

9-1-2016

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)

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Dana L. Showalter, Court Report, 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), 20 U. Denv. Water L. Rev. 143 (2016).

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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)

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

all challenges are resolved.

The Objectors also took issue with the Water Court's decision regarding the supporters' motion to dismiss ten of the Objector's challenges. The Water Court partially granted the motion and dismissed eight of the challenges. The Water Court reasoned that the challenges should be dismissed because they questioned methodologies approved by the Decree and affirmed in *San Antonio*. The Water Court concluded that it was barred from reconsidering those issues. The remaining two challenges the Water Court addressed were whether the water produced by the Closed Basin Project was a suitable source of replacement water and whether the treatment of augmentation plan wells violated the Plan. First, the Water Court maintained that the basin water was a suitable source of replacement water, as established in the Decree, and that challenges to "salvaged" water rights of basin water were a collateral attack on the Basin decree. Second, the Water Court determined that the treatment of augmentation plan wells was appropriate, and while the failure to include a list of augmentation wells was improper, this failure did not invalidate the 2012 ARP.

Following the trial, the Water Court upheld the State Engineer's approval of the 2012 ARP. The Objectors appealed to the supreme court, and argued: (i) the Water Court could address issues previously decided; (ii) the ARP could not go into effect with open challenges; (iii) the replacement water source was not appropriate use of water; (iv) the inclusion of augmentation plan wells violated the Decree; and (v) the omission of a list of wells invalidated the 2012 ARP.

First, the Objectors claimed that the Water Court's retained jurisdiction required it to hear all challenges to the Plan, regardless of the supreme court's affirmation of the Plan and Decree. Reviewing the supreme court's decision in *San Antonio*, the supreme court verified that the Decree was still appropriate and continued to meet its stated objectives. Consequently, the supreme court determined the Water Court correctly dismissed the challenges regarding previously decided issues.

Second, the Objectors claimed that the ARP is an extension of the Plan. Thus, the Objectors argued, the ARP should be subject to the rules and regulations of groundwater management plans and should not be effective until all protests are resolved. However, the supreme court determined that prior decisions affirming the Plan deemed the Plan complete. In addition, the supreme court found that the Plan established the ARP as an operating "tool." The supreme court discussed that halting the implementation of the ARP every year to address objections would be impractical because it would ultimately stop the Plan from ever going into effect. Therefore, the supreme court affirmed the Water Court's finding that the ARP is an extension of the plan and is not subject to a stay pending the resolution of all challenges.

Third, the Objectors argued that using basin water as replacement water in the 2012 ARP was not permissible. The supreme court noted that the basin water is a result of a federal reclamation effort to help meet obligations under the Rio Grande Compact ("Compact"). The Objectors claimed that using basin water interferes with the State's ability to meet Compact obligations and, furthermore, falls under the definition of salvaged water managed by the priority system. Below, the Water Court determined that the basin water was a suitable

source of replacement water as set forth in the basin decree, allowing the Subdistrict to simultaneously meet Compact obligations and replace injurious depletions. The Water Court also found that using basin water provided the opportunity to reduce curtailments upriver, benefitting senior water right owners. Finally, the Water Court found the salvaged water claim was an improper collateral attack on the basin decree. The supreme court agreed with the Water Court's analysis and affirmed the Water Court's finding that the basin water was adequate and suitable to prevent injury to senior surface right holders. The supreme court further stated that the basin water provided a suitable source of replacement water in the 2012 ARP, and that the water usage falls within the decreed purposes.

Fourth, the Objectors contended that the inclusion of augmentation plan well pumping in the calculation of the Subdistrict's groundwater use violated the Plan. The supreme court noted that the Decree established that Subdistrict landowners with augmentation plan wells may, but are not required to, opt out of the Plan. The supreme court held that including the augmentation plan wells was appropriate and found that including augmentation plan wells as Subdistrict wells did not injure senior surface right holders. Therefore, the supreme court allowed the 2012 ARP to include wells covered by augmentation plans and held it did not violate the Decree.

Finally, the Objectors claimed that the ARP's omission of a comprehensive list of augmentation plan wells violated the Plan, and rendered the 2012 ARP invalid pursuant to the doctrine of substantial compliance. The supreme court agreed with the Water Court that this was a minor omission as the Subdistrict and the State Engineer made good faith efforts to comply with the Plan. Thus, the supreme court found that the failure was an oversight caused by the unfamiliarity of the process and did not invalidate 2012 ARP.

Accordingly, the supreme court affirmed the Water Court's decision and upheld the approval of the ARP.

Dana L. Showalter

Upper Eagle Reg'l Water Auth. v. Wolfe, 371 P.3d 681 (Colo. 2016) (holding that an owner of multiple water rights can choose to divert and make absolute any of its in-priority, conditional water rights and is not required to make absolute a senior conditional water right before a junior conditional water right, so long as the owner lives with his or her choice and does not injure the rights of other water users).

Effective as of March 25, 2004, the Upper Eagle Regional Water Authority (the "Authority") formed a water service agreement with the Edwards Metropolitan District and the Cordillera Metropolitan District. Under the agreement, the Cordillera Metropolitan District gave certain water rights and facilities to the Authority, which in turn provided water services to the Cordillera area. The rights conveyed to the Authority included the SCR Diversion Point No. 1 conditional water right (the "Senior Lake Creek Right"), with a priority year of 1989, and the Eagle River Diversion Point No. 2 conditional water right (the "Junior Eagle River Right"), with a priority year of 1991. Pursuant to the agreement, the Authority would limit use of both conditional water rights to irrigation, domestic, commercial, and fire protection purposes, with diversions to occur at