Water Law Review

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City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061 (Colo. 2010)

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Thus, the court held that the groundwater allocations in the Tracy Segment Hydrographic Basin might adversely affect the Tribe's decreed water rights under the Orr Ditch Decree. It also held that the district court has subject matter jurisdiction over the Tribe's appeal from the Engineer's 5747 Ruling insofar as the allocation of groundwater rights is alleged to adversely affect the Tribe's decreed water rights. Accordingly, the court reversed and remanded.

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STATE COURTS

COLORADO

City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061 (Colo. 2010) (holding that an agreement between the City of Denver and companies owning senior water rights was a valid no-call agreement that did not unlawfully change or expand Denver's water rights and that the City of Englewood was not entitled to a presumption of injury as a junior water right holder).

In 1999, the City of Denver entered an agreement with several companies holding senior water and storage rights diverted at the Burlington headgate of the South Platte River. The water and storage rights in the agreement were held by Farmers Reservoir and Irrigation Company ("FRICO"), Burlington Ditch, Reservoir and Land Company, and Henrylyn Irrigation District (collectively "the Companies"). The Companies held the senior storage rights for filling the Barr and Oasis Reservoirs ("Oasis storage right") to 11,081 acre feet at a rate of 350 cubic feet per second ("cfs"). FRICO possessed additional storage rights to fill Milton Lake and Barr Lake after using its Oasis storage right. The City of Denver held water rights upstream of the Burlington headgate that are junior to the Companies' Oasis storage right. The City of Denver and the Companies agreed that the Companies would not place a call under the Oasis storage right but could place calls under their Barr Lake or Milton Lake storage rights until the Oasis storage right achieved Paper Fill. (Paper filling is when the carry-over storage and storable inflow equals the decreed storage amount.) In return, Denver agreed not to reduce the amount of water divertable for the Oasis storage right below 150 cfs.

The City of Englewood challenged the agreement in 2002. Englewood held water rights on the South Platte River junior to the rights held by the Companies and Denver. Englewood argued that the agreement was an invalid subordination agreement that improperly expanded Denver's water rights and violated the one-fill rule. (The one-fill rule refers to the Colorado's law allowing use of

only one reservoir fill per year.)

The Colorado Supreme Court affirmed the Division 1 water court's determination that the agreement was a valid no-call agreement. A senior right holder may contract away the right to place a call for water to the Division Engineer. The court noted there is no requirement that the senior user must place a call on the river and use its rights. Instead, the senior user may contractually choose not to make calls on the river. This right differs from a subordination agreement in which the holder of a senior water right gives its senior priority to another party. Such an agreement would be invalid because it would establish new water right priorities.

The court rejected Englewood's argument that the agreement was an unlawful change or use of the water right. A court must balance the competing interests of other holders with vested water rights to change a water right. Here, Englewood argued that the agreement allowed Denver to expand its use of water while the Companies filled their Oasis storage rights with the Barr Lake and Milton Lake storage rights. However, the court rejected this interpretation of the agreement. Colorado law distinguishes a "change" from a "call." A "change" alters the use or scope of a water right. In contrast, a "call" requires juniors to receive less water in order to satisfy the senior priority. The State Engineer reviews a call to make sure it fulfills the water right. The State Engineer does not look at whether a call injures other junior water right holders. Therefore, the court concluded the agreement does not change the water rights because the Companies are not obligated to make calls under their Oasis storage rights, thus clearing the way for Denver to use its junior Oasis storage right.

The court also rejected the claim that the water court erred by not allowing Englewood to rely on a presumption of injury and not allowing it to present evidence of injury. Englewood argued that an applicant seeking a change of water right has the initial burden of showing the change will not injure other water right holders. Additionally, Colorado law recognizes an express presumption of injury with groundwater depletion through well pumping. However, the court held that Englewood bore the burden of proving injury against its rights because the agreement was not a change in water rights and did not involve groundwater. Also, the water court did not abuse its discretion by preventing Englewood from presenting extrinsic evidence that the agreement violated the one-fill rule because Denver and the Companies stipulated that the Oasis storage right will not fill the Barr and Milton Lake storage rights. The court reasoned that the stipulation cured Englewood's alleged potential injury.

Accordingly, the court affirmed the water court's ruling.

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