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In re Revised Abandonment List of Water Rights in Water Div. 2, 276 P.3d 571 (Colo. 2012) (en banc)

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In re Revised Abandonment List of Water Rights in Water Div. 2, 276 P.3d 571
(Colo. 2012) (en banc)

The trial court explicitly stated the “best efforts” clause did not create a fiduciary duty and Pedotti’s customary or typical efforts satisfied the “best efforts” standard. In so ruling, the trial court compared Pedotti’s actions with the best practices of a typical rancher in the area. The trial court found flood irrigation was typical in Modoc County, where the Ranch was located. In addition, the trial court found Pedotti checked the irrigation system on a daily basis to ensure efficient irrigation practices and irrigated during the winter to further ensure efficiency by keeping the soil saturated until the spring. Although the appeals court noted Pedotti’s practice of irrigating while livestock were in the field was not a “best practice,” it was a typical practice in Modoc County.

Moreover, notwithstanding the fact that livestock could potentially compact the non-established soil, which could cause ponding during irrigation, the trial court found fields on the Ranch were well established and such damage would be minimal. The trial court also found Pedotti regularly measured his water use in volume so as to not overdraw. The trial court also found Pedotti used less water from the Reservoir than his licenses permitted at times of low water levels and, in 2009, took no water from the Reservoir at all.

Based on its review of these factual findings by the trial court, the appeals court held the evidence supported a “best effort” finding under the “diligence of a reasonable person under comparable circumstances” standard. Accordingly, the appeals court affirmed the trial court’s ruling that Pedotti acted within the “best efforts” clause of the 1986 agreement and held the Association failed to prove the trial court’s findings were erroneous.

Robert Sykes

COLORADO

In re Revised Abandonment List of Water Rights in Water Div. 2, 276 P.3d 571 (Colo. 2012) (en banc) (holding (i) an application for a change of a water right must be supported by proof of historic use; (ii) denial of an application for a change of a water right for failure to prove historic use does not amount to an unconstitutional taking of property without just compensation; and (iii) the failure of an applicant to prove historic use does not establish abandonment of the water right).

In this case, John C. Harrison (“Harrison”), acting as personal representative for the estate of Nolan G. Thorsteinson and trustee of The Margie (Dotts) M. Thorsteinson Trust, sought to avoid an abandonment order for a disputed 1.04 c.f.s. interest in the Mexican Ditch. In May 2001, the Division Engineer placed this disputed water right on the decennial abandonment list and Harrison filed protests in the Water Court for Water Division No. 2 (“water court”).

In 2006, Harrison entered into a stipulation with the State and Division Engineers (“Engineers”) whereby he would file an application for a change in the point of diversion reflecting the historic use of the water right and the Engineers would remove the water right from the abandonment list. The stipulation also required Harrison to divert the water right only from the original decreed point of diversion nowhere else. If Harrison failed to abide by the

stipulations, he could not oppose a motion by the Engineers to have the water right declared abandoned.

Harrison timely filed an application for change of the water right, along with a map showing the approximate location of the historic point of diversion and the State Engineer's diversion records for the Mexican Ditch over several decades. St. Charles Mesa Water District, the Division Engineer, and the holders of several intervening rights opposed Harrison's application. Five years later, the water court heard Harrison's application and subsequently denied the application on the merits for Harrison's failure to prove by a preponderance of the evidence the historic use of the water right. The following month, the water court granted the Engineers' motion to declare the water right abandoned. Harrison appealed both rulings directly to the Supreme Court of Colorado.

The Court addressed three issues on appeal. First, whether Harrison fell within an exception to the requirement that applicants must prove historic use of a water right for a change to that water right. Second, whether the denial of a change application for failure to prove historic use is tantamount to an unconstitutional taking of property without just compensation. And finally, whether abandonment is the proper remedy for failure to prove historic use.

On appeal, Harrison argued that he fell within an exception to the requirement that a change application be supported by evidence of the actual historic use of the right over a representative period. The Court rejected this argument because the exception created by the Court in *Flasche v. Westcolo Co.*, 112 Colo. 387 (1944) is not a general exemption from proving historic use, but rather, concerns the representative period of time over which a showing of historic use may be sufficient. Moreover, an analysis of a representative period of historic use was irrelevant in this case because the water court did not find, and Harrison did not assert, a proven historic use.

Next, the Court addressed whether the water court's denial of Harrison's change application for failing to prove historic use unconstitutionally deprived him of property without just compensation in violation of the Fifth Amendment of the United States Constitution or Article II, Section 15 of the Colorado Constitution. Answering the question in the negative, the Court reasoned that although a water right is characterized as a property right, it remains usufructuary in nature. This merely permits a water right holder to use of water within the limitations of the prior appropriation doctrine, which provides for the abandonment of water rights for which there has been a prescribed period of nonuse. The Court further held limiting a change in water right to the extent of established historic use does not deprive an applicant of an existing property right (as is a required showing for a taking) but rather guards against an enlargement of that right.

Last, the Court addressed the Harrison-Engineers stipulation, pursuant to which Harrison's failure to include sufficient proof of historic use in his change application resulted in abandonment of the water right. The Court stated Harrison's failure to prove historic use by a preponderance of the evidence did not establish an abandonment of that right. The Court reasoned that although the parties stipulated to this remedy and the water court approved it, the language of the stipulation was ambiguous because there was

more than one reasonable interpretation of the terms of the stipulation and the parties' later actions were inconsistent with the stipulation.

Accordingly, the Court affirmed the water court's dismissal of Harrison's change application because he failed to prove historic use of the water right and because denying a change of a water right for failure to prove historic use does not amount to an unconstitutional, compensable taking of property. The Court reversed the water court's decision to grant the Engineers' motion for abandonment because the parties' stipulation did not provide for abandonment as the consequence of Harrison's failing to succeed in his change application.

Darin Smith

Mesa Cnty. Land Conservancy, Inc. v. Allen, No. 11CA1416, 2012 WL 2044781 (Colo. Ct. App. June 7, 2012) (holding (i) a 2003 amendment to Colorado's conservation easement statute was intended to apply retroactively; (ii) the notice requirement of the statute only applied prospectively; and (iii) the conservation easement in question encumbering mutual ditch shares complied with statutory requirements).

In 1990, the United States granted a conservation easement ("easement") covering 140 acres in Mesa County to Mesa Land Trust (the "property"), and the easement provided that all water rights associated with the easement would remain with the property. At the time of the conveyance, the United States held nine shares of capital stock for access to water rights in the Big Creek Reservoir Company ("Big Creek"). Sam A. and Susie R. Allen ("Allens") subsequently purchased the property, subject to the easement. The Allens later sold the property, but exempted the shares in Big Creek from the transfer.

Mesa Land Trust sought declaratory and injunctive relief against the Allens for violating the terms of the easement that required the water rights to be transferred with the property. The Colorado District Court for Mesa County ("district court") issued a permanent injunction in favor of Mesa Land Trust, requiring the Allens to convey the Big Creek shares to their purchasers. The Allens appealed the district court's ruling to the Colorado Court of Appeals for Division VII ("appeals court").

On appeal, the Allens argued that the easement was invalid on the basis that the relevant statute, at the time of the creation of the easement, did not allow the encumbrance of water rights. The appeals court began by analyzing COLO. REV. STAT. § 38-30.5-101 to -111 ("statute") and subsequent amendments to the statute. Pursuant to the statute, if subsequent amendments to the statute created a new right or obligation, that right or obligation could not apply retroactively because it would violate the constitutional prohibition on *ex post facto* laws.

In determining whether the statute created a new right or obligation, or whether it merely clarified an existing ambiguity, the appeals court applied a three part analysis in which it (i) assessed whether the statute was ambiguous prior to amendment; (ii) reviewed the legislative history surrounding the amendments to the statute; and (iii) considered the plain language of the statute.