

1-1-2000

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999)

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Amy W. Beatie, Court Report, Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999), 3 U. Denv. Water L. Rev. 451 (2000).

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economic infeasibility alone did not defeat a diligence finding.

The Subdistrict argued that the court was required to analyze OXY's application in light of Colorado's can and will test and anti-speculation doctrine. OXY argued that the can and will standard applied only to the granting of initial conditional decrees. The court found that both the can and will and anti-speculation requirements should apply to hexennial diligence proceedings.

The court stated that the very nature of conditional water rights required application of these two doctrines. The can and will test required the applicant to show a substantial probability that the intended appropriation can and will reach fruition. The court found that analysis of current economic conditions beyond the applicant's control was a part of this test. OXY successfully met the can and will standard by proving it possessed the technology necessary to make the project feasible.

Similarly, the court stated that the anti-speculation doctrine applied in diligence proceedings because a conditional right, or some portion of that right, might become speculative over time. The court found that OXY met its anti-speculation burden by showing a steady effort to complete the appropriation through investment and litigation, evidencing its intention to pursue the project to completion in the future.

The court also upheld the water court's imposition of sanctions against OXY for impeding the discovery process. The Subdistrict sought information during pre-trial discovery regarding OXY's future plans for its oil shale project. OXY's appointed representative did not know enough to provide adequate information. The water court found this frustrated the Subdistrict's legitimate discovery attempts and ordered OXY to pay the Subdistrict's related attorney fees and expenses.

The court also found that the water court had committed an error when it took judicial notice of the testimony of OXY's appointed representative. However, because the error was not central to the issue of OXY's adequate diligence, and OXY was able to present other evidence that it was diligently pursuing its conditional rights, it was not reversible error.

Chip Cutler

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999) (holding that an undecreed change of use could not establish historic use).

In this case, the Colorado Supreme Court addressed whether diversions not used for decreed uses established historic consumptive use in a change of use proceeding if the water commissioner was aware of the diversions and did not order their discontinuance or curtailment and no other users had complained of injury. The court held that they may not.

Santa Fe Ranches sought to change the use of two water rights appropriated by Colorado Fuel & Iron Company ("CF & I"). CF & I obtained the water rights at issue in the late nineteenth century for

manufacturing and domestic purposes. From 1966 to 1985, CF & I leased the rights, without a change in use proceeding, to El Moro Ditch Company ("El Moro") which used the water for irrigation via different points of diversion from CF & I's diversions. In 1985, CF & I transferred the rights to a third party, but El Moro continued to use the rights under an arrangement with the third party. Santa Fe Ranches, the applicant in this case, had the option of purchasing the rights from the third party, a transaction requiring a change of use proceeding. Santa Fe Ranches sought to rely on El Moro's use of the water rights instead of CF & I's to establish historic use.

The water court held that undecreed changes in use could not establish historic consumptive use in a change in use proceeding. The water court required Santa Fe Ranches to provide information on use undertaken pursuant to the decreed uses, which Santa Fe Ranches could not. CF & I had destroyed or misplaced all records on the water rights and the water had not been used for decreed purposes for decades. Santa Fe Ranches requested the water court to dismiss its application in order to appeal to the Colorado Supreme Court. The water court dismissed the application.

This Colorado Supreme Court upheld the water court's ruling. The court stated that a change in use was predicated upon two issues: (1) the historic beneficial use that had occurred pursuant to the appropriation; and (2) the conditions that the court was required to impose on the change to prevent injury. After reviewing the historical foundations and fundamental premises of Colorado water law that pertained to change proceedings, the court concluded its review of the law by stating that the right to change a water right was limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use. The court explained the policy behind this requirement: to prevent waste and to prevent the recognition of water claims not justified by the nature and extent of the appropriator's need.

Applying the law to the facts, the court explained that the applicant sought "to dispense with the basic requirement of a change of water right proceeding that require[d] the proponent of the change to identify the extent of actual beneficial use of the decreed appropriation at its place of use." For several reasons, including the policies behind change of use proceedings which were not vindicated in this case, the requirement of an inquiry into abandonment of CF & I's rights which could not be conducted due to lack of evidence, and the proper role of water officials, the court stated that the applicant could not dispense with the requirement of a demonstration of beneficial use for decreed purposes.

Amy W. Beatie