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S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226 (Colo. 2011)

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S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226 (Colo. 2011)

power. The district court found that the District's withholding of the approval was unreasonable because the District itself was unable to provide water service. The district court held that it was within the Town's police powers to require the dedication of water rights as a condition of subdivision approval.

The Colorado Court of Appeals upheld the district court's ruling. The appellate court concluded that the District's attempt to bar the Town from furnishing water service was an unreasonable exercise of their approval power because it had neither the intent nor financial resources to provide water service itself.

The Colorado Supreme Court granted certiorari. The court began with an overview of the powers that the General Assembly conferred to special districts and statutory towns. Special districts have the power to "acquire water rights and construct and operate lines and facilities within and without the district," while statutory towns have general police powers. The court then discussed the two applicable sections of Colorado statute that address the operation of water and sewer systems. Because special districts are considered municipalities for the purposes of the statute, the powers conferred apply to both the District and the Town. The statute prevents one municipality from providing water services in another municipality without the approval of the other municipality.

The District argued that it must approve the Town's furnishing of water services because their territories overlap. The Town argued that because the District was unable to provide water services, the District could not prevent the Town from providing water services. The court looked at the statute as a whole and determined that consistent with case law and the legislative intent, the statute intended to promote rather than hinder, an essential service. Therefore, the approval power was not unlimited and must be exercised reasonably. The court held that the District could not prevent the Town from exercising its police and land use powers to promote public health and to regulate the distribution and supply of water to its own residents within its own territory.

The court affirmed the judgment of the court of appeals.

J. Tobin Weiner

S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226 (Colo. 2011) (holding that a water rights determination can include reviews of prior court decrees and the service requirements for such water rights determinations are satisfied by resume notice and newspaper publication).

Between 2001 and 2006, seven of the eight ditch companies with water rights in the Pine River system ("ditch companies") filed applications for winter stock watering rights. The Southern Ute Indian Tribe ("Tribe"), another rights holder on the Pine River, filed statements of opposition to each application. After consultation, the state Division Engineer determined that the applications were unnecessary because pri-

or decrees in 1934 and 1966 allowed for incidental non-irrigation uses of the water, such as stock watering in winter.

The parties entered into settlement negotiations in light of the Engineer's determination but failed to reach a settlement. In March 2009, the ditch companies filed a consolidated application for a water rights determination in the Water Court Division Seven ("water court"), asking the water court to find that the prior decrees allowed winter stock watering. The court then gave notice of the application in a resume published in a local newspaper. Two months later the ditch companies filed a verification of the application, which Colorado law required for a water rights determination.

In May 2009, the Tribe filed an untimely statement of opposition to the application. The tribe therefore included a motion to intervene, asking the court to excuse the untimely statement of opposition. In the filing, the Tribe argued that the water rights determination was invalid because of the failure to verify the application and because the application should have been filed as an action for declaratory judgment. A declaratory judgment action would have been subject to the Colorado Rules of Civil Procedure (C.R.C.P.), which required personal service on affected parties such as the Tribe. This differed from the rules for water rights determinations, which merely require resume notice. The water court held the ditch companies timely filed their verification of the water rights determination because the verification related back to the original filing in March 2009. The water court also denied the statement of opposition from the Tribe as untimely and used its discretion to deny the motion to intervene because it would delay the proceedings and force the expenditure of unnecessary time and resources. The Tribe then appealed to the Colorado Supreme Court ("court").

On appeal, the court considered: 1) whether a water rights determination included a review of prior decrees and whether resume notice and newspaper publication was sufficient notification for interested parties; 2) whether the relation back doctrine can apply to a belated verification of a water rights determination; and 3) whether the water court abused its discretion in denying the motion to intervene.

First, the court looked at the plain language of the statute governing water rights determinations and held that a determination was not limited to a plan or change in plan. The court considered the definition of "determination" in the Webster's New International Dictionary and the statutory definition of "water right." Here, the ditch companies were taking action so that the water court could determine whether prior decreed water rights included winter stock watering. As such, the court could properly characterize the ditch companies' application as a water rights determination.

The court then turned to the question of notice requirements. The C.R.C.P. required personal service on affected parties, however, the statutes provided less stringent notice requirements for matters of water. By filing a water rights determination, the ditch companies had to meet the less stringent statutory notice requirements. Resume notice by the water

court's clerk and publication in a local newspaper satisfied this requirement. Personal service was only required for water matters in limited circumstances where a specific party's ownership interest was subject to termination or abandonment. The court also noted that the statutory notice requirements applied equally to federally reserved rights, such as the Tribe's, due to a waiver of sovereign immunity by the U.S. Government. Therefore, the court held the lesser notification standard of resume notice and publication in a newspaper was sufficient.

On the second issue, the court looked at whether it was proper for the water court to relate back the belated verification to the original water rights determination resulting in a timely filed determination. The C.R.C.P. allowed for amendments to pleadings that relate back to the original pleading, so long as the interested parties have notice of the claims from the original pleading. A court must construe the C.R.C.P. liberally to allow for amendment of pleadings with technical errors not substantially affecting other interested parties. Here, the Tribe had notice of the water rights determination through the resume notice and newspaper publication. The court held that the technical error of initially omitting verification did not substantially affect the Tribe's rights.

Lastly, the court turned to whether the water court abused its discretion by not allowing the Tribe to intervene after it missed the deadline to file a statement of opposition. There was no right to intervention absent extraordinary circumstances. The water court did not find sufficient evidence of extraordinary circumstances to excuse the Tribe. In addition, the court agreed that allowing the Tribe to intervene would significantly increase the private and public time and resources committed to resolution of the water rights determination, frustrating the intent of the Colorado legislature for expediency and finality. The court held that the water court did not abuse its discretion by denying the Tribe's motion to intervene, affirming the water court's ruling in a 4-3 decision.

The dissent argued that the court was expanding the definition of "determination" to include water rights procedures not previously included and that this was a declaratory review of a prior decree - not a water rights determination. Thus, the lesser resume notice and newspaper publication requirement was not applicable and C.R.C.P. required the ditch companies to serve all interested parties personally.

Michael L. Downey

Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C., 249 P.3d 794 (Colo. 2011) (holding that the Upper Yampa Water Conservancy District's application for a conditional water right failed to demonstrate sufficient need for additional water because existing contracts for stored water, absent any specific plan or demonstration of reasonably anticipated future need based on projected population growth, did not constitute a beneficial use).

The Upper Yampa Water Conservancy District ("District") applied in Water Division No. 6 ("water court") for conditional water rights to fifty