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State Eng'r of New Mexico v. Diamond K Bar Ranch, LLC, 385 P.3d 626(N.M. 2016)

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600 cattle at the place of use. The Court concluded that the district court erred in determining that the statute prohibited the conveyance to Rand; although the statute prevents issuance of a certificate from the State Engineer, it does not prohibit conveyance of certificates by a private party. Nevertheless, the Court found that Tomera could be the proper owner, since the conveyance occurred prior to the enactment of the statute requiring a person to obtain title to a certificate by deed. The Court then vacated and remanded to the district court to properly review Rand's bona fide purchaser defense.

Accordingly, the Court reversed the judgment of the district court and remanded for further proceedings.

Dalton Kelley

NEW MEXICO

State Eng'r of New Mexico v. Diamond K Bar Ranch, LLC, 385 P.3d 626 (N.M. 2016) (holding: (i) waters diverted from an out-of-state river into New Mexico by ditch remained unappropriated waters of New Mexico subject to the regulatory authority of the New Mexico State Engineer; and (ii) the landowners' use of water in excess of existing permitted water rights was an illegal use of surface water).

The Animas River flows south from Colorado into New Mexico. The Ralston Ditch, located in southern Colorado, diverts water from the Animas River into New Mexico. The Echo Ditch Decree ("Decree") established the rights of Petitioner, Diamond K Bar Ranch, LLC ("Diamond") to water diverted by the Ralston Ditch. The State Engineer of New Mexico ("State Engineer") brought suit against Diamond for using river waters in excess of the permitted quantity under the Decree.

Diamond claimed it was entitled to appropriate more water than provided in the Decree and filed a motion to dismiss alleging (1) that the State Engineer lacked the regulatory and constitutional authority to enjoin them from the use of river waters when the water was transported by a ditch from Colorado into New Mexico and (2) that the Ralston Ditch was exempt from permitting requirements because it was a "community ditch." A district court denied Diamond's motion to dismiss but certified its ruling for interlocutory appeal. The appellate court quashed Diamond's interlocutory appeal and the New Mexico Supreme Court granted Diamond's petition for writ of certiorari.

The Court first considered Diamond's argument that the Ralston Ditch was not a "natural watercourse" that flowed into New Mexico and thus not subject to the State Engineer's authority because the water became private at the point of diversion. The Constitution of the State of New Mexico broadly granted the State Engineer the authority to regulate the unpermitted appropriation of water of "every natural stream" within the state of New Mexico. Diamond primarily relied on *Turley v. Furman*, in which the court found that the New Mexico State Engineer did not have the jurisdictional authority to grant a permit for the construction of a new diversion in Colorado. Distinguishing *Turley v. Furman*, the Court noted that the State Engineer made no attempt to exercise authority over the appropriation of out of state waters or the construction of a new out of state ditch, but instead regulated the appropriation of New Mexico surface waters for use on lands in New Mexico.

The Court also recognized that New Mexico allows only a usufructuary right to water and that a person cannot have a private ownership in the corpus of the water. Accordingly, the Ralston Ditch alone could not create a water right. The Court rejected Diamond's argument that waters diverted into New Mexico by ditch conveyance was "by artificial means" and thus rendered its use private because the water never flowed "in a natural stream" within the state of New Mexico. The Court held that the waters diverted from the Animas River into the Ralston Ditch remained natural, unappropriated waters, subject to the regulation of the State Engineer.

The Court next addressed Diamond's argument that it was not required to obtain a permit to divert water from the Ralston Ditch waters because it was an existing community ditch. Community ditches are early New Mexico diversion that do not require a diversion permit pursuant to N.M.S.A. Section 72-5-2. The Court recognized that the Ralston Ditch was a community ditch constructed in the 1880s and that Diamond's pre-1907 water rights did not require a permit for the under N.M.S.A. Section 72-5-2. However, citing several New Mexico statutes, the Court recognized that the exemption applied only to the place of diversion and not to the quantity of water appropriated, and that community ditch users remained subject to the regulation by the State Engineer. The State Engineer alleged that Diamond had used an amount of water that exceeded its permitted right and that Diamond had used the water to irrigate lands not appurtenant to such rights. The State Engineer also had authority to regulate Diamond's water consumption because the Decree stated that "the State Engineer must approve *any change*" in water use, regardless of whether the ditch is a community ditch. The Court acknowledged that the Ralston Ditch to the Decree. The Court held that although Diamond had a vested water right as a community ditch user, they were still subject to regulation by the State Engineer.

Accordingly, the Court affirmed the district court's denial of Diamond's motion to dismiss and remanded the case for trial.

Reggie Norris