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San Antonio, Los Pinos and Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No 1 of the Rio Grande Water Conservation Dist., No. 10SA224, 2011 WL 6318977 (Colo. Dec. 19, 2011)

San Antonio, Los Pinos and Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist., No. 10SA224, 2011 WL 6318977 (Colo. Dec. 19, 2011) (en banc) (holding that (i) the subdistrict's proposed water management plan was sufficiently comprehensive, detailed, and protective of senior rights to meet the statutory requirements; (ii) the State Engineer had authority to investigate and approve subdistrict water replacement plans when acting in response to a court degree; (iii) the statute enabling subdistrict plans authorized a court to retain jurisdiction when a court order places conditions on plan approval; (iv) the trial court acted within its discretion in authorizing the delay in replacement of injurious stream depletions where the delay was caused by initial plan approval and judicial review; (v) a water management plan did not change or restrict existing water rights when it allowed a user fee credit for water imported into a subdistrict, but not consumed; (vi) a subdistrict's ability under a water management plan to enter future contracts for outside replacement water did not make its plan insufficiently complete when senior water rights were protected by procedures for public notice, hearings, and the opportunity for judicial review, (vii) a subdistrict's plan may consider the adequacy of replacement water sources through its annual replacement procedures, and (viii) inclusion of phreatophyte evapotranspiration in water modeling did not unlawfully consider phryeatophyte destruction as a replacement water source.)

San Antonio, Los Pinos and Conejos River Acequia Preservation Association ("Opposers"), holders of senior water rights in Colorado's San Luis Valley, challenged the District Court for Water Division 3's ("water court") approval and the Alamosa County District Court's ("trial court") affirmation of the of the Special Improvement District No. 1 of the Rio Grande Water Conservation District ("Subdistrict") water management plan ("Plan"). The Colorado legislature created the Subdistrict by statute to manage both surface and groundwater in a region where the State is subject to obligations under the Rio Grande Compact, which apportions water between Colorado, New Mexico, and Texas. To implement its statutory directives, the Subdistrict's Plan provided for maintaining aquifers at sustainable levels while simultaneously preventing injury to senior surface water rights by regulating groundwater use. Opposers raised a number of challenges to the Plan.

Opposers first argued that the approval of a subdistrict water management plan must adhere to augmentation plan review requirements, specifically, that a water court must issue a finding of no material injury to senior water rights. The Colorado Supreme Court ("Court") held that, while both subdistrict plans and augmentation plans must protect senior water rights, they do so through different statutory mechanisms. While an augmentation plan protects senior rights through a judicial no-injury finding, a subdistrict plan protects senior right through a comprehensive and detailed plan. By using water modeling tools, a subdistrict plan seeks to predict injurious depletions to enable timely replacement of water. Failing replacement in the current irrigation year, a subdistrict may re-

place depletions in its next annual plan. The Court held that the Plan's use of this modeling tool satisfied the statutory requirement that a water management plan reasonably prevent injury to senior water rights.

Opposers next argued that the State Engineer lacks authority to approve a subdistrict plan to replace annual depletions because this authority lies exclusively with the water court. While the Court agreed with Opposers that the water court generally has exclusive jurisdiction over water matters, the legislature assigned such authority to the State Engineer under certain circumstances, for example, when the State Engineer is responding to State obligations imposed by a judicial order. Here, because the State Engineer was responding to the trial court's decree that the Subdistrict amend its plan, the Court held the State Engineer acted within the scope of his powers.

Next, Opposers argued that the trial court acted outside its authority when it decreed additional procedural terms and conditions on the Plan's operation. Interpreting the subdistrict enabling legislation, the Court held that the statute grants a trial court retained jurisdiction to ensure compliance with any conditions of approval it imposes on a water management plan. Thus, the trial court had authority to decree conditions as part of its approval of the Subdistrict's Plan.

Opposers next asserted that, because material injury to senior water rights would occur, the trial court erred in allowing the Subdistrict to delay the replacement of injurious depletions until 2012. The Court held that the trial court acted within its authority when it allowed the Subdistrict to delay these replacements until the Subdistrict was funded and could apply that funding to replacement water. The Court reasoned that a necessary component of implementing the Plan is the time required for judicial review. Because "the legislature did not mandate the impossible," the court upheld the delay in the replacement of depletions.

The court next addressed Opposers' argument that aspects of the Subdistrict's water use fee assessment violated existing recharge decrees held by several irrigation associations. Under existing decrees, several irrigation associations have the right to divert water and store it in an aquifer for future use. In the event that these decree beneficiaries import water into the Subdistrict, but do not consume it, the Subdistrict will reduce the member's water use fee accordingly. The Court held that the Subdistrict could offset a member's water use fees by the amount of water that the user returns to the system under a recharge decree, and that crediting a member's user fee in this manner did not change or restrict any existing water rights.

Opposers also argued that the Plan was insufficiently comprehensive and detailed because a Plan provision allows the Subdistrict to enter future contracts to obtain replacement water from outside the Subdistrict's initial geographical boundaries. The Court held that this provision did not defeat the Plan, reasoning that, should the Subdistrict seek to enter such a contract, its procedures for public notice, hearings, and the opportunity for judicial review, would protect senior adjudicated rights as required by the statute.

Addressing Opposers' contest of a particular source of potential replacement water, the Closed Basin Project, the Court held that the adequacy of replacement water sources would be addressed through the Subdistrict's annual replacement procedures and declined to address the Plan's inclusion of this source water in this decision.

Finally, Opposers argued that the Plan's inclusion of phreatophyte evapotranspiration changes in its modeling calculations unlawfully considered phreatophyte destruction as a water source. The Court rejected this argument, reasoning that the computer model's consideration of phreatophyte evapotranspiration changes - changes caused by normal fluctuations in ground water levels - was not the same as destroying phreatophytes as a source of replacement water.

Accordingly, the Court held the Subdistrict's water management plan met all statutory requirements and approved the Plan.

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Upper Yampa Water Conservancy Dist. v. Wolfe, 255 P.3d 1108 (Colo. 2011) (holding that the Upper Yampa Water Conservancy District, in seeking to perfect a conditional water rights decree, must demonstrate (i) a beneficial use other than storage of water; and (ii) quantifiable usage in excess of all existing absolute rights).

In 1964, the Upper Yampa Water Conservancy District ("District") obtained a conditional decree for water rights on Four Counties Ditch Number 3 ("Four Counties Rights"). In 1972 and 1978, the District secured further conditional decrees, enlarging the Four Counties Rights and changing their use. These decrees allowed for water storage in the Stagecoach Reservoir, but recognized rights to rates of flow only, not volumetric amounts. The District perfected a portion of these rights in 1994 and 1997, gaining absolute rights to a total of 151 cubic feet per second ("cfs"). In the 1994 and 1997 decrees, the water court stated that the District had stored water in the Stagecoach Reservoir, but made no finding that it had released water for any beneficial use.

In June 2006, the inflow of the Stagecoach Reservoir exceeded its outflow. The District accordingly applied to the District Court, Water Division 6 ("water court") to perfect the remaining Four County Rights. The State Engineer and the Water Division 6 Engineer ("Engineers") opposed the application. In considering the District's motion for summary judgment, the water court required the District to show actual beneficial use of the water, along with quantifiable evidence that its use had exceeded the amount of its existing absolute water rights. When the District could not provide quantifiable evidence on either point, the water court granted summary judgment to the Engineers.

On appeal to the Colorado Supreme Court, the District first argued that actual use is not necessary to perfect a water right and that storing water in a reservoir fulfills the "beneficial use" requirement of Colorado's prior appropriation system. The Court disagreed, holding that the Dis-