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## Two Supreme Court Cases

(Thursday, 15 December 2005) -

On September 12, 2005, the Court decided two cases with similar issues: High Plains A&M, LLC v. Southeastern Colorado Water Conservancy District<sup>[i]</sup> and ISG, LLC v. Arkansas Valley Ditch Association<sup>[ii]</sup>. In December 2002 and March 2003, High Plains filed change of water rights applications requesting a change from irrigation use to more than 50 proposed uses in 28 Colorado counties. The water court dismissed the application stating that it was "so expansive and nebulous" that the threshold inquiry of injury to vested water rights could not be addressed, and therefore, failed the antispeculation doctrine test.<sup>[iii]</sup> The Supreme Court affirmed.<sup>[iv]</sup>

Upon review, the Court stated that "the antispeculation doctrine is rooted in the requirement that an appropriation of the public's water resource must be for an actual beneficial use."<sup>[v]</sup> Additionally, a change of water right includes "a change in the type, place, or time of use and a change in the point of diversion."<sup>[vi]</sup> Pursuant to the 1969 Act, such changes of water rights must necessarily include a situs that includes a point of diversion, as well as the place where actual beneficial use occurs or will occur.<sup>[vii]</sup> Beneficial use is defined as "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."<sup>[viii]</sup> "Actual beneficial use is the basis, measure, and limit of an appropriation."<sup>[ix]</sup>

Colorado water law has long held that water rights holders may change their water rights, but that they may not do so to the detriment of other vested water rights.<sup>[x]</sup> This principle is not designed to deter water development or private investment, but rather to ensure that waters are put to actual beneficial use and not wasted or locked up based upon speculative intent.<sup>[xi]</sup>

The present case is distinguishable from other change of water right applications in that High Plains admitted that it did not have any contracts in place to support its applications. High Plains argued that it was prejudiced by the water court's dismissal due to the financial risk of investing in the subject water rights and entering into contracts without a decree approving their claims.<sup>[xii]</sup> The Court disagreed on six grounds: (1) High Plains can use its acquired shares as currently decreed; (2) a sufficient historic consumptive use analysis can be used in other change cases; (3) precedence has been set that other applicants have been held to the same standards regarding reasonableness and beneficial use; (4) the shares are valuable assets; (5) Colorado law has established and provides for changes of water rights; and (6) legislature has created provisions to ensure flexibility yet security for the administration of water in Colorado.<sup>[xiii]</sup>

Based upon the foregoing, and the fact that the applications were dismissed without prejudice, the Court affirmed the water court's decision.<sup>[xiv]</sup>

Similarly in ISG, the Court determined that a change of water right application must specify the place of use and reasonable beneficial uses, which are subject to the antispeculation doctrine.<sup>[xv]</sup>

ISG also appealed on the basis that the water court sua sponte dismissed the case. ISG claimed that because no party filed a motion for summary judgment, the water court erred in dismissing the case of its own accord.<sup>[xvi]</sup> The standard of review for a motion for summary judgment is de novo.<sup>[xvii]</sup> The Court stated that "[d]ismissal may be proper even in cases where no motion requesting dismissal has been filed."<sup>[xviii]</sup> Therefore, summary judgment is appropriate, even if entered as a matter of law, when the losing party had notice and an opportunity to respond.<sup>[xix]</sup> The Court determined that ISG had adequate notice and an opportunity to respond.

ISG also argued on appeal that the dismissal infringes on its right to make temporary changes to its water rights. The Court disagreed stating that the temporary changes sought by ISG are allowable through statutory provisions via permission of the state engineer.<sup>[xx]</sup> Therefore, the Court affirmed the water court's dismissal without prejudice.<sup>[xxi]</sup>

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[i] Case No. 04SA266 - High Plains A & M, LLC, a Colo. Ltd. Liability Co., v. Southeastern Colorado Water Conservancy Dist.; Lower Arkansas Valley Water Conservancy Dist.; Dist. 67 Irrigating Canals Ass'n and its members, the Amity Mutual Irrigation Co., the Fort Bent Canal and Irrigation Co., Keesee Ditch, Buffalo Mutual Irrigation Co., X Y and Graham Canals, Manval Canal and Irrigation Co., and the Hyde Mutual Ditch Co.; Carl M. Shinn; Mary Jane Shinn; Wendy S. Shinn; Bd. of Water Works of Pueblo, Colo.; Colo. Springs Util.; Lake Henry Reservoir Co.; Lake Meredith Reservoir Co.; Colo. Canal Co.; Harold (Hal) D. Simpson, State Eng'r; Steven J. Witte, Div. Eng'r for Water Div. 2; Colo. Water Conservation Bd.; Arkansas Valley Ditch Ass'n and its individual members, Bessemer Irrigating Ditch, Oxford Farmers Ditch Co., High Line Canal Co., Rocky Ford Ditch Co. (Board of Water Works of Pueblo, Colo. Named separately above); Catlin Canal Co., individually and as a member of the Arkansas Valley Ditch Ass'n; City of Aurora; Bent County Bd. of County Comm'rs.; Bourne Ltd. Partnership; Stanley V. Cline, individually, and as Personal Representative of the Estate of Bonnie Cline and the Estate of Joe Cline; Clover Meadow Lateral Ditch Co.; City of Colo. Springs; Colo. Water Protective and Development Ass'n; Columbine Lateral Ditch Co. and members; Consolidated Ditch Lateral Inc. and members; Contibeef LLC, d/b/a Colo. Beef; Rex David; Alberta Davis; Enterprise Lateral, an unincorporated ass'n; the Fort Lyon Canal Co.; James A. Gruenloh; Holbrook

Mutual Irrigating Co.; Lyle T. Japhet, as trustee for the Lyle T. Japhet Trust; Willard Kasza; Andrew Kern Drainage Ditch, Priority No. 65; City of Lamar; Lower Arkansas Water Management Ass&rsquo;n.; Robert C. Lubbers; Raymond D. Mauch; May Valley Water Ass&rsquo;n.; Donald Martin McBee; Donald Marvin McBee; McClave Lateral, an unincorp. ass&rsquo;n.; Board of County Comm&rsquo;rs. of the County of Otero; Public Service Co. of Colo. d/b/a Xcel Energy; Pueblo, a municipal corp.; Smith Mutual Ditch Co.; St. Charles Mesa Water Dist.; Sunflower Lateral, an unincop. ass&rsquo;n., Timberlake Grazing Ass&rsquo;n., Inc.; United States of America; Upper Arkansas Water Conservancy Dist.; and Valley Water Protection Ass&rsquo;n., LLC and individual members; AND Case No. 04SA267 &ndash; High Plains A & M, LLC, a Colo. ltd. Liability co.; Wollert Enterprises, Inc., a Colo. corp. v. Southeastern Colo. Water Conservancy Dist.; Lower Arkansas Valley Water Conservancy Dist.; Dist. 67 Irrigating Canals Ass&rsquo;n. and its members, the Amity Mutual Irrigation Co., the Fort Bent Canal and Irrigation Co., Keesee Ditch, Buffalo Mutual Irrigation Co., X Y and Graham Canals, Manval Canal and Irrigation Co., and the Hyde Mutual Ditch Co.; Carl M. Shinn; Mary Jane Shinn; Wendy S. Shinn; Bd. of Water Works of Pueblo, Colo.; Colo. Springs Util.; Lake Henry Reservoir Co.; Lake Meredith Reservoir Co.; Colo. Canal Co.; Harold (Hal)D. Simpson, State Eng&rsquo;r.; Steven J. Witte, Div. Eng&rsquo;r; for Water Div. 2; Colo. Water Conservation Bd.; Arkansas Valley Ditch Ass&rsquo;n and its individual members, Bessemer Irrigating Ditch, Oxford Farmers Ditch Co., High Line Canal Co., Rocky Ford Ditch Co. (Board of Water Works of Pueblo, Colo. Named separately above); Catlin Canal Co., individually and as a member of the Arkansas Valley Ditch Ass&rsquo;n.; Arbor Lateral Co.; City of Aurora; Bent County Bd. of County Comm&rsquo;rs.; Bourne Ltd. Partnership; Stanley V. Cline, individually, and as Personal Representative of the Estate of Bonnie Cline and the Estate of Joe Cline; Clover Meadow Lateral Ditch Co.; City of Colo. Springs; Colo. State Div. Of Wildlife and Wildlife Comm&rsquo;n; Colo. Water Protective and Development Ass&rsquo;n.; Columbine Lateral Ditch Co. and members; Consolidated Ditch Lateral Inc. and members; Contibeef LLC, d/b/a Colo. Beef; Rex David; Alberta Davis; Don Downing; Bonnie J. Earl, as trustee for the Earl Living Trust; Enterprise Lateral, an unincorporated ass&rsquo;n.; the Fort Lyon Canal Co.; Hans Friederichs, Jr. and Joleyne White-Heckman Friederichs, as members and representative of the Stony Point Lateral, an unincorp. ass&rsquo;n.; James A. Gruenloh; Burt Heckman, individually, as partner with Fred Heckman, as a member and representative of the McClave Lateral, an unincorp. ass&rsquo;n. and as owner of the A. Reyher Seep One Ditch; Ruth Hency; Dale Hency; Holbrook Mutual Irrigating Co.; Lyle T. Japhet, as trustee for the Lyle T. Japhet Trust; Willard Kasza; Andrew Kern Drainage Ditch, Priority No. 65; City of Lamar; Lower Arkansas Water Management Ass&rsquo;n.; Robert C. Lubbers; Raymond D. Mauch; May Valley Water Ass&rsquo;n.; Donald Martin McBee; Donald Marvin McBee; McClave Lateral, an unincorp. ass&rsquo;n.; Board of County Comm&rsquo;rs. of the County of Otero; Prowers County Bd. of Comm&rsquo;rs.; Public Service Co. of Colo. d/b/a Xcel Energy; Pueblo, a municipal corp.; Reed & Ullom, a general partnership; Lorraine Schleining; Stoney Point Lateral, an unincorp. ass&rsquo;n.; Smith Mutual Ditch Co.; St. Charles Mesa Water Dist.; Sunflower Lateral, an unincop. ass&rsquo;n., Timberlake Grazing Ass&rsquo;n., Inc.; United States of America; Upper Arkansas Water Conservancy Dist.; and Valley Water Protection Ass&rsquo;n., LLC and individual members; Lance O. Verhoeff; Verhoeff Farms, Inc.; the Wheatridge Mutual Later Ditch Co.; Wiley Drainage Dist.; Wiley School Dist. RE-13JT; and Mike Tyckoff as Personal Representative for headgates 101, 112, of Fort Lyon Canal,

120 P.3d 710 (Colo. 2005)

[ii] ISG, LLC, a Colo. ltd. Liability co.; Big Bend Farms, LLLP, a Colo. ltd. liability limited partnership; dean L & C Co., Inc., a Colo. corp.; Joann Fletcher; Hans Friederichs, Jr.; Jo Leyne White Heckman Friederichs; Lorella L. Gadash; Merle G. Hays Children&rsquo;s Trust; Clarence A. Hays; Darrel W. Hays; Delbert R. Hays; Burt White Heckman; Caryol Heckman; Frederick Heckman; Laura White Heckman; Margaret K. Hunker; Charles O. Jones; Ruby L. Jones, Raymond L. May; Tresa I. May; the McKinnis Family Partnership, Ltd., a Colo. ltd. partnership; Glenda McWilson; Kent Miller; Peg Miller; Dennis Neterhton; David H. Nunnery; Anita R. Pointon; Charle T. Pointon; Keith Rasmussen; Gale Tempel; Melody Tempel; Judith M. Tigner; Dawn K. Vanhook; John R. Vodneck; Joshua P. Weimer; Patricia Weimer; Paul Weimer; Barbara Wertz; Steven Wertz; Wooten Investments, Ltd., a Colo. ltd. partnership; and Michael Lynn Wyckoff v. Arkansas Valley Ditch Ass&rsquo;n. and its members the Bessemer Irrigating Ditch Co., Oxford Farmers Ditch Co., Catlin Canal Co. (which also filed a separate statement of opposition and is named again below), High Line Canal Co., Rocky Ford Ditch Co., Board of Water Works of Pueblo; City of Aurora; Bent County Board of County Comm&rsquo;rs; Catlin Canal Co.; Colo. Canal Co.; Colo. Springs Util.; Colo. Water Conservation Board; Colo. Water Protective and Development Ass&rsquo;n.; Randa David-Tice; Dist. 67 Irrigating Canals Ass&rsquo;n. and its members the Amity Mutual Irrigation Co., the Fort Bent Canal and Irrigation Co., Keesee Ditch,, Buffalo Mutual Irrigation Co, X & and Graham Canals, Manval Canal and Irrigation Co., the Hyde Mutual Ditch Co.; the Fort Lyon Canal Co.; Holbrook Mutual Irrigation Co.; Andrew Kern Drainage Ditch; Lake Henry Reservoir Co.; Lake Meredith Reservoir Co; Lower Arkansas Valley Water conservancy Dist.; Lower Arkansas Water Mgmt. Ass&rsquo;n.; Robert C. Lubbers Revocable Trust; Robert C. Lubbers, Trustee; Board of County Comm&rsquo;rs. of the County of Otero; Public Service Co. of Colo. d/b/a Xcel Energy; Board of Water Works of Pueblo; Pueblo West Metropolitan Dist.; Pueblo, a municipal corp.; Carl M. Shinn; Mary Jane Shinn; Wendy S. Shinn; Harold D. (Hal) Simpson, Colo. State Eng&rsquo;r.; Southeastern Colo. Water Conservancy Dist.; St. Charles Mesa Water Dist.; Henry Earl Tice; United States of America; Upper Arkansas Water Conservancy Dist.; Valley Water Protection Ass&rsquo;n., LLC; Steve J. Witte, Div. No. 2 Eng&rsquo;r.; David Findley; David E. Gardner; Susan L. Garnder; J-S Farms, Inc., a Colo. corp.; Heath L. Perdue; Robyn Y. Perdue; Allen Van Whye; and Kathleen Van Whye, 120 P.3d 724 (Colo. 2005).

[iii] Id. at 715-17.

[iv] Id. at 710 and 752.

[v] Id. at 724.

[vi] Id. at 724; citing C.R.S. § 37-92-103 (5) (2005).

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[vii] Id. at 725; citing *Chatfield East Well Co., Ltd. v. Chatfield E. Prop. Owners Ass'n*, 956 P.2d 1260, 1268 (Colo. 1998); *New Mercer Ditch Co. v. Armstrong*, 40 P. 989, 992 (Colo. 1895); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 634 (Colo. 1954); *Fields v. Kincaid*, 184 P.832, 834 (Colo. 1919).

[viii] Id. at 726-27; citing C.R.S. § 37-92-103 (3) (a) (2005); *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1168 (Colo. 2002); *Combs v. Agric. Ditch Co.*, 28 P. 966, 967-68 (Colo. 1892).

[ix] Id. at 732; citing *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999).

[x] Id. at 727; citing *Strickler v. Colo. Springs*, 26 P. 313, 316 (Colo. 1891).

[xi] Id. at 736-37.

[xii] Id. at 739 - 45.

[xiii] Id. at 745-51; see case for additional case cites.

[xiv] Id. at 751-2.

[xv] ISG at 754.

[xvi] Id. at 832-34.

[xvii] Id. at 733.

[xviii] Id.; citing 11 James Wm. Moore, *Moore's Federal Practice* AP 56. 10 [2] [b] at 56-63 (3d ed. 2005); *Kennedy v. Whitehurst*, 509 F. Supp. 225, 232 (D.D.C. 1981); cf. *Bowdidge v. Lehman*, 252 F.2d 366, 368-69 (6th Cir. 1958).

[xix] Id. at 736-37.

[xx] Id. at 746; citing C.R.S. §§ 37-80.5-104 to &ndash;106, 37-83-104 and 105; 37-92-309 (2005).

[xxi] Id. at 748-49.