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Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist., 2011 WL 382377 (Colo. Feb. 7, 2011)

determinations.

Michael L. Downey

COLORADO

Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist., 2011 WL 382377 (Colo. Feb. 7, 2011) (holding that a district's failure to comply with a stipulated decree's filing deadline to perfect its conditional groundwater rights resulted in abandonment of those rights).

Cherokee Metropolitan District ("Cherokee") and Upper Black Squirrel Creek Ground Water Management District ("UBS") entered into a stipulation on January 25, 1999, concerning Cherokee's use of two sets of wells in the Upper Black Squirrel Creek Designated Ground Water Basin ("the Basin"). The water court incorporated the stipulation into a conditional water rights diligence decree ("stipulated decree") in March of 1999. The stipulated decree required Cherokee to file an application to perfect its conditional groundwater rights in the Basin within a two-year period after diverting and applying the water to a beneficial use.

Cherokee first applied water from well 14 to a beneficial use in December of 2000 and applied water from wells 15 and 16 to beneficial use in April of 2002. Cherokee did not file an application to make absolute its conditional rights to these wells, which had been applied to beneficial use, until February of 2005. Cherokee applied water from well 17 to beneficial use on April 28, 2006. The parties disputed whether Cherokee filed to make a portion of well 17 absolute on April 30, 2008, when Cherokee filed its motion to amend its application, or on May 30, 2008, when Cherokee filed the amended application.

UBS and the Bookers ("the Objectors") filed a motion to dismiss Cherokee's application to make portions of wells 14-17 absolute in the District Court, Water Division 2. The water court ordered abandonment of the conditional portions of wells 14-17 and awarded attorney fees. Cherokee then appealed to the Colorado Supreme Court ("the court").

The court held that the Objectors' motion to dismiss was not subject to the three-year statute of limitations that governs contracts because the Objectors filed the motion in response to Cherokee's failure to comply with a stipulated water court decree. The court also held that Cherokee stipulated away a sexennial schedule of filing deadlines, notice prior to cancellation, and the ability to file within the same month of diversion when it entered the stipulated decree.

The court further held that Cherokee did not comply with the two-

year period when it filed to perfect a portion of its conditional rights to wells 14-17. Cherokee was approximately two years and two months tardy in filing to perfect well 14 after diversion, approximately ten months tardy in filing to perfect wells 15 and 16, and at least two days tardy in filing to perfect well 17. Therefore, the court held that the water court correctly determined that Cherokee abandoned only the portion of its conditional rights to wells 14-17 for which it untimely filed to perfect under the stipulated decree.

Accordingly, the court affirmed the water court's order of abandonment of only the conditional rights to wells 14-17, but reversed the water court's award of attorney's fees because it determined Cherokee's argument that a contract remedy should apply to be rational.

Caroline Powers

HAWAII

In re Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. Oct. 13, 2010) (holding that Hawaii's Commission on Water Resource Management: (1) could prioritize between trust resources and allocate non-potable water over potable water for irrigation; (2) had sufficient findings for Interim Instream Flow Standards; but (3) had erred by failing to consider new evidence regarding a particular application for water use permit).

This is the third appeal of a case hearing before the Hawaii Commission on Water Resource Management ("Water Commission") regarding waters distributed by the Waiahole Ditch System ("Ditch") in Oahu, Hawaii. The Hawaii Supreme Court remanded the first two Waiahole cases for further findings by the Water Commission. This appeal involves the Water Commission's third decision, entitled Findings of Fact, Conclusions of Law, and Decision and Order ("D&O III"). There are three issues on this appeal: (1) the water use permit to the Estate of James Campbell ("Campbell Estate"); (2) the water use permit to Pu'u Makakilo, Inc. ("PMI"); and (3) the Interim Instream Flow Standards ("IFFS").

The Waiahole Ditch collects fresh surface water and dike impounded ground water from windward Oahu and delivers it to leeward Oahu. In 1992, existing users of Ditch water were required to apply for water use permits. In 1993 Oahu Sugar Company ended its operations, making available a large amount of ditch water. Soon after, the Water Commission admitted twenty-five parties and commenced a combined contested case hearing for all applications and petitions.

In D&O III, the Water Commission considered evidence of five groundwater sources from the Waipahu-Waiawa Aquifer ("Aquifer") for construction of a new well to irrigate Campbell Estate's lands as an