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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

EDDIE FALZON et al.,

Plaintiffs and Appellants,

v.

CASEY WACK et al.,

Defendants and Respondents.

E059209

(Super.Ct.No. SICVUG 09-49191)

**OPINION**

APPEAL from the Superior Court of Inyo County. Dean Stout, Judge. Affirmed.

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, Joseph D. Hughes, Catherine E. Bennett, and Kurt Van Sciver for Plaintiffs and Appellants.

Law Office of Timothy B. Sanford and Timothy B. Sanford for Defendants and Respondents Casey Wack, Carrie Williams, Francis J. Stewart, Lisa Jaeger, Martin Yolken, Mara Yolken, Erika A. Kroenlein, Donna Gail Mason Schaffer, Edward L. Himelhoch, Maribeth B. Himelhoch, William J. Stewart, Sandra J. Stewart, Martin A. Lewis, Sharon J. Lewis, Ralph Milton Tate, Gaye Ann Tate, Douglas L. Coy, Karin V.

Coy, Daniel L. McCarthy, Anna J. McCarthy, Katherine A. Duvall, Nancy Davidson, Geoffrey M. Pope, Iris A. Pope, and David Bradford.

No appearance for Defendants and Respondents Michael J. Kenney, Cary Kenney, Donna Taylor, David O. Thomas, Donna S. Thomas, Paul Payne, Pamela Payne, David D. Diener, Sharon M. Diener, Robert F. Bartlett, and Helene B. Dorian.

Plaintiffs Eddie and S. Jo Falzon own several parcels in a subdivision in Inyo County called 40 Acres. Starting just outside the northwest corner of the subdivision, the water of Pine Creek is divided and distributed throughout the subdivision, via a system of forks and ditches, until it comes together again just outside the southeast corner and flows away.

Despite the interdependence of the system — or, perhaps, because of it — there has been a series of disputes over water rights in 40 Acres. In this latest such dispute, the parties stipulated to submit the issues to a referee for resolution; they stipulated to many of the underlying facts; and they stipulated to a briefing and hearing schedule.

Commendably, as the litigation went on, they resolved a number of issues by mutual agreement. Finally, the referee drafted, and the trial court adopted, a judgment resolving the remaining issues.

The Falzons' appeal. They are dissatisfied with only two aspects of the judgment:

1. The provision limiting the Falzons' right to take water from one particular ditch; they argue:

a. The parties had stipulated to let the Falzons specify their own allocation of water from the ditch, and the referee could not disregard that stipulation; and

b. The referee's allocation was inconsistent with the riparian nature of the Falzons' water rights.

2. The provision requiring the parties to ask the 40 Acres Water Association to attempt to resolve future disputes and labeling this an "administrative remedy" that must be "exhausted" before the parties can submit a dispute to a watermaster or, ultimately, to the courts; they argue:

a. This provision violated the separation of powers;

b. There was no preexisting private or statutory administrative remedy; and

c. The 40 Acres Water Association had no particular expertise.

We will conclude that the Falzons forfeited all of their contentions by failing to raise them in a timely manner below — particularly in light of the stipulated briefing and hearing schedule, which gave all of the parties an opportunity to file briefs objecting to the referee's tentative decision.

Separately and alternatively, we will also conclude that, while the parties did agree to let the Falzons (and certain other parties) specify their own allocation, they further agreed that those allocations would not be binding on the referee if they turned out to be infeasible, as indeed they did.

Finally, and again, separately and alternatively, we will also conclude that the referee had the authority to require the parties to engage in a nonbinding dispute resolution procedure.

Accordingly, we will affirm.

## I

### FACTUAL BACKGROUND

All of the parties own parcels in a subdivision in Round Valley known as 40 Acres. 40 Acres receives water from Pine Creek, as follows. Before reaching 40 Acres, the Pine Creek water splits at a point called the Hardy Y into two conduits, called the Northwest Fork and the Southeast Fork. The Southeast Fork then splits, and one of those branches splits again, forming three watercourses, each running roughly north-to-south. Using the referee's numbering system, we will call these (from east to west) Ditch 1, Ditch 2, and Ditch 3.

The Falzons own three parcels in 40 Acres — two contiguous, and one noncontiguous. Ditch 2 flows across the two contiguous parcels. There is a dispute with respect to whether Ditch 3 flows across any of the Falzons' parcels.

## II

### PROCEDURAL BACKGROUND

The Falzons filed this action in September 2009. The operative complaint named as defendants all other persons owning land in 40 Acres.<sup>1</sup> It sought a declaration of water rights pursuant to Water Code section 7005 as well as a declaratory judgment.

All but two defendants filed answers to the operative complaint. The Falzons took the default of the remaining two defendants.

The defendants who have appeared as respondents in this appeal are all represented by Attorney Timothy B. Sanford; they were also represented by Sanford in the trial court. They therefore refer to themselves as the “Sanford defendants.” We will follow their lead.

In June 2011, pursuant to a stipulation of the parties, the trial court appointed a referee “to hear and determine any or all of the issues in the action . . . , whether of fact or

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<sup>1</sup> The named defendants are Casey Wack and Carrie Williams; Michael J. Kenney and Cary Kenney, as trustees; Francis J. Stewart and Lisa Jaeger, as trustees; Donna Taylor; Martin Yolken and Mara Yolken; Erika A. Kroenlein, as trustee; Donna Gail Mason Schaffer, as trustee; David O. Thomas and Donna S. Thomas; Edward L. Himelhoch and Maribeth B. Himelhoch, as trustees; Paul Payne and Pamela Payne; William J. Stewart and Sandra J. Stewart, as trustees; Martin A. Lewis and Sharon J. Lewis; Ralph Milton Tate and Gaye Ann Tate, as trustees; David D. Diener and Sharon M. Diener, as trustees; Robert F. Bartlett, as trustee; Douglas L. Coy and Karin V. Coy, as trustees; Daniel L. McCarthy and Anna J. McCarthy; Helene B. Dorian; Katherine A. Duvall; Nancy Davidson, as trustee; Geoffrey M. Pope and Iris A. Pope; and David Bradford.

of law, and to report a statement of decision,” under Code of Civil Procedure section 638.<sup>2</sup>

The parties entered into a stipulation “re: foundational facts and procedure.” (Capitalization altered.) It provided that both sides would file simultaneous initial briefs, followed by simultaneous response briefs. The referee would then hold a non-evidentiary hearing. Next, the referee would issue a tentative decision. The parties would file simultaneous briefs responding to the tentative decision. Finally, the referee would file a final decision.

The stipulation also allowed the referee to view 40 Acres at any reasonable time without any further consent.

In their response brief, the Sanford defendants proposed for the first time that “each owner of a lot with multiple branches will, at his or her sole discretion, allocate in writing the amount of acreage of his or her lot to be allocated to each branch. . . . Each lot will be required to conform its usage to the allocation selected for that lot to insure that the proper amount of flow exists in each branch.”

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<sup>2</sup> When a referee is appointed by stipulation, under Code of Civil Procedure section 638, his or her decision “must stand as the decision of the court . . . .” (Code Civ. Proc., § 644, subd. (a).) By contrast, when a referee is appointed without the consent of all parties, under Code of Civil Procedure section 639, “the decision of the referee or commissioner is only advisory. The court may adopt the referee’s recommendations, in whole or in part, after independently considering the referee’s findings and any objections and responses thereto filed with the court.” (Code Civ. Proc., § 644, subd. (b).)

The Sanford defendants also proposed that the superior court should retain jurisdiction, “but only after any disputes are first mediated and then, if necessary, arbitrated by [a] watermaster . . . .”

In January 2012, the referee held the non-evidentiary hearing. At the hearing, counsel for the Falzons commented that the Sanford defendants’ proposal of a written allocation election “made a lot of sense. And it’s something we can agree to. Now, the mechanics of the thing, I don’t think any one of us have given thought to that. . . . How that’s going to be accomplished is, I suppose, something we’re throwing in the court’s lap at this point.”

The referee asked, “If you’re in agreement that there might be an election to allocate water from one ditch to another by a property owner, served by one or more ditches, what would you think about the idea of me sending a request to you to provide stipulations from your clients to communicate that election to me, so that I can use that in formulating the physical solution?” All parties agreed.

Counsel for the Sanford defendants pointed out that there was one “practical issue” that he had not yet “figured out how to deal with”: Depending on the parties’ respective elections, it was possible that “a ditch may not be deep enough or wide enough to handle it and so I’m not exactly sure what we’d do with that.”

The referee responded, “That’s one of the reasons I was hoping to get the allocation selection made so that we can assess whether that’s workable with the current physical configuration of the ditches . . . .”

In February 2012, the referee ordered “the parties whose properties . . . can receive water from more than one branch of the ‘Southeast Fork’” to “submit written stipulations” specifying what percentage of their property would be served by which branch or branches of the Southeast Fork.

Attached to the order was an allocation election form, entitled “Stipulation Specifying Water Use,” which the parties were required to use.

The Falzons submitted an election form in which they opted to have 95.2 percent of their water come from Ditch 2 and 4.8 percent from Ditch 3. Some but not all of the Sanford defendants also submitted election forms; presumably, the ones who did not submit forms owned property served by only one ditch.

On June 5, 2012, the Sanford defendants submitted a letter brief to the referee. They admitted that, in hindsight, the allocation election procedure they had proposed “does not work.” They conceded that the Falzons’ election was “not a part of the problem,” but they asserted that other parties’ elections had “skewed the flow of water . . . to such an extent that some downstream owners . . . will get insufficient water for their needs while other downstream owners . . . will get an amount that not only exceeds their needs but also surpasses the capacity of the ditch.” They also asked the referee to “tour . . . the properties and ditches that are the subject of this litigation.”

On June 21, 2012, the referee did tour 40 Acres.

In August 2012, the referee issued a tentative decision. In it, he ruled that the Falzons could divert water from Ditch 3 not more than four times a year, for not more

than 24 hours at a time, solely for the purpose of irrigating certain trees along the northern boundary of their property. He cited evidence that the Falzons' predecessor in interest had diverted water from Ditch 3 "probably three times a season" to irrigate the trees.

The referee found that "the [Falzons] have sufficient water available from Ditch 2 to meet the[ir] reasonable irrigation, fire protection and other needs . . ." He further found that "if the [Falzons] were to divert more water from Ditch 3 than is necessary to irrigate the trees along the north boundary of [their] parcels, the downstream riparian users of Ditch 3 would be adversely affected."

The tentative decision appointed a watermaster. It also provided:

"[T]o provide . . . an opportunity for a non-adjudicatory resolution of a dispute, and to avoid incurring costs of having the Watermaster unnecessarily act on a complaint, if a party has a complaint that another Party is in violation of the terms and provisions of this Judgment and Physical Solution, before submitting the complaint to the Watermaster, the Party must request the 40 Acres Water Association to attempt to resolve the matter. If the 40 Acres Water Association is unwilling to attempt to resolve the matter, or if the matter remains unresolved within 30 days of . . . receipt of a request to resolve the matter, the complaining Party may submit the matter for resolution to the Watermaster. However, if the complaint arises out of an emergency situation requiring immediate action, a complaint may be submitted directly to the Watermaster. The Watermaster shall

have the discretion to determine whether the complaint warrants immediate action or should first be submitted to the 40 Acres Water Association.

“ . . . [S]ubmission of a request to the 40 Acres Water Association of a dispute or complaint that a Party is in violation of the terms and provisions of this Judgment . . . is an administrative remedy which first must be exhausted before submission of the matter to the Watermaster.”

The Falzons filed a brief responding to the tentative decision and objecting to portions of it. However, they did not object to the limits on their allocation of water from Ditch 3. They also did not object to the provision requiring the submission of future disputes to the 40 Acres Water Association (Association).

The Sanford defendants likewise filed a brief objecting to portions of the tentative decision. In it, they argued that the Falzons should not be allowed to receive any water from Ditch 3 at all.

In November 2012, the referee held a hearing on the objections to the tentative decision.

At that hearing, counsel for the Falzons opposed the Sanford defendants' contention that his clients should not receive *any* water from Ditch 3. He noted that their right to take water from Ditch 3 to irrigate their trees had “never been a problem, never been in dispute.” He never argued that the proposed judgment's allocation of water from Ditch 3 was erroneous.

He also pointed out that previously, the Sanford defendants had been willing to allow the Falzons to receive water from Ditch 3 in accordance with their election form. However, he never argued that the trial court was bound by the election form.

Finally, he opposed any “involvement” of the Association. He argued that (1) the trial court did not have “supervisory control” of the Association, (2) the Association included landowners on the Northwest Fork as well as the Southeast Fork, (3) the Association was not a judicial body, (4) involving the Association would “politicize [the] situation,” and (5) if submission of a dispute to the Association was deemed an administrative remedy, “it raises the [specter] of possible administrative mandamus proceedings.”

The Sanford defendants noted that the Falzons were raising new arguments that had not been in their brief.

In April 2013, the referee issued a proposed judgment. It went into somewhat more detail about the procedure the Falzons would have to follow in diverting water from Ditch 3. Otherwise, however, it was identical to the tentative decision in all relevant respects.

In May 2013, the trial court signed and entered the referee’s proposed judgment.

### III

#### THE EFFECT OF THE ALLOCATION ELECTION

The Falzons contend that there was a stipulation that owners of lots with access to multiple ditches could elect to apportion their own allocation from those ditches, and that the referee erred by rejecting that stipulation.

Preliminarily, the Sanford defendants argue that the Falzons forfeited this contention by failing to raise it below. We agree. The parties' procedural stipulation allowed both sides to file briefs objecting to the referee's tentative decision; it did not provide for any hearing on those objections. Thus, it implicitly but necessarily required the parties to raise any and all objections in their briefs.

Ultimately, the referee did hold a hearing on the objections to the tentative decision. At that hearing, the Falzons complained that the *Sanford defendants* were trying to repudiate their willingness to be bound by the Falzons's election. Even then, however, they never argued that the *referee* was bound by any prior stipulation or election.

“[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.]” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) ““Appellate courts are loath[] to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing

judgment to attack. [Citation.]’ [Citation.] ““The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.” [Citation.]’ [Citation.]” (*Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1011.)

Even if not forfeited, this contention would lack merit.

It is clear that, at the January 2012 hearing, all the parties were agreed on the general concept of letting owners with property served by two ditches elect how much water to draw from each ditch. However, they were equally agreed that there were unresolved issues about exactly how that would work. Counsel for the Sanford defendants noted that there might be a problem if the existing ditches could not handle the parties’ chosen allocations. Counsel for the Falzons commented more broadly that “the mechanics of the thing” — “[h]ow that’s going to be accomplished” — was as yet unresolved. The referee indicated that the parties needed to make their elections before he and the parties could “assess whether that’s workable with the current physical configuration of the ditches . . . .”

Although the election forms themselves were entitled “Stipulation,” they cannot be viewed, individually or collectively, as constituting a true stipulation. They did not include any language expressing an intent to be bound by the election forms of the other parties. Moreover, they were not supposed to be filled out — and they were not filled out — by all of the parties; they were only supposed to be filled out by those parties who owned land that received water from more than one ditch.

Thus, the only reasonable reading of the record is that the parties and the referee agreed to send out election forms. This was in fact done. However, there was no agreement that the parties' respective elections would necessarily be incorporated into the eventual judgment. Quite the contrary, it was agreed that this might turn out to be unworkable.

And in the end, it *was* unworkable. In his June 2012 letter brief, counsel for the Sanford parties represented that it was impossible to implement the election forms, because "some downstream owners . . . w[ould] get insufficient water for their needs while other downstream owners . . . w[ould] get an amount that not only exceeds their needs but also surpasses the capacity of the ditch." The Falzons have never disputed the truth of this.

Accordingly, the referee did not err by declining to implement the Falzons' election form.

#### IV

#### THE FALZONS' RIGHTS TO WATER FROM DITCH 3

The Falzons contend that the referee erred by allocating Ditch 3 water to them as if their rights were appropriative, when actually, their rights were riparian.

Once again, the Sanford parties argue that the Falzons forfeited this argument by failing to raise it below. And once again, we agree. The Falzons did not object, either in their brief or at the hearing, to the provision of the proposed judgment allocating water

from Ditch 3. Indeed, they supported that provision, as against the Sanford defendants' contention that the Falzons should not receive any water from Ditch 3.

As the Falzons note, their counsel did say: “[W]e have submitted our own proposed stream allocations. We submitted them to the Referee and opposing counsel and parties at the conclusion of the June tour. . . . [W]e stand by those figures.” However, he did not appear to be arguing that the proposed judgment was erroneous because it did not incorporate those figures. “Issues presented on appeal must actually be litigated in the trial court — not simply mentioned in passing.” (*Natkin v. California Unemployment Ins. Appeals Bd.*, *supra*, 219 Cal.App.4th at p. 1011.) Moreover, any figures that the Falzons submitted after the June tour are not in the record. Thus, we have no way of knowing whether those figures would have allocated the Falzons any more water from Ditch 3.

Elsewhere in this opinion, after holding that a given contention has been forfeited, we proceed to reach the merits of that contention as an alternative ground for affirmance. However, we decline to consider the merits of this contention, even in the alternative, for the following reasons.

The parties disagree as to what the referee actually found. For example, the Falzons claim the referee found that *all* of their water rights were riparian. The Sanford defendants respond that the referee merely found that the Falzons have riparian rights to *some* water; he did not find that they have riparian rights specifically to Ditch 3.

Similarly, the Falzons argue that the referee erred by limiting their use of Ditch 3 in the absence of a finding that “downstream users will lack sufficient water for their reasonable and beneficial use.” The Sanford defendants retort that the referee essentially made such a finding, by finding that, if the Falzons diverted more water from Ditch 3 than was necessary to irrigate their trees, downstream users would be “adversely affected.”

Thus, the Falzons’ present contention turns, in part, on issues of interpretation. If they had objected below, the referee would have had an opportunity to change or to clarify his findings. ““[I]t is inappropriate to allow any party to ‘trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable.’ [Citation.]” [Citation.]” (*Rebmann v. Rohde* (2011) 196 Cal.App.4th 1283, 1292.)

We therefore conclude that this contention has not been preserved.

## V

### THE SUBMISSION OF FUTURE DISPUTES TO THE 40 ACRES WATER ASSOCIATION

The Falzons contend that the referee erred by requiring the parties to submit future disputes to the Association.

Yet again, the Falzons forfeited this contention by failing to raise it in their briefs in response to the referee’s tentative decision. Admittedly, at the hearing on objections to the tentative decision, the Falzons did object to this provision. However, this objection

came too late, because the parties were required to raise any objections in their briefs. (See part III, *ante.*) Even if not, however, it failed to preserve their present contention, because the arguments they raised below were completely different from the arguments they are raising in their opening brief.

Separately and alternatively, however, we find no error.

“[T]he court not only has the power but the duty to fashion a solution to insure the reasonable and beneficial use of the state’s water resources as required by article X, section 2. [Citation.] The only restriction is that, absent the party’s consent, a physical solution may not adversely affect that party’s existing water rights. [Citation.]” (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288.)

“‘It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad powers to see that justice is done in the case. The state has a definite interest in seeing that none of the valuable waters from any of the streams of the state should go to waste. Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts.’ [Citation.]” (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480.)

The referee could reasonably require the parties to resort to mediation or other informal dispute resolution by the Association before invoking the watermaster. The benefit is that any dispute might be resolved amicably and without incurring the costs of

the watermaster. The only downside is possible delay; however, the referee dealt with this by allowing a party to go directly to the watermaster in an emergency.

The Falzons argue that (1) the referee violated the separation of powers by creating an administrative agency, (2) there is no preexisting statutory or private administrative remedy, and (3) the Association lacked the expertise that would qualify it to act as an administrative agency. All of these arguments presuppose that the judgment did actually create both an administrative agency and an administrative remedy.

The judgment, however, did not magically transform the Association into an administrative agency. The Association has no power to make any rules; it cannot compel anybody to do anything. And it has no power to resolve any dispute without the consent of the parties. Trial courts regularly order parties to “go out in the hall and see if you can resolve this.” We fail to see how involving the Association is any different.

While the judgment describes resort to the Association as an “administrative remedy,” this merely means that any party who fails to submit a dispute to the Association is barred from seeking relief from the watermaster. The judgment could have so provided without using the words “administrative remedy” at all. The fact that the referee used an arguably inapt shorthand term for this procedural rule does not invalidate the rule itself.

VI

DISPOSITION

The judgment is affirmed. The Sanford defendants are awarded costs on appeal against the Falzons.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.