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City of Helena v. Cmty. of Rimini, 397 P.3d 1 (Mont. 2017)

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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

of water from Tenmile Creek in Helena, Montana. The City's water right decree dates back to 1903. In 2011, the Water Master found that the City abandoned 7.35 cfs of its water right and imposed a specific place of use restriction on the City's water rights. The City filed objections and in 2013, the water court restored the City's water rights in full, but adopted the Water Master's specific place of use restriction. Skinner appealed. The Montana Supreme Court remanded for further proceedings. On remand, the water court ruled that the City had abandoned 0.60 cfs of its water rights. Once again, Skinner appealed.

The legislature amended M.C.A. section 85-2-227 in 2005 to create a presumption of nonabandonment for water rights claimed for municipal use by a city when the city meets any of four criteria, one being the construction and maintenance of a diversion or conveyance structure. Skinner argued that, under M.C.A. section 1-2-109, the statute could not be applied retroactively because the statute does not expressly declare so. The Court upheld the water court's finding that the 2005 amendment to M.C.A. section 85-2-227 was a change in the burden of proof, which was a procedural change in law rather than a substantive one. Therefore, the presumption of nonabandonment of a water right applied to the City, so long as the City met the requirements of the statute.

Abandonment of a water right typically requires both non-use and intent to abandon. However, under M.C.A. section 85-2-227, the City would benefit from a presumption that it did not abandon its water right, despite any period of non-use, if the City used any part of its water right while showing an intention to plan for future growth. Constructing a diversion or conveyance structure, conducting a formal study, or maintaining a facility connected to the municipal water supply system for emergency purposes evidenced intent to plan for future growth. The Montana statute comports with the purpose of the great and growing cities doctrine, a doctrine that originated from the Colorado Supreme Court. The doctrine arose in response to growing urban populations to ensure an adequate water supply to the public. The policy behind the great and growing cities doctrine is that cities cannot survive without acquiring more water and should therefore receive different treatment than private individuals. The Colorado Supreme Court emphasized the importance of cities' ability to obtain appropriations of water that will satisfy the needs of the city, especially resulting from a normal increase in population within a reasonable amount of time.

The Court upheld the water court's finding that the City showed intent to use its water right in the future. The City created a presumption of nonabandonment by constructing a concrete diversion pipeline with a capacity of 13.15 cfs in 1921, commissioning an engineering report in 1929, and maintaining an open channel ditch for emergency municipal water supply. Although the 1921 conveyance, called the Rimini Pipeline, did not have the capacity to transport the City's entire water right (13.75 cfs), the Court held that the City did not intend to abandon the unused 0.60 cfs. The 1929 engineering report revealed that friction, leakage, waste, and other factors were restricting the capacity of the City's two smaller transmission pipelines. The report qualified as a formal study evidencing the City's intention to accommodate for its future needs. In 1948, the City constructed a new pipeline with the capacity to convey the City's entire water right of 13.75 cfs.

Skinner contended that the City's period of non-use between 1948 and 2011 was sufficient to rebut the presumption of nonabandonment. The water

court agreed with the Water Master's finding that the City did not present evidence that it intended to increase the Rimini Pipeline's capacity from 13.15 cfs to the full water right capacity of 13.75 cfs. Although the 1948 conveyance had the capacity of 13.75 cfs, the Rimini Pipeline was restricting the new pipeline's water flow to 13.15 cfs. Skinner argued that the beneficial use requirement limits the City's water right to the amount of water actually used for a beneficial use. The water court held that the City did not present sufficient evidence to show intention to increase its diversion capacity to the full extent of the water right. The Court held the water court erred in upholding the Water Master's determination because the City took affirmative steps towards planning for the City's future water needs. The Court emphasized the importance of protecting a city's efforts to substantially utilize its water rights. The City met the statutory criteria for the presumption of nonabandonment of its water right as applied to the City's entire system of conveyances, including all pipelines. The Court held that despite the period of non-use, the City's construction of the 13.75 cfs capacity pipeline permitted an inference that the City sought to make use of its entire water right.

Montana law requires a final water right decree to include a place of use restriction. The statute for this place of use element is constitutionally protected. The City challenged the restriction, but failed procedurally to comply with the notice requirement when challenging a constitutionally protected statute.

Accordingly, the Court affirmed the water court's opinion that the presumption of nonabandonment applied to the City, reversed the water court's determination that the City abandoned 0.60 cfs of its water right, and remanded for the entry of an amended judgment awarding the City its entire 13.75 cfs water right in Tenmile Creek.

Justice Jim Rice, dissenting.

Justice Rice did not agree with the Court's finding that M.C.A. section 85-2-227 could be applied retroactively because the 2005 amendment to the statute was procedural. He argued the amendment was in fact substantive because the statute, as applied, produced a different legal result from the result that would have followed had the presumption of nonabandonment not been applied. He found the sixty year period of non-use by the City unfair to Skinner's claim, especially considering Skinner's four water rights dating back to 1865.

Kate Mailliard

NEBRASKA

Hill v. State, 894 N.W.2d 208 (Neb. 2017) (holding that: (i) an interstate compact is federal law and supersedes water appropriators' property interests; (ii) regulatory actions that limit water rights to ensure compliance with an interstate compact do not represent a physical permanent invasion; (iii) regulatory actions that limited water rights did not deprive farmers of all economically beneficial use of their property; and (iv) a state agency department's failure to curtail groundwater pumping does not result in a taking when the department has no jurisdiction to regulate groundwater).

The Republican River Compact ("the Compact") apportions Colorado,