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## In re the Application for Water Rights of United States, No. 03SA321, 2004 WL 2496684 (Colo. Nov. 8, 2004)

Elizabeth Frost

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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

Canyon in response to a motion by numerous environmental groups ("environmental groups"). Various private and public Colorado entities ("Colorado entities") challenged the stay as an abdication of the water court's jurisdiction. The Colorado Supreme Court decided this case pursuant to its original jurisdiction to review the water court for an abuse of discretion.

In 1933, when President Hoover designated the Black Canyon as a national monument, the United States acquired rights to water from the Gunnison River through the reserved rights doctrine. The reserved rights doctrine entitled the United States to the quantity of water from the Gunnison River necessary to satisfy the purposes for which Hoover reserved the Black Canyon. Because these water rights vested at the time of reservation, the federal government could assert the rights at any time without abandonment or loss of priority. In 1978 the water court issued an interlocutory decree awarding the United States absolute and conditional water rights for the Black Canyon.

In January 2001, the United States filed an application to quantify its conditional water rights. Over 380 parties filed statements opposing the application. The water court granted a stay of proceedings so the United States could discuss settlements with opposing parties. The environmental groups, however, did not have a chance to participate in the negotiations. On April 2, 2003 the United States and the State of Colorado entered into a settlement agreement whereby the United States released its reserved right and claimed a lower year round base flow. The United States also filed a motion to amend its quantification application and filed a proposed amended application with the water court.

On August 5, 2003 the environmental groups filed a complaint in the United States District Court for the District of Colorado against the United States Department of the Interior, the National Park Service, and the heads of both agencies. The environmental groups alleged the United States violated provisions of federal law through decisions regarding the protection and management of the Black Canyon Water Resources. The district court denied the United States' motion to dismiss and clarified that the district court retained jurisdiction to determine whether the agencies maintained their duty to protect the Black Canyon's resources under the judicial review provisions of the Administrative Procedure Act ("APA"). The district court also explained it would not decide "the exact amount of water necessary to fulfill the Park's purpose."

The environmental groups filed a written motion to the water court, requesting the court stay the quantification proceeding until the district court resolved the federal litigation, which the water court granted. The Colorado entities challenged the stay, claiming the water court's order staying the quantification proceeding constituted an "abdication of [the water court's] jurisdiction and responsibility to deter-

mine issues regarding quantification of the federal reserved water right.” The Colorado entities also argued the stay irreparably prejudiced their ability to litigate the merits of the case.

The primary issue the court examined was whether the McCarran Amendment’s (“the Amendment”) waiver of sovereign immunity allowed a state court to evaluate and adjudicate the federal agencies’ decisions regarding the quantification application. The court explained the Amendment allowed state courts to involuntarily join the United States as a necessary party in comprehensive water rights adjudications. The court stated, despite the fact that Congress intended the Amendment proceedings to be all-inclusive; Congress limited the waiver of sovereign immunity to proceedings that determined or administered rights to the use of water. The court concluded the Amendment did not suggest a state court should have jurisdiction to review federal agency decisions for compliance with federal law. The court supported this position by noting that the APA’s language demonstrated Congress intended to hold administrative agencies answerable for their conduct only in federal courts.

Hence, the court concluded the Amendment did not provide a waiver of sovereign immunity broad enough to allow the water court to evaluate or adjudicate the federal agencies’ decision-making processes that led the United States to make the water applications. The court determined the federal district court was the only court that could decide the environmental groups’ claims, and the parties could not reach a final resolution regarding the United States’ reserved water rights for the Black Canyon without both state and federal proceedings. Specifically, the federal court needed to determine whether the United States’ amended application complied with federal law and the water court needed to quantify the water right.

Next, the court determined whether the water court abused its discretion by staying the state proceedings and allowing the federal court to resolve federal issues first. The court explained it would uphold the stay if the balance of prejudices and interests of the parties justified the delay. As a framework to consider the relevant facts and circumstances, the court used the federal factors from *Adolph Coors Co. v. Davenport Mach. & Foundry Co.*: (1) the order in which the courts obtained jurisdiction, (2) the adequacy of relief the state court could provide, (3) comity, and (4) the need for comprehensive adjudication and the coinciding desire to avoid piecemeal litigation.

The court reasoned that although the water court obtained jurisdiction before the federal court, the two actions would not resolve the same issue and the federal court had sole authority to resolve the federal claim. Hence, the order of jurisdiction did not convince the court the water court abused its discretion.

The court determined that consideration of the relief available to the parties favored the water court’s award of a stay. The court ex-

plained that if the water court entered a decree and the federal court subsequently determined the United States violated federal law by amending its application, the doctrine of res judicata would prevent the United States from reopening the reserved water rights adjudication. When the court considered the "avoidable potential for conflict between state and federal courts," it determined that comity favored the stay.

Finally, the court determined that since the federal court had exclusive jurisdiction over the federal claims, the Amendment's goal of avoiding piecemeal litigation and achieving comprehensive adjudication did not apply to warrant lifting the stay. Balancing competing interests, the court stated the Colorado entities would not suffer as much prejudice from the stay as the environmental groups would suffer if the water court refused to grant the stay, because the Colorado entities were able to intervene in the federal case, but the environmental groups were not able to participate in the settlement negotiations.

The court found the district court retained exclusive jurisdiction over the environmental groups' federal claims and the district court's resolution of those claims could require the United States to claim a broader reserved water right for the Black Canyon. Accordingly, the court held that the water court acted within its discretion by staying its proceedings until the district court resolves the federal litigation. Additionally, the court noted the balance of prejudices and competing interests favored upholding the stay.

Justice Hobbs dissented, concluding the water court abused discretion by granting the stay. The dissent stated the court should vacate the stay order, and provided the following four supporting arguments. First, the dissent argued the federal court did not have exclusive jurisdiction over the federal claims and the Amendment favored federal courts to defer jurisdiction to state courts. Second, the dissent argued the stay would deprive the federal courts of the water court's "comprehensive view of the interaction of all federal and state water rights on the Gunnison River." Third, the dissent argued that the law favored settlements in proceedings like this where state and federal parties own rights to waters of the same stream. Finally, the dissent argued that by upholding the stay, the majority underemphasized the harm the stay causes to the State of Colorado and its water users by delaying finality. In summary, the court upheld the stay and remanded the case back to the water court.

*Elizabeth Frost*

**WRWC, LLC v. City of Arvada, No. 02CV1622, 2004 Colo. App. LEXIS 1360 (Colo. Ct. App. July 29, 2004)** (holding that a groundwater right, by itself, does not convey the right to use an easement appurtenant to the land the water underlies).