

MEMORANDUM

July 12, 2007

TO: South Platte River Task Force

FROM: Anne Castle
Bill Caile

RE: Salvaged Water

Introduction

We have been asked to brief the Task Force on the law in Colorado regarding projects to increase the physical supply of water through salvage of water that would otherwise be lost to evaporation, evapotranspiration, or other naturally-occurring consumptive processes.

There is a long-standing rule in Colorado that water salvaged by the removal of phreatophytes (“water-loving” plants such as tamarisk and cottonwoods) belongs to the river system and is subject to administration in order of priority. It is settled law that water salvaged by reducing evaporation or cutting vegetation does not belong to the person responsible for the salvage and cannot result in a new or changed appropriation free of the river’s call. *Ready Mixed Concrete Co. v. Farmers Reservoir and Irrigation Co.*, 115 P3d 638, 644 (Colo. 2005). In other words, a person who salvages water, whether by eliminating vegetation or by other means, does not have a right to use that water outside of the priority system.

Shelton Farms and its Progeny: Developed Water and Salvaged Water

The primary Colorado Supreme Court decision on salvaged water is *Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974) (“*Shelton Farms*”). In *Shelton Farms*, a landowner on the Arkansas River cleared two land areas of phreatophytes, and filled in a third marshy area. He claimed that by his actions he had made available approximately 442 acre feet of water per year that would have otherwise been consumed by the phreatophytes or through evaporation from the marsh, and sought a decree affirming the right to use that amount of water. The trial court awarded him 181.72 acre feet annually, free from the call of the river.

On appeal, the Colorado Supreme Court reversed, and made several important statements of law. First, the Court drew a distinction between “developed” water and “salvaged” water. 529 P.2d at 1325. Developed water exists when one “adds” water to an existing supply, if such water would

not otherwise have been present. A person who adds water to the system is entitled to a decree affirming the right to use it.

Examples of developed water are transmountain diversions from one river basin to another; trapped water artificially produced through draining of a mine; and water trapped in impervious geologic formations. See *Shelton Farms*, 524 P.2d at 1324-25 (citing *Ripley v. Park Center Land and Water Co.*, 40 Colo. 129, 90 P. 75 (1907) (mine water); *Pike Peak v. Kuiper*, 169 Colo. 309, 455 P.2d 882 (1969) (“saucepan-type” impervious shale formation)). Developed water is free from the river call, and is not junior to prior decrees. The Court in *Shelton Farms* noted, however, that “[s]trong evidence is required to prove the addition of the water” to the stream system. 524 P.2d at 1324. Note that transmountain developed water is free from the river call in the basin that it has been exported to; it must be diverted in priority in the basin of origin.

In contrast to developed water, “salvaged” water, of the sort at issue in *Shelton Farms*, is water “in the river or its tributaries (including the aquifer) which would ordinarily go to waste, but somehow [is] made available for beneficial use.” 529 P.2d at 1325. When salvaged waters are made available, they belong to the river system in general and are subject to call by appropriators in order of priority.

The Court in *Shelton Farms* stressed the importance of Colorado’s priority system of administering water rights, and held that the priority system could not be replaced by a “lack of injury doctrine.” *Id.* at 1325-26. The phreatophytes were “water thieves” that had grown up near the river in the time since the first appropriations were made, and had long ago deprived senior water rights of their lawful entitlements. Although the water was no longer available for use by senior water rights, the Court refused to allow those who removed the phreatophytes to claim it. Writing for the Court, Justice Day famously stated that “thirsty men cannot step into the shoes of a ‘water thief.’” *Id.* at 1325.

The *Shelton Farms* Court announced the salvage rule “with reluctance,” being “loathe to stifle creativity in finding new water supplies.” 529 P.2d at 1326-27. The Court was equally concerned, however, with the unintended effects of creating a “super class of water rights never before in existence.” *Id.*

The Court quoted Steve Reynolds, a former State Engineer of New Mexico, regarding the potential for such unintended effects:

If one ignores the technical difficulty of determining the amount of water salvaged, this proposal [for a water right free of river call], at first blush, might seem reasonable and in the interest of the best use of water and related land resources.

On closer scrutiny, it appears that if the water supply of prior existing rights is lost to encroaching phreatophytes and then taken by individuals eradicating the plants, the result would be chaos. The doctrine of prior

appropriation as we know it would fall—the phreatophytes and then the individual salvaging water would have the best right. Furthermore, if individuals salvaging public water lost to encroaching phreatophytes were permitted to create new water rights where there is no new water, the price of salt cedar jungles would rise sharply. And we could expect to see a thriving, if clandestine, business in salt cedar seed and phreatophyte cultivation.

Id. Finally, the Court in *Shelton Farms* emphasized that while creative and beneficial solutions for the treatment of salvaged water could be fashioned, it was the General Assembly that would need to do so:

No one on any river would be adverse to a schematic and integrated system of developing this kind of water supply with control and balancing considerations. But to create such a scheme is the work of the legislature, through creation of appropriate district authorities with right to condemnation on a selective basis, not for the courts.

529 P.2d at 1327. Justices Groves, in a special concurrence, stated that “[i]t is earnestly hoped that the General Assembly can provide a solution so that this water, now being lost in such large quantities to the phreatophytes may be brought under control.” *Id.* at 1328.

The holding of *Shelton Farms* has been affirmed and approved many times over the years. In *R.J.A., Inc. v. Water Users Ass’n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984), the applicants had removed extensive deposits of peat moss and drained a swamp. They argued that because the consumptive use of the swamp and peat had existed *before* the first appropriations had ever been made on the stream, *Shelton Farms* did not apply. The Court disagreed, holding that “reduction of consumptive use of tributary water cannot provide the basis for a water right that is independent of the system of priorities.” *Id.* at 825. This same holding has been repeated in many contexts. See *Giffen v. State*, 690 P.2d 1244 (Colo. 1984) (removal of pine and fir trees); *State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993) (increased runoff from urban development); *City of Aurora v. State Engineer*, 105 P.3d 595 (Colo. 2005) (reduction of native vegetation by lowering water table in connection with conjunctive use project).

In addition to an emphasis on the importance of the priority system, as described above the salvage water decisions have also consistently expressed concern for the effect of a salvage water credit on Colorado’s environment. The Court in *Shelton Farms* was particularly concerned that:

If these decrees were affirmed, the use of a power saw or a bull-dozer would generate a better water right than the earliest ditch on the river. The planting and harvesting of trees to create water rights superior to the oldest decrees on the Arkansas would result in a harvest of pandemonium. Furthermore, one must be concerned that once all plant life disappears, the

soil on the banks of the river will slip away causing irreparable erosion. . . .
We believe that in this situation unrestrained self-help to a previously
untapped water supply would result in a barren wasteland.

529 P.2d at 1327. *See also Ready Mixed Concrete Co.*, 115 P.3d at 644 (“[t]o permit such a practice would encourage stripping the environment . . . and reward developers”); *R.J.A., Inc.*, 690 P.2d at 828 (“maximizing beneficial use and integrated use of surface and subsurface water must be implemented with a sensitivity to the effect on other resources”).

Legislative Enactments

The holdings of *Shelton Farms* and *Castle Meadows* are now codified at C.R.S. § 37-92-103(9) with respect to the use of salvaged water in augmentation plans:

“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.

As discussed above, the Court in *Shelton Farms* specifically noted that the legislature had authority to prescribe new salvage water protocols. The legislature has already created at least two such statutory exceptions to the salvaged water rule, which allow reservoirs and gravel pits to take credit against their evaporative losses for vegetation that was eradicated by inundation of the water surface. *See* C.R.S. §§ 37-84-117(4); 37-80-120(5); 37-92-305(12)(a); *see also Central Colorado Water Conservancy Dist. v. Simpson*, 877 P.2d 335 (Colo. 1994) (upholding gravel pit statute and stating that “the General assembly has authority to create programs by which water that would otherwise be lost because of natural vegetative transpiration can be developed in an orderly fashion for beneficial use”).

Other programmatic approaches to salvaged water and developed water have been proposed. For example, a recent study examined the potential for “rainwater harvesting” in Douglas County. *See* Leonard Rice Engineers, Inc., Meurer and Associates, Inc., and Ryley Carlock & Applewhite, “Holistic Approach to Sustainable Water Management in Northwest Douglas County” (January, 2007). This report concluded, among other things, that while current Colorado law requires replacement (augmentation) of 100 percent of captured precipitation, it is recognized that a portion of this precipitation is lost to native vegetation and sublimation (loss of water through evaporation of snow) and never reaches the stream system. *See id.*, at pp14-16. To the extent that the portion of precipitation that did not historically reach the stream system could be quantified, the study suggests that this amount could be credited against augmentation requirements with appropriate legislative action. *See id.* at p. 2.

Legislative Creation of a Salvage Water Credit

Without limiting the available alternatives, an option for consideration by the task force would be a legislative proposal to allow the creation of a salvage water credit that could be claimed by persons who reduce naturally occurring consumptive uses like evaporation, sublimation, or evapotranspiration associated with phreatophytes. The countervailing policy considerations outlined in the *Shelton Farms* decision should be carefully assessed. Possible provisions of such legislation could include:

- Creation of appropriate district authorities with right to condemn on a selective basis, as suggested by Justice Day in *Shelton Farms*;
- Total or partial credit for salvage. For example, the salvager could claim a percentage of the water made available, while the remainder accrued to the stream for use by senior priorities;
- Credit only for salvage of water that was never historically available to senior appropriators (consistent with the “water thieves” reasoning of *Shelton Farms*, but contrary to the more expansive rule announced in *R.J.A., Inc.*);
- “Target” incentives based on particular resource objectives. For example a special salvage credit could be created for removal of tamarisk (salt cedar);
- Environmental review process to protect other resource values such as native vegetation, wildlife habitat, and soil conservation.