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SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Appeal from the District Court, Weld County, Colorado Honorable Roger A. Klein, Judge Case No. 03CV1335 REINALDO GALLEGOS, MARIANNE GALLEGOS, HAROLD L. GALLEGOS, ELLEN GALLEGOS, AND GENE J. GALLEGOS, Appellants, V. COLORADO GROUND WATER COMMISSION, an Administrative Agency of the State of Colorado, and Mr. HAROLD D. SIMPSON, in his capacity as the COLORADO STATE ENGINEER, and as *ex officio* executive Director of the Colorado Ground Water Commission and as a non-voting member of the Colorado Ground Water Commission, Appellees, EDNA B. ANDERSON, WILLIAM ANDERSON, LARRY L. CROISSANT, JEAN L. CROISSANT, THE TOWN OF GROVER C.O RICK HAYES, HEREFORD FARMS, LLC CO. JERRY BURNETT, CARL A. JOHNSON, ANITA R. JOHNSON, ROD JOHNSON, JAMES M. KONIG, JANET F. KONIG, MICHAEL D. KONIG, LARRY LANG, RICHARD L. PETTINGGER AND LISA R. PETTINGER, RORY PETTINGER, ROCKY PLAINS, LLP, TR, INC., TENNICK LAND AND CATTLE CO., COLIN W. NICKLAS, CLARENCE W. TIETMEYER, VONDA J. TIETMEYER, CLARENCE E. TIETMEYER, SCOTT W. TIETMEYER, PAULA J. TIETMEYER, VONDA JEAN TIETMEYER, AND TIETMEYER FARMS, INC., CHARLES E. NUSSBAUM, DOROTHY L. NUSSBAUM, JAMES L. KARST, JUDY KARST, KENNETH EVERITT, PENNY EVERITT, PHIL	FILED IN THE SUPREME COURT JUN 0 2 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK **Δ COURT USE ONLY Δ** Case No. 05SA253

MCKINLEY, DIANE MCKINLEY, DAN LOYD, DEERCO, LLC, JESSE E. LOYD, EVELYN T. LOYD, LOYD FARMS, LOYD FARMS GENERAL PARTNERSHIP, LEE A. TAPPY, FRED D. MARICK, ROXANNE L. MARICK, F&R MARICK AND FOUR DIAMONDS RANCH, LLC, ROSELLA JESSEN, BCK HEATH PROPERTY, LLC, GREEN VALLEY RANCH,

Appellees.

Kenneth S. Copple, #16485
P.O. Box 272202
Fort Collins, CO 80527
Telephone: (970) 490-2882
Facsimile: 484-2228
ATTORNEY FOR THE FOLLOWING DEFENDANTS-APPELLEES-CROSS APPELLANTS:
CHARLES NUSSBAUM; DOROTHY NUSSBAUM; JAMES L. KARST; JUDY KARST; KENNETH EVERITT; PENNY EVERITT; PHIL MCKINLEY; DIANE MCKINLEY; DAN LOYD; LOYD FARMS; LOYD FARMS GENERAL PARTNERSHIP; LEE A. TAPPY; FRED D. MARRICK; ROXANNE L. MARRICK; F & R MARRICK AND FOUR DIAMOND RANCH, LLC.

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Defendants / Appellees / Cross Appellants Charles Nussbaum; Dorothy Nussbaum; James L. Karst; Judy Karst; Kenneth Everitt; Penny Everitt; Phil McKinley; Diane McKinley; Dan Loyd; Loyd Farms; Loyd Farms General Partnership; Lee A. Tappy; Fred D. Marick; Roxanne L. Marick; and F & R Marick and Four Diamond Ranch, LLC, collectively "the Nussbaum Defendants," acting by and through their attorney, Kenneth Copple, hereby file their Reply Brief, and state the following:

I. STATEMENT OF ISSUES

1. Whether the Doctrines of collateral estoppel and *res judicata* preclude a surface right holder from challenging an order as to the responsibilities of the Colorado Ground Water Commission to protect surface rights in a designated ground water basin.

2. Whether surface rights in a designated basin are subject to the doctrine of reasonable method of diversion.

II. STATEMENT OF THE CASE

The Nussbaum Defendants hereby adopt the Statement of the Case as stated in their Opening / Answer Brief by this reference.

III. SUMMARY OF REPLY ARGUMENT

The Colorado Ground Water Commission's (Commission) designation proceeding was a quasi-judicial act and as such should be afforded full recognition under the doctrines of collateral estoppel and *res judicata*. The notice and hearing

requirement under §37-90-106 C.R.S. is compelling proof that the procedure is quasi-judicial in nature. The Commission, after proper notice and hearing, applies the statutory definition of "designated ground water" to the facts discovered at the hearing through testimony and submitted reports. This application of facts to a prescribed definition is quasi-judicial in nature. As such, the doctrines of collateral estoppel and *res judicata* should apply.

The District Court correctly ruled that surface rights in a designated basin are subject to certain limitations including the doctrine of "unreasonable method of diversion." In rebutting this finding, the Gallegoses raise a new issue arguing that the application of this principle in the instant case is inappropriate. In making this argument the Gallegoses severely over-represent the true nature of their surface rights alleging that 185 wells would be required to fulfill their decree, when in fact it could be met by a single irrigation well. As such, the claim is not credible, and the doctrine of unreasonable method of diversion should apply.

The Nussbaum Defendants hereby adopt the arguments set forth in the Reply Briefs filed by the Anderson Defendants, and the Colorado Ground Water Commission.

IV. REPLY ARGUMENT

1. THE COMMISSION'S HEARING REGARDING THE CREATION OF THE CROW CREEK DESIGNATED GROUND WATER BASIN WAS A QUASI-JUDICIAL ACT AND AS SUCH SHOULD BE AFFORDED FULL RECOGNITION UNDER THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA.

The Gallegoses claim that the doctrines of collateral estoppel and *res judicata* do not apply to the instant case because the creation of Crow Basin was quasi-legislative in nature and not a quasi-judicial act. (Pl.'s/Appellant's Answer/Reply Br. 25.) The Nussbaum Defendants disagree. This Court has stated that there is no single litmus test for determining the nature of a particular proceeding. *See Cherry Hills Resort Dev. Co. v. Cherry Hills Vill.*, 757 P.2d 622, 627 (Colo. 1988). The language from *Cherry Hills* relied on by the Gallegoses stems from *City and County of Denver v. Eggert,* 647 P.2d 216 (Colo. 1982) and "stands for the proposition that it is the nature of the decision rendered . . . and not the existence of a legislative scheme mandating notice and a hearing . . ." that determines the nature of the proceeding in question. 757 P.2d at 627. However, the Court recognized that the existence of a notice and a hearing requirement like that of §37-90-106 C.R.S. is "compelling proof that any decision under that legislative scheme is intended to be quasi-judicial in character . . . ." *Id.* at 626; *see*

also Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203, 1207 (Colo. App. 2000) ("Where a statute requires notice to affected persons and a hearing before an impartial decision-maker, the action is almost certainly quasi-judicial.").

Thus reiterated, "[t]he existence of a statute or ordinance mandating notice and a hearing to those persons whose interests are likely to be affected by the decision is a clear signal that the governmental decision is to be regarded as quasi-judicial . . . ." 757 P.2d at 627. The Nussbaum Defendants have clearly argued the facts pertinent to the fact that Gallegos' predecessor in interest received notice of the creation of Crow Basin subject to §37-90-106 C.R.S. and appeared through its attorney to testify in support of creation and designation of Crow Basin. (*See* Def.'s Opening/Answer Br. 13-20.) The Gallegos' predecessor in interest and all other parties located within the proposed boundaries of Crow Basin had property interests that could be adversely affected by the basin's ultimate creation, and they had an opportunity to object to the inclusion of their lands within Crow Basin. (*See e.g.*, Affidavit of Ms. Cristie L. Nicklas, Def.'s Opening/Answer Br., App. 5.) Only one party that was subject to the creation of Crow Basin objected to the inclusion of their lands; the Commission subsequently excluded that property. (*See* Designation Order p. 1, and ¶¶9, 16.)

The Gallegoses point to *Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212 (Colo. 1996) to establish that the Commission acts in both quasi-legislative and quasi-judicial capacities. The Nussbaum Defendants do not deny this truism. But it bears clarification that the matter in *Eagle Peak Farms* pertained to the quasi-legislative actions that the Commission undertakes pursuant to its rule making authority. *See id.* at 214, n. 1. The Commission's basin designation proceedings, by contrast, have the trappings of a quasi-judicial action.

In *Gilpin County Bd. of Equalization v. Russell*, 941 P.2d 257 (Colo. 1997) this Court set forth the elements that would typify a quasi-judicial action:

> Quasi-judicial action is characterized by the following factors: (1) a local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring a hearing before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case.

Id. at 262 (citing *Hadley v. Moffat County Sch. Dist.*, 681 P.2d 938, 945 n. 3 (Colo. 1984)). These elements are easily satisfied under the legislative scheme established by the General Assembly in the Management Act. First, Section 37-90-112 establishes the notice requirements via publication. §37-90-112 C.R.S. Second, Section 37-90-106 requires that following proper publication notice, a hearing be held before the Commission to consider creation of a designated ground water basin. §37-90-106 C.R.S. Section 37-90-113 establishes the hearing requirements,

and grants all parties the right to subpoena witnesses to testify under oath, and to be represented by an attorney. §37-90-113(1) C.R.S. The final element is met by the provisions of §37-90-106 wherein the Commission is directed to take the facts discovered at the hearing and apply the definition of "designated ground water" under §37-90-103(6)(a) to those facts. This application of facts to a prescribed definition is quasi-judicial in nature. This Court's language in cases giving substance to the effect of the Commission's findings subsequent to a designation hearing supports this conclusion. *See e.g., State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981) ("The creation of the designated ground water basin reflects the commission's conclusion that the quantity of ground water in the basin that would come within the definition of designated ground water upon determination of the basin pursuant to section 37-90-106, C.R.S. 1973, is sufficient to support such a determination.").

The Management Act's notice and hearing requirements differentiate the designation proceedings from the Commission's rule making authority. In *Eagle Peak Farms*, this Court recognized the proceedings under the sections immediately preceding §37-90-115's appeal provision as non-rulemaking actions. *See Eagle Peak Farms,* 919 P.2d at 219. The Court stated "[t]he 'acts' and 'decisions' of the Commission referenced in section 37-90-115 are non-rulemaking in nature, such as

those involving the application of statutes or rules to specific well permit applications, **water rights**, change of water rights, **or other matters focusing on particular water users** in specific circumstances." *Id.* at 221 (emphasis added). The Nussbaum Defendants believe that the Court's language used here encompasses the creation of Crow Basin via the designation proceedings outlined in §37-90-106.

For a particular water user's water rights to be affected in compliance with the notions of due process, personal service is not necessarily required—notice by publication is sufficient.

> It has been the rule in this state since territorial days that statutes relating to publication of notice in legal proceedings must be strictly complied with. [citation omitted] **Notice by publication is the law's substitute for personal notice.** It is frequently called constructive notice, but to be effective as against any one whose rights are involved . . . strict compliance with the proper statute is essential . . . .

People for Use of Sch. Dist. No. 6, Conejos County v. Schaeffer, 65 P.2d 699, 701 (Colo. 1937) (emphasis added); *see also Holly Dev., Inc. v. Bd. of County Comm'rs of Arapahoe County*, 342 P.2d 1032, 1037 (Colo. 1959) (quoting *People for Use of Sch. Dist. No. 6, Conejos County v. Schaeffer*, 65 P.2d 699 (Colo. 1937)). The Gallegoses do not allege any deficiency in the notice published prior to the creation of Crow Basin, nor was any such claim brought by their predecessor in interest. The fact that the Commission's hearing held subsequent to the notice

requirements of §§37-90-106 and 37-90-112 had the potential of affecting many individuals within the proposed basin does not detract from the fact that it had the potential of affecting the Gallegoses individually. So long as sufficient notice is given, a party affected by creation of the basin cannot claim that the creation does not affect them individually, but only extends as much to their neighbors within the basin boundaries.[1] Likewise, the parties that did appear at the Crow Basin designation proceedings and requested that their lands be excluded from the basin boundaries (*see* Designation Order p. 1 and ¶¶9, 16) cannot later argue that they should benefit from the legal effects of inclusion and summarily decide that they want to be included.

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[1] *See e.g.*, *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981). In *Vickroy*, the Water Management District and the State Engineer attempted to enjoin, by a suit in the proper district court, diversions from the plaintiff's wells that the District and Engineer contended were waters from a designated basin. Vickroy argued that the matter should be resolved in the proper water court in the first instance because the waters were waters of the state, and thus within the water court's jurisdiction. The land where the wells were located was within the designated ground water basin. *See id.* at 759. The Court stated:

> There is no indication in the record whether Vickroy sought to have the boundaries drawn to exclude his land, as he might have done in the proceeding by which the basin was determined. *See* section 37-92-106(2), C.R.S.1973. Under similar circumstances we have termed arguments much like those made by Vickroy here as "an impermissible collateral attack on the decision of the commission to include the appellant's land within the boundaries of the (designated ground water) Basin[.]"

Id. at 759, n.8 (quoting *Larrick v. N. Kiowa-Bijou Mgmt. Dist.*, 510 P.2d 323, 329 (Colo. 1973)).

Despite the Gallegos' contentions, their water rights were the subject matter of the designation proceeding. Their predecessor in interest was represented by counsel at the designation proceeding where their rights were addressed along with the rights of all other surface right's owners within the proposed basin. Furthermore, the issue regarding the Commission's responsibilities in administrating and thus protecting surface rights within Crow Basin was addressed and determined. (*See* Designation Order, Def.'s Opening/Answer Br., App. 4, ¶18.) The Gallegos' predecessor in interest, acting through its attorney, had a full and fair opportunity to object to the inclusion of their land within Crow Basin; the subsequent effect that the inclusion would have on their rights was well known to them. (*See* Affidavit of Ms. Cristie L. Nicklas, Def.'s Opening/Answer Br., App. 5.)

Therefore, the Court should find that the Commission's Designation Proceeding was a quasi-judicial act and as such should be afforded full recognition under the doctrines of collateral estoppel and *res judicata.*

2. THE DISTRICT COURT CORRECTLY RULED THAT SURFACE RIGHTS LOCATED IN A DESIGNATED BASIN ARE SUBJECT TO RESTRICTIONS INCLUDING THE DOCTRINE OF REASONABLE METHOD OF DIVERSION.

As discussed in more detail in the Nussbaum Defendant's Opening/Answer Brief, the District Court correctly ruled that there are certain restrictions and

guidelines that apply to surface rights in a designated basin. For example, the District Court found that a surface right holder has the burden of showing unreasonable injury caused by the well permitees in the basin, and that there is a presumption of reasonableness attributed to well permitees operating in compliance with their permits. (*See* District Court Order, Def.'s Opening/Answer Br., App. 3 at 8.) The District Court also found that the futile call doctrine and the doctrine of unreasonable method of diversion apply to disputes in a designated basin, even as between a surface right holder and a designated basin well permitee. (*See id.*) The Nussbaum Defendants addressed many of these issues in their Opening/Answer brief as did the Anderson Defendants and the Commission.

However, the Gallegoses have introduced a new issue on page 30 of their Answer Brief. That issue concerns what would be appropriate circumstances for withdrawal of ground water to satisfy their surface rights. The Gallegoses assert that to satisfy their decreed right, they would have to pump 185,000 gallons of water per minute. (Pl.'s / Appellant's Answer/Reply Br. 30.) They assert they are entitled to 413 cubic feet per second in their decreed right. The Nussbaum Defendants dispute the calculations relied on by the Gallegoses and believe that the Gallegoses have misrepresented the true nature of their surface rights.

First, the Hydrologic Study (R. Vol. 3, p. 780) conducted when the Commission designated Crow Basin found that beginning in the 1950s numerous dams were constructed in Wyoming for municipal and irrigation purposes, and there began extensive ground water development along Crow Creek in the Carpenter, Wyoming area. (*See id.* at 798, 802.) These projects caused a major diminishment in Crow Creek's surface flows between Cheyenne, Wyoming and the Colorado-Wyoming state line. (*Id.* at 802.) In normal years, March and April spring runoff resulted in surface flows reaching the state line only in small amounts. (*See id.* at 798.) Generally, there was no water in the creek at the state line during the farming season. (*See id.* at 799.)

The Gallegos' surface rights date to 1914, well before the dams and diversions were constructed upstream of the state line. It is axiomatic though that the measure of their senior surface rights is limited by several factors. "One limitation is that 'diversions are limited to an amount sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion.'" *In re Bd. of County Comm'rs of County of Arapahoe*, 891 P.2d 952, 969 (Colo. 1995) (quoting *Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064, 1067 (Colo. 1981)). Furthermore, "[a]bsolute water right decrees should be considered to the extent of historical diversions, not

to the maximum amount for the decreed purpose." *Id.* "Historical use is measured by the amount of water applied to a beneficial use and the amount to [sic] return flow." *City and County of Denver v. Snake River Water Dist.*, 788 P.2d 772, 785 (Colo. 1990) (citing *May v. United States*, 756 P.2d 362, 371 (Colo. 1988), *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363, 373 (1982)). The Hydrologic Study found that the diversion records provided by the appropriators for the past fifteen years indicate about 650 acre feet of surface water was diverted from Upper Crow Creek within the study area during normal runoff years. (R. Vol. 3, p. 793.) Of this amount the only ditch used by the Gallegoses, the Larson Ditch, averaged 476 acre feet per year over a fifteen year period spanning from 1970 to 1985. (R. Vol. 3, pp. 802-03.) (This figure excludes the 1983 flood flows.) Even assuming that all of the water in the Larson Ditch is attributable to the Gallegos' use and there is 100% consumption and no return flows, a single irrigation pump could meet the alleged Gallegos' needs. An irrigation well pumping 1130 gallons per minute (gpm) pumps 5 acre feet per day. Assuming an irrigation period of twenty days per month, this well could easily pump the 476 acre feet over a five month irrigation season. Thus, the historical diversion of 476 acre feet reflected in the Hydrologic Study could be pumped by one irrigation well pumping 1130 gpm during the farming season.

Ironically, these numbers are supported by the terms and conditions of a conditional well permit issued by the State Engineer to the Gallegoses on February 12, 2003. (R. Vol. 5, Ex. 48.) The State Engineer issued the permit for the construction of **one well**. (*See id.*) The maximum pump rate was set at 1480 gpm, for a maximum annual withdrawal of 463 acre feet to irrigate 185 acres as described therein. (*See id.*, ¶¶4, 6, 7.) Although the Gallegoses did not install the well, the fact that the State Engineer issued a permit demonstrates that a more reasonable method of diversion is available. Regardless if one accepts the calculations presented above, or the limits set forth in the conditional well permit, the fact remains that a single irrigation well is sufficient to fulfill the Gallegos' surface right—a number far below the 185 wells the Gallegoses would have this Court believe is necessary.

V. CONCLUSION

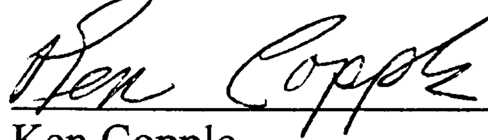
The Commission's designation proceeding was a quasi-judicial act and as such should be afforded full recognition under the doctrines of collateral estoppel and *res judicata.* The notice and hearing requirement under §37-90-106 C.R.S. is compelling proof that the designation proceeding is quasi-judicial in nature. The Commission, after proper notice and hearing, applies the statutory definition of "designated ground water" to the facts discovered at the hearing through testimony

and submitted reports. The Nussbaum Defendants respectfully request that this Court recognize that the Commission's designation proceedings are quasi-judicial in nature and as such that the doctrines of collateral estoppel and *res judicata* should apply. The Commission's responsibilities as to administration of surface rights within Crow Basin were determined when the basin was created; the Gallegoses should be bound by such determination. This Court should also find that *res judicata* precludes the Gallegoses from asserting claims of injury to their surface rights. These claims could have been addressed at the designation proceedings.

The District Court correctly ruled that surface rights in a designated basin are subject to certain limitations including the doctrine of "unreasonable method of diversion." The Gallegos' argument against requiring them to drill a well to fulfill their decree severely overstates the nature of their right. Their claim is not credible and this Court should find that as a matter of law the doctrine of unreasonable method of diversion applies.

Respectfully submitted on this 2nd day of June, 2006:

KEN COPPLE & ASSOCIATES, P.C.



Ken Copple

CERTIFICATE OF COMPLIANCE WITH C. A. R. 28(g)

In accordance with Rule 32(A)(3) of the Colorado Rules of Appellate Procedure, the undersigned counsel certifies that this brief complies with the word limit set forth in C.A.R. 28(g), and that this brief, exclusive of the items listed in Rule 28(g), contains 3191 words.

Respectfully submitted on this 2nd day of June, 2006:

KEN COPPLE & ASSOCIATES, P.C.

Ken Copple

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing REPLY BRIEF was served via U S Mail, postage prepaid on this 2nd day of June, 2006, on the following:

Lind, Lawrence & Ottenhoff LLP
1011 11thAve
Greeley, CO 80631

Alexandra Davis
Attorney Generals Office
1525 Sherman St. 5th floor
Denver, CO 80203

Rosella Jessen
59363 WCR
Grover, CO 80729

Edna Anderson
5894 US Highway 36
Last Chance, CO 80757

Timothy Buchanan P.C.
7703 Ralston Rd.
Arvada, CO 80002

Michelle Haines
____