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East Twin Lakes Ditches & Water Works, Inc. v. Bd. of County Comm'rs of Lake County, 76 P.3d 918 (Colo. 2003)

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after the Commission grants a use right does the District have authority to assist in the enforcement of Commission rules regarding the management of that district.

Finally, the court ruled that the anti-speculation doctrine applied to applications to the Commission for groundwater use rights. The court rationalized that since groundwater in deep Denver Basin Aquifers was a finite public resource, it was inconsistent to require a showing of beneficial use for surface waters replenished seasonally, but not for groundwater within aquifers easily exhausted. A landowner like the Bradburys possesses only an inchoate, statutory right to use of underlying groundwater and therefore, must make a threshold showing of a beneficial, non-speculative use without waste. Alternatively, a landowner must establish a contract demonstrating beneficial use by a third party for uses not occurring on landowner's property.

In conclusion, the court held the Bradburys had a right to apply to the Commission for a determination of a use right for groundwater in aquifers underlying their land in the Kiowa-Bijou Designated Groundwater Basin and did not need to drill a well to obtain a use right. Additionally, the court found that under Colorado law, the Commission has proper authority to determine a use right for Denver Basin designation groundwater, not the North Kiowa-Bijou Groundwater Management District. Finally, the court remanded the case to the district judge to reinstate the finding that the Bradburys' applications were not speculative based on evidence previously offered during the administrative hearing.

Dara Lum

East Twin Lakes Ditches & Water Works, Inc. v. Bd. of County Comm'rs of Lake County, 76 P.3d 918 (Colo. 2003) (affirming water court's holding that the water right at issue was not abandoned because the owner adequately rebutted the presumption of abandonment created by failure to apply water to a beneficial use for a period of ten years with evidence sufficient to demonstrate an intent not to abandon).

In 1998, East Twin Lakes Ditches and Water Works, Inc. ("ETLD") filed suit seeking a declaratory judgment that the water right in Derry Ditch No. 1 ("ditch"), owned by Lake County Board of County Commissioners ("Lake County"), had been abandoned. The court in Water Division Two held that ETLD failed to establish by a preponderance of the evidence that the water had been abandoned. ETLD appealed, alleging abandonment due to thirty years of non-use and that the decision by the predecessors of Lake County to not line the ditch was affirmative proof of that abandonment. Lake County conceded a presumption of abandonment; however, Lake County

argued that it successfully rebutted the presumption with sufficient evidence demonstrating intent not to abandon. The Colorado Supreme Court explained it would not overturn the water court's decision unless the record was "wholly insufficient to support the decision."

The water right associated with the ditch was a senior water right for four cubic feet of water per second ("c.f.s") for the irrigation of a two-acre parcel of land, commonly known as Hallenbeck Ranch ("Hallenbeck"). In 1972, Twin Lakes Recreation Land Investment Company ("TLR") purchased Hallenbeck and its associated water rights with the intent to resell it for residential development. During the time TLR owned Hallenbeck, the property manager was unable to transport water in the ditch due to its porous nature. The manager informed TLR that in order to transport and apply the water, the ditch must be lined. However, TLR was unable to secure funds to line the ditch. Despite this failure, TLR took other actions demonstrative of an intent not to abandon. For instance, during its ownership, TLR filed a statement of opposition to a water rights application because it believed it might conflict with its own water rights, and filed an action in 1995 to correct a discrepancy between the decreed and actual points of diversion for the ditch. Despite repeated efforts, TLR was unable to resell the property for development, and in 1998, Lake County bought the ranch. Lake County purchased Hallenbeck with knowledge of the ditch's status and testimony indicated that Lake County made the purchase in part because it could use the water right associated with the ditch to create wetlands in the event Lake County successfully accomplished a land swap with the federal government.

The court reviewed the record to determine if it supported the water court's decision that the water right was not abandoned. A finding of abandonment depends on the existence of two elements: a sustained period of non-use and intent to abandon. The objector must prove abandonment by a preponderance of the evidence; however, since intent is difficult to prove, Colorado law provides that failure to apply water to a beneficial use for a period of ten years creates a rebuttable presumption of abandonment. To rebut this presumption, the water right owner must introduce objective and credible evidence sufficient to excuse the non-use or demonstrate intent not to abandon. In evaluating whether an owner intended to abandon his or her water right, Colorado courts examine seven factors whose cumulative weight may be enough to rebut a presumption of abandonment. These factors include: (1) repair and maintenance of the diversion structure; (2) attempts to put the water to beneficial use; (3) active diversion records and non-appearance of the water right in the State Engineer's abandonment list; (4) diligent efforts to sell the water right; (5) filing documents to protect, change, or preserve the water right; (6) leasing the water right; and (7) economic or legal obstacles to exercising the right.

The court then examined the facts according to these factors. The court found that both TLR and Lake County engaged in maintenance

and repair of the ditch, that the TLR property manager made a series of attempts between 1972 and 1998 to put the water to beneficial use, and that the ditch never appeared on the state engineer's abandonment list. Furthermore, the court found that TLR and Lake County took legal actions during their ownerships that were consistent with the use and protection of their water rights, including the investigation of water rights applications, TLR's 1995 filing of a statement of opposition to an application, TLR's application to correct invalid points of diversion for the ditch, and Lake County's 1998 joint filing with the City of Aurora requesting the ditch be used as an alternate point of diversion in a change case. Additionally, the court found evidence in the record of TLR's ten-year lease of the ditch to Box Creek Mining Company beginning in 1980, and also determined that TLR's repeated efforts to sell the ranch demonstrated the partnership's intent not to abandon. Lastly, the court found that TLR's inability to secure funds to line the ditch represented an economic obstacle to exercising the water right. In summary, the court found support in the record for six of the seven factors showing intent not to abandon, and held that the cumulative weight of these factors was sufficient to rebut the presumption of abandonment. Thus, the Colorado Supreme Court affirmed the water court's decision.

Kate O. Lively

Groundwater Appropriators of the S. Platte River Basin, Inc. v. City of Boulder, 73 P.3d 22 (Colo. 2003) (holding the Colorado Rules of Civil Procedure do not authorize imposition of attorneys' fees in cases dismissed with prejudice, and finding the opponent's requested injunction inapplicable in the present case).

Groundwater Appropriators of the South Platte River Basin ("GASP"), a corporation owning more than 3000 wells, filed applications for conditional water rights in 1995, 1996, and 1998. Various interested parties, including the City of Boulder ("Boulder") and local irrigation companies, filed statements of opposition to at least one of GASP's applications. GASP filed for partial summary judgment, requesting the District Court for Water Division One to not require GASP to identify augmented well depletions as a qualification for the conditional water rights sought. Boulder joined the irrigation companies in a cross-motion for summary judgment, seeking either an outright denial of GASP's applications, or alternatively, a requirement that GASP identify potential depletions and submit plans for augmentation. Boulder and the irrigation companies also sought an injunction to prevent GASP members from out-of-priority pumping. The water court granted GASP's motion for partial summary judgment.

Before trial on the remaining issues, GASP filed a motion to