DISTRICT COURT, WATER DIVISION 5, STATE OF COLORADO Court Address: Garfield County Courthouse 109 8th Street, Suite 104 Glenwood Springs, CO 81601	DATE FILED: February 17, 2017 3:57 PM CASE NUMBER: 2014CW3095
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: **HIGH VALLEY FARMS, LLC** IN PITKIN COUNTY, COLORADO	COURT USE ONLY Case No. 14CW3095
ORDER REGARDING ISSUES RAISED IN THE SUMMARY OF CONSULTATION	

The Court having considered High Valley Farms, LLC's ("High Valley") Response to Division Engineer's Consultation report filed on November 13, 2015 in the above-captioned matter, and being fully advised in the premises, makes the following determinations.

I. Factual and Procedural History

This case concerns High Valley's application for an underground water right, surface water rights, storage water rights, and a plan for augmentation including exchange. *See Second Amended Application*, filed on May 31, 2016. High Valley is seeking to appropriate water from the Roaring Fork River. High Valley is not claiming the use of any federal contract water or any federal water facilities. The application specifically lists one of the proposed uses as "commercial and industrial uses associated with operation of a marijuana cultivation facility, which includes, but is not limited to irrigation within a 37,500 square foot greenhouse, Operation of the Mechanical Systems and Commercial In-House Uses." *Id.* ¶ 7. High Valley is licensed to operate a marijuana cultivation facility. *Response to Division Engineer's Consultation Report*, at 2 (November 13, 2015).

As required by statute, the Division Engineer for Water Division 5 filed a Summary of Consultation for each amended application in this case. *See Summary of Consultation* (filed on November 12, 2014, August 31, 2015, and January 23, 2017). In each Summary of Consultation, the Division Engineer asked High Valley to explain how its water rights can be granted in light of the statutory definition of beneficial use – "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purposes for which the appropriation is *lawfully* made." *Id.* at concern 1 (emphasis in the Summary of Consultation). The Division Engineer also asked for an explanation on how a plan for augmentation could be granted pursuant to the statutory definition of a plan for augmentation – "a detailed program . . . to increase the supply of water available for *beneficial use*." *Id.* at concern 2 (emphasis in the Summary of Consultation). High Valley provided a response to the Summary of Consultation on November 13, 2015. In its response, High Valley explained why use of water for marijuana cultivation is lawful under Colorado water law. *Response to Summary of Consultation*, at 1-9. High Valley requested that the Court decide this issue.

II. Issue

The issue before the Court is whether High Valley can lawfully appropriate water to cultivate marijuana and for use in its greenhouse facilities in light of the Federal Controlled Substances Act (the "CSA"), which prohibits all marijuana use. Whether High Valley can seek to appropriate water for marijuana cultivation is a threshold issue in this case. To resolve this issue, the Court must determine how "lawful" is used in the water law statutes and if there is a conflict between those statutes and the CSA.

III. Standard of Review

The primary purpose in statutory construction is to ascertain and give effect to the legislature's intent. *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016). The court first looks to the statutory language, giving words and phrases their plain and ordinary meanings. *Id.* The court reads the words and phrases of the statute in context, and construes them according to the rules of grammar and common usage. *Id.*

Further, courts are required to interpret a statute to give effect to the purpose of the legislative scheme. *Id.* at 196. "In doing so, we read the scheme as a whole, and we give consistent, harmonious, and sensible effect to all of its parts. We also must avoid constructions that would render any statutory word or phrase superfluous or that would lead to illogical or absurd results." *Id.*

IV. Legal Standards

A. *Colorado's Authority to Allocate and Regulate its Internal Water Resources.*

Colorado's authority to develop a system to regulate and allocate its water resources derived from the federal government, which initially owned almost all of the lands within the boundaries of Colorado and other western states. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). In 1866, Congress passed the Mining Act to expressly confirm the federal policy of deferring to State sovereignty in the determination and allocation of water resources within State boundaries. Mining Act of July 26, 1866, ch. 262, 14 Stat. 251, 253 (*currently codified at* 30 U.S.C. § 51 (2012)). The Mining Act affirmatively acknowledges the federal government's acceptance of "the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899).

Following the Mining Act, Congress passed several other acts that resulted in "sever[ing] water from other property interests in land, consigning the establishment of water rights to the states while also retaining its continuing power to establish reserved water rights under the law of the United States." *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1267 (Colo. 1998). *See, e.g.*, Desert Lands Act of March 3, 1877, ch. 107, 19 Stat. 377 (*currently codified at* 43 U.S.C. §§ 321 to 323, 325, 327 to 329 (2012)); Timber Culture Act of March 3, 1891, ch. 591, 26 Stat. 1095 (*currently codified at* 43 U.S.C. § 946 (2012)). Similarly, section 8 of the Reclamation Act recognizes that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation . . . ." 43 U.S.C. § 383.

The United States Supreme Court has stated that throughout the history of the reclamation of arid lands "runs the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653, 98 S.Ct. at 2990. Accordingly, "federal statutes, as interpreted by the United States Supreme Court, recognize Colorado's authority to adopt its own system for the use of all waters within the state in accordance with the needs of its citizens, subject to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters. *Dept. of Natural Resources v. Southwestern of Colorado Water Conservation Dist.*, 671 P.2d 1294, 1307 (Colo. 1983) (*overruled on other grounds as stated in Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987)).

B. *Appropriation and Beneficial Use under Colorado Water Laws.*

The Colorado Constitution expressly recognizes that "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of

the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Colo. Const. art. XVI, § 5. Under Colorado's prior appropriation doctrine, a water right is a usufructuary right that is created when a specific quantity of water is applied to an actual beneficial use. *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011). "The right to divert the unappropriated waters of any natural stream to beneficial uses *shall never be denied*." Colo. Const. art. XVI, § 6 (emphasis added). The Constitution "guarantees Colorado's system of prior appropriation as it had developed since territorial days and protects the people of the state from divestment of appropriation." *St. Jude's Co. v. Roaring Fork Club, LLC*, 351 P.3d 442, 448 (Colo. 2015). A statute cannot "prohibit the appropriation or diversion of unappropriated water for useful purposes." *Fox v. Division Engineer*, 810 P.2d 644, 646 (Colo. 1991) (*citing Larimer County Reservoir Co. v. People*, 8 Colo. 614, 618, 9 P. 794, 797 (1886)).

An appropriation is statutorily defined as "the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law." Colo. Rev. Stat. § 37-92-103(3)(a). Under Colorado law, an appropriation consists of two elements: (1) the diversion of water from a natural stream; and (2) the application of that water to a beneficial use. Diversion of water alone is not enough to create a water right. *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999). "The touchstone of Colorado's prior appropriation doctrine is beneficial use. As such, an appropriator of water perfects a water right only by application of a specified quantity of water to an actual beneficial use." *Widefield Water & Sanitation Dist. v. Witte*, 340 P.3d 1118, 1123 (Colo. 2014) (internal quotations and citation omitted).

Section 37-92-103(4) defines beneficial use as the "use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." While what constitutes a valid appropriation under Colorado law has been addressed and defined in numerous cases since Colorado's territorial days, neither the Constitution nor the 1969 Water Right Determination and Administration Act ("1969 Act") define the parameters of what constitutes a beneficial use. *See Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34 (Colo. 1997) (*citing Yunker v. Nichols*, 1 Colo. 551, 570 (1872)). Instead, "the 1969 Act's definition of beneficial use is expansive, leaving room for new, innovative uses." *St. Jude's*, 351 P.3d at 449.

The Colorado Supreme Court has defined a lawful appropriation as the amount of water sufficient for the decreed purposes of the water right that an water user "may apply . . . to any of the beneficial uses he may see fit, as against other parties whose rights have accrued subsequently to his own, provided the amount of water taken by him is not thereby increased beyond that of his original appropriation nor the rights of those coming later injured or impaired in any manner." *Santa Fe Trail*, 990 P.2d at 53 (*citing* Clesson S. Kinney, *A Treatise on the Law of Irrigation* 375 (1894)). Accordingly, a water right in Colorado is a right to use a certain amount of water for beneficial use, "from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right." *Id.*

C. *Laws Governing Marijuana Cultivation.*

i. Colorado Law.

The Colorado Constitution authorizes the personal and commercial use of marijuana as well as the operation of marijuana-related facilities. Colo. Const. art. XVIII, § 16(3)-(4). In response to the constitutional amendments, the Colorado legislature adopted the Colorado Retail

Marijuana Code (the "Code"). Colo. Rev. Stat. § 12-43.4-202(2)(b). *See also* 1 CCR 212-2 ("Regulations"). The Code and the related Regulations contemplate that an adequate source of water will be supplied to allow the operation of marijuana grow facilities. *See* 1 CCR 212-2, Regulation 504(B)2(c), 10, and 11.

As the entity responsible for the administration and distribution of the waters of the state, the Office of the State Engineer has issued a Written Instruction and Order regarding the use of water for marijuana irrigation. Colo. Rev. Stat. § 37-92-501(1) ("[t]he state engineer and division engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article"); *Written Instruction and Order 2015-01*, dated March 25, 2015 (the "Order"). The Order defines irrigation as the application of "water to any type of plant that may be legally grown under Colorado law for the purpose of growing such plants." *Order*, at 2. Further "[t]he State Engineer and Division Engineers shall allow Irrigation Water Rights to be used to irrigate any type of plant that may be legally grown under Colorado law . . . ." *Id.* at 1.

ii. Federal Law.

The CSA classifies marijuana as an illegal drug and prohibits marijuana use. 21 U.S.C. § 844(a)(2012). The CSA prohibits all marijuana use. *See Gonzales v. Raich*, 545 U.S. 1, 29 (2005). The CSA also includes language that it does not preempt state law on the subject matter "unless there is a positive conflict between a provision of [the CSA] and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903.

In the *Gonzales* case, the United States Supreme Court concluded that the Commerce Clause and the Supremacy Clause both include Congressional power to prohibit the local cultivation and use of marijuana. *Id.* at 2201-15. *Gonzales* raised the question of whether a locally grown product used within a state's boundaries rather than sold on the open market is

subject to federal regulation. In reaching its conclusion, the Court stated that Congress can regulate purely intrastate activity, if it concludes that a failure to regulate that class of activity would undercut the regulation of the interstate market for a particular good. *Id.* at 2205-06. The Court also relied on the Supremacy Clause, which recognizes that if "there is any conflict between federal and state law, federal law shall prevail." *Id.* at 2212.

The Bureau of Reclamation has issued a policy regarding the use of Reclamation water and/or its facilities for marijuana cultivation. *Policy PEC TRMR-63* (May 16, 2014) (the "Policy"). The Policy states that "Reclamation will operate its facilities, make available contract water, execute and administer its water-related contracts, and otherwise perform its contractual and legal duties in a manner that is consistent with the CSA." *Id.* ¶ 5. The Policy specifically exempts non-federal water and non-federal facilities. *Id.* ¶ 5.D.

iii. Conflict Between Colorado and Federal Law.

The Colorado Supreme Court addressed the conflict between Colorado and Federal law governing marijuana in *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015). *Coats* involved an employment statute that protected the "lawful activities" of employees. *Id.* at 852. However, the statute did not define the term "lawful." The issue before the Court was whether medical marijuana use permitted by Colorado law but prohibited under federal law is lawful under the state employment statute. *Id.* The Court concluded that "lawful" as used in the statute at issue means lawful under both federal and state law. To support its conclusion, the Court explained that the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail, including in the area of marijuana regulation." *Id.* The Court also noted that in the employment law context, lawful is generally understood to mean complying with the applicable state and federal laws. *Id.* at 852-53.

In the *Crouse* case, the Colorado Supreme Court applied a preemption analysis to determine if compliance with Colorado law would necessarily require noncompliance with the CSA. *People v. Crouse*, 2017 CO 5, ¶ 14 (Colo. 2017). The issue in *Crouse* was whether the Colorado law that requires law enforcement officers to return marijuana conflicts with the CSA's provisions regarding the return, or distribution of marijuana. *Id.* ¶ 2. The Court noted that the CSA does not preempt state law unless there is a positive conflict between the two provisions. *Id.* ¶ 13. A positive conflict exists when a federal and a state law cannot "consistently stand together." *Id.* The Court held that law enforcement officers could not comply with both Colorado law and the CSA, accordingly, the Supremacy Clause applied and the CSA controls. *Id.* ¶ 18-19.

V. Analysis

A. *Definition of Lawful Appropriation.*

Section 37-92-103(4) describes beneficial use and states that "use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." In this provision "lawfully made" is closer to the word "appropriation" than the word "use." Under principles of statutory construction, "relative and qualifying words and phrases . . . are construed to refer solely to the last antecedent with which they are closely connected." Colo. Rev. Stat. § 2-4-214) (internal quotations and citation omitted). Accordingly, the term "lawfully made" as used in section 37-92-103(4) modifies appropriation not use.

While the 1969 Act does not contain a definition of lawful appropriation, Colorado case law holds that an appropriation is lawful if there is a diversion of a certain amount of water for a specified use that can be captured, possessed, and controlled in priority. *See* discussion *supra* Section IV.B. Thus, the water court must determine whether the claimed appropriation is lawful,

not whether the claimed beneficial use is lawful. A lawful appropriation of water does not require an analysis of the lawfulness of the subsequent use of that water.

In the *Coats* and *Crouse* cases, the Colorado Supreme Court concluded that lawful must be defined as lawful under both state and federal law. In contrast to the facts in those cases, there is no federal water law that governs the appropriation of water from intrastate water sources. The regulation and allocation of a state's internal water resource has been expressly delegated to the states by the federal government. There is no way to determine whether an appropriation is lawful under federal law. Thus, lawful appropriation means lawful under Colorado water law.

B. *No Positive Conflict with the CSA*.

Complying with the provisions in Colorado water law regarding the elements of a lawful appropriation of water does not necessarily require noncompliance with the CSA. In *Crouse*, law enforcement was forced to decide whether to comply with Colorado law or the CSA – compliance with both was impossible. Similarly, *Coats* involved an employee who relied on state law as a defense to his dismissal for violating federal law. In both cases, there was an express federal prohibition on an action allowed by Colorado state law.

There is no federal law that prohibits the appropriation of unappropriated water, if that appropriation is done in compliance with state law or lawfully. The Colorado Constitution creates a right to divert unappropriated water for useful purposes that cannot be abrogated by the legislature. The legislature can pass laws to regulate and administer the use of water, but the legislature cannot prohibit a water user from making a lawful appropriation of water.

The CSA provides that it only preempts state law when there is a positive conflict that would make it impossible to comply with both laws. In this case, there is nothing in the CSA

that prevents High Valley from seeking to divert unappropriated water for a specified beneficial use. *See, e.g., Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882) (Colorado has long recognized irrigation as beneficial use). Complying with Colorado water law standards for appropriating water is not a direct conflict with the CSA's prohibition on marijuana possession or use. If the federal government decides to enforce the CSA's provisions, the Supremacy Clause would apply and federal law trumps Colorado state law allowing the possession and use of marijuana. However, this does not change the analysis of whether a lawful appropriation is made under Colorado water law. Because there is no positive conflict between Colorado water laws governing appropriations and the CSA, the CSA does not preempt Colorado water law.

The Supremacy Clause does not require Colorado to change the application of its existing water laws. *See New York v. United States*, 505 U.S. 144, 155-56 (1992). A lawful appropriation of water requires the diversion of unappropriated water for a beneficial use. The fact that the CSA prohibits marijuana use does not make an otherwise lawful appropriation of water under Colorado law illegal. Instead, the validity of the appropriation is governed by Colorado water laws.

VI. Order

In section 37-92-103(4), the term lawful is used to describe the elements of an appropriation under Colorado water law. Establishing a valid appropriation does not require an analysis of the legality of the subsequent use of the water right. Because water right appropriations are governed exclusively by Colorado law, there is no conflicting provision in the CSA.

Therefore, sections 37-92-103(4) and 37-92-103(9) do not preclude High Valley from proceeding with its claims in this case.

Dated: February 17, 2017.

BY THE REFEREE

Susan M. Ryan, Water Referee
Division 5, Water Court