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Update to Colorado Water Law: An Historical Overview

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ARTICLE UPDATE

UPDATE TO

COLORADO WATER LAW: AN HISTORICAL OVERVIEW

THE HONORABLE GREGORY J. HOBBS, JR.

To provide our readers with the most up-to-date water law information, the editors will periodically include updates of works previously published in the *Water Law Review*. The following is an update to *Colorado Water Law: An Historical Overview, Appendix - Colorado Water Law: A Synopsis of Statutes and Case Law*, selected by The Honorable Gregory J. Hobbs, Jr., and published in the *Water Law Review*, Volume 1, Issue 1.

Chatfield East Well Company, Ltd. v. Chatfield East Property Owners Ass'n

"Waters of the natural stream, including tributary ground water, belong to the public and are subject to use under Colorado's constitutional prior appropriation doctrine and implementing statutes. Rights of use thereto become perfected property rights upon application to beneficial use. In contrast, the right to use water in designated ground water basins, nontributary water outside of designated ground water basins, or any Dawson, Denver, Arapahoe, or Laramie-Fox Hills ground water outside of a designated ground water basin, is governed by the provisions of the Groundwater Management Act. Ground water located in designated basins is subject to a modified system of prior appropriation administered by the ground water commission. Use of nontributary ground water and Denver Basin aquifer water outside of designated ground water basins is subject to the provisions of section 37-90-137(4). Regardless of whether water rights are obtained in accordance with prior appropriation law, or pursuant to the Ground Water Management Act, no person "owns" Colorado's public water resource as a result of land ownership."

Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Assoc., 956 P.2d 1260, 1268 (Colo. 1998) (citations omitted).

"In *Bayou Land Co. v. Talley* we reiterated that a right to use nontributary ground water outside of a designated basin is purely a function of statute and landowners do not have an absolute right to ownership of water underneath their land. Rather, landowners have an inchoate right to extract and use the nontributary water in accordance with section 37-90-137(4). We held that

> '[t]he right does not vest until the landowner or an individual with the landowner's consent constructs a well in accordance with a well permit from the state engineer and/or applies for and receives water court adjudication. Until vesting occurs, the right to extract nontributary ground water is subject to legislative modification or termination.'"

Id. (citations omitted).

"By means of Senate Bill 5, the General Assembly subjected Denver Basin ground water, whether nontributary or not nontributary, to the separate water use system of section 37-90-137(4) and required the state engineer to promulgate rules for use of this water under section 37-90-137(9)(b)."
Id. at 1270 (citations omitted).

City of Grand Junction v. City & County of Denver

"[W]e disagree with Grand Junction's claim that the Water Court exceeded its jurisdiction when it examined and construed the provisions of the Blue River Decree. We hold that the Water Court possessed the authority to review the Blue River Decree in order to ascertain whether Denver's application would interfere with the terms or objectives of the decree. In doing so, we also reaffirm the principle . . . that a court of coordinate jurisdiction does not possess the authority to enter a decree that modifies or interferes with the objectives or terms of another court's decree."
City of Grand Junction v. City & County of Denver, 960 P.2d 675, 682–83 (Colo. 1998).

"Therefore, in the context of the priorities described in the decree, Denver can fill Dillon Reservoir only once. In other words, all priorities to Blue River water awarded in the Blue River Decree are senior to Denver's rights, if any, to fill Dillon Reservoir more than once. In the instant case, Denver ultimately sought a refill right with a priority date of 1987, a date junior to all priorities described in the Blue River Decree. Hence, Denver's new claim is entirely consistent with those terms of the Blue River Decree that relate specifically to refilling Dillon Reservoir."
Id. at 683 (footnotes omitted).

"Furthermore, Denver's claim to a refill right at Dillon Reservoir was not even among the subjects addressed by the Blue River Decree. The refill right was not, and could not have been, before the Federal Court in 1955 because Denver's first appropriation date for the refill of the reservoir was 1965. As the Water court explained, the Federal court in the Blue River Decree addressed only those relative priorities at issue at the time of adjudication. The Federal Court enjoined the parties from asserting in the future any priorities different from those described in the Blue River Decree. Accordingly, the Federal Court has thwarted subsequent efforts by Denver to modify, intentionally or otherwise, the United States' senior rights to Blue River water."
Id. at 684.

"The Federal Court's continuing jurisdiction is limited to the purpose of effectuating the objectives of the Blue River Decree .... Denver's refill right does not interfere with the objectives of the Blue River Decree because Denver's refill right is subject to all of the provisions of the Blue River Decree .... Consequently, Denver's application for a refill right with respect to Dillon Reservoir did not implicate the Federal Court's exclusive jurisdiction to implement the Blue River Decree. We hold, therefore, that the Water Court possessed subject matter jurisdiction over Denver's application."
Id. at 685.

City of Lafayette v. New Anderson Ditch Co.

"The conditional decree contemplated that Lafayette would not obtain an absolute decree if it no longer had a lawful right to divert water through the Anderson Ditch. Lafayette did not meet this test because at the time of the trial and the entry of the proposed absolute decree, Lafayette had no legal right to exchange water using the Anderson Ditch for application to beneficial use.

Lafayette argues that the water court improperly injected an additional requirement for the perfection of a conditional water right by requiring the applicant to possess facilities to transport the water when it ruled that 'absent a permanent means of transport[ing] water, there can be no absolute water right.' We agree with Lafayette that the water court's ruling is inaccurate, since Colorado law contemplates that legal arrangements for a means of diversion may be perpetual or for a term of years. Consistent with the terms of the stipulation between these parties, we have concluded that the water court was correct in declining to enter an absolute decree following trial, because Lafayette then had no legal right to use the point of diversion identified in the decree.

In conclusion, we hold that Lafayette demonstrated reasonable diligence in developing the rights set forth in the 1987 decree, and that the water court properly continued Lafayette's conditional rights

to exchanges to the Anderson Ditch for another diligence period."
City of Lafayette v. New Anderson Ditch Co., 962 P.2d 955, 963 (Colo. 1998) (citations omitted).

Campbell v. Orchard Mesa Irrigation District

"Irrigation districts were created 'to provide means . . . for bringing into cultivation the arid lands of the state and making them highly productive by the process of irrigation.' To accomplish this objective, the legislature authorized irrigation districts to levy and collect special assessments at the expense of those landowners whose lands were serviced by irrigation waters. However, legal authority to levy and obtain collection of special assessments does not transform an essentially private entity into a governmental entity for Amendment 1 purposes. We have repeatedly said that irrigation district special assessments are not general taxes characteristic of government. While general taxes exact revenue from the public at large for general governmental purposes, an irrigation district's special assessment benefits specific landowners whose land the district supplies with water. These special assessments are designated to pay the expenses, including servicing debt, incurred in irrigating the land. The assessments are levied in proportion to land ownership and are paid only by the landowners who receive the benefits. In summary, a 1921 Act irrigation district serves the interests of landowners within the district and not the general public. As such, it cannot be said that an increase of an irrigation district's special assessment increases the burden of the taxpaying public which Amendment 1 sought to regulate."
Campbell v. Orchard Mesa Irrigation Dist., 972 P.2d 1037, 1039-40 (Colo. 1998) (citations and footnotes omitted).

"[W]e conclude that the private character of a 1921 Act irrigation district differs in essential respects from that of a public governmental entity exercising taxing authority contemplated by Amendment 1. An irrigation district exists to serve the interests of landowners not the general public. Rather than being a local governmental agency, a 1921 Act irrigation district is a public corporation endowed by the state with the powers necessary to perform its predominantly private objective. Accordingly, we hold that an irrigation district is not a local government within the meaning of Amendment 1's taxing and spending election requirements."
Id. at 1041.