Water Law Review

Volume 17 | Issue 1 Article 24

9-1-2013

In re Water Rights of the City and Cnty. Of Denver v. City of Englewood, 304 P.3d 1160 (Colo. 2013)

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tions to be insufficient to overcome a motion to dismiss or a motion for summary judgment.

Accordingly, the court affirmed the district court's decision to dismiss the claims arising under FILCSA and the due process clause of the Constitution, as well as its decision to grant summary judgment for the equal protection claim.

Lillie Parker

STATE COURTS

COLORADO

In re Water Rights of the City and Cnty. of Denver v. City of Englewood, 304 P.3d 1160 (Colo. 2013) (holding (i) municipality may use properly quantified transmountain lawn irrigation return flows ("LIRFs") as substitute supply for decreed appropriative rights of exchange, by virtue of the fact that such LIRFs are legally indistinguishable from reusable imported transmountain effluent; and (ii) junior appropriator cannot claim injury based solely upon municipality's proper operation of its decreed exchanges).

In 2004 the City and County of Denver ("Denver") filed an application for determination of water right in the Colorado District Court for Water Division 1 ("water court"). Denver requested approval of its use of properly quantified transmountain LIRFs as a substitute supply of water for its appropriative rights of exchange decreed in Civil Action ("C.A.") 3635. The C.A. 3635 decree, which the Colorado District Court for Douglas County issued in 1972, rests upon Denver's intent to effectuate exchanges on the South Platte River of public stream water as substitute supplies for appropriated water supplied or taken by Denver. In 1992 the Colorado Supreme Court ("Court") interpreted the C.A. 3635 decree in *City and County of Denver v. City of Englewood* and approved imported Colorado River water and imported transmountain water returning to the South Platte River as wastewater effluent ("transmountain effluent") as permitted substitute supplies for the C.A. 3635 exchanges.

Just as it did in 1992, Englewood filed a statement of opposition to Denver's 2004 application. In response, Denver filed a C.R.C.P. 56(h) motion for determination of questions of law, requesting the water court to decide (i) whether Denver could use properly quantified LIRFs as a substitute supply of water for the C.A. 3635 exchanges, and (ii) whether a junior appropriator within the exchange reach could claim injury based solely on the use of such LIRFs as a substitute supply source.

Addressing the Rule 56(h) motion, the water court concluded Denver could use properly quantified transmountain LIRFs as a substitute supply. The water court compared transmountain LIRFs to reusable transmountain effluent, which was approved as a decreed substitute supply in *Englewood*, and noted that the two are legally indistinguishable. In addition, the water court reasoned that junior appropriators have no expectation as to imported reusable water because senior appropriators can use and reuse imported transmountain water to extinction. Therefore, junior appropriators could not claim

injury based solely upon the proper operation of the C.A. 3635 exchanges through the use of imported transmountain water as a substitute supply.

After the water court's determinations of law, Denver and Englewood entered a stipulated final decree with the water court, subject to Englewood's appeal of the water court's grant of Denver's Rule 56(h) motion. Thereafter, Englewood appealed the water court's decision directly to the Colorado Supreme Court, which issued this opinion after a *de novo* review of the two questions at issue. The Court affirmed the water court's decision.

Regarding the first issue, the Court noted the statutory and common law support for a transmountain water user's right to reuse imported transmountain water to the maximum possible extent, as well as a user's right to use transmountain water and reusable transmountain effluent as substitute supplies for appropriative rights of exchange. In addition, the Court discussed its *Englewood* decision, which noted Denver's clear intent in 1921 to use Colorado River water as substitute supply for the C.A. 3635 exchanges. The water court analogized properly quantified transmountain LIRFs to the reusable transmountain effluent discussed in *Englewood* and concluded that LIRFs could similarly serve as a substitute supply for C.A. 3635 exchanges. The Court therefore affirmed the water court's conclusion that Denver could use properly quantified transmountain LIRFs as substitute supply just as it may use reusable transmountain effluent, because the two are legally indistinguishable.

Next, the court discussed Englewood's injury claim. Like the water court, the Court held that Englewood, as a junior appropriator, had no expectation as to imported reusable water because senior appropriators may use and reuse imported water to extinction. Thus, Englewood could not claim injury from Denver's use of imported water for exchanges under C.A. 3635. By this principle, Englewood could not claim injury related to Denver's use of properly quantified transmountain LIRFs as a substitute supply of water under the C.A. 3635 appropriative rights of exchange.

Accordingly, the Court affirmed the water court's order granting Denver's Rule 56(h) Motion.

Sarah J. McGrath

Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros., 307 P.3d 1056 (Colo. 2013) (holding (i) the water court did not need to interpret the phrase "all other beneficial uses" in a previous decree nor determine the abandonment of commercial and industrial uses where the applicant only sought to change its irrigation rights; (ii) the water court incorrectly applied the "can and will" doctrine for a finding of reasonable diligence of a conditional water right when it found that a water right is speculative only when it is impossible to implement; and (iii) the water court improperly granted conditional water rights because the applicants failed to prove a non-speculative use).

The Colorado Supreme Court ("Court") reviewed three cases in which the District Court for Water Division 6 ("water court") granted the parties' applications for two conditional water rights and a change to an absolute right on Talamantes Creek in Moffat County. The first adjudication of water rights on Talamantes Creek took place in the 1890s. A single ranching family owned all of the decreed water rights on the creek until the 1950s, when the family split