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A Review of *Nicoll vs. Rudnick*

In this installment of Footsteps we will review a recent court decision from the appeals court in California, *Nicoll Versus Rudnick*. This case involves a dispute over the distribution of water drawn from the South Fork of the Kern River. Although it is primarily a water rights case, it has interesting lessons about land subdivision and the way that rights can “attach” to land instead of a person or organization. It is for these reasons I thought it would be beneficial to review the case.

Dry conditions in the American Southwest are also making water rights even more important. Oftentimes land without the legal right to water (and the physical ability to obtain that water) is worthless or of very little value. It would make good sense for land surveyors to be at least passingly aware of water rights and water rights law.

Before we look at the legal questions raised by this case and consider the court's answers, we need to review the timeline for the dispute.

1860's: JW Nicoll constructs a three (3) mile long ditch (the “Nicoll Ditch”) to supply water from the South Fork of the Kern River to his 300.5 acre parcel.

1902: A court judgment confirms JW Nicoll's right to divert appropriated water from the South Fork of the Kern River through Nicoll Ditch.

1933: The bank forecloses on a 157.70 acre portion of the 300.5 acre Nicoll parcel. The 157.50 acre parcel is lowland known as “Nicoll Field”. The 142.79 acre remainder parcel is upland known as “Nicoll Ranch”.

TIMELINE	
1860's	JW Nicoll constructs a 3 mile long ditch to supply water from the Kern River.
1902	Court judgment confirms JW Nicoll's right to diver water through ditch.
1933	Bank forecloses on a 157.70 acre portion of the 300.5 acre JW Nicoll parcel.
????	Rudnick acquires 157.70 acre parcel (Nicoll Field).
????	A Dispute arises between Nicoll and Rudnick over water supplied by the ditch.
2006	A quite title action is filed for the water in the ditch.
2007	The trial court rules in favor of Rudnick.

????: Rudnick acquires Nicoll Field.

????: A dispute arises between Nicoll and Rudnick over water supplied in the Nicoll Ditch.

2006: A quite title action is filed for the water in Nicoll Ditch.

2007: The trial court rules in favor of Rudnick, granting him a share of the ditch water based on parcel area and not on historic water usage.

Legal Questions

The dispute in this case centers on how the water supplied by Nicoll Ditch is to be divided between the two (2) parcels which originated from the same parent parcel. Nicoll asserts the ditch water should be divided based upon historic water usage on each parcel. This method would give Nicoll a larger share of the water. Rudnick asserts

the ditch water should be divided based upon parcel area. This method would give Rudnick a larger share of the water.

These are the legal questions raised by this case:

- What is the nature of the water right obtained by JW Nicoll?
- How should the water supplied by the Nicoll Ditch be divided between the two (2) parcels (Nicoll Ranch and Nicoll Field)?

The Trial Court's Decision

The trial court ruled in Rudnick's favor with a decision that determined the following:

- The water right recognized by the 1902 judgment in favor of JW Nicoll was an appropriative right that attached to the entire 300.5 acres of the historical Nicoll parcel.

- The water right was to be divided between Nicoll and Rudnick based on parcel area, not historic usage.

The Appeals Court Decision

The appeals court confirmed the trial court's decision in this case. This is the basis for the appeals court decision:

- The 1902 judgment granted a water right to JW Nicoll's 300.5 acre parcel, not to JW Nicoll personally. This appurtenant right attached to the entire 300.5 acre parcel, even if the water obtained under the right was only actually used on a portion of the parcel.
- Water rights are included in a conveyance through foreclosure, which originally separated the Rudnick parcel (Nicoll Field) from the 300.5 acre parent parcel owned by JW Nicoll. Because the water right is an appurtenant right, and attaches to all 300.5 acres, they water right should be divided using a method based on the area of the subdivided parcels.

The court also stated that modifications of this method of dividing the water obtained by area would have required clear and direct statements in the deed that carved the Rudnick parcel from the 300.5 acre parent parcel.

Questions

This case raises some interesting questions:

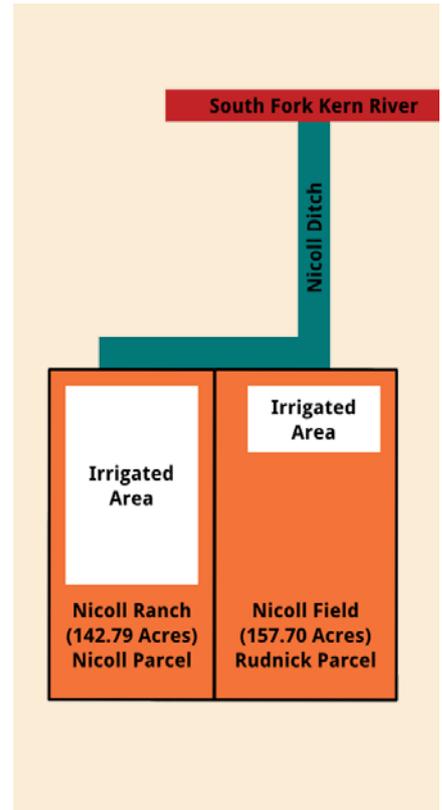
- How was the deed of trust that ultimately caused the subdivision of the 300.5 acre parcel written? Who prepared it? Was a land surveyor involved in the writing of the land description that was included with this deed?

- Was any thought given to water rights when the deed of trust was prepared?
- How do Nicoll and Rudnick now share the cost of the ditch maintenance and repair? Was this issue addressed in the deed of trust? Or is that another battle waiting to start?

Lessons

What lessons can we take away from this court decision and the events that led up to it?

- Some jurisdictions still allow subdivisions by deed to occur when there has been a default on a loan where real property is used as collateral. The danger with this is the lack of precautions and oversight that occur in a normal land subdivision process. This risk is especially great if a land surveyor isn't properly involved in overseeing the process. I suspect more problems are experienced with this type of default initiated subdivision because the subdivision is only "theoretical" and doesn't occur unless there is a default.
- The right to access and use water is a critical component of land use and land value in many parts of the United States, and especially in the Southwest. Water rights should be considered by land surveyors and others involved in subdivision planning.
- Rights can attach to people, organizations OR land parcels. These different types of rights are treated differently in our legal system. In this case, the attachment of the water right to the 300.5 acre parcel of land, and not any person or organization, was an important factor.



I hope you have enjoyed reviewing this court decision with me. It includes a short discussion of water rights in California and other issues that we didn't have room to discuss in this article. I encourage you to read the case itself.

I'd like to talk more about water rights and their close relationship with land division and land use in this column. *AS*

Editor's note: You can read about upcoming articles in Footsteps and get other content about boundary surveying from Landon at the Footsteps blog: www.redefinedhorizons.com/footsteps/

	NICOLL	RUDNICK	TRIAL COURT	APPEALS COURT
LEGAL QUESTION #1 Was the water right obtained by JW Nicoll in 1902 attached to the 300.5 acre parent parcel?			YES	YES
LEGAL QUESTION #2 Should the water right be divided between the Nicoll Parcel and the Rudnick Parcel using a method based on area?	NO	YES	YES	YES
LEGAL QUESTION #3 Should the water right be divided between the Nicoll Parcel and the Rudnick Parcel using a method based on historic use?	YES	NO	NO	NO