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St. Jude's Co. v. Roaring Fork Club, LLC, 351 P.3d 442 (Colo. 2015)

Whitney Phillips

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the Court held McKenna did not rebut the abandonment presumption.

Accordingly, the Court held that the abandonment list preparation deadline was a directional and not a jurisdictional mandate, affirmed the water court's finding of abandonment, and remanded to the water court for further proceedings consistent with its ruling.

Daphne Hamilton

St. Jude's Co. v. Roaring Fork Club, LLC, 351 P.3d 442 (Colo. 2015) (holding that: (i) the private club's asserted "aesthetic, recreation, and piscatorial uses," without impoundment, do not meet the state's constitutional and statutory requirements for beneficial use, and therefore, the water court erred in granting new appropriative rights to the club; and (ii) the water court correctly determined that prior agreements between the parties barred all but one of the claims against the private club).

Roaring Fork Club ("the Club") owns a private resort along the Roaring Fork River that provides members and guests with golfing, fishing, residential, and recreational amenities. The resort is located upstream from a contiguous parcel where St. Jude's Company ("the Company") conducts agricultural operations. The two parties have water rights that are diverted from the same headgate located on the Club's property. A settlement agreement and a mutual release agreement ("the Prior Agreements"), which are the result of earlier litigation between the parties, govern the terms of the parties' water use.

In March of 2007, the Club filed two applications with the Garfield County District Court, Water Division 5 ("the water court"). The first application requested a decree of new appropriative water rights and a change in the point of diversion of an existing water right. The Club sought new appropriative rights for "aesthetic, recreation, and piscatorial uses" because it claimed that since 2001 it had diverted 21 cubic feet per second from the Roaring Fork River ("the River") into its ditch. The Club also sought to correct the legal description of an existing right's point of diversion to its actual location. The second application proposed an augmentation plan for the ditch to account for "evaporative depletions."

The Company opposed both of the Club's applications because the Company was concerned that those changes would adversely affect its downstream rights. In October of 2007, the Company also filed a complaint against the Club with the water court. The Company alleged that the Club was wrongfully denying it access to and use of the headgate on Club's property in violation of the Prior Agreements and Colorado law. The Company also alleged trespass and breach of contract, and requested that the water court quiet title to two other disputed priority rights between the parties.

The water court approved both of the Club's applications. It decreed the Club new appropriative rights "for aesthetic, recreation, and piscatorial uses," corrected the legal description of the diversion point, and approved the proposed augmentation. The water court found that the terms of the Prior Agreements between the two parties barred all of the Company's claims, aside from one. The water court quieted title to the disputed priority rights, allotting sixty-one percent of each right to the Company and thirty-nine percent to the Club. The Company appealed the water court's ruling to the Colorado Supreme

Court (“the Court”).

On appeal, the Court addressed whether the Club’s diversion into and through a ditch for aesthetic, recreation, and piscatorial purposes was a beneficial use under state law. The Colorado Constitution guarantees the right to divert water for “beneficial uses.” The 1969 Water Right Determination and Administration Act (“the Act”) defines “beneficial use” as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.” The Act specifically approves three applications of water: (i) the impoundment of water for firefighting or storage for recreational, fishery, or wildlife purposes; (ii) the appropriation by the State of Colorado for future generations of minimum flows in order to preserve the natural environments; and (iii) the diversion by a county, city, municipality, water conservation district, or sanitation district for recreational in-channel diversion purposes. The Court noted that the legislature has recently strictly limited recreational in-channel diversions by only allowing for appropriation to “certain governmental entities,” and by limiting such appropriations to a “minimum amount of stream flow. . . for a reasonable recreation experience.”

The Court found the Club’s applications for “aesthetic, recreation, and piscatorial” uses did not fit under any of the Act’s specifically authorized uses because the Club was not impounding any water, only the Colorado Water Conservation Board can appropriate instream flows, and the Act reserved recreational in-channel diversion for governmental entities. The Court found that the Club’s application of water—diverting it into and through a ditch for fishing streams, golf-course maintenance and aesthetic purposes—was entirely “passive.” The Court reasoned that putting water to “use” requires the water be used actively or for a type of service.

Further, the Court found that even if the Club’s uses were in fact active applications of water, the Club was still not putting the water to beneficial use because, unlike the approved recreational uses that benefit the public in general, the Club’s uses only serve “the subjective enjoyment of the Club’s private guests.” The Court concluded that “[t]he flow of water necessary to *efficiently* produce beauty, excitement, or fun cannot even conceptually be quantified,” and thus there is no way to properly limit such use. And while the Court noted previous decisions that designated “piscatorial” uses as beneficial, the uses in those cases were for fish production, a sharp juxtaposition to the Club’s merely recreational purpose. Thus, the Court held that the water court erred in decreeing appropriative rights to the Club.

The Court also addressed the Company’s assertion that the water court erred in interpreting the Prior Agreements between the parties, as well as governing law. The Court found that because contract law governed the interpretation of the Prior Agreements, the water court properly interpreted the agreements based on their “meaning according to the intent of the parties as expressed in the instrument itself.” Therefore, the water court did not err in concluding that the plain language in the Prior Agreements barred all but one of the Company’s trespass claims.

The Court found no clear error in the water court’s findings of facts based on observation, testimony, and the documentary record, nor did it find abuse of discretion in any of the water court’s other decisions.

Accordingly, the Court reversed the water court's order decreeing new appropriative rights to the Club and affirmed the rest of its rulings.

Márquez, J., Concurring in Part and Dissenting in Part

Justice Márquez, joined by Justice Hood, dissented, arguing that the Club's uses were beneficial under state law. She reasoned that there is "no meaningful distinction between recreational fishing in a reservoir and recreational fishing in a flow-through diversion." Accordingly, Justice Márquez argued that the Club's use was a beneficial use enumerated under the Act.

Whitney Phillips

Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist., 351 P.3d 408 (Colo. 2015) (affirming the water court's decision and holding (i) a stipulation agreement mandating that a special district recharge an aquifer with its recaptured wastewater did not allow the special district to "reuse" the water, and (ii) the stipulation did not preclude the district from requesting the right to claim replenishment credits for that wastewater in an application for replacement plan because the stipulation did not address the issue).

The Upper Black Squirrel Creek Ground Water Management District ("UBS") is a governmental body responsible for managing ground water in the Upper Black Squirrel Creek Ground Water Basin ("UBS Basin"). The Cherokee Metropolitan District ("Cherokee") is a special district that previously had numerous disputes with UBS concerning Cherokee's conditional ground water rights in the UBS Basin. In 1999, UBS, Cherokee, and other parties entered into a stipulation ("Stipulation") that resolved many of the disputes. The Stipulation required Cherokee to deliver wastewater returns back to the UBS Basin in order to recharge the aquifer.

Cherokee filed an application for replacement plan with the Colorado Ground Water Commission ("Commission"). In 2009, UBS opposed the application before the Commission and motioned the El Paso County, Water Division 2 ("water court") for a declaratory judgment that the terms of the Stipulation prohibited Cherokee from claiming credit for the wastewater returns it delivered back to the UBS Basin. UBS also sought to enjoin Cherokee from asserting such a claim in its application for replacement plan before the Commission.

The water court initially found the Stipulation prohibited Cherokee, or any other person, from claiming credit for the wastewater returns in Cherokee's replacement plan application. However, Cherokee appealed to the Colorado Supreme Court ("Court") and the Court remanded the case to the water court on other grounds.

UBS then filed an amended motion for declaratory judgment and the parties rebriefed the issues. This time, the water court found the Stipulation did not preclude Cherokee from making a claim for credits from the wastewater Cherokee was obligated to return to the UBS aquifer. The water court emphasized that it was only to interpret the relevant "recharge" provision of the Stipulation. The water court determined the Stipulation only required Cherokee to deliver wastewater returns to the UBS Basin to recharge the aquifer, rather than