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N. Sterling Irrigation Dist. v. Simpson, 202 P.3d 1207 (Colo. 2009)

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way in the contract was "non-exclusive"; and (2) the Land Board had the discretion to relocate Rangeview's rights-of-way. The court disagreed with both arguments. First, the court contended that an owner of property where another has rights-of-way may not interfere in an unreasonable manner with those rights, and allowing Aurora access to the disputed sites would unreasonably infringe on Rangeview's rights. Second, the court noted that according to the terms of the lease agreement, the Land Board could only relocate Rangeview's rights-of-way when it was convenient for both parties, not for the benefit of a third party. Further, relocating rights-of-way was only permissible for the "commercially reasonable development of the Lowry Range."

Aurora next argued that, in spite of the Land Board's rejection of their request, the City could still potentially gain access to the disputed sites through negotiation with Rangeview, and thus a summary judgment based on the "can and will" requirement was not appropriate. The court rejected this argument, noting that the fact that the parties were opponents in this action was sufficient evidence that compromise was not a substantial possibility.

Finally, Aurora contended that a less rigid "can and will" rule should be applied in this case because speculation was not an issue. The court responded by clarifying that this rule actually requires a technical obstacle to the "can and will" requirement and that such a requirement impedes maximum utilization. The court pointed out that neither of these criteria was satisfied, and so the relaxed standard did not apply. Similarly, the court noted that section 37-87-101(1)(b) of the Colorado Revised Statutes, which requires state agencies to allow persons to acquire real property for water storage "to the maximum extent practicable," does not apply in this situation as it would not be "practicable" for the Land Board to acquiesce to Aurora's request for access to the disputed sites.

Accordingly, the court affirmed the water court's ruling, and remanded the case for proceedings consistent with the decision.

James Henderson

N. Sterling Irrigation Dist. v. Simpson, 202 P.3d 1207 (Colo. 2009) (holding that a fixed water year does not itself impose a limit on decreed storage rights, but is merely the administrative mechanism by which the one-fill rule lawfully limits those rights).

The North Sterling Irrigation District ("NSID") requested water under its storage rights; however, the State and Division Engineers for Water Division No. 1 (the "Engineers") denied the requests. The Engineers stated that the November 1 water year and the one-fill rule limited NSID's diversions. NSID filed a Complaint for Declaratory Judgment requesting that the water court determine whether Colorado law authorizes the Engineers to impose a fixed water year on NSID for purposes of administering the one-fill rule. The City of Boulder,

Centennial Water and Sanitation District, and Pawnee Well Users intervened as Intervenors-Plaintiffs ("Intervenors"). The water court held that the Engineers had the authority to impose a fixed water year to administer the one-fill rule. NSID appealed, and the Colorado Supreme Court conducted *de novo* review of the water court's determination of Colorado law.

The Engineers maintained that the November 1 water year had been in place since 1936, and no change in administrative policy had occurred. NSID asserted that, since 1911, the operable policy was the low-point administration regime and diversion based on a variable calendar year. Intervenors argued that a change in administration of NSID's water rights would change the timing of NSID's requests and inhibit Intervenors' diversions.

The court considered the Engineers' authority pursuant to Colorado statute and explained that it is the Engineers' duty to administer the waters of the state and that this duty includes curtailing diversions that contravene applicable law. Relying on previous Colorado Supreme Court decisions, the court explained that the one-fill limitation on water storage rights dictates that the Engineers limits a reservoir to one annual filling, up to its decreed capacity. Upon reaching capacity, the Engineers can refuse to honor a call during the remainder of that one-year period. Further, if the storage decree is silent regarding administration of the one-fill rule, then the Engineers have authority to account for and, if necessary, curtail diversions that violate the rule.

According to Colorado case law, the November 1 date represents the generally accepted start-date for the administrative water year. In addition, the court recognized that a variable year can provide inadequate protection to the rights of junior water users. Finally, parties claiming historical water uses must obtain a judicial determination adjudicating those rights so that the party has standing to enforce its historical use.

The court concluded that NSID had not demonstrated any legal injury associated with a change in administrative policy because 1) NSID had not adjudicated its rights; 2) NSID's historical diversions were consistent with a fixed water year; 3) a former NSID manager wrote a letter in 1989, objecting to the November 1 policy; 4) NSID's decree was silent regarding administration of the one-fill rule; and 5) NSID could have diverted water in-priority any day of the year, as long as the right had not exceeded the volumetric limitation of the one-fill rule. Any limitation on NSID's storage rights was imposed by Colorado's one-fill rule, not the Engineers' fixed water year. Finally, low-point administration had the potential to unlawfully enlarge NSID's water rights and harm to junior users.

Based on the foregoing, the court found that a fixed water year does not itself impose a limit on NSID's decreed storage rights, but is merely the administrative mechanism by which the one-fill rule lawfully limits those rights. The court determined that because there was no change

in administrative policy, the fixed water year did not affect Intervenors' rights. Consequently, the court affirmed the water court's holdings.

Mariel Yarbrough

Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 219 P.3d 774 (Colo. 2009) (holding that the water districts did not display a substantial probability that they would utilize the requested appropriations, and that the evidence supported a fifty-year water supply planning period, but did not support conditional water appropriations for recreational in-channel rights or possible bypass flow requirements of federal permits, or a fifty cubic feet per second diversion from a pumping station for use in the water districts' system).

The Pagosa Area Water and Sanitation District and the San Juan Water Conservancy District ("Districts") made an initial application for the right to store 29,000 acre-feet of water in Dry Gulch Reservoir with the right to refill the reservoir and potentially use up to 64,000 acre-feet of water per year, a 100 cubic feet per second ("cfs") direct flow right at the Dry Gulch Pumping Station into storage, and a eighty cfs direct flow right from the pumping station for use anywhere in the districts system. The Districts based their initial application on a 100-year planning period and the District Court, Water Division 7 approved the initial decree. Trout Unlimited appealed the decree and the Colorado Supreme Court reversed and remanded the decision determining that the Districts had not provided enough evidence to support a 100-year planning period. On remand the water court issued a decree with a fifty year planning period, and Trout Unlimited appealed to the court again, bringing this action.

On appeal, Trout Unlimited asserted that the Districts had not provided enough information to substantiate the allocation requests made, even under the shorter planning period. The Districts' revised decree consisted of a conditional storage right of 19,000 acre-feet with the right to refill to a total annual storage of 25,300 acre-feet in Dry Gulch Reservoir, a direct diversion of 100 cfs from the San Juan River into storage at Dry Gulch, and a separate direct diversion flow right of fifty cfs from the San Juan River for use anywhere in the Districts' system. The Districts attempted to use a planning period of seventy years, but the water court approved a period of fifty years. Trout Unlimited appealed this decision as well, asserting that the court's remand instructions lent to a thirty-five-year planning period, ending in 2040.

Reviewing the new appeal, the court determined that the fifty-year planning period decided on by the water court was appropriate and comported with statutory requirements and other decisions by the court. Due to the lengthy lead-time necessary to prepare the Dry Gulch Reservoir, it would not be ready for use until 2025. The fifty-year planning period, which reaches to 2055, also coincides with other state initiatives to project Colorado population and geographic location for