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## Gallegos v. Colo. Ground Water Comm'n, 147 P.3d 20 (Colo. 2006)

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junior right holders would use all water forfeited by senior-rights holders in full under existing junior entitlements.

Delta's appeal contended that the trial court erred in measuring the forfeiture against its full appropriation even when there was insufficient water to meet the full appropriation. The court addressed this issue in Kern's appeal, but held that what was forfeited was the right to appropriate in excess of Delta's greatest use as determined by the forfeiture period and the measurement period. Thus, Delta's claim that it forfeited water it never had an opportunity to use was meritless.

The court affirmed the judgment as modified to declare the extent of forfeiture of senior and junior appropriative rights.

*Carrie Stanley*

## COLORADO

**Gallegos v. Colo. Ground Water Comm'n, 147 P.3d 20 (Colo. 2006)** (holding if an owner of surface water rights within the boundaries of a designated ground water basin can show hydrologic connection between the surface water rights and water within the designated ground water basin, and show injury from that connection, the Colorado Ground Water Commission will have jurisdiction over the surface water rights only for the purpose of altering the basin's boundaries. Jurisdiction over the surface water rights will then vest in the water courts and the State Engineer).

In 1987, the Colorado Ground Water Commission ("Commission") established the Upper Crow Creek Designated Ground Water Basin ("Basin") in Weld County, Colorado. Reinaldo, Marianne, Harold, Ellen, and Gene Gallegos ("Gallegos Family") possessed surface water rights that predated the Basin's designation but were located within the Basin's boundaries.

In 2002 and 2003, the Gallegos Family sent letters to the State Engineer, claiming diversions and pumping within the Basin interfered with the family's surface water rights, and asked that either the State Engineer or Commission curtail junior well pumping. The State Engineer denied the Gallegos Family's request. The Gallegos Family appealed the decision to the Commission. The Commission held that through the designation process, the Commission determined that all water within the basin is designated groundwater and only has a *de minimus* effect on surface water when it is withdrawn. In addition, the Commission held it only has jurisdiction over designated ground water and not surface water. The Gallegos Family appealed to the District Court for Weld County. The district court held the Commission has jurisdiction over surface water rights when withdrawals of designated ground water impact surface water rights. The district court also held that when the Commission has jurisdiction, it must apply modified prior appropriation and administer junior designated ground water

wells for the benefit of the senior surface water rights. The Gallegos Family appealed and the Commission cross-appealed.

The Gallegos Family argued to the Colorado Supreme Court that the Commission has jurisdiction over the family's surface water rights but prior appropriation, not modified prior appropriation, applies. The Commission argued that designated ground water only had a *de minimis* impact on surface water and jurisdiction does not apply. The Commission also argued that if jurisdiction does apply, the Commission must use the modified prior appropriation doctrine.

The court first considered the Commission's jurisdiction in light of the Colorado Constitution, the Colorado Ground Water Management Act ("Management Act"), and the Water Rights Determination and Administration Act ("1969 Act"). The court explained the Colorado Constitution applies prior appropriation to the unappropriated waters of any natural stream, which include surface water and ground water that is tributary to surface water. In 1965, the Management Act created the Commission, an administrative body that designates and manages ground water basins. The Management Act specifically requires modified prior appropriation and gives the Commission discretionary power to curtail the pumping of junior wells for the benefit of senior appropriators. In addition, the Management act defined designated ground water as ground water that has no more than a *de minimis* impact on any surface stream. The court then examined the 1969 Act, which gives State and Division Engineers the non-discretionary duty to administer water rights under the prior appropriations system. The court explained that the 1969 Act applies to all surface water and underground water tributary to a natural stream, but clearly does not apply to designated ground water.

The court next considered whether a designated ground water basin may contain more than just designated ground water and who has jurisdiction over a designated basin containing more than just designated ground water. The court pointed to previous Colorado Supreme Court decisions that held designated basins may contain designated ground water as well as water that is tributary to surface water and subject to the 1969 Act. The decisions also established that the Commission has jurisdiction over a designated ground water basin unless the proponent can prove certain water within the basin is not designated ground water. If the water is not designated ground water, but instead water subject to the 1969 Act, jurisdiction switches to the water court. The court also referred to the Management Act's text that states the Commission shall alter a basin's boundaries in response to future conditions and factual data. The court interpreted this to mean that the General Assembly contemplated that a basin could contain more than just designated ground water and, in response, the Commission must redraw a basin's boundaries.

The court concluded the Commission has jurisdiction over surface water rights only for the purpose of redrawing basin boundaries. A surface water rights holder seeking relief must prove that ground water being pumped in the basin has more than a *de minimis* effect on surface water rights. Pumping must be hydrologically connected and causing injury to surface water rights. If a surface water rights holder can prove injury, the Commission must redraw the basin's boundaries, and jurisdiction will switch to the water court and State Engineer, who administers water rights under the 1969 Act. If a surface water rights holder cannot prove injury, the Commission must dispose of the case.

The court found the Gallegos Family had not proven ground water in the Basin was hydrologically connected and causing injury to its surface water rights. The court reversed in part and remanded so the Gallegos Family could make a factual showing of hydrologic connection and injury.

*Kurt Kropp*

**Colorado Springs v. Bd. of Comm'rs of Pueblo County, 147 P.3d 1 (Colo. 2006)** (holding that venue for declaratory relief action challenging validity of land use regulations impacting regional water delivery project was properly in neighboring county, where passage of challenged regulations occurred).

The City of Colorado Springs ("Colorado Springs") filed a complaint in the El Paso County District Court seeking a declaratory judgment that new land use regulations adopted by the Board of Commissioners of the County of Pueblo ("Board") were invalid with respect to the Southern Delivery System ("SDS"). The Colorado Springs District Court granted a transfer of venue to the Pueblo County District Court. Colorado Springs filed a petition for an original proceeding in the Colorado Supreme Court requesting transfer of action back to El Paso County District Court. The court reviewed, under original jurisdiction, whether the Pueblo County District Court acted in excess of its jurisdiction or without jurisdiction.

In 1990, Colorado Springs began working on SDS, a regional water delivery project designed to increase its water supply and storage. The SDS plans required facilities crossing through a small portion of unincorporated Pueblo County. In 2005, the Board adopted a resolution that changed its existing land use regulations. The adopted resolution prohibited the development of municipal and industrial water projects wholly or partially within unincorporated Pueblo County without the developer first obtaining a permit. Colorado Springs argued that the resolution was invalid, asserting that its purpose was to stall the SDS project.

Colorado Springs challenged the venue decision on two grounds, C.R.C.P. 98(b)(2) and C.R.C.P. 98(a). In pertinent part, C.R.C.P.