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High Plains A & M, LLC v. Southeastern Colo. Water Conservancy Dist., 120 P.3d 710 (Colo. 2005)

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High Plains A & M, LLC v. Southeastern Colo. Water Conservancy Dist., 120 P.3d 710 (Colo. 2005) (holding that to obtain a decree for a change of water right, an applicant must sufficiently demonstrate an actual beneficial use to be made at an identified location).

The Fort Lyon Canal Company (“FLCC”), a mutual ditch company, operates an extensive system of canals and reservoirs with decreed water rights in the Arkansas River Basin in southeastern Colorado. The system provides irrigation water to nearly 93,000 acres of land between the towns of La Junta and Lamar. High Plains A & M (“High Plains”), a private water investment company, purchased 20,000 shares in the FLCC, with options to purchase an additional 8,000 shares, together constituting roughly 30 percent of all outstanding shares in the FLCC.

High Plains filed two separate applications with the District Court for Water Division 2 to change the use of its FLCC ownership from irrigation to municipal and other related uses, as well as for alternate points of diversion and alternate places of use. High Plains also proposed a change in place of use of the water rights to any one of twenty-eight counties located from southeastern to northern Colorado, but did not identify any particular municipal or quasi-municipal entity with which High Plains had an agreement for actual beneficial use of the water.

Multiple parties filed statements of opposition to High Plains’s two applications. The water court consolidated the applications, and High Plains filed a motion for determination of a question of law pursuant to Colorado Rules of Civil Procedure 56(h), arguing that Colorado’s anti-speculation doctrine did not apply to changes of water rights. The objectors in the case subsequently filed a motion for summary judgment, arguing that High Plains’ applications violated the anti-speculation doctrine and that High Plains presented no specific plan for the water court to assess injury to other water users. At the time the water court ruled on the motion for summary judgment, High Plains had obtained no agreements or contracts with other entities to use the water rights it sought to change.

The water court granted the objectors’ motion for summary judgment, holding that the anti-speculation doctrine applied to changes of water rights, and found High Plains’s applications in violation of the doctrine. The water court found High Plains’s application “so expansive and nebulous” that rendering a judicial determination of injury to other water right holders was impossible. High Plains subsequently appealed to the Colorado Supreme Court for a determination of whether Colorado’s anti-speculation doctrine applied to changes of water rights.

On appeal, the court looked to the fundamental requirements for any appropriation of water in Colorado. Reasoning that a change of water right is simply a changed form of the original appropriation, the

requirements for a change of water right encapsulate the elements of the original appropriation. The court noted that because appropriators can only perfect water rights by actual use, all water rights have a situs that includes the point of diversion and the place where actual beneficial use occurs. In addition, an essential element of a perfected water right is actual beneficial use of the water appropriated, and the actual beneficial use of a water right is the basis, measure, and limit of an appropriation. In a change of use proceeding, the court must ensure that the perfected water right is the one that continues in its changed form under the new decree.

Further, as a requirement of a valid appropriation of water, Colorado law requires a purported appropriator to have a legally vested interest, or a reasonable expectation of procuring such interest, in the land or facilities such appropriation will serve. Therefore, the court held that as a basic predicate of an application for a decree changing the type and place of use of a water right, the applicant must sufficiently demonstrate an actual beneficial use at an identified location or locations under the change decree.

High Plains argued that the water court's decision would prejudice High Plains's investment, because it could not enter into contracts with end users until the water court approved the change of its water rights, thereby diminishing the value of its investment. The court rejected High Plains's argument of prejudice on several grounds, stating, among other things, that the purchase of shares in a mutual ditch company guaranteed only a proportionate interest in the water rights held by the mutual ditch company and continued delivery of the water to their historic place of use. The court noted that shares in a mutual ditch company are valuable assets, and High Plains could use its ownership in the FLCC on lands under the FLCC system "to the benefit of the local economy and to consumers of agricultural products." Further, according to the court, basic tenets of Colorado water law, which entitle an owner to a change of water rights, would still apply if High Plains contracted with other entities to use its FLCC shares. This would allow High Plains to seek adjudication of a change of water rights at that time.

In its disposition of the case, the court affirmed the water court's dismissal of High Plains's applications without prejudice to consideration of future applications for change of the water rights owned by High Plains in the FLCC.

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ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724 (Colo. 2005) (affirming the water court's sua sponte summary judgment of a change decree because the losing party had sufficient opportunity to argue against dismissal and the shareholder group's members will not lose decreed water rights when making temporary changes authorized by statute).