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Tatum v. People ex rel. Simpson, 122 P.3d 997 (Colo. 2005)

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them, and that the court should modify the judgment to treat them in the same manner as the parties who timely appealed. The court held that this argument failed to address whether an overlying pumper in an over-drafted basin should be required to defend an action to adjudicate groundwater rights. The court provided that the trial court's mistake as to whether the Cardozo appellants had water rights of the type justifying a physical solution did not excuse the Vernolas from defending the litigation. The court further noted that the parties to the litigation were entitled to rely on the finality of a judgment that survived timely filed post-trial motions and appeals. The court established that although no time limit is placed on a motion to vacate the judgment as void, and the judgment was not final as to the parties who appealed, the judgment did become final in July 1996 as to all of the defaulting parties, which included the Vernolas, for purposes of appeal and most post-trial motions. The court affirmed the holding of the Superior court denying the motion to vacate as void the judgment imposing the physical solution.

Robert Stevens

COLORADO

Tatum v. People *ex rel.* Simpson, 122 P.3d 997 (Colo. 2005) (holding the water court did not err in enjoining an irrigation ditch user from violating a statute by failing to maintain a river headgate sufficient to control the inflow of water at the point of diversion).

On July 2, 2003, the Office of the State Engineer ("State Engineer") inspected the headgate to an irrigation ditch called Dolores Duran Ditch ("Ditch") at its point of diversion from the Middle Fork of the Purgatoire River. The State Engineer found that the river headgate was not controlling the water in the Ditch, which permitted Jim Tatum ("Tatum") to divert water in excess of his decreed amount. The State Engineer determined that Tatum was violating a Colorado statute that required him to maintain a suitable and proper headgate sufficient to control the inflow of water into the Ditch at all ordinary stages. Consequently, the State Engineer ordered Tatum to comply by installing a controllable and lockable headgate at the decreed point of diversion or a wastegate and waste ditch above the existing measuring flume. In January 2004, the State Engineer returned to inspect the Ditch and discovered Tatum had failed to comply with the July order.

The State Engineer filed a complaint in the District Court, Water Division Two seeking an injunction to prevent Tatum from continuing to violate the statute. The water court held an evidentiary hearing in which the water commissioner, the division engineer, and the assistant division engineer testified that the headgate was unsuitable for control-

ling the water flowing around it because it was located in a swamp area. The water court found Tatum was in violation of the statute and ordered him to comply with the order or breach a hole in the Ditch to allow all diverted water to return to the Purgatoire River. Tatum appealed to the Colorado Supreme Court, asserting that the water court erred in finding him in violation of the statute.

The court ruled that the water court's findings were supported by the record, which clearly indicated that although a headgate was present at the point of diversion, it failed to control the inflow of water at all ordinary stages. Accordingly, the court found Tatum was in violation of the statute.

The Colorado Supreme Court affirmed the water court's order.

Stacy Hochman

Colorado Water Conservation Board v. City of Central, 125 P.3d 424 (Colo. 2005) (holding the Colorado General Assembly intended that the Colorado Water Conservation Board be entitled to impose terms and conditions to protect a junior instream flow right from injury under a plan for augmentation or a plan for augmentation including an exchange).

The City of Central, Colorado sought approval of a change of water rights, approval of a plan for augmentation, and an adjudication of an appropriative right of substitution and exchange. The plan would replace water from Central's existing points of diversion and three new points of diversion with water from the Farmers Highline Canal and the Wanamaker Ditch. The Colorado Water Conservation Board ("Board") owns 1.5 c.f.s. of instream flow right with a 1987 priority date. This instream flow right is located on North Clear Creek, downstream from Central's proposed points of diversion, but upstream of Central's proposed replacement sources. Thus, Central's plan would reduce the amount of water available to satisfy the Board's instream flow.

To protect its North Clear Creek instream flow water right from injury under Central's plan, the Board filed a Statement of Opposition with the District Court, Water Division No. 1, seeking protective terms and conditions. It was undisputed that Central's proposed exchange of certain water rights was subordinate to the Board's instream flow right. However, three of Central's existing decreed water rights are senior to the Board's instream right, creating the issue whether Central's plan for augmentation was required to protect the Board's junior instream flow right from injury. The water court concluded there was no such requirement under Colorado law and the Board appealed the issue directly to the Colorado Supreme Court.

The court examined the plain language of Colo. Rev. Stat. § 37-90-305, which provides the injury standards for judicial approval of a