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### Selected Legal Issues Relating to Application of American Water Development, Inc., Case No. 86 CW 46, Water Division No. 3, Colorado

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SELECTED LEGAL ISSUES RELATING TO  
APPLICATION OF AMERICAN WATER DEVELOPMENT, INC.  
Case No. 86 CW 46, Water Division No. 3, Colorado

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Denver, Colorado

Uncovering the Hidden Resource:  
Groundwater Law, Hydrology, and Policy in the 1990's

Natural Resources Law Center  
University of Colorado at Boulder  
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SELECTED LEGAL ISSUES RELATING TO  
APPLICATION OF AMERICAN WATER DEVELOPMENT, INC.  
Case No. 86 CW 46, Water Division No. 3, Colorado

A. Case History:

Filed: 12/31/86

Amended: 2/21/87; 8/31/90

State Engineer's factual determination: 4/29/87

Trial: 29 days, October 15 - November 22, 1991

Decided: February 10, 1992

Notice of Appeal Filed: 3/25/92

B. Principal Claims:

1. Spanish-Mexican Land Grants. Dismissed 7/5/90
2. United States Land Grant 6/21/1860. Dismissed 7/5/90
3. Tributary Groundwater. Voluntarily dismissed 11/24/91
4. Nontributary Groundwater. Denied 2/10/92
5. Augmentation Plan/Protective Measures. Bifurcated-moot

C. Amounts claimed.

1. 200,000 AF/yr. (60,000 AF in first phase).
2. Baca Grant and environs: 117 wells on over 100,000 acres.

3. Villa Grove: 15 wells on 4,683 acres.
4. Wells: 2,500 feet deep pumping from 200-2500 feet at 5,000 g.p.m. each.
5. Use: irrigation of 38,000 acres and other uses in San Luis Valley; 30,000 AF export to Front Range in Phase I.

D. Issues Regarding Nontributary Groundwater Claim.

1. Claim preclusion by decree in Case No. W-3038 for Closed Basin Project.
2. Standards for determination of nontributary groundwater
  - a. Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).
  - b. S.B. 213; 37-90-137
  - c. District 10 Water Users Association v. Barnett, 198 Colo. 291, 599 P.2d 894 (Colo. 1979).
  - d. State v. Southwestern Colorado Water Conservancy District, 671 P.2d 1294 (Colo. 1983)
  - e. S.B. 5; 37-90-103 (10.5):

"Nontributary ground water" means that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101(2) and 37-92-102(1)(b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be

based on aquifer conditions existing at the time of permit application...

- f. Applicability of standards for appropriative water rights in 37-92-103(3), 37-92-305(1), 37-92-305(9).

### 3. Definition of natural stream

#### a. Statutes:

- (1) 37-82-101(1):

(1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream but does not include nontributary ground water as that term is defined in section 37-90-103.

- (2) 37-92-102(1)(a):

It is hereby declared to be the policy of the state of Colorado that all water in or tributary to natural surface streams, not including nontributary ground water as that term is defined in section 37-90-103, originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of article XVI of the state constitution and this article. As incident thereto, 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 waters of this state.

- (3) 37-82-101(2) and 37-92-102(1)(b):

A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation...

- (4) 37-92-103(11):

"Underground water", as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream.

- (5) 37-92-103(13):

"Waters of the state" means all surface and underground water in or tributary to all natural streams within the state of Colorado, except waters referred to in section 37-90-103(6).

- (6) 37-87-102(1)(b):

37-87-102. Definitions - natural streams and use thereof by reservoir owners. (1) As used in this article, unless the context otherwise requires... (b) "Natural stream" means a place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions.



- b. Case law: In re German Ditch, 56 Colo. 252, 139 P.2(1913).

4. Nature and location of "natural streams"

- a. Surface streams outside Closed Basin
- b. Surface streams within Closed Basin
- c. Alluvium of surface streams
- d. Unconfined aquifer

5. Relationship between confined aquifer and natural streams.

- a. Faulting
- b. Hydraulic conductivity within confined aquifer: active/passive zones
- c. Conductance of stream channel
- d. Hydraulic connection between streams and unconfined aquifer.
- e. Rate of recharge to
  - (1) unconfined aquifer
  - (2) confined aquifer
- f. Evapotranspiration
- g. Leakage from confined aquifer to unconfined aquifer

- h. Separate administration of confined and unconfined aquifers
6. "Existing aquifer conditions" under 37-90-103(10.5):
- a. Appropriate time period for analysis
  - b. Projections as to future changes
  - c. Effect of Compact administration
  - d. Effect of Closed Basin Project
7. Salvage of evapotranspiration

a. Case law:

- (1) Southwestern Colo. Water Conservancy District v. Shelton Farms, 529 P.2d 1321 (Colo. 1974) (independent appropriation)
- (2) R.J.A., Inc. v. Water Users Ass'n. of District No. 6, 690 P.2d 823 (Colo. 1984) (augmentation plan).
- (3) Giffen v. State of Colorado, 690 P.2d 1244 (Colo. 1984) (augmentation plan).
- (4) SRJ I Venture v. Smith Cattle, Inc. 820 P.2d 341 (1991) ("nontributary" springs resulting from evapotranspiration of spring discharge).

b. Statutory constraint: 37-92-103(9):

"Plan for augmentation" does not include the salvage of tributary waters by the eradication of phreatophytes

c. Relationship between phreatophytes and senior water rights.

8. Effect of artificial recharge.

(1) Existing practices: W-3979, W-3980, 79 CW 91

(2) 37-90-103(10.5); 37-90-137(4)

9. Modeling

a. Availability of data

b. Calibration

c. Credibility

E. Injury

1. Potentially injured parties

a. Closed Basin Project: 38,000 AF/year

(1) Right to collaterally attack decree:

Closed Basin Landowners Association v. Rio Grande Water Conservation District, 734 P.2d 627 (Colo. 1987)

(2) Reasonableness of means of diversion

(3) Applicability of State law to Federal Reclamation Project

b. Wells (not decided)

(1) obligation to deepen wells; optimum use

(a) City of Colorado Springs v. Bender,  
148 Colo. 458, 366 P.2d 552 (1961)

(b) Alamosa-LaJara Water Users Protection  
Association v. Gould, 674 P.2d 914 (Colo.  
1984)

(c) A-B Cattle Co. v. United States, 589 P.2d  
57 (Colo. 1979)

(d) 37-92-102(1)(a); 37-92-102(2)(b)

(2) Decline in artesian pressure/water levels

(a) Applicability of 37-90-102(1), 137(4)(c)

(b) Relationship to prior tributary decrees

c. United States reserved rights

(1) Great Sand Dunes National Monument, Case  
No. 81-CW-164.

(2) Public springs and waterholes, Case Nos. 81-  
CW-144-147.

(3) Injury per se or injury to purposes of  
reservation. Caepfert v. United States,  
426 U.S. 128 (1976); U.S. v. Denver, 656 P.2d  
1 (Colo. 1982).

d. Senior rights on drains. 37-80-102.

e. Recharge rights decreed in Case Nos. W-3979, W-  
3980, 79 CW 91

f. Senior rights on surface streams

(1) Within Closed Basin

(2) Rio Grande/Conejos/Alamosa-LaJara

(3) Conditional water rights: compare 37-90-137(2)  
and 37-92-305(3)

g. Pending claims: Case Nos. 90 CW 42, 45, 48

h. Subirrigators: Lamont v. Riverside Irrigation District, 179 Colo. 134, 498 P.2d 1150 (1972)

i. Wetlands/environmental values

2. Means of remedying injury

a. Deepen wells; pay pumping costs; change source of rights

b. Pump from AWDI wells to Closed Basin conveyance channel

c. Changes of senior surface rights

d. Exchanges: Platoro Reservoir, Closed Basin Project. Issue of ownership or contractual right in structures or water under "can and will" doctrine. See FWS Land and Cattle Co. v. State, 795 P.2d 837, 840 (Colo. 1990).

3. Legal Issues:

a. Relationship between injury analysis and nontributary claim: can "nontributary" wells injure

decreed "tributary" rights diverting from same source?

(1) 37-90-102(2)

(2) 37-90-137(2)

(3) 37-90-137(4)(c)

b. Injury to environmental values apart from water rights

(1) Shelton Farms, *supra*.

(2) RJA, *supra*.

(3) Alamosa-LaJara Water Users, *supra*

F. Findings and Conclusions

- a. Identity of natural streams
- b. Nature of alluvium and unconfined aquifer
- c. Appropriate time period for analysis
- d. Extent and location of depletions: percent, volume, time
- e. Tributary "beyond a reasonable doubt"
- f. Injury to water rights

G. New Legislation

1. S. 1812: Protection of San Luis Valley
2. S.B. 92: Revegetation
3. H.B. 1188: Water salvage

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