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Applications of Thomas H. Bradbury, et al. for a Determination of Rights to Withdraw Designated Ground Water Pursuant to CRS § 37-90-107(7)

COLORADO WATER RIGHTS APPLICATIONS

ARAPAHOE DISTRICT COURT

APPLICATIONS OF THOMAS H. BRADBURY, ET AL. FOR A DETERMINATION OF RIGHTS TO WITHDRAW DESIGNATED GROUND WATER PURSUANT TO CRS § 37-90-107(7). Case No. 2001CV1652 (Arapahoe District Court, June 27, 2001). Applicant: Thomas H. Bradbury, et al. (Atty. Hill and Robbins, P.C.)

1. Applications

On October 27, 1998, Thomas H. Bradbury, et al. ("Applicant") submitted forty applications to the Colorado Groundwater Commission ("Commission") to appropriate all the Denver Basin groundwater underlying approximately 19,650 acres within the Kiowa-Bijou designated groundwater basin. These applications sought the maximum amount of groundwater from the Denver, Arapahoe and Laramie-Fox Hills aquifers underlying fourteen separate parcels of land within Adams and Arapahoe counties. The first application, associated with a land area of 7553 acres within Adams County, sought the maximum amount of Laramie-Fox Hills groundwater, which is approximately 158,600 acre-feet. The remaining thirty-nine applications sought, in various combinations, the maximum amount of Denver, Arapahoe and Laramie-Fox Hills groundwater underlying thirteen separate parcels of land, and consisting of approximately 12,097 acres within Arapahoe county. The total quantity of groundwater underlying the thirteen parcels was calculated to be 547,100 acre-feet. The first application was published pursuant to Colo. Rev. Stat. §§ 37-90-107(7) and 37-90-112 on November 4 and November 11, 1999, after the Commission Staff gave the application favorable consideration. However, due to complications and the inability of the Commission staff to give favorable consideration, the remaining applications were not published until March 30, and April 6, 2000.

2. Opposition

The North Kiowa-Bijou Groundwater Management District ("District") objected to the first application on November 5, 1999. The District asserted seven claims against this application. These claims were: (1) the subject matter of the application was within the District boundaries and was in violation of the District rules and regulations; (2) the applications, notice, and procedure of the

commission staff were improper and not in conformity with the statutes, rules and regulations of the District; (3) granting these applications would adversely affect the right of the appropriators, ground water users and taxpayers within the District; (4) the Applicant's claim of ownership and control of groundwater underlying the property was specifically denied and any such claim was contrary to state law and the state constitution; (5) the Applicant's claim of beneficial use was speculative; (6) any attempt to determine the maximum allowable annual amount of groundwater would be speculative; and (7) Colo. Rev. Stat. § 37-90-107(7), and the designated basin rules are unconstitutional. On April 30, 2000, after the publication on March 30, and April 6, 2000, the District objected to the remaining thirty-nine applications associated with the thirteen parcels of land within Arapahoe county asserting the same objections as above.

3. Commission Actions

The Commission assigned these applications to its hearing officer to conduct a hearing on the fourteen separate publications (forty applications). On May 31, 2000, the hearing officer, upon agreement from all the parties, consolidated all fourteen publications into one case and then assigned case number 99GW15 (A-N consolidated). Prior to the hearing, the Applicant filed a motion for summary judgment on three issues: (1) Colo. Rev. Stat. § 37-90-107(7) is constitutional; (2) the applications were properly filed with the Commission and not with the District; and (3) the anti-speculation doctrine did not apply to the Denver Basin aquifers within the designated basins. The District also filed a pre-trial motion requesting that the hearing officer strike the Commission staff's responses and prohibit the Commission staff from participating in the hearing. On December 4, 2000, the hearing officer granted the Applicant's first two issues, stating that Colo. Rev. Stat. § 37-90-107(7) was constitutional, and that the applications in this case were properly before the Commission. The hearing officer denied the Applicant's third issue, stating that the anti-speculation doctrine applies within the Denver Basin aquifers in the designated groundwater basins, and that the facts were still in dispute over whether these applications were speculative. Finally, the hearing officer denied the District's motion to strike the Commission staff's responses, and denied the request to prohibit the Commission staff from participating in the hearing.

On January 16, 2001, a hearing was held over the only remaining issue, whether these applications were speculative. On February 1, 2001, the hearing officer, after listening to testimony and reviewing all the evidence, issued Findings of Fact, Conclusions of Law and an Initial Order of the Commission. The Initial Order stated that the applications in this case were not speculative, and that the determination of water rights may be issued.

On March 2, 2001, the District appealed the hearing officer's initial decision to the Commission. On May 29, 2001, the Commission,

after oral argument and review of the hearing officer's initial decision at their regularly scheduled meeting on May 18, 2001, upheld the hearing officer's initial decision, which constituted a final agency action. In their Order, the Commission determined they do not have authority to pass on the constitutionality of state statutes, that the applications were properly before the Commission and not the District, and that the applications in this case were not speculative.

4. District Court Proceedings

On June 27, 2001, the District filed a complaint and appeal of the Commission's decision to Arapahoe District Court. In its complaint, the District claimed that the Commission's decision was: (1) arbitrary and capricious; (2) denied them of a statutory right; (3) was contrary to the Colorado Constitution; (4) in excess of its statutory jurisdiction and authority as against the jurisdiction and authority of the District; (5) not in accordance with procedures, procedural limitations, and due process as required by law; (6) based upon findings of fact that were clearly erroneous on the record and unsupported by substantial evidence when the record is considered as a whole; and (7) was contrary to law.

On July 2, 2001, the Applicant filed a motion to dismiss in part, stating that the Arapahoe District Court did not have jurisdiction over a part of these water right applications because some of them were located in Adams County. The basis of this motion was the provisions of Colo. Rev. Stat. § 37-90-115(1)(a), which require the District to make an appeal to the district court in the county where the water rights or wells are located. On August 17, 2001, the Applicant filed a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to CRCP 12(b), or in the alternative, a motion for summary judgment pursuant to CRCP 56 for the following determinations: (1) Colo. Rev. Stat. § 37-90-107(7) is constitutional; (2) the applicable law did not require determination of water right applications to be submitted to the District prior to the Commission; and (3) that determination of water right applications were not subject to the anti-speculation doctrine.

On July 19, 2001, the Commission also filed a motion pursuant to CRCP 12(b). The Commission's motion was based upon the fact that the District was asking the court to review the record under the Colorado Administrative Procedure Act, when Colo. Rev. Stat. § 37-90-115(1)(b)(III) requires that the district court conduct a *de novo* review. On July 19, 2001, the Commission filed an alternative motion for a more definite statement pursuant to CRCP 12(e). In this motion, the Commission asked the court to require that the District provide definiteness and particularity to the averments listed in the District's complaint.

On July 27, 2001, the District filed a motion to strike the Commission's motions and responses, and for a default judgment against the Commission. The basis of the District's motion was that the specific attorney general representing the Commission staff

throughout the Commission's proceedings was now the Commission's attorney in the action in district court.

On August 15, 2001, the Arapahoe District Court granted the Applicant's motion to dismiss in part, stating that they had no jurisdiction under § 37-90-115(1)(a) to review rights to designated groundwater in Adams county. Also on August 15, 2001, the Arapahoe District Court denied the District's motion to strike the Commission's motions and responses, and denied both the Applicant's and Commission's motions to dismiss. However, on August 15, 2001, the Arapahoe District Court granted the Commission's motion for a more definite statement. On August 16, 2001, the Arapahoe District Court granted partial summary judgment to the issues requested by the Applicant. The Arapahoe District Court found that Colo. Rev. Stat. § 37-90-107(7) is constitutional and that the legislature has plenary authority to enact legislation for the management and control of designated groundwater. Furthermore the Arapahoe District Court ordered that the since Colo. Rev. Stat. § 37-90-107(7) is constitutional, the statute clearly indicates that the applications must be made to the Commission, and that there is no statutory authority supporting the claim that the applications first be submitted to the District. The Arapahoe District Court also denied the Applicant's motion claiming that the anti-speculation doctrine does not apply to determination of water right applications within the designated groundwater basins. Finally, the Arapahoe District Court ordered that the anti-speculation doctrine applies to Denver Basin groundwater within the designated groundwater basins.

On August 21, 2001, the District filed an amended complaint and on September 10, 2001, the Commission filed its answer to the original complaint and the amended complaint. Currently, motion has been made to the Arapahoe District Court to vacate all aforementioned orders because of lack of jurisdiction. This new motion is based upon the reading of Colo. Rev. Stat. § 37-90-115, which states that all designated groundwater issues shall be heard by the designated groundwater judge as appointed by the Colorado Supreme Court, not the Arapahoe District Court judge. The Arapahoe District Court is still reviewing this motion as of the writing of this case summary.

William H. Fronczak

WATER COURT DIVISION 1

AMENDMENT TO THE APPLICATION FOR UNDERGROUND WATER RIGHT FROM THE LOWER DAWSON AQUIFER IN THE DENVER BASIN. Case No. 98CW377 (Water Division 1, May 31, 2001). Applicant: City and County of Denver (Atty. Michael D. Shimmin, Vranesh & Raisch, LLP).