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In re the Application for Water Rights of Farmers Reservoir and Irrigation Co., No. 02CW403 (Colo. Water Div. 1 Sept. 5, 2008) (ordering that multiple irrigation companies' direct flow and storage rights are limited to no more than their historic consumptive use following a change application), *appeal pending*, Colorado Supreme Court Case No. 09SA133 ("FRICO case").

OVERVIEW OF THE WATER COURT DECISION

This Colorado Water Court case arose from the consolidation of two separate change in water right applications, one by Farmers Reservoir and Irrigation Co. ("FRICO"), Burlington Ditch, Reservoir and Land Co. ("Burlington"), and Henrylyn Irrigation District ("Henrylyn") (collectively, "the Companies"). The other case involved applications by FRICO and two sanitation districts, United Water and Sanitation District and East Cherry Creek Valley Water and Sanitation District ("ECCV") (collectively with the Companies, the Applicants). Following consolidation, the change of water rights analysis focused on the preclusive effects of previous litigation, the historical consumptive use ("HCU") of the Burlington and FRICO water rights, proposed limitations on the storage rights, and alterations to Burlington's point of diversion.

The pertinent water rights involved in the change application included both Burlington's 1885 direct flow rights for 350 cubic feet per second ("cfs") and 1885 storage right for 11,081.23 acre feet ("af") as well as FRICO's 1908 and 1909 direct flow and storage rights. The water court found that FRICO's involvement with the Burlington system in 1909 expanded Burlington's direct flow water right use. The Burlington headgate on the South Platte River constituted the original point of diversion for the Burlington rights. The construction of the Globeville Flood Control Project, designed to help prevent flooding, modified the channel of the South Platte River in the area of the headgate. Additionally, Denver contracted with the Companies in 1968 to build pumps ("Metro Pumps") to bring water back into the Burlington Canal that the construction of a Denver wastewater treatment plant then diverted around the headgate. No water court decree approved either of these as alternate points of diversion.

Among numerous surrounding issues, the water court decreed that all of the applicants' water rights were absolute and limited by the HCU, including those rights of the Companies not included in the

applications.

The applicants claimed that two prior Colorado Water Court cases, Case No. 54658 and Case. No. 87CW107, precluded the water court from considering any limitations on the 1885 Burlington right. The water court found that neither case met two of the four required elements of issue preclusion, allowing the water court to contemplate the reduction of the 1885 right. Specifically, the water court stated that the prior cases did not actually determine the quantity of the rights, nor did the parties in the prior litigation have a full and fair opportunity to litigate the 1885 rights quantity.

Regarding the modifications to the point of diversion, the water court held that the HCU could not include the water transferred into the Burlington Canal by the Metro Pumps because the Metro Pumps are an undecreed point of diversion. The water court found it of no matter that the construction of the pumps intended to ensure that the wastewater plant would not alter the use of Burlington and FRICO water rights. Additionally, the water court found that the Globeville flood control project constituted a change in the point of diversion, and that the change adversely affected other users. The judge reasoned that the new point of diversion was 900 feet from the headgate prior to the project and allowed for the diversion of a greater volume of water. Thus, the Companies may not divert any more water than what was available prior to the project's construction.

The water judge further ordered that the HCU shall not include the seepage of water back into the Burlington and FRICO systems, reasoning that seepage and return flows are subject to the appropriation system. This effectively barred reuse of the seepage water without an additional decree. To subtract the seepage from the HCU, the court assessed a fifty-three percent conveyance efficiency to the release of Burlington and FRICO waters. For similar reasons, the water court also rejected the inclusion of seepage recovered by toe drain systems installed in the Barr Lake dam to remove seepage from the structure and place it into the canal. To account for the toe drain seepage, the water court reduced the HCU by fifteen percent of the water delivered to shareholders.

Additionally, the water judge had to decide whether the applicants' proposed storage rights should be limited by HCU, or whether these rights should be determined by the amount needed to fill the storage facility once each year (the "one-fill" rule). The water court determined that the actual HCU limits applied, and therefore refused to apply the "one-fill" rule. The water court found that the application of the "one-fill" rule in *Westminster v. Church*, 445 P.2d 52 (Colo. 1968) was overruled by the Water Right and Determination and Administration Act of 1969, C.R.S. §§ 37-92-101 to -602 (2010). Any expansion over the HCU would cause injury to other users, thus a decree could only change the right within HCU limitations.

As a result of these findings, the water court limited the Burlington 1885 right to 200 cfs, 150 cfs lower than the use since 1909. The case also established that the storage facilities may only be filled according

to the HCU of the companies, which is only a fraction of the acre-feet previously available under the "one-fill" rule.

ORAL ARGUMENTS BEFORE THE COLORADO SUPREME COURT

On appeal to the Colorado Supreme Court, the applicants challenged the water court's decisions regarding the above findings. Instead of hearing the oral arguments at the Supreme Court's temporary chambers, the University of Denver Sturm College of Law ("SCOL") hosted the arguments in a large lecture hall. Students and community members filed into the room anticipating the importance of the appeal, filling every seat. After a brief introduction from SCOL's Dean Martin Katz and a briefing on the court rules, the arguments began with each side rising to outline their time allotments and participating attorneys.

Attorney Brian Nazarenus rose first on behalf of the appellants in their attempt to reverse the water court's findings, focusing his arguments on the water court's rejection of the "one-fill" rule for storage rights and the court's findings of expansion of use. He asserted the appellants' position that Colorado law grants an inherent right without limitation to a storage right holder to fill to the full level of the right each year ("one-fill" rule). The Supreme Court justices interjected with numerous questions throughout Mr. Nazarenus' arguments, including inquiries regarding HCU as a limitation on storage rights. Mr. Nazarenus answered each question in turn and held firm to his argument that historical use should not limit the diversion flow for a storage right.

William Hillhouse followed Mr. Nazarenus for the applicants. He argued that the Colorado Water Court's findings in Case No. 87CW107 precluded the water court from re-determining the HCU of the 1885 direct flow right and from excluding the water from the Metro Pumps in the HCU analysis. Additionally, Hillhouse asserted that the water court should have respected the earlier case's finding that the HCU was approximately three acre feet per acre (compared to the water court's actual finding of only one acre foot per acre). At the conclusion of Mr. Hillhouse's argument, one justice inquired about what should be done about Judge Klein of the water court's finding that No. 87CW107 had not been litigated, and thus could not be issue preclusive. Mr. Hillhouse emphatically responded, "Judge Klein was wrong, he thought the whole thing was stipulated, and it wasn't, it was litigated."

Attorney Steven Sims spoke first for the appellees, explaining that this is simply a change case, reliant on the specific facts deliberated upon by the water court in making its decision, and that this decision should be granted great deference. Mr. Sims pointed out that FRICO's initial involvement in 1909 greatly expanded the acres served by the 1885 right, the right's headgate, and the amount of water diverted from the stream. Mr. Sims further argued that No. 87CW107 and the decree only affected use above Barr Lake and not those rights

below Barr Lake, which are the rights at issue in this appeal.

Regarding the "one-fill" rule, Mr. Sims asserted that HCU limits any changes to a storage right. At the time of *Westminster v. Church,* the "one-fill" rule was sufficient to prevent injury, but in the present day, the "one-fill" rule serves only as a minimum check to prevent injury. If the "one-fill" rule insufficiently prevents injury, however, Mr. Sims argued that the court must use express volumetric limitations. Finally, regarding the toe drains, Mr. Sims stated that the applicants attempt to "double dip" by both including the recovered water in the HCU while they are already diverting extra water to account for the losses before recovery.

David Hallford provided the appellees' position regarding the Metro Pumps dispute. He stated that the "applicants cannot take credit from an undecreed point of diversion when calculating historical use of their water rights being changed," regardless of whether a private agreement had been made with the city of Denver. Under Mr. Hallford's argument, the applicants should have gone to the water court to get their alternate point of diversion approved.

John Akolt closed the arguments, focusing the applicants' rebuttal on the Globeville Flood Control Project. After explaining that the point of diversion had not been altered by the project, Mr. Akolt presented the applicants' position: "we ask that the amount of water that was historically discharged above the ditches . . . would be part of the source of supply that could be called upon, as it was historically, to meet the demands of the Burlington Canal."

The justices then retired to deliberate, leaving the parties to anticipate the court's issuance of the opinion several months down the road. The case will have considerable effects upon all the parties' water rights, but the appellees and appellants disagree over the implications for the broader status of water law in Colorado. Steve Sims for the appellees does not believe that any of the issues involved are cutting edge or controversial. He explained that this is a simple water right change case involving parties that have been "diverting water illegally for years and realizing when applying for a change that they can't do it. The 'one-fill' rule is just an old-fashioned term and condition that is no longer effective in preventing injury."

In contrast, the appellants contend that if the Supreme Court upholds the rejection of the "one-fill" rule, Colorado storage rights will be extensively limited below the current standard. According to the appellants, this could even lead storage right holders to wastewater to increase HCU. However, both sides agree that the amount of available water is the central issue. Star Waring, attorney for the appellants, elaborated that while the court's ruling on the "one-fill" issue will determine how changes in storage rights will be quantified in Colorado, the primary concern of the parties is that "they want to protect their vested water rights."

David Dechant, a FRICO shareholder and farmer, echoed these sentiments: "Engineering figures show that we could lose half of our

water if we lose on all the issues today. That will directly cut down on the water flow to my farm." Mr. Sims has concern for his own clients' water, articulating that if the applicants' change is permitted, "there would be much less water available to downstream users . . . we want [the applicants] to play by the same rules the rest of us have to play by."

The Supreme Court justices will have to weigh these concerns in their ongoing deliberation. The water at issue is vitally important to all the parties involved, leaving the Colorado Supreme Court in the difficult position of determining who shall hold the rights to it.