Water Law Review

Volume 13 | Issue 2 Article 46

1-1-2010

City of Aurora v. ACJ P'ship, 209 P.3d 1076 (Colo. 2009)

James Henderson

City of Aurora v. ACJ P'ship, 209 P.3d 1076 (Colo. 2009)

upon ASARCO's equal protection rights nor provided special benefits to GRIC.

Accordingly, the court affirmed the lower court's approval of the GRIC settlement agreement.

James Henderson

COLORADO

City of Aurora v. ACJ P'ship, 209 P.3d 1076 (Colo. 2009) (holding that the City of Aurora could not be granted conditional water storage rights for its proposed reservoir site as the City could not satisfy the statutory "can and will" requirement because of a pre-existing contractual agreement between the Colorado State Board of Land Commissioners and Rangeview Metropolitan District).

The City of Aurora ("Aurora") filed an application for conditional water storage rights for a proposed project that would divert water from the Platte River into a new "East Reservoir." Aurora had not yet determined where this reservoir would be located, so the application contained requests for conditional water storage rights for six potential sites. Three of the proposed sites are located on the former Lowry Bombing Range ("Lowry Range"), which is administered by the Colorado State Board of Land Commissioners ("Land Board"). Several years prior, the Land Board and Rangeview Metropolitan District ("Rangeview") entered into a restated lease agreement that designated four sites on the Lowry Range for use by Rangeview for future reservoirs. As part of this lease agreement, Rangeview obtained non-exclusive rights-of-way for its reservoir sites. Three of Aurora's six proposed sites significantly overlapped with the four Rangeview sites.

The Land Board rejected Aurora's request for access to the disputed sites, noting that allowing this access would require Rangeview to give up one or more of its sites and that the contractual arrangement prohibited the Land Board from doing this without Rangeview's consent. In the subsequent action before the District Court, Water Division 1 ("water court"), Rangeview requested a partial summary judgment based on the assertion that Aurora could not satisfy the "can and will" requirement for conditional water rights. To acquire a conditional water right, an applicant must demonstrate that "there is a substantial probability that the applicant can and will complete the appropriation with diligence and within a reasonable time." Because of the lease agreement and the Land Board's rejection of Aurora's request, the water court agreed with Rangeview that Aurora could not satisfy this requirement, and subsequently granted the motion for a partial summary judgment. Aurora appealed the partial summary judgment and dismissal of its claim for conditional water storage rights for the three disputed sites.

On appeal, Aurora maintained that the Land Board could have granted access to the disputed sites without violating its contractual arrangement with Rangeview for two reasons: (1) Rangeview's right-of-

way in the contract was "non-exclusive"; and (2) the Land Board had the discretion to relocate Rangeview's rights-of-way. The court disagreed with both arguments. First, the court contended that an owner of property where another has rights-of-way may not interfere in an unreasonable manner with those rights, and allowing Aurora access to the disputed sites would unreasonably infringe on Rangeview's rights. Second, the court noted that according to the terms of the lease agreement, the Land Board could only relocate Rangeview's rights-of-way when it was convenient for both parties, not for the benefit of a third party. Further, relocating rights-of-way was only permissible for the "commercially reasonable development of the Lowry Range."

Aurora next argued that, in spite of the Land Board's rejection of their request, the City could still potentially gain access to the disputed sites through negotiation with Rangeview, and thus a summary judgment based on the "can and will" requirement was not appropriate. The court rejected this argument, noting that the fact that the parties were opponents in this action was sufficient evidence that compromise was not a substantial possibility.

Finally, Aurora contended that a less rigid "can and will" rule should be applied in this case because speculation was not an issue. The court responded by clarifying that this rule actually requires a technical obstacle to the "can and will" requirement and that such a requirement impedes maximum utilization. The court pointed out that neither of these criteria was satisfied, and so the relaxed standard did not apply. Similarly, the court noted that section 37-87-101(1)(b) of the Colorado Revised Statutes, which requires state agencies to allow persons to acquire real property for water storage "to the maximum extent practicable," does not apply in this situation as it would not be "practicable" for the Land Board to acquiesce to Aurora's request for access to the disputed sites.

Accordingly, the court affirmed the water court's ruling, and remanded the case for proceedings consistent with the decision.

James Henderson

N. Sterling Irrigation Dist. v. Simpson, 202 P.3d 1207 (Colo. 2009) (holding that a fixed water year does not itself impose a limit on decreed storage rights, but is merely the administrative mechanism by which the one-fill rule lawfully limits those rights).

The North Sterling Irrigation District ("NSID") requested water under its storage rights; however, the State and Division Engineers for Water Division No. 1 (the "Engineers") denied the requests. The Engineers stated that the November 1 water year and the one-fill rule limited NSID's diversions. NSID filed a Complaint for Declaratory Judgment requesting that the water court determine whether Colorado law authorizes the Engineers to impose a fixed water year on NSID for purposes of administering the one-fill rule. The City of Boulder,