

1-1-2006

Colorado Water Conservation Board v. City of Central, 125 P.3d 424 (Colo. 2005)

Noah Klug

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



Part of the [Law Commons](#)

Custom Citation

Noah Klug, Court Report, Colorado Water Conservation Board v. City of Central, 125 P.3d 424 (Colo. 2005), 9 U. Denv. Water L. Rev. 656 (2006).

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, dig-commons@du.edu.

Colorado Water Conservation Board v. City of Central, 125 P.3d 424 (Colo. 2005)

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

change of water right or plan of augmentation. The statute requires the Board to obtain a priority date for its appropriations, and subjects these rights to the priority system. Under the accepted rules applicable to adjudication of water rights, a senior in the hierarchy can always make a diversion for its decreed beneficial uses unaffected by junior instream flow rights. Thus, adherence to these rules would allow Central to implement its plan without interference by the Board.

The court focused on the legislative intent behind the statute. After discussing the statutory history, the court concluded that the General Assembly's intent was to preserve and protect the natural environment by maintaining instream flow. The General Assembly vested the Board with the power to preserve the natural environment by appropriating levels of minimum stream flows. Because the Board did not gain its appropriative right until the statute was adopted in 1973, the Board's water rights are usually relatively junior in the hierarchy of users. The court observed that if these rights were subordinated to senior rights such as Central's, the Board's date of priority would be of little value in protecting instream resources. Absent an ability to assert injury against a senior water right, instream flows could be eliminated by a change of water right or a plan for augmentation. To forestall this result contrary to the legislative purpose, the court held that the water court's decree approving Central's augmentation plan required protective terms and conditions in favor of the Board. In so deciding, the court set the Board's rights apart from typical water rights that gain their value from their place in the hierarchy of users who possess rights to water from the same sources.

The court found justification for its holding in the general rule that a senior water right adapting to a new or enlarged use through a change of water right proceeding may do so only if it does not injure senior or junior users. This so-called noninjury requirement derives from the longstanding tenet of water law that a junior appropriator is entitled to expect that stream conditions existing at the time of appropriation will be maintained. The court had previously held, in the context of water exchanges, that a junior instream flow right may resist all proposed changes in time, place, or use of water from a source which in any way materially injures or adversely affects the decreed minimum flow in the absence of adequate protective conditions in the change of water right or augmentation decree. The court here expanded this general rule beyond water exchanges to include augmentations, finding support in precedent holding that the injury standard is the same for changes of water rights and augmentation plans. Thus, the court reversed the water court in favor of the Board and remanded for a determination of rights consistent with the opinion.

Noah Klug