4-29-2003

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 OPENING BRIEF	

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF FACTS 3

A. The Oulette Ditch Priority No. 5 Water Right and the Change Decree. 3

B. The State Order. 4

C. The 3.5 cfs Threshold Flow Condition in the FHL Provision. 6

D. Golden's Offer of Proof. 7

E. The Role of FHL and Other Water Users. 9

IV. SUMMARY OF ARGUMENT. 10

V. ARGUMENT 11

A. Standard of Appellate Review. 11

B. The Water Court Should Not Have Dismissed Based on the Evidence Presented at the TRO Hearing. 12

C. Offer of Proof on the 3.5 cfs Threshold Flow Condition: Golden's Evidence must Be Considered. 14

D. The Water Court Interpretation of the FHL Provision is Contrary to the Plain Language. 15

E. Other Provisions of the Change Decree Are Not Consistent with the Water Court's Interpretation. 16

F. In the Alternative, the Language in the FHL Provision Is Ambiguous, and the Matter Should Be Remanded for the Water Court to Hear Additional Evidence Concerning the Meaning of the FHL Provision. 18

G. Reading the FHL Provision as a Complete Subordination Would Mean a Windfall to the FHL. 20

V. CONCLUSION 21

TABLE OF AUTHORITIES

CASES

City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 40 (Colo. 1996) 11

Davis v. M.L.G. Corp., 712 P.2d 985, 989 (Colo. 1986) 19

Governor's Ranch Professional Center, ltd. v. Mercy of Colorado, Inc., 793 P.2d 648, 650-651 (Colo. App. 1990) 12, 13

Kuta v. Joint District No. 50 (J) (Colo. 1990) 17

Litinsky v. Ouerard, 683 P.2d 816 (Colo. App. 1984) 13

Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984) 12

Spickerman v. Sproul, 138 Colo. 13, 328 P.2d 87 (1958) 13

Town of Estes Park v. Northern Colo. Water Conservancy Dist., 677 P.2d 320, 327-28 (Colo. 1984) 16

USI Properties East, Inc. v. Simpson, 938 P.2d 168, 174 (Colo. 1997) 16-18, 21

1. STATEMENT OF THE ISSUES

1. Whether the Water Court erred in dismissing the City of Golden's Complaint based solely on evidence presented at an emergency temporary restraining order hearing held the same day the Complaint was filed.

2. Whether the Water Court erred in concluding that 3.5 cfs was present in Clear Creek between July 15 and September 6, 2002, based solely on the limited evidence presented at the emergency temporary restraining order hearing held the same day the Complaint was filed.

3. Whether the Water Court erred in denying Golden the opportunity to present evidence that 3.5 cfs was not present in Clear Creek at the Oulette Ditch headgate under the terms of the change decree in Civil Action 88646, District Court for the City and County of Denver.

4. Whether the Water Court erred in sua sponte dismissing Golden's Complaint when there was no pending motion to dismiss and without first giving Golden notice and an opportunity to be heard.

5. Whether the Water Court erred in interpreting the language in paragraph 7(e) of the 1966 change decree entered in Civil Action No. 88646, District Court for the City and County of Denver, as a complete subordination of Golden's Oulette Ditch Priority No. 5 water right to the Priority No. 9 water right owned by the Farmer's High Line Canal and Reservoir Company.

II. STATEMENT OF THE CASE

This appeal involves a challenge to a September 6, 2002, cease and desist order issued by the Division Engineer for Water Division No. 1 (the "State Order") directing the City of Golden ("Golden") to cease further diversion of water from Clear Creek under its Oulette Ditch Priority No. 5 ("Priority No. 5") water right beginning at 12:01 a.m. Sunday morning, September 8, 2002. The basis of the State Order was the Division Engineer's interpretation of terms and conditions in the 1966 change decree entered in Civil Action 88646, District Court in and for the County of Denver (the "Change Decree"), by which Golden was allowed to move the point of diversion of the Priority No. 5 water right for its municipal use.

On the morning of Monday, September 9, 2002, Golden filed its Verified Complaint for Injunctive Relief ("Complaint"), which challenged the State Order on the ground that it was inconsistent with the Change Decree, and requested permanent injunctive relief to prevent future interference with Golden's right to divert the Priority No. 5 water right. Golden also filed a Motion for a Temporary Restraining Order ("TRO") and a Motion for Preliminary Injunction ("PI") that same day, requesting temporary and permanent relief from the State Order until the merits of its Complaint could be resolved.

An emergency hearing on the TRO was held September 9, 2002, the same day the Complaint, the PI and the TRO were all filed. At the end of the TRO hearing, the Water Court denied the requested TRO from the bench, and directed Golden to comply with the State Order. The Court also specifically explained that Golden could schedule a hearing on its PI motion for a later date. Later that same day, however, the Court issued an "Order Dismissing Complaint" that sua sponte dismissed the entire action. There was no motion to dismiss pending, and the Court

gave Golden no notice that it might dismiss the Complaint, nor any opportunity to be heard on that issue.

Golden filed a Motion for Reconsideration asking the Court to withdraw its September 9, 2002 Order Dismissing Complaint, and further requested a one-day trial to present evidence in support of its position. The Water Court denied Golden's Motion for Reconsideration in an Order dated November 5, 2002. That Order also denied Golden's request to present additional evidence at a one-day trial, but allowed Golden to file an offer of proof presenting any additional evidence it had to support its claims. Though objecting to the unique procedure established by the Water Court in this regard, Golden did prepare and file an Offer of Proof and Request for Trial dated December 18, 2002 ("Offer of Proof"). The Water Court has never considered the evidence in the Offer of Proof.

III. STATEMENT OF FACTS

A. The Oulette Ditch Priority No. 5 Water Right and the Change Decree.

The Priority No. 5 water right was originally decreed for diversion from Clear Creek at the headgate of the Oulette Ditch, for irrigation purposes, and with a priority date of May 31, 1860. (Rec. v. 3, Exh. A, p. 2, Rec. v. 2, p. 66, ln. 1-14.) That priority date makes Priority No. 5 a very senior right water right on Clear Creek. (Rec. v. 2, p. 30, ln. 1-4.) At the time of the 1966 Change Decree, Golden owned 6.69 cfs of this senior Priority No. 5 water right. (Rec. v. 3, Exh. A, p. 2, ¶ 2.) The Oulette Ditch where Priority No. 5 was originally diverted is located downstream of the Farmers High Line Canal ("FHL"). (Rec. v. 3, Exh. E; v. 2 p. 28, ln. 2-8; See also, Rec. v. 2, p. 29, ln. 18 - p. 30, ln. 19.) The Change Decree allowed Golden to move the point of diversion of the Priority No. 5 water right upstream of the FHL and certain other ditches

to a point where it could be used for Golden's municipal purposes. (Rec. v. 3, Exh. A, p. 8; Rec. v. 2, p. 29, ln. 18 - p. 30, ln. 19.)

The Change Decree required Golden to abandon 3.27 cfs of the 6.69 cfs that it owned in the Priority No. 5 water right. (Rec. v. 3, Exh. A, p. 3, ¶ 7.b.) Paragraph 7(e) of the Change Decree imposed an additional protective condition, directing in relevant part that Golden's "Priority No. 5 shall be exercised by the City of Golden only at times such that its use will not **result in a call** at the headgate of the Farmers Highline Canal on the No. 5 and 9 direct rights divertable at said headgate." (Rec. v. 3, Exh. A, p. 4, ¶ 7(e)) (emphasis added). Paragraph 7(e) is hereafter referred to as the "FHL Provision." The FHL Provision further directs that flows must exceed 3.5 cfs at the Oulette Ditch headgate in order for the foregoing limitation to take effect. (Id.)

B. The State Order.

The State Order was issued after 4:30 p.m. on Friday, September 6, 2002, and directed Golden to cease further diversion of water from Clear Creek under its Priority No. 5 water right beginning at 12:01 a.m. on Sunday, September 8, 2002. (Rec. v. 3, Exh. B, Rec. v. 2, p. 66, ln. 1-14.) At the time of the State Order, the Priority No. 5 water right was very important to Golden's municipal water supply (Rec. v. 2, p. 99, ln. 15 - p. 105, ln. 17). Witnesses testifying for Golden at the TRO hearing explained that without the Priority No. 5 water right, Golden would have to eliminate outdoor water use, and potentially implement rationing for in-house use. (Rec. v. 2, p. 58, ln. 2-17; p. 99, ln. 15 - p. 105, ln. 17.)

Neither Golden nor its counsel received any notice of the State Order until it was faxed to Golden after 4:30 p.m. on Friday, September 6th. (Rec. v. 1, p. 3, ¶ 8.) The State Attorney

General's Office called Golden's counsel with verbal notification of the Order at 4:45 p.m. that Friday afternoon, and said it would look into extending the time when the State Order took effect, but never called back. (Id.) The Division Engineer thus left Golden with not a single business day to address the State Order before it took effect at one minute after midnight on Sunday morning. It is impossible for a large municipality to prohibit all outdoor water use and ration indoor use in less than 32 hours, over a weekend. (Rec. v. 2, p. 58, ln. 5-17; v. 2, p. 105 ln. 18 - p. 106 ln. 10.)

The State Order was purportedly based on the FHL Provision of the 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.)

In the 36 years since the 1966 Change Decree was entered, including the drought years of 1977, 1978 and 1981 when the FHL Priority No. 9 was the calling right on Clear Creek, the FHL Provision was never interpreted or enforced as it was in the 2002 State Order. (Rec. v. 2, p. 49, ln. 5 - p. 54, ln. 20; Rec. v. 3, Exh. F and G – v. 2, p. 50, ln. 23 - p. 51, ln. 1.) Moreover, there was no evidence introduced at the TRO hearing to suggest that any of the parties to the Change Decree or any other water users on Clear Creek had ever before urged the Division Engineer to administer the Change Decree in the manner adopted in the 2002 State Order. The State Order thus represents a change in the administrative practice of the State and Division Engineer. (Rec. v. 2, p. 54, ln. 21-23.) The timing and manner of the issuance of the 2002 State Order clearly prejudiced Golden's ability to contest this administrative change.

C. The 3.5 cfs Threshold Flow Condition in the FHL Provision.

The evidence presented at the TRO hearing concerning the 3.5 cfs threshold flow condition consisted only of the assertion by Mr. Richard Stenzel, the Division Engineer for Water Division No. 1, that he believed there was approximately 7 cfs passing the historic headgate of the Oulette Ditch on September 9, 2002, the day of the TRO hearing (Rec. v. 2, p. 156, ln. 11-16), and the testimony of Neal Jaquet, Director of Water Resources for the Coors Brewing Company, that the "current condition" of Clear Creek at the historic headgate of the Oulette Ditch on September 9, 2002, was "5 to 10 cubic feet per second." (Rec. v. 2, p. 224, ln. 9-13.) There were no gauge records or measurements of any kind offered to support the testimony on this issue. The Water Court commented on this evidence at the close of the TRO hearing:

> 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.)

Later that evening, presumably on the basis of the preliminary evidence it heard earlier that day, the Water Court dismissed Golden's Complaint. Given the timing of the State Order, Golden had no opportunity to investigate whether the 3.5 cfs flow threshold was, in fact, met before the September 9 TRO hearing. In particular, as the State Order was transmitted at the close of business, Golden did not have the opportunity to examine any state flow records. Thus, it was unable to present evidence on that issue at the TRO hearing, or to effectively cross-examine those witnesses that testified the amount was greater than 3.5 cfs. Only after the

September 9 hearing was Golden able to adequately investigate the 3.5 cfs threshold flow condition. In its Motion for Reconsideration, Golden asked for a one-day trial to present its evidence on this issue (Rec. v. 1, pp. 54-56), but that was denied. The evidence that Golden developed after the TRO hearing on this point is set forth in its Offer of Proof and clearly demonstrates that the 3.5 cfs threshold was not met for purposes of the State Order. That evidence has not been considered by the Water Court.

D. Golden's Offer of Proof.

Golden's 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.) In the expert witness letter attached as an exhibit to the Offer of Proof, Mr. Thompson, Golden's expert water rights engineer, explained that it is standard practice for the State Engineer's Office to administer water deliveries past intervening water users, and to subtract such amounts from any calculation of the amount of water that is available for diversion by others. (Rec. v. 1, p. 129.) There was no evidence offered at the TRO hearing, however, concerning the quantity of imported water and storage water present in Clear Creek at the Oulette Ditch during the summer of 2002. The Offer of Proof 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 typically lower than 3.5 cfs (Rec. v. 1, p. 127-135), and thus below the express threshold flow condition in the FHL Provision.

The Offer of Proof also presents evidence that the Oulette Ditch headgate was not historically satisfied by return flows. (Rec. v. 1, p. 131-132). At the TRO hearing, the Division

Engineer argued that the FHL Provision was a complete subordination of Golden's Priority No. 5 to the FHL Priority No. 9. (Rec. v. 2, p. 149, ln. 13-17.) In support of that position, witnesses testifying in support of the State Order argued that such a reading was logical and did not result in a windfall to the FHL because the Oulette Ditch was likely historically satisfied by return flows from the FHL and other upstream ditches. (Rec. v. 2, p. 219, ln. 3-21; v. 2, p. 231, ln. 5-10.) Although the Water Court heard substantial extrinsic evidence on the meaning of the FHL Provision at the TRO hearing, Golden had no opportunity to present its evidence that the Oulette Ditch was not historically satisfied by return flows, because it had no time to study the issue.

As set forth in the Offer of Proof, Golden has since examined prior rulings of the Division No. 1 Water Court that clearly demonstrate that return flows were not a significant part of the historic supply for the Oulette Ditch, meaning the Priority No. 5 would have historically required water to flow past the more junior, upstream FHL Priority No. 9. (Rec. v. 1, pp. 131-132.) On these facts, in a time of shortage the FHL will have a greater water supply with the senior Priority No. 5 taking 3.42 cfs upstream than in the pre-change regime where the FHL had to allow enough water to go pass its headgate to satisfy the 6.69 cfs required by the senior Priority No. 5 at the Oulette Ditch downstream. (Rec. v. 2, p. 45, ln. 18 - p. 46, ln. 20.) Thus, the FHL is in a better position after the 1966 Change Decree, and reading the FHL Provision as a complete subordination results in a windfall to the FHL. (Id.) The Water Court has not heard, and has refused to hear this evidence.

E. The Role of FHL and Other Water Users.

The State Order was issued at the behest of the Farmers High Line Canal ("FHL") and its shareholders, which include the municipalities of Arvada, Thornton and Westminster, and the Coors Brewing Company ("Coors").[1] (See Rec. v. 3, Exh. 2, Rec. v. 2, p. 134, ln. 11-12; p. 135, ln. 3-7.) The FHL Priority No. 9 call began on July 15, 2002. (Rec. v. 2, p. 174, ln. 5-10; Rec. v. 3, Exh. B, Exh. 2.) Golden has subsequently learned that the FHL began discussing administration of the FHL Provision in the Change Decree with employees of the Division Engineer at least as early as August, 2002. (Rec. v. 2, p. 175, ln. 2-6.) The FHL did not raise the issue directly with Golden at that time, however, or at any point thereafter.

On September 3, 2002, the FHL wrote a letter to State Engineer Hal Simpson demanding that he invoke the FHL Provision and order an immediate cessation of Golden's Priority No. 5 diversions. (Rec. v. 3, Exh. 2, p. 1.) The letter further requested that the State Engineer order Golden to pay back 229 acre-feet of water that the FHL alleged Golden improperly diverted. (Rec. v. 3, Exh. 2, p. 2.) On September 4, 2002, prior to receiving the FHL letter, representatives from Golden briefly met with the State and Division Engineers to answer questions regarding interpretation of the FHL Provision. (Rec. v. 2, p. 60, ln. 1-5.) At the conclusion of that meeting, the State Engineer told Golden's representatives that he did not know what the FHL Provision meant. (Rec. v. 2, p. 60, ln. 15-18.) The next communication from the State to Golden was the September 6, 2002 State Order directing Golden to stop diverting the Priority No. 5 in less than 32 hours.

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[1] Attorneys for the FHL, Coors, Arvada and Thornton all appeared and participated at the September 9, 2002, TRO hearing.

IV. SUMMARY OF ARGUMENT.

This appeal is before the Supreme Court on the basis of the September 9, 2002 Order Dismissing Complaint issued after only an emergency TRO hearing held earlier that same day. There was never a trial. There was never a dispositive motion of any kind filed by any party. There was no notice given to Golden that the Court intended to dismiss the suit, and Golden had no opportunity to be heard on that issue. The Court should not have sua sponte dismissed Golden's Complaint in the absence of a stipulation from Golden that the emergency TRO hearing would substitute for a hearing on the merits, and without first giving Golden notice of the possible dismissal and the opportunity to be heard.

In its motion asking the Water Court to reconsider the September 9, 2002 dismissal, Golden explained that it had additional evidence and asked for the opportunity to present that evidence to the Water Court at a one-day trial. That request was denied, but Golden was allowed to submit its Offer of Proof. The Offer of Proof presents evidence challenging the premise of the State Order that the 3.5 cfs threshold flow condition in the FHL Provision of the Change Decree was met. The Water Court never considered that evidence. This matter should be remanded so the Water Court can take evidence on this critical issue.

Golden also asserts that the Water Court erred in interpreting the FHL Provision of the Change Decree as a complete subordination of Priority No. 5 to Priority No. 9. That interpretation is contrary to the plain language of the provision, and inconsistent with other terms and conditions in the Change Decree which are express subordinations. The plain language of the FHL Provision is that the limitations on Golden's right to divert its Priority No. 5 are only effective when those diversions "result in a call" for the Priority No. 9 right, i.e., when diversions

under the No. 5 right cause or trigger the No. 9 call, not where diversions by the No. 5 merely contribute to a call that would otherwise exist.

If the Court does not accept Golden's interpretation of the plain language, then Golden asserts in the alternative that the FHL Provision is ambiguous. The Water Court already heard substantial extrinsic evidence on the meaning of the FHL Provision presented by the FHL and others participating at the September 9, 2002 TRO hearing. These entities argued that their reading of the FHL Provision as a complete subordination of the Priority No. 5 to the FHL Priority No. 9 made sense because the Oulette Ditch was likely historically supplied in large part by return flows from the FHL and other upstream ditches. That explanation is contradicted by prior rulings of the Water Court as set forth in Golden's Offer of Proof, which the Water Court has not considered. If the Court does not accept Golden's plain language interpretation of the FHL Provision, the provision should be deemed ambiguous and the cause remanded with the instruction that the Water Court should consider Golden's additional evidence on this issue.

V. ARGUMENT

A. Standard of Appellate Review.

The Water Court should not have sua sponte dismissed the Complaint on the basis of the preliminary evidence presented at the TRO hearing; rather, it should have allowed Golden the opportunity to present its evidence, particularly that evidence concerning whether the 3.5 cfs threshold flow condition in the FHL Provision was satisfied between July 15, 2002 and September 6, 2002, as alleged in the State Order. This is a legal question that is subject to de novo review. *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 40 (Colo. 1996).

Interpretation of the Change Decree and the FHL Provision, and whether there is any ambiguity that allows consideration of extrinsic evidence, are also questions of law, and the Court need not defer to the Water Court's interpretation. *See, e.g., Pepcol Mfg. Co. v. Denver Union Corp.,* 687 P.2d 1310, 1313 (Colo. 1984).

To the extent that factual context is necessary to resolve this appeal, there have been no factual findings by the Water Court to which this Court must defer. *Governor's Ranch Professional Center v. Mercy of Colorado,* 793 P.2d 648, 651 (Colo. App. 1990)(findings offered after preliminary hearing are not conclusive, even in the trial court). Given the preliminary nature of the proceedings below, the facts presented in Golden's Complaint should be accepted as true for purposes of reviewing the dismissal, and any uncertainties about the evidence presented at the TRO hearing should be viewed in the light most favorable to Golden. *See, generally, Governor's Ranch,* 793 P.2d at 651 (discussing how evidence from a preliminary hearing should be considered on appeal).

B. The Water Court Should Not Have Dismissed Based on the Evidence Presented at the TRO Hearing.

The Water Court sua sponte dismissed this matter after only a TRO hearing. As expressly explained by the Court in its September 9, 2002 Order Dismissing Complaint:

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

(Rec. v. 1, p. 47).

The purpose of a temporary injunction is to prevent a tort or wrong and to preserve the status quo pending a final hearing and determination of the parties' controverted rights.

Spickerman v. Sproul, 328 P.2d 87, 88 (Colo. 1958). A court should not dismiss an action solely on the basis of evidence presented at a preliminary hearing. *Governor's Ranch*, 793 P.2d at 650-51; *Litinsky v. Querard*, 683 P.2d 816, 819 (Colo. App. 1984). A party is under no obligation to present its entire case at such a hearing. *Governor's Ranch*, 793 P.2d at 650. The evidence and argument presented at the TRO hearing on September 9, 2002, was not all of the relevant evidence that Golden has to challenge the State Order, but only that which it was able to organize over the weekend at a time when the State offices and records were closed and unavailable to Golden's engineers and attorneys.

The only exception to the rule that a Court should not dismiss on the basis of evidence taken at a preliminary hearing is where the parties clearly stipulate that the preliminary hearing can substitute for a hearing on the merits, or stipulate that they have no more evidence to present. *Governor's Ranch*, 793 P.2d at 650-51. That did not happen in this case. In fact, at the conclusion of the September 9, 2002 TRO hearing, the Court specifically told Golden it could schedule a subsequent hearing on its motion for preliminary injunction.[2] (Rec. v. 2, p. 272, ln. 1-8.) Later that evening, however, the Court sua sponte dismissed the entire action.

Not only was the dismissal premature, but it should not have happened without a pending motion from one of the other parties, or, at a minimum, notice from the Court that dismissal was

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[2]The State has argued to the Water Court that Golden did consent to the Water Court's disposition of the merits. In making this argument, the State referenced that portion of the September 9, 2002 TRO transcript where counsel for Golden, in response to the Water Court's inquiry about what additional evidence Golden would present at a PI hearing, responded, "I'm not sure there would be any, Your Honor." (Rec. v. 2, p. 272, ln. 1-8.) That statement speaks for itself as an expression of uncertainty concerning what might be presented by Golden at a PI hearing, especially given that the TRO hearing was held the first business day after the State Order. There was no discussion at the September 9th TRO hearing concerning the ultimate disposition of the case. Counsel's statement cannot be exaggerated into a definitive stipulation that Golden had nothing left to present for trial, or a statement indicating Golden's consent for the Court to reach a decision on the merits.

its intended course of action. Here, no motion to dismiss or motion for summary judgment was filed. The Colorado Rules of Civil Procedure specify a process for such motions, and ensure a party has notice and an opportunity to respond. *See, e.g.,* C.R.C. P. 12, 56, 121 §1-15. Even default proceedings and dismissals for failure to prosecute require notice and an opportunity to be heard. *See, e.g.*, C.R.C.P. 41(b)(2), 55. Golden did not receive the benefit of these basic procedural safeguards.

C. Offer of Proof on the 3.5 cfs Threshold Flow Condition: Golden's Evidence must Be Considered.

The threshold requirement for imposing the limits in the FHL Provision is that flows must exceed 3.5 cfs at the Oulette Ditch headgate. (Rec. v. 3, Exh. A, p. 4, ¶ 7(e).) That requirement exists no matter what meaning is given to the more controversial language in the provision. If allowed a trial in this matter, at a minimum Golden would have presented the Water Court with the evidence set forth in its December 18, 2002, Offer of Proof on this 3.5 cfs threshold flow issue. The Offer of Proof demonstrates that flows at the historic headgate of the Oulette Ditch were comprised in significant part of imported water and storage releases scheduled for delivery to downstream users – water that was not present in Clear Creek at the time of the Change Decree. (Rec. v. 1, pp. 109-112, 127-131.)

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.) 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. For these reasons, as set forth in the Offer of Proof, the effective flow at the historic headgate of the Oulette Ditch during the period that is the subject of the State Order was typically lower than 3.5 cfs. (Rec. v. 1, pp. 110-113, 130-131, 134-135.) Golden did not have an opportunity to present, and the Water Court did not consider, this crucial evidence. This case should be remanded so Golden can present this and any other relevant evidence that it discovers to the Water Court.

D. The Water Court Interpretation of the FHL Provision is Contrary to the Plain Language.

The State Order directed Golden to cease and desist further diversion of its Priority No. 5 because the FHL Priority No. 9 was the calling right. (Rec. v. 3, Exh. B, Rec. v. 2, p. 66, ln. 1-8.) The State Order thus interpreted the FHL Provision as a complete subordination of Golden's otherwise senior Priority No. 5 water right to the otherwise junior FHL Priority No. 9 water right. (Rec. v. 2, p. 149, ln. 13-17.) The Water Court accepted that interpretation and dismissed the suit. (Rec. v. 1, p. 47, 101.) Contrary to the Water Court interpretation, the FHL Provision, by its plain language, is not a complete subordination.

The FHL Provision provides that Golden's "Priority No. 5 shall be exercised by the City of Golden only at times such that its use will not **result in a call** at the headgate of the Farmers Highline Canal on the No. 5 and 9 direct rights divertable at said headgate." (Emphasis added). By its plain terms, the FHL Provision prohibits Golden's diversions when they "result in a call" 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. The only time Golden's Priority No. 5 diversions "result" in the FHL call is when, but for Golden's diversions under the No. 5 right, the FHL No. 9 would not be calling. The limitation on Golden's right to divert the Priority No. 5 water right thus only comes into play when flows in Clear Creek are such that the FHL Priority No. 9 is on the cusp of being the calling water right.

This Court has explained that in interpreting a stipulation incorporated into a water court decree, "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." *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 174 (Colo. 1997)(citing *Town of Estes Park v. Northern Colo. Water Conservancy Dist.*, 677 P.2d 320, 327-28 (Colo. 1984)). That rule 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)).

On this later point, the facts here are that in the 36 years since the 1966 Change Decree was entered, including the drought years of 1977, 1978 and 1981 when the FHL Priority No. 9 was the calling right on Clear Creek, the FHL Provision was never interpreted or enforced as it was in the 2002 State Order. (Rec. v. 2, p. 49, ln. 5 - p. 54, ln. 20; Rec. V. 3, Exh. F and G – v. 2, p. 50, ln. 24; v. 1, p. 51, ln. 1.) There was no evidence introduced at the TRO hearing to suggest that any of the parties to the Change Decree or any other water users on Clear Creek had ever before urged the Division Engineer to administer the Change Decree in the manner adopted

in the 2002 State Order. These facts reinforce the conclusion that the plain language of the Change Decree is not a complete subordination as contended by the State Order.

E. Other Provisions of the Change Decree Are Not Consistent with the Water Court's Interpretation.

The Change Decree contains other provisions that clearly are complete subordinations. In those instances, the language explicitly states that Priority No. 5 "shall be junior and subordinate to" the other rights. This explicit "junior and subordinate" language is used to describe the relationship between the changed Priority No. 5 and certain priorities decreed to the Croke Canal (Rec. v. 3, Exh. A, ¶ 7(d)), and other priorities decreed to the Agricultural Ditch and Reservoir Company. (Id., ¶ 7(g).) Similarly, paragraph 7(h)(1) of the Change Decree explains that the changed Priority No. 5 "shall be junior to Priorities numbered 5, 7, 13, 14, 15 and 21 in the Agricultural Ditch, Priority No. 12 in the Welch Ditch and Priority No. 12 in the Lee Stewart & Eskins Ditch and shall be so administered." Clearly, the Court and the parties knew how to draft explicit complete subordination provisions when that was intended.

The State's interpretation of the FHL Provisions treats the "result in a call" language as being no different than the conditions that expressly state "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). All of the provisions of the Change Decree should be read together, and a complete subordination should not be implied when that reading is inconsistent with the plain language of the FHL Provision and with the other

provisions that use express "junior and subordinate" language. The rule from the *USI Properties* case that "bypass of water past an otherwise senior priority is a consequential matter" and should not be presumed "in the absence of explicit language," should be applied to read the FHL Provision consistent with its plain language – as simply a trigger subordination, and not a complete subordination. *USI Properties*, 938 P.2d at 174.

Indeed, if the differences between the FHL Provision and the language used in the other provisions of the Change Decree with respect to conditions protecting other junior water rights are ignored, and instead they are all read as complete subordinations, then the Priority No. 5 effectively loses its seniority against these junior water rights. Such a reading is arguably inconsistent with paragraph 7.b. of the Change Decree which required Golden to abandon 3.27 cfs of the 6.69 cfs Priority No. 5 water right. If the Priority No. 5 is effectively junior to the No. 9 and the other junior rights identified in the Change Decree, than the abandonment is superfluous and not necessary to protect these junior rights – they are fully protected by the subordination. Moreover, as set forth in section V.G. below, reading the FHL Provision as a complete subordination results in a windfall to the FHL.

F. In the Alternative, the Language in the FHL Provision Is Ambiguous, and the Matter Should Be Remanded for the Water Court to Hear Additional Evidence Concerning the Meaning of the FHL Provision.

In its oral ruling from the bench at the TRO hearing, the Water Court concluded that the Change Decree was not ambiguous. The Court further explained that ruling in its November 5, 2002 Order Denying Golden's Motion to Reconsider:

> In determining the existence or absence of irreparable injury in this case, the court had to interpret the 1966 change decree and make findings and conclusions concerning Golden's right to divert. At the September 9 hearing, the court

> concluded that the decree was unambiguous. Extrinsic evidence cannot be used to modify the plain language of an unambiguous decree, hence the court did not consider the extrinsic evidence that was presented at the hearing.

(Rec. v. 1, p. 101.)

A provision in a decree is ambiguous if it is fairly susceptible to more than one interpretation. *See Davis v. M.L.G. Corp.*, 712 P.2d 985, 989 (Colo. 1986). As set forth above, Golden strongly disagrees with the Water Court interpretation of the FHL Provision. More persuasive, however, is the fact that the State Engineer himself admitted in meetings with Golden just two days before the State Order was unexpectedly issued that the FHL Provision was complicated and he did not know what it meant. (Rec. v. 2, p. 60, ln. 6-18.)

The State and other water users introduced extrinsic evidence on the meaning of the FHL Provision at the TRO hearing. Witnesses testifying in support of the State Order argued that a complete subordination was a logical reading of the FHL Provision and did not result in a windfall to the FHL because the Oulette Ditch was likely historically satisfied by return flows from the FHL and other upstream ditches. (Rec. v. 2, p. 219, ln. 3-21; v. 2, p. 231, ln. 5-10.) Under this argument, the FHL was not historically required to pass water to the more senior downstream Priority No. 5, because the No. 5 was satisfied by return flows entering the stream below the FHL, but above the historic headgate of the Oulette Ditch.

The evidence in the Offer of Proof directly contradicts the extrinsic evidence already offered in support of the State Order. It demonstrates that the Oulette Ditch was not, in fact, historically supplied by a meaningful percentage of return flow water from the FHL and other ditches immediately upstream. (Rec. v. 1, p. 131-132.) This evidence demonstrates that in a time of shortage, the Priority No. 5 would have historically required water to flow past the more

junior, upstream FHL Priority No. 9. (Rec. v. 1, pp. 131-132; See also Rec. v. 2, p. 45, ln. 18 - p. 46, ln. 20.)

The best evidence of historic return flow patterns are the judicial findings concerning return flow obligations set forth in decrees that allowed changes in the water rights for ditches located between the historic Oulette Ditch headgate and Golden's municipal headgate. Those prior decrees represent final decisions on the return flow issue. A review of these change decrees demonstrates that only a small amount of return flows would have occurred in this reach, and even then, the water would have typically been diverted by other ditches upstream of the Oulette Ditch headgate. (Id.) This evidence, as detailed below, demonstrates that the complete subordination urged by the State would result in a tremendous windfall to the FHL.

G. Reading the FHL Provision as a Complete Subordination Would Mean a Windfall to the FHL.

The Change Decree required Golden to abandon 3.27 cfs of the 6.69 cfs that it owned in the Priority No. 5 water right. (Rec. v. 3, Exh. A, p. 3, ¶ 7.b.) As explained by Mr. Thompson at the TRO hearing, combining this partial abandonment with a complete subordination to the more junior Priority No. 9 would destroy the primary benefit of Priority No. 5 and result in an enormous windfall to junior water rights such as the FHL. (Rec. v. 2, p. 43, ln. 6 - p. 47, ln. 8.)

The windfall occurs in the first instance because the 3.27 cfs abandonment itself results in more water and an improved position for the FHL. (Rec. v. 2, p. 45, ln. 18 - p. 46, ln. 20.) This occurs because the Oulette Ditch diversions were not historically satisfied by return flows from the FHL and other ditches, and in a time of shortage in the pre-change condition the upstream FHL Priority No. 9 would have passed the entire 6.69 cfs for diversion by the more senior

downstream Priority No. 5. (Rec. v. 2, p. 43, ln. 6 - p. 46, ln. 20.) After the Change Decree, the FHL no longer passes water downstream to the Priority No. 5, but instead the Priority No. 5 diverts only 3.42 cfs of the original 6.69 cfs upstream of the FHL, leaving the abandoned 3.27 cfs in the stream for the direct benefit of the FHL and other junior rights. This abandoned 3.27 cfs is water that was not historically available to the FHL in a time of shortage in the pre-change condition.

Reading the FHL Provision as a complete subordination on top of the required 3.27 cfs abandonment would compound the windfall. The direct benefit to the FHL from the Change Decree in a time of shortage would be not only the 3.27 cfs left in the stream, but effectively all of the remaining 3.42 cfs of the Priority No. 5 as well. As demonstrated above, the FHL was not only fully protected by the required abandonment of the 3.27 cfs, but received a windfall from that abandonment. The complete subordination urged by the State compounds that windfall, and is a serious and unwarranted limit on Golden's right to use the Priority No. 5. This reading of the FHL Provision as a complete subordination eviscerates the value of the senior Priority No. 5 against the junior Priority No. 9, and should not be implied where that result is not required by the express language of the Change Decree. *USI Properties*, 938 P.2d at 174.

If the Court does not accept Golden's plain language interpretation of the FHL Provision, the provision should be deemed ambiguous and the cause remanded with the instruction that the Water Court should consider this and further evidence developed through discovery.

V. CONCLUSION

For the foregoing reasons, Golden requests that the Court reverse the September 9, 2002, dismissal of Golden's Complaint, and remand this matter for the Water Court to consider

Golden's evidence concerning whether the 3.5 cfs threshold flow condition in the FHL Provision was met. Golden further requests that the Court reverse the interpretation of the FHL Provision offered by the Water Court, and instead rule that the plain language interpretation is that it is a trigger subordination, and only in effect when diversions by the Priority No. 5 right "result in a call" on the Priority No. 9, not when such diversions merely contribute to a call that would otherwise exist. In the alternative, Golden requests a ruling that the FHL Provision is ambiguous, and that the Court remand this matter for the parties to develop, and the Court to consider, further extrinsic evidence on the meaning of that provision.

Respectfully submitted this 29th day of April, 2003.

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CERTIFICATE OF MAILING

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