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## ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724 (Colo. 2005)

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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.

*Donald E. Frick*

**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).

Independent Shareholders Group, LLC (“ISG”) is a group of forty-five ranchers and farmers who owned shares in the largest mutual ditch company along the Arkansas River. ISG proposed permanent changes to its water rights but did not specifically identify the location or the beneficial use of the water under the proposed change decree. Upon ISG’s motion, the District Court Water Division 2 consolidated ISG’s application for a change decree with another similar application. Subsequently, the Southeastern Water Conservancy District (“Southeastern”) moved for summary judgment against the similar application, but not against ISG’s application. The water court dismissed both applications.

ISG appealed the water court’s summary judgment of the application directly to the Supreme Court of Colorado based on two arguments. First, ISG claimed that since no party moved for summary judgment against ISG’s application specifically, the water court’s sua sponte dismissal on summary judgment was improper. The court affirmed the water court’s sua sponte summary judgment motion by comparing the unusual procedure to the federal court system. The court adopted the notion used in federal courts that appellate courts will affirm a technically flawed summary judgment as long as the losing party had an opportunity to argue against the dismissal and the losing party is not subject to undue prejudice. Here, ISG had notice of the possibility for summary judgment against its change decree, ISG asserted its position on the issues in its own motion, and ISG was not unduly prejudiced. Therefore, the court found the sua sponte summary judgment was not a reversible error. Additionally, the court affirmed the water court’s award of costs to Southeastern, even though Southeastern had not moved for summary judgment against ISG, because Southeastern was the adverse party.

ISG’s second claim on appeal rests on the argument that its members could lose their historic consumption rates if they make temporary changes through water leases, exchanges, or loans. The court dismissed this theory by pointing out the numerous legislative concessions which allow for temporary changes to water rights without penalizing the original water appropriator.

In conclusion, the court affirmed the water court’s sua sponte dismissal of the change decree without prejudice, allowing for a re-application, because ISG had an opportunity to present its case against dismissal and the members would not lose their consumptive rights by making statutorily authorized short term changes.

*David B. Oakley*