

1-1-2010

Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009)

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Margaret Korey, Court Report, Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009), 13 U. Denv. Water L. Rev. 523 (2010).

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still present. The court reversed the judgment of the water court and remanded the case to allow for the introduction of further evidence to substantiate the Districts' requests.

Matt Brodahl

Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009) (holding that (1) the water court had jurisdiction over the subdistrict, which enabled it to order an augmentation plan for water for out-of-priority depletions due to well pumping that occurred prior to the subdistrict's filing of its application; (2) the water court had authority under Colorado's Water Right Determination and Adjudication Act of 1969 to order a well augmentation subdistrict to provide augmentation water for out-of-priority depletions resulting from well pumping that occurred prior to the subdistrict's filing of its application; (3) the surface water conditions that would exist absent pumping in the basin, rather than current hydrological conditions, must determine the subdistrict's water replacement obligations; and (4) the Administrative Procedure Act governs the standard of review for substitute water supply plans approved by the State Engineer pending approval of an augmentation plan, rather than the de novo standard of review).

In 2003, the Well Augmentation Subdistrict of the Central Colorado Water Conservancy and the South Platte Well Users Association (collectively, "WAS"), submitted applications in the District Court for Water Division Number One ("water court") for approval of an augmentation plan. The proposed plan sought to provide augmentation water to offset the out-of-priority depletions of 215 structures diverting groundwater from the South Platte River Basin in locations from Brighton, Colorado, to Fort Morgan, Colorado. Before WAS filed its application, many of the wells included in its plan had operated under annual substitute water supply plans issued by the State Engineer in favor of Groundwater Appropriators of the South Platte ("GASP"). Following rulings by the Colorado Supreme Court, holding that the State Engineer lacked the authority to promulgate rules permitting out-of-priority alluvial wells, GASP dissolved, and former GASP well owners petitioned the Central Colorado Water Conservancy District to establish WAS so that they might seek a court-approved augmentation plan. The wells involved in WAS make up a subset of the former GASP wells.

WAS's augmentation plan employed a "well call" structure to administer the groundwater seniority system, which obligated all wells with priority dates junior to the date of the calling well to replace water, while wells with priority dates senior to the calling well did not have to replace water. Thirty-seven parties, including the City of Aurora (collectively, "Aurora"), filed statements of opposition to WAS's proposed augmentation plan. Some opposers of the plan filed a motion for a question of law determination relating to the appropriate

method for calculating depletions of water for WAS wells in the alluvium of Box Elder Creek. Specifically, the motion sought the water court's determination on whether the present hydrological conditions in the basin or the hydrological conditions that would exist in the basin without well pumping determines the amount of depletions to the South Platte River from well pumping in Box Elder Creek.

The water court conducted a trial on WAS's application in 2007. In 2008, it issued a post-trial order that approved WAS's augmentation plan, imposing specific terms and conditions on the operation of the plan. The water court determined that, in the absence of well pumping in the Box Elder Creek basin, Box Elder Creek would hydrologically connect to the South Platte River. On the basis of these depletions to the South Platte, the water court rejected WAS's proposed augmentation plan. The water court declined to include WAS's well call provision in its decree. The water court found that uncertainty regarding how much water a particular call could produce by curtailing upstream junior rights and how much time it could take for the curtailment of groundwater depletions to impact surface waters could injure vested water rights.

WAS appealed to the Colorado Supreme Court (the "court"), challenging these terms. WAS argued that the water court erred in requiring WAS to provide replacement water for depletions that continued to negatively impact surface conditions that WAS made before filing its augmentation plan application. WAS also argued that the water court erred in basing replacement obligations for wells in the Box Creek Elder basin on conditions that would exist in the basin had the historic pumping of wells in the area not occurred. Additionally, WAS asked the court to decide whether the State and Division Engineers have the authority to administer a "well call" structure in their administration of the South Platte River basin. Finally, WAS asserted that the water court erred in reviewing its substitute water supply plan ("SWSP") under a *de novo* standard, arguing that the correct standard of review, the arbitrary and capricious standard, appears in the Colorado Administrative Procedure Act ("APA").

On appeal, WAS argued that the water court lacked jurisdiction to make an order that obligated WAS to provide replacement water for depletions made before WAS filed its application. WAS claimed that, although it is clear that the water court had jurisdiction over the augmentation plan, it could not impose a requirement to provide replacement water because the water court did not have personal jurisdiction over the individual well owners. The court rejected WAS's contention, finding that WAS's reasoning revealed a misapprehension with respect to the nature of water court proceedings. The court explained WAS had misunderstood Colo. Rev. Stat. § 37-92-305, which provides for substituted service through the publication of a water division resumé for matters involving applications for water rights, changes of water rights, and augmentation plans. Publication of the resumé provides the water court with subject matter jurisdiction over all issues inherent to a resolution of an application. The court reasoned

that the opposers' requested relief, which asked for replacement of pre-2003 pumping water that caused injury to their vested rights, directly related to the subject of approval of the augmentation plan. Thus, it was within the scope of the water court's jurisdiction. The court found that when WAS filed its augmentation plan, it invoked the water court's jurisdiction over the water rights involved in the plan. Consequently, the water court undertook a duty to ensure that operation of the augmentation plan would not injure senior vested water rights and decreed conditional water rights, which is why the water court conditioned its approval on the provision of replacement water by WAS for pre-application depletions.

WAS next argued that the water court lacked the jurisdiction under the Water Right Determination and Adjudication Act of 1969 ("1969 Act") to condition approval of its augmentation plan upon the replacement of well depletions caused by pumping that occurred before WAS filed its augmentation plan application. WAS argued that conferring such jurisdiction upon the water court contravenes the intent of the Colorado General Assembly in enacting the statute, asserting that the phrase "applicant's use or proposed use of water" limited the water court's consideration to depletions resulting from well pumping occurring during the time that the application is pending. The court rejected this argument, focusing instead on the provision in the 1969 Act that gives the water court the power to require terms and conditions in an augmentation plan intended to prevent injury to vested water rights and conditional decreed water rights. The court found that WAS's interpretation of "applicant" as the party currently applying for approval of the augmentation plan was too narrow. Rather, the court found that the "applicant" had the responsibility to account for all injurious depletions made by water rights covered by the proposed augmentation plan. The court found that the General Assembly deliberately used broad language in the 1969 Act to allow the water court to devise terms and conditions intended to protect water rights from injury, without chronological limitation with respect to when the injurious pumping took place. The court, therefore, agreed with the water court's determination that pre-2003 depletions would likely have an impact on surface water conditions in the future.

Relying on the principle that an augmentation plan requires the replacement of out-of-priority depletions so that holders of decreed water rights can receive the same amount of water that would be available to them in the absence of those depletions, the court rejected WAS's argument that WAS should be responsible for replacing only those depletions made following the submission of its 2003 application. The court began by noting that Colorado water law presumes all water is tributary. As such, parties seeking to rebut that presumption bear the burden of proving that the waters are nontributary. Only by showing that the groundwater wells are nontributary can a party relieve its obligation to augment the wells to avoid injury to senior water users. While the water court had permitted WAS to present evidence showing that the groundwater in the basin was nontributary, it found that WAS

did not present sufficient evidence at trial to rebut the presumption that the water of Box Elder Creek was tributary water. WAS did not argue that Box Elder Creek was nontributary, but rather that the court should adopt WAS's proposed replacement schedule. The court reasoned that if the water court were to base replacement obligations on current hydrological conditions in the Box Elder Creek basin, WAS would receive the benefit of out-of-priority pumping of seepage and return flow waters belonging to the South Platte River. The court found that well pumping in the Box Elder Creek basin intercepted the return flows and seepage water, which had established the hydrological connection between Box Elder Creek and the South Platte. This interception caused the water to stop flowing into the South Platte River, thereby depriving senior users on the South Platte River of their rightful return flows. The court agreed with the water court that allowing WAS to base its replacement obligation on present conditions would allow WAS's wells to pump seepage water and return flows that should have remained in the river.

Before hearing the appeal, the water court had issued an order finding that the appropriate standard of review for appeals from the State Engineer's approval or denial of SWSPs was *de novo*. Because WAS agreed to curtail its out-of-priority depletions pending the issuance of the water court's final decree, however, the water court did not hear the SWSP appeals before ruling on WAS's augmentation plan application. While the court found that the SWSP issue was moot, it nevertheless chose to address the issue, finding that the matter fit within the exception to the mootness doctrine applicable to issues capable of repetition yet evading review, as SWSP appeals tend to fit within a short timeframe. Because the APA is a "gap-filler," its provisions apply only to agency actions not covered by a specific provision of the agency's statute or preempted by another statutory provision. The court looked at whether Colo. Rev. Stat. § 37-92-308(4)(c), which governs appeal of SWSPs, conflicted with APA review. The court began its analysis with the plain language of subsection 37-92-308(4), construing the statute as a whole to give "sensible effect to all of its parts." The court found that the subsections surrounding subsection (4) clearly designated a standard of review for the State Engineer's approval or denial of SWSPs. Presuming that the General Assembly purposefully included a standard of review in certain sections of the statute and excluded it in others, the court found that subsection 37-92-308(4) does not conflict with the APA standard of review. Therefore, the court found the arbitrary and capricious standard under the APA standard of review controls.

The court determined that WAS's request for the court to issue an opinion deciding whether the State and Division Engineers have the authority to implement a well call in the future asked the court to issue a purely advisory opinion, because WAS did not challenge the factual findings of the water court or seek an additional decree mandating use of its well call system on appeal. Since the court could not base an opinion on a hypothetical set of facts, the court found that the issue was

not

yet ripe for judicial resolution and declined to decide the matter in its decision

Accordingly, the court affirmed in part and reversed in part the water court's decision.

Margaret Korey

Meridian Ranch Metro. Dist. v. Colorado Ground Water Comm'n, — P.3d—, 2009 WL 3765490 (Colo. Ct. App. 2009) (holding that management districts have authority to regulate water pumping levels by rule after the Ground Water Commission issues well permits and are not preempted by the Commission's rules).

The Meridian Ranch Metropolitan District, the Meridian Service Metropolitan District, and the Cherokee Metropolitan District ("Metro Districts") are special districts created by Title 32 of the Colorado Revised Statutes. The Metro Districts own and manage wells in the Management District, organized under the 1979 Ground Water Management Act ("GWMA"). The Metro Districts operate wells permitted by the Ground Water Commission ("Commission"). In this case, the Management District adopted rules ("Rules") to ameliorate declining groundwater levels in its designated basin. The Rules focused on wells supplying water to single-family homes, whether in a subdivision or not, and commercial businesses, imposing lower use limits than the Commission originally promulgated. The Metro Districts appealed the Management District's Rules to the Commission, under Section 37-90-131(b) of the Colorado Revised Statutes. On two occasions, a Commission-designated hearing officer declared the Rules invalid; initially, the officer held that the Management District lacked authority to adopt the Rules, and later the officer held that the Rules were unreasonable. The Commission, however, overrode the hearing officer's findings, and upheld the Management District's Rules. The Metro Districts sought judicial review in the District Court for El Paso County, which upheld the Commission's ruling. The district court found that after permits are issued for a basin, a management district has wide authority to regulate the basin's water priorities. The Metro Districts appealed this determination to the Colorado Court of Appeals and simultaneously applied to the Supreme Court of Colorado for *certiorari*, which was denied.

As the Colorado Court of Appeals noted, the Supreme Court of Colorado has jurisdiction over appeals involving priorities or adjudications of individual rights. The court said, however, that though the case involved water rights, there were no issues of relative rights between individual users; thus, the case did not involve priorities or adjudication of individual rights, and the court found it had jurisdiction