4-4-2001

City of Thornton v. City & County of Denver ex rel. Bd. of Water Comm'rs (In re Plan for Augmentation of City & County of Denver)

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 E. 14th Avenue, Fourth Floor
Denver, CO 80203
(303) 837-3790

▲COURT USE ONLY▲

Appellant:
CITY OF THORNTON (Objector)

Appellees:
THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS (Applicant)

and

CENTENNIAL WATER & SANITATION DISTRICT, THE CITY OF AURORA, THE CITY OF ENGLEWOOD, HENRYLYN IRRIGATION DISTRICT (Objectors)

and

RICHARD STENZEL, Division Engineer for Water Division 1, (Pursuant to C.A.R. 1(e))

Case No: 00SA302

ON APPEAL FROM THE WATER COURT FOR WATER DIVISION 1, THE HONORABLE JONATHON W. HAYS, Case No. 91CW028

Attorney: Jack Graves
CHRISMAN, BYNUM & JOHNSON, P.C.
1900 Fifteenth Street
Boulder, CO 80302
Phone: (303) 546-1300
Fax: (303) 449-5426
E-mail: jmg@cbj.com
Atty. #: 24576

ANSWER BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether or not Thornton can invoke retained jurisdiction to newly litigate water quality issues that Thornton elected not to litigate when it stipulated to entry of a decree seven years ago?

2. Whether or not Thornton's alleged water quality "injury" is cognizable in water court when the augmentation source at issue is fully regulated and controlled by the Water Quality Control Commission and Water Quality Control Division pursuant to C.R.S. § 25-8-101 to 703?

STATEMENT OF THE CASE

Nature of the Case

In this case, the City of Thornton ("Thornton") seeks to invoke the retained jurisdiction provision contained in the water court's Judgment and Decree issued in Case No. 91CW028. Thornton wishes to litigate the suitability of effluent discharged by the Littleton/Englewood Wastewater Treatment Plant ("Bi-City") as an augmentation source under C.R.S. § 37-92-305(5)—despite the fact that Thornton stipulated to the entry of the original decree, including Bi-City discharges as a source of augmentation water.

Course of Proceedings

The City and County of Denver, Acting by and through its Board of Water Commissioners, ("Denver") filed its Application in Case No. 91CW028 on April 12, 1991. (R. at 6.) On March 11,

1993, Thornton, an objector, stipulated to the entry of a Decree granting Denver's Application, "provided that [its terms] are no less restrictive on the Applicant than the form of the attached proposed decree." (R. at 108.) All other Objectors also stipulated prior to trial, (R. at 86), and Denver put on a prima facie case establishing the elements of its claims before the water court, (R. at 88). On May 24, 1993, the water court entered a final Judgment and Decree, which included a period of retained jurisdiction of seven years. (R. at 89-99; ¶ 20 at 99.)

Thornton has never made any allegations—either at the time the Decree was entered, or subsequently—that the Judgment and Decree entered by the water court on May 24, 1993, was any less restrictive than that to which Thornton stipulated. Instead, on May 22, 2000, Thornton filed a "Petition Invoking Retained Jurisdiction," in which Thornton asked the water court to now allow it to newly litigate water quality issues related to the Decree's inclusion of Bi-City effluent as a source of augmentation water. (R. at 103.)

Disposition in the Court Below

The water court denied Thornton's Petition on August 11, 2000, noting, *inter alia*, that Thornton could not use retained jurisdiction as a basis to litigate allegedly new water quality concerns in a case it had settled seven years ago. (R. at 189-90.)

Statement of Facts

The dispositive and undisputed facts are as follows: (1) Thornton stipulated to the entry of a decree prior to trial, (R. at 108-17); (2) the Judgment and Decree entered by the water court did not violate the terms of Thornton's stipulation, (compare R. 109-17 and 89-99); (3) Thornton now seeks to use the retained jurisdiction provisions of the Decree in Case No. 91CW028 to raise water quality issues that were never subject to trial in Case No. 91CW028, but purportedly involve some of the same water quality issues being litigated in an ongoing trial involving Denver, Thornton, and Englewood in Case No. 96CW145,[1] (Opening Br. 3-4; R. at 105); (4) Bi-City's discharges are regulated by the Water Quality Control Commission and Division pursuant to C.R.S. § 25-8-101 to 703 (see generally C.R.S. § 25-8-101 to 703); and (5) the subject water quality issues in both cases involve the suitability of effluent discharged by Bi-City as a source of substitute supply under C.R.S. § 37-92-305(5), (Opening Br. 3-4).

ARGUMENT

Summary of Argument

Thornton chose not to litigate water quality issues when

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[1] Englewood does not agree with the water court's decision to hear the water quality issues in that case. However, the trial is not yet completed, and the water court has not yet entered a final, appealable Order in that case.

this case originally went to trial in 1993. Instead, Thornton stipulated to the entry of a decree that included Bi-City effluent as an augmentation source. The water court properly denied Thornton's attempt to litigate entirely new issues in a case it settled seven years ago.

Thornton's claims of water quality "injury" are not cognizable under Colorado law. The Water Quality Control Commission and Division have sole authority over Bi-City's discharges into the South Platte River, and Thornton's claims based on removal of dilution water from the South Platte River are directly contrary to the doctrine of "maximum utilization" under Colorado law.

Standard of Review

The water court's denial of Thornton's Petition Invoking Retained Jurisdiction is subject to review for abuse of discretion by the water court. (See Answer Brief of Denver, Part II at 18-22 (for argument in support of abuse of discretion standard, which Englewood hereby adopts with respect to the standard of review appropriate to this Court's review of the water court's denial of Thornton's Petition).)[2]

[2] Where possible, and in an effort to aid judicial economy, Englewood will reference and adopt, rather than repeat, certain of Denver's arguments contained in its Answer Brief.

I. THE WATER COURT PROPERLY REFUSED TO ALLOW THORNTON TO INVOKE RETAINED JURISDICTION TO NEWLY LITIGATE WATER QUALITY ISSUES THAT THORNTON ELECTED NOT TO LITIGATE WHEN IT STIPULATED TO A DECREE SEVEN YEARS AGO.

C.R.S. § 37-92-304(6) provides for "reconsideration" of injury in the case of a change of water rights or plan for augmentation. The statute does not provide for litigation of new and additional issues that were not and could not have been litigated before the water court in the first instance because such litigation was and is precluded by a binding Stipulation and settlement between Thornton and Denver.

A. Thornton Cannot Invoke the Court's Jurisdiction to Reconsider a Claim of Injury that Thornton was Precluded by Stipulation from Raising for the Court's Consideration in the First Instance.

Thornton stipulated before trial to the entry of a decree no less restrictive than that attached to Thornton's Stipulation. Under such circumstances, Thornton was unequivocally barred from going to trial in 1993 and asserting injury in an effort to persuade the water court to impose terms and conditions more restrictive than those to which Thornton stipulated. Likewise, Thornton was barred from asking for reconsideration of the water court's initial Decree under C.R.C.P. 52 or 59, unless Thornton believed that the Decree somehow violated the terms of the Stipulation. Such a violation has not been asserted here. Instead, Thornton argues that it can somehow command the water court to reconsider water quality issues under retained jurisdiction that it could not have asked the water court to

consider or reconsider in the first place. Thornton's legal theory finds no support under C.R.S. § 37-92-304(6).

Normally, a trial court loses jurisdiction over a matter when the time for reconsideration under C.R.C.P. 59 passes, and it becomes subject to appeal. Once the time for appeal runs, the judgment becomes final and unassailable, but for limited circumstances described in C.R.C.P. 60. However, C.R.S. § 37-92-304(6) creates a special exception whereby certain water court judgments are deemed final and appealable, but remain subject to the water court's jurisdiction to reconsider the question of injury, if appropriate.

This Court has not yet had occasion to define the precise contours of the water court's exercise of its retained jurisdiction; however, one can easily envision the water court acting to: (1) correct mutual and/or fundamental factual mistakes with respect to trial evidence or inferences therefrom; (2) address the subsequently discovered impossibility of operating an augmentation plan with the designated sources approved by the water court at trial; or (3) address an inability of the state to administer the plan for augmentation that was not reasonably apparent at trial. Each of the above exercises would be consistent with the finality and appealability of judgments entered by the water court, combined with the safety net provided by retained jurisdiction to address issues that the water court simply could not have reasonably addressed prior to the operation

of the water rights at issue.

An excellent example of retained jurisdiction, consistent with the above description, is found in City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993). In Clear Creek Water Users Alliance, the Alliance sought to change a conditional storage right by adding five new storage sites. Id. at 1349. The City of Thornton and others objected to the application. Id. at 1349, 1351. Some or all of the other objectors either stipulated or withdrew from the case, and Thornton was the sole objector to participate in trial. Id. at 1353. The water court granted the application, despite Thornton's opposition, but retained jurisdiction in order to revisit the concerns expressed by Thornton at trial, as needed. Id. at 1354-55.

In affirming the water court's decision on appeal by Thornton, this Court stated that "[s]ection 37-92-304(6) protects the rights of the City of Thornton insofar as it allows the water court to reconsider the question of injury until it is convinced that the nonoccurrence of injury to the City of Thornton's water rights is conclusively established." Id. at 1360. Thus, the water court could **reconsider**, under retained jurisdiction, any of the issues it had originally **considered** when Thornton had raised them at trial (provided of course they could not have reasonably been addressed at trial in the first instance). Nothing in Clear

Creek Water Users Alliance even hints at the proposition that one of the objectors who had earlier stipulated could raise entirely new issues under retained jurisdiction. Nor may Thornton do so in the instant case.

Simply stated, Thornton may not ask the water court to reconsider under retained jurisdiction issues that Thornton was barred by stipulation from asking the water court to consider in the first instance. The water court correctly denied Thornton's attempt to newly litigate a case it settled seven years ago.

B. Thornton's Attempt to Now Impose Water Quality Terms and Conditions More Restrictive Than Those to Which it Stipulated is Inconsistent with and Violative of its Stipulation.

Thornton argues that it has a right to invoke retained jurisdiction for the water court to newly consider water quality issues based on the inclusion of a retained jurisdiction provision in the decree to which it stipulated. However, Thornton ignores the fact that it stipulated to any decree that was no less restrictive than the one attached to the Stipulation. Thornton cannot, consistent with its Stipulation, now seek terms and conditions that are more restrictive than those to which it stipulated.

Stipulations made in water cases are enforceable as contracts. Williams v. Midway Ranches Property Owners Assoc., Inc., 938 P.2d 515, 527 (Colo. 1997). Thus, both Thornton and Denver are bound by and entitled to the benefits of their

Stipulation. There is only one reading that does justice to each of their contractual interests. Thornton had a contractual right to invoke retained jurisdiction, inasmuch as this provision was contained within the decree to which it stipulated. However, any such invocation of retained jurisdiction was limited by the terms and conditions to which Thornton stipulated. If Denver had been unable to operate its augmentation plan consistent with those terms and conditions (again, based on issues that could not have reasonably been addressed at trial in the first instance), then Thornton or any other Party could have reasonably asked for the water court's assistance under retained jurisdiction.

Thornton, however, remains bound by its Stipulation. Denver is entitled to enforce Thornton's promise not to seek terms and conditions any more restrictive than those attached to its Stipulation. Thornton cannot now, under retained jurisdiction, magically make its promise to Denver disappear and ask the water court to impose terms and conditions more restrictive than those to which it agreed seven years ago. The water court properly enforced Thornton's promise to Denver and denied Thornton's Petition.

C. Thornton's Position Is Bad Public Policy Because it Would Effectively Eviscerate Every Settlement of a Water Rights Case in Which the Proposed Decree Included a Retained Jurisdiction Provision.

Thornton correctly states that "public policy favors settlement of disputes out of court." However, the adoption of

Thornton's position would have just the opposite effect.

Parties to water cases have been entering into stipulations since long before the legislative enactment of C.R.S. § 92-37-304(6). Parties decide which cases and issues to litigate and which to settle based on a whole host of considerations. Allowing a party to change its mind and litigate later would have the undesirable effect of voiding all prior settlements involving stipulations to proposed decrees that include statutorily mandated retained jurisdiction provisions. This hardly promotes settlement efforts or certainty with respect to water rights.[3]

Thornton could have chosen to litigate Denver's Application at trial in 1993. Had it done so, it might be entitled to invoke retained jurisdiction as to issues originally resolved by the water court that merit reconsideration based on changed circumstances not reasonably anticipated at trial. Thornton, however, chose not to go to trial, and Thornton cannot now change its mind seven years later. The water court properly denied Thornton's Petition.

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[3] In City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348, 1360 (Colo. 1993), this Court pointed out that Thornton's arguments for delaying the water court's consideration of injury under retained jurisdiction "would render it impossible for water courts to grant applications for changes in water rights." In the same vein, Thornton's arguments herein would render it impossible to settle or stipulate to applications for changes in water rights.

II. THE WATER COURT PROPERLY REFUSED TO EXERCISE RETAINED JURISDICTION, BECAUSE THORNTON'S ALLEGED WATER QUALITY "INJURY" IS NOT COGNIZABLE IN WATER COURT.

Should this Court choose to reach the merits of Thornton's assertions of water quality "injury," Englewood fully adopts Denver's argument that the water court properly refused to exercise retained jurisdiction because Thornton's alleged water quality "injury" is not cognizable in water court. (See Answer Brief of Denver, Part I at 4-18.)

Thornton is likely to argue that it is not asking the water court to regulate or control Bi-City's discharges (that being the exclusive province of the Water Quality Control Commission and Division), but is simply asking the water court to impose terms and conditions on Denver's use of Bi-City effluent as an augmentation source. Thornton argues here and in Case No. 96CW145 that Denver's removal of water from the South Platte, combined with Denver's taking of credit for reusable water discharged from Bi-City, has the effect of concentrating certain wastewater pollutants (as well as all of the other pollutants introduced to the South Platte as it travels through metropolitan Denver) at Thornton's point of diversion at the Burlington headgate. (See Affidavit of Walid Hajj, ¶¶ 5 and 6, R. at 161.)

Thornton is effectively asking the water court to judicially guarantee dilution flows through terms and conditions on Denver's use of Bi-City effluent as an augmentation source (or as a source of substitute supply for exchange in 96CW145). No matter how its

theory is framed, Thornton is effectively asking the water court to interfere with the statutory roles assigned to the Water Quality Control Commission and Division in protecting the quality of the state's waters and regulating discharges into those waters. Thornton's position is also contrary to the doctrine of maximum beneficial use mandated by the Colorado Constitution. See City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 92-95 (Colo. 1996); Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

"Instream waste assimilation . . . should not be recognized as a beneficial use. Utilizing water to dilute wastes, in lieu of control or treatment at the source, is a wasteful dissipation of the available resource and runs counter to the prior appropriation doctrine of 'maximum utilization,' which is designed to bolster the use of appropriative rights." Gregory J. Hobbs, Jr. and Bennett W. Raley, Water Rights Protection in Water Quality Law, 60 U. Colo. L. Rev. 841, 872 (1989) (citing Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968) and Alamosa-La Jara Water Users Protection Association v. Gould, 674 P.2d 914, 935 (Colo. 1984)).

The Water Quality Control Commission and Division have sole and exclusive responsibility for regulating and controlling Bi-City's treatment of its discharges at the source. Thornton's assertion of an instream dilutive right to reduce the concentrations of Bi-City effluent or any other discharge to the

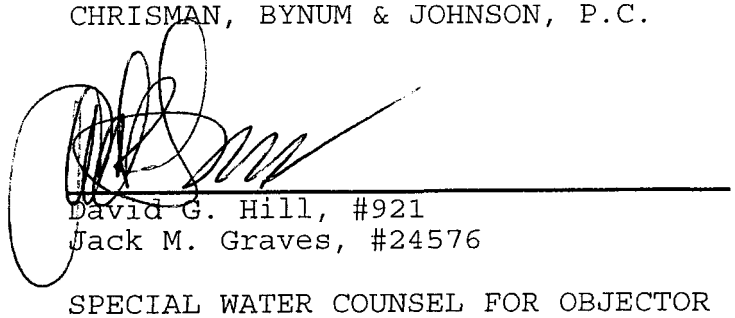
South Platte River is contrary to Colorado law. The water court correctly denied Thornton's petition to assert water quality injury under the retained jurisdiction provision of the Decree in Case No. 91CW028.

CONCLUSION

Englewood respectfully requests that this Court affirm the decision of the water court based on the grounds stated in Part I, Part II, or both, as well as any additional relief the Court may deem appropriate.

Dated: April 4, 2001

CHRISMAN, BYNUM & JOHNSON, P.C.

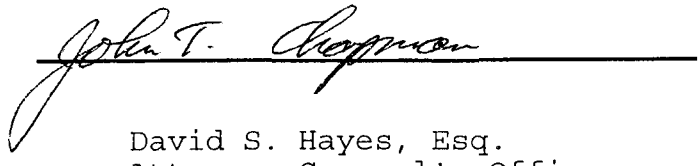


David G. Hill, #921
Jack M. Graves, #24576

SPECIAL WATER COUNSEL FOR OBJECTOR
THE CITY OF ENGLEWOOD

CERTIFICATE OF SERVICE

I certify that on April 4, 2001 a true and correct copy of the foregoing **ANSWER BRIEF** was placed in the United States Mail, postage prepaid, to the following:



Mary Crespin
Clerk of the Court
Water Division No. 1
PO Box C
Greeley, CO 80632

John M. Dingess, Esq.
Duncan, Ostrander & Dingess, PC
7800 E. Union Ave., #550
Denver, CO 80237

Casey S. Funk, Esq.
Denver Water Department
Legal Division
1600 West 12th Avenue
Denver, CO 80254

Austin Hamre, Esq.
White & Jankowski
511 16th Street, Suite 500
Denver, CO 80202

David S. Hayes, Esq.
Attorney General's Office
1525 Sherman Street, 5th Floor
Denver, CO 80203

Honorable Jonathan Hays
Weld County Courthouse
PO Box C
Greeley, CO 80632

Steven L. Janssen, Esq.
2100 22nd Street, Suite C
Boulder, CO 80302-4530

Veronica A. Sperling, Esq.
Moses, Wittemyer, et al.
P.O. Box 1440
Boulder, CO 80306-1440