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# CASE NOTE

# COLORADO WATER COURT'S DECISION TOWARDS THE AVAILABILITY OF UNAPPROPRIATED WATER: *BUFFALO PARK DEVELOPMENT COMPANY V. MOUNTAIN MUTUAL RESERVOIR COMPANY*

## I. INTRODUCTION

According to the Colorado Constitution, water is a public resource, and the water of every natural stream is property of the public, subject to the use of the people of the state, and available for appropriation.[1] People can therefore create water rights by appropriating an available body of water. At first glance, the idea of "availability of unappropriated water" in water law appears to be an easy concept to grasp. After all, it seems simple enough that in order to "claim" a water right, there can be no pre-existing claims to those rights or injuries resulting thereof. However, there is a disagreement in how to determine "availability" in conditional water rights proceedings involving augmentation plans: should proof of availability be a requirement separate and apart from proving the absence of injury, or should courts consider augmentation plans *with* the application for water rights when determining if any such injuries could exist? At the time of this case, appellant Bear Mountain Homeowners Association had spent a considerable amount of time and money trying to find an answer to that very question.[2]

## II. BACKGROUND

### A. THE PARTIES

Buffalo Park Development Company, Colorado Mountain Properties, Inc., and Evergreen Memorial Park, Inc. are all Colorado corporations involved in the construction of new subdivisions in Jefferson County. Mountain Mutual Reservoir Company, a non-profit Colorado corporation, united with North Fork Associates, LLC, collectively as applicants-appellees. The following opposers-appellees joined the two

1. COLO. CONST. ART. XVI, § 5.
2. Answer Brief of Opposer-Appellees at 6, *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, No. 06SA373 (Colo. App. 2008).

applicant-appellees: Bear Mountain Homeowners Association, Brook Forest Water District, Colorado Water Conservation Board, City and County of Denver, acting by and through its Board of Water Commissioner, City of Englewood, Evergreen Metropolitan District, Vista Exline, Farmers Reservoir and Irrigation Company, Foothills Metropolitan Recreation and Park District, Genesee Water and Sanitation District, Jefferson County Open Space Department, Henry L. Kerschbaum, City of Lakewood, Jeremiah P. Lee, Ronald P. Lewis, Charles J. Maas, Town of Morrison, Ben Napheys, Larry J. Plume, Red Rocks Country Club, South Evergreen Water District, Theodore M. Zorich, and the Colorado Department of Water Resources, State and Division Engineers.

### B. THE FACTS

Buffalo Park Development Company ("Buffalo Park") sought to acquire conditional water rights and establish an augmentation plan for 205 wells to support five new subdivisions in Jefferson County.[3] The plans for the wells existed in the Turkey Creek and Bear Creek subbasins of the South Platte River Basin.[4] Mountain Mutual Reservoir Company ("Mountain Mutual") and other small capacity well owners, including Bear Mountain Homeowners Association ("BMHOA"), opposed the application. These parties asserted that: (1) no unappropriated water was available for appropriation by means of the newly-proposed subdivision wells, and (2) the proposed augmentation plan was fatally defective by failing to protect the well owners from injury to existing groundwater users in the vicinity.[5]

### C. PROCEDURAL HISTORY

Buffalo Park first initiated its application for conditional water rights and establishment of the augmentation plan in 1994.[6] The District Court for Water Division No. 1 ("water court") heard the case in three separate sections over the course of approximately three years, from July 1999 to September 2002.[7] The water court ultimately approved the application for two of the five subdivisions, Buffalo Meadows and Homestead, and dismissed the application for the other three subdivisions, Mountain Park Homes, Bear Mountain Vista, and Cragmont.[8] In August 2006, after a round of proposed adjustments to prior

3. Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co., 195 P.3d 674, 679 (Colo. 2008).
4. *Id.*
5. *Id.* at 678.
6. *Id.*
7. *Id.*
8. *Id.* at 679.

decree drafts, the water court issued a decree approving an augmentation plan for two of the subdivisions, Buffalo Meadows and Homestead, and denied the augmentation plans for the other three subdivisions.[9] Buffalo Park contended that the water court had erred by not granting the appropriation of water rights for all five subdivisions and by not affording an adequate opportunity for Buffalo Park to propose terms and conditions for an augmentation plan.[10] Buffalo Park united with Colorado Mountain Properties, Inc., and Evergreen Memorial Park, Inc., and collectively appealed the water court's decision to the Supreme Court of Colorado.

## III. *BUFFALO PARK DEVELOPMENT COMPANY V. MOUNTAIN MUTUAL RESERVOIR COMPANY*

### A. THE SUPREME COURT OF COLORADO HOLDING

The Colorado Supreme Court upheld the water court's decision and ruled in favor of Mountain Mutual. The court determined that Buffalo Park did not meet its burden of proof because it did not show: (1) the existence of available unappropriated water for the conditional groundwater rights it claimed for the Mountain Park Homes, Bear Mountain Vista, and Cragmont subdivisions, or (2) a non-injurious augmentation plan sufficient to protect the groundwater rights of small capacity domestic well owners who divert from the aquifers.[11] Furthermore, the Supreme Court rejected Buffalo Park's contention that the water court did not afford it an adequate opportunity to propose terms and conditions for an augmentation plan.[12]

### B. DISCUSSION

#### 1. Requirement to Show Availability of Groundwater

Buffalo Park maintained that Colorado law did not require it to demonstrate the availability of unappropriated groundwater before the start of its operation. The company used this reasoning because Buffalo Park was pursuing the application seeking water rights *in conjunction* with its proposed augmentation plan, theoretically relieving any negative effects resulting from the well construction.[13] More specifically, Buffalo Park bemoaned the fact that its opponents considered Buffalo Park's claim for decreed groundwater rights as the "trigger" for

9. *Id.*
10. *Id.*
11. *Id.* at 691.
12. *Id.*
13. Reply Brief of Co-Applicants-Appellants at 3, *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, No. 06SA373 (Colo. App. 2008).

requiring a finding of unappropriated groundwater. Buffalo Park maintained that it merely made these claims "to establish the priority dates for each of the wells," and did not warrant a showing of unappropriated groundwater until a later date.[14]

Conversely, BMHOA, citing *Board of County Commissioners of Arapahoe v. United States*[15] and *In re Water Rights of Park County Sportsmen's Ranch,*[16] claimed that not only did Colorado law require the stand-alone showing of unappropriated groundwater, but also asserted that any proposed plan involving an augmentation plan that requires *post*-decree monitoring to show lack of injury could not function as a substitute.[17] In its brief, BMHOA cited the "can and will" test, set forth in Colorado statutes, which states that "no claim for a conditional water right may be recognized or a decree therefore [sic] granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled. . . ."[18] Cases such as *Pagosa Area Water and Sanitation District v. Trout Unlimited* have used the anti-speculative "can and will" test to ensure that petitioners' plans and intended uses for water rights utilize reasonable, good-faith estimates for beneficial use of the water.[19] Furthermore, the appellees referred to the *Southeastern Colorado Water Conservancy District v. City of Florence* case,[20] which overruled a finding that unappropriated water availability was "irrelevant to the award of a new conditional water right."[21] BMHOA also referenced *In re the Application for Water Rights of Turkey Canon Ranch,*[22] which held that those who held vested water rights and were in danger of material injury concerning those rights would have standing to bring suit for that injury.

The Supreme Court ignored Buffalo Park's rebuttals that claimed the appellees' proffered case law did not apply due to minor differences in fact patterns. The court agreed with BMHOA concerning the

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14. *Id.*

15. *See* Bd. of County Comm'rs v. United States, 891 P.2d 952 (Colo. 1995).

16. *See* City of Aurora v. Simpson, 105 P.3d 595 (Colo. 2005).

17. Answer Brief of Opposer-Appellees at 7, *Buffalo Park Dev. Co.*, No. 06SA373.

18. COLO. REV. STAT. § 37-92-305(9)(b) (2008).

19. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 309-11 (Colo. 2007). This case involved a fisheries conservation organization that opposed a water district's application for conditional water rights. The application included a planning period extending for over 100 years, prompting the court to stress the importance of using reasonable estimates and realistic projections of necessity when determining water rights appropriations.

20. *See* Se. Colo. Water Conservancy Dist. v. City of Florence, 688 P.2d 715 (Colo. 1984).

21. Answer Brief of Opposer-Appellees, *supra* note 2, at 8.

22. *See* Shirola v. Turkey Canon Ranch L.L.C., 937 P.2d 739 (Colo. 1997). While this case did not involve an argument that there was an absence of unappropriated water, it confirmed basic principles for establishing standing during occurrences of material injury toward water rights.

plain language of Section 37-93-305(9)(b) of Colorado Revised Statutes, prompting the court to conclude that Buffalo Park cannot use a "wait and see" approach by asserting that conditions may change and therefore increase the availability of water.[23] Essentially, Buffalo Creek had to prove that the unappropriated water was available "based upon conditions existing at the time of the application."[24]

2. Existence of Unappropriated Groundwater

Conversely, BMHOA's expert witness, Bruce Kroeker, gave his opinion no unappropriated water was available for Buffalo Park's suggested appropriations.[25] Specifically, Kroeker thought that the water levels were falling "because there's no direct replacement at that location being proposed, [and] that the sources of replacement will not protect these wells from injury in this area."[26] Kroeker referred to well water dates from several exhibits to support his opinion that: "(1) the available amount of recharge in the area was not sufficient to offset depletions already being made from the aquifer, (2) significantly declining water levels demonstrate a groundwater mining condition, and (3) no unappropriated water was available for the proposed new groundwater appropriations."[27] Buffalo Park, on the other hand, had no expert testimony to counter this because of its timely failure to disclose its expert's opinion during the pretrial process. Thus, the court refused to overturn the water court's holding on the matter, and approved the water court's exercise of discretion.

3. The Injurious Nature of the Augmentation Plans

After affirming that no unappropriated water was available for the conditional groundwater rights that Buffalo Park claimed for the three divisions, the Supreme Court then reviewed Colorado statutes regarding augmentation processes, and found three applicable rules: (1) any new augmentation plan cannot "injuriously affect the owner of or persons entitled to use water under a vested water right;"[28] (2) any augmentation plan must have a structure that allows the applicant to make future diversions through the proposed well without injury to the preexisting water rights of others; and (3) the applicant bears the burden of proof to show no injury.[29] In essence, Buffalo Park needed to intro-

23. Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co., 195 P.3d 674, 679 (Colo. 2008).195 P.3d at 683 (citing COLO. REV. STAT. § 37-92-305(9)(b)).
24. *Id.*
25. *Id.* at 680.
26. *Id.*
27. *Id.* at 680-81.
28. COLO. REV. STAT. § 37-92-305(3)(a).
29. *Id.*

duce evidence of augmentation sufficient to demonstrate non-injury to existing well owners because Colorado statutes indicate that small capacity groundwater owners hold vested groundwater rights; the rights vest when the wells reach completion and the owners put the groundwater to beneficial use. In this case, BMHOA asserted this position and filed a statement of opposition against Buffalo Park, claiming standing via its possession of a "legally protected interest in a vested water right."[30] After recognizing that the proposed groundwater would have sufficient impact on BMHOA for proper standing in this case, the Supreme Court concurred that the evidence produced at the water court trial showed the proposed augmentation plan would be injurious to the members of BMHOA.[31]

4. Ample Opportunity to Propose Additional Terms and Conditions

Nonetheless, according to Colorado law, Buffalo Park maintained that the water court had to allow Buffalo Park to "propose additional or modified terms and conditions to prevent material injury."[32] The Supreme Court agreed, but held that applicants must propose these additional considerations within a reasonable amount of time.[33] The judges noted that, while the water court directed Buffalo Park to "prepare, circulate to the parties, and file an amended proposed decree that would effectuate the augmentation plan for the Buffalo Meadows and Homestead subdivisions," Buffalo Park delayed for nineteen months before submitting a revised decree. Even this revised decree failed to embody the water court's findings.[34] Moreover, the applicants made no motion or offer of proof to introduce supplementary evidence or include additional terms and conditions in its augmentation plan, which would have sufficiently protected the vested small capacity groundwater rights of the Mountain Park Homes, Bear Mountain Vista, and Cragmont subdivision users.[35] The court concluded that Buffalo Park failed to propose adequate augmentation plans and conditions before the water court's final judgment, and based on this information, the Supreme Court affirmed the trial court's decision regarding the

30. Shirola v. Turkey Canon Ranch L.L.C, 937 P.2d 739, 747 (Colo. 1997); *see also* Trial Order for In the Matter of the Application for Water Rights of Buffalo Park Development Company, No. 94CW290 (Colo. Dist. Ct. 1999).

31. Reply Brief of Co-Applicants-Appellants at 3, *Buffalo Park Dev. Co.*, No. 06SA373; *see also* COLO. REV. STAT. § 37-92-305(3).

32. Reply Brief of Co-Applicants-Appellants at 11, *Buffalo Park Dev. Co.*, No. 06SA373.

33. Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co., 195 P.3d 674, 691 (Colo. 2008).

34. *Id.* at 682.

35. *Id.* at 680.

denial of the appropriation rights for the three subdivisions and corresponding augmentation plans.[36]

### C. THE DISSENT

Justice Coats, joined by Justice Eid, dissented from the majority's opinion and judgment. While concurring with most of the majority's holdings, Justice Coats specifically asserted that the water court erred in denying Buffalo Park's request to propose additional terms and conditions to its proposed augmentation plan, and maintained that he based his disagreement upon his difference of opinion concerning the court's understanding of the "availability requirement."[37] While Justice Coats was sympathetic to the opposers' feelings of exasperation after fourteen years of litigation, he contended that the court unfairly and prematurely denied Buffalo Park's opportunity to demonstrate the availability of unappropriated water.[38] Some previous Colorado case law involved certain courts that, while adhering to the statutory "can-and-will" test for conditional water rights, did not require that petitioners must establish availability before or apart from consideration of a proposed augmentation plan.[39] In lieu of this, Coats found it difficult to imagine how an application for water rights, combined with an augmentation plan, could ever be *completely* dismissible "for failure to prove the availability of unappropriated water, without first considering the applicant's augmentation plan, and if necessary, permitting the applicant to propose additional conditions that could prevent injury."[40] In essence, Justice Coats opined, "proof that the water level will be lowered by pumping additional wells does not, by itself, demonstrate that unappropriated water is currently unavailable."[41]

## IV. CONCLUSION

In the future, all applicants for conditional water rights must demonstrate, before commencing any operations or causing outside interference, that an availability of unappropriated groundwater plainly exists. Additionally, the petitioners must also show that implementation of the augmentation plan would not result in any injury to any

36. *Id.*

37. *Id.* at 692.

38. *Id.*

39. *Id.* at 693 (citing Mount Emmons Mining Co. v. Town of Crested Butte, 30 P.3d 1255, 1260 (Colo. 2002) ("Typically, to satisfy the 'can and will' test, new appropriators must convince the water court that their diversion will cause no harm to senior appropriators: i.e. that water is available.")).

40. *Id.* at 694.

41. *Id.*; *see also* Simpson v. Cotton Creek Circles, L.L.C., 181 P.3d 252,258 (Colo. 2008) (suggesting that proof of groundwater usage is taking place does *not* necessarily mean unappropriated water is no longer available).

existing water rights holder. This should help deter the hoarding of water rights, such as in *Pagosa Area Water and Sanitation District v. Trout Unlimited*, which encouraged the adoption of reasonable terms and conditions for those who appropriate water rights.[42] This decision will hopefully make a gradual change towards benefiting "smaller" representatives, who necessarily depend on water rights, while dissuading those more powerful entities from taking advantage of the water rights system of Colorado.

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42. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 307 (Colo. 2007) (holding that establishing a reasonable planning period, substantiated population, projections, and the amount of unappropriated water that was reasonably necessary are essential factors to consider when appropriating water rights).