



## MEMORANDUM

TO: Colorado Water Congress

FROM: Stephen Leonhardt, Esq. and Kole Kelley, Law Clerk

DATE: January 16, 2019

SUBJECT: Decision in *Hill v. Warsewa* (Case No. 18-cv-01710-KMT)

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The Colorado Water Congress has been monitoring *Hill v. Warsewa* (Case No. 18-cv-01710-KMT). On May 31, 2018, Roger Hill filed a complaint with the state district court in Fremont County. This complaint included a declaratory judgment claim, seeking a determination that a portion of the Arkansas River was property of the State of Colorado, “to be held in trust for the public.” The defendants, Mark Everett Warsewa and Linda Joseph, filed to remove the case from state court to U.S. District Court based on a federal question, that the rights which Mr. Hill asserts are based on the doctrine of navigability for title. This doctrine arises under the United States Constitution and the Equal Footing Doctrine, which creates a federal question. Once in federal court, Warsewa and Joseph filed a motion to dismiss for lack of prudential standing, and the State filed a motion to dismiss for lack of standing and failure to state a claim. Mr. Hill filed both a motion to remand to state court and a motion to certify a question to the Colorado Supreme Court regarding whether the State of Colorado’s title in navigable riverbeds is subject to a public trust.

Magistrate Judge Tafoya of the United States District Court (District of Colorado) granted the State and Warsewa defendants’ motions to dismiss the case on January 8, 2019. Judge Tafoya’s order dismissed Mr. Hill’s complaint for failure to state a claim, denied Mr. Hill’s motion for remand, and denied all other pending motions (including Mr. Hill’s motion to certify a public trust question to the Colorado Supreme Court) as moot.

Magistrate Judge Tafoya’s order made repeated references to the U.S. Supreme Court’s 2012 decision in *PPL Montana, LLC v. Montana* to explain the federal law concept of “navigability for title,” and to establish that states retain residual power determine the scope of any public trust over waters within their borders. In this context, that applicability of any public trust doctrine is a matter of state law, Magistrate Judge Tafoya also pointed out that Colorado has generally rejected any public trust doctrine (citing *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 586 (Colo. 2016)).

The basis for Magistrate Judge Tafoya’s order is that Mr. Hill lacks prudential standing to claim rights in the Arkansas River on private property. Judge Tafoya framed the primary question of the case as whether a private citizen with no ownership right in the property can bring the public trust issue to court in the way it was framed. Judge Tafoya acknowledged “the State does not want

ownership of these sections of privately owned river beds,” citing the State’s position that “in order to credit Mr. Hill’s argument, portions of the riverbed currently under private ownership would have to be ‘taken from their owners’ and declared ‘public land owned by the state of Colorado, . . . invalidat[ing] private property rights that were established near or before the year 1876 . . .’” and raising questions of State liability “‘for the taking of land . . . along a 280-mile stretch of river.’” Magistrate Judge Tafoya reasoned that because Mr. Hill cannot force the State to act, his claim boils down to an attempt “to take it upon himself to assert the State’s perceived property rights.” Similar to federal public lands, interested members of the public like Mr. Hill have no legally protected interest in the government’s perceived property rights, even if they might derive some benefit from such property. So, Mr. Hill cannot bring a suit to quiet title to any real property in the name of the State of Colorado.

To establish prudential standing, a party must assert his own rights, not the rights of third parties; the claim cannot be a generalized grievance; and the plaintiff’s grievance must “arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” Mr. Hill admits he does not own the land in question, failing the element requiring that he must assert his own rights. Mr. Hill also failed to show his claim was more than a desire for the general public to be able to fish while standing on the bed of the Arkansas River without the unpleasantness of trespassing on private property, which the court characterized as a generalized grievance. Because Mr. Hill lacks prudential standing, he failed to state a claim and the case was dismissed.

Magistrate Judge Tafoya addressed Mr. Hill’s motion to remand the case to state court because the Eleventh Amendment robbed the federal court of jurisdiction. Magistrate Judge Tafoya pointed out that the Eleventh Amendment also would bar Mr. Hill from forcing the State of Colorado to change its position on title ownership of the Arkansas River riverbed by naming it as a defendant. Yet the court did not reach the Eleventh Amendment question because prudential standing is a threshold question to consider prior to jurisdictional issues.

Concluding the order, Magistrate Judge Tafoya granted both motions to dismiss the complaint, denied the motion to remand to state court, denied all other motions as moot, and closed the case.