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Haystack Ranch, L.L.C. v. Fazzio, 997 P.2d 548 (Colo. 2000)

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support a finding of reasonable diligence, the supreme court deferred to the findings of the water court. To demonstrate reasonable diligence, Colorado statutory law and case law requires that the applicant show steady efforts to complete the appropriation in an expedient and efficient manner under all the facts and circumstances, and continuous, project-specific efforts directed toward the development of the conditional right commensurate with the applicant's capabilities. The court did not disturb the water court's findings, citing evidence in the record of Getty's investment in stream gauges, funding of geological investigations, and involvement in litigation to protect its water rights.

On the Subdistrict's final contention that the water court erred in its interpretation and application of section 37-92-301(4)(c) to the facts, the supreme court relied on their decision in *Municipal Subdistrict, Northern Colorado Water Conservancy District v. OXY*. The court recognized in *OXY* that both the "economic feasibility" requirement and the "can and will" requirement must be considered together in a diligence analysis, yet economic feasibility is only one factor that a court should consider in a diligence proceeding. The court deferred to the water court's finding that the oil shale project was technically feasible given current technology, thus demonstrating that Getty "can" complete and "will" go forward with the project.

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(affirming the water court's decree of abandonment where the evidence consisted mainly of the ditches' state of disrepair and lack of diversion records despite removal of the ditches from the division engineer's abandonment list).

In 1993, Haystack Ranch, L.L.C. ("Haystack") purchased property that contained two ditches, the Snyder and Middleton Ditches, with appropriation dates of 1879 and 1888, respectively. The property changed hands several times before Haystack acquired it and the chain of title showed that only the Snyder Ditch was expressly conveyed with each transaction. Haystack drew water under its rights from unauthorized alternate points of diversion, causing curtailment to Frank Fazzio's ("Fazzio") junior right. As a result, Fazzio filed an application of abandonment for the water rights of the Snyder and Middleton Ditches (the "Ditches") and a tort action for damage to his hay crops.

The Division One Water Court held that the water rights in question had been abandoned before Haystack acquired them. The water court considered the Ditches' state of disrepair, the lack of diversion records, and the long periods of unexcused nonuse. Such

nonuse, the water court held, created a rebuttable presumption of the previous owner's intent to abandon the water rights, and Haystack failed to rebut this presumption. Haystack appealed the decision of the water court.

Haystack first argued it was error for the water court to rely on the nonexistence of diversion records as evidence of nonuse. The Colorado Supreme Court found, however, that the water court had only partially relied on the lack of diversion records and that this reliance was permissible where other testimonial and documentary evidence bolstered the court's finding of nonuse. The additional evidence involved testimony from the former water commissioner that was consistent with reports from two water engineering firms noting the long disuse and state of disrepair of the Ditches. Because water rights are usufructuary in nature, nonuse retired the use entitlement to the stream. Nonuse can be manifested by conditions inconsistent with active use of a water right, including the failure to make beneficial use of the water and the failure to repair or maintain diversion structures. Thus, the supreme court held that the entirety of the evidence supported the water court's finding of nonuse.

This finding of nonuse was crucial because one can infer abandonment from nonuse coupled with an intent to abandon. Continued and unexplained nonuse of a water right for an unreasonable period of time creates a rebuttable presumption of intent to abandon. Because the water court found nonuse, Haystack next argued that the activities of the past and current owners rebutted the presumption of intent to abandon the water rights for the Ditches. Haystack pointed to the chain of title that expressly conveyed Snyder Ditch, its diversions of water, and its attempts to get alternate points of diversion authorized by the state. The supreme court first held that chain of title is never enough alone to rebut the presumption of intent to abandon. The Court next held that, while Haystack's use of the water constituted evidence of lack of intent to abandon, this use came too late. The water court found nonuse before Haystack acquired the water rights, and subsequent actions could not rebut a presumption of the previous owners' intent to abandon.

Third, Haystack argued the removal of the water rights from the division engineer's abandonment list in 1972, 1976, 1980, and 1984 strongly indicated a lack of intent to abandon these rights. While acknowledging that administrative officials' decisions warranted considerable deference, the supreme court concluded the division engineer's decision was not alone sufficient to make a finding of lack of intent to abandon. The court looked to the Water Right Determination and Administration Act of 1969 (the "Act") and found the Act's general scheme supported the conclusion that a division engineer's decision is merely evidence that a water court may consider. Because a division engineer's decision is not a definitive decree or judgment under the Act, the water court could simply add this

evidence to the larger calculus in determining its final outcome.

The supreme court affirmed the water court's judgment that the evidence supporting abandonment substantially outweighed the engineer's decision to remove the rights from the abandonment list.

Susan P. Klopman

Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss, 993 P.2d 1177 (Colo. 2000) (holding the Management District, not the Commission, had authority to issue or refuse to issue well withdrawal curtailment orders within Management District boundaries).

David Goss ("Goss") owned a well (the "Goss Well") in the Upper Black Squirrel Creek Designated Ground Water Basin ("Designated Basin"). His permit allowed him to irrigate forty acres with an annual appropriation of 200 acre-feet. The Goss Well had a number two priority on the Colorado Ground Water Commission's ("Commission") priority list for the Designated Basin.

On July 28, 1997, Goss filed a written request with the Commission for issuance of a summary order requiring the cessation of pumping from wells that were interfering with Goss' senior water rights. On September 2, 1997, Goss filed a written request with the Management District to enjoin the Cherokee Metropolitan District's junior Cherokee Well and other unnamed wells that were negatively impacting his senior rights. The Commission, through the Attorney General, responded on September 15, 1997, that Goss should direct his request to the Management District as it, not the Commission, had authority over his request. On December 2, 1997, the Management District voted to deny Goss' request on the basis that it did not have authority over it. Consequentially, Goss filed a Complaint with the El Paso County District Court seeking (1) a writ of mandamus compelling either the Management District or the Commission to order the cessation of withdrawals from wells which may be injuring his senior rights; (2) an injunction and damages against the Cherokee Metropolitan District; and (3) a declaratory judgment for determination of rights and obligations regarding enforcement of his priority.

The Ground Water Judge held that a writ of mandamus did not lie against the Management District because the statute allows discretion in its administration of wells, rather than establishing a non-discretionary duty. Additionally, the Ground Water Judge held that an administrative remedy for alleged injury to a permitted well right resides in the Management District and must first be exhausted before pursuing recourse in court. The Ground Water Judge issued a declaratory judgment, dictating that the Management District had authority over Goss' request to enforce the priority of his well. The