

SUPREME COURT, STATE OF COLORADO 2 East 14 th Avenue Denver, Colorado 80203	
District Court, Water Division 5, State of Colorado The Honorable James B. Boyd Case No. 2014CW3021	
Plaintiff-Appellant: SAM A. ALLEN, v. Defendants-Appellees: STATE OF COLORADO; COLORADO COURT OF APPEALS; MARGARET V. MORTON; LARRY L. STEVENS; and MESA COUNTY LAND CONSERVANCY, INC., v. Appellee: Division Engineer, Water Division 5.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff-Appellant:</i> Nathan A. Keever, Attorney Reg. No. 24630 DUFFORD, WALDECK, MILBURN & KROHN, L.L.P. 744 Horizon Court, Suite 300 Grand Junction, CO 81506 Telephone: (970) 241-5500; Fax: (970) 243-7738 E-mail: dwmk@dwmk.com	Case Number: 2017SA_____
NOTICE OF APPEAL	

In response to the July 31, 2017, Order on Motions to Dismiss (“July 31 Order”) in Water Division 5 District Court (“Court”), Case No. 2014CW3021 (“Action”), Plaintiff-Appellant Sam Allen (“Allen” or the “Appellant”), through his undersigned counsel, submits the following Notice of Appeal.

1. Nature of the Case.

A. Statement of the Controversy.

This case is an inverse condemnation action in which Allen alleges a judicial taking of his mutual ditch shares in the Big Creek Reservoir Company, a mutual ditch company. Defendants moved to dismiss Allen's water court complaint under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction in the water court. The motion to dismiss was granted in the July 31 Order.

B. Order Being Appealed and Basis for Appellate Court Jurisdiction.

Appellant seeks review and reversal of the July 31 Order. Jurisdiction is proper in this Court pursuant to C.R.S. § 13-4-102(1)(d) and C.A.R. 1(a)(2) and (e).

C. Whether the Order Resolved All Pending Issues.

The July 31 Order resolved all issues pending before the water court.

D. Was Judgment Made Final for Purposes of Appeal Pursuant to C.R.C.P. 54(b).

C.R.C.P. 54(b) was not applied in the Action.

E. Date of Judgment/Order.

The July 31 Order was entered and electronically transmitted to counsel on July 31, 2017.

F. Were there any Extensions Granted to File Motions for Post-Trial Relief.

No extensions of time were requested or given to file motions for post-trial judgment relief.

G. Date Any Motion for Post-Trial Relief Was Filed.

No motions for post-trial relief were filed.

H. Date Any Motion for Post-Trial Relief Was Denied Under C.R.C.P. 59(j).

No motions for post-trial relief were filed.

I. Whether There Were Any Extensions Granted To File Any Notice(s) of Appeal.

No extensions were requested or granted to file a notice of appeal.

2. Advisory Listing of Issues to be Raised on Appeal.

Whether the water court erred in holding that it did not have subject matter jurisdiction to consider Allen's inverse condemnation action in which Allen alleges a judicial taking of his mutual ditch shares in the Big Creek Reservoir Company, a mutual ditch company.

3. Whether the Transcript is Necessary to Resolve Issues on Appeal.

The water court did not take any evidence or oral argument at any hearing in connection with ruling on the motions to dismiss, and thus no transcripts will be necessary to resolve the issues raised on appeal.

4. Whether Order on Review was Issued by a Magistrate where Consent was Necessary.

The order on review was not issued by a magistrate where consent was necessary.

5. Names of Counsel for the Parties.

*Attorneys for Defendants-Appellees
State of Colorado and Colorado Court
of Appeals:*

John W. Suthers, Attorney General
Patrick L. Sayas, Sr. Asst. AG
1300 Broadway, 10th Floor
Denver, CO 80203

*Attorneys for Defendants-Appellees
Margaret V. Morton and Larry L.
Stevens:*

John T. Howe, Esq.
Hoskin Farina & Kampf
200 Grand Avenue, Suite 400
P.O. Box 40
Grand Junction, CO 81502-0040

*Attorneys for Defendant-Appellee
Mesa County Land Conservancy,
Inc.:*

Peter D. Nichols, Esq.
Josh A. Marks, Esq.
Berg Hill Greenleaf & Ruscitti,
LLP
1712 Pearl Street
Boulder, CO 80302

6. Appendix.

A copy of the July 31 Order is attached as Exhibit A.

Respectfully submitted this 18th day of September, 2017.

Dufford Waldeck Milburn & Krohn LLP

By: /s/ Nathan A. Keever
Nathan A. Keever, Reg. No. 24630
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2017, the foregoing ***Notice of Appeal*** was filed with the Court and true and accurate copies were served on the following parties via electronic service:

John W. Suthers, Attorney General
Patrick L. Sayas, Sr. Asst. Atty. General
1300 Broadway, 10th Floor
Denver, CO 80203
*Attorneys for Defendants-Appellees State
of Colorado and Colorado Court of
Appeals*

John T. Howe, Esq.
Hoskin Farina & Kampf
200 Grand Avenue, Suite 400
P.O. Box 40
Grand Junction, CO 81502-0040
*Attorneys for Defendants-Appellees
Margaret V. Morton and Larry L. Stevens*

Peter D. Nichols, Esq.
Josh A. Marks, Esq.
Berg Hill Greenleaf & Ruscitti, LLP
1712 Pearl Street
Boulder, CO 80302
*Attorneys for Defendant-Appellee
Mesa County Land Conservancy,
Inc.*

/s/ Pam Johnson
Pam Johnson, Paralegal

Pursuant to C.R.C.P. 121 §1-26(7), the signed original of this document is maintained at the offices of the filing attorney and will be made available for inspection by other parties or the Court upon request.

<p>GARFIELD COUNTY, COLORADO: WATER DIVISION NO. 5, COLORADO</p> <p>Court Address: Garfield County Courthouse 109 8th Street, Suite 104 Glenwood Springs, Colorado 81601</p> <p>Phone Number: 970-928-3065</p>	<p>DATE FILED: July 31, 2017 CASE NUMBER: 2014CW3021</p>
<p>Plaintiff(s): SAM A. ALLEN</p> <p>vs.</p> <p>Defendant(s): STATE OF COLORADO; COLORADO COURT OF APPEALS; MARGARET V. MORTON; LARRY L. STVENS; and MESA COUNTY LAND CONSERVANCY, INC.</p>	<p>Case Number: 14CW3021</p> <p>Div.: C</p>
<p align="center">ORDER on MOTIONS TO DISMISS</p>	

This matter comes before the Court on the motions to dismiss filed by Defendants the State of Colorado, the Colorado Court of Appeals and Mesa County Land Conservancy, Inc. The Court has considered the pertinent record and is otherwise fully advised. Therefore, the Court finds, concludes and orders as follows:

1. This case is an inverse condemnation action in which Plaintiff Allen alleges a judicial taking of his shares in the Big Creek Reservoir Company, a mutual ditch company. Allen initially sought either an award of compensation for the taking or an order vacating the taking.

2. The State of Colorado and the Colorado Court of Appeals (collectively “Colorado” or the “State”) move to dismiss the Complaint under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction in the water court and under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. Mesa County Land Conservancy, Inc. (the Mesa Trust) joins in the State’s motion and makes additional arguments about the lack of jurisdiction.

3. The Court must determine the jurisdictional issue first. If this Water Court has no jurisdiction, then a dismissal must follow on that ground alone because the Court would have no jurisdiction to resolve the issues raised under C.R.C.P. 12(b)(5).

4. The present case is an outgrowth of a prior civil action litigated in Mesa County. That case was tried in the Mesa County District Court, appealed through a decision of the Colorado Court of Appeals, and became a final appellate decision after the Colorado Supreme Court denied certiorari. In the prior case, Allen and his then wife had owned a parcel that had previously been encumbered by a conservation easement (the Conservation Easement or the Easement) granted by the United States to the Mesa Land Trust. The Conservation Easement provided that all “[a]ll water rights” would “remain with this land.” The interests held by the Allens included 9 shares of stock (the Ditch Shares) in the Big Creek Reservoir

Company. When the Allens sold the property, they did not convey, but instead kept, the Ditch Shares. The Mesa Land Trust sued the Allens for violating the Conservation Easement. The trial court agreed with the Mesa Land Trust, concluded the Ditch Shares could not be severed from the land, and ordered the Allens to convey the shares to the land purchasers.

5. On appeal, the Allens argued that even if the Conservation Easement precluded a transfer of the land without the Ditch Shares, the Easement provision could not be enforced against them. They argued in the alternative that the Easement could not be enforced against them either because the restriction on transfer was not noted on the face of the Ditch Shares, a requirement under § 4-8-204(1), C.R.S., of the Uniform Commercial Code, or, if the UCC did not apply, because the Easement could not encumber the Ditch Shares except through permission granted by the Big Creek Company and perhaps each of its shareholders. The Court of Appeals concluded the UCC did not apply. The Court of Appeals then held the Easement requirements bound subsequent purchasers because the Easement was properly recorded under the statutes governing real property transfers. This result rested on the Court of Appeals' conclusion that ditch shares and the water rights they represent are real property interests. Mesa

County Land Conservancy, Inc. v. Allen, 2012 COA 95, ¶¶ 40, 41, cert. denied, 2013 WL 4008745 (August 5, 2013).

6. In the present case, Allen claims the Court of Appeals' decision was an unconstitutional taking. Section 7-42-104(4), C.R.S., provides "The shares of stock [of a mutual ditch company] shall be deemed personal property and transferable as such" Allen asserts the Court of Appeals changed the law by converting ditch shares from personal to real property and thereby newly exposing ditch shares to encumbrance in the manner allowed under the recording statutes for real property. According to Allen, this change eliminated Allen's opportunity to deny the enforceability of the Easement's encumbrance against him because of his alleged capacity as a bona fide purchaser for value.

7. In his Response to Colorado's motion, Allen retreats from his request to vacate the taking. He states, "It is undisputed that M&S [Defendants Morton and Stevens] are the owners of the Big Creek shares" Response, p. 10. Allen is now pursuing solely his claim for compensation for the alleged wrongful taking.

8. Disagreeing with the motions to dismiss, Allen contends this matter falls within the exclusive jurisdiction of the water court:

[A]ll doubt is resolved in this case by the nature of the relief requested. Here Allen seeks just compensation for the loss of the use of the water In order to resolve this issue, the court will be required to assign a monetary value to the priority and the right of use

Response, p. 10.

9. The water court has exclusive jurisdiction over “water matters.” § 37-92-203(1), C.R.S.

10. Plaintiff argues his inverse condemnation claim is a water matter. He relies on Kobobel v. State, Dep't of Nat. Res., 249 P.3d 1127 (Colo. 2011). In Kobobel, farmers owned adjudicated rights in certain wells. The Division Engineer ordered the farmers to cease and desist their pumping from the wells on the ground the pumping was occurring outside the scope of the farmers’ water rights. Apparently, the well owners did not contest the cease and desist order. Instead, they filed an inverse condemnation action in district court asserting the cease and desist order was a wrongful taking. The district court dismissed the case on the ground that the inverse condemnation claim involved the right to use water and hence was a water court matter in the exclusive jurisdiction of the water court. The Court of Appeals affirmed the dismissal by the district court. The farmers refiled the case in water court although they continued to argue district court was the proper forum. The water court dismissed the case on a Rule 12(b)(5) motion.

11. The Supreme Court reviewed the jurisdictional issue. The Supreme Court relied on the established distinction between actions about the use of water and actions about the ownership of water. The former belong in the water court. The

latter belong in the district court. The predicate issue in Kobobel was whether or not the farmers had a right to use the water. The water right held by the farmers was not in dispute. The issue was the scope of that right and whether the water being used by the farmers fell within the scope of the right.

12. The Supreme Court held the proper forum was the water court. The reasoning of the Supreme Court turned on the nature of the issue as one of use rather than ownership. Nothing in the opinion suggests that an inverse condemnation claim will always be, as a matter of law, a water court matter when the condemnation involves a water right.

13. The Supreme Court clarified to some degree the distinction between an ownership issue and a use issue in Humphrey v. Southwestern Development Co., 734 p.2d 637 (Colo. 1987). Humphrey involved ownership of a decreed right. The dispute was filed as a district court case. To resolve the case, the district court was required to study the chain of title, and the district court did so. The Court of Appeals reversed concluding “title to decreed water” was entrusted to the jurisdiction of the water court. The Supreme Court reversed the Court of Appeals’ jurisdictional conclusion. The determination of a water right, that is the determination of a right to use water, is a water court matter. The adjudication of

who owns an established right is a district court matter. Id. at 641. In explaining the distinction, the Supreme Court stated,

If we followed the court of appeals' reasoning, all ownership adjudications would now fall under the exclusive jurisdiction of water judges. The result would be to divest the district courts of jurisdiction to hear disputes over ownership of previously adjudicated water rights. . . . [T]hese disputes arise in a variety of civil contexts, often in conjunction with the conveyance of property and other rights.

Humphrey v. Sw. Dev. Co., 734 P.2d 637, 641 (Colo. 1987) (emphasis added).

14. The Supreme Court has confirmed a “determination” of a water right is not limited to the initial decree of the right. A declaratory judgment action that seeks declaration about the scope of use allowed by an existing right is a water matter in the water court’s jurisdiction. S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226, 1234 (Colo. 2011). A declaratory judgment action to determine what properties are subject to the requirements of a water decree is a water matter.

Crystal Lakes Water & Sewer Ass'n v. Backlund, 908 P.2d 534 (Colo. 1996).

15. In this case, as in many, applying the use/ownership distinction is an imprecise undertaking. As characterized by Allen, his unconstitutional loss was the loss of “his vested right to use the water represented by the shares.” Response to State Motion, p. 10. With no change in meaning, he could have described his loss as the loss of “his ownership of the Ditch Shares.”

16. Here, there is no dispute about the existence of the water rights represented by the Ditch Shares. There is no dispute that the owner of the rights and Shares, whoever that might be, has the right to use the water. The only issues are whether the decision of the Court of Appeals changed the law applicable to the transfer of ditch shares, whether that change effectively deprived Allen of ownership of the Ditch Shares he reserved, and whether the change in law combined with the change in ownership constituted a wrongful taking of the water and Ditch Shares from Allen.

17. The property lost is shares in a ditch company. Ownership of a ditch share is ownership of a water right. Jacobucci v. Dist. Court In & For Jefferson Cty., 541 P.2d 667, 672 (Colo. 1975). Although jurisdiction was not discussed in the case, it is noteworthy that Jacobucci was a condemnation case filed in a district court against a mutual ditch company. The Supreme Court held the individual shareholders, as owners of the water rights, were indispensable parties to the district court condemnation proceedings. Id. at 670. If Allen's position here were correct, the Jacobucci Court should have concluded the district court lacked jurisdiction because the condemnation was a water matter entrusted to the jurisdiction of a water court.

18.If Allen were to prevail on his inverse condemnation claim, he would be entitled to compensation for the value of the property lost. The only “use” issue in the current case is the right of use inherent in the ownership of a water right. Allen argues the remedy he seeks is a water matter because it will require valuation of the Ditch Shares, that is, the valuation of the water rights. That valuation, he says, will require review of the historic use of the water. Although it is conceivable historic use could be examined in the valuation process, the exact valuation process the parties might use is speculative at this point. The only valuation mentioned in the record to date is the amount by which Allen states he reduced his sale price in recognition of his reservation of the Ditch Shares. Ironically, Allen’s argument exposes the dilemma the Kobobel Court expressly declined to resolve.

Condemnation proceedings are governed by statute, and a jury right exists in the typical condemnation case; Colorado law has never determined that a water court has authority to summon a jury or to conduct statutory condemnation proceedings. See Kobobel, 249 P.3d at 1132, n. 6. If the task of valuation were entrusted to a jury, the special expertise of the water court about use issues could not be brought to bear on the only issue in this case identified as a “use” issue by Allen.

19.Here, the decision of the Court of Appeals did not negate a property right. The water rights and Ditch Shares existed before the case. They continue to exist

today. At most, the Court of Appeals decision clarified the mechanism for transfer. The issue is a conveyance issue, one of the civil contexts recognized as a district court matter in Humphrey, supra. Just as noted by the Supreme Court in Humphrey in the circumstances of that case, if Allen were correct in this case, the jurisdictional distinction between ownership issues and use issues would disappear.

20. The Court concludes Allen's claim is grounded in ownership and the conveyance of that ownership, not use. Allen's claim is not a water matter within the exclusive jurisdiction of the water court. Instead, his claim is a district court matter.

21. Allen also suggests his claim is within the ancillary jurisdiction of this water court. Ancillary jurisdiction is triggered only when a case includes at least one claim within the water court's exclusive jurisdiction, and ancillary issues exist that will "directly affect the outcome" of the water claim. Crystal Lakes, supra, 908 P.2d at 544. Here, Allen's only claim is the allegedly wrongful taking of his water rights. There is no water use issue that will affect a takings analysis. The case does not fall within the ancillary jurisdiction of the water court.

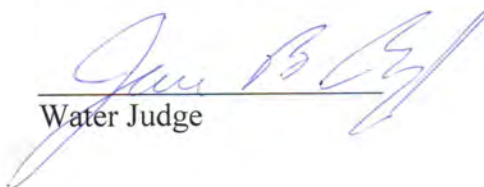
22. For the reasons discussed above, the motion under Rule 12(b)(1) is granted, and the case is dismissed for lack of jurisdiction. Therefore, the Court is without jurisdiction to resolve the motion to dismiss under Rule 12(b)(5). The dismissal is

without prejudice in the sense of adjudicating Allen's inverse condemnation claim.

The dismissal is with prejudice in the sense of adjudicating the jurisdiction of the water court.

Done on July 31, 2017.

BY THE COURT


Water Judge