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E. Cherry Creek Valley Water & Sanitation Dist. v. Rangeview Metro. Dist., 109 P.3d 154 (Colo. 2005) (holding that the anti-speculation doctrine requiring demonstration of non-speculative, beneficial use does not apply to nontributary groundwater, and thus affirming a Water Court decree modifying nontributary groundwater rights).

In June 1985, the Colorado District Court, Water Division 1 (“Water Court”) issued a decree creating a vested right in the Colorado State Land Board (“Board”) and its lessee to appropriate up to 85% of the available nontributary groundwater underlying its lands at the former Lowry Range. The 1985 decree granted the Board the right to develop 85% of the nontributary groundwater, and placed volumetric and annual appropriation restrictions on each of the wells planned to develop the right. In September 2002, the Board and Rangeview Metropolitan District (“Rangeview”), successor in interest to the Board’s previous lessee, resurrected an earlier Application for Change of Water Right, which sought relief from the 1985 Decree’s restrictions and the right to construct additional wells to develop the decreed water right. East Cherry Creek and the state and division engineers (“Engineers”) opposed the application on two grounds. First, East Cherry Creek argued the requested changes would injure its existing water rights. Second, East Cherry Creek and the Engineers argued that amending the 1985 Decree as requested would entitle Rangeview to withdraw additional water, thus expanding its existing right, without demonstrating a non-speculative, beneficial use for the water. The Water Court rejected both claims, and decreed a right to the full amount of available water to Rangeview, subject only to existing statutory and groundwater rules. East Cherry Creek appealed to the Colorado Supreme Court, maintaining only its challenge to Rangeview’s right to develop additional groundwater without being required to show a non-speculative, beneficial use.

The Colorado Supreme Court first established the nature and intent of Colorado law governing the establishment of nontributary groundwater rights. The court noted that an overlying landowner may establish a vested right to use nontributary groundwater either by constructing a well in accordance with a permit from the state engineer or by adjudication. A decreed right to nontributary groundwater does not imply an obligation on the right-holder to construct a well or withdraw and use the decreed water within any specified timeframe. The court stressed the legislature’s intent to enable adjudication of future uses without requiring current development, as well as the legislature’s reserved right to impose beneficial use restrictions on such rights in the future.

Next, the court discussed why the anti-speculation doctrine does not apply to nontributary groundwater. In *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District*, the court

held that the anti-speculation doctrine requires a threshold showing of non-speculative, beneficial use to acquire groundwater rights in designated groundwater basins. However, the court explained that the anti-speculation doctrine does not apply to nontributary groundwater outside of designated basins for three primary reasons. First, the protection of potential appropriators is unnecessary because only overlying landowners have potential development rights. Second, protection against waste at the adjudication stage is unnecessary because any decreed rights will still be subject to state engineer approval. Third, and most importantly, to require a threshold showing of non-speculative, beneficial use would “thwart a clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them.” Finally, the court held the applicants complied with procedural requirements to adjudicate nontributary rights, so no procedural challenge could undermine the application.

As a result, the court upheld the Water Court’s ruling that Rangeview’s claim did not require a showing of non-speculative, beneficial use.

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Carbondale v. GSS Properties, LLC, No. 03CA2523, 2005 Colo. App. LEXIS 1473 (Colo. App. Sept. 8, 2005) (holding that operational conflicts allowing for the preemption of local watershed ordinances by state or federal law were matters of fact to be resolved through the evidentiary record).

In 1999, GSS Properties, LLC (“GSS”) purchased a fifty-five acre parcel located above Carbondale, Colorado’s Nettle Creek water plant. When GSS began construction and earthmoving activities on the property, it used herbicides and other chemicals to eradicate noxious weeds. In 2001, the town of Carbondale (“Town”) sued GSS seeking damages and preliminary and permanent injunctive relief. The Town alleged that GSS’s construction activities led to a rupture of the Town’s water main and that GSS’s use of chemicals and herbicides constituted a public nuisance that the Town’s watershed ordinance entitled it to abate. In 2003, GSS moved to amend its answer to the Town’s complaint to add an affirmative defense that state law preempted the Town’s ordinance. The trial court denied the motion, stating that it would “substantially change the nature of the trial and put the trial date in jeopardy.”

At a bench trial, the court addressed whether the Town could enjoin GSS’s use of herbicides and chemicals as allowed by its ordinance. The trial court, based on its denial of GSS’s motion to amend, refused to allow GSS to introduce evidence regarding state and federal standards for water quality and agricultural use of chemicals, or evidence regarding the Town’s authority to enforce its ordinance. The trial