6-26-2001

Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 E. 14th Avenue, 4th Floor
Denver, Colorado 80203

APPEAL FROM DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO, CASE NO. 99CW129
Honorable Jonathan W. Hays

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK AND JAMES B. GARDNER AND AMANDA WOODBURY,

Appellants,

v.

PARK COUNTY SPORTSMEN'S RANCH, LLP, a limited liability partnership,

Appellee.

▲COURT USE ONLY▲

Case Number: 01SC335

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DOUGLAS COUNTY WATER RESOURCE AUTHORITY'S BRIEF OF AMICUS CURIAE

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Douglas County Water Resource Authority, by Grimshaw & Harring, P.C., submits this amicus curiae brief in response to Appellants' Opening Brief.

INTRODUCTION

Douglas County Water Resource Authority (the "Authority") is comprised of several entities, including the Board of County Commissioners of Douglas County and various special districts located in Douglas County, as follows:

Arapahoe County Water & Wastewater Authority

Castle Pines Metropolitan District

Castle Pines North Metropolitan District

Town of Castle Rock

Cottonwood Water & Sanitation District

Donala Water & Sanitation District

Douglas County

East Cherry Creek Valley Water & Sanitation District

Inverness Water & Sanitation District

Meridian Metropolitan District

North Douglas County Water & Sanitation District

Parker Water & Sanitation District

Pinery Water & Wastewater District

Roxborough Park Metropolitan District

This brief constitutes the position of the Authority. Each member of the Authority is free, however, to assert a different position.

The relevant water rights of the various entities within the Authority are in ground water within the Denver, Dawson, Arapahoe and Laramie-Fox Hills aquifers inside the Denver Basin, where the ground water is nontributary or not nontributary, but, in any event, not tributary.[1]

In its application in Case No. 96CW014, and in its related application in 96CW013, Park County Sportsmen's Ranch ("PCSR") seeks conditional underground water rights in water that is tributary to the South Platte River and its tributaries. See In re Water Rights of Park County Sportsmen's Ranch LLP v. Bargas, 986 P.2d 262, 275 (Colo. 1999). Further, PCSR proposes that such ground water may be injected into, stored in and extracted from aquifers outside the Denver Basin.

The classification and location of ground water at issue in the present appeal is different from ground water within the Denver Basin.[2] The trial court, in its Order Denying Summary

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[1] Neither the ground water that is the subject of Park County Sportsmen's Ranch application in Case No. 96CW014, nor the ground water of the entities in the Authority is "designated groundwater"subject to administration by the Colorado Ground Water Commission pursuant to C.R.S. §§ 37-90-106; 37-90-103(5), (6), (7); 37-90-107; 37-90-109. Thus, this brief will not address the law or administrative rules applicable to such designated groundwater.

[2] Excluding tributary ground water, there are three types of ground waters – designated; nontributary outside of designated basins; and nontributary and not nontributary Denver Basin water of the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers. Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d 1177, 1182 (Colo. 2000). Nonrenewable ground water is administered differently from underground waters tributary to surface streams. Id. at 200, citing Fundingsland v. Colorado Water Comm'n, 171 Colo. 487, 495, 468 P.2d 835, 839 (1970).

Judgment, did not make any such distinction. The trial court did find that "[t]o the extent that the subsurface estate is utilized for storage of [PCSR's] water, it is analogous to the use of an unconfined aquifer or natural stream for transport." Record at 304. It is important for this Court to know that ground water rights and storage rights in the Denver Basin aquifers are established by statute. Any decision in this proceeding is inapplicable to any ground water rights, injection or extraction of such water, and any storage rights within the Denver Basin. This point is expressly recognized and confirmed by Appellants in their Opening Brief, Section IV(F), at 17-19. Thus, this Court should distinguish PCSR's claimed tributary ground water rights and storage rights from ground water rights and storage rights in the Denver Basin aquifers.

ARGUMENT

1. Water injected into and stored in aquifers does not necessarily constitute trespass.

Appellants rely on Colorado common law and the real property maxim *cujus est solum, ejus est usque ad coelum* to claim ownership of subsurface storage rights.

California courts have rejected the applicability of that maxim of law to water transport and storage in underground aquifers. City of Los Angeles v. City of Glendale, 142 P.2d 289, 294 (Cal. 1943) (holding the maxim is inapplicable to circumstances where one uses natural facilities, such as underground reservoirs, for transportation and storage of water); see City of Los Angeles v. City of San Fernando, 123 Cal. Rptr. 1, 14 Cal. 3d 199, 264 (held plaintiff is entitled to use a basin for storage of its imported water by means of artificial recharge and subsequent recapture); see also Alameda County Water District v. Niles Sand and Gravel Co., Inc., 112 Cal.Rptr. 846, 37 Cal.App.3d 924 (1974) (rejected argument that plaintiffs have absolute right to use their land,

to unlimited depths below its surface, by application of the "correlative rights doctrine" which limits the overlying landowners to their reasonable share of groundwater).

The trial court in this case made a similar distinction and held that the well-established real property principle of *cujus est solum, ejus est usque ad coleum et ad infernos* is inapplicable to water law. Record at 303. The trial court looked to law applicable to tributary waters to reach this distinction. However, as set forth herein, Colorado statutes specific to ground water in the Denver Basin aquifers and rules promulgated thereunder expressly remove the Denver Basin aquifers and waters stored therein from any applicability of the real property maxim relied upon by Appellants.

In the City of Los Angeles v. City of Glendale case, the California Supreme Court analogized compelling the plaintiff to build reservoirs when natural ones were available to compelling the construction of an artificial ditch beside a stream bed. 142 P.2d at 294. The trial court in this case found that no facilities of any kind will be constructed on Appellants' land, nor will PCSR use and operation of its underground storage activities take place on Appellants' land, and held that, "[t]o the extent that the subsurface estate is utilized for storage of [PCSR's] water, it is analogous to the use of an unconfined aquifer or natural stream for transport." Record at 304.

In the City of Los Angeles v. City of San Fernando case, the California Supreme Court refused to interfere with such a storage right because there was no "shortage of underground storage space in relation to the demand therefor." 14 Cal.3d at 264. Similarly, here, the Appellants have made no claim, and the trial court found that, their "use, benefit and enjoyment

of the estate will [not] be invaded or compromised in any way." Record at 304.

The trial court held that "movement of underground water in an aquifer, resulting from artificial recharge, does not constitute trespass." Record at 304. In the trial court and here, Appellants rely on Burt v. Beautiful Savior Lutheran Church of Broomfield, 809 P.2d 1064 (Colo.App. 1990), in support of their claim for compensation. However, the Burt case is distinguishable on its facts. In that case, storm water flowed into the Burts' home, causing damage. Here, PCSR proposes to recharge an aquifer underlying the Appellants' land, in which Appellants have no storage rights, and, presumably, no wells or ground water rights (they have alleged none).

With regard to landowners overlying the Denver Basin aquifers, the legislature, in § 37-90-137(4)(b)(II), C.R.S., expressly removed artificially recharged water from the pool of ground water available to the overlying landowner. That section provides: "the amount of such ground water available for withdrawal shall be that quantity of water, exclusive of artificial recharge, underlying the land owned by the applicant or underlying land owned by another (A) Who has consented in writing to the applicant's withdrawal; or (B) Whose consent exists by virtue of lawful municipal ordinance or quasi-municipal district resolution . . . ; or (C) Who shall be deemed to have consented to the withdrawal of ground water pursuant to the provisions of subsection (8) of this section." (Emphasis supplied.) This section applies only to ground water outside a designated ground water basin that is not exempted and is nontributary or in the Denver Basin aquifers. C.R.S. § 37-90-137(4)(a). In other words, the legislature recognized that artificially recharged water may lie under a person's land, but not be available for withdrawal by

that person, and that artificially recharged water may lie under the land of another.

Contrary to Appellants' assertion otherwise, Colorado has not addressed the issue of ownership of underground storage formations. In Bushey v. Seven Lakes Reservoir Co., 37 Colo.App. 106, 545 P.2d 158, 161 (1975), an adverse possession case, the Colorado Court of Appeals recognized that by storing water in an underground water basin, one could gain a right to use the subsurface area for the underground storage of water, and held that such use was not inconsistent with the surface use by the adverse possessor. In that case, an expert testified that he or she was unable to state how far the underground basin extended under the land. Id. at 160. The Court of Appeals did not determine ownership of the subsurface formation. It held that the surface ownership (acquired by adverse possession) was "subject to Seven Lakes' . . . underground storage rights." Id. at 160. Further, the court did not hold that a subsurface water storage area is a separate and severable estate, or real property interest, as Appellants imply in their Opening Brief at page 11, but only that, in the context of adverse possession, use of the subsurface for water storage is not a "joint use so as to preclude plaintiffs from acquiring the surface by adverse possession." Id. at 161.

There is law in the Tenth Circuit to support a right to store water under land owned by another without committing trespass. The Tenth Circuit has reviewed the applicability of trespass laws to a subsurface invasion of water that occurred as a result of water flooding an oil bearing formation to push residual oil forward for recovery through output wells, accomplished pursuant to a permit from a state regulatory agency. Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1963), cert. denied, 375 U.S. 942, 84 S.Ct. 347 (1963).

In the Tidewater case, the Tidewater Oil Company was using such a method of flooding to recover oil when water injected into the Tidewater input wells flooded Jackson's wells. Id. at 159. The Tenth Circuit, in determining by what standards of tort liability the conduct should be judged, i.e., trespass, nuisance, negligence, strict liability or unreasonable use or disregard of another's property, under Kansas law, analyzed the law of other jurisdictions, as well. Id. at 162. The Court cited an article by Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 39 Tex. Law Rev. 253, in which all adjudicated cases from Kansas, Oklahoma and Texas are reviewed, where it was suggested that "orthodox rules and principles applicable to surface invasions should not be appropriately applied to subsurface invasions, arising out of operations affected with a public interest and involving a weighing of the individual interest of the damaged lessee against the social interest involved in the production and conservation of crude oil." Id. at 163.

The Tenth Circuit stated that: "it is safe to assume that, though a water flood project in Kansas be carried on under color of public law, as a legalized nuisance or trespass, the water flooder may not conduct operations in a manner to cause substantial injury to the property of non-assenting lessee-producer in the common reservoir, without incurring the risk of liability therefor." Id. at 163 (emphasis supplied). The Court went on to conclude that the operations, although lawful, were actionable if they caused substantial injury to the claimants. Id. at 163-64.

Similarly, the maximum utilization of aquifers through the conjunctive use of surface and ground water is a public interest, as set forth by Colorado's legislature. And, water, including ground water, is a natural resource of which the state encourages development and beneficial use.

See section 6, below. The reasoning of the Tenth Circuit (in analyzing Kansas law) is applicable here, i.e., the orthodox rules of trespass do not apply, and trespass liability arises only if there is a substantial injury resulting from storage of water in underground aquifers.

This point was brought to the attention of the trial court when it considered Appellants' Motion for Summary Judgment. The trial court correctly found that "[l]egislative intent contemplates the artificial recharge of aquifers, and conjunctive use of stored groundwater, as a means for achieving maximum utilization," citing C.R.S. §§ 37-87-101(2); 37-90-137(4)(b)(II); 37-92-305(9)(c), and that a "ruling that artificially recharged water trespasses upon the property of another by way of its presence in a subterranean aquifer would frustrate this intent." Record at 303.

2. Permitting injection of artificially recharged waters, as well as storage of such waters, in the Denver Basin aquifers, effectuates the policy set forth in section 37-90-137(9)(d), C.R.S., of promoting "maximum utilization of [the Dawson, Denver, Arapahoe, and Laramie-Fox Hills] aquifers through the conjunctive use of surface and ground water."

The doctrine of maximum beneficial use of water requires courts to interpret applications for water rights to encourage development of the state's water resources. Board of County Commissioner's of Arapahoe County v. United States, 891 P.2d 952, 965 (Colo. 1995).

In relation to artificially recharged water in Denver Basin aquifers, the legislature has set forth the policy of promoting "maximum utilization of the [Dawson, Denver, Arapahoe, and Laramie-Fox Hills] aquifers through the conjunctive use of surface and ground water." C.R.S. § 37-90-137(9)(d). This policy will be effectuated by permitting storage of the artificially recharged waters that are injected into these aquifers. In fact, this policy statement, read in

conjunction with section 37-90-137(4)(b), C.R.S. (discussed in section 1, supra), assumes such storage will occur.

3. Section 37-90-137(9)(d), C.R.S., and the rules promulgated thereunder, expressly permit injection, extraction and underground storage of water in the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers within the Denver Basin. There is no similar statutory authority for aquifers outside the Denver Basin.

In 1985, the General Assembly adopted Senate Bill 5, which was codified, as amended, in scattered sections of Title 37 of Colorado Revised Statutes (1998). Senate Bill 5 created a statutory system for administering and allocating nontributary ground water, giving overlying landowners an inchoate right to withdraw ground water from underlying aquifers. In re Water Rights of Park County Sportsmen's Ranch LLP, 986 P.2d at 266. Section 37-90-103(10.5), C.R.S., defines nontributary ground water.

The legislature relaxed the standard for the determination of tributariness of waters in the Denver, Dawson, Arapahoe and Laramie-Fox Hills aquifers. §§ 37-90-103(10.5) (defines "nontributary") and (10.7) (defines "not nontributary" ground water), C.R.S. The Colorado Supreme Court addressed the applicability of these statutory sections and held that the relaxed standards of subsections 10.5 and 10.7 apply only to ground water in those four aquifers within the Denver Basin. In re Water Rights of Park County Sportsmen's Ranch LLP, 986 P.2d at 272 and 275.

In section 37-90-137(9)(d), C.R.S., the legislature specifically directed the State Engineer to "promulgate reasonable rules which shall apply to the permitting and use of waters artificially recharged into the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers."

There is no section permitting artificial recharge of (or extraction from) aquifers other than the Denver, Dawson, Arapahoe and Laramie-Fox Hills aquifers in the Denver Basin; the South Park Formation and the South Park Aquifer are nowhere mentioned.

4. The Denver Basin Artificial Recharge Extraction Rules promulgated by the State Engineer apply only to Denver Basin aquifers, and permit storage in such aquifers.

Pursuant to section 37-90-137(9)(d), C.R.S., in 1995, the State Engineer adopted the Rules and Regulations for the Permitting and Use of Waters Artificially Recharged into the Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers. 2 CCR 402-11(1985). The short title for these rules is the Denver Basin Artificial Recharge Extraction Rules (the "Rules"). Id., Rule 1. (A copy of the Rules is in the Record at 248-269.) The Rules apply only to the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers located within the Denver Basin and outside designated ground water basins. Id., Rules 3.1, 4.3.2, 4.3.8. The Rules promote artificial recharge and enable the State Engineer to administer the orderly withdrawal of any water artificially recharged into the Denver Basin aquifers. Id., Rule 3.2.

The Statement of Basis and Purpose for 1995 Artificial Recharge Extraction Rules ("Statement of Purpose") was prepared to "elaborate on and clarify the reason for and the intent of the Denver Basin Artificial Recharge Extraction Rules." In the Statement of Purpose, the State Engineer states:

> The naturally occurring waters of the Denver Basin bedrock aquifers are essentially nonrenewable by natural processes. The life of this valuable resource can be prolonged by artificial recharge using surface water or other ground water available during periods of low demand or excess capacity.
>
> Water recharged into the Denver Basin aquifers may be extracted during

> periods of drought, or may be left in the aquifer, resulting in lower rates of decline in local or regional water levels, thus maximizing the conjunctive use of the waters of the state.

Statement of Purpose, Rule 3. Thus, artificial recharge is permitted in order to maximize the conjunctive use of the waters of the state. This requires that water be recharged into the Denver Basin aquifers, and, at times, left in the aquifers, as set forth in this elaboration of Rule 3. The basic premise of the extraction rules, then, is that water will be injected into the aquifers, with no constraints on where in the aquifers the water is placed, provided, however, that the wells shall be constructed on property only with the consent of the owner of the property.

The Rules acknowledge that water artificially recharged into a Denver Basin aquifer will be stored in the aquifer. Id., Rule 5.1. Rule 5.1 requires that water that is artificially recharged be: (1) fully consumable and/or reuseable; or (2) decreed for storage by means of artificial recharge in the Denver Basin aquifers at the time of injection; or (3) otherwise legally and physically available for storage by means of artificial recharge in the Denver Basin aquifers. Id.

The Rules specify the location of wells used for extraction of artificially recharged water.

Artificially recharged water may be extracted through an existing permitted well or through a newly constructed well. Id., Rules 6.1, 6.2, 6.3, and 6.7 - 6.10. The wells may be the same wells through which the artificially recharged water was injected, or may be remote, or other than a well through which the water was injected. Id., Rules 4.3.8 and 4.3.11.

The State Engineer explained in the Statement of Purpose what information must be submitted with an application for an extraction permit and justified the notice requirements of the Rules:

> it appears that any effects on the aquifers as a result of recharge and extraction would be minimal beyond several thousand feet from the extraction site. Therefore, providing notice to any person authorized to withdraw water from the same aquifer within one (1) mile of the proposed extraction site will reach any person likely to be affected by the proposed extraction.
>
> . . . Rule 6.4 assures that water rights holders in the same aquifer within one (1) mile of the proposed extraction site have the opportunity to provide input into the evaluation process.

The Rules prohibit remote extraction wells, as defined in Rule 4.3.11, from being located within the cylinder of appropriation of another person, without the written permission of such person. Id., Rule 7.1.1; Rule 4.3.5.

The Statement of Purpose states that Rule 7.1 takes into consideration the practical limits on the ability to extract artificially recharged water from a confined aquifer. It is expected that the owners/operators of recharge/extraction projects will primarily be municipalities and/or municipally served districts and that these projects will take place within the service boundaries or claimed consent areas of these entities. This explanation suggests that statutory consent provides consent not only for pumping underground water, but also for injection, extraction and storage within claimed consent areas.

The Rules protect property rights by providing that a permit to extract does not grant a right to the owner of recharged water to enter upon lands not owned by the applicant. Id., Rule 6.6.

While the Rules expressly administer the location of wells for extraction, they assume, and permit, storage anywhere within the Denver Basin. The Rules define injection as the "act of placing water into a Denver Basin aquifer through a well by pressure or force of gravity." Id.,

Rule 4.3.9. The Rules discuss the nature of artificially recharged water, requiring:

> Water artificially recharged into a Denver Basin aquifer, whether for the maintenance of water levels or for subsequent extraction shall be, at the time of injection, fully consumable and/or reusable pursuant to decree, statute, or regulation, or shall have been, at the time of injection, decreed for storage by means of artificial recharge in the Denver Basin aquifers, or shall be otherwise legally and physically available for storage by means of artificial recharge into the Denver Basin aquifers.

Id., Rule 5.1

The Rules do not address the permitting process for injection by means of artificial recharge in the Denver Basin aquifers, but address instead the extraction of such water. See id., Rule 3.2 ("rules promulgated . . to enable the State Engineer to administer the orderly withdrawal of any water artificially recharged into these aquifers"); Rule 3.5 ("rules provide for the submission and evaluation of permit application to extract and use water which has been artificially recharged into the Denver Basin aquifers"); Rule 6.1 ("the owner . . . of recharged water shall obtain a permit to extract").

The Rules, however, assume the water to be extracted is first injected and, at times, stored in the Denver Basin aquifers. See, e.g., Rule 5.1 (quoted above); Rule 6.1 ("Any application for a permit to extract . . . shall be supported by copies of all approvals, authorizations, and permits allowing the injection of water which is proposed for extraction."); Rule 7.3 (amount extracted shall not exceed the total amount of water injected, less any amounts previously extracted); see also Rule 6.4 (requires notice of application to all decreed rights and permitted or registered wells of record allowing withdrawal from the same aquifer within one mile of the proposed extraction site).

In fact, the Rules expressly state that "artificially recharged water may be retained in the aquifer indefinitely by the person who has injected the water or the assignee of that person." Id., Rule 7.4.

Further, the Statement of Purpose acknowledges that the Rules recognize that "in most cases, the water extracted will not physically be the same water that was injected, particularly when the water is extracted from a confined aquifer at a site some distance from the injection site or sites." Thus, as a practical matter, the water will not remain where it was injected, but will move throughout the aquifer, and commingle with other water in the aquifer. The Rules assume this will happen, and regulate the location of the extraction wells on the surface, and require notice to others within a one mile radius of the extraction site, and require measurement of water injected and extracted at each site, but do not limit the locations within the aquifer where artificially recharged water may be stored. Rather, the Rules (as bolstered by the Statement of Purpose) assume water that is injected will be "stored" in the aquifer generally.

Most important, however, is neither the Rules nor the interpretation of the Rules, but the fact that the Rules apply only to the Dawson, Denver, Arapahoe and Laramie-Fox Hills Aquifers in the Denver Basin. The Rules do not apply to the South Park Formation or the South Park Aquifer.

5. By enacting section 37-90-137(9)(d), C.R.S., the legislature placed the storage capacity of Denver Basin aquifers into the public domain, permitting them to be utilized for storage of artificially recharged water.

In section 37-90-137(9)(d), the General Assembly expressly permits injection of artificially recharged water into and extraction of it from the Denver Basin aquifers. The

Colorado Supreme Court has determined that the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers within the Denver Basin constitute the "Denver Basin aquifers." In Re Park County Sportsmen's Ranch, 986 P.2d at 271.

Further, the legislature authorized the state engineer to promulgate rules to administer the extraction of artificially recharged water from the Denver Basin aquifers, which the State Engineer did, as discussed extensively in section 4, above.

The common law rule is that he who owns the surface of the ground has exclusive right to everything which is above it. People v. Emmert, 198 Colo. 137, 597 P.2d 1025, 1027 (1979). This rule was both recognized and modified by the legislature when it proclaimed that the ownership of space above the lands and waters of Colorado is vested in the owners of the surface beneath, subject to the right of flight of aircraft. C.R.S. § 41-1-107. The Colorado Supreme Court in Emmert recognized that the exclusive right of a landowner (or owner of a non-navigable stream bed) to control everything above the surface is subject to, and can be limited by, constitutional and statutory limitations, restrictions and regulations. Emmert, 597 P.2d at 1027. The Court specifically noted that "it is within the competence of the General Assembly to modify rules of common law within constitutional parameters." Id. Appellants do not disagree with this statement of the law, and, in fact, rely on it in their Opening Brief to support their claim to ownership of storage space in aquifers beneath their lands. See Opening Brief at 10.

As explained in Thompson v. City and County of Denver, 958 P.2d 525, 527 (Colo. App. 1998), generally, a landowner's property interest in the land extends to the airspace directly over the property to the extent that the airspace can be used to benefit the underlying land. However,

the federal government placed navigable airspace into the public domain, limiting the surface owner's property interest in airspace above the land to airspace which is below navigable limits. Id. Thus, navigable airspace was removed from a landowner's bundle of property rights, and, in a "takings" context, a landowner cannot ordinarily recover for an alleged taking of an avigation easement for overflights in this portion of airspace. Id.

Similarly, here, the legislature has removed the storage capacity of the Denver Basin aquifers from the overlying landowner's bundle of property rights. As set forth in sections 2, 3 and 4, above, the legislature expressly permits injection and extraction of artificially recharged water from the Denver Basin aquifers, thereby placing the storage space in the Denver Basin aquifers into the public domain. Appellants recognize that the passage of Senate Bill 5, permitting recharge and extraction of water in the Denver Basin aquifers, did just that. See Opening Brief at 17-18.

Appellants point to section 37-87-101(2), C.R.S., to support their proposition that the law of eminent domain applies to storage in aquifers, and go on to state that there is no provision in the eminent domain statutes related to reservoirs which exempts underground storage reservoirs. Opening Brief at 14. However, section 37-90-137, C.R.S., specifically and expressly permits injection into the Denver Basin aquifers. The codification of Senate Bill 5 in section 37-90-137, then, is controlling as to the Denver Basin aquifers. When the legislature expressly permits the storage of water in aquifers, there is no need to resort to eminent domain to secure the right to store water, just as there was no need for anybody to condemn an avigation easement, where one has already been provided by law. See Thompson, 958 P.2d at 527.

6. PCSR's ground water is tributary, and is, therefore, subject to the doctrine of prior appropriation, unlike nontributary and not nontributary ground water.

In its application in Case No. 96CW014, PCSR states that the sources of water for each well to be constructed are waters now found in the South Park Aquifer, as well as waters subsequently placed therein and in the South Park Formation. Application, First Claim ¶ 3(a). (The Application is in the Supplemental Record at Exhibit A.) The ground water to be withdrawn from these wells (and, injected into these wells) is tributary to the South Platte River System and its tributaries. Application, First Claim ¶ 3(c) and ¶ 13(a).

PCSR proposes utilizing the unsaturated portion of the South Park Formation, as well as the South Park Aquifer, for storage of artificially recharged water. Application, Second Claim ¶ 2(a) and (b).

Because the waters in the South Park Formation and the South Park Aquifer are tributary to the South Platte River and its tributaries, PCSR proposes a plan for augmentation in its Fourth Claim of the Application.

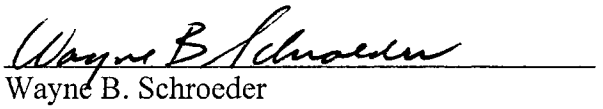
Because the ground water in which PCSR claims conditional water rights in its Application is not in the Denver Basin and not designated, it cannot be categorized as nontributary or not nontributary pursuant to § 37-90-103(10.5) and (10.7), respectively. See In re Water Rights of Park County Sportsmen's Ranch, 986 P.2d at 266 - 68. Therefore, it is categorically different from the water within the Denver Basin aquifers. Any determination made in this case with regard to storage in the South Park Formation or the South Park Aquifer should be distinguished from storage of artificially recharged water within the Denver Basin aquifers.

See discussion of different types of ground water rights and the administration thereof in Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d at 1181-1190.

CONCLUSION

The decision of the trial court should therefore be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Douglas County Water Resource Authority's Brief of Amicus Curiae was served on the following, by placing a true and correct copy thereof in the United States Mail, first-class postage prepaid, addressed to the following on this 26th day of June, 2001:

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