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In re Water Rights of Elk Dance Colorado, LLC, 139 P.3d 660 (Colo. 2006)

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larger regulatory scheme and the legislative intent to prevent persons from using wells in violation of discontinuance orders, the court found that § 37-92-503 demanded an interpretation that included liability for the acts of others. The court did not examine the outer limits of this rule regarding liability for others' acts; rather, the court restricted its holding to a ruling that the statute imposed liability on an owner to whom the division engineer issued a discontinuance order and whose well continued to be used with his authorization.

The court concluded with a brief analysis of the State's evidence at trial including the volume of water removed from the well, the success of Vaughn's alfalfa crop the year in which the water use was discontinued, and the improbability that an intruder would remove over six million gallons of water from Vaughn's well without him having noticed. Based on this evidence and Vaughn's admission that he delegated the farming and irrigation of the crop to his father and his children, the court found that the water court correctly concluded that Vaughn was a person who diverted water within the meaning of the statute. Therefore, the court affirmed the judgment of the water court.

Michelle Young

In re Water Rights of Elk Dance Colorado, LLC, 139 P.3d 660 (Colo. 2006) (holding that the doctrine of issue preclusion bars a homeowners' association from re-litigating the ownership of disputed water rights previously litigated in district court; and prevents the homeowners association from collaterally attacking the district court's subject matter jurisdiction because it did not raise a jurisdictional challenge either at trial or on direct appeal).

Members of a homeowners' association ("HOA") appealed Colorado Water Court, District Number 5, orders dismissing their petitions to set aside decrees granting Elk Dance Colorado ("Elk Dance") authority to amend certain features of a previously decreed water augmentation plan. The water court held that a previous Summit County District Court decision, determining Elk Dance owned the disputed water rights, collaterally estopped the HOA from asserting ownership. The Colorado Supreme Court affirmed the water court's decision, holding that the Colorado doctrine of issue preclusion barred the HOA from claiming it owned the disputed water rights and prevented a collateral attack on the district court's subject matter jurisdiction.

The water law issues and the parties in this case derived from a series of transactions commencing in 1980, when a real estate development group ("Development Company") acquired 6000 acres of land in Summit County and obtained a decree for a water augmentation plan providing for 175 acre feet of water per year ("Original Decree"). Shortly thereafter, the initial group of residential lot owners formed a homeowners association ("HOA"). In 1989, the Development Com-

pany defaulted on its loan, prompting the lender (“Lender”) to foreclose on the property, which it then sold to the Lane family (“Lanes”). This sale included the water rights associated with the Original Decree. In 1999, the Lanes sold the property and associated water rights to Elk Dance. In 2000, Elk Dance and the HOA entered into an agreement whereby Elk Dance agreed to provide the HOA with water if the HOA’s current water service agreement proved insufficient for the fourteen residences on the property. However, several HOA members refused to sign the agreement, claiming that the HOA, and not Elk Dance, actually owned the water rights granted by the Original Decree, and that the current board of directors did not have authority to contract on behalf of the other owners.

The HOA filed suit in district court seeking a declaratory judgment validating its authority, and a partition of the disputed water rights among its members. The district court determined that the board of directors had the authority to contract on behalf of the HOA, but denied the partition request. The district court held that Elk Dance owned the disputed water rights, finding that: (1) the Original Decree granted water rights to the Development Company; (2) the Lender assumed the water rights upon foreclosure of the mortgage; (3) the Lender conveyed the water rights to the Lanes; (4) the Lanes conveyed the water rights to Elk Dance; and (5) there was no evidence supporting the HOA’s ownership claim.

Subsequently, Elk Dance obtained water court decrees amending the Original Decree in order to change the location of a well on the property and the method of wastewater treatment specified in the water augmentation plan. The HOA petitioned the water court to set aside these decrees pursuant to Colorado Revised Statutes section 37-92-304(10) (allowing a person, adversely affected by a substantive error in a water court judgment to petition the water court for its correction), continuing to claim that it owned the water rights in the Original Decree. The water court dismissed the HOA’s petitions, holding that the district court judgment collaterally estopped the HOA from re-litigating the ownership issue.

On appeal, the Colorado Supreme Court upheld the water court’s decision, applying the Colorado doctrine of issue preclusion which bars re-litigation of an issue when: (1) it is identical to an issue actually litigated and necessarily adjudicated in a prior proceeding; (2) the party against whom estoppel is sought was a party to, or in privity with, a party to the prior proceeding; (3) the previous suit resulted in a final judgment on the merits; and (4) the party seeking to avoid application of the doctrine of issue preclusion had a full and fair opportunity to litigate the issue in the prior proceeding.

First, the court found that the HOA actually litigated ownership of these water rights in the district court, which necessarily adjudicated the issue to deny the HOA’s partition request. Second, the court de-

terminated that the members representing the HOA in this case were either identical to, or in privity with, the HOA members in the district court case. The court reasoned that both cases involved substantially similar interests, which the HOA members in the district court case represented and protected on the association's behalf. Third, the HOA's failure to directly appeal the district court's decision resulted in a final judgment on the merits. Finally, the court found that the HOA had a full and fair opportunity to litigate the ownership of the disputed water rights in district court. The court observed that the HOA members in this case either already argued the ownership issue in district court, or had notice of the issues scheduled for litigation but chose not to appear.

Moreover, the court determined that the doctrine of issue preclusion also prevented the HOA from challenging the district court's subject matter jurisdiction because it failed to do so during the district court trial, or on direct appeal. The court reasoned that allowing the HOA to collaterally attack the district court's jurisdiction would "undermine the finality of the judgment and could lead to conflicting factual determinations" over the ownership of the water rights in the Original Decree.

Accordingly, the court affirmed the water court's decision and held that the doctrine of issue preclusion bars the HOA from asserting ownership of the water rights in the Original Decree, and prevents the HOA from collaterally attacking the district court's subject matter jurisdiction.

Cameron Banko

GEORGIA

Black v. Floyd, 630 S.E.2d 382 (Ga. 2006) (affirming that Georgia holds title to all tidewaters within the state except where a private party can trace their title to a valid Crown or state grant containing an explicit conveyance).

Russell and Josie Black (collectively "Black") claimed that two Crown grants gave them title to property along the tidewaters of Sterling Creek. Douglas Floyd, Thomas Garrett and Tami Garret (collectively "Floyd"), owners of adjacent property, joined the State of Georgia as a necessary party in a declaratory judgment action maintaining that the State of Georgia held title to the property along Sterling Creek. The Bryan County Superior Court entered judgment in favor of Floyd and the State of Georgia. On appeal to the Supreme Court of Georgia, Black argued that navigability of tidewaters is a factor for determining tidewater ownership.

In Georgia, tidewaters include the sea as well as all rivers and arms of the sea affected by the rise and fall of the tide, useable for fishing,