

1-1-2017

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

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### Custom Citation

Connor Pace, Court Report, Cty of Boulder v. Boulder & Weld Cty. Ditch Co., 367 P.3d 1179 (Colo. 2016), 20 U. Denv. Water L. Rev. 453 (2017).

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The court next addressed the state's claim that it could establish Davis's ownership through severance of the water from the property. The court stated that water may be held as personal property once it is severed from the land through capture and storage. However, water that is diverted for irrigation is not considered to have been severed and does not qualify as personal property. The prosecution claimed that a larceny charge could be brought according to precedent regarding the severance of oil. Severance of oil converted it to personal property and subjected it to a valid claim of larceny. However, the court found that Davis used the water from the tank for irrigation, which did not create a severance of the water and did not convert the water into personal property. Therefore, the prosecution's alternate claim was insufficient to bring a larceny charge.

Accordingly, the court reversed Davis's conviction for petty theft, with instructions to dismiss the count. It otherwise affirmed the judgment against Davis, and ordered an amended probation order.

*Ryan Hull*

#### COLORADO

**Cty of Boulder v. Boulder & Weld Cty. 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 use 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 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 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 court's determination.

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

In its discussion of legal principles, the 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 Court examined long-established principles regarding changes of water rights and HCU analyses. The 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 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 Court then analyzed whether the County upheld its burden in proving a reliable HCU. The 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 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 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 Court also held that 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 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 Court could not accept the analysis. Moreover, the 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 Court also rejected the County's request for an appropriative right of substitution and exchange. The 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 Court affirmed the ruling of the water court and denied the County's change of use application.

*Connor Pace*

## MONTANA

**United States v. Barthelme Ranch Corp., 386 P.3d 952 (Mont. 2016)** (holding: (i) the U.S. Bureau of Land Management could perfect stockwatering appropriation claims in its reservoirs irrespective of contentions rooted in historic water use from the same source and (ii) the United States owned reserved water rights for stockwatering in a pothole lake on federal grazing land pursuant to an Executive Order).

The United States Bureau of Land Management ("BLM") filed six water right claims in Montana. These included five reservoir claims rooted in Montana law, and a reserved water right in Pothole Lake, a natural feature located on a federal land reservation. The BLM claimed to use each water source, all located wholly or partially on federal land, for wildlife and stockgrazing for grazing permittees, the latter being the primary focus in the following discussion.

The BLM's five reservoir claims relate to the agency's acquisition of Funnells Reservoir in 1951, and its construction of the Windy Day Reservoir in