

Filed In The District Court

DISTRICT COURT, WATER DIVISION NO. 4, COLORADO

JUN 18 1998

Case No. 88 CW 178

Seventh Judicial District

ORDER REGARDING MOTION FOR AMENDMENT OF FINDINGS FILED BY THE GUNNISON DISTRICT ON MAY 19, 1998.

In the Matter of the Application for Water Rights of

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE

in Gunnison County, Colorado.

Following entry of its Decree in this case on April 6, 1998, the Court entered an order at the request of some of the parties which extended the deadline for any party to file post-trial motions including motions for appropriate bills and costs. The deadline established was May 21, 1998. The only parties availing themselves of this opportunity were two opposers: the Gunnison District and the River District [the "Districts"] which filed a Motion for Amendment of Findings on May 19, 1998. No other post-trial motion has been timely filed.

The Districts' Motion for Amendment of Findings elicited responses and replies by Crystal Creek and the applicant, the County of Arapahoe, and a reply by the Districts to Crystal Creek's response. The last brief received was Arapahoe's reply to Crystal Creek's response to the Motion for Amendment of Findings on June 15, 1998. It may be that one or more parties believe that they have the right to reply further, but the Court is satisfied that it understands the issues raised and it is prepared to rule on the issues without further input from the parties. Also, the undersigned Judge will be on vacation from June 22 through July 10, 1998 and he recognizes that C.R.C.P. 59(j) requires a ruling on post-trial motions within 60 days after they are filed. Because little time would remain for the Court to act upon the motion after Judge Brown returns from vacation, the following orders are entered at this time, to wit:

1. The Court finds that the Districts are correct with respect to the "clerical mistakes" which are identified in the Motion for Amendment in paragraph 1(a) through 1(f) inclusive. The Court finds and concludes that the requested amendment should be granted with respect to these mistakes.

2. The Districts are also correct in stating that this Court's summary in paragraph 93 on page 51 of the April 6, 1998 Decree incorrectly summarized its previous decree of May 30, 1991 in Case 88-CW-183. With one modification the Court adopts the Districts' requests for amendment by stating that the Upper Gunnison Basin Project's conditional water rights remain in full force and effect, except that the rights decreed to Ohio City Reservoir and Quartz Creek Canal. Further footnote 20 to paragraph 104 on page 56 of the April 6, 1998 Decree is hereby deleted. Also the Court recognizes the appropriateness of Arapahoe's comments in this context. Specifically the Court recognizes that conditional water rights for the Taylor River Canal and the East River Canal were initially cancelled by the Court. However they were later reinstated by the Court's supplemental findings and decree dated March 23, 1993 in Case 88-CW-183 subject to a stipulation with Arapahoe that the two

conditional water rights would be administered as junior to the Union Park Reservoir Project.

3. A primary focus of the Motion of Amendment of Findings and the subsequent responses and replies has to do with this Court's analysis and reference in the April 6, 1998 Decree to the effect that the BUREC has a "marketable pool" or "marketable yield" of 240,000 acre-feet of stored water for sale to water users throughout the state.

a. In their motion for amendment the Districts asked the Court to acknowledge that the size of the marketable pool has not been definitely quantified. In its response to the motion Crystal Creek expressed concern that the marketability of water from the Aspinall Unit and the quantity of any pool therefor were not issues litigated at trial and were not within the jurisdiction of this Court to determine in the context of Arapahoe's application in this case. Crystal Creek raised these points in an effort to clarify that any findings by the Court in this regard would not be preclusive in any subsequent litigation between the parties under the doctrine of collateral estoppel. Crystal Creek also wished to make it clear that issues in this regard had not been tried by consent and specifically asked that the Court, in its consideration of the Districts' Motion for Amendment, take care not to broaden the preclusive effect of the 1998 decree.

b. In response to these positions by the Districts and Crystal Creek, Arapahoe countered that in fact there has been reference throughout the litigation (since at least 1991) to the potential for a marketable pool of stored water in the Aspinall Unit and that the generally recognized quantity of said pool was 240,000 acre-feet. Further Arapahoe contends that in its Decree of April 6, 1998 the Court relied on the availability of the marketable pool for trans-basin use in holding that the subordination analyzed by the Court was available only to in-basin uses.

c. After studying the foregoing concerns expressed by the parties, the Court does not withdraw its basic finding that the BUREC has a separate "marketable pool" of water available for sale to water users beyond the water which is available through the BUREC's subordination policy. However the Court acknowledges that specifics with respect to the quantity of the marketable pool and conditions which the BUREC may be entitled to impose with respect to the sale of said water to any particular water user are dicta which the Court used to amplify its analysis. Therefore the Court does not consider its findings and conclusions in this regard to be preclusive in any subsequent litigation between the parties under the doctrine of collateral estoppel. This is true for the reasons advanced by Crystal Creek in its response filed June 4, 1998. Also as a matter of caution, the Court adopts as additional language Arapahoe's proposal that any orders in this case regarding federal facilities are limited to resolution of the pending application and will not prospectively bind the United States to operate federal projects in a particular way.

4. For the reasons stated in paragraph 4 of the Motion for Amendment of Findings, the Court finds and concludes that paragraph 67 of its April 6, 1998 Decree should be deleted entirely. Said paragraph was included in the mistaken belief that it supported the concept of compensatory storage and since it does not support that concept, it should be deleted.

WHEREFORE IT IS THE ORDER OF THE COURT the Motion of the Districts for Amendment of Findings filed May 19, 1998 is granted to the extent set out in the foregoing findings and conclusions, but in all other respects the Court's Decree of April 6, 1998, remain as originally ordered.

DONE BY THE COURT this 18th day of June, 1998.



Water Judge, Water Division No. 4

cc: Counsel for the Movants (McClow and Hallford)

All counsel and persons identified in the certificate of service attached to the motion for amendment of findings