6-16-2003

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	
CITY OF GOLDEN, Appellant, v. HAL D. SIMPSON, IN HIS OFFICIAL CAPACITY AS COLORADO STATE ENGINEER, AND JIM HALL, IN HIS OFFICIAL CAPACITY AS ACTING DIVISION ENGINEER FOR WATER DIVISION NO. 1, Appellees.	▲ **COURT USE ONLY** ▲ Case No.: 02SA364
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ANSWER BRIEF	

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STATEMENT OF THE CASE

The Appellant is appealing an Order of the Division 1 Water Court, denying Appellant's request for a Temporary Restraining Order ("TRO") and granting the State and Division Engineers' request for an Injunctive Order. On September 6, 2002, the State and Division Engineers issued a Cease and Desist Order requiring the Appellant to cease its illegal diversions, pursuant to § 37-92-502, C.R.S. (2002). (Exhibit B, Vol. 1 p. 22; Vol. 2 p. 66, ll. 10-11). The Appellant did not discontinue its diversions, as required by the State and Division Engineers' Cease and Desist Order, but rather filed its request for a TRO. The water court held a hearing on the Appellant's TRO request on September 9, 2002, the Monday following the issuance of the State's Cease and Desist Order. Farmers Highline Canal and Reservoir Co. ("FHL"), the City of Westminster, the City of Thornton, Coors

Brewing Company and Wannamaker Ditch Company, and the City of Arvada also appeared before the water court in support of the State and Division Engineers' position.

The fundamental issue for the water court at the TRO hearing was whether the provisions of a 1966 consent decree ("the 1966 decree") required the Appellant to cease diverting. At the hearing, the Appellant argued that the 1966 decree was ambiguous and required extrinsic evidence for its interpretation; that the State and Division Engineers had never enforced the 1966 decree and so should not be allowed to request enforcement at the time of the hearing; and that Appellant's Complaint for Injunctive Relief should not have been dismissed.

The water court issued its Order from the bench, holding that Appellant had not established its right to continue diverting under the 1966 decree. Although the water court acknowledged that it need not address irreparable injury because the 1966 decree was enforceable on its face, it found that Appellant would not suffer immediate or irreparable harm. (Vol. 2, p. 269, ll. 16-22). The water court held that because the applicable provisions in the 1966 decree were unambiguous, no extrinsic evidence was required to interpret the terms of the decree. The water court determined that the terms of the 1966 decree required Appellant to cease diverting when flows were in excess of 3.5 c.f.s. and denied the Appellant's request for a TRO; dismissed Appellant's Complaint for a Permanent Injunction; and granted the State and Division Engineer's request for an injunction requiring the Appellant to cease its diversions. (Vol. 3, p. 47). The Appellant filed a Motion for

Reconsideration, which the Court denied. Appellant then attempted to file an Offer of Proof purporting to set forth evidence concerning whether flows at the Oulette headgate exceeded 3.5 c.f.s. and the types of water rights that should be considered in determining the flow amount - issues that it had failed to contest or present in any form at the TRO hearing. The water court declined to accept the untimely Offer of Proof and refused Appellant's reconsideration motion.

STATEMENT OF FACTS

Appellant's Priority No. 5 water right was originally decreed to the Oulette Ditch headgate, located downstream of the Appellant's municipal water intake at the Church Ditch. In 1966, the Appellant obtained a decree in Case No. 88646, allowing it to change its point of diversion for a portion of Priority No. 5 from the Oulette Ditch headgate to its municipal water intake at the Church Ditch. (Vol. 2, pp. 31, ll. 1-25). The 1966 decree also changed the use of the water from irrigation to municipal and required the Appellant to abandon 3.27 c.f.s. to the stream. (Exhibit A, 1966 decree).

FHL diverts approximately 44.4 c.f.s. of water from Clear Creek between the Church Ditch and the Oulette Ditch, through Priority No. 9. In 2002, the drought substantially reduced Clear Creek's flow, and FHL placed a call for water under its Priority No. 9 on July 15, 2002. (Vol. 2, p. 174, ll. 7-10). Under the 1966 decree, when flows at the Oulette headgate exceed 3.5 c.f.s., the Appellant must cease diverting at the Church Ditch in order to prevent injury resulting from the change of use.

When the Appellant refused to honor the FHL Priority No. 9 call and did not cease its diversions at the Church Ditch, Westminster, FHL, Arvada, Thornton, Coors, and others who hold shares in FHL (including numerous farmers) demanded that the State and Division Engineers enforce that call. (State's Exhibit 2, Vol. 2, pp. 133-134, ll.16-10; Vol. 2, p.175, ll.2-11).

On September 6, 2002, the State and Division Engineers issued the following Cease and Desist Order to force the Appellant to comply with the 1966 decree:

> The Farmers Highline Canal and Reservoir Company for the benefit of its stockholders, comprised of farmers, the municipalities of Arvada, Thornton, and Westminster, and the Coors Brewing Company has complained and made written notification that their Priority No. 9 right "has been calling for water and unsatisfied nearly continuously since July 15 of this year." During this period and as of today there have been at least 3.5 C.F.S. available for diversion at the original headgate of the Oulette Ditch. During the same period and continuing today, the City of Golden has been diverting through the Church Ditch a volume of water that included approximately 3.42 C.F.S. of Priority 5.
>
> Based on the Conclusions of Law presented in Civil Action 88646 referenced above, said diversion of the Priority 5 water by the City of Golden constitutes an **OUT OF PRIORITY USE OF SURFACE WATER.**
>
> Your water right allows you to put to beneficial use that amount of water decreed in the place, time and amount and for the use decreed, and in compliance with the terms and conditions of the decree. Pursuant to the authority vested in this office by section 37-92-502, CRS 2001, you and your agents, employees, lessees, assigns, and/or successors are hereby **ORDERED TO CEASE AND DESIST YOUR DIVERSIONS OF THE PRIORITY NO. 5 WATER BY 12:01 AM, SEPTEMBER 8, 2002 AND**

AT ALL TIME WHEN THE PRIORITY NO. 9 CALL IS PLACED ON THE RIVER AND THERE IS AT LEAST 3.5 CFS OF WATER AVAILABLE AT THE HEADGATE OF THE OULETTE DITCH.

(Vol. 3, Exhibit B; Vol. 2, pp. 131-132, ll. 22 –21).

The Appellant refused to adhere to the terms of the Cease and Desist Order and filed its Motion for a Temporary Restraining Order, among other injunctive pleadings.

SUMMARY OF THE ARGUMENT

The water court did not need extrinsic evidence to determine the meaning of paragraph 7(e) of Appellant's 1966 decree. The water court properly found that paragraph 7(e) is unambiguous and clear, supporting the water court's denial of Appellant's TRO and the issuance of an injunction against Appellant to cease its Priority No. 5 diversions. Appellant's arguments regarding the lack of "junior and subordinate" language, the "cusp" theory, and the "windfall" interpretation are simply inapposite, since the 1966 decree was held to be clear and unambiguous. Evidence presented at the hearing demonstrated the Appellant would suffer no immediate and irreparable injury, further supporting the water court's denial of the TRO. In issuing an injunction against Appellant to cease its Priority No. 5 diversions, the water court properly considered evidence of flow conditions, which evidence Appellant did not contradict at the hearing. The water court properly gave the State and Division Engineer's past administration of the Priority No. 5 right no weight, as a call by FHL of its Priority No. 9 right had never previously been brought to the attention of the State

and Division Engineer. The water court was factually and legally correct in dismissing Appellant's Complaint for further injunctive relief.

ARGUMENT

I. THE WATER COURT PROPERLY HELD THAT THE 1966 DECREE IS UNAMBIGUOUS.

The Appellant argues that the water court erred in determining that the 1966 decree is unambiguous. The water court properly held that the provision at issue unambiguously required the Appellant to cease diverting water when flows at the Oulette headgate were in excess of 3.5 c.f.s.

The provision in the 1966 decree most prominently at issue is paragraph 7(e), which states:

> As to the Farmers Highline Canal, the above mentioned Priority No. 5 shall be exercised by the City of Golden only at times such that its uses will not result in a call at the headgate of the Farmers Highline Canal on the No. 5 and 9 direct rights divertible at said headgate. Diversions by the Farmers Highline Canal, under its Priority No. 5 right, shall not be diminished by pro-rating with the Priority No. 5 right of the City of Golden. These limitations are effective when the flow at the present Oulette headgate exceeds 3.5 c.f.s. When the flow at the present location of the Oulette headgate is less than the 3.5 c.f.s., the Priority No. 5 right of the City of Golden may be exercised against the Priority No. 9 right of the Farmers Highline Canal by the difference between the actual flow at the present location of the Oulette Ditch headgate and 3.5 c.f.s., or said difference shall be pro-rated between the Priority No. 5 right of the City of Golden and the Priority No. 9 right of the Farmers Highline Canal. Subject to the rights of Petitioner to contest diversions by the Farmers Highline Canal on its No. 9 Priority out of

> storage season, and without any admission by the Petitioner of any right to so divert.

(Appellant's Exhibit A, p. 4, emphasis added)

The 1966 decree was negotiated among all parties to Case No. 88646 and a stipulation was reached; hence, the 1966 decree must be interpreted in accordance with the principles of contract law. *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173, (Colo. 1997). When interpreting a contract, intent of the parties is to be determined primarily from the language utilized. *Id.* at 173, citing *KN Energy, Inc. v. Great West Sugar Co.*, 698 P.2d 769, 776 (Colo. 1985); *Radiology Prof'l Corp. v. Trinidad Area Health Ass'n*, 195 Colo. 253, 256, 577 P.2d 748, 750 (1978). The plain and generally accepted meanings of the words are to be used in ascertaining whether an agreement is ambiguous. *Id.* at 173, *citing May v. United States*, 756 P.2d 362, 369 (Colo. 1988*); Radiology Professional Corp. v. Trinidad Area Health Ass'n*, 195 Colo. 253, 256, 577 P.2d 748, 750 (1978); and *Heller v. Fire Ins. Exch.*, 800 P.2d 1006, 1009 (Colo. 1990). If no ambiguity exists in the terms of the contract, then the reviewing court shall not consider extraneous evidence. *Id.* at 273, citing *Radiology Prof'l Corp. v. Trinidad Area Health Ass'n*, 195 Colo. 253, 256, 577, P.2d 748, 750 (1978). Thus, the water court, citing *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997), properly held that "[e]xtrinsic evidence cannot be used to modify the plain language on an unambiguous decree, hence the water court did not consider the evidence that was presented at the hearing." (Vol. 3, p. 101).

Because the 1966 decree is unambiguous, Appellant is precluded from arguing legal contentions contrary to the unambiguous language. *Id.* at 173, *citing United States v. Northern Colo. Water Conservancy Dist.,* 608 F.2d 422, 430 (10th Cir. 1979). The Court may not rewrite the terms of an unambiguous contract. See *Kaiser v. Market Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo.App. 1999).

Appellant and numerous opposers other than the State and Division Engineers presented substantial extrinsic evidence regarding the interpretation of this paragraph 7(e) of the 1966 decree during trial. The State's expert, Division 1 Engineer Richard Stenzel, testified that paragraph 7(e) allowed Appellant to exercise the Priority No. 5 right only when FHL was not calling and the flows at the Oulette headgate were 3.5 c.f.s. or less. (Vol. 2, p. 130, ll. 1-25, *see also* the terms of the Cease and Desist Order cited previously). Not only had the State's expert never heard of a "cusp" interpretation of a decree, but he also believed that such a unique provision would be written explicitly into a stipulation, had that been the parties' intent. (Vol. 2, p.146, ll. 3-17).

The water court properly held that paragraph 7(e) of the 1966 decree is unambiguous in requiring that Appellant could not exercise its Priority No. 5, when the flow at the Oulette headgate exceeded 3.5 c.f.s. Because paragraph 7(e) of the 1966 decree is unambiguous, the water court properly did not consider extrinsic evidence to interpret the 1966 decree. The Appellant's argument that the 1966 decree was ambiguous must be rejected.

II. BECAUSE THE 1966 DECREE IS UNAMBIGUOUS, THIS COURT SHOULD NOT CONSIDER THE APPELLANT'S ARGUMENTS THAT REQUIRE A REVIEW OF EXTRINSIC EVIDENCE

The water court properly rejected the extrinsic evidence presented by Appellant, basing its rejection on its holding that paragraph 7(e) of the 1966 decree is unambiguous. This Court should uphold the water court's action and refuse to consider Appellant's "cusp," "windfall," and "junior and subordinate" theories. The 1966 decree contains no terms supporting Appellant's arguments. Giving any credibility to Appellant's fanciful and self-serving interpretations would be contrary to the law of contract interpretation and would distort the operation of the prior appropriation system. The water court correctly held that the 1966 decree is straightforward and unambiguous and properly rejected the Appellant's creative interpretations. (Vol. 2, pp. 266-267, ll.18-3).

A. Appellant's "junior and subordinate" argument fails because it improperly rests on extrinsic evidence to interpret an unambiguous document, and because no factual or legal support exists for the argument.

Appellant argues that this Court must consider the fact that the terms "junior and subordinate" were utilized in some provisions of the 1966 decree. It contends that since these terms were not included in paragraph 7(e), its changed Priority No. 5 right is not junior or subordinate to FHL's Priority No. 9 right.

Appellant's expert, Mr. Gary Thompson, testified extensively as to his interpretation of the 1966 decree. (Vol. 2, pp. 33-42, ll.12-5). His arguments centered on the use of the

terms "junior and subordinate," which were utilized in some paragraphs of the 1966 decree, but not in paragraph 7(e). He argued that the 3.5 c.f.s. mentioned in paragraph 7(e) could not be junior or subordinate to FHL's Priority No. 9, since those terms were not mentioned in that specific paragraph. (Vol. 2, p. 37, ll.12-20). This alleged deliberate inconsistency provided the basis for Appellant's expert, Mr. Gary Thompson, to argue the "cusp" interpretation of the 1966 decree, discussed below. The State's expert Mr. Stenzel testified that the 3.5 c.f.s. limitation provided the test for when Appellant's Priority No. 5 became subordinate to other more senior rights. (Vol. 2, p. 150, ll. 10-14). Coors' expert witness, Mr. Neal Jaquet, further testified that Appellant's Priority No. 5 was subordinate to FHL Priority No. 9 when the flow past the Oulette headgate exceeded 3.5 c.f.s. (Vol. 2, pp. 224, ll. 1-8).

As previously stated, a court may not rewrite the terms of an unambiguous contract. *Kaiser, supra,* at 640. The absence of the terms "junior and subordinate" from paragraph 7(e) does not mean the provisions of paragraph 7(e) have no force and effect. The provision clearly and unambiguously states, "As to the Farmers Highline Canal, the above mentioned Priority No. 5 shall be exercised by the City of Golden only at times such that its uses will not result in a call at the headgate of the Farmers Highline Canal on the No. 5 and 9 direct rights divertible at said headgate." (Appellant's Exhibit A, p. 4). In fact, had the terms "junior and subordinate" been included in paragraph 7(e), there would be no reason to

include the later provision that allows Appellant to pro rate its diversions based on the amount of water flowing past the Oulette headgate.

Appellant's "junior and subordinate" argument fails when compared to the clear and unambiguous language of the 1966 decree.

B. The "cusp" argument fails because it improperly rests on extrinsic evidence to interpret an unambiguous document and because there is no legal or factual support for such argument.

The Appellant argues that this Court must consider evidence of whether its "cusp" interpretation applies to the 1966 decree. The "cusp" interpretation essentially argues that once Appellant's Priority No. 5 is no longer the right "resulting in a call," Appellant may resume diverting Priority No. 5 from Clear Creek. Again, this argument fails because the 1966 Decree is unambiguous, and thus, no extrinsic evidence should be allowed. The argument also fails because the evidence does not support it.

Applying the "cusp" theory to implement paragraph 7(e) would result in injury to downstream senior calls including a call by FHL. Sections 37-92-305(3) and (4), C.R.S. (2002) provide that a decree must include terms and conditions to prevent injury to other water rights potentially affected by the change. *See also Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder,* 157 Colo. 197, 402 P.2d 71 (1965); *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988). In this instance, Appellant was required by the 1966 decree to cease, or reduce on a pro rata basis, its diversions when more than 3.5

c.f.s. was passing the original Oulette headgate. This provision reduces the potential for injury to the FHL Priority No. 9 water right, since when the FHL call is placed, numerous upstream junior rights have to cease diversions on Clear Creek. If the junior rights along Clear Creek cease diversions due to the FHL call, the flow in Clear Creek increases. When such increase in flows reach 3.5 c.f.s., per paragraph 7(e), Appellant is required to reduce or cease its diversions. A provision that Appellant could again begin diversions, once it is no longer the right that triggers the FHL call ("result in a call"), is clearly contrary to the requirement that injury be prevented to the more senior FHL right.

Appellant's expert propounded that once its Priority No. 5 right is no longer the right "resulting in a call" of Priority No. 9, Appellant is allowed to resume its diversions of Priority No. 5 . (Vol. 2, p. 41, ll. 6-25). The State's expert, Mr. Stenzel testified that he had never heard of a "cusp" interpretation of a decree, but he also believed that if the parties intended such a unique provision, it would be explicitly included in a decree. (Vol. 2, p.146, ll. 3-17). Mr. Kelly DiNatale, the expert for Westminster, testified that he also did not agree with Appellant's "cusp" interpretation of the 1966 decree and further explained that such an interpretation would not result in a "windfall" to FHL. (Vol. 2, p. 169, ll. 17-25, Vol. 2, p. 172, ll. 15-21, Vol. 2, p. 218, ll. 6-16). It seems obvious that had the parties to the negotiated 1966 decree intended to allow Appellant to resume its diversions of Priority No. 5, as asserted by Appellant's "cusp" theory, surely such an important and unusual provision would

have been carefully spelled out in the decree by the five attorneys who negotiated and signed it. (Vol. 1, p. 21).

Appellant's "cusp" argument fails when compared to the clear and unambiguous language of the 1966 decree and because the evidence does not support it.

C. The Appellant's "windfall" argument fails because it improperly rests on extrinsic evidence to interpret an unambiguous document and because there is no legal or factual support for the argument.

The Appellant argues that in order to interpret the 1966 decree, this Court must consider evidence of whether FHL would receive a "windfall." Appellant's 1966 decree provided for the abandonment to the stream of 3.27 c.f.s. of the Priority No. 5 right. Prior to the negotiation of the 1966 decree, Priority No. 5 could be diverted by Appellant at the Oulette Ditch headgate at a rate of up to 6.69 c.f.s. (Ex. A, p. 3, paragraph 7. b., Vol. 2, p. 46, ll. 13-20). Appellant argues the 1966 abandonment of 3.27 c.f.s. to the stream creates a "windfall" to FHL and to other rights on the stream. (Appellant's Opening Brief, p. 20). However, the 1966 decree makes it very clear that the abandonment of 3.27 c.f.s. was meant to prevent injury to other water rights as the diversion point had been moved upstream and intervening water rights required protection from injury. (Ex. A, p.3, paragraph 7(b); Vol. 2, p. 149, ll. 18-25). Appellant's "windfall" argument fails, first, because the 1966 Decree is unambiguous and no extrinsic evidence should be allowed, and second, because the

Appellant voluntarily abandoned 3.27 c.f.s as a condition of obtaining the 1966 decree. (Exhibit A, p. 3 paragraph 7(b)).

Appellant further asserts that the abandonment was somehow a "benefit" to FHL and claims that FHL receives an additional "windfall" if return flows did not historically satisfy the Oulette Ditch. This argument presumes that the conditions in the 1966 decree were meant to provide a benefit to other water rights on the stream; however, the conditions simply prevent injury as required by law. *See* Section 37-92-305(3) and (4), C.R.S. (2002). The 1966 decree clearly states that the abandonment of 3.27 c.f.s. was prevent injury to other water rights, as the diversion point had been moved upstream, necessitating protection of intervening water rights from injury. (Ex. A, p.3, paragraph 7(b); Vol. 2, p. 149, ll. 18-25). Paragraph 7(e) of the 1966 decree specifically states, "The granting of the change of point of diversion requested by Petitioner will not injuriously affect the vested rights of any of the Protestants, or others, **provided that the Petitioner, its successors and assigns, and Petitioners grantors comply with the following conditions and limitations. . . .** " (Exhibit A, p. 7, paragraph 7, emphasis added).

Further, when a water right is abandoned, it is abandoned to the stream, resulting in all water rights, not just the FHL water right, advancing in the priority system. *See City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971). The water court stated specifically that Appellant had bargained away many rights and had to live with the consequences of such a decision. (Vol. 2 p. 266-267, ll. 1-7; Vol. 2, p.270. ll. 14-20).

Appellant has argued that as a result of the water court's dismissal of its Complaint, it did not have the opportunity to present evidence regarding whether return flows historically satisfied flows at the Oulette headgate. The issue is simply irrelevant to the case at hand, contradicts the logic of the unambiguous terms of the 1966 decree, and constitutes improperly offered extrinsic evidence. Based upon the water court's ruling that the terms of the 1966 decree are unambiguous, this Court should not consider such extrinsic evidence of an alleged "windfall" or return flows at the Oulette Ditch. *USI, supra*, at 273. Appellant voluntarily abandoned 3.27 c.f.s when it entered into the 1966 decree. (See Exhibit A, p. 3, paragraph 7(b)). There is no mention of the need for future calculations of return flows in the 1966 decree and Appellant's argument is further negated by the fact that the decree provides, "Whenever the word 'flow' is used in connection with said headgate points, it shall mean the total flow of Clear Creek." (Exhibit A, p.15, paragraph 12).

Appellant's "windfall" argument fails when compared to the clear and unambiguous language of the 1966 decree and because the evidence does not support it.

D. The Appellant's argument that the State and Division Engineers' historical administration of this water right must be continued fails because it improperly rests on extrinsic evidence to interpret an unambiguous document and because there is no legal or factual support for such argument.

The Appellant seems to argue that because the State and Division Engineers have not administered this water right in the past, they are precluded from doing so now. This argument has no merit.

Prior to 2002, the State and Division Engineer had never been required to curtail Priority No. 5 diversions, because no water users had complained of out of priority diversions and proper measuring devices had never been installed. The 1966 decree required the installation of a measuring device at the Oulette headgate. (Exhibit A, p. 14, paragraph 10). Adequate flow measurements have only been available since 2000. (Vol. 2, p. 175, ll. 5-11). Appellant's reporting of flows to the Division Engineer since 2000 for the first time enabled the Division Engineer to accurately administer the Priority No. 5 right. (Vol. 2, pp. 137-139, ll. ll7- 40).

While calls by FHL may have occurred occasionally during drought years, historically, FHL generally received its full entitlement to Priority No. 9. (State's Expert, Vol. 2, pp. 143-145, ll. 20-8). The drought conditions of 2002 brought Appellant's out-of-priority and illegal diversions to the attention of the State and Division Engineers. (Vol. 2., p. 145-146, ll. 15-2). In years past, water users on Clear Creek had never complained that

Appellant was diverting its Priority No. 5 right out of priority and thus, administrative action had not previously been required to enforce the terms of the 1966 decree. (Vol. 2, pp.145-146, ll.15-2). On July 15, 2002, FHL exercised a call of Priority No. 9, the first time a call had been placed to the Division Engineer's knowledge. (Vol. 2, p. 137, ll. 16-19). Subsequent to July 15, the State and Division Engineer began receiving telephone calls complaining that Appellant had not stopped its Priority No. 5 diversions. (Vol. 2, pp. 133-34, ll. 16-10). Consequently, the State and Division Engineer issued the Cease and Desist Order.

Prior administrative inaction of the State and Division Engineers certainly does not preclude the Engineers from issuing an administrative order or commencing an appropriate enforcement proceeding before the water court. *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P. 2d 46, 58 (Colo. 1999), *citing Park County Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262, 264-65, 268 (Colo. 1999). The water court was quite properly not persuaded by Appellant's arguments regarding the State and Division Engineer's lack of administration in the past. (Vol. 2, pp. 270-270, ll. 21-4). This Court should also reject this argument.

E. The Appellant's argument that it would suffer immediate and irreparable harm is without merit.

The Appellant argues that it would suffer immediate and irreparable harm if the State's Cease and Desist Order were ruled valid. (Opening Brief at pages 3-4). However,

this argument is without merit. The water court stated on two separate occasions in its ruling that it need not go further than ruling as to whether the decree was unambiguous. (Vol. 2, p. 269, ll. 20-22, Vol. 2, p. 270, ll. 12-13). Nevertheless, the water court proceeded to address irreparable injury and immediate harm pursuant to C.R.C.P. 65.

The opposers (other than the State and Division Engineers) presented substantial testimony that they had been and currently were suffering injury as a result of Appellant's illegal diversions. In fact, FHL indicated it had been shorted over 299 acre-feet since Appellant had failed to respect the FHL call of July 15, 2002. (Vol. 2, p.174, ll. 8-19). Coors testified that the cooling water required at the Coors plant was substantially reduced as a result of Appellant's diversion under Priority No. 5. (Vol. 2, pp. 225-227, ll. 12-10). The Cease and Desist Order was issued as a result of the complaints received from numerous water rights users affected by Appellant's illegal diversion of Priority No. 5.

Further, Appellant's alleged harm was not immediate, in direct contrast to the injury being suffered on a daily basis by numerous parties as a result of Appellant's failure to cease its Priority No. 5 diversions. Appellant's own expert testified that Appellant would have enough water until October, 10, 2002; that a 1980 right under an agreement with Westminster would allow for diversions beginning October 31, 2002; that it would be filing for a substitute supply plan immediately; and that it would be exercising options for other water rights. (Vol. 2, p. 73, ll. 6-24; Vol. 2, p. 58-59, ll. 21-6; Vol. 2, p 63-64, ll.14–13; Vol. 2, pp.71-72, ll. 23-3). In denying Appellant's motion for a TRO, the water court considered

the fact that Appellant had resources available to it until October 2002. (Vol. 2, p. 269, ll. 24-25).

The Appellant's alleged harm was neither irreparable nor immediate and, given the unambiguous nature of the 1966 decree, such legal arguments had no bearing on the ruling of the water court.

III. THE ONLY EVIDENCE PRESENTED AT THE TRO AND INJUNCTION HEARING SHOWS THAT THE FLOWS AT THE OULETTE HEADGATE WERE IN EXCESS OF 3.5 C.F.S.

The Appellant argues that the water court erred in rejecting its offer of proof that flows were not in excess of 3.5 c.f.s. and that as a result, it did not have an opportunity to present such evidence. (Opening Brief, p. 15). However, the Appellant's expert stated specifically at the hearing, ". . . there is always now more than 3.5 c.f.s. at the Oulette Ditch headgate . . ." (Vol. 2, p. 34, ll. 20-21).

In the late summer of 2002, the flows in Clear Creek were around 14 c.f.s. (Vol. 2, p.144, ll. 15-16). FHL's expert testified that those current reduced flows, which would normally be around 44 c.f.s., could not cover all of its stockholders. (Vol. 2, p. 167, ll. 13-21, p. 168 –169). Coors' expert indicated the flow at the Oulette Headgate to be between 5 to 10 c.f.s. and that the flow was dropping dramatically. (Vol. 2, p. 224, ll. 9-13, Vol. 2, p. 224-25, ll. 21-5). Coors was suffering injury due to the low flows. (Vol. 2, P. 226, ll. 7-20). In fact, the water court held that no evidence was presented at trial showing that less than 3.5 c.f.s was flowing past the Oulette headgate . (Vol. 2, pp. 267, ll. 8-10).

Factual disputes decided by the trial court are accorded great deference and, therefore, the standard of review is clear error. *Quintana v. City of Westminster*, 56 P.3d 1193, 1196 (Colo. App. 2002), *citing Walton v. State*, 968 P.2d 636 (Colo. 1998). Unless the findings of fact are unsupported by the record, a trial court's findings are given considerable deference upon review. *Reid v. Pyle,* 51 P.2d 1064, 1067 (Colo. App. 2002).

This Court should uphold the water court's finding of fact that more than 3.5 c.f.s. was flowing past the Oulette headgate at the times relevant to this dispute.

IV. THE WATER COURT PROPERLY HELD THAT NO FURTHER PROCEEDINGS WERE REQUIRED.

The Appellant argues that it was entitled to further proceedings on its Complaint for Injunctive Relief. The water court properly dismissed Appellant's Complaint for Injunctive Relief, because, in granting the State and Division Engineer's Motion for an Injunction, the water court ruled on the merits of both cases.

The water court issued an Order Dismissing Complaint on September 9, 2002. (Vol.1, p.77). The Order specifically states, "The court held a hearing on Appellant's Motion for Temporary Retraining 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." Thus, the water court granted the State and Division Engineer's request for injunctive relief pursuant to § 37-92-503(1)(a), C.R.S. (2002), which request was verbally made prior to the presentation at the hearing. (Vol. 2, p. 6, ll. 13-19.)

The water court specifically stated before all parties, "And I will hear that and take that up along with the other evidence today." (Vol. 2, p. 6, ll. 20-21). The water court thus consolidated for hearing the State and Division Engineer's request for a statutorily based injunction with Appellant's TRO request and Complaint for Injunctive Relief.

In *Leek v. City of Golden*, 870 P.2d 580 (Colo. App. 1993), the court simultaneously held a temporary restraining order and permanent injunction hearing regarding a suit filed by taxpayers against the City of Golden. *Id.* at 582. The trial court accepted offers of proof and evidentiary stipulations and determined it had sufficient evidence to make a ruling on the merits of the case. *Id.* at 582. The taxpayer's motions were then consolidated with a trial on the merits. *Id.* at 582. On appeal, the taxpayers objected to the consolidation and the court's ultimate judgment on the merits of the case. The Court of Appeals held, "C.R.C.P. 65(a)(2) gives the trial court discretion to consolidate a preliminary injunction hearing with a trial on the merits before or after the commencement of the hearing, if the court believes that it has sufficient evidence before it to decide the case on the merits." *Id.* at 585.

In the instant case, Appellant was on notice from the beginning of the TRO hearing that the State and Division Engineer's request for an injunction was before the water court and would be considered in conjunction with the TRO hearing. When the water court questioned Appellant's attorney Mr. Porzak near the end of the hearing as to whether any further evidence needed to be presented at a preliminary injunction hearing, Mr. Porzak

stated in response to the water court's inquiry, "I'm not sure there would be any, Your Honor." (Vol. 2, pp. 272, ll. 1- 6).

The water court stated twice in its verbal order from the bench that it need not address irreparable injury, but proceeded to do so – perhaps to prevent an argument by Appellant that the issue had not been considered. (Vol. 2, p. 269, ll. 20-22, Vol. 2, p. 270, ll. 12-13). A review of the trial transcript indicates the water court had sufficient evidence before it to determine the case on the merits. The water court then determined the 1966 decree to be unambiguous, denied the Appellant's request for a TRO, and granted the State and Division Engineer's request for an injunction pursuant to § 37-92-503(1)(a), C.R.S. (2002).

In the subsequent filing of its Offer of Proof on December 18, 2002, the Appellant attempted to raise issues regarding which types of flows passing the Oulette headgate – *i.e.* native flows versus return flows -- were to be counted towards the 3.5 c.f.s. trigger. (Vol. 1, pp. 109-113). The issues are irrelevant given the clear and unambiguous statement in the 1966 decree, "Whenever the word 'flow' is used in connection with such headgate points, it shall mean the total flow of Clear Creek." (Exhibit A, p. 15, paragraph 12). In light of the water court's ruling on the merits of the case, the water court's refusal to accept Appellant's filing of its December 18, 2002 offer of proof is moot. (Vol. 1, pp. 107-137).

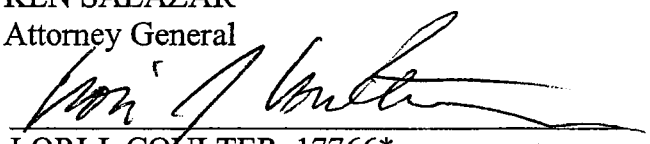
The water court correctly determined the merits of the consolidated requests for injunctive relief. The judgment of a trial court will not be reversed unless the errors complained of are shown to prejudice the substantial rights of the complaining party. *Leek,*

supra, at 585, *citing Poudre Valley Rural Electric Ass'n v. City of Loveland*, 807 P.2d 547, 557 (Colo. 1991).

CONCLUSION

The water court's ruling in this matter was legally and factually correct and should be affirmed by this Court.

KEN SALAZAR
Attorney General



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 16th day of June 2003 addressed as follows:

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