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Kobobel v. Dep't of Natural Res., 249 P.3d 1127 (Colo. 2011)

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On appeal, the Colorado Supreme Court first addressed whether the trial court erred in treating the Application as an appropriative right, rather than as a proposed augmentation plan. An augmentation plan operates to replace depletions with substitute water supply in an amount necessary to prevent injury to other water rights. In contrast, an appropriative right allows a strict one-to-one diversion of upstream water in exchange for providing continuity with a source of substitute supply at a point downstream. The court reasoned that defining a conditional appropriative right of exchange in terms of conditional water rights is in line with Colorado water law's principle of maximum utilization. Accordingly, the court determined that, because an exchange is an appropriative right and not an augmentation plan, courts should review an application for a conditional appropriative right of exchange under a conditional water right analysis.

The court then considered whether the trial court erred by applying the "first step" requirement and the "can and will" test to Broomfield's sources of substitute supply on a source-by-source basis. Broomfield argued that the court should instead apply these requirements to its exchange plan as a whole. The court found, however, that when an applicant claims various substitute sources of supply for a proposed plan of conditional appropriative rights of exchange, the court must analyze each individual substitute source in order to identify the specific risk of injury. Therefore, the court considered each substitute source individually.

In Colorado, to obtain a conditional water right, an applicant must demonstrate three actions: (i) it has taken a first step toward appropriation of a certain amount of water, (ii) its intent to appropriate is not based upon the speculative sale or transfer of the appropriative right, and (iii) the applicant can and will complete the appropriation with diligence. In affirming the water court, the court found that Broomfield had met its burden for all of the sources it owned or controlled, but had failed to meet its burden for six of the sources that it did not own or control.

Accordingly, the court approved Broomfield's conditional appropriative rights of exchange based on the nine sources of substitute supply that it owned or controlled and two of the sources it did not own or control.

Molly Callender

Kobobel v. Dep't of Natural Res., 249 P.3d 1127 (Colo. 2011) (holding that the water court had exclusive jurisdiction to hear, and properly denied, a claim by a group of well owners who asserted they were entitled to just compensation because the State Engineer issued curtailment orders that allegedly effectuated a taking).

Well owners ("Owners"), with rights to thirteen decreed irrigation wells tributary to the South Platte River with appropriation dates between March 1945 and December 1966, brought an inverse condemnation action against the State of Colorado in Morgan County District Court ("district court") after receiving a cease and desist order ("order") from the State Engineer. The order stated that, because the wells were part of an

augmentation plan pending in the District Court for Water Division 1 ("water court"), Owners must stop pumping until the water court entered a decreed augmentation plan. The district court dismissed Owners' action, finding that the water court, not the district court, had exclusive jurisdiction over the action. The Colorado Court of Appeals affirmed the district court on the same grounds. As a result, Owners brought their action in the water court. Although Owners submitted to the jurisdiction of the water court, they continued to assert the district court had proper jurisdiction over their inverse condemnation action. Owners did not seek approval for an augmentation or substitute water supply plan before the water court.

The water court dismissed Owners' complaint for failure to state a claim upon which relief could be granted, holding that Owners' right to use their wells was qualified by Owners' priority date and senior vested interests. The water court reasoned that all tributary groundwater wells in Colorado operate within the priority system, and because owners of such wells must obtain augmentation plans before pumping out of priority to prevent injury to senior rights, the State Engineer's order was not an unconstitutional taking. Owners appealed the water court's decision directly to the Colorado Supreme Court.

Owners first claimed that the district court, not the water court, was the proper venue for their takings action. In analyzing this issue, the court looked at the nature of the claim. The court focused on the distinction between actions involving the use of water and the ownership of water. District courts have jurisdiction over the latter, however, the water court has exclusive jurisdiction over the former. The court held that because Owners' claim depended on whether the State's action improperly interfered with their right to use their wells, and ownership of wells and corresponding appropriation dates were undisputed, the water court had exclusive jurisdiction over the claims.

Next, the court addressed Owners' takings claims. A property owner may bring an inverse condemnation action when state action may substantially deprive the owner of the use and enjoyment of the property and the State has brought no formal condemnation action. Owners claimed the orders deprived them of their vested right to use the water in their wells, precluding all economically beneficial use of their land. Owners claimed that the government owed them just compensation for the loss of their crops resulting from curtailed irrigation water.

To support their takings claim, Owners raised two arguments. First, they argued that because their wells were decreed before the 1969 Water Rights Determination and Administration Act ("1969 Act"), which incorporated tributary groundwater into the priority system, their rights were the equivalent of a vested property right in nontributary groundwater. Second, Owners argued the orders were a regulatory taking because the State Engineer had allowed them to pump out of priority for decades, and recent action on behalf of the State Engineer to enforce the regulatory scheme condemned their vested interest.

The court rejected both of these arguments because they were based on a misconception of the nature and scope of the rights at issue. Despite the temporal relation between the priority of the rights and the 1969 Act, Owners' rights had always been qualified by Colorado's doctrine of prior appropriation, which prohibits use of water that would injure senior rights. The order enforced this doctrine by addressing injurious effects to senior rights resulting from pumping wells tributary to the South Platte out of priority. Because the court held that Owners did not have an unqualified, constitutionally protected property interest in the use of water in their wells, Owners could not show that the State took their property. The court accordingly affirmed the water court's dismissal of Owners' takings claims.

In her dissent, Justice Eid disagreed that the water court had exclusive jurisdiction over Owners' claims, and instead asserted that the claims involved issues of ownership proper for the district court. Justice Eid reasoned that if the water court held in favor of Owners, it would have been required to transfer the case to the district court and that is problematic for two reasons. First, the eminent domain statute gives the district court jurisdiction over inverse condemnation actions and does not intend for the water court to be entitled to an initial review. Second, the dissent found the majority approach to be repetitive, as evidence presented at water court would also need to be presented in district court.

John Lahner

S. Fork Water & Sanitation Dist. v. Town of S. Fork, 252 P.3d 465 (Colo. 2011) (holding that a special district cannot withhold approval to allow a municipality to provide water service for its residents when the special district has failed to do so itself).

Between 2001 and 2003, the South Fork Water and Sanitation District ("District"), a special district and quasi-municipality formed to provide sewerage services, took preliminary steps toward creating a centralized water service. However, the project was not constructed because the District failed to secure funding. In 2006, the Town of South Fork ("Town"), which is located within the District, began preparing to provide a water service to its residents by amending its Land Use and Development Code to require the commitment of water rights as a condition for subdivision approval. The District then filed a declaratory judgment complaint alleging the town was providing a water service within the District without the District's approval, which was a violation of Colorado statutory law. In response, the Town filed a petition for exclusion from the District pursuant to state law, but ultimately withdrew the petition after over 100 voters petitioned for an election regarding the question of exclusion. In 2007 and 2008, the Town negotiated three letters of intent to obtain private water systems.

Through the application of Colorado case law, the Colorado District Court for the 12th Judicial District in Rio Grande County construed the applicable state statute to require a reasonable exercise of the approval