanded use of the Jones Ditch Water Right was unlawful. However, since *laches* is an equitable doctrine, a party who has engaged in unlawful conduct may not invoke *laches*. *See, e.g., Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000). Having engaged in unlawful conduct, it is not reasonable for Central or the other shareholders of the Jones Ditch Company to rely on the lack of action, if any, of other water users and therefore they cannot establish any prejudice under the circumstances of this case. The Water Court's finding that the third element of *laches* was not sufficiently established is fully supported by the record.

Water users have the right to object to unlawful use by others, even where that unlawful use has gone on for some time. *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46 (Colo. 1999) (use for 31 years at undecreed

place of use and point of diversion cannot be considered in determining historical use in change proceeding); *Steffens v. Rinebarger*, 756 P.2d 1002, 1005 (Colo. 1988) (use on increased acres for more than 40 years cannot be considered in determining historical use in change proceeding). Moreover, since *laches* is an equitable doctrine, a party who has engaged in illegal, fraudulent or improper conduct regarding the subject matter of the dispute may not invoke *laches*. *Salzman v. Bachrach*, 996 P.2d at 1269. The underlying principle of *laches* is to promote justice and to prevent inexcusable delay. *Continental Bank & Trust Co. v. Tri-State General Agency, Inc.*, 185 F. Supp. 208 (D.C. Colo. 1960). Justice is not promoted by barring Opposers from challenging the unlawful enlarged use of the Jones Ditch Water Right in a change of water right proceeding and there has been no inexcusable delay. The Water Court's ruling that Opposers' claims are not barred by *laches* in these cases should be affirmed.

VI. ARGUMENT CONCERNING CROSS-APPEAL

A. Where The Water Court Has Determined The Historical Consumptive Use Of A Water Right, Further Determinations Regarding The Transferable Consumptive Use Of Portions Of The Water Right Must Be Limited By Ownership Interests In The Water Right.

The Jones Ditch Water Right is held and delivered by the Jones Ditch Company. The Jones Ditch Company is a Colorado mutual ditch company that operates pursuant to the provisions of §7-42-101, C.R.S., *et seq.* The owner of stock within a mutual ditch company owns the water right acquired by and delivered by the company and each shareholder owns the right to delivery of water in proportion to his stock ownership. *Jacobucci v. District Court*, 189 Colo. 330, 541 P.2d 667 (1975) Although mutual ditch company shareholders enjoy the right to the exclusive use of the water represented by their particular shares, the water itself is considered as being divided *pro rata* according to the number of shares of stock held by each shareholder. *Great Western Sugar Co. v. Jackson Lake Reservoir & Irrigation Co*, 681 P.2d 484 (Colo. 1984) Mutual ditch company water rights are particularly valuable if they have senior priorities, in light of the over-appropriated status of the South Platte River. *See, High Plains A & M, LLC v. Southeastern Colorado Water Conservancy District*, 120 P.3d 710 (Colo. 2005)

Hence, each shareholder in the Jones Ditch Company is entitled to the delivery of water in proportion to his stock ownership. If a shareholder is allocated more water under the Jones Ditch Water Right than is represented by the shareholder's stock ownership during the course of a change of use proceeding, the shareholder

may (1) receive water and consumptive use credit that belongs to other shareholders, and (2) unlawfully take water that belongs to other holders of water rights in the stream system. Since the Jones Ditch Water Right is a very senior water right, the changed use of the water right must be subject to appropriate terms and conditions to prevent injury to other shareholders and other holders of water rights.

The terms and conditions for a change of water right such as the Jones Ditch Water Right were discussed in *Farmers Reservoir and Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799 (Colo. 2001). In *Farmers Reservoir*, the determinations made by the Water Court regarding the historical use of a water right and their effect on future change of water right proceedings were discussed as follows:

> Over an extended period of time, a pattern of historic diversions and use under the decreed right for its decreed use at its place of use will mature and become the measure of the water right for change purposes, typically quantified in acre-feet of water consumed. *See Midway Ranches*, 938 P.2d at 521. Essential functions of change of water right proceedings are to: (1) identify the original appropriation's historic beneficial use; (2) fix the historic beneficial consumptive use attributable to the appropriation by employing a suitable parcel-by-parcel or ditch-wide methodology; (3) determine the amount of beneficial consumptive use attributable to the applicant's ownership interest; and (4) affix protective conditions for preventing injury to other water rights in operation of the judgment and decree. *See Santa Fe Trail Ranches*, 990 P.2d at 54--55. **Under a ditch-wide methodology, each**

> **owner's consumptive use allocation depends upon its percentage ownership of the total historic consumptive use allocated to the ditch water rights. Once the Water Court has adopted a methodology for determining an appropriation's historic beneficial consumptive use and has made allocations of consumptive use based thereon, that methodology and those allocations are normally expected to govern future change proceedings involving the same water right.** *See Midway Ranches*, 938 P.2d at 526. [Emphasis added]

33 P.3d at 807. *See, Concerning the Application for Water Rights of Midway Ranches Property Owners Assoc., Inc.*, 938 P.2d 515 (Colo. 1997) and *Santa Fe Trail Ranches Property Owners Association v. Simpson*, 990 P.2d 46 (Colo. 1997).

In Case No. 88CW127, the Water Court determined and decreed that Central's ownership of 62 shares of stock in the Jones Ditch Company entitled Central to 401.4 acre-feet per year of consumptive use associated with the Jones Ditch Water Right. However, in the instant proceedings, the Water Court determined that the ditch-wide consumptive use of the Jones Ditch Water Right was approximately 520 acre-feet of water annually. R., Vol. 6, p. 892 (February Order). Central's ownership of 69.5% of the Jones Ditch Company stock therefore entitles Central to a total of approximately 361 acre-feet per year of transferable consumptive use. Since Central had already received 401.4 acre-feet per year of transferable consumptive use in Case

No. 88CW127, Central is not entitled to receive any additional quantity of historical consumptive use of the Jones Ditch Water Right.

B. <u>Where a Previous Decree Does Not Contain Sufficient Terms and Conditions to Prevent Injury to Other Vested Water Rights, Colorado Law Requires Imposition of Additional Terms and Conditions in Subsequent Decrees to Prevent Injury to Other Vested Water Rights</u>.

Section 37-92-305, C.R.S. provides the standards for judicial approval of a change of water right or plan for augmentation, including exchange. Section 37-92-305(3) and (4), C.R.S. provide, in part, as follows:

> (3) **A change of water right** or plan for augmentation, including water exchange project, **shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right....**
>
> (4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:
>
> (a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;
>
> (b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees for which the change is sought or **the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to**

prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;

(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(d) Such other conditions as may be necessary to protect the vested rights of others. (Emphasis added).

The Water Court may not enter a change of water right decree that perpetuates an unlawful expansion of use. *See Steffens v. Rinebarger,* 756 P.2d 1002, 1007(Colo. 1988) (a water judge must, under §37-92-305(3), C.R.S., prevent a preexisting enlargement of use from being perpetuated through a change of water right decree).

Protection of vested water rights will be frustrated if the Water Court does not consider the effect of previous decrees. In these cases, there are remaining shareholders in the Jones Ditch Company that will be adversely affected by Central receiving more than its proportionate share of the transferable consumptive use of the Jones Ditch Water Right. As a result of these cases, future changes of the Jones Ditch Water Right will be limited to the difference between the historical consumptive use of 520 acre feet per year and the total amount allocated to Central in Case No. 88CW127 and these cases, which is approximately 468.05 acre feet. If Central is limited to the 401.4 acre feet determined in Case No. 88CW127, which is more than

Central's proportionate ownership of the Jones Ditch Water Right, other water users will be protected.

This is the very situation contemplated by §37-92-305(3), C.R.S. The decrees entered by the Water Court indicate that the portion of the Jones Ditch Water Right that is the subject of these cases will be used "in conjunction" with the portion of the Jones Ditch Water Rights decreed in Case No. 88CW127. Paragraph 4 of each of the decrees in these cases recite that Central owns a total of 139 shares in the Jones Ditch Company and that 62 shares have already been changed in Case No. 88CW127 in a similar manner. Ms. Griffith testified that Central plans to account for all of its Jones Ditch water through its plan for augmentation accounting form, which would include all of Central's changed water rights that are being used for replacement. R., Vol. 9, pp. 41-43. Thus, the water rights that are the subject of this case are to be used "in conjunction" with the water rights that were the subject of Case No. 88CW127. The Water Court found that of the 193.6 acres that have been historically irrigated with the 77 shares of the Jones Ditch Company that are the subject of this case, 37 acres are within the 340 acres of lawful historical use. R., Vol. 6, p. 891 (February Order). The Water Court further found that Central was entitled to change that portion of the Jones Ditch Water right that had been consumptively used on these 37 acres to new

uses. *Id.* This was error because Central has already been allocated more consumptive use credit than the *pro rata* amount associated with its ownership of the Jones Ditch Water Right.

C. The Doctrine of *Res Judicata* Does Not Prevent The Imposition of Additional Terms and Conditions in Subsequent Decrees to Prevent Injury to Other Vested Water Rights.

The Water Court based its decision to not limit the amount of transferable consumptive use of the Jones Ditch Water Right attributable to Central's ownership of stock in the Jones Ditch Company on the principle of *res judicata* and on the "implication that shares in the Jones Ditch Company do not receive water on a *pro rata* basis." R., Vol. 6, p. 894 (February Order). The Water Court's determinations are not supported by Colorado law.

In *Concerning the Application for Water Rights of Midway Ranches Property Owners Assoc., Inc.*, 938 P.2d 515 (Colo. 1997), it was claimed that *res judicata* precluded inquiry into the historical use of a water right in a subsequent proceeding regarding additional amounts of the same water right. This Court noted that:

> [W]e do not hold that *res judicata* should bar the water court from addressing circumstances which have changed subsequent to the previous determination, nor does this doctrine preclude the water court from determining historic use in a change, augmentation, or expanded

> use injury case when such historic use has not been determined in a previous proceeding.

938 P.2d at 525. *See, also, Farmers High Line Canal and Reservoir Company v. City of Golden*, 975 P.2d 189, 203 (Colo. 1999).

The Water Court in the proceedings in Case No. 88CW127 only determined the historical use of a portion of the Jones Ditch Water Right used on 230 specific acres, and did not undertake a ditch-wide determination of historical use of the Jones Ditch Water Right. It was not until the instant cases that the Water Court considered historical use of the Jones Ditch Water Right within the entire area claimed to have been irrigated by the Jones Ditch Water Right. Upon evidence of the claimed irrigated area and the determination of the Court of the land that could be lawfully irrigated by the Jones Ditch Water Right, the Court determined that the lawfully irrigated land included 340 acres, of which 37 acres were within the lawfully irrigated area. The Water Court further determined that the total lawful consumptive use of the Jones Ditch Water Right was 520 acre feet per year, which included the 401.4 acre feet per year determined by the Water Court in Case No. 88CW127.

However, *res judicata* is not applicable because Opposers are not attacking any of the provisions of the 88CW127 decree, nor are the Opposers asking the court to

revisit the historical consumptive use findings made in those proceedings. Rather, the Opposers are seeking to limit the historical consumptive use allocated to Central in the instant cases to Central's *pro rata* ownership of the Jones Ditch Water Right and to prevent the perpetuation of an unlawful enlargement of use.

In the February Order, the Water Court stated the "implication that shares in the Jones Ditch Company do not receive water on a *pro rata* basis." R., Vol. 6, p. 894 (February Order). There was no evidence submitted to the Water Court regarding specific water deliveries to each parcel of land, including the land that has been unlawfully irrigated. In *Wagner v. Allen*, 688 P.2d 1102 (Colo. 1984), this Court considered a similar situation involving water use under a mutual ditch company where there were no specific records of water use associated with each individual parcels of land or each share of stock in the mutual ditch company. The Court stated the following presumption should apply in changes of water rights represented by mutual ditch company stock:

> In these circumstances, we hold that the applicants were entitled to a presumption that water was historically used by the shareholders on the basis to which they were legally entitled to use such water. In this case, that basis is each shareholder's *pro rata* share of the water rights owned by the company. *See Great Western Sugar Co. v. Jackson Lake Reservoir & Irrigation Co.*, 681 P.2d 484 (Colo. 1984); *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975). Such evidentiary

> rule permits applicants who can demonstrate gross patterns of historic use of water rights to seek beneficial changes in such patterns of use which otherwise would be prohibited not because of demonstrable injury to the legal rights of others but because of the practical problem of the unavailability of reliable records. A shareholder asserting that historic use differed from use based on legal ownership may, of course, attempt to rebut the presumption.

688 P.2d at 1107, 1108. The "implication" determined by the Water Court is contrary to the presumption of *pro rata* allocation of water associated with the ownership of stock in a mutual ditch company as described in *Wagner*.

The Water Court's "implication" of an alternative allocation method also rewards Central for the unlawful expansion of use of the Jones Ditch Water Right. By refusing to limit the amount of historical consumptive use that Central receives in the instant cases by consideration of the consumptive use of the Jones Ditch Water Right in Case No. 88CW127, Central has been granted an additional 106.24 acre feet of consumptive use that Central would not receive under the presumption of *pro rata* allocation of water associated with the ownership of stock in a mutual ditch company as described in *Wagner*. There is no basis under Colorado law to imply allocation of water under a mutual ditch company water right, other than by a presumption of *pro rata* allocation of water associated with the ownership of stock. In any event, any such "implication" is not enough to overcome the Jones Ditch Company Articles of

Incorporation and Bylaws, which are binding as a contract between the shareholders and the Jones Ditch Company and which require the Jones Ditch Company to distribute and apportion water to shareholders based on the proportion of shares held by any such owner to the entire outstanding stock of the company. R., Vol. 12, Exhibit 4, p. 29, paragraph 3rd; R., Vol. 12, Exhibit 4, pp. 000039-40. *See, also, Jacobucci v. District Court*, 189 Colo. 330, 541 P.2d 667 (1975)

VII. CONCLUSION.

The Water Court properly found and determined that Opposers had no duty to act with respect to the unlawful irrigation of additional lands pursuant to the Jones Ditch Water Right. The actions of Central, and its predecessors, in unlawfully expanding the use of the Jones Ditch Water Right is contrary to Colorado law and cannot ripen into an enlarged water right. Central further failed to establish any elements of *laches*. The Water Court's determinations regarding Central's claims of *laches* should be affirmed.

Since Central has already obtained a determination from the Water Court in Case No. 88CW127for more than Central's proportional ownership interest in the Jones Ditch Water Right historical consumptive use, Central has no remaining transferable consumptive use associated with the shares of stock at issue in the instant

cases. Therefore, the Opposers request that this Court reverse the determination by the Water Court that the 77 shares of stock in the Jones Ditch Company in Case Nos. 00CW72 and 02CW200 have transferable consumptive use of approximately 66.65 acre feet per year, and remand these cases to the Water Court with directions to enter an order that the transferable consumptive use associated with the shares of stock at issue in the instant cases has already been allocated to Central in Case No. 88CW127 and no transferable consumptive use is associated with the shares described in Case Nos. 00CW72 and 02CW200.

CERTIFICATE OF COMPLIANCE WITH C.A.R. 28(g)

In accordance with Rule 32(a)(3) of the Colorado Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the applicable word limit set forth in C.A.R. 28(g) and that this brief, exclusive of the items listed in Rule 28(g), contains 6215 words.

Respectfully submitted this 12th day of December, 2005.

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