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Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 219 P.3d 774 (Colo. 2009)

in administrative policy, the fixed water year did not affect Intervenor's rights. Consequently, the court affirmed the water court's holdings.

Mariel Yarbrough

Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 219 P.3d 774 (Colo. 2009) (holding that the water districts did not display a substantial probability that they would utilize the requested appropriations, and that the evidence supported a fifty-year water supply planning period, but did not support conditional water appropriations for recreational in-channel rights or possible bypass flow requirements of federal permits, or a fifty cubic feet per second diversion from a pumping station for use in the water districts' system).

The Pagosa Area Water and Sanitation District and the San Juan Water Conservancy District ("Districts") made an initial application for the right to store 29,000 acre-feet of water in Dry Gulch Reservoir with the right to refill the reservoir and potentially use up to 64,000 acre-feet of water per year, a 100 cubic feet per second ("cfs") direct flow right at the Dry Gulch Pumping Station into storage, and a eighty cfs direct flow right from the pumping station for use anywhere in the districts system. The Districts based their initial application on a 100-year planning period and the District Court, Water Division 7 approved the initial decree. Trout Unlimited appealed the decree and the Colorado Supreme Court reversed and remanded the decision determining that the Districts had not provided enough evidence to support a 100-year planning period. On remand the water court issued a decree with a fifty year planning period, and Trout Unlimited appealed to the court again, bringing this action.

On appeal, Trout Unlimited asserted that the Districts had not provided enough information to substantiate the allocation requests made, even under the shorter planning period. The Districts' revised decree consisted of a conditional storage right of 19,000 acre-feet with the right to refill to a total annual storage of 25,300 acre-feet in Dry Gulch Reservoir, a direct diversion of 100 cfs from the San Juan River into storage at Dry Gulch, and a separate direct diversion flow right of fifty cfs from the San Juan River for use anywhere in the Districts' system. The Districts attempted to use a planning period of seventy years, but the water court approved a period of fifty years. Trout Unlimited appealed this decision as well, asserting that the court's remand instructions lent to a thirty-five-year planning period, ending in 2040.

Reviewing the new appeal, the court determined that the fifty-year planning period decided on by the water court was appropriate and comported with statutory requirements and other decisions by the court. Due to the lengthy lead-time necessary to prepare the Dry Gulch Reservoir, it would not be ready for use until 2025. The fifty-year planning period, which reaches to 2055, also coincides with other state initiatives to project Colorado population and geographic location for

the year 2050.

After determining that the planning period used by the water court was appropriate the court turned to the substance of the proposed appropriation by the Districts. Pursuant to section 37-92-103(3)(a) of the Colorado Revised Statutes, governmental entities supplying water have slightly less stringent standards with regard to anti-speculation and beneficial use standards than nongovernmental appropriators. However, proposed appropriations must be consistent with the governmental entity's reasonably expected future water needs and the entity needs to substantiate with solid projections of future growth in the service area, within a reasonable planning period. To accomplish this, the governmental entity has the burden of proving three conditions in order to make a conditional appropriation of unappropriated water. First, the entity must establish a reasonable water supply planning period. Second, the entity must substantiate population projections based on a normal rate of growth for the area in question. Finally, the entity must estimate the amount of unappropriated water necessary to serve the anticipated needs of the governmental entity for the proposed planning period, beyond the entity's current water supply.

In determining what amount of water was reasonably needed the court provided four considerations: (1) implementation of reasonable conservation measures through the planning period; (2) expected land use mixes during the planning period; (3) per capita usage projections for indoor and outdoor use during the planning period; and (4) the amount of consumptive use necessary for the increased population. In a conditional decree proceeding, the court also said it would apply the "can and will" test, requiring that the potential appropriator show there is a substantial possibility that the proposed project will come to fruition. Finally, the court determined that approving appropriations based on future hypothetical uses of other governmental entities with senior rights was speculative in nature and that the Districts could not use them as evidence for an appropriation. The court first addressed the decree-approved recreational in-stream rights or a federal by-pass flow requirement, which allow diversions from the stream if all appropriators maintain the desired flow amount in the river. The Districts claimed that the United States Forest Service or another governmental body might require a by-pass flow. The expert testifying for the Districts asserted that there was a chance the Districts would need the by-pass flows or in-stream rights to meet future obligations. However, according to the court, the District did not substantiate its assertions with any significant evidence. On remand from the previous decision, the court indicated that the appropriation of water for recreational in-stream flows and by-pass flow rights was too speculative and that the Districts would need to provide further evidence to substantiate the appropriation. The Districts, however, did not introduce any further evidence, and according to the court, did not meet its burden to prove a non-speculative intent to use the water beneficially. In addition, the Districts' request did not pass the "can

and will" test.

Next, the court addressed the Districts' request for fifty cfs diversion to be utilized anywhere in the Districts' service area. The court determined that there are competing provisions in the Districts' decree surrounding the fifty cfs direct flow request and that some of them are open-ended and would not correspond to the fifty-year planning period. While one provision of the decree seemed to put an overall cap of 25,300 acre-feet of water annually on all proposed diversions, another provision seemed to indicate that future projects would allow the Districts to divert the fifty cfs flow to other areas that would not be subject to the overall annual cap. The court remanded this issue with instructions that the water court should limit the direct flow rate to the amount necessary for the 2055 planning period.

Finally, the court determined that there was insufficient evidence to support the Districts' request for 100 cfs direct flow diversion and an annual storage amount of 25,300 in the Dry Gulch Reservoir. The court used the considerations outlined above to determine that the Districts' requests were too speculative in nature. While the court agreed with the 50-year planning period proposed by the water court, the record did not contain significant information about the amount of unappropriated water reasonably needed to serve the needs of the Districts. In addition, there were significant discrepancies surrounding the projected population of the area during the planning period. Specifically, the court was dissatisfied with the lack of showing of the projected land uses. The Districts did not attempt to do a build-out analysis or account for significant tribal and public lands within the service area in its analysis. The court cited legislation addressing the requirement that a governmental entity provide a showing of particular types of analysis when making appropriation requests, which included the build-out analysis. In addressing the projected population, the court compared the Districts' 2055 projected population of 62,906 with the state-authorized study that concluded a maximum of 42,532 individuals in 2050. To deal with this variance and the lack of evidence concerning a build-out analysis, the court asked the water court to take further evidence to help further determine the amount of water and the direct flow diversions necessary for the anticipated needs of the District in 2055.

In addition to the specific water diversion request at issue, the Districts also asserted a position that when making conditional appropriations, the governmental water suppliers are acting in a legislative capacity, and the courts should defer to the amount of water the governmental supplier has deemed necessary to carry out its functions. The court rejected that assertion citing statutes and case law indicating that both private and governmental appropriators carry a burden of proof when making an appropriation request. While the burden on the governmental entity carries a limited exception regarding anti-speculation and beneficial use standards, the burden is

still present. The court reversed the judgment of the water court and remanded the case to allow for the introduction of further evidence to substantiate the Districts' requests.

Matt Brodahl

Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009) (holding that (1) the water court had jurisdiction over the subdistrict, which enabled it to order an augmentation plan for water for out-of-priority depletions due to well pumping that occurred prior to the subdistrict's filing of its application; (2) the water court had authority under Colorado's Water Right Determination and Adjudication Act of 1969 to order a well augmentation subdistrict to provide augmentation water for out-of-priority depletions resulting from well pumping that occurred prior to the subdistrict's filing of its application; (3) the surface water conditions that would exist absent pumping in the basin, rather than current hydrological conditions, must determine the subdistrict's water replacement obligations; and (4) the Administrative Procedure Act governs the standard of review for substitute water supply plans approved by the State Engineer pending approval of an augmentation plan, rather than the de novo standard of review).

In 2003, the Well Augmentation Subdistrict of the Central Colorado Water Conservancy and the South Platte Well Users Association (collectively, "WAS"), submitted applications in the District Court for Water Division Number One ("water court") for approval of an augmentation plan. The proposed plan sought to provide augmentation water to offset the out-of-priority depletions of 215 structures diverting groundwater from the South Platte River Basin in locations from Brighton, Colorado, to Fort Morgan, Colorado. Before WAS filed its application, many of the wells included in its plan had operated under annual substitute water supply plans issued by the State Engineer in favor of Groundwater Appropriators of the South Platte ("GASP"). Following rulings by the Colorado Supreme Court, holding that the State Engineer lacked the authority to promulgate rules permitting out-of-priority alluvial wells, GASP dissolved, and former GASP well owners petitioned the Central Colorado Water Conservancy District to establish WAS so that they might seek a court-approved augmentation plan. The wells involved in WAS make up a subset of the former GASP wells.

WAS's augmentation plan employed a "well call" structure to administer the groundwater seniority system, which obligated all wells with priority dates junior to the date of the calling well to replace water, while wells with priority dates senior to the calling well did not have to replace water. Thirty-seven parties, including the City of Aurora (collectively, "Aurora"), filed statements of opposition to WAS's proposed augmentation plan. Some opposers of the plan filed a motion for a question of law determination relating to the appropriate