

DISTRICT COURT, WATER DIVISION 2, PUEBLO COUNTY, COLORADO 320 WEST 10TH STREET PUEBLO, COLORADO 81003	EFILED Document – District Court 1998CW80 CO Pueblo County District Court 10th JD Filing Date: Jun 7 2011 11:54AM MDT Filing ID: 38003171 Review Clerk: N/A
CONCERNING THE APPLICATION FOR WATER RIGHT FOR CHEROKEE METROPOLITAN DISTRICT IN EL PASO COUNTY, COLORADO	Case Number: 98CW80
ORDER	

THIS MATTER is before the Court on Upper Black Squirrel Creek Ground Water Management District's (UBS) Motion for Declaratory Judgment Regarding Previous Stipulation of the Parties Entered in This Case No. 98CW80. UBS is represented by Lisa M. Thompson and Peter D. Nichols. Applicant is represented by Kevin Donovan and Martha P. Whitmore. The Court is now properly advised in the premises:

The Court finds and concludes:

In May 1998, Cherokee filed an Application for a Sexennial Finding of Reasonable Diligence in 98CW80 for several conditional water rights located within the boundaries of the UBS Basin. The conditional water rights are generally known as Cherokee's Sweetwater Wells.

On June 16, 1998, UBS filed a Statement of Opposition and Petition for Declaratory Judgment challenging, inter alia, Cherokee's export of the conditional water rights for use outside of the UBS Basin. Cherokee's application for diligence was also opposed by the Colorado Ground Water Commission.

UBS and Cherokee resolved the dispute by entering into a Stipulation and Release dated January 25, 1999.

The wells at issue herein are comprised of the Sweetwater Wells No. 1, No. 2, No. 3, No.5, No. 8, No. 9, No. 11, No. 13, No. 15, and No. 16. The issues, as framed by UBS. Are:

1. Should Cherokee Metropolitan District be required to deliver its wastewater returns for recharge to the Upper Black Squirrel Creek Designated Ground Water Basin pursuant to the Stipulation between the parties in this case, which would result in a net benefit to the basin, or can Cherokee claim the

wastewater returns for replacement credit in its Replacement Plan Application, which would result in no net benefit to the basin?

2. Should Cherokee's diversions from Cherokee Wells 9-12 be limited to the existing decreed diversion amounts pursuant to the Stipulation, or can Cherokee increase diversions at its Wells 9-12 in its Replacement Plan Application?

The Replacement Plan Application refers to the replacement plan application filed with the Colorado Ground Water Commission by Cherokee and Meridian Service Metropolitan District as co-applicants in Case No. 08CW71.

Cherokee is currently building a new wastewater treatment plant located outside the boundaries of the UBS Basin and plans to deliver wastewater returns from the new plant into the UBS Basin.

The replacement plan seeks to appropriate up to 3,036 acre feet per year of new diversions from the Upper Black Squirrel alluvial aquifer through Cherokee Wells 9-12 and six new proposed wells designated as Cherokee Wells 18-23. Cherokee's proposed order seeks 2337.5 acre feet per year claimed for replacement credit.

Paragraph 5 of the January 25, 1999, Stipulation provides:

"5. Recharge: Cherokee will use its best efforts to deliver wastewater returns from Sunset, Paintbrush, and Woodmen Hills subdivisions, Falcon Air Force Base, and any other subdivisions it services back into the Upper Black Squirrel Creek Designated Basin for recharge of the aquifer. Cherokee shall recharge any wastewater returns from the Sunset Plant into the aquifer."

Paragraph 4.E. of the Stipulation provides in part:

"Diversions from all wells used or owned by Cherokee located in the Upper Black Squirrel Designated Basin shall be limited to the lesser of the permit, decree, or physical availability at the permitted or decreed location of the well."

Recharge is synonymous with replenishing the aquifer.

Cherokee's proposed replacement plan provides that for every acre-foot of wastewater returned to the UBS Basin from Cherokee's new wastewater treatment plant, Cherokee will claim an acre-foot of "fully consumable" replacement credit to offset an acre-foot of new appropriations. Under this

arrangement, there will be no net benefit to the UBS Basin per the recharge portion of the Stipulation.

The Stipulation at paragraph 5 provides that “wastewater” returns from certain subdivisions will be delivered back into the Upper Black Squirrel Creek Designated Basin for recharge of the aquifer. (Emphasis added). The words recharge and replacement water have distinctive meanings within the water law arena and are not interchangeable.

Paragraph 5 of the Stipulation refers to “wastewater” returns which has a specific meaning and is specifically associated with the subdivisions included in paragraph 5. The Replacement Plan refers to water that is provided from sources other than those from the subject subdivisions.

Cherokee argues that it is not violating paragraph 5 for several reasons which will be discussed as presented by Cherokee.

Cherokee claims it used “its best efforts” to deliver wastewater returns from the entities listed in the Stipulation and that none of the entities listed in the Stipulation (Sunset, Paintbrush, Woodmen Hills, or Falcon Air Force Base) were parties to the Stipulation and did not agree to limitations on their wastewater return flows and, therefore, Cherokee has no authority to so bind them, or to commit delivery of wastewater returns that it does not own or over which it has no control.

However, Cherokee has control over all the wastewater treated at its facility. Cherokee now seeks to benefit from its business relationships with other entities at the expense of UBS. In order for Cherokee to enter into the various contractual arrangements concerning the wastewater treatment plant, Cherokee would be required to have the authority to do so. The Court finds that Cherokee does have control over the wastewater returns.

The Colorado Supreme Court defines “best efforts” as an obligation “to make a reasonable, diligent, and good-faith effort to accomplish a given objective.” Great W. Producers Corp. v. Great W. United Corp., 613 P.2d 873, 878-79. In this case, “best efforts” means making a reasonable, diligent, and good-faith effort to deliver wastewater returns from the previously mentioned subdivisions back into the Upper Black Squirrel Creek Designated Basin for recharge of the aquifer. The Court has previously determined that Cherokee has the authority and control to accomplish the intent of paragraph 5.

The Pikes Peak Wells

Cherokee argues the Pikes Peak Wells were not included in the Stipulation and/or Decree previously mentioned and, therefore, are not subject to

said provisions contained therein. Cherokee further argues that future water rights appropriations were not subject to the Stipulation and/or Decree.

Cherokee's argument is without merit. Paragraph 4.E of the Stipulation and Release specifically provides: "Diversions from all wells used or owned by Cherokee located in the Upper Black Squirrel Designated Basin shall be limited to the lesser of the permit, decree, or physical availability at the permitted or decreed location of the well." (Emphasis added)

Paragraph 10.e. of the Decree provides: "Diversions from all wells used or owned by Cherokee located in the Upper Black Squirrel Designated Basin shall be limited to the lesser of the permit, decree, or physical availability at the permitted or decreed location of the well." (Emphasis added)

The language in both references is identical and is clear and unambiguous. The Pikes Peak Wells shall be considered by the Court in addressing the Motion for Declaratory Judgment.

The Stipulation is Voidable and Unenforceable

Cherokee argues on behalf of UBS, without authority from UBS, that UBS "did not understand the limitations of the Stipulation with respect . . ."

A party may rescind a contract when, at the time the contract is made, the parties make a mutual mistake about a material fact, the existence of which is a basic assumption of the contract. Beals v. Tri-B. Assoc., 644 P.2d 78, 80 (Colo. App. 1982) (Emphasis added)

Cherokee claims UBS was mistaken but does not allege it was also mistaken. Absent the recognition of mistake by all parties to a contract, rescission is not appropriate.

Cherokee's bold allegation that UBS was mistaken is not supported by the evidence. UBS denies it was mistaken. Paragraph 5 of the Stipulation provides: "Cherokee will use its best efforts to deliver wastewater returns from Sunset, . . . and any other subdivisions it services." (Emphasis added)

The language clearly anticipates the possibility that Cherokee might provide said services to unnamed subdivisions in the future.

Cherokee's argument that the Stipulation is voidable and unenforceable is without merit and is DENIED.

UBS is estopped from raising issues pertaining to the Stipulation

A party is estopped from asserting a claim or objection when it has full knowledge of the facts; it unreasonably delayed asserting an available remedy and there has been intervening reliance by and prejudice to another. Bijou Irr. Dist. V. Empire Club, 804 P.2d 175, 185-186 (Colo. 1991)

Cherokee's argument fails for two reasons:

(1) UBS previously placed Cherokee on notice of its concerns relative to the replacement plan as a violation of the Stipulation; and (2) UBS has the right to enforcement of the terms of its contract with Cherokee and the enforcement of the Decree entered herein.

The Court REJECTS Cherokee's estoppel argument.

Proper Jurisdiction is in the Colorado Ground Water Commission

The Court believes this issue has been adequately addressed by other courts, including the Colorado Supreme Court.

The Court has jurisdiction over this matter and will continue to exercise said jurisdiction.

UBS is not entitled to a declaratory judgment as a matter of law

The Court finds that determining the parties' rights pursuant to the Stipulation is proper subject matter for a declaratory judgment action.

IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED:

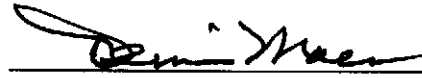
UBS's Motion for Declaratory Judgment be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that wastewater returns delivered into the Upper black Squirrel Creek Designated Ground Water Basin by Cherokee are for recharge pursuant to Paragraph 5 of the Stipulation and cannot be claimed or used by Cherokee or any other persons as replacement credit in Cherokee's Replacement Plan Application (08CW71) or any other plan to offset new appropriations.

IT IS FURTHER ORDERED that diversions from Cherokee Wells 9-12 are limited to the currently decreed amount of 840 acre-feet per year pursuant to Paragraph 4.E. of the Stipulation, and Cherokee is prohibited from increasing diversions through its Replacement Plan Application (08CW71) or any other plan.

DONE this 7 day of June 2011.

BY THE COURT:



Dennis Maes, Water Judge
Water Division 2, State of Colorado