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Overview

The Colorado Supreme Court recently made a monumental decision in two related cases potentially affecting water rights for agricultural operations and other rural landowners. While the specific legal issue decided in each case was narrow, the ultimate effect of the two cases could significantly impact Colorado's entire water allocation system.

Colorado utilizes the ballot referendum and initiative process. The process gives Coloradans the ability to initiate legislation via statute or as a constitutional amendment. They also can repeal legislation by means of a veto referendum.¹ Under the Colorado system, each proposed measure must address only one subject that must be closely linked to a measure's ballot title.²

The Water Law Ballot Title Cases

In two cases,³ the court was asked for a very narrow ruling regarding whether the titles, ballot titles, and submission clauses for the two proposals each contained a single subject that would alert the voters to the substance of the initiative. In this inquiry, the court was prohibited from addressing the merits of the proposed initiative or how it might be actually applied if enacted.

As noted above, Colorado law requires that every amendment or law proposed by initiative be limited to a single subject. An overarching theme is not enough to make the initiative

related to one subject if there are separate and unconnected purposes to the initiative. The purpose of the rule is to prevent the enactment of measures that might fail on their own merits if not tied to additional issues, and to avoid voter surprise by the inadvertent passage of a provision in a complex initiative. This was the narrow issue reviewed by the court. The framework for the inquiry was the same for both initiatives reviewed. Dissenting in both cases, Justice Hobbs warned of the potential issues unseen and separate and distinct purposes not connected with each other, which should have rendered these initiatives improper.

*In re Title, Ballot Title and Submission Clause for 2011-2012 #3.*⁴ Title #3 at issue in this case asked voters to adopt the "public trust doctrine" as applied to the use of Colorado's water. The impact of applying the doctrine to water would be to subordinate contract, property, and appropriative water rights to the creation of a public estate in water. It would also allow public access along any natural stream in Colorado and provide enforcement mechanisms for the public.

The initiative was challenged based solely on the claim that the initiative expressed more than a single subject. However, the court found that the Title contained a single subject and that it fairly and clearly reflected the proposed measure relating to "the public's rights in the waters of natural streams." There were no other arguments presented to the court regarding the invalidity of the initiative, so the court found that the Title and initiative was proper.

Justice Hobbs dissented. He agreed the stated purpose, which is “to protect the public’s interests in the water of natural streams and to instruct the state of Colorado to defend the public’s interests in the water of natural streams and to instruct the state of Colorado to defend the public’s water ownership rights and public enjoyment’...the right to divert the public’s water for beneficial use is a ‘grant from the people of the state of Colorado to the appropriator for the common good’” is consistent with 150 years of Colorado water law, which is what voters could believe they were affirming with their votes.

But, within the meat of the initiative, Justice Hobbs found three separate subjects not dependent on each other, which could mislead voters regarding the true scope of the initiative. He addressed each of these issues in turn. But, he was also concerned that, when combined, all three subjects would create new rights for Colorado’s public at the expense of current property interests and established water law.

The first issue was that the initiative would subordinate all existing water rights in Colorado to a newly created dominant water estate. This would mean a change to existing water rights and create a super water right for all environmental and recreational uses, which are currently subrogated to statutory instream flow and lake level water rights.

The second issue was that there would be a public possessory interest in the beds and banks of streams currently owned by public entities and private landowners. The final issue was the creation of a new property right of access to the public to any natural stream in Colorado. This interest would create a vast recreational easement for the public over all private land through which a trickle of water runs. According to Justice Hobbs, the effects of these unexpected and dramatic changes in Colorado water law should not be thrust upon Colorado voters through an improper multi-subject initiative.

The appeal of unfettered rights of access to any natural stream of Colorado combined with

extensive private enforcement mechanisms for environmental factors might be appealing to many Colorado residents, but these would be at the expense of drastic changes in property rights in Colorado and current designated water uses.

*In re Title, Ballot Title and Submission Clause for 2011-2012 #4.*⁵ The Title #45 initiative involved the “public control of waters.” The court found that all of the proposed provisions properly related to this public control. The public control would eliminate unappropriated and natural stream limitations from within the legal framework and bring all water into a public water estate with public control. The initiative would give residents a limited use to the water owned by the state so long as the water used is returned “unimpaired to the public.” The court held that this initiative “does not alter the long-recognized scope of the subject”; it merely “modifies the existing rights and interests in water between private individuals and the public.”

Again, Justice Hobbs dissented. He wrote that the initiative, if passed, would create voter surprise when the effects of the initiative were actually implemented. The initiative would change the Colorado Constitution and subject all water within the state to an appropriation system. Currently, non-tributary groundwater is vested in the overlying landowner. Justice Hobbs pointed out that if passed, groundwater would no longer be treated this way. Also, he stated, the initiative would return water that had already been appropriated to be re-appropriated by the state to protect the natural environment and the public’s use and enjoyment rather than used for the beneficial purpose for which it was originally appropriated.

Further, Justice Hobbs argued, the requirement to return water unimpaired to the public would transform Colorado’s legal water law to a riparian water system. This would mean landowners adjacent to streams and rivers would have rights to use the water due to their proximity to it, but face strict limits as to the actual use of water because downstream users would have rights to water flow in the natural volume and channels unimpaired in quality by

the upstream user. If Colorado would become a riparian water state, the flow of streams and waters in Colorado would drain unimpeded and unchanged straight into reservoirs, fields, and cities of neighboring states rather than fully benefit the people of Colorado.

Additionally, Justice Hobbs points out, these complex issues would deprive Colorado of its interstate allocation of waters from the Platte, Arkansas, Rio Grande and Colorado Rivers by imposing a non-consumptive regimen upon the state and its users. This would devastate the state's economy and quality of life.

Because of these multiple concealed issues within a complex initiative, Justice Hobbs stressed that voters would be forced to vote for all or none even if they did not favor all three. These multiple issues would cause voter confusion and result in unexpected surprise to the voters. Because of this, Justice Hobbs determined that the initiative should have been ruled invalid for failing to address a single subject.

What The Future Holds

After reviewing the limited legal challenge to the initiatives, the court allowed the two ballot initiatives to proceed to a vote. The ensuing battle over these initiatives will likely be fierce. Passage would result in a fundamental change in Colorado's water law that has been working for citizens for more than 130 years.

Proponents say these initiatives would prevent farmers from exercising their rights during droughts thereby drying up precious rivers and could even prevent water use in hydraulic fracturing. They favor the initiative as an environmental protection of Colorado's natural resources. The initiatives themselves might be also be appealing to active, recreational users of Colorado's water system.

Opponents of the initiatives, including water users and state agencies, believe the initiatives go too far at the expense of private land rights and those who have put Colorado's water to beneficial use.

Neighboring states, meanwhile, will likely have the largest gains from passage of these initiatives as precious water resources in the western state will be required to flow unimpaired back into the rivers and aquifers being used by their residents.

Stay tuned as we continue to monitor the debate.

Note: Neither initiative made the November 6, 2012 Colorado ballot.

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¹ The Colorado General Assembly may also place measures on the ballot as legislatively-referred constitutional amendments or legislatively-referred state statutes. Referred amendments require a 2/3 vote of each chamber.

² Colorado Constitution, Article V, Section 1.

³ In re Title, Ballot Title and Submission Clause for 2011-2012 #3, 274 P.3d 562 (Colo. Sup. Ct. 2012) and In re Title, Ballot Title and Submission Clause for 2011-2012 #45, 274 P.3d 576 (Colo. Sup. Ct. 2012).

⁴ No. 12SA8, 2012 WL 1259027 (Colo. Apr. 16, 2012).

⁵ No. 12SA22, 2012 WL 1259041 (Colo. Apr. 16, 2012).