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ADVANCE SHEET HEADNOTE  
June 25, 2007

**No. 05SA326, Spring Creek Ranchers Ass'n v. McNichols – The Colorado Supreme Court holds that it was not an abuse of discretion for a judge to recuse himself from this case without comment nor was it an abuse of discretion for the water court to impose attorney fees on a party who consistently ignored the court's admonition to not relitigating settled matters.**

The Appellants, McNichols and Lewis ("Individual Homeowners"), appeal an order of the District Court, Water Division 5 ("water court") allowing the recusal of Judge Petre from this case and awarding attorney fees to the appellee, The Spring Creek Ranchers Association, Inc. ("Association"), under section 13-17-102, C.R.S. (2006). The Supreme Court of Colorado affirms the water court's order because the evidence in the record is sufficient to support the water court's findings.

The court holds that it was not an abuse of discretion for Judge Petre to recuse himself without providing a waivable reason for such recusal on the record. In addition, the record adequately supports the water court's finding that the Individual Homeowners and their attorney were "stubbornly litigious" because they continued to relitigate a settled issue contrary to the water court's explicit admonition. Therefore, the water court

did not abuse its discretion in awarding a reasonable amount of attorney fees to the Association under section 13-17-102(4).

<p>SUPREME COURT, STATE OF COLORADO  Two East 14<sup>th</sup> Avenue  Denver, Colorado 80203</p> <p>Appeal from the District Court, Water Division 5  Case No. 93CW213  Honorable Thomas W. Ossola, Judge</p>	<p>Case No. 05SA326</p>
<p>CONCERNING THE APPLICATION FOR WATER RIGHTS IN SUMMIT COUNTY OF:</p> <p><b>Applicant-Appellee:</b></p> <p>SPRING CREEK RANCHERS ASSOCIATION, INC.,</p> <p>v.</p> <p><b>Opposers-Appellants:</b></p> <p>JOYCE C. McNICHOLS, KENNETH J. McNICHOLS, and GERALD LEWIS,</p> <p>and</p> <p><b>Opposers:</b></p> <p>ALAN MARTELLARO, Division Engineer for Water Division 5; HAROLD SIMPSON, Colorado State Engineer; SHADOW CREEK OWNERS' ASSOCIATION; GALLOWAY, INC.; and HELENA LEWIS.</p>	
<p style="text-align: center;">ORDER AFFIRMED  EN BANC  JUNE 25, 2007</p> <p>PER CURIAM</p>	

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No appearance by or on behalf of Opposers:

Alan Martellaro, Division Engineer For Water Division 5; Harold Simpson, Colorado State Engineer; Shadow Creek Owners' Association; Galloway, Inc.; and Halena Lewis.

This is an appeal from an order of the District Court, Water Division 5 ("water court") awarding attorney fees to the appellee under section 13-17-102, C.R.S. (2006), and allowing the recusal of Judge Petre from this case. Because the evidence in the record is sufficient to support the water court's findings, we affirm the water court's order.

### **I. Facts and Procedural History**

The appellants (the "Individual Homeowners") filed a Protest to the Ruling of the Referee (the "Protest") that granted the appellee's application for water rights. The appellee is the homeowners' association for the Spring Creek Ranch Subdivision (the "Association") located in Summit County, Colorado. The Protest was referred to Judge Ossola just before he announced his retirement. The matter was transferred to another judge who had a potential conflict and recused himself. The Protest was then reassigned to Judge Petre. Judge Petre recused himself presumably because he had been the water referee who had made the order the Individual Homeowners were protesting. The matter was then referred to the State Court Administrator and was reassigned the case to Judge Ossola, sitting as a Senior Judge. The Individual Homeowners moved for the reinstatement of Judge Petre but the motion was orally denied by Judge Ossola at a March 23, 2005 preliminary hearing.

At the September 14, 2005 hearing on the Protest, Judge Ossola warned the Individual Homeowners' attorney to not relitigate the issues of whether the Association represented the interests of Spring Creek Ranch Subdivision and whether a settlement that the Association had entered into was valid. The water court referee had decided those issues and had held that the Association's Board of Directors was the duly authorized Board and, as such, could enter into a settlement on behalf of the Spring Creek Ranch Subdivision.

Notwithstanding Judge Ossola's warning, the Individual Homeowners and their attorney continued to raise the issue that the Association was not empowered to act on the Subdivision's behalf. As a result of this continued disregard of the court's orders, Judge Ossola found that the Individual Homeowners and their attorney were being "stubbornly litigious" and unnecessarily prolonging the water court proceedings. Consequently, the court held the Individual Homeowners and their attorney jointly and severally liable for \$15,877.93 in attorney fees. The Individual Homeowners and their attorney appeal the water court's acceptance of Judge Petre's recusal and its award of attorney fees.

## **II. Recusal of Judge Petre**

"In a civil case, the trial judge's decision whether to disqualify himself or herself is discretionary and will not be

reversed unless an abuse of discretion is shown." Zolin v. Telluride Lodge Ass'n, 732 P.2d 635, 639 (Colo. 1987). A judge may recuse himself or herself sua sponte without written explanation or specific findings on the record. Beckord v. Dist. Ct., 698 P.2d 1323, 1328 (Colo. 1985).

In this case, Judge Petre recused himself presumably because he had been the water referee on the Association's water application before he was appointed to the District Court bench. Consistent with Beckord, Judge Petre was not required to provide a reason for his recusal on the record. In addition, even though under the Colorado Code of Judicial Conduct, a judge "may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification," there is no requirement that he or she make such a disclosure and seek remittal of the disqualification. C.J.C. 3(D) (2006) (emphasis added). Finally, we find no abuse of discretion in Judge Petre's decision to recuse himself under Zolin. 732 P.2d at 639.

### **III. Attorney Fees**

A judge can assess attorney fees if an attorney or party brings an action or defends an action "that lacked substantial justification." § 13-17-102(4), C.R.S. (2006). An action "lacks substantial justification" if it is "substantially frivolous, substantially groundless, or substantially vexatious." Id. In determining the amount of attorney fees, the court shall exercise

its sound discretion. § 13-17-103, C.R.S. (2006). Therefore, we will review the Individual Homeowners' claim as to attorney fees under an abuse of discretion standard and will only reverse a trial court's finding if it is not supported by the evidence. In re Application of Talco, Ltd., 769 P.2d 468, 475-76 (Colo. 1989); see also Weber v. Wallace, 789 P.2d 427, 429 (Colo. App. 1989).

In this matter, the record adequately supports the trial court's finding that the Individual Homeowners and their attorney continued to relitigate a settled issue against the water court's warning. In fact, the Individual Homeowners' attorney attempted to relitigate the issue from the very beginning in her opening statement. "They have a so-called board of directors who is working for the other side . . . I know your honor barred us from making these arguments, but that's what's going on here." (R. Vol. VII at 26.) Similar statements and questions were made throughout the trial transcript. Based on these actions, the water court held that the attorney was being "stubbornly litigious." In addition, these repetitive arguments lacked substantial justification and lengthened the water court proceeding. Therefore, based on the record, the water court did not abuse its discretion in awarding a reasonable amount of attorney fees to the Association under section 13-17-102(4).

#### **IV. Conclusion**

There was no abuse of discretion in this case as to the recusal of Judge Petre nor the imposition of attorney fees. For these reasons, we affirm the water court's May 18, 2006 order.