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Select Energy Servs., LLC v. K-LOW, LLC, 392 P.3d 695 (Colo. 2017)

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point where the alluvial aquifer necks down at the Larson headgate. However, the Court noted that this is not novel information. Rather, it is merely a repackaging of information that was presented at the 1987 hearing.

Further, the Court held that Gallegos's showings fail under *Gallegos I*. Specifically, the Court emphasized that under *Gallegos I*, claim preclusion prevents relitigation of issues that could have been litigated in a prior proceeding. Here, the connectivity claim could have, and should have, been litigated during the original designation proceedings, and Gallegos relied on the same evidence that the 1987 Commission relied on when originally designating the Basin.

Accordingly, the Court affirmed the decision of the designated groundwater court.

Alicia Garcia

Select Energy Servs., LLC v. K-LOW, LLC, 394 P.3d 695 (Colo. 2017) (affirming the water court's finding that a decree defining a right to divert water only from a headgate located downstream from a disputed ditch did not include the right to divert water from that ditch).

This case came before the Colorado Supreme Court on appeal from the water court's definition of a water right stemming from a 1914 decree and a recent change to that right.

The original 1914 decree granted twenty-eight cubic feet of water per second absolute, for irrigation of 300 acres, with an appropriation date of December 8, 1893. The legal description of the diversion point was a certain headgate on the South Platte River, where the water then travelled via the Sterling Drain and Seepage Ditch ("SD&SD"). Additionally, the decree noted that, as a source of supply, the SD&SD right "takes its supply of water . . . from seepage and waste waters coming . . . from the Plumb drain ditch and other accretions along its course."

Faith Tabernacle Church ("Faith") later obtained the SD&SD right, and, in 2014, Faith applied to move the right's diversion point pursuant to Colorado's recently enacted simple change statute. The statute creates a simpler process for moving a surface point of diversion but prohibits combining that change with any other change to the right.[1]

The water court approved the application and entered the 2014 decree, which changed the diversion point from the headgate to a downriver pump on Faith's property, downstream from both the original diversion point and the terminus of the ditch. Rights to usage remained unchanged, as did the original appropriation date. The decree named the South Platte River as the source, while noting that the 1914 decree also adjudicated the Plumb Drain ditch and other accretions as sources of supply for the SD&SD. After changing the diversion point, Faith quitclaimed what remaining property interests it may have retained in the ditch to K-LOW, while retaining ownership of the SD&SD itself.

Select Energy Services ("Select"), laid a pipeline across this ditch, and K-LOW filed a trespass claim against Select, relying on its quitclaim deed and claiming an easement to the ditch associated with the historic water right. Select filed suit in Water Court Division 1 seeking a declaratory judgment as to

1. COLO. REV. STAT. § 37-92-305(3.5) (2016).

whether the recent change to the historic decree extinguished any right to divert water from the ditch. The status of the easement also depended upon this determination, as its existence hinged on the scope of the underlying water right.

While the parties to this case disagreed as to whether the 2014 decree eliminated any right to divert water from the old ditch, both parties agreed that the viability of K-LOW's trespass claim turned upon whether it retained a water right to the ditch after the 2014 change.

The water court looked to the plain language of the 2014 decree and held that the water right allowed its holder to divert water only at the pump downriver from the headgate and disputed ditch. The court further held that the decree did not include a right to divert water from that ditch, thus granting Select's partial motion for summary judgment. K-LOW appealed.

The Colorado Supreme Court agreed with the water court's findings. The Court explained that a water decree does not confer a water right: it merely confirms its existence, recognizes its scope, and governs its administration. Any asserted right, to include any claimed alternate diversion points, must appear on the face of the decree or result from the proper construction of its provisions. The Court thereby looked to the plain language of the 2014 decree and found that whether there was a right to divert the water was unambiguous: the decree did not grant a right to divert from the SD&SD.

K-LOW argued that the court should recognize alternate points of diversion and, therefore, a right to divert from the ditch, based on the 1914 adjudication of the "Plumb Drain ditch and other accretions" as additional sources of supply. Looking again to the plain language of the decree, the Court found that though the decree identifies these additional sources, it does not identify alternate points of diversion for them. Instead, the decree clearly recognizes a single point of diversion—that of the downstream pump—as well as the sources of supply available to that point of diversion. The Court agreed with the water court's determination that, assuming all of the sources of supply returned to the South Platte River above the new diversion point, then all original sources of the SD&SD would be available at the new location. Thus, no independent right remained to divert seepage, waste waters, or accretions from anywhere besides the new diversion point, and accordingly no right existed to divert water from the SD&SD.

Accordingly, the Court affirmed the water court's order granting summary judgment in favor of Select Energy Services.

Megan McCulloch

MONTANA

City of Helena v. Cmty. of Rimini, 397 P.3d 1 (Mont. 2017) (holding that, despite a period of non-use, a presumption of nonabandonment of a water right that comported with the great and growing cities doctrine, applied to a municipality when the city proved intent to use its entire water right in the future by constructing a conveyance with the capacity to utilize the city's water right completely).

Junior water right holder Andy R. Skinner and the Community of Rimini objected to the City of Helena's (the "City") claim to 13.75 cubic feet per second