



When You've Had Your Fill: A Review Of the One-Fill Rule

by Austin Hamre

The "one-fill rule" for water storage rights has evolved, but may still have implications for the initial adjudication of storage appropriations, as well as for how those rights are made absolute and for changes of such rights. This evolution over the last ninety years can leave practitioners confused over what the rule does and does not mean. Just recently, the Colorado Supreme Court again addressed the rule in *City of Grand Junction v. City and County of Denver*.¹ A discussion of where the rule is now and is headed, however, must start with an examination of its history.

New Appropriations

Origin of the Rule

The first case to discuss the one-fill rule in detail was *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*,² an appeal from the second basin-wide adjudication for the Cache la Poudre River. In connection with refill rights, the Colorado Supreme Court said that a party cannot obtain a decree allowing the reservoir to be filled twice in the same year under the same priority.³ Its application of this rule, however, was far more limiting.

In *Windsor Reservoir*, two irrigation companies, North Poudre Irrigation Co. and Water Supply and Storage Co., had

obtained decrees with provisions allowing their reservoirs to be filled more than once in the same year, provided "that said second filling shall in no manner affect, prejudice or injure the rights of junior reservoir appropriators." By definition, therefore, the refill right sought by NPIC and WSSC was not "under the same priority," but would have been under a later appropriation junior to all other storage appropriations then decreed. The court seemed to recognize this fact at one point,⁴ but elsewhere stated:

Whether, after all reservoirs in a water district have in any one season or year, been once filled to their decreed capacity, a second filling may be had, and, if so, in what order they shall be filled, are not questions now before us.⁵

Why the decree provisions did not sufficiently raise that issue is not apparent. The court eventually concluded that the provisions were "wrong and should be omitted" from the decree on remand.⁶

The court's conclusion in *Windsor Reservoir* was based on its interpretation of the statute then in effect pertaining to reservoir appropriations.⁷ It read the statute to say that the amount of the appropriation is defined not by the appropriator's intent, but by the capacity of the reservoir as built. The decree could only confirm that appropriation. Further, because the court viewed the appropriation as being dependent solely on the act of building the reservoir, any refill priority must have the same appropriation date as the first fill priority.

The court held that a refill decree "in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation. . . ."⁸ In connection with a different reservoir involved in the appeal, the court had already held that priorities cannot be

awarded to two different entities for the same reservoir when both are based on one and the same act of filling that reservoir.⁹

The court next applied the one-fill rule in *Holbrook Irrigation District v. Ft. Lyon Canal Co.*¹⁰ Among other things, this case involved two reservoirs, both of which had three decreed sources of supply, all with varying dates of appropriation. Ft. Lyon's plans for the size of the reservoirs had expanded substantially over the several years of design and construction. New maps and statements had been filed with each new enlargement, but Ft. Lyon obtained a decree for the total enlarged capacity of each structure, with a priority relating back to the original dates of appropriation.

The focus of the opinion is on the doctrine of relation back, and unlike *Windsor Reservoir*, there is no discussion of the reasoning behind the application of the one-fill rule. Apparently, Ft. Lyon claimed the right to fill the reservoir once from each source each year, to which the court responded: "There will be allowed but one annual filling of said reservoir, from whatever sources the water may be derived."

Evolution of the Rule

By the time of the next opinion to address the rule, *Orchard City Irrigation District v. Whitten*,¹¹ there was an implicit acceptance of the proposition that a refill

right, in some form, could be granted. The facts were that Orchard City Irrigation District ("OCID") first obtained a decree to divert from Surface Creek the full capacity (3,400 af) of Fruit Growers Reservoir. Later, it made a claim for an "auxiliary supply" of up to 2,870 af diverted from Dry Creek, and obtained a second decree for that amount. After the dam washed out, the reservoir was rebuilt to a capacity of 4,500 af. OCID wanted to use its existing decrees to completely fill the enlarged reservoir.

Orchard City refers to four types of storage decrees: (1) a right to fill the original capacity; (2) a right for an auxiliary or supplemental supply to achieve one-fill per year; (3) a right to fill an enlargement of the reservoir; and (4) a right to refill the reservoir. Most of the Supreme Court's consideration of the one-fill rule focused on the intended demand on the water supply at the time the second decree was obtained. In this case, the statement of claim and the transcript both indicated that the intent of the second decree was to use the second source only to help ensure one complete filling per year of the original capacity. As a result, the operation of the two decrees was limited to the originally intended demand of 3,400 af, rather than the full 6,270 af.

Having fully resolved the issue, the opinion could have stopped there, but it went on to quote extensively from *Windsor Reservoir* and *Holbrook*, then stated that those cases

state the law in effect when plaintiff was awarded its decrees for Fruit Growers Reservoir, to the effect that a reservoir is limited to one annual filling from whatever source the water may be derived, and that the decreed capacity of a reservoir controls and limits the amount of water that may be stored therein.¹²

The point of *Windsor Reservoir*, however, was not simply that reservoirs could not be refilled, but that they could not be refilled under their original priority. Contrary to *Orchard City's* characterization, *Windsor* expressly declined to decide whether a later appropriation for a refill could be decreed. The statute that was the basis for *Windsor* was no longer in existence at the time of the *Orchard City* decision, and the latter opinion gives little guidance as to whether the physical capacity analysis used in *Windsor Reservoir*, or the intent analysis it employed, would be controlling under the law as it existed in 1961.

If the one-fill rule truly meant no refills, however, practitioners would have expected the focus of the discussion in *City of Aspen v. Colorado River Conservation District*¹³ to have been much different. In that case, Aspen and Pitkin County jointly filed an application for a storage right to refill the full capacity of Ruedi Reservoir. Though the opinion does not say so, the United States already had a decree for the full amount of the reservoir.¹⁴ The parties stipulated that water would be available for appropriation.

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The focus of the *City of Aspen* opinion is exclusively on the "overt act" prong of the "first step test" for a conditional water right. In note 1, the Supreme Court pointed out several questions pertaining to operation of the refill right that were left unanswered by the record on appeal, but nowhere did the court hint that the existing decree for Ruedi Reservoir might be a basis for denying Aspen's application. The water court's ruling similarly stated that the only issue was the sufficiency of the overt act, excluding the possibility that the one-fill rule was a potential obstacle. The Supreme Court remanded for further proceedings, finding the record insufficient to allow a "determination as to the validity of applicants' claimed conditional water right."¹⁵ However, it seems that the *Windsor Reservoir* court would have had no difficulty concluding from the facts stated in the first page of this opinion that the attempted appropriation was invalid.

*Board of County Commissioners of County of Arapahoe v. Upper Gunnison Water Conservancy District*¹⁶ also approved the granting of a refill decree. The opinion then went on to acknowledge that "[a] reservoir is permitted one filling each year; and a storage right is entitled to claim whatever water is available each year to fill that storage decree."¹⁷

Most recently, in *City of Grand Junction*,¹⁸ the Supreme Court addressed the one-fill rule in the context of interpreting the "Blue River Decree,"¹⁹ in which Denver's original appropriation for Dillon Res-

ervoir was adjudicated. The court held that the Blue River Decree allows only one filling under its 1946 priority, but it did not preclude Denver's appropriation of a refill right under a later 1965 priority based on when Denver began refill operations. The opinion states that this limitation is consistent with one-fill limitations in prior case law, citing *Orchard City* and *Windsor Reservoir* for the proposition that "[t]he statute which provides for these decrees forbids the allowance of more than one filling on one priority in any one year."²⁰

Current Status

While *Grand Junction* continues the court's more liberal approach toward the one-fill rule, it may now be time to recognize that the law governing the appropriation of conditional water rights has been dramatically restructured during this century, and that some aspects of the one-fill rule, as originally conceived, are unnecessary and contrary to public policy considerations.

First, even assuming the 1881 legislature intended to limit reservoir decrees to no more than one filling of the actual reservoir capacity, that statute was repealed in 1943.²¹ The Water Right Determination and Administration Act, as amended,²² and more contemporary case law have provisions for preventing injury, speculation, and the accumulation of paper water rights that will never be operated,²³ without need for the restrictive approach of the 1881 statute. Under current law, the primary focus is on the appropriator's intent.²⁴ The physical capacity of the "bucket" used to effect the appropriation is relevant operationally, and therefore enters into the proof that water can and will be diverted, stored, and used,²⁵ but generally deserves to be accorded no further legal significance.

If a party can show that an intent to refill was part of the original appropriative intent, and can make the "can and will" showing required by CRS § 37-92-305(9) (b), there now should be no barrier to the appropriation of a refill right, even as part of the original priority granted for a reservoir. In fact, the court has already approved such an appropriation in *Thornton v. Bijou*.²⁶ Although the attack on the refill rights in that case was primarily on the basis of insufficient notice rather than an asserted legal impossibility of obtaining a right to refill as part of the original storage priority, the Supreme Court acknowledged the one-fill rule, and characterized it as merely a presumption that is

overcome by notice of the appropriator's intent to fill and refill the reservoir.²⁷

Second, in *Fellhauer v. People*,²⁸ seven years after *Orchard City* was decided, the court developed the doctrine of maximum or optimum beneficial use. Today, "an important aspect of the water court's task is to assure the maximum beneficial use of water while adequately protecting against injury to vested water rights,"²⁹ and the court has recognized that doing so will require innovative approaches to existing problems and practices.³⁰ Increasingly, the court has recognized that use of the state's water resources should not be considered in a vacuum; rather, use of other natural resources may be part of the analysis.³¹ Optimum beneficial use of the state's waters, therefore, should include optimum beneficial use of diversion and storage structures.

As Denver's experience with Two Forks has demonstrated, it is no longer a certainty that someone desiring to store water can simply go out and build another reservoir. In this author's opinion, if the state's waters can be more efficiently used by allowing reservoirs to be refilled, in the absence of injury, such appropriations should be allowed. Given the other statutory limitations described above, it appears inadvisable to require more or larger storage structures to be built when fewer or smaller ones, with the right to refill, can do the same job.

Making Absolute: What Is a "Fill"?

Having obtained a conditional storage decree, the next question is, what must be shown to make the right absolute? Generally, the mere act of storing water does not constitute a beneficial use.³² Consequently, the appropriator must show that water has first been stored in the decreed amount, and then has been beneficially used. Although the full decreed amount must be in storage at one point in time, the entire amount need not be diverted all in one year.³³ Because of the one-fill rule, "carry-over" storage from one year is counted toward the next year's fill.³⁴ Beneficial use of the stored water must occur within a "reasonable time" thereafter.³⁵

Again, the analysis must focus on individual priorities. Where more than one priority has been decreed to a reservoir, the volumes diverted, used, and carried-over attributable to each must be accounted for separately. Although the water year used for reservoir accounting historically has been from November 1 to October 31

(that is, terminating with the end of the irrigation season), reservoirs used for other purposes may select a different date, or may employ "low point accounting," in which the ending of the water year varies depending on the date on which the lowest reservoir contents are recorded.³⁶

Determining when a reservoir has filled can be further complicated by the treatment of water that could have been stored by a reservoir, but was not. In some cases, the State Engineer's Office has charged intentionally foregone diversions when storage capacity is available against a reservoir's annual fill.³⁷ Conceivably, because a storage right is limited by volume, the failure of a senior storage right to divert in one month might result in its placing a call in a later month that would have been unnecessary if the senior right had taken water and filled earlier when more water was in the stream.

The State Engineer's policy may be justified if a legally cognizable injury results; however, the situations in which that occurs should be quite limited. Administration in this manner has been tacitly approved twice,³⁸ but the practice does not appear to have been specifically litigated at the appellate level. It is questionable whether such "paper fills" could provide a basis for making a right absolute.

Changes of Storage Rights

The application of the one-fill rule to changes of storage rights has yielded curious results. *City of Westminster v. Church*³⁹ was an injunction action in which Westminster was sued for expanding the use of various water rights it had purchased from an agricultural user. The trial court applied the rule that when the use of a water right is changed, it is re-quantified based on historical usage, and enjoined Westminster's expanded use.

The Supreme Court held that this outcome was correct as to the direct flow rights, but not as to the storage decrees: "A reservoir right permits one filling of the reservoir per year. Change of use does not create a greater burden [on the stream] as to storage water."⁴⁰ Arguably, this statement is incorrect; a ditch may be "entitled" under its decree to divert 100 cfs, but if for fifty years it has only diverted 10 cfs, a change resulting in an increase to its full decreed rate will likely injure junior appropriators. Similarly, if a 10,000 af reservoir consistently carries over 9,000 af, diverting only 1,000 af per year, a change in use resulting in 10,000 af of diversions every year will have an impact on junior

storage rights no different than in the ditch example.

In *Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Co.*,⁴¹ the Supreme Court recognized that the approach used in *Westminster* was problematic and began to correct it, but may not yet have completed that task. *Southeastern* recognizes that the guiding principle in a change case is prevention of injury to other water rights.⁴² However, *Southeastern* specifically requires only that historic return flows be maintained. Other aspects of the historic use analysis are not addressed. The under-utilized storage right described in the example above, if used for agricultural irrigation, may generate approximately 500 af per year of return flows. If continuation of that volume of return flows were the sole criteria, the right could begin diverting and fully consuming several thousand acre feet per year—again with a decidedly negative impact on junior rights.

Southeastern cites CRS § 37-92-103(5) (defining a change of water right to include virtually any change of storage rights) and CRS § 37-92-305(3) (stating that changes will be approved only if injury is prevented), both of which were enacted the year following *Westminster*. *Southeastern* could have held that those enactments legislatively overruled *Westminster*, and that the no-injury standard is applied no differently to changes of storage rights than to changes of direct flow rights. Although *Southeastern* may not have seized that opportunity, neither did it foreclose the argument.

Conclusion

While there are parts of the one-fill rule that remain valid today, they are precepts commonly encountered in Colorado water law: (1) the amount of an appropriation is limited by the appropriator's intent, and by the appropriator's ability to show that the water can and will be diverted, stored and used within a reasonable time; (2) the priority of an appropriation can relate back no farther than the time the appropriator formed the intent to appropriate that volume of water; and (3) a new appropriation may not operate to injure senior water rights.

Other aspects of the one-fill rule, as originally conceived, seem to be no longer consistent with current statutory and case law, or with public policy. Among these are the ideas that: (1) a reservoir cannot be granted a right to refill; (2) one reservoir can never be the object of several de-

crees totaling more than its physical capacity; and (3) an intent to refill cannot be part of a party's original appropriative intent. In light of the Supreme Court's more recent decisions, these aspects of the one-fill rule may now be no more than historical curiosity.

NOTES

1. 27 Colo.Law. 221 (Aug. 1998) (Sup.Ct. No. 97SA93, *ann'd* 6/15/98).

2. 98 P. 729 (1908).

3. *Id.* at 733.

4. "If this proviso has any significance at all, it is, expressed concretely, that double fillings shall not be allowed to a senior reservoir appropriator in any one year, until after junior reservoirs have been once filled." *Id.* at 734.

5. *Id.* at 733.

6. *Id.* at 734. The refill right was denied despite the fact that refills had already been accomplished. *Id.* at 733. Whether the refills were accomplished in accordance with the restriction, however, is not stated.

7. Section 2403, Mills Ann. Stat., read in relevant part:

... make and cause to be entered a decree determining and establishing the several priorities of right ... each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and

if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree.

8. *Id.* at 733.

9. *Id.*

10. 84 Colo. 174, 269 P. 574 (1928).

11. 361 P.2d 130 (Colo. 1961).

12. *Id.* at 137.

13. 696 P.2d 758 (Colo. 1985).

14. Granted June 20, 1958, in Civil Action 4613.

15. *Supra*, note 13 at 765.

16. 838 P.2d 840 (Colo. 1992).

17. *Id.* at 851.

18. *Supra*, note 1.

19. Consolidated Federal Actions 2782, 5016, 5017, District Court for Colorado, entered October 12, 1955.

20. *Supra*, note 1 at n. 6.

21. Senate Bill 90, enacted April 19, 1943, codified as C.S.A. 1935, 1943 Supp., Chap. 90, §§ 189(1) through 189(25).

22. CRS § 37-92-101 *et seq.*

23. In particular, *see* CRS §§ 37-92-103(3)(a), -305(3), and -305(9); *and see Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979); *Southeastern Colorado Water Conservation Dist. v. City of Florence*, 688 P.2d 715 (Colo. 1984).

24. "A conditional water right is established upon the concurrence of an intent to appropriate water and the performance of overt acts in furtherance of that intent." *Upper Gunnison, supra*, note 16 at 848-49. "Storage" is now statutorily defined simply as "impoundment, possession and control of water by means of a dam." CRS § 37-92-103(10.5). That statute

goes on to authorize storage in underground aquifers, despite the fact that the capacity of the aquifer generally imposes no realistic physical constraints on the volume capable of being stored. The proposed demand on the water supply, or "contemplated draft," is primarily a matter of the appropriator's intent. *City of Thornton v. Clear Creek Water Users Alliance*, 859 P.2d 1348, 1355-56 (Colo. 1993). *See also Water Supply & Storage Co. v. Curtis*, 733 P.2d 680, 683 (Colo. 1987) (appropriator's original intent controls right to reuse native water).

25. *See* CRS § 37-92-305(9)(b).

26. 926 P.2d 1, 27-28 (Colo. 1996).

27. *Id.* at n. 13.

28. 447 P.2d 986, 994 (Colo. 1968).

29. *City of Thornton, supra*, note 26 at 86.

30. *Kelly Ranch v. Southeastern Colorado Water Conservancy Dist.*, 550 P.2d 297, 304 (Colo. 1976).

31. *Id.*, *cf.*, *Board of County Comm'rs of County of Arapahoe v. United States*, 891 P.2d 952, 971-72 (Colo. 1995).

32. *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 184 (Colo. 1991).

33. *North Sterling Irr. Dist. v. Riverside Res. & Land Co.*, 200 P.2d 933, 935 (Colo. 1948).

34. *Id.*

35. *Id.*

36. *See, e.g., Upper Gunnison, supra*, note 16 at 851-52.

37. *See, e.g., id.* at 853-54; *Grand Junction, supra*, note 1 at 221.

38. *Id.*

39. 445 P.2d 52 (Colo. 1968).

40. *Id.* at 58.

41. 720 P.2d 133 (Colo. 1986).

42. *Id.* at 145-46.