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Pawnee Well Users, Inc. v. Wolfe, 320 P.3d 320 (Colo. 2013)

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argued his actions fell under both of these exceptions. The Government, however, argued that the CWA's "recapture" provision trumps the exceptions in this case. The CWA recapture provision requires that, even if farmers' normal activities and irrigation maintenance are exempted, they must obtain a discharge permit if such activity brings an area of the navigable waters into a new use that impairs water flow. Hamilton presented testimony that prior landowners used the filled portions of the Creek for farming activities. The court concluded that, given this evidence, it was still disputable whether the land Hamilton filled was previously farmland and, therefore, whether the recapture provision applied.

Accordingly, the court granted the Government's request for summary judgment in part and found that the Creek is a water of the United States. However, the court denied the Government's request for summary judgment on the applicability of the CWA's recapture provision.

Lauren Hammond

STATE COURTS

COLORADO

Pawnee Well Users, Inc. v. Wolfe, 320 P.3d 320 (Colo. 2013) (holding the water court erred in invalidating the Fruitland Rule based on the Tribal Rule because the General Assembly granted the State Engineer the authority to adopt rules governing nontributary groundwater extracted during oil and gas production, and the State Engineer can neither establish nor divest himself of statutory authority).

This case was an appeal from a final judgment issued in Colorado District Court, Water Division 1 ("water court"), which found that the Tribal Rule stripped the Office of the State Engineer ("State Engineer") of the authority to enact the Fruitland Rule and, thus, the Fruitland Rule was invalid. The State Engineer, the Southern Ute Indian Tribe ("Tribe"), and several other intervenors appealed to the Supreme Court of Colorado ("Court").

In *Vance v. Wolfe*, the Court held that water extracted during the course of coalbed methane ("CBM") production was subject not only to Colorado Oil and Gas Conservation Commission ("COGCC") regulations, but also to both the Water Right Determination and Administration Act of 1969 and the Colorado Ground Water Management Act ("Ground Water Act"). The Court's holding in *Vance* required the State Engineer to evaluate and potentially issue permits for more than 40,000 existing oil and gas wells within sixty days of the decision.

To alleviate the situation, the General Assembly passed House Bill 09-1303 ("H.B. 1303"), which gave the State Engineer authority under the Ground Water Act to adopt rules to administer the "dewatering of geologic formations by withdrawing nontributary groundwater to facilitate or permit mining of minerals." H.B. 1303 also afforded the State Engineer additional time to evaluate the wells and issue permits.

The State Engineer held public meetings and then filed a notice of proposed rule making. The notice of proposed rules included the State Engineer's

intent to designate certain geologic formations as nontributary, which would mean that the groundwater within those formations would not fall within the state prior appropriation system. The notice of rulemaking allowed interested parties to propose alternate rules. The Tribe and various oil and gas operators proposed a rule that identified groundwater in the Fruitland Formation, which extended into the Southern Ute Indian Reservation (“Reservation”), as nontributary. This rule ultimately became the Fruitland Rule.

Because the Fruitland Rule included land inside and outside of the Reservation’s boundaries, jurisdictional issues arose. Accordingly, the Tribe proposed the Tribal Rule, which stated that the rules “shall not be construed to establish the jurisdiction of either the State of Colorado or the Southern Ute Indian Tribe over nontributary groundwater within the boundaries of the Southern Ute Indian Reservation. . . .” The State Engineer agreed to adopt the Tribal Rule but maintained that the State Engineer already possessed jurisdiction over nontributary groundwater within the Reservation.

The State Engineer then filed the final Produced Nontributary Ground Water Rules (“Final Rules”), which included the Fruitland Rule and the Tribal Rule. After the State Engineer had enacted the Final Rules and had already completed evaluations for wells in the Fruitland Formation, interested citizen groups and owners of vested rights (“Pawnee Well Users”) filed complaints in six water divisions challenging the validity of the Final Rules. The Multidistrict Litigation Panel consolidated the complaints in the water court.

The water court upheld all of the Final Rules except the Fruitland Rule, which it found invalid. The water court found that (i) the Tribal Rule divested the State Engineer of his authority to enact the Fruitland Rule, (ii) the State Engineer was not authorized to issue the rule as an advisory rule, and (iii) the State Engineer needed to obtain a judicial determination of his authority in order to enact the Fruitland Rule. The State Engineer, the Tribe, and other intervenors appealed.

The Court first addressed whether the Tribal Rule divested the State Engineer of authority to enact the Fruitland Rule. The Court held that the water court erred on this issue, reasoning that the Tribal Rule could not take away the State Engineer’s statutory authority to promulgate the Fruitland Rule. The Court explained that the State Engineer could neither establish, nor take away, his own jurisdiction because the State Engineer is a state agency that only has the powers that the legislature expressly gives it. Therefore, only H.B. 1303, not the Tribal Rule, gave authority to the State Engineer, including the authority to enact the Fruitland Rule.

The Court subsequently set aside the remainder of the water court’s order that dealt with the Fruitland Rule. First, the Court disagreed with the water court’s holding that the Fruitland Rule was “advisory” based on the absence of authority given to the State Engineer by the Tribal Rule to enact the Fruitland Rule. The Court reasoned that the Fruitland Rule was not “advisory” because H.B. 1303 specifically granted the State Engineer the authority to promulgate the Fruitland Rule. Also, the Court rejected the water court’s conclusion that the State Engineer must obtain a judicial determination of its authority in order to enact the Fruitland Rule because the Tribal Rule could not—and therefore

did not—divest the State Engineer of his statutory authority to promulgate the Fruitland Rule.

The Court also rejected Pawnee Well Users' argument that the State Engineer may fail to administer nontributary water on the Reservation because the Tribal Rule divested the State Engineer of his jurisdiction over nontributary ground water within the reservation. The Court rejected this argument on the grounds that, logically, the State Engineer would not delineate nontributary groundwater with the Fruitland Rule only to decline to administer it by promulgating the Tribal Rule.

Accordingly, the Court held that the water court erred in invalidating the Fruitland Rule based on the Tribal Rule and reversed and remanded the case for further proceedings. In a footnote, the Court pointed out that a party could still bring an as-applied challenge to the State Engineer's implementation of the Fruitland Rule.

Brock Miller

Yellow Jacket Water Conservancy Dist. v. Livingston, 318 P.3d 454 (Colo. 2013) (holding the Water Conservancy Act's holdover provision, containing neither temporal nor reasonableness requirements, allowed district's holdover directors to remain in office past their original term as de jure officers with authority to act on behalf of the district).

The Yellow Jacket Water Conservancy District ("Yellow Jacket") held conditional water rights to several bodies of water located in northwest Colorado. Yellow Jacket's board of directors met on September 29, 2009, and authorized the filing of diligence applications with the water court. On the date of the meeting, Yellow Jacket's board of directors, normally a nine-member panel, had one vacancy as well as four directors whose terms had expired but who were still performing their official duties pending the appointment of qualified replacements. After reviewing Yellow Jacket's diligence applications, several parties (hereinafter "Livingston") objected to the board's authority to approve the filing of these documents. Livingston argued that Yellow Jacket could not have assembled a valid quorum because only three of the nine directors were serving unexpired terms on the date of the board meeting. Livingston filed for summary judgment asking the Routt County District Court, Water Division 6 ("water court") to cancel Yellow Jacket's conditional water rights.

Although the water court recognized that Colorado's Water Conservancy Act ("WCA") contained a holdover provision, the court relied on case law from other states to find that the four holdover directors had remained in their positions for an unreasonable amount of time past the expiration of their terms. The four holdover directors' terms expired on October 18, 2008, nearly one year before the board meeting. Consequently, the court found that Yellow Jacket's board had not assembled a valid quorum and lacked the authority to approve the filing of the diligence applications. The water court granted Livingston's motion for summary judgment, deeming Yellow Jacket's conditional water rights abandoned and cancelled.

On appeal, the Colorado Supreme Court ("Court") began its analysis by reviewing the purpose and procedure of WCA. In order to maintain a conditional water right, the holder is required to file an application for a finding of