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CASE NOTE

GRAND VALLEY WATER USERS ASS'N V. BUSK-IVANHOE, INC., 386 P.3D 452 (COLO. 2016).

I. INTRODUCTION

In the December 5, 2016 decision *Grand Valley Water Users Association v. Busk-Ivanhoe*, the Supreme Court of Colorado reversed the Water Court for Division 2's holding in a change of water rights case.¹ The Supreme Court of Colorado ruled that: (i) a right to store water is not automatic with a direct flow right; (ii) a right to store on the western slope does not imply a right to store on the eastern slope; and (iii) water storage cannot occur prior to the water being put to its beneficial use without an explicit or implied right written into the water right decree.²

According to the Supreme Court of Colorado, in order to store water on the eastern slope prior to being put to any beneficial use, diversion projects will have to acquire storage rights or show an implied storage right within their decrees, regardless of when the decree is issued.³ Although western slope and environmental interests viewed the ruling as a victory,⁴ the decision gave the impression that it would likely stir up Colorado diversion and reservoir projects. However, the Colorado Legislature muddied the waters for all interested parties with the passage of recent bills that allow reservoir storage on the eastern slope.⁵

II. BACKGROUND

A. PRIOR TO THE *BUSK-IVANHOE* DECISION: THE LAW IN COLORADO

Colorado water law allows water users to change the terms of their decrees.⁶ A water right holder may change the type, place, or time of beneficial use within the water right's decree.⁷ However, a water right may only be changed, not enlarged⁸—a rule which dates back to the nineteenth century.⁹ To change a water

1. *Grand Valley Water Users Assoc. v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 457 (Colo. 2016).

2. *Id.*

3. *Id.*

4. See Karen Antonacci, *Colo. Supreme Court water decision impact on Windy Gap Firming Project unclear*, TIMES-CALL (Jan. 7, 2017), http://www.timescall.com/longmont-local-news/ci_30710178/colo-supreme-court-water-decision-impact-windy-gap.

5. See H.B. 17-1248, 71st Gen. Assemb., Reg. Sess. (Colo. 2017); H.B. 17-1291, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

6. *Busk-Ivanhoe*, 386 P.3d at 461; COLO. REV. STAT. § 37-92-103(5) (2016); see Strickler v. City of Colorado Springs, 26 P. 313, 315-17 (Colo. 1891).

7. COLO. REV. STAT. § 37-92-103(5).

8. *Id.*; see *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 656-58 (Colo. 2011).

9. See *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 21 P. 1028, 1028-29

right, a court must determine the historic consumptive use, a method of quantifying the water beneficially consumed in an attempt “against rewarding wasteful practices or recognizing water claims that are not justified by the nature or extent of the appropriator’s actual need.”¹⁰

B. FACTUAL BACKGROUND: BUSK-IVANHOE’S WATER RIGHTS

In the 1928 Garfield County District Court Case No. 2621 (“2621 Decree” or “Decree”), A.E. and L.G. Carlton (the “Carltons”) received an adjudicated decree to the water rights at issue in *Busk-Ivanhoe*.¹¹ The 2621 Decree granted the Carltons the right to divert and transfer Colorado River Basin water across the Continental Divide through the Ivanhoe Tunnel to the Arkansas River Basin, which was already over-appropriated.¹² The Carltons put the water to beneficial use for supplemental irrigation.¹³ During this time, they stored the water on the eastern slope in Sugarloaf Reservoir, where they rented, by volume, the storage space from CF&I Steel Company and leased the water to High Line Canal Company for supplemental irrigation.¹⁴ The 2621 Decree did not adjudicate storage on the eastern slope, though.¹⁵ In 1950, the Carltons sold the Busk-Ivanhoe Water System water rights to High Line Canal Company, and the company continued to store water in the Sugarloaf Reservoir and, later, in Turquoise Reservoir.¹⁶ In 1972, it sold an undivided one-half interest in the rights to the Board of Water Works of Pueblo (“Pueblo”), and in 1984, the entity Busk-Ivanhoe incorporated and gained the remaining one-half interest in the system water rights.¹⁷ The City of Aurora (“Aurora”) purchased and now owns the capital stock of Busk-Ivanhoe, acquiring the entity’s one-half interest in the water rights.¹⁸

The Busk-Ivanhoe System involves the Lyle Ditch, the Pan Ditch, the Hidden Lake Creek Ditch, the Ivanhoe Reservoir, and the Ivanhoe Tunnel.¹⁹ The Decree granted absolute direct flow rights for waters from Ivanhoe Creek and Lyle Ditch and conditional direct flow rights for waters from Pan Ditch and Hidden Lake Creek Ditch.²⁰ The Decree also granted an absolute right for

(Colo. 1889).

10. *Busk-Ivanhoe*, 386 P.3d at 462 (citing to Santa Fe Ranches Prop. Owners Assoc. v. Simpson, 990 P.2d 46, 54–55 (Colo. 1999)).

11. *Id.* at 457.

12. *Id.*; see Hal Simpson, *Water Administration in Colorado*, in ARKANSAS RIVER BASIN WATER FORUM: A RIVER OF DREAMS AND REALITIES, INFORMATION SERIES NO. 82 1, 69–70 (Colo. Water Res. Research Inst. ed., 1995).

13. *Busk-Ivanhoe*, 386 P.3d at 458.

14. *Id.*

15. *Id.*

16. *Id.* The change in reservoir occurred during construction of the Fryingpan-Arkansas Project, where High Line Canal Company contracted the arrangement with the Bureau of Reclamation. See generally G. MOSS DRISCOLL, FRONT RANGE WATER SUPPLY PLANNING UPDATE: INCREASED STORAGE, INCREASED DEMANDS, INCREASED TRANSMOUNTAIN DIVERSION 6–12 (2011).

17. *Busk-Ivanhoe*, 386 P.3d at 458.

18. *Id.*

19. *Id.* at 457.

20. *Id.* at 458.

storage of 1,200 acre-feet of water in the Ivanhoe Reservoir.²¹ The Ivanhoe Tunnel carries both the direct flow water and the storage water to the eastern slope, where it discharges the water in Lake Fork Creek.²² It is then diverted and used for 80,000 acres of supplemental irrigation in the Arkansas River Basin.²³

In 1987, Busk-Ivanhoe began putting the water rights to municipal use in Aurora.²⁴ This changed the decreed supplemental irrigation rights in the Arkansas River Basin to an undecreed municipal use in the South Platte River Basin.²⁵ At Aurora's request, Busk-Ivanhoe diverted the water rights through the Ivanhoe Tunnel, stored it in the former Sugarloaf Reservoir, and then transferred the water through the Mount Elbert Conduit to Twin Lakes Reservoir.²⁶ The water then traveled through the Otero Pipeline to the Otero Pump Station, leaving Water Division 2 and entering Aurora storage in Water Division 1.²⁷ Busk-Ivanhoe did not apply for a change in the place of use and the type of use until 2009.²⁸ Between 1987 and 2009, Busk-Ivanhoe used the water for its decreed supplemental irrigation use only once in the Arkansas River Basin.²⁹

C. CASE HISTORY

On December 30, 2009, the Engineer for Division 2 requested that Busk-Ivanhoe file the application to change the place of use and type of use of the water rights.³⁰ The Engineer filed the application in the following divisions: (i) Water Division 5, where Busk-Ivanhoe exported the water since its 2621 Decree; (ii) Water Division 2, where Busk-Ivanhoe imported the water to be put it to its supplemental irrigation use; and (iii) Water Division 1, where Busk-Ivanhoe then stored the water and put it to municipal use from 1987 to 2009.³¹ The courts consolidated the cases to Water Division 2, and in July 2013, the water court held a five-day trial.³²

In May 2014, the Water Court for Water Division 2 outlined the historical decreed supplemental irrigation use from 1928 to 1986.³³ It excluded the undecreed uses of the water from 1987 to 2009.³⁴ The water court concluded that the 2621 Decree did allow lawful storage on the eastern slope because the Decree's reference to "supplemental supply" showed an intent to use the water for supplemental irrigation when Arkansas River flows could not provide that use.³⁵

21. *Id.*

22. *Id.*

23. *Busk-Ivanhoe*, 386 P.3d at 457-58.

24. *Id.* at 458.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Busk-Ivanhoe*, 386 P.3d at 458.

30. *Id.* at 458-59.

31. *Id.* at 459.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Busk-Ivanhoe*, 386 P.3d at 459.

It concluded that storage was necessary “for the effective and beneficial use of the water rights.”³⁶ The water court viewed the instances within the Decree where “direct irrigation” had been stricken and replaced with “direct flow” as evidence that the water may not be immediately used for irrigation but may be stored on the eastern slope.³⁷

The water court relied on extrinsic evidence of “a map and statement filed with the State Engineer’s Office that described a reservoir on the eastern slope that the Carltons had proposed but never built and certain meeting minutes marketing the water as ‘reservoir water.’”³⁸ However, the court in 1928 that adjudicated the Decree never saw this evidence.³⁹ The 2014 water court also relied on the volumes of water used to pay for storage in the Sugarloaf and Turquoise Reservoirs when it determined the historic consumptive use quantification.⁴⁰ Because it accepted that storage was necessary to beneficial use of the water and relied on expert testimony that fees paid in volumes of water were akin to evaporation or transit losses, the water court quantified the water rights as 2,416 acre-feet per year.⁴¹

III. THE COLORADO SUPREME COURT RULING

“The right to change a water right is limited to that amount actually used beneficially pursuant to the decree at the appropriator’s place of use.”⁴² This requires a water court to quantify the historic consumptive use of the decreed water right.⁴³ When Busk-Ivanhoe filed its application for the change in both place and type of water right in 2009, the Court performed this analysis.

On appeal, the Supreme Court of Colorado looked at: (i) “whether storage of the water on the eastern slope prior to use was lawful and therefore could be included in the water court’s historic use quantification”; (ii) “whether the volumes of water paid to rent such storage could be included in the quantification”; and (iii) “whether the water court properly excluded the twenty-two years of undecreed municipal use from the representative study period used to quantify the rights.”⁴⁴

A. THE RIGHT TO STORE WATER IS NOT AN AUTOMATIC INCIDENT OF A DIRECT FLOW RIGHT

The Supreme Court of Colorado reversed the water court’s holding that Busk-Ivanhoe’s storage rights on the eastern slope were lawful.⁴⁵ The Court stated that transmountain diversion has no effect on whether storage can occur.⁴⁶

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Busk-Ivanhoe*, 386 P.3d at 459-60.

42. *Id.* at 460.

43. *See id.*

44. *Id.*

45. *Id.*

46. *Id.*

A storage right does not come with a direct flow right.⁴⁷ A right to store must be “reflected, or at least implied, in the decree.”⁴⁸ The Court relied on the 2621 Decree, which expressly included storage on the western slope prior to its journey across the Continental Divide, but did not include any language that would allow storage on the eastern slope.⁴⁹ This decimated the lower court’s rationale, which found an implied right to store on the eastern slope from the Decree’s language “supplemental.”⁵⁰ The Supreme Court determined the water court erred when it concluded that storage of Busk-Ivanhoe rights on the eastern slope prior to use for their decreed purpose was lawful.⁵¹

B. THIS RULING THEN SKEWED THE LOWER WATER COURT’S HISTORIC CONSUMPTIVE USE QUANTIFICATION

A historic consumptive use quantification requires that the consumptive use be lawful under its decree.⁵² When the water court incorrectly determined that the eastern slope storage from 1928 to 1986 was lawful, it skewed the quantification.⁵³ The water court included the rental fees paid to store the water rights in Sugarloaf and Turquoise Reservoirs, which allowed for quantification of unlawful use.⁵⁴

C. THE WATER COURT SHOULD HAVE CONSIDERED THE UNJUSTIFIED NON-USE OF THE WATER RIGHTS BETWEEN THE YEARS 1987 AND 2009

The Supreme Court concluded the water court should have considered the twenty-two year period when Aurora stored and used the water rights for undecreed municipal use in its historic consumptive use analysis.⁵⁵ It determined this was not an expansion of the water rights, but a replacement of the decreed rights for undecreed rights.⁵⁶ The undecreed municipal use of water occurred instead of its decreed purpose for supplemental irrigation.⁵⁷ The Supreme Court remanded the case to the water court to determine if Aurora’s non-use of the supplemental irrigation use is unjustified.⁵⁸ If it is determined to be unjustified non-use, then it must be included in the historic consumptive use quantification as “zero-use.”⁵⁹

47. *Busk-Ivanhoe*, 386 P.3d at 460.

48. *Id.*

49. *Id.* at 461.

50. *Id.*

51. *Id.*

52. *Id.* at 462.

53. *Busk-Ivanhoe*, 386 P.3d at 470.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Busk-Ivanhoe*, 386 P.3d at 470.

IV. DISCUSSION

Colorado's western slope water users have feuded with eastern slope users for years.⁶⁰ In 1990, western slope interests challenged Pueblo's application for a change of use for Pueblo's half of the Busk-Ivanhoe System.⁶¹ When Pueblo sought the change of water rights from irrigation to municipal and industrial use, the Water Court for Division 5 forced seasonal and volumetric limits on Pueblo's half of the Busk-Ivanhoe System water.⁶² However, without similar limitations, Aurora had been putting its half of the Busk-Ivanhoe System to municipal and industrial uses without first obtaining a change of use decree affirming that type of use.⁶³ In *Busk-Ivanhoe*, the ruling from the water court essentially allowed transmountain water to be stored without authorization and muddled the legal distinction between direct flow rights and storage rights.⁶⁴ However, the Supreme Court of Colorado clarified that the right to use is not a right to store.⁶⁵

As a result, current and future Colorado water projects may be subject to more contention as water users attempt to quench the thirst of the increasingly populated eastern slope.⁶⁶ One of these projects is the Windy Gap Firming Project. When the Firming Project's owners received the 404(b) Clean Water Act permit from the U.S. Army Corps of Engineers in May 2017, western slope interests and environmental groups filed a Petition for Review in the U.S. District Court for the District of Colorado.⁶⁷ The Firming Project aims to build a reservoir on the eastern slope to firm the yield of the existing Windy Gap Project.⁶⁸

The existing Windy Gap Project is a completed project involving the western slope Windy Gap Reservoir with conveyance of Colorado River water through the Colorado-Big Thompson pipeline.⁶⁹ The Bureau of Reclamation ("BOR") filed its Final Environmental Impact Statement for the existing Windy

60. DRISCOLL, *supra* note 16, at i.

61. *Id.* at 13.

62. *Id.*

63. *See Busk-Ivanhoe*, 386 P.3d at 460.

64. *See id.* at 459.

65. *Id.* at 460.

66. DRISCOLL, *supra* note 16, at 3.

67. U.S. ARMY CORPS OF ENGINEERS, OMAHA DIVISION, RECORD OF DECISION: WINDY GAP FIRING PROJECT (2017), http://www.nwo.usace.army.mil/Portals/23/docs/regulatory/CO/gen/WGFP%20-%20Record%20of%20Decision%20-%2005162017-FINAL_CLEAN_noAppendices.pdf?ver=2017-05-22-112724-837 [hereinafter ARMY CORPS ROD]; Petition for Review of Agency Action, *Save the Colorado v. U.S. Bureau of Reclamation*, No. 1:17-cv-02563 (D. Colo. Oct. 26, 2017).

68. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: WINDY GAP FIRING PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT 5-6 (2014) [hereinafter WINDY GAP FIRING PROJECT FEIS].

69. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, 2014 CONTRACT NO. 15XX650003: 2014 CONTRACT FOR THE INTRODUCTION, STORAGE, CONVEYANCE, EXCHANGE, SUBSTITUTION, AND DELIVERY OF WATER FOR MUNICIPAL SUBDISTRICT, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, COLORADO-BIG THOMPSON PROJECT, COLORADO 4-5 (2014), https://www.colorado.gov/pacific/sites/default/files/All%20Appendices%20in%20one%20file_new.pdf [hereinafter 2014 CONTRACT].

Gap Project in April 1981.⁷⁰ Since its completion, it has not met its anticipated firm yield due to junior water rights and a limited storage capacity.⁷¹ In December of 2011, BOR filed a Final Environmental Impact Statement for the Windy Gap Firming Project.⁷² The Firming Project's goal is to firm the yield of the original Windy Gap Project by building the eastern slope Chimney Hollow Reservoir for storage.⁷³

However, BOR acknowledged the lack of prepositioning storage rights in its 2014 Contract.⁷⁴ This lack of eastern slope storage rights mirrors the issue of the recent *Busk-Ivanhoe* decision, where a transmountain direct flow right does not grant a water user the right to store that water on the eastern slope before putting it to its beneficial use.⁷⁵ One significant difference between the Busk-Ivanhoe System and this new Firming Project is the amount of water subjected to transmountain diversions.⁷⁶ While Busk-Ivanhoe's average annual yield is 5,209 acre-feet, the new Firming Project purports to "deliver a firm annual yield of about 30,000 acre-feet of water from the existing Windy Gap Project to meet a portion of the water deliveries anticipated from the original Windy Gap Project and to provide up to 3,000 acre-feet of storage" on the eastern slope by building the Chimney Hollow Reservoir.⁷⁷ Since the original Windy Gap Project utilized mostly junior rights and could not transport the water effectively, this amounts to more diversions from the already-depleted Colorado River.⁷⁸ Western slope interests, particularly in Grand County, have voiced opposition to the Firming Project throughout its planning process.⁷⁹

The Municipal Subdistrict of Northern Colorado Water Conservancy District ("Northern") is in charge of the Firming Project.⁸⁰ While its general manager Erik Wilkinson stated in a news article that staff members are researching to determine if the *Busk-Ivanhoe* decision poses a water rights issue for the Firming Project, Northern's Spokesman Brian Werner said in the week following the Supreme Court decision that it should not significantly impact the Firming Project.⁸¹ The Firming Project's 2014 Contract, however, states:

[S]hould a court conclude that Prepositioning is not consistent with applicable law, future Windy Gap Firming Project operations shall not include Preposi-

70. *Id.* at 5.

71. WINDY GAP FIRING PROJECT FEIS, *supra* note 68, at 6.

72. *Id.* at 7.

73. *Id.* at 8.

74. 2014 CONTRACT, *supra* note 69, at 4.

75. *See* Antonacci, *supra* note 4.

76. WINDY GAP FIRING PROJECT FEIS, *supra* note 68, at 7-8.

77. *Id.*

78. *See* DAVID OWEN, WHERE THE WATER GOES: LIFE AND DEATH ALONG THE COLORADO RIVER 52-64 (2017); Press Release, Save the Colorado, Climate Change Be Dammed, Army Corps Decides to Further Drain Colorado River (May17, 2017), <http://savethecolorado.org/press-release-climate-change-be-damned-army-corps-decides-to-further-drain-colorado-river/>.

79. *See generally* WINDY GAP FIRING PROJECT FEIS, *supra* note 68, at 14-18.

80. *Id.* at 5.

81. Antonacci, *supra* note 4.

tioning unless the appropriate authority is obtained by the [Municipal Subdistrict of Northern Colorado Water Conservancy District]. The Secretary shall have no obligation to obtain any such authorizations.⁸²

This language suggests that in the event the Firming Project violates Colorado water law, Northern must acquire the rights to store on the eastern slope because it owns the Firming Project.⁸³ This also protects the BOR from any responsibility to obtain those water rights.⁸⁴

After *Busk-Ivanhoe*, and despite Northern's assertion that the Firming Project's water way is crystal clear, one can only conclude that construction of the Chimney Hollow Reservoir on the eastern slope would violate Colorado water law.⁸⁵ After *Busk-Ivanhoe*, Northern is required to first obtain the right to store the water from a water court prior to the construction of the Chimney Hollow Reservoir.⁸⁶ Werner stated the Firming Project's intent to store the water always existed, whether on the eastern or western slope.⁸⁷ But the original Windy Gap Project never intended to not meet its firm yield, so an implied intention to store on the eastern slope seems unlikely—unless Northern knew all along that it would not meet its firm yield, which raises ethical and feasibility questions about the purpose in the original Windy Gap Project altogether.⁸⁸ Under this new Supreme Court ruling, Northern will have to prove its implied intention to store on the eastern slope or apply for a change of water right.⁸⁹

However, a new crinkle emerged in the 2017 Colorado Legislative session. The House of Representatives pushed through two house bills that support the Firming Project.⁹⁰ House Bill 17-1248 authorized the Colorado Water Conservancy Board to “make loans in the amount of up to \$90,000,000” from the fund for the Firming Project.⁹¹ The House passed House Bill 17-1248 on April 27, with the Senate following suit on May 9.⁹² Then, the House passed House Bill 17-1291, which:

allows a water right for which the historical consumptive use was previously quantified to be stored in any reservoir, without the necessity of adjudicating an additional change of water right, if: the water will be diverted from a point of diversion that has already been decreed for that water right; previous notice is given to the division engineer; transit and ditch losses are assessed from the decreed point of diversion to the alternate place of storage; and the division

82. 2014 CONTRACT, *supra* note 69, at 32.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Busk-Ivanhoe*, 386 P.3d at 470.

87. Antonacci, *supra* note 4.

88. *See id.*; *see generally* WINDY GAP FIRMING PROJECT FEIS, *supra* note 68, at 7–8.

89. *See Busk-Ivanhoe*, 386 P.3d at 470.

90. H.B. 17-1248, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); H.B. 17-1291, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

91. H.B. 17-1248.

92. *Colorado Water Conservation Board Construction Fund Project - HIB 17-1248*, THE DENVER POST, http://extras.denverpost.com/app/bill-tracker/bills/2017a/hb_17-1248/ (last visited Jan. 9, 2018).

engineer approves the proposed accounting of the storage.⁹³

Passed in the House on April 24, 2017, and the Senate on May 3, 2017, this Bill essentially demolishes the Supreme Court ruling in *Busk-Ivanhoe*.⁹⁴ It allows a water right holder to store water in any reservoir without needing to apply for a change of water right.⁹⁵ So long as a water right holder had a historical consumptive use to store water in a reservoir, it can store it elsewhere if it fits the above stipulations.⁹⁶

As these bills become law, the Firming Project will steadily flow its way to constructing the new eastern slope reservoir. As the Firming Project has already received approval from the U.S. Army Corps of Engineers through the issuance of the 404(b) Clean Water Act permit, construction is anticipated to begin sometime in the near future.⁹⁷ However, while the fate of *Busk-Ivanhoe* is still unclear, the western slope interests suffered a small defeat in their battle to maintain, what they perceived to be, the health of Colorado's river systems.

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93. H.B. 17-1291.

94. *Id.*; see *Busk-Ivanhoe*, 386 P.3d at 470.

95. H.B. 17-1291.

96. *Id.*

97. See ARMY CORPS ROD, *supra* note 67.

