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Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401 (Colo. 2011)

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Last, the court considered whether Reclamation's analysis of alternatives to the project was sufficient to comply with NEPA. The court noted that Reclamation had been working with Ecology throughout the entire project development process. Ecology's EIS considered and rejected five alternatives to the project and Reclamation referenced Ecology's EIS in its EA. The court ultimately held that because another document related to the same project had already considered the alternatives, the EA did not have to again evaluate those same alternatives. Therefore, the court held the alternatives discussed in Reclamation's EA complied with NEPA.

Accordingly, the court affirmed the district court's grant of summary judgment to Reclamation.

Alan Kitchen

STATE COURTS

COLORADO

Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401 (Colo. 2011) (en banc) (holding that a municipal service provider's protectable and unique interest in its right to reuse return flows from a wastewater treatment plant would be impaired if the provider were prohibited to intervene in prior litigation).

Cherokee Metropolitan District ("Cherokee") and Meridian Service Metropolitan District ("Meridian") are government bodies that provide water to residents and landowners within their boundaries. Upper Black Squirrel Creek Ground Water Management District ("UBS") is a government body that manages ground water withdrawals from the Upper Black Squirrel Creek designated ground water basin ("UBS basin") - from which Cherokee and Meridian both source water. In 1998, Cherokee and UBS began litigation over Cherokee's water rights in the UBS basin. The parties settled and entered a Stipulation and Release whereby Cherokee was required to deliver certain wastewater returns back into the UBS basin for recharge of the aquifer.

In 2003, Cherokee and Meridian entered into an intergovernmental agreement ("IGA") to build a new wastewater treatment facility to treat wastewater from both Cherokee and Meridian and return the water back into the UBS basin. In 2008, Cherokee and Meridian applied for a replacement plan with the Colorado Ground Water Commission ("Commission") to obtain replacement credit for the return flows from the wastewater treatment facility into the UBS basin. UBS filed a statement of objection with the Commission and a motion to dismiss the replacement plan, which the Commission denied. UBS then filed motions for declaratory judgment and injunctive relief.

In 2010, Meridian moved to intervene as of right to challenge both the declaratory judgment and injunction motions. Meridian argued that the motions directly affected its water rights in both the replacement plan and the IGA, and that intervention was the only way it could protect those rights. The Water Court Division 2 ("water court") denied Meridian's request for intervention because it was not a party to the 1999 Stipulation between UBS and Cherokee. The water court further noted that UBS had no contractual obligations to Meridian, and that Meridian's proper recourse was instead to hold Cherokee accountable for its obligations under the IGA. While Meridian's appeal was pending, the water court granted UBS's motion for declaratory judgment.

The Supreme Court of Colorado addressed two issues on appeal. First, it reviewed the water court's denial of Meridian's motion to intervene. Second, it reviewed the water court's grant of declaratory relief while Meridian's appeal of its motion to intervene was pending.

Meridian sought to intervene under Rule 24(a)(2) of the Colorado Rules of Civil Procedure. Under the statute, a party seeking intervention must satisfy three distinct components: interest, impairment, and inadequate representation. The court analyzed these three components in turn. Under the first part of the statute, Meridian claimed an interest in maintaining its right to reuse the return flows from the wastewater treatment plant by way of a share of the additional water diverted from the UBS basin under the replacement plan. The court noted that Meridian's interest related to the subject matter of the underlying declaratory judgment action because UBS sought an injunction against Cherokee "or any other person" from claiming wastewater returns as replacement credit. In addition, an injunction could effectively estop Meridian from moving forward with its replacement plan application. Although UBS argued that Meridian was not a party to the Stipulation and therefore did not have a valid interest in the matter, the court found that Meridian satisfied the first part of the statute.

Under the second part of the statute requiring impairment, the court reasoned that the declaratory judgment action could have, as a practical matter, impaired Meridian's ability to protect its rights to reuse return flows from the wastewater treatment plant. The court noted that a favorable ruling for UBS could potentially preclude Meridian from reusing return flows for replacement credit, and that Meridian would have no option to opt out of the judgment or bring an independent challenge to the water court's interpretation of the Stipulation. Thus, the court determined that Meridian satisfied the second part of the statute.

Under the third part of the statute, the court found that Meridian's interest in protecting its rights to reuse the return flows from the wastewater treatment plant was similar, but not identical, to Cherokee's interest. Furthermore, the court outlined specific reasons why Cherokee might not adequately represent Meridian's interests, including: Cherokee's own statements that it would not do so; the fact that Cherokee and Meridian may be involved in future litigation over the IGA; and that resolution of the declaratory judgment action might put Cherokee's interests in direct

conflict with Meridian's. Consequently, the court found that Meridian satisfied the third part of the statute.

Because Meridian satisfied all three parts of the statute, the court held that Meridian had a right to intervene and reversed the water court's denial of Meridian's motion to intervene.

The court then addressed the water court's grant of declaratory relief for UBS while Meridian's appeal of its motion to intervene was pending. Because the court found that Meridian did have a right to participate in the declaratory judgment proceedings, the court held that the proceedings must be reopened to give Meridian an opportunity to be heard. Accordingly, the court vacated the grant of declaratory relief for UBS and remanded the case for further proceedings consistent with its holding.

Darin Smith

LoPresti v. Brandenburg, No. 10SA191, 2011 WL 6147058 (Colo. Dec. 12, 2011) (en banc) (holding that a rotational no-call agreement is valid under Colorado law if the agreement does not sanction a change in water rights).

This case involved the appeal of an order issued by the Colorado District Court for Water Division No. 2 ("water court") voiding a rotational no-call water right agreement on Alvarado Creek in Custer County. At issue were four separate water rights ("Four Ditches") originally adjudicated in 1896 along Alvarado Creek. In 1908, the owner of three of these rights entered into a settlement decree with the owner of a single right. This decree, known as the Beardsley Decree, stated that, every fourth day, the owner of the single right could use or divert water from the stream from any point for any lawful use.

The LoPrestis, the current owners of three of the rights, filed an application in 1996 to change these rights on Alvarado Creek, which Brandenburg and others opposed. In 2000, the water court, by summary judgment, declared the Beardsley Decree void because the consequent changes in the diversion points, when compared to the decree, were not in accord with notice provisions effective in 1908. In 2011, Brandenburg resurrected the case because the water court had not resolved the LoPrestis' original 1996 application for change in water rights. The water court granted Brandenburg's Rule 54(b) motion and certified the case for immediate appeal of the Beardsley Decree order. The Supreme Court of Colorado ("Court") reviewed the water court's decision *de novo* on two separate issues: the legal conclusion reached on the summary judgment motion; and the water court's interpretation of the decree as a contract.

Brandenburg first argued that the Beardsley Decree language permitted the LoPrestis to choose points along Alvarado Creek for the diversion of water when they were in priority, thereby effecting an illegal change of water rights, and that summary judgment was therefore appropriate. The Court disagreed with this argument and looked at the entire language of the decree to interpret the terms Brandenburg questioned. The term "all