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Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist., 351 P.3d 408 (Colo. 2015)

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Accordingly, the Court reversed the water court's order decreeing new appropriative rights to the Club and affirmed the rest of its rulings.

Márquez, J., Concurring in Part and Dissenting in Part

Justice Márquez, joined by Justice Hood, dissented, arguing that the Club's uses were beneficial under state law. She reasoned that there is "no meaningful distinction between recreational fishing in a reservoir and recreational fishing in a flow-through diversion." Accordingly, Justice Márquez argued that the Club's use was a beneficial use enumerated under the Act.

Whitney Phillips

Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist., 351 P.3d 408 (Colo. 2015) (affirming the water court's decision and holding (i) a stipulation agreement mandating that a special district recharge an aquifer with its recaptured wastewater did not allow the special district to "reuse" the water, and (ii) the stipulation did not preclude the district from requesting the right to claim replenishment credits for that wastewater in an application for replacement plan because the stipulation did not address the issue).

The Upper Black Squirrel Creek Ground Water Management District ("UBS") is a governmental body responsible for managing ground water in the Upper Black Squirrel Creek Ground Water Basin ("UBS Basin"). The Cherokee Metropolitan District ("Cherokee") is a special district that previously had numerous disputes with UBS concerning Cherokee's conditional ground water rights in the UBS Basin. In 1999, UBS, Cherokee, and other parties entered into a stipulation ("Stipulation") that resolved many of the disputes. The Stipulation required Cherokee to deliver wastewater returns back to the UBS Basin in order to recharge the aquifer.

Cherokee filed an application for replacement plan with the Colorado Ground Water Commission ("Commission"). In 2009, UBS opposed the application before the Commission and motioned the El Paso County, Water Division 2 ("water court") for a declaratory judgment that the terms of the Stipulation prohibited Cherokee from claiming credit for the wastewater returns it delivered back to the UBS Basin. UBS also sought to enjoin Cherokee from asserting such a claim in its application for replacement plan before the Commission.

The water court initially found the Stipulation prohibited Cherokee, or any other person, from claiming credit for the wastewater returns in Cherokee's replacement plan application. However, Cherokee appealed to the Colorado Supreme Court ("Court") and the Court remanded the case to the water court on other grounds.

UBS then filed an amended motion for declaratory judgment and the parties rebriefed the issues. This time, the water court found the Stipulation did not preclude Cherokee from making a claim for credits from the wastewater Cherokee was obligated to return to the UBS aquifer. The water court emphasized that it was only to interpret the relevant "recharge" provision of the Stipulation. The water court determined the Stipulation only required Cherokee to deliver wastewater returns to the UBS Basin to recharge the aquifer, rather than

putting it to successive uses. Because the Stipulation did not mention anything regarding claims for water credits in future applications, the water court found the Stipulation did not specifically preclude Cherokee from making such a claim.

UBS appealed the water court's interpretation of the Stipulation to the Court. On appeal, the Court considered the effect of the requirement that Cherokee deliver its wastewater returns to the UBS Basin had on its application for new appropriative rights. The Court reasoned that the Stipulation should be governed by the principles of contract law and the Colorado Ground Water Management Act. The Court noted that ground water is different from water native to a public stream in that it follows a modified prior appropriation regime. This allows an appropriator who lawfully exports water from another basin to make successive uses of that water.

UBS argued that the water court's finding implicitly authorized Cherokee to claim credits for the wastewater it had to return to the UBS Basin. The Court rejected this argument for two reasons. First, the Court noted the water court's ruling gave no direction as to Cherokee's potential future rights to claim credit for the wastewater. The Court emphasized that the Commission is responsible for managing designated ground water and ensuring that aquifers are not unreasonably depleted. Thus, because the Stipulation lacked any language about claiming future credits, the Court found it had no bearing on any such claim and the decision to allow or deny such a claim remained squarely with the Commission. Therefore, the Court determined that the question of whether Cherokee could claim water rights for delivering wastewater to the UBS aquifer was beyond the scope of the Stipulation. The Court upheld the water court's finding that the Stipulation neither permitted nor precluded Cherokee from applying for credits.

Second, the Court considered UBS's argument that returning the wastewater to the aquifer amounted to Cherokee being able to "reuse" it. The Court disagreed with UBS's definition of reuse. The Court found the Stipulation requires Cherokee to use its best efforts to recapture the wastewater returns and deliver them back to the aquifer, nothing more. The Court held, "[I]n no meaningful sense can receiving credit for relinquishing dominion over return flows by delivering them back to the basin for recharge of the aquifer, in lieu of making successive uses of them, be characterized as reuse."

Accordingly, the Court affirmed the water court's interpretation of the Stipulation.

Hobbs, G.J., Concurring in Part and Dissenting in Part

Justice Hobbs wrote a concurrence-in-part and dissent-in-part, with which Chief Justice Rice joined. Justice Hobbs opined that because granting Cherokee water credits for the recharged wastewater would effectively deprive UBS of the benefits it had bargained for in the Stipulation, the Stipulation did implicitly preclude Cherokee from claiming those rights. He observed that if Cherokee had the right to claim replacement credits, the Stipulation's recharge obligation would be unnecessary and meaningless. Justice Hobbs argued that the Court should have adopted a construction that gave effect to all Stipulation provisions in determining the Stipulation precluded Cherokee from claiming replacement credits. However, Justice Hobbs also observed that the Colorado

Ground Water Commission would certainly prohibit Cherokee from claiming credits for the recharged water, so the outcome would be correct despite the Court's restraint. Justice Hobbs agreed with the rest of the majority's findings.

Katy Rankin

Farmers Water Development Company v. Colorado Water Conservation Board, 346 P.3d 52 (Colo. 2015) (holding that Colorado Water Conservation Board decisions concerning preservation of the natural environment are quasi-legislative, rather than quasi-judicial, actions).

The San Miguel River originates in the San Juan Mountains above the town of Telluride. The river goes down a valley for seventy miles before joining the waters of the Dolores River. Within those seventy miles of river the Colorado Water Conservation Board ("CWCB") sought to appropriate an instream flow right ("ISF") along seventeen miles for environmental preservation. The Colorado Division of Wildlife and U.S. Bureau of Land Management recommended the CWCB seek this appropriation for the preservation of three "sensitive" fish species and the "imperiled" riparian habitat. Farmers Water Development Company ("Farmers") opposed the appropriation.

CWCB's enabling legislation requires it to make three findings before applying for an ISF: (i) the appropriated water would preserve the natural environment to a reasonable degree; (ii) the appropriation can preserve a natural environment; and (iii) the environment's preservation will not cause material injury to other water rights.

The CWCB must have notice and comment at various stages of the determination process. This includes annual meetings in January, where the CWCB declares any intent to appropriate, and in March when it takes public comment on any pending ISF appropriations. The CWCB also must have a hearing whenever a party contests an ISF appropriation. Parties can present evidence, have witnesses give testimony, and orally argue their position for or against the appropriation. The CWCB typically announces hearing results at its November board meeting, but retains the discretion to modify or delay this schedule. In this case, the CWCB made notice of its intentions nine times between 2008 and 2010, ultimately delaying its decision until January of 2011. This schedule modification gave water users in the San Miguel Basin time to adjudicate water rights for future needs. Farmers did not apply for a water right during this postponement period.

At the meeting in January the CWCB set a hearing for the proposed appropriation in September 2011. Farmers gave a notice of intent to contest the proposed ISF request, but did not participate in the September 2011 hearing. At the hearing the CWCB found the ISF appropriation satisfied the requirements of the three determinations. The CWCB filed its request for the ISF appropriation with Water Division 4 and published notice of its request. Farmers opposed. The CWCB asked the water court to determine whether its decision-making procedure for an ISF appropriation was quasi-legislative. Farmers counterclaimed alleging both that the procedure is quasi-judicial and that the CWCB's procedure was insufficient under that premise.

The water court held in favor of the CWCB, finding that the process for