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**A Man Who Is His Own Lawyer Has a Fool for a Client - Pro Se Representation in Colorado Water Courts, 359 P.3D 29**

**“A MAN WHO IS HIS OWN LAWYER HAS A FOOL  
FOR A CLIENT” - PRO SE REPRESENTATION IN  
COLORADO WATER COURTS, 359 P.3D 29**

KATHLEEN CECELIA CUNILIO\*

Concerning the Application for Water Rights of Town of Minturn  
Supreme Court of Colorado

Supreme Court Case No. 14SA295  
October 26, 2015

An Appeal from the District Court Water Division No. 5  
Case No. 12CW77  
Honorable Judge Thomas W. Ossola

**I. INTRODUCTION**

Generally, individuals may represent themselves in courts of law.<sup>1</sup> For example, a criminal defendant may choose to serve as his own counsel in his death penalty trial.<sup>2</sup> In the realm of water law in Colorado, any person may insert themselves into water-court proceedings.<sup>3</sup> However, after a recent decision, a person may not proceed *pro se* in water court while acting in a trustee capacity.<sup>4</sup> This article addresses why the ability to represent oneself in Colorado water court exists, even in the context of *Tucker v. Minturn*. The article will first provide pertinent background on Colorado’s water regime as well as context to the *Minturn* decision. Moreover, the article suggests this ruling is analogous to the way courts treat unrepresented parties in water court. Last, the article will make a policy recommendation that could potentially ameliorate the inequity that exists in the realm of water disputes.

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2. Kevin Sack, *Dylann Roof to Represent Himself at Trial in Charleston Church Shootings*, N.Y. TIMES (Nov. 28, 2016), [http://www.nytimes.com/2016/11/28/us/dylann-roof-charleston-massacre.html?\\_r=0](http://www.nytimes.com/2016/11/28/us/dylann-roof-charleston-massacre.html?_r=0) (last visited Nov. 28, 2016).

3. See COLO. REV. STAT. § 37-92-302(1)(b) (2012).

4. *In re Water Rights of Town of Minturn*, 359 P.3d 29, 30 (Colo. 2015).

## II. BRIEF BACKGROUND ON COLORADO WATER COURTS

In order to understand how a *pro se* water court litigant wrote his own legal brief and argued before the Colorado Supreme Court, it is helpful to first explain the legal regime behind Colorado water law. Pursuant to Colorado's Constitution, water rights are unique because ownership remains in the general public, subject to prior appropriation.<sup>5</sup> Under the Water Rights Determination and Administration Act of 1969 ("the Act"),<sup>6</sup> the Colorado legislature created a framework for specialized water court proceedings.<sup>7</sup> Unlike other states that have created administrative water agencies, under the Act, Colorado "retained a judicial system and charged it with administrative functions."<sup>8</sup> The Act divided Colorado into seven water divisions, corresponding to its seven major drainages.<sup>9</sup>

A user must file an application with the appropriate water clerk in order to be granted a water right or to change an existing water right.<sup>10</sup> Every month, each water division prints resumes of pending water applications, publishing them both in newspapers and online.<sup>11</sup> Moreover, the resumes are sent to rights-holders potentially affected by an application.<sup>12</sup> If someone wishes to object to an application, he or she may file a statement of opposition.<sup>13</sup> A water referee, serving as a fact-finder, consults with the division engineer before making a ruling to either approve, partially approve, or deny each application.<sup>14</sup> Notably, "[i]nterested parties who are dissatisfied with the ruling may file a protest. A protest results in a hearing at which the water judge determines the issues [on a] *de novo*" standard of review.<sup>15</sup> These hearings are safeguards for potentially injured parties to state or restate their opposition to an application. In these protest hearings, the applicant, and all other parties who oppose the application, will generally hire lawyers and engineers, which "can be rather expensive."<sup>16</sup>

Another safeguard ensuring that referees' determinations are appropriate is that their rulings are reviewed semi-annually by the division's water court judge, who has the statutory power to confirm, modify, or reverse the decisions.<sup>17</sup> Thereafter, any appeals go directly to the Colorado Supreme Court.<sup>18</sup>

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5. COLO. CONST. art. 16, § 5; COLO. REV. STAT. § 37-92-103(12) (2014).

6. COLO. REV. STAT. §§ 37-92-101-602 (2016).

7. DAVID H. GETCHES ET AL., *WATER LAW IN A NUTSHELL* 164-165 (4<sup>th</sup> ed., 2009) [hereinafter GETCHES].

8. *Id.* at 164.

9. *Id.* at 165.

10. A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 203 (7th ed., 2014) [hereinafter TARLOCK].

11. *Id.*

12. *Id.*

13. COLO. REV. STAT. § 37-92-302(1)(b).

14. TARLOCK, *supra* note 10, at 203.

15. *Id.*; see also *Wadsworth v. Kuiper*, 562 P.2d 1114, 1119 (Colo. 1977) (noting that "persons, including the State of Colorado, might file a protest to the ruling of a referee even though they had not filed a statement of opposition to an application" for a water right).

16. TARLOCK, *supra* note 10, at 203.

17. *Id.*

18. *Id.*

### III. FACTS OF THE MINTURN CASE

The town of Minturn is a small municipality located upstream from the confluence of Gore Creek and the Eagle River on Colorado's Western Slope.<sup>19</sup> In fulfilling its duty to provide water to its residents, Minturn was originally decreed what is known as the Bolts Lake conditional water right in 1999 for 320 acre-feet in the District Court for Water Division 5 ("Division 5 Water Court").<sup>20</sup>

Bolts Lake lies on a property known as Battle Mountain.<sup>21</sup> This property is described as "one of the most coveted, disputed, and complex pieces of land in the Rocky Mountains."<sup>22</sup> Although Battle Mountain was not at issue in the *Minturn* case, its description serves as an appropriate primer for water rights, which could also be characterized as coveted, disputed, and complex.

In 2012, Minturn filed its sexennial application for a finding of reasonable diligence in developing its Bolts Lake water right.<sup>23</sup> This finding was an important step because it would be Minturn's only storage right,<sup>24</sup> and without a water storage right, Minturn's "beneficial use of water would be limited to short runoff periods."<sup>25</sup>

Soon after Minturn filed its application, Mr. Jeff Tucker inserted himself into the adjudication by filing a statement of opposition, claiming an interest in affected water rights as a trustee of an express trust.<sup>26</sup> However, Tucker provided no evidence regarding the purported trust nor the allegedly affected water rights.<sup>27</sup> Notably, Tucker has previously opposed efforts by Minturn to appropriate the Bolts Lake water right.<sup>28</sup>

Incidentally, back in 2011, a Colorado magazine referred to Tucker as a "mysterious man" who had filed several lawsuits related to Battle Mountain.<sup>29</sup> Moreover, in its answer brief to the Supreme Court, Battle Mountain Entities

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19. TOWN OF MINTURN HISTORY, <http://www.minturn.org/community/MinturnHistory/index.html> (last visited Mar. 13, 2017).

20. Brief of Applicant-Appellee at 4, *Town of Minturn v. Tucker*, No. 2014SA295 (Colo. Sept. 30, 2015) [hereinafter Brief of Applicant-Appellee].

21. See BATTLE MOUNTAIN RESORT, <http://battlemountainresort.com/description/> (last visited Mar. 13, 2017) ("Bolts Lake itself was built by the Bolt brothers at the turn of the century and used for fishing and boating. They cut a channel through solid rock to feed it with a diversion from Cross Creek.").

22. Patrick Doyle, *The Last Resort*, 5280 MAGAZINE, June 2011, at 72, available at [http://www.minturn.org/pdf/PublicNotices/5280\\_Article\\_-\\_The\\_Last\\_Resort\\_06-2011.PDF](http://www.minturn.org/pdf/PublicNotices/5280_Article_-_The_Last_Resort_06-2011.PDF) [hereinafter Doyle].

23. Brief of Applicant-Appellee, *supra* note 20, at 3.

24. *Id.* at 4.

25. GETCHES, *supra* note 7, at 200.

26. Brief of Opposer-Appellee at 3, *Town of Minturn v. Tucker*, No. 2014SA295 (Colo. Sept. 30, 2015) [hereinafter Brief of Opposer-Appellee].

27. *Id.* ("Trustee's Statement of Opposition does not state for what entity or trust he is acting as trustee.").

28. See Winslow Taylor, *Town of Minturn v. Tucker*, 16 U. DENV. WATER L. REV. 485, 493 (Apr. 15, 2013) ("After the water court entered . . . the final decrees, Minturn discovered the stipulation decree based several consumptive use calculations on billing statements . . . which made the monthly calculations differ by one month and not reflect[ive] of actual monthly historical use numbers. Minturn petitioned the water court to correct the decrees. Tucker was the only opposer [to these decree corrections].").

29. Doyle, *supra* note 22, at 92.

asserted “Tucker has inserted himself into many Colorado cases, claiming various entities . . . hold an interest in the Battle Mountain Property.”<sup>30</sup> The answer brief also indicated that Tucker has a history of fraudulent, failed property ownership claims, casting doubt on the veracity of his trusteeship.<sup>31</sup>

In response to Tucker’s Bolts Lake opposition, the Water Court held a case management conference and raised *sua sponte* the question whether Tucker could proceed *pro se* in the capacity of a trustee.<sup>32</sup>

The Water Court ultimately held that the Tucker, a non-attorney, could not represent a trust in a water proceeding, and the court granted Minturn’s application and Decree.<sup>33</sup> Tucker appealed the Water Court’s ruling, which propelled the issue to the province of the Colorado Supreme Court.<sup>34</sup>

Oral arguments for *Minturn* occurred on September 30, 2015.<sup>35</sup> Tucker, acting as his own attorney, argued against attorneys from the well-known firm Holland & Hart, and argued first.<sup>36</sup> At the podium, Tucker made no mention of the unidentified beneficiaries of the trust, further exacerbating the legitimacy of his role as a *pro se* opposer.<sup>37</sup>

One notable query for Tucker came from Chief Justice Rice, who expressed her concern with the rule against the unauthorized practice of law.<sup>38</sup> Rice suggested that Tucker’s self-representation implicated the interests of (albeit unknown) others, which could cross that line.<sup>39</sup> In response, Tucker made an interesting characterization: He stated that it was his personal perspective that Americans have always had the right to represent themselves in court, and that the right to be represented by counsel is more of a secondary right.<sup>40</sup>

Next, Minturn’s attorney, Megan Winokur, argued before the justices. Winokur conceded that there is a unique level standing in Colorado water law.<sup>41</sup> Any person has a right to file a statement of opposition in a case without demonstrating any explicit interest or injury.<sup>42</sup> This lower threshold for standing results from Colorado’s waters belonging to the public.<sup>43</sup>

30. Brief of Opposer-Appellee, *supra* note 26, at 3 n.2.

31. *Id.*

32. Brief of Applicant-Appellee, *supra* note 20, at 10 (At this hearing Senior Water Court Judge Ossola said, “And here we have Mr. Tucker, who I understand is not a lawyer . . . and styles himself in the pleadings as trustee, but . . . I don’t know what Mr. Tucker is trustee of. The term ‘trustee’ causes me to assume that there is a trust of which he is the trustee, and that raises the question [what he is a] trustee of.”).

33. *See Minturn*, 359 P.3d at 31.

34. *Id.*

35. *Oral Argument Schedule*, STATE OF COLO. JUDICIAL DEP’T (Sep. 30, 2015), [https://www.courts.state.co.us/Courts/Supreme\\_Court/Oral\\_Arguments/Index.cfm?year=2015&month=9](https://www.courts.state.co.us/Courts/Supreme_Court/Oral_Arguments/Index.cfm?year=2015&month=9).

36. *See* Oral Argument 14SA295, Tucker v. Town of Minturn, 359 P.3d 29 (Colo. 2015), <https://cojudicial.omninet.org/shows/14sa295> (last visited Nov. 29, 2016) [hereinafter Oral Argument Video Recording].

37. *Id.*

38. *Id.* at 8:07; *See* Colo. Rev. Stat. § 12-5-101 (2014) (In Colorado, an individual is statutorily required to obtain a law license to practice law).

39. Oral Argument Video Recording, *supra* note 36, at 8:10.

40. *Id.* at 11:10.

41. *Id.* at 15:10.

42. *Id.* at 15:18.

43. *Id.* at 15:25; *see also* Colo. CONST. art. XVI, § 5.

Nonetheless, Winokur asserted that there are good reasons to require counsel on behalf of parties in water court.<sup>44</sup> First, individuals are entitled to competent representation.<sup>45</sup> Second, attorneys are held to certain ethical standards.<sup>46</sup> Third, having attorneys represent the rights of clients ensures orderly and organized legal proceedings.<sup>47</sup> Last, Winokur stressed that Tucker's *pro se* participation implicated "the time and [financial] resources of a small municipality" in defending the Water Court's decision.<sup>48</sup>

A month later, the court upheld the Water Court's determination: because Tucker was trying to represent the interests of a trust, he was acting in a capacity that involved the interests of individuals other than himself, which meant he, as a trustee, was not allowed to represent a trust *pro se* in a litigation matter.<sup>49</sup>

#### IV. THE ISSUE OF SELF-REPRESENTATION IN WATER COURT

An issue the court did not directly address in its short *Minturn* decision is whether Colorado water court proceedings are fundamentally different from other court proceedings requiring counsel. The uniqueness of water law creates a paradox for self-represented parties. *Minturn*'s own attorney noted the lower threshold of standing in water disputes that entitles anyone, with or without an attorney, to file a statement of opposition, which represents "a legal system that provides stability and fairness" to all Coloradans.<sup>50</sup> Since "water is legally and historically a public resource," water proceedings implicate fundamentally different values than more privatized or individualized disputes where attorneys are prevalent.<sup>51</sup> Thus, although Tucker may not have been the most appropriate *pro se* party for whom this suggestion should be made, the current framework provides a mechanism for lay people, without the resources to hire a lawyer, to challenge another's use of water.

More broadly speaking, however, the *Minturn* ruling is consistent with other Colorado court decisions that hold *pro se* water court parties to a certain standard. For example, a non-attorney's water lawsuit was dismissed for lack of jurisdiction because the petitioner improperly filed it in district court, not water court.<sup>52</sup> Thus, the court did not grant the petitioner special consideration because he lacked a law degree.<sup>53</sup>

Moreover, the Colorado Supreme Court has also found that merely because a *pro se* party "did not know of his obligations under the Water Court Rules or the Rules of Civil Procedure d[id] not excuse his failure to make . . .

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44. Oral Argument Video Recording, *supra* note 36, at 22:15.

45. *Id.* at 22:28; see also COLO. RULES OF PROF'L CONDUCT r. 1.1 (2016).

46. Oral Argument Video Recording, *supra* note 36, at 22:38; see generally COLO. RULES OF PROF'L CONDUCT pmbl. (2016).

47. Oral Argument Video Recording, *supra* note 36, at 22:41.

48. *Id.* at 24:28. Moreover, Winokur also told the court that Tucker's *pro se* involvement with the Water Court implicated the three types of concerns she listed.

49. *Minturn*, 359 P.3d at 32.

50. GETCHES, *supra* note 7, at 3; Oral Argument Video Recording, *supra* note 36, at 15:18; Brief of Opposer-Appellee, *supra* note 26, at 28 n.4.

51. GETCHES, *supra* note 7, at 11.

52. See *People v. Spencer*, 524 P.2d 1084, 1085 (Colo. 1974).

53. *Id.* at 1085-87.

required disclosures.”<sup>54</sup> The Court further held that, “[w]hile courts may take into account the fact that a party is appearing *pro se*, *pro se* parties are ‘bound by the same rules of civil procedure as attorneys licensed to practice law.’”<sup>55</sup>

Thus, non-attorneys like Tucker have the right to present their own case, but Colorado courts will hold them to the same standard as lawyers because “otherwise, ignorance is unjustly rewarded.”<sup>56</sup> In *Minturn*, Tucker asserted a perplexing due process claim for the first time to the Colorado Supreme Court.<sup>57</sup> Tucker’s choice not to hire counsel means that he “must be prepared to accept the consequences of his mistakes and errors” in representing himself both in the water court and on appeal.<sup>58</sup> Therefore, there is a balancing act in keeping water courts accessible to those who may not be able to afford an attorney, while also ensuring that water court proceedings are not abused by *pro se* litigants.

Despite the unique public entitlement to Colorado’s unappropriated waters, when a non-attorney represents his or her own interests (or the interest of others like in *Minturn*) in a legal forum, issues may arise. One litigator notes that “self-represented part[ies] suffer from lack of experience, expertise, and often, basic competence.”<sup>59</sup> Further, unrepresented parties’ lack of training and experience creates more of a burden for courts, “which often must decipher unclear arguments, tease out unmade arguments, and parse the record to a greater extent than it would for a represented party.”<sup>60</sup>

## V. POLICY RECOMENDATION: PRO BONO WATER COURT PROGRAM

While there may be equally “keen competition among [all types of] water users,”<sup>61</sup> there is oft-times inequitable bargaining power among those users due to disparate financial resources and knowledge of Colorado’s regime governing water law. Water disputes can be highly-technical processes, involving scientific assessments.<sup>57</sup> It may be difficult for a person who cannot hire an engineer, let alone an attorney, to successfully bring an action in a water court. Therefore, the fundamentally complicated nature of water law often motivates interested parties to retain counsel.

However, in light of available resources for *pro se* litigants in other contexts, there is an opportunity to provide self-represented litigants with attorneys in

54. *Cornelius v. River Ridge Ranch Landowners Ass’n*, 202 P.3d 564, 572 (Colo. 2009).

55. *Id.* (citing to *Negron v. Golder*, 111 P.3d 538, 540 (Colo. App. 2004)).

56. *Knapp v. Fleming*, 258 P.2d 489, 489–90 (Colo. 1953).

57. Opening Brief of Opposer-Appellant at 14–16, *Town of Minturn v. Tucker*, No. 2014SA295 (Colo. Sept. 30, 2015).

58. *Viles v. Scofield*, 261 P.2d 148, 149 (Colo. 1953).

59. Marcy G. Glenn, *Pro Se Civil Appeals: The Problem and Special Standards and Rules*, COLO. LAW., Mar. 2016, at 63, 64. [hereinafter Glenn I].

60. Marcy G. Glenn, *Pro Se Civil Appeals-Resources and Opportunities*, COLO. LAW., June 2016, at 57, 60 [hereinafter Glenn II].

61. GETCHES, *supra* note 7, at 1.

<sup>57</sup>James S. Witwer and P. Andrew Jones, *Statutory and Rule Changes to Water Court Practice*, COLO. LAW., June 2009, at 53, 56 (stating that “[t]oday’s water litigants arrive at the courthouse with complex hydrologic models, gigabytes of data, and a cadre of expert witnesses. Colorado has a large number of qualified, ethical professionals who fulfill this role, helping attorneys, participants, and judges understand the complexities of hydrology and related technical fields”).



water court. Notably, by way of a recent Chief Justice Directive, Colorado courts are permitted to supply “limited self-help assistance to *pro se* litigants in non-criminal appeals, [in order] to facilitate their access to the courts.”<sup>62</sup> Perhaps this type of program could be extended and tailored to assist *pro se* water court litigants.

In the appellate context, the Colorado Bar Association has initiated the Appellate Pro Bono Program.<sup>63</sup> This program pairs indigent litigants, who would otherwise appear unrepresented, with volunteer lawyers.<sup>64</sup> A way to make water court proceedings more fundamentally fair would be to create a Water Court Pro Bono Program for the seven water court divisions, streamlining disputes involving unrepresented parties.

Another potential avenue for *pro se* Colorado water court litigants would be the creation of a water law clinic at the University of Denver Sturm College of Law. Given the demographic and economic difficulties associated with agricultural water users in particular, the establishment of this type of clinic could help farmers and other water users navigate the court process. For example, student attorneys could assist clients in protecting their own water rights. The University of Denver’s strong reputation for both water law and its clinical programs, coupled with its expanding water law course offerings,<sup>65</sup> including a Water Court Practice Seminar and a Water Transactions Seminar, would make it an ideal forum for a clinic serving *pro se* water court litigants who need assistance.

## VI. CLOSING

While water law is complex, *Minturn* demonstrates it remains rife with contention as its public nature opens the floodgates for *pro se* parties to insert themselves into water court proceedings. However, if Jeff Tucker had been required to meet with a water law attorney, or alternatively, have law students from a Water Law Clinic work with him, perhaps his lengthy and costly appeal could have been avoided.

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62. Glenn I, *supra* note 59, at 65; see generally CHIEF JUSTICE MICHAEL L. BENDER, COLO. CHIEF JUSTICE DIRECTIVE 13-01 (June 12, 2013), [https://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/13-01.pdf](https://www.courts.state.co.us/Courts/Supreme_Court/Directives/13-01.pdf).

63. Glenn II, *supra* note 60, at 57.

64. *Id.*

65. See generally Course List, University of Denver College of Law Registrar, <http://www.law.du.edu/forms/registrar/course-list.cfm> (last visited May 8, 2017).

