

DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	<div style="text-align: right; color: blue;"> <p>DATE FILED: May 9, 2018 4:58 PM</p> <p>FILING ID: 8CC84C468B01D</p> <p>CASE NUMBER: 2016CV30362</p> </div> <div style="text-align: center; margin-top: 100px;"> <p>▲ COURT USE ONLY ▲</p> </div>
<p>Plaintiff(s): LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company,</p> <p>v.</p> <p>Defendant(s): THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50</p>	
Josh A. Marks, Atty. Reg. # 16953 Mary Sue Greenleaf, Atty. Reg. # 47749 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com ; msg@bhgrlaw.com	Case Number: 2016CV30362 Div.: 4C Ctrm.:
<p>DEFENDANT CITY OF LOVELAND’S MOTION SEEKING CLARIFICATION AND RULING REGARDING MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF’S THIRD AND FOURTH CLAIMS FOR RELIEF</p>	

Defendant, the City of Loveland (the “**City**”), through its undersigned counsel, Berg Hill Greenleaf Ruscitti LLP, respectfully submits the following Motion Seeking Clarification and Ruling Regarding the City’s Motion for Summary Judgment on Plaintiff Loveland Eisenhower Investments, LLC’s (“**LEI**”) Third and Fourth Claims for Relief (the “**Motion**”), and in support thereof states as follows:

CONFERRAL PURSUANT TO C.R.C.P. 121 § 1-15(8)

Pursuant to C.R.C.P. 121, the undersigned counsel conferred with counsel for Plaintiff LEI and counsel for co-defendant the Greeley and Loveland Irrigation Company (“GLIC”) regarding the relief sought in this Motion. Counsel for LEI advised that LEI opposes this Motion and the relief sought herein. GLIC has advised that it does not oppose this Motion.

I. INTRODUCTION

As explained for more fully in the City’s Motion for Summary Judgment and associated briefing, LEI’s third claim for relief seeks an order from this Court declaring that a Water Court Settlement Agreement’s prohibition on the City’s future use or attempt to convert Chubbuck Ditch rights as a void, unlawful delegation of legislative authority. In this briefing, the City asserted numerous, stand-alone legal arguments warranting dismissal of this claim, and LEI’s derivative permanent injunction claim.¹ However, the City’s primary argument justifying dismissal of LEI’s third and fourth claims was lack of subject matter jurisdiction – namely, that the Court cannot afford LEI the relief sought in those claims, as doing so would effectively invalidate two water court decrees over which this Court lacks jurisdiction. An objection such as this, to the Court’s subject matter jurisdiction over the claims asserted, may be raised at any time and mandates dismissal of the action under Colo. R. Civ. P. 12(h)(3). While the Order ultimately denied the City MSJ in its entirety, it failed to address or rule on its position as to the existence of a jurisdictional bar to the relief LEI is seeking from the Court. Accordingly, because the declaration sought by LEI in LEI’s declaratory relief claim would impermissibly intrude upon

¹ Resolution of LEI’s permanent injunction claim is derivative of its declaratory relief claim. If LEI has no valid claim for declaratory relief that the Settlement Agreement is void, it cannot maintain its permanent injunction claim seeking an order enjoining its enforcement.

the exclusive jurisdiction of the Water Court, this Court should issue a ruling on this issue, granting the City's MSJ on LEI's third and fourth claims for relief for lack of jurisdiction.

II. BACKGROUND

1. On April 11, 2016, LEI filed the above referenced action against the City and GLIC, setting forth the following claims against the City: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) declaratory relief; and (4) permanent injunction.

2. Generally, LEI's declaratory relief claim seeks a declaration from the Court that that Settlement Agreement is invalid, alleging that the Settlement Agreement's prohibition on the City's application for future changes of use or any future use of Chubbuck Ditch water rights was an unlawful delegation of the City's legislative authority. *See generally* Complaint, ¶¶ 72 – 81. LEI's permanent injunction claim is a derivative of this claim for declaratory relief, alleging that if the Court affords LEI the declaratory relief sought in its third claim for relief, that enforcement of the aforementioned provision of the Settlement Agreement is a violation of Colorado law and must be enjoined. *See generally* Complaint, ¶¶ 82 – 87.

3. The City answered the suit on May 25, 2016, and commenced discovery.

4. On August 28, 2017, the City filed a dispositive motion containing a motion to dismiss the breach of contract and breach of the duty of good faith and fair dealing claims (“**Contract Claims**”) as barred by the Colorado Governmental Immunity Act (“**CGIA**”), and a motion for summary judgment on the merits of all claims, including LEI's third claim for relief, for declaratory judgment (the “**City MSJ**”).

5. In the City MSJ, among other things, the City sought summary judgment on LEI's declaratory relief and permanent injunction claims. In doing so, the City primarily argued that this Court lacks jurisdiction to enter the declaration sought or enjoin enforcement of the bargained-for prohibition in the Settlement Agreement. *See generally* City MSJ, pp. 21 – 23.

6. Specifically, the City asserted that the Court lacked jurisdiction to afford LEI the relief sought, as the declaration requested of the Court and the nature of those claims effectively seek to bypass the authority of the Water Court and interfere with the stipulation between GLIC and the City, which served as the basis for and permitted the City to change certain Chubbuck Ditch water rights in the prior water court cases. *See* City MSJ, p. 20 – 23. In sum, the City explained that the Chubbuck Ditch water rights, as contractually-delivered water rights, “are not water rights with a statutory right to change the use,” and that absent the negotiated Settlement Agreement and stipulation between the City and GLIC, the water court decrees would essentially be rendered meaningless. *See* City MSJ, pp. 20 – 22. The City explained that the decrees in Case Nos. 02CW392 and 00CW108/03CW354, which are orders to, among other things, permit the City's change to municipal use of numerous water rights, lie within the sound and exclusive jurisdiction of the Division 1 Water Court. *See* City MSJ, pp. 21 – 22. These decrees were only entered after objectors, such as GLIC, withdrew their opposition, and such withdrawal was contingent upon the bargained-for agreements in the Settlement Agreement and associated stipulations. *Id.* Thus, absent these stipulations, the City's application likely would not have moved forward and the Water Court would not have entered the decrees, making them an integral part of those decrees which must be given effect. *Id.*

7. In the City MSJ, the City also argued that LEI's declaratory relief claims should be dismissed on the merits because the Settlement Agreement's prohibition on further applications for changes or use of Chubbuck Inches was not an unlawful delegation of the City's legislative authority as claimed by LEI, and further that the claims were time barred by the applicable two-year statute of limitations. *See* City MSJ, pp. 23 – 24.

8. LEI responded to the City's MSJ, and specifically this jurisdictional argument, by attempting to recast its claims, stating that the relief sought is not invalidation of the Settlement Agreement, but rather "a declaration concerning ownership of LEI's contractual rights to Chubbuck Inches and Loveland's obligation to provide municipal credits," which is not a "water matter" over which the water court possesses exclusive jurisdiction. *See generally* LEI Response to City MSJ ("**LEI Response**"), pp. 20 – 21. Indeed, LEI declined to address the City's arguments head-on, but rather attempted to restate the declaration sought in its claims, *i.e.* a declaration that the Settlement Agreement's prohibition on applications for changes of use and future use is invalid, in such a manner as to avoid the jurisdictional impediments. *Id.*

9. Also on August 28, 2017, LEI filed a separate motion seeking partial summary judgment on liability for its Contract Claims and the declaratory and injunctive relief claims against the City (the "**LEI MSJ**"). Therein, LEI argued that it was entitled to judgment as a matter of law on its declaratory relief claim, as the City's entry into the Settlement Agreement was an unlawful delegation of legislative authority. *See* LEI MSJ, pp. 19 – 20. LEI specifically stated, contrary to the position asserted in LEI's subsequent response to the City MSJ, that it sought and was entitled to "declaratory judgment that the Settlement [Agreement's] requirement that the City refrain from applying for changes of any additional Chubbuck Inches and that no

additional Chubbuck Inches will be used by the City for any purpose is an unlawful delegation of the City's legislative authority and is invalid." LEI MSJ, p. 20.

10. The City responded to LEI's MSJ on September 21, 2017 (the "**City Response**"). In the City's Response, the City distinguished the case law cited by LEI and explained that the Settlement Agreement's prohibition on the acceptance, use, or attempt to change additional Chubbuck Ditch rights was *not* legislative. City Response, pp. 18 – 21. Importantly, however, the City once again asserted that the primary impediment to LEI's declaratory relief and derivative permanent injunction claims was the Court's lack of subject matter jurisdiction to hear LEI's challenge to the Settlement Agreement, which was approved by the Division 1 Water Court in entering the decrees, and order the relief sought by LEI. *See* City Response, p. 21.

11. On December 20, 2017, this Court issued one, combined order on LEI's claims, addressing all² of the dispositive motions pending (the "**Order**").

12. In the Order, the Court denied the City's and LEI's motions for summary judgment on LEI's declaratory relief claim, but failed to address or rule on the City's jurisdictional argument. Rather, the Court concluded that there were insufficient facts to support LEI's position that the Settlement Agreement "involves a full vesting of legislative authority," or the City's position, on the merits, that the Settlement Agreement was not a divestiture of the City's legislative authority and denied both parties' motions. *See* Order, pp. 11 – 12. The Court also concluded that there were issues of fact precluding entry of summary judgment based upon the two year statute of limitations. *See id.*, pp. 12 – 13.

² The Greeley and Loveland Irrigation Company ("**GLIC**") also filed a motion for summary judgment on August 28, 2017, which was similarly addressed in the Court's December 20, 2017 Order.

13. Importantly, the Order failed to address the City’s arguments, raised in both the City’s MSJ and the City’s Response to LEI’s MSJ, that the Court lacked jurisdiction over the declaratory relief claim altogether. *See generally, id.*, pp. 11 – 13.

14. The City subsequently filed a motion with the Court seeking certification of the Order for interlocutory appeal. That motion was granted by the Court on January 5, 2018.

15. The City then filed a Petition for Interlocutory Review Pursuant to C.A.R. 4.2 (the “**Petition**”) with the Colorado Court of Appeals, seeking intermediate appellate review of that portion of this Court’s Order denying the City MSJ as to LEI’s declaratory relief claim.

16. The Court of Appeals rejected the City’s Petition, dismissing the appeal and remanding the matter to the trial court, on February 13, 2018.

17. The City’s separate, interlocutory appeal of the Court’s Order rejecting the City’s CGIA defense to LEI’s Contract Claims is still pending in the Colorado Court of Appeals. Because resolution of this motion addresses only that portion of the City’s MSJ relating to LEI’s third and fourth claims for relief, it has no bearing or impact on those issues or claims currently up on appeal.³

III. ARGUMENT

Simply put, this Court lacks jurisdiction to afford LEI the relief sought on its third claim for relief, for declaratory relief. The invalidation of the Water Court Settlement Agreement sought by LEI – which serves as the basis for two Water Court decrees – impermissibly intrudes upon the exclusive jurisdiction of the Water Court where the Settlement Agreement arose.

³ The trial court retains jurisdiction to rule on those portions of this case that are not currently on appeal. *See Christel v. EB Eng’g, Inc.*, 116 P.3d 1267, 1270 (Colo. App. 2005) (holding that public entity’s interlocutory appeal did not divest trial court of jurisdiction to hear claims not involved in that appeal).

Importantly, an objection raising the Court's lack of subject matter jurisdiction over the claims asserted, may be raised by the parties or *sua sponte* at any time in the proceeding and mandates dismissal of the action under Colo. R. Civ. P. 12(h)(3). *See Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist.*, 717 P.2d 955, 957 – 58 (Colo. 1986) (“it is axiomatic that questions of subject matter jurisdiction may be raised at any time”). Accordingly, while this Court failed to address the jurisdictional deficiencies present that preclude LEI's third and fourth claims for relief in resolving the parties' dispositive motions, the City requests this Court address and resolve the jurisdictional arguments asserted herein, independent of the prior briefing on the City's and LEI's motions for summary judgment. Further, it is vital that the Court continue to assess whether it has subject matter jurisdiction to hear the claims asserted by LEI, as that jurisdiction concerns the court's very authority to deal with the claims over which it has been tasked with rendering judgment *See Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986).

Because this argument was not addressed in the Court's Order denying the City's MSJ, the City respectfully requests that this Court issue a ruling on this issue and/or clarification as to its denial of the City MSJ in light of the jurisdictional impediment raised in the City's MSJ and articulated herein, and GRANT the City's MSJ on LEI's third claim for relief for the reasons set forth in the City's prior MSJ briefing, and stated herein.

1. The Water Court Has Exclusive Jurisdiction Over the Water Court Decrees and the Underlying Settlement Agreement.

In the City MSJ, the City asserted that this Court lacks jurisdiction to grant LEI the relief sought in LEI's third and fourth claims for relief, as those claims effectively seek orders from this Court that would impermissibly interfere with the exclusive jurisdiction of the water court.

As explained in the City's prior briefing, "water judges have exclusive jurisdiction over water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." Colo. Rev. Stat. § 37-92-203(1); *see also In re Tonko*, 154 P.3d 397, 404 (Colo. 2007).

In ruling on the City's and LEI's motions for summary judgment, this Court did not explicitly address this argument. Further, nothing in the Court's Order suggests that the Court implicitly rejected this argument either. As a result, this Court should take up this jurisdictional issue.

A secondary consequence of allowing LEI's declaratory relief claim to proceed is that it condones an impermissible collateral attack on the water court decrees in Case Nos. 02CW392 and 00CW108/03CW354.

Under Colorado law, a judgment, however obtained, is entitled to complete legal effect. *See DeBoer v. Dist. Ct. First Judicial Dist.*, 518 P.2d 942, 944 (Colo. 1974). Additionally, a final judgment entered with proper jurisdiction is not subject to collateral attack by another court. *See Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 637 (Colo. 1987) (upholding entry of summary judgment dismissing claims seeking to collaterally challenge a water court decree adjudicating a conditional water right).

Thus, because the water court clearly had the exclusive jurisdiction to approve the Settlement Agreement and enter these decrees, *see* Colo. Rev. Stat. § 37-92-203(1), *In re Tonko*, 154 P.3d at 404, the district court lacks the requisite jurisdiction to let LEI invalidate them. To do so would effectively void the most critical component of the underlying Settlement Agreement

and stipulations giving rise to those decrees. *See Closed Basin Landowners Ass’n*, 734 P.2d at 636.

IV. CONCLUSION

Because it is evident that this Court lacks jurisdiction to order the relief sought by LEI in its third and fourth claims for relief, dismissal of those claims is warranted. Accordingly, the City requests that this Court issue a ruling on the jurisdictional impediment to LEI’s claims, and dismiss LEI’s declaratory relief and derivative permanent injunction claims as a matter of law under Colo. R. Civ. P. 12(b)(1) or 56.⁴

For the reasons set forth above, the City respectfully requests this Court for clarification and ruling regarding the City’s Motion for Summary Judgment on Defendant LEI’s third claim, seeking dismissal of LEI’s declaratory relief for lack of jurisdiction, or, in the alternative, to reconsider its ruling on that claim based upon the briefing articulated herein, the City’s original Motion, LEI’s response, and the City’s reply which have been previously submitted to the Court in their entirety.

Respectfully submitted this 9th day of May, 2018.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file at
Berg Hill Greenleaf Ruscitti LLP]*

s/ Josh A. Marks

Josh A. Marks
Mary Sue Greenleaf
Attorneys for Defendant the City of Loveland

⁴ Although the City’s MSJ sought dismissal of LEI’s claims under Colo. R. Civ. P. 56, dismissal pursuant to Colo. R. Civ. P. 12(b)(1) for lack of jurisdiction is also appropriate.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2018, a true and correct copy of the foregoing **DEFENDANT CITY OF LOVELAND'S MOTION SEEKING CLARIFICATION AND RULING REGARDING MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S THIRD AND FOURTH CLAIMS FOR RELIEF** was served electronically via ICCES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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s/ Cheryl Stasiak

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	Case Number: 2016CV30362 Div.: 4C Ctrm.:
<p style="text-align: center;">[PROPOSED ORDER] GRANTING DEFENDANT CITY OF LOVELAND'S MOTION SEEKING CLARIFICATION AND RULING REGARDING MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S THIRD AND FOURTH CLAIMS FOR RELIEF</p>	

This matter comes before the Court on Defendant City of Loveland's Motion Seeking Clarification and Ruling Regarding Motion for Summary Judgment on Plaintiff's Third and Fourth Claims for Relief (the "Motion"). The Court has reviewed the Motion and being fully advised in the matter enters the following Order:

The Motion is HEREBY GRANTED. For the reasons argued in the Motion and the related summary judgment briefing, the Court determines that it lacks jurisdiction to order the relief sought by Plaintiff in Plaintiff's Third and Fourth Claims for Relief. Therefore, this Court finds that Plaintiff's Third and Fourth Claims for Relief are HEREBY DISMISSED pursuant to Colo. R. Civ. P. 12(b)(1) and/or 56.

Entered this ____ day of May, 2018.

BY THE COURT:

 District Court Judge