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Empire Lodge Homeowners' Assoc. v. Moyer, 39 P.3d 1139 (Colo. 2002)

Holly Kirsner

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that since the unregulated utilities and industrial defendants were not subject to PUC regulation, court action against the unregulated utilities would not interfere with the PUC's regulatory authority. Hence the Residents' claims against the Unregulated Utilities were allowable.

Thus, the Residents were limited in their recovery against the Regulated Utilities to damages from violations of the PUC's water standards, if such violations did exist. The Residents recovery the Industrial Defendants and Unregulated Utilities were not limited. The court remanded the case for further proceedings.

James Siegesmund

COLORADO

Empire Lodge Homeowners' Assoc. v. Moyer, 39 P.3d 1139 (Colo. 2002) (holding that a party does not have standing to challenge another's water right on the basis of injury if it does not have an adjudicated water right, and that water users diverting out-of-priority water need augmentation plans decreed by water courts).

Empire Lodge Homeowners' Association ("Empire Lodge") filed suit against Anne and Russell Moyer ("Moyers") in District Court for Water Division No. 2 ("Water Court") claiming unlawful use enlargement and invocation of the futile call doctrine. Empire Lodge alleged that the Moyers unlawfully expanded their irrigated acreage to include land outside their decreed use area, used water for undecreed purposes, violated the "duty of water" limitation expressed in their decree, and irrigated land that the Parkville Water District "dry up" covenant required to be removed from irrigation. The Moyers counterclaimed to enjoin Empire Lodge from illegally diverting water, due to failure to obtain an augmentation plan decree, from Empire Creek into Beaver Lakes. The Water Court dismissed Empire Lodge's claims and enjoined Empire Lodge from its out-of-priority diversions pending adjudication of an augmentation plan. The Colorado Supreme Court affirmed the Water Court's judgment.

Empire Lodge was a homeowners' association connected with Beaver Lakes Subdivision, a 261-lot development situated on Empire Creek, a tributary to the Arkansas River. The Moyers operated a ranch downstream from Empire Lodge. Empire Lodge diverted water out-of-priority to fill two ponds, known as Beaver Lakes, used for recreational purposes. In order to divert out-of-priority, Empire Lodge relied upon the State Engineer's approval. The State Engineer conditioned approvals upon Empire Lodge providing substitute supply water to the Arkansas River; however, the replacement point was below the Moyer's ranch. As early as 1986, the State Engineer informed Empire Lodge that it needed to obtain an adjudicated augmentation plan.

In order to determine whether Empire Lodge had standing, the

Supreme Court first evaluated Colorado's prior appropriation system, adjudication, and administration system of natural stream use rights. Prior appropriation promoted multiple use of a finite resource, thus fostering optimum use, efficient management, and priority administration. Colorado premised this appropriation system upon three principles: (1) waters are a public resource where property rights can attach to unappropriated waters for beneficial use; (2) courts adjudicate water rights and priorities; and (3) state engineers, division engineers and water commissioners administer the waters in accordance with judicial decrees and statutory provisions. In order to obtain benefits of the priority system, such as value and priority, a party must adjudicate its water right. During dry years, the State Engineer administers the priority system by favoring decreed senior users and curtailing decreed junior uses and undecreed water use. Thus, a party cannot make an enforceable call on the river without having a decreed right.

Next, the court evaluated out-of-priority diversions, augmentation plans, and exchanges through the court and the legislative responses to Colorado's increased water needs. These responses centered on reinforcing the adjudication and administration process and use maximization of Colorado's limited water supply. The Water Right Determination and Administration Act established the ability to divert out-of-priority through a "decreed augmentation plan." Augmentation plans allowed out-of-priority diversions while ensuring protection to senior rights via a replacement water supply. State Engineers enjoyed short-lived authority to approve temporary augmentation plans. However, in 1977, the legislature repealed this authority in response to concern about the constitutionality due to lack of notice to potentially injured water rights holders. Thus, the authority to approve an augmentation plan lay with the courts.

Empire Lodge asserted that the State Engineer had broad authority to approve substitute supply plans, but the court disagreed. When utilizing the term substitute supply throughout the Colorado Revised Statutes, the court determined the provisions' common nexus was quantity and quality requirements applicable to replacement water. The State Engineer had authority to approve augmentation plans in a very narrow context. For instance, he may issue approval in connection with sand and gravel open mine extraction situations or with upstream reservoir storage so long as the user releases the water upon senior user need due to insufficient supply.

In addition to authority, the court evaluated substitute supply in the context of exchanges. The court identified four critical elements to an exchange: (1) the substitute supply source must be above a calling water right; (2) the supply must be the same quantity and quality for the downstream water user; (3) natural flow must be available at the upstream diversion point; and (4) the exchange cannot injure other users. Exchanges are distinct from augmentation plans because it merely substitutes water with a priority date, whereas augmentation plans address depletion of the resource with no priority

resulting.

The court found that Empire Lodge's out-of-priority diversion, required, but did not have a decreed water right. Empire Lodge relied on a right to divert via a State Engineer approved temporary augmentation plan. However, the court determined that water courts, not the State Engineer, have the sole authority to approve augmentation plans. With no water right, Empire Lodge lacked standing to assert either its futile call argument or its enlargement claim. On the other hand, since the Moyers possessed a decreed water right, they had standing to assert their counter claim.

In Empire Lodge's appeal to the Water Court's injunction, it argued that the Moyers did not prove injury by Empire Lodge's diversion. The court stated, first, there was a presumption of injury and second, the Moyers provided actual proof of injury. The court further found that Empire Lodge's substitute supply plan was not an exchange because the replacement source entered the river system below the Moyer's diversion point. The court clarified that the injunction had the effect of directing Empire Lodge to obtain a court approval for the out-of-priority diversion. Additionally, the court stated that the injunction did not inhibit Empire Lodge's ability to store water under "free river" conditions, and it could appropriate unappropriated water. Thus, the court held the injunction enjoined Empire Lodge's out-of-priority diversions that required a decreed augmentation plan authorizing them to do so. The court affirmed the Water Court's judgment.

Holly Kirsner

Strole v. Guymon, 37 P.3d 529 (Colo. Ct. App. 2001) (holding an oral water rotation scheme unenforceable; a court may limit the use of a pre-existing ditch to resolve an equitable dispute).

The Stroles owned property directly north of the Guymon's. Each party held water rights from the Uncompaghre Valley Water Users Association; the Stroles maintained an interest of .17 cfs for their 8.6 shares of irrigation water, and the Guymon's maintained an interest of .22 cfs or 2.8 shares at 100 percent. There were two ditches involved, the eastern ditch, and the western ditch. Each party's water entered the Guymon's property through the eastern ditch on the southeastern corner of their property. Starting in 1979, when the Stroles purchased their property, they retained an agreement with the Guymon's predecessor (the Guymon's purchased their property in 1995). As such, the parties had rotated their water shares; the Guymon's used the party's combined water one half of the time, and the Stroles used the combined water the other half of the time. Because of the contour of the land and the middle ditch, the Price ditch, it was imperative the Stroles received the combined water for their hay crop. However, in 1999, the Guymons decided to discontinue the water rotation arrangement.