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Cameron Banko

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SOUTH DAKOTA

Brown v. Hanson, 2007 SD 134, 743 N.W. 2d 677 (holding that the unauthorized commercial use of well water, in violation of an easement agreement permitting residential use only, did not extinguish the easement or entitle the aggrieved party to the remedy of rescission).

In June of 2001, neighboring property owners entered into a common well easement agreement ("Agreement"). The Agreement entitled Terry and Susan Brown ("Browns") to access water from James Hanson's ("Hanson") well for domestic, residential purposes only. From 2000 to 2005, the Browns permitted attendees of the Sturgis Bike Rally ("Sturgis") to camp on their property and to take water from the well, constituting non-domestic, non-residential use in violation of the Agreement. In July of 2006, the Browns entered into an agreement to sell their property to an unrelated third party, at which point Hanson filed a letter with the county claiming that he rescinded the Agreement in view of the Browns' unauthorized provision of well water to Sturgis attendees.

Consequently, the Browns initiated a declaratory judgment action in the Circuit Court of the Fourth Judicial Circuit, Meade County, South Dakota, seeking to determine whether Hanson was entitled to the remedy of rescission. The circuit court entered summary judgment in favor of the Browns, determining that the Agreement created a permanent water right rather than a conditional easement, and thus the remedy of rescission was unavailable to Hanson. Hanson appealed to the Supreme Court of South Dakota, claiming that the Browns' misuse of the water extinguished the easement as a matter of law, entitling him to rescind the Agreement.

South Dakota statutory law provides that an easement "is extinguished by the performance of any act . . . which is incompatible with its nature or exercise." In analyzing this statutory provision, the court looked to the plain meaning of the term "incompatible," defined by the Merriam-Webster dictionary as "incapable of association or harmonious coexistence," and analyzed case law from other jurisdictions with similar statutes, resulting in the application of a severability test to the easement at issue.

The court found that the Browns' misuse of the water was severable from the authorized domestic use provided for by the Agreement, resulting in the restoration of the easement to its intended use. Furthermore, the court reasoned that the Browns' misuse did not disturb or diminish Hanson's domestic use under the Agreement, nor did it result in a severe or permanent burden on his entitled use. Finally, the court determined that the authorized residential use and the commercial misuse of the water were not "incompatible" under the plain meaning of the term.

Accordingly, the court affirmed the decision of the circuit court and held that the Browns' unauthorized misuse of the water was not sufficient to extinguish the Agreement, and Hanson was not entitled to the remedy of rescission.

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UTAH

W. Water, L.L.C. v. Olds, No. 20060527, 2008 WL 465540 (Utah 2008) (dismissing for lack of subject matter jurisdiction where the water rights applicant failed to first exhaust administrative remedies in its submission of a request for reconsideration that dramatically differed from the original plan).

Western Water, L.L.C. ("Western Water") filed three related applications (collectively, the "Original Plan") with the Utah State Engineer ("State Engineer") to appropriate water through a plan that would "salvage and exchange" water that was spilling into Great Salt Lake. The State Engineer found the Original Plan to be massive, covering 288,107 acre-feet of water. However, Western Water described the plan as medium-sided because a number of its requests were in the alternative and it only sought to appropriate 86,000 acre-feet of water.

The State Engineer denied the Original Plan on the grounds that it failed to meet all the statutory requirements. The State Engineer decided: (1) there was insufficient evidence that water was available for the applications; (2) the approval of the applications would impair existing rights or interfere with the more beneficial use of water; (3) there was insufficient evidence that the plan was physically or economically feasible; (4) there was insufficient evidence that the applicants could complete the proposal; (5) the applicants filed the plan for the purpose of speculation or monopoly; and (6) the plan would ultimately harm public welfare.

Instead of requesting reconsideration of the Original Plan, Western Water filed a timely request for reconsideration of a "revised and reduced" version of the Original Plan (the "Revised Plan"). Western Water argued that the State Engineer or the applicant could pare down an application to remove infirmities. However, the State Engineer did not act on the request, which resulted in a statutory denial after twenty days.

Western Water sought de novo review of the State Engineer's denial of the Revised Plan in the Third District Court for the State of Utah. The district court dismissed Western Water's claim for lack of subject matter jurisdiction. The district court reasoned that the State Engineer did not consider the Revised Plan independent of the Original Plan. Accordingly, the State Engineer reviewed the Revised Plan only to see if it provided a reason to grant the Original Plan. Therefore, the court held that Western Water failed to exhaust administrative reme-