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Upper Eagle Reg'l Water Auth. v. Wolfe, 371 P.3d 681 (Colo. 2016)

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Upper Eagle Reg'l Water Auth. v. Wolfe, 371 P.3d 681 (Colo. 2016)

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

the Edwards Drinking Water Facility.

On July 4, 2004, a day on which there was no call on the Colorado and Eagle Rivers, the Authority diverted 0.716 cubic feet per second ("cfs") of water at the Edwards Drinking Water Facility on the Eagle River for beneficial use in the Cordillera area. The Authority allocated 0.47 cfs of this diversion to its Junior Eagle River Right. On December 29, 2004, the Authority filed an Application for a Finding of Reasonable Diligence and to Make Water Right Absolute ("Application"). The Application requested confirmation that the Authority had made absolute 0.47 cfs of the Junior Eagle River Right at the Edwards Drinking Water Facility for irrigation, domestic, commercial, and fire protection purposes during free conditions. The State and Division Engineers (the "Engineers") opposed the Application.

The Engineers initially argued the Authority must make diversions in accordance with the "seniors first" policy, requiring that users first attribute diversions to senior absolute water rights, then to senior conditional rights, and finally, junior conditional rights. The Water Court granted the Engineers' motion for summary judgment in part and denied the Authority's claim for making 0.47 cfs of the Junior Eagle River Right absolute. The Water Court held the Authority did not have discretion to choose a junior water right over a senior water right when both rights decreed the same point of diversion for the same purposes at the same place of use.

The Authority appealed the Water Court's decision, arguing that it should have the discretion to choose the conditional water right it wants to divert and use. The Colorado Supreme Court reviewed *de novo* the Water Court's conclusions of law.

The supreme court only examined whether the Authority had to attribute its diversion to a senior water right. The Engineer partially based its argument on a previous Colorado Supreme Court holding, which required that applicants seeking to make a conditional water right absolute first show they appropriated water in excess of an existing absolute decree. The supreme court rejected that argument by distinguishing the facts of this case as involving a choice between two conditional rights rather than a choice between a conditional right and an absolute right. The supreme court reasoned that the previous case was not compatible, because the Authority had to attribute one of its conditional rights to a needed water diversion.

The Engineers then argued that application of a "seniors first" policy here would help effectively administer the prior appropriation system and "correctly express" the Colorado Constitution and state statutes. The Engineers believed that if the supreme court allowed the Authority to freely select among its conditional water rights, the Authority could change its attribution of diversions from one day to the next. The Engineers claimed that this potential behavior was dangerous because it could allow the Authority to make absolute more water rights than it actually needed. The supreme court did not accept the Engineers' argument. The supreme court ruled that once the Authority makes 0.47 cfs of the Junior Eagle River Right absolute, it must live with that choice; the only way the Authority could later perfect its other conditional water rights is through a showing of quantifiable evidence that it requires more water than 0.47 cfs of the Junior Eagle River Right to fulfill the need of the Cordillera area. The supreme court summarized that, absent any evidence of waste, hoarding, or injury to the

rights of other water users, the Authority may choose which of its conditional water rights it wishes to divert and make absolute.

Accordingly, the supreme court reversed the order of the Water Court that the July 4, 2004 diversion must be allocated to the Senior Lake Creek Right, and remanded the case with instructions to make 0.47 cfs of the Junior Eagle River Right absolute.

Tina Xu

IDAHO

Rangen, Inc. v. Idaho Dep't of Water Res., 371 P.3d 305 (Idaho 2016) (affirming the district court's ruling that: (i) the Idaho Department of Water Resources' approval of a mitigation plan that deferred consideration of injury to other water users was not an abuse of discretion; (ii) a mitigation plan that included curtailment and insurance as contingencies was adequate to assure protection to senior priority rights; and (iii) construction of a water pipeline across private land to a place of beneficial use did not constitute an unlawful taking under Idaho's eminent domain laws).

On December 13, 2011, Rangen, Inc. ("Rangen") filed a petition for a delivery call with the Idaho Department of Water Resources ("IDWR"), alleging groundwater pumping by junior appropriators in the Eastern Snake Plain Aquifer ("ESPA") materially injured its water rights. In response, IDWR's director (the "Director") issued an order that curtailed some junior-priority groundwater pumping in the ESPA. The order allowed junior-priority groundwater users to avoid curtailment by participating in an approved mitigation plan providing 9.1 cubic feet per second ("cfs") of water to Rangen. Idaho Ground Water Appropriators, Inc. ("IGWA"), who represented junior priority users in ESPA, submitted several mitigation plans to IDWR. On October 8, 2014, the Director conditionally approved IGWA's Fourth Mitigation Plan (the "Plan"), which required IGWA build and maintain a pumping station, pipeline, and other necessary facilities for the transport of water ("the Magic Springs Project"). Under the Plan, SeaPac of Idaho, Inc. agreed to sell or lease 10 cfs of water to IGWA. IGWA would then pump that water to Rangen through the Magic Springs Project.

The conditional plan hinged on IGWA obtaining approval for its Application of Transfer from SeaPac of Idaho, Inc. The Director declined to rule on the Application of Transfer in the order. The Plan also required IGWA to purchase an insurance policy that covered Rangen's losses of fish attributable the Magic Springs Project's failure. Last, the Director ordered Rangen state in writing that it would accept the water delivered and the construction of the Magic Springs Project on its land. If the conditions failed, IDWR would suspend the Plan. Nevertheless, IGWA constructed the Magic Springs Project's pipeline during the conditional period.

After approval, Rangen petitioned the district court to review the Director's decision. The district court affirmed the decision. Rangen then appealed to the Supreme Court of Idaho, challenging that: 1) the Director abused his discretion when he deferred consideration of potential injury to other water users until proceedings on IGWA's Application for Transfer; 2) the Director erred by approving a plan with inadequate contingency provisions; and 3) the Director's order constituted an unlawful taking of Rangen's property and should be