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Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056 (Colo. 2013)

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injury based solely upon the proper operation of the C.A. 3635 exchanges through the use of imported transmountain water as a substitute supply.

After the water court's determinations of law, Denver and Englewood entered a stipulated final decree with the water court, subject to Englewood's appeal of the water court's grant of Denver's Rule 56(h) motion. Thereafter, Englewood appealed the water court's decision directly to the Colorado Supreme Court, which issued this opinion after a *de novo* review of the two questions at issue. The Court affirmed the water court's decision.

Regarding the first issue, the Court noted the statutory and common law support for a transmountain water user's right to reuse imported transmountain water to the maximum possible extent, as well as a user's right to use transmountain water and reusable transmountain effluent as substitute supplies for appropriative rights of exchange. In addition, the Court discussed its *Englewood* decision, which noted Denver's clear intent in 1921 to use Colorado River water as substitute supply for the C.A. 3635 exchanges. The water court analogized properly quantified transmountain LIRFs to the reusable transmountain effluent discussed in *Englewood* and concluded that LIRFs could similarly serve as a substitute supply for C.A. 3635 exchanges. The Court therefore affirmed the water court's conclusion that Denver could use properly quantified transmountain LIRFs as substitute supply just as it may use reusable transmountain effluent, because the two are legally indistinguishable.

Next, the court discussed Englewood's injury claim. Like the water court, the Court held that Englewood, as a junior appropriator, had no expectation as to imported reusable water because senior appropriators may use and reuse imported water to extinction. Thus, Englewood could not claim injury from Denver's use of imported water for exchanges under C.A. 3635. By this principle, Englewood could not claim injury related to Denver's use of properly quantified transmountain LIRFs as a substitute supply of water under the C.A. 3635 appropriative rights of exchange.

Accordingly, the Court affirmed the water court's order granting Denver's Rule 56(h) Motion.

Sarah J. McGrath

Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056 (Colo. 2013) (holding (i) the water court did not need to interpret the phrase "all other beneficial uses" in a previous decree nor determine the abandonment of commercial and industrial uses where the applicant only sought to change its irrigation rights; (ii) the water court incorrectly applied the "can and will" doctrine for a finding of reasonable diligence of a conditional water right when it found that a water right is speculative only when it is impossible to implement; and (iii) the water court improperly granted conditional water rights because the applicants failed to prove a non-speculative use).

The Colorado Supreme Court ("Court") reviewed three cases in which the District Court for Water Division 6 ("water court") granted the parties' applications for two conditional water rights and a change to an absolute right on Talamantes Creek in Moffat County. The first adjudication of water rights on Talamantes Creek took place in the 1890s. A single ranching family owned all of the decreed water rights on the creek until the 1950s, when the family split

the property and water rights into two parts. Raftopoulos Brothers ("Raftopoulos") eventually acquired the upstream parcel in 1985. Vermillion Ranch Limited Partnership ("Vermillion"), members of which belong to the original ranching family, controlled the lower parcel. The competing applications both proposed to appropriate water from Talamantes Creek for commercial and industrial purposes.

The Court first reviewed Raftopoulos's application. Raftopoulos requested a change to its existing direct flow rights in order to add alternate points of diversion for irrigation and to move the place of use upstream. Raftopoulos also sought a new conditional right to store 1440 acre-feet of water in one of two as yet unconstructed reservoirs. Vermillion opposed Raftopoulos's application on the grounds that use of the phrase "all other beneficial uses" in the decrees for the absolute rights ("1974 decrees") did not permit commercial and industrial uses. In the alternative, Vermillion argued the water rights should be limited to irrigation, domestic, and stock uses because Raftopoulos previously abandoned the commercial and industrial uses. The water court decided the decree included commercial and industrial purposes in the phrase "all other beneficial uses," but granted the changes in diversion points and place of use for irrigation purposes only. The water court also determined Raftopoulos did not abandon its commercial and industrial uses because it consistently used the full amount of its water right, albeit for other uses. Finally, the water court granted Raftopoulos's application for conditional storage rights in two sections of the Elk Ranch Reservoir because Raftopoulos "may" need the water rights for future mineral development.

Upon review, the Court held that the water court never needed to interpret the phrase "all other beneficial uses" in the 1974 Decrees. Vermillion, in opposing the application, argued "all other beneficial uses" did not include industrial and commercial uses, but the Court held the interpretation had no relevance to the application because Raftopoulos sought to change its irrigation rights only. The Court further held that the water court did not need to determine if Raftopoulos abandoned the commercial and industrial uses. The Court vacated the water court judgment concerning these issues.

The second issue the Court considered was whether Raftopoulos met its burden to demonstrate a non-speculative intent to use the new conditional water storage right for commercial and industrial purposes. To obtain a conditional water right, the Court noted, the applicant must show that (i) it took the "first step," which includes an intent to appropriate the water and an overt act manifesting such intent; (ii) the intent is not based on speculative sale or transfer of the water to be appropriated; and (iii) the applicant "can and will" complete the appropriation with diligence and within a reasonable time. The water court found Raftopoulos met this burden based on testimony that it "may" develop mineral rights and "may "need water for that purpose, and that it contracted with Moffatt County for dust suppression. However, the Court reversed and held that without tangible evidence of actual development activities or a reasonable estimate of the quantity of water required for that development or for dust suppression, Raftopoulos did not demonstrate a non-speculative need for the water. As such, the Court reversed the water court decree and denied Raftopoulos's new conditional storage rights.

The Court next reviewed the water court's approval of Vermillion's two applications. Vermillion acquired a conditional water right in 1975 and amended it in 2003 to include three alternate places of storage that would not exceed 1200 acre-feet. The first application sought a finding of reasonable diligence with respect to this conditional water storage right. The second application aimed to expand new conditional storage rights for commercial and industrial uses and involved constructing reservoirs on Raftopoulos's land for storage. Vermillion's second application sought to expand its total storage to 2400 acre-feet to provide for industrial and commercial uses.

Raftopoulos opposed both applications on the grounds that both were speculative because Vermillion could not acquire the necessary permits, did not assess the condition of the land, and did not show how it would finance the possible costs of construction. The water court initially denied both applications, but later reversed its decision and entered decrees granting both applications. The water court did not change its findings of fact when it reversed the judgment, but rather applied a different standard to the evidence. The alternative standard the water court applied stated that the water court could only deny the applications if it found that impediments made it impossible for Vermillion to construct the diversions.

The Court looked to the "can and will" requirement found at COLO. REV. STAT. § 37-92-305(9)(b) (2012) to determine whether the water court properly granted Vermillion's applications. The "can and will" doctrine asks if a project to appropriate water "can and will be completed with diligence within a reasonable time." According to the Court, the "can and will" test is a balance that includes relevant factors, including economic and technical feasibility. Though these two factors are not dispositive of the "can and will" test, the Court relied on them to decide whether Vermillion exercised reasonable diligence and noted their relevance in most applications of the "can and will" doctrine.

In opposition to Vermillion's applications, Raftopoulos argued Vermillion failed to show the economic and technical feasibility of constructing the reservoir meant to store the new conditional water storage rights. The Court recognized that the "can and will" requirement did not impose a burden of proof upon the applicant to prove feasibility, but also observed that feasibility remained a relevant factor that Vermillion did not address. The Court reasoned that such evidence could take the form of construction timelines, construction cost breakdowns, land acquisition budgets, steps to acquire necessary permits, or analysis of the feasibility of design and construction of the reservoirs. Vermillion failed to present any such evidence. The Court reasoned the failure to set forth economic feasibility evidence might lead to the conclusion that Vermillion had no intent to build the project. The Court concluded that Vermillion failed to meet its burden to show a substantial probability that the reservoirs "can and will" be completed with diligence in a reasonable amount of time.

The Supreme Court ultimately vacated the lower court's interpretation of the 1974 Decrees and reversed the judgments granting both Raftopoulos's and Vermillion's applications for anti-speculation reasons.

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