A couple living off the grid fought water law — and won

The decision could upend a Colorado rule that goes back 150 years.


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Living off the grid in Colorado’s vast San Luis Valley, Chuck and Barbara Tidd needed to find a source of energy to supplement their solar panels. Their solution, to use a creek on their property to generate power, led to a legal battle that went all the way to the Colorado Supreme Court — where they won. That decision worries some who say their new right could upend water law that goes back 150 years:

Transcript:

Jamie Sudler: The San Luis Valley in Southern Colorado is immense. It’s a basin about 125 miles long sitting right in the middle of the Rocky Mountains.

Frani Halperin: Despite being at high altitude the valley has a desert feel. It typically only gets a few inches of precipitation a year and in fact one of its most famous attractions are sand dunes.
Jamie: In the spring snowmelt from the adjacent peaks drains into the valley and much of that runoff soaks into the soil to fill shallow aquifers, making it ideal for agriculture.

Frani: But there's only so much of that water to go around and a claim to it can pit neighbor against neighbor as it did in the case of Barbara and Chuck Tidd.

Jamie: It's their situation that brought us to their home to hear what happened, and how their victory might have turned 150 years of law on its head.

Frani: The Tidds live in house they built on the valley slope that would make you drool. A wide panorama from their living room takes in the sweep of the basin and you could swear you see New Mexico some 70 miles away.

Jamie: Even as we talk a pronghorn antelope strolls below their deck and stops to stare in our direction as if on cue to show off the amazing natural beauty Chuck and Barbara enjoy.

Frani: You could say they have it all—but at the same time you would have to say they've got nothing.

Chuck Tidd: We're way too far off grid to make it feasible to run power lines. When we started to build it would have been 100,000 dollars just to run the wires up here and I'm sure it's a lot more than that now.

Frani: So they're on their own. Getting their drinking water from springs...

Jamie: And their electricity from a solar array. But when it gets cloudy they need something else to keep the lights on and appliances humming.

Frani: Their answer? Hydro. They came up with an idea to generate power from an irrigation ditch that runs through their property.

Jamie: Only problem—the ditch belonged to someone else.

Chuck: The creek that runs through our property is actually a ditch that belongs to the Frees family down the hill, and they irrigate with the water.
Frani: The Frees are cattle ranchers who grow hay with their water and they were none too pleased with the Tidds' plan to generate power—or how they went about it.

Barbara Tidd: My understanding—in correct understanding—was that you start working on it and then you file. Wrong. Chuck started digging and was going to lay some pipe and then he called the irrigators up to look at it and they said, “Don't touch my ditch.”

Jamie: Welcome to Colorado Water Law known as the “Prior Appropriation System” that basically says “First in time, first in right.” It started back in early gold mining days and essentially allowed the first guys in to dibs water in a stream before anyone else could use it.

Frani: Even though all the Tidds wanted to do was run water through a pipe to generate power and return every drop — this was no simple undertaking.

Jamie: For starters, they had to file an application for a water right with the state.

Frani: But the irrigators objected.

Jamie: The case went to “water court.” Yes, this complex arrangement has its own legal system — and the judge agreed with the Tidds — they could use the water to generate power as long as they did no harm to the downstream users.

Frani: The ranchers were not happy. They took the case all the way to the Colorado Supreme Court, arguing that the Tidds could not use the water because it already belonged to them and they should have the right to use it before anyone else. But is that really what the law states?

Chuck: Water can be used for many uses. It's a usufructuary right to use that water, meaning you don't own it. They use the term “use the molecules of water” before anybody else does. We're not using any of the molecules of water; we are using the weight of the water as it goes downhill. That's the whole point. They have to get their water in the right time, condition and quantity that their right entitles them to and we're not trying to interfere with that at all.
Frani: The Supreme Court agreed saying that the Frees didn't own the water, they only have the right to use it. Barbara and Chuck could use the water, too, so long as they returned it to the ditch.

Barbara: And that was a real eye-opener to me. I didn't realize what a can of worms we had opened.

Jamie: Indeed they had. And not just any can of worms. The tangled and complex rules that are Colorado water law. A system that's becoming more and more controversial as the state's population grows and issues like drought and climate change make the resource even more scarce.

Bill Paddock: I thought it was sort of goofy.

Jamie: That's Bill Paddock, a well-respected water lawyer. We asked him to weigh in on the Supreme Court's decision.

Bill: It's what you would call judicial legislation because it authorizes a new class of water rights that didn't previously exist.

Frani: A new right that says, sure, you can jump in line and use water already appropriated to someone else as long as you don't hurt that owner. A decision that seemingly contradicts the intent of the current structure.

Jamie: According to Paddock, this is new and potentially threatening to the entire system.

Bill: It's a leap into uncharted territory by the court and will probably result in a lot more litigation in the future over how you address the rights of these junior...what I would call a piggyback appropriation.

Jamie: But there it is. Barbara and Chuck are proud owners of a new water right, and the next step is to build their system.

Frani: We follow Chuck and Barbara across a field near their house to see the creek they plan to use. It feels a bit ironic. The ditch at the center of this decision...it's surprisingly tiny.

Jamie: How wide would you estimate the ditch to be here?
Chuck: I would say it's a foot wide in general and maybe another foot deep.

Frani: And the waterfall that would generate the power, it tumbles a mere few inches. Small that it is — this little trench could be huge in terms of what it portends for the future of Colorado water law.

*Photo credit: The Alamosa Wildlife Refuge in Southern Colorado's San Luis Valley. /Kent Kanouse, Flickr user.*