

1-1-2005

## In re Park County Sportsmen's Ranch, L.L.P., No. 01SA412, 105 P.3d 595 (Colo. Jan. 18, 2005)

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### Custom Citation

Donald E. Frick, Court Report, In re Park County Sportsmen's Ranch, L.L.P., No. 01SA412, 105 P.3d 595 (Colo. Jan. 18, 2005), 8 U. Denv. Water L. Rev. 678 (2005).

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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,

which PCSR claimed as free from the priority system as developed water, as direct replacement to the river. In its application, PCSR also claimed conditional water rights for six reservoirs, a direct flow collection system, the underground storage reservoir created by the project, and a conditional water right for a fourth spring which it claimed was free from the priority system as replacement sources.

Prior to trial, PCSR withdrew its claims to administer any of the springs free of the priority system, and withdrew its claim to change the use of previously decreed water rights for use in the plan for augmentation. Thus, prior to trial the only sources of replacement water for PCSR's proposed plan for augmentation were its claim for conditional surface rights with 1996 priorities and its claim for underground storage.

Opposers to PCSR's application challenged, among other things, the adequacy of PCSR's plan for augmentation to replace out-of-priority depletions associated with the project. In support of its application, PCSR hired a consulting firm to develop surface water and groundwater models to demonstrate the legal availability of water, and to simulate the operation of the project. Initially, PCSR also proposed to use the models for the calculation of out-of-priority depletions in actual operation of the project, in conjunction with a limited ground water monitoring program. Before trial, PCSR abandoned the models in favor of a more extensive ground water monitoring plan to quantify and replace depletions associated with the project as they occurred.

At trial, the water court excluded expert testimony in support of the proposed ground water monitoring plan due to PCSR's failure to timely disclose the testimony. After PCSR's case-in-chief, in which PCSR presented extensive expert testimony in support of its models, the water court dismissed PCSR's application concluding that the models did not produce sufficiently reliable results to permit reasonably accurate determination of the timing, amount, and location of stream depletions or rate of aquifer recharge. The water court also found that PCSR's surface water model did not produce sufficiently reliable results to determine stream flow or legal availability of replacement water for the project.

Following its ruling, the water court denied PCSR's motion for reconsideration, and granted the Opposers' request for costs, attorney's fees, and joinder of Aurora. On appeal to the Colorado Supreme Court, PCSR argued that the water court erred by dismissing PCSR's application, and that the water court abused its discretion by awarding costs and fees.

The court began by examining the water court's dismissal of PCSR's plan for augmentation. First, PCSR argued that the water court erred in requiring PCSR to replace 100 percent of its groundwater withdrawals. To the extent, an applicant can prove that its depletions are non-injurious or that its injurious depletions are less than its with-

drawals, the applicant need not replace 100 percent of its withdrawals. Where surface water is over appropriated, Colorado law presumes that groundwater depletions through well pumping injure senior appropriators absent a showing to the contrary. The court suggested two ways PCSR could have shown that it did not have to replace 100 percent of its withdrawals. First, PCSR could have demonstrated its depletions to the river would have occurred when downstream senior water rights did not have a call on the river. During trial, however, PCSR failed to prove the timing of depletions from its wells. Second, PCSR could have shown that its depletions would be less than its withdrawals due to return flows. The court pointed out that PCSR presented no evidence of anticipated return flows, and instead claimed the right to consume all of the water it pumped.

PCSR also argued that reductions in evapotranspiration resulting from the project would offset some of its withdrawals. As part of its proposed plan for augmentation, PCSR claimed that its wells would cause reductions in the groundwater table that would eradicate certain phreatophytes. These phreatophytes historically consumed tributary groundwater. In support of its claim, PCSR argued that the underground storage created by the pumping was analogous to gravel pits and on-stream reservoirs.

The court noted that generally an applicant cannot claim salvaged water as credit in an augmentation plan, and that courts should narrowly construe exceptions to the general laws. Two exceptions allowed applicants to credit the amount of water historically consumed by pre-existing natural vegetative cover for unlined gravel pits and on-stream reservoirs. The court rejected PCSR's argument, reasoning that legislature narrowly drafted the statutes, and refusing to imply that the legislature provided for credit such as PCSR claimed.

The court upheld the water court's exclusion of certain expert testimony and evidence regarding water availability and PCSR's ability to calculate out-of-priority depletions. The court also considered the water court's dismissal of PCSR's augmentation plan pursuant to Colorado Rules of Civil Procedure Rule 41(b)(1). PCSR argued that it was only required to meet a *prima facie* case to survive dismissal of its application. The court noted that where a court is the trier of fact and a party brings a Rule 41(b)(1) motion to dismiss, the court should not evaluate whether the plaintiff established a *prima facie* case, but instead should evaluate whether the evidence presented justified judgment in favor of defendant. In cases involving applications for approval of augmentation plans, the water court will only approve such plans if such plan will not injuriously affect the owner of or persons entitled to use the water under a vested water right or a decreed conditional water right. In reviewing a proposed augmentation plan, a water court must consider the amount and timing of the applicant's depletions, the amount and timing of available replacement water, and the

existence of injury to senior appropriators. Thus the court ruled that, before an applicant can establish an absence of injury to satisfy its *prima facie* case, the applicant must first establish the timing and location of depletions, as well as the availability of replacement water to prevent injury from those depletions.

PCSR also argued that the water court should retain jurisdiction to remedy uncertainty regarding injury from an augmentation plan, rather than dismiss the case. The court rejected this argument holding that water courts should retain jurisdiction to address injurious effects that result from the operation of a decreed augmentation plan, and Opposers may only invoke jurisdiction after a water court finds no injury. The trial court must determine quantity of depletions and the legal availability of replacement water at trial as part of the court's injury analysis, not during retained jurisdiction. The court upheld the water court's factual determinations that PCSR's groundwater and surface water models failed to produce sufficiently reliable results to permit a reasonably accurate determination of the timing, amount, and location of stream depletions or the legal availability of replacement water. The court therefore held that the water court correctly concluded that it could not determine the issue of injury, and properly dismissed PCSR's augmentation plan.

The court next turned to PCSR's claims for absolute and conditional surface water rights, its claim for conditional water rights for twenty-six wells, and the water court's dismissal of the claims. The court noted that a conditional right to pump water that would injure senior appropriators might only be decreed in conjunction with an augmentation plan. Under Colorado law, to obtain a conditional decree, an applicant must present evidence of intent to appropriate and an overt act in furtherance of that intent. Further, the applicant must show that (1) the water can and will be diverted; (2) the applicant will beneficially use the water; and (3) the applicant will complete the project within a reasonable time. Because PCSR's claims for conditional water rights were interdependent with its claim for underground storage, and because PCSR failed to present testimony of Aurora's direct use of the water without prior underground storage, the court held that the water court properly dismissed PCSR's claim for absolute and conditional surface water rights, and conditional underground water rights.

In conclusion, the Colorado Supreme Court held that the water court properly dismissed PCSR's application because PCSR lacked an adequate augmentation plan. The court also ruled that the water court abused its discretion by awarding attorney's fees, with the exception of attorney's fees incurred in defending PCSR's frivolous claims for precipitation and irrigation runoff. Because the water court made no specific findings with respect to the fees incurred in defending the frivo-

lous claims for precipitation and runoff, the court remanded the case to the water court for a determination of these fees.

*Donald E. Frick*

**Trail's End Ranch, LLC v. Colo. Div. of Water Res., 91 P.3d 1058 (Colo. 2004)** (holding the practice of diverting water from points not decreed to a water right amounts to a change in the right that cannot enjoy the priority of the existing decree without first following the requirement of adjudication).

Trail's End Ranch, LLC, ("Trail's End") brought suit for declaratory judgment and injunctive relief against the Colorado Division of Water Resources ("Division"). The District Court, Water Division 2, granted the Division's motion for summary judgment and Trail's End appealed to the Colorado Supreme Court.

Trail's End held three decreed water rights for irrigation at separate ditches on Spruce Creek. Trail's End diverted water associated with these rights not only at the decreed headgates, but also at points downstream. When the Division Engineer issued an order to cease this practice, Trail's End complied. However, Trail's End subsequently proposed to the Division Engineer a plan to operate these rights by diverting the associated water at the decreed headgates, measuring it, and then returning it into Spruce Creek. The water then flowed downstream to points where Trail's End would recapture and use it for irrigation. Although this proposed practice occurred entirely on the property of Trail's End and there were no other water users between the headgates and the downstream points of diversion, the Division Engineer found the practice objectionable and rejected the proposal. When the State Engineer agreed that the practice was unacceptable, Trail's End filed an action in the water court to declare its entitlement to the proposed operations and to enjoin enforcement of the Division Engineer's order.

The water court held that Trail's End's practice resulted in a change of its decreed points of diversion and that the plan to convey and recapture the same water did not exempt Trail's End from applying for a change of water right as prescribed by statute. The water court granted the Division's motion for summary judgment and denied the similar motion filed by Trail's End. Following this decision, Trail's End appealed directly to the Colorado Supreme Court.

In addressing the appeal, the supreme court first recognized that the legislatively created process of adjudication makes water rights enforceable. An absolute decree from such adjudication confirms a water right holder's vested property interest in the use of a specified amount of water, when the right holder obtains it through decreed points of diversion and applies it to a particular beneficial use. Incident to this right is the right to change the point of diversion to the extent it nei-