7-30-2003

City of Golden v. Simpson

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Appeal from the District Court, Water Division No. 1, Case No. 02CW191, Honorable Jonathon Hays Presiding. CITY OF GOLDEN, a COLORADO Municipal Corporation, **Appellant,** v. HAL D. SIMPSON, in his official capacity as Colorado State Engineer, and RICHARD L. STENZEL, in his official capacity as Division Engineer for Water Division No. 1, and the FARMERS HIGH LINE CANAL AND RESERVOIR COMPANY **Appellees.**	**▲ COURT USE ONLY ▲**
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CITY OF GOLDEN'S REPLY BRIEF	

The City of Golden ("Golden"), Appellant in the above captioned matter, by and through its undersigned attorneys, hereby submits this single Reply to the Answer Briefs filed by the State and Divisions Engineers (the "State") and the Farmer's High Line Canal and Reservoir Company ("FHL").

INTRODUCTION

The primary issue in this appeal is whether the Water Court erred in sua sponte dismissing Golden's Complaint, the very same day it was filed, on the basis of evidence heard at only an emergency TRO hearing, and without any notice to Golden that it planned to reach a decision on the merits. By this prematurely terminated process, Golden was denied any meaningful opportunity to investigate, much less present evidence concerning whether the facts recited in the September 6, 2002 Cease and Desist Order were correct.

As thoroughly explained in Golden's Opening Brief, the Cease and Desist Order was purportedly based on paragraph 7(e) (the "FHL Provision") of the 1966 Change Decree. The factual predicate recited in the order as justification for directing Golden to cease further diversion of its Priority No. 5 water right was that Priority No. 9 was the calling right, and that there was 3.5 cfs present in Clear Creek at the historic headgate of the Oulette Ditch between July 15 and September 6, 2002, the date the State Order was issued. (Rec. v. 3, Exh. B.) Whether 3.5 cfs was in fact present at the historic headgate of the Oulette Ditch for purposes of imposing the limitation in the FHL Provision is a major disputed issue that has not been heard in a trial on the merits.

Perhaps recognizing the due process problems raised by the premature dismissal of Golden's Water Court action, the State and FHL have now invented in their Answer Briefs the argument that the September 9 hearing addressed not only Golden's motion for a TRO, but was also a "trial" on the merits with respect to the State's oral motion for an injunction under C.R.S. § 37-92-503 made at the hearing that day. (State at 2, 20-23, FHL at 1, 7, 22-26.) In this manner, the Appellees attempt to give the September 9 proceedings a finality and sufficiency that is unsupported by the record. Simply put, the Appellee's argument on this point is groundless.

1. There was no hearing, much less any ruling, on the State's oral request for an injunction under C.R.S. § 37-92-503.

The assertion that the Water Court considered and decided the State's oral motion for an injunction under § 37-92-503 is directly contradicted by the transcript of the September 9 TRO hearing, by the Court's oral ruling at the end of that hearing, and by the plain text of the written September 9, 2002 Order Dismissing Complaint. The Court was correct not to consider and address that oral motion, as it was not adequately noticed, and was made in violation of the procedural due process safeguards built into the Rules of Procedure.

The only part of the Appellees' argument that is accurate is that counsel for the State made an oral motion at the September 9 TRO hearing for an injunction under § 37-92-503. (Rec. v. 2, p. 6, ln. 19.) Both the State and FHL fail to mention, however, that Golden specifically objected to the State's attempt to assert that oral motion, and that in response to that objection, the Court explained:

> This morning we are going to do the TRO. **If we have time,** we will move on to the other issue concerning the injunction asked for by the State, **if time permits,** and **if the parties have been adequately notified.**

(Rec. v. 2, p. 7, ln. 20-24 (emphasis added).)

The Court thus expressly reserved any decision about whether it would consider the State's oral motion for an injunction under § 37-92-503 pending a showing that the parties had been adequately notified. No such showing was made. No such showing could have been made because there had been no notice whatsoever to Golden that the State planned to seek an injunction. The Court never again addressed the issue.

To the contrary, what is apparent from a review of the transcript is that the Water Court did not even consider, much less reach any decision on the merits of the State's oral motion for

an injunction. At the very end of the hearing held that day, the Water Court specifically instructed that Golden could schedule a subsequent hearing on its motion for preliminary injunction to stay the effective date of the Cease and Desist Order. (Rec. v. 2, p. 272, ln. 1-8.) Neither the State nor FHL mention that fact in their respective Answers, and it directly contradicts their theory that the Water Court meant to reach the merits of the State's motion for injunction under § 37-92-503.

The September 9, 2002 Order Dismissing Complaint further confirms that the Water Court did not rule on the State's oral motion. That short ruling expressly states that the only hearing held that day was on Golden's request for a TRO:

> **The Court held a hearing on Appellant's Motion for Temporary Restraining Order** and ruled at the conclusion of evidence the Appellant was not entitled to injunctive relief and must comply with the Cease and Desist order served upon it by the State Engineer's Office.

(Rec. v. 1, p. 47 (emphasis added).) The State's oral motion under C.R.S. § 37-92-503 is not mentioned in the written order, the statute is not cited, and as a ruling on any requested injunctive relief, this order totally fails to satisfy the detailed requirements specifically outlined for such an order in Rule 65(d).[1]

Clearly, the Water Court Judge did not consider or rule on the State's oral motion, nor could it have given the lack of notice to Golden. Rule 65(a)(1) succinctly states "no preliminary injunction shall be issued without notice to the adverse party." It is undisputed that the State

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[1]Rule 65(d) explains: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

gave Golden no advanced notice of its plan to request an injunction at the September 9 hearing. Surely no permanent injunction under § 37-92-503 can be reached without observing even the minimum notice required for preliminary injunctive relief.

2. The Court should not have reached the merits after only the TRO hearing.

Both the State and FHL defend the Water Court's order dismissing this case by citing the provision in Rule 65(a) that gives a trial court the authority to reach a decision on the merits at a preliminary injunction hearing. (State at 21-22; FHL at 24-25.) The first point, as clearly set forth above, is that the September 9 hearing was only a TRO, not a PI hearing. Though Rule 65(a) allows a court to reach the merits of a matter in a PI hearing in certain limited circumstances, there is no such parallel power under Rule 65(b) addressing TRO procedure. The Water Court was thus without authority to dismiss the case at such an early stage in the proceedings.

Even if the September 9 hearing could be considered a preliminary injunction hearing, the Water Court was without authority to reach the merits without first giving Golden notice of its intent to do that. The *Leek v. City of Golden* decision cited by both the State and FHL is instructive on the minimum procedural safeguards that must be observed before a Court can consolidate a hearing on the merits with a PI hearing. *Leek v. City of Golden*, 870 P.2d 580 (Colo. App. 1993).

In *Leek*, the Court of Appeals noted the United States Supreme Court ruling that parties should receive clear and unambiguous notice of a court's intent to consolidate a PI hearing under Rule 65(a) with a trial on the merits either before the hearing commences, or at time which will still afford the parties a full opportunity to present their respective cases. *Id.* at 585 (citing *University of Texas v. Camenisch*, 451 U.S. 390 (1981)). The Court of Appeals upheld the

consolidated process at issue in *Leek* because the trial court gave the parties clear notice of its intent to reach the merits, and allowed them to submit offers of proof and stipulations sufficient to fully present their cases. *Id.* at 586. By contrast, the Water Court gave no notice that it planned to reach the merits of this matter either before or during the September 9 TRO hearing.[2] Moreover, in contrast to *Leek,* under the unique procedure established by the Water Court in this matter, Golden was allowed to submit its Offer of Proof only after the Water Court had already dismissed the case, and the critical evidence contained in that document was never considered by the Water Court.

The ability of a Court to reach the merits after only a PI hearing is further circumscribed and explained by *Governor's Ranch Professional Center v. Mercy of Colorado* and *Litinsky v. Querard* which clearly hold that evidence taken at a PI hearing is preliminary in nature, and cannot serve as the basis for a final judgment in the absence of a stipulation by the parties consenting to that procedure or a stipulation that they have no more evidence to present. *Governor's Ranch Professional Center v. Mercy of Colorado*, 793 P.2d 648, 651 (Colo. App. 1990); *Litinsky v. Querard*, 683 P.2d 816, 819 (Colo. App. 1984)("In granting a preliminary injunction, the court should not attempt to do what can be done only after a full hearing and final decree."). Though Golden cited and relied on *Governor's Ranch* and *Litinsky* in its Opening Brief, the State does not bother to address or even cite these decisions anywhere in its Answer. FHL does at least address the *Governor's Ranch* decision toward the very end of its Answer Brief (FHL at 24), but its effort only highlights the significant problems with the process by which the Water Court prematurely dismissed Golden's Complaint. FHL asserts that *Governor's*

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[2]To the contrary, as stated above, it informed Golden at the very end of the TRO hearing that it could schedule a PI hearing. (Rec. v. 2, p. 272, ln. 1-8.)

Ranch is inapposite because "that case involved factual disputes," and incorrectly asserts that resolution of this matter involves no disputed facts. (FHL at 24.) The State makes a similar unsupported assertion throughout its Answer Brief. (See State at 19-23.) This statement is plain wrong.

The main point of this appeal is that Golden had no opportunity to present the evidence set forth in its Offer of Proof to the Water Court concerning whether the 3.5 cfs threshold flow requirement in the FHL Provision of the Change Decree was satisfied. Given the timing of the State Order issued at the close of business on Friday September 6, 2002, Golden had no opportunity to investigate whether the 3.5 cfs flow threshold was in fact met before the Monday, September 9 TRO hearing. In particular, Golden did not have the opportunity to examine any state flow records over the weekend. Thus, it was unable to present its evidence, or effectively cross-examine those witnesses that testified at the TRO hearing that this threshold condition was satisfied.

As fully explained in Golden's Opening Brief, the Offer of Proof demonstrates that flows at the headgate of the Oulette Ditch at the time of the State Order were comprised in significant part of imported water and storage releases scheduled for delivery to downstream users, and not present in Clear Creek at the time of the Change Decree. (Rec. v. 1, pp. 107-137.) The Offer of Proof thus demonstrates that when this additional delivery water is taken into account, the effective flow at the historic headgate of the Oulette Ditch during the relevant period was lower than 3.5 cfs (Rec. v. 1, p. 127-135), and thus below the express threshold flow condition in the FHL Provision.[3]

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[3]The Offer of Proof also demonstrates that the Oulette Ditch was not historically satisfied by return flows. (Rec. v. 1, p. 131-132.) That issue is addressed in section 5 below.

Both the State and FHL argue that the yet unconsidered evidence in Golden's Offer of Proof will not change the conclusion that the 3.5 cfs threshold flow requirement was satisfied because it should not matter that transmountain water and storage releases now augment what was the natural stream flow of Clear Creek at the time of the 1966 Change Decree. (State at 22, FHL at 26.) In support of this argument, Appellees cite the final sentence of the Change Decree that directs, "whenever the word "flow" is used in connection with said headgate points, it shall mean the total flow of Clear Creek." Appellees argument on this point is incorrect for many reasons.

First, as explained in Golden's Opening Brief, it is standard practice for the State Engineer's Office to administer water deliveries past intervening water users. (Rec. v. 1, pp. 111, 129.) Typically, non-native water and storage water scheduled for delivery is segregated and not included in calculating the amount of water that is available for diversion. (Id.) Neither the State nor FHL contest Golden's assertion concerning the SEO's standard administrative practice in this regard.[4] If that admitted standard practice is not applied in the administration of the FHL Provision, deliveries of water past the Oulette Ditch would, through no fault of Golden, result in Golden losing Priority No. 5 water during dry conditions when it is needed the most. It would be a dramatic departure, and grossly inequitable to Golden, if such flows added since the 1966 Change Decree were counted against Golden for purposes of implementing the 3.5 cfs threshold flow condition.

Second, the language Appellees cite does not support the conclusion they ask the Court to draw. "The total flow of Clear Creek" as that phrase is used in the last line of the Change Decree

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[4]Golden notes that the State Engineer has subsequently affirmed this standard administrative practice in writing, and Golden is prepared to offer that evidence at a trial.

most reasonably means the natural flow of that stream, not the flow as subsequently augmented by storage releases and by transmountain diversions importing what would otherwise be the natural flow of the Colorado River or some other West Slope stream.

Clearly, contrary to the unsupported assertion made by FHL and the State, satisfaction of the 3.5 cfs threshold flow condition is a seriously disputed issue. That condition was the factual predicate to the September 6, 2002 Cease and Desist Order, and the Court relied on the very preliminary and untested evidence presented on this issue at the TRO hearing in dismissing the Complaint.[5] *Governor's Ranch* and *Litinsky* instruct that a court should not dismiss on the basis of such preliminary evidence. In short, the abruptly terminated process used by the Water Court violated Golden's due process rights, was inconsistent with Rule 65, and the decision resulting therefrom must be reversed so that Golden can present its case.

3. The Court should not have reached the merits on decree interpretation.

The Answer Briefs devote most of their argument to defending the Water Court's determination made after the TRO hearing that the FHL Provision in the 1966 Change Decree was unambiguous, and was effectively a complete subordination of Golden's Priority No. 5 to the FHL Priority No. 9. (See State at 6-17; FHL at 10-22.) Given the notice and due process requirements set forth in Rule 65, as further explained by the *Governor's Ranch*, *Litinsky*, and *Leek* decisions discussed above, the Water Court's determination on the meaning of the FHL Provision can also only be considered a preliminary ruling, sufficient perhaps to have denied Golden's TRO, but not a sufficiently final ruling to sustain dismissal of the action. Though the

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[5]The Court commented: "The only testimony I've heard today is that it is greater than 3.5 cfs. At this time I haven't heard testimony to the contrary. . . . I haven't heard anyone testify that they went down to the Oulette headgate and saw that it was dry or flowing with less than 3.5 cfs." (Rec. v. 2, p. 267, ln. 8-15.)

question of ambiguity is generally a matter of law, there was no dispositive motion pending before the Court, nor any notice to Golden at the TRO hearing that the Court planned to reach the merits, and this ruling must also be reversed so the issue can be properly developed and presented to the Water Court under the Rules of Procedure. If this Court disagrees, however, it should reverse the Water Court's determination on the meaning of the FHL provision, and accept instead Golden's plain language interpretation.

4. The plain language in the Change Decree is that the limitation in the FHL Provision only applies where Golden's diversion under the No. 5 "result in a call."

As fully explained in Golden's Opening Brief, the plain language of the FHL Provision is that it prohibits Golden's diversions under Priority No. 5 when those diversions would "result in a call" on the No. 9 at the headgate of the Farmer's Highline Canal – i.e., when Golden's diversions cause or trigger that call. If diversions by Golden merely contribute to a call that would otherwise exist whether or not Golden diverted under the Priority No. 5, then such diversions do not cause or trigger that call, and are not prohibited by the plain language of the FHL Provision. This plain language reading was not directly addressed by the Court in any ruling, nor is it directly addressed by either the State or FHL in their Answer Briefs, neither of which make any attempt to parse the actual words.

In its Opening Brief, Golden demonstrated that the parties to the Change Decree clearly knew how to draft complete subordinations when that was intended. In those instances, the language explicitly states that Priority No. 5 "shall be junior and subordinate" to the other listed rights, or "shall be junior" to other listed rights. (See Change Decree at ¶ 7(d), (g), (h)(1).) In response, the FHL asserts that paragraph 7(d) and 7(g) address storage rights, and that therefore the different language makes sense. (FHL at 15.) That argument ignores paragraph 7(h)(1)

which explains that the changed Priority No. 5 "shall be junior" to a number of direct flow irrigation rights. The fact remains that the parties knew how to draft explicit complete subordination provisions when that was intended, and that explicit language is not what they used in crafting the FHL Provision.

The Water Court's interpretation of the FHL Provision that the Appellees urge this Court to adopt treats the "result in a call" language as being no different than the other conditions in the Change Decree that expressly use terms like "junior and subordinate." The distinction between these terms must be recognized, and the Court should use their respective and precise meanings in interpreting the different provisions of the Change Decree. *See Kuta v. Joint District No. 50 (J)*, 799 P.2d 379, 382 (Colo. 1990) (interpretation should consider entire instrument, and not view clauses or phrases in isolation).

The failure to acknowledge the distinction between the different language used in the different parts of the Change Decree also runs afoul of the rule from *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 174 (Colo. 1997), that "bypass of water past an otherwise senior priority is a consequential matter and we should not presume, in the absence of explicit language, that the parties intended that effect." Neither the FHL nor the State address that basic rule of decree interpretation in their respective Answers. Moreover, the rule of decree construction explained in *USI Properties East* should be applied with greater force where, as here, there is no history of conduct by the parties which demonstrates their understanding that a complete subordination was intended. *Id.* (citing *Town of Estes Park v. Northern Colo. Water Conservancy Dist.*, 677 P.2d 320, 327-28 (Colo. 1984)). The FHL and the State discuss the history of the administration of the FHL Provision at some length (State at 16-17, FHL at 20-21), but cannot point to any conduct by any of the parties to the Change Decree, or by the State or Division Engineer, supporting the

interpretation of the FHL Provision they now urge this Court to adopt.

The FHL further challenges the plain language interpretation offered by Golden by citing the testimony of its expert that such a "trigger" subordination would be difficult to administer. (FHL at 17-18.) Not only is that extrinsic evidence which should not be used to change the plain language, but any purported difficulty is not a basis to undue the language the parties negotiated and incorporated into the decree.

5. Appellee's offer mostly extrinsic evidence to support their interpretation of the FHL Provision, suggesting the FHL Provision is ambiguous at best.

Both the State and FHL assert that the Water Court was correct to rule that the Change Decree is unambiguous. (State at 6-8; FHL at 16-22.) At the same time, to support their reading of the Change Decree, they do not focus on the plain language, but offer instead extrinsic evidence concerning historic return flow patterns.[6] For example, at page 11 of its Answer Brief, FHL asserts that the injury addressed by the FHL Provision "resulted from the fact that water taken at the Oulette Ditch, as at other lower ditches, was historically supplied by inflows into Clear Creek below the FHL and above the Oulette." (FHL at 11.) FHL further relies on its assertion that the Oulette was historically supplied by return flow to support its interpretation argument throughout much of the rest of its brief. (See FHL at 12, 13, 15.) FHL must rely on its

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[6]The FHL also offers an extremely complicated and convoluted construction of the FHL Provision based on the second part of that paragraph which addresses Golden's right to divert under Priority No. 5 when the flow in Clear Creek is less than 3.5 cfs. FHL argues this latter part of the FHL Provision demonstrates that the Oulette was historically satisfied by return flows. (FHL at 11-13.) It does no such thing. The language cited by FHL is silent on the question of return flows, and is a negotiated term that could have been inserted for a variety of reasons. The complexity of this language and its uncertain meaning and operation only further illustrate the need for this matter to be remanded and developed in the Water Court.

assertions about historic return flow patterns and other exclusively extrinsic evidence[7] because it must convince the Court that the actual "results in a call" language in the FHL Provision really means "junior and subordinate."

Despite FHL's presentation of its extensive return flow discussion to the Water Court at the TRO hearing, and urging that evidence again in this appeal, the FHL and the State continue to insist that Golden's contrary evidence on the return flow issue is extrinsic evidence that may not be considered.[8] (State at 15; FHL at 20.) Their argument in summary is that their extrinsic evidence demonstrates that the decree is unambiguous, and the Court should therefore not consider Golden's extrinsic evidence. They cannot have it both ways. The fact is that FHL and the other parties appearing at the TRO hearing had the weeks before the September 6, 2002 Cease and Desist Order when they were discussing this issue with the State Engineer to prepare their evidence. By contrast, Golden had only the weekend of September 7 and 8. The Water Court has not considered Golden's Offer of Proof which examines prior rulings of the Division No. 1 Water Court to demonstrate that return flows were not a significant component of the historic supply for the Oulette Ditch. The FHL had the opportunity to fully present its extrinsic

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[7]Examples of other items of extrinsic evidence offered by FHL in its Answer Brief to support its interpretation of the FHL Provision include the testimony of the Division Engineer about examples of other decree provisions (FHL at 13); assertions about the "typical" seasonal storage pattern at Standley Reservoir and for diversions by the Agricultural Ditch and Reservoir Company (FHL at 15); the testimony of Coors expert concerning the Wanamaker Ditch and historic return flows (FHL at 16); testimony that Golden's interpretation of the FHL Provision would be difficult to administer (FHL at 17-18); assertions about the purpose for the abandonment of 3.27 cfs of the Priority No. 5 required by the Change Decree (FHL at 19-20); and extensive extrinsic and unsupported assertions about why the FHL Provision had never before in the 36 years since the 1966 Change Decree was entered been interpreted as it was in the 2002 Cease and Desist Order. (FHL at 20-21.)

[8]FHL takes this position even while recognizing that the Water Court found that the return flow question was "a disputable fact." (FHL at 20, citing Rec. v. 2, p. 271, ln. 7-13.)

evidence on this issue, and Golden should be given the same chance.

As fully explained in Golden's Opening Brief, the fact that the Oulette headgate was not historically supplied by return flows supports Golden's plain language interpretation of the FHL Provision and demonstrates that the reading urged by Appellees, and adopted by the Water Court at the TRO hearing, would result in a significant windfall to the FHL. (See Golden's Opening Brief at 20-21.)

The fact that Appellees must resort to extrinsic evidence to support their interpretation of the FHL Provision strongly supports Golden's alternative argument that the language is ambiguous.[9] If this Court is inclined to even address the meaning of the Change Decree despite the flawed process by which this appeal has come before it, and if the Court does not accept Golden's plain language interpretation, it should remand with the instruction that the Water Court should consider Golden's return flow evidence, and other evidence developed through discovery that might bear on the meaning of the Change Decree.

[9]Even the State Engineer admitted to Golden that he did not know what the FHL Provision meant. (Rec. v. 2, p. 60, ln. 15-18.)

CONCLUSION

For the foregoing reasons, and those additionally and more fully set forth in its Opening Brief, Golden requests that the Court reverse the September 9, 2002, dismissal of Golden's Complaint, and remand this matter for further proceeding in the Water Court.

Respectfully submitted this 30th day of July, 2003.

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CERTIFICATE OF MAILING

I certify that on this 30th day of July, 2003, a true and correct copy of the foregoing City of Golden's Reply Brief was served by U.S. Mail, postage pre-paid, to the following:

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