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Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009)

Sarah Felsen

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statute. The court acknowledged that the GMA requires a landowner's consent before transporting water off the land, and held that the legislature did not believe a right to future prospective groundwater use existed because otherwise it would not require consent if it believed such rights existed and were transferrable. Thus, the court held that landowners do not have a real property interest in potential future groundwater use which they can sever from the overlying land.

The Supreme Court of Arizona vacated and remanded the case to the Arizona Court of Appeals for hearing on other arguments.

Andrew Reitman

COLORADO

Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009) (holding that coal-bed methane gas wells' use of ground water constitutes a "beneficial use," giving rise to appropriative water rights; these rights are subject, under statute, to permits issued by the State Engineer and to the State Engineer's administration of augmentation plans approved by water courts).

William S. Vance, Jr., Elizabeth S. Vance, James Fitzgerald, and Mary Theresa Fitzgerald (the "Ranchers") possess water rights in sources tributary to the Piedra and Pine Rivers. The Ranchers claimed that coal-bed methane ("CBM") production diverted ground water that would have otherwise discharged into the Piedra and Pine. CBM wells tap into deep coalbed formations that contain methane gas trapped in hydrostasis. By removing the water that surrounds the formations, CBM producers release the gas for withdrawal. CBM producers bring the water to the surface, store it briefly, and then re-inject it below the aquifers that formerly held the gas.

The Ranchers brought a motion for declaratory judgment in the Water Division 7 District Court (the "water court"), naming the Colorado State Engineer and the Division Engineer of Water Division 7 ("the Engineers") as defendants. The Ranchers sought a declaration that, under statutory law, CBM production is a "beneficial use" of water that places legal obligations on the Engineers to protect senior vested water rights. The water court issued a summary judgment in the Ranchers' favor and the Engineers appealed directly to the Colorado Supreme Court. In this case of first impression, the court addressed whether CBM production involves the beneficial use of water, whether the court must defer to the Engineers' interpretation of beneficial use, and whether CBM production is exclusively within the province of the Colorado Oil and Gas Conservation Commission ("COGCC").

Two state statutes aided the court in its determination of the Engineers' obligations: the Colorado Ground Water Management Act ("GWM Act") and the Water Right Determination and Administration Act of 1969 ("1969 Act"). The GWM Act states that people cannot build new "wells" in designated areas without a permit. The 1969 Act defines a well, generally, as a structure that obtains an aquifer's water for

beneficial use. In addition to arguing that CBM wells meet the statutory definition of a well, the Ranchers claimed that CBM wells “appropriate” water—apply it to a beneficial use—at the expense of the Ranchers’ senior water rights. Colorado doctrine protects water rights in order of appropriation. Accordingly, the 1969 Act can require the more recent appropriator to submit an “augmentation plan” detailing how he or she will restore depleted water to the senior appropriator. Both the GWM Act and the 1969 Act obligate the Engineers to issue well permits and administer augmentation plans decreed by the water court.

The GWM Act and the 1969 Act share the premise that people should put water to beneficial use. The court adopted the definition contained in the 1969 Act—“the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish the purpose for which the appropriation is lawfully made.” The court found that CBM production constitutes beneficial use because it “uses” water by extracting it from the ground to “accomplish” the “purpose” of releasing methane gas.

The court also rejected the Engineers’ argument that water withdrawn during CBM production has no beneficial use because it is an unwanted byproduct that producers extract coincidentally with gas. The court’s previous holdings establish that, when an activity inevitably results in the diversion of ground water, this inevitability obviates the purpose requirement of beneficial use. In this case, the extraction of water is not only an inevitable result of CBM production, it is integral to that production. The court determined that it was irrelevant that the water might become a nuisance after its beneficial use, because neither statute nor case law requires the satisfaction of a temporal element for beneficial use.

The court also rejected the Engineers’ claim that the GWM Act exempts CBM withdrawal water because it is nontributary. Colorado courts presume that ground water is tributary until a party proves otherwise. The Engineers did not attempt such proof. Therefore, the court affirmed the water court’s determination that this case involves tributary water.

After considering the Engineers’ arguments, the court concluded that CBM wells are wells under the GWM Act, and therefore require well permits issued by the Engineers. Additionally, the court determined that the 1969 Act requires the Engineers to administer augmentation plans approved by the water court. The court found that this regulatory scheme, dependent upon both the State Engineer and the water court, provides sufficient protection to senior water rights holders and addresses the Ranchers’ injury. A State Engineer’s permitting involves determining the existence of unappropriated water and establishing whether a party can make an appropriation without injury. By statute and according to precedent, water courts—not the Engineers—establish the presence or absence of a water right.

On the issue of deference to the Engineers, the court concluded that it is not bound to defer to the Engineers’ definition of beneficial use. This is particularly true when, as here, the court found that the

definition was contrary to that provided in statutory law and case law.

Finally, the court found that COGCC regulation of gas wells does not release the Engineers from the duty to permit and administer augmentation plans for CBM wells. The court did not create an exemption from the GWM and 1969 Acts for gas production.

Accordingly, the court affirmed the water court's holding and remanded the case for further proceedings.

Sarah Felsen

IDAHO

Mesenbrink v. Hosterman, 210 P.3d 516 (Idaho 2009) (holding that riparian owners of land abutting non-navigable lakes take title to land between the ends of meander line and the center of lake).

Herman Lake ("Lake") is a 30-acre, non-navigable lake surrounded by privately owned property. The Mesenbrinks, private landowners, brought suit against the Idaho Department of Lands ("Department") and neighboring landowners ("neighbors"), the Hostermans and the Hubbards, to determine ownership of the land between their property and the Lake's waterline. The Mesenbrinks contended that their lot abutted a portion of the Lake's ordinary high water mark in 1890, when Idaho achieved statehood. They claimed that the water level had since lowered, and that they owned the land between their property line and the existing high water mark.

Subsequently, the Idaho State Board of Land Commissioners determined that the Lake was non-navigable at Idaho's statehood; thus, the state had no title to the lakebed. The Department then filed an answer to the Mesenbrinks' suit, disclaiming any interest in the Lake because the Lake was non-navigable at Idaho's statehood. As a result, the Mesenbrinks and the Department stipulated to dismissal with prejudice because the Department had disclaimed any interest in the lakebed. The District Court for the First Judicial District ("district court") dismissed the claim against the Department with prejudice. The district court tried the remainder of the case, determining the ordinary high water mark's location at the time of Idaho's statehood. The parties stipulated that the district court could enter judgment granting the Mesenbrinks property down to the Lake's current ordinary high water mark. The district court entered judgment pursuant to the stipulation and the neighbors appealed to the Supreme Court of Idaho.

On appeal, the Supreme Court of Idaho considered whether there was substantial and competent evidence supporting the district court's finding as to the Lake's ordinary high water mark at Idaho's statehood. After explaining that Idaho's ownership of land underlying navigable waters originated with the grant of statehood, the court noted that the trial court misused case law applicable to navigable, rather than non-navigable waters. Owners of land abutting non-navigable waters have different rights the trial court did not consider.

Although Idaho received title to land under navigable waters, the