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Upper Eagle Reg'l Water Auth. v. Simpson, 167 P.3d 729 (Colo. 2007)

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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-

of-priority diversion will not cause injury. If the proponent establishes the absence of injury, the burden shifts to the objector to show injury to an existing water right; the court does not require a specific water right, rather proof of injury to senior appropriators is sufficient. If the objector adequately presents contrary evidence based on evidential facts, not potentialities, the burden shifts back to the proponent to show absence of injurious effect.

The court found that adequate evidence in the record supported the district court's finding of injury. The court noted that a provision within the proposed decree, which reserved for the CWCB the right to halt the Authority's operation of the plan if that operation affected the CWCB's instream flow rights, adequately protected the CWCB from injury. Furthermore, the court found that water engineers' testimony as to the reasonableness and adequacy of the depletion table supported the district court's finding that the Authority presented a prima facie case that the out-of-priority diversions would not result in injury. The court also noted that the CWCB did not provide any convincing evidence to contradict the Authority's assertion of no injury.

Second, the court responded to the CWCB's argument that the district court approached the case incorrectly, in that it should have determined the amount and timing of the applicant's depletions and available replacement water before determining injurious effect. The court held that the district court followed the appropriate method of analysis by considering the proposed depletions and augmentation water both in quantity and in time as part of a comprehensive inquiry into whether an injury would result, rather than as an independent inquiry in and of itself.

Additionally, the court responded to the Authority's alternative argument that claim preclusion barred the CWCB from challenging the Authority's use of the depletion table because the CWCB had the opportunity to raise such a challenge in those cases to which it was a party. The court held that due to the unique circumstances of individual augmentation plans, claim preclusion would not have barred the district court from considering the individual circumstances of the proposed plan.

The court affirmed the district court's approval of the proposed decree and held that claim preclusion cannot bar consideration of individual circumstances of augmentation plans.

Ryan Malarky

Vance v. Simpson, No. 2005CW063 (Colo. Water Ct. Div. 7, July 2, 2007) (holding that the diversion of ground water during coal-bed methane extraction requires a water well permit).

William S. Vance, Jr., Elizabeth S. Vance, James G. Fitzgerald, and Mary Theresa Fitzgerald (collectively "the Ranchers") filed suit in the