Water Law Review

Volume 2 | Issue 2 Article 30

1-1-1999

City of Lafayette v. New Anderson Ditch Co., 962 P.2d 955 (Colo. 1998)

Stephanie Pickens

not mislead petition signers and voters into support for or against a proposition by reason of the words employed by the Board. Furthermore, the court must conduct the review with all legitimate presumptions in favor of the Board, without addressing the merits of the proposed legislation.

Following those standards, the court found that the Board did not abuse its discretion in using the term "nonexempt" well without further defining the term. The court pointed out that the actual verbiage used in the title and summary referred to wells not exempt under the Colorado Revised Statutes. The court further explained that due to potential future legislative and judicial interpretation the Board could not define the complex definition contained in the statutes without a detailed statutory explanation.

The court also rejected the petitioners' claim that the Impact Statement misled voters by failing to specify which taxpayers might receive a refund. The court noted that the initiative itself did not include a reference to a refund. Furthermore, the Impact Statement mentioned only a possibility of a refund, and the General Assembly would determine the appropriateness of such an action. The court further explained that mentioning the refund served only to promote and clarify the statewide implications of the proposal. To that end, the Board properly used its discretion in determining how to describe the fiscal impact of the proposal without creating prejudice for or against the proposal.

Stephen Lawler

Ed. note: The Colorado electorate defeated the initiative in the November 1998 general election.

City of Lafayette v. New Anderson Ditch Co., 962 P.2d 955 (Colo. 1998) (holding that the court will not make a conditional exchange right absolute where the applicant does not have a legal right to use the point of diversion identified in the proposed absolute decree).

In order to complete a large water project, the City of Lafayette ("Lafayette") acquired several water rights through agreements with numerous entities for a right to divert water. One of the rights included a conditional right of exchange with the Anderson Ditch, owned by the New Anderson Ditch Company. In 1987, the water court granted Lafayette's application for various conditional rights. Part of the final decree included language which stated that if Lafayette had not obtained a legal right to use the Anderson Ditch by April, 1993, the right to this point of diversion would terminate. Subsequently, Lafayette entered into a contract with New Anderson which permitted

it to obtain water in exchange for an annual fee. The agreement, later amended, continued in effect until 1994, at which time the contract expired and Lafayette discontinued use of the diversion.

In 1993, Lafayette filed an application for determination of water rights and requested that the court make the Anderson Ditch and four other exchanges absolute. New Anderson opposed the application as Lafayette failed to satisfy the condition in the 1987 decree. The water court found that overall, Lafayette had demonstrated reasonable diligence as to many of its exchanges and made portions of them absolute. However, it did not grant the city an absolute right to the Anderson Ditch, finding that Lafayette had allowed its contract to expire. The water court held that "absent a permanent means of transporting water, there can be no absolute water right."

Lafayette appealed the water court's judgment. It argued that employing water for a beneficial use is the only requirement to convert a conditional right into an absolute right. Lafayette further contended that the water court erred when it considered the absence of transportation facilities in its decision whether to grant an absolute right. In its cross-appeal, New Anderson argued that the water court erred by continuing the conditional right where the 1987 decree required the cancellation of the exchange if Lafayette did not acquire a legal right to use the ditch. Thus, the issue was whether Lafayette had demonstrated reasonable diligence to allow the water court to extend the decree for another period.

The Colorado Supreme Court held that Lafayette had demonstrated reasonable diligence in developing its various rights and that the water court had correctly continued the city's conditional right to the Anderson Ditch. It further held that since Lafayette did not have a current legal right to use the ditch, in keeping with the terms of the 1987 decree, it was not entitled to an absolute right. The court also agreed with Lafayette that the water court erred when it required that a permanent means of transporting water exist in order to perfect a right. An appropriator may arrange a legal means of diversion that is perpetual for a term of years.

The court determined that reasonable diligence requires a consideration of all relevant factors, including a present right and prospective ability to use structures and facilities. It noted that Lafayette had made consistent progress to complete the project as a whole by working with governmental agencies, expending a large amount of money to develop an appropriation, developing property to be served by the water, and constructing facilities for water transportation. The court also stated that since Lafayette had not met the requirements of the 1987 decree, it had no legal right to the Anderson Ditch. Therefore, consistent with the terms of the decree, it was not entitled to an absolute decree.

The supreme court also mentioned in footnote 2 that the water court lacked subject matter jurisdiction over Lafayette's claim that stock ownership in the New Anderson Ditch created a right to operate the exchange. The court stated that this claim was not ancillary to a

water matter. It also noted that New Anderson was a proper party in the proceeding despite the fact that the entity had dissolved.

Stephanie Pickens

Rice v. Brandon, 961 P.2d 1092 (Colo. 1998) (holding that ballot initiative #105, requiring Rio Grande Water Conservation District to make payments for benefit of public school districts, did not violate the Colorado Constitution's single-subject requirement; titles and summaries for three proposed initiatives (#105, #102, and #103) were not misleading or confusing; and initiative title setting board did not abuse its discretion in setting titles and summaries for the three ballot initiatives).

Registered Colorado electors brought suit challenging various actions of the Initiative Title Setting Board (the "Board"). Colorado Constitution article V section 1 states that before an initiative is placed on the ballot, the Board must affix a title and summary to it that informs the voters about the initiative's purpose. The Board had approved the titles and summaries affixed to three ballot initiatives—two statutory amendments and an amendment to the Colorado Constitution, all up for voter approval in the 1998 election year. The electors brought suit in an effort to keep the initiatives off the ballot, due to their fear that the new laws' passage would adversely affect their water rights. A common theme throughout the case was the electors' assertion that titles and summaries affixed by the Board were misleading because they omitted the proponents' overall scheme, allegedly crucial to voter understanding of the initiatives.

Initiative 105 would have amended the Colorado Constitution by adding a new section requiring that the Rio Grande Water Conservation District pay $40 to the state per acre-foot of water pumped from aquifers under state trust lands for use by the Closed Basin Project. The Closed Basin is located in Colorado's San Luis Valley, and is characterized by a sump area that collects water flowing into the basin. The water cannot escape to the nearby Rio Grande River due to a natural barrier at the southern boundary of the basin. Water trapped there is lost to evaporation and evapotranspiration. The Closed Basin Project, authorized by the Reclamation Project Authorization Act of 1972, was designed to withdraw water from an unconfined aquifer in the Closed Basin for delivery to the Rio Grande River, through which it flows to New Mexico and Texas to help satisfy Colorado's obligations under the Rio Grande Compact. The lands under which the aquifer lies are state trust lands.

Under Colorado's Enabling Act, the legislature granted certain public lands in trust to the people for the purpose of funding public schools and governmental activities (e.g., erecting public buildings for