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Colorado Wild, Inc. v. United States Forest Serv., 122 F. Supp. 2d 1190 (D. Colo. 2000)

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Colorado Wild, Inc. v. United States Forest Serv., 122 F. Supp. 2d 1190 (D. Colo. 2000) (holding Colorado water quality standards only apply to discharges of pollutants and not to withdrawals or appropriations of water; further holding section 313 of the Clean Water Act does not waive the United States' sovereign immunity when the federal agency was not itself the polluter in violation of the Clean Water Act).

Colorado Wild unsuccessfully exhausted its administrative remedies and brought suit against the United States Forest Service ("Forest Service") challenging its approval of a Master Development Plan ("Plan") for Arapahoe Ski Basin Area in The United States District Court for the District of Colorado. Defendant-Intervener Dundee Realty operated the ski area, and through the Plan, sought to increase its artificial snowmaking operations by diverting water from a tributary of the Snake River. The court heard the Forest Services' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Colorado Wild contested the Forest Service's approval of the Plan for Arapahoe Basin Ski Area located in the White River National Forest near Dillon, Colorado. The Plan would allow Dundee Realty to divert water from the North Fork, a tributary of the Snake River, in order to increase its artificial snowmaking operations. As a relatively clean water source, the tributary assisted to dilute the concentration of toxic metals within the Snake River. Colorado Wild contended that diverting water from the North Fork would increase the pollutants in the Snake River aggravating the Snake River's water quality problems.

Colorado Wild alleged three causes of action against the Defendants: (1) violation of the National Forest Management Act ("NFMA"); (2) violation of the Clean Water Act ("CWA"); and (3) violation of the Freedom of Information Act ("FOIA"). It argued the Forest Service failed to observe and enforce the maintenance of state water quality standards in Colorado in violation of NFMA and 36 C.F.R. §§ 219.10(e) and 251.56(a)(1)(i)(C). NFMA requires the Forest Service to ensure that all activities it allows comply with state water quality standards under 16 U.S.C. § 1604(i). The Forest Service contested this cause of action, asserting that Colorado does not regulate water quality standards, and therefore Colorado Wild failed to state a claim upon which relief could be granted.

The court first pointed out that Colorado regulates water quality and water quantity through two separate entities. Under the Water Quality Control Act, the Colorado Water Quality Control Commission and the Water Quality Division ("Water Quality Agencies") regulated water quality. However, Colorado water courts administer water quantity via the prior appropriation system. The court also looked at the legislature's intent in creating the Water Quality Agencies and emphasized the Colorado legislature "made clear its intention that the Water Quality Agencies' authority cannot be exercised in a manner

that significantly compromises the appropriative rights of present or future water users.” Based on the legislative intent and the statute itself the court concluded that, under Colorado law, water quality standards only apply to discharges of pollutants and not to appropriations of water. Colorado Wild’s claim, which was based solely on the allegation that withdrawals of water from the North Fork would increase the pollutants in the Snake River, failed to show any violation of Colorado state water quality standards, and therefore failed.

Next, Colorado Wild argued the Forest Service violated NFMA by failing to comply with the CWA. The court rejected this argument and observed the distinct roles the federal government and state governments have under the CWA. Under the CWA, the EPA monitored point source discharges of pollutants into navigable waters while states were responsible for implementing water quality standards for intrastate waters. The court found that the appropriation of water was not a discharge of pollution within the meaning of the CWA, and thus rejected Colorado Wild’s claim that the Forest Service violated NFMA by failing to comply with the CWA.

In its second cause of action, Colorado Wild argued the Forest Service violated section 313 of the CWA. The Forest Service challenged this claim, contending the United States’ sovereign immunity deprived the court of subject matter jurisdiction. In response, Colorado Wild asserted section 313 of the CWA waived the United States’ sovereign immunity. The court examined the text of section 313 and recognized a federal agency waived sovereign immunity only when one of its facilities or activities resulted in the discharge of pollutants. However, the court held section 313 did not waive sovereign immunity where, as here, the federal agency was not itself the polluter in violation of the CWA. Since the United States was immune from suit, the court was without subject matter jurisdiction.

The court held Colorado water quality standards only apply to discharges of pollutants and not to appropriations of water. Thus, the court dismissed Colorado Wild’s cause of action alleging violations of NFMA for failure to state a claim. The court further held the Forest Service was immune from suit, since it was not the actual polluter in violation of the CWA.

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Sierra Club v. El Paso Gold Mines, Inc., 198 F. Supp. 2d 1265 (D. Colo. 2002) (holding judicial resolution of a claim that a mining company violated the Clean Water Act would not interfere with the company’s discharge permit application pending before a state administrative agency).

El Paso Gold Mines, Inc. (“El Paso”) operated a gold mine in Teller County, Colorado. Sierra Club brought suit against El Paso in