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Pub. Serv. Co. of Colo. V. Meadow Islands Ditch Co. No. 2, 132 P.3d 333 (Colo. 2006)

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the statute or the case law required the subterranean stream follow the exact flow of the channel. The court held that as long as the subterranean stream flowed in the same general direction as the channel it would suffice to meet the test and the directional deviation would be irrelevant. The Board noted that the channel which runs beneath the wells deviated from flowing parallel to the subterranean stream when it hit the less permeable clay sediments near the wells, which forced the streamflow into more permeable soils. The Board argued that the divergence of the groundwater flow was consistent with the general downstream flow of the subterranean stream. The court found this explanation to be adequate to explain the perpendicular flow.

Finally, NGWC argued that the four-part test be replaced with the classifications found in 1911 treatise authored by Samuel C. Wiel, *WATER RIGHTS IN THE WESTERN STATES*. Wiel stated that known underground streams were rare and the presumption was against their presence. The court found that the pre-1913 case law distinguished subterranean streams as a subclass of underground streams, which when looked at together failed to support NGWC's claims. The court held that the four-part test was consistent with the language and objective of the statute and that substantial evidence supported the Board's findings. The court also found that NGWC waived the issue of the Board's application of the original permit when it failed to raise it in 1999. The court then noted that even if NCWC had timely raised the issue, it would not be persuasive because courts extend considerable deference to an administrative agency's explanation of its own regulations and language.

The court affirmed the judgment of the trial court, holding that the Board accurately interpreted a statute to determine whether groundwater fell within the Board's permitting authority.

Kathleen Brady

COLORADO

Pub. Serv. Co. of Colo. v. Meadow Island Ditch Co. No. 2, 132 P.3d 333 (Colo. 2006) (holding that the recipient of a contractually-delivered water right may not change its use without the consent of the appropriative owner and that a plan for augmentation does not violate a contractual prohibition against changing the point of diversion for a subject water).

The Public Service Company of Colorado ("PSCo") derived its water rights in the subject water through its 46.25% ownership in the Beeman Ditch and Milling Company ("Beeman"). Meadow Island Ditch Company No. 2 ("Meadow") and Beeman, under a 1905 decree, shared a head-gate on the South Platte River, where each diverts its respective water rights. In 1925, a dispute arose between Meadow and

an organization representing Beeman, Consolidated Ditches Company of District No. 2 (“Consolidated”). That same year, Consolidated and Meadow reached a settlement, the Consolidated/Meadow agreement, which limited Meadow’s draft of water to 40 c.f.s. and prohibited changing the point of diversion for Meadow water.

Also in 1925, Beeman and Meadow entered into a separate agreement, the Beeman/Meadow agreement, which incorporated the terms of the above 1925 agreement, and further specified that Meadow would deliver its water in excess of 40 c.f.s. to Beeman. Furthermore, Beeman owned 12 of the 90 outstanding shares of Meadow. Thus, Beeman, and therefore PSCo, had an interest in Meadow’s excess water as well as an interest in the 40 c.f.s. which Meadow normally diverts.

As a shareholder in Beeman, the above 1925 agreements give PSCo a pro-rata interest in both the excess water and the 12/90ths water. However, the agreements only give PSCo a contractual right to Meadow’s excess water. PSCo does not have an ownership right in this excess water as it is a contractually-delivered right governed by the 1925 agreements. Conversely, PSCo’s interest in the 12/90ths water is an adjudicated water right.

On July 31, 2002, PSCo applied for a change of water rights and sought approval of a plan for augmentation. Meadow objected to PSCo’s application and proposed plan. Meadow argued that PSCo did not own the water rights, but rather had a contractual right to receive the subject water. Additionally, Meadow argued that the agreements under which PSCo claimed its water rights were unambiguous and expressly prohibited PSCo from changing the point of diversion for Meadow water.

The District Court for Water Division No. 1 issued a pre-trial order holding that PSCo could not change the use of the excess water under the controlling 1925 agreements. The water court also issued a post-trial order approving PSCo’s plan for augmentation, as these same agreements did not bar PSCo from using its subject water to augment out-of-priority diversions. In an appeal by PSCo, challenging the water court’s Pre-Trial Order, and a cross-appeal by Meadow challenging the water court’s Post-Trial Order, the Colorado Supreme Court considered the scope of water rights governed by the two 1925 agreements.

Regarding PSCo’s appeal, the court looked to the 1925 contractual grant to use the adjudicated water right to determine whether PSCo may change the use of the water. The Beeman/Meadow agreement is silent regarding whether Meadow granted the right to change the use of the subject water to Beeman, and thus to PSCo. The agreement’s silence permitting or prohibiting any change of use of the excess water did not allow for an implied grant to change this use. Instead, the court interpreted the absence of such language to do the opposite. Because PSCo’s contractually-delivered water right was different than a water right acquired by original appropriation, diversion, and applica-

tion to beneficial use, the court declined to interpret the contract's silence as granting PSCo the right to change the use of the water.

The court concluded that the rights represented by the 1925 Beeman/Meadow agreement were not water rights with statutory right to change use. The court noted that the 1925 agreements had a single intent, which was to limit Meadow's diversions to 40 c.f.s. The court viewed PSCo as a consumer, whose rights were determined by the terms of its contract. Meadow had retained ownership of its water rights, and the contract had not bargained for a change in the use of Meadow's excess water. Thus, the court held that the holder of a contractually-delivered water right, PSCo, may not change its use without the consent of the appropriative owner, Meadow.

Regarding Meadow's cross-appeal, the court examined the contractual restriction on PSCo's adjudicated water right to determine whether PSCo may operate its proposed plan for augmentation without violating the 1925 agreements. The 1925 agreements maintain a prohibition on changing the point diversion of the subject water. PSCo's plan for augmentation would not change the point of diversion and provided for continued use of the South Platte River head-gate. Further, PSCo's plan allowed use of the 12/90ths share of water as replacement water to satisfy holders of vested rights. The court noted that out-of-priority diversions, such as the one proposed by PSCo, were not contemplated by the parties at the time of the 1925 agreements, because the legislature had not yet authorized such a use.

The court concluded PSCo's plan for augmentation did not involve changing the diversion points for the subject water. Rather, the proposed plan and subject water replaced the water diverted from upstream wells. Additionally, PSCo performed the proper water law procedures and quantified and limited the planned augmentation so Meadow's water right did not exceed 40 c.f.s. This effectuated the intent of the 1925 agreements as it did not allow for an enlargement of Meadow's water rights. Thus, the court held that PSCo's plan for augmentation furthered the intent of the original 1925 agreements and did not violate the agreements' prohibition on changing the point of diversion for the subject water.

Accordingly, the court affirmed the decisions of the water court. The 1925 Beeman/Meadow agreement was silent on change of use and there was no evidence of a bargain for this change of use. The court stated that PSCo's right was a contractually-delivered right, and as such it may not change the use of its water without the consent of Meadow. Additionally, the court affirmed PSCo's plan for augmentation reasoning that the point of diversion was not changed; the 1925 agreements did not contemplate the out-of-priority diversions; and the proposed plan did not violate the intent of the original agreements.

David Riddle