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Vance v. Simpson, No. 2005CW063 (Colo. Water Ct. Div. 7, July 2, 2007)

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of-priority diversion will not cause injury. If the proponent establishes the absence of injury, the burden shifts to the objector to show injury to an existing water right; the court does not require a specific water right, rather proof of injury to senior appropriators is sufficient. If the objector adequately presents contrary evidence based on evidential facts, not potentialities, the burden shifts back to the proponent to show absence of injurious effect.

The court found that adequate evidence in the record supported the district court's finding of injury. The court noted that a provision within the proposed decree, which reserved for the CWCB the right to halt the Authority's operation of the plan if that operation affected the CWCB's instream flow rights, adequately protected the CWCB from injury. Furthermore, the court found that water engineers' testimony as to the reasonableness and adequacy of the depletion table supported the district court's finding that the Authority presented a prima facie case that the out-of-priority diversions would not result in injury. The court also noted that the CWCB did not provide any convincing evidence to contradict the Authority's assertion of no injury.

Second, the court responded to the CWCB's argument that the district court approached the case incorrectly, in that it should have determined the amount and timing of the applicant's depletions and available replacement water before determining injurious effect. The court held that the district court followed the appropriate method of analysis by considering the proposed depletions and augmentation water both in quantity and in time as part of a comprehensive inquiry into whether an injury would result, rather than as an independent inquiry in and of itself.

Additionally, the court responded to the Authority's alternative argument that claim preclusion barred the CWCB from challenging the Authority's use of the depletion table because the CWCB had the opportunity to raise such a challenge in those cases to which it was a party. The court held that due to the unique circumstances of individual augmentation plans, claim preclusion would not have barred the district court from considering the individual circumstances of the proposed plan.

The court affirmed the district court's approval of the proposed decree and held that claim preclusion cannot bar consideration of individual circumstances of augmentation plans.

Ryan Malarky

Vance v. Simpson, No. 2005CW063 (Colo. Water Ct. Div. 7, July 2, 2007) (holding that the diversion of ground water during coal-bed methane extraction requires a water well permit).

William S. Vance, Jr., Elizabeth S. Vance, James G. Fitzgerald, and Mary Theresa Fitzgerald (collectively "the Ranchers") filed suit in the

Water Division 7 District Court, challenging the Colorado Engineer's decision not to require coal-bed methane ("CBM") mining companies to obtain water right permits for water withdrawals occurring from CBM gas production. The Ranchers asked the district court to determine the statutory obligation of the State Engineer to require well permits and augmentation plans when the mining companies divert ground water, hydraulically connected or tributary to surface streams in which the Ranchers hold water rights, during CBM production.

To remove CBM, mining companies extract water from the coal seams to reduce reservoir pressure. Ground water diverted in CBM production is then transported to reinjection wells where the water is reinjected deeper into the ground. CBM production often consumes all of the water, making it unavailable for shallow groundwater users.

The Oil and Gas Conservation Act ("the Oil and Gas Act") grants the Colorado Oil and Gas Conservation Commission ("COGCC") authority to regulate and oversee oil and gas wells and the exploration and production waste from such wells. The state board of examiners of water well construction and pump installation contractors has no authority over the construction, pump installation, or abandonment of wells subject to the jurisdiction of the COGCC.

The COGCC has specific statutory authority to regulate the disposal of produced water. However, the COGCC has no expressed statutory authority regarding diversion of water that is in or tributary to natural surface streams. The Oil and Gas Act, furthermore, does not explicitly exclude diversion and consumption of ground water associated with CBM drilling operations from application of the water acts governing the appropriation and administration of water.

COGCC Rule 209 applies to diversion of water and states that in oil and gas operations each owner shall exercise due care in the protection of coal seams and water-bearing formations as required by the applicable Colorado statutes. The district court found that applicable Colorado statutes included the Ground Water Management Act ("Ground Water Act") and the Water Act.

The Water Act provides the right to divert the unappropriated stream and tributary ground waters of the state to beneficial uses. Ground water is subject to state water law and administration under the Ground Water Act.

The legislature carefully exempted certain circumstances from application of the water acts, but did not explicitly exempt oil and gas wells from the Ground Water Act's permitting requirements. The absence of an exemption for oil and gas wells demonstrates a legislative intent to require water well permits under factual scenarios that contrast with statutory exemptions.

Based upon the theory that the inclusion of one thing implies the exclusion if another, the district court concluded that non-exempted

mineral-related activities, such as oil and gas activities, are subject to the scrutiny of state water law.

The district court then examined whether the diversion of water in connection with CBM production is an appropriation of water. Appropriation is the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by Colorado law. The definition of beneficial use depends on specific circumstances of the case and the court should broadly interpret its meaning.

The General Assembly intended to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in a way to maximize the beneficial use of all of the waters of Colorado through the Water Act.

The district court concluded that the removal of water during CBM production, regardless of the fact that the division of water is inadvertent, occurred as a result of the active and intentional pumping of water to accomplish the intended purpose. Therefore, the district court found that the pumping of water in the course of CBM production is an appropriation for a beneficial use.

The next issue considered by the district court dealt with whether the CBM drilling operation that removed water from the ground constituted a well within the meaning of the Ground Water Act. The Ground Water Act defines a well as any structure or device used for the purpose or with the effect of obtaining ground water for beneficial use from an aquifer. Using this definition, the district court concluded that a CBM drilling operation that removes ground water constitutes a "well." The district court contended that, while the objective is not the water produced from the drilling operation, the effect of the drilling operation is to obtain ground water from the aquifer. The district court further held that an oil and gas well is not subject to the technical criteria applicable to construction of a water well, but an oil and gas well that affects water rights is subject to the permitting requirements of the Ground Water Act.

The district court granted summary judgment in favor of the Ranchers along with the requested relief.

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GEORGIA

Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 649 S.E.2d 619 (Ga. Ct. App. 2007) (holding that the Coastal Marshlands Protection Act does not allow the Coastal Marshlands Protection Committee to consider the adverse impacts of integrated upland developments' storm water runoff when the upland development does not service or augment the marshland project).