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Waters and Water Courses - Non-Tributary Ground Water

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CASE COMMENT

WATERS AND WATER COURSES– NON-TRIBUTARY GROUND WATER

In 1948, the district court of Mesa County entered its decree in a general water adjudication proceeding and granted to the plaintiff decreed priorities for the use of water from an aquifer for domestic purposes.[1] In 1957, the plaintiff instituted an action in the lower court[2] to (1) obtain a mandatory injunction requiring the state engineer and his deputies to recognize and enforce the 1948 decree, (2) to enjoin those defendants who had no decreed rights from diverting water from the aquifer, and (3) to require the owners of all wells taking water from the aquifer to properly cement and equip them to the end that water would not be wasted and lost.

The district court of Mesa County ordered the state engineer and his deputies to control and administer the ground waters and the well—the subject of this case—in the manner and to the same purpose as in the case of diversions from public streams of the State of Colorado.[3] The defendants, on appeal, challenged the order of the district court, contending (1) there was no legislative duty on the defendants to control and administer such waters as ordered by the district court; and (2) the waters involved, being non-tributary ground waters, were such that the doctrine of prior appropriation could not be applied. *Held*: (1) there is no legislative duty on the defendants to control and administer the waters in question; (2) the doctrine of prior appropriation does not apply to ground water which is not tributary to a natural stream or river. *Whitten v. Coit*, 385 P.2d 131 (Colo. 1963).

The question of what principles of law to apply to non-tributary ground water has never before arisen in Colorado. There are two reasons for this: (1) in Colorado there is a well-established presumption that all ground water is tributary to a natural stream —the presumption is rebuttable, but the burden of proof is on the party asserting the fact,[4] (2) until recently it has been hydrologically impossible to determine with any real certainty that the water in question is *not* tributary to a natural stream.

Colorado, until the present case, has determined the rights to its waters by the doctrine of prior appropriation. In 1882, Judge Helm, in *Coffin v. Left Hand Ditch Co.*,[5] said that the doctrine of prior appropriation "has existed from the date of the earliest appropriation of water within the boundaries of this state."[6] He stated further that the territorial legislature recognized and approved of the appropriation doctrine in the legislation it passed in 1864.[7] When

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1 District Court of Mesa County, Colorado, Civil Action No. 7327 (1948). This was one of the first times the rights to well water was decided on the basis of the appropriation doctrine. It is interesting to note that no appeal was taken contesting the court's decree.

2 District Court of Mesa County, Colorado, Civil Action No. 10599 (1957).

3 Surface waters are governed by the doctrine of prior appropriation, Colo. Rev. Stat. §§ 147-1-1 to 147-17-16 (1953).

4 Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951).

5 6 Colo. 443 (1882).

6 *Id.* at 446.

7 *Id.* at 447.

Colorado adopted its constitution in 1876, two sections were included dealing with water.[8] By court interpretation, these two sections have been held to mean that all water of a natural stream is public property and that the doctrine of prior appropriation applies in determining the rights to such water.[9]

Colorado's only legislative attempts concerning ground water regulation and control have been limited to two statutory enactments,[10] with numerous amendments. The acts are really in the nature of conservation legislation; no provisions are made therein for determining rights or priorities of ground water.

Presently in Colorado, the doctrine of prior appropriation applies to the waters of natural streams, ground waters that are tributary to a natural stream, and non-tributary surface waters. Because all ground water is presumed to be tributary to a natural stream, it is subject to appropriation the same as are the waters of a surface stream.[11] However, there are no separate statutes concerning the appropriation of ground waters. The present statutes that may be suitable for fulfilling the needs in surface water appropriation are not suitable for ground water appropriation.[12]

The court could have reached, in addition, either of two decisions that could be substantiated by established legal principles. (1) The court could have decided that the doctrine of prior appropriation does apply to non-tributary ground water, or (2) could have stated that this is a case dealing with tributary ground water and that there was no need to determine whether non-tributary ground water is subject to appropriation.

Based on history—both custom and legislative—the court could have held that in the absence of legislation to the contrary, the doctrine of prior appropriation applies to non-tributary ground water. Colorado, from the beginning, adopted the appropriation doctrine and rejected the common law doctrine of riparian rights.[13] One exception to this statement has developed in the area of non-tributary surface water. Such water is governed by the appropriation doctrine with the provision that the landowner on whose land the water is located has a prior right if the water is capable of being used on his land.[14] It can be said that non-tributary ground water is analogous to non-tributary surface water and, therefore, the same exception should apply to it. However, it should be noted that the exception in non-tributary surface water is a result of legislation and not judicial decision.[15] The court could have followed the principle of appropriation, which is basic in determining

8 Colo. Const. art. XVI, §§ 5, 6.

9 Coffin v. Left Hand Ditch Co., *supra* note 5.

10 Colo. Rev. Stat. §§ 147-18-1 to 147-18-16 (1953); Colo. Rev. Stat. §§ 147-19-1 to 147-19-15 (Perm. Supp. 1960).

11 Cresson Consolidated Gold Mining and Milling Co. v. Whitten, 139 Colo. 273, 338 P.2d 278 (1959); Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951); DeHaas v. Benesch, 116 Colo. 344, 181 P.2d 453 (1947).

12 Colorado Water Conservation Board, *Legal and Management Problems Related to the Development of an Artesian Ground Water Reservoir*, Colorado Ground Water Circular No. 6 (1962).

13 Coffin v. Left Hand Ditch Co., *supra* note 5.

14 Colo. Stat. Ann. ch. 90, § 20 (1935): "All ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; provided, that the person upon whose land the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands, Lomas v. Webster, 109 Colo. 107, 122 P.2d 248 (1942); Nevius v. Smith, 86 Colo. 178, 279 Pac. 44 (1929).

15 Colorado's first legislation concerning non-tributary surface water was passed in 1889, L.'89, p. 215, § 1.

rights to water in dry states, and left it to the discretion of the legislature to decide whether another exception to the appropriation doctrine is needed in Colorado.

If the court had wished to avoid making a decision as to what law applies to non-tributary ground water, it could have decided that the water involved was tributary ground water. Judge Hall, in his dissent, states that it is unclear from the record what type of water is involved in this case. The lower court found the water was contained in a large aquifer, the walls of which were almost impermeable, and that the water moved, if at all, very slowly. However, even with this finding of fact, the presumption that exists in Colorado today has not been met.[16] This presumption may be rebutted, but the court has stated that such a presumption is strong, and only clear and satisfactory evidence to the contrary is sufficient to overcome it.[17] Both parties appear to have assumed that the water in question was non-tributary. No evidence on this question was presented in the trial court, nor was the issue ever raised on appeal. It may be that none of the parties to the suit considered the question of tributary or non-tributary ground water to be at issue, since the rights to the water had been decided in 1948 on the basis of the prior appropriation doctrine and the sole question in this case was recognition and enforcement of that 1948 decree. Because no evidence was offered to establish the fact that the water was non-tributary in nature, the presumption was not rebutted and the supreme court did not need to decide whether the doctrine of appropriation applies to non-tributary water.

One is led to feel that the court, in holding that non-tributary ground water is not subject to appropriation, was trying to induce the legislature into taking positive action on regulation, administration, and determination of rights to ground water—tributary or non-tributary; however, it would have been helpful to the legislature if the court had held non-tributary ground water subject to appropriation.[18] Between the time of this decision and the time that the legislature acts, some of the problems that will arise in determining rights to non-tributary ground water would have become evident, and the legislature would have had guide lines upon which to base their future legislation.

Another result of this holding will be to limit the use of non-tributary ground water to the lowest economic user of water—agriculture. For example, industry, the highest economic user of water, will not build and make use of such water unless it can be assured of a continual supply. Under the principle expounded by the court, no one can be assured the water he has today will be there tomorrow and, therefore, will not be willing to make the substantial investment necessary to make a higher economic use of the water possible.[19]

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16 "Under our Colorado law it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream." Safranek v. Town of Limon, *supra* note 4.

17 Safranek v. Town of Limon, *supra* note 4; Dalpez v. Nix, 96 Colo. 540, 45 P.2d 176 (1935); Comrie v. Sweet, 75 Colo. 199, 225 Pac. 214 (1924).

18 This statement is based on the presumption that the Colorado legislature will adopt some form of an appropriation system for determining rights to non-tributary ground water.

19 Wollman, Nathaniel, *The Value of Water in Alternative Uses*, University of New Mexico Press (1962).