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Technical Corner

The Colorado Supreme Court Weighs in on Rights to Use Subterranean Storage Space

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With growing water demand and limited surface storage resources, use of surplus subterranean storage space has become a valuable and coveted resource. However, the legal framework for its use has not yet fully developed. One persistent issue is whether overlying landowners can control the use of storage space beneath their land. A convincing argument can be made that California precedent has already decided against landowners on this issue. *See City of Los Angeles v. City of San Fernando, 14 Cal.3d 199, 264 (1975); City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 76-77(1943); and Niles Sand and Gravel v. Alameda County Water Dist.*, 37 Cal.App.3d 924. If the California courts follow the lead of a recent Colorado Supreme Court Case, such claims will be conclusively put to rest.

In an opinion earlier this spring, the Colorado Supreme Court held that landowners can not enjoin, and have no right to compensation for, non-injurious use of the storage space beneath their property. *County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (2002). The case arose from an application for state permits by a private sportsmen's ranch to initiate a conjunctive use storage project on their land. Neighboring landowners filed a declaratory rights action against the ranch alleging: (1) that water from the proposed storage project would enter into subterranean storage space beneath their land; (2) that the ranch had no right to store water beneath the neighboring property without permission of the neighbors; and (3) that such unauthorized use constituted a trespass. The neighboring landowners based their complaint on the common-law property doctrine that holds that property ownership extends to the sky and to the depths of the earth, and on certain Colorado constitutional and statutory provisions.

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Dismissing the neighboring landowners' claims, the Court held that the law does not recognize control of aquifers as a property right. In the Court's view, the nature of water as a public resource allows water generated or flowing from one property to another to be used by a lawful appropriator. Water resources are not like mineral resources which are relatively immobile and owned as part of land ownership. Accordingly, landowners simply cannot claim absolute ownership of water below their land. On this reasoning, the Court held that the common law doctrine of property ownership extending to the sky and to the depths of the earth is inapplicable to groundwater resources.

While California does recognize an association between groundwater rights and land ownership in the form of overlying rights, the Colorado Supreme Court's reasoning is nonetheless applicable to California where water in its natural state is also considered a common public resource (Water Code § 102) while flowing from one parcel to another.

The Court further noted that Colorado law specifically authorizes use of aquifers for storage of artificially recharged water. Such activity is also similar to the use of a surface stream for transport of foreign or developed water, which Colorado law allows. Accordingly, the Court held that possessors of appropriative rights are entitled to artificially recharge an aquifer as part of their decreed water right if the aquifer can accommodate the recharged water without injury to senior rights and overlying land uses. The California Supreme Court relied on a similar analogy in *Glendale and San Fernando*. *Glendale, supra, 23* Cal.2d 68 at 76-77 [affirmed by *San Fernando, supra*, 14 Cal.3d at 263-64]. There, the Court reasoned that California Water Code section 7075, which expressly authorizes use of surface stream for transport of developed water, also authorizes use of subterranean storage space to store developed water. *Id*.

Because the reasoning in *County of Park* was largely based on the generically applicable nature of groundwater resources and common legal doctrines,

Colorado's approach will likely be followed by other states. Indeed, the Court relied on similar holdings in Ohio (*Chance v. BP Chemicals, Inc*, 77 Ohio St.3d 17 (1996)), Arizona (*W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Resources*, 200 Ariz. 400 (2001)), and California (*San Fernando, supra*,14 Cal.3d 199)). The Colorado Supreme Court quoted *San Fernando*'s explanation that the "fact that spread [artificially recharged] water is commingled with other ground water is no obstacle to the right to recapture the amount by which the available conglomerated ground supply has been augmented by the spreading." *County of Park*, 45 P.3d at 701 quoting *San Fernando, supra*, 14 Cal.3d at 263-64.

The California Supreme Court has twice recognized the right to use surplus subterranean storage space to store developed water on multiple occasions. *San Fernando, supra*,14 Cal.3d at 263-64 and *Glendale, supra*, 23 Cal.2d 68 at 76-77. In neither case did it mention overlying landowners in relation to this storage right. Additionally, *Niles Sand and Gravel* held that a landowner was not entitled to compensation for storage of water beneath its property that interfered with its sand and gravel operation. *Niles Sand and Gravel, supra*, 37 Cal.App.3d 924. These cases suggest that landowners in California are not entitled to compensation for storage of water beneath their property where there is no infrastructure placed upon their land, their overlying groundwater rights are not impaired, and there is no inundation or interference with their lawful use of their surface property. The recent ruling from Colorado provides evidence that sister states are reaching the same result.

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