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Farmers Water Development Company v. Colorado Water Conservation Board, 346 P.3d 52 (Colo. 2015)

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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

obtaining an ISF appropriation is quasi-legislative in nature. The water court found that the ultimate outcome of the process is to enact legislation with the purpose of protecting the environment, rather than make any determination as to a specific person's rights or duties. Farmers reserved the right to appeal to the Colorado Supreme Court ("Court"), and timely did so.

The Court sought to answer whether the CWCB's decision-making process for an ISF appropriation request was quasi-legislative, as CWCB claimed, or quasi-judicial, as Farmers alleged. The Court reviewed the water court's ruling *de novo*. The Court acknowledged early in its opinion that the CWCB has the exclusive right to appropriate ISFs to maintain minimum water levels for the benefit of the citizens of Colorado, and the CWCB follows a specific procedure to acquire ISF appropriations to natural streams and lakes.

The Court analyzed a similar decision-making question in its previous case, *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622 (Colo. 1988). In *Cherry Hills*, the Court held that the key factor in determining whether an action is quasi-judicial or quasi-legislative is the nature of the governmental body's action, rather than a set legislative system requiring notice and hearing. Applying the *Cherry Hills* analysis, the Court determined that the nature of the CWCB's ISF appropriation was the preservation of the environment, which section 37-92-10(3) charges CWCB with pursuing on behalf of the public of Colorado. The Court held that the CWCB's determination was quasi-legislative because it requested an ISF appropriation in the public's interest, rather than adjudicating a specific case.

The Court next looked at the CWCB's process. The CWCB possesses discretion for how it proceeds once it has gone through initial inquiries. It may apply for the ISF, decline to apply, or table the proposal. The Colorado legislature delegated this power and the calculation of the three determinations CWCB must find before requesting an ISF appropriation to the CWCB. The legislature required these three determinations to direct the CWCB's analysis when determining whether to apply for an appropriation. The Court said that the CWCB's required three determinations did not make the process an adjudication and therefore quasi-judicial. The CWCB has limitations on its ability to appropriate: it may only exercise its appropriation power to maintain minimum stream flows as necessary for the preservation of the natural environment.

The Court saw the notice and comment periods, and the hearings as a process to gather public input for CWBC's determination. The CWCB has a unique duty to preserve the environment on behalf of the people of Colorado, making its policy determinations generally applicable. The process the CWBC follows prior to applying for an appropriation facilitates its determination of whether the preservation will be successful without causing harm to existing water rights. The general, rather than individual, applicability of the ISF determinations reinforced the Court's view that the CWBC pursued the ISF in order to preserve the environment on behalf of the citizens of Colorado. The Court observed that the legislature put the three determinations in place to channel the CWCB's policy in making policy findings like those in this case. The CWCB, under direction of the necessary determinations, seeks to preserve the environment for the citizens of Colorado. For these reasons the Court affirmed the water court's ruling.

The Court then analyzed each of Farmers' arguments for why the process

is quasi-judicial, and ultimately found all of Farmers' argument fruitless. First, Farmers focused on two factors laid out in *Snyder v. City of Lakewood*, 542 P.3d 371, 374 (Colo. 1975). These factors included: (i) that a state or local law required publication of notice, and (ii) state or local law required a public forum at which citizens could give testimony and present evidence. The Court rejected this argument because *Cherry Hills* overruled *Snyder* and stated that the factors in *Snyder* were not determinative of an agency's action being quasi-legislative or quasi-judicial. The Court concluded that the nature of the decision is what controls, and in this case that nature is quasi-legislative. The Court held that the nature of the CWCB's decision to apply for an ISF is quasi-legislative because it is prospective in nature, not focused on an individual or group, and it has general applicability.

Second, Farmers argued that the CWCB's process must be adjudicative because it replaces adjudicative water court proceedings. This argument also failed because the CWCB's process was not for adjudication of water, but for the determination of whether or not to request an ISF appropriation from the water court. The CWCB does not have the power to grant itself an ISF decree, nor to amend one it already has. Thus, the Court did not find this argument persuasive.

Third, Farmers contested the water court's deferential standard of review when it makes a finding based on an administrative record. Farmers complained that this deference contributes to preventing Farmers from having its day in court. The Court found that this argument lacked merit because one does not have that right in response to an agency's quasi-legislative policy decision. Furthermore, the Court recognized that Farmers willingly passed on its opportunity to partake in the notice and comment proceedings, and to appear at the CWCB hearing. Additionally, the Court noted that Farmers had the opportunity to appear before the water court prior to filing an appeal.

Finally, the Court dismissed Farmers' argument that the ISF determination impermissibly affected current water right holders with vested interests in the San Miguel River. The Court interpreted this argument as a challenge to the CWCB's determination that it may obtain the ISF appropriation without injuring other water rights. The Court also found that Farmers waived this argument on appeal because Farmers did not raise it before the water court. The Court, however, explained that in Colorado the doctrine of prior appropriation guarantees that no junior water right may infringe on any senior water right. The Court noted that the CWCB further combatted this argument by choosing to postpone making a determination in order to allow water users in the basin to obtain water rights for foreseeable needs, and that Farmers chose not to apply for additional water rights during this period.

Accordingly, the Court affirmed the water court's ruling that the CWCB's decision to apply for an ISF appropriation was a quasi-legislative action, not quasi-judicial, because the CWCB made a policy decision regarding the preservation of Colorado's natural environment.

W. James Tilton