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Concerning the Application for Water Rights of the City of Golden

and the Handy Ditch Company.

The Thompson Valley Water Users Association ("Association") filed a Statement of Opposition on December 24, 2001 concerned that the rights sought in Koolstra's application may injure the rights of Association members and other water users. Additionally, the objector proposed that any decree, if entered, contain appropriate provisions for the release of all water stored out-of-priority. The Association also requested that strict proof be required as to the amount of evaporative loss and out-of-priority depletions, and that the reasonable administration of applicant's augmentation plan meet the requirements of strict proof; resulting in remediation of any injury caused by applicant's out-of-priority diversions. Lastly, the Association asked that the amount of consumptive use claimed in applicant's Handy Ditch shares be substantiated.

On December 28, 2001, the State Engineer filed a Statement of Opposition requesting that Koolstra: (1) quantify the historical and consumptive use of the water right and provide terms and conditions for dry-up of irrigated acreage; (2) maintain the historic flow regime; (3) prove ownership of other entitlements to use the structure claimed; (4) provide adequate engineering to verify claims made in the application, including timing and location of historic return flows and how claimed replacement sources will match the historic flow regime; and (5) allow for development of adequate account and other conditions to prevent injury to vested water rights.

The day of the State Engineer's filing, the Handy Ditch Company advanced a similar objection, asserting that members of the Handy Ditch Company along the Big Thompson River and its tributaries may be adversely affected if the application is granted. Further, the Handy Ditch Company asserted the requirements that Koolstra's (1) use of the water should remain subject to operational control of the Handy Ditch Company; and (2) should be limited in accordance with the water rights' historical use, including a requirement that return flows reasonably approximate historic return flow in amount, location and timing.

Each Statement of Opposition included the right to raise additional objections or otherwise amend their Statements of Opposition as more information becomes available.

Kiowa K. Engwis

CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE CITY OF GOLDEN, Case No. 98CW448 (Division 1 Water Court, June 2001).

Applicant: City of Golden (Attys. Glenn E. Porzak & Steven J. Bushong, Porzak, Bronwning & Johnson, LLC.)

1. Applications

On December 30, 1998, the City of Golden ("Golden") submitted an application to the Division 1 Water Court ("water court") for water

required for a championship white water course ("course") on Clear Creek in Jefferson County. Golden is proposing to design, construct and install eight dam structures and flow deflectors for the purpose of controlling and concentrating the flow of Clear Creek to allow boating (including kayaking, rafting and canoeing), piscatorial, and general recreational beneficial uses. As part of the application, Golden claims the following amounts of water per month on an absolute ("A") and conditional ("C") basis: January 101 cubic feet per second ("cfs") A, February 75 cfs A, March 96 cfs A, April 255 cfs A, May 836 cfs A and 164 cfs C, June 992 cfs A and 8 cfs C, July 768 cfs A and 232 cfs C, August 559 cfs A, September 251 cfs A, October 143 cfs A, November 103 A, December 128 cfs A.

In addition, Golden also applied for water rights associated with ten additional structures to be added to the course for the same beneficial uses. The amounts of water claimed per month for this extension are: January 101 cfs C, February 75 cfs C, March 96 cfs C, April 255 cfs C, May 1000 cfs C, June 1000 cfs C, July 1000 cfs C, August 559 cfs C, September 251 cfs C, October 143 cfs C, November 103 C, December 128 cfs C.

After submission of the application, Golden amended this application by dropping their claim on the first structure in the course and amending their claimed appropriations for the months of January, February, March and December on both the existing and additional courses to 70 cfs per month absolute.

2. Opposition

Statements of Opposition were filed by the following parties: Colorado Water Conservation Board ("CWCB"), the State Engineer ("SEO"), Coors Brewing Company ("Coors"), Town of Idaho Springs ("Idaho Springs"), City of Arvada ("Arvada"), Board and County Commissioners of the County of Clear Creek ("Clear Creek Board"), Clear Creek Skiing Corporation, City of Westminster ("Westminster"), and Town of Georgetown ("Georgetown").

Before trial, Arvada, Idaho Springs, and Coors all withdrew their statements of opposition. Additionally, the Clear Creek Board, Clear Creek Skiing Corporation, Westminster, and Georgetown entered into stipulations with Golden and, thus, withdrew from the case. Westminster stipulated that their primary diversion was downstream of Golden's last proposed diversion structure. In the other three stipulations, Golden agreed to subordinate up to 41 cfs of the course water rights for the benefit of the upstream objectors.

Therefore, the CWCB and the SEO remained as the only objectors to the application. The CWCB argued against the application because the application's purpose was similar in nature to an instream flow right. The SEO opposition disputes: (1) whether the water rights sought had been applied to beneficial use in the amount and at the time claimed; (2) the conditional water rights are sought in amounts and times that cannot be placed to beneficial use; (3) the application

is not capable of administration; and (4) the application seeks in-stream uses inconsistent with the Colorado Supreme Court Ruling in *Thornton v. City of Fort Collins*.

3. *Water Court Proceedings*

In March 2001, the water court held a hearing on Golden's application. The water court determined the amount of water diverted and controlled by the existing structures within the course were both reasonable and in conformance with *Thornton*. Unrebutted testimony and evidence indicated the design capacity of the diversion structures supported the claimed diversion amounts, and the diversion structures controlled, concentrated and directed the flow of the water through the course constituting a diversion as required under C.R.S. § 37-92-103(7).

The water court stated recreational use is a recognized beneficial use within Colorado. The water court determined most of the water claimed by Golden was put to beneficial use, and the conditional portions of the existing course can and will be diverted in a reasonable amount of time. Evidence indicated this course is economically beneficial to Golden, and boaters of all skill levels at the claimed flow rates can use the course. However, the water court determined that Golden was only entitled to an absolute decree for those flow rates that have been put to beneficial use by the boaters. Insufficient data was provided to support that all the diversions within the course were put to beneficial use. Therefore, the water court reduced Golden's absolute water right claims, while increasing their conditional water right claims. Furthermore, the court also made a distinction between daytime, nighttime uses of the course, and determined nighttime uses were still in the planning stages and should be considered conditional.

The water court also ruled on two additional points raised by the SEO and the CWCB. First, the court determined Golden had no intent to export water outside Colorado. Undisputed evidence indicated major industrial, municipal and agricultural diversions existed downstream of Golden, which would use and reuse this water up to seven times before the water exited the state at the Nebraska/Colorado state line. Finally, the water court determined, pursuant to the *Board of County Commissioners and Aspen Wilderness Workshop v. Colo. Water Conservation Board* decisions, Golden's constitutional right to appropriate new water in accordance with Colorado law may not be denied or limited due to public policy.

William H. Fronczak