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Hughey v. Gwinnett County, 278 Ga. 740 (2004)

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ther enlarges the right or nor injures other water users. However, such a change in the point of diversion constitutes a change in the water right itself, which requires application and adjudication similar to an initial determination of a water right. Considering the meaning of terms used in the applicable statutory provisions, the court concluded that diverting water from a natural stream at a point other than that decreed to the water right was an out-of-priority diversion. This justifies an order from the Division to cease further diversions as to protect other existing adjudicated water rights.

The court then applied this statutory scheme to the proposed practice of Trail's End. The court found that the plan to recapture diverted water returned into Spruce Creek below the headgates, constituted a change in point of diversion, regardless of the other measures taken. As such, Trail's End could not benefit from the priorities of the existing water rights without first adjudicating the change of those rights. Although Colorado law permits water right holders to use natural streams to convey water when measured in accordance with the dictates of the State Engineer, this allowance does not relieve the water right holder from resulting legal obligations. The required adjudicative process played a critical role in the administration of water right changes as it protected potentially-affected decreed water rights and prevented the enlargement of appropriations by quantifying and establishing an appropriation's historic beneficial consumptive use before approving any proposed change. In light of this, the court found no legitimate purpose for the proposed rerouting practice of Trail's End existed, other than to circumvent the statutory requirement to adjudicate a change of water right, which undermines this important protection for other decreed rights.

Having found that the proposed practice resulted in a new or changed diversion, the court concluded that Trail's End could not benefit from the priorities of its existing water rights without adjudicating the resulting changes in those rights in the manner prescribed by statute. Therefore, the supreme court affirmed the judgment of the water court granting the Division's motion for summary judgment.

Mark D. Shea

GEORGIA

Hughey v. Gwinnett County, 278 Ga. 740 (2004) (holding a non-licensee party challenging the validity of a discharge permit has the burden of proof of showing impropriety).

The Environmental Protection Division of the Georgia Department of Natural Resources ("EPD") issued Gwinnett County a National Pollutant Discharge Elimination System permit ("permit") to discharge treated wastewater into Lake Lanier on November 9, 2000. Terence D. Hughey and others appealed the issuance of the permit, and Gwinnett

County intervened. At the first hearing, the administrative law judge ("ALJ") ruled in favor of the EPD and Gwinnett County. The Georgia Superior Court subsequently reversed the ALJ's decision. The Supreme Court of Georgia granted a writ of certiorari after the Court of Appeals of Georgia reversed the superior court's decision.

On appeal, Hughey contended (1) the court of appeals did not have proper jurisdiction, (2) the court of appeals erred by placing the burden of proof on Hughey, (3) the permit did not meet substantive requirements under antidegradation rules, and (4) the EPD failed to comply with required public notice and comment rules.

First, the court determined the court of appeals had proper jurisdiction and the order on remand was final and appealable. Next, the court concluded the court of appeals was correct in placing the burden of proof on Hughey. The court reasoned the burden of proof shifted to Hughey under the Georgia Administrative Rules of Procedure, and noted a party challenging the issuance of a license who was not the licensee bore the burden of proof.

On the third issue, the court held the court of appeals correctly found evidence to support the ALJ's ruling on degradation of water quality and reasoned the evidence was justifiable due to social and economic development. Furthermore, the court held the court of appeals erred in reversing the superior court's determination the permit did not require the highest and best level of treatment practicable under existing technology. On the final issue, the court concluded the court of appeals erred in reversing the superior court's finding of a notice and comment rules violation because the ALJ did not have the authority to summarily dispose of the issue and required more specificity for the public to have meaningful participation.

The court thus affirmed in part and reversed in part the court of appeal's decision.

Alexandra Farkouh

IDAHO

Clear Lakes Trout Co. v. Clear Springs Foods, Inc., 106 P.3d 443 (Idaho 2005) (holding that the Interim Stipulated Agreement between ground and surface water users provided safe harbor protection only to junior ground water users).

Clear Lakes Trout Company ("Lakes") and Clear Springs Food, Inc. ("Springs") operated fish hatcheries on adjacent parcels below the rim of the Snake River Canyon near Buhl, Idaho. Following litigation, Lakes obtained senior surface water rights and Springs obtained junior surface water rights. In 2001, due to severe drought conditions, the Idaho Department of Water Resources ("IDWR") informed groundwater users that they intended to curtail water use above the canyon rim. This notice motivated groundwater users and surface water users to