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## City of Thornton v. City of Denver, 44 P.3d 1019 (Colo. 2002)

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City of Thornton v. City of Denver, 44 P.3d 1019 (Colo. 2002)

Golden from watering more than 225 acres or applying more than 900 af to lawn irrigation.

*Alan Curtis*

**City of Thornton v. City of Denver, 44 P.3d 1019 (Colo. 2002)** (the water court erred in refusing to hold a hearing or extend the period of retained jurisdiction over the City and County of Denver's plan of augmentation when the operation of the plan created a cognizable issue of injury to the City of Thornton's senior water rights due to a change in water quality).

In May 2000, the City of Thornton ("Thornton") timely petitioned the District Court, Water Division 1 to invoke its retained jurisdiction, claiming that recent operation of the City of Denver's ("Denver") augmentation plan increased pollution at Thornton's diversion structure and therefore made normal use of the water for municipal use unsuitable. Thornton asked the water court to extend the period for retained jurisdiction until Denver and Thornton resolved another dispute involving Denver's use of Bi-City effluent. Denver presented the argument that only the Water Quality Control Commission ("WQCC") under the Water Quality Control Act ("WQCA") could determine injury as a result of quality and the water court had to limit their analysis to quantity issues. The water court accepted Denver's argument and refused to extend the period of retained jurisdiction upon a finding that a better understanding of the detrimental water quality effects was not the type of injury the general assembly intended the retained jurisdiction statute to address. Furthermore, the water court decided that controversies in the water court required final resolution, and to allow jurisdiction to be retained based upon the outcome of a subsequent dispute would frustrate this requirement.

Thornton appealed the water court's decision to the Colorado Supreme Court on the issue of whether the water court erred in deciding to not retain jurisdiction over the Denver augmentation plan as a result of Thornton's claim of injury due to water quality. The court reversed the water court's decision and remanded the case back to the water court.

In 1991, Denver sought an augmentation plan ("Plan") to offset out-of-priority depletions caused by the diversion of South Platte River water to irrigate Overland Park golf course. This augmentation plan proposed to substitute Denver's Bi-City ("Bi-City") treated effluent for the out-of-priority South Platte River diversions.

Thornton and other water users on the South Platte filed statements of opposition to the augmentation plan application filed with the water court. The other water users stipulated out of the controversy, however, Thornton remained in the case because of their

concerns over the quality of water discharged from Bi-City and the subsequent increase in pollutants at their diversion point downstream of the discharge. In March 1993, Thornton and Denver agreed to the terms and conditions for the augmentation plan and in May 1993 the water court entered a decree granting Denver's augmentation plan. The water court entered this decree upon an initial finding of no injury, however, upon requests from both Denver and Thornton and pursuant to Colorado Revised Statutes section 37-92-304(6) decided to retain jurisdiction over the plan's operation.

The Colorado Supreme Court affirmed Colorado law that augmentation plans can only be approved by the water court if the augmentation plan's terms and conditions are sufficient to mitigate injury (either in quantity or quality) to senior appropriators. The court also determined that the law in Colorado allowed the water court to retain jurisdiction to temporarily reserve their final determination of injury to senior appropriators as the result of augmentation plan operation due to uncertainties. This allowance was predicated upon the water court's initial finding of no injury as a result of the operation of the augmentation plan to senior appropriators. The court noted that typically this analysis in Colorado centered on quantity concerns (discrepancies in time, place and amount) instead of quality concerns.

The court further determined that the Water Right Determination and Administration Act ("WRDAA") and precedential case law established that the prior appropriation doctrine prohibits the discharge of pollutants into streams where doing so makes the water unusable for the normal uses of senior appropriators. In short, the court determined that pollution was prohibited if it caused injury to senior appropriators. It concluded that the WQCA clearly expresses intent by the General Assembly to prevent water pollution and refers to the need to protect beneficial uses of water through the WQCC adoption of guidelines. Furthermore, the court resolved that the WQCA expressly reserves the determination of injury to senior appropriators to the water courts. Additionally, it found that the WRDAA requires that only the water court approve augmentation plans that will not injuriously affect the rights of a senior appropriator. The court concluded that both the WQCA and the WRDAA guarantee the right of a senior appropriator to a substitute water supply suitable for their normal use of water prior to the implementation of the augmentation plan.

Applying this analysis to the facts of this case, the court concluded that the water court erred in not extending the retained jurisdiction period, or in the alternative, holding a hearing on Thornton's claim of injury. The court determined that the actual operation of Denver's Plan created a cognizable issue of injury due to water quality not anticipated by Thornton at the time of the initial decree. Further, the

court decided that the stipulation initially agreed to by Thornton on the suitability of the Plan did not preclude the water court from reconsidering this injury.

*William H. Fronczak*

**Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002)** (holding proposal to artificially recharge ground water aquifers that underlie various landowners property would not result in a trespass claim, require consent, or require condemnation with compensation to the landowners).

Park County Sportsman's Ranch ("PCSR") filed an application for a conditional water right, plan for augmentation and exchange ("applications") involving the extraction and subsequent recharge of water into the South Park formation for augmentation, storage and beneficial uses with District Court, Water Division 1. Park County Board of County Commissioners, James B. Gardner, and Amanda Woodbury ("Landowners") in Park County objected to the PCSR applications and also filed for declaratory judgment relief in Park County District Court claiming that the placement of water in storage above or below the surface of their land absent their consent constituted a trespass pursuant to the *cujus* doctrine—to whomever the soil belongs, he owns also to the sky and the depths. The water court received the declaratory judgment motion from the district court *vis-à-vis* a change of venue and denied the action. The water court stated that the landowners had not alleged that PCSR's proposal invaded or compromised the use, benefit, or enjoyment of their properties in any way. Furthermore, the water court determined that recharge activities involving the movement of ground water underlying the landowner's property did not constitute a trespass and that PCSR was not required to obtain consent from the landowners or condemnation and payment of compensation. Upon request from the landowners, the water court ruled in favor of PCSR and the landowners appealed that ruling to the Colorado Supreme Court on the issues of whether: (1) the appeal was not rendered moot by subsequent decision of water court denying PCSR's application for a conditional decree; (2) the landowners have a property right under the *cujus* doctrine to require that PCSR obtain their consent before recharging aquifer; and (3) PCSR is required under the Colorado Constitution or state statutes to seek consent of landowners or pay landowners just compensation.

The court initially determined the action on appeal was not moot because resolution of property issues affecting water rights are proper for the water court to determine, and PCSR's applications were predicated upon resolution of these issues.

Regarding the landowners' trespass claim, the court determined