IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-01907-DDD-KLM

CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado,

Plaintiff,

v.

BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, a body corporate and politic of the State of Colorado, and MATT JONES, CLAIRE LEVY, and MARTA LOACHAMIN, in their official capacity as Commissioners,

Defendants, and

THE ENVIRONMENTAL GROUP, and SAVE THE COLORADO,

Intervenors.

INTERVENORS' RESPONSE TO DENVER WATER'S
MOTION FOR VOLUNTARY DISMISSAL
AND THE SETTLEMENT AGREEMENT UNDERLYING THE MOTION

On November 3, 2021, Plaintiff Denver Water and Defendant Boulder County entered into a Settlement Agreement (ECF No. 66, Ex. A), which did not include Intervenors The Environmental Group and Save The Colorado. Among other commitments, Boulder County permanently abandoned its legal "authority to require Denver Water to obtain a permit under Boulder County's 1041 Regulations" that implement the Areas and Activities of State Interest Act, *see* Colo. Rev. Stat. §§ 24-65.1-101–24-65.1-502. It did so without any adjudication by this Court of two pending motions to dismiss raising affirmative defenses that would dispose of this case, *see* ECF Nos. 18 & 44, or of myriad arguments that would require denial of summary judgment to Denver Water on its preemption claim, *see* ECF Nos. 51 & 53. Yet, on the basis of

this Settlement Agreement that will work severe prejudice to Intervenors and the public, Denver Water now seeks to voluntarily dismiss this case before the Court has any opportunity to review, let alone resolve, these important legal questions. The Settlement Agreement and voluntary dismissal, therefore, greenlight a project that will have far-reaching and irreversible consequences for thousands of Boulder County residents and the local ecosystem.

Given the circumstances that led to this Settlement Agreement, Intervenors file this response to explain their views as to why the Settlement Agreement, and the process leading to it, flout the public interest and common sense. Nevertheless, because the egg has now been scrambled and the Court is essentially powerless to undo the Settlement Agreement or prevent voluntary dismissal, Intervenors do not oppose the relief requested in Denver Water's motion.

BACKGROUND

A detailed factual background can be found in Intervenors' motion to dismiss, *see* ECF No. 44 at 1-4, and Intervenors' opposition to Denver Water's motion for summary judgment, *see* ECF No. 53 at 5-11. Below, Intervenors provide a brief summary relevant to this response.

After repeatedly threatening to play its Federal Power Act ("FPA") preemption card to avoid Boulder County's 1041 process—yet failing to actually seek a preemption ruling for over a decade, including in its prior state court lawsuit challenging Boulder County's regulatory authority over this Project—Denver Water walked away from Boulder County's near-final 1041 process in July 2021 to file a belated preemption challenge in this Court. As a result, Boulder County suspended the 1041 process, leaving Intervenors, their members, and other Boulder County residents without any ability to exercise the due process rights afforded to them by State law and Boulder County's 1041 regulations. *See* Boulder Cty. Land Use Code 1041 Regulations,

Art. 8 at 8-303 & 8-510 (requiring a public hearing, testimony from members of the public, and evidentiary submissions from the public on all 1041 permit applications).[1]

When intervening in this case, Intervenors pointed to their concern that Denver Water and Boulder County could settle this case in a manner requiring Boulder County to abandon its 1041 process, resulting in members of the public losing their rights that they could otherwise exercise unless this Court ultimately finds that the FPA, in fact, preempts Boulder County's 1041 process. *See* ECF No. 21 at 5, 9-10, 13-15. Intervenors feared such a settlement despite the fact that Boulder County and Intervenors previously obtained a state court judgment—which Denver Water failed to appeal—holding that "the [Project] is subject to Boulder County's permitting authority and regulation process," and thus "the [Project] requires [Boulder County] review and approval [through the 1041 process] prior to development." ECF No. 18-2 at 6-7.

Soon after the Court (Judge Mix) granted intervention, this case was reassigned, *see* ECF No. 29, and the trajectory of the litigation changed dramatically. The Court (Judge Jackson) promptly convened a status conference on September 8, 2021. *See* ECF No. 41. In that conference, the Court explained that "I am barely even familiar with this case" because "[i]t was just reassigned to me." ECF No. 45 at 3:5-6; *see also id.* at 15:11-12 ("I don't know anything yet about the merits of all of this."). Nevertheless, the Court expressed its view that the construction of this Project is "inevitable" regardless of the merits of any legal defense mounted by Boulder County and Intervenors. *See id.* at 18:24-19:1 ("It's inevitable that this project in some form or fashion is going to go forward. You can't stop this train, I don't think."); *id.* at 15:18-22 ("[I]t seems to me that it is inevitable that there's going to be an expansion of reservoir capacity somewhere."). Thus, despite the Court's admitted lack of familiarity with the parties' legal

[1] https://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code-article-08.pdf

arguments—most of which had not yet been made since those legal filings were still forthcoming—the Court suggested that Boulder County was almost certain to lose, and that settlement was the county's best option. *See id.* at 19:2-5 ("I think even your commissioners probably know that in the end they're fighting a losing battle. So are they willing to sit down reasonably and try to work out a deal or not?").

Further pressuring the parties into a settlement posture, the Court explained its view that "the best motivator for a settlement is a trial date." *Id.* at 19:15-16. As a result, the Court adopted the unorthodox approach (over the objection of Boulder County and Intervenors) of allowing simultaneous briefing of two motions to dismiss and a motion for summary judgment on a highly expedited schedule, setting an oral argument on all three motions less than two months later on November 4, 2021. *See id.* at 20:16-17. Although the Court allowed Boulder County to take a single deposition of a Denver Water official, the Court denied Intervenors any opportunity for discovery even though discovery ordinarily occurs prior to any party moving for summary judgment. *See id.* at 20:25-21:1 (counsel for Intervenors stating that "there are also a few issues of very limited targeted discovery that [Intervenors] had planned to take as well"); *id.* at 21:2 (the Court stating "No, I'm not going to let you take any discovery, not now."); *id.* at 21:9-15 ("THE COURT: I want you to bear in mind, Mr. Eubanks, that the fewer motions that you file, the better I'll like your client. . . . We're on the record now. You've just made your record [of a denied motion requesting discovery].").

On this highly accelerated schedule, Boulder County and Intervenors continued to pursue their affirmative defenses (i.e., claim preclusion and laches) through their motions to dismiss, which if granted would dispose of this case. *See* ECF Nos. 18, 44, 50, 52. Boulder County and Intervenors also opposed Denver Water's motion for summary judgment, raising numerous

arguments as to why summary judgment is not appropriate due to substantive flaws in Denver Water's preemption arguments, the existence of triable issues of material fact, and the lack of meaningful discovery. *See* ECF Nos. 51 & 53.[2]

Despite these robust legal arguments, in advance of the November 4 oral argument, Boulder County's counsel quickly negotiated a proposed settlement to avoid the Court ruling in Denver Water's favor, as the Court's prior statements strongly suggested would be "inevitable." ECF No. 45 at 18:24-19:1. Thus, on October 29—six days prior to the oral argument—Boulder County announced a public meeting on November 2 to discuss whether to enter into a proposed settlement to "avoid[] the legal risk that a federal court will order the project to proceed without any county-approved mitigation measures." Boulder Cty., *Commissioners to Consider a Gross Reservoir Expansion Project Settlement Proposal* (Oct. 29, 2021).[3]

On November 2—two days prior to oral argument and only hours before Boulder County's meeting—the Court (Judge Jackson) recused itself due to a potential conflict of interest and canceled the November 4 argument. *See* ECF No. 60. In light of this new development, members of the public (including Intervenors) urged Boulder County to reject the hastily prepared Settlement Agreement, or to at least postpone its meeting on the proposed settlement to allow for a more constructive all-party settlement negotiation (involving Intervenors) now that the November 4 oral argument date was no longer forcing the parties to rush to settlement.

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[2] For example, Intervenors contend that most, if not all, of Boulder County's 1041 process falls outside the FPA's reach because the Federal Energy Regulatory Commission—the agency that administers the FPA—has already determined that the Act does *not* apply to upstream and downstream (i.e. off-site) mitigation to address the impacts of *this* Project, which was a major focus of both the 1041 process and now the Settlement Agreement. *See* ECF No. 53 at 19-20 (citing *City & Cty. of Denver*, 94 FERC ¶ 61,313, 62,158 (2001)).

[3] https://www.bouldercounty.org/news/commissioners-to-consider-a-gross-reservoir-expansion-project-settlement-proposal/

Despite these pleas, Boulder County's Commissioners accepted the proposed settlement, but expressed serious disappointment with the outcome. *See* Boulder Cty., *Boulder County Agrees to Proposed Gross Reservoir Expansion Settlement Agreement with Denver Water* (Nov. 2, 2021) ("We faced an impossible choice between more litigation which we would almost certainly lose and agreeing to a settlement that mitigates some of the impacts of this project."); *id.* ("[T]he Commissioners said that the project as proposed should not proceed."); *id.* ("We understand that settling with Denver Water is not acceptable to many of our constituents. It isn't the outcome we would have liked to see.").[4] Notwithstanding the Court's recusal earlier that day, its previous statements encouraging Boulder County to settle evidently helped, in part, to convince the county that it stood little chance of prevailing before the Court on its yet-to-be-adjudicated affirmative defenses and preemption arguments, and thus that a settlement conferring even relatively marginal benefits was the best possible outcome.[5]

It would be a major understatement to characterize the Settlement Agreement between Boulder County and Denver Water as highly disappointing. Although it commits Denver Water to paying Boulder County roughly $12,500,000, *see* ECF No. 66, Ex. A, this funding commitment pales in comparison to the overall estimated Project costs (in 2021 dollars) of $500,000,000-$700,000,000. It also falls woefully short of adequately mitigating the substantial and years-long noise, light, traffic, emission, and other major impacts that Boulder County's

[4] https://www.bouldercounty.org/news/boulder-county-agrees-to-proposed-gross-reservoir-expansion-settlement-agreement-with-denver-water/

[5] Intervenors understand and appreciate "the policy of encouraging the voluntary settlement of lawsuits," but also recognize that "[c]ourts, however, are also charged with responsibility for safeguarding the rights of parties." *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987). Part of the Court's role in safeguarding the parties' rights is that any encouragement towards settlement, and any related statements regarding the merits of the case, should be tethered to the actual strength or weakness of the legal claims before the Court.

residents (including Intervenors' members) will be forced to endure against their will. *See* ECF Nos. 21-1 & 21-2. Intervenors are not signatories to the Settlement Agreement even though they are the party to this case whose members' lives will be most directly and acutely impacted by the Settlement Agreement and the Project it allows to proceed.

Yet, on the basis of the Settlement Agreement, Denver Water now seeks to voluntarily dismiss this case, which will have the effect of: (1) foreclosing Intervenors from obtaining resolution of their pending (and fully briefed) motion to dismiss this case; (2) precluding Intervenors from their right to present evidence at trial regarding their affirmative defenses and in opposition to Denver Water's preemption arguments, any of which could dispose of this case; and (3) extinguishing Intervenors' due process rights afforded by State law and Boulder County's 1041 regulations (and a state court judgment requiring Denver Water to obtain a 1041 permit), due to Boulder County's permanent abandonment of the 1041 process for this Project.

DISCUSSION

Intervenors make several brief points below in response to Denver Water's motion for voluntary dismissal and the Settlement Agreement underlying the motion.

First, and most importantly, Intervenors do not view justice as having been served in this litigation. Despite having a state court judgment in hand that requires Denver Water to obtain a 1041 permit from Boulder County—through a public process that would afford Intervenors significant due process rights to be heard on issues important to them—Intervenors, as parties to this case, will forever lose those rights based on a Settlement Agreement to which they are not a party and without any adjudication of the robust affirmative defenses and legal arguments they have made at the motion to dismiss and summary judgment stages. Moreover, the hastily prepared Settlement Agreement does not remotely protect the interests of Intervenors or other

Boulder County residents that will be severely affected by the Project, and in no way serves as a substitute for the 1041 process required by State law and a prior judgment that, at minimum, would have yielded far stronger mitigation measures and other safeguards for Boulder County's residents. In addition, the Court's prior statements encouraging Boulder County to settle to avoid a likely loss—despite admitting such statements were divorced from any understanding of the legal arguments involved or their relative strength—undermined the integrity of the litigation process and rushed a settlement that thwarts the public interest. Given the permanence of the Project and the importance of the legal questions involved, Intervenors deserved—but did not receive—an equitable opportunity to develop and present their legal defenses.

Second, Intervenors strongly disagree with Denver Water's assertion that "[t]here is also no prejudice to Intervenors from voluntary dismissal of this suit." ECF No. 66 at 3. As explained, voluntary dismissal will upend the status quo by effectuating a Settlement Agreement that abandons Boulder County's 1041 process and extinguishes Intervenors' due process rights under State law (as reinforced by a favorable state court judgment). And it will do so without Intervenors having any opportunity to resolve the pending motions or to present evidence at trial demonstrating why Denver Water's preemption claim fails legally and factually. These are precisely the types of injuries that courts recognize as supplying a basis for non-settling parties to oppose settlements entered into by other parties to litigation. *See, e.g.*, *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283 (10th Cir. 2008) ("A party also suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross claim *or the right to present relevant evidence at trial.*" (quotation marks and citation omitted) (emphasis added)). Accordingly, not only are Intervenors immeasurably prejudiced in a practical sense by voluntary dismissal, but they have also plainly suffered legal prejudice.

Nevertheless, although Intervenors satisfy the test (i.e., plain legal prejudice) for opposing the Settlement Agreement and requesting relief from the Court, Intervenors do not believe that any such relief would be meaningful at this juncture. For example, although the Court could order the parties to engage in further attempts to reach an all-party settlement (i.e., a settlement that includes Intervenors and better comports with the public interest), Denver Water has no incentive to agree to any additional terms with Intervenors now that Boulder County has settled for so little while permanently abandoning the 1041 process. As a result, Intervenors see no path forward for the Court to unscramble this egg, and thus Intervenors will reluctantly step out of the way of voluntary dismissal.

CONCLUSION

Seeing no viable path forward, Intervenors do not oppose voluntary dismissal. However, the one-sided Settlement Agreement and the process leading to it fly in the face of justice, fairness, and the public interest. While Intervenors appreciate why Boulder County felt it had no choice but to trade its 1041 authority for such a paltry sum, this choice will be Boulder County's to live with when the Project wreaks havoc on the county's residents for decades to come.

Respectfully submitted,

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