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Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002)

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court decided that the stipulation initially agreed to by Thornton on the suitability of the Plan did not preclude the water court from reconsidering this injury.

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Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002) (holding proposal to artificially recharge ground water aquifers that underlie various landowners property would not result in a trespass claim, require consent, or require condemnation with compensation to the landowners).

Park County Sportsman's Ranch ("PCSR") filed an application for a conditional water right, plan for augmentation and exchange ("applications") involving the extraction and subsequent recharge of water into the South Park formation for augmentation, storage and beneficial uses with District Court, Water Division 1. Park County Board of County Commissioners, James B. Gardner, and Amanda Woodbury ("Landowners") in Park County objected to the PCSR applications and also filed for declaratory judgment relief in Park County District Court claiming that the placement of water in storage above or below the surface of their land absent their consent constituted a trespass pursuant to the *cujus* doctrine—to whomever the soil belongs, he owns also to the sky and the depths. The water court received the declaratory judgment motion from the district court *vis-à-vis* a change of venue and denied the action. The water court stated that the landowners had not alleged that PCSR's proposal invaded or compromised the use, benefit, or enjoyment of their properties in any way. Furthermore, the water court determined that recharge activities involving the movement of ground water underlying the landowner's property did not constitute a trespass and that PCSR was not required to obtain consent from the landowners or condemnation and payment of compensation. Upon request from the landowners, the water court ruled in favor of PCSR and the landowners appealed that ruling to the Colorado Supreme Court on the issues of whether: (1) the appeal was not rendered moot by subsequent decision of water court denying PCSR's application for a conditional decree; (2) the landowners have a property right under the *cujus* doctrine to require that PCSR obtain their consent before recharging aquifer; and (3) PCSR is required under the Colorado Constitution or state statutes to seek consent of landowners or pay landowners just compensation.

The court initially determined the action on appeal was not moot because resolution of property issues affecting water rights are proper for the water court to determine, and PCSR's applications were predicated upon resolution of these issues.

Regarding the landowners' trespass claim, the court determined

that they did not have absolute ownership of everything below the surface of their properties. It further found that water, surface and ground, in Colorado is a public resource and holders of decreed water rights have the right to pass the appropriated water through natural surface and subsurface drainages.

Contemplating, the conjunctive use projects, the court determined that these types of projects were water projects that utilize the natural water bearing formations and that the General Assembly, in authorizing the use of aquifers in the storage of artificially recharged water pursuant to a decreed conjunctive use project, supplanted the landowner's common-law property ownership theory (the *cujus* doctrine). The court determined that Colorado statutes encouraged the issuance of conditional decrees for water in underground aquifers artificially recharged, if the applicant can and will lawfully capture, possess and control water for beneficial use, which it then artificially recharges into the aquifer. This determination is predicated upon the finding that the decree will not cause injury to senior appropriators.

The court then analyzed the relationship between water use rights and land use rights. It recognized that Colorado, since its inception, has abandoned the common law theory of ground water belonging to the overlying landowner. The court determined surface water and ground water are public resources, that the right to use water also includes the right to cross the lands of others to place the water to use, and that natural water bearing formations can be utilized to transport and retain water. The court also determined that surface landowners do not have the right to claim as property rights, surface water, ground water, the use rights thereto, or the water bearing capacity of natural formations. Then, the court concluded by rejecting the landowners' claim that the *cujus* doctrine provides them with a property right requiring consent for artificial recharge and storage of water in aquifers that extend through their land. Furthermore, the court concluded that within Colorado water is not a mineral and therefore the laws of minerals and property ownership are inapplicable to water and water rights.

Finally, the court rejected the landowners' claim that the Colorado constitution and statutes require condemnation with compensation before an applicant could obtain a right to store water in the aquifers underlying their lands. The court concluded that condemnation with compensation was only applicable for reservoirs or storage artificially constructed on or in land. The court also concluded that reservoirs in this context refer to damming water, not water artificially recharged into an aquifer. Finally, the court concluded that allowing property owners to control who may store water in natural formations, or charging water right holders for easements to occupy natural water bearing formations would upset Colorado's historical balance between water use rights and land use rights. However, the court noted that the use of natural water bearing formations (either surface or ground) does not allow a water user to alter the natural drainage pattern,

increase the water levels beyond the ordinary high water mark or tortuously interfere with surface uses due to the increase in ground water levels.

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Application for Water Rights in Rio Grande County *ex rel.* State Eng’r v. Bradley, 53 P.3d 1165 (Colo. 2002) (holding an applicant requesting a change in point of diversion of an existing water right did not meet his burden of proving the change would not cause injury or enlarge the right where the right was historically used in combination with other rights, and holding applicant did not present sufficient evidence to differentiate and quantify historical use of the individual right for which the change was requested).

David W. Bradley (“Bradley”), in an effort to improve the irrigation of his farmland, sought to construct a well intended as an alternate point of diversion for an existing water right. After the State Engineer refused to issue a well permit, Bradley filed an application with the water court for Water Division No. 3, requesting a change in point of diversion. The water referee denied the application on the grounds that Bradley failed to meet his burden of proving the amount requested at the new point of diversion did not exceed the historic use of the right. Bradley filed a protest, and the State Engineer and Division Engineer for Water Division No. 3 (“state”) intervened. At a hearing before the water court, neither Bradley nor the state offered evidence sufficient to quantify the historic use of the right. Nonetheless, the water court found Bradley met his burden of proof regarding historic use and ordered the state to issue the requested permit. On hearing the state’s appeal, the Colorado Supreme Court concluded the record did not support the water court’s ruling. The court reversed the water court’s order and remanded the case for possible further fact-finding or modification of the application.

Under Colorado Revised Statutes section 37-92-305(3), a water court must approve an application for a change of water right if the change will not injure the owners or users of other decreed rights. The court emphasized an owner may only change a water right; the owner may not enlarge the right beyond the amount of historic use. As used by the court, “historic use” referred to the “historic consumptive use” of a right; the amount of the appropriation consumed by the application to the decreed beneficial use. Unless the application to beneficial use consumes one hundred percent of the amount originally decreed or historically diverted, the historic use is necessarily less. Even where historic use is less than the amount originally decreed or historically diverted, the measure of a water right for change purposes is the amount of historic use. Thus, when