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Yellow jacket Water Conservancy Dist. v. Livingston, 318 P.3d 454 (Colo. 2013)

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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

due diligence every six years. These applications help ensure that the holder is continuing to work toward completion of the project that initially led to the conditionally decreed appropriation. The water court then publishes the applications, allowing interested parties to contest the continuation of these conditional water rights.

The Court next examined the holdover provision of the WCA. Looking at the plain language of the statute and construing that language according to rules of grammar and common usage, the Court found that the WCA unambiguously allows a director to hold office for the original term, as well as any interim term without limitation, pending the appointment of a duly qualified successor. The Court noted its longstanding position that when a statute provides that an incumbent may remain in office until a successor is duly qualified, the incumbent remains as a de jure officer with all the authority vested in such position. Finding no legislative intent to impose temporal or reasonableness requirements on holdover terms, the Court declined to read either limitation into the statute.

The Court held the water court had erred in its reliance on a standard of reasonableness, rather than the plain language of the holdover provision of the WCA. Accordingly, the Court reversed the water court's decision to cancel Yellow Jacket's conditional water rights and remanded the case for further proceedings.

Gina Tincher

IDAHO

In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, 315 P.3d 828 (Idaho 2013) (holding (i) the Director of the Idaho Department of Water Resources may use a predicted baseline of senior water right holders' needs as a starting point in considering material injury in a water call in both the management and administrative contexts; and (ii) clear and convincing evidence is the proper evidentiary standard to meet the burden of proof for material injury).

In January 2005, senior surface water rights holders ("Coalition") initiated a delivery call alleging they had suffered material injury due to pumping by junior groundwater rights holders ("Groundwater Appropriators"). The basin serving water rights holders in this matter is of a hydrological character that groundwater pumping will have an effect on surface flows. In response to the delivery call, the Director of the Idaho Department of Water Resources ("Director") issued an initial order that described the methodology used to determine whether the senior rights holders had suffered material harm. In May 2005, the Director issued an amended order that emphasized that material injury only exists if a senior rights holder lacks sufficient water to meet its authorized beneficial uses and that this amount may differ from the total decreed or licensed right. Later in May 2005, the Director granted the City of Pocatello ("City") leave to intervene. Subsequent to the amended order, the Director issued three supplemental orders refining the methodology to calculate material harm. In April 2008, a hearing officer reviewed the Director's orders and issued an opinion and recommendation that noted the use of a baseline was a departure from the