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Centennial Water & Sanitation Dist. v. City & Cnty. Of Broomfield, 256 P.3d 677
(Colo. 2011)

COURT REPORTS

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Centennial Water & Sanitation Dist. v. City & Cnty. of Broomfield, 256 P.3d 677 (Colo. 2011) (holding that a city and county failed to meet its burden on an application for conditional appropriative rights of exchange and for conditional water rights for several water sources that it did not own or control because it was unable to fulfill the “first step” requirement and the “can and will” test).

On December 20, 2004, the City and County of Broomfield (“Broomfield”) filed an Application for Conditional Appropriative Rights of Exchange and for Conditional Water Rights (“Application”) in the District Court for Water Division No.1 (“water court”). The Application requested judicial confirmation of conditional appropriative rights of exchange for a total of seventeen sources of substitute water supply. Broomfield owned or controlled nine of the sources, but not the other eight.

Centennial Water and Sanitation District and the City of Boulder (together, “Opposers”) filed Statements of Opposition to the Application. Opposers argued that the court should treat the Application as a proposed augmentation plan, rather than an application for a conditional water right. Under this theory, Broomfield would need to own or control each proposed substitute source of water supply in order to succeed on its Application. Disagreeing with Opposers, the water court found that a conditional appropriative right of exchange is a conditional water right and held that it would analyze the Application under a conditional water right analysis.

The water court then applied the “first step” requirement and the “can and will” test to determine whether Broomfield had met its burden of satisfying the elements for a conditional water right for substitute supplies. Under the “first step” requirement, an applicant must demonstrate that it has taken a first step toward appropriating a certain amount of water. Under the “can and will” test, an applicant must show that there is a substantial probability that the applicant can and will complete the appropriation with diligence. Applying both analyses, the water court found that while Broomfield had met its burden for all of the sources it owned or controlled, it had failed to meet its burden for six of the sources that it did not own or control. Both Opposers and Broomfield appealed the water court’s decision.

On appeal, the Colorado Supreme Court first addressed whether the trial court erred in treating the Application as an appropriative right, rather than as a proposed augmentation plan. An augmentation plan operates to replace depletions with substitute water supply in an amount necessary to prevent injury to other water rights. In contrast, an appropriative right allows a strict one-to-one diversion of upstream water in exchange for providing continuity with a source of substitute supply at a point downstream. The court reasoned that defining a conditional appropriative right of exchange in terms of conditional water rights is in line with Colorado water law's principle of maximum utilization. Accordingly, the court determined that, because an exchange is an appropriative right and not an augmentation plan, courts should review an application for a conditional appropriative right of exchange under a conditional water right analysis.

The court then considered whether the trial court erred by applying the "first step" requirement and the "can and will" test to Broomfield's sources of substitute supply on a source-by-source basis. Broomfield argued that the court should instead apply these requirements to its exchange plan as a whole. The court found, however, that when an applicant claims various substitute sources of supply for a proposed plan of conditional appropriative rights of exchange, the court must analyze each individual substitute source in order to identify the specific risk of injury. Therefore, the court considered each substitute source individually.

In Colorado, to obtain a conditional water right, an applicant must demonstrate three actions: (i) it has taken a first step toward appropriation of a certain amount of water, (ii) its intent to appropriate is not based upon the speculative sale or transfer of the appropriative right, and (iii) the applicant can and will complete the appropriation with diligence. In affirming the water court, the court found that Broomfield had met its burden for all of the sources it owned or controlled, but had failed to meet its burden for six of the sources that it did not own or control.

Accordingly, the court approved Broomfield's conditional appropriative rights of exchange based on the nine sources of substitute supply that it owned or controlled and two of the sources it did not own or control.

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Kobobel v. Dep't of Natural Res., 249 P.3d 1127 (Colo. 2011) (holding that the water court had exclusive jurisdiction to hear, and properly denied, a claim by a group of well owners who asserted they were entitled to just compensation because the State Engineer issued curtailment orders that allegedly effectuated a taking).

Well owners ("Owners"), with rights to thirteen decreed irrigation wells tributary to the South Platte River with appropriation dates between March 1945 and December 1966, brought an inverse condemnation action against the State of Colorado in Morgan County District Court ("district court") after receiving a cease and desist order ("order") from the State Engineer. The order stated that, because the wells were part of an