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Upper Eagle Reg'l Water Auth. v. Wolfe, 230 P.3d 1203 (Colo. 2010)

Upper Eagle Reg'l Water Auth. v. Wolfe, 230 P.3d 1203 (Colo. 2010) (holding that (1) for purposes of filing a complaint, the operational date of an augmentation plan is the date of entry of decree, (2) the water court had the duty to prevent injury to vested water rights, not just to remedy such injuries, and (3) the purpose of retained jurisdiction periods is to allow courts to reconsider whether there is injury to vested water rights.

The Upper Eagle Regional Water Authority ("Authority") is the second-largest water system on the western slope of Colorado. The Authority provides water for over 25,000 people, diverting over 5,000 acre-feet of water per year. Since 1995, the Authority used the same depletion table, created by engineer Thomas Williamsen in the early 1990s, to calculate the projected depletions from out-of-priority diversions. The Authority used this depletion table in the two augmentation plans at issue in this case.

The Water Court for Water Division No. 5 ("water court") approved the first augmentation plan on August 1, 2000. The Authority used the depletion table's projections in the plan. The Authority identified Eagle Park Reservoir as the supplemental replacement source of water, covering out-of-priority Authority depletions to the Eagle River up to three hundred and eighty-three acre-feet. The water court retained jurisdiction for ten years, which would expire August 1, 2010. The water court approved the second augmentation plan on February 6, 2003. The Authority again used the depletion table's projections in this plan. The Authority identified Homestake Reservoir as the supplemental replacement source of water for out-of-priority Authority depletions to the Eagle River up to one hundred and twenty-five acre-feet. The water court retained jurisdiction for five years, which would expire February 6, 2008.

In 2006, the State and Division Engineers ("Engineers") and the Colorado Water Conservation Board ("CWCB") filed petitions in the water court to invoke the retained jurisdiction provisions. The Engineers and the CWCB alleged that the Authority's use of the depletion tables in accounting for its out-of-priority diversions had resulted in under-replacement of the depletions. The Engineers and CWCB requested an injunction of the Authority's continued use of the depletion table and an extension of the retained jurisdiction periods until the water court conclusively established the absence of injury to vested water rights. The Authority filed motions to dismiss the cases, arguing that the Engineers and the CWCB could not invoke the retained jurisdiction provisions because the augmentation plans at issue had not yet operated. Although the water court originally denied the motions to dismiss on June 7, 2007, it eventually reconsidered the motions. The water court concluded that the Engineers and the CWCB could not invoke the retained jurisdiction period because the augmentation plans at issue had not operated. The Engineers and CWCB subsequently appealed to the Supreme

Court of Colorado (“court”).

On consolidated appeal, the court first determined whether the water court erred in dismissing the cases. The court held that the water court erroneously dismissed the case because it misinterpreted the operative date of the augmentation plans. Operation of a plan is significant because COLO. REV. STAT. § 37-92-304(6) allowed the water court to reconsider a question of injury to vested water rights under an augmentation plan based on operational experience. In prior cases, the court had made findings on when a plan was operational. Relying on case law, the court determined that as a matter of law an augmentation plan would be effective for operational purposes at the time of entry of the decree. It was irrelevant that the Authority had not taken water out of either reservoir at the time the Engineers and the CWCB filed suit. Rather, the relevant dates of operation for the two cases were August 1, 2000, and February 6, 2003, the dates the water court approved the authority’s augmentation plans. Because both augmentation plans were operating when the Engineers and the CWCB filed suit, the court held that the water court should have continued with proceedings.

The court next considered whether the Engineers and the CWCB could invoke the water court’s retained jurisdiction under an augmentation plan to prevent injury to vested water rights. This question was one of first impression for the court. The court looked to the plain language of the statute as well as its purpose and intent. The court found that under Colorado’s Water Right Determination and Administration Act of 1969 (“1969 Act”) the water court could approve augmentation plans so long as the plans did not injure vested water rights. In addition, the 1969 Act gave the water court discretion to include a retained jurisdiction plan. Then, the General Assembly amended the 1969 Act in 1977 to not only require the inclusion of a retained jurisdiction provision but also to permit the water court to revisit its decision and extend the period of retained jurisdiction as necessary to protect vested water rights. Accordingly, the court found that the statute explicitly provided that the water court could extend the retained jurisdiction period if it was unclear whether an augmentation plan would be injurious to vested water rights.

Moreover, the court found that the legislative history supported this interpretation. The General Assembly emphasized that nonoccurrence of an injury to a vested water right might not be evident at first, and thus, the water courts may need to reconsider their decisions. Because the General Assembly intended the retained jurisdiction period to be a test period, it followed that if there was evidence suggesting injury or the possibility of injury the water court should be able to extend its retained jurisdiction period. In accordance with this finding, the court held that the water court should make a decision on whether to extend the retained jurisdiction in the subject cases.

Accordingly, the court, sitting *en banc*, reversed the water court’s

rulings in both cases and remanded for further proceedings consistent with its opinion.

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V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010) (holding that the State Engineer has the power to change and revoke well permits, and that the beneficial use of water on the date of appropriation controls the scope of water rights).

V Bar Ranch LLC (“V Bar”) drilled a well in 1946 (“Well No. 1”) that predated state law requiring wells be registered or permitted. For two decades, V Bar used Well No. 1 to irrigate only the Southwest Quarter of Section 3. In 1966, V Bar obtained the Northwest Quarter of Section 3 and subsequently used Well No. 1 to irrigate both quarters. In 1972, V Bar applied to the District Court for Water Division 3 (“water court”) for adjudication of Well No. 1. The water court gave the well an appropriation date of 1946 without assigning an acreage or volumetric limitation. V Bar irrigated the Southwest and Northwest Quarters of Section 3 until 1978. In 2005, the State Engineer issued a replacement well permit that allowed V Bar to irrigate both quarters. George Gallegos, a neighboring landowner then petitioned the State to revoke V Bar’s replacement well permit on the grounds that the State Engineer erroneously allowed V Bar to expand its water rights beyond the confines of the Southwest Quarter in violation of C.R.S § 37-90-137(1).

A hearing officer found that the date of Well No. 1’s appropriation, 1946, was the operative date in determining the scope of V Bar’s water rights. The officer also found that the State Engineer issued the replacement well permit erroneously by allowing V Bar to expand its water use without a proper decree from a water court. The State Engineer affirmed the decision. On V Bar’s appeal, the water court likewise affirmed, upholding application of the 1946 appropriation date and rejecting V Bar’s contention that the State Engineer lacked jurisdiction to hear and act upon Gallegos’s petition for revocation of the replacement well permit. V Bar appealed to the Colorado Supreme Court (“court”) to contest the State Engineer’s jurisdiction and object to the operative date for determination of scope. V Bar also argued for application of the doctrine of equitable estoppel to prevent the State Engineer from modifying the replacement well permit.

The court first addressed the question of jurisdiction. The court found two legislative acts useful in assessing the extent of the State Engineer’s authority: the Colorado Administrative Procedures Act (“APA”), and the Water Rights Determination and Adjudication Act of 1969 (“1969 Act”). The APA authorizes state agencies to revoke licenses; the court noted that a well permit is a “license” under the APA criteria. The 1969 Act establishes the framework for the existing water courts and extends exclusive jurisdiction to these courts in “water matters.” Though the 1969 Act does not define “water