

2017

Gallengos Family Props., v. Colo. Groundwater Comm'n, 398 P.3d 599 (Colo. 2017)

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Alicia Garcia, Court Report, Gallengos Family Props., v. Colo. Groundwater Comm'n, 398 P.3d 599 (Colo. 2017), 21 U. Denv. Water L. Rev. 127 (2017).

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As another point of injury, the Court pointed to the potential effect on return flows caused by changing the location of diversions. Although impact may be minimal, the burden was on Freeport to demonstrate a lack of injury. However, Freeport failed to present such evidence. Further, the Court noted the negative impact on water quality caused by changing the type of diversion. At least one of Freeport's applications requested change from a ground level diversion to a pumping diversion which has higher salinity levels. This would have increased the overall salinity levels in the Gila River thus negatively affecting the Tribe which requires fresh water in order to irrigate and grow crops.

After evaluating the injury, the Court next assessed the District Court's ruling that a "prolonged period on non-use coupled with improvements to the property (the construction of a road and canal) were incompatible with irrigation," thus providing sufficient evidence that Freeport intended to abandon its water rights. Freeport argued that there is no intent to abandon because: (1) it bought the farmlands for the purpose of acquiring water rights; (2) it required lessees to maintain its water rights; and (3) it paid all water right related taxes and fees. The Court held that purchasing land with the intention of acquiring the water rights, as well as requiring lessees to maintain water rights, is irrelevant if those rights are not acted upon after purchase by removing developments that are inconsistent with water usage (canals and road).

The Court affirmed the district court's decision denying Freeport's applications. However, it reversed the district court's decision that Arizona's statutory forfeiture law did not apply to Freeport's water rights. The Court remanded the remaining objections filed by the United States, the Tribe, and the Community to the district court.

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STATE COURTS

COLORADO

Gallegos Family Props., v. Colo. Groundwater Comm'n, 398 P.3d 599 (Colo. 2017) (holding that: (i) evidence that groundwater and a creek had been connected at the time of designation of the groundwater was not a condition newly discovered or occurring after the original basin designation date, and therefore was insufficient to modify a basin boundary under Colo. Rev. Stat. section 37-90-106(1)(a); (ii) claim preclusion applied because the issue of connectivity was not litigated at the time of the designation proceeding; and (iii) costs recovered by the prevailing well owners were reasonable and necessary).

Gallegos Family Properties, LLC ("Gallegos") appealed, for a second time, to the Supreme Court of Colorado in hopes of de-designating a portion of the Upper Crow Creek Designated Ground Water Basin ("the Basin"). Specifically, Gallegos petitioned to re-draw the Basin boundaries to exclude twenty-five wells on Crow Creek, thus curtailing the junior water rights of the well owners ("Well-Owners") in favor of Gallegos's senior water rights.

Gallegos owns what is known as the "Larson Rights," which consist of surface rights to a combined flow of 413 cubic feet per second in Consolidated Larson Ditch and 59.5 acre-feet of storage rights in Larson Reservoir #1. Decreed in 1914, these rights divert from a headgate on Crow Creek that originates

in Wyoming and flows into Colorado. Gallegos purchased the rights in 1999.

Prior to the 1950's, Crow Creek maintained a reliable base surface flow in Colorado. However, as surface pumping in Wyoming continued to increase, surface water rights in Colorado became increasingly unreliable and could no longer meet the needs of surface rights owners.

Thus, in 1983, a group that included the Well-Owners and Gallegos's predecessors in interest petitioned to the Colorado Groundwater Commission (the "Commission") to designate the Basin to allow for pumping from the aquifers underlying Crow Creek. There was only one objection to the designation, and the hearing officers designated the basin based on the designation standards set forth in C.R.S. section 37-90-103(a). Under the statute, "designation is proper for groundwater in areas not adjacent to a continuously flowing natural stream wherein groundwater withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin." The 1987 Commission affirmed.

Gallegos purchased the rights in 1999, and leased the water rights and the associated land rights until 2002. At that time, Gallegos's tenant farmers were unable to irrigate the crops due to insufficient surface water. In response, Gallegos petitioned for the curtailment of the Well-Owners junior water rights on the grounds that their pumping had injured its senior water rights.

Gallegos brought this appeal to the Colorado Supreme Court appealing the order denying re-designation of a portion of the Basin to exclude twenty-five wells owned by the Well-Owners. As established in *Gallegos v. Colo. Groundwater Comm'n*, 147 P.3d 20 (Colo. 2006) (*Gallegos I*) and under the requirements of C.R.S section 37-90-106(1)(a), in order to justify a partial de-designation of the Basin, Gallegos must: (1) "show by new evidence not before the 1987 commission (2) that the well owner's pumping has a greater than de minimis impact to its senior surface rights (3) such that future conditions and factual data justify de-designation a portion of the Basin."

In order to show that the Well-Owner's pumping had a greater than de minimis impact, Gallegos needed prove both connectivity and injury. The Court defined connectivity "as the linkage between groundwater and surface water such that augmenting or depleting groundwater impacts the availability of surface flow." In forming this definition, the Court relied on the hydrological connection between groundwater and surface water and the influence that the former has on the latter. Thus, the primary issue was whether Gallegos could show connectivity, by new evidence, not before the 1987 Commission at the time of the Basin's original designation.

In applying these standards, the Court held that Gallegos's showings fail under both requirements of section 37-90-106(1)(a) and *Gallegos I*. Specifically, the evidence failed under the designation statute because it did not show either a new condition that had arisen since 1987 or an existing condition that had been newly discovered since 1987—either of which would be necessary to justify the modification of a basin boundary.

Although Gallegos's experts may have been able to establish a connection between the groundwater in the Basin and Crow Creek, this merely confirmed what was already shown to the 1987 Commission. In proving a connection, Gallegos's experts pointed to the increased stream flow of Crow Creek at the

point where the alluvial aquifer necks down at the Larson headgate. However, the Court noted that this is not novel information. Rather, it is merely a repackaging of information that was presented at the 1987 hearing.

Further, the Court held that Gallegos's showings fail under *Gallegos I*. Specifically, the Court emphasized that under *Gallegos I*, claim preclusion prevents relitigation of issues that could have been litigated in a prior proceeding. Here, the connectivity claim could have, and should have, been litigated during the original designation proceedings, and Gallegos relied on the same evidence that the 1987 Commission relied on when originally designating the Basin.

Accordingly, the Court affirmed the decision of the designated groundwater court.

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Select Energy Servs., LLC v. K-LOW, LLC, 394 P.3d 695 (Colo. 2017) (affirming the water court's finding that a decree defining a right to divert water only from a headgate located downstream from a disputed ditch did not include the right to divert water from that ditch).

This case came before the Colorado Supreme Court on appeal from the water court's definition of a water right stemming from a 1914 decree and a recent change to that right.

The original 1914 decree granted twenty-eight cubic feet of water per second absolute, for irrigation of 300 acres, with an appropriation date of December 8, 1893. The legal description of the diversion point was a certain headgate on the South Platte River, where the water then travelled via the Sterling Drain and Seepage Ditch ("SD&SD"). Additionally, the decree noted that, as a source of supply, the SD&SD right "takes its supply of water . . . from seepage and waste waters coming . . . from the Plumb drain ditch and other accretions along its course."

Faith Tabernacle Church ("Faith") later obtained the SD&SD right, and, in 2014, Faith applied to move the right's diversion point pursuant to Colorado's recently enacted simple change statute. The statute creates a simpler process for moving a surface point of diversion but prohibits combining that change with any other change to the right.¹

The water court approved the application and entered the 2014 decree, which changed the diversion point from the headgate to a downriver pump on Faith's property, downstream from both the original diversion point and the terminus of the ditch. Rights to usage remained unchanged, as did the original appropriation date. The decree named the South Platte River as the source, while noting that the 1914 decree also adjudicated the Plumb Drain ditch and other accretions as sources of supply for the SD&SD. After changing the diversion point, Faith quitclaimed what remaining property interests it may have retained in the ditch to K-LOW, while retaining ownership of the SD&SD itself.

Select Energy Services ("Select"), laid a pipeline across this ditch, and K-LOW filed a trespass claim against Select, relying on its quitclaim deed and claiming an easement to the ditch associated with the historic water right. Select filed suit in Water Court Division 1 seeking a declaratory judgment as to

1. COLO. REV. STAT. § 37-92-305(3.5) (2016).