Water Law Review

Volume 19 | Issue 1 Article 16

9-1-2015

Frees v. Tidd, 349 P.3d 259 (Colo. 2015)

Neillie Fields

STATE COURTS

COLORADO

Frees v. Tidd, 349 P.3d 259 (Colo. 2015) (holding that the owner of a servient estate, whose property is subject to a ditch easement conveying water under a senior priority, may obtain a junior conditional right to use the same water for non-consumptive hydropower use if he or she can make an initial showing that water is available).

David Frees, George Frees, and Shirley Frees ("Frees") own an irrigation water right with an 1890 priority, which has diverted at most 6.4 cubic feet per second ("cfs") of water from Garner Creek. The Garner Creek Ditch No. 1 headgate delivered the water into a ditch that crossed property owned by Charles and Barbara Tidd ("Tidds") in Saguache County. Across the Tidds' property, the Frees owned an easement for delivery of their water right.

In 2010, the Tidds applied for a 0.41 cfs conditional water right for non-consumptive hydropower use. The Tidds initially filed for a right to divert from Garner Creek Ditch, but they amended their application to identify Garner Creek itself as the source of appropriation. In 2014, the District Court, Alamosa County ("water court") issued a decree, giving the Tidds a conditional water right with a 2010 priority date. The water court determined that water was available for the Tidds' proposed non-consumptive hydropower use and that the Frees could not exclude the Tidds from use. The water court reasoned that the Frees only owned the right to use the water for irrigation purposes, not the water itself. To apply the decreed water for their proposed hydropower use, the Tidds needed to make modifications to the ditch thereby altering the Frees' easement. Subsequently, both parties outlined and agreed to terms and conditions to a decree that would ensure against any material injury to the Frees' water right. Nevertheless, the Frees appealed the decree to the Colorado Supreme Court ("Court"), arguing that Colorado law prevented the Tidds from appropriating the same physical water the Frees had already appropriated through their 1890 irrigation priority.

On appeal, Justice Hobbs, writing for the majority, first addressed the Frees' contention that the water they diverted "ha[d] a label on it." Relying on the Tenth Circuit's opinion in *Public Service Co. of Colorado v. Federal Energy Regulatory Commission,* the Frees argued that their "label" prohibited the Tidds from using the water for any purpose. The Court rejected this argument, concluding that the language came from problematic dicta and, therefore, did not support the Frees' position. Instead, the Court explained that the Tidds' use of water was consistent with Public Service Company's use of the Green Mountain Reservoir water in the Tenth Circuit opinion. Accordingly, the Court stated that *Public Service Co. of Colorado* did not support the Frees' position. The Court found that the Frees owned the right to use the water for irrigation, which the Court distinguished from owning the physical water itself. Therefore, the Frees' ownership interest in the water did not prevent the Tidds from also using the water.

Additionally, the Frees argued that the water court lacked the power to order another appropriation unless there was un-appropriated water available to assign to that decree. The Court explained that this argument directly contradicted the intent and requirements of the Water Right Determination and Administration Act of 1969. The fundamental goal of the 1969 Act was to promote, without injury, "flexibility" in the use and appropriation of the public's water, concurrently and in succession. The Court also relied on previous case law and the Colorado Constitution for support of the same proposition. Previous cases reiterated the notion that the Constitution guarantees the right to use a specified amount of groundwater to the exclusion of others not in priority. However, this right is not the right to exclude others from using the same water if multiple users can use the water without injury.

Next, the Court addressed the Frees' contention that Colorado law required the Tidds to appropriate new water. The Court rejected this argument, explaining that Colorado law did not require a conditional water right applicant to appropriate new water. Instead, Colorado law requires the applicant to show that there is water available that he can put to beneficial use. The "can and will" doctrine promulgated in section 37-92-305(9)(b) of the Colorado Revised Statutes requires: "an applicant for a conditional water rights decree to prove the availability of water under river conditions existing at the time of the application as a threshold requirement to establishing that there is a substantial probability that the project can and will be completed with diligence and within a reasonable time."

The Court found that the question of water availability linked directly to the question of whether decreeing a new appropriation would injure senior water rights. In order to meet this statutory requirement, a new appropriator must convince the water court that its diversion will not injure senior appropriators and that water is available. The Court determined that under the terms of the 2010 decree, which protected against any injury to the Frees' irrigation water right, water was available for the Tidds' decreed use.

Accordingly, the Court affirmed the water court's conditional water right decree.

Márquez, J., Dissenting

Justice Márquez, joined by Justice Coats, dissented. Justice Márquez raised several issues including: the scope of the right to appropriate; the lack of support for the decision in prior precedent; the potential for unintended consequences; and the Court's intrusion into the realm of legislative policy and decision-making. The dissent argued that although the Tidds' conditional water right had a 2010 priority, the Tidds would actually be diverting pursuant to the Frees' 1890 priority. The dissent observed that, under the majority's decision, a new appropriator could intercept water that was only available in light of a senior appropriator's diversion. The majority's decision would effectively allow the junior appropriator to gain an "overvalued water right by 'diverting' under an earlier priority date."

The dissent also disagreed with the majority's interpretation of *Public Ser-*

vice Co. of Colorado. The dissent argued that the majority's analysis overlooked the crucial fact in that case: Public Service Company received more water than Colorado law would have otherwise granted. Contrary to the majority's interpretation, the dissent argued that *Public Service Co. of Colorado* "stands for the proposition that a downstream user cannot obtain a vested water right in already appropriated water simply by applying that water to a beneficial, nonconsumptive use."

The dissent also questioned, among other things, what would happen if the Frees changed the water diversion point. Because the potential answers proved problematic, Justice Márquez advised the Court to defer to the legislature on "novel, out-of-priority diversions, rather than upholding a conditional water right in the unique circumstances of this case and thereby establishing a potentially dangerous precedent."

Neillie Fields

McKenna v. Witte, 346 P.3d 35 (Colo. 2015) (holding that Division Engineer's statutory deadline to prepare a water rights abandonment list is a directional, not jurisdictional, mandate; and the water court did not erroneously determine abandonment of the water right).

In 1889, the Huerfano County District Court decreed three rights to water from the Cucharas River ("Sanchez Ditch rights") to the Sanchez Ditch for crop irrigation. In 1991, Tom McKenna and McKenna Ranch (collectively "McKenna") acquired the Sanchez Ditch rights with a tract of land at a foreclosure sale. In 2000, the local water commissioner warned McKenna's water attorney of the Sanchez Ditch's neglected state. In 2010, after the Sanchez Ditch further deteriorated, the Division Engineer ("Engineer") placed the Sanchez Ditch rights on the decennial abandonment list.

McKenna objected to the inclusion of the Sanchez Ditch rights on the abandonment list, claiming he used his Sanchez Ditch rights. The Engineer denied McKenna's objection. McKenna protested the denial to the water court, and he asked the water court to remove the Sanchez Ditch rights from the abandonment list. McKenna argued he did not abandon the Sanchez Ditch rights. He testified to his use and repair of the Sanchez Ditch, proffered a 2003 receipt of ditch maintenance, handwritten notes attesting to occasional use, and photographs depicting water in the Sanchez Ditch. McKenna also argued the water court lacked jurisdiction to terminate his water rights because the Engineer failed to compile the abandonment list before the statutory deadline. Conversely, the State argued that McKenna did not use the Sanchez Ditch rights for decades, and failed to rebut the presumption of abandonment.

The water court found that the State's evidence triggered a presumption of intent to abandon, and McKenna failed to subsequently rebut the presumption. The water court rejected McKenna's statutory compliance argument because the Engineer sufficiently complied with the statutory scheme by publishing the list in July. McKenna appealed the water court's decision to the Colorado Supreme Court ("Court").

On appeal, the Court first reviewed de novo whether the abandonment list preparation deadline was a directional or jurisdictional mandate. McKenna contended that the mandatory language in Colo. Rev. Stat. § 37-92-401(1)(a)