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Ready Mixed Concrete Co. v. Farmer Reservoir & Irrigation Co., 115 P.3d 638 (Colo. 2005)

James E. Downing

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rangement of the tidelands, but the court found that a simple rearrangement of two parcels of land was not analogous to the statutorily required "enhancement of the shoreline."

The court, in adopting Earth Corps' argument, found that the requirement of enhancing the configuration of the shoreline required a specific change to the physical geography of the area or the construction of an improvement to the shoreline. The court held that the Exchange neither changed the physical geography nor added improvement to the shoreline. Therefore, the Commission's finding that the Exchange enhanced the configuration of the shoreline lacked evidentiary support, and in the absence of such evidence, the court found that the Commission erred in finding the exchange met the criteria required by the section 6307. Because the Commission did not meet the statutory conditions, the Commission lacked the legislative power to facilitate the exchange of the parcels.

The court reversed the district court's decision and granted Earth Corp's petition for writ of mandate.

Brandon Saxon

COLORADO

Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co., 115 P.3d 638 (Colo. 2005) (holding that the plain language of the 1918 decree and referee's report demonstrated that the ditch water right was for tributary South Platte Basin water, not developed water, and return flows from the decreed irrigation use belonged to the river system for use by other appropriators).

Ready Mixed Concrete filed an application to quantify and change its McCanne Ditch water right for use in augmentation. The McCanne ditch collects water from percolating springs, drainage and seepage water gathered along the first three miles of its course. Ready Mixed Concrete's 1918 decree recognizes an appropriation date of March 16, 1892, a rate of flow of 4.0 cubic feet per second for irrigation use on 300 acres, not to exceed 900 acre-feet of water annually. The decree requires the water remaining after irrigation to be returned to the South Platte River system directly or by percolation through the soil. The 1918 McCanne Ditch decree was for irrigation use of seepage waters. Ready Mixed Concrete filed the change application to store water under the McCanne ditch priority in a newly excavated gravel pit and release it to the South Platte River to replace evaporation depletions injurious to other rights from gravel pits the company operates.

Ready Mixed Concrete, by a motion for summary judgment, claimed entitlement under the 1918 decree to 900 acre-feet of fully consumable "developed water" for its use by augmentation or replacement, free of the river's call. Several parties, including Farmers Reser-

voir and Irrigation Co. ("Farmers"), filed statements of opposition. They claimed the application would alter historic stream conditions as they had existed under the decreed irrigation use for McCanne Ditch water. The District Court for Water Division No. 1 denied summary judgment and dismissed the application when Ready Mixed Concrete failed to carry its burden of proof to demonstrate historical consumptive use of the McCanne Ditch water. Ready Mixed Concrete appealed to the Supreme Court of Colorado.

On review, the court turned to the plain language of the 1918 McCanne Ditch decree and the accompanying referee's report. The court observed that the referee's report and the decree clearly stated that the decreed use of McCanne ditch water was for irrigation of 300 acres of land, not to exceed 900 acre-feet per year. The decree stated that, "[a]ny amount greater than what is necessary under the present method of use to maintain the flow and needs herein established and limited, shall be delivered into the South Platte River." The "method of use" referred to by the referee is collection of the water by the ditch and field irrigation using the water; the "need" referred to is crop production; and the "limitation" referred to is the requirement of returning to the river all water not needed for crop production. Based on the language in the decree provisions, the court found that the 900 acre-foot volumetric limitation was a condition to prohibit wasteful irrigation of the 300 acres, and was not intended to be a volumetric water consumption allowance. The court found that the 1918 decree and referee's report cannot be read as a whole and given effect unless water not consumed by the decreed irrigation use for growing crops on the 300 acres is returned to the stream.

The court also addressed Ready Mixed Concrete's burden of quantifying the beneficial consumptive use made of the McCanne Ditch water for irrigation of the 300 acres of land. A change of water right application reopens the prior decree for determination of the true measure of the appropriative water right's consumptive use draw on the river system. Ready Mixed Concrete requested a change to the irrigation right in order to augment surface evaporation from mined gravel pits. In proposing the change from its prior decree, Ready Mixed Concrete altered the subject matter, the cause of action, and the parties affected by the proposed action in contrast to the existing decree. The court held that *res judicata* principles of claim or issue preclusion do not apply in a change case to allow Ready Mix Concrete the benefit of a priority independent of other priorities to South Platte River water. The court affirmed the water court's judgment.

James E. Downing