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TENTH UPDATE TO COLORADO WATER LAW: AN HISTORICAL PERSPECTIVE

JUSTICE 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 tenth 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]

UPPER BLACK SQUIRREL GROUND WATER MANAGEMENT DISTRICT V. CHEROKEE METROPOLITAN DISTRICT

"Upper Black Squirrel appealed from an order of the water court interpreting an earlier stipulated decree, to which it and Cherokee Metropolitan were parties, concerning the latter's rights to ground water in the Upper Black Squirrel Basin and, particularly, its right to export water for use outside the basin. Upper Black Squirrel sought a declaration that a provision of the stipulation, which required Cherokee to deliver wastewater returns back into the basin for recharge of the aquifer, barred Cherokee and Meridian, another metropolitan district with which Cherokee had entered into an inter-governmental agreement, from claiming credit for these wastewater returns as replacement water, for purposes of acquiring the right to additional pumping from Cherokee's wells in the basin. The water court ruled instead that nothing in the stipulation, and particularly not its use of the word 'recharge,' implied abandonment or forfeiture of any right Cherokee might otherwise have to claim future credits with the Ground Water Commission."

Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist., 351 P.3d 408, 410-11 (2015).

"Unlike the 'waters of any natural stream,' the management of designated ground water is governed by the Colorado Ground Water Management Act. The allocation of rights to the use of ground water, which has been

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).

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

characterized as a modified prior appropriation regime, is determined by application to the Ground Water Commission, which is charged with, among other things, ensuring that designated ground water aquifers are not unreasonably depleted. Withdrawals of designated ground water can be made under this system through the issuance of well permits pursuant to regulations of the Commission and the local ground water district for the maintenance of reasonable ground water pumping levels.

Id. at 412-13.

"The water court's order makes clear, and we agree, that the stipulation bars Cherokee from reusing the exported water, regardless of any right to reuse foreign water that it might otherwise have had and, instead, requires Cherokee to make its best efforts to recapture the specified wastewater returns and upon recapture to deliver them back into the Upper Black Squirrel Creek Basin for recharge of the aquifer. Whether or not Cherokee may yet derive some benefit from stipulating away its right to reuse the foreign water it has developed and agreeing instead to pump the unused portion of that water back into the basin, is a matter that is simply beyond the scope of the stipulation. Recharging, or replenishing, an aquifer clearly serves to prevent or at least mitigate its being mined; but the determination whether the resultant state of the aquifer is such that water is available for further appropriation, and if so, who should be granted such an appropriation, and on what terms, are all questions governed by a different authority, according to rules and regulations promulgated for that purpose."

Id. at 414.

"Depending upon the specific context or designated purposes for which the recharge of an aquifer were required, the term 'recharge' could have additional implications, but standing alone it simply refers to the physical act of replenishing the aquifer. As the state engineer later put it in advising UBS concerning the need to clarify its rules, "Recharge' could mean the *physical act of recharging water* into an aquifer with loss of dominion and control, or the *physical act of recharge* in a recharge/storage/recovery plan approved by the Commission under Designated Basin Rule 5.8, or the *physical act of recharging* replacement water under a replacement plan.' We agree with the water court that nothing in paragraph 5's requirement for Cherokee to deliver wastewater back into the basin for recharge of the aquifer implies that it either must or must not be entitled to credit in a subsequent application to the Ground Water Commission for further appropriation."

Id.

ST. JUDE'S CO. V. ROARING FORK CLUB, L.L.C.

"The application indicated that the RFC Ditch is a flow-through structure located entirely on Club land, which returns water to the Roaring Fork River approximately one half-mile downstream from its point of diversion, and that the Club used the water in question and the RFC Ditch itself as an 'aesthetic and recreational amenity to a golf course development, as well as for fish habitat

and as a private fly-fishing stream.' The Club sought a decree for the amount in question for 'aesthetic, recreation, and piscatorial uses.'"

St. Jude's Co. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 446 (Colo. 2015).

"[T]he constitution guarantees Colorado's system of prior appropriation as it had developed since territorial days and protects the people of the state from divestment of appropriation. Under this system, '[a] water right comes into existence by applying state water to beneficial use.' This system differs dramatically from 'the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands,' which was quickly found to be 'inapplicable in Colorado.' In particular, 'the right to the maintenance of the "flow" of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation.'"

Id. at 448.

"The 1969 Act defines a 'water right' as 'a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same,' and defines 'appropriation' as 'the application of a specified portion of the waters of the state to beneficial use pursuant to the procedures prescribed by law.'"

Id. at 448-49

"In three subparts of the 1969 Act's definition of beneficial use, the General Assembly has gone beyond the meaning of 'beneficial,' providing legislative approval for three specific applications of water, for specified purposes: (1) the impoundment of water for firefighting or storage for any purpose for which an appropriation is lawfully made, including recreational, fishery, or wildlife purposes; (2) the appropriation by the state of Colorado, for the benefit and enjoyment of present and future generations and in the manner prescribed by law, of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree; and (3) the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes.

The latter two beneficial uses, both of which involve the use of water instream, are highly regulated. Instream flows to preserve the natural environment may only be appropriated by the Colorado Water Conservation Board ("CWCB"), a state agency with a "statutory fiduciary duty" to the people of Colorado to both protect the environment and appropriate only the minimum amount of water necessary to do so, and these appropriations undergo extensive review by the CWCB, subject to notice and comment, and by an adjudicating water court."

Id. at 449.

"The Club's proposed 'uses' of the water in question, as expressed in its application, cannot be beneficial within the meaning of the Act because the only purpose they are offered to serve is the subjective enjoyment of the Club's private guests. The flow of water necessary to *efficiently* produce beauty, excitement, or fun cannot even conceptually be quantified, and therefore where these kinds of subjective experiences are recognized by the legislature to be valuable, it has specifically provided for their public enjoyment, scientific administration, and careful measurement. *See, e.g.,* § 37-92-102 (restricting appropriation of instream flows and in-channel diversions to particular purposes and amounts as determined by a state agency bound by fiduciary duty, and with public participation. Without describing a purpose for the accomplishment of which a measurable amount of water, however approximate, must be used, the Club, by definition, fails to articulate an intent to put the *specific amount* of water it claims to a beneficial use."

Id. at 451.

Recognition of the Club's proposed uses would substantially undermine the intent evident in the legislature's instream flow and RICD provisions. The General Assembly has taken great care to limit recreational and environmental uses of water in-channel, largely to deal with the potential dangers and excesses inherent in capturing the flow of the stream. The Club would indisputably be barred from appropriating rights for its asserted uses were the water in question to remain in the natural course of the Roaring Fork River. In effect, the Club seeks to accomplish by virtue of diversion what the legislature has expressly prohibited instream: By using a diversion to effectively change the path of a natural stream or a significant portion of it, the Club seeks approval for re-creating a natural stream on its private property and adjudicating the rights to enjoy the flows therein. This appropriation is tantamount to a 'forbidden riparian right.' Because an appropriation requires actual application of a portion of the waters of the state to a beneficial use, the Club cannot acquire such a forbidden right simply by virtue of diversion.

For these reasons, the Club's asserted aesthetic, recreation, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act. It is for the General Assembly to approve such unconventional beneficial uses, as it has done with its instream and RICD provisions." *See People v. Emmert,* 198 Colo. 137, 597 P.2d 1025, 1029 (1979) ('If the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end.'); *Bd. of Cnty. Comm'rs v. United States,* 891 P.2d 952, 972 (Colo.1995) ('We have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs.'

The water court's judgment decreeing the Club's new appropriative rights must therefore be reversed, and the decree for aesthetic, recreation, and piscatorial uses vacated."

Id. at 451-52.

SAN ANTONIO, LOS PINOS AND CONJEOS ACEQUIA PRESERVATION ASSOCIATION V. SPECIAL IMPROVEMENT DISTRICT NO. 1 OF THE RIO GRANDE WATER CONSERVATION DISTRICT

"Members of the Subdistrict are landowners within the District who rely on wells for all or part of their irrigation water supply for lands north of the Rio Grande River within the closed basin area of the San Luis Valley, in Water Division No. 3. As described in *San Antonio,* water levels in the unconfined aquifer within the Subdistrict have declined significantly due to increased groundwater consumption and sustained drought. The overall objective of the Amended [Replacement] Plan is to provide a water management system of self-regulation within the Subdistrict (in lieu of state-imposed limits on the use of irrigation wells) using economic-based incentives to promote responsible management and use of irrigation water and ensure the protection of senior surface water rights. Subdistrict members are required to contribute financially (through assessment of various fees tethered in part to a farm unit's net groundwater consumption) to fund Subdistrict operations that, among other activities, provide economic incentives to fallow or permanently retire lands to reduce irrigation water consumption.

The Amended Plan requires the Subdistrict to prepare, and obtain the State Engineer's approval of, an ARP that prevents injury to senior water rights. Each ARP must estimate anticipated stream depletions caused by groundwater pumping within the Subdistrict during the replacement plan year, including lagged depletions caused by prior-year pumping. The ARP must then provide a procedure and timeline to deliver replacement water to any injured rights on the Rio Grande or Conejos Rivers or other stream, including delivery to Rio Grande Compact gauges to reduce any Compact curtailment."

San Antonio, Los Pinos and Conjeos River Acequia Pres. Ass'n v. Rio Grande Water Conservation Dist., 351 P.3d 1112, 1115-16 (Colo. 2015).

"We note that Objectors' challenges fail to allege or establish injury from the operation of the 2012 ARP and Amended Plan but, instead, largely raise legal challenges to these documents."

Id. at 1119.

"We hold that: (1) the water court was not authorized to reconsider the Amended Plan's methodology that this court approved in *San Antonio*; (2) courts are not required to stay operation of an ARP until all challenges are resolved; (3) the 2012 ARP's inclusion of Closed Basin Project water as a source of replacement water for depletions caused by Subdistrict well pumping was adequate and suitable to prevent injury to senior surface water rights; and (4) the inclusion of augmentation plan wells as Subdistrict wells for the purpose of calculating total groundwater depletions did not violate the 2010 Decree or the Amended Plan, and the omission of a separate list of augmentation plan wells did not invalidate the 2012 ARP."

Id. at 1120.

"[T]he water court correctly concluded that, to the extent Objectors' challenges sought to resurrect issues with respect to the Amended Plan addressed in *San Antonio,* this court's opinion was binding law of the case. Under the law of the case doctrine, 'prior relevant rulings made in the same case are to be followed unless such application would result in error or unless the ruling is no longer sound due to changed conditions.' A trial court has discretion to apply the law of the case doctrine to its own prior rulings. However, the law of the case established by an appellate court must be followed on remand in subsequent proceedings before a trial court. This principle protects the finality of judgments and ensures lower courts' adherence to decisions of higher courts."

Id.

"The Closed Basin Decree explains the Closed Basin Project in detail and states that '[t]he water *developed* by drainage and the operation of the proposed wells would be collected in and *transported to'* the Rio Grande. (Emphasis added). The Decree similarly states that the project will 'collect and *introduce* into the Rio Grande River a large volume of water' (emphasis added). Regardless of whether such water is characterized as salvaged or developed, the Closed Basin Decree makes clear that water produced by the Closed Basin Project is water that would not otherwise have made its way to the Rio Grande. Thus, the water court in this case could not presume that pumping Project wells causes injury to senior surface rights, and Objectors presented no evidence that Project water would in fact reach the Rio Grande without the Project's operations. In any event, this court has previously rejected a similar challenge based on *Shelton Farms,* as an impermissible collateral attack on the Closed Basin Decree. [citation omitted] (noting that a final judgment by a court with proper jurisdiction is not subject to collateral attack)."

Id. at 1123.

"We hold that the Closed Basin Project provided a suitable source of replacement water in the 2012 ARP because "the water could simultaneously meet Compact obligations and replace injurious depletions. We further hold that use of the Closed Basin Project water rights for replacement falls within their decreed purposes. Therefore, the water court properly concluded that Closed Basin Project water was adequate and suitable to prevent injury to senior surface right holders."

Id. at 1124.

TUCKER V. TOWN OF MINTURN

"This appeal requires us to decide whether a non-attorney trustee of a trust may proceed pro se before the water court. Opposer-appellant J. Tucker, Trustee, appeals the water court's order ruling that as trustee of a trust, he was not permitted to proceed pro se because he was representing the interests of others.

Addressing a matter of first impression in Colorado, we conclude that the water court correctly ruled that as a non-attorney trustee, Tucker could not proceed pro se on behalf of a trust."

Tucker v. Town of Minturn, 359 P.3d 29, 30 (Colo. 2015).

"Although we have not previously considered whether a trustee may proceed pro se on behalf of a trust in a litigation matter, we have made clear in a number of other contexts that a party who is not an attorney may not, without counsel, represent the interests of others in a litigation matter.

'The purpose of the bar and our admission requirements is to protect the public from incompetent legal advice and representation.' Non-attorneys are thus prohibited from undertaking activities that require the exercise of legal discretion or judgment on behalf of others."

Id. at 31.

MERIDIAN SERVICE METROPOLITAN DISTRICT V. GROUND WATER COMMISSION

"We have long and consistently held that in the context of such a jurisdictional conflict, the Commission must make the initial determination as to whether the controversy implicates designated ground water. Jurisdiction shifts to the water court only if the Commission concludes that the water at issue is not designated ground water."

Meridian Serv. Metro. Dist. v. Ground Water Comm'n, 361 P.3d 392, 396 (Colo. 2015).

"Meridian next contends that the district court erred when it ultimately found that the water at issue was designated ground water... [T]he determination of whether the water at issue was designated ground water turned on whether, 'under natural conditions,' the water would be visible on the surface, and whether, in its 'natural course,' it would be available for the fulfillment of decreed surface rights."

Id.

"Here, the district court found: 'The precipitation that falls in the Basin would sink into the ground and be part of the ground water supply under natural or pre-development conditions and is water that would normally not be visible on the surface under natural pre-development conditions in the Basin, except during heavy rain events.' The court further found that the water that Meridian sought to divert was merely runoff that had been increased by Meridian's construction of impermeable surfaces. Thus, the court concluded that the water at issue was 'neither a "natural stream" nor water that is 'tributary to a natural stream' under natural conditions.

Because each of these findings was amply supported by the record, we conclude that the district court correctly found that a portion of the water claimed by Meridian as a result of its development was designated ground water over which the Commission had jurisdiction."

Id. at 396-97.

"Specifically, when the General Assembly enacted the Management Act, it affirmed that the prior appropriation doctrine applies to designated ground water, and it directed the Commission to protect senior appropriators of ground water. The legislature also recognized, however, that the doctrine should be modified to permit the full economic development of designated groundwater.

The legislature thus rejected a pure appropriation doctrine for designated ground water because, whereas surface streams 'are subject to seasonal recharge,' water can be 'mined' from an aquifer to the point that it could take many years to restore the water level. Accordingly, the Management Act empowers the Commission to curtail ground water pumping when the amount of water needed to fill a water right would, among other things, 'result in withdrawing the ground water supply at a rate materially in excess of the reasonably anticipated average rate of future recharge.'

The district court's order in this case was fully consistent with these legislative determinations and, thus, with public policy."

Id. at 399.