

Water Law Review

Volume 11 | Issue 2

Article 63

1-1-2008

Nicoll v. Rudnick, 72 Cal. Rptr. 3d 879 (Cal. Ct. App. 2008)

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Kathleen Brady, Court Report, Nicoll v. Rudnick, 72 Cal. Rptr. 3d 879 (Cal. Ct. App. 2008), 11 U. Denv. Water L. Rev. 458 (2008).

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conveyed, and accordingly, that the Agua Sierra's ownership interest in commercial water rights was valid under Arizona water law.

Jeff McGaughran

CALIFORNIA

Nicoll v. Rudnick, 72 Cal. Rptr. 3d 879 (Cal. Ct. App. 2008) (holding that appropriative water rights run with the land in proportion to the acreage of the property conveyed unless expressly reserved in the conveyance).

Nicoll Ranch consisted of two contiguous parcels of land, an upslope parcel also referred to as Nicoll Ranch and a downslope parcel referred to as Nicoll Field. In 1864, J.W. Nicoll constructed a ditch to convey water from the Kern River to his ranch land and had a judgment entered in 1902 confirming his right to appropriate the water. Presently, John W. Nicoll ("Nicoll") is the owner of the parcel known as Nicoll Ranch, while Oscar Rudnick ("Rudnick") bought Nicoll Field after the Nicoll family lost the property in a foreclosure. A dispute arose between Nicoll and Rudnick, and in 2006, Nicoll filed an action to quiet title to the parties' respective water rights. Nicoll argued that the amount of water actually used on each parcel in the years immediately preceding the foreclosure determined the apportionment of the water rights. Rudnick contended that the 1902 judgment established the water rights as appurtenant to the entire property, and by acquisition of Nicoll Field, he acquired a proportionate share of the water rights. The trial court agreed with Rudnick's position and Nicoll appealed. The Fifth District Court of Appeal ("Court") affirmed.

The trial court concluded that the 1902 judgment recognized an appropriative water right that was appurtenant to the entire property, and when Rudnick acquired a percentage of the total acreage by a conveyance deed that did not refer to any water right, he obtained his proportionate share of the water rights. The Court held that the trial court applied the correct legal principles and found no legal error.

The Court found that the 1902 judgment clearly recognized that the water rights were appurtenant to the land and that this judgment comported with established California law that acquired water rights become appurtenant to the land. Additionally, the 1902 judgment specifically stated that acquisition of the water rights attached to the "land owned by said parties." Therefore, until Nicoll Field came under separate ownership, the water was appurtenant to the entire property for any allocation of beneficial use. Further, both the agreement to submit the controversy to arbitration and the Report of Arbitrators indicated that the Court awarding the 1902 judgment based its water quantity allotment at least partially on acreage increments and fractions of 160 acres. Thus, J.W. Nicoll's ownership of more than 300 acres determined the particular allotment awarded at the time.

While none of the conveyances relating to Nicoll Field referred to the water rights, the Court found that the general rule is that a sale under foreclosure includes the appropriative water rights even when not mentioned in the foreclosure proceedings. Because water rights run with the land, courts presume conveyance with the land when there is no express reservation. Since the beneficial use of the water right extended to the entire property without limitation, the Court found that the trial court correctly and reasonably resolved the issue by proportional allotment.

Additionally, the Court found that the pre-foreclosure water use did not affect apportionment of the water right between the two parts of the land. The owner of an appropriative water right may use the water at any location on the land without impairing or restricting the nature of his right. Finally, because the Court concluded that the water right was appurtenant to the entire property at the time of the foreclosure, the established water right was appurtenant to the entirety of the land, not only a portion of the property.

The Court affirmed the judgment of the trial court, holding that the parties' respective water rights ran appurtenant to the land in proportion to the acreage of the property in its entirety.

Kathleen Brady

COLORADO

Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307 (Colo. 2007) (holding that the water court did not make sufficient findings of fact to enable review regarding governmental water supply agencies' burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of unappropriated water, nor did the water court make sufficient findings of fact regarding agencies' fulfillment of the "can-and-will" test).

In 2004, the San Juan Water Conservancy District ("SJWCD") and the Pagosa Area Water and Sanitation District ("PAWSD") (collectively, the "districts") agreed to apply for an additional conditional appropriation for the Dry Gulch Reservoir ("Reservoir"), an off-stream, as-yet unconstructed reservoir. Prior to the agreement for the additional appropriation, SJWCD held a conditional decree for 6,300 acre-feet for the Reservoir.

In 2003, Steve Harris ("Harris"), the engineer for the districts, submitted a report that documented a water storage need of approximately 12,000 acre-feet to meet the 2040 annual demand of the districts' users. However, when Harris and the districts' legal counsel were preparing the 2004 water court application, Harris suggested that the application seek to fill the Reservoir to its 35,000 acre-foot capacity. The districts projected that this amount would meet their needs through 2100. Harris justified this amount by noting 1) the town of