

1-1-2010

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Karina Swenson Phipps, Court Report, Waterfall Cmty. Water Users Ass'n v. N.M. State Eng'r, 216 P.3d 270 (N.M. Ct. App. 2009), 13 U. Denv. Water L. Rev. 534 (2010).

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Waterfall Cmty. Water Users Ass'n v. N.M. State Eng'r, 216 P.3d 270 (N.M. Ct. App. 2009)

Waterfall Cmty. Water Users Ass'n v. N.M. State Eng'r, 216 P.3d 270 (N.M. Ct. App. 2009) (holding that New Mexico Statute section 72-5-29 does not grant a superseding natural right to appropriate waters of a fully appropriated stream system).

Waterfall Community Water Users Association ("Waterfall") submitted an application for 320 acre-feet per year of surface water from Culberson Spring, a tributary to Pecos River. The State of New Mexico Office of the State Engineer ("State Engineer") concluded that granting Waterfall's application would impair existing water rights to water in the Pecos River stream system and denied Waterfall's application. Waterfall appealed to the Twelfth Judicial District Court of New Mexico. Waterfall argued that section 72-5-29 of the New Mexico Statutes allows Waterfall to divert waters from the Culberson Spring for the domestic uses of the inhabitants of the land adjacent to the Culberson Spring as long as any distribution of water does not interfere with vested rights. The district court granted summary judgment in favor of the State Engineer finding that there was no available water for appropriation in the Pecos River stream system, that Culberson Springs was a tributary and part of the Pecos River stream system, and that the provisions of section 72-5-29 were inapplicable to Waterfall's claim.

On appeal, the Court of Appeals of New Mexico addressed Waterfall's assertion of a "natural right" to the fully appropriated water in Culberson Spring under section 72-5-29. Waterfall conceded it could only exercise the alleged natural right if doing so would not interfere with preexisting vested water rights, but maintained that exercising its natural right to the waters of Culberson Spring would have little or no adverse impact on the existing appropriations in the Pecos River stream system. Waterfall supported this argument by offering the opinion of their domestic water system operator, James Murrill. Mr. Murrill's affidavit stated that based on his personal knowledge, most of the water Waterfall sought to appropriate would be "discharged back into the ground in the valley through individual liquid waste disposal systems."

The court primarily addressed two issues. First, the court analyzed whether section 72-5-29 provided Waterfall with a superseding natural right to appropriate waters from the Culberson Spring notwithstanding the fact that there is no unappropriated water in Pecos River stream system. Second, the court analyzed whether the district court improperly denied Waterfall an opportunity to exercise this right by granting summary judgment. To determine these issues, the court initially looked at the plain language of section 72-5-29.

According to both the plain language of the statute and the State Engineer's explanation of the statute, section 72-5-29 is limited to the narrow purpose of conserving and utilizing torrential floodwater. The intended effect of the statute is to smooth out the water supply curve by allowing water to be impounded during periods of excess supply, which otherwise would not be placed to beneficial use. The plain language of the statute comports with the conclusion that the State Engineer could grant such an application only if there is unappropriated water to

appropriate and such appropriation would not deprive prior rights holders of that water. Thus, the Legislature did not create a “super status water use” for utilization of floodwaters.

The court concluded that summary judgment was proper as a matter of law because section 72-5-29 concerns flood waters and Waterfall was not asserting a right to flood waters, but to water from Culberson Spring. Furthermore, Waterfall was not entitled to appropriation under section 72-5-29 because this statute does not provide Waterfall a superseding natural right to water from a fully appropriated stream system. The only basis for Waterfall’s argument responding to the unavailability of unappropriated waters was from Mr. Murrill’s opinion, based on personal knowledge, that individual liquid waste disposal systems would return the water Waterfall sought to appropriate back to vested rights holders. The court dismissed Mr. Murrill’s testimony because it was opinion testimony unsupported by scientific fact and thus insufficient to defeat a motion for summary judgment. Consequently, the court affirmed the district court’s ruling.

Karina Swenson Phipps

UTAH

Otter Creek Reservoir Co. v. New Escalante Irrigation Co., 203 P.3d 1015 (Utah 2009) (holding that a water user must complete seven years of adverse use by the 1939 effective date of an amendment to the water right statute to obtain a water right by adverse possession).

Otter Creek Reservoir Company (“Otter Creek”) and New Escalante Irrigation Company (“New Escalante”) claimed rights to snow melt near the divide between the Sevier River drainage and the Escalante River drainage. Without a diversion, the water would flow into the Sevier River, which forms part of Otter Creek’s water supply. New Escalante claimed that it adversely used the water since December 1, 1936 by way of a ditch that intercepted the water and carried it to the Escalante River drainage. The issue concerned the application of a 1939 amendment to Utah Code Ann. § 73-3-1 which prohibited the acquisition of water rights by adverse use. Prior to 1939, water users could obtain a right through seven years of “continuous, uninterrupted, hostile, notorious, adverse use.” Otter Creek filed an action with the Sixth District Court in Utah against New Escalante in 2001 seeking a declaratory judgment that New Escalante had no right to use the water. New Escalante filed a counterclaim, arguing that it had a diligence right, or, in the alternative, a superior right based on adverse use.

The district court granted summary judgment in favor of Otter Creek with respect to the diligence claim, holding that New Escalante forfeited its right by not participating in the 1936 adjudication of all water rights in the Sevier River drainage (“Cox Decree”). The district court denied summary judgment regarding the adverse use claim, holding that because New Escalante’s adverse use began prior to the effective date of the amended statute in 1936, the use could still ripen