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## Trail's End Ranch, LLC v. Colo. Div. of Water Res., 91 P.3d 1058 (Colo. 2004)

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lous claims for precipitation and runoff, the court remanded the case to the water court for a determination of these fees.

*Donald E. Frick*

**Trail's End Ranch, LLC v. Colo. Div. of Water Res., 91 P.3d 1058 (Colo. 2004)** (holding the practice of diverting water from points not decreed to a water right amounts to a change in the right that cannot enjoy the priority of the existing decree without first following the requirement of adjudication).

Trail's End Ranch, LLC, ("Trail's End") brought suit for declaratory judgment and injunctive relief against the Colorado Division of Water Resources ("Division"). The District Court, Water Division 2, granted the Division's motion for summary judgment and Trail's End appealed to the Colorado Supreme Court.

Trail's End held three decreed water rights for irrigation at separate ditches on Spruce Creek. Trail's End diverted water associated with these rights not only at the decreed headgates, but also at points downstream. When the Division Engineer issued an order to cease this practice, Trail's End complied. However, Trail's End subsequently proposed to the Division Engineer a plan to operate these rights by diverting the associated water at the decreed headgates, measuring it, and then returning it into Spruce Creek. The water then flowed downstream to points where Trail's End would recapture and use it for irrigation. Although this proposed practice occurred entirely on the property of Trail's End and there were no other water users between the headgates and the downstream points of diversion, the Division Engineer found the practice objectionable and rejected the proposal. When the State Engineer agreed that the practice was unacceptable, Trail's End filed an action in the water court to declare its entitlement to the proposed operations and to enjoin enforcement of the Division Engineer's order.

The water court held that Trail's End's practice resulted in a change of its decreed points of diversion and that the plan to convey and recapture the same water did not exempt Trail's End from applying for a change of water right as prescribed by statute. The water court granted the Division's motion for summary judgment and denied the similar motion filed by Trail's End. Following this decision, Trail's End appealed directly to the Colorado Supreme Court.

In addressing the appeal, the supreme court first recognized that the legislatively created process of adjudication makes water rights enforceable. An absolute decree from such adjudication confirms a water right holder's vested property interest in the use of a specified amount of water, when the right holder obtains it through decreed points of diversion and applies it to a particular beneficial use. Incident to this right is the right to change the point of diversion to the extent it nei-

ther enlarges the right or nor injures other water users. However, such a change in the point of diversion constitutes a change in the water right itself, which requires application and adjudication similar to an initial determination of a water right. Considering the meaning of terms used in the applicable statutory provisions, the court concluded that diverting water from a natural stream at a point other than that decreed to the water right was an out-of-priority diversion. This justifies an order from the Division to cease further diversions as to protect other existing adjudicated water rights.

The court then applied this statutory scheme to the proposed practice of Trail's End. The court found that the plan to recapture diverted water returned into Spruce Creek below the headgates, constituted a change in point of diversion, regardless of the other measures taken. As such, Trail's End could not benefit from the priorities of the existing water rights without first adjudicating the change of those rights. Although Colorado law permits water right holders to use natural streams to convey water when measured in accordance with the dictates of the State Engineer, this allowance does not relieve the water right holder from resulting legal obligations. The required adjudicative process played a critical role in the administration of water right changes as it protected potentially-affected decreed water rights and prevented the enlargement of appropriations by quantifying and establishing an appropriation's historic beneficial consumptive use before approving any proposed change. In light of this, the court found no legitimate purpose for the proposed rerouting practice of Trail's End existed, other than to circumvent the statutory requirement to adjudicate a change of water right, which undermines this important protection for other decreed rights.

Having found that the proposed practice resulted in a new or changed diversion, the court concluded that Trail's End could not benefit from the priorities of its existing water rights without adjudicating the resulting changes in those rights in the manner prescribed by statute. Therefore, the supreme court affirmed the judgment of the water court granting the Division's motion for summary judgment.

*Mark D. Shea*

## GEORGIA

**Hughey v. Gwinnett County, 278 Ga. 740 (2004)** (holding a non-licensee party challenging the validity of a discharge permit has the burden of proof of showing impropriety).

The Environmental Protection Division of the Georgia Department of Natural Resources ("EPD") issued Gwinnett County a National Pollutant Discharge Elimination System permit ("permit") to discharge treated wastewater into Lake Lanier on November 9, 2000. Terence D. Hughey and others appealed the issuance of the permit, and Gwinnett