

1-1-2005

East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., No. 03SA372, 2005 Colo. LEXIS 230 (Colo. Mar. 21, 2005)

Susan M. Curtis

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Susan M. Curtis, Court Report, East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., No. 03SA372, 2005 Colo. LEXIS 230 (Colo. Mar. 21, 2005), 8 U. Denv. Water L. Rev. 676 (2005).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., No. 03SA372,
2005 Colo. LEXIS 230 (Colo. Mar. 21, 2005)

court opined that at a minimum, merely floating a kayak could be a reasonable recreation experience on some reaches, while at a maximum, a world-class expert course requiring nearly the entire flow of a given stream could also be reasonable. Thus, the reasonableness of an applicant's sought recreation experience depended on the available, unappropriated stream flow. As such, what constituted reasonableness depended entirely upon the river basin.

Once the water court determined whether an RICD application was for an objectively reasonable recreation experience in and on the stream in question, then the water court needed to determine the minimum amount of stream flow necessary to accomplish that intended recreation experience. Thus, the statute might require the water court to weigh conflicting expert testimony given by course designers or other interested parties, and to make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience. The court also made clear that the water court could not take at face value the appropriator's suggestion, as set forth in the application, of a reasonable recreation experience for the stream involved, nor should the water court accept, without scrutiny, the applicant's analysis of necessary stream flow to achieve that objective. In making its determinations, the water court must carefully evaluate the Five Factors, giving presumptive effect to unrebutted Board findings, and considering the Board's recommendation and any other evidence submitted in the course of the trial.

Thus, the court held both the Board and the water court erred, and remanded the case to the water court with instructions to remand to the Board to determine whether the application comported with the Five Factors.

David Michael Shoheit

East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., No. 03SA372, 2005 Colo. LEXIS 230 (Colo. Mar. 21, 2005) (holding the terms of a contract govern restrictive, contractually created water rights and may not exceed the uses detailed in the contract).

East Ridge of Fort Collins, LLC ("East Ridge") filed a complaint for declaratory judgment against the Larimer & Weld Irrigation Company ("Irrigation Company"). East Ridge sought to change the point of diversion and place and the type of its water right pursuant to two contractual agreements. Conversely, the Irrigation Company claimed East Ridge owned a water right perpetually restricted to irrigation use. The Division 1 Water Court concluded the contractual nature of East Ridge's water right perpetually restricted the use to irrigation purposes only. East Ridge appealed the water court's decision to the Colorado Supreme Court. In its appeal, East Ridge requested the court determine whether the contractual language prohibited conveying, chang-

ing, or moving East Ridge's water right. East Ridge also raised the issue of whether it forfeited its water right by using the right for a non-specified purpose.

In 1873 several individuals incorporated the Irrigating Ditch Company No.10 ("No. 10") for the sole purpose of irrigation. In 1879 Benjamin Eaton purchased all the rights, titles, and interests in the No. 10. Each right, title, and interest expressly provided for the irrigation of eighty acres of land. Eaton eventually conveyed all of the rights to the Irrigation Company. East Ridge obtained a water right in the Irrigation Company through two contracts dated April 1878.

The supreme court began its analysis by defining mutual ditch companies as quasi-public entities whose stock represents a definite and specific water right. The court noted that, under Colorado law, shareholders in a mutual ditch company may seek a change in their water rights.

Since East Ridge owns a contractual delivery water right, the court interpreted the terms of the contracts. The court noted the contracts provided for a sufficient quantity of water necessary to irrigate eighty acres of land. Accordingly, the issue was whether the irrigation of eighty acres qualified as a descriptive or restrictive provision. The court stated the contracts appeared facially ambiguous and it considered extrinsic evidence to resolve the ambiguity.

First, the court inferred the decrees adjudicated to the Irrigation Company included East Ridge's water rights, and, thus, the explicit terms of the contracts governed the water rights. Second, the court noted other jurisdictions concluded that specific reference to irrigation of land was restrictive, rather than descriptive. In addition, the minutes from the March 25, 1878, No. 10 shareholders' meeting suggested the restrictive nature of the irrigation provision. Third, the court construed the contracts to allow both East Ridge and the Irrigation Company to receive the benefits of the bargain based on their reasonable expectations because the facts indicated the shareholders believed the provision restricted the use and the location of the water rights.

In his dissenting opinion, Justice Hobbs noted the early priority date of the No. 10 Ditch water rights and pointed out the practical effect of the majority's holding that only those with the first and best priority rights needed to restrict their use to irrigation, while all other shareholders in the Irrigating Company could change their uses and location. In Justice Hobbs' opinion, the majority's reasoning deprived the earliest priority owners of fully realizing the modern, economic value of their water rights, a result that was "shocking, unconscionable, and contrary to Colorado law." Justice Hobbs felt the majority also failed to consider the most important extrinsic evidence: the historical context surrounding irrigation priorities. In conclusion, Justice Hobbs stated all water users on the same ditch must possess the opportunity to

change water rights to other uses and locations. By only allowing some shareholders on the ditch to change their water rights, the majority failed to honor the original intent of the parties.

East Ridge's contracts contained terms that narrowed and limited the scope of the agreement. Therefore, the court held the contracts, rather than Colorado water law statutes, governed East Ridge's water rights. Accordingly, the court affirmed the water court's decision and prohibited changing the use or location of East Ridge's water rights.

Susan M. Curtis

In re Park County Sportsmen's Ranch, L.L.P., No. 01SA412, 105 P.3d 595 (Colo. Jan. 18, 2005) (holding an applicant that requests approval of a plan for augmentation must prove that it can establish the timing and location of depletions, and the availability of replacement water to prevent injury from those depletions; and that in the absence of a showing that out-of-priority depletions will occur when senior water rights do not have a call on the river, or that depletions will be less than its withdrawals because of anticipated return flows, an applicant must replace 100 percent of its withdrawals from tributary groundwater in an over appropriated basin).

In 1996, Park County Sportsmen's Ranch ("PCSR") filed an application with the District Court for Water Division 1 for conditional underground and surface water rights in the South Park region of Colorado on the South Platte River. PCSR also sought adjudication of a plan for augmentation. Numerous parties objected to PCSR's application, and at the end of PCSR's case-in-chief, the water court dismissed PCSR's application.

PCSR's proposed project envisioned pumping up to 140,000 acre-feet of groundwater from the underlying South Park Formation, a saturated aquifer tributary to the South Platte River, using a series of proposed wells on its property and delivering the water pumped from the wells downstream to the City of Aurora. According to PCSR, the pumping of the wells would create a cone of depression in the aquifer, the underground storage vessel for which PCSR sought adjudication. PCSR planned to store surface water, collected during periods of high runoff through a system of diversions, in the underground storage vessel to recharge ponds located above the aquifer. PCSR also claimed the right to store precipitation and irrigation return flows salvaged from surface vegetation in the underground reservoir. PCSR's pumping would diminish the amount of groundwater flow to the South Platte River from the aquifer, and the resulting cone of depression would ultimately draw on and deplete the flow of the river.

PCSR initially proposed to replace out-of-priority depletions to the South Platte River by utilizing the water pumped from its wells, and previously decreed water rights in the area including three springs,