

9-1-2007

## In re Tonko, 154 P.3d 397 (Colo. 2007)

Christopher Frenz

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Christopher Frenz, Court Report, In re Tonko, 154 P.3d 397 (Colo. 2007), 11 U. Denv. Water L. Rev. 218 (2007).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

In re Tonko, 154 P.3d 397 (Colo. 2007)

The Fort Lyon Canal Company (“Company”), a mutual ditch company, filed for declaratory relief in the Water Court for Division 2 of Colorado (“water court”) naming High Plains and others (“stockholders”) as defendants. The Company sought an order declaring the stockholders liable for the legal costs incurred in defending the Company’s determination for a change of a water right. The water court granted summary judgment in favor of the stockholders. The Company appealed directly to the Supreme Court of Colorado.

When stockholders in the Company desire to change the use of their water, they must make a written request to the Company’s Board of Directors. If the Board of Directors determines that a change is permissible, they can place conditions on the grant necessary to prevent injury to the canal. The Company bylaws require stockholders to pay the legal and engineering expenses incurred in making the original determination. If the stockholders disagree with the Board’s determination, or the conditions placed upon the grant, they can challenge the determination in water court.

The Company argued that the bylaws held stockholders liable not only for the legal expenses incurred in making a determination for a water change, but the legal expenses the Company incurred in defending a stockholder challenge in water court as well. The court noted that its enforcement of company bylaws requiring stockholders to pay legal fees was consistent with express statutory provisions that allow for the awarding of reasonable attorney’s fees, as long as the bylaw that affects a water right is consistent with the jurisdiction of the water court. Reading the relevant provision in the bylaws, the court held that stockholders were only responsible for legal expenses incurred when requesting a water change. Stockholders were not liable for the legal fees if the board of directors decided to participate in subsequent water court proceedings.

The Company further argued that the circumstances surrounding the adoption of the provision demonstrated the intent to hold stockholders responsible for all expenses associated with a request for a water change. The court noted that extrinsic evidence may be helpful in determining the intent of parties when the adopted bylaw was ambiguous. The court held, however, that the bylaw was unambiguous, and the intent of parties when adopting the provision can not contradict the unambiguous language of the bylaw.

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

*Christopher Hudson*

*In re Tonko*, 154 P.3d 397 (Colo. 2007) (holding that the district court lacked subject matter jurisdiction to determine certain water rights because applications for a change of decreed water rights are within the exclusive jurisdiction of the water courts, and that issue preclusion did not bar action in the water court because the non-

moving party did not have an opportunity to fully and fairly litigate their claimed water rights in previous litigation).

The Tonkos' immediate predecessors-in-interest ("Tonkos") filed a condemnation hearing in the Fremont County District Court to obtain a ditch right-of-way. The district court ruled that it lacked subject matter jurisdiction, and that the District Court for Water Division No. 2 ("water court") had exclusive jurisdiction to determine whether the Tonkos had or could obtain an adjudicated water right. The water court, in granting summary judgment against the Tonkos, held that "the issue of the historic use of the subject water rights" had been litigated adversely to the Tonkos in the district court and could not be re-litigated in the water court. The Colorado Supreme Court ("Court") reviewed the issues of whether the district court lacked subject matter jurisdiction and whether the water court erred in granting summary judgment against the Tonkos based on issue preclusion.

Noting that, per statute, water courts retain exclusive jurisdiction over all water matters, the Court stated that determining what constitutes a water matter "turns on the distinction between the legal right to use of water . . . and the ownership of a water right." The Court found that applications for a change of decreed water rights fall within the exclusive jurisdiction of the water courts. The Court added that the water court may examine documents and evidence in order to determine the decree's setting, intent, meaning, and effect when adjudicating the applicant's water use right.

The Court defined issue preclusion as the doctrine that "the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit." The water court cited issue preclusion as the reason to bar re-litigation because the district court had already determined the issue of historic use of the subject water rights. However, in review, the Court determined that the parties had not fairly and fully litigated the issues presented in the district court. Therefore, the Court held that it was err for the water court to grant summary judgment against the Tonkos.

In its discussion on issue preclusion, the Court examined four elements required to bar re-litigation: identity, privity, final judgment on the merits, and full and fair opportunity to litigate. The Court found the first element, identity, unsatisfied because the district court did not determine the issue of the Tonkos' water use rights raised by the Tonkos' application, which asserted that their water rights derived from their immediate predecessor-in-interest. The second element, privity, was satisfied because the Tonkos were a party in the previous proceeding. The court found the third element, a final judgment on the merits, unsatisfied because the district court entered no final judgment regarding the Tonkos' immediate predecessor-in-interest's water use rights. Finally, the court found the fourth element, a full and fair op-

portunity to litigate, unsatisfied because the issue was not identical to any issue the district court determined. Therefore, the Tonkos were not allowed a full and fair opportunity to litigate that issue because it was never completely presented in previous litigation.

The Supreme Court of Colorado reversed the water court's dismissal of the Tonkos' claim and remanded the case to the water court to determine the issues within its exclusive jurisdiction.

*Christopher Frenz*

**Upper Eagle Reg'l Water Auth. v. Simpson, 167 P.3d 729 (Colo. 2007)** (holding that evidence in the record supported the district court's finding that the proposed decree would not cause injury, and that claim preclusion does not bar an objector from challenging the authority's reliance on a depletion table in its augmentation plan).

The Upper Eagle Regional Water Authority ("Authority") encompasses the Town of Avon and the Metropolitan Districts of Eagle-Vail, Edwards, Arrowhead, Berry Creek, and Beaver Creek. Prior to this action, the Town of Avon annexed the Village at Avon and the metropolitan district responsible for that development dedicated water rights adequate to serve it to the Authority, plus an additional twenty percent for a total of 10.8 acre-feet. In order to ensure that it could use this water for demands of its entire service area, the Authority filed an application for augmentation and exchange. The proposed plan would allow the Authority 10.8 acre-feet of out-of-priority depletions from the Eagle River, so long as the Authority augmented the flow with releases from the Wolford and/or Ruedi Reservoirs. In order to calculate this augmentation, the Authority used a depletion rate table that it developed in 1992 and 1993 using its members' adjudicated augmentation plans ("Original Decrees") from before the Authority's formation. The Original Decrees projected future water demands using predicted irrigation and in-building depletion rates assuming 100% build-out. The Authority relied on the depletion table in two prior cases concerning augmentation plan applications in which the Colorado Water Conservation Board ("CWCB") was a party.

At trial, the District Court, Water Division, approved the proposed decree, finding that the Authority met its burden of showing that the plan would not injure any vested water rights. In addition, the district court found that the CWCB did not produce sufficient evidence to invalidate the Authority's determination based on the depletion table. The CWCB appealed to the Supreme Court of Colorado.

First, the court reviewed the holding to determine whether there was sufficient evidence in the record to support the district court's finding that calculations based on the depletion table proved the absence of injury. In doing so, the court stated that the proponent of the augmentation plan has the initial burden of establishing that the out-