

9-1-2011

## Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C. 249 P.3d 794 (Colo. 2011)

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Michael Lerch, Court Report, Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C. 249 P.3d 794 (Colo. 2011), 15 U. Denv. Water L. Rev. 211 (2011).

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court's clerk and publication in a local newspaper satisfied this requirement. Personal service was only required for water matters in limited circumstances where a specific party's ownership interest was subject to termination or abandonment. The court also noted that the statutory notice requirements applied equally to federally reserved rights, such as the Tribe's, due to a waiver of sovereign immunity by the U.S. Government. Therefore, the court held the lesser notification standard of resume notice and publication in a newspaper was sufficient.

On the second issue, the court looked at whether it was proper for the water court to relate back the belated verification to the original water rights determination resulting in a timely filed determination. The C.R.C.P. allowed for amendments to pleadings that relate back to the original pleading, so long as the interested parties have notice of the claims from the original pleading. A court must construe the C.R.C.P. liberally to allow for amendment of pleadings with technical errors not substantially affecting other interested parties. Here, the Tribe had notice of the water rights determination through the resume notice and newspaper publication. The court held that the technical error of initially omitting verification did not substantially affect the Tribe's rights.

Lastly, the court turned to whether the water court abused its discretion by not allowing the Tribe to intervene after it missed the deadline to file a statement of opposition. There was no right to intervention absent extraordinary circumstances. The water court did not find sufficient evidence of extraordinary circumstances to excuse the Tribe. In addition, the court agreed that allowing the Tribe to intervene would significantly increase the private and public time and resources committed to resolution of the water rights determination, frustrating the intent of the Colorado legislature for expediency and finality. The court held that the water court did not abuse its discretion by denying the Tribe's motion to intervene, affirming the water court's ruling in a 4-3 decision.

The dissent argued that the court was expanding the definition of "determination" to include water rights procedures not previously included and that this was a declaratory review of a prior decree - not a water rights determination. Thus, the lesser resume notice and newspaper publication requirement was not applicable and C.R.C.P. required the ditch companies to serve all interested parties personally.

*Michael L. Downey*

**Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.**, 249 P.3d 794 (Colo. 2011) (holding that the Upper Yampa Water Conservancy District's application for a conditional water right failed to demonstrate sufficient need for additional water because existing contracts for stored water, absent any specific plan or demonstration of reasonably anticipated future need based on projected population growth, did not constitute a beneficial use).

The Upper Yampa Water Conservancy District ("District") applied in Water Division No. 6 ("water court") for conditional water rights to fifty

cubic feet per second of water in Morrison Creek, to be diverted into Stagecoach Reservoir ("Reservoir"). Landowners in the Morrison Creek Basin ("Opposers"), on whose property the District's physical diversion and conveyance facilities would be located, objected to the District's proposed transfer and filed a motion for determination of the conditional decree as a matter of law. The water court held that direct flow and storage rights are not one in the same and cannot be combined to form a single water right as a matter of law. Thus, a conditional right to direct flow could not be put to beneficial use through storage.

The District then amended its engineering report to reflect the water court's ruling on the theory that the District's needs could still be met through a conditional direct flow right without storage. The District produced evidence at trial showing that it had contractual obligations with multiple commercial and municipal users for storage and delivery of 13,192 acre feet of water, and that it required 2,000 additional acre feet in its augmentation plan. An expert for the District determined that the additional water would only increase the firm yield of the reservoir by 2,615 acre feet, leaving the total reservoir yield significantly below the more than 15,000 acre feet the District was obligated to supply. The District's representative admitted that the District had never released some of the contractually-obligated water and that 7,000 acre feet of the contract water was designated for Tri-State Generation and Transmission Association, but was not being put to any beneficial use because there was no existing or planned project for the water.

The water court granted the Opposers' motion to dismiss, holding that the District did not establish any need for the additional water and therefore had not satisfied the anti-speculation doctrine. The water court further found that the District already had a sufficient supply of water to meet its foreseeable future demands. The District appealed the water court's decision to prohibit a joint appropriation of direct and storage flow rights to the Supreme Court of Colorado ("Court").

The District first argued that because the sales and transfers of appropriative water rights involved firm contractual commitments, they were not speculative because they required yearly payments from the contractees and obligated the District to deliver the water when needed. Nonetheless, the Court found the District's contractual obligations to various municipal and commercial users insufficient to show an absence of speculative sale or transfer. Consequently, the District lacked proof of beneficial use without any firm contract with a user who was committed to put the water to a beneficial use. Accordingly, the Court held that the District failed to show it had made a "first step" toward appropriation through beneficial use.

Next, the Court rejected the District's argument that governmental agencies have wide flexibility and may acquire conditional decrees based upon projections of future growth. The Court based its finding on existing Colorado case law stating that a firm contractual commitment to appropriate waters must also have a specific plan for beneficial use of the water, or be "consistent with reasonably anticipated requirements, based

on substantiated projections of future growth.” Accordingly, the Court held that there is no immunity for municipalities and other government agencies from speculation challenges under a governmental planning “exception.”

Finally, the Court held that the District’s assignment of error by the water court could be rejected as a matter of law. The court determined that not only did the District fail to assert any over-commitment (other than the 7,000 acre feet already under contract for some future delivery with no plan for beneficial use), it also failed to show that *any* of the 13,000 acre feet it had under contract was committed to a specific beneficial use or was necessary for the municipality’s reasonably anticipated population growth. The Court rejected the District’s argument that its planned water uses, or those of its contractees for water, were irrelevant. The Court concluded that the evidence was insufficient as a matter of law to prove a need for additional rights or any recognizable legal demands and, thus, it was unnecessary to make any decision regarding joint appropriation of direct and storage flow rights.

Accordingly, the Court affirmed the water court’s ruling granting the Opposers’ motion to dismiss.

*Michael Lerch*

## IDAHO

**Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (Idaho 2011)** (holding that the Director’s curtailment of junior groundwater users pumping volume, in favor of protecting the rights of senior surface water users, was a proper decision under Idaho law and within the Director’s discretion).

This appeal dealt with seven issues arising from a Final Order issued by the Director of the Idaho Department of Water Resources (“IDWR”), curtailing withdrawals from the Eastern Snake River Plain Aquifer (“Aquifer”) by individual appropriators and groundwater districts (collectively known as “junior groundwater users”). The Final Order was the result of delivery calls made to the IDWR by Clear Springs Food, Inc. and Blue Lakes Trout Farm, Inc. (collectively known as “senior surface water users”) and was the culmination of IDWR administrative proceedings. The junior groundwater users filed an appeal to the Idaho Supreme Court after the District Court of the Fifth Judicial District affirmed the Final Order.

Initially, the court rejected the junior groundwater users’ first issue on appeal that the Swan Falls Agreement, made in 1984, precluded the senior users’ ability to make delivery calls so long as minimum flows were maintained in the Snake River below the Murphy Gauge. The Swan Valley Agreement was a settlement between the Idaho Power Company and the State of Idaho, which reduced minimum flows for hydroelectric power generation on the Snake, thus leaving more water available for future