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Mesa Cnty. Land Conservancy, Inc, v. Allen, No. 11CA1416, 2012 WL 2044781 (Colo. Ct. App. June 7, 2012)

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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.

As to the first issue, the appeals court concluded the statute was ambiguous because multiple interpretations of the statute were possible. Accordingly, the appeals court examined the legislative history of the statute to see if the legislative history could help it resolve the ambiguity. On the second issue, the appeals court noted that statements made during legislative hearings on the statutory amendments may reveal the legislature's intent when it enacted the amendments. Absent a clear legislative statement that the amendments were intended to substantively change the statute, the appeals court concluded that the legislative intent behind the amendments was to clarify, not change, the statute. Last, in part three of its analysis, the appeals court examined the plain language of the statute. The statute stated that it applied to conservation easements in place prior to the effective date of the statute. The appeals court concluded the plain language of the statute showed the statute was to apply retroactively to easements in existence at the time the statute was enacted.

After determining that the statute applied retroactively, the appeals court analyzed whether the statute was unconstitutionally retrospective, meaning it impaired a vested right or imposed a new duty or obligation upon a vested right. The appeals court noted the easement statute permitted creation of easements involving water rights. Furthermore, because the 2003 amendment only clarified the 1976 easement statute, the appeals court held the legislature did not create a new right or obligation and it did not impair any vested rights.

On the other hand, the appeals court concluded the easement statute did contain retrospective language. The amended statute's notice provision required sixty-day notice to a mutual ditch or reservoir company before an easement could be created or revoked in the ditch or reservoir's water rights. In order to avoid enforcing an unconstitutionally retrospective notice requirement that did not exist when United States created the easement in question, the appeals court held the notice requirement applied only to easements created after the effective date of the 2003 amendment.

Last, the appeals court addressed the Allens' argument that the Colorado Uniform Commercial Code ("UCC") notice requirement applied to the Big Creek shares because the shares were securities governed by the UCC. The appeals court dismissed the Allens' argument and applied longstanding Colorado law that recognized shares in a mutual ditch company are distinct from shares of ownership in corporate entities. Therefore, the appeals court held the UCC requirements associated with recording and transferring mutual ditch stocks did not apply to the Big Creek shares.

In the alternative, the Allens argued that Mesa Land Trust was required to obtain permission from Big Creek in order to encumber the Big Creek shares. Again, the appeals court dismissed the Allens' claim, applying the well-settled common law doctrine that shares in a mutual ditch company are water rights, and thus real property interests subject to the same notice and recording requirements as other real property. Because the deed contained record notice of the easement, subsequent purchasers, including the Allens, had constructive notice of the encumbrance and Mesa Land Trust was not required to notify Big Creek of the conservation easements prior to the conveyance of the Bear Creek shares.

Accordingly, the appeals court affirmed the judgment of the trial court in favor of Mesa Land Trust, requiring the Allens to convey the Big Creek shares to their purchaser along with the land.

Winslow Taylor

IDAHO

A & B Irrigation Dist. v. Idaho Dep't of Water Res., 284 P.3d 225 (Idaho 2012) (holding that the district court did not err in holding (i) the Ground Water Act applied to the administration of appellant's water right; (ii) the Director had sufficient evidence to support his decision not to set a reasonable groundwater pumping level; (iii) the Director could force appellant to interconnect prior to filing for a delivery call; and (iv) a clear and convincing evidence standard was proper when a court analyzes the Director's determinations).

This was an appeal of the District Court of Minidoka County's ("district court") decision regarding the Director of the Idaho Department of Water Resources' ("Director") application of the Rules for Conjunctive Management of Surface and Groundwater Resources ("CM Rules") to a groundwater delivery call filed by A & B Irrigation District ("A&B"). A&B acquired water rights on the Snake River in 1948, three years prior to the enactment of the Idaho Ground Water Act ("Act"). The Idaho Department of Water Resources ("IDWR") licensed and authorized A&B to divert 1,100 cfs from 177 points of diversion in order to irrigate approximately 62,000 acres in south-central Idaho.

Underlying the A&B project is the Eastern Snake Plain Aquifer ("ESPA"), which serves as the Minidoka Project's ("project") water source. A&B's delivery call petition sought an administration of junior-priority groundwater rights from the ESPA and a designation of the ESPA as a groundwater management area ("GWMA"). The delivery call petition alleged that junior-priority groundwater pumping from the ESPA lowered the water table an average of twenty feet, resulting in a 126-cfs reduction in A&B's diversion rate.

Citing a lack of material injury, the Director denied A&B's request to designate the ESPA as a GWMA. Moreover, the Director concluded, A&B had an obligation to take reasonable steps to maximize the use of interconnection to move water within the system before seeking curtailment or compensation from junior appropriators. The Director also noted that while conditions in the southwest area make recovery of water from the wells difficult, it is not a proper justification for curtailment. Further, A&B did not need to exceed reasonable pumping levels.

In response, A&B filed a petition for review with the district court. The district court affirmed the Director's findings on all of A&B's claims except for the standard the Director applied to whether or not A&B suffered a material injury. Therefore, the district court remanded the proceedings with an instruction to apply the clear and convincing evidence standard.

A&B then appealed to the Idaho Supreme Court alleging: (i) the Director erred in concluding that A&B's water right is subject to the Act; (ii) the Director erred in finding that A&B did not need to exceed reasonable pumping levels, even though the Director did not provide a specific level; (iii) the Direc-