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## Farmers High Line Canal & Reservoir Co. v. City of Golden, No. 97SA343, slip op. at 1 (Colo. Mar. 29, 1999)

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legislation might not disturb any vested substantive rights by retroactively changing the law that applies to already completed events.

Since Arizona follows the prior appropriation doctrine, it is impermissible for subsequent legislation to change the legal effect of acts that resulted in acquisition and priority of water rights. Thus, any implementation of the retroactive intent to affect vested substantive rights to water creates a due process violation. The court listed the specific statutes in question and declared them invalid due to their potential alteration of past events.

The second issue pertaining to House Bill 2276 was whether these provisions also violated the separation of powers doctrine. This issue addressed the invalidation of statutes pertaining to *de minimis* use, on-farm water duties, maximum capacity rules, settlement agreements, prior filing presumptions, the role of the Arizona Department of Water Resources, changes regarding the special master, and public trust. The court held some of the provisions violative of separation of powers. An equal protection question also arose within this analysis; however, the court held that none of the statutes in question violated equal protection principles.

The court then analyzed House Bill 2193. It recognized that the previous analyses applied to many of these statutes, thereby invalidating them. The court then decided to strike down the statutes in their entirety, and let the Legislature decide whether to reenact the provisions that satisfied constitutional requirements.

*Melinda B. Barton*

## COLORADO

**Farmers High Line Canal & Reservoir Co. v. City of Golden**, No. 97SA343, slip op. at 1 (Colo. Mar. 29, 1999) (holding that volumetric limitations will not be implied as a matter of law upon an earlier change in use decree, fully litigated as to its terms and conditions).

The City of Golden ("Golden") applied for a change in use of its decreed Priority 12 water rights in Clear Creek to use the water for municipal purposes. In September 1995, several junior appropriators in Clear Creek filed objections to the application, asserting injury to their vested rights because Golden had expanded its water use beyond the scope decreed.

The Clear Creek Priority 12 water right, initially decreed in October 1884, carried an appropriation date of May 1861. The City of Golden, appellee, and Consolidated Mutual Ditch Company ("Consolidated Mutual") are the majority holders of Priority 12 rights.

Appellants own Clear Creek water rights junior to Priority 12. The water court decreed Golden's share of Priority 12 water in two 1960's proceedings. These decrees expressly quantified Golden's Priority 12 rights based on historic consumptive use. They gave Golden the right to annually divert water up to 4.66 cubic feet per second ("c.f.s."), from May through October. The water court required Golden to abandon part of its flow entitlement to protect junior users. The Colorado Supreme Court decided the existence of express flow limitations in the 1960's change decrees precluded appellants' claim. Thus, courts may not read acre-foot volumetric limitations into Golden's Priority 12 decrees, as a matter of law.

Courts traditionally quantified Colorado water rights using a two-part measurement. First, the court determined the rate of flow measured in cubic feet per second. Second, the court adjusted that amount, if necessary, to account for historic consumption and the proposed use. The court used this method to determine the Georgetown's 1960's decrees. Since the passage of the 1969 Water Rights Determination and Administration Act, Colorado has been firmly committed to the idea of using volumetric limitations in over-appropriated basins. Clear Creek is such a basin. In modern change decrees, the court generally imposed an acre-foot limitation on the amount of water it allowed an appropriator yearly. Appellants here urged the court to impose such an acre-foot volumetric limitation on Golden. They argued that Golden's water engineer, Gary Thompson, had already implied this measurement in a 1993 case involving Consolidated Mutual.

The first change decree proceeding began in 1957 when Golden approached James Mannon and William Vaughn, the then owners of the Priority 12 rights, seeking to purchase them. Before sale, the owners had the courts change their decree by changing uses from irrigation to municipal. At the hearing, Golden's expert water engineer, W.W. Wheeler, testified that the change in use would not harm junior right holders. Golden would balance its municipal use to consume an equivalent amount as that used for irrigation. Wheeler determined that transferring 2.86 cubic feet per second to Golden would not injure junior users. The water court denied Mannon and Vaughn's petition. On appeal the Colorado Supreme Court reversed and remanded the case to the water court to determine whether a change decree with limiting conditions would prevent injury to juniors. In 1961, before the case was re-heard, the parties entered into a court-approved consent decree. The consent decree limited Golden's maximum annual diversion to 2.86 cubic feet per second. The court imposed three conditions for approval including the removal of Mannon and Vaughn's land from irrigation, the abandonment back to Clear Creek of .84 c.f.s., and a diversion limitation allowing use between May and October.

Golden's second Priority 12 decree arose out of a 1964 purchase of 1.8 c.f.s. from then owners Mauz and Thuet. The second decree also involved a change in use from agricultural irrigation to municipal

consumption. Again W.W. Wheeler determined that transferring 1.8 c.f.s. to Golden for municipal use would not injure junior Clear Creek appropriators. The 1964 decree contained similar conditions as the 1961 decree, including limiting Golden's diversions to the period of May through October each year. Importantly, neither of these 1960's decrees involved an acre-foot volumetric limitation on Golden's annual consumption.

In 1993, Consolidated Mutual applied to change the use of its Priority 12 rights, from agricultural to municipal use. Golden objected arguing the change in use would injure Golden's Priority 12 rights unless the court imposed volumetric limitations on Consolidated Mutual's decree. By computing the average total consumptive use of Priority 12 water at 411 acre-feet, and subtracting the amount allocated Golden in the 1960's decrees, Gary Thompson arrived at an acre-foot volumetric limitation on Consolidated Mutual's share of Priority 12. In determining Consolidated Mutual's share of Priority 12, Thompson implied Golden's remaining acre-foot share. Thompson determined Consolidated Mutual's share of Priority 12 was 124 acre-feet per year, and by implication set Golden's share of Priority 12 at 287 acre-feet per year. It is this implied volumetric limitation of Golden's share of Priority 12 that appellants sought to have the court read into Golden's current change of use application. The water court imposed Thompson's 124 acre-feet per year volumetric limitation on Consolidated Mutual's decree of Priority 12 in approving its change in use application.

The current litigation began in 1995 when appellants filed claims in District Court, Water Division No. 1, against Golden alleging the city had infringed on their junior rights by expanding its water use beyond that decreed in the 1960's proceedings. Appellants brought three claims against Golden. First, due to the 1993 Consolidated Mutual litigation and Gary Thompson's findings, these had established a 287 acre-feet per year volumetric limitation of Golden's Priority 12 rights. Additionally, Golden's use had exceeded its 287 acre-feet per year amount, injuring junior Clear Creek appropriators. Appellants argued the court should read this limitation into Golden's 1960's decrees as a matter of law. Second, appellants contended that Golden had impermissibly expanded its use by changing its use pattern from peak flow use to base flow use. Peak flow rights satisfy municipal demand during the summer months, while base flow rights satisfy municipal demand outside of the summer months. Finally, appellants alleged Golden had impermissibly enlarged its use by increasing the lawn acreage it irrigated with Priority 12 water.

In response, Golden filed a motion to dismiss. The city claimed the court should bar, under claim preclusion, the modification requested by appellants, to establish a volumetric limitation for each of Golden's 1960's decrees of Priority 12 use. The appellants filed a cross-motion for partial summary judgment arguing issue preclusion and judicial estoppel relating to the Consolidated Mutual litigation and a 1994 report Golden filed with the State Water Commissioner

regarding its water transfers for that year. Its 1994 transfers exceeded Wheeler and Thompson's estimates of historic consumptive use under the 1960's decrees. The water court denied both motions.

The water court reasoned that, after interpreting *Orr v. Arapahoe Water & Sanitation District*, appellants' claims were permissible as they were not previously litigated and asserted injury resulting from Golden's expanded use. The water court determined that the 1960's decrees conferred the right to change the point of diversion, and to change the use to municipal uses, but that the decrees included an implied volumetric limitation preventing Golden from expanding the historical consumption of its Priority 12 rights. In denying appellants' cross-motion for summary judgment, the water court found that Gary Thompson's testimony in the Consolidated Mutual litigation did not judicially estop Golden from arguing against modifying its prior decrees to reflect volumetric limitations. The water court did not address the appellants issue preclusion argument.

The trial began in May 1997. Expert testimony covered all three of the appellants' claims of injury. The water court reversed its 1996 holding that Golden's change decrees were subject to implied volumetric limitations. Contrary to its initial interpretation of *Orr*—that decrees are subject to implied volumetric limitations as a matter of law—the court instead decided *Orr* requires courts "imply volumetric limitations in decrees when historical consumptive use was *not* at issue in an earlier proceeding." Because the parties already litigated both the historic consumptive use and the future municipal consumptive use associated with Golden's Priority 12 rights in the 1960's change decree proceedings, the water court could not imply volumetric limitations into those decrees. The court also rejected appellants' attempts to bind Golden to Thompson's 1993 testimony with issue preclusion and judicial estoppel.

Regarding the appellants' second claim of injury resulting from Golden's changing its pattern of use from peak flow to base flow, the court agreed with Thompson that there had been no change in Golden's pattern of use in forty years. The court made no finding regarding the third injury asserted by the appellants. They claimed injury from Golden's increasing the total lawn acreage irrigated with Priority 12 water. Appellants appealed the decision to the Colorado Supreme Court.

The supreme court agreed with the water court and barred the appellants' request that the court read the implied volumetric limitations into the express terms of Golden's 1960's decrees under claim preclusion. Affirming the water court's analysis of *Orr*, the supreme court found that implied volumetric limitations were developed to prevent injury to juniors when a prior change decree did not address or contemplate the question of historic consumptive use. The court also found support from its decision in *In re Application for Water Rights of Midway Ranches Property Owners Ass'n*, about the preclusive effect of a prior quantification of historical consumptive use on a subsequent augmentation plan. The court thus denied

appellants' claim under *Orr*, as Golden's 1960's decrees addressed the historic consumptive use of Priority 12 water. The supreme court rejected appellants' motion for partial summary judgment on issue preclusion grounds.

The court decided that the appellants' second and third claims of injury were not precluded, and addressed each. The appellants' second claim was that Golden had expanded its use beyond the c.f.s. limitations decreed in the 1960s by changing its pattern of use from a peak flow to a base flow. The court accepted the water court's factual conclusions as sufficiently supported by the record. The water court had relied on and accepted Gary Thompson's testimony that Golden had not changed its pattern of use in forty years. As the water court failed to address the appellants' third claim, regarding the increase in law acreage irrigated by Golden's Priority 12 water, the supreme court remanded the issue for determination of the validity of the claim.

*Chip Cutler*

***In re Title, Ballot Title, & Submission Clause v. Brandon*, 960 P.2d 672 (Colo. 1998)** (holding that in setting the title for a proposed statutory amendment, the initiative title setting board did not abuse its discretion by omitting the definition of the term "nonexempt well," and that the fiscal impact statement which did not specify which "taxpayers" a possible refund provision would effect did not mislead voters).

The Title Initiative Setting Board ("Board") fixed a title, ballot title and submission clause, and summary for a proposed statutory amendment. The amendment called for the installation of water meters by the state engineer on all wells in the unconfined aquifer in Water Division 3, which were not exempt pursuant to Colorado Revised Statutes § 37-92-601 and § 37-92-602. The initiative summary included a fiscal impact statement ("Impact Statement") which outlined the costs associated with the proposed amendment. The Impact Statement indicated that due to state spending limits, the state might have to refund some fee revenues generated by the initiative to taxpayers.

Registered voters petitioned the court to review the action taken by the Board claiming that the titles and summary misled the electorate because the Board failed to (i) properly define the term "non-exempt" well; and (ii) specify which taxpayers might be entitled to a tax refund, and therefore abused its discretion.

The court explained that the scope of review in such a case is limited to ensuring that the title, ballot title and submission clause, and summary fairly reflect the proposed initiative in a way that does