Water Law Review

Volume 20 | Issue 2 Article 12

1-1-2017

Eleventh Update to Colorado Water Law: An Historical Overview

Gregory J. Hobbs

Eleventh Update to Colorado Water Law: An Historical Overview

ELEVENTH UPDATE TO COLORADO WATER LAW: AN HISTORICAL OVERVIEW

THE HONORABLE GREGORY J. HOBBS, JR.

To provide our readers with the most up-to-date water law information, the editors periodically include updates of works previously published in the *Water Law Review*. The following is the eleventh update to *Colorado Water Law; An Historical Overview, Appendix—Colorado Water Law: A Synopsis of Statutes and Case Law*,[1] selected by the Honorable Gregory J. Hobbs, Jr.[2]

COUNTY OF BOULDER V. BOULDER AND WELD COUNTY DITCH COMPANY

"The water court perceived several fatal flaws in the County's HCU (historical consumptive use) analysis: first, the County inaccurately calculated the amount of water used pursuant to the Bailey Farm Inches; second, the County failed to prove that the 70-acre parcel, which comprised over two-thirds of the County's claimed acreage, was historically irrigated with the Bailey Farm Inches . . . In light of these flaws, the water court rejected the County's HCU analysis and concluded that the County had failed to carry its burden of proving HCU. The water court determined that the County could not carry its primary burden of showing the absence of injury to other water users without an accurate HCU analysis, and the court therefore denied the change of use of the Bailey Farm Inches."

County of Boulder v. Boulder and Weld County Ditch Company, 367 P.3d 1179, 1185 (2016).

---

1. Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 27 (1997). The first update to Justice Hobbs's article appears at 2 U. DENV. WATER L. REV. 223 (1999); the second update is at 4 U. DENV. WATER L. REV. 111 (2000); the third update is at 6 U. DENV. WATER L. REV. 116 (2002); the fourth update is at 8 U. DENV. WATER L. REV. 213 (2004); the fifth update is at 10 U. DENV. WATER L. REV. 391 (2007); the sixth update is at 13 U. DENV. WATER L. REV. 389 (2009); the seventh update is at 14 U. DENV. WATER L. REV. 159 (2010); the eighth update is at 16 U. DENV. WATER L. REV. 137 (2012); the ninth update is at 18 U. DENV. WATER L. REV. 390 (2015); the tenth update is at 19 U. DENV. WATER L. REV. 261 (2016).

2. Internal citations and footnotes have been omitted from segments of the opinions reproduced below.

"This HCU analysis quantifies the water right for which the change is sought based on the amount of water actually and lawfully used over time under the right, not the amount specified in the original decree. Because 'a proper HCU analysis measures the amount of water actually *and lawfully* used,' HCU is determined not only by calculating the amount of water used during a representative time period, but also by limiting that calculation to water used on the specific acreage for which the appropriation was made."

Id. at 1188.

"In addition to an acceptable water-quantity figure, the County had to base its HCU analysis on an acceptable acreage figure. This means the County had to prove not only that the acreage claimed in its analysis was part of the lawful place of use of the MM water right, but also that the claimed acreage was in fact historically irrigated with the Bailey Farm Inches. The water court found that the County failed to satisfy this latter basic requirement. This, too, is supported by the record, and we therefore uphold it. The County's claimed 101 acres consisted of two parcels of land within the Bailey Farm: the 31-acre parcel located in the northwest portion of the property and the 70-acre parcel located in the eastern portion. However, the County offered no definitive proof that the Bailey Farm Inches were ever applied to the 70-acre parcel."

Id. at 1190.

"Because that evidence was premised on an unsubstantiated assumption that the Bailey Farm Inches were historically used on the 70-acre parcel, it does nothing to undermine the water court's finding that the County failed to prove that assumption was correct in the first place. Thus, absent sufficient evidence of actual application of the Bailey Farm Inches to the 70-acre parcel, the water court properly determined that the County failed to carry its burden of proving the Bailey Farm Inches were historically used to irrigate 101 acres on the Bailey Farm."

Id. at 1191.

UPPER EAGLE REGIONAL WATER AUTHORITY V. WOLFE

"We hold that where there is no evidence of waste, hoarding, or other mischief, and no injury to the rights of other water users, the owner of a portfolio of water rights is entitled to select which of its different, in-priority conditional water rights it wishes to first divert and make absolute. We note that this holding is limited to conditional water rights, and does not extend to a choice between senior and junior absolute water rights. Further, the portfolio owner must live with its choice. Since it has chosen to make a portion of the Junior Eagle River Right absolute, the Authority may not now divert and use the Senior Lake Creek Right unless it demonstrates that it needs that water right in addition to the Junior Eagle River Right."

Upper Eagle Regional Water Authority v. Wolfe, 371 P. 3d 681, 684 (2016).

"An applicant seeking to make a conditional water right absolute must show

its need for the conditional right, and cannot do so 'unless it can demonstrate that it has exhausted its absolute rights first.' Thus, an applicant 'must show with quantifiable evidence that it in fact appropriated water in excess of its existing absolute decrees' before making a conditional water right absolute. Because it has chosen to make 0.47 cfs of the Junior Eagle River Right absolute, the Authority may not now seek to make any portion of the Senior Lake Creek Right absolute unless it can show that it needs to divert to Cordillera more than the 5 cfs decreed to the Junior Eagle River Right for the same claimed beneficial uses. Contrary to the Engineers' argument, therefore, permitting the Authority to first perfect its junior conditional right would not permit it to change its attribution of diversions at a whim. If the Junior Eagle River Right proves sufficient to serve Cordillera at full build-out, it is possible that the Authority might not ever make the Senior Lake Creek Right absolute. In short, the Authority must live with its choice."

Id. at 687.

GRAND VALLEY WATER USERS ASSOCIATION V. BUSK-IVANHOE, INC.

"First, the water court erred when it concluded that storage of the Busk-Ivanhoe rights on the eastern slope prior to use for their decreed purpose was lawful. Under Colorado law, the right to store water is not an automatic incident of a direct flow right. This principle does not change simply because the diverted water is exported transmountain; the right to reuse and successively use imported water is not the equivalent of a right to store imported water without authorization before it is first applied to its decreed beneficial use. Thus, the right to store water in the basin of import prior to use is not an automatic incident of transmountain water rights, but rather, must be reflected, or at least implied, in the decree. In this case, the 2621 Decree is silent with respect to storage of the water on the eastern slope prior to use for supplemental irrigation and the record does not support the water court's finding of an implied right in the decree for such storage. That the transmountain water was to be used for "supplemental" irrigation does not, without more, suffice to infer a separate right to store the water on the eastern slope before using it for that purpose, particularly here, where the decree expressly included storage on the western slope prior to export. And although a court may rely on extrinsic evidence such as the applicant's underlying statement of claim or testimony to construe or interpret a decree, here the petition and statement of claim upon which the 2621 Decree is based give no indication of the appropriators' intent to store on the eastern slope. On the facts of this case, we conclude that the water court erred by relying on other extrinsic evidence of the appropriators' intent to infer a separate storage right on the eastern slope because this evidence was not before the court in the 2621 proceedings and therefore could not have factored into the rights confirmed in the 2621 Decree. On remand, the water court must requantify the water rights subject to change; to the extent that unlawful storage of the water on the eastern slope expanded the decreed Busk-Ivanhoe rights, such amounts cannot be included in the historic use quantification of those rights.

Second, because storage of the subject water rights in the basin of import prior to use was unlawful, the water court erred in including the volumes of exported water paid as rental fees for storage on the eastern slope in its historic

consumptive use quantification of the water rights.

Finally, the water court erred in concluding that it was required to exclude the twenty-two years of undecreed use of the subject water rights from the representative study period. In this case, the undecreed use did not represent expanded use of the decreed right for which an appropriator may not receive credit. Rather, the undecreed municipal use of the water occurred in lieu of its decreed purpose for supplemental irrigation. In other words, the period of undecreed use in this case reflects twenty-two years of non-use of the decreed rights. Because unjustified non-use of a decreed right should be considered when quantifying historic consumptive use for purposes of a change application, we remand the case to the water court to determine whether the years of non-use of the Busk-Ivanhoe rights for their decreed purpose were unjustified. If so, the water court should consider including the years of unjustified non-use in the representative study period as "zero-use" years for purposes of its historic consumptive use analysis. Accordingly, we reverse the water court's May 27, 2014, Order and August 15, 2014, Judgment and Decree and remand to Water Division 2 for further proceedings consistent with this opinion."

Grand Valley Water Users Association v. Busk-Ivanhoe, Inc., 386 P.3d 452, 460-61 (2016).

"We further disagree that a right to store the Busk-Ivanhoe water rights on the eastern slope may be implied from the 2621 Decree and its underlying pleadings. The 2621 Decree makes no reference at all to storage of the water on the eastern slope before being used for supplemental irrigation. And although a court may rely on extrinsic evidence such as the applicant's underlying statement of claim or testimony to construe or interpret a decree, here the petition and statement of claim upon which the 2621 Decree is based give no indication of the appropriators' intent to store on the eastern slope. On the facts of this case, we conclude that the water court erred by relying on other extrinsic evidence of the appropriators' intent to infer a separate storage right on the eastern slope because this evidence was never presented to the water court in the 2621 Decree proceedings and could not have formed the basis of its supposed recognition of the appropriators' intent to store the water on the eastern slope."

Id. at 464.

"In short, if an asserted right exists, it must be found in the language of the decree or at least 'implied from the express provisions of the decree.' In this case, the 2621 Decree adjudicates a storage right for 1,200 acre-feet of water in the Ivanhoe Reservoir on the western slope prior to export. Yet the 2621 Decree contains no reference to storage of the Busk-Ivanhoe System rights on the eastern slope before such water is put to beneficial use. To the contrary, the language of the 2621 Decree repeatedly states that both the direct flow water and the water released from storage in the Ivanhoe Reservoir, once exported, will be released into Lake Fork Creek 'and thence into the Arkansas River,' from which it will be diverted for irrigation of lands in the Arkansas River Basin."

Id. at 466-67.

"Accordingly, on remand, the water court must determine to what extent storage of the Busk-Ivanhoe rights on the eastern slope prior to using the water for its decreed purpose caused an unlawful expansion of the decreed right. In conducting its historic consumptive use analysis, the water court should exclude the amounts, if any, by which the rights have been expanded by the unlawful storage."

Id. at 468.

"We conclude that the water court erred in concluding that it was required to exclude the periods of undecreed use from the representative study period. In this case, the undecreed use did not represent expanded use of the decreed right for which an appropriator may not receive historic use credit. Rather, here, the water was used for undecreed municipal purposes in lieu of its decreed purpose for supplemental irrigation. Consequently, the period of undecreed use in this case reflects twenty-two years of non-use of the decreed rights for their decreed purpose. Because unjustified non-use of a decreed right should be considered when quantifying historic consumptive use for purposes of a change application, the water court should have considered including any years of unjustified non-use of the decreed water rights as 'zero-use' years when selecting a representative study period. By omitting years of unjustified non-use from a representative study period, the average annual historic use is artificially inflated, thereby effectively giving credit for the undecreed use in the quantification of the right."

Id. at 470.