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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

Pagosa Springs was seeking a recreation in-channel diversion that would tie up much of the water, 2) the Colorado Water Conservation Board may increase the instream flow in the future through an additional appropriation, and 3) the United States Forest Service might impose a right-of-way permit requiring a large amount of bypass flow.

Trout Unlimited ("Trout") filed a statement of opposition and participated in the trial at Colorado District Court, Water Division 7. Trout believed that the application contradicted Colorado's anti-speculation doctrine, because the proposed appropriation would provide the districts more water than they could reasonably anticipate using over a reasonable period of time. Trout supported its argument by introducing a study that found that population forecasts over thirty years are highly susceptible to uncertainty. Additionally, Trout's engineer, John Gerstle, used the same spreadsheet Harris had used, substituting what Gerstle believed were more realistic figures, and concluded that the districts' projections exceeded their actual need. After hearing arguments from the districts and Trout, the water court entered a conditional decree in favor of the districts for 1) the right to fill and refill the Reservoir to achieve a total annual storage volume of 64,000 acre-feet; 2) an additional right of diversion at a rate up to 80 cubic feet per second ("cfs") with a priority date of December 20, 2004; and 3) the right to reuse the water with prior water court approval. The decree provided the ability to exercise the storage and direct flow rights independently or in combination with a limitation that the diversion rate should never exceed 180 cfs at any time. In regard to the "can-and-will" anti-speculation test, the water court concluded that the districts had demonstrated that the water can and will be diverted and beneficially used, and that the districts could accomplish the appropriations within a reasonable time. The water court further stated that the districts' appropriation was non-speculative and based upon reasonable needs for a growing population.

Trout appealed the grant of the conditional decree to the Colorado Supreme Court. On appeal, the Court noted that a governmental entity may receive a conditional decree only if it is non-speculative in nature. The Court further elaborated that a governmental agency may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period. The Court found that the water court did not make findings of fact with regard to the threshold issue of what planning period is reasonable, while specifically noting that the water court should closely scrutinize a governmental agency's claim for a planning period exceeding fifty years. Moreover, the Court held that the water court did not resolve the factual dispute concerning projections of future growth or future land use mixes. Finally, the Court held that the water court did not make findings of fact under the "can-and-will" test regarding the districts' ability to construct

the necessary infrastructure to perfect the use and reuse of 64,000 acre-feet of stored water coupled with an additional 80 cfs direct flow right.

Accordingly, the Court set aside the conditional water right while reversing and remanding the water court's judgment. In doing so, the Court held that a governmental agency must satisfy the "can-and-will" test by showing that it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time. Additionally, the Court held that the water court must make sufficient findings of fact that a governmental water supply agency has met the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation: 1) what is a reasonable planning period; 2) what are the substantiated population projections based on a normal rate of growth for that period; and 3) what amount of water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the period, above its current supply.

Tim Fiene

IDAHO

In re SRBA, No. 33669, 2008 WL 427550 (Idaho Feb. 19, 2008) (holding that an 1888 federal act did not grant water rights to the City of Pocatello, but rather merely granted access to surface water on an Indian reservation and the opportunity to establish water rights under state law).

In the late 1800s, the Utah Northern Railway Company ("railroad") built two intersecting railroad lines on the Fort Hall Indian Reservation ("reservation"). Within a few years, non-Indian trespassers settled on the intersection at a site called Pocatello Junction ("townsite"). In 1887, the United States and the Tribes of the reservation negotiated a Cession Agreement ("agreement"). This agreement transferred the townsite to the settlers and granted a right-of-way to the railroad for the existing rail lines but made no mention of water. An 1888 congressional bill approved the agreement but, unlike the agreement, did mention water. Section 10 of the bill ("Section 10") stated Pocatello citizens "shall have the free and undisturbed use in common with the said Indians of the waters . . . in the vicinity of [the townsite], with right and access at all times . . . and the right to construct, operate, and maintain all [water carrying structures]."

In 1990, the City of Pocatello ("Pocatello") filed a claim in the Snake River Basin Adjudication ("SRBA"), asserting that Section 10 granted Pocatello a federal water right via the Property Clause of the U.S. Constitution. The United States, Idaho, and the Shoshone-Bannock Tribes ("opposing parties") all objected and moved for summary judgment. An SRBA Special Master granted summary judgment in favor of the opposing parties and recommended that the SRBA court not confirm Pocatello's claim. The SRBA court affirmed the