

9-1-2016

## County of Boulder v. Boulder & Weld Cnty. Ditch Co., 367 P.3d 1179 (Colo. 2016)

Connor Pace

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### Custom Citation

Connor Pace, Court Report, County of Boulder v. Boulder & Weld Cnty. Ditch Co., 367 P.3d 1179 (Colo. 2016), 20 U. Denv. Water L. Rev. 140 (2016).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

restricted Trujillo's water use to indoor purposes and limited the amount to 0.5 AFY based on historic beneficial use. Trujillo objected to her permit's prohibition on outdoor use and the limitation of 0.5 AFY. The State offered into evidence an affidavit by an expert witness stating that, on average, permits for a domestic well use 0.4 AFY per household. Trujillo failed to prove that she had the right to use more than 0.5 AFY under the doctrine of beneficial use for a purpose other than as allowed in the permit. In 2010, the special master granted summary judgment in favor of New Mexico.

After the special master issued the order, Trujillo filed several motions, including an objection to the 2010 order of summary judgment, two motions to quash the 1983 injunction, and a motion to reconsider the district court's overruling of her objection to the order of summary judgment. In 2015, the district court issued an order adjudicating Trujillo's domestic water rights as part of a regional general stream adjudication. The 2015 order issued by the district court imposed identical conditions on Trujillo's domestic water rights as had been stated in the 2010 order: a limit of 0.5 AFY with a prohibition on outdoor use including irrigation.

On appeal, the court of appeals did not find this to be a final ruling subject to its jurisdiction because Trujillo and other permit holders may object to the order during the *inter se* stage before the district court enters a final judgment on September 15, 2017. Therefore, the court of appeals did not have jurisdiction under 28 U.S.C. § 1291 to review 2015 order by the district court. The pragmatic finality doctrine is an exception under § 1291 and may be applied in order to expedite appellate review. However, the court of appeals did not apply the pragmatic finality doctrine to Trujillo's appeal, instead finding jurisdiction under 28 U.S.C. § 1291(a), which permits interlocutory appeals.

Accordingly, the court of appeals had jurisdiction to review the special master's summary judgment order issued in 2010. The court of appeals upheld the district court's ruling from 2010 and the subsequent order in 2015. Trujillo did not present the court with evidence of her beneficial indoor use. Trujillo failed to raise an argument against the 2010 decision upon which the 2015 decision was based. Contrary to New Mexico law, Trujillo argued that her permit alone created the water right. Beneficial use is the basis from which all water rights within the state may be legally measured and limited, and Trujillo gave no evidence of her beneficial use for indoor purposes in excess of the allocated 0.5 AFY.

Therefore the court of appeals affirmed the district court's order for summary judgment in favor of the state of New Mexico.

*Margaret Casey*

## STATE COURTS

### COLORADO

**County of Boulder v. Boulder & Weld Cnty. Ditch Co.**, 367 P.3d 1179 (Colo. 2016) (holding that the Water Court correctly denied the County of Boulder's change of use application because it failed to meet its burden of proving an accurate historical consumptive use analysis).

Beginning in the early 1990s, the County of Boulder (the "County") entered

into a series of transactions to acquire the Bailey Farm, a 290-acre property historically used for irrigated agriculture and gravel mining. The County aimed to develop the Bailey Farm into an open-space park featuring two ponds made from gravel pits filled with groundwater. The ponds would expose groundwater and increase evaporation, requiring the County to replace lost water through an augmentation plan under Colo. Rev. Stat. § 37-90-137. To meet this requirement, the County filed an application in the District Court for Water Division No. 1 for underground water rights, approval of a plan for augmentation, a change of water rights, and an appropriative right of substitution and exchange. Each component was interdependently linked. The application hinged on approval of the change in water rights. The County sought to change fifty inches of its Martha M. Matthews Ditch surface water right (“MM water right”), used historically to irrigate the Bailey Farm (the “Bailey Farm Inches”), into an augmentation plan. Boulder and Weld County Ditch Company (“BW Ditch”) opposed the County’s application, claiming injury from the proposed change.

At trial, the County submitted two historical consumptive use (“HCU”) analyses examining the Bailey Farm Inches to prove BW Ditch would not suffer injury. Both analyses included a prorated estimate that assumed previous users delivered the Bailey Farm Inches entire to 101 acres of the Bailey Farm. The County’s first analysis assumed full delivery of all fifty Bailey Farm Inches to Bailey Farm from 1950 to 2000; however, BW Ditch records later revealed the HCU analysis overestimated actual consumption by thirty-seven percent from 1973 to 2000. As a result, the County supplemented the original HCU analysis with BW Ditch’s correct numbers from 1973 to 2000 and the same estimated numbers for 1950 to 1972. The Water Court cited three fatal deficiencies in the County’s HCU analysis.

First, the County inaccurately calculated actual use of the Bailey Farm Inches. BW Ditch claimed the County overstated the number of acres the Bailey Farm Inches historically irrigated, which would unlawfully enlarge the Bailey Farm Inches water right and injure down-stream users. Second, the County failed to prove the Bailey Farm Inches irrigated the seventy-acre parcel of land that the County purported. Specifically, the County assumed without support that the Bailey Farm Inches irrigated the entire Bailey Farm and based the HCU analysis on these figures. Finally, the County ignored the historical consumption of other water rights by conducting a parcel-specific analysis, rather than ditch-wide analysis. The Water Court rejected the County’s findings as inaccurate and insufficient to meet the County’s burden of proving HCU, and consequently dismissed the entire application because the County could not demonstrate an absence of injury to others or that the proposed change in water rights would not fully compensate for the anticipated loss. The County appealed the Water Court’s determination.

On appeal, the Colorado Supreme Court affirmed the Water Court’s holding. The supreme court divided its analysis into two stages. First, the supreme court discussed applicable principles of Colorado water law. Second, the supreme court discussed whether the County provided an accurate HCU analysis.

In its discussion of legal principles, the supreme court explained why an accurate HCU analysis is necessary for persons exposing groundwater through gravel pits. It first explained the interaction between surface and ground water rights, and the Water Right Determination and Administration Act of 1969,

which integrated the prior appropriation of surface with ground water while maximizing beneficial use of water. Integrating surface rights with groundwater often requires augmentation plans. Augmentation plans allow users out-of-priority groundwater diversions, so long as he or she adequately replenishes the diversion from existing water rights to protect senior water rights. Water districts only approve augmentation plans that do not injure other users. A careful accounting of actual water use may help demonstrate lack of injury and prevent the unlawful expansion of water rights.

Next, the supreme court examined long-established principles regarding changes of water rights and HCU analyses. The supreme court noted that the amount of water changed must reflect the actual amount of water used and exist within the water's contemplated use at the time of appropriation. This limitation comes from the principle that water rights derive from both appropriation and beneficial use. Once diverted, the water's beneficial use becomes the basis, measure, and limit of the water right. The supreme court also explained that modification of use itself cannot injure other water users. Courts often intertwine these principles, as an expansion of a water right's previous use often reduces the amount of water in return flow. Thus, established principles allow water rights holders to change only as much water as they historically consumed in the manner contemplated by those rights.

The supreme court then analyzed whether the County upheld its burden in proving a reliable HCU. The supreme court first found the County did not accurately report historical consumption of Bailey Farm Inches. As the applicant, the County had to prove that previous users of the Bailey Farm Inches actually used the water as calculated in the HCU analysis. Despite this change, the supreme court found the inaccurate estimate cast serious doubt on the validity of the remaining figures and, thus, the entire report. The County failed to provide a convincing explanation for their inaccurate HCU. Thus, the supreme court affirmed the Water Court's decision that the County failed to carry its burden of accurately quantifying the amount of Bailey Farm Inches actually used on the Bailey Farm.

The supreme court also held that the County did not show the Bailey Farm Inches historically irrigated the entire Bailey Farm. Covering a total of 101 acres, the Bailey Farm existed as two main parcels: a thirty-one-acre parcel and a seventy-acre parcel. To carry its burden, the County had to prove that the 101 acres of the Bailey Farm claimed was within the lawful place of use and historically irrigated with Bailey Farm Inches. The County failed to offer definitive proof that the larger portion of the Bailey Farm in fact received Bailey Farm Inches for irrigation. Specifically, the supreme court pointed to the lack of evidence on the record demonstrating the seventy-acre parcel received any of the Bailey Farm Inches. Without actual evidence showing past users irrigated the seventy-acre parcel with Bailey Farm Inches, the supreme court could not accept the analysis. Moreover, the supreme court also explained that even if the seventy-acre parcel fell within the lawful place of use, the County would still have to prove that the MM water right was actually used on that land over time. At first, different entities appropriated the Bailey Farm Inches to use in different properties. Over time, the owners consolidated the properties. Because of the convoluted past, the Water Court required an accurate accounting of actual past use. Absent actual proof of historical use, the Water Court declined to rely on

the County's HCU. In committing these two errors, the County failed to prove the HCU and, thus, failed to prove a lack of injury to other water users.

The supreme court also rejected the County's request for an appropriative right of substitution and exchange. The supreme court found the County could not supplement its augmentation plan through a water lease with the City of Lafayette because the lease alone could not satisfy the County's replacement obligations.

Accordingly, the supreme court affirmed the ruling of the Water Court and denied the County's change of use application.

*Connor Pace*

**San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist., 351 P.3d 1112 (Colo. 2015) (*en banc*)** (affirming the Water Court's decision in holding: (i) the Water Court correctly rejected challenges to issues previously affirmed by appellate courts; (ii) objections to an annual replacement plan pending resolution does not justify a stay on the plan; (iii) the Closed Basin Project water was an adequate source of replacement water; (iv) the annual replacement plan's treatment of augmentation plan wells did not violate the water management plan; and (v) the omission of the augmentation plan wells lifespan did not render the annual replacement plan invalid).

In 2011, under *San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1*, 270 P.3d 927 (Colo. 2011) ("*San Antonio*"), the Colorado Supreme Court affirmed a May 2010 decree ("Decree") issued by the District Court for Water Division No. 3 ("Water Court") for Special Improvement District No. 1 ("Subdistrict") of the Rio Grande Water Conservation District. The Decree states that, along with specific decreed conditions, the amended water management plan ("Plan") established a "satisfactory methodology and procedure" to determine injurious depletions due to well pumping within the Subdistrict and to acquire replacement water. The Plan's appendices established requirements for the Subdistrict to develop an annual replacement plan ("ARP") to support the operation of the Plan. The Water Court retained jurisdiction to ensure operation of the Plan and to prevent injury in conformity with the terms of the Decree.

The Subdistrict submitted the initial ARP to the State Engineer for approval in 2012. The State Engineer determined that the ARP was sufficient to remedy injurious depletions without injuring senior water rights and approved the ARP on May 1, 2012. Several senior surface water rights holders ("Objectors") raised objections to the ARP and challenged the approval.

The Water Court reviewed the objections and made several pretrial rulings. The Objectors appealed two of the rulings. The first was whether the Water Court appropriately denied a motion to halt all pumping until resolving protests to the ARP. The Objectors based this motion on the reasoning that the ARP was an extension of the Plan and subject to groundwater management rules and regulations. The Water Court clarified that the Plan was complete with the Court's decision in *San Antonio* and that the ARP was an operating tool created annually to predict stream depletions and establish replacement of depletions. As such, the Water Court saw no requirement to halt operation of an ARP until