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Bd. of County Comm'rs v. Crystal Creek Homeowners' Ass'n, 14 P.3d 325 (Colo. 2000)

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for purchase only exists with a corresponding contract for sale from the County, and whether the transferee or transferor actually applied for the use of the conveyance system was not important.

Second, the court of appeals rejected the City's argument that the conveyance facility contemplated in the statute included only aqueducts and canals, and not local distribution systems. The court stated the legislature would have specifically excluded local distribution systems from the statute if that was the legislature's intent. The court ruled the City had no duty to allow the School District to use the City storage facility for any period longer than the incidental use time necessary to convey the water.

Third, the court of appeals rejected the City's argument that the statute should not be enforced because the School District's use did not promote the statute's conservation purpose. The court stated the statute did not indicate conservation was the statute's only purpose. Therefore, the School District's purpose of reducing cost was acceptable.

Finally, the court of appeals rejected the City's argument that allowing the School District's use of the water conveyance system violated section 1810(d) of the Water Code. Section 1810 did not allow use of the water conveyance facility if the use caused legal injury to other legal users. The City argued the agreement violated this provision, because injury would occur to other legal users due to the increases in the City's water prices if the School District did not purchase its water from the City. The court rejected this argument stating an increased water prices was not the type of injury the legislature intended to prevent.

The court remanded the case with the instruction that the trial court order the City to produce the information listed in section 1812, including the amount and availability of the conveyance facility's unused capacity and the terms and conditions of the facility's use.

Tiffany Turner

COLORADO

Bd. of County Comm'rs v. Crystal Creek Homeowners' Ass'n, 14 P.3d 325 (Colo. 2000) (holding that the Gunnison River, located in the Aspinall Unit, did not contain sufficient water for Arapahoe County to meet the "can and will" requirement of a conditional water right decree).

The Board of County Commissioners of Arapahoe County ("Arapahoe") applied for a decree for a conditional water right. The District Court, Water Division No. 4, denied Arapahoe's application,

first at trial, and again on remand. The court found that the Gunnison River, located in the Aspinall Unit, did not have enough water to support Arapahoe's proposed project. The court dictated that the United States both had an absolute decree for the Aspinall Unit and had always put the full amount of water to beneficial use. Because the United States had an absolute decree to this water, the court concluded that Arapahoe failed to satisfy the "can and will" requirement of a conditional decree. Arapahoe raised six issues on appeal.

First, Arapahoe contended that because the Colorado Supreme Court remanded the case to the water court, the water court should not have used the "can and will" doctrine. Arapahoe contended that the remand must have meant the Colorado Supreme Court required the water court to find more water available than it found in the first trial. Subsequent to the remand, the Colorado Supreme Court found that the water court's findings were acceptable since the remand only set standards for the water court and did not mandate any particular findings.

Arapahoe's second issue concerned the Colorado River Storage Project Act ("CRSPA"). Arapahoe divided the issue into three parts. First, Arapahoe argued that CRSPA did not preclude its requested appropriation because Congress intended the CRSPA to assist the Upper Basin in meeting its compact obligations, without regard to the Aspinall Unit decrees. The court found that Congress clearly intended the CRSPA to include the water in the Aspinall Unit, thereby making water unavailable to Arapahoe for appropriation and nullifying a "can and will" analysis.

Second, Arapahoe claimed that the Aspinall unit's operations could not stop in-state users from developing water resources. The Aspinall Unit's operations included hydropower, flood control, and fish, wildlife, and recreational uses. Arapahoe contended that according to the CRSPA, Congress intended hydropower to be an incidental use subordinate to in-state beneficial uses. The court found that since the United States had an absolute decree to the Aspinall Unit, such decree allowed power generation. Moreover, Colorado law defined hydropower as a legitimate beneficial use. Accordingly, Arapahoe could not claim any of the water used for hydropower for its project. Additionally, Arapahoe argued that CRSPA section 620f stated that the Aspinall Unit could not impair upstream junior appropriation for domestic or agricultural uses. The court countered that when read in full, such section clearly applied only to interstate compact entitlements protecting allocations. The court found that the water court was correct in considering the Aspinall Unit's hydroelectric water rights when determining what water was available for Arapahoe's project. In addition, the court found that both flood control and fish, wildlife, and recreational resources were legitimate beneficial uses. Also, the 1968 Colorado River Basin Act authorized

fish, wildlife, and recreation as a legitimate purpose for the Aspinall Unit. Because hydropower, flood control, and fish, wildlife, and recreational uses were clearly beneficial uses, the court deemed the water court's finding that the water in the Aspinall Unit was unavailable for appropriation to Arapahoe to meet the "can and will" requirement as proper.

The third portion of Arapahoe's argument related to the CRSPA involved a subordination agreement and marketable pool analysis. Arapahoe first argued that a subordination agreement created an additional 60,000 acre-feet of water available for appropriation. Second, Arapahoe contended the Bureau of Reclamation's ("BUREC") admission that an additional 240,000 acre-feet could be available through reengineering meant that BUREC was not putting that amount of water to beneficial use. Therefore, such water was available for appropriation and could be used to meet the "can and will" requirement. The court found that the subordination agreement was selective in that only users within the basin could use the 60,000 acre-feet. Consequently, Arapahoe could not use that water to meet its requirement. Furthermore, although Arapahoe could not claim any of the 240,000 acre-feet in the marketable pool for appropriation, it could contract with BUREC to obtain some. However, the court found that the marketable pool water could not be included in the "can and will" analysis either.

The third issue Arapahoe raised concerned whether the water court had correctly determined the amount of water Taylor Park Reservoir used. The court found that Arapahoe had previously litigated this issue, and the water court's conclusions were correct. Accordingly, the doctrines of collateral estoppel and res judicata prevented Arapahoe from relitigating this claim. Hence, the original finding stood.

Arapahoe's fourth contention was that it should not have to satisfy the "can and will" doctrine in order to obtain a conditional right for a pumping plant still requiring a permit. Since Arapahoe provided little evidence that it could acquire the permit, the court upheld the water court's decision that Arapahoe did not meet the requirements of the "can and will" doctrine.

The court found Arapahoe's fifth claim concerning eminent domain moot. In addition, the court also found a stipulation agreement brought up on cross appeal moot. Arapahoe's sixth claim concerned expert witness testimony.

Rebekah King

Mun. Subdist., N. Colo. Water Conservancy Dist. v. Getty Oil Exploration Co., 997 P.2d 557 (Colo. 2000) (holding (1) Getty's application was not void due to expiration of the statute of limitations; (2) Getty's activities were sufficient to support the water court's finding of reasonable diligence; and (3) the water court properly applied the