

37-92-103. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Abandonment of a conditional water right" means the termination of a conditional water right as a result of the failure to develop with reasonable diligence the proposed appropriation upon which such water right is to be based.

(2) "Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder. Any period of nonuse of any portion of a water right shall be tolled, and no intent to discontinue permanent use shall be found for purposes of determining an abandonment of a water right for the duration that:

(a) The land on which the water right has been historically applied is enrolled under a federal land conservation program; or

(b) The nonuse of a water right by its owner is a result of participation in:

(I) A water conservation program approved by a state agency, a water conservation district, or a water conservancy district;

(II) A water conservation program established through formal written action or ordinance by a municipality or its municipal water supplier;

(III) An approved land fallowing program as provided by law in order to conserve water;

(IV) A water banking program as provided by law;

(V) A loan of water to the Colorado water conservation board for instream flow use under section [37-83-105](#) (2); or

(VI) Any contract or agreement with the Colorado water conservation board that allows the board to use all or a part of a water right to preserve or improve the natural environment to a reasonable degree under section [37-92-102](#) (3).

(3) (a) "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:

(I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.

(II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial

uses.

(b) Nothing in this subsection (3) shall affect appropriations by the state of Colorado for minimum streamflows as described in subsection (4) of this section.

(4) "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 impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

(5) "Change of water right" means a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion, a change in the means of diversion, a change in the place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights.

(6) "Conditional water right" means a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.

(6.3) "Control structure" means a structure consisting of durable man-made or natural materials that has been placed with the intent to divert, capture, possess, and control water in its natural course for an appropriator's intended and specified recreational in-channel diversion. The control structure and its efficiency shall be designed by a professional engineer, as that term is defined in section [12-25-102](#), C.R.S., or under the direct supervision of a professional engineer, and constructed so that it will operate efficiently and without waste to produce the intended and specified reasonable recreation experience. Concentration of river flow by a control structure constitutes control of water for a recreational in-channel diversion.

(6.7) "County" means any county and any city and county established under Colorado law.

(7) "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 control structure, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device; except that, on and after January 1, 2001, only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may file an application to control water in its natural course or location by means of a control structure for recreational in-channel diversions.

(8) "Person" means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States, or any other legal entity, public or private.

(9) "Plan for augmentation" means a detailed program, which may be either temporary or perpetual in duration, to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means. "Plan for augmentation" does not include the salvage of tributary waters by the eradication of phreatophytes, nor does it include the use of tributary water collected from land surfaces that have been made impermeable, thereby increasing the runoff but not adding to the existing supply of tributary water.

(10) "Priority" means the seniority by date as of which a water right is entitled to use or conditional water right will be entitled to use and the relative seniority of a water right or a conditional water right in relation to other water rights and conditional water rights deriving their supply from a common source.

(10.1) "Reasonable recreation experience" means the use of a recreational in-channel diversion for, and limited to, nonmotorized boating. Other recreational activities may occur but may not serve as evidence of a reasonable recreation experience.

(10.3) "Recreational in-channel diversion" means the minimum amount of stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by control structures pursuant to an application filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for a reasonable recreation experience in and on the water from April 1 to Labor Day of each year unless the applicant can demonstrate that there will be demand for the reasonable recreation experience on additional days. The recreational in-channel diversion shall be limited to one specified flow rate for each time period claimed by the applicant. Individual time periods shall not be shorter than fourteen days unless the applicant can demonstrate a need for a shorter time period. There shall be a presumption that there will not be material injury to a recreational in-channel diversion water right from subsequent appropriations or changes of water rights if the effect on the recreational in-channel diversion caused by such appropriations or changes does not exceed one-tenth of one percent of the lowest decreed rate of flow for the recreational in-channel diversion as measured at the recreational in-channel diversion and the cumulative effects on the recreational in-channel diversion caused by such appropriations or changes do not exceed two percent of the lowest decreed rate of flow for the recreational in-channel diversion measured at the recreational in-channel diversion. The owner of a water right for a recreational in-channel diversion may not call for water that has been lawfully stored by another appropriator.

(10.4) "Removal of water" means a change in the type and place of use of an absolute decreed agricultural water right from irrigated agricultural use in one county to a use not primarily related to agriculture in another county.

(10.5) "Revegetation" means the establishment of a ground cover of plant life demonstrated to be, without irrigation, reasonably capable of sustaining itself under the climatic conditions, soils, precipitation, and terrain prevailing for the lands from which irrigation water is removed.

Grasses or other plants used for the purpose of revegetation shall not be noxious as such plants are defined under the provisions of the "Colorado Noxious Weed Act", article [5.5](#) of title [35](#), C.R.S.

(10.6) "Rotational crop management contract" means a written contract in which the owner or groups of owners of irrigation water rights agree to implement a change of the rights to a new use by foregoing irrigation of a portion of the lands historically irrigated and that provides that the water rights owner or groups of owners may rotate the lands that will not be irrigated as long as there is no injurious effect as specified in section [37-92-305](#) (3). The contract shall also provide that in the change of water right proceeding the water rights owner or groups of owners shall seek water court approval to rotate the lands that will not be irrigated as long as there is no injurious effect as specified in section [37-92-305](#) (3).

(10.7) "Significant water development activity" means any removal of water that results in the transfer of more than one thousand acre-feet of consumptive use of water per year by a single applicant or an applicant's agents.

(10.8) "Storage" or "store" means the impoundment, possession, and control of water by means of a dam. Waters in underground aquifers are not in storage or stored except to the extent waters in such aquifers are placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right.

(11) "Underground water", as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in section [37-90-103](#) (6).

(12) "Water right" means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same.

(13) "Waters of the state" means all surface and underground water in or tributary to all natural streams within the state of Colorado, except waters referred to in section [37-90-103](#) (6).

(14) (a) "Well" means any structure or device used for the purpose or with the effect of obtaining ground water for beneficial use from an aquifer. "Well" includes an augmentation well that diverts ground water tributary to the South Platte river and delivers it to a surface stream, ditch, canal, reservoir or recharge facility to replace out-of-priority stream depletions, or to meet South Platte river compact obligations, either directly or by recharge accretions, as part of a plan for augmentation approved by the water judge for water division 1 or a substitute water supply plan approved pursuant to section [37-92-308](#).

(b) "Well" does not include a naturally flowing spring or springs where the natural spring discharge is captured or concentrated by installation of a near-surface structure or device less than ten feet in depth located at or within fifty feet of the spring or springs' natural discharge point and the water is conveyed directly by gravity flow or into a separate sump or storage, if the owner obtains a water right for such structure or device as a spring pursuant to article 92 of this title.

Source: **L. 69:** 1201, § 1. **C.R.S. 1963:** § 148-21-3. **L. 73:** p. 1521, § 1. **L. 75:** (9) amended, p. 1397, § 1, effective June 20. **L. 79:** (3) amended and (10.5) added, p. 1368, § 5, effective June 22. **L. 86:** (2) amended, p. 1097, § 1, effective April 24. **L. 92:** (10.4) added, p. 2289, § 1, effective April 16. **L. 95:** (14) added, p. 141, § 4, effective April 7. **L. 96:** (9) amended, p. 125, § 1, effective March 25. **L. 2001:** (4) and (7) amended and (10.3) added, p. 1188 § 2, effective June 5. **L. 2003:** (14)(a) amended, p. 1453, § 3, effective April 30; (10.4) and (10.5) amended and (6.7), (10.6), and (10.7) added, p. 880, § 1, effective August 6. **L. 2005:** (2) amended, p. 232, § 1, effective April 14. **L. 2006:** (6.3) and (10.1) added and (7) and (10.3) amended, p. 907, § 2, effective May 11; (10.6) and (10.7) amended and (10.8) added, p. 999, § 1, effective May 25. **L. 2007:** (2)(b)(V) added, p. 48, § 2, effective August 3. **L. 2008:** IP(2)(b) amended and (2)(b)(VI) added, p. 589, § 2, effective August 5.

Editor's note: (1) Section 4 of chapter 197, Session Laws of Colorado 2006, provides that the act enacting subsections (6.3) and (10.1) and amending subsections (7) and (10.3) applies only to applications for and the administration of new recreation in-channel diversions filed on or after May 11, 2006, and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to May 11, 2006.

(2) Section 4 of chapter 170, Session Laws of Colorado 2008, provides that the act amending the introductory portion to subsection (2)(b) and enacting subsection (2)(b)(VI) applies to water court determinations of historic consumptive use and abandonment occurring on or after August 5, 2008. The act was passed without a safety clause. For an explanation concerning the effective date, see page ix of this volume.

ANNOTATION

Analysis

[I. General Consideration.](#)

[II. Abandonment.](#)

[III. Appropriation.](#)

[IV. Beneficial Use.](#)

[V. Change of Water Right.](#)

[VI. Conditional Water Right.](#)

[VII. Plan for Augmentation.](#)

[VIII. Priority.](#)

[IX. Water Right.](#)

[X. Underground Water.](#)

I. GENERAL CONSIDERATION.

Law reviews. For article, "Optimizing Water Use: The Return Flow Issue", see 44 U. Colo. L. Rev. 301 (1973). For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For comment, "United States v. New Mexico and the Course of Federal Reserved Water Rights", see 51 U. Colo. L. Rev. 209 (1980). For comment, "Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.: Diversion as an Element of Appropriation", see 57 Den. L.J. 661 (1980). For

comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "Pollution or Resources Out-of-Place: Reclaiming Municipal Wastewater for Agricultural Use", see 53 U. Colo. L. Rev. 559 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Water Rights -- How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Water for Mining and Milling Operations -- Part I", see 13 Colo. Law. 240 (1984). For article, "Water for Mining and Milling Operations", see 13 Colo. Law. 437 (1984). For casenote, "Nontributary, Nondesignated Ground Water: The Huston Decision", see 56 U. Colo. L. Rev. 135 (1984). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For comment, "Water Use Efficiency and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use", see 58 U. Colo. L. Rev. 657 (1988). For article, "The Legal Evolution of Colorado's Instream Flow Program", see 17 Colo. Law. 861 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For comment, "The Case For Private Instream Appropriations in Colorado", see 60 U. Colo. L. Rev. 1087 (1990). For comment, "Colorado's Foreign Water Doctrine: License To Speculate", see 60 U. Colo. L. Rev. 1113 (1990). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "Transaction Costs as Determinants of Water Transfers", see 61 U. Colo. L. Rev. 393 (1990).

Annotator's note. Since § [37-92-103](#) is similar to repealed § 148-9-1, C.R.S. 1963, § 147-9-1, CRS 53, and CSA, C. 90, § 189 (1), relevant cases construing these provisions have been included in the annotations to this section.

The statute is not applicable to designated ground water basins as defined and established by the Colorado ground water management act. Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

This act is quite specific in giving mandates by using the word "must", and in making matters permissive by using the word "may". Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

The conditional versus the absolute status of a water right cannot provide a ground for distinguishing between rights that arise from the same intent and overt acts initiating an appropriation. An absolute water right is not a right separate and distinct from the conditional right from which it originates, rather, a conditional right matures into an absolute right. Purgatoire River Water Conservancy v. Witte, 859 P.2d 825 (Colo. 1993).

The water court is not required to consider environmental factors to determine whether to grant conditional water right decree. Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995).

Any regulation of well pumping and determination of the effect thereof upon a surface stream must be predicated upon hydrologic projections. Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

An argument to the effect that water withdrawn must be replaced 100 percent fell where senior users could show no injury by the diversion of water, even though the river involved was over-appropriated. Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976).

Where not more than half of the water adjudicated to priority was ever applied to beneficial use, such adjudication could only afford protection to the extent that such water, or fraction thereof, was actually applied to beneficial use. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

A "storage water right" is defined to mean "the right of impounding water for future beneficial use", and there is nothing in the statutes which limits the beneficial use of water for adjudication purposes to

the particular year in which it was diverted and stored, and if it is applied to a beneficial use within a reasonable time such use is sufficient to meet the requirements of the law. *North Sterling Irrigation Dist. v. Riverside Reservoir & Land Co.*, 119 Colo. 50, 200 P.2d 933 (1948).

Stream administration. Streams independently appropriated remain independent under the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

Developed water implies new waters not previously part of the river system. *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974).

State engineer's authority to apply compact tributary rule. A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

Reduction of consumptive use of tributary water cannot provide basis for water right that is independent of the system of priorities on the stream. *R.J.A., Inc. v. Water Users Ass'n of Dist. 6*, 690 P.2d 823 (Colo. 1984).

Water proposed to be saved by removing trees and replacing them with nonirrigated grasses is tributary ground water and thus, subject to water priority system. *Giffen v. State*, 690 P.2d 1244 (Colo. 1984).

Nontributary ground water is that ground water not in or tributary to a natural stream within the meaning of subsection (13). *State Dept. of Natural Resources v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984).

"Underground water" is water that could influence rate or direction of movement of a stream for over a century. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L.Ed.2d 663 (1975).

Mutual ditch company not entitled to reuse or successive uses of water obtained by diversion from river tributary. Mutual ditch company which had many differing ideas for reuse or successive use of water but which had no fixed purpose to pursue any particular idea lacked intent to appropriate and, therefore, was not entitled to reuse or successive uses of such water after first beneficial use, and, thus, returning liquids to be stored in reservoir under conditional water storage rights were "waters of the state" subject to diversion and use to supply existing and future appropriations on stream. *Water Supply and Storage Co. v. Curtis*, 733 P.2d 680 (Colo. 1987).

Where the issue is abandonment, the effect of such abandonment on any other water right diverting from the same source of supply is not the subject of the inquiry. *Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283 (Colo. 1996).

Applied in *Twin Lakes Reservoir & Canal Co. v. City of Aspen*, 192 Colo. 209, 568 P.2d 45 (1977); *In re Bohn v. Kuiper*, 195 Colo. 17, 575 P.2d 402 (1978); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981). *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982); *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *Lionelle v. S. E. Colo. Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984); *S.E. Colo. Water Cons. v. Ft. Lyon Canal Co.*, 720 P.2d 133 (Colo. 1986).

II. ABANDONMENT.

Abandonment of water rights occurs when there is nonuse coupled with an intention to abandon.

In re CF&I Steel Corp., 183 Colo. 135, 515 P.2d 456 (1973); Masters Inv. Co. v. Irrigationists Ass'n, 702 P.2d 268 (Colo. 1985); People v. City of Thornton, 775 P.2d 11 (Colo. 1989); Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990); Consol. Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995).

Nonuse for an unreasonable period creates a rebuttable presumption that there was an intention to abandon water rights. In re CF&I Steel Corp., 183 Colo. 135, 515 P.2d 456 (1973); Masters Inv. Co. v. Irrigationists Ass'n, 702 P.2d 268 (Colo. 1985); People v. City of Thornton, 775 P.2d 11 (Colo. 1989); Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

Requisite intent for abandonment may be inferred from all circumstances rather than proven directly. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

To rebut the presumption of abandonment of water rights arising from a long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse. In re CF&I Steel Corp., 183 Colo. 135, 515 P.2d 456 (1973); Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990); SRJ I Venture v. Smith Cattle, Inc., 820 P.2d 341 (Colo. 1991).

Amount of time considered unreasonable varies with facts of each case. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

Fifty-four years of nonuse was an unreasonable period and created a rebuttable presumption that there was an intention to abandon water rights. In re CF&I Steel Corp., 183 Colo. 135, 515 P.2d 456 (1973).

A presumption of abandonment may be rebutted by evidence of justifiable excuse for nonuse. Southeastern Colo. Water Conservancy Dist. v. Twin Lakes Assocs., Inc., 770 P.2d 1231 (Colo. 1989); Consol. Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995).

Statements of intent by owner of water rights insufficient to rebut presumption of abandonment without other supporting evidence. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990); Consol. Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995).

Diligent efforts to sell water rights show an intent not to abandon such rights. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

Abandonment of water right must be shown by preponderance of evidence. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

Abandonment is a factual question determined by weighing all of the evidence and assessing the credibility of the witnesses. Water Rights of Masters Inv. Co., Inc. v. Irrigationists Ass'n, 702 P.2d 268 (Colo. 1985); Consol. Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995).

Water court's decision regarding question of abandonment of water right will not be disturbed on appeal unless the evidence is wholly insufficient to support the decision. Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990); Consol. Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995).

An asserted water right which never comes into being cannot be "abandoned". Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

If the former user of water has abandoned the water originally decreed to it, then there would be no valid or existing appropriation of water which could be made the subject matter of a petition by the former user to change the point of diversion. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

If in fact the original decreed water rights have been abandoned, the water originally decreed belongs to the stream and is available for subsequent appropriators who would otherwise have been

junior in point of time. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

Different tests for abandonment of conditional and absolute water rights. The general assembly clearly intended different tests to be applied in determining when a conditional water right is abandoned and when an absolute water right is abandoned. The difference is the element of intent, which must be shown before an abandonment of an absolute water right can be decreed, but which is not necessary in establishing the abandonment of a conditional water right. The test applicable to determining whether a conditional water right has been abandoned is whether there has been a "failure to develop with reasonable diligence". Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980); Municipal Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

III. APPROPRIATION.

An appropriation is the intent to take accompanied by some open physical demonstration of the intent. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The appropriation is, in legal contemplation, made when the act evidencing the intent is performed. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

When the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designated, there is an appropriation. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

An effective appropriation requires the actual diversion of a definite quantity of water with intent to apply that water to a beneficial use. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984).

To be effective, an appropriation must divert a definite quantity of water with the intent of applying such water to a beneficial use. Whether the requirements of diversion and intent have been established is a factual question and the water court's determination of such question will not be reversed unless it is clearly unsupported by the evidence. Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840 (Colo. 1992).

An application for a conditional water right turns in part on the existence of a claimant's intent to appropriate water. Thus, the issue of claimant's intent directly affects the outcome of the case and should not be determined on a motion for summary judgment. Dominguez Reservoir Corp. v. Feil, 854 P.2d 791 (Colo. 1993).

Under the "intent" prong of the first step test necessary to appropriate a conditional water right, an applicant must establish an intent to appropriate water for application to beneficial use. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

A city may appropriate water for its future needs without violating the "anti-speculation" doctrine so long as the amount of the appropriation is in line with the city's "reasonably anticipated requirements" based on substantiated projections of future growth as determined by the water court. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Trial court may impose volumetric limitation on the yield of a project if the limitation conforms to the amount of water available that the applicant has established a need and future intent and ability to use or that the limitation is specifically found by the court to be necessary to prevent injury to other water users. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

A conditional water right is limited to the amount of water available for appropriation and for which the applicant can establish a nonspeculative intent to put to beneficial use while satisfying the "can and will" requirements. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

In quantifying the permissible yield of a conditional water right, the water court is not imposing an independent limitation, it is merely formalizing in the decree the scope of the conditional water right as it has been established by the applicant. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

The governmental agency exception to the anti-speculation doctrine allows some freedom from anti-speculation limitations to allow them to plan for future water needs of constituents. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

The governmental agency exception to the anti-speculation doctrine should be narrowly construed, and where the water court did not make specific findings that a 100-year water supply planning period was reasonable or that the applicant's population projections were substantiated, the judgment must be reversed and remanded. A planning period in excess of 50 years should be closely scrutinized. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007).

Even though the court decreed conditional rights to Thornton pursuant to the governmental agency exception to the anti-speculation doctrine, the potential for a decree in excess of its needs still exists, as the water court must make its determinations of the city's reasonably anticipated requirements based on projections that cannot be verified at the time the decree is entered. Therefore, the court's imposition of specific diligence requirements was within its authority to ensure that Thornton show its continuing need for the volumetric amount of the water claimed. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

Anti-speculation doctrine applies to diligence proceedings. *Municipal Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999).

The anti-speculation requirement of subsection (3)(a) applies in a change proceeding; accordingly, the applicant must show a legally vested interest in the place to be served by the change of use and a specific plan and intent to use the water for specific purposes. The proposed change, to any of over 50 proposed uses in any of 28 counties without a single agreement with any end user of the water, was properly dismissed. *High Plains A & M, Inc. v. S.E. Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005); *ISG, LLC v. Arkansas Valley Ditch Ass'n*, 120 P.3d 724 (Colo. 2005).

Water is available for appropriation if the taking thereof does not cause injury. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

Although legislature cannot prohibit appropriation or diversion of unappropriated water for useful purposes, it may regulate manner in which appropriation or diversion is effected. *Fox v. Div. Eng. for Water Div. 5*, 810 P.2d 644 (Colo. 1991).

If water court erred and decreed a private in-stream flow right, this would simply constitute legal error vulnerable to reversal upon appeal, but would not constitute an overstepping of jurisdictional authority. *Bd. of County Comm'rs v. Collard*, 827 P.2d 546 (Colo. 1992).

Controlling water within its natural course or location by some structure or device, such as a dam, for a beneficial use may result in a valid appropriation. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

A boat chute or a fish ladder may qualify as a "structure or device" which controls water in its natural course or location. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

Once the collected water in the drainage canal is turned into a natural watercourse, it becomes a part of the supply of that stream and is subject to public appropriation and use. *Quirico v. Hickory Jackson Ditch Co.*, 130 Colo. 481, 276 P.2d 746 (1954).

Reclamation plan which includes filling gravel pits with water obtained from an aquifer constitutes an "appropriation". *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164 (Colo. 1988).

IV. BENEFICIAL USE.

Not unconstitutional delegation of power to appropriate. The statutory language in § [37-92-102](#) and subsection (4) empowering the Colorado water conservation board to appropriate such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree is not unconstitutionally vague and, therefore, not an impermissible delegation of authority. Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

Appropriations for piscatorial purposes without diversion intended. The general assembly in the enactment of the second sentence in subsection (4) and § [37-46-107](#) (1) (j) intended to have appropriations for piscatorial purposes without diversion. Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

Capture and storage of flood waters may be a "beneficial use" underlying an appropriation of water. Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594 (Colo. 1984).

Hydroelectric power and flood control are both recognized as beneficial uses in Colorado. Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n, 14 P.3d 325 (Colo. 2000).

Persons who cut down water-consuming vegetation along river banks did not have a right to equivalent amount of water for their own "beneficial use" free from the call of the river. Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

Salvaged water implies waters in the river or its tributaries, including the aquifer, which ordinarily would go to waste, but somehow are made available for beneficial use. Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

The volume of water applied to beneficial use is the full measure of the water right acquired. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Where not more than half of the water adjudicated to priority was ever applied to beneficial use, such adjudication could only afford protection to the extent that such water, or fraction thereof, was actually applied to beneficial use. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

A "storage water right" is defined to mean, "the right of impounding water for future beneficial use", and there is nothing in the statutes which limits the beneficial use of water for adjudication purposes to the particular year in which it was diverted and stored, and if it is applied to a beneficial use within a reasonable time, such use is sufficient to meet the requirements of the law. North Sterling Irrigation Dist. v. Riverside Reservoir & Land Co., 119 Colo. 50, 200 P.2d 933 (1948).

V. CHANGE OF WATER RIGHT.

Right to change point of diversion is limited in quantity by historical use. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

Definition of "change of water right". It is clear that both a change in the place of storage and a change from direct flow to storage are included within the definition "change of water right". S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

Change in point of diversion of water right constitutes "change of water right". A change in the point of diversion of a water right is included in the term "change of water right", and it is, therefore, subject to all of the provisions of this article. Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980).

Application for alternate places of storage for a previously decreed conditional right to store a certain amount of water constitutes a change of water right as defined in subsection (5). City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993).

Proposed water exchange involving foreign water and addressed by section concerning right to reuse of imported water does not fit criteria for general change of water right. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

In order to use an alternate point of diversion to make absolute a conditional water right at another location, there must first be a decree establishing the new source as an alternate point of diversion. This process provides notice to interested persons of a proposed new diversion point and allows for the establishment of terms and conditions that will protect other water rights. *Northern Colo. Water v. Three Peaks Water*, 859 P.2d 836 (Colo. 1993).

VI. CONDITIONAL WATER RIGHT.

Purpose of a conditional water decree has always been to allow an ultimate appropriation of water to relate back to the time of the "first step" toward that appropriation. *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982); *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

Conditional water decrees are designed to establish that the first step toward the appropriation of water has been taken and to recognize the relation back of the ultimate appropriation to the date of that first step. *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

A conditional water decree requires an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986); *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

To show the first step toward appropriation of water, the applicant must show the concurrence of intent and overt acts. The date on which the first step is taken determines the date of the appropriation. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

Applicant who had negotiated for three years for the purpose of ensuring water would be used to improve fishery and recreational and irrigational purposes and had entered into a contract and paid fees for such purpose showed sufficient overt acts to demonstrate its intent to appropriate. *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

Intent to abandon was clearly shown, and presumption of abandonment arising from over 10 years' non-use was not rebutted, where city purchased senior downstream irrigation rights, never diverted or applied them, did not protest their inclusion on the decennial abandonment list, and made all subsequent diversions under junior priorities. *Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283 (Colo. 1996).

The overt acts required under the first step test must perform the following three functions: (1) Manifest the necessary intent to appropriate water to beneficial use; (2) Demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) Give notice to interested parties of the nature and extent of the proposed demand upon the water supply. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992); *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

Acts which demonstrate a substantial step toward application of water to a beneficial use and acts which constitute notice to third parties of the proposed demand upon the water supply may precede the formation of the intent to appropriate and an act manifesting such intent. However, the appropriation date of a conditional water right cannot be set prior to the formation of the necessary intent to appropriate and completion of an act manifesting such intent. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

Filing of an application for a conditional water right may be evidence of an act manifesting the intent to appropriate and it may be deemed to constitute notice to third parties of the proposed demand upon the water supply, but it is doubtful that filing of an application is, by itself, a substantial

step toward application of water to a beneficial use. Other overt acts would normally be required. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

Establishment of conditional water right requires concurrence of an intent to appropriate water for a beneficial use and the performance of overt acts in furtherance of such intent. Concurrence of such intent and overt acts qualifies as the first step toward appropriation of water and the date the first step is taken determines the date of appropriation. *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

Conditional decree of water rights which would injure senior appropriators cannot be granted without plan for augmentation which would assure sufficient water to exercise right. *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644 (Colo. 1991).

Owner or user of conditional decree of water rights must comply with §§ [37-92-301\(4\)](#) and [37-92-601](#), and the failure to do so results in the loss of his conditional water rights. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980).

Appropriation and development with reasonable diligence required for conditional decree. Subsection (6) requires that an applicant for a conditional water right demonstrate that an appropriation has been made and that the appropriation has been developed with reasonable diligence before the conditional decree will issue. *Colo. River Water Conservation Dist. v. City & County of Denver*, 642 P.2d 510 (Colo. 1982).

Finding of reasonable diligence equal to development with reasonable diligence. In considering § [37-92-301](#) (4) in juxtaposition with subsection (1), it is evident that the general assembly was drawing a clear connecting line between "failure to develop with reasonable diligence" and the requirement that the owner or user of a conditional water right obtain a finding of reasonable diligence. In effect, the general assembly equated a failure to obtain a finding of reasonable diligence with a failure to develop with reasonable diligence. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980).

Reasonable diligence in the development of conditional water rights is demonstrated when conditional water rights remain part of an integrated water project and the diligent work performed on the project as a whole is properly attributed to such conditional water rights. *Vail Valley Consolidated Water District v. City of Aurora*, 731 P.2d 665 (Colo. 1987).

Site-specific work to develop each individual conditional water right is not a precondition to finding of a reasonable diligence in the development of water rights which are part of an integrated project. *Vail Valley Consol. Water Dist. v. City of Aurora*, 731 P.2d 665 (Colo. 1987).

Prospective appropriator shall be deemed to have made a "diversion" of water by "controlling water in its natural course". Such control may be accomplished by the construction of a boat chute and fish ladder to control water and put it to recreational uses or uses benefitting wildlife. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

A court can complete an adjudication proceeding involving a conditional water right if: (1) Prior to the designation and creation of the designated ground water basin, the claim for a conditional water right has been filed in the court adjudication proceedings; and (2) either before or after the designation and creation of the designated ground water basin, proof is introduced showing that the applicant was entitled to a conditional decree prior to the time of the designation and creation of the basin. *Sweetwater Dev. Corp. v. Schubert Ranches, Inc.*, 188 Colo. 379, 535 P.2d 215 (1975).

An application for a conditional water right turns in part on the existence of a claimant's intent to appropriate water. Thus, the issue of claimant's intent directly affects the outcome of the case and should not be determined on a motion for summary judgment. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791 (Colo. 1993).

To establish a "conditional water right", an applicant must show in general that a "first step" toward the appropriation of a certain amount of water has been taken, that the applicant's intent to appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is

a substantial probability that the applicant "can and will" complete the appropriation with diligence. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Whether the relevant act or acts were sufficiently "overt" is a mixed question of law and fact, the resolution of which must be made by the court through the application of a legal standard to the facts of the case. The applicant bears the burden of proving that an overt act or acts have fulfilled the necessary functions and that the first step has been accomplished on a particular date. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The inquiry notice required of the overt acts context is more than mere notice of an unrefined intent to appropriate by something less than a detailed summary of exact diversion specifications. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Thornton's activities of formal acts taken by city officials, posting the signs, and surveying the general points of diversion were insufficient "overt acts". City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The formal acts taken by Thornton, such as the passing of a resolution by its utilities board, were insufficiently publicized to the extent necessary to charge potentially interested parties with inquiry notice. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The signs were sufficient to provide notice of general intent to appropriate; however, they were insufficient as "inquiry notice" because interested parties would have to wait until the publication of the resume to know the nature and extent of the proposed demand upon the water supply. Therefore, the date of the filing of Thornton's application is the appropriation date. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Surveying general points of diversion were not sufficiently public or informative, either in isolation or in combination with the posted signs to put interested parties on inquiry notice of the extensive nature of the proposed diversion. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Under the "intent" prong of the first step test necessary to appropriate a conditional water right, an applicant must establish an intent to appropriate water for application to beneficial use. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

A city may appropriate water for its future needs without violating the "anti-speculation" doctrine so long as the amount of the appropriation is in line with the city's "reasonably anticipated requirements" based on substantiated projections of future growth as determined by the water court. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Trial court may impose volumetric limitation on the yield of a project if the limitation conforms to the amount of water available that the applicant has established a need and future intent and ability to use or that the limitation is specifically found by the court to be necessary to prevent injury to other water users. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

A conditional water right is limited to the amount of water available for appropriation and for which the applicant can establish a nonspeculative intent to put to beneficial use while satisfying the "can and will" requirements. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

In quantifying the permissible yield of a conditional water right, the water court is not imposing an independent limitation, it is merely formalizing in the decree the scope of the conditional water right as it has been established by the applicant. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The governmental agency exception to the anti-speculation doctrine allows some freedom from anti-speculation limitations to allow them to plan for future water needs of constituents. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Even though the court decreed conditional rights to Thornton pursuant to the governmental

agency exception to the anti-speculation doctrine, the potential for a decree in excess of its needs still exists, as the water court must make its determinations of the city's reasonably anticipated requirements based on projections that cannot be verified at the time the decree is entered. Therefore, the court's imposition of specific diligence requirements was within its authority to ensure that Thornton show its continuing need for the volumetric amount of the water claimed. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

VII. PLAN FOR AUGMENTATION.

An acceptable plan for augmentation does not require the addition of new water into the water system, such as the introduction of transmountain diverted water into the system. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

An exchange plan is not part of a plan for augmentation where the exchange is not part of a detailed program to increase the supply of water available for beneficial use in a division. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

It would contravene the purpose of subsection (9) to allow stream depletions to be offset by anticipated increases in runoff with the result of circumventing the applicants' obligations to compensate holders of water rights for injuries that would otherwise occur, and the district court erred when it considered this factor in concluding that applicants' withdrawals will not result in such injury. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

In amending subsection (9) to prevent runoff water collected from land surfaces that have been made impermeable from serving as a source of augmentation, the legislature intended to remove the incentive for persons to attempt to increase water supplies by replacing natural land conditions with impermeable surfaces. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

Allowing the applicants credit for runoff water collected from land surfaces that have been made impermeable, thereby eliminating their obligation under § [37-90-137](#) (9)(c) to compensate holders of senior rights for injuries that may otherwise result from their withdrawals, would clearly undermine the purpose of the legislature's amendment to the definition of a plan for augmentation contained in subsection (9). *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

A tributary aquifer that would be used as a reservoir is not analogous to an unlined gravel pit or an on-stream reservoir and, thus, is not exempt from the prohibition against crediting a plan of augmentation for reductions in evapotranspiration. However, the claim is not frivolous as it is a good-faith attempt to extend existing law. *In re Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

Reduction in consumptive use of tributary water cannot be considered development of new sources of water as part of a plan for augmentation. Therefore, such reductions cannot provide the basis for a water right that is independent of water priority system, and revision in definition of "augmentation" did not provide that such reduction can be the basis for a water right independent of the water priority system. *Giffen v. State*, 690 P.2d 1244 (Colo. 1984).

The fact that rivers involved are over-appropriated, rather than being an argument against the plans for augmentation, is the very reason for the valid exercise of ingenuity of persons seeking to maximize the use of water, whether they are present or future owners of land and wells, developers, or as characterized by the water court here, promoters, speculators, or nonusers. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

Plan of augmentation held valid. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

VIII. PRIORITY.

Although an appropriation is not complete until actual diversion and use, still, the right may relate

back to the time when the first open step was taken giving notice of intent to secure it. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

What constitutes the "first step" required to establish a priority date, or date of first appropriation in a water rights matter is not the same in every proposed diversion because the facts must be taken into consideration in each case on an ad hoc basis; and although there are no precise standards, general guidelines have been established. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The required "first step" must consist of open work "on the land" in order that notice can be given to others of the intention of the appropriators. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

"On the land" test disavowed in favor of test which determines whether the acts performed might have been substantial enough to provide notice, manifest intent, and demonstrate a serious step toward application of water to beneficial use. City of Aspen v. Colo. River Conservation Dist., 696 P.2d 758 (Colo. 1985).

The "first step" may include, when the appropriator is a public entity, a resolution passed or other official action taken by the entity but the adoption of a land use policy by the entity would not be sufficient because it would not give notice to interested parties of the intent to appropriate water. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

For discussion of what constitutes the "first step" required to establish a priority date in a conditional water rights matter, see Bar 70 Enters., Inc. v. Tosco Corp., 703 P.2d 1297 (Colo. 1985).

The requisite intent to appropriate does not have to precede or be contemporaneous with the acts which constitute the work on the land; what is required is that at some point in time the two requirements -- the open physical demonstration and the requisite intent to appropriate -- coexist, with the priority date to be set not earlier than the date on which both elements are present. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

IX. WATER RIGHT.

Water right is a property right. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980); People v. City of Thornton, 775 P.2d 11 (Colo. 1989).

Water right definitionally does not include a right to use "designated ground water", as defined in § [37-90-103](#) (6). State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

There is absolutely no question that a decreed water right is valuable property; that it may be used, its use changed, its point of diversion relocated; and that a municipal corporation is not precluded from purchasing water rights previously used for agricultural purposes and thereafter devoting them to municipal uses, provided that no adverse effect be suffered by other users from the same stream, particularly those holding junior priorities. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

Value of water right is in its relative priority and its use. The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982).

When the application of water to beneficial use is effected by some structure or device, the resulting appropriation is by a diversion as defined in subsection (7). City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

X. UNDERGROUND WATER.

Junior appropriators with vested rights in underground water tributary to a natural stream are

entitled to protection against injury resulting from another water user's change of rights. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

Aquifer storage and augmentation claims based on the natural percolation of irrigation run-off and precipitation are frivolous when the water has not been placed there by other than natural means. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).
