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## Colorado Supreme Court Prevents Collateral Attack on Previously Litigated Change of Use Decrees

# COLORADO SUPREME COURT PREVENTS COLLATERAL ATTACK ON PREVIOUSLY LITIGATED CHANGE OF USE DECREES

R. WOODRUFF CURRAN AND PAUL J. ZILIS<sup>‡</sup>

## I. INTRODUCTION

As Colorado's population has grown during the past century, the need for more water in municipalities has caused many water suppliers to purchase irrigation water rights with early priority dates and change the use of those rights to municipal uses. Most watersheds are overappropriated for much of the year, and municipalities must be aggressive in both obtaining and protecting their water rights. In *Farmers High Line Canal & Reservoir Co. v. City of Golden*,<sup>1</sup> a case recently decided by the Colorado Supreme Court ("Supreme Court"), several water suppliers brought an action in water court to protect their water rights from injury due to alleged overuse of a senior, upstream water user under change of use decrees entered during the 1960s. The *Farmers Highline* decision narrows the range of issues that can be raised regarding previously litigated change of use decrees, particularly those based upon assertions that decrees which do not include volumetric limitations must be governed by implied limitations.

## II. BACKGROUND

A basic tenet of Colorado water law, commonly referred to as the "no injury" rule, is that the vested rights of other appropriators cannot be injured when a water right is changed. The terms and conditions included in change of use decrees to prevent such injury have evolved over the years as engineering practices and technologies have improved. In change of use cases litigated before the 1970s, applicants were typically required to protect junior water rights by abandoning some of their water rights to the stream, thereby limiting the use of the changed water rights to their historic consumptive use. Decrees

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1. No. 97SA343, 1999 WL 167671 at \*1 (Colo. Mar. 29, 1999) (to be reported at 975 P.2d 189).

approving changes of water rights typically included flow limitations, use limitations, and abandonment requirements.

Improved engineering and technology have afforded the water courts more precision in applying the "no injury" rule. Change decrees now typically include detailed volumetric limits scientifically based on the historic consumptive use. Furthermore, volumetric limits have been implied into some older decrees for change of use in order to prevent enlarged uses of the changed water rights.<sup>2</sup> However, change in use decrees awarded without the accuracy of these improved determinations may be exposed to litigation where juniors assert expanded use.

### III. *FARMERS HIGHLINE CANAL & RESERVOIR CO. V. CITY OF GOLDEN*

In *Farmers Highline*, Farmers High Line Canal and Reservoir Company, Farmers Reservoir and Irrigation Company, and the cities of Westminster, Thornton, and Arvada ("the Plaintiffs") filed a complaint in water court against the City of Golden ("Golden") alleging that Golden was using more water than its decrees permitted. The decrees in question were court-approved consent decrees entered in two change of use cases during the early 1960s.

#### A. ISSUES PRESENTED

The case raised two issues: (1) under what circumstances are implied limitations applicable to previously litigated decrees not containing volumetric limits; and (2) does claim or issue preclusion protect such a change of use decree from the addition of implied volumetric limitations years after a decree has been entered.

#### B. BACKGROUND AND PROCEDURAL HISTORY

The decrees at issue in this case were based on a senior water right known as Clear Creek Priority 12 ("Priority 12"), originally decreed in a general adjudication in October 1884 with an appropriation date of May 1861. In 1957, Golden approached two owners of Priority 12 water and offered to buy a portion of their water rights.<sup>3</sup> The owners applied to the water court to change the decreed uses of their portion of the Priority 12 water right from irrigation to municipal use. In the water court, Golden's water engineer, W.W. Wheeler, testified that Golden could receive 2.86 cubic feet per second ("cfs") without injuring junior water rights.<sup>4</sup> The water court denied the application ruling Golden had failed to present sufficient evidence to support a showing that juniors would not suffer injury.<sup>5</sup> The Supreme Court reversed on the ground that the trial court was required to assist in the

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2. See *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1226 (Colo. 1988).

3. *Farmers Highline*, 1999 WL 167671, at \*2.

4. *Id.* at \*3.

5. *Id.*

development of a decree which would protect junior water rights holders.<sup>6</sup>

The parties to that case ultimately developed a consent decree that the water court approved in 1961.<sup>7</sup> While the decree contained no express volumetric limitations, it included terms and conditions intended to protect junior water rights. The decree required Golden to dry up the lands previously irrigated with the transferred water and limited Golden's actual use of 2.86 cfs of Priority 12 water by two requirements: (1) 0.84 cfs of the transferred water had to be abandoned to the stream; and (2) the diversions had to be limited to the irrigation months of May to October.<sup>8</sup>

Golden's other decree at issue in this case, a consent decree approved in 1964, contained the same terms as the 1961 decree and covered Golden's purchase of 1.8 cfs of additional Priority 12 water rights from another party. The same water engineer prepared an engineering study that formed the basis for these terms.<sup>9</sup>

While no volumetric limits were developed during the 1960s litigation or negotiations, Golden did quantify its use of Priority 12 water while opposing another water application in 1993.<sup>10</sup> Consolidated Mutual ("Con Mutual"), another owner of Priority 12 water rights, applied in 1992 to change the use of 2.5855 cfs of Priority 12 water from agricultural to municipal use. Golden opposed Con Mutual's application arguing that Con Mutual's change of use would injure Golden's portion of the Priority 12 water right unless the resulting decree included a volumetric limitation. In determining what that limit should be, Golden's water engineer provided testimony regarding the historic consumptive use of Priority 12 water by both Golden and Con Mutual based on the 1960s testimony and documentation of W.W. Wheeler. The water court adopted the calculations and volumetric limits asserted by Golden in Con Mutual's decree in that case.<sup>11</sup>

### C. THE CURRENT CASE

The Plaintiffs in this action alleged that Golden was acting outside the authority of its change of use decrees by exceeding the volumetric limits that should be implied, by changing the timing of its diversions, and by changing the extent of its lawn irrigation. The Plaintiffs' primary argument was that volumetric limits are implied as a matter of law in all decrees. The Plaintiffs also asserted that Golden had quantified a limit during the 1993 Con Mutual litigation and should

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6. *Mannon v. Farmers' High Line Canal & Reservoir Co.*, 360 P.2d 417, 423 (1961) (stating "[t]he trial court . . . is required to do more than passively hear the evidence; it has an active role in the administration of valuable and vital rights . . .").

7. *Farmers Highline*, 1999 WL 167671, at \*3.

8. *Id.*

9. *Id.* at \*4.

10. *Id.*

11. *Id.* at \*4-5.

therefore be either judicially estopped or prevented by claim preclusion from arguing that volumetric limits are not applicable to its decrees.<sup>12</sup>

Additionally, the Plaintiffs asserted two factually based claims: (1) that Golden had enlarged its use by altering the use patterns of its Priority 12 water from a supplemental supply during summer months to a year-round, base supply; and (2) that Golden had increased the percentage of Priority 12 water being used to irrigate lawns, thereby undermining the analysis relied upon in the issuance of the 1960s decrees.

The Plaintiffs argued that the Supreme Court's decision in *Orr v. Arapahoe Water & Sanitation District*,<sup>13</sup> required incorporating volumetric limits into Golden's 1960s decrees.<sup>14</sup> Golden defended its decrees on the basis that claim and issue preclusion prevented re-litigation of the 1960s decrees.<sup>15</sup> Although the water court initially denied Golden's motion for summary judgment on this issue, it ruled after a trial that the Plaintiffs could not attack the terms of the previous decrees. The water court distinguished *Orr* on the grounds that its holding applies only to decrees arising from cases in which the issue of historic consumptive use was not litigated.<sup>16</sup>

The Supreme Court affirmed the water court's ruling. In highlighting the role that claim and issue preclusion often play in water rights litigation, the Supreme Court resolved some of the tension between the preclusive effect of final decrees and the need to allow claims of injury to be litigated based upon subsequent enlarged uses of water.

The Supreme Court held that the request to add volumetric limitations to Golden's 1960s change of use decrees was properly dismissed by the water court as an issue previously litigated and determined.<sup>17</sup> The Supreme Court held that the water court properly limited the *Orr* decision to change of use proceedings in which no quantification of historic use was litigated. During the proceedings that led to the entry of decrees for Golden's change of water rights, expert analysis formed the basis for the decrees. The decrees also included flow limitations and season of use limitations. Finally, the amount of water abandoned to the stream was based on the expert witness' analysis of historic return flows. In a case where historic use has been litigated, the determination of historic use is final, and subsequent litigation of the issue is precluded.

The Plaintiffs also argued that issue preclusion and judicial estoppel prevented Golden from denying the existence of volumetric limitations on the two disputed decrees. Issue preclusion was asserted

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12. *Id.* at \*5.

13. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d at 1217 (Colo. 1988).

14. *See id.* at 1226.

15. *Farmers High Line*, 1999 WL 167671, at \*6.

16. *Id.* at \*7.

17. *Id.* at \*12.

on the basis of testimony given by Golden's expert witness during the 1993 Con Mutual litigation. Since testimony in that action appeared to limit Golden's claim under the 1960s decrees to specific volumetric amounts, the Plaintiffs argued that actual litigation of that issue in 1993 should preclude Golden from arguing otherwise in subsequent litigation. The Supreme Court held that the 1960s decrees were final and unassailable on the issue of implied limitations in later proceedings. Evidence from the 1993 litigation could not achieve indirectly that which would not be allowed directly in this case.

Additionally, the Supreme Court held that judicial estoppel was inappropriate because Golden had not taken truly contradictory positions in the same or related litigation.<sup>18</sup> Judicial estoppel prevents a prevailing party from adopting a new legal position in the same or related litigation which conflicts with an earlier successful position.<sup>19</sup> Additionally, the Supreme Court ruled that Golden did not receive a benefit as a result of the position it took in the 1993 litigation, another condition required for the doctrine to apply. Golden was not bound by their expert testimony in the 1993 litigation because Golden's legal position throughout that action was that no volumetric limits apply to Golden's 1960s decrees for its Priority 12 water rights.

The Plaintiffs were successful in arguing however, that factual allegations of enlarged use since the entry of the 1960s consent decrees could not be dismissed on the basis of issue or claim preclusion.<sup>20</sup> The Supreme Court held that the claims of enlarged water use which were based on claims of changed circumstances or changes in operating procedures by Golden were not precluded by the 1960s decrees as argued by Golden. Golden was not permitted to enlarge the use of its decreed rights and then use the 1960s decrees as a bar to the Plaintiffs' claims of injury based on that enlarged use. Since expanded municipal uses could not have been litigated during those earlier proceedings, those claims were correctly heard by the water court.<sup>21</sup>

Ultimately, however, the Supreme Court found sufficient evidence in the record to sustain the water court's ruling that Golden generally had not changed its pattern of diversions in such a manner as to cause injury to the Plaintiffs. The only issue remanded to the water court was whether Golden had enlarged its use by increasing the percentage of Priority 12 water used to irrigate lawns. The water court had not expressly ruled on that issue, so the Supreme Court deemed a factual determination necessary before complete conclusion of the case.

#### IV. IMPLICATIONS OF THE CASE

This decision has further defined the extent to which previous

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18. *Id.* at \*13.

19. *Id.*

20. *Id.* at \*14.

21. *Id.* at \*15.

change of use decrees can be attacked. Water rights have been repeatedly transferred and the uses of those water rights have changed throughout this century. In all likelihood, most change of use decrees entered before the 1970s do not contain the implied limitations required by the *Orr* decision. This recent decision makes clear that not every change of use decree lacking a volumetric limitation is vulnerable to attack, although holders of such rights are still required to ensure that they do not provide grounds for future litigation by changing or enlarging the uses they make of such water.