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Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., No. 04SA44, 2005 Colo. LEXIS 201 (Mar. 14, 2005)

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held that the final EIR completely discussed groundwater-related issues, and sufficient evidence supported the Final EIR. . Therefore, the court held that the EIR comported with the CEQA requirements.

Further, the court held that VACRG's argument that the EIR inadequately described the impacts on the wetlands lacked merit. The final EIR explicitly stated the Project's unavoidable adverse effect on the wetlands. The EIR even quantified the amount of the wetlands losses projected. The function of the final EIR was to provide information, and the court held the EIR served that purpose.

VACRG next argued that the court should overturn approval of the Project because the EIR did not describe a complete and certain water supply throughout the completion of the Project. The court stressed that two critical issues under a CEQA include: (1) identifying a source of water for a project, and (2) addressing the environmental effects of obtaining water from that source. The court held that the Project identified the potential water supply sources and analyzed the environmental effects of those sources. Further, the court held that an EIR was adequate without identifying every possible source of water for the Project if the expected sources did not materialize. However, the EIR could not list only speculative sources of water.

The court held that, even though the EIR did not confirm the WFP water sources, the EIR was adequate, and although the identified sources were incomplete, they were not speculative. The court rejected VACRG's argument that the final EIR was speculative, because the availability of water from NVWF occurred on a first come first serve basis. Also, the court reasoned that the County was not required to take a "worse-case scenario" approach, but that the EIR met the CEQA requirements by discussing reasonable scenarios. Therefore, the court held that the County validly approved the Project, and affirmed the decision of the trial court.

Kate Brewer

COLORADO

Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., No. 04SA44, 2005 Colo. LEXIS 201 (Mar. 14, 2005) (holding (1) the Colorado Water Conservation Board functions as a narrowly constrained fact finding advisory body when it reviews recreational in-channel diversions applications, (2) Colorado water courts give presumptive effect to the findings of the Colorado Water Conservation Board, which are binding on the water courts, but a party may produce evidence to rebut that presumption and the water courts must evaluate the contested factors using a preponderance of the evidence standard, and (3) water courts must determine whether an application for a recreational in-channel diversion is for a reasonable recreation experience on each particular stream and determine the minimum

amount of stream flow necessary to accomplish that intended recreation experience).

The Upper Gunnison River Water Conservancy District ("District") filed for a conditional water right for a recreational in-channel diversion ("RICD"). The Colorado Water Conservancy Board ("Board") reviewed the application and, without evaluating the application strictly, recommended a minimum stream flow necessary to provide a reasonable recreation experience to the District Court, Water Division 4. The Board recommended a flow amount less than requested by the District and the District proceeded to water court for adjudication.

After hearing testimony and reviewing the Board's findings and recommendation, the water court issued a decree awarding a RICD in higher flow amounts than the District requested. In doing so, the water court acknowledged that the District's application was the first application addressed under Senate Bill 01 216 ("SB 216"). Therefore, the water court began its analysis by examining the language of the statute, which ultimately led the water court to treat the Board's findings of fact as a rebuttable presumption. The water court then examined whether the District overcame the rebuttable presumption of the amount recommended by the Board. Based on the totality of the evidence presented, the water court concluded the District met the burden of proof to overcome the Board's rebuttable presumption. With the water court concluding that Gunnison should receive more water than recommended, the water court then looked at whether the Board made findings regarding stream flow amounts. The water court held the Board did not find whether the amounts applied for comported with the statutory factors of SB 216. SB 216 required the Board to look at the following five statutory factors: compact impairment, stream reach appropriateness, access availability, instream flow rights injury, and maximum utilization ("Five Factors"). The water court also noted the Board did not find the maximum quantity of flow that complied with the Five Factors. Thus, the water court concluded the Board made no presumptively valid findings concerning stream flows above the recommended amount. The water court itself then attempted to determine the minimum stream flow for a reasonable recreational experience as stated in SB 216. The water court, reluctant to usurp the District's determination of the size and scope of a RICD, subject to the traditional criteria of speculation and waste, concluded that the District's requested stream flows did not reach the level of speculation or waste. Lastly, the water court analyzed the District's requested stream flows under the Five Factors. Since the water court concluded the Board did not make any presumptively valid findings regarding these factors, the water court concluded the District's requested stream flows were appropriate under the Five Factors. Thus, the water court granted the District conditional water rights in a decree awarding the

claimed amounts in full. The Board appealed the water court's decision to the Colorado Supreme Court.

The court began its analysis by examining SB 216. The court noted that SB 216 changed the statutory definitions of diversion and beneficial use to expressly encompass RICDs. The bill defined RICD to mean the minimum stream flow as such flow is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures pursuant to an application filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for a reasonable recreation experience in and on the water.

The bill also outlined the review and adjudication process for an RICD application. To start the RICD process, SB 216 required an applicant to submit a copy of the application to the Board for review prior to the water courts adjudication. Since this was the first step in the RICD process, the court first addressed the extent of the Board's review of an RICD application.

After looking at the plain language of SB 216 as well as the legislative history of the bill, the court held the Colorado General Assembly intended the Board to act as a narrowly constrained fact finding advisory board upon reviewing RICD applications. Thus, the Board, as required by SB 216, could only consider the Five Factors and make written factual findings as to these Five Factors. Reviewing an RICD application under the Five Factors required the Board to undertake a careful, probing analysis. The court, however, noted SB 216 limited the Board to reviewing an application on its face. Nothing in SB 216 allowed the board to look beyond the stream flow claimed for the recreational experience intended by the applicant when reviewing an RICD. The court went on to further state that an applicant did not have an entitlement to a grant recommendation from the Board merely upon a showing of water availability. The Board could recommend denial where an application did not comport with the Five Factors. Once the Board completed its review, the application returned to the water court for adjudication along with the factual findings and final recommendation. Since the water court looked at an RICD application after the Board, the court next examined the water court's role.

The court began this part of its analysis by noting that SB 216 imposed several analytical burdens on the water court when reviewing an RICD application. First, the bill made the Board's finding of facts presumptive, but subject to rebuttal by any party. Second, the water court itself needed to apply the Five Factors to the RICD application. Based on these burdens upon the water court, the court went on to define each burden.

Starting first with the presumptive effect of the Board's findings and recommendation, the court again examined SB 216. The court

determined the recommendation given by the Board did not have presumptive effect before the water court. The court noted a recommendation functionally was not rebuttable. Thus, the court held the water court needed only give the Board's findings presumptive effect. Looking at Colorado Rules of Evidence, the court determined "presumptive" meant the water court needed to presume the Board's findings were correct if no party presented any evidence to the water court on the Five Factors. The court continued by noting that any party who presented evidence on the Five Factors could rebut the presumptive effect of the Board's findings. The water court then needed to evaluate the contested factors anew, and, using the preponderance of the evidence standard, make findings of fact with respect to the contested factors.

The court then addressed the water court's review of an RICD. The court determined the water court erred in adjudicating an RICD using the beneficial use doctrine alone. SB 216 intended beneficial use to encompass RICD uses of water, but only those uses limited to the minimum stream flow for a reasonable recreational experience in and on the water. As a result, the court noted that an RICD application required proof of these elements before the water court decreed a conditional water right. The court went on to note that an RICD application did not satisfy the beneficial use requirement unless the application was limited to the minimum stream flow for a reasonable recreation experience in and on the water. The more difficult issue, however, was determining exactly what SB 216 meant by its RICD definition and, in particular, the phrases "minimum stream flow" and "for a reasonable recreation experience in and on the water."

The court, looking at the common usage of the term, held that the phrase "minimum stream flow," as used in the RICD definition, meant the least necessary stream flow to accomplish a given reasonable recreation experience in and on the water. The phrase, "reasonable recreation experience in and on the water" in the RICD definition gave the court more of a problem, since the term did not have a common usage nor did SB 216 define the term. The court, in trying to define the term, first noted the reasonableness of a given recreation experience such as whitewater kayaking, varied by the appropriator's perspective. A casual kayaker, for example, could be satisfied with low to moderate flows, while an expert would probably demand higher stream flows. In addition, some non-kayakers could consider enough stream flow to merely float the kayak reasonable. Thus, the term had no plain meaning that the court could apply as written. The court therefore turned to the legislative history and intent of the bill to define the term. After a thorough review of the history and intent, the court determined the RICD definition essentially provided flexibility, requiring a recreation experience in and on the water be reasonable, considering the water availability of a particular stream reach. The

court opined that at a minimum, merely floating a kayak could be a reasonable recreation experience on some reaches, while at a maximum, a world-class expert course requiring nearly the entire flow of a given stream could also be reasonable. Thus, the reasonableness of an applicant's sought recreation experience depended on the available, unappropriated stream flow. As such, what constituted reasonableness depended entirely upon the river basin.

Once the water court determined whether an RICD application was for an objectively reasonable recreation experience in and on the stream in question, then the water court needed to determine the minimum amount of stream flow necessary to accomplish that intended recreation experience. Thus, the statute might require the water court to weigh conflicting expert testimony given by course designers or other interested parties, and to make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience. The court also made clear that the water court could not take at face value the appropriator's suggestion, as set forth in the application, of a reasonable recreation experience for the stream involved, nor should the water court accept, without scrutiny, the applicant's analysis of necessary stream flow to achieve that objective. In making its determinations, the water court must carefully evaluate the Five Factors, giving presumptive effect to unrebutted Board findings, and considering the Board's recommendation and any other evidence submitted in the course of the trial.

Thus, the court held both the Board and the water court erred, and remanded the case to the water court with instructions to remand to the Board to determine whether the application comported with the Five Factors.

David Michael Shoheit

East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., No. 03SA372, 2005 Colo. LEXIS 230 (Colo. Mar. 21, 2005) (holding the terms of a contract govern restrictive, contractually created water rights and may not exceed the uses detailed in the contract).

East Ridge of Fort Collins, LLC ("East Ridge") filed a complaint for declaratory judgment against the Larimer & Weld Irrigation Company ("Irrigation Company"). East Ridge sought to change the point of diversion and place and the type of its water right pursuant to two contractual agreements. Conversely, the Irrigation Company claimed East Ridge owned a water right perpetually restricted to irrigation use. The Division 1 Water Court concluded the contractual nature of East Ridge's water right perpetually restricted the use to irrigation purposes only. East Ridge appealed the water court's decision to the Colorado Supreme Court. In its appeal, East Ridge requested the court determine whether the contractual language prohibited conveying, chang-