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REGIMES FOR ALLOCATING
RIGHTS IN GROUND WATER

By

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WATER RESOURCES ALLOCATION:
LAWS AND EMERGING ISSUES

University of Colorado
School of Law

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I. Introduction.

This outline deals almost exclusively with issues which have arisen in the western United States, with particular emphasis on Colorado.

II. Physical Classifications of Ground Water.

- A. The early cases developed an artificial distinction between percolating ground water and water which flows in underground streams, and applied different doctrines to the two classes of water. The distinction does not comport with physical reality. It is more realistic physically to think of water as either tributary or non-tributary to surface streams.
- B. Tributary ground water is water which is hydraulically connected in some way to a surface stream, so that withdrawals of ground water may have an impact upon surface flows. Cf. 1973 C.R.S. 37-92-103(11). The waters in an unconsolidated alluvial aquifer are tributary, but waters found in bedrock fractures or deep aquifers may also be tributary if hydraulically connected to a surface stream.
- C. Strictly speaking, non-tributary ground water is water which is not hydraulically connected to any surface stream. Truly non-tributary ground water, in this geological sense, is rare, since even deep

water-bearing strata usually outcrop somewhere and either discharge to or receive recharge from surface flows. Therefore, we frequently are speaking of water with a minimal hydraulic connection to surface streams. The effect of withdrawing such water would not be evident at a surface stream, if at all, for a very long time and perhaps at a great distance. Typically the rate of recharge to this type of aquifer is limited and the water in the formation has accumulated over a very long time. However, the pressure relationships within a confined aquifer (where water is under pressure within a formation between confining strata) may transmit effects more quickly and over greater distance than within an unconfined or water table aquifer.

III. Legal Classifications of Ground Water.

In Colorado, ground waters may fall into four legal categories which cut in part across physical classifications.

- A. Ground water may be tributary in a legal as well as in a physical sense. In Colorado, the presumption, in the absence of strong countervailing evidence, is that all ground waters are tributary. Safranek v. Limon, 228 P.2d 975 (1951).

- B. Water may be tributary in a geological sense, but the effect upon a surface stream of withdrawing that water so attenuated that it is regarded as being tributary only to a de minimis extent. This water is treated legally as if it were non-tributary. See Kuiper v. Lundahl, 187 Colo. 40, 529 P.2d 1328 (1974). For ground water to fall within this category the time of effect upon stream flows from pumping a well (which may be different from and considerably less than the time for a particular molecule of water to travel through the aquifer to a surface stream) is long, such as 100 years. See District 10 Water Users Ass'n. v. Barnett, 599 P.2d 894 (1979). Where the time of effect is between 40 and 100 years, the courts have not decided how to treat the water. Compare Lundvall, supra, with Hall v. Kuiper, 181 Colo. 130, 510 P.2d 329 (1973).
- C. Non-tributary water is that which is either geologically non-tributary or which is legally non-tributary because geologically tributary only in a de minimis sense.
- D. "Designated ground water" may include either geologically tributary or non-tributary water. It is defined as water within the boundaries of a designated ground water basin (which may be based upon

geographical as well as geological considerations) and either (1) geologically non-tributary, or (2) "ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least 15 years...." 1973 C.R.S. § 37-90-103(6).

IV. Legal Regimes for Allocating Rights to Tributary Ground Water.

A. Doctrines.

1. Controversies among tributary ground water users. Such a situation could arise, for example, where two or more wells are in close proximity, and the pumping of one interferes with the physical supply for the others.
 - a. Some states apply the same laws as would be applicable to surface water; others have separate bodies of law for ground water and surface water. See the discussion at page 458 of Trelease, Water Law, Third Edition.
 - b. Priority of appropriation may govern or a modified priority doctrine may apply. For example, in Colorado, it has been held that the senior ground water appropriator must

have a reasonably efficient means of diversion. The senior may not call out juniors and deny their use of the aquifer, in order to effect an inefficient diversion. However, the cost of providing the senior with facilities which will permit both him and the juniors to divert may fall upon the juniors. Colorado Springs v. Bender, 366 P.2d 552 (1961).

2. Controversies between users of tributary ground water and surface water users. Since tributary ground water, by definition, contributes to the surface supply, pumping will have an effect upon surface supplies. However, the amount of water in the alluvial aquifer and the surface stream together likely will exceed the water available from the surface stream alone. Therefore, the question is how to make full use of the water resource without impairing the senior rights of surface users.
 - a. No action is one alternative. For more than 30 years, Colorado allowed the drilling of wells in the alluviums of its major surface streams. One result was a substantial well-based economy. However, another

result was sharp controversy when senior surface diversions declined, partly because of the effect of the wells.

b. In 1965, the Colorado legislature adopted H.B. 1066, which basically directed the State Engineer to administer tributary ground waters in the same manner as he administered surface water rights, i.e. in accordance with their respective priorities. See C.R.S. § 148-11-22 (1965 Supp.), subsequently repealed.

c. This approach was rejected by the Colorado Supreme Court in Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968). The Court reasoned that maximum utilization was as much of an imperative, to be found implicitly in the Constitution, as the protection of vested senior rights, which is based expressly upon the language of the Constitution.

B. Legal tools for accomplishing conjunctive use.

• Colorado has experimented with a variety of means of implementing the twin Fellhauer mandates.

1. Restrictions upon the issuance of new permits.

a. All new wells have required permits since 1957. However, Colorado's standards for permit issuance have become increasingly strict. Now, no new permit will be issued for a non-exempt well outside of a designated basin unless the State Engineer "finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts...." 1973 C.R.S. § 37-90-137. See Attachment A.

b. This statutory standard has been applied stringently. In Hall v. Kuiper, 181 Colo. 130, 510 P.2d 329 (1973), the Colorado Supreme Court affirmed the denial of permits for two wells to be located 13 miles from the nearest major stream, even though there would have been no impact upon surface flows for approximately 40 years.

2. Protection of existing ground water use.

a. When the Colorado Legislature rewrote the water laws in 1979, it created an exemption for small (50 g.p.m. or less) existing

wells used for various defined purposes, including irrigation of up to one acre of home gardens and lawns. See 1973 C.R.S. § 37-92-602. The Legislature obviously could have chosen to exempt existing large-capacity wells, but it did not. It did create an exemption for very small (15 g.p.m. or less) wells used for household and other limited purposes, but the more recent trend has been to make these exemptions much narrower.

- b. Administratively also, the State has experimented with provisions which would protect existing pumping. The first set of rules and regulations adopted by the State Engineer to integrate ground water and surface water use utilized a zone approach under which wells close to the South Platte River were required to be curtailed for a longer period than wells at a greater distance. This approach was upheld by the Supreme Court in Kuiper v. Well Owners, 176 Colo. 119, 490 P.2d 268 (1971). However, since 1971, the State Engineer has elected to pursue tougher rules and regulations

which would curtail existing pumping after a several year grace period unless the wells were sheltered by the priority of a senior surface right. This approach has met with only limited success, resulting in a stipulation in the South Platte drainage basin and a judicial determination that the State Engineer may not make his previous rules more stringent in the Arkansas River basin without proof of the inadequacy of the prior rules. Kuiper v. Atcheson, T. and S. F. Ry. Co., 195 Colo. 557, 581 P.2d 293 (1978).

- c. There is an unresolved issue within designated ground water basins. The Legislature contemplated that administration of ground water uses would be handled by local management districts under the general supervision of the State Ground Water Commission, rather than by the State Engineer as part of his general administrative duties. However, the statute is silent as to what happens if ground water pumping within such a basin affects surface rights, either inside or outside of the boundaries of the basin.

3. Requirements that surface users make full use of all facilities available to them, including wells, before junior wells are curtailed. This position was argued to the Supreme Court in Kuiper v. Well Owners, supra, but the Court found that no such requirement existed in the 1969 statute or otherwise. A recent trial court decision, arising out of the challenge to the State Engineer's proposed rules and regulations for the basin of the Rio Grande reached a different result. In that case, which now is on appeal, the Water Judge ruled that the owners of senior surface rights must attempt to supply their decrees through the use of wells, including new wells, prior to requiring the curtailment of junior well appropriators. Judgment, In the Matter of Rules and Regulations Governing the Use, Control and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries, January 31, 1980. See Attachment B.
4. Reliance upon private sector creativity. The private sector has had some success in integrating surface and ground water usage, allowing

the use of ground water while protecting the rights of senior appropriators. The 1969 Act authorized the development and adjudication of "plans for augmentation," i.e. flexible programs to protect senior appropriators, through the provision of substitute supplies of water or otherwise. See 1973 C.R.S. § 37-92-103(9). These plans frequently have been utilized by real estate developers, municipalities and energy companies to provide a legally secure supply for new wells, although augmentation plans also have been utilized by irrigators and others to protect existing diversions. A well operating under the protection of such a plan enjoys freedom from administrative curtailment. The concept was challenged, but upheld, in the parallel Supreme Court cases of Kelly Ranch v. Southeastern Colorado Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976) and Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976).

5. Public water management programs.

- a. Colorado has not moved too aggressively in this direction, although proposals are made from time to time for the creation or

public financing of a river basin authority which might manage the total water resource and determine when wells should be used rather than surface rights and vice versa. Cf. 1973 C.R.S. § 7-93-101-108.

- b. Water conservancy districts do have authority to develop plans for augmentation, and some have done so. See 1973 C.R.S. § 37-92-302(5).

V. Legal Regimes for Allocating Rights to Non-tributary Ground Water.

A. Controversies.

1. Competition among users of non-tributary ground water. The Court or administrative agency must determine how, and to what extent, to protect existing uses and to what extent to permit new uses.
2. The "mining" issue. The situation often is complicated by the fact that the amount of water within the aquifer may be relatively large, but the rate of annual recharge relatively small. Should the rate of withdrawal be limited to the rate of recharge, so as to preserve the ground water for future generations, or should this

water be permitted to be developed over some finite time period? Is the answer any different where existing uses already exceed the annual recharge? Some states have chosen to preclude mining of ground water. See, for example, Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973). Other states, such as Colorado, have chosen to permit mining of the ground water on some basis or another.

B. Legal doctrines based on land ownership.

1. The English or common law rule was that the surface owner owned the underlying water and could take it, so long as he did not do so maliciously or wastefully, despite the impact upon his neighbor.
2. The so-called American rule of reasonable use limits the right of the overlying landowner to the amount of water which is necessary for beneficial use on the land from which it is taken.
3. The doctrine of correlative use limits the rights of overlying landowners by providing that when there is inadequate supply for all, they must prorate.

4. The Restatement (Second) of Torts adopts the correlative rights doctrine, but adds the provision that the overlying landowner's withdrawal of ground water may not unreasonably harm a neighbor, through lowering the water table or reducing artesian pressure, without potential liability.

C. Legal doctrines independent of land ownership.

1. Some states apply the doctrine of prior appropriation. Statutes which do this have been upheld against the constitutional challenge that they deprive the landowner of property. See, for example, State v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), and Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964). The prior appropriation doctrine may not always provide a workable answer, however, since the impact of one well upon another is largely a function of their respective locations.
2. A number of states have adopted modified appropriation systems for the apportionment of ground water. See Wyo. Stat. 1957 Section 41-132, providing for apportionment by priority unless this will not result in proportionate benefits to senior appropriators, in which case the State

Engineer may require a system of rotation of use.

3. Colorado has adopted a modified prior appropriation system for designated ground water basins. Prior appropriators are entitled to protection, but this does not include the maintenance of historical water levels. 1973 C.R.S. § 37-90-102. Prior appropriators are protected in part through the process for permitting new wells, which are allowed only if the proposed appropriation would not unreasonably impair existing water rights. 1973 C.R.S. 37-90-107(4). The Ground Water Commission has developed a test under which it draws a circle with a 3-mile radius around a proposed well site, determines a rate of pumping which would permit a 40% depletion of the available ground water over 25 years and then determines whether that rate of pumping is already being exceeded. The test has been approved by the Colorado Supreme Court in Fundingsland v. Ground Water Commission, 171 Colo. 487, 468 P.2d 835 (1970), but reviewed more critically in subsequent cases. See Thompson v. Ground Water Commission, 194 Colo. 489, 575 P.2d 372 (1978);

Peterson v. Ground Water Commission, 195 Colo. 508, 579 P.2d 629 (1978); Berens v. Ground Water Commission, 614 P.2d 352 (1980).

4. The California Supreme Court created another means of allocating water among ground water users. Pasadena v. Alhambra, 33 Cal.2d 908, 207 P.2d 17 (1949), held that the various users of the Raymond Basin had established mutually prescriptive rights as against each other and must share proportionately in a reduction of the amount to be pumped. However, the impact of the Pasadena case was limited substantially by the subsequent decision of Los Angeles v. San Fernando, 14 Cal.3d 199, 537 P.2d 1250 (1975), holding that a prescriptive right could not be asserted against a municipality and could not be asserted against any other party unless that party had adequate notice that a condition of overdraft existed.

D. Colorado experience with non-designated, non-tributary ground water.

1. Prior to 1973, Colorado had no statute dealing explicitly with non-tributary ground water outside of designated basins. The 1965 Ground Water Management Act contained a provision, Sec.

140-18-36, requiring a permit for all new wells outside of designated groundwater basins. See Attachment A for that section as amended.

2. The applicable case law was Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963), and Colorado Springs v. Bender, 148 Colo. 458 (1961).

Whitten v. Coit held that the adjudication statute which applied to surface waters did not apply to non-tributary groundwaters. However, in dictum, the court approved language from a law review article to the effect that a landowner has a property interest in the non-tributary water underlying his land, and stating further that this property right is subject only to the reasonable use doctrine.

3. In 1973, the Colorado Legislature adopted S.B. 213, now 1973 C.R.S. 37-90-137(4), which is part of Attachment A. This Section purports to limit the right to withdraw non-tributary groundwater to a quantity underlying lands owned by the applicant or by others, with their consent, and to ration that withdrawal over 100 years. However, the statute unfortunately uses language of appropriation as well as of land ownership, raising questions as to the underlying doc-

trine. The statute also speaks in terms of issuing a permit when there is "no material injury to vested water rights".

4. In December of 1978, various interests filed claims all over the state for thousands of non-tributary wells and for over 20 million acre feet in underground reservoirs. An original proceeding was commenced in the Colorado Supreme Court to consolidate these cases in order to obtain a determination of common questions of law. The Supreme Court appointed a special water judge to hear certain fundamental questions which it identified, including the issue of the basic doctrine which applies to non-tributary water outside of designated basins. Southeastern Colorado Water Conservancy Dist. v. Huston, 197 Colo. 365, 593 P.2d 347 (1979), Attachment C.
5. On February 11, 1981, M. O. Shivers, Special Water Judge, issued his Ruling, Judgment and Certification, Attachment D. The Special Water Judge ruled that non-tributary waters are subject to the doctrine of appropriation, but that a non-landowner may not effect such an appropriation without obtaining the right to

utilize the overlying land for the drilling of wells and related purposes. The Court further stated that this right is unavailable to private persons through eminent domain. The Court proceeded to dismiss each of the applications before it on various grounds, including the ground that the uses claimed for the water were speculative and therefore improper. (See Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566 (1979).) The Special Water Judge's ruling is being appealed to the Colorado Supreme Court.

6. In another significant case under S.B. 213, the developers of the large Mission Viejo project applied for permits to withdraw water from the non-tributary Arapahoe Formation underlying lands owned by them. The State Engineer denied the permits on the ground that other water rights in the vicinity, drawing upon the same aquifer, would be injured because of the loss of artesian pressure and decline in the water table. The Water Judge for Division No. 1 ordered that the permits be issued under S.B. 213. See Attachment E. He ruled that the acceleration of water level declines which would

be caused by the new wells did not constitute "material injury" under the statute, relying upon Whitten v. Coit and Colorado Springs v. Bender, both supra. He noted that water levels would continue to decline because of the pumping of other existing wells in any event, and held that the developers should not be compelled to forego the development of non-tributary groundwaters underlying their lands for the benefit of others who tapped the same aquifer. This decision was not appealed.

ATTACHMENT A

and notice shall also fix the date upon which such election shall be held, the manner of holding the same, and the method of voting for or against the incurring of the proposed indebtedness. Such election shall be held in the same general manner as in this article provided for the election of directors. The bond issue or indebtedness proposed shall not be valid unless a majority of those voting at the election held for that purpose vote in favor of such bond issue or indebtedness in accordance with the terms of the resolution.

37-90-135. Management district - dissolution - procedure - funds - disposition.-- If there are no debts outstanding, the board of directors may, on its own motion or on the written petition of twenty percent of the taxpaying electors of the district, request of the ground water commission that the question of dissolution of such district be submitted to the electors of the district. The commission shall fix the date of such election, notice of which shall be given and which shall be conducted in the same manner as elections for the formation of such districts. If a majority of those voting on such question vote in favor of dissolution, the commission shall so certify to the county clerk and recorders of the counties involved and the district shall thereupon be dissolved. The question of dissolution shall not be submitted more often than once every twelve months. In case a district is dissolved the funds on hand or to be collected shall be held by the treasurer, and the directors shall petition the district court of the county in which the main office is located for an order approving the distribution of funds to the taxpayers of the district on the same basis as collected.

37-90-136. Unlawful to divert water for application outside of state.-- For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein.

37-90-137. Permits to construct wells outside designated areas - fees - permit no ground water right - evidence - time limitation.--
(1) From and after May 17, 1965, no new wells shall be constructed outside the boundaries of a designated ground water basin, nor the supply of water from existing wells outside the boundaries of a designated ground water basin increased or extended, unless the user makes an application in writing to the state engineer for a "permit to construct a well", in a form to be prescribed by the state engineer. The applicant shall specify the particular designated aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year, the proposed maximum pumping rate in gallons

per minute, and, if the proposed use is irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

(2) Upon receipt of an application for a replacement well or a new, increased, or additional supply of ground water from an area outside the boundaries of a designated ground water basin, accompanied by a filing fee of twenty-five dollars, the state engineer shall make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others. If the state engineer finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts, he shall issue a permit to construct a well, but not otherwise; except that no permit shall be issued unless the location of the proposed well will be at a distance of more than six hundred feet from an existing well, but if the state engineer, after a hearing, finds that circumstances in a particular instance so warrant, he may issue a permit without regard to the above limitation. The permit shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent waste, pollution, or material injury to existing rights. The state engineer shall endorse upon the application the date of its receipt, file and preserve such application, and make a record of such receipt and the issuance of the permit in his office so indexed as to be useful in determining the extent of the uses made from various ground water sources.

(3) (a) Any permit to construct a well, issued on or after April 21, 1967, shall expire one year after the issuance thereof, unless the applicant to whom such permit was issued shall furnish to the state engineer, prior to such expiration, evidence that the water from such well has been put to beneficial use, or unless prior to such expiration the state engineer, upon application, with good cause shown, as to why the well has not been completed and an estimate of the time necessary to complete the well, extends such permit for only one additional period certain, not to exceed one year, but the limitation on the extension of well permits provided for in this paragraph (a) shall not apply to well permits for federally authorized water projects contained in paragraph (d) of this subsection (3). The state engineer shall charge a reasonable fee for such extension.

(b) Any permit to construct a well issued by the state engineer prior to April 21, 1967, shall expire on July 1, 1973, unless the applicant furnishes to the state engineer, prior to July 1, 1973, evidence that the water from such well has been put to beneficial use prior to that date. The state engineer shall give notice by certified or registered mail to all persons to whom such permits were issued at the address shown on the state engineer's records, setting forth the provisions of this subsection (3). Such notices shall be mailed not later than December 21, 1971.

(c) If evidence that water has been placed to beneficial use as required pursuant to paragraph (a) of this subsection (3) has not been received as of the expiration date of the permit to construct a well, the state engineer shall so notify the applicant by certified mail. The notice shall give the applicant the opportunity to submit proof that the water was put to beneficial use prior to the expiration date, but, due to excusable neglect, inadvertence, or mistake, the applicant failed to submit the evidence on time. The proof must be received by the state engineer within twenty days of receipt of the notice by the applicant and must be accompanied by a filing fee of thirty dollars. If the proof can be given favorable consideration by the state engineer, then, within thirty days, a synopsis of the proof shall be published, specifying that objections shall be filed within thirty days. After the expiration of the time for filing objections, if no such objections have been filed, the state engineer shall, if he finds the proof to be satisfactory, find that the permit should remain in force and effect. If objections have been filed together with a nonrefundable filing fee of ten dollars, the state engineer shall set a date for a hearing on the proof and the objections thereto and shall notify the applicant and the objectors of the time and place. The state engineer shall consider all evidence presented at the hearing and all other matters set forth in this section in determining whether the permit should remain in force and effect.

(d) In the case of federally authorized water projects wherein well permits are required by this section and have been secured, the expiration dates thereof may be extended for additional periods based upon a finding of good cause by the state engineer following a review of any such project at least annually by the state engineer.

(4) In the issuance of a permit to construct a well in those aquifers which do not meet the definitions of section 37-90-103 (6) or section 37-92-103 (11), and do not meet the exemptions set forth in sections 37-90-105 and 37-92-602, the provisions of subsections (1) and (2) of this section shall apply, except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or by the owners of the area, by their consent, to be served is considered to be unappropriated; the minimum useful life of the aquifer is one hundred years.

assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water.

37-90-138. Waste - well logs - license - bond - violations - penalties.--

(1) The state engineer in cooperation with the commission has power to regulate the drilling and construction of all wells in the state of Colorado to the extent necessary to prevent the waste of water and the injury to or destruction of other water resources, and shall require well drillers and private drillers to file a log of each well drilled whether or not exempt by virtue of section 37-90-105. The state engineer shall adopt such rules and regulations as are necessary to accomplish the purposes of this section.

(2) If the state engineer finds any well to have been drilled or maintained in a manner or condition contrary to any of the provisions of this article or the regulations issued under this article, he shall immediately notify the user in writing of such violation and give him such time as may reasonably be necessary, not to exceed sixty days, to correct deficiencies. If the user fails or refuses to make the changes within the allowed time, the state engineer is authorized to enter upon his land and do whatever is necessary in order that the user comply with the provisions of this article or regulations issued under this article.

(3) No well driller or private driller shall drill a new well or otherwise do work on any well requiring authority from the state engineer until a permit with respect thereto has been secured for such work. Any structure which would fall into the classification of a "well" as defined in section 37-90-103 (21), except for the fact that the same is made for the purpose of a test only, shall be completely filled within thirty days after completion of the test, and if not so filled shall be deemed a "well" as defined in said subsection (21).

37-90-139. Existing beneficial uses not recorded - fee.-- Existing uses of ground water put to beneficial use prior to May 17, 1965, not of record in the office of the state engineer on April 21, 1967, may be recorded upon written application and payment of a filing fee of twenty-five dollars, and shall retain the date of initiation when first put to beneficial use, but no such recording shall be accepted after December 31, 1968.

37-90-140. Inclusion of lands.--

(1) (a) The boundaries of any district organized under the provisions of this article may be changed in the manner prescribed in this section, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property, or any of its rights and privileges whatsoever; nor shall it affect or impair or discharge any contract, obligation, lien, or charge for or upon which it might be liable or chargeable had

ATTACHMENT B

IN THE DISTRICT COURT WITHIN AND FOR WATER DIVISION NO. 3

STATE OF COLORADO

Case No. W-3466

IN THE MATTER OF RULES AND)
REGULATIONS GOVERNING THE)
USE, CONTROL, AND PROTECTION)
OF WATER RIGHTS FOR BOTH)
SURFACE AND UNDERGROUND)
WATER LOCATED IN THE RIO)
GRANDE AND CONEJOS RIVER)
BASINS AND THEIR TRIBUTARIES.)

J U D G M E N T

THIS MATTER came on for trial commencing March 5, 1979, and concluding July 24, 1979. The State Engineer, Proponent of the Proposed Rules, was represented by David W. Robbins and Donald H. Hamburg, Special Assistant Attorneys General, for the Attorney General of Colorado. Protestants Oliver Gould and Faye Gould, Kenneth E. Hodgell and Marilyn A. Hodgell, Hodgell Farms, Inc., Still Farms, Inc., Ford Farms, Inc., John M. Davis and Adalyn M. Davis, Headlee Wright and Harriet A. Wright, Joseph L. Tonso and James T. Tonso, Joseph H. Camillo and Grace P. Camillo, and Klecker Ranch, Inc., were represented by William R. Bartlett. Protestants Board of County Commissioners of Rio Grande County, Colorado, and Otto W. Scherzer and Margaret Scherzer were represented by Richard L. Bloss, Jr. Protestants Byron Phillips and Myra Phillips dba South Fork Lodge, Gary L. Mix and Elizabeth A. Mix, Ray McGee and Ruth McGee dba Wolf Creek Ranch, Robert T. Davie and Ross Davie, Harold L. Benson and N. Carolyn Benson, Leo D. Stoeber and Eva G. Stoeber, John H. Gjellum and Elizabeth Ann Gjellum, Wayne Armstrong and Lorana Armstrong, Norman W. Slade and Janice M. Slade, Irene D. Slade, Robert M. Butler individually and as personal representative of the Estate of Robert W. Butler, Deceased, Harry Anderson and Ruth Anderson, Greg A. Gosar and

Suzanne Gosar, James Selters, James G. Cooper dba Water Development, Robert J. Shown, Town of Del Norte, Navajo Development Co., Inc., and M. Willis Blau and Yvonne J. Blau were represented by Elizabeth A. Conour. Protestants Thelma Wadsworth, Monte Vista Potato Growers Corporation Association, Walter W. Firkins and Dorothy M. Firkins, Lester R. Muller and Lois A. Muller, Reed Hynds, Ward E. Mathias and Bettymae Mathias, B.A.R.Cattle Company, Cyrus K. Rickel as trustee of Bonnie Ann Rickel Trust, Cyrus K. Rickel and B. Preston Lockhart of the testamentary trust of Cyrus K. Rickel, Sr., and Monte Vista Consolidated School District were represented by Robert S. Crites, Jr. Protestant The City of Monte Vista was represented by Robert S. Crites, Jr., and by Michael White of Yegge, Hall and Evans. Protestant Conejos Water Conservancy District was represented by William A. Hillhouse II and Joseph P. McMahon of Davis, Graham and Stubbs; David L. Harrison of Moses, Wittemyer, Harrison and Woodruff, P.C.; and by Carlos F. Lucero. Protestant San Luis Valley Irrigation Well Owners, Inc., was represented by M. E. MacDougall of Geddes, MacDougall, Geddes and Paxton, P.C., and by George W. Woodard. Protestants Rio Grande Water Users Association, Billings Ditch Company, Centennial Ditch Company, Chicago Ditch Company, Costilla Ditch Company, Commonwealth Irrigation Company, Excelsior Ditch Company, The Grant Ditch, Independent Ditch Company, Monte Vista Water Users Association, Rio Grande Canal Water Users Association, Santa Maria Reservoir Company, San Luis Valley Irrigation District, San Luis Valley Canal Company, Senior Water Rights Association and Rio Grande Lariat Ditch Company were represented by John U. Carlson, John Land and Paul D. Frohart of Holland and Hart. Protestants Rio Grande and San Luis Irrigation Company, Lariat Irrigation Company and Rio Grande and Piedra Valley Ditch Company were represented by John U. Carlson, John Land and Paul D. Frohart of Holland and Hart and by Gordon H. Rowe, Jr. Protestant Prairie Ditch Company was represented by John U. Carlson, John

Land and Paul D. Frohart of Holland and Hart and by Gordon H. Rowe, Jr. Protestants Alamosa-LaJara Water Users Protection Association, H. E. Ryker, Hugh Hamilton, Stanley Price, Ivan Gylling, Leonard Hartung, Wade Hartung, Larry Beaudin, Gordon Reed, Kenneth L. Hensley, John F. Griffee, Leo O. Price, Andres Mondragon, Kawanabe Farm, Larry W. Coombs, Seaman Syndicate Ditch Company, William Gallagher, Tim Gallagher, Carmel Drain Water Users Association, and Jack Allen were represented by Monte Pascoe and Kirk Holleyman of Ireland, Stapleton, Pryor and Holmes, P.C. Protestant Terrace Irrigation Company was represented by Monte Pascoe and Kirk Holleyman of Ireland, Stapleton, Pryor and Holmes, P.C. and by George W. Woodard. Protestants Manassa Land and Irrigation Company, Mogote Northeastern Consolidated Ditch Company and Romero Irrigation Company were represented by John McClure of McClure and Jacobs, P.C. Protestants San Luis Valley Canal Company, San Luis Valley Ranches, Inc., Larwill-Costilla Ranches, Inc., Top of the World Ranches, Inc., San Antonio River Water Users Association and William Gibson were represented by David L. Harrison of Moses, Wittemyer, Harrison and Woodruff, P.C. Protestants Robert E. Robbins, Jr., Gary Robbins, David E. Broyles, Pete DeHerrera, Aniceto Lucero, James Darold Vance and Beryle J. Vance, Henry Salazar, and Alfonso Abeyta were represented by David L. Harrison of Moses, Wittemyer, Harrison and Woodruff, P.C., and by Stephen T. Williamson of Musick, Williamson, Schwartz, Leavenworth and Cope, P.C. Protestant The Bowen Drainage District was represented by Gordon H. Rowe, Jr. Protestants Commonwealth Irrigation Company and The Hickory-Jackson Ditch Company were represented by Charles Alexander of Seraphine, Bratton, Alexander and Ramous. Protestants AZL Resources, Inc., and Adolph Coors Company were represented by W. B. Tourtillott and Christopher Paulson of Saunders, Snyder, Ross and Dickson, P.C. Protestant The Rio Grande Water Conservation District was represented by Robert S. Wham of Shoemaker

and Wham. Protestants The San Luis Valley Drainage District No. 1 and The Waverly Drainage District No. 1 were represented by Kenneth A. Selby. Protestants Winnie D. Dunn aka Mrs. James T. Dunn; Mrs. Rae Clifft; The First National Bank of Lamesa, Lamesa, Texas, Trustee under the Will of James T. Dunn, Deceased; Seamster Farm, Inc.; John P. Seamster, Sr.; Bonnie L. Seamster; S. Paul Beck; Catherine Beck and John P. Seamster, Jr.; and Non-Pareil Processing Corporation were represented by John S. Wilder. Protestants Trinchera Irrigation Company, Trinchera Water Conservancy District, Cerro Ditch Company, San Pedro Ditch Company, San Luis People's Ditch, Costilla County Conservancy District and Dos Hermanos Ranches, Inc., were represented by O. John Kuenhold. Protestants Capulin Water and Sanitation District, Chama Domestic Water Users Association, Inc., Conejos Water and Sanitation District, Conejos Water and Sewer Association, Fort Garland Water and Sanitation District, Guadalupe Water Association, Town of La Jara, San Luis Water and Sanitation District, Romeo Water and Sanitation District, Town of Manassa, Town of Blanca, Town of Center and Town of Antonito were represented by Michael White of Yegge, Hall and Evans. Protestants City of Alamosa and East Alamosa Water and Sanitation District were represented by George H. Ottenhoff and Michael White of Yegge, Hall and Evans. Protestants Carl E. Benson, Arthur C. Benson and Nina M. Benson, Larry H. Mayfield and D'Anna L. Mayfield, T. A. Dicky and Amber Dicky, Obbie L. Dicky and Willa Lee Dicky, Colbert Pepper and Virginia Sue Pepper, Pepper Farms, Lois Hynds, Deceased, and Reed Hynds individually and as Administrator for Lois Hynds, Deceased, A. L. Wood and Claudine Wood, Evan Keith Montgomery, Grace I. Montgomery and Blanche M. Montgomery, Bob Bloxsom, Walter Burkhardt and Arlene Burkhardt, Orville E. Stewart, James B. Melchior and Cheryl Melchior, Frank L. Rodman and Grace A. Rodman, Ray Pauley and Linda M. Pauley, Keith Scidmore, Irene I. Scidmore, Harold K. Scidmore and Frances Jean Scidmore, Saguache County Farm

Bureau, Carl E. Goldbranson, Wade D. Hill and Betty Jane Hill, Milne Enterprises, Inc., Donald J. Moschetti and Cathryn A. Moschetti, Wayne M. Davis and Wilma Wilcox, sole and only heir and devisee of Toney Wilcox, Deceased, appeared pro se.

The Court, being fully advised in the premises, having heard and reviewed the evidence, having considered the briefs submitted and having heard the arguments of counsel, finds that:

On August 21, 1975, the State Engineer promulgated proposed "Rules and Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Under-ground Water Located in the Rio Grande and Conejos River Basins and their Tributaries" (Proposed Rules), under § 37-92-501, C.R.S. 1973, of the Water Right Determination and Administration Act of 1969 and § 37-80-104, C.R.S. 1973. Pursuant to § 37-92-302(3), C.R.S. 1973, appropriate notice of the Proposed Rules was published in all counties of Water Division No. 3 in the manner provided for by law. Numerous protests were filed.

The Honorable Donald G. Smith, Water Judge in this Court, entered an Order on June 23, 1976, disapproving the Proposed Rules and remanding the matter to the State Engineer for the purpose, inter alia, of proceeding separately with the Rio Grande Compact interpretation issues and the integration of ground and surface water issues inherent in the regulations. By decision dated August 21, 1978, Kuiper v. Gould, ____ Colo. ____, 583 P.2d 910 (1978), the Supreme Court of Colorado reversed, and remanded the action to this Court for further proceedings, and appointed the undersigned Water Judge to preside.

The Proposed Rules would govern and integrate the State Engineer's regulation, for intrastate and interstate purposes, of both surface and underground water in Water Division No. 3, which is generally coterminous with the San Luis Valley

(the Valley). The Proposed Rules provide:

a. A method of regulation of the Conejos River and its tributaries (Conejos) and of the Rio Grande and its tributaries, exclusive of the Conejos (Rio Grande mainstem) so as to satisfy the interstate delivery requirements set forth in the Rio Grande Compact, C.R.S. 1973 § 37-66-101 et seq. (Compact), including an allocation of the 10,000 acre feet of water annual credit which reduces the total obligation of Colorado, contained in Article III of the Compact. The basic mode of administration proposed requires that the Conejos deliver sufficient water at a gauging station near La Sauses (the mouth of the Conejos) to satisfy the schedule of deliveries contained in the table entitled Discharge of Conejos River in Article III of the Compact, and requires that the Rio Grande mainstem deliver sufficient water at a gauging station near Lobatos to satisfy the schedule of deliveries contained in the second table entitled Discharge of the Rio Grande, exclusive of the Conejos, in Article III of the Compact.

b. Restrictions on non-beneficial winter diversions within the Conejos and Rio Grande mainstem.

c. Provisions concerning storage in pre-Compact reservoirs.

d. Specification of the times and quantities in which underground water from aquifers hydraulically connected to surface streams may be placed to a beneficial use.

e. A schedule of progressive curtailment over a five year period -- starting with curtailment two days per week and ending with total curtailment -- of the diversion of underground water from aquifers hydraulically connected to surface streams.

f. A list of exceptions to the application of the well curtailment schedule. The exceptions are based on possible operation of a well pursuant to a decreed plan of augmentation, under its own priority, or as an alternate point of diversion to surface decree.

g. A requirement that all artesian wells in Water Division 3 be equipped with suitable control devices.

The San Luis Valley consists of a broad elevated plain in south central Colorado. The Valley extends approximately 90 miles from north to south and 50 miles from east to west, with a "floor" elevation varying from roughly 7,500 feet to 8,000 feet above sea level. The Valley is surrounded by the San Luis and La Garita Hills, and the Conejos, San Juan, Saguache, and Sangre de Cristo Mountains with elevations ranging up to over 14,000 feet. The Valley floor sustains a highly productive agricultural economy, which is totally dependent on irrigation water. The principal crops grown are alfalfa, potatoes, brewing barley, small grains and native hay.

The Rio Grande mainstem rises in the San Juan Mountains to the west of the Valley, flows southeasterly through Del Norte and Monte Vista to Alamosa, then runs generally south for some 40 miles through a break in the San Luis Hills and enters New Mexico. The Conejos River rises in the mountains to the southwest and flows northeasterly along the southern edge of the Valley, joining the Rio Grande mainstem at La Sauses. The Conejos River has two principal tributaries, the Los Pinos and San Antonio Rivers. These streams flow northerly from New Mexico into Colorado, where they conjoin, and then discharge into the Conejos River near Manassa. Other tributaries of the Rio Grande mainstem in Colorado include La Jara, Alamosa and Rock Creeks from the west, and Trinchera, Culebra and Costilla Creeks from the east. Costilla Creek, a tributary of the Rio Grande which flows through New Mexico and Colorado, is governed by a separate interstate compact and it is not affected by the Proposed Rules.

The floor of the San Luis Valley is underlain by a complex ground water system, which is interrelated with the Valley's surface water in a complicated manner. Unconfined

of non-artesian water underlies the great bulk of the Valley floor at shallow depths. Beneath this unconfined aquifer system there are relatively impermeable beds, consisting principally of clays, but in some locales consisting of basalts, which cover a large area of the Valley subsurface. Beneath these confining layers lie substantial quantities of water under artesian pressure. This confined aquifer system is recharged principally from surface inflow to the ground water system around the Valley's perimeter. The existence of this confined water results in many wells of an artesian or naturally flowing nature. There is estimated to be over two billion acre feet of ground water in storage beneath the San Luis Valley.

There is an hydraulic divide, a ridge in the ground water table, that extends across the unconfined aquifer, generally from west to east, a few miles north of the Rio Grande mainstem. North of this divide is an area commonly known as the Closed Basin. The lowest surface area of the Closed Basin, known as "the sump," or "the dead area," lies in the southeastern portion of the basin, in the vicinity of the San Luis Lakes. The great bulk of the irrigated acreage in the Closed Basin lies west of the sump in a relatively compact block extending northerly from the hydraulic divide. This irrigated land is supplied with water from the Rio Grande by means of four large mutual irrigation systems, the Rio Grande Canal, the Farmers Union Canal, the Prairie Ditch, and the San Luis Canal. Numerous small streams flow into the Closed Basin and toward the sump. Their discharge does not contribute to the flow of the Rio Grande, for the water conveyed to the sump is lost to non-beneficial evapotranspiration. By Stipulation of the parties hereto and by order of this Court approving said Stipulation, Rule II (subjecting waters to administration for Compact purposes) of the Proposed Rules does not apply to certain unconfined waters within the Closed Basin.

Irrigation development in the San Luis Valley began in the 1850's and 1860's, primarily on Culebra Creek and the Conejos River. The most extensive development on both the Rio Grande and the Conejos occurred in the decade between 1880 and 1890, when even the peak runoff flows of water were appropriated and substantial canal construction was undertaken.

By 1890, as a result of the irrigation-based agricultural economy which had developed by that date throughout the San Luis Valley, the natural flow of all surface streams in the Valley was over-appropriated. Well construction in the district began as early as 1850; in fact the most senior water right in the Valley is a well.

Due to the pattern of high spring runoff and very low summer flows in San Luis Valley streams, and the occurrence of a severe drought cycle in the 1890's, water users in the Valley very early began to seek reservoir development to regulate their water supply, and to construct wells to supply or supplement their water requirements. Early efforts to obtain reservoir development on the Conejos and Rio Grande were frustrated by an 1896 embargo instituted by the United States Secretary of the Interior, which precluded needed permission to utilize federal lands for construction purposes. A later modification enabled some limited reservoir construction, (Rio Grande Reservoir, Santa Maria Reservoir and Continental Reservoir on the Rio Grande headwaters), but the embargo remained largely in effect until 1925.

Following lifting of the embargo in 1925, federal grants for reservoir construction within Colorado were vigorously resisted by New Mexico and Texas. They contended that such development would increase depletions in Colorado and thus diminish the water supply of the downstream states. In an effort to resolve their differences, representatives of the three states met with the goal of formulating an interstate compact concerning the Rio Grande. These efforts culminated

in a compact signed February 12, 1929, (Temporary Compact), in which the three states promised not to alter existing conditions on the river pending further study and efforts to obtain federal aid. By its explicit terms, the Temporary Compact did not effect an equitable apportionment of Rio Grande waters among the three states, nor establish any precedent regarding proper long term resolution of the interstate controversy.

Formal negotiations for a permanent compact among the three states began in December, 1934. Colorado's official representative at the 1930's negotiations was M. C. Hinderlider, Compact Commissioner and State Engineer. Hinderlider was assisted (as were the other parties) by both engineering and legal advisors. His Engineer-Advisor was Royce J. Tipton. His legal advisors in drafting the Compact were Ralph L. Carr, who participated throughout the negotiations on behalf of water users along the Conejos River, and George M. Corlett, who similarly participated on behalf of water users along the mainstem of the Rio Grande. In the final phases of the negotiations, Judge Clifford Stone of the Colorado Water Conservation Board also acted as a legal advisor to Hinderlider.

While these negotiations were underway, in September of 1935 President Franklin D. Roosevelt reinstated a form of reservoir embargo by issuing a mandate that no application directed to federal agencies for projects involving the use of Rio Grande water be approved "without securing from the National Resources Committee a prompt opinion on it from all relevant points of view." The National Resources Committee was a special federal agency, constituted by President Roosevelt, with special responsibilities in the area of the nation's internal development. This presidential mandate effectively precluded any federal contribution to further water development projects in Colorado, or elsewhere on the Rio Grande, and thereby gave impetus to a negotiated resolution of the interstate problems.

At that time there was also pending before the United States Supreme Court a suit brought by Texas against New Mexico regarding the respective rights of the two states to the waters of the river. See Texas v. New Mexico, 296 U.S. 547 (1935). The burden and risks of this litigation to the parties, together with the threat that Colorado might be joined as a defendant, was a further inducement to the three states and their citizens to compose their differences by a permanent compact.

Following this presidential mandate the three states and the federal government, under the auspices of the National Resources Committee, undertook an extensive study known as the Rio Grande Joint Investigation "to determine the present and potential water and land resources of the Rio Grande Basin." The study and its conclusions confirmed the position taken by Colorado, that extensive reservoir development was possible in the San Luis Valley without material injury to the downstream states.

Following receipt of the completed report of the Rio Grande Joint Investigation in the Fall of 1937, the states made rapid progress toward a compact. At meetings of the Compact Commissioners in September and October, 1937, sufficient agreement on general principles was reached to warrant referral of the matter to the Engineer-Advisors.

The essential features of the final Rio Grande Compact, along with its underlying engineering principles, were formulated in a report to the Compact Commissioners by the Engineer-Advisors, dated December 27, 1937. In spite of previous assertions by the downstream states that there had been early water development in their regions which constituted "senior" water rights that should be given preference over allegedly "junior" rights in Colorado, the Engineer-Advisors stated in their report that they "avoided discussion of the relative

rights of water users in the three states, and were guided throughout our work by the general policy - - expressed at the meeting of the Compact Commission in October -- that present uses of water in each of the three states must be protected in the formulation of a Compact. . . because the usable water supply is no more than sufficient to satisfy such needs." Thus, the Engineer-Advisors and the Compact Commissioners explicitly rejected a Compact based on an interstate priority system. Instead, they constructed a plan aimed at preserving established levels of development within each of the river segments, by limiting allowable stream depletions to those which had prevailed in each segment during the ten years from 1928 through 1937.

This plan was based on an engineering method called inflow-outflow analysis. For the years 1928 through 1937, hereafter referred to as the Compact study period, the Engineers determined inflow at certain upstream gauging stations on both the Rio Grande mainstem and the Conejos and its two tributaries. By comparing the measured inflow above the principal diversions with outflow below the principal diversions, the Engineers were able to identify consistent relationships between Conejos inflow and outflow at the river's mouth and between Rio Grande mainstem inflow and outflow. These consistent relationships plotted as smooth curves on a graph. By reference to these curves the amounts set forth in the two tables in Article III were fixed. By this inflow-outflow method the Engineers sought to tie Colorado's delivery obligations to the amount of indexed inflow. Thus, as water supply increased on each stream, the amount of required outflow increased as well. By reference to the two curves, the Engineers concluded that with a certain inflow on a stream, under conditions then prevailing on the rivers, a corresponding outflow was to be expected. The expected outflows, subject to minor adjustments, became the delivery obligations.

The Engineers recognized that departures or variations from the predicted performance of each river would occur in future years due to man's activities or to the vagaries of nature, e.g. the sequencing of wet and dry years, variable runoff patterns, new depletions. Accordingly, they attempted to protect Colorado from the obvious difficulties in adherence to the scheduled deliveries on an annual basis by allowing debits and credits to accumulate within certain parameters.

A similar inflow-outflow analysis was performed for that section of New Mexico above Elephant Butte Reservoir. The Engineers recommended a schedule of deliveries from the Rio Grande as measured at an upstream gauge in New Mexico, near Otowi Bridge, and a delivery gauge near San Marcial, New Mexico. Thus, that portion of the State of New Mexico served by the Elephant Butte reclamation project and project lands in Texas above Fort Quitman are guaranteed certain deliveries. It should be noted that Article IV of the Rio Grande Compact divides New Mexico into two sections, and lumps the lower section with Texas as entitled to receive water from both Colorado and New Mexico above Elephant Butte Reservoir. Thus, the plan of the Engineers ignored state boundaries and focused rather on distinct segments of the Rio Grande River.

With relatively minor alterations, the substance of the Engineers' December 27, 1937, proposal was adopted in the final Rio Grande Compact.

The Compact was signed on March 18, 1938, codified at § 37-66-101, C.R.S. 1973, ratified by the legislatures of each of the three states involved and given the consent and approval of the United States Congress by the Act of May 31, 1939 (53 Stat. 785).

Colorado's obligations to the downstream states are principally specified in Article III of the Compact. Article III contains two tables variously denominated in the text as "tabulations of relationship" or "schedules," which are

respectively entitled "Discharge of Conejos River" and "Discharge of Rio Grande Exclusive of Conejos River." Each table lists quantities of water to be discharged at specified downstream gauging stations whenever certain quantities of water pass specified upstream gauging stations. The amount of discharge required thus fluctuates with the indexed water supply. "Discharge" means a measurable outflow, the required magnitude of which is in this instance established for the Conejos River and the Rio Grande mainstem by the respective tabulations of relationship.

The Compact does not establish any separate "discharge tables" or "schedules," nor any corresponding gauging stations, for any Rio Grande tributary other than the Conejos River and its tributaries, the Los Pinos and San Antonio.

As disclosed by the Compact proceedings and the directive of the Commission to the Engineer-Advisors referred to above, the overriding object sought to be attained in the equitable apportionment of the Rio Grande was the maintenance of the levels of water use then existing in the various sections of the Basin. The mechanism utilized for equitable apportionment consists principally of fixing delivery obligations which preserve a level of water usage by the tabulations of relationship established for the Conejos River and the Rio Grande mainstem (in Article III), and for the portion of New Mexico above Elephant Butte Reservoir (in Article IV).

During the entire history of irrigated agriculture in the San Luis Valley, water rights on the Conejos River have been administered independently of water rights on the Rio Grande mainstem. This independence follows from obvious physical facts. The Conejos and the Rio Grande mainstem join shortly before the Rio Grande enters the State of New Mexico. Prior to and at the time of the signing of the Compact, there were no decreed diversions from the Rio Grande in Colorado below this confluence. Accordingly, there was no possible

means whereby any water user on the Conejos River could by a "call" that is, by exercise of a priority right, obtain delivery of water from, or otherwise impact diversions on, the Rio Grande mainstem, or vice versa.

The legislative history of the Rio Grande Compact contains numerous statements demonstrating that the Compact negotiators and their advisors intended the Compact to be interpreted and applied within Colorado to continue separate and independent administration of the Conejos River and the Rio Grande mainstem.

An analysis of the Engineer-Advisors' Report of December 27, 1937, was prepared by C. L. Patterson, Chief Engineer of the Colorado Water Conservation Board, and submitted to the Colorado negotiators in March of 1938. In this analysis Patterson recognized that the proposal for separate Conejos and Rio Grande "schedules of deliveries" constituted a form of apportionment of Colorado's responsibilities as between the two streams. He noted that the proposal would constitute a volumetric limitation on the amount of permitted depletion on each stream, that such volumetric allowance of depletion had already been reached on the Conejos, and that existing uses on the Conejos and Rio Grande mainstem within Colorado would be protected only to the extent that existing levels of depletions were not expanded.

Beginning in the early 1950's Colorado began to accumulate what the downstream states denominate a "debit" or shortfall in Compact deliveries. The total accumulated alleged debit for Colorado reached nearly 944,000 acre feet by the end of 1967. During this period the Colorado water officials did not curtail Colorado direct flow diverters or pre-Compact reservoirs for purposes of satisfying the Compact. ..

In 1966 Texas and New Mexico initiated an original action against Colorado in the United States Supreme Court, in which they sought to compel Colorado to repay this alleged debit, and to adhere to the schedule of deliveries contained in the Compact.

This suit was stayed in 1968 pursuant to a stipulation among the three states. In that stipulation the plaintiff states agreed that so long as Colorado met the deliveries spelled out by Article III on an annual basis, they would not press the litigation. Colorado, in return, promised to undertake appropriate administrative and legal action to assure annual compliance. Failure by Colorado to adhere to its undertaking entitled the plaintiff states to resume the litigation. The allowance for accumulated departures up to 100,000 acre feet, contained in Article VI cannot be invoked during the life of the stay. Hence, it is necessary for the State Engineer to administer the Conejos and Rio Grande on the basis of a projected annual runoff. The uncertainty of what the flow will actually measure at the end of the year greatly compounds the administrative problems encountered in complying with the stay.

In compliance with the terms of the stay, the State Engineer has, in each year starting with 1958, administered surface diversions on the Rio Grande with the objective of assuring deliveries at the state line in accordance with the second table of Article III, and administered surface diversions on the Conejos with the objective of assuring deliveries at La Sauses in accordance with the first table of Article III.

Since the State Engineer began to administer surface rights on both the Conejos River and the Rio Grande mainstem

in an effort to satisfy the two streams' respective Article III schedules, water users on both streams have experienced substantial curtailments of their diversions. These curtailments have reduced substantially the annual volume of diversions on both streams.

Until 1974 no attempt was made to regulate ground water withdrawals in the Valley. Then and thereafter well regulation was accomplished by curtailment of well production at specific times or under stated conditions.

Various aspects of the hydrological patterns and system existing in the San Luis Valley at the time the Compact was consummated have subsequently been altered by a combination of natural and man-made causes. Approximately seventy to eighty percent of the total annual surface water runoff in the San Luis Valley results from melting of the snowpack in the surrounding mountains. Precipitation on the Valley floor constitutes a relatively minor proportion of total streamflow. Since the Compact study period, annual Valley floor precipitation in both the Conejos and Rio Grande mainstem areas has remained roughly constant. However, annual snowpack supplying both the Conejos River and the Rio Grande mainstem has declined significantly since the Compact study period. This general decline commenced circa 1950.

In spite of the decline in snowpack, the relationship between snowpack and index inflow on both the Conejos and Rio Grande mainstem has remained generally constant on each stream since the date of the Compact. This demonstrates that the decline in water supply as measured at the upstream index gauges is primarily attributable to decline in snowpack and not to new man-made depletions above the Compact index stations. While the sustained

declines in snowpack and hence inflow on the Conejos River in the post-1950 period have continued to the present, there has been a recovery in Rio Grande mainstem snowpack and inflow during the last decade to levels only slightly below those experienced during the Compact study period.

Records of the State Engineer indicate that there has been a decline in diversions in the post-1950 period along both the Conejos and the Rio Grande, roughly corresponding in volume to the declines in inflow during that time. Post-Compact depletions in the lower reaches of the Conejos River have increased over pre-Compact levels of depletion in part because of the increased use of return flows in that area, and by increased diversions from the Conejos into the La Jara watershed. Water diverted out of the Conejos Basin contributes no return flow to aid in deliveries at La Sauses.

In an equitable apportionment of an interstate stream, the State of Colorado has legal power and authority to allocate by Compact different burdens and entitlements between various sections of the river. This is especially true where, as here, the burden represents only that quantity of water which was not consumed on each river at the time of the Compact.

The law of equitable apportionment derives from two sources: judicial decrees which determine respective rights on an interstate stream [Nebraska v. Wyoming, 325 U. S. 589 (1945)], and interstate compacts. The former mechanism comes into operation upon initiation of an original action between states before the United States Supreme Court. The latter mechanism is authorized by the United States Constitution, Art. I, Sec. 10, cl. 3, and is

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created by an agreement between the sovereign states, consented to by the federal Congress. While the former is purely a judicial resolution of a controversy, the latter is the result of negotiation. Its very flexibility and amenability to provide for peculiar local conditions has made it a widely used approach, and one urged upon the states by the United States Supreme Court. [Colorado v. Kansas, 320 U. S. 383, 392 (1943)].

The utilization of interstate compacts to avoid the uncertainties and burdens of litigation has been favored by the State of Colorado. In addition to the Rio Grande Compact, Colorado has entered into compacts with respect to waters of Costilla Creek, Las Animas River, La Plata River, the Colorado River, the Arkansas River, the South Platte River, and the Republican River. Several interstate compacts to which Colorado is a party; other than the Rio Grande Compact, contain provisions that have an impact upon the intrastate distribution of water within Colorado. Although an interpretation of the Rio Grande Compact as establishing separate Conejos and Rio Grande mainstem delivery obligations merely reinforces historical San Luis Valley use and administration patterns, other compacts contain provisions altering historical practice and modifying the application of the prior appropriation doctrine within Colorado. The La Plata River Compact, § 37-63-101, C.R.S. 1973, Article II, Sec. 3, upheld by the United States Supreme Court in Hinderlider v. La Plata, 304 U. S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938), the Arkansas River Compact, § 37-69-101, C.R.S. 1973, Article V and the Upper Colorado River Compact, § 37-62-101, C.R.S. 1973, Article XI (a) and Article XIII, each contain provisions, which, as a part of the specific equitable

interstate apportionment formulated, in some manner affect the distribution of water within Colorado.

Because the controversy about the meaning of the statute is so intense, because so much is at stake in this case, and because the litigants assert diametrically opposing interpretations of the Compact, the Court has determined that it is appropriate to test its conclusions by reference to § 2-4-203, C.R.S. 1973. That statute calls for an examination of the following:

a. The Object Sought to be Attained. As expressed in the legislative history, the object of the Compact was to eliminate interstate controversy by effecting an equitable apportionment which maintained levels of use then prevailing in all sections of the basin. This is fully consistent with the view that the separate Conejos and Rio Grande mainstem discharge schedules contained in Article III constitute binding obligations. Further, the United States Supreme Court has held that in applying the doctrine of equitable apportionment, a Court is called upon to fashion a judgment which will preserve, to the greatest degree possible, the development which has grown up on a river system. Nebraska v. Wyoming, 325 U. S. 589, 618, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945).

b. The Circumstances Under Which the Statute Was Enacted. The historically separate use and administration of the Conejos River and the Rio Grande mainstem water rights which prevailed at the time that the Compact was entered into reinforce the construction of Article III as mandating separate delivery obligations. Had the Compact negotiators intended to establish for the first time a unitary, valley-wide priority system to satisfy Colorado's interstate commitments, a radical break from

the pre-existing circumstances would have been necessitated. The law is reluctant to impute so fundamental a change without clear evidence of such a design. There is no such evidence.

c. The Legislative History. The legislative history of the Rio Grande Compact contains numerous statements by Compact principals which are only reasonable, logical and meaningful when the Compact is construed to create separate Conejos and Rio Grande delivery obligations.

d. Laws Upon Same or Similar Subjects. To the extent that the Rio Grande Compact has an impact on the intrastate distribution of water within Colorado by establishing separate Conejos and Rio Grande mainstem interstate obligations, other laws upon similar subjects, namely other interstate compacts to which Colorado is a part, provide examples which support such an approach. See Arkansas Compact, § 37-69-101, Article V, D; Upper Colorado River Compact, § 37-62-101, Articles XI and XIII; La Plata River Compact, § 37-63-101, Article II, Sec. 3.

3. Consequences of a Particular Construction. Comparison of the consequences obtaining from the separate delivery obligations to those stemming from a unitary obligation provides further reinforcement of the view that the former is intended by the Compact. Separate delivery obligations will no doubt yield less water to Conejos appropriators than would a unitary obligation, but they will still obtain a larger volume of water per acre of irrigated land (as measured by the Rio Grande Joint Investigation) than do mainstem appropriators. Also, separate delivery obligations will provide the more equitable apportionment of the burden of meeting Compact requirements than would unitary obligation.

f. Administrative Construction. The administrative construction of the Rio Grande Compact has consistently supported

the position that separate Conejos River and Rio Grande mainstem delivery obligations are created thereby. The construction of a statute by administrative officials charged with its enforcement is to be given great weight by Colorado courts.

g. The Declaration of Legislative Purpose. The declaration of purpose which prefaces the Rio Grande Compact identified these purposes:

- (1) a desire to remove controversy among the states, and between the citizens of one state and the others;
- (2) a desire to effect an equitable apportionment of the waters.

Here equitable apportionment preserved the water supply that had been historically used in the Conejos area and in the Rio Grande mainstem area. Had the Rio Grande Compact not mandated separate delivery obligations for the Conejos River and the Rio Grande mainstem, Compact administration not preserving the historically separate use and administration of the two stream systems would violate § 37-80-104, C.R.S. 1973. This statute provides that when any compact is deficient in establishing standards for administration, implementation of its provisions shall be formulated "so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible." In light of the historical conditions existing at the time of the Compact's enactment, lawful use conditions in the San Luis Valley would be most nearly restored by making the Conejos and Rio Grande mainstem responsible for the deliveries indicated by their respective discharge tables, which were based on historical conditions in each area.

The Rio Grande Compact is clear on its face. The only logical purpose for the two "tabulations of relationship" specifying the "Discharge of Conejos River" and the "Discharge of Rio Grande Exclusive of Conejos River" is to establish separate

obligations for administration of these two rivers in Colorado. Perhaps it was unwise for this to have been done by the Compact. However, this is what it provides and we are bound thereby.

The consequences of approving separate delivery obligations for the Conejos River and the Rio Grande mainstem is to maintain each stream's historically separate dependence on the particular water supply nature affords that stream, and to allocate to water users on each stream the burden of pursuing those responsible for new depletions in their area; in short, to preserve the historical regime on the two stream systems, which developed under the prior appropriation doctrine.

The award of 10,000 acre feet credit was intended, as determined by the Compact itself and its legislative history, to benefit both streams, and the method of allocation in Proposed Rule II E is inconsistent with that intent. This credit was intended as a "cushion" to protect against hardships and inequities caused by variations from predicted performance of each river due to "vagaries of nature" or other causes. It should be applied to relieve such hardship and inequities when they occur on either river. The percentage allocation tied to each river system's delivery requirement as provided by Rule II E must be disapproved.

The surface streams, the unconfined aquifer and the confined aquifer in the San Luis Valley are all hydraulically connected, but the extent of the connections is not uniform and has not been fully defined. The confined aquifer is a pressure system and water from it leaks upwards through the confining clay layers into the unconfined aquifer. But, the transmissivity and thickness of the confining layers varies from place to place. Thus, the amount of leakage may vary also in different locations. The unconfined aquifer is

directly connected with the surface streams in some places but not in other places.

Both the number of large capacity wells and the amount of water withdrawn from such wells in the Valley have increased substantially since 1950. To the extent these wells are hydraulically connected to the Conejos or the Rio Grande, they may affect the flows of those streams below the index gauging stations. Conflicting evidence was presented regarding the effect that wells may have upon various streams. No attempt was made in the evidence to identify amounts of depletion caused by any particular well.

In the Valley there is not a direct one-for-one effect upon stream flow in the amount of water pumped minus the amount of return flow to a surface stream, because of the widespread occurrence of a highly significant phenomena. The naturally occurring relatively non-beneficial consumptive use of water by phreatophytes and native grasses accounts for a very large portion of the annual loss of water in the San Luis Valley. When wells are pumped one of the effects is the lowering the water table, directly in the case of unconfined aquifer pumping and indirectly by means of reduced leakage in the case of confined aquifer withdrawals. The lowering of the water table causes a substantial salvage of the loss by evapotranspiration. The evidence shows that the phreatophytes involved in this case, rabbit brush and greasewood, which together with the cottonwoods which occur along the stream channels, cause a very large portion of the "non-beneficial" consumptive use. The evidence shows that in many cases the amount of salvaged evapotranspiration is in the same order of magnitude as total well pumping.

1973 C.R.S. 37-92-502 states: "The materiality of injury depends on all factors which will determine in each case the amount of water such discontinuance will make available - - -", and "Each diversion shall be evaluated and

administered on the basis of the circumstances relating to it - - - ." (emphasis added) This statute makes it abundantly clear that no total or partial discontinuance of any diversion, well or otherwise, shall be ordered unless that diversion is causing or will cause material injury to water rights having senior priorities. The materiality of injury must be determined as to each well after consideration of the factors required by Section 502. Some of these wells may have minimal or even beneficial effect, while others may cause material injury to water rights having senior priorities. Until the Division Engineer determines the materiality of injury to senior priorities caused by a specific well, as required by 1973 C.R.S. 37-92-502, that well may not be curtailed.

The average annual obligation of Colorado under the Rio Grande Compact from 1940 through 1977, a period of 38 years, was 292,118 acre feet of water.

The Valley alluvium is some 30,000 feet deep and saturated with water. In the upper 6,000 feet of the alluvium there are in excess of two billion (2,000,000,000) acre feet of ground water. A mere 0.015 per cent, or 15/100,000th of this would completely satisfy the annual Compact obligation.

Mr. Philip A. Emery of the U. S. Geological Survey, having made an extended in-depth study of water in the San Luis Valley and recognized as an expert on the subject, testified that up to 1,400,000 acre feet of water annually is now lost to non-beneficial evapotranspiration by phreatophytes and that by increasing ground water production and lowering the water table 12.5 feet in areas not under crop, over one million (1,000,000) acre feet of water now lost to non-beneficial evapotranspiration could be salvaged. It would require less than 30 per cent of this salvaged water to satisfy Colorado's Compact obligation. Mr. Emery stated that pumped water comes mostly from salvaged

ground water that would have been lost to non-beneficial evapotranspiration (84%) and the balance is from ground water storage (14%) and only two (2) per cent from the Rio Grande; that eighty-six (86) per cent of the water supplied by surface inflow and precipitation is consumed by evapotranspiration; and that more wells rather than fewer are needed. His assessment was concurred in by many of the engineers and others familiar with the water system of the Valley.

The means must be found to salvage the huge quantity of water presently wasted to non-beneficial evapotranspiration and to tap the enormous supply of water underground in the San Luis Valley.

In Kuiper v. Well Owners Association, 176, Colo. 119, at 147 (1971), the Colorado Supreme Court held that the lower court had erred in ruling that regulations permitted appropriators to command the whole flow of the stream because the well curtailment schedule did not cause pumping to cease more than 3/7ths of the time. The plain implication of the basis of the reversal is that had the regulations required total curtailment, as do the present proposed rules and regulations, they would have commanded the whole flow of the stream.

The Supreme Court in the Kuiper case also held that the owner of a surface decree could not be compelled to first apply his well water to that decree before making a call on junior appropriators. The well involved was an existing well and thus apparently already under priority. A requirement for such use of an existing well might be unconstitutional. However, in the case before us the rule in Kuiper does not preclude an administrative requirement that before a senior appropriator can command the whole flow of the stream, whether above or below ground surface, to facilitate the taking of a mere fraction of that flow, he employ an efficient means of

diversion. This may take the form of requiring the senior appropriator to drill a new well or wells to augment or replace his surface water diversion before he can require curtailment of junior rights. Thus maximum utilization through conjunctive use can be achieved. This complies with 1973 C.R.S. 37-92-102, which states:

"(1) --- it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the water of this state."

"(2) --- it is hereby declared to be the further policy of the state of Colorado that in the determination of water rights, uses, and administration of water the following principles shall apply:"

"(b) --- but, at his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled."

The above section codified a judicial principle which originated in Schodde v. Twin Falls Land & Water Co., 224 U. S. 107 (1912), and was adopted by Colorado in City of Colorado Springs v. Bender, 148 Colo. 458, 336 P2d 552 (1961). While neither case dealt with the relationship between stream flows and tributary groundwater, the "waterwheel" principle of Schodde is directly applicable to water use in the San Luis Valley. Together, Schodde, Bender, and the Water Right Determination and Administration Act of 1969 establish that, under certain circumstances, a surface stream appropriator has a duty to withdraw groundwater tributary to the stream in order to satisfy his surface appropriation.

Schodde dealt with the relationship of senior and junior stream appropriators. An upstream senior, who had used the river's current to power waterwheels sought to enjoin a downstream junior who, by damming the stream, had rendered the waterwheels useless. The court held that, under the law of appropriation, a demand that stream conditions be maintained

merely to facilitate the method rather than the amount of diversion will not be tolerated.

With Bender Colorado adopted and extended the "water-wheel" doctrine, first applying the doctrine to groundwater and, second expressly requiring a senior appropriator to improve his means of diversion to reach a supply of water adequate to satisfy his appropriation. Bender, a senior appropriator of underground water, alleged that groundwater diversions by junior appropriators had lowered the water table below the intake of his pumping facilities. The court held that, although Bender could not be required to improve his extraction facilities beyond his "economic reach," if adequate means for reaching a sufficient supply were available, provision for such means would be decreed at the expense of junior appropriators.

The Bender court announced that:

[e]ach diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. . . . This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand. 366 P.2d at 555.

Although not formally announced until Fellhauer v. People, 167 Colo. 320, 447 P.2d 986, 994 (1968), recognition that "maximum utilization" of water is a necessary policy of the state, underlies the Bender decision. The policy of "maximum utilization" requires reasonable means of diversion. In short, Bender provides that the allocation of costs beyond the economic reach of the senior appropriator to the junior appropriator constitutes the sole limitation on the senior's duty to effectuate reasonable means of diversion.

In Fellhauer, the court expressly chose not to decide whether a senior stream appropriator has a duty to withdraw groundwater that is both tributary to the stream and sufficient to satisfy his appropriation. Yet this duty is a necessary outgrowth of three forces: (1) Bender and the enactment of the "waterwheel" doctrine in § 37-92-102(2)(b); (2) the policy of "maximum utilization" of the state's water as announced in Fellhauer; and (3) the directive of the Water Right Determination and Administration Act of 1969 that the "appropriation, use, and administration of underground water tributary to a stream with the use of surface water" be integrated. § 37-92-102(1), C.R.S. 1973.

Section 37-92-101 et seq., C.R.S. 1973, The Water Right Determination and Administration Act, recognized that surface water of a stream, together with groundwater tributary to that stream, constitutes a stream system. The rules and regulations proposed by the State Engineer require the curtailment of wells on the basis of assumed injury to surface rights. Yet the rules and regulations make no effort to require stream appropriators to tap the enormous supply of water underlying the surface of the Valley. Thus the rules and regulations are contrary to the policy directives and the law expressed by both the legislature and the courts.

Several suggestions by some of the engineers who have been involved in this trial offer additional possibilities and hope of successful resolution of the water problems facing the San Luis Valley. Some of these suggestions include:

1. Elimination of the wasteful practice of sub-irrigation.
2. Encouragement of improved irrigation efficiency, such as increased use of sprinklers.
3. Prohibit the wasteful practice of allowing diverted water to collect in barrow pits, pot holes and other areas, only to evaporate.
4. Promote the Closed Basin Project.

5. Construct new wells and use existing wells to deliver both confined and unconfined water to help satisfy Compact obligations.
6. Construct new drains and rehabilitate existing drains to salvage water presently lost to non-beneficial evapotranspiration.
7. Initiate channel rectification program to prevent the wasteful overflow losses on critical reaches of the river system in the Valley.
8. A systematic augmentation plan for direct flow rights and wells from the confined and unconfined aquifers, pursuant to ongoing research to determine the effect of such augmentation upon senior priority rights.
9. Development of reservoirs to store pre-Compact direct flow rights.
10. Additional purchase of existing water rights and release of those waters to the streams.

These and other proposals should be thoroughly investigated and implemented where feasible. In some instances the costs should be borne by the water user directly benefited thereby. In other instances the costs should be borne by a local or regional agency, such as the Rio Grande Conservation District.

Many of these proposals can be implemented by the State Engineer under his present statutory authority. Others can be promoted and developed privately or by public agencies under aggressive leadership of the State Engineer.

Irrigation development and water use on Rio Grande tributaries other than the Conejos River at the time of the Compact study period was such that those streams contributed little water to the mainstem except occasional flood flows. The Compact proceedings and the Rio Grande Joint Investigation contain a number of references to this fact. In light of this circumstance, the Compact negotiators omitted index gauging stations for these lesser tributaries. However, they did not exclude these tributaries from the Compact obligation. They could have so stated in the Compact, had that been their intention.

The Motions for Summary Judgment and the claim of res judicata and collateral estoppel by Trinchera Water Conservancy

District and Trinchera Irrigation Company should be denied. The waters that must be delivered to downstream states under the Compact, pursuant to the doctrine of equitable apportionment are not subject to Colorado's priority system. The rights to those waters are vested in users in the downstream states and the conflicting claims of Colorado users are, therefore, invalid.

The first sentence of the Compact states:

"The state of Colorado, the state of New Mexico, and the state of Texas, desiring to remove all causes of present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, ---"

The Compact at Article III (4) states:

"Rio Grande at Lobatos less Conejos at mouths is the total flow of the Rio Grande at the U.S.G.S. gauging station near Lobatos, less the discharge of Conejos river at its mouths, during the calendar year."
(emphasis added)

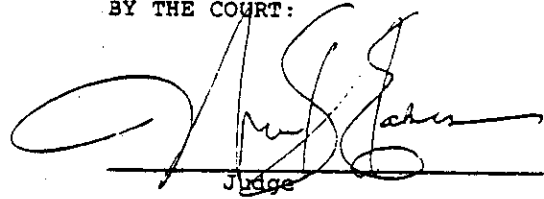
These and other references make it clear that the Compact applies to all tributaries of the Rio Grande. Also, the evidence established that the underground flows of the tributaries contribute to the Rio Grande at Lobatos.

The protests of The Alamosa La Jara Water Users, The Hickory-Jackson Ditch Company, Commonwealth Irrigation Company, Trinchera Water Conservancy District and Trinchera Irrigation Company should be denied. However, when the State Engineer determines that delivery of water from these tributaries to the mainstem of the Rio Grande would be futile or wasteful, he has the authority to choose not to administer the streams or curtail diversions.

IT IS ORDERED, ADJUDGED AND DECREED That the Proposed Rules and Regulations of the State Engineer and the Motions for Summary Judgment are disapproved as specified and for the reasons hereinbefore stated.

DATED this 31st day of January, 1980.

BY THE COURT:



A handwritten signature in black ink, appearing to be "M. J. [unclear]", written over a horizontal line. The signature is cursive and somewhat stylized.

Judge

[4] We hold, therefore, that the trial court's finding that the plaintiff waived its right as granted in portion two of the judgment, to a hearing on additional attorney fees is supported fully by the record.

Accordingly, we reverse the court of appeals decision and remand with directions to affirm the trial court's dismissal of the plaintiff's motion for an award of additional attorney fees.

MR. JUSTICE PRINGLE does not participate.

No. 79SA38

Southeastern Colorado Water Conservancy District; Northern Colorado Water Conservancy District; Southwestern Colorado Water Conservation District v. John Huston; Alan Leaffer; Wallace Yaffe, d/b/a various John Doe and Richard Roe joint ventures; Nedlog Technological Group; Colorado Pacific Energy; Colorado Pacific Aztec; and Bob Johnston, Jr.

(593 P.2d 1347)

Decided April 16, 1979. Rehearing denied April 30, 1979. Rehearing denied May 7, 1979.

Original proceeding in which a number of water cases have been consolidated in order that there may be a determination of common questions of law. These cases arise from applications for adjudication of rights in non-tributary underground waters apparently not located within any designated ground water basin and supreme court is asked to comply with this request under its supervisory powers granted by *Colo. Const.* Art. VI, § 2. Rule to show cause issued.

Rule Made Absolute

1. **WATER RIGHTS** — *Water Judge — Jurisdiction — "Water Matters" — Non-Tributary Water — Statute.* Under section 37-92-203(1), C.R.S. 1973, the water judge has been given jurisdiction with respect to "water matters"; in addition, the supreme court has stated that non-tributary water, which has not been designated as ground water, is included within the term "water matters."
2. *Water Judge or as District Judge — Jurisdiction — Applications — Determine — Questions.* The water judge, either as a water judge or as a district judge, has jurisdiction to determine any questions which may properly be raised concerning respondents' applications in instant case.
3. **COURTS** — *Supreme Court — Appellate Jurisdiction — General Superintending Control — Inferior Courts.* Under the Colorado Constitution, the supreme court is vested with appellate jurisdiction; in addition, it also has a

superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law.

4. *Supreme Court — "Superintending Control" — Constitution — Harmony — Judicial System.* One of the purposes of the "superintending control" over all inferior courts, which has been granted to the supreme court under the Colorado Constitution, is to insure the harmonious working of the judicial system.
5. **WATER RIGHTS — Supreme Court — Supervisory Power — Constitution — Basis — Original Jurisdiction — Non-Tributary Underground Waters — Harmony — Judicial System.** The constitutional supervisory power granted to the supreme court is a proper basis for the present exercise of original jurisdiction in cases arising from applications for adjudication of rights in non-tributary underground waters apparently not located within any designated ground water basin; moreover, such action is necessary to insure the harmonious working of the state's judicial system.
6. *Additional Water Judge — Each of Seven Water Divisions — Compliance — Statutes.* Where chief justice temporarily assigned an additional water judge to each of the seven water divisions — referred to here as the special water judge — who will act as the water judge of the cases consolidated in instant proceeding, sitting in the county or counties which he shall designate, *held*, this procedure, as such, disposes of the argument that the supreme court is taking original jurisdiction away from the water judges; actually, the court is complying with the statutes.
7. **PRACTICE AND PROCEDURE — Common Questions of Law — Joint Hearing — Consolidation.** Under C.R.C.P. 42(a), when actions involving a common question of law are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; further, it may order all the actions consolidated; and it may also make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
8. **WATER RIGHTS — Consolidation for Determination — Common Questions of Law — Change of Venue — Negative.** In an original proceeding involving various alleged rights to take or appropriate non-tributary water outside of designated water basins under many applications pending before water judges, the supreme court — in ordering that applications be consolidated for determination of common questions of law by an additional water judge — is not changing venue.
9. *Consolidation — Common Questions of Law — Statutes — Standing.* With reference to the matter of standing to obtain consolidation for the purpose of determination of certain common questions of law, supreme court is of the view that the petitioners in instant case do have standing under the powers granted to them by sections 37-45-102 and sections 37-47-101 and 107, C.R.S. 1973, and also in light of the court's discussion concerning the State Engineer's authority as set forth in *Wadsworth v. Kuiper*, 193 Colo. 95, 562 P.2d 1114 (1977).
10. *Common Questions of Law — Not Answered by Previously Announced Colorado Law.* With reference to the contention that the common questions of law suggested by the petition are already settled by constitutional or statutory pro-

vision or by case law, supreme court is not at all satisfied that they are answered by previously announced Colorado law.

11. *Surface Water Rights — Claim — Speculative — Prohibited.* A claim to surface water rights cannot be predicated solely upon speculative purposes.
12. *Non-Tributary Water — Various Alleged Rights — Appropriations — Consolidation of Actions — Due Process — Equal Protection.* In an original proceeding involving various alleged rights to take or appropriate non-tributary water outside of designated water basins under many applications pending before water judges, *ordered*, that applications be consolidated for determination of common questions of law by an additional water judge; and making the rule absolute will not constitute a denial of due process or a violation of equal protection.
13. *Single Water Judge — Instead of Piecemeal — Decisions by Seven Different Judges — Speedier Determination — Questions of Law.* Since the questions of law involved in instant case are fundamental, their determination in an orderly and studied fashion should take place with all feasible speed; thus, having a single water judge, who can consider all aspects of all claims involved, decide these questions subject to the right of appellate review, instead of having them decided piecemeal by seven different judges on differing time schedules with many possible appeals, will achieve the result all seek, namely, speedier determination.

Original Proceeding

Fairfield and Woods, Charles J. Beise, Howard Holme, for petitioner Southeastern Colorado Water Conservancy District.

Davis, Graham & Stubbs, John M. Sayre, for petitioner Northern Colorado Water Conservancy District.

Maynes, Bradford & Duncan, for petitioner Southwestern Colorado Water Conservation District.

J. D. MacFarlane, Attorney General, Hubert A. Farbes, Jr., First Assistant, Vicki J. Fowler, Assistant, Jack Wesoky, Assistant, for co-petitioner C. J. Kuiper, State Engineer.

Yegge, Hall & Evans, Michael D. White, John D. Phillips, Harvey W. Curtis, Charles B. White, for respondents John H. Huston, Alan Leaffer and Wallace Yaffe.

Holme, Roberts & Owen, Kenneth J. Burke, Marilyn G. Alkire, for respondent Nedlog Technology Group.

Calkins, Kramer, Grimshaw & Harring, Wayne B. Schroeder, for respondents Colorado Pacific Energy and Colorado Pacific Aztec.

Saunders, Snyder, Ross & Dickson, P.C., W. B. Tourtillot, Jr. for respondent Bob Johnston, Jr.

Fischer, Brown, Huddleson & Gunn, Ward H. Fischer, Steven B. Ray, for amici curiae Jackson County Water Conservancy District, Cache La Poudre Water Users Association and City of Fort Collins, Colorado.

Steinmark & Lawrence, Kim R. Lawrence, for amicus curiae Central Colorado Water Conservancy District.

En Banc.

MR. JUSTICE GROVES delivered the opinion of the Court.

This is an original proceeding in which we have been requested to consolidate a number of water cases in order that there may be a determination of common questions of law. These cases arise from applications for the adjudication of rights in non-tributary underground waters apparently not located within any designated ground water basin.¹ We are asked to comply with this request under our supervisory powers granted by *Colo. Const.* Art. VI, § 2. We issued a rule to show cause and now make the rule absolute.

On January 24, 1979 the petition commencing these proceedings was filed by Southeastern Colorado Water Conservancy District, Northern Colorado Water Conservancy District and Southwestern Colorado Water Conservation District. Shortly thereafter the State Engineer asked for, and was granted, permission to join in the prayer for relief contained in the petition.

The respondents are referred to as follows:
John Huston, Allan Leaffer and Wallace Yaffe, d/b/a various John Doe and Richard Roe Joint Venturers — the "Joint Venturers";
Nedlog Technological Group — "Nedlog";
Colorado Pacific Energy and Colorado Pacific Aztec — "Colorado Pacific"; and
Bob Johnston, Jr. — "Johnston".

¹ See sections 37-90-101 *et seq.*, C.R.S. 1973.

On December 28 and 29, 1978 the Joint Venturers, Nedlog and Johnston filed separate applications for non-tributary underground water rights. In the documents before us we have observed no connection between these three claimants. At about the same time Colorado Pacific filed for 148 wells. Colorado Pacific states that 92 of these were from non-tributary sources and that "[n]o such allegation was made" as to the other 56. Colorado Pacific disavows any connection with the other respondents.

It appears that the respondents have filed over 100 cases² involving claims for thousands of wells and over 20 million acre feet of water in underground reservoirs.

The common questions of law suggested in the petition are:

1. Does the water judge have jurisdiction over these claims?
2. Can non-tributary waters outside the boundaries of designated water basin be appropriated by non-owners of the surface?
3. Are such waters subject to appropriation under the Colorado Constitution?
4. Can such applications be filed without first applying for permits from the State Engineer?
5. Can appropriations be made for speculative purposes in uses by persons other than the claimants?

The prayer of the petition is "that this Court designate one water judge of one division to hear and determine all common questions of law, staying all proceedings in all other cases in all other divisions until final determination of said legal questions."

I.

We do not submit the questions in precisely the manner suggested by the petitioners nor grant all of the relief requested, as we set forth below.

The chief justice of this court is appointing the same district judge as an additional water judge in each of the seven water divisions of the state. For convenience, he is here called the special water judge. Our ruling in capsulized form, to be expanded later in this opinion, is that the applications of the respondents for decrees awarding them rights to non-tributary waters are assigned to the special water judge in order that there may be a determination of the threshold question (Q1) of whether non-tributary waters in Colorado are subject to appropriation; and, in the event that the answer to this question is in the affirmative, for the determination of the following additional questions of law:

- Q2. By what authority can such waters be appropriated?
- Q3. Can non-tributary waters outside the boundaries of designated ground water basins be appropriated by persons having no property

² Joint Venturers set forth in one of their briefs that 122 "applications" have been filed in the matters designated by the petitioners. "Applications" as here used, we believe means the same as "cases."

interest in the surface?

Q4. Can non-tributary waters outside the boundaries of designated ground water basins be appropriated for use by persons other than the claimant or those whom the claimant is authorized to represent?

Q5. Can applications for non-tributary waters outside the boundaries of designated ground water basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?

We are not here staying proceedings in cases other than those involved in the applications of the respondents.

II.

[1,2] We are not directing that in the consolidated proceeding there be a determination of the question as to whether the water judge has jurisdiction over these claims. In *Perdue v. Ft. Lyon Canal*, 184 Colo. 219, 519 P.2d 954 (1974), we called attention to the provision of section 37-92-203(1), C.R.S. 1973³ to the effect that the water judge has been given jurisdiction with respect to "water matters." We there stated that non-tributary water, which has not been designated as ground water, is included within the term "water matters." In that opinion we called attention to the fact that a water judge is a district judge and stated that, "When the water judge wears two hats, it would approach an absurdity to say that he must rule in two different actions to bring about the [ultimate] result" Whatever the rights of the respondents may or may not be, we think that it has already been determined that the water judge, either as a water judge or as a district judge, has jurisdiction to determine any questions which may properly be raised concerning the respondents' applications. See *Oliver v. District Court*, 190 Colo. 524, 549 P.2d 770 (1976).

III.

The respondents have made a number of objections. These may be classified as follows:

A. Jurisdictional objections.

1. This court's supervisory power provides no basis for its exercise of original jurisdiction.
2. The water courts have exclusive jurisdiction of water matters within their divisions.
3. Only trial courts can order consolidation, and no motions for consolidations have been filed with them.
4. This court cannot change venue.
5. Cases pending in different divisions may not be consolidated.

³ There referred to as 1969 Perm. Supp., C.R.S. 1963, 148-21-10(1).

B. Objections as to parties.

1. The petitioners have no standing to bring this proceeding and are not parties to many of the cases pending in the water courts.
2. Persons in interest are not parties here and, therefore, consolidation at this time is premature.
3. The petitioners have failed to designate the particular application to which they have filed statements of opposition.
4. There is no identity of interest among the respondents.
5. The water judges have not been joined in this proceeding.

C. Objections as to subject matters.

1. Common questions of law are not involved in this proceeding.
 2. The "common questions of law" have already been resolved.
 3. The petition does not adequately describe the matters sought to be consolidated.
 4. Speculative purposes involve differing facts in different cases.
- D. To make the rule absolute would constitute a denial of due process of law and a violation of equal protection under the law.
- E. Making the rule absolute would result in unnecessary delay.

III. A-1

[3,4] The supervisory powers granted to this court by the constitution are:

"The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." *Colo. Const.* Art. VI, § 2(1).

One of the purposes of the "superintending control" provision is "to insure the harmonious working of our judicial system." *People v. Richmond*, 16 Colo. 274, 26 P. 929 (1891); *In re Assignment of Huff*, 352 Mich. 402, 91 N.W.2d 613 (1958).

Joint Venturers have filed applications in each of the seven water divisions of our state. It appears that, absent consolidation, seven different water judges will have before them most if not all of the questions of law above mentioned under Article I. These are difficult questions. Beyond the waste of judicial time, there is the very present possibility that the seven judges might come to different conclusions. These questions involve matters of great public importance. This importance is not only to the many persons whose rights may be involved, but to the General Assembly as it reviews the present state of constitutional and statutory law relating to water rights and seeks solutions to legal problems which are capable of solution by it.

[5] We have been told that a rule such as we are here making absolute should be issued only with great care and under extraordinary circumstances. Assuming *arguendo* that this is a proper statement, mak-

ing the rule absolute meets those conditions. We are thoroughly convinced that our action is necessary to insure the harmonious working of our judicial system. The constitutional supervisory power granted to this court is a proper basis for making the rule absolute.

III. A-2

[6] It is argued that there is no authority for the proposal "that a single water judge be conferred extraordinary jurisdiction over applications for water rights filed by various applicants in different water divisions." This argument is predicated upon the following statutory provisions:

"There is established in each water division the position of water judge of the district courts of all counties situated entirely or partly within the division. Said district courts collectively acting through the water judge have exclusive jurisdiction of 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" Section 37-92-203(1), C.R.S. 1973.

We are complying with the statutes. Subsection (2) of section 203 provides:

"The water judge for a particular division shall be selected from among the judges of the district courts of the counties situated entirely or partly within the division; except that the chief justice may make temporary assignments of other judges."

As mentioned, contemporaneously with the announcement of this opinion, the chief justice is temporarily assigning an additional water judge to each of the seven water divisions, referred to here as the special water judge. He will act as the water judge of the cases consolidated in this proceeding, sitting in the county or counties which he shall designate. Section 37-92-203(3), C.R.S. 1973.

This procedure disposes of the argument that we are taking original jurisdiction away from the water judges. Later, we may be reviewing the decisions of the special water judge on these questions of law, but we are not exercising original jurisdiction to answer them in the first instance.

III. A-3

[7] It is argued that only the water courts can order consolidation. This argument is predicated upon C.R.C.P. 42(a) which reads:

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

A reading of C.R.C.P. 42(a) answers the argument. These provisions relate to actions pending before the same trial court.

III. A-4

[8] In support of the argument that this court cannot change venue, the Joint Venturers cite section 37-92-203 and 304(4), C.R.S. 1973 and C.R.C.P. 98. We have already addressed ourselves to the argument under section 203. Rule 98 is the venue rule. We are not changing venue. The Joint Venturers quote the portion of section 304(4) reading:

"If an applicant, a person who has filed a statement of opposition, or a protestant requests, the hearing shall be conducted by the water judge in the district court of the county in which is located the point of diversion of the water right or conditional water right involved."

Counsel then state in their brief:

"In order to insure that there be no uncertainty as to this point, Respondents hereby state that they will assert their statutory right, pursuant to § 37-92-304(4), that all hearings concerning any conditional water rights, in which they have an interest, be conducted in the district courts of the counties in which are located the points of diversion of the water rights involved."

This challenge consists of a statement of intent to make an assertion in the water court. If counsel proceed as they state, then they should do so in order that the matter may be heard by the special water judge.

III. A-5

We have already made disposition of most of the objections raised under III. A-5. Remaining portions of such objections are without merit. We do mention a partial paradox as to the objection that cases pending in different divisions may not be consolidated. Nedlog moved in Water Division Nos. 5 and 6 that its applications filed in those divisions be consolidated on the ground that they involve common questions of law and fact. The motion states:

"Consolidation of these Applications as sought herein will promote the just, speedy and inexpensive determination of the uses presented to avoid unnecessary costs and delay and inconsistent determinations, and promote the policies and purposes of C.R.C.P. Rules 1(a) and 42(a)."

In fairness to Nedlog, it should be stated that it was not among the respondents who made the objection that cases pending in different divisions could not be consolidated.

III. B

We now consider the respondents' objections as to parties.

[9] All respondents have contended that the petitioners do not have standing.

The petitioners have made the following allegations: that the petitioner Southeastern Colorado Water Conservancy District has filed objections to all of the claims of the Joint Venturers in Water Divisions 2 and 5, to all of the claims in Nedlog in Division 5, and to all of the claims of Johnston in Division 2; that the petitioner Southwestern Colorado Water

Conservation District has filed or is filing objections to all of the Colorado Pacific claims in Division 7; and that the petitioner Northern Colorado Conservancy District is filing objections to the respondents' claims in Divisions 1 and 5. When the State Engineer entered this proceeding, he stated that he is filing statements of opposition to all of the applications for water rights involved in this proceeding.

Under the powers granted to the petitioners by sections 37-45-102 and 118 and sections 37-47-101 and 107, C.R.S. 1973, and in light of the discussion concerning the State Engineer's authority in *Wadsworth v. Kuiper*, 193 Colo. 95, 562 P.2d 1114 (1977), we have no doubt as to the standing of either of the petitioners or the State Engineer to request the relief here asked. We are only concerned here with the question of whether petitioners have standing to obtain consolidation for the purpose of determining certain common questions of law. The many "standing" cases cited by petitioners are not applicable to this particular issue. We hold that there is standing here.

We do not perceive the alleged prematurity of this proceeding, and we find the objections as to parties in this respect without merit.

III. C-1

Joint Venturers and Nedlog take the position that for an issue to constitute a common question of law it must be common to every respondent and every application for water right. The only authority cited for this assertion is *Willy v. Atchison T. & S. F. Ry. Co.*, 115 Colo. 306, 172 P.2d 958 (1946). In contrast, we are considering a common question of law to be one common to more than one of the respondents. Johnston vigorously insists that he should not be included in this consolidation because he "is seeking a conditional decree on ground water rights to protect and preserve those rights underlying *his own land*." In its objection to Johnston's application, the Southeastern Colorado Water Conservancy District has alleged: that the water involved is not subject to appropriation; that appropriations cannot be initiated for speculative purposes; and that no more waters can be appropriated from deep wells than are required for beneficial use on lands overlying the same. Johnston's application claims 71 cubic feet per second of time of water to serve "agricultural, residential, commercial, and/or industrial development of the property described . . . and such other land as may be served directly or served through exchange or augmentation," and asks that the water be determined to be non-tributary. The Johnston application for 53 wells involves questions common to the other petitioners.

III. C-2

[10] The Joint Venturers state in one of their briefs: "The 'common questions of law' suggested by the petition are already settled by constitutional or statutory provision or by case law." The question as to the correctness of this statement goes to the heart of this proceeding.

The first of the common questions is whether non-tributary water in Colorado is subject to appropriation. It is to be noted that the question we pose is broader than that suggested by the petitioners, namely, are such waters subject to appropriation under the Colorado Constitution?

Do the following constitutional provisions include non-tributary water:

"The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." *Colo. Const. Art. XVI, § 5.*

"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied" *Colo. Const. Art. XVI, § 6.*

"All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation." *Colo. Const. Art. XVI, § 7.*

If these constitutional provisions do not apply to non-tributary waters, then as to such waters which are not "designated ground water" what is the effect of the Water Right Determination and Administration Act of 1969 (section 37-92-101 *et seq.*, C.R.S. 1973) and the Colorado Ground Water Management Act (section 37-90-101 *et seq.*, C.R.S. 1973)?

We have reread the "developed water" cases, such as *Leadville Co. v. Sweet*, 91 Colo. 536, 17 P.2d 303 (1932); *Comrie v. Sweet*, 75 Colo. 199, 225 P. 214 (1924); *Ripley v. Park Center Co.*, 40 Colo. 129, 90 P. 75 (1907); and *Platte Valley Co. v. Buckers Co.*, 25 Colo. 77, 53 P. 334 (1898). We have questions as to the applicability of these cases to the non-tributary water problems posed here. We are not unmindful of *Sweetwater Co. v. Schubert*, 188 Colo. 379, 535 P.2d 215 (1975) and *Pikes Peak v. Kuiper*, 169 Colo. 309, 455 P.2d 882 (1969).

Without pursuing the Joint Venturers' assertion further, we simply state that, from the fact that we ask these questions as to the instant applications, it can be deduced that we are not satisfied that they are answered by previously announced Colorado law.

III. C-3

We do not agree with the contention that the petition herein does not adequately describe the matters involved.

III. C-4

Most of the respondents have presented the argument — rather convincingly — that any ruling as to the matter of speculative purposes depends upon the particular facts of the individual case. We agree that to apply a general rule concerning this subject does require consideration of the facts of the application before the court. That, however, does not

prevent the special water judge, who hears the matters involved in this proceeding, from applying the general rules involved to the facts of the applications of the respondents.

[11] This court has held that a claim to surface water rights cannot be predicated solely upon speculative purposes. *Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375, 276 P.2d 992 (1954); *Combs v. Agricultural Ditch Company*, 17 Colo. 146, 28 P. 966 (1892). This court shortly will announce its opinion in *Colorado River Water Conservation District v. Vidler Tunnel Co.*, 197 Colo. 413, 594 P.2d 566 (1979) which deals with the question. The special water judge will have the guidance of those cases in addressing the related question of whether non-tributary waters outside the boundaries of a designated ground water basin can be appropriated except for use by the respondents or others whom the respondents are authorized to represent.

III. D

[12] The Joint Venturers and Johnston argue that making the rule absolute will constitute a denial of due process of law and a violation of equal protection under the law. The only cases cited for this proposition are *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975); *Woodson v. Ingram*, 173 Colo. 65, 477 P.2d 455 (1970); *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); and *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (1968). We are unable to perceive the applicability of the cited cases in the instant proceeding. The statements in support of the argument are in large part the same as the objections already considered or are without merit.

III. E

[13] Some of the respondents express the opinion that our action here will result in great delay and consequent prejudice. One of the principal reasons for our action here is that our prognosis is otherwise. We appear to be confronted with one of the great emergencies in the history of Colorado water law. The questions of law here involved are fundamental. The determination of these questions in an orderly and studied fashion should take place with all feasible speed. Having a single water judge, who can consider all aspects of all claims involved, decide these questions subject to the right of appellate review, instead of having them decided piecemeal by seven different judges on differing time schedules with many possible appeals, will achieve the result all seek — speedier determination.

IV.

The special water judge now being appointed by the chief justice shall be an additional judge in and assigned to each of the seven divisions. This special water judge hereby has assigned to him all matters connected with the pending applications of the respondents which are the subject of this proceeding and which are on file with any of the water clerks of the state. These applications include, without limitation by reason of enumeration

thereof, the following:

Applications by any of the Joint Venturers under trade names such as Dexter Enterprises and Bluepond Associates, examples of which are the applications in Case No. W-4810 and W-4829 in Water Division No. 2.

Applications of Nedlog Technology Group, an example of which is the application in Case No. W-4004 in Water Division No. 5, captioned for filing in Water Division Nos. 5 and 6.

All applications of Colorado Pacific Aztec and Colorado Pacific Energy, examples of which are cases numbered W-1905-78 and W-1906-78 filed in Water Division No. 7.

All applications of Bob Johnston, Jr., an example of which is the application filed in Case No. W-4805 in Water Division No. 2.

The special water judge is directed, with the cooperation of the water clerks of the state and of the other water judges, without delay to compile and publish a list of the applications which he is to consider under the rule of this opinion. Either on his own motion or that of any interested person, the special water judge may add other applications, or delete applications, from the list. He may certify to this court in this proceeding any questions in connection with the compilation and publication of such list or amendments thereto, and this court expressly retains jurisdiction of this proceeding for that purpose.

If the special water judge finds that any claim made by any respondent is solely for tributary water to be adjudicated as a part of the adjudication of decreed tributary priorities under the Water Right and Administration Act of 1969, and if the special water judge shall find that such transfer will not prejudice any rights, the special water judge may transfer such claim to the other water judge of the division involved for hearing and disposition by the latter.

The special water judge, acting in conjunction with the water clerks and the other water judges, shall do those things necessary to preserve, and to protect the integrity of, the files of all matters with which the special water judge shall be concerned. In the event of a substantial doubt in the mind of the special water judge as to the method of preserving the files and the integrity of the filing, he may address an inquiry concerning the matter to this court in this proceeding. Jurisdiction in this proceeding is reserved to consider and answer any such inquiries.

In the event that the special water judge concludes that in the discharge of his duties there must be clarification of any directions or other statements in this opinion, he may request this court for clarification. We retain jurisdiction in this proceeding to respond to any such request from the special water judge for clarification.

If the special water judge has any substantial question as to the procedures to be followed in carrying out his duties under our rule here issued, he may address to this court a request for direction in this respect.

We retain jurisdiction to act upon any such request.

When the special water judge has decided all common questions of law involved as to any claim, he may certify that fact to this court in this proceeding with the request that any remaining questions involved in the claim be determined by the other water judge of the division. We retain jurisdiction to accept and act upon any such certification and request.

When the special water judge has decided any particular common question of law submitted hereby, he may enter an order in the nature of that for which provision is made in C.R.C.P. 54(b) in order that there may be review of the decision by this court.

We do not intend in this proceeding to reserve jurisdiction to assign to the special water judge any cases in addition to those now filed by the respondents for non-tributary water. Neither do we reserve jurisdiction here to stay the processing and determination of any other applications. The water judges, other than the special water judge, may in their discretion conclude to hold other applications in abeyance awaiting the outcome of determination of the common questions of law. In this connection, they must consider factors which are not before us. We, therefore, decline to issue stays as to any other proceedings.

Rule made absolute.

IN THE SUPREME COURT
OF THE STATE OF COLORADO

ASSIGNMENT OF AN ADDITIONAL
WATER JUDGE (SECTION 31-92-203
(1), C.R.S. 1973)

ORDER

As a matter complementary to the opinion in original proceeding No. 79SA38 today announced by this court,

IT IS HEREBY ORDERED that Honorable M. O. Shivers, Jr., Chief Judge of the Eighteenth Judicial District, be and he is hereby appointed and assigned temporarily as an additional water judge in each of the seven water divisions of this state, namely, divisions numbered 1, 2, 3, 4, 5, 6 and 7.

Done at Denver, Colorado this 16th day of April, 1979.

/s/ Paul V. Hodges
Chief Justice
Colorado Supreme Court

appointed a Trial Committee, composed of attorney personnel from each of the seven water divisions, together with the Assistant Attorney General of the State of Colorado, an attorney for each claimant, and the Assistant United States Attorney.

The Trial Committee was ordered to analyze all pending applications, thereafter to divide the claims into classes, and then select one claim in each class fairly representative of all in that category.

This Court then ruled that it would treat the applications as being presented somewhat in the nature of a motion to dismiss under the Rules of Civil Procedure. It would be assumed that all matters alleged in the representative applications could be proven and the Court would then, as a matter of law, decide whether the claimant would be entitled to the relief requested in the application. The Court's ruling would be under Rule 54(b), CRCP, 1973 CRS.

The determination would be made based upon legal briefs and oral argument. If the Court needed further evidentiary information, the Court would request affidavits and the matter would then be treated as a motion for summary judgment under Rule 56(e), with the same result as a motion to dismiss under Rule 12(b) (5).

Briefs were filed and oral argument held, pursuant to which the Court is making the following rulings as to the questions submitted by the Supreme Court.

Unless otherwise specified, non-tributary water and de minimis non-tributary water will be referred to as being synonymous under existing case law and, likewise, under existing case law considered as developed water.

QUESTION NO. 1 (Q.1)

Are non-tributary waters in Colorado subject to

appropriation?

This question is answered in the affirmative.

Long established law in Colorado is that all ground water is presumed tributary to a stream and if underground water is claimed to be non-tributary, the burden is on the one claiming the non-tributary status to prove that fact by clear and satisfactory evidence. Safranek v. Limon, 123 Colo. 228, P2d 975; DeHaas v. Benisch, 116 Colo. 344, 181 P2d 453; Comrie v. Sweet, 75 Colo. 199, 225 P2d 214; and other cases.

In the applications before this Court, that burden must somehow be sustained before the question posed becomes an issue for decision.

The Legislature has recognized that non-tributary groundwater can be appropriated. From the date of the first legislative act affecting underground water in designated groundwater basins, such water has been determined as subject to appropriation.

Fundingsland v. Colorado Groundwater Commission, 171 Colo. 487, 468 P2d 835, and subsequent cases.

Even if water in designated basins may actually in fact be tributary, if its motion to a stream is de minimis, it is still considered as non-tributary in nature. Kuiper v. Lundvall, 187 Colo. 40, 529 P2d 1328, and cases cited therein.

Therefore, if it is not moving in a de minimis manner, it must axiomatically be non-tributary and if in a designated groundwater basin, it is clearly subject to appropriation under 37-90-102, CRS 1973.

Since it is concluded that Colorado has recognized non-tributary underground water in designated basins as appropriable, it is then further concluded that non-tributary water outside a designated groundwater basin must likewise be appropriable.

This Court perceives no valid distinction between non-tributary water in a designated basin and non-tributary water

outside a designated basin, except the establishment of agencies to supervise and manage, as provided by law, being superimposed in the designated basin areas.

The character of the water itself is identically the same. It is all water and it is all non-tributary.

The determination of the affirmative answer to Question No. 1, that non-tributary water outside a designated groundwater basin is subject to appropriation, is not determinative of the remaining issues. It is here noted that the right to appropriate waters of this state antedated the State Constitution. Coffin v. Left Hand Ditch Co., 6 Colo. 443.

QUESTION NO. 2 (Q.2)

By what authority can such waters be appropriated?

Statute in Colorado, namely, 37-90-137, CRS 1973, provides the method for the appropriation of non-tributary water outside a designated groundwater basin. It provides not only the method, but requirements and time elements involved. Further, the statutes provide for appeal of actions of the State Engineer, both before and after the 1979 Amendment to the foregoing section. It is provided that appeal of decisions of the State Engineer shall be made to the District Court of the county where the well involved is located. Prior to court decision, Jackson v. Colorado, 294 Fed. Sup. 1065 (Colorado, 1968), and the 1979 Act, the appeal was trial de novo, thus eliminating appeal under Rule 106, CRCP, certiorari review. The 1979 Amendment, 37-90-115, now provides that the review shall be under 24-4-106, CRS 1973, the Administrative Procedures Act.

While this amendment cannot be applied retroactively as to those applications pending in this case where no permit has been requested the State Engineer has not acted and no appeals are pending, it is the finding of this Court that in any future action by the State Engineer under 37-90-137, supra,

appeal must be to the county where the well is located and the procedure to be followed would be under 24-4-106, CRS 1973, except as to some Nedlog claims. As to those, this Court rules that by reason of the consolidation of the applications and the time involved in reaching a conclusion in this case, time limitations for appeal are stayed as to the actions of the State Engineer and where such actions occurred prior to this consolidation, anyone desiring to appeal the State Engineer's rulings shall have the time set forth under the Administrative Procedures Act, beginning with final determination of this case, unless time for appeal of the State Engineer's action had fully expired both prior to the 1979 Amendment and prior to the consolidation of these claims for determination by this Court.

Regardless of some proceedings conducted by individual Water Judges in some of the seven divisions, this Court does not interpret 37-92-302(2), CRS 1973, as creating a method for appeal of a decision of the State Engineer. This section only provides for a requirement to be fulfilled before the Water Court can make rulings and orders. Nothing in Article 92, Chapter 37, creates a substitute for the appellate procedure provided for in 37-90-115, supra, and review of the State Engineer's actions under said Section 115 is held to be a prerequisite to any right in the Water Court to proceed under 37-92-302, supra.

Analysis of the various statutes, beginning with the Session Laws of 1957, the Act of 1965, and the Act of 1969, discloses that each and every expression of legislative intention regarding appeal has been continuously the same; namely, that appeal is to the District Court of the county where the proposed well is located (except that under the 1957 Act it was the county where the user was located.)

Appeal has always been trial de novo until the 1979 Amendment adopting the Administrative Procedures Act, which

permissively allows the court considering the same on appeal, to take additional evidence to that disclosed by the record, should the court considering the appeal in its discretion determine to do so.

The mere fact that it is possible that the District Judge in the county of the location of the well might also have been designated as the Water Judge of a division makes no difference. On appeals from actions of the State Engineer, he is nonetheless hearing the matter as a District Judge under 24-4-106, supra, and not as a Water Judge under 37-92, CRS, supra.

This Court does not share the view, nor the fear, of some of the applicants that the State Engineer may become a "water czar." His actions are always subject to review in the proper District Court.

Therefore, the answer to Question No. 2, as posed by the Supreme Court, is in the affirmative, that the authority for appropriation of non-tributary water outside designated groundwater basins is 37-90-137, CRS 1973, and that appeal is under the Administrative Procedures Act, 24-4-106, supra, to the District Court of the county where the proposed well is located in the event of dispute with or desire to appeal a ruling of the State Engineer.

QUESTION NO. 3 (Q.3)

Can non-tributary water outside the boundaries of designated groundwater basins be appropriated by persons having no property interests in the surface?

The answer to this question is a qualified affirmative as to appropriation only, with the qualification as hereinafter set forth.

The time has come, as has been inevitably certain, to distinguish between a well and a surface stream diversion by headgate and ditch.

It has been held that "diversion" as a part of an appropriation was a "court made" theory until the Legislative Act of 1969, Colorado River Water Conservancy District v. Colorado River Conservancy Board, Enwold and Town of Aspen, 197 Colo. 469, page 473, 594 P2d 570.

The 1969 Legislative Act defined "diversion" and included "well" as a means thereof.

This Court is, however, of the opinion that there is a distinct physical difference between a headgate on a stream with its partners a dam and ditch, as opposed to a well and its partner the pump. While both may be loosely referred to as diverting water and achieve the same results with regard to appropriation and beneficial use, it is this Court's opinion that a "headgate" requires an interceptor dam impeding a surface flow going in a fixed direction, changing the direction of that flow into the headgate and ditch.

(That a well pumping water which is tributary might possibly be somewhat similar is not necessary to the determination of the questions submitted to this Court in this action.)

As to non-tributary groundwater, the well and pump are withdrawing or extracting, similar to a mining operation. The definition in Black's Law Dictionary of the word "diversion" is that it means turning aside or altering the natural course of a thing, and the word "divert" means to turn aside, to turn out of the way, to alter the course of things, usually applied to water courses.

Since non-tributary water is theoretically not moving in any particular direction, the well and pump change only the elevation of the water to apply it to beneficial use. They do not change the direction of flow or turn aside the direction of the course of the water.

In effect, they develop or mine, rather than intercept. They perform this function by means of privately-owned personal

property in the form of the pump, appurtenant equipment, and casing, all of which is personal property owned outright by the developer of the well.

If the water is de minimis non-tributary in nature, it may have some direction of flow, but the well and pump are still not turning that direction aside, but are only extracting or withdrawing water from a semi-static state. De minimis non-tributary water, if moving, may be doing so in one or several different directions. Still, the water and pump change elevation, not direction of flow, in order to apply the water to a beneficial use.

It is this Court's opinion that the right as set forth in case law to use another's headgate and ditch should not be expanded into a right to use another's personal property and well, located on his realty, without the owner's consent.

To drill and equip a well, one must in almost all cases be engaged in construction upon privately-owned property. The right to condemn a right-of-way, as set forth by the Constitution and statutes, does not apply. The provisions of the State Constitution and statutes which authorize condemnation of rights-of-way states as follows:

Constitution: "All persons shall have a right-of-way across* private lands for the construction of ditches, canals, and flumes for conveying water."
(Emphasis added.)

This does not grant a right to take land to drill and construct a well, to develop a well, or to excavate on private real property.

The statute, 37-86-102, provides that any person "owning" a water right, or conditional water right, shall be entitled to a right-of-way through lands which lie between the point of diversion and the point of use, or where the proposed use for the right-of-way is for the purpose of transporting water.

Obviously the statute cannot apply until (1) the person claiming a right-of-way has already become the owner of a water right or a conditional water right and (2) thereafter the statute applies only to transporting from one point to another across intervening lands.

The Court also concludes that 38-2-101, et seq., supra, does not apply to condemnation of, or for, wells. The statutes, 38-1-101 and 102, apply to reservoirs, drains, flumes, or ditches for agriculture, mining, milling, domestic, or sanitation purposes.

These terms do not include construction work on privately owned real property, drilling of wells, equipping of wells, and particularly not to the condemnation of personal property. The Court is aware that some cases hold that municipal corporations, or quasi-municipal corporations, formed for specific purposes, such as an irrigation district, may condemn for a well site, but where private parties are concerned, even a right to survey is restricted under the eminent domain Acts to road, tunnel, ditch, or railroads and to companies formed for those specific purposes.

Hence, if a well, pump, and appurtenant fixtures are necessary to develop water, apply the same to a beneficial use, and thus obtain a conditional or absolute water right, one must have the consent of the landowner, or be the landowner, in order to conduct the necessary construction involved.

The affirmative answer to Question No. 3 is thus qualified as to the right of entry to appropriate. There is no such right unless the proposed appropriator is the landowner, or has the consent of the landowner first obtained, to erect physical works upon the real estate.

This Court is not unmindful of the importance of the maximum use doctrine, as announced in several decisions of the Supreme Court, but private rights of ownership of real and personal

property must also be constitutionally protected, and the non-tributary groundwater will not be lost as a result. It will eventually be developed in an orderly fashion consistent with the protection of those private rights.

While water may be appropriable, the means to appropriate as to non-tributary underground water are, at least at present, in the absence of further legislative action, limited to the owner of the land or one utilizing the land with the consent of the owner.

This Court is also aware of the recent decision of the Supreme Court in Bubb and Yaeger v. Christensen, _____ Colo. _____, 610 P2d 1343. However, the Honorable Justice Lohr in that opinion expressly excludes any determination of a right to trespass to initiate a water right and the footnotes clearly indicate that the decision is limited to the specific facts of that case; namely, that the trespass had already occurred, is not a defense to the entry of a final decree in a water adjudication proceedings, the landowner had no development of his own, and a condemnation proceeding was in fact already in process. Further, it was determined that the water source was not a well, but was determined as being "unnamed springs."

This Court expressly disagrees with any concept that a claimant may at will commit a trespass to engage in construction on another's property, or that 37-86-102, et seq., gives any right to a private person to condemn another's property for purposes of constructing a well on that land. Again, certain municipal or quasi-municipal agencies may have such rights. Riverside Irrigation District v. Lamont, 152 Colo. 151, 572 P2d 151.

QUESTION NO. 4 (Q.4)

Can non-tributary water outside designated groundwater basins be appropriated for use by persons other than the claimant, or those whom the claimant is authorized to represent?

Case law in Colorado establishes that each case involving the above issue should be considered on an ad hoc basis. Elk Rifle

v. Templeton, 173 Colo. 438, 484 P2d 1211, and other cases.

However, if a claim for water in an application for adjudication is phrased in pure general language for extreme magnitudes of amount, where the proposed appropriator claims no ownership in any land, designates no place of use, even in the broadest of descriptions (as was the case in Taussig v. The Moffat Tunnel Company, 106 Colo. 384, 106 P2d 363), and is thereby attempting to tie up under a conditional priority date, vast quantities of underground water and, thus, antedate those who later might have a real need and uses, and force them to deal with the owner of the conditional decree, such claim is not within the principle of the maximum use policy or in line with case law. Denver v. Northern Colorado Water District, 130 Colo. 375, 276 P2d 992; In the Matter of the Application for Water Rights of Mills E. Bunker, et al., v. Uncompagne Valley, 192 Colo. 159, 557 P2d 389; and Colorado River Water Conservation District v. Vidler Tunnel Water Company, State of Colorado Department of Natural Resources and Lee Enwold, 197 Colo. 413, 594 P2d 566. All these cases hold at a minimum that by the application for adjudication may show the purely speculative nature of the claim by the nature of the language of the application itself.

The answer to Question No. 4, therefore, again is a qualified affirmative, the qualification being that an appropriator must have beneficial uses at hand, or actual need, contact with, or agency with, those having such need and existing beneficial uses in mind. The application cannot merely argue maximum use or general need in some unknown area, not even limited to the state boundaries of the State of Colorado.

The application itself, without other evidence, can indicate by the size of the quantity claimed and the uses listed and the general purposes only being stated, that it is pure speculation for monetary or pecuniary benefit and that the decree is sought for profit, rather than actual beneficial use by the applicant.

This Court is acutely aware that a conditional decree can tie up water by priority date for many, many years while diligence matters and hearings proceed. All too frequently a showing of due diligence, as required by statute, is found to be adequate, based on very minute, or minimal, activity. Thus, huge quantities of water could be claimed as of a certain priority date, and with an absolute minimum of investment, be withheld from later appropriators in dire need of development and actual use, unless tribute is paid to the conditional decree holder.

Water in reasonable amounts may be appropriated for beneficial use by owners, or for those who the claimant is authorized to represent, where agreements with owners are in process or actual discussion, or where those in need of the water cannot for some reason provide the finances necessary to construct the works, or temporarily, at least, are unable to do so. Then, as in the Taussig case, supra, a conditional decree might be justified, but not under conditions as in the Bunger case, supra, or the Vidler case, supra.

QUESTION NO. 5 (Q.5)

Can applications for non-tributary waters outside the boundaries of designated groundwater basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?

This Court is puzzled by the language of the question, but must assume that the intent of the question would, or should, include certain omitted words and that the question in fact is:

"Can applications for (adjudication of) non-tributary (underground) water outside the boundaries of designated groundwater basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?"

Since this Court has found no distinction between

non-tributary water in a designated basin, and non-tributary water outside a designated basin, with regard to the right to appropriate, and has further found that 37-90-137, supra, applies as to the appropriation of water outside a designated basin and, further, that 37-92-305(6) requires that evidence of a request for a permit, either granted or denied, supplement an application for adjudication before any decree, decision, ruling, or order can be entered by the Water Court (37-92-302), this Court reaches the following conclusions:

Although 305(6) of Chapter 37, Article 92, supra, provides that the referee or Water Court should "consider the findings of the State Engineer," it seems clear, as this Court has previously determined, that this does not refer to appellate procedure. It states that the Water Court "may grant" a decree unless the denial of the permit is "justified." Also, as heretofore determined, the question of justification is a matter, if a permit is denied, for an appeal, to be determined under the Administrative Procedures Act by the District Court of the county of the location of the proposed structure. Specifically, Section 305(6), supra, only sets forth guidelines or standards for the referee and Water Judge. It does not establish appellate procedures. Appellate procedures are set forth in Chapter 37, Article 90, supra.

While it is not specifically required by statute that a permit be issued before the filing of an application in an adjudication proceeding, or that application for a permit be made prior to filing an application in an adjudication proceeding, common sense dictates that there is no chance for any ruling, decision, or order by the Water Court under 92-302, supra, unless the permit has either been granted, or appellate procedure from a denial, or arbitrary reduction in quantity, have been completed, with the State Engineer having, as a result, been overruled.

To void obvious confusion, as has been created in this case by a premature filing of applications in adjudication pro-

ceedings, it would seem that (since the priority date goes back to the first step in adjudication proceedings and would not be affected by waiting to file the application, or a filing of the application without a setting for hearing), the legislative intent in construing the two Acts together should be, that an application for adjudication should not be filed until a permit for a well has been issued by the State Engineer, or denied and the appellate procedures resulting therefrom, with a reversal, has been completed. However, if it clearly appears that the priority date for a particular calendar year may be lost, then the application could be filed and no hearing set until the State Engineer has acted and appellate procedures are concluded.

Again, this Court is not unaware of the fact that some Water Judges have permitted this to occur, and have treated the permit problems somewhat in the nature of an appellate procedure, but such past action is not considered as being precedent for continuing error.

The application does not constitute the first "step" in establishing a priority date. It is only common sense that the application await the final determination of the State Engineer's action before being filed or set for hearing.

The foregoing are the original questions submitted by the Supreme Court and the determination thereof. On a later date this Court requested, at the instance of some of the parties, the right to consider certain rephrased supplemental or additional questions, and the Supreme Court, by Supplemental Order, authorized the Special Water Judge to consider those additional questions "in his discretion."

As to such of those questions as are contained in the Supplemental Order which the Special Water Judge intends to address, determination will be made by the appropriate ruling to the representative application in the various classes of claims prepared by the Trial Committee without specifying the question or an answer thereto.

PART II

APPLICANTS BY CLASS

Class 1 - Underground reservoirs.

Representative case: W-3971, Water Division 3.

Applicant: Bluepond Associates.

Bluepond Associates, one of the group referred to by the Supreme Court in its decision as the joint venturers, filed application for the adjudication of 72 underground storage rights involving tributary water. The venturers took the position that since this was tributary water, the Special Water Judge was not authorized to consider the same. However, the Supreme Court had specifically listed these applications by number in referring the matter to the Special Water Judge and, with regard to tributary water, stated that if it was found that any claim was solely tributary water and if the Special Water Judge should find that such transfer would not prejudice any rights, then the Special Water Judge may transfer the claim back to the Water Judge of the division for hearing and disposition.

Under this latter provision, it is the position of the Special Water Judge that these particular claims for storage rights, although involving only tributary water, would prejudice other water rights and therefore jurisdiction to continue to consider the same was retained.

Each of these applications requests a decree for underground water storage where a naturally occurring glacial terminal moraine creates an underground dam. Each of the locations of the alleged storage capacity behind this glacial terminal moraine lies directly under a surface flowing river or stream.

In briefs and argument, the proponents of these projects specifically advised the Court as to what their evidence would show concerning methods of operation for the proposed storage right. These are shown in the form of drawings labeled as Appendixes A, B, and C, attached to the Reply Brief of the Joint Venturers.

Without the argument and exhibits, affidavits might have been necessary. (See copies of exhibits attached to this opinion.)

Explanation in argument and evidence by exhibit was offered to show that at present, beneath the flowing surface stream, these underground reservoirs were full of water and that the applicants proposed to pump through shallow wells, or withdraw by french drains, water presently being held there. The water withdrawn was to be released to the stream, thereby creating empty storage capacity in the glacial moraine.

Applicants proposed to obtain a storage decree permitting them to refill under such decree from the surface stream, by some type of recharge operation, the capacity of the decree, would be determined by the capacity created through the initial pumping out and release of the water to the stream. In every case the over-lying river or stream is named as the source of water for the storage rights. Also no consideration of effect on, or loss to, existing rights by the original withdrawal and release was indicated.

These drawings of the operations and the argument presented, it seems to the Court, raise the authorized supplemental question as to whether one can obtain a decree to store in an underground reservoir created by impounding water behind a naturally occurring glacial terminal moraine, and the modified question of whether tributary waters can be appropriated for use by persons other than the claimants, or those whom the claimant is authorized to represent, which was one of the original questions as to non-tributary water.

It requires little study of the claimant's briefs and exhibits to see, that at present the surface river or stream is riding on the existing water in storage, which actually is admittedly also moving to a small degree, or amount, into the surface stream, through the lower part of the terminal moraine. This factual situation is no different, as a practical matter, than the description of the alluvial flow of the Platte River contained in

Kuiper, et al., v. Well Owners Conservation District, 176 Colo. 119, on page 132, 490 P2d 268, where the Honorable Mr. Justice Groves states:

"In other words, the flow in the aquifer is both downstream and toward the stream. As mentioned in Fellhauer, the surface flow to the river rides piggyback on the subsurface flow. It follows that any withdrawal of groundwater will have some effect on the stream." (Quoting from Fellhauer.)

Here it is perfectly obvious that the initial withdrawal of water to create capacity in the reported underground reservoir, and subsequent recharge from the stream itself, will have an affect on the stream flow, and, of necessity, an affect upon existing decreed appropriations.

It is inconceivable, and beyond the realm of practicality, that the applicants would ever be able to control depletion of the surface stream by infiltration of water, into a vacant capacity immediately under the stream bed for recharge, at only the times the State Engineer should determine that storage decrees be exercised.

Although the applicants argue vociferously that they would fill in accordance with the appropriation date, thereby avoiding injury to others, by release from the reservoir to satisfy earlier claims, it is almost axiomatic that as release takes place additional refill will automatically occur and will come from the surface stream.

It is further inconceivable to the Court, that the applicants could intend, or that it would be financially feasible, to seal by concrete, or some other method, the entire bed of the stream from the location of the dam to the headwaters of the stream, with the proper types of openings in the bottom to control the time when refill from the stream would take place. Since the points in the surface flow from which the present water comes to keep the glacial moraine full at this time, cannot be determined,

there simply is not any method, in this Court's point of view, that filling in accordance with the priority date of a storage right could be controlled. Nor is there any way in which water could be brought from another source, and be placed in the stream without creating some adverse affect on other appropriators and depletion of the surface stream above.

The application makes no reference to filling the demands of downstream senior appropriators through waters from any other source than the river which rides on the aquifer. But even if such should be anticipated, it could not eliminate the adverse affect on those direct flow decrees upstream from the proposed area of storage.

This ruling is not to be interpreted as stating that water cannot be stored behind a naturally occurring glacial terminal moraine at some off-stream site and where recharge might have occurred through normal precipitation on the land and the water is, in effect, at present non-tributary and the intent is to withdraw therefrom and refill with decreed water, either storage or direct flow, from some other source. That type of issue is not before the Court.

The application also recites proposed beneficial uses in the broadest of general ways without the location of such use. For example, for domestic, commercial, and irrigation purposes, municipal purposes, or industrial purposes. The quantities of water claimed are vast in magnitude and, from the face of the applications themselves and exhibits submitted to the Court, the claims appear to be purely speculative, made for purposes of profit and not for purposes of true and actual beneficial use. The Court agrees with the position of some of the objectors that this is a very thinly veiled attempt to obtain a direct flow right under the guise, or disguise, of a storage right.

As a consequence, the Court is of the opinion that treating the application, coupled with the argument and exhibits

submitted, in the nature of a motion to dismiss or summary judgment can and does result in the Court finding that these claims are without merit and should be dismissed.

It, therefore, is the Order of the Court that all claims of Bluepond Associates in Water Divisions 1, 2, 3, 4, 5, 6, and 7 seeking underground storage rights beneath the channels of flowing streams, being the cases as follows:

Division 1, W-9525 through W-9533, inclusive.

Division 2, W-4829 through W-4832, inclusive.

Division 3, W-3971.

Division 4, W-3556 through W-3571, inclusive, and W-2582.

Division 5, W-3962 through W-3981, inclusive.

Division 6, W-1511 through W-1526, inclusive.

Division 7, W-1899 through W-1904, inclusive.

be and they are hereby dismissed. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 2 - Well Field Projects.

Representative case: W-4820, Water Division 2.

Applicant: Elk Creek Ventures.

This class consists of applications for underground water rights by Elk Creek Ventures, described as the Las Animas-Cheyenne-Arkansas Project, for the construction of wells, as described in the application, to be physically "interconnected" into an integrated system and is for the withdrawal of allegedly non-tributary water.

The questions applicable to this group of applications are all five of the original questions propounded by the Supreme Court and perhaps certain of the supplemental questions. By virtue of the determination of the answers to the original questions submitted, this Court sees no necessity of addressing the supplemental questions in connection with these claims.

The applications describe physical field surveys, which do nothing more than pinpoint the location of the proposed well, with no mention of ownership of the real property upon which the same is located; contain a general allegation of non-tributary character of the groundwater involved; recite "immediate application to beneficial use, and/or for storage and subsequent application to beneficial use, as well as reuse, successive use, disposition, substitution, and exchange within the particular river basin involved."

The application also has attached, as do the other joint venture claims, a paper recital of intent to appropriate and specifically reciting that well construction permits, or evidence of denial thereof by the State Engineer, or evidence of his failure to grant or deny, are to be submitted to the Water Court prior to the entry of any decision, ruling, or order granting a water right. This presumably refers to 37-92-302(2), CRS 1973.

This Court in ruling on the general questions has indicated that in the interests of orderly procedure, the application for well permits should be made to the State Engineer prior to application for adjudication and any appeal from his action thereon should be taken to the District Court of the county where the proposed well is to be located, under the provisions of 37-90-115, CRS 1973, as amended, and a determination made in such appeal before any adjudication process. This Court reiterates its ruling that the intention of the legislative acts and of the Legislature, by the recital of standards in 37-92-205, CRS 1973, "The Water Right Determination and Administration Act" is in no way an intent to create an appellate procedure by the mere words "may grant a conditional decree unless a denial of such permit was justified."

This Court again interprets the meaning of those words as being that the justification must either be found to exist or reversed by the proper court; namely, the District Court of the county where the well is to be located.

Also, in the absence of ownership of the land where the well is to be located, the consent of the owner to construct a well thereon, is a prerequisite, the eminent domain statutes and the Constitution give no right of condemnation of well sites to private parties. All this is explained in the answers to the original questions submitted, principally Question No. 3.

These applications are considered by the Court to be speculative under the Bunger case, supra, the Vidler case, supra, and other cases, and are clearly for the purpose of profit, rather than application to beneficial use by the applicant.

Consequently, as a matter of law, assuming all of the allegations of the application could be proven, the applicant would still not be entitled to a water right.

These cases, specifically in Division 1, case No. W-9518, W-9519, W-9520, W-9523, W-9524, W-9505, and W-9506, in Division 2 cases Nos. W-4810 through W-4828, inclusive, are hereby Ordered dismissed in this instance however, without prejudice, with the right to renew following completion of applications for well permits or appellate procedures thereon, and the obtaining of the necessary landowner consent, or ownership of the land involved for the well site. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 3 - Ground Water Infiltration Projects

Water Division 1.

Applicant: Central Metropolitan Water Users.

These applications, total nine in number, all in Water Division 1, and were filed by Central Metropolitan Water Users, another of the same joint ventures, claiming both tributary and/or non-tributary groundwater. The groundwater alleged in the application is a product of infiltration into sewage lines, collectors, and other buried pipes, lines and conduits presently used for wastewater and sewage.

With regard to the claim of such water as may be tributary, the cases are legion ever since Comstock v. Ramsay, 55 Colo. 244, 133 P 1107, (and no other citation of authority is necessary), to the effect that underground water percolating, seeping, or traveling to the river, is tributary thereto, and constitutes a part of the river, subject to the claims of the appropriators thereon. Any direct flow decrees which might be awarded for such tributary water would, of necessity, have to be junior and inferior to all existing priorities as of the date of entry of the new decree.

As to the non-tributary water and the de minimis tributary groundwater to which claim is also made, the application clearly states concerning both, that the water would never flow naturally to the stream, or it would never reach the stream naturally in less than 100 years, if it were not for the fact of its infiltration and transportation by the pipes and so forth hereinbefore described.

If in fact such pipes are at a depth sufficiently far underground to intercept non-tributary or de minimis tributary water, which again is somewhat inconceivable to this Court, or is non-tributary, or trans-basin water returning through sewers to the stream, then, pursuant to existing case authority, such water would be developed water, constituting new water into the basin or stream. It would be created by those who installed the pipes, lines, or conduits, and under case authority, one who does not contribute to the cost of, or contribute in some way to, such development has no right to claim the water developed thereby. It has been unequivocally held that the party responsible for the development of water has the first right thereto, and recapture and reuse thereof. Denver v. Shulton, 179 Colo. 47 506 P2d 144 and prior cases.

It is true, as first discussed in Brighton Ditch Company v. Englewood, 124 Colo. 366, at page 377, that appropriators downstream may not force a developer of new water into the stream, (in that case trans-basin water), to continue to provide such

water either from development of non-tributary water, de minimis tributary water, or transmountain diversion of water from one basin to another, and that the appropriators on the stream to which this new water is added, have no vested right to a continuation of such new water. Nevertheless, as long as the developer actually does continue to develop and provide such water and fails himself to recapture it for his use, as he is permitted to do (Denver v. Fulton Ditch Company, supra) then the water has left his possession and control, is abandoned and is traveling to the surface stream, it has thus become become a part thereof as to all others than the developer, and is subject to use by the existing appropriators on the stream and it may not be claimed by some far junior new-comer free of river call.

Since this is the basis of these claims by Central Metropolitan Water Users (namely, Division 1, cases W-9508 through W-9516), to be free of river call, it is conclusive on the face of the application alone, if everything stated therein is proven and the applicant sustains his burden of proof, still, as a matter of law, the applicant is not entitled to the type of decree sought, for total consumption of water developed by others by use, reuse, successive use, and disposal thereof, or for exchange or substitution.

The foregoing applications are, therefore, Ordered dismissed. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), Volume 7-A, CRS 1973.

Class 4 - Denver Basin Projects.

Water Division 1

Applicant: Central Metropolitan Water Users.

The applicant here is also the Central Metropolitan Water Users and there are nine applications, all in Water Division 1 involved.

The application requests adjudication of non-tributary water from "unconsumed withdrawals, return flows, and/or wastewater from certain described existing wells presently withdrawing non-tributary groundwater, plus certain described wells to be constructed by applicants to divert and recapture such unconsumed withdrawals, return flow, and/or wastewater which allegedly enter non-tributary formations within the Denver Basin."

The Reply Brief of the applicant-joint ventures contains argument and an Appendix F, the latter of which illustrates the proposal. Apparently the proposal is to capture alleged unconsumed withdrawals, return flow, and wastewater from existing wells, and new wells to be constructed, into an "integrated" system on the theory that after application to beneficial use on the surface the unconsumed water or return flow and waste water travels back down to the non-tributary original location from which it was originally withdrawn by either the existing wells or wells to be constructed. The maze of pipelines, and number of real property rights-of-way involving eminent domain proceedings, required is beyond imagination.

When this theory was argued, it was pointed out that if water withdrawn was non-tributary, there must be some sort of an impermeable layer of material between the surface and the non-tributary water. To this argument (and the same situation in Class 5 hereinafter discussed), the joint ventures responded that there was in fact such an impermeable material, as shown on Appendix F, Reply Brief of Joint Ventures (attached hereto), but that the return water perched on top of this impermeable layer, from whence it would be taken by the recovery wells.

Assuming that the applicant's proof would apply solely to wells constructed by the applicant and such wells are producing non-tributary water or de minimis tributary water, then such water would be developed water, with the applicant as the developer.

It would constitute new water into the stream basin, and if the developer could do so, under *Denver v. Fulton*, supra, they perhaps would be entitled to recapture and reuse to extinction.

On the other hand, if this is non-tributary or de minimis non-tributary groundwater developed by existing wells and the developers thereof have not sought to recapture and reuse return flow or waste from their development, then while the appropriators on the stream may not insist that they continued to pump and provide such water, such appropriators have, while it is being provided, the first right to the same in the stream and it may not be intercepted by some later junior appropriator, such as Applicant, free from the call of the river. It is tributary at that point in time, subject only to discontinuance by the developer or use or reuse by the developer alone.

As a matter of law, the applicants are not entitled to any unconsumed withdrawal, return flow, or waste water from existing wells constructed by others bringing new water into the basin. In addition, as a matter of law, the applicants, as private parties, as previously pointed out in this opinion, lack any capacity under existing statutes to enter upon the lands of the well owners for either the purpose of constructing new wells or attempting to intercept waste or return flows from the existing wells.

In point of fact, if the water perching on the impermeable layer includes both water developed by the applicants, and water from other developers, there would seem to be no way in which one type of water could be distinguished from the other, and no way in which the quantity of unconsumed withdrawal, return flow, and waste water from the applicants' developed water could be determined, as opposed to such water developed by others, and, as a consequence, a decree with any meaning could not be entered.

In addition, as to both this Class 4 and subsequent Class 5, with reference to existing wells, there has been no physical demonstration on the land of the owners of existing wells to give notice to others of intent to appropriate, as required by Central Colorado Water Conservancy District v. City and County of Denver, 189 Colo. 272, at page 275, 539 P2d 1270. To integrate some 2,333 wells into one system and to claim 246,160 acre feet a year surpasses the absurd.

As to the claim for unconsumed withdrawals, return flows, and/or waste water from water actually developed by the applicant from non-tributary or de minimis non-tributary sources, the application may proceed, with the onus being on the Water Judge to determine the quantity which can be validly reclaimed and reused from water developed by only the applicant. All claims based on existing wells are dismissed.

In addition, the Court would point out that under these applications there is an attempted claim by the applicant to a right to return flow from sewage disposal plants and power plants, as well as from existing constructed wells, and as to this claim it is clear to the Court that such water is enroute to the surface stream, is tributary thereto, and is considered a part thereof. These claims are dismissed.

The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 5 - Denver Basin Recharge Project.

Case W-9537-78, Water Division 1.

Applicant: Central Metropolitan Water Users.

The applicant is again Central Metropolitan Water Users and the claim is for unconsumed withdrawals, return flow, and/or waste water from existing wells, together with wells to be

constructed by the applicant, to withdraw, divert, or recapture the foregoing water.

The Court here incorporates all of its comments concerning Class 4, relative to existing wells and rights to developed water.

In addition, however, the Court refers to Appendix E, attached to Joint Ventures' Reply Brief and hereto attached, where once again the perched aquifer above the impermeable shale, which enclosed the non-tributary aquifer, is shown. In this diagram, however, there is one distinguishing feature from Appendix F, Denver Basin Recharge Plan, namely Appendix E shows the bed of the river to be adjacent to, and in elevation above, the area where this returning water will supposedly perch.

Assuming, arguendo, that the area exists, and from the impermeable shale to the surface, the ground is not impermeable, then, it would appear to this Court that seepage from the river would long since have filled the area where the applicants claim there is space for return flow from the surface to perch. The drawing Appendix E clearly demonstrates this fact.

The Court reiterates, that these applicants have no rights whatever to the existing wells, or return flow therefrom, no rights of eminent domain with regard thereto, particularly as to the personal property involved in the existing rights, and no right to use said existing wells in conjunction, or in partnership, with the present owners, as in the case of a headgate and ditch, which in effect applicants are attempting, by calling such existing wells an alternate point of diversion for the applicant, (paragraph 3(c) of the application), and in addition referring to the whole as an "integrated" system.

The proposed beneficial use is obviously a recitation of general purposes without any actual beneficial use known to exist or intended. No power of eminent domain for a "right-of-way" exists to the presently existing wells, since the applicant is not

an "owner" of a water right seeking to transport it from one point to another across the land of another party, as is stated in answers to the general questions. In addition, in this application, the only field work to which a priority date could be attached appears to be merely a survey of the location of an existing well from the State Engineer's Records or a survey of one point in which a well is to be drilled, one of which points is located in the middle of a publically dedicated street right-of-way. The entire plan and program of the applications appear once again to be clearly for profit, rather than actual beneficial use, by the applicant, either itself, or by contract, or need of others, Bunger, supra, and Vidler, supra.

It is repeated that as to existing wells there has been no open demonstration on the land where the wells are located to give any notice of intent to appropriate. Central Colorado v. Denver, supra.

In the Court's opinion, these applications (being cases W-9494, W-9495, W-9497, W-9498 through W-9503, inclusive) should be, and are hereby dismissed. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

In Classes 4 and 5 the claims are so preposterous that evidence is not necessary to support dismissal.

Class 6

Representative case: W-4805, Water Division 2

Applicant: Bob Johnston

This is one application in Water Division 2, case No. W-4805, requesting adjudication for 53 wells, to be integrated together as one system, claiming "All of the water lying below Applicant's land contained in the Dakota, Cheyenne, and Morrison aquifers." The application contains a general allegation that

the applicant intends to construct additional wells as alternate points of diversion, as may be required to recover full productive yields from the three aquifers.

The application further alleged beneficial uses by "immediate application" for domestic, industrial, commercial, irrigation, fire protection, stock watering, recreational, fish and wildlife, and any other beneficial purpose. In addition, it mentions storage and subsequent application of said uses, for exchange purposes, for replacement of depletion, and other augmentation purposes.

As a generality, it is described as a "unified municipal water supply system." This could not be immediate.

All of the previous findings and rulings of this Court with regard to right to apply for adjudication, and applications for permits to the State Engineer apply to this case, except that the applicant alleged ownership of all of the land, which for purposes of a motion to dismiss the Court must assume can be proven.

The quantity claimed is again of a huge magnitude, namely, 71 CFS, allegedly yielding a total of 51,430 acre feet per year. It is completely obvious from the argument of counsel for the applicant, and the briefs submitted in his behalf, that none of the proposed beneficial uses, with the possible exception of irrigation, or stock watering, on his own land, presently exist. Or that there is even any demand in any location for the other uses, particularly for a "municipal" system.

Under these circumstances, the Court cannot assume that the applicant will be able to prove immediate application, as alleged, to beneficial use of the quantity claimed, even assuming all wells should be immediately drilled, rather than construction being delayed over a long extended period of years.

It would appear that this is an attempt again to become the owner of a conditional decree to a vast quantity of water,

allegedly non-tributary in nature, over an extended period of years, thus totally excluding subsequent developers who might become owners of portions of the land, or might desire to utilize water from the land, having the consent of the then owner thereof to do so, from appropriating water which is lying dormant beneath the surface. The conditional decree could be kept alive with a very minimal amount of diligence, for an interminable number of years.

It was most interesting to the Court that in argument, and brief, counsel for Mr. Johnston stated that by virtue of certain filings made in December, 1979, which never came to fruition, by Mr. Huston, one of the joint venturers in this proceeding, because of such former applications, his actions in this application are not only taken in an attempt to protect, preserve, and develop for use the non-tributary water under his land, but "also to protect himself against the claims of Huston." Self protection is not proper intent to appropriate and apply to beneficial use, to the contrary, it is hoarding water.

This being the case, the Applicant admits in effect that he does not at this time, while intending to try to appropriate, know of any beneficial use needs presently existing for this water, other than as previously stated, perhaps irrigation and stock watering on his own land.

Even the doctrine of maximum use could not possibly justify a conditional decree solely for the purpose of protecting water resources against the claims of others, nor justify such a clearly speculative profit-making venture.

This Court has previously ruled that well applications should first be made, then applications for adjudication filed to protect a priority date within the year of filing, but should never be set for hearing pending final action of the State Engineer, and of the proper appellate court with regard to the well permit requests.

While this Court does not subscribe entirely to the outright ownership "in fee" of the surface owners in the non-tributary groundwaters underlying his property, as argued by the opponent and concurred in by Johnston, relying upon Whitten v. Coit

153 Colo. 157, 385 P2d 131, this Court has indicated that the construction of wells requires ownership of the land where construction is to take place, or consent of the owner of that land. The Special Water Judge has the highest admiration and respect for Mr. William R. Kelly from many years of acquaintance and association, and while the Whitten v. Coit case, supra, adopts with approval his language, that language states that the landowner has "property" in the water in his soil which is a vested right, but goes on to state that it is subject to the Reasonable Use Doctrine and Mr. Kelly does not state that it is "fee ownership." Hence, this Court departs in its ruling from adoption of the principle that there is such a "fee" ownership in non-tributary water underlying an owner's property.

By virtue of the need of the ownership, or consent of the owner to develop non-tributary water, it is obvious that the ruling of this Court does find that the landowner has the first right of development as to non-tributary waters underlying his property, and the same may be developed by others only with his consent. That consent must include the right to construct the necessary structures, as well as the right to use the water therefrom.

As to this application, it is the opinion of the Court that the claims of beneficial use in excess of that necessary for irrigation or stock watering, on the applicant's land could not be brought into existence for years, and years, and years, and the application as to such fancitized uses should be and, therefore, is dismissed, it being provided that the application should by the Supreme Court be referred back to the Water Court in Water Division 2, assuming well permit requests have been made by the time it is remanded, for adjudication and determination by the Water Judge, as to the quantity of water that can be sustained as necessary for beneficial use on the lands of the applicant for irrigation and stock watering purposes.

The dismissal of the balance of the application is based upon its purely speculative nature, its obvious intention to be for profit rather than beneficial use, and the admission that the application was so framed, and filed, purely to try to protect the underground water from the claim of others.

The Court finds no just reason for delay and the dismissal as to the major portion of the claim shall be considered final, pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 7

Representative case No. W-1905, Water Division 7

Applicant: Colorado-Pacific-Aztec

The applicant here has filed two applications, W-1905 and W-1906, in Water Division 7 and W-1905 has been selected as representative of the class. The applicant is described as "Colorado-Pacific-Aztec," without an indication of whether this is a tradename, a corporation, or what type of entity it actually is. It seems, however, that it is neither a municipality nor an organization quasi-municipal in nature.

The application seeks adjudication of 56 wells, but in a most unusual approach. It first seeks 56 wells 300 feet in depth, involving tributary water, but then in the same identical location of the first 56, seeks a second 56 wells of a depth of 1,300 feet, claiming to tap non-tributary water by virtue of the depth.

The application further states, and the Court must assume it can be proven, that the consent of all surface owners where well sites are to be located has been obtained.

The total amount of water claimed is stated in gallons per minute, it involves 1,485 gallons per minute of tributary water and 9,837 gallons per minute of non-tributary water. These claims, once again, are for a vast quantity of water, and no explanation is made as to how you draw from the same well in measurable quantities both tributary and non-tributary water at different depths. It would seem obvious, that drawing water from both

sources through the same well opening would make any determination of whether the water produced was tributary, or non-tributary, infeasible, and perhaps impossible.

The proposed beneficial uses are again very indefinite in nature, but do in general, state the location of the use as being "within Water Division No. 7". This general location conceivably might be adequate under the Taussig case, supra, if the claim being made were not for such an enormous quantity. The applicant does not state that the applicant itself, whatever it is, will apply the water to the proposed beneficial uses and the Court finds the following inconsistencies in the named proposed uses (paragraph 8 of the Application.)

The proposed uses include "agriculture," and yet in paragraph 10, where the number of acres proposed to be irrigated is to be set forth, the applicant states that this is "undetermined." This is speculation.

Further, a beneficial use is claimed for "dust control." In reading all of the cases back to Coffin v. Left Hand Ditch, supra, the Court has found no instance where such a use has been found to be a beneficial use.

Next, there is a claim of beneficial use for "land reclamation," which has not heretofore received approval as proper beneficial use. "Cooling," of course, would normally be a 100 percent consumptive use, which the applicant might have the right to achieve as to non-tributary water, the same being developed water, but under applicable law would have no such right as to tributary water without depletion of the stream, to the injury of other appropriators.

Finally, the proposed uses include "slurry pipelines." The Court is aware of the present and past statutes of Colorado, first holding that no water may be appropriated for use outside the boundaries of the State of Colorado, later amended to include

use outside, with those Compact states willing to give Compact credit for water delivered through slurry pipelines. This Court holds, however, that in view of the amended statutes, the Water Court is without jurisdiction to enter conditional or other decrees concerning water for such use, until all preliminary action regarding the Compact, and the compact state involved, have been completed. If the applicant does not intend to proceed under the 1979 amendment, 37-81-101, CRS 1973, as Amended, then use outside of the state under the preceding Acts, 37-81-101 (formerly 148-1-1, CRS 1963), for slurry pipelines to carry solids beyond the state line is totally prohibited. No claim is made by Colorado-Pacific, other than the general claim of use within Water Division No. 7, that there is need existant at this time within that District for use of water for slurry pipeline purposes.

In the opinion of this Court, the application should be remanded back by the Supreme Court to the Water Judge in Water Division 7, for proper adjudication as to claims for tributary water, again assuming that by time of remand applications have been made to the State Engineer for well permits, which appears to have been already done by the allegations of the claim, and subject to the restrictions found by this Court to exist regarding action of the State Engineer and appellate review thereof.

This Court does find, however, that "dust control" may not be considered a beneficial use, and leaves to the determination of the Water Judge the question of whether cooling, and slurry pipelines may constitute beneficial uses. This Court points out that utility companies and municipalities have applied water for cooling purposes and it may very well be that this is a proper beneficial use. By no stretch of the imagination is there such a beneficial use as "land reclamation."

As to the non-tributary water, the same may be appropriated as heretofore set forth in this ruling as to other

claims, but in remand to the Water Judge the same should occur only under the caveat, that proof must be made that such water can be distinguished from the tributary water, for measurement purposes, and that Colorado-Pacific-Aztec must prove to the satisfaction of the Water Judge that beneficial use is actually going to take place, and further that this application is not solely for profit-making purposes, rather than under a true intention to apply it to beneficial use. Further under an additional caveat that reduction in quantity claimed, may, as a result of evidence presented, indicate that the amounts should be severely cut back.

Class - Nedlog

Representative case: W-4004, Water Division 5

Applicant: Nedlog Technology Group

The representative application selected is case No. W-4004, as amended, in Water Division No. 5. The applicant is Nedlog Technology Group, without specification of whether this is a tradename, corporation, or other type of entity, but again it is apparently not municipal or quasi-municipal in nature.

Just prior to briefing and the argument before the Special Water Judge, the applicant withdrew its claims to "all" of the water in the Burns Basin, allegedly constituting some twenty million acre feet, and withdrew any claim for an underground storage refill right to store and withdraw 20,000 acre feet annually of "refill" water into the Burns Basin.

The applicant maintains its application as to the seeking of a decree for withdrawal through wells of 200,000 acre feet annually from the Burns Basin, plus 20,000 acre feet annually of what the applicant refers to as "lost water" from said basin.

The applicant alleged that the subject water is part of a natural stream, but that stream is not tributary to, or

hydraulically connected with any surface stream, alluvial aquifer, or other water, so as to influence the rate, or direction of movement of any such surface stream or alluvial aquifer. This presupposes that the entire Burns Basin extending over several counties, is an impervious bowl with a lower lip, over which water spills at the rate of 20,000 acre feet annually. Assuming this foregoing can all be proven, which is doubtful, it is very clear that there must, a fortiori, be an annual refill to the basin of 20,000 acre feet per year. This recharge must come from some surface source. The applicant claims that the water produced through its wells will be "developed" water and, therefore, new water into the surface streams. Applicant therefore claims the right to reuse, and successive use, or other disposition, free from any limitation, restriction, or requirement as to place of use, amount of discharge, or location or discharge following initial use, reuse, or successive use. Presumably it is intended to claim a right of use to extinction.

The area for the proposed use is "all lands susceptible of being served directly or by exchange," (emphasis added) without any limitation as to location whatever. Further, a claim is made to apply to beneficial use beyond the boundaries of the State of Colorado. As to the latter, this Court has previously pointed out, such use is either totally prohibited or, if the applicant intends to proceed under the 1979 amendment, is subject to use in Compact states which are willing to give credit to Colorado under its Compact commitments for water delivered into that state.

In the event the Water Judge in Water Divisions 5 and 6 were to have jurisdiction of this matter, it is the finding of this Court, as stated heretofore, that all action necessary under the 1979 amendment would have to be completed before the Water Court would have jurisdiction to proceed. If the applicant's intention is not to proceed under the 1979 amendment, then this

portion of the claim for use outside the state is prohibited and should be dismissed.

Interestingly enough, the application itself is so general in nature as to assume that the applicant would have the authority, or obtain the right to use the Adams Tunnel, a Federal facility, the Moffat Tunnel, and delivery systems belonging to others, but does not claim as in Taussig, supra, having negotiated for use of these systems.

Further, the applicant is relying upon certain prior obtained agreements from landowners, examples of which were submitted to the Special Water Judge, in which the contract or agreement specifically and unequivocally states that the landowner and the applicant Nedlog are to share in the pecuniary profits.

The proposed uses contain reference to uses which have never been determined as beneficial in nature, such as stream flow enhancement, and the entire application is so general in nature that it cannot be defined otherwise, than as pure speculation.

The applicant also complained in argument, of prior arbitrary actions of the State Engineer concerning well permits applied for, and requests the Water Judge to "require" the State Engineer to issue and review well permits for the applicant. As to any wells presently in existence or those subsequently drilled, this Court has ruled that where the State Engineer has denied in whole, or in part, any permit, appellate review must be to the District Court in the county of location, rather than to the Water Court, and following completion of such appeal the Water Court then may be in a position, as a result, to make a finding that the denial of a permit was justified under 37-90-137, CRS 1973, but not make such determination in an appellate capacity.

The applicant further admits, in the application itself, that the project and expenses associated therewith is of such a

"magnitude" (pages 14 and 15, Application) that it would be phased over several years. As has been previously ruled by this Court, no prospective appropriator should be permitted by the obtaining of a conditional decree, to require later appropriators to pay tribute to fulfill their needs, assuming they are able to make appropriations by well in accordance with the determinations set forth in this opinion.

This application is very similar to those in the Bunger case, supra, and the Vidler case, supra. It is so broad and general in nature as to be totally infeasible as an entire project.

It is the ruling of this Court that this application should be and is dismissed, in this instance, however, without prejudice to the applicant to file a new application in the Water Court, complying with the terms of this opinion for a realistic quantity of water based upon proper and adequate proof of application of said water to beneficial use within a reasonable time, rather than profit, and stating the nature of the beneficial use and the locations where such use is to occur.

PART III

CONCLUSIONARY MATTERS

A. As stated earlier in this ruling, at the instance of some of the parties, the Special Water Judge requested from the Supreme Court the right in his discretion, to consider certain rephrased supplemental, or additional and subordinate questions. By Supplemental Order, dated August 29, 1979, the Supreme Court granted the request and added seven supplemental questions.

Some of these have been in effect answered in the rulings on the first five questions and the claims involved. The others, the Special Water Judge in his discretion does not consider

essential to the rulings herein made and some, such as Supplemental Question No. 5, involve a claim or portion of a claim which has been withdrawn. In the light of the ruling of the Court concerning the fact that non-tributary groundwater outside the boundaries of a designated basin is subject to appropriation and setting forth authority therefor, there is no necessity to take up the constitutional question of whether or not the waters are appropriable under the Constitution. Nor did the Supreme Court initially, even though requested by some of the parties, refer to the Constitution in its question to the Special Water Judge. The question was deliberately framed to exclude reference to the Constitution.

This Court does, however, declare that, in the opinion of the Court, regardless of the semanrical language used in the applicable sections of the Constitution of the State of Colorado, where it speaks of "natural streams," such language must be interpreted in the light of the technical knowledge available at the time of the drafting and adoption of the Constitution. It is the opinion of this Court, that although the drafters were limited in knowledge at that time, to perhaps surface flows, and shallow well information, they, nevertheless, intended subjectively to state that "all" of the waters in the State of Colorado, wherever located, are to be protected by the Constitution, are the property of the public, and dedicated to the use of the people of the state, subject to legislative enactment prescribing methods of effecting appropriation, and providing, as they later did, for conditional decrees, as well as absolute decrees following application to beneficial use.

B. The United States of America is a party to this proceeding, having been made so by notice served in accordance with the provisions of the McCarran Act, and by making a general appearance, but it appears here in the role of an "objector" to the claims before the Court. In making such objection, counsel for

the United States reiterated the old theory of reservation of waters, stating in arguments that all water underlying Federal lands is the property of the United States.

This claim the Court specifically rejects. Since the Desert Land Act, and subsequent enactment of Federal legislation, in order to acquire water rights, the United States of America must comply with state law and procedures. The large areas held by the United States and denominated as National Forests and National Parks do not in any way constitute reservations, as that term is used in connection with power plant sites or Indian reservations, where the United States has been somewhat successful in asserting reservation of waters.

By simple pronouncement and argument, the United States of America may not be permitted to substitute a rhetorical "reservation" of waters for a conditional decree, as that is defined and legally entered pursuant to the laws of the State of Colorado. The United States may not withhold from the dedication to the people of this state all this essential natural resource under National Forests and Parks by mere language. It has no right unless or until, it procures a conditional decree and/or final decree in the courts of this state, for whatever beneficial use it intends to make of those subsurface waters and for a fixed quantity thereof.


This is, of course, not a specific issue before this Court submitted by the Supreme Court of this state, nor is it necessarily asserted as an issue, except in the form of an objection, principally to the Nedlog claims of right to withdraw from under Federal lands by wells adjacent thereto. However, this Court feels obligated to point out, that any argument of reservation of waters over such an enormous expanse as the National Forests and National Parks in the State of Colorado is being argued

only as a substitute to try to assert ownership without decree and, in lieu of coming into state courts and seeking conditional, and final, decrees for beneficial purposes, as required by law.

All of the foregoing concludes the matters submitted to the Special Water Judge for decision by the Supreme Court of the State of Colorado and in accordance with its Order of April 16, 1979, the foregoing decisions as to common questions of law and claims involved are certified to the Supreme Court.

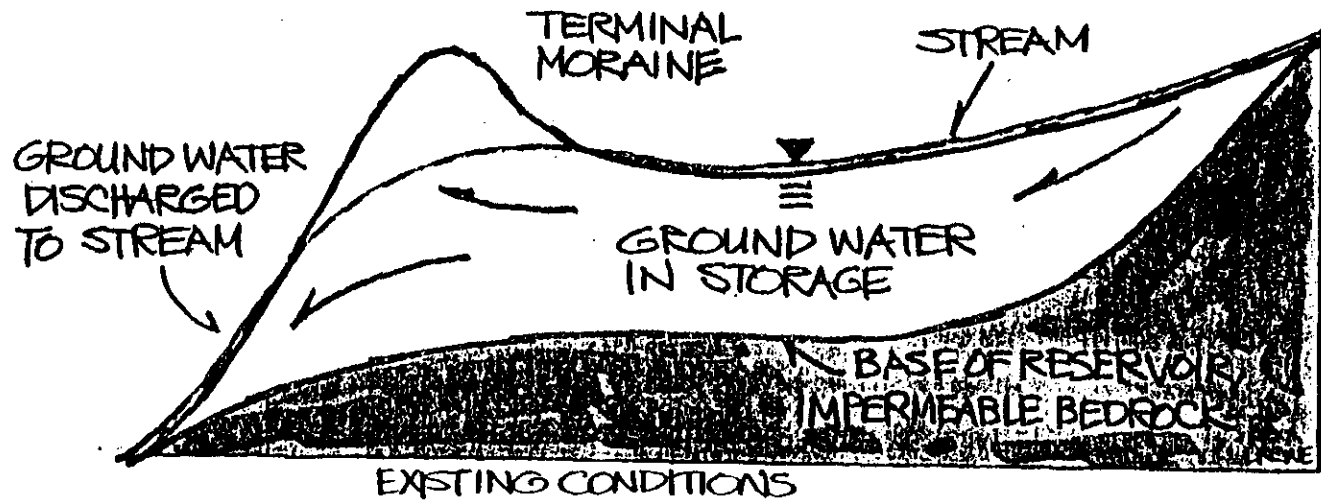
DONE IN OPEN COURT this 11th day of February, 1981.

BY THE COURT



SPECIAL WATER JUDGE

OPERATION OF BLUEPOND RESERVOIRS (1)

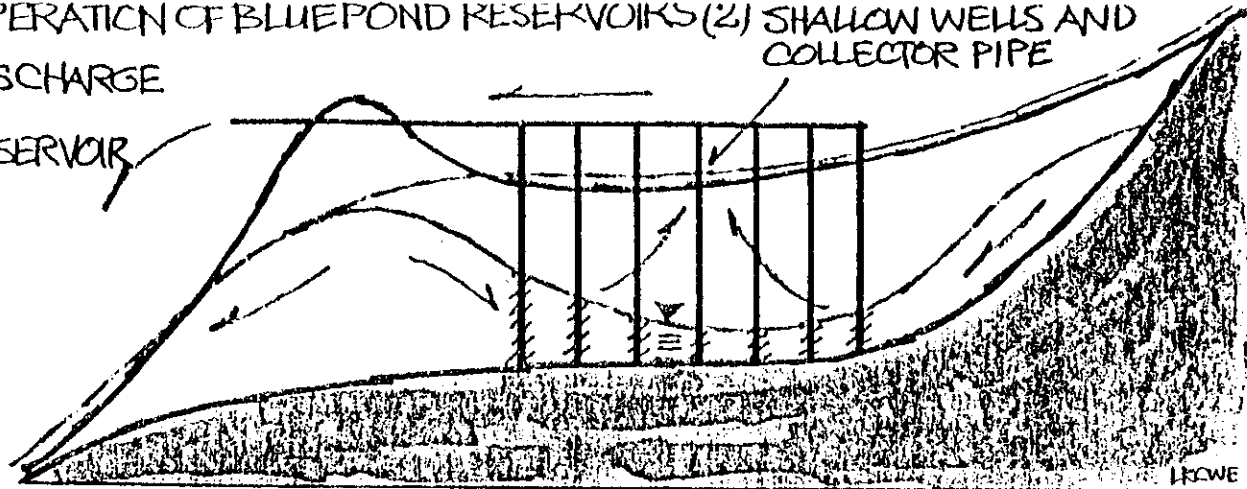


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APPENDIX A
JOINT VENTURERS'
REPLY BRIEF

OPERATION OF BLUEPOND RESEKVOIKS (2) SHALLOW WELLS AND COLLECTOR PIPE

DISCHARGE OF RESERVOIR

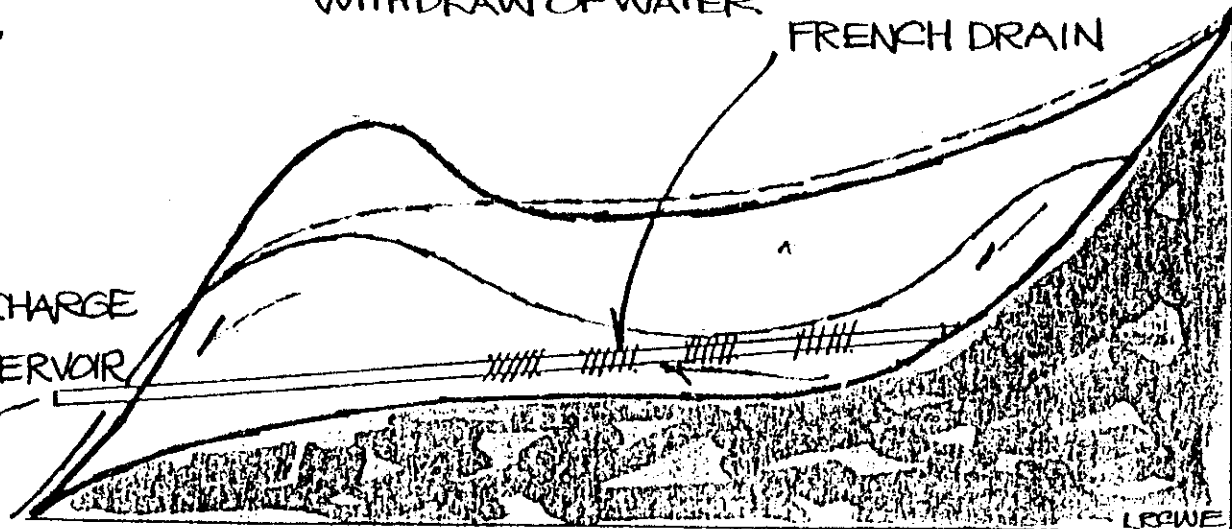


OR

WITHDRAW OF WATER

FRENCH DRAIN

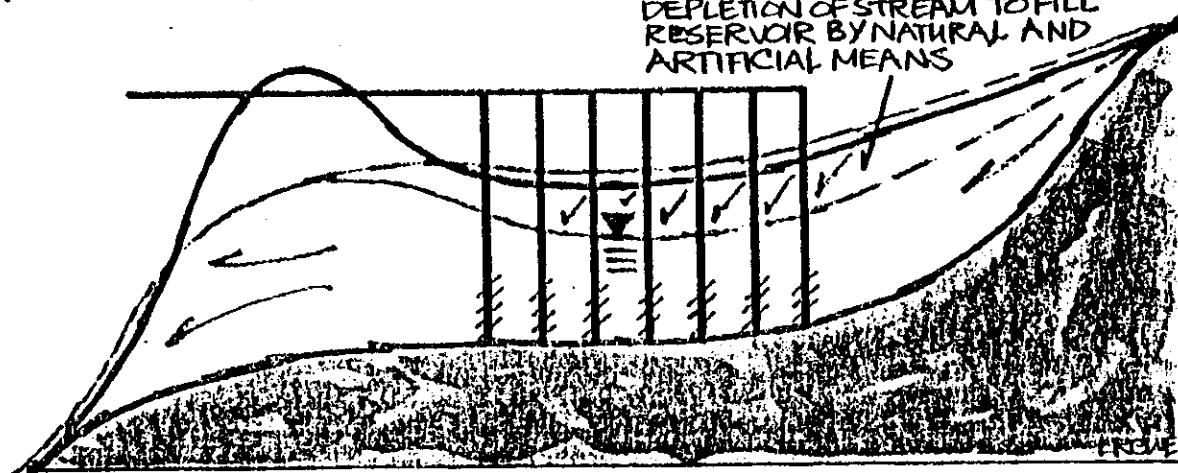
DISCHARGE OF RESERVOIR



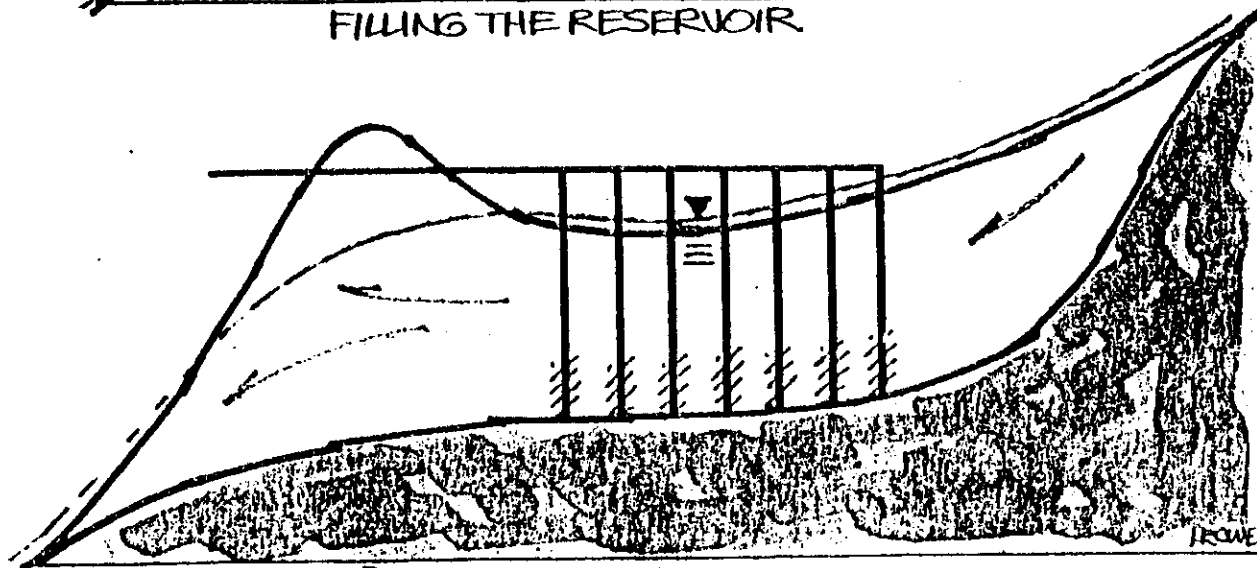
WITHDRAW OF WATER

OPERATION OF BLUEPOND RESERVOIRS (3)

DEPLETION OF STREAM TO FILL
RESERVOIR BY NATURAL AND
ARTIFICIAL MEANS



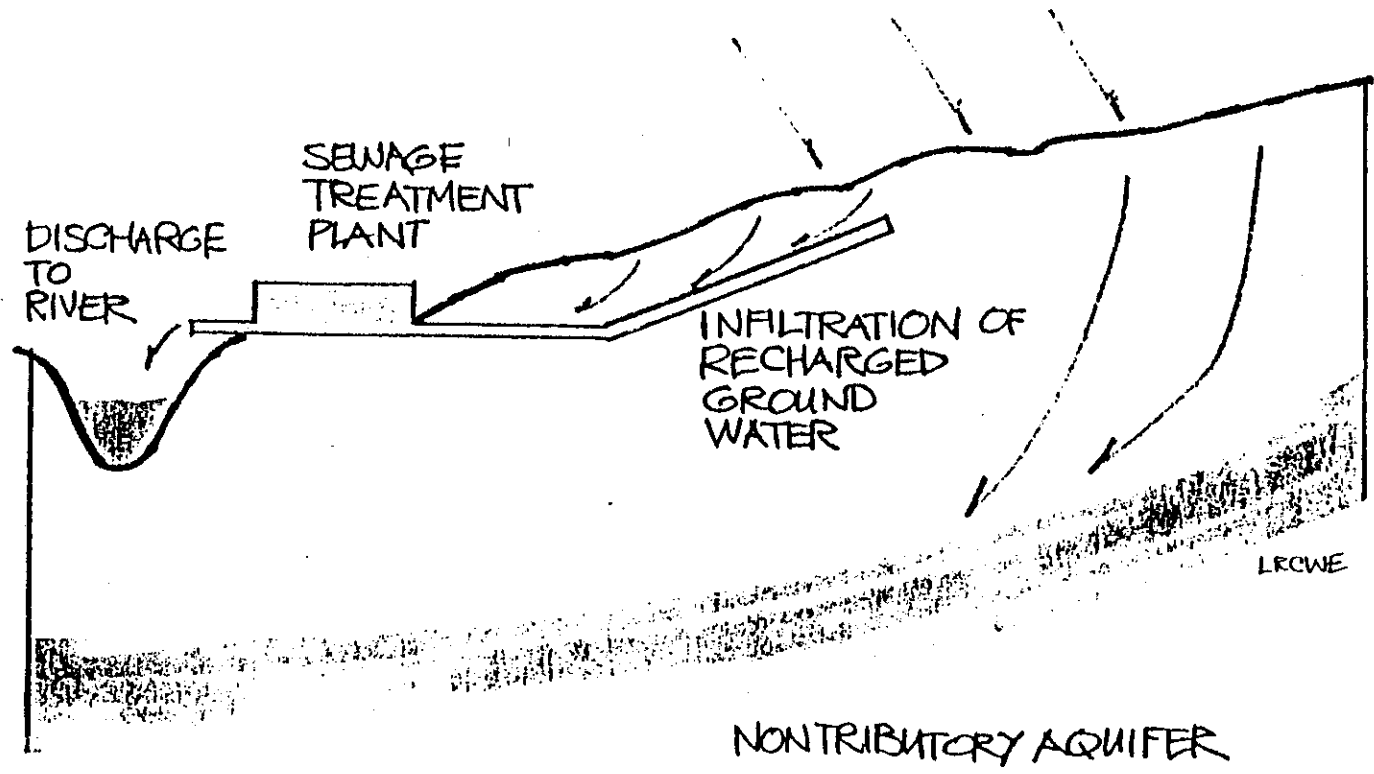
FILLING THE RESERVOIR



RESERVOIR FULL

INFILTRATION PROJECT

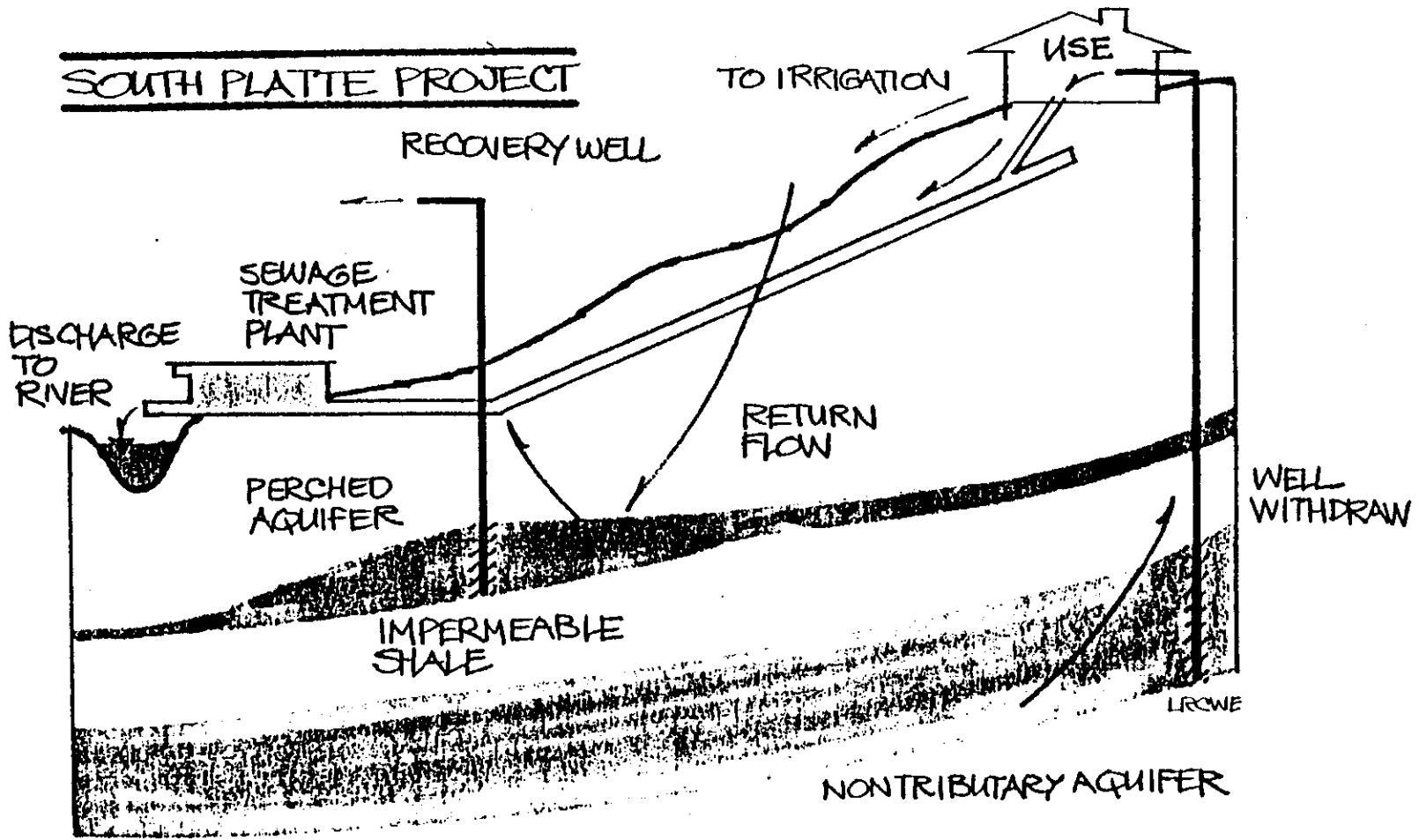
- SOURCES
NONTRIBUTORY GROUND WATER
DEEP WELL RETURN FLOW
TRANS BASIN WATER
DE MINIMIS TRIBUTARY GROUND WATER



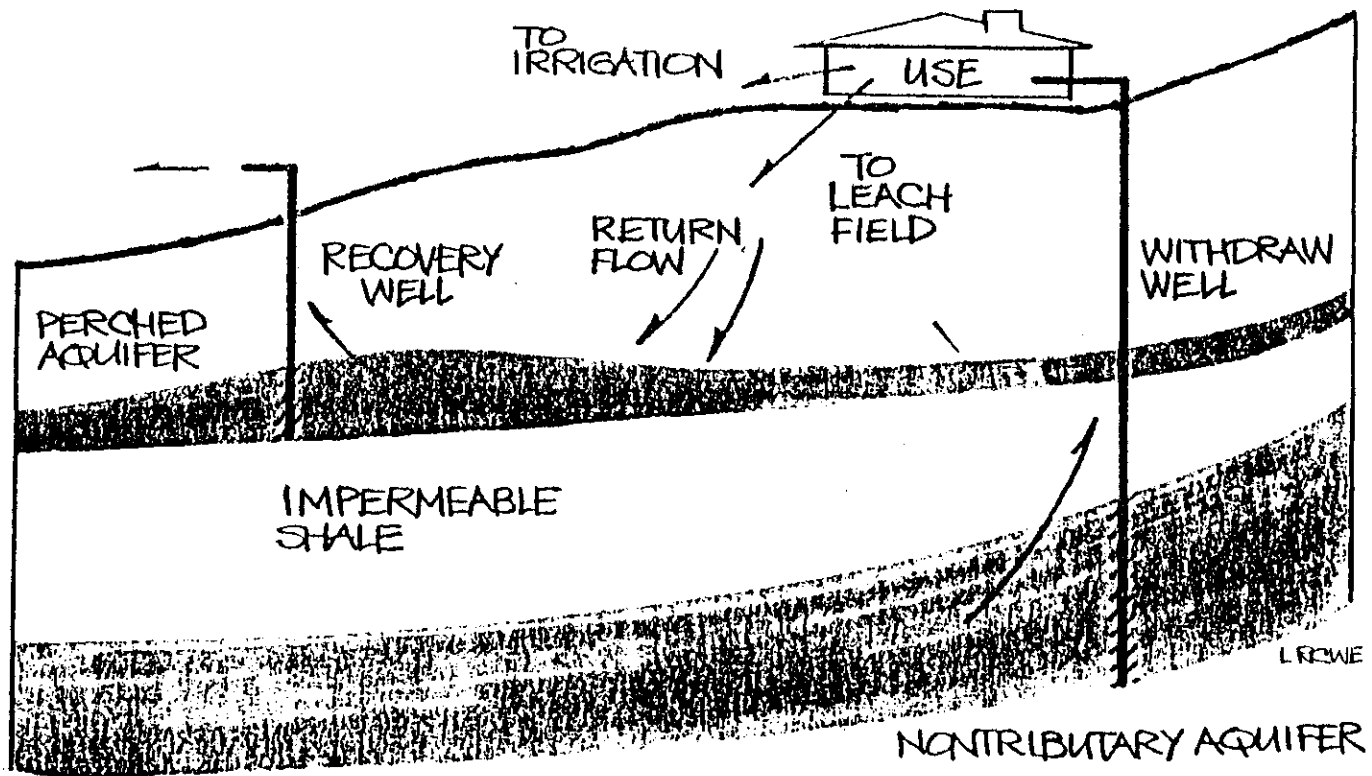
6115

APPENDIX D
JOINT VENTURERS' REPLY BRIEF

SOUTH PLATTE PROJECT



DENVER BASIN RECHARGE RECOVERY



APPENDIX F
JOINT VENTURERS' REPLY BRIEF

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IN THE DISTRICT COURT OF THE STATE OF COLORADO
IN AND FOR WATER DIVISION NO. 1
STATE OF COLORADO
CASE NO. W-9192-78

WATER DIVISION
FEB 27 1981

IN THE MATTER OF THE APPLICATION)
FOR WATER RIGHTS OF)
HIGHLAND VENTURERS AND MISSION)
VIEJO COMPANY)
IN THE ARAPAHOE FORMATION AND)
THE LARAMIE-FOX HILLS AQUIFER)
IN DOUGLAS COUNTY)

CORRECTED
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECREE

This matter was tried to the Court on November 5 through 8 and 14, 1979, December 12, 26 and 27, 1979, and February 29, 1980, upon applicant's claims for conditional underground water rights from the Arapahoe Formation. After considering the pleadings, the files herein, the evidence presented at trial, and the written closing arguments submitted by the parties, the Court entered on August 20, 1980 its Memorandum of Decision herein. On September 10, 1980, the Court held a conference with the parties at which was discussed the form of the decree to be entered herein. On that same date, the Court conducted a hearing at which applicant presented evidence concerning proposed well locations and the question whether the application should be republished due to changes in certain of the proposed well locations. Consistent with the Court's Memorandum of Decision and its orders entered herein at the conclusion of the hearing on September 10, 1980, the Court enters the following findings of fact, conclusions of law and decree.

FINDINGS OF FACT

1. The application herein for conditional underground water rights from both the Arapahoe Formation and the Laramie-Fox Hills Aquifer was filed on February 28, 1978, notice of the application was given according to law. Statements of opposition to the application were filed on behalf of the State of Colorado, Department of Natural Resources; Edward Russell Jaksch; Agnes Jaksch; Mildred Simons; McArthur Ranch Civic Association and Surrey Ridge Homeowner's Association; Joy R. Hilliard, et al., (Esther G. Smedley subsequently withdrew as a party in opposition); and Willows Water District. Entries of appearance were filed on behalf of Phipps 1527 and Western Water Resources; Stonybrooke Associates; Inverness

Water and Sanitation District; City of Aurora; Colorado Memorial Parks, Inc.; Consolidated Industries, Inc.; Anthony A. Jones, et al.; and Water in Our Wells (an unincorporated association, the members of which include those listed in the entry of appearance filed on behalf of Anthony A. Jones, et al.). The statements of opposition of McArthur Ranch Civic Association, Mildred Simons, Agnes Jaksch and Edward Russell Jaksch were subsequently withdrawn. The entries of appearance filed on behalf of the Colorado Memorial Parks, Inc., Consolidated Industries, Inc., and Goldsmith Metropolitan District (formerly listed as a member of Water in Our Wells) were also withdrawn.

2. At the initial pretrial conference on May 1, 1979, Water in Our Wells filed a motion, joined in by the State of Colorado, to abate the proceedings pending the Colorado Supreme Court's decision in original proceeding 79SA38 (Southeastern Water Conservancy District, et al. v. John Huston, et al.). The motion was denied. Applicant's motion for separate trials and separate decrees with respect to applicant's proposed wells in the Laramie-Fox Hills Aquifer and the Arapahoe Formation was granted. The Court's pretrial order dated July 20, 1979, nunc pro tunc June 20, 1979, provided for trial of the Laramie-Fox Hills Aquifer claims on August 31, 1979, and trial of the Arapahoe Formation claims starting on November 3, 1979. The Court's decree with respect to applicant's claims for water in the Laramie-Fox Hills Aquifer was entered on October 30, 1979.

3. A second pretrial conference with respect to applicant's claims and proposed wells in the Arapahoe Formation was held on September 27, 1979. A second motion to abate the proceedings pending decision in original proceeding 79SA38 was filed by the State of Colorado. The motion was denied, and the State's ensuing petition for a writ in the nature of prohibition was denied by the Colorado Supreme Court. At the second pretrial conference, an appearance was entered on behalf of Richmond Phipps for the first time in this proceeding. The Court's supplemental pretrial order entered October 30, 1979, nunc pro tunc September 27, 1979, required Richmond Phipps to file a statement of position setting forth her position with respect to applicant's Arapahoe Formation claims. The statement of opposition and statement of position subsequently filed on

behalf of Richmond Phipps asserted that the Court did not have jurisdiction to adjudicate applicant's claims prior to decision on her petition to set aside the sale of the Highlands Ranch pending in Case No. P-4007, Douglas County District Court. This assertion was treated as a motion to abate the proceeding, and was heard and denied on October 30, 1979. Richmond Phipps' petition for writ in the nature of prohibition followed, and was denied by the Colorado Supreme Court. Her subsequent motion for permission not to participate at trial was granted by this Court.

4. The parties that participated in the trial on applicant's Arapahoe Formation claims were, in addition to applicant: the State of Colorado, Water in Our Wells, Willows Water District, Western Water Resources and Phipps 1527 Partnerships, and Stonybrooke Associates. Pursuant to the Court's order at the conclusion of the trial, the parties submitted written closing arguments. Applicant also submitted a written reply closing argument in response to the closing arguments of the other parties.

5. On December 18, 1979, Mission Viejo Company acquired all interest of Highland Ventures in the decree on the Laramie-Fox Hills Aquifer wells and claims, and in the application in this proceeding with respect to the Arapahoe Formation claims and proposed wells. Mission Viejo Company, therefore, is the sole applicant in this proceeding.

6. Applicant Mission Viejo Company owns 21,612 contiguous acres in Douglas County comprising most of what is known as the Highlands Ranch, and claims the right to construct wells to divert and use water from the Arapahoe Formation underlying the ranch. Applicant seeks in this proceeding a decree confirming its right to use such water and determining that the State Engineer is required to issue permits for the wells it wants to construct for that purpose. The lands overlying the portion of the Arapahoe Formation from which applicant seeks to use such water are described in Appendix 1 attached hereto, and are referred to hereafter as the "Highlands Ranch." Applicant proposed to divert the water through thirteen Arapahoe Formation wells to be constructed initially with additional wells to be constructed as necessary to maintain production levels. The total amount of water claimed from the Arapahoe Formation in the application filed herein was 11,640 acre-feet annually. This was the total amount requested in the thirteen Arapahoe Formation well permit

applications filed with the State Engineer's Office by applicant on January 31, 1978. At trial, the total amount of water claimed in this proceeding was reduced to 5,948 acre-feet. The application as originally filed in this proceeding requested that each of the proposed wells be designated as an alternate point of diversion, so that the total water claimed could be produced through any combination of wells. At trial this request was modified to limit overpumping of any one well to 125 percent of its permitted and decreed capacity, subject to the 5,948 acre-feet limitation on total annual pumping.

7. Applicant's applications to the State Engineer's Office on January 31, 1978, for permits to construct thirteen Arapahoe Formation wells on the Highlands Ranch were initially denied on July 24, 1978. The State Engineer's denial order included the finding that:

(T)he ground water would be produced from the Arapahoe aquifer. The provision of subsection 37-90-137(4), C.R.S. 1973, will therefore apply to these applications.

(This statute is often referred to as Senate Bill 213, and is referred to hereafter as "S.B. 213".) The applications were denied because the State Engineer was unable to find:

- a. That unappropriated water is available for withdrawal by the proposed wells in the amount requested by the applicant.
 - b. That the vested water rights of senior appropriators diverting water from the Arapahoe aquifer would not be materially injured.
- (Applicant's exh. 16).

At trial Water in Our Wells, Western Water Resources and Phipps 1527 asserted that the applicant was bound by the State Engineer's denial of its well permit applications because it failed to take an appeal to the District Court pursuant to 37-90-115, C.R.S. 1973. Applicant contended that the State Engineer had never finally denied the well permit applications.

This Court has jurisdiction to grant a conditional decree in the face of either inaction or denial by the State Engineer. Accordingly, the Court need not determine the finality of the State Engineer's actions.

8. Objector Willows Water District provides municipal water service to approximately 10,000 people residing within its boundaries, which comprise about 1,100 acres in Arapahoe County adjacent to the north

boundary of the Highlands Ranch. The primary source of supply for the district's water system is thirteen Arapahoe Formation wells, five of which are located within its boundaries near the north boundary of the Highlands Ranch, and eight of which are located on the Highlands Ranch.

9. The Western Water Resources and Phipps 1527 Partnerships claim to own seventy-five percent of the water produced by the eight Arapahoe Formation wells on the Highlands Ranch that are used by the Willows Water District. The Partnerships and the District entered lease agreements pursuant to which the wells were constructed by the District and the Partnerships' share of the water produced by the wells is used by the District. Applicants claim to own twenty-five percent of the water produced by these eight wells. Four of these wells were decreed to be nontributary in Case No. W-8284-76 in this Court. The remaining four are pending adjudication in Case No. W-9310-78 in this court.

10. An unspecified number of Arapahoe Formation wells are owned or claimed by members of Water in Our Wells. Some of such wells have been decreed nontributary. Most of such wells are located several miles north of the Highlands Ranch. The Willows Water District and the five Arapahoe Formation wells within its boundaries lie between the Highlands Ranch and most of the wells owned or claimed by members of Water in Our Wells.

11. Objector, Stonybrooke Associates, does not own any Arapahoe Formation wells. Its interest in this proceeding is based on its pending claims for conditional decrees for water in the Arapahoe Formation. Such claims are included in the cases consolidated before a special water judge in original proceeding 79SA38. (Southeastern Water Conservancy District, et al. v. John Huston, et al.). The closest proposed location for an Arapahoe Formation well claimed by Stonybrooke Associates is more than ten miles from the Highlands Ranch.

12. On November 5, 1979, applicant and objector, Willows Water District, entered into a stipulation pursuant to which the district consented to a decree in this proceeding confirming applicant's right to divert and use up to 6,000 acre-feet of water annually from the Arapahoe Formation beneath the Highlands Ranch, subject to certain limitations and conditions.

The Court's Memorandum of Decision, its orders entered on September 10, 1980, and its findings and conclusions herein are contrary,

in certain respects, to the terms of the stipulation; therefore, the stipulation cannot entirely be implemented in the form in which it was executed.

13. As indicated in the Court's Memorandum of Decision, based on all of the evidence presented at trial, the Court finds that applicant has sustained its burden of showing that the pumping of its proposed Arapahoe Formation wells will not affect the flow of the South Platte River, Plum Creek, or any other surface stream within one hundred years. Applicant's expert witness, Mr. Erker, expressed the opinion that the pumping of applicant's proposed wells at an annual rate of 5,948 acre-feet would not affect the flow of any surface stream within 100 years. His opinion was based on data specific to the Arapahoe Formation in the area of the Highlands Ranch. Such data included information available from nine Arapahoe Formation wells that had been constructed on the Highlands Ranch before applicant acquired it, and from five Laramie-Fox Hills wells and four test holes constructed by applicant on or adjacent to the ranch. Data available from other wells in the area and from published reports about the Arapahoe Formation in the area were also relied on by Mr. Erker. The Court also considered the evidence and opinions presented by other expert witnesses who testified on the point.

The Court finds, based on all of the foregoing that it has been established by clear and satisfactory evidence that pumping of the wells at an annual rate of 4,915 acre-feet would not affect the flow of the South Platte, Plum Creek, or any other surface stream within 100 years.

14. As indicated in the Court's Memorandum of Decision, based on the evidence presented at trial, the Court finds that the Arapahoe Formation beneath the Highlands Ranch contains about 491,500 acre-feet of water that is not considered to be appropriated by existing Arapahoe Formation wells located on and adjacent to the ranch. Under the 100-year minimum life provisions of S.B. 213, 4,915 acre-feet of water is available for withdrawal by applicant's proposed wells annually. As indicated in the Court's Memorandum of Decision, this amount is based on the following findings: applicant's lands overlying the portion of the Arapahoe Formation which is subject to its claims in this proceeding comprise about 21,612 acres; the average saturated thickness of the formation beneath the Highlands Ranch is 275 feet; the specific yield of the formation beneath the ranch

is fifteen percent; and about 4,000 acre-feet of water annually is considered to be appropriated from the Arapahoe Formation beneath the Highlands Ranch by existing wells on and adjacent to the ranch.

15. Although the State Engineer's denial order indicated that applicant's Arapahoe Formation well permit applications were denied in part because the State Engineer was unable to find that there was unappropriated water available in the amounts requested in the permits, the State's testimony at trial was that the State Engineer's Office did not question the amount of water claimed by applicants. The State's testimony was that the permits were denied because the proposed wells were located within an area in which water levels in existing Arapahoe Formation wells had declined one hundred feet or more, and the State Engineer therefore was unable to find that the proposed wells would not cause "material injury" to existing wells. The testimony at trial indicated that the State Engineer's policy was to deny all permits for nontributary wells outside of designated groundwater basins in areas of the Laramie-Fox Hills, Arapahoe, and Dawson-Arkose Formations where water levels in existing wells have declined one hundred feet or more. Such areas within the geological structure known as the Denver Basin in Water Division No. 1 are depicted on applicant's exhibit 26, a color-coded map prepared by the State Engineer's Office. This policy was referred to throughout the trial as the State's "critical area" policy. The critical area policy appears to be that no further permits are issued for wells in any area of the three affected formations in which water levels are believed to have declined one hundred feet or more since water level data became available.

16. The evidence indicates that the critical area policy was formulated by the State Engineer some time late in 1977 or early 1978. According to the state witnesses, there are no written rules, regulations, guidelines, or statement of policy explaining the critical area policy or how it is applied. Several state witnesses testified that the State Engineer's Office has never adopted any rules, regulations, or guidelines, formal or informal, for evaluating nontributary well permit applications or for determining what constitutes "material injury" within the meaning of S.B. 213. There was testimony that no application for a well permit under S.B. 213 had been denied on the ground of material injury until this

policy was adopted. The evidence showed that no public hearings were held on the question of adopting the policy, and no public notice regarding the policy was given to landowners or well owners before the policy was adopted.

17. The boundaries of the one hundred feet decline areas considered by the State to be "critical" were established without regard to the rate of water level declines in those areas. The evidence showed that the State established the boundaries of such areas based on information indicating that water levels in existing wells had declined 100 feet or more since data became available. In establishing the boundaries of the critical areas, the State Engineer's Office relied on whatever information was available. No water level measurements were made by personnel of the State Engineer's Office. No test holes were constructed or utilized for monitoring purposes. The boundaries of the critical areas were established through interpolation and extrapolation based on available data.

The evidence showed, without disagreement, that even if no new wells are constructed, the continued pumping of existing wells in existing 100 feet decline areas will cause water levels in such areas to continue to decline and the boundaries of such areas to expand. The evidence also showed that new wells outside the boundaries of such areas will accelerate the rates of water level declines in wells inside the boundaries. The evidence showed, without disagreement, that in confined aquifers under artesian conditions such as the Arapahoe Formation, the pumping of each well ultimately affects each other well; that water cannot be used without declines in water levels in wells throughout the aquifer; and that each new well accelerates to some extent the rate of such declines.

18. The evidence showed that based on the characteristics of the Arapahoe Formation in the area of the Highlands Ranch, only about 0.5 percent of the total water in storage has been removed when the water level has declined one hundred feet. This is depicted on applicant's exhibit 21. The evidence also showed that the amount of water that can be produced from the Arapahoe Formation in the area of the Highlands Ranch while artesian conditions continue to exist represents about 3.4 percent of the total water recoverable from storage in the formation, so that when water levels in Arapahoe Formation wells in the area have declined to the top of the formation, approximately 96.6 percent of the recoverable water

will remain in storage. This is also depicted in applicant's exhibit 21.

19. Applicant's proposed wells would not be located within the boundaries of a designated ground water basin.

20. The evidence shows that applicant intends to use the Arapahoe Formation water claimed herein primarily to furnish a water supply for a municipal water system to serve applicant's proposed residential, commercial, and industrial development on the Highlands Ranch. The proposed uses of the water include municipal, domestic, industrial, commercial, irrigation, stock watering and recreation. Applicant claims the right to reuse, successively use, and otherwise dispose of such water for such uses within the South Platte River drainage. The water would be diverted for immediate use, for storage and subsequent use, for exchange purposes and for augmentation purposes, including replacement of depletions resulting from use of water from other sources.

21. The testimony indicated that applicant's proposed development on the Highlands Ranch will be constructed over approximately thirty to thirty-five years. Rather than constructing all of the Arapahoe Formation wells at once, applicant seeks confirmation of its right to construct the wells as required to meet water demands as the development proceeds. For these reasons, and because of the large expenditures required to construct and equip the wells and to construct the water system, the Court finds that all of the wells should be treated as part of an integrated single water system for purposes of reasonable diligence requirements, to the extent that such requirements apply to nontributary ground waters.

22. The appropriation date asserted for the conditional water rights claimed herein from the Arapahoe Formation is January 31, 1978, based on the filing of well permit applications for the thirteen wells proposed to be constructed, and the surveying and staking of the site of test hole number 1, which was constructed for the purpose of gaining geological and hydrologic data about both the Laramie-Fox Hills Aquifer and the Arapahoe Formation. The evidence presented at trial showed also that applicant staked each of the proposed well sites and constructed a number of additional test holes in order to gain more information about the Arapahoe Formation in the area of the Highlands Ranch. The evidence showed that applicant intends to appropriate the Arapahoe Formation water claimed herein, that such intent to appropriate has been adequately

demonstrated through overt acts on the land, and that applicants have taken the requisite steps in order to be entitled to a conditional decree for the water rights claimed herein.

23. The locations specified in the original application herein for certain of applicant's proposed wells are required to be changed as a result of the stipulation between applicant and Willows Water District. Applicant proposed to relocate others in order to minimize potential interference between wells and to more efficiently produce the 4,915 acre-feet annually to which the Court has found applicant is entitled. Some of the objectors argued that in order to give adequate notice to others who are not parties to this proceeding the application must be republished showing the new well locations. Objectors do not assert that their wells will be affected by the relocations. Instead, they argue that other well owners in the area who are not parties may be affected, and are entitled to notice.

The original application in this case claimed 11,640 acre-feet annually from the Arapahoe Formation. The amount has now been reduced to 4,915 acre-feet. The original application requested the right, without limitation, to pump the total 11,640 acre-feet annually through any combination of wells. Pursuant to the stipulation subsequently entered between applicant and Willows Water District, overpumping of any well would be limited to 125 percent of its permitted and decreed capacity. In accordance with the Court's order on September 10, 1980, the pumping of any single well would be further limited to an average of 110 percent of such well's annual appropriation as determined herein, over any five year period.

Evidence was taken on the question of republication at the hearing on September 10, 1980. Applicant submitted three alternative sets of proposed locations for the thirteen wells to be constructed. Comparisons of the effects of pumping each of the proposed sets of well locations in the amounts provided for herein with the effects of pumping of wells based on the locations and amounts claimed in the original application herein, are depicted on applicant's exhibits 53 through 61. Applicant's witness testified that none of the relocations shown on applicant's exhibit 56 would result in moving any of the proposed wells closer to the nearest exterior boundary of the Highlands Ranch than the location described in

the original application. His testimony further indicated that applicant's exhibits 57 and 58 show that no owner of an existing Arapahoe Formation well on or off of the Highlands Ranch, and no other owner of land overlying the Arapahoe Formation would be potentially injured by the pumping of applicant's proposed wells at the rate of 4,915 acre-feet annually at the locations shown on applicant's exhibit 56 to any greater extent than he would have been if the wells were constructed and operated as proposed in the original application.

The Court finds, therefore, that the proposed relocations as shown on applicant's exhibit 56 could not injure any well owner to a greater extent than the wells in their original locations at the original amounts claimed would have. The Court finds that adequate notice having been given of the original application, additional notice is not now required in order to make these changes. The adjusted locations are described in paragraph 31 herein, and are shown on applicant's exhibit 56, which is attached hereto as Appendix 2.

CONCLUSIONS OF LAW

24. As decided in the Court's Memorandum of Decision, this Court has proper jurisdiction over this proceeding.

25. If it is shown that the pumping of proposed wells at the requested rates would not affect the flow of any surface stream within 100 years, then the water is considered nontributary. District 10 Water Users Association v. Barnett, Colo. , 599 P.2d 894 (1979); Kuiper v. Lundvall, 187 Colo. 40 (1975). If the pumping would affect the flow of a stream within forty years, the water is considered tributary. Hall v. Kuiper, 181 Colo. 130 (1973). The Supreme Court has reserved ruling on whether wells that would affect a stream within more than forty but less than one hundred years are to be considered tributary or nontributary. District 10 Water Users Association v. Barnett, supra. The Court has determined, based on all of the evidence, that the pumping of applicant's proposed wells at the rate of 4,915 acrefeet annually will not affect the flow of any surface stream within one hundred years. Applicant therefore is entitled to a decree confirming that its proposed Arapahoe Formation wells will produce water that is legally nontributary to any surface stream.

26. Since applicant's proposed wells would produce nontributary

water outside of a designated ground water basin, the provisions of 37-90-137(4) C.R.S. 1973, ("S.B. 213") control in determining whether the permits required for such wells shall be issued.

27. S.B. 213 was enacted in 1973 as an amendment to the 1965 Ground Water Management Act, which prior to that time did not distinguish between wells having tributary and nontributary sources of supply outside of designated basins. The 1965 Act required well permits for all wells constructed thereafter outside of designated basins. Regarding the issuance of such permits, it provided in part:

If the state engineer finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts, he shall issue a permit to construct a well, but not otherwise...

37-90-137(2) C.R.S. 1973. S.B. 213, added in 1973, provides, in part:

In the issuance of a permit to construct a well in ... (a nontributary aquifer outside of a designated ground water basin), the provisions of subsections (1) and (2) of this section shall apply, except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant... is considered to be unappropriated; the minimum useful life of the aquifer is one hundred years, assuming there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit.

37-90-137(4), C.R.S. 1973. (Emphasis and language in brackets added.)

The principal question of law in this case is what the language "no material injury to vested water rights" in S.B. 213 was intended to mean. The material injury standard, as applied to water rights in renewable tributary sources is dictated primarily by the priority system -- senior rights shall not be diminished by junior rights. Black v. Taylor, 128 Colo. 449 (1953); Felhauer v. People, 167 Colo. 320 (1968); Colorado Springs v. Bender, 148 Colo. 458 (1961). However, the doctrine of prior appropriation was held inapplicable to nontributary groundwater in Whitten v. Coit, 153 Colo. 157 (1963), and the difficulty of attempting to apply a priority system to wells producing from the same nontributary source was discussed in some detail there.

The State, Water in Our Wells, and the Phipps 1527 and Western

Water Resources Partnerships do not contend that a priority system per se applies with respect to nontributary groundwater, but they take the position that "material injury" in the context of this case is economic injury caused by acceleration of water level declines in existing wells. Their position concerning the amount of acceleration in declines which constitutes material injury is unclear. The State's "critical area" policy which was the basis of the denial of applicant's permits does not appear to tolerate any acceleration in the rate water level declines once one hundred feet of decline has occurred. These objectors argued in their closing argument that an "economic injury" test should be applied, which would require findings in every case as to the financial means of the affected well owners.

The Court finds that regardless of the outcome of this case the water levels in wells tapping the Arapahoe Aquifer will continue to decline. This is an inescapable result of the fact that water in the Arapahoe Formation is being "mined"; that is the water being removed through wells is not being replaced. Only by ceasing all pumping of any nature--and accordingly foregoing development of the large amount of water which is held in the Arapahoe Aquifer--could this result be avoided; however, pumping of the wells herein provided for will contribute to the decline, and accordingly somewhat accelerate it. Thus the necessity of redrilling wells of certain objectors, although probably inescapable in any event, will materialize somewhat sooner as a result of this project.

As concluded in the Court's Memorandum of Decision, the two basic Supreme Court decisions which govern this branch of the case are Whitten v. Coit, supra, and Colorado Springs v. Bender, 148 Colo. 458, 336 P.2d 552 (1961). It appears to the Court that section 37-90-137(4) recognizes the doctrine of Whitten v. Coit, supra, and is a determination by the legislature that each landowner should have the benefit of the volume of unappropriated nontributary groundwater underlying his own land. He should not be compelled to forego the development of such nontributary groundwaters underlying his lands for the benefit of others who tap the same aquifer.

The Bender case established that the water level or artesian head is not a part of the water right. Accordingly, any economic injury occasioned by a decline in water levels or artesian head is not material injury to a vested water right within the meanings of

37-90-137(4), C.R.S. 1973. This does not mean persons in the position of members of objector Water in Our Wells have no recourse. In an appropriate case they may have an action for damages as suggested in Bender supr.

28. Applicant's proposed Arapahoe Formation wells, in the amounts provided for herein, meet each of the requirements of S.B. 213. Therefore, the State Engineer's denial of such permits was unjustified, and applicant is entitled to issuance of such permits. Applicant is entitled to a decree confirming its right to divert and use 4,915 acre-feet of water from the Arapahoe Formation beneath the Highlands Ranch, subject to the conditions and limitations provided herein.

29. The steps taken and work performed by applicant are sufficient to meet the requirements for initiation of the appropriation of the conditional water rights claimed herein, and applicant is entitled to a conditional decree confirming applicant's vested right to divert and use groundwater in the amount of 4,915 acre-feet annually from the Arapahoe Formation beneath the Highlands Ranch.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

30. The application herein, insofar as it relates to applicant's claims, as modified herein, for water from the Arapahoe Formation, is hereby granted, subject to the limitations provided for herein.

31. A conditional water right in the amount of 4,915 acre-feet of water annually from the Arapahoe Formation underlying the Highlands Ranch, with an appropriation date of January 31, 1978, for municipal, domestic, industrial, commercial, irrigation, stock watering, recreation and other beneficial uses within the South Platte River drainage, including reuse and successive uses until such water is entirely consumed, is hereby confirmed. Such water may be used through immediate application to beneficial uses, for storage and subsequent application to beneficial uses, for exchange purposes, for replacement of depletions, and for augmentation purposes. Said water may be withdrawn through the following wells to be constructed, with the annual appropriation for each well to be determined in accordance with the procedure set forth in paragraph 32(b) herein:

(1) Arapahoe Well No. 1:

- (a) Location: In the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 6 South, Range 68 West, of the 6th P.M., at a point 350 feet from the South section line and 645 feet from the West section line of said Section 12.
- (b) Depth: 1450 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(2) Arapahoe Well No. 2:

- (a) Location: In the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 6 South, Range 68 West, of the 6th P.M., at a point 2035 feet from the South section line and 2205 feet from the East section line of said Section 14.
- (b) Depth: 1485 feet.
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(3) Arapahoe Well No. 3:

- (1) Location: In the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, Township 6 South, Range 68 West of the 6th P.M., at a point 2130 feet from the South section line and 1685 feet from the East section line of said Section 16.
- (b) Depth: 1050 feet.
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(4) Arapahoe Well No. 4:

- (1) Location: In the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 6 South, Range 68 West of the 6th P.M., at a point 50 feet from the South section line and 1165 feet from the East section line of said Section 10.
- (b) Depth: 1275 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(5) Arapahoe Well No. 5:

- (a) Location: In the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, Township 6 South, Range 68 West of the 6th P.M., at a point 1910 feet from the North section line and 1165 feet from the East section line of said Section 23.

- (b) Depth: 1620 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(6) Arabahoe Well No. 6:

- (a) Location: In the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22, Township 6, South, Range 68 West of the 6th P.M., at a point 870 feet from the North section line and 1215 feet from the East section line of said Section 22.

- (b) Depth: 1375 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(7) Arabahoe Well No. 7:

- (a) Location: In the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 6 South, Range 68 West of the 6th P.M., at a point 1365 feet from the North section line and 770 feet from the West section line of said Section 25.

- (b) Depth: 1660 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(8) Arabahoe Well No. 8:

- (a) Location: In the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, Township 6 South, Range 68 West, of the 6th P.M., at a point 2255 feet from the North section line and 20 feet from the East section line of said Section 27.

- (b) Depth: 1375 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(9) Arabahoe Well No. 9:

- (a) Location: In the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, Township 6 South, Range 67 West of the 6th P.M., at a point 1065 feet from the South section line and 770 feet from the West section line of said Section 30.

- (b) Depth: 1850 feet
- (c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(10) Arabahoe Well No. 10:

- (a) Location: In the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, Township 6 South, Range 67 West of the 6th P.M., at a point 1265 feet from the South section line and 990 feet from the East section line of said Section 29.

- (b) Depth: 2060 feet
(c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(1) Arapahoe Well No. 11:

- (a) Location: In the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 6 South, Range 68 West of the 6th P.M., at a point 2480 feet from the North section line and 2455 feet from the East section line of said Section 35.
- (b) Depth: 1480 feet
(c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(12) Arapahoe Well No. 12:

- (a) Location: In the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 7 South, Range 68 West of the 6th P.M., at a point 2600 feet from the North section line and 1510 feet from the East section line of said Section 2.
- (b) Depth: 1450 feet
(c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

(13) Arapahoe Well No. 13:

- (a) Location: In the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, Township 7 South, Range 68 West of the 6th P.M., at a point 225 feet from the North section line and 400 feet from the East section line of said Section 1.
- (b) Depth: 1660 feet
(c) Pumping rate: 600 g.p.m. (1.34 c.f.s.)

32. The conditional water rights confirmed herein are subject to the following limitations:

(a) The total amount of water that may be produced from the Arapahoe Formation beneath the Highlands Ranch through applicant's proposed wells that are the subject of this proceeding shall be 4,915 acre-feet annually.

(b) The amount of water available for appropriation by each well annually shall be determined by the Colorado Division of Water Resources based on data obtained from construction of each well. In making such determinations, the following method and criteria shall be applied:

(1) The sand line and shale line on the spontaneous potential log shall be determined following the procedure set forth

in Schlumberger Log Interpretation Manual (1972).

(2) Saturated sand thickness in the interval of interest shall be defined as the cumulative thickness of that material for which the spontaneous potential log falls on the sand side of the line midway between the sand and shale lines. For wells where no spontaneous potential log is available, the saturated thickness shall be considered to be 275 feet.

(3) For purposes of calculating the volume of water available for appropriation by applicant's wells, the specific yield of the Arapahoe Formation shall be fifteen percent.

(4) The volume of water available for appropriation by each well annually shall be one percent of the product of the specific yield of the aquifer, the saturated thickness of the aquifer at the well site, and the surface land area within the "cylinder of appropriation" for that well. The cylinder of appropriation for any well constructed pursuant to this decree shall not overlap the cylinders of appropriation of any nonexempt Arapahoe Formation wells owned by others and existing on the date of this decree. A specific yield value of fifteen percent shall be used in computing the surface land area on the Highlands Ranch considered to be within the "cylinders of appropriation" of existing nonexempt Arapahoe Formation wells, and to determine spacing between applicant's wells and existing wells owned by others. For the purposes of this decree, "cylinder of appropriation" is defined as that vertical cylindrical volume of the aquifer which contains the amount of water to be appropriated by the subject well over a 100-year period. The well site is considered to be the center of the cylinder.

(5) Subject to the Court's retained jurisdiction to resolve questions of spacing and proposed changes of well locations, the locations and spacing of applicant's proposed wells shall be in accordance with paragraph 31 herein and Appendix 2 attached hereto. The annual appropriations listed on Appendix 2 are estimates only. The actual annual appropriation for each well shall be determined in accordance with this paragraph 32(b).

(c) The 4,915 acre-feet that may be diverted from the Arapahoe Formation annually by applicant's wells may be diverted through any combination of two or more such wells, provided that the

annual appropriation of water by any such well shall not exceed 125 percent of the amount of water determined to be available for appropriation by such well annually in accordance with the procedures set forth in paragraph 32(b) hereof, and provided further that the average of the annual appropriations of water from any such well over any five-year period reckoned in a continuous progressive series beginning when water from the well is first put to beneficial use, shall not exceed 110 percent of the average of the amount of water annually determined to be available for appropriation by such well in accordance with the procedures set forth in paragraph 32(b) hereof, during such five year period. The Court retains jurisdiction to resolve any disputes that may arise concerning interference between applicant's wells and the eight existing Arapahoe Formation wells on the Highlands Ranch that are now used by the Willows Water District.

(d) If after the thirteen wells provided for herein have been constructed applicant determines that additional wells are necessary in order to produce, consistent with sound engineering principles and practices 4,915 acre-feet of water annually, then applicant may apply to this Court for permission to construct such additional well or wells. Such applications shall be published as required by law and the rules of this Court. Pursuant to C.R.S. 1973, 37-90-137(4), applicant shall apply to the State Engineer for permits to construct such additional wells. In considering such permit applications, the State Engineer shall be governed by the Findings of Fact, Conclusions of Law and Decree herein.

(e) Each of the wells provided for herein shall be constructed and operated in a manner consistent with sound engineering principles and practices.

(f) Each of the wells provided for herein shall be constructed and equipped in the following manner:

(1) A totalizing flow meter shall be installed on the well discharge prior to diverting water for beneficial use. Applicant shall keep records of such diversions for each individual well and shall submit them to the Division of Water Resources upon request.

(2) Each well shall be equipped so that water level may be measured and monitored.

(3) The entire bore hole of each well shall be geophysically surveyed and copies of the geophysical logs shall be submitted to the Division of Water Resources. Said geophysical surveys shall be taken of the open bore hole whenever possible.

(4) The ground water production from each well shall be limited to the Arapahoe Formation. Plain, unperforated casing, shall be installed and properly sealed to prevent appropriation of water from other zones.

33. The Court retains jurisdiction for the purposes set forth in paragraphs 32(b)(5), 32(c) and, 32(d) herein. In addition the Court retains jurisdiction for the purposes of resolving any disputes that may arise between parties hereto concerning whether applicant's wells are constructed and operated in a manner consistent with sound engineering principles and practices, and concerning whether, in determining the annual appropriations for applicant's wells, the Colorado Division of Water Resources has complied with paragraph 32(b) herein. The Court's retained jurisdiction may be invoked by written notice to the Court requesting a hearing. Copies of such notice shall be served on all other parties by mailing a copy to each of them at their latest address as given in the pleadings and, if different, to the latest address as known to the party serving such notice. The Court's retained jurisdiction may also be invoked in any other manner provided by law or the rules of this Court.

34. Applicant's proposed Arapahoe Formation wells, in the amounts provided herein, meet each of the requirements of 37-90-137(4), C.R.S. 1973. Therefore, applicant is entitled to issuance of such permits, subject to the limitations set forth herein. Water is available for appropriation from the Arapahoe Formation beneath the Highlands Ranch, and the withdrawal, through said thirteen wells to be constructed of 4,915 acre-feet annually, will not result in material injury to any other vested water rights.

35. The proposed withdrawals through applicant's Arapahoe Formation wells will not affect the flow of the South Platte River, Plum Creek, or any other surface streams within one hundred years, and therefore are hereby decreed to be nontributary to any surface stream.

36. Each of the wells constructed to produce the water decreed

herein from the Arapahoe Formation shall be an alternate or supplemental point of diversion for each other such well, and each well shall be treated as part of an integrated single water system for purposes of reasonable diligence requirements. Since the wells will be constructed over a considerable period of time as development proceeds on the Highlands Ranch, failure to construct any of said wells within the period of time specified in the well permits for said wells shall not necessarily affect future determinations to be made by this Court with respect to such reasonable diligence requirements.

37. The Court hereby decrees and confirms that applicant is entitled to construct the proposed wells to produce and use annually 4,915 acre-feet of water from the Arapahoe Formation beneath the Highlands Ranch, subject to the limitations provided for herein, and that applicant owns a vested right to divert and use such water. At such time as applicant submits modified permit applications for its proposed Arapahoe Formation wells, the State Engineer shall issue such permits subject only to the conditions and limitations provided for herein. Applicant shall submit a modified permit application for each well at such time as applicant is prepared to construct the well, and need not construct the wells all at once. If any permit issued by the State Engineer for construction of such a well should expire before the well has been constructed and the water applied to beneficial use, applicant shall apply to the State Engineer for the issuance of a new well permit at the time applicant is prepared to construct the well. The State Engineer shall thereupon issue a new well permit for the well identical to the one that expired.

38. An application for a quadrennial finding of reasonable diligence shall be filed during or before the month of December, 1984, and during or before the month of December of every fourth calendar year thereafter as long as applicant desires to maintain the conditional water right decreed herein, or until determination shall have been made that such conditional water right has become absolute by reason of the completion of the appropriation.

DATED this 27 day of February, 1987,

NONE PRO TONE XS

December 10, 1980

Certified to be a full, true and correct
copy of the original in my custody,
Dated February 27, 1987
MARCUS S. FITE
CLERK, WATER COURT, DIV. I
STATE OF COLORADO.

BY THE COURT

ROBERT A. BEHRMAN
Water Judge, Water Division No. 1

APPENDIX 1

LEGAL DESCRIPTION

The following parcels of real property located in Township 6 South, Range 67 West of the 6th P.M., County of Douglas, State of Colorado:

All of Section 5;

The SE 1/4 and the South 1/2 of the NE 1/4 of Section 6;

All of Section 7, except one square acre in the NW corner of Section 7 conveyed to the Directors of School District Number Nine;

All of Section 8, except the North 465 feet of the East 380 feet of the NE 1/4 NE 1/4 NE 1/4 of said Section 8 conveyed to Public Service Company of Colorado by deed recorded in Book 172 at Page 12;

The North 1/2 and the NE 1/4 SE 1/4 of Section 17;

All of Section 18;

All of Section 19;

The West 1/2 of the NW 1/4, the SW 1/4 and the West 1/2 of the SE 1/4 of Section 20;

The West 1/2 of Section 28 except that part conveyed to Public Service Company of Colorado in deed recorded in Book 167 at Page 251;

All of Section 29, except a parcel conveyed to Public Service Company in Deed recorded in Book 167 at Page 251;

All of Section 30; and

The following parcels of real property located in Township 7 South, Range 67 West of the 6th P.M., County of Douglas, State of Colorado:

The West 1/2 and the NE 1/4 of Section 6, except that portion contained in deed recorded in Book 61 at Page 80; and

The following parcels of real property located in Township 6 South, Range 68 West of the 6th P.M., County of Douglas, State of Colorado:

All of Section 1;

All of Section 2;

All of Section 3, except that portion deeded to Department of Highways of the State of Colorado by deed recorded in Book 159 at Page 399 and re-recorded in Book 160 at Page 117; and except a tract conveyed in Book 169 at Page 342, and tract conveyed in Book 176 at Page 133; and except tracts deeded to the Northern Colorado Irrigation Co. in Book 38 at Page 129 and in Book 93 at Page 64;

The SE 1/4 NE 1/4, the North 1/2 of the SE 1/4, the SE 1/4 SE 1/4 and the SW 1/4 of Section 4, except a strip of land 1320 feet long and 22 feet wide off the East Side of the NE 1/4 of said SW 1/4 and a strip of land 20 feet long and 22 feet wide off the East side of the SE 1/4 of said SW 1/4 and adjoining the strip of land last above described on the South;

The SE 1/4, the NW 1/4 SW 1/4, the SE 1/4 SW 1/4, the NE 1/4 SW 1/4 of Section 5, and that part of the East 1/2 of the NE 1/4 of Section 5 described as follows: Beginning at the NE corner of said Section 5; thence West 1130 feet, thence South 700 feet, thence South 50°30' West 418 feet, thence South 20°30' West 300 feet, thence South 1671 feet, thence East 1571 feet, thence North 2902 feet to the point of beginning; except that part described in deed recorded in Book 101 at Page 90; and except that part described in deed recorded in Book 183 at Page 423; and except that part conveyed to the Department of Highways of the State of Colorado in deed recorded in Book 159 at Page 397; and except a strip 150 feet wide for Canal through the SE 1/4 of said Section 5, as conveyed to Northern Colorado Irrigation Co. by deed recorded in Book N at Page 266, and except for strip 100 feet wide for Canal through the SW 1/4 and the NE 1/4 of said Section 5 as conveyed in deed recorded in Book N at Page 132, and except that part lying within the right-of-way for U.S. Highway 85;

That part of the NE 1/4 SE 1/4 of Section 6 lying east of the Atchison, Topeka and Santa Fe Railroad right-of-way except that part lying within the right-of-way for U.S. Highway 85;

All of the East 1/2 of Section 7, except that part conveyed to School District #16 in Book 104 at Page 375; and except that part conveyed to Douglas County School District RE. 1, in Book 270 at Page 204 and except that part conveyed to Northern Colorado Irrigation Company for Highline Canal in Book H at Page 132; and except that part in Chatfield Reservoir Site as described in Declaration of Taking recorded April 24, 1970 in Book 203 at Page 383; and except that parcel conveyed to Carter Concrete Products Co. in Book 311 at Page 11; and except that part conveyed to the Santa Fe Land Improvement Company in Book 38 at Page 477; and except right-of-way for the Denver and Rio Grande Railroad Company and right-of-way for the Atchison, Topeka and Santa Fe Railroad Company; and except that part conveyed by the Atchison, Topeka and Santa Fe Railroad Company to the United States of America in Book 278 at Page 407; and except part lying within right-of-way for U.S. Highway 85; and except part conveyed to Board of County Commissioners for Road in Book 106 at Page 75;

All of Section 8 except a tract described as follows: Starting at a point, point of beginning, which lies on the North and South centerline of said Section 8, 100 feet South of the North 1/4 corner of said Section 8, thence South on centerline a distance of 674 feet, thence East 395 feet, thence North 430 feet, thence North 58°15' West 460 feet, more or less, to the point of beginning; except a tract described in Declaration of Taking for Chatfield Dam Project recorded in Book 203 at Page 383; and except that part lying within the right-of-way for U.S. Highway 85;

All of Section 9;

All of Section 10;

All of Section 11, except that portion of the SE 1/4 SW 1/4 of said Section 11, more particularly described as follows: Commencing at the SW corner of said Section 11, measure East to a point 1589.5 feet distant; thence North a distance of 20 feet to the point of beginning; thence North 6°8' East, a distance of 243.3 feet to a point, thence East a distance of 249 feet to a point, thence South 242 feet to a point 20 feet North of the South line of said Section 11; thence West 275 feet to the point of beginning;

All of Section 12;

All of Section 13;

All of Section 14;

All of Section 15;

All of Section 16;

The North 1/2 and the SE 1/4 of Section 17, except that part of the NW 1/4 lying Westerly of the Easterly right-of-way line of U.S. Highway 85;

All of Section 18, except that part within Chatfield Reservoir Site as described in Declaration of Taking recorded in Book 203 at Page 383; and except tract deeded to Northern Colorado Irrigation Company in Book K at Page 404;

All of Section 22;

All of Section 23;

All of Section 24;

All of Section 25;

All of Section 26;

All of Section 27;

All of Section 35;

All of Section 36; and

The following real real property located in Township 7 South, Range 68 West of the 6th P.M., County of Douglas, State of Colorado:

All of Section 1, except that portion described in Book 61 at Page 80;

The East 1/2 and the East 1/2 of the West 1/2 of Section 2, except that portion contained in deed recorded in Book 61 at Page 80;

The North 1/2 of the Northeast 1/4 of Section 11, except that portion contained in deed recorded in Book 61 at Page 80;

The following parcel of real property located in Township 6 South, Range 68 West of the 6th P.M., County of Douglas, State of Colorado:

All of Section 13, except that part in Chatfield Reservoir Site as described in the Declaration of Takiny recorded April 24, 1970 in Book 203 at Page 383; and except tract deeded to Northern Colorado Irrigation Company recorded in Book N at Page 132 and Book 3 at Page 430.

All of the above Book and Page references are to the records of the Clerk and Recorder of Douglas County, Colorado.

