ADVANCE SHEET HEADNOTE
June 17, 2024
AS MODIFIED JULY 22, 2024

2024 CO 43M

No. 23SA317, *City of Golden v. United States*—Water Law—Blue River Decree—Injury—Colorado-Big Thompson Project—Interpretation of Prior Decree—Subordination Agreement—Power Interference Agreement—Newly Discovered Evidence.

This case concerns the Green Mountain Reservoir Administrative Protocol (the "Protocol"), an agreement among the parties to the Blue River Decree, the Colorado State Engineer's Office, and two other entities regarding the administration of water rights in and upstream of Green Mountain Reservoir, a component of the Colorado-Big Thompson Project ("CBT"). The Protocol was developed after decades of disputes among the United States, the Cities of Denver and Colorado Springs (the "Cities"), and others over how to implement the United States' rights in Green Mountain Reservoir while maximizing the availability of water for upstream use in accordance with the Blue River Decree.

The parties to the Protocol submitted an application for a determination of water rights to the water court for Water Division 5 requesting confirmation that the Protocol is consistent with the Blue River Decree. The City of Golden

("Golden") opposed the application, arguing that the Protocol would cause injury to its rights upstream of Green Mountain Reservoir. The water court granted the United States' motion for summary judgment, ruled that the Protocol is consistent with the Blue River Decree, and denied Golden's motion for reconsideration. Golden appealed.

The supreme court affirms the water court's ruling on summary judgment. First, it holds that an assessment of injury is not required where, as here, a water rights holder merely requests confirmation that an administrative protocol implementing an existing decree is consistent with the terms of that decree. Second, the court holds that the Protocol is consistent with the Blue River Decree, rejecting Golden's claims that the Protocol contradicts language in the Blue River Decree requiring the "fair" and "equitable" treatment of all parties with interests in the CBT. The court also rejects Golden's assertion that the Protocol violates the prior appropriation doctrine. Finally, the court rejects Golden's procedural arguments regarding the water court's denial of its motion for reconsideration.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 43M

Supreme Court Case No. 22SA317
Appeal from the District Court
District Court, Water Division 5, Case No. 13CW3077
Honorable James Berkley Boyd, Water Judge

Concerning the Application of United States of America; City and County of Denver, acting by and through its Board of Water Commissioners; City of Colorado Springs, acting through its enterprise Colorado Springs Utilities; Colorado River Water Conservation District; Northern Colorado Water Conservancy District; Middle Park Water Conservancy District; Grand Valley Water Users Association; Orchard Mesa Irrigation District; Grand Valley Irrigation Company; Palisade Irrigation District; and Climax Molybdenum Company for a Determination of Water Rights in Summit, Grand, Garfield, Eagle, Pitkin, Routt, Gunnison, Rio Blanco, and Mesa Counties, Colorado.

Applicants-Appellees:

United States of America; City and County of Denver, acting by and through its Board of Water Commissioners; City of Colorado Springs, acting through its enterprise Colorado Springs Utilities; Colorado River Water Conservation District; Northern Colorado Water Conservancy District; Middle Park Water Conservancy District; Orchard Mesa Irrigation District; Grand Valley Water Users Association; Grand Valley Irrigation Company; Palisade Irrigation District; and Climax Molybdenum Company,

v.

Opposer-Appellant:

City of Golden,

Opposers-Appellees:

Ute Water Conservancy District; Grand County Board of Commissioners; City of Aurora; Clinton Ditch and Reservoir Company; Eagle River Water and Sanitation District; Upper Eagle Regional Water Authority; Eagle Park Reservoir Company; Summit County Board of Commissioners; Public Service Company of Colorado; Town of Gypsum; Chimney Rock Ranch, LLC; and Snake River Water District,

and

Appellee Pursuant to C.A.R. 1(e):

James Heath, in his capacity as the Division Engineer for Water Division No. 5.

Judgment Affirmed
en banc
June 17, 2024

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

July 22, 2024

Attorneys for Opposer-Appellant City of Golden:
Bushong & Holleman P.C.
Steven J. Bushong
Cassidy L. Woodard
Gunnar J. Paulsen
Boulder, Colorado

Porzak Law LLC
Glenn Porzak
Boulder, Colorado

Attorneys for Applicant-Appellee United States of America:
United States Department of Justice
John E. Bies
Washington, District of Columbia

United States Department of Justice

Jeffrey Neel Candrian
Denver, Colorado

Attorneys for Applicant-Appellee City and County of Denver:
Daniel J. Arnold
James M. Wittler
Denver, Colorado

Attorneys for Applicant-Appellee City of Colorado Springs:
Carlson, Hammond & Paddock, L.L.C.
William A. Paddock
Denver, Colorado

City Attorney's Office
Michael J. Gustafson
Colorado Springs, Colorado

Attorneys for Applicant-Appellee Colorado River Water Conservation District:
Peter C. Fleming
Jason V. Turner
Glenwood Springs, Colorado

Attorneys for Applicant-Appellee Northern Colorado Water Conservancy District:
Trout Raley
Bennett W. Raley
Denver, Colorado

Attorneys for Applicant-Appellee Middle Park Water Conservancy District:
The Whitmer Law Firm, LLC
Kent Whitmer
Hot Sulphur Springs, Colorado

Attorneys for Applicants-Appellees Orchard Mesa Irrigation District and Grand Valley Water Users Association:
Williams, Turner & Holmes, P.C.
Kirsten M. Kurath
Grand Junction, Colorado

Attorneys for Applicant-Appellee Grand Valley Irrigation Company:

Aldrich Law Firm, LLC
Frederick G. Aldrich
Grand Junction, Colorado

Attorneys for Applicant-Appellee Palisade Irrigation District:
Dufford Waldeck
Nathan A. Keever
Grand Junction, Colorado

Attorneys for Applicant-Appellee Climax Molybdenum Company:
Nazarenus Stack Wombacher LLC
Brian M. Nazarenus
Sheela S. Stack
Greenwood Village, Colorado

No appearance on behalf of: Ute Water Conservancy District; Grand County Board of Commissioners; City of Aurora; Clinton Ditch and Reservoir Company; Eagle River Water and Sanitation District; Upper Eagle Regional Water Authority; Eagle Park Reservoir Company; Summit County Board of Commissioners; Public Service Company of Colorado; Town of Gypsum; Chimney Rock Ranch, LLC; Snake River Water District; and James Heath, in his capacity as the Division Engineer for Water Division No. 5.

JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 This appeal from the water court for Division 5 is the latest chapter in the decades-long dispute over water rights associated with Green Mountain Reservoir. In 1937, Congress directed the construction of Green Mountain Reservoir on the Blue River, a tributary to the Colorado River, as part of the Colorado-Big Thompson Project ("CBT"). The CBT is a complex transbasin diversion project comprising an extensive and integrated system of dams, reservoirs, diversion works, tunnels, canals, conduits, basins, pumping plants, hydroelectrical plants, and other structures for impounding, diverting, or using water. The project supplies areas in northeastern Colorado with water diverted from the Colorado River basin across the Continental Divide. As a component of the CBT, Green Mountain Reservoir serves two purposes: (1) to provide replacement water to western slope interests affected by the CBT and (2) to supply a federal hydroelectric generating station.

¶2 Litigation over water rights in the CBT began in 1942, shortly after construction was completed. The first cases, ultimately decided in federal court, concerned the interaction between the United States' water rights in Green Mountain Reservoir and water rights held by the cities of Denver and Colorado Springs (the "Cities") in the Blue River basin. At the heart of these disputes was the Cities' interest in exercising their Blue River rights—located upstream of Green

Mountain Reservoir—despite the United States' senior rights to fill the reservoir and to use Blue River water for power generation. A series of decrees and stipulations among the Cities, the United States, and other entities with interests in the CBT, the first of which issued in 1955, was intended to resolve the Cities' concerns. We refer to that series of decrees and stipulations collectively as the "Blue River Decree."[1]

¶3 The Blue River Decree proved insufficient to resolve the concerns that animated its development. When another dispute began in 2003—this time among the parties to the Blue River Decree[2] and the State Engineer—the interested entities

---

[1] We acknowledge that the use of the singular, "Blue River Decree," can be confusing given that multiple decrees, stipulations, and orders govern the water rights involved. *See City & Cnty. of Denver v. Consol. Ditches of Water Dist. No. 2*, 2019 CO 68, ¶¶ 19–25, 444 P.3d 278, 287–89 (describing the history and evolution of the Blue River Decree). In past cases, we have used the singular term, "Blue River Decree," to refer to the 1955 Decree, *City & Cnty. of Denver ex rel. Bd. of Water Comm'rs v. Consol. Ditches Co. of Dist. No. 2*, 807 P.2d 23, 28 (Colo. 1991); *United States v. City & Cnty. of Denver ex rel. Bd. of Water Comm'rs*, 656 P.2d 1, 14 (Colo. 1982), even when we have recognized the supplements to that decree, *City of Grand Junction v. City & Cnty. of Denver*, 960 P.2d 675, 680–81 (Colo. 1998). Here, the parties to the Green Mountain Reservoir Administrative Protocol at issue in this case define the "Blue River Decree" to include the 1955 Decree as well as "all supplemental or amendatory orders, judgments, and decrees . . . including, without limitation," the decrees entered in 1964 and 1978. Green Mountain Reservoir Administrative Protocol, at 1. Accordingly, in using the singular, "Blue River Decree," we refer to the complete collection of "orders, judgments, and decrees" associated with the 1955 Decree. *Id.*

[2] Besides the United States and the Cities, the other parties to the Blue River Decree are Colorado River Water Conservation District, Northern Colorado Water

took a different approach. In 2013, after a lengthy period of negotiation and interim administrative policies, these entities developed the Green Mountain Reservoir Administrative Protocol (the "Protocol"). The purpose of the Protocol was to clarify and implement the provisions of the Blue River Decree in a consistent, transparent manner. To that end, and to prevent further litigation, most of the parties to the Protocol (the "Applicants")[3] filed an application for a determination of water rights under section 37-92-302(1)(a), C.R.S. (2023), asking Water Division 5 to confirm that the Protocol was consistent with the Blue River Decree.

¶4 Meanwhile, the City of Golden ("Golden") had acquired water rights of its own in the Blue River basin, also upstream of Green Mountain Reservoir but junior to both the United States' and the Cities' water rights. Golden opposed the Applicants' water rights application, alleging that implementation of the Protocol would injure its water rights. After the water court set a five-day trial and discovery began, the United States moved for summary judgment, arguing that

---

Conservancy District, Middle Park Water Conservancy District, Grand Valley Water Users Association, Orchard Mesa Irrigation District, Grand Valley Irrigation Company, and Palisade Irrigation District.

[3] The Applicants include all parties to the Blue River Decree as well as Climax Molybdenum Company. Although Ute Water Conservancy District is also a party to the Protocol, it participated in the water court proceeding as a supporter of the application rather than directly as an applicant.

Golden had not raised a genuine issue of material fact because injury was not a proper or essential inquiry in this water proceeding.

¶5 The water court agreed. Relying on our decision in *Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226 (Colo. 2011), the water court concluded that the application did not warrant an injury analysis because it involved only the "interpretation and application of established vested rights." The water court then analyzed various provisions of the Protocol and concluded that they were consistent with the Blue River Decree. Accordingly, the water court granted the United States' motion for summary judgment.

¶6 Golden moved for reconsideration, lodging several procedural complaints and urging the water court to reevaluate its ruling that injury to Golden's water rights was not a proper inquiry in this case. But before the water court ruled on the motion for reconsideration, Golden filed this appeal.

¶7 The core of Golden's argument is that the water court erred by failing to consider the potential for the Protocol to injure Golden's water rights. Its other arguments—that the Protocol is inconsistent with the Blue River Decree, that the Protocol violates the prior appropriation doctrine, and that the water court erred by ignoring evidence Golden hoped to present at trial—all stem from Golden's concerns about injury to its rights.

¶8 The Applicants respond that Golden's principal argument rests on a flawed premise because injury is neither a proper nor an essential inquiry where, as here, the issue before the water court concerns the interpretation of an existing decree—not potential changes or modifications to a water right. They further contend that Golden's other arguments are likewise predicated on the possibility of injury or involve injury-related evidence Golden did not present until it filed its motion for reconsideration. The Applicants therefore urge us to uphold the water court's ruling that the Protocol is consistent with the Blue River Decree.

¶9 We agree with the Applicants. Although injury to other adjudicated water rights is a central principle in Colorado's prior appropriation system, that does not mean that injury is relevant to every water rights proceeding. When a water court application asks only that the water court construe the scope of an existing decree, any reduction in the water supply available to junior appropriators resulting from the administration of water rights consistent with that decree is a consequence of the prior appropriation doctrine and does not establish an independently cognizable injury to junior appropriators. Here, Golden's water rights are junior to those memorialized in the Blue River Decree and implemented through the Protocol. If the Protocol implements water rights consistent with the Blue River Decree, the operation of the Protocol cannot cause cognizable injury to Golden's rights. Any evidence concerning injury that Golden hoped to introduce at trial is

irrelevant to the issue at the heart of this water rights application: whether the Protocol is consistent with the Blue River Decree. And on that core question, we agree with the water court that it is.

¶10 We therefore affirm the water court's order granting summary judgment to the United States and directing the State Engineer to administer the Blue River Decree in accordance with the Protocol.

I. Background

¶11 Before analyzing the issues in this case, we provide a brief but comprehensive introduction to the history and purpose of the Blue River Decree, as well as the disputes it has generated. First, we describe the development of Green Mountain Reservoir in the context of the CBT, including the origins and development of the suite of decrees known collectively as the Blue River Decree. *City & Cnty. of Denver v. Consol. Ditches of Water Dist. No. 2*, 2019 CO 68, ¶¶ 19–25, 444 P.3d 278, 287–89 ("*Consol. Ditches No. 2*"). For the purposes of this decision, we focus on the 1955 and 1964 decrees. We then provide an overview of the history and key provisions of the Protocol. Finally, we discuss Golden's acquisition of the Blue River basin water rights that led to the present dispute.

A. Origins of the Blue River Decree

¶12 Congress authorized the CBT in 1937. *City of Grand Junction v. City & Cnty. of Denver*, 960 P.2d 675, 679 (Colo. 1998). Congress described the CBT's primary

purpose in a 1937 report: to divert "surplus waters from the headwaters of the Colorado River" on the western slope to "lands in northeastern Colorado on the . . . eastern slope greatly in need of supplemental irrigation water." S. Doc. No. 75-80, at 1 (1937) ("SD-80"). Recognizing the impact such diversions would have on the western slope's water supply, the CBT prescribed replacement of the diverted supply for the benefit of western slope interests. *City of Grand Junction*, 960 P.2d at 679. To store this replacement water, the CBT directed the construction of Green Mountain Reservoir on the Blue River. *Id.*

¶13 Per Congress's direction, Green Mountain Reservoir would have a total capacity of 152,000 acre-feet, of which 100,000 acre-feet would be used to generate power at a hydroelectric generating station. SD-80, at 3. The remainder of Green Mountain Reservoir's capacity would "be available as replacement in western Colorado[] of the water which would be usable there if not withheld or diverted by" the CBT. *Id.*

¶14 Following Green Mountain Reservoir's completion in 1942, the Cities, among others, commenced two separate adjudication proceedings in state court to determine the relative priorities of their rights in the Blue River: one for irrigation rights, and another for non-irrigation rights. *Id.* We affirmed the state court's decrees with respect to water rights in the Blue River. *City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 1015 (Colo. 1954). We also

explained, however, that the lower court improperly denied the claims of certain parties to rights in Green Mountain Reservoir, recognizing that those parties had asserted such claims in the absence of the United States' participation in the state court proceedings.[4] *Id.* Accordingly, we remanded the cases with instructions to adjudicate rights to Green Mountain Reservoir. *Id.*

¶15 On remand, the United States was joined as a party.[5] *City of Grand Junction*, 960 P.2d at 680. The United States then removed the cases to the U.S. District Court for the District of Colorado, where they were consolidated (the "consolidated cases"). *Consol. Ditches No. 2*, ¶ 20, 444 P.3d at 288.

¶16 In 1955, the federal district court issued a decree that substantially settled the consolidated cases with respect to the Cities' and the United States' rights in Blue River water and in Green Mountain Reservoir. *Id.* at ¶ 22, 444 P.3d at 288. As relevant here, the 1955 Decree: (1) confirmed the United States' August 1, 1935 priority date for 1,726 cubic-feet-per-second ("cfs") of direct-flow rights for power

[4] The United States originally filed a "statement of claims" in state court, but later withdrew its statement and instead initiated a parallel adjudication in federal court in 1949. *City of Grand Junction*, 960 P.2d at 679.

[5] By this time, Congress had enacted the McCarran Amendment, Pub. L. No. 82-495, § 208(a)–(c), 66 Stat. 549, 560 (1952), which gave consent for the United States to be joined as a party in state water adjudications. *City of Grand Junction*, 960 P.2d at 680.

generation ("Green Mountain Reservoir power rights"), and for 154,645 acre-feet[6] of storage rights in Green Mountain Reservoir ("Green Mountain Reservoir storage rights"); (2) confirmed Denver's 1946 priority dates and Colorado Springs' 1929 and 1948 priority dates for water rights in the Blue River; (3) required that the Cities be permitted to divert in accordance with these priority dates to serve municipal purposes, subject to the United States' Green Mountain Reservoir storage rights; and (4) imposed an obligation on the Cities to replace water to satisfy senior calling rights downstream of Green Mountain Reservoir. *See generally United States v. N. Colo. Water Conservancy Dist.*, Nos. 2782, 5016, & 5017 (D. Colo. Oct. 12, 1955) (comprising two documents: the Findings of Fact and Conclusions of Law ("1955 FFCL") and the Final Decree ("1955 Final Decree") (collectively the "1955 Decree")). The Cities could satisfy these replacement obligations by exchange, using Williams Fork Reservoir as a replacement source. 1955 FFCL, at 33; *see also Consol. Ditches No. 2*, ¶ 22, 444 P.3d at 288 (describing this provision of the 1955 Decree).

¶17 To accommodate the Cities' relatively junior rights, the 1955 Decree permitted the Cities to divert *prior* to fulfillment of the United States' Green

[6] As noted above, SD-80 contemplated a lower storage volume of 152,000 acre-feet, but 154,645 acre-feet represents Green Mountain Reservoir's actual maximum storage volume as built.

Mountain Reservoir storage rights—that is, out of priority—provided that it was "reasonably probable" that Green Mountain Reservoir would fill to capacity and that such out-of-priority diversions would not "adversely affect the ability of Green Mountain Reservoir to fulfill its function as set forth in" SD-80. 1955 FFCL, at 31–32. With respect to the United States' Green Mountain Reservoir power rights, the 1955 Decree allowed the Cities to divert out of priority—and, therefore, to impede the United States' ability to generate power—subject to the requirement that the Cities "[d]eliver or cause to be delivered to the United States" electrical energy "at substantially the same rates of delivery that would have been generated . . . had it not been for" the Cities' diversions. *Id.* at 32. To implement this requirement, the Cities and the United States entered formal agreements that allowed the Cities to provide financial compensation, in lieu of actual electrical energy, in exchange for the ability to divert out of priority. *See* Protocol, at 5. Today, these agreements are known as power interference agreements. *Id.*

¶18 The 1955 Decree also incorporated a portion of SD-80 titled, "Manner of Operation of Project Facilities and Auxiliary Features." 1955 Final Decree, at 3–9. This portion of the 1955 Decree prohibited the Cities' out-of-priority diversions from interfering with the "primary purposes" of Green Mountain Reservoir, including "preserving insofar as possible the rights and interests dependent on [Colorado River] water, which exist on both slopes of the Continental Divide." *Id.*

at 3–4. Notably, it also memorialized SD-80's directive that these purposes be accomplished "in a *fair* and efficient manner, *equitable to all parties having interests therein*." *Id.* at 4 (emphases added).

¶19 The 1955 Decree did not fully resolve the interested parties' disputes, and litigation continued for decades on multiple fronts. *Consol. Ditches No. 2*, ¶ 23, 444 P.3d at 288–89. Relevant here, a 1964 decree confirmed that the Cities have no "right, title, or interest" in Green Mountain Reservoir, nor in the water that the United States stores there. *United States v. N. Colo. Water Conservancy Dist.*, Nos. 2782, 5016, & 5017, at 2 (D. Colo. Apr. 16, 1964) ("1964 Decree"). In addition, the 1964 Decree required that new arrangements "tendered or proposed to the United States for the replacement of [Green Mountain Reservoir] water from other sources, for the replacement of power losses, or for compensation therefor, must . . . not impair any right of any beneficiary under" SD-80. *Id.*

B. The Green Mountain Reservoir Administrative Protocol

¶20 In 2003, another dispute developed, this time among the parties to the Blue River Decree and the State Engineer regarding the proper administration of water rights during Green Mountain Reservoir's fill period. The following year, the State Engineer began administering the fill of Green Mountain Reservoir pursuant to an interim policy. Ten years of negotiations followed. These negotiations—involving parties to the Blue River Decree, the State Engineer's Office, and two other entities,

Ute Water Conservancy District ("Ute Water") and Climax Molybdenum Company ("Climax")—sought to resolve apparent conflicts between Green Mountain Reservoir operations and the administration of the Blue River Decree. In 2013, these negotiations culminated in the Green Mountain Reservoir Administrative Protocol Agreement ("Protocol Agreement"), which adopted the Protocol at issue here. The State Engineer began to administer water rights in accordance with the Protocol as an interim policy in 2014 and has done so every year since.

¶21 In the Protocol Agreement, the parties intended to "clarify and implement certain provisions" of the Blue River Decree. Protocol Agreement, at 3. Accordingly, the adopted Protocol sets forth methods for administering and operating the United States' and the Cities' water rights that provide for consistent administration during Green Mountain Reservoir's fill period, maximize the amount of water available for upstream use, and prevent the Cities from "'hid[ing] behind' or otherwise benefit[ing] from" the United States' rights. *Id.* at 3–4. The Protocol is divided into four sections:

- Section I (titled "Blue River Decree Background") defines key terms, identifies important documents that underlie the Protocol, and explains the out-of-priority diversions the Cities may make under the Blue River Decree as well as the obligations that flow from those diversions. Protocol, at 1–8.

- Section II (titled "Administrative Protocol") is the heart of the Protocol. It explains the administration of the United States' Green Mountain Reservoir power and storage rights, including how to properly account for the Cities' out-of-priority diversions and how those diversions and Green Mountain Reservoir should operate when downstream senior users place calls. *Id.* at 8–20. Section II also discusses the rights of City Contract Beneficiaries and Upstream Dillon Junior Beneficiaries. *Id.* at 11–12. The City Contract Beneficiaries are "certain West Slope water users" that may divert and store water upstream of Green Mountain Reservoir pursuant to contracts with the Cities under which the Cities have agreed to replace the depletions resulting from the City Contract Beneficiaries' diversions. *Id.* at 2–3. Like the City Contract Beneficiaries, the Upstream Dillon Junior Beneficiaries are also western slope water users with water rights junior to the Cities' rights that are located upstream of Dillon Reservoir; however, they do not have similar contracts. *Id.* at 7. Nevertheless, "[t]o ensure the satisfaction of" a provision of the 1964 Decree, the Protocol affords the Upstream Dillon Junior Beneficiaries similar protections. *Id.*

- Section III (titled "Blue River Decree Priority Administration in Water District 36 and Water Division No. 5 (Climax C.A. 1710 Water Rights)") resolves disputes concerning Climax's 1935 and 1936 water rights adjudicated in Civil Action No. 1710. *Id.* at 20–23.

- Section IV (titled "The Cities' Replacement Operations") explains how to quantify the Cities' replacement obligations for their municipal diversions and operation losses under the Blue River Decree. *Id.* at 23–32.

¶22 The Protocol Agreement required that the parties to the Blue River Decree, along with Climax, commence judicial proceedings in water court "requesting a determination that Sections I, II, and III of the [Protocol] are consistent with the Blue River Decree." Protocol Agreement, at 4. The Agreement also required the parties to pursue concurrent proceedings in the U.S. District Court for the District

of Colorado, under its "retained jurisdiction to interpret and implement the Blue River Decree," to request a determination that all four sections of the Protocol are consistent with the Decree. *Id.* at 5.

C. Golden's Vidler Rights

¶23 In 2001, Golden acquired water rights (the "Vidler rights") from the Vidler Ditch Company ("Vidler"). The Vidler rights permit diversions of no more than 39.8 cfs from the Blue River basin upstream of Green Mountain Reservoir for domestic, agricultural, industrial, and municipal uses on the eastern slope. These rights carry a priority date of July 28, 1959.

¶24 Like the Cities, Vidler had a power interference agreement with the United States. This agreement allowed Vidler to make out-of-priority diversions that interfered with the Green Mountain Reservoir power rights in exchange for appropriate financial compensation. It also prohibited Vidler's diversions to the extent they would "impair any right of any beneficiary or Green Mountain Reservoir contractor under [SD-80]" or "preclude or cause curtailment of the diversion of water by any beneficiary of [SD-80] or contractors for Green Mountain Reservoir water."

¶25 When Golden acquired the Vidler rights, Vidler assigned its power interference agreement to Golden. The United States refused, however, to acknowledge this assignment or to enter into a new agreement with Golden, citing

a concern that the State Engineer would administer such an agreement as a general subordination of the United States' power rights to all upstream junior water rights that were also senior to the Vidler rights.[7] This impasse led Golden to initiate the dispute before us today.

II. Procedural History

¶26 The protracted procedural history of this case provides necessary context for our decision, so we describe it in some detail. First, we discuss the Applicants' original application filed ten years ago in the water court for Water Division 5. We then discuss the amended application filed nearly seven years later, which marked the first time Golden entered a dispute over the Blue River Decree. Next, we explain the United States' motion for summary judgment and the water court's order granting it. Finally, we describe Golden's motion for reconsideration.

---

[7] The United States' concern stemmed from a 2007 State Engineer's order stating that the State Engineer would administer power interference agreements involving "a senior hydropower water right and one or more junior water rights that are not the next rights in priority," as "a subordination of all or a portion of the hydropower right . . . to the most junior water right covered by the contract and all water rights senior to that most junior water right." Off. of the State Eng'r, *Written Instruction and Order 2007-03: Instruction and Order Concerning the Administration of Power Interference Contracts*, at 1 (May 31, 2007). In other words, this form of administration would force the United States' power right to "stand behind" the Vidler rights and all rights senior to the Vidler rights, effectively rendering the United States' right less likely to be fulfilled during times of shortage. *Id.*

A. The Initial Application

¶27 In 2013, consistent with the Protocol Agreement, the Applicants filed an application in Water Division 5 styled as a determination of water rights under this court's decision in *Southern Ute Indian Tribe*, 250 P.3d at 1233, which held that requests to interpret the scope of an existing water rights decree constitute a "determination of water rights" under section 37-92-302(1)(a). The Applicants sought confirmation that Sections I, II, and III of the Protocol are consistent with the Blue River Decree. Following publication of the resumé notice, the Division 5 Engineer submitted a written recommendation to the water court stating that the Protocol was "administrable" and, therefore, that the Division 5 Engineer did not object to the Applicants' requested relief.

¶28 The Applicants commenced similar proceedings in the consolidated cases in the U.S. District Court for the District of Colorado. The Applicants then requested a stay of the state water court proceedings, which the water court granted until the conclusion of the federal proceedings. In 2017, the federal court concluded that it would no longer exercise jurisdiction over the consolidated cases absent a claim under 28 U.S.C. § 1345, circumstances not present here. The Applicants nevertheless sought to continue the stay of the state water court proceedings. In 2020, the water court lifted the stay and compelled the proceedings forward.

B. The Amended Application

¶29 In October 2020, the Applicants filed an amended application renewing their request for a determination that Sections I, II, and III of the Protocol are consistent with the Blue River Decree.[8] In light of the federal court's decision not to exercise jurisdiction, the Applicants also requested that the water court address Section IV of the Protocol, binding only on the parties to the Blue River Decree. This led the Division 5 Engineer to submit another written recommendation confirming that he did not object to the Applicants' requested relief, including with respect to Section IV.[9]

¶30 Following resumé notice, Golden timely filed a statement of opposition to the amended application. Golden argued that implementing the Protocol would injure its Vidler rights unless the United States agreed to enter into a power interference agreement.

¶31 The water court set a five-day trial for May 2022 and issued a discovery schedule. The Applicants and opposers filed a flurry of initial and rebuttal expert

[8] As a result of the federal district court's ruling, and before filing the amended application, the Applicants, Ute Water, and the State Engineer's Office amended the Protocol Agreement to clarify that they would seek judicial approval of the Protocol only in the water court.

[9] The Division 5 Engineer reasoned that, because Section IV is binding only on the parties to the Blue River Decree, it "does not implicate the Division Engineer's administrative duties."

reports, including reports from the United States and the Cities explaining how various components of the Protocol are consistent with the Blue River Decree. In contrast, Golden's expert's report focused on how the United States' refusal to enter into a power interference agreement with Golden is inconsistent with SD-80, the Protocol, and the Blue River Decree and renders the Protocol a series of "selective subordinations" that "increase the likelihood that the [Vidler rights] will be called out by the 1935 Green Mountain fill and power rights." In a rebuttal report, the United States' expert argued that Golden's arguments were "outside of the water rights administration focus of the Protocol and the relief requested in the Amended Application."

C. The United States' Motion for Summary Judgment

¶32 The United States then moved for summary judgment, arguing that Golden had not raised any dispute of material fact concerning the sole question the Application presented: whether the Protocol was consistent with the Blue River Decree. Rather, the United States argued, Golden did not dispute the United States' evidence showing that the Protocol is consistent with the Blue River Decree. Instead, Golden "only suggest[ed] adding provisions to the Protocol to advance [its] specific interests." The motion also argued that nothing in the Blue River Decree required the United States to enter into a power interference agreement with Golden, and that Golden—as an eastern slope water user with no ties to the

CBT—is not protected under the terms of SD-80 as incorporated into the Blue River Decree.

¶33 Golden argued in response that "[i]njury is an essential inquiry in all water right determinations." In its view, the Applicants' request for a "determination of a water right" therefore required the water court to address Golden's claim that the Protocol's "complex and intricate framework of subordinations and agreements" would cause injury to Golden's Vidler rights. Golden also asserted that SD-80 requires the "fair" and "equitable" administration of water rights in the Blue River basin and thus, the administration of the Blue River Decree must protect Golden's Vidler rights.

¶34 In its reply, the United States relied on *Southern Ute Indian Tribe* to argue that an injury analysis was not material to the narrow relief it had requested. And in any event, the United States maintained, Golden's evidence of potential injury was insufficient to create a genuine issue of material fact. The United States also countered that the "fair" and "equitable" language in SD-80 cited by Golden did not apply to Golden because Golden is neither a western slope water user nor a party with interests in the CBT.

D. The Water Court's Order

¶35 The water court granted the United States' motion for summary judgment. First, the water court concluded that the importance of injury to water rights in

Colorado "does not make [injury] an issue in every case." *In re Application of United States for a Determination of Water Rts.*, No. 13CW3077, at 19 (Dist. Ct., Water Div. 5, May 26, 2022) (the "Water Court Order"). The water court cited several examples of water rights proceedings that do not require an injury inquiry, including proceedings to confirm a prior appropriation; to render conditional water rights absolute; to adjudicate abandonment claims; and, as in *Southern Ute Indian Tribe*, to determine the scope and content of a prior decree. *Id.* at 19–20. The water court then explained that, similar to *Southern Ute Indian Tribe*, the application here asked the court to interpret "established vested rights"—namely, those memorialized in the Blue River Decree. *Id.* at 20. Because the relief the Applicants requested would not involve changing or modifying water rights, the water court found that injury was not implicated. *Id.*

¶36 Accordingly, the water court proceeded to compare the provisions of the Protocol to the Blue River Decree and concluded that they were consistent. *Id.* at 20–28. The court also found that Golden's expert opinions concerning potential inconsistency and injury were, respectively, conclusory and irrelevant. *Id.* at 28–29. In addition, the court found that SD-80's "fair" and "equitable" language neither protected Golden's interests nor required that the United States enter a power interference agreement with Golden. *Id.* at 30. Finally, the court explained that Golden had other opportunities to raise its concerns—including throughout

the development of the Protocol itself—but had failed to do so. *Id.* at 33–34. For these reasons, the court concluded that there were no genuine issues of material fact. *Id.* at 35. Accordingly, it granted the United States' motion. *Id.*

E. Golden's Motion for Reconsideration

¶37 Shortly thereafter, Golden moved for reconsideration, reiterating its assertion that the water court must address its injury claims. In addition, Golden continued to rely on SD-80's "fair" and "equitable" language to insist that it had raised genuine issues of material fact with respect to the Protocol's consistency with the Blue River Decree. Golden also asserted that after full briefing on the United States' motion to dismiss, it had gathered additional evidence to support its injury and inconsistency claims that the water court should consider.

¶38 The Applicants responded that Golden's motion merely rehashed its earlier argument about injury. The Applicants also asserted that Golden's arguments were procedurally barred to the extent they were based on evidence Golden had not presented in response to the United States' summary judgment motion.

¶39 Golden's reply countered that because any such evidence was "newly discovered" within the meaning of C.R.C.P. 59(d)(4), the water court could rely on it as grounds for resetting trial.

¶40 The water court never responded to Golden's motion for reconsideration. Golden filed this appeal.

III. Analysis

¶41 Golden asks this court to reverse the water court's grant of summary judgment and to remand the case for further proceedings. Golden argues that the water court erred in concluding that injury is not a proper or essential inquiry in this case and that summary judgment was, therefore, inappropriate. It further asserts that the Protocol is inconsistent with the Blue River Decree and with Colorado's prior appropriation system. Finally, Golden raises procedural issues regarding the timing of the United States' motion for summary judgment relative to the completion of discovery.

¶42 We affirm the water court's ruling on summary judgment. First, we set forth our standard of review. We then address Golden's argument that the water court erred by failing to perform an injury analysis. We agree with the water court that injury was not a proper or essential inquiry in this case. Next, reviewing the water court's findings and considering Golden's arguments to the contrary, we conclude that the Protocol is consistent with the Blue River Decree. We then explain why the Protocol does not violate the prior appropriation doctrine. Finally, we address—and dismiss—each of Golden's procedural arguments.

A. Standard of Review

¶43 We review the water court's resolution of questions of law in C.R.C.P. 56 motions de novo. *Consol. Ditches No. 2*, ¶ 53, 444 P.3d at 295. In performing such

reviews, "all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Select Energy Servs., LLC v. K-LOW, LLC*, 2017 CO 43, ¶ 12, 394 P.3d 695, 698.

¶44 Courts interpret a stipulated water rights decree, like the Blue River Decree, as they would a contract. *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 146 (Colo. 2006). Accordingly, "[o]ur primary goal is to implement the intent of the parties as expressed in the agreed-upon language," considering extrinsic evidence "to prove intent when there is an ambiguity in the terms of the agreement." *Id.* Such evidence includes "the facts and circumstances attending [the agreement's] execution, so as to learn the intentions of the parties and carry out their intent." *Id.*

B. Injury Is Not a Proper or Essential Inquiry in This Proceeding

¶45 Critical to Golden's appeal is its contention that the water court erred by failing to inquire whether implementing the Protocol would injure its Vidler rights. To support this argument, Golden relies on our characterization of "[n]o injury to other adjudicated water rights" as "a fundamental principle applicable to fashioning decrees in water cases." *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011), *as modified on denial of reh'g* (June 20, 2011). Golden stretches these words too far.

¶46 The flaw in Golden's argument emerges from basic tenets of Colorado water law. Therefore, we begin by reviewing those governing principles. We then turn to Golden's specific claims.

1. Legal Principles

¶47 In Colorado, "[a] water right is a usufructuary right." *Id.* As such, water rights holders "do[] not 'own' water," but rather "own[] the right to use water within the limitations of the prior appropriation doctrine." *Id.*; *see also* § 37-92-103(12), C.R.S. (2023) ("'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."). A core tenet of the prior appropriation doctrine is that water rights holders take in accordance with their priority: senior water rights holders take before junior rights holders. Colo. Const. art. XVI, § 6 ("Priority of appropriation shall give the better right as between those using the water for the same purpose . . . .").

¶48 Two distinct events govern a water right's priority and enforceability relative to other water rights. First, *appropriation* of a water right sets the date a water right vests and, therefore, determines a water right's priority date. *Shirola v. Turkey Cañon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 744 (Colo. 1997) ("[W]ater rights vest upon appropriation, not upon adjudication."), *as modified on denial of reh'g* (May 19, 1997). Second, *adjudication* of a water right produces a decree which, in

turn, permits enforcement of the right's priority date against other users. *Id.* In other words, an adjudicated water right entitles the owner to a certain amount of water subject to the rights of senior appropriators and the amount of water that is available for appropriation. *S. Ute Indian Tribe*, 250 P.3d at 1234. In this sense, water rights decrees memorialize and render enforceable the water rights that existed at the time of appropriation. *Dill v. Yamasaki Ring, LLC*, 2019 CO 14, ¶ 25, 435 P.3d 1067, 1074 ("An adjudicated water right is memorialized in a water decree.").

¶49 Against this backdrop lies the concept of injury. Avoiding injury to other water rights is "an essential part of Colorado's prior appropriation system."[10] *San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1*, 270 P.3d 927, 945 (Colo. 2011); *see also Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451–52 (1882) (explaining the relationship between injury and the prior appropriation system). Under the no injury rule, water users may change, among

[10] We acknowledge that the concept of injury is also considered with respect to certain water rights that are not subject to the prior appropriation doctrine—for example, when the State Engineer considers whether to issue a permit for the withdrawal of nontributary and not-nontributary groundwater. § 37-90-137(2)(b)(I)(A), C.R.S. (2023); *see also* § 37-90-137(4)(a) (confirming that sections 37-90-137(1) and (2) apply to wells pumping nontributary and not-nontributary groundwater); § 37-90-102(2), C.R.S. (2023) ("The doctrine of prior appropriation shall not apply to nontributary groundwater."). Our discussion of injury here, however, concerns only surface water rights subject to the prior appropriation doctrine.

other things, "the type, place, or time of use" associated with a water right, § 37-92-103(5)(a), only if they demonstrate that the change "will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right," § 37-92-305(3)(a), C.R.S. (2023). *See also Burlington Ditch*, 256 P.3d at 662. The no injury rule also applies to newly decreed conditional appropriations "under appropriate circumstances" that require such decrees to include provisions designed to protect senior appropriators. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 48 (Colo. 1996) (citing, *inter alia*, *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644, 646 (Colo. 1991)).

¶50 In the context of the prior appropriation system, injury occurs when there is a "diminution of the available water supply that a water right[s] holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority." *Burlington Ditch*, 256 P.3d at 661 (citing *Farmer's Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001)). Such diminution can arise when changes to a water right alter the distribution of water in a hydrologic system relative to existing users' expectations, compromising junior appropriators' "vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations." *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954).

¶51 At the same time, "[g]iven the demand for water, there can never be a 'guarantee that there will be enough water to satisfy all claims to this scarce resource.'" *Kobobel v. State*, 249 P.3d 1127, 1134–35 (Colo. 2011) (quoting *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1380 (Colo. 1982)). To accommodate this reality, the prior appropriation system requires satisfying senior users' rights before junior users' rights when the available supply is insufficient to satisfy them all. *Id.* at 1135. This necessarily means that junior water rights may, at times, go unfulfilled. *Id.* ("The risk of curtailment is inherent to Colorado water rights holders because water . . . is an over-appropriated, relatively scarce resource."). But so long as the senior water rights holder is exercising their water rights in a manner consistent with the terms of an adjudicated decree, curtailment of a junior right to satisfy a senior right does not constitute "injury" to the junior rights holder.

¶52 Water courts have the power "to construe and make determinations regarding the scope of water rights adjudicated in prior decrees." *S. Ute Indian Tribe,* 250 P.3d at 1234 (citing *Crystal Lakes Water & Sewer Ass'n v. Blacklund*, 908 P.2d 534, 542 (Colo. 1996)). These proceedings clarify which of a user's appropriated rights have also been adjudicated such that they carry enforceable priority dates. *See, e.g.*, *Mike & Jim Kruse P'ship v. Cotten*, 2021 CO 6, ¶ 45, 479 P.3d 893, 903 (interpreting the text of a 1933 decree as excluding a certain water source);

Dill, ¶ 34, 435 P.3d at 1076 (holding that a 1909 decree did not adjudicate water rights in a spring because it lacked the "required indicia of enforceability"); *Select Energy Servs.*, ¶ 17, 394 P.3d at 699 (holding that a 2014 decree limited diversions to a single diversion point). Importantly, such proceedings merely "confirm[] . . . pre-existing rights," and do not affect the water right's place in the priority system. *S. Ute Indian Tribe*, 250 P.3d at 1234 (citing *Groundwater Appropriators of S. Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 26 (Colo. 2003)).

2. Golden's Claims

¶53 Like the water court, we acknowledge that injury to other water rights is an essential inquiry in many water court proceedings, including in the examples Golden cites. *E.g.*, § 37-92-305(3)(a) (requiring approval of a change of water right, implementation of a rotational crop management plan, or a plan for augmentation, "if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right"); § 37-92-301(3)(d), C.R.S. (2023) (requiring an injury inquiry when a water court authorizes an alternate point of groundwater diversion, which could deplete water necessary to satisfy senior appropriators); *Santa Maria Reservoir Co. v. Warner*, 2020 CO 27, ¶ 4, 461 P.3d 478, 481 (explaining how injury can result from a change of water right that does not allow return flows to return to the stream system from which they came); *Burlington Ditch*, 256 P.3d at 661 (discussing how

improper calculations of historical consumptive use during change proceedings can lead to injury). These examples necessarily implicate potential injury because they concern changes to a water right that could affect the distribution of water within a system or deplete the availability of water necessary to satisfy senior appropriators.

¶54 But where a water user's request goes no further than the interpretation of the terms of an existing decree, there is no potential for this type of injury. *Southern Ute Indian Tribe* presented this scenario. There, the applicant ditch companies asked the water court to determine whether the terms of an existing decree included wintertime stock-watering rights. *S. Ute Indian Tribe*, 250 P.3d at 1231. In holding that the water court had jurisdiction to resolve this question under section 37-92-302(1)(a), we explained that the statutory phrase, "determination of a water right," encompasses proceedings, such as the interpretation of an existing decree, that "have as their object" the mere "confirmation of pre-existing rights" and do not result in the assignment of a new priority date. *Id.* at 1234. When such proceedings concern the *implementation* of a water right consistent with an existing decree, that implementation does not diminish the supply a junior appropriator would otherwise enjoy in accordance with their junior priority. Rather, any reduction in supply to the junior appropriator would stem from the senior appropriator's exercise of its water rights pursuant to its senior priority.

Accordingly, we agree with the water court's statement that, in such cases, "an injury analysis . . . would be immaterial to the relief requested." Water Court Order, at 20.

¶55 *Southern Ute Indian Tribe* is not the only case in which we have declined to entertain a party's claims of injury because we concluded they were immaterial. In *City of Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061, 1065, 1068 (Colo. 2010), the City of Englewood ("Englewood") argued that a no-call agreement[11] between the applicant ditch companies and Denver threatened to injure Englewood's water rights by unlawfully changing stream conditions. We rejected Englewood's claim. First, we reasoned that the right to the maintenance of stream conditions existing at the time of a water user's original appropriation "is directly related to the statutory standard for evaluating an application for a change of water right." *Id.* at 1069. In other words, we consider potential injury to other water rights in change applications. *Id.* But the general concept of a call (including the right not to place a call) is not a "change of water right." *Id.* Moreover, the State Engineer evaluates requests for calls based on whether the call will succeed in fulfilling the right of the senior appropriator—not whether the call

[11] "[A] no-call agreement provides that a senior appropriator will not place a call on a particular water right that it holds," thereby "contract[ing] away the right to place a call . . . requesting more water to fulfill the senior right." *City of Englewood*, 235 P.3d at 1068 (emphasis omitted).

will injure others with vested water rights. *Id.* Thus, we explained that "it makes little sense to speak of a right of other appropriators to maintenance of stream conditions based on historical call requests of senior rights." *Id.*

¶56 Viewing the case before us in light of *Southern Ute Indian Tribe* and *City of Englewood*, we hold that the Applicants' request in this proceeding likewise does not require consideration of injury to other rights. The Applicants asked the water court to "confirm that the exercise and operation of the subject water rights under the Protocol are consistent with the Blue River Decree." To the extent resolution of this question requires interpreting the scope of the Blue River Decree, *Southern Ute Indian Tribe* instructs that such proceedings merely confirm preexisting rights and, therefore, cannot injure junior water rights. 250 P.3d at 1234. And, as in *City of Englewood*, evaluating the Protocol for consistency with the underlying Blue River Decree does not depend on the Protocol's potential to cause injury; it turns only on the Protocol's faithfulness to the Blue River Decree.

¶57 For similar reasons, Golden's argument that the Protocol impairs its right to the maintenance of stream conditions that existed under an earlier, alternative administrative scheme is likewise unpersuasive. Like the no-call agreement in *City of Englewood*, whether implementation of the Protocol would alter stream conditions a junior appropriator previously enjoyed is irrelevant to determining whether the Protocol is consistent with the Blue River Decree. Rather, even

changes in stream conditions resulting from the Protocol are not improper so long as they fall within the scope of the parties' rights under the Blue River Decree. *See, e.g.*, *LoPresti v. Brandenburg*, 267 P.3d 1211, 1216–17 (Colo. 2011) (holding that a settlement agreement memorialized in a decree did not improperly approve a change of water right in part because the agreement was consistent with the decree).

¶58 Accordingly, we affirm the water court's conclusion that an injury inquiry was not required in this case and conclude that remand is not appropriate on these grounds. We now turn to the heart of the matter: whether the water court properly concluded that the Protocol is consistent with the Blue River Decree.

C. The Protocol Is Consistent with the Blue River Decree

¶59 Based on the expert reports submitted in support of the parties' summary judgment filings, the water court described four areas[12] in which the Protocol is consistent with the Blue River Decree, focusing on the Protocol's treatment of the United States' water rights in Green Mountain Reservoir and the Cities' decreed ability to make out-of-priority diversions under certain conditions. Golden does

[12] Those areas were, in broad terms: (1) the mechanisms the Protocol outlines for implementing the United States' first fill storage right; (2) how the Protocol maximizes diversions upstream of Green Mountain Reservoir; (3) how the Protocol ensures that the Cities cannot improperly benefit from the United States' more senior priority; and (4) the Protocol's implementation of the Cities' replacement obligations. Water Court Order, at 21–27.

not contest these findings. Instead, it asserts that the Protocol is inconsistent with the Blue River Decree for two alternative reasons. Neither is persuasive.

¶60 First, Golden argues that whether the Protocol is consistent with the Blue River Decree is the wrong inquiry; in Golden's view, we must instead ask what the terms of the Blue River Decree specifically require. But if the terms of the Blue River Decree were sufficiently specific to discern conclusively what they *require*, there would be no need for a separate protocol. Furthermore, we have already held that water courts have the authority to interpret the Blue River Decree to determine whether other actions are consistent with—but not necessarily required by—their terms. *City of Grand Junction*, 960 P.2d at 683 (considering whether a new decree granting Denver a refill right "modif[ies] or conflict[s] with the Blue River Decree"); *see also City & Cnty. of Denver ex rel. Bd. of Water Comm'rs v. Consol. Ditches Co. of Dist. No. 2*, 807 P.2d 23, 34–35 (Colo. 1991) (interpreting the Blue River Decree as "expressly acknowledg[ing]" the legal limitations imposed on Denver's obligations by a separate agreement).

¶61 True, the Protocol is distinguishable from the agreements in these cases inasmuch as it implements the Blue River Decree directly, filling in details not contained in the decree. But if anything, this distinction only reinforces the applicability of the consistency standard; when supplemental documents are necessary to address gaps in a decree, there will rarely—if ever—be only one way

for them to do so. Moreover, the Division 5 Engineer's determination that the Protocol is "administrable" affirms that the Protocol's provisions align with the State Engineer's duty to administer Colorado's waters "in accordance with" applicable law—including the Blue River Decree. § 37-92-501(1), C.R.S. (2023); *see Kenneth M. Good Irrevocable Trust v. Bell*, 759 P.2d 48, 53 (Colo. 1988) ("The state engineer is responsible for the administration and distribution of the waters of this state on the basis of priorities established by *adjudicated decrees*, the Colorado Constitution, statutory and case law, and written orders of the state engineer." (emphasis added)). Whether the Protocol could have accomplished this in a different way that Golden would have preferred is simply irrelevant.

¶62 Second, Golden asserts that the Protocol is inconsistent with the Blue River Decree because it violates the terms of SD-80. Reprising its argument before the water court, Golden claims that the Protocol denies it the "fair" and "equitable" administration of water rights that SD-80 guarantees to water users upstream of Green Mountain Reservoir. As an example of this disparate treatment, Golden explains that while its Vidler rights go unfulfilled, other water users—such as the City Contract Beneficiaries and Upstream Dillon Junior Beneficiaries—reap the benefits of the Blue River Decree's directive to ensure that "as much water as possible [will] be available for upstream rights without impairment of the United States' right to fill Green Mountain Reservoir and to use that Reservoir."

1964 Decree, at 3; *see also* 1955 Final Decree, at 3 (quoting SD-80) ("The [CBT] contemplates the maximum conservation and use of the waters of the Colorado River.").

¶63 But this language, although broad, does not afford protections to *every* existing and potential water user in the Blue River basin. Rather, the Blue River Decree requires that any power or water replacement arrangements the United States enters to permit out-of-priority diversions "be such as will not impair any right of any *beneficiary* under" SD-80. 1964 Decree, at 2 (emphasis added). In turn, SD-80 protects users only to the extent that such protections are consistent with its purpose: to build the CBT. SD-80, at 1.

¶64 Accordingly, SD-80 requires the CBT to be operated in a "fair and efficient" manner that is "equitable to all parties *having interests therein*" — that is, interests in the CBT. *Id.* at 3 (emphasis added). Certain eastern slope users undoubtedly have an interest in the CBT; indeed, as described above, the CBT is a transmountain diversion designed to supplement northeastern Colorado's water supply. *Id.* at 1 ("The [CBT] . . . contemplates the diversion of surplus waters from the headwaters of the Colorado River on the . . . western slope to lands in northeastern Colorado . . . ."). And by directing the construction of Green Mountain Reservoir, as part of the CBT, to provide replacement water for western slope water users, SD-80 makes clear that such users also have interests in the CBT. *Id.* at 3 (stating

that "supplemental construction will be necessary" because "interests dependent" on Colorado River water "exist on both slopes of the Continental Divide"); *City of Grand Junction*, 960 P.2d at 679 ("One of the purposes of the CBT . . . was to store replacement water . . . for use by *western slope interests* to compensate for other Colorado River water diverted to the eastern slope . . . ." (emphasis added)).

¶65 But Golden has no interest in the CBT. It is not an eastern slope user that receives CBT water. Nor is it a western slope water user for which Green Mountain Reservoir stores replacement water. The Upstream Dillon Junior Beneficiaries, by contrast, comprise exclusively western slope water users who, as SD-80 beneficiaries, the Protocol must protect from impairment under the terms of the Blue River Decree itself. Protocol, at 7. That the Protocol protects these users in a "fair" and "equitable" manner, but does not afford the same protections to Golden, is hardly surprising; indeed, this disparity aligns with the terms of the Blue River Decree.

¶66 The Protocol treats the City Contract Beneficiaries differently—for good reason. The City Contract Beneficiaries are not SD-80 beneficiaries the Protocol must protect to stay consistent with the Blue River Decree; rather, the City Contract Beneficiaries benefit from contracts with the Cities under which the Cities commit to replacing water that the City Contract Beneficiaries divert or store upstream of Green Mountain Reservoir. *Id.* at 2–3. Accordingly, depletions

attributable to the City Contract Beneficiaries are counted against the *Cities*' depletions and included within the *Cities'* replacement obligations. *Id.* at 7. In this sense, the City Contract Beneficiaries simply expand the Cities' replacement obligations.

¶67 Ultimately, Golden's attempt to construe the Protocol as inconsistent with the Blue River Decree disguises its central complaint: that administering the Protocol will injure Golden's water rights. Golden may find it more difficult to fulfill its water rights when the Protocol is operating (though the water court made no factual finding to that effect). But as we have already explained, this concern does not implicate legally cognizable injury. What Golden presents is, as the water court put it, "a mere allegation that a water right is not being satisfied." Water Court Order, at 29**.** And such allegations are necessarily "insufficient to uphold an opposition relating to a decreed water right." *Id.* Indeed, as the water court observed, "[t]hat some water rights will not be satisfied is the nature of the prior appropriation system." *Id.*

D. The Protocol's System of Administration Is Consistent with the Prior Appropriation System

¶68 In Golden's view, however, the Protocol is inconsistent with the prior appropriation system itself. Golden describes the Protocol as a "selective subordination agreement" that permits water rights upstream of Green Mountain Reservoir, and junior to the United States' Green Mountain Reservoir rights, to

divert ahead of the United States, excluding only Golden's Vidler rights. We disagree with this characterization.

¶69 In subordination agreements, "the holder of an otherwise senior water right consents to stand in order of priority behind another person or persons holding a junior water right." *Bd. of Cnty. Comm'rs v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 329 n.1 (Colo. 2000), *as modified on denial of reh'g* (Dec. 18, 2000). A selective subordination is a special type of subordination agreement in which a senior water user subordinates their water rights to certain junior water users while denying the same permission to other junior users. *Id.* at 340 n.18. "Courts generally disfavor selective subordination." *Id.* at 341.

¶70 Golden's claim that the Protocol constitutes a series of selective subordination agreements is dubious at best. First, subordination agreements must evince an intent among the parties to change their relative priority status. *See id.* ("[B]y contract, a person can make his or her priority inferior to another, and courts can give legal effect to the senior user's intention to make his priority inferior in this regard."); *City of Englewood*, 235 P.3d at 1068 (concluding that an agreement did not constitute a subordination agreement because it did not "suggest a change in the relative priority status of the parties"). But nothing in the Protocol suggests that the United States intended to subordinate its rights to any others—quite the opposite:

> This operation does not constitute, or result in, a subordination of the water right priority of the 1935 First Fill Storage Right, but allows "as much water as possible to be available for upstream rights without impairment of the United States' right to fill Green Mountain Reservoir and to use that reservoir as provided in" the 1955 Decree and [SD-80], as directed by paragraph 4 of the 1964 Decree, and without impairment of legal calls of downstream water rights.

Protocol, at 20 (quoting 1964 Decree, at 3).

¶71 Furthermore, the water court's factual findings indicate that the Protocol does not contemplate subordination. Instead, the Protocol's "tiered priority date administration scheme" is designed to maximize the water available for upstream rights *without impairing* the United States' rights or allowing the Cities "to inappropriately benefit from the United States' more senior priority water rights." Water Court Order, at 23–24.

¶72 The Protocol is certainly complex. In that sense, it mirrors the Blue River Decree it implements—a decree that prescribes a series of out-of-priority diversions to satisfy the needs of some parties without impeding the senior rights of others. The Protocol accomplishes this using strategies well-known to Colorado's water rights system. By permitting out-of-priority diversions under the terms of the Blue River Decree, and only to the extent that mechanisms exist to compensate senior water users for the losses those diversions cause, the Protocol hews to the broader goals of prior appropriation: "optimum use, efficient water

management, and priority administration." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001), *as modified on denial of reh'g* (Feb. 11, 2002).

E. Procedural Issues

¶73 Finally, we briefly address the parties' procedural arguments.

¶74 Golden argues that the water court erred in granting summary judgment to the United States because whether the Protocol will injure Golden's water rights is a question of material fact. On the one hand, Golden is correct that injury is a question of fact. *See Consol. Mut. Water Co.*, 33 P.3d at 812 ("The issue of injurious effect is inherently fact specific and one for which we have always required factual findings."). But the core issue before the water court—whether the Protocol is consistent with the Blue River Decree—is a question of law that, as we have already discussed, did not demand factual findings on the question of injury.

¶75 Even considering Golden's claim that the water court improperly denied Golden the opportunity to present evidence of injury, we perceive no error. Golden had an opportunity to submit such evidence in its response to the United States' motion for summary judgment. But Golden failed to do more than simply identify features of the Protocol—such as the out-of-priority diversions it allows—that Golden believed *might* result in injury. Such speculation fails to "includ[e] facts that tend to prove or disprove the allegations made in the motion for summary judgment" and is, therefore, "insufficient to give rise to genuine issues

of fact." *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007) (citing *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978)).

¶76 Nevertheless, Golden argues that the water court erred by assuming that Golden's responsive motion, and the expert report that accompanied it, were Golden's only evidence of injury. However, the fact that Golden may have planned to present other evidence at a trial is irrelevant. The water court was obligated to consider only the evidence that Golden submitted with its responsive motion. *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11, 304 P.3d 239, 244 ("If the non-moving party cannot produce enough evidence to establish a triable issue, then the moving party is entitled to summary judgment as a matter of law.").

¶77 Finally, Golden's briefing raises concerns that appeared, for the first time, in Golden's motion for reconsideration. These include claims that Denver's Williams Fork exchange operations under the Protocol are inconsistent with the Blue River Decree and that the Protocol is contrary to the State Engineer's General Administration Guidelines for Reservoirs ("Reservoir Guidelines"). Applicants argue that this court need not consider such arguments because they are not based on "newly discovered evidence," the sole exception to the general principle that parties cannot present new arguments or additional evidence in a motion for reconsideration. *McDonald v. Zions First Nat'l Bank, N.A.*, 2015 COA 29, ¶ 86, 348 P.3d 957, 969; *see also Rinker v. Colina-Lee*, 2019 COA 45, ¶ 25, 452 P.3d 161, 167

("[P]resentation of new arguments in a motion for reconsideration is improper." (citing *Ogunwo v. Am. Nat'l Ins. Co.*, 936 P.2d 606, 611 (Colo. App. 1997))).

¶78 We agree. "Newly discovered evidence" is evidence that (1) "could not have been previously discovered by the exercise of reasonable diligence"; (2) "is material"; and (3) "if admitted," would have led to a different result. *McDonald*, ¶ 87, 348 P.3d at 969. The evidence Golden presented concerning Denver's Williams Fork exchanges and the Protocol's consistency with the Reservoir Guidelines relied entirely on documents, such as the Applicants' expert reports and the Protocol and Reservoir Guidelines themselves, that were available to Golden when it submitted its response to the United States' motion. And to the extent that other aspects of Golden's motion for reconsideration depend on affidavits and declarations Golden could not have collected until after the deadline to submit its responsive motion, those materials are related only to Golden's claims of injury.

¶79 Our resolution of these procedural arguments flows directly from our rejection of Golden's chief complaint: that the water court should have reached the merits of Golden's injury claim. Because we conclude that injury is immaterial in this case, we need not consider Golden's additional, injury-related evidence.[13]

[13] We offer no opinion on whether Golden could assert claims of injury to its water rights in another context or proceeding.

IV. Conclusion

¶80 The water court did not err in declining to conduct an injury inquiry where, as here, the Applicants sought an order interpreting an existing decree. We further agree with the water court that the Protocol is consistent with the Blue River Decree. We reject Golden's contention that the Protocol violates Colorado's prior appropriation system, as well as its procedural arguments.

¶81 Accordingly, we affirm the water court's entry of summary judgment in favor of the United States and its direction to the State Engineer to administer and carry out the Blue River Decree in accordance with the Protocol.

ADVANCE SHEET HEADNOTE
June 17, 2024
AS MODIFIED JULY 22, 2024

2024 CO 43M

No. 23SA317, *City of Golden v. United States*—Water Law—Blue River Decree—Injury—Colorado-Big Thompson Project—Interpretation of Prior Decree—Subordination Agreement—Power Interference Agreement—Newly Discovered Evidence.

This case concerns the Green Mountain Reservoir Administrative Protocol (the "Protocol"), an agreement among the parties to the Blue River Decree, the Colorado State Engineer's Office, and two other entities regarding the administration of water rights in and upstream of Green Mountain Reservoir, a component of the Colorado-Big Thompson Project ("CBT"). The Protocol was developed after decades of disputes among the United States, the Cities of Denver and Colorado Springs (the "Cities"), and others over how to implement the United States' rights in Green Mountain Reservoir while maximizing the availability of water for upstream use in accordance with the Blue River Decree.

The parties to the Protocol submitted an application for a determination of water rights to the water court for Water Division 5 requesting confirmation that the Protocol is consistent with the Blue River Decree. The City of Golden

("Golden") opposed the application, arguing that the Protocol would cause injury to its rights upstream of Green Mountain Reservoir. The water court granted the United States' motion for summary judgment, ruled that the Protocol is consistent with the Blue River Decree, and denied Golden's motion for reconsideration. Golden appealed.

The supreme court affirms the water court's ruling on summary judgment. First, it holds that an assessment of injury is not required where, as here, a water rights holder merely requests confirmation that an administrative protocol implementing an existing decree is consistent with the terms of that decree. Second, the court holds that the Protocol is consistent with the Blue River Decree, rejecting Golden's claims that the Protocol contradicts language in the Blue River Decree requiring the "fair" and "equitable" treatment of all parties with interests in the CBT. The court also rejects Golden's assertion that the Protocol violates the prior appropriation doctrine. Finally, the court rejects Golden's procedural arguments regarding the water court's denial of its motion for reconsideration.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 43M

Supreme Court Case No. 22SA317
Appeal from the District Court
District Court, Water Division 5, Case No. 13CW3077
Honorable James Berkley Boyd, Water Judge

Concerning the Application of United States of America; City and County of Denver, acting by and through its Board of Water Commissioners; City of Colorado Springs, acting through its enterprise Colorado Springs Utilities; Colorado River Water Conservation District; Northern Colorado Water Conservancy District; Middle Park Water Conservancy District; Grand Valley Water Users Association; Orchard Mesa Irrigation District; Grand Valley Irrigation Company; Palisade Irrigation District; and Climax Molybdenum Company for a Determination of Water Rights in Summit, Grand, Garfield, Eagle, Pitkin, Routt, Gunnison, Rio Blanco, and Mesa Counties, Colorado.

Applicants-Appellees:

United States of America; City and County of Denver, acting by and through its Board of Water Commissioners; City of Colorado Springs, acting through its enterprise Colorado Springs Utilities; Colorado River Water Conservation District; Northern Colorado Water Conservancy District; Middle Park Water Conservancy District; Orchard Mesa Irrigation District; Grand Valley Water Users Association; Grand Valley Irrigation Company; Palisade Irrigation District; and Climax Molybdenum Company,

v.

Opposer-Appellant:

City of Golden,

Opposers-Appellees:

Ute Water Conservancy District; Grand County Board of Commissioners; City of Aurora; Clinton Ditch and Reservoir Company; Eagle River Water and Sanitation District; Upper Eagle Regional Water Authority; Eagle Park Reservoir Company; Summit County Board of Commissioners; Public Service Company of Colorado; Town of Gypsum; Chimney Rock Ranch, LLC; and Snake River Water District,

and

Appellee Pursuant to C.A.R. 1(e):

James Heath, in his capacity as the Division Engineer for Water Division No. 5.

Judgment Affirmed
en banc
~~date~~June 17, 2024

Modified Opinion. Marked revisions shown.

Attorneys for Opposer-Appellant City of Golden:
Bushong & Holleman P.C.
Steven J. Bushong
Cassidy L. Woodard
Gunnar J. Paulsen
Boulder, Colorado

Porzak Law LLC
Glenn Porzak
Boulder, Colorado

Attorneys for Applicant-Appellee United States of America:
United States Department of Justice
John E. Bies
Washington, District of Columbia

United States Department of Justice
Jeffrey Neel Candrian
Denver, Colorado

Attorneys for Applicant-Appellee City and County of Denver:
Daniel J. Arnold
James M. Wittler
Denver, Colorado

Attorneys for Applicant-Appellee City of Colorado Springs:
Carlson, Hammond & Paddock, L.L.C.
William A. Paddock
Denver, Colorado

City Attorney's Office
Michael J. Gustafson
Colorado Springs, Colorado

Attorneys for Applicant-Appellee Colorado River Water Conservation District:
Peter C. Fleming
Jason V. Turner
Glenwood Springs, Colorado

Attorneys for Applicant-Appellee Northern Colorado Water Conservancy District:
Trout Raley
Bennett W. Raley
Denver, Colorado

Attorneys for Applicant-Appellee Middle Park Water Conservancy District:
The Whitmer Law Firm, LLC
Kent Whitmer
Hot Sulphur Springs, Colorado

Attorneys for Applicants-Appellees Orchard Mesa Irrigation District and Grand Valley Water Users Association:
Williams, Turner & Holmes, P.C.
Kirsten M. Kurath
Grand Junction, Colorado

Attorneys for Applicant-Appellee Grand Valley Irrigation Company:
Aldrich Law Firm, LLC
Frederick G. Aldrich
Grand Junction, Colorado

Attorneys for Applicant-Appellee Palisade Irrigation District:
Dufford Waldeck
Nathan A. Keever
Grand Junction, Colorado

Attorneys for Applicant-Appellee Climax Molybdenum Company:
Nazarenus Stack Wombacher LLC
Brian M. Nazarenus
Sheela S. Stack
Greenwood Village, Colorado

No appearance on behalf of: Ute Water Conservancy District; Grand County Board of Commissioners; City of Aurora; Clinton Ditch and Reservoir Company; Eagle River Water and Sanitation District; Upper Eagle Regional Water Authority; Eagle Park Reservoir Company; Summit County Board of Commissioners; Public Service Company of Colorado; Town of Gypsum; Chimney Rock Ranch, LLC; Snake River Water District; and James Heath, in his capacity as the Division Engineer for Water Division No. 5.

JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 This appeal from the water court for Division 5 is the latest chapter in the decades-long dispute over water rights associated with Green Mountain Reservoir. In 1937, Congress directed the construction of Green Mountain Reservoir on the Blue River, a tributary to the Colorado River, as part of the Colorado-Big Thompson Project ("CBT"). The CBT is a complex transbasin diversion project comprising an extensive and integrated system of dams, reservoirs, diversion works, tunnels, canals, conduits, basins, pumping plants, hydroelectrical plants, and other structures for impounding, diverting, or using water. The project supplies areas in northeastern Colorado with water diverted from the Colorado River basin across the Continental Divide. As a component of the CBT, Green Mountain Reservoir serves two purposes: (1) to provide replacement water to western slope interests affected by the CBT and (2) to supply a federal hydroelectric generating station.

¶2 Litigation over water rights in the CBT began in 1942, shortly after construction was completed. The first cases, ultimately decided in federal court, concerned the interaction between the United States' water rights in Green Mountain Reservoir and water rights held by the cities of Denver and Colorado Springs (the "Cities") in the Blue River basin. At the heart of these disputes was the Cities' interest in exercising their Blue River rights—located upstream of Green

Mountain Reservoir—despite the United States' senior rights to fill the reservoir and to use Blue River water for power generation. A series of decrees and stipulations among the Cities, the United States, and other entities with interests in the CBT, the first of which issued in 1955, was intended to resolve the Cities' concerns. We refer to that series of decrees and stipulations collectively as the "Blue River Decree."[1]

¶3 The Blue River Decree proved insufficient to resolve the concerns that animated its development. When another dispute began in 2003—this time among the parties to the Blue River Decree[2] and the State Engineer—the interested entities

---

[1] We acknowledge that the use of the singular, "Blue River Decree," can be confusing given that multiple decrees, stipulations, and orders govern the water rights involved. *See City & Cnty. of Denver v. Consol. Ditches of Water Dist. No. 2*, 2019 CO 68, ¶¶ 19–25, 444 P.3d 278, 287–89 (describing the history and evolution of the Blue River Decree). In past cases, we have used the singular term, "Blue River Decree," to refer to the 1955 Decree, *City & Cnty. of Denver ex rel. Bd. of Water Comm'rs v. Consol. Ditches Co. of Dist. No. 2*, 807 P.2d 23, 28 (Colo. 1991); *United States v. City & Cnty. of Denver ex rel. Bd. of Water Comm'rs*, 656 P.2d 1, 14 (Colo. 1982), even when we have recognized the supplements to that decree, *City of Grand Junction v. City & Cnty. of Denver*, 960 P.2d 675, 680–81 (Colo. 1998). Here, the parties to the Green Mountain Reservoir Administrative Protocol at issue in this case define the "Blue River Decree" to include the 1955 Decree as well as "all supplemental or amendatory orders, judgments, and decrees . . . including, without limitation," the decrees entered in 1964 and 1978. Green Mountain Reservoir Administrative Protocol, at 1. Accordingly, in using the singular, "Blue River Decree," we refer to the complete collection of "orders, judgments, and decrees" associated with the 1955 Decree. *Id.*

[2] Besides the United States and the Cities, the other parties to the Blue River Decree are Colorado River Water Conservation District, Northern Colorado Water

took a different approach. In 2013, after a lengthy period of negotiation and interim administrative policies, these entities developed the Green Mountain Reservoir Administrative Protocol (the "Protocol"). The purpose of the Protocol was to clarify and implement the provisions of the Blue River Decree in a consistent, transparent manner. To that end, and to prevent further litigation, most of the parties to the Protocol (the "Applicants")[3] filed an application for a determination of water rights under section 37-92-302(1)(a), C.R.S. (2023), asking Water Division 5 to confirm that the Protocol was consistent with the Blue River Decree.

¶4 Meanwhile, the City of Golden ("Golden") had acquired water rights of its own in the Blue River basin, also upstream of Green Mountain Reservoir but junior to both the United States' and the Cities' water rights. Golden opposed the Applicants' water rights application, alleging that implementation of the Protocol would injure its water rights. After the water court set a five-day trial and discovery began, the United States moved for summary judgment, arguing that

---

Conservancy District, Middle Park Water Conservancy District, Grand Valley Water Users Association, Orchard Mesa Irrigation District, Grand Valley Irrigation Company, and Palisade Irrigation District.

[3] The Applicants include all parties to the Blue River Decree as well as Climax Molybdenum Company. Although Ute Water Conservancy District is also a party to the Protocol, it participated in the water court proceeding as a supporter of the application rather than directly as an applicant.

Golden had not raised a genuine issue of material fact because injury was not a proper or essential inquiry in this water proceeding.

¶5 The water court agreed. Relying on our decision in *Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226 (Colo. 2011), the water court concluded that the application did not warrant an injury analysis because it involved only the "interpretation and application of established vested rights." The water court then analyzed various provisions of the Protocol and concluded that they were consistent with the Blue River Decree. Accordingly, the water court granted the United States' motion for summary judgment.

¶6 Golden moved for reconsideration, lodging several procedural complaints and urging the water court to reevaluate its ruling that injury to Golden's water rights was not a proper inquiry in this case. But before the water court ruled on the motion for reconsideration, Golden filed this appeal.

¶7 The core of Golden's argument is that the water court erred by failing to consider the potential for the Protocol to injure Golden's water rights. Its other arguments—that the Protocol is inconsistent with the Blue River Decree, that the Protocol violates the prior appropriation doctrine, and that the water court erred by ignoring evidence Golden hoped to present at trial—all stem from Golden's concerns about injury to its rights.

¶8 The Applicants respond that Golden's principal argument rests on a flawed premise because injury is neither a proper nor an essential inquiry where, as here, the issue before the water court concerns the interpretation of an existing decree—not potential changes or modifications to a water right. They further contend that Golden's other arguments are likewise predicated on the possibility of injury or involve injury-related evidence Golden did not present until it filed its motion for reconsideration. The Applicants therefore urge us to uphold the water court's ruling that the Protocol is consistent with the Blue River Decree.

¶9 We agree with the Applicants. Although injury to other adjudicated water rights is a central principle in Colorado's prior appropriation system, that does not mean that injury is relevant to every water rights proceeding. When a water court application asks only that the water court construe the scope of an existing decree, any reduction in the water supply available to junior appropriators resulting from the administration of water rights consistent with that decree is a consequence of the prior appropriation doctrine and does not establish an independently cognizable injury to junior appropriators. Here, Golden's water rights are junior to those memorialized in the Blue River Decree and implemented through the Protocol. If the Protocol implements water rights consistent with the Blue River Decree, the operation of the Protocol cannot cause cognizable injury to Golden's rights. Any evidence concerning injury that Golden hoped to introduce at trial is

irrelevant to the issue at the heart of this water rights application: whether the Protocol is consistent with the Blue River Decree. And on that core question, we agree with the water court that it is.

¶10 We therefore affirm the water court's order granting summary judgment to the United States and directing the State Engineer to administer the Blue River Decree in accordance with the Protocol.

I. Background

¶11 Before analyzing the issues in this case, we provide a brief but comprehensive introduction to the history and purpose of the Blue River Decree, as well as the disputes it has generated. First, we describe the development of Green Mountain Reservoir in the context of the CBT, including the origins and development of the suite of decrees known collectively as the Blue River Decree. *City & Cnty. of Denver v. Consol. Ditches of Water Dist. No. 2*, 2019 CO 68, ¶¶ 19–25, 444 P.3d 278, 287–89 ("*Consol. Ditches No. 2*"). For the purposes of this decision, we focus on the 1955 and 1964 decrees. We then provide an overview of the history and key provisions of the Protocol. Finally, we discuss Golden's acquisition of the Blue River basin water rights that led to the present dispute.

A. Origins of the Blue River Decree

¶12 Congress authorized the CBT in 1937. *City of Grand Junction v. City & Cnty. of Denver*, 960 P.2d 675, 679 (Colo. 1998). Congress described the CBT's primary

purpose in a 1937 report: to divert "surplus waters from the headwaters of the Colorado River" on the western slope to "lands in northeastern Colorado on the . . . eastern slope greatly in need of supplemental irrigation water." S. Doc. No. 75-80, at 1 (1937) ("SD-80"). Recognizing the impact such diversions would have on the western slope's water supply, the CBT prescribed replacement of the diverted supply for the benefit of western slope interests. *City of Grand Junction*, 960 P.2d at 679. To store this replacement water, the CBT directed the construction of Green Mountain Reservoir on the Blue River. *Id.*

¶13 Per Congress's direction, Green Mountain Reservoir would have a total capacity of 152,000 acre-feet, of which 100,000 acre-feet would be used to generate power at a hydroelectric generating station. SD-80, at 3. The remainder of Green Mountain Reservoir's capacity would "be available as replacement in western Colorado[] of the water which would be usable there if not withheld or diverted by" the CBT. *Id.*

¶14 Following Green Mountain Reservoir's completion in 1942, the Cities, among others, commenced two separate adjudication proceedings in state court to determine the relative priorities of their rights in the Blue River: one for irrigation rights, and another for non-irrigation rights. *Id.* We affirmed the state court's decrees with respect to water rights in the Blue River. *City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 1015 (Colo. 1954). We also

explained, however, that the lower court improperly denied the claims of certain parties to rights in Green Mountain Reservoir, recognizing that those parties had asserted such claims in the absence of the United States' participation in the state court proceedings.[4] *Id.* Accordingly, we remanded the cases with instructions to adjudicate rights to Green Mountain Reservoir. *Id.*

¶15 On remand, the United States was joined as a party.[5] *City of Grand Junction*, 960 P.2d at 680. The United States then removed the cases to the U.S. District Court for the District of Colorado, where they were consolidated (the "consolidated cases"). *Consol. Ditches No. 2*, ¶ 20, 444 P.3d at 288.

¶16 In 1955, the federal district court issued a decree that substantially settled the consolidated cases with respect to the Cities' and the United States' rights in Blue River water and in Green Mountain Reservoir. *Id.* at ¶ 22, 444 P.3d at 288. As relevant here, the 1955 Decree: (1) confirmed the United States' August 1, 1935 priority date for 1,726 cubic-feet-per-second ("cfs") of direct-flow rights for power

---

[4] The United States originally filed a "statement of claims" in state court, but later withdrew its statement and instead initiated a parallel adjudication in federal court in 1949. *City of Grand Junction*, 960 P.2d at 679.

[5] By this time, Congress had enacted the McCarran Amendment, Pub. L. No. 82-495, § 208(a)–(c), 66 Stat. 549, 560 (1952), which gave consent for the United States to be joined as a party in state water adjudications. *City of Grand Junction*, 960 P.2d at 680.

generation ("Green Mountain Reservoir power rights"), and for 154,645 acre-feet[6] of storage rights in Green Mountain Reservoir ("Green Mountain Reservoir storage rights"); (2) confirmed Denver's 1946 priority dates and Colorado Springs' 1929 and 1948 priority dates for water rights in the Blue River; (3) required that the Cities be permitted to divert in accordance with these priority dates to serve municipal purposes, subject to the United States' Green Mountain Reservoir storage rights; and (4) imposed an obligation on the Cities to replace water to satisfy senior calling rights downstream of Green Mountain Reservoir. *See generally United States v. N. Colo. Water Conservancy Dist.*, Nos. 2782, 5016, & 5017 (D. Colo. Oct. 12, 1955) (comprising two documents: the Findings of Fact and Conclusions of Law ("1955 FFCL") and the Final Decree ("1955 Final Decree") (collectively the "1955 Decree")). The Cities could satisfy these replacement obligations by exchange, using Williams Fork Reservoir as a replacement source. 1955 FFCL, at 33; *see also Consol. Ditches No. 2*, ¶ 22, 444 P.3d at 288 (describing this provision of the 1955 Decree).

¶17 To accommodate the Cities' relatively junior rights, the 1955 Decree permitted the Cities to divert *prior* to fulfillment of the United States' Green

[6] As noted above, SD-80 contemplated a lower storage volume of 152,000 acre-feet, but 154,645 acre-feet represents Green Mountain Reservoir's actual maximum storage volume as built.

Mountain Reservoir storage rights—that is, out of priority—provided that it was "reasonably probable" that Green Mountain Reservoir would fill to capacity and that such out-of-priority diversions would not "adversely affect the ability of Green Mountain Reservoir to fulfill its function as set forth in" SD-80. 1955 FFCL, at 31–32. With respect to the United States' Green Mountain Reservoir power rights, the 1955 Decree allowed the Cities to divert out of priority—and, therefore, to impede the United States' ability to generate power—subject to the requirement that the Cities "[d]eliver or cause to be delivered to the United States" electrical energy "at substantially the same rates of delivery that would have been generated . . . had it not been for" the Cities' diversions. *Id.* at 32. To implement this requirement, the Cities and the United States entered formal agreements that allowed the Cities to provide financial compensation, in lieu of actual electrical energy, in exchange for the ability to divert out of priority. *See* Protocol, at 5. Today, these agreements are known as power interference agreements. *Id.*

¶18 The 1955 Decree also incorporated a portion of SD-80 titled, "Manner of Operation of Project Facilities and Auxiliary Features." 1955 Final Decree, at 3–9. This portion of the 1955 Decree prohibited the Cities' out-of-priority diversions from interfering with the "primary purposes" of Green Mountain Reservoir, including "preserving insofar as possible the rights and interests dependent on [Colorado River] water, which exist on both slopes of the Continental Divide." *Id.*

at 3–4. Notably, it also memorialized SD-80's directive that these purposes be accomplished "in a *fair* and efficient manner, *equitable to all parties having interests therein*." *Id.* at 4 (emphases added).

¶19 The 1955 Decree did not fully resolve the interested parties' disputes, and litigation continued for decades on multiple fronts. *Consol. Ditches No. 2*, ¶ 23, 444 P.3d at 288–89. Relevant here, a 1964 decree confirmed that the Cities have no "right, title, or interest" in Green Mountain Reservoir, nor in the water that the United States stores there. *United States v. N. Colo. Water Conservancy Dist.*, Nos. 2782, 5016, & 5017, at 2 (D. Colo. Apr. 16, 1964) ("1964 Decree"). In addition, the 1964 Decree required that new arrangements "tendered or proposed to the United States for the replacement of [Green Mountain Reservoir] water from other sources, for the replacement of power losses, or for compensation therefor, must . . . not impair any right of any beneficiary under" SD-80. *Id.*

B. The Green Mountain Reservoir Administrative Protocol

¶20 In 2003, another dispute developed, this time among the parties to the Blue River Decree and the State Engineer regarding the proper administration of water rights during Green Mountain Reservoir's fill period. The following year, the State Engineer began administering the fill of Green Mountain Reservoir pursuant to an interim policy. Ten years of negotiations followed. These negotiations—involving parties to the Blue River Decree, the State Engineer's Office, and two other entities,

Ute Water Conservancy District ("Ute Water") and Climax Molybdenum Company ("Climax")—sought to resolve apparent conflicts between Green Mountain Reservoir operations and the administration of the Blue River Decree. In 2013, these negotiations culminated in the Green Mountain Reservoir Administrative Protocol Agreement ("Protocol Agreement"), which adopted the Protocol at issue here. The State Engineer began to administer water rights in accordance with the Protocol as an interim policy in 2014 and has done so every year since.

¶21 In the Protocol Agreement, the parties intended to "clarify and implement certain provisions" of the Blue River Decree. Protocol Agreement, at 3. Accordingly, the adopted Protocol sets forth methods for administering and operating the United States' and the Cities' water rights that provide for consistent administration during Green Mountain Reservoir's fill period, maximize the amount of water available for upstream use, and prevent the Cities from "'hid[ing] behind' or otherwise benefit[ing] from" the United States' rights. *Id.* at 3–4. The Protocol is divided into four sections:

- Section I (titled "Blue River Decree Background") defines key terms, identifies important documents that underlie the Protocol, and explains the out-of-priority diversions the Cities may make under the Blue River Decree as well as the obligations that flow from those diversions. Protocol, at 1–8.

- Section II (titled "Administrative Protocol") is the heart of the Protocol. It explains the administration of the United States' Green Mountain Reservoir power and storage rights, including how to properly account for the Cities' out-of-priority diversions and how those diversions and Green Mountain Reservoir should operate when downstream senior users place calls. *Id.* at 8–20. Section II also discusses the rights of City Contract Beneficiaries and Upstream Dillon Junior Beneficiaries. *Id.* at 11–12. The City Contract Beneficiaries are "certain West Slope water users" that may divert and store water upstream of Green Mountain Reservoir pursuant to contracts with the Cities under which the Cities have agreed to replace the depletions resulting from the City Contract Beneficiaries' diversions. *Id.* at 2–3. Like the City Contract Beneficiaries, the Upstream Dillon Junior Beneficiaries are also western slope water users with water rights junior to the Cities' rights that are located upstream of Dillon Reservoir; however, they do not have similar contracts. *Id.* at 7. Nevertheless, "[t]o ensure the satisfaction of" a provision of the 1964 Decree, the Protocol affords the Upstream Dillon Junior Beneficiaries similar protections. *Id.*

- Section III (titled "Blue River Decree Priority Administration in Water District 36 and Water Division No. 5 (Climax C.A. 1710 Water Rights)") resolves disputes concerning Climax's 1935 and 1936 water rights adjudicated in Civil Action No. 1710. *Id.* at 20–23.

- Section IV (titled "The Cities' Replacement Operations") explains how to quantify the Cities' replacement obligations for their municipal diversions and operation losses under the Blue River Decree. *Id.* at 23–32.

¶22 The Protocol Agreement required that the parties to the Blue River Decree, along with Climax, commence judicial proceedings in water court "requesting a determination that Sections I, II, and III of the [Protocol] are consistent with the Blue River Decree." Protocol Agreement, at 4. The Agreement also required the parties to pursue concurrent proceedings in the U.S. District Court for the District

of Colorado, under its "retained jurisdiction to interpret and implement the Blue River Decree," to request a determination that all four sections of the Protocol are consistent with the Decree. *Id.* at 5.

C. Golden's Vidler Rights

¶23 In 2001, Golden acquired water rights (the "Vidler rights") from the Vidler Ditch Company ("Vidler"). The Vidler rights permit diversions of no more than 39.8 cfs from the Blue River basin upstream of Green Mountain Reservoir for domestic, agricultural, industrial, and municipal uses on the eastern slope. These rights carry a priority date of July 28, 1959.

¶24 Like the Cities, Vidler had a power interference agreement with the United States. This agreement allowed Vidler to make out-of-priority diversions that interfered with the Green Mountain Reservoir power rights in exchange for appropriate financial compensation. It also prohibited Vidler's diversions to the extent they would "impair any right of any beneficiary or Green Mountain Reservoir contractor under [SD-80]" or "preclude or cause curtailment of the diversion of water by any beneficiary of [SD-80] or contractors for Green Mountain Reservoir water."

¶25 When Golden acquired the Vidler rights, Vidler assigned its power interference agreement to Golden. The United States refused, however, to acknowledge this assignment or to enter into a new agreement with Golden, citing

a concern that the State Engineer would administer such an agreement as a general subordination of the United States' power rights to all upstream junior water rights that were also senior to the Vidler rights.[7] This impasse led Golden to initiate the dispute before us today.

II. Procedural History

¶26 The protracted procedural history of this case provides necessary context for our decision, so we describe it in some detail. First, we discuss the Applicants' original application filed ten years ago in the water court for Water Division 5. We then discuss the amended application filed nearly seven years later, which marked the first time Golden entered a dispute over the Blue River Decree. Next, we explain the United States' motion for summary judgment and the water court's order granting it. Finally, we describe Golden's motion for reconsideration.

---

[7] The United States' concern stemmed from a 2007 State Engineer's order stating that the State Engineer would administer power interference agreements involving "a senior hydropower water right and one or more junior water rights that are not the next rights in priority," as "a subordination of all or a portion of the hydropower right . . . to the most junior water right covered by the contract and all water rights senior to that most junior water right." Off. of the State Eng'r, *Written Instruction and Order 2007-03: Instruction and Order Concerning the Administration of Power Interference Contracts*, at 1 (May 31, 2007). In other words, this form of administration would force the United States' power right to "stand behind" the Vidler rights and all rights senior to the Vidler rights, effectively rendering the United States' right less likely to be fulfilled during times of shortage. *Id.*

A. The Initial Application

¶27 In 2013, consistent with the Protocol Agreement, the Applicants filed an application in Water Division 5 styled as a determination of water rights under this court's decision in *Southern Ute Indian Tribe*, 250 P.3d at 1233, which held that requests to interpret the scope of an existing water rights decree constitute a "determination of water rights" under section 37-92-302(1)(a). The Applicants sought confirmation that Sections I, II, and III of the Protocol are consistent with the Blue River Decree. Following publication of the resumé notice, the Division 5 Engineer submitted a written recommendation to the water court stating that the Protocol was "administrable" and, therefore, that the Division 5 Engineer did not object to the Applicants' requested relief.

¶28 The Applicants commenced similar proceedings in the consolidated cases in the U.S. District Court for the District of Colorado. The Applicants then requested a stay of the state water court proceedings, which the water court granted until the conclusion of the federal proceedings. In 2017, the federal court concluded that it would no longer exercise jurisdiction over the consolidated cases absent a claim under 28 U.S.C. § 1345, circumstances not present here. The Applicants nevertheless sought to continue the stay of the state water court proceedings. In 2020, the water court lifted the stay and compelled the proceedings forward.

B. The Amended Application

¶29 In October 2020, the Applicants filed an amended application renewing their request for a determination that Sections I, II, and III of the Protocol are consistent with the Blue River Decree.[8] In light of the federal court's decision not to exercise jurisdiction, the Applicants also requested that the water court address Section IV of the Protocol, binding only on the parties to the Blue River Decree. This led the Division 5 Engineer to submit another written recommendation confirming that he did not object to the Applicants' requested relief, including with respect to Section IV.[9]

¶30 Following resumé notice, Golden timely filed a statement of opposition to the amended application. Golden argued that implementing the Protocol would injure its Vidler rights unless the United States agreed to enter into a power interference agreement.

¶31 The water court set a five-day trial for May 2022 and issued a discovery schedule. The Applicants and opposers filed a flurry of initial and rebuttal expert

[8] As a result of the federal district court's ruling, and before filing the amended application, the Applicants, Ute Water, and the State Engineer's Office amended the Protocol Agreement to clarify that they would seek judicial approval of the Protocol only in the water court.

[9] The Division 5 Engineer reasoned that, because Section IV is binding only on the parties to the Blue River Decree, it "does not implicate the Division Engineer's administrative duties."

reports, including reports from the United States and the Cities explaining how various components of the Protocol are consistent with the Blue River Decree. In contrast, Golden's expert's report focused on how the United States' refusal to enter into a power interference agreement with Golden is inconsistent with SD-80, the Protocol, and the Blue River Decree and renders the Protocol a series of "selective subordinations" that "increase the likelihood that the [Vidler rights] will be called out by the 1935 Green Mountain fill and power rights." In a rebuttal report, the United States' expert argued that Golden's arguments were "outside of the water rights administration focus of the Protocol and the relief requested in the Amended Application."

C. The United States' Motion for Summary Judgment

¶32 The United States then moved for summary judgment, arguing that Golden had not raised any dispute of material fact concerning the sole question the Application presented: whether the Protocol was consistent with the Blue River Decree. Rather, the United States argued, Golden did not dispute the United States' evidence showing that the Protocol is consistent with the Blue River Decree. Instead, Golden "only suggest[ed] adding provisions to the Protocol to advance [its] specific interests." The motion also argued that nothing in the Blue River Decree required the United States to enter into a power interference agreement with Golden, and that Golden—as an eastern slope water user with no ties to the

CBT—is not protected under the terms of SD-80 as incorporated into the Blue River Decree.

¶33 Golden argued in response that "[i]njury is an essential inquiry in all water right determinations." In its view, the Applicants' request for a "determination of a water right" therefore required the water court to address Golden's claim that the Protocol's "complex and intricate framework of subordinations and agreements" would cause injury to Golden's Vidler rights. Golden also asserted that SD-80 requires the "fair" and "equitable" administration of water rights in the Blue River basin and thus, the administration of the Blue River Decree must protect Golden's Vidler rights.

¶34 In its reply, the United States relied on *Southern Ute Indian Tribe* to argue that an injury analysis was not material to the narrow relief it had requested. And in any event, the United States maintained, Golden's evidence of potential injury was insufficient to create a genuine issue of material fact. The United States also countered that the "fair" and "equitable" language in SD-80 cited by Golden did not apply to Golden because Golden is neither a western slope water user nor a party with interests in the CBT.

D. The Water Court's Order

¶35 The water court granted the United States' motion for summary judgment. First, the water court concluded that the importance of injury to water rights in

Colorado "does not make [injury] an issue in every case." *In re Application of United States for a Determination of Water Rts.*, No. 13CW3077, at 19 (Dist. Ct., Water Div. 5, May 26, 2022) (the "Water Court Order"). The water court cited several examples of water rights proceedings that do not require an injury inquiry, including proceedings to confirm a prior appropriation; to render conditional water rights absolute; to adjudicate abandonment claims; and, as in *Southern Ute Indian Tribe*, to determine the scope and content of a prior decree. *Id.* at 19–20. The water court then explained that, similar to *Southern Ute Indian Tribe*, the application here asked the court to interpret "established vested rights"—namely, those memorialized in the Blue River Decree. *Id.* at 20. Because the relief the Applicants requested would not involve changing or modifying water rights, the water court found that injury was not implicated. *Id.*

¶36 Accordingly, the water court proceeded to compare the provisions of the Protocol to the Blue River Decree and concluded that they were consistent. *Id.* at 20–28. The court also found that Golden's expert opinions concerning potential inconsistency and injury were, respectively, conclusory and irrelevant. *Id.* at 28–29. In addition, the court found that SD-80's "fair" and "equitable" language neither protected Golden's interests nor required that the United States enter a power interference agreement with Golden. *Id.* at 30. Finally, the court explained that Golden had other opportunities to raise its concerns—including throughout

the development of the Protocol itself—but had failed to do so. *Id.* at 33–34. For these reasons, the court concluded that there were no genuine issues of material fact. *Id.* at 35. Accordingly, it granted the United States' motion. *Id.*

E. Golden's Motion for Reconsideration

¶37 Shortly thereafter, Golden moved for reconsideration, reiterating its assertion that the water court must address its injury claims. In addition, Golden continued to rely on SD-80's "fair" and "equitable" language to insist that it had raised genuine issues of material fact with respect to the Protocol's consistency with the Blue River Decree. Golden also asserted that after full briefing on the United States' motion to dismiss, it had gathered additional evidence to support its injury and inconsistency claims that the water court should consider.

¶38 The Applicants responded that Golden's motion merely rehashed its earlier argument about injury. The Applicants also asserted that Golden's arguments were procedurally barred to the extent they were based on evidence Golden had not presented in response to the United States' summary judgment motion.

¶39 Golden's reply countered that because any such evidence was "newly discovered" within the meaning of C.R.C.P. 59(d)(4), the water court could rely on it as grounds for resetting trial.

¶40 The water court never responded to Golden's motion for reconsideration. Golden filed this appeal.

III. Analysis

¶41 Golden asks this court to reverse the water court's grant of summary judgment and to remand the case for further proceedings. Golden argues that the water court erred in concluding that injury is not a proper or essential inquiry in this case and that summary judgment was, therefore, inappropriate. It further asserts that the Protocol is inconsistent with the Blue River Decree and with Colorado's prior appropriation system. Finally, Golden raises procedural issues regarding the timing of the United States' motion for summary judgment relative to the completion of discovery.

¶42 We affirm the water court's ruling on summary judgment. First, we set forth our standard of review. We then address Golden's argument that the water court erred by failing to perform an injury analysis. We agree with the water court that injury was not a proper or essential inquiry in this case. Next, reviewing the water court's findings and considering Golden's arguments to the contrary, we conclude that the Protocol is consistent with the Blue River Decree. We then explain why the Protocol does not violate the prior appropriation doctrine. Finally, we address—and dismiss—each of Golden's procedural arguments.

A. Standard of Review

¶43 We review the water court's resolution of questions of law in C.R.C.P. 56 motions de novo. *Consol. Ditches No. 2*, ¶ 53, 444 P.3d at 295. In performing such

reviews, "all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Select Energy Servs., LLC v. K-LOW, LLC*, 2017 CO 43, ¶ 12, 394 P.3d 695, 698.

¶44 Courts interpret a stipulated water rights decree, like the Blue River Decree, as they would a contract. *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 146 (Colo. 2006). Accordingly, "[o]ur primary goal is to implement the intent of the parties as expressed in the agreed-upon language," considering extrinsic evidence "to prove intent when there is an ambiguity in the terms of the agreement." *Id.* Such evidence includes "the facts and circumstances attending [the agreement's] execution, so as to learn the intentions of the parties and carry out their intent." *Id.*

B. Injury Is Not a Proper or Essential Inquiry in This Proceeding

¶45 Critical to Golden's appeal is its contention that the water court erred by failing to inquire whether implementing the Protocol would injure its Vidler rights. To support this argument, Golden relies on our characterization of "[n]o injury to other adjudicated water rights" as "a fundamental principle applicable to fashioning decrees in water cases." *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011), *as modified on denial of reh'g* (June 20, 2011). Golden stretches these words too far.

¶46 The flaw in Golden's argument emerges from basic tenets of Colorado water law. Therefore, we begin by reviewing those governing principles. We then turn to Golden's specific claims.

1. Legal Principles

¶47 In Colorado, "[a] water right is a usufructuary right." *Id.* As such, water rights holders "do[] not 'own' water," but rather "own[] the right to use water within the limitations of the prior appropriation doctrine." *Id.*; *see also* § 37-92-103(12), C.R.S. (2023) ("'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."). A core tenet of the prior appropriation doctrine is that water rights holders take in accordance with their priority: senior water rights holders take before junior rights holders. Colo. Const. art. XVI, § 6 ("Priority of appropriation shall give the better right as between those using the water for the same purpose . . . .").

¶48 Two distinct events govern a water right's priority and enforceability relative to other water rights. First, *appropriation* of a water right sets the date a water right vests and, therefore, determines a water right's priority date. *Shirola v. Turkey Cañon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 744 (Colo. 1997) ("[W]ater rights vest upon appropriation, not upon adjudication."), *as modified on denial of reh'g* (May 19, 1997). Second, *adjudication* of a water right produces a decree which, in

turn, permits enforcement of the right's priority date against other users. *Id.* In other words, an adjudicated water right entitles the owner to a certain amount of water subject to the rights of senior appropriators and the amount of water that is available for appropriation. *S. Ute Indian Tribe*, 250 P.3d at 1234. In this sense, water rights decrees memorialize and render enforceable the water rights that existed at the time of appropriation. *Dill v. Yamasaki Ring, LLC*, 2019 CO 14, ¶ 25, 435 P.3d 1067, 1074 ("An adjudicated water right is memorialized in a water decree.").

¶49 Against this backdrop lies the concept of injury. Avoiding injury to other water rights is "an essential part of Colorado's prior appropriation system."[10] *San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1*, 270 P.3d 927, 945 (Colo. 2011); *see also Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451–52 (1882) (explaining the relationship between injury and the prior appropriation system). Under the no injury rule, water users may change, among

[10] We acknowledge that the concept of injury is also considered with respect to certain water rights that are not subject to the prior appropriation doctrine—for example, when the State Engineer considers whether to issue a permit for the withdrawal of nontributary and not-nontributary groundwater. § 37-90-137(2)(b)(I)(A), C.R.S. (2023); *see also* § 37-90-137(4)(a) (confirming that sections 37-90-137(1) and (2) apply to wells pumping nontributary and not-nontributary groundwater); § 37-90-102(2), C.R.S. (2023) ("The doctrine of prior appropriation shall not apply to nontributary groundwater."). Our discussion of injury here, however, concerns only surface water rights subject to the prior appropriation doctrine.

other things, "the type, place, or time of use" associated with a water right, § 37-92-103(5)(a), only if they demonstrate that the change "will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right," § 37-92-305(3)(a), C.R.S. (2023). *See also Burlington Ditch*, 256 P.3d at 662. The no injury rule also applies to newly decreed conditional appropriations "under appropriate circumstances" that require such decrees to include provisions designed to protect senior appropriators. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 48 (Colo. 1996) (citing, *inter alia*, *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644, 646 (Colo. 1991)).

¶50 In the context of the prior appropriation system, injury occurs when there is a "diminution of the available water supply that a water right[s] holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority." *Burlington Ditch*, 256 P.3d at 661 (citing *Farmer's Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001)). Such diminution can arise when changes to a water right alter the distribution of water in a hydrologic system relative to existing users' expectations, compromising junior appropriators' "vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations." *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954).

¶51 At the same time, "[g]iven the demand for water, there can never be a 'guarantee that there will be enough water to satisfy all claims to this scarce resource.'" *Kobobel v. State*, 249 P.3d 1127, 1134–35 (Colo. 2011) (quoting *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1380 (Colo. 1982)). To accommodate this reality, the prior appropriation system requires satisfying senior users' rights before junior users' rights when the available supply is insufficient to satisfy them all. *Id.* at 1135. This necessarily means that junior water rights may, at times, go unfulfilled. *Id.* ("The risk of curtailment is inherent to Colorado water rights holders because water . . . is an over-appropriated, relatively scarce resource."). But so long as the senior water rights holder is exercising their water rights in a manner consistent with the terms of an adjudicated decree, curtailment of a junior right to satisfy a senior right does not constitute "injury" to the junior rights holder.

¶52 Water courts have the power "to construe and make determinations regarding the scope of water rights adjudicated in prior decrees." *S. Ute Indian Tribe,* 250 P.3d at 1234 (citing *Crystal Lakes Water & Sewer Ass'n v. Blacklund*, 908 P.2d 534, 542 (Colo. 1996)). These proceedings clarify which of a user's appropriated rights have also been adjudicated such that they carry enforceable priority dates. *See, e.g.*, *Mike & Jim Kruse P'ship v. Cotten*, 2021 CO 6, ¶ 45, 479 P.3d 893, 903 (interpreting the text of a 1933 decree as excluding a certain water source);

Dill, ¶ 34, 435 P.3d at 1076 (holding that a 1909 decree did not adjudicate water rights in a spring because it lacked the "required indicia of enforceability"); *Select Energy Servs.*, ¶ 17, 394 P.3d at 699 (holding that a 2014 decree limited diversions to a single diversion point). Importantly, such proceedings merely "confirm[] . . . pre-existing rights," and do not affect the water right's place in the priority system. *S. Ute Indian Tribe*, 250 P.3d at 1234 (citing *Groundwater Appropriators of S. Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 26 (Colo. 2003)).

2. Golden's Claims

¶53 Like the water court, we acknowledge that injury to other water rights is an essential inquiry in many water court proceedings, including in the examples Golden cites. *E.g.*, § 37-92-305(3)(a) (requiring approval of a change of water right, implementation of a rotational crop management plan, or a plan for augmentation, "if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right"); § 37-92-301(3)(d), C.R.S. (2023) (requiring an injury inquiry when a water court authorizes an alternate point of groundwater diversion, which could deplete water necessary to satisfy senior appropriators); *Santa Maria Reservoir Co. v. Warner*, 2020 CO 27, ¶ 4, 461 P.3d 478, 481 (explaining how injury can result from a change of water right that does not allow return flows to return to the stream system from which they came); *Burlington Ditch*, 256 P.3d at 661 (discussing how

improper calculations of historical consumptive use during change proceedings can lead to injury). These examples necessarily implicate potential injury because they concern changes to a water right that could affect the distribution of water within a system or deplete the availability of water necessary to satisfy senior appropriators.

¶54 But where a water user's request goes no further than the interpretation of the terms of an existing decree, there is no potential for this type of injury. *Southern Ute Indian Tribe* presented this scenario. There, the applicant ditch companies asked the water court to determine whether the terms of an existing decree included wintertime stock-watering rights. *S. Ute Indian Tribe*, 250 P.3d at 1231. In holding that the water court had jurisdiction to resolve this question under section 37-92-302(1)(a), we explained that the statutory phrase, "determination of a water right," encompasses proceedings, such as the interpretation of an existing decree, that "have as their object" the mere "confirmation of pre-existing rights" and do not result in the assignment of a new priority date. *Id.* at 1234. When such proceedings concern the *implementation* of a water right consistent with an existing decree, that implementation does not diminish the supply a junior appropriator would otherwise enjoy in accordance with their junior priority. Rather, any reduction in supply to the junior appropriator would stem from the senior appropriator's exercise of its water rights pursuant to its senior priority.

Accordingly, we agree with the water court's statement that, in such cases, "an injury analysis . . . would be immaterial to the relief requested." Water Court Order, at 20.

¶55 *Southern Ute Indian Tribe* is not the only case in which we have declined to entertain a party's claims of injury because we concluded they were immaterial. In *City of Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061, 1065, 1068 (Colo. 2010), the City of Englewood ("Englewood") argued that a no-call agreement[11] between the applicant ditch companies and Denver threatened to injure Englewood's water rights by unlawfully changing stream conditions. We rejected Englewood's claim. First, we reasoned that the right to the maintenance of stream conditions existing at the time of a water user's original appropriation "is directly related to the statutory standard for evaluating an application for a change of water right." *Id.* at 1069. In other words, we consider potential injury to other water rights in change applications. *Id.* But the general concept of a call (including the right not to place a call) is not a "change of water right." *Id.* Moreover, the State Engineer evaluates requests for calls based on whether the call will succeed in fulfilling the right of the senior appropriator—not whether the call

[11] "[A] no-call agreement provides that a senior appropriator will not place a call on a particular water right that it holds," thereby "contract[ing] away the right to place a call . . . requesting more water to fulfill the senior right." *City of Englewood*, 235 P.3d at 1068 (emphasis omitted).

will injure others with vested water rights. *Id.* Thus, we explained that "it makes little sense to speak of a right of other appropriators to maintenance of stream conditions based on historical call requests of senior rights." *Id.*

¶56 Viewing the case before us in light of *Southern Ute Indian Tribe* and *City of Englewood*, we hold that the Applicants' request in this proceeding likewise does not require consideration of injury to other rights. The Applicants asked the water court to "confirm that the exercise and operation of the subject water rights under the Protocol are consistent with the Blue River Decree." To the extent resolution of this question requires interpreting the scope of the Blue River Decree, *Southern Ute Indian Tribe* instructs that such proceedings merely confirm preexisting rights and, therefore, cannot injure junior water rights. 250 P.3d at 1234. And, as in *City of Englewood*, evaluating the Protocol for consistency with the underlying Blue River Decree does not depend on the Protocol's potential to cause injury; it turns only on the Protocol's faithfulness to the Blue River Decree.

¶57 For similar reasons, Golden's argument that the Protocol impairs its right to the maintenance of stream conditions that existed under an earlier, alternative administrative scheme is likewise unpersuasive. Like the no-call agreement in *City of Englewood*, whether implementation of the Protocol would alter stream conditions a junior appropriator previously enjoyed is irrelevant to determining whether the Protocol is consistent with the Blue River Decree. Rather, even

changes in stream conditions resulting from the Protocol are not improper so long as they fall within the scope of the parties' rights under the Blue River Decree. *See, e.g.*, *LoPresti v. Brandenburg*, 267 P.3d 1211, 1216–17 (Colo. 2011) (holding that a settlement agreement memorialized in a decree did not improperly approve a change of water right in part because the agreement was consistent with the decree).

¶58 Accordingly, we affirm the water court's conclusion that an injury inquiry was not required in this case and conclude that remand is not appropriate on these grounds. We now turn to the heart of the matter: whether the water court properly concluded that the Protocol is consistent with the Blue River Decree.

C. The Protocol Is Consistent with the Blue River Decree

¶59 Based on the expert reports submitted in support of the parties' summary judgment filings, the water court described four areas[12] in which the Protocol is consistent with the Blue River Decree, focusing on the Protocol's treatment of the United States' water rights in Green Mountain Reservoir and the Cities' decreed ability to make out-of-priority diversions under certain conditions. Golden does

[12] Those areas were, in broad terms: (1) the mechanisms the Protocol outlines for implementing the United States' first fill storage right; (2) how the Protocol maximizes diversions upstream of Green Mountain Reservoir; (3) how the Protocol ensures that the Cities cannot improperly benefit from the United States' more senior priority; and (4) the Protocol's implementation of the Cities' replacement obligations. Water Court Order, at 21–27.

not contest these findings. Instead, it asserts that the Protocol is inconsistent with the Blue River Decree for two alternative reasons. Neither is persuasive.

¶60 First, Golden argues that whether the Protocol is consistent with the Blue River Decree is the wrong inquiry; in Golden's view, we must instead ask what the terms of the Blue River Decree specifically require. But if the terms of the Blue River Decree were sufficiently specific to discern conclusively what they *require*, there would be no need for a separate protocol. Furthermore, we have already held that water courts have the authority to interpret the Blue River Decree to determine whether other actions are consistent with—but not necessarily required by—their terms. *City of Grand Junction*, 960 P.2d at 683 (considering whether a new decree granting Denver a refill right "modif[ies] or conflict[s] with the Blue River Decree"); *see also City & Cnty. of Denver ex rel. Bd. of Water Comm'rs v. Consol. Ditches Co. of Dist. No. 2*, 807 P.2d 23, 34–35 (Colo. 1991) (interpreting the Blue River Decree as "expressly acknowledg[ing]" the legal limitations imposed on Denver's obligations by a separate agreement).

¶61 True, the Protocol is distinguishable from the agreements in these cases inasmuch as it implements the Blue River Decree directly, filling in details not contained in the decree. But if anything, this distinction only reinforces the applicability of the consistency standard; when supplemental documents are necessary to address gaps in a decree, there will rarely—if ever—be only one way

for them to do so. Moreover, the Division 5 Engineer's determination that the Protocol is "administrable" affirms that the Protocol's provisions align with the State Engineer's duty to administer Colorado's waters "in accordance with" applicable law—including the Blue River Decree. § 37-92-501(1), C.R.S. (2023); *see Kenneth M. Good Irrevocable Trust v. Bell*, 759 P.2d 48, 53 (Colo. 1988) ("The state engineer is responsible for the administration and distribution of the waters of this state on the basis of priorities established by *adjudicated decrees*, the Colorado Constitution, statutory and case law, and written orders of the state engineer." (emphasis added)). Whether the Protocol could have accomplished this in a different way that Golden would have preferred is simply irrelevant.

¶62 Second, Golden asserts that the Protocol is inconsistent with the Blue River Decree because it violates the terms of SD-80. Reprising its argument before the water court, Golden claims that the Protocol denies it the "fair" and "equitable" administration of water rights that SD-80 guarantees to water users upstream of Green Mountain Reservoir. As an example of this disparate treatment, Golden explains that while its Vidler rights go unfulfilled, other water users—such as the City Contract Beneficiaries and Upstream Dillon Junior Beneficiaries—reap the benefits of the Blue River Decree's directive to ensure that "as much water as possible [will] be available for upstream rights without impairment of the United States' right to fill Green Mountain Reservoir and to use that Reservoir."

1964 Decree, at 3; *see also* 1955 Final Decree, at 3 (quoting SD-80) ("The [CBT] contemplates the maximum conservation and use of the waters of the Colorado River.").

¶63 But this language, although broad, does not afford protections to *every* existing and potential water user in the Blue River basin. Rather, the Blue River Decree requires that any power or water replacement arrangements the United States enters to permit out-of-priority diversions "be such as will not impair any right of any *beneficiary* under" SD-80. 1964 Decree, at 2 (emphasis added). In turn, SD-80 protects users only to the extent that such protections are consistent with its purpose: to build the CBT. SD-80, at 1.

¶64 Accordingly, SD-80 requires the CBT to be operated in a "fair and efficient" manner that is "equitable to all parties *having interests therein*" — that is, interests in the CBT. *Id.* at 3 (emphasis added). Certain eastern slope users undoubtedly have an interest in the CBT; indeed, as described above, the CBT is a transmountain diversion designed to supplement northeastern Colorado's water supply. *Id.* at 1 ("The [CBT] . . . contemplates the diversion of surplus waters from the headwaters of the Colorado River on the . . . western slope to lands in northeastern Colorado . . . ."). And by directing the construction of Green Mountain Reservoir, as part of the CBT, to provide replacement water for western slope water users, SD-80 makes clear that such users also have interests in the CBT. *Id.* at 3 (stating

that "supplemental construction will be necessary" because "interests dependent" on Colorado River water "exist on both slopes of the Continental Divide"); *City of Grand Junction*, 960 P.2d at 679 ("One of the purposes of the CBT . . . was to store replacement water . . . for use by *western slope interests* to compensate for other Colorado River water diverted to the eastern slope . . . ." (emphasis added)).

¶65 But Golden has no interest in the CBT. It is not an eastern slope user that receives CBT water. Nor is it a western slope water user for which Green Mountain Reservoir stores replacement water. The Upstream Dillon Junior Beneficiaries, by contrast, comprise exclusively western slope water users who, as SD-80 beneficiaries, the Protocol must protect from impairment under the terms of the Blue River Decree itself. Protocol, at 7. That the Protocol protects these users in a "fair" and "equitable" manner, but does not afford the same protections to Golden, is hardly surprising; indeed, this disparity aligns with the terms of the Blue River Decree.

¶66 The Protocol treats the City Contract Beneficiaries differently—for good reason. The City Contract Beneficiaries are not SD-80 beneficiaries the Protocol must protect to stay consistent with the Blue River Decree; rather, the City Contract Beneficiaries benefit from contracts with the Cities under which the Cities commit to replacing water that the City Contract Beneficiaries divert or store upstream of Green Mountain Reservoir. *Id.* at 2–3. Accordingly, depletions

attributable to the City Contract Beneficiaries are counted against the *Cities*' depletions and included within the *Cities'* replacement obligations. *Id.* at 7. In this sense, the City Contract Beneficiaries simply expand the Cities' replacement obligations.

¶67 Ultimately, Golden's attempt to construe the Protocol as inconsistent with the Blue River Decree disguises its central complaint: that administering the Protocol will injure Golden's water rights. Golden may find it more difficult to fulfill its water rights when the Protocol is operating (though the water court made no factual finding to that effect). But as we have already explained, this concern does not implicate legally cognizable injury. What Golden presents is, as the water court put it, "a mere allegation that a water right is not being satisfied." Water Court Order, at 29**.** And such allegations are necessarily "insufficient to uphold an opposition relating to a decreed water right." *Id.* Indeed, as the water court observed, "[t]hat some water rights will not be satisfied is the nature of the prior appropriation system." *Id.*

D. The Protocol's System of Administration Is Consistent with the Prior Appropriation System

¶68 In Golden's view, however, the Protocol is inconsistent with the prior appropriation system itself. Golden describes the Protocol as a "selective subordination agreement" that permits water rights upstream of Green Mountain Reservoir, and junior to the United States' Green Mountain Reservoir rights, to

divert ahead of the United States, excluding only Golden's Vidler rights. We disagree with this characterization.

¶69 In subordination agreements, "the holder of an otherwise senior water right consents to stand in order of priority behind another person or persons holding a junior water right." *Bd. of Cnty. Comm'rs v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 329 n.1 (Colo. 2000), *as modified on denial of reh'g* (Dec. 18, 2000). A selective subordination is a special type of subordination agreement in which a senior water user subordinates their water rights to certain junior water users while denying the same permission to other junior users. *Id.* at 340 n.18. "Courts generally disfavor selective subordination." *Id.* at 341.

¶70 Golden's claim that the Protocol constitutes a series of selective subordination agreements is dubious at best. First, subordination agreements must evince an intent among the parties to change their relative priority status. *See id.* ("[B]y contract, a person can make his or her priority inferior to another, and courts can give legal effect to the senior user's intention to make his priority inferior in this regard."); *City of Englewood*, 235 P.3d at 1068 (concluding that an agreement did not constitute a subordination agreement because it did not "suggest a change in the relative priority status of the parties"). But nothing in the Protocol suggests that the United States intended to subordinate its rights to any others—quite the opposite:

> This operation does not constitute, or result in, a subordination of the water right priority of the 1935 First Fill Storage Right, but allows "as much water as possible to be available for upstream rights without impairment of the United States' right to fill Green Mountain Reservoir and to use that reservoir as provided in" the 1955 Decree and [SD-80], as directed by paragraph 4 of the 1964 Decree, and without impairment of legal calls of downstream water rights.

Protocol, at 20 (quoting 1964 Decree, at 3).

¶71 Furthermore, the water court's factual findings indicate that the Protocol does not contemplate subordination. Instead, the Protocol's "tiered priority date administration scheme" is designed to maximize the water available for upstream rights *without impairing* the United States' rights or allowing the Cities "to inappropriately benefit from the United States' more senior priority water rights." Water Court Order, at 23–24. ~~And, in any event, the other water rights Golden references—including those of the City Contract and Upstream Dillon Junior beneficiaries—are either senior to the Vidler rights or are protected under the Blue River Decree's terms. Therefore, any diminution in supply that would be available to Golden but for the Protocol is a legal consequence of the prior appropriation doctrine—not a violation of that doctrine.~~

¶72 The Protocol is certainly complex. In that sense, it mirrors the Blue River Decree it implements—a decree that prescribes a series of out-of-priority diversions to satisfy the needs of some parties without impeding the senior rights of others. The Protocol accomplishes this using strategies well-known to

Colorado's water rights system. By permitting out-of-priority diversions under the terms of the Blue River Decree, and only to the extent that mechanisms exist to compensate senior water users for the losses those diversions cause, the Protocol hews to the broader goals of prior appropriation: "optimum use, efficient water management, and priority administration." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001), *as modified on denial of reh'g* (Feb. 11, 2002).

E. Procedural Issues

¶73 Finally, we briefly address the parties' procedural arguments.

¶74 Golden argues that the water court erred in granting summary judgment to the United States because whether the Protocol will injure Golden's water rights is a question of material fact. On the one hand, Golden is correct that injury is a question of fact. *See Consol. Mut. Water Co.*, 33 P.3d at 812 ("The issue of injurious effect is inherently fact specific and one for which we have always required factual findings."). But the core issue before the water court—whether the Protocol is consistent with the Blue River Decree—is a question of law that, as we have already discussed, did not demand factual findings on the question of injury.

¶75 Even considering Golden's claim that the water court improperly denied Golden the opportunity to present evidence of injury, we perceive no error. Golden had an opportunity to submit such evidence in its response to the United States' motion for summary judgment. But Golden failed to do more than simply

identify features of the Protocol—such as the out-of-priority diversions it allows—that Golden believed *might* result in injury. Such speculation fails to "includ[e] facts that tend to prove or disprove the allegations made in the motion for summary judgment" and is, therefore, "insufficient to give rise to genuine issues of fact." *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007) (citing *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978)).

¶76 Nevertheless, Golden argues that the water court erred by assuming that Golden's responsive motion, and the expert report that accompanied it, were Golden's only evidence of injury. However, the fact that Golden may have planned to present other evidence at a trial is irrelevant. The water court was obligated to consider only the evidence that Golden submitted with its responsive motion. *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11, 304 P.3d 239, 244 ("If the non-moving party cannot produce enough evidence to establish a triable issue, then the moving party is entitled to summary judgment as a matter of law.").

¶77 Finally, Golden's briefing raises concerns that appeared, for the first time, in Golden's motion for reconsideration. These include claims that Denver's Williams Fork exchange operations under the Protocol are inconsistent with the Blue River Decree and that the Protocol is contrary to the State Engineer's General Administration Guidelines for Reservoirs ("Reservoir Guidelines"). Applicants argue that this court need not consider such arguments because they are not based

on "newly discovered evidence," the sole exception to the general principle that parties cannot present new arguments or additional evidence in a motion for reconsideration. *McDonald v. Zions First Nat'l Bank, N.A.*, 2015 COA 29, ¶ 86, 348 P.3d 957, 969; *see also Rinker v. Colina-Lee*, 2019 COA 45, ¶ 25, 452 P.3d 161, 167 ("[P]resentation of new arguments in a motion for reconsideration is improper." (citing *Ogunwo v. Am. Nat'l Ins. Co.*, 936 P.2d 606, 611 (Colo. App. 1997))).

¶78 We agree. "Newly discovered evidence" is evidence that (1) "could not have been previously discovered by the exercise of reasonable diligence"; (2) "is material"; and (3) "if admitted," would have led to a different result. *McDonald*, ¶ 87, 348 P.3d at 969. The evidence Golden presented concerning Denver's Williams Fork exchanges and the Protocol's consistency with the Reservoir Guidelines relied entirely on documents, such as the Applicants' expert reports and the Protocol and Reservoir Guidelines themselves, that were available to Golden when it submitted its response to the United States' motion.[13] And to the

[13] Even if Golden had raised these arguments earlier, we would not find them persuasive. We have already recognized that the Blue River Decree "allows Denver to operate the Blue River system ahead of Green Mountain Reservoir by exchange, using water stored in the Williams Fork Reservoir as a replacement source." *Consol. Ditches No. 2*, ¶ 22, 444 P.3d at 288. And even assuming *arguendo* that the Protocol is inconsistent with the Reservoir Guidelines, we note that the Blue River Decree – not the Reservoir Guidelines – is the relevant source of law. *See* Reservoir Guidelines, at 2 ("These Guidelines should not be relied upon for administrative or legal authority . . . .").

extent that other aspects of Golden's motion for reconsideration depend on affidavits and declarations Golden could not have collected until after the deadline to submit its responsive motion, those materials are related only to Golden's claims of injury.

¶79 Our resolution of these procedural arguments flows directly from our rejection of Golden's chief complaint: that the water court should have reached the merits of Golden's injury claim. Because we conclude that injury is immaterial in this case, we need not consider Golden's additional, injury-related evidence.[14]

IV. Conclusion

¶80 The water court did not err in declining to conduct an injury inquiry where, as here, the Applicants sought an order interpreting an existing decree. We further agree with the water court that the Protocol is consistent with the Blue River Decree. We reject Golden's contention that the Protocol violates Colorado's prior appropriation system, as well as its procedural arguments.

¶81 Accordingly, we affirm the water court's entry of summary judgment in favor of the United States and its direction to the State Engineer to administer and carry out the Blue River Decree in accordance with the Protocol.

[14] We offer no opinion on whether Golden could assert claims of injury to its water rights in another context or proceeding.