

9-1-2010

Kerbs v. Walck, 229 P.3d 974 (Wyo. 2010)

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Serena Hendon, Court Report, Kerbs v. Walck, 229 P.3d 974 (Wyo. 2010), 14 U. Denv. Water L. Rev. 193 (2010).

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constructed. The court held that although the DNR had the authority to consider the environmental impact of the well, it was not required to do so. The DNR's duty under the public trust doctrine arose only when there was evidence suggesting that the well could affect state waters. The court did not set any standard for the DNR to determine when the duty to further examine environmental impacts arises, but it did state that scientific evidence suggesting adverse impacts should be sufficient. The court ultimately deferred to the judgment of the DNR to decide what evidence would be sufficient to warrant further investigation into environmental impacts of the state's water. Accordingly, the court held that if there was a substantial indication that a well would significantly affect the waters of the state then the DNR should consider the information and possibly conduct its own studies.

Finally, the court addressed the proper way concerned citizens should present evidence of environmental impacts of a well to the DNR. The court agreed with the DNR that citizens have three options for submitting information. The first two options allow citizens to present new information either while the permit process was ongoing or after the DNR granted the permit, in which case a contested case hearing would take place to consider the information. The third option allows for petition of judicial review after the DNR issues the permit; however, this option does not allow for consideration of new information. The court also pointed out that the District did not submit its information under any of these options.

Nonetheless, because the DNR had the geologist's report prior to making its decisions to approve the Village's permits, the court ultimately concluded that the DNR did have a duty to consider the report as to whether the well would cause adverse environmental impacts to the waters of Lake Beulah. The court reversed and remanded to the district court with directions to remand to the DNR to consider the affidavit and any other information pertaining to the well.

Kelly Miller

WYOMING

Kerbs v. Walck, 229 P.3d 974 (Wyo. 2010) (holding that a landowner harmed a neighboring landowner by installing a non-approved diversion, that the same landowner unlawfully tampered with headgates, and that the damages awarded were not excessive).

Two ranchers, Mr. Eugene Walck ("Walck") and Mr. Scott Kerbs ("Kerbs") of Kerbs Ranch, own both pre-1904 and post-1904 water rights along Jack Creek. Two irrigation ditches, the Forney No. 2 Ditch ("Forney Ditch") and the D. McPhail Ditch ("McPhail Ditch"), convey water through headgates from Jack Creek. The Forney No. 2 Ditch conveys water to just the Kerbs Ranch, while the McPhail Ditch

conveys water to both ranches. For over fifty years, however, Kerbs sent Kerbs Ranch water from McPhail Ditch through the Forney No. 2 Ditch, without permission for a point of diversion change.

In 2002, drought and low water levels subjected Jack Creek to the Pathfinder Call, a 1904 water right call to fill the Pathfinder Reservoir. On April 12, 2002, the water commissioner placed notices allowing for the supply of only pre-1904 water rights from Jack Creek. Kerbs did not adjust the headgates for pre-1904 water rights and continued to take McPhail Ditch water for the Kerbs Ranch through the Forney Ditch. On April 25, 2002, the water commissioner chained and locked the headgates to the pre-1904 allotment position. However, Kerbs then installed a canvas dam, culvert, and slide gate to divert water from McPhail Ditch into the Forney Ditch, effectively stopping flow in the McPhail Ditch.

On May 7, 2002, the water commissioner discovered the headgates for the McPhail Ditch and the Forney Ditch completely closed. In addition, Kerbs shut two outlet pipes to Walck's lower creek field, giving Kerbs ample water but leaving Walck a minimal amount. Walck owns twenty-three acres downstream of the diversion installed by Kerbs, and thus, could not irrigate from the McPhail Ditch. In 2004, Walck sued Kerbs. In a bench trial, the district court ruled that Kerbs Ranch interfered with Walck's water rights. Kerbs Ranch then appealed to the Wyoming Supreme Court (the "court").

The court first analyzed the district court's findings regarding the diversion installed by Kerbs. Kerbs argued that he left some water in the McPhail Ditch but neglected to install a measuring device so he did not know the amount of water he diverted. The district court held that Kerbs violated Wyoming law by installing a diversion without proper approval for a diversion point change. Because Kerbs interfered with the legal water amount required in the McPhail Ditch at the point of Walck's diversion, the district court determined that Walck did not receive his legal share. Kerbs argued that, with this finding, the district court put Walck's water rights above his, despite the equal priority of the rights. The court affirmed the district court's ruling.

Secondly, the court reviewed the timeframe in which Kerbs shut the headgates to the Forney and McPhail Ditches. The district court concluded that the McPhail Ditch would have conveyed Walck's appropriation had Kerbs not shut the headgates. Kerbs argued that the water commissioner shut the gates, the water commissioner should have opened the headgates, and finally, Walck should have opened the headgates. The court determined that the only proof available showed Kerbs shutting the headgates, the water commissioner had no duty to re-open the headgates, and Walck would not have opened the headgates, as he understood the shut headgates were part of an on-going criminal investigation. Kerbs again argued the district court elevated Walck's water rights above his. The court disagreed.

The court determined that due to the equal priority of rights,

both Walck and Kerbs should share the shortfall equally. By taking ample water while leaving Mr. Walck with the minimal amount, Kerbs elevated his water rights above Walck. Also, the court determined that the district court awarded non-excessive, reasonable damages.

Accordingly, the court affirmed the ruling of the district court.

Serena Hendon

