

<p>COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80202</p>	
<p><i>En banc</i> Opinion, February 10, 2025 (2025 CO 5) Authoring: Chief Justice Márquez Concurring: Justice Gabriel</p> <p>Appeal from: DISTRICT COURT, WATER DIVISION 1 Honorable Todd L. Taylor, Water Judge Case No. 2019CW3220</p>	
<p>Opposers-Appellants: FRANKTOWN CITIZENS COALITION II, INC. and WEST ELBERT COUNTY WELL USERS ASSOCIATION</p> <p>Applicant-Appellee: INDEPENDENCE WATER and SANITATION DISTRICT and CORDILLERA CORPORATION</p> <p>Appellee: DIVISION 1 ENGINEER PURSUANT TO C.A.R. 1(e)</p>	
<p>Attorney for Appellee the Division Engineer for Water Division 1 under C.A.R. 1(e): Philip J. Weiser, Attorney General Derek L. Turner, First Assistant Attorney General, Atty. Reg. No. 44091* Will Allen, Senior Assistant Attorney General, Atty. Reg. No. 26386* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 10th Floor Denver, CO 80203 Telephone: 720-508-6926 (Turner); 720-508-6632 (Allen) E-mail: derek.turner@coag.gov; will.allen@coag.gov *Counsel of Record</p>	<p>Supreme Court Case No.: 2023SA154</p>
<p>APPELLEE DIVISION ENGINEER'S PETITION FOR RE-HEARING</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with all requirements of C.A.R. 32 and 40 including all formatting requirements set forth in the Rules. Specifically, the undersigned certified that this petition complies with the applicable word limits set forth in C.A.R. 40(b)(2). This petition contains 1898 words.

I acknowledge that this petition may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and 40.

PHILIP J. WEISER
Attorney General

/s/ Derek Turner

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Water Division 1

Appellee Pursuant to C.A.R. (1)(e), Corey Deangelis, Division Engineer for Water Division 1, submits this Petition for Rehearing pursuant to C.A.R. 40.

I. Introduction

On February 10, 2025, this Court issued its Opinion in this matter, affirming the judgment of the Water Court for Water Division 1. Chief Justice Márquez delivered the Opinion of the Court *en banc*. Justice Gabriel issued a concurring opinion.

Division Engineers are automatic appellees in every appeal from their Division's water court. C.A.R. 1(e). Under the 1969 Act, the State Engineer, through his Division Engineers, "is responsible for the administration and distribution of the waters of the state ... as specified in article 92 of the Colorado Revised Statutes." *Bar 70 Enterprises, Inc. v. Tosco Corp.*, 703 P.2d 1297, 1304 (Colo. 1985). "This responsibility carries with it a clear obligation to represent the public interest in proceedings involving water rights." *Id.* (citing *Wadsworth v. Kuiper*, 562 P.2d 1114 (Colo. 1977)).

The Division Engineer did not participate in this matter because it

involved narrow issues related to amendments of not-nontributary groundwater augmentation plans. However, the Opinion appears to adopt a broad rule for *tributary* augmentation plans adjudicated in the prior appropriation system, even though the allocation and administration of tributary water is fundamentally different from *not-nontributary* groundwater. The Court's Opinion as applied to tributary augmentation plans leaves uncertain the status of recent precedent and whether an unadjudicated but augmented right to divert the public's water resource could be speculative.

The Division Engineer does not request this Court modify its holding regarding Independence Water and Sanitation District's augmentation plan, or regarding not-nontributary augmentation plans in general. The Division Engineer files this Petition pursuant to C.A.R. 40 to request this Court consider issuing a modified opinion that, with respect to tributary augmentation plans, would: (1) correct an imprecise statement that tributary augmentation plans "exist outside of the prior appropriation system," Opinion, ¶10; (2) explicitly address (or leave unaddressed for a future proceeding) whether fully augmented

unadjudicated diversions of tributary water are limited to non-speculative beneficial uses; and (3) clarify the status of *Coors Brewing Company v. City of Golden*, 2018 CO 63.

II. Basis for the Petition

The Court justifies its holding in this matter by reaching beyond the arguments of the parties and the water court's reasoning regarding not-nontributary groundwater augmentation plans. This broad reach does not recognize that the "system" of allocation and administration of not-nontributary groundwater is "*fundamentally different* from the prior appropriation doctrine applicable to tributary waters." *Park Cnty. Sportsmens Ranch LLP v. Bargas*, 986 P.2d 262, 266 (Colo. 1999) (emphasis added). A not-nontributary user owns a fixed, finite amount of water available for beneficial use, not subject to abandonment, nor subject to administration "in priority." *See Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist*, 77 P.3d 62, 74 n.23 (Colo. 2003); see § 37-90-137(9)(c.5)(I)(A)-(C), C.R.S. Because pumping not-nontributary groundwater depletes a natural stream, the user must obtain an augmentation plan to replace very small quantities of water.

See § 37-90-137(9)(c.5)(I)(C). For example, if Independence pumped its full 75 acre-feet per year for 100 years (7500 acre-feet total) “the maximum depletion to the affected stream system” is 3.92 acre-feet in the 195th year. See Independence’s Final Decree, Case No. 19CW3220, ¶10. The augmentation supply for these plans is typically the non-tributary groundwater itself: return flows from the initial use, or water pumped and released directly from the user’s allocation. See, e.g., *id.* ¶¶9,10 (replacement supply is return flows from use, and reserved portion of nontributary groundwater to replace depletions after pumping).

A landowner’s right to use not-nontributary groundwater is fundamentally defined and limited to the amounts statutorily allocated based on the area of land owned; it cannot be diverted without an augmentation plan and a well permit. The State Engineer reviews permit applications for non-speculative beneficial uses. See *East Cherry Creek Valley Water & San. Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154, 158 (Colo. 2005).

By contrast, tributary water rights “come[] into existence only

through application of the water to the appropriator's beneficial use; that beneficial use then becomes the basis, measure, and limit of the appropriation." *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 53 (Colo. 1999). The appropriation must not be speculative, for "[o]ur constitution guarantees a right to appropriate, not a right to speculate" *Colo. River Water Conservation Dist. V. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979).

Water courts have decreed tributary augmentation plans that allow out-of-priority diversions that are not specifically adjudicated as appropriative water rights. Prior to the Opinion, the Division Engineer believed such augmented diversions of public water resources were limited to non-speculative beneficial uses. However, the Opinion suggests courts cannot evaluate a proposed out-of-priority diversion for speculation if the diversion is replaced under an augmentation plan. Moreover, the ruling suggests that courts should solely consider whether a new or amended plan will prevent injury—in contrast to the scrutiny applied to Coors Brewing Company's proposed augmentation plan amendment in *Coors Brewing*.

Because Colorado water users rely on this Court’s precedent to define, evaluate, and litigate the use of Colorado’s public water resources, the Division Engineer requests this Court modify its opinion to address the following points of law.

A. Tributary augmentation plans are adjudicated, integrated, and administered *within* the prior appropriation system

The Court stated that “augmentation plans exist outside the prior appropriation system.” Opinion, ¶10. This Court’s previous decisions suggest something different—that augmentation plans *preserve* the prior appropriation system while promoting maximum beneficial use of the public’s resource, even when that use would otherwise be out-of-priority. *See Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1150-51 (Colo. 2001).

Importantly, when tributary augmentation plans are decreed to allow out-of-priority diversion of a water right, the out-of-priority diversion remains limited to the underlying water right’s non-speculative decreed uses. *See Farmers Reservoir & Irr. Co. v. Consol. Mutual Water Co.*, 33 P.3d 799, 806 (Colo. 2001). (“[A]ugmentation plans permit *junior water right holders* to divert water out-of-priority

while ensuring the protection of senior water rights.” (Emphasis added)); *Well Augmentation Subdist. of Central Colo. Water Conservancy Dist. v. Aurora*, 221 P.3d 399, 411 (Colo. 2009) (“[I]t is the *water rights included* within the plan that are augmented.” (Emphasis added)).

While the diversion of those augmented water rights may *occur* “outside of the priority system,” the augmentation plan preserves the priority system by allowing the Division Engineer to “administer the [out-of-priority] diversions for beneficial use without curtailment.” *Empire Lodge* 39 P.3d at 1155, 1151; *see also* § 37-92-305(8)(c) (augmentation plan “must be sufficient to permit to continuation of diversions when curtailment would otherwise be required” under a senior call); *Simpson v. Bijou Irrigation Co.*, 69 P.3d 40, 60-61 (Colo. 2003) (describing augmentation plans as a tool “for *integrating groundwater into* the state priority system”). Consequently, the augmentation plan is intertwined with the right, in-or-out-of-priority. The Division Engineer requests the Opinion be modified to reflect that augmentation plans exist *within* the prior appropriation system, or

otherwise to recognize the integration of augmentation plans into the system.

B. A proposed unadjudicated but augmented use may warrant speculation scrutiny

Although most tributary augmentation plans allow the out-of-priority diversion of adjudicated non-speculative water rights, Colorado law does not appear to prohibit an augmented water diversion that is not specifically adjudicated as an appropriative water right. The Opinion suggests that so long as the plan prevents injury, the unadjudicated out-of-priority use does not face speculation scrutiny.

This litigation did not consider whether a fully augmented use of tributary water under an augmentation plan requires adjudication as an “appropriation” under section 37-92-103(3)(a), or must be limited to non-speculative beneficial uses. The Division Engineer is concerned the Court may not have considered the possibility that fully augmented out-of-priority uses of Colorado’s public water resource may not face the speculation scrutiny that Colorado’s Constitution requires for all “appropriations.” *See Vidler*, 594 P.2d at 568. Accordingly, the Division

Engineer requests that this Court explicitly clarify, or leave uncertain for a future adversarial proceeding, whether unadjudicated diversions under augmentation plans should be evaluated to ensure non-speculative beneficial use of waters of the state.

C. This Court’s reasoning is inconsistent with *Coors Brewing*

In *Coors Brewing*, the Court rejected the reasoning relied on in this matter. There, Coors sought to “amend its decreed augmentation plans” to reuse return flows from out-of-priority diversions made under those plans without amending the underlying water right. *Coors Brewing*, at ¶1. Coors argued “that the water court must approve the amendment ... after a showing of non-injury.” *Id.* at ¶30 (Court’s emphasis).

The Court unanimously rejected Coors’s argument. *Id.* at ¶33. First, the Court noted that “it is not at all clear that the statute authorizes amendments” to augmentation plans to change the nature of the use of the augmented diversion. *Id.* at ¶26. Second, the Court determined the augmentation plan could not be changed even if Coors could show no injury, because doing so “would be circumventing the

established rule that an appropriation is limited to the amount of water the appropriator puts to beneficial use.” *Id.* at ¶¶28, 29. Third, the Court found that the proposed amendment “would effectively add new uses to its decreed water rights while avoiding the procedural hurdles that normally accompany such changes”—like satisfying “the anti-speculation doctrine, which [a] party could indisputably [challenge] if Coors were to seek a new appropriation.” *Id.* at ¶30. Confirming that diversions under augmentation plans remain intertwined with underlying appropriative rights, the Court recognized that applications to amend augmentation plans must “at a minimum, comply with the requirements of both subsections 37-92-305(3), (5) and (8) *and our case precedents.*” *Id.* at ¶25 n.1 (emphasis added).

Ultimately, the Court rejected Coors’s argument that the only relevant question in a proceeding to amend an augmentation plan is whether injury will occur. The Opinion appears to overturn that holding.

Due to the unexpected change that this case seems to introduce to augmentation plans for tributary uses, the Engineers request this

Court's assistance in harmonizing its reasoning with *Coors Brewing*.

D. Requested Modification

The Division Engineer only takes issue with certain aspects of the Court's reasoning related to *tributary* augmentation plans. The parties in this case have expended significant resources in litigating this matter and the Court's judgment, as applied to this particular dispute, appears consistent with its precedent involving *not-nontributary groundwater* augmentation plans. Moreover, this Court's precedent related to tributary water rights and plans for augmentation is extensive, detailed, and carefully reasoned based on developed factual records and adversarial briefing, and often, *amici* participation. With that in mind, the Division Engineer respectfully requests the Court:

(1) Correct the statement in paragraph 10 of the Opinion that augmentation plans "exist outside of the prior appropriation system," to reflect that augmentation plans are intertwined with their underlying water rights and are administered within Colorado's prior appropriation system;

(2) Explicitly address (or leave uncertain for a future

adversarial proceeding) whether diversions of tributary water in augmentation plans without underlying adjudicated appropriations should be limited to non-speculative beneficial uses; and

(3) Clarify the status of *Coors Brewing*, particularly with regard to the scope of judicial review for claims to amend tributary augmentation plans involving underlying appropriative water rights.

(4) In the alternative, this Court should explicitly limit its holding to plans involving not-nontributary groundwater, based on the reasoning of the water court and this Court's precedent.

Dated March 24, 2025.

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/s/ Derek Turner

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2025, I served the foregoing **APPELLEE DIVISION ENGINEER'S PETITION FOR RE-HEARING** via Colorado Courts E-Filing upon all parties of record.

Party Name	Party Type	Attorney/Paraprofessional Name
Christopher Dale Cummins	Attorney	N/A
Cordillera Corporation	Opposer-Appellee	N/A
Division 1 Engineer	Appellee Pursuant to C.A.R. 1(e)	Division 1 Water Engineer (State of Colorado DWR Division 1)
Franktown Citizens Coalition II, Inc.	Opposer-Appellant	David Michael Shoheit (Monson Cummins Shoheit and Farr LLC)
Independence Water And Sanitation District	Applicant-Appellee	David S Hayes (Hayes Poznanovic Korver LLC) Eric Krisberg Trout (McGeady Becher Cortese Williams PC) Matthew Steven Poznanovic (Hayes Poznanovic Korver LLC)
State Engineer	Appellee Pursuant to C.A.R. 1(e)	Division 1 Water Engineer (State of Colorado DWR Division 1)
West Elbert County Well Users Association	Opposer-Appellant	David Michael Shoheit (Monson Cummins Shoheit and Farr LLC)

/s/ Derek Turner

Pursuant to C.A.R. 30 printed or printable copies of this document bearing the original, electronic, or scanned signature are on file in the offices of Colorado Department of Law.