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West Elk Ranch v. United States, No. 02SA93, 2002 WL 31681910 (Colo. Dec. 2, 2002)

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conditional water right and that a conditional water right does not expire without first providing notice of cancellation or expiration under section 305(7).

Thus, even though the Ranch failed to file its application for a finding of reasonable diligence, the water court improperly canceled the conditional water right by failing to provide the Ranch with the required statutory notice that its conditional water right would expire or be cancelled. Therefore, the court reversed the judgment and directed the water court to allow the Ranch to file an application for finding of reasonable diligence.

Mark Shea

West Elk Ranch v. United States, No. 02SA93, 2002 WL 31681910 (Colo. Dec. 2, 2002) (holding a party cannot show they “can and will” put water to a beneficial use if they have not obtained, and there is no evidence the party will obtain, the required permits to use the United States National Forest).

West Elk Ranch (“West Elk”) sought a conditional water right to a spring adjacent to their property on the United States National Forest in the water court for Water Division No. 4. The United States Forest Service (“USFS”) denied West Elk’s application for a Special Use Permit (“SUP”) to capture water and divert it to their property. Therefore, the water court granted summary judgment to the USFS and denied the conditional water right request because West Elk did not meet the conditional water right “can and will” requirement. West Elk appealed to the Colorado Supreme Court claiming they would eventually obtain an SUP, however, the court affirmed the lower court’s decision.

West Elk’s predecessor in interest applied for a conditional water right to use Bear Gulch Spring, located on the national forest, for stock watering and domestic use. The Department of Justice filed a statement of opposition to the petition because West Elk had not obtained an SUP and the USFS expressed concerns over the project’s environmental effects. Ultimately, after filing SUP applications, the USFS denied West Elk’s application due to environmental concerns. The water court found that West Elk could not and would not put the water to beneficial use without an SUP from the USFS; therefore, it did not meet the conditional water right “can and will” requirement. After the USFS filed a summary judgment motion, the court denied West Elk’s application and granted summary judgment in favor of the USFS.

On appeal, the supreme court first reviewed the definition of conditional water rights. A conditional water right is perfected when the holder of a right with priority finalizes their appropriation with reasonable diligence. The application must establish that the applicant has taken the “first step” towards perfecting his right and

illustrate how the applicant “can and will” finalize the appropriation.

The court then reviewed the *FWS* case where FWS and the Colorado Division of Wildlife (“DOW”) owned adjacent submerged property. FWS wanted a conditional right to expand its storage right, however, DOW would not grant permission to submerge more land and expand the storage capacity of the lakes. Therefore, the *FWS* court did not grant FWS a conditional right because they did not obtain permission to enlarge the lake and, therefore, could not put water to a beneficial use.

West Elk argued the present case was analogous to *In re Gibbs* where Gibbs requested a conditional right to withdraw water from a well located on adjacent property. The well property owner had not granted access permission. In granting a conditional right, the *In re Gibbs* court did not require such permission at the time of the decree because Gibbs illustrated she could gain access to the well through a prior easement or private condemnation.

The court found this case more factually similar to *FWS* than *In re Gibbs* because the USFS did not grant West Elk an SUP, nor was there evidence that it would grant an SUP in the future. Thus, absent an SUP, West Elk could not and would not put water from Bear Gulch Spring to beneficial use. In finding the water court properly granted summary judgment, the supreme court concluded there was no question of material fact and West Elk could not meet the “can and will” requirement.

Holly Kirsner

CONNECTICUT

Ace Equip. Sales v. Buccino, 797 A.2d 516 (Conn. 2002) (holding that a pond originally created by damming a natural stream is treated under the law in the same way as a natural pond with respect to riparian rights and that owners of abutting land are presumed to possess riparian rights in the adjoining pond).

Ace Equipment Sales (“Ace”) initiated this suit in the Superior Court of Connecticut seeking an injunction to bar Thomas and Irma Buccino (“Buccino”) from entering onto or using Hall’s Pond for recreational purposes, and a declaratory judgment that Buccino owned no part of the pond bed. Buccino claimed ownership of a sliver of subaqueous land at the base of the pond dam and sought a declaratory judgment regarding that boundary and an injunction to enforce their right to use the pond and removal of a fence, erected by Ace, which barricaded their right-of-way. The court granted summary judgment in favor of Buccino and denied Ace’s motion. The issue of the precise location of the boundary between Buccino’s land and that