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## Water District No. 1 v. Mission Hills Country Club, 960 P.2d 239 (Kan. 1998)

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function of annexation; and (3) whether the 1998 Order properly interpreted the 1995 Order to grant all the area outside the exclusive service of Centerville to Warner Robins.

The Supreme Court of Georgia held: (1) the 1995 Order was properly treated as a consent judgment; (2) the superior court did not usurp control over a legislative function; and (3) the superior court properly interpreted the 1995 Order to designate to Warner Robins all the area outside the exclusive service area of Centerville.

First, the court recognized that the original 1995 consent order resulted from an affirmative act of the parties, rather than the judgment of the court following litigation of the issues. The court noted that a consent judgment is a voluntary stipulation by the parties entered into in order to resolve a dispute. The 1995 Order was the culmination of settlement efforts of Centerville and Warner Robins in determining service areas. Thus, the superior court properly characterized the 1995 Order as a consent judgment.

In deciding the second issue, the court recognized that the power of annexation is a legislative function, not subject to control by the judiciary. However, the superior court did not attempt to usurp control over this function, it merely enforced the 1995 Order. In the 1995 Order, Centerville agreed not to seek annexation of property within the Warner Robins service area. Thus, the superior court merely sought to enforce that agreement.

Finally, the court noted that the 1995 Order failed to clearly describe the Warner Robins service area in the same detail as it described the Centerville service area. However, the superior court properly used the general rules of contract construction in referring to the record in order to construe the ambiguity. The record clearly indicated the intent of the parties to designate to Warner Robins all the area outside of Centerville's exclusive service area. Thus, the superior court properly interpreted the 1995 Order.

*Candace Deen*

## **KANSAS**

**Water District No. 1 v. Mission Hills Country Club, 960 P.2d 239 (Kan. 1998)** (holding water district had an exclusive right under the Water District Act to provide pressurized treated water by pipeline within the district's boundaries and that this exclusive right did not violate the Commerce Clause).

A privately owned Kansas Water Company ("KWC") obtained its water supply from Kansas City, Missouri. In 1990, Water District No. 1 ("District"), pursuant to the Kansas Water District Act ("Act"), voluntarily annexed the area served by KWC. Therefore, Mission Hills

Country Club ("Club") became subject to the District's service area.

In 1994, the District developed a new rate structure to enhance its water supply facilities and distributions, due to the large requirements of the Club. As a result, the Club's water bill increased dramatically. To combat the increased rate, the Club sought alternative means of water distribution and entered into a lower priced purchase agreement with the water department of Kansas City, Missouri. The Club intended to construct a private pipeline to transport the water for its greens and fairways.

The Club notified the District of the agreement and the District objected on the grounds that it had an exclusive right to supply treated water to citizens within its boundaries. The Club informed the District of its intent to disregard the rule and the District brought suit to enjoin the Club from obtaining an alternative water source.

The issues before the Supreme Court of Kansas were: (1) whether the District had an exclusive right under the Water District Act to provide treated water by pipeline within the District's boundaries; and (2) whether this exclusive right violated the Commerce Clause. The supreme court answered the former in the affirmative and the latter in the negative.

The supreme court recognized that exclusivity in municipal services has received judicial endorsement in Kansas. The legislature reasoned that two water districts could not serve a territory at the same time by adopting McQuillin Municipal Corporations §7.08: "[I]ntolerable confusion instead of good government would obtain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally."

The court also focused on the phrase "supply and distribution system" used throughout the Act in rendering its decision. A Kansas statute, § 19-3509, provides that "the water district board shall . . . have the exclusive control of the water supply and distribution facilities . . . ." The control of water supply and distribution prohibited any other person or entity from controlling the supply and distribution of water. Thus, the court concluded, the Club could not use a pipeline to bring treated water into the District's boundaries.

The Club argued that, in Kansas, utility customers are not normally precluded from obtaining their own supply of heat, light or water for private use. The court stated that the Club misconstrued the statute it was asserting and that it only applied to the first part of the statute concerning telephones, telegraphs or conveyance of oil and gas.

The Club also argued, pursuant to statute, that if a city grants a franchise to furnish water services that the franchise cannot be exclusive. However, the court stated that the legislature granted the District exclusive power. As the municipality involved, the District was a "quasi-municipal body corporate with the power of eminent domain." Furthermore, the court reasoned that the Kansas Constitution does not prohibit municipalities from granting exclusive franchises.

In supporting its claim that the District's exclusive right violated the Commerce Clause, the Club relied on *C & A Carbone, Inc. v. Clarkstown*. In *Carbone*, the United States Supreme Court held that an ordinance violated the Commerce Clause because it required all in-county possessors of trash to use a specific transfer station, thus depriving in-state and/or out-of-state processors of waste processing and disposal business. The Kansas Supreme Court distinguished this case from *Carbone* in that the District, itself, performs the entire piped pressurized water production and delivery operation within its boundaries; thus, it provided a municipal service.

The supreme court also relied on *U.S.A. Recycling, Inc. v. Town of Babylon*. The court applied the reasoning in *U.S.A.* and held that in creating the District, Kansas had not favored in-state water producers over out-of-state competitors nor had it hindered business from competing against a group of local proprietors. Based on this reasoning, the supreme court found the market participant exception inapplicable. The State of Kansas eliminated the market for piped water when it created the District, which, in turn, fulfilled a governmental duty. Therefore, no market existed due to the exclusive nature of the municipal services. Furthermore, the District did not impose any burdens on interstate commerce and arguably, the benefits of the municipal services would outweigh any burdens that may have been placed on interstate commerce.

*Anna Litaker*

## MAINE

**Dorey v. Spicer, 715 A.2d 182 (Me. 1998)** (holding that the owner of downstream property had no flowage rights relative to upstream dam when: (1) he did not own lot on which dam was located; (2) the easement he relied upon, created by conveyance of half-interest in the sawmill, was extinguished when gristmill owner gave back that interest to sawmill owner; (3) any appurtenant easement, created by the Mills Act, was incapable of existence separate from the land containing the dam).

Peter M. Dorey ("Dorey") the downstream owner of property along Gristmill Brook ("Brook"), which originated from Foster Pond ("Pond"), filed an action naming as defendants forty-four owners of waterfront property on the Pond. Dorey sought a declaration of his rights to operate the Pond dam, inclusive of a right to flood the waterfront land of the Pond. Dorey also sought an injunction stopping any defendants from interfering with those rights. Dorey used the connection between the original dam and the current surrounding land rights as a basis for his claim.