EIGHTH UPDATE TO COLORADO WATER LAW: AN HISTORICAL OVERVIEW

THE HONORABLE GREGORY J. HOBBS, JR.

To provide our readers with the most up-to-date water law information, the editors periodically include updates of works previously published in the *Water Law Review*. The following is the eighth update to *Colorado Water Law: An Historical Overview, Appendix—Colorado Water Law: A Synopsis of Statutes and Case Law*,[1] selected by the Honorable Gregory J. Hobbs, Jr.

Anderson v. Pursell

"'Mark Anderson ('Anderson') challenges an April 3, 2009, water court order that granted attorney fees and costs to Henry R. Sebesta and Mary M. Sebesta Revocable Trust and C & K Properties, Inc. (collectively 'Sebesta'), and Richard Pursell ('Pursell') for various stages of the litigation. We hold that the water court was correct in granting attorney fees and costs associated with the Final Decree to Pursell because he was the 'prevailing party' under the parties' Water Agreement. Further, the water court was correct in both the award and the amount of attorney fees and costs to both Sebesta and Pursell for defending Anderson's Motion to Enforce because it lacked substantial justification under section 13-17-102(4), C.R.S. (2010). But we hold that the water court incorrectly awarded attorney fees and costs to Sebesta and Pursell for defending Anderson's appeal and pursuing the underlying fee award. Therefore, we affirm in part, reverse in part, and remand to the water court to enter a judgment consistent with our opinion.

Anderson v. Pursell, 244 P.3d 1188, 1191 (Colo. 2010).

. . . Here, the bulk of the litigation involved whether or not Sebesta and Pursell were required to by-pass the ponds on their properties so that Anderson would receive his share of the water right in accordance with the Water Agreement. There was little to no contention over the other parts of the application. The water court ultimately ruled that the Water Agreement did not require Sebesta and Pursell to by-pass the ponds on their properties. Thus, because Pursell succeeded on his main objection to the application and the only issue that was significantly litigated, the water court was correct in determining that he was the 'prevailing party' in a 'dispute arising concerning the intent or construction of the [Water Agreement].'"

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[1] Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 27 (1997). The first update to Justice Hobbs' article appears at 2 U. DENV. WATER L. REV. 223 (1999); the second update is at 4 U. DENV. WATER L. REV. 111 (2000); the third update is at 6 U. DENV. WATER L. REV. 116 (2002); the fourth update is at 8 U. DENV. WATER L. REV. 213 (2004); the fifth update is at 10 U. DENV. WATER L. REV. 391 (2007); the sixth update is at 13 U. DENV. WATER L. REV. 389 (2009); the seventh update is at 14 U. DENV. WATER L. REV. 159 (2010).

Id. at 1194-95.
(Citations and footnotes omitted).

Cherokee Metropolitan District v. Upper Black Squirrel Creek Designated Ground Water Management District

"In this case, we affirm the water Division No. 2 court's order that declared a number of conditional water rights abandoned, and we reverse the water court's entry of attorney fees. On January 25, 1999, Cherokee Metropolitan District ('Cherokee') and Upper Black Squirrel Creek Ground Water Management District ('UBS'), among other parties, entered into a Stipulation and Release concerning Cherokee's use of two sets of wells in the Upper Black Squirrel Creek Designated Ground Water Basin ('the Basin'). The water court incorporated the stipulation into a March 1999 conditional water rights diligence decree ('stipulated decree'). Paragraph 10.f of the stipulated decree requires Cherokee to file an application to perfect its conditional groundwater rights that have been applied to beneficial use 'on or before two years after the first diversion' from the wells. The stipulated decree does not explicitly provide for a remedy should Cherokee file after the two-year deadline.

At issue here are Cherokee's conditional water rights to wells 14–17. While Cherokee timely filed for a sexennial finding of reasonable diligence for wells 14–17, it did not timely file within the stipulated two-year period to perfect the portion of the water from these wells that it diverted and put to beneficial use. UBS and the Bookers ('the Objectors') filed a motion to dismiss both Cherokee's application to make portions of wells 14–17 absolute and also its application for a finding of reasonable diligence on the wells. The Objectors asked the court to declare wells 14–17 abandoned in their entirety. The water court granted the Objectors' motion to dismiss Cherokee's application to make only a portion of wells 14–17 absolute and ordered those conditional rights abandoned.

We agree with the water court's interpretation of the stipulated decree. Based on the language of the stipulated decree, we hold that the parties' intended remedy for failure to comply with the strict filing deadline in Paragraph 10.f was abandonment. Hence, Cherokee could prove no set of facts in support of its application, and the water court correctly determined that Cherokee abandoned only the portions of its conditional rights to wells 14–17 for which it had untimely filed to make absolute.

Cherokee Metropolitan District v. Upper Black Squirrel Creek Designated Ground Water Management District, 247 P.3d 567, 569 (Colo. 2011).

. . . The stipulated decree is a bargained-for instrument, agreed to by the parties in consideration for resolving litigation. Cherokee was entitled to stipulate away valuable rights under the Act, such as a sexennial schedule of filing deadlines, notice prior to cancellation, and the ability to file within the same month of diversion. In entering the stipulation and decree, Cherokee did just that. Hence, we hold that the parties' intended remedy for failure to comply with the strict filing deadline in Paragraph 10.f was abandonment.

Having determined the correct interpretation of the stipulated decree, we must apply it here. Cherokee was roughly two years and two months tardy in filing to perfect well 14 after diversion and roughly 10 months tardy in filing to perfect wells 15 and 16.

Concerning well 17, we find it unnecessary to consider whether the relevant 10.f filing was the date Cherokee filed its motion to amend or the amended application itself. At a minimum, Cherokee was two days late in filing to perfect well 17. Cherokee did not comply with Paragraph 10.f when filing to perfect a portion of its conditional rights to wells 14–17.

Hence, Cherokee could prove no set of facts in support of its application, and the water court correctly determined on a motion to dismiss that Cherokee abandoned only the portion of its conditional rights to wells 14–17 for which it untimely filed to perfect under Paragraph 10.f of the stipulated decree. Because the water court only ordered abandonment of the conditional portions of these wells for which Cherokee untimely filed to perfect, we reach no determination as to whether Cherokee should receive a finding of reasonable diligence for the remaining conditional portions or whether the stipulated decree mandates that those amounts should be considered abandoned."

Id. at 575.

(Citations and footnotes omitted).

Upper Yampa Water Conservancy District v. Dequine Family L.L.C.

"The Upper Yampa Water Conservancy District appealed directly to this court from an order of the water court dismissing its application for a conditional water right. After presentation of the District's case, the court granted the opposer Dequine Family's C.R.C.P. 41(b) motion and dismissed for failure of the District to establish a need for water in the claimed amount sufficient to satisfy the requirements of the anti-speculation doctrine.

Because the District's evidence of existing demands included contracts for stored water that had admittedly not yet been put to beneficial use and for which no specific plan for beneficial use was offered, and because the District made no attempt to demonstrate a reasonably anticipated future need based on projected population growth, its proof was insufficient to establish that it had made the required 'first step' to obtain a conditional water right. The judgment of the water court is therefore affirmed.

Upper Yampa Water Conservancy District v. Dequine Family L.L.C., 249 P.3d 794, 796 (Colo. 2011).

. . . An applicant for a conditional water right must, therefore, demonstrate that it needs the amount of water it claims; and where the applicant relies on contractual obligations to demonstrate that its existing water rights are inadequate to satisfy its needs, it must prove the existence of a specific plan and intent to put the contracted-for amount of water to a beneficial use or, in the case of contracts with governmental entities, that the contracted-for amount is necessary for the entity's reasonably anticipated needs, based on substantiated projections of population growth.

Id. at 800.

. . . Because the applicant's evidence of existing demands included contracts for stored water that had admittedly not yet been put to beneficial use and for which no specific plan for beneficial use was offered, and because the applicant failed to adequately demonstrate a reasonably anticipated future need based on projected population growth, its evidence was insufficient to establish that it had made the required 'first step' to obtain a conditional water right. The judgment of the water court is

therefore affirmed."

Id. at 801.

(Citations and footnotes omitted).

Kobobel v. State

"In 2006, the State issued cease and desist orders prohibiting the well owners from pumping water from their irrigation wells until the water court entered a decreed plan for augmentation. The well owners have complied with the cease and desist orders, but contend that the State's action has rendered their farming operations essentially worthless, thus entitling them to compensation for the unconstitutional taking of their vested property rights.

We affirm the water court's judgment dismissing the well owners' claims. As a threshold matter, we hold that the well owners' claims are water matters within the exclusive jurisdiction of the water court because the claim is predicated upon the well owners' right to use the water in their decreed wells. We further hold that the State's order curtailing the well owners' use of the water in their wells did not constitute a taking in violation of article II, section 15 of the Colorado Constitution or the Fifth and Fourteenth Amendments to the U.S. Constitution.

The well owners' takings argument misconceives the scope of their water rights. The well owners neither hold title to the water in their wells, nor do they have an unlimited right to use water from their wells. What they possess is a legally vested priority date that entitles them to pump a certain amount of tributary groundwater from their wells for beneficial use. Under Colorado's prior appropriation doctrine, the well owners' vested priority date has always been subject to the rights of senior water rights holders and the amount of water available in the tributary system.

Accordingly, the well owners hold no compensable right to use water outside the priority system or to cause injury to other vested water rights. Here, the State's cease and desist orders simply curtailed the well owners' out-of-priority diversions consistent with Colorado law. Because the well owners cannot show that the State infringed on a constitutionally protected property right, they are not entitled to just compensation for the 'taking' of that alleged right. The water court therefore properly dismissed the complaint.

Kobobel v. State, 249 P.3d 1127, 1129-30 (Colo. 2011).

. . . In accordance with Colorado's doctrine of prior appropriation, the well owners neither hold title to the water in their decreed wells, nor is their right to use the water unfettered. What the well owners possess is a legally vested priority date that entitles them to pump a certain amount of tributary groundwater from their wells for beneficial use, subject to the rights of senior water rights holders and the amount of available water. Consistent with those rights, the State's cease and desist orders curtailed the well owners' ability to pump water out of priority to the injury of senior water rights without a court approved augmentation or substitute water supply plan. Simply put, the State's order did not deprive the well owners of any constitutionally protected right to the unfettered use of the water in their wells; the well owners have no such right. Accordingly, the well owners are not entitled to just compensation because the State's action did not amount to an unconstitutional taking of their property.

Id. at 1137.

. . . The well owners also emphasize that, even after the Act took effect, they irrigated their crops for decades; the State Engineer did not administer their wells until 2006, when the cease and desist orders issued. The well owners contend that, in light of this long period of use, the State Engineer's orders that they stop pumping their wells constituted a regulatory taking for which they deserve just compensation.

It is true that the State did not enforce limitations on groundwater well pumping until relatively recently. The fact that the well owners enjoyed several decades of groundwater well pumping, however, does not change the fact that their right to water usage has always been limited by the constitutional prior appropriation doctrine. Indeed, the well owners themselves seemed to acknowledge this fact when they participated in GASP [Ground Water Appropriators of the South Platte] to obtain replacement water so they could pump out of priority.

The cease and desist orders represent a change in enforcement, not a change in law. As discussed above, the 2006 curtailment orders did not take away the well owners' vested property rights to the use of their wells because the well owners never possessed an unfettered right to pump out of priority. Instead, by acting to stop the well owners from continuing to pump water out of priority, the State is enforcing the principle—enshrined in the state constitution and predating the 1969 Act—that they may not pump to the injury of senior appropriators. Such action does not constitute a regulatory taking."

Id. at 1137.

(Citations and footnotes omitted).

Southern Ute Indian Tribe v. King Consolidated Ditch Company

"In this appeal from a judgment of the District Court for Water Division No. 7, the Southern Ute Tribe ('the Tribe') seeks to set aside the judgment on three grounds: (1) this case involves a declaratory judgment action requiring personal service on the Tribe and other affected parties pursuant to C.R.C.P. 19 and 4, and publication of resume notice pursuant to section 37-92-302(3)(a), C.R.S. (2010) was insufficient; (2) if the applicants ('the Ditch Companies') properly filed this case as an application for a determination of a water right under section 37-92-302(1)(a), the lack of verification of the application when it was filed prevented the court from proceeding; and (3) the water court abused its discretion by denying the Tribe's motion to intervene pursuant to section 37-92-304(3) and in disallowing its late-filed statement of opposition.

The Ditch Companies filed an application in this case for a water court determination that two previously adjudicated decrees included priorities for year-round stockwatering and domestic uses incidental to the appropriation and use of water for agricultural purposes, including wintertime use. Resume notice and newspaper publication occurred. One of the Ditch Companies belatedly verified the application. The Tribe did not file a statement of opposition to the application within the time period specified by section 37-92-302(1)(b) and (c). No statements of opposition were filed by any other party. The water court considered and denied the Tribe's motion to intervene and disallowed its untimely statement of opposition. The water court then proceeded to consider the case and entered its written judgment that the previously adjudicated

decrees had awarded the Ditch Companies priority dates for year-round stockwatering and domestic uses incidental to the appropriation and use of water for agricultural purposes, including wintertime use.

We hold that the application in this case is for a determination of a water right under section 37-92-302(1)(a) and the water court properly proceeded in compliance with the resume notice procedures of section 37-92-302(3); the belated verification of the application related back to the original application; and the water court did not abuse its discretion in denying the Tribe's motion to intervene and disallowing its untimely filed statement of opposition.

Southern Ute Indian Tribe v. King Consolidated Ditch Company, 250 P.3d 1226, 1229-30 (Colo. 2011).

. . . In the case before us, the water clerk published notice of the consolidated application in Water Division No. 7's monthly-resume within the local newspaper, as provided by the 1969 Act. The monthly resume also appeared on the water court's web page at www.courts.state.co.us/courts/water/index.cfm.

As a result, the Southern Ute Tribe and all other water users on the stream received the requisite legal notice. The Tribe argued to the water court and now to us that it was also entitled to personal service under C.R.C.P. 4 and 19 in lieu of or in addition to resume notice. The Tribe is not entitled to personal service, nor must personal service be effectuated on any or all other water users on the stream who may be affected by the water court's determination of the Ditch Companies' water rights.

The General Assembly enacted the resume notice and newspaper publication procedure to serve the dual purpose of providing due process notice to all users of water rights on the stream, so they could decide whether to participate in the water court proceedings through filing a timely statement of opposition, and, whether or not they do so, bind them to the results of the adjudication.

Id. at 1236.

. . . The 1969 Act does not require that every application for determination of a water right must result in assignment of a new priority date. An applicant who holds a prior adjudicated decree may file an application with the water court for review and determination of the scope and content of the prior decree. This is consistent with the General Assembly's overarching purpose that the Act be construed and administered consistent with the doctrine of prior appropriation."

Id. at 1237.

(Citations and footnotes omitted).

Upper Yampa Water Conservancy District v. Wolfe

"In 2006, the Upper Yampa Water Conservancy District (the 'District') filed an application for absolute water rights, based on their conditional water rights on Four Counties Ditch Number 3 ('Four Counties Rights'). The State Engineer and Division Engineer, Water Division 6 (the 'Engineers') opposed the application and moved for summary judgment. The water court denied the Engineers' motion, but ruled as a matter of law that in order to perfect a conditional water storage right, the District must show 'actual' beneficial use of a specific amount of water. The water court additionally held that the District must show that it diverted and put to beneficial use water in excess of its

existing absolute decrees.

The District acknowledged that it could not show that it had, at the time of its application, diverted in excess of its existing decrees at the alternate point of diversion. The water court subsequently granted the Engineers' motion for summary judgment and denied the District's application.

The District now appeals, and we affirm. We hold that in order to perfect a conditional water right that allows storage, an applicant must show actual storage and actual beneficial use of a specific amount of water. The applicant must also show that it in fact appropriated water in excess of its existing absolute decrees allowing for storage; in other words, it must show that it has exhausted its absolute rights before its conditional rights can be perfected.

Upper Yampa Water Conservancy District v. Wolfe, 255 P.3d 1108, 1109 (Colo. 2011).

. . . The District urges that the requirement of showing actual beneficial use of a storage right will undermine the very character and purpose of Colorado's large network of reservoirs. According to the District, such a requirement will cause water courts to cancel conditional water rights given that, once a reservoir is constructed and water stored, a water supplier can do nothing more to show diligence. However, in order to show diligence, an applicant need only show that is has been diligent in developing its water resource for a specific beneficial need.

Section 37-92-301(4)(a)(1) dictates that every six years, a holder of conditional water rights 'shall file an application for a finding of reasonable diligence, or said conditional water right shall be considered abandoned.' There is no exception for storage facilities, and the District has provided no support for its assertion that the reasonable diligence requirement is overly onerous on storage facilities. Instead, if this Court followed the District's rationale on this issue, storage facilities would have an incentive to hoard water in advance of receiving absolute decrees—contrary to the anti-speculation doctrine. Accordingly, the District is not exempt from the continuing reasonable diligence requirements that apply to all holders of conditional water rights.

Id. at 1112.

. . . Significantly, when given an opportunity by the water court to provide quantifiable evidence of its beneficial use, the District was unable to provide such evidence—neither its prior stated uses nor any other, recognizable beneficial uses. Instead, the District opted to rely on the argument that mere storage should qualify as beneficial use. Therefore, the water court properly found that the District failed to submit the required quantifiable evidence of its actual beneficial uses prior to an absolute decree."

Id. at 1113.

(Citations and footnotes omitted).

Burlington Ditch Reservoir and Land Company v. Metro Wastewater Reclamation District

"Based upon the record in this change of water rights proceeding, we uphold the findings of fact, conclusions of law, judgment and decree of the water court, including these: in order to prevent an unlawful enlargement of the Burlington and FRICO water

rights, the Companies' 1885 Burlington direct flow water right is limited to 200 cfs historically diverted and used for irrigation above Barr Lake; the 1885 Burlington storage water right is limited to annual average reservoir releases of 5,456 acre-feet historically used on lands under the Hudson and Burlington Extension laterals as they existed in 1909; seepage gains into the Beebe Canal, as well as water collected through the Barr Lake toe drains, cannot be counted towards the Companies' historical consumptive use under the 1885 Burlington and 1908 and 1909 FRICO water rights; historical releases from Barr Lake rather than operation of the "one-fill rule" constitute the proper measure of Companies' storage rights in this change of water rights proceeding; the water court's system-wide analysis of historical consumptive use is not barred by claim or issue preclusion due to the orders and decrees issued in Cases Nos. 54658 and 87CW107; the Metro Pumps are a heretofore undecreed point of diversion for which prior diversions cannot be given credit in calculating historical consumptive use; the Globeville Project is also a previously undecreed point of diversion, subject to the water court's imposition of terms and conditions to prevent injury to other water right holders; the water court's judgment and decree do not exceed the scope of its jurisdiction; and the decree contains appropriate conditions to prevent injury to other water rights resulting from the change of water rights.

Burlington Ditch Reservoir and Land Company v. Metro Wastewater Reclamation District, 256 P.3d 645, 653 (Colo. 2011).

. . . The [United Water and Sanitation District-East Cherry Creek Valley Water and Sanitation District] United–ECCV Water Supply Project ("project") is a multi-million dollar effort to provide a renewable source of water to replace the Denver Basin nontributary groundwater upon which ECCV has previously relied for use in its service area. ECCV serves about 50,000 customers in the southeastern Denver metropolitan area within Arapahoe County. Current demand for water in ECCVs service area is about 9,000 acre-feet per year, but ECCV projects that, within the next twenty years, it will serve 70,000 customers with an annual water demand of 14,000 acre-feet. In 2003, ECCV entered into an agreement with FRICO [Farmers Reservoir Irrigation Company] and United to implement the project. Water supplies contemplated as part of the project include shares diverted from the South Platte River under the 1885 Burlington water rights and the 1908 and 1909 FRICO water rights for beneficial use on farms located north of Denver and Arapahoe Counties.

Id. at 654.

. . . Change proceedings scrutinize proposed alterations to existing decreed rights that may injure other decreed water rights. The calculation of consumptive use credits allowed through a change proceeding does not include water from an undecreed enlargement, even if there has been a long period of enlarged usage. The law's prohibition against undecreed enlargements protects flows upon which other appropriators rely in order of their decreed priorities. Water native to the stream system is limited to one use in that system and return flows belong to the stream system as part of the public's resource, subject to appropriation and administration.

The 'one-fill rule' of Colorado water law serves to prevent injury to other appropriators by prohibiting a reservoir from making more than one fill annually based on its adjudicated priority.

Id. at 662-63.

. . . Storage itself is not a beneficial use; the subsequent use of stored water, such as irrigation of lands, is the beneficial use for which water is stored. In a change of water rights proceeding, the actual beneficial use made of the stored water must be ascertained and assigned its proper consumptive use credit per share in the ditch or reservoir company.

Id. at 663.

. . . Applying water to additional acreage, resulting in increased consumptive use above that perfected under the decreed appropriation, is unlawful. The water court found the Burlington 1885 direct flow right was not appropriated for use below Barr Lake. Instead, the evidence demonstrated that the 12,000 acres between the headgate of the Burlington Canal and Barr Lake were the lands to be served by the 350 cfs direct flow right specified in the 1893 decree. The water court found that the structures the Burlington Company built could divert only 200 cfs before FRICO's involvement in 1909. Taking into account the vague reference to additional lands susceptible of irrigation below Barr and Oasis reservoirs, evidence in the record supports the water court's conclusion that the Burlington 1885 direct flow right historical consumptive use credit must be determined by use on lands irrigated above Barr Lake and the 1885 storage right credit by use on lands irrigated below Barr Lake prior to FRICO's enlargement of the system.

FRICO unlawfully enlarged its use of the 1885 Burlington priorities. Appellants argue that no unlawful enlargement of the Burlington rights occurred because the decree in Case No. 11200 contains no limitation prohibiting the use of its direct flow right on lands below Barr Lake. To the contrary, the contract FRICO entered into with Burlington in 1909 supports the conclusion that an undecreed enlargement occurred. Burlington sold its 'excess' rights to FRICO, not any part of the water it had put to beneficial use.

The water court found that following the 1909 agreement with Burlington, FRICO constructed 140 miles of outlet laterals below Barr Lake (the Speer and Neres laterals and the Beebe Canal). These canals enabled the Burlington and FRICO companies to deliver direct flow water diverted through Barr Lake to irrigate substantially more acreage than appropriated for irrigation under the 1885 Burlington priority. What Burlington purported to sell to FRICO were diversions Burlington did not need nor put to beneficial use on the 12,000 acres irrigated under the 1885 direct flow priority above Barr Lake. But this 'excess water' belongs to the public under Colorado water law, subject to appropriation and use in order of decreed priority; any purported conveyance of water the appropriator does not 'need' or has not put to beneficial use flags an illegal enlargement.

We affirm the water court's findings of fact and its conclusions of law. A diversion flow rate specified in a decree is neither the measure of a matured water right, nor conclusive evidence of the appropriator's need for which the appropriation was originally made. Nor can diversions made at an undecreed point of diversion be credited in the calculation of historical consumptive use in fashioning a change of water rights decree."

Id. at 664-65.

(Citations and footnotes omitted).

Centennial Water and Sanitation District v. City and County of Broomfield

"The City and County of Broomfield ('Broomfield') filed an application for conditional appropriative rights of exchange in the district court for Water Division No. 1 for two claimed exchange reaches on the South Platte River and Big Dry Creek, a tributary of the South Platte River. The conditional appropriative rights of exchange included claims to seventeen sources of substitute water supply: nine that Broomfield owns or controls and eight that Broomfield admittedly does not own or control. Centennial Water and Sanitation District ('Centennial') and the City of Boulder ('Boulder') (together 'Opposers'), among others, filed Statements of Opposition.

Before the water court, Opposers argued that Broomfield's Application for conditional appropriative rights of exchange should be treated as a proposed augmentation plan, rather than as an application for a conditional water right, and that therefore Broomfield would have to own or control each proposed substitute source of water supply. The water court disagreed, and instead treated Broomfield's Application as an application for a conditional water right subject to the first step requirement and the can and will test.

Applying those doctrines as they have developed in the context of government entities to each proposed substitute source, the water court found that Broomfield had met its burden with regard to the nine sources of substitute supply that it did own or control; with regard to the proposed sources that it admittedly did not own or control, the court found that Broomfield had met its burden as to two substitute sources, and had failed to meet its burden for the remaining six. Accordingly, the water court decreed Broomfield's conditional appropriative rights of exchange based on the nine sources of substitute supply that it does own or control, and the two sources of substitute supply it does not own or control but has demonstrated a first step to acquiring and can and will acquire.

Centennial Water and Sanitation District v. City and County of Broomfield, 256 P.3d 677, 680 (Colo. 2011).

. . . We now affirm the water court. We hold that an application for a conditional appropriative right of exchange should be treated as an application for a conditional water right, rather than as a proposed augmentation plan. As an application for a conditional water right, Broomfield's Application for conditional appropriative rights of exchange is subject to the can and will test and the first step requirement as those doctrines have been developed in the context of government entities. Accordingly, Broomfield need not own or control all sources of substitute water supply at the time the decree is entered, but it must demonstrate that it has taken the first step to acquiring and can and will acquire the proposed sources of substitute supply. We also hold that this analysis is to be applied source-by-source, and find that the water court properly concluded that Broomfield had met its burden with regard to two of the eight proposed sources of substitute supply that it did not own or control. We therefore affirm the water court's decree of conditional appropriative rights of exchange based on the nine sources Broomfield owns or controls and two of the eight proposed sources that it does not own or control."

Id. at 680-81.

(Citations and footnotes omitted).

Cherokee Metropolitan District v. Meridian Service Metropolitan District

"In 2003, Cherokee and Meridian entered into an intergovernmental agreement ("IGA") to build a new wastewater treatment facility. According to the IGA, wastewater from both Cherokee and Meridian would be treated at the facility, and the return flows would go back into the UBS basin [Upper Black Squirrel Designated Groundwater Basin]. In 2008, pursuant to the IGA, Cherokee and Meridian jointly applied for a replacement plan with the Colorado Ground Water Commission to obtain replacement credit for the return flows from the wastewater treatment facility into the UBS basin, under Case No. 08GW71. This replacement credit would allow Cherokee to divert additional water from the UBS basin in exchange for the return flows. The IGA allocates a portion of this additional water to Meridian.

Cherokee Metropolitan District v. Meridian Service Metropolitan District, 266 P.3d 401, 403 (Colo. 2011).

. . . Here, Meridian claims an interest relating to the property or transaction that is the subject of the declaratory judgment action, namely, its interest in ensuring that its claimed rights to reuse the return flows from the planned wastewater treatment facility are not precluded by the water court's interpretation of the 1999 Stipulation between Cherokee and UBS. Specifically, Meridian claims a vested right, in addition to its contractual rights under the IGA, to reuse the return flows from the first use of its Denver Basin water. The water treatment plant is a joint project between Meridian and Cherokee. Meridian asserts that, in consideration for its contributions to the treatment plant, the IGA allocates to Meridian a share of any additional water diverted from the UBS Basin under the Replacement Plan, the share to be determined by the amount of water Meridian sends into the wastewater treatment plant. Meridian also claims a vested right to reuse the return flows from the first use of its Denver Basin water, and that it must intervene to protect that interest. In short, Meridian claims an interest in ensuring that its rights to reuse the return flows from the wastewater treatment plant, via a share of the additional water diverted from the UBS basin under the Replacement Plan, are not precluded by the water court's interpretation of the Stipulation between Cherokee and UBS.

Id. at 405.

. . . Meridian's interest in protecting its rights to reuse the return flows from the wastewater treatment plant is similar to, but not identical with, Cherokee's interests in the underlying declaratory judgment action. Like Meridian, Cherokee presumably wants to go forward with the Replacement Plan and does not want the water court to grant the declaratory judgment requested by UBS. Ultimately, however, both Cherokee and Meridian have separate water rights to protect. Thus, Cherokee and Meridian do not have the kind of relationship as to make their interests identical.

Furthermore, there are reasonable doubts about whether Cherokee will adequately represent Meridian. Cherokee itself has stated that it does not believe it can adequately represent Meridian. Cherokee acknowledges that it could choose to make certain concessions to UBS to settle or limit litigation with UBS. In addition, as UBS itself contends, Cherokee and Meridian may be involved in future litigation over the IGA. Thus, Cherokee may shape its arguments in the declaratory judgment proceedings accordingly. Finally, resolution of the declaratory judgment action could generate findings or conclusions regarding the rights to the return flows from the wastewater

treatment plant. In this context, Cherokee's interests may directly conflict with Meridian.

Therefore, we hold that the third part of Rule 24(a)(2) is satisfied because Meridian's interests are not adequately represented by Cherokee. Because all three parts of [C.R.C.P.] Rule 24 (a)(2) have been satisfied, we hold that Meridian had a right to intervene in the declaratory judgment proceedings and we reverse the water court's order denying Meridian's Motion to Intervene."

Id at 407.

(Citations and footnotes omitted).

LoPresti v. Brandenburg

"This appeal addresses orders of the District Court for Water Division No. 2 regarding the administration of water on Alvarado Creek in Custer County. Applicants–Appellants Catherine Boyer LoPresti and Peter LoPresti ('LoPrestis') and Opposers–Appellants City of Fountain and Widefield Water and Sanitation District ('Fountain & Widefield') claim the water court erred in voiding a rotational no-call agreement titled the 'Beardsley Decree.' Opposers–Appellees John Brandenburg, Douglas and Nancy Brandon, Dilley Family Trust, James D. Hood, Ronald Keyston, Arlie Riggs, Schneider Enterprises, Inc., Dr. Charles Schneider, and Mund Shaikly (collectively 'Brandenburg') argue that the Beardsley Decree was an improperly noticed change in water rights, and as such the water court correctly declared it void.

We now hold that the Beardsley Decree is a valid rotational no-call agreement because, by its plain language, it does not sanction a change in water rights. Accordingly, we reverse the judgment of the water court.

LoPresti v. Brandenburg, 267 P.3d 1211, 1212 (Colo. 2012).

. . . The Decree's terms therefore do not permit the LoPrestis to divert all of the available water in the stream system down Alvarado Creek or the North Fork to 'any point or points.' Instead, under the Decree, the LoPrestis can only call for a diversion down Alvarado Creek or the North Fork to deliver water to satisfy their ditches in priority. This call is limited to the maximum amount decreed, "severally and respectively,' to each individual ditch pursuant to the 1896 adjudication. Because the Legard No. 5 is on a different channel than the Legard Nos. 11 and 12, the 'point or points' language enabled the LoPrestis to choose which ditch or ditches to serve when the stream system's flow was inadequate to fully supply all of the ditches in priority. Thus, the water court erred by concluding that the Decree 'constitutes judicial sanction of Beardsley and Bates switching water back and forth between streams to meet their own needs, with the consequent changes in points of diversion from those specified in their respective decrees.'

Id. at 1217.

. . . As previously discussed, the Decree is a settlement agreement that rotates the ability to *call for water* between senior rights holders on a heavily over-appropriated stream system. This arrangement allows the available water supply to be shared between those water rights holders in priority, and often enables delivery at a higher flow rate to those who are receiving water at the time. It neither *changes* a junior right holder's priority on the stream system, nor does it *permit* diversion of more water than is decreed to a point of diversion. The Decree also does not permit the use of diverted

water on un-decreed land. Rather, the Decree's language is in line with our decisions that 'have repeatedly affirmed the ability of a holder of a senior right to enter into a no-call agreement with the holder of a junior right.'"

Id. at 1217-18.

(Citations and footnotes omitted).

San Antonio, Los Pinos and Conejos River Acequia Preservation Association v. Special Improvement District No. 1 of the Rio Grande Water Conservation District

"This appeal is from a judgment and decree of the District Court for Water Division 3 ('water court') and the Alamosa County District Court in two consolidated cases tried before Judge John Kuenhold, Chief Judge and Water Judge ('trial court'). In combination, these two cases involve an amended plan for water management ('Plan') adopted by Special Improvement District No. 1 of the Rio Grande Water Conservation District ('Subdistrict').

The Plan as decreed is the product of an iterative public process of adoption, review, revision, and approval by the Rio Grande Water Conservation District ('District"), the Subdistrict, the State Engineer and the trial court. The District and any of its subdistricts are political subdivisions of the state created by statute to carry out water planning and management functions within the San Luis Valley.

Section 37-48-101, C.R.S. (2011), the legislative declaration to the Rio Grande Water Conservation District Act, states its purpose, in part, to be

> the conservation of the water of the Rio Grande and its tributaries for beneficial use and the construction of reservoirs, ditches, and works for ... the growth and development of the entire area and the welfare of all its inhabitants and ... to safeguard for Colorado all waters to which the state of Colorado is equitably entitled.

The Subdistrict's Plan implements both longstanding statutory provisions for management of the ground and surface water resources of the Rio Grande Basin within Colorado's San Luis Valley, such as sections 37-48-108, -123 and -126 of Rio Grande Water Conservation District Act, and statutes enacted in the first decade of the twenty-first century, in particular section 37-92-501 (4) of the Water Right Determination and Administration Act. These and ancillary statutory provisions introduce into Colorado water law a basin-specific mechanism for optimizing the conjunctive use of tributary groundwater and surface water within Water Division No. 3, the use of which is subject to the Rio Grande Compact under section 37-66-101. As summarized in section 37-92-501(4), the General Assembly's purpose is to maintain a 'sustainable water supply' in the confined and unconfined aquifers underlying the San Luis Valley, while permitting 'the continued use of underground water consistent with preventing material injury to senior surface water rights' and consistent with the state's obligations under the Rio Grande Compact. Subdistrict No. 1's Plan may be the predecessor to like plans which, in conjunction with State Engineer rules, will comprise a comprehensive water management framework for Water Division No. 3.

San Antonio, Los Pinos and Conejos River Acequia Preservation Association v.

Special Improvement District No. 1 of the Rio Grande Water Conservation District, 270 P.3d 927, 931 (Colo. 2011).

. . . The trial court delved deeply into the amended Plan's ability to address injury to senior surface rights. The crucial calculations in the plan are the [Rio Grande Decision Support System] RGDSS–dependent projections of lagged impacts to surface streams from Subdistrict groundwater pumping. The trial court held that, although the RGDSS model has inherent limitations in determining stream impacts caused by groundwater pumping, the most updated version—the RGDSS groundwater model Phase 5 and response functions developed in connection therewith—constitutes the best available tool to determine the timing, amount, and location of depletions to surface streams from Subdistrict well pumping. The court found that using RGDSS to calculate the Subdistrict's net groundwater consumption accurately and reasonably calculates the out-of-priority diversions by Subdistrict wells that may cause material injury to surface rights and must be replaced.

The court found and ruled that the amended Plan, in order to meet the requirements of section 37-92-501(4)(a) and (b), must be accompanied by decree conditions that primarily address the replacement of injurious stream depletions resulting from ongoing and past Subdistrict well pumping that will have future impact.

Construing the statutory criteria for subdistrict water management plans in Water Division No. 3, the court determined that it need not make the threshold no-injury finding contained in the augmentation plan statutes. Instead, the court found, the General Assembly intended that an approved, decreed, and implemented subdistrict plan with a ground water management component would operate as an alternative means for protecting against injury to adjudicated senior water rights. The water court retained jurisdiction to ensure the Plan is operated, and injury is prevented, through the means of an annual replacement plan, in conformity with the terms of the court's decree. The State Engineer approved the Plan with the inclusion of the trial court's decree conditions. The Subdistrict does not contest the trial court's judgment and decree with the added conditions.

The Objectors challenge the trial court's judgment and decree on a number of grounds. We agree with the trial court that the Plan meets the criteria of the applicable statutory provisions governing its adoption."

Id. at 935.

(Citations and footnotes deleted).

Reynolds v. Cotton

"Reynolds and the owners of several other ditches diverting water from La Jara Creek appealed directly to this court from an order of the water court denying their claim for declaratory relief. The plaintiff-ditch owners sought a declaration to the effect that their appropriative rights to La Jara Creek water were not limited to water flowing into the Creek from the San Luis Valley Drain Ditch. Without directly addressing the merits of their claim, the water court granted summary judgment in favor of the State and Division Engineers, and other defendants, on the grounds that substantially the same issue had already been litigated and decided against the plaintiff-ditch owners in a prior declaratory judgment action involving the same parties or their predecessors in interest.

More particularly, the water court concluded that all of the water rights of the parties in La Jara Creek were not only at issue but were in fact finally determined in the prior litigation, and therefore the plaintiff-ditch owners' current claim of entitlement to non-drain native La Jara Creek water had been implicitly resolved against them in the judgment concluding that litigation.

Because the plaintiff-ditch owners' entitlement to non-drain native La Jara Creek water was not actually determined in the prior litigation, either expressly or by necessary implication, the summary judgment of the water court is reversed and the case is remanded for further proceedings.

Reynolds v. Cotton, 274 P.3d 540, 541-42 (Colo. 2012).

. . . Because the matter that was explicitly determined by the W–3894 judgment—the amount of water from the Drain for which the Reeds were senior to River Ranch—can be rationally understood without necessarily implying a determination of the asserted issue—whether the plaintiff-ditch owners appropriative rights in La Jara Creek were merely subordinated by the 1952 and 1960 decrees to River Ranch's rights to non-drain native water rather than altogether extinguished—the ditch owners cannot be collaterally estopped from litigating that issue in the current proceedings.

Because our reading of the record indicates that the plaintiff-ditch owners' entitlement to non-drain native La Jara Creek water was not actually determined in the prior litigation, either expressly or by necessary implication, the summary judgment of the water court is reversed and the case is remanded for further proceedings."

Id. at 547.

(Citations and footnotes omitted).

In Re Revised Abandonment List of Water Rights in Water Division 2

"Harrison appealed directly to this court from adverse rulings of the Water Court for Water Division No. 2 in two separate cases. With regard to Harrison's Application for a Change of Water Right, the water court granted the Engineers' motion to dismiss at the close of Harrison's case, finding that he was required, but failed, to establish the historic use of the right as to which he sought a change in the point of diversion. With regard to Harrison's protest to the inclusion of the interests he claimed in the Mexican Ditch on the Division Engineer's decennial abandonment list, the water court granted the Engineer's motion for abandonment, as a stipulated remedy for Harrison's failure to succeed in his change application.

Because Harrison neither proved historic use of the right for which he sought a change nor was excepted from the requirement that he do so as a precondition of changing its point of diversion; and because denying a change of water right for failing to prove the historic use of the right does not amount to an unconstitutional taking of property, the water court's dismissal of Harrison's application is affirmed. Because, however, Harrison did not stipulate to an order of abandonment as the consequence of failing to succeed in his change application, but only as the consequence of failing to timely file an application reflecting historic use, a condition with which he complied, the water court's order granting the Engineers' motion for abandonment is reversed.

In Re Revised Abandonment List of Water Rights in Water Division 2, 276 P.3d 571, 572-73 (Colo. 2012).

. . . We firmly reject the assertion that whenever the holder of a water right would be permitted to repair a damaged structure without applying for a change, he must also be permitted to replace that structure with a new and different one, at a new point of diversion, without applying for a change of water right and establishing the historic consumptive use of the right with regard to which he seeks a change.

Id. at 574.

. . . Nor does the denial of a change of water right for failing to prove historic use unconstitutionally deprive an applicant of property without just compensation, in violation of either the Fifth Amendment to the United States Constitution or article II, section 15 of the Colorado Constitution. Although we have characterized a water right, including the right to change its point of diversion, as a property right, we have also made clear that the right in question is usufructuary in nature, merely permitting the use of water within the limitations of the prior appropriation doctrine. The right itself is created by appropriating unappropriated water and putting it to a beneficial use. As we have often held, an absolute decree does not represent an adjudication of the full measure of the right but is implicitly further limited in quantity by historic beneficial consumptive use according to the decree. Limiting a change in water right to the extent of established historic use, therefore, does not deprive an applicant of an existing property right but rather ensures against an enlargement of that right."

Id. at 574-75.

(Citations and footnotes omitted).