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LoPresti v. Brandenburg, No. 10SA191, 2011 WL 6147058 (Colo. Dec. 12, 2011)

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conflict with Meridian's. Consequently, the court found that Meridian satisfied the third part of the statute.

Because Meridian satisfied all three parts of the statute, the court held that Meridian had a right to intervene and reversed the water court's denial of Meridian's motion to intervene.

The court then addressed the water court's grant of declaratory relief for UBS while Meridian's appeal of its motion to intervene was pending. Because the court found that Meridian did have a right to participate in the declaratory judgment proceedings, the court held that the proceedings must be reopened to give Meridian an opportunity to be heard. Accordingly, the court vacated the grant of declaratory relief for UBS and remanded the case for further proceedings consistent with its holding.

Darin Smith

LoPresti v. Brandenburg, No. 10SA191, 2011 WL 6147058 (Colo. Dec. 12, 2011) (en banc) (holding that a rotational no-call agreement is valid under Colorado law if the agreement does not sanction a change in water rights).

This case involved the appeal of an order issued by the Colorado District Court for Water Division No. 2 ("water court") voiding a rotational no-call water right agreement on Alvarado Creek in Custer County. At issue were four separate water rights ("Four Ditches") originally adjudicated in 1896 along Alvarado Creek. In 1908, the owner of three of these rights entered into a settlement decree with the owner of a single right. This decree, known as the Beardsley Decree, stated that, every fourth day, the owner of the single right could use or divert water from the stream from any point for any lawful use.

The LoPrestis, the current owners of three of the rights, filed an application in 1996 to change these rights on Alvarado Creek, which Brandenburg and others opposed. In 2000, the water court, by summary judgment, declared the Beardsley Decree void because the consequent changes in the diversion points, when compared to the decree, were not in accord with notice provisions effective in 1908. In 2011, Brandenburg resurrected the case because the water court had not resolved the LoPrestis' original 1996 application for change in water rights. The water court granted Brandenburg's Rule 54(b) motion and certified the case for immediate appeal of the Beardsley Decree order. The Supreme Court of Colorado ("Court") reviewed the water court's decision *de novo* on two separate issues: the legal conclusion reached on the summary judgment motion; and the water court's interpretation of the decree as a contract.

Brandenburg first argued that the Beardsley Decree language permitted the LoPrestis to choose points along Alvarado Creek for the diversion of water when they were in priority, thereby effecting an illegal change of water rights, and that summary judgment was therefore appropriate. The Court disagreed with this argument and looked at the entire language of the decree to interpret the terms Brandenburg questioned. The term "all

of said waters” was defined within the decree as only the water rights of the Four Ditches. The term did not allow for, as Brandenburg argued, the LoPrestis to divert any more water than issued by decree. Furthermore, the Court found that the term “points or points” referred only to the fact that one of the three water rights the LoPrestis possessed was on a different channel than the other two. Alvarado Creek split at a control structure with the northern channel called the North Fork of Alvarado Creek. The North Fork was not connected to any tributaries before it dried up; therefore, Colorado courts have always held the two streams together as one stream system. The LoPrestis, by this language, were able to choose points in order to obtain the flow to which they were entitled. The Court thus determined that the water court erred when it interpreted the Beardsley Decree to be an illegal water right change.

Next, Brandenburg argued that the Beardsley Decree should still fail because it was an improper water loan. Under Colorado law it is improper for a senior water right holder to loan unused water rights to junior right holders because this bypasses the state priority system. But the Court found that here, the decree only rotated water availability between senior holders and thus did not change the priority of any junior right holders. Brandenburg further contended that the original decree in 1908 lacked valid consideration to support its enforcement. Again, the court found that the prior holder of the LoPrestis’ rights gave up his water rights on a rotating basis in exchange for a litigation settlement, which established adequate consideration.

Finally, Brandenburg argued that the decree, as administered, effectuated a change in water rights and therefore should fail because of lack of notice under Colorado law. Brandenburg contended that the decree changed points of diversion and therefore changed the water rights -- essentially that the Beardsley Decree was more than just a rotational no-call agreement. The Court rejected this argument and instead found that the decree was without intention to change any of the Four Ditches’ rights. Thus, in 1908 there was no agreement to sanction any change in water rights.

Accordingly, the Court reversed the water court’s order voiding the Beardsley Decree.

Robert Sykes