ADVANCE SHEET HEADNOTE
February 10, 2025
AS MODIFIED APRIL 21, 2025

2025 CO 5M

No. 23SA154, *Franktown Citizens Coalition II, Inc. v. Indep. Water & Sanitation Dist.* —Not Nontributary Groundwater—Denver Basin—Augmentation Plan—Anti-Speculation Doctrine—Denial of Motion for Summary Judgment—Injury.

This case concerns Independence Water and Sanitation District's ("Independence") application to amend its augmentation plan for not-nontributary groundwater in the Denver Basin by adding uses for the augmented water to the plan. Franktown Citizens Coalition II, Inc., and West Elbert County Well Users Association ("Opposers") opposed Independence's application, arguing that the proposed amendment to the augmentation plan did not comply with the anti-speculation doctrine. The water court for Water Division 1 concluded that the anti-speculation doctrine was inapplicable and issued a final judgment and decree approving Independence's application.

The supreme court holds that the water court did not err in declining to apply the anti-speculation doctrine to Independence's application to amend its

augmentation plan for not-nontributary groundwater in the Denver Basin for two reasons. First, applying the anti-speculation doctrine to applications to obtain or amend an augmentation plan would not make sense because the anti-speculation doctrine does not advance the purpose of an augmentation plan: to permit out-of-priority diversions provided that diverters demonstrate that they will not injure existing water rights. Second, in reviewing an application to obtain or amend an augmentation plan, the water court need only determine whether the plan will injuriously affect existing water rights. Answering this question does not require applying the anti-speculation doctrine.

Because the water court properly found that Independence's amended augmentation plan will not result in injury, the supreme court affirms the water court's judgment and decree.

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

2025 CO 5M

Supreme Court Case No. 23SA154
Appeal from the District Court
District Court, Water Division 1, Case No. 19CW3220
Honorable Todd L. Taylor, Water Judge

Concerning the Application for Amendment of an Augmentation Plan of Independence Water and Sanitation District in Elbert County.

Opposers-Appellants:

Franktown Citizens Coalition II, Inc. and West Elbert County Well Users Association,

v.

Applicant-Appellee:

Independence Water and Sanitation District,

and

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

Division 1 Engineer.

Judgment Affirmed
en banc
February 10, 2025

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

April 21, 2025

Attorneys for Opposers-Appellants:
Monson, Cummins, Shohet & Farr, LLC
David M. Shohet
Colorado Springs, Colorado

Attorneys for Applicant-Appellee:
Hayes Poznanovic Korver LLC
David S. Hayes
Matthew S. Poznanovic
Eric K. Trout
Denver, Colorado

Attorneys for Division 1 Engineer:
Philip J. Weiser, Attorney General
Derek L. Turner, First Assistant Attorney General
Will Allen, Senior Assistant Attorney General
Denver, Colorado

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

JUSTICE GABRIEL concurred in the judgment.

CHIEF JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 Independence Water and Sanitation District ("Independence"), a quasi-municipal special district, intends to provide water services to a proposed 920-home residential development located on a 1,012-acre property in Elbert County, Colorado (the "Subject Property"). To do so, it will withdraw groundwater underlying the Subject Property from the Denver Basin[1] pursuant to a 2006 decree. *See generally In re Application for Water Rts. & an Augmentation Plan of Grant Bentley in Elbert Cnty.*, No. 06CW59 (Dist. Ct., Water Div. 1, Sept. 5, 2006) (Findings of Fact, Conclusions of Law, Ruling of the Referee, Judgment and Decree, in the Nontributary Lower Dawson, Denver, Arapahoe, and Laramie-Fox Hills and the Not Nontributary Upper Dawson Aquifers) ("2006 Decree"). The 2006 Decree established the amounts of nontributary and not-nontributary groundwater[2]

---

[1] The Denver Basin encompasses those portions of the Dawson (including the Upper and Lower portions), Denver, Arapahoe, and Laramie-Fox Hills aquifers that underlie an approximately 6,700-square-mile region "stretching from Greeley on the north, Colorado Springs on the south, the front-range hogback on the west, and Limon on the east." *Parker Water & Sanitation Dist. v. Rein*, 2024 CO 71M, ¶ 10, 559 P.3d 217, 223 (quoting *Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 72 (Colo. 2003)).

[2] "Nontributary groundwater" refers to groundwater "the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream . . . at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal." § 37-90-103(10.5), C.R.S. (2024). Not-nontributary groundwater, by contrast, describes groundwater in the Denver Basin "the withdrawal of which *will*, within one hundred years, deplete the flow of a natural

available for withdrawal from the Denver Basin's four aquifers and identified a host of uses for the water. *Id.* at 2. It also approved an augmentation plan permitting the use of a portion of the decreed not-nontributary groundwater from the Upper Dawson aquifer for two of those uses on the Subject Property. *Id.* at 4. This case concerns Independence's application to amend the augmentation plan in the 2006 Decree to permit the specified portion of not-nontributary groundwater to be used for *all* of Independence's decreed uses (plus municipal use) and to allow such uses both on and off the Subject Property.

¶2 Independence's application encountered considerable opposition before the Division 1 water court. As relevant here, Franktown Citizens Coalition II, Inc. ("Franktown") and West Elbert County Well Users Association (collectively, "Opposers") moved for summary judgment, arguing that the water court could

---

stream . . . at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal." § 37-90-103(10.7) (emphasis added); *see also Water Rts. of Park Cnty. Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262, 274–75 (Colo. 1999) (clarifying that not-nontributary groundwater exists only in the Denver Basin), *as modified on denial of reh'g* (Oct. 4, 1999). Both nontributary and not-nontributary groundwater are, by definition, nondesignated groundwater. § 37-90-103(10.5), (10.7). "Designated groundwater" is groundwater that "in its natural course would not be available to and required for the fulfillment of decreed surface rights" or that is located "in areas not adjacent to a continuously flowing natural stream" where groundwater is the "principal" water source. § 37-90-103(6)(a). Though designated groundwater exists in the Denver Basin, *see N. Kiowa-Bijou*, 77 P.3d at 77–78, none of the groundwater at issue here is designated. Therefore, our discussions of groundwater in this opinion refer to nondesignated groundwater, unless otherwise stated.

not approve Independence's application to amend its augmentation plan because it could not make the threshold showing of non-speculative intent required by the anti-speculation doctrine. The anti-speculation doctrine is a well-established principle of Colorado water law that "precludes the appropriator who does not intend to put water to use for [their] own benefit, and has no contractual or agency relationship with one who does, from obtaining a water use right." *Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 78–79 (Colo. 2003). Opposers contended that Independence could not satisfy the anti-speculation doctrine because Independence did not have specific plans to put a specific amount of the augmented water to certain proposed uses.

¶3 In response, Independence claimed that under this court's decision in *East Cherry Creek Valley Water & Sanitation District v. Rangeview Metropolitan District*, 109 P.3d 154 (Colo. 2005), the water court had no authority to apply the anti-speculation doctrine when reviewing an application to amend an augmentation plan for not-nontributary groundwater. Independence argued that such authority lay instead with the State Engineer's Office ("SEO"), which applies the anti-speculation doctrine as part of its well permitting process.

¶4 The water court denied Opposers' motion, agreeing with Independence's understanding of *East Cherry Creek* and concluding that the anti-speculation doctrine did not apply to Independence's application. *In re Application for Amend.*

of an Augmentation Plan of Indep. Water & Sanitation Dist., No. 19CW3220, at 5–7 (Dist. Ct., Water Div. 1, Mar. 6, 2023) ("March 6 Order"). The water court then entered a final decree approving Independence's proposed amendment to its augmentation plan. *In re Application for Amend. of an Augmentation Plan of Indep. Water & Sanitation Dist.*, No. 19CW3220, at 6 (Dist. Ct., Water Div. 1, May 2, 2023) ("Final Decree"). The Final Decree recited the holding in *East Cherry Creek* that water courts may not apply the anti-speculation doctrine when reviewing an application for a determination of rights in nondesignated, nontributary groundwater. *Id.* (citing *E. Cherry Creek*, 109 P.3d at 158). This reference in the Final Decree, read in conjunction with the water court's March 6 Order, apparently implied that the same rule applies in the context of *not*-nontributary groundwater. *Id.*

¶5 Opposers appeal the Final Decree, asserting that the anti-speculation doctrine applies to Independence's application to amend its augmentation plan and that the record unambiguously demonstrates that Independence has not satisfied that doctrine. Specifically, Opposers argue that *East Cherry Creek* recognized a narrow exception to the anti-speculation doctrine that applies only to *determinations of rights* in *nontributary* Denver Basin groundwater and that this exception does not extend to *applications to amend an augmentation plan* for *not*-nontributary groundwater. As a result, Opposers claim, the anti-speculation

doctrine does apply to Independence's proposed amendment to its augmentation plan, and the water court erred in failing to apply it. Furthermore, because Independence has never asserted a non-speculative intent with respect to certain uses of the augmented water in its proposed amendment to its augmentation plan, Opposers contend that this court should not only reverse the water court's relevant conclusions of law but also strike what Opposers describe as Independence's speculative uses from the amended augmentation plan.

¶6 Independence, in contrast, submits that the reasoning in *East Cherry Creek* applies with equal force to the not-nontributary groundwater at issue here. In other words, Independence argues that both nontributary and not-nontributary groundwater are allocated on the basis of land ownership; accordingly, Independence maintains, landowners must generally satisfy the same requirements for obtaining a determination of rights in either nontributary or not-nontributary groundwater. Therefore, because *East Cherry Creek* precludes a water court from applying the anti-speculation doctrine to applications for determinations of rights in *non*tributary groundwater, the holding in that case necessarily precludes a water court from applying the anti-speculation doctrine to applications for determinations of rights in *not*-nontributary groundwater. Furthermore, Independence argues, because applications for determinations of rights in not-nontributary groundwater are "inexorably intertwined" with

applications to amend an augmentation plan for not-nontributary groundwater, *East Cherry Creek* forecloses application of the anti-speculation doctrine to applications to amend an augmentation plan for not-nontributary groundwater. Finally, Independence contends that the anti-speculation doctrine plays no role in a water court's review of augmentation plans in any event because such a review focuses solely on the question of potential injury. For these reasons, Independence asks that we adopt the water court's reasoning and affirm the Final Decree.

¶7 We affirm the water court's order, albeit on somewhat different grounds.

¶8 We begin by rejecting the water court's and Independence's reliance on *East Cherry Creek* because it does not resolve the narrow legal question Opposers present: whether the anti-speculation doctrine applies to an application to amend an augmentation plan for not-nontributary groundwater. Instead, to answer this question, we turn to the statutes governing the anti-speculation doctrine and augmentation plans, as well as our well-developed case law in both areas.

¶9 Considering these authorities, we hold that the water court did not err in declining to apply the anti-speculation doctrine to Independence's application to amend its augmentation plan for not-nontributary groundwater. We reach this conclusion for two related reasons.

¶10 First, because the anti-speculation doctrine and augmentation plans serve different purposes, it does not make sense for the water court to apply the doctrine

as part of its review of an application to obtain or amend an augmentation plan. The anti-speculation doctrine exists to protect the integrity of the prior appropriation system by preventing would-be appropriators from hoarding water rather than putting it to beneficial use. By contrast, augmentation plans provide a mechanism to further Colorado's policy of maximum use by allowing out-of-priority diversions of water that has already been appropriated, provided that such diversions do not result in injury to other water users. While the anti-speculation doctrine protects the future of the prior appropriation system, augmentation plans inject flexibility into that system without injuring existing water rights.

¶11 Second, the only question relevant to a water court's review of an augmentation plan (or an amendment thereto) is whether the plan will cause injury to existing water rights. While this inquiry necessarily leads the water court to consider a number of factors—including whether the applicant has put forward a proposed beneficial use—the sole purpose of evaluating those factors is to identify potential injury to existing water rights. The anti-speculation doctrine plays no role in this injury analysis.

¶12 Here, the water court found that Independence's amended augmentation plan will not result in injury to existing water rights. We perceive no clear error

in this finding. Therefore, we affirm the water court's approval of Independence's proposed amendment to its augmentation plan.[3]

I. Factual and Procedural Background

¶13 We begin by explaining the relevant terms of the 2006 Decree. We then describe Independence's application to amend the augmentation plan that was initially approved as part of the 2006 Decree. Finally, we trace the water court proceedings that brought this case before us.

A. The Initial Decree and Augmentation Plan

¶14 Under the 2006 Decree obtained by Independence's predecessor-in-interest, Independence has 1,269 acre-feet per year of nontributary groundwater available for withdrawal from the Lower Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers. 2006 Decree, at 2. Relevant here, the 2006 Decree also includes 288.3 acre-feet per year of not-nontributary groundwater available for withdrawal from the Upper Dawson aquifer. *Id.* Both the nontributary and the not-nontributary groundwater are decreed for "use[], reuse[] and successive[] use[]" for "domestic, industrial, commercial, irrigation, stock watering, fire protection, and exchange and augmentation purposes, both on and off the Subject Property." *Id.*

[3] To the extent the Final Decree implied that water courts may not apply the anti-speculation doctrine when determining a Denver Basin landowner's rights in not-nontributary groundwater, we express no opinion on that issue.

¶15 In addition, the 2006 Decree approved a statutorily required augmentation plan for the not-nontributary groundwater. *See* § 37-90-137(9)(c.5)(I)(A), C.R.S. (2024) (requiring "judicial approval of plans for augmentation . . . prior to the use of" not-nontributary groundwater). The augmentation plan permits withdrawals of up to seventy-five of the 288.3 acre-feet per year of not-nontributary groundwater decreed to be available. 2006 Decree, at 4. Notably, the plan lists only "inhouse and irrigation use on the Subject Property" as uses for this augmented water. *Id.* Finally, the plan designates "[r]eturn flows from either or both inhouse and irrigation use" as the sole source of water to replace depletions from the permitted withdrawals during pumping and reserves a portion of the decreed nontributary groundwater to replace depletions after pumping. *Id.* at 5.

B. Independence's Application to Amend the 2006 Augmentation Plan

¶16 Upon acquiring the interests described in the 2006 Decree, Independence applied for an amendment to the augmentation plan. The proposed amendment would not alter the 2006 Decree's limit on the withdrawal of not-nontributary groundwater to seventy-five acre-feet per year. However, it expands the list of uses included in the augmentation plan by incorporating all the uses adjudicated

in the 2006 Decree—namely, "domestic, municipal,[4] industrial, commercial, irrigation, stock watering, fire protection, and exchange and augmentation purposes, both on and off the Subject Property," in addition to the inhouse and irrigation uses mentioned in the original augmentation plan. Independence's application did not specify how much (if any) of the seventy-five acre feet it would allocate to each use. Nor did it describe a plan to use any amount of this water off the Subject Property.

¶17 In accordance with section 37-92-302(4), C.R.S. (2024), the water referee for Division 1 consulted with the Division 1 Engineer, Corey DeAngelis, regarding Independence's application. In a summary of their consultation, DeAngelis requested that the water court require Independence to "document that the claimed return flows from septic systems and irrigation continue to cover the during-pumping stream depletions in time, location and amount." And, to the

[4] The 2006 Decree does not mention municipal use, either in the list of decreed uses or in the augmentation plan. *See* 2006 Decree, at 2, 4. The water court assumed that Independence's application either erroneously included municipal uses, or that Independence had withdrawn that aspect of its proposal. However, Independence's answer brief before this court clarifies that its application sought to add municipal use to both its list of decreed uses and its augmentation plan. Nevertheless, the Final Decree includes municipal use only in the amended augmentation plan; it does not add municipal use to the list of decreed uses. Final Decree, at 1–2. Opposers do not argue that the absence of municipal use from Independence's list of decreed uses precludes Independence from putting its not-nontributary groundwater to municipal use in accordance with its amended augmentation plan. Therefore, we do not consider this question here.

extent that Independence could not demonstrate sufficient return flows, DeAngelis stated that Independence "must be required to pump water directly into the stream in the amount that has not been replaced by return flows."

¶18 Numerous individuals and entities from neighboring communities, including Opposers, filed statements of opposition. Later, several opposers submitted comments on initial and subsequent versions of the referee's proposed ruling. Opposers' statements and comments raised multiple concerns, including that Independence's application violated the anti-speculation doctrine.

¶19 The referee's final ruling, issued in July 2021, did not address Opposers' concerns. Accordingly, Opposers filed protests reiterating, among other things, that Independence's application did not comply with the anti-speculation doctrine. Shortly thereafter, the water court set the case for a five-day trial.

¶20 During discovery, Franktown submitted interrogatories to Independence requesting that Independence provide the "estimated annual amount of water" Independence would dedicate to each of its proposed new uses of the augmented water, as well as the locations in which it proposed to exercise those uses. Viewing these interrogatories as related to Franktown's claims under the anti-speculation doctrine, Independence responded that it was not required to make a threshold showing of non-speculative use under this court's decision in *East Cherry Creek*. Independence nevertheless provided estimates of its annual municipal and

commercial demands.[5] Notably, Independence indicated that it had "no specific plans" to use the augmented water for domestic, industrial, exchange, or stock-watering purposes. Similarly, Independence stated that it had no specific plans to use its not-nontributary groundwater for augmentation purposes other than those covered in the original decree nor to use the augmented water for *any* purpose in "any location other than the Subject Property." Instead, Independence explained that it "may need to put" that water to any of its proposed uses to satisfy its "future water obligations."

C. Opposers' Motion for Summary Judgment

¶21 Following discovery, Opposers moved for summary judgment pursuant to C.R.C.P. 56, arguing that the anti-speculation doctrine applies to an application to amend an augmentation plan to cover new uses for not-nontributary groundwater. In Opposers' view, Independence's discovery responses indisputably showed that Independence could not make the threshold showing of non-speculative intent required by the anti-speculation doctrine with respect to its proposal to add domestic, industrial, and stock-watering uses to its augmentation plan. Nor could Independence make a showing of non-speculative intent with

[5] Specifically, Independence predicted that it would need 0.84 acre-feet per year to serve a future community clubhouse, representing both a municipal and a commercial use. In addition, it estimated that it would need 7.59 acre-feet per year for irrigation, which it listed as a municipal use.

respect to its proposal to add any use off the Subject Property. Accordingly, Opposers asked the water court to dismiss Independence's application with respect to these uses.[6]

¶22 In its response, Independence asserted that *East Cherry Creek* precludes a water court from applying the anti-speculation doctrine to determinations of rights in Denver Basin groundwater, whether nontributary or not-nontributary. In *East Cherry Creek*, this court considered whether water courts must apply the anti-speculation doctrine when adjudicating a Denver Basin landowner's application for a determination of nontributary groundwater rights. 109 P.3d at 157. We held that water courts may not apply the anti-speculation doctrine when determining Denver Basin nontributary groundwater rights because the General Assembly reserved anti-speculation review for the SEO's well-permitting process. *Id.* at 158. Independence argued that this holding in *East Cherry Creek* necessarily prohibits a water court from applying the anti-speculation doctrine to a

[6] Opposers have not challenged the in-house, irrigation, augmentation, or exchange uses to the extent that they were already covered by the augmentation plan as approved under the 2006 Decree. Nor have they challenged the addition of municipal or commercial uses to the extent that Independence's discovery responses detailed a specific plan with respect to those uses. They also have not challenged Independence's proposal to add a fire protection use. Accordingly, this case concerns only Independence's proposal to add previously decreed domestic, industrial, and stock-watering uses to its existing augmentation plan, as well as any use of augmented water off the Subject Property.

determination of rights in not-nontributary groundwater because both not-nontributary and nontributary groundwater are allocated on the basis of land ownership. Therefore, Independence maintained, a water court is likewise prohibited from applying the anti-speculation doctrine to an application for an augmentation plan for not-nontributary groundwater (or an amendment to such an augmentation plan). Independence further contended that the anti-speculation doctrine has no place in a water court's review of an augmentation plan in any event because such a review considers only whether implementation of the plan will injuriously affect existing water rights.

¶23 The water court agreed with Independence. March 6 Order, at 1**.** It, too, read *East Cherry Creek* as precluding a water court from applying the anti-speculation doctrine to a determination of rights in not-nontributary groundwater. *Id.* at 4–5. The water court reasoned that because landowners have a statutory right to adjudicate their right to use Denver Basin groundwater for future, undetermined uses, water courts performing such adjudications may not apply the anti-speculation doctrine as part of their review. *Id.* Instead, the water court explained, anti-speculation review occurs only when the SEO considers an application for a well permit which, if successful, authorizes Denver Basin landowners to construct a well and, therefore, to actually exercise their adjudicated rights. *Id.*

¶24 The water court noted that, in this case, Independence's predecessor-in-interest had already adjudicated the rights in the 2006 Decree. *Id.* at 6. Therefore, Independence had a vested right to apply its not-nontributary groundwater to *all* uses listed in the 2006 Decree, including all the uses Independence sought to add to the 2006 augmentation plan. *Id.* The only question for the water court, then, was whether Independence's proposed amended augmentation plan would continue to avoid injury to other water users. *Id.* Accordingly, the water court denied Opposers' motion and concluded that, as a matter of law, the anti-speculation doctrine did not apply to Independence's application. *Id.* at 7.

D. The Water Court's Final Decree

¶25 Following the March 6 Order, Independence and Opposers stipulated to the entry of a final decree consistent with the water court's order. However, Opposers preserved their right to appeal the water court's conclusion that the anti-speculation doctrine did not apply to Independence's application to amend its augmentation plan.

¶26 The water court accepted the parties' stipulations, vacated the trial date, and entered a final decree. *See generally* Final Decree. The Final Decree amends Independence's augmentation plan in accordance with Independence's proposal, confirming that Independence may "use, reuse, and successive[ly] use" seventy-five acre-feet of its not-nontributary water "for in-house, municipal, domestic,

industrial, commercial, irrigation, stock watering, fire protection, and exchange and augmentation purposes, on and off the Subject Property." *Id.* at 2. The plan continues to identify return flows as a means of replacing depletions associated with these withdrawals. *Id.* at 3. However, in addition to return flows, and consistent with the summary of consultation prepared by Division Engineer DeAngelis, the plan requires Independence to directly release nontributary groundwater to the potentially affected surface streams if Independence's return flows prove inadequate to replace all depletions. *Id.* Finally, the plan includes provisions specifying how Independence will replace post-pumping depletions. *Id.* at 3–4; *see also Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1115 (Colo. 1990) (requiring that augmentation plans for not-nontributary groundwater provide for post-pumping depletions).

¶27 The Final Decree also includes findings of fact and conclusions of law. As relevant here, the water court found that Independence's augmentation plan would not injuriously affect vested water rights or decreed conditional rights. Final Decree, at 5. In addition, citing *East Cherry Creek*, 109 P.3d at 158, the water court observed that, as a matter of law, the anti-speculation doctrine does not apply to judicial determinations of nondesignated, nontributary groundwater. Final Decree, at 6. Instead, the water court explained, the anti-speculation doctrine is "applied by the [SEO] during the well permitting process." *Id.* Although the

water court did not expressly hold that the anti-speculation doctrine does not apply to judicial determinations of *not*-nontributary groundwater, the Final Decree implied as much. *See id.*

¶28 Similarly, the water court did not expressly conclude that the anti-speculation doctrine does not apply to an application to amend an augmentation plan for not-nontributary groundwater. *See id.* However, it did conclude that "an augmentation plan is intended to prevent injury to owners or users of surface water or tributary groundwater" and that, because Independence's amended augmentation plan "will not injuriously affect" such water rights, "it shall be approved." *Id.* Accordingly, the water court approved Independence's amended augmentation plan consistent with Independence's proposal and without performing an anti-speculation analysis. *Id.*

¶29 Opposers appealed the Final Decree.

II. Standard of Review

¶30 We review a water court's conclusions of law de novo. *Dill v. Yamasaki Ring, LLC*, 2019 CO 14, ¶ 23, 435 P.3d 1067, 1074. In contrast, "[w]e accept the water court's factual findings on appeal unless they are so clearly erroneous as to find no support in the record." *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 660 (Colo. 2011), *as modified on denial of reh'g* (June 20, 2011).

¶31 Opposers have made clear that they are appealing the Final Decree—indisputably a "judgment and decree" subject to our review. C.A.R. 1(a)(2). We acknowledge, however, that the Final Decree does not expressly conclude that a water court may not apply the anti-speculation doctrine in evaluating an application to amend an augmentation plan for the use of not-nontributary groundwater. Further, we recognize that to the extent the water court's order denying Opposers' motion for summary judgment does reach this conclusion, orders denying summary judgment are usually "unappealable interlocutory ruling[s]." *Manuel v. Fort Collins Newspapers, Inc.*, 631 P.2d 1114, 1116 (Colo. 1981).

¶32 We do not view the absence from the Final Decree of an express conclusion regarding the applicability of the anti-speculation doctrine to an application to amend an augmentation plan as a barrier to our review. The Final Decree approved Independence's amendment to its augmentation plan in full without applying the anti-speculation doctrine based, at least in part, on the water court's order denying Opposers' motion for summary judgment. Final Decree, at 6. In addition, the Final Decree specifically reflected the water court's finding that the amended augmentation plan would not cause injury to vested water rights or decreed conditional rights. *Id.* at 5. Therefore, the Final Decree fully captures the issues raised in this appeal.

III. Analysis

¶33 Because the heart of the parties' dispute is their diverging interpretations of *East Cherry Creek*, we begin with a discussion of that case and the parties' arguments concerning it. Ultimately, however, we conclude that *East Cherry Creek* does not answer the narrow legal question before us: whether the anti-speculation doctrine applies to a Denver Basin landowner's application to amend an augmentation plan for not-nontributary groundwater. To resolve that question, we consider the principles underlying the anti-speculation doctrine and the concept and requirements of augmentation plans. We hold that the water court did not err in declining to apply the anti-speculation doctrine to Independence's application to amend its augmentation plan for not-nontributary groundwater. Accordingly, we affirm the water court's judgment and decree approving Independence's amended augmentation plan.

A. *East Cherry Creek* Does Not Resolve Whether the Anti-Speculation Doctrine Applies to Independence's Application

¶34 *East Cherry Creek* concerned nontributary groundwater in the Denver Basin. 109 P.3d at 157. To provide necessary context for our discussion of *East Cherry Creek*, we briefly review the legal framework governing Denver Basin groundwater. We then discuss *East Cherry Creek*'s holding, present the parties'

conflicting views of that holding, and, finally, explain why *East Cherry Creek* does not govern our decision today.

1. Denver Basin Groundwater

¶35 The Denver Basin encompasses portions of the Dawson (including Upper and Lower portions), Denver, Arapahoe, and Laramie-Fox Hills aquifers that underlie an approximately 6,700-square-mile region covering much of the Front Range. *Parker Water & Sanitation Dist. v. Rein*, 2024 CO 71M, ¶ 10, 559 P.3d 217, 223. Though groundwater in most of Colorado is presumed to be tributary and, therefore, subject to the prior appropriation system, *N. Kiowa-Bijou*, 77 P.3d at 70, the General Assembly has distinguished Denver Basin groundwater from other groundwater in Colorado for two reasons, § 37-90-103(10.5), C.R.S. (2024). First, Denver Basin groundwater carries immense economic importance relative to its de minimis impact on surface streams. *Id.* Second, it is feasible to account for those de minimis impacts by replacing the limited surface water depletions associated with pumping from the Denver Basin. *Id.*; *Water Rts. of Park Cnty. Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262, 266 (Colo. 1999), *as modified on denial of reh'g* (Oct. 4, 1999).

¶36 For these reasons, the General Assembly crafted a classification and administration scheme that is unique to the Denver Basin. *N. Kiowa-Bijou*, 77 P.3d at 73 n.19. Specifically, Denver Basin groundwater is divided into two categories:

(1) nontributary groundwater, defined, like nontributary groundwater in other parts of Colorado, as groundwater "the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream . . . at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal," § 37-90-103(10.5). *But see Bargas*, 986 P.2d at 265, 267 (explaining the hydrostatic pressure assumption, which applies only when determining whether Denver Basin groundwater is nontributary); and (2) not-nontributary groundwater, which exists only in the Denver Basin and is defined as groundwater that does not meet the definition of nontributary groundwater because withdrawing it "*will*, within one hundred years, deplete the flow of a natural stream . . . at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal," § 37-90-103(10.7) (emphasis added); *see also Bargas*, 986 P.2d at 274–75 (clarifying that not-nontributary groundwater is statutorily limited to the Denver Basin).

¶37 Nontributary groundwater throughout Colorado is not allocated under the prior appropriation system, but rather "upon the basis of ownership of the overlying land." § 37-90-102(2), C.R.S. (2024); *see also Parker*, ¶ 21, 559 P.3d at 227. This statutory scheme confers upon landowners an inchoate right to control and use the nontributary groundwater beneath their land that vests when the SEO issues a well permit or when the water court issues a decree determining the

landowner's rights in the underlying groundwater. *Parker*, ¶¶ 19, 21, 559 P.3d at 227; *N. Kiowa-Bijou*, 77 P.3d at 71–72. Not-nontributary groundwater is also "administered on the basis of land ownership . . . ." *N. Kiowa-Bijou*, 77 P.3d at 74. Unlike nontributary groundwater, however, Denver Basin landowners must obtain "judicial approval of plans for augmentation . . . prior to the use of [their not-nontributary] groundwater." § 37-90-137(9)(c.5)(I)(A).

2. *East Cherry Creek*

¶38 In *East Cherry Creek*, we were asked to decide whether water courts must apply the anti-speculation doctrine as part of adjudicating a Denver Basin landowner's application for a determination of rights in nontributary groundwater. 109 P.3d at 157. We held that water courts may not apply the doctrine in this context. *Id.* at 158. We began by explaining that section 37-90-137(6) allows Denver Basin landowners to commence adjudication proceedings "at any time" to seek a determination of rights "not only for existing, but also for future, uses." *E. Cherry Creek*, 109 P.3d at 157. Thus, in contrast to a conditional use right—the context in which we first announced the anti-speculation doctrine, *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 569 (Colo. 1979)—a determination of rights in nontributary groundwater neither requires applicants to present a date by which they will begin a withdrawal project nor to show reasonable diligence towards completing such a

project. *E. Cherry Creek*, 109 P.3d at 157. Allowing a water court to apply the anti-speculation doctrine at the adjudication stage would, therefore, "thwart a clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them." *Id.* at 158.

¶39 Nevertheless, we continued, "the legislature has also made clear . . . that nontributary ground water may be withdrawn solely for beneficial uses." *Id.* To satisfy this condition, we explained that the legislature requires a Denver Basin landowner who seeks to use their nontributary groundwater to obtain a permit from the SEO. *Id.* Under that permitting scheme, the SEO may issue a permit authorizing a Denver Basin landowner to construct a well only if that landowner demonstrates that the nontributary groundwater will be put to a beneficial use. *Id.*; *see also* § 37-90-137(1)(b)(II) (requiring that permit applicants specify their "proposed beneficial use"); § 37-90-137(4)(a) (clarifying that the permit requirements in sections 37-90-137(1) and (2) apply to permits for nontributary and not-nontributary groundwater).

¶40 Accordingly, we held that the legislature established "a clear demarcation between," on the one hand, "the determination of available water underlying particular lands," and on the other, "the regulation of its withdrawal and use." *E. Cherry Creek*, 109 P.3d at 158. Because the legislature delegated the latter to the SEO, we concluded that the legislature directed the SEO to apply the anti-

speculation doctrine as part of its permitting process, thereby precluding water courts from applying the doctrine when adjudicating rights in nontributary groundwater. *Id.*

3. The Parties' Arguments Concerning *East Cherry Creek*

¶41 Opposers construe *East Cherry Creek* as announcing a "limited exception" to the anti-speculation doctrine that applies only to *determinations of rights* in *nontributary* Denver Basin groundwater. Thus, they argue, *East Cherry Creek* has no bearing on whether water courts may apply the anti-speculation doctrine in reviewing an *application to amend an augmentation plan* for *not-nontributary groundwater*. In the context of such applications, Opposers submit that because only the water court can approve an augmentation plan (or an amendment thereto), application of the anti-speculation doctrine cannot be relegated to the SEO as it is in the context of a determination of rights in nontributary groundwater under *East Cherry Creek*. Rather, Opposers maintain, only the water court has the authority to apply the anti-speculation doctrine here because only the water court has the authority to review an augmentation plan.

¶42 Independence, in contrast, contends that a water court may not apply the anti-speculation doctrine to an application to amend an augmentation plan for not-nontributary groundwater for three reasons.

¶43 First, Independence argues that *East Cherry Creek* applies with equal force to determinations of rights in *not*-nontributary groundwater because, like nontributary groundwater, not-nontributary groundwater is allocated on the basis of land ownership for purposes of any present or future use. Accordingly, Independence maintains, the same factors that determine the availability of nontributary Denver Basin groundwater determine the availability of *not*-nontributary groundwater. Those factors do not, in Independence's view, include compliance with the anti-speculation doctrine.

¶44 Second, Independence contends that the water court's approval of an augmentation plan for not-nontributary groundwater (or an amendment thereto) is "inexorably intertwined" with the determination-of-rights process. Therefore, in Independence's view, because *East Cherry Creek* prohibits a water court from applying the anti-speculation doctrine when reviewing an application for a determination of rights in not-nontributary groundwater, the reasoning of that decision also prohibits a water court from applying the doctrine when reviewing an application for an augmentation plan for not-nontributary groundwater (or an application to amend such a plan).

¶45 Finally, Independence asserts, separate and apart from *East Cherry Creek*, that a water court's review of an application for an augmentation plan does not implicate the anti-speculation doctrine because the only question before the water

court in such proceedings is whether the augmentation plan will result in injury to existing water rights.

4. *East Cherry Creek* Does Not Apply Here

¶46 To the extent Opposers argue that *East Cherry Creek* does not govern this case, we agree. As an initial matter, the circumstances of *East Cherry Creek* required the water court to examine a Denver Basin landowner's *determination of rights* in *nontributary* groundwater. 109 P.3d at 156–57. By contrast, the application here seeks to *amend an augmentation plan* for *not*-nontributary groundwater. *East Cherry Creek* does not address whether a water court must apply the anti-speculation doctrine to an application for a determination of rights in *not*-nontributary groundwater. Nor is it necessary for us to reach that question because the application here concerns only an amendment to an existing augmentation plan.

¶47 Relatedly, we reject Independence's assertion that the approval of an augmentation plan for not-nontributary groundwater is "inexorably intertwined" with a determination of rights in the water to be augmented. A Denver Basin landowner pursues a determination of rights to vest their inchoate rights in Denver Basin groundwater. *Id.* at 157; *N. Kiowa-Bijou*, 77 P.3d at 74. Those applying for an augmentation plan, in contrast, seek judicial approval of a plan to divert water out of priority to the extent they can do so without causing injury to existing water rights by replacing their out-of-priority depletions with water from

a legally available source. *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1150 (Colo. 2001), *as modified on denial of reh'g* (Feb. 11, 2002). Although Denver Basin landowners may not exercise their vested rights in not-nontributary groundwater without an augmentation plan, nothing precludes them from obtaining a determination of rights before they secure the water court's approval of an augmentation plan.[7] Indeed, that is precisely what Independence's predecessor-in-interest did with respect to the amount of not-nontributary groundwater included in the 2006 Decree for which neither Independence nor Independence's predecessor has ever proposed an augmentation plan.

¶48 The question we must answer here is whether the water court erred in declining to apply the anti-speculation doctrine to an application to amend an augmentation plan for not-nontributary groundwater. *East Cherry Creek* did not address this question. Accordingly, we look elsewhere to resolve it.

---

[7] True, applicants seeking an augmentation plan to divert, out of priority, water for which they have adjudicated rights may not put the augmented water to beneficial uses other than those decreed at the determination of rights stage. *See Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 411 (Colo. 2009) ("[I]n the context of augmentation plans, it is the water rights included within the plan that are augmented . . . ."). But this does not mean the separate processes for obtaining the decree and for obtaining the augmentation plan are "inexorably intertwined." Nor does it mean that these processes are subject to the same requirements, as Independence appears to suggest.

B. The Water Court Did Not Err in Declining to Apply the Anti-Speculation Doctrine to Independence's Application

¶49 To address Opposers' contention that the water court erred in failing to apply the anti-speculation doctrine to Independence's application for an amendment to its augmentation plan, we consider the relationship between the issues underlying a water court's review for compliance with the anti-speculation doctrine on the one hand, and the issues involved in a water court's consideration of an application for an augmentation plan on the other. We conclude that the water court did not err in declining to apply the anti-speculation doctrine to Independence's application to amend its augmentation plan in not-nontributary groundwater for two reasons: (1) the anti-speculation doctrine and augmentation plans serve different purposes, and (2) the only question relevant to a water court's review of an augmentation plan (or an amendment thereto) is whether the plan will cause injury to existing water rights.

1. The Anti-Speculation Doctrine and Augmentation Plans Serve Different Purposes

¶50 At its core, the anti-speculation doctrine precludes a water rights applicant from claiming an intent to appropriate water "based upon the subsequent speculative sale or transfer of the appropriative rights." *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 36 (Colo. 1996). To accomplish this objective, those seeking to appropriate water or to change a water right must demonstrate that

they have "a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses." § 37-92-103(3)(a), C.R.S. (2024); *High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist.*, 120 P.3d 710, 719–21 (Colo. 2005) (applying the anti-speculation doctrine to applications for a change of water right to ensure that change proceedings fulfill their "essential function" of "confirm[ing] that a valid appropriation continues"); *see also Vidler*, 594 P.2d at 568 (noting that applicants seeking to appropriate water "must have an intent to take the water and put it to beneficial use"). Thus, the purpose of the anti-speculation doctrine is to prevent water hoarding for personal profit, thereby preserving water for beneficial use within the prior appropriation system. *Vidler*, 594 P.2d at 568.

¶51 Unlike the anti-speculation doctrine, which is designed to protect the integrity of appropriations within the prior appropriation system, augmentation plans exist specifically to "allow[] a diversion *outside* of the priority system." *Empire Lodge*, 39 P.3d at 1155 (emphasis added); *see also Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 685 (Colo. 2008) (explaining that augmentations plans "allow diversions in areas where they would not be possible otherwise" because "unappropriated water is not available" there), *as modified on denial of reh'g* (Nov. 24, 2008). To accomplish this, augmentation plans describe "a detailed program . . . to increase the supply of water available for beneficial use"

by, as relevant here, "providing substitute supplies of water." § 37-92-103(9). The substitute supply must offset the applicant's proposed out-of-priority depletions in an amount sufficient to prevent injury. *See* § 37-92-305(3)(a), C.R.S. (2024); *Empire Lodge*, 39 P.3d at 1150. Thus, augmentation plans offer a method by which to "implement a policy of maximum flexibility" while also "protect[ing] the constitutional doctrine of prior appropriation." *Empire Lodge*, 39 P.3d at 1150.

¶52 Given the distinct purposes of the anti-speculation doctrine and augmentation plans, applying the anti-speculation doctrine to applications for such plans (or amendments thereto) would make no sense. Augmentation plans permit diversions of water that other users have already appropriated by ensuring that a supply sufficient to avoid injury to those users is available for replacement purposes, thereby protecting existing water rights while advancing Colorado's policy of maximum use. *See id.* This scheme could not encourage hoarding water "for personal profit" to the exclusion of future users seeking to appropriate that water for a beneficial use, *Vidler*, 594 P.2d at 568, because the augmented water would not be available for an additional "appropriation" but for the operation of the augmentation plan, *see Buffalo Park*, 195 P.3d at 685. Nor could an augmentation plan threaten to transform an existing appropriative right into a speculative right, *High Plains*, 120 P.3d at 720, because augmentation plans merely ensure that existing water-rights holders can continue to exercise their

appropriative rights in the water to be augmented (albeit with the replacement supply).[8] Thus, applying the anti-speculation doctrine to applications for an augmentation plan (or applications to amend such plans) would not serve the purpose of such plans: to accommodate diversions of water outside the priority system by providing a substitute supply sufficient to prevent injury to other appropriators.[9]

---

[8] We acknowledge that in some circumstances, the only "procedure[] prescribed by law" authorizing a diversion may be the proposed augmentation plan itself. § 37-92-103(3)(a). Similarly, some proposals to amend an augmentation plan may effectively amount to an application for a change of water right. *See Coors Brewing Co. v. City of Golden*, 2018 CO 63, ¶ 30, 420 P.3d 977, 985 (describing the applicant's proposed amendment to an augmentation plan as "effectively" seeking to "add new uses to its decreed water rights"). To the extent such circumstances may constitute new or changed "appropriations," they may be subject to the anti-speculation doctrine. *See* § 37-92-103(3)(a); *High Plains*, 120 P.3d at 719–21; *see also Coors Brewing Co.*, ¶ 30, 420 P.3d 977, 985 (rejecting the applicant's attempt to secure a "new appropriation" through an amendment to its augmentation plan in part because such an "abbreviated proceeding" would circumvent, among other things, the anti-speculation doctrine); *Front Range Res., LLC v. Ground Water Comm'n*, 2018 CO 25, ¶ 25, 415 P.3d 807, 812 (applying the anti-speculation doctrine to a replacement plan for designated groundwater because the plan "amount[ed] to a new appropriation"). We do not address these circumstances here, however. Independence does not seek to increase the quantity of water it will divert, and Opposers challenge Independence's proposed amendment to its augmentation plan only to the extent it proposes additional uses not included in the 2006 Decree.

[9] Our conclusion is consistent with proceedings that involve augmentation plans in the tributary context. For example, applicants for a conditional water right in tributary water that would injure senior appropriators may not receive a decree "except in conjunction with a plan for augmentation assuring enough available water to exercise the right." *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644, 645

2. The Sole Inquiry in Reviewing an Augmentation Plan Application Is Whether the Plan Will Injure Existing Water Rights

¶53 Under section 37-92-305(3)(a), a water court's task in reviewing an augmentation plan is to determine whether the proposed plan will "injuriously affect" vested water rights or decreed conditional rights. Performing this injury analysis requires that water courts "consider the depletions from an applicant's use or proposed use of water, in quantity and in time, [and] the amount and timing of augmentation water that would be provided by the applicant." § 37-92-305(8)(a). If the water court determines that the proposed augmentation plan will not result in injury, it "shall" approve the plan. § 37-92-305(3)(a); *see also*

(Colo. 1991). In those circumstances, applicants must comply with the anti-speculation doctrine because they are seeking a conditional water right. *E.g.*, *City of Thornton*, 926 P.2d at 30. In contrast, such applicants must secure approval of an augmentation plan to prevent injury that would otherwise result from exercising their conditional rights. *See Lionelle v. Se. Colo. Water Conservancy Dist.*, 676 P.2d 1162, 1168 (Colo. 1984) (holding that conditional water rights applicants could not receive a decree until they applied for an augmentation plan because exercising their proposed conditional water right would result in injury). Similarly, because augmentation plan applicants must show that their source of replacement water is "legally available," *Empire Lodge*, 39 P.3d at 1150, applicants planning to use replacement water that is subject to the anti-speculation doctrine would have had to comply with that doctrine as part of applying for a determination of rights in the replacement water, *see Williams v. Midway Ranches Prop. Owners Ass'n*, 938 P.2d 515, 522 (Colo. 1997) (noting that replacement water may include "tributary native water which has been quantified by historic beneficial use"). Thus, anti-speculation concerns underlying determinations of rights are separate and distinct from the injury concerns underlying augmentation plans associated with those rights.

Upper Eagle Reg'l Water Auth. v. Simpson, 167 P.3d 729, 735 (Colo. 2007) ("[O]nly if operation of the [augmentation] plan would cause injury . . . does the statute require the water judge to deny the plan."), *as modified on denial of reh'g* (Oct. 1, 2007).

¶54 The same statutory requirements that govern applications for new augmentation plans also govern an application that, like Independence's, seeks to amend an existing augmentation plan. *Coors Brewing Co. v. City of Golden*, 2018 CO 63, ¶ 25 n.1, 420 P.3d 977, 984 n.1 (explaining that amendments to an augmentation plan "must, at a minimum, comply with the requirements of both subsections 37-92-305(3), (5), and (8) and our case precedents"); *cf. Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 542 (Colo. 1996) (explaining that water courts have the authority to "define the scope" of an augmentation plan and otherwise "adjust such a plan upon reconsideration"). Similarly, augmentation plans for not-nontributary groundwater must generally satisfy the same statutory criteria as augmentation plans for tributary water.[10] § 37-90-137(9)(c.5)(I)(B), (C) (requiring

[10] The sole distinction between augmentation plans for tributary water and augmentation plans for not-nontributary groundwater lies in how augmentation plan applicants determine the amount of replacement water they must provide. Tributary water users must determine, on a case-by-case basis, the amount of replacement water necessary to prevent injury. *See Buffalo Park*, 195 P.3d at 684–85. Not-nontributary water users, on the other hand, must follow specific statutory requirements that determine the amount of replacement water they must make available based on (1) the aquifer from which the groundwater will be withdrawn,

that augmentation plans permitting the use of not-nontributary groundwater "meet all other statutory criteria" associated with augmentation plans); *see also Danielson*, 791 P.2d at 1113 ("[T]he General Assembly, by using the term 'plans for augmentation' in section 37-90-137(9)(c) [later renumbered section 37-90-137(9)(c.5)], intended that the term carry the same meaning in that subsection as elsewhere in the statutes governing water resources.").

¶55 In sum, under section 37-92-305(3)(a), a water court asked to approve an application for an augmentation plan (or an amendment thereto) is concerned with a single question, regardless of the type of water to be augmented: whether the proposed plan will result in injury to vested water rights or decreed conditional rights.[11] Though answering this question may require the water court to consider

---

and (2) for some aquifers, the distance between the point of withdrawal and a contact with a natural stream. § 37-90-137(9)(c.5)(I). All of Independence's potential not-nontributary wells would withdraw groundwater from the Upper Dawson aquifer, where "decrees approving plans for augmentation must provide for the replacement of actual out-of-priority depletions to the stream." § 37-90-137(9)(c.5)(I)(B).

[11] Like augmentation plans, change applications are also subject to section 37-92-305(3)(a); thus, they "shall be approved" if the water court determines that the proposed change will not result in injury. Nevertheless, we have held that water courts must also apply the anti-speculation doctrine when reviewing an application for a change of water right. *High Plains*, 120 P.3d at 720–21; *cf.* Harvey W. Curtis et al., *The Anti-Speculation Doctrine Extended to Change of Water Rights Cases: A New Dilemma for Water Rights Owners*, 9 U. Denv. Water L. Rev. 577, 594–96 (2006) (critiquing *High Plains*'s deviation from the "straightforward, time-honored non-injury standard[] mandated by Colorado Revised Statute 37-92-305(3)").

multiple factors, its focus remains the same: "to ascertain whether vested water rights will sustain injury." *Upper Eagle Reg'l Water Auth.*, 167 P.3d at 735.

¶56 For example, an applicant for an augmentation plan may need to estimate the "time, amount, and location of return flows" associated with its proposed out-of-priority diversions if the applicant plans to rely on return flows to ensure that water is available in the quantity and at the time necessary to prevent injury. *Farmer's Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 808 & n.6 (Colo. 2001), *as modified on denial of reh'g* (Nov. 13, 2001). To estimate return flows with the degree of certainty that this injury analysis requires, the applicant must put forward proposed beneficial uses of the augmented water, consistent with the statutory definition of augmentation plans. § 37-92-103(9) (defining an augmentation plan as a "detailed program . . . to increase the supply of water available for beneficial use"). Thus, a water court could not approve an augmentation plan if the applicant entirely failed to identify any proposed

---

Critically, however, change applications are distinct from augmentation plan applications because "[t]he essential function of the change proceeding is to confirm that a valid *appropriation* continues in effect under decree provisions that differ from those contained in the prior decree." *High Plains*, 120 P.3d at 719 (emphasis added). The statutory definition of an "appropriation" includes the requirement that an appropriation be non-speculative. § 37-92-103(3)(a). Augmentation plans, in contrast, generally do not create or alter appropriative water rights. *See Buffalo Park*, 195 P.3d at 685–86. Therefore, they do not typically implicate the concerns that animated our extension of the anti-speculation doctrine to change applications in *High Plains*.

beneficial use but then purported to rely exclusively on return flows as a substitute supply for replacing depletions. This is because, in such a scenario, the applicant would have failed to "identify the sources and character of the substitute supplies with certainty," creating an intolerable risk of injury. *Centennial Water & Sanitation Dist. v. City & Cnty. of Broomfield*, 256 P.3d 677, 683 (Colo. 2011); *see also Buffalo Park*, 195 P.3d at 684 (explaining that applicants "must first establish . . . the availability of replacement water" before demonstrating that their proposed depletions will not cause injury (quoting *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r*, 105 P.3d 595, 615 (Colo. 2005))); *Williams v. Midway Ranches Prop. Owners Ass'n*, 938 P.2d 515, 522 (Colo. 1997) ("An essential component of an augmentation plan is the provision for adequate replacement water."); *Weibert v. Rothe Brothers, Inc.*, 618 P.2d 1367, 1373 (Colo. 1980) ("In order to determine the adequacy of the [augmentation] plan to accomplish its intended purpose, it is necessary to consider the adequacy of the replacement water rights.").

¶57 But the fact that an augmentation plan applicant may propose specific beneficial uses for its augmented water to prove that the plan will not result in injury does not mean that the applicant must demonstrate an intent to put that augmented water to those beneficial uses, as the anti-speculation doctrine requires. § 37-92-103(3)(a)(II) (requiring "a specific plan and intent to divert, store, or otherwise capture, possess, and control a *specific quantity* of water for *specific*

beneficial uses" (emphases added)); *see also Vidler*, 594 P.2d at 568–69; *High Plains*, 120 P.3d at 720. Rather, applicants need only show that if the beneficial use of their augmented water changes, they will still have sufficient supplies of replacement water to prevent injury.[12] *Farmer's Reservoir & Irrigation Co.*, 33 P.3d at 808 n.6. Thus, the statutory scheme governing augmentation plans tolerates some degree of uncertainty in the future operation of the plan to "implement a policy of maximum flexibility that also protect[s] the constitutional doctrine of prior appropriation." *Empire Lodge*, 39 P.3d at 1150.

¶58 Indeed, a water court decree approving an augmentation plan represents no more than a "*prediction* of how the plan can operate" to permit out-of-priority diversions "without causing injury to existing water rights." *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. Centennial Water & Sanitation Dist.*, 2019 CO 12, ¶ 10, 435 P.3d 469, 472 (emphasis added). Approving a "prediction" of how an augmentation plan will operate does not require the water

[12] This conclusion does not imply that an amendment to an augmentation plan can lawfully effect a change of water right. *See City of Aurora*, 221 P.3d at 411. Indeed, under our precedent, a water user seeking to "add new uses to its decreed water rights" must do so through appropriate procedural mechanisms that require, among other things, anti-speculation review. *Coors Brewing*, ¶¶ 27–28, 30, 46, 420 P.3d at 984–85, 987 (rejecting the applicant's effort to amend its augmentation plan "to obtain the right to reuse or make successive use of . . . return flows" for which it had not adjudicated a right and instead requiring that the applicant "adjudicate a new water right").

court to consider the applicant's intent to execute that plan. The "prediction" remains valid regardless of when the decree-holder begins to operate the plan.

¶59 For these reasons, we hold that the water court did not err in declining to apply the anti-speculation doctrine to Independence's application to amend its augmentation plan. Therefore, we need only review the water court's determination that Independence's amended augmentation plan will not result in injury.

C. Independence's Proposed Augmentation Plan, as Amended, Will Not Result in Injury

¶60 The water court found that Independence's amended augmentation 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." Final Decree, at 5. Opposers have not contested this finding. And even if they had, we perceive no basis for characterizing the water court's finding as clearly erroneous. Independence's application estimates that its return flows from irrigation alone will equal almost four times its estimated actual depletions. *Id.* at 2–3. And even if Independence's return flows ultimately prove inadequate, the augmentation plan requires that Independence use its abundant nontributary groundwater to replace all depletions. *Id.* at 2.

¶61 Therefore, we affirm the water court's conclusion that Independence's amended augmentation plan will not result in injury to existing water rights.

IV. Conclusion

¶62 The anti-speculation doctrine requires that potential appropriators demonstrate an intent to put the water rights they seek to a beneficial use, thereby preventing those who seek to hold such rights only for potential future profit from obtaining a use right. *N. Kiowa-Bijou*, 77 P.3d at 78–79. Accordingly, potential appropriators must present a *specific* plan and intent to divert a *specific* quantity of water for *specific* beneficial uses. § 37-92-103(3)(a)(II). This requirement protects the integrity of the prior appropriation system by reinforcing the constitutional guarantee of "a right to appropriate, not a right to speculate." *Vidler*, 594 P.2d at 568.

¶63 In contrast, an augmentation plan is merely a tool designed to increase the amount of water available for *some* beneficial use at *some point* in time without causing injury to vested water rights or conditional decreed rights. § 37-92-103(9). Judicial approval of a proposed augmentation plan (or an amendment thereto) may require the water court to consider multiple factors—such as the quantity and timing of depletions, the amount of likely return flows, and the beneficial uses for the augmented water—to the extent necessary to confirm that the proposal will not result in injury. §§ 37-92-103(9), -305(8)(a); *Upper Eagle Reg'l Water Auth.*, 167 P.3d at 735. This injury inquiry does not require a water court to ascertain an augmentation plan applicant's specific intent with respect to the use of the water

to be augmented. Rather, the water court need only determine whether the applicant's plan, as proposed, will prevent injury. That is precisely what the water court did here.

¶64 Accordingly, because we perceive no clear error in the water court's finding that Independence's amended augmentation plan will not result in injury, we affirm the water court's judgment and decree.

JUSTICE GABRIEL concurred in the judgment.

JUSTICE GABRIEL, concurring in the judgment.

¶65 The majority holds that the water court did not err in declining to apply the anti-speculation doctrine to Independence Water and Sanitation District's application to amend its augmentation plan for not-nontributary groundwater. Maj. op. ¶ 9. The majority principally bases this conclusion on its view that the anti-speculation doctrine and augmentation plans serve different purposes and, therefore, it makes no sense for a water court to apply the anti-speculation doctrine in connection with its review of an application to obtain or amend an augmentation plan. *Id.* at ¶ 10. On this basis, the majority affirms the water court's judgment and decree. *Id.* at ¶ 64.

¶66 Although I agree with the majority's ultimate conclusion, I cannot agree with its reasoning. Accordingly, I respectfully concur in the judgment, only.

I. Analysis

¶67 No party in this case has argued that the anti-speculation doctrine virtually never applies to an application to obtain or amend an augmentation plan, as the majority now effectively holds. Accordingly, I do not believe that the parties have been given a full and fair opportunity to be heard on that question.

¶68 Nor did the water court rule on the broad ground on which the majority bases its ruling. Rather, relying on *East Cherry Creek Valley Water & Sanitation District v. Rangeview Metropolitan District*, 109 P.3d 154, 157–58 (Colo. 2005), the

water court began with the apparently undisputed premise that because a landowner has the statutory right to adjudicate the right to use Denver Basin nontributary, nondesignated groundwater for future, undetermined uses, the anti-speculation doctrine does not apply to adjudications of that right. The court then observed that we recognized in *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District*, 77 P.3d 62, 74 (Colo. 2003), that Denver Basin groundwater located outside of a designated basin that is partially tributary because it does not satisfy the definition of Denver Basin nontributary groundwater (i.e., not-nontributary groundwater) "shall nevertheless be administered on the basis of land ownership as if it were nontributary, provided its use is augmented." Accordingly, the water court concluded that for the same reasons that the anti-speculation doctrine is inapplicable to adjudications of Denver Basin nontributary, nondesignated groundwater, that doctrine is inapplicable to adjudications of the not-nontributary groundwater at issue here, which, by definition, is nondesignated Denver Basin groundwater subject to the same separate water use system that applies to nontributary groundwater. (In reaching this conclusion, the water court did not rely solely on *East Cherry Creek*, as the majority seems to suggest. Maj. op. ¶¶ 4, 8. Rather, it so concluded by reading *East Cherry Creek* together with *North Kiowa-Bijou Groundwater Management District*.)

¶69 Having thus decided that the not-nontributary groundwater at issue should be treated like Denver Basin nontributary water, the water court turned to the narrow issue presented and observed that Independence had already obtained water court approval to use not-nontributary Upper Dawson groundwater for certain decreed uses and therefore had a vested right to do so. Thus, the court viewed the only question before it as concerning the changes required to the augmentation plan to avoid injury to out-of-priority depletions that Independence would cause when it used its not-nontributary Upper Dawson groundwater for the decreed purposes. In these circumstances, the court concluded, as a matter of law, that the anti-speculation doctrine did not apply to Independence's request to add previously adjudicated uses to the augmentation plan.

¶70 In light of the foregoing, unlike the majority, I perceive no reason to adopt a broad rule, which neither the parties nor the water court below advanced, that the anti-speculation doctrine virtually never applies to an application to obtain or amend an augmentation plan. Rather, I would simply follow the water court's narrower reasoning, which I believe is well supported by our case law.

¶71 I believe that the foregoing analysis is more in line with the arguments that the parties actually presented to us. It is also more consistent with long-settled principles of judicial restraint, which dictate that courts should decide only the issues necessary to resolve the cases before them—no more and no less.

II. Conclusion

¶72 For these reasons, I respectfully concur in the judgment, only.