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City of Black Hawk v. City of Central, No. 03SA295, 2004 Colo. LEXIS 691 (Colo. Sept. 13, 2004)

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the District's decision only restricted SNG's use of the water to uses that did not require a distribution system.

SNG contended that, because the District did not adopt all findings before voting on SNG's application, the vote was invalid as a matter of law. However, SNG had raised this argument in a previous action and that court found the District acted within the District's rules. Invoking the doctrine of collateral estoppel, the court refused to allow SNG to re-litigate the issue.

SNG claimed insufficient evidence supported the District's findings. The court first reviewed evidence on the question of whether the proposed distribution system would create or exacerbate an overdraft condition. The court determined the evidence showed that pumping would exceed replenishment and create an overdraft condition. Furthermore, the court reasoned this condition would reverse the gradient allowing seawater to mix with groundwater causing an unacceptable degradation of groundwater quality. The court held that, while there was evidence showing there might not be an overdraft, the District reasonably concluded otherwise. There was also evidence SNG did not satisfy the California Environmental Quality Act because SNG changed its proposal after filing the required Environmental Impact Report ("EIR"). Due to the overdraft risk and the inaccuracy of the EIR, the court held the District proceeded properly.

Finally, SNG asserted an inverse condemnation claim for the deprivation of the right to use its property and a claim alleging a violation of SNG's right to substantive due process. The court concluded these claims were not ripe for adjudication because the District, in denying SNG's proposal, had not reached a "final definitive position" regarding all uses of SNG's property. The court thus affirmed the trial court's decision on all counts.

Mark Terzaghi Howe

COLORADO

City of Black Hawk v. City of Central, No. 03SA295, 2004 Colo. LEXIS 691 (Colo. Sept. 13, 2004) (holding the water court did not err in finding Black Hawk satisfied the can and will statute where a nonbinding, general resolution by Central City did not serve as a final denial of access to the reservoir site, and where Central City's expert testimony that the requisite enlargement of the reservoir would be technically challenging and financially burdensome was insufficient to defeat Black Hawk's evidence that the project was technically feasible).

Black Hawk and Central City, two adjacent municipalities in Colorado located within the mountains of Gilpin County and the South Platte River Basin, receive and depend upon water from Chase Gulch Reservoir ("the Reservoir"). The Reservoir had a storage capacity of 602 acre-feet of water. Central City owned the property underlying the

Reservoir and had 580 acre-feet of conditional water storage rights in the Reservoir. Central City's conditional storage decree was senior in priority to Black Hawk's conditional storage decree.

In 1992, Black Hawk applied for 600 acre-feet conditional water storage rights in the Reservoir, which would have necessitated an enlargement of the existing reservoir. Just nine days prior to trial, Central City's city council passed a resolution barring Central City from entering into any agreement allowing a third party to "use real estate interests to construct other water projects not filed for adjudication by Central." Although other opposing parties eventually settled with Black Hawk, at trial, Central City objected to Black Hawk's application. The District Court heard the case and, at the trial's conclusion, awarded Black Hawk 600 acre-feet of conditional water storage rights in the Reservoir.

Central City appealed to the Supreme Court of Colorado, and it considered, in relevant part, whether the water court erred in finding Black Hawk satisfied the requirements of the "can and will" statute, Colorado Revised Statute section 37-92-305(9)(b) (2003). The court began its analysis by noting its standard of review mandated great deference to the water court's findings. The court then explained, an applicant with a conditional water right must participate in diligence proceedings to demonstrate he or she has taken the necessary steps to put the waters covered by the right to beneficial use. The court further stated, under the can and will statute, a court may not award a conditional water storage right unless the applicant can show "the waters can and will be stored and beneficially used and the project can and will be completed with diligence and within a reasonable time." The court acknowledged an applicant must prove these factors by a substantial probability, but added such a standard would necessarily entail "imperfect predictions of future events and conditions." Thus, the court clarified it would not impose the can and will statute's requirements rigidly if an applicant otherwise met the legal standard of "establishing a non-speculative intent to appropriate for beneficial use." Under this framework, Central City proffered two arguments to convince the court the water court erred in finding Black Hawk met the requirements of the can and will statute.

Specifically, Central City first argued Black Hawk did not satisfy the can and will statute because it failed to prove it had a present right to access the Reservoir. The court stated it was appropriate to consider an applicant's present right or prospective ability to access a reservoir site in order to determine if an applicant could complete a project. However, the court clarified, access only constitutes one factor, not a clear determination as to whether the applicant passed the can and will test because contingencies within a water application do not automatically defeat the test. Central City argued precedent dictated Black Hawk failed this prong of the can and will test because Central City

adopted a resolution prohibiting third party agreements to construct water storage facilities on city property. Central City contended the resolution effectively denied Black Hawk access to the property underlying its proposed conditional water storage right in the Reservoir. The court disagreed and easily distinguished the earlier cases based on the concept of finality: those cases involved private entity applicants and final denials of access to state or federal property. Especially in light of the fact that Central City waited until nine days before trial to pass the resolution in question, the court observed, unlike the previous cases, Central City's resolution was nonbinding, general in nature, and did not even refer to Black Hawk or the Reservoir; thus, it did not qualify as a final denial of access. Therefore, with deference to the water court's findings that Black Hawk satisfied all other requirements of the can and will statute, the court concluded the water court did not err in finding Black Hawk fulfilled the access requirement of the can and will statute adequately.

Second, Central City contended Black Hawk did not satisfy the can and will statute because it failed to prove enlarging the reservoir was technically feasible. The court stated it was appropriate for the water court to consider technical feasibility to determine if an applicant fulfilled the can and will test. Central City asserted Black Hawk's desired enlargement of the Reservoir was not technically feasible based upon Central City's expert who testified the Reservoir's capacity for water storage was 1,117 acre-feet, and Black Hawk's enlargement exceeded that limit by eighty-eight acre-feet. Hence, Central City's expert characterized Black Hawk's enlargement as technically challenging and financially burdensome. However, Black Hawk's expert testified the proposed enlargement of the Reservoir was technically feasible. The court examined the expert testimony and concluded the trial court did not err in finding Black Hawk presented sufficient evidence of technical feasibility to satisfy the requirements of the can and will statute.

Thus, the Supreme Court of Colorado affirmed the water court's decision and remanded the case for further consistent proceedings.

Jessica L. Grether

In re the Application for Water Rights of United States, No. 03SA321, 2004 WL 2496684 (Colo. Nov. 8, 2004) (holding the state water court's grant of a motion for stay pending resolution of a federal court proceeding was not an abuse of discretion where the federal claims would not affect the water court's ability to quantify the federal reserved water right; and the McCarran Amendment did not allow a state court to evaluate or adjudicate federal administrative law claims at issue in a federal case).

This case presented a challenge to a Colorado Water Court decision that granted a stay of the quantification proceeding for the Black